

First Supplement to Memorandum 88-16

Subject: Study L-3005 - Antilapse Statute and Construction of
Instruments (State Bar letter)

Attached to this supplement is a letter from Jim Quillinan on behalf of the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section. He also forwards a report from Harley Spittler on the activities of the Joint Editorial Board of the Uniform Probate Code relating to anti-lapse issues. The Executive Committee requests that the Commission defer study of these matters until the UPC review is completed.

Respectfully submitted,

Stan G. Ulrich
Staff Counsel

EXHIBIT 1

**ESTATE PLANNING, TRUST AND
PROBATE LAW SECTION
THE STATE BAR OF CALIFORNIA**

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April 22, 1988

Mr. John H. DeMouilly
Executive Director
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94303

Re: LRC Memo 88-16

Dear John:

I have enclosed a copy of Harley Spitler's report on Memo 88-16. The report has not been reviewed by the Executive Committee. The report is brought to the attention of the LRC so that you are aware that the UPC provisions dealing with anti-lapse are also being reviewed at this time. The Section suggests that the LRC defer study of the anti-lapse issues until such time as the JEB of the UPC finishes its review. The JEB's review is to be completed by late summer. These provisions are difficult if not impossible to understand and it may helpful to to have the UPC's input before the LRC tackles these provisions.

Your cooperation is most appreciated.

Very truly yours,

James V. Quillinan
Attorney at Law

JVQ/hl
Encls.

cc: Chuck Collier Jim Opel Valerie Merritt
 Keith Bilter Jim Devine Harley Spitler
 Irv Goldring Ted Cranston K. Ballsun

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April 19, 1988

James Quillinan
444 Castro Street, Suite 900
Mountain View, CA 94041

Re: LLRC Memorandum 88-16

Dear Jim:

Team 4 has been given the joyful assignment of reviewing, and commenting on, Memorandum 88-16 dated February 23, 1988 which is Study L-3005 "Antilapse Statute and Construction of Instruments."

At the recently concluded annual meeting of the Executive Committee of the EPTPL Section of the State Bar, I informed the Executive Committee that:

1. At the March 12-13, 1988 meeting of the Joint Editorial Board for the Uniform Probate Code ("JEB"), we devoted a part of the meeting to a consideration of proposed amendments to the anti lapse provisions of the Uniform Probate Code ("UPC").

2. I would endeavor to make available to you (and through you, to CLRC) those recommendations of JEB that relate to the subject matter of 88-16 believing that JEB may desire to consider them.

A few words about the JEB process:

a. JEB's Director of Research is Lawrence W. Waggoner, Professor of Law, University of Michigan Law School. He prepares an analysis of the UPC sections to be studied at each JEB meeting.

b. The JEB meeting lasts 1-1/2 days.

c. The JEB takes action upon the various sections of UPC.

d. Those proposals, in some form, eventually come before the Assembly of the NCCUSL and are approved, amended or rejected.

Attached are excerpts from the March 12-13 JEB meeting that seem relevant to CLRC 88-16. It will be necessary for the CLRC staff to correlate the minutes with the relevant sections of UPC.

Please note, again, that the actions taken by JEB may not be the final action taken by NCCUSL. They are in the nature of the recommendations of JEB. To amend UPC, the NCCUSL must approve the recommendations.

Sincerely,



Harley J. Spitzer

HJS828(5):wp

cc: D. Keith Bilter
Irwin D. Goldring
Team 4 members

PROPOSED 2-603. [Anti-lapse; Deceased Devisee; Class Gifts.] [Old 2-605]

(a) If a devisee who is a grandparent or a descendant of a grandparent of the decedent is dead at the time of execution of the will, fails to survive the decedent, or is treated as if he [or she] predeceased the decedent, the property to which the devisee would have been entitled if he [or she] survived the decedent passes to the devisee's descendants who survived the decedent, by 120 hours, to be divided among them by representation. One who would have been a devisee under a class gift if he [or she] had survived the decedent is treated as a devisee for purposes of this section, whether his [or her] death occurred before or after the execution of the will.

With respect to a devise to the "survivors" of two or more persons, or a devise to two or more persons containing language of similar import, whether the devise is or is not in class gift form, the substitute gift created by this section is not defeated. With respect to a devise to one individual "if he [or she] survives" the testator, or a devise containing language of similar import, the substitute gift created by this section is not defeated.

(b) For purposes of this section, devisee (i) refers to a beneficiary of a [testamentary] trust rather than the trustee, (ii) includes a beneficiary of an

insurance policy, of a transfer on death account, or of a pension, profit-sharing, retirement, or similar benefit plan if the beneficiary is a grandparent or a descendant of a grandparent of the decedent and (iii) includes an appointee under a power of appointment exercised by the decedent's will if the appointee is a grandparent or a descendant of a grandparent of either the decedent or the donor of the power; the descendants who take in place of an appointee under this section need not be objects of the power.

COMMENT 2-603

[Old 2-605]

[Partially Revised]

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 antilapse 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 dies before the testator. The five day 120-hour 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.

This section is applicable only when a devisee of a will or the beneficiary of the types of arrangements described in subsection (b) predecease the decedent. It does not apply to inter vivos trusts, whether revocable or irrevocable. See, however, section 2-706 for rules of construction applicable when the beneficiary of a future interest is not living when the interest is to take effect in possession or enjoyment.

The "Relevant Statutes," Exhibit 1 to Memorandum 88-16 includes Probate Code 240.

At our March 11-13 meeting, JEB also proposed, after a long discussion that UPC 2-106 be amended to read as follows:

Revised 2-106. [Representation.]

If representation is called for by this Code, the estate is divided into as many equal shares as there are (i) surviving heirs in the [nearest degree of kinship and deceased persons in the same degree who left issue who survive the decedent, each surviving heir in the nearest degree receiving one share and the share of each deceased person in the same degree being divided among his issue in the same manner.] generation nearest to the decedent that contains one or more surviving heirs and (ii) then-deceased persons in the same generation who left descendants then living, if any. Each then-living heir in that nearest generation is allocated one share. The remaining shares, if any, are combined and then divided in the same manner among the remaining then-living descendants as if the descendants already allocated a share and their descendants had predeceased the decedent.