

Memorandum 87-7

Subject: Study L-1029 - Estate and Trust Code (Marital Deduction Gifts--draft of recommendation)

At the February 1986 meeting the Commission reviewed the existing statute governing construction of marital deduction gifts in wills and trusts. The Commission also heard a presentation by Bob Mills, draftsman of the existing statute, indicating that a few clarifying changes in the statute might be helpful. The Commission asked Mr. Mills if he would be willing to assist the Commission by providing a draft of the suggested changes in consultation with the Commission's consultant Ed Halbach. Mr. Mills agreed.

Mr. Mills and Professor Halbach, together with the staff, have developed the attached draft for consideration by the Commission. We also have consulted with Ken Klug, who has helped us on other estate tax matters (proration). The draft incorporates suggestions made by State Bar Team 4 and by the Legislative Subcommittee on Estate Planning, Trust and Probate Law of the San Diego County Bar Association.

In addition to clarifying changes, there are a number of substantive changes made in the present draft. Perhaps the most significant change is the extension of the marital deduction gift provisions from the estate tax to the gift tax as well. Other, policy issues are mentioned in Notes following a few of the sections.

The draft also makes a substantial reorganization of the statute. The reason for the reorganization is that the marital deduction gift provisions apply to trusts as well as wills, as do many of the general rules of construction applicable to testamentary instruments. To make this more clear, and to allow adequate room in the code for the rules of construction, we have created at the end of the code a new Division 11: Construction of Wills, Trusts, and Other Instruments. We intend to collect in this division other rules of construction, such as abatement, no contest clauses, and the like, that apply to all instruments.

We have also broken down the marital deduction gift provisions into several chapters so as to separate the marital deduction gift provisions from other statutes governing gifts intended to comply with Internal Revenue Code requirements.

This is a highly technical area. If the present draft appears to be sound, we believe it would be appropriate to incorporate it in our 1987 probate bill, subject to review by the various bar committees.

Respectfully submitted,

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Assistant Executive Secretary

Staff Draft

Recommendation
relating to
MARITAL DEDUCTION GIFTS

Existing law governing construction of marital deduction gifts in wills¹ applies to marital deduction gifts in trusts as well.² To help make this relationship more clear, the proposed law relocates the marital deduction gift provisions to a new division of the code devoted to construction of wills, trusts, and other instruments, whether inter vivos or testamentary. The proposed law also reorganizes the marital deduction gift provisions to group them separately from other unrelated provisions³ governing compliance with Internal Revenue Code requirements, and makes other technical and clarifying revisions.⁴

The existing marital deduction gift provisions apply only to the estate tax; the proposed law extends the provisions to the gift tax as well. This will help effectuate a disposition of property intended to satisfy the gift tax marital deduction.⁵

1. Prob. Code §§ 1030-1039.

2. Prob. Code § 15005 (law applicable to marital deduction gifts in trust) (Cal. Stats. 1986, ch. 820, operative July 1, 1987), which continues former Prob. Code § 1138.14 without substantive change.

3. Provisions governing construction of charitable remainder unitrusts and annuity trusts are currently intermingled with marital deduction gift provisions. See Prob. Code § 1032. In addition to regrouping the charitable trust provisions, the proposed law adds comparable rules of construction for charitable lead trusts. See Int. Rev. Code § 170(f)(2)(b).

4. See Comments to the proposed legislation, infra.

5. Int. Rev. Code § 2523.

The proposed law also makes several revisions in the marital deduction gift provisions, relating to the interaction of the statute with a qualified terminable interest property (QTIP) trust election:⁶

(1) In the case of a pre-September 13, 1986, formula marital deduction gift, typical language would appear to require that the gift be reduced by any amount qualified by a QTIP trust election.⁷ The proposed law remedies this by making clear that a QTIP trust election may be made without thereby reducing the amount passing under the formula marital deduction gift.

(2) The Internal Revenue Code requires that under a QTIP trust the surviving spouse must be entitled to all income from the property.⁸ Where accrued income is unpaid at the time of death of the surviving spouse or other life beneficiary, however, existing law provides that the accrued but unpaid income presumptively becomes part of principal.⁹ As a matter of caution, the proposed law requires that the unpaid income of a QTIP trust be distributed to the estate of the surviving spouse.¹⁰

(3) Exercise of the QTIP trust election may have the effect of increasing the estate tax burden on the spouses' estates or of shifting the burden among ultimate beneficiaries of the property. The fiduciary should be able to make the election in an appropriate case, however,

6. Int. Rev. Code § 2056(b)(7).

7. Prob. Code § 1034(c).

8. Int. Rev. Code § 2056(b)(7)(B)(ii)(I).

9. Prob. Code §§ 1035(e) (QTIP trust excepted) and 16304 (Revised Uniform Principal and Income Act).

10. Proposed Treasury regulations would enable the unpaid income to pass with principal. A limited change in the trust law is recommended nonetheless, since the regulations may not become final in that form.

free of concern about potential liability to beneficiaries who are adversely affected by the election. The proposed law adds a provision to make clear that a good faith election may be made without liability. This provision is analogous to Kansas law.¹¹

11. 79 K.S.A. § 1537d (1984).

OUTLINE

DIVISION 11. CONSTRUCTION OF WILLS, TRUSTS, AND OTHER INSTRUMENTS

Part 1. General Provisions (\$ 21100)

Part 2. Special Rules Governing Wills (\$ 21200)

Part 3. Exoneration and Ademption (\$ 21300)

Part 4. Abatement and Interest and Income (\$ 21400)

Part 5. Compliance with Internal Revenue Code (\$ 21500)

Part 6. No Contest Clauses (\$ 21600)

DIVISION 11. CONSTRUCTION OF WILLS, TRUSTS, AND OTHER INSTRUMENTS

PART 1. GENERAL PROVISIONS

CHAPTER 1. SCOPE AND DEFINITIONS

- § 21100. Definitions
- § 21101. Division applicable to wills, trusts, and other instruments

CHAPTER 2. MISCELLANEOUS PROVISIONS

- § 21120. Satisfaction of a pecuniary gift

PART 5. COMPLIANCE WITH INTERNAL REVENUE CODE

CHAPTER 1. GENERAL PROVISIONS

- § 21500. "Internal Revenue Code" defined
- § 21501. Application of part
- § 21502. Severability clause

CHAPTER 2. MARITAL DEDUCTION GIFTS

- § 21520. Definitions
- § 21521. Application of chapter
- § 21522. Marital deduction gifts
- § 21523. Maximum marital deduction for instrument dated September 13, 1981, or earlier
- § 21524. Marital deduction gift in trust
- § 21525. Survival requirement for marital deduction gift
- § 21526. QTIP election

CHAPTER 3. CHARITABLE GIFTS

- § 21540. Charitable remainder unitrusts and annuity trusts
- § 21541. Charitable lead trusts

COMMENTS TO REPEALED SECTIONS

CONFORMING CHANGES

DIVISION 11. CONSTRUCTION OF WILLS, TRUSTS, AND OTHER INSTRUMENTS

PART 1. GENERAL PROVISIONS

CHAPTER 1. SCOPE AND DEFINITIONS

§ 21100. Definitions

21100. Unless the provision or context otherwise requires, as used in this division:

(a) "Fiduciary" means personal representative, trustee, guardian, conservator, or other legal representative.

(b) "Instrument" means a will, trust, deed, or other writing that designates a beneficiary or makes a disposition of property.

(c) "Transferor" means the testator, settlor, grantor, owner, or other person who executes an instrument.

Comment. Subdivision (a) of Section 21100 restates former Probate Code Section 1030(f) without substantive change. Subdivisions (b) and (c) are new. Unless the provision or context otherwise requires, this division applies to both inter vivos and testamentary instruments. See Section 21101 (division applicable to wills, trusts, and other instruments).

CROSS-REFERENCES

Definitions

Beneficiary § 24
Personal representative § 58
Property § 62
Trust § 82
Trustee § 84
Will § 88

Note. The term "beneficiary" is redefined in the 1987 probate bill. It might be useful to expand the definition, thus.

24. "Beneficiary" means a person to whom a disposition of property is made, and:

(a) As it relates to the estate of a decedent who died intestate, means an heir and, as it relates to the estate of a decedent who died testate, means a devisee.

(b) As it relates to a trust, means a person who has any present or future interest, vested or contingent, and includes an owner of an interest by assignment or by other transfer.

(c) As it relates to a charitable trust, includes any person entitled to enforce the trust.

§ 21101. Division applicable to wills, trusts, and other instruments

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

Comment. Section 21101 is new.

CROSS-REFERENCES

Definitions

Instrument § 21100

Trust § 82

Will § 88

Note. The Commission intends to develop this division to incorporate rules of construction applicable to inter vivos and testamentary instruments generally. Matters to be incorporated in this division will include the rules of construction of wills currently found in Sections 6140 to 6178, abatement and distribution of interest and income, no contest clauses, and other relevant provisions.

CHAPTER 2. MISCELLANEOUS PROVISIONS

§ 21120. Satisfaction of a pecuniary gift

21120. (a) If an instrument authorizes the fiduciary to satisfy a pecuniary gift wholly or partly by distribution of property other than money, property selected for that purpose shall be valued at its fair market value on the date of distribution, unless the instrument expressly provides otherwise. If the instrument permits the fiduciary to value property selected for distribution as of a date other than the date of distribution, then, unless the instrument expressly provides otherwise, the property selected by the fiduciary for that purpose shall have an aggregate fair market value on the date or dates of distribution which, when added to any cash distributed, will amount to no less than the amount of the pecuniary gift as stated in, or determined by, the instrument.

(b) As used in this section, "pecuniary gift" means a disposition of property made in an instrument that either is expressly stated as a fixed dollar amount or is a dollar amount determinable by the provisions of the instrument.

Comment. Subdivision (a) of Section 21120 restates former Probate Code Section 1033(a) without substantive change. Subdivision (b) restates former Probate Code Section 1030(a) without substantive change.

CROSS-REFERENCES

Definitions

Fiduciary § 21100
Instrument § 21100
Property § 62

PART 5. COMPLIANCE WITH INTERNAL REVENUE CODE

CHAPTER 1. GENERAL PROVISIONS

§ 21500. "Internal Revenue Code" defined

21500. As used in this part, "Internal Revenue Code" means the United States Internal Revenue Code of 1986.

Comment. Section 21500 restates former Probate Code Section 1030(g) without substantive change. A reference to a provision of the Internal Revenue Code includes any subsequent provision of law enacted in its place. See also Section 7 (amendments and additions).

§ 21501. Application of part

21501. (a) This part applies to a distribution made on or after January 1, 1983, whether the transferor died before, on, or after that date. However, this part does not apply to an instrument the terms of which expressly or by necessary implication make this part inapplicable.

(b) By an appropriate statement made in an instrument, the transferor may incorporate by reference the terms of this part, or any of its provisions. The effect of incorporating this part or any of its provisions in an instrument is to make the incorporated provision a part of the instrument as though the language of the incorporated provision were set forth verbatim in the instrument. Unless an instrument incorporating a provision of this part provides otherwise, the instrument automatically incorporates the provision's amendments.

Comment. Section 21501 restates former Probate Code Section 1031 without substantive change. This part applies to trusts as well as wills. Section 21101 (division applicable to wills, trusts, and other instruments). Cf. former Prob. Code § 15005 (law applicable to marital deduction gifts in trust).

CROSS-REFERENCES

Definitions

Instrument § 21100
Transferor § 21100

§ 21502. Severability clause

21502. If a provision of this part or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the part that can be given effect without the invalid provision or application, and to this end the provisions of this part are severable.

Comment. Section 21502 restates former Probate Code Section 1038 without substantive change.

CROSS-REFERENCES

Definitions

Person § 56

CHAPTER 2. MARITAL DEDUCTION GIFTS

§ 21520. Definitions

21520. As used in this chapter:

(a) "Marital deduction" means the federal estate tax deduction allowed for transfers under Section 2056 of the Internal Revenue Code or the federal gift tax deduction allowed for transfers under Section 2523 of the Internal Revenue Code.

(b) "Marital deduction gift" means a disposition of property that is intended to qualify for the marital deduction.

Comment. Section 21520 restates former Probate Code Section 1030(b) and (d), and expands them to apply to the gift tax as well as the estate tax. Whether an instrument contains a marital deduction gift depends upon the intention of the transferor at the time the instrument is executed.

CROSS-REFERENCES

Definitions

Internal Revenue Code § 21500

Property § 62

Note. *The significant change made in this section is to extend the marital deduction gift provisions to the gift tax as well as the estate tax.*

§ 21521. Application of chapter

21521. This chapter does not apply to a trust that qualifies for the marital deduction under Section 20.2056(e)-2(b) of the Code of Federal Regulations (the so-called "estate trust").

Comment. Section 21521 restates the fourth sentence of former Probate Code Section 1032(a) without substantive change.

CROSS-REFERENCES

Definitions

Marital deduction § 21520
Trust § 82

§ 21522. Marital deduction gifts

21522. If an instrument contains a marital deduction gift:

(a) The provisions of the instrument, including any power, duty, or discretionary authority given to a fiduciary, shall be construed to comply with the marital deduction provisions of the Internal Revenue Code in order to conform to the intent of the gift.

(b) The fiduciary shall not take any action or have any power that impairs the deduction as applied to the marital deduction gift.

(c) The marital deduction gift may be satisfied only with property that qualifies for the marital deduction.

Comment. Subdivisions (a) and (b) of Section 2152 restate the first three sentences of subdivision (a) of former Probate Code Section 1032 without substantive change. See Sections 21500 ("Internal Revenue Code" defined) and 21520 ("marital deduction gift" defined). Subdivision (c) restates former Probate Code Section 1033(b) without substantive change.

CROSS-REFERENCES

Definitions

Fiduciary § 21100
Instrument § 21100
Marital deduction § 21520
Marital deduction gift § 21520
Property § 62

§ 21523. Maximum marital deduction for instrument dated September 13, 1981, or earlier

21523. If an instrument executed on or before September 13, 1981, indicates the transferor's intention to make a gift that will provide the maximum allowable marital deduction, the instrument passes to the recipient an amount equal to the maximum amount of the marital deduction that would have been allowed as of the date of the gift under federal law as it existed before August 13, 1981 (before the applicability of the Economic Recovery Tax Act of 1981), with adjustments for the following, if applicable:

(a) The provisions of Section 2056(c)(1)(B) and (C) of the Internal Revenue Code in effect immediately before the Economic Recovery Tax Act of 1981.

(b) To reduce the amount passing under the gift by the final federal estate tax values of any other property that passes under or outside of the instrument and qualifies for the marital deduction. This subdivision does not apply to qualified terminable interest property under Section 2056(b)(7) of the Internal Revenue Code.

Comment. Section 21523 restates former Probate Code Sections 1030(c) and 1034(a) and (c) with the addition in subdivision (b) of a provision to make it possible to make a "QTIP" trust election in a pre-September 13, 1981, instrument under Internal Revenue Code Section 2056(b)(7) without thereby reducing the formula marital deduction gift on a dollar-for-dollar basis. Subdivision (b) of former Probate Code Section 1034 is omitted in conformity with the change in the generation-skipping transfer tax made by the Tax Reform Act of 1986 (H.R. 3838).

CROSS-REFERENCES

Definitions

Instrument § 21100
Internal Revenue Code § 21500
Marital deduction § 21520
Property § 62
Transferor § 21100

Note. *Bob Mills points out that in this draft revision of Section 21523(b), "I have not specifically said that the exception that I have added would not apply if the will specifically directed that it not apply. I recognize that it would be possible, although highly unlikely, that an individual would consciously decide to reduce the formula marital deduction bequest by the amount of property that was Q-tipped. The most common situation where the proposed amendment would be useful would be if the will was pre-ERTA and set up a conventional by-pass trust with no thought given to the Q-tip election, since it did not then exist."*

§ 21524. Marital deduction gift in trust

21524. If a marital deduction gift is made in trust, in addition to the other provisions of this chapter, each of the following provisions also applies to the marital deduction trust:

(a) The transferor's spouse is the only beneficiary of income or principal of the marital deduction property as long as the spouse is alive.

(b) Subject to subdivision (d), the transferor's spouse is entitled to all of the income of the marital deduction property not less frequently than annually, as long as the spouse is alive.

(c) The transferor's spouse has the right to require that the trustee of the trust make unproductive marital deduction property productive or to convert it into productive property within a reasonable time.

(d) Notwithstanding subdivision (d) of Section 16304, in the case of qualified terminable interest property under Section 2056(b)(7) of the Internal Revenue Code, on termination of the interest of the transferor's spouse in the trust all of the remaining accrued or undistributed income shall pass to the estate of the transferor's spouse, unless the instrument provides otherwise.

Comment. Section 21524 restates former Probate Code Section 1035, combining the concepts of former subdivisions (b) and (c) and revising subdivision (d) to provide for qualification of a QTIP trust that is silent about the payment of income between the last distribution date of the trust and the date of the spouse's death and, beyond that, to provide for qualification of a QTIP trust that mandates payment of income to the remaindermen.

CROSS-REFERENCES

Definitions

Beneficiary § 24
Fiduciary § 21100
Instrument § 21100
Marital deduction gift § 21520
Property § 62
Transferor § 21100
Trust § 82
Trustee § 84

Note. In connection with subdivision (d), Bob Mills notes that, "Substantively, the problem that we are seeking to address is not clearly real since the proposed regulations would permit the income interest to qualify even if income between the last distribution date and the date of the surviving spouse's death went to the remaindermen. I nevertheless think that an amendment is in order since the proposed regulations may never become final or, even if they do, some court or the IRS itself may decide someday that such regulations are not consistent with underlying law."

§ 21525. Survival requirement for marital deduction gift

21525. If a survival requirement expressed in an instrument is not limited to six months after the transferor's death, or to a common disaster resulting in the death of the transferor and spouse, or to the later of these two events, the survival requirement does not apply to property passing under a marital deduction gift, but shall be limited to a six-month period beginning with the decedent's death as applied to the marital deduction gift.

Comment. Section 21525 restates former Probate Code Section 1036 without substantive change.

CROSS-REFERENCES

Definitions

Instrument § 21100
Marital deduction gift § 21520
Property § 62
Transferor § 21100

§ 21526. QTIP election

21526. A fiduciary is not liable for a good faith decision to make the election or not to make the election referred to in Section 2056(b)(7) of the Internal Revenue Code.

Comment. Section 21526 combines the fifth sentence of former Probate Code Section 1032(a) with a provision analogous to 79 Kansas Statutes Annotated, Section 1537d (1984).

CROSS-REFERENCES

Definitions

Fiduciary § 21100
Internal Revenue Code § 21500

Note. This provision was offered for consideration by Mr. Mills to hold harmless a personal representative from liability to a holder of a beneficial interest as a result of a QTIP election. He notes the Kansas statute:

The executor of any decedent's estate subject to the jurisdiction of this state is hereby authorized to file a qualified terminable interest property election with respect to any property in which the surviving spouse has a "qualifying income interest for life" as defined in 26 U.S.C. 2056(b)(7), as in effect on January 1, 1982, without liability to any holder of a beneficial interest under the instrument governing the disposition of property in the decedent's estate, whether said instrument was executed before or after the effective date of Public Law 97-34.

CHAPTER 3. CHARITABLE GIFTS

§ 21540. Charitable remainder unitrusts and annuity trusts

21540. If an instrument indicates the transferor's intention at the time the instrument is executed to comply with the Internal Revenue Code requirements for a charitable remainder unitrust or a charitable remainder annuity trust as each is defined in Section 664 of the Internal Revenue Code, the provisions of the instrument, including any power, duty, or discretionary authority given to a fiduciary, shall be construed to comply with the charitable deduction provisions of Section 2055 of the Internal Revenue Code and the charitable remainder trust provisions of Section 664 of the Internal Revenue Code in order to conform to that intent. In no event shall the fiduciary take an action or have a power that impairs the charitable deduction. After the death of the transferor, the provisions of the instrument may be augmented in any manner consistent with subdivision (e) of Section 2055 of the Internal Revenue Code on a petition provided for in Part 5 (commencing with Section 17000) of Division 9.

Comment. Section 21540 restates subdivision (b) of former Probate Code Section 1032 and applies it to inter vivos as well as testamentary gifts.

CROSS-REFERENCES

Definitions

Fiduciary § 21100
Instrument § 21100
Internal Revenue Code § 21500
Transferor § 21100

Note. *The significant change in this section is that it applies to inter vivos as well as testamentary gifts.*

§ 21541. Charitable lead trusts

21541. If an instrument indicates the transferor's intention at the time the instrument is executed to comply with the Internal Revenue Code requirements for a charitable lead trust as described in Section 170(f)(2)(b) of the Internal Revenue Code, the provisions of the instrument, including any power, duty, or discretionary authority given to a fiduciary, shall be construed to comply with the provisions

of that section in order to conform to that intent. In no event shall the fiduciary take any action or have any power that impairs the charitable deduction. After the death of the transferor, the provisions of the instrument may be augmented in any manner consistent with that intent upon a petition provided for in Part 5 (commencing with Section 17000) of Division 9.

Comment. Section 21541 is new; it extends the general approach of Section 21540 (charitable remainder unitrusts and annuity trusts) to include charitable lead trusts.

CROSS-REFERENCES

Definitions

Fiduciary § 21100
Instrument § 21100
Internal Revenue Code § 21500
Transferor § 21100

COMMENTS TO REPEALED SECTIONS

Probate Code § 1030 (repealed)

Comment. Subdivision (a) of former Section 1030 is restated in Section 21120(b) (satisfaction of a pecuniary gift) without substantive change. Subdivisions (b) and (d) are restated in Section 21520 (definitions) and expanded to apply to the gift tax as well as the estate tax. Subdivision (c) is restated by general language in Section 21523 (maximum marital deduction for instrument dated September 13, 1981, or earlier). Subdivision (e) is restated in Section 88 ("will" defined) without substantive change. Subdivision (f) is restated in Sections 21100 (definitions) and 10 (singular and plural) without substantive change. Subdivision (g) is restated in Section 21500 ("Internal Revenue Code" defined) without substantive change. Subdivision (h) is superseded by general language in the provisions to which it related.

Probate Code § 1031 (repealed)

Comment. Former Section 1031 is restated in Section 21501 (application of part) without substantive change.

Probate Code § 1032 (repealed)

Comment. The first three sentences of subdivision (a) of former Section 1032 are restated in Section 21522(a)-(b) (marital deduction gifts) without substantive change. The fourth sentence is restated in Section 21521 (application of chapter) without substantive change. The fifth sentence is combined in Section 21526 (QTIP election) with a provision analogous to 79 Kansas Statutes Annotated, Section 1537d (1984).

Subdivision (b) is restated in Section 21540 (charitable remainder unitrusts and annuity trusts), which applies it to inter vivos as well as testamentary gifts.

Probate Code § 1033 (repealed)

Comment. Subdivision (a) of former Section 1033 is restated in Section 21120(a) (satisfaction of a pecuniary gift) without substantive change. Subdivision (b) is restated in Section 21522(c) (marital deduction gifts) without substantive change.

Probate Code § 1034 (repealed)

Comment. Subdivisions (a) and (c) of former Section 1034 are restated in Section 21523 (maximum marital deduction for instrument dated September 13, 1981, or earlier), with the addition of a provision to make it possible to make a "QTIP" trust election in a pre-September 13, 1981, instrument under Internal Revenue Code Section 2056(b)(7) without thereby reducing the formula marital deduction bequest on a dollar-for-dollar basis. Subdivision (b) is omitted in conformity with the change in the generation-skipping transfer tax made by the Tax Reform Act of 1986 (H.R. 3838).

Probate Code § 1035 (repealed)

Comment. Former Section 1035 is restated in Section 21524 (marital deduction gift in trust), with provision for qualification of a QTIP trust that is silent about the payment of income between the last distribution date of the trust and the date of the spouse's death and, beyond that, with provision for qualification of a QTIP trust that mandates payment of income to the remaindermen.

Probate Code § 1036 (repealed)

Comment. Former Section 1036 is restated in Section 21524 (survival requirement for marital deduction gift) without substantive change.

Probate Code § 1037 (repealed)

Comment. Former Section 1037 is not continued. It was a transitional provision that is no longer necessary.

Probate Code § 1038 (repealed)

Comment. Former Section 1038 is restated in Section 21502 (severability clause) without substantive change.

Probate Code § 1039 (repealed)

Comment. Former Section 1039 is not continued. The provision did not serve a useful purpose.

CONFORMING CHANGES

Prob. Code § 15005. Law applicable to marital deduction gifts in trust
(added by 1986 Cal. Stats. ch. 820) (repealed)

SEC. . Section 15005 of the Probate Code is repealed.

~~15005. (a) Except as provided in subdivision (b), Article 3 (commencing with Section 1030) of Chapter 16 of Division 3 applies to gifts, whether outright or in trust, made in a trust.~~

~~(b) This section does not apply to any trust if its terms expressly or by necessary implication make this section inapplicable to it.~~

~~(c) For purposes of this section, references in Article 3 (commencing with Section 1030) of Chapter 16 of Division 3 to a "testator" refer to the settlor and references to a "will" refer to a trust.~~

Comment. Section 15005 is omitted because it is no longer necessary. See Section 21101 (division applicable to wills, trusts, and other instruments).

Prob. Code § 16304. When right to income arises; apportionment
of income (added by 1986 Cal. Stats. ch. 820)

SEC. . Section 16304 of the Probate Code is amended to read:

16304. (a) An income beneficiary is entitled to income from the date specified in the trust instrument or, if none is specified, from the date an item of property becomes subject to the trust. In the case of an item of property becoming subject to a trust by reason of a person's death, it becomes subject to the trust as of the date of the death of the person even though there is an intervening period of administration of the person's estate.

(b) Upon property becoming subject to a trust by reason of a person's death:

(1) Receipts due but not paid at the date of death of the person are principal.

(2) Receipts in the form of periodic payments (other than corporate distributions to stockholders), including rent, interest, or annuities, not due at the date of the death of the person shall be treated as accruing from day to day. That portion of the receipt accruing before the date of death is principal and the balance is income.

(c) In all other cases, any receipt from income-producing property is income even though the receipt was earned or accrued in whole or in part before the date when the property became subject to the trust.

(d) If an income beneficiary's right to income ceases by death or in any other manner, all payments actually paid to the income beneficiary or in the hands of the trustee for payment to the income beneficiary before such termination belong to the income beneficiary or to his or her personal representative. All income actually received by the trustee after such termination shall be paid to the person next entitled to income by the terms of the trust. This subdivision is subject to subdivision (d) of Section 21524 and does not apply to income received by a trustee under subdivision (b) of Section 16305.

(e) Corporate distributions to stockholders shall be treated as due on the day fixed by the corporation for determination of stockholders of record entitled to distribution or, if no date is fixed, on the date of declaration of the distribution by the corporation.

Comment. Subdivision (d) of Section 16304 is amended to recognize a QTIP election under Section 21524(d).