

## First Supplement to Memorandum 2001-85

### Rules of Construction for Trusts (Draft of Recommendation)

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Attached to this supplemental memorandum are comments of the State Bar Estate Planning, Trust and Probate Law Section on the draft recommendation on rules of construction for trusts. All their comments are addressed to Probate Code Section 21110 (anti-lapse).

Their concern is with the proposed revision of subdivision (b):

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

The State Bar's position, in brief, questions the advisability of deleting these two sentences; they instead recommend expansion of these provisions. In addition, the Bar believes that if the Commission persists in recommending deletion of these provisions, the Commission must, at a minimum, add language to ensure that this does not affect the interpretation of existing instruments drafted on the basis of the provisions. Likewise, the Comment should be strengthened so that the courts are instructed as to the proper weight to be given clauses of the type referred to in the deleted provisions. Finally, the Commission should develop alternate statutory language that a drafter could use with assurance that the transferor's intention to override the antilapse statute will be honored in court ("safe harbor").

We will discuss these matters at the Commission meeting.

Respectfully submitted,

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Executive Secretary