

#L-1038

ns29b  
10/29/87

Memorandum 87-95

Subject: Study L-1038 - Abatement (Approval of Recommendation for  
Printing)

Attached to this memorandum is a draft of the recommendation relating to abatement, with revisions made at the October meeting in Sacramento shown in ~~strikeout~~ and underscore to the extent practical. We hope all interested persons will review the draft carefully once more, since we would like to approve the recommendation now for printing and submission to the Legislature.

Respectfully submitted,

Nathaniel Sterling  
Assistant Executive Secretary

Staff Draft  
RECOMMENDATION  
relating to  
ABATEMENT

If property not disposed of by a decedent's will (intestate property) and residuary property are not sufficient to pay debts, expenses of administration, or family allowance, existing statutory and case law require general and specific devises to be abated (reduced).<sup>1</sup> The proposed law extends the abatement rules to trusts and other donative transfers in addition to dispositions by will, since the same problems may also arise concerning nontestamentary dispositions.<sup>2</sup>

For purposes of abatement, the testator's spouse and kindred are preferred over nonrelatives. A gift to a nonrelative is exhausted before a comparable gift to a relative is reduced.<sup>3</sup> The proposed law makes clear that the preference for relatives includes all those who might take from the decedent by intestate succession. This includes halfbloods, adoptees, persons born out of wedlock, and, in limited cases, stepchildren and foster children.<sup>4</sup> The same policies that favor giving such persons an intestate share also favor giving such persons a preference in abatement.

---

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.

2. For this reason the new provisions are located with other rules of construction of wills, trusts, deeds, and other instruments.

3. Prob. Code § 752; Estate of De Santi, 53 Cal. App. 2d 716, 719-21, 128 P.2d 434 (1942); *In re Estate of Wever*, 12 Cal. App. 2d 237, 242-3, 55 P.2d 279 (1936).

4. See Prob. Code §§ 6406, 6408, 6408.5. Cf. Prob. Code § 6152.

Statutory language appears to require general and specific devises to abate proportionately,<sup>5</sup> but case law makes clear that general devises must be exhausted before specific devises are reduced.<sup>6</sup> The proposed law conforms statutory language to existing case law by requiring general devises to be exhausted before specific devises are reduced.

Proportionate abatement is retained, however, in cases of omitted heirs.<sup>7</sup> Application of the general abatement rule to such cases instead of the proportionate rule would likely result in the omitted spouse or child receiving a larger share than family members named in the will as residuary devisees,<sup>8</sup> a result probably contrary to the testator's intent.

---

5. Probate Code Section 750 states that "all property devised and bequeathed is liable ... in proportion to the value or amount of the several devises and legacies."

6. Compare Prob. Code § 750 with Estate of Jenanyan, 31 Cal. 3d 703, 711-12, 646 P.2d 196, 183 Cal. Rptr. 525 (1982).

7. Prob. Code §§ 6562, 6573.

8. This is a consequence of the large, unanticipated share taken from the residuary devisees 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 testator's intent is more likely achieved by requiring general and specific devises to contribute proportionately with residuary devisees to make up the statutory share of the omitted spouse or child.

## PROPOSED LEGISLATION

### Probate Code § 736 (repealed). Exonerating encumbered property

SEC. . Article 2 (commencing with Section 736) of Chapter 12 of Division 3 of the Probate Code is repealed.

Comment. For the Comment to former Section 736, see the Appendix to this recommendation.

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

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

Comment. For the Comments to former Sections 750 to 753, see the Appendix to this recommendation.

### Probate Code §§ 21400-21405 (added). Abatement

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

#### PART 4. ABATEMENT

##### § 21400. Abatement subject to transferor's intent

21400. Notwithstanding any other provision of this part, if the instrument provides for abatement, or if the transferor's plan or the purpose of the transfer would be defeated by abatement as provided in this part, the shares of beneficiaries abate as is necessary to effectuate the instrument, plan, or purpose.

Comment. ~~Section 21400 is generally consistent with prior law. See former Sections 736, 750-752 [AB 708]; Estate of Jenanyan, 31 Cal. 3d 703, 713-14, 646 P.2d 196, 183 Cal. Rptr. 525 (1982). It is drawn from Uniform Probate Code Section 3-902(b).~~

Section 21400 generalizes a number of provisions in existing statutes, and is consistent with case law. See former Sections 736, 750-752 [AB 708]; Estate of Jenanyan, 31 Cal. 3d 703, 713-14, 646 P.2d 196, 183 Cal. Rptr. 525 (1982). The text of the section is drawn from subdivision (b) of Section 3-902 of the Uniform Probate Code.

#### CROSS-REFERENCES

##### Definitions

Beneficiary § 24  
Instrument § 21100  
Transferor § 21100

§ 21401. Purposes for which abatement made

21401. Except as provided in Sections 6562 (omitted spouse) and 6573 (omitted children) and in Division 10 (commencing with Section 20100) (proration of taxes), 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 gifts, and payment of expenses on specifically devised property pursuant to Section 12003, and without any priority as between real and personal property.

Comment. Section 21401 supersedes a portion of the first sentence of former Section 750 and a portion of the introductory clause of former Section 751. The provision that there is no priority as between real and personal property restates a provision formerly found in the California statutes. See former Section 754 (first sentence). It is consistent with existing case law. See, e.g., In re Estate of Woodworth, 31 Cal. 595, 614 (1867). See also Section 3-902 of the Uniform Probate Code. This section is subject to Section 21400 (abatement subject to transferor's intent).

CROSS-REFERENCES

Definitions

- Beneficiary § 24
- Property § 62
- Real property § 68

§ 21402. Order of abatement

21402. (a) Shares of beneficiaries abate in the following order:

- (1) Property not disposed of by the instrument.
- (2) Residuary gifts.
- (3) General gifts to persons other than the transferor's relatives.
- (4) General gifts to the transferor's relatives.
- (5) Specific gifts to persons other than the transferor's relatives.
- (6) Specific gifts to the transferor's relatives.

(b) For purposes of this section, a "relative" of the transferor is a person who would be entitled to take property from the transferor under Part 2 (intestate succession) of Division 6 if the transferor died intestate and there were no other person having priority.

Comment. Paragraphs (1) and (2) of subdivision (a) of Section 21402 restate the first portion of the second sentence of former Section 750 and all of former Section 751, and generalize them to apply to other gifts as well as devises. The preference for specific gifts in paragraphs (5) and (6) over general gifts 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 relatives in paragraphs (4) and (6) over nonrelatives in paragraphs (3) and (5) 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 De Santi, 53 Cal. App. 2d 716, 719-21, 128 P.2d 434 (1942).

Under subdivision (b), "relatives" includes the transferor's blood relatives other than those who may not take from the transferor by intestate succession because of an adoption. Section 6408.5 (adoption). "Relatives" also includes a spouse, as well as other persons other than who are not blood relatives but who may take from the transferor by intestate succession under provisions such as Sections 6408 and 6408.5 (adoptive, foster parent, and stepparent relationships).

This section is subject to Section 21400 (abatement subject to transferor's intent).

#### GROSS-REFERENCES

##### Classification of devises § 6154

##### Definitions

- Beneficiary § 24
- Instrument § 21100
- Property § 62
- Transferor § 21100

##### § 21403. Abatement within classes

21403. (a) Except as provided in subdivision (b), shares of beneficiaries abate pro rata within each class specified in Section 21402.

(b) Gifts of annuities and demonstrative gifts have priority over other general gifts against any property or fund to which they are charged. To the extent the fund or property is insufficient, the annuity or demonstrative gift may be made from the general estate as in the case of other general gifts.

Comment. Subdivision (a) of Section 21403 restates a portion of the second sentence of former Section 750 and a portion of former Section 752, and supersedes the first portion of former Section 753 (if preferred devise sold, all devisees must contribute), and generalizes them to apply to other gifts as well as devises.

Subdivision (b) restates the last portion of subdivision (c) of former Section 662, and generalizes it to apply to other gifts as well as devises. With respect to the fund designated for payment of an annuity or demonstrative gift, the priority given by subdivision (b) controls over the priority that the transferor's relatives have for

other general gifts under Section 21402 (a)(4). Thus a general gift to the transferor's relatives will abate before abatement of the fund designated for an annuity for a nonrelative.

This section is subject to Section 21400 (abatement subject to transferor's intent).

#### CROSS-REFERENCES

##### Classification of devises § 6154

##### Definitions

Beneficiary § 24

Property § 62

##### § 21404. No exoneration by abatement of specific gift

21404. If an instrument requires property that is the subject of a specific gift to be exonerated from a mortgage, deed of trust, or other lien, a specific gift of other property does not abate for the purpose of exonerating the encumbered property.

Comment. Section 21404 restates former Section 736 and generalizes it to apply to exoneration of personal as well as real property and to apply to other gifts as well as devises. This section is subject to Section 21400 (abatement subject to transferor's intent).

#### CROSS-REFERENCES

##### Definitions

Instrument § 21100

Property § 62

Specific devise not exonerated § 6170

##### § 21405. Contribution in case of abatement

21405. (a) When a distribution is made during estate administration, the court shall fix the amount each distributee must contribute for abatement. The personal representative shall ~~reserve that amount from~~ reduce the distributee's share by that amount.

(b) If a specific gift is required to abate, the beneficiary of the specific gift may satisfy the contribution for abatement out of personal assets instead of out of the property that is the subject of the specific gift.

Comment. Subdivision (a) of Section 21405 restates the last portion of former Section 753 without substantive change. Contribution may be required for abatement for any purpose, including sale of property for payment of debts or expenses or family allowance. See Section 21401 (purposes for which abatement made). Subdivision (b) is new.

## CROSS-REFERENCES

### Definitions

Beneficiary § 24

Personal representative § 58

Property § 62

### § 21406. Transitional provision

21406. (a) This part applies to a gift made on or after July 1, 1989. In the case of a gift made before July 1, 1989, the law that would have applied had this part not been enacted shall apply.

(b) For purposes of this section a gift by will is made on the date of the decedent's death.

## APPENDIX

### DISPOSITION OF EXISTING PROBATE CODE SECTIONS

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

##### CHAPTER 12. CLAIMS AGAINST DECEDENT

###### Article 2. Exonerating Encumbered Property

###### § 736 (repealed). Exonerating encumbered property

Comment. Former Section 736 is restated in Sections 21400 (abatement subject to transferor's intent) and 21404 (exoneration by abatement of specific gift), which generalize it to apply to exoneration of personal as well as real property and to apply to other gifts as well as devises.

##### 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 restated in Sections 21400 (abatement subject to transferor's intent) and 21401 (purposes for which abatement made), which generalize it to apply to other gifts as well as devises. The second sentence is restated in Sections 21400 (abatement subject to transferor's intent) and 21402 (order of abatement), which generalize it to apply to other gifts as well as devises.

###### § 751 (repealed). Order of payment of legacies

Comment. Former Section 751 is restated in Sections 21401 (purposes for which abatement made) and 21402 (order of abatement), which generalize it to apply to other gifts as well as devises.

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

Comment. Former Section 752 is superseded by Sections 21400 (abatement subject to transferor's intent) and 21402 (order of abatement).

###### § 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 (a) of Section 21403 (abatement within classes). The last portion of former Section 753 (court to decree each person's contribution when distribution is made) is restated in subdivision (b) of Section 21405 (contribution in case of abatement) without substantive change.