Third Supplement to Memorandum 83-91

Subject: Study L-626 - Probate Law and Procedure (Professor Niles'
           Comments Concerning Constructional Preference for
           Contingent Remainders)

The First Supplement to Memorandum 83-91 discusses some problems
with new Section 6146 of the Probate Code which establishes a construc-
tional preference in favor of requiring a devisee of a future interest
(including one in class gift form) to survive until the devise is to
take effect in enjoyment. We have just received a letter from Professor
Russell Niles concerning Section 6146, a copy of which is attached to
this supplement as Exhibit 1.

Professor Niles likes the new constructional preference for contin-
gent remainders in Section 6146 with respect to class gifts, but is
doubtful about it when the devisee of the future interest is a named
person. It would thus appear that Professor Niles would favor policy
option #2 on page 2 of the First Supplement to Memorandum 83-91 (presume
contingent remainder for class gift, vested remainder for gift to named
person).

Professor Niles supports the language proposed to be added to
Section 6146 to deal with the problem of the rule against perpetuities
(First Supplement, page 3), and the language to be added to the Comment
to Section 6146 concerning the case where the devisee is required to
survive a designated age to take (First Supplement, page 4).

Respectfully submitted,

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November 2, 1983

Mr. John DeMoully
California Law Revision Commission
4000 Middlefield Road
Palo Alto, CA 94306

Dear John:

I am unable to attend the meeting of the Commission on Friday evening, November 4, but I can attend the meeting on Saturday, November 5 until the middle of the afternoon.

If the First Supplement to Memorandum 83-91 (10/21/83) comes up before I arrive, I should like to express my views:

1. As Jesse Dukeminier points out, the rules of construction should apply to both wills and deeds of trust and should be picked up in the trust revision.

2. I am confident that the presumed requirement of survivorship until the date a future interest becomes possessory is right for class gifts.

The Restatement already provides for such a presumption when the gift is to a multi-generational class such as issue, descendants, heirs, next of kin, or the like. [Restatement, Property, §§ 300-314.] This is probably the

law in California, but the Easter case [24 Cal.2d 191,

148 P.2d 601 (1944)], especially in view of the unfortunate

dissent of Justice Traynor, has caused confusion.

I am quite willing to extend the presumption to

gifts of future interests to a one-generational class, such

as a gift to A for life, remainder to his children (or

grandchildren, or nephews or nieces). This would supersede

the holding in the Stanford case [49 Cal.2d 120, 315 P.2d 681

(1957)] but would be in accord with most donors' intentions.

In these two cases the anti-lapse statute

(§ 6146) would preserve a share for most issue of most class

members, and this would, of course, be most useful in the

second type of case.

My trouble with applying the presumption to a

remainder to a named person is that the anti-lapse statute

does not so clearly carry out the donor's presumed intent.

A gift to A for life, remainder to B suggests that B should

have more control over the remainder than if he were a

member of a class. If B has issue, all well and good, but

if he leaves a widow, the case is harder. We have generally

favored spouses, even where there are issue.

A remainder to B, C, and D, since not a class

gift, would probably be the same, although the argument is

weaker.

There are additional reasons for my concern about requiring a named person to survive until his or her future interest is possessory.

Designating the classical indefeasibly vested remainder as a contingent·remainder or a remainder subject to complete defeasance constitutes a de facto restraint on alienation and diminishes or suspends the rights of creditors under California cases [Anglo California Nat'l Bank v. Kidd, 58 Cal.App.2d 651, 137 P.2d 460 (1943)] and under the new sections of the Code of Civil Procedure, § 709.010.

The Commission will soon be considering Restraints on Alienation in connection with Civil Code § 711, and the possible extension of spendthrift protection to future interests after income trusts. [Matter of Vought's Will, 25 N.Y.2d 163, 250 N.E.2d 343, 303 N.Y.S.2d 61 (1969); Niles, Matter of Vought's Will: A Tighter Grip by the Dead Hand, 45 N.Y.U.L.Rev. 421 (1970).] These problems would be prejudged by § 6146 as it now reads.

Since Probate Code § 6146 states a rule of construction, subject to the intention of the testator, I am afraid that judges used to the ancient and well-settled law will read it back by the process of construction. If a testator devised Blackacre to his sister Mary, with remainder to her son John, who has a wife Alice but no

children, and John predeceases Mary, I suspect that the wife

Alice would be favored.

I concede that the Halbach draft is clear and

self-consistent, would reduce litigation, and would tend to

bring certainty into this troubled area. I would prefer,

however, to have the Commission cure the class gift problems

now and reconsider the problems of gifts to named persons

after the Commission considers spendthrift trusts and

restraints on alienation.

I agree with Jesse Dukeminier's suggestion

about cases that violate the rule against perpetuities.

I am not sure that Ed Halbach intended to abo-

lish the rule in Clobberie's Case or to neutralizing the

inference to be drawn from the payment of income before an

age is attained. At least the matter should be clarified.

Sincerely,

Russell

Russell D. Niles
Professor of Law

RDN/js