

## Memorandum 82-18

Subject: Study L-605 - Probate Law (Rules of Construction)

## UPC RULES OF CONSTRUCTION

Attached to this Memorandum as Exhibit 1 is a complete draft of Part 6 of Article II of the UPC relating to rules of construction. The conforming revisions are set forth in Exhibit 2. There are twelve UPC sections in Part 6, seven of which were approved by the Commission at the September 1981 meeting (§§ 2-603, 2-605, 2-606, 2-607, 2-608, 2-609, and 2-612). One section (§ 2-610) has already been enacted in California (Civil Code § 1386.2). Four UPC sections in Part 6 have not been considered by the Commission. These are:

(1) The rule of construction that a potential devisee named in the testator's will must survive the testator by 120 hours in order to take the property. (This is akin to the UPC provisions--already approved by the Commission--that a potential intestate taker must survive the decedent by 120 hours in order to take, and that issue of a deceased devisee must survive the latter by 120 hours in order to be substituted by the anti-lapse statute.)

(2) The rule of construction that permits the testator to specify in the will what law will be applied for determining the meaning and legal effect of the dispositive provisions in the will. (Memorandum 82-11 concerns the related question of what law applies to determining the formal validity of a will.)

(3) The rule of construction that a will passes all of the testator's property owned when the will was made and acquired thereafter.

(4) The rule of construction that class gifts include adopted persons, persons born out of wedlock, and relatives of the half blood.

Since these are merely rules of construction, they yield to a contrary intent expressed in the testator's will. UPC § 2-603. The staff recommends the adoption of all four of these UPC rules. These are discussed in order below.

Requirement That Devisee Survive Testator by 120 Hours

Under existing California law, if a devisee (D) named in the testator's (T's) will dies a few hours after T (probably as the result of a

common accident), the willed property passes into the estate of D to be redistributed under D's will or to D's intestate takers. Under the UPC, however, D must survive T by 120 hours (unless the will provides otherwise) in order to take from T. If D does not survive for the required period, D is treated as if D had predeceased T. UPC § 2-601.

If D has surviving issue (whether or not D also has a surviving spouse), to treat D as having predeceased T results in the anti-lapse statute being applied. T's property willed to D thus passes directly to D's issue, avoiding a double administration of the estate. If D has no surviving spouse, D's issue who take under the anti-lapse statute are the same people who would have taken from D by intestacy, and are probably the ones who would have taken under D's will, if any. In such a case, a double administration serves no useful purpose, and causes unnecessary delay and expense.

If D leaves both spouse and issue surviving, application of the anti-lapse statute results in D's issue taking, probably to the detriment of the surviving spouse. Although arguably T may not have wanted such a result, the benefit of avoiding a double administration seems more important and justifies treating D as having predeceased T in such a case.

If D dies without issue, then the anti-lapse statute cannot be applied and the property passes instead to T's residuary or intestate takers. This is probably consistent with what T would have wanted.

Thus the 120-hour survival requirement of the UPC seems like a desirable rule. It generally produces results consistent with what the testator probably would have wanted and avoids a double administration of the estate. Accordingly, the staff recommends the adoption of UPC Section 2-601.

#### Choice of Law as to Meaning and Effect of Wills

Under existing California law, with respect to real or personal property in California, a will is construed according to California law "unless an intention to the contrary clearly appears." Prob. Code § 100; 7 B. Witkin, Summary of California Law Wills and Probate § 49, at 5573 (8th ed. 1974). Thus the testator may specify in the will which state's law is to be applied in interpreting the will with respect to California property. 7 B. Witkin, supra.

The UPC has a similar provision, but, unlike California law, the UPC permits the testator to specify which state's law will apply without regard to where the property is located. UPC § 2-602 and Official Comment. The UPC rule is consistent with the rule in most U.S. jurisdictions. See 16 Am. Jur.2d Conflict of Laws § 70, at 109 (1979).

If the testator does not specify in the will what law is to be applied to construe the will, the traditional choice of law rules will be applied: With respect to dispositions of real property, the rules of construction that would be applied by the courts of the situs are used; with respect to dispositions of personal property, the rules of construction that would be applied by the courts where the testator was domiciled at death are used. 7 B. Witkin, supra.

In its 1973 critique of the UPC, the State Bar objected to the UPC provision as follows:

UPC 2-602 authorizing the testator to select the local law to be applied to the dispositions under his will could create serious problems. California has certain property concepts that are not common to all the states, such as community property and quasi-community property. Serious problems could be created by attempting to apply the law of other states to these concepts.

State Bar of California, The Uniform Probate Code: Analysis and Critique 51 (1973). In response to this criticism, the UPC section was revised in 1975 to make clear that the law selected may not contravene the enacting state's family protection provisions (elective share, exempt property, family allowance, and homestead allowance). The staff has revised the section to make clear that the community and quasi-community property rights of the surviving spouse may not be contravened. This should satisfy the 1973 objection of the State Bar.

Professor Averill supports Section 2-602 as follows:

This provision promotes several policies of the Code. First, by permitting the testator to select the rules and laws to be applicable to her will, it improves the chances that the testator's intentions will control the legal effect of her dispositions. Second, it aligns testamentary choice of law rules with what is generally permitted in dealing with inter vivos transactions including trusts. The removal of differences between the way inter vivos transactions and testamentary transactions are treated is one of the goals of the Code and of recent Conflict of Laws theory. . . . And third, the overall effect of this provision should encourage the use of the will as a dispositive device.

L. Averill, *The Uniform Probate Code in a Nutshell* § 10.02, at 99 (1978).

Since Section 2-602 is generally consistent with California law, would broaden it to include property outside California, and states sound policy, the staff recommends the adoption of the section in place of Probate Code Section 100, revised to make clear that California community and quasi-community property rights may not be contravened.

Construction That Will Passes All Property; After-Acquired Property

Both under existing California law and under the UPC, a testator's will passes property owned when the will was made and property acquired thereafter unless a contrary intention appears in the will. Prob. Code §§ 120, 121, 125, 126; UPC §§ 2-603, 2-604; 7 B. Witkin, *Summary of California Law Wills and Probate* § 206, at 5718 (8th ed. 1974); French & Fletcher, A Comparison of the Uniform Probate Code and California Law With Respect to the Law of Wills, in *Comparative Probate Law Studies* 333 (1976).

The California sections are somewhat repetitive:

120. A devise of land conveys all the estate of the testator therein which he could lawfully devise, unless it clearly appears by the will that he intended to convey a less estate.

121. Any estate, right, or interest in lands acquired by the testator after the making of his will, passes thereby and in like manner as if title thereto was vested in him at the time of making the will, unless the contrary manifestly appears by the will to have been the intention of the testator.

125. Except as provided by Sections 1386.1 and 1386.2 of the Civil Code relating to powers of appointment, a devise or bequest of all the testator's real or personal property, in express terms, or in any other terms denoting his intent to dispose of all his real or personal property, passes all the real or personal property which he was entitled to dispose of by will at the time of his death.

126. Except as provided by Section 1386.1 and 1386.2 of the Civil Code relating to powers of appointment, a devise of the residue of the testator's real property, or a bequest of the residue of the testator's personal property, passes all of the real or personal property, as the case may be, which he was entitled to devise or bequeath at the time of his death, not otherwise effectually devised or bequeathed by his will.

UPC Section 2-604 is to the same effect, but is a simpler and more direct statement:

2-604. A will is construed to pass all property which the testator owns at his death including property acquired after the execution of the will.

The staff proposes to substitute UPC Section 2-604 for Probate Code Sections 120, 121, 125, and 126. The staff will modify the UPC provision to preserve the "except" clause of Probate Code Sections 125 and 126. This will make it clear that powers of appointment are governed by the California Civil Code provisions.

Class Gift to Adopted Person, Person Born Out of Wedlock, and Relative of the Half Blood

Both under California law and the UPC, whether a class gift to "children," "issue," "descendants," "family," or the like, includes adopted children, illegitimate children, or those of the half blood is determined as a matter of the testator's intent. See 7 B. Witkin, supra §§ 197-200, at 5708-12; UPC § 2-603. If the testator's intent is not apparent, the question is determined by applying the applicable rule of construction. See id.

Under California case law, an adopted child is included within such a class gift if no contrary intent appears. 7 B. Witkin, supra §§ 198-99, at 5709-11. There appear to be no California decisions concerning the inclusion of illegitimate children or those of the half blood in class gifts. See id. §§ 197, 200, at 5709, 5712.

The UPC (Section 2-611) has a rule of construction that all such persons are included in class gifts if no contrary intent appears:

2-611. Halfbloods, adopted persons, and persons born out of wedlock are included in class gift terminology and terms of relationship in accordance with rules for determining relationships for purposes of intestate succession.

The reference to intestate succession rules picks up UPC Sections 2-107 (half blood relatives inherit as if they were of the whole blood) and 2-109 (illegitimate is treated as child of its parents for succession purposes, and parent-child relationship may be established under Uniform Parentage Act). Both of these UPC sections have been approved by the Commission.

Thus UPC Section 2-611 makes the rules in the wills context consistent with the rules in the intestate succession context. Professor Niles has recommended the adoption of UPC Section 2-611. Niles, Probate

Reform in California, 31 Hastings L.J. 185, 215 n.192, 218 (1979). The staff concurs, and recommends the inclusion of Section 2-611 in the rules of construction for wills.

#### DISPOSITION OF CALIFORNIA SECTIONS

In addition to the conforming revisions necessitated by the adoption of the UPC rules of construction, there a number of California constructional rules that deal with matters on which the UPC is silent. These are:

(1) Probate Code Sections 102 to 106 purport to offer guidance to the court in determining what meaning is to be given to language used in a will. However, determining the meaning of a will is a semantic process, just as is determining the meaning of any other written instrument, and statutory rules for this process would seem to be of little value. Professor Turrentine has said that these provisions have been "of dubious benefit to our law." Turrentine, Introduction to the California Probate Code, in West's Annotated Codes, Probate Code 20 (1956). Professor Niles and one other commentator have specifically recommended the repeal of Probate Code Sections 105 and 106. Niles, Probate Reform in California, 31 Hasting L.J. 185, 218 (1979); Comment, Extrinsic Evidence and the Construction of Wills in California, 50 Calif. L. Rev. 283 (1962). Accordingly, the staff recommends that Probate Code Sections 102 to 106, inclusive, not be continued.

(2) Probate Code Section 109 abolishes the testamentary branch of the doctrine of worthier title. Although California apparently never recognized the testamentary branch of this doctrine, Section 109 was added in 1959 at the recommendation of the Law Revision Commission "out of an abundance of caution." 2 Calif. L. Revision Comm'n Reports, at D-5 (1959). The staff proposes to retain this section in the recommended legislation (see Section 2-614).

(3) Probate Code Sections 122 to 124 and 140 to 143 set forth rules of construction that are consistent with the common law rules--for example, defining "condition precedent" and "condition subsequent," setting forth the common law doctrine of equitable conversion, and rules for determining the scope of a class to which a testamentary disposition is made. These rules are not found in the UPC, and could probably be repealed with the Comment that repeal is not intended to change the law.

However, the staff is of the view that it is probably better to retain these explicit rules of construction in the recommended legislation, and these have been included as draft Sections 2-615 to 2-621.

(4) Probate Code Sections 160 to 163 set forth rules for accrual of income from or interest on legacies. The staff proposes temporarily to recodify these in Division 3 (administration of estates), subject to further study when we reach administration.

Respectfully submitted,

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## EXHIBIT 1

## RULES OF CONSTRUCTION

Requirement That Devisee Survive Testator by 120 Hours

Under existing California law, if a devisee named in the testator's will dies a few hours after the testator (probably as the result of a common accident), the willed property passes into the estate of the devisee to be redistributed under the devisee's will or to the devisee's intestate takers. This results in the property being subject to probate administration twice, and causes unnecessary delay and expense.

The UPC requires that the devisee must survive the testator by 120 hours (unless the will provides otherwise) in order to take under the testator's will.<sup>1</sup> If the devisee does not survive for the required period, the devisee is treated as if the devisee had predeceased the testator with the result that the devisee's issue (if any) are substituted by the anti-lapse statute, or if the devisee has no surviving issue the property passes instead to the testator's residuary or intestate takers. Since under the UPC rule the property does not pass through the estate of the deceased devisee, the UPC avoids an unnecessary double administration, and in most cases produces results more consistent with what the testator probably would have wanted. Accordingly, the Commission recommends adoption of the UPC's 120-hour survival requirement.

Choice of Law as to Meaning and Effect of Wills

Under general U.S. law,<sup>2</sup> California law,<sup>3</sup> and the UPC,<sup>4</sup> whether the testator's will disposes of real property, personal property, or both,

1. Uniform Probate Code § 2-601.
2. See 16 Am. Jur.2d Conflict of Laws § 70, at 109 (1979). An occasional decision can be found refusing to give effect to the testator's choice of law when the affected property is real property, and instead applying the traditional rule that the will is construed according to the law of the state where the land is located. Id. at 110. The Restatement rejects this rule, and follows the testator's choice whether the property is real or personal. See Restatement (Second) of Conflict of Laws §§ 240(1), 264(1) (1971).
3. Prob. Code § 100; 7 B. Witkin, Summary of California Law Wills and Probate § 49, at 5573 (8th ed. 1974).
4. Uniform Probate Code § 2-602.

the will may select the law of any state to be used in construing the will.<sup>5</sup> However, California gives the testator this freedom of choice only with respect to real and personal property located in California.<sup>6</sup> If the property is located outside California, California uses the traditional choice of law rules.<sup>7</sup>

The UPC permits the testator to designate in the will the law to be applied in construing the will without regard to where the property is located.<sup>8</sup> Since the law selected by the testator is for the purpose of construing the will,<sup>9</sup> the UPC rule is sound: The testator may make his or her meaning clear by detailed and explicit provisions in the will; by selecting the constructional rules of a particular state, the testator may be able to accomplish the same result with greater economy of language.<sup>10</sup> Accordingly, the Commission recommends adoption of the UPC rule.

#### Broadening Application of Anti-Lapse Statute

At common law, if after a will was executed a beneficiary named in the will became unable or unwilling to take and the will made no substitute gift, the gift was said to "lapse" and either passed under the

5. If the testator does not specify in the will what law is to be applied to construe the will, the traditional choice of law rules are used: With respect to dispositions of real property, the rules of construction that would be applied by the courts of the state where the property is located are used; with respect to dispositions of personal property, the rules of construction that would be applied by the courts of the state where the testator was domiciled at death are used. 7 B. Witkin, Summary of California Law Wills and Probate § 49, at 5573 (8th ed. 1974).
6. See Prob. Code § 100; 7 B. Witkin, supra.
7. See note 5 supra.
8. Uniform Probate Code § 2-602 and Comment thereto.
9. Under the UPC, the testator does not have the freedom to select what law will determine the formal validity of the will. See Uniform Probate Code § 2-506, discussed in text accompanying notes \_\_\_\_\_.
10. The UPC provision makes clear that the law selected by the testator may not contravene the forum state's provisions for protection of the testator's family or "any other public policy" of the forum state. See Uniform Probate Code § 2-602. The provision recommended by the Commission for adoption in California would also make clear that the testator may not contravene the interests of the surviving spouse in community or quasi-community property.

residuary clause of the will or, if no residuary clause or if the lapsed gift was a residuary gift, passed by the rules of intestacy.<sup>11</sup> Both California and the UPC have provisions designed to prevent lapse by substituting issue of the predeceased beneficiary, depending on the relationship of the beneficiary to the testator.<sup>12</sup> California law prevents lapse only if the predeceased beneficiary is "kindred" of the testator--that is, related to the testator by blood.<sup>13</sup> The UPC is more limited: It prevents lapse only if the predeceased beneficiary is a grandparent or a lineal descendant of a grandparent of the testator.<sup>14</sup>

The purpose of anti-lapse statutes is to carry out the presumed intent of the testator when that intent cannot be determined from the will.<sup>15</sup> The California and UPC anti-lapse provisions, which require some blood relationship between the predeceased beneficiary and the testator before a substitute gift to issue will be made, are based on the assumption that the testator would want a substitution made when the gift is to a relative, but would not want a substitution made when the gift is to a friend. This is a dubious generalization, since in practice the testator's intent is likely to turn on factors having nothing to do

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11. T. Atkinson, Handbook of the Law of Wills § 140, at 777-78, 784 (2d ed. 1953); 7 B. Witkin, Summary of California Law Wills and Probate § 224, at 5735 (8th ed. 1974). The most common cause of lapse is death of the beneficiary, but lapse may also be caused by a disclaimer or by dissolution of a corporate beneficiary. T. Atkinson, supra § 140, at 777. If the will beneficiary was already unable to take when the will was made, the gift was said to be "void," with generally the same consequences as in the case of lapse. Id. at 777, 786.

12. See Prob. Code § 92; Uniform Probate Code § 2-605.

13. Prob. Code § 92; cf. In re Estate of Sowash, 62 Cal. App. 512, 516, 217 P. 123 (1923). In California, "kindred" includes those related by adoption. 7 B. Witkin, Summary of California Law Wills and Probate § 226, at 5737 (8th ed. 1974); French & Fletcher, supra note 38, at 370 n.112.

14. Uniform Probate Code § 2-605.

15. T. Atkinson, Handbook of the Law of Wills § 140, at 779 (2d ed. 1953); 7 B. Witkin, Summary of California Law Wills and Probate § 225, at 5736 (8th ed. 1974). For this reason, the anti-lapse statute is not automatically applied. The testator's intention as indicated in the will must be ascertained if possible. See Estate of Salisbury, 76 Cal. App.3d 635, 639, 143 Cal. Rptr. 81 (1978); 7 B. Witkin, supra; Uniform Probate Code § 2-603.

with the presence or absence of blood relationship. The arbitrary distinction of California law and the UPC seems likely to defeat the testator's intent as often as to effectuate it.<sup>16</sup>

The persuasive factor in the Commission's view is that both the California and UPC rules are unfair to the testator's stepchildren when the testamentary gift is to a spouse who has predeceased the testator: Neither California nor the UPC substitutes issue of the predeceased spouse in such a case.<sup>17</sup> The argument for making a substituted gift to issue of the testator's predeceased spouse is at least as strong as it is for substituting issue in the case of the testator's brothers, sisters, and other close relatives. However, rather than adding such a category to the California or UPC scheme, the Commission recommends abandoning

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16. Since a lapsed gift passes under the residuary clause of the will or by intestacy (see note 11 supra), the question is whether the testator would have preferred the issue of the predeceased named taker or would have preferred residuary legatees or intestate takers. Residuary legatees and intestate takers are usually the most favored beneficiaries--the testator's immediate family--suggesting that the statutory presumption should be in favor of lapse, whether the predeceased named taker was related to the testator or not.

It has been suggested that the policies underlying the prevention of lapse in the family context are: (1) preventing disappointment of expectations, (2) providing equality among different branches of the family, and (3) protecting issue of predeceasing family members. French, Application of Antilapse Statutes to Appointments Made by Will, 53 Wash. L. Rev. 405, 437 (1978). However, the first and third of these policies would appear to apply equally in a non-family context.

Thus it appears that the principal reasons for distinguishing between predeceased relatives and predeceased non-relatives for the purpose of the anti-lapse statute are that (1) the testator probably knew the issue of relatives and would want to benefit them, and (2) equality should be preserved among different branches of the family to the extent possible.

17. As used in Probate Code Section 92, "kindred" means a blood relative and does not include the testator's spouse. See In re Estate of Sowash, 62 Cal. App. 512, 217 P. 123 (1923); 7 B. Witkin, Summary of California Law Wills and Probate § 226, at 5737 (8th ed. 1974). Similarly, the UPC's anti-lapse statute only applies to a predeceased named taker who is related to the testator by blood, and does not include persons related by marriage. Official Comment to Uniform Probate Code § 2-605.

the requirement of blood relationship altogether.<sup>18</sup> This would align California with the eight states that follow a similar rule.<sup>19</sup>

Since the UPC provision is better drafted than the California one and would clarify the application of the anti-lapse statute to class gifts,<sup>20</sup> the Commission recommends adoption of the UPC language, modified to eliminate the requirement of blood relationship, in place of the California provision.

#### Awarding Failed Residuary Gift to Other Surviving Residuary Beneficiaries

Both under California law and the UPC, if the residuary clause of a will makes a gift to two or more named persons and one of them predeceases the testator, one first looks to the anti-lapse statute to see if a substitution may be made for the predeceased taker as in the usual case.<sup>21</sup> However, if the residuary gift does not come within the anti-lapse statute (either because the named taker is not properly related to the testator<sup>22</sup> or dies without issue) and thus cannot be saved, the

18. There will, of course, be instances where such a rule will defeat the testator's intent, just as any other mechanical rule would do. No rule can produce ideal results in every case. However, abandonment of the requirement of blood relationship should produce fairer results in those cases where reform is most urgently needed--viz., where the gift is to the testator's predeceased spouse leaving issue.

This change in California's anti-lapse statute has the additional advantage of making the general anti-lapse rule conform to recent legislative changes made in the anti-lapse rule in the context of powers of appointment. See 1981 Cal. Stats. ch. 63, § 6 (amending Civil Code § 1389.4).

19. These states are Georgia, Kentucky, New Hampshire, North Carolina, Rhode Island, Tennessee, Virginia, and West Virginia. French, supra note 16, at 408.

20. The UPC makes clear that the anti-lapse statute applies to class gifts whether the gift "lapsed" or was "void." This is probably the law in California despite some conflict in the cases. See Estate of Steidl, 89 Cal. App.2d 488, 201 P.2d 58 (1948); French & Fletcher, A Comparison of the Uniform Probate Code and California Law With Respect to the Law of Wills, in Comparative Probate Law Studies 372 (1976); Niles, Probate Reform in California, 31 Hastings L.J. 185, 215 (1979).

21. French & Fletcher, supra note 20, at 372; Niles, supra note 20, at 215.

22. Under the Commission's recommendation, the requirement of the anti-lapse statute that the named taker be related to the testator would

failed gift is a "residue of a residue" and, under the ancient doctrine as well as under California law, passes by intestacy.<sup>23</sup>

The UPC avoids intestacy by abolishing the residue of a residue rule and providing instead that the failed gift passes to the surviving residuary beneficiary, or to two or more surviving residuary beneficiaries in proportion to their interests in the residue.<sup>24</sup> The UPC rule conforms more closely to the intent of the average decedent than does the California rule. Accordingly, the Commission recommends abolishing the California residue of a residue rule, and replacing it with the UPC rule which avoids intestacy.<sup>25</sup>

#### Codifying Some Rules of Nonademption

If a will makes a gift of specific property and the property no longer exists at the testator's death or is no longer a part of the estate, the gift is said to be "adeemed" (revoked). No economic equivalent is substituted for the gift, with the result that the testamentary provision is nullified.<sup>26</sup> California law and the UPC recognize two closely related types of ademption: ademption by extinction of the property,<sup>27</sup> and ademption by satisfaction where the testator gives the property to the will beneficiary during lifetime.<sup>28</sup>

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be eliminated. See discussion in text accompanying notes 11-20 supra. Thus a residuary gift to a predeceased taker would fail only if the taker died without issue.

23. French & Fletcher, supra note 20, at 372-73; Niles, supra note 20, at 215.
24. Uniform Probate Code § 2-606.
25. The Commission's recommendation is consistent with the view of Professor Niles. See Niles, supra note 20, at 218.
26. See 7 B. Witkin, Summary of California Law Wills and Probate § 218, at 5728 (8th ed. 1974); Note, Ademption and the Testator's Intent, 74 Harv. L. Rev. 741, 741 (1961). If it is the testator's intent to give a general legacy rather than a specific one, there will be no ademption, since a general legacy is not subject to ademption. 7 B. Witkin, supra § 218, at 5729.
27. See 7 B. Witkin, supra note 26, § 218, at 5728-29; French & Fletcher, supra note 20, at 382.
28. See Prob. Code §§ 1050-1054; Uniform Probate Code § 2-612; 7 B. Witkin, supra note 26, § 217, at 5727-28; French & Fletcher, supra note 20, at 382, 387-89.

Ademption by extinction of the property. Both under California law and the UPC, the basic rule that a specific gift is adeemed when the property no longer exists at the testator's death or is no longer part of the estate is not codified, but rather depends on decisional law. Both have specific codified rules relating to particular problems of ademption by extinction, but these two sets of rules deal with different matters and do not overlap.

Where there has been a complete extinction of the property rather than a mere change in form, California follows the traditional rule that the gift is adeemed without regard to what the testator actually intended.<sup>29</sup> However, where a specific gift is changed in form, ademption will not automatically take place. Rather the California courts look to the inferred or probable intent of the testator to determine whether the beneficiary will get the property in its new form.<sup>30</sup> Because of the harsh effects of ademption, the courts in California and other jurisdictions have strained to find nonademption whenever possible by applying various constructional rules. For example, if a gift can be construed to be a general legacy or a "demonstrative" gift rather than a specific one, the gift is not adeemed.<sup>31</sup> California has very liberal rules such that a gift that would be adeemed in most other jurisdictions may be saved in California.<sup>32</sup>

In addition to its decisional law, California has two sections which state nonexclusive rules of when a testamentary gift is not adeemed:<sup>33</sup>

29. See 7 B. Witkin, supra note 26, § 218, at 5729; Note, Ademption and the Testator's Intent, 74 Harv. L. Rev. 741, 742-43 (1961).
30. 7 B. Witkin, supra note 26, §§ 220-21, at 5730-31. An example of a testamentary gift merely changed in form is found in Estate of Cooper, 107 Cal. App.2d 592, 237 P.2d 699 (1951). There the testator willed "[t]hat certain Hudson Automobile, now owned by me." At the time the will was executed, the testator had owned a 1941 Hudson. However, he later sold that one and bought a 1948 Hudson which he owned at his death. The court held that there was no ademption of the testamentary gift.
31. 7 B. Witkin, supra note 26, § 218, at 5729; Note, Ademption and the Testator's Intent, 74 Harv. L. Rev. 741, 743-45 (1961).
32. 7 B. Witkin, supra note 26, § 218, at 5729; French & Fletcher, supra note 20, at 385.
33. Prob. Code §§ 77, 78. Although Sections 77 and 78 use language of revocation rather than ademption, it is more accurate to view these

(1) There is no ademption of a specific gift which is the subject of an executory contract of sale.<sup>34</sup>

(2) There is no ademption of a specific gift if the testator alters but does not wholly divest his or her interest in the property by a conveyance, encumbrance, or other act.<sup>35</sup>

Like California law, the UPC makes no general statement of the doctrine of ademption by extinction. Rather the UPC states specific rules of nonademption, but to deal with a different set of situations than do the California statutes.<sup>36</sup> The UPC nonademption rules are as follows:

(1) There is no ademption of a specific gift of securities because of a stock split, stock dividend, or substitution of securities of a different entity resulting from a merger, consolidation, reorganization,

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as ademption sections. Cf. French & Fletcher, supra note 20, at 344 n.48 (discussing Probate Code Section 73); Turrentine, Introduction to the California Probate Code, in West's Annotated California Codes, Probate Code 38 (1956) (discussing Probate Code Section 73). Probate Code Section 73, which is also cast in terms of revocation, could also more accurately be viewed as an ademption section. Id.

The Commission has recommended the repeal of Section 73 in the revocation context. See text accompanying notes supra. Section 73 is also superfluous in the ademption context. The section provides that a gift of specific property is revoked if the testator alters his or her interest in property previously disposed of by will and the instrument which makes the alteration either expresses the testator's intent to revoke or contains provisions wholly inconsistent with the will. In the ademption context, if the property is wholly conveyed away by the testator, the matter will be adequately covered by the common law doctrine of ademption by extinction, and the gift will be considered to be adeemed in such a case. 7 B. Witkin, supra note 26, § 218, at 5728; Official Comment to Uniform Probate Code § 2-612. If the property is only partly conveyed away, Probate Code Section 78 will apply (no revocation where the testator's interest "is altered, but not wholly divested"), and the testamentary gift would not be adeemed.

34. Prob. Code § 77. The property subject to the executory contract of sale passes by the will subject to the buyer's remedies. 7 B. Witkin, supra note 26, § 219, at 5730.

35. Prob. Code § 78.

36. See Uniform Probate Code §§ 2-607, 2-608.

or the like, and the devisee gets the increased number of shares, the different shares, or additional shares in a regulated investment company as a result of the testator's reinvestment plan.<sup>37</sup>

(2) There is no ademption where there are unpaid proceeds resulting from sale, condemnation, or destruction of, or damage to, specifically devised property, and the devisee is entitled to such proceeds when paid to the estate.<sup>38</sup>

(3) There is no ademption of a secured note which is specifically given by will where the security interest has been foreclosed by the testator and the property taken by foreclosure is in the testator's estate; the will beneficiary is entitled to the property.<sup>39</sup>

(4) There is no ademption if the testator was subject to a conservatorship and during that time proceeds have been paid to the conservator as a result of sale, condemnation, damage, or destruction of specifically devised property; the devisee is entitled to a general pecuniary devise equal to the net sale price, condemnation award, or insurance proceeds.<sup>40</sup>

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37. Uniform Probate Code § 2-607. The problem of changes before the testator's death in securities that have been specifically given by will is a "recurring problem" in California. State Bar of California, *The Uniform Probate Code: Analysis and Critique* 52 (1973). California has no statute governing the matter. However, to the extent that the California cases have dealt with the problem, California decisional law is "closely similar" to the UPC. French & Fletcher, supra note 20, at 383. For example, with respect to stock splits, the cases hold that the split is merely a change in form, and the legatee gets the increased number of shares as under the UPC. 7 B. Witkin, supra note 26, § 220, at 5730-31; French & Fletcher, supra. However, California ademption law is unclear concerning stock dividends, securities received as a result of merger, consolidation, or reorganization, and acquisitions made through a reinvestment plan of a regulated investment company. French & Fletcher, supra at 383-84; see 7 B. Witkin, supra. UPC Section 2-607 would clear up the uncertainties in California law, and the State Bar has approved the UPC section in concept. See State Bar of California, supra.

38. Uniform Probate Code § 2-608(a). California has no statute comparable to UPC Section 2-608(a). However, California decisional law is "roughly similar." French & Fletcher, supra note 20, at 384. Accord, State Bar of California, *The Uniform Probate Code: Analysis and Critique* 52-53 (1973).

39. Uniform Probate Code § 2-608(a)(4).

40. Uniform Probate Code § 2-608(b). This provision does not apply if after the sale, condemnation, or casualty, the testator is adjudicated to be competent and thereafter survives for one year. Id.

The Commission recommends the enactment of all four of these UPC rules of nonademption. They deal with matters not covered by California statute and, except for the situation where the testator is subject to a conservatorship, they are consistent with California decisional law.<sup>41</sup> To the extent California decisional law has not dealt with all these questions, the UPC would clear up the uncertainties and provide useful rules. In the context of a sale of specifically devised property by the testator's conservator, or receipt of proceeds by the conservator from condemnation, fire, or casualty, the UPC would improve California law by giving the devisee a pecuniary substitute for the property instead of requiring tracing into other property and limiting the award to that property as under present California law.<sup>42</sup>

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The assumption underlying this exception is that if the testator does not change the will having had a one-year opportunity in which to do so, the testator must have intended an ademption to occur. State Bar of California, supra note 38, at 53.

California has no statute comparable to UPC Section 2-608(b). California decisional law differs from the UPC in the following respect: If the property disposed of by the conservator can be traced entirely into other property remaining in the testator's estate, the devisees are entitled only to the remaining property, not to a pecuniary devise as under the UPC. See Estate of Ehrenfels, 241 Cal. App.2d 215, 226-28, 50 Cal. Rptr. 358 (1966); French & Fletcher, supra note 20, at 386-87.

The question of what happens when the testator regains competence has not been addressed in California, although one case noted that there is no ademption by a conservator's sale because the "incompetent testator lacks intent to adeem . . . and the opportunity to avoid the effect of an ademption by making a new will." Estate of Mason, 62 Cal.2d 213, 216, 397 P.2d 1005, 42 Cal. Rptr. 13 (1965); see French & Fletcher, supra note 20, at 387.

41. See notes 37, 38, 40 supra.

42. See note 40 supra. The UPC rule is more consistent with the probable intent of the testator than the California rule, since the conservatee-testator may well lack the intent to adeem. Id. Under California law, the appointment of a conservator is not an adjudication that the conservatee lacks the capacity to make a valid will. Prob. Code § 1871(c). Therefore the conservatee may in some cases be able to avoid an ademption by making a new will. Nevertheless, the UPC rule of nonademption in the case of sale by a conservator provides a convenient and certain rule. See also Uniform Probate Code § 2-603 (UPC ademption rules yield to a contrary intention expressed in the testator's will).

The Commission recommends retaining the two California nonademption rules.<sup>43</sup> They are not inconsistent with the UPC and, as specific statements of nonademption, are consistent with the liberal thrust of the California decisions which avoid the harshness of ademption whenever possible.<sup>44</sup>

Ademption by satisfaction. Under both California law and the UPC, if the testator makes an inter vivos gift to a person who also is given a general legacy under the donor's will, the inter vivos gift is not deducted from the general legacy unless the testator's intent that it be deducted is expressed in writing or unless the donee so acknowledges in writing.<sup>45</sup> The Commission recommends the UPC provision in place of the corresponding California provision: It is better drafted, would clarify California law by requiring that if the testator's writing is other than a will the writing must be "contemporaneous" with the gift,<sup>46</sup> and would properly delay the date of valuation of the property where the donee's possession or enjoyment of the property was delayed.

However, there is one useful provision of the California valuation rules that should be retained: Under California law, the testator-donor may assign a value to an inter vivos gift in the conveyance or other

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43. Prob. Code §§ 77, 78.

44. See French & Fletcher, supra note 20, at 385; 7 B. Witkin, supra note 26, §§ 219-21, at 5729-33.

45. See Prob. Code § 1050; Uniform Probate Code § 2-612. Probate Code Section 1050 also provides that if an inter vivos gift is made of specific property also given by will, an ademption will occur. However, this is a redundant special application of the doctrine of ademption by extinction. The UPC finds it unnecessary to codify such a rule. See Official Comment to Uniform Probate Code § 2-612 ("[i]f the devise is specific, a gift of the specific property during lifetime would adeem the devise by extinction rather than by satisfaction, and this section would be inapplicable").

46. Although the California statute (Prob. Code § 1050) does not require that the testator's writing be contemporaneous with the gift, one California case appears to have accepted that that is the rule apart from the statute. See In re Estate of Hayne, 165 Cal. 568, 574, 133 P. 277 (1913). As a matter of policy, the writing which provides for deduction of the inter vivos gift from the general legacy should be contemporaneous with the gift. The testator should not be able in effect to revoke a completed and unconditional gift by an informal writing long after the gift was made. Instead, the testator should revise his or her will.

writing, or the donee may acknowledge its value in writing, and that will conclusively establish its value.<sup>47</sup> The UPC has no comparable provision. Since the testator may revise his or her will to decrease a general legacy by an amount equal to the value the testator assigns to an inter vivos gift, the testator should be able to accomplish the same result by making a contemporaneous assignment of value in the conveyance.

#### Encumbered Property Not To Be Exonerated

If a will devises land which is subject to a mortgage, deed of trust, or other lien, and the will makes clear whether the testator intended that the devisee take the land subject to or free of the encumbrance, the clearly expressed intention controls.<sup>48</sup> However, if the testator's intention does not appear from the will, the common law and California case law rule provides that if the debt is one for which the testator is personally liable, the devisee is entitled to "exoneration," that is, to receive the land free of the encumbrance by having the debt paid out of other assets of the estate.<sup>49</sup> The UPC abolishes the doctrine of exoneration.<sup>50</sup>

The Commission recommends adoption of the UPC rule. It is unrealistic to presume the testator would intend to give encumbered property free of a trust deed which the testator had no thought of discharging

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47. Prob. Code § 1052.

48. See 7 B. Witkin, Summary of California Law Wills and Probate § 456, at 5895-96 (8th ed. 1974); Uniform Probate Code § 2-603.

49. 7 B. Witkin, supra note 48; French & Fletcher, supra note 20, at 379-80. The impact of this rule is diminished in California because of anti-deficiency legislation which provides that on a purchase money mortgage or deed of trust for real property, no personal liability may be imposed on the debtor. Code Civ. Proc. § 580b. Hence in such a case no exoneration is required. 7 B. Witkin, supra § 457, at 5896; French & Fletcher, supra at 380. Moreover, exoneration does not apply to one who takes as a surviving joint tenant and not as devisee unless the will so provides, and a direction in the will to "pay all debts" is not a sufficient statement of the testator's intent that the surviving joint tenant should take the property free and clear of the encumbrance. 7 B. Witkin, supra.

50. See Uniform Probate Code § 2-609.

during lifetime.<sup>51</sup> The UPC rule conforms to the intent of the average testator and should be adopted for that reason.<sup>52</sup>

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51. 7 B. Witkin, supra note 48, § 457, at 5896.

52. Under the UPC, the testator can indicate in the will that the devisee is to take the property subject to the encumbrance, and in that case the testator's intent controls. See Uniform Probate Code § 2-603.

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## RULES OF CONSTRUCTION

Section 2-601. Requirement that devisee survive testator by 120 hours

2-601. A devisee who does not survive the testator by 120 hours is treated as if he or she predeceased the testator, unless the will of decedent contains some language dealing explicitly with simultaneous deaths in a common disaster, or requiring that the devisee survive the testator or survive the testator for a stated period in order to take under the will.

Comment. Section 2-601 is the same in substance as Section 2-601 of the Uniform Probate Code and is new to California law.

27228

Section 2-602. Choice of law as to meaning and effect of wills

2-602. The meaning and legal effect of a disposition in a will shall be determined by the local law of a particular state selected by the testator in his or her instrument unless the application of that law is contrary to the provisions relating to the ~~elective share described in Part 2 of this Article~~ rights of the surviving spouse in community and quasi-community property, the provisions relating to exempt property and allowances described in [Part 4 of this Article], or any other public policy of this ~~State~~ state otherwise applicable to the disposition.

Comment. Section 2-602 is the same in substance as Section 2-602 of the Uniform Probate Code and supersedes former Section 100. The reference in UPC Section 2-602 to elective share is revised to refer instead to the rights of the surviving spouse in community and quasi-community property. See also Section 2-802 (definition of "surviving spouse").

26761

Section 2-603. Rules of construction; intention of testator

2-603. The intention of a testator as expressed in his or her will controls the legal effect of his or her dispositions. The rules of construction expressed in the succeeding sections of this [Part] apply unless a contrary intention is indicated by the will.

Comment. Section 2-603 is the same in substance as Section 2-603 of the Uniform Probate Code.

Section 2-604. Construction that will passes all property; after-acquired property

2-604. A Except as provided by Sections 1386.1 and 1386.2 of the Civil Code relating to powers of appointment, a will is construed to pass all property which the testator owns at his or her death including property acquired after the execution of the will.

Comment. Section 2-604 is the same in substance as Section 2-604 of the Uniform Probate Code and continues the substance of former Sections 120, 121, 125, and 126. The "except" clause of Section 2-604 is taken from former Sections 125 and 126 and is consistent with the Uniform Probate Code. See Uniform Probate Code §§ 2-604, 2-610.

401/753

Section 2-605. Anti-lapse

2-605. If a devisee ~~who is a grandparent or a lineal descendant of a grandparent of the testator~~ is dead at the time of execution of the will, fails to survive the testator, or is treated as if he or she predeceased the testator, the issue of the deceased devisee who survive the testator by 120 hours take in place of the deceased devisee and if they are all of the same degree of kinship to the devisee they take equally, but if of unequal degree then those of more remote degree take by representation. One who would have been a devisee under a class gift if he or she had survived the testator is treated as a devisee for purposes of this section whether his or her death occurred before or after the execution of the will.

Comment. Section 2-605 is the same in substance as Section 2-605 of the Uniform Probate Code, except that, unlike the UPC, this section does not require any blood relationship between the testator and the predeceased devisee in order for the anti-lapse provisions to substitute issue of the latter. Thus the anti-lapse provisions of this section will substitute issue of any predeceased devisee, whether related to the testator or not. This revision makes Section 2-605 consistent with Civil Code Section 1389.4 (powers of appointment).

Section 2-605 supersedes former Section 92, which also limited the anti-lapse provisions to a predeceased devisee who was "kindred" of the testator.

405/334

Section 2-606. Failure of testamentary provision

2-606. (a) Except as provided in Section 2-605, if a devise other than a residuary devise fails for any reason, it becomes a part of the residue.

(b) Except as provided in Section 2-605 , if the residue is devised to two or more persons and the share of one of the residuary devisees fails for any reason, his or her share passes to the other residuary devisee, or to other residuary devisees in proportion to their interests in the residue.

Comment. Section 2-606 is the same in substance as Section 2-606 of the Uniform Probate Code. Subdivision (b) changes the former California case law rule that if the share of one of several residuary devisees fails, the share passes by intestacy. See, e.g., Estate of Russell, 69 Cal.2d 200, 215-16, 444 P.2d 353, 70 Cal. Rptr. 561 (1968); In re Estate of Kelleher, 205 Cal. 757, 760, 272 P. 1060 (1928); Estate of Anderson, 166 Cal. App.2d 39, 42, 332 P.2d 785 (1958).

405/340

Section 2-607. No ademption from change in form of securities

2-607. (a) If the testator intended a specific devise of certain securities rather than the equivalent value thereof, the specific devisee is entitled only to:

(1) ~~as~~ As much of the devised securities as is a part of the estate at time of the testator's death † .

(2) ~~any~~ Any additional or other securities of the same entity owned by the testator by reason of action initiated by the entity excluding any acquired by exercise of purchase options † .

(3) ~~securities~~ Securities of another entity owned by the testator as a result of a merger, consolidation, reorganization or other similar action initiated by the entity † ~~and~~ .

(4) ~~any~~ Any additional securities of the entity owned by the testator as a result of a plan of reinvestment if it is a regulated investment company.

(b) Distributions prior to death with respect to a specifically devised security not provided for in ~~subsection~~ subdivision (a) are not part of the specific devise.

Comment. Section 2-607 is the same in substance as Section 2-607 of the Uniform Probate Code, and is generally consistent with prior California case law. See 7 B. Witkin, Summary of California Law Wills and Probate § 220, at 5730-31 (8th ed. 1974). The rules of nonademption in Sections 2-607 and 2-608 are not exclusive, and nothing in these provisions is intended to increase the incidence of ademption in California. See also Sections 77, 78.

Section 2-608. No ademption of certain proceeds

2-608. (a) A specific devisee has the right to the remaining specifically devised property and all the following :

(1) ~~any~~ Any balance of the purchase price (together with any security interest) owing from a purchaser to the testator at death by reason of sale of the property † .

(2) ~~any~~ Any amount of a condemnation award for the taking of the property unpaid at death † .

(3) ~~any~~ Any proceeds unpaid at death on fire or casualty insurance on the property † and .

(4) ~~property~~ Property owned by the testator at his death as a result of foreclosure, or obtained in lieu of foreclosure, of the security for a specifically devised obligation.

(b) If specifically devised property is sold by a conservator, or if a condemnation award or insurance proceeds are paid to a conservator as a result of condemnation, fire, or casualty, the specific devisee has the right to a general pecuniary devise equal to the net sale price, the condemnation award, or the insurance proceeds. This ~~subsection~~ subdivision does not apply if after the sale, condemnation or casualty, ~~it is adjudicated that the disability of the testator has ceased~~ the conservatorship is terminated and the testator survives the ~~adjudication~~ termination by one year. The right of the specific devisee under this ~~subsection~~ subdivision is reduced by any right he or she has under ~~subsection~~ subdivision (a).

Comment. Subdivision (a) of Section 2-608 is the same in substance as subdivision (a) of Section 2-608 of the Uniform Probate Code, and is generally similar to prior California case law. See, e.g., Estate of Shubin, 252 Cal. App.2d 588, 60 Cal. Rptr. 678 (1967); Estate of Newsome, 248 Cal. App.2d 712, 56 Cal. Rptr. 874 (1967).

The first sentence of subdivision (b) is the same as the first sentence of subdivision (b) of Section 2-608 of the Uniform Probate Code, and is consistent with prior California case law. See Estate of Packham, 232 Cal. App.2d 847, 43 Cal. Rptr. 318 (1965).

The second sentence of subdivision (b) revises the corresponding Uniform Probate Code language to refer to termination of the conservatorship rather than to an "adjudication that the disability of the testator has ceased." The second sentence is based on the assumption that if the conservatee-testator has been restored to capacity and for one year did not change the will, he or she must have intended an ademption to occur. However, under California law, the appointment of a conservator has no

effect on the capacity of the conservatee to make a will. Prob. Code § 1871(c). Also, it is not the case under California law that the conservatee either has full contractual capacity or entirely lacks it; California has a graduated system in which the court has broad power to specify what transactions the conservatee has or lacks the capacity to enter into. See Prob. Code § 1873. Nonetheless, the application of the second sentence of subdivision (b) turns on whether a conservatorship has been terminated, and not on whether the testator has regained the capacity to make a will. Thus the second sentence affords a rule of administrative convenience, and avoids the need to litigate the question of whether the testator had capacity to make a will.

The third sentence of subdivision (b) is the same as the third sentence of subdivision (b) of Section 2-608 of the Uniform Probate Code.

The rules of nonademption in Sections 2-607 and 2-608 are not exclusive, and nothing in these provisions is intended to increase the incidence of ademption in California. See also Sections 77, 78.

405/769

Section 2-609. No exoneration

2-609. A specific devise passes subject to any mortgage interest existing at the date of death, without right of exoneration, regardless of a general directive in the will to pay debts.

Comment. Section 2-609 is the same as Section 2-609 of the Uniform Probate Code, and reverses the prior California case law rule that, in the absence of an expressed intention of the testator to the contrary, if the debt which encumbers the devised property is one for which the testator was personally liable, the devisee was entitled to "exoneration," that is, to receive the property free of the encumbrance by having the debt paid out of other assets of the estate. See 7 B. Witkin, Summary of California Law Wills and Probate § 456, at 5895-96 (8th ed. 1974).

[Note. Adoption of this section will require a conforming revision to Section 736 of the Probate Code.]

27824

[Section 2-610, which provides that a residuary clause does not exercise a power of appointment, is omitted since the substance of the section has already been enacted in Section 1386.2 of the Civil Code.]

27859

Section 2-611. Construction of generic terms to accord with relationships as defined for intestate succession

2-611. Halfbloods, adopted persons, and persons born out of wedlock are included in class gift terminology and terms of relationship in accordance with rules for determining relationships for purposes of intestate succession.

Comment. Section 2-611 is the same as Section 2-611 of the Uniform Probate Code. The bracketed language of UPC Section 2-611 is omitted since California has enacted the Uniform Parentage Act. See Civil Code §§ 7000-7021. To the extent that California cases have addressed the matter, Section 2-611 is consistent with prior California law. See 7 B. Witkin, Summary of California Law Wills and Probate §§ 197-200, at 5708-12 (8th ed. 1974). For the rules for determining relationships for purposes of intestate succession, see Sections 2-107, 2-109.

405/878

Section 2-612. Ademption by satisfaction

2-612. (a) Property which a testator gave in his or her lifetime to a person is treated as a satisfaction of a devise to that person in whole or in part, only if the will provides for deduction of the lifetime gift, or the testator declares in a contemporaneous writing that the gift is to be deducted from the devise or is in satisfaction of the devise, or the devisee acknowledges in writing that the gift is in satisfaction. ~~For~~ Subject to subdivision (b), for purpose of partial satisfaction, property given during lifetime is valued as of the time the devisee came into possession or enjoyment of the property or as of the time of death of the testator, whichever occurs first.

(b) If the value of the gift is expressed in the writing of the testator or in the acknowledgment of the devisee, such value is conclusive in the division and distribution of the estate.

Comment. Subdivision (a) of Section 2-612 is the same in substance as Section 2-612 of the Uniform Probate Code, and is consistent with former Section 1050. Subdivision (a) changes the rule under former Section 1052 that, if the value of the property given is not established by the testator or acknowledged by the donee, it is valued as of the date of the gift. Under subdivision (a), the gift is valued as of the time the devisee came into possession or enjoyment of the property or as of the time of death of the testator, whichever occurs first. Thus, if the devisee does not come into possession or enjoyment of the property until after the testator's death, the property would be valued as of the date of death.

Subdivision (b) continues a provision in former Section 1052. There is no comparable provision in the Uniform Probate Code.

30173

Probate Code Section 2-613. Vesting

2-613. (a) Testamentary dispositions, including devises to a person on attaining majority, are presumed to vest at the testator's death.

(b) A devise or legacy given to more than one person vests in them as owners in common.

Comment. Subdivision (a) of Section 2-613 continues former Section 28. Subdivision (b) continues former Section 29. There is no comparable provision in the Uniform Probate Code.

The rules of Section 2-613 yield to a contrary intent expressed in the testator's will. Section 2-603. This continues prior law. See 7 B. Witkin, Summary of California Law Wills and Probate § 184, at 5696 (8th ed. 1974) (discussing former Section 28); former Section 29 (containing express provision that the section yields to a contrary will). See also Section 1-201 ("devise" means testamentary disposition of real or personal property).

26964

Section 2-614. No ademption or revocation by contract of sale or by encumbrance

2-614. With respect to property disposed of by the testator's will, the disposition by the will is not adeemed or revoked by any of the following:

(a) An agreement by the testator for sale or transfer of the property. The property passes by the will subject to the same remedies on the testator's agreement, whether specific performance or otherwise, against the devisees as might be had against the testator's heirs if the property had passed by intestate succession.

(b) A charge or encumbrance placed by the testator on the property to secure the payment of money or the performance of any covenant or agreement, or a conveyance, settlement, or other act of the testator by which his or her interest in the property is altered but not wholly divested. The property or the remaining interest therein passes by the will subject to the charge or encumbrance.

Comment. Section 2-614 continues the substance of former Sections 77 and 78. See also Section 1-201 (definition of "devise" and "heirs").

101/197

Section 2-615. Worthier title abolished

2-615. (a) The law of this state does not include (1) the common law rule of worthier title that a testator cannot devise an interest to his or her own heirs or (2) a presumption or rule of interpretation that

a testator does not intend, by a devise to his or her own heirs or next of kin, to transfer an interest to them. The meaning of a devise of a legal or equitable interest to a testator's own heirs or next of kin, however designated, shall be determined by the general rules applicable to the interpretation of wills.

(b) This section shall be applied in all cases in which final judgment had not been entered as of September 18, 1959.

Comment. Section 2-615 continues former Section 109. Subdivision (b) continues the last sentence of former Section 109; September 18, 1959, was the effective date of that section. See 1959 Cal. Stats. ch. 122.

As used in Section 2-615, the term "devise" applies both to testamentary dispositions of real and personal property. See Section 1-201.

404/296

Section 2-616. Words referring to death or survivorship

2-616. Words in a will referring to death or survivorship, simply, relate to the time of the testator's death, unless possession is actually postponed, when they must be referred to the time of possession.

Comment. Section 2-616 is the same as former Section 122. See generally 7 B. Witkin, Summary of California Law Wills and Probate § 188, at 5699 (8th ed. 1974).

404/983

Section 2-617. Scope of disposition to a class; afterborn child

2-617. A testamentary disposition to a class includes every person answering the description at the testator's death; but when the possession is postponed to a future period, it includes also all persons coming within the description before the time to which possession is postponed. A child conceived before but born after a testator's death, or any other period when a disposition to a class vests in right or in possession, takes, if answering to the description of the class.

Comment. Section 2-617 is the same as former Section 123. See generally 7 B. Witkin, Summary of California Law Wills and Probate §§ 194, 201, 204, at 5705-06, 5712, 5715-16 (8th ed. 1974). The second sentence of Section 2-616 is comparable to the rule in intestate succession. See Section 2-108.

Section 2-618. Direction in will for conversion of real property

2-618. When a will directs the conversion of real property into money, such property and all its proceeds are deemed personal property from the time of the testator's death.

Comment. Section 2-618 is the same in substance as former Section 124. This section is declaratory of the common law doctrine of equitable conversion. See In re Estate of Gracey, 200 Cal. 482, 488, 253 P. 921 (1927). See generally 7 B. Witkin, Summary of California Law Equity §§ 118-121, at 5337-40 (8th ed. 1974).

405/879

Section 2-619. Death of devisee of limited interest

2-619. The death of a devisee of a limited interest before the testator's death does not defeat the interest of persons in remainder who survive the testator.

Comment. Section 2-619 is the same in substance as former Section 140. See generally 7 B. Witkin, Summary of California Law Wills and Probate §§ 184-193, at 5696-5705 (8th ed. 1974). The term "devisee" means a person designated in a will to receive real or personal property. Section 1-201.

999/357

Section 2-620. Conditional disposition defined

2-620. A conditional disposition is one which depends upon the occurrence of some uncertain event, by which it is either to take effect or be defeated.

Comment. Section 2-620 is the same as former Section 141. See generally 7 B. Witkin, Summary of California Law Wills and Probate §§ 184-193, at 5696-5705 (8th ed. 1974).

999/557

Section 2-621. Condition precedent defined; construction and operation

2-621. A condition precedent in a will is one which is required to be fulfilled before a particular disposition takes effect. It is to be deemed performed when the testator's intention has been substantially, though not literally, complied with. Nothing vests until such condition is fulfilled, except where fulfillment is impossible, in which case the

disposition vests, unless the condition was the sole motive thereof and the impossibility was unknown to the testator or arose from an unavoidable event subsequent to the execution of the will.

Comment. Section 2-621 is the same as former Section 142. See generally 7 B. Witkin, Summary of California Law Wills and Probate §§ 184-193, at 5696-5705 (8th ed. 1974).

13604

Section 2-622. Condition subsequent defined; operation

2-622. A condition subsequent is where an estate or interest is so given as to vest immediately, subject only to be divested by some subsequent act or event. A testamentary disposition, when vested, can not be divested unless upon the occurrence of the precise contingency prescribed by the testator for that purpose.

Comment. Section 2-622 is the same as former Section 143. See generally 7 B. Witkin, Summary of California Law Wills and Probate §§ 184-193, at 5696-5705 (8th ed. 1974).

EXHIBIT 2

CONFORMING REVISIONS

3665

Probate Code § 28 (repealed). Presumed vesting

28. Testamentary dispositions, including devises and bequests to a person on attaining majority, are presumed to vest at the testator's death.

Comment. Former Section 28 is continued in Section 2-613.

3666

Probate Code § 29 (repealed). Plural devisee or legatee

29. A devise or legacy given to more than one person vests in them as owners in common, unless the will otherwise provides.

Comment. Former Section 29 is continued in Section 2-613.

27870

Probate Code § 77 (repealed). No revocation by contract of sale

77. An agreement made by a testator for the sale or transfer of property disposed of by a will previously made, does not revoke such disposal; but the property passes by the will, subject to the same remedies on the testator's agreement, for a specific performance or otherwise, against the devisees or legatees, as might be had against the testator's successors, if the same had passed by succession.

Comment. Former Section 77 is continued in substance in Section 2-614.

31533

Probate Code § 78 (repealed). No revocation by charge or encumbrance on property

78. Neither a charge or encumbrance placed by a testator upon property previously disposed of by his will, for the purpose of securing the payment of money or the performance of any covenant or agreement, nor a conveyance, settlement, or other act of a testator, by which his interest in any such property is altered, but not wholly divested, is a

revocation of the disposal; but the property, subject to such charge or encumbrance, or the remaining interest therein, passes by the will.

Comment. Former Section 78 is continued in substance in Section 2-614.

3664

Probate Code § 92 (repealed). Anti-lapse

92. If a devisee or legatee dies during the lifetime of the testator, the testamentary disposition to him fails, unless an intention appears to substitute another in his place; except that when any estate is devised or bequeathed to any kindred of the testator, and the devisee or legatee dies before the testator, leaving lineal descendants, or is dead at the time the will is executed, but leaves lineal descendants surviving the testator, such descendants take the estate so given by the will in the same manner as the devisee or legatee would have done had he survived the testator.

Comment. Former Section 92 is superseded by UPC Section 2-605.

27874

Probate Code § 100 (repealed). Domestic law governs domestic property

100. The interpretation of wills, wherever made, is governed, when relating to property within this state, by the law of this state, and the rules prescribed by this code are to be observed, unless an intention to the contrary clearly appears.

Comment. Former Section 100 is superseded by UPC Section 2-602 which permits the testator to specify in the will what state's law will govern the construction of the will without regard to where the property is located. If the testator does not specify what law shall apply, the traditional choice of law rules will apply. See generally 7 B. Witkin, Summary of California Law Wills and Probate § 49, at 5573 (8th ed. 1974).

27866

Probate Code § 101 (repealed). Construction of one or more testamentary instruments

101. Several testamentary instruments executed by the same testator are to be taken and construed together as one instrument. A will is to

be construed according to the intention of the testator. Where his intention cannot have effect to its full extent, it must have effect as far as possible.

Comment. The first sentence of former Section 101 is superseded by UPC Section 2-507 which leaves to the court the determination of whether a later will which has no express revocation clause is inconsistent with the prior will so as to revoke it wholly or partially. See UPC Comment to Section 2-507.

The second sentence of former Section 101 is continued in substance in the first sentence of UPC Section 2-603.

The third sentence of former Section 101 is omitted as unnecessary; it stated an accepted rule of construction, and its omission is not intended to change the law.

27948

Probate Code § 102 (repealed). Every expression given some effect; intestacy avoided

102. The words of a will are to receive an interpretation which will give to every expression some effect, rather than one which will render any of the expressions inoperative; and of two modes of interpreting a will, that is to be preferred which will prevent a total intestacy.

Comment. Former Sections 102 through 104 and former Section 106 are omitted as unnecessary; they stated accepted rules of construction, and their omission is not intended to change the law.

28282

Probate Code § 103 (repealed). Construction of will as a whole

103. Where the meaning of any part of will is ambiguous or doubtful, it may be explained by any reference thereto, or recital thereof, in another part of the will. All the parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole; but where several parts are absolutely irreconcilable, the latter must prevail.

Comment. See the Comment to former Section 102.

28283

Probate Code § 104 (repealed). Clear and distinct devise or bequest

104. A clear and distinct devise or bequest can not be affected by any reasons assigned therefor, or by any other words not equally clear

and distinct, or by inference or argument from other parts of the will, or by an inaccurate recital of or reference to its contents in another part of the will.

Comment. See the Comment to former Section 102.

28287

Probate Code § 105 (repealed). Correction of mistakes and omissions; extrinsic evidence

105. When there is an imperfect description, or no person or property exactly answers the description, mistakes and omissions must be corrected, if the error appears from the context of the will or from extrinsic evidence, excluding the oral declarations of the testator as to his intentions; and when an uncertainty arises upon the face of a will, as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, excluding such oral declarations.

Comment. Former Section 105 is not continued. The section purported to codify the much-criticized distinction between patent and latent ambiguities in a will. See Comment, Extrinsic Evidence and the Construction of Wills, 50 Calif. L. Rev. 283, 285 (1962). Also, although the section purported to exclude oral declarations of the testator, the courts have created exceptions to that rule. See, e.g., In re Estate of Dominici, 151 Cal. 181, 185-86, 90 P. 448 (1907) (attorney's testimony of testator's oral instructions held admissible).

28290

Probate Code § 106 (repealed). Words taken in ordinary and grammatical sense; technical words

106. The words of a will are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected, and that other can be ascertained. Technical words are not necessary to give effect to any species of disposition by a will; but technical words in a will are to be taken in their technical sense, unless the context clearly indicates a contrary intention, or unless it satisfactorily appears that the will was drawn solely by the testator, and that he was unacquainted with such technical sense.

Comment. See the Comment to former Section 102.

Probate Code § 107 (repealed). Devise of fee

107. The term "heirs," or other words of inheritance, are not requisite to devise a fee, and a devise of real property passes all the estate of the testator, unless otherwise limited.

Comment. Former Section 107 is superseded by UPC Sections 2-603 and 2-604.

28452

Probate Code § 108 (repealed). Class gift construed according to rules for intestate succession

108. A testamentary disposition to "heirs," "relations," "nearest relations," "representatives," "legal representatives," "personal representatives," "family," "nearest (or next) of kin" of any person, without other words of qualification, and when the terms are used as words of donation, and not of limitation, vests the property in those who would be entitled to succeed to the property of such person, according to the provisions of Division 2 of this code. Such terms are used as words of donation, and not of limitation, when the property is given to the person so designated, directly, and not as a qualification of an estate given to the ancestor of such person.

Comment. Former Section 108 is superseded by UPC Section 2-611.

24842

Probate Code § 109 (repealed). Devise or bequest to testator's own heirs or next of kin

109. The law of this State does not include (1) the common law rule of worthier title that a testator cannot devise an interest to his own heirs or (2) a presumption or rule of interpretation that a testator does not intend, by a devise or bequest to his own heirs or next of kin, to transfer an interest to them. The meaning of a devise or bequest of a legal or equitable interest to a testator's own heirs or next of kin, however designated, shall be determined by the general rules applicable to the interpretation of wills. This section shall be applied in all cases in which final judgment has not been entered on its effective date.

Comment. Former Section 109 is continued in Section 2-615.

Probate Code § 120 (repealed). Devise of land

120. A devise of land conveys all the estate of the testator therein which he could lawfully devise, unless it clearly appears by the will that he intended to convey a less estate.

Comment. Former Section 120 is continued in substance in UPC Sections 2-603 and 2-604.

999/352

Probate Code § 121 (repealed). Devise of land; after-acquired interests

121. Any estate, right, or interest in lands acquired by the testator after the making of his will, passes thereby and in like manner as if title thereto was vested in him at the time of making the will, unless the contrary manifestly appears by the will to have been the intention of the testator.

Comment. Former Section 121 is continued in substance in UPC Sections 2-603 and 2-604.

3464

Probate Code § 122 (repealed). Words referring to death or survivorship

122. Words in a will referring to death or survivorship, simply, relate to the time of the testator's death, unless possession is actually postponed, when they must be referred to the time of possession.

Comment. Former Section 122 is continued in Section 2-616.

30158

Probate Code § 123 (repealed). Scope of disposition to a class; afterborn child

123. A testamentary disposition to a class includes every person answering the description at the testator's death; but when the possession is postponed to a future period, it includes also all persons coming within the description before the time to which possession is postponed. A child conceived before but born after a testator's death, or any other period when a disposition to a class vests in right or in possession, takes, if answering to the description of the class.

Comment. Former Section 123 is continued in Section 2-617.

30936

Probate Code § 124 (repealed). Direction in will for conversion of real property

124. When a will directs the conversion of real property into money, such property and all its proceeds must be deemed personal property from the time of the testator's death.

Comment. Former Section 124 is continued in Section 2-618.

32249

Probate Code § 125 (repealed). Disposition of all real or personal property; property included

125. Except as provided by Sections 1386.1 and 1386.2 of the Civil Code relating to powers of appointment, a devise or bequest of all the testator's real or personal property, in express terms, or in any other terms denoting his intent to dispose of all his real or personal property, passes all the real or personal property which he was entitled to dispose of by will at the time of his death.

Comment. Former Section 125 is continued in substance in UPC Section 2-604.

32291

Probate Code § 126 (repealed). Residuary disposition

126. Except as provided by Sections 1386.1 and 1386.2 of the Civil Code relating to powers of appointment, a devise of the residue of the testator's real property, or a bequest of the residue of the testator's personal property, passes all of the real or personal property, as the case may be, which he was entitled to devise or bequeath at the time of his death, not otherwise effectually devised or bequeathed by his will.

Comment. Former Section 126 is continued in substance in UPC Section 2-604.

Probate Code § 140 (repealed). Death of devisee or legatee of limited interest

140. The death of a devisee or legatee of a limited interest before the testator's death does not defeat the interest of persons in remainder who survive the testator.

Comment. Former Section 140 is continued in Section 2-619.

32296

Probate Code § 141 (repealed). Conditional disposition defined

141. A conditional disposition is one which depends upon the occurrence of some uncertain event, by which it is either to take effect or be defeated.

Comment. Former Section 141 is continued in Section 2-620.

32297

Probate Code § 142 (repealed). Condition precedent defined; construction and operation

142. A condition precedent in a will is one which is required to be fulfilled before a particular disposition takes effect. It is to be deemed performed when the testator's intention has been substantially, though not literally, complied with. Nothing vests until such condition is fulfilled, except where fulfillment is impossible, in which case the disposition vests, unless the condition was the sole motive thereof and the impossibility was unknown to the testator or arose from an unavoidable event subsequent to the execution of the will.

Comment. Former Section 142 is continued in Section 2-621.

32298

Probate Code § 143 (repealed). Condition subsequent defined; operation

143. A condition subsequent is where an estate or interest is so given as to vest immediately, subject only to be divested by some subsequent act or event. A testamentary disposition, when vested, can not be divested unless upon the occurrence of the precise contingency prescribed by the testator for that purpose.

Comment. Former Section 143 is continued in Section 2-622.

Probate Code § 160 (repealed). Bequest of interest or income

160. In case of a bequest of the interest or income of a certain sum or fund, the income accrues from the testator's death.

Comment. Former Section 160 is continued in Section 740.

[Note. Sections 160-163 may ultimately be superseded by the UPC provisions governing administration of estates. See, e.g., UPC §§ 3-101, 3-904, 3-906.]

32451

Probate Code § 161 (repealed). Legacies; distinctions and designations

161. Legacies are distinguished and designated, according to their nature, as follows:

(1) A legacy of a particular thing, specified and distinguished from all others of the same kind belonging to the testator, is specific; if such legacy fails, resort can not be had to the other property of the testator;

(2) A legacy is demonstrative when the particular fund or personal property is pointed out from which it is to be taken or paid;

(3) An annuity is a bequest of certain specified sums periodically; if the fund or property out of which a demonstrative legacy or an annuity is payable fails, in whole or in part, resort may be had to the general assets, as in case of a general legacy;

(4) A residuary legacy embraces only that which remains after all the bequests of the will are discharged;

(5) All other legacies are general legacies.

Comment. Former Section 161 is continued in Section 741.

32453

Probate Code § 162 (repealed). Interest on legacies; commencement annuities; interest on unpaid accumulations

162. General pecuniary legacies, including general pecuniary legacies in trust, if not paid prior to the first anniversary of the testator's death, bear interest thereafter at the rate of 4 percent per annum. Annuities commence at the testator's death and are due at the end of the annual, monthly or other specified period. Whenever an

annuitant, legatee of a legacy for maintenance or beneficiary of a trust may be entitled to periodic payments or trust income commencing at the testator's death, he shall be entitled to interest at 4 percent per annum on the amount of any unpaid accumulations of such payments or income held by the executor or administrator on each anniversary of the decedent's death, computed from the date of such anniversary.

Comment. Former Section 162 is continued in Section 742.

32464

Probate Code § 162.5 (repealed). Distribution of income from property sold during administration

162.5. Unless otherwise provided by the will of the testator, (a) all net income received during the period of administration from real and personal property not specifically or demonstrably devised or bequeathed, including net income from property sold during said period, shall be distributed pro rata as income to any trust or trusts of all or any part of the residuary estate, and to any tenant or tenants for life or for a term of years of all or any part of the residuary estate, and to any person or persons entitled absolutely and free of trust to all or any part of the residuary estate but (b) no such income shall be distributed as income of a general pecuniary legacy in trust, except that the interest on a pecuniary legacy in trust provided for in Section 162 shall be distributed as income to said trust.

Comment. Former Section 162.5 is continued in Section 743.

32467

Probate Code § 163 (repealed). Testamentary intent controlling

163. The provisions of this chapter are in all cases to be controlled by a testator's express intention.

Comment. Former Section 163 is continued in Section 744.

32468

CHAPTER 12.5. LEGACIES AND INTEREST

Probate Code § 740 (added). Bequest of interest or income

740. In case of a bequest of the interest or income of a certain sum or fund, the income accrues from the testator's death.

Comment. Section 740 is the same as former Section 160.

32469

Probate Code § 741 (added). Legacies; distinctions and designations

741. Legacies are distinguished and designated, according to their nature, as follows:

(a) A legacy of a particular thing, specified and distinguished from all others of the same kind belonging to the testator, is specific; if such legacy fails, resort can not be had to the other property of the testator.

(b) A legacy is demonstrative when the particular fund or personal property is pointed out from which it is to be taken or paid.

(c) An annuity is a bequest of certain specified sums periodically; if the fund or property out of which a demonstrative legacy or an annuity is payable fails, in whole or in part, resort may be had to the general assets, as in the case of a general legacy.

(d) A residuary legacy embraces only that which remains after all the bequests of the will are discharged.

(e) All other legacies are general legacies.

Comment. Section 741 is the same as former Section 161.

32470

Probate Code § 742 (added). Interest on legacies; commencement of annuities; interest on unpaid accumulations

742. General pecuniary legacies, including general pecuniary legacies in trust, if not paid prior to the first anniversary of the testator's death, bear interest thereafter at the rate of four percent per annum. Annuities commence at the testator's death and are due at the end of the annual, monthly or other specified period. Whenever an annuitant, legatee of a legacy for maintenance or beneficiary of a trust may be entitled to periodic payments or trust income commencing at the testator's death, he or she shall be entitled to interest at four percent per annum on the amount of any unpaid accumulations of such payments or income held by the executor or administrator on each anniversary of the decedent's death, computed from the date of such anniversary.

Comment. Section 742 is the same as former Section 162.

Probate Code § 743 (added). Distribution of income from property sold during administration

743. Unless otherwise provided by the will of the testator, (a) all net income received during the period of administration from real and personal property not specifically or demonstrably devised or bequeathed, including net income from property sold during said period, shall be distributed pro rata as income to any trust or trusts of all or any part of the residuary estate, and to any tenant or tenants for life or for a term of years of all or any part of the residuary estate, and to any person or persons entitled absolutely and free of trust to all or any part of the residuary estate but (b) no such income shall be distributed as income of a general pecuniary legacy in trust, except that the interest on a pecuniary legacy in trust provided for in Section 742 shall be distributed as income to said trust.

Comment. Section 743 is the same as former Section 162.5.

[Note. Section 743 is poorly drafted. Nonetheless, the staff proposes not to attempt to redraft the section until we reach administration of estates.]

Probate Code § 744 (added). Testamentary intent controlling

744. The provisions of this chapter are in all cases to be controlled by a testator's express intention.

Comment. Section 744 is the same as former Section 163.

Probate Code § 1050 (repealed). Gift before death

1050. A gift before death shall be considered as an ademption of a bequest or devise of the property given; but such gift shall not be taken as an advancement to an heir or as an ademption of a general legacy unless such intention is expressed by the testator in the grant or otherwise in writing, or unless the donee acknowledges it in writing to be such.

Comment. Former Section 1050 is superseded by UPC Section 2-612.

Probate Code § 1051 (repealed). Advancement as part of estate; deduction from share

1051. Any property, real or personal, given by the decedent in his lifetime as an advancement to an heir, is a part of the estate of the decedent for the purposes of division and distribution thereof among his heirs, and must be taken by such heir toward his share of the estate of the decedent. If the amount of such advancement exceeds the share of the heir receiving the same, he must be excluded from any further portion in the division and distribution of the estate, but he shall not be required to refund any part of such advancement. If the amount so received is less than his share, he is entitled to so much more as will give him his full share of the estate of the decedent.

Comment. Former Section 1051 is not continued. The former California rules relating to advancement and ademption by satisfaction found in former Sections 1050, 1051, and 1052 are superseded by UPC Section 2-612. Former Section 1051 was a procedural section and has been omitted as unnecessary.

Probate Code § 1052 (repealed). Determination of value

1052. If the value of the property so advanced is expressed in the conveyance, or in the charge thereof made by the decedent, or in the acknowledgment of the party receiving it, it must be held as of that value in the division and distribution of the estate; otherwise, it must be estimated according to its value when given, as nearly as the same can be ascertained.

Comment. The first portion of former Section 1052 is continued in subdivision (b) of UPC Section 2-612. The last portion of former Section 1052 is superseded by the second sentence of subdivision (a) of UPC Section 2-612.