

6/11/69

Memorandum 69-78

Study 74 - Civil Code Section 715.8 (Rule Against Perpetuities)

At the 1969 legislative session, the Legislature authorized the Law Revision Commission to make a study to determine whether Civil Code Section 715.8 should be revised or repealed. The attached recommendation provides a comprehensive review of the statute and sets forth several persuasive reasons for its repeal. It should be read before the meeting. The recommendation is lengthy because it will not be accompanied by a research study. The attached law review article and the detailed recommendation have taken the place of a research study.

This memorandum will not elaborate on the reasons for the repeal of the statute which are set out in detail in the recommendation. Rather, this memorandum takes a critical view of the recommendation to provide the Commission with the countervailing arguments on this topic. Specifically, this memorandum is written from the point of view that repeal of Civil Code Section 715.8 without more is an incomplete resolution of the problems arising in this field of law. The principle criticism of the recommendation would be that, while it solves a particular problem, it fails to resolve several other existing perpetuities problems.

The repeal of Section 715.8 may create some uncertainty as to the application of the Rule Against Perpetuities to commercial transactions. Although the enactment of Section 715.8 was made unnecessary by the decision in Wong v Di Grazia, 60 Cal.2d 525, 35 Cal. Rptr. 241, 386 P.2d 817 (1963), subsequent district court of appeal decisions have failed to apply the doctrine laid down by the Supreme Court. In First & C Corp.

v. Wencke, 253 Cal. App.2d 719, 61 Cal. Rptr. 531 (1967) (dicta), the court held that a commercial lease to commence on completion of construction violated the Rule Against Perpetuities. Wencke expressly followed Haggerty apparently unaware that Haggerty had been overruled by Wong. Thus, it is doubtful that Wencke will be followed if this issue is ever raised.

In Prime v. Hyne, 260 Cal. App.2d 397, 67 Cal. Rptr. 170 (1968), the court remorselessly applied the rule to a contract for the sale of an expectancy. The court held that, since the contract was contingent upon the distribution of the estate, a contingency which might be delayed for longer than 21 years, the Rule Against Perpetuities was violated. The nature of the transaction is indicated by the following argument made by the appellant: Mrs. Williams (the testator) was the actual seller of the property; through her agent, John Williams, she agreed upon the price and terms of a sale; but, in order to avoid a capital gains tax liability, it was agreed that title would be distributed to the heirs through probate of the will and that they would make the conveyance to appellant and receive the purchase price. Prime, however, recognized Wong but failed to follow that case on the following ground: "The reasoning of the opinion [Wong] is not applicable to an agreement for the sale of a mere expectancy. Contracts for the sale of expectancies of heirs and devisees are in the general class of interests created by wills, deeds or contracts to vest in the future. As to these the rules against restraints of alienation and perpetuities are strictly enforced." Strict application of the rule to a sale of an expectancy is consistent with the courts' general tendency to frown upon such transactions, which tend to defeat the intentions of the testator and leave the heir with only a small fraction of "his rightful inheritance."

Whether Prime will be confined to its facts remains to be seen. However, the Supreme Court in Wong has indicated that it will no longer apply the rule in a rigid mechanistic manner: "We therefore do not propose to apply the rule in the rigid or remorseless manner characterized by some past decisions; instead we shall seek to interpret it reasonably, in the light of its objectives and the economic conditions of modern society." Perhaps, future development in the perpetuities field should be left to the common law process. The Comment to Section 715.8 indicates that the legislative intent in repealing Section 715.8 is to adopt the doctrinal approach laid down in Wong.

A second problem highlighted by the repeal of Section 715.8 is that this action thrusts the illusive common law concept of "vest" upon California estate planners as the sole criterion of an interests validity. Even John Chipman Gray argued that the common law meaning of vest was not always sound in policy. While repeal of the statutory definition of vest does nothing more than to continue existing law, a persuasive argument can be made that vest must be defined:

The word "vest" is the key word in applying the Rule against Perpetuities. If an interest will "vest" in due time, it is valid. If it may "vest" too remotely, it is void. Where such important legal consequences turn on the use of this particular collocation of four letters, it behooves us to ascertain, as far as may be possible, what this four-letter word means.

An obstinate mythology has made "vest" into a ventriloquism. Though seemingly pronounced by the court, the true source, it is said, is the apt language of the instrument creating the interest. Since words of the instrument control--regardless of the problem before the court--"vest" may be defined solely by reference to such words. History has seen some remarkable efforts to frame definitions which would classify whatever words man could produce; yet none of them gives us any reliable prediction of how the courts will use the word "vest." It has been obvious for many years--at least since Myres McDougal's classic debunking of this myth²¹--that "vest" cannot

²¹McDougal, "Future Interests Restated: Tradition versus Clarification and Reform," 55 Harv. L. Rev. 1077 (1942).

be given any realistic meaning by referring solely to the words of the instrument. Still there persists this belief in the power of a dead man's words to conquer whatever problem may arise.

This notion that "vest" is a talismanic word seems to rest on ignorance of elementary semantics as well as on fallacious logic. At any rate, these matters need some looking into before we turn to the cases and attempt to discover the meaning of "vest." For anyone with a fixed belief in an all-embracing definition of "vest" cannot begin to hope to understand Kentucky perpetuities cases. He will find they stubbornly resist analysis. . . . [Cases reviewed.]

* * * * *

In short, the only clear channel of meaning is: "vest" means "become possessory." Any other meaning one accepts at his peril.

The court's orientation has not been toward the subtleties and refinements of the feudal concept of vesting, nor toward the academic horsemanship inherent in it. On the contrary, the court has, taking the cases as a whole, shown a sound grasp of policy in defining "vest." In spite of contrary dicta, the sheer weight of results indicates the essential idea basing the decisions is that a rational policy against perpetuities requires a rule against remote possession and enjoyment.⁶⁰ This is the indispensable, though largely unacknowledged, premise of the perpetuities cases rejecting the vested with possession postponed construction. It also underlies the rejection of the vested subject to divestment construction. It was, appropriately enough, John Chipman Gray himself who first suggested this was desirable policy. "It seems that in the ideal system of law," wrote Gray, "no interests which did not vest in possession within the allotted period would be allowed. They are within the practical reason of a Rule against Remoteness."⁶¹ More recently, Professors Simes and Schuyler have come to the same conclusion.⁶² [Dukeminier, Perpetuities Law in Action 14-15, 29 (1960).]

⁶⁰ Only two cases, *Liggett* and *Goodloe*, are discordant notes in the policy song the court has apparently been singing for over a century. But there is plenty of irreverent obbligate in dicta. Two recent writers suggest other courts are also "groping toward a possessory test of validity." Lynn & Van Doren, "Applying the Rule against Perpetuities to Remainders and Executory Interests: Orthodox Doctrine and Modern Cases," 27 U. Chi. L. Rev. 436, 461 (1960).

⁶¹ Gray § 972.

⁶² Simes, *Public Policy and the Dead Hand* 80-82 (1955) (with reservations); Schuyler, "Should the Rule against Perpetuities Discard Its Vest?" 56 Mich. L. Rev. 683, 887 (1958).

Repeal of Section 715.8 forces this issue to the forefront because it removes a test of vest which at least one legal writer has praised for its ease of application. Perhaps a substitute definition or a revision of Section 715.8 could be devised which would provide more certainty and represent sounder policy than continuing the American common law meaning of vest.

It should also be noted that Section 715.8 treats functionally equivalent interests alike, but a repeal of the section would treat these equivalent interests differently. At least one legal writer has noted this effect of Section 715.8: "For treating alike these functional equivalents (possibilities of reverter, rights of entry, and executory interests to enforce land use restrictions), the alternative definition of vesting deserves applause." 55 Cal. L. Rev. at 681.

The similarity of these interests is demonstrated by studying the following hypothetical transfers.

- Case 1. (Possibility of Reverter)
O conveys Blackacre to Trinity Church so long as used for church purposes.
- Case 2. (Right of Entry for Condition Broken)
O conveys Blackacre to Trinity Church on the express condition that the premises are used for church purposes and, in the event that the premises are not so used, then O or his heirs may enter and terminate the estate to Trinity Church.
- Case 3. (Executory Limitation)
O conveys Blackacre to Trinity Church so long as used for church purposes, then to A and his heirs.

All the above transfers tend to tie up the property for an unreasonably long period of time, and the scholars agree that these interests should all be limited in some manner. At common law, the interests in cases 1 and 2 were valid, and the interest in A and his heirs in case 3 was void.

This illogic was even assailed by the renowned perpetuities expert, John Chipman Gray. The virtue of Section 715.8 is that it treats these interests alike--all are valid--not that it exempts executory interests from the rule. However, unaided by statute the courts have tended to restrict these interests either by narrowly construing them or by subjecting them to equitable defenses. At least one legal writer has concluded that it is likely that the courts would restrict all of the above functionally equivalent interests.

The repeal of Section 715.8 would limit executory interests by subjecting them to the Rule Against Perpetuities and would leave possibilities of reverter and rights of entry free from the rule but subject to judicially developed restrictions--the result that obtained before the enactment of Section 715.8. Perhaps a better solution would be to legislatively limit each of these interests. While there is agreement that these interests should be limited, there is some disagreement as to how this should be accomplished. At least five methods of limiting these interests have been proposed: (1) subject them to the Rule Against Perpetuities, (2) terminate them after a fixed period of years, (3) transform them into equitable servitudes subject to termination by change of circumstances, (4) terminate those that are limited on "merely nominal" conditions, and (5) terminate those that serve to restrict the use of land. At least one or more of the above solutions have been legislatively adopted in at least 12 states.

A final problem is that the repeal of Section 715.8 does not alleviate the need to devise a more effective method of terminating trusts which last too long. As one legal writer has pointed out, Civil Code Section 771, the principle bulwork against trusts which last too long, is inadequate for

several reasons: (1) Section 771 does not require that all trusts terminate after a fixed or determinable period of time, (2) constructional difficulties tend to inhibit termination under the section, and (3) the statute is difficult to enforce.

Even if Section 715.8 is repealed, consideration should be given to the following problems: (1) Should a new mandatory trust duration statute be enacted (such a statute has been proposed by a distinguished committee of perpetuities experts)? (2) Should the present trust duration statute be revised to eliminate the constructional difficulties pointed out in the attached law review article? (3) Should Section 19285 of the California Revenue and Taxation Code be amended to provide the Attorney General with access to lists of California trusts so that he can enforce Section 771?

It is hoped that, at the June meeting, the direction and approach the Commission should take on this topic can be developed. Some of the possible approaches are: (1) Repeal Section 715.8 without any other change in existing law and without undertaking a study of the problems raised in this memorandum. (2) Repeal Section 715.8 immediately (1970) and reserve authority to study the related problems mentioned herein. (3) Defer action until a comprehensive recommendation can be prepared.

Respectfully submitted,

John L. Cook
Junior Counsel

EXHIBIT I

Report to the Board of Governors of the State Bar Committee on the Rule against Perpetuities (January 10, 1963).

The case of Haggerty v. City of Oakland, 161 Cal. App. (2) 407, forcibly brought to the attention of the Bar the necessity of modernizing the interpretation of the rule against perpetuities. In the Haggerty case, the City of Oakland executed a lease, the term of which was ten years, to commence on the completion of a building to be constructed by the Board of Port Commissioners, at a cost of \$250,000. The majority opinion held that since the lease was to commence when the building was constructed and the date of completion might conceivably be later than twenty-one years, it was void as in violation of the rule against perpetuities. This opinion came as a shock to the bar, for leases of this same commercial character were of common occurrence.

Nearly all lawyers will agree that the confusion and mystery surrounding the field of perpetuities should be clarified. To use the words of Mr. Justice Bray in the dissenting opinion in the Haggerty case, "After all, there has to be some common sense in the rulings of courts." One law review commentator on the Haggerty case expressed the view, "possibly this new absurdity will alert the bar of California and other states to the desirability of riding the current wave of statutory change." He was referring to the widespread movement in many states to do away with medieval interpretations of the rule.

Nearly three centuries ago the rule first came to be expressed in the English courts. It never was a statutory rule but rather one of judgemade law. Although the rule has been codified in California, the statutes are intended to express rather than to modify the common law rule. Whether in common law or statutory form, the rule against perpetuities is designed, and properly so, to prevent the tying up of landed estates for long or

indefinite periods of time. It is not designed to hamper commercial transactions. It is the purpose of the proposed Section 715.8 to be added to the Civil Code, to eliminate from the rule virtually all commercial and contract transactions inasmuch as there are ordinarily in such cases parties in being who can modify or terminate the contractual relationships. Sections 693, 694 and 695, which conflict in some respects and are uncertain in themselves, are recommended for repeal.

The Committee also believes that the best interests of the people would be served by calling for a liberal interpretation of the intent of the creator of an interest. Such is the effect of Section 715.5.

Sections 715.6 and 715.7 introduce additional elements of flexibility into the rule against perpetuities which the Committee believes are desirable. These modifications do not, however, undercut the basic policy of the rule, which is to prevent the undue fettering of property while permitting reasonable dispositions to be made.

There are comparatively few decisions involving perpetuities in the California reports, but there are hundreds in states other than California. Modern property transactions should not be hampered by these very old decisions. Commercial transactions never were intended to be affected by them.

The proposal of the Committee is to clarify and modernize the law in line with movements in other leading commercial states. A draft statute is attached.

June 11, 1969

TENTATIVE
RECOMMENDATION OF THE CALIFORNIA
LAW REVISION COMMISSION
relating to
THE RULE AGAINST PERPETUITIES

An owner of property has the power to dispose of it in such a way as to control its use and disposition by future generations. Such control is commonly achieved by the use of trusts and testamentary dispositions. However, since at least the middle of the 17th century, Anglo-American law (primarily the Rule Against Perpetuities) has embodied a policy of preventing unreasonable control of the future use of property and protecting the recipient of property from the too prolonged control by the dead hand. The basic rule in California is that an interest in property cannot remain "unvested" for a period longer than that of some life in being at the time the interest is created plus 21 years. Serious problems were created in 1963 when Civil Code Section 715.8¹ was added. This section furnishes an alternative definition of "vest" that permits the creation of interests of indefinite duration that were invalid under prior law. For example, Section 715.8 makes possible the creation of private trusts of indefinite, possibly

1. Civil Code Section 715.8 provides:

715.8. An interest in real or personal property, legal or equitable, is vested if and when there is a person in being who could convey or there are persons in being, irrespective of the nature of their respective interests, who together could convey a fee simple title thereto.

An interest is not invalid, either in whole or in part, merely because the duration of the interest may exceed the time within which future interests in property must vest under this title, if the interest must vest, if at all, within such time.

perpetual, duration which are free from estate taxation throughout their duration. This recommendation relates to this section and recommends that Civil Code Section 715.8 be repealed.

BACKGROUND

Civil Code Section 715.2 restates the American common law Rule Against Perpetuities.³ The substance of the rule is that, "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."⁴ Any interest that violates the rule will be construed and reformed to pre-serve the general intent of the creator of the interest.⁵ The rule requires

2. This recommendation does not directly relate to the question of the duration of trusts. The Rule Against Perpetuities is not a rule invalidating interests which last too long; rather it is a rule invalidating interests which "vest" too remotely. ⁶ American Law of Property § 24.3 (1952). Civil Code Section 771 permits the termination of trusts which last too long. See discussion, infra at 9-10.

3. Civil Code Section 715.2 provides:

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.

See Estate of Bird, 225 Cal. App.2d 196, 37 Cal. Rptr. 288 (1964), for an example of how the American common law rule of perpetuities has been applied to a matter of first impression in California.

4. For a concise explanation of the rule, see Leach, Perpetuities in a Nutshell, 51 Harv. L. Rev. 638 (1938); Leach, Perpetuities: The Nutshell Revised, 78 Harv. L. Rev. 973 (1965). For a more detailed analysis of the rule, see 4 Restatement of Property, Chs. 26-28 (1944); 6 American Law of Property (1952); 5 Powell, Real Property, Chs. 71-73 (1956); Simes & Smith, The Law of Future Interests, Ch. 39 (2d ed. 1956).

5. This power of cy pres by which the courts can reform an interest which violates the Rule Against Perpetuities is conferred upon the courts by Civil Code Section 715.5:

that it be absolutely certain at the date of creation of the interest that the interest will "vest,"⁶ if at all, within the period. Absolute certainty is required and the barest possibility that the interest might not vest violates the rule.⁷ Probabilities or even what has actually happened are⁸ totally irrelevant.

715.5. No interest in real or personal property is either void or voidable as in violation of Section 715.2 of this code if and to the extent that it can be reformed or construed within the limits of that section to give effect to the general intent of the creator of the interest whenever that general intent can be ascertained. This section shall be liberally construed and applied to validate such interest to the fullest extent consistent with such ascertained intent.

Prior to the enactment of Section 715.5, California followed the common law rule under which any interest which violated the Rule Against Perpetuities was void. See Civil Code Section 715.2: "No interest in real or personal property shall be good unless"

6. The meaning of the word "vest" is exceedingly complex and technical. However, the following definition of "vest" is very helpful:
- a. A remainder is "vested" when the persons to take it are ascertained and there is no condition precedent attached to the remainder other than the termination of the prior estates.
 - b. An executory interest (that is, an interest which cuts off a previous estate rather than follows after it when it has terminated) is not "vested" until the time comes for taking possession.
 - c. Possibilities of reverter and rights of entry for condition broken are "vested" from the outset (under American, but not English, cases).
 - d. Most important of all, a class gift is not "vested" until the exact membership in the class has been determined; or to put it differently, a class gift is still contingent if any more persons can become members of the class or if any present members can drop out of the class.

6 American Law of Property § 24.3 (1952). See also id., §§ 24.17-24.25.

7. See, e.g., Estate of Johnston, 47 Cal.2d 265, 270, 303 P.2d 1, 4 (1956); Estate of Sahlender, 89 Cal. App.2d 329, 348, 201 P.2d 69, 81 (1948).
8. See Prime v. Hyne, 260 Cal. App.2d 397, 67 Cal. Rptr. 179 (1968).

California Civil Code Section 715.8 provides a new definition of "vest" for the purposes of applying the Rule Against Perpetuities.⁹ This section is important because it effectuates a radical departure from orthodox perpetuities doctrine by providing an alternative definition of vest--the heart of the perpetuities doctrine. Thus, in California, an interest in property is valid if (1) the interest must vest (using the American common law meaning of vest), if at all, within lives in being plus 21 years or (2) a fee simple title to the property can be conveyed within lives in being plus 21 years.¹⁰ The single judicial decision discussing this section fails to illuminate any of the issues with which this recommendation is concerned.¹¹

9. "The alternative definition of 'vested' in § 715.8 should be used only in solving perpetuities problems even though it is the only section numbered 715 which is not made expressly applicable to the Rule Against Perpetuities alone." Dukeminier, Perpetuities Revision in California: Perpetual Trusts Permitted, 55 Cal. L. Rev. 678, 679 n.4 (1967).
10. See Dukeminier, supra note 9, at 679-680. But see Simes, Perpetuities in California Since 1951, 18 Hastings L.J. 247, 257 (1967) (Section 8 not noted).
11. The case of Prime v. Hyne, 260 Cal. App.2d 397, 67 Cal. Rptr. 170 (1968), is the only reported appellate decision involving Section 715.8. That case involved a 1961 contract for the sale of an expectancy contingent upon distribution of the estate. The court found the rule of reasonable construction adopted in Wong v. Di Grazia, 60 Cal.2d 525, 35 Cal. Rptr. 241, 386 P.2d 817 (1963), to be inapplicable to a contract for the sale of an expectancy. The court went on to hold that the required certainty of vesting was absent because the estate might not be distributed within 21 years of the death of the testator. The court, expressly passing the question of the applicability of Section 715.8 to a contract entered in 1961, rejected the argument that the interest was vested under Section 715.8 on the ground that the contract created "no ownership of a present or future interest in the property."

The opinion is confusing for several reasons. First, Wong v. Di Grazia expressly refused to apply the 1963 legislation to property interests created before its enactment. Second, if there was no interest in property which could vest, there could be no interest in property which the Rule Against Perpetuities could invalidate. Third, if there was a sufficient interest in the property for purposes of invalidating the interest, then why was that interest not capable of vesting under Section 715.8 for purposes of validating the interest? Finally, if the 1963 legislation was applicable, Civil Code Section 715.5 requires the void or voidable interest to be reformed or construed to give effect to the general intent of the creator of the interest. For alternative constructions of gifts contingent on distribution of the estate, see 6 American Law of Property § 24.23 (1952).

Section 8 of the 1963 legislation is the source of California's alternative meanings of vest. The section provides:

Sec. 8. This act does not invalidate, or modify the terms of, any interest which would have been valid prior to its enactment, and any such interest which would have been valid prior to the effective date is valid irrespective of the provisions of this act.

Section 8 is not a retroactivity clause, but rather it seeks to prevent the 1963 legislation from invalidating or modifying any interest which was valid under pre-1963 law.¹² A question of construction arises under this section relating to the law that is to be applied as the law prior to the enactment of the 1963 legislation. At first glance, it would appear that Section 8 refers to the common law meaning of vest as modified by Civil Code Sections 693-695.¹³ However, since Civil Code Sections 693-695 were

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12. For a discussion of the possible meanings of this section, see Comment, 37 So. Cal. L. Rev. 283, 298-299 (1964).

Section 8 may have several purposes. First, Section 715.8 does not vest every interest which would have been vested under prior law. For example:

O conveys Blackacre to A (a bachelor) for life, then to A's children for their lives, then to A's grandchildren in fee simple.

No interest is vested under Section 715.8. However, under the common law meaning of vest, the life estate in A and the secondary life estate in A's children are valid. Thus, Section 8 is necessary to preserve interests valid at common law. Second, Section 8 may be an admonishment that reformation of an instrument which violates the rule may not affect interests valid at common law.

13. These repealed sections provided:

693. Kinds of future interests. A future interest is either:
1. Vested; or,
2. Contingent.

694. Vested interests. A future interest is vested when there is a person in being who would have a right, defeasible or indefeasible, to the immediate possession of the property, upon the ceasing of the intermediate or precedent interest.

695. Contingent interests. A future interest is contingent, whilst the person in whom, or the event upon which, it is limited to take effect remains uncertain.

The Code definitions have been criticized because, by applying a definition perhaps adequate to describe vested and contingent remainders to

repealed by Sections 1-3 of the 1963 legislation, the repeal would be meaningless if Section 8 were to reenact those sections by inference. It would appear that the proper interpretation of the 1963 legislation is that an interest is valid if it is vested either under the American common law meaning of "vest" without statutory modification or under the Section 715.8 meaning of "vest."

Section 715.8 was enacted to free commercial transactions from the complexities of the Rule Against Perpetuities. The legislation achieves this purpose because, in commercial transactions involving the creation of leasehold interests, options to purchase, easements, mineral rights, there ordinarily will be persons in being who together can convey a fee simple title to the property. This exemption of commercial transactions from the Rule Against Perpetuities is not questioned inasmuch as the application of the rule to commercial transactions is generally considered inappropriate

as a matter of policy. However, subsequent to the enactment of Section

all future interests, violation of the common law Rule Against Perpetuities is permitted. See McMurray, A Review of Recent California Decisions in the Law of Property, 9 Cal. L. Rev. 447 (1921); Turrentine, Suggestions for Reform of Provisions of the California Civil Code Regarding Future Interests, 21 Cal. L. Rev. 1, 2-4 (1932); Jones, The Rule Against Perpetuities As It Affects California Oil and Gas Interests, 7 U.C.L.A. L. Rev. 261 (1960). See also Walsh, Future Interests in New York 29-35 (1931).

14. Cal. Stats. 1963, Ch. 1455, p. 3010. The following reason was given for the repeal of these sections: "Sections 693, 694, and 695, which conflict in some respects [with Section 715.8] and are uncertain in themselves, are recommended for repeal." Report to the Board of Governors of the State Bar Committee on the Rule Against Perpetuities (Jan. 10, 1963). See Exhibit I. See also Review of 1963 Code Legislation, 38 Cal. S.B.J. 601, 641 (1963).
15. This legislation was proposed by the California State Bar. The purpose for suggesting this legislation is indicated in Report to the Board of Governors of the State Bar Committee on the Rule Against Perpetuities. See Exhibit I.
16. See *Wong v. Di Grazia*, 60 Cal.2d 525, 35 Cal. Rptr. 341, 386 P.2d 817 (1963); 6 American Law of Property § 24.56 (1952); J. Morris & W.B. Leach, *The Rule Against Perpetuities* 219-231 (2d ed. 1962).

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715.8, the California Supreme Court made this legislation unnecessary
when it refused to follow Haggerty v. City of Oakland,¹⁸ which remorse-
lessly applied the rule to an "on completion" lease.

The essential defect in the drastic liberalization of the Rule Against Perpetuities accomplished by Section 715.8 is that its application exceeds the apparent purpose for enacting Section 715.8. As one legal commentator¹⁹ has put it, "the legislature used an atomic cannon to kill a gnat." Aside from commercial transactions, Section 715.8 incorrectly exempts several other kinds of transactions from the operation of the Rule Against Perpetuities.

One apparently unintended effect of Section 715.8 is that it exempts from the Rule Against Perpetuities dispositions of property to ascertained persons upon a contingency which may not occur with lives in being plus 21²⁰ years--for example, forfeiture land use restrictions. Such transactions

17. In Wong v. Di Grazia, 60 Cal.2d 525, 35 Cal. Rptr. 241, 386 P.2d 817 (1963), the court expressly overruled Haggerty v. City of Oakland, 161 Cal. App.2d 407, 326 P.2d 957 (1958), and adopted what has been termed the "rule of reasonable construction." The court upheld an "on completion" lease because the lease was construed to contain a limitation that the building was to be completed within a reasonable time, necessarily less than 21 years. However, in First & C Corp. v. Wencke, 253 Cal. App.2d 719, 61 Cal. Rptr. 531 (1967) (dicta), Haggerty was expressly followed. The court was apparently unaware that Haggerty had been overruled by Wong.

18. 161 Cal. App.2d 407, 326 P.2d 957 (1958).

19. Dukeminier, supra note 9.

20. An example of a forfeiture land use restriction valid under Civil Code Section 715.8, but not at common law, is the following:

O conveys Blackacre to Trinity Church so long as used for church purposes, then to A and his heirs.

The result of Section 715.8 is that possibilities of reverter, rights of entry, and executory interests to enforce land use restrictions are treated alike: they are exempted from the Rule Against Perpetuities. Although the section has been praised for treating alike these functional equivalents (Dukeminier, supra note 9, at 681-682), the statute may increase the amount of unmarketable land unless the courts subject such restrictions to equitable defenses. See Simes, Restricting Land Use in California by Rights of Entry and Possibilities of Reverter, 13 Hastings L.J. 293 (1962).

are valid because there are, or will be, persons in being within lives in being plus 21 years who can convey a fee simple. However, these transactions do not satisfy orthodox perpetuities policy because, although the interests are transferable, they cannot be satisfactorily valued and thus no market exists for them. They, therefore, are likely to run on as actual, even if not theoretical, barriers to the normal marketability of the property.

Section 715.8 also affects the validity of gifts in trust. Even assuming a restrictive interpretation of Section 715.8, a skilled draftsman may create a perpetual private trust which will meet the requirements imposed by Section 715.8 and which will be free of estate taxation. Consider the following trust:

T bequeaths a fund to the Security Trust Company, in trust, to pay the income to his issue per stirpes from time to time living. Whenever there is no issue of T alive, the Security Trust Company is directed to convey the trust property to The Regents of the University of California. The trustee is given the power to sell the trust property. T gives the adult income beneficiaries, acting jointly, the power to appoint the trust property to whomsoever they see fit, but the power can be exercised only with the consent of the Regents.

The power of the beneficiaries to terminate the trust meets the most restrictive interpretation of the requirement of Section 715.8 that there²¹ be persons in being who together could convey a fee simple title. On

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21. Section 715.8 as applied to trusts may be interpreted in one of three ways: (1) It may merely require that the trustee have the power to sell any asset of the trust; (2) it may require that one or more persons have the power to give away any asset of the trust--a power to give the trust assets to the trust beneficiaries would satisfy this requirement; or (3) it may require that one or more persons have the power to convey a fee simple title to anyone without any consideration. See Dukeminier, supra note 9, at 682-684.

The interests in the trust property would become unvested if there were no adult beneficiaries. For possible drafting techniques to avoid this possibility, see id. at 683 n.12.

the other hand, the power to terminate the trust is not a general power of appointment for purposes of the Internal Revenue Code because the power can only be exercised with the consent of adverse parties.²²

The principal bulwark against such perpetual private trusts is Civil Code Section 771.²³ This section provides that a trust which has lasted longer than lives in being plus 21 years may be terminated (1) upon request by a majority of the beneficiaries of the trust, or (2) by the courts upon petition by the Attorney General or by an interested party.

22. Int. Rev. Code of 1954, § 678 (Income Tax)(donees not treated as owners for income tax purposes because the power is lodged in more than one person); Treas. Reg. § 20.2041-3(c)(2)(1958)(Estate Tax); Treas. Reg. § 25.2514-3(b)(2)(1958)(Gift Tax).

23. Civil Code Section 771 provides, in part:

A trust is not invalid, either in whole or in part, merely because the duration of the trust may exceed the time within which future interests in property must vest under this title, if the interest of all the beneficiaries must vest, if at all, within such time. . . .

Whenever a trust has existed longer than the time within which future interests in property must vest under this title

(1) It shall be terminated upon the request of a majority of the beneficiaries;

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

Absent Civil Code Section 771 and the Rule Against Perpetuities, there is no rule of law in California requiring the termination of private trusts which last too long. However, at least one legal writer has noted that, in view of the constitutional prohibition of perpetuities (Article XX, Section 9) and the general policy of the law against undue fettering of property, the courts may rule that there is a limit to the duration of private trusts. See Turrentine, Rule Against Suspension of Absolute Power of Alienation and Future Interests in California, 9 Hastings L.J. 262, 270-278 (1958).

It should be noted, however, that Section 771 may not be adequate to satisfy perpetuities policy with respect to trusts of indefinite duration for several reasons. First, the trust is not terminable under Section 715.8 until the perpetuities period has run. Second, there is no certainty that such trusts will be terminated where this would be in the public interest. The numerous, unresolved constructional problems created by this section 24 tend to discourage termination because the legal right to do so is unclear. Moreover, the beneficiaries may not be entirely free to terminate the trust if termination would result in the loss of special advantages, such as immunity from creditors and taxation. Further, the beneficiaries may have renounced their power of termination.

Termination by parties other than the beneficiaries is also uncertain. Although the Attorney General and other interested parties may petition the courts for termination of the trust, the policy underlying the Rule Against Perpetuities is frustrated by the practical difficulties in enforcing such trusts. Enforcement by the Attorney General can be haphazard at best since 25 there is no available list of trusts. Enforcement is also hindered by the costs of terminating the trust and the lack of readily available records of the "measuring lives" of California trusts. It is evident that, while Section 771 can be used to terminate trusts which last longer than lives in being plus 21 years, the statute is difficult to enforce and, therefore, tends to be inadequate.

24. In a challenging article, Professor Dukeminier has pointed out that Section 771 provides a "mare's-nest of constructional problems." Dukeminier, supra note 9, at 678. The meaning of Section 771 has not been interpreted by the appellate courts.

25. A complete list of such trusts would be hard to produce. Inter vivos transfers in trust are not recorded unless real property is involved and, although a list could be compiled from the records of the Internal Revenue Service, such information could not be disclosed without an executive order. Int. Rev. Code of 1954, §§ 6103, 7213. California tax records are also confidential. Cal. Rev. & Tax. Code §§ 19282, 19285.

RECOMMENDATION

Under the guise of a new definition of vesting, Section 715.8 has made radical inroads on the centuries old policy of preventing the imposition of unreasonable restrictions on the future use of property. Section 715.8 should be repealed in its entirety. Nothing is needed to take its place. Section 715.8 provides an alternative meaning of vest and its repeal would make the existing American common law meaning of vest applicable to all perpetuities problems. Section 715.8 was ill considered from the beginning as is evidenced by the many cogent reasons that have been advanced for the repeal of the section:²⁶

(1) Enactment of Section 715.8 was wholly unnecessary to repudiate Haggerty v. City of Oakland,²⁷ which was wrongly decided, to free commercial transactions from the Rule Against Perpetuities. Haggerty had been severely criticized by legal writers and the doctrine established by that lower court case was under reexamination in a case on hearing in the California Supreme Court before the section was enacted.²⁸ The Haggerty

26. Several legal writers have concluded that Section 715.8 should be repealed. L. Simes, supra note 10; Comment, 16 Stan. L. Rev. 177 (1963). But see Comment, 37 So. Cal. L. Rev. 283 (1964). See also Dukeminier, supra note 9. A recent study for the Assembly Committee on Judiciary reports: "According to U.C.L.A. law professor Jesse Dukeminier, 'All the perpetuities experts in the state would vote to get rid of one confusing statute, California Civil Code Section 715.8. We need nothing in its place.'" Goldfarb & Singer, Problems in the Administration of Justice in California 62 (1969).

27. 161 Cal. App.2d 407, 326 P.2d 957 (1958). Accord, First & C Corp. v. Wencke, 253 Cal. App.2d 719, 61 Cal. Rptr. 531 (1967). Cf. Prime v. Hyne, 260 Cal. App.2d 397, 67 Cal. Rptr. 170 (1968).

28. See Leach, Perpetuities: New Judicial Absurdity. Judicial and Statutory Corrections, 73 Harv. L. Rev. 1318 (1960); Comment, 16 Stan. L. Rev. 177 (1963); Note, 10 Hastings L.J. 439 (1959); Note, 6 U.C.L.A. L. Rev. 165 (1959).

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doctrine was subsequently disapproved in Wong v. Di Grazia,²⁹ which adopted a rule of reasonable construction which should satisfactorily resolve the problems created by applying the rule to commercial transactions.

(2) In light of the Wong decision, the perpetuities reforms of 1963 also free commercial transactions from the rule. Civil Code Section 715.6 provides an alternative measure of the validity of an interest; an interest which will vest, if at all, within 60 years is valid.³⁰ Thus, commercial instruments which contemplate performance within 60 years will not violate the rule.³¹ As the California Supreme Court said in Wong:

Courts and scholars almost unanimously agree that provisions making vesting contingent upon performance within a reasonable time, or some equivalent phrase, do not violate the rule if, in light of surrounding circumstances, as a matter of construction "a reasonable time" is necessary less than . . . [60][32] years.

In addition, Civil Code Section 715.5 confers the power of cy pres upon the courts and avoids many of the harsh results obtained under the common law rule. Section 715.5 requires that an interest which violates the Rule Against Perpetuities shall be construed or reformed to effect the general intent of the creator of the interest. The potential availability of the power of cy pres should satisfactorily resolve most perpetuities

29. 60 Cal.2d 525, 35 Cal. Rptr. 241, 386 P.2d 817 (1963). See also Fisher v. Parsons, 213 Cal. App.2d 829, 29 Cal. Rptr. 210 (1963); Caffroy v. Fremlin, 198 Cal. App.2d 176, 17 Cal. Rptr. 668 (1961).

30. Civil Code Section 715.6 provides:

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.

There is no requirement that the instrument specify that this period is being used. Simes, supra note 10, at 254-255 (1967).

31. 60 Cal.2d 525, 536-537, 35 Cal. Rptr. 241, 249, 386 P.2d 817, 825 (1963).

32. The allowable period in gross has been extended to 60 years. Civil Code § 715.6.

litigation since the bulk of perpetuities litigation seems to involve either bizarre situations or simple contingency violations where intent can be drawn from the instrument itself.

(3) Section 715.8 permits the creation of private trusts of indefinite, possibly perpetual, existence which are free of estate taxation. This tax loophole exists only because Section 715.8 provides an alternative definition of vest radically different from the common law meaning of vest. Although the extent of the use of such trusts is not known, it can be anticipated that, unless Section 715.8 is repealed, Congress will be forced to enact legislation to close this tax loophole. However, federal legislation is likely to strike down other legitimate estate planning devices and hinder estate planners in all states.

(4) Section 715.8 frustrates perpetuities policy because it makes possible control over the future use of property for an unreasonable length of time. The primary function of the rule is to end dead-hand control over property and permit the living to be masters over their own fate. As one legal writer has remarked:

[T]he Rule Against Perpetuities strikes a fair balance between the desires of members of the present generation, and similar desires of succeeding generations, to do what they wish with the property which they enjoy.

The compromise adjustment of these conflicting interests assures the settlor of a trust as much power to shape this gift as is consistent with the equally important demands of the recipient to be free to do as he chooses with his assets. Section 715.8 upsets this delicate balance because it permits practical fettering of property beyond lives in being plus 21 years. Practical fettering of property is rightly condemned by orthodox perpetuities doctrine

33. L. Simes, Public Policy and the Dead Hand 58 (1955).

because the difficulty of valuing the separate property interests inhibits agreement among the parties. Therefore, such property is likely to be unmarketable, even if theoretically no legal barriers exist to the normal marketability of the property. Separate sale of the individual interests is unlikely because such interests cannot be valued and thus no market exists for them. Recognition of the limited interest held by a donee of a general power of appointment exercisable only with the consent of an adverse party is found in the Internal Revenue Code's failure to tax such interests.³⁴

(5) The violation of perpetuities policy permitted by Section 715.8 raises a question as to the constitutional validity of the section. Article XX, Section 9, of the California Constitution provides: "No perpetuities shall be allowed except for eleemosynary purposes." Although several California decisions and many legal writers have discussed the meaning of Article XX, Section 9, it is not clear whether the constitutional provision means (1) that the common law rule against Perpetuities has been enacted in all its details, (2) that the Constitution merely announces a general policy against perpetuities, or (3) that the common law rule is enacted in its substance only and reasonable legislative reform, but not abolition, is permissible.³⁵ This ambiguity not only is likely to breed litigation, but it is possible that it will lead to a judicial construction inimical to future perpetuities reform in order to strike down perpetual private trusts.

34. See note 22, supra.

35. See Simes, supra note 10, at 259-261 and authorities there cited.

(6) Section 715.8 conflicts with and is inconsistent with the recently enacted law relating to powers of appointment.³⁶ Civil Code Section 1391.1 provides that, for purposes of the exercise of a general power of appointment held by two or more persons, the permissible period under the Rule Against Perpetuities begins at the time of the creation of the power. Thus, Section 1391.1 states that, for purposes of testing the validity of the exercise of a power of appointment, a power held by two or more persons is not the equivalent of absolute ownership. Since no distinction, valid in policy, can be drawn between the creation and exercise of general powers, it can be inferred from this section that a general power of appointment held by two or more persons which can be exercised beyond the period of the rule is invalid. However, Section 715.8 expressly provides that such powers are valid.

This conflict between Sections 715.8 and 1391.1 is noted in the Comment to Section 1391.1 which states that the validity of an exercise of a power of appointment is governed by Section 1391.1 notwithstanding the fact that there are persons in being who theoretically could convey a fee simple title. Section 1391.1 is the sounder rule. Its policy determination that a general power of appointment held by two or more persons is not the equivalent of absolute ownership and therefore does not satisfy the policy of the Rule Against Perpetuities should not be limited to the exercise of powers but should apply to the creation of powers as well.

(7) The existence of a statutory definition of vest has led some legal writers to question whether the common law meaning of vest is still applicable.³⁷ However, although the common law meaning of vest still is

36. Cal. Stats. 1969, Ch. , p. .

37. See California Will Drafting § 15.9 (Cal. Cont. Ed. Bar 1965); Simes, supra note 10; Comment, 37 So. Cal. L. Rev. 283 (1964).

applicable because of Section 8 of the enacting statute, this question of ambiguity unnecessarily confuses persons affected by California law with respect to future interests.

(8) Further constructional difficulties are presented by Section 715.8.³⁸ Section 715.8 provides that "an interest in real or personal property" is vested if there are persons in being who can convey a "fee simple title thereto." Although the introductory clause indicates this alternative definition of vest applies to personal property, Section 715.8 may never "vest" an interest in personal property. Technically, a fee simple title is not normally used with respect to personal property.³⁹ Therefore, it may not be possible to convey the required title. This ambiguity whether Section 715.8 applies to both real and personal property further clouds California law.

38. See also Comment, 16 Stan. L. Rev. 177, 178-179 n.9 (1963) which argues that the second paragraph of Section 715.8 unnecessarily restates a settled aspect of perpetuities law--that an interest which must vest within the period is valid regardless of its duration--and that the second paragraph possibly introduces an innovation in trust law in direct conflict with Civil Code Section 771, relating to the duration of trusts.

39. See Civil Code § 701, the Code Commissioners' Note thereto, and §§ 702, 762. See also Comment, 37 So. Cal. L. Rev. 283, 297 (1964). If Section 715.8 was meant to apply to personal as well as real property, the term "absolute ownership," as defined by Civil Code Section 679, should have been used.

RECOMMENDED LEGISLATION

The Commission's recommendation would be effectuated by the enactment of the following measure:

An act to repeal Section 715.8 of the Civil Code, relating to
future interests in property.

The people of the State of California do enact as follows:

Section 1. Section 715.8 of the Civil Code is repealed.

~~715.8. An interest in real or personal property, legal or equitable, is vested if and when there is a person in being who could convey or there are persons in being, irrespective of the nature of their respective interests, who together could convey a fee simple title thereto.~~

~~An interest is not invalid, either in whole or in part, merely because the duration of the interest may exceed the time within which future interests in property must vest under this title, if the interest must vest, if at all, within such time.~~

Comment. Section 715.8 formerly provided an alternative definition of vest which affected the application of Civil Code Section 715.2. For the history and application of the repealed Section, see Recommendation Relating to the Rule Against Perpetuities, 10 Cal. L. Revision Comm'n Reports at ____ (1970). Under prior law, an interest in property was vested if: (1) it was certain the interest would vest (using the American common law meaning of vest), if at all, with the period prescribed by law, Civil Code § 715.2; Cal. Stats. 1963, Ch. 1455, p. 3010, §§ 1-3, 8, or (2) if and when there was a person in being or there were persons in being

irrespective of the nature of their respective interests, who together could convey a fee simple title thereto, Civil Code § 715.8 (repealed Cal. Stats.). Under prior law, there was some question whether Section 715.8 applied to interests in personal property inasmuch as a "fee simple" normally describes an interest in real property. The repeal of Section 715.8 leaves the American common law meaning of vest in California which is applicable to interests in real or personal property. The other 1963 statutory modifications of the application and effect of Civil Code Section 715.2 are not affected by the repeal of Section 715.8. See Civil Code §§ 715.5, 715.6, 715.7.

The alternative definition of vest provided by Section 715.8 primarily affected three kinds of dispositions: (1) the creation of interests in property in the context of commercial transactions, such as the creation of leasehold interests, options to purchase, easements, and mineral rights; (2) the creation of executory interests in ascertained persons subject to a condition precedent uncertain to occur, if at all, within the period prescribed by law, including forfeiture land use restrictions; and (3) the creation of general powers of appointment not presently exercisable by one donee alone. Although Section 715.8 was designed to free commercial transactions from Civil Code Section 715.2 by manipulation of the meaning of vest, its repeal does not alter the validity of most interests in property created in the context of commercial transactions. In light of the perpetuities reforms of 1963, and Wong v. Di Grazia, 60 Cal.2d 525, 35 Cal. Rptr. 241, 386 P.2d 817 (1963), Civil Code Section 715.2 properly applied will not result in frustration of commercial ventures. The proper application of Section 715.2 has been charted by the California Supreme Court:

Courts and scholars almost unanimously agree that provisions making vesting contingent upon performance within a reasonable time, or some equivalent phrase, do not violate the rule if, in the light of surrounding circumstances, as a matter of construction 'a reasonable time' is necessarily less than 21 years. (The allowable period in gross has been extended to 60 years by Civil Code § 715.6.) [Wong v. Di Grazia, supra at 536-537, 35 Cal. Rptr. 249, 386 P.2d 825.]

But see Prime v. Hyne, 260 Cal. App.2d 397, 67 Cal. Rptr. 170 (1968); First & C Corp. v. Wencke, 253 Cal. App.2d 719, 61 Cal. Rptr. 531 (1967) (dicta), for questionable applications of Civil Code Section 715.2 to commercial transactions. The repeal of Section 715.8 is intended to adopt the doctrine established in Wong v. Di Grazia, supra, not to revert to a rigid mechanistic operation of the rule. As the court stated in that case: "Our task is not to block the business pathway but to clear it, defining it by guideposts that are reasonably to be expected." Id. at 534, 35 Cal. Rptr. 247, 386 P.2d 823.

On the other hand, with respect to executory interests in ascertained persons subject to a condition precedent uncertain to occur, if at all, within the period prescribed by law and general powers of appointment exercisable only with the consent of two or more persons, the repeal of Section 715.8 alters the result obtained under prior law. Under prior law, these interests could be vested under Section 715.8, but not under the American common law meaning of vest. See Recommendation Relating to the Rule Against Perpetuities, supra.

Under prior law, the validity of the creation of a general power exercisable by two or more persons and the validity of an exercise of that power were not judged by the same standards. The creation of such a power was valid if there were persons, irrespective of the nature of their respective interests, who together could convey a fee simple title to the

trust property even though the power was exercisable beyond the period prescribed by law. Civil Code § 715.8 (repealed Cal. Stats.

On the other hand, an exercise of such a power could be invalid because Civil Code Section 1391.1 requires that the appointed interests vest within the period prescribed by law as measured from the date of the creation of the power. Thus, the inconsistent policies underlying Civil Code Sections 715.8 and 1391.1 created a situation whereby it was possible that a valid general power of appointment could not be effectively exercised. See the Comment to Civil Code Section 1391.1. The repeal of Section 715.8 eliminates this inconsistency and is intended to extend the rule for determining the validity of an exercise of a general power of appointment exercisable by two or more persons to determinations of the validity of the creation of such a power.