#L-3013

su445
07/07/89

Sixth Supplement to Memorandum 89-53

Subject: Study L-3013 - Uniform Statutory Rule Against Perpetuities (More Letters Pro and Con)

Attached to this supplement are several more letters concerning the Uniform Statutory Rule Against Perpetuities:

1. Professor Jesse Dukeminier makes additional remarks and sends a Georgia Supreme Court case rejecting wait-and-see. (Exhibit pp. 1-3.)

2. Professor Russell Niles, Hastings College of the Law, suggests that we keep existing California law. (Exhibit pp. 4-5.)

3. Professor Lawrence Waggoner provides an overview of the policies behind USRAP, catalogs its supporters, and notes its enactment in seven states. (Exhibit pp. 6-10.) In addition, Professor Waggoner sends three memorandums dealing with issues the have been raised in earlier materials: (1) frequency of perpetuity violations and perpetuity cases (Exhibit pp. 11-12); (2) infectious invalidity under the Uniform Act (Exhibit pp. 13-14); (3) sample cases comparing the Uniform Act with immediate cy pres (Exhibit pp. 15-22).

In light of the volume of materials that we have been receiving, and the complexity of the subject, the staff has reached the conclusion that we must devote substantial additional time to a careful analysis of the issues that have been raised. It would be premature to decide to recommend for or against the Uniform Statutory Rule Against Perpetuities at the July meeting. Accordingly, the staff recommends that the Commission defer consideration of this subject until we have time to review the relevant materials in detail and prepare a comprehensive analysis for Commission consideration.

Respectfully submitted,

Stan G. Ulrich
Staff Counsel

L-3 013

UNIVERSITY OF CALIFORNIA, LOS ANGELES

UCLA

BERKELEY · DAVIS · IRVINE · LOS ANGELES · RIVERSIDE · SAN DIEGO · SAN FRANCISCO

SANTA BARBARA · SANTA CRUZ

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

June 28, 1989

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

CA LAW REV. COMM'N
JUL 3 1989
RECEIVED

Dear John:

Re: USRAP

1. In case you haven't seen Pound v. Shorter, 377 S.E.2d 854 (Ga. 989), I enclose a copy. In this case the Georgia Supreme Court unanimously rejected wait-and-see. In footnote 3, the court summarizes the problems with wait-and-see and USRAP.

2. I wish to call your attention to Professor Leach's complete approval of cy pres. Leach is the old master who started perpetuities reform:

> "[I]n my view cy pres offers a total and simple solution." Leach, 108 U. Pa. L. Rev. 1124, 1149 (1960).
>
> "One way to put the Rule against Perpetuities in its place is to change the penalty for violation. At present the penalty is: Invalidate the whole interest -- and sometimes a lot more as well. Professor Simes says: Cut the interest down to size by applying the rule of cy pres, permitting the court to reform the gift in such a way that the testator's wishes are carried out to the greatest extent permitted by the Rule.
>
> "I agree to this, and indeed I said it first." Leach & Tudor, The Rule Against Perpetuities 201 (1957).
>
> "A word of caution is in order: This is a job for the repair shop, not the scrap yard. Anyone who thinks it would be a good idea to abolish the Rule against Perpetuities and enact an invention of his own as a substitute should familiarize himself with the confusion invariably attendant upon this type of venture." Id. at 196.

I believe Leach's word of caution is entirely appropriate with regard to the Uniform drafting group's invention of its own.

Sincerely,

Jesse Dukeminier
Professor of Law

JD/2018/dhb
Enclosure

POUND et al.

v.

SHORTER et al.

Nos. 46328, 46344.

Supreme Court of Georgia.

April 6, 1989.

Trustee under will filed petition to determine validity of a trust created thereunder. The Superior Court, Muscogee County, Rufe E. McCombs, J., found item created a perpetuity and decreed trust be terminated and life beneficiary have fee ownership. Residual beneficiaries appealed. The Supreme Court, Weltner, J., held that trust violated rule against perpetuities, in providing for income to testator's son's widow for life, as widow could conceivably have been unborn at time of testator's death.

Affirmed.

1. Perpetuities ⇐4(15)

"Wait-and-see" exception to rule against perpetuities would not be applied to determine whether widow of son of testator, who could conceivably have been born after testator died thus invalidating a trust, was in fact born before testator's death.

2. Perpetuities ⇐4(15)

Trust created by will, which provided that in the event testator's then unmarried son died, leaving neither child nor children of deceased wife, but leaving a surviving wife, income from trust would be paid to wife during her life, and upon her death corpus would go to children and descendants of testator's brother and sister, was invalid under rule against perpetuities, as son could conceivably marry woman who had not been born at time of testator's death. O.C.G.A. § 44-6-1.

Edward S. Grenwald, H. Quigg Fletcher, Hansell & Post, Atlanta, for Barbara Swift Pound, et al.

Marcus B. Calhoun, Jr., Davidson & Calhoun, P.C., Aaron Cohn, Cohn & Cohn, P.C., Columbus, D. Lurton Massee, Jr., Kilpatrick & Cody, John A. Wallace, King & Spalding, Atlanta, Cecil M. Cheves, Page, Scrantom, Harris & Chapman, P.C., Columbus, for Mildred W. Shorter, et al. in No. 46328.

Aaron Cohn, Cohn & Cohn, P.C., Columbus, for Gabriel Jeremiah Pound, et al.

Marcus B. Calhoun, Jr., Davidson & Calhoun, P.C., Columbus, John A. Wallace, King & Spalding, D. Lurton Massee, Jr., Kilpatrick & Cody, Atlanta, Cecil M. Cheves, Page, Scrantom, Harris & Chapman, P.C., Columbus, Edward S. Grenwald, Hansell & Post, Atlanta, for Mildred W. Shorter, et al. in No. 46344.

WELTNER, Justice.

When Elizabeth Shorter died in 1929, her will created a trust that provided for her one unmarried son as follows: "In trust further, should my son die, either before or after my death, leaving neither child, nor children of a deceased wife surviving him, but leaving a wife surviving him, to pay over the annual net income arising each year from said trust property, in quarterly installments each year, to the wife of my said son, during her life, and upon the death of the wife of my said son, to thereupon pay over, deliver and convey, in fee simple, the corpus of said trust property to the children and descendants of children of my brother ... and sister....."

The son married in 1953 and died in 1987, survived by his widow. He left no descendants. After his death, the trustee bank filed a petition to determine the validity of the trust item. The trial court found that the item created a perpetuity and decreed that the trust be terminated and that the son's widow have fee ownership. Fifty-two lineal descendants of Elizabeth Shorter appeal.

1. The Rule against Perpetuities, adopted first by the legislature in 1863, provides: "Limitations of estates may extend through any number of lives in being at the time when the limitations commence, and 21 years, and the usual period of gestation added thereafter. The law terms a limitation beyond that period a perpetuity and forbids its creation. When an attempt is made to create a perpetuity, the law will give effect to the limitations which are not too remote and will declare the other limitations void, thereby vesting the fee in the last taker under the legal limitations." OCGA § 44-6-1.

[1] 2. We have undertaken a study of both the rule against perpetuities and an alternative approach, commonly called "wait and see."[1] Fifteen states have adopted some form of the "wait and see" approach, and all have done so through legislation.[2] We conclude:

(1) that the traditional rule against perpetuities has been effective so far in Georgia, judging by the few cases brought to invalidate grants, and the even fewer invalidations; and (2) that the alternative "wait and see" approach has many problems, including initial uncertainty (which is avoided by the traditional rule) and the necessity for selecting a method by which to determine the length of the waiting period.[3]

3. We are not convinced that the goals of certainty and early vesting will be served by adopting the alternative, and accordingly decline to do so.

[2] 4. As the will encompasses the possibilities that the son might marry a woman who was unborn in 1929 (a life *not* "in being") and then predecease her, it violated the rule against perpetuities.

Judgment affirmed.

All the Justices concur.

---

1. "The wait-and-see principle permits a court to consider the actual sequence of events occurring after the creation of the interest. Any interest that might possibly be too remote is valid, if under the facts as they actually occur, the interest vests within the period of the Rule." Chaffin, *The Rule Against Perpetuities as Applied to Georgia Wills and Trusts: A Survey and Suggestions for Reform*, 1982, 16 Ga.L.Rev. 235, 345.

2. Ten states have adopted an unlimited form of the "wait and see" modification. These are Alaska, Iowa, Kentucky, New Mexico, Nevada, Ohio, Pennsylvania, Virginia, Vermont and Washington. Alaska Stat. § 34.27.020 (1983); Iowa Code § 558.68 (1983); Ky.Rev.Stat. § 381.216 (1972); 1983 N.M. Laws 246; Nev. Rev.Stat. ch. 111 (1983); Ohio Rev.Code Ann. § 2131.08 (1982); Pa.Cons.Stat.Ann. § 6104(b) (1975); Va.Code § 55-13.3 (Supp.1982); Vt.Stat. Ann. tit. 27, § 501 (1975); Wash.Rev.Code § 11.98.010 (1981). The other five have a limited "wait and see" alternative; these are Connecticut, Florida, Maine, Maryland and Massachusetts. Conn.Gen.Stat.Ann. § 45-95 (West 1960); Fla.Stat.Ann. § 689.22(2)(a) (West Supp.1979); Me.Rev.Stat.Ann. tit. 33, § 101 (1978); Md.Est. & Trusts Code Ann. § 11-103(a) (1969); Mass. Gen. Laws Ann. ch. 184A, § 1 (West 1977). See Chaffin, The Rule Against Perpetuities in Georgia, (1984); Waggoner, *Perpetuity Reform*, 1983, 81 Mich.L.Rev. 1718.

3. The problems may be summarized as follows: (1) there is actually no severe problem of grants being invalidated due to a violation of the rule against perpetuities; (2) technical violations of the rule can be avoided by competent drafting, so only unwary counsel is trapped by the rule; (3) there is a big problem of expense and inconvenience during the waiting period; (4) there is an increase in litigation due to the alternative doctrine; (5) much of the testator's estate is diverted to lawyers' fees; (6) most alternative statutes provide for cy pres litigation at the end of the waiting period if the interest has neither vested nor failed, and that litigation is difficult and expensive due to the passage of time; and (7) the alternative does not simplify the perpetuities law. Bloom, *Perpetuities Refinement: There is an Alternative*, 1987, 62 Wash.L.Rev. 23.

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

June 30, 1989

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

Dear John:

I stand squarely with my colleague, Professor Gail Boreman Bird, and with Professor Jesse Dukeminier, in opposing the adoption in California of the Uniform Statutory Rule Against Perpetuities. I think we should all be grateful to Professor Dukeminier for his imaginative analysis and persistent criticism of the Act.

I sat through the debates on the American Law Institute reform of the Rule Against Perpetuities in 1978 and 1979 and at that time I prepared a draft of a memorandum to be submitted in due course to the Commission. I came to the conclusion that the California statutory system, after revisions in 1917, 1951, 1959 and 1963, was superior to the Restatement version of the wait-and-see rule. My principal argument was that immediate cy pres was vastly superior to cy pres after the full period of the rule against perpetuities. The 90 year alternative period of the Uniform Act postpones the application of cy pres even further.

Professor Dukeminier in his articles (and especially in "The Uniform Statutory Rule Against Perpetuities: Ninety Years in Limbo" [34 UCLA Law Rev. 1023 (1987)], fairly criticizes the drafters of the Uniform Act for neglecting the policy considerations that were so important to the great scholars in the field.

I do not think that Lewis Simes, Richard Powell or Barton Leach would have accepted the 90 year alternative provision of the Uniform Act. The dead hand has been over extended. The Act invites long-term indestructible trusts, and accumulations for too long a period. The Act causes some additional inalienability and causes increased uncertainty and anxiety on the part of living beneficiaries during an excessive waiting period.

I think the best statutory plan now available is the one recommended in the recent article by Professor Ira Mark Bloom. "Perpetuities Refinement: There Is An Alternative" [62 Wash.L.Rev. 23 (1987)]. His plan is essentially the New York statute, with immediate cy pres. This is very close to the present California statute. I favor concentrating our attention on the few refinements that would improve the California statute.

There is no need for California to be in a rush to gain uniformity. I agree with Professors Bloom and Dukeminier that uniformity is far away. There are too many states with some form of the wait-and-see rule. New York, with its traditional disapproval of long-term indestructible trusts, is not likely to accept the Act.

At two times in recent history there were possibilities of finding common ground. At the 1969 meeting of the American Law Institute, at the height of the debate between former Reporter Richard Powell and current Reporter James Casner, Professor Powell's successors at Columbia offered to accept a limited wait-and-see rule based on Leach's Massachusetts statute. They said Professor Powell would agree. Professor Casner refused. More recently, when Professor Dukeminier sent his memorandum to Professor Lawrence W. Waggoner, the Reporter for the Uniform Act, there might have been some give and take. (Professor Edward Halbach has suggested that he might have favored such a course).

If we were dealing with angels, who had never written anything, who had no turf to protect, we might have a uniform statute someday. We might draft a statute that eliminated the common pitfalls (like the New York statute), that adopted a limited wait-and-see rule (like the Massachusetts statute) with vesting and cy pres postponed only until life beneficiaries died. The statute would adopt the Dukeminier measuring lives, and would have no long "period of procrastination" (as the New York Revisers put it). All the great scholars, living and dead, would have had to yield something, would have achieved something, and the nation might have a uniform law.

In the meantime, let us stay with the present California statute.

Sincerely,

Russell D. Niles

RDN:pcm

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

July 5, 1989

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

Re: Study L-3013, Uniform Statutory Rule Against Perpetuities

Dear John:

I write in reference to Study L-3013 recommending enactment of the Uniform Statutory Rule Against Perpetuities (Uniform Act) in California. As you know, I was the Reporter for the Uniform Act and have taken an interest in perpetuity reform for many years. I appreciate receiving copies of the additional materials submitted to the Law Revision Commission on this proposal.

The Drafting Committee and I have no misgivings about the Uniform Act. We very much hope for a California enactment. Nevertheless, the letters from Professor Dukeminier and others suggesting the retention of the current California perpetuity reform measure -- the immediate cy pres statute -- lead me to suggest that, if the Law Revision Commission desires a further round of study before approving the Uniform Act for adoption in California, I would welcome that further review. The Commission Staff is known for its professionalism, competence, and impartiality. A further study of the Uniform Act by the Staff would provide an opportunity for all views to be thoroughly examined and tested with care and deliberation.

The basic approach of the Uniform Act is broadly categorized as wait-and-see plus deferred reformation. It may be noted that, during the Drafting Committee's deliberations, Professor Dukeminier urged the Committee to adopt this same basic approach, not the immediate cy pres approach which he now embraces, except that he wanted the Committee to measure the allowable perpetuity

period by causal-relation measuring lives plus 21 years.

In any event, the Uniform Act contains four principal features:

> 1. A contingent future interest (or power of appointment) that is valid under the common-law Rule Against Perpetuities remains valid. This is an important point because it means that the profession can continue to draft for initial validity and can continue to use standard perpetuity-saving clauses; there is no need to adjust current practice.
>
> 2. A contingent future interest (or power of appointment) that would have been invalid under the common-law Rule is given up to 90 years to work out validly. This is the wait-and-see feature of the Uniform Act. The Uniform Act simplified the process of measuring this period by substituting a flat 90 years for the period that would be produced on a case-by-case basis by the controversial measuring-lives approach. The 90-year period is designed to approximate the average margin-of-safety period provided under the wait-and-see method using actual measuring lives (or by standard perpetuity saving clauses).
>
> 3. A contingent future interest (or power of appointment) that does not work out validly within the 90-year period becomes invalid but is subject to reformation to make it valid; within this constraint, the reformation is to come as close as possible to the transferor's manifested plan of distribution.
>
> 4. Commercial transactions are exempted from the Rule Against Perpetuities. (A statutory 30-year time limit on options in gross, rights-of-first refusal, etc., is a quite desirable supplement to this feature.)

Essentially, this method can be described as a <u>"judicial hands-off" approach</u> to perpetuity questions -- "hands-off," that is, except in those very rare instances in which intervention via judicial reformation really becomes necessary.

The Drafting and Review Committees that produced the Uniform Act were composed of Henry Kittleson (Florida) as chairman of the Drafting Committee; then Chief Justice Norman Krivosha of the Supreme Court of Nebraska as chairman of the Review Committee (he attended many of our meetings and took an active part in the process); Justice Marian Opala of the Supreme Court of Oklahoma; many able practitioners; Dean Robert Stein of the University of Minnesota Law School; Charles A. Collier, Jr. (California) as the ABA Advisor; James Pedowitz (New York) as the ABA Section of Real

Property, Probate and Trust Law Advisor; Raymond Young (Massachusetts) as the American College of Probate Counsel Advisor; and Ray Sweat (California) as the American College of Real Estate Lawyers Advisor.

The Uniform Act has the endorsement of the following important national groups:

-- the American Bar Association, on the unanimous recommendation of the Council of the ABA Section of Real Property, Probate and Trust Law

-- the Board of Regents of the American College of Probate Counsel (unanimous)

-- the Board of Governors of the American College of Real Estate Lawyers (unanimous)

-- the Joint Editorial Board for the Uniform Probate Code (unanimous, by vote taken in February 1989)

Though promulgated less than three years ago, the Uniform Act has been enacted in seven states:

-- Connecticut, repealing its former limited form of wait-and-see statute

-- Florida, repealing its former full-scale type wait-and-see statute that failed to specify how the waiting period was to be determined

-- Michigan, adopting wait-and-see for the first time

-- Minnesota, adopting wait-and-see for the first time (effective date deferred)

-- Nevada, repealing its former causal-relation type wait-and-see statute, the type advocated by Professor Dukeminier throughout the last 35 years or so

-- Oregon, adopting wait-and-see for the first time

-- South Carolina, adopting wait-and-see for the first time

On its way to enactment in many of the above states, the Uniform Act has benefitted from endorsements by councils of state bar groups and law revision commissions. Many of these groups included local academic lawyers in their membership who were instrumental in supporting the Act's adoption.

In addition, the Uniform Act is endorsed in written letters by leading scholars in the field, such as Alexander, Browder, Chaffin, Halbach, Thomas Jones, Kurtz, Langbein, Fellows, Stein, Allan Smith, and Wellman. I wish to note that Professor Dukeminier's letter seeks to dismiss the endorsements of these prominent scholars by suggesting that "almost all of [them]" have a Conference connection. Yet, of the eleven, only five that I know of are affiliated with the Uniform Laws Conference in one connection or another. They are Jones, Langbein, Stein, and Wellman, who are Commissioners; and Halbach, who is an ABA Representative to the Joint Editorial Board for the Uniform Probate Code. Alexander had a connection several years ago as the reporter for an act on living probate, but no act was ever produced and the project was abandoned by the Conference. If the others now have or ever have had a connection to the Uniform Laws Conference, I am unaware of it. Other academics, also quite unconnected to the Uniform Laws Conference, have also written or spoken to me privately expressing approval of the Uniform Act.

An Act that has met the test at so many different levels and in so many different forums surely cannot fairly be labeled "Waggoner's phantom ship"[1] or "a contraption worthy of Rube Goldberg."[2]

This brings me to an extremely important point. Perpetuity reform is essentially a line-drawing exercise. Any line-drawing exercise will necessarily admit of many potential solutions. The challenge in developing uniform perpetuity legislation is to identify a single line out of many possible ones. Put differently, there can be a variety of ways to accomplish the goal that we all share. The choice of one solution from the many is not likely to please persons who have devoted effort in good faith to a different solution. The problem is not that the other solutions do not work or cannot be made to work. <u>The problem is that a Uniform Act can adopt only one solution</u>. If on balance the adopted solution works well, then greater uniformity can be achieved over time.

The cause of uniformity is a worthy one. Professor Halbach's letter sets forth the case for uniformity:

> Many estates from which trusts are funded, plus the effects of powers of appointment, involve multi-state sources of contacts. Without uniformity many and

---

[1] Dukeminier, The Uniform Statutory Rule Against Perpetuities: Ninety Years in Limbo, 34 UCLA L. Rev. 1023, 1068 (1987).

[2] J. Dukeminier letter to John DeMoully of June 9, 1989, p. 8.

serious conflict of laws problems will result.

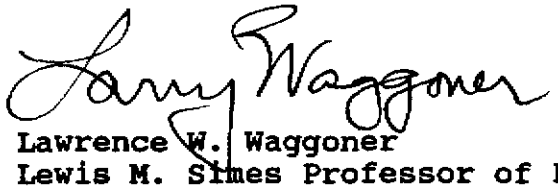
Now that a Uniform Act has finally been promulgated and is the subject of an emerging yet still fragile consensus, the cause of uniformity ought not be lightly shunted aside. Again, as Professor Halbach notes:

> It may be some years before all or nearly all of the states will act on a modern reform, but when the job is done we should not indefinitely have to cope (in planning, in administration and in court) with two basically inconsistent types of solutions.

The Drafting Committee and I fully believe that a careful, independent review of the arguments will conclude that the balance of advantages favors the Uniform Act.

I am enclosing memoranda addressing some of the concerns that have been raised. I stand ready to supply the Staff with additional position papers responding even more fully to these concerns or to any other concern that arises in the course of the Commission's deliberations.

Yours sincerely,



Lawrence W. Waggoner
Lewis M. Simes Professor of Law
Reporter, Uniform Statutory Rule
Against Perpetuities

Encls.

TO: CALIFORNIA LAW REVISION COMMISSION

FROM; LAWRENCE W. WAGGONER, Simes Professor of Law, University of Michigan Law School; Reporter, Uniform Statutory Rule Against Perpetuities

DATE: July 5, 1989

SUBJECT: FREQUENCY OF PERPETUITY VIOLATIONS AND PERPETUITY CASES

I conducted a WESTLAW computer check of cases in which the phrase "Rule Against Perpetuities" appeared, for the years 1987 and 1988 and for the first six months of 1989 -- a 2 1/2 year stretch. The result: 82 state cases and 14 federal cases, many of which are unreported cases.[1]

Drawing conclusions about the frequency of violations of the common-law Rule Against Perpetuities from the number of reported appellate decisions is misleading. Many perpetuity violations go undetected, making it a matter of luck as to which ones are cut down and which ones escape. See, e.g., Fruehwald, Rule Against Perpetuities Savings Clauses, 30 Ind. B. A. Res Gestae 378 (1978). Ms. Fruehwald found:

> After reviewing the [Indiana] Supreme Court's decision in Merrill [v. Wimmer, 481 N.E.2d 1294 (Ind. 1983)], this author had an opportunity to review some wills and trusts prepared by various Indiana practitioners.... While it was not surprising that several of the documents this author reviewed violated the [R]ule, it was surprising that so few of the documents contained 'savings clauses' designed to save the bequest if the [R]ule was violated.

Furthermore, the number that are detected and litigated may not be accurately reflected by the number of reported appellate decisions. As indicated above, many of the cases that showed up on the computer check were unreported cases.

In addition, Charles A. Collier, Jr., Esq., the American Bar Association Advisor to the USRAP Drafting Committee represented to the Committee that in Los Angeles County a number of perpetuity violations have been reformed, without appeal, by the lower courts under the California reformation statute, Cal.Civ.Code § 715.5.

---

[1] In the press of time, I have not been able to inspect the opinions or synopses of all of these cases; some of them, on inspection, may turn out not to be true perpetuity cases.

Notice, too, that perpetuity violations can occur even when a saving clause is inserted, as in the not infrequent instances of irrevocable inter-vivos trusts that incorrectly gear the perpetuity-period component of the saving clause to lives in being at the settlor's death.

TO: CALIFORNIA LAW REVISION COMMISSION

FROM: LAWRENCE W. WAGGONER, Simes Professor of Law, University of Michigan Law School; Reporter, Uniform Statutory Rule Against Perpetuities

DATE: July 5, 1989

SUBJECT: INFECTIOUS INVALIDITY UNDER THE UNIFORM ACT

Professor William F. Fratcher of the University of Missouri-Columbia has previously corresponded directly with me raising his concerns that USRAP does not abolish the doctrine of infectious invalidity.

Professor Fratcher and I agree that that doctrine ought to be abolished under USRAP. I concur in the statement of the Law Revision Commission Staff in the Third Supplement to Memorandum 89-53 that the Comments to USRAP, together with the statutory section on reformation, are sufficient to abolish that doctrine. However, in deference to Professor Fratcher's contrary view, I have worked with him on a statutory provision that could be added as subsection (b) to Section 3. I am surprised that his June 15 letter to you did not mention this and did not enclose a copy of that statutory provision, since he has given me reason to believe that he is satisfied with that statutory provision and intends to publish and recommend it in the 1990 pocket supplements to Scott on Trusts and Simes and Smith on Future Interests.

In any event, I enclose a copy of a version of Section 3 that incorporates our statutory draft, in case the Staff or Commission comes to the conclusion that statutory language is necessary. I add a simpler alternative as well, which also does the trick.

I stress that neither statutory provision has been submitted for approval to the Drafting Committee of the Uniform Statutory Rule Against Perpetuities nor to NCCUSL. As the Reporter for the Act, however, I can say that in my opinion they are both entirely consistent with USRAP and its Comments; indeed, each is declaratory of the views expressed in the Comments. Even so, statutory drafting is an enormously difficult business in this area, and so I offer these provisions as a working draft for the Law Revision Commission Staff to study and possibly improve upon, if statutory language is thought desirable on the question.

SECTION 3. REFORMATION.

(a) Upon the petition of an interested person, a court shall reform a disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the 90 years allowed by Section 1(a)(2), 1(b)(2), or 1(c)(2) if:

(1) a nonvested property interest or a power of appointment becomes invalid under Section 1 (statutory rule against perpetuities);

(2) a class gift is not but might become invalid under Section 1 (statutory rule against perpetuities) and the time has arrived when the share of any class member is to take effect in possession or enjoyment; or

(3) a nonvested property interest that is not validated by Section 1(a)(1) can vest but not within 90 years after its creation.

(b) The court's authority to reform under this section is limited to prospective reformation, effective no earlier than the filing of the petition for reformation. In reforming, the court may prospectively alter existing interests or powers and create new interests or powers by implication or construction based on the transferor's manifested plan of distribution as a whole. The court shall not retroactively (i) strike down, limit, or alter the title, powers, conveyances, mortgages, leases, or other acts of a trustee or (ii) invalidate a conveyance, mortgage, or lease given by a person who was in peaceable possession before the filing of the petition for reformation. The common-law rule known as the doctrine of infectious invalidity is abolished.

[a simpler alternative]

(b) The common-law rule known as the doctrine of infectious invalidity is abolished.

TO: CALIFORNIA LAW REVISION COMMISSION

FROM: LAWRENCE W. WAGGONER, Simes Professor of Law, University of Michigan Law School; Reporter, Uniform Statutory Rule Against Perpetuities

DATE; July 5, 1989

SUBJECT: SAMPLE RECENT CASES COMPARING THE UNIFORM ACT WITH IMMEDIATE CY PRES

The current California perpetuity statute adopts the immediate cy pres method. The Uniform Act adopts the method of wait-and-see with deferred reformation.

The approaches are fundamentally inconsistent. The immediate cy pres method is a "judicial hands-on" approach to perpetuity reform, under which every violation of the common-law Rule Against Perpetuities, except those saved by a specific provision such as Cal. Civ. Code § 715.7, creates a potential court case.

The Uniform Act adopts a "judicial hands-off" approach--hands off, that is, except in those rare instances in which judicial intervention via reformation really becomes necessary. The Uniform Act will provide a nearly litigation-free environment insofar as perpetuity matters are concerned.

This memorandum compares the application of the two approaches in the context of two recent perpetuity cases:

> Estate of Anderson v. Deposit Guaranty Nat'l Bank, 541 So.2d 423 (Miss. 1989); and
>
> Arrowsmith v. Mercantile-Safe Deposit and Trust Co., 313 Md. 334, 545 A.2d 674 (1988).

Note that both of these cases involved lawyer-drawn wills. Neither involved a home-made will or other document. Neither involved a fanciful disposition such as "to my dog Trixie and her progeny" or "to the first vegetarian who becomes governor of California."

1. Estate of Anderson v. Deposit Guaranty Nat'l Bank

The Facts. The facts of Estate of Anderson v. Deposit Guaranty Nat'l Bank, 541 So.2d 423 (Miss. 1989), are quite simple. The testator's will, drafted by a lawyer, created a trust to last for 25 years from the date of the admission of the will to probate. The income was to be used for the education of the descendants of the testator's father. The trust was to terminate at the end of the 25-year period, at which time the trust corpus was payable to the testator's nephew, Howard Davis or, if Howard is not then living, to the heirs of Howard's body.

The testator, a childless bachelor, died in 1984. The testator had a brother and a sister, but they predeceased him. The testator was survived, however, by his brother's four children and seven grandchildren; and by his sister's child and five grandchildren -- in all, there were 17 surviving descendants of his parents.

Violation of Common-law Rule. The testator's trust violated the common-law Rule Against Perpetuities. The reason was that the contingent remainder in the corpus might not vest within a life in being plus 21 years because all 17 of the descendants of the testator's father living at the testator's death might die within four years after the testator's death!

The Actual Holding. The Supreme Court of Mississippi expressed grave impatience with the fact that the common-law Rule would strike down this quite reasonable trust. The court took two bold steps to avoid that result: the court judicially adopted the wait-and-see method, using causal-relation lives; and (2) the court sanctioned reformation via judicially inserting a perpetuity saving clause into the instrument. To my knowledge, this is the first appellate decision ever to do that.

There is a feature of the Anderson case that is striking indeed, which is how closely the facts fit the rationale of the 90-year period of the Uniform Act. As pointed out in Waggoner, "The Uniform Statutory Rule Against Perpetuities: The Rationale of the 90-Year Period," 73 Cornell L. Rev. 157, 166 & footnote 30 (1988), the youngest measuring life under wait-and-see -- whether causal-relation lives are used or the Restatement (Second)'s list is used -- is likely to be the transferor's youngest descendant living at the transferor's death (or, in the Anderson case, the youngest descendant of the transferor's parents). In the approximation used by the Uniform Act to develop the 90-year period, the youngest measuring life, on average, was taken to be

about 6 years old.[1]

The Anderson court identified the measuring lives as the beneficiaries of the trust -- the descendants of the testator's father living at the testator's death. The youngest of these descendants was Polly Douglas Robertson, a one-year old granddaughter of the testator's deceased brother. In addition to Polly, there were several other young descendants who also were identified as measuring lives -- a 2-year old grandson of the testator's deceased sister, a 3-year old granddaughter of the testator's deceased brother, and a 5-year old grandson of the testator's deceased brother.

If Polly, the youngest, lives out her statistical life expectancy of 74.6 years (if a sex-neutral table is used),[2] and if the 21-year period following her death is added in,[3] the wait-and-see period marked off in the Anderson case would turn out to be about 96 or 99 years. (Even if Polly dies prematurely, at least one of the other young descendants is likely to outlive his or her statistical life expectancy, so the period will work out about the same either way.) Note also that this would be about the same margin-of-safety period of time that a standard perpetuity saving clause would have produced also.

Of course, the actual trust in Anderson will last only 25 years. The fact that the allowable period adopted by the court is in the high 90's, and the fact that the Uniform Act marks off a 90-year period for all cases, will not make the trust in Anderson last longer than 25 years. It just simply means that there will be a quite long, quite harmless, and quite ignored unused end-portion of the allowable period.

Note well that the solution adopted by the Mississippi Supreme Court -- wait-and-see or, in the alternative, judicial insertion of a standard perpetuity saving clause -- allowed the testator's trust to go ahead without any change at all in its terms. The testator's intent was not defeated or altered in any way. There was a cost, however: the cost of the lawsuit and the appeal all the way to the state supreme court.

---

[1] The 90 years was derived by adding 21 years to the 69 years of remaining statistical life expectancy of a 6-year old (21 + 69 = 90).

[2] See Table 109 of the 1989 Statistical Abstract of the United States.

[3] The court indicated it would add that period in. See 541 So.2d at 431.

California Immediate Cy Pres Statute. How would the Anderson case have been decided under the California immediate cy pres statute? There is no appellate court precedent in California -- or in any other state to my knowledge, except for the recent Mississippi Anderson decision -- for judicially inserting a perpetuity saving clause. Rather, California precedent suggests that the court would reduce the term of the trust to 21 years. If this approach were adopted, the testator's quite reasonable intent would have been defeated -- the trust would not have been invalidated in its entirety, as under the common-law Rule, but the terms would have been altered.

Perhaps the California courts of today, despite the earlier appellate court precedent, would be inclined to apply the immediate cy pres statute differently. Rather than reduce the term of the trust to 21 years, the California courts of today might do what the Mississippi court did -- reform by judicially inserting a standard perpetuity saving clause. This approach would not alter the testator's intention, but it would still require the cost of a lawsuit.

And, if in fact the California court were to break new ground and sanction the judicial insertion of perpetuity saving clauses, the margin-of-safety period marked off by these judicially inserted saving clauses would add up to around the same period as the 90-year period the Uniform Act adopts without the cost of judicial intervention.

Would Professor Bloom's statute have avoided the cost of this lawsuit? No. It contains no specific provision relating to 25- year trusts. Instead, the general cy pres provision of section 4 would have to be invoked, putting the case in the same posture as under the current California immediate cy pres statute. A lawsuit would still have to be brought to determine whether to reform by reducing the term of the trust to 21 years or, instead, to insert the saving clause.

Uniform Act. Had the Anderson case been governed by the Uniform Act, Mr. Anderson's quite reasonable trust would have gone into effect as he intended, the trustee would now be using the income for the education of the descendants of his father as he intended (without the deduction of lawyer's fees to pay for both sides of a perpetuity challenge), and at the end of the 25-year period the corpus would be distributed.

No court would have had to figure out how to reform it to save it or partially save it. No lawyers would have been hired to argue different sides of the case. No court would ever even have heard of a perpetuity problem in the trust.

2. Arrowsmith v. Mercantile-Safe Deposit and Trust Co.

The Facts. Arrowsmith v. Mercantile-Safe Deposit and Trust Co., 313 Md. 334, 545 A.2d 674 (1988), is a more complicated case. George H. C. Arrowsmith died in 1983, leaving a will dated July 29, 1982. George's 1982 will, drafted by a lawyer, expressly revoked all prior wills and exercised a testamentary power of appointment over some $7 million in assets of an irrevocable inter-vivos trust created by his mother in 1953.

By his will, George exercised his power of appointment by creating a trust. Most of the corpus of that trust was to be held for George's three children, Edith Ann (born in 1959), Jeffrey (born in 1961), and Stephen (born in 1962). At George's death, therefore, Edith Ann was about 24 years old, Jeffrey was about 22, and Stephen was about 21. None had children of their own.

George's trust did not grant the children a right to the income from their respective shares. Rather, the trustee was given discretionary power to pay the income to them or accumulate it; and the trustee was also given the discretionary power to invade the corpus of each child's share for the child's support and maintenance.

Upon the death of each child, that child's share was to be divided among that child's then living descendants, per stirpes; if none was then living, then to that child's then living brothers or sister, with the share of any deceased brother or sister going to that sibling's then living descendants, per stirpes.

The Actual Holding. The Maryland court invoked the common-law Rule Against Perpetuities and held the remainder interests in the corpus of each child's share to be invalid. In addition, the trustee's discretionary powers over income and corpus were also invalid. Result: The court held that George's trust was entirely invalid, and the property was ordered distributed outright to each child in one-third shares. George's intention was fully defeated.

California Immediate Cy Pres Statute. Under the California immediate cy pres statute, the court is to save George's trust "to the extent that it can be reformed or construed within the limits of [the common-law Rule] 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."

There is a dearth of appellate court opinions under the immediate cy pres method. So far, all the appellate court decisions in and out of California have involved interests that were invalid because of an age contingency in excess of 21 or a period in gross exceeding 21 years, and except for the recent Anderson case, above, the court reformed the disposition to lower the age contingency to 21 or reduce the period in gross to 21.

The lack of appellate guidance in a case like Arrowsmith makes it hard to feel confident about what type of reformation a court working under this statute would be willing to approve. Maybe a California court of today would be willing to insert a perpetuity saving clause. If so, the approach is the equivalent of giving the case the benefit of wait-and-see, but in an inefficient way because of the cost of the lawsuit.

If the court really were to strain to reform George's trust to let it take effect as far as possible and still comply with the common-law Rule, the court might eliminate the trustee's discretionary powers over income and corpus and instead give each child a right to the income for life. This would save the income interest for each child.

A more sophisticated approach would be to validate the trustee's discretionary powers for the 21-year period following George's death, and then give each child a right to the income for the remainder of that child's life. That would allow the trustee to exercise the discretionary powers until each child was in his or her mid-40's.

What about the remainder interest in the corpus at each child's death? How could those interests be reformed to make them valid and still come fairly close to George's intent? A reasonable possibility is to "vest them in interest" as of 21 years after George's death or as of the child's death, whichever event occurs first. This again is not too bad a result, because as noted the children would then be in their mid-40's and would probably have then completed their child-bearing. Note that "vesting in interest" is quite different from "vesting in possession." The trust would not be terminated prematurely, which means that distribution of the corpus would still be postponed until each child's death.

Note that under this hypothesis, validation of George's trust requires the complete or partial elimination of the discretionary powers of the trustee over income and corpus, rendering the trust less flexible than originally drafted!

Would Professor Bloom's statute have avoided the cost of this lawsuit? No, because there is no specific provision in the

statute governing a case like this. The general cy pres provision of section 4 would apply, causing a lawsuit to determine how best to reform this trust to comply with the common-law Rule.

Uniform Act. In contrast to the immediate cy pres method, the application of the Uniform Act to this case is simplicity itself.

First, no immediate litigation would be required and more than likely no litigation would ever be required.

Second, the trust would go into effect as written, with the discretionary powers of the trustee fully operable for up to 60 years.[4]

Remember the ages of George's children at his death -- Edith was 24, Jeffrey was 22, and Stephen was 21. Add 60 years to their ages and you get age 84 for Edith, age 82 for Jeffrey, and age 81 for Stephen. Edith's share would be valid and distributed to her descendants if she dies at age 84 or under; Jeffrey's share would be valid and distributed to his descendants if he dies at 82 or under; Stephen's share would be valid and distributed to his descendants if he dies at 81 or under.

If all three children die under these ages, no court contact at all would be required under the Uniform Act. Statistically speaking, each child is more likely than not to die under these ages, given that life expectancy now is 75 years on average. This is not to suggest, of course, that it is not quite possible for one, two, or all three of these children to live into low 80's.

Deferred Reformation Under the Uniform Act. Because there is a possibility in this case that judicial intervention really would become necessary, I now turn to that possibility, to see how the deferred reformation feature of the Uniform Act would operate. Suppose, then, that Stephen lives beyond 81. A reformation suit would then be in order as to Stephen's share. How would the court reform? I submit that the notion that such a case would generate complex litigation with staggering fees is a

---

[4] At common-law, and under the Uniform Act, the perpetuity period begins running when George's mother created the original trust, in 1953. Under the Uniform Act, this would means that, as of George's death in 1983, 60 years would remain of the allowable period before any interest or power in the trust would become invalid and subject to reformation.

smokescreen. The court would seldom be engaged in hearing extrinsic evidence as to George's intent, for there likely will be none. The language of the reformation section of the statute requires the court to be guided by the transferor's "manifested plan of distribution." Transferors manifest their plans of distribution in the language of the instrument. The written terms of the trust will provide the guidance as to how to reform "in the manner that most closely approximates the transferor's manifested plan of distribution," within the constraint of vesting all interests within the allowable period.

One of the advantages of a Uniform Act is the opportunity to use the Official Comments to give guidance to courts in a variety of cases. As to a case like Arrowsmith, the court will find considerable guidance in those Comments. In fact, Example (2) in the Comment to Section 3 is nearly exactly on point. The court will find that Stephen is like Z in that example. Working under that example, the court should be willing to approve the following modifications to the terms of Stephen's share:

> (1) the trustee's discretionary power over the income and corpus would be eliminated as of the expiration of the allowable period, probably substituting for Stephen a vested right to the income for the remainder of his life; and
>
> (2) the court will vest the remainder interest in the corpus of Stephen's share in his descendants, per stirpes, who are living as of the expiration of the allowable period, with possession delayed until Stephen dies (which should not be very many more years).

"Dead-hand Control" Comparison. Note that under the reformation suggested above under the immediate cy pres method, the trust will be permitted to last just as long as the Uniform Act permits it to last -- for the life of each of George's children. There is no difference between the two methods on that score.

A Final Comment. The overall lesson of this memorandum is extremely important to any decision-maker considering which type of perpetuity reform legislation to favor. The lesson is: The immediate cy pres method keeps the judicial perpetuity pot boiling. The Uniform Act cools that pot down by creating a nearly litigation-free perpetuity environment.