

APPENDIX 4

REPORT OF THE CALIFORNIA LAW REVISION COMMISSION ON CHAPTER 138 OF THE STATUTES OF 2002 (ASSEMBLY BILL 1784)

Rules of Construction for Trusts and Other Instruments

Chapter 138 of the Statutes of 2002 was introduced as Assembly Bill 1784 by Assembly Member Tom Harman. It implements the California Law Revision Commission recommendation on *Rules of Construction for Trusts and Other Instruments*, 31 Cal. L. Revision Comm'n Reports 167 (2001). The revised Comments set out below supersede the comparable Comments in the recommendation, and reflect clarifications of or amendments made to the bill in the legislative process.

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

Comment. Subdivision (a) of Section 21109 is amended to clarify and limit its application. See Section 21104 (“at-death transfer” defined).

Former subdivision (b) is deleted as unnecessary. The general “clear and convincing evidence” standard of Section 220 applies.

The 1994 enactment of Section 21109 extended former Section 6146 (wills) to at-death transfers. See Section 21104 (“at-death transfer” defined). The question of whether or not survival is required in other cases is determined according to general rules of interpretation and construction. See, e.g., Section 21102 (intention of transferor).

The at-death transfer provision of Section 21109 changes the traditional common law and California rule illustrated by *Randall v. Bank of America*, 48 Cal. App. 2d 249, 119 P.2d 754 (1941) (remainder interest in revocable trust held not divested by beneficiary’s failure to survive settlor; upon settlor’s death the trust property passed to deceased beneficiary’s estate). However, language of this section referring to survival “until a future time required by the instrument” does not change

the result of other future interest cases that have generally refused to find an implied condition of survival where the instrument fails expressly to impose such a condition, such as *Estate of Stanford*, 49 Cal. 2d 120, 315 P.2d 681 (1957) (testamentary trust for A for life, remainder to A's "children"; despite class gift form, remainder passed to estate of child who predeceased A), and *Estate of Ferry*, 55 Cal. 2d 776, 361 P.2d 900, 13 Cal. Rptr. 180 (1961) (even though the interest in question was subject to another condition precedent, court refused to find an implied condition of survival). See also Restatement (Second) of Property (Donative Transfers) § 27.3 (1987).

With respect to a class gift of a future interest, Section 21109 must be read together with Section 21114. If the transferee fails to survive but is properly related to the transferor or the transferor's spouse, the antilapse statute may substitute the transferee's issue. See Section 21110. See also Section 21112 (conditions referring to "issue").

For a provision governing the administration and disposition of community property and quasi-community property where one spouse does not survive the other, see Section 103. See also Sections 230-234 (proceeding to determine whether devisee survived testator).

Prob. Code § 21110 (amended). Anti-lapse

Comment. Subdivision (b) of Section 21110 is amended to avoid the implication that a specific period of time is the only expression of survival that constitutes a contrary intention. While an expression of that type may well indicate an intention that the antilapse statute not apply, other survival requirements in an instrument may also be sufficient to override the antilapse statute.

In applying the provision of subdivision (b) relating to a substitute gift, care must be taken not to ascribe to the transferor too readily or too broadly an intention to override the antilapse statute, the purpose of which is to lessen the risk of serious oversight by the transferor. For example, by providing a substitute taker, the transferor may very well intend to override the antilapse statute in the ordinary case. If, however, the substitute taker has also predeceased the transferor, the transferor may have intended that the antilapse statute should apply to the first taker.

Section 21110 does not make a substitute gift in the case of a class gift where a person otherwise answering the description of the class was dead when the instrument was executed and that fact was known to the transferor. It is consistent with *Estate of Steidl*, 89 Cal. App. 2d 488, 201 P.2d 58 (1948) (antilapse statute applied where class member died before testator but after execution of will).

Subdivision (c) makes the antilapse statute apply not only to kindred of the transferor but also to kindred of a surviving, deceased, or former spouse of the transferor. Thus, if the transferor were to make a transfer to a stepchild who predeceased the transferor, Section 21110 will make a substitute gift to issue of the predeceased stepchild. The term “kindred” was taken from former Section 92 (repealed by 1983 Cal. Stat. ch. 842, § 18) and refers to persons related by blood. *In re Estate of Sowash*, 62 Cal. App. 512, 516, 217 P. 123 (1923). In addition, an adoptee is generally kindred of the adoptive family and not of the natural relatives. See Section 21115 (halfbloods, adopted persons, persons born out of wedlock, stepchildren, and foster children, plus issue of such persons, as “kindred” or “issue”). See also *Estate of Goulart*, 222 Cal. App. 2d 808, 35 Cal. Rptr. 465 (1963).

As to when a transferee is treated as having predeceased the transferor, see Sections 220 (simultaneous death), 282 (effect of disclaimer), 250 (effect of feloniously and intentionally killing decedent), 6122 & 5600 (effect of dissolution of marriage), See also Sections 230-234 (proceeding to determine survival), 240 (manner of taking by representation).

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

Comment. Section 21113 is repealed as unnecessary. It inadequately codified the common law “rule of convenience,” failing to include its common law exceptions. See Restatement (Second) of Property §§ 26.1-26.2 (1987). Repeal of this section does not reject existing law on this subject, but is intended to eliminate any implication that the section is a complete statement of the existing law.

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

Comment. Section 21114 is amended to conform to Uniform Probate Code Section 2-711 (1993). The amendment clarifies a number of 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, based on the transferor’s domicile.
- (4) Elimination of the special rule for ancestral property.

The 1994 enactment of Section 21114 extended former Section 6151 (wills) to trusts and other instruments. See also Section 21101 (application of part). The former section was drawn from Section 2514 of the Pennsylvania Consolidated Statutes, Title 20, and established a special rule for a class gift to an indefinite class such as the transferor’s

or another designated person's "heirs," "next of kin," "relative," "family," and the like. As Section 21114 applies to a transfer of a future interest, the section is consistent with Section 21109 in that Section 21114 establishes a constructional preference against early vesting. However, Section 21114 differs from Section 21109 in that one who does not survive until the future interest takes effect in enjoyment is not deemed a member of the indefinite class described in Section 21114 (such as "heirs"), is therefore not a "transferee" under the class gift, and no substitute gift will be made by the antilapse statute (Section 21110). If the transfer of a future interest is to a more definite class such as "children," one coming within that description who fails to survive until the transfer takes effect in enjoyment does not take under the instrument (Section 21109) but may nonetheless be a "deceased transferee" under the antilapse statute (Section 21110) permitting substitution of the deceased transferee's issue. See Sections 21109 & 21110 Comments. See also Section 21115(c)(3) (rules for determining persons who would be heirs of transferor or other person).

By postponing the determination of class membership until the gift takes effect in enjoyment where the class is indefinite (e.g., to "heirs"), Section 21114 should reduce the uncertainty of result under prior law. See Halbach, *Future Interests: Express and Implied Conditions of Survival*, 49 Cal. L. Rev. 297, 317-20 (1961). Section 21114 is consistent with *Estate of Easter*, 24 Cal. 2d 191, 148 P.2d 601 (1944).

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

Comment. Section 21116 is not continued. It codified a presumption in favor of early vesting that is overbroad and inconsistent with the rule of deferred vesting applicable in some circumstances. See, e.g., Section 21114 (class gift to heirs, next of kin, relatives, and the like). Repeal of this section does not reject existing law on this subject, but is intended to eliminate any implication that the section is a complete statement of the existing law.

Prob. Code § 21134 (amended). Effect of conservatorship or power of attorney on specific gift

Comment. The 1994 enactment of Section 21134 extended former Section 6173 (wills) to trusts and other instruments. See also Sections 21101 (application of part), 21117(a) ("specific gift" defined).

Section 21134 is amended for conformity with Uniform Probate Code Section 2-606(b) (1990). (Section 21134 is based on former Uniform Probate Code Section 2-608(b) (1987), which is superseded by Uniform Probate Code Section 2-606(b) (1990).) As to the construction of provisions drawn from uniform acts, see Section 2.

Subdivisions (a) and (b) are consistent with prior California case law. See *Estate of Packham*, 232 Cal. App. 2d 847, 43 Cal. Rptr. 318 (1965). See also Section 62 (“property” defined). The rules stated in Section 21134 apply in the absence of a contrary intention of the transferor. See Section 21102. See also Section 21139 (rules stated in Sections 21133-21135 not exhaustive).

Subdivision (c) revises the corresponding Uniform Probate Code language to refer to the conservatorship being terminated rather than to it being “adjudicated that the disability of the testator has ceased.” The application of subdivision (c) turns on whether a conservatorship has been terminated, and not on whether the transferor has regained the capacity to make an instrument of transfer. Thus subdivision (c) provides a rule of administrative convenience and avoids the need to litigate the question of whether the conservatee had capacity to make an instrument of transfer after the time of the sale, condemnation, fire, or casualty.

It should be noted that the presumption provided in subdivision (d) applies only 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.

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

Comment. Section 21136 is not continued. The matter is governed by case law. See, e.g., 12 B. Witkin, *Summary of California Law Wills and Probate* § 314 *et seq.*, at 347-50 (9th ed. 1990). Repeal of this section does not reject existing law on this subject, but is intended to eliminate any implication that the section is a complete statement of the existing law.

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

Comment. Section 21137 is not continued. The matter is governed by case law. See, e.g., 12 B. Witkin, *Summary of California Law Wills and Probate* § 314 *et seq.*, at 347-50 (9th ed. 1990). Repeal of this section does not reject existing law on this subject, but is intended to eliminate any implication that the section is a complete statement of the existing law.

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

Comment. Section 21138 is not continued. The matter is governed by case law. See, e.g., 12 B. Witkin, *Summary of California Law Wills and Probate* § 314 *et seq.*, at 347-50 (9th ed. 1990). Repeal of this section

does not reject existing law on this subject, but is intended to eliminate any implication that the section is a complete statement of the existing law.
