

Memorandum 83-86

Subject: Study L-640 - Trusts (Construction and Interpretation)

Professor Richard Wellman has written the Commission concerning a problem in applying the requirement of survival to the time of enjoyment (Section 6146) and the antilapse provision (Section 6147) which appear in Assembly Bill 25, the Commission's recommendation on wills and intestate succession. (See letter attached as Exhibit 1.) The antilapse provision and related sections use the term "devisee" which is defined by Section 34 in AB 25 as follows:

(a) "Devisee" means any person designated in a will to receive a devise.

(b) In the case of a devise to an existing trust or trustee, or to a trustee on trust described by will, the trust or trustee is the devisee and the beneficiaries are not devisees.

It does not appear that California law makes a distinction in this area between direct devises and devises in trust. See, *e.g.*, In re Estate of McCurdy, 197 Cal. 276, 284, 240 P. 498 (1925); see also 2 A. Scott, *The Law of Trusts* § 112.3 (3d ed. 1967); Restatement (Second) of Trusts § 112 comment f (1959). Since the antilapse rule is restricted to situations where the devisee is kindred of the testator, however, the result may differ in cases involving inter vivos trusts. In one case involving a revocable inter vivos trust where the remainderman predeceased the income beneficiary (who was also the trustor), the court held that the widow of the remainderman as his sole heir was entitled to the property because it was a vested remainder which then passed by intestate succession. *Randall v. Bank of America*, 48 Cal. App.2d 249, 119 P.2d 754 (1941).

It seems odd that testamentary trusts would be treated differently from inter vivos trusts in this regard. If the antilapse provisions of AB 25 are amended to include trust beneficiaries under testamentary trusts, it appears that different rules would prevail in pour-over trusts. Professor Wellman also raises the question of what rules govern class gifts in testamentary trusts, and that question could be expanded to inter vivos trusts.

The staff tentatively concludes that rules governing lapsed dispositions and dispositions to a class should be provided that govern both testamentary and inter vivos trusts. Perhaps it would be ideal if all donative transfers were governed by the same rules of construction in this regard. Thus far we seem to be embarked on providing special rules in special areas. For example, the powers of appointment statute provides its own rules where the donee or appointee is dead. See Civil Code §§ 1389.3-1389.5. At the November meeting, we will present a draft of appropriate provisions to be added to the statutes governing trusts. We envision these provisions as being consistent with the rules governing wills as set forth in Sections 6146-6152 of AB 25.

Respectfully submitted,

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Staff Counsel

American Bar Association Section of Real Property, Probate and Trust Law
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August 22, 1983

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Dear John,

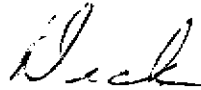
The UPC definition of "devise" which is incorporated in AB25 may cause trouble in connection with §6146 as amended. The definition of "devise" excludes benefits by testamentary trust. Hence, the anti-lapse provisions and the requirement of survival to the time of enjoyment would apply only to direct devises rather than to beneficial interests in trusts.

Since most future interests are interests in trusts, I would think that §6146 and related sections should apply to beneficial interests in trusts. A case in New Mexico made those of us interested in UPC realize that we should have extended our anti-lapse provisions to beneficial interests in testamentary trusts. It involved a crudely drawn trust which directed division and distribution of property devised in trust at the death of a life beneficiary, but failed to require survivorship until that time by the remaindermen. A remainderman who was a descendant of the decedent's grandparent died before the decedent leaving issue who survived the decedent. The court held that UPC's formulations failed to prevent lapse, and an intestacy resulted. As I read AB25 as it would be amended to reflect the Commission's recommendations relating to simultaneous death and survival, the same result would follow in California. I think you

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do not mean to ordain such a result.

Sincerely,

A handwritten signature in cursive script, appearing to read "Dick", written in dark ink.

Richard V. Wellman
Educational Director

RVW/khb