

Burkett v. Capovilla And The Interpretation Of Revocable *Inter Vivos* Trusts

JAMES LOUGHBOROUGH, CARMEN SINIGIANI AND BRETT STEIN

I. INTRODUCTION

For years lawyers and courts struggled with an ambiguity in the interpretation of revocable *inter vivos* trusts. Namely, where a beneficiary predeceases a settlor, and there is a survivorship clause not specifically tied to either the date of execution or the date of death, does the survivorship period begin on the date of the settlor's death or on the date of the trust execution? There were two schools of thought.

Historically, *inter vivos* trusts were viewed as a type of third party beneficiary contract; and therefore, when problems of interpretation and construction arose, the courts used contract law to resolve the conflict. More recently, however, such trusts are viewed as being testamentary in nature, similar to a will; therefore, the rules of interpretation and construction applicable to wills are more appropriate. If the rules of construction applicable to contracts apply, the survivorship period begins on the date of execution, since that is when contracts become effective. If rules applicable to wills apply, the survivorship period begins on the date of settlor's death, since that is when wills become effective.

The ambiguity has finally been resolved. In October of 2003 the California Appellate Court ruled that a testamentary interpretation is properly utilized when analyzing such trusts. As wills and revocable *inter vivos* trusts fulfill the same function, the rules governing the distribution should be uniform.

II. OCTOBER 2003 CASE: BURKETT V. CAPOVILLA¹

In *Burkett*, Erma Mary Olivera, settlor, named her son, Peter Capovilla, and daughter, Eleanor Rollings, as beneficiaries in a 1998 revocable *inter vivos* trust. However, at the time of settlor's death, the only assets remaining in the

1. *Burkett v. Capovilla*, 112 Cal. App. 4th 1444 (Ca. 2003).

trust were those designated for Eleanor. Paragraph 5.02 of the trust instrument stated, "Survivorship Requirements: For all gifts under this instrument, the beneficiary must survive for sixty (60) days before entitlement to such gifts." Unfortunately, the trust failed to state whether the sixty days referred to the date of execution of the instrument or to the date of settlor's death.

The daughter, Eleanor, survived approximately three years after the trust was executed, but predeceased settlor by about a month. If the interpretive rules governing contracts controlled in interpreting the clause, Eleanor's estate would take her share, because she would have obtained an interest in the trust on the date of execution. However, if the rules governing the interpretation of wills controlled, then settlor's heirs would take, as the beneficiary of a will has no property interest until the date of testator's death.

The trial court applied a common law contractual interpretation, wherein the trust beneficiaries acquire an immediate equitable interest in the trust estate, holding that the survivorship period began on the date of the trust execution. The Appellate Court disagreed, applying instead a testamentary interpretation, where the beneficiaries hold no such interest, ruling that the survivorship period commenced on the date of the settlor's death.

The Appellate Court said that "survive" and "survivorship," according to plain meaning, connotes living past the date of another person's death. In support of its holding, the Appellate Court noted that California Probate Code section 21101 applies the same general rules of interpretation to "a will, trust, deed and any other instrument." Here, the settlor's trust is primarily concerned with the disposition of her property after death. And as gifts under the trust only vest upon the settlor's death, Eleanor's estate is not entitled to take. Instead, the gift to Eleanor lapsed, and the distribution was made not to her heirs but to the settlor's, which therefore included Peter.

SURVIVORSHIP CLAUSE: WHAT IS IT, WHY HAVE ONE?

Generally, wills and trusts contain a survivorship clause, such as the one in *Burkett*. The clause conditions the transfer, distribution, devise or other right on the survival of the beneficiary. Additionally, it might require the beneficiary not only to survive, but to survive for a certain period of time,² such as, "I give my entire estate to X if she survives me for sixty days."³ This type of provision can be helpful where each spouse has an estate of approximately equal size, and both die within six months of the other. Administration costs and taxes are reduced because the inclusion and taxation

2. California Wills & Trusts § 91.09 (Mathew Bender & Company, Inc., 2003).

3. California Wills & Trusts § 24.03 (Mathew Bender & Company, Inc., 2003).

of marital deduction bequests are avoided.⁴ But there are even more fundamental reasons to have a survivorship clause.

A SURVIVORSHIP CLAUSE AND AVOIDING THE ANTI-LAPSE STATUTE.

With the exception of class gifts, if the beneficiary predeceases the testator or fails to satisfy a survivorship clause, the gift fails.⁵ The failed gift then falls into the residue, unless the instrument provides an alternative disposition.⁶ If, however, there is no alternative disposition, there is no residuary clause or the gift that fails is the residuary gift, then the property is transferred to the decedent's estate, and it passes by intestate succession.⁷

California Probate Code section 21110, the "anti-lapse statute," determines what happens to gifts when: (1) the beneficiary is kindred of the testator; (2) the beneficiary is kindred of testator's surviving, deceased or former spouse; (3) the instrument expresses an intention contrary to the provisions in the anti-lapse statute; and (4) there is a substitute disposition.⁸ If the beneficiary predeceases the testator and is either kindred of testator or kindred of testator's surviving, deceased or former spouse, then lineal descendants of the beneficiary take.⁹ This result can be avoided.

If the instrument expresses a contrary intention or substitute disposition, then the descendants of the deceased beneficiary will not take.¹⁰ However, the intent to avoid the effect of the anti-lapse statute must be clear.¹¹ Obviously, a provision such as, "I do not want any provision(s) of Probate Code section 21110(a)-(c) or any anti-lapse statute to apply to my will," will probably sufficiently express a contrary intention. But a residuary clause, which is merely adequate to avoid intestacy, will not.¹² The clause must at least include the disposition of the failed and lapsed gifts.¹³ Such a disposition need not name a specific individual; the designation of someone's "estate" or "heirs" is

4. Modern Estate Planning, § 13.09 (Mathew Bender & Company, Inc., 2003).

5. Cal. Prob. Code §§ 21109(a) - 21110(b) (Deering, LEXIS through 2004 Sess.).

6. Cal. Prob. Code § 21110(a)(b) (Deering, LEXIS through 2004 Sess.).

7. *Id.*

8. Cal. Prob. Code § 21110(b) (Deering, LEXIS through 2004 Sess.).

9. *Id.*

10. *Id.*

11. *See, e.g.*, Estate of Casey., 128 Cal. App. 3d 867, 867, 872-73 (Ca. 1982). Holographic will containing provision "[R]emaining stocks to be sold and divided equally among. . .grandchildren. . .[A]ny cash remaining in . . .account. . .shall be given to Martha. . .[S]tock not otherwise mentioned shall be sold & the cash. . .shall be divided. . .among the. . .grandchildren" not sufficient to avoid anti-lapse statute; *see also* California Decedent Estate Practice §24.12 6. Lapsed Gifts (CEB 2003).

12. *Id.*

13. *See, e.g.*, Estate of Salisbury, 76 Cal. App.3d, 635, 638 (Ca. 1982). "[T]he residue of my estate. . .including all failed and lapsed gifts, to my granddaughter and grandson" prevented application of anti-lapse statute.

sufficient.¹⁴ A survivorship clause is another way to avoid the anti-lapse statute, because it sufficiently expresses a contrary intention,¹⁵ However, earlier courts have not always followed this view.¹⁶

HISTORICAL EVOLUTION: FROM A CONTRACTUAL TO TESTAMENTARY INTERPRETATION

Not long ago, Burkett's counsel would probably have had better success convincing the court to tie the sixty-day survivorship clause to the date of execution. Again, the common law and old California view was that trusts were a type of a third party beneficiary contract, and therefore, contract law applied; beneficiaries acquired an immediate, equitable interest in the trust estate, even though the testator could revoke the gift at anytime before her death.¹⁷ In this way trusts were unlike wills, which have no effect until the testator's death.¹⁸ Courts held that survivorship clauses not expressly tied to testator's death "tended to" refer to the date of distribution.¹⁹

Then lawmakers began legislating to change the old rule by merging probate and trust law.²⁰ The 1990 Revision of California Probate Code section 21109 provides an anti-lapse provision for those trusts which function as will substitutes. In an attempt to create uniformity, the 1994 Revision of the Code, 21101 *et seq.*, clarified terminology relating to transfers that are revocable during the life of the transferor, renaming "testamentary gifts" as "at-death transfers."²¹ In a further attempt at uniformity, a 2002 amendment of section 21101 states that all the rules applicable to wills apply to trusts, deeds and any other instrument of such a nature.

VI. BURKETT: CONFIRMING THE RULES OF CONSTRUCTION.

As pointed out by the Appellate Court in *Burkett*, the plain meaning of

14. *See, eg.*, Estate of Brunet 34 Cal.2d 105 (1949). The words, "To Otto Speckter or his Estate", used in a holographic will, was found to be a sufficient alternate disposition, preventing application of the anti-lapse statute.

15. Cal. Prob. Code § 2110(b). (Deering, LEXIS through 2004 Sess.). *see also*, California Decedent Estate Practice § 24.12 6, *supra*.

16. *See e.g.* Randall v. Bank of America 48 Cal. App. 2d 249, 254-55 (1941). Ambiguous language of survival tends to refer to distribution date rather than to some other time, such as testator's death.

17. *Id.*

18. *See generally* Trowbridge v. First Stamford National Bank & Trust Company. 182 Misc. 181 (NY, 1956). (Inter vivos trust speaks as of the day of its execution and delivery). *But see* First National Bank v. Tenney, 165 Ohio St. 518 (1956) (will speaks from the date of death).

19. Lawrence W. Waggoner, Correspondence: The Uniform Probate Code Extends Antilapse-Type Protection to Poorly Drafted Trusts. 94 Mich. L. Rev. 2317 (1996).

20. Restatement (Third) of Trusts: Formalities, Creation of Inter Vivos Trusts § 2 (2003).

21. *Wills, Trusts, and Estate Planning Instruments: Rules of Construction: Hearings on AB 1784 Before the Senate Judiciary Comm. 6-0, California Law Revision Comm'n.* (2002).

“survive” and “survivorship” connote living past the date of another person’s death.²² But resting upon the “plain meaning” of a word can prove problematic. “[T]he ‘plain meaning’ is simply the meaning of the people who did *not* write the document.”²³ Casebooks are replete with scenarios where judges rested on “plain meaning” to hold contrary to what the petitioner and reader would believe correct.²⁴ Fortunately, the practitioner now has something more to rely on, other than plain meaning.

Burkett is the first case in California to hold that revocable trusts, concerned primarily with the disposition of property at death, are testamentary in nature, not contractual. Accordingly, the rules of interpretation and construction of such trusts should be those used for wills, not contracts.

22. *Copavilla v. Burkett*, 112 Cal. App.4th 1444, 1450 n.3 (2003). “Common definitions of the term ‘survive,’ include: ‘To live longer than: outlive. . .[.]’ (American Heritage Dict. (2d college ed. (1982) p. 1224), and ‘to remain alive after the death of. . .’ (Webster’s Collegiate Dict. (10th ed. 1999) p. 1187.) Black’s Law Dictionary defines a ‘survivor’ as ‘One who survives another: one who outlives another: one who lives beyond some happening. . .’ (Black’s Law Dict. (6th d. 1990) p. 1446, col.1.) It defines survivorship as ‘The living of one of two or more persons after the death of the other or others.’ (Id. at p. 1446, col. 2.)”

23. James H. Chadbourne rev. (1981) *in* Wills, Trusts, and Estates, at 413 (Dukemineir and Johnson. 6th ed. (2000).)

24. *See generally*, Wills, Trusts, and Estates; chapter 6, Construction of Wills (Dukemineir and Johnson. (2000).)