

First Supplement to Memorandum 2000-87

Rules of Construction for Trusts (State Bar Comments)

Attached as an Exhibit are comments of the Estate Planning, Trust and Probate Law Section of the State Bar concerning the issues discussed in Memorandum 2000-87.

PROB. CODE § 21102. INTENTION OF TRANSFEROR

Memorandum 2000-87 discusses amendment of Section 21102 to eliminate the implication that extrinsic evidence of the transferor's intent is precluded.

The State Bar would leave Section 21102 unchanged:

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.

The Bar feels that the proposed changes would unnecessarily alter the balance in existing law between the language contained in the instrument and the intent of the transferor. "Under present law there is generally no difficulty in getting extrinsic evidence admitted." They believe a change in language would shift the balance too much in favor of a contestant.

Presumably, they would have no problem with commentary elaborating the opportunity for introduction of extrinsic evidence under existing law. Something along the following lines, perhaps:

Comment. It should be noted that, notwithstanding the references in Section 21102 to the intention of the transferor as expressed or indicated "in the instrument", language in the instrument is not the exclusive means by which a transferor's intention 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, the court may reform an instrument for mistake or imperfection of writing. Cf., Code Civ. Proc. § 1856(e);

Estate of Smith, 61 Cal. App. 4th 259, 71 Cal.Rptr. 2d 424 (1998) (contestant bears burden of proof of mistake as to testamentary intent). Extrinsic evidence may also 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).

PROB. CODE § 21104. "TESTAMENTARY GIFT" DEFINED

Memorandum 2000-87 discusses the inadequacy of the term "testamentary gift", and suggests that it would be preferable to use some other term. "At death transfer" may be viable, or perhaps a circumlocution that avoids any use of an artificial term.

The State Bar agrees with the staff recommendations.

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

The staff has proposed deleting an obsolete transitional provision. The State Bar concurs.

PROB. CODE § 21110. ANTI-LAPSE

Express Requirement of Survival

Memorandum 2000-87 discusses at length the question of what language in the instrument is sufficient to signal the transferor's intention that the beneficiary must survive in order to take (thereby overriding the antilapse statute). The staff suggests that no change in law is warranted on this matter.

The State Bar generally agrees with the staff analysis, but would make two changes:

(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) (2) 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) (3) other persuasive evidence of the transferor's likely intent.

Their concern about the requirement that the beneficiary must survive for a specified period is that it may be read to imply that if no period is specified no survival is required. "Perhaps it would be more logical if neither of these provisions would have preclusive effect so that extrinsic evidence could be offered to demonstrate intent."

They do not explain their concern about the reference to an attorney-drafted instrument. We have heard previously that, as between an attorney-drafted survival requirement and one in a printed beneficiary designation form, the attorney-drafted requirement is more likely to be intentional.

Application of Antilapse Statute to Future Interests

The State Bar agrees with Professor McGovern that the question of application of the antilapse statute to future interests should be left to case law. "It would be difficult to draft a satisfactory statute and the issue appears to be seldom litigated."

PROB. CODE §§ 21133-21135. MISCELLANEOUS ADEMPION ISSUES

The State Bar would amend these three provisions consistent with the revised Uniform Probate Code. Drafts to accomplish this are set out in Memorandum 2000-87.

COMMISSION COMMENTS FOR RULES OF CONSTRUCTION

The State Bar agrees with the concept of preparing new Commission Comments for the rules of construction.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

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December 12, 2000

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Re: Rules of Construction for Trusts

Dear Mr. Sterling:

On behalf of the Estate Planning, Trust and Probate Law Section I would like to comment on some of the issues discussed in Memorandum 2000-87, Rules of Construction for Trusts (Discussion of Issues). Page references in this letter will be to the Memorandum. Also, in areas in which we agree with the staff recommendation I will simply state that position without repeating the points, which you have already made in the Memorandum.

Probate Code §21102. Intention of Transferor. We feel that the changes proposed by the staff will unnecessarily alter the balance in existing law between the language contained in the instrument and the intent of the transferor. Under present law there is generally no difficulty in getting extrinsic evidence admitted. The proposed change could be construed as shifting the balance too far in favor of the litigant who wishes to challenge the provisions in the document, and we suggest that this section should not be changed.

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Probate Code §21104 "Testamentary Gift" Defined. We agree with the staff recommendations as to the proposed changes to Probate Code §21104 and §21109.

Probate Code §21108. Common Law Doctrine of Worthier Title Abolished. We agree with the staff recommendation to amend this section.

Probate Code §21110. Antilapse. In general we agree with the staff recommendations in this area, with two exceptions. First, the existing California rule provides that a requirement that the initial transferee survive the transferor for a specified period of time constitutes an expression of intent that the antilapse statute not apply. Although the statute does not address the point, mere words of survival indicating no specified period may or may not be construed as an expression of intent. The staff recommendation would preserve this situation. We see very little difference in terms of expression of intent between a provision that states "to my son Ben if he survives me" and a provision that says "to my son Ben if he survives me for thirty days". It seems odd that a distinction would be drawn between these provisions, although we understand the distinction is drawn in most jurisdictions. Perhaps it would be more logical if neither of these provisions would have preclusive effect so that extrinsic evidence could be offered to demonstrate intent. This might be accomplished by deleting the second sentence in (b), page 12, which states "A requirement that the initial transferee survive for a specified period of time after the death of the transferor constitutes a contrary intention." We are aware of the considerable time which has already been devoted to this question but it may be that some further study is advisable.

A second area of disagreement is the proposed comment on page 13. We believe that "(1) whether the instrument is attorney drafted." should be deleted.

Application of Antilapse Statute to Future Interests. We agree with Professor McGovern that this matter should be left to case law. It would be difficult to draft a satisfactory statute and the issue appears to be seldom litigated.

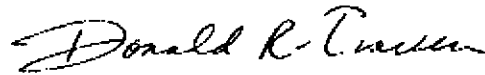
Probate Code §21133 Unpaid Proceeds of Sale, etc., §21134 Sale by Conservator, etc., §21135 Ademption by Satisfaction. In respect to all of these sections, we would oppose repeal; we are, however, in favor of amending them so that they will be consistent with the revised Uniform Probate Code.

Finally, we agree that new Commission Comments should be written for the rules of construction.

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Two members of our committee will attend the Commission meeting on December 15, 2000. Thank you for your consideration of our comments.

Very truly yours,



Donald R. Travers

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