

## First Supplement to Memorandum 2001-62

### Rules of Construction for Trusts (Additional Comments on Tentative Recommendation)

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The Commission has received the following additional comments on its tentative recommendation on *Rules of Construction for Trusts and Other Instruments*.

	<i>Exhibit p.</i>
1. Jeffrey Dennis-Strathmeyer .....	1
2. State Bar Estate Planning, Trust and Probate Law Section .....	2

The new comments are analyzed below.

#### **Prob. Code § 21102. Intention of transferor**

##### *Extrinsic Evidence*

In Memorandum 2001-62, the staff proposes to augment Probate Code Section 21102 along the lines suggested by the Bar Association of San Francisco:

21102. (a) The intention of the transferor as expressed in the instrument controls the legal effect of the dispositions made in the instrument.

(b) The rules of construction expressed in this part apply where the intention of the transferor is not indicated by the instrument.

(c) Nothing in this section limits the use of extrinsic evidence, to the extent otherwise authorized by law, to determine the intention of the transferor.

The State Bar Estate Planning, Trust and Probate Law Section observes that existing case law permits liberal introduction of extrinsic evidence to prove the transferor's intent and to identify and explain ambiguities in the instrument. Therefore a provision along the lines of proposed subdivision (c) is unnecessary.

That having been said, the State Bar Section concludes, "While we see no obvious benefit from the addition of subsection (c) to Section 21102, we also see no obvious harm from the addition of the subsection as long as it is made clear in comments to the subsection that it is intended to provide statutory confirmation

of the development of case law in this area and not intended to alter the effect of case law in any way.” Exhibit p. 3.

That sounds like a reasonable approach to the staff. **We would revise the Comment as follows:**

Nothing in this section Subdivision (c) is added to make clear the admissibility of extrinsic evidence under this section. Subdivision (c) neither expands nor limits the extent to which extrinsic evidence admissible under former law may be used to determine the transferor’s intent as expressed in the instrument. See generally 12 B. Witkin, Summary of California Law Wills and Probate §§ 245-47, at 280-84 (9th ed. 1990). Cf. Section 6111.5 (will); Estate of Anderson, 56 Cal. App. 4th 235, 65 Cal. Rptr. 2d 307 (1997) (extrinsic evidence admissible). See also Section 12206 (limitation in will of time for administration of estate is directory only).

#### *Reformation for Mistake*

In Memorandum 2001-62, the staff recommends that the Comment to Section 21102 be revised to avoid any suggestion as to the specific circumstances in which California law may or may not allow reformation:

Thus under the parol evidence rule extrinsic evidence may be available to explain, interpret, or supplement an expressed intention of the transferor. Code Civ. Proc. § 1856. Likewise, the court has authority to reform an instrument for mistake or imperfection of writing to the extent otherwise authorized by law to effectuate the intention of the transferor. Cf. Code Civ. Proc. § 1856(e); Estate of Smith, 61 Cal. App. 4th 259, 71 Cal. Rptr. 2d 424 (1998) (contestant bears burden of proof of mistake as to testamentary intent). It should be noted that before granting reformation, courts require that the evidence of mistake be clear and convincing; reformation is denied, for example, if the donor’s testimony as to the transferor’s intention is equivocal and unsupported by disinterested witnesses. See W. McGovern, S. Kurtz & J. Rein, Wills, Trusts and Estates § 6.4 (1988).

The State Bar Section questions the advisability of addressing the issue of reformation of instruments in a Comment to a basic statutory provision governing the interpretation of instruments. “While this subject may be worthy of review on its merits by the Commission, we suggest that references to reformation of instruments be eliminated from the comments to Section 21102, whether or not a new subsection (c) is proposed.” Exhibit p. 3.

The staff thinks the point is a good one. The discussion in the Comment is gratuitous. **We would delete the discussion of reformation from the Comment.**

**Prob. Code § 21110. Anti-lapse**

The State Bar Section notes that it has not had an opportunity to review the proposals in Memorandum 2001-62 concerning this section, but will do so if additional time is allowed before the Commission finalizes a recommendation.

The staff has recommended that the Commission go slow on this recommendation and allow interested parties an opportunity to review any revised draft before taking final action in November. If the Commission adopts the staff recommendation, that will provide the State Bar Section the requested opportunity.

**Prob. Code § 21118. Satisfaction of pecuniary gift by property distribution**

Memorandum 2001-62 discusses the problems with Section 21118 identified by Jeff Strathmeyer, and concludes that the staff does not see how to cure the problems, other than by repealing the provision. The memorandum suggests the Commission solicit further input on the matter.

Mr. Strathmeyer has written to suggest one alternative:

21118. (a) If an instrument authorizes a fiduciary to satisfy a pecuniary gift wholly or partly by distribution of property other than money, property selected for that purpose shall be valued at its fair market value on the date of distribution, unless the instrument expressly provides otherwise. If the instrument permits the fiduciary to value the property selected for distribution as of a date other than the date of distribution, then, unless the instrument expressly provides otherwise, the property selected by the fiduciary for that purpose shall ~~have an aggregate fair market value on the date or dates of distribution that, when added to any cash distributed, will amount to no less than the amount of the pecuniary gift as stated in, or determined by, the instrument~~ fairly reflect net appreciation and depreciation (occurring between the valuation date and the date of distribution) in all of the assets from which the distribution could have been made.

(b) As used in this section, “pecuniary gift” means a transfer of property made in an instrument that either is expressly stated as a fixed dollar amount or is a dollar amount determinable by the provisions of the instrument.

**The staff suggests we insert this language into the draft recommendation for the purpose of obtaining reaction to it. We would add a Comment that this language is drawn from Reg. 26.2642-2(b)(2).**

Respectfully submitted,

Nathaniel Sterling  
Executive Secretary

Exhibit

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**RULES OF CONSTRUCTION FOR TRUSTS**

From: Jeffrey Dennis-Strathmeyer <Jeffrey.Dennis.Strathmeyer@ceb.ucop.edu>  
To: "Nat Sterling" <nsterling@clrc.ca.gov>  
Subject: Study L0605 Aug 31, 2001  
Date: Fri, 7 Sep 2001 14:21:09 -0700

The second sentence of 2118(a) currently states:

If the instrument permits the fiduciary to value the property selected for distribution as of a date other than the date of distribution, then, unless the instrument expressly provides otherwise, the property selected by the fiduciary for that purpose shall have an aggregate fair market value on the date or dates of distribution that, when added to any cash distributed, will amount to no less than the amount of the pecuniary gift as stated in, or determined, by the instrument.

As indicated in the cited Reporter material, this minimum worth provision is obsolete and contrary to GST regs. I would change the language in italics and somewhat quote Reg 26.2642-2(b)(2) to by instead providing:

\* \* \* for that purpose shall fairly reflect net appreciation and depreciation (occurring between the valuation date and the date of distribution) in all of the assets from which the distribution could have been made.

The alternative is to delete the provision entirely. Last I talked to Ed I think we were leaning in the direction of deletion, but I cannot recall whether we considered inserting a "fairly representative" solution.

**ESTATE PLANNING, TRUST AND  
PROBATE LAW SECTION  
THE STATE BAR OF CALIFORNIA**

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September 11, 2001

Nathaniel Sterling  
Executive Secretary  
California Law Revision Commission  
4000 Middlefield Road, Room D-1  
Palo Alto, CA 94303-4739

Re: Rules of Construction for Trusts

Dear Mr. Sterling:

On behalf of the Estate Planning, Trust and Probate Law Section, I would like to comment further on the California Law Revision Commission's Tentative Recommendation on the Rules of Construction for Trusts and Other Instruments, March 2001, and Memorandum 2001-62, which reports on comments received in response to the Tentative Recommendation. My comments elaborate on comments made on behalf of the Section in a letter by Donald R. Travers to you of December 12, 2000.

Probate Code §21102, Intention of Transferor.

At page 4 of the Tentative Recommendation, the Commission requested input on three questions:

"(1) Whether existing law is satisfactory concerning the extent to which extrinsic evidence may be admissible to explain dispositive provisions of an instrument or may be otherwise admissible to show the donor's intent."

"(2) Whether the explanation in the Comment is satisfactory concerning the authority of the court to reform an instrument for mistake or otherwise interpret the meaning of the instrument or the intention of the donor."

"(3) Whether the language of Section 22102 requires liberalization either to recognize the effect of existing law or to further enable use of extrinsic evidence in appropriate circumstances."

As set forth in our letter of December 12, 2000, the Section believes that present law, including long established precedent from both the California Supreme Court (e.g., *Estate of Russell* (1968) 69 Cal.2d 200; *Estate of Dodge* (1971) 6 Cal.3d 311; *Newman v. Wells Fargo Bank* (1996) 14 Cal.4th 126) and the lower appellate courts, permits the liberal introduction of extrinsic evidence to prove the transferor's intent and to identify and explain ambiguities in the instrument. As such, in response to Questions 1 and 3, we believe that existing law is satisfactory concerning the extent to which extrinsic evidence may be admissible to explain dispositive provisions of an instrument governed by Section 21102. We do not believe that the language of Section 21102 requires liberalization to facilitate the consideration of extrinsic evidence to explain the intent of the transferor. While we recognize that Section 21102 could be construed to limit unduly the use of extrinsic evidence in determining the transferor's intent, the appellate courts have not adopted such a construction of the statute. Thus, we do not see the need for a clarifying amendment such as the subsection (c) suggested in Memorandum 2001-62. While we see no obvious benefit from the addition of subsection (c) to Section 21102, we also see no obvious harm from the addition of the subsection as long as it is made clear in comments to the subsection that it is intended to provide statutory confirmation of the development of case law in this area and not intended to alter the effect of case law in any way.

As for Question 2, we question the advisability of addressing the issue of reformation of instruments in a comment to a basic statutory provision governing the interpretation of instruments. As noted in another comment to the Tentative Recommendation, there does not appear to be clear law in California concerning the circumstances under which the reformation of trusts should or should not be available. While this subject may be worthy of review on its merits by the Commission, we suggest that references to reformation of instruments be eliminated from the comments to Section 21102, whether or not a new subsection (c) is proposed.

Probate Code §21110. Anti-lapse.

We appreciate the consideration of our prior comments on this provision and regret that we have not had the time to consider the modifications suggested in Memorandum 2001-62. If an additional comment period is given, either before or after a final recommendation, we will attempt to explore this issue further and offer comments as appropriate.

Nathaniel Sterling  
September 13, 2001  
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I currently plan to attend the Commission meeting on September 20, 2001 on behalf of our committee. Thank you for your consideration of these comments.

Very truly yours,

  
Charles P. Wolff

cc: Warren A. Sinsheimer III  
Marshal A. Oldman  
Betty J. Orvell  
William E. Beamer  
Donald R. Travers

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