

First Supplement to Memorandum 90-22

Subject: Study L-3013 - Uniform Statutory Rule Against Perpetuities
(Supplement to Charles Collier's Background Study)

Attached hereto is a Supplement to the Background Study on the Uniform Statutory Rule Against Perpetuities prepared by the Commission's consultant, Charles A. Collier, Jr. This supplement comments on issues raised in the materials that have been submitted since Mr. Collier prepared his original Background Study.

Respectfully submitted,

Stan Ulrich
Staff Counsel

SUPPLEMENT TO BACKGROUND STUDY
THE UNIFORM STATUTORY RULE
AGAINST PERPETUITIES

By: Charles A. Collier, Jr.

February 1990

SUPPLEMENT TO BACKGROUND STUDY,
THE UNIFORM STATUTORY RULE
AGAINST PERPETUITIES

A Background Study on the Uniform Statutory Rule Against Perpetuities ("USRAP") was prepared in February 1989. A copy is attached to Memorandum 90-22 as Exhibit 1. Reference is made thereto.

The purpose of this Supplement is to comment on issues raised relating to USRAP after the Background Study was prepared and submitted to the Commission. Many of the exhibits to Memorandum 90-22, for example, were submitted to the Commission after the Background Study was prepared.

Scholarly Literature on the
Rule Against Perpetuities

The Index to Legal Periodicals from 1958 to the present listed a total of 234 articles dealing with the Rule Against Perpetuities. Of those, some 47 articles have been published since 1980. Thus, there is a great deal of academic and scholarly interest in the Rule, various reform proposals, etc. A number of articles deal with the application of the Rule to certain commercial transactions, for example.

Enactment of USRAP

USRAP was approved by the National Conference of Commissioners on Uniform State Laws in 1986 and approved by the House of Delegates, American Bar Association, in 1987. It has

been enacted now in ten states, namely, Connecticut, Florida, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, Oregon and South Carolina. Thus, approximately 20% of the states have now enacted it; and further enactments are anticipated, although it was only promulgated about three years ago.

Uniformity

As the great number of articles referred to above in the Index of Legal Periodicals suggest, the Rule Against Perpetuities is the subject of a great deal of scholarly debate, differences of opinion, suggestions for reform, ways of measuring a wait-and-see concept whether by a fixed group of measuring lives, by causally related lives, or other methods, etc. One of the primary benefits of USRAP is that it does offer a uniform approach to the Rule Against Perpetuities and continues the validating side of the common law Rule Against Perpetuities, adopts the wait-and-see approach to otherwise invalid transfers, uses an easy to measure period to wait-and-see, namely, 90 years, excludes commercial transactions from the scope of the Rule and allows reform of existing documents. While there will undoubtedly continue to be certain scholarly debate as to whether USRAP is the best approach, it is the approach of the Uniform Law Commissioners, as approved by the House of Delegates of the American Bar Association, by the Board of Regents, American College of Probate Counsel, and by

the Board of Governors, American College of Real Estate Lawyers. Thus, it has wide support in the field.

The 90-Year Trust

Professor Jesse Dukeminier in his letter of July 9, 1989 (Exhibit 7) and in his law review article in the UCLA Law Review (Exhibit 2) expresses the view that the 90-year period for wait-and-see will cause lawyers to draft 90-year trusts. Trusts now can be drafted for periods that often exceed 90 years by referring to all living descendants of a settlor or testator. Wisconsin never recognized the common law concept of the Rule Against Perpetuities. The Drafting Committee on USRAP checked with Wisconsin lawyers and found no evidence that trusts in that state were being drafted in perpetuity or for any long period of time. Rather, they were being tailored to the needs of the particular clients. South Dakota and Idaho also have no Rule Against Perpetuities. California Civil Code § 715.6, enacted in 1963, states that no interest is invalid if it must vest, if at all, within 60 years of the creation of the interest. This consultant is not aware of any lawyers in California drafting 60-year trusts. Professor Dukeminier argues that the 90-year wait-and-see period would extend control well beyond that which would normally occur. Yet he advocates in his letter of June 9, 1989 (Exhibit 7) as the second best alternative abolition of the Rule Against Perpetuities entirely and providing by statute that no trust can

last beyond 110 years. This is inconsistent with his argument that 90-year trusts would become common. Most lawyers put a perpetuity savings clause in wills and trusts, which clause is tailored to the particular estate plan. Examples of those clauses are found on pages six through eight of Exhibit 1, Memorandum 90-22, as part of the Background Study. If a will or trust has a properly drawn perpetuity savings clause, the trust is valid under the common law Rule Against Perpetuities. The wait-and-see concept applies where there is no perpetuity savings clause or it is in some way defective. Thus, the wait-and-see concept, which involves waiting and seeing if an interest actually vests or terminates within the statutory period, that is, within 90 years, will not apply in most situations. It is a protection against badly drafted estate plans.

Retention of the Validating Side
of the Common Law Rule

The common law Rule determines validity or invalidity at the inception. If a trust or other property arrangement satisfies the common law Rule, it is valid at its creation. If valid at its creation, it is not subject to possible future reformation. Since the validating side of the common law Rule Against Perpetuities is included in USRAP, it will not impose a perpetuity scheme discordant with accepted common law practice or drafting practices. It is not anticipated that

lawyers will change their drafting practices in tailoring perpetuity savings clauses to the particular facts and documents.

Easy to Administer
Wait-and-See Concept

Wait-and-see is a corrective strategy for trusts or other property arrangements that would have been invalid at common law. Wait-and-see allows a period of time, called a permissible vesting period, during which the contingencies are allowed to work themselves out and vest. The effect of the wait-and-see concept is similar to a statutory perpetuity savings clause.

The measuring lives concept included in the Restatement of Property, Donative Transfers, (1981) is not easy to apply. There are certain ambiguities in the measuring lives concept and it requires tracing of lives over a long period of time to determine when the vesting takes place. Professor Dukeminier suggested another approach for wait-and-see, namely, using lives having a "causal relationship" to the vesting. The casual relationship concept requires detailed records as to the family, requires tracing and has resulted in in some litigation over its application. See, for example, Fleet National Bank v. Colt, 529 A.2d 122 (R.I. 1987). Any statutory list of measuring lives or using causally related lives makes it very difficult to determine when the property interest must vest or

terminate under wait-and-see concepts, requires a great deal of recordkeeping and tracing, and requires very complex statutory provisions. The Drafting Committee, after lengthy deliberations, moved away from the measuring lives or causally related lives concept to a straight period of 90 years, which is an approximation for lives in being plus 21 years. It has the advantage of being very easy to apply, easy to understand, easy to calculate, and eliminates all tracing of family members or other measuring lives, etc.

Reformation

Professor Dukeminier had advocated wait-and-see concepts since at least 1960 when he was instrumental in drafting the then new Kentucky perpetuities law (see J. Dukeminier, Jr., Kentucky Law Review 49.3, Fall 1960, "Kentucky Perpetuities Law Restated and Reformed.") He has also advocated for many years the causal relationship measuring lives concept in determining how long to wait-and-see if the interests actually vest or terminate. California Civil Code § 715.5, enacted in 1963, allows reformation through a court proceeding at any time after creation of the interest, if it is invalid under the Common Law Rule. The USRAP approach, however, is to wait-and-see if the technical problems which violate the Common Law Rule resulting in invalidity are resolved by actual vesting or termination during the 90-year period. Reformation through court action is delayed until the end of the 90 years

for interests created on and after the effective date. Therefore, it is a non-court involvement approach to perpetuities in almost all situations.

Proposed § 21202(b) would continue the ability to reform documents as to all interests created before the effective date of USRAP. Immediate cy pres would continue to be available, as it is now in California, for all existing documents. Professor Dukeminier now contends that immediate cy pres is the best form of perpetuities reform (see Exhibit 7). This is contrary to his many scholarly articles arguing for wait-and-see and the causal relationship of the lives to be used in determining when interests must vest under wait-and-see. Since it is anticipated that in almost all cases the interest will vest or terminate within the 90 years, no judicial involvement would be necessary. Immediate cy pres now in effect in California without the wait-and-see element can result in many matters being brought before the Court which in fact would resolve themselves without court involvement under wait-and-see.

Advantages of USRAP Over Existing California Law

There are a number of advantages in the enactment of USRAP over existing California law. These include the following:

1. Enactment would provide uniformity with at least ten other states and undoubtedly a number of other states which will adopt the uniform statute.

2. Enactment will bring into California law the concept of wait-and-see which is in effect in a number of states in addition to the ten states enacting USRAP and which is incorporated in the Restatement of Property, Donative Transfers, provisions on the Rule Against Perpetuities.

3. USRAP law clearly makes the Rule Against Perpetuities inapplicable to commercial transactions, that is, in non-donative transactions, certain of which are covered by specific provisions of the Civil Code, but a number of which are not the subject of California statutory law and, therefore, unresolved.

4. USRAP sets forth in considerable detail in proposed § 21225 the various situations where the Rule Against Perpetuities does not apply. This is more detailed than existing California law and would clarify the scope of the exclusions, including the commercial transaction exclusions.

5. USRAP would continue the reformation provisions of California law under Civil Code § 715.5 for all interests created prior to the effective date of USRAP. That is, cy pres would continue to be available.

6. The provision that an interest must vest or terminate within 90 years under wait-and-see is easy to apply and understand. It represents a substantial simplification from the specified group of measuring lives or from the causal relationship lives concept in applying wait-and-see to the Rule.

7. USRAP avoids the harshness of the common law rule and would solve many of the California statutory problems. The Staff in the Tentative Recommendation, page two, refers to "the history of the Rule Against Perpetuities in California as convoluted and confusing."

8. The exemptions in USRAP from the statutory rule are more detailed than in California (see Staff Draft, page seven, Tentative Recommendation).

9. USRAP avoids unnecessary litigation to reform a trust or other document which under wait-and-see will in fact not violate the Rule Against Perpetuities under the wait-and-see concept, as the interest will vest or terminate within the wait-and-see period. This saves costs. The cy pres method is a judicial hands-on approach to perpetuities reform, whereas the USRAP approach is a judicial hands-off approach requiring litigation only in those very rare instances where the interest would not terminate or vest within the wait-and-see period.

10. The Rule Against Perpetuities is an extremely technical rule which is very difficult to understand and apply. The wait-and-see approach in USRAP allows time and events to cure most technical defects.

11. The scholarly articles that have related to USRAP have in some instances disagreed with the approach to perpetuities reform but have not, so far as this consultant is aware, pointed out any fundamental omissions or problems with USRAP.

Dated: February 26 1990

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'Charles A. Collier, Jr.', written over a horizontal line.

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Consultant