

Memorandum 87-61

Subject: Study L-1038 - Abatement; Interest and Income Accruing During Administration

Attached is a staff draft of a Tentative Recommendation Relating to Abatement, and Interest and Income Accruing During Administration. The draft is revised to reflect Commission decisions at the last meeting. Questions pertaining to individual sections are raised in staff notes under the appropriate section. The question discussed below pertains to the interest and income provisions as a whole.

Application of Interest and Income Provisions

Chapter 8 (commencing with Section 12000) applies to administration of decedents' estates, the same as existing law (Prob. Code §§ 660-665). The Commission asked the staff to consider whether the chapter should be broadened to apply to trusts and other cases outside the context of estate administration. The staff has not so broadened the chapter because some of the provisions do not work well unless there is an estate being administered, and the Revised Uniform Principal and Income Act (Prob. Code §§ 16300-16313) already provides rules for trusts outside the context of estate administration.

If some rules in Chapter 8 seem desirable in the context of trusts generally -- such as the rule that unpaid periodic payments draw interest (Section 12005) -- we could adopt a provision as follows:

§ 12008. Application of chapter to trusts, deeds, and other instruments

12008. Nothing in this chapter prevents application of the provisions of this chapter to a trust, deed, or other writing that makes a donative transfer of property, to the extent not inconsistent with another statute.

Comment. Section 12008 is new and is comparable to subdivision (c) of Section 15003. Chapter 8 (commencing with Section 12000) applies to administration of decedents' estates. Section 12008 permits application of the chapter to other instruments which make a donative transfer of property, to the extent not inconsistent with another statute such as the Revised Uniform Principal and Income Act (Prob. Code §§ 16300-16313).

The staff is inclined to recommend against adopting a provision like Section 12008.

Approval to Distribute TR for Comment

If the Commission approves the attached TR, we should distribute it to interested persons for comment with a view toward having legislation ready for the 1988 session.

Respectfully submitted,

Robert J. Murphy III  
Staff Counsel

TENTATIVE RECOMMENDATION  
relating to  
ABATEMENT, AND INTEREST AND INCOME  
ACCRUING DURING ADMINISTRATION

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).<sup>1</sup> 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.<sup>2</sup> The proposed law continues existing law as judicially construed by requiring general devises to be exhausted before specific devises are reduced.<sup>3</sup>

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

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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 proposed law, 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.<sup>4</sup>

Intérest and Income Accruing During Administration

Expenses on property specifically devised. Under existing law, expenses on specifically devised property during administration are charged first to any income from the property, and then to the residue as an expense of administration,<sup>5</sup> except that if the property is occupied rent free by the devisee, the devisee is charged with the expenses whether or not the property produces income.<sup>6</sup> The proposed law qualifies this rule by limiting the time such expenses are paid out of the estate to one year after the testator's death.

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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 proposed law 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. McCarroll, 1 California Decedent Estate Supplement § 17.9, at 452 (Cal. Cont. Ed. Bar, June 1985).

6. Estate of Reichel, 28 Cal. App. 3d 156, 103 Cal. Rptr. 836 (1972).

Rate of interest on unpaid devises. Under existing law, the rate of interest on a general pecuniary devise or on an overdue periodic payment is ten percent.<sup>7</sup> This rate is higher than the likely return on funds being held by the estate, and therefore imposes an unfair penalty on the estate. The proposed law reduces the interest rate to the minimum rate that would be payable on a United States Series EE savings bond, if purchased on the date of the testator's death and held for at least five years (5.75 percent at present).<sup>8</sup>

Marital deduction gift. The proposed law continues the rule of existing law that interest on an unpaid general pecuniary devise commences one year after testator's death.<sup>9</sup> If applied to a marital deduction under a formula clause, this rule might decrease the value of the deduction,<sup>10</sup> contrary to testator's intent. To avoid this undesirable result, the proposed law provides that a general pecuniary devise intended to qualify for the marital deduction bears a pro rata share of income after the date of the gift.<sup>11</sup>

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7. The rate of interest is that payable on a money judgment entered in this state. Prob. Code §663. The rate of interest on a money judgment is ten percent. Code Civ. Proc § 685.010.

8. This rate is 85% of the average return on five-year Treasury marketable securities rounded to the nearest one-quarter percent. A new rate is fixed every six months and is readily ascertainable. By using the rate of interest on savings bonds on the date of the testator's death, the proposed law avoids having to recalculate interest every six months.

9. Prob. Code § 663(a).

10. 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).

11. In all other respects, the proposed law continues the substantive effect of existing law concerning distribution of interest and income accruing during administration. Prob. Code §§ 660-665.

The proposed law does not continue 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." This is not a substantive change. Although the language "a certain sum or fund" is ambiguous, 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

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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). The question of when income from a testamentary trust commences is already governed by Probate Code Section 16304(a) (Revised Uniform Principal and Income Act) (income commences at death if trust instrument is silent).

The question of when an income beneficiary is entitled to income from the trust must be distinguished from the question of when interest on a devise to the trust commences. Under the proposed law as well as existing law (Prob. Code § 663(a)), interest on a pecuniary devise to trust commences one year after death. If the trust is funded entirely by a pecuniary devise, the trust will have no income until either the devise is distributed to the trust, or until the trust becomes entitled to interest on the undistributed devise (one year after death). Thus, although the Revised Uniform Principal and Income Act provides that an income beneficiary is entitled to income from the date of death (Prob. Code § 16304(a)), if the devise is not distributed to the trust during the first year after death, there will be no income during this period for the trust to distribute to the income beneficiary.

DIVISION 7. ADMINISTRATION OF ESTATES OF DECEDENTS

PART 10. DISTRIBUTION OF ESTATE

CHAPTER 8 (ADDED). INTEREST AND INCOME ACCRUING  
DURING ADMINISTRATION

- § 12000. Definitions
- § 12001. Testator's intention controls
- § 12002. Rate of interest
- § 12003. Earnings on and expenses of specific devise
- § 12004. Interest on general pecuniary devise
- § 12005. Annuity; interest on periodic payments
- § 12006. Remaining income to residuary or intestate distributees
- § 12007. Reference in instrument

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

PART 1. GENERAL PROVISIONS

CHAPTER 1. SCOPE AND DEFINITIONS

- § 21100 (amended). Definitions
- § 21102 (added). Transferor's intention controls

PART 4 (ADDED). ABATEMENT

- § 21400. Purposes for which abatement made
- § 21401. Order of abatement
- § 21402. Abatement to carry out transferor's intent
- § 21403. No sale of specific devise to exonerate other devise

Transitional provision

APPENDIX  
DISPOSITION OF EXISTING SECTIONS

An act to amend Section 21100 of, to add Chapter 8 (commencing with Section 12000) to Part 10 of Division 7 of, to add Section 21102 to, to add Part 4 (commencing with Section 21400) to, to repeal Section 736 of, and to repeal Chapter 11 (commencing with Section 660) and Chapter 13 (commencing with Section 750) of Division 3 of, the Probate Code, relating to probate law and procedure.

*The people of the State of California do enact as follows:*

Probate Code §§ 660-665 (repealed). Legacies and interest

SECTION 1. Chapter 11 (commencing with Section 660) of Division 3 of the Probate Code is repealed.

Comment. For the Comments to the repealed sections of former Chapter 11 (commencing with Section 660) of Division 3, see the Appendix to this recommendation.

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

SEC. 2. Section 736 of the Probate Code is repealed.

~~736.---When---a---testator---devises---real---property---subject---to---a mortgage, deed of trust, or other lien and the intention is indicated by the will that the mortgage, deed of trust, or other lien is to be exonerated, other property specifically devised or bequeathed shall not be sold for the purpose of exonerating the encumbered property unless a contrary intention that the other property be sold is indicated by the will.~~

Comment. Former Section 736 is continued in Section 21403 without substantive change.

Probate Code §§ 750-753 (repealed). Abatement

SEC. 3. Chapter 13 (commencing with Section 750) of Division 3 of the Probate Code is repealed.

Comment. For the Comments to the repealed sections of former Chapter 13 (commencing with Section 750) of Division 3, see the Appendix to this recommendation.



Probate Code §§ 12000-12007 (added). Interest and income accruing during administration

SEC. 4. Chapter 8 (commencing with Section 12000) is added to Part 10 of Division 7 of the Probate Code, to read:

CHAPTER 8. INTEREST AND INCOME ACCRUING  
DURING ADMINISTRATION

§ 12000. Definitions

12000. Unless the provision or context otherwise requires, as used in this chapter:

(a) "Annuity" means a general devise of a specified amount which is payable periodically.

(b) "Demonstrative devise" means a general devise that specifies the fund or property from which the devise is primarily to be made.

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

(d) "Residuary devise" means a devise of property that remains after all specific and general devises have been satisfied.

(e) "Specific devise" means a devise of specifically identifiable property.

Comment. Subdivision (a) of Section 12000 restates the first clause of subdivision (c) of former Section 662 without substantive change. The reference in subdivision (a) to an annuity as a "general" devise or gift is new, but is consistent with subdivision (c) of former 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).

Subdivision (b) restates subdivision (b) of former Section 662 without substantive change. The reference in subdivision (b) to a demonstrative devise as a "general" devise is new, but is consistent with prior law. See former 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).

Subdivision (c) supersedes subdivision (e) of former 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).

Subdivision (d) restates subdivision (d) of former Section 662 without substantive change.

Subdivision (e) restates a portion of subdivision (a) of former Section 662 without substantive change. See also Estate of Ehrenfels, 241 Cal. App. 2d 215, 221, 50 Cal. Rptr. 358 (1966).

#### CROSS-REFERENCES

##### Definitions

Devise § 32

Property § 62

*Note.* In the previous draft (Memo 87-37), the definitions were at the front of the Probate Code. This caused drafting problems because the definitions applied to many kinds of instruments. In this draft, definitions for the chapter on interest and income accruing during administration are contained in Section 12000, above. These definitions are applied to Division 11 (construction of wills, trusts, and other instruments) by new cross-references in Section 21100. Is this satisfactory?

Should this chapter be divided into articles? We could organize it as follows:

- Art. 1. Definitions
- Art. 2. Application of chapter
- Art 3. [substantive rules]

#### § 12001. Testator's intention controls

12001. The provisions of this chapter apply where the intention of the testator is not indicated by the will.

*Comment.* Section 12001 restates without substantive change former Section 660 and the introductory clause of subdivision (a) of former Section 664. The language of Section 12001 is drawn from Sections 6140(b) and 6165.

#### CROSS-REFERENCES

##### Definitions

Will § 88

#### § 12002. Rate of interest

12002. When interest is payable under this chapter, the rate of interest is the minimum rate payable on a United States savings bond, Series EE, if purchased on the date of the testator's death and held for at least five years.

Comment. Section 12002 supersedes portions of subdivisions (a) and (c) of former Section 663. Under former Section 663, the rate of interest was that payable on a money judgment entered in this state. The rule of Section 12002 applies where the intention of the testator is not indicated by the will. Section 12001.

Note. In the previous draft (Memo 87-37), the rate of interest was that on a money judgment (10%), the same as existing law. The Commission thought 10% interest is too high for decedents' estates. The Commission wanted the rate to be that for U. S. savings bonds, and to be fixed for a particular estate at the rate in effect at decedent's death. This rate is now 5.75 percent. This rule is now in Section 12002, above. Is this section satisfactory?

§ 12003. Earnings on and expenses of specific devise

12003. (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) Except as provided in subdivision (a), a specific devise does not bear interest.

(c) If the earnings on specifically devised property are not sufficient to pay expenses attributable to the property, including taxes on the property, the excess shall be paid out of the estate until the earliest of the following times:

- (1) One year after the testator's death.
- (2) When the property is distributed to the devisee.
- (3) When the devisee takes possession of or occupies the property.

Comment. Section 12003 is new. Section 12003 applies to specific devises of real and personal property. See Sections 32 ("devise" defined), 73 ("specific devise" defined). The rule of Section 12003 applies where the intention of the testator is not indicated by the will. Section 12001.

Subdivision (a) of Section 12003 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) codifies case law. See Estate of McKenzie, supra at 399-400.

Paragraphs (2) and (3) of subdivision (c) are consistent with Estate of Reichel, 28 Cal. App. 3d 156, 103 Cal. Rptr. 836 (1972) (where specifically devised real property produces no income but is occupied rent free by the devisee from testator's death, expenses on the property are chargeable to the devisee). If expenses attributable to a specific devise are paid out of the estate pursuant to

subdivision (c), they are imposed on distributees according to the abatement rules in Sections 21400-21403.

#### CROSS-REFERENCES

##### Definitions

Devise § 32  
Devisee § 34  
Property § 62  
Specific devise § 12000

*Note.* The Beverly Hills Bar has persuaded staff that, under existing law, expenses on specifically devised property during administration are charged first to income from the property, and then to residue as an expense of administration, except that if the devisee occupies the property rent free, the devisee is charged with expenses whether or not the property produces income. McCarroll, 1 California Decedent Estate Administration Supplement § 17.9, at 452 (Cal. Cont. Ed. Bar, June 1985).

The Commission thought that by requiring the estate to bear the excess of expenses over income on specifically devised property for one year or until the property is distributed or occupied, we would impose a new liability on the estate. For that reason, the Commission wanted the one-year limit on the estate's liability under this provision, now in Section 12003(c)(1), above.

But if existing law is that the estate generally does bear such expenses, the one-year limit may be undesirable, particularly if the specific devisee is also the personal representative. In that case, the personal representative would be tempted to delay closing the estate to shift expenses to the estate.

Does the Commission want to delete paragraph (1) from subdivision (c) of Section 12003?

#### § 12004. Interest on general pecuniary devise

12004. 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.

Comment. Section 12004 restates a portion of subdivision (a) of former Section 663 without substantive change. The rule of Section 12004 applies where the intention of the testator is not indicated by the will. Section 12001.

The question of when an income beneficiary of a trust is entitled to have income commence is governed by Section 16304(a) (Revised Uniform Principal and Income Act).

*Note.* State Bar Team 4 was concerned that the one-year-from-death rule for interest under Section 12004 might cause a decrease of the marital deduction. Team 4 suggested adding a new subdivision to Section 21522 (AB 708) to say that a general pecuniary devise,

*including one in trust, intended to qualify for the marital deduction bears a pro rata share of income after the date of the gift. However, the matter seems already to be covered by subdivision (b) of Section 21524 which reads in part: "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." This may not solve the problem for a general pecuniary devise in trust, because there will be no interest during the first year under Section 12004, and therefore no income to which the spouse would otherwise be entitled under Section 21524. The staff asks that Team 4 give further thought to this problem.*

#### CROSS-REFERENCES

##### Definitions

Devise § 32  
General devise § 12000  
Trust § 82  
Rate of interest § 12002

##### § 12005. Annuity; interest on periodic payments

12005. (a) An annuity commences at the testator's death and shall be paid 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 Section 663 without change. The first sentence of subdivision (b) restates the first portion of subdivision (c) of former 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 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 § 12000  
Devise § 32  
Devisee § 34  
Personal representative § 58  
Trust § 82  
Rate of interest § 12002

### § 12006. Remaining income to residuary or intestate distributees

12006. (a) Net income received during administration not paid 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 for 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 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 12001.

## CROSS-REFERENCES

### Definitions

Devise § 32  
Property § 62  
Trust § 82

### § 12007. Reference in instrument

12007. 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. Section 12007 continues the substance of subdivision (b) of former Section 665, and includes a reference to former Chapter 11 of Division 3 in which former Section 665 was found.

## CROSS-REFERENCES

Definitions  
Will § 88  
Trust § 82

### Probate Code § 21100 (amended). Definitions

SEC. 5. Section 21100 of the Probate Code is amended to read:

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

(a) "Annuity" has the meaning given that term in Section 12000 and applies to a donative transfer as well as to a devise.

(b) "Demonstrative devise" has the meaning given that term in Section 12000 and applies to a donative transfer as well as to a devise.

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

(d) "General devise" has the meaning given that term in Section 12000 and applies to a donative transfer as well as to a devise.

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

(f) "Residuary devise" has the meaning given that term in Section 12000 and applies to a donative transfer as well as to a devise.

(g) "Specific devise" has the meaning given that term in Section 12000 and applies to a donative transfer as well as to a devise.

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

Comment. Section 21100 is amended to add subdivisions (a), (b), (d), (f), and (g). These new definitions are consistent with former Section 662.

## CROSS-REFERENCES

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

*Note.* In the previous draft (Memo 87-37), the definitions were at the front of the Probate Code. This caused drafting problems because the definitions applied to many kinds of instruments. In this draft, definitions for the chapter on interest and income accruing during

*administration are contained in Section 12000. These definitions are applied to Division 11 (construction of wills, trusts, and other instruments) by new cross-references in Section 21100, above. Is this satisfactory?*

Probate Code § 21102 (added). Transferor's intention controls

SEC. 6. Section 21102 is added to the Probate Code, to read:

21102. Except as provided in Part 5 (commencing with Section 21500), the provisions of this division apply where the intention of the transferor is not indicated by the instrument.

Comment. Section 21102 restates without substantive change a portion of the first sentence of former Section 750, paragraph (1) of former Section 751, and a portion of former Section 752. The language of Section 21102 is drawn from Sections 6140(b) and 6165. The "except" clause of Section 21102 recognizes that the provisions of Part 5 (commencing with Section 21500) (compliance with Internal Revenue Code) may override the terms of an instrument. See also Section 21402 (abatement to carry out transferor's intent).

CROSS-REFERENCES

Definitions

Instrument § 21100

Transferor § 21100

Probate Code §§ 21400-21403 (added). Abatement

SEC. 7. Part 4 (commencing with Section 21400) is added to Division 11 of the Probate Code, to read:

PART 4. ABATEMENT

§ 21400. Purposes for which abatement made

21400. (a) Except as provided in Sections 6562 and 6573 and in Division 10 (commencing with Section 20100), shares of beneficiaries 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 a distribution is made during 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 Section 750 and a portion of the introductory clause of former Section 751 without substantive change. The provision that there is no priority as between real and personal property restates the first sentence of former 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 Section 753 without substantive change. Subdivision (c) is new.

#### CROSS-REFERENCES

##### Definitions

Beneficiary § 24  
Devise § 32  
Devisee § 34  
Property § 62  
Real property § 68  
Specific devise § 21100

#### § 21401. Order of abatement

21401. Except as provided in Sections 21402 and 21403:

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

(1) Property not disposed of by the instrument.

(2) Residuary devises.

(3) General devises to persons other than the transferor's spouse or kindred.

(4) General devises to the transferor's spouse or kindred.

(5) Specific devises to persons other than the transferor's spouse or kindred.

(6) Specific devises to the transferor's spouse or kindred.

(b) Annuities and demonstrative devises have priority over other general devises against any property or fund to which they are charged. 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 devises.

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

(d) As used in this section, "kindred" means both of the following:

(1) The transferor's blood relatives other than those who may not take from the transferor by intestate succession because of an adoption.

(2) The persons who may take from the transferor by intestate succession under Sections 6408 and 6408.5.

Comment. Subdivision (a) of Section 21401 replaces the second sentence of former Section 750 and all of former Sections 751 and 752. Paragraphs (1) and (2) of subdivision (a) of Section 21401 restate the first portion of the second sentence of former Section 750 and all of former 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 Section 752. 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 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 transferor's spouse and kindred have for other general devisees under paragraph (4) of subdivision (a). Thus a general devise to the transferor'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 Section 750 and a portion of former Section 752 without substantive change, and supersedes the first portion of former Section 753 (if preferred devise sold, all devisees must contribute).

The order of abatement provided in Section 21401 applies where the intention of the transferor 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 beneficiaries abate as the court determines is necessary to give effect to the intention or purpose of the transferor. Section 21402.

## CROSS-REFERENCES

### Definitions

Annuity § 21100  
Beneficiary § 24  
Demonstrative devise § 21100  
Devise § 32  
General devise § 21100  
Instrument § 21100  
Person § 56  
Property § 62  
Residuary devise § 21100  
Specific devise § 21100  
Transferor § 21100

### § 21402. Abatement to carry out transferor'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 beneficiaries abate as is necessary to give effect to the intention or purpose of the transferor.

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 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). See also Section 21102 (division applies where intention of transferor not indicated by the instrument).

## CROSS-REFERENCES

### Definitions

Beneficiary § 24  
Devise § 32  
Instrument § 21100  
Transferor § 21100

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

21403. When a transferor 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 Section 736 without substantive change. Section 21403 applies where the intention of the transferor is not indicated by the instrument. Section 21102.

CROSS-REFERENCES

Definitions

Devise § 32  
Property § 62  
Real property § 68  
Transferor § 21100  
Specific devise not exonerated § 6170

Transitional provision

SEC. 9. This act applies only in cases where the decedent died on or after the operative date. In cases where the decedent died before the operative date, the law that would have applied had this act not been enacted shall apply.

## APPENDIX

### DISPOSITION OF EXISTING SECTIONS

#### DIVISION 3. ADMINISTRATION OF ESTATES OF DECEDENTS

#### CHAPTER 11. LEGACIES AND INTEREST

##### § 660 (repealed). Testator's intention controls

Comment. Former Section 660 is restated in Section 12001 without substantive change.

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

Comment. Former Section 661 is not continued. Former Section 661 applied to a bequest of the interest or income of a certain sum or fund. As applied by case law under former Section 661, 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). The question of when income from a testamentary trust commences is governed by Section 16304(a) (Revised Uniform Principal and Income Act).

##### § 662 (repealed). Kinds of legacies

Comment. The first portion of subdivision (a) of former Section 662 is restated in subdivision (e) of Section 12000 ("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 not continued. If property owned by the decedent at death is specifically devised, that devise abates last under Section 21401. If specifically devised property is no longer owned by the decedent at death, the rules of ademption determine whether or not a substitute gift is made. See, e.g., Sections 6165, 6171-6173, 6178.

Subdivision (b) of former Section 662 is restated in subdivision (b) of Section 12000 ("demonstrative devise" defined) without substantive change.

The first portion of subdivision (c) of former Section 662 is restated in subdivision (a) of Section 12000 ("annuity" defined) without substantive change. The last portion of subdivision (c) is restated in subdivision (b) of Section 21401 (priority of annuity or demonstrative devise) without substantive change.

Subdivision (d) of former Section 662 is restated in subdivision (d) of Section 12000 ("residuary devise" defined) without substantive change.

Subdivision (e) of former Section 662 is superseded by subdivision (c) of Section 12000 ("general devise" defined).

§ 663 (repealed). Interest; annuities

Comment. The provision of subdivision (a) of former Section 663 that interest on a general pecuniary legacy commences one year after death is restated in Section 12004 without substantive change. The provision of subdivision (a) of former Section 663 that the rate of interest is that payable on a money judgment entered in this state is superseded by Section 12002.

Subdivision (b) of former Section 663 is continued in subdivision (a) of Section 12005.

Subdivision (c) of former Section 663 is superseded by Section 12002 (rate of interest) and by subdivision (b) of Section 12005 (interest on unpaid periodic payments).

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

Comment. Subdivision (a) of former Section 664 is restated in Sections 12001 (testator's intention controls) and 12006 (remaining income to residuary or intestate distributees) without substantive change.

The provision of subdivision (b) of former 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 Section 664 that interest on a pecuniary legacy in trust shall be distributed as income to the trust is not continued, since the matter is governed by Section 16305(a) (Revised Uniform Principal and Income Act).

§ 665 (repealed). Transitional provision

Comment. Subdivision (a) of former Section 665 is superseded by an uncodified provision in the act repealing former Section 665. Subdivision (b) of former Section 665 is continued in Section 12007 without substantive change.

CHAPTER 13. ABATEMENT

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

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

§ 751 (repealed). Order of payment of legacies

Comment. Former Section 751 is superseded by Section 21401.

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

Comment. Former Section 752 is superseded by Section 21401.

§ 753 (repealed). Contribution after sale of property

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