

Memorandum 87-16

Subject: Study L-1029 - Amendments to AB 708 (Marital Deduction  
Gifts)

Attached to this memorandum as Exhibit 1 are amendments to AB 708 that would incorporate the Commission's recommendation on marital deduction gifts. Also attached is a draft of the recommendation, to be approved for printing. We have sent this draft to our experts for review before the meeting, and should be able to take care of any remaining problems and approve the recommendation at the meeting.

Respectfully submitted,

Nathaniel Sterling  
Assistant Executive Secretary

Exhibit 1

AMENDMENTS TO AB 708  
(Marital Deduction Gifts)

AMENDMENT 1

On page 6, line 17, after "Beneficiary", insert:  
means a person to whom a donative transfer of property is made or the  
person's successor in interest, and

AMENDMENT 2

On page 6, line 19, after "heir", insert a period.

AMENDMENT 3

On page 6, line 19, strike out "and, as", and insert:  
(b) As

AMENDMENT 4

On page 6, line 21, strike out "(b)" and insert:  
(c)

AMENDMENT 5

On page 6, lines 22 to 24, strike out ", and includes an owner of  
an interest by assignment or by other transfer".

AMENDMENT 6

On page 6, line 25, strike out "(c)", and insert:  
(d)

AMENDMENT 7

On page 160, following line 40, insert:

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 Section 15005 of the Probate Code is repealed.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

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.

SEC. . Division 11 (commencing with Section 21100) is added to the Probate Code, to read:

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

PART 1. GENERAL PROVISIONS

CHAPTER 1. SCOPE AND 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 donative transfer of property.

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

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

## CHAPTER 2. MISCELLANEOUS PROVISIONS

21120. (a) If an instrument authorizes a 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 transfer 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.

## PART 5. COMPLIANCE WITH INTERNAL REVENUE CODE

### CHAPTER 1. GENERAL PROVISIONS

21500. As used in this part, "Internal Revenue Code" means the Internal Revenue Code of 1986, as amended from time to time. A reference to a provision of the Internal Revenue Code includes any subsequent provision of law enacted in its place.

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.

21502. If an instrument makes a transfer of property under a formula intended to eliminate or reduce the federal estate tax or the federal gift tax, a transfer of property under the formula shall be applied only to that portion of the federal estate or gift tax that is subject to elimination or reduction and shall not be applied to that portion of the federal estate or gift tax that is not subject to elimination or reduction.

## CHAPTER 2. MARITAL DEDUCTION GIFTS

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 transfer of property that is intended to qualify for the marital deduction.

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 (commonly referred to as the "estate trust").

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.

(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.

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.

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) or Section 2523(f) 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.

21525. If an instrument includes a requirement that the transferor's spouse survive the transferor by a specified period or that the transferor's spouse survive a common disaster that results in the transferor's death, or either of these requirements, the survival requirement, as applied to property passing under a marital deduction gift, shall be limited to the shorter of the period expressed in the instrument or a six-month period beginning with the transferor's death.

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) or Section 2523(f) of the Internal Revenue Code.

### CHAPTER 3. CHARITABLE GIFTS

21540. If an instrument indicates the transferor's intention 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 or Section 2522 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 Section 2055(e) or Section 2522(c) of the Internal Revenue Code on a petition provided for in Section 17200.

21541. If an instrument indicates the transferor's intention to comply with the requirements for a charitable lead trust as described in Section 170(f)(2)(B) and Section 2055(e)(2) or Section 2522(c)(2) 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 Section 17200.



NSJ

STATE OF CALIFORNIA  
CALIFORNIA LAW  
REVISION COMMISSION

Staff Draft

RECOMMENDATION

relating to

MARITAL DEDUCTION GIFTS

March 1987

CALIFORNIA LAW REVISION COMMISSION  
4000 Middlefield Road, Suite D-2  
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NSJ

March 12, 1987

To: The Honorable George Deukmejian  
Governor of California  
and  
The Legislature of California

The California Law Revision Commission is now devoting its time and resources almost exclusively to the study of probate law and procedure. The Commission is preparing a new code to replace the existing Probate Code.

The Commission has decided not to delay submitting all recommendations for the improvement of probate law until work on the new code is completed. This recommendation is one of those which is being submitted for enactment prior to the submission of the entire code.

The recommended legislation replaces the existing provisions governing marital deduction gifts (existing Prob. Code §§ 1030-1039). The Commission wishes to express special appreciation to Robert A. Mills of San Francisco and Professor Edward C. Halbach, Jr., of Boalt Hall, for their substantial help in the development of this recommendation. Kenneth M. Klug of Fresno also assisted the Commission and its staff on this project.

This recommendation is submitted pursuant to Resolution Chapter 37 of the Statutes of 1980.

Respectfully submitted,

ARTHUR K. MARSHALL  
Chairperson

Staff Draft

Recommendation  
relating to  
MARITAL DEDUCTION GIFTS

Existing law governing construction of marital deduction gifts in wills<sup>1</sup> applies to marital deduction gifts in trusts as well.<sup>2</sup> 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 provisions<sup>3</sup> governing compliance with Internal Revenue Code requirements, and makes other technical and clarifying revisions.<sup>4</sup>

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1. Prob. Code §§ 1030-1039.

2. Prob. Code § 15005 (law applicable to marital deduction gifts in trust) (Cal. Stat. 1986, ch. 820, operative July 1, 1987), which restates 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 I. R. C. § 170(f)(2)(B).

4. The proposed legislation provides a rule of construction for formula clauses intended to eliminate or reduce the federal estate tax. The rule of construction makes clear that a formula clause applies only to that portion of the estate tax that is subject to elimination or reduction. This will cure the problem in application of a formula clause caused by enactment of a non-reducible estate tax. I. R. C. § 4981(d), enacted by the Tax Reform Act of 1986, § 1133.

For other changes, see the Comments to the proposed legislation, infra.

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.<sup>5</sup>

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:<sup>6</sup>

(1) In the case of a pre-September 13, 1981, formula marital deduction gift, typical language would appear to require that the gift be reduced by any amount qualified by a QTIP trust election.<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup>

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5. I. R. C. § 2523.

6. I. R. C. § 2056(b)(7).

7. Prob. Code § 1034(c).

8. I. R. C. § 2056(b)(7)(B)(ii)(I).

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

10. It is conceivable that proposed regulations may be adopted that enable the unpaid income to pass with principal. A change in the law is recommended nonetheless, since such regulations may never become final or may be found to be inconsistent with the underlying law.

(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, 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.<sup>11</sup>

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11. 79 Kan. Stat. Ann. § 1537d (1984).

OUTLINE

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. Application of formula clause to federal estate tax

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 donative transfer 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 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  
Person § 56  
Personal representative § 58  
Property § 62  
Trust § 82  
Trustee § 84  
Will § 88

§ 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. This division does not apply to an instrument if its terms expressly or by necessary implication make this division inapplicable. *Cf.* former Section 15005(b).

## CROSS-REFERENCES

### Definitions

Instrument § 21100  
Trust § 82  
Will § 88

## CHAPTER 2. MISCELLANEOUS PROVISIONS

### § 21120. Satisfaction of a pecuniary gift

21120. (a) If an instrument authorizes a 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 transfer 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 Section 1033(a) without substantive change. Subdivision (b) restates former 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 Internal Revenue Code of 1986, as amended from time to time. A reference to a provision of the Internal Revenue Code includes any subsequent provision of law enacted in its place.

Comment. Section 21500 restates former Section 1030(g) without substantive change. 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 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 Section 15005 (law applicable to marital deduction gifts in trust).

CROSS-REFERENCES

Definitions

Instrument § 21100

Transferor § 21100

§ 21502. Application of formula clause to federal estate tax

21502. If an instrument makes a transfer of property under a formula intended to eliminate or reduce the federal estate tax or the federal gift tax, a transfer of property under the formula shall be applied only to that portion of the federal estate or gift tax that is subject to elimination or reduction and shall not be applied to that portion of the federal estate or gift tax that is not subject to elimination or reduction.

Comment. Section 21502 establishes a rule of construction that would apply a formula clause only to the portion of the estate or gift tax that may be reduced or eliminated by credits and deductions. The effect of this rule is that the formula clause applies to the tax imposed by chapter 11 (commencing with Section 2001) or chapter 12 (commencing with Section 2501) of Subtitle B of the Internal Revenue Code and not to the tax imposed by Section 4981(d) of the Internal Revenue Code.

CROSS-REFERENCES

Definitions

Instrument § 21100

Property § 62

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 transfer of property that is intended to qualify for the marital deduction.

Comment. Section 21520 restates former 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

§ 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 (commonly referred to as the "estate trust").

Comment. Section 21521 restates the fourth sentence of former 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.

(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 21522 restate the first three sentences of subdivision (a) of former Section 1032 without substantive change. See Sections 21500 ("Internal Revenue Code" defined) and 21520 ("marital deduction gift" defined). Subdivision (c) restates former 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 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 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

#### § 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) or Section 2523(f) 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 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

#### § 21525. Survival requirement for marital deduction gift

21525. If an instrument includes a requirement that the transferor's spouse survive the transferor by a specified period or that the transferor's spouse survive a common disaster that results in the transferor's death, or either of these requirements, the survival requirement, as applied to property passing under a marital deduction gift, shall be limited to the shorter of the period expressed in the instrument or a six-month period beginning with the transferor's death.

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) or Section 2523(f) of the Internal Revenue Code.

Comment. Section 21526 supersedes the fifth sentence of former Section 1032(a). It is analogous to 79 Kansas Statutes Annotated, Section 1537d (1984).

CROSS-REFERENCES

Definitions

Fiduciary § 21100  
Internal Revenue Code § 21500

CHAPTER 3. CHARITABLE GIFTS

§ 21540. Charitable remainder unitrusts and annuity trusts

21540. If an instrument indicates the transferor's intention 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 or Section 2522 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 Section 2055(e) or Section 2522(c) of the Internal Revenue Code on a petition provided for in Section 17200.

Comment. Section 21540 restates subdivision (b) of former Probate Code Section 1032 and applies it to living as well as testamentary trusts. Whether an instrument contains a gift under this section depends upon the intention of the transferor at the time the instrument is executed.

CROSS-REFERENCES

Definitions

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

§ 21541. Charitable lead trusts

21541. If an instrument indicates the transferor's intention to comply with the requirements for a charitable lead trust as described in Section 170(f)(2)(B) and Section 2055(e)(2) or Section 2522(c)(2) 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 Section 17200.

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 superseded by Section 21526 (QTIP election).

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 not continued. It duplicated Section 11 (severability clause).

Probate Code § 1039 (repealed)

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

CONFORMING CHANGES

Prob. Code § 24. "Beneficiary" defined

SEC. . Section 24 of the Probate Code, as amended by Assembly Bill No. 708 (1987), is amended to read:

24. "Beneficiary" means a person to whom a donative transfer of property is made or the person's successor in interest, and:

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

(b) As it relates to the estate of a decedent who died testate, means a devisee.

(~~b~~) (c) 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.~~

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

Comment. The introductory clause of Section 24 is amended to expand the application of the definition to other donative transfers in addition to wills and trusts. Cf. Section 21100(b) ("instrument" means will, trust, deed, or other writing that designates a beneficiary or makes a donative transfer of property). The introductory clause also generalizes the provision of Section 24 that relates to successors in interest of a beneficiary. Successors in interest include assignees and other transferees of an interest in a donative transfer of property.

CROSS-REFERENCES

Definitions

- Devisee § 34
- Heirs § 44
- Person § 56
- Trust § 82

Note. This section points up a technical defect in the draft of the Probate Code: the definitions of "heir" and "devisee" fail to include successors in interest. If "beneficiary" were used consistently instead, this problem would be partially eliminated. But because the definition of beneficiary uses the terms "heir" and "devisee", the definition of beneficiary could be construed to be limited by the definitions of heir and devisee.

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).