Study L-605

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

BACKGROUND STUDY

Rules of Construction: Probate Code Sections 21101-21140

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March 2000

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REPORT TO THE CALIFORNIA LAW REVISION COMMISSION ON RULES OF CONSTRUCTION: PROBATE CODE SECTIONS 21101-21140

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RULES OF CONSTRUCTION: PROBATE CODE SECTIONS 21101-21140

Sections 21101-21140 were added to the California Probate Code in 1994, without the participation of the Law Revision Commission, as a new Part 1 of Division 11, entitled "Rules for Interpretation of Instruments." The rules are based on previously existing Probate Code rules for the construction of wills. The basic idea of the 1994 provisions was to extend these rules to other forms of transfer. The same notion underlies several provisions in the Uniform Probate Code as amended in 1990.[1] The idea of assimilating revocable trusts and wills also finds support in the Third Restatement of Trusts Section 25(2), which states that "a revocable inter vivos trust is ordinarily subject to … rules of construction … applicable to testamentary dispositions." Extension of these rules to other forms of transfer, such as irrevocable trusts, deeds, joint tenancy, and insurance policies is more controversial.

Many of the construction rules which now appear in Sections 21101-21140[2] were based originally on provisions in the pre-1990 UPC which have since been altered in the UPC but not in California. I shall also consider in this report whether the 1990 changes made in the UPC construction rules should be adopted in California.

On January 9, 1996, Professors Jesse Dukeminier and Susan French wrote a letter to Nathaniel Sterling criticizing several of the 1994 provisions. I will refer to this letter in this Report as DUKE. On April 22, 1998 Randolph Godshall, Chair of the Estate Planning and Tax Committee of the California State Bar, also criticized some of the new provisions in a letter to the Commission. I will refer to this letter as GODSHALL.

I will discuss the new provisions in order.

§ 21101. Application of part

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

DUKE suggests that this provision would not cover "gifts effected by physical delivery of an object" and thus would cause "inconsistent treatment" of similar gifts. I do not think that this is a serious problem Not many important gifts today are made without a written instrument. Also to talk about rules of construction for oral gifts makes little sense, since they do not fall into patterns like the expressions which repeated recur in written documents.

DUKE also criticizes Section 21101 because the word "instrument," as it is defined in Section 45,[3] is limited to a "donative transfer." This raises questions as to whether divorce settlements, ante-nuptial agreements, etc., are included. I do not find this objection troublesome. The line between donative and non-donative transfers may be hazy in a few cases but in general it is clearer than many others in the law. It would certainly be a

1. Relevant provisions of the UPC are reproduced in the Appendix.

2. Except as otherwise indicated, all further citations are to the Probate Code.

3. *§ 45. "Instrument"*

45. "Instrument" means a will, trust, deed, or other writing that designates a beneficiary or makes a donative transfer of property.

mistake to apply the rules of construction in this part to commercial transactions. Courts have in the past caused considerable trouble by extending the common-law Rule against Perpetuities, which was developed in the context of donative transfers, to commercial transactions. For this reason Section 21225(a) excludes "nondonative transfers" from the Statutory Rule Against Perpetuities, with exceptions for the types of cases raised in DUKE. The same exceptions could be inserted for rules of construction in Section 21101[4], but I do not think that is necessary, since rules of construction, unlike the Rule Against Perpetuities, are merely rebuttable inferences of intent.

The argument that functionally similar transactions should be governed by the same rules has already been effectuated in Section 19001[5] *et seq*., which give creditors of the settlor of a revocable trust rights similar to those to accorded to creditors of a testator.

This extension is limited to *revocable* trusts whereas Section 21101 applies to *all* trusts and other instruments. I agree with DUKE that this produces an improper result when an irrevocable gift from *A* to *B* is, by virtue of Section 21109, transformed into one in which *B*'s interest is forfeited if he fails to survive *A*. See also GODSHALL: Section 21109 "makes no sense in the case of a gift deed or an irrevocable trust."[6] On the other hand, other rules of construction in this part seem equally appropriate to irrevocable gifts. E.g., Section 21115 dealing with adoptees and children born out of wedlock. I propose to handle this by adding a sentence (modeled on the second sentence of UPC 2-701) providing that the application of a particular section can be "limited by its terms to a specific type of instrument." The details will be taken up again in the context of specific provisions.

> ***Recommended Substitute*:** Unless the provision or context otherwise requires, the rules of construction in this part apply to a governing instrument of any type, except as the application of a particular section is limited by its terms to a specific type or types of donative disposition or governing instrument.

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4. *§ 21225. Interests excluded*

21225. Article 2 (commencing with Section 21205) does not apply to any of the following:

(a) A nonvested property interest or a power of appointment arising out of a nondonative transfer, except a nonvested property interest or a power of appointment arising out of (1) a premarital or postmarital agreement, (2) a separation or divorce settlement, (3) a spouse's election, (4) or a similar arrangement arising out of a prospective, existing, or previous marital relationship between the parties, (5) a contract to make or not to revoke a will or trust, (6) a contract to exercise or not to exercise a power of appointment, (7) a transfer in satisfaction of a duty of support, or (8) a reciprocal transfer.

5. *§ 19001. Property as subject to certain claims*

19001. (a) Upon the death of a settlor, the property of the deceased settlor that was subject to the power of revocation at the time of the settlor's death is subject to the claims of creditors of the deceased settlor's estate and to the expenses of administration of the estate to the extent that the deceased settlor's estate is inadequate to satisfy those claims and expenses.

….

6. *Accord* Cunningham, *The Hazards of Tinkering with the Common Law of Future Interests*, 48 Hastings L.J. 667, 690 *et seq*. (1997).

§ 21102. Intention of testator

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.

Improper application of general rules of construction (i.e., situations where they do not fit the intent of a particular transferor) can be avoided by the provision in Section 21102 that the "intention of the transferor as expressed in the instrument" takes precedence. What evidence of intent is admissible to overcome a rule of construction? Under UPC 2-701 contrary intent may be shown by any evidence, but Section 21102 seems limited to manifestations of intent "expressed in the instrument." This is a sharply debated issue. In *Estate of Smith*,[7] the court cited Section 21102 approvingly in rejecting evidence of a "testator's conversational statements that she was leaving her property to certain heirs, "since this would create" a great deal of uncertainty "in probate proceedings and "unsettle the security of testators." On the other hand, in *Estate of Anderson*,[8] the court considered extrinsic evidence of intent on the theory that "a court cannot determine whether the terms of [a] will are clear and definite in the first place until it considers the circumstances under which the will was made." I believe that *rules of construction* should be subject to override by extrinsic evidence even if *express statements* in an instrument are not. Section 6111.5[9] seems to support this, unless it is trumped by Section 21102.

If an instrument makes a gift to "children," for example, the default rule in Section 21115 for resolving the issues that this word raises, e.g., as to adopted children, children born out of wedlock, does not make the testator's intent "clear." If you agree, Section 21102 should be modified to resemble the UPC, by eliminating the words "as expressed in the instrument" in subdivision (a) and the words "by the instrument" in subdivision (b). If these words are left in the statute, they raise the question whether reformation is still possible in the case of a mistaken writing. Langbein and Waggoner have argued that the traditional distinction between wills and other instruments with respect to reformation makes no sense. Their view, that reformation should be allowed for both wills and inter-vivos instruments, has been accepted in the Restatement of Property. The general idea behind Section 21101 *et seq*. is to treat all instruments the same way. Section 21102 as presently worded might bar reformation of inter-vivos instruments. This would be a regressive step which I do not think was intended.

***Recommended change*:**

(a) The intention of the transferor controls the legal effect of the dispositions made in the instrument.
(b) The rules of construction expressed in this part apply in the absence of a finding of contrary intent by the transferor.

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7. 71 Cal. Rptr. 2d 424, 432 (1998).
8. 65 Cal. Rptr. 2d 307, 316 (App. 1997).
9. *§ 6111.5. Admissibility of extrinsic evidence*

6111.5. Extrinsic evidence is admissible to determine whether a document constitutes a will pursuant to Section 6110 or 6111, or to determine the meaning of a will or a portion of a will if the meaning is unclear.

§ 21103. Choice of law as to meaning and effect of disposition in 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.

Section 21103 comes from former Section 6141 which in turn was based on UPC 2-602, which has since been replaced by 2-703, which now applies to all instruments. There is no substantial difference now between the California and the UPC provisions. I question whether a testator or settlor should be able to designate the law of a state that has no connection with the property being disposed of or the persons affected.[10] Professor Ed Halbach, with whom I have discussed a prior draft of this memo, thinks this is not a problem in ascertaining "the meaning" of an instrument, since the designation of law is simply be a short hand way to express intent. Allowing a provision in an instrument to determine the law governing its "legal effect" is harder to justify. There may be situations apart from community property rights, where such a choice of law provision should be disregarded, e.g., an attempt to escape the limitations of spendthrift trusts by choosing the law of some off-shore island which imposes no limits on them. But this problem can be dealt with under the "public policy" exception in the provision. I recommend no change.

Recommendation: No change.

§ 21104. "Testamentary gift"

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

The words "testamentary gift" defined here are not used again until Section 21117. See also Section 21135. Compare "testamentary *disposition*" in Section 21116. Some argue that the anti-lapse provisions in Sections 21109 and 21110 should apply to revocable trusts but not other inter-vivos transfers. The term "testamentary gift" might be used to make this point if this argument is adopted. Compare UPC 1-201(4), which uses "beneficiary designation "as a specially defined limiting term. The UPC definition is awkward in some respects, but it clearly covers "nonprobate transfers," whereas the historical association of "testamentary" with wills may be confusing.

Recommendation: No change.

§ 21105. Will to pass all property, including after-acquired property

21105. Except as provided in Sections 641 and 642[11] a will passes all property the testator owns at death, including property acquired after execution of the will.

10. See also First Nat'l Bank v. Daggett, 497 N.W.2d 358, 363 (Neb. 1993) (disregarding a reference to the law of a state which had no connection with a trust).

11. Dealing with powers of appointment.

Section 21105 goes back ultimately to old 2-604 of the UPC, which has been replaced by 2-602 which says "a will *may provide for*" the passage of property the testator owns at death or "acquired by the estate after testator's death." If it is read literally Section 21105 might lead to an overbroad construction of a will by which the testator only intended to dispose of an existing asset, but this is not a serious problem in light of the proviso about contrary intent in Section 21101.

The revised UPC gives property devised "to *A* or his estate" to the devisees of *A* if *A* predeceases the testator, overruling *Braman's Estate*,[12] which held that such a devise passed to *A*'s heirs rather than under *A*'s will. I agree with the UPC result in the case supposed, but I am unaware of any contrary California authority that needs to be corrected.

Elsewhere I have questioned why a trust (as distinguished from a will) cannot dispose of after-acquired property.[13] Changing the rule would be convenient for persons who use living trusts as a will substitute to dispose of all their property, and consistent with the general thrust of these provisions to assimilate wills and other instruments. But maybe this would rock the boat too much. The practical problems posed the inability to include after acquired property in a living trust can be handled by the settlor's executing a pour over will which adds any assets which are still in the settlor's name to the trust.

Recommendation: No change.

§ 21106. Transferees as owners in common

21106. A transfer of property to more than one person vests the property in them as owners in common.

Section 21106 is consistent with the presumption in favor of tenancy in common in Civil Code Section 683,[14] but the latter has some ambiguities. E.g., does the twice repeated phrase "when expressly declared in the transfer to be a joint tenancy" apply to *all* the cases mentioned outside a transfer to executors and trustees? The basic idea of the 1994 provisions — a single set of rules to cover all forms of property transfers —takes us back to the days when such rules were placed in the Civil Code. Since many of these rules have been were shifted to the Probate Code, confusing duplication can be avoided by repealing the Civil Code counterpart. On the other hand, since the Probate Code provi-

12. 258 A.2d 492 (Pa. 1969).

13. McGovern, *Trusts, Custodianships and Durable Powers*, 27 Real Prop. Prob. & Tr. J. 1, 43 (1992).

14. *§ 683. Joint tenancy*

683. (a) A joint interest is one owned by two or more persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or by transfer from a sole owner to himself or herself and others, or from tenants in common or joint tenants to themselves or some of them, or to themselves or any of them and others, or from a husband and wife, when holding title as community property or otherwise to themselves or to themselves and others or to one of them and to another or others, when expressly declared in the transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants. A joint tenancy in personal property may be created by a written transfer, instrument, or agreement.

(b) Provisions of this section do not apply to a joint account in a financial institution if Part 2 (commencing with Section 5100) of Division 5 of the Probate Code applies to such account.

sions are limited to donative transfers, this might create a gap when, e.g., property is deeded "to *A* and *B*" in a sale.

Section 21106 is *in*consistent with Section 5130 which presumes that the owners of a joint account intend a right of survivorship; — hence the cross reference in Civil Code Section 683(b). What rule applies when brokerage accounts or securities are registered in the names of "*A* and/or *B*?" On this question any rule of construction should be qualified. The Law Revision Commission Comment to old Section 6143, the predecessor to Section 21106, noted that "many cases have permitted extrinsic evidence of surrounding circumstances to show what was meant by the words of the will." See my earlier discussion of Section 21102.

Recommended change:

Add at the end: This provision does not apply to a joint account in a financial institution covered by Part 2 (commencing with Section 5100 of Division 5).

Repeal Civil Code Section 1073?

§ 21107. Direction in instrument to convert real property to 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.

Section 21107, like its predecessor, old Section 6144, is declaratory of the common law.[15] The question hardly ever arises today, since the classification of property as real or personal is rarely important. I guess the provision does no harm, and thus recommend no change, although nothing of importance would be lost by the repeal of this section.

Recommendation: No change.

§ 21108. Abolishment of common law rule of worthier title

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.

Section 21108 has a counterpart in UPC 2-710. It duplicates Civil Code Section 1073,[16] so maybe we could save trees by eliminating one or the other. In this case, I do not

15. Restatement (Second) Conflict of Laws § 225 (1971).

16. *Civil Code § 1073. Negation of rule of worthier title, grants to heirs and next of kin*

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

believe this would create a problem with non-donative transfers, since I doubt that the phrase occurs in that context. The principal relevance of the rule (or Doctrine) of worthier title arises when a settlor wants to terminate or modify a trust which gives an interest to "his heirs." Today, despite the abrogation of the Doctrine of Worthier Title, Section 15404(c)[17] may allow this, because it limits the class of "heirs" whose consent is needed to terminate or modify a trust. I would recommend an expansion of Section 15404(c) to include gifts to the "heirs" of persons other than the settlor, but that is outside my mandate.

Recommendation: Repeal same provision in Civil Code 1073.

§ 21109. Failure of transferee to survive

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.

(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.

Insofar as this provision covers *wills*, it is declaratory of the common law. I wonder why a 120-hour survival requirement (like the one in UPC 2-702) applies to the California Statutory Will (Section 6211)[18] and intestacy (Section 6403), but does not extend to all wills as a general presumption of intent. Do testators have a different intent on this point than persons who die intestate? Professor Halbach tells me that the idea of extending the 120-hour rule to ordinary wills was rejected in California because of the various types of language appearing in wills which may (or may not) show a contrary intent. UPC 2-702, which covers wills, is a rather long provision.

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section shall be applied in all cases in which final judgment has not been entered on its effective date.

17. *§ 15404. Modification or termination by settlor and all beneficiaries*

15404. (a) If the settlor and all beneficiaries of a trust consent, they may compel the modification or termination of the trust.…

(c) If the trust provides for the disposition of principal to a class of persons described only as "heirs" or "next of kin" of the settlor, or using other words that describe the class of all persons who would take under the rules of intestacy, the court may limit the class of beneficiaries whose consent is needed to compel the modification or termination of the trust to the beneficiaries who are reasonably likely to take under the circumstances.

18. *§ 6211. Requirement that beneficiaries must survive decedent*

Reference to a person "if living" or who "survives me" means a person who survives the decedent by 120 hours. A person who fails to survive the decedent by 120 hours is deemed to have predeceased the decedent for the purpose of a California statutory will, and the beneficiaries are determined accordingly. If it cannot be established by clear and convincing evidence that a person who would otherwise be a beneficiary has survived the decedent by 120 hours, it is deemed that the person failed to survive for the required period. The requirement of this section that a person who survives the decedent must survive the decedent by 120 hours does not apply if the application of the 120-hour survival requirement would result in the escheat of property to the state.

The requirement of "clear and convincing evidence" of survival in subdivisions (b) and (c) duplicates Section 220[19] and so these subdivisions could be eliminated.

I think it makes sense to require the beneficiary of a revocable trust to survive the settlor, since the assumptions made about the testator's intent in a will apply to these will substitutes as well.[20] Section 5302(b) and (c) impose a comparable survival requirement on beneficiaries designated in POD accounts and Totten trusts. But as to irrevocable trusts or deeds I agree with DUKE and GODSHALL and Cunningham, *supra*, that it makes no sense to require that the donee or beneficiary survive the donor to keep an irrevocable gift. Thus in a deed "from *A* to *B*," *B* should not lose the property if he dies before *A*. (Query if the authors of Section 21109 actually intended that someone who had already "taken" property should lose it at death when he failed to survive the donor.)

I feel the same way about an irrevocable trust "to *A* for life, remainder to *B*." The question whether *B* must survive *A* is different and will be discussed in connection with Section 21110. UPC 2-706 is limited in its scope to "beneficiary designations" which are defined in 1-201(4) to include insurance, pensions plans and "other nonprobate transfer at death." A deed or irrevocable trust is a present transfer, not a "transfer at death." The same distinction appears in the definition of "testamentary gift" in Section 21104, so this might be used here.

Subdivision (a) also requires survival "until any future time required by the instrument." A deed or irrevocable trust which gives property "to *A* for life, remainder to his issue living at his death" would exclude any issue of *A* who predecease *A*, and so it is not necessary to say this in subdivision (a). The more difficult question whether a requirement of survival should be *implied* in future interests will be discussed in conjunction with the next section.

Recommendation: This section should be considered in conjunction with the following one.

§ 21110. Anti-lapse statute, substitute transferee

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

19. *§ 220. Proof of survival by clear and convincing evidence*

220. Except as otherwise provided in this chapter, if the title to property or the devolution of property depends upon priority of death and it cannot be established by clear and convincing evidence that one of the persons survived the other, the property of each person shall be administered or distributed, or otherwise dealt with, as if that person had survived the other.

20. See also Restatement (Third) of Trusts § 25, comment e.

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.

Probably Section 21110 was inspired by the same idea as UPC 2-707 which is designed to "project the antilapse idea into the area of future interests." (UPC 2-707, comment.) That is, it couples a requirement of survival with a substitutional gift to the issue of any beneficiary of a future interest who does not survive until the time of distribution.[21] UPC 2-603 applies this idea to traditional lapses, i.e., devisees who fail to survive a testator. Section 21110 is not substantially different from the UPC in the case of wills, except:

1. UPC 2-603 only applies to devises to a grandparent, descendant of a grandparent or a step child of the testator, whereas Section 21110 applies to any devise to "kindred" of either the testator or of the testator's spouse.

2. UPC 2-603 applies to all class gifts, but Section 21110 does not apply to a class member who was dead when the will was executed if the testator knew this. The distinctions in 1 and 2 existed before 1994.

3. The property given to issue under the UPC is divided "per capita at each generation" (described in UPC 2-106, and in Probate Code Section 246), whereas Probate Code 21110 refers to Probate Code Section 240 as the basis for division (sometimes called per capita with representation)

4. Both provisions can be rebutted by proof of contrary intention, but UPC 2-603(b) says the "word of survivorship, such as in a devise to an individual `if he survives me' … are not, in the absence of additional evidence, a sufficient indication" of a contrary intent. Similar language appears in 2-706(b)(3) (covering will substitutes) and 2-707(b)(3) (covering future interests. Section 21110(b), on the other hand, treats references to "survive" as evidence of a contrary intent.

UPC 2-706 applies the anti-lapse idea to will substitutes, as defined (rather awkwardly) in the way described above, but it excludes "joint tenancy with right of survivorship" and joint bank accounts. (2-703(a)(2).) In *this* context, the survivorship idea was thought to trump any implied gift to the issue of a predeceasing joint tenant. I agree. I am more uncertain as to a will or an insurance policy which designates the "surviving" children of the testator or insured as beneficiaries. In Dukeminier, *The Uniform Probate Code Upends the Law of Remainders*, [22]the author wrote:

In cases involving the application of an antilapse statute to lapsed gifts in wills, most courts have held that an express requirement of survivorship states an intent that the anti-lapse statute not apply. Hence, a devise "to A if A survives me" does not go to A's descendants if A predeceases the testator. Under the 1990 revision of the Uniform Probate Code, the drafters reversed this majority rule, giving A's lapsed gift to A's descendants even though the will states "if A survives me." This action of the 1990 UPC drafters has come under sharp criticism.…

21. UPC Section 2-707, unlike the basic anti-lapse provision in Section 2-603, is not limited to devises to relatives — *all* future interests are covered.

22. 94 Mich. L. Rev. 148, 153 (1995).

The argument *for* disregarding the word "surviving" is stated in the Comment to UPC 2-603:

> 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 statue 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.…. Other cases, however, reach the opposite conclusion.… 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.").
>
> 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." …
>
> 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.… 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 under Section 2601 …
>
> 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 2603 only applies to wills, a companion provision is Section 2706, which applies to will substitutes, including life insurance. Section 2706 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.

I find the arguments in the UPC comment convincing, even if not overwhelming. If the Commission agrees with the UPC position, a modification of the language of Section

21110(b) is necessary. One way to handle this would be to replace Section 21109 and 21110 with provisions modeled on UPC 2-603 and 2-706. The UPC's putting virtually identical rules as to wills and will substitutes in separate provisions may seem odd, but it has an advantage. UPC 2-706(d) and (e) protect third parties, like insurance companies and bona-fide purchasers, who act in ignorance of the rules. This is not necessary for wills, since the decree of distribution by a probate court clearly establishes who is entitled to the estate.

Copying UPC 2-603 and 2-706 would eliminate the distinctions between the UPC and Probate Code anti-lapse provisions with respect to coverage (kindred v. descendants of grandparents and class gifts where a class member dies before the instrument is executed, division among issue), which I mentioned earlier. These differences are not very significant, but they could be preserved by modifying the language of the UPC provisions so as not to change the Probate Code on these issues.

According to DUKE the "simplest way to eliminate the problems" he sees in the 1994 changes is "to return to pre-1994 law by limiting the application of Sections 21109 and 21110 to wills only." However, he finds "there is merit in having a rule that is applicable to wills made applicable to will substitutes," but not as to "absolute inter vivos gifts and irrevocable trusts." See also Cunningham: "[T]he statute should be amended to apply only to testamentary dispositions, which should be defined as those that take place at the transferor's death either by will or by an instrument that remains revocable until death."[23]

A more controversial change was introduced in UPC 2-707 which is "designed to project the anti-lapse statute into the area of future interests." (Comment)[24] For example, a trust (testamentary or inter-vivos) provides that the income shall be paid to "my spouse for life, and upon his death the remainder to my children." A daughter survives the testator, but dies during the spouse's (income beneficiary's) lifetime. Under UPC 2-707, the daughter's share would pass not into her estate but would go to any of her issue living at the time of distribution. The drafters of Sections 21109 and 21110 may have been attempting to reach the same result in saying that "if the transferee … fails to survive … until a future time required by the instrument, the issue of the deceased transferee take in the transferee's place."[25] However, this is not clear, since one could plausibly argue that the instrument supposed does *not* require the children to survive the spouse's death. This interpretation is supported by Section 21116 which "presumes" that interests vests at the testator's (transferor's) death. On the other hand, arguably the children *were* required to survive the spouse by virtue of Section 21113(b) which says that only "persons answering the class description at the time the transfer is to take effect in enjoyment" take. A child who predeceased the spouse would not meet that test according to the Law Revision Commission Comment to old Section 6150 (the predecessor to Section 21113), which said that "class membership may be diminished by death after the testator's death but before the devise takes effect in enjoyment" because Section 6146 (the predecessor to Section 21109) "establishes a constructional preference for requiring class members to survive until the devise takes effect in enjoyment." The comment refers to Section 6151

23. Cunningham, *supra*, at 693-94.

24. As of 1997, this provision had been adopted in seven states. See Cunningham, *supra*, at 676.

25. This was clearly the intent behind former Sections 6146-6147, which were enacted in 1983 but repealed in 1984. See Cunningham, *supra*, at 684-86.

(predecessor to Section 21114) which says that in a gift "to *A* for life, remainder to my [or *B*'s] *heirs"* the heirs are determined as of *A*'s death, thereby excluding anyone who died before the income beneficiary (*A*.) If these Law Revision Commission Comments are good law, future interests given to an *individual* are presumed to vest at the testator's death (under Section 21116), whereas those given to a *class*, such as "children" (under Section 21113) or "heirs" (under Section 21114) do not vest until the date of distribution. The UPC, on the other hand, rejects the common-law presumption in favor of early vesting (restated in Section 21116) and "imposes a condition of survivorship on future interests to the distribution date." (Comment to 2-707) This is consistent with UPC 2-708 which, like Section 21114, postpones the determination of "heirs" until the time of distribution.

Clearly the present Probate Code provisions are fraught with ambiguity. Cunningham concludes that they are "virtually impossible to comprehend, and a mine field for estate planners to navigate."[26] Does the UPC provide a good model for escaping from the present confusion? Professor Dukeminier does not think so.[27] The Dukeminier article produced a rebuttal by Lawrence Waggoner, chief drafter of the UPC.[28] I will reproduce the arguments in these two articles seriatim, first Dukeminier's attack followed by Waggoner's rebuttal. I believe that the extracts reproduced below fairly reflect the (considerably longer) arguments on both sides. (The footnotes are my own).

Flexibility

[Dukeminier] Section 2-707 can be fairly described as retrogressive, slipping trusts back to the days before flexible powers of appointment came into widespread use. When a trust is created for *A* for life, remainder to *B*, *B* has the equivalent of a general power of appointment over the remainder. If *B* dies before *A*, *B* can transmit the remainder at death to anyone *B* chooses. Under UPC section 2-707, *B*'s remainder is made contingent upon surviving *A*. If *B* dies during *A*'s life leaving descendants, *B*'s descendants are substituted for *B*. *B* has no power to transmit the remainder to others.

A principal feature of sound estate planning in the twentieth century is creating flexibility in trusts, which experience has shown to be highly desirable. The transmissible vested remainder rule of the common law is a substitute for a power of appointment overlooked by the settlor. *B* can devise the remainder to *B*'s spouse, taking advantage of the estate tax marital deduction, and making it possible for the spouse to use her spouse,… Or *B* can devise the remainder to *B*'s children in such shares and on such terms as appear wise. If *B*'s children are minors, *B* can devise the remainder in trust for the children until they reach majority, avoiding conservatorship[29]. If one of *B*'s children is disabled and supported by the state in a state institution, *B* can devise the child's share in a trust providing the child only with benefits supplementing those the state provides, thus

26. *Id.* at 670.

27. Dukeminier, *The Uniform Probate Code Upends the Law of Remainders*, 94 Mich. L. Rev. 148 (1995). *Accord*, Cunningham, *supra* at 694.

28. Waggoner, *The Uniform Probate Code Extends Antilapse-Type Protection to Poorly Drafted Trusts*, 94 Mich. L. Rev. 2309 (1996).

29. Conservatorship (guardianship) for minors in California can also be avoided in California by distribution to a custodian under the California Uniform Transfers to Minors Act. Section 3900 *et seq*. For a comparison between trusts, custodianships and guardianship, see McGovern, *Trusts, Custodianships and Durable Powers of Attorney*, 27 Real. Prop., Prob. & Tr. J. 1 (1992).

avoiding the state's seizure of the child's full share as the child's creditor, as section 2-707 would allow.[30]

[**Waggoner]** There is much that is wrong with Dukeminier's claim that section 2-707 deprives the remainder beneficiary, *B*, of the "flexibility" to "deal with changes in his family circumstances during the life tenant's life." First and foremost, the predeceased beneficiary of a transmissible future interest can only transmit a future interest, not a present interest..… Of course, the future interest does become valuable when the trust is dissolved and the corpus is actually distributed. But the remainder beneficiary cannot adjust for changes in his or her family circumstances that have occurred by that time. The remainder beneficiary can only take into account changes in family circumstances up to his or her own death. Only the life tenant can take into account changes in family circumstances occurring after the remainder beneficiary's death but before the distribution date. This explains why capable estate planners wanting to build flexibility into a trust give a power of appointment to the life tenant, not to the remainder beneficiary.[31]

…. Dukeminier cites no evidence, and my research of the case law uncovered none, that beneficiaries of transmissible future interests do any of the things that Dukeminier's article suggests. In the actual cases, the court either does not bother to disclose what happened to the transmissible remainder or does disclose that it passed through the beneficiary's estate by default, not by design — either because the remainder beneficiary died intestate or because the remainder beneficiary's will made no mention of the remainder interest and thus passed it, apparently unwittingly, under the will's catch-all clause, the residuary clause.… If it were true that clients were clamoring for trusts giving powers of appointment to remainder beneficiaries who predecease the distribution date rather than to life tenants, one would expect the form books to be full of such forms. They are not. I am unaware of any form book giving a remainder beneficiary who predeceases the distribution date a power of appointment over the remainder interest.

Termination of Trusts

[**Dukeminier**] Section 2-707 makes it more difficult to terminate trusts. Where a trust is created for *A* for life, remainder to *B*, the trust can be terminated if *A* and *B* agree, unless termination would be contrary to a material purpose of the settlor. Under section 2-707, it is much more difficult to terminate the trust during *A*'s lifetime because B's issue who survive *A* have a potential interest in the trust. Section 2-707 thus places a substantial restraint upon alienation.

[**Waggoner**] Professor Dukeminier asserts that "section 2-707 makes it more difficult to terminate trusts." Theoretically, Dukeminier is correct because section 2-707 creates a substitute future interest in remainder beneficiaries' descendants, a class that includes potentially unborn persons who cannot give the required consent. As a practical matter, however, the point is not as significant as Dukeminier makes it appear. Even under current law, very few trusts can be terminated before the distribution date. The usual rule is that spendthrift trusts, discretionary trusts, trusts for support, and postponement-of-enjoyment trusts contain a "material purpose" and cannot be terminated.[32] Typical trust forms include a boilerplate spendthrift provision, and many trusts grant discretionary powers or discretionary-support powers to the trustee. In addition, most trusts create future interests in classes that are still subject to open, thus preventing premature termination. The fact that section 2-707 creates a substitute gift to descendants of remainder beneficiaries who predecease the distribution date does not make many trusts nonterminable that were not otherwise nonterminable anyway.… In any event, there is an easy solution

30. As to this point, see Section 15306, which is replete with ambiguities of its own.

31. E.g. 1 California Will Drafting § 16.38 (Cal. Cont. Ed. Bar, 3d ed. 1992)

32. See Section 15403(b). Section 15409 modifies this to an extent which is hard to gage.

to the trust termination problem. It is to add a section resembling the California statutory provision that permits a guardian ad litem to consent to termination or modification on behalf of "a beneficiary who lacks legal capacity, including a minor, or who is an unascertained or unborn person." [See Section 15405.]

Spouses

[Dukeminier] Where trusts have been created for a child for life, with a remainder to the child's children, overlooking the needs of the child's surviving spouse, desperate beneficiaries sometimes have adopted their spouse as a child in an attempt to continue trust support for the spouse. These wife-adoption cases are vivid lessons in how far beneficiaries will go to remedy inadequate trust drafting that has overlooked a beneficiary's natural desire to benefit a spouse. Section 2-707 imbeds this omission in the statutes. Why do the revisers assume that the decedent would want to be generous with his or her spouse but would want to cut out a beneficiary's spouse? Is this merely an irresistible atavism of our English inheritance, revering the blood line and effacing the son's wife? [33]

[Waggoner] In today's divorce-prone and blended-family world, the evidence indicates that settlors incline toward substituting the descendants, not the spouse, of a remainder beneficiary who predeceases the distribution date. During the developmental stage of section 2-707, I brought to the Board a draft that would have substituted the persons who would be the predeceased remainder beneficiary's "heirs" if the remainder beneficiary died on the distribution date, rather than his or her "descendants" surviving the distribution date. Substituting the remainder beneficiary's distribution-date heirs would have included his or her surviving spouse (assuming that the beneficiary's spouse was still living at the distribution date and had not remarried). The practitioners on the Board rejected this version on the ground that it would not carry out common intent.[34]

Dukeminier also brings up the transfer tax implications of 2-707, which, he says, may result in a generation skipping tax. Waggoner has a rebuttal on this too, but I will not rehearse these contentions, because, as Dukeminier concedes, the alternatives should not be judged on the basis of taxes "because no clear general tax advantage results from one rule rather than the other."[35] Dukeminier raises possible violations of the Rule Against Perpetuities that might be caused by 2-707, but I do not find this to be a serious obstacle. Even before California adopted the Statutory Rule (Section 21200 *et seq*.), perpetuities violations were very rare, and I would be quite surprised if any will occur in the 21st century, whether or not 2-707 or something like it is adopted.

One way to describe the practical effect of UPC 2-707 is to say that it treats a remainder to a single-generation class (like children) as if it had been expressed as one to "issue," as to which the common law imposes a survival requirement, but includes the issue of any deceased member of the older generation, e.g., grandchildren take their dead parent's share. Trusts which use the word "issue" produce the same result as UPC 2-707. One might object that had the settlor/testator intended to say "issue" he/she would have said so. But this argument is not very convincing. People normally assume that their children will outlive their spouse or other life beneficiary because that usually happens. Questions of construction of future interests arise when the unusual (and therefore unan-

33. See also Cunningham, *supra*, at 696 (child without children cannot leave her remainder "to her husband (or her partner)."

34. Cunningham, *supra*, at 699 characterizes this concern for keeping property in the family as "bizarre, almost feudal."

35. 94 Mich. L. Rev. at 163.

ticipated) event happens, viz. a member of the younger generation predeceases a parent (or step-parent). As to a related question, California has already adopted a position like that of UPC 2-707. Suppose instead of a simple remainder to "my children" the trust had given the life-beneficiary spouse power to appoint "among my children." If the spouse appointed to one or more children who later predeceased the spouse, Section 674 would pass the appointee's share down to his or her issue.[36] And an ordinary anti-lapse state has the effect of turning an immediate devise to "children" into one to "issue, "thereby cutting out any spouse of the deceased child. This case differs from the devise of a remainder in that a child who predeceases the *testator* is not in a position to make adjustments with his share of the type Dukeminier supposes to occur when a remainderman survives the testator but dies before the life tenant.

Professor Dukeminier has been joined in his attack on 2-707 by Professor David Becker in a recently published article.[37] Professor Becker posits that there are skilled lawyers who wish to draft provisions which depart from the scheme in 2-707 and the provision will frustrate their wishes. He lists situations

> in which estate owners and their planners reject the notion that everyone wants to and, therefore, must create future interests that are nontransmissible at death in the event the beneficiary does not survive to the time for distribution. Once again, underscoring 2-707's condition of survivorship and its concomitant substitute gift to living descendants of a deceased beneficiary are two critical assumptions: that estate owners wish to keep the subject matter of a trust within their family and not to fortuitously distort distribution within its branches; and that they want to avoid, or at least to minimize, death costs whenever possible. There has been, however, no empirical proof that these assumptions apply to *everyone at all times*.[38]

I doubt that empirical evidence is needed to support the assumption that testators "want to avoid, or at least minimize, death costs whenever possible." Several provisions in the Probate Code, e.g., those designed to preserve the federal estate tax marital deduction (Section 21520 *et seq*.) make the same assumption. It is supported by common sense, if

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36. *§ 673. Effect of ineffective appointment by will or instrument effective only at death of donee*

673. (a) Except as provided in subdivision (b), if an appointment by will or by instrument effective only at the death of the donee is ineffective because of the death of an appointee before the appointment becomes effective and the appointee leaves issue surviving the donee, the surviving issue of the appointee take the appointed property in the same manner as the appointee would have taken had the appointee survived the donee, except that the property passes only to persons who are permissible appointees, including appointees permitted under Section 674. If the surviving issue are all of the same degree of kinship to the deceased appointee, they take equally, but if of unequal degree, then those of more remote degree take in the manner provided in Section 240.

(b) This section does not apply if either the donor or donee manifests an intent that some other disposition of the appointive property shall be made.

§ 674. Effect of death of permissible appointee prior to exercise of special power

674. (a) Unless the creating instrument expressly provides otherwise, if a permissible appointee dies before the exercise of a special power of appointment, the donee has the power to appoint to the issue of the deceased permissible appointee, whether or not the issue was included within the description of the permissible appointees, if the deceased permissible appointee was alive at the time of the execution of the creating instrument or was born thereafter.

37. *Uniform Probate Code Section 2-707 and the Experienced Estate Planner: Unexpected Disasters and How to Avoid Them*, 47 UCLA L. Rev. 339 (1999).

38. *Id.* at 380; italics in original.

not by opinion surveys. The assumption "that estate owners wish to keep the subject matter of a trust within their family" is more doubtful, although Waggoner found it supported by the collective experience of the estate planners who were consulted when the UPC was drafted.[39] It is reflected in California's (and all other states') anti-lapse statutes, which provide substitutional gifts to the issue, but not the spouse of devisee who predeceases the testator.

In any event the test of a rule of construction which is rebuttable by proof of contrary intent is not whether it matches the intention "of everyone at all times" (an impossible goal), but whether it is "right" more often than not. The Uniform Statutory Will Act, which was also drafted by experienced estate planners as "a widely usable 'simple will,'" makes assumptions like those in UPC 2-707. The Statutory Will creates a trust for the testator's spouse followed by a remainder to the testator's "then living issue."[40] UPC 2-707 would produce the same result even if the remainder was "to my children."

The question remains, in cases where the common assumptions of intent do not apply, will the construction rule frustrate the transferor's peculiar wishes? I do not believe so. For example, the Uniform Statutory Will Act Section 9 has a provision which retains in trust shares which would otherwise be distributed to a person who is disabled. If the beneficiary of a trust under Section 9 dies prior to termination, the terms require distribution to the "personal representative of the distributee's estate." Professor Becker discusses a similar hypothetical in which the settlor wants distribution to be postponed until grandchildren reach a specified age but "wants the age requirements to function merely as a direction for payment and not as a condition of survivorship … to overcome any potential perpetuities problem."[41] Becker suggests that the implied condition of survival in UPC 2-707 would frustrate this intent. I disagree, assuming the drafter used language like USWA Section 9: "Upon termination, the trustee shall distribute the remaining trust property to the distributee or personal representative of the distributee's estate." [To fit Becker's hypo better, this might read: "When a grandchild reaches age ___, the trustee shall distribute the remaining trust property to the grandchild; but if he or she dies prior to reaching age ___ the trustee shall distribute the remaining trust property to the personal representative of the grandchild's estate." As I read 2-707 this intent would be given effect and Waggoner agrees.

I asked Professor Waggoner to comment on some of Becker's hypotheticals, since he has not had a chance to do so in print. I extract some of our correspondence on this.

> **[Becker]** For example, an estate owner might have two siblings for whom she wants to provide in her will, but she may not care at all about their respective families. Because her sister's needs seem greater and more immediate, the estate owner might create a trust in which income belongs first to the sister for life and thereafter the principal would be distributed to the brother absolutely if he is then living. This specific devise may say no more, or it might expressly provide that if the brother does not survive the sister, the remainder would fail and the subject matter would then automatically pass to the residue. Either way the result should be the same — the trust principal should belong to the residuary taker — and assume that this is the exact result the estate owner wants and, therefore, intends. This is not, however, a result congruent with the statutory overlay of 2-707.

39. See *supra* text accompanying note 34.

40. See also 2 California Will Drafting § 21.38 (Cal. Cont. Ed. Bar. 3d ed. 1992).

41. Becker, *supra*, at 402.

If the deceased brother were to leave descendants alive at the sister's death, they and not the takers of the residue would receive the entire principal.[42]

[Waggoner's response] I think that in both of Becker's cases[43] the remainder would pass to the testator's residuary takers. As we discussed, in the case where the remainder says that if the brother does not survive the sister, the remainder would fail and the subject matter would automatically pass to the residue, subsection (b)(4) supersedes the substitute gift to the brother's descendants.

In the case where no alternative future interest is stated in the trust, section 2-701 along with 2-707(b)(3) would override the substitute gift because the facts would seem to support a finding of a contrary intent. Section 2-701 allows the use of extrinsic evidence to support such a finding. So, if in Becker's example, there was evidence that the testator wanted the estate to pass to his residuary takers if the brother predeceased the life tenant sister, that would prevail. Of course, Becker does not make clear that there was actual extrinsic evidence of such an intent. He might be thinking that this is what the testator wanted but only he (Becker) knows this (because) Becker made the hypo up in order to attack the statute). If that's what Becker is saying, then you could do that to ANY rule of construction, i.e., you could make up a donor who had a contrary intent but who kept it secret; and so you could claim that the rule of construction defeated intent.

[I sent a hypo of my own to Waggoner McGovern] I want my tangible personal property divided among my children (assuming my wife does not survive me). If a child predeceases me I don't want the piddling shares which would devolve to her issue under the AL statute to take effect. I presume it is enough under 2-603(b)(4) to say "the share of any child who predeceases me shall pass to the child's siblings who survive me. And if no child survives me, my TPP shall pass into the residue." Do I have to add "Goddamnit, I don't want the AL statute to apply"?

[Waggoner's answer] The language you posed ("the share of any child who predeceases me shall pass to the child's siblings who survive me. And if no child survives me, my TPP shall pass into the residue") would supersede the substitute gift under (b)(4). No, you don't have to say I really mean it.

I tend (mildly) to favor the UPC view over the common law presumption that remainders are vested (as advocated by Dukeminier and set forth in Section 21116). I would actually prefer a case by case approach in which the result would depend on the facts as they appear when the question is decided, i.e., no rule of construction at all.[44] This would allow a court, for example, to consider the possible tax implications of the alternative constructions in a case in which this mattered, and the relationship between the testator/settlor and a spouse of a deceased child who might take under a vested construction. *Perhaps* this was the Commission's intent when in 1984 they recommended amending former Section 6146 so that "the question of whether or not survivorship is required is to be determined according to general rules of construction."[45] However, the presumption in favor of early vesting in Section 21116 would weight the deck in favor of a vested construction, and should be repealed if the courts are really to have free rein to consider all the circumstances.

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42. 47 UCLA L. Rev. 373-74.

43. Referring to the hypo quoted on p. 18 of this Report.

44. McGovern, *Facts and Rules and the Construction of Wills*, 26 UCLA L. Rev. 285 (1978).

45. 18 Cal. L. Revision Comm'n Reports 87 (1984).

I do not agree with GODSHALL that in *this* context it makes sense to distinguish between revocable and irrevocable instruments. As to the latter, survival of the *transferor* should be irrelevant, but an implied requirement of survival *to the date of distribution* as in UPC 2-707 can be justified, *provided* that the rule can be avoided by drafters who prefer something else. If the general approach of UPC 2-707 is favored, but not the particular language, we could return to that in former Sections 6146-6147 (as of 1983):

§ 6146. Devisees, failure to survive, future interests

6146. (a) A devisee who fails to survive the testator or until any future time required by the will does not take under the will. For the purposes of this subdivision, unless a contrary intention is indicated by the will, a devisee of a future interest (including one in class gift form) is required by the will to survive to the time when the devise is to take effect in enjoyment.

§ 6147. Devisee defined, taking by representation, contrary intention in will

6147. (a) As used in this section, "devisee" means a devisee who is kindred of the testator or kindred of a surviving, deceased, or former spouse of the testator.

(b) Subject to subdivision (c), if a devisee is dead when the will is executed, or is treated as if he or she predeceased the testator, or fails to survive the testator or until a future time required by the will, the issue of the deceased devisee take in his or her place by representation. A devisee under a class gift is a devisee for the purpose of this subdivision unless his or her death occurred before the execution of the will and that fact was known to the testator when the will was executed.

(c) The issue of a deceased devisee do not take in his or her place if the will expresses a contrary intention or a substitute disposition. With respect to multiple devisees or a class of devisees, a contrary intention or substitute disposition is not expressed by a devise to the "surviving" devisees or to "the survivor or survivors" of them, or words of similar import, unless one or more of the devisees had issue living at the time of the execution of the will and that fact was known to the testator when the will was executed.

This has the advantage over the UPC that it would preserve the existing Probate Code views as to coverage of the statute, and applicability to class gifts.[46] These provisions differ somewhat from the UPC (as well as with Section 21110) with respect to the effect of the inclusion of a word like "surviving." If a testator had grandchildren living when the will was executed, a remainder or outright devise to "my surviving children" would under former Section 6147 bar substituting the issue of a child who thereafter died before the testator (in the case of an outright devise) or the life beneficiary (in the case of a remainder) I am not persuaded that that would reflect intent better than the UPC which treats "surviving" as boilerplate unless it is further spelled out (or contrary intent is shown by extrinsic evidence.) Also I disagree (as stated in the discussion of Section 21102, *supra*) with the idea in the 1983 Probate Code provisions that evidence of an intent to overcome this rule of construction should be limited to evidence in the will. However, the sections would not have to refer to contrary intent at all, since by virtue of Section 21102 all rules of construction would be subject to this proviso.

Since former Sections 6146 and 6147 were limited to wills, they would not accomplish the assimilation of rules for wills and revocable trusts which was the basic idea of the 1994 changes, an idea which has been supported even by the critics of the 1994 changes.

46. See *supra* pp. 10-11.

This might be accomplished by utilizing the concept of "testamentary gift" in Section 21104 so as to include non-probate transfers which take effect at death. The new sections might then read as follows:

> **[Proposed 21109]**
>
> 21109. (a) A beneficiary of a testamentary gift who fails to survive the transferor or until any future time required by the gift does not take under the gift.
>
> (b) 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.

> **[Proposed 21110]**
>
> 21110. (a) As used in this section:
>
> (1) "beneficiary " means a beneficiary who is kindred of the transferor or kindred of a surviving, deceased, or former spouse of the transferor.
>
> (2) A beneficiary under a class gift is a beneficiary unless his or her death occurred before the execution of the instrument of transfer and that fact was known to the transferor when the instrument of transfer was executed.
>
> (b) Subject to subdivision (c), (1) if a beneficiary of a testamentary gift is dead when the instrument of transfer is executed, or is treated as if he or she predeceased the transferor, or fails to survive the transferor, or (2) if the beneficiary of a future interest in any gift[47] fails to survive until a future time required by the instrument of transfer (as interpreted under the preceding section), the issue of the deceased beneficiary shall take in his or her place in the manner provided by Section 240.
>
> (c) The issue of a deceased beneficiary do not take in his or her place if the transferor expressed a contrary intention. With respect to multiple beneficiaries or a class of beneficiaries, a contrary intention is not expressed by a devise to the "surviving" beneficiaries or to "the survivor or survivors" of them, or words of similar import, in the absence of additional evidence.

This incorporates the basic ideas of UPC 2-706 and 2-707, but with a "California gloss" with respect to the coverage of the statute, treatment of class gifts where a class member is dead when the instrument is executed, and the division among issue. It does not go into as much detail as the UPC with respect to various possible manifestations of contrary intent, including substitute gifts, e.g., "to my children and the children of any deceased child." But it does adopt the basic notion in the UPC that use of the word "surviving" *without more* does not bar the implied gift to the issue of a deceased beneficiary at least in a class gift.

Uniform Probate Code 2-707, unlike 2-706 and 2-603, is not limited to a particular kind of beneficiary — future interests given to non-relatives are included as well. In this respect it differs from the basic anti-lapse provision which is its model. In former Probate Code Sections 6146 and 6147, on the other hand, the coverage was the same as to both, and I have followed that idea in my proposal.

Uniform Probate Code 2-707 includes living trusts, but not legal future interests on the theory that it would impair the ability of a legal life tenant and remaindermen to sell land by creating "a contingent substitute remainder interest in the … descendants of the person holding the remainder interest." UPC 2-707, Comment. This is not a problem in trusts

47. Subdivision (b)(2) would apply to future interests in irrevocable as well as irrevocable trusts. It *might* be limited to trusts, as is UPC 2-707, but I do not think that is necessary.

where the trustee typically has a power of sale. DUKE raises the problem of alienability as an objection to Section 21110, but I question this. Legal future interests are relatively rare today, and even when they exist, courts have authorized a sale of the fee with the proceeds being put into a trust when sale is desirable.[48] Dukeminier himself criticized UPC 2-707 for distinguishing between legal interests and trusts in his Michigan article.

DUKE suggests "a return to pre-1994 law by limiting the application of §§ 21109 and 21110 to wills only" but he adds that "there is merit in having a rule that is applicable to wills made applicable to will substitutes, such as payable on death designations and revocable trusts." See also, Cunningham, supra at 690.[49] This suggestion could be implemented by adopting UPC 2-706 (with appropriate modifications) without 2-707, or by eliminating the references to future interests in the above rewriting of former Sections 6146-47. The result would be that if *S* created a revocable trust which provided that upon his death, the property would pass to his children, the share of a child who predeceased *S* would pass to the child's issue. But if the trust continued after *S*'s death for the life of *S*'s widow, remainder to his children, any child who survived *S* would have a vested interest under the view favored by Dukeminier If this were thought desirable, Section 21116 should be modified to make it clear that the presumption of vesting is not limited to wills. The word "testamentary disposition" suggests that it is so limited unless the words "testamentary distribution" include non-probate transfers, as do "testamentary *gifts*" under Section 21114.

The logic of Dukeminier's arguments for early vesting in the Michigan Law Review (promoting flexibility, protecting spouses of deceased remaindermen, and facilitating termination of trusts) would also support the repeal of Section 21114 which postpones vesting in a gift or devise to "heirs," but Dukeminier has not argued for this.

I have devoted considerable space to the various alternatives on this question, because the innovation in UPC 2-707 has provoked considerable debate in the law reviews. I must add, however, that the question is not for me so significant as this lengthy debate might suggest. I have been struck by how rarely the question of an implied condition of survival in future interest appears in reported decisions of the past 30 years. (They are more common than perpetuities cases, but not by a very wide margin.) Possibly this is due to the fact that drafters, even inexperienced ones, are using form books in which the answer is clearly spelled out. Another possible explanation is that even when a will or trust is ambiguous, it may not make much practical difference whether a remainder is vested or conditioned on survival. If the predeceasing remainderman's estate passes to his or her children (by will or intestate succession) they are going to succeed to the deceased remainderman's interest either way. The remainderman's spouse may assert an interest in the remainder as vested, but if the spouse is the other parent of the remainderman's children (as is often the case), there may be no real conflict between them. Creditors of the decedent and the taxing authorities may have an interest in the issue, but often they do not, e.g., because the remainderman had enough other assets to cover debts, but not enough to incur an estate tax.

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48. See Wells Fargo Bank v. Title Ins. Co., 99 Cal. Rptr. 464, 465 (1971).

49. "[E]xtending the anti-lapse statute … to revocable living trusts" was a "reasonable and probably advisable goal."

§ 21111. Failed 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.

Section 21111 has a counterpart in UPC 2-604, the primary function of which was to abolish the "no residue of a residue" rule. See the Law Revision Commission Comment to former Section 6148. The UPC counterpart, in contrast to 2-707, applies only to wills, whereas Section 21111 covers all "transfers." It may be hard to find "residuary gifts" outside of wills, but the term may be used in revocable trusts which are used as will substitutes.

The question which has troubled me — is a devise of "all my estate" a "residuary gift" within the meaning of the statute —is now answered affirmatively in a Comment to UPC 2-604. I would suggest putting this into the text of Section 21111 as subdivision (c).

Section 21111 has a special rule for future interests. Subdivision (a) says when they fail they do not pass into the residue; subdivision (b) says that a future interest "to two or more persons" passes to the other transferees. (i.e., all future interests are treated as a class gift). This raises problems for me. In a devise "to *A* for life, to *B* if he survives *A*," neither subdivision (a) nor (b) applies if *B* fails to survive *A*. Does this mean that the property goes intestate to the testator's heirs after *A* dies? A similar problem arises when the remainder is "to *B* and *C* if they survive" and neither survives[50] I suggest eliminating the references to future interests in Section 21111, unless someone can point out a case in which they accomplish a useful result.

Recommended change:

§ 21111. Failed transfer

21111. Except as provided in Section 21110:
(a) If a transfer, other than a residuary gift, fails for any reason, the property transferred becomes a part of the residue transferred under the instrument.
(b) If a residuary gift 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.
(c) A devise of "all my estate" or words of similar import constitutes a residuary gift for purposes of this section.

§ 21112. Conditions regarding "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

50. I assume in these hypotheticals that the deceased remainderman had no issue so that any rule like UPC 2-707 would not apply.

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.

According to the Law Revision Commission Comment to the predecessor of Section 21112, it "overrules California's much criticized theory of indefinite failure of issue." It overlaps Civil Code Section 1071, which perhaps should be repealed to foster the idea that all relevant rules of construction can be found in this part of the Probate Code.[51]

Recommendation: No change, except repeal of Civil Code Section 1071.

§ 21113. Transfer to class, time of vesting, afterborn member

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.

DUKE criticizes Section 21113 for possibly imposing a survival requirement on class. gifts. I have already discussed this issue above. DUKE also correctly observes that the section "appears to restate the rule of convenience, but it restates it inaccurately." The common law exceptions can perhaps be read into Section 21113's restatement of the rule of convenience. But why not repeal the section as DUKE suggests? The common law is more accurately restated in the Second Restatement of Property Sections 26.1-26.2. These rather lengthy provisions could be copied into a statute, but why? They deal with problems that do not arise very often.

Recommendation: Repeal this section.

§ 21114. 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 designated person's "heirs," "next of kin," "relatives," or "family," or to "the persons entitled thereto under the intestate succession laws," or to persons described by words of 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. 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.

51. *Civ Code § 1071. Meaning of "heirs" and "issue" in certain remainders*

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.

Section 21114 is very close to UPC 2-711. Although they have the effect of postponing vesting in a gift to heirs until the time for distribution, DUKE does not object to them. I prefer the UPC version insofar as it differs from Section 21114.

1. The UPC applies to interests which "heirs" acquire by statute as well as by a "transfer." I presume this means that if an intestacy occurs because of a gap in an instrument which creates future interests — e.g., residuary devise "to *A* for life, remainder to his children" and *A* dies without issue, the testator's heirs who take are determined at A's death, contrary to the common law which determines them at the testator's death.[52]

2. UPC 2-711 makes it clear that if the designated ancestor dies without a spouse or relatives, the property escheats to the state. This is not clear under Section 21114.

3. Section 21114 refers to the intestacy law of California, which may be inappropriate if the domicile of the designated ancestor and/or situs of the property was in another state. UPC 2-711 refers to the "law of the designated individual's domicile."

4. The California provision excepts the peculiar provisions of Section 6402.5 (property attributable to a predeceased spouse) from the general incorporation of the intestacy statutes. This section does not often apply, but it is not clear to me why if it makes sense in general (a doubtful premise), an exception should apply in this situation.

I favor making Probate Code Section 21114 conform to the UPC counterpart in these particulars. The reference in the UPC to Section 2-105 has been replaced by Section 6800 of the Probate Code which covers escheat.

Recommendation:

If an applicable statute or a governing instrument calls for a future distribution to or creates a future interest in a designated individual's "heirs," "heirs at law," "next of kin," "relatives," or "family," or language of similar import, the property passes to those persons, including the state under Section 6800, and in such shares as would succeed to the designated individual's intestate estate under the intestate succession law of the designated individual's domicile if the designated individual died when the donative disposition is to take effect in possession or enjoyment. If the designated individual's surviving spouse is living but is remarried at the time the interest is to take effect in possession or enjoyment, the surviving spouse is not an heir of the designated individual.

§ 21115. Half-bloods, adoptees and 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

52. See McGovern *et al.*, Wills, Trusts and Estates 443 (1987) [hereinafter McGovern]; Estate of Roulac, 136 Cal. Rptr. 492 (App. 1977).

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.

The basic idea of Section 21115(a) is to apply the intestacy rules (with certain modifications) to determine who is a "child" (for example) in an instrument. The same idea appears in UPC 2-705, the comment to which says it is partly "based on § 6152," the predecessor to Section 21115. UPC 2-705 also has a sentence saying that "uncles, aunts, nephews, and nieces" do not include "relatives by affinity." That may not be a bad presumption but I doubt if the issue comes up often enough to justify amending the statute. The reasons for the proposed subdivision (d) are set forth in the discussion of Section 21140 below.

Recommendation: No change except the addition of a subdivision (d):

(d) The rules for determining intestate succession under this subdivision shall be those in effect at the time the transfer is to take effect in enjoyment.

§ 21116. Presumption that testamentary disposition vests at testator's death

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.

Section 21116 has already been discussed in connection with the requirement of survival. It should be repealed if we follow the UPC view of postponing vesting.

Recommendation: Repeal this section.

§ 21120. Giving some effect to every expression, avoidance of intestacy

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, rather than one that will result in an intestacy.

GODSHALL suggests that Section 21120's preference for avoiding intestacy is hard to apply to instruments other than wills, but Professor Halbach has suggested to me that a comparable principle could be applied in construing revocable trusts to produce a complete disposition of the trust property so that a resulting trust (see Restatement (Third) of Trusts § 8) would not arise. Such a principle may be sound, but I doubt if it would have much effect on the result of actual cases. Courts pay only lip service to the concept of avoiding intestacy in will cases anyway.

Recommendation: No change.

§ 21131. Specific gift subject to lien without right of exoneration

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.

The UPC counterpart to Section 21131 (UPC 2-607) applies only to wills and does not extend to persons succeeding to mortgaged property by joint tenancy. If one thinks that there should be no exoneration in the latter case as well, the most recent California case so held, *In re Estate of Dolley*,[53] even though at that time specific devisees *were* entitled to exoneration (a presumption later reversed by Section 21131.) If the issue arises again in California, Section 21131 might not in resolve the issue, since a deed putting land in joint tenancy does not seem to be a "specific gift," since Section 21117[54] defines these as a type of "testamentary" gift, which is limited to transfers that "take effect at or after death" Section 21104.

Recommendation: No change.

§ 21132. Transfer of specific gift of certain 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.

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53. 71 Cal. Rptr. 56 (1968).

54. *§ 21117. 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.

The predecessor of Section 21132, former Section 6171, was based on a UPC provision which has since been revised (2-605) so that it applies "regardless of whether that devise is characterized as a general or specific devise." UPC 2-605, Comment. I like this change, which some courts have reached by manipulating the distinction between "specific" and "general" gifts.[55] UPC 2-605 is clearly applicable only to wills. The language of Section 21131, on the other hand, could possibly apply to a living trust which provided, e.g., that at the settlor's death a beneficiary should get "100 shares of XYZ stock" which later split 2 for 1. To apply Section 21132, however, in this case would require that the additional stock be "owned by the transferor" and also a part of the [trust?] estate" when the settlor died, ideas that are contradictory. This problem does not seem to be worth the trouble of trying to redraft the statute, particularly since such gifts are not used by well-advised drafters.[56] I would not worry about non-probate transfers and simply copy UPC 2-605 to get around the specific-general classification difficulty.

Recommendation: Substitute UPC 2-605 (p. 35 infra) for this provision.

§ 21133. Right of recipient of specific gift

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.

§ 21134. Right of beneficiary of specific gift sold by conservator or taken in return for eminent domain award

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.

Sections 21133 and 21134 are based on former Sections 6171 and 6172, which in turn were based on former UPC 2-608, which has since been revised and renumbered as 2-

55. See McGovern at 401.

56. 1 California Will Drafting § 12.61 (Cal. Cont. Ed. Bar, 3d ed. 1992).

606. The new version adds what the comment calls "a mild presumption against ademption" even in cases not covered by the specific exceptions (condemnation, loss covered by insurance, etc.). The UPC comment cites a California case to show that its courts have adopted the "intent" theory which it favors, even though the California statute is not as broad as the UPC.

Section 21134(a) covers property sold by a conservator. UPC 2-606 extends the same principle to sales by an agent for an incapacitated principal under a durable power.[57] This may be a sensible change, but in general I find the UPC provision to be an odd mixture of specific rules and general admonitions to carry out the testator's intent. Since (as the UPC comment notes) California courts long ago rejected the "bad" intent-defying cases that inspired the UPC, why do California courts need statutory guidance? I would say the same of Sections 21136-21139[58], which are derived from earlier Probate Code provisions dealing with ademption, and serve no useful purpose. My own views on probable intention in the ademption situation are too open-ended to be easily codified.

> Even a testator who voluntarily disposes of a specifically devised asset may not intend thereby to adeem the devise. For example, a testator's shifting money from a savings account to a certificate of deposit in order to get a higher interest rate was held to have adeemed a devise of the account, but this probably did not reflect the testator's intention. On the other hand, the reason for a specific devise may disappear when the property is disposed of. When a business is devised to employees in the hope that they shall be able to carry on the business, and the testator later sells the business, it seems reasonable to infer an intent to adeem. The same is often true of devises of items of sentimental value, like a painting or jewelry. Many wills specifically devise a house and tangible personal property so as to avoid including them in a trust which receives the residue of the estate. If the testator later sells the house there is no reason why the sale proceeds should not go into the residuary trust, so ademption seems the proper result. Avoiding ademption can create administrative problems, requiring the executor, for example, to determine the value of property which is no longer in the estate or the net sale price of property which was sold years before.

I agree with GODSHALL that Sections 21133 and 21134 are so worded as to make them hard to apply to revocable trusts, even though this was apparently the intent behind revising them. There is some case law upsetting actions taken by a conservator regarding non-probate assets of the conservatee which upset an estate plan.[59] This should be covered in California by Section 2580 *et seq*. under which courts are supposed to scrutinize conservators' actions, in the light, inter alia, of "any known estate plan of the conservatee." Section 2583(f). Thus I conclude no harm would be done by repealing Sections 21133-21134 and 21136-21139.

Recommendation: Repeal.

57. See McGovern at 402-03.

58. See Appendix.

59. McGovern at 402.

§ 21135. Conditions for treatment of gift during lifetime as satisfaction of testamentary gift

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.

Section 21135 is derived via former Section 6174 from UPC 2-612, now 2-609. The UPC rule applies only to wills, but apparently Section 21135 would also apply to a gift made by the settlor of a revocable living trust to a beneficiary after the trust was executed. It has always struck me as odd, given the general thrust of the UPC to reduce formal requirements in searching for a decedent's intent (e.g., 2-503, 2-601), that in this instance the Code imposes an obstacle to ascertaining intent which did not exist at common law.[60] The rule here is comparable to the one on advancements in intestacy, Section 6409,[61] which is likewise taken from an earlier version of the UPC.

The latest version of the UPC has provisions dealing with gifts which are intended to satisfy a devise but are made to a person other than the devisee. This is an esoteric point, since the unusual testator knows that his or her intent must be expressed in a writing (otherwise intent is disregarded), will probably spell out in the writing what the intent is. The situation arises so rarely that it is hard to generalize about what most people want in this situation and thereby derive a sensible rule of construction. In this instance I would not follow the lead of the UPC, and would repeal both Section 21134 and Section 6409.

Recommendation: Repeal.

§ 21140. Application of part

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

60. McGovern at 30.

61. See Appendix.

In general I favor making changes retroactive on the theory that if a change is good, it should be broadly applied and if it is not it should not be made at all. The counter argument, reliance by drafters on the old rules, is based on improbable assumptions. If the drafter or testator really cared about an issue which a rule of construction deals with, the intent would have been articulated in the instrument and not left to inferences. The same penchant for retroactivity underlies Section 3, which applies new law unless this would create substantial injustice.[62] Section 21140(a) points in the same direction when it makes rules of this part apply to instruments previously executed. This is qualified by subdivision (b), but the sections mentioned in subdivision (b) (former Sections 1050-1054) apply in very few cases (the effect of advancements to an heir in determining the heir's intestate share). A possible, but I believe erroneous construction of the last sentence of subdivision (b) is that the entire Probate Code as it existed in January 1, 1985 governs *any* case involving a decedent who died before 1985. This construction would make nonsense of subdivision (a) and of the specific mention of Sections 1050-1054 in subdivision (b).

The California Supreme Court never mentions Section 21140 in *Newman v. Wells Fargo Bank, N.A.*[63] — never mentions Section 21140 in construing the will of a testator who died prior to 1985. The case involved an adopted-away child who would have taken under Section 21115 (because the adoption was by a step-parent). The court invoked Section 6103 as controlling.[64] One of the chapters listed in Section 6103 formerly contained the rules of construction for wills, but these rules had been moved to another chapter (Chapter 1 of Part 1 of Division 11) in 1994. This chapter has its own effective date (Section 21140), which is *not* limited in the case of testators who died prior to 1985, except in the limited situations covered by subdivision (b). Thus the opinion in *Newman* seems perverse.[65] The result *can* be explained by referring to *Section 6414* which freezes the intestacy rules for persons dying prior to 1985 to those existing on that date. This affects Section 21115 which incorporates the intestacy rules in interpreting class gifts. However, Section 21114 expressly states that in construing a gift to "*heirs*" they are to be determined as of "the time when the transfer is to take effect in enjoyment *and according to the California statutes of intestate succession … in effect at that time.*" Using different choice of law rules in the determination of "heirs" and "issue" makes no sense.

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62. See Estate of Gardner, 1 Cal. App. 4th 995, 2 Cal. Rptr. 664 (1991) (abolition of jury trial in will contests in 1989, applied to contest filed in 1988); UPC 8-101(5). See also Section 21108 which by its terms governs all cases except where final judgment was entered before 1959.

63. 14 Cal. 4th 126, 59 Cal. Rptr. 2d 2 (1996).

64. *§ 6103. Application of certain chapters where testator died before January 1, 1985*

> 6103. Except as otherwise specifically provided, Chapter 1 (commencing with Section 6100), Chapter 2 (commencing with Section 6110), Chapter 3 (commencing with Section 6120), Chapter 4 (commencing with Section 6130), Chapter 5 (commencing with Section 6140), Chapter 6 (commencing with Section 6200), and Chapter 7 (commencing with Section 6300) do not apply where the testator died before January 1, 1985, and the law applicable prior to January 1, 1985, continues to apply where the testator died before January 1, 1985.

65. *Contrast* Estate of Woodworth, 18 Cal. App. 4th 936, 22 Cal. Rptr. 2d 676 (1993), which involved a devise to "heirs." The heirs were not determined as of the time of distribution, as Section 21114 and its predecessor mandate, because the testator had died before 1985. The court's citation of Section 6103 was in point in this pre-1994 case because at that time the rules of construction were in the chapter to which Section 6103 refers.

Recommendation: Repeal subdivision (b).

I suggest that Section 21115 be amended by adding a new subdivision (d) saying "The rules for determining intestate succession under this subdivision shall be those in effect at the time the transfer is to take effect in enjoyment."

APPENDIX

California Probate Code

§ 6409. Advancements

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.

(2) The heir acknowledges in writing that the gift is to be so deducted or is an advancement.

(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 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.

§ 21136. Right of beneficiary of specific gift when transferor enters agreement for sale or transfer

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.

§ 21137. Right of beneficiary of specific gift when transferor encumbers gift

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.

§ 21138. Right of beneficiary of specific gift when transferor alters interest in 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.

§ 21139. Construction of provisions of chapter

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

Uniform Probate Code

§ 1-201 General definitions….

(4) "Beneficiary designation" refers to a governing instrument naming a beneficiary of an insurance or annuity policy, of an account with POD designation, of a security registered in beneficiary form (TOD), or of a pension, profit-sharing, retirement, or similar benefit plan, or other nonprobate transfer at death.

§ 2-602. Will may pass all property and after-acquired property

A will may provide for the passage of all property the testator owns at death and all property acquired by the estate after the testator's death.

§ 2-603. Antilapse, deceased devisee, class gifts

(a) [Definitions.] In this section:

(1) "Alternative devise" means a devise that is expressly created by the will and, under the terms of the will, can take effect instead of another devise on the happening of one or more events, including survival of the testator or failure to survive the testator, whether an event is expressed in condition-precedent, condition-subsequent, or any other form. A residuary clause constitutes an alternative devise with respect to a nonresiduary devise only if the will specifically provides that, upon lapse or failure, the nonresiduary devise, or nonresiduary devises in general, pass under the residuary clause.

(2) "Class member" includes an individual who fails to survive the testator but who would have taken under a devise in the form of a class gift had he [or she] survived the testator.

(3) "Devise" includes an alternative devise, a devise in the form of a class gift, and an exercise of a power of appointment.

(4) "Devisee" includes (i) a class member if the devise is in the form of a class gift, (ii) the beneficiary of a trust but not the trustee, (iii) an individual or class member who was deceased at the time the testator executed his [or her] will as well as an individual or class member who was then living but who failed to survive the testator, and (iv) an appointee under a power of appointment exercised by the testator's will.

(5) "Stepchild" means a child of the surviving, deceased, or former spouse of the testator or of the donor of a power of appointment, and not of the testator or donor.

(6) "Surviving devisee" or "surviving descendant" means a devisee or a descendant who neither predeceased the testator nor is deemed to have predeceased the testator under Section 2-702.

(7) "Testator" includes the donee of a power of appointment if the power is exercised in the testator's will.

(b) [Substitute Gift.] If a devisee fails to survive the testator and is a grandparent, a descendant of a grandparent, or a stepchild of either the testator or the donor of a power of appointment exercised by the testator's will, the following apply:

(1) Except as provided in paragraph (4), if the devise is not in the form of a class gift and the deceased devisee leaves surviving descendants, a substitute gift is created in the devisee's surviving descendants. They take by representation the property to which the devisee would have been entitled had the devisee survived the testator.

(2) Except as provided in paragraph (4), if the devise is in the form of a class gift, other than a devise to "issue," "descendants," "heirs of the body," "heirs," "next of kin," "relatives," or "family," or a class described by language of similar import, a substitute gift is created in the deceased devisee or devisee's surviving descendants. The property to which the devisees would have been entitled had all of them survived the testator passes to the surviving devisees and the surviving descendants of the deceased devisees. Each surviving devisee takes the share to which he [or she] would have been entitled had the deceased devisees survived the testator. Each deceased devisee's surviving descendants who are substituted for the deceased devisee take by representation the share to which the deceased devisee would have been entitled had the deceased devisee survived the testator. For the purposes of this paragraph, "deceased devisee" means a class member who failed to survive the testator and left one or more surviving descendants.

(3) For the purposes of Section 2-601, 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 this section.

(4) If the will creates an alternative devise with respect to a devise for which a substitute gift is created by paragraph (1) or (2), the substitute gift is superseded by the alternative devise only if an expressly designated devisee of the alternative devise is entitled to take under the will.

(5) Unless the language creating a power of appointment expressly excludes the substitution of the descendants of an appointee for the appointee, a surviving descendant of a deceased appointee of a power of appointment can be substituted for the appointee under this section, whether or not the descendant is an object of the power.

(c) [More Than One Substitute Gift; Which One Takes.] If, under subsection (b), substitute gifts are created and not superseded with respect to more than one devise and the devises are alternative devises, one to the other, the determination of which of the substitute gifts takes effect is resolved as follows:

(1) Except as provided in paragraph (2), the devised property passes under the primary substitute gift.

(2) If there is a younger-generation devise, the devised property passes under the younger-generation substitute gift and not under the primary substitute gift.

(3) In this subsection:

(i) "Primary devise" means the devise that would have taken effect had all the deceased devisees of the alternative devises who left surviving descendants survived the testator. (ii) "Primary substitute gift" means the substitute gift created with respect to the primary devise.

(iii) "Younger-generation devise" means a devise that

(A) is to a descendant of a devisee of the primary devise,

(B) is an alternative devise with respect to the primary devise,

(C) is a devise for which a substitute gift is created, and

(D) would have taken effect had all the deceased devisees who left surviving descendants survived the testator except the deceased devisee or devisees of the primary devise.

(iv) "Younger-generation substitute gift" means the substitute gift created with respect to the younger-generation devise.

§ 2-604. Failure of testamentary provision

(a) Except as provided in Section 2-603, a devise, other than a residuary devise, that fails for any reason becomes a part of the residue.

(b) Except as provided in Section 2-603, if the residue is devised to two or more persons, the share of a residuary devisee that fails for any reason passes to the other

residuary devisee, or to other residuary devisees in proportion to the interest of each in the remaining part of the residue.

§ 2-605. Increase in securities, accessions

(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; or

(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.

§ 2-606. Nonademption of specific devises, unpaid proceeds of sale, condemnation, or insurance, sale by conservator or agent

(a) A specific devisee has a right to the specifically devised property in the testator's estate at death and:

(1) any balance of the purchase price, together with any security agreement, owing from a purchaser to the testator at death by reason of sale of the property;

(2) any amount of a condemnation award for the taking of the property unpaid at death;

(3) any proceeds unpaid at death on fire or casualty insurance on or other recovery for injury to the property;

(4) property owned by the testator at death and acquired as a result of foreclosure, or obtained in lieu of foreclosure, of the security interest for a specifically devised obligation;

(5) real or tangible personal property owned by the testator at death which the testator acquired as a replacement for specifically devised real or tangible personal property; and

(6) unless the facts and circumstances indicate that ademption of the devise was intended by the testator or ademption of the devise is consistent with the testator's manifested plan of distribution, the value of the specifically devised property to the extent the specifically devised property is not in the testator's estate at death and its value or its replacement is not covered by paragraphs (1) through (5).

(b) If specifically devised 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, or if a condemnation award, insurance proceeds, or recovery for injury to the 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 specific devisee has the right to a general pecuniary devise equal to the net sale price, the amount of the unpaid loan, the condemnation award, the insurance proceeds, or the recovery.

(c) The right of a specific devisee under subsection (b) is reduced by any right the devisee has under subsection

(a).

(d) For the purposes of the references in subsection (b) to a conservator, subsection (b) does not apply if after the sale, mortgage, condemnation, casualty, or recovery, it was adjudicated that the testator's incapacity ceased and the testator survived the adjudication by one year.

(e) For the purposes of the references in subsection (b) to an agent acting within 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.

§ 2-607. Nonexoneration

A specific devise passes subject to any mortgage interest existing at the date of death, without right of exoneration, regardless of a general directive in the will to pay debts.

§ 2-609. Ademption by satisfaction

(a) Property a testator gave in his [or her] lifetime to a person is treated as a satisfaction of a devise in whole or in part, only if (i) the will provides for deduction of the gift, (ii) the testator declared in a contemporaneous writing that the gift is in satisfaction of the devise or that its value is to be deducted from the value of the

devise, or (iii) the devisee acknowledged in writing that the gift is in satisfaction of the devise or that its value is to be deducted from the value of the devise.

(b) For purposes of partial satisfaction, property given during lifetime is valued as of the time the devisee came into possession or enjoyment of the property or at the testator's death, whichever occurs first.

(c) If the devisee fails to survive the testator, the gift is treated as a full or partial satisfaction of the devise, as appropriate, in applying Sections 2-603 and 2-604, unless the testator's contemporaneous writing provides otherwise.

§ 2-701. Scope

In the absence of a finding of a contrary intention, the rules of construction in this Part control the construction of a governing instrument. The rules of construction in this Part apply to a governing instrument of any type, except as the application of a particular section is limited by its terms to a specific type or types of donative disposition or governing instrument.

§ 2-706. Life insurance, retirement plan, account with pod designation, transfer-on-death registration, deceased beneficiary

(a) [Definitions.] In this section:

(1) "Alternative beneficiary designation" means a beneficiary designation that is expressly created by the governing instrument and, under the terms of the governing instrument, can take effect instead of another beneficiary designation on the happening of one or more events, including survival of the decedent or failure to survive the decedent, whether an event is expressed in condition-precedent, condition-subsequent, or any other

form.

(2) "Beneficiary" means the beneficiary of a beneficiary designation and includes (i) a class member if the beneficiary designation is in the form of a class gift and (ii) an individual or class member who was deceased at the time the beneficiary designation was executed as well as an individual or class member who was then living but who failed to survive the decedent.

(3) "Beneficiary designation" includes an alternative beneficiary designation and a beneficiary designation in the form of a class gift.

(4) "Class member" includes an individual who fails to survive the decedent but who would have taken under a beneficiary designation in the form of a class gift had he [or she] survived the decedent.

(5) "Stepchild" means a child of the decedent's surviving, deceased, or former spouse, and not of the decedent.

(6) "Surviving beneficiary" or "surviving descendant" means a beneficiary or a descendant who neither predeceased the decedent nor is deemed to have predeceased the decedent under Section 2-702.

(b) [Substitute Gift.] If a beneficiary fails to survive the decedent and is a grandparent, a descendant of a grandparent, or a stepchild of the decedent, the following apply:

(1) Except as provided in paragraph (4), if the beneficiary designation is not in the form of a class gift and the deceased beneficiary leaves surviving descendants, a substitute gift is created in the beneficiary's surviving descendants. They take by representation the property to which the beneficiary would have been entitled had the beneficiary survived the decedent.

(2) Except as provided in paragraph (4), if the beneficiary designation is in the form of a class gift, other than a beneficiary designation to "issue," "descendants," "heirs of the body," "heirs," "next of kin," "relatives," or "family," or a class described by language of similar import, a substitute gift is created in the deceased beneficiary or beneficiaries' surviving descendants. The property to which the beneficiaries would have been entitled had all of them survived the decedent passes to the surviving beneficiaries and the surviving descendants of the deceased beneficiaries. Each surviving beneficiary takes the share to which he [or she] would have been entitled had the deceased beneficiaries survived the decedent. Each deceased beneficiary's surviving descendants who are substituted for the deceased beneficiary take by representation the share to which the deceased beneficiary would have been entitled had the deceased beneficiary survived the decedent. For the purposes of this paragraph, "deceased beneficiary" means a class member who failed to survive the decedent and left one or more surviving descendants.

(3) For the purposes of Section 2-701, words of survivorship, such as in a beneficiary designation to an individual "if he survives me," or in a beneficiary designation to "my surviving children," are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of this section.

(4) If a governing instrument creates an alternative beneficiary designation with respect to a beneficiary designation for which a substitute gift is created by paragraph (1) or (2), the substitute gift is superseded by the alternative beneficiary designation only if an expressly designated beneficiary of the alternative beneficiary designation is entitled to take.

(c) [More Than One Substitute Gift; Which One Takes.] If, under subsection (b), substitute gifts are created and not superseded with respect to more than one beneficiary designation and the beneficiary designations are alternative beneficiary designations, one to the other, the determination of which of the substitute gifts takes effect is resolved as follows:

(1) Except as provided in paragraph (2), the property passes under the primary substitute gift.

(2) If there is a younger-generation beneficiary designation, the property passes under the younger-generation substitute gift and not under the primary substitute gift.

(3) In this subsection:

(i) "Primary beneficiary designation" means the beneficiary designation that would have taken effect had all the deceased beneficiaries of the alternative beneficiary designations who left surviving descendants survived the decedent.

(ii) "Primary substitute gift" means the substitute gift created with respect to the primary beneficiary designation.

(iii) "Younger-generation beneficiary designation" means a beneficiary designation that (A) is to a descendant of a beneficiary of the primary beneficiary designation, (B) is an alternative beneficiary designation with respect to the primary beneficiary designation, (C) is a beneficiary designation for which a substitute gift is created, and (D) would have taken effect had all the deceased beneficiaries who left surviving descendants survived

the decedent except the deceased beneficiary or beneficiaries of the primary beneficiary designation.

(iv) "Younger-generation substitute gift" means the substitute gift created with respect to the younger-generation beneficiary designation.

(d) [Protection of Payors.]

(1) A payor is protected from liability in making payments under the terms of the beneficiary designation until the payor has received written notice of a claim to a substitute gift under this section. Payment made before the receipt of written notice of a claim to a substitute gift under this section discharges the payor, but not the recipient, from all claims for the amounts paid. A payor is liable for a payment made after the payor has received written notice of the claim. A recipient is liable for a payment received, whether or not written notice of the claim is given.

(2) The written notice of the claim must be mailed to the payor's main office or home by registered or certified mail, return receipt requested, or served upon the payor in the same manner as a summons in a civil action. Upon receipt of written notice of the claim, a payor may pay any amount owed by it to the court having jurisdiction of the probate proceedings relating to the decedent's estate or, if no proceedings have been commenced, to the court having jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence. The court shall hold the funds and, upon its determination under this section, shall order disbursement in accordance with the determination. Payment made to the court discharges the payor from all claims for the amounts paid.

(e) [Protection of Bona Fide Purchasers; Personal Liability of Recipient.]

(1) A person who purchases property for value and without notice, or who receives a payment or other item of property in partial or full satisfaction of a legally enforceable obligation, is neither obligated under this section to return the payment, item of property, or benefit nor is liable under this section for the amount of the payment or the value of the item of property or benefit. But a person who, not for value, receives a payment, item of property, or any other benefit to which the person is not entitled under this section is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who is entitled to it under this section.

(2) If this section or any part of this section is preempted by federal law with respect to a payment, an item of property, or any other benefit covered by this section, a person who, not for value, receives the payment, item of property, or any other benefit to which the person is not entitled under this section is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who would have been entitled to it were this section or part of this section not preempted.

§ 2-707. Survivorship with respect to future interests under terms of trust, substitute takers

(a) [Definitions.] In this section:

(1) "Alternative future interest" means an expressly created future interest that can take effect in possession or enjoyment instead of another future interest on the happening of one or more events, including survival of an event or failure to survive an event, whether an event is expressed in condition-precedent, condition-subsequent, or any other form. A residuary clause in a will does not create an alternative future interest with respect to a future interest created in a nonresiduary devise in the will, whether or not the will

specifically provides that lapsed or failed devises are to pass under the residuary clause.

(2) "Beneficiary" means the beneficiary of a future interest and includes a class member if the future interest is in the form of a class gift.

(3) "Class member" includes an individual who fails to survive the distribution date but who would have taken under a future interest in the form of a class gift had he [or she] survived the distribution date.

(4) "Distribution date," with respect to a future interest, means the time when the future interest is to take effect in possession or enjoyment. The distribution date need not occur at the beginning or end of a calendar day, but can occur at a time during the course of a day.

(5) "Future interest" includes an alternative future interest and a future interest in the form of a class gift.

(6) "Future interest under the terms of a trust" means a future interest that was created by a transfer creating a trust or to an existing trust or by an exercise of a power of appointment to an existing trust, directing the continuance of an existing trust, designating a beneficiary of an existing trust, or creating a trust.

(7) "Surviving beneficiary" or "surviving descendant" means a beneficiary or a descendant who neither predeceased the distribution date nor is deemed to have predeceased the distribution date under Section 2-702.

(b) [Survivorship Required; Substitute Gift.] A future interest under the terms of a trust is contingent on the beneficiary's surviving the distribution date. If a beneficiary of a future interest under the terms of a trust fails to survive the distribution date, the following apply:

(1) Except as provided in paragraph (4), if the future interest is not in the form of a class gift and the deceased beneficiary leaves surviving descendants, a substitute gift is created in the beneficiary's surviving descendants. They take by representation the property to which the beneficiary would have been entitled had the beneficiary survived the distribution date.

(2) Except as provided in paragraph (4), if the future interest is in the form of a class gift, other than a future interest to "issue," "descendants," "heirs of the body," "heirs," "next of kin," "relatives," or "family," or a class described by language of similar import, a substitute gift is created in the deceased beneficiary or beneficiaries' surviving descendants. The property to which the beneficiaries would have been entitled had all of them survived the distribution date passes to the surviving beneficiaries and the surviving descendants of the deceased beneficiaries. Each surviving beneficiary takes the share to which he [or she] would have been entitled had the deceased beneficiaries survived the distribution date. Each deceased beneficiary's surviving descendants who are substituted for the deceased beneficiary take by representation the share to which the deceased beneficiary would have been entitled had the deceased beneficiary survived the distribution date. For the purposes of this paragraph, "deceased beneficiary" means a class member who failed to survive the distribution date and left one or more surviving descendants.

(3) For the purposes of Section 2-701, words of survivorship attached to a future interest are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of this section. Words of survivorship include words of survivorship that relate to the distribution date or to an earlier or an unspecified time, whether those words of survivorship are expressed in condition-precedent, condition-subsequent, or any other form.

(4) If a governing instrument creates an alternative future interest with respect to a future interest for which a substitute gift is created by paragraph (1) or (2), the substitute gift is superseded by the alternative future interest only if an expressly designated beneficiary of the alternative future interest is entitled to take in possession or enjoyment.

(c) [More Than One Substitute Gift; Which One Takes.] If, under subsection (b), substitute gifts are created and not superseded with respect to more than one future interest and the future interests are alternative future interests, one to the other, the determination of which of the substitute gifts takes effect is resolved as follows:

(1) Except as provided in paragraph (2), the property passes under the primary substitute gift.

(2) If there is a younger-generation future interest, the property passes under the younger-generation substitute gift and not under the primary substitute gift.

(3) In this subsection:

(i) "Primary future interest" means the future interest that would have taken effect had all the deceased beneficiaries of the alternative future interests who left surviving descendants survived the distribution date.

(ii) "Primary substitute gift" means the substitute gift created with respect to the primary future interest.

(iii) "Younger-generation future interest" means a future interest that (A) is to a descendant of a beneficiary of the primary future interest, (B) is an alternative future interest with respect to the primary future interest, (C) is a future interest for which a substitute gift is created, and (D) would have taken effect had all the deceased

beneficiaries who left surviving descendants survived the distribution date except the deceased beneficiary or beneficiaries of the primary future interest.

(iv) "Younger-generation substitute gift" means the substitute gift created with respect to the younger-generation future interest.

(d) [If No Other Takers, Property Passes Under Residuary Clause or to Transferor's Heirs.] If, after the application of subsections (b) and (c), there is no surviving taker, the property passes in the following order:

(1) if the trust was created in a nonresiduary devise in the transferor's will or in a codicil to the transferor's will, the property passes under the residuary clause in the transferor's will; for purposes of this section, the residuary clause is treated as creating a future interest under the terms of a trust.

(2) if no taker is produced by the application of paragraph (1), the property passes to the transferor's heirs under Section 2-711.

§ 2-711. Future interests in "heirs" and like

If an applicable statute or a governing instrument calls for a future distribution to or creates a future interest in a designated individual's "heirs," "heirs at law," "next of kin," "relatives," or "family," or language of similar import, the property passes to those persons, including the state under Section 2-105, and in such shares as would succeed to the designated individual's intestate estate under the intestate succession law of the designated individual's domicile if the designated individual died when the donative disposition is to take effect in possession or enjoyment. If the designated individual's surviving spouse is living but is remarried at the time the interest is to take effect in possession or enjoyment, the surviving spouse is not an heir of the designated individual.

§ 8-101. Time of taking effect, provisions for transition

(a) This Code takes effect on January 1, 19

(b) Except as provided elsewhere in this Code, on the effective date of this Code:

(1) the Code applies to any wills of decedents dying thereafter;

(2) the Code applies to any proceedings in Court then pending or thereafter commenced regardless of the time of the death of decedent except to the extent that in the opinion of the Court the former procedure should be made applicable in a particular case in the interest of justice or because of feasibility of application of the procedure of this Code;

(3) every personal representative including a person administering an estate of a minor or incompetent holding an appointment on that date, continues to hold the appointment but has only the powers conferred by this Code and is subject to the duties imposed with respect to any act occurring or done thereafter;

(4) an act done before the effective date in any proceeding and any accrued right is not impaired by this Code. If a right is acquired, extinguished or barred upon the expiration of a prescribed period of time which has commenced to run by the provisions of any statute before the effective date, the provisions shall remain in force with respect to that right;

(5) any rule of construction or presumption provided in this Code applies to instruments executed and multiple party accounts opened before the effective date unless there is a clear indication of a contrary intent;

(6) a person holding office as judge of the Court on the effective day of this Act may continue the office of judge of this Court and may be selected for additional terms after the effective date of this Act even though he does not meet the qualifications of a judge as provided in Article I.
