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Articles

The Hazards of Tinkering with the Common Law of Future Interests: The California Experience

by

LAURA E. CUNNINGHAM*

Introduction

Because of their enormous flexibility, trusts are extremely useful estate planning tools. By means of a trust, a donor can divide property temporally among multiple beneficiaries, and thus create successive interests in trust property, while legal title remains in but one party, the trustee.¹ Thus, for example, if Ophelia wishes to ensure that certain property will ultimately be available for her grandchild Ben, but wishes to provide support for her child Adam throughout his life, she can transfer title² to the property to a trustee under the terms of a trust providing income to Adam for life, remainder to Ben. Suppose Ophelia creates such a trust, and that Ben dies during Adam's lifetime. Who is entitled to the trust property when Adam dies? This

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1. Although successive interests in specific property can also be created through the use of legal life estates, they are far less common than trusts. The fact that legal title can be held in but one person, the trustee, throughout the existence of the successive interests makes the trust vehicle the preferred one. The discussion in this Article will be limited to successive interests in trusts.

2. The trust can be inter vivos or testamentary. The term "testamentary trust" generally refers to one created by the trustor's will. Although some of the doctrines discussed in this Article apply only to testamentary trusts, the trend in the law has been to apply the same rules to both testamentary and inter vivos trusts. For present purposes, assume the trust is created by Ophelia's will.

apparently simple question has generated a surprising amount of litigation and controversy.³

Because Ophelia's trust fails to expressly state whether Ben must survive Adam in order to receive his interest, it will be up to a court to construe the trust in an effort to discern and carry out Ophelia's unexpressed intent in that regard. The common law developed a default rule which required the court to construe the trust utilizing a constructional preference for vested remainders.⁴ Applying that default rule, Ben's remainder interest is considered vested and transmissible⁵ by him, rather than contingent on Ben's survival of Adam. Application of the common law default rule means that the remainder interest is part of Ben's estate (for tax and probate purposes), and will pass as Ben directs by will (or to his heirs if he dies intestate). Although this result may be completely consistent with Ophelia's intent, it may not be optimal: probating the interest in Ben's estate is awkward, potentially expensive, and *may* result in an unnecessary estate tax burden. Thus, the attentive estate planner would draft the trust in such a way as to express Ophelia's intent concerning ultimate disposition of the property and to achieve the optimal probate and tax results.⁶ The controversy surrounding this issue is, however, testimony to the fact that not all estate planners are as attentive as they should be.

The constructional preference for vested remainders has been portrayed by commentators as a relic of the past, and an aspect of the law of trusts and estates ripe for reform. While some have criticized

3. In 1961, Professor Halbach described the question of whether a remainder beneficiary must survive to the time of possession as "probably the most litigated question in the law of future interests." Edward C. Halbach, Jr., *Future Interests: Express and Implied Conditions of Survival* (pts. I & II), 49 CAL. L. REV. 297, 431 (1961) [hereinafter Halbach, *Future Interests*]. See generally Verner F. Chaffin, *Descendible Future Interests in Georgia: The Effect of the Preference for Early Vesting*, 7 GA. L. REV. 443 (1973); Susan F. French, *Imposing a General Survival Requirement on Beneficiaries of Future Interests: Solving the Problems Caused by the Death of a Beneficiary Before the Time Set for Distribution*, 27 ARIZ. L. REV. 801 (1985); Edward C. Halbach, Jr., *Issues About Issue: Some Recurrent Class Gift Problems*, 48 MO. L. REV. 333 (1983); Edward C. Halbach Jr. & Lawrence W. Waggoner, *The UPC's New Survivorship and Antilapse Provisions*, 55 ALB. L. REV. 1091 (1992); Edward H. Rabin, *The Law Favors the Vesting of Estates. Why?*, 65 COLUM. L. REV. 467 (1965); Daniel M. Schuyler, *Drafting, Tax and Other Consequences of the Rule of Early Vesting*, 46 U. ILL. L. REV. 407 (1951).

4. 5 AMERICAN LAW OF PROPERTY § 21.3 (A.J. Casner ed., 1952); L. SIMES & A. SMITH, *THE LAW OF FUTURE INTERESTS* § 573 (2d ed. 1956).

5. The term "transmissible" is generally used to describe an indefeasibly vested remainder over which the beneficiary has testamentary power. It is so used in this Article.

6. For example, Ben could have been given a non-general power of appointment over the property in the event he predeceased Adam, and a substitute taker, for example, Ben's heirs, could have been named to take in the event Ben failed to survive Adam.

the rule and have warned drafters to avoid it,⁷ others have argued that the common law rule favoring vested remainders should be replaced with a statutory scheme which essentially rewrites poorly written trust instruments, in an attempt to achieve the "optimal" probate and tax result for each trust.⁸ The proposed statutory solutions not only attempt to effectuate donor intent, but to effectuate the intent of a donor who was fully informed in tax and probate law.

Prior to the 1980s, only a handful of states had adopted limited versions of a delayed vesting rule.⁹ In 1983, the California legislature was the first in the country to enact a sweeping version of a delayed vesting statute, although that statute never became effective.¹⁰ Yet advocates of delayed vesting achieved a major victory with the issuance of the 1990 revision of the Uniform Probate Code (UPC) containing section 2-707, which would essentially redraft the language of Ophelia's trust to read as follows: "Income to Adam for life, remainder to Ben if Ben survives Adam, and if Ben does not survive Adam, then to Ben's issue, if any, and if none then to the residuary beneficiaries of Ophelia's estate, and if none then to Ophelia's heirs."¹¹ Seven states have already adopted this provision.¹²

This Article demonstrates the dangers inherent in replacing long-standing common law doctrines regarding construction of trust instruments with statutory rules (like UPC section 2-707) which reach dramatically different results. Because such rules rewrite attorney-drawn instruments in a revolutionary manner, their enactment should be supported by a compelling justification, and should be done carefully. As a pioneer in this area, California has not set a good example.

The primary focus of this Article is on California law: Has the constructional preference for vested remainders survived the Probate Code reform of the 1980s and 1990s? It demonstrates that the California statute is ambiguous on this point, and that the ambiguities result from an unsuccessful attempt to eliminate the preference for vested remainders.

In 1983, the California legislature enacted a major revision of the Probate Code, including a provision that abandoned the common law

7. Schuyler, *supra* note 3, at 436-40; Chaffin, *supra* note 3, at 490.

8. French, *supra* note 3; Halbach & Waggoner, *supra* note 3.

9. Illinois, Pennsylvania, and Tennessee each had statutes in place which implied a survival condition only on class gifts. ILL. ANN. STAT. ch. 755, para. 5/4-11 (Smith-Hurd 1996); 20 PA. CONS. STAT. ANN. § 2514(5) (1996); TENN. CODE ANN. § 32-3-104 (1984).

10. See discussion *infra* Part II.

11. UNIF. PROB. CODE § 2-707 (West 1990), discussed in detail *infra* Part IV.

12. See *infra* note 37.

presumption of early vesting in favor of a constructional preference for delayed vesting.¹³ The effective date of the revised code was delayed until 1985.¹⁴ In the meantime, the legislature repealed the delayed vesting rule and revised the Probate Code yet again to re-establish a preference for early vesting except as applied to a relatively narrow type of future interests.¹⁵ Yet the remedial legislation removed only the most obvious statements of the preference for delayed vesting, leaving in place statutory language which was originally drafted to coordinate with that preference. That statutory language, particularly when coupled with the legislative history, created ambiguities in the law as to the proper treatment of future interests created by will. The problem was compounded in 1994, when the State Bar naively recommended that the rules be made applicable to all donative transfers, whether by deed, trust, or will.¹⁶ Thus, rules that were troublesome in the context of wills became applicable to wills, trusts, deeds, and all other instruments making donative transfers. The results in some instances are absurd.

As a consequence of the California legislature's enactment and attempted repeal of a delayed vesting rule, the California statutes governing the construction of wills and trusts are virtually impossible to comprehend, and a mine field for estate planners to navigate. This has been accomplished in the name of reform, of furthering the intent of the testator, and limiting the instances of malpractice. Instead, the resulting law places a larger premium than ever on careful drafting to explicitly state the testator's intent, for the failure to do so may result in dispositions that create unanticipated tax consequences, run contrary to the drafter's intent, and violate established principles of future interest law.

This Article exposes and attempts to resolve the severe problems in California law, in part as a warning to other states considering joining the delayed vesting bandwagon: they should proceed with caution. After a brief description of the debate over vested versus contingent remainders in Part I, it traces the developments in California law regarding the construction of wills and trusts, beginning with pre-1983 law and ending with the most recent revisions of 1994, in an effort to comprehend the present state of the law. This Article focuses on the two most troublesome aspects of present law.

13. 1983 Cal. Stat. 842.

14. *Id.* § 58.

15. 1984 Cal. Stat. 892 § 28.

16. See *infra* Part III.

In Part II, I demonstrate that current California law does not imply a survivorship condition upon future interests, except in the case of a class gift to a class such as "heirs," "descendants," or a similarly described class. Although the legislature did enact an implied condition of survivorship, it repealed the requirement prior to the time it was scheduled to become effective, and the rule never became a part of California law. Yet the amendments repealing the requirement were constructed so poorly that the statute could still be read to imply a survivorship requirement. Thus, those ambiguities in the Probate Code that leave room for interpreting the law to encompass such a rule should be eliminated. The danger in not doing so is that, given the current statute, the door is open for an unwitting court to adopt a survivorship requirement, and the dangers lurking in that interpretation are enormous.

In Part III, I then illustrate the problems of extending the Probate Code rules, which were originally drafted to apply to interests conveyed by will, to all donative instruments. Although there may be sound reasons for rules that interpret wills and will substitutes consistently, applying those rules in blanket fashion to instruments creating outright gifts, such as irrevocable trusts and deeds, creates not only absurd results, but also major transfer tax problems.

Finally, I address the broader question that all states considering adoption of UPC section 2-707 must consider: should the common law of future interests be replaced by statutory rules that rewrite trust instruments to impose survivorship conditions where none are explicitly stated? Supporters of UPC section 2-707 have portrayed its rules as achieving a "best of all worlds" result that effectuates donor intent while obtaining optimal transfer tax and probate results.¹⁷ In fact, there is no consensus that it is more likely to effectuate donor intent than the common law; it clearly does not achieve optimal tax results in all cases; and the probate problems it seeks to solve may not even exist, or at least could be solved in a less drastic fashion. For the reasons discussed in Part IV of this Article, I conclude that adoption of UPC section 2-707 is unnecessary and unjustified.

17. See generally Halbach & Waggoner, *supra* note 3.

I. The Debate over Implied Conditions of Survival

In the absence of an express requirement¹⁸ that the beneficiary of a remainder interest survive until the time her interest becomes possessory, should such a requirement be implied? This seemingly arcane question has become increasingly controversial. The tax and probate consequences of construing a remainder as indefeasibly vested (and hence "transmissible") or as subject to a condition of survival are dramatically different, and for that reason, the careful attorney will draft the instrument to achieve the type of interest desired.

A. Transmissible Remainders

Recall the example of Ophelia's trust, granting "income to Adam for life, remainder to Ben." If Ben's remainder is construed to be indefeasibly vested at the time that the trust is created, it will be transmissible by him at death. As a result, it will be included in his probate estate as well as in his gross estate for federal estate tax purposes. As a probate asset, it will be subject to the attendant fees and other disadvantages of probate administration. If Ben's executor neglects to include the remainder in Ben's probate estate, it may be necessary to reopen Ben's probate estate when Adam dies in order to obtain a decree of distribution.¹⁹ Inclusion of the remainder in Ben's estate for federal estate tax purposes *may* subject it to an estate tax burden. If Ben's taxable estate, including the remainder interest, exceeds \$600,000, then an estate tax will be imposed.²⁰ Note, however, that if Ben's will leaves the remainder to his spouse, any estate tax burden on the remainder will be postponed until the death of the spouse because of the estate tax marital deduction.²¹

18. It is essential to note at the outset that the rules of construction discussed here are default rules which apply only in the absence of a clear and unequivocal expression of the transferor's intent. CAL. PROB. CODE § 21102 (West 1997).

19. See French, *supra* note 3, at 804. In some cases, however, where the deceased beneficiary's executor neglected to include the remainder in the probate estate, a court may be willing to direct distribution directly to the persons who are entitled to receive it without reopening the estate, thus avoiding probate costs entirely. See, e.g., Security Trust Co. v. Irvine, 93 A.2d 528, 532 (Del. Ch. 1953). See also JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 711 (5th ed. 1995) (noting that there is little empirical evidence to confirm that increased costs result from inclusion of transmissible remainders in probate estates).

20. I.R.C. § 2010 (West 1997).

21. I.R.C. § 2056(a) (West 1997). The careful drafter who wanted to preserve Ben's (B) share of the estate for his family and avoid estate taxation would have specified that B's spouse and/or issue should take if B fails to survive, or would have given B a non-general power to appoint the property, with his heirs or issue as takers in default of appointment. Note, however, as discussed below, that a careful drafter might have desired

B. Contingent Remainders

If the language of the trust is construed to require Ben to survive until Adam's death in order for Ben to receive his interest, Ben will possess a contingent remainder that will not pass through Ben's probate estate, nor be subject to federal estate tax at Ben's death.²² However, because the trust fails to name an alternate taker, the trust property will revert to the trustor. Thus, in the above example the trust property would revert to Ophelia's estate, which could require the reopening of Ophelia's probate estate, perhaps many years after her death. Most significantly, if the remainder is construed as contingent, then Ben lacks the power to direct who will take the property upon his death.

California has historically followed the majority common law view, which *disfavors* implying a survival condition, while favoring a constructional preference for vested remainders.²³ In most cases, including those involving gifts to specifically defined classes such as children, California courts have historically relied upon the former Probate Code section 28 preference for early vesting in declining to imply a condition of survival.²⁴ Although the preference for early vesting has its origins in early property law,²⁵ the primary modern justification offered for this result is that it is more likely to conform to the testator's probable intent by preserving equality of distribution among lines of descent.²⁶ To illustrate, consider the example above. Ophelia failed to specify what happens to Ben's remainder should he fail to survive Adam. If Ben died leaving a spouse and children, the preference for vested remainders presumes it is more likely that

that the remainder be included in B's estate for estate tax purposes in order to avoid the generation-skipping transfer tax.

22. I.R.C. § 2033 (West 1997). Because Ben's interest terminates with his death, it will not be an asset of his gross estate.

23. Halbach, *Future Interests*, *supra* note 3, at 302-04.

24. One exception recognized in some jurisdictions is where the gift of the remainder is to a vaguely defined class such as "heirs" or "family," where the courts have been willing to imply that the testator intended to limit the class to those living at the time possession of the interest occurs. See Rabin, *supra* note 3, at 476-78. California courts have not embraced that exception. See Halbach, *Future Interests*, *supra* note 3, at 315-20; see also Estate of Woodworth, 22 Cal. Rptr. 2d 676, 681 (Cal. Ct. App. 1993) (applying the rule of early vesting to find that the determination of heirs must take place at the death of the named ancestor rather than at the time of enjoyment of the interest). The result in *Woodworth* was changed by statute with the 1983 Probate Code revisions. See discussion *infra* Part II.

25. The historic justifications for the rule are discussed at length in Schuyler, *supra* note 3, at 408-27.

26. See Rabin, *supra* note 3, at 483-86.

Ophelia would prefer that Ben's family share in the estate rather than being cut out entirely, which would likely occur should the remainder revert to Ophelia's estate and pass under the residuary clause of her will. Thus, the majority common law approach, followed in California, is that Ben's remainder will be treated as vested at the time of creation of the trust (at Ophelia's death if the trust is contained in Ophelia's will), and will therefore pass as Ben directs by his will.²⁷

The common law solution is not flexible enough to achieve optimal probate and tax consequences. A court construing the language "income to Adam, remainder to Ben" has limited options: it can determine the interest vested and is transmissible by Ben (resulting in the probate and tax consequences discussed above) or it can imply a survival condition, which would result in the failure of the interest. When the interest fails it must then pass back to Ophelia's estate, to be distributed under the residuary clause of her will. Given a choice between these two extremes, the preference for vested remainders has retained its vitality.²⁸

Yet dissatisfaction with the probate and tax results of characterizing a remainder as transmissible has led some commentators to advocate a statutory solution that would protect Ben's issue from disinheritance, but not subject the remainder to probate in Ben's estate or inclusion in his taxable estate.²⁹ In the most comprehensive article on the subject, Professor French provided an exhaustive discussion of the alternatives available to legislatures in addressing this problem.³⁰ One possibility she discussed is extending the principles of

27. This result was approved by Professor Halbach:

If a testator (or settlor of a living trust) has selected a particular person to receive some interest in his property and has thought no further than that selection, it seems preferable to allow the rights to vest and to let that beneficiary's own desires take effect where the testator's desires are unknown. Since the beneficiary in question is the only person known to have been intended to receive the property, he could at least be given the benefit of deciding who will take the interest in his place.

Halbach, *Future Interests*, *supra* note 3, at 305.

28. Professor Halbach described the principle of early vesting as "a fundamental cohesive force which fosters predictability and usually leads to desirable results." *Id.* at 328. Professor Rabin, although critical of a wooden application of the rule, noted that the rule's tendency to protect issue of deceased remaindermen is the rule's "principal *raison d'être*." Rabin, *supra* note 3, at 484.

29. See Rabin, *supra* note 3, at 487 ("It might well be preferable to protect the issue of deceased remaindermen by legislation, rather than by the rule favoring vesting."). See generally French, *supra* note 3.

30. See generally French, *supra* note 3.

anti-lapse statutes to future interests.³¹ Typical anti-lapse statutes, including California's,³² protect a bequest by will to a person who has predeceased the testator by substituting the beneficiary's issue. The statutes will normally apply only if there is some relationship between the testator and the beneficiary. For example, the California statute will apply if the deceased beneficiary was kindred³³ to the testator or to the testator's spouse.³⁴ As applied to the future interest created by Ophelia's will, the anti-lapse solution would substitute Ben's issue in his place.

Professor French advocated a much more sophisticated solution: implication of a survivorship requirement on beneficiaries of future interests, accompanied by an implied non-general power in the beneficiary to appoint the assets among some class of beneficiaries.³⁵ The eligible takers may include issue only, or heirs only, or any persons, so long as the power excludes the beneficiary's estate, her creditors, and the creditors of her estate. In essence, Professor French's solution would rewrite the trust instrument to include language which most estate planners would have included had they desired to: (i) avoid estate taxation in the remainderman's estate; (ii) avoid probate of the remainder interest in the deceased beneficiary's estate; and (iii) give the beneficiary the power to determine to whom the future interest would ultimately pass. Thus, a trust that reads only "income to Adam for life, remainder to Ben," might be rewritten by the legislature to read "income to Adam for life, remainder to Ben if he survives Adam, and if he does not, then to those persons whom Ben shall appoint by will, solely excluding Ben, his estate, his creditors, or the creditors of his estate, and if Ben shall fail to so appoint, then to Ben's heirs at law, determined as of the time of Ben's death."

To date, those states that have enacted survivorship statutes have followed the anti-lapse model. Prior to 1983, when the California law reform took place, Illinois, Pennsylvania, and Tennessee had statutes implying survivorship conditions, with substitute gifts in issue, in lim-

31. *Id.* at 813-15.

32. CAL. PROB. CODE § 21110 (West 1997).

33. Kindred describes a relationship by blood or consanguinity. BLACK'S LAW DICTIONARY 871 (6th ed. 1990).

34. CAL. PROB. CODE § 21110 (West 1997).

35. French, *supra* note 3, at 835-36. Internal Revenue Code section 2041 imposes estate tax liability with respect to the value of property that is subject to a general power of appointment. A general power of appointment is defined as a power that can be exercised in favor of the holder of the power, her estate, her creditors, or creditors of the estate. I.R.C. § 2041(b)(1) (West 1997).

ited circumstances.³⁶ As discussed below, California briefly enacted a similar rule, and most recently, the 1990 revisions of the Uniform Probate Code added UPC section 2-707, which provides that absent a contrary intent, "[a] future interest under the terms of a trust is contingent on the beneficiary's surviving the distribution date." The statute goes on to imply a substitute gift to the beneficiary's issue, if any, and if none, then to the beneficiaries under the residuary clause of the trustor's will, and if none, or if the trust was contained in the residuary clause, then to the trustor's heirs. Unlike traditional anti-lapse statutes, UPC section 2-707 implies the substitute gift regardless of the relationship between the trustor and the beneficiary. Seven states have adopted this provision.³⁷

Although UPC section 2-707 may be viewed as accomplishing a "best of all worlds" result, it is not without its problems, and has been subject to sharp criticism.³⁸ It preserves equality of distribution among lines of descent, but it eliminates the deceased beneficiary's ability to direct distribution of the remainder if he either has no issue or wishes the property to pass to someone other than issue, such as his spouse. Thus, the provision has been criticized for reducing rather than increasing flexibility in estate planning.³⁹

Even when the beneficiary's will would have left the remainder to his or her issue, the statute achieves markedly different results than if the remainder had been transmissible. The remainder will not be included in the deceased beneficiary's taxable estate for federal estate tax purposes, but it may be subject to the potentially higher tax on generation-skipping transfers.⁴⁰ And while UPC section 2-707 ensures that the interest passes to the deceased beneficiary's issue, it will pass outright and free of trust. If the issue are minors, it will be necessary

36. The Pennsylvania and Tennessee statutes apply only to class gifts. 20 PA. CONS. STAT. ANN. § 2514(5) (1996); TENN. CODE ANN. § 32-3-104 (1984). The Illinois statute applies to future interests generally, but contains an exception for indefeasibly vested remainders, which substantially narrows its reach. ILL. ANN. STAT. ch. 755, para. 5/4-11 (Smith-Hurd 1996).

37. ALASKA STAT. § 13.12.707 (1996); ARIZ. REV. STAT. ANN. § 14-2707 (1996); COLO. REV. STAT. ANN. § 15-11-707 (West 1996); HAW. REV. STAT. § 560:2-707 (1996); MONT. CODE ANN. § 72-2-717 (1995); N.M. STAT. ANN. § 45-2-707 (Michie 1996); N.D. CENT. CODE § 30.1-09.1-07 (1995).

38. See generally Jesse Dukeminier, *The Uniform Probate Code Upends the Law of Remainders*, 94 MICH. L. REV. 148 (1995).

39. *Id.* at 150.

40. The federal estate tax is imposed under a progressive rate structure, which essentially begins at 37% and runs to 55%. The tax on generation-skipping transfers is imposed at the maximum estate tax rate of 55%. I.R.C. §§ 2001, 2010 (West 1997). See discussion *infra* Part IV.

to establish a guardianship to manage the funds, whereas the beneficiary's will could leave the property in further trust.

The problems inherent in UPC section 2-707 are discussed in detail in Part IV. The following section focuses on California law, where the legislature has not adopted the provision. However, in 1983, the California legislature did adopt a remedial future interest statute in the anti-lapse model, but it repealed that provision before it became effective. It appears that the California Law Revision Commission tested the waters and found them too cold. But in the process, the clarity of prior law gave way to the muddied waters of present law.

II. Does California Imply a Survivorship Requirement?

A. An Introductory Exercise

A law school Wills and Trusts class is asked to answer the following question, applying California law:

T's will leaves her estate in trust for the benefit of *A* for life, remainder to *A's* children. When *T* writes the will, *A* has three children, *B*, *C*, and *D*, all of whom are still living at *T's* death. *B* predeceases *A*, leaving all of his estate to his widow, *W*. He is survived by his widow and two children, *X* and *Y*. To whom should the trustee distribute the trust when *A* dies, survived by *C*, *D*, *W*, *X*, and *Y*?

(1) Pre-Reform Law

If the question were asked prior to 1983, it could be easily answered by reference to the California statute and the well-established common law of future interests.

No property interest is created in the beneficiaries of *T's* will until her death, at which point two separate interests are created. The first is an income interest in *A*, a so-called "present interest." The second is a future interest: a remainder interest in *A's* children who are living at *T's* death. These interests are vested at *T's* death.⁴¹

B's remainder vested, but because it is part of a gift to a class consisting of *A's* "children," and *A* might still have children prior to death, the interest of each member of the class is subject to reduction in the event more members join the class prior to the time the interest becomes possessory.⁴²

41. Former California Probate Code section 28 provided: "Testamentary dispositions, including devises and bequests to a person on attaining majority, are presumed to vest at the testator's death." CAL. PROB. CODE § 28 (West 1982) (repealed 1983).

42. Former California Probate Code section 123 stated the common law "rule of convenience" for determining when to cut off the opportunity for additional members to join the class:

B's vested remainder is transmissible, which means that he has the power to decide to whom it will pass upon his death. Thus, *B*'s interest will pass to *W* under the terms of his will.⁴³

In sum, California common law followed the majority rule favoring vested remainders. The effect was to completely divest *T* of the property at *T*'s death. Ultimate disposition of the property would depend on *B*, and in no event would the property revert to *T*.

(2) *Post-Reform Law*

If that same question were asked in 1996, the answer would be far less clear, for the following reasons. Probate Code section 21109(a) states: "A transferee who fails to survive the transferor or until any future time required by the instrument does not take under the instrument." Does this mean, the student asks, that *B* must survive until *A*'s death in order to take under the will? The will does not explicitly require that *B* survive until *A*'s death, so the answer is probably no. But what does the "future time" language mean?

Probate Code section 21110(a) states:

[I]f a transferee . . . 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. . . . 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.⁴⁴

Subsection (c) states: "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."⁴⁵ If the student decides that section 21109 requires *B* to survive until *A*'s death, then does section 21110 mean that *X* and *Y*, the issue of *B*, are entitled to take *B*'s interest, rather than *W*, as under prior law, but only if *B* is "kindred" to *T*? But again, because the document does not explicitly require that *B* survive until *A*'s death, perhaps section 21110 does not

A testamentary disposition to a class includes every person answering the description at the testator's death; but when possession is postponed to a future period, it includes also all persons coming within the description before the time to which possession is postponed. A child conceived before but born after a testator's death, or any other period when a disposition to a class vests in right or in possession, takes, if answering to the description of the class.

CAL. PROB. CODE § 123 (West 1982) (repealed 1983).

43. See *In re Stanford's Estate*, 315 P.2d 681 (Cal. 1957), discussed in Halbach, *Future Interests*, *supra* note 3, at 308-11.

44. CAL. PROB. CODE § 21110(a) (West 1997).

45. CAL. PROB. CODE § 21110(c) (West 1997).

apply, and absent such a requirement, it will never apply to a gift of a future interest to a class. If that is the case, what is the meaning of the reference to a "future time" in section 21110?

Probate Code section 21113(b) states: "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."⁴⁶ The clear implication of subsection (b) is that even if the student decides that section 21109 does not impose a survivorship requirement upon all takers of future interests, if that interest is given to a class, survivorship until the time of possession *is* required. The result is unclear. Does *B*'s interest fail, and pass to *C* and *D*, as the two members of the class who have survived to the time of possession? Or is *B*'s interest saved by the anti-lapse statute of section 21110, and passed to *B*'s issue? If the "future time" language of section 21110 only applies to express requirements in the instrument, so that it does not apply here, then it would seem that there is no room to apply the anti-lapse statute here either. It would appear instead that *B*'s interest in the trust may pass to *C* and *D*. In no case will it pass under the terms of his will to *W*, as it did under prior law.

Probate Code section 21116 states: "A testamentary disposition by an instrument, including a transfer to a person on attaining majority, is presumed to vest at the transferor's death."⁴⁷ This statute, which is substantially the same as former Probate Code section 28, would appear to indicate that *B*'s remainder interest vested at the time of *T*'s death and should pass under the terms of his will, the same answer that was reached (albeit more quickly) under pre-1983 law. If that is the case, then what is the meaning of sections 21109 through 21113?

This exercise illustrates the numerous problems that one encounters in attempting to negotiate the revised sections of the Probate Code governing the construction of instruments. As a practical matter, finding the "correct" answer will be of great interest to *C*, *D*, *W*, *X*, and *Y*, to the Internal Revenue Service, and to *T*'s attorney, who more likely than not drafted the will with full confidence that the pre-1983 result would invariably be the correct one, and who may be held responsible to *W* should she be proven incorrect. As an academic matter, the exercise illustrates the stresses that a poorly written statute can place on the legal system (let alone on law students).

46. CAL. PROB. CODE § 21113(b) (West 1997).

47. CAL. PROB. CODE § 21116 (West 1997).

For the reasons described below, however, the answer to the question posed earlier should be the same under post- and pre-reform law: *B*'s remainder vested at *T*'s death, although his share was subject to reduction in the event *A* had more children. On *B*'s death, his share will pass under the terms of his will to *W*, who will be entitled to possession when *A* dies. The answer, however, is not at all self-evident, and there is a substantial risk that a court interpreting the statute might reach a different conclusion. In fact, in *Estate of Woodworth*,⁴⁸ the California Court of Appeal, in dicta, did just that. In *Woodworth*, the testator left a portion of his estate in trust for the benefit of his wife for life, remainder to the testator's sister if she was living at the wife's death, and if not, then to the sister's "heirs at law."⁴⁹ The testator died in 1971, his sister died in 1980, and his wife died in 1991.⁵⁰ The question before the court was the relevant date for determining the identity of the sister's heirs: was it 1980 or 1991?⁵¹ The sister's husband (or the beneficiaries of his will, because he died in 1988) would be included in the class were the relevant date 1980, whereas he would not be included if the correct time for ascertaining the class were 1991, when the remainder became possessory.

Applying pre-reform law, the Court of Appeal found that the common law preference for early vesting of remainder interests dictated that the heirs of the sister should be determined at the time of her death.⁵² Thus, the beneficiaries of the husband's will (including the University of California) were entitled to share in the estate. The court noted, however, that the result would be different under post-reform law:

It is undisputed that had the testator in this case died on or after January 1, 1985, the Regents would have no claim to the trust assets. Under Probate Code sections [21113] and [21114], which have been in effect since 1985, a devise of a future interest to a class, such as heirs, includes only those who fit the class description at the time the legacy is to take effect in enjoyment.⁵³

48. 22 Cal. Rptr. 2d 676 (Cal. Ct. App. 1993).

49. *Id.* at 677.

50. *Id.*

51. *Id.* at 678.

52. *Id.* at 681. As discussed *supra* in note 24, some jurisdictions have recognized an exception to the delayed vesting rule in these circumstances. One can see the benefit of applying the exception here, because the earlier determination of the sister's heirs increased the likelihood that the property would pass to strangers whom the testator had clearly not intended to benefit. The exception is now part of California law due to the enactment of the predecessor to Probate Code section 21114.

53. 22 Cal. Rptr. 2d at 679 n.3.

Although the court's dictum is correct under section 21114,⁵⁴ the fact that it also found support for that conclusion in section 21113 is troublesome: the court seems to have believed it clear that section 21113 also requires survival until the time of possession. That court, it would appear, would find that, under our facts, *B*'s interest fails, and passes to *C* and *D*.

Reading section 21113 to encompass an implied survivorship condition leads one to an entirely different result than that reached under California law prior to 1985. One can argue that the result is better or worse than that reached under pre-1985 law; it is impossible to argue that it is not *very* different. Given the drastic differences between the two constructions, *Woodworth* highlights the need to clarify the California statute, before such misconceptions in dicta become misapplications of the law in general.

B. The Evolution of the Revised Probate Code

In an effort to clarify the state of the present law, the following discussion tracks the changes in California law, which went from simple to complex, and describes some of the forces propelling those changes. It concludes that, in spite of all the excess statutory baggage now in the California Probate Code, the law has not changed much after all.

(1) *The Original Reform Proposals*

In response to a 1980 charge by the California legislature,⁵⁵ the California Law Revision Commission (Commission)⁵⁶ tentatively recommended a new comprehensive statute governing wills and trusts in 1982. The proposed statute was partially based upon the 1969 version of the Uniform Probate Code, and its stated goal was "to clarify and simplify probate law, to carry out more effectively the testator's intent, and to promote national uniformity of law."⁵⁷ The rules con-

54. Section 21114 succeeded section 6151, which was added during the Probate Code reform of 1983.

55. Resolution Chapter 37, Statutes of 1980, reads: "Whether the California Probate Code should be revised, including but not limited to whether California should adopt, in whole or in part, the Uniform Probate Code." 1980 Cal. Stat. 5086.

56. The role of the California Law Revision Commission is to study topics assigned to it by the California legislature and prepare recommendations for law reform. CAL. GOV'T CODE §§ 8280-8281 (West 1992).

57. 16 CAL. L. REVISION COMM'N REP. 2305, 2311 (1982).

cerning construction of wills were but a small part of the major and comprehensive revision of the Code.⁵⁸

As originally proposed, the statute did not depart significantly from prior rules regarding the construction of wills. The anti-lapse statute was revised to be more consistent with the 1969 version of the Uniform Probate Code by the addition of a new section that saves a failed residuary bequest by passing it to the other residuary beneficiaries. Yet nothing in the originally proposed statute would change the answer in our exercise above from that under pre-reform law. The proposed statute did not change California's preference for vested over contingent remainders. It did, however, include a provision codifying the rule discussed above regarding delaying vesting where the class designation is to "heirs," "descendants," or a similarly described class.⁵⁹

58. 1983 Cal. Stat. 842 § 58.

59. In particular, the Commission's initial proposal contained the following suggested provisions:

[§] 6143.

(a) A devisee who does not survive the testator does not take under the will.

(b) If it cannot be established by clear and convincing evidence that the devisee has survived the testator, it is deemed that the devisee did not survive the testator.

(c) Subdivision (b) does not apply if the testator's will contains language (1) dealing explicitly with simultaneous deaths or deaths in a common disaster or (2) requiring that the devisee survive the testator for a stated period in order to take under the will.

[§] 6145. If a devisee who is kindred of the testator is dead at the time of execution of the will, fails to survive the testator, or is treated as if he or she predeceased the testator, the issue of the deceased devisee who survive the testator 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 or she had survived the testator is treated as a devisee for the purposes of this section whether his or her death occurred before or after the execution of the will.

[§] 6146. Except as provided in Section 6145:

(a) If a devise other than a residuary devise fails for any reason, the property devised becomes a part of the residue.

(b) If the residue is devised to two or more persons and the share of one of the residuary devisees fails for any reason, the share passes to the other residuary devisee or to the other residuary devisees in proportion to their interests in the residue.

[§] 6148. A testamentary disposition, whether directly or in trust, to the testator'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, means "heirs" as defined in Section 44 determined as if the testator or other designated person were to die intestate at the time when the testamentary disposition is to take effect in enjoyment.

(2) *The 1983 Legislation*

For reasons that are unclear from the legislative history, the statute that the California legislature ultimately enacted in 1983 deviated dramatically from the Commission's tentative recommendations. The legislation drastically changed California law by moving from a system that favored vested property interests to one that favored contingent interests. In brief, the major changes wrought by the 1983 enactment can be summarized as follows.

By far the most dramatic change was the addition of an implied condition to require that the taker of a future interest survive until the time the interest takes effect in enjoyment,⁶⁰ and the extension of the anti-lapse statute to kindred of the testator, thus avoiding the failure of the future interest.⁶¹ No such survivorship condition existed in prior law, which called for the vesting of future interests created by will at the testator's death. Because those interests were vested, and in most cases transmissible, the anti-lapse statute was not needed in such a situation. Under the new rule established by the 1983 enactment, a testamentary trust which provides "income to *A* for life, remainder to *B*" no longer creates a vested transmissible remainder in *B*. *B*'s remainder is contingent upon survival until *A*'s death, and if *B* fails to survive, his remainder interest fails. If, however, *B* is *T*'s kindred, then the anti-lapse statute would apply and *B*'s issue can take in *B*'s place. Contrast this with the result under prior law: regardless of the relationship between *B* and *T*, if *B* predeceases *A*, *B*'s remainder is an asset of his estate, and passes to the beneficiaries under his will at his death (or to his heirs if he dies without a will).⁶²

Former code section 123,⁶³ which merely codified the common law rule of convenience for class gifts, was repealed and replaced with section 6150⁶⁴ so that it would be consistent with the implied condition of survivorship in the new section 6146. Thus, on its face, section 6150 allowed reduction in class membership through failure to survive until

[§] 6149. A person conceived before but born after a testator's death, or any other period when a disposition to a class vests in right or possession, takes if answering to the description of the class.

16 CAL. L. REVISION COMM'N REP. 2305, 2401-04 (1982).

60. CAL. PROB. CODE § 6146 (West 1983) (repealed 1994).

61. CAL. PROB. CODE § 6147 (West 1984) (repealed 1994).

62. Note that the common law future interests law would continue to apply to trusts created inter vivos.

63. CAL. PROB. CODE § 123 (West 1956) (repealed 1983).

64. CAL. PROB. CODE § 6150 (West 1984) (repealed 1994).

the time of enjoyment.⁶⁵ The Commission comment to the statute notes that the issue of a deceased class member may take under the anti-lapse statute.⁶⁶

As was true in the original proposals, section 6151 expressly made a gift to a class such as "heirs" subject to a requirement of survivorship to the time of enjoyment.⁶⁷ The legislative history describes this as "a special application of, and . . . consistent with, Section 6150."⁶⁸ The difference between the survivorship requirement applicable to class gifts generally and one to "heirs" is described in the comment to section 6151. It is noted there that the issue of a deceased class member of a class gift who is kindred to the testator will take under the anti-lapse statute, whereas the shares of members of an indefinite class, such as "heirs," are not subject to the anti-lapse statute.⁶⁹ The comment also notes that the statute is new and that it was drawn from the Pennsylvania statute.⁷⁰ It is, in fact, consistent with the California common law approach to such cases, and can be viewed as merely codifying existing law, rather than effecting any change in the law.

Although sweeping and controversial, the statutes that the California legislature enacted in 1983 were thoughtfully drafted. They were internally consistent and meshed well. The anti-lapse statute was expressly made applicable in cases where remainders failed because of the implied survivorship requirement.⁷¹ It is also made clear that a remainder to a deceased class member could be saved by the anti-lapse statute.⁷² The revised statutes read as follows (and significant variations from the proposed statute are marked by italics).

§ 6146. Devisees; failure to survive; future interests

(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.*⁷³

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

65. *Id.*

66. 17 CAL. L. REVISION COMM'N REP. 867, 874-75 (1984).

67. CAL. PROB. CODE § 6151 (West 1991) (repealed 1994) (current version at CAL. PROB. CODE § 21114 (West Supp. 1997)).

68. 17 CAL. L. REVISION COMM'N REP. 867, 874-76 (1984).

69. *Id.* at 876.

70. *Id.*

71. CAL. PROB. CODE § 6147 (West 1983) (repealed 1994).

72. *Id.*

73. CAL. PROB. CODE § 6146(a) (West 1983) (repealed 1994).

(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.*⁷⁴

§ 6150. Devise to class; persons included

In the absence of a contrary provision in the will:

(a) A devise of a present interest to a class includes all persons answering the class description at the testator's death.

(b) A devise of a future interest to a class includes all persons answering the class description at the time the devise is to take effect in enjoyment.

(c) A person conceived before but born after the testator's death or time of enjoyment, as the case may be, takes if answering the class description.⁷⁵

§ 6151. Devise to heirs

Unless a contrary intention is indicated by the will, a devise of a present or future interest to the testator'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 devise to those who would be the testator's or other designated person's heirs, their identities and respective shares to be determined as if the testator or other designated person were to die intestate at the time when the devise is to take effect in enjoyment and according to the California statutes of intestate succession in effect at that time.⁷⁶

(3) *The 1984 Amendments*

Between the time of enactment in 1983 and the effective date of the statute in 1985, the Commission changed its mind about the most significant change made in 1983: the implied condition of survivorship

74. *Id.* § 6147.

75. *Id.* § 6150.

76. *Id.* § 6151.

for future interests.⁷⁷ In 1984, the Commission recommended that the statute be amended to delete the general survivorship requirement.⁷⁸ To accomplish this, the Commission recommended the following changes, which the California legislature enacted in 1984.

The second sentence of section 6146(a) was deleted, and section 6153,⁷⁹ restating the pre-reform rule that interests vest at the testator's death, was added. The Commission comment states:

The second sentence of subdivision (a) formerly established a constructional preference in favor of contingent remainders (survivorship required) rather than vested remainders (survivorship not required). With the deletion of the second sentence from subdivision (a), the question of whether or not survivorship is required is to be determined according to general rules of construction.⁸⁰

The second sentence of section 6147(c) was deleted. The Commission's comment gives no explanation for this deletion.

Even though the change wrought by the 1983 legislation was so great and was reflected throughout the statutes enacted at that time, the 1984 revisions removing the 1983 changes were remarkably sparse. The previously carefully crafted statutes were sloppily revised, leaving internal inconsistencies and ambiguities where none existed before. What else should have been done?

(a) Removal of "Future Time" Language From Sections 6146 and 6147

Recall the wording of section 6146 prior to the 1984 amendment:

§ 6146. Devisees; failure to survive; future interests

(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.⁸¹

The first part of the first sentence merely restated the pre-reform rule that a deceased beneficiary of a will does not take. The language "or until any future time required by the will" was added *solely* because of the second sentence, which wrote into any will that did not expressly

77. See *id.* § 6146.

78. 18 CAL. L. REVISION COMM'N REP. 87 (1984).

79. California Probate Code section 6153 stated: "A testamentary disposition, including a devise to a person on attaining majority, is presumed to vest at the testator's death." CAL. PROB. CODE § 6153 (West 1991) (repealed 1994) (current version at CAL. PROB. CODE § 21116 (West Supp. 1997)).

80. 18 CAL. L. REVISION COMM'N REP. 87 (1986) (citing CAL. PROB. CODE §§ 6140, 6153 (West 1984) (repealed 1994)).

81. CAL. PROB. CODE § 6146(a) (West 1983) (repealed 1990).

state otherwise, a condition that the taker of a future interest must survive until the time that interest takes effect in enjoyment, in other words, until the time the preceding interest ended. Yet in 1984, when the Commission backed away from the survivorship condition and recommended deletion of the second sentence, it left in place the "future time" language in the first sentence. Similar "future time" language remains in section 6147, which addresses the application of the anti-lapse statute to an otherwise failed future interest. Yet in the absence of an implied survivorship condition, what can that "future time" language possibly mean? Absolutely nothing! Yet there remains a possible implication that section 6146 *does* still impose a survivorship condition after the 1984 amendment. But this was clearly not the result desired by the Commission, which intended to remove the implied survivorship condition.

The "future time" language of sections 6146 and 6147 after the 1984 amendment can only conceivably have meaning in the context of a will that expressly requires survival until some time *other than* the testator's death. For example, a will may state, "I leave \$10,000 to *E* if he survives me by 30 days." Can meaning be given to the "future time" language of sections 6146 and 6147 in the context of this type of will provision? Absolutely not! Because the will expressly requires survival until thirty days after the testator's death, the interest fails by the terms of the will itself. Section 6146 adds nothing to the will itself. Its predecessor, section 92,⁸² was needed to deal with a will that did *not* require survival. In such a case, section 92 implied a condition of survivorship. Section 92 had no application, nor did its successors, section 6146 and now section 21109, when the will expressly imposed a condition of survivorship. Then what about section 6147? Might some meaning be given to the "future time" language in the context of the anti-lapse statute? Again, absolutely not. It has long been the rule in California, as in a majority of jurisdictions, that an express requirement of survival negates application of the anti-lapse statute.⁸³ So again, we are left with statutory words that are bereft of meaning.⁸⁴ The only way to give any meaning to the "future time" language is to imply a condition of survivorship. Yet the Commission comments to

82. CAL. PROB. CODE § 92 (West 1982) (repealed 1983).

83. CAL. PROB. CODE § 21110(b) (West Supp. 1997).

84. This would also be true in the case of a future interest expressly conditioned upon survival. For example, suppose a will creates a trust that provides, "income to *A* for life, remainder to *E* if *E* survives *A*." In such a case, *E*'s remainder is expressly contingent, and will revert to *T*'s estate if no alternate taker is named. Section 6146 adds nothing. Because survival of *A* is expressly required, the anti-lapse statute of section 6147 will not apply.

the 1984 amendment clearly state the intent to remove the survivorship condition.⁸⁵ The statute *must* be amended to remove the ambiguity.

(b) Return Section 21113(b) to its Pre-Reform State

Whether survivorship until time of enjoyment is required for future interests in class gift form, the situation illustrated in the exercise posed above, remains unresolved. After the 1984 revision, section 6150(b) (now section 21113(b)) remained the same: "(b) A devise of a future interest to a class includes all persons answering the class description at the time the devise is to take effect in enjoyment."⁸⁶ This could easily be read to imply that the class does *not* include persons not alive at the time of enjoyment. This was clearly how the *Woodworth* court read the statute.⁸⁷ Yet I believe that the Commission intended the 1984 amendment to eliminate *all* implied conditions of survivorship, except in the narrow situation dealt with by section 6151, a gift to a class such as "heirs." I base this conclusion on the comments made by the Commission when section 6146 was added in 1983 and amended in 1984. In 1983, the Commission stated:

The first sentence of subdivision (a) of Section 6146 continues the substance of the first portion of former Section 92. The second sentence of subdivision (a) is new and establishes a constructional preference in favor of contingent remainders (survivorship required) rather than vested remainders (survivorship not required). See generally 3 B. Witkin, *Summary of California Law Real Property* §§ 246-259, at 1973-83 (8th ed. 1973). The second sentence thus changes the result in cases such as *Miller v. Oliver*, 54 Cal. App. 495, 202 P. 168 (1921) (vested remainder included in remainderman's estate notwithstanding her death before life tenant), and *Estate of Stanford*, 49 Cal. 2d 120, 315 P.2d 681 (1957) (class gift to "child or children" of income beneficiary on termination of trust held vested and remainderman not required to survive income beneficiary), and is consistent with *Estate of Easter*, 24 Cal. 2d 191, 148 P.2d 601 (1944).⁸⁸

85. The Commission stated:

The second sentence of subdivision (a) formerly established a constructional preference in favor of contingent remainders (survivorship required) rather than vested remainders (survivorship not required). With the deletion of the second sentence from subdivision (a), the question of whether or not survivorship is required is to be determined according to general rules of construction. See, e.g., § 6140 (intention of testator). See also § 6153 (presumption that disposition vests at testator's death).

18 CAL. L. REVISION COMM'N REP. 87 (1986).

86. CAL. PROB. CODE § 6150(b) (West 1991) (repealed 1994).

87. See *supra* text accompanying notes 52-54.

88. 17 CAL. L. REVISION COMM'N REP. 875 (1984).

This language, coupled with the Commission's 1984 comment⁸⁹ when it removed (or attempted to remove) the survivorship condition from section 6146, and added section 6153, leads me to conclude that the Commission intended that future interests to classes, except those described in section 6151, would vest at the testator's death. Yet after the 1984 amendments, there is arguably an inconsistency between sections 6150(b) and 6153. To leave that inconsistency in place was inexcusable. The language of section 6150 should have been restored to its pre-1983 state, eliminating the possibility of reduction in class membership.

In spite of these substantial problems, the law as revised in 1984 became effective in 1985, and was reenacted without substantive change in the next round of Probate Code reform in 1990. Although no courts, other than *Woodworth*, have considered how the rules apply to future interests, cases on this issue will undoubtedly arise.

III. Expansion of the Rules to Govern "Instruments"

To make matters worse, in 1994, at the urging of the State Bar, the legislature amended the rules described above to expand their application. Whereas the construction provisions in sections 6146-6153 applied only to interests conveyed by will, the new statutes, renumbered sections 21109-21114, now apply to all donative transfers by "instrument," a term defined to include wills, trusts, and deeds. The confusion and ambiguity inherent in the pre-1994 rules were compounded exponentially by extension of their application to all "instruments."

The Estate Planning, Trust and Probate Law Section of the State Bar of California sponsored the 1994 legislation, ostensibly in order to achieve consistency in the construction of wills and will substitutes.⁹⁰ Although revocable living trusts have become increasingly popular in California as a means of avoiding the probate of assets, anti-lapse statutes and other rules of construction had not been made applicable to them.⁹¹ To illustrate, suppose *T* leaves his estate by will to *A*, without stating how the estate should be distributed should *A* fail to survive him. If *A* is kindred to *T*, the pre-1994 anti-lapse statute (section 6147) would imply a substitute gift to *A*'s issue. If, however, *T* placed his assets in a revocable living trust, reserving to himself the income

89. See *supra* note 80.

90. See Melitta Fleck, *Should Rules of Construction of Wills be Applied to Living Trusts?*, EST. PLAN. TR. & PROB. NEWS, Summer 1993, at 15, 15-16.

91. *Id.*

for life, and directing that the trust be distributed to *A* upon his death, he has accomplished an identical dispositive scheme, while avoiding probate of his assets. Nevertheless, under pre-1994 law, the result would be very different should *A* fail to survive *T*, because section 6147 did not apply to revocable living trusts. Instead, courts have held that *A* possessed a vested remainder in the trust from the time of its creation, subject to divestment through revocation by *T*.⁹² The result: the trust would pass to *A*'s estate, and to his heirs. Although those heirs might be *A*'s issue, achieving the same result as the anti-lapse statute, it is equally possible that the heirs might be *A*'s spouse, or another person whom *T* might or might not have intended to benefit.

It was this type of inconsistency that caused the State Bar of California's Estate Planning, Trust and Probate Law Section to recommend extending the anti-lapse statute, and other provisions of the Probate Code, to revocable living trusts.⁹³ For no apparent reason, however, the recommended legislation that the California legislature passed went far beyond what was necessary to achieve this reasonable and probably advisable goal. As drafted, the statutes apply not only to will substitutes, but to gifts and gift substitutes as well. This has created a host of problems.

A. Outright Gifts by Deed or Other Instrument

The simplest example is perhaps the most dramatic. *O* wishes to make a gift of Blackacre to *A*, and executes a deed conveying Blackacre to *A*, in fee simple. Under section 21109, unless *O* has expressed a contrary intention, *A*'s right to Blackacre will not vest until *O*'s death, for it is conditioned upon *A* surviving *O*. If *A* fails to survive *O*, then the anti-lapse statute will pass Blackacre to *A*'s issue, if *A* is kindred to *O*. If *A* is not kindred, or does not leave issue, then Blackacre will revert to *O*. Could the legislature have intended this result? Perhaps more importantly, could *O* have intended this result? How might *O* be able to express a contrary intention, so as to avoid section 21109? Drafting the deed to read "to *A*, even if she does not survive me," should do the trick. Yet such language is hardly that used in the normal drafting of deeds. A literal application of section 21109 would recharacterize an irrevocable outright gift to *A* as something more

92. See, e.g., *Randall v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 119 P.2d 754, 755-57 (Cal. 1941); *First Nat'l Bank v. Anthony*, 557 A.2d 957, 959 (Me. 1989).

93. See Fleck, *supra* note 90, at 15-16; see generally Rochelle A. Smith, Note, *Why Limit a Good Thing? A Proposal to Apply the California Antilapse Statute to Revocable Living Trusts*, 43 HASTINGS L.J. 1391 (1992).

akin to a life estate in *A* coupled with a contingent remainder in *A* or *A*'s issue, which will fail should *A* or *A*'s issue fail to survive *O*. This is a patently absurd result, and one hopes that courts would strain mightily to avoid a literal reading of section 21109.

The tax consequences of the gift to *A* under pre-1994 law are straightforward. *O* has made a taxable gift of all of Blackacre to *A*. When *O* dies, the property will not be a part of his gross estate for federal estate tax purposes.⁹⁴ One of the major estate tax benefits sought through lifetime giving is the removal of post-gift appreciation from the donor's estate. Where a gift is outright, this will invariably be achieved. When *A* dies, the value of Blackacre will be included in her taxable estate for federal estate tax purposes.⁹⁵

If section 21109 is applied literally, it is much more difficult to predict the tax consequences of the transfer under post-1994 law. That section recharacterizes the transfer in a manner that departs from standard estate planning practice; that is, no one would ever purposely draft a deed in such a way. It is clear that the value of *O*'s reversionary interest must be taken into account in valuing the gift to *A*. However, that value will be zero, if, as is apt to be the case, *O* and *A* are members of the same family.⁹⁶ It also appears clear that the value of Blackacre, less the value of *A*'s outstanding life estate, will be included in *O*'s estate if he dies during *A*'s lifetime,⁹⁷ thereby substantially eliminating the benefit of a lifetime gift of the property. Moreover, if *A* should predecease *O* and *A* leaves no issue, the property

94. By transferring the property irrevocably during life, *O* has effectively removed from his estate any appreciation in Blackacre between the time of the gift and the date of his death, as well as any gift tax paid with the gift (unless he dies within three years of the gift, in which case the gift tax paid will be added back to his estate). I.R.C. § 2035 (West 1997).

95. I.R.C. § 2033 (West 1997).

96. I.R.C. § 2702(a) (West 1997). If *A* and *O* are not members of the same family, then the reversion must be valued under actuarial principles and subtracted in calculating the amount of the gift.

97. Internal Revenue Code sections 2036 and 2037 bring into the gross estate lifetime transfers that are essentially substitutes for testamentary dispositions. Under section 2037, if a donee can only take possession or enjoyment of property by surviving the donor (which is true of *A*'s remainder interest), and if the donor has retained a reversionary interest in the property with a value in excess of five percent of the value of the property, then the donor is taxed at death as though the remainder interest in the property was never given away by including the property, less the value of any outstanding income interests. Even if the value of *O*'s reversion is less than five percent, because of the possibility that *O* will possess or enjoy the property for a period not ascertainable without reference to his death, section 2036 may bring the property back into his estate, less the value of *A*'s outstanding income interest. I.R.C. § 2036(a)(1) (West 1997).

will revert to *O* and will be included in his estate on his subsequent death.⁹⁸

If *A* dies during *O*'s lifetime, Blackacre will no longer be included in *A*'s estate. But if the property passes to *A*'s issue because of the anti-lapse statute, then that transfer will be subject to the tax on generation-skipping transfers.⁹⁹

If applied literally, section 21109 drastically changes the estate and gift tax consequences of lifetime gifts by "instruments."¹⁰⁰ This creates an enormous trap into which countless donors (and their attorneys) could fall, for the only way to avoid application of section 21109 is to expressly negate a requirement of survival in the transfer instrument. In the case of outright gifts, this is rarely, if ever, done.

The non-tax consequences are also dramatically changed. Although the possibility of a reversion to *O* may be remote, *A* lacks the power to dispose of a fee simple interest in the property by will so long as *O* is alive. Yet *A* may view Blackacre as her own, and believe that she has the power to dispose of it by will. She does not. Similarly, sale of the property by *A* will be virtually impossible, given the contingent nature of *A*'s interest.

The effective date of the 1994 revisions raises another issue. Section 21109 applies "to all instruments, regardless of when they were executed."¹⁰¹ Consider *A*, who received a deed to Blackacre in 1993. Suddenly, with the enactment of section 21109 in 1994, does *A* lose her vested interest in Blackacre? This is an absurd result, which may rise to the level of an unconstitutional taking.¹⁰²

B. Irrevocable Gifts in Trust

Consider now how section 21109 would apply to a substitute for a direct gift, an irrevocable trust. *O* leaves Blackacre in trust giving income to *A* for life, remainder to *B*. Because of section 21109, *B*'s remainder interest is contingent on his survival of *O*, although it will

98. I.R.C. § 2033 (West 1997).

99. I.R.C. § 2612(a) (West 1997). *A*'s death would result in a "taxable termination" under Internal Revenue Code section 2612(a). Even though the transfer was not in trust, it would be treated as a trust for purposes of the statute. I.R.C. § 2652(b)(1) (West 1997). Of course, if *O* had not used up his one million dollar exemption from the generation-skipping transfer, then the transfer would not be subject to tax. See I.R.C. §§ 2631-2632 (West 1997). But if *O*'s exemption were no longer available, then an immediate tax at the maximum estate tax rate of 55% would be imposed. See I.R.C. § 2641 (West 1997).

100. The absurdity is compounded when one considers that gifts of property that are effected by delivery, such as corporate shares, are not subject to the rule.

101. CAL. PROB. CODE § 21140(a) (West Supp. 1997).

102. Dukeminier, *supra* note 38, at 165.

pass to his issue if he is kindred to *O* or *O*'s spouse. If *B* leaves no issue, or if *B* leaves issue who fail to survive *O*, the property will revert to *O*. If *A* dies during *O*'s lifetime, what happens? Does the property pass to *B*, subject to divestment if he predeceases *O* without issue? Or does it pass back to *O* until his death, at which point it will pass to *B* if he is still alive? The answer is unclear. What is clear is that nobody would intentionally draft a trust in this manner.

As in the case of the outright gift of Blackacre, the transfer tax consequences are dramatically different should section 21109 recharacterize *B*'s remainder as contingent. Whereas under pre-1994 law *O* would have made a completed gift of the property by creation of the trust, thereby removing post-gift appreciation from his estate, under post-1994 law, *O*'s reversionary interest will bring the property back into his estate, less the value of *A*'s and *B*'s outstanding life estates, should *O* predecease *B*.¹⁰³ Moreover, although under pre-1994 law the value of *B*'s remainder will be included in his estate should he predecease *A*, that will no longer be the case if his interest is contingent.¹⁰⁴ Yet, if the remainder interest passes to *B*'s issue because of the anti-lapse statute, then the result will be an imposition of the tax on generation-skipping transfers at *A*'s death.¹⁰⁵

Again, section 21109 creates a tax trap into which many estate planners could fall. Relying on the long-standing rule that trusts, like the one above, create a vested remainder in *B*, many will be shocked to learn that they have unwittingly lost the estate tax advantage of lifetime giving of the property and have incurred a generation-skipping transfer tax where none was anticipated, and where estate tax inclusion might very well have been desired.¹⁰⁶

It is apparent that there is no justification whatsoever in imposing a survivorship condition on inter vivos gifts, as section 21109 does, and it is essential that section 21109 be amended to eliminate this problem. In fact, there does not seem to be any reason to make the construction rules of section 21110 applicable to anything but wills and will substitutes. Thus, the statute should be amended to apply only to testamen-

103. I.R.C. §§ 2036-2037 (West 1997).

104. I.R.C. § 2033 (West 1997).

105. I.R.C. § 2612(a) (West 1997). Again, this assumes that *O*'s one million dollar generation-skipping transfer tax exemption has been exhausted. I.R.C. §§ 2631-2632 (West 1997).

106. Planners wishing to minimize transfer taxes on the trust must take into account a wide variety of factors, including the amount of the trust, the identity of the trust beneficiaries, the size of the beneficiary's estate, and the availability of the donor's one million dollar exemption from the tax on generation-skipping transfers.

tary 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. Under such a rule, consistency would be achieved between the treatment of revocable trusts and wills, without needlessly extending the rules to future interests or irrevocable inter vivos transfers.

IV. Unneeded Reform

While California has not adopted a statutory replacement for the common law rules of future interests, the UPC has with the addition of section 2-707 in 1990. For those states considering adopting UPC section 2-707, or some variation of it, it is worth discussing the inherent problems in any statute which overrides long-standing common law by rewriting a trust instrument. The merits of UPC section 2-707 have been the subject of a somewhat heated exchange in the Michigan Law Review between Professors Dukeminier and Waggoner.¹⁰⁷ In this section, I weigh in on the controversy on the side of Professor Dukeminier.

UPC section 2-707 rewrites a trust instrument that fails to explicitly state whether or not a remainder beneficiary is required to survive until the time of possession. The model adopted, though not precisely followed, is the anti-lapse model: it presumes that the testator would have wanted (i) the beneficiary's issue to take should the beneficiary not survive until the time of possession, and (ii) if the beneficiary died without issue, all of the deceased beneficiary's interest to terminate. Thus, *O*'s trust that reads "Income to *A* for life, remainder to *B*" is rewritten by the statute to read "Income to *A* for life, remainder to *B* if *B* survives *A*, and if not, then to *B*'s issue, and if none, then to the residuary beneficiaries of *O*'s will, and if none, then to *O*'s heirs."

Professors Halbach and Waggoner have declared that the standard to be applied in evaluating UPC section 2-707 is "whether it advances the law by giving a satisfactory result in a greater proportion of cases than the law it replaces and whether it does so with a minimum of litigation."¹⁰⁸ They argue that this standard is met. I disagree both with their standard and with their conclusion that it has been met.

I have serious objections to UPC section 2-707, and join Professor Dukeminier in his criticisms of it. My primary objection is that UPC

107. See Dukeminier, *supra* note 38; Lawrence W. Waggoner, *The Uniform Probate Code Extends Antilapse-Type Protection to Poorly Drafted Trusts*, 94 MICH. L. REV. 2309 (1996).

108. Halbach & Waggoner, *supra* note 3, at 1149.

section 2-707 represents a drastic change in the law of future interests; indeed it does "upend" the law of future interests, without sufficient justification. Professor Waggoner minimizes the statute's import, by stating that it only applies to poorly drafted instruments.¹⁰⁹ But whether the result of poor draftsmanship or not, a remainder interest that is transmissible is vastly different from one that is contingent, and a statute which overturns long-standing common law and converts transmissible remainders into contingent ones should have to meet a higher standard than that offered by Professors Waggoner and Halbach.

In addition, even if the standard for evaluating the statute should be that offered by Professors Halbach and Waggoner, I do not believe it is clear that UPC section 2-707 meets that standard. UPC section 2-707 is touted as the solution to the three main disadvantages of transmissible remainders: (1) inclusion in the beneficiary's gross estate for federal estate tax purposes; (2) tracing through the probate estate of the deceased beneficiary; and (3) the possibility of diverting the remainder outside the bloodline of the creator of the trust. As discussed below, I believe that problem (1) is overstated, that (2) could be substantially mitigated in a much less dramatic and complex fashion, and I question whether (3) is a serious problem in the first place.

I do not doubt that all of the illustrious practitioners and academics who participated in the drafting of UPC section 2-707¹¹⁰ believe in the worth of the endeavor. But I do believe that they were overzealous. They have created an enormously complex, cumbersome statute which effects a dramatic change in the law, and have failed to demonstrate that the statute is necessary or that the results it achieves are appropriate.

A. UPC Section 2-707 Dramatically Changes the Nature of Future Interests

In defense of UPC section 2-707, Professor Waggoner states as follows:

First and foremost, the predeceased beneficiary of a transmissible future interest can only transmit a *future* interest, not a present interest. The recipient cannot derive much pleasure from a future interest until it ripens into possession. The recipient cannot use it for investment or consumption. The recipient cannot even hang it on the wall or place it on the coffee table and admire its beauty. A future interest is of minimal financial (or aesthetic) value *until the*

109. Waggoner, *supra* note 107, at 2310.

110. See Waggoner, *supra* note 107, at 2337-38.

distribution date, i.e., until the trust is dissolved and the corpus is actually distributed.¹¹¹

I find this to be a most remarkable misstatement of economic reality. Obviously, while delay in the time of possession impacts an interest's value, it in no way nullifies it. Changing that interest to one contingent on survival, which is what UPC section 2-707 will do, has a far more significant effect on the interest's value.

Consider Ellen, a remainder beneficiary of a trust created by her deceased father. The trust, drafted sloppily, states "income to my spouse, remainder to my children." The income beneficiary is Ellen's mother; the remainder passes to Ellen and her siblings. Ellen is unable to have children. She is married (or has a non-marital partner). If she survives her mother by as little as one week, she will have the ability to leave her interest in the trust to her husband (or partner). Yet if she predeceases her mother by the same margin, her share of the trust will go entirely to her siblings. This is the result caused by UPC section 2-707, and I find it troubling. If Ellen's interest is transmissible, it absolutely has significant value, even if, as Professor Waggoner stated, she can't put it on her coffee table. She and her husband can (and will) take it into account in planning their lives. I am dubious of Professor Waggoner's minimization of the impact of UPC section 2-707 in this circumstance. What compelling concerns dictate in favor of a statutory alternative to the common law result in this case?

B. The Estate Tax Problem

If Ellen's interest is contingent on surviving her mother, it will not be included in her estate for federal estate tax purposes. This is true. However, if it is included in her estate, it will not be subject to current tax if she leaves it to her husband.¹¹² Even if she leaves it to her non-marital partner, it will not result in estate tax liability unless its value, combined with the value of Ellen's other assets, exceeds \$600,000 (or even greater amounts under current legislative proposals).¹¹³ If, however, it passes to her siblings because of operation of UPC section 2-707, it will be taxed in their estates on their later deaths (or on the deaths of their spouses). Thus, in the case of a single gener-

111. *Id.* at 2329-30.

112. I.R.C. § 2056 (West 1997).

113. *See, e.g.*, S. 2, introduced January 21, 1997, which would increase the effective exemption to \$1,000,000. More recently, the Clinton Administration's budget agreement with congressional Republicans calls for a doubling of the unified credit to an exemption equivalent of \$1,200,000. *See* Richard W. Stevenson, *After Years of Wrangling, Accord is Reached on Plan to Balance Budget by 2002*, N.Y. TIMES, May 3, 1997, §1, at 1.

ation class gift such as this one, when a remainder beneficiary dies without issue, there is at best estate tax deferral when the interest lapses.¹¹⁴

If Ellen did have children, so that UPC section 2-707 operated to pass her remainder interest to them at their grandmother's death, then the effect of UPC section 2-707 is to substitute the tax on generation-skipping transfers for estate tax inclusion. Distribution of the trust to Ellen's issue at the time of her mother's death would be a "taxable termination."¹¹⁵ This result could be preferable to estate tax inclusion in Ellen's estate, under specific circumstances. First, one would have to assume that Ellen would not have left the interest to her spouse, and that the interest is sufficiently valuable and her taxable estate is sufficiently large that the estate tax burden at her death would be significant. In those circumstances, avoidance of the estate tax could be preferable, because the tax on generation-skipping transfers would be deferred until the time of the taxable termination, i.e., the death of Ellen's mother. In addition, some or all of Ellen's father's one million dollar exemption from the tax on generation-skipping transfers might be available to shelter the interest from tax.¹¹⁶ Nevertheless, if the tax on generation-skipping transfers did apply, it would be imposed at the maximum federal estate tax rate of fifty-five percent.¹¹⁷ And if Ellen's mother died shortly after her, the deferral benefit could well be outweighed by the larger amount of tax.

Professor Waggoner dismisses UPC section 2-707's substitution of generation-skipping tax for estate tax inclusion as insignificant, because it will only apply to poorly drafted trusts, and few poorly drafted trusts will exceed the one million dollar exemption from the tax on generation-skipping transfers.¹¹⁸ To the extent that this argument has merit, it would equally apply to dilute the estate tax "problem" of transmissible remainders, even if the current legislative proposals to increase the unified credit against estate tax are not passed.¹¹⁹ Professor Waggoner describes the "momentum" in the scholarly literature

114. However, if Ellen died childless and intestate, so that under the common law rule the trust passed to her siblings, then the UPC result would be better, because the property would not be taxed in both the siblings' estate and Ellen's estate. This, of course, assumes that the estates of Ellen and her siblings exceed the exemption equivalent from estate taxes.

115. I.R.C. § 2612(a) (West 1997).

116. I.R.C. § 2631 (West 1997).

117. I.R.C. § 2641 (West 1997).

118. Waggoner, *supra* note 107, at 2345.

119. See sources cited *supra* note 113.

for a statute like UPC section 2-707, citing articles dating back to 1951 criticizing the rule of early vesting.¹²⁰ Yet the transfer tax landscape has altered dramatically and fundamentally in the last fifteen years with the enactment of the unlimited marital deduction,¹²¹ increase in the unified credit to an exemption equivalent to \$600,000,¹²² the enactment of the tax on generation-skipping transfers, and the current proposals to limit application of the estate tax even further. It is obvious that the estate tax problem perceived by those early writers no longer exists for most trust beneficiaries, and that for sufficiently affluent ones, it is far more complex than represented by Professor Waggoner and is hardly solved by UPC section 2-707. Affluent beneficiaries might benefit from a reduction in estate taxes, while less affluent ones (the most likely victims of sloppy draftsmanship) are robbed of the full value of their remainder interests.

C. The Problem of Probating the Remainder

Probably the greatest current problem with transmissible remainders is the need to identify the persons entitled to the remainder when the life tenant dies. Using the example above, when Ellen's mother dies, the trustee will have to determine to whom the interest should pass under Ellen's will, or who her heirs are if she died intestate. If an heir or will beneficiary also predeceased Ellen's mother, then the interest would have to be traced through their estates. This clearly could become a cumbersome process, and is avoided by UPC section 2-707.¹²³ Yet is this problem sufficiently serious to justify a fundamental change in the nature of Ellen's interest? I think not.

The process of probating the remainder may be costly. Yet it is not necessarily true that the remainder will be subject to probate administration in the deceased beneficiary's estate. Professor Dukeminier notes that re-opening a deceased beneficiary's estate may rarely be necessary because most forms for decrees of final distribution contain an omnibus clause including later discovered assets.¹²⁴ In addition, some courts have expressly directed distribution to the persons entitled thereto.¹²⁵ UPC section 2-707 may in fact subject the remainder to supervision of the probate court in more cases than the

120. Waggoner, *supra* note 107, at 2321-22.

121. I.R.C. § 2056 (West 1997).

122. I.R.C. § 2010 (West 1997).

123. Waggoner, *supra* note 107, at 2328.

124. Dukeminier, *supra* note 38, at 161-62.

125. *Id.* at 162.

common law: if the deceased beneficiary left minor issue, their shares will have to be administered through a guardianship.¹²⁶ On the other hand, the beneficiary of a transmissible remainder has the ability to leave the property in trust for his minor children. Thus, UPC section 2-707 by no means guarantees that the remainder interest will not be subject to administration by the probate court.

To the extent that there is concern about the costs of probating transmissible remainders, a far less drastic solution would be a statute authorizing a trustee to distribute the interest of a deceased remainder beneficiary directly to the persons entitled to the interest under the beneficiary's will, or to her heirs if she died without a will.¹²⁷ While not eliminating the problem of tracing, this solution would largely mitigate the probate cost concern, without the dramatic change in the nature of the beneficiary's interest.

D. Passing Property Outside the Bloodline

UPC section 2-707 evidences a bizarre, almost feudal belief that there is some inherent evil in the possibility that a remainder interest might pass outside the bloodline of the settlor of a trust, and that only remainder beneficiaries with children are entitled to enjoy the full value of their remainder interests. Indeed, Professor Waggoner asserts that the elimination of the possibility that property may pass outside the settlor's bloodline is the goal of most well-drafted trusts.¹²⁸

As evidence of the inadequacy of the common law rule favoring vested interests, Professor Waggoner cites cases in which a finding that a remainder was transmissible resulted in distribution of a portion of a trust to someone unrelated to the settlor. In *In re Krooss*,¹²⁹ under facts more complicated but not significantly different from the Ellen trust described above, the trust share of a daughter who predeceased her mother passed to the daughter's husband. Who is to say that this is a bad result? Was the surviving brother more deserving than the husband? How are we to know? The brother's share was not

126. Professor Waggoner identified this as a problem with the Illinois statute in 1969, noting that it will often be the case that minor children will take the interest, because when a legatee of a future interest dies prior to the time of possession, it is frequently because he died at a young age. Lawrence W. Waggoner, *Future Interests Legislation Implied Conditions of Survivorship and Substitutionary Gifts under the New Illinois "Anti-lapse" Provision*, 1969 U. ILL. L.F. 423, 437-38 (1969).

127. This was suggested by Professor Dukeminier. See Dukeminier, *supra* note 38, at 162.

128. Waggoner, *supra* note 107, at 2310.

129. 99 N.E.2d 222 (N.Y. 1951).

eliminated; he simply did not receive his sister's share. The father was apparently content that his daughter could do with the interest as she wished if she survived her mother.¹³⁰ If her father was concerned about the trust passing outside the bloodline, he could have further limited her interest in the trust, rather than giving it to her absolutely on her mother's death. Yet the only expressed intention in the trust is that she should receive it absolutely on her mother's death.¹³¹ This demonstrates his intent that his daughter receive a valuable, if future, interest in the property. What purpose is served in taking that interest away?

If the ultimate goal of the law of wills and trusts is to effectuate the testator's intent, then there is no reason to believe that the solution offered by UPC section 2-707 is any more likely to achieve that goal than is the common law. There is no consensus on the critical question of what the settlor's intent is when the instrument creating the trust fails to require survival. All that is known from the face of the instrument is that no alternative taker was named. Again using the Ellen trust example, while it may be that Ellen's father never contemplated that she would die before her mother, it is equally plausible that the issue was discussed, and the attorney drafted the instrument as she did because she knew what the result would be under common law: the remainder would pass to Ellen's estate. While this may not be artful estate planning, it very well may express the father's intent that the property was to be disposed of by Ellen, whether she died before or after her mother. Simply because the cumulative experience of the illustrious estate planners who sit on the Joint Editorial Board for the Uniform Probate Code¹³² would indicate that most clients would not want Ellen to enjoy the full value of a transmissible remainder interest unless she chose or was able to have children, I do not believe the law should attribute that same prejudice to Ellen's father where there is no indication in the instrument that he shared it.

Given the lack of certainty over the extent of the problems which UPC section 2-707 purports to solve, the fact that it may create new problems, and the total lack of consensus over the appropriate means of distributing property, the area of transmissible future interests seems hardly ripe for reform. In fact, UPC section 2-707 seems

130. In *In re Krooss*, the settlor had specified that if the daughter died with descendants the interest should pass to them, but he did not specify what should happen if the daughter died without descendants, as she did. *Id.* at 223.

131. *Id.*

132. See Waggoner, *supra* note 107, at 2337-38.

largely indefensible. It is essential to recall in considering reform proposals that the legislature is not writing on a blank slate. Perhaps if this were the dawn of time, a statutory rule disposing of remainder interests might be preferable to a common law rule giving the remainder to the deceased beneficiary's estate. Yet this is not the dawn of time; there is a well-developed body of common law which has dealt effectively, if not optimally, with the problem posed. The applicable standard for evaluating a proposal to overturn that body of law should be higher than when starting from scratch. Does the reform proposal reach a significantly better result than the common law? Clearly UPC section 2-707 does not.

Conclusion

In order to eliminate the ambiguities left behind in the 1984 legislation, the California Probate Code must be revised. Absent such a revision, there is the distinct possibility that a court might wrongly interpret the Code to impose a survivorship condition on gifts of future interests. *Woodworth* illustrates that the possibility is not at all remote.

Also apparent is the fact that the 1994 revisions of the Code went well beyond those necessary to extend the rules of construction applicable to wills and will substitutes. The statute must be amended to make it applicable only to transfers, by will or trust, that take place upon the transferor's death.

All states should approach the survivorship provisions of the 1990 version of the UPC with caution. Legislatures should not overturn long-standing common law rules and rewrite instruments, particularly attorney-drawn ones, without some compelling justification. Future interests are rarely created in home-drawn instruments. It is the attorney's role to discern the transferor's intent and to express it clearly and unambiguously in the instrument. When the attorney fails to do so, the common law takes the instrument as drafted and allows the beneficiary to dictate the disposition of the remainder. The UPC (and other statutes in the anti-lapse model) add words to the instrument that dramatically change the nature of the interests transferred. In spite of the lack of any empirical evidence of transferor preference, the UPC rewrites a trust in a way equally likely to frustrate the testator's intent as to carry it out. What justification then might be served by UPC section 2-707? The rule seems more likely to protect incompetent attorneys than a testator's intent, and that purpose should not form the normative foundation for a statute that rewrites trust instru-

ments in a way that could potentially frustrate the testator's intent, and impose even greater transfer tax burdens and administrative costs.