#L-3013

su441
06/19/89

Third Supplement to Memorandum 89-53

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

Attached to this supplement is a letter from Professor William F. Fratcher expressing his agreement with Professor Dukeminier that the Uniform Statutory Rule Against Perpetuities should not be enacted and that existing California law is preferable.

Professor Fratcher appears to be concerned primarily with the application of the doctrine of infectious invalidity. He notes that the comments to USRAP say that the doctrine of infectious invalidity is abolished, but that the statutory language does not do so. The staff believes that the comment would be sufficient, but if not, the abolition could be elevated to the statute. For the relevant part of the draft statute, see Sections 21201 and 21220, at pages 11 & 19-20 of the draft attached to Memorandum 89-53, and the Background, at pages 32 & 70 of the draft.

Respectfully submitted,

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June 15, 1989

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

Dear Mr. DeMoully:

Professor Jesse Dukeminier of the University of California, Los Angeles, has sent me a copy of his letter of June 9, 1989, opposing enactment in California of the Uniform Statutory Rule Against Perpetuities.

Professor Dukeminier and I have not always agreed on perpetuities matters but, in this case, I agree whole-heartedly with everything that he says in opposition to the Uniform Statutory Rule Against Perpetuities. The present California immediate reformation cy pres statute, Civil Code §715.5, is similar to Missouri Revised Statutes §442.555, which was drafted by me and enacted in 1965. See Fratcher, The Missouri Perpetuities Act, 45 Mo. L. Rev. 240 (1980). In my opinion, immediate reformation cy pres is much better than "wait and see."

My objections to the Uniform Statutory Rule Against Perpetuities are set out in §62.10 of SCOTT ON TRUSTS (4th ed. by Fratcher, 1987, and 1989 Supplement) and in §1230 of the 1989 Supplement to SIMES AND SMITH ON FUTURE INTERESTS. The objection which strikes me as being the most serious is that stated in numbered paragraph 2 at the top of page 3 of Professor Dukeminier's letter, "Wait-and-see makes title uncertain for the waiting period. Not knowing whether an interest is valid may cause serious inconvenience to the parties." After mentioning that England adopted "wait and see" in 1964, the section in SCOTT continues:

> There are two differences between the English situation and that in this country which raise questions about how "wait and see" will work here. First, in England all future interests are beneficial interests under trusts and the trustee has statutory powers to sell and mortgage the fee simple and to give long leases, so outstanding contingent future interests do not make property inalienable. Second, only the contingent future interest that may vest too remotely is void under the English decisions; prior interests created by the same instrument do not fail. In this country there is a doctrine of infectious invalidity under which the courts assume power to strike down present and other vested interests and future interests that are certain to vest on time.

> Some of these courts have taken the position that a will is like a class gift: if any limitation in the will violates the rule against perpetuities, the entire will is void. Others strike down the provisions only if they think that the settlor or testator, if apprised of the invalidity of part of his disposition, would prefer intestacy or total invalidity of the trust to enforcement of those parts that do not violate the rule. . . .
>
> Although the official comments to Sections 1 and 3 of the Uniform Statutory Rule Against Perpetuities state that it should be deemed to abolish the American doctrine of infectious invalidity, the act itself does not mention the doctrine. Hence, there is danger that, after a trust has been administered in accordance with its terms for 90 years, a court might strike the entire trust down ab initio, making void the conveyances, mortgages and leases made by the trustee and subjecting the trustee to liability for all payments made to the beneficiaries.

Suppose a California will bequeathing the residue to a trustee to pay the income in equal shares to children Alice, James and Molly, remainder in principal as to the shares of Alice and Molly to their issue per stirpes and as to the share of James to the first Vegetarian to become Governor of California. The remainder in the share of James is void under the common law rule against perpetuities. Under the present California statute its invalidity can be determined immediately and the court can determine now what is to happen to it. If the whole trust is struck down now, Alice, James and Molly will take the residue as heirs on intestacy. Under the Uniform Statutory Rule Against Perpetuities it would be necessary to wait 90 years to determine the validity of the remainder. If no Vegetarian becomes Governor by the end of the 90 years, the court may then determine that the whole trust was void ab initio. If so, all administrative acts of the trustee were ineffective; people who dealt with him will be liable to whoever took under the wills of the heirs. These may include the devisees of the third wife of Alice's second husband.

Substantial amendments might improve the Uniform Statutory Rule Against Perpetuities but I agree with Professor Dukeminier that the present California statute is the best solution to the perpetuities problem.

Sincerely yours,

William F. Fratcher

William F. Fratcher,
Professor of Law
Emeritus

cc: Prof. Dukeminier