Memorandum 90-126

Subject: Study L-3013 - Uniform Statutory Rule Against Perpetuities (Comments on Tentative Recommendation)

This memorandum reviews comments we have received on the *Tentative Recommendation Relating to Uniform Statutory Rule Against Perpetuities* (March 1990). A copy of the Tentative Recommendation is attached. Also attached as exhibits are 13 letters from interested persons commenting on the Tentative Recommendation (see Exhibits at 22-39) and other letters commenting on earlier materials that we received after the March meeting at which the Tentative Recommendation was approved (see Exhibits at 1-21).

After consideration of the letters commenting on the Tentative Recommendation and other materials received by the Commission, the staff recommends that the Commission approve the recommendation for printing and introduction in the 1991 legislative session with two important changes discussed below: (1) USRAP should be made applicable to all nonvested interests, regardless of when they were created, and (2) the new provision concerning two-pronged perpetuities saving clauses approved by the Uniform Commissioners should be added to the proposed statute. Some other changes are recommended in the following discussion.

Summary of Comments

A majority of the comments on the Tentative Recommendation itself were favorable. Eight commentators support the proposal and two are opposed. Two others may be characterized as indifferent. (See Exhibits at 22 & 29.)

With one exception, the eight letters received after the March meeting, but before distribution of the Tentative Recommendation, are a continuation of the academic debate summarized in Memorandum 90-22, considered at the March meeting. Four of these letters are written by professors from whom we have already heard, reemphasizing and

clarifying earlier arguments. (See letters from Fratcher (Exhibits at 1-2), Dukeminier (Exhibits at 16-18), and Niles (Exhibits at 19-21).) The exception is the letter from Kenneth G. Petrulis expressing the opposition of the Legislative Committee of the Probate, Trust and Estate Planning Section of the Beverly Hills Bar Association, which was written in response to Memorandum 89-53, the first memorandum on this subject. (See Exhibits at 14-15.) It is assumed that this group would also oppose the Tentative Recommendation.

Support for Tentative Recommendation

Ruth E. Ratzlaff of Fresno believes the proposed change is a good one. (See Exhibits at 23.)

Joseph A. Montoya, Chief Counsel of the Department of Transportation, approves the recommendation, especially the wait-and-see rule. (See Exhibits at 24.)

Ernest Rusconi of Morgan Hill concurs with the recommendation and is persuaded in part by the possibility for a greater degree of uniformity. (See Exhibits at 25.)

Wilbur L. Coats of Poway supports the recommendation without additional comment. (See Exhibits at 26.)

Paul H. Roskoph of Palo Alto supports the recommendation, although he is "not certain whether learning a new rule will be helpful or more confusing." (See Exhibits at 27.)

Frank M. Swirles of Rancho Santa Fe believes the uniform act is good and also notes an omitted word in Section 21230(c)(2). (See Exhibits at 28.) The staff will insert the omitted word.

Ruth A. Phelps of Pasadena approves the recommendation and comments that "[a]nything that you can do to simplify the rule against perpetuities is most welcome." (See Exhibits at 34.)

Henry Angerbauer of Concord approves the recommendation. (See Exhibits at 35.)

Indifference

Irwin D. Goldring of Los Angeles does not believe this project should have been undertaken and is indifferent about its ultimate disposition. (See Exhibits at 29.)

Jeffrey A. Dennis-Strathmeyer of Berkeley is unenthusiastic about USRAP, writing that the "best thing that can be said about the proposed statute is that we will all be long since dead in 90 years when courts start confronting the task of ascertaining the intent of persons whose ambiguously stated wishes have outlived all the witnesses." (See Exhibits at 22.) Mr. Strathmeyer's letter is discussed below in connection with reformation.

Opposition to Tentative Recommendation

Opposition to the Tentative Recommendation came from two persons.

Professor Jesse Dukeminier remains opposed, but limits his discussion in this letter to questions involving the duration of executory interests, options, and powers of termination, of trusts lasting beyond the perpetuities period, and of honorary trusts. (See Exhibits at 30-33.) These matters are not part of USRAP proper, but concern peripheral clean-up amendments and conforming changes. Professor Dukeminier's specific points are considered in detail below.

Arnold F. Williams of Fresno opposes USRAP because he finds that the benefits of uniformity would not compensate for the disruptions he believes USRAP would cause. (See Exhibits at 36-37.) Mr. Williams concludes by saying that he looks forward to reading the Commission's recommendation to the Legislature.

Discussion

In the following discussion, issues involving staff-recommended revisions of the Tentative Recommendation are considered first. Other questions raised by the letters attached as exhibits to this memorandum are considered thereafter. The staff has not attempted to discuss every argument presented in the attached letters. In particular, we have not attempted to rehash the many issues presented in Memorandum 90-22 and its accompanying materials (which totaled over 300 pages), which were considered at the March meeting. The following discussion seeks to consider each new argument made in the letters received since Memorandum 90-22 was prepared. This memorandum omits discussion of the more abstract, general, or speculative arguments. At this stage of the Commission's deliberations, practical considerations are more relevant,

and we believe that USRAP is a practical statute that solves the common, day-to-day issues facing practitioners and does so in a simple, straightforward manner. Speculation about the convoluted history of the common law, California law, and the potential effect of USRAP on the perpetuities *Zeitgeist* can be very intriguing, but does not provide much in the way of assistance to the Commission.

Application of Statute -- Retroactivity

In a note following Section 21202 on page 20 of the Tentative Recommendation, the Commission asked the views of commentators on the issue of whether USRAP should apply only to nonvested interests created by instruments executed on or after January 1, 1992, or to all nonvested interests regardless of whether they were created before or after the operative date. The note following Section 21202 contains an alternative draft section that would apply the new rule to all nonvested interests.

Those who expressed a view on this question urge adoption of a single perpetuities statute by applying USRAP to all instruments. Ruth E. Ratzlaff of Fresno supports retroactive application, noting that the USRAP rule would not change the interpretation of language in instruments drafted before the operative date and that it would save some defective instruments. (See Exhibits at 23.) She believes that this is a better way of obtaining the result intended by the testator or other creator of the instrument. She suggests that we should inquire whether malpractice insurance carriers would prefer retroactive application. Joseph A. Montoya, Chief Counsel of the Department of Transportation, suggests that the new law should apply to all interests, seeing "very little disadvantage or disruption to 'prior' transfers; and all such interests would be more equitably treated under the proposed provisions." (See Exhibits at 24.) Ruth A. Phelps of Pasadena also supports retroactivity since "this approach would not invalidate any interest valid under prior law, but it may help in some instances where the interest was invalid." (See Exhibits at 34.)

The staff recommends that the Commission approve the retroactive application of USRAP. This would be accomplished by the alternative Section 21202 set out in the Note on pages 20-21 of the Tentative

Recommendation. We would also make the necessary conforming changes in the language of other comments which refer to the operative date.

Making the new rule apply to all instruments is advantageous in several respects:

(1) It avoids the need to determine which law applies.

(2) It also results in a much cleaner statute, since the old law can be repealed. If USRAP applies only prospectively, the old statutes will need to be retained for many years.

(3) Applying the new statute retroactively would preserve existing instruments that violate the traditional rule but which can work out within the 90-year wait-and-see period.

(4) Limiting application of the new rule to instruments created after the operative date of the new statute was advocated mainly because of the concern that attorneys would feel the need to reexamine and perhaps to redraft instruments drawn before the operative date. However, the new rule would not require any redrafting, since it would not invalidate any dispositions valid under the existing rule against perpetuities.

(5) The attempt to provide a clear rule of demarcation between the old and new rules was not completely successful because wills and testamentary trusts may be drafted before the operative date of the new statute, but revoked and redrawn thereafter, or changed by a codicil executed after the operative date. Thus, the attempt to avoid whatever impulse lawyers may feel to review existing documents cannot be achieved by a statute based on the date of execution of an instrument where the instrument remains subject to change after the operative date. The same problem would exist with regard to revocable living trusts.

(6) Finally, we assume that the uniform act was limited to prospective application in consideration of jurisdictions with the traditional rule against perpetuities and out of an excess of caution about disrupting the expectation of takers in default. But in California, the *cy pres* rule eliminates any claim that reversioners possibly have an expectation worthy of due process protection.

Generation Skipping Transfer Tax Situation

Professors Ira Bloom and Jesse Dukeminier discussed the generation skipping transfer tax "trap" in earlier materials considered by the Commission. The issue is raised again in letters attached to this memorandum from Professor Dorothy Glancy (see Exhibits at 3) and Professor Dukeminier (see Exhibits at 16-17). It is the only specific issue noted in the letter of opposition from Kenneth G. Petrulis on behalf of the Legislative Committee of the Probate, Trust and Estate Planning Section of the Beverly Hills Bar Association. (See Exhibits at 14.)

The generation skipping transfer tax "trap" involves the potential for "ungrandfathering" pre-1986 irrevocable trusts by exercise of a power of appointment to postpone vesting beyond lives in being plus 21 years, thereby losing the exemption from the generation-skipping tax. See Temp. Treas. Reg. § 26.2601-1(b)(1)(v)(B)(2). Exercise of a power of appointment within the period of USRAP but after the time specified in the regulation would have adverse tax consequences. (See page 16 of the Tentative Recommendation, including n.35.)

At the outset, it should be noted that the GST "trap" is not a creation of USRAP, nor does it apply only to situations arising under USRAP. The "trap" exists in California now, since a donee of a power of appointment who relies on the 60-year rule of Civil Code Section 715.6 could also violate the regulation and lose the exemption. The trap could also close on the unwary in other jurisdictions that do not follow the common law rule. Competent estate planners should not be surprised to learn that an action taken in conformity with state property law might have adverse consequences under a federal tax statute or regulation.

As reported in the Tentative Recommendation, the "trap" is not unavoidable. There are several available solutions. We are informed that the best solution is in the works. It appears that the regulation will be revised to take account of the 90-year USRAP period as an alternative to the period measured by lives in being plus 21 years. Anticipating the revision of the regulation, the National Conference of Commissioners on Uniform State Laws at its recent meeting approved the following addition to Section 1 of USRAP to deal with Treasury's

concern that double-pronged perpetuities saving clauses would have the effect of increasing the time period to the later of 90 years or lives in being plus 21 years:

> (e) If, in measuring a period from the creation of a trust or other property arrangement, a clause in a governing instrument purports to postpone the vesting or termination of any interest or trust until, purports to disallow the vesting or termination of any interest or trust beyond, purports to require all interests or trusts to vest or terminate no later than, or operates in any similar fashion upon, the later of (i) the expiration of a period of time that exceeds 21 years or that exceeds or might exceed 21 years after the death of the survivor of lives in being at the creation of the trust or other property arrangement or (ii) the death of, or the expiration of a period not exceeding 21 years after the death of, the survivor of specified lives in being at the creation of the trust or other property arrangement, then the portion of the clause pertaining to the period of time that exceeds 21 years or that exceeds or might exceed 21 years after the death of the survivor of lives in being at the creation of the trust or other property arrangement must be disregarded, and the clause operates upon the death of, or upon the expiration of the period not exceeding 21 years after the death of, the survivor of the specified lives in being at the creation of the trust or other property arrangement.

The staff recommends that this language be added to the proposed statute. It would fit in the Tentative Recommendation as Section 21209. The staff also recommends including the explanatory text of subsection 1(e) (see Exhibits at 42-47) as background to the new section, edited along the lines of the other background material set out in the Appendix to the Tentative Recommendation (see pages 37-90 in the attached copy of the Tentative Recommendation).

Duration of Trusts (Section 21230 in Tentative Recommendation)

Professor Dukeminier provides a lengthy critique of Section 21230 (set out in attached Tentative Recommendation at 30-31) which he describes as containing numerous ambiguities. (See Exhibits at 31-32.) The staff believes that Professor Dukeminier makes some good points, but much of his criticism would be more properly directed at Civil Code Section 716.5 and its predecessor, former Civil Code Section 771, which have been part of California law since 1959. Thus, the questions Professor Dukeminier raises concerning the meaning of

"beneficiaries" and "majority" and the determination of distributees at termination may be important, but they are not issues raised by this recommendation, which simply continues the language of existing law, except for the substitution of "nonvested property interests" for "future interests in property" for the sake of consistency with the language of USRAP.

When the Trust Law was in preparation, this provision was moved to its present location (Civ. Code § 716.5), even though there were questions about its continued vitality at that time. However, much more important issues faced the Commission and the decision was made to simply continue the provision rather than taking the time to study it. Now, in consideration of Professor Dukeminier's remarks, perhaps we should take the opportunity to dispense with the provision in its present form.

Most of Section 21230 in the Tentative Recommendation can be omitted without loss. The remainder may be relocated in the Trust Law, as discussed below. However, if Section 21230 is retained in this recommendation, Professor Dukeminier's concern about determining the applicable time period should be addressed. As set out in the Tentative Recommendation, the section retains the language "must vest" and "if at all" which reflect the language of the common law rule as codified in Civil Code Section 715.2. The staff had considered this language flexible enough to encompass the 90-year rule of USRAP, but as we see, this view is not universal. It would be useful to correlate this provision with USRAP. Accordingly, if Section 21230 is to be retained, the staff proposes revising it to read as follows:

§ 21230. Validity of trusts

21230. (a) A trust is not invalid, either in whole or in part, merely because the duration of the trust may exceed the ~~time within which nonvested property interests must vest, if the interest of all the beneficiaries must vest, if at all, within that time~~ longer of the periods provided by the statutory rule against perpetuities, Article 2 (commencing with Section 21205) of Chapter 1.

(b) If a trust is not limited in duration to the ~~time within which nonvested property interests must vest~~ longer of the periods provided by the statutory rule against perpetuities, Article 2 (commencing with Section 21205) of Chapter 1, a provision, express or implied, in the instrument creating the trust that the trust may not be terminated is

ineffective insofar as it purports to be applicable beyond that time.

(c) If a trust ~~has existed longer than the time within which nonvested property interests must vest~~ continues in existence after the expiration of the longer of the periods provided by the statutory rule against perpetuities, Article 2 (commencing with Section 21205) of Chapter 1, the following apply:

(1) The trust shall be terminated upon the request of a majority of the beneficiaries.

(2) The trust may be terminated by a court of competent jurisdiction on petition of the Attorney General or of any person who would be affected by the termination if the court finds that the termination would be in the public interest or in the best interest of a majority of the persons who would be affected by the termination.

Comment. Section 21230 restates Civil Code Section 716.5 without substantive change, and with modifications to reflect the enactment of the Uniform Statutory Rule Against Perpetuities. See Section 21200 *et seq.* This section applies the longer of the two time periods applicable under the statutory rule: (1) lives in being plus 21 years or (2) 90 years after creation of the interest. See Sections 21205-21207. See also Section 21225(d) (rule against perpetuities does not apply to discretionary power of trustee to distribute principal to beneficiary having indefeasibly vested interest). For a discussion of trust termination at the end of the perpetuities period, see the Background to Section 21201.

As noted above, however, this provision might best be merged into the Trust Law provisions concerning termination of trusts. The purpose of Section 21230 (and its predecessors) is to avoid invalidating trusts that would otherwise violate the rule against suspension of the absolute power of alienation and to provide for termination after expiration of the perpetuities period. The original version of this provision, Civil Code Section 771, was enacted in 1959 on Commission recommendation as part of a study of the old statutes relating to suspension of the absolute power of alienation. Most of the suspension rules were repealed because they were redundant after the codification of the rule against perpetuities in 1951. See *Recommendation Relating to Suspension of the Absolute Power of Alienation,* 1 Cal. L. Revision Comm'n Reports G-5, G-7 to G-8 (1957); see also Turrentine, *A Study to Determine Whether the Sections of the Civil Code Prohibiting Suspension of the Absolute Power of Alienation Should Be Repealed,* 1 Cal. L.

Revision Comm'n Reports G-11 (1957). Civil Code Section 771 was drafted in the context of court decisions applying the suspension rule to invalidate interests in trust that continued in existence beyond the perpetuities period, even though the beneficiaries' interests under the trust had vested (or failed) in satisfaction of the rule against perpetuities. The legislation resolved the conflict by preserving the trust and the interests under it, but making clear that the trust could be terminated after the perpetuities period notwithstanding a contrary provision in the trust. This brought California in line with most other jurisdictions. In the course of preparing the provision which Professor Dukeminier finds ambiguous, the Commission intentionally drafted the new language in "rather general terms" to leave "considerable discretion in the courts in order to provide sufficient flexibility to enable them to deal with the various kinds of situations which may be expected to arise." *Id.* at G-8.

The staff concludes that this provision is no longer needed in the form preserved in Section 21230 of the Tentative Recommendation. Any parts of this provision worth preserving should be moved to the Trust Law. This approach has the added benefit of picking up the general provisions concerning notice, petitions, hearings, jurisdiction, and distribution on termination that apply under the Trust Law. The staff recommends that Section 21230 (Civil Code Section 716.5 in existing law) be disposed of as follows:

(1) Subdivision (a) is unnecessary and should not be continued. As we have seen, this language was drafted to clarify the effect on trusts of the repeal of the old statutes on suspension of the absolute power of alienation. This approach was beneficial at a time when lawyers and judges were familiar with the unique and confusing California statutes relating to suspension of the absolute power of alienation, but this climate no longer prevails.

(2) The substance of subdivision (b) concerning the ineffectiveness of a trust provision making the trust indestructible should be retained in the Trust Law in the following terms:

> § 15413 (added). Effect of provision that trust may not be terminated
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> 15413. A trust provision, express or implied, that the trust may not be terminated is ineffective insofar as it

purports to be applicable after the expiration of the longer of the periods provided by the statutory rule against perpetuities, Article 2 (commencing with Section 21205) of Chapter 1 of Part 2 of Division 11.

Comment. Section 15413 continues former Civil Code Section 716.5(b) without substantive change, and with modifications to reflect the enactment of the Uniform Statutory Rule Against Perpetuities. See Section 21200 *et seq.* This section applies the longer of the two time periods applicable under the statutory rule: (1) lives in being plus 21 years or (2) 90 years after creation of the interest. See Sections 21205-21207. See also Section 21225(d) (rule against perpetuities does not apply to discretionary power of trustee to distribute principal to beneficiary having indefeasibly vested interest).

(3) The general trust termination rules could be applied in place of the special rules in subdivision (c). This will result in some differences in treatment, but the application of the special termination provisions of existing Civil Code Section 716.5 (and former Civil Code Section 771) must be so rare that no one will be inconvenienced by the change. Note, however, that Probate Code Section 15403 requires the consent of all beneficiaries to terminate an irrevocable trust, whereas Civil Code Section 716.5 (and draft Section 21230) permit termination by a majority of beneficiaries or on petition of the Attorney General or an interested person if the court finds that it would be in the best interest of a majority of persons who would be affected by the termination. There do not appear to be any cases applying this termination statute. However, if desired, this special termination rule could be continued:

§ 15414 (added). Termination of trust after perpetuities period

15414. Notwithstanding any other provision in this chapter, if a trust continues in existence after the expiration of the longer of the periods provided by the statutory rule against perpetuities, Article 2 (commencing with Section 21205) of Chapter 1 of Part 2 of Division 11, the trust may be terminated in either of the following manners:

(1) On the request of a majority of the beneficiaries.

(2) On petition of the Attorney General or of any person who would be affected the termination, if the court finds that the termination would be in the public interest or in the best interest of a majority of the persons who would be affected by the termination.

Comment. Section 15414 restates former Civil Code Section 716.5(c) without substantive change, and with modifications to reflect the enactment of the Uniform Statutory Rule Against Perpetuities. See Section 21200 *et seq.* Termination under this section is permissible after the expiration of the longer of the two time periods applicable under the statutory rule: (1) lives in being plus 21 years or (2) 90 years after creation of the interest. See Sections 21205-21207. As to judicial proceedings for termination, see Section 17200(b)(13).

Treatment of Powers of Termination, Executory Interests, and Options

Professor Dukeminier argues that USRAP would create "new, tricky, and unjustifiable distinctions in California land law." (See Exhibits at 30-31.) Differences in treatment of executory interests, powers of termination, and options are present in existing law and are not a creation of USRAP. Note that Professor Dukeminier does not seek to justify application of the common law rule against perpetuities to these interests. It is not clear whether he would object to an executory interest lasting 80 or 90 or 100 years if it satisfied the common law rule against perpetuities, or only where it occurs under USRAP.

Professor Dukeminier reminds us of the traditional distinction between a "power of termination" which is retained by the grantor and an "executory interest" which is created in another person. Civil Code Section 885.030 in the marketable title statutes addresses powers of termination, but apparently does not apply to executory interests. The definition of "power of termination" in Civil Code Section 885.010 is quite broad:

> 885.010. (a) As used in this chapter, "power of termination" means the power to terminate a fee simple estate in real property to enforce a restriction in the form of a condition subsequent to which the fee simple estate is subject, whether the power is characterized in the instrument that creates or evidences it as a power of termination, right of entry or reentry, right of possession or repossession, reserved power of revocation, or otherwise, and includes a possibility of reverter that is deemed to be and is enforceable as a power of termination pursuant to Section 885.020. A power of termination is an interest in the real property.

However, read in context, this definition is not intended to cover executory interests preceded by a fee simple determinable. See Comments to Civ. Code §§ 885.010, 885.015, 885.030; *Recommendation Relating to Marketable Title of Real Property,* 16 Cal. L. Revision Comm'n Reports 401, 413-424 (1982).

The staff shares Professor Dukeminier's dismay at the inconsistent treatment of functionally equivalent dispositions. A simple way to achieve consistency would be to include executory interests of transferees in Section 885.010 so that the 30-year rule of Section 885.030 would apply. The marketable title statute did not include such interests, presumably because the focus was on powers of termination not covered by perpetuities law. This should not be taken as a judgment that the common law rule against perpetuities operated satisfactorily as to the executory interests. The common law rule with its lives in being plus 21 years can also run a long time.

Civil Code Section 885.030, cited with apparent approval by Professor Dukeminier, cuts off powers of termination only upon the failure to record a notice of intent to preserve within a 30-year period. This provision provides no limit on the duration of a power of termination as long as it is preserved by repeated recordings. The practical effect is to wipe out unattended powers of termination, but this statute is not equivalent to a mandatory cut off statute.

The Uniform Commissioners are considering recommending language that would provide an absolute cut off:

> A possibility of reverter, a right of entry, or an executory interest preceded by a fee simple determinable or a fee simple subject to an executory limitation becomes invalid, and the preceding fee simple becomes a fee simple absolute, if the possibility of reverter, right of entry, or executory interest does not vest in possession within [30] years after its creation.

While this provision would dispose of the problem, the staff is not prepared to suggest replacement of the 30-year renewable feature in the marketable title statute. Thus, if consistency is desired, it will be necessary to treat executory interests like powers of termination under the Section 885.030.

The option example presented by Professor Dukeminier seems to be a

special case of a power of termination that falls within the broad definition in Civil Code Section 885.010. As to the question of options in general, the Uniform Commissioners are considering language that would terminate them if not exercised within 30 years (or some other time period selected in the enacting jurisdiction). Once again, if consistency is the goal, options should be subject to the same renewable 30-year period as powers of termination.

One final possibility should be considered. The problem could be ignored on the assumption that the 90-year period, while long, is not necessarily inconsistent with the 30-year renewable period scheme applicable under Section 885.010. As to options, this would mean that open ended options could last 90 years. The question is how great a problem this represents in practical terms.

The staff recommends that the three types of interests described by Professor Dukeminier -- powers of termination, executory interests preceded by fee simple determinable or a fee simple subject to an executory limitation, and options -- be treated in an equivalent manner by application of the 30-year renewable feature like that in Section 885.030. We believe that this would come closer to the goal of consistent treatment of functionally equivalent dispositions than has ever been achieved in California. As a less ambitious alternative, the staff would leave options alone and just include executory interests in the treatment of powers of termination. We do not, at this time, suggest adopting the absolute 30-year cutoff under study by the Uniform Commissioners.

Uniformity

Ernest Rusconi of Morgan Hill concurs in the effort to achieve uniformity. (See Exhibits at 25.) Professor David M. Becker believes that uniformity is not enough of an argument to support enactment of USRAP. (See Exhibits at 6-7.) He argues that there is already a uniform rule available -- the common law rule -- since instruments that comply with the traditional rule are valid in California, USRAP states, wait-and-see states, and other jurisdictions. (Professor Becker is apparently unaware of the 60-year rule of Civil Code Section 715.6, as evidenced by his statement that "California currently uses only the

common law rule to determine whether an interest is valid or invalid." See Exhibits at 7.) Professor Jesse Dukeminier also reiterates his position that USRAP will not bring uniformity and suggests that if it comes it will be through federal action. (See Exhibits at 17-18.)

What degree of uniformity is significant? Some earlier commentary on USRAP noted with apparent glee that it had been enacted in only three or four states. Now, after four years, it has been enacted in eleven states. Will Minnesota finally reverse itself, as Professor Dukeminier believes? Time will tell. Has USRAP run out of steam? It is obviously too early to know, but we doubt it. California is a part of the process, presumably a significant one. If California adopts USRAP, it might encourage several other states, and at least some regional uniformity would be accomplished since both Oregon and Nevada have already enacted USRAP. If 25 states ultimately enact USRAP, would fair-minded observers agree that a significant degree of uniformity had been achieved? The point is that uniformity is a goal, and a desirable one, as urged by Professor Halbach, and remains desirable even if it will not be achieved to an absolute degree or within just a few years. Finally, can anyone seriously believe that there is any other scheme with an equal or better chance of achieving uniformity?

Need for Law Reform

One general argument merits brief consideration. Letters from Professors Stake, Glancy, and Becker, and from Messrs. Goldring, Petrulis, and Williams, among others, argue that there is no reason to reform the California law relating to perpetuities, that nothing is wrong with existing law, that a burden of proof has not been met in this study. However, it has never been the position of the staff or of the Commission that the California law on perpetuities is in dire need of reform, as it was in 1959 and perhaps in 1963. The staff has never sought to show that California law was in need of a major overhaul, because it is not. But we are perfectly comfortable in advocating reform of the statute in the interest of improving it, making it simpler to administer, and increasing the opportunity for uniformity. This is especially true in this case where the new rule overlays the old rule, as seen in Section 21205 of the Tentative Recommendation. It

would be a different situation if, for example, the Commission were considering adoption of a causally related measuring lives approach, for this would require rethinking each application of the rule and would not promote uniformity. In short, the staff is not sympathetic to Professor Becker's axiom that "any argument for reform must begin with strong criticism of the prevailing rule." (See Exhibits at 6.)

Uncertainty

Several commentators make the argument that USRAP would increase uncertainty during the wait-and-see period. See letters from Professors Glancy (Exhibits at 4), Stake (Exhibits at 5), Becker (Exhibits at 7-10), and Niles (Exhibits at 19), and from Mr. Williams (Exhibits at 36). Before proceeding to consider the merits of this argument, it bears repeating that this argument, if it is valid, applies to all wait-and-see statutes, not just USRAP. This is a significant point, because the argument about uncertainty can be tested against the cumulative experience of the many jurisdictions with wait-and-see schemes, e.g., Connecticut and Massachusetts (both of which have now adopted USRAP). If wait-and-see caused such an uncomfortable degree of uncertainty in title, we would not expect any jurisdictions to continue such a scheme after trying it, nor would be expect them to enact USRAP.

The uncertainty argument was made to the Commission in material on the agenda at prior meetings, both in letters and in law review articles presented as background. We have also received a draft of an article by Professor Mary Louise Fellows which analyzes all reported perpetuities cases from 1984-1989 and concludes that nothing in the 16 cases reviewed supports the charge of USRAP critics that deferred reformation would cause undue uncertainty and confusion. Fellows, *Testing Perpetuity Reforms: A Study of Perpetuity Cases 1984-1989* (forthcoming; abstract attached to Second Supplement to Memorandum 90-22, Feb. 27, 1990).

Arnold F. Williams of Fresno believes that USRAP would have the effect of "destroying the present certainty of the Rule in exchange for tying up property for ninety years, during which period any sales, leases, or contests would presumably have to be approved by the court." (See Exhibits at 36.) This would not be the effect of USRAP.

The "certainty" of the common law rule is preserved in USRAP since interests valid under the traditional rule are valid under USRAP. Interests invalid under the common law rule would be nonvested future interests, so the uncertainty resulting from contingent interests is already present. USRAP simply adds an additional contingency to such contingent interests -- that they must vest within the 90-year period. But since the time period is known to be 90 years under USRAP, the additional contingency does not increase uncertainty of title beyond what would have been the case if the correct time period had been expressed in the instrument in the first place. The litigation that would be required under existing law to reform the interests invalid under the common law would not be needed under USRAP. The assumption that court approval would be required for any property transactions during the 90-year period is erroneous. If property is held in trust, the trustee will normally be able to sell, lease, invest, or otherwise deal with the property under USRAP, as under existing law. The existence of a contingent interest under existing law does not require litigation to permit sale of trust property, nor would it under USRAP. If the problem described by Mr. Williams is real, it is shared by existing law. The staff does not believe it is a practical problem.

Honorary Trusts etc.

Professor Dukeminier writes that Probate Code Section 15210 in the Tentative Recommendation (at pages 35-36) is "not entirely clear" as to whether an honorary trust or trust for a noncharitable purpose that is "specifically measured by lives in being plus 21 years would be valid for the specified period or only for 21 years." (See Exhibits at 33.) The staff believes the section is clear as written; the Comment also notes that the section places a 21-year limit on trusts that would have violated the common law rule. The purpose of this section is to provide a practical limit on such trusts, rather than the 90-year rule that would otherwise apply under Section 21205. The 21-year limit is drawn from language under consideration by the Uniform Commissioners. As Professor Dukeminier illustrates, there are some pets who will survive beyond the 21-year statutory period. This possibility has led to the development of a more detailed proposal concerning trusts for

pets. Perhaps the Commission will want to take a look at this uniform law at a future meeting.

Professor Dukeminier also notes that the common law treats trusts for unincorporated noncharitable associations differently from honorary trusts for pets and trusts for specific noncharitable purposes, while Section 15210 treats them the same. (See Exhibits at 33.) The staff is content to treat them the same. We are unaware of any California cases on this point. The distinction does not appear to be a very important one, or worth preserving in a modern statute.

Infectious Invalidity

Professor William F. Fratcher argues that USRAP is

> seriously defective because it fails to abolish or modify the American doctrine of infectious invalidity under which courts strike down otherwise valid property dispositions because they are contained in an instrument making other dispositions that violate the rule against perpetuities.

(See Exhibits at 1.) The staff does not believe this is a problem. California courts have not applied the doctrine, to our knowledge, since the advent of the *cy pres* era in California perpetuities law. In any event, the matter is settled to our satisfaction in the Background to Section 21201 at page 39 in the Tentative Recommendation which specifically states that the doctrine of infectious invalidity is superseded by Section 21220 (reformation).

Nonvested Interests Held by Governmental Agency

Joseph A. Montoya, Chief Counsel of the Department of Transportation, makes the following comment apparently directed toward Section 21225(e) of the Tentative Recommendation (see Exhibits at 24):

> The codification of the common law rule of a nonvested property interest held by a governmental agency is appropriate; however, it would appear to be a better social policy to continue the exclusion even if a charity does not precede a subsequent governmental agency.

Section 21225(e) provides that the rule against perpetuities does not apply to a nonvested interest held by a charity or governmental agency

if the preceding interest is held by a charity or governmental agency. Thus, the rule does apply if the nonvested interest held by a charity is preceded by an interest held by an individual. (Examples of the operation of this principle are set out in the Appendix to the Tentative Recommendation at 89.) The staff does not believe this rule presents a problem, nor is it different in substance from existing law.

Reformation

Jeffrey A. Dennis-Strathmeyer of Berkeley writes that the "best thing that can be said about the proposed statute is that we will all be long since dead in 90 years when courts start confronting the task of ascertaining the intent of persons whose ambiguously stated wishes have outlived all the witnesses." (See Exhibits at 22.) This touches on an issue discussed in earlier materials. In the rare case that may reach that stage, the court may have an easier time determining the appropriate disposition under USRAP than under the immediate *cy pres* rule of existing law (where "immediate" means immediately available). Civil Code Section 715.5 provides for reformation or construction within the limits of the rule against perpetuities in Section 715.2 "to give effect to the general intent of the creator of the interest whenever that general intent can be ascertained." The section also provides that it shall be "liberally construed and applied to validate such interest to the fullest extent consistent with such ascertained intent." USRAP, on the other hand, generally does not permit reform until the expiration of 90 years. (Reform may be had earlier if a class gift might become invalid and the share of a class member is ready to take effect or if a nonvested interest can vest but not within 90 years or the common law period). See Section 21220 in the Tentative Recommendation at 27. USRAP provides for reform on the basis of the "transferor's manifested plan of distribution" which is determined from the instrument, not the testimony of witnesses. Remember also that "immediate" *cy pres* under Civil Code Section 715.5 need not take place for many years after the testator's death, making the determination of the "general intent" of the testator more difficult than determining the "manifested plan" under USRAP.

Mr. Strathmeyer's letter also relates his personal experience with a disposition in a holographic will that attempted to keep a ranch in

the family "more or less forever." (See Exhibits at 22.) This violation of the rule against perpetuities was solved by a stipulation and entry of a "decree of heirship" settling the property on two sons for life and the remainder to three grandchildren (who were apparently lives in being under the common law rule). From the facts, as related, this might be thought to be a fair resolution of the perpetuities problem, although it is not the only alternative available in the course of reformation under Civil Code Section 715.5. We might consider what a fourth grandchild born after the settlement would think of this disposition, or what great-grandchildren would think of the division at their parents' generation if there are widely varying numbers of great-grandchildren in each branch. It is also worth noting that Mr. Strathmeyer's experience is not an example of a triumph of the California immediate *cy pres* statute, but a ratified settlement under the statute permitting a determination of heirship.

Mr. Strathmeyer notes his regret at having deprived some attorneys 90 years hence of their few dollars representing great-grandchildren. Presumably the living attorneys involved in the described settlement and subsequent court approval were happy to take their fees -- the point being that a settlement and court proceedings took place in the case as described, just as could happen under USRAP.

Statutory Saving Clause

The Legislative Committee of the Probate, Trust and Estate Planning Section of the Beverly Hills Bar Association suggests a different approach -- enacting a statutory saving clause that is deemed included in an instrument that otherwise would violate the Rule. (See letter from Kenneth Petrulis in Exhibits at 14-15.) We have not analyzed this proposal, or any of the other possibilities outside of USRAP (as noted in on page 11 of Memorandum 90-22). However, it bears repeating that USRAP is considered by its proponents to serve the same purpose as a statutory saving clause. (See Memorandum 90-22, at 12.)

Drafting

Arnold F. Williams of Fresno is critical of the "redundancy in drafting" in Sections 21205, 21206, and 21207. (See Exhibits at 37.)

These three sections are patterned on the official draft of USRAP. They do not differ only in the choice of verbs, as suggested by Mr. Williams. The nouns, too, are different. Section 21205 applies to nonvested property interests. Section 21206 applies to general powers of appointment not presently exercisable because of a condition precedent. Section 21207 applies to nongeneral powers of appointment and general testamentary powers of appointment. If all of these sections were combined into one provision, we would be subject to criticism because of the difficulty of sorting out which verb in a series separated by commas apply to which noun in a string of nouns. The staff believes that the current organization is preferable to the suggested alternative.

Validity of 60-Year Rule in Civil Code Section 715.6

John Hoag of Ticor Title Insurance Company in Los Angeles reports that title insurers have "never intelligently relied upon the sixty year rule of Civil Code Section 715.6" apparently because, when it was enacted, it was arguably inconsistent with a constitutional provision then in effect. (See Exhibits at 38-39.) He urges the repeal and reenactment of Section 715.6.

The staff would not do this for two reasons. First, if the USRAP rule is made retroactive, the 60-year rule will be repealed. Second, if the 60-year rule is retained, we do not agree with the suggestion that the provision is invalid. For a detailed analysis, see the memorandum prepared by Robert Hanna, a summer legal assistant, in the Exhibits at 40-41.

Explanatory Pamphlet

Paul H. Roskoph suggests that the Commission publish a booklet preserving the explanatory materials as a long-term source book. (See Exhibits at 27.) If the Commission approves the recommendation to print, our normal practice is to print a pamphlet which would include the explanatory text, proposed statute and comments, and the Appendix. The pamphlet is ultimately bound into the Commission's permanent bound volumes and would be available in law libraries. The Commission also

cooperates with Continuing Education of the Bar and other legal education organizations such as the Rutter Group.

Respectfully submitted,

Stan Ulrich
Staff Counsel

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5 March 1990

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

Dear Mr. DeMoully:

Professor Jesse Dukeminier of the University of California at Los Angeles School of Law has sent me a copy of the letter about the Uniform Statutory Rule Against Perpetuities that he sent to you on 2 March 1990.

As stated in my letter to you of 15 June 1989, the Uniform Statutory Rule Against Perpetuities is seriously defective because it fails to abolish or modify the American doctrine of infectious invalidity under which courts strike down otherwise valid property dispositions because they are contained in an instrument making other dispositions that violate the rule against perpetuities. If an entire trust that has been administered in accordance with its terms for ninety years is struck down ab initio because some interest under it fails to vest, the results to the trustee and the beneficiaries may be disastrous.

Courts normally hold trustees absolutely liable for improper payments. Scott on Trusts §226 (4th ed. by Fratcher, 1988). A beneficiary who receives such a payment is also liable. Id. §254. If any interest under or following a trust might vest beyond ninety years, a trustee could not safely make a payment and a beneficiary could not safely receive one without litigation and a declaratory decree that the provisions of the trust authorizing the payment will not be struck down if the interest fails to vest on time.

The Uniform Act is also seriously defective because it applies only to donative transactions. In preparing the 1989 Pocket Parts for Simes and Smith on Future Interests I noted that the commonest perpetuities litigation concerns options to repurchase land. The present California cy pres statute offers a solution to this type of problem; the Uniform Statutory Rule does not. The Massachusetts statute adopting the Uniform Statutory Rule Against Perpetuities, Laws 1989, c. 668, attempts to solve problems of this type.

As stated in my letter of 15 June 1989, I think that the present California statute, which permits immediate reformation cy pres of any disposition that might vest beyond the period of the common law rule against perpetuities, is much more complete than, and much superior to, the Uniform Statutory Rule Against Perpetuities.

Very truly yours,

William F. Fratcher.

William F. Fratcher

CC: Prof. Dukeminier

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March 6, 1990

Mr. John H. DeMoully
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RE: Law Revision Staff Memorandum 90-22
Uniform Statutory Rule Against
Perpetuities

Dear Mr. DeMoully:

I write to express my opposition to the Law Revision Commission project promoting adoption of the Uniform Statutory Rule Against Perpetuities. I have taught the rule against perpetuities here at the University of Santa Clara since 1975 and am familiar with the common law rule, the California statutes, and the proposed Uniform Rule. Existing California law with regard to perpetuities is far more predictable and certain than the Uniform Rule.

I join in Professor Dukeminier's extensive comments in his letter to you dated February 23, 1990, regarding the undesirable consequences which would result from California's adoption of the staff report's recommendations. The existing cy pres statute is a much simpler, more useful approach to the Rule Against Perpetuities than the complicated structure of the Uniform Rule.

I will not at this time go into an extensive argument on each of the many defects in the staff recommendation. Professor Dukeminier has done an admirable job in that regard. Two big problems seem to provide compelling reasons not to adopt the Uniform Rule. First, the Uniform Rule would result in some California trusts being subject both to the 90-years-abeyance approach under the Uniform Rule and to the common law rule under the Treasury Regulations. Professor Dukeminier describes this as a "tax trap." It is also serves as one stark example of the numerous needless complexities which would be generated were the Uniform Rule adopted as California law.

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Second, during the Uniform Rule's 90-year abeyance period, the title to property would remain indeterminate. In cases where real property has been transferred, such uncertainties create expensive additions to the already high costs of purchasing land in this state. There is literally no reason to add further to the costs and complications surrounding real property titles by setting up a system fostering 90 years of uncertainty regarding the validity of contingent property interests. That alone should be ample reason to reject the complexities and uncertainties of the Uniform Rule.

In light of the fact that California's existing law with regard to perpetuities has worked well, there is no reason to engraft on it complicated changes which will have unpredictable and undesirable consequences. The Law Revision Commission can better expend its efforts in other more productive directions. It would indeed be regrettable if the Commission were stampeded into adopting the Uniform Rule just because it is another uniform statute and California wants to be uniform. California already has a better way. I urge the Commission to reject the staff's suggestions with regard to adoption of the Uniform Rule. There is no reason to adopt the Uniform Rule and every reason not to engraft its complications into California law.

Sincerely,

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March 9, 1990

Mr. John De Moully
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Dear Mr. De Moully and Commissioners:

I have learned that California might repeal its cy pres statute and adopt the USRAP and am writing to express my doubts that such a reform would be beneficial.

I have just recently written an article on the common law Rule against Perpetuities (page proofs enclosed) which will appear shortly in the Tulane Law Review. The article points out that many of the criticisms leveled at the Rule have not been thought through completely. The article does not address the fixed 90-year approach specifically, but it does question the need for reform to the extent that the impetus for reform is predicated upon the traditional criticisms.

In addition to questioning the need for reform, I have some serious doubts about the advisability of a fixed 90-year period. Ninety years is a long time for people to wonder about their rights. One of the advantages of the common law Rule is that many cases can be determined immediately, saving the substantial costs of prolonged uncertainty. Though I am not in 100% agreement with Professor Dukeminier, I do believe that he has the better of the argument in his Columbia Law Review debate with Professor Waggoner.

Thank you for considering my views.

Very truly yours,

Jeffrey E. Stake
Visiting Associate Professor

Assistant Professor
Indiana University School of Law
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Enclosure

JES/mm

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March 14, 1990

Mr. John H. DeMoully
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RE: Uniform Statutory Rule
Against Perpetuities

Dear Mr. DeMoully:

Professor Jesse Dukeminier has informed me that Staff Memorandum 90-22 of the Law Revision Commission recommends adoption of the Uniform Statutory Rule Against Perpetuities (USRAP). This letter is in support of the position taken by Professor Dukeminier. Although I neither teach nor practice in your state, I do not believe that it makes good sense for California to replace its current rule (the common law rule coupled with immediate cy pres) with the USRAP. As someone who has been teaching the rule for twenty-seven years and writing about it for nearly ten years, I would like to explain why I believe California's rule is superior to the USRAP.

Among the many reasons given for adoption of the USRAP, several seem more important than others. To begin with, any argument for reform must begin with strong criticism of the prevailing rule--the common law rule against perpetuities. Commentators criticize the common law rule because of its complexity and because of its outrageous results. No matter how simply one might state it, the common law rule often appears beyond the competence of the average lawyer. To some extent, this difficulty in understanding the rule derives from its quirks and absurdities. And, worst of all, these quirks and absurdities often lead to outrageous violations--violations of provisions that do not offend basic perpetuities policy and violations based upon dispositive interpretations never contemplated by the estate owner. Further, advocates of the USRAP maintain that reformations of the rule should produce a uniform perpetuities rule among the states. Finally, they maintain that the best perpetuities rule is the one presented by the USRAP. I would like to address these concerns and arguments.

To begin with, uniformity should never be an end unto itself. If a state's rule works, and does so quite well, surely it ought not to adopt another rule because of uniformity unless that other rule is clearly superior. Law among the states in this country is not uniform, and this is clearly true for the law of property. One might argue strongly that because the

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population within the United States has become so mobile, even among the elderly, estate owners ought to be able to execute a will or trust pursuant to a perpetuities rule that validates the interests they create in all jurisdictions. But, such a uniform rule exists; indeed, it is the common law rule. Interests that satisfy the common law rule are valid in California; they are also valid under the USRAP and in other jurisdictions as well. Perpetuities problems and perpetuities compliance are first and foremost matters for the planner--matters to be addressed in the process of creation of dispositive instruments. And for this process, there is already a uniform rule. Nevertheless, only if the USRAP is in all respects a far superior rule, should one consider its acceptance.

In contemplating whether to replace California's rule with the USRAP, one must carefully scrutinize the substance of the new rule in comparison with the existing rule. This examination should begin with several observations about the USRAP. First, the USRAP permits interests to be validated if they satisfy the common law rule against perpetuities. Second, the USRAP adopts a wait-and-see test that validates all interests which actually vest within the allowed time period--ninety years. Third, the USRAP authorizes cy pres reformation of invalid interests consistent with the estate owner's intent, and ordinarily this must occur at the end of ninety years--the time when the interest is finally deemed invalid. Quite differently, California currently uses only the common law rule to determine whether an interest is valid or invalid--whether it does not or does cause a perpetuities violation. California also allows for cy pres reformation or construction of interests that do not satisfy the common law rule. However, California law allows both the determination of invalidity and reformation to be made without delay, while the USRAP mandates a delay of ninety years. And the many problems caused by this delay lead me to believe the USRAP should be rejected.

Both the USRAP and the California rule have the following questions in common and, therefore, these uncertainties. Will the subject matter in actuality pass to those whose interest has been expressly conditioned and precisely who will they be? Although a maximum time limit may have been established, exactly when will this determination as to the primary takers be made? Conversely, will the subject matter in actuality pass to the substitute takers because the condition has not been satisfied? If so, when will this be known, and, specifically, who will then be entitled to take? Or, does the subject matter pass differently because of a perpetuities violation? Finally, if a violation exists, specifically to whom will the subject matter belong?

Although the USRAP and the California rule share these

questions and uncertainties, there are important differences. The California rule calls for an immediate resolution of whether a perpetuities violation exists and, if so, who is entitled to take the subject matter. The answers to these questions can and must be determined without delay, or as to validity alone, without the knowledge derived from delayed application. The USRAP, however, uses a wait-and-see test, and because of this, it allows these determinations to be delayed until the end of the perpetuities period. Only after this delayed determination is made will it be known whether the subject matter belongs to those who take in the event of a violation, namely, those who take if a contingent interest actually neither vests nor terminates within the perpetuities period. Therefore, by this delay, the USRAP exacerbates initial uncertainty; more importantly, it invites significant problems. The USRAP invites disputes as to whether there is a violation and, if so, as to what action can and should be taken. There should be at least the same potential for disputes and litigation concerning the existence and consequences of a violation as there is under the California rule. The major difference is, of course, that such litigation must be delayed for ninety years under the USRAP; only then can it be known whether the contingent interest actually violates the rule. This delay can cause serious problems. It could easily increase the number of parties involved in the dispute and, therefore, the costs incurred by litigation. Also, it could cause estates which have been closed for many years to be reopened with costs and taxes thereby increased.

Professor Lawrence W. Waggoner, the Reporter for the USRAP, must recognize the importance of achieving certainty as to validity and outcome at the outset. He has observed: "...(Interests) that are valid under the Common-law Rule Against Perpetuities...continue to be valid under the Statutory Rule and can be declared so at their inceptions. This is an extremely important feature of the Uniform Act because it means that no new learning is required of competent estate planners. <u>The practice of lawyers who competently draft trusts and other property arrangements for their clients is undisturbed.</u>" (The author's emphasis.) (The Uniform Statutory Rule Against Perpetuities, 21 Real Prop.& Prob.J. 569,592 (1986). Undoubtedly, Professor Waggoner reaches this conclusion because of the certainty lawyers are able to achieve with immediate compliance. Certainty of result is important to the planner; surely, it ought to be just as important in legislating a time for determinations of invalidity. In either instance, delayed determinations cause serious problems.

Whenever a violation occurs under both the California rule and the USRAP, reformation of the provision is authorized in a manner that avoids a violation and carries out the intent of the estate owner. This opportunity for reformation is extremely

important. And in the case of the common law rule, cy pres overcomes the rule's most serious criticisms. In short, cy pres rectifies the mistakes of those who cannot master the rule's complexities and it averts the outrageous results occasioned by the rule's quirks and absurdities. Cy pres offers the opportunity to amend estate plans where the rule has been misunderstood or misapplied and, in the end, to save and implement perfectly reasonable dispositive designs. And, once again, it is important to emphasize that California's perpetuities rule already contains this design saving provision.

Nevertheless, because cy pres allows for judicial redirection of unlawful interests, there is always the occasion for disputes and uncertainty as to the substance of the court's reformation. More specifically, there are apt to be disputes as to which revised plan of valid deposition best approximates the estate owner's wishes. As long as a court has discretion, uncertainty and disputes would seem to be inevitable. Cy pres alone requires this determination to be made at the outset or whenever an interest is challenged under the rule. Although it exacerbates the common law rule's inherent uncertainty attending the matter of what happens when a violation occurs, cy pres does afford a solution that obviates the common law rule's bad results and it does this without significant delay. However, this does not follow when cy pres is combined with wait-and-see, as it is under the USRAP. In that instance, judicial reformation cannot occur without the delay needed to determine actual invalidity. Because redirection is delayed, the uncertainty is prolonged. Furthermore, the particular disputes concerning the substance of judicial redesign are multiplied and complicated. This delayed resolution presents its own set of substantive problems beyond those of cy pres unaccompanied by wait-and-see. Delayed cy pres involves more difficult problems of judicial approximation of the estate owner's intent than immediate application of the principle. Once variables are introduced by passage of time, the subjective element becomes more significant; consequently, courts may be inclined to completely reconstruct estate plans instead of approximating them. Additionally, because delayed cy pres defers final determination of interests for a time, under the USRAP for ninety years, and because these deferred determinations could conceivably extinguish interests, postponed use of cy pres necessarily exacerbates important problems of valuation. At the very least, this makes it more difficult to administer estates and trusts after the death of an estate owner. Postponed cy pres compounds uncertainty and thereby diminishes the benefits achieved from enlightened judicial redirection and the preservation of essential interests. Immediate cy pres, especially if applied conservatively, establishes validity early on and, thereby, avoids prolonged uncertainty as to what will be done in the event of a perpetuities violation.

Proponents of the USRAP might concede that the common law rule achieves greater certainty, but they would argue it does this at the cost of extraordinary and unnecessary complexity. The common law rule is beyond the comprehension of many competent lawyers. Central to the problem is the question of "who is the life in being?" The USRAP makes its perpetuities rule understandable and enables every one to apply it successfully. It accomplishes this by substituting ninety years in place of a life in being plus twenty-one years. This is the period of time used in determining whether an interest is invalid.

I cannot deny that my students have a very tough time understanding and applying the common law rule against perpetuities. I also confess that the life in being concept lies at the heart of their difficulty. Nevertheless, even first year law students find the rule <u>easy</u> to apply whenever they are asked to use a specific condition in creating an interest that satisfies the common law rule. If given an existing limitation, these students may have great difficulty interpreting and explaining whether there is a perpetuities violation. Often they will reach the correct result without being able to justify their conclusion. And this causes great uneasiness for them with the common law rule. Although these students may have enormous problems applying the rule by way of interpretation to existing limitations, they have comparatively little difficulty creating limitations that satisfy the rule. In designing valid interests, they recognize that they control selection of the life in being which will be used to satisfy the rule. All they need do to avoid a common law rule violation is to make certain that the conditions they impose must be fulfilled, if at all, within twenty-one years of the death of a life in being they have selected. Invariably, they will select their validating life or lives in being from the beneficiaries of the contingent interest or from the beneficiaries of prior estates. And that is all there is to it.

This observation is exceedingly important. Even under the California rule, lawyers should never have difficulty formulating valid interests. This creative function is the most important one in the estate transfer process because it sets the framework by which dispositive goals are to be achieved, assets are to be conserved, and disputes are to be avoided. Consequently, it is here that lawyers first and most frequently encounter any rule against perpetuities, and it is here that lawyers must master such rule. Finally, it is here that lawyers can actually understand and apply the common law rule correctly. In short, within this most important context of creation, the common law rule is clearly viable for all lawyers. Consequently, lawyers should never draft provisions that violate the common law rule. Nevertheless, they do. These violations, however, do not arise because of the common law rule's complexity; undoubtedly, it has

more to do with inattention to the rule itself. And when these violations do arise, the California rule already has a sensible solution. It authorizes immediate reformation of existing interests to save an estate owner's plan and avert all of the disastrous results associated with a perpetuities violation. Given the history of cy pres reformation among reported perpetuities cases, these violations may not be frequent. This might signify that California lawyers know how to create valid interests under the California rule. Although interpretive application of the California rule may be difficult for many lawyers, it is not all that important when it comes to law reform. At least, it is not important enough to justify substituting ninety years as a proxy for a life in being plus twenty-one years.

In making a choice between the California rule and the USRAP, one must bear in mind that the USRAP also allows creative validation with the common law rule. Once again, even the Reporter for the USRAP acknowledges that competent planners will still use the common law rule to achieve immediate compliance for the interests they create. Three assumptions are implicit in this conclusion. First, Professor Waggoner must recognize that creative compliance can be readily achieved by all lawyers. Interpretive application of the common law rule to existing interests may be difficult; however, creative validation is within the competence of all lawyers.

Second, Professor Waggoner must recognize the benefits of creative validity--of designing interests that satisfy all perpetuities requirements at the outset. Estate owners want their lawyers to produce plans that achieve certainty and minimize the opportunity and occasion for disputes. Reliance upon a wait-and-see test will probably enable a lawyer to achieve most planning objectives. Nevertheless, this is not without ongoing uncertainty as to whether a violation will occur and, accordingly, the concomitant risk of dispute and emasculation of these objectives. Similarly, reliance upon a cy pres rule can preserve most objectives, but it also introduces uncertainty as to whether a judicial reformation will carry out these objectives consistent with the estate owner's actual wishes. Indeed, judicial redirection may miss the dispositive mark altogether or, at least, settle on an unpreferred objective. Quite differently, compliance with the common law rule as to each dispositive provision will do the job fully; it can preserve reasonable objectives and accomplish them with greater certainty. Furthermore, if any moderation of objectives is needed to satisfy the rule, a lawyer can do this consistent with the estate owner's actual wishes; unlike cy pres, the estate owner is alive to make his election from a full range of choices. In short, compliance with the common law rule bolsters certainty as to validity and the desirability and acceptability of a dispositive choice.

Third, Professor Waggoner must view creative validation with the common law rule as superior to creative validation with the USRAP's ninety year proxy. To be sure, under the USRAP lawyers can create valid interests under the common law rule, but they can also establish validity at the outset with the ninety year proxy. They can readily accomplish this by formulating conditions that must be fulfilled, if at all, within ninety years of creation. Mechanically speaking, this may be an easier method of creative validation. Apparently, however, Professor Waggoner does not expect this to happen. He believes that the practice of competent lawyers will remain undisturbed, and this practice involves creative validation with the common law rule so that interests can be declared valid at their inception.

But why will lawyers select creative validation with the common law rule instead of the ninety year proxy? Perhaps Professor Waggoner believes this will occur because of the reluctance of lawyers to jettison existing knowledge and practices. Or, perhaps this will occur because lawyers recognize that careful use of the common law rule, and the period of time it allows, permits them to control the devolution of an estate beyond ninety years. This should be especially important in the creation of dynasty trusts which are designed to make full use of the one million dollar exemption to the generation-skipping tax.

More likely, lawyers will cling to the common law period because it is better suited to the dispositive objectives of estate owners and the conditions they wish to impose. A rule against perpetuities should be designed to permit devolutionary control for as long as the estate owner has good reason, and an estate owner has good reason for the generation he knows--those alive at his death. Beyond lives in being, the common law rule allows an estate owner to control his estate during the minority of the next generation--those born after his death. He can pass judgment on people he knows, but he cannot pass an extended judgment on people he could never know. This comports with society's view as to how long the living should be subject to the controls of the dead. More importantly, it comports with the general concerns of estate owners who think in terms of people and their ability to manage the estate and their affairs. Estate owners develop objectives in terms of people and generations. The common law rule is formulated in terms of generations, the ninety year proxy is not. Even though most generational objectives can be easily achieved within ninety years, there is no guarantee. Accordingly, if the generational objectives of an estate owner can be cast within the generational limits of the common law rule, one should expect estate planners to achieve creative validation with the common law rule the same as before. Indeed, congruency of dispositive design and validity is always much easier to achieve and assure with a rule squarely focused on

the legitimate devolutionary objectives of estate owners.

By way of conclusion, is the USRAP superior to the California rule? I think not. The USRAP permits creative validation with the common law rule, but so does the California rule. And this is the way lawyers will continue practicing under either rule. The ninety year proxy offered by the USRAP should not be a factor for competent planners. They have drafted provisions--or at least saving clauses--that satisfy the common law rule in the past, and they should do the same in the future. What then does the USRAP offer? It offers nothing significant with respect to the most important thing lawyers do in the estate transfer process--the planning and drafting of dispositive instruments. Yet what about those instruments in which lawyers have ignored the rule or miscalculated? The USRAP permits one to wait-and-see for as much as ninety years to determine whether an interest is valid because it has vested or whether it is invalid because it has not yet vested. To be sure, invalidity may be very infrequent. And when an interest actually vests in time, one is spared the disaster of a common law perpetuities violation. But until it vests or until the perpetuities period has run, one must wait to determine validity or invalidity and one must delay remedial reformation for ninety years. The California rule also allows for remedial reformation, and because of this, it also avoids disastrous results that can gut an estate plan. Yet it should be emphasized that the California rule allows for immediate determinations of invalidity and immediate remedial reformation. The California rule does not involve prolonged delay. Because of this, the California rule avoids the uncertainty--and its associated costs-- caused by prolonged delay. In short, the California rule produces results that are just as good as the USRAP, but it does so immediately. And sooner is always better than later.

Sincerely,

David M. Becker

David M. Becker
Professor of Law

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DAVID E. LICH
KENNETH G. PETRULIS

April 19, 1990

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

Re: Memorandum 89-53, Study #L-3013
Uniform Statutory Rule Against Perpetuities

Dear Mr. DeMoully:

The Legislative Committee of the Probate, Trust and Estate Planning Section of the Beverly Hills Bar association has reviewed recent materials concerning the recommendation for the adoption of the Uniform Statutory Rule Against Perpetuities. We continue to oppose the adoption of that rule.

In particular, we have reviewed Professor Dukeminier's letter of February 23, 1990. Professor Dukeminier points out, and we agree, that the mere fact of the change in the law will create problems, since USRAP doesn't always tie into existing laws and regulations, especially those in areas of taxation.

We, therefore, reaffirm our opposition to USRAP and our support for the retention of existing law.

We would also remind you that we have recommended a savings clause to be added to the existing law, which would read as follows:

> "Perpetuities Savings Clause: Unless terminated earlier by the provisions of the instrument, all trusts which otherwise would violate the rule against perpetuities shall terminate twenty-one (21) years after the death of the last to die of the trust beneficiaries living at the time when the period of the Rule Against Perpetuities began to run or 21 years after that date if no beneficiary was then living. Upon termination the principal and undistributed income of the trust shall be distributed outright to the than-living beneficiaries of the

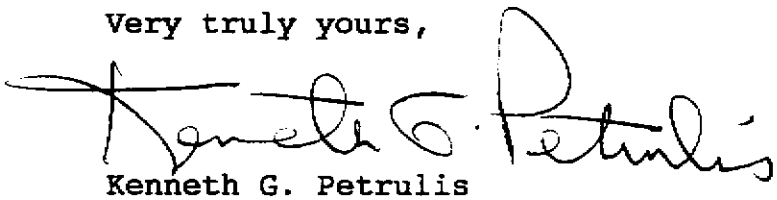
trust in the same proportion that the beneficiaries are entitled to receive income when the trust terminates. If, at the time of termination the rights to income are not fixed by the terms of the trust, distribution shall be made , by right of representation, to the persons who are then entitled or authorized to receive trust payments."

This solution, as opposed to the URAP, preserves the existing body of law, while at the same time removing all but a small number of cases from the threat of litigation. Those limited cases, including, primarily, legal estates, as opposed to trusts, can also benefit if the present cy pres provisions are amended to include a direction to the court to insert a savings clause into the offending instrument, if that will cure the problem.

At the present time Illinois has a statutory savings provision which, from all indications, has worked well.

These proposals would retain the existing body of law and at the same time avoid court involvement for virtually all trusts. Neither would they have the liabilities of the flat 90 year period which others have commented on. Furthermore, the savings clause would place a 21 year limit, under part (b), on fanciful gifts such as the "gift to my dog Trixie and her progeny."

Very truly yours,



Kenneth G. Petrulis
BHBA P,T & E Section
Legislative Committee

KGP:ar

cc: Legislative Committee

HARVARD LAW SCHOOL
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April 24, 1990

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

RE: Uniform Statutory Rule Against Perpetuities

Dear John:

I was rather surprised to learn that the Law Revision Commission had given the green light to USRAP. It is the first time in my memory that the Commission has rejected the advice of four of its consultants on a highly technical subject (Professors Bird, Niles, French, and myself). I also note that eight professors who teach perpetuities law in California opposed USRAP; only one (Halbach) favored it. Two state bar teams studied USRAP. One was opposed; the other was of mixed views, but overall was distinctly unenthusiastic.

It seems obvious that the push for USRAP comes from its drafting committee. When this act was first presented to the Commission, it was accompanied by a sheaf of testimonials from professors associated with it portraying me as the only academic opposed to it. I believe the many letters of opposition from professors teaching perpetuities law show how very far from the truth this portrayal is.

The USRAP tax trap, explained in my earlier letter to the Commission, needs some additional comment, since I do not believe it can be dismissed so easily as the staff suggests. Temp. Treas. Reg. Sec. 26.2601-1 (b) (1) (i) (1988) requires that powers of appointment in grandfathered trusts must be exercised so as to comply with a lives-in-being-plus-21-years time frame. A 90-year wait-and-see time frame applied to them will remove the GST tax exemption. <u>This is not a new regulation</u>. In 1980 the Treasury promulgated the identical regulation under the old generation-skipping transfer tax. Treas. Reg. Sec. 26.2601-1 (e) (3) (1980). When the new generation-skipping transfer tax was adopted in 1986, the chairman of the Senate Finance Committee, Senator

Packwood, confirmed on the Senate floor that Treas. Reg. Sec. 26-2601-1 (e) (3) would carry over to the new generation-skipping transfer tax. Accordingly, the Treasury promulgated the same regulation under the new GST tax. It is called "temporary," as are all the new regulations, but in all likelihood it will become permanent.

It remains to be explained why the drafters of Uniform perpetuities legislation were not cognizant of perpetuities regulations of federal tax authorities promulgated some six years before USRAP. It confirms my view that had USRAP not been drawn by a small committee in a closed room, but had had a full public airing, this tax trap would have been discovered.

The GST tax trap may not be avoided by making USRAP prospective only, as your staff suggests. Under IRC Sec. 2631 each person has a $1 million exemption from GST tax. This exemption can be allotted to a dynasty trust for descendants for as long as the local perpetuities law permits. In view of the fact that trusts can be created in perpetuity in Wisconsin, South Dakota, and Idaho, for 110 years in Delaware, for 90 years or lives in being plus 21 years in USRAP states, and for lives in being plus 21 years in other states, it seems likely that the Treasury will issue a regulation limiting the tax exemption period of dynasty trusts by treating taxpayers in all states the same way. If, consistently, the Treasury limits the tax exemption to a period measured by lives in being plus 21 years, as it has with grandfathered trusts, a trust created in a USRAP state in violation of the common law Rule against Perpetuities would not qualify for the $1 million tax exemption.

As for USRAP bringing uniformity, I think its proponents vastly overrate its chances. It is my view that USRAP has about run out of steam. It has been adopted largely in states where a member of the drafting committee lived, and pushed it. With the increased publicity given to its defects, academic opposition continues to grow. No Uniform act in my memory has been so controversial, and has received such negative reviews in the law journals.

I believe that Minnesota, which was on the verge of repealing USRAP this year, will do so in 1991. Minn. Senate Bill 1891 (1990), abolishing USRAP and adopting cy pres, passed the Senate, but because of the press of more important business, the matter was put over another year.

I think there is no chance of adoption of USRAP in most important trust states: New York, Delaware, Illinois, Pennsylvania. Opposition there is too strong and the states

are quite happy with their own recent reforms. So too, Wisconsin and South Dakota, which have abolished the Rule against Perpetuities, will never adopt USRAP.

If uniformity comes in this field, it will come not through USRAP but through federal legislation or regulation. And, as Treasury regulations now indicate, the uniform period allowed for tax advantages will probably be the period the ancient judges settled on more than 200 years ago: lives in being plus 21 years. It is a period that permits a person of property to provide for all those in his family whom he personally knew, and the next generation upon attaining majority. This is an appropriate period for a person to assay the capacity of his descendants to manage property. It is also fair to the taxpayers in all states.

Letting each state claim special federal tax advantages for its residents by extending its perpetuities period beyond this long-settled common law period would result in inequities among the states that Congress will not, I predict, tolerate. It would be unjustifiable for Delaware dynasty trusts to be free of generation-skipping transfer tax for 110 years, and for Wisconsin trusts to be free forever, while New York dynasty trusts can escape the tax only for lives in being plus 21 years. The USRAP tax trap shows clearly the dangers in shifting from the common law lives-in-being-plus-21-years perpetuities period to a 90-year period, when the federal government is the only effective unifying agent.

Sincerely,

Jesse Dukeminier
(Richard C. Maxwell
Professor of Law, UCLA)

UNIVERSITY OF CALIFORNIA
HASTINGS COLLEGE OF THE LAW

FACULTY

May 10, 1990

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

Dear John:

Re: USRAP

Thank you for my certificate. I have enjoyed my association with you, your staff, and the Commissioners. The new Probate Code is a very good piece of work.

I have read all the USRAP literature; I know almost all of the cases. Let me state as calmly and rationally as I can what my conclusions are about the current debate.

The most important issue is instant versus delayed cy pres. The 90 year period would cause little harm in the hands of expert draftsmen who write clealry and know the law. Beneficiaries of their instruments would know how they stand and how to plan even if they have to wait a long time for all contingencies to work out.

If the draftsmen are laymen or lawyers who are not specialists, and the instruments they produce are ambiguous or obscure or even possibly invalid without cy pres, then it is a serious matter for beneficiaries who are required to wait for up to 90 years to know how they stand and how to plan.

The USRAP does not expressly prevent a court from construing an ambiguous instrument at once--it only requires a court to delay reformation (with limited exceptions) for 90 years. But query? Can construction be easily--or properly--distinguished from reformation? Take our Grove case. Is that a case of construction as the court said or of reformation? Our statute

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realistically combines construction and reformation. As Browder pointed out years ago in "Construction, Reformation and the Rule Against Perpetuities" [62 Mich. L. Rev. 1 (1963)], the two processes are very close: construction is often a method of reformation under the cy pres doctrine.

I do not like instant construction and delayed reformation even if that is possible. If construction can clarify the intention of a donor and indicate a pattern of reformation within the policy of the Rule, why should two litigations be necessary?

In my judgment the real consumer protection is afforded by C.C. §715.5--not by a statutory saving clause. Section 715.5 has not caused excessive litigation. Under the doctrine of stare decisis the litigation of the future is likely to be less. What lawyer, even now, would advise challenging a gift to ~~an~~ 25 open class of children who must attain 25 when a reduction to 21 would be so likely under §715.5 and the California and other decisions? As Leach pointed out, the money is in breaking wills, not in reforming them.

I wish you would read the enclosed copies of my correspondence with Olin Browder. He is the most level-headed of the living experts. I also wish you and your staff would reread Browder's 1963 article.

We should not sacrifice C.C § 715.5!

Sincerely,

Russell D. Niles

RDN/jmg

UNIVERSITY OF CALIFORNIA
HASTINGS COLLEGE OF THE LAW
200 MCALLISTER STREET
SAN FRANCISCO, CALIFORNIA 94102-4978

March 12, 1990

Professor Olin Browder
School of Law
University of Michigan
Ann Arbor, Michigan 48109

Dear Olin:

I have just reread your 1963 article, "Construction, Reformation and the Rule Against Perpetuities." I admired the article when I first read it -- indeed it has influenced my thinking ever since. I have also just reread your Statement in Support of the USRAP. At first I could not believe that they were written by the same person. On reflection, however, I see how the two pieces can be reconciled. In your later statement you do not endorse delayed reformation. I believe in instant cy pres. I strongly support CC § 715.5 -- as did Lewis Simes. Your article is an admirable brief in its favor.

I am not especially in favor of Larry Waggoner's 90-year invention but I am not strongly against it if used by skilled draftsmen who write clearly, using precise terms of art. But I do think the 90 year rule, coupled with delayed reformation, is dangerous in the hands of a layman or an inexpert lawyer. The courts are deprived of jurisdiction for too long.

I could accept the 90 year rule if California could retain CC § 715.5. This statute properly combines construction and reformation. I do not like instant construction and delayed reformation. As you have pointed out, construction is sometimes a type of reformation.

I believe that anyone as clever and imaginative as Larry (with the help of your learning and common sense) could adapt the California cy pres. statute to the USRAP -- at least for California.

Wouldn't you like to have California retain instant cy pres? I would be grateful for your views.

Sincerely,

Russell D. Niles

RDN:lh

JEFFREY A. DENNIS-STRATHMEYER
ATTORNEY AT LAW

POST OFFICE BOX 533 - BERKELEY, CALIFORNIA 94701
415) 642-8317

June 7, 1990

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Tentative Recommendation relating to Uniform Statutory Rule Against Perpetuities

Sirs:

The best thing that can be said about the proposed statute is that we will all be long since dead in 90 years when courts start confronting the task of ascertaining the intent of persons whose ambiguously stated wishes have outlived all the witnesses.

The second best thing to be said is that the sparse number of California appellate decisions on this topic suggests that the topic is not particularly important.

I will share my only personal experience with this problem. My client's mother was quite elderly at death and had less than an eighth grade education. Her holographic will provided that her modest ranch was to be kept in the family more or less forever. The living parties in interest, two sons and three adult grandchildren, stipulated to entry of a decree of heirship that passed the property to the sons for life with remainder to the three grandchildren. The probate judge, in his wisdom, ordered judgment in accordance with the stipulation. My apologies to the lawyers of the late 21st century who might have made a few dollars representing great-grandchildren.

Very truly yours,

Jeffrey A. Dennis-Strathmeyer

RUTH E. RATZLAFF
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June 11, 1990

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Atlo, Ca 94303-4739

Dear Commissioners:

I have reviewed your tentative recommendation relating to the Uniform Statutory Rule Against Perpetuities.

I think the change you recommend is a good one. The 90-year wait-and-see period will solve many problems for instruments that are defectively drafted.

I am curious about the lack of retroactivity that your proposal contains. I understand that laws generally should not be applied retroactively, but in this situation, it seems that retroactive application would not be harmful. It would not change the interpretation of language in instruments that were drafted before the affective date. It would simply save some defective instruments that would have failed under current law. This seems to be the better way of obtaining the result that the testator or other creator of the instrument wanted.

Absent a compelling reason to the contrary, I would support retroactive application of the proposed change. Perhaps you should inquire of malpractice insurance carriers whether their preference would be for retroactive application.

Sincerely,

Ruth Ratzlaff

Ruth E. Ratzlaff

RER/dr

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June 12, 1990

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Dear Sir/Madam:

In re: Comments on Commission's Tentative Recommendation relating to Uniform Statutory Rule against Perpetuities. March 1990.

The Commission's tentative recommendations, especially the "wait and see" role (§ 21205(b)) appear to be well thought out.

The codification of the common law rule of a nonvested property interest held by a governmental agency is appropriate; however, it would appear to be a better social policy to continue the exclusion even if a charity does not precede a subsequent governmental agency.

The only recommendation we have for a change is to have the proposed provisions apply to nonvested property interests created before or after January 1, 1992. We see very little disadvantage or disruption to "prior" transfers; and all such interests would be more equitably treated under the proposed provisions.

Very truly yours,

JOSEPH A. MONTOYA
Chief Counsel

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June 18, 1990

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road Suite D-2
Palo Alto, CA 94303-4739

Re: Proposed Uniform Statutory Rule Against Perpetutities

Gentlemen:

I have just read your tentative recommendations relating to the above uniform statutory rule. I concur with what the Commission is trying to do, especially since it is expected that many more states will adopt the Uniform Statute. This will make it easier for one to interpret documents drafted in another state, and also make many more decisions interpreting the Uniform Rule available to attorneys.

Very truly yours,

RUSCONI, FOSTER, THOMAS & PIPAL

Ernie Rusconi

ERNEST RUSCONI

ER/bbr

WILBUR L. COATS
ATTORNEY AND COUNSELOR AT LAW

TELEPHONE (619) 748-6512

June 18, 1990

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

In re: Tenative Recommendation "Uniform Statutory Rule Against Perpetuities"

Dear Administrator:

I concur in the above cited recommendation.

Very truly yours,

Wilbur L. Coats

Wilbur L. Coats

12759 Poway Road, Suite 104, Poway, California 92064

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June 19, 1990

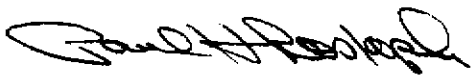
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Re: Uniform Statutory Rule Against Perpetuities

Gentlemen:

I have reviewed the CLRC tentative recommendation relating to the Uniform Statutory Rule Against Perpetuities. My estate planning practice causes me to constantly be aware of this ever-present problem. I am not certain whether learning a new rule will be helpful or more confusing, but I support the recommendation. It is my hope, however, that if this proposal is adopted and implemented into California Law, a booklet will be available from your organization containing the materials set forth in this recommendation as a long-term source book. CEB will undoubtedly have a program on this new rule, either as a special program or as part of the annual update. This material, either from your office or CEB, will be most helpful for practitioners.

Very truly yours,



Paul H. Roskoph

PHR/rer
PHR248/1727

FRANK M. SWIRLES
LAW CORPORATION

June 19, 1990

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Tentative Recommendations -

Gentlemen:

1. *Litigation involving decedents* - This appears to be straight forward. I have no objections to your recommendation.

2. *Elimination of the seven-year limit for durable powers of attorney for health care* - The recommendation is satisfactory, but the question is still with us. What do we do with all of those instruments which are now floating around and will probably lapse just before they are needed?

3. *Uniform Statutory Rule Against Perpetuities* - The uniform act is good. I would suggest that the language on page 30, in section 21230(c)(2) be changed by adding a "by" in the 3rd line so that the sentence reads, "The trust may be terminated by a court of competent jurisdiction on petition of the Attorney General or of any person who would be affected by the termination . . . . . ".

Very truly yours,

Frank M. Swirles

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June 27, 1990

California Law Revision Commission
4000 MIddlefield Road, Suite D-2
Palo Alto, California 94303-4739

Re: Uniform Statutory Rule
Against Perpetuities

Gentlemen:

I must tell you I find it distressing that so much paper and time has been devoted to this matter which even in the lesser scheme of probate will have an impact slightly less than a snowflake during a Sierra winter.

You may do whatever you want with this proposal with my blessing and curse.

Very truly yours,

IRWIN D. GOLDRING

IDG:hs

UNIVERSITY OF CALIFORNIA, LOS ANGELES UCLA

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SCHOOL OF LAW
405 HILGARD AVENUE
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July 19, 1990

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

Re: Uniform Statutory Rule Against Perpetuities

Dear John:

I have the tentative recommendation of the California Law Revision Commission proposing the adoption of the Uniform Statutory Rule Against Perpetuities (USRAP) in California. As you know, I and the large majority of teachers of perpetuities law in California have strongly opposed this legislation. It is unsound in policy, adds unneeded complexity to California's simple cy pres statute, will likely produce more lawsuits than does our present statute, and may have mischievous and unforeseen consequences. I will not repeat these arguments, made in earlier letters to the Commission. I will confine myself here to the ambiguities and unwarranted technical distinctions this legislation contains.

USRAP Creates New, Tricky, and
Unjustifiable Distinctions in California Land Law

Under USRAP, remainders and executory interests in violation of the common law Rule against Perpetuities are valid for 90 years. Under USRAP, nondonative options are not subject to any time limitation. In contrast, Calif. Civ. Code §885.030 provides that powers of termination (including what were known at common law as rights of entry and possibilities of reverter) expire after 30 years. If USRAP is enacted, the following results will be the law in California.

Example 1 (power of termination). O grants Blackacre to Women's Health Council, but if the Council ever supports abortion rights O and her heirs shall have a power to terminate the estate granted. At the end of 30 years, O's power of termination expires and Women's Health Council owns a fee simple absolute. (Cal. Civ. Code §885.030.)

Example 2 (executory interest). O grants Blackacre to Women's Health Council, but if the Council ever supports abortion rights then to O's son A and his heirs. A has an executory interest, not a power of termination, because the future interest is created in a transferee. (A power of termination can be retained only by the transferor.) A's

executory interest violates the common law Rule against Perpetuities. Under USRAP it is valid for 90 years.

Example 3 (option). For $1000, O grants Blackacre to Women's Health Council, but if the Council ever supports abortion rights O or her heirs have an option to refund the purchase price and retake the land. O has an option (not a power of termination), because retaking the fee simple requires the payment of money. Peele v. Wilson County Bd. of Educ., 56 N.C. App. 555, 289 S.E.2d 890 (1982). This option violates the common law Rule against Perpetuities, but under USRAP it is not subject to any time limitation and can extend forever.

There seems to be no persuasive justification for the different results in these examples. A forfeiture interest in a third party (Example 2) should not be valid for 90 years while a forfeiture interest in the grantor (Example 1) is valid for only 30 years. Nor does there seem to be any reason why a forfeiture interest in a grantor can exist forever if the grantor promises to give back the purchase price (Example 3). Surely the policies underlying Cal. Civ. Code §885.030 apply equally to all three examples. The effect of each of these interests upon the alienability of land is the same. The different results follow from applying different time-limitation rules to functionally equivalent interests with different labels. Yet these unjustifiable different results will be the law if USRAP is enacted.

The potential for malpractice liability here should not be overlooked. Any lawyer, by using two pieces of paper, can create an executory interest rather than a power of termination in her client, thus getting the 90-year rather than 30-year period. And any lawyer can completely eliminate a time limitation by casting the arrangement in the form of a purchase and call for return of the purchase price upon breach of the condition. If a lawyer does not explain these choices to a client, is it malpractice? California should be eliminating irrational, technical, unexpected distinctions that can trip up lawyers, rather than creating more of them. Functional equivalents should be treated alike.

Section 21230 Contains Numerous Ambiguities

Section 21230(a) provides that "A trust is not invalid . . . merely because the duration of the trust may exceed the time within which nonvested property interests must vest, if the interest of all the beneficiaries must vest, if at all, within that time." This sentence is confusing. Does the section apply only if all interests satisfy the common law Rule against Perpetuities? It seems to say that. The language "must vest, if at all," comes straight out of Gray's Rule. Does §21230(a) apply if the interests violate §21205(a) but the trust continues for 90 years under §21205(b)?

Confusion results from the fact that language in §21230(a) (Gray's language) is not parallel with the language of §21205(a) (USRAP's phrasing of Gray's Rule) and §21205(b) (wait-and-see rule). This section does not seem to take into account the fact that you have introduced a wait-and-see rule in addition to the common law Rule.

Section 21230(c)(1) provides that "If a trust has existed longer than the time within which nonvested property interests must vest . . . The trust shall be terminated upon the request of a majority of beneficiaries." There are several ambiguities here. First, the "time" within which nonvested interests "must vest" appears to refer back, according to my reading of the staff comment, to §21205(a) and (b) -- to wit, "21 years after the death of an individual then alive" or "90 years after its creation," whichever is longer -- but the use of "must vest" confuses matters somewhat. In any case, now follow the ambiguities: Does "an individual" (in the context of §21230(c)(1)) mean all individuals or any individual or only any individual who can affect vesting or only validating lives? If the individual can be any person who was alive when the trust was created, can a future beneficiary prevent termination of a trust by showing there was a person alive at the creation of the trust who died within 21 years before the suit to terminate the trust? Example: Trust created in year 2000. In year 2110 A, a beneficiary, sues to terminate trust. B, another beneficiary, produces a death certificate for C (wholly unrelated to vesting or the beneficiaries), born in 1999, who died in 2102. Can B prevent termination under §21230(c)(1) until 21 years after the death of C (and of other people B can prove were alive in 2000)?

You could remove this ambiguity by amending §21205(a) to read "21 years after the death of an individual then alive who can affect vesting," or by otherwise identifying the individuals who are measuring lives for purposes of §21230(c).

Second, how is the word "beneficiaries" in §21230(c)(1) defined? Does it include an income beneficiary as well as a principal beneficiary? Does it include a contingent or potential beneficiary, such as the beneficiary of a discretionary trust or a person who will receive trust principal if another person dies before termination of the trust?

Third, how is the "majority" of beneficiaries ascertained under §21230(c)(1)? Is a "majority" ascertained by reference to the number of vested and potential beneficiaries, regardless of the nature, size, and certainty of their shares? Are income beneficiaries counted the same as principal beneficiaries?

Fourth, to whom is the trust property distributed upon termination of the trust? Section 21230(c)(1) merely says that the trust shall be terminated. It does not say what disposition is to be made of the trust property. Section 21230(c)(1) is like a defective perpetuities saving clause that does not tell you what is done with the trust property if the clause kicks in.

Many answers to this question are possible, and how you answer the question will, I suppose, also affect who is counted as a "beneficiary." Are the life beneficiaries to be given the discounted present value of their life estates, or cut off from income completely, or given a fractional share of the principal commensurate with their fractional share of the income, or do the equitable estates merely turn into legal estates freed of trust management? Section 21230(c)(1) does not say.

Fifth, similar ambiguities exist in §21230(c)(2). This section says "any person who would be affected [by?] the termination" may sue for termination. "Affected" is an expansible word of little fixed meaning. Might this include the spouses or creditors of a beneficiary? Or the Commissioner of Internal Revenue?

Section 15210 (Honorary Trusts) Contains Ambiguities

First, it is not entirely clear whether an honorary trust or noncharitable purpose trust specifically measured by lives in being plus 21 years would be valid for the specified period or only for 21 years. That should be made plain. For example, suppose a testator left property to her children in trust for their lifetimes to maintain and support the horses on her farm. Suppose further that a horse lived for more than 21 years and that a child was still alive. Would the trust cease? Should §15210 say that the designated trust "may be performed by the trustee for 21 years, and no longer"?

Second, §15210 lumps together honorary trusts for pets, trusts for specific noncharitable purposes, and trusts for unincorporated noncharitable associations, but the last of these three types of trusts is treated differently at common law from the first two. An honorary trust or a trust for a specific noncharitable purpose is invalid merely because it may continue beyond the period of the Rule against Perpetuities. On the other hand, a trust for an unincorporated noncharitable association is not invalid merely because it may extend beyond the perpetuities period, provided the trustee or some person or persons may terminate the trust or expend the trust corpus within the period. For example, a trust for a Masonic Lodge -- an unincorporated society -- may lawfully go on beyond the perpetuities period provided the trustee or the members of the Lodge have power to terminate the trust at any time or spend the entire principal for Lodge purposes. See Restatement (Second) of Trusts §119, Comment c; Restatement of Property §380.

Section 15210 appears to treat these different types of trusts alike. Is it discarding the different treatment at common law? Would a trust for a Masonic Lodge be valid for 21 years only, even though the trustee has the power to expend the whole corpus for the purposes of the Lodge (valid at common law)?

In closing, I reiterate my opposition to this complex and unnecessary legislation. Existing California law, which has produced very little litigation in modern times, is far preferable to this complicated statute.

Sincerely,

Jesse Dukeminier
Maxwell Professor of Law

JD/2041/dhb

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July 19, 1990

CA LAW REV. COMM'N
JUL 23 1990
RECEIVED

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Re: Tentative Recommendation Relating To Uniform Statutory Rule Against Perpetuities

Dear Sir/Madam:

I have read this tentative recommendation. I did not read the appendix. I approve of the recommendation. Anything that you can do to simplify the rule against perpetuities is most welcome.

I think you should make the new rule applicable retroactively as well, if needed to save a disposition. As you have written it, this approach would not invalidate any interest valid under prior law, but it may help in some instances where the interest was invalid. Therefore, I prefer the alternative section 21202, which does not limit the applicability of the statute.

PHELPS, SCHWARZ & PHELPS

By: Ruth A. Phelps
Ruth A. Phelps

RAP:sp

HENRY ANGERBAUER, C.P.A.
4401 WILLOW GLEN CT.
CONCORD, CA 94521 -4344

7/21/90

California Law Revision Commission

I have reviewed your recommendation related to the Uniform Statutory Rule against Perpetuities as recommended by the National Conference of Commissioners on Uniform State Laws in 1986. I note that other states have enacted it into law already. I approve of your recommendations and conclusions and suggest you proceed to the legislature with your modifications to be enacted into law herewith. Thanks for letting me make my views known on this subject. Best Personal Regards

Sincerely

Hen

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DONALD J. MAGARIAN
DANIEL K. WHITEHURST
MORRIS M. SHERR
OF COUNSEL

July 26, 1990

OUR FILE NO. 9999

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303
Attn: John H. DeMoully, Executive Secretary

Re: Tentative Recommendation relating to Uniform Statutory Rule Against Perpetuities (March 1990)

Dear Mr. DeMoully:

With regard to the above-referenced proposal, I have only a few comments.

First, and most important, I do not see why any effort should be made to preserve interests which would otherwise violate the Rule Against Perpetuities (the "Rule"). By definition, such interests would vest after those now alive, in the relevant class, were dead. Should the law encourage any attempt to preserve an intention on the part of a dead individual to influence the course of action in society, or should a concerted effort be made to see that assets and their disposition were under the control of living minds, who will be better able to take into account changing circumstances? The Rule was a compromise concerning the preservation of such intentions, and had the virtue of being certain, though complex (compromises often are).

The proposal attempts to change the compromise by destroying the present certainty of the Rule in exchange for tying up property for ninety years, during which period any sales, leases, or contests would presumably have to be approved by the court with guardians ad litem for the possible interests in the proceedings envisioned by Proposed Section 21220. The courts should not have this burden: they are overworked enough as it is. When the virtue of uniformity is weighed in the scale

against poor social policy it represents, I believe a different answer is appropriate.

Second, I applaud the efforts of the Commission to apply definite limits on the creation of other interests, such as leases. The same policy consideration outlined in the paragraph above apply.

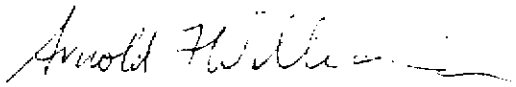
Third, even if the compromise needed to be adjusted, the division of the Rule into a "validating" and an "invalidating" side is conceptually poor. No such actions are necessary. The interests are valid or invalid under any system (including the "wait and see" regime suggested), and do not require separate statements. The coin flip is "heads" or "tails": the flip does not have a "heading" side and a "tailing" side. Any attempt to create the suggestion of movement in what should be a purely definitional matter invites ambiguity in interpretation. The Rule is criticized as ambiguous (however justly or unjustly) already: surely no more need be added.

Finally, I am curious concerning your preference for redundancy in drafting: §§21205, 21206 and 21207 appear to differ only in the use of the verbs customarily applied to the objects regulated. Surely it would be sufficient to indicate the matters covered by the new rule and then supply the rule?

I look forward to reading your recommendation and report to the Legislature.

Very truly yours,

DOWLING, MAGARIAN, PHILLIPS & AARON



Arnold F. Williams

AFW:ped

TICOR TITLE INSURANCE

John C. Hoag
Vice President and
Senior Associate Title Counsel

July 27, 1990

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

Re: Tentative Recommendation Relating To Uniform Statutory Rule Against Perpetuities

Dear Mr. DeMoully:

Thank you for providing me with an opportunity to comment on the tentative recommendations regarding perpetuities.

Title insurers have never intelligently relied upon the sixty year rule of Civil Code Section 715.6. (I have enclosed an excerpt from a section of a manual of title practices I write. The excerpt is from a section on Business and Commercial Leases and the effect of Civil Code Section 715.6 on the lease term.)

The reason, I recall, that the sixty year rule is unreliable is that at the time of its passage the California Constitution contained the common law rule.

I recommend you repeal and re-enact Civil Code Section 715.6.

Very truly yours,

John C. Hoag

JCH:j
encl:

cc: J. Bonita w/encl.
R. Turley w/encl.
N. Sterling w/encl.

Ticor Title Insurance Company of California
6300 Wilshire Boulevard. Suite 836. Los Angeles. California 90048 (213) 852-6155

32.00 IN GENERAL
Cont.

without approval of Management, if the term might not commence within 21 years, or if the term might extend beyond 99 years. (Haggerty v. City of Oakland, 161 CA 2d 407, 326 P 2d 957 (1958); contra: Wong v. DiGrazia, 60 C 2d 525, 35 Cal Rptr. 241 (1958)); (Epstein v. Zahlonte, 99 CA 2d 738, 222 P 2d 318 (1950))

A lease which provides for perpetual renewals is contrary to public policy and an attempt to create a perpetuity [Norrison v. Rossignol, 5 C 64 (1855)] except in the case of an eleemosynary (charitable) institution.

Statutory limitations on the permissible terms of particular leases are so numerous that detailed reference to them is made in Section 32.05.

NEW ✗ The sixty-year rule of Civil Code Section 715.6 shall not be relied upon for title insurance purposes.

6. Form and Contents

A lease which contains the foregoing essential elements and which clearly reflects an intent to establish the relationship of lessor and lessee will be sufficient regardless of its form and terminology used. The requisite intent to
NEW presently create a leasehold is usually disclosed by use of words such as hereby 'leases', 'lets', and 'demises' unto the lessee or words of similar import, followed by lessor's relinquishment of the property and the lessee's entry into possession.

NEW The use of the present tense of the verb 'leases' or 'lets' or 'demises' must be used in order to have present operative words of conveying a leasehold interest to lessee. For title insurance purposes, present operative words of conveyance of a leasehold are required.

E. Incidents and Characteristics of a Valid Lease

1. In General

A lease reflects BOTH the incidents and characteristics of an interest in real property

MEMORANDUM

TO: Stan Ulrich
FROM: Robert Hanna
RE: Concern about Civil Code Section 715.6
DATE: August 6, 1990

In his letter, John C. Hoag urges the Commission to recommend the repeal and reenactment of Civil Code Section 715.6 because the "state constitution contained the common law rule" against perpetuities when Section 715.6 was enacted, and Section 715.6 is either invalid or of questionable validity.

CONCLUSION

No cases passing on the validity of Section 715.6 have been found. As discussed below, however, language in several cases suggests that section was valid when enacted and would be so at present.

ANALYSIS

Section 715.6 was enacted in 1963 as part of a series of changes in perpetuities law in California. Note, *California Revises the Rule Against Perpetuities - Again,* 16 Stan. L. Rev. 177, 177-78 (1963); see 1963 Cal. Stat. ch 1455. At that time, former Section 9 of Article XX of the California Constitution was in force and stated that "[n]o perpetuities shall be allowed except for eleemosynary purposes." Note, *California Revises the Rule Against Perpetuities - Again,* 16 Stan. L. Rev. 177, 179, n. 11 (1963); see Cal. Civ. Code § 715 (West 1971). That constitutional provision incorporated the common law rule against perpetuities into the California Constitution. Victory Oil Co. v. Hancock Oil Co., 125 Cal. App. 2d 222, 227, 270 P.2d 604 (1954); Estate of Sahlender, 89 Cal. App. 2d 329, 339, 342, 201 P.2d 69 (1948); see also Estate of McCray, 204 Cal. 399, 405, 268 P. 647 (1928) (dicta); Estate of Hinckley, 58 Cal. 457, 472 (1881) (dicta); Dallapi v. Campbell 45 Cal. App. 2d 541, 544, 114 P. 2d 646 (1945) (dicta).

Even though the provisions of Section 715.6 differ from those of the common law, the section was probably constitutional. No case decided prior to the repeal of the constitutional provision in 1970 has been found that addressed the validity of Section 715.6, but language in several other cases suggests that it would have been held to be constitutional. It had been assumed that the Legislature had the power to regulate perpetuities law. Reagh v. Kelly, 10 Cal. App. 3d 1082, 1097 n.8, 89 Cal. Rptr. 425 (1970) (discussing former Civ. Code § 715.8, which broadly defined vesting (see 1963 Cal. Stat. ch. 1455, § 7); *Sahlender,* 89 Cal. App. 2d at 339; see also *Hinckley,* 58 Cal. at 472 (Legislature may reduce perpetuities period). Presumably, then, Section 715.6 would have been interpreted as such a regulation, especially in view of the preference for a construction supporting the statute's constitutionality. For constructional preference, *see, e.g.,* People v. Davis, 68 Cal. 2d 481, 483-84, 439 P.2d 651, 67 Cal. Rptr. 547 (1968); County of Madera v. Genderon, 59 Cal. 2d 789, 801, 382 P.2d 342, 31 Cal. Rptr. 302 (1963); Estate of Skinner, 47 Cal. 2d 290, 297, 303 P.2d 745 (1956); County of Los Angeles v. Legg, 5 Cal. 2d 349, 353, 55 P.2d 206 (1936).

The validity of Section 715.6 after repeal of the constitutional provision has not been questioned. No decision rendered after November 1970 has been found that explicitly upholds the validity of Section 715.6, but courts have instead assumed its validity without question and applied it to a variety of situations. *See, e.g.*, Housing Authority v. Monterey Senior Citizen Park, 164 Cal. App. 3d 348, 353-54, 210 Cal. Rptr. 4497 (1985); Estate of Ghiglia, 42 Cal. App. 3d 433, 441, 116 Cal. Rptr. 827 (1974); United California Bank v. Bottler, 16 Cal. App. 3d 610, 617, 94 Cal. Rptr. 227 (1971); see also Taormina Theosophical Community, Inc. v. Silver, 140 Cal. App. 3d 964, 977, 190 Cal. Rptr. 38 (1983) (application of Civ. Code § 715.6 unnecessary, but validity not questioned). Courts in the future probably would be reluctant to question the validity of Section 715.6.

The history of litigation involving Section 715.5 also supports this view. As in the case of Section 715.6, a case where the constitutionality of Section 715.5 was questioned has not been found, but Section 715.5 could have been held constitutional. See discussion above and references therein. The courts have also applied Section 715.5 after the repeal of the constitutional perpetuities provision without questioning its validity. *See, e.g.*, Strong v. Theis, 187 Cal. App. 3d 913, 920, 232 Cal. Rptr. 272 (1986); Taormina Theosophical Community, Inc. v. Silver, 140 Cal. App. 3d 964, 977, 190 Cal. Rptr. 38 (1983); Estate of Grove, 70 Cal. App. 3d 355, 364-65, 138 Cal. Rptr. 684 (1977); Estate of Ghiglia, 42 Cal. App. 3d 433, 441, 116 Cal. Rptr. 827 (1974); United California Bank v. Bottler, 16 Cal. App. 3d 610, 618, 94 Cal. Rptr. 227 (1971).

NEW SUBSECTION (e) FOR § 1 of USRAP

(e) **Perpetuity Saving or Termination Clauses; Partial Invalidity of Certain Double-pronged Clauses.** If, in measuring a period from the creation of a trust or other property arrangement, a clause in a governing instrument purports to postpone the vesting or termination of any interest or trust until, purports to disallow the vesting or termination of any interest or trust beyond, purports to require all interests or trusts to vest or terminate no later than, or operates in any similar fashion upon, the later of (i) the expiration of a period of time that exceeds 21 years or that exceeds or might exceed 21 years after the death of the survivor of lives in being at the creation of the trust or other property arrangement or (ii) the death of, or the expiration of a period not exceeding 21 years after the death of, the survivor of specified lives in being at the creation of the trust or other property arrangement, then the portion of the clause pertaining to the period of time that exceeds 21 years or that exceeds or might exceed 21 years after the death of the survivor of lives in being at the creation of the trust or other property arrangement must be disregarded, and the clause operates upon the death of, or upon the expiration of the period not exceeding 21 years after the death of, the survivor of the specified lives in being at the creation of the trust or other property arrangement.

NEW SUBSECTION 1(e) OF USRAP: AN EXPLANATION

The Uniform Statutory Rule Against Perpetuities was amended in 1990 to add a new subsection (e) to Section 1. Attached to this memorandum is the language of new subsection 1(e). This memorandum explains the meaning of new subsection 1(e) and the background of its development.

1. New Subsection 1(e) Transforms a Non-standard Perpetuity Saving or Termination Clause Into a Standard Clause

Subsection 1(e) only applies to a non-standard type of perpetuity saving or termination clause called a "double-pronged" (or "later of") clause. A double-pronged, "later of" clause states, in effect, that all interests in a trust must vest no later than the later of (i) 90 years after the creation of the trust or (ii) 21 years after the death of the survivor of specified lives in being at the creation of the trust. Some lawyers operating in USRAP states had begun to use this type of clause, not necessarily in a direct effort to use the Act to attempt to extend the allowable perpetuity period beyond that allowed by the common-law Rule Against Perpetuities, but as a protection against a malpractice claim. Subsection 1(e) states that, if such a clause is used, the "90-year" prong must be disregarded, and the clause operates upon the lives-in-being-plus-21-years prong.

Standard perpetuity saving or termination clauses do not utilize a double-pronged ("later of") approach. Standard clauses utilize only the live-in-being-plus-21-years period.[1] Hence, subsection 1(e) has no detrimental effect on standard perpetuity saving or termination clauses. In fact, by eliminating the "90-year" prong of a doube-pronged clause, subsection 1(e) reforms the non-standard, double-pronged clause to make it operate like a standard lives-in-being-plus-21-years clause.

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[1] Standard clauses need not utilize the full lives-in-being-plus-21-years period. The 21-year period following the death of the specified lives in being need not be fully used or used at all. Thus, a standard clause could be drafted to operate upon the expiration of any number of years following the death of the survivor of the specified lives in being, as long as the number of years does not exceed 21; or, a standard clause could be drafted to operate upon the death of the survivor of the specified lives in being. It also is possible, but highly unusual, to draft a clause without using specified lives in being, but only a specified number of years not exceeding 21.

2. Detailed Explanation of the Language of Subsection 1(e)

Lines 1 through 9. Subsection 1(e) appears to be complex, but it really is not. Lines 1 through 9 describe the various ways that perpetuity saving or termination clauses are worded. Thus, a clause that "purports to postpone the vesting or termination of any interest or trust until . . . the later of . . . ." is covered. So also is a clause that "purports to disallow the vesting or termination of any interest or trust beyond . . . the later of . . . ." And, so is a clause that "purports to require all interests or trusts to vest or terminate no later than . . . the later of . . . ."

To make sure that a double-pronged, "later of" clause is covered by subsection 1(e), no matter how it is worded, the catch-all phrase "or operates in any similar fashion upon, the later of" is added. Thus, a "double-pronged" clause that, for example, requires "all interests in a trust to vest, if any have not previously vested, either within a period of 21 years after the death of [specified lives in being] or within a fixed number of years allowed by applicable law, whichever period is longer," does in fact purport to operate upon the "later of" its two prongs and is covered by subsection 1(e). Subsection 1(e) is intended to cover "double-pronged" clauses, however they may be drafted.

Lines 9 through 15. Lines 9 through 15 describe the prongs to which subsection 1(e) applies. To take account of the possibility that the so-called "90-year" prong might be drafted in various ways, the statutory language describes this prong in these terms: "(i) the expiration of a period of time that exceeds 21 years or that exceeds or might exceed 21 years after the death of the survivor of lives in being at the creation of the trust or other property arrangement."[2]

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[2] That part of the statutory language "period of time that exceeds 21 years" is designed to prevent any attempted evasion of subsection 1(e) by drafting the so-called "90-year" prong as, for example, a prong using an "89 year" period. That part of the statutory language "that exceeds ... 21 years after the death of the survivor of lives in being at the creation of the trust or other property arrangement" is designed to apply to a "later of" clause that utilizes lives in being plus, say, 25 years (a period allowed by the perpetuity law of a small number of non-USRAP states). That part of the statutory language "that ... might exceed 21 years after the death of the survivor of lives in being at the creation of the trust or other property arrangement" is designed to apply to any variation of the so-called "90-year" prong, such as one drafted in terms of "the maximum period of

To take account of possible variations in drafting the so-called "lives-in-being-plus-21-years" prong, such as described supra footnote 1, the statutory language describes this prong in these terms: "(ii) the death of, or the expiration of a period not exceeding 21 years after the death of, the survivor of specified lives in being at the creation of the trust or other property arrangement."

Lines 15 through 23. These lines describe the consequence of using a double-pronged, "later of" clause. This part of subsection 1(e) directs that the so-called "90-year" prong must be disregarded or eliminated, and the clause must operate on the other prong only, that other prong being the so-called lives-in-being-plus-21-years prong. Lines 15 through 23 state that, if such a double-pronged ("later of") clause is used, then the prong covered by the statutory language "(i) the expiration of a period of time that exceeds 21 years or that exceeds or might exceed 21 years after the death of the survivor of lives in being at the creation of the trust or other property arrangement" must be disregarded, and the clause operates upon the other prong only, covered by the statutory language "the death of, or the expiration of a period not exceeding 21 years after the death of, the survivor of specified lives in being at the creation of the trust or other property arrangement." In effect, subsection 1(e) transforms a double-pronged clause into a standard lives-in-being-plus-21-years clause.

1. Rationale of Subsection 1(e)

Why must the so-called "90-year" prong of a double-pronged, "later of" clause be disregarded? The rationale of subsection 1(e) is that such a clause should not be allowed to be effective because, if it were, it would authorize an inappropriate use of USRAP's 90-year period.

USRAP's 90-year period is designed to approximate the period that, on average, would be produced by using actual lives in being plus 21 years. The reason why USRAP adopted a flat 90-year period for its wait-and-see element was to avoid the difficulties of identifying and tracing actual lives in being on a case-by-case basis. A flat 90 years is more efficient than other wait-and-see statutes or methods. It avoids the difficulties and costs of identifying and tracing actual measuring lives, which arise under those other statutes or methods because under them

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time that applicable law permits"; this part of the language applies to any variation, however drafted, that describes a period of time that might, in a given case, exceed 21 years after the death of the survivor of lives in being.

there is the need to set forth a list or formula that will identify actual measuring lives in cases in which the trust document does not specify the lives to be used.

Like standard perpetuity saving or termination clauses, a double-pronged, "later of" clause itself specifies the lives to be used in measuring the lives-in-being-plus-21-years period. The actual period produced by these specified lives in any given case can be shorter or longer than USRAP's 90-year average. By utilizing the 90-year period in the clause itself, the double-pronged clause inappropriately turns the 90-year <u>average</u> into a <u>minimum</u>. When the specified-lives-in-being-plus-21-years portion of the clause turns out to be longer than 90 years, it controls; but when that portion of the clause turns out to be shorter than 90 years, the 90-year period controls. This is inappropriate because it prevents the 90-year period from operating in the manner in which it was designed to operate -- as an average.

<u>4. New Subsection 1(e) Prevents Possible Loss of "Grandfathered" Status Under the Federal Generation-skipping Transfer Tax</u>

In 1988, two years after USRAP was promulgated, the U.S. Treasury Department issued a temporary regulation under the "grandfathering" provisions of the federal generation-skipping transfer tax. The regulation, Temp. Treas. Reg. § 26.2601-1(b)(1)(v)(B)(2) (1988), states that "grandfathered" status of a trust can be lost if the donee of a nongeneral power of appointment exercises that power in a manner than can postpone vesting beyond 21 years after the death of the survivor of lives in being at the creation of the trust.

Although USRAP's 90-year period represents an approximation of the period produced by the lifetime of the survivor of lives in being plus 21 years, the literal wording of this temporary regulation, as originally promulgated, did not take cognizance of USRAP's flat period of years approach.

In late March of 1990, the President of the Uniform Laws Conference and the Director of Research of the Joint Editorial Board for the Uniform Probate Code wrote to the Treasury Department drawing to Treasury's attention USRAP's 90-year approach and petitioning for an amendment of the temporary regulation to take cognizance of that approach.

Shortly thereafter, the Treasury Department agreed to amend the regulation to treat the 90-year period as the equivalent of a lives-in-being-plus-21-years period. As revised, the regulation will recognize that USRAP's 90-year period is a valid approximation of the period that, on average, would be produced by lives in being plus 21 years.

The Treasury Department raised only one concern, which was the use of a double-pronged, "later of" clause by the donee of a nongeneral power of appointment when exercising that power under a "grandfathered" trust. As amended, the regulation will provide that the use of a double-pronged, "later of" clause will cause a loss of grandfathered status, unless state law requires the "90-year" prong to be disregarded. Subsection 1(e), added to USRAP in 1990, has been reviewed and accepted by the Treasury Department as satisfying that requirement.

Note that, under the regulation as it will be amended, loss of "grandfathered" status can only occur with respect to a document that actually uses a double-pronged clause. No loss of "grandfathered" status can arise under USRAP merely because a document might have, but did not, use such a clause. And, only then can "grandfathered" status be lost if a state has failed to include subsection 1(e) in its enactment. Nevertheless, even though the prospect of loss of "grandfathered" status is quite narrowly constricted, a state enacting USRAP should protect its citizens from even this narrowly constricted possible loss of "grandfathered" status by including subsection 1(e) in its enactment; and a state that has previously enacted USRAP should amend that enactment by adding subsection 1(e) as quickly as possible.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

relating to

Uniform Statutory Rule Against Perpetuities

March 1990

This tentative recommendation is being distributed so interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Comments sent to the Commission are a public record, and will be considered at a public meeting of the Commission. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe it should be revised.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN **JULY 30, 1990.**

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

STATE OF CALIFORNIA GEORGE DEUKMEJIAN, Governor

CALIFORNIA LAW REVISION COMMISSION
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Letter of Transmittal

This tentative recommendation proposes enactment of the Uniform Statutory Rule Against Perpetuities and would make other conforming changes.

This tentative recommendation was prepared pursuant to Resolution Chapter 37 of the Statutes of 1980.

CONTENTS

APPENDIX

[Adapted from Official Comments to the Uniform Statutory Rule Against Perpetuities (1986)]

RECOMMENDATION

Background

The common law rule against perpetuities, as developed in England beginning in the 17th Century, invalidates attempts to create interests in property that would remain contingent for more than the lives of certain people alive when the interest was created plus 21 years. The rule is now most commonly known in Professor Gray's formulation: "No interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest."[1] A central purpose of the rule is to mediate between those who seek to tie property up for generations to come and future generations who wish to control the property, free of dead hand control.

In general, the rule permits a person to create property interests that will vest in his or her grandchildren who reach 21 years of age, but not to create interests that will vest only in great grandchildren.[2] The common law rule can operate harshly, however, since it invalidates a disposition if there is any conceivable possibility that it will violate the rule, regardless of whether it is likely to do so, and regardless of how reasonable the disposition appears. Individuals who draft their own wills or trusts without expert advice can easily run afoul of the rule, but many lawyers have also failed the test, notwithstanding the prominent position the rule enjoys in the law school curriculum.[3]

The history of the rule against perpetuities in California is convoluted and confusing. From the early constitutional provision that "[n]o perpetuities shall be allowed except for

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1. J. Gray, The Rule Against Perpetuities § 201 (4th ed. 1942).

2. See Halbach, *Rule Against Perpetuities*, in California Will Drafting Practice § 12.30, at 566 (Cal. Cont. Ed. Bar 1982).

3. See, e.g., Lucas v. Hamm, 56 Cal. 2d 583, 592, 364 P.2d 685, 15 Cal. Rptr. 821 (1961) ("[F]ew, if any, areas of the law have been fraught with more confusion or concealed more traps for the unwary draftsman.").

eleemosynary purposes,"[4] the rule has developed through decades of judicial interpretation, backtracking, and refinement, and periodic legislative attempts at clarification.[5] California law includes the common law rule against perpetuities, with its lives in being plus 21 years,[6] as well as an alternative 60-year period in gross.[7] The harshness of judging the validity of nonvested interests at the time of their creation is mitigated by a *cy pres* provision permitting reform of instruments to avoid violation of the rule.[8] Knowledgeable lawyers will also insert a perpetuities savings clause as appropriate to avoid violating the rule against perpetuities.

National movements for reform of perpetuities law have culminated in the Uniform Statutory Rule Against Perpetuities[9], approved by the National Conference of Commissioners on Uniform State Laws in 1986.[10] In the three years since it was approved, the Uniform Statute has been enacted in eleven states — Connecticut, Florida, Georgia, Massachusetts, Michigan, Minnesota, Montana, Nebraska,

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4. Former Cal Const. art. XX, § 9 (repealed 1970); now stated in Civ. Code § 715.

5. See generally 4 B. Witkin, Summary of California Law *Real Property*, §§ 377-404, at 568-92 (9th ed. 1987); Halbach, *Rule Against Perpetuities*, in California Will Drafting Practice §§ 12.1-12.54, at 547-79 (Cal. Cont. Ed. Bar 1982); Halbach, *id.*, §§ 12.1-12.54, at 215-20 (Cal. Cont. Ed. Bar Supp. 1988); Simes, *Perpetuities in California Since 1951*, 18 Hastings L.J. 247 (1967); Taylor, *A Study Relating to the "Vesting" of Interests Under the Rule Against Perpetuities*, 9 Cal. L. Revision Comm'n Reports 909, 910-15 (1969); Comment, *Rule Against Perpetuities: The Second Restatement Adopts Wait and See*, 19 Santa Clara L. Rev. 1063, 1081-91 (1979); Note, *California Revises the Rule Against Perpetuities—Again*, 16 Stan. L. Rev. 177-90 (1963).

6. Civ. Code § 715.2. The section is quoted in the text *infra*.

7. Civ. Code § 715.6 provides as follows:

> 715.6. No interest in real or personal property which must vest, if at all, not later than 60 years after the creation of the interest violates Section 715.2 of this code.

8. Civ. Code § 715.5.

9. Unif. Statutory Rule Against Perpetuities (1986), 8A U.L.A. 132 (Supp. 1989) [hereinafter cited as "USRAP" or "Uniform Statute"].

10. USRAP has also been approved by the House of Delegates of the American Bar Association, the Board of Regents of the American College of Probate Counsel, and the Board of Governors of the American College of Real Estate Lawyers.

Nevada, Oregon, and South Carolina[11] — and is under consideration in others.

The Uniform Statute has two principal virtues. It provides a simple, easily administered rule and it offers the best hope for achieving uniformity among the states.

Summary of USRAP

The Uniform Statute retains the common law rule against perpetuities as a validating rule,[12] but suspends its operation as an invalidating rule for a 90-year wait-and-see period running from the creation of the interest.[13] The 90-year waiting period was chosen by the Uniform Drafting Committee as an approximation of (or proxy for) the common law period of lives in being plus 21 years.[14] On petition of an interested person, a court may exercise a *cy pres* power to reform the disposition to approximate the donative transferor's manifested plan of distribution. The right of reformation does not arise until it is necessary. Generally, a disposition that violates the common law rule is not in need of reformation

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11. See 1989 Conn. Acts 44; Fla. Stat. Ann. § 689.225 (West Supp. 1990); 1990 Ga. Laws ch. __; 1989 Mass. Acts 668; Mich. Comp. Laws Ann. §§ 554.71-554.78 (West Supp. 1990); Minn. Stat. Ann. §§ 501A.01-501A.07 (effective Jan. 1, 1991) (West 1990); Mont. Code Ann. §§ 70-1-801 to 70-1-807 (19_); Neb. Rev. Stat. §§ 76-2001 to 76-2008 (Supp. 1989); Nev. Rev. Stat. §§ 111.103-111.1039 (Supp. 1989); 1989 Or. Laws ch. 208; S.C. Code Ann. §§ 27-6-10 to 27-6-70 (Law. Co-op Supp. 1989).

12. The Prefatory Note to USRAP distinguishes between the validating and invalidating sides of the common law rule as follows:

> *Validating Side of the Common-law Rule:* A nonvested property interest is valid when it is created (initially valid) if it is then *certain* to vest or terminate (fail to vest) — one or the other — no later than 21 years after the death of an individual then alive.
>
> *Invalidating Side of the Common-law Rule:* A nonvested property interest is invalid when it is created (initially valid) if there is no such certainty.

13. For a fuller discussion, see the Prefatory Note to USRAP.

14. For background on the 90-year period, see Waggoner, *The Uniform Statutory Rule Against Perpetuities*, 21 Real Prop. Prob. & Tr. J. 569, 575-90 (1986); Waggoner, *The Uniform Statutory Rule Against Perpetuities: The Rationale of the 90-Year Waiting Period*, 73 Cornell L. Rev. 157 (1988).

until the 90-year period expires or, in the case of a class gift, when a member of a class is entitled to enjoyment of a share before the expiration of the 90-year period.[15]

The Uniform Statute would also make other changes which are discussed below and in the comments to the sections in the proposed legislation.

USRAP and California Law Compared

Statement of the Rule Against Perpetuities

Civil Code Section 715.2 provides the basic California rule in the following language:

> 715.2. No interest in real or personal property shall be good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest and any period of gestation involved in the situation to which the limitation applies. The lives selected to govern the time of vesting must not be so numerous or so situated that evidence of their deaths is likely to be unreasonably difficult to obtain. It is intended by the enactment of this section to make effective in this State the American common-law rule against perpetuities.

The Uniform Statute provides a simplified form of this rule, holding that a "nonvested property interest is invalid" unless "when the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive" or it "vests or terminates within 90 years after its creation."[16] Thus, the common law rule against perpetuities continues as a validating principle, but its invalidating side is postponed in operation for the 90-year waiting period. No major changes would be made in the validating side of the

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15. Reformation may also be had before the expiration of the 90-year period in the unlikely case where an interest can vest beyond the 90-year period but not before. See USRAP § 3(3) and comment.

16. See USRAP § 1(a). Special applications of the rule are provided for powers of appointment. See USRAP § 1(b)-(c).

rule by substituting the language of the Uniform Statute for the California provision.[17]

Cy Pres

In 1963, California enacted a *cy pres* rule permitting reformation of a disposition of property that otherwise would violate the rule against perpetuities "if and to the extent" that it can be reformed or construed to comply with the rule and to give effect to the general intent of the creator of the interest "whenever that general intent can be ascertained."[18] Reformation can take place at any time after creation of the interest. Although the *cy pres* rule provides an opportunity to avoid some harsh applications of the rule against perpetuities, its reliance on judicial remedies is inefficient and potentially expensive.

The Uniform Statute also provides a *cy pres* rule, as noted above, but makes resort to it unlikely because the 90-year waiting period should solve most of the problems before reformation would be necessary. Since the common law rule does not act to invalidate a disposition until the 90-year period has expired, the right of reformation under the Uniform Statute does not generally arise until it becomes useful, i.e., at the end of the waiting period. However, in the case of a class gift, where a member of a class is entitled to enjoyment of a share before that time, the disposition may be reformed on petition of an interested person. The *cy pres* standard under the Uniform Statute differs from the California standard, providing for reformation in the manner that "most closely approximates the transferor's manifested plan of distribution."[19]

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17. The subsidiary doctrines of the common law rule are approved or disapproved in a comment to Section 1 of USRAP. A revised form of this comment is set out in the Background to Probate Code Section 21201 of the proposed legislation *infra*.

18. Civ. Code § 715.5; see also Note, *California Revises the Rule Against Perpetuities — Again*, 16 Stan. L. Rev. 177, 186-90 (1963).

19. USRAP § 3; see also Waggoner, *The Uniform Statutory Rule Against Perpetuities*, 21 Real Prop. Prob. & Tr. J. 569, 595-98 (1986).

Exclusions from Rule

By common law and statute, some types of interests are excluded from the coverage of the rule against perpetuities. The Uniform Statute explicitly excludes a variety of interests and in some respects would change California law.

Commercial Transactions. The California rule has been applied to commercial transactions, e.g., where a lease is to commence on completion of construction.[20] The Uniform Statute does not apply to commercial (nondonative) transactions.[21] The period of a life in being plus 21 years is not relevant to commercial transactions.[22] It makes no sense to apply a rule based on family-oriented donative transfers to interests created by contract whose nature is determined by negotiations between the parties. Limitations on the duration of commercial interests is better handled directly.[23]

Charitable Dispositions. California law has always permitted perpetuities for eleemosynary purposes.[24] The Uniform Statute also excludes interests held by "a charity, government, or governmental agency or subdivision, if the nonvested property interest is preceded by an interest held by another charity, government, or governmental agency or subdivision."[25]

Insurance and Retirement Plans. By statute, California exempts trusts of hospital service contracts, group life insurance, group disability insurance, group annuities, profit-sharing, and retirement plans from the rule against

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20. See, e.g., Wong v. Di Grazia, 60 Cal. 2d 525, 386 P.2d 817, 35 Cal. Rptr. 241 (1963); Haggerty v. Oakland, 161 Cal. App. 2d 407, 326 P.2d 957 (1958).

21. See USRAP § 4(1) and comment.

22. See Waggoner, *The Uniform Statutory Rule Against Perpetuities*, 21 Real Prop. Prob. & Tr. J. 569, 599-600 (1986).

23. See, e.g., Civ. Code §§ 717-719 (limitations on duration of leases), 882.020-882.040 (ancient mortgages and deeds of trust), 883.210-883.270 (termination of dormant mineral rights).

24. Civ. Code § 715 (continuing former Cal. Const. art. XX, § 9); see also 4 B. Witkin, Summary of California Law *Real Property* § 399, at 587-88 (9th ed. 1987).

25. See USRAP § 4(5).

perpetuities.[26] The Uniform Statute exempts similar property interests from the statutory rule against perpetuities in different language.[27] The recommended legislation would continue much of the California language in addition to the exemption in the Uniform Statute.

Additional Exemptions. The Uniform Statute provides other explicit exemptions from the rule, including a fiduciary's administrative powers (as opposed to distributive powers),[28] a trustee's discretionary power to distribute principal before termination of a trust to a beneficiary having an indefeasibly vested interest in income and principal,[29] a power to appoint a fiduciary,[30] and any property interest, power of appointment, or arrangement that was not subject to the common law rule against perpetuities.[31]

Miscellaneous Matters

The invalidating side of the common law rule also strikes down various nonvested dispositions such as leases to commence in the future, nonvested options in gross, nonvested easements in gross, and honorary trusts. The Uniform Statute postpones the invalidating operation of the common law rule for 90 years and thus presents the possibility that these kinds of peripheral interests would exist for 90 years, with no way to invalidate them.

The proposed law places a 30-year limit on the period of time that commencement of a lease may be postponed.[32] The proposed law also places a 21-year limit on honorary trusts.[33]

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26. Civ. Code §§ 715.3, 715.4.
27. USRAP § 4(6).
28. USRAP § 4(2). This provision specifically lists the power to sell, lease, or mortgage property, and the power to determine principal and income.
29. USRAP § 4(4).
30. USRAP § 4(3).
31. USRAP § 4(7).
32. See proposed Civil Code Section 718. This section is drawn from a draft prepared by the USRAP Drafting Committee.
33. See proposed Probate Code Section 15210. This section is drawn from a draft prepared by the USRAP Drafting Committee.

The marketable title statutes provide sufficient remedies to handle problems presented by nonvested options and easements.[34]

One unresolved problem concerns the interrelation of the Uniform Statute and the generation-skipping transfer tax as to pre-1986 irrevocable trusts.[35] The Commission is informed that efforts are being made to modify the applicable federal regulations to take account of the Uniform Statute. If this effort is unsuccessful, the proposed law will be revised so that it does not apply to such trusts.

Prospective Application

The Uniform Statute would apply only to dispositions made by instruments executed after the operative date.[36] This avoids the need for individuals and attorneys to review and revise instruments that were drafted before the operative date of the new law.[37]

Illustration

The operation of the common law, the California rule, and the Uniform Statute can be seen by way of an example: Suppose that A gives property in a testamentary trust to his daughter D for life, and the remainder to D's children who reach 25. Assume that D is alive at A's death.

This disposition would fail under the common law rule since the remainder interest could fail to vest within 21 years after the D's death.

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34. See Civ. Code §§ 884.010-884.030 (options), 887.010-887.090 (easements).

35. Irrevocable trusts created before 1986 were "grandfathered" so that the generation-skipping transfer tax does not apply, but all interests in such trusts must vest within 21 years after lives in being at the creation of the trust or the trust is "ungrandfathered." See Temp. Treas. Reg. § 26.2601-1(b)(V)(B)(2). Exercise of a power of appointment in a grandfathered trust may be exercised in a manner that violates this regulation, though not the Uniform Statute, thereby subjecting the trust to the generation-skipping transfer tax.

36. See USRAP § 5(a).

37. The proposed law differs from the rule in Section 5 of USRAP, which operates prospectively from the date of "creation" of the interest, not execution of the instrument creating the instrument.

Under California law, the interest could be saved by a petition to reform the disposition under Civil Code Section 715.5 to accomplish A's general intentions. The court could reduce the required age of D's children from 25 to 21 years.[38] Or, in appropriate circumstances, the will might be construed to provide that the remainder beneficiaries included only A's grandchildren alive at A's death.[39] Legal scholars have also urged that courts consider inserting an appropriate perpetuities saving clause in the course of reformation to preserve the 25-year contingency where possible.[40]

Under the Uniform Statute, we would wait up to 90 years following A's death to see if the rule has been violated. In a normal case, this will be more than enough time and the property will pass as directed.[41] If the rule is violated at the end of the waiting period, such as where a grandchild was born after A's death and will not reach age 25 before the 90th anniversary of A's death, reformation would be appropriate under the Uniform Statute.[42]

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38. See, e.g., Estate of Ghiglia, 42 Cal. App. 3d 433, 442-43, 116 Cal. Rptr. 827 (1974) (required age reduced from 35 to 21 years).

39. See, e.g., Estate of Grove, 70 Cal. App. 3d 355, 363-65, 138 Cal. Rptr. 684 (1977).

40. See, e.g., Dukeminier, *The Uniform Statutory Rule Against Perpetuities: Ninety Years in Limbo*, 34 UCLA L. Rev. 1023, 1071-72 (1987) (insert saving clause immediately when disposition found to violate rule); Restatement (Second) of Property (Donative Transfers) § 1.5 comment d & Reporter's Note 5 (1983) (reformation in age contingency situations at end of wait-and-see period).

41. For a more detailed discussion of this type of case, see Example (3) in the comment to USRAP § 3 (set out in revised form in the Background to Probate Code Section 21220 of the proposed legislation *infra*).

42. Reformation may take place under USRAP before the 90-year period has expired since some of A's grandchildren may be have reached age 25. These grandchildren would be entitled to petition for reformation and it would be appropriate for the court to hold the share of the grandchild under 25 until the 90th anniversary of A's death.

Conclusion

The Commission recommends adoption of the Uniform Statute in California for a number of reasons.[43] The Uniform Statute (1) provides an easily administered rule, eliminating a number of complexities and ambiguities associated with the traditional rule, (2) offers the prospect for a significant degree of unity among the states, (3) eliminates the inappropriate coverage of commercial transactions from the rule, (4) reinforces the *cy pres* approach that is already a part of California law, and (5) avoids the need to litigate the validity of dispositions that will work out within the 90-year wait-and-see period.

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43. See also the study by the Commission's consultant on this subject, Charles A. Collier, Jr., *The Uniform Statutory Rule Against Perpetuities* (February 1989) (on file at Commission's office).

PROPOSED LEGISLATION

Note. This tentative recommendation includes edited versions of the official comments from USRAP, which are set out in the Appendix. These comments have been edited to eliminate nonrelevant material, such as explanations directed toward those considering enactment of USRAP, and to retain material of potential interest to practitioners and courts seeking guidance after its enactment.

Probate Code §§ 21200-21231 (added). Uniform Statutory Rule Against Perpetuities and Related Provisions

PART 2. PERPETUITIES

CHAPTER 1. UNIFORM STATUTORY RULE AGAINST PERPETUITIES

Article 1. General Provisions

§ 21200. Short title

21200. This chapter shall be known and may be cited as the Uniform Statutory Rule Against Perpetuities.

Comment. Section 21200 provides a short title for this chapter and is the same as Section 6 of the Uniform Statutory Rule Against Perpetuities (1986). As to the construction of uniform acts, see Section 2(b). This part applies only to property interests created by instruments executed on or after January 1, 1992. See Section 21202. For the rule applicable to property interests created by instruments executed before January 1, 1992, see Civil Code §§ 715-716.5.

§ 21201. Common law rule against perpetuities superseded

21201. This chapter supersedes the common law rule against perpetuities.

Comment. Section 21201 is the same in substance as part of Section 9 of the Uniform Statutory Rule Against Perpetuities (1986). This chapter supersedes the common law rule against perpetuities, which is specifically incorporated into California law by Civil Code Section 715.2 (applicable only to interests created by instruments executed before January 1, 1992). This chapter and Chapter 2 (commencing with Section 21230) also supersede the statutory provisions relating to perpetuities in Civil Code Sections 715-716.5 and 1391.1-1391.2, as to property interests created by instruments executed on or after January 1, 1992. See Section 21202 (prospective application).

Background. For background on Section 21201, adapted from the official comments to the Uniform Statutory Rule Against Perpetuities (1986), see the Appendix at page 37 *infra*.

§ 21202. Prospective application

21202. (a) Except as provided in subdivision (b), this part applies only to nonvested property interests and powers of appointment created by instruments executed on or after January 1, 1992.

(b) For purposes of this section, a nonvested property interest or a power of appointment created by the exercise of a power of appointment is created when the power is irrevocably exercised or when a revocable exercise becomes irrevocable.

Comment. Section 21202 is similar to Section 5(a) of the Uniform Statutory Rule Against Perpetuities (1986), except that it applies from the date of execution of the instrument that creates an interest, rather than the date of "creation" of the interest. Under Section 21202, the new statutory rule against perpetuities and related provisions apply only prospectively. For the rule applicable to property interests created by instruments executed before January 1, 1992, see Civil Code §§ 715-716.5.

Background. For background on Section 21202, adapted from the official comments to the Uniform Statutory Rule Against Perpetuities (1986), see the Appendix at page 45 *infra*.

Note. *The Commission would like to know the views of interested persons on whether the Uniform Statute should apply retroactively — i.e., to instruments executed before its operative date. This approach would not invalidate any interest valid under prior law. Nor would it reopen any matters where the interest had been held invalid before the operative date or disturb any settlements made under prior law. The following draft section would make USRAP apply to instruments executed before its operative date:*

§ 21202 [alternative]. Application of chapter

21202. (a) Except as provided in subdivision (b), this part applies to nonvested property interests and powers of appointment regardless of whether they were created before, on, or the operative date of this part.

(b) This chapter does not apply to any nonvested property interest or power of appointment the validity of which has been determined in a judicial proceeding or by a settlement among interested persons.

Comment. *Subdivision (a) of Section 21202 applies the new statutory rule against perpetuities to nonvested interests whether*

created before or after January 1, 1992, except as provided in subdivision (b). This differs from Section 5 of the Uniform Statutory Rule Against Perpetuities (1986).

Article 2. Statutory Rule Against Perpetuities

§ 21205. Statutory rule against perpetuities as to nonvested property interests

21205. A nonvested property interest is invalid unless one of the following conditions is satisfied:

(a) When the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive.

(b) The interest either vests or terminates within 90 years after its creation.

Comment. Section 21205 is the same in substance as Section 1(a) of the Uniform Statutory Rule Against Perpetuities (1986). See also Sections 21230 (validity of trusts), 21231 (spouse as life in being). This part applies only to property interests created by instruments executed on or after January 1, 1992. See Section 21202. For the rule applicable to property interests created by instruments executed before January 1, 1992, see Civil Code §§ 715-716.5.

Background (adapted from Prefatory Note to Uniform Statute). This article sets forth the statutory rule against perpetuities (statutory rule). The statutory rule and the other provisions of this part supersede the common law rule against perpetuities (common law rule) and replace the former statutory version. See Section 21201. Section 21205 deals with nonvested property interests; Sections 21206 and 21207 deal with powers of appointment.

Subdivision (a) of Section 21205 codifies the validating side of the common law rule. In effect, subdivision (a) provides that a nonvested property interest that is valid under the common law rule is valid under the statutory rule and can be declared so at its inception. In such a case, nothing would be gained and much would be lost by invoking a waiting period during which the validity of the interest or power is in abeyance.

Subdivision (b) establishes the wait-and-see rule by providing that an interest or a power of appointment that is not validated by subdivision (a), and hence would have been invalid under the common law rule, is nevertheless valid if it does not actually remain nonvested when the allowable 90-year waiting period expires.

For additional background on Section 21205, adapted from the official comments to the Uniform Statutory Rule Against Perpetuities (1986), see the Appendix at page 47 *infra*.

§ 21206. Statutory rule against perpetuities as to general power of appointment not presently exercisable because of condition precedent

21206. A general power of appointment not presently exercisable because of a condition precedent is invalid unless one of the following conditions is satisfied:

(a) When the power is created, the condition precedent is certain to be satisfied or become impossible to satisfy no later than 21 years after the death of an individual then alive.

(b) The condition precedent either is satisfied or becomes impossible to satisfy within 90 years after its creation.

Comment. Section 21206 is the same in substance as Section 1(b) of the Uniform Statutory Rule Against Perpetuities (1986). See also Sections 21230 (validity of trusts), 21231 (spouse as life in being). This chapter applies only to property interests created by instruments executed on or after January 1, 1992. This part applies only to property interests created by instruments executed on or after January 1, 1992. See Section 21202. For the rule applicable to property interests created by instruments executed before January 1, 1992, see Civil Code §§ 715-716.5.

Background (adapted from Prefatory Note to Uniform Statute). This article sets forth the statutory rule against perpetuities (statutory rule). The statutory rule and the other provisions of this part supersede the common law rule against perpetuities (common law rule) and replace the former statutory version. See Section 21201. Section 21205 deals with nonvested property interests; Sections 21206 and 21207 deal with powers of appointment.

Subdivision (a) of Section 21206 codifies the validating side of the common law rule. In effect, subdivision (a) provides that a power of appointment that is valid under the common law rule is valid under the statutory rule and can be declared so at its inception. In such a case, nothing would be gained and much would be lost by invoking a waiting period during which the validity of the interest or power is in abeyance.

Subdivision (b) establishes the wait-and-see rule by providing that an interest or a power of appointment that is not validated by subdivision (a), and hence would have been invalid under the common law rule, is

nevertheless valid if the power ceases to be subject to a condition precedent or is no longer exercisable when the allowable 90-year waiting period expires.

For additional background on Section 21206, adapted from the official comments to the Uniform Statutory Rule Against Perpetuities (1986), see the Appendix at page 60 *infra*.

§ 21207. Statutory rule against perpetuities as to nongeneral power of appointment or general testamentary power of appointment

21207. A nongeneral power of appointment or a general testamentary power of appointment is invalid unless one of the following conditions is satisfied:

(a) When the power is created, it is certain to be irrevocably exercised or otherwise to terminate no later than 21 years after the death of an individual then alive.

(b) The power is irrevocably exercised or otherwise terminates within 90 years after its creation.

Comment. Section 21207 is the same in substance as Section 1(c) of the Uniform Statutory Rule Against Perpetuities (1986). See also Sections 21230 (validity of trusts), 21231 (spouse as life in being). This chapter applies only to property interests created by instruments executed on or after January 1, 1992. This part applies only to property interests created by instruments executed on or after January 1, 1992. See Section 21202. For the rule applicable to property interests created by instruments executed before January 1, 1992, see Civil Code §§ 715-716.5.

Background (adapted from Prefatory Note to Uniform Statute). This article sets forth the statutory rule against perpetuities (statutory rule). The statutory rule and the other provisions of this part supersede the common law rule against perpetuities (common law rule) and replace the former statutory version. See Section 21201. Section 21205 deals with nonvested property interests; Sections 21206 and 21207 deal with powers of appointment.

Subdivision (a) of Section 21207 codifies the validating side of the common law rule. In effect, subdivision (a) provides that a power of appointment that is valid under the common law rule is valid under the statutory rule and can be declared so at its inception. In such a case, nothing would be gained and much would be lost by invoking a waiting period during which the validity of the interest or power is in abeyance.

Subdivision (b) establishes the wait-and-see rule by providing that an interest or a power of appointment that is not validated by subdivision (a), and hence would have been invalid under the common law rule, is nevertheless valid if the power ceases to be subject to a condition precedent or is no longer exercisable when the allowable 90-year waiting period expires.

For additional background on Section 21207, adapted from the official comments to the Uniform Statutory Rule Against Perpetuities (1986), see the Appendix at page 60 *infra*.

§ 21208. Possibility of posthumous birth disregarded

21208. In determining whether a nonvested property interest or a power of appointment is valid under this article, the possibility that a child will be born to an individual after the individual's death is disregarded.

Comment. Section 21208 is the same in substance as Section 1(d) of the Uniform Statutory Rule Against Perpetuities (1986). This part applies only to property interests created by instruments executed on or after January 1, 1992. See Section 21202. For the rule applicable to property interests created by instruments executed before January 1, 1992, see Civil Code §§ 715-716.5.

Background. For background on Section 21208, adapted from the official comments to the Uniform Statutory Rule Against Perpetuities (1986), see the Appendix at page 69 *infra*.

Article 3. Time of Creation of Interest

§ 21210. When nonvested property interest or power of appointment created

21210. Except as provided in Sections 21211 and 21212 and in subdivision (a) of Section 20202, the time of creation of a nonvested property interest or a power of appointment is determined by other applicable statutes or, if none, under general principles of property law.

Comment. Section 21210 is the same in substance as Section 2(a) of the Uniform Statutory Rule Against Perpetuities (1986), with the addition of the reference to other statutory provisions. This section supersedes Civil Code Section 1391.1(a)(2). This part applies only to property interests created by instruments executed on or after January 1, 1992. See Section 21202. For the rule applicable to property interests created by instruments executed before January 1, 1992, see Civil Code §§ 715-716.5.

Background (adapted from Prefatory Note to Uniform Statute). This article defines the time when, for purposes of this chapter, a nonvested property interest or a power of appointment is created. The period of time allowed by Article 2 (commencing with Section 21205) (statutory rule against perpetuities) is marked off from the time of creation of the nonvested property interest or power of appointment in question. Section 21202, with certain exceptions, provides that this chapter applies only to nonvested property interests and powers of appointment created by instruments executed on or after the operative date of this chapter.

For additional background on Section 21210, adapted from the official comments to the Uniform Statutory Rule Against Perpetuities (1986), see the Appendix at page 71 *infra*.

§ 21211. Postponement of time of creation of nonvested property interest or power of appointment in certain cases

21211. For purposes of this chapter:

(a) If there is a person who alone can exercise a power created by a governing instrument to become the unqualified beneficial owner of (1) a nonvested property interest or (2) a property interest subject to a power of appointment described in Section 21206 or 21207, the nonvested property interest or power of appointment is created when the power to become the unqualified beneficial owner terminates.

(b) A joint power with respect to community property held by individuals married to each other is a power exercisable by one person alone.

Comment. Section 21211 is the same in substance as Section 2(b) of the Uniform Statutory Rule Against Perpetuities (1986). Section 21211(a) supersedes Civil Code Sections 716 and 1391.1(a)(1), which are continued as to pre-January 1, 1992, instruments. See Civ. Code §§ 715.1, 1391.1(b), 1391.2(b). The reference to the Uniform Marital Property Act in Section 2(b) of the Uniform Statutory Rule Against Perpetuities is not included in Section 21211(b) because it is unnecessary in light of the definition of community property in Section 28. See the Comment to Section 28.

This part applies only to property interests created by instruments executed on or after January 1, 1992. See Section 21202. For the rule applicable to property interests created by instruments executed before January 1, 1992, see Civil Code §§ 715-716.5.

Background (adapted from Prefatory Note to Uniform Statute). Section 21211 provides that, if one person can exercise a power to become the unqualified beneficial owner of a nonvested property interest (or a property interest subject to a power of appointment described in Section 21206 or 21207), the time of creation of the nonvested property interest or the power of appointment is postponed until the power to become unqualified beneficial owner ceases to exist. This is in accord with existing common law.

For additional background on Section 21211, adapted from the official comments to the Uniform Statutory Rule Against Perpetuities (1986), see the Appendix at page 72 *infra*.

§ 21212. Time of creation of nonvested property interest or power of appointment arising from transfer to trust or other arrangement

21212. For purposes of this chapter, a nonvested property interest or a power of appointment arising from a transfer of property to a previously funded trust or other existing property arrangement is created when the nonvested property interest or power of appointment in the original contribution was created.

Comment. Section 21212 is the same in substance as Section 2(c) of the Uniform Statutory Rule Against Perpetuities (1986). This part applies only to property interests created by instruments executed on or after January 1, 1992. See Section 21202. For the rule applicable to property interests created by instruments executed before January 1, 1992, see Civil Code §§ 715-716.5.

Background (adapted from Prefatory Note to Uniform Statute). Section 21212 provides that nonvested property interests and powers of appointment arising out of transfers to a previously funded trust or other existing property arrangement are created when the nonvested property interest or power of appointment arising out of the original contribution was created. This avoids an administrative difficulty that can arise at common law when subsequent transfers are made to an existing irrevocable trust. Arguably, at common law, each transfer starts the period of the rule running anew as to that transfer. This difficulty is avoided by Section 21212.

For additional background on Section 21212, adapted from the official comments to the Uniform Statutory Rule Against Perpetuities (1986), see the Appendix at page 77 *infra*.

Article 4. Reformation

§ 21220. Reformation

21220. On petition of an interested person, a court shall reform a disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the 90 years allowed by the applicable provision in Article 2 (commencing with Section 21205), if any of the following conditions is satisfied:

(a) A nonvested property interest or a power of appointment becomes invalid under the statutory rule against perpetuities provided in Article 2 (commencing with Section 21205).

(b) A class gift is not but might become invalid under the statutory rule against perpetuities provided in Article 2 (commencing with Section 21205), and the time has arrived when the share of any class member is to take effect in possession or enjoyment.

(c) A nonvested property interest that is not validated by subdivision (a) of Section 21205 can vest but not within 90 years after its creation.

Comment. Section 21220 is the same in substance as Section 3 of the Uniform Statutory Rule Against Perpetuities (1986). Section 21220 supersedes Civil Code Section 715.5 (reformation or construction to avoid violation of rule against perpetuities). This part applies only to property interests created by instruments executed on or after January 1, 1992. See Section 21202. For the rule applicable to property interests created by instruments executed before January 1, 1992, see Civil Code §§ 715-716.5.

Background (adapted from Prefatory Note to Uniform Statute). Section 21220 directs a court, on petition of an interested person, to reform a disposition within the limits of the allowable 90-year period, in the manner deemed by the court most closely to approximate the transferor's manifested plan of distribution, in three circumstances: (1) when a nonvested property interest or a power of appointment becomes invalid under the statutory rule; (2) when a class gift has not but still might become invalid under the statutory rule and the time has arrived when the share of a class member is to take effect in possession or enjoyment; and (3) when a nonvested property interest can vest, but

cannot do so within the allowable 90-year waiting period. It is anticipated that the circumstances requisite to reformation under this section will rarely arise, and consequently that this section will seldom need to be applied.

For additional background on Section 21220, adapted from the official comments to the Uniform Statutory Rule Against Perpetuities (1986), see the Appendix at page 78 *infra*.

Article 5. Exclusions from Statutory Rule Against Perpetuities

§ 21225. Exclusions from statutory rule against perpetuities

21225. This chapter does not apply to any of the following:

(a) A nonvested property interest or a power of appointment arising out of a nondonative transfer, except a nonvested property interest or a power of appointment arising out of (1) a premarital or postmarital agreement, (2) a separation or divorce settlement, (3) a spouse's election, (4) or a similar arrangement arising out of a prospective, existing, or previous marital relationship between the parties, (5) a contract to make or not to revoke a will or trust, (6) a contract to exercise or not to exercise a power of appointment, (7) a transfer in satisfaction of a duty of support, or (8) a reciprocal transfer.

(b) A fiduciary's power relating to the administration or management of assets, including the power of a fiduciary to sell, lease, or mortgage property, and the power of a fiduciary to determine principal and income.

(c) A power to appoint a fiduciary.

(d) A discretionary power of a trustee to distribute principal before termination of a trust to a beneficiary having an indefeasibly vested interest in the income and principal.

(e) A nonvested property interest held by a charity, government, or governmental agency or subdivision, if the nonvested property interest is preceded by an interest held by another charity, government, or governmental agency or subdivision.

(f) A nonvested property interest in or a power of appointment with respect to a trust or other property

arrangement forming part of a pension, profit-sharing, stock bonus, health, disability, death benefit, income deferral, or other current or deferred benefit plan for one or more employees, independent contractors, or their beneficiaries or spouses, to which contributions are made for the purpose of distributing to or for the benefit of the participants or their beneficiaries or spouses the property, income, or principal in the trust or other property arrangement, except a nonvested property interest or a power of appointment that is created by an election of a participant or a beneficiary or spouse.

(g) A property interest, power of appointment, or arrangement that was not subject to the common law rule against perpetuities or is excluded by another statute of this state.

(h) A trust created for the purpose of providing for its beneficiaries under hospital service contracts, group life insurance, group disability insurance, group annuities, or any combination of such insurance, as defined in the Insurance Code.

Comment. Subdivisions (a)-(g) of Section 21225 are the same in substance as Section 4 of the Uniform Statutory Rule Against Perpetuities (1986). Subdivision (e) supersedes Civil Code Section 715 (no perpetuities allowed except for eleemosynary purposes). Subdivision (h) restates Civil Code Section 715.4 without substantive change. This part applies only to property interests created by instruments executed on or after January 1, 1992. See Section 21202. For the rule applicable to property interests created by instruments executed before January 1, 1992, see Civil Code §§ 715-716.5.

Background (adapted from Prefatory Note to Uniform Statute). Section 21225 identifies the interests and powers that are excluded from the Statutory Rule Against Perpetuities. This section is in part declaratory of existing common law. All the exclusions from the common law rule recognized at common law and by statute in this state are preserved. In line with long-standing scholarly commentary, Section 21225(a) excludes nondonative transfers from the statutory rule. The rule against perpetuities is an inappropriate instrument of social policy to use as a control on such arrangements. The period of the rule — a life in being plus 21 years — is suitable for donative transfers only.

For additional background on Section 21225, adapted from the official comments to the Uniform Statutory Rule Against Perpetuities (1986), see the Appendix at page 85 *infra*.

CHAPTER 2. RELATED PROVISIONS

§ 21230. Validity of trusts

21230. (a) A trust is not invalid, either in whole or in part, merely because the duration of the trust may exceed the time within which nonvested property interests must vest, if the interest of all the beneficiaries must vest, if at all, within that time.

(b) If a trust is not limited in duration to the time within which nonvested property interests must vest, a provision, express or implied, in the instrument creating the trust that the trust may not be terminated is ineffective insofar as it purports to be applicable beyond that time.

(c) If a trust has existed longer than the time within which nonvested property interests must vest, the following apply:

(1) The trust shall be terminated upon the request of a majority of the beneficiaries.

(2) The trust may be terminated by a court of competent jurisdiction on petition of the Attorney General or of any person who would be affected the termination if the court finds that the termination would be in the public interest or in the best interest of a majority of the persons who would be affected by the termination.

Comment. Section 21230 restates Civil Code Section 716.5 without substantive change. The phrase "future interests in property" has been replaced with "nonvested property interests" to conform to the terminology of the Uniform Statutory Rule Against Perpetuities (1986) in Chapter 1 (commencing with Section 21200). The rules governing the time within which nonvested property interests must vest are provided in Sections 21205-21207 (statutory rule against perpetuities). For a discussion of trust termination at the end of the perpetuities period, see the Background to Section 21201. This part applies only to property interests created by instruments executed on or after January 1, 1992. See Section 21202. For the rule applicable to property interests created

by instruments executed before January 1, 1992, see Civil Code §§ 715-716.5.

§ 21231. Spouse as life in being

21231. In determining the validity of a nonvested property interest pursuant to Article 2 (commencing with Section 21205) of Chapter 1, an individual described as the spouse of a person in being at the commencement of a perpetuities period shall be deemed a "life in being" at that time whether or not the individual so described was then in being.

Comment. Section 21231 restates Civil Code Section 715.7 without substantive change. This part applies only to property interests created by instruments executed on or after January 1, 1992. See Section 21202. For the rule applicable to property interests created by instruments executed before January 1, 1992, see Civil Code §§ 715-716.5.

CONFORMING REVISIONS

Heading for Article 3 (commencing with Section 715) (amended)

SEC. . The heading of Article 3 (commencing with Section 715) of Chapter 1 of Title 2 of Part 1 of Division 2 of the Civil Code is amended to read:

Article 3. ~~Restraints Upon Alienation~~ *Perpetuities*

Civil Code § 715.1 (added). Limitation on application of article

715. (a) Except as provided in subdivision (b), this article applies only to nonvested property interests and powers of appointment created by instruments executed before January 1, 1992.

(b) For purposes of this section, a nonvested property interest or a power of appointment created by the exercise of a power of appointment is created when the power is irrevocably exercised or when a revocable exercise becomes irrevocable.

Comment. Section 715.1 limits the application of this chapter to interests created by instruments executed before January 1, 1992. Interests created by instruments executed on or after that date are

governed by the Uniform Statutory Rule Against Perpetuities and related provisions set out in Probate Code Sections 21200-21231. Section 715.1 is complementary with Probate Code Section 21202, which provides for the prospective application of the new statutory rule against perpetuities.

Heading for Article 3.5 (commencing with Section 717) (added)

SEC. . An article heading is added immediately preceding Section 717 of the Civil Code, to read:

Article 3.5. Duration of Leases

Civil Code § 718 (added). Lease to commence in future

SEC. . Section 718 is added to the Civil Code, to read:

718. (a) A lease to commence at a time certain or upon the happening of a future event becomes invalid if its term does not actually commence in possession within 30 years after its execution.

(b) This section applies only to leases executed on or after January 1, 1992.

Comment. Section 718 is new. Subdivision (a) places a 30-year limit on leases that would have been voidable future interests under the rule against perpetuities provided in Civil Code Section 715.2 (applicable to instruments executed before January 1, 1992). Subdivision (b) applies this rule prospectively.

Civil Code § 722 (amended). Time limit on accumulations

722. Dispositions of the income of property to accrue and to be received at any time subsequent to the execution of the instrument creating such disposition, are governed by the rules ~~prescribed in this Title in relation~~ *relating* to future interests.

Comment. Section 722 is amended to reflect relocation of statutes concerning perpetuities to the Probate Code. See Prob. Code §§ 21200-21231 (superseding Civil Code §§ 715-716.5).

Civil Code § 724 (amended). Time limit on accumulations

724. An accumulation of the income of property may be directed by any will, trust or transfer in writing sufficient to pass the property or create the trust out of which the fund is to arise, for the benefit of one or more persons objects or

purposes, but may not extend beyond the time ~~in this title~~ permitted for the vesting of future interests.

Comment. Section 724 is amended to reflect the revision and relocation of the statutes concerning perpetuities to the Probate Code. See Civ. Code §§ 715-716.5 (applicable to property interests created by instruments executed before January 1, 1992); Prob. Code §§ 21200-21231 (applicable to property interests created by instruments executed on or after January 1, 1992).

Civil Code § 773 (amended). Limitations on future estates

773. Subject to the rules of this title, and of Part 1 of this division, a freehold estate, as well as a chattel real, may be created to commence at a future day; an estate for life may be created in a term of years, and a remainder limited thereon; a remainder of a freehold or chattel real, either contingent or vested, may be created, expectant on the determination of a term of years; and a fee may be limited on a fee, upon a contingency, which, if it should occur, must happen within the period prescribed in Section 715.2 *or by the statutory rule against perpetuities in Article 2 (commencing with Section 21205) of Chapter 1 of Part 2 of Division 11 of the Probate Code, whichever is applicable.*

Comment. Section 773 is amended to refer to the statutory rule against perpetuities. See Prob. Code §§ 21200-21231 (statutory rule against perpetuities applicable to property interests created by instruments executed on or after January 1, 1992); Civ. Code §§ 715-716.5 (rule applicable to property interests created by instruments executed before January 1, 1992).

Civil Code § 1391 (added). Applicable rule against perpetuities

1391. (a) The statutory rule against perpetuities provided by Chapter 1 (commencing with Section 21200) of Part 2 of Division 11 of the Probate Code applies to powers of appointment governed by this part.

(b) This section applies only to nonvested property interests and powers of appointment created by instruments executed on or after January 1, 1992. For purposes of this subdivision, a nonvested property interest or a power of appointment

created by the exercise of a power of appointment is created when the power is irrevocably exercised or when a revocable exercise becomes irrevocable.

Comment. Section 1391 is a new section providing a cross-reference to the statutory rule against perpetuities. For the rule applicable to property interests created by instruments executed before January 1, 1992, see Civil Code §§ 715-716.5, 1391.1-1391.2. The Uniform Statutory Rule Against Perpetuities applies only to property interests created by instruments executed on or after January 1, 1992). See Prob. Code §§ 21200-21231.

Civil Code § 1391.1 (amended). Beginning of permissible period for powers of appointment

1391.1. *(a)* The permissible period under the applicable rule against perpetuities with respect to interests sought to be created by an exercise of a power of appointment begins:

~~(a)~~ *(1)* In the case of an instrument exercising a general power of appointment presently exercisable by the donee alone, on the date the appointment becomes effective.

~~(b)~~ *(2)* In all other situations, at the time of the creation of the power.

(b) This section applies only to nonvested property interests and powers of appointment created by instruments executed before January 1, 1992. For purposes of this subdivision, a nonvested property interest or a power of appointment created by the exercise of a power of appointment is created when the power is irrevocably exercised or when a revocable exercise becomes irrevocable.

Comment. Subdivision (b) is added to Section 1391.1 to limit the application of the section to pre-January 1, 1992, instruments. For the rule against perpetuities applicable to property interests created by instruments executed before January 1, 1992, see Civil Code §§ 715-716.5.

As to interests created by instruments executed on or after January 1, 1992, subdivision (a)(1) of Section 1391.1 is superseded by Probate Code Section 21211(a) and subdivision (a)(2) is superseded by Probate Code Section 21210. See Section 1391 (applicable rule against perpetuities).

Civil Code § 1391.2 (amended). Facts and circumstances affecting validity of interests created by exercise of power of appointment

1391.2. *(a)* When the permissible period under the applicable rule against perpetuities begins at the time of the creation of a power of appointment with respect to interests sought to be created by an exercise of the power, facts and circumstances existing at the effective date of the instrument exercising the power shall be taken into account in determining the validity of interests created by the instrument exercising the power.

(b) This section applies only to nonvested property interests and powers of appointment created by instruments executed before January 1, 1992. For purposes of this subdivision, a nonvested property interest or a power of appointment created by the exercise of a power of appointment is created when the power is irrevocably exercised or when a revocable exercise becomes irrevocable.

Comment. Subdivision (b) is added to Section 1391.2 to limit the application of the section to pre-January 1, 1992, instruments. For the rule against perpetuities applicable to property interests created by instruments executed before January 1, 1992, see Civil Code §§ 715-716.5.

As to interests created by instruments executed on or after January 1, 1992, subdivision (a) of Section 1391.2 is superseded by the statutory rule against perpetuities. See Prob. Code §§ 21206-21207 (statutory rule against perpetuities as to powers of appointment), 21220 (reformation). The second-look doctrine, codified in this section, is a part of the common law carried forward in the Uniform Statutory Rule Against Perpetuities (1986). See the Background to Prob. Code §§ 21206-21207.

Probate Code § 15210 (added). Honorary trusts

15210. (a) A trust for the care of a specific domestic or pet animal, for a noncharitable corporation or unincorporated society, or for a lawful noncharitable purpose may be performed by the trustee for 21 years, whether or not there is a beneficiary who can seek the trust's enforcement or

termination and whether or not the terms of the trust contemplate a longer duration.

(b) This section applies only to trusts created by instruments executed on or after the operative date of this section.

Comment. Section 15210 is new. Subdivision (a) places a 21-year limit on trusts that would have been voidable under the rule against perpetuities provided in Civil Code Section 715.2 (applicable to instruments executed before January 1, 1992). For the rule applicable to instruments executed on or after January 1, 1992, see Prob. Code §§ 21200-21231. Subdivision (b) applies this rule prospectively and is consistent with Section 21202.

APPENDIX

BACKGROUND TO SECTION 21201

[Adapted from Comment G to Section 1 of the Uniform Statutory Rule Against Perpetuities (1986)]

As provided in Section 21201, this chapter supersedes the common law rule against perpetuities (common law rule) and the statutory provisions previously in effect, replacing them with the statutory rule against perpetuities (statutory rule) set forth in Article 2 (commencing with Section 21205) and by the other provisions in this chapter.

Unless excluded by Section 21225, the statutory rule applies to nonvested property interests and to powers of appointment over property or property interests that are nongeneral powers, general testamentary powers, or general powers not presently exercisable because of a condition precedent. The statutory rule does not apply to vested property interests. See, e.g., X's interest in Example (23) in the Background to this section. Nor does the statutory rule apply to presently exercisable general powers of appointment. See, e.g., G's power in Example (19) in the Background to Section 21206; G's power in Example (1) in the Background to Section 21211; A's power in Example (2) in the Background to Section 21211; X's power in Example (3) in the Background to Section 21211; A's noncumulative power of withdrawal in Example (4) in the Background to Section 21211.

G. Subsidiary Common Law Doctrines: Whether Superseded by this Chapter

The courts, in interpreting the common law rule, developed several subsidiary doctrines. This chapter does not supersede those subsidiary doctrines except to the extent the provisions of this chapter conflict with them. As explained below, most of these common law doctrines remain in full force or in force in modified form.

1. Constructional Preference for Validity

Professor Gray in his treatise on the common law rule against perpetuities declared that a will or deed is to be construed without regard to the rule, and then the rule is to be "remorselessly" applied to the provisions so construed. J. Gray, The Rule Against Perpetuities § 629 (4th ed. 1942). Some courts may still adhere to this proposition. Colorado Nat'l Bank v. McCabe, 143 Colo. 21, 353 P.2d 385 (1960). Most courts, it is believed, would today be inclined to adopt the proposition put by the Restatement of Property § 375 (1944), which is that where an instrument is ambiguous — that is, where it is fairly

susceptible to two or more constructions, one of which causes a rule violation and the other of which does not — the construction that does not result in a rule violation should be adopted. The California rule favors construction for validity. See, e.g., Civil Code § 3541; Wong v. Di Grazia, 60 Cal. 2d 525, 539-40, 386 P.2d 817, 35 Cal. Rptr. 241 (1963); Estate of Phelps, 182 Cal. 752, 761, 190 P. 17 (1920); Estate of Grove, 70 Cal. App. 3d 355, 362-63, 138 Cal. Rptr. 684 (1977). Other cases supporting this view include: Southern Bank & Trust Co. v. Brown, 271 S.C. 260, 246 S.E.2d 598 (1978); Davis v. Rossi, 326 Mo. 911, 34 S.W.2d 8 (1930); Watson v. Goldthwaite, 184 N.E.2d 340, 343 (Mass. 1962); Walker v. Bogle, 244 Ga. 439, 260 S.E.2d 338 (1979); Drach v. Ely, 703 P.2d 746 (Kan. 1985).

The constructional preference for validity is not superseded by this chapter, but its role is likely to be different. The situation is likely to be that one of the constructions to which the ambiguous instrument is fairly susceptible would result in validity under Section 21205(a), 21206(a), or 21207(a), but the other construction does not necessarily result in invalidity; rather it results in the interest's validity being governed by Section 21205(b), 21206(b), or 21207(b). Nevertheless, even though the result of adopting the other construction is not as harsh as it is at common law, it is expected that the courts will incline toward the construction that validates the disposition under Section 21205(a), 21206(a), or 21207(a).

2. Conclusive Presumption of Lifetime Fertility

At common law, all individuals — regardless of age, sex, or physical condition — are conclusively presumed to be able to have children throughout their entire lifetimes. This principle is not superseded by this chapter, and in view of the widely accepted rule of construction that adopted children are presumptively included in class gifts, the conclusive presumption of lifetime fertility is not unrealistic. Since even elderly individuals probably cannot be excluded from adopting children based on their ages alone, the possibility of having children by adoption is seldom extinct. See, generally, Waggoner, *In re Lattouf's Will and the Presumption of Lifetime Fertility in Perpetuity Law,* 20 San Diego L. Rev. 763 (1983). Under this chapter, the main force of this principle is felt as in Example (7) in the Background to Section 21205, where it prevents a nonvested property interest from passing the test for initial validity under Section 21205(a).

For a California case approving the common law rule, see Fletcher v. Los Angeles Trust & Sav. Bank, 182 Cal. 177, 184, 187 P. 425 (1920).

3. Act Supersedes Doctrine of Infectious Invalidity

At common law, the invalidity of an interest can, under the doctrine of infectious invalidity, be held to invalidate one or more otherwise valid interests created by the disposition or even invalidate the entire disposition. The question turns on whether the general dispositive scheme of the transferor will be better carried out by eliminating only the invalid interest or by eliminating other interests as well. This is a question that is answered on a case-by-case basis. Several items are relevant to the question, including who takes the stricken interests in place of those the transferor designated to take. For the rule applied in California, see, e.g., Estate of Willey, 128 Cal. 1, 11, 60 P. 471 (1900) (severance allowed); Estate of Gump, 16 Cal. 2d 535, 547, 107 P.2d 17 (1940) (severance allowed); Estate of Van Wyck, 185 Cal. 49, 63, 196 P. 50 (1921) (severance denied); Sheean v. Michel, 6 Cal. 2d 324, 329, 57 P.2d 127 (1936) (severance denied).

The doctrine of infectious invalidity is superseded by Section 21220, under which the court, on petition of an interested person, is required to reform the disposition to approximate as closely as possible the transferor's manifested plan of distribution when an invalidity under the statutory rule occurs.

4. Separability.

The common law's separability doctrine is that when an interest is expressly subject to alternative contingencies, the situation is treated as if two interests were created in the same person or class. Each interest is judged separately; the invalidity of one of the interests does not necessarily cause the other one to be invalid. This common law principle was established in Longhead v. Phelps, 2 Wm. Bl. 704, 96 Eng. Rep. 414 (K.B. 1770), and is followed in this country. L. Simes & A. Smith, The Law of Future Interests § 1257 (2d ed. 1956); 6 American Law of Property § 24.54 (A. Casner ed. 1952); Restatement of Property § 376 (1944). Under this doctrine, if property is devised "to B if X-event or Y-event happens," B in effect has two interests, one contingent on X-event happening and the other contingent on Y-event happening. If the interest contingent on X-event but not the one contingent on Y-event is invalid, the consequence of separating B's interest into two is that only one of them, the one contingent on X-event, is invalid. B still has a valid interest — the one contingent on the occurrence of Y-event.

The separability principle is not superseded by this chapter. As illustrated in the following example, its invocation will usually result in one of the interests being initially validated by Section 21205(a) and the validity of the other interest being governed by Section 21205(b).

Example (22) — Separability case. G devised real property "to A for life, then to A's children who survive A and reach 25, but if none of A's children survives A or if none of A's children who survives A reaches 25, then to B." G was survived by his brother (B), by his daughter (A), by A's husband (H), and by A's two minor children (X and Y).

The remainder interest in favor of A's children who reach 25 fails the test of Section 21205(a) for initial validity. Its validity is, therefore, governed by Section 21205(b) and depends on each of A's children doing any one of the following things within 90 years after G's death: predeceasing A, surviving A and failing to reach 25, or surviving A and reaching 25.

Under the separability doctrine, B has two interests. One of them is contingent on none of A's children surviving A. That interest passes Section 21205(a)'s test for initial validity; the validating life is A. B's other interest, which is contingent on none of A's surviving children reaching 25, fails Sections 21205(a)'s test for initial validity. Its validity is governed by Section 21205(b) and depends on each of A's surviving children either reaching 25 or dying under 25 within 90 years after G's death.

Suppose that after G's death, A has a third child (Z). A subsequently dies, survived by her husband (H) and by X, Y, and Z. This, of course, causes B's interest that was contingent on none of A's children surviving A to terminate. If X, Y, and Z had all reached the age of 25 by the time of A's death, their interest would vest at A's death, and that would end the matter. If one or two, but not all three of them, had reached the age of 25 at A's death, B's other interest — the one that was contingent on none of A's surviving children reaching 25 — would also terminate. As for the children's interest, if the after-born child Z's age was such at A's death that Z could not be alive and under the age of 25 at the expiration of the allowable waiting period, the class gift in favor of the children would be valid under Section 21205(b), because none of those then under 25 could fail either to reach 25 or die under 25 after the expiration of the allowable 90-year waiting period. If, however, Z's age at A's death was such that Z could be alive and under the age of 25 at the expiration of the allowable 90-year waiting period, the circumstances requisite to reformation under Section 21220(b) would arise, and the court would be justified in reforming G's disposition by reducing the age contingency with respect to Z to

the age he would reach on the date when the allowable waiting period is due to expire. See Example (3) in the Background to Section 21220. So reformed, the class gift in favor of A's children could not become invalid under Section 21205(b), and the children of A who had already reached 25 by the time of A's death could receive their shares immediately.

5. The "All-or-Nothing" Rule with Respect to Class Gifts

The common law applies an "all-or-nothing" rule with respect to class gifts, under which a class gift stands or falls as a whole. The all-or-nothing rule, usually attributed to Leake v. Robinson, 2 Mer. 363, 35 Eng. Rep. 979 (Ch. 1817), is commonly stated as follows: If the interest of any potential class member might vest too remotely, the entire class gift violates the rule. Although this chapter does not supersede the basic idea of the much-maligned "all-or-nothing" rule, the evils sometimes attributed to it are substantially if not entirely eliminated by the wait-and-see feature of the statutory rule and by the availability of reformation under Section 21220, especially in the circumstances described in Section 21220(b)-(c). For illustrations of the application of the all-or-nothing rule under this chapter, see Examples (3), (4), and (6) in the Background to Section 21220.

For application and interpretation of the all-or-nothing rule California, see, e.g., Estate of Troy, 214 Cal. 53, 3 P.2d 9300 (1931); Estate of Grove, 70 Cal. App. 3d 355, 361-62, 138 Cal. Rptr. 684 (1977); Estate of Ghiglia, 42 Cal. App. 3d 433, 116 Cal. Rptr. 827 (1974).

6. The Specific Sum Doctrine

The common law recognizes a doctrine called the specific sum doctrine, which is derived from Storrs v. Benbow, 3 De G.M. & G. 390, 43 Eng. Rep. 153 (Ch. 1853), and states: If a specified sum of money is to be paid to each member of a class, the interest of each class member is entitled to separate treatment and is valid or invalid under the rule on its own. The specific sum doctrine is not superseded by this chapter.

The operation of the specific sum doctrine under this chapter is illustrated in the following example.

Example (23) — Specific sum case. G bequeathed "$10,000 to each child of A, born before or after my death, who attains 25." G was survived by A and by A's two children (X and Y). X but not Y had already reached 25 at G's death. After G's death a third child (Z) was born to A.

If the phrase "born before or after my death" had been omitted, the class would close as of G's death under the common law rule of construction known as the rule of convenience: The

after-born child, Z, would not be entitled to a $10,000 bequest, and the interests of both X and Y would be valid upon their creation at G's death. X's interest would be valid because it was initially vested; neither the common law rule nor the statutory rule applies to interests that are vested upon their creation. Although the interest of Y was not vested upon its creation, it would be initially valid under Section 21205(a) because Y would be his own validating life; Y will either reach 25 or die under 25 within his own lifetime.

The inclusion of the phrase "before or after my death," however, would probably be construed to mean that G intended after-born children to receive a $10,000 bequest. See Earle Estate, 369 Pa. 52, 85 A.2d 90 (1951). Assuming that this construction were adopted, the specific sum doctrine allows the interest of each child of A to be treated separately from the others for purposes of the statutory rule. For the reasons cited above, the interests of X and Y are initially valid under Section 21205(a). The nonvested interest of Z, however, fails Section 21205(a)'s test for initial validity; there is no validating life because Z, who was not alive when the interest was created, could reach 25 or die under 25 more than 21 years after the death of the survivor of A, X, and Y. Under Section 21205(b), the validity of Z's interest depends on Z's reaching (or failing to reach) 25 within 90 years after G's death.

7. The Sub-Class Doctrine

The common law recognizes a doctrine called the sub-class doctrine, which is derived from Cattlin v. Brown, 11 Hare 372, 68 Eng. Rep. 1318 (Ch. 1853), and states: If the ultimate takers are not described as a single class but rather as a group of subclasses, and if the share to which each separate subclass is entitled will finally be determined within the period of the rule, the gifts to the different subclasses are separable for the purpose of the rule. American Security & Trust Co. v. Cramer, 175 F. Supp. 367 (D.D.C. 1959); Restatement of Property § 389 (1944). The sub-class doctrine is not superseded by this chapter.

The operation of the sub-class doctrine under this chapter is illustrated in the following example.

Example (24) — Sub-class case. G devised property in trust, directing the trustee to pay the income "to A for life, then in equal shares to A's children for their respective lives; on the death of each child, the proportionate share of corpus of the one so dying shall go to the children of such child." G was survived

by A and by A's two children (X and Y). After G's death, another child (Z) was born to A. A now has died, survived by X, Y, and Z.

Under the sub-class doctrine, each remainder interest in favor of the children of a child of A is treated separately from the others. This allows the remainder interest in favor of X's children and the remainder interest in favor of Y's children to be validated under Section 21205(a). X is the validating life for the one, and Y is the validating life for the other.

The remainder interest in favor of the children of Z fails Section 21205(a)'s test for initial validity; there is no validating life because Z, who was not alive when the interest was created, could have children more than 21 years after the death of the survivor of A, X, and Y. Under Section 21205(b), the validity of the remainder interest in favor of Z's children depends on Z's dying within 90 years after G's death.

Note why both of the requirements of the sub-class rule are met. The ultimate takers are described as a group of sub-classes rather than as a single class: "children of the child so dying," as opposed to "grandchildren." The share to which each separate sub-class is entitled is certain to be finally determined within a life in being plus 21 years: As of A's death, who is a life in being, it is certain to be known how many children he had surviving him; since in fact there were three, we know that each sub-class will ultimately be entitled to one-third of the corpus, neither more nor less. The possible failure of the one-third share of Z's children does not increase to one-half the share going to X's and Y's children; they still are entitled to only one-third shares. Indeed, should it turn out that X has children but Y does not, this would not increase the one-third share to which X's children are entitled.

Example (25) — General testamentary powers — sub-class case. G devised property in trust, directing the trustee to pay income "to A for life, then in equal shares to A's children for their respective lives; on the death of each child, the proportionate share of corpus of the one so dying shall go to such persons as the one so dying shall by will appoint; in default of appointment, to G's grandchildren in equal shares." G was survived by A and by A's two children (X and Y). After G's death, another child (Z) was born to A.

The general testamentary powers conferred on each of A's children are entitled to separate treatment under the principles of

the sub-class doctrine. See above. Consequently, the powers conferred on X and Y, A's children who were living at G's death, are initially valid under Section 21207(a). But the general testamentary power conferred on Z, A's child who was born after G's death, fails the test of Section 21207(a) for initial validity. The validity of Z's power is governed by Section 21207(b). Z's death must occur within 90 years after G's death if any provision in Z's will purporting to exercise his power is to be valid.

8. Duration of Indestructible Trusts — Termination of Trusts by Beneficiaries

The widely accepted view in American law is that the beneficiaries of a trust other than a charitable trust can compel its premature termination if all beneficiaries consent and if such termination is not expressly restrained or impliedly restrained by the existence of a "material purpose" of the settlor in establishing the trust. Restatement (Second) of Trusts § 337 (1959); 4 A. Scott, The Law of Trusts § 337 (3d ed. 1967). California law varies this rule by giving the court discretion in applying the material purposes doctrine, except as to a restraint on disposition of the beneficiaries interest. See Section 15403.

A trust that cannot be terminated by its beneficiaries is called an indestructible trust. It is generally accepted that the duration of the indestructibility of a trust, other than a charitable trust, is limited to the applicable perpetuity period. See Restatement (Second) of Trusts § 62 comment o (1959); Restatement (Second) of Property (Donative Transfers) § 2.1 & Legislative Note & Reporter's Note (1983); 1 A. Scott, The Law of Trusts § 62.10(2) (3d ed. 1967); J. Gray, The Rule Against Perpetuities § 121 (4th ed. 1942); L. Simes & A. Smith, The Law of Future Interests §§ 1391-93 (2d ed. 1956). In California this rule is provided by statute. See Section 21230 (continuing former Civil Code § 716.5). Nothing in this chapter supersedes this principle. One modification, however, is necessary: As to trusts that contain a nonvested property interest or power of appointment whose validity is governed by the wait-and-see element adopted in Section 21205(b), 21206(b), or 21207(b), the courts can be expected to determine that the applicable perpetuity period is 90 years.

BACKGROUND TO SECTION 21202

[Adapted from the Comment to Section 5 of the Uniform Statutory Rule Against Perpetuities (1986)]

Chapter Not Retroactive

Subdivision (b) establishes a special rule for nonvested property interests (and powers of appointment) created by the exercise of a power of appointment. For purposes of this section only, a nonvested property interest (or a power of appointment) created by the exercise of a power of appointment is created when the power is irrevocably exercised or when a revocable exercise of the power becomes irrevocable. Consequently, all the provisions of this chapter apply to a nonvested property interest (or power of appointment) created by a donee's exercise of a power of appointment where the donee's exercise, whether revocable or irrevocable, occurs on or after the operative date of this chapter. All the provisions of this chapter also apply where the donee's exercise occurred before the operative date of this chapter if: (1) the pre-operative-date exercise was revocable and (2) the revocable exercise becomes irrevocable on or after the operative date of this chapter. This special rule applies to the exercise of all types of powers of appointment — presently exercisable general powers, general testamentary powers, and nongeneral powers.

If the application of this special rule determines that the provisions of this chapter apply, then for all such purposes, the time of creation of the appointed nonvested property interest (or appointed power of appointment) is determined by reference to Article 3 (commencing with Section 21210), without regard to the special rule contained in subdivision (b).

Example (1) — Testamentary power created before but exercised after the operative date of this chapter. G was the donee of a general testamentary power of appointment created by the will of his mother, M. M died in 1980. Assume that the operative date of the chapter is January 1, 1992. G died in 1992, leaving a will that exercised his general testamentary power of appointment.

Under the special rule in Section 21202(b), any nonvested property interest (or power of appointment) created by G in his will in exercising his general testamentary power was created (for purposes of Section 21202) at G's death in 1992, which was after the operative date of this chapter.

Consequently, all the provisions of this chapter apply. That point having been settled, the next step is to determine whether

the nonvested property interests or powers of appointment created by G's testamentary appointment are initially valid under Section 21205(a), 21206(a), or 21207(a), or whether the wait-and-see element established in Section 21205(b), 21206(b), or 21207(b) apply. If the wait-and-see element does apply, it must also be determined when the allowable 90-year waiting period starts to run. In making these determinations, the principles of Article 3 (commencing with Section 21210) control the time of creation of the nonvested property interests (or powers of appointment); under Article 3 , since G's power was a general testamentary power of appointment, the common law relation back doctrine applies and the appointed nonvested property interests (and appointed powers of appointment) are created at M's death in 1980.

If G's testamentary power of appointment had been a nongeneral power rather than a general power, the same results as described above would apply.

Example (2) — Presently exercisable nongeneral power created before but exercised after the operative date of this chapter. Assume the same facts as in Example (1), except that G's power of appointment was a presently exercisable nongeneral power. If G exercised the power in 1992, after the operative date of this chapter (or, if a pre-operative-date revocable exercise of his power became irrevocable in 1992, after the operative date of this chapter), the same results as described above in Example (1) would apply.

Example (3) — Presently exercisable general power created before but exercised after the operative date of this chapter. Assume the same facts as in Example (1), except that G's power of appointment was a presently exercisable general power. If G exercised the power in 1992, after the operative date of this chapter (or, if a pre-operative-date revocable exercise of his power became irrevocable in 1992, after the operative date of this chapter), all the provisions of this chapter apply; for such purposes, Article 3 (commencing with Section 21210) controls the date of creation of the appointed nonvested property interests (or appointed powers of appointment), without regard to the special rule in Section 21202(b). With respect to the exercise of a presently exercisable general power, it is possible — indeed, probable — that the special rule in Section 21202(b) and the rules of Article 3 agree on the same date of creation for their

respective purposes, that date being the date the power was irrevocably exercised (or a revocable exercise thereof became irrevocable).

BACKGROUND TO SECTION 21205

[Adapted from Comments A-C to Section 1 of the Uniform Statutory Rule Against Perpetuities (1986)]

A. General Purpose

Sections 21205-21207 set forth the statutory rule against perpetuities (statutory rule). As provided in Section 21201, the statutory rule supersedes the common law rule against perpetuities (common law rule) and prior statutes. See the Comment to Section 21201.

1. The Common Law Rule's Validating and Invalidating Sides

The common law rule against perpetuities is a rule of initial validity or invalidity. At common law, a nonvested property interest is either valid or invalid as of its creation. Like most rules of property law, the common law rule has both a validating and an invalidating side. Both sides are derived from John Chipman Gray's formulation of the common law rule:

> No [nonvested property] interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest.

J. Gray, The Rule Against Perpetuities § 201 (4th ed. 1942). From this formulation, the validating and invalidating sides of the common law rule are derived as follows:

> *Validating Side of the Common Law Rule.* A nonvested property interest is valid when it is created (initially valid) if it is then certain to vest or terminate (fail to vest) — one or the other — no later than 21 years after the death of an individual then alive.
>
> *Invalidating Side of the Common Law Rule.* A nonvested property interest is invalid when it is created (initially invalid) if there is no such certainty.

Notice that the invalidating side focuses on a lack of certainty, which means that invalidity under the common law rule is not dependent on actual post-creation events but only on possible post-creation events. Actual post-creation events are irrelevant, even those that are known at the time of the lawsuit. It is generally recognized that the invalidating side of the common law rule is harsh because it can invalidate interests on the ground of possible post-creation events that are extremely unlikely to happen and that in actuality almost never do happen, if ever.

2. The Statutory Rule Against Perpetuities

The essential difference between the common law rule and its statutory replacement is that the statutory rule preserves the common law rule's overall policy of preventing property from being tied up in unreasonably long or even perpetual family trusts or other property arrangements, while eliminating the harsh potential of the common law rule. The statutory rule achieves this result by codifying (in slightly revised form) the validating side of the common law rule and modifying the invalidating side by adopting a wait-and-see element. Under the statutory rule, interests that would have been initially valid at common law continue to be initially valid, but interests that would have been initially invalid at common law are invalid only if they do not actually vest or terminate within the allowable waiting period set forth in Section 21205(b). Thus, the Uniform Act recasts the validating and invalidating sides of the rule against perpetuities as follows:

> *Validating Side of the Statutory Rule:* A nonvested property interest is initially valid if, when it is created, it is then certain to vest or terminate (fail to vest) — one or the other — no later than 21 years after the death of an individual then alive. The validity of a nonvested property interest that is not initially valid is in abeyance. Such an interest is valid if it vests within the allowable waiting period after its creation.
>
> *Invalidating Side of the Statutory Rule:* A nonvested property interest that is not initially valid becomes invalid (and subject to reformation under Section 21220) if it neither vests nor terminates within the allowable waiting period after its creation.

As indicated, this modification of the invalidating side of the common law rule is generally known as the wait-and-see method of perpetuity reform. The wait-and-see method of perpetuity reform was approved by the American Law Institute as part of the Restatement (Second) of Property (Donative Transfers) §§ 1.1-1.6 (1983). For a discussion of the various methods of perpetuity reform, including the wait-and-see method and the Restatement (Second)'s version of wait-and-see, see Waggoner, *Perpetuity Reform*, 81 Mich. L. Rev. 1718 (1983).

B. Section 21205(a): Nonvested Property Interests That Are Initially Valid

1. Nonvested Property Interest

Section 21205 sets forth the statutory rule against perpetuities with respect to nonvested property interests. A nonvested property interest (also called a contingent property interest) is a future interest in property

that is subject to an unsatisfied condition precedent. In the case of a class gift, the interests of all the unborn members of the class are nonvested because they are subject to the unsatisfied condition precedent of being born. At common law, the interests of all potential class members must be valid or the class gift is invalid. As pointed out in the Background to Section 21201, this so-called all-or-nothing rule with respect to class gifts is not superseded by this chapter, and so remains in effect under the statutory rule. Consequently, all class gifts that are subject to open are to be regarded as nonvested property interests for the purposes of this chapter.

2. Section 21205(a) Codifies the Validating Side of the Common Law Rule

The validating side of the common law rule is codified in Section 21205(a) and, with respect to powers of appointment, in Sections 21206(a) and 21207(a).

A nonvested property interest that satisfies the requirement of Section 21205(a) is initially valid. That is, it is valid as of the time of its creation. There is no need to subject such an interest to the waiting period set forth in Section 21205(b), nor would it be desirable to do so.

For a nonvested property interest to be valid as of the time of its creation under Section 21205(a), there must then be a certainty that the interest will either vest or terminate — an interest terminates when vesting becomes impossible — no later than 21 years after the death of an individual then alive. To satisfy this requirement, it must be established that there is no possible chain of events that might arise after the interest was created that would allow the interest to vest or terminate after the expiration of the 21-year period following the death of an individual in being at the creation of the interest. Consequently, initial validity under Section 21205(a) can be established only if there is an individual for whom there is a causal connection between the individual's death and the interest's vesting or terminating no later than 21 years thereafter.

The individual described in Sections 21205(a), 21206(a), and 21207(a) is often referred to as the "validating life," the term used throughout the Background Comments to this chapter.

3. Determining Whether There Is a Validating Life

The process for determining whether a validating life exists is to postulate the death of each individual connected in some way to the transaction, and ask the question: Is there with respect to this individual an invalidating chain of possible events? If one individual can be found for whom the answer is No, that individual can serve as the validating life. As to that individual there will be the requisite causal connection

between his or her death and the questioned interest's vesting or terminating no later than 21 years thereafter.

In searching for a validating life, only individuals who are connected in some way to the transaction need to be considered, for they are the only ones who have a chance of supplying the requisite causal connection. Such individuals vary from situation to situation, but typically include the beneficiaries of the disposition, including the taker or takers of the nonvested property interest, and individuals related to them by blood or adoption, especially in the ascending and descending lines. There is no point in even considering the life of an individual unconnected to the transaction — an individual from the world at large who happens to be in being at the creation of the interest. No such individual can be a validating life because there will be an invalidating chain of possible events as to every unconnected individual who might be proposed: Any such individual can immediately die after the creation of the nonvested property interest without causing any acceleration of the interest's vesting or termination. (The life expectancy of any unconnected individual, or even the probability that one of a number of new-born babies will live a long life, is irrelevant.)

Example (1) — Parent of devisees as the validating life. G devised property "to A for life, remainder to A's children who attain 21." G was survived by his son (A), by his daughter (B), by A's wife (W), and by A's two children (X and Y).

The nonvested property interest in favor of A's children who reach 21 satisfies Section 21205(a)'s requirement, and the interest is initially valid. When the interest was created (at G's death), the interest was then certain to vest or terminate no later than 21 years after A's death.

The process by which A is determined to be the validating life is one of testing various candidates to see if any of them have the requisite causal connection. As noted above, no one from the world at large can have the requisite causal connection, and so such individuals are disregarded. Once the inquiry is narrowed to the appropriate candidates, the first possible validating life that comes to mind is A, who does in fact fulfill the requirement: Since A's death cuts off the possibility of any more children being born to him, it is impossible, no matter when A dies, for any of A's children to be alive and under the age of 21 beyond 21 years after A's death. (See the Background to Section 21208.)

A is therefore the validating life for the nonvested property interest in favor of A's children who attain 21. None of the other

individuals who is connected to this transaction could serve as the validating life because an invalidating chain of possible post-creation events exists as to each one of them. The other individuals who might be considered include W, X, Y, and B. In the case of W, an invalidating chain of events is that she might predecease A, A might remarry and have a child by his new wife, and such child might be alive and under the age of 21 beyond the 21-year period following W's death. With respect to X and Y, an invalidating chain of events is that they might predecease A, A might later have another child, and that child might be alive and under 21 beyond the 21-year period following the death of the survivor of X and Y. As to B, she suffers from the same invalidating chain of events as exists with respect to X and Y. The fact that none of these other individuals can serve as the validating life is of no consequence, however, because only one such individual is required for the validity of a nonvested interest to be established, and that individual is A.

4. Rule of Section 21208 (Posthumous Birth)

See the Background to Section 21208.

5. Recipients as Their Own Validating Lives

It is well established at common law that, in appropriate cases, the recipient of an interest can be his or her own validating life. See, e.g., Rand v. Bank of California, 236 Or. 619, 388 P.2d 437 (1964). Given the right circumstances, this principle can validate interests that are contingent on the recipient's reaching an age in excess of 21, or are contingent on the recipient's surviving a particular point in time that is or might turn out to be in excess of 21 years after the interest was created or after the death of a person in being at the date of creation.

Example (2)—Devisees as their own validating lives. G devised real property "to A's children who attain 25." A predeceased G. At G's death, A had three living children, all of whom were under 25.

The nonvested property interest in favor of A's children who attain 25 is validated by Section 21205(a). Under Section 21208, the possibility that A will have a child born to him after his death (and since A predeceased G, after G's death) must be disregarded. Consequently, even if A's wife survived G, and even if she was pregnant at G's death or even if A had deposited sperm in a sperm bank prior to his death, it must be assumed that all of A's children are in being at G's death. A's children are, therefore, their own validating lives. (Note that Section 21208

requires that in determining whether an individual is a validating life, the possibility that a child will be born to "an" individual after the individual's death must be disregarded. The validating life and the individual whose having a post-death child is disregarded need not be the same individual.) Each one of A's children, all of whom under Section 21208 are regarded as alive at G's death, will either reach the age of 25 or fail to do so within his or her own lifetime. To say this another way, it is certain to be known no later than at the time of the death of each child whether or not that child survived to the required age.

6. Validating Life Can Be Survivor of Group

In appropriate cases, the validating life need not be individualized at first. Rather the validating life can initially (i.e., when the interest was created) be the unidentified survivor of a group of individuals. It is common in such cases to say that the members of the group are the validating lives, but the true meaning of the statement is that the validating life is the member of the group who turns out to live the longest. As the court said in Skatterwood v. Edge, 1 Salk. 229, 91 Eng. Rep. 203 (K.B. 1697), "for let the lives be never so many, there must be a survivor, and so it is but the length of that life; for Twisden used to say, the candles were all lighted at once."

Example (3) — Case of validating life being the survivor of a group. G devised real property "to such of my grandchildren as attain 21." Some of G's children are living at G's death.

The nonvested property interest in favor of G's grandchildren who attain 21 is valid under Section 21205(a). The validating life is that one of G's children who turns out to live the longest. Since under Section 21208, it must be assumed that none of G's children will have post-death children, it is regarded as impossible for any of G's grandchildren to be alive and under 21 beyond the 21-year period following the death of G's last surviving child.

Example (4) — Sperm bank case. G devised property in trust, directing the income to be paid to G's children for the life of the survivor, then to G's grandchildren for the life of the survivor, and on the death of G's last surviving grandchild, to pay the corpus to G's great-grandchildren then living. G's children all predeceased him, but several grandchildren were living at G's death. One of G's predeceased children (his son, A) had deposited sperm in a sperm bank. A's widow was living at G's death.

The nonvested property interest in favor of G's great-grandchildren is valid under Section 21205(a). The validating life is the last surviving grandchild among the grandchildren living at G's death. Under Section 21208, the possibility that A will have a child conceived after G's death must be disregarded. Note that Section 21208 requires that in determining whether an individual is a validating life, the possibility that a child will be born to "an" individual after the individual's death is disregarded. The validating life and the individual whose having a post-death child is disregarded need not be the same individual. Thus in this example, by disregarding the possibility that A will have a conceived-after-death child, G's last surviving grandchild becomes the validating life because G's last surviving grandchild is deemed to have been alive at G's death, when the great-grandchildren's interests were created.

Example (5) — Child in gestation case. G devised property in trust, to pay the income equally among G's living children; on the death of G's last surviving child, to accumulate the income for 21 years; on the 21st anniversary of the death of G's last surviving child, to pay the corpus and accumulated income to G's then-living descendants, per stirpes; if none, to X Charity. At G's death his child (A) was 6 years old, and G's wife (W) was pregnant. After G's death, W gave birth to their second child (B).

The nonvested property interests in favor of G's descendants and in favor of X Charity are valid under Section 21205(a). The validating life is A. Under Section 21208, the possibility that a child will be born to an individual after the individual's death must be disregarded for the purposes of determining validity under Section 21205(a). Consequently, the possibility that a child will be born to G after his death must be disregarded; and the possibility that a child will be born to any of G's descendants after their deaths must also be disregarded.

Note, however, that the rule of Section 21208 does not apply to the question of the entitlement of an after-born child to take a beneficial interest in the trust. The common law rule (sometimes codified) that a child in gestation is treated as alive, if the child is subsequently born viable, applies to this question. Thus, Section 21208 does not prevent B from being an income beneficiary under G's trust, nor does it prevent a descendant in gestation on the 21st anniversary of the death of G's last surviving child from being a member of the class of G's "then-living descendants," as

long as such descendant has no then-living ancestor who takes instead.

7. Different Validating Lives Can and in Some Cases Must Be Used

Dispositions of property sometimes create more than one nonvested property interest. In such cases, the validity of each interest is treated individually. A validating life that validates one interest might or might not validate the other interests. Since it is not necessary that the same validating life be used for all interests created by a disposition, the search for a validating life for each of the other interests must be undertaken separately.

8. Perpetuity Saving Clauses and Similar Provisions

Knowledgeable lawyers almost routinely insert perpetuity saving clauses into instruments they draft. Saving clauses contain two components, the first of which is the perpetuity-period component. This component typically requires the trust or other arrangement to terminate no later than 21 years after the death of the last survivor of a group of individuals designated therein by name or class. (The lives of corporations, animals, or sequoia trees cannot be used.) The second component of saving clauses is the gift-over component. This component expressly creates a gift over that is guaranteed to vest at the termination of the period set forth in the perpetuity-period component, but only if the trust or other arrangement has not terminated earlier in accordance with its other terms.

It is important to note that regardless of what group of individuals is designated in the perpetuity-period component of a saving clause, the surviving member of the group is not necessarily the individual who would be the validating life for the nonvested property interest or power of appointment in the absence of the saving clause. Without the saving clause, one or more interests or powers may in fact fail to satisfy the requirement of Section 21205(a), 21206(a), or 21207(a) for initial validity. By being designated in the saving clause, however, the survivor of the group becomes the validating life for all interests and powers in the trust or other arrangement: The saving clause confers on the last surviving member of the designated group the requisite causal connection between his or her death and the impossibility of any interest or power in the trust or other arrangement remaining in existence beyond the 21-year period following such individual's death.

Example (6) — Valid saving clause case. A testamentary trust directs income to be paid to the testator's children for the life of the survivor, then to the testator's grandchildren for the life of the survivor, corpus on the death of the testator's last living

grandchild to such of the testator's descendants as the last living grandchild shall by will appoint; in default of appointment, to the testator's then-living descendants, per stirpes. A saving clause in the will terminates the trust, if it has not previously terminated, 21 years after the death of the testator's last surviving descendant who was living at the testator's death. The testator was survived by children.

In the absence of the saving clause, the nongeneral power of appointment in the last living grandchild and the nonvested property interest in the gift-in-default clause in favor of the testator's descendants fail the test of Sections 21205(a) and 21207(a) for initial validity. That is, were it not for the saving clause, there is no validating life. However, the surviving member of the designated group becomes the validating life, so that the saving clause does confer initial validity on the nongeneral power of appointment and on the nonvested property interest under Sections 21205(a) and 21207(a).

If the governing instrument designates a group of individuals that would cause it to be impracticable to determine the death of the survivor, the common law courts have developed the doctrine that the validity of the nonvested property interest or power of appointment is determined as if the provision in the governing instrument did not exist. See cases cited in Restatement (Second) of Property (Donative Transfers) Reporter's Note No. 3, at 45 (1983). See also Restatement (Second) of Property (Donative Transfers) § 1.3(1) comment a (1983); Restatement of Property § 374 & comment 1 (1944); 6 American Law of Property § 24.13 (A. Casner ed. 1952); 5A R. Powell, The Law of Real Property ¶ 766[5] (1985); L. Simes & A. Smith, The Law of Future Interests § 1223 (2d ed. 1956). If, for example, the designated group in Example (6) were the residents of X City (or the members of Y Country Club) living at the time of the testator's death, the saving clause would not validate the power of appointment or the nonvested property interest. Instead, the validity of the power of appointment and the nonvested property interest would be determined as if the provision in the governing instrument did not exist. Since without the saving clause the power of appointment and the nonvested property interest would fail to satisfy the requirements of Sections 21205(a) and 21207(a) for initial validity, their validity would be governed by Sections 21205(b) and 21207(b).

The application of the above common law doctrine, which is not superseded by this chapter and so remains in full force, is not limited to saving clauses. It also applies to trusts or other arrangements where the period thereof is directly linked to the life of the survivor of a designated

group of individuals. An example is a trust to pay the income to the grantor's descendants from time to time living, per stirpes, for the period of the life of the survivor of a designated group of individuals living when the nonvested property interest or power of appointment in question was created, plus the 21-year period following the survivor's death; at the end of the 21-year period, the corpus is to be divided among the grantor's then-living descendants, per stirpes, and if none, to the XYZ Charity. If the group of individuals so designated is such that it would be impracticable to determine the death of the survivor, the validity of the disposition is determined as if the provision in the governing instrument did not exist. The term of the trust is therefore governed by the allowable 90-year period of Section 21205(b), 21206(b), or 21207(b) of the statutory rule.

9. Additional references

Restatement (Second) of Property (Donative Transfers) § 1.3(1) & comments (1983); Waggoner, *Perpetuity Reform,* 81 Mich. L. Rev. 1718, 1720-26 (1983).

C. Section 21205(b): Wait-and-See — Nonvested Property Interests Whose Validity Is Initially in Abeyance

Unlike the common law rule, the statutory rule against perpetuities does not automatically invalidate nonvested property interests for which there is no validating life. A nonvested property interest that does not meet the requirements for validity under Section 21205(a) might still be valid under the wait-and-see provisions of Section 21205(b). Such an interest is invalid under Section 21205(b) only if in actuality it does not vest (or terminate) during the allowable waiting period. Such an interest becomes invalid, in other words, only if it is still in existence and nonvested when the allowable waiting period expires.

1. The 90-Year Allowable Waiting Period

Since a wait-and-see rule against perpetuities, unlike the common law rule, makes validity or invalidity turn on actual post-creation events, it requires that an actual period of time be measured off during which the contingencies attached to an interest are allowed to work themselves out to a final resolution. The statutory rule against perpetuities establishes an allowable waiting period of 90 years. Nonvested property interests that have neither vested nor terminated at the expiration of the 90-year allowable waiting period become invalid.

As explained in the Prefatory Note to the Uniform Statutory Rule Against Perpetuities (1986), the allowable period of 90 years is not an arbitrarily selected period of time. On the contrary, the 90-year period represents a reasonable approximation of — a proxy for — the period of

time that would, on average, be produced through the use of an actual set of measuring lives identified by statute and then adding the traditional 21-year tack-on period after the death of the survivor.

2. Technical Violations of the Common Law Rule

One of the harsh aspects of the invalidating side of the common law rule, against which the adoption of the wait-and-see element in Section 21205(b) is designed to relieve, is that nonvested property interests at common law are invalid even though the invalidating chain of possible events almost certainly will not happen. In such cases, the violation of the common law rule could be said to be merely technical. Nevertheless, at common law, the nonvested property interest is invalid.

Cases of technical violation fall generally into discrete categories, identified and named by Professor Leach in Perpetuities in a Nutshell, 51 Harv. L. Rev. 638 (1938), as the fertile octogenarian, the administrative contingency, and the unborn widow. The following three examples illustrate how Section 21205(b) affects these categories.

Example (7) — Fertile octogenarian case. G devised property in trust, directing the trustee to pay the net income therefrom "to A for life, then to A's children for the life of the survivor, and upon the death of A's last surviving child to pay the corpus of the trust to A's grandchildren." G was survived by A (a female who had passed the menopause) and by A's two adult children (X and Y).

The remainder interest in favor of G's grandchildren would be invalid at common law, and consequently is not validated by Section 21205(a). There is no validating life because, under the common law's conclusive presumption of lifetime fertility, which is not superseded by this chapter (see the Background to Section 21201), A might have a third child (Z), conceived and born after G's death, who will have a child conceived and born more than 21 years after the death of the survivor of A, X, and Y.

Under Section 21205(b), however, the remote possibility of the occurrence of this chain of events does not invalidate the grandchildren's interest. The interest becomes invalid only if it remains in existence and nonvested 90 years after G's death. The chance that the grandchildren's remainder interest will become invalid under Section 21205(b) is negligible.

Example (8) — Administrative contingency case. G devised property "to such of my grandchildren, born before or after my death, as may be living upon final distribution of my estate." G was survived by children and grandchildren.

The remainder interest in favor of A's grandchildren would be invalid at common law, and consequently is not validated by Section 21205(a). The final distribution of G's estate might not occur within 21 years of G's death, and after G's death grandchildren might be conceived and born who might survive or fail to survive the final distribution of G's estate more than 21 years after the death of the survivor of G's children and grandchildren who were living at G's death.

Under Section 21205(b), however, the remote possibility of the occurrence of this chain of events does not invalidate the grandchildren's remainder interest. The interest becomes invalid only if it remains in existence and nonvested 90 years after G's death. Since it is almost certain that the final distribution of G's estate will occur well within this 90-year period, the chance that the grandchildren's interest will be invalid is negligible.

Example (9) — Unborn widow case. G devised property in trust, the income to be paid "to my son A for life, then to A's spouse for her life, and upon the death of the survivor of A and his spouse, the corpus to be delivered to A's then living descendants." G was survived by A, by A's wife (W), and by their adult children (X and Y).

Unless the interest in favor of A's "spouse" is construed to refer only to W, rather than to whoever is A's spouse when he dies, if anyone, the remainder interest in favor of A's descendants would be invalid at common law, and consequently is not validated by Section 21205(a). There is no validating life because A's spouse might not be W; A's spouse might be someone who was conceived and born after G's death; she might outlive the death of the survivor of A, W, X, and Y by more than 21 years; and descendants of A might be born or die before the death of A's spouse but after the 21-year period following the death of the survivor of A, W, X, and Y.

Under Section 21205(b), however, the remote possibility of the occurrence of this chain of events does not invalidate the descendants remainder interest. The interest becomes invalid only if it remains in existence and nonvested 90 years after G's death. The chance that the descendants remainder interest will become invalid under the statutory rule is small.

3. Age Contingencies in Excess of 21

Another category of technical violation of the common law rule arises in cases of age contingencies in excess of 21 where the takers cannot be

their own validating lives (unlike Example (2), above). The violation of the common law rule falls into the technical category because the insertion of a saving clause would in almost all cases allow the disposition to be carried out as written. In effect, the statutory rule operates like the perpetuity-period component of a saving clause.

Example (10) — Age contingency in excess of 21 case. G devised property in trust, directing the trustee to pay the income "to A for life, then to A's children; the corpus of the trust is to be equally divided among A's children who reach the age of 30." G was survived by A, by A's spouse (H), and by A's two children (X and Y), both of whom were under the age of 30 when G died.

The remainder interest in favor of A's children who reach 30 is a class gift. At common law, the interests of all potential class members must be valid or the class gift is totally invalid. Leake v. Robinson, 2 Mer. 363, 35 Eng. Rep. 979 (Ch. 1817). This chapter does not supersede the all-or-nothing rule for class gifts (see the Background to Section 21201), and so the all-or-nothing rule continues to apply under this chapter. Although X and Y will either reach 30 or die under 30 within their own lifetimes, there is at G's death the possibility that A will have an afterborn child (Z) who will reach 30 or die under 30 more than 21 years after the death of the survivor of A, H, X, and Y. The class gift would be invalid at common law and consequently is not validated by Section 21205(a).

Under Section 21205(b), however, the possibility of the occurrence of this chain of events does not invalidate the children's remainder interest. The interest becomes invalid only if an interest of a class member remains nonvested 90 years after G's death.

Although unlikely, suppose that at A's death Z's age is such that he could be alive and under the age of 30 at the expiration of the allowable waiting period. Suppose further that at A's death X or Y or both is over the age of 30. The court, upon the petition of an interested person, must under Section 21220 reform G's disposition. See Example (3) in the Background to Section 21220.

BACKGROUND TO SECTIONS 21206 AND 21207

[Adapted from Comments D-F to Section 1 of the Uniform Statutory Rule Against Perpetuities (1986)]

D. Sections 21206(a) and 21207(a): Powers of Appointment That Are Initially Valid

Sections 21206 and 21207 set forth the statutory rule against perpetuities with respect to powers of appointment. A power of appointment is the authority, other than as an incident of the beneficial ownership of property, to designate recipients of beneficial interests in or powers of appointment over property. Restatement (Second) of Property (Donative Transfers) § 11.1 (1986). The property or property interest subject to a power of appointment is called the "appointive property."

The various persons connected to a power of appointment are identified by a special terminology. The "donor" is the person who created the power of appointment. The "donee" is the person who holds the power of appointment, i.e., the powerholder. The "objects" are the persons to whom an appointment can be made. The "appointees" are the persons to whom an appointment has been made. The "takers in default" are the persons whose property interests are subject to being defeated by the exercise of the power of appointment and who take the property to the extent the power is not effectively exercised. Restatement (Second) of Property (Donative Transfers) § 11.2 (1986).

A power of appointment is "general" if it is exercisable in favor of the donee of the power, the donee's creditors, the donee's estate, or the creditors of the donee's estate. A power of appointment that is not general is a "nongeneral" power of appointment. Restatement (Second) of Property (Donative Transfers) § 11.4 (1986).

A power of appointment is "presently exercisable" if, at the time in question, the donee can by an exercise of the power create an interest in or a power of appointment over the appointive property. Restatement (Second) of Property (Donative Transfers) § 11.5 (1986). A power of appointment is "testamentary" if the donee can exercise it only in the donee's will. Restatement of Property § 321 (1940). A power of appointment is "not presently exercisable because of a condition precedent" if the only impediment to its present exercisability is a condition precedent, i.e., the occurrence of some uncertain event. Since a power of appointment terminates on the donee's death, a deferral of a power's present exercisability until a future time (even a time certain) imposes a condition precedent that the donee be alive at that future time.

A power of appointment is a "fiduciary" power if it is held by a fiduciary and is exercisable by the fiduciary in a fiduciary capacity. A power of appointment that is exercisable in an individual capacity is a "nonfiduciary" power. As used in this chapter, the term "power of appointment" refers to "fiduciary" and to "nonfiduciary" powers, unless the context indicates otherwise.

Although Gray's formulation of the common law rule against perpetuities (see the Background to Section 21205) does not speak directly of powers of appointment, the common law rule is applicable to powers of appointment (other than presently exercisable general powers of appointment). The principle of Sections 21206(a) and 21207(a) is that a power of appointment that satisfies the common law rule against perpetuities is valid under the statutory rule against perpetuities, and consequently it can be validly exercised, without being subjected to a waiting period during which the power's validity is in abeyance.

Two different tests for validity are employed at common law, depending on what type of power is at issue. In the case of a nongeneral power (whether or not presently exercisable) and in the case of a general testamentary power, the power is initially valid if, when the power was created, it is certain that the latest possible time that the power can be exercised is no later than 21 years after the death of an individual then in being. In the case of a general power not presently exercisable because of a condition precedent, the power is initially valid if it is then certain that the condition precedent to its exercise will either be satisfied or become impossible to satisfy no later than 21 years after the death of an individual then in being. Sections 21206(a) and 21207(a) codify these rules. Under either test, initial validity depends on the existence of a validating life. The procedure for determining whether a validating life exists is essentially the same procedure explained in Part B, above, pertaining to nonvested property interests.

Example (11) — Initially valid general testamentary power case. G devised property "to A for life, remainder to such persons, including A's estate or the creditors of A's estate, as A shall by will appoint." G was survived by his daughter (A).

A's power, which is a general testamentary power, is valid as of its creation under Section 21207(a). The test is whether or not the power can be exercised beyond 21 years after the death of an individual in being when the power was created (G's death). Since A's power cannot be exercised after A's death, the validating life is A, who was in being at G's death.

Example (12) — Initially valid nongeneral power case. G devised property "to A for life, remainder to such of A's descendants as A shall appoint." G was survived by his daughter (A).

A's power, which is a nongeneral power, is valid as of its creation under Section 21207(a). The validating life is A; the analysis leading to validity is the same as applied in Example (11), above.

Example (13) — Case of initially valid general power not presently exercisable because of a condition precedent. G devised property "to A for life, then to A's first born child for life, then to such persons, including A's first born child or such child's estate or creditors, as A's first born child shall appoint." G was survived by his daughter (A), who was then childless.

The power in A's first born child, which is a general power not presently exercisable because of a condition precedent, is valid as of its creation under Section 21206(a). The power is subject to a condition precedent — that A have a child — but this is a contingency that under subdivision (d) is deemed certain to be resolved one way or the other within A's lifetime. A is therefore the validating life: The power cannot remain subject to the condition precedent after A's death. Note that the latest possible time that the power can be exercised is at the death of A's first born child, which might occur beyond 21 years after the death of A (and anyone else who was alive when G died). Consequently, if the power conferred on A's first born child had been a nongeneral power or a general testamentary power, the power could not be validated by Section 21207(a); instead, the power's validity would be governed by Section 21207(b).

E. Sections 21206(b) and 21207(b): Wait-and-See — Powers of Appointment Whose Validity Is Initially in Abeyance

1. Powers of Appointment

Under the common law rule, a general power not presently exercisable because of a condition precedent is invalid as of the time of its creation if the condition might neither be satisfied nor become impossible to satisfy within a life in being plus 21 years. A nongeneral power (whether or not presently exercisable) or a general testamentary power is invalid as of the time of its creation if it might not terminate (by irrevocable exercise or otherwise) within a life in being plus 21 years.

Sections 21206(b) and 21207(b), by adopting the wait-and-see method of perpetuity reform, shift the ground of invalidity from possible to actual

post-creation events. Under these subdivisions, a power of appointment that would have violated the common law rule, and therefore fails the tests in Section 21206(a) or 21207(a) for initial validity, is nevertheless not invalid as of the time of its creation. Instead, its validity is in abeyance. A general power not presently exercisable because of a condition precedent is invalid only if in actuality the condition neither is satisfied nor becomes impossible to satisfy within the allowable 90-year waiting period. A nongeneral power or a general testamentary power is invalid only if in actuality it does not terminate (by irrevocable exercise or otherwise) within the allowable 90-year waiting period.

Example (14) — General testamentary power case. G devised property "to A for life, then to A's first born child for life, then to such persons, including the estate or the creditors of the estate of A's first born child, as A's first born child shall by will appoint; in default of appointment, to G's grandchildren in equal shares." G was survived by his daughter (A), who was then childless, and by his son (B), who had two children (X and Y).

Since the general testamentary power conferred on A's first born child fails the test of Section 21207(a) for initial validity, its validity is governed by Section 21207(b). If A has a child, such child's death must occur within 90 years of G's death for any provision in the child's will purporting to exercise the power to be valid.

Example (15) —Nongeneral power case. G devised property "to A for life, then to A's first born child for life, then to such of G's grandchildren as A's first born child shall appoint; in default of appointment, to the children of G's late nephew, Q." G was survived by his daughter (A), who was then childless, by his son (B), who had two children (X and Y), and by Q's two children (R and S).

Since the nongeneral power conferred on A's first born child fails the test of Section 21207(a) for initial validity, its validity is governed by Section 21207(b). If A has a child, such child must exercise the power within 90 years after G's death or the power becomes invalid.

Example (16) — General power not presently exercisable because of a condition precedent. G devised property "to A for life, then to A's first born child for life, then to such persons, including A's first born child or such child's estate or creditors, as A's first born child shall appoint after reaching the age of 25; in default of appointment, to G's grandchildren." G was

survived by his daughter (A), who was then childless, and by his son (B), who had two children (X and Y).

The power conferred on A's first born child is a general power not presently exercisable because of a condition precedent. Since the power fails the test of Section 21206(a) for initial validity, its validity is governed by Section 21206(b). If A has a child, such child must reach the age of 25 (or die under 25) within 90 years after G's death or the power is invalid.

2. Fiduciary Powers

Purely administrative fiduciary powers are excluded from the statutory rule under Section 21225(b)-(c), but the only distributive fiduciary power that is excluded is the power described in Section 21225(d). Otherwise, distributive fiduciary powers are subject to the statutory rule. Such powers are usually nongeneral powers.

Example (17)—Trustee's discretionary powers over income and corpus. G devised property in trust, the terms of which were that the trustee was authorized to accumulate the income or pay it or a portion of it out to A during A's lifetime; after A's death, the trustee was authorized to accumulate the income or to distribute it in equal or unequal shares among A's children until the death of the survivor; and on the death of A's last surviving child to pay the corpus and accumulated income (if any) to B. The trustee was also granted the discretionary power to invade the corpus on behalf of the permissible recipient or recipients of the income.

The trustee's nongeneral powers to invade corpus and to accumulate or spray income among A's children are not excluded by Section 21225(d), nor are they initially valid under Section 21207(a). Their validity is, therefore, governed by Section 21207(b). Both powers become invalid thereunder, and hence no longer exercisable, 90 years after G's death.

It is doubtful that the powers will become invalid, because the trust will probably terminate by its own terms earlier than the expiration of the allowable 90-year period. But if the powers do become invalid, and hence no longer exercisable, they become invalid as of the time the allowable 90-year period expires. Any exercises of either power that took place before the expiration of the allowable 90-year period are not invalidated retroactively. In addition, if the powers do become invalid, a court in an appropriate proceeding must reform the instrument in accordance with the provisions of Section 21220.

F. The Validity of the Donee's Exercise of a Valid Power

1. Donee's Exercise of Power

The fact that a power of appointment is valid, either because it (1) was not subject to the statutory rule to begin with, (2) is initially valid under Sections 21206(a) or 21207(a), or (3) becomes valid under Sections 21206(b) or 21207(b), means merely that the power can be validly exercised. It does not mean that any exercise that the donee decides to make is valid. The validity of the interests or powers created by the exercise of a valid power is a separate matter, governed by the provisions of this chapter. A key factor in deciding the validity of such appointed interests or appointed powers is determining when they were created for purposes of this chapter. Under Sections 21211 and 21212, as explained in the Background to those sections, the time of creation is when the power was exercised if it was a presently exercisable general power; and if it was a nongeneral power or a general testamentary power, the time of creation is when the power was created. This is the rule generally accepted at common law (see Restatement (Second) of Property (Donative Transfers) § 1.2, comment d (1983); Restatement of Property § 392 (1944)), and it is the rule adopted under this chapter (except for purposes of Section 21202 only, as explained in the Background to Section 21202).

Example (18)—Exercise of a nongeneral power of appointment. G was the life income beneficiary of a trust and the donee of a nongeneral power of appointment over the succeeding remainder interest, exercisable in favor of M's descendants (except G). The trust was created by the will of G's mother, M, who predeceased him. G exercised his power by his will, directing the income to be paid after his death to his brother B's children for the life of the survivor, and upon the death of B's last surviving child, to pay the corpus of the trust to B's grandchildren. B predeceased M; B was survived by his two children, X and Y, who also survived M and G.

G's power and his appointment are valid. The power and the appointed interests were created at M's death when the power was created, not on G's death when it was exercised. See Sections 21210-21211. G's power passes Section 21207(a)'s test for initial validity: G himself is the validating life. G's appointment also passes Section 21205(a)'s test for initial validity: Since B was dead at M's death, the validating life is the survivor of B's children, X and Y.

Suppose that G's power was exercisable only in favor of G's own descendants, and that G appointed the identical interests in favor of his own children and grandchildren. Suppose further that at M's death, G had two children, X and Y, and that a third child, Z, was born later. X, Y, and Z survived G. In this case, the remainder interest in favor of G's grandchildren would not pass Section 21205(a)'s test for initial validity. Its validity would be governed by Section 21205(b), under which it would be valid if G's last surviving child died within 90 years after M's death.

If G's power were a general testamentary power of appointment, rather than a nongeneral power, the solution would be the same. The period of the statutory rule with respect to interests created by the exercise of a general testamentary power starts to run when the power was created (at M's death, in this example), not when the power was exercised (at G's death).

Example (19) — Exercise of a presently exercisable general power of appointment. G was the life income beneficiary of a trust and the donee of a presently exercisable general power of appointment over the succeeding remainder interest. G exercised the power by deed, directing the trustee after his death to pay the income to G's children in equal shares for the life of the survivor, and upon the death of his last surviving child to pay the corpus of the trust to his grandchildren.

The validity of G's power is not in question: A presently exercisable general power of appointment is not subject to the statutory rule against perpetuities. G's appointment, however, is subject to the statutory rule. If G reserved a power to revoke his appointment, the remainder interest in favor of G's grandchildren passes Section 21205(a)'s test for initial validity. Under Sections 21210-21211, the appointed remainder interest was created at G's death. The validating life for his grandchildren's remainder interest is G's last surviving child.

If G's appointment were irrevocable, however, the grandchildren's remainder interest fails the test of Section 21205(a) for initial validity. Under Sections 21210-21211, the appointed remainder interest was created upon delivery of the deed exercising G's power (or when the exercise otherwise became effective). Since the validity of the grandchildren's remainder interest is governed by Section 21205(b), the remainder interest becomes invalid, and the disposition becomes subject to reformation under Section 21220, if G's last surviving

child lives beyond 90 years after the effective date of G's appointment.

Example (20) — Exercises of successively created nongeneral powers of appointment. G devised property to A for life, remainder to such of A's descendants as A shall appoint. At his death, A exercised his nongeneral power by appointing to his child B for life, remainder to such of B's descendants as B shall appoint. At his death, B exercised his nongeneral power by appointing to his child C for life, remainder to C's children. A and B were living at G's death. Thereafter, C was born. A later died, survived by B and C. B then died survived by C.

A's nongeneral power passes Section 21207(a)'s test for initial validity. A is the validating life. B's nongeneral power, created by A's appointment, also passes Section 21207(a)'s test for initial validity. Since under Sections 21210-21211 the appointed interests and powers are created at G's death, and since B was then alive, B is the validating life for his nongeneral power. (If B had been born after G's death, however, his power would have failed Section 21207(a)'s test for initial validity; its validity would be governed by Section 21207(b), and would turn on whether or not it was exercised by B within 90 years after G's death.)

Although B's power is valid, his exercise may be partly invalid. The remainder interest in favor of C's children fails the test of Section 21205(a) for initial validity. The period of the statutory rule begins to run at G's death, under Sections 21210-21212. (Since B's power was a nongeneral power, B's appointment under the common law relation back doctrine of powers of appointment is treated as having been made by A. If B's appointment related back no further than that, of course, it would have been validated by Section 21205(a) because C was alive at A's death. However, A's power was also a nongeneral power, so relation back goes another step. A's appointment — which now includes B's appointment — is treated as having been made by G.) Since C was not alive at G's death, he cannot be the validating life. And, since C might have more children more than 21 years after the deaths of A and B and any other individual who was alive at G's death, the remainder interest in favor of his children is not initially validated by Section 21205(a). Instead, its validity is governed by Section 21205(b), and turns on whether or not C dies within 90 years after G's death.

Note that if either A's power or B's power (or both) had been a general testamentary power rather than a nongeneral power, the above solution would not change. However, if either A's power or B's power (or both) had been a presently exercisable general power, B's appointment would have passed Section 21205(a)'s test for initial validity. (If A had the presently exercisable general power, the appointed interests and power would be created at A's death, not G's; and if the presently exercisable general power were held by B, the appointed interests and power would be created at B's death.)

2. Common Law "Second-Look" Doctrine

As indicated above, both at common law and under this chapter (except for purposes of Section 21202 only, as explained in the Background to that section), appointed interests and powers established by the exercise of a general testamentary power or a nongeneral power are created when the power was created, not when the power was exercised. In applying this principle, the common law recognizes a so-called doctrine of second-look, under which the facts existing on the date of the exercise are taken into account in determining the validity of appointed interests and appointed powers. E.g., Warren's Estate, 320 Pa. 112, 182 A. 396 (1930); In re Estate of Bird, 225 Cal. App. 2d 196, 37 Cal. Rptr. 288 (1964). The common law's second-look doctrine in effect constitutes a limited wait-and-see doctrine, and is therefore subsumed under but not totally superseded by this chapter. The following example, which is a variation of Example (18) above, illustrates how the second-look doctrine operates at common law and how the situation would be analyzed under this chapter.

Example (21) — Second-look case. G was the life income beneficiary of a trust and the donee of a nongeneral power of appointment over the succeeding remainder interest, exercisable in favor of G's descendants. The trust was created by the will of his mother, M, who predeceased him. G exercised his power by his will, directing the income to be paid after his death to his children for the life of the survivor, and upon the death of his last surviving child, to pay the corpus of the trust to his grandchildren. At M's death, G had two children, X and Y. No further children were born to G, and at his death X and Y were still living.

The common law solution of this example is as follows: G's appointment is valid under the common law rule. Although the period of the rule begins to run at M's death, the facts existing at

G's death can be taken into account. This second look at the facts discloses that G had no additional children. Thus the possibility of additional children, which existed at M's death when the period of the rule began to run, is disregarded. The survivor of X and Y, therefore, becomes the validating life for the remainder interest in favor of G's grandchildren, and G's appointment is valid. The common law's second-look doctrine would not, however, save G's appointment if he actually had one or more children after M's death and if at least one of these after-born children survived G.

Under this chapter, if no additional children are born to G after M's death, the common law second-look doctrine can be invoked as of G's death to declare G's appointment then to be valid under Section 21205(a); no further waiting is necessary. However, if additional children are born to G and one or more of them survives G, Section 21205(b) applies and the validity of G's appointment depends on G's last surviving child dying within 90 years after M's death.

3. Additional References

Restatement (Second) of Property (Donative Transfers) § 1.2 comments d, f, g, & h; § 1.3 comment g; § 1.4 comment l (1983).

BACKGROUND TO SECTION 21208

[Adapted from Comment B to Section 1 of the Uniform Statutory Rule Against Perpetuities (1986)]

The rule established in Section 21208 plays a significant role in the search for a validating life. Section 21208 declares that the possibility that a child will be born to an individual after the individual's death is to be disregarded. It is important to note that this rule applies only for the purposes of determining the validity of an interest (or power of appointment) under Section 21205(a), 21206(a) or 21207(a). The rule of Section 21208 does not apply, for example, to questions such as whether or not a child who is born to an individual after the individual's death qualifies as a taker of a beneficial interest — as a member of a class or otherwise. Neither Section 21208, nor any other provision of this chapter, supersedes the widely accepted common law principle, sometimes codified, that a child in gestation (a child sometimes described as a child *en ventre sa mere*) who is later born alive is regarded as alive at the commencement of gestation.

The limited purpose of Section 21208 is to solve a perpetuity problem caused by advances in medical science. The problem is illustrated by a case such as Example (1) in the Background to Section 21205 — "to A for life, remainder to A's children who reach 21." When the common law rule was developing, the possibility was recognized, strictly speaking, that one or more of A's children might reach 21 more than 21 years after A's death. The possibility existed because A's wife (who might not be a life in being) might be pregnant when A died. If she was, and if the child was born viable a few months after A's death, the child could not reach his or her 21st birthday within 21 years after A's death. The device then invented to validate the interest of A's children was to "extend" the allowable perpetuity period by tacking on a period of gestation, if needed. As a result, the common law perpetuity period was comprised of three components: (1) a life in being (2) plus 21 years (3) plus a period of gestation, when needed. Today, thanks to sperm banks, frozen embryos, and even the possibility of artificially maintaining the body functions of deceased pregnant women long enough to develop the fetus to viability — advances in medical science unanticipated when the common law rule was in its developmental stages — having a pregnant wife at death is no longer the only way of having children after death. These medical developments, and undoubtedly others to come, make the mere addition of a period of gestation inadequate as a device to confer initial validity under Section 21205(a) on the interest of A's children in the above example. The rule of Section 21208, however, does ensure the initial validity of the children's interest. Disregarding the possibility that children of A will be born after his death allows A to be the validating life. None of his children, under this assumption, can reach 21 more than 21 years after his death.

Note that Section 21208 subsumes not only the case of children conceived after death, but also the more conventional case of children in gestation at death. With Section 21208 in place, the third component of the common law perpetuity period is unnecessary and has been jettisoned. The perpetuity period recognized in Section 21205(a), 21206(a), or 21207(a) has only two components: (1) a life in being (2) plus 21 years.

As to the legal status of conceived-after-death children, that question has not yet been resolved. For example, if in Example (1) in the Background to Section 21205 it in fact turns out that A does leave sperm on deposit at a sperm bank and if in fact A's wife does become pregnant as a result of artificial insemination, the child or children produced thereby might not be included at all in the class gift. *Cf.* Restatement (Second) of Property (Donative Transfers) Introductory Note to Ch. 26,

at 2-3 (Tent. Draft No. 9, 1986). Without trying to predict how that matter will be settled in the future, the best way to handle the problem from the perpetuity perspective is Section 21208's rule requiring the possibility of post-death children to be disregarded.

BACKGROUND TO SECTION 21210

[Adapted from the Comment to Section 2(a) of the Uniform Statutory Rule Against Perpetuities (1986)]

General Principles of Property Law; When Nonvested Property Interests and Powers of Appointment Are Created

Under Sections 21205-21207, the period of time allowed by the statutory rule against perpetuities is marked off from the time of creation of the nonvested property interest or power of appointment in question. Section 21202, with certain exceptions, provides that this chapter applies only to nonvested property interests and powers of appointment created on or after the operative date of this chapter.

Except as provided in Sections 21211 and 21212, and in Section 21202(b) for purposes of that section only, the time of creation of nonvested property interests and powers of appointment is determined under general principles of property law.

Since a will becomes effective as a dispositive instrument upon the decedent's death, not upon the execution of the will, general principles of property law determine that the time when a nonvested property interest or a power of appointment created by will is created is at the decedent's death.

With respect to a nonvested property interest or a power of appointment created by inter vivos transfer, the time when the interest or power is created is the date the transfer becomes effective for purposes of property law generally, normally the date of delivery of the deed.

With respect to a nonvested property interest or a power of appointment created by the testamentary or inter vivos exercise of a power of appointment, general principles of property law adopt the "relation back" doctrine. Under that doctrine, the appointed interests or powers are created when the power was created not when it was exercised, if the exercised power was a nongeneral power or a general testamentary power. If the exercised power was a general power presently exercisable, the relation back doctrine is not followed; the time of creation of the appointed property interests or appointed powers is regarded as the time when the power was irrevocably exercised, not when the power was created.

BACKGROUND TO SECTION 21211

[Adapted from the Comment to Section 2(b) of the Uniform Statutory Rule Against Perpetuities (1986)]

1. Postponement, for Purposes of This Chapter, of the Time When a Nonvested Property Interest or a Power of Appointment Is Created in Certain Cases

The reason that the significant date for purposes of this chapter is the date of creation is that the unilateral control of the interest (or the interest subject to the power) by one person is then relinquished. In certain cases, all beneficial rights in a property interest (including an interest subject to a power of appointment) remain under the unilateral control of one person even after the delivery of the deed or even after the decedent's death. In such cases, under Section 21211, the interest or power is created, for purposes of this chapter, when no person, acting alone, has a power presently exercisable to become the unqualified beneficial owner of the property interest (or the property interest subject to the power of appointment).

Example (1) — Revocable inter vivos trust case. G conveyed property to a trustee, directing the trustee to pay the net income therefrom to himself (G) for life, then to G's son A for his life, then to A's children for the life of the survivor of A's children who are living at G's death, and upon the death of such last surviving child, the corpus of the trust is to be distributed among A's then-living descendants, per stirpes. G retained the power to revoke the trust.

Because of G's reservation of the power to revoke the trust, the creation for purposes of this chapter of the nonvested property interests in this case occurs at G's death, not when the trust was established. This is in accordance with common law, for purposes of the common law rule against perpetuities. Cook v. Horn, 214 Ga. 289, 104 S.E.2d 461 (1958).

The rationale that justifies the postponement of the time of creation in such cases is as follows. A person, such as G in the above example, who alone can exercise a power to become the unqualified beneficial owner of a nonvested property interest is in effect the owner of that property interest. Thus, any nonvested property interest subject to such a power is not created for purposes of this chapter until the power terminates (by release, expiration at the death of the donee, or otherwise). Similarly, as noted above, any property interest or power of appointment created in an

appointee by the irrevocable exercise of such a power is created at the time of the donee's irrevocable exercise.

For the date of creation to be postponed under Section 21211, the power need not be a power to revoke, and it need not be held by the settlor or transferor. A presently exercisable power held by any person acting alone to make himself the unqualified beneficial owner of the nonvested property interest or the property interest subject to a power of appointment is sufficient. If such a power exists, the time when the interest or power is created, for purposes of this chapter, is postponed until the termination of the power (by irrevocable exercise, release, contract to exercise or not to exercise, expiration at the death of the donee, or otherwise). An example of such a power that might not be held by the settlor or transferor is a power, held by any person who can act alone, fully to invade the corpus of a trust.

An important consequence of the idea that a power need not be held by the settlor for the time of creation to be postponed under this section is that it makes postponement possible even in cases of testamentary transfers.

Example (2) — Testamentary trust case. G devised property in trust, directing the trustee to pay the income "to A for life, remainder to such persons (including A, his creditors, his estate, and the creditors of his estate) as A shall appoint; in default of appointment, the property to remain in trust to pay the income to A's children for the life of the survivor, and upon the death of A's last surviving child, to pay the corpus to A's grandchildren." A survived G.

If A exercises his presently exercisable general power, any nonvested property interest or power of appointment created by A's appointment is created for purposes of this chapter when the power is exercised. If A does not exercise the power, the nonvested property interests in G's gift-in-default clause are created when A's power terminates (at A's death). In either case, the postponement is justified because the transaction is the equivalent of G's having devised the full remainder interest (following A's income interest) to A and of A's having in turn transferred that interest in accordance with his exercise of the power or, in the event the power is not exercised, devised that interest at his death in accordance with G's gift-in-default clause. Note, however, that if G had conferred on A a nongeneral power or a general testamentary power, A's power of appointment, any nonvested property interest or power of appointment created by

A's appointment, if any, and the nonvested property interests in G's gift-in-default clause would be created at G's death.

2. Unqualified Beneficial Owner of the Nonvested Property Interest or the Property Interest Subject to a Power of Appointment

For the date of creation to be postponed under Section 21211, the presently exercisable power must be one that entitles the donee of the power to become the unqualified beneficial owner of the nonvested property interest (or the property interest subject to a nongeneral power of appointment, a general testamentary power of appointment, or a general power of appointment not presently exercisable because of a condition precedent). This requirement was met in Example (2), above, because A could by appointing the remainder interest to himself become the unqualified beneficial owner of all the nonvested property interests in G's gift-in-default clause. In Example (2) it is not revealed whether A, if he exercised the power in his own favor, also had the right as sole beneficiary of the trust to compel the termination of the trust and possess himself as unqualified beneficial owner of the property that was the subject of the trust. Having the power to compel termination of the trust is not necessary. If, for example, the trust in Example (2) was a spendthrift trust or contained any other feature that under Section 15403 would prevent A as sole beneficiary from compelling termination of the trust, A's presently exercisable general power over the remainder interest would still postpone the time of creation of the nonvested property interests in G's gift-in-default clause because the power enables A to become the unqualified beneficial owner of such interests.

Furthermore, it is not necessary that the donee of the power have the power to become the unqualified beneficial owner of all beneficial rights in the trust. In Example (2), the property interests in G's gift-in-default clause are not created for purposes of this chapter until A's power expires (or on A's appointment, until the power's exercise) even if someone other than A was the income beneficiary of the trust.

3. Presently Exercisable Power

For the date of creation to be postponed under Section 21211, the power must be presently exercisable. A testamentary power does not qualify. A power not presently exercisable because of a condition precedent does not qualify. If the condition precedent later becomes satisfied, however, so that the power becomes presently exercisable, the interests or powers subject thereto are not created, for purposes of this chapter, until the termination of the power. The common law decision of Fitzpatrick v. Mercantile Safe Deposit Co., 220 Md. 534, 155 A.2d 702 (1959), appears to be in accord with this proposition.

Example (3) — General power in unborn child case. G devised property "to A for life, then to A's first-born child for life, then to such persons, including A's first-born child or such child's estate or creditors, as A's first-born child shall appoint." There was a further provision that in default of appointment, the trust would continue for the benefit of G's descendants. G was survived by his daughter (A), who was then childless. After G's death, A had a child, X. A then died, survived by X.

As of G's death, the power of appointment in favor of A's first-born child and the property interests in G's gift-in-default clause would be regarded as having been created at G's death because the power in A's first-born child was then a general power not presently exercisable because of a condition precedent.

At X's birth, X's general power became presently exercisable and excluded from the statutory rule. X's power also qualifies as a power exercisable by one person alone to become the unqualified beneficial owner of the property interests in G's gift-in-default clause. Consequently, the nonvested property interests in G's gift-in-default clause are not created, for purposes of this chapter, until the termination of X's power. If X exercises his presently exercisable general power, before or after A's death, the appointed interests or powers are created, for purposes of this chapter, as of X's exercise of the power.

4. Partial Powers

For the date of creation to be postponed under Section 21211, the person must have a presently exercisable power to become the unqualified beneficial owner of the full nonvested property interest or the property interest subject to a power of appointment described in Section 21206 or 21207. If, for example, the subject of the transfer was an undivided interest such as a one-third tenancy in common, the power qualifies even though it relates only to the undivided one-third interest in the tenancy in common; it need not relate to the whole property. A power to become the unqualified beneficial owner of only part of the nonvested property interest or the property interest subject to a power of appointment, however, does not postpone the time of creation of the interests or powers subject thereto, unless the power is actually exercised.

Example (4) — "5 and 5" power case. G devised property in trust, directing the trustee to pay the income "to A for life, remainder to such persons (including A, his creditors, his estate, and the creditors of his estate) as A shall by will appoint;" in default of appointment, the governing instrument provided for

the property to continue in trust. A was given a noncumulative power to withdraw the greater of $5,000 or 5% of the corpus of the trust annually. A survived G. A never exercised his noncumulative power of withdrawal.

G's death marks the time of creation of: A's testamentary power of appointment; any nonvested property interest or power of appointment created in G's gift-in-default clause; and any appointed interest or power created by a testamentary exercise of A's power of appointment over the remainder interest. A's general power of appointment over the remainder interest does not postpone the time of creation because it is not a presently exercisable power. A's noncumulative power to withdraw a portion of the trust each year does not postpone the time of creation as to all or the portion of the trust with respect to which A allowed his power to lapse each year because A's power is a power over only part of any nonvested property interest or property interest subject to a power of appointment in G's gift-in-default clause and over only part of any appointed interest or power created by a testamentary exercise of A's general power of appointment over the remainder interest. The same conclusion has been reached at common law. See Ryan v. Ward, 192 Md. 342, 64 A.2d 258 (1949).

If, however, in any year A exercised his noncumulative power of withdrawal in a way that created a nonvested property interest (or power of appointment) in the withdrawn amount (for example, if A directed the trustee to transfer the amount withdrawn directly into a trust created by A), the appointed interests (or powers) would be created when the power was exercised, not when G died.

5. Incapacity of the Donee of the Power

The fact that the donee of a power lacks the capacity to exercise it, by reason of minority, mental incompetency, or any other reason, does not prevent the power held by such person from postponing the time of creation under Section 21211, unless the governing instrument extinguishes the power (or prevents it from coming into existence) for that reason.

6. Joint Powers — Community Property; Marital Property

For the date of creation to be postponed under Section 21211, the power must be exercisable by one person alone. A joint power does not qualify, except that, under Section 21211(b), a joint power over community property (or over marital property under a Uniform Marital

Property Act held by individuals married to each other, pursuant to the definition of community property in Section 46) is, for purposes of this chapter, treated as a power exercisable by one person acting alone. See Restatement (Second) of Property (Donative Transfers) § 1.2 comment b & illustrations 5, 6, & 7 (1983) for the rationale supporting the enactment of the bracketed sentence and examples illustrating its principle.

BACKGROUND TO SECTION 21212

[Adapted from the Comment to Section 2(c) of the Uniform Statutory Rule Against Perpetuities (1986)]

No Staggered Periods

For purposes of this chapter, Section 21212 in effect treats a transfer of property to a previously funded trust or other existing property arrangement as having been made when the nonvested property interest or power of appointment in the original contribution was created. The purpose of Section 21212 is to avoid the administrative difficulties that would otherwise result where subsequent transfers are made to an existing irrevocable trust. Without Section 21212, the allowable period under the statutory rule would be marked off in such cases from different times with respect to different portions of the same trust.

Example (5) — Series of transfers case. In Year One, G created an irrevocable inter vivos trust, funding it with $20,000 cash. In Year Five, when the value of the investments in which the original $20,000 contribution was placed had risen to a value of $30,000, G added $10,000 cash to the trust. G died in Year Ten. G's will poured the residuary of his estate into the trust. G's residuary estate consisted of Blackacre (worth $20,000) and securities (worth $80,000). At G's death, the value of the investments in which the original $20,000 contribution and the subsequent $10,000 contribution were placed had risen to a value of $50,000.

Were it not for Section 21212, the allowable period under the statutory rule would be marked off from three different times: Year One, Year Five, and Year Ten. The effect of Section 21212 is that the allowable period under the statutory rule starts running only once — in Year One — with respect to the entire trust. This result is defensible not only to prevent the administrative difficulties inherent in recognizing staggered periods. It also is defensible because if G's inter vivos trust had contained a perpetuity saving clause, the perpetuity-period component of the

clause would be geared to the time when the original contribution to the trust was made; this clause would cover the subsequent contributions as well. Since the major justification for the adoption by this chapter of the wait-and-see method of perpetuity reform is that it amounts to a statutory insertion of a saving clause, Section 21212 is consistent with the theory of this chapter.

BACKGROUND TO SECTION 21220

[Adapted from the Comment to Section 3 of the Uniform Statutory Rule Against Perpetuities (1986)]

1. Reformation

This section requires a court, on petition of an interested person, to reform a disposition whose validity is governed by the wait-and-see element of Section 21205(b), 21206(b), or 21207(b) so that the reformed disposition is within the limits of the 90-year period allowed by those sections, in the manner deemed by the court most closely to approximate the transferor's manifested plan of distribution, in three circumstances: First, when (after the application of the statutory rule) a nonvested property interest or a power of appointment becomes invalid under the statutory rule; second, when a class gift has not but still might become invalid under the statutory rule and the time has arrived when the share of one or more class members is to take effect in possession or enjoyment; and third, when a nonvested property interest can vest, but cannot do so within the allowable 90-year period under the statutory rule.

It is anticipated that the circumstances requisite to reformation will seldom arise, and consequently that this section will be applied infrequently. If, however, one of the three circumstances arises, the court in reforming is authorized to alter existing interests or powers and to create new interests or powers by implication or construction based on the transferor's manifested plan of distribution as a whole. In reforming, the court is urged not to invalidate any vested interest retroactively (the doctrine of infectious invalidity having been superseded by this chapter, as indicated in the Background to Section 21201). The court is also urged not to reduce an age contingency in excess of 21 unless it is absolutely necessary, and if it is deemed necessary to reduce such an age contingency, not to reduce it automatically to 21 but rather to reduce it no lower than absolutely necessary. See Example (3) below; Waggoner, *Perpetuity Reform,* 81 Mich. L. Rev. 1718, 1755-59 (1983); Langbein & Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?,* 130 U. Pa. L. Rev. 521, 546-49 (1982).

2. Judicial Sale of Land Affected by Future Interests

Although this section — except for cases that fall under subdivisions (b) or (c) — defers the time when a court is directed to reform a disposition until the expiration of the allowable 90-year waiting period, this section is not to be understood as preventing an earlier application of other remedies. In particular, in the case of interests in land not in trust, the principle, codified in many states, is widely recognized that there is judicial authority, under specified circumstances, to order a sale of land in which there are future interests. See 1 American Law of Property §§ 4.98-.99 (A. Casner ed. 1952); L. Simes & A. Smith, The Law of Future Interests §§ 1941-46 (2d ed. 1956); see also Restatement of Property § 179, at 485-95 (1936); L. Simes & C. Taylor, Improvement of Conveyancing by Legislation 235-38 (1960). Nothing in Section 21220 should be taken as precluding this type of remedy, if appropriate, before the expiration of the allowable 90-year waiting period.

3. Duration of the Indestructibility of Trusts — Termination of Trusts by Beneficiaries

As noted in the Background to Section 21201, it is generally accepted that a trust cannot remain indestructible beyond the period of the rule against perpetuities. Under this chapter, the period of the rule against perpetuities applicable to a trust whose validity is governed by the wait-and-see element of Section 21205(b), 21206(b), or 21207(b) is 90 years. The result of any reformation under Section 21220 is that all nonvested property interests in the trust will vest in interest (or terminate) no later than the 90th anniversary of their creation. In the case of trusts containing a nonvested property interest or a power of appointment whose validity is governed by Section 21205(b), 21206(b), or 21207(b), courts can therefore be expected to adopt the rule that no purpose of the settlor, expressed in or implied from the governing instrument, can prevent the beneficiaries of a trust other than a charitable trust from compelling its termination after 90 years after every nonvested property interest and power of appointment in the trust was created.

4. Subdivision (a): Invalid Property Interest or Power of Appointment

Subdivision (a) is illustrated by the following examples.

Example (1) — Multiple generation trust. G devised property in trust, directing the trustee to pay the income "to A for life, then to A's children for the life of the survivor, then to A's grandchildren for the life of the survivor, and on the death of A's last surviving grandchild, the corpus of the trust is to be divided among A's then living descendants per stirpes; if none, to" a specified charity. G was survived by his child (A) and by A's

two minor children (X and Y). After G's death, another child (Z) was born to A. Subsequently, A died, survived by his children (X, Y, and Z) and by three grandchildren (M, N, and O).

There are four interests subject to the statutory rule in this example: (1) the income interest in favor of A's children, (2) the income interest in favor of A's grandchildren, (3) the remainder interest in the corpus in favor of A's descendants who survive the death of A's last surviving grandchild, and (4) the alternative remainder interest in the corpus in favor of the specified charity. The first interest is initially valid under Section 21205(a); A is the validating life for that interest. There is no validating life for the other three interests, and so their validity is governed by Section 21205(b).

If, as is likely, A and A's children all die before the 90th anniversary of G's death, the income interest in favor of A's grandchildren is valid under Section 21205(b).

If, as is also likely, some of A's grandchildren are alive on the 90th anniversary of G's death, the alternative remainder interests in the corpus of the trust then become invalid under Section 21205(b), giving rise to Section 21220(a)'s prerequisite to reformation. A court would be justified in reforming G's disposition by closing the class in favor of A's descendants as of the 90th anniversary of G's death (precluding new entrants thereafter), by moving back the condition of survivorship on the class so that the remainder interest is in favor of G's descendants who survive the 90th anniversary of G's death (rather than in favor of those who survive the death of A's last surviving grandchild), and by redefining the class so that its makeup is formed as if A's last surviving grandchild died on the 90th anniversary of G's death.

Example (2) — Sub-class case. G devised property in trust, directing the trustee to pay the income "to A for life, then in equal shares to A's children for their respective lives; on the death of each child the proportionate share of corpus of the one so dying shall go to the descendants of such child surviving at such child's death, per stirpes." G was survived by A and by A's two children (X and Y). After G's death, another child (Z) was born to A. Subsequently, A died, survived by X, Y, and Z.

Under the sub-class doctrine, each remainder interest in favor of the descendants of a child of A is treated separately from the others. Consequently, the remainder interest in favor of X's descendants and the remainder interest in favor of Y's

descendants are valid under Section 21205(a): X is the validating life for the one, and Y is the validating life for the other.

The remainder interest in favor of the descendants of Z is not validated by Section 21205(a) because Z, who was not alive when the interest was created, could have descendants more than 21 years after the death of the survivor of A, X, and Y. Instead, the validity of the remainder interest in favor of Z's descendants is governed by Section 21205(b), under which its validity depends on Z's dying within 90 years after G's death.

Although unlikely, suppose that Z is still living 90 years after G's death. The remainder interest in favor of Z's descendants will then become invalid under the statutory rule, giving rise to subdivision (a)'s prerequisite to reformation. In such circumstances, a court would be justified in reforming the remainder interest in favor of Z's descendants by making it indefeasibly vested as of the 90th anniversary of G's death. To do this, the court would reform the disposition by eliminating the condition of survivorship of Z and closing the class to new entrants after the 90th anniversary of G's death.

5. Subdivision (b): Class Gifts Not Yet Invalid

Subdivision (b), which, upon the petition of an interested person, requires reformation in certain cases where a class gift has not but still might become invalid under the statutory rule, is illustrated by the following examples.

Example (3) — Age contingency in excess of 21. G devised property in trust, directing the trustee to pay the income "to A for life, then to A's children; the corpus of the trust is to be equally divided among A's children who reach the age of 30." G was survived by A, by A's spouse (H), and by A's two children (X and Y), both of whom were under the age of 30 when G died.

Since the remainder interest in favor of A's children who reach 30 is a class gift, at common law (Leake v. Robinson, 2 Mer. 363, 35 Eng. Rep. 979 (Ch. 1817)) and under this chapter (see the Background to Section 21201) the interests of all potential class members must be valid or the class gift is totally invalid. Although X and Y will either reach 30 or die under 30 within their own lifetimes, there is at G's death the possibility that A will have an afterborn child (Z) who will reach 30 or die under 30 more than 21 years after the death of the survivor of A, H, X, and Y. There is no validating life, and the class gift is therefore not validated by Section 21205(a).

Under Section 21205(b), the children's remainder interest becomes invalid only if an interest of a class member neither vests nor terminates within 90 years after G's death. If in fact there is an afterborn child (Z), and if upon A's death, Z has at least reached an age such that he cannot be alive and under the age of 30 on the 90th anniversary of G's death, the class gift is valid. (Note that at Z's birth it would have been known whether or not Z could be alive and under the age of 30 on the 90th anniversary of G's death; nevertheless, even if it was then certain that Z could not be alive and under the age of 30 on the 90th anniversary of G's death, the class gift could not then have been declared valid because, A being alive, it was then possible for one or more additional children to have later been born to or adopted by A.)

Although unlikely, suppose that at A's death (prior to the expiration of the 90-year period), Z's age was such that he could be alive and under the age of 30 on the 90th anniversary of G's death. Suppose further that at A's death X and Y were over the age of 30. Z's interest and hence the class gift as a whole is not yet invalid under the statutory rule because Z might die under the age of 30 within the remaining part of the 90-year period following G's death; but the class gift might become invalid because Z might be alive and under the age of 30, 90 years after G's death. Consequently, the prerequisites to reformation set forth in subdivision (b) are satisfied, and a court would be justified in reforming G's disposition to provide that Z's interest is contingent on reaching the age he can reach if he lives to the 90th anniversary of G's death. This would render Z's interest valid so far as the statutory rule against perpetuities is concerned, and allow the class gift as a whole to be declared valid. X and Y would thus be entitled immediately to their one-third shares each. If Z's interest later vested, Z would receive the remaining one-third share. If Z failed to reach the required age under the reformed disposition, the remaining one-third share would be divided equally between X and Y or their successors in interest.

Example (4)—Case where subdivision (b) applies, not involving an age contingency in excess of 21. G devised property in trust, directing the trustee to pay the income "to A for life, then to A's children; the corpus of the trust is to be equally divided among A's children who graduate from an accredited medical school or law school." G was survived by A, by A's spouse (H), and by A's two minor children (X and Y).

As in Example (3), the remainder interest in favor of A's children is a class gift, and the common law principle is not superseded by this chapter by which the interests of all potential class members must be valid or the class gift is totally invalid. Although X and Y will either graduate from an accredited medical or law school, or fail to do so, within their own lifetimes, there is at G's death the possibility that A will have an after-born child (Z), who will graduate from an accredited medical or law school (or die without having done either) more than 21 years after the death of the survivor of A, H, X, and Y. The class gift would not be valid under the common law rule and is, therefore, not validated by Section 21205(a).

Under Section 21205(b), the children's remainder interest becomes invalid only if an interest of a class member neither vests nor terminates within 90 years after G's death.

Suppose in fact that there is an afterborn child (Z), and that at A's death Z was a freshman in college. Suppose further that at A's death X had graduated from an accredited law school and that Y had graduated from an accredited medical school. Z's interest and hence the class gift as a whole is not yet invalid under Section 21205(b) because the 90-year period following G's death has not yet expired; but the class gift might become invalid because Z might be alive but not a graduate of an accredited medical or law school 90 years after G's death. Consequently, the prerequisites to reformation set forth in Section 21220(b) are satisfied, and a court would be justified in reforming G's disposition to provide that Z's interest is contingent on graduating from an accredited medical or law school within 90 years after G's death. This would render Z's interest valid so far as the Section 21205(b) is concerned and allow the class gift as a whole to be declared valid. X and Y would thus be entitled immediately to their one-third shares each. If Z's interest later vested, Z would receive the remaining one-third share. If Z failed to graduate from an accredited medical or law school within the allowed time under the disposition as so reformed, the remaining one-third share would be divided equally between X and Y or their successors in interest.

6. *Subdivision (c): Interests that Can Vest But Not Within the Allowable 90-Year Period*

In exceedingly rare cases, an interest might be created that can vest, but not within the allowable 90-year period of the statutory rule. This

may be the situation when the interest was created (See Example (5)), or it may become the situation at some time thereafter (see Example (6)). Whenever the situation occurs, the court, upon the petition of an interested person, is required by subdivision (c) to reform the disposition within the limits of the allowable 90-year period.

Example (5) — Case of an interest, as of its creation, being impossible to vest within the allowable 90-year period. G devised property in trust, directing the trustee to divide the income, per stirpes, among G's descendants from time to time living, for 100 years. At the end of the 100-year period following G's death, the trustee is to distribute the corpus and accumulated income to G's then-living descendants, per stirpes; if none, to the XYZ Charity.

The nonvested property interest in favor of G's descendants who are living 100 years after G's death can vest, but not within the allowable 90-year period of Section 21205(b). The interest would violate the common law rule, and hence is not validated by Section 21205(a), because there is no validating life. In these circumstances, a court is required by Section 21220(c) to reform G's disposition within the limits of the allowable 90-year period. An appropriate result would be for the court to lower the period following G's death from a 100-year period to a 90-year period.

Note that the circumstance that triggers the direction to reform the disposition under this subdivision is that the nonvested property interest still can vest, but cannot vest within the allowable 90-year period of Section 21205(b). It is not necessary that the interest be certain to become invalid under that subdivision. For the interest to be certain to become invalid under Section 21205(b), it would have to be certain that it can neither vest nor terminate within the allowable 90-year period. In this example, the interest of G's descendants might terminate within the allowable period (by all of G's descendants dying within 90 years of G's death). If this were to happen, the interest of XYZ Charity would be valid because it would have vested within the allowable period. However, it was thought desirable to require reformation without waiting to see if this would happen: The only way that G's descendants, who are G's primary set of beneficiaries, would have a chance to take the property is to reform the disposition within the limits of the allowable 90-year period on the ground that their interest cannot vest within the allowable period and subdivision (c) so provides.

Example (6) — Case of an interest after its creation becoming impossible to vest within the allowable 90-year period. G devised property in trust, with the income to be paid to A. The corpus of the trust was to be divided among A's children who reach 30, each child's share to be paid on the child's 30th birthday; if none reaches 30, to the XYZ Charity. G was survived by A and by A's two children (X and Y). Neither X nor Y had reached 30 at G's death.

The class gift in favor of A's children who reach 30 would violate the common law rule against perpetuities and, thus, is not validated by Section 21205(a). Its validity is therefore governed by Section 21205(b).

Suppose that after G's death, and during A's lifetime, X and Y die and a third child (Z) is born to or adopted by A. At A's death, Z is living but her age is such that she cannot reach 30 within the remaining part of the 90-year period following G's death. As of A's death, it has become the situation that Z's interest cannot vest within the allowable period. The circumstances requisite to reformation under subdivision (c) have arisen. An appropriate result would be for the court to lower the age contingency to the age Z can reach 90 years after G's death.

7. Additional References

For additional discussion and illustrations of the application of some of the principles of this section, see the comments to Restatement (Second) of Property (Donative Transfers) § 1.5 (1983).

BACKGROUND TO SECTION 21225

[Adapted from the Comment to Section 4 of the Uniform Statutory Rule Against Perpetuities (1986)]

Section 21225 lists seven exclusions from the statutory rule against perpetuities (statutory rule). Some are declaratory of existing law; others are contrary to existing law. Since the common law rule against perpetuities and the Civil Code perpetuities provisions are superseded by this chapter, a nonvested property interest, power of appointment, or other arrangement excluded from the statutory rule by this section is not subject to the rule against perpetuities, statutory or otherwise.

A. Subdivision (a): Nondonative Transfers Excluded

1. Rationale

In line with long-standing scholarly commentary, subdivision (a) excludes (with certain enumerated exceptions) nonvested property

interests and powers of appointment arising out of a nondonative transfer. The rationale for this exclusion is that the rule against perpetuities is a wholly inappropriate instrument of social policy to use as a control over such arrangements. The period of the rule — a life in being plus 21 years — is not suitable for nondonative transfers, and this point applies with equal force to the 90-year allowable waiting period under the wait-and-see element of Sections 21205-21207 because that period represents an approximation of the period of time that would be produced, on average, by using a statutory list identifying actual measuring lives and adding a 21-year period following the death of the survivor.

No general exclusion from the common law rule against perpetuities is recognized for nondonative transfers, and so subdivision (a) is contrary to existing common law. (But see Metropolitan Transportation Authority v. Bruken Realty Corp., 67 N.Y.2d 156, 492 N.E.2d 379, 384 (1986), pointing out the inappropriateness of the period of a life in being plus 21 years to cases of commercial and governmental transactions and noting that the rule against perpetuities can invalidate legitimate transactions in such cases.)

Subdivision (a) is therefore inconsistent with decisions holding the common law rule to be applicable to the following types of property interests or arrangements when created in a nondonative, commercial-type transaction, as they almost always are: options (e.g., Milner v. Bivens, 335 S.E.2d 288 (Ga. 1985)); preemptive rights in the nature of a right of first refusal (e.g., Atchison v. City of Englewood, 170 Colo. 295, 463 P.2d 297 (1969); Robroy Land Co., Inc. v. Prather, 24 Wash. App. 511, 601 P.2d 297 (1969)); leases to commence in the future, at a time certain or on the happening of a future event such as the completion of a building (e.g., Southern Airways Co. v. DeKalb County, 101 Ga. App. 689, 115 S.E.2d 207 (1960)); nonvested easements; top leases and top deeds with respect to interests in minerals (e.g., Peveto v. Starkey, 645 S.W.2d 770 (Tex. 1982)); and so on.

2. *Consideration Does Not Necessarily Make the Transfer Nondonative*

A transfer can be supported by consideration and still be donative in character and hence not excluded from the statutory rule. A transaction that is essentially gratuitous in nature, accompanied by donative intent on the part of at least one party to the transaction, is not to be regarded as nondonative simply because it is for consideration. Thus, for example, the exclusion would not apply if a parent purchases a parcel of land for full and adequate consideration, and directs the seller to make out the deed in favor of the purchaser's daughter for life, remainder to such of the

daughter's children as reach 25. The nonvested property interest of the daughter's children is subject to the statutory rule.

3. Some Transactions Not Excluded Even If Considered Nondonative

Some types of transactions — although in some sense supported by consideration and hence arguably nondonative — arise out of a domestic situation, and should not be excluded from the statutory rule. To avoid uncertainty with respect to such transactions, subdivision (a) specifies that nonvested property interests or powers of appointment arising out of any of the following transactions are not excluded by subdivision (a)'s nondonative-transfers exclusion: a premarital or postmarital agreement; a separation or divorce settlement; a spouse's election, such as the "widow's election" in community property states; an arrangement similar to any of the foregoing arising out of a prospective, existing, or previous marital relationship between the parties; a contract to make or not to revoke a will or trust; a contract to exercise or not to exercise a power of appointment; a transfer in full or partial satisfaction of a duty of support; or a reciprocal transfer. The term "reciprocal transfer" is to be interpreted in accordance with the reciprocal transfer doctrine in the tax law (see United States v. Estate of Grace, 395 U.S. 316 (1969)).

4. Other Means of Controlling Some Nondonative Transfers Desirable

Some commercial transactions respecting land or mineral interests, such as options in gross (including rights of first refusal), leases to commence in the future, nonvested easements, and top leases and top deeds in commercial use in the oil and gas industry, directly or indirectly restrain the alienability of property or provide a disincentive to improve the property. Although controlling the duration of such interests is desirable, they are excluded by subdivision (a) from the statutory rule because, as noted above, the period of a life in being plus 21 years — actual or by the 90-year proxy — is inappropriate for them; that period is appropriate for family-oriented, donative transfers.

B. Subdivisions (b)-(g): Other Exclusions

1. Subdivision (b) — Administrative Fiduciary Powers

Fiduciary powers are subject to the statutory rule against perpetuities, unless specifically excluded. Purely administrative fiduciary powers are excluded by subdivisions (b) and (c), but distributive fiduciary powers are generally speaking not excluded. The only distributive fiduciary power excluded is the one described in subdivision (d).

The application of subdivision (b) to fiduciary powers can be illustrated by the following example.

Example (1). G devised property in trust, directing the trustee (a bank) to pay the income to A for life, then to A's children for the life of the survivor, and on the death of A's last surviving child to pay the corpus to B. The trustee is granted the discretionary power to sell and to reinvest the trust assets and to invade the corpus on behalf of the income beneficiary or beneficiaries.

The trustee's fiduciary power to sell and reinvest the trust assets is a purely administrative power, and under subdivision (b) of this section is not subject to the statutory rule.

The trustee's fiduciary power to invade corpus, however, is a nongeneral power of appointment that is not excluded from the statutory rule. Its validity, and hence its exercisability, is governed by Sections 21205-21207. Since the power is not initially valid under Section 21207(a), Section 21207(b) applies and the power ceases to be exercisable 90 years after G's death.

2. Subdivision (c) — Powers to Appoint a Fiduciary

Subdivision (c) excludes from the statutory rule against perpetuities powers to appoint a fiduciary (a trustee, successor trustee, or co-trustee, a personal representative, successor personal representative, or co-personal representative, an executor, successor executor, or co-executor, etc.). Sometimes such a power is held by a fiduciary and sometimes not. In either case, the power is excluded from the statutory rule.

3. Subdivision (d) — Certain Distributive Fiduciary Power

The only distributive fiduciary power excluded from the statutory rule against perpetuities is the one described in subdivision (d); the excluded power is a discretionary power of a trustee to distribute principal before the termination of a trust to a beneficiary who has an indefeasibly vested interest in the income and principal.

Example (2). G devised property in trust, directing the trustee (a bank) to pay the income to A for life, then to A's children; each child's share of principal is to be paid to the child when he or she reaches 40; if any child dies under 40, the child's share is to be paid to the child's estate as a property interest owned by such child. The trustee is given the discretionary power to advance all or a portion of a child's share before the child reaches 40. G was survived by A, who was then childless.

The trustee's discretionary power to distribute principal to a child before the child's 40th birthday is excluded from the statutory rule against perpetuities. (The trustee's duty to pay the income to A and after A's death to A's children is not subject to the statutory rule because it is a duty, not a power.)

4. Subdivision (e) — Charitable or Governmental Gifts

Subdivision (e) codifies the common law principle that a nonvested property interest held by a charity, a government, or a governmental agency or subdivision is excluded from the rule against perpetuities if the interest was preceded by an interest that is held by another charity, government, or governmental agency or subdivision. See L. Simes & A. Smith, The Law of Future Interests §§ 1278-87 (2d ed. 1956); Restatement (Second) of Property (Donative Transfers) § 1.6 (1983); Restatement of Property § 397 (1944).

Example (3). G devised real property "to the X School District so long as the premises are used for school purposes, and upon the cessation of such use, to Y City."

The nonvested property interest held by Y City (an executory interest) is excluded from the statutory rule under subdivision (e) because it was preceded by a property interest (a fee simple determinable) held by a governmental subdivision, X School District.

The exclusion of charitable and governmental gifts applies only in the circumstances described. If a nonvested property interest held by a charity is preceded by a property interest that is held by a noncharity, the exclusion does not apply; rather, the validity of the nonvested property interest held by the charity is governed by the other sections of this chapter.

Example (4). G devised real property "to A for life, then to such of A's children as reach 25, but if none of A's children reaches 25, to X Charity."

The nonvested property interest held by X Charity is not excluded from the statutory rule.

If a nonvested property interest held by a noncharity is preceded by a property interest that is held by a charity, the exclusion does not apply; rather, the validity of the nonvested property interest in favor of the noncharity is governed by the other sections of this chapter.

Example (5). G devised real property "to the City of Sidney so long as the premises are used for a public park, and upon the cessation of such use, to my brother, B."

The nonvested property interest held by B is not excluded from the statutory rule by subdivision (e).

5. Subdivision (f) — Trusts for Employees and Others; Trusts for Self-Employed Individuals

Subdivision (f) excludes from the statutory rule against perpetuities nonvested property interests and powers of appointment with respect to a trust or other property arrangement, whether part of a "qualified" or "unqualified" plan under the federal income tax law, forming part of a bona fide benefit plan for employees (including owner-employees), independent contractors, or their beneficiaries or spouses. The exclusion granted by this subdivision does not, however, extend to a nonvested property interest or a power of appointment created by an election of a participant or beneficiary or spouse.

6. Subdivision (g) — Pre-existing Exclusions from the Common Law Rule Against Perpetuities

Subdivision (g) ensures that all property interests, powers of appointment, or arrangements that were excluded from the common law rule against perpetuities or are excluded by another statute of this state are also excluded from the statutory rule against perpetuities. Possibilities of reverter and rights of entry (also known as rights of re-entry, rights of entry for condition broken, and powers of termination) are not subject to the common law rule against perpetuities, and so are excluded from the statutory rule.