

## Memorandum 81-56

Subject: Study L-603 - Probate Code (Lapsed and Void Gifts;  
Residue of a Residue)

## LAPSED AND VOID GIFTS

Lapsed and Void Gifts in Dispositive Provisions of Wills

At common law, if after a will was executed a beneficiary named in the will became unable or unwilling to take, the gift was said to "lapse" and either passed under the residuary clause of the will or, if no residuary clause or if the lapsed gift was a residuary gift, passed by the rules of intestacy. T. Atkinson, Handbook of the Law of Wills § 140, at 777, 784 (2d ed. 1953); 7 B. Witkin, Summary of California Law Wills and Probate § 224, at 5735 (8th ed. 1974). The most common cause of lapse is death of the beneficiary, but lapse may also be caused by a disclaimer or by dissolution of a corporate beneficiary. T. Atkinson, supra § 140, at 777. If the will beneficiary was already unable to take when the will was made, the gift was said to be "void," with generally the same consequences as in the case of lapse. Id. at 777, 786.

Almost all states have statutes designed to prevent lapse by substituting issue of the predeceased beneficiary, depending on the relationship of the beneficiary to the testator. Id. at 779. These statutes may be divided into four classes depending on the relationship of beneficiary to testator they require: Some prevent lapse only if the beneficiary (1) is a child of the testator; others do so if the beneficiary is (2) a descendant, (3) a relative, or (4) any person, whether related to the testator or not. Id. California is in the third class, requiring that the beneficiary be "kindred" of the testator--that is, related to the testator by blood. Prob. Code § 92; cf. In re Estate of Sowash, 62 Cal. App. 512, 516, 217 P. 123 (1923). Probate Code Section 92 provides:

92. If a devisee or legatee dies during the lifetime of the testator, the testamentary disposition to him fails, unless an intention appears to substitute another in his place; except that when any estate is devised or bequeathed to any kindred of the testator, and the devisee or legatee dies before the testator, leaving lineal descendants, or is dead at the time the will is executed, but leaves lineal descendants surviving the testator, such descendants take the estate so given by the will in the same manner as the devisee or legatee would have done had he survived the testator.

The Uniform Probate Code is also in the third class, but restricts the class of relatives of the testator to whom the anti-lapse provisions apply. The UPC section is Section 2-605 which provides:

**Section 2-605. [Anti-lapse; Deceased Devisee; Class Gifts.]**

If a devisee who is a grandparent or a lineal descendant of a grandparent of the testator is dead at the time of execution of the will, fails to survive the testator, or is treated as if he predeceased the testator, the issue of the deceased devisee who survive the testator by 120 hours take in place of the deceased devisee and if they are all of the same degree of kinship to the devisee they take equally, but if of unequal degree then those of more remote degree take by representation. One who would have been a devisee under a class gift if he had survived the testator is treated as a devisee for purposes of this section whether his death occurred before or after the execution of the will.

**COMMENT**

This section prevents lapse by death of a devisee before the testator if the devisee is a relative and leaves issue who survives the testator. A relative is one related to the testator by kinship and is limited to those who can inherit under Section 2-103 (through grandparents); it does not include persons related by marriage. Issue include adopted persons and illegitimates to the extent they would inherit from the devisee; see Section 1-201 and 2-109. Note that the section is broader than some existing anti-lapse statutes which apply only to devises to children and other descendants, but is narrower than those which apply to devises to any person. The section is expressly applicable to class gifts, thereby eliminating a frequent source of litigation. It

also applies to the so-called "void" gift, where the devisee is dead at the time of execution of the will. This, though contrary to some decisions, seems justified. It still seems likely that the testator would want the issue of a person included in a class term but dead when the will is made to be treated like the issue of another member of the class who was alive at the time the will was executed but who died before the testator.

The five day survival requirement stated in Section 2-601 does not require issue who would be substituted for their parent by this section to survive *their parent* by any set period.

Section 2-106 describes the method of division when a taking by representation is directed by the Code.

The California and UPC anti-lapse provisions are similar to each other. French & Fletcher, A Comparison of the Uniform Probate Code and California Law With Respect to the Law of Wills, in Comparative Probate Law Studies 369 (1976). Both California and the UPC apply the anti-lapse provisions only if the testator's intention cannot be discerned from the will. UPC § 2-603; see Prob. Code § 92. Both apply to void gifts as well as lapsed gifts. The UPC makes clear that the anti-lapse

statute applies to class gifts whether the gift "lapsed" or was "void"; this is probably the law in California despite some conflict in the cases. See Estate of Steidl, 89 Cal. App.2d 488, 201 P.2d 58 (1948); French & Fletcher, supra at 372; Niles, Probate Reform in California, 31 Hastings L.J. 185, 215 (1979). Neither California nor the UPC apply the anti-lapse provisions to substitute issue of a predeceased spouse of the testator. 7 B. Witkin, supra § 226, at 5737; Official Comment to UPC § 2-605.

However, there is one important difference between California law and the UPC: While California substitutes takers if the named taker was any blood relative of the testator no matter how remote, the UPC substitutes only if the named taker is a grandparent or a descendant of a grandparent of the testator. (This group coincides with the relatives of the decedent who may take the decedent's property by intestate succession under the UPC--approved by the Commission for inclusion in California intestate succession law.) The effect of enacting UPC Section 2-605 in place of Probate Code Section 92 would be to prefer residuary beneficiaries under the will to issue of a predeceased named taker who is a remote collateral ("laughing heir") of the testator, or if there is no residuary clause or if the lapsed gift was a residuary gift, to prefer intestate heirs of the testator to issue of a predeceased named taker who is a remote collateral of the testator.

The UPC also has the benefit of describing the substituted takers with precision, limiting them to issue of the named taker and providing for representation if they are related to the named taker in unequal degree; California merely substitutes "lineal descendants" without further detail. French & Fletcher, supra at 370.

A strong argument can be made that the Commission should depart from both the California and UPC rules which require some blood relationship between the named taker and the testator before a substitution of beneficiaries will be made to prevent lapse, either by opting for the fourth class (no relationship to testator required) or by modifying the third class (some blood relationship required) to include a predeceased spouse of the testator and perhaps also close relatives of a predeceased spouse. The anti-lapse provisions of the California powers of appointment statute (Civil Code § 1389.4) have just been amended on recommendation of the Commission to eliminate the requirement that a predeceased appointee be related to the donee by blood so that the anti-lapse provisions will

apply to any predeceased appointee, whether related to the donee or not. In its recommendation, the Commission pointed out that a predeceased spouse, as well as brothers, sisters, nieces, and nephews of a predeceased spouse--none of whom are "kindred" of the donee--were not within the anti-lapse provisions as they then existed. The Commission's view was that not to substitute issue of a predeceased spouse or of close relatives of a predeceased spouse in such a case was probably contrary to the intent of most donees, particularly where the marriage was a long one and the donee had an opportunity to develop close relationships with the spouse's relatives. This argument may be applied to the general anti-lapse provisions as well.

In his comments on the Commission's powers of appointment recommendation, Professor Dukeminier wrote that the "kindred" requirement of the general anti-lapse statute is unsound, stressing in particular the failure of the statute to include a predeceased spouse and relatives of a predeceased spouse. This is unfair to the testator's stepchildren, if any. In the context of intestate succession, the Commission has decided not to provide a special rule for the distribution of some intestate property to stepchildren, and to eliminate the ancestral property doctrine which will to some extent worsen the position of stepchildren under intestate succession law. This could be ameliorated by giving stepchildren anti-lapse protection.

Should we depart from the UPC and California law as Professor Dukeminier suggests? We could do one of the following:

(1) Adopt the UPC scheme (anti-lapse statute will apply only to those related to the testator as a grandparent or a descendant of a grandparent), but modify it to include a predeceased spouse of the testator and possibly also certain close predeceased relatives of the testator's spouse (e.g., brothers, sisters, nieces, and nephews of the testator's spouse when the testamentary gift is to them).

(2) Eliminate the requirement of relationship to the testator altogether, and apply the anti-lapse statute to any predeceased named taker whether related to the testator or not.

#### Rule of Representation in Anti-Lapse Provision of Powers of Appointment Statute

The new anti-lapse provision of the powers of appointment statute (Civil Code § 1389.4, amendment operative July 1, 1982) provides that

the surviving issue of a predeceased appointee take the appointed property "per stirpes and not per capita." At the July meeting, the Commission decided to adopt the UPC rule of representation for intestate succession. Under the UPC rule, the stocks or roots are determined at the first generation having any living members, and if a descending share of the estate reaches a generation with no living members that generation is skipped and the stocks are redetermined per capita at the next generation having any living members. See Memo 81-34, considered at the July meeting.

The staff recommends that the UPC rule of representation in Sections 2-605 (anti-lapse) and 2-106 (representation) be substituted for the per stirpes rule of Civil Code Section 1389.4 by revising the section as follows:

1389.4. (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 such appointee who survive the appointee by 120 hours shall take the appointed property, per stirpes and not per capita, and if they are all of the same degree of kinship they take equally, but if of unequal degree then those of more remote degree take by representation as provided in [section comparable to UPC § 2-106]. Such issue shall take the appointed property in the same manner as the appointee would have taken had the appointee survived the donee except that the property shall pass only to persons who are permissible appointees, including those permitted under Section 1389.5.

(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.

#### RESIDUE OF A RESIDUE

Both under California law and the UPC, if the residuary clause of a will makes a gift to two or more named persons and one of them predeceases the testator, one first looks to the anti-lapse statute to see if a substitution may be made for the predeceased taker as in the usual case. French & Fletcher, supra at 372; Niles supra at 215. However, if the residuary gift does not come within the anti-lapse statute (either because the named taker is not properly related to the testator or dies without issue) and thus cannot be saved, the failed gift is a "residue of a residue" and, under the ancient doctrine as well as under California law, passes by intestacy. French & Fletcher, supra at 372-73; Niles, supra at 215.

The UPC avoids intestacy by abolishing the residue of a residue rule and providing that the failed gift passes to the surviving residuary beneficiary, or to two or more surviving residuary beneficiaries in proportion to their interests in the residue. UPC § 2-606. The staff recommends the UPC rule as more closely conforming to the intent of the average decedent.

Respectfully submitted,

Robert J. Murphy III  
Staff Counsel