

Memorandum 87-9

Subject: Study L-1038 - Estate and Trust Code (Abatement; Interest and Income Accruing During Administration)

Attached is a redraft of abatement, and interest and income accruing during administration. The Commission has considered abatement twice (8/85, 9/86) and interest and income once (8/85). This draft reflects Commission decisions. The staff has split the draft into three pieces to go in separate parts of the new code:

(1) Definitions will go in the front of the new code with other general definitions.

(2) The interest and income provisions only apply to administration of decedents' estates, and hence will go in Part 10 (distribution) of Division 7 (administration of estates).

(3) The abatement provisions provide rules of construction for wills, trusts, deeds, and other instruments that dispose of property at death, and hence will go in Division 11 (construction of wills, trusts, and other instruments) along with other constructional provisions.

Remaining policy issues are discussed below.

ABATEMENT

Cash Payment In Lieu of Sale of Specific Devise

Since what is now Section 21400 was last seen by the Commission, the staff has revised subdivision (b) and has added a new subdivision (c):

~~(b) If property specifically devised is sold during administration, abatement shall be achieved by appropriate adjustments in or contribution from the remaining assets.~~ When distribution is made in estate administration, the court shall fix the amount each person shall contribute and reserve that amount from the person's distributive share.

(c) If a specific devisee is required to contribute, the specific devisee may pay the contribution out of personal assets in lieu of having his or her specific devise sold.

The staff deleted the first sentence of subdivision (b) because it appears to be a specific application (sale of specific devise) of Section 21401 (order of abatement generally), and therefore was

redundant and confusing. The added sentence is consistent with the apparent purpose of the existing provision from which subdivision (b) is drawn (Prob. Code § 753), and is a clearer statement than the existing provision. Does the Commission approve these revisions to Section 21400?

Preference for Testator's "Kindred"

Section 21401 continues the existing preference of Section 752 for the testator's spouse and kindred, so that general and specific devisees to nonrelatives abate first. State Bar Study Team 4 is concerned that the term "kindred" as used in Section 21401 is ambiguous, and that therefore the scope of the section is not clear.

The staff has addressed this problem by noting in the Comment to Section 21401 that "kindred" means blood relative, and by making a conforming revision to existing Section 6152. Section 6152 states a constructional rule for class gifts under a will and for the purpose of the antilapse statute. Section 6152 includes for those purposes all those who may take from the decedent by intestate succession -- halfbloods, adoptees, persons born out of wedlock, and, in limited cases, stepchildren and foster children. See Prob. Code §§ 6408, 6408.5. The conforming revision expands Section 6152 to include such persons in the abatement preference. Does the Commission approve?

INTEREST AND INCOME ACCRUING DURING ADMINISTRATION

Commencement of Income From Testamentary Trust

The Commission has not previously seen Section 12004, which provides:

12004. In case of a devise of income from a trust, the income commences at the testator's death.

Section 12004 is consistent with existing Probate Code Section 661 which provides: "In case of a bequest of the interest or income of a certain sum or fund, the interest or income accrues from the testator's death." Although it is not clear what "a certain sum or fund" means, the cases have uniformly applied it to refer to a testamentary trust.

A previous draft of this section was circulated but not considered by the Commission, and contained two distinct rules depending on whether the devise of income was from a residuary devise

or a general pecuniary devise in trust. Under the previous draft, income from a residuary devise in trust commenced at death, but income from a general pecuniary devise in trust commenced one year after death (subject to a contrary provision in the will).

Most lawyers who reviewed the former draft objected to the one-year-from-death rule for income from a general pecuniary devise in trust. Instead, they favored the commencement-at-death rule now in Section 12004. This was the view of State Bar Study Team 4 (Team 4 report of 8/28/86), the Probate, Trust and Estate Planning Section of the Beverly Hills Bar (Exhibit 1 to First Supplement to Memo 86-60), the Executive Committee of the Probate and Trust Law Section of the Los Angeles County Bar (Valerie Merritt letter of 8/25/86), attorney William Lyshak of Sacramento, and attorney Richard Kinyon of San Francisco.

The question of when income commences affects the value of the marital deduction under a formula clause: The value of the deduction is less if income commences one year after death than if it commences at death. See Drafting California Revocable Living Trusts § 4.27, at 131 (Cal. Cont. Ed. Bar 1984); Halstead, The Marital Deduction, in California Will Drafting Practice § 6.16, at 240 (Cal. Cont. Ed. Bar 1982). Section 12004 provides a clearer rule than does existing law. Does the Commission approve Section 12004?

Liability for Expenses of Specifically Devised Property

At the August 1985 meeting, the Commission asked the staff to deal with the case where earnings on a specific devise are insufficient to pay taxes on the property and expenses of upkeep. There was support for a rule requiring such expenses to be paid by the estate for one year, and by the specific devisee thereafter. This is the rule in subdivision (b) of Section 12002.

The Executive Committee of the Probate and Trust Law Section of the Los Angeles County Bar (Valerie Merritt letter of 8/25/86) objects to subdivision (b). The L.A. Bar wants all expenses of property specifically devised to be borne by the specific devisee, whether or not there is any income from the property. This is existing law. Estate of Reichel, 28 Cal. App.3d 156, 103 Cal. Rptr. 836 (1972). The L.A. Bar thinks existing law makes sense and should be continued:

The most common specific devise which does not generate sufficient income to pay its expenses is the personal residence of the decedent. Since normally the specific devisee has the ability to either allow the estate to rent the property (thereby generating income) or to live there (thereby getting the benefit of the use of the property), it is only fair that the specific devisee should bear the expenses. As a convenience to estate administration, perhaps the personal representative could be authorized to advance such expenses for a period of up to one year from the date of death of decedent, in order to protect and preserve the property, without any issue of surcharge of the representative for advancing the expenses during that period.

What is the Commission's view?

Respectfully submitted,

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TENTATIVE RECOMMENDATION
relating to
CONSTRUCTION OF WILLS, TRUSTS,
AND OTHER INSTRUMENTS

Abatement

If property not disposed of by the will (intestate property) and residuary property are not sufficient to pay debts, expenses of administration, and family allowance, general and specific devises must be abated (reduced).¹ The statute appears to require general and specific devises to abate proportionately, but, under case law, general devises must be exhausted before specific devises are reduced.² The new code continues existing law as judicially construed by requiring general devises to be exhausted before specific devises are reduced.³

The new code also continues the special abatement rule for pretermission cases that all devises under the will abate

1. Prob. Code § 750. See also Prob. Code §§ 736, 751-753. If the will designates the property to be used to pay debts, expenses of administration, or family allowance, the will controls. Prob. Code §§ 750-751. Within each class, the testator's spouse and kindred are preferred: Devises to nonrelatives within each class are exhausted before shares of a spouse or kindred are reduced. Prob. Code § 752; Estate of DeSanti, 53 Cal. App.2d 716, 719-21, 128 P.2d 434 (1942); In re Estate of Wever, 12 Cal. App.2d 237, 242, 55 P.2d 279 (1936). The proposed law makes clear that the preference for the testator's spouse and kindred includes all those who may take from the decedent by intestate succession — halfbloods, adoptees, persons born out of wedlock, and, in limited cases, stepchildren and foster children. See Prob. Code §§ 6406, 6408, 6408.5. Cf. Prob. Code § 6152.

2. Estate of Jenanyan, 31 Cal.3d 703, 711-12, 646 P.2d 196, 183 Cal. Rptr. 525 (1982).

3. In the new code, the abatement provisions apply to wills, trusts, deeds, and other instruments disposing of property at death. Hence the new provisions are located with other rules of construction for such instruments.

proportionately, whether specific, general, or residuary.⁴

Distribution of Interest and Income Accruing During Administration

The new code continues existing law concerning distribution of interest and income accruing during administration.⁵

4. Prob. Code §§ 6562, 6573. In the conventional abatement situation where the estate is insufficient to satisfy fully the devisees to those named in the will, it is consistent with the testator's probable intent to exhaust residuary devisees first, then general, and finally specific ones. However, a different abatement rule is needed in pretermission cases because a large, unanticipated share is taken from the estate for the omitted spouse or child: An omitted spouse takes all community and quasi-community property and one-third or one-half of decedent's separate property. Prob. Code § 6560. An omitted child may take as much as half of the decedent's separate property. Prob. Code §§ 6401-6402, 6570. The omitted spouse or child would likely have been a residuary devisee if the testator had thought to provide for him or her in the will. If the general abatement rule were applied in pretermission cases, the share of the omitted spouse or child would be taken first from residuary devisees. Since residuary devisees are usually those nearest and dearest to the testator, the result would likely be to take the shares of other family members to provide a statutory share for an omitted spouse or child. Thus the omitted spouse or child would likely receive a larger share than family members named in the will, a result probably contrary to the testator's intent. For this reason, the new code continues the existing proportional abatement rule for pretermission cases. Prob. Code §§ 6562, 6573. This carries out the testator's probable intent by requiring general and specific devisees to contribute proportionately with residuary devisees to make up the statutory share of the omitted spouse or child.

5. Prob. Code §§ 660-665. The code adds a provision that if the will devises income from a trust but does not specify when income commences, it commences at the testator's death. This is consistent with Probate Code Section 661, which provides that "[i]n case of a bequest of the interest or income of a certain sum or fund, the interest or income accrues from the testator's death." Although it is not clear what "a certain sum or fund" refers to, the cases have applied this language to mean a testamentary trust. See, e.g., Estate of Petersen, 92 Cal. App.2d 677, 682, 207 P.2d 607 (1949); Estate of Schiffmann, 86 Cal. App.2d 638, 642-44, 195 P.2d 484 (1948); Estate of DeLano, 62 Cal. App.2d 808, 816, 145 P.2d 672 (1944); Estate of Hyland, 58 Cal. App.2d 556, 137 P.2d 73 (1943); Estate of Dasher, 53 Cal. App.2d 721, 724-25, 128 P.2d 380 (1942); In re Estate of Lair, 38 Cal. App.2d 737, 740, 102 P.2d 436 (1940).

DIVISION 1. PRELIMINARY PROVISIONS AND DEFINITIONS

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- § 30. Demonstrative devise
- § 42. General devise
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- § 12001. Rate of interest
- § 12002. Earnings on and expenses of specific devise
- § 12003. Interest on general pecuniary devise
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DIVISION 11. CONSTRUCTION OF WILLS, TRUSTS,
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CHAPTER 1. SCOPE AND DEFINITIONS

- § 21100. Definitions
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- § 21400. Purposes for which abatement made
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- § 21403. No sale of specific devise to exonerate other devise

CONFORMING REVISION

DISPOSITION OF EXISTING SECTIONS

DIVISION 1. PRELIMINARY PROVISIONS AND DEFINITIONS

PART 2. DEFINITIONS§ 23.5. Annuity

23.5. "Annuity" means a general devise of a specified amount periodically.

Comment. Section 23.5 restates the first clause of subdivision (c) of former Probate Code Section 662 without substantive change. The reference in Section 23.5 to an annuity as a "general" devise or gift is new, but is consistent with subdivision (c) of former Probate Code Section 662 (if indicated fund fails, resort may be had to general assets as in case of general devise) and with case law. See Estate of Luckel, 151 Cal. App.2d 481, 493-95, 312 P.2d 24 (1957) (annuity is a "general charge on the testator's whole estate"). For the priority that an annuity has over other general devises, see Section 21401(b).

CROSS-REFERENCES

Definitions

Devise § 32

General devise § 42

Property § 62

§ 30. Demonstrative devise

30. "Demonstrative devise" means a general devise that specifies the fund or property from which the devise is to be made.

Comment. Section 30 restates subdivision (b) of former Probate Code Section 662 without substantive change. The reference in Section 30 to a demonstrative devise as a "general" devise is new, but is consistent with prior law. See former Probate Code Section 662(c) (if indicated fund fails, resort may be had to general assets as in case of general devise); 7 B. Witkin, Summary of California Law Wills and Probate § 214, at 5725 (8th ed. 1974) (same); Estate of Cline, 67 Cal. App.2d 800, 805-05, 155 P.2d 390 (1945) (demonstrative devise is "in the nature of" a general devise; reference to particular fund is for convenient method of payment); Johnston, Outright Bequests, in California Will Drafting § 11.92, at 401 (Cal. Cont. Ed. Bar 1965) (demonstrative devise is "similar to" general devise). For the priority that a demonstrative devise has over other general devises, see Section 21401(b).

CROSS-REFERENCES

Definitions

Devise § 32

General devise § 42

Property § 62

§ 42. General devise

42. "General devise" means a devise from the general estate that does not give specific property.

Comment. Section 42 supersedes subdivision (e) of former Probate Code Section 662 and is consistent with case law under the former provision. See Estate of Buck, 32 Cal.2d 372, 374, 196 P.2d 769 (1948); Estate of Sullivan, 128 Cal. App.2d 144, 146, 274 P.2d 946 (1954); Estate of Jones, 60 Cal. App.2d 795, 798, 141 P.2d 764 (1943).

CROSS-REFERENCES

Definitions

Devise § 32
Property § 62

§ 69. Residuary devise

69. "Residuary devise" means a devise of the property that remains after all specific and general devises have been satisfied.

Comment. Section 69 restates subdivision (d) of former Probate Code Section 662 without substantive change.

CROSS-REFERENCES

Definitions

Devise § 32
General devise § 42
Property § 62
Specific devise § 73

§ 73. Specific devise

73. "Specific devise" means a devise of specific property, distinguished from all other property of the same kind in the estate.

Comment. Section 73 restates a portion of subdivision (a) of former Probate Code Section 662 without substantive change, and is consistent with case law. See Estate of Ehrenfels, 241 Cal. App.2d 215, 221, 50 Cal. Rptr. 358 (1966).

CROSS-REFERENCES

Definitions

Devise § 32
Property § 62

DIVISION 7. ADMINISTRATION OF ESTATES OF DECEDENTS

PART 10. DISTRIBUTION OF ESTATE

CHAPTER 8. INTEREST AND INCOME ACCRUING
DURING ADMINISTRATION

§ 12000. Testator's intention controls

12000. The provisions of this chapter apply where the intention of the testator is not indicated by the will.

Comment. Section 12000 restates without substantive change former Probate Code Section 660 and the introductory clause of subdivision (a) of former Probate Code Section 664. The language of Section 12000 is drawn from Sections [6140(b)] and [6165].

CROSS-REFERENCES

Definitions

Will § 88

§ 12001. Rate of interest

12001. When interest is payable under this chapter, the rate of interest is that payable on a money judgment entered in this state.

Comment. Section 12001 restates portions of subdivisions (a) and (c) of former Probate Code Section 663 without substantive change. For the rate of interest payable on a money judgment entered in this state, see Code Civ. Proc. § 685.010 (10 per cent per annum on unpaid principal). The rule of Section 12001 applies where the intention of the testator is not indicated by the will. Section 12000.

CROSS-REFERENCES

Trustee's liability for interest § 16441

§ 12002. Earnings on and expenses of specific devise

12002. (a) A specific devise carries with it the earnings on the specified property from the date of death, less taxes and other expenses attributable to that property during administration of the estate.

(b) If the earnings on specifically devised property are not sufficient to pay expenses attributable to the property, including taxes on the property, the expenses shall be paid out of the estate for one year after the testator's death or until the property is

distributed to the devisee, whichever occurs first. Thereafter, the expenses shall be borne by the devisee.

(c) Except as provided in subdivision (a), a specific devise does not bear interest.

Comment. Section 12002 is new. Section 12002 applies to specific devises of real and personal property. See Sections 32 ("devise" defined), 73 ("specific devise" defined). The rule of Section 12002 applies where the intention of the testator is not indicated by the will. Section 12000.

Subdivision (a) of Section 12002 codifies case law. See, e.g., In re Estate of Daly, 202 Cal. 284, 287, 260 P. 296 (1927) (stock); Estate of McKenzie, 199 Cal. App.2d 393, 400, 18 Cal. Rptr. 680 (1962) (inheritance from another estate); Estate of Bixby, 140 Cal. App.2d 326, 334, 295 P.2d 68 (1956) (stock).

Subdivision (b) changes the rule of Estate of Reichel, 28 Cal. App.3d 156, 103 Cal. Rptr. 836 (1972) (expenses on property specifically devised borne by specific devisee, whether or not the property produces income). If expenses relating to a specific devise are paid out of the estate pursuant to subdivision (b), they are imposed on distributees according to the abatement rules in Sections 21400-21403. Subdivision (b) authorizes payment from the estate to maintain the property, but not to improve it.

Subdivision (c) codifies case law. See Estate of McKenzie, supra at 399-400.

CROSS-REFERENCES

Definitions

Devise § 32

Devisee § 34

Property § 62

Specific devise § 73

§ 12003. Interest on general pecuniary devise

12003. If a general pecuniary devise, including a general pecuniary devise in trust, is not distributed before the first anniversary of the testator's death, the devise bears interest thereafter. In the case of a general pecuniary devise in trust, the interest shall be distributed as income to the trust.

Comment. The first sentence of Section 12003 restates a portion of subdivision (a) of former Probate Code Section 663 without substantive change.

The second sentence of Section 12003 restates the last portion of subdivision (b) of former Probate Code Section 664 without substantive change. Interest distributed as income to the trust under this provision is treated by the trustee as income of the trust. Section 16305(a) (Revised Uniform Principal and Income Act).

The rule of Section 21452 applies where the intention of the testator is not indicated by the will. Section 21410.

CROSS-REFERENCES

Definitions

Devise § 32
General devise § 42
Trust § 82
Rate of interest § 12001

§ 12004. Devise of income from testamentary trust

12004. In case of a devise of income from a trust, the income commences at the testator's death.

Comment. Section 12004 restates former Probate Code Section 661 as it applied to trusts. The rule of Section 12004 applies where the intention of the testator is not indicated by the will. Section 12000.

CROSS-REFERENCES

Definitions

Devise § 32
Trust § 82

[Note. The Commission has not previously seen Section 12004.]

§ 12005. Annuity; interest on periodic payments

12005. (a) An annuity commences at the testator's death and is due at the end of the annual, monthly, or other specified period.

(b) Whenever an annuitant, devisee of a devise for maintenance, or beneficiary of a trust, is entitled to periodic payments or trust income commencing at the testator's death, the annuitant, devisee, or beneficiary is entitled to interest on the amount of any unpaid accumulations of the payments or income held by the personal representative on each anniversary of the decedent's death. No interest accrues during the first year after the decedent's death.

Comment. Subdivision (a) of Section 12005 continues subdivision (b) of former Probate Code Section 663 without change. The first sentence of subdivision (b) restates the first portion of subdivision (c) of former Probate Code Section 663 without substantive change. The second sentence of subdivision (b) restates what appears to have been the substance of the last portion of subdivision (c) of former Probate Code Section 663 (interest "computed from the date of such anniversary"). See 7 B. Witkin, Summary of California Law Wills and

Probate § 449, at 5891 (8th ed. 1974); California Will Drafting Practice § 8.67, at 372, § 9.59, at 429 (Cal. Cont. Ed. Bar 1982).

The rule of Section 12005 applies where the intention of the testator is not indicated by the will. Section 12000.

CROSS-REFERENCES

Definitions

Annuity § 23.5

Devise § 32

Devisee § 34

Personal representative § 58

Trust § 82

Rate of interest § 12001

§ 12006. Remaining income to residuary or intestate distributees

12006. (a) Net income received during administration not paid out under other provisions of this chapter and not otherwise devised shall be distributed pro rata as income among all distributees of residuary or intestate property. If a distributee takes in trust or for life or for a term of years, the pro rata share of income is trust income or belongs to the tenant for life or the term of years.

(b) Net income under subdivision (a) includes net income from property sold during administration.

Comment. Section 12006 restates a portion of former Probate Code Section 664 without substantive change. The reference in Section 12006 to intestate property is new, and recognizes that there may be a partial intestacy in a testate estate.

The rule of Section 12006 applies where the intention of the testator is not indicated by the will. Section 12000.

CROSS-REFERENCES

Definitions

Devise § 32

Property § 62

Trust § 82

§ 12007. Transitional provision

12007. (a) The provisions of this chapter apply on [the operative date] without regard to when the will was executed or when the decedent died.

(b) A reference in a written instrument, including a will or trust, to a provision of former Chapter 8 (commencing with Section 160) of former Division 1, or former Chapter 11 (commencing with Section 660) of former Division 3, shall be deemed to be a reference to the corresponding provision of this chapter.

Comment. Subdivision (a) of Section 12007 supersedes subdivision (a) of former Probate Code Section 665, and makes clear that this chapter applies to estate proceedings pending on the operative date.

Subdivision (b) continues the substance of subdivision (b) of former Probate Code Section 665, and includes a reference to former Chapter 11 of Division 3 in which former Probate Code Section 665 was found.

CROSS-REFERENCES

Definitions

Will § 88

Trust § 82

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) "Decedent" means the testator, settlor, grantor, or other person who executes an instrument that makes a disposition of property on the person's death.

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

(c) "Instrument" means a will, trust, deed, or other instrument that makes a disposition of property on a person's death.

Comment. Subdivisions (a) and (c) of Section 21100 are new. Subdivision (b) restates former Probate Code Section 1030(f) without substantive change.

CROSS-REFERENCES

Definitions

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

Note. Section 21100 is being revised in connection with Memorandum 87-7 (marital deduction gifts), and when revised will supersede this section.

§ 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 that makes a disposition of property on a person's death.

Comment. Section 21101 is new.

CROSS-REFERENCES

Definitions

Property § 62
Trust § 82
Will § 88

Note. Section 21101 is being revised in connection with Memorandum 87-7 (marital deduction gifts), and when revised will supersede this section.

§ 21102. Decedent's intention controls

21102. The provisions of this division apply where the intention of the decedent is not indicated by the instrument.

Comment. Section 21102 restates without substantive change a portion of the first sentence of former Probate Code Section 750, paragraph (1) of former Probate Code Section 751, and a portion of former Probate Code Section 752. The language of Section 21102 is drawn from Sections [6140(b)] and [6165].

CROSS-REFERENCES

Definitions

Decedent § 21100
Instrument § 21100

PART 4. ABATEMENT

§ 21400. Purposes for which abatement made

21400. (a) Except as provided in Sections 6562 and 6573, shares of distributees abate as provided in this part for all purposes, including payment of the debts, expenses, and charges specified in Section 11420, satisfaction of devises, and payment of expenses on specifically devised property pursuant to Section 12002, and without any priority as between real and personal property.

(b) When distribution is made in estate administration, the court shall fix the amount each person shall contribute and reserve that amount from the person's distributive share.

(c) If a specific devisee is required to contribute, the specific devisee may pay the contribution out of personal assets in lieu of having the specifically devised property sold.

Comment. Subdivision (a) of Section 21400 restates a portion of the first sentence of former Probate Code Section 750 and a portion of the introductory clause of former Probate Code Section 751 without substantive change. The provision that there is no priority as between real and personal property restates the first sentence of former Probate Code Section 754 without substantive change, and is consistent with Section 3-902 of the Uniform Probate Code and with California case law. See In re Estate of Woodworth, 31 Cal. 595, 614 (1867).

Subdivision (b) of Section 21400 restates the last portion of former Probate Code Section 753 without substantive change. Subdivision (c) is new.

CROSS-REFERENCES

Definitions

Devise § 32

Devisee § 34

Property § 62

Real property § 68

Specific devise § 73

§ 21401. Order of abatement

21401. Except as provided in Sections 21402 and 21403:

(a) Shares of distributees abate in the following order:

- (1) Property not disposed of by the instrument.
- (2) Residuary devisees.
- (3) General devisees to persons not related to the decedent.
- (4) General devisees to the decedent's spouse or kindred.
- (5) Specific devisees to persons not related to the decedent.
- (6) Specific devisees to the decedent's spouse or kindred.

(b) Annuities and demonstrative devisees have priority over other general devisees against the property or fund from which they are to be made. To the extent the fund or property is insufficient, the annuity or demonstrative devise may be made from the general estate as in the case of other general devisees.

(c) Within each class as specified in this section, shares of distributees abate pro rata.

Comment. Subdivision (a) of Section 21401 replaces the second sentence of former Probate Code Section 750 and all of former Probate Code Sections 751 and 752. Paragraphs (1) and (2) of subdivision (a) of Section 21401 restate the first portion of the second sentence of former Probate Code Section 750 and all of former Probate Code Section 751 without substantive change. The preference for specific devisees in paragraphs (5) and (6) over general devisees in paragraphs (3) and (4) continues the rule of Estate of Jenanyan, 31 Cal.3d 703, 711-12, 646 P.2d 196, 183 Cal. Rptr. 525 (1982).

The preference for spouse and kindred in paragraphs (4) and (6) of subdivision (a) continues the last portion of former Probate Code Section 752. As used in Section 21401, "kindred" means persons related to the decedent by blood (including halfbloods and persons born out of wedlock) and adopted persons, and, to a limited degree, stepchildren and foster children. Section 6152. See also Estate of Buck, 32 Cal.2d 372, 376, 196 P.2d 769 (1948); Estate of DeSanti, 53 Cal. App.2d 716, 719-20, 128 P.2d 434 (1942).

Subdivision (b) of Section 21401 restates the last portion of subdivision (c) of former Probate Code Section 662 without substantive change. With respect to the fund designated for payment of an annuity or demonstrative devise, the priority given by subdivision (b) controls over the priority that the decedent's spouse and kindred have for other general devisees under paragraph (4) of subdivision (a). Thus a general devise to the decedent's spouse or kindred will abate before abatement of the fund designated for an annuity for a nonrelative that will reduce the annuity.

Subdivision (c) of Section 21401 restates a portion of the second sentence of former Probate Code Section 750 and a portion of former Probate Code Section 752 without substantive change, and supersedes

the first portion of former Probate Code Section 753 (if preferred devise sold, all devisees must contribute).

The order of abatement provided in Section 21401 applies where the intention of the decedent is not indicated by the instrument. Section 21102. If the instrument expresses an order of abatement, or if the testamentary plan or the express or implied purpose of the devise would be defeated by the order of abatement stated in Section 21401, the shares of the distributees abate as the court determines is necessary to give effect to the intention or purpose of the decedent. Section 21402.

CROSS-REFERENCES

Definitions

Annuity § 23.5
Decedent § 21100
Demonstrative devise § 30
Devise § 32
General devise § 42
Instrument § 21100
Person § 56
Property § 62
Residuary devise § 69
Specific devise § 73

§ 21402. Court discretion to carry out decedent's intent

21402. If the instrument expresses an order of abatement, or if the testamentary plan or the express or implied purpose of the devise would be defeated by the order of abatement stated in Section 21401, the shares of the distributees abate as the court determines is necessary to give effect to the intention or purpose of the decedent.

Comment. Section 21402 is drawn from subdivision (b) of Section 3-902 of the Uniform Probate Code. Section 21402 is generally consistent with prior law. See former Probate Code Sections 750-752; Estate of Jenanyan, 31 Cal.3d 703, 713-14, 646 P.2d 196, 183 Cal. Rptr. 525 (1982) (extrinsic evidence admissible concerning abatement).

CROSS-REFERENCES

Definitions

Decedent § 21100
Devise § 32
Instrument § 21100

§ 21403. No sale of specific devise to exonerate other devise

21403. When a decedent devises real property subject to a mortgage, deed of trust, or other lien and the intention is indicated by the instrument that the mortgage, deed of trust, or other lien is to be exonerated, other property specifically devised shall not be sold for the purpose of exonerating the encumbered property.

Comment. Section 21403 continues former Probate code Section 736 without substantive change. Section 21403 applies where the intention of the decedent is not indicated by the instrument. Section 21102.

CROSS-REFERENCES

Definitions

Decedent § 21100

Devise § 32

Property § 62

Real property § 68

Specific devise not exonerated § [6170]

CONFORMING REVISION

Probate Code § 6152 (amended). Halfbloods, adopted persons, and persons born out of wedlock

6152. Unless otherwise provided in the will:

(a) Except as provided in subdivision (b), halfbloods, adopted persons, persons born out of wedlock, stepchildren, foster children, and the issue of all such persons when appropriate to the class, are included in terms of class gift or relationship in accordance with the rules for determining relationship and inheritance rights for purposes of intestate succession.

(b) In construing a devise by a testator who is not the natural parent, a person born to the natural parent shall not be considered the child of that parent unless the person lived while a minor as a regular member of the household of the natural parent or of that parent's parent, brother, sister, spouse, or surviving spouse. In construing a devise by a testator who is not the adoptive parent, a person adopted by the adoptive parent shall not be considered the child of that parent unless the person lived while a minor (either before or after the adoption) as a regular member of the household of the adopting parent or of that parent's parent, brother, sister, or surviving spouse.

(c) Subdivisions (a) and (b) also apply in determining:

(1) Persons who would be kindred of the testator or kindred of a surviving, deceased, or former spouse of the testator under Section 6147.

(2) Person to be included as issue of a deceased devisee under Section 6147.

(3) Persons who would be the testator's or other designated person's heirs under Section 6151.

(4) Persons who would be kindred of the decedent under Section 21401.

Comment. Section 6152 is amended to add paragraph (4) to subdivision (c).

DISPOSITION OF EXISTING SECTIONS

DIVISION 3. ADMINISTRATION OF ESTATES OF DECEDENTS

CHAPTER 11. LEGACIES AND INTEREST

§ 660 (repealed). Testator's intention controls

Comment. Former Probate Code Section 660 is restated in Estate and Trust Code Section 12000 without substantive change.

§ 661 (repealed). Bequest of interest or income of certain sum

Comment. Former Probate Code Section 661 is superseded by Estate and Trust Code Section 12004 (devise of income from testamentary trust). The meaning of the reference in former Probate Code Section 661 to a bequest of interest or income of "a certain sum or fund" was unclear. However, as applied by case law under the former section, it appears that "certain sum or fund" referred to a testamentary trust. See, e.g., Estate of Petersen, 92 Cal. App.2d 677, 682, 207 P.2d 607 (1949); Estate of Schiffmann, 86 Cal. App.2d 638, 642-44, 195 P.2d 484 (1948); Estate of DeLano, 62 Cal. App.2d 808, 816, 145 P.2d 672 (1944); Estate of Hyland, 58 Cal. App.2d 556, 137 P.2d 73 (1943); Estate of Dasher, 53 Cal. App.2d 721, 724-25, 128 P.2d 380 (1942); In re Estate of Lair, 38 Cal. App.2d 737, 740, 102 P.2d 436 (1940).

§ 662 (repealed). Kinds of legacies

Comment. The first portion of subdivision (a) of former Probate Code Section 662 is restated in Estate and Trust Code Section 73 ("specific devise" defined) without substantive change. The last portion of subdivision (a) (if specific gift fails, resort cannot be had to testator's other property) is superseded by subdivision (b) of Estate and Trust Code Section 21400 (abatement after sale of specifically devised property) and by the ademption rules. See, e.g., Sections [6165, 6171-6173].

Subdivision (b) of former Probate Code Section 662 is restated in Estate and Trust Code Section 30 ("demonstrative devise" defined) without substantive change.

The first portion of subdivision (c) of former Probate Code Section 662 is restated in Estate and Trust Code Section 23.5 ("annuity" defined) without substantive change. The last portion of subdivision (c) is restated in subdivision (b) of Estate and Trust Code Section 21401 (priority of annuity or demonstrative devise) without substantive change.

Subdivision (d) of former Probate Code Section 662 is restated in Estate and Trust Code Section 69 ("residuary devise" defined) without substantive change.

Subdivision (e) of former Probate Code Section 662 is superseded by Estate and Trust Code Section 42 ("general devise" defined).

§ 663 (repealed). Interest; annuities

Comment. Subdivision (a) of former Probate Code Section 663 is restated in Estate and Trust Code Sections 12001 (rate of interest) and 12003 (interest on general pecuniary devise) without substantive change.

Subdivision (b) of former Probate Code Section 663 is continued in subdivision (a) of Estate and Trust Code Section 12005.

Subdivision (c) of former Probate Code Section 663 is superseded by Estate and Trust Code Section 12001 (rate of interest) and by subdivision (b) of Estate and Trust Code Section 12005 (interest on unpaid periodic payments). Under Estate and Trust Code Section 12001, interest is simple interest unless the personal representative is guilty of a willful breach of duty. See the Comment to Section 12001.

§ 664 (repealed). Distribution of income from certain property

Comment. Subdivision (a) of former Probate Code Section 664 is restated in Estate and Trust Code Sections 12000 (testator's intention controls) and 12006 (remaining income to residuary or intestate distributees) without substantive change.

The provision of subdivision (b) of former Probate Code Section 664 that no income received during administration shall be distributed as income of a general pecuniary legacy in trust is restated in the provision of Section 12006 that net income received during administration not paid out under Sections 12000-12005 goes to distributees of residuary or intestate property. The provision of subdivision (b) of former Probate Code Section 664 that interest on a pecuniary legacy in trust shall be distributed as income to the trust is restated in the second sentence of Estate and Trust Code Section 12003 without substantive change.

§ 665 (repealed). Transitional provision

Comment. Subdivision (a) of former Probate Code Section 665 is superseded by subdivision (a) of Estate and Trust Code Section 12007. Subdivision (b) of former Probate Code Section 665 is continued in subdivision (b) of Estate and Trust Code Section 12007 without substantive change.

CHAPTER 12. PRESENTATION AND PAYMENT
OF CLAIMS

Probate Code § 736 (repealed). No sale of specific devise to
exonerate other devise

Comment. Former Section 736 is continued in Estate and Trust Code Section 21403 without substantive change.

CHAPTER 13. ABATEMENT

Probate Code § 750 (repealed). Abatement for payment of debts,
expenses of administration, and family allowance

Comment. The first sentence of former Probate Code Section 750 is continued in Estate and Trust Code Sections 21102 and 21400(a) without substantive change. The first portion of the second sentence of former Probate Code Section 750 is superseded by Estate and Trust Code Section 21401. The last portion of the second sentence of former Probate Code Section 750 (court discretion) is superseded by Estate and Trust Code Section 21402.

Probate Code § 751 (repealed). Order of payment of legacies

Comment. Former Probate Code Section 751 is superseded by Estate and Trust Code Section 21401.

Probate Code § 752 (repealed). Abatement within class; legacies to
spouse or kindred

Comment. Former Probate Code Section 752 is superseded by Estate and Trust Code Section 21401.

Probate Code § 753 (repealed). Contribution after sale of property

Comment. The first portion of former Probate Code Section 753 (if preferred devise sold, all others must contribute) is superseded by subdivision (c) of Estate and Trust Code Section 21401 (pro rata abatement within each class). The last portion of former Probate Code Section 753 (court to decree each person's contribution when distribution is made) is continued in subdivision (b) of Estate and Trust Code Section 21400 without substantive change.