Study L-605 August 22, 2000

# Memorandum 2000-75

## Rules of Construction for Trusts (Consultant's Study)

This memorandum replaces Memorandum 2000-50 and its First Supplement, which had been scheduled for the Commission's July 2000 meeting but were not considered. This memorandum integrates material from the two earlier memoranda, along with additional material developed since then.

The following items are attached to this memorandum:



Also relevant for consideration in connection with this memorandum is Professor McGovern's background study, *Rules of Construction: Probate Code Sections 21101-21140* (March 2000).

### BACKGROUND

During the decade of the 1980's the Law Revision Commission reviewed the entire Probate Code for the purpose of making improvements in probate procedures. The new Probate Code is the result of that project.

One feature of the Probate Code project was the enactment of modern rules of construction for wills. At the time that work was done, the Commission considered the possibility of extending the rules of construction to trusts and other estate planning instruments. And in fact the Commission retained Professor Susan French to prepare material on this subject. However, Professor French's work, focusing on the anti-lapse statute, revealed the complexities inherent in this endeavor. The entire project was deemed too substantial an undertaking at the time, and the Commission reserved the matter for future consideration.

Meanwhile, the State Bar Probate Section became active in the area. In 1994, legislation sponsored by the Probate Section was enacted, extending the existing rules of construction for wills to trusts and other instruments. See Probate Code §§ 21101-21140.

We now have experience under the new rules. Articles have been written critiquing them. The Commission has also received critical correspondence concerning them from both academics and practitioners, including the State Bar Probate Section's Estate Planning and Tax Committee.

The Commission concluded in 1998 to study this matter. We retained Professor William McGovern of UCLA Law School to prepare a background study on it. This spring Professor McGovern delivered his study, *Rules of Construction: Probate Code Sections 21101-21140* (March 2000). We circulated the study to interested persons for comment, and received the letters attached to this memorandum.

The memorandum summarizes Professor McGovern's findings in the background study and relevant responses or comments we have received. Our objective is to begin making basic policy decisions on the issues raised. We will develop a tentative recommendation to circulate for comment, before delivering to the Legislature a final recommendation on the matter.

At this point we are not particularly concerned about drafting conventions in the proposed statutory revisions. The staff will conform to standard California drafting style, and will provide draft Comments, in future iterations of this material.

For better understanding of the grouping of existing statutes, it is worth noting that Division 11 of the Probate Code — Construction of Wills, Trusts, and Other Instruments — imposes the following structure on the rules of interpretation:

Part 1. Rules of Interpretation
- Chapter 1. General Provisions (§§ 21101-21118)
- Chapter 2. Ascertaining the Meaning of Language Used in the Instrument (§§ 21120-21122)
- Chapter 3. Exoneration; Ademption (§§ 21131-21139)
- Chapter 4. Effective Dates (§ 21140)

## NOTES ON TERMINOLOGY AND GENERAL APPROACH

Before getting into the substance of the rules of construction, a couple of notes on terminology and general approach are appropriate.

**Terminology**

The rules of construction deal generally with donative transfers — gifts made by will, trust, or other instrument. Although the rules of construction do not use the term "donative transfer", they do refer to a "transfer", as well as to the "transferor" and "transferee". Some definitions are provided in the Probate Code:

> 81. "Transferor" means the testator, settlor, grantor, owner, or other person who executes an instrument.
>
> 81.5. "Transferee" means the beneficiary, donee, or other recipient of an interest transferred by an instrument.

(It is not clear why the alphabetical order of these two terms is reversed, while all other Probate Code definitions retain alphabetical order. See, e.g., §§ 29 (conservatee) and 30 (conservator).)

To fully appreciate the scope of these terms, the definitions of "instrument" and "beneficiary" should also be noted:

> 45. "Instrument" means a will, trust, deed, or other writing that designates a beneficiary or makes a donative transfer of property.
>
> 24. "Beneficiary" means a person to whom a donative transfer of property is made or that person's successor in interest, and:
> (a) As it relates to the intestate estate of a decedent, means an heir.
> (b) As it relates to the testate estate of a decedent, means a devisee.
> (c) As it relates to a trust, means a person who has any present or future interest, vested or contingent.
> (d) As it relates to a charitable trust, includes any person entitled to enforce the trust.

Unfortunately, the rules of construction we are about to consider employ these terms inconsistently. Throughout, variant terminology is interjected, such as "gift" in place of "transfer" and "beneficiary" in place of "transferee". Perhaps this is because "transfer" and "transferee" may be read to imply a completed

transaction, whereas such terms as "donative transfer" and "beneficiary" may be read to imply a prospective as well as a completed gift.

The staff is not necessarily inclined at this point to go through the statute systematically and try to clean it up using standard terminology consistently. For now, in reviewing these statutes the Commission should be conscious of the variant terms used, and their defined meanings.

(For an additional terminological issue posed by the rules of construction, see the discussion below of Section 21104 ("testamentary gift" defined).)

**General Approach**

The rules of construction are intended as aids to interpretation where the instrument being construed is silent or ambiguous as to a particular point. They are default rules in the sense that if the instrument is clear on the matter, they are inapplicable. See 21102(b) ("The rules of construction expressed in this part apply where the intention of the transferor is not indicated by the instrument.").

Suppose, however, that the instrument is silent on a point, but there is clear extrinsic evidence of what the donor's intent would have been, even though not expressed in the instrument. Should the rules of construction override the donor's intent and mandate a contrary result?

This matter is discussed below in connection with Section 21102(b). In that discussion it is concluded that the rules of construction should not apply where the donor's intent on the issue can be determined.

Assuming the Commission adopts this approach to the statute, that will affect our analysis of a number of the issues raised concerning the rules of construction. The rule adopted for any particular issue should be the rule most likely to be embraced by most donors. We should not be influenced by the fact that the rule would be inappropriate for some donors, since the rule can be overridden for those donors by a showing of their likely intent in the circumstances, even if not expressed in the instrument.

Professor McGovern's general philosophy is to minimize restrictive rules of construction and free the court to make the most appropriate determination of the donor's intent. This should be contrasted with the philosophy expressed in Mr. Deeringer's letter from a practitioner's perspective that the statutes should give maximum guidance, thereby minimizing litigation over these issues. The tension between these two philosophies is played out below.

**Prob. Code § 21101. Application of part**

Section 21101 extends the rules of construction to trusts, deeds, and other instruments for donative transfers. Professor McGovern does not believe it is necessary to address gifts made by delivery or nondonative transfers. He does, in the background study, suggest it is worth making clear that a rule of construction may be limited by its terms to a specific type of instrument, such as a revocable (as opposed to irrevocable) trust.

The staff thinks this result could be accomplished with minimal change to the statute and the addition of an appropriate Comment. Professor McGovern responds that this may be right. **The staff would revise Section 21101 and add a Comment as follows**:

> 21101. Unless the provision or context otherwise requires, this part ~~shall apply~~ applies to a will, trust, deed, and any other instrument.
>
> **Comment.** The amendment to Section 21101 is technical. The rules of construction in this part apply to a governing instrument of any type, except to the extent the application of a particular provision is limited by its terms to a specific type of donative disposition or governing instrument. See, e.g., Sections 21105 (application of section limited to will), 21109 (application of section limited to testamentary gift). See also Section 45 ("instrument" defined).

(We have made a technical change in the section not so much to conform with contemporary drafting style as to provide the Commission an opportunity for a Comment.)

**Prob. Code § 21102. Intention of transferor; rules of construction apply unless instrument indicates contrary intention**

As drafted, Section 21102 appears to prohibit use of extrinsic evidence to prove the transferor's intention where the instrument is ambiguous. This is inconsistent with modern theory as expressed in the academic literature, the Uniform Probate Code, and the Restatement of Property. Professor McGovern says, "Section 21102 as presently worded might bar reformation of inter-vivos instruments. This would be a regressive step which I do not think was intended." He would revise the section to provide:

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~~ in the absence of a finding of contrary intent by the transferor.

Rawlins Coffman (Exhibit p. 6) suggests that this change creates more problems than it cures. He thinks it needs to be reviewed with respect to its relationship, if any, to the parol evidence rule and the discretion of the court to exclude evidence.

Professor McGovern agrees that this is not the place to deal with the rules of evidence. The proposed language is designed simply to make clear that the possibility of reforming documents to correct mistakes is not precluded by this section. The parol evidence rule would allow this. Code Civ. Proc. § 1856(e).

The policy issue, as the staff sees it, comes down to this: We of course want to effectuate the decedent's intent. But if we invite a would-be heir to come to court notwithstanding clear language in the instrument and assert, for example, an alleged oral statement of contrary intent by the decedent, that would just facilitate fraudulent attacks on the estate. (The hold-up value, and cost of litigation, would as a practical matter force the estate to settle with anyone who chose to make a claim.)

Professor McGovern notes that, "This is a sharply debated issue." He recites precedents in California law that appear to go both ways on it, but concludes that the rules of construction should be subject to override by extrinsic evidence even if express statements in an instrument are not.

The approach recommended by Professor McGovern appears to the staff to be reasonable. Mr. Deeringer agrees that the law should "allow extrinsic evidence to override the rules of construction but not express statements of intent". Exhibit p. 11.

Whether the draft language proposed by Professor McGovern adequately captures the concept is a question. After reviewing the comments and drafts provided by Professor McGovern and Mr. Deeringer, **the staff suggests the following approach, including relevant commentary**:

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~~ do not apply to the extent a contrary intention of the transferor is ~~not indicated by~~ expressed in the instrument or is otherwise determined by the court.

**Comment.** Subdivision (b) of Section 21102 is amended to make clear that extrinsic evidence may be used to demonstrate an intention of the transferor contrary to the rules of construction in this part.

It should be noted that under subdivision (a), extrinsic evidence may also be available to explain, interpret, or supplement an expressed intention of the transferor. Cf. Code Civ. Proc. § 1856 (parol evidence rule). See also Prob. Code § 6111.5 (admissibility of extrinsic evidence to determine meaning of will). Likewise, nothing in subdivision (a) limits the authority of the court to reform an instrument for mistake or imperfection of writing. Cf. Code Civ. Proc. § 1856(c).

**Prob. Code § 21103. Choice of law as to meaning and effect of instrument**

While Professor McGovern is skeptical of allowing an instrument to designate the governing law in all cases, he thinks problems can be handled under the "public policy" exception of Section 21103. Therefore, he recommends no change in this statute.

21103. The meaning and legal effect of a disposition in an instrument shall be determined by the local law of a particular state selected by the transferor in the instrument unless the application of that law is contrary to the rights of the surviving spouse to community and quasi-community property, to any other public policy of this state applicable to the disposition, or, in the case of a will, Part 3 (commencing with Section 6500) of Division 6.

**Prob. Code § 21104. "Testamentary gift" defined**

This definition is used in several sections in the statute. Mr. Deeringer notes the anomalous use of the term "testamentary" gift to include a nontestamentary (nonprobate) transfer. He would at least make that usage more explicit in the statute.

21104. As used in this part, "testamentary gift" means a transfer in possession or enjoyment, including a nonprobate transfer, that takes effect at or after death.

Professor McGovern has no objection to this clarification. **The staff agrees.**

Mr. Deeringer would actually prefer to further revise the statute to replace the term "testamentary gift" with a more appropriate term, such as "at-death

transfer". (This is a term frequently used by attorneys and other estate planning professionals in the tax planning context.)

> 21104. As used in this part, ~~"testamentary gift"~~ "at-death transfer" means a transfer in possession or enjoyment that takes effect at or after death.

Mr. Deeringer notes that this term is not completely satisfactory either, since it may imply that only transfers of present interests and not future interests are covered. But it is preferable to "testamentary gift".

The staff is not sure "at-death transfer" is any better than "testamentary gift". It is certainly more awkward, and may have other unfortunate implications of his own. The staff suspects this is not a particularly critical matter — the term is used in only a few sections of existing law. Regardless of what term is ultimately selected, **the staff would add a Comment to each section in which the term appears, cross-referring to Section 21104 and noting the broad definition**. For example:

> 21135. (a) Property given by a transferor during ~~his or her~~ the transferor's lifetime to a beneficiary is treated as a satisfaction of a testamentary gift to that person in whole or in part only if one of the following conditions is satisfied:
>
> (1) The instrument provides for deduction of the lifetime gift from the testamentary gift.
>
> (2) The transferor declares in a contemporaneous writing that the transfer is to be deducted from the testamentary gift or is in satisfaction of the testamentary gift.
>
> (3) The transferee acknowledges in writing that the gift is in satisfaction of the testamentary gift.
>
> (b) Subject to subdivision (c), for the purpose of partial satisfaction, property given during lifetime is valued as of the time the transferee came into possession or enjoyment of the property or as of the time of death of the transferor, whichever occurs first.
>
> (c) If the value of the gift is expressed in the contemporaneous writing of the transferor, or in an acknowledgment of the transferee made contemporaneously with the gift, that value is conclusive in the division and distribution of the estate.
>
> **Comment.** Subdivision (a) Section 21135 is amended for purposes of clarification. It should be noted that, as used in this section, a "testamentary gift" is a transfer in possession or enjoyment, including a nonprobate transfer, that takes effect at or after death. See Section 21104 ("testamentary gift" defined).

(It is not clear why subdivision (a) of this section refers to a beneficiary rather than a transferee; probably it should be conformed to subdivisions (b) and (c).)

If the Commission decides to shift from "testamentary gift" to another term such as "at-death transfer", the staff will implement that change wherever the term occurs in the statute.

**Prob. Code § 21105. Will passes all property including after-acquired property**

Professor McGovern reluctantly accepts the concept that the after-acquired property provision should be limited to wills, since a pour over will may be used to put after-acquired property into a trust. He recommends no change in this provision.

> 21105. Except as provided in Sections 641 and 642, a will passes all property the testator owns at death, including property acquired after execution of the will.

The staff questions this recommendation. As Professor McGovern notes in his paper, "Changing the rule would be convenient for persons who use living trusts as a will substitute to dispose of all their property, and consistent with the general thrust of these provisions to assimilate wills and other instruments." He concludes that this change might "rock the boat too much." **The staff thinks we should investigate this concept before deciding to discard it.**

Professor McGovern offers the following draft if we wish to extend this provision:

> 21105. Except as provided in Sections 641 and 642, a ~~will passes~~ testamentary gift may pass all property the ~~testator~~ transferor owns at death, including property acquired after execution of the ~~will~~ instrument.

**Prob. Code § 21106. Transferees as owners in common**

Section 21106 provides:

> 21106. A transfer of property to more than one person vests the property in them as owners in common.

Professor McGovern's study notes that the general tenancy in common presumption should not apply in the case of a multiple party bank account, where the law presumes a right of survivorship is intended. He suggests amending the statute to recognize this.

The staff would not do this. As Professor McGovern points out, the Multiple-Party Accounts Law is not the only statute providing a special rule. As a matter

of statutory construction, the special will control over the general. We could simply refer to other controlling statutes in the Comment.

Professor McGovern offers as an alternative simply repealing Section 21106. He observes that, "The very fact that we have different rules for bank accounts, automobiles, etc., suggests that the subject is not appropriate for a general rule of construction as § 21106 purports to be." In any event, he thinks this is a matter for Civil Code, rather than Probate Code coverage.

The staff agrees that Section 21106 could be repealed without loss. Civil Code Section 686 states the same rule in a more complete form:

> 686. Every interest created in favor of several persons in their own right is an interest in common, unless acquired by them in partnership, for partnership purposes, or unless declared in its creation to be a joint interest, as provided in Section 683, or unless acquired as community property.

**We would repeal the section**:

> ~~21106. A transfer of property to more than one person vests the property in them as owners in common.~~
>
> **Comment.** Section 21106 is repealed as incomplete and unnecessary. See, e.g., Civ. Code § 686 (what interests are in common).

**Prob. Code § 21107. Direction in instrument to convert real property into money**

Professor McGovern notes that this section is declaratory of the common law, but does no harm. He does not recommend its repeal.

> 21107. If an instrument directs the conversion of real property into money at the transferor's death, the property and its proceeds shall be deemed personal property from the time of the transferor's death.

**Prob. Code § 21108. Common law doctrine of worthier title abolished**

Probate Code Section 21108 abolishes the common law doctrine of worthier title.

> 21108. The law of this state does not include (a) the common-law rule of worthier title that a transferor cannot devise an interest to his or her own heirs or (b) a presumption or rule of interpretation that a transferor does not intend, by a transfer to his or her own heirs or next of kin, to transfer an interest to them. The meaning of a transfer of a legal or equitable interest to a transferor's own heirs

or next of kin, however designated, shall be determined by the general rules applicable to the interpretation of instruments. This section applies to all cases in which a final judgment had not been entered as of September 18, 1959.

Professor McGovern notes that Civil Code Section 1073 duplicates Probate Code Section 21108. Since the issue really only arises in the context of trusts, he would keep Section 21108 and repeal Section 1073.

~~1073. The law of this State does not include (1) the common law rule of worthier title that a grantor cannot convey an interest to his own heirs or (2) a presumption or rule of interpretation that a grantor does not intend, by a grant to his own heirs or next of kin, to transfer an interest to them. The meaning of a grant of a legal or equitable interest to a grantor's own heirs or next of kin, however designated, shall be determined by the general rules applicable to the interpretation of grants. This section shall be applied in all cases in which final judgment has not been entered on its effective date.~~

The staff notes that this illustrates how much times have changed. Both Section 1073 and the predecessor of Section 21108 were enacted in 1959 on recommendation of the Law Revision Commission. At that time the Commission observed that, "The Probate Code provision is recommended only out of an abundance of caution since it is generally agreed that the American doctrine of worthier title does not apply to testamentary transfers." *Recommendation relating to The Doctrine of Worthier Title*, 2 Cal. L. Revision Comm'n Reports D-5 (1959).

**Prob. Code § 21109. Requirement that transferee survive transferor**

Professor McGovern points out that the survival requirement of Section 21109(a), while appropriate for wills and revocable trusts, does not work for irrevocable trusts and gifts — it would appear to void an absolute gift made during the donor's lifetime if the beneficiary later predeceases the donor. He also notes out that subdivisions (b) and (c) duplicate the "clear and convincing" requirement of Section 220, and should be repealed.

21109. ~~(a) A transferee~~ A beneficiary of a testamentary gift who fails to survive the transferor or until any future time required by the ~~instrument~~ gift does not take under the ~~instrument~~ gift.

~~(b) If it cannot be established by clear and convincing evidence that the transferee has survived the transferor, it is deemed that the beneficiary did not survive the transferor.~~

~~(c) If it cannot be established by clear and convincing evidence that the transferee survived until a future time required by the~~

~~instrument, it is deemed that the transferee did not survive until the required future time~~.

The application of the survival requirement to future interests he deals with in conjunction with Section 21110 (anti-lapse).

**Prob. Code § 21110. Anti-lapse**

Much of the debate over application of rules of construction to trusts and other nonprobate transfers revolves around the anti-lapse statute. The anti-lapse statute saves for the beneficiary's offspring a gift that would otherwise lapse due to the beneficiary's failure to survive the donor. (The anti-lapse statute only applies, though, if the beneficiary was kindred of the donor or of the donor's spouse).

> 21110. (a) Subject to subdivision (b), if a transferee is dead when the instrument is executed, or is treated as if the transferee predeceased the transferor, or fails to survive the transferor or until a future time required by the instrument, the issue of the deceased transferee take in the transferee's place in the manner provided in Section 240. A transferee under a class gift shall be a transferee for the purpose of this subdivision unless the transferee's death occurred before the execution of the instrument and that fact was known to the transferor when the instrument was executed.
>
> (b) The issue of a deceased transferee do not take in the transferee's place if the instrument expresses a contrary intention or a substitute disposition. A requirement that the initial transferee survive for a specified period of time after the death of the transferor constitutes a contrary intention. A requirement that the initial transferee survive until a future time that is related to the probate of the transferor's will or administration of the estate of the transferor constitutes a contrary intention.
>
> (c) As used in this section, "transferee" means a person who is kindred of the transferor or kindred of a surviving, deceased, or former spouse of the transferor.

A number of issues have been raised in connection with the anti-lapse statute.

**Express Requirement of Survival**

Do "mere words of survival" in an instrument indicate the donor's intention to override the statute — e.g., a gift "to my children who survive me"? Professor McGovern concludes that the better rule is that words of survival in the instrument should be subject to extrinsic evidence of the donor's intent.

Professor French agrees that the statute should not give preclusive effect to an express survival requirement — "there are too many situations in which failure to apply the antilapse statue would be likely to frustrate, rather than further, carrying out the donor's intent." Exhibit p. 8. She suggests addition of the following provision to the statute:

> Language of survival shall be given the following effect:
>
> (a) Survival language in a devise to lineal descendants of the testator shall not alone prevent application of this statute, if the result of lapse would be to disinherit a branch of the testator's lineal descendants.
>
> (b) Survival language alone in a devise to collateral relatives, relatives by marriage of the testator, or to other persons is sufficient to prevent application of this statute unless there is other persuasive evidence that the testator or settlor would not have intended the devise to lapse, or unless the result of lapse would be to pass the property to persons expressly disinherited by the will or to the state by escheat.

Mr. Deeringer reports that the State Bar Executive Committee overwhelmingly favors retaining existing California law on this point — namely, that an express requirement of survival indicates an intention that the anti-lapse rule not apply (at least to the extent that the instrument in question is lawyer-prepared). It is the Committee's experience that lawyers use language of survival purposefully to express the donor's actual intent. "Words of survivorship, *without more*, do not, in our experience, imply an intent to benefit the issue of a predeceased transferee." Exhibit, p. 12. Mr. Deeringer states that a change in the anti-lapse rule, particularly if applied retroactively, would create a great many administration problems and require the sale of tangible personal property in many cases where no such sale was contemplated by the transferor.

Mr. Deeringer notes that this concern relates primarily to attorney-drafted language of survival. However, he thinks that an effort to distinguish between attorney-drafted instruments and others would be difficult to effectuate, and a uniform rule that gives effect to survival language is probably preferable.

Professor McGovern indicates that existing law is not so clear as the State Bar suggests. The existing statute (Section 21110(b)) addresses a clause that requires survival for a specified time or for a time related to estate administration; the law is silent as to bare words of survival. Professor McGovern is also skeptical of Professor French's suggested language because of difficulties in its application.

He suggests as a compromise making clear that the anti-lapse statute does not apply if the transferor expressed a contrary intention, but providing no statutory presumptions for construing that intention. Under this approach the courts would figure out what the transferor intended, unrestricted by any rule of construction. In making its determination, a court could consider as relevant whether the instrument in question is attorney-drafted, and whether it would completely cut out a branch of the transferor's family, along with any other indicia of intent.

The staff thinks that court flexibility would be preferable to detailed rules of construction in this area. **We agree with Professor McGovern's suggested compromise approach, coupled with appropriate commentary**:

> (b) The issue of a deceased ~~transferee~~ beneficiary do not take in the ~~transferee's~~ beneficiary's place if the ~~instrument expresses~~ transferor expressed a contrary intention ~~or a substitute disposition. A requirement that the initial transferee survive for a specified period of time after the death of the transferor constitutes a contrary intention. A requirement that the initial transferee survive until a future time that is related to the probate of the transferor's will or administration of the estate of the transferor constitutes a contrary intention~~.
>
> **Comment.** Subdivision (b) of Section 21110 is revised to eliminate references to specific indicia of the transferor's intent. Matters the court might take into account in determining whether or not the transferor intended issue of a deceased beneficiary to take in the beneficiary's place may include such matters as whether the instrument makes a substitute disposition on failure of survival, whether survival is required for a specified period or for a time related to probate or administration, whether the instrument is attorney-drafted, whether the result of a survival requirement would be to disinherit a branch of the transferor's lineal descendants, whether the result of a survival requirement would be to pass property to persons expressly disinherited by the instrument or to the state by escheat, or other persuasive evidence of the transferor's likely intent.

**Application of Anti-Lapse Statute to Future Interests**

A hotly debated issue is whether the anti-lapse statute should extend to future interests. In the example of a gift "to A for life, remainder to B", what happens if B fails to survive A? The California anti-lapse statute is ambiguous as applied to this situation, and appears to give a different result depending on whether B is an individual (e.g., "my daughter") or a class (e.g., "my children").

Professor McGovern recites the arguments pro and con over this issue, including its impact on flexibility, trust termination, spousal protection, tax consequences, and the like. He would prefer a case by case approach in which the result depends on all the facts — i.e., no rule of construction at all. Absence of a rule of construction might produce litigation where a remainder beneficiary dies before a life beneficiary, but probably not much. Professor McGovern argues that the courts could use the freedom from rules of construction to produce sensible results which take all the circumstances of a case into account.

If the Commission is unwilling to abandon rules of construction in this area and thinks it is necessary to presumptively determine the transferor's intent, Professor McGovern comes down on the side of extending the anti-lapse statute to future interests — it would effectively convert the gift of a remainder to "children" into the gift of a remainder to "issue", which is probably generally in accord with the ordinary donor's intent.

> 21109. (b) A beneficiary of a future interest (including one in class gift form and including one designated in an irrevocable gift) is required to survive to the time when the gift is to take effect in enjoyment.
>
> 21110. ~~(c)~~ (a) As used in this section~~, "transferee"~~:
>
> (1) "Beneficiary" means a ~~person~~ beneficiary who is kindred of the transferor or kindred of a surviving, deceased, or former spouse of the transferor.
>
> (2) A beneficiary under a class gift is a beneficiary unless the beneficiary's death occurred before the execution of the instrument of transfer and that fact was known to the transferor when the instrument of transfer was executed.
>
> ~~(a)~~ (b) Subject to subdivision ~~(b)~~, (c), (1) if a ~~transferee~~ beneficiary of a testamentary gift is dead when the instrument of transfer is executed, or is treated as if the ~~transferee~~ beneficiary predeceased the transferor, or fails to survive the transferor or (2) if the beneficiary of a future interest in any gift fails to survive until a future time required by the instrument of transfer (as interpreted by the preceding section), the issue of the deceased ~~transferee take in the transferee's~~ beneficiary shall take in the beneficiary's place in the manner provided in Section 240. ~~A transferee under a class gift shall be a transferee for the purpose of this subdivision unless the transferee's death occurred before the execution of the instrument and that fact was known to the transferor when the instrument was executed.~~
>
> ~~(b)~~ (c) ...

Mr. Deeringer agrees with Professor McGovern's position, and suggests only a few minor changes in wording.

Professor Dukeminier disagrees with this approach. See Exhibit pp. 1-5. He notes that under traditional principles, the remainder interest following a life estate is vested when the interest is created, and the holder of the remainder interest can dispose of it by will, appointment, or otherwise. Application of the anti-lapse statute would divest the predeceased holder of the remainder of this ability, and send the interest to the holder's issue. He argues that leaving flexibility in the holder of the remainder is desirable, and mirrors what an expert estate planner would do. The law should be changed to make a remainder contingent on survival only if it also gives the holder of the remainder a special power of appointment. "The fundamental issue here is whether the remainderman predeceasing the life tenant should be deprived of control of the remainder. The common law has given control to the remainderman and has worked satisfactorily for a very long time. I would not change it to diminish flexibility in estate planning, which experience has shown to be so important to a family's welfare." Exhibit p. 4.

Professor French's views coincide with Professor Dukeminier's. See Exhibit pp. 7-8. She argues that if the donor has not expressly limited succession to the beneficiary's issue, or made another disposition of the property in the event of the beneficiary's death before the date of distribution, it is likely that the donor would have wanted the remainder beneficiary to control the property's disposition. The alternative under the anti-lapse statute would confine distribution to the beneficiary's issue or cause a forfeiture if the beneficiary died without issue. Professor French points out that an automatic gift to the beneficiary's issue via the anti-lapse statute has a number of disadvantages, particularly where the issue are minor children. For example, the beneficiary would be unable to give the property to the other parent of the children, or put the property in a trust, or accommodate the special needs of a disabled child. Rather, the property will be tied up in conservatorships, and distributed outright to the children at age 18.

Professor French proposes a dual scheme — revocable future interests would be subject to anti-lapse treatment, but irrevocable future interests would be treated as being coupled with a special power of appointment. She suggests that we:

- Treat future interests revocable by the grantor and expectancies in wills the same, and apply our standard anti-lapse treatment to both.
- Treat all other future interests that have not yet vested in possession as special powers of appointment given to the beneficiary to appoint to anyone other than the beneficiary, the beneficiary's creditors, the beneficiary's estate, or creditors of the beneficiary's estate. There should be a gift in default to the beneficiary's issue, and a reversion to the grantor or grantor's estate in the event the beneficiary dies before the interest vests in possession without having exercised the power and without issue.

Professor McGovern notes a number of drawbacks to this approach:

(1) Giving remainder beneficiaries a broad power of appointment would allow them to appoint to their spouses. "Some would find this desirable, others not." Exhibit p. 18.

(2) Because the statute would need to make a gift in default of appointment to the issue of the remainder beneficiary, "the (actual or potential) issue of the remaindermen would continue to have a beneficial interest in trusts, and this would pose an obstacle to their termination." Exhibit p. 18.

(3) The flexibility of the power of appointment in the remainder beneficiary is limited — the remainder beneficiary, having predeceased the life tenant, will not be in a position to appoint appropriately at the life tenant's death. (It should be noted that the instrument drafter could give the life tenant a power of appointment, so that the remainder beneficiary's exercise of the power only comes into play if the life tenant fails to exercise it.)

To put this matter in perspective, Professor McGovern indicates that in his opinion the question is not as significant as the amount of debate over it would suggest. The issue arises infrequently, perhaps because of drafters' use of form books that adequately address it, and perhaps because in the ordinary case the bottom line in terms of inheritance by beneficiaries comes out about the same either way.

**Prob. Code § 21111. Failure of transfer**

Section 21111 excepts future interests from its operation, leaving them in limbo. Professor McGovern would eliminate this exception — it causes problems without accomplishing a useful result.

21111. Except as provided in Section 21110:

(a) If a transfer, other than a residuary gift ~~or a transfer of a future interest~~, fails for any reason, the property transferred becomes a part of the residue transferred under the instrument.

(b) If a residuary gift ~~or a future interest~~ is transferred to two or more persons and the share of a transferee fails for any reason, the share passes to the other transferees in proportion to their other interest in the residuary gift ~~or the future interest~~.

He would also make clear that a devise of the decedent's entire estate is treated as a residuary gift for purposes of application of the section. This would end a potentially endless loop in the statute.

(c) A devise of "all my estate" or words of similar import constitutes a residuary gift for purposes of this section.

**Prob. Code § 21112. Conditions referring to "issue"**

Professor McGovern notes that Section 21112 overlaps Civil Code Section 1071.

21112. A condition in a transfer of a present or future interest that refers to a person's death "with" or "without" issue, or to a person's "having" or "leaving" issue or no issue, or a condition based on words of similar import, is construed to refer to that person's being dead at the time the transfer takes effect in enjoyment and to his or her either having or not having, as the case may be, issue who are alive at the time of enjoyment.

He recommends repeal of Section 1071, in order to consolidate all relevant rules of construction in the Probate Code.

~~1071. Where a future interest is limited by a grant to take effect on the death of any person without heirs, or heirs of his body, or without issue, or in equivalent words, such words must be taken to mean successors, or issue living at the death of the person named as ancestor.~~

**Prob. Code § 21113. Afterborn member of class**

Professor McGovern notes that Section 21113 inadequately codifies the common law "rule of convenience", failing to include its common law exceptions. The Second Restatement of Property §§ 26.1-26.2 is a more accurate statement of the rule. He recommends that this section be repealed.

~~21113. (a) A transfer of a present interest to a class includes all persons answering the class description at the transferor's death.~~

~~(b) A transfer of a future interest to a class includes all persons answering the class description at the time the transfer is to take effect in enjoyment.~~

~~(c) A person conceived before but born after the transferor's death or after the time the transfer takes effect in enjoyment takes if the person answers the class description.~~

**Prob. Code § 21114. Class gift to "heirs", "next of kin", "relatives", or the like**

Professor McGovern notes that Section 21114 is similar to the parallel provision of the Uniform Probate Code, but the Uniform provision covers a number of issues that are unclear under California law. He would conform the California statute to the Uniform provision.

21114. ~~A transfer of a present or future interest to the transferor's or another~~ If an applicable statute or a governing instrument calls for a future distribution to or creates a future interest in a designated person's "heirs," "heirs at law" "next of kin," "relatives," or "family," or ~~to "the persons entitled thereto under the intestate succession laws," or to persons described by words~~ language of similar import, ~~is a transfer to those who would be the transferor's or other designated person's heirs, their identities and respective shares shall be determined as if the transferor or other designated person were to die intestate at the time when the transfer~~ the property passes to those persons, including the state under Section 6800, and in such shares as would succeed to the designated individual's intestate estate under the intestate succession law of the designated individual's domicile if the designated individual died when the donative disposition is to take effect in possession or enjoyment ~~and according to the California statutes of intestate succession of property not acquired from a predeceased spouse in effect at that time~~. If the designated person's surviving spouse is living but is remarried at the time the ~~transfer~~ interest is to take effect in possession or enjoyment, the surviving spouse is not an heir of the designated person for purposes of this section.

**Prob. Code § 21115. Halfbloods, adopted persons, persons born out of wedlock, stepchildren, and foster children**

Professor McGovern suggests that the same choice of law rules should apply under Section 21115 as under 21114 — heirs are determined in accordance with the law applicable at the time the transfer is to take effect in enjoyment. (Using different choice of law rules in the determination of "heirs" and "issue" makes no sense.)

21115. (a) Except as provided in subdivision (b), halfbloods, adopted persons, persons born out of wedlock, stepchildren, foster children, and the issue of these persons when appropriate to the class, are included in terms of class gift or relationship in accordance with the rules for determining relationship and inheritance rights for purposes of intestate succession.

(b) In construing a transfer by a transferor who is not the natural parent, a person born to the natural parent shall not be considered the child of that parent unless the person lived while a minor as a regular member of the household of the natural parent or of that parent's parent, brother, sister, spouse, or surviving spouse. In construing a transfer by a transferor who is not the adoptive parent, a person adopted by the adoptive parent shall not be considered the child of that parent unless the person lived while a minor (either before or after the adoption) as a regular member of the household of the adopting parent or of that parent's parent, brother, sister, or surviving spouse.

(c) Subdivisions (a) and (b) shall also apply in determining:

(1) Persons who would be kindred of the transferor or kindred of a surviving, deceased, or former spouse of the transferor under Section 21110.

(2) Persons to be included as issue of a deceased transferee under Section 21110.

(3) Persons who would be the transferor's or other designated person's heirs under Section 21114.

(d) The rules for determining intestate succession under this section shall be those in effect at the time the transfer is to take effect in enjoyment.

**Prob. Code § 21116. Vesting of testamentary disposition**

Professor McGovern recommends repeal of Section 21116. It codifies a presumption in favor of early vesting which limits the ability of the courts to consider all the circumstances in construing the intent of an instrument.

~~21116. A testamentary disposition by an instrument, including a transfer to a person on attaining majority, is presumed to vest at the transferor's death.~~

Mr. Deeringer initially questions the suggested repeal of Section 21116. However, after working through various drafts, he concludes that Professor McGovern is probably correct and we do not need the section at all.

**Prob. Code § 21117. Classification of testamentary gifts**

Professor McGovern makes no recommendation with respect to Section 21117.

> 21117. Testamentary gifts are classified as follows:
>
> (a) A specific gift is a transfer of specifically identifiable property.
>
> (b) A general gift is a transfer from the general assets of the transferor that does not give specific property.
>
> (c) A demonstrative gift is a general gift that specifies the fund or property from which the transfer is primarily to be made.
>
> (d) A general pecuniary gift is a pecuniary gift within the meaning of Section 21118.
>
> (e) An annuity is a general pecuniary gift that is payable periodically.
>
> (f) A residuary gift is a transfer of property that remains after all specific and general gifts have been satisfied.

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

Professor McGovern makes no recommendation with respect to Section 21118.

> 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.
>
> (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.

## CHAPTER 2. ASCERTAINING THE MEANING OF LANGUAGE USED IN THE INSTRUMENT (§§ 21120-21122)

### Prob. Code § 21120. Every expression given some effect; intestacy avoided

Professor McGovern's study notes the application of Section 21120 primarily to wills. Mr. Deeringer thinks it would be helpful to rewrite the provision so that the principle applies to transfers by trust as well as by will:

> 21120. The words of an instrument are to receive an interpretation that will give every expression some effect, rather than one that will render any of the expressions inoperative. Preference is to be given to an interpretation of an instrument that will prevent ~~intestacy~~ failure of a transfer, rather than one that will result in ~~an intestacy~~ failure of a transfer.

Professor McGovern has no objection to such an extension.

### Prob. Code § 21121. Construction of instrument as a whole

Professor McGovern makes no recommendation with respect to Section 21121.

> 21121. All the parts of an instrument are to be construed in relation to each other and so as, if possible, to form a consistent whole. If the meaning of any part of an instrument is ambiguous or doubtful, it may be explained by any reference to or recital of that part in another part of the instrument.

The staff observes that, depending on what action the Commission takes with respect to use of extrinsic evidence in ascertaining intent, a conforming revision may be needed in this statute.

### Prob. Code § 21122. Words given their ordinary meaning; technical words

Professor McGovern makes no recommendation with respect to Section 21122.

> 21122. The words of an instrument are to be given their ordinary and grammatical meaning unless the intention to use them in another sense is clear and their intended meaning can be ascertained. Technical words are not necessary to give effect to a disposition in an instrument. Technical words in an instrument are to be considered as having been used in their technical sense unless (a) the context clearly indicates a contrary intention or (b) it satisfactorily appears that the instrument was drawn solely by the

transferor and that the transferor was unacquainted with the technical sense.

## CHAPTER 3. EXONERATION; ADEMPTION (§§ 21131-21139)

### Prob. Code § 21131. No exoneration

Professor McGovern notes questions about the scope of Section 21131, but recommends no change in the provision.

> 21131. A specific gift passes the property transferred subject to any mortgage, deed of trust, or other lien existing at the date of death, without right of exoneration, regardless of a general directive to pay debts contained in the instrument of transfer.

### Prob. Code § 21132. Change in form of securities

Professor McGovern observes that Section 21132 is problematic in that it is based on the troublesome special versus general gift distinction. He recommends the section (which originally was based on a Uniform Probate Code provision) be replaced by the latest generation Uniform Probate Code provision, which is appropriately limited to wills.

> ~~21132. (a) If the transferor intended a specific gift of certain securities rather than the equivalent value thereof, the beneficiary of the specific gift is entitled only to:~~
>
> ~~(1) As much of the transferred securities as is a part of the estate at the time of the transferor's death.~~
>
> ~~(2) Any additional or other securities of the same entity owned by the transferor by reason of action initiated by the entity excluding any acquired by exercise of purchase options.~~
>
> ~~(3) Securities of another entity owned by the transferor as a result of a merger, consolidation, reorganization or other similar action initiated by the entity.~~
>
> ~~(4) Any additional securities of the entity owned by the transferor as a result of a plan of reinvestment if it is a regulated investment company.~~
>
> ~~(b) Distributions prior to death with respect to a security specifically given and not provided for in subdivision (a) are not part of the specific gift.~~
>
> 21132, (a) If a testator executes a will that devises securities and the testator then owned securities that meet the description in the will, the devise includes additional securities owned by the testator at death to the extent the additional securities were acquired by the

testator after the will was executed as a result of the testator's ownership of the described securities and are securities of any of the following types:

(1) securities of the same organization acquired by reason of action initiated by the organization or any successor, related, or acquiring organization, excluding any acquired by exercise of purchase options;

(2) securities of another organization acquired as a result of a merger, consolidation, reorganization, or other distribution by the organization or any successor, related, or acquiring organization; or

(3) securities of the same organization acquired as a result of a plan of reinvestment.

(b) Distributions in cash before death with respect to a described security are not part of the devise.

**Prob. Code § 21133. Unpaid proceeds of sale, condemnation, or insurance; property obtained as a result of foreclosure**

Professor McGovern would repeal Section 21133. California case law on ademption is adequate and would effectuate the donor's intent. This provision no longer serves a useful purpose.

Mr. Deeringer agrees with the premise, but not the conclusion — "The virtue of specific statutes such as [§ 21133] is that they foreclose litigation (and even the necessity of uncontested petitions for orders determining entitlement to distribution) by leaving no doubt as to the proper result in such cases." Exhibit p. 14. Unless the California courts have unambiguously and uniformly ruled on each of the questions presented in the section, he would not repeal it.

21133. A recipient of a specific gift has the right to the remaining property specifically given and all of the following:

(a) Any balance of the purchase price (together with any security interest) owing from a purchaser to the transferor at death by reason of sale of the property.

(b) Any amount of an eminent domain award for the taking of the property unpaid at death.

(c) Any proceeds unpaid at death on fire or casualty insurance on the property.

(d) Property owned by the transferor at death as a result of foreclosure, or obtained in lieu of foreclosure, of the security for a specifically given obligation.

Professor McGovern mildly disagrees with Mr. Deeringer's analysis. He does not think the statute conforms to the likely intent of the transferor in all cases. For example, where the transferor executes an instrument making a gift of specific

property to a beneficiary and then sells the same property, in some circumstances it will be clear that the transferor would have preferred the proceeds of sale to go with the residuary trust rather than to the beneficiary originally designated to receive the specific property. But Section 21133(a) frustrates that intent.

The staff thinks the resolution of this issue hinges on the effect given the rules of construction — are they absolute or merely presumptive? can they be overridden by evidence of the transferor's likely intent? The virtue of rules such as this, from Mr. Deeringer's perspective, is that they provide answers without the need for litigation.

The best approach, in the staff's opinion, is to provide default rules that suit the most common situation. These rules would have presumptive effect, but may be overridden by a showing of contrary intent. If the Commission adopts that approach (see discussion above under "General Approach"), **this would argue for perhaps leaving the section in place, accompanied by qualifying language in the Comment**.

**Prob. Code § 21134. Sale by conservator; payment of proceeds of specifically devised property to conservator**

Professor McGovern would repeal Section 21134 on the same basis as Section 21133. Mr. Deeringer objects for the same reason.

> 21134. (a) Except as otherwise provided in this section, if specifically given property is sold by a conservator, the beneficiary of the specific gift has the right to a general pecuniary gift equal to the net sale price of the property.
>
> (b) Except as otherwise provided in this section, if an eminent domain award for the taking of specifically given property is paid to a conservator, or if the proceeds on fire or casualty insurance on specifically gifted property are paid to a conservator, the recipient of the specific gift has the right to a general pecuniary gift equal to the eminent domain award or the insurance proceeds.
>
> (c) This section does not apply if, after the sale, condemnation, fire, or casualty, the conservatorship is terminated and the transferor survives the termination by one year.
>
> (d) The right of the beneficiary of the specific gift under this section shall be reduced by any right the beneficiary has under Section 21133.

Professor McGovern does not think the statute conforms to the likely intent of the transferor in all cases. Take, for example, the case where the transferor executes an instrument making a gift of specific property to a beneficiary and

later the transferor's agent under a durable power of attorney sells the property. Is there a reason to treat the proceeds of sale in that situation differently from the situation where the transferor's conservator sells the property? But Section 21134, by limiting its application to sales by a conservator could be read to imply a different result for sales by an agent. Professor McGovern thinks we're just better off without Section 21134.

Once again, the staff thinks the resolution of this issue hinges on the effect given the rules of construction. The best approach, in the staff's opinion, is to provide default rules that suit the most common situation. **This would argue for perhaps leaving the section in place, accompanied by qualifying language in the Comment.** See discussion above in connection with Section 21133.

**Prob. Code § 21135. Ademption by satisfaction**

Section 21135 provides a rule on advancements. There is a comparable statute applicable in intestate estates — Section 6409.

> 21135. (a) Property given by a transferor during his or her lifetime to a beneficiary is treated as a satisfaction of a testamentary gift to that person in whole or in part only if one of the following conditions is satisfied:
>
> (1) The instrument provides for deduction of the lifetime gift from the testamentary gift.
>
> (2) The transferor declares in a contemporaneous writing that the transfer is to be deducted from the testamentary gift or is in satisfaction of the testamentary gift.
>
> (3) The transferee acknowledges in writing that the gift is in satisfaction of the testamentary gift.
>
> (b) Subject to subdivision (c), for the purpose of partial satisfaction, property given during lifetime is valued as of the time the transferee came into possession or enjoyment of the property or as of the time of death of the transferor, whichever occurs first.
>
> (c) If the value of the gift is expressed in the contemporaneous writing of the transferor, or in an acknowledgment of the transferee made contemporaneously with the gift, that value is conclusive in the division and distribution of the estate.

> 6409. (a) If a person dies intestate as to all or part of his or her estate, property the decedent gave during lifetime to an heir is treated as an advancement against that heir's share of the intestate estate only if one of the following conditions is satisfied:
>
> (1) The decedent declares in a contemporaneous writing that the gift is to be deducted from the heir's share of the estate or that the gift is an advancement against the heir's share of the estate.

(2) The heir acknowledges in writing that the gift is to be so deducted or is an advancement.

(b) Subject to subdivision (c), the property advanced is to be valued as of the time the heir came into possession or enjoyment of the property or as of the time of death of the decedent, whichever occurs first.

(c) If the value of the property advanced is expressed in the contemporaneous writing of the decedent, or in an acknowledgment of the heir made contemporaneously with the advancement, that value is conclusive in the division and distribution of the intestate estate.

(d) If the recipient of the property advanced fails to survive the decedent, the property is not taken into account in computing the intestate share to be received by the recipient's issue unless the declaration or acknowledgment provides otherwise.

Professor McGovern thinks that Section 21135 is unnecessary and imposes an obstacle to ascertaining intent that does not exist at common law. He would repeal the provision, as well as Section 6409.

Mr. Deeringer would not want to see Section 21135 repealed — the premature satisfaction problem arises frequently and justifies this sort of specific treatment. "The specificity of this section has no doubt prevented much litigation." Exhibit p. 14. He suggests that the concern about ascertaining the transferor's intent could be addressed by expanding the provision:

21135. (a) Property given by a transferor during his or her lifetime to a beneficiary is treated as a satisfaction of a testamentary gift to that person in whole or in part only if one of the following conditions is satisfied:

(1) The instrument provides for deduction of the lifetime gift from the testamentary gift.

(2) The transferor declares in a contemporaneous writing that the transfer is to be deducted from the testamentary gift or is in satisfaction of the testamentary gift.

(3) The transferee acknowledges in writing that the gift is in satisfaction of the testamentary gift.

(4) A court finds that the lifetime transfer was intended by the transferor to be in satisfaction of the testamentary gift.

(b) Subject to subdivision (c), for the purpose of partial satisfaction, property given during lifetime is valued as of the time the transferee came into possession or enjoyment of the property or as of the time of death of the transferor, whichever occurs first.

(c) If the value of the gift is expressed in the contemporaneous writing of the transferor, or in an acknowledgment of the transferee

made contemporaneously with the gift, that value is conclusive in the division and distribution of the estate.

Professor McGovern thinks that the proposed addition of paragraph (4) simply swallows the rule — what's the point of saying that the transferor's intent is to be determined both if it is in a writing (paragraphs (1)-(3)) and whether or not it is in a writing (paragraph (4))?

The staff notes that there is more to this section than the determination of the donor's intent with respect to satisfaction. Subdivisions (b) and (c) also provide rules on valuation. It is possible that they merely codify the common law. However, **there may be some virtue to making that codification readily available here**.

**Prob. Code § 21136. Contract for sale or transfer of specifically "devised" property**

Professor McGovern would repeal Section 21136. California case law on ademption is adequate and would effectuate the donor's intent. This provision no longer serves a useful purpose.

~~21136. If the transferor after execution of the transfer instrument enters into an agreement for the sale or transfer of specifically given property, the beneficiary of the specific gift has the right to the property subject to the remedies of the purchaser or transferee.~~

**Prob. Code § 21137. Transferor placing charge or encumbrance on specifically "devised" property**

Professor McGovern would repeal Section 21137. California case law on ademption is adequate and would effectuate the donor's intent. This provision no longer serves a useful purpose.

~~21137. If the transferor after execution of the transfer instrument places a charge or encumbrance on specifically given property for the purpose of securing the payment of money or the performance of any covenant or agreement, the beneficiary of the specific gift has the right to the property subject to the charge or encumbrance.~~

**Prob. Code § 21138. Act of transferor altering transferor's interest in specifically "devised" property**

Professor McGovern would repeal Section 21138. California case law on ademption is adequate and would effectuate the donor's intent. This provision no longer serves a useful purpose.

~~21138. If the transferor after execution of the transfer instrument alters, but does not wholly divest, the transferor's interest in property that is specifically given by a conveyance, settlement, or other act, the beneficiary of the specific gift has the right to the remaining interest of the transferor in the property.~~

**Prob. Code § 21139. Rules stated in Sections 21133 to 21138 not exhaustive**

Professor McGovern would repeal Section 21139. California case law on ademption is adequate and would effectuate the donor's intent. This provision no longer serves a useful purpose.

~~21139. The rules stated in Sections 21133 to 21138, inclusive, are not exhaustive, and nothing in those sections is intended to increase the incidence of ademption under the law of this state.~~

The staff notes that we may wish to retain a version of this provision, depending on the Commission's action on other provisions of this chapter.

CHAPTER 4. EFFECTIVE DATES (§ 21140)

**Prob. Code § 21140. Effective dates**

Professor McGovern believes in retroactive application of statutes. The statutes referred to in subdivision (b) apply in very few cases (the effect of advancements to an heir in determining the heir's intestate share), and he would eliminate that complexity from the law.

21140. ~~(a) Except as otherwise provided and subject to subdivision (b), this~~ <u>This</u> part applies to all instruments, regardless of when they were executed.

~~(b) The repeal of former Sections 1050, 1051, 1052, and 1053 and the amendment of former Section 1054, by Chapter 842 of the Statutes of 1983, do not apply to cases where the decedent died before January 1, 1985. If the decedent died before January 1, 1985, the case is governed by the former provisions as they would exist had Chapter 842 of the Statutes of 1983 not been enacted.~~

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

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June 20, 2000



Mr. Nathaniel Sterling
Executive Secretary
California Law Revision Commission
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Dear Nat:

RE: Commission Background Study L-605;
Rules of Construction

Thank you for sending me a copy of my colleague Bill McGovern's thoughtful background study of Rules of Construction: Probate Code Sections 21101-21140. I generally agree with Professor McGovern's recommendations, save one. I am opposed to the adoption of Uniform Probate Code § 2-707, which McGovern "mildly" favors and which is discussed at pages 10-22 of his study.

Under the common law, a remainder to a given person vests upon creation, unless it is expressly made contingent upon surviving the life tenant. If the remainderman predeceases the life tenant, the remainderman can control the disposition of the remainder.

Under Uniform Probate Code § 2-707, unless the instrument provides otherwise, the following rules apply.

(1) All future interests in trust are contingent on the beneficiary's surviving to the date of distribution.
(2) If a remainderman does not survive to the distribution date, UPC § 2-707 creates a substitute gift in the remainderman's descendants who survive the date of distribution.
(3) If a remainderman dies before distribution and leaves no descendants, the remainder fails, and, if there is no alternative remainder that takes effect, the trust property passes to the settlor's residuary devisees or the settlor's heirs.
(4) If the trust is an inter vivos irrevocable trust, and the remainderman predeceases the life tenant without descendants, upon the life tenant's death UPC § 2-707 sends the property to the settlor's heirs ascertained as

> if the settlor is dead. If there are no takers, the trust property escheats to the state. It does not revert to a living settlor.

This sea change in the law of remainders was set in motion by the Code's revisers when they expanded the antilapse idea of the law of wills to include remainders in trust, irrevocable as well as revocable.

Here is the way UPC § 2-707 works:

> *T* devises property in trust "for my wife *A* for life, then to my daughter *B*." Under present law, *B*'s remainder is vested and, if *B* dies during the life of *A*, *B* can devise her remainder to her spouse, to her issue, to charity, or to anyone she pleases, or in further trust, perhaps setting up a discretionary trust for a disabled child. Under UPC § 2-707, *B*'s remainder is made contingent upon *B*'s surviving *A*. If *B* dies during *A*'s life leaving issue, *B*'s issue are substituted for *B*. *B* has no power to transfer the remainder to others. If *B* is not survived by issue, the gift fails, and the property reverts to *T*'s residuary devisee or *T*'s heirs on *A*'s death.

There is no general tax advantage which would favor UPC § 2-707 over present law. Under current law, B's remainder will pass through B's probate estate and the value of the remainder will be subject to federal estate taxes. Under UPC §2-707, if B dies with issue, a generation-skipping transfer tax at a 55% rate is payable at A's death on the whole value of the trust property. Which tax will be higher depends upon A's life expectancy (which determines the value of the remainder), how long A actually lives, the amount of B's other property, and numerous other factors. It is worth pointing out that B's estate can escape estate taxes if the remainder passes to B's spouse. Professor McGovern agrees that the choice between current law and UPC § 2-707 should be made on some ground other than an assumed tax advantage for one or the other.

The only disadvantage of present law is that B's remainder passes through B's probate estate and is subject to probate fees and costs. The fundamental question then is whether these costs outweigh the flexibility of current law, which gives the remainderman control of the remainder, so that it is advisable to switch to the rigid substitution of B's issue (UPC § 2-707) and deprive B of control of the remainder. I think the balance favors current law.[1]

Most lawyers would agree, I suppose, that the default rules of construction should mirror what an expert estate planner would do. Current law, by vesting the remainder, gives the remainderman the equivalent of a general power of appointment over the remainder. I

[1] I will not go into here the invisible and unexpected boomerangs in § 2-707, which have been explored in detail in Professor David Becker's article cited by McGovern on page 17. Becker concludes that skilled lawyers will avoid the hidden traps in § 2-707 by inserting a provision that totally disclaims the rules of construction embodied in it.

believe that many, perhaps most, expert draftsmen would (1) make the remainder contingent upon surviving the life tenant and (2) give the remainderman a special power of appointment if the remainderman predeceased the life tenant. This was first recommended, so far as I can tell, by the late W. Barton Leach, Story Professor of Law at Harvard, who was one of the most influential teachers of future interests during the middle of the twentieth century. See W. Barton Leach, Planning and Drafting a Will, 27 B.U.L. Rev. 157, Model Will at 168 (1947). In his 1961 casebook on future interests and estate planning, the most widely used casebook in its field, Leach discussed a trust created by the testator for his wife for life, remainder to his two sons contingent on surviving the wife. Leach asked how the will should be drafted to take care of the situation if one of the sons predeceased the life tenant. His answer: "Obviously, provide that if a son predeceases his mother he shall have a special power of appointment over half the principal." W. Barton Leach & James K. Logan, Cases and Text on Future Interests and Estate Planning 329 (1961). See also, id., Paragraph VII2(e)(3) of Model Will, creating a special power of appointment in a contingent remainderman.

A skilled estate planner may give the life tenant a special power of appointment or, if the life tenant is unsuitable because incompetent or if she has adverse personal relations with the remaindermen (e.g., a stepparent), give the remainderman a special power of appointment, exercisable if the remainderman predeceases the life tenant. Even when the life tenant is given a special power of appointment, an expert may give the remainderman who dies before the life tenant a special power exercisable if the life tenant does not exercise her power or cannot exercise her power because of incompetence, which occurs more frequently nowadays as persons live longer.

Professor Waggoner, the principal proponent of UPC § 2-707, disagrees with this. To buttress his argument that taking away control of the remainder from the remainderman reflects current good drafting, he asserts that a "capable" draftsman does not create special powers in remaindermen, only in life tenants. He writes: "I am unaware of any form book giving a remainder beneficiary who predeceases the distribution date a power of appointment over the remainder interest." (Quoted by McGovern on page 15 of his study.) Professor Waggoner should look around. In addition to Professor Leach's forms, forms for special powers in contingent remaindermen can be found in the treatise by Leach's successor at Harvard, David Westfall, Estate Planning and Taxation, Appendix Form 4 at 23, Form 7 at 57, Form 11 at 90, Form 12 at 103 (coauthored with George P. Mair, 2d ed. 1989). This treatise with forms is widely used in the Boston area.

In the Midwest, form books give a special power to the remainderman, following Professor Leach's recommendation. See The Northern Trust Co., Will and Trust Forms §§ 201-11, 201-13 (7th ed. 1992); Robert P. Wilkins, Drafting Wills and Trust Agreements, §§ T.11.74, W.11.74 (3d ed. 1998).

In California, books published by the CEB also contain forms making remainders contingent on survival and giving the remainderman a special power of appointment. See 1 John R. Cohan & Marc M. Stern, Drafting California Irrevocable Trusts §§ 9.28-1, 9.54 (3d ed. 2000); 2 id., Appendix § 9.27-1 (3d ed. 2000); John R. Cohan & Marc M. Stern, Drafting California Revocable Living Trusts § 14.21-1 & Appendices A, B, C, and E, § 14.21-1 (3d ed. 1999); CEB, 3 California Will Drafting, Appendix I, § 22.53-1(5) (3d ed. 2000).

If the Law Revision Commission were to recommend that the default rule of current law be changed to make remainders contingent on survival and to give remaindermen special powers of appointment, I would favor it.[2] But if that is not done, I think the current law of vesting the remainder, which gives the remainderman great flexibility in dealing with changes that occur in the family or tax laws, is preferable to the rigid substitution of issue under UPC § 2-707. I agree with what Professor Ed Halbach has written on this matter:

> If a testator (or settlor of a living trust) has selected a particular person to receive some interest in his property and has thought no further than that selection, it seems preferable to allow the rights to vest and to let that beneficiary's own desires take effect where the testator's desires are unknown. Since the beneficiary in question is the only person known to have been intended to receive the property, he could at least be given the benefit of deciding who will take in his place. This is what would have happened had he survived to the date the testator seemingly assumed he would. [Edward C. Halbach, Jr., Future Interests: Express and Implied Conditions of Survival, 49 Calif. L. Rev. 297, 305 (1961)]

The fundamental issue here is whether the remainderman predeceasing the life tenant should be deprived of control of the remainder. The common law has given control to the remainderman and has worked satisfactorily for a very long time. I would not change it to diminish flexibility in estate planning, which experience has shown to be so important to a family's welfare.

Sincerely,

Jesse Dukeminier

JD:mrk

[2] This is the recommendation of Professor Susan French, in her comprehensive study of this issue, in 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).

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June 26, 2000

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



Dear Nat:

RE: Commission Background Study L-605;
Rules of Construction

On June 20, I wrote you a letter about Bill McGovern's background study of Rules of Construction: Probate Code Sections 21101-21140. With respect to the vesting of remainders, I suggested that remainders be construed as contingent upon surviving the life tenant and that a remainderman be given a special power of appointment over the remainder if he predeceased the life tenant. This default rule of construction reflects, I believe, what capable draftsmen would provide.

I wish to call to the attention of the commission a passage from the CEB book, Drafting California Irrevocable Trusts (3d ed. 2000), by John R. Cohan and Marc M. Stern. They write in § 9.54:

> Vesting a beneficiary with a limited power of appointment in case he or she dies before becoming entitled to receive trust principal creates desirable flexibility to adapt to unexpected future circumstances (e.g., a grandchild's illness or inability to manage wealth) and future changes in the tax law (e.g., generation-skipping transfer (GST) tax, changes in trust income tax rates, and multiple-trust rules).

The sample drafting form of Cohan and Stern creates a contingent remainder with a limited (or special) power of appointment in the remainderman.

Please add the advice of Messrs. Cohan and Stern to my comments.

Sincerely,

Jesse Dukeminier

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June 12, 2000

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

Re: Study L-605

Dear Folks:

I received the BACKGROUND STUDY relating to Probate Code Sections 21101-21140 in last week's mail.

It seems to me that the recommended change relating to §21102., "Intention of testator" creates more problems than it cures.

Perhaps Professor McGovern relies on the exception set forth in Probate Code §1000. On the other hand it would appear that he overlooks CCP 1856, the "Parol evidence rule", as well as Evidence Code §352 entitled "Discretion of court to exclude evidence".

It would seem to me that the staff should be asked to review the "Recommended change" set forth at the bottom of page 5 with respect to its relationship, if any, to CCP 1856 and Evidence Code §352.

Respectfully submitted,

Rawlins Coffman

RC:ef

# Susan F. French
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July 2, 2000



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

Re: Construction of Estate Planning Instruments

Dear Nat:

I agree with most of the recommendations made in Prof. McGovern's background study, but take strong exception to the idea that California should adopt UPC § 2-707. As applied to interests that will not vest in possession until after the transferor's death, § 2-707 unreasonably limits the opportunities of trust beneficiaries to engage in sound estate planning.

Under current California law, if an irrevocable future interest is not subject to a survival requirement, the beneficiary has complete discretion to determine what will happen to it in the event of the beneficiary's death before distribution. Under § 2-707, the beneficiary's issue are substituted without regard to the beneficiary's wishes or the situation of the family, and the beneficiary will even forfeit the future interest if he or she dies without issue. In my view, the only real drawback to our current law (aside from its very confusing language) is that the future interest is subject to probate in the beneficiary's estate. This problem can easily be remedied without going to the extremely rigid alternative provided by § 2-707.

What I would propose the Commission recommend is as follows:

- Treat future interests revocable by the grantor and expectancies in wills the same, and apply our standard anti-lapse treatment to both, except for the effect of survival language, as spelled out below.

- Treat all other future interests that have not yet vested in possession as special powers of appointment given to the beneficiary to appoint to anyone other than the beneficiary, the beneficiary's creditors, the beneficiary's estate, or creditors of the beneficiary's estate. There should be a gift in default to the beneficiary's issue, and a reversion to the grantor or grantor's estate in the event the beneficiary dies before the interest vests in possession without having exercised the power and without issue.

The primary advantage of this proposal is that it accomplishes the two-fold objectives of treating gifts made in wills and will substitutes alike and avoiding the need to include future interests in the probate estates of beneficiaries who die before the time for distribution without disrupting the substance of current California law. It has the added advantage of providing a solution for those situations where a future interest is subjected to an express survival requirement but no alternative disposition of the property is made in the instrument.

From the standpoint of sound estate planning, giving a special power to the beneficiary is far superior to making a rigid substitution of issue or forcing forfeiture of the interest of a beneficiary who dies without issue. If the donor has not expressly limited succession to the donee's issue, or made another disposition of the property in the event of the donee's death before the date of distribution, it seems much more likely that the donor wanted the donee to have control of the property's disposition, than that the donor wanted to confine it to issue, or cause a forfeiture.

The farther the beneficiary's death occurs from the date of the gift or the donor's death, the sounder this proposal becomes. The beneficiary will have the advantage of knowing all the changes that have taken place in the family since the original instrument was drawn or became irrevocable. I'm sure the Commission is aware of the drawbacks of making a rigid substitution of outright gifts to issue as would result from adoption of § 2-707. Think of the beneficiary with limited resources and minor children. It may make a lot more sense to give the future interest to the other parent of the children, or to continue the interest in trust than to have it tied up in guardianships, or distributed to the children at age 18. The case of the disabled child is another obvious example where § 2-707 will prevent sensible planning. I could go on, but expect it's not necessary.

If the Commission is interested in pursuing this idea, I would be happy to help draft statutory language to carry it out. If you are interested in a more detailed analysis of the problem and possible solutions, see my article, "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).

Turning to the anti-lapse statute, which I think should apply to beneficiaries who die before the testator or before the settlor of a revocable trust, I agree with Professor McGovern that the statute should not give preclusive effect to an express survival requirement—there are too many situations in which failure to apply the antilapse statute would be likely to frustrate, rather than further, carrying out the donor's intent. In my article, "Antilapse Statutes are Blunt Instruments: A Blueprint for Reform," 37 Hasting L. J. 335, 372-73 (1985), I suggested the following provision:

Language of survival shall be given the following effect:

(a) Survival language in a devise to lineal descendants of the testator shall not alone prevent application of this statute, if the result of lapse would be to disinherit a branch of the testator's lineal descendants.

(b) Survival language alone in a devise to collateral relatives, relatives by marriage of the testator, or to other persons is sufficient to prevent application of this statute unless there is other persuasive evidence that the testator or settlor would not have intended the devise to lapse, or unless the result of lapse would be to pass the property to persons expressly disinherited by the will or to the state by escheat.

If I can be of any further help, please let me know.

Yours very truly,

Susan F. French

cc: Prof. Bill McGovern
Prof. Jesse Dukeminier

ESTATE PLANNING, TRUST
AND PROBATE LAW SECTION
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July 11, 2000

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



Re: **Rules of Construction: Probate Code Sections 21101-21140**

Dear Commissioners and Staff:

On behalf of the Executive Committee of the Estate Planning, Trust, and Probate Law Section of the State Bar, I have reviewed Professor McGovern's March 2000 study on the Probate Code rules of construction. Unfortunately, I am not able to attend the Commission's July 20, 2000 meeting and therefore must offer my comments in writing.

The following comments are all my own, except for the comments on Section 21110 (anti-lapse), which reflect input from the Executive Committee as a whole.

§ 21102. Intention of transferor

The title of our existing §21102 is "Intention of Transferor" rather than "Intention of Testator", and I assume that Prof. McGovern's use of the word "testator" in his study was inadvertant and does not indicate an intention to change the title.

I agree that one should be able to consider extrinsic evidence of intent and not simply the intent "as expressed in the instrument". I also agree with Prof. McGovern's statement that the *rules of construction* should be subject to override by extrinsic evidence even if *express statements* in the instrument are not. However, Prof. McGovern's proposed revisions of this section appear to go beyond the implementation of these principles and give *too little* deference to the transferor's express statements of intent.

The wording of Prof. McGovern's proposed subsection (b) would require the parties to fall back on the rules of construction, even in the face of express statements of contrary intent in the instrument, unless a court (presumably) had found that such written expressions of intent did in fact reflect the transferor's intent. This would not be a helpful change in the law.

I suggest that subsection (b) read: **"The rules of construction expressed in this part apply in the absence of an express statement of intent in the instrument or a court finding of contrary intent on the part of the transferor."** This wording would allow extrinsic evidence

to override the rules of construction but not express statements of intent, which is, I believe, the result we want.

§21104. "Testamentary gift" defined

The word "testamentary", as Prof. McGovern notes, is historically associated with wills; therefore, it is not obvious, as it should be, that the term "testamentary gift" is intended to apply to nonprobate as well as probate transfers. This problem becomes more significant than it would be otherwise if the term is inserted into revised §§21109 and 21110, as Prof. McGovern has suggested.

One could use the term "at-death transfer" instead, but that term may imply that only present interest transfers are included and not future interests (although the definition itself clears that up). As an alternative, one could retain the term "testamentary gift" but say that it means "a transfer in possession or enjoyment, *including a nonprobate transfer*, that takes effect at or after death." The term "at-death transfer" is frequently used by attorneys and other estate planning professionals in the tax planning context and is more obvious. I prefer that term to "testamentary gift", regardless how the latter is defined.

§§21109 and 21110: Survivorship and Anti-lapse

*Effect of Survivorship Language*. Prof. McGovern appropriately gives much attention in his discussion of these sections to the proper effect of words of survivorship in a transfer. I prepared a memorandum for my Executive Committee outlining this issue, the UPC approach, and the past and present California rules, and presenting Prof. McGovern's recommendations.

The Executive Committee overwhelmingly favors retaining California's current approach to survivorship language, namely, that an express requirement of survivorship indicates an intention that the anti-lapse rule *not* apply, at least to the extent that the instrument in question is lawyer-prepared.

We are not at all persuaded by the UPC Comment to the effect that words of survivorship tend to reflect the drafter's form language more than they do the transferor's intent. Our experience as drafting attorneys is to the contrary. First, a competent attorney *does* typically ask the client who states desire to make a transfer "to my children", for example, whether the client wishes to have the share of a predeceased child pass to his or her issue. Second, we use words of survivorship when the client has expressed to us an intention to benefit only the person or class members in question and not their issue. While the client may not fully understand how or why survivorship language accomplishes the goal of benefitting only the transferee or the surviving members of a

stated class, the drafting lawyer knows what such language accomplishes and (if the drafter is competent), he or she uses such language intentionally, to achieve the client's stated goal.

If the client wants the gift to pass to the issue of a predeceased transferee, the instrument will, in the case of a transfer to one individual, either omit any reference to survival or follow the survivorship language with an alternative gift to issue. If the client wants to benefit only the surviving members of a class, the instrument will either (a) divide the property in question into shares, with the share of a predeceased class member passing to his or her issue, or (b) include words of survivorship but follow those words with an alternative gift to issue. Words of survivorship, *without more*, do not, in our experience, imply an intent to benefit the issue of a predeceased transferee.

Each of us on the Executive Committee who is in private practice has drafted many hundreds of transfers of tangible personal property, in particular, which include words of survivorship without a following alternative gift to issue. We know that our clients in these cases did not wish to have the share of any predeceased child pass to his or her issue. A change in the anti-lapse rule, applied to all instruments regardless of the time of execution, would create a great many administration problems and require the sale of tangible personal property in many cases where no such sale was contemplated by the transferor.

Prof. McGovern's recommendation apparently would allow for override of the anti-lapse rule in the case of a transfer "to my sister, Dolly Donee, if she survives me," but it would cause the rule to apply in the case of a class gift that uses survivorship language. We cannot see any reason to make a distinction in this respect between gifts to one individual and class gifts.

However, our Executive Committee discussion did not reach the question whether the anti-lapse statute should trump survivorship language in the case of *beneficiary designations* (as opposed to wills, trusts, and other attorney-drafted instruments). In such cases one cannot suppose that the attorney's form book has determined the expression of the gift; instead, the transferor has more likely used his or her own words. Is a layperson likely to use words of survivorship when he or she really intends to benefit the issue of a predeceased designee? I believe it is more likely that a layperson's use of survivorship language reflects an intention to benefit the named person only or the surviving members of the described class.

In any event, a distinction between attorney-drafted transfers and non-attorney drafted transfers would be difficult to draft into the statute. I suspect that if the question were posed to them, the Executive Committee would prefer a uniform rule that gives effect to survivorship language.

*Vesting of Future Interests.* I concur with Prof. McGovern's recommendation concerning the vesting of future interests. The Executive Committee's initial reaction to the issue was the

same as mine, although most conceded that the issue was a little too involved for them to give a final and definitive opinion after five minutes of discussion, my earlier memo notwithstanding. We may ultimately get some dissent on this question, but I doubt that the committee as a whole will adopt a contrary view.

A couple of additional comments on Prof. McGovern's proposed language:
(1) For reasons explained above in my discussion of §21104, we may create less confusion by using the term "at-death transfer" instead of "testamentary gift".
(2) Do we need to refer to an "instrument *of transfer*"? The term "instrument" is defined adequately in §45 and is used elsewhere in the Rules of Construction without modifiers. I suggest that we simply refer to an "instrument".

§21116. Testamentary disposition vests at death

I agree with Prof. McGovern's observation that this section is in conflict with the rule that postpones vesting of future interests until the time when the interest vests in current enjoyment. At a minimum, this section must be made inapplicable to future interests.

However, this section may still be useful as it applies to dispositions of present interests. In the administration of decedent's estates and trusts, it is helpful to have authority for the proposition that a beneficiary of a present interest is the *owner* of that interest as of the moment of death, subject only to administration of the estate or trust.

If the section is retained in any form, we will have to deal with the appropriateness of the term "testamentary disposition". As Prof. McGovern notes elsewhere in his study, the term contrasts with the term "testamentary gift", which is defined in §21104. In my discussion of §21104 above, I suggested the term "at-death transfer" as a substitute for "testamentary gift".

If my suggested terminology were used, the section could perhaps read: **"An at-death transfer of a present interest is presumed to vest at the transferor's death."** When I rephrase the statute in this manner, it seems so self-evident that I am more inclined to agree with Prof. McGovern after all. Maybe we don't need this section at all.

§21120. Avoidance of intestacy

I disagree with the statement that courts pay only lip service to the concept of avoiding intestacy, and I believe it would be helpful to draft this section in a manner that applies the principle to transfers by trust as well as by will.

Perhaps the last sentence of the section could read: **"Preference is to be given to an interpretation of an instrument that will prevent failure of a transfer rather than to one that will result in a failed transfer."**

§§21133 and 21134. Rights of recipient of specific gift

These two sections deal with various situations where ademption can fairly be presumed *not* to have been the transferor's intention. Prof. McGovern questions whether California courts really need statutory guidance in such cases.

I agree that our courts would probably decide cases presenting the statutory facts in the same manner as the statute provides. However, do we want to require the courts to make these decisions? The virtue of specific statutes such as §§21133 and 21134 is that they foreclose litigation (and even the necessity of uncontested petitions for orders determining entitlement to distribution) by leaving no doubt as to the proper result in such cases. Unless California courts have unambiguously and uniformly ruled on each of the questions presented in these sections, I would not favor simply repealing the section.

§21135. Satisfaction of testamentary gift

I would not want to see this section repealed. The premature satisfaction problem arises frequently and, in my view, justifies this sort of specific treatment. The specificity of this section has no doubt prevented much litigation.

I agree that the section leaves no room for introduction of *other* evidence of the transferor's intent. Perhaps a subdivision (3) should be added to subsection (a), reading as follows: **"(3) A court finds that the lifetime transfer was intended by the transferor to be in satisfaction of the at-death transfer."**

Again, the term "testamentary gift" should be reconsidered and the term "at-death transfer" perhaps substituted.

Incidentally, §21135, as quoted in the study, omits subsection (c).

By copy of this letter, I am informing my fellow members of the Estate Planning Committee of the Executive Committee of my comments and inviting them to concur or disagree. As I receive further comments from other committee members, I will pass them along to you.

We want to express our appreciation to Prof. McGovern for his thorough and well-considered study and to the Commission for undertaking a re-examination of the rules of construction.

Very truly yours,

James L. Deeringer

JLD:me

cc: James B. Ellis
David Weston
Donald Travers
Bill Beamer
Tracy Potts
Jim Allen
John Hartog
Warren Sinsheimer

#333929.1

Revisions in Report to CLRC on Rules of Construction: Probate Code Sections 21101-21140

Professor William McGovern
UCLA Law School
July 27, 2000

In light of various comments generated by my original report [hereinafter Original], I would like to propose some modifications to it.

§ 21101 The staff did not think the language proposed by me was needed. Perhaps they are right. If a comment can be inserted without changing the text of the statute, it should refer to § 21109 as a provision which by its terms is limited to "testamentary" gifts.

§ 21102 The staff found my recommended approach "reasonable" but thought it would be better effectuated by a change in paragraph (b) rather than (a).
With respect to Mr. Deeringer's[1] objection, I certainly do **not** favor having courts use rules of construction, "even in the face of express statements of contrary intent in the instrument," but I think the language I proposed is sufficient to make this clear --- an express statement in an instrument is clear evidence of "contrary intent by the transferor." However, I have no objection to the language he proposes. Perhaps a comment should be appended indicating that there is no intent to interfere with the court's power to reform instruments.
I agree with Mr. Coffman that this is not the place to deal with the rules of evidence. My proposed language was simply designed to make clear that the possibility of reforming documents to correct mistakes, which CCP § 1856(e) leaves open, is not precluded by this section.

§ 21104 I have no objection to Deeringer's proposal to add the words ,"including a nonprobate transfer" to the definition of "testamentary transfer."

§ 21105 The staff thanks we should consider including revocable trusts in this provision so that they too could pass after acquired property. We could do this by changing the language to read

> **§ 21105. Testamentary gift to pass all property, including after-acquired property**
> **Except as provided in Sections 641 and 642,[dealing with powers of appointment], a testamentary gift may pass all property the transferor owns at death, including property acquired after execution of the instrument.**

§ 21106 The staff objects to my proposal to refer to the provisions dealing with joint bank accounts, since there are other statutes providing special rules for multiple ownership. Good point I wonder whether it would be better to repeal §21106 and leave it to Civil Code 683 to deal with the problem. I have some problems with the language of 683 but it is better than Probate code 21106, which does not even hint at the many exceptions to the rule it states. The very fact that we have different rules for bank accounts, automobiles, etc. suggests that the subject is not appropriate for a general rule of construction as § 21106 purports to be. Also the language of multiple ownership crops up in non-donative instruments and so should be dealt with in the Civil code.

§ 21110(c) second sentence under my original proposal basically accepted the position of the UPC that the word "surviving" did not by itself show an intent to overcome the anti-lapse statute. Professor French proposes different language to deal with this question. Mr Deeringer says that "the Executive Committee overwhelmingly favors retaining California's current approach to survivorship language, namely, that an express requirement of

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[1] Mr. Deeringer corrected an error of mine in the rubric, which should refer to the intention of the **transferor** rather than the testator

survivorship indicates an intention that the anti-lapse rule ***not*** apply." I question whether the present statute actually reflects this view. It says: (21110(b)

> **(b) The issue of a deceased transferee do not take in the transferee's place if the instrument expresses a contrary intention or a substitute disposition**. A requirement that the initial transferee survive for a specified period of time after the death of the transferor constitutes a contrary intention. A requirement that the initial transferee survive until a **future time that is related to the probate of the transferor's will or administration of the estate of the transferor constitutes a contrary intention**.

Suppose a will says "I devise my estate to my surviving children" or "to my children who survive me." It is not clear to me that this language requires survival "for a specified period of time after the death of the transferor." or "until a future time that is related to the probate of the transferor's will or administration of the estate of the transferor." within the meaning of 2110(b) In other words the result under the present statute is (to me) up for grabs.

I also have problems with Professor French's proposed language in this case. Would the result of refusing to apply the AL statute be to "disinherit a branch of the testator's lineal descendants" within the meaning of her proposal if the issue of the deceased child took something under another clause of the will or a non-probate transfer?

Mr. Deeringer says that terms like "surviving" may be deliberately used by attorneys who want thereby to avoid the AL statute, but this is less likely in non-attorney drafted instruments (see also the UPC comment quoted on Original p. 12 ). But Deeringer also feels that "a distinction between attorney-drafted transfers and non-attorney drafted transfers would be difficult to draft into the statute."

A compromise of the competing views would be to drop the second sentence of my proposed § 21110(c), and let courts figure out what the transferor intended, unrestricted by any rule of construction. Presumably they would consider whether this language was lawyer drafted or came out of an insurance policy form (***pace*** Mr. Deeringer), or whether it completely cut out a branch of the transferor's family (***pace*** Professor French), along with any other indicia of intent.

According to p. 9 of Memorandum 2000-50 "McGovern. . . concludes that the anti-lapse statute should extend to future interests." This is not case. As I said in my original memo, "I would actually prefer a case by case approach in which the result would depend on all the facts. . . , i.e no rule of construction at all."(Original p. 19) However, my proposed Sections 21109 and 21110 (Original p. 21) did follow the UPC view (with changes) under which the anti-lapse statute extends to future interests. If my first choice were accepted (no rule of construction), §§ 21116 (presumption of vesting) and § 21113 (arguably imposing a requirement of survival in class gifts) should be repealed, as already suggested (Original pp. 24, 26). In order to clear the field completely, I would drop my proposed § 21109(b) and § 21110(b)(2). This would leave the original anti-lapse statute in effect, extended to "testamentary transfers" other than wills, such as revocable trusts, but inapplicable to future interests if the owner survived the transferor. Absence of a rule of construction in cases where a remainderman dies before a life beneficiary might produce litigation, but probably not much for the reasons suggested at Original p. 22. My argument that the courts could use this freedom to produce sensible results which take all the circumstances of a case into account is set forth in 26 UCLA Law Review 285 (1978) and will not be repeated here.

If this approach is rejected, there remains the choice between (1) the proposals suggested in Original p. 21 (with or without the change suggested above in § 21110(c) as to the word "surviving") and (2) the view favored by Prof. Dukeminier and French. Professor Dukeminier now says "If the LRC were to recommend that the default rule of current law be changed to make remainders contingent on survival and to give remaindermen special powers of

appointment, I would favor it," citing a suggestion of Prof. French, who (not surprisingly) agrees. This proposal further narrows what was already a rather narrow difference in practical terms between the UPC and the common law presumption of early vesting. If the LRC favors approach (2), I welcome Prof. French's offer "to help draft statutory language to carry it out." Giving holders of future interests a very broad special power of the type proposed by French would allow them to appoint to their spouses. Some would find this desirable, others not. See Original p. 16. If Prof. Waggoner is right (see Original p. 15), not many remaindermen will actually exercise the power conferred by the Duke-French proposal. (I assume the general presumption of non-exercise of powers in § 641 will apply in this situation as well). Thus a statutory power must also include a gift in default of appointment, which, presumably would be to the issue of remainderman as in § 21110(b)(2) as I originally proposed. This means the (actual or potential) issue of the remaindermen would continue to have a beneficial interest in trusts, and this would pose an obstacle to their termination. (Compare the Dukeminier-Waggoner debate on this aspect of UPC 2-707, Original p. 15.) Professor Waggoner dismisses the usefulness of giving remaindermen power over their interests:

> The remainder beneficiary cannot adjust for changes in his or her family circumstances that have occurred by that time [when the trust is dissolved and the corpus is actually distributed.]. The remainder beneficiary can only take into account changes in family circumstances up to his or her own death. Only the life tenant can take into account changes in family circumstances occurring after the remainder beneficiary's death but before the distribution date. This explains why capable estate planners wanting to build flexibility into a trust give a power of appointment to the life tenant, not to the remainder beneficiary.

But the Dukeminier/French proposal would not be inconsistent with a drafter's giving the life tenant a power of appointment which, if exercised, could trump whatever appointment the remainderman made.

§21120 I have no objection to Mr. Deeringer's proposal to change "intestacy" to "failure of a transfer" so as to extend the principle to transfers that are not in the form of wills.

§§ 21133 and 21134. Mr. Derringer disagrees with my proposal to repeal the provisions dealing with ademption on the ground that they "foreclose litigation. . . by leaving no doubt as to the proper result in such cases." I disagree (mildly). I question whether in the situations covered by these sections the statute actually reflects the decedent's intent in all cases Suppose I put most of my estate in a trust for my wife, but specifically devise the residence to her outright, thinking she will continue to live there and there is no need to burden the trust with such an asset. If I contract to sell the house before I die, would I want the sales proceeds to go outright to my wife under § 21133(a)? I suspect that on these facts, many testators would want them to pass to the residuary trust. In some cases which are ***not*** covered by these sections ademption may not be appropriate, for example, sale under a durable power after the principal has become incompetent? Should one infer from § 21134's reference to sale by a ***conservator*** that sales by an agent under a durable power are to be differently treated? Why? Thus I continue to favor repeal of these sections.

§21135 Mr Deeringer agrees that the introduction of evidence other than a writing to show the transferor's intent is appropriate in such cases. But the whole point to the provision as I understand it (based on its antecedent in the UPC) was to require a writing. I see no point to a provision which says "intent shall be respected (a) if in writing, and (b) if it is not in writing" (unless one is trying to get rid of a common-law writing requirement which is not the case here.)