

Memorandum 91-3

Subject: Study H-409, L-3013 - Application of Marketable Title Statute to Executory Interests (Comments on Tentative Recommendation)

This memorandum considers comments we have received on the *Tentative Recommendation Relating to Application of Marketable Title Statute to Executory Interests* (November 1990). A copy of the tentative recommendation is attached. This recommendation is related to the Uniform Statutory Rule Against Perpetuities (USRAP). Its purpose is to apply the renewable 30-year marketable title period to executory interests, consistent with the treatment of reversionary powers of termination. Otherwise such interests might cloud title for 90 years under the wait-and-see period of USRAP.

We have received 13 letters concerning this tentative recommendation. The letters are attached as exhibits:

EX#

1. Alvin G. Buchignani, San Francisco
2. Thomas R. Thurmond, Vacaville
3. Henry Angerbauer, Concord
4. Wilbur L. Coats, Poway
5. Frank M. Swirles, Rancho Santa Fe
6. John G. Lyons, San Francisco
7. Dan L. Kirby, Western Surety Co., Sioux Falls, SD
8. Charles H. Jarvis, Santa Barbara
9. Ruth E. Ratzlaff, Fresno
10. Prof. Russell D. Niles, San Francisco
11. Michael J. Anderson
12. Prof. Jesse Dukeminier, Los Angeles
13. Arnold F. Williams, Fresno

Most writers support the tentative recommendation (9 out of 13). One person takes no position (Exhibit 7) and another is "lukewarm" (Exhibit 13). Professor Jesse Dukeminier raises some technical issues (discussed below) but expresses no opinion on the proposal. Finally, one commentator is opposed to the tentative recommendation (Exhibit 5).

If the recommendation is approved to print (subject to any revisions made), the statutory material should be amended into the bill relating to the Uniform Statutory Rule Against Perpetuities at the earliest opportunity.

REVISIONS RECOMMENDED BY STAFF

Executory Interest in Minerals

Professor Dukeminier (Exhibit 12, at pp. 13-14) identifies an inconsistency in the coverage of mineral interests that should be remedied. Civil Code Section 885.015 exempts "reversionary" interests conditioned on production or removal of oil or gas or other minerals. This term is too limited if the statute is revised to include executory interests within the 30-year rule. Accordingly, the staff suggests that Section 885.015 be amended as follows:

Civil Code § 885.015 (amended). Application of chapter

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

(a) A ~~reversionary--interest~~ power of termination conditioned upon the continued production or removal of oil or gas or other minerals.

(b) A ~~reversionary--interest--in~~ power of termination as to separately owned improvements or fixtures conditioned upon the continued leasehold or possessory interest in the underlying land.

Comment. Section 885.015 is amended to refer to powers of termination, for consistency with the broadened scope of this chapter. See Section 885.010(b) ("power of termination" includes executory interest). The effect of this revision is to treat interests created by the transferor in another person in the same manner as interests retained by the transferor.

Professor Dukeminier did not suggest the change proposed in subdivision (b), but it should be made for the sake of consistency.

Interrelation of 30-Year Rule and Rule Against Perpetuities

Professor Dukeminier asks whether the tentative recommendation intends to apply both the 30-year marketable title rules and the 90-year rule of USRAP to executory interests. The change that would me

made by this recommendation is to apply the 30-year marketable title rule to executory interests. It does not go further than that. Thus, executory interests would continue to be subject to the outside time limit of USRAP. This is noted in footnote 12 in the text of the tentative recommendation, although it is not stated explicitly in the proposed legislation.

Professor Dukeminier suggests clarifying the matter, since an interest may violate one rule and not the other. The staff agrees, and would add the following statement to the Comment to Civil Code Section 885.010:

Executory interests are also subject to the limitations provided in the statutory rule against perpetuities. See Prob. Code §§ 21202 (application of statutory rule), 21205 (90-year wait-and-see period). Thus, an executory interest that becomes invalid under the statutory rule against perpetuities may not be renewed under this chapter. Similarly, if an executory interest terminates under this chapter, it is fully terminated and does not continue for purposes of the statutory rule against perpetuities. See Section 885.060 (effect of expiration of power of termination).

Comment Revision

The amendment of Section 885.010 in the tentative recommendation expands the definition of the term "power of termination." This approach was chosen because it was the most efficient means of accomplishing the goal of applying the reversionary power of termination rules to similar executory interests. This change in the definition may cause confusion, however, in the Comment to Section 885.030. The staff proposes to revise this Comment even though the section does not need amendment and to include the new version in the recommendation. The following draft shows the suggested changes:

Comment to Civil Code § 885.030 (revised). Expiration of power of termination

Comment. Section 885.030 provides for expiration of a power of termination after 30 years, notwithstanding a longer or indefinite period provided in the instrument reserving the power. The expiration period supplements the rule against perpetuities, ~~which has been held inapplicable~~. The rule against perpetuities does not apply to reversionary powers of termination. See *Strong v. Shatto*, 45 Cal. App. 29, 187 P. 159 (1919); Prob. Code § 21225(g) (exclusion from statutory

rule against perpetuities). Executory interests remain subject to the limitations provided in the statutory rule against perpetuities. See Comment to Section 885.010; Prob. Code §§ 21202 (application of statutory rule), 21205 (90-year wait-and-see period).

The expiration period runs from the date of recording rather than the date of creation of the power of termination because the primary purpose of Section 885.030 is to clear record title. The expiration period can be extended for up to 30 years at a time by recordation of a notice of intent to preserve the power of termination. See Section 880.310 (notice of intent to preserve interest). Recordation of a notice of intent to preserve the power of termination does not enable enforcement of a power that has expired because it has become obsolete due to changed conditions or otherwise. See Sections 880.310 (notice of intent to preserve interest), 885.040 (obsolete power of termination), & Comments.

For the effect of expiration of a power of termination pursuant to this section, see Section 885.060 (effect of expiration). This section does not affect conservation easements pursuant to Sections 815-816. See Section 880.240 (interests excepted from title) & Comment. See also Section 885.015 (exceptions from chapter) & Comment.

REVISIONS NOT RECOMMENDED BY STAFF

Exception for Executory Interests Shifting Between Charities

Professor Dukeminier (Exhibit 12, at pp. 12-13) notes that at common law an executory interest in a charity that is preceded by a fee simple in another charity is not subject to the rule against perpetuities. (Nor is such an interest subject to USRAP.) From a perpetuities standpoint, such dispositions have been considered unobjectionable because both interests are held by charities. This does not mean there is no problem from the marketable title perspective.

Professor Dukeminier suggests that this presents a policy issue the Commission should consider. He notes that it is arguable that 30 years is a sufficient time and that the executory interest, even though held by a charity, could be cut off. (Remember, however, that the interest is not cut off at the end of 30 years if the holder of the executory interest records a notice of intent to preserve the interest.) On the other hand, he suggests that reversionary interests are distinguishable from executory interests in that reversionary interests tend to fractionate over the years, through inheritance by numerous heirs. The need for marketable title legislation is more

apparent, then, as to reversionary interests than executory interests held by charities, which would not fractionate.

The staff believes that the 30-year renewable marketable title rule period should apply to executory interests held by a charity following a fee held by another charity. We are more inclined toward Professor Dukeminier's argument that 30 years should be long enough, particularly in view of the availability of renewal by recording a notice of intent to preserve.

Executory Interests in Family Wealth Transfers

Professor Dukeminier (Exhibit 12, at pp. 14-15) suggests that the new statute should not include executory interests that are equivalent to remainders in family wealth dispositions. He argues that such executory interests should be subject to the same time limits as remainders -- the rule against perpetuities -- rather than the 30-year renewable period under the marketable title statute.

The tentative recommendation applies to all executory interests that permit a transferee to "enforce a restriction in the form of a condition subsequent." See Section 885.010(a)(2) in the tentative recommendation. The quoted language is identical to the language used in the existing provision to define a power of termination retained by the transferor. Professor Dukeminier does not believe that the concept of "restriction" is sufficient to distinguish between executory interests that are the functional equivalent of reversionary interests (which should be subject to the 30-year rule) and those that are the functional equivalent of remainders (which should be subject to the rule against perpetuities). He further argues that the "problem of sorting executory interests into two groups . . . does not arise with respect to possibilities of reverter and rights of entry [reversionary interests] because the vast majority of these interests are used to police restrictive conditions on land use." Executory interests, on the other hand, "are used for many purposes other than enforcing land use restrictions."

A review of the examples of different dispositions set out in Professor Dukeminier's letter illustrates the difficulty of applying the "restriction" standard. But the staff does not see a better

solution. It is inevitable in a complicated area of the law such as this that a number of specific cases will not fall readily into one defined class or the other. The language used in the marketable title statute is based on traditional concepts, and so its weaknesses at least have a long pedigree.

From another perspective, it may be asked whether the 30-year rule is undesirable even if it is applied to an executory interest that may be characterized as the functional equivalent of a remainder. The 30-year rule is not absolute -- it is renewable. And, as discussed elsewhere, the rule against perpetuities would continue to apply to all executory interests, thereby providing an outside limit to their duration. Treating all or most executory interests in the same fashion would have the benefit of simplicity. It would avoid the need to determine the fine point of whether the particular executory interest is the functional equivalent of a reversion or a remainder. We wonder whether applying the 30-year rule to executory interests presents a practical problem. And does the possibility of such problems override the interest in improving marketability of title and keeping the statute simple. The staff is also mindful of the difficulty of constructing a new rule that would solve more problems than it created.

Retroactivity

Professor Dukeminier (Exhibit 12, at p. 15) discusses some retroactivity issues. The staff believes that the retroactivity issues are sufficiently covered by the amendment of Section 885.070 in the tentative recommendation and by Section 880.370, which provides as follows:

Civil Code § 880.370. Grace period for recording notice

880.370. If the period prescribed by statute during which a notice of intent to preserve an interest in real property must be recorded expires before, on, or within five years after the operative date of the statute, the period is extended until five years after the operative date of the statute.

Professor Dukeminier notes that allowing a five-year grace period has the potential of permitting a person with a "void" executory interest (one that violates the applicable rule against perpetuities)

to record a notice and preserve the interest. This potential does not concern the staff for several reasons. (1) The concept of "void" interests is problematical. Under the USRAP recommendation, which would apply retroactively, an executory interest that is invalid under the common law rule against perpetuities may not be declared void for 90 years. Under existing Civil Code Section 715.5, an interest is not void if it can be reformed or construed under the *cy pres* rule of that section. This type of "voidness" is not very void, and thus the potential of reviving such "void" interests is not as startling as it otherwise might be. (2) Assuming that a person with a "void" interest is aware of the marketable title statute, the "revived" interest would still be subject to control under Civil Code Section 885.040 concerning obsolete interests. (3) A "revived" executory interest would also be limited by the 90-year rule under USRAP.

OTHER COMMENTS

Relationship to USRAP

Professor Russell D. Niles (Exhibit 10) is "strongly in favor of the recommended change" since he believes that in time the enactment of the Uniform Statutory Rule Against Perpetuities would "result in unnecessary restraints on alienation not connected with family settlements." In the case of executory interests, Professor Niles prefers the 30-year period under the marketable title statute to the 90-year period that would apply under USRAP. He notes that the amendment would cure one of his objections to USRAP.

Arnold F. Williams (Exhibit 13, at p. 16) expresses the concern that the proposal would create an ambiguity as to whether executory interests are subject to reformation (presumably under Civil Code Section 715.5) or the 30-year renewable period under the marketable title statute. Mr. Williams finds the proposal to be "not radical enough or too radical or both or neither." The staff believes that Mr. Williams's difficulty with the proposal may be due to an assumption that *cy pres* under Civil Code Section 715.5 would continue to be available. However, under USRAP, a disposition may generally not be reformed until the end of the 90-year wait-and-see period. Thus, the "ambiguity" described by Mr. Williams should not exist.

Preference for Common Law

Frank M. Swirles (Exhibit 5) objects to revision of common law rules and apparently would repeal the marketable title statute. Mr. Swirles also suggests that the effect of USRAP would be to shorten "the period of effectiveness of certain conveyances from approximately 120 years to 90 years." Although this is not part of this recommendation, it should be noted that this is not the result of USRAP. A property disposition that satisfies the common law rule against perpetuities so that interests might not vest for 120 years would satisfy USRAP as well, since USRAP is the same as the common law rule insofar as valid interests are concerned.

Changes in Quiet Title Procedure

Alvin G. Buchignani (Exhibit 1) suggests, as a "corollary," that the Commission consider simplifying procedures for quiet title actions, "particularly in relationship to the service of process . . . with a view to reducing costs and expenses in connection with the proceedings." The staff would not include any additional matters in this recommendation. Mr. Buchignani's suggestion will be added to the file on future topics for study.

Respectfully submitted,

Stan Ulrich
Staff Counsel

DEC 07 1990

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ALVIN G. BUCHIGNANI
ATTORNEY AT LAW

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December 6, 1990

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

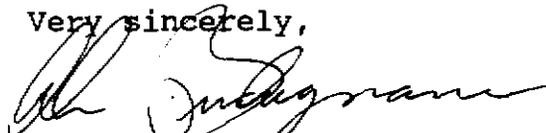
Re: Application of Marketable Title Statute to
Executory Interests

Dear Ladies & Gentlemen,

I believe the above recommendation is a good one, and concur with its adoption, basically on the ground that it would improve the marketability of titles.

As a corollary, I would like to see more simplified procedures for actions to quiet title, particularly in relationship to the service of process in such actions, with a view to reducing costs and expenses in connection with the proceedings.

Very sincerely,


Alvin G. Buchignani

AGB/pzg



DEC 11 1990

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December 10, 1990

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

Re: Tentative Recommendations - Executory Interests

I believe that one seldom encounters the type of conditional remainder interest that is the subject of the proposed legislation. Generally, I am opposed to expanding the body of statutory law to encompass such isolated cases.

However, in this case there is an argument for uniformity within the California Codes, since the statutes already address the case of a power of termination. Also, the proposed 30-year recording period seems to strike a balance between the hypothetical needs of an individual drafter and the goal of eliminating another source of title clouds.

Therefore I support the tentative recommendation.

Yours very truly,

THURMOND LAW OFFICE

Thomas R. Thurmond
Attorney at Law

TT/sr

HENRY ANGERBAUER, CPA
4401 WILLOW GLEN CT.
CONCORD, CA 94521

DEC 11 1990

12/9/90 RECEIVED

California Law Revision Commission:

I have reviewed your tentative recommendation
Related to Application of Marketable Title
Statute to Executory Interests and agree with
your conclusions and recommendations.
Thank you for permitting me to make my views
known

Sincerely

Henry Angerbauer CPA

R E C E I V E D

WILBUR L. COATS
ATTORNEY AND COUNSELOR AT LAW

TELEPHONE (619) 748-6512

December 10, 1990

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

In re: Tentative Recommendation, Application of Marketable Title
to Executory Interests.

Dear Administrator:

I concur with the tentative recommendation cited above.

Very truly yours,



Wilbur L. Coats

Frank M. Swirles Law Corporation

POST OFFICE BOX 1490 RANCHO SANTA FE, CALIFORNIA 92067

(619) 756-2080

CA LAW REV. COMMITTEE

DEC 12 1990

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December 10, 1990

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

Re: Tentative Recommendations - re Application of
Marketable Title Statute to Executory Interests

Gentlemen:

If I interpret properly what you are recommending, I am opposed to it. It appears that you have already recommended enactment of a Uniform Statutory Rule Against Perpetuities which is shortening the period of effectiveness of certain conveyances from approximately 120 years to 90 years. Now you are proposing to invalidate executory interests of record if a notice of intent to preserve them is not recorded in a 30 day period.

Why can't you leave the common law rules alone? What's wrong with them the way they were before you started to screw them all up? You have already screwed up powers of termination. Rather than do what you are proposing, why don't you restore powers of termination to their original status?

Did it ever occur to you that people like the law the way it is? That certain persons desire to preserve an estate to its maximum? Rather than be nit picking about it, why don't you propose state ownership of all property? I am opposed to the Socialistic trend in which we find ourselves.

Very truly yours,



Frank M. Swirles

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CA LAW REV. COMMISSION

DEC 12 1990

R E C E I V E D

December 11, 1990

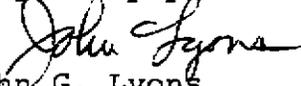
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Re: #H-409, #L3013
Tentative Recommendation
relating to Application of
Marketable Title Statute to
Executory Interests

Gentlemen:

I approve the proposed recommendation.

Very truly yours,


John G. Lyons

JGL:ea

DEC 17 1990



Western Surety Company

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Office of General Counsel

December 14, 1990

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

Gentlemen:

Re: Tentative Recommendation Relating to Application
of Marketable Title Statute to Executory Interests
Our Special File CA-4372-F

Thank you for sending us a copy of this Tentative Recommendation for review. This Company has no position on this particular Tentative Recommendation.

Thank you also for keeping us on the mailing list for all issues related to estate planning, probate and trusts.

Sincerely,

Dan L. Kirby

DLK:gm

cc: A-K Associates, Inc.

SCHRAMM & RADDUE RECEIVED

Paul W. Hartloff, Jr.
Dale E. Hanst
Chas. H. Jarvis
Douglas E. Schmidt
Kurt H. Pyle
John W. Warnock
Daniel A. Reicker
Howard M. Simon
Derek A. Westen
Weldon U. Howell, Jr.
Frederick W. Clough
Richard F. Lee
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David C. Fainer, Jr.
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December 17, 1990

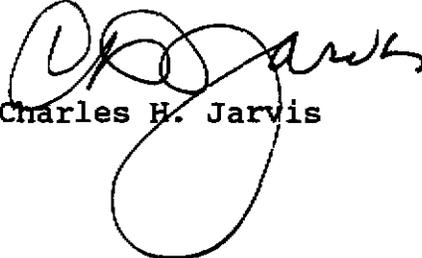
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Gentlemen:

I have read your Tentative Recommendation relating to Application of Marketable Title Statute to Executory Interests. I support your recommendation and I have no constructive suggestions as to how it might be improved.

Very cordially yours,

SCHRAMM & RADDUE

By 
Charles H. Jarvis

CHJ:cls

DEC 18 1990

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**RUTH E. RATZLAFF
Attorney at Law
925 "N" Street, Suite 150
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December 17, 1990

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

Dear Commissioners:

I have reviewed your tentative recommendation relating to Application of Marketable Title Statute to Executory Interests.

One of your statements deserves nomination for the "Understatement of the Year Award." You noted that the commission is not aware that such executory interests are encountered with any frequency in practice. That is certainly true as it relates to my practice.

I can see, however, that the issue needs to be addressed. The method you have chosen seems to be reasonable.

Sincerely,



Ruth E. Ratzlaff

RER:pp

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DEC 18 1990
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December 14, 1990

John H. DeMouilly
 California Law Revision Commission
 4000 Middlefield Road
 Palo Alto, CA 94303-4739

Dear John:

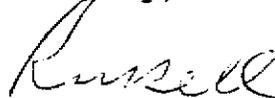
Re: Recommendation, Nov. 1990, to revise marketable title statute to treat executory interest in the same manner as powers of termination.

I am strongly in favor of the recommended change in the Civil Code (§ 85.010(2) to make executory interests subject to the same time limitations as powers of terminations [§ 885.070(c)]. Without this change the proposed Uniform Statutory Rule Against Perpetuities would in time cause unnecessary restraints on alienation not connected with family settlements.

Although the staff memorandum states that the problem has not arisen frequently in California as yet, I suspect that it will in the future. As more and more school districts are consolidated, as local churches merge, as roads and rail lines are abandoned, many parcels of land will have to be disposed of. In older sections of the country, these parcels have not been readily marketable because of limitations imposed by the grantors, including limitations over to other family members or to other owners in the neighborhood. The time frame may be very long. Thirty years is much better than ninety. This amendment would cure one of my objections to the SRAP.

I still wish that the staff would address the problem of the right of a beneficiary to a declaratory judgment to construe an ambiguous dispositive instrument (§ 715.5) even if reformation must be delayed. I would, of course, still prefer to retain instant cy pres -- that is, § 715.5 as it is.

Sincerely,



Professor Russell D. Niles

RDN/jmg

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December 19, 1990

CALIFORNIA LAW REVISION COMMISSION
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ENCLOSED HEREWITH IS THE FOLLOWING:

APPLICATION OF MARKETABLE TITLE STATUTE TO EXECUTORY INTRESTS

_____ Drafts for your review. After reviewing, please contact me to schedule an appointment to review and sign.

_____ For filing, return endorsed copies back to my office in the enclosed self-addressed envelope.

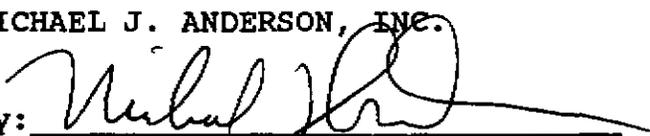
_____ For your signature where indicated. After signing, forward back to me in the enclosed envelope.

_____ Enclosed is a check in the amount of \$_____ for fees.

XXXXXX Other: APPROVED, NO COMMENTS.

Sincerely,

MICHAEL J. ANDERSON, INC.

By: 
MICHAEL J. ANDERSON

MJA\md
Enclosures

UNIVERSITY OF CALIFORNIA, LOS ANGELES

UCLA

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SANTA BARBARA • SANTA CRUZ



DEC 21 1990

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

December 19, 1990

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

Dear John:

Re: Tentative Recommendation Relating to Application of
Marketable Title Statute to Executory Interests

California Civil Code §§ 885.010 to 885.070 cut off powers of termination in real property after 30 years unless they are rerecorded. The term "powers of termination" includes what formerly were known as possibilities of reverter and rights of entry. Your staff has recommended that Cal. Civ. Code § 885.010 be amended to include executory interests within the definition of a power of termination. I see some problems in this proposed amendment which the Commission will want to consider.

1. Executory interest shifting ownership from one charity to another charity. Take this case:

T devises Blackacre to Library Board, but
if Blackacre ceases to be used as a library to the
Baptist Church.

Under common law, the executory interest in the Baptist Church is not subject to the Rule against Perpetuities. The staff amendment appears to put a 30-year limitation on the Church's interest.

The common law exempts an executory interest in a charity terminating the possessory fee simple in another charity because all interests in the property are in charity. Since T could have created a perpetual charitable trust with power in the trustee to shift income from one charity to another, courts have seen no perpetuities objection to an executory interest shifting the fee simple from one charity to another. Of course, there is a difference: Where a trust is created, the trustee can convey a fee simple and the assets

are marketable; here Blackacre is unmarketable without the consent of both Library Board and Baptist Church.

An argument can be made that recognizing the donor's right to control the use of land for 30 years is a sufficient incentive to encourage charitable gifts (as the legislature has implicitly decided by limiting reversionary interests to 30 years). The Baptist Church's executory interest arguably should be cut off after 30 years, if reversionary interests are similarly cut off. On the other hand, there is an important difference between reversionary interests and an executory interest in a charity. Reversionary interests tend to fractionate over the years, through inheritance by numerous heirs, and after 30 years, title becomes really unmarketable because there are too many heirs holding fractional shares of a reversionary power of termination. The land may be more easily sold if the policing executory interest is in one person, a charity, easily identifiable. The discussion of this issue in 4A Scott, Trusts § 401.5 is useful.

In any event, this is a policy issue that the Commission should discuss and decide. The staff draft does not discuss this rather important change in the law of charitable gifts.

2. Executory interests in minerals. Take this case:

O conveys Blackacre to A, reserving the mineral rights for 20 years and, if minerals are produced within 20 years, for so long thereafter as minerals are produced.

The usual construction of this conveyance is that O reserves a fee simple determinable in the minerals and A has an executory interest to terminate the fee simple in the minerals at the end of 20 years or whenever mineral production begun within that period ceases, whichever occurs last. The orthodox holding is that A's executory interest in the minerals violates the Rule against Perpetuities and is void. *Walker v. Marcellus & O.L.R. Co.*, 226 N.Y. 347 (1919). There are, however, some imaginative ways of finding A's executory interest valid. See *Williams v. Watt*, 668 P.2d 620 (Wyo. 1983), classifying A's interest as a vested remainder on the theory that a fee simple determinable in a mineral estate could be analogized to an ordinary life estate (both must "wear out" or "die"). See also *Earle v. International Paper Co.*, 429 So.2d 989 (Ala. 1983), using the regrant theory of reserved easements to hold that the grantee A took the fee simple absolute and granted back a fee simple determinable in the minerals to O, retaining a possibility of reverter in A.

Section 885.015 exempts from the 30-year rule a "reversionary interest conditioned upon the continued production or removal of oil or gas or other minerals." A reversionary interest is a right retained by the grantor. A court might well hold that this section does not apply to an executory interest under the amended statute, because by defining a power of termination in § 885.010 to include an executory interest, while using

the restricted term "reversionary interest" in § 885.015, the legislature intended the latter section to apply only to powers retained by the grantor.

The problem might be resolved by changing "reversionary interest" in § 885.015 to "power of termination" (as newly defined in § 885.010). If this were done, it would still be unclear whether a donative executory interest in this situation, though free of the 30-year rule, is subject to the Rule against Perpetuities (see below).

3. Executory interests in family wealth transfers. Take this example:

T devises Blackacre to A, but if A dies without issue at any time, to B.

This devise creates a valid executory interest in B. Is it subject to the 30-year time limitation? It ought not to be. Executory interests such as B's are equivalent to remainders in family wealth dispositions, and should be subject to the same time limitation as remainders (the Rule against Perpetuities).

B's interest may be subject to the 30-year rule under the staff's amendment. The question is whether B's executory interest is a "power created in a transferee 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." Is the condition subsequent here "a restriction"?

It is not altogether clear what a "restriction" means. Does it include a restriction on land use only? Does it include cessation of mineral production (discussed above)? Or does "restriction" include a broader class of shifting events? The drafting problem for your staff is how to amend the statute so that it applies (a) only to executory interests that are the functional equivalents of powers of termination (and subject to a 30-year rule) and (b) not to executory interests used for other purposes (which are subject to the Rule against Perpetuities or to a 90-year rule under USRAP or to no time limitation at all).

Here are some other shifting events from actual cases:

1. to A, but when the mortgages are paid, to B.
2. to A, but if A ever marries outside the Jewish faith, to B.
3. to A for life, then to A's children, but if A's children die without issue, to B. (Does the 30-year rule apply to a power to terminate a remainder or only a possessory fee? If the latter, should the statute be amended to say "to terminate a possessory fee simple estate"?)
4. to A so long as A remains unmarried, and if A marries, to B.

5. to A my summer home, but if A ever denies access to my other children, to my other children.
6. to A until his youngest child reaches 25, then to A's children.

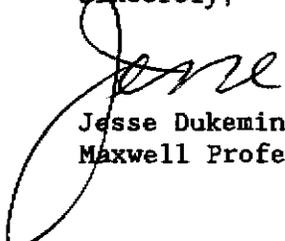
The problem of sorting executory interests into two groups, one functionally corresponding to possibilities of reverter and rights of entry, and the other to remainders, does not arise with respect to possibilities of reverter and rights of entry because the vast majority of these interests are used to police restrictive conditions on land use. Executory interests, on the other hand, are used for many purposes other than enforcing land use restrictions. They must be sorted out appropriately where you want one time-limitation rule (30 years) to apply to those comparable to possibilities of reverter and rights of entry and another rule (Rule against Perpetuities) to apply to those comparable to remainders. Does "restriction" suffice as a sorting device?

4. Interrelation of 30-year rule and Rule against Perpetuities.

Since reversionary interests are not subject to the Rule against Perpetuities, it was not necessary to deal with the Rule in legislation subjecting them to a 30-year duration. But executory interests are subject to the Rule against Perpetuities. Therefore, the question arises whether an executory interest that is subject to the 30-year rule is free of the Rule against Perpetuities (and USRAP's 90-year limitation, if adopted). I believe you intend that, but it ought to be made explicit. Otherwise an executory interest might be valid under one rule and void under another. If USRAP is adopted, this might put a 90-year limit on rerecorded executory interests but not on rerecorded powers of termination in the grantor's heirs.

5. Retroactivity. Will the retroactivity provisions of §§ 880.370 and 885.070 apply to newly included existing executory interests, giving them five years for recording a notice of intent to preserve? Retroactivity is not discussed in the staff draft. It also may be unclear whether, by rerecording a void executory interest created before 1991, the holder may reinstitute it for 30 years. Under present California law, the court would subject a void executory interest created after 1963 (or possibly before) to cy pres reformation, perhaps validating it for the life of the grantee plus 21 years. In light of this, it seems a sensible solution to apply the retroactive provisions mentioned above to existing void executory interests. However, this may have the potential of permitting someone with a void executory interest created more than 30 years ago to rerecord such an interest and preserve it indefinitely.

Sincerely,



Jesse Dukeminier
Maxwell Professor of Law

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OF COUNSEL

December 26, 1990

OUR FILE NO. _____

CA LAW REV. COMMISSION

DEC 21 1990

RECEIVED

John H. DeMouly
Executive Secretary
The California Law Revision
Commission
4000 Middlefield Road, Suite D2
Palo Alto, CA 94303

Re: Application of Marketable Title Statute
to Executory Interests

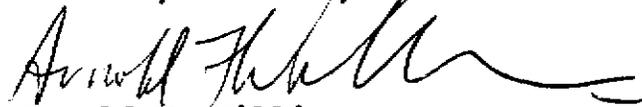
Gentlemen:

The proposal you advanced appears to create an ambiguity as to whether executory interests can be either reformed by cy pres or eliminated entirely or, alternatively, preserved by a filing for thirty years. While your rationale appears to be in the interest of advancing uniformity in the treatment of interests in real property, what is created is a significant new exception in the group of transferred interests (which are subject to the rule against perpetuities) versus retained interests (which are not subject to the rule against perpetuities). It seems as if either the proposal is not radical enough or too radical or both or neither. My reaction, therefore, is lukewarm.

I look forward with interest to hearing others' reactions to this proposal.

Very truly yours,

DOWLING, MAGARIAN, PHILLIPS & AARON


Arnold F. Williams

AFW:ped

ped\DeMouly

#H-409, #L-3013

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

relating to

Application of Marketable Title Statute to Executory Interests

November 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 DECEMBER 31, 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

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Letter of Transmittal

This tentative recommendation proposes revising the marketable title statute to treat executory interests in the same manner as powers of termination. This would have the effect of terminating executory interests of record if a notice of intent to preserve the interest is not recorded for a 30-year period.

This tentative recommendation was prepared pursuant to Resolutions Chapter 81 of the Statutes of 1988.

APPLICATION OF MARKETABLE TITLE STATUTE
TO EXECUTORY INTERESTS

In a separate recommendation, the Commission proposes enactment of the Uniform Statutory Rule Against Perpetuities.¹ The Uniform Statutory Rule adopts a 90-year wait-and-see period in place of the common law period of lives in being plus 21 years. During the wait-and-see period, property dispositions that violate the common law rule are generally not invalidated or subjected to reformation. One type of future interest in real property that, in theory, could be greatly affected by the new perpetuities statute is the executory interest preceded by a fee simple determinable or the executory limitation on a fee simple.² For example, the owner of a home devises the property to A and his heirs so long as the property is used for residential purposes, then to B and her heirs.³ Under the common law

1. See *Recommendation Relating to Uniform Statutory Rule Against Perpetuities* [September 1990], 20 Cal. L. Revision Comm'n Reports 2501 (1990).

2. A variety of phrases have been used to describe this class of interest, including the executory interest subject to an unfulfilled condition precedent and the executory interest preceded by a fee simple determinable. See Restatement (Second) of Property: Donative Transfers § 1.4 comment m (1983); H. Miller & M. Starr, *Current Law of California Real Estate* § 11.15, at 23-24 (2d ed. 1989); L. Simes & A. Smith, *The Law of Future Interests* §§ 191-92, 221 (2d ed. 1956); Waggoner, *Future Interests in a Nutshell* § 2.1 (1981). At common law, the fee simple interest in this situation was known as a fee simple determinable or a fee simple subject to a condition subsequent. The fee simple determinable terminated automatically on occurrence of the stated condition, whereas the fee simple subject to a condition subsequent terminated only by divestment by a person entitled to take advantage of breach of the condition. See 4 B. Witkin, *Summary of California Law Real Property* § 238, at 442-43 (9th ed. 1987). The fee simple determinable was abolished in the 1982 marketable title legislation; such an interest is now deemed to be a "fee simple subject to a restriction in the form of a condition subsequent." See Civil Code § 885.020 & Comment.

3. See Restatement (Second) of Property: Donative Transfers § 1.4 comment m, illus. 19 (1983). Another example would be a devise of land to a church so long as they maintain their present religious belief, then to B and his heirs. See Fellows, *Testing Perpetuity Reforms: A Study of Perpetuity Cases 1984-1989*, __ Real Prop. Prob. & Tr. J. [100-01] (forthcoming).

rule against perpetuities, the interest of B and her heirs is void because it is not certain to vest (or fail) within lives in being plus 21 years.⁴ However, under the proposed Uniform Statutory Rule Against Perpetuities, an executory limitation invalid under the common law rule could last for 90 years.

Although the Commission is not aware that such executory interests are encountered with any frequency in practice, the potential existence of such interests for 90 years could act as an undesirable cloud on title. The law would be improved if executory interests were to be treated the same as powers of termination under the marketable title statute.⁵ A power of termination is a reversionary interest retained by the testator or transferor rather than an interest created in a devisee or transferee. A power of termination may accomplish the same purpose as the executory interest in the example given above: O devises the property to A and his heirs so long as the property is used for residential purposes, but if the property ceases to be so used, O's heirs have the power to terminate the estate devised to A. The interest of O's heirs in this example may be transferred,⁶ and so could be held by the same person (B's heirs) who held the executory interest in the first example.

A power of termination is not subject to the rule against perpetuities,⁷ but the marketable title statute causes a power of termination of record to expire if a notice of intent to preserve the

4. The result in California is not certain, in view of the *cy pres* rule in Civil Code Section 715.5. A court might permit the executory interest to last for 21 years or might invalidate it.

5. See Civil Code §§ 885.010-885.070. These sections are part of a comprehensive statute concerning marketable title of real property, enacted on Commission recommendation. See *Recommendation Relating to Marketable Title of Real Property*, 16 Cal. L. Revision Comm'n Reports 401, 420 (1982), implemented by 1985 Cal. Stat. ch. 1268, § 1.

6. See Civil Code § 885.010(a) (last sentence).

7. See 4 B. Witkin, *Summary of California Law Real Property* § 397, at 586 (9th ed. 1987); *Restatement (Second) of Property: Donative Transfers* § 1.4 comment c (1983).

interest is not recorded within the preceding 30 years.⁸ As defined in the marketable title statute, a power of termination is

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 885.020.⁹

In traditional terms a power of termination is an interest retained by the transferor of real property, although the statutory definition is not specifically so limited.¹⁰

The power of termination and the executory interest are functionally equivalent. These interests operate in the same fashion on the preceding fee simple, the distinguishing characteristic being the person in whom the interest is originally created. But since both types of interest are transferable, the nature of the interest's origin does not restrict the class of persons who may ultimately hold the interest. One important difference does remain: An executory interest (but not a power of termination) is subject to the rule against perpetuities,¹¹ and, conversely, a power of termination (but not an executory interest) is subject to the 30-year marketable title recording limitations.

8. Civil Code § 885.030. A power of termination may also be extinguished if it becomes obsolete. See Civil Code § 885.040.

9. Civil Code § 885.010(a).

10. It should be noted that the 1872 Civil Code does not make the traditional distinctions between reversionary and executory interests, although California courts have adopted the general usage. See 4 B. Witkin, *Summary of California Law Real Property* § 335, at 534 (9th ed. 1987).

11. See Civil Code § 885.030 Comment; *Recommendation Relating to Marketable Title of Real Property*, 16 Cal. L. Revision Comm'n Reports 401, 419-20 (1982); 4 B. Witkin, *Summary of California Law Real Property* § 397, at 586 (9th ed. 1987).

The Commission recommends that these interests be treated in the same manner under the marketable title statute by applying the 30-year recording rule to executory interests. Under this rule, an executory interest would terminate if the instrument creating the interest or a notice of intent to preserve the interest is not recorded within a 30-year period.¹² Executory interests should not be preserved for a different period than similar interests retained by a testator or grantor which may be preserved for additional 30-year periods. Treating powers of termination and executory interests in the same fashion under the marketable title statute would also apply the rules concerning expiration of an obsolete power of termination,¹³ the procedure for exercising a power of termination,¹⁴ and the effect of expiration of a power of termination.¹⁵ The proposed law would apply to existing executory interests, but provides a five-year grace period for holders of existing executory interests to record a notice of intent to preserve the interest.¹⁶

12. The traditional rule that includes executory interests within the coverage of the rule against perpetuities while excluding powers of termination retained by a transferor would not be changed. It would not be appropriate to extend the rule against perpetuities to reversionary interests at this late stage. Consistency of treatment would not justify removing the perpetuities limitations from executory interests.

13. See Civil Code § 885.040.

14. See Civil Code § 885.050.

15. See Civil Code § 885.060.

16. The grace period is the same as that provided by the 1982 legislation applicable to powers of termination. See Civil Code § 885.070; *Recommendation Relating to Marketable Title of Real Property*, 16 Cal. L. Revision Comm'n Reports 401, 421-22 (1982).

PROPOSED LEGISLATION

The Commission's recommendation would be effectuated by the following legislation:

Civil Code § 885.010 (amended). "Power of termination" defined

SECTION 1. Section 885.010 of the Civil Code is amended to read:

885.010 (a) As used in this chapter, ~~"power:~~

(1) "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.

(2) "Power of termination" includes the power created in a transferee 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 an executory interest, executory limitation, or otherwise, and includes the interest known at common law as an executory interest preceded by a fee simple determinable.

(b) A power of termination is an interest in the real property.

~~(b)~~ (c) For the purpose of applying this chapter to other statutes relating to powers of termination, the terms "right of reentry," "right of repossession for breach of condition subsequent," and comparable terms used in the other statutes mean "power of termination" as defined in this section.

Comment. Section 885.010 is amended to include an executory limitation on a fee simple within the scope of this chapter. The language of subdivision (a)(2) extends the definition of "power of termination" to include an executory interest created in a transferee of real property. For the purpose of this chapter, the inclusion of such executory interests extends the traditional use of the term "power of termination" beyond rights of entry and related interests that were

retained by the grantor. The traditional description of an executory interest preceded by a fee simple determinable in subdivision (a)(2) makes the coverage of this provision complete. The fee simple determinable is abolished in Section 885.020. See Comment to Section 885.020.

Civil Code § 885.070 (amended). Application of chapter

SEC. 2. Section 885.070 of the Civil Code is amended to read:

885.070. (a) Subject to Section 880.370 (grace period for recording notice) and except as otherwise provided in this section, this chapter applies on the operative date to all powers of termination, whether executed or recorded before, on, or after the operative date.

(b) If breach of the restriction to which the fee simple estate is subject occurred before the operative date of this chapter and the power of termination is not exercised before the operative date of this chapter, the power of termination shall be exercised, or in the case of a power of termination of record, exercised of record, within the earlier of the following times:

(1) The time that would be applicable pursuant to the law in effect immediately prior to the operative date of this chapter.

(2) Five years after the operative date of this chapter.

(c) As used in this section, "operative date" means the operative date of this chapter as enacted or, with respect to any amendment of a section of this chapter, the operative date of the amendment.

Comment. Subdivision (c) is added to Section 885.070 to clarify the application of this section to executory interests included within the scope of this chapter by the amendment of Section 885.010. The effect is the same as the effect on powers of termination when this chapter was enacted. See 1982 Cal. Stat. ch. 1268, § 1.