Memorandum 83-104

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

Background

The recently enacted recommendation on wills and intestate succession (see copy attached to Memorandum 83-64) defines "devisee" as follows:

> 34. (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.

This definition, drawn from the Uniform Probate Code, excludes trust beneficiaries from the coverage of any provision of the wills and intestate succession provisions that is drafted in terms of a devise or devisee.

Professor Richard Wellman has written the Commission concerning one aspect of this problem, involving the application of the requirement that a person survive to the time of enjoyment in order to take (Prob. Code § 6146) and the antilapse provision (Prob. Code § 6147). (See letter from Professor Wellman, attached as Exhibit 1.) Professor Wellman also raises the question of what rules govern class gifts in trusts. Related concerns are expressed by Professor Jesse Dukeminier (see Exhibit 1, attached to the First Supplement to Memorandum 83-91) and by Professor Edward Halbach (see Exhibit 1, attached to the Second Supplement to Memorandum 83-91).

The problem arising under the UPC definition of devisee is illustrated in the New Mexico case of Portales National Bank v. Bellin, 98 N.M. 113, 645 P.2d 986 (Ct. App. 1982). This case involved a claim of grandchildren of testamentary trust beneficiaries (who were siblings of the testator). The will provided that the proceeds were to go to children of the testator's siblings if any of the siblings predeceased the testator. The court held that "children" did not include grandchildren, rejecting the claim of the children of those children who had predeceased the testator. The grandchildren's claim that they should take under the antilapse provision was rejected on the grounds that "devisee" does not include trust beneficiaries. In this case, the bank was the devisee.

No reason for the UPC exclusion of trust beneficiaries is given by the New Mexico court, nor has the staff discovered any reason in UPC materials. The staff surmises that the exclusion may be a way of saying that an executor is to distribute to the trustee and not the trust beneficiaries, which could easily be said directly.

The staff has searched AB 25 for every section that uses the terms "devise" or "devisee." This search was restricted to Division 1 (Preliminary Provisions), Division 2 (General Provisions), and Division 6 (Wills and Intestate Succession) because Section 20 limits the coverage of the definitions to these provisions. In some sections the definition is not relevant, such as Sections 6300 and 6301 (Uniform Testamentary Additions to Trusts Act) and Sections 6340-6344, 6346, 6347, and 6349 (devises subject to Uniform Gifts to Minors Act). In many situations, however, such as those mentioned by Professor Wellman, the provision should apply to trust beneficiaries and makes no sense when applied to the trustee. (A more detailed analysis is presented below.)

In the process of reviewing the section-by-section analysis that follows, the Commission should keep in mind the possible solutions to the problems. The staff sees three major possibilities: (1) Sections or groups of sections can be adjusted to cover trust beneficiaries and exclude trustees as needed. (2) The definition of "devisee" can be revised to include beneficiaries of testamentary trusts and then beneficiaries can be excluded on a section by section basis if needed. (3) Separate rules governing construction and interpretation of trusts can be provided in another part of the Probate Code.

Section-by-Section Analysis of AB 25

§ 48. "Interested person" defined

Section 48 uses "devisee" but also uses "beneficiary" (defined in Section 24) and refers explicitly to trusts and fiduciaries representing interested persons. This section would not need revision, no matter what approach is taken.

§ 150. Contracts concerning will or succession

Section 150 tightens the rules for proving a contract to make a will or devise or not to revoke a will or devise. How would this provision be applied where a person attempts to establish a contract not to revoke a testamentary disposition in trust? It might be argued that Section 150 does not apply in this case since it does not apply to

beneficiaries of testamentary trusts. This does not seem to be a very practical problem, but it illustrates the strange results that may arise when the definition of devisee is applied through the definition of devise. Its absurdity is shown by the fact that use of the phrase "contract to make a will" does not exclude a contract to make a testamentary trust. It would seem that a beneficiary of a testamentary trust claiming a contract not to revoke a will in which there is a testamentary trust would be covered by the standards of Section 150.

§ 233. Notice of hearing on determination of survival

Section 233 requires notice of a petition to determine whether one person survived another to be given devisees of such persons. This section is not derived from the UPC, so there is no reason to assume that trust beneficiaries should be excluded. If the decedent has chosen to devise property in trust instead of directly, there is no reason to exclude the devisee. It also seems that a beneficiary of a pour-over trust has an interest in receiving notice. The trustee should also be given notice.

§ 6112. Who may witness a will

Section 6112(b) creates a presumption that a subscribing witness procured a devise in his or her favor by duress, menace, fraud, or undue influence. This provision is not in the UPC. Presumably it should also apply to a subscribing witness who happens to be taking in trust. This section should also apply to a pour-over trust. One can imagine situations where this rule should also apply to a trustee who witnesses a will, but it does not appear to matter whether trustees (anymore than executors) are covered by the presumption of Section 6112(b).

§ 6143. Devisees as owners in common

Subject to a contrary expression of testator's intent, Section 6143 makes clear that a devise to more than one person vests title in them as owners in common. This section continues existing Section 29 which refers to a devise or legacy, without the artificiality of excluding testamentary trust beneficiaries. This is a problem that runs throughout the subject considered in this memorandum; California law has treated testamentary trusts as an aspect of the law applicable to disposition by will generally. The courts assume without discussion that cases applying to interpretation of wills govern testamentary trusts too. The rule of Section 29 was applied in a case involving a testamentary trust without

statutory citation. See In re Estate of Rawitzer, 175 Cal. 585, 592, 166 P. 581 (1917). Section 6143 should apply to testamentary trust beneficiaries, although it is not an area where significant problems would arise in the absence of a statute. A similar rule would be appropriate, though unneeded, for inter vivos trusts.

§ 6145. Common law of worthier title abolished

Section 6145 continues existing Section 109 which makes clear that the doctrine of worthier title does not apply where the testator makes a devise to his or her heirs. The exclusion of testamentary trust beneficiaries would not occur under existing Section 109. While it is not a matter of great significance, there is no reason to impose this limitation on Section 6145. It would also be nonsensical to read trustees into this section, as required by the definition of "devisee" in Section 34.

§ 6146. Requirement that devisee survive testator or until a future time

This section is in a cross-fire. It is proposed for revision in the Recommendation Relating to Simultaneous Deaths and Survival approved at the last meeting and is subject to further changes as discussed in Memorandum 83-91. The rule concerning survival until a future time should be the same whether or not the devise is in trust, regardless of what the rule is. Consequently, this section should apply to beneficiaries of testamentary trusts. It is nonsensical to apply this section to trustees as devisees, particularly if Section 6146 is revised to provide a 120-hour survival requirement. There is no reason to require a trustee to survive 120 hours or to a future time. The predecease of an intended trustee is also not relevant in this context, nor should the section be applied to the trustee of an inter vivos trust.

Section 6146 should apply to devisees of testamentary dispositions who are the takers of beneficial interests. This leaves open the possibility of different results where an inter vivos trust, as opposed to a testamentary trust, is involved because of the new rule in subdivision (a) that creates a constructional preference in favor of contingent remainders. Unless some consistent provision is applied to future interests in inter vivos trusts, there is a possibility of variant results depending upon whether an estate plan uses a pour-over trust or a testamentary trust created by will. In practical effect, this may not be a very significant problem and the staff is not overly troubled by the prospect of leaving the law pertaining to inter vivos trusts inconsis-

tent with testamentary trusts until the comprehensive trust law revision is finished. It is far better to have the inconsistency between inter vivos and testamentary trusts than between testamentary trust dispositions and direct testamentary dispositions. It should also be remembered that these rules are subject to the contrary intention of the testator.

§ 6147. Antilapse

Section 6147 saves devises that lapse under Section 6146, if the devisee is kindred of the testator or of a spouse of the testator. This section is drawn in part from UPC Section 2-605 which is also phrased in terms of a devisee. It is this provision that Professor Wellman discusses in his letter attached as Exhibit 1. The existing antilapse provision--Section 92--refers to a "devisee or legatee" but without the limitation excluding trust beneficiaries. California law does not appear to make a distinction between direct devises and devises in trust in the application of antilapse rules. 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). The antilapse rule should apply to testamentary trust beneficiaries. Obviously, it should not apply to trustees. Antilapse questions are rare in inter vivos trusts. Lapsed gift problems usually arise where the intended donee dies before the gift is made, a situation that is most likely to occur when the effectiveness of the gift is delayed. If the beneficiary is dead when an inter vivos trust is created, the trust fails for want of a beneficiary. See Restatement (Second) of Trusts § 112 comment f (1959). As to future interests, the question of lapse has not been a problem because the passage of property depends upon the common law governing future interests. For example, if the remainder is vested, it passes to the remainderman's heirs. See Randall v. Bank of America, 48 Cal. App.2d 249, 119 P.2d 754 (1941).

§ 6148. Failure of devise

Subdivision (b) of this section provides that if the residue or a future interest is devised to more than one person and the devisee's share fails, the other devisees take in proportion to their interests. This provision should apply to testamentary trust beneficiaries, since there is no reason to distinguish between direct devises and devises in trust. One can also imagine situations in which the rule should apply to trusts as devisees, although it does not seem significant. The

situation covered by this rule does not seem applicable to inter vivos trusts.

§ 6149. Meaning of death with or without issue

Subject to a contrary provision in the will, this section makes clear that a determination of death with or without issue is to be made when a devise takes effect in enjoyment. This provision should apply to direct devises and devises in trust. In this instance, the coverage of the section is unclear because it uses "devise" but not "devisee." It does not make sense to consider relevant the issue or lack of issue of a trustee, however. This section should also be applied in the case of other future interests, including inter vivos trusts, for the sake of consistency.

§ 6150. Persons included in class gift; afterborn member of class

Section 6150 generally continues existing Section 123 subject to the change in the constructional preference for requiring class members to survive until the devise takes effect in enjoyment (Section 6146(a)). This provision should be applied to testamentary trust beneficiaries, and makes no sense as applied to trustees. An analogous rule would be appropriate for determination of class gifts in inter vivos trusts.

§ 6151. Class gifts to "heirs," "next of kin," "relatives," or the like

Section 6151 provides for the determination of class gifts to heirs, next of kin, relatives, and like designations. This section determines the class as if the testator were to die intestate when the devise takes effect, and is thus an aspect of the preference against early vesting embodied in Sections 6146 and 6150. The rule should apply to the determination of the class of testamentary trust beneficiaries. In fact, the case cited in the comment as providing a consistent rule involved a testamentary trust. As in the other sections based on the preference for contingent remainders, application of this section to testamentary trusts would result in the possibility of variant outcomes from pour-over trusts where vested remainders would be favored.

§ 6152. Halfbloods, adopted persons, and persons born out of wedlock

Section 6152(a) treats halfbloods, adoptees, and persons born out of wedlock as natural issue, and is based on UPC Section 2-611. The offending definitions are used only in the new material provided in subdivisions (b) and (c). As with other provisions on class gifts, this

section should apply to testamentary trust beneficiaries and not to trusts and trustees.

§ 6170. No exoneration

Section 6170 provides for the passage of specifically devised property without paying off mortgages, regardless of a general directive in the will to pay debts. This section uses "devise" but not "devisee" so the section may be read to cover all property devised without worrying about the exclusion of beneficiaries from the definition of "devisee." This rule should apply to property passing under a specific devise without regard to whether the beneficiary is technically a trust, trustee, or the holder of the beneficial interest in the testamentary trust.

§ 6171. Change in form of securities

Section 6171 provides special rules governing specific devises of securities and is generally consistent with existing case law. Subdivision (a) refers to the "specific devisee" which by application of Section 34 would be the trust or trustee and not the beneficiary. If in fact the specific devisee is the trust beneficiary, it is difficult to apply this section. As in Section 6170, we are really attempting to provide a rule governing testamentary dispositions of specific securities where there is some inconsistency between the description of the devise and the property available upon the testator's death. The nature of the specific devisee is not relevant here and should not be restricted.

§ 6172. Unpaid proceeds of sale, condemnation, or insurance; property obtained as a result of foreclosure

Section 6172 provides that the "specific devisee" has the right to the remaining specifically devised property and certain proceeds from it. As in Section 6171, the nature of the devisee should not be an issue.

§ 6173. Sale by conservator; payment of proceeds of specifically devised property to conservator

Section 6173 gives the specific devisee the right to a general pecuniary devise where a conservator has disposed of specifically devised property. As in Section 6171, the nature of the devisee should not matter.

§ 6174. Ademption by satisfaction

Section 6174 specifies the conditions under which property given during the testator's life time is considered a satisfaction of the

devise. Subdivision (a)(3) refers to an acknowledgment by the devisee that the gift is in satisfaction. Subdivision (b) provides for valuation of property at the time the devisee came into possession of the property. These provisions need to apply to the person who takes the beneficial interest. Clearly an acknowledgment by a person who takes as a beneficiary of a testamentary trust should be effective under subdivision (a)(3), notwithstanding the exclusion of such persons by Section 34. Subdivision (b) also must be applied to the trust beneficiary in order to accomplish its purpose.

§ 6175. Contract for sale or transfer of specifically devised property

Section 6175 makes clear that a specific devisee takes property subject to the rights of a purchaser or transferee. This section, like Section 6171, has nothing to do with the nature of the devisee and should not be affected by any limitation in Section 34.

§ 6176. Encumbrance on specifically devised property

Section 6176 provides that a specific devisee takes encumbered property subject to the encumbrance. This section, like Section 6171, should not depend on the nature of the devisee.

§ 6177. Alteration of testator's interest in specifically devised property

Section 6177 provides that the specific devisee takes the remainder of specifically devised property when the testator alters his or her interest but does not totally divest. This rule should not depend in its application on the nature of the devisee.

§ 6300. Testamentary additions to trusts

This section speaks directly about devises to a trustee of a trust established or to be established by the testator or some other person. There is no issue arising under the definitions of "devise" and "devisee."

§ 6301. Effect on prior wills

Section 6301 preserves devises made by wills executed before September 17, 1965. There is no problem interpreting this use of "devise."

§§ 6340-6349. Devises subject to Uniform Gifts to Minors Act

These sections continue existing Sections 186-186.9, but the word "devise" is substituted for "bequest." There should not be any real danger of misapplying these provisions by operation of the definitions. Section 6340 provides that a testator may devise property to a minor.

It would be absurd to claim that this means a minor who is a trustee and excludes a minor who is a beneficiary. Section 6342 provides for the devise to be made to a designated adult or a trust company. Section 6347 specifically provides for notice to be given to the custodian and also the minor in any case when a devisee is to be given notice.

§ 6402.5. Ancestral property

As relevant here, Section 6402.5, in defining the "portion of the decedent's estate attributable to the decedent's predeceased spouse" refers to property given the predeceased spouse "by way of gift, descent, or devise." See subdivision (b)(2), (4). This language seems broad enough to avoid any restrictive technical arguments derived from the general definitions of "devise" and "devisee."

§ 6523. Factors to be considered in setting apart probate homestead

Section 6523(a) requires the court to take into account the needs of the heirs or devisees of the decedent as one factor in determining the probate homestead of the surviving spouse and minor children of the decedent. The needs of the testamentary trust beneficiary are relevant here, not the needs of the trustee. Subdivision (b)(2) recognizes that the court may set aside the probate homestead on the condition that the property be assigned to heirs or devisees. In this provision, the assignment would presumably be made to the trust and the usage of "devisee" does not seem very important.

§ 6541. Petition for family allowance and notice

Notice of a hearing on a petition for a family allowance is required by Section 6541(c) to be given to "all devisees." If this section used "interested person" as defined in Section 48, trustees and trust beneficiaries would both be covered. If "devisees" is taken in its defined sense here, however, trust beneficiaries are excluded. The best solution in this case seems to be to replace "all devisees" with "interested persons."

§ 6562. Manner of satisfying share of omitted spouse

Section 6562 provides that the general abatement rules apply to devises when a share is given an omitted spouse. The general rules are not subject to the definition of "devise," so there is no room for odd interpretations in this case.

§ 6571. No share if child intentionally omitted or otherwise provided for

Section 6571 provides that the child does not receive the share of an omitted child if the testator had children when the will was executed and "devised" the estate to the other parent. This should not be restricted to devises to the other parent as a trustee.

§ 6573. Manner of satisfying share of omitted child

This section is the same as Section 6562.

Conclusion

The limitation imposed by Section 34(b) on the definition of "devisee" does not seem to accomplish any useful purpose in the sections using that term or "devise" in AB 25. On the contrary, in many situations, particularly regarding antilapse, class gifts, exoneration, and ademption, the limitation of "devisee" to trusts and trustees instead of beneficiaries is wrong. The simplest and most efficient approach is to eliminate the limitation in Section 34(b). The staff proposes the amendment of Section 34 as follows:

> 34. (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, "devisee" includes the trust or trustee ~~is the devisee and~~ or the beneficiaries ~~are not devisees~~ as is appropriate under the circumstances.

Respectfully submitted,

Stan G. Ulrich
Staff Counsel

Exhibit 1

Memo 83-104 **Joint Editorial Board for the Uniform Probate Code** Study L-640

American Bar Association Section of Real Property, Probate and Trust Law
American College of Probate Counsel
National Conference of Commissioners on Uniform State Laws

August 22, 1983

Mr. John DeMoully, Executive Secretary
California Law Revision Commission
4000 Middlefield Rd., Room D-2
Palo Alto, CA 94306

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 do not mean to ordain such a result.

Sincerely,

Richard V. Wellman
Educational Director

RVW/khb