Study L-605 August 31, 2001

Memorandum 2001-62

Rules of Construction for Trusts (Comments on Tentative Recommendation)

The Commission in March approved its tentative recommendation on *Rules of Construction for Trusts and Other Instruments.* The tentative recommendation has been circulated for comment. We have received the following comments:

We anticipate additional comments from the State Bar Probate Section and others. We will supplement this memorandum when that material is received.

The staff wishes to acknowledge the assistance of Amy Ash, a Stanford Law School student serving as a summer intern with the Commission, in analyzing a number of the issues raised in this memorandum.

GENERAL REACTION

The tentative recommendation is a general review and cleanup of the statutes governing the rules of construction for trusts and other instruments. As such, it includes an aggregation of disparate proposals, such as limiting overly broad provisions, repealing duplicative provisions, correcting obsolete references, and making drafting improvements.

The Bar Association of San Francisco (BASF) generally supports the proposals, but has comments on a few specific points. The other commentators address specific points.

Issues raised by the commentators, or on which the staff has conducted additional research, are discussed below.

Prob. Code § 21102. Intention of transferor

Extrinsic Evidence

Section 21102(a) states that the intention of the transferor "as expressed in the instrument" controls the legal effect of dispositions made in the instrument. The statement is misleading, however, since extrinsic evidence may be admissible to determine the transferor's intention. The tentative recommendation describes this situation in the Comment, and solicits input on the questions (1) whether existing law is satisfactory on the matter and (2) whether the statutory language requires further liberalization to enable appropriate use of extrinsic evidence.

The Bar Association of San Francisco responds that existing law is satisfactory, but that the statutory language is "very short and seemingly restrictive." They believe it would be helpful to liberalize the statutory language to encompass some of the material from the Comment.

The staff agrees that courts appear perfectly willing to consider extrinsic evidence to determine the transferor's intention in an appropriate case despite the apparently restrictive statutory language. A recent case illustrates this point. *Estate of Guidotti*, 2001 DJDAR 7741 (July 27, 2001), construed a testamentary trust providing lifetime income to the transferor's wife, but only if she did not remarry or live with a man as though married. The validity of the provision hinged on the transferor's intention. If the provision was intended to restrain marriage, it was void as against public policy; if the provision was intended to provide support until remarriage, it was valid. The court of appeal quoted the language of Section 21102(a) but went on to rely on extrinsic evidence (in the form of an affidavit from the transferor's attorney) as determinative of the transferor's intention to restrain marriage, thereby voiding the trust provision. **The staff would add a reference to *Guidotti* in the Comment.**

With respect to the suggestion of BASF that the statute language be liberalized to recognize case law authority, the Commission has been indecisive about this point. The Commission's consultant, Professor McGovern, also recommended to the Commission that the statute language be liberalized. However, the State Bar Probate Section has been concerned that liberalizing the statutory language could tilt the balance too far in favor of extrinsic evidence.

Earlier drafts considered by the Commission either deleted the "expressed in the instrument" qualification or deleted Section 21102(a) altogether. **Perhaps, instead, an augmentation of the statute along the lines suggested by the Bar Association of San Francisco would be preferable:**

> 21102. (a) The intention of the transferor as expressed in the instrument controls the legal effect of the dispositions made in the instrument.
>
> (b) The rules of construction expressed in this part apply where the intention of the transferor is not indicated by the instrument.
>
> (c) Nothing in this section limits the use of extrinsic evidence, to the extent otherwise authorized by law, to determine the intention of the transferor.

Reformation for Mistake

The tentative recommendation also requests input on the question whether its discussion of the authority of the court to order reformation for mistake is adequate. The tentative recommendation states (footnotes omitted):

> The reference in Section 21102(a) to expressions of the donor's intention "in the instrument" should not be construed to preclude reformation in the case of a mistaken writing. 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.

Jeffrey A. Jaech takes exception to this analysis. He rejects the suggestion that reformation authority under California law is as broad as the Commission suggests. "There remains no California authority to my knowledge that holds that unambiguous language, alleged to be a mistake, in a testamentary instrument may be reformed to conform with the testator or settlor's intent as proved by extrinsic evidence." He states that it may be that modern theory allows broad reformation authority, but California law should adopt modern theory only after careful consideration of the ramifications. "It is misleading to state in your recommendation that this is already the law in California."

As Mr. Jaech indicates, there is extensive case law on the authority of the court to reform ambiguous provisions of an instrument. It is not our intention here to change the California law governing reformation, but merely to ensure that the law governing wills and the law governing trusts is on the same footing. To the extent case law allows reformation of wills, it should likewise allow

reformation of trusts. **The staff would revise the language of the tentative recommendation to avoid any suggestion as to the specific circumstances in which California law may or may not allow reformation.**

We would revise the preliminary part of the recommendation:

> The reference in Section 21102(a) to expressions of the donor's intention "in the instrument" should not be construed to preclude reformation ~~in the case of a mistaken writing~~ to the extent otherwise authorized by law to effectuate the donor's intention. 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.

We would likewise revise the Comment to Section 21102:

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

Prob. Code § 21104. "At-death transfer" defined

The definition of "at-death transfer" refers to a transfer in possession or enjoyment, whereas many of the rules of construction depend on the time of enjoyment rather than possession. The tentative recommendation queries whether the reference to the time of possession is helpful, and the staff has also conducted research on this issue.

The Bar Association of San Francisco notes that the reference to possession may be useful in the trust context, since a trustee has possession of the property without the right to enjoyment. This is consistent with the staff's research on the point. **The staff would therefore preserve the reference to both possession and enjoyment in Section 21104:**

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

Comment. Section 21104 is amended to ~~make~~ substitute the term "at-death transfer" for "testamentary gift." As used in this part, an at-death transfer does not include a lifetime gift.

The reference to a transfer "in possession" includes a transfer to the trustee of a trust.

Prob. Code § 21109. Requirement that transferee survive transferor

Section 21109 requires that the beneficiary survive the transferor in order to take. The tentative recommendation requests comment on the question whether this rule is overly broad as applied to a transfer made by an irrevocable trust. An argument can be made that the transferor intends an irrevocable gift as absolute, and the gift should not be defeated by the happenstance of the order of death of transferor and beneficiary.

The Bar Association of San Francisco argues that the provision is appropriately applied to an irrevocable trust. They give as an example a trust to a life tenant with remainder to the beneficiary. Section 21109 should apply to require that the remainder beneficiary survive the life tenant in order to take.

The staff thinks BASF makes a good point. Until now we have focused on the provision of Section 21109 that requires the beneficiary to survive the transferor, but in fact the statute is broader than that. It also requires survival "until any future time required by the instrument", which would include survival until termination of a preceding life estate. **We do need to make clear, though, that the requirement of survival until a future time required by the instrument applies to all beneficiaries, not just beneficiaries of at-death transfers**:

21109. A transferee ~~of an at-death transfer~~ who fails to survive the transferor of an at-death transfer or until any future time required by the instrument does not take under the instrument.

Prob. Code § 21110. Anti-lapse

Generally, a beneficiary must survive the transferor in order to take a gift. Otherwise, the gift lapses and passes to other beneficiaries or goes intestate.

The anti-lapse statute saves a gift made to a relative of the transferor who predeceases the transferor. In that case the issue of the relative stand in the relative's place and are entitled to the gift. Section 21110(a).

Contrary Intention

The anti-lapse statute does not apply if the transferring instrument expresses a contrary intention or makes a substitute disposition of the property. Existing Section 21110(b) provides some guidance on the question whether a clause in the instrument requiring survival for a specified period should be construed as an expression of contrary intention. The tentative recommendation would eliminate this provision on the theory that it could be read to imply that other language in an instrument does not override the antilapse statute:

> (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.~~

Jeff Strathmeyer disagrees with the proposed deletion. He gives as an example a will clause that states, "I give my daughter my diamond ring if she survives me by thirty days." The testator has considered the possibility of the daughter's failure to survive, leaving the logical implication that the property is to pass under the residuary clause. Because the language of the statute referring to "a contrary intention or a substitute disposition" is ambiguous with respect to such a gift, the language proposed for deletion is helpful and should be preserved.

If the Commission agrees with Mr. Strathmeyer and recommends that the existing language be preserved, **the staff would add a note to the Comment disclaiming any implication that other evidence of a contrary intention is precluded**.

Irrevocable Gifts

The Commission also in the tentative recommendation solicited reaction to the question whether the antilapse statute ought to be limited in its application so that it does not cover an irrevocable transfer, such as an irrevocable trust. The Bar Association of San Francisco thinks it should not be so limited. They give as an example an irrevocable living trust that provides for a life estate to a beneficiary with the remainder to another beneficiary. Since a survival requirement will apply to the remainder beneficiary, the antilapse statute likewise should apply.

The staff notes that **the Commission would not need to make further revisions in the draft to accomplish the result suggested by BASF**. The tentative recommendation does not limit application of the antilapse statute in the case of an irrevocable transfer, it merely asks for input on the matter.

Joint Tenancy

Our consultant, Professor McGovern, has previously raised the concern that the anti-lapse statute makes no sense as applied to joint tenancy. The concept of survivorship under joint tenancy is obviously at odds with the concept of saving the interest of a deceased joint tenant for the issue of that joint tenant.

The staff thinks Professor McGovern is right, although an argument can be made that if a transferor creates a joint tenancy with a child, for example, the intention is to make an at-death gift to that child. If the child fails to survive the transferor, the property arguably should pass to that child's issue, just as it would under a gift in trust. Of course, this would wreak havoc on joint tenancy theory and raise innumerable questions. What happens to the transferor's half-interest? What are the rights of creditors? **The staff would exclude joint tenancy from operation of the anti-lapse statute**:

> (c) As used in this section, "transferee" means a person, other than a joint tenant, who is kindred of the transferor or kindred of a surviving, deceased, or former spouse of the transferor.

Prob. Code § 21111. Failure of transfer

Currently pending legislation, recommended by the Commission, would revise Section 21111. See AB 873 (Harman) — estate planning during marital dissolution. Assuming the bill is enacted, **the revisions proposed in the tentative recommendation should be directed to the new version of Section 21111**:

> 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 is transferred as follows:
>
> (1) If the transferring instrument provides for an alternative disposition in the event the transfer fails, the property is transferred according to the terms of the instrument.
>
> (2) If the transferring instrument does not provide for an alternative disposition but does provide for the transfer of a residue, the property becomes a part of the residue transferred under the instrument.

(3) If the transferring instrument does not provide for an alternative disposition and does not provide for the transfer of a residue, the property is transferred to the decedent's estate.

(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.

General Clause in Instrument.

The Bar Association of San Francisco suggests further revision of Section 21111. BASF notes that under subdivision (a), if a specific gift of tangible personal property fails, the item would fall into the residue. BASF thinks a better choice would be to pass the item pursuant to a provision in the instrument, if any, disposing of tangible articles of personal property generally.

The staff notes that this result could be achieved under subdivision (a)(1) of the statute as it would be revised by the pending legislation. **It might be useful to add an interpretive Comment along the lines suggested by BASF**:

> Under subdivision (a)(1), an alternative disposition may take the form of a transfer of specifically identifiable property (specific gift) or a transfer from general assets of the transferor (general gift) that includes the specific property.

Proportionality Rule.

Subdivision (b) provides that if a gift is made to several persons and the share of one person fails, that share should pass proportionately to the others. BASF notes that this provision by its terms is limited to residuary gifts, but it should apply to gifts of all types.

Because subdivision (a) of Section 21111 will have been newly revised to deal with this issue, **the staff suggests it be given a chance to prove itself in operation before considering a shift** to a rule such as that suggested by BASF for subdivision (b).

"All My Estate"

The Commission directed the staff to give further attention to the treatment of a gift of "all my estate", in light of the new version of Section 21111.

The courts have tended to treat a gift of "all my estate" as a general gift rather than a residuary gift. Such a gift would thus be governed by Section 21111(a) rather than 21111(b).

Suppose I make a gift of "all my estate" to my two best friends, and one of them has died at the time the gift is to take effect. Under Section 21111(a), the failed share will go in accordance with any alternative disposition in the instrument (a possibility) or in accordance with any residuary clause in the instrument (there is unlikely to be one for a gift of this type). Absent that, the failed share will pass by intestacy — see Section 21111(a)(3) — arguably not what I would have wanted.

If the gift of all my estate were treated instead as a residuary gift, Section 21111(b) would apply and the failed share would pass to the survivor of the two beneficiaries. (Note: If the gift was to a relative rather than a friend, the anti-lapse statute would apply and the failed share would instead pass to my relative's issue.) This is more likely to be in accord with my intention than that the failed share pass by intestacy (and possibly even escheat).

The staff agrees with Professor McGovern's suggested addition of the following provision to deal with this situation:

> (c) A transfer of "all my estate" or words of similar import is a residuary gift for purposes of this section unless the transferring instrument provides for an alternative disposition in the event the transfer fails.

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

The tentative recommendation leaves unchanged Section 21118:

> 21118. (a) If an instrument authorizes a fiduciary to satisfy a pecuniary gift wholly or partly by distribution of property other than money, property selected for that purpose shall be valued at its fair market value on the date of distribution, unless the instrument expressly provides otherwise. If the instrument permits the fiduciary to value the property selected for distribution as of a date other than the date of distribution, then, unless the instrument expressly provides otherwise, the property selected by the fiduciary for that purpose shall have an aggregate fair market value on the date or dates of distribution that, when added to any cash distributed, will amount to no less than the amount of the pecuniary gift as stated in, or determined by, the instrument.
>
> (b) As used in this section, "pecuniary gift" means a transfer of property made in an instrument that either is expressly stated as a fixed dollar amount or is a dollar amount determinable by the provisions of the instrument.
>
> **Note**. There is no Law Revision Commission Comment for Section 21118. The text is set out here for completeness.

Jeff Strathmeyer criticizes this provision, referring to his 1994 article explaining the need for revision of the section. See *The Obsolete "Minimum Worth" Provision*, 16 CEB Estate Planning & California Probate Reporter 60 (December 1994). He explains that the provision would allow overfunding of a marital (or charitable) deduction gift, as well as overfunding of a bypass trust or other pecuniary gift at the expense of a marital (or charitable deduction) residue. The statute also runs afoul of the generation skipping transfer tax requirement that assets allocated in satisfaction of a pecuniary gift must fairly reflect net appreciation or depreciation in the value of all assets available for funding the gift.

The staff is uncertain how the defects identified by Mr. Strathmeyer could readily be rectified, other than by repealing the section. **The staff suggests that, before acting, the Commission solicit further input on this issue.**

Prob. Code § 21132. Change in form of securities

The Bar Association of San Francisco notes that the existing version of Section 21132 applies to nonprobate transfers as well as to wills, whereas the new version of that section proposed in the tentative recommendation applies only to wills. BASF assumes this was an oversight and that the proposed new section is meant to cover at-death transfers by trust and other instruments as well as wills.

Actually, the limitation to wills is intentional. The tentative recommendation points out that applying the statute to trusts creates internal inconsistencies. The tentative recommendation follows the lead of the Uniform Probate Code, which restricts application of the provision to wills. Elimination of internal inconsistencies would involve tricky drafting, and in any event a gift of specific stock is rarely used by a knowledgeable estate planner.

Further staff research indicates, however, that these types of securities issues arise not uncommonly in the trust context. **We could extend Section 21132 in a limited manner, minimizing drafting problems, by making it applicable to "at-death transfers"**:

> 21132, (a) If a ~~testator~~ transferor executes ~~a will that devises~~ an instrument that makes an at-death transfer of securities and the ~~testator~~ transferor then owned securities that meet the description in the ~~will , the devise~~ instrument, the transfer includes additional securities owned by the ~~testator~~ transferor at death to the extent the additional securities were acquired by the ~~testator after the will~~ transferor after the instrument was executed as a result of the

~~testator's~~ transferor'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~~ transfer.

Prob. Code § 21133. Proceeds of specific gift

Section 21133 provides that if a specific gift is made by a transferor and the property given is no longer owned by the transferor at the time the gift takes effect in enjoyment, the beneficiary is entitled to certain proceeds in place of the property given.

Lifetime Gifts

Jeff Strathmeyer points out that this section may be overbroad in extending to lifetime gifts. Suppose, for example, the transferor owns a piece of improved property and the improvement is destroyed. The transferor deeds the property to a child. There is no reason to think that the transferor intends to give the child also the uncollected insurance proceeds for the destroyed improvement. Yet literally applied, Section 21133(c) would interpret the gift as including the insurance proceeds.

This problem could be avoided by limiting the section to at-death transfers — transfers in possession or enjoyment that take effect at or after death:

21133. A recipient of an at-death transfer of a specific gift has a right to the property specifically given, to the extent the property is 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 agreement) owing from a purchaser to the transferor at 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 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 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.

Comment. Section 21133 is amended to limit its application to at-death transfers — transfers in possession or enjoyment that take effect at or after death. See Section 21104 ("at-death transfer" defined).

Trusts

The current draft of this section is also problematic as applied to trusts. It works fine for an outright at-death transfer, such as often is made in a will. But in the trust context, where assets may be held after the transferor's death until a specified age or event, the transferor does not "own" the property at the time the gift takes effect in enjoyment. Section 21133 is simply not drafted in a way to readily accommodate this situation.

There are a number of possible solutions. The simplest would be to follow the lead of the Uniform Probate Code, from which the section is drawn, and prescribe rules that apply only to gifts of property that take effect at the time of the transferor's death. This would provide clear rules for a limited number of cases, and leave other circumstances to case law.

Other options are more sophisticated. They include drafting special rules to deal with trusts, depending on whether or not the transferor was acting as trustee, and whether or not the trust was revocable. Proximity in time to the testator's death of the conversion of the property could be made a factor. Some states by statute protect a gift from ademption only if the conversion of the property occurred within a limited time before the testator's death, e.g., one year or six months.

The staff does not think the current tentative recommendation should be the occasion for significant departures from existing law. We should just try to make the existing scheme work for trusts to the extent reasonably practicable. Thus, **we would revise the draft so that it covers the time a transfer to a trust becomes**

effective in possession or enjoyment. This would include the time a transfer to a trustee is effective:

> 21133. A recipient of an at-death transfer of a specific gift has a right to the property specifically given, to the extent the property is owned by the transferor at the time the gift takes effect in possession or enjoyment, and all of the following:
>
> (a) Any balance of the purchase price (together with any security agreement) owing from a purchaser to the transferor at the time the gift takes effect in possession or enjoyment by reason of sale of the property.
>
> (b) Any amount of an eminent domain award for the taking of the property unpaid at the time the gift takes effect in possession or enjoyment.
>
> (c) Any proceeds unpaid at ~~death~~ the time the gift takes effect in possession or enjoyment on fire or casualty insurance on or other recovery for injury to the property.
>
> (d) Property owned by the transferor at the time the gift takes effect in possession or 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~~ the gift takes effect in possession or enjoyment that the transferor acquired as a replacement for specifically given real or tangible personal property.

Cross References

As a technical matter, Mr. Strathmeyer suggests that a cross-reference be added in the Comment to the definition of a "specific gift" (Section 21117(a)) here and in other places where the term is used. **The staff will add the suggested Comment references.**

CONFORMING REVISIONS

Prob. Code § 250. Wills, intestate succession, and family protection

The tentative recommendation draft includes conforming revisions to Probate Code Section 250. The Bar Association of San Francisco correctly points out that the draft picks up an older version of the section, and the current version should be substituted:

> 250. (a) A person who feloniously and intentionally kills the decedent is not entitled to any of the following:

(1) Any property, interest, or benefit under a will of the decedent, or a trust created by or for the benefit of the decedent or in which the decedent has an interest, including any general or special power of appointment conferred by the will or trust on the killer and any nomination of the killer as executor, trustee, guardian, or conservator or custodian made by the will or trust.

(2) Any property of the decedent by intestate succession.

(3) Any of the decedent's quasi-community property the killer would otherwise acquire under Section 101 or 102 upon the death of the decedent.

(4) Any property of the decedent under Part 5 (commencing with Section 5700) of Division 5.

(5) Any property of the decedent under Part 3 (commencing with Section 6500) of Division 6.

(b) In the cases covered by subdivision (a):

(1) The property interest or benefit referred to in paragraph (1) of subdivision (a) passes as if the killer had predeceased the decedent and Section 21110 does not apply.

(2) Any property interest or benefit referred to in paragraph (1) of subdivision (a) which passes under a power of appointment and by reason of the death of the decedent passes as if the killer had predeceased the decedent, and Section ~~1389.4 of the Civil Code~~ 673 does not apply.

(3) Any nomination in a will or trust of the killer as executor, trustee, guardian, conservator, or custodian which becomes effective as a result of the death of the decedent shall be interpreted as if the killer had predeceased the decedent.

Comment. Section 250 is amended to correct a cross-reference.

With this revision, the question arises whether the Section 250 revision should be included in the final recommendation at all. The reason for its inclusion in the tentative recommendation was to correct the obsolete reference to the rules of construction. See subdivision (b)(1). But the current version of Section 250 already corrects this reference. This leaves hanging the obsolete reference to the power of appointment statute. See subdivision (b)(2).

The staff suggests we overlook the germaneness point and go ahead and correct the power of appointment cross-reference, now that it has been identified.

CONCLUSION

This is an extraordinarily complex subject, and different rules of construction may be appropriate in different circumstances. We ought not to rush into this.

We also expect to supplement this memorandum with additional comments of the State Bar Probate Section and other knowledgeable persons.

The staff would hold off approving a final recommendation until interested persons have had a chance to review and comment on changes made by the Commission to the tentative recommendation.

The staff would prepare a draft of a final recommendation that incorporates any changes made to the tentative recommendation, for review and approval at the next Commission meeting.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

Exhibit

RULES OF CONSTRUCTION FOR TRUSTS

From: Jeffrey Dennis-Strathmeyer <Jeffrey.Dennis.Strathmeyer@ceb.ucop.edu>
To: "'comment@clrc.ca.gov'" <comment@clrc.ca.gov>
Subject: Rules of Construction for Trusts and Other Instruments #L-605
Date: Wed, 25 Apr 2001 11:51:46 -0700

1) The comment to Prob C 21133 needs a reference or explanation for the term "specific gift", as do some other sections.
2) Prob C 21133, or at least some parts of it, should not apply to current transfers. If the summer cabin burns down and Mom then deeds the real property to daughter, there is no reason to think Mom intends to transfer the still uncollected insurance proceeds.
3) The recommendation leaves 21118 unchanged. For a discussion of matters needing correction in this section see: 16 CEB Est Plan R 60 (December 1994) under the heading "The Obsolete 'Minimum Worth' Provision."
4) I do not agree with the proposed change in Prob C 21110. If the will states, "I give my daughter my diamond ring if she survives my by thirty days." The testator has considered the possibility of daughter's failure to survive, leaving the logical implication that the property is to pass under the resiudary clause. Because the language "instrument expresses a contrary intention or substitute disposition" is arguably ambiguous with respect to this implication, the language proposed for deletion is helpful.

Jeffrey A. Dennis-Strathmeyer
c/o CEB
300 Frank H. Ogawa Plaza 410
Oakland, CA 94612
510-302-2176

THE BAR ASSOCIATION OF SAN FRANCISCO

BY FAX

July 30, 2001

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

RE: The California Law Revision Commission's Tentative Recommendations on the Rules of Construction for Trusts and Other Instruments (March 2001)

Dear Commission Members:

The Bar Association of San Francisco generally supports the above referenced recommendation, however, we submit the following comments.

The proposal relating to Probate Code § 21132, on pages 23 and 24 of the Recommendation refers to devises by will. The present section (which would be repealed) refers to transfers. We assume this was an oversight and that the proposed new section is meant to cover at-death transfers by trust and other instruments as well as wills.

Similarly, the proposal relating to Probate Code § 250, on page 30 of the Recommendation purports to only correct a cross-reference. However, Section 250 as reproduced does not refer to transfers under trusts created by or for the benefits of the decedent, which is different from present Section 250 of the Probate Code. Presumably, they reproduced the wrong Section 250 by mistake and don't intend to eliminate transfers under trusts.

The Merchants Exchange Building, 465 California Street, Suite 1100, San Francisco, California 94104-1826
Telephone 415-982-1600 • Telecopier 415-477-2388 • Lawyer Referral Service 415-989-1616 • www.sfbar.org

Probate Code § 21111(a) (see page 18 of the Recommendation) should be further amended to provide that the failed, non-residuary transfer simply passed the subject property as though the transfer had not been made rather than making it part of the residue. Thus, if a transfer of a specific tangible article of a personal nature fails for some reason, that article should pass pursuant to a provision in the instrument, if any, disposing of tangible articles of a personal nature generally rather than making it part of the residue of the property transferred under the instrument. Probate Code § 21111(b) should apply to all gifts, not just residuary gifts.

Regarding Probate Code § 21102:

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

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

3. The language of the Section is very short and seemingly restrictive. We believe it would be helpful to liberalize it to encompass some of the language in the comment.

Regarding Probate Code § 21104, "possession" seems to imply legal ownership, whereas "enjoyment" seems to imply beneficial ownership. A fee interest in property entitles the owner to both possession and enjoyment, whereas an interest in property held in trust gives possession to the trustee and enjoyment to the beneficiary. Thus, in a trust context, possession can change while enjoyment continues, and vice versa. Consequently, it might be helpful to retain both words.

Expanding upon this comment, if "at death transfer" means a transfer of possession, enjoyment, or both possession and enjoyment, Section 21109 apparently would apply to an irrevocable living trust where, for example, enjoyment of the trust property passes from the life tenant to the remainder person upon the death of the life tenant, who is not the transferor of the trust

property. In such a situation, it seems to us that Section 21109 should apply if the remainder person fails to survive the life tenant. Therefore, we think that Section 21109 should apply to irrevocable transfers in this regard.

For the same reasons expressed above, we think that Section 21110 should apply to irrevocable transfers, such as irrevocable trusts, and should also apply to future transferees in enjoyment who do not survive a future event, such as the death of a life tenant.

Thank you for the opportunity to comment on these Recommendations.

Very truly yours,

Richard Kinyon

Richard Kinyon, Chair
Estate Planning, Trust & Probate Section

Douglas R. Young

Douglas R. Young, President
Bar Association of San Francisco

BAKER, MANOCK & JENSEN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

JOHN H. BAKER
KENDALL L. MANOCK
DOUGLAS B. JENSEN
DONALD R. FISCHBACH
JOHN L. B. SMITH
GEORGE L. STRASSER
JOSEPH M. MARCHINI
CRAIG A. HOUGHTON
ANDREW R. WEISS
JAMES E. SHEKOYAN
CARL R. REFUERZO
JOHN G. MICHAEL
CHRISTOPHER L. CAMPBELL
ROBERT D. WILKINSON
JEFFREY A. JAECH
LISA M. MARTIN
GAYLE D. HEARST
GLENN J. HOLDER
MARK B. CANEPA
WILLIAM M. WHITE
KATHLEEN A. MEEHAN
RICHARD S. SALINAS

DAVID E. HOLLAND
CHARLES K. MANOCK
JAMES C. SCHAEFFER
ALBERT J. BERRYMAN
MATTHEW E. HOFFMAN
DEBORAH A. COE
KEITH M. WHITE
MICHELLE E. GUARDADO
LINDA BERG OTHMAN
SCOTT G. CROSS
PA LAI V. LEE
C. FREDRICK MEINE, III
SUZANNE D. McGUIRE
WILLIAM E. CHALTRAW, JR.
JENNIFER E. LARSON

OF COUNSEL
LEONARD I. MEYERS
JAMES GANULIN
OTTO E. BERG

HOWARD M. ZIDENBERG (1949-1999)

FIG GARDEN FINANCIAL CENTER
5260 NORTH PALM AVENUE
FOURTH FLOOR
FRESNO, CALIFORNIA 93704-2222
TELEPHONE (559) 432-5400
TELECOPIER (559) 432-5620

OXNARD OFFICE
TELEPHONE (805) 981-3940

INTERNET:
E-MAIL: bmj@bmj-law.com
WEB: www.bmj-law.com

MR. JAECH'S ELECTRONIC MAIL:
JAJ@BMJ-LAW.COM

July 31, 2001

VIA FAX AND MAIL

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

Re: Rules of Construction for Trusts and Other Instruments, Tentative Recommendation

Dear Commission:

I am concerned that your Tentative Recommendation of March 2001 does not accurately state the current California law regarding reformation of a testamentary instrument in the case of a mistake. Footnote 16 on page 3 of the Tentative Recommendation is offered as authority that reformation is available to correct a mistake in a testamentary instrument. I do not believe that is the law in California. Rather, I believe the California rule is that extrinsic evidence is admissible to construe a patently or latently ambiguous instrument, but only if the language in the instrument is susceptible to the interpretation supported by the extrinsic evidence. Estate of Russell (1968) 69 Cal.2d 200; Estate of Casey (1982) 128 Cal.App.3d 867; Estate of Weaver (1972) 27 Cal.App.3d 312; Estate of Townsend (1963) 221 Cal.App.2d 25. In other words, unambiguous language even if it is proven to be a mistake, cannot be corrected (except with the beneficiaries' consent under Probate Code §§ 15403 and 15404). Even in the Ike v. Doolittle (1998) 61 Cal.App.4th 51, where the mistakes were fundamental and multiple, "reformation" based on the drafting attorney's mistakes was permitted only because the instrument was ambiguous. There remains no California authority to my knowledge that holds that unambiguous language, alleged to be a mistake, in a testamentary instrument may be

reformed to conform with the testator or settlor's intent as proved by extrinsic evidence.

You may be correct in stating that "modern theory" supports reformation based on mistake in certain circumstances, but this theory has not yet been adopted in California.

Perhaps California should adopt the "modern theory," but I believe it should do so only after careful consideration of the ramifications. It is misleading to state in your recommendation that this is already the law in California.

Very truly yours,

Jeffrey A. Jaech
BAKER, MANOCK & JENSEN

JAJ:mtw

::ODMA\GRPWISE\BMJDOM.FresDocs.PS4Lib:122249.1