Memorandum 88-16

Subject: Study L-3005 - Antilapse Statute and Construction of Instruments (Policy Issues)

Several years ago, when the Commission was revising the law concerning wills and instate succession, we considered the possibility of adopting general rules of construction of instruments, rather than adopting different and inconsistent rules covering wills, trusts, and other donative instruments. Division 11 (commencing with Section 21100) is the intended location of rules of construction as they are developed.

Professor Susan French was engaged as a consultant in this project. Attached to this memorandum are two background studies prepared by Professor French relating to antilapse statutes and future interests. This memorandum summarizes the major policy issues raised by Professor French and discusses them in light of California statutes. You should read the attached studies, paying particular attention to the many examples of the operation of proposed rules. At the meeting, the staff plans to proceed through the policy issues presented below. The Commission needs to make basic policy decisions before any statutory drafting can proceed. Professor French intends to be present at the meeting to provide further explanation and answer questions from the Commission.

In the first study, Professor French reviews the elements of different antilapse statutes and identifies problems in their approach and application. See *Antilapse Statutes Are Blunt Instruments: A Blueprint for Reform,* 37 Hastings L.J. 335 (1985) (on pink paper) [hereinafter cited as *Antilapse Study*]. The study concludes that an antilapse statute should be drafted so that it will apply to achieve the probable intent of the ordinary testator. The antilapse statute is discussed in Part 1 *infra*.

The second study considers the problems arising where the beneficiary of a future interest fails to survive the donor. See *Imposing a General Survival Requirement on Beneficiaries of Future Interests: Solving the Problems Caused by the Death of a Beneficiary*

Before the Time Set for Distribution, 27 Ariz. L. Rev. 801 (1985) (on yellow paper) [hereinafter cited as *Survival Study*]. In this context, the major stumbling block is the traditional preference for vested future interests. Professor French recommends reconsideration of this rule in an effort to better implement the donor's intent. These matters are discussed in Part 3 *infra*.

After studying these areas in depth, Professor French concludes that a uniform rule of construction should not be applied to all donative transfers. This question is discussed in Part 2 *infra*.

The following discussion considers the major points made by Professor French as related to California law.

1. ANTILAPSE

Under the lapse doctrine, a devise to a beneficiary who dies before the testator lapses and passes under the residuary clause or to intestate takers, barring a provision in the will covering the situation. The lapse doctrine often frustrated the testator's dispositive plan by passing property outside of the family or by dramatically altering the shares passing to various branches of the family. Antilapse statutes were adopted to preserve the dispositive plan by providing substitute takers for predeceased devisees. Professor French discusses the development and operation of antilapse statutes (see *Antilapse Study* at 336-44) and concludes that the statute applies too indiscriminately. In some cases, the statute applies too broadly and in others, too narrowly. She recommends that the California statute be refined to achieve the intentions of the typical testator and avoid frustrating the testator's dispositive plan.

Devise to Kindred

Under California law, the antilapse statute saves devises to "kindred of the testator or kindred of a surviving, deceased, or former spouse of the testator" who fail to survive the testator or until a time required by the will. See Section 6147(a) (copy attached as Exhibit 1). California courts have not considered the effect on the testator's dispositive plan of applying the statute in determining

whether the will expressed a contrary intention. Professor French notes that courts have applied the statute in several cases where the testator's plan would have been better achieved by permitting the gift to the predeceasing devisee to lapse and pass under the residuary clause or by intestacy. She suggests that applying the antilapse statute furthers the testator's dispositive plan where it prevents property from passing out of the family or promotes equal treatment of family branches and that it defeats the dispositive plan where it produces or perpetuates unequal treatment of family branches from one generation into the next. (See *Antilapse Study* at 338-42, 352-57, & examples 1, 2, & 7 at 364.)

Being related to the testator or to a spouse or former spouse of the testator would not be enough to save the devise under Professor French's proposed statute. (See *Antilapse Study* at 371-72.) Professor French would require in addition that the estate be devised in substantially proportionate amounts to other members of the same generation and class of relationship as the devisee and to the issue of deceased members of that generation and class. (See example 2 in *Antilapse Study* at 363-64.) This additional qualification assumes that the equal treatment of family branches is evidence that the testator would not want the gift to lapse. If this condition is not satisfied, the devise may still be saved if the residue of the estate is devised to an entity other than a natural person. (See example 1 in *Antilapse Study* at 363.) This rule implements the policy of preferring family members over residuary charitable takers.

Under Professor French's statute, the devise would lapse, even though the devisee is kindred, if the devisee's branch of the family is treated in a disproportionately favorable manner and the lapse would achieve a more nearly equal distribution to the generation following that of the devisee. (See example 7 in *Antilapse Study* at 364.) This is consistent with the policy of applying the lapse/antilapse rules so as to achieve equal treatment of family branches, rather than mechanically.

Devise to Spouse

Section 6147 does not save a devise where a spouse or former spouse is a devisee; "kindred" does not include spouse, although it

does include relatives of a spouse. (See Section 6147 in Exhibit 1.) This rule reflects the policy that a devise to a spouse is not evidence that the testator intends to benefit the spouse's relatives, whereas a devise to a relative of the spouse, obviously is evidence of such an intent.

Professor French finds the statute too narrow where it does not save devises to spouses in situations where the average testator would probably prefer substituting the issue to lapse. Thus Professor French would apply antilapse in the case of a predeceasing spouse if the property would otherwise go to the state, to persons expressly disinherited, or to an institutional residuary taker (where the amount of the devise is substantial). Similarly, if the entire estate or residue is devised to the spouse and the testator has no lineal descendants, the devise to the spouse would not lapse. (See *Antilapse Study* at 357-59, and examples 3 & 5 at 364.)

Devise to Friend

Section 6147 does not apply to save a devise to a person who is a friend, rather than kindred. Professor French would save devises to friends on the same basis as a devise to a spouse as just discussed. (See *Antilapse Study* at 359-62, and examples 4 & 6 at 364.)

Class Gifts

Section 6147(b) provides that the antilapse statute applies to predeceasing class gift members unless the class member died before execution of the will and the testator knew of the death. The rationale for distinguishing between the issue of class members who die before and after execution of the will is that the testator must have known about the issue of the deceased class member, and the failure to mention them indicates an intent not to include them. No such conclusion can be drawn about the issue of a class member who is alive when the will is drawn but dies before the testator.

Professor French finds this approach to be reasonable, but concludes that it produces problems in situations where some class members are dead when the will is drawn and other class members die afterwards. Under Section 6147, the issue of some class members would

take while others are excluded. The distortion of the testator's probable intent is particularly severe if all class members die before the testator. Professor French suggests revising the statute so that if there was a deceased class member with issue living at the time the will was drawn, the antilapse statute would not apply to class members who die after execution of the will, unless all class members die. If all class members predecease the testator, the antilapse statute would apply to all of them, including the members dead at the time of execution. (See *Antilapse Study* at 368-69.)

Survival Language in Will

Section 6147(c) provides that the antilapse provisions may apply if the devisee does not survive to a time required by the will, but the statute does not save the devise where the will requires the devisee to survive until a future time related to the probate of the will or administration of the estate. Section 6147 does not specify the effect to be given to language of survival in other situations.

Professor French suggests that survival language should not prevent application of the antilapse statute if the result would be to cut off a branch of the testator's lineal descendants, but that it should be permitted to do so if the result is to cut off the issue of collateral relatives or friends in favor of other collaterals or friends. If the survival requirement is applied to a group of takers, she would apply the antilapse statute only if all members of the group predeceased. If the survival requirement is applied to an individual, then she would apply the statute only if the property would otherwise pass to expressly disinherited takers or by escheat. Any different conclusion as to the intended effect of the survival language should be admitted only if supported by evidence normally admissible in construing a will. (See *Antilapse Study* at 369-70.)

Professor French's statute would give greater effect to survival language than the California statute. (See paragraph 9 of the statute in *Antilapse Study* at 372-73.) If the devisee is a lineal descendant, survival language alone would not prevent application of the statute where to do so would be to disinherit a branch of the testator's lineal descendants. Survival language alone would be sufficient as to other

persons unless there is other persuasive evidence of the testator's intent or if lapse would pass property to disinherited persons or the state.

Frustration of Dispositive Plan

Professor French's statute would not be applied to cause or prevent a lapse if its application would frustrate the will's dispositive plan. (See paragraph 8 of the statute in *Antilapse Study* at 372.) This sort of provision would seem to invite litigation. On the other hand, this rule excludes possibly relevant evidence of nontestamentary dispositions that the decedent may have made. Since the will may be just one part of an integrated estate plan, considering only evidence of the dispositive plan reflected in the will may not yield a very good answer. Even more litigation would result from a rule that allowed parties to attack lapse or antilapse rules with arguments based on factors outside the will.

2. UNIFORM RULES?

Once an appropriate antilapse statute has been determined for wills, the Commission should consider whether these rules should be applied in other areas, specifically multiple-party accounts, insurance contracts, and future interests in trust under a will or revocable living trust. Professor French has provided an outline of this problem which is attached as Exhibit 2.

In this connection, there are two main issues that the Commission should address. The first is whether different default distributions should be provided for different kinds of donative transfers when the intended beneficiary predeceases the donor. The second issue is which substitute dispositions should be retained, and whether changes should be made to make them work better.

Should the Same Default Distribution Apply to all Donative Transfers?

Professor French argues that the answer to this question should depend on whether there are real differences among the kinds of transfers or interests created that justify different distributions.

The premise behind selecting a default distribution provision is that the ordinary donor would prefer this distribution over other alternatives. The question to be addressed, then, is whether the ordinary donor would prefer different alternate takers for POD accounts in credit unions, for life insurance policy proceeds, for remainder beneficiaries under revocable living trusts, and for devisees in a will.

The only difference that would affect likely donor preference would seem to be between interests that will become possessory no later than the time of the donor's death, and those that may not become possessory until many years later. In the latter situation, the law currently provides that the property is distributed as property of the donee. Since the donee's death usually will occur much closer to the time of distribution, the donee is in a better position to determine how the property should be distributed.

As to interests that become possessory at or before the donor's death, it is difficult to find a reason to differentiate between the treatment of various types of donative transfers. If the average donor would prefer that issue be substituted for a predeceasing devisee, the same is probably true for the predeceasing beneficiary of a life insurance policy, POD account, and retirement plan death benefit. If the average donor would prefer that the property pass to residuary or intestate takers, or to the survivors of a group of beneficiaries, that same preference probably holds true across all these types of transfers.

Which Substitute Disposition Provisions Should be Retained?

If the Commission decides that there are not sufficient differences in likely donor preference to justify the array of substitute takers provided by California law, it then should decide which substitutions the average donor would prefer. Professor French recommends that only two of the current dispositions be retained, although with modifications. For future interests, she recommends retaining the current distribution, but with modifications discussed *infra*. (See *Survival Study* at 825-26.) For all other transfers, testamentary and nonprobate alike, she recommends retaining the distribution made by the antilapse statute, with modifications as discussed *supra*.

3. SURVIVAL OF BENEFICIARIES OF FUTURE INTERESTS

In her second article, Professor French suggests abandoning the general preference for vested future interests, meaning for practical purposes, future interests in trust. It is recognized that the preference for vesting historically served several useful functions, such as promoting transferability, solving perpetuities problems, and carrying out the donor's presumed intent. The presumption of vesting also avoids the need to attempt to determine the donor's intent in many cases and avoids the need to determine substitute takers where the beneficiary does not survive until distribution. (See *Survival Study* at 802-04.)

On the other hand, the vesting rule has several serious drawbacks. (See *Survival Study* at 804-05.) Distribution to the beneficiary's estate requires another probate and incurs tax liability. It also exposes the distribution to claims of the beneficiary's creditors.

To deal with these problems, Professor French suggests that beneficiaries be required to survive until the time of distribution and also makes other suggestions for dealing with the problems that may arise. For practical reasons, the statute should provide a substitute disposition based on what the average donor would want, as is done in the case of wills. After examining several existing approaches to the problem, Professor French concludes that the mechanical problems can best be eliminated by adopting a power of appointment scheme. (See *Survival Study* at 812-20.) The principal change recommended is to dispose of the interest of the beneficiary who dies before it becomes possessory as if the beneficiary held a nongeneral power of appointment over the future interest, rather than an ownership interest. The advantages of this approach are that it would avoid subjecting the property to taxation and probate expenses in the donee's estate and to the donee's creditors. This could be implemented by imposing a general survival requirement on the takers of all future interests, and then providing that the predeceasing beneficiary holds the nongeneral power.

Power of Appointment

The statutory special power of appointment given the predeceasing beneficiary avoids the tax and probate costs associated with a vested future interest. The beneficiary could be given the power to appoint to anyone other than the beneficiary's creditors, estate, or creditors of the estate. See Civil Code § 1381.2 (general and special powers defined); see also *Survival Study* at 820-21. The power of appointment can be restricted as a policy matter, but it makes the most sense to preserve the flexibility of this approach by excluding only the beneficiary's estate, creditors, and creditors of the estate. However, the power could be more limited. A list of permissible appointees that might be selected in a more limited statute is set out in the study. See *Survival Study* at 827.

Substitute Takers in Default of Exercise of Power of Appointment

If the beneficiary does not exercise the statutory power of appointment under this scheme, a limited group of takers in default should be provided by statute. Professor French suggests consideration of the following as takers in default:

1. Beneficiary's issue.
2. Surviving class members.
3. Beneficiary's heirs.
4. Beneficiary's devisees.
5. Donor's heirs.

[*Survival Study* at 827.] The choice among these default takers depends upon an assessment of what the average donor would want if the beneficiary has not exercised the power of appointment. Professor French suggests that it might be concluded that the beneficiary's heirs and devisees should take, but that it might also be concluded that only heirs should take in default if the beneficiary has failed to exercise the power of appointment. It might also be thought best to conform this default taker provision to that applicable under the antilapse statute, meaning that issue would take by right of representation. Assuming adoption of the power of appointment approach, the selection of appropriate default takers is a policy question to be resolved by the Commission. (For further analysis of the possible choices, see *Survival Study* at 827-30.)

Other Problems

Several additional problems are created by the recommended approach. These problems involve perpetuities, modification and termination of trusts, marketability of real property, and other matters. (See *Survival Study* at 821-23, 831-35.) Professor French suggests ways to deal with these problems and they should not inhibit adoption of the power of appointment scheme. If the Commission decides to pursue the recommended approach, detailed work will need to be done to resolve these problems.

Respectfully submitted,

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Exhibit 1

Relevant Statutes

Probate Code § 240. Representation

240. If a statute calls for property to be distributed or taken in the manner provided in this section, the property shall be divided into as many equal shares as there are living members of the nearest generation of issue then living and deceased members of that generation who leave issue then living, each living member of the nearest generation of issue then living receiving one share and the share of each deceased member of that generation who leaves issue then living being divided in the same manner among his or her then living issue.

Probate Code § 6146. Lapse

6146. (a) A devisee who fails to survive the testator or until any future time required by the will does not take under the will.

(b) In the absence of a contrary provision in the will:

(1) If it cannot be established by clear and convincing evidence that the devisee has survived the testator, it is deemed that the devisee did not survive the testator.

(2) If it cannot be established by clear and convincing evidence that the devisee survived until a future time required by the will, it is deemed that the devisee did not survive until the required future time.

Probate Code § 6147. Antilapse

6147. (a) As used in this section, "devisee" means a devisee who is kindred of the testator or kindred of a surviving, deceased, or former spouse of the testator.

(b) Subject to subdivision (c), if a devisee is dead when the will is executed, or is treated as if he or she predeceased the testator, or fails to survive the testator or until a future time required by the will, the issue of the deceased devisee take in his or her place in the manner provided in Section 240. A devisee under a class gift is a devisee for the purpose of this subdivision unless his or her death occurred before the execution of the will and that fact was known to the testator when the will was executed.

(c) The issue of a deceased devisee do not take in his or her place if the will expresses a contrary intention or a substitute disposition. A requirement that the initial devisee survive for a specified period of time after the death of the testator constitutes such a contrary intention. A requirement that the initial devisee survive until a future time that is related to the probate of the will or administration of the estate of the testator constitutes such a contrary intention.

Exhibit 2

PROBLEMS OF PREDECEASING BENEFICIARIES

American law in general, and California law in particular, provides an astounding array of substitute distributions when the intended beneficiary of a donative transfer dies before the transfer takes place or becomes possessory. These substitute dispositions become important only when the instrument of transfer fails to name an alternate beneficiary. The law provides a substitute dispositon for the transferor who fails to anticipate the possible death of the named beneficiary.

When beneficiaries of donative transfers die before the transfer becomes effective or before their interests become possessory, the property will be distributed as provided in the instrument of transfer. If the instrument fails to provide an alternate taker, the law provides one. Current California law provides at least five different distributions for donative transfers where the beneficiary dies prematurely.

When the instrument of transfer does not provide an answer, California law provides different distributions in the following situations: (1) the beneficiary under a will transfer dies before the testator; (2) the beneficiary of a non-probate transfer effective at death (other than a multiple-party account) dies before the donor/owner; (3) the beneficiary of a multiple-party account dies before the

original payee; (4) the beneficiary of a future interest created by a will dies before the interest becomes possessory; and, (5) the beneficiary of a future interest created by a non-probate transfer dies before the interest becomes possessory.

The major policy questions the Commission should address are (1) whether the same distribution should be provided for all cases; (2) which distribution or distributions should be selected; and (3) whether changes should be made in those distributions?

I. DEFAULT DISTRIBUTIONS PROVIDED BY CURRENT LAW

A. The Beneficiary of a Probate Transfer Dies Before the Testator: Lapse, Antilapse

If the beneficiary of a probate transfer dies before the testator, the devise to the beneficiary lapses. Unless the antilapse statute applies, the property devised passes first to surviving class members, if any, (but only if the devise is to a class), then to the surviving residuary takers, if any, and finally, to the testator's intestate takers. CPC Section 6148.

If the antilapse statute, CPC Section 6147, applies, the property passes to the surviving issue of the predeceasing devisee, if any.

The antilapse statute applies only if:

1. The devisee was kindred of the testator or of a surviving, deceased, or former spouse of the testator;

2. The devisee has issue surviving at the time of the testator's death;

3. The devisee was not required by the will to survive for a specified period of time after the death of the testator, or until a future time related to the probate of the will or administration of the estate; and

4. The will does not express a contrary intention.

Devises to spouses, friends, and relatives who leave no surviving issue lapse and pass to other takers under the will or by intestacy. If the will indicates an intent that the antilapse statute should not apply, or imposes either of the specified survival requirements, devises to relatives also lapse. When the antilapse statute applies, the default distribution is to the surviving issue of the predeceasing beneficiary.

B. The Beneficiary of a Non-Probate Transfer Effective at Death--Other Than Multiple-Party Account--Dies Before the Donor/Owner: Reversion

When the beneficiary of a non-probate transfer dies before the owner, and no alternate beneficiary is provided in the transfer document, the property is distributed to the owner's estate. This distribution applies only where the transfer is not intended to be effective until death of the

owner, as with life insurance, POD designations, and the like. It does not apply to non-probate transfers of future interests, which are discussed below. The default distribution provided by law for the non-probate transfer intended to be effective at death is to the estate of the donor/owner of the property, where the property will pass to the residuary or intestate takers. Although not technically a reversion, the disposition is characterized as such because the result is to leave the property in the donor's estate.

C. The Beneficiary of a Multiple-Party Account Dies Before the Original Payee: Survivors, Reversion

Distribution of multiple-party accounts on death of a named beneficiary prior to the death of the original payee of the account is governed by CPC Section 5302(b) and (c). If more than one beneficiary is named on a POD account, the account will be distributed to the surviving POD beneficiaries. The property is not distributed to the issue of the predeceasing beneficiary. If no POD beneficiary survives, the property will be distributed to the estate of the last of the original payees to die.

The provisions for distribution of trust accounts are the same as for POD accounts, except that the surviving beneficiary does not take the account if there is clear and convincing evidence of a contrary intent. Presumably in

that event, the share of the predeceasing beneficiary would be distributed to the estate of the owner/trustor.

D. The Beneficiary of a Future Interest Created by Probate Transfer Dies Before the Interest Vests in Possession: Vested Interest, Antilapse, Reversion

If the beneficiary of a future interest created by will is alive at the time the testator dies, or is born thereafter, but dies before the interest becomes possessory, the distribution of the property depends on whether the instrument subjects the beneficiary to a survival requirement. If there is no survival requirement, the property is characterized as a vested interest which will be distributed to the estate of the beneficiary.

If there is a survival requirement, the property will revert and be distributed to the testator's residuary or intestate takers, unless the antilapse statute applies under CPC Section 6147(b). Note that the survival requirement which calls for application of the antilapse statute is one which requires the beneficiary to survive to some future time that is not measured from the testator's death or related to the probate of the estate. If the beneficiary was related to the testator or to any spouse of the testator, died leaving issue, was required by the will to survive, and the will does not indicate a contrary intent, the surviving issue of the beneficiary will take the

property. Otherwise, the property goes to the residuary or intestate takers, or to their estates, if any of them have also died since the testator.

E. The Beneficiary of a Future Interest Created by Non-Probate Transfer Dies Before the Interest Vests in Possession: Vested Interest or Reversion

If the beneficiary of a future interest created by a non-probate transfer dies before the effective date of the transfer, the transfer is void, and there is a reversion to the donor. If the property is not otherwise disposed of, and it will pass into the donor's estate on the donor's death. If the beneficiary dies after the effective date of the transfer but before the interest becomes possessory, however, the disposition of the future interest is much the same as the future interest created by will, except that the antilapse statute does not apply.

If the instrument of transfer (usually a trust) imposes no survival requirement, the property will be distributed to the beneficiary's estate. If there is a survival requirement, and the property is not otherwise disposed of, the property will revert and pass to the donor's estate, where it will pass to the residuary or intestate takers, or their estates if they have also died after the donor. The antilapse statute does not apply to future interests created

by non-probate transfers, so that the property will not pass to the surviving issue of the beneficiary.

Summary of Default Distributions Provided by California Law

Will	Lapse	Surviving members of class Surviving residuary takers Intestate takers
Future Interest Created by Will w/ Survival Rqmt	Antilapse	Surviving issue of predeceasing beneficiary
Non-Probate	Reversion	Owner's estate (residuary or intestate takers)
Multiple-Party Account	Survivor	Surviving beneficiaries
Future Interest w/o Survival Requirement	Vested	Beneficiary's estate

TWO STUDIES BY PROFESSOR FRENCH

Antilapse Statutes Are Blunt Instruments: A Blueprint for Reform, 37 Hastings L.J. 335 (1985) (on pink paper). Cited as *Antilapse Study* in Memorandum 88-16.

Imposing a General Survival Requirement on Beneficiaries of Future Interests: Solving the Problems Caused by the Death of a Beneficiary Before the Time Set for Distribution, 27 Ariz. L. Rev. 801 (1985) (on yellow paper). Cited as *Survival Study* in Memorandum 88-16.