Study L-605 November 22, 2000

Memorandum 2000-87

Rules of Construction for Trusts (Discussion of Issues)

BACKGROUND

At the October 2000 meeting the Commission commenced consideration of issues relating to the rules of construction for trusts. The Commission noted that many of the suggestions of the Commission's consultant, Professor Bill McGovern, appear to be generally acceptable. The Commission directed the staff to start developing a draft tentative recommendation to implement the generally acceptable changes along the lines set out in the memorandum considered at that meeting (Memorandum 2000-75). The Commission further directed the staff to prepare additional material for its review concerning the more controversial provisions, specifically:

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

Prob. Code § 21110. Antilapse

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

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

Prob. Code § 21135. Ademption by satisfaction

The staff draft of generally acceptable provisions is attached to this memorandum. Material concerning the more controversial provisions, as well as other issues that have come to the staff's attention, is presented in this memorandum.

PROB. CODE § 21102. INTENTION OF TRANSFEROR

The Commission directed that the Comment to subdivision (a) of Section 21102 should include discussion of the possibility of reformation for mistake, with reference to appropriate evidentiary provisions. A note is also to be added

when the proposal is circulated for comment specifically requesting input as to whether the subdivision requires amendment.

Here is a staff draft:

> 21102. (a) The intention of the transferor as expressed in the instrument controls the legal effect of the dispositions made in the instrument.
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> (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.
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> **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. See also Section 6111.5 (will); Estate of Anderson, 56 Cal. App. 4th 235, 65 Cal. Rptr. 2d 307 (1997) (extrinsic evidence admissible).
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> It should be noted in connection with subdivision (a) that expressions in the instrument are not the exclusive means by which a transferor's intention as to the legal effect of a disposition may be ascertained. Under the parol evidence rule, for example, extrinsic evidence may be available to explain, interpret, or supplement an expressed intention of the transferor. Code Civ. Proc. § 1856. 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(e) (parol evidence rule); Estate of Smith, 61 Cal. App. 4th 259, 71 Cal.Rptr. 2d 424 (1998) (contestant bears burden of proof of mistake as to testamentary intent).
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> ☞ **Note.** The Commission particularly requests input as to whether subdivision (a) requires amendment to make clear the authority of the court to reform for mistake, or whether the Comment explaining its operation is satisfactory.

Professor McGovern suggests that, with the revision of subdivision (b) and the expanded Comment, we no longer need subdivision (a) — subdivision (b) says it all. **The staff agrees** with that analysis and suggests we delete subdivision (a) and recast the Comment accordingly for the purpose of seeking comments on the tentative recommendation. We would revise the Note to read:

> ☞ **Note.** The Commission particularly requests input as to whether subdivision (a) should be repealed and whether the explanation in the Comment is satisfactory concerning the authority of the court to reform an instrument for mistake.

PROB. CODE § 21104. "TESTAMENTARY GIFT" DEFINED

The more the staff works with the statute, the less we like the phrase, "testamentary gift". It so clearly describes a gift made by will, that to use it in a broader sense to mean a gift, whether or not by will, seems just plain wrong and misleading. We don't usually like to define "apples" to include "oranges", but that's what we're doing here:

> 21104. As used in this part, "testamentary gift" means a transfer in ~~possession or~~ enjoyment that takes effect at or after death, including a nonprobate transfer.
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> **Comment.** Section 21104 is amended to make clear that, notwithstanding use of the term "testamentary", this part applies to nonprobate transfers as well. Cf. Section "5000 (nonprobate transfers). See also Sections 21109 and 21135 and Comments. The reference to "possession or" enjoyment is deleted as superfluous.

Jim Deeringer of the State Bar has previously suggested use of the term "at death transfer", while noting that it is not completely satisfactory either. (It may imply that only transfers of present interests and not future interests are covered.) The staff initially rejected the suggestion because of the awkwardness of the phrase and because it may have other unwanted connotations as well. But we have come to agree with Mr. Deeringer that it is probably better than "testamentary gift".

We will continue to ponder these and other phrases to cover the concept. One possibility is to use a substantive phrase, rather than a defined term. There are few enough instances of the use of the term in the statute, that the staff believes such a circumlocutory approach is well worth considering. E.g.:

> 21109. A transferee of a ~~testamentary gift~~ transfer that takes effect in enjoyment at or after death, including a nonprobate transfer, who fails to survive the transferor or until any future time required by the instrument does not take under the instrument.

PROB. CODE § 21108. COMMON LAW DOCTRINE OF WORTHIER TITLE ABOLISHED

In the attached draft, the staff has deleted the obsolete transitional provision:

> 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~~.

Comment. Section 21108 is amended to remove an obsolete transitional provision.

PROB. CODE § 21110. ANTILAPSE

The thorniest aspect of the rules of construction involves the antilapse statute. The Commission has asked the staff for a more detailed analysis of the issues and possible solutions. The Commission should be aware that it is not possible to cover the area in depth in a memorandum of this type. The Commission has previously contracted with Professor Susan French, who prepared two separate law review articles on the matter. See French, *Antilapse Statutes Are Blunt Instruments: A Blueprint for Reform*, 37 Hast. L.J. 335 (1985); French, *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). We will try here to touch on the main issues.

A fundamental rule of donative transfer law is that a gift to a beneficiary fails (or lapses) if the beneficiary does not survive the donor. See Probate Code Section 21109(a) ("A transferee who fails to survive the transferor or until any future time required by the instrument does not take under the instrument."). Thus if I make a gift in my will to my friend Ben and Ben predeceases me, the gift lapses and falls into my residuary estate.

But suppose Ben is not my friend, but my son, and he has children (my grandchildren). If my son predeceases me, shouldn't his children stand in his place and take his share, rather than the share falling into the residue of my estate? It depends on my intention. But my intention may not be clear, either from the will, or from indicia outside the will. Would I really have intended to disinherit that line of descent had I thought about it? That is where the antilapse statute comes in.

In simplest terms, the antilapse statute is designed to prevent lapse of a gift to my kindred (or to my spouse's kindred) who predecease me, unless it is clear that my intention was that such a gift should lapse. Of course nothing is that simple, and with all its qualifications, the current California version of the antilapse statute looks like this:

> 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.
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> (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.
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> (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.

We have been concerned with two issues involving the antilapse statute — (1) what language in the instrument is sufficient to constitute an expression of intent that the antilapse statute not apply, and (2) is it proper to apply the antilapse statute to future interests?

Express Requirement of Survival

Statement of the Problem

The antilapse statute is quite clear that it does not save my gift to Ben from lapsing if my will expresses a contrary intention. Section 21110(b). My will expresses a contrary intention if (1) it makes a substitute disposition should Ben fail to survive, (2) it requires Ben to survive for a specified period of time after my death, or (3) it requires Ben to survive until a future time related to the probate of my will or administration of my estate.

But suppose my will is not that specific as to the survival requirement, and simply says "to my son Ben if he survives me." Should this survival language be construed to override the antilapse statute and disinherit my grandchildren in Ben's line? Or were these words of survival simply thrown into the will from some form book without thought of their potential consequences?

Existing California law on this point is not clear. The Executive Committee of the State Bar Estate Planning, Trust, and Probate Law Section understands existing law to be that an express requirement of survival indicates an intention that the antilapse rule not apply (at least to the extent the instrument in question is lawyer-prepared). They favor retention of existing California law on this point. It is their 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."

Professor McGovern questions how widespread this concern is among practitioners. He expects that experienced lawyers in this area draft instruments that are clear enough so that there is no need to resort to rules of construction.

Professor McGovern also indicates that existing law is not so clear as the State Bar suggests. The existing statute addresses words of survival *coupled with* further indicia of intent — a substitute disposition or a requirement of survival for or until a specified time. The law is silent as to bare words of survival. 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.

What do other jurisdictions say about this issue? The antilapse statutes of most jurisdictions, like California's, do not address the issue directly. In construing these statutes, the overwhelming weight of case law authority is that mere words of survival *are* sufficient to override the antilapse statute; if the beneficiary fails to survive, the gift passes with the residue or by intestacy. (In the case of a class gift, the share of the predeceased beneficiary passes to the other members of the class.) See discussion in Roberts, *Lapse Statutes: Recurring Construction Problems*, 37 Emory L.J. 323, 349-354 (1988).

Uniform Probate Code Approach

The Uniform Probate Code (1990) would provide a contrary result. Under the Uniform Code, "words of survivorship, such as in a devise to an individual 'if he survives me,' or in a devise to 'my surviving children,' are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application" of the antilapse statute. UPC § 2-603(b)(3); see also UPC §§ 2-706(b)(3), 2-707(b)(3). Eight states (Alaska, Arizona, Colorado, Hawaii, Minnesota, Montana, New Mexico, and North Dakota) have apparently adopted this provision of the Uniform Probate Code.

Professor McGovern notes the following rationale for the change given by the Uniform Probate Code drafters:

> A much-litigated question is whether mere words of survivorship — such as in a devise "to my daughter, A, if A survives me" or "to my surviving children" — automatically defeat the antilapse statute. Lawyers who believe that the attachment of words of survivorship to a devise is a foolproof method of defeating an antilapse statute are mistaken. The very fact that the question is litigated so frequently is itself proof that the use of mere words of survivorship is far from foolproof. In addition, the results of the litigated cases are divided on the question. To be sure, many cases hold that mere words of survivorship do automatically defeat the antilapse statute. E.g., Estate of Stroble, 636 P.2d 236 (Kan.Ct.App.1981); Annot., 63 A.L.R.2d 1172, 1186 (1959); Annot., 92 A.L.R. 846, 857 (1934). Other cases, however, reach the opposite conclusion. E.g., Estate of Ulrikson, 290 N.W.2d 757 (Minn. 1980) (residuary devise to testator's brother Melvin and sister Rodine, and "in the event that either one of them shall predecease me, then to the other surviving brother or sister"; Melvin and Rodine predeceased testator, Melvin but not Rodine leaving descendants who survived testator; court held residue passed to Melvin's descendants under antilapse statute); Detzel v. Nieberding, 219 N.E.2d 327 (Ohio P. Ct. 1966) (devise of $5,000 to sister "provided she be living at the time of my death"; sister predeceased testator; court held $5,000 devise passed under antilapse statute to sister's descendants); Henderson v. Parker, 728 S.W.2d 768 (Tex. 1987) (devise of all of testator's property "unto our surviving children of this marriage"; two of testator's children survived testator, but one child, William, predeceased testator leaving descendants who survived testator; court held that share William would have taken passed to William's descendants under antilapse statute; words of survivorship found ineffective to counteract antilapse statute because court interpreted those words as merely restricting the devisees to those living at the time the will was executed); see also Restatement (Second) of Property (Donative Transfers) 27.2 comment f, illustration 5; cf. id. 27.1 comment e, illustration 6. It may also be noted that the antilapse statutes in some other common-law countries expressly provide that words of survivorship do not defeat the statute. See, e.g., Queensland Succession Act 1981, 33(2) ("A general requirement or condition that [protected relatives] survive the testator or attain a specified age is not a contrary intention for the purposes of this section.").
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> Subsection (b)(3) adopts the position that mere words of survivorship do not — by themselves, in the absence of additional evidence — lead to automatic defeat of the antilapse statute. As

noted in French, "Antilapse Statutes Are Blunt Instruments: A Blueprint for Reform," 37 Hastings L. J. 335, 369 (1985) "courts have tended to accord too much significance to survival requirements when deciding whether to apply antilapse statutes."

...

Another objection to applying the antilapse statute is that mere words of survivorship somehow establish a contrary intention. The argument is that attaching words of survivorship indicates that the testator thought about the matter and intentionally did not provide a substitute gift to the devisee's descendants. At best, this is an inference only, which may or may not accurately reflect the testator's actual intention. An equally plausible inference is that the words of survivorship are in the testator's will merely because the testator's lawyer used a will form with words of survivorship. The testator who went to lawyer X and ended up with a will containing devises with a survivorship requirement could by chance have gone to lawyer Y and ended up with a will containing devises with no survivorship requirement — with no different intent on the testator's part from one case to the other.

Even a lawyer's deliberate use of mere words of survivorship to defeat the antilapse statute does not guarantee that the lawyer's intention represents the client's intention. Any linkage between the lawyer's intention and the client's intention is speculative unless the lawyer discussed the matter with the client. Especially in the case of younger-generation devisees, such as the client's children or nieces and nephews, it cannot be assumed that all clients, on their own, have anticipated the possibility that the devisee will predecease the client and will have thought through who should take the devised property in case the never-anticipated event happens.

If, however, evidence establishes that the lawyer did discuss the question with the client, and that the client decided that, for example, if the client's child predeceases the client, the deceased child's children (the client's grandchildren) should not take the devise in place of the deceased child, then the combination of the words of survivorship and the extrinsic evidence of the client's intention would support a finding of a contrary intention ...

Any inference about actual intention to be drawn from mere words of survivorship is especially problematic in the case of will substitutes such as life insurance, where it is less likely that the insured had the assistance of a lawyer in drafting the beneficiary designation. Although Section 2-603 only applies to wills, a companion provision is Section 2-706, which applies to will substitutes, including life insurance. Section 2-706 also contains language similar to that in subsection (b)(3), directing that words of survivorship do not, in the absence of additional evidence, indicate

> an intent contrary to the application of this section. It would be anomalous to provide one rule for wills and a different rule for will substitutes.
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> ...
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> In the absence of persuasive evidence of a contrary intent, however, the antilapse statute, being remedial in nature, and tending to preserve equality among different lines of succession, should be given the widest possible chance to operate and should be defeated only by a finding of intention that directly contradicts the substitute gift created by the statute. Mere words of survivorship — by themselves — do not directly contradict the statutory substitute gift to the descendants of a deceased devisee.

Professor Dukeminier observes (Dukeminier, *The Uniform Probate Code Upends the Law of Remainders*, 94 Mich. L.Rev. 148, 153-4 (1995)) that this aspect of the 1990 Uniform Probate Code has come under sharp criticism:

> Instead of allowing "if he survives me" to mean what almost everyone would expect it to mean, the revisers have translated it into, "if he survives me, and, if he does not survive me, to his issue who survive me." For those unfamiliar with estate planning esoterica, therefore, it has become yet more difficult to figure out what the words in a will actually mean. [Mark L. Ascher, *The 1990 Uniform Probate Code: Older and Better, or More Like the Internal Revenue Code?*, 77 Minn. L. Rev. 639, 651-55 (1993); see also Martin D. Begleiter, *Article II of the Uniform Probate Code and the Malpractice Revolution,* 59 Tenn. L. Rev. 101, 126 -30 (1991) (arguing that the new antilapse provision in the 1990 UPC will increase malpractice suits against lawyers who continue to use the language they have used for years -- "to A if A survives me" -- expecting the words requiring survivorship to negate the operation of the antilapse statute).]

Note that the Uniform Probate Code provision does not prescribe factors a court should look to in determining intent. It simply negates case law holding that mere words of survival without more are a sufficient basis for a finding of the donor's intent to avoid operation of the antilapse statute.

Factors To Be Considered

Numerous factors have been identified that may be relevant to the determination of the donor's likely intent in using words of survival in an instrument. A key consideration is whether the instrument is prepared by an attorney. Mr. Deeringer, on behalf of the State Bar Section, signals great concern about a rule that would allow the court to look beyond consciously selected

survival language by a legally informed drafter. The Uniform Probate Code commentary quoted above attacks this argument at length.

Certainly there is a stronger argument for looking behind the words of the instrument where the instrument is a standard form, such as one prepared by an insurance company for beneficiary designations under its policies. Mr. Deeringer expresses skepticism that a satisfactory statute could be crafted that distinguishes among instruments on this basis. But the staff believes there are existing statutory models that could be drawn upon if the Commission is inclined to prepare a finely-articulated antilapse statute.

Professor French agrees with the Uniform Probate Code approach in general — 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." She suggests a narrowly-crafted statute that allows the court to overlook survival language in circumstances where it is likely the donor would have wanted the antilapse statute to apply. Specifically:

- *Gift to lineal descendant*. If the gift is to a lineal descendant of the donor, and if failure of the gift would disinherit that branch of the donor's lineal descendants, survival language in the instrument should "not alone" prevent application of the antilapse statute. Further evidence of the donor's intent should be necessary before the gift is allowed to lapse.
- *Gift to person other than lineal descendant*. If the gift is to a person other than a lineal descendant of the donor, survival language in the instrument should be "sufficient" to prevent application of the antilapse statute, except in three situations:

  (1) There is other "persuasive" evidence that the donor would not have intended the gift to lapse.

  (2) The result of lapse would be to pass the property to a person expressly disinherited in the instrument.

  (3) The result of lapse would be to pass the property to the state by escheat.

If the Commission determines to pursue the finely-articulated approach to the antilapse statute on this point, we should consider a number of other possible factors as well. These include:

- *Alternative takers*. If the donor makes an alternative disposition in the event of the beneficiary's failure to survive, the antilapse statute

should not apply. The existing California statute addresses this point.

- *Class gift*. The implication of a class gift (e.g., "to my children who survive me") is that the class expands and contracts over time. If a class member predeceases the donor, the other members of the class take that share. Good arguments can be made both ways on the donor's likely intention in this sort of class gift. The existing California statute addresses this point by applying the antilapse statute to a class gift except as to members of the class deceased at the time the instrument was executed.
- *Per stirpes gift*. A gift "to my children who survive me, per stirpes", could be construed as an expression of the donor's intent that even though a child has predeceased the donor, the gift should go to the donor's children.
- *"And his heirs"*. Does standard fee simple terminology ("to my son and his heirs) express the donor's intent that the gift not lapse in case of his son's death? Most cases do not read this to be a substituted gift to heirs, but give the technical words a technical meaning. There are contrary cases, however, and this issue could be addressed by statute.
- *Gift to an estate*. If a donor makes a gift to "my son or his estate", is that an expression of the donor's intention that the gift not lapse? Courts have gone both ways on that one.
- *Scheme of distribution*. The donor's likely intent may be apparent from the overall scheme of distribution. However, many courts refuse to accept this extrinsic evidence to ascertain the donor's intent as to application of the antilapse statute. The existing California statute recognizes this factor to some extent. See Section 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.")
- *Specific v. residuary gift*. It may make a difference whether a specific gift or a residuary gift is involved. An argument can be made that a specific gift is more likely to be personal to the beneficiary, and the donor's intent more likely to favor lapse if the beneficiary fails to survive. Residuary beneficiaries tend to be the donor's principal beneficiaries, and there is perhaps a greater likelihood of intent to save the gift for that line of descent.
- *Intestacy*. Would application of the antilapse statute result in intestacy? Since donors are presumed to want to avoid intestacy, it may be appropriate to prefer application of the antilapse statute in cases where the failure of the gift would result in intestacy.

There is another consideration involved in the decision whether to craft a detailed antilapse statute that addresses these issues. Mr. Deeringer of the State

Bar Section states that a change in the antilapse 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. He does not elaborate on this concern, but it is something to be aware of.

Professor McGovern's suggestion is to make clear that the antilapse statute does not apply if the transferor expressed a contrary intention, but to provide *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.

Thus he would truncate the existing statute ("The issue of a deceased transferee do not take in the transferee's place if the instrument expresses a contrary intention.") and move the bulk of it into the Comment. He would either leave the matter completely to the court *or* develop elaborate statutory detail, but not leave it halfway in between, as existing law does.

Staff Recommendation

The staff does not think a strong case has been made for any change in the existing California rule of construction on this point. There appears to be nothing wrong with the existing California statute, which states whether the antilapse statute does or does not apply in a couple of key situations, such as where the instrument makes an alternate gift or a class gift, and leaves questions about other indicia of contrary intent to court determination. The Commission's general approach is that extrinsic evidence of the donor's intent should be allowed to overcome a rule of construction; that would be appropriate in this instance as well.

The staff recommends that we take a minimalist approach to revision with respect to this issue, but couple the statute with appropriate commentary:

> (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.

Comment. It should be noted that, in addition to the limitations prescribed in subdivision (b), Section 21110 is subject to the general principle that rules of construction in this part do not apply if it is determined that the transferor intended a contrary result, whether or not expressed in the instrument. See Section 21102(b) (rules of construction inapplicable to extent contrary intention of transferor is expressed in instrument or otherwise determined by court).

Matters the court might take into account in determining whether or not the transferor intended that issue of a deceased beneficiary should take in the beneficiary's place may include (1) whether the instrument is attorney-drafted, (2) whether the result of a survival requirement would be to disinherit a branch of the transferor's lineal descendants, (3) 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, and (4) other persuasive evidence of the transferor's likely intent.

Application of Antilapse Statute to Future Interests

Statement of the Problem

A more difficult and hotly argued issue concerning the antilapse statute is whether the antilapse statute should extend to future interests. In the example of a gift "to my spouse for life, remainder to my children", what happens to the future interest created in my children if one of them fails to survive my spouse? Should the gift (1) lapse and be distributed among the surviving children, (2) vest in the predeceased child and pass with the child's estate, or (3) pass to the predeceased child's issue by means of a type of antilapse provision?

The Commission asked for further discussion of factors that might be involved in this decision.

At common law, it was presumed that the predeceased child would have a vested remainder that would pass in the child's estate if the child failed to survive my spouse (the life tenant). However, many courts were able to find indications of contrary intent, and the presumption was challenged by many commentators because it sometimes produced bad tax results. Until the 1990 Uniform Probate Code, antilapse statutes did not generally disturb this situation.

Existing California law is unclear on the issue. The California antilapse statute comes into play if a transferee fails to survive "until a future time required by the instrument." Section 21110(a). In a gift "to my spouse for life, remainder to my

children", does the instrument by its terms require that a child survive my spouse in order to take? One would not think so, and there is no case so holding.

But in the case of a gift to a class such as children, survival may be impliedly required by Sections 21113 and 21114, which provide that membership in a class for purposes of a class gift is determined as of "the time the transfer is to take effect in enjoyment." The anti-lapse statute could then be construed to save the remainder for issue of a predeceased member of the class — "A transferee under a class gift shall be a transferee for the purpose of [the antilapse statute.]" Section 21110(a).

The staff thinks that result is unlikely — (1) It would require a court to conclude that a rule of construction requiring survival (class gift rule) is the same thing as a survival requirement in the instrument for purposes of the antilapse statute. (2) It would require the court to determine that one rule of construction (the antilapse statute) overrides another rule of construction (class gift rule). (3) And it would further require the court to conclude that the general (antilapse statute) controls over the specific (class gift rule), contrary to standard principles of statutory construction.

Uniform Probate Code Approach

Whether the California antilapse statute *should* apply to a future interest in this way is another question, and one that has been the subject of extensive academic scrutiny. Professor Susan French went into the matter in some depth in her background study for the Commission — French, *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).

The 1990 revision of the Uniform Probate Code applies the antilapse statute to future interests. Since then the debate has intensified and is summarized in Professor McGovern's background study for the Commission— McGovern, *Rules of Construction: Probate Code Sections 21101-21140*, at pp. 13-22 (March 2000). Among the other recent entries in this colloquy are Halbach & Waggoner, *The UPC's New Survivorship and Antilapse Provisions*, 55 Alb. L. Rev. 1091 (1992); Dukeminier, *The Uniform Probate Code Upends the Law of Remainders*, 94 Mich. L.Rev. 148, 153-4 (1995); Waggoner, *The Uniform Probate Code Extends Antilapse-Type Protection to Poorly Drafted Trusts*, 94 Mich. L. Rev. 2309 (1996); Cunningham, *The Hazards of Tinkering with the Common Law of Future Interests: The California Experience*, 48 Hast. L.J. 667 (1997); Becker, *Uniform Probate Code Section 2-707 and*

the Experienced Estate Planner: Unexpected Disasters and How to Avoid Them, 47 UCLA L. Rev. 339 (1999).

Professor McGovern in his study for the Commission recites the arguments pro and con over this issue. These include:

- *Flexibility*. It may be said that the UPC rule limits flexibility, by denying the predeceased child the opportunity to make an appropriate disposition at death; the property would pass automatically to the child's issue. The child would be unable to do sound estate planning, e.g., by setting up a marital deduction trust for the child's surviving spouse. Likewise, the child would be unable to create an appropriate form of disposition to issue (e.g., custodial account), or to apportion the gift among issue according to need.

  On the other hand, it can be argued that, since by definition the child has predeceased the life tenant, the child will not be around at the time the life estate ends and therefore will not really be in a position to know the circumstances of potential beneficiaries at that time. The only person in a position to know the family circumstances at the time of my spouse's death will be my spouse.

- *Termination of trusts*. It may be appropriate to terminate a trust, on agreement of all interested parties. But an antilapse provision creates an interest in the issue of my predeceased child, which will make it more difficult to terminate a trust by agreement of interested parties.

  The response to this concern is that most trusts are not terminable anyway. And in any event, this is not a problem in California, where the statutes would allow the issue of my predeceased child to be represented by a guardian ad litem for purposes of termination.

- *Spouses*. The antilapse provision disinherits my child's spouse, to the benefit of my child's children. This is not a result routinely desired by donors.

  On the other hand, with the high incidence of divorce these days, the more common intent of donors is that lineal descendants, rather than in-laws, be benefited.

- *Taxes*. There is a possibility of application of the generation skipping transfer tax if the antilapse statute were to operate in this situation. However, no clear tax advantage would apparently result from the operation of one rule or the other.

- *Consistency of result*. If I make a gift to my spouse for life, with the power to appoint the remainder to my children, and if my spouse

> appoints to a child who then predeceases my spouse, California law will apply an antilapse rule and save the gift for that child's issue. Section 673. Adopting the same rules for a remainder gift to my children, without an intervening power of appointment, would have the virtue of yielding a consistent result in both situations. This would also be consistent with Section 21114, which provides that if I make a gift to "my heirs", the determination of the composition of that class is postponed until the time the gift is to take effect in enjoyment; the gift is not deemed vested before that time.

Opinions of Experts

Professor McGovern 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 antilapse 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. Both **Jim Deeringer** of the State Bar and **Professor Halbach** agree with this general position.

Professor Dukeminier disagrees with this approach. 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 antilapse 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."

Professor French's views coincide with Professor Dukeminier's. 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 antilapse 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 antilapse 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 — a revocable future interest would be subject to antilapse treatment, but an irrevocable future interest would be treated as being coupled with a special power of appointment. Thus in the case of a trust to my spouse for life, remainder to my children, the trust becomes irrevocable on my death. In that case the gift would pass to the predeceased child's issue, subject to the right of the child to appoint (other than to itself or to its own benefit).

Professor McGovern notes several drawbacks to the special power of appointment 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.

(2) Because the proposal would make a gift in default of appointment to the issue of the remainder beneficiary, the issue of the remaindermen would continue to have a beneficial interest in trusts, and this would pose an obstacle to their termination.

(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.)

Of course, some of these are the same criticisms that have been leveled against application of the antilapse statute to future interests. The key difference is that the power of appointment approach would allow the property to pass to a spouse, but not the antilapse approach (at least as applied by the Uniform Probate Code).

Conclusion

Where does all this leave us? First, the California law seems to be that in the case of a gift of a remainder after a life estate the remainderperson is not required to survive the life tenant in order to take. Section 21109. If the remainderperson predeceases the life tenant, the gift passes in the remainderperson's estate. The antilapse statute does not apply. Section 21110.

But if the remainder after the life estate passes to a class such as children, the law imposes a survival requirement. Sections 21113 and 21114. A member of the class who predeceases the life tenant does not take, and the share passes to the other members of the class. In the staff's opinion, the antilapse statute does not operate to save the gift either for the deceased child's estate or the deceased child's issue. However, this outcome is the subject of argument, and a case can be made that the antilapse statute does apply. Even so, the antilapse statute would not save a gift to a member of the class known to the donor to have predeceased the execution of the instrument. Section 21110(a).

Perhaps it would be helpful to provide clear and appropriate rules for these circumstances. One problem is that every expert has a different opinion on the proper result. We have four different opinions from Professors Dukeminier, French, Halbach, and McGovern, ranging from a suggestion that the antilapse statute should apply to future interests, through various refined applications including a power of appointment, to applying no statutory rule at all and leaving the matter to case development.

Generally, we seek in the rules of construction to effectuate the result that the average donor would most commonly desire. We have heard conflicting views on whether the donor would most commonly desire that the remainderperson be able to pass the property to a spouse or whether the property should be forced to the remainderperson's issue. In either event, it appears that the common desire would be that some form of antilapse should clearly apply (particularly in the class gift situation).

Professor McGovern indicates that if the Commission is interested in providing statutory guidance, rather than leaving the matter to case law development, he would suggest something along the following lines, basically extending the antilapse statute to future interests:

> (a) 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.
>
> (b) 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 provision), the issue of the deceased beneficiary shall take in the beneficiary's place in the manner provided in Section 240.

(Note: For purposes of focusing on basic policy, the staff has omitted some details of the McGovern proposal, such as the provision of existing law that the antilapse statute would not save a gift to a beneficiary who predeceased the execution of the instrument. We will examine those details once the Commission has decided its policy approach in this area.) Mr. Deeringer of the State Bar has indicated his basic agreement with the approach outlined above.

The staff thinks this is a close call, and the resolution depends considerably on one's perception of what most donors would want. The staff thinks a strong argument can be made for passing the gift in the estate of the predeceased remainderperson. First, that appears to be the rule right now in the case of a gift to an individual (but not to a class). Second, the estate of the decedent will quite likely go to issue in any event. Third, in many cases the decedent's surviving spouse is the most appropriate person to handle the estate, and can also take care of issue; the decedent should not be precluded from passing the property to the surviving spouse. That leaves the staff in a position similar to that advocated by Professors Dukeminier and French.

The staff thinks a strong argument can also be made for leaving the matter to case law, as Professor McGovern proposes. There are many factors that bear on this issue, which could tend either way depending on the circumstances of the particular case. Allowing the court flexibility to determine presumptive intent, based on all the circumstances, makes some sense. Generally the staff does not favor rules of law that implicate extensive judicial involvement. However, this particular issue does not appear to have caused problems in practice. Perhaps that is because form instruments adequately deal with it, or because the end

result of lapse or antilapse is often the same in any event. The complexities of drafting a finely-tuned antilapse statute to meet this issue may argue for leaving it alone.

The staff thinks the Commission needs to decide general policy on this matter before we get into the actual drafting of an appropriate statute, with its various fine points such as distinctions between individual and class gifts, preference for kindred over others, possible limitation to trusts (excluding other interests such as mineral interests), etc.

PROB. CODE § 21133. UNPAID PROCEEDS OF SALE, CONDEMNATION, OR INSURANCE; PROPERTY OBTAINED AS A RESULT OF FORECLOSURE

The Commission directed the staff to offer a draft to modernize the language of this section consistent with the revised Uniform Probate Code. (This is a provision that Professor McGovern recommends be repealed, but that the State Bar argues should be retained.)

> 21133. A recipient of a specific gift has ~~the right to the remaining property specifically given~~ a right to the property specifically given owned by the transferor at the time the gift takes effect in enjoyment and all of the following:
>
> (a) Any balance of the purchase price (together with any security ~~interest~~ agreement) owing from a purchaser to the transferor at ~~death~~ the time the gift takes effect in enjoyment by reason of sale of the property.
>
> (b) Any amount of an eminent domain award for the taking of the property unpaid at ~~death~~ the time the gift takes effect in enjoyment.
>
> (c) Any proceeds unpaid at death on fire or casualty insurance on or other recovery for injury to the property.
>
> (d) Property owned by the transferor at ~~death~~ the time the gift takes effect in enjoyment and acquired as a result of foreclosure, or obtained in lieu of foreclosure, of the security interest for a specifically given obligation.
>
> (e) Real or tangible personal property owned by the transferor at the time the transfer is effective that the transferor acquired as a replacement for specifically given real or tangible personal property.
>
> (f) If not covered by subdivisions (a) to (e), a pecuniary gift equal to the value as of its date of disposition of other specifically given property disposed of during the transferor's lifetime but only to the extent it is established that ademption would be inconsistent with the transferor's manifested plan of distribution or that at the

time the instrument was made, the date of disposition or otherwise, the transferor did not intend that the gift adeem .

Comment. Section 21133 is amended for conformity with Uniform Probate Code Section 2-606(a). (The Section 21133 is based on former Uniform Probate Code Section 2-608(a), which is superseded by Uniform Probate Code Section 2-606(a).)

Note. We have not picked up the UPC references to the time the gift takes effect "in *possession or* enjoyment" here. Other California statutes refer simply to the time the gift takes effect "in enjoyment". See Sections 21112, 21113, 21114. But see Sections 21104, 21135 (possession or enjoyment).

PROB. CODE § 21134. SALE BY CONSERVATOR; PAYMENT OF PROCEEDS OF SPECIFICALLY DEVISED PROPERTY TO CONSERVATOR

The Commission directed the staff to offer a draft to modernize the language of this section consistent with the revised Uniform Probate Code. (This is a provision that Professor McGovern recommends be repealed, but that the State Bar argues should be retained.)

21134. (a) Except as otherwise provided in this section, if specifically given property is sold or mortgaged by a conservator or by an agent acting within the authority of a durable power of attorney for an incapacitated principal, the beneficiary of the specific gift has the right to a general pecuniary gift equal to the net sale price of, or the amount of the unpaid loan on, 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 to an agent acting within the authority of a durable power of attorney for an incapacitated principal, or if the proceeds on fire or casualty insurance on, or recovery for injury to, specifically gifted property are paid to a conservator or to an agent acting within the authority of a durable power of attorney for an incapacitated principal, the recipient of the specific gift has the right to a general pecuniary gift equal to the eminent domain award or the insurance proceeds or recovery.

(c) ~~This~~ For the purpose of the references in this section to a conservator, this section does not apply if, after the sale, mortgage, condemnation, fire, or casualty, or recovery, the conservatorship is terminated and the transferor survives the termination by one year.

(d) For the purpose of the references in this section to an agent acting with the authority of a durable power of attorney for an incapacitated principal, (i) "incapacitated principal" means a principal who is an incapacitated person, (ii) no adjudication of incapacity before death is necessary, and (iii) the acts of an agent

within the authority of a durable power of attorney are presumed to be for an incapacitated principal.

(e) The right of the beneficiary of the specific gift under this section shall be reduced by any right the beneficiary has under Section 21133.

Comment. Section 21134 is amended for conformity with Uniform Probate Code Section 2-606(b). (Section 21134 is based on former Uniform Probate Code Section 2-608(b), which is superseded by Uniform Probate Code Section 2-606(b).)

Note. This section (and a few others) refer occasionally to the "beneficiary", whereas most other rules of construction refer to the "transferee". The staff proposes to convert beneficiary provisions to transferee provisions throughout.

PROB. CODE § 21135. ADEMPTION BY SATISFACTION

The Commission directed the staff to offer a draft to modernize the language of this section consistent with the revised Uniform Probate Code. (This is a provision that Professor McGovern recommends be repealed, but that the State Bar argues should be retained.)

21135. (a) Property given by a transferor during his or her lifetime to a person 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 or that its value is to be deducted from the value of the testamentary gift.

(3) The transferee acknowledges in writing that the gift is in satisfaction of the testamentary gift or that its value is to be deducted from the value 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~~ at 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.

(d) If the transferee fails to survive the transferor, the gift is treated as a full or partial satisfaction of the gift, as appropriate, in

applying Sections 21110 and 21111 unless the transferor's contemporaneous writing provides otherwise.

Comment. Section 21135 is amended for conformity with Uniform Probate Code Section 2-609. (Section 21135 is based on former Uniform Probate Code Section 2-612, which is superseded by Uniform Probate Code Section 2-609.) The reference to "possession or" enjoyment is deleted as superfluous.

A comparable provision for intestate succession is found at Section 6409 and should be conformed.

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 or that its value is to be deducted from the value of 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 or that its value is to be deducted from the value of the heir's share of the estate.

(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~~ at 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.

Comment. Section 6409 is amended for conformity with Section 21135 and with Uniform Probate Code Section 2-109.

COMMISSION COMMENTS FOR RULES OF CONSTRUCTION

The basic rules of construction for wills were enacted in 1983 on recommendation of the Law Revision Commission. See former Probate Code § 6140 et seq. As with all Commission-sponsored legislation, there were Comments accompanying the statutes explaining their derivation, their relation to other

statutes, aids to construction, etc. See *Wills and Intestate Succession*, 16 Cal. L. Revision Comm'n Reports 2301 (1982); 17 Cal. L. Revision Comm'n Reports 822 (1983).

These statutes were in place for 10 years before they were generalized and made applicable to trusts and other instruments besides wills. See Probate Code § 21101 et seq. This was done by the State Bar Probate Section. Unfortunately, the useful Commission commentary to these sections was lost in the process of relocation of the provisions from the wills portion of the Probate Code to the general portion of the Probate Code.

The staff proposes as part of the current project to write new Commission Comments for the rules of construction. This will involve taking the old Comments, looking to see what changes were made to the statutes in the relocation process, and then revising the old Comments so that they conform to the new provisions.

In some cases, little or no change will be necessary because the old provision was carried over verbatim into the new section. In other cases extensive changes may be required.

The staff has sought help in this task from the Institute for Legislative Practice. They have agreed to catalog the changes made in the statutes when they were relocated and provide us with an initial draft of revised commentary.

As a general rule, the Commission provides Comments only for legislation enacted on Commission recommendation. This case is a little different, however, since the relocated statute is derived directly from Commission-sponsored legislation, and for which the Commission has previously prepared Comments.

We are touching many of the rules of construction in this project. About a third of them, however, are being left unchanged. Ordinarily we only provide Comments for sections actually affected. (Sometimes we will make a technical change in a section for the sole purpose of attaching a Comment to the section.) In the present case, since we are preparing a comprehensive revision of an entire Part of the Probate Code, and affecting most of the sections in it, we would draft Comments for the entire Part, including sections we are not otherwise amending.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

RULES OF CONSTRUCTION FOR TRUSTS AND OTHER INSTRUMENTS

Background

Modern rules of construction for wills were enacted in California in 1983 on recommendation of the Law Revision Commission.[1] Subsequent legislation enacted in 1994 extended the rules of construction to trusts and other instruments.[2]

Problems in the application of the extended rules have become apparent.[3] The Law Revision Commission has concluded that a comprehensive review of this matter is appropriate. The Commission retained Professor William McGovern of UCLA Law School as a consultant. Professor McGovern's background study[4] is attached to this recommendation as an Appendix.

This recommendation proposes adjustments in the rules of construction to ensure their proper functioning in the environment of their expanded application to trusts and other instruments.

Overview of Existing Law

The rules of construction are now found in Part 1 (Sections 21101-21140) of Division 11 of the Probate Code — "Rules for Interpretation of Instruments". All of the rules of construction are based on previously existing Probate Code provisions applicable to wills. The basic idea of the 1994 extension to trusts and other instruments was to achieve uniformity among the common estate planning instruments.

Extension of the rules of construction beyond wills has been driven by the evolution of the inter vivos trust and other nonprobate transfer instruments as will substitutes. The concept of uniform rules of construction finds support in the Restatement of Trusts, which notes that a revocable inter vivos trust is ordinarily subject to rules of construction applicable to testamentary dispositions.[5] The Uniform Trust Code likewise provides that, "The rules of construction that apply in this state to the interpretation of and disposition of property by will also apply as appropriate to the interpretation of the terms of a trust and the disposition of the trust property."[6] More problematic, though, is extension of the same rules to other

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1. See *Wills and Intestate Succession*, 16 Cal. L. Revision Comm'n Reports 2301 (1982); 17 Cal. L. Revision Comm'n Reports 822 (1983); former Prob. Code § 6140 *et seq*. Except as otherwise noted, all further references are to the Probate Code.

2. 1994 Cal. Stat. ch. 806; See Sections 21101-21140.

3. See, e.g., Cunningham, *The Hazards of Tinkering with the Common Law of Future Interests: The California Experience*, 48 Hast. L.J. 667 (1997).

4. McGovern, *Rules of Construction: Probate Code Sections 21101-21140* (March 2000).

5. Restatement (3d) of Trusts, § 25(2).

6. Uniform Trust Code § 112 (2000).

forms of donative transfer, such as irrevocable trusts, deeds, joint tenancy, and insurance policies.

Many of the original 1983 California rules of construction applicable to wills were based on the pre-1990 Uniform Probate Code.[7] A number of the uniform code provisions have since been altered in the source but not in California. In several instances the Law Revision Commission proposes that the 1990 Uniform Probate Code changes should be paralleled in California.

General Approach

The rules of construction are intended as aids to interpretation where the instrument being construed is silent or ambiguous. They are default rules in the sense that if the instrument is clear on the matter, they are inapplicable.[8]

Even though the instrument may be silent on a point, there may nonetheless be clear extrinsic evidence of the donor's intent. The rules of construction should not apply where the donor's intent on the issue can be determined.[9]

Rules of construction are necessarily blunt instruments. They are designed to provide the result that would most likely be embraced by most donors, had they addressed the point. A particular rule of construction inevitably will yield an inappropriate result in some circumstances for a particular donor; but the rule can be overridden for that donor by a showing of the donor's likely intent in the circumstances, even though not expressed in the instrument.

The rules of construction result from the interplay of two conflicting lines of legal thought. One philosophy would minimize the role of rules of construction and free the court to make the most appropriate determination of the donor's intent. The other philosophy would seek to maximize guidance to the parties by providing presumptive answers for the most common situations, thereby limiting litigation over these issues. The tension between the two philosophies can be seen in the various issues addressed in this recommendation.

Application of Rules of Construction

The rules of construction are, by their terms, applicable to wills, trusts, deeds, and any other "instrument."[10] This is a sweeping provision, since an instrument may be any writing that designates a beneficiary or makes a donative transfer of property.[11]

The Law Revision Commission has concluded that most of the rules of construction may appropriately be applied to all instruments. There are some exceptions, however. The existing statute makes clear that the rules of construction

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7. See *Wills and Intestate Succession*, 16 Cal. L. Revision Comm'n Reports 2301 (1982).

8. See 21102(b) ("The rules of construction expressed in this part apply where the intention of the transferor is not indicated by the instrument.").

9. See Section 21102(a).

10. Section 21101.

11. Section 45.

apply "[u]nless the provision or context otherwise requires".[12] This limitation is satisfactory and does not require further elaboration. The following rules of construction have limited application:[13]

- Section 21105 — instrument passes all property including after-acquired property (limited to will)
- Section 21109 — requirement that transferee survive transferor (limited to testamentary gift)
- Section 21132 — change in form of securities (limited to will)

Intention of Transferor

The intention of a transferor "as expressed in the instrument" controls the legal effect of dispositions made in the instrument.[14] It should be noted, however, that expressions in the instrument are not the exclusive means by which a transferor's intention may be ascertained. Under the parol evidence rule, for example, extrinsic evidence is admissible on the issue of a mistake or imperfection of the writing.[15]

The reference in Section 21102(a) to expressions of the transferor's intention "in the instrument" should not be construed to preclude reformation in the case of a mistaken writing.[16] Modern theory as expounded in the academic literature, the Uniform Probate Code, and the Restatement of Property, all support the concept that reformation should be available for inter vivos instruments, as it is for wills. The Commission has proposed commentary to Section 21102 to emphasize this concept.

☛ *The Commission particularly requests input as to whether Section 21102(a) requires further revision to address the issue of reformation, or whether the proposed Comment explaining its operation is satisfactory.*

The rules of construction should apply only where the intention of the maker of the instrument cannot be ascertained.[17] In this respect, existing law specifying the effect of the rules of construction is unduly narrow.[18] The law should be revised to make clear that the rules of construction do not apply to the extent a contrary intention of the transferor is expressed in the instrument "or is otherwise determined by the court". This would be consistent with existing law that allows

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12. Section 21101.

13. The Commission has cross-referenced examples of rules of construction that are limited by their terms in the Commentary to Section 21101.

14. Section 21102(a).

15. Code Civ. Proc. § 1856(e). The parol evidence rule applies to wills, among other instruments. Code Civ. Proc. § 1856(h).

16. *Cf.* Estate of Smith, 61 Cal. App. 4th 259, 71 Cal.Rptr. 2d 424 (1998) (contestant bears burden of proof on mistake as to testamentary intent).

17. See discussion of "General Approach", above.

18. See Section 21102(b) (rules apply where intention of testator "not indicated by the instrument").

extrinsic evidence of a testator's intent in order to rebut the presumptive effect of rules of construction.[19]

Presumption that Property Vests in Common

Section 21106 recapitulates the common law presumption that a transfer to two or more persons vests the property transferred to them as tenants in common, absent an expressed intent otherwise.[20] This statement of the law is incomplete[21] and unnecessary.[22] The Commission recommends that it be repealed in reliance on the equivalent but more accurate rendition of the concept in the Civil Code.[23] The Civil Code is the more appropriate location for the provision in light of its significant application as well to transactions outside the donative transfer context.

Common Law Doctrine of Worthier Title Abolished

Section 21108 abolishes the common law doctrine of worthier title, that a grantor cannot convey an interest to the grantor's own heirs. The Section duplicates Civil Code Section 1073. Both provisions were enacted in 1959 on recommendation of the Law Revision Commission.[24] 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."[25]

Since then circumstances have changed, and the principal contemporary relevance of the doctrine of worthier title is to trusts.[26] The duplicative provision in the Civil Code is unnecessary. The statutes would be simplified by its repeal.[27]

Requirement that Transferee Survive Transferor

The transferee of a donative transfer must survive the transferor in order to take the gift.[28] This rule of construction is unduly broad as drafted. It is appropriately

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19. See Section 6111.5; Estate of Anderson, 56 Cal. App. 4th 235, 65 Cal. Rptr. 2d 307 (1997) (extrinsic evidence admissible).

20. See Civil Code Section 683 for another codification of the common law presumption.

21. There are numerous exceptions to the rule stated that are not reflected in the statement. See, e.g., Section 5100 et seq. (multiple-party accounts); Section 5500 et seq. (Uniform TOD Security Registration Act).

22. Both the common law and other statutes cover the issue completely. See, e.g., Civ. Code § 686.

23. Civ. Code § 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.")

24. 1959 Cal. Stat. ch. 122.

25. *Recommendation relating to The Doctrine of Worthier Title*, 2 Cal. L. Revision Comm'n Reports D-5 (1959).

26. The issue arises when the settlor of a trust wants to terminate or modify a trust that gives an interest to the settlor's "heirs".

27. The statutes should be further simplified by removal of the obsolete transitional provision from Section 21108 ("This section applies to all cases in which a final judgment had not been entered as of September 18, 1959.").

28. Section 21109(a).

applied to wills (codifying the common law rule) and to revocable trusts (will substitutes).[29] But its application to irrevocable trusts and deeds is problematic. It could be read to require a beneficiary or donee to survive the settlor or donor in order to retain a gift. It is unlikely the existing statute was intended to rescind a completed transfer of property if the transferee later were to predecease the transferor.[30] The statute should be limited to gifts intended to take effect at or after the death of the donor.

Failure of Transfer

Section 21111 provides rules for treatment of a failed transfer. A failed specific gift passes with the residue; a failed residuary gift passes to the remaining residuary beneficiaries proportionately.

The treatment of a gift of "all my estate" is unclear under this scheme. A clarification should be added that such a gift is treated as a residuary gift; this will close a potentially endless loop in the statute.

The existing statute inexplicably treats a future interest in the same manner as a residuary gift. The result is to create intestacy in many instances. Take, for example, a devise "to A for life, remainder to B if B survives A." Under Section 21111, a failed gift of the future interest is precluded from going to the residuary beneficiaries, resulting in an intestacy. This anomaly should be eliminated from the statute, and a future interest treated the same as other gifts.

Class Gift to "Heirs", "Next of Kin", "Relatives", or the Like

The California statute[31] governing determination of beneficiaries entitled to take under a class gift contains a number of ambiguities. Although the statute is based on an earlier version of Uniform Probate Code Section 2-711, the current version of the uniform code resolves the ambiguities.[32] The Commission recommends that the California statute be recast in conformity with the current version of the uniform code.

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29. California imposes a comparable survival requirement on pay on death accounts and Totten trusts. Section 5302.

30. See, e.g., Cunningham, *The Hazards of Tinkering with the Common Law of Future Interests: The California Experience*, 48 Hast. L.J. 667, 690-91 (1997).

31. Section 21114.

32. The uniform code version resolves the following issues:

(1) Application of the section to interests acquired by operation of law.

(2) Application of escheat principles.

(3) Application of the law of another state.

(4) Elimination of the special rule for ancestral property.

See discussion in McGovern, *Rules of Construction: Probate Code Sections 21101-21140*, xx Cal. L. Revision Comm'n xx (xxxx).

Halfbloods, Adopted Persons, Persons Born Out of Wedlock, Stepchildren, and Foster Children

Section 21115 incorporates intestacy rules in interpreting class gifts, but fails to indicate which rules apply — those in effect at the time the instrument is executed or those in effect at the time the transfer takes effect in enjoyment. By comparison, in construing a gift to "heirs" under Section 21114, the determination is made as of the time when the transfer is to take effect in enjoyment and according to the intestate succession law in effect at that time. There is no apparent reason to use different choice of law rules in the determination of "heirs" as opposed to "issue". Section 21115 should be conformed to Section 21114 on this point, and the determination made under the intestate succession laws in effect at the time the transfer is to take effect in enjoyment.

Vesting of Testamentary Disposition

Section 21116 creates a presumption that interests vest at the transferor's death (at least with respect to a future interest given to an individual), whereas a gift of a future interest to a class such as children or heirs does not vest until the date of distribution.[33] Besides the inconsistency created by Section 21116, its presumption in favor of early vesting for individuals unduly limits the ability of the court to consider all the circumstances in construing the intent of an instrument. The Commission recommends its repeal.

Change in Form of Securities

The provisions applicable to a gift of securities that have changed form (for example by sale, merger, reinvestment, and the like) are based on Uniform Probate Code Section 2-605.[34] The uniform code has since been revised to make clear that it applies regardless of whether the gift is characterized as general or specific. The uniform code is also limited to gifts made by will, thus avoiding internal inconsistencies inherent in the California statute's application to other instruments.[35] The Commission recommends that California law be conformed to the revised uniform code.

Changes to Property the Subject of a Specific Gift

The statutes applicable to a specific gift of property that is subject to a contract of sale or transfer[36], or is subject to a charge or encumbrance,[37] or as to which the transferor has an altered interest,[38] are derived from older Probate Code provisions

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33. Sections 21113 and 21114.

34. Section 21132.

35. To apply the California law in a trust context would require that additional stock be both owned by the transferor and be part of the trust estate. Such gifts are not used by well-advised drafters in any event. See, e.g., 1 *California Will Drafting* § 12.61 (Cal. Cont. Ed. Bar 3d ed. 1992).

36. Section 21136.

37. Section 21137.

38. Section 21138.

dealing with ademption, and no longer serve a useful purpose. They are not exhaustive,[39] whereas the case law on ademption is adequate and would effectuate the donor's intent.[40] The provisions may be repealed without loss.

Elimination of Redundant Provisions

A number of the rules of construction expressed in the Probate Code are redundant and should be repealed, either because their substance is covered more adequately elsewhere in the codes[41] or because they merely restate the common law but fail to accurately capture its nuances.[42]

Other rules of construction appear both in the Probate Code and elsewhere.[43] These provisions should be consolidated in the Probate Code, so that practitioners and others may easily find all relevant rules of construction in one location.

Effective Dates

As a general principle, the rules of construction apply retroactively to all instruments, regardless of their date of execution.[44] This is consistent with the purpose of rules of construction, which apply in circumstances where the intent of the maker of the instrument cannot be ascertained.[45] It is also consistent with the general approach of the Probate Code to apply new law except where it would create substantial injustice,[46] and with the principle that improvements in the law should be broadly applied.

Section 21140(b) creates an exception to retroactive application of the rules of construction in a case where former Sections 1050-1054 would apply to a decedent who died before January 1, 1985. This provision is obsolete. The statutes it refers to have relevance to very few cases (the effect of an advancement to an heir in determining the heir's intestate share), and the likelihood of such an issue arising in the future with respect to a pre-1985 decedent is remote. In the interest of simplification of the law, this provision should be repealed.

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39. Section 21139.

40. [Citations to be provided.]

41. Compare, e.g., Sections 21109(b)-(c) and 220 (requirement that transferee survive transferor).

42. See Section 2113 (afterborn member of class); McGovern, *Rules of Construction: Probate Code Sections 21101-21140*, xx Cal. L. Revision Comm'n xx (xxxx).

43. Compare, e.g., Civ. Code § 1071 and Prob. Code § 21112 (conditions referring to issue).

44. Section 21140(a).

45. Section 21102. See also, McGovern, *Rules of Construction: Probate Code Sections 21101-21140*, xx Cal. L. Revision Comm'n xx (xxxx).

46. Section 3.

Contents

PROPOSED LEGISLATION

☞ **Note.** Statutes as to which the Commission recommends no change are also set out below, for convenience of reference.

DIVISION 11. CONSTRUCTION OF WILLS, TRUSTS, AND OTHER INSTRUMENTS

PART 1. RULES OF INTERPRETATION

CHAPTER 1. GENERAL PROVISIONS

Prob. Code § 21101 (amended). Application of part

21101. Unless the provision or context otherwise requires, this part ~~shall apply~~ applies to a will, trust, deed, and any other instrument.

Comment. Section 21101 makes the rules of construction in this part applicable 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 (will passes all property including after-acquired property), 21109 (requirement for testamentary gift that transferee survive transferor), 21132 (change in form of securities disposed of by will). See also Section 45 ("instrument" defined).

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

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.

☞ **Note.** See Memorandum 2000-87 for discussion.

Prob. Code § 21103 (unchanged). Choice of law as to meaning and effect of instrument

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 (amended). "Testamentary gift" defined

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

Comment. Section 21104 is amended to make clear that, notwithstanding use of the term "testamentary", this part applies to nonprobate transfers as well. Cf. Section 5000 (nonprobate

transfers). See also Sections 21109 and 21135 and Comments. The reference to "possession or" enjoyment is deleted as superfluous.

☞ **Note.** The Commission solicits suggestions for alternative terminology for "testamentary gift", such as "at death transfer".

Prob. Code § 21105 (unchanged). Will passes all property including after-acquired property

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.

Prob. Code § 21106 (repealed). Transferees as owners in common

~~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. *Cf.* Civ. Code § 686 (what interests are in common).

Prob. Code § 21107 (unchanged). Direction in instrument to convert real property into money

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 (amended). Common law doctrine of worthier title abolished

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.~~

Comment. Section 21108 is amended to remove an obsolete transitional provision.

Prob. Code § 21109 (amended). Requirement that transferee survive transferor

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

~~(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.~~

Comment. Subdivision (a) of Section 21109 is amended to limit is application to at death transfers. See Section 21104 ("testamentary gift" defined).

Subdivisions (b) and (c) are deleted as unnecessary. The general "clear and convincing evidence" standard of Section 220 applies.

Prob. Code § 21110. Anti-lapse

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.

☞ **Note.** See Memorandum 2000-87 for discussion.

Prob. Code § 21111 (amended). Failure of transfer

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~~.

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

Comment. Section 21111 is amended to treat future interests in the same manner as other gifts. Subdivision (c) is added to clarify an ambiguity in application of the statute.

Prob. Code § 21112 (unchanged). Conditions referring to "issue"

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.

Prob. Code § 21113 (repealed). Afterborn member of class

~~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.~~

Comment. Section 21113 is repealed as unnecessary. It inadequately codifies the common law "rule of convenience", failing to include its common law exceptions. See Restatement of Property 2d §§ 26.1-26.2.

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

21114. ~~A transfer of a present or future interest to the transferor's or another~~ If a statute or an instrument provides for transfer of a present or future interest to or creates a present or 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 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 is to take effect in enjoyment and according to the California statutes of intestate succession of property not acquired from a predeceased spouse in effect at that time~~ words of similar import, the transfer is to the persons, including the state under Section 6800, and in the shares that would succeed to the designated person's intestate estate under the intestate succession law of the designated person's domicile if the designated person died when the transfer is to take effect in enjoyment. If the designated person's surviving spouse is living but is remarried at the time the transfer is to take effect in enjoyment, the surviving spouse is not an heir of the designated person for purposes of this section.

Comment. Section 21114 is amended to conform to Uniform Probate Code Section 2-711. The amendment clarifies a number of issues, including:

(1) Application of the section to interests acquired by operation of law.
(2) Application of escheat principles.
(3) Application of the law of another state, based on the designated person's domicile.
(4) Elimination of the special rule for ancestral property.

See *Rules of Construction for Trusts and Other Instruments*, xx Cal. L. Revision Comm'n Reports xx (xxx).

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

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.

Comment. Subdivision (d) is added to Section 21115 for consistency with the choice of law rules of Section 21114.

Prob. Code § 21116 (repealed). Vesting of testamentary disposition

~~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.~~

Comment. Section 21116 is not continued. It codifies a presumption in favor of early vesting that limits the ability of the court to consider all the circumstances in construing the intent of an instrument.

Prob. Code § 21117 (unchanged). Classification of testamentary gifts

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.

☞ **Note.** It should be noted that, as used in this section, a "testamentary gift" is a transfer, including a nonprobate transfer, that takes effect at or after death. See Section 21104 ("testamentary gift" defined).

Prob. Code § 21118 (unchanged). Satisfaction of pecuniary gift by property distribution

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

Prob. Code § 21120 (amended). Every expression given some effect; intestacy avoided

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.

Comment. Section 21120 is amended to more fully implement its application to trusts and other instruments.

Prob. Code § 21121 (unchanged). Construction of instrument as a whole

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.

Prob. Code § 21122 (unchanged). Words given their ordinary meaning; technical words

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

Prob. Code § 21131 (unchanged). No exoneration

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 (repealed). Change in form of securities

~~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.~~

Comment. Former Section 21132 is superseded by new Section 21132 (change in form of securities).

Prob. Code § 21132 (added). Change in form of securities

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.

(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.

Comment. New Section 21132 supersedes former Section 21132 (change in form of securities); the new section is based on Uniform Probate Code Section 2-605, as revised. (The former section was based on Uniform Probate Code Section 2-605, before its revision.)

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

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.

☞ **Note.** See Memorandum 2000-87 for discussion.

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

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.

☞ **Note.** See Memorandum 2000-87 for discussion.

Prob. Code § 21135. Ademption by satisfaction

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.

☞ **Note.** See Memorandum 2000-87 for discussion.

Prob. Code § 21136 (repealed). Contract for sale or transfer of specifically devised property

~~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.~~

Comment. Section 21136 is not continued. The matter is governed by case law. [Citations to be provided.]

Prob. Code § 21137 (repealed). Transferor placing charge or encumbrance on specifically devised property

~~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.~~

Comment. Section 21137 is not continued. The matter is governed by case law. [Citations to be provided.]

Prob. Code § 21138 (repealed). Act of transferor altering transferor's interest in specifically devised property

~~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.~~

Comment. Section 21138 is not continued. The matter is governed by case law. [Citations to be provided.]

Prob. Code § 21139 (amended). Rules stated in Sections 21133 to 21135 not exhaustive

21139. The rules stated in Sections 21133 to ~~21138~~ 21135, inclusive, are not exhaustive, and nothing in those sections is intended to increase the incidence of ademption under the law of this state.

Comment. Section 21139 is amended to reflect repeal of Sections 21136-21138.

CHAPTER 4. EFFECTIVE DATES

Prob. Code § 21140 (amended). Effective dates

21140. ~~(a) Except as otherwise provided and subject to subdivision (b), this~~ This 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.~~

Comment. Section 21140 is amended to delete the transitional provision in subdivision (b).

CONFORMING REVISIONS

Civ. Code § 1071 (repealed). Conditions referring to issue

~~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.~~

Comment. Section 1071 is repealed as unnecessary. It duplicates Probate Code Section 21112.

Civ. Code § 1073 (repealed). Common law doctrine of worthier title abolished

~~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.~~

Comment. Section 1073 is repealed as unnecessary. It duplicates Probate Code Section 21108.