

Second Supplement to Memorandum 89-53

Subject: Study L-3013 - Uniform Statutory Rule Against Perpetuities
(Comments from Professor Waggoner)

If the Commission approves circulation of the *Tentative Recommendation Relating to the Uniform Statutory Rule Against Perpetuities*, some additional issues need to be considered. A side effect of the 90-year waiting period of the Uniform Act is that certain interests that would be invalid under the traditional rule are not invalid for 90 years. This problem has been mentioned at various points in the materials you have already been sent, particularly as relates to options, leases to commence at a future time, and trusts for noncharitable purposes. (See, e.g., Unif. Statutory Rule Against Perpetuities § 4 comment, accompanying Memorandum 89-53; letter from Prof. Dukeminier, Exhibit 1, at 3-4, in the First Supplement to Memorandum 89-53.)

Attached to this supplement is a letter from Professor Lawrence W. Waggoner, reporter for USRAP, suggesting that the Commission consider a set of provisions designed to limit the duration of options, leases to commence in the future, nonvested easements, possibilities of reverter, and honorary trusts. A freestanding act prepared by the USRAP drafting committee (but not submitted to the Uniform Law Commissioners for approval) is set out on page 5 of Exhibit 1, attached to this supplement. This draft would be a good starting point for making policy decisions on additional limitations if the Commission decides to recommend USRAP.

The letters endorsing the Uniform Act, referred to in Professor Waggoner's letter, have already been distributed. (See Exhibit 3, attached to Memorandum 89-53.)

Respectfully submitted,

Stan G. Ulrich
Staff Counsel

The University of Michigan
Law School

Hutchins Hall
Ann Arbor, Michigan 48109-1215

(313) 763-2586

LAWRENCE W. WAGGONER
Lewis M. Simes Professor of Law

May 27, 1989

Mr. Stan Ulrich
California Law Revision Commission
4000 Middlefield Rd., Suite D-2
Palo Alto, CA 94303

Re: Uniform Statutory Rule Against Perpetuities

Dear Stan:

Per our telephone conversation of Thursday, I'm enclosing the letters from prominent academics in support of the Uniform Statutory Rule Against Perpetuities (Uniform Act) and other endorsements of the Uniform Act.

Although you already have a copy of my article in the Cornell Law Review, I'm enclosing another one, which updates the enactments to date -- Connecticut, Florida, Michigan, Minnesota, Nevada, Oregon (passed by both houses of the Oregon legislature and sent to the governor for signature), and South Carolina. I also want to draw your attention to footnotes 4 and 21, which are especially relevant to current California law on perpetuities. See also the enclosed letter from Professor Mary Louise Fellows, which gives further advantages of the Uniform Act as compared to the "immediate cy pres" approach.

A point we did not get around to discussing Thursday is the exclusion of commercial transactions from the Rule (§ 4(1)). For the reasons explained in the Comment to Section 4, this is an extremely desirable step. The period of the Rule Against Perpetuities is an inappropriate measure for the validity of commercial transactions. As the Comment to section 4 notes, however, the exclusion of commercial transactions does leave the common-law rules on unreasonable restraints on alienation as the only control on those certain types of commercial transactions that restrain the alienability of property or provide a disincentive to improve the property. I speak principally of options in gross and leases to commence in the future.

As the Comment to Section 4 notes, the Drafting Committee

drafted a set of statutory provisions to limit the duration of these particular types of commercial transactions. I'm enclosing a copy of those statutory provisions, in case you would want to recommend their inclusion. As you will see, they can either be adopted as a freestanding Act or set of sections, or as an addition to section 4 of the Uniform Act. These provisions are superior to using the rule against perpetuities itself as the control on options, etc. Under the common-law Rule, an option in gross that could be outstanding for more than a life in being plus 21 years is invalid from its inception; under the wait-and-see version of the Rule, they would be valid for 90 years. Invalidating such options, etc., from their inception is unnecessarily harsh and allowing them to endure for 90 years is too lenient. The 30 or 40 year limit seems the better solution. Please give me a call if you want to discuss them further.

I hope you will send Professor Ed Halbach, at Berkeley, a notice of the July 13 hearing. He has taken an interest in perpetuity reform and, as his enclosed letter indicates, supports the adoption of the Uniform Act. He may wish to communicate further with the Commission, either by letter or in person.

Sincerely,

A handwritten signature in cursive script that reads "Larry Waggoner". The signature is written in dark ink and is positioned to the right of the word "Sincerely,".

Encl.

The provisions on options in gross, etc., as an addition to section 4 of USRAP:

Section 4. EXCLUSIONS FROM STATUTORY RULE AGAINST PERPETUITIES; TIME LIMIT ON OPTIONS IN GROSS AND CERTAIN OTHER INTERESTS IN LAND[; HONORARY TRUSTS].

(a) EXCLUSIONS. Section 1 (statutory rule against perpetuities) does not apply to:

(1) a nonvested property interest or a power of appointment arising out of a nondonative transfer, except a nonvested property interest or a power of appointment arising out of (i) a premarital or postmarital agreement, (ii) a separation or divorce settlement, (iii) a spouse's election, (iv) a similar arrangement arising out of a prospective, existing, or previous marital relationship between the parties, (v) a contract to make or not to revoke a will or trust, (vi) a contract to exercise or not to exercise a power of appointment, (vii) a transfer in satisfaction of a duty of support, or (viii) a reciprocal transfer;

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

(3) a power to appoint a fiduciary;

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

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

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

(7) a property interest, power of appointment, or

arrangement that was not subject to the common-law rule against perpetuities or is excluded by another statute of this State.

(b) OPTIONS IN GROSS, ETC. An option in gross with respect to an interest in land or minerals or a preemptive right in the nature of a right of first refusal in gross with respect to an interest in land or minerals becomes invalid if it is not exercised within [30] [40] years after its creation.

(c) LEASES TO COMMENCE IN THE FUTURE. A lease to commence at a time certain or upon the happening of a future event becomes invalid if its term does not actually commence in possession within [30] [40] years after its execution.

(d) NONVESTED EASEMENTS. A nonvested easement in gross becomes invalid if it does not vest within [30] [40] years after its creation.

[Optional provision for states that do not have a "reverter statute."]

[(e) POSSIBILITIES OF REVERTER, ETC. A possibility of reverter, a right of entry, or an executory interest preceded by a fee simple determinable or a fee simple subject to an executory limitation becomes invalid, and the preceding fee simple becomes a fee simple absolute, if the possibility of reverter, right of entry, or executory interest does not vest in possession within [30] [40] years after its creation.]

[Optional provision for validating and limiting the duration of so-called honorary trusts.]

[(e) [(f)]. HONORARY TRUSTS. A trust for the care of a specific domestic or pet animal, for a noncharitable corporation or unincorporated society, or for a lawful noncharitable purpose may be performed by the trustee for 21 years, whether or not there is a beneficiary who can seek the trust's enforcement or termination and whether or not the terms of the trust contemplate a longer duration.]

As the Comment to Section 4 of the Uniform Statutory Rule Against Perpetuities indicated, the Drafting Committee was concerned that certain types of commercial transactions potentially restrict the alienability of property. The Drafting Committee drafted a statute that addresses this problem, which could be added as a free standing Act accompanying USRAP. (The following Act has not been submitted to or approved by the Uniform Law Commissioners.)

AN ACT TO IMPOSE A TIME LIMIT
ON OPTIONS IN GROSS AND CERTAIN OTHER
INTERESTS IN LAND OR MINERALS[; HONORARY TRUSTS]

Section 1. OPTIONS IN GROSS, ETC. An option in gross with respect to an interest in land or minerals or a preemptive right in the nature of a right of first refusal in gross with respect to an interest in land or minerals becomes invalid if it is not exercised within [30] [40] years after its creation.

Section 2. LEASES TO COMMENCE IN THE FUTURE. A lease to commence at a time certain or upon the happening of a future event becomes invalid if its term does not actually commence in possession within [30] [40] years after its execution.

Section 3. NONVESTED EASEMENTS. A nonvested easement in gross becomes invalid if it does not vest within [30] [40] years after its creation.

[Optional provision for states that do not have a
"reverter statute."]

[Section 4. POSSIBILITIES OF REVERTER, ETC. A possibility of reverter, a right of entry, or an executory interest preceded by a fee simple determinable or a fee simple subject to an executory limitation becomes invalid, and the preceding fee simple becomes a fee simple absolute, if the possibility of reverter, right of entry, or executory interest does not vest in possession within [30] [40] years after its creation.]

[Optional provision for validating and limiting the
duration of so-called honorary trusts.]

[Section 4 [5]. HONORARY TRUSTS. A trust for the care of a specific domestic or pet animal, for a noncharitable corporation or unincorporated society, or for a lawful noncharitable purpose may be performed by the trustee for 21 years, whether or not there is a beneficiary who can seek the trust's enforcement or termination and whether or not the terms of the trust contemplate a longer duration.]