#L-626 10/21/83

First Supplement to Memorandum 83-91

Subject: Study L-626 - Probate Law and Procedure (Constructional Preference for Contingent Remainders)

Professor Jesse Dukeminier has written concerning some problems under new Section 6146 that provides a new rule of construction for wills. Under Section 6146, in the absence of a contrary intent expressed in the will, a devisee of a future interest takes nothing unless the devisee survives until the interest vests in possession. Thus if the will makes a gift to A for life, remainder to B, under the new rule B's remainder is contingent on B's surviving until the death of A. (If B does not survive and B is related to the testator, the new anti-lapse statute will make a substitute gift to B's surviving issue, if any. See Section 6147.) Under the old California rule, the Restatement, and general common law, B's remainder is vested: If B predeceases A, B's vested remainder is a part of B's estate, is subject to estate taxation, and passes under B's will or to B's heirs by intestate succession.

A copy of Professor Dukeminier's letter is attached to this Memorandum as Exhibit 1. Before discussing his points, however, we will take another look at the soundness of the new rule.

Evolution of New Rule

Old Section 123 of the Probate Code states a special application in the case of class gifts of the old constructional preference for vested remainders: The class includes every person answering the class description at the testator's death. If possession is postponed, the class may be enlarged by persons coming within the description before the time to which possession is postponed. In other words, the class may be enlarged after the testator's death by birth or adoption, but is not diminished by the death of class members. 7 B. Witkin, Summary of California Law Wills and Probate § 201, at 5712 (8th ed. 1974).

The old rule was thought to create unnecessary estate taxation, since the vested interest of a deceased class member would pass through that person's estate. Professors Dukeminier and Russell Niles suggested that we follow Pennsylvania and Massachusetts law by creating a rebuttable presumption that class membership is not determined until possession vests, thereby excluding those who fail to survive until that time.

The staff agrees that, with respect to class gifts, this is the better rule.

Eventually, however, the proposed new rule was redrafted to apply not only to class gifts, but to all future interests given by will. The staff has some concern that in so doing we may not have made the best policy choice.

Policy Options

What would the testator probably want concerning survival? The following are some policy options:

(1) Return to the old California rule by having B's remainder vest at the testator's death, whether the gift to B is as an individual or as a class member. Thus, if B predeceases A (the life tenant), B's interest will nonetheless be included and taxed in B's estate, and will pass under B's will or to B's heirs by intestate succession.

(2) Treat individual gifts of a future interest differently from class gifts so that an individual gift (to A for life, remainder to B) would be presumed to vest in B at the testator's death, while a class gift (to A for life, remainder to the testator's brothers and sisters of whom B is one) would be presumed to require B's survival until the death of A (subject to operation of the anti-lapse statute if B is related to the testator). Arguably this scheme may produce results most nearly consistent with that the testator would have wanted.

(3) Have B's remainder vest at the testator's death (whether an individual or a class gift), subject to defeasance if B dies before A without issue. If B does not die before A without issue, B may dispose of the future interest by will, presumably to B's family. If B does die before A without issue, the gift to B will fail. If the failed gift was an individual gift to B, it will probably pass under the residuary clause of the testator's will, presumably to the testator's family. If the failed gift was a class gift, the gift will pass to other class members (those who survive A, and those who predeceased A leaving issue). Professor Halbach thinks this is the result most testators would prefer, although this is not necessarily the result that he would personally prefer. This policy option has the drawback of requiring some complexity in drafting.

(4) Keep new Section 6146 under which B takes nothing unless B survives A. If B predeceases A leaving issue and B is related to the

testator, the new anti-lapse statute (Section 6147) makes a substitute gift to B's issue who take their interest directly from the testator's estate, without the undesirable feature of having that interest pass through the estate of B. (Under this rule, of course, B cannot dispose of the future interest by will during the life of A.) This policy option appears to be Professor Dukeminier's preference.

The staff is not in agreement as to what should be done. What is the Commission's view?

Problems Raised by Professor Dukeminier

Need for consistent rules applicable to all instruments, not just wills. Professor Dukeminier says that the new rules of construction should apply to all instruments, not just wills. The staff agrees with this view, although we cannot accomplish it in time for the 1984 legislative session. This should be a long-term project which we would work on as resources permit.

Rule against perpetuities. Professor Dukeminier points out that our new rule of construction in favor of contingent remainders causes potential problems with the rule against perpetuities. If we choose policy option (1) above by returning to the old rule favoring vested remainders, the perpetuities problem evaporates. If all or part of the new rule is to be kept, however, we will need to address the perpetuities problem. If Section 6146 is to be kept in its present form, the staff suggests that we follow one of the alternatives proposed by Professor Dukeminier to provide that the presumption in favor of a contingent remainder would not be made if the presumption would cause the interest to violate the rule against perpetuities:

> 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. For the purposes of this subdivision, unless a contrary intention is indicated by the will or unless the application of this rule of construction would cause the devise to violate the rule against perpetuities, a devisee of a future interest (including one in class gift form) is required by the will to survive to the time when the devise is to take effect in enjoyment.
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> Comment. Section 6146 is amended to provide that the rule of construction provided by the section is not to be applied if its application would cause the devise to violate the rule against perpetuities. See Civil Code § 715.2 (rule against perpetuities).

Technical problems. Professor Dukeminier points out that since Section 6146 says that a devisee of a "future interest" must survive, we

have inadvertently left room for the argument that it does not cover the case where the devisee is required to survive to a designated age to take, the theory being that the interest, like a remainder under the old rule, is a present (though nonpossessory) interest. Professor Dukeminier also says it may be argued that a gift of intermediate income until the devisee reaches a designated age means the devisee need not survive to that age to take. We would negate these readings of Section 6146 by adding the following to the Comment (subject to whatever policy decision the Commission makes regarding the substance of Section 6146):

> The constructional preference in favor of contingent remainders (survivorship required) rather than vested remainders (survivorship not required) established by Section 6146 is intended to include the case where the devisee is required to survive to a designated age to take, including the case where the devisee is entitled to the income from the property prior to reaching the designated age.

Respectfully submitted,

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October 10, 1983

Mr. John DeMoully
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94306

Dear John:

Re: New Probate Code §§ 6146 & 6147

New Probate Code § 6146 provides that "unless a contrary intention is indicated by the will, a devisee of a future interest (including one in class gift form) is required by the will to survive to the time when the devise is to take effect in enjoyment." Section 6147 provides that if a devisee does not survive, and is kindred of the testator or the testator's spouse, such devisee's issue take in his or her place by representation. Although I approve of this change, which requires a devisee of a future interest to survive to the time of possession, I can foresee some questions arising which you may wish to cover in commentary or amendment.

First, as your Memorandum 83-86 suggests, this new rule of construction should apply to all future interests, legal as well as equitable, and to all instruments, including deeds and inter vivos trusts, as well as wills. It makes no sense to assume that the transferor intends to require survivorship if a will is involved but not if an inter vivos conveyance is involved. The statutes need to be amended so that the same rule of construction is applied in all cases.

Second, with reference to the problem brought up by Professor Wellman in a letter attached to Memorandum 83-86, the New Mexico case Wellman has in mind is Portales National Bank v. Bellin, 98 N.M. 113, 645 P.2d 986 (1982). The case held that if T devises property in trust "for A for life, then to my child B," and B predeceases T, the lapse statute does not apply to B's remainder, because the UPC definition of devisee (Cal. AB 25, § 34) excludes the beneficiary of a trust from being a devisee. The trustee is the devisee under this definition. This definition should not be applied to lapse problems, where the trust beneficiary should be treated as the devisee. The statute should be amended to so provide.

Third, I believe one purpose of section 6146 is to abolish the rules of construction laid down in old Clobberie's Case. There the court held that if a bequest was made to A, to be paid at (or payable at) a given age, the gift was vested with possession postponed. If A died before

reaching the designated age, A's estate was entitled to the bequest. See 5 Am. Law Prop. § 21.18. Inasmuch as A is not entitled to present possession, A's interest is analytically a future interest (see R. Lynn, The Modern Rule Against Perpetuities 27 (1966)), and I believe that section 6146 applies so that A must survive to the designated age in order to take.

It is possible to argue, however, that this rule of Clobberie's Case has not been changed. The argument goes like this. A does not have a future interest, but a "present interest" which is vested. Then "present interest" is taken to mean "present possessory interest." Courts sometimes slip from a "presently vested interest" (which is what A's future interest is under Clobberie's Case) to a "present possessory interest," because they don't keep clearly in mind that a future interest is a present interest in the sense that it is an existing interest. Your commentary should make clear that the rule of construction provided in section 6146 applies where there are words of gift followed by words of payment.

Another rule of construction laid down in Clobberie's Case was that a gift of intermediate income until the donee reaches a designated age means that the donee is not required to survive to that age. See 5 Am. Law Prop. § 21.20. Your commentary should also point out that it is intended that section 6146 abolish this rule of construction as well.

Fourth, the new rule of construction laid down in section 6146 will cause some gifts to violate the Rule against Perpetuities that were previously valid. This is true because section 6146 rules out the preference for a "vested interest" construction and replaces it with a preference for a "contingent on survivorship" construction. Take this case: to A for life, then to A's children for life, then to B if B is living and if B is not living to B's children. Under old law the remainder to B's children was valid because it will vest in interest, if at all, at the death of B. Under the construction laid down in section 6146, the remainder to B's children is void because it remains contingent during the lives of B's children (who might be afterborns).

Another example of a gift previously valid that will be invalidated by the rule of construction in section 6146 is this: T bequeaths a fund in trust for A for life, then to pay the principal to the children of A when they reach 40, with income to the children in the meantime. A is unmarried and without children at T's death. Under Clobberie's Case, the gift to the children would vest in interest at A's death, if at all, and would be valid. Under section 6146 it is void because survival to age 40 is required. The gift may remain contingent more than 21 years after A's death.

Under Civil Code § 715.5, a court has power to reform an interest that violates the Rule against Perpetuities to give effect to the general intent of the transferor. You could amend section 6146 to provide that the presumption of a contingent interest would not be made where such presumption would cause the interest to violate the Rule against Perpetuities. Or you could amend Civil Code § 715.5 to provide what kind of

reformation a court will make when a gift violates the Rule. I prefer the latter approach, but if taken, the statute should cover all the usual situations of perpetuities violations and not just those caused by survivorship requirements. You could use Restatement (Second) of Property, Donative Transfers § 1.5 (1983) as a drafting guide. Ed Halbach served on the advisory committee to the Restatement. And I would be glad to help you on such a project.

Sincerely,

Jesse Dukeminier

Jesse Dukeminier
Professor of Law

JD/1051/bd
cc/Prof. Edward Halbach