

STATE OF CALIFORNIA

# CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

*relating to*

Wills and Intestate Succession

November 1982

CALIFORNIA LAW REVISION COMMISSION  
4000 Middlefield Road, Suite D-2  
Palo Alto, California 94306

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November 8, 1982

*To: THE HONORABLE EDMUND G. BROWN JR.*  
*Governor of California* and  
**THE LEGISLATURE OF CALIFORNIA**

This tentative recommendation proposes the enactment of a new comprehensive statute governing wills and intestate succession. The new statute will replace the comparable portion of the California Probate Code. Conforming revisions in other statutory provisions are also proposed.

The new statute is drawn in part from the Uniform Probate Code. It makes some significant changes in existing California law. These changes are designed primarily to simplify the administration of an intestate estate and to carry out more effectively the intent of the decedent who dies leaving a will. In some instances, the new statute adopts a Uniform Probate Code rule because national uniformity in that area of the law is particularly desirable and the Uniform Probate Code offers a sound rule that would help achieve national uniformity.

This tentative recommendation is submitted pursuant to Resolution Chapter 37 of the Statutes of 1980. That chapter directs the Commission to study "[w]hether the California Probate Code should be revised, including but not limited to whether California should adopt, in whole or in part, the Uniform Probate Code."

Respectfully submitted,

ROBERT J. BERTON  
*Chairperson*



## ACKNOWLEDGMENTS

In preparing the proposed law, the Commission consulted with the Executive Committee of the Estate Planning, Trust and Probate Law Section of the State Bar of California. Members of that committee reviewed materials prepared by the Commission's legal staff and preliminary drafts of the proposed law. James D. Devine, Monterey, and William H. Plageman, Jr., San Francisco, regularly attended Commission meetings as representatives of the committee. The Commission has benefited from the comments and the practical experience and expertise of these and other committee members. However, there should be no implication that the State Bar either approves or disapproves of the proposed law.

Nine law professors served as expert consultants on this project. Each is an expert in one or more of the following: probate law, community property law, real and personal property law, tax law. The consultants attended Commission meetings and assisted the Commission in preparing the proposed law. They are listed below.

Paul E. Basye Hastings College of the Law	Susan F. French U.C. Davis Law School
Gail Boreman Bird Hastings College of the Law	Russell D. Niles Hastings College of the Law
James L. Blawie Univ. of Santa Clara School of Law	William A. Reppy, Jr. Duke University School of Law
Carol S. Bruch U.C. Davis Law School	Bruce Wolk U.C. Davis Law School
Jesse Dukeminier U.C.L.A. Law School	

While the contribution of the State Bar Section, the consultants listed above, and others who assisted in this project is gratefully acknowledged, the members of the Commission necessarily must assume the sole responsibility for the content of the proposed law.

The proposed law is primarily drawn from the Uniform Probate Code supplemented by provisions drawn from existing California law. However, a provision of the proposed law drawn from the Uniform Probate Code may be substantially different from the comparable provision of the Uniform Probate Code. This publication includes a table that shows the comparable provisions in the proposed law for portions of the Uniform Probate Code. See "Uniform Probate Code Sections to Proposed Law," found at the end of this publication.

In preparing the proposed law, the Commission also drew on the wealth of published material relating to the Uniform Probate Code and the existing California law. The following were particularly useful:

(1) Niles, *Probate Reform in California*, 31 *Hastings L.J.* 185 (1979).

(2) French & Fletcher, *A Comparison of the Uniform Probate Code and California Law With Respect to the Law of Wills*, in *Comparative Probate Law Studies* 331 (1976).

(3) Turrentine, *Introduction to the California Probate Code*, in *West's Annotated California Codes, Probate Code* 1 (1956).

(4) Evans, *Comments on the Probate Code of California*, 19 *Calif. L. Rev.* 602 (1931) (Professor Evans was the draftsman of the 1931 Probate Code).

An analysis of the Uniform Probate Code by the State Bar of California and a response by the Joint Editorial Board for the Uniform Probate Code provided an insight as to significant policy issues involved in preparing the proposed law. See *State Bar of California, The Uniform Probate Code: Analysis and Critique* (1973); *Joint Editorial Board for the Uniform Probate Code, Response of the Joint Editorial Board* (1974).

The Commission also considered published empirical information in its effort to formulate recommendations consistent with modern conditions and desires. See, e.g., Fellows, Simon & Rau, *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 *Am. Bar Foundation Research J.* 321 (article reporting the results of a study conducted using a scientifically-designed telephone survey of 750 families in

five states, including California). Other published empirical information was taken into consideration.

An excellent recent report of the Law Reform Commission of British Columbia contained valuable suggestions and statistical data. See Law Reform Comm'n of British Columbia, Report on the Making and Revocation of Wills (1981). Other published material, not listed above, was also reviewed and taken into consideration in the course of preparing the proposed law.



## **SUMMARY OF REPORT**

This report proposes a comprehensive new statute governing wills and intestate succession. The proposed law continues a substantial portion of existing law, but many changes are made to clarify and simplify probate law, to carry out more effectively the testator's intent, and to promote national uniformity of law. The proposed law would become operative on January 1, 1985, and would apply to cases involving persons who die on or after that date. Some of the more significant changes made by the proposed law are summarized below.

### **Share of Surviving Spouse**

Under existing law governing intestate succession, the surviving spouse takes a half or a third of the decedent's separate property, depending on the circumstances, with the balance passing to the decedent's children, parents, brothers, sisters, or descendants of a deceased brother or sister; the surviving spouse takes all the separate property only if the decedent is survived by none of these relatives. The proposed intestate succession provisions give the surviving spouse all the decedent's separate property without regard to the other relatives left by the decedent, unless the decedent left children who are not also children of the surviving spouse. In this case the surviving spouse takes one-half and the decedent's children take one-half.

### **Dissolution Revokes Disposition to Former Spouse**

The dissolution of the testator's marriage has no effect under existing law upon a disposition made to the former spouse in a will executed by the testator before the dissolution. The proposed law reverses this rule: A disposition to the former spouse in a will made before dissolution is revoked by the dissolution unless the will expressly provides otherwise.

### **Family Allowance**

The proposed law broadens the persons eligible for family allowance to include, in the discretion of the court,

a parent of the decedent who was actually dependent in whole or in part upon the decedent for support.

Keeping the estate open after the normal time for closing the estate is not permitted under the proposed law in order to continue a family allowance unless the court finds both of the following:

- (1) The allowance is needed to pay for necessities of life.
- (2) The need for the family allowance outweighs the adverse effect on the heirs or beneficiaries of the estate of keeping the estate open.

### **Pay-On-Death Clauses**

The proposed law expressly validates pay-on-death beneficiary designations in contracts, notes, deeds of trust, and other instruments. The law thus makes clear that such designations are valid even though not executed with all the formalities of a will. Existing law with respect to some types of designations is not clear.

### **Filing Notice of Will**

The proposed law permits a testator to file with the Secretary of State a notice that the testator has a will and where the will is to be kept. A certificate from the Secretary of State—stating what information is on file or that no information is on file—may be filed in any proceeding where the existence of a will is relevant.

### **Exoneration**

Under existing law, an encumbrance on real property given by will must be discharged out of estate assets (unless the will directs otherwise or the encumbrance is one for which the decedent was not personally liable). The proposed law reverses this rule so that in the ordinary case property given by will passes subject to all encumbrances.

### **Ancestral Property Doctrine**

The proposed law does not continue the special rules of succession found in existing law that govern the descent of certain property acquired by the decedent from specified ancestors or from a predeceased spouse. Under the

proposed law, all property descends on the basis of the relationship of the successors to the decedent, not on the basis of the source of the property.

### **Inheritance by Remote Relatives**

Under existing law, if the decedent dies intestate the property may pass to remote collateral relatives of the decedent if no close relatives survive the decedent. The proposed law cuts off inheritance by relatives more remote than grandparents and their descendants.

### **Right of Heirs of Predeceased Spouse**

If property would otherwise escheat for lack of heirs of a decedent, existing law allows relatives of a predeceased spouse to inherit. The proposed law replaces this provision with a rule that permits stepchildren of the decedent to inherit; more remote relatives of a predeceased spouse do not inherit, but they may claim property of the decedent that has escheated.

### **Inheritance Rights of Adopted Person**

Ordinarily an adopted person inherits from or through the adoptive parents but not from or through the natural parents who gave the person up for adoption. The proposed law permits a person who is adopted in a stepparent adoption to continue to inherit from and through the natural parents as well as the adoptive parents.

### **Interested Witness**

The proposed law does not continue the existing provision that may invalidate a gift in a will to a person who witnessed the will. Instead, the proposed law makes a no-contest clause in a will ineffective to disinherit a person who challenges a gift to an interested witness.

### **Pretermitted Child**

The proposed law continues to provide an intestate share for the decedent's child unintentionally omitted from a will made before the child was born, but eliminates the intestate share provided under existing law for the decedent's

omitted child living when the will was made and for the decedent's omitted grandchildren.

### **Spouse Omitted From Will**

If a spouse is unintentionally omitted from a will because the marriage occurred after the will was made, existing law gives the omitted spouse all the community property and one-third, one-half, or all of the decedent's separate property depending on the existence of other heirs of the decedent. The proposed law continues this basic scheme but gives the omitted spouse a fixed half share of the decedent's separate property regardless of the existence of other heirs.

### **Failed Residuary Gift**

If one of several named residuary takers under the decedent's will predeceases the decedent without issue, the proposed law passes the failed gift to the other residuary taker or takers. This changes the existing rule that the failed gift passes by intestacy.

### **Waiver of Rights by Surviving Spouse**

Existing case law strictly construes a waiver by one spouse of rights in the estate of the other. The proposed law, generally consistent with existing case law, makes clear that such a waiver must be in writing and to be enforceable must be either (1) made upon full disclosure of assets with advice of independent counsel or (2) found by the court to be voluntary, knowing or fair, and not unconscionable.

### **Election to Take Quasi-Community Property Against Will**

The proposed law treats quasi-community property the same as community property by deleting the existing provision that the surviving spouse must elect whether to take the statutory share of quasi-community property or property given under the will.

### **Execution Formalities**

The proposed law eliminates some of the existing ritual requirements of will execution in favor of the basic

requirements that the will be in writing, be signed by the testator, and be witnessed by two witnesses. In addition, the witnesses must understand that the instrument they sign is the testator's will and must be present at the same time to witness either the signing of the will by the testator or the testator's acknowledgment of the signature or of the will. As an alternative to the two-witness requirement, the proposed law permits the will to be acknowledged by the testator before a notary public at any place within this state.

### **Requirements of Proof**

The proposed law eliminates extraordinary proof requirements that may prevent the proof by credible evidence of the terms of a missing will or of the fact of revocation or revival of a will.

The Statute of Frauds requires that an agreement to make or not to revoke a will or to die intestate must be in writing, but existing rules permit proof of an oral agreement in a number of situations. The proposed law tightens these rules by permitting an oral agreement to be established only where some form of written evidence is available to show that the agreement actually exists.



# RECOMMENDATION

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## INTRODUCTION

The California law of wills and intestate succession has had no thorough substantive revision for over a century. Changes have been piecemeal. Much of the Probate Code has not changed since it was copied from the Texas Code in 1850 or modified by the Field Code in 1872. It remains a nineteenth century code in its premises, its phraseology, and its excessive detail.<sup>1</sup>

Existing California law contains technical requirements that often invalidate wills, even where there is no reasonable doubt that the testator intended the instrument as his or her will and there is no suspicion of fraud.<sup>2</sup> Other provisions of existing law set forth mechanical rules that produce results that are inconsistent with the testator's intent.<sup>3</sup>

Although intestate succession rules should conform to what the testator probably would have wanted if he or she had made a will,<sup>4</sup> many of the California intestate succession rules produce results that are inconsistent with what people want as shown by empirical studies.<sup>5</sup>

There have been many changes in the American family and in public attitudes since the last major revision of the

<sup>1</sup> Niles, *Probate Reform in California*, 31 Hastings L.J. 185, 188 (1979). A new, modern statute has replaced one major portion of the Probate Code. In 1979, the new Guardianship-Conservatorship Law (Division 4 of the Probate Code) replaced the former separate guardianship and conservatorship statutes that were found in former Divisions 4 and 5 of the Probate Code. See 1979 Cal. Stats. ch. 726. The new statute was enacted as a result of a Law Revision Commission recommendation. *Recommendation Relating to Guardianship-Conservatorship Law*, 14 Cal. L. Revision Comm'n Reports 501 (1978).

<sup>2</sup> Niles, *supra* note 1, at 210.

<sup>3</sup> For example, if the testator has made two wills and later destroys the second intending thereby to revive the first will, evidence of the testator's intent is excluded with the result that the testator may well die intestate. See discussion under "Revival of Revoked Will" *infra*. Or if the testator directs someone else to destroy a will in the testator's presence for the purpose of revoking the will, revocation may only be proved if two witnesses viewed the act and are available to testify. See discussion under "Proof of Destruction" *infra*. If the testator devises land which is subject to a mortgage (other than a purchase money mortgage), the mortgage is ordinarily paid off out of other assets of the estate, contrary to what the testator probably intended. See discussion under "Exoneration" *infra*.

<sup>4</sup> Niles, *Probate Reform in California*, 31 Hastings L.J. 185, 200 (1979).

<sup>5</sup> For example, if the decedent dies intestate survived by a spouse and a grandnephew, half of the decedent's separate property goes to the spouse and the other half goes to the grandnephew. See Prob. Code § 223. In such a case, most people would prefer to have all of the property go to the surviving spouse. See discussion under "Share of Surviving Spouse" *infra*.

California Probate Code in 1872: There are more divorces and a greater likelihood that decedents will leave separate property in their estates; more decedents have had plural families and leave adopted children, stepchildren, children born out of wedlock, and relatives of the half-blood; more decedents die with inherited property in their estates; more decedents have moved to California with property acquired elsewhere.<sup>6</sup> As a result, the California Probate Code is overdue for a comprehensive revision.

The Commission recommends enactment of a new comprehensive statute, drawn in part from the Uniform Probate Code,<sup>7</sup> to govern wills, intestate succession, and related matters.<sup>8</sup> The proposed law will make probate more efficient and expeditious. It will provide rules that are more likely to carry out the intent of the testator or, if a person dies without a will, the intent a decedent without a will is most likely to have had. By drawing freely from the Uniform Probate Code,<sup>9</sup> the proposed law will promote national uniformity in cases where a special local rule is not required.<sup>10</sup>

Although much of the substance of existing law is retained, the proposed law makes a number of significant

<sup>6</sup> Niles, *Probate Reform in California*, 31 *Hastings L.J.* 185, 215-16 (1979).

<sup>7</sup> The Uniform Probate Code reflects contemporary thinking and generally is a clearer, simpler statement of the law. Niles, *supra* note 6, at 216, 218. Currently 14 states are considered by the National Commissioners on Uniform State Laws as having enacted the Uniform Probate Code: Alaska, Arizona, Colorado, Idaho, Maine, Michigan, Minnesota, Montana, Nebraska, New Jersey, New Mexico, North Dakota, Pennsylvania, and Utah. See National Conference of Commissioners on Uniform State Laws, 1982-83 Reference Book 78.

<sup>8</sup> This tentative recommendation is one of a series relating to probate law. Other current probate law recommendations relate to missing persons, emancipated minors, disclaimer of testamentary and other interests, and nonprobate transfers. See *Recommendations Relating to Probate Law and Procedure*, 16 Cal. L. Revision Comm'n Reports 101 (1982).

<sup>9</sup> Frequently the language of the Uniform Probate Code is substituted for existing California language even though no substantive change is intended. The Uniform Probate Code language is used in such cases because it is clearer or simpler or because uniformity of language in the particular area of law is desirable.

<sup>10</sup> As a result of the mobility of contemporary society and the frequency of interstate property transactions, a decedent may leave property in several jurisdictions. Uniformity of the law of wills and intestate succession will help ensure that the decedent's intent is effectuated with a minimum disruption of the estate. Uniformity also enables use of cases from other jurisdictions construing the law. The importance of national uniformity of probate and related law is recognized by the adoption in California of such laws as the Uniform Simultaneous Death Act (Prob. Code §§ 296-296.8), Uniform Testamentary Additions to Trusts Act (Prob. Code §§ 170-173), Uniform Gifts to Minors Act (Civil Code §§ 1154-1165), and Uniform Durable Power of Attorney Act (Civil Code §§ 2400-2407).

changes either drawn from the Uniform Probate Code or based on unfavorable experience under existing law. The significant changes are discussed below.<sup>11</sup>

The operative date of the proposed law is deferred one year to January 1, 1985, to give the bench, bar, and public time to become familiar with its provisions. The proposed law applies only to cases where the decedent dies on or after the operative date. Old law will continue to govern cases where the decedent dies before the operative date.

## WILLS

### Execution of Wills

#### Formal Requirements

The formalities for execution of an attested will are to ensure that the testator intended the instrument to be a will, to minimize the opportunity for fraudulent alteration of the will or substitution of another instrument for it, and to provide witnesses who can testify that the testator appeared to be of sound mind and free from duress at the time the testator signed or acknowledged the will.<sup>12</sup> These purposes are served by the existing requirements that the will be in writing, be signed by the testator, and be signed by two witnesses who understand that the instrument is the testator's will and who were present at the same time to witness the testator's signing of the will.<sup>13</sup> The proposed law continues these requirements.

The proposed law eliminates other requirements of California law that often invalidate wills on technical grounds where there is no reasonable doubt that the testator intended the instrument as a will and there is no suspicion of fraud. These are the requirements that the signatures be "at the end" of the will,<sup>14</sup> that the testator

<sup>11</sup> Less significant and technical changes to existing law are noted in the Comments following each section of the proposed law.

<sup>12</sup> See *In re Estate of Fmart*, 175 Cal. 238, 239, 165 P. 707 (1917); Mechem, *Why Not A Modern Wills Act?*, 33 Iowa L. Rev. 501, 504-05 (1948).

<sup>13</sup> See Prob. Code § 50. The proposed law continues the existing provision that, in lieu of the testator's signing of the will, the testator's name may be signed by someone else in the testator's presence and at the testator's direction, or the testator may acknowledge the signature to the witnesses. See *id.*

<sup>14</sup> Prob. Code § 50. Signatures are required to be at the end of the will in order to prevent fraudulent insertion of additional matter following the last paragraph of the will. See

“declare” to the witnesses that the instrument is his or her will and “request” the witnesses to sign,<sup>15</sup> and that the witnesses sign in the testator’s presence.<sup>16</sup>

As an alternative to the two-witness requirement, the proposed law permits the testator to acknowledge the will before a notary public in California. This alternative is new to California law. It provides a simple and reliable method to prove that the person who signed the will was the testator and to prove the date the will was acknowledged.<sup>17</sup>

### Interested Witness

Under existing law, a witness is disqualified from taking under the will unless there are two other disinterested witnesses.<sup>18</sup> The intent of this rule is to prevent fraud or

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*In re Estate of Seaman*, 146 Cal. 455, 460, 462-63, 80 P. 700 (1905). However, experience has shown that this type of alteration is very rare, while invalidation of wills by rigid application of the requirement that the signature be at the end of the will is alarmingly frequent. *Estate of Chase*, 51 Cal. App.2d 353, 359, 124 P.2d 895 (1942). And the requirement does not protect against inserting additional matter in the will on some page other than the signature page.

The more recent California cases have upheld wills by giving the signature-at-the-end requirement a liberal and practical interpretation. 7 B. Witkin, *Summary of California Law Wills and Probate* § 115, at 5629-31, § 117, at 5632 (8th ed. 1974). Under the proposed law, as under the Uniform Probate Code, the requirement that the will be signed by the testator is satisfied if the testator writes his or her name in the body of the will and intends it to be his or her signature on the will, whether or not the signature be at the end of the will. See the Comment to Uniform Probate Code § 2-502.

- <sup>15</sup> Prob. Code § 50. The requirement that the testator “declare” that the instrument is his or her will and “request” the witnesses to sign has been weakened by cases holding that these need not be spoken in words but may be inferred from the testator’s conduct and surrounding circumstances. *Estate of Gray*, 75 Cal. App.2d 386, 390, 171 P.2d 113 (1946); 7 B. Witkin, *Summary of California Law Wills and Probate* § 118, at 5633-34 (8th ed. 1974). It should be sufficient that the witnesses understand, by whatever means, that the instrument being witnessed is the testator’s will, and the proposed law so provides.
- <sup>16</sup> Prob. Code § 50. The requirement that the witnesses sign in the testator’s presence serves none of the purposes for the execution formalities. See text accompanying note 12 *supra*. This requirement is eliminated by the proposed law. However, the proposed law continues the existing requirement that the witnesses be present at the same time to witness the signing of the will by the testator or at the testator’s direction or the testator’s acknowledgment of the signature because all the witnesses should observe the testator’s apparent soundness of mind and absence of duress at the same time.
- <sup>17</sup> The notary’s certificate of acknowledgment indicates the date of the acknowledgment. See, e.g., Civil Code § 1189. A will executed in the traditional manner need not be dated. McCarroll & Smith, *Formal and Technical Aspects of Wills*, in *California Will Drafting* § 4.16, at 132 (Cal. Cont. Ed. Bar 1965).
- <sup>18</sup> Prob. Code § 51. If the interested witness would be entitled to an intestate share of the estate if the will were not established, the disqualification is limited so that the interested witness may take the lesser of (1) the amount provided in the will or (2) the intestate share. It should be noted that under California law the fact that a

undue influence. However, in most cases of fraud or undue influence the malefactor is careful not to sign as a witness.<sup>19</sup> The disqualification of a witness from taking under the will tends rather to penalize an innocent member of the testator's family who witnesses a home-drawn will.

Under the proposed law, an interested witness is not automatically disqualified from taking under the will.<sup>20</sup> Instead, the person who challenges the gift to the interested witness can bring all the salient facts to the court's attention, and the court can draw an inference of undue influence if justified from those facts.<sup>21</sup> In addition, the proposed law permits a person to challenge the gift without the risk of losing benefits under the will: The proposed law makes a no-contest clause in the will ineffective to disinherit the person who challenges a gift to an interested witness.

### Choice of Law

If a will executed *outside* California is offered for probate in California, the will is valid under existing law<sup>22</sup> (1) if the will was executed in accordance with the law of California or the state where the will was executed or (2) if the will is valid under the laws of the state where the testator was domiciled on the date the will was executed or the state where the testator was domiciled at the time of death. However, if a will executed *inside* California is offered for probate in California, the existing rule<sup>23</sup> may be that the will is valid only if it was executed in accordance with California

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subscribing witness is "interested" does not invalidate the will. Estate of Tkachuk, 73 Cal. App.3d 14, 139 Cal. Rptr. 55 (1977).

Section 22.1 of the Probate Code invalidates a testamentary gift to a nonprofit charitable corporation if the corporation is subsequently appointed as guardian or conservator of the testator and the will was executed within six months prior to the filing of the petition for guardianship or conservatorship. The proposed law does not continue this limitation, since it is easily circumvented. Cf. 7 B. Witkin, Summary of California Law *Wills and Probate* § 34, at 5557 (8th ed. 1974) (discussing repeal of analogous provisions); *Review of Selected 1971 California Legislation*, 3 Pac. L.J. 191, 197 (1972) (same).

<sup>19</sup> Comment to Uniform Probate Code § 2-505.

<sup>20</sup> This provision is taken from Section 2-505 of the Uniform Probate Code.

<sup>21</sup> See Comment to Uniform Probate Code § 2-505.

<sup>22</sup> Prob. Code § 26.

<sup>23</sup> No statutory provision specifically deals with this matter, and no case has been found involving the choice of law rule where the will was executed inside California.

law, even though the testator may have been domiciled in another state at the time of execution and the will would be valid under the law of that state.

Public policy favors law that carries out the testator's intent by validating the will whenever possible. To this end, the California rule that recognizes the validity of a will executed *outside* California if valid under the law of another appropriate jurisdiction should be extended. Under the proposed law, a will executed *inside* California is likewise valid for California purposes if it would be valid under the law of another appropriate jurisdiction. This is consistent with the Uniform Probate Code choice of law rule<sup>24</sup> in an area where national uniformity is plainly advantageous.

## Revocation of Wills

### Proof of Destruction

Under California law, a will may be revoked by being burned, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking it, either by the testator or by another person in the testator's presence and by the testator's direction.<sup>25</sup> However, California law requires two witnesses if the will is destroyed by another person at the testator's direction but not if the will is destroyed by the testator in person.<sup>26</sup>

The reason for this difference in treatment is obscure. The rule does not prevent fraud—a person who fraudulently destroys a will after the testator's death need only allege that the testator destroyed it in person in order to avoid the two-witness rule. The rule serves mainly to frustrate the testator's intent by excluding proof by a single credible witness that the will was destroyed in the testator's presence and at the testator's direction for the purpose of

<sup>24</sup> Uniform Probate Code § 2-506.

<sup>25</sup> Prob. Code § 74.

<sup>26</sup> See Prob. Code § 74; 7 B. Witkin, *Summary of California Law Wills and Probate* § 151, at 5667 (8th ed. 1974). It is not clear under Section 74 whether the witnesses must be eyewitnesses and whether the person who destroyed the will is a qualified witness. See French & Fletcher, *A Comparison of the Uniform Probate Code and California Law With Respect to the Law of Wills*, in *Comparative Probate Law Studies* 347 n.51 (1976).

revoking it. Accordingly, the proposed law eliminates the two-witness requirement.<sup>27</sup>

### Revival of Revoked Will

Under California law, if the testator's first will is revoked by a second will and the second will is then revoked, whether the first will is thereby revived depends upon the manner of revocation: If the second will is revoked by an instrument, the first will is not revived unless the revoking instrument contains terms showing that the testator intended the first will to be revived.<sup>28</sup> If the second will is revoked not by an instrument but by a physical act such as destruction, the revocation does not revive the first will, regardless of what the testator intended; extrinsic evidence of the testator's intent to revive the first will is inadmissible.<sup>29</sup>

Existing law frustrates the intent of the testator who destroys a second will intending thereby to revive the first.<sup>30</sup> The proposed law provides instead that if the testator revokes the second and revoking will by a physical act such as destruction, the first will may be revived if it is evident from the circumstances of the revocation or from the

<sup>27</sup> This is consistent with Uniform Probate Code § 2-507. Section 79 of the Probate Code which provides that "revocation of a will revokes all its codicils" is also repealed. This apparently absolute rule is qualified by a case holding that if the codicil is sufficiently complete to stand on its own as a will and the underlying will is revoked by the testator with the intent that the comprehensive terms of the codicil be given effect as the testator's final testamentary expression, the codicil becomes a will. Estate of Cuneo, 60 Cal.2d 196, 202, 384 P.2d 1, 32 Cal. Rptr. 409 (1963). Repeal of Section 79 would leave the matter to be resolved as a question of the testator's intent in the particular case and would thus be more consistent with present California law than the somewhat inaccurate statement of Section 79.

<sup>28</sup> Prob. Code § 75. Under California law, revocation may sometimes be accomplished in an instrument which is not executed with the formalities of a will. See Prob. Code § 73. The proposed law omits this provision. See note 60 *infra*. Also, the California anti-revival rule does not apply to a codicil which does not revoke an entire will and is itself later revoked; revocation of such a codicil leaves the original will intact. Estate of Hering, 108 Cal. App.3d 88, 166 Cal. Rptr. 298 (1980); Bird, *Revocation of a Revoking Codicil: The Renaissance of Revival in California*, 33 Hasungs L.J. 357, 370-74 (1981).

<sup>29</sup> See *In re Estate of Lones*, 108 Cal. 688, 689, 41 P. 771 (1895); Bird, *supra* note 28, at 362 n.34; Prob. Code § 75. The only relief that might be afforded in California would be to avoid the revocation of the second will by applying the doctrine of dependent relative revocation. Niles, *Probate Reform in California*, 31 Hastings L.J. 185, 214 (1979).

<sup>30</sup> See Evans, *Comments on the Probate Code of California*, 19 Calif. L. Rev. 602, 611-12 (1931); Ferrier, *Revival of a Revoked Will*, 28 Calif. L. Rev. 265, 273, 276 (1940); Niles, *supra* note 29, at 214.

testator's contemporary or subsequent declarations that the testator intended the first will to take effect as executed.<sup>31</sup> This rule is subject to the general hazard of admitting parol evidence in probate proceedings.<sup>32</sup> However, it is more likely than existing law to effectuate the testator's actual intent and to avoid intestacy.

### Revocation by Dissolution or Annulment

The California rule is that dissolution or annulment of the testator's marriage has no effect on dispositive provisions in the will in favor of the former spouse.<sup>33</sup> This rule generally produces results contrary to what the average person would have wanted had the person thought about the matter. In most cases where the testator fails to change a will following dissolution of marriage, the failure is inadvertent.<sup>34</sup>

Under the proposed law, dissolution or annulment of marriage revokes any disposition made by will to the former spouse unless the will expressly provides otherwise.<sup>35</sup> This rule is consistent with the weight of scholarly opinion<sup>36</sup> and with the rule of the Uniform Probate Code.<sup>37</sup>

<sup>31</sup> This is the rule of Uniform Probate Code § 2-509.

<sup>32</sup> See Bird, *supra* note 28, at 377 n.117; T. Atkinson, *Handbook of the Law of Wills* § 92, at 477 (2d ed. 1953).

<sup>33</sup> See *In re Estate of Patterson*, 64 Cal. App. 643, 646, 222 P. 374 (1923); 7 B. Witkin, *Summary of California Law Wills and Probate* § 150, at 5666 (8th ed. 1974). The California Legislature recently reaffirmed this rule. See 1980 Cal. Stats. ch. 1188, § 1 (codified as Civil Code § 4352).

<sup>34</sup> The attorney representing a party to a marriage dissolution or annulment proceeding will review the party's will, insurance beneficiaries, joint tenancies, and the like in connection with the property settlement agreement. However, the number of dissolution cases that are handled by the parties themselves without the benefit of legal counsel appears to be increasing, and this development makes it more likely that a party will overlook changing his or her will following the dissolution of the marriage.

<sup>35</sup> The recommended legislation makes a conforming revision in the recently enacted provision of the Family Law Act (Civil Code § 4352) requiring that notice of the effect of dissolution or annulment of marriage be included in every final judgment of dissolution or annulment.

<sup>36</sup> See Niles, *Probate Reform in California*, 31 *Hastings L.J.* 185, 212 (1979); Evans, *Comments on the Probate Code of California*, 19 *Calif. L. Rev.* 602, 610 (1931); Turrentine, *Introduction to the California Probate Code*, in *West's Annotated California Codes*, Probate Code 38 (1956). *Accord*, State Bar of California, *The Uniform Probate Code: Analysis and Critique* 45 (1973). *But see* Note, *The Effect of Divorce on Wills*, 40 *So. Cal. L. Rev.* 708, 714-15 (1967).

<sup>37</sup> Uniform Probate Code § 2-508. The proposed law also adopts the Uniform Probate Code rule that dissolution or annulment revokes any provision conferring a general or special power of appointment on the former spouse and any nomination of the former spouse as executor, trustee, conservator, or guardian, unless the will expressly provides otherwise.

## Missing Wills

### Filing Notice of Will

A practical problem after the death of a person is to ascertain whether the person made a will and, if so, its location. Even if the existence and location of a will are known, it is still necessary to search for codicils and possible subsequent wills.<sup>38</sup> This task is greatly simplified in the case of a will executed in conformity with the Uniform International Wills Act<sup>39</sup> by voluntary registration with the California Secretary of State of a notice which may indicate the intended place of deposit or safekeeping of the will.<sup>40</sup> The information in the notice is kept in strict confidence until the death of the maker. After the death of the maker, the Secretary of State makes the information available to any person who presents a death certificate or other satisfactory evidence of the testator's death.<sup>41</sup>

The proposed law permits filing with the Secretary of State of information concerning wills generally, not just international wills.<sup>42</sup> Filing of information is voluntary, as in the case of an international will; failure to file does not affect the validity of the will. The will itself is not filed, only certain identifying information and a statement of the location of the will. After the death of the testator, a certificate from the Secretary of State reporting the information on file may be obtained, and the certificate may be filed with the court in any proceeding in which the existence of a will of the testator is relevant. It is anticipated that this procedure, involving a relatively modest cost,<sup>43</sup> will result in finding wills that otherwise might not have been found.<sup>44</sup>

<sup>38</sup> Farrand, *Immediate Arrangements*, in 1 California Decedent Estate Administration § 1.16, at 16 (Cal. Cont. Ed. Bar 1971).

<sup>39</sup> Prob. Code §§ 60-60.8. Use of an international will is intended to facilitate proving the validity of the will in countries which are signatories to the international convention. The proposed law continues the Uniform International Wills Act without substantive change.

<sup>40</sup> Prob. Code § 60.8.

<sup>41</sup> Prob. Code § 60.8.

<sup>42</sup> Such a scheme has been adopted in British Columbia. See Wills Act, B.C. Rev. Stat. ch. 434, §§ 33-40 (1979).

<sup>43</sup> The fee for filing the notice of will or for requesting a certificate is five dollars.

<sup>44</sup> This has been the result in British Columbia, which has had a favorable experience with such a scheme. See Law Reform Comm'n of British Columbia, Report on the Making and Revocation of Wills 114 (1981).

## Probate of Valid but Missing Will

A valid, unrevoked will that cannot be found after the testator's death is denied probate under existing California law unless it is established that the will was in existence at the testator's death or that the will was destroyed during the testator's lifetime and without the testator's knowledge, either fraudulently or by public calamity.<sup>45</sup> The rule that denies probate to a missing will under these circumstances—in cases where there is no reasonable doubt that there was such a will and that it was valid and unrevoked at the testator's death—is a substantial defect in California law.<sup>46</sup> The proposed law repeals the rule so that any valid, unrevoked will is provable whether or not the will is physically in existence.<sup>47</sup>

## Proof Requirements For Missing Will

If a missing will is admitted to probate, California law requires that the will provisions be “clearly and distinctly proved by at least two credible witnesses.”<sup>48</sup> This extraordinary proof requirement increases the hazard that the terms of a valid, unrevoked will may not be provable.<sup>49</sup>

<sup>45</sup> See Prob. Code § 350; French & Fletcher, *A Comparison of the Uniform Probate Code and California Law With Respect to the Law of Wills*, in *Comparative Probate Law Studies* 351-54 (1976); Niles, *Probate Reform in California*, 31 *Hastings L.J.* 185, 213 (1979).

<sup>46</sup> See Niles, *supra* note 45, at 213-14, 218; Turrentine, *Introduction to the California Probate Code*, in *West's Annotated California Codes, Probate Code* 38 (1956); Note, *Statutory Restrictions on Probate of Lost Wills: Judicial Inroads on Restrictions*, 32 *Calif. L. Rev.* 221 (1944). The California rule which excludes a valid but missing will from probate has also been criticized as “legal sophistry” (Niles, *supra* at 213), and a “misguided statute” (9 J. Wigmore, *Evidence in Trials at Common Law* § 2523, at 577 (Chadbourn rev. ed. 1981)). Not only does California law sometimes have the undesirable effect of excluding a valid, unrevoked will from probate, but it may also prevent the court from applying the ameliorative doctrine of dependent relative revocation to avoid injustice. For example, if the testator destroys a first will in the mistaken belief that a second will is valid, the law will presume that the testator intended to revoke the first will only if the second will were valid. In other words, the revocation is not absolute, but is relative to and dependent on the validity of the second will. 7 B. Witkin, *Summary of California Law Wills and Probate* § 155, at 5670 (8th ed. 1974). By requiring the will to be “in existence” at the testator's death, Section 350 appears to preclude application of the doctrine of dependent relative revocation to save the destroyed first will. L. Simes & P. Basye, *Problems in Probate Law* 300 (1946).

<sup>47</sup> This is the common law rule. L. Simes & P. Basye, *Problems in Probate Law* 298 (1946). This is also the rule under the Uniform Probate Code. See French & Fletcher, *A Comparison of the Uniform Probate Code and California Law With Respect to the Law of Wills*, in *Comparative Probate Law Studies* 351 (1976).

<sup>48</sup> Prob. Code § 350.

<sup>49</sup> French & Fletcher, *supra* note 47, at 354.

The requirement that at least two witnesses prove the provisions of a missing will has not worked satisfactorily in those states that have such a rule.<sup>50</sup> The quality of evidence cannot be measured in terms of the number of witnesses; the question is rather one of the credibility of the witnesses. There may well be cases in which only one witness is available but the witness is of such credibility that no further proof is necessary, and none should be required.

The proposed law repeals California's extraordinary proof and two-witness requirements for proof of the terms of a missing will. It adopts the rule that proof is by a preponderance of the evidence and requires no minimum number of witnesses. This will avoid the situation where the terms of a valid and unrevoked will are known but nonetheless not provable.

## Interpretation of Wills

### Choice of Law as to Interpretation

Under California law, a testator may in the will select the law of any state to be used in construing the will with respect to real and personal property located in California.<sup>51</sup> If the property is located outside California, a disposition of real property is construed under the law of the place where the property is located and a disposition of personal property is construed under the law of the testator's domicile.<sup>52</sup>

The proposed law permits the testator to designate in the will the law to be applied in construing the will.<sup>53</sup> This will enable consistent treatment of the testator's property in all jurisdictions in which the property may be located.

### Exoneration

Under existing law, if a will devises land that is subject to a mortgage, deed of trust, or other lien, and the will makes

<sup>50</sup> L. Simes & P. Basye, *Problems in Probate Law* 302-03 (1946).

<sup>51</sup> See Prob. Code § 100; 7 B. Witkin, *Summary of California Law Wills and Probate* § 49, at 5573 (8th ed. 1974).

<sup>52</sup> 7 B. Witkin, *Summary of California Law Wills and Probate* § 49, at 5573 (8th ed. 1974).

<sup>53</sup> This is also the rule adopted in the Uniform Probate Code § 2-602. The Uniform Probate Code 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

clear whether the testator intended that the devisee take the land subject to or free of the encumbrance, the clearly expressed intention controls.<sup>54</sup> However, if the testator's intention does not appear from the will and 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>55</sup>

The proposed law abolishes the doctrine of exoneration.<sup>56</sup> It is unrealistic to presume the testator would intend to give encumbered property free of an encumbrance the testator had no thought of discharging during lifetime.<sup>57</sup> The proposed law conforms more closely to the intent of the average testator than existing California law.

### Ademption by Extinction

Under existing law, 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 monetary equivalent is substituted for the gift, with the result that the testamentary provision is nullified.<sup>58</sup>

Because of the harsh effects of ademption, the California courts have sought to avoid ademption whenever possible

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policy" of the forum state. The proposed law would additionally make clear that the testator may not contravene the interests of the surviving spouse in community or quasi-community property.

<sup>54</sup> See 7 B. Witkin, *Summary of California Law Wills and Probate* § 456, at 5895-96 (8th ed. 1974).

<sup>55</sup> 7 B. Witkin, *supra* note 54; French & Fletcher, *A Comparison of the Uniform Probate Code and California Law With Respect to the Law of Wills*, in *Comparative Probate Law Studies* 379-80 (1976). 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 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*.

<sup>56</sup> This is consistent with Uniform Probate Code § 2-609. Under the proposed law, the testator may indicate in the will that the devisee is to take the property free of encumbrances, and the testator's intent controls.

<sup>57</sup> 7 B. Witkin, *supra* note 54, § 457, at 5896.

<sup>58</sup> 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 generally not subject to ademption. See 7 B. Witkin, *supra* § 218, at 5729.

by applying various constructional rules.<sup>59</sup> In addition, several statutes state special rules that save a testamentary gift from ademption.<sup>60</sup>

The Uniform Probate Code identifies a number of other special situations where a specific gift should not be adeemed. This is where a stock split, merger, or the like, alters the character of the securities given,<sup>61</sup> where there are unpaid proceeds of sale, condemnation, or insurance on damaged or destroyed property that was devised,<sup>62</sup> or where a secured note given by will has been foreclosed and the property used as security is in the testator's estate as a result of the foreclosure.<sup>63</sup> The proposed law adds these Uniform Probate Code rules of nonademption to the existing California statutes. The Uniform Probate Code rules deal with matters not covered by California statute and are generally consistent with California decisional law.

<sup>59</sup> See 7 B. Witkin, *supra* note 58, § 218, at 5729; French & Fletcher, *A Comparison of the Uniform Probate Code and California Law With Respect to the Law of Wills*, in *Comparative Probate Law Studies* 385 (1976).

<sup>60</sup> Prob. Code §§ 77 (no ademption of specific gift that is subject of executory contract of sale), 78 (no ademption of specific gift if testator alters but does not wholly divest interest in property by conveyance, encumbrance, or other act).

Probate Code Section 73, which is cast in terms of revocation, is more accurately viewed as an ademption provision. It provides that a gift of specific property is revoked if the testator alters his or her interest in the property and the instrument that makes the alteration either expresses the testator's intent to revoke or contains provisions wholly inconsistent with the will. Section 73 is superfluous. 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 58, § 218, at 5728; Comment to Uniform Probate Code § 2-612. If the property is only partly conveyed away, Probate Code Section 78 will apply, and the testamentary gift would not be adeemed. Section 73 has also sometimes been applied in the context of determining the effect on a will of a marital settlement agreement incident to dissolution. French & Fletcher, *supra* note 59, at 344 n.48 (1976). However, this application of Section 73 has been superseded by Section 80 specifically to deal with this problem.

Probate Code Section 72 includes a provision that when a second will contains dispositive provisions wholly inconsistent with the dispositive provisions of a prior will, the court need not give effect to the appointment of an executor in the first will even though the second will is silent on the matter if that appears consistent with the testator's intent. This special provision is also unnecessary since it is consistent with the general rule that the testator's intent governs.

<sup>61</sup> 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). 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 59, at 383.

<sup>62</sup> Uniform Probate Code § 2-608(a). California decisional law is roughly similar. French & Fletcher, *supra* note 59, at 384.

<sup>63</sup> Uniform Probate Code § 2-608(a)(4).

To the extent California decisional law has not dealt with all these matters, the provisions will clear up uncertainties and provide useful rules.

### Ademption by Satisfaction

Under existing law, if the testator makes an inter vivos gift to a person who also is given a general legacy under the 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>64</sup> The proposed law continues existing law but makes clear that if the testator's writing is other than a will the writing must be contemporaneous with the gift,<sup>65</sup> and delays the date of valuation of the property if the donee's possession or enjoyment of the property is delayed.<sup>66</sup>

### Failed Residuary Gift

Under California law, if the residuary clause of a will makes a gift to two or more named persons and one of them predeceases the testator, the anti-lapse statute is first applied to make a substitution for the predeceased taker.<sup>67</sup> However, if the residuary gift does not come within the anti-lapse statute (either because the named taker is not kindred of the testator<sup>68</sup> or dies without issue) and thus cannot be saved, the failed gift passes by intestacy.<sup>69</sup>

<sup>64</sup> Prob. Code § 1050. Section 1050 also provides that if an inter vivos gift is made of specific property also given by will, an ademption will occur. This special application of the doctrine of ademption is redundant and is not codified in the proposed law. See generally 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”).

<sup>65</sup> Although Probate Code Section 1050 does not require that the testator's writing be contemporaneous with the gift, one California case appears to have accepted that rule. See *In re Estate of Hayne*, 165 Cal. 568, 574, 133 P. 277 (1913).

<sup>66</sup> In this case, the property is valued as of the time the donee comes into possession or enjoyment or the date of the testator's death, whichever time is the earlier. This clarification is drawn from Uniform Probate Code § 2-612.

<sup>67</sup> 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).

<sup>68</sup> 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, *A Comparison of the Uniform Probate Code and California Law With Respect to the Law of Wills*, in *Comparative Probate Law Studies* 370 n.112 (1976).

<sup>69</sup> French & Fletcher, *supra* note 67, at 372-73; Niles, *supra* note 67, at 215.

The proposed law changes existing law to provide 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>70</sup> This provision conforms more closely to the intent of the average decedent than does existing law, and also avoids intestacy.

### California Statutory Will

Legislation enacted in 1982<sup>71</sup> provides for a "California statutory will"—a will executed by the testator on a printed will form.<sup>72</sup> The proposed law continues the substance of the 1982 statute with a few revisions needed to conform it to the proposed provisions applicable to wills generally.<sup>73</sup>

## INTESTATE SUCCESSION

### Share of Surviving Spouse

Under existing law, in the event of intestacy, all of the community property<sup>74</sup> and quasi-community property<sup>75</sup> goes to the surviving spouse, but the disposition of the decedent's separate property depends upon the decedent's

<sup>70</sup> This is the rule of Uniform Probate Code § 2-606.

<sup>71</sup> 1982 Cal. Stats. ch. 1401 (codified at Prob. Code §§ 56-56.14).

<sup>72</sup> The statute sets out two printed will forms. The printed forms give the testator a limited choice of dispositive clauses and permit the testator to nominate one or more persons or institutions as executor or as guardian of the testator's minor children. One of the forms includes provisions for a trust and permits the testator also to nominate one or more persons or institutions as trustee. No alteration may be made in the printed form except in accordance with the instructions for execution of the form.

<sup>73</sup> The significant revisions of the 1982 statute made by the proposed law are:

(1) A provision is added that a disposition of property by the will to the testator's spouse or a nomination of the testator's spouse as an executor, trustee, or guardian is revoked if the marriage of the testator terminates after execution of the will as a result of dissolution or annulment. This adopts the general rule of the proposed law that dissolution revokes a disposition to or a nomination of a former spouse. See discussion under "Revocation by Dissolution or Annulment" *supra*.

(2) Various provisions adopting the laws relating to the succession of separate property not acquired from a parent, grandparent, or predeceased spouse have been replaced by a reference to the law relating to intestate succession. This change permits community property and quasi-community property to be governed by the intestate succession rules applicable to that property and recognizes that the special provisions relating to succession of property acquired from ancestors are not continued in the proposed law. See discussion under "Ancestral Property Doctrine" *infra*.

Conforming revisions have been made in other provisions of the 1982 statute to reflect these changes, and other technical revisions have been made.

<sup>74</sup> Prob. Code § 201.

<sup>75</sup> Prob. Code § 201.5.

family situation. If the decedent dies leaving one or more issue, parents, brothers, sisters, or descendants of a deceased brother or sister, the share of the surviving spouse in the separate property of the decedent is one-half or one-third depending upon who the survivors are.<sup>76</sup> If the decedent dies leaving no such relatives, the surviving spouse takes all of the decedent's separate property.<sup>77</sup>

This scheme causes a number of problems:

(1) Empirical studies show that most persons want the entire estate to go to the surviving spouse in preference to children, parents, and brothers and sisters.<sup>78</sup> Existing law defeats this desire; for example, if the decedent is survived by a spouse and a grandnephew, the grandnephew takes as much of the separate property as the spouse.

(2) A portion of the separate property estate may go to adult children or other relatives of the decedent who have little or no need for the property. The surviving spouse is deprived of a portion of the decedent's estate that may be required to maintain the surviving spouse during lifetime. This problem is becoming greater as the incidence of second marriages, involving substantial amounts of separate property, increases.

(3) Division of the separate property often engenders litigation over such matters as the value of the property.

(4) Treating separate property differently from community property causes delay and expense to determine claims as to the community or separate nature

<sup>76</sup> The surviving spouse receives one-half of the intestate decedent's separate property if the decedent is survived by only one child or only the issue of one deceased child (Prob. Code § 221) or if the decedent dies without issue but is survived by one or both parents or the issue of one or both parents (Prob. Code § 223).

The surviving spouse receives one-third of the intestate decedent's separate property if the decedent is survived by two or more children, by one child and the issue of one or more deceased children, or by the issue of two or more deceased children. Prob. Code § 221.

<sup>77</sup> Prob. Code § 224.

<sup>78</sup> See Fellows, Simon & Rau, *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 Am. B. Foundation Research J. 321, 348-64; Niles, *Probate Reform in California*, 31 Hastings L.J. 185, 192 n.47 (1979). This preference applies in the case of children of the marriage, not in the case of the decedent's children of a former marriage. It is reasonable to expect that a surviving spouse will deal fairly with his or her own children and grandchildren, both during the surviving spouse's lifetime and upon the surviving spouse's death, particularly where they devote attention to and show concern for the welfare of the surviving spouse after the death of the decedent. Where the decedent has concern that the other spouse may not deal fairly with the children or other relatives, the decedent may provide for them by will.

of property. Difficult problems of tracing, commingling, and apportionment often arise in litigation concerning the community or separate nature of property.

(5) An award to minor children is unnecessary, since the surviving spouse has the duty to support them.<sup>79</sup> Moreover, awarding property directly to children often involves the expense of establishing and administering court supervised guardianships for minors who receive property of the decedent.

The proposed law cures these problems by giving all of the intestate decedent's separate property to the surviving spouse. The only exception to this rule is where the decedent is survived by children or other lineal descendants of a former marriage. In this case, one-half of the decedent's separate property goes to the surviving spouse and the other half is divided among all of the decedent's children and descendants of predeceased children (including those who are descendants of both spouses as well as those who are descendants only of the decedent). This scheme is designed to protect children of a prior marriage and their offspring who might otherwise not be provided for by the surviving spouse; it is consistent with the findings of empirical studies that most persons want the children to receive a portion of the estate in this situation.<sup>80</sup>

### Inheritance by Remote Relatives

Under existing California intestate succession law, a blood relative of the decedent may inherit no matter how remote the heir may be.<sup>81</sup> A remotely related heir has been described as a "laughing heir" because such a person is thought unlikely to feel a sense of bereavement at the decedent's death.<sup>82</sup>

Unlimited inheritance has been described as an absurd anachronism and has long been the subject of scholarly criticism. The proposed law limits inheritance by intestate

<sup>79</sup> Civil Code §§ 196-196a.

<sup>80</sup> Fellows, Simon & Rau, *supra* note 78, at 366.

<sup>81</sup> See Prob. Code § 226.

<sup>82</sup> See Cavers, *Change in the American Family and the "Laughing Heir,"* 20 Iowa L. Rev. 203, 208 (1935).

succession to lineal descendants of the decedent, parents and their lineal descendants, and grandparents and their lineal descendants; it eliminates inheritance by more remote relatives traced through great-grandparents and other more remote ancestors.<sup>83</sup> This rule cuts off the "laughing heir" and limits inheritance to relatives whom the decedent probably knew and had an interest in.

The proposed law has a number of advantages over existing law:

(1) It simplifies the administration of estates (and of trusts where there is a final gift to "heirs") by avoiding the delay and expense of attempting to find remote missing heirs and by minimizing problems of service of notice.<sup>84</sup>

(2) It eliminates the standing of remote heirs to bring will contests (or trust litigation) and thus minimizes the opportunity for unmeritorious litigation brought for the sole purpose of coercing a settlement.<sup>85</sup>

(3) It removes a significant source of uncertainty in land titles.<sup>86</sup>

(4) It is consistent with the decedent's probable desire in a case where the decedent had a predeceased spouse, since it reduces the number of remote relatives who take in preference to stepchildren and close in-laws.<sup>87</sup> The result is that the property will go to persons for whom the decedent is likely to have had real affection in preference to remote relatives who probably were not acquainted with the decedent.

### Ancestral Property Doctrine

Modern intestate succession statutes are based on the relationship of the decedent to possible successors; property goes to certain relatives of the decedent regardless of the source from which the decedent acquired

<sup>83</sup> This is also the rule of Uniform Probate Code § 2-103.

<sup>84</sup> Niles, *Probate Reform in California*, 31 *Hastings L.J.* 185, 200 n.98 (1979).

<sup>85</sup> From time to time there is prolonged litigation in California, brought by remote heirs to establish their relationship to the decedent. Evans, *Comments on the Probate Code of California*, 19 *Calif. L. Rev.* 602, 613 (1931). Eliminating the standing of remote heirs to bring will contests will not result in the probate of invalid wills merely because there is no one with standing to contest the will, since the Attorney General may contest any will where the state stands to benefit by escheat. *In re Estate of Peterson*, 138 *Cal. App.* 443, 32 *P.2d* 423 (1934).

<sup>86</sup> Cavers, *supra* note 82, at 211, 214.

<sup>87</sup> See discussion under "Right of Heirs of Predeceased Spouse" *infra*.

the property.<sup>88</sup> Notwithstanding this general rule, there are a number of situations under California law where inheritance is governed not by the relationship of the heirs to the decedent but by the source of the property in the decedent's estate. This is referred to as the "ancestral property" doctrine.

For example, the usual rule is that on the death of a person without spouse or issue, property passes to the person's parents.<sup>89</sup> But under the ancestral property doctrine:

(1) Property received from a particular parent or grandparent goes to that parent or grandparent or, if dead, to the heirs of the parent or grandparent.<sup>90</sup>

(2) Property received from a predeceased spouse goes to near relatives of the predeceased spouse.<sup>91</sup>

(3) Property received from a parent by an unmarried minor goes to other children of the same parent.<sup>92</sup>

Likewise, the usual rule is that half blood relatives of a decedent<sup>93</sup> are entitled to inherit equally with whole blood relatives of the same degree. But under a California variant of the ancestral property doctrine a half blood relative is excluded from inheriting property that came to the decedent from an ancestor.<sup>94</sup>

<sup>88</sup> Niles, *Probate Reform in California*, 31 *Hastings L.J.* 185, 203 (1979).

<sup>89</sup> Prob. Code § 225.

<sup>90</sup> Prob. Code § 229(c).

<sup>91</sup> See Prob. Code §§ 229, 296.4. First preference is given to children of the predeceased spouse and their descendants by right of representation. If there are no issue of the predeceased spouse, the property goes to the parents of the predeceased spouse equally, or the survivor. If there is no surviving issue or parent of the predeceased spouse, the property goes to the brothers and sisters of the predeceased spouse equally and their descendants by right of representation. If none of the foregoing survive, the property goes to blood relatives of the decedent. Prob. Code § 230; *Estate of McDill*, 14 Cal.3d 831, 537 P.2d 874, 122 Cal. Rptr. 754 (1975). If none of the foregoing survive, the property goes to relatives of the predeceased spouse more remote than the issue of parents. Prob. Code §§ 229(e), 296.4; *Estate of McDill*, *supra*. If none of the foregoing survive, the property escheats to the state. Prob. Code § 231.

<sup>92</sup> Prob. Code § 227. If children of the parent are deceased, the property goes to the issue of deceased children.

<sup>93</sup> The term "half blood" is used broadly to describe all those who share one common ancestor with the decedent, but not two. Thus, for example, if the decedent's brother had the same father as the decedent but a different mother, the brother would be a half blood kindred of the decedent. Similarly, all descendants of the brother are included within the term "half blood." See *Estate of Ryan*, 21 Cal.2d 498, 133 P.2d 626 (1943).

<sup>94</sup> Prob. Code § 254.

The proposed law does not continue the ancestral property doctrine currently found in California law.<sup>95</sup> Elimination of the ancestral property doctrine will reduce the cost of probate, because this doctrine injects complexity into administration of intestate estates and often causes difficult problems of tracing, commingling, and apportionment.<sup>96</sup> The estate must be sorted out so that the ancestral property may pass by the special rules of succession. When a portion of the decedent's estate goes to relatives of a predeceased spouse, the problems of tracing heirs and giving notice are substantially increased. When property goes to children of a parent there is a likelihood that a guardian must be appointed. Delay, expense, and inconvenience result.

Moreover, the ancestral property rules violate the basic purpose of the intestate succession laws, which is to provide a will substitute for a person who dies intestate. The laws of succession should correspond to the manner in which the average decedent would dispose of property by will. As a general rule, if the decedent were making a will, it is likely that the relationship of possible beneficiaries to the decedent would be a more important factor than the source of the property.

While the ancestral property principles create problems of administration and violate the basic policy of the intestate succession laws, they have been justified on the ground that they provide a measure of equity in some cases. However, whether the principles in fact operate equitably is disputable; the courts have stated that the rules are discriminatory and illogical, and have narrowly construed

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<sup>95</sup> This is consistent with the position of scholars who have studied intestate succession law and concluded that the ancestral property doctrine should be abolished. See Niles, *supra* note 88, at 207-08; Reppy & Wright, *infra* note 96, at 135; Evans, *Comments on the Probate Code of California*, 19 Calif. L. Rev. 602, 614 (1931); Turrentine, *Introduction to the California Probate Code*, in West's Annotated California Codes, Probate Code 35 (1956); Fellows, Simon & Rau, *infra* note 96, at 344. The majority of American States have never adopted any form of ancestral property inheritance. Those that have, generally confined it to real property as under English common law. Reppy & Wright, *supra* at 112-13.

<sup>96</sup> Reppy & Wright, *California Probate Code § 229: Making Sense of a Badly Drafted Provision for Inheritance by a Community Property Decedent's Former In-Laws*, 8 Community Prop. J. 107, 134 (1981). Accord, Niles, *supra* note 88, at 206; Fellows, Simon & Rau, *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 Am. B. Foundation Research J. 321, 344.

them.<sup>97</sup> Moreover, the rules are easily defeated by will or where the decedent dies intestate leaving spouse or issue. The minimal beneficial effect the rules may have in a few cases is outweighed by their overall disadvantages and the complexity in the probate law that they generate.

### Right of Heirs of Predeceased Spouse

California law gives certain relatives<sup>98</sup> of a predeceased spouse a right to inherit any portion of the decedent's estate that would otherwise escheat.<sup>99</sup> This scheme creates a burdensome problem of having to locate and give notice to relatives of a predeceased spouse in every case where there are such relatives, even though they may not be entitled to inherit in the particular case.<sup>100</sup>

The proposed law eliminates inheritance by relatives of a predeceased spouse, other than the decedent's stepchildren, in favor of a procedure permitting such persons to claim property that has escheated.<sup>101</sup> This avoids the location and notice problem but still gives those who may have been close to the decedent a share of the decedent's property. The decedent's stepchildren are continued as heirs rather than as claimants to escheated property because of the likelihood of their closeness to the decedent and because of the minimal problem of locating and giving notice to them. The proposed law provides a simple procedure for determining claims by other relatives of a predeceased spouse to escheated property.<sup>102</sup>

### Representation

Under existing law, if all of the decedent's surviving descendants are in the same generation (for example, if all are children or all are grandchildren), they all share the

<sup>97</sup> See, e.g., *Estate of Ryan*, 21 Cal.2d 498, 504, 512, 133 P.2d 626 (1943); *In re Estate of Sayles*, 215 Cal. 207, 8 P.2d 1009 (1932).

<sup>98</sup> The relatives of the decedent's predeceased spouse who are entitled to inherit are the issue, parents, brothers, sisters, and issue of deceased brothers and sisters of the predeceased spouse. Prob. Code § 229(a).

<sup>99</sup> Prob. Code § 229(d). This supplements the ancestral property provisions of existing law. See Prob. Code § 229. See also Prob. Code § 296.4.

<sup>100</sup> See Prob. Code § 328.

<sup>101</sup> A relative of a predeceased spouse is entitled to receive the escheated property only if the property is not claimed by an heir or devisee of the decedent.

<sup>102</sup> The general escheat procedure found in existing law is adopted for use. See Code Civ. Proc. § 1352.

decedent's intestate property equally (per capita).<sup>103</sup> This result is consistent with a strong popular preference for having all descendants in the same generation share equally.<sup>104</sup>

However, the California rule is that, if the decedent's surviving descendants are not all of the same degree of kindred to the decedent, they take by right of representation—that is, the decedent's estate is divided into as many shares as there are children of the decedent either living or deceased but leaving descendants, and each share of a deceased child leaving descendants is further divided in the same manner at each generation.<sup>105</sup> Because predeceased descendants of the decedent may have had different numbers of children from each other, there is a likelihood that members of the same generation may take unequal shares, contrary to popular preference.

The Uniform Probate Code handles this problem by making the primary division of the estate at the generation nearest to the decedent having at least one living member.<sup>106</sup> Once the estate is divided into primary shares, it descends thereafter by right of representation the same as under California law, with one exception: If a descending

<sup>103</sup> Prob. Code §§ 221, 222. Under this rule, if all of the decedent's surviving descendants are grandchildren, they share equally without reference to the share that their deceased parent would have taken if living. This rule does not apply to collateral kindred of the decedent. The stocks of the decedent's brothers and sisters are maintained through all generations, even though no brothers or sisters survive and all of their surviving offspring are of the same generation. Prob. Code § 225; Niles, *Probate Reform in California*, 31 *Hastings L.J.* 185, 202 (1979). If the decedent's nearest relatives are an aunt or uncle and cousins who are the children of a deceased aunt or uncle, there is no representation at all, since "the estate goes to the next of kin in equal degree." Prob. Code § 226; Niles, *supra* at 203.

<sup>104</sup> See Fellows, Simon & Rau, *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 *Am. B. Foundation Research J.* 321, 383-84; Niles, *supra* note 103, at 202 n.111.

<sup>105</sup> See Prob. Code §§ 221, 222. Under this scheme, the primary division of the estate is made at the children's generation, even though there may be no living members of that generation. *Maud v. Catherwood*, 67 *Cal. App.2d* 636, 155 *P.2d* 111 (1945); Niles, *supra* note 103, at 202. Although this situation occurs relatively infrequently in the context of intestate succession, it does occur in the trust context where the ultimate gift is made long after the death of the settlor to "heirs" as determined under the laws of intestate succession. See *id.*; *Lombardi v. Blois*, 230 *Cal. App.2d* 191, 40 *Cal. Rptr.* 899 (1964).

<sup>106</sup> See Uniform Probate Code § 2-106 and Comment thereto. The Uniform Probate Code follows the same rule of representation with respect to collateral heirs (descendants of the decedent's parents or grandparents) as it does with respect to descendants of the decedent, except that if both paternal and maternal grandparents survive the decedent, or leave descendants who do, one-half of the decedent's estate goes to each line. See Uniform Probate Code §§ 2-106, 2-103; Niles, *supra* note 103, at 201-02.

share of the estate reaches a generation all of whose members have predeceased the decedent, the share is redivided per capita at the next generation having any living members.<sup>107</sup> The result is that with respect to that descending share, the members of that generation share equally.

The proposed law adopts the Uniform Probate Code rule of representation in place of the California rule. This brings California law closer to a per capita distribution scheme and thus corresponds more closely to popular preference.<sup>108</sup>

### Stepparent Adoption

Under existing California law, when a child is adopted the child is deemed to be a descendant of the adopting parent for all purposes of succession by, from, or through the adopting parent, and inheritance by, from, or through blood relatives of the adopted child is cut off by the adoption.<sup>109</sup> However, if the adoption is by the spouse of a natural parent (*i.e.*, a stepparent adoption), it is desirable that the adopted child inherit not only from or through the adoptive parent but also from or through the natural parent who gave up the child for adoption. For example, if a natural grandparent of the adopted child dies intestate, the child should be entitled to inherit; it is unlikely that the grandparent would disinherit the child, had the grandparent made a will, simply because the child was adopted by a stepparent.<sup>110</sup> Accordingly, under the proposed law a stepparent adoption does not cut off inheritance by, from, or through the natural parent who gave up the child for adoption.<sup>111</sup>

<sup>107</sup> See Uniform Probate Code § 2-106; Waggoner, *A Proposed Alternative to the Uniform Probate Code's System for Intestate Distribution Among Descendants*, 66 Nw. U.L. Rev. 626, 630-31 (1971).

<sup>108</sup> The Commission also considered a system of "per capita at each generation" as recommended by Professor Lawrence Waggoner. See Waggoner, *supra* note 107. The Commission found Professor Waggoner's scheme theoretically appealing, but chose the Uniform Probate Code rule in the interest of national uniformity of intestate succession law.

<sup>109</sup> Prob. Code § 257; 7 B. Witkin, *Summary of California Law Wills and Probate* § 62, at 5585-86 (8th ed. 1974).

<sup>110</sup> See *Estate of Garrison*, 122 Cal. App.3d 7, 175 Cal. Rptr. 809 (1981).

<sup>111</sup> This is also the rule of Uniform Probate Code § 2-109. This rule creates the possibility that the adopted child could inherit from the same person both as a natural and as an adopted child. See Comment to Uniform Probate Code § 2-114. The Uniform

## Advancements

If a person makes a gift during lifetime to a potential heir and later dies intestate, the gift is sometimes treated as an "advancement" to the donee and is deducted from the donee's intestate share on the theory that that is what the donor intended.<sup>112</sup> Under existing law, if the donee predeceases the donor, the advancement is deducted from the share the donee's heirs would take, just as if the advancement had been made directly to them.<sup>113</sup> The proposed law reverses this rule and does not charge the advancement against the donee's heirs unless the donor or donee expressly intended that this be done.<sup>114</sup> Most inter vivos transfers are either intended to be absolute gifts or are a carefully integrated part of a comprehensive estate plan. In addition, the predeceased donee may have disposed of the property during lifetime; to charge the gift against the donee's heirs in such a case would be unfair to them.

## FAMILY PROTECTION

### Family Allowance

Existing law provides for a reasonable family allowance to the decedent's surviving spouse and minor children and also to the decedent's adult children who are physically or mentally incapacitated from earning a living and who were actually dependent in whole or in part upon the decedent for support.<sup>115</sup> In addition, existing law gives the court discretion to grant a family allowance to other adult children of the decedent who are not incapacitated but who were actually dependent in whole or in part upon the decedent for support.<sup>116</sup> Payment of the family allowance is

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Probate Code precludes this by a provision that a person who is related to the decedent through two lines is entitled only to a single share. Uniform Probate Code § 2-114. The proposed law adopts this provision.

<sup>112</sup> See Prob. Code § 1050; 7 B. Witkin, *Summary of California Law Wills and Probate* § 35, at 5557-58 (8th ed. 1974).

<sup>113</sup> Prob. Code § 1053.

<sup>114</sup> This is also the rule of Uniform Probate Code § 2-110. Under this rule the donor's writing declaring the gift to be an advancement must be "contemporaneous" with the gift. Although there is now no such express requirement in California law, the accepted rule appears to be that the writing must be either contemporaneous with the gift or embodied in a subsequent testamentary instrument. See *In re Estate of Hayne*, 165 Cal. 568, 574-75, 133 P. 277 (1913).

<sup>115</sup> Prob. Code § 680.

<sup>116</sup> Prob. Code § 680.

given priority over most other charges against the decedent's estate.<sup>117</sup>

The proposed law broadens the persons eligible for family allowance to include, in the discretion of the court, a parent of the decedent who was actually dependent in whole or in part upon the decedent for support. The new provision permits the court, for example, to mitigate the hardship that might otherwise exist where the death of the decedent would terminate the support provided by the decedent to an aged parent. Making the dependent parent eligible for a family allowance will give the court authority comparable to the authority the court has under existing law to grant family allowance to the decedent's adult dependent child attending an educational institution.

The family allowance ceases when the probate estate is distributed.<sup>118</sup> A petition for final distribution of the estate must be filed within one year or within 18 months after the issuance of letters (depending upon whether a federal estate tax return is required) or a status report must be filed within that time showing the reasons why the estate cannot be distributed and closed.<sup>119</sup> At the hearing on the status report, the court may order that administration continue for such time and on such conditions as the court deems reasonable if continued administration appears to be in the best interests of the estate and the beneficiaries, or the court may order that a petition for final distribution be filed.<sup>120</sup>

The proposed law adds a new provision that continuation of the administration of the estate after the normal time for closing the estate in order to continue payment of family allowance is not in the best interests of the estate or the persons interested therein unless the court finds (1) that the family allowance is needed by the recipient to pay for necessities of life, including education so long as pursued to advantage, and (2) that the needs of the recipient for

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<sup>117</sup> Prob. Code §§ 680, 950 (only the expenses of administration, funeral expenses, and expenses of last illness have priority over family allowance). If more than one person is otherwise eligible for a family allowance, the allowance is granted only to those who do not have a reasonable maintenance derived from other sources. Prob. Code § 682.

<sup>118</sup> Prob. Code § 680. See also *Estate of Vannucci*, 103 Cal. App.3d 175, 182-83, 163 Cal. Rptr. 11 (1980).

<sup>119</sup> Prob. Code § 1025.5.

<sup>120</sup> Prob. Code § 1025.5.

continued family allowance outweigh the needs of the decedent's heirs or the beneficiaries under the decedent's will whose interests would be adversely affected by continuing the administration of the estate for the purpose of continuing the family allowance. This new provision recognizes the strong public policy in favor of early closing of estates and at the same time gives the court authority to exercise its discretion to mitigate the serious hardships caused by terminating the family allowance in a case where the equities are in favor of the family allowance. The provision would not affect the existing rule that family allowance may not continue longer than one year after granting letters in the case of an insolvent estate.<sup>121</sup>

### Pretermitted Children

California has a broad pretermission statute that provides an intestate share for a child of the testator, or issue of a deceased child, who is omitted from the testator's will.<sup>122</sup> The statute applies not only to a child born after the will was made but also a child living at that time. The statute does not apply if the will includes express words of disinheritance or strong and convincing language that the omission was intentional.<sup>123</sup>

The purpose of the pretermission statute is to carry out the testator's presumed intent and protect against disinheritance where it appears that the omission from the will was unintentional.<sup>124</sup> To effectuate this purpose the proposed law makes changes in the California statute so it will operate in a manner more consistent with the intent of most testators:

(1) The proposed law continues to protect a child born after the making of the will but no longer protects a child living when the will was made.<sup>125</sup> It is more likely than not that omission of a child living when the will was made was intentional.<sup>126</sup>

<sup>121</sup> Prob. Code § 680.

<sup>122</sup> Prob. Code § 90.

<sup>123</sup> See, e.g., Estate of Smith, 9 Cal.3d 74, 78-79, 507 P.2d 78, 106 Cal. Rptr. 774 (1973); 7 B. Witkin, Summary of California Law *Wills and Probate* § 5, at 5524 (8th ed. 1974).

<sup>124</sup> 7 B. Witkin, Summary of California Law *Wills and Probate* § 5, at 5524 (8th ed. 1974).

<sup>125</sup> The proposed law would protect a child living when the will was made if the testator mistakenly believed the child to be dead or was unaware of its birth.

<sup>126</sup> See Evans, *Should Pretermitted Issue Be Entitled to Inherit?*, 31 Calif. L. Rev. 263, 265, 269 (1943); Niles, *Probate Reform in California*, 31 Hastings L.J. 185, 197 (1979).

(2) The protection of the proposed law is limited to an omitted child of the testator; it does not extend to omitted grandchildren or more remote issue of the testator. If the testator's child is alive when the will is made, more remote issue are protected by the anti-lapse statute; if the testator's child is not alive when the will is made, the omission of more remote issue is ordinarily intentional.

### Spouse Omitted from Pre-Marital Will

A testator may marry after making a will and the will may fail to provide for the spouse. Under existing law, on the testator's death the omitted spouse is entitled to an intestate share unless it appears from the will that the omission was intentional or unless there is an applicable provision in a marriage contract.<sup>127</sup> However, the testator may have provided for the spouse by a transfer outside the will, and the testator's intent that the transfer was to be in lieu of a testamentary provision may be apparent from statements of the testator, from the amount of the transfer, or from other evidence. The proposed law expands California law to allow evidence that the testator's omission of a spouse from a will made before marriage was intentional because the testator made provision for the spouse outside the will.<sup>128</sup> This will more effectively carry out the testator's intent<sup>129</sup> and reduce the number of instances where the spouse omitted from the testator's premarital will may take a share of the estate.

The proposed law also modifies somewhat the share of the decedent's estate received by the surviving spouse. Existing law gives the surviving spouse an intestate share of

<sup>127</sup> See Prob. Code § 70. Although California law speaks in terms of the will being "revoked" as to the omitted spouse, the effect of the provision is to give the omitted spouse an intestate share. *Estate of Stewart*, 69 Cal.2d 296, 298, 444 P.2d 337, 70 Cal. Rptr. 545 (1968); French & Fletcher, *A Comparison of the Uniform Probate Code and California Law With Respect to the Law of Wills*, in *Comparative Probate Law Studies* 374 (1976).

<sup>128</sup> This is the rule of Uniform Probate Code § 2-301. See French & Fletcher, *supra* note 127, at 374. In its 1973 critique of the Uniform Probate Code, the State Bar expressed concern that this provision would not permit the testator to provide for the omitted spouse by marriage contract as does present California law unless the marriage contract were accompanied by an actual transfer of property. See State Bar of California, *The Uniform Probate Code: Analysis and Critique* 33 (1973). However, this concern is dealt with by a separate provision in the proposed law that gives effect to a waiver of all the benefits under a will executed before the waiver.

<sup>129</sup> See Joint Editorial Board for the Uniform Probate Code, *Response of the Joint Editorial Board* 7 (1974).

the decedent's property, which in the case of the decedent's separate property is all the property if the decedent leaves no issue, parents, siblings, or their descendants,<sup>130</sup> one-half if the decedent leaves any of these relatives,<sup>131</sup> and one-third if the decedent leaves two or more children or their descendants.<sup>132</sup> One consequence of incorporating this scheme for the omitted spouse is that even though relatives of the decedent may take nothing under the will, the amount received by the spouse varies with the existence of the relatives. In addition, the omitted spouse may take all the separate property in preference to a close friend or favorite charity to which the decedent made a specific and reasonable devise. The proposed law remedies these anomalies by giving the omitted spouse one-half the separate property in every case. This is not only simpler and more sound in concept than existing law, but it is also more protective of the omitted spouse without unreasonably depriving the other close relatives and devisees of the decedent of all benefits under the will.

## RELATED PROVISIONS

### Simultaneous Death

When two or more persons die in a common accident and there is no sufficient evidence that the decedents died other than simultaneously, under the California version of the Uniform Simultaneous Death Act<sup>133</sup> the property of each person is disposed of as if each had survived.<sup>134</sup> If there is evidence that one person survived the other, even if it is circumstantial evidence of survival only for an extremely short period,<sup>135</sup> the simultaneous death act does not apply

<sup>130</sup> Prob. Code § 224.

<sup>131</sup> Prob. Code §§ 221, 223.

<sup>132</sup> Prob. Code § 221.

<sup>133</sup> See Prob. Code §§ 296-296.8.

<sup>134</sup> Prob. Code § 296. If there is no sufficient evidence that two joint tenants have died other than simultaneously, the joint tenancy property is split between the two estates. Prob. Code § 296.2. If a husband and wife die and there is no sufficient evidence that they died other than simultaneously, one-half of the community property is dealt with in each spouse's estate. Prob. Code § 296.4. If an insured and a beneficiary die and there is no sufficient evidence that they died other than simultaneously, the proceeds are distributed as if the insured survived the beneficiary. Prob. Code § 296.3.

<sup>135</sup> See, e.g., *Estate of Rowley*, 257 Cal. App.2d 324, 65 Cal. Rptr. 139 (1967) (Simultaneous Death Act held inapplicable in case where testimony that one passenger in a car was killed 1/150,000 of a second before the other).

and the property passes accordingly. This may result in speculative litigation to prove survival by an instant being brought by those who stand to gain thereby.

The proposed law requires clear and convincing evidence that one of the decedents survived the other. This will avoid litigation based on a speculation that one survived the other for a brief instant.

### Effect of Homicide

California by statute disqualifies one who commits an intentional homicide from taking the victim's property by will or intestate succession.<sup>136</sup> By case law, California also disqualifies the killer from taking benefits from the victim through life insurance, joint tenancy, family allowance, and retirement and survivor benefits.<sup>137</sup> The proposed law deals comprehensively with these matters by disqualifying the killer from taking from the victim by will, intestate succession, joint tenancy, joint bank account, life insurance, bond, other contractual arrangement, or any other means.<sup>138</sup>

The proposed law makes three significant substantive changes in existing California law:

(1) The proposed law applies the civil burden of proof (preponderance of the evidence) in the civil proceeding to disqualify the killer, in place of the existing criminal burden of proof (beyond a reasonable doubt).<sup>139</sup> Different policies apply in civil and criminal proceedings; the extraordinary burden of proof attached to a criminal penalty is not appropriate where civil matters and the competing interests of heirs are concerned.

(2) Existing law gives conclusive effect in the civil proceeding to an acquittal of the killer in a prior criminal proceeding. The proposed law does not give such an acquittal any effect in a later civil proceeding. The acquittal establishes only that the extraordinary burden of proof

<sup>136</sup> Prob. Code § 258.

<sup>137</sup> See French & Fletcher, *A Comparison of the Uniform Probate Code and California Law With Respect to the Law of Wills*, in *Comparative Probate Law Studies* 367 n.105 (1976). See also *Estate of Jeffers*, 134 Cal. App.3d 729 (1982) (killer may not designate alternative beneficiary of insurance proceeds); *Estate of Hart*, 135 Cal. App.3d 684 (1982) (joint tenant who kills cotenant).

<sup>138</sup> These provisions are drawn from Uniform Probate Code § 2-803.

<sup>139</sup> *Estate of McGowan*, 35 Cal. App.3d 611, 619, 111 Cal. Rptr. 39 (1973).

beyond a reasonable doubt was not met; it does not establish a lack of evidence to satisfy the civil standard of proof.<sup>140</sup>

(3) Existing law disqualifies the killer from taking from one who is killed accidentally during the commission of specified felonies.<sup>141</sup> The proposed law disqualifies the killer only if the killing was intentional. The accidental killing aspect of existing rule is of extremely limited application<sup>142</sup> and does not promote the purpose of eliminating any financial incentive for the killing.

### Waiver of Rights by Surviving Spouse

There may be an agreement between the decedent and the surviving spouse in which the surviving spouse purports to waive rights in the estate of the decedent. Such a waiver commonly occurs in an antenuptial agreement, an integrated estate plan, or a marital termination agreement. The agreement may waive such specific items as rights in community property or the right to receive exempt property, family allowance, or probate homestead, or may broadly waive "all rights" in the estate of the decedent.

Although there is little statutory law governing such a waiver,<sup>143</sup> the case law is quite strict in construing a waiver agreement to prevent the loss of valuable statutory property rights.<sup>144</sup> Because husband and wife occupy a confidential and fiduciary relationship, the opportunity for undue influence and duress is great. An effective waiver of rights must be clear and explicit,<sup>145</sup> and the person making the waiver must understand its practical and legal consequences.<sup>146</sup>

It has been suggested that in order for a waiver of rights by a spouse to be effective, the waiver should be made only

<sup>140</sup> This is analogous to tax law, where a taxpayer acquitted of tax fraud in a criminal proceeding may be found to have committed fraud in a civil proceeding. See Comment to Uniform Probate Code § 2-803.

<sup>141</sup> The felonies are arson, rape, robbery, burglary, mayhem, or any act punishable under Section 288 of the Penal Code. These are the felonies included within the felony murder rule. See Penal Code § 189; 1 B. Witkin, *California Crimes Crimes Against the Person* § 311, at 283-84 (1963).

<sup>142</sup> See Wild, *The Felonious Heir in California*, 49 Cal. St. B.J. 528, 528 n.2 (1974).

<sup>143</sup> See Prob. Code § 80 (effect of waiver of rights in marital termination agreement).

<sup>144</sup> 7 B. Witkin, *Summary of California Law Wills and Probate* § 532, at 5947-48 (8th ed. 1974).

<sup>145</sup> See, e.g., Annot., 9 A.L.R.3d 955 (1966); Annot., 30 A.L.R.3d 858 (1970).

<sup>146</sup> Wolfe & Hellman, *Handling Surviving Spouse's Share of Marital Property*, in *California Will Drafting Practice* § 5.31, at 205-06 (Cal. Cont. Ed. Bar 1982).

after complete disclosure of all pertinent facts and upon advice of competent counsel.<sup>147</sup> The proposed law adopts this suggestion<sup>148</sup> and provides that a written agreement of the surviving spouse that waives rights in the estate of the decedent is enforceable unless it is shown that the waiver was made without full and complete disclosure of the property of the decedent or that the surviving spouse was not represented by independent counsel. In cases where there has not been full disclosure or independent counsel, the waiver should nonetheless be enforceable (except as to any provision the court finds is unconscionable) if it can be shown that (1) the surviving spouse understood the effect of the waiver and voluntarily executed it and (2) either the surviving spouse had an adequate knowledge of the property of the decedent or the waiver made a fair disposition of the property. These rules are generally consistent with the strict construction of existing law, but will provide express statutory standards for the guidance of the parties and the courts.

### Contracts Relating to Wills

A promise to make a will, or not to revoke a will already made, comes within the Statute of Frauds.<sup>149</sup> Such a promise must therefore as a general rule be in writing and is unenforceable if oral.<sup>150</sup> However, the courts have developed a number of doctrines to permit enforcement of an oral promise to make or not to revoke a will in order to avoid the harshness that would be caused by a strict application of the Statute of Frauds.<sup>151</sup>

Where an oral agreement to make or not to revoke a will is alleged after promisor is deceased and unable to testify,

<sup>147</sup> Kahn & Gallo, *The Widow's Election: A Return to Fundamentals*, 24 Stan. L. Rev. 531, 543-44 (1972).

<sup>148</sup> The text of the proposed law is adapted from the July / August 1982 draft of the Uniform Antenuptial Agreements Act.

<sup>149</sup> Civil Code § 1624; *Zaring v. Brown*, 41 Cal. App.2d 227, 231, 106 P.2d 224 (1940).

<sup>150</sup> *Notten v. Mensing*, 3 Cal.2d 469, 473, 45 P.2d 198 (1935); 1 B. Witkin, Summary of California Law *Contracts* § 223, at 197 (8th ed. 1973); 7 B. Witkin, Summary of California Law *Wills and Probate* § 94, at 5611 (8th ed. 1974).

<sup>151</sup> These doctrines include:

(1) An oral agreement concerning a will that is unenforceable when made may become enforceable if a written note or memorandum is later made—the later writing relates back to the earlier oral agreement. See *Potter v. Bland*, 136 Cal. App.2d 125, 131, 288 P.2d 569 (1955). See generally 1 B. Witkin, Summary of California Law *Contracts* § 205, at 186 (8th ed. 1973).

there is an opportunity for the fabrication of testimony concerning the existence of the agreement.<sup>152</sup> Sound policy requires some form of written evidence that such an agreement actually exists.

Under the Uniform Probate Code, for example, a contract to make a will or devise, or not to revoke a will or devise, or to die intestate,<sup>153</sup> can be established only by (1) provisions of a will stating material provisions of the contract, (2) an express reference in the will to the contract and extrinsic evidence proving the terms of the contract, or (3) a writing signed by the decedent evidencing the contract.<sup>154</sup> Under this provision all of the terms of the contract need not be in writing; it is sufficient that there is some written evidence that the contract exists. The evidence may be as minimal as an "express reference" in the will to the contract, the terms of which are entirely oral. This allows adequate room for the courts to develop

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(2) Oral testimony is admissible in a court proceeding concerning points on which a written agreement is silent, so long as the testimony does not contradict the writing. *Potter v. Bland*, 136 Cal. App.2d 125, 132, 288 P.2d 569 (1955).

(3) In an extreme case where the decedent has made an oral promise to make or not to revoke a will and has induced another to change position in reliance on the oral promise, the courts will find an estoppel and will enforce the oral promise. See, e.g., *Walker v. Calloway*, 99 Cal. App.2d 675, 222 P.2d 455 (1950). In the context of mutual wills, the court has held that if two people execute mutual wills and orally agree not to revoke them, one of them dies, the survivor accepts the benefits under the decedent's will, and then the survivor revokes his or her own will, a constructive fraud sufficient to raise an estoppel has been practiced, and equity will enforce a constructive trust on the property. *Notten v. Mensing*, 3 Cal.2d 469, 45 P.2d 198 (1935); *Daniels v. Bridges*, 123 Cal. App.2d 585, 589, 267 P.2d 343 (1954); see *Potter v. Bland*, 136 Cal. App.2d 125, 132-33, 288 P.2d 569 (1955).

(4) In some cases, the courts have enforced an oral promise to leave property to another by finding an oral express trust. See *Maddox v. Rainoldi*, 163 Cal. App.2d 384, 329 P.2d 599 (1958).

(5) If the court cannot find a sufficient basis to award to the plaintiff the property in the decedent's estate which was promised to be left by will under one of the foregoing theories, the court may nonetheless award the plaintiff the reasonable value of services rendered to the decedent. *Drvol v. Bant*, 183 Cal. App.2d 351, 356-57, 7 Cal. Rptr. 1 (1960). See generally 1 B. Witkin, *Summary of California Law Contracts* § 49, at 60, § 223, at 198, § 259, at 225 (8th ed. 1973).

<sup>152</sup> To some extent, this danger is ameliorated by the rule in California that there must be clear and convincing evidence to prove an oral agreement to make or not to revoke a will. See *Notten v. Mensing*, 3 Cal.2d 469, 477, 45 P.2d 198 (1935); *Lynch v. Lichtenthaler*, 85 Cal. App.2d 437, 441, 193 P.2d 77 (1948).

<sup>153</sup> There are no California cases concerning an agreement to die intestate. See generally 79 Am. Jur.2d *Wills* § 63 (1975).

<sup>154</sup> Uniform Probate Code § 2-701. Under this provision the execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills. This is consistent with California decisional law. See *Daniels v. Bridges*, 123 Cal. App.2d 585, 589, 267 P.2d 343 (1954) (joint will); *Lich v. Carlin*, 184 Cal. App.2d 128, 133, 7 Cal. Rptr. 555 (1960) (mutual wills).

reasonable interpretations of the writing requirement and thereby avoid harsh results.<sup>155</sup>

The proposed law adopts the Uniform Probate Code provision governing contracts concerning a will in place of the applicable portion of the Statute of Frauds. This will provide a clearer, more detailed statutory statement than the present Statute of Frauds and will limit the opportunity for fraud by fabricated proof of an oral agreement.

### **Pay-on-Death Provisions in Contracts and Instruments**

The proposed law includes a statutory provision taken from the Uniform Probate Code that authorizes pay-on-death provisions in bonds, mortgages, promissory notes, and conveyances, as well as other contractual instruments, and deems such provisions to be nontestamentary.<sup>156</sup> In particular, the statute validates contractual provisions that money or other benefits payable to or owned by the decedent may be paid after death to a person designated by the decedent in either the instrument or a separate writing, including a will, executed at the same time as the instrument or subsequently. This validates contractual arrangements that might be held testamentary and invalid under existing law because not made in a valid will.<sup>157</sup>

The sole purpose of the statute is to eliminate the testamentary characterization of arrangements falling within its terms.<sup>158</sup> The statute avoids the need to execute the contract in compliance with the requirements for a will and avoids the need to have the instrument probated. There appears to be no sound reason for holding these types

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<sup>155</sup> L. Averill, *Uniform Probate Code in a Nutshell* § 11.01, at 115 (1978).

<sup>156</sup> *Uniform Probate Code* § 6-201.

<sup>157</sup> This provision would codify California case law that a promissory note may contain a provision for the cancellation of the debt on the death of the payee. *Bergman v. Ornbaun*, 33 Cal. App.2d 680, 92 P.2d 654 (1939). It would also codify the rule that an employment contract may provide for ownership of a business to pass to the employee-manager on the death of the owner. *Estate of Howe*, 31 Cal.2d 395, 189 P.2d 5 (1948). See generally 7 B. Witkin, *Summary of California Law Wills and Probate* §§ 87-89, at 5607-09 (8th ed. 1974). It may expand California law by validating a provision in a promissory note that on the payee's death the note shall be paid to another person. Although the issue has not been decided in California, most courts treat as testamentary and therefore invalid a provision in a promissory note that on the payee's death the note shall be paid to another person. Comment to *Uniform Probate Code* § 6-201.

<sup>158</sup> Nothing in the provision limits the rights of creditors under other laws of the state.

of provisions in written instruments to be invalid merely because the instrument has not been executed in accordance with the formalities of the will statutes. Experience with insurance contracts, revocable living trusts, multiple-party bank accounts, and United States government bonds with "pay-on-death" provisions demonstrates that the evils envisioned if will statutes are not rigidly enforced simply do not materialize.<sup>159</sup>

### Disclaimers

The recipient of an interest by will, intestate succession, or other means may disclaim or renounce the interest.<sup>160</sup> The disclaimant is treated as having predeceased the person who created the interest.<sup>161</sup> This treatment could have the effect, in some situations, of increasing the intestate share of the disclaimant's issue to the detriment of other intestate heirs, contrary to the general rules of intestate succession.<sup>162</sup> The proposed law makes clear that exercise of a disclaimer may not operate to defeat the general provisions governing intestate succession.

### Community Property Acquired Elsewhere

The proposed law makes clear that property is to be treated as community property under California law if the property was community property under the law of the state where the acquiring spouse was domiciled at the time of its acquisition.<sup>163</sup>

<sup>159</sup> Comment to Uniform Probate Code § 6-201.

<sup>160</sup> Prob. Code §§ 190-190.10. The Law Revision Commission has made a separate recommendation for revision of the law of disclaimers. *Recommendation Relating to Disclaimer of Testamentary and Other Interests*, 16 Cal. L. Revision Comm'n Reports 207 (1982).

<sup>161</sup> Prob. Code § 190.6.

<sup>162</sup> For example, if the disclaimant is the last surviving member of a generation, the disclaimer could alter the shares received by the next generation, who would take per capita rather than by right of representation. See discussion of "Representation" *supra*. Likewise, if the disclaimant has received an advancement on his or her intestate share, exercise of the disclaimer could avoid the rule that the advancement is deducted from the share, thereby increasing the intestate share of the disclaimant's issue. See discussion of "Advancements" *supra*. A debt owed to the decedent by an heir is deducted from the intestate share of the heir; by disclaiming, the heir may avoid this rule and thereby pass a larger share to the heir's issue.

<sup>163</sup> Existing law is not entirely clear. See generally *Recommendation and Study Relating to Rights of Surviving Spouse in Property Acquired by Decedent While Domiciled Elsewhere*, 1 Cal. L. Revision Comm'n Reports, at E-5 (1957). Under the proposed law, community property acquired by a domiciliary of another community property

## Election to Take Quasi-Community Property Against Will

Under existing law the surviving spouse must elect whether to claim the statutory half share of the decedent's quasi-community property or to take the benefits provided by the decedent's will.<sup>164</sup> This requirement is contrary to general principles governing community property which permit the surviving spouse to claim the statutory share without sacrificing benefits under the will.<sup>165</sup> The proposed law does not continue the special quasi-community property election requirement.

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jurisdiction retains its community character in California even though the property might not have been community if acquired while domiciled in California. For example, if the income of separate property is community under the laws of the place where the spouse owning the separate property is domiciled at the time the income is earned, the income will be classified as community property under California law also.

<sup>164</sup> Prob. Code § 201.7. The election is not required if the will permits the surviving spouse both to claim the statutory share and to take under the will.

<sup>165</sup> See 7 B. Witkin, *Summary of California Law Wills and Probate* §§ 21-22, at 5542-44 (8th ed. 1974). An election is necessary if the will expressly requires an election or if the decedent's intent to require an election may be implied from the fact that not to require an election would thwart the decedent's estate plan.

# **PROPOSED STATUTE RELATING TO WILLS AND INTESTATE SUCCESSION**

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An act to add Division 1 (commencing with Section 1), Division 2 (commencing with Section 100), and Division 6 (commencing with Section 6100) to, and to repeal the General Provisions (commencing with Section 1 and including the title thereof), Division 1 (commencing with Section 20), Division 2 (commencing with Section 200), and Division 2b (commencing with Section 296) of, the Probate Code, relating to probate law and procedure.

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

**Note.** The proposed legislation adds Divisions 1, 2, and 6 to the Probate Code. These provisions are set out below.

The proposed legislation also repeals the following existing provisions of the Probate Code: General Provisions (Sections 1-11), Division 1 (Sections 20-190.10), Division 2 (Sections 200-258), and Division 2b (Sections 296-296.8). The repealed General Provisions are superseded by proposed Sections 1-11. The portion of Division 2 relating to disclaimers (Sections 190-190.10) is superseded by legislation proposed in a separate recommendation. See *Recommendation Relating to Disclaimer of Testamentary and Other Interests*, 16 Cal. L. Revision Comm'n Reports 209 (1982). See that recommendation for the disposition of existing Sections 190-190.10. For the disposition of the remaining provisions of Division 2 and the provisions of Divisions 1 and 2b, see the Comments set out in "Disposition of Existing Sections of Divisions 1, 2, and 2b of the Probate Code" found at the end of this publication.

## DIVISION 1. PRELIMINARY PROVISIONS AND DEFINITIONS

### PART 1. PRELIMINARY PROVISIONS

#### § 1. Short title

1. This code shall be known as the Probate Code.

**Comment.** Section 1 continues former Section 1.

**§ 2. Continuation of existing law; construction of provisions drawn from Uniform Probate Code**

2. (a) The provisions of this code, insofar as they are substantially the same as previously existing provisions relating to the same subject matter, shall be construed as restatements and continuations thereof and not as new enactments.

(b) A provision of this code, insofar as it is the same in substance as a provision of the Uniform Probate Code, shall be so construed as to effectuate the general purpose to make uniform the law in those states which enact that provision of the Uniform Probate Code.

**Comment.** Subdivision (a) of Section 2 continues the substance of former Section 2. Subdivision (b) is new and recognizes that some provisions of this code are the same in substance as the provisions of the Uniform Probate Code.

**§ 3. Application of certain provisions where decedent died before January 1, 1985**

3. Except as otherwise specifically provided, Parts 1 (commencing with Section 100), 3 (commencing with Section 140), 4 (commencing with Section 200), and 5 (commencing with Section 220) of Division 2, and Division 6 (commencing with Section 6100), do not apply in any case where the decedent died before January 1, 1985, and such case continues to be governed by the law applicable to the case prior to January 1, 1985.

**Comment.** Section 3 limits the application of certain portions of this code to cases where the decedent died after the operative date. The introductory clause makes clear that the section is subject to specific exceptions. See, *e.g.*, Section 224(c) (survival under life or accident insurance).

Section 3 supersedes former Section 3. The former section is obsolete.

**§ 4. Effect of headings in code**

4. Division, part, chapter, article, and section headings do not in any manner affect the scope, meaning, or intent of the provisions of this code.

**Comment.** Section 4 continues the substance of former Section 4.

**§ 5. Certified mail equivalent of registered mail**

5. If a notice or other communication is required by this code to be mailed by registered mail, the mailing of the notice or other communication by certified mail is deemed to be sufficient compliance with the requirements of law.

Comment. Section 5 is the same in substance as former Section 5.

**§ 6. Construction of code**

6. Unless the provision or context otherwise requires, these general provisions and rules of construction govern the construction of this code.

Comment. Section 6 continues former Section 6.

**§ 7. References to statute**

7. Whenever a reference is made to any portion of this code or to any other law, the reference applies to all amendments and additions heretofore or hereafter made.

Comment. Section 7 continues former Section 7.

**§ 8. Reference to division, part, chapter, article, section, or part of section**

8. Unless otherwise expressly stated:

(a) "Division" means a division of this code.

(b) "Part" means a part of the division in which that term occurs.

(c) "Chapter" means a chapter of the division or part, as the case may be, in which that term occurs.

(d) "Article" means an article of the chapter in which that term occurs.

(e) "Section" means a section of this code.

(f) "Subdivision" means a subdivision of the section in which that term occurs.

(g) "Paragraph" means a paragraph of the subdivision in which that term occurs.

Comment. Section 8 continues former Section 8.

### § 9. Construction of tenses

9. The present tense includes the past and future tenses, and the future, the present.

Comment. Section 9 continues former Section 9.

### § 10. Construction of singular and plural

10. The singular number includes the plural, and the plural, the singular.

Comment. Section 10 continues former Section 10.

### § 11. Severability

11. If any provision or clause of this code or application thereof to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the code which can be given effect without the invalid provision or application, and to this end the provisions of this code are severable.

Comment. Section 11 continues former Section 11.

### § 12. Construction of “shall” and “may”

12. “Shall” is mandatory and “may” is permissive.

Comment. Section 12 is new.

## PART 2. WORDS AND PHRASES DEFINED

### § 20. Application of definitions

20. Unless the provision or context otherwise requires, the words and phrases defined in this part govern the construction of Divisions 1 (commencing with Section 1), 2 (commencing with Section 100), and 6 (commencing with Section 6100).

Comment. Section 20 is new. Some definitions in this part apply to the entire Probate Code. See, *e.g.*, Sections 28 (“community property”) and 66 (“quasi-community property”).

### § 21. Account

21. “Account” means a contract of deposit of funds between a depositor and a financial institution, and includes a checking account, savings account, certificate of deposit, share account, and other like arrangement.

**Comment.** Section 21 is the same in substance as Section 6-101(1) of the Uniform Probate Code.

**§ 22. Annulment of marriage**

**22. “Annulment of marriage” includes adjudication of nullity of marriage.**

**Comment.** Section 22 is new.

**§ 24. Beneficiary**

**24. “Beneficiary,” as it relates to trust beneficiaries, includes a person who has any present or future interest, vested or contingent, and also includes the owner of an interest by assignment or other transfer and as it relates to a charitable trust, includes any person entitled to enforce the trust.**

**Comment.** Section 24 is the same as Section 1-201(2) of the Uniform Probate Code.

**§ 26. Child**

**26. “Child” includes any individual entitled to take as a child under this code by intestate succession from the parent whose relationship is involved and excludes any person who is only a stepchild, a foster child, a grandchild, or any more remote descendant.**

**Comment.** Section 26 is the same as Section 1-201(3) of the Uniform Probate Code.

**§ 28. Community property**

**28. As used in this code, “community property” includes:**

**(a) All personal property wherever situated, and all real property situated in this state, heretofore or hereafter acquired during the marriage by a married person while domiciled elsewhere, that is community property, or a substantially equivalent type of marital property, under the laws of the place where the acquiring spouse was domiciled at the time of its acquisition.**

**(b) All personal property wherever situated, and all real property situated in this state, heretofore or**

hereafter acquired during the marriage by a married person in exchange for real or personal property, wherever situated, that is community property, or a substantially equivalent type of marital property, under the laws of the place where the acquiring spouse was domiciled at the time the property so exchanged was acquired.

**Comment.** Section 28 supplements the definition of community property in Civil Code Section 5110. As used in this code, “community property” includes not only the property described in Section 28 but also community property heretofore or hereafter acquired during marriage by a married person while domiciled in this state. See, *e.g.*, Civil Code § 5110.

Under Section 28 community property acquired while domiciled in another community property jurisdiction is treated as community property in California even though the property might not have been community if acquired while domiciled in California. For example, property is community property under Section 28 if it is the income of separate property and the income of separate property is community property under the laws of the place where the spouse owning the separate property is domiciled at the time the income is earned. Thus, Section 28 ensures generally comparable treatment of the property in California to that given it in the other community property jurisdiction and fills a gap in the quasi-community property law. See Section 66 (“quasi-community property” defined). Section 28 applies whether the property is acquired before or after the operative date of the section. The reference in Section 28 to substantially equivalent types of marital property is intended to cover possible adoption in other jurisdictions of the Uniform Marital Property Act or other laws establishing a community property regime. See also Sections 58 (“personal property” defined), 68 (“real property” defined).

### § 32. Devise

32. “Devise,” when used as a noun, means a disposition of real or personal property by will, and, when used as a verb, means to dispose of real or personal property by will.

**Comment.** Section 32 is the same in substance as Section 1-201(7) of the Uniform Probate Code.

**§ 34. Devisee**

34. (a) “Devisee” means any person designated in a will to receive a devise.

(b) In the case of a devise to an existing trust or trustee, or to a trustee on trust described by will, the trust or trustee is the devisee and the beneficiaries are not devisees.

Comment. Section 34 is the same in substance as Section 1-201(8) of the Uniform Probate Code.

**§ 36. Dissolution of marriage**

36. “Dissolution of marriage” includes divorce.

Comment. Section 36 is new.

**§ 38. Family allowance**

38. “Family allowance” means an allowance provided for in Chapter 4 (commencing with Section 6540) of Part 3 of Division 6.

Comment. Section 38 is new.

**§ 40. Financial institution**

40. “Financial institution” means a state or national bank, state or federal savings and loan association or credit union, or like organization.

Comment. Section 40 is the same as a portion of Code of Civil Procedure Section 680.200.

**§ 44. Heirs**

44. “Heirs” means the persons, including the surviving spouse, who are entitled under the statutes of intestate succession to the property of a decedent.

Comment. Section 44 is the same in substance as Section 1-201(17) of the Uniform Probate Code. See also Section 78 (“surviving spouse” defined).

**§ 48. Interested person**

48. (a) Subject to subdivision (b), “interested person” includes any of the following:

(1) An heir, devisee, child, spouse, creditor, beneficiary, and any other person having a property right

in or claim against a trust estate or the estate of a decedent which may be affected by the proceeding.

(2) Any person having priority for appointment as personal representative.

(3) A fiduciary representing an interested person.

(b) The meaning of "interested person" as it relates to particular persons may vary from time to time and shall be determined according to the particular purposes of, and matter involved in, any proceeding.

**Comment.** Section 48 is the same in substance as Section 1-201(20) of the Uniform Probate Code.

#### § 50. Issue

50. "Issue" of a person means all his or her lineal descendants of all generations, with the relationship of parent and child at each generation being determined by the definitions of child and parent.

**Comment.** Section 50 is the same in substance as Section 1-201(21) of the Uniform Probate Code.

#### § 54. Parent

54. "Parent" includes any person entitled to take, or who would be entitled to take if the child died without a will, as a parent under this code by intestate succession from the child whose relationship is in question and excludes any person who is only a stepparent, foster parent, or grandparent.

**Comment.** Section 54 is the same as Section 1-201(28) of the Uniform Probate Code.

#### § 56. Person

56. "Person" means an individual, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, or other entity.

**Comment.** Section 56 is drawn from paragraphs (27) and (29) of Section 1-201 of the Uniform Probate Code.

#### § 58. Personal property

58. "Personal property" does not include a leasehold interest in real property.

**Comment.** Section 58 is consistent with the last sentence of Civil Code Section 5110. See also Section 68 (“real property” defined).

**§ 60. Probate homestead**

**60. “Probate homestead” means a homestead provided for in Chapter 3 (commencing with Section 6520) of Part 3 of Division 6.**

**Comment.** Section 60 is new.

**§ 62. Property**

**62. “Property” includes both real and personal property or any interest therein and means anything that may be the subject of ownership.**

**Comment.** Section 62 is the same as Section 1-201(33) of the Uniform Probate Code.

**§ 66. Quasi-community property**

**66. As used in this code, “quasi-community property” means the following property, other than community property as defined in Section 28:**

**(a) All personal property wherever situated, and all real property situated in this state, heretofore or hereafter acquired by a decedent while domiciled elsewhere that would have been the community property of the decedent and the surviving spouse if the decedent had been domiciled in this state at the time of its acquisition.**

**(b) All personal property wherever situated, and all real property situated in this state, heretofore or hereafter acquired in exchange for real or personal property, wherever situated, that would have been the community property of the decedent and the surviving spouse if the decedent had been domiciled in this state at the time the property so exchanged was acquired.**

**Comment.** Section 66 continues the substance of portions of former Section 201.5, except that community property under the laws of another jurisdiction is classified as community rather than quasi-community property. See Section 28 (“community property” defined) and the Comment to that section. See also Sections 58 (“personal property” defined), 68 (“real property” defined).

**§ 68. Real property**

68. "Real property" includes a leasehold interest in real property.

Comment. Section 68 is new and is consistent with the last sentence of Civil Code Section 5110. See also Section 58 ("personal property" defined).

**§ 70. Security**

70. "Security" includes any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in an oil, gas, or mining title or lease or in payments out of production under such a title or lease, collateral trust certificate, transferable share, voting trust certificate or, in general, any interest or instrument commonly known as a security, or any certificate of interest or participation, any temporary or interim certificate, receipt, or certificate of deposit for, or any warrant or right to subscribe to or purchase, any of the foregoing.

Comment. Section 70 is the same as Section 1-201 (37) of the Uniform Probate Code.

**§ 74. State**

74. "State" includes any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession subject to the legislative authority of the United States.

Comment. Section 74 is the same as Section 1-201 (40) of the Uniform Probate Code.

**§ 78. Surviving spouse**

78. "Surviving spouse" does not include any of the following:

(a) A person whose marriage to the decedent has been dissolved or annulled, unless, by virtue of a subsequent marriage, the person is married to the decedent at the time of death.

(b) A person who obtains or consents to a final decree or judgment of dissolution of marriage from the decedent or a final decree or judgment of annulment of their marriage, which decree or judgment is not recognized as

valid in this state, unless they (1) subsequently participate in a marriage ceremony purporting to marry each to the other or (2) subsequently live together as husband and wife.

(c) A person who, following a decree or judgment of dissolution or annulment of marriage obtained by the decedent, participates in a marriage ceremony with a third person.

(d) A person who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights.

**Comment.** Section 78 is drawn from Section 2-802 of the Uniform Probate Code. Subdivisions (b) and (c) deal with the problem of a divorce or annulment which is not recognized in California, and apply an estoppel principle against the surviving spouse. These provisions are consistent with prior California law. See, *e.g.*, *Spellens v. Spellens*, 49 Cal.2d 210, 317 P.2d 613 (1957) (estoppel to deny validity of marriage); *Estate of Atherley*, 44 Cal. App.3d 758, 764, 119 Cal. Rptr. 41 (1975) (recognizing principle but declining to apply it). See also Sections 22 (“annulment of marriage” defined), 36 (“dissolution of marriage” defined).

#### § 80. Totten trust account

80. “Totten trust account” means an account in the name of one or more parties as trustee for one or more beneficiaries where the relationship is established by the form of the account and the deposit agreement with the financial institution and there is no subject of the trust other than the sums on deposit in the account. In a Totten trust account, it is not essential that payment to the beneficiary be mentioned in the deposit agreement. A Totten trust account does not include (1) a regular trust account under a testamentary trust or a trust agreement which has significance apart from the account or (2) a fiduciary account arising from a fiduciary relation such as attorney-client.

**Comment.** Section 80 is the same in substance as Section 6-101(14) of the Uniform Probate Code. See also Section 21 (“account” defined).

**§ 82. Trust**

82. "Trust" includes any express trust, private or charitable, with additions thereto, wherever and however created. It also includes a trust created or determined by judgment or decree under which the trust is to be administered in the manner of an express trust. "Trust" excludes other constructive trusts, and it excludes resulting trusts, guardianships, conservatorships, personal representatives, Totten trust accounts, custodial arrangements pursuant to the Uniform Gifts to Minors Act of any state, business trusts providing for certificates to be issued to beneficiaries, common trust funds, voting trusts, security arrangements, liquidation trusts, and trusts for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits of any kind, and any arrangement under which a person is nominee or escrowee for another.

**Comment.** Section 82 is the same in substance as Section 1-201(45) of the Uniform Probate Code. See also Section 80 ("Totten trust account" defined).

**§ 84. Trustee**

84. "Trustee" includes an original, additional, or successor trustee, whether or not appointed or confirmed by a court.

**Comment.** Section 84 is the same as Section 1-201(46) of the Uniform Probate Code.

**§ 88. Will**

88. "Will" includes codicil and any testamentary instrument which merely appoints an executor or revokes or revises another will.

**Comment.** Section 88 is the same as Section 1-201(48) of the Uniform Probate Code.

## **DIVISION 2. GENERAL PROVISIONS**

### **PART 1. EFFECT OF DEATH OF MARRIED PERSON ON COMMUNITY AND QUASI-COMMUNITY PROPERTY**

#### **§ 100. Community property**

**100. Upon the death of a married person, one-half of the community property belongs to the surviving spouse and the other half belongs to the decedent.**

**Comment.** Section 100 continues the substance of a portion of former Section 201. The decedent's half of the community property is subject to the testamentary disposition of the decedent (Section 6101) and, in the absence of testamentary disposition, goes to the surviving spouse (Section 6401). But see Section 103 (effect on community property where married persons die simultaneously). As to the liability of the surviving spouse for debts of the deceased spouse chargeable against community property, see Section 649.4. See also Sections 28 ("community property" defined), 104 (community property held in revocable trust).

#### **§ 101. Quasi-community property**

**101. Upon the death of a married person domiciled in this state, one-half of the decedent's quasi-community property belongs to the surviving spouse and the other half belongs to the decedent.**

**Comment.** Section 101 continues the substance of a portion of former Section 201.5. The decedent's half of the quasi-community property is subject to the testamentary disposition of the decedent (Section 6101) and, in the absence of testamentary disposition, goes to the surviving spouse (Section 6401). But see Section 103 (effect on quasi-community property where married persons die simultaneously). See also Section 66 ("quasi-community property" defined).

Former Section 201.7 qualified the rule that upon the death of a married person one-half of the decedent's quasi-community property belongs to the surviving spouse. Former Section 201.7 required the surviving spouse to elect to take under the decedent's will or against the will unless it appeared by the will that the testator intended that the surviving spouse might take

both under the will and against it. The rule of former Section 201.7 is not continued. Under Section 101, the rule for quasi-community property is the same as for community property. The surviving spouse is not forced to an election unless the decedent's will expressly so provides or unless such a requirement should be implied to avoid thwarting the testator's apparent intent. See 7 B. Witkin, *Summary of California Law Wills and Probate* §§ 21-22, at 5542-44 (8th ed. 1974).

As to the liability of the surviving spouse for debts of the deceased spouse chargeable against quasi-community property, see Section 649.4.

**§ 102. Recapture by surviving spouse of certain quasi-community property**

102. (a) The decedent's surviving spouse may require the transferee of property in which the surviving spouse had an expectancy under Section 101 at the time of the transfer to restore to the decedent's estate one-half of the property if the transferee retains the property or, if not, one-half of its proceeds or, if none, one-half of its value at the time of transfer, if all of the following requirements are satisfied:

(1) The decedent died domiciled in this state.

(2) The decedent made a transfer of the property to a person other than the surviving spouse without receiving in exchange a consideration of substantial value and without the consent of the surviving spouse.

(3) The decedent had a substantial quantum of ownership or control of the property at death.

(b) All property restored to the decedent's estate under this section belongs to the surviving spouse pursuant to Section 101 as though the transfer had not been made.

**Comment.** Section 102 continues the substance of the first and third sentences of former Section 201.8. The second sentence of former Section 201.8 which required the surviving spouse to elect to take under or against the decedent's will is not continued. Under the law as revised, the rule for quasi-community property is the same as for community property: The surviving spouse is not forced to an election unless the decedent's will expressly so provides or unless such a requirement should be implied to avoid thwarting the testator's

apparent intent. See 7 B. Witkin, *Summary of California Law Wills and Probate* §§ 21-22, at 5542-44 (8th ed. 1974).

Section 102 does not apply to transfers for which a consideration of substantial value is received nor does it reach an outright transfer, even though wholly gratuitous, under which no interest in or power over the property is retained by the transferor.

Section 102 provides that a transfer may be set aside only if the decedent made it without receiving in exchange a consideration of "substantial" value. Where the consideration is not substantial and the transfer is set aside, no provision is made for return of the insubstantial consideration given by the transferee when property is restored to the decedent's estate because only one-half of the property transferred is required to be restored. It is not expected that a transfer will be set aside under the statute if the transferee gave a consideration equal to one-half or more of the value of the property received. Thus, in cases in which the transfer is set aside the one-half which the transferee keeps will be at least equal in value to any consideration given.

The provision of Section 102 that only one-half of the property transferred is to be restored is applied when the decedent dies intestate as well as when the decedent dies testate. This is because the decedent has manifested an intention to deprive the surviving spouse of the property. The intent of the intestate decedent should be given effect to the extent he or she could have accomplished the same result by will.

Section 102 provides that all of the property restored to the estate belongs to the surviving spouse pursuant to Section 101. Such property is, in effect, the one-half which the surviving spouse could have claimed against the decedent's will. The one-half which the transferee is permitted to retain is, in effect, the one-half which the decedent could have given to the transferee by will. The surviving spouse is entitled to all of the first half.

Section 102 provides that the property shall be restored to the decedent's estate rather than that the surviving spouse may recover it directly from the transferee. This is to make the property available to creditors of the decedent to the extent that it would have been available to them if no inter vivos transfer had been made.

Section 102 is limited in application to transfers made at a time when the surviving spouse has an expectancy under Section 101—*i.e.*, at a time when the transferor is domiciled in California. This is to avoid the application of the statute to transfers made

before the transferor moved here, when the transferor could not reasonably have anticipated that the transfer would later be subjected to California law.

**§ 103. Effect on community and quasi-community property where married persons die simultaneously**

103. Except as provided by Section 224, if a husband and wife die leaving community or quasi-community property and it cannot be established by clear and convincing evidence that one spouse survived the other:

(a) One-half of the community property and one-half of the quasi-community property shall be administered upon or distributed, or otherwise dealt with, as if one spouse had survived and as if that half belonged to that spouse.

(b) The other half of the community property and the other half of the quasi-community property shall be administered upon or distributed, or otherwise dealt with, as if the other spouse had survived and as if that half belonged to that spouse.

**Comment.** Section 103 supersedes the first paragraph of former Section 296.4 and extends to quasi-community property the rule formerly applicable only to community property. The introductory clause recognizes that Section 224 governs the disposition of life or accident insurance benefits where one spouse is the insured and the other the beneficiary, even if the source of the insurance premiums was community property. This continues the last clause of the first paragraph of former Section 296.4. See also Sections 230-234 (proceeding to determine whether one spouse survived the other).

**§ 104. Community property held in certain revocable trusts**

104. Notwithstanding Section 100, community property held in a revocable trust described in Section 5113.5 of the Civil Code is governed by the provisions, if any, in the trust for disposition in the event of death.

**Comment.** Section 104 continues the substance of a portion of former Section 206.

## PART 2. SURVIVING SPOUSE'S RIGHT IN CALIFORNIA REAL PROPERTY OF NONDOMICILIARY DECEDENT

### § 120. Surviving spouse's right in California real property of nondomiciliary decedent

120. If a married person dies not domiciled in this state and leaves a valid will disposing of real property in this state which is not the community property of the decedent and the surviving spouse, the surviving spouse has the same right to elect to take a portion of or interest in such property against the will of the decedent as though the property were situated in the decedent's domicile at death.

**Comment.** Section 120 continues former Section 201.6. Section 120 gives the surviving spouse the same protected interest in California as the surviving spouse would have under the law of the decedent's domicile. See also Section 68 ("real property" defined).

## PART 3. CONTRACTUAL ARRANGEMENTS RELATING TO RIGHTS AT DEATH

### CHAPTER 1. SURVIVING SPOUSE'S WAIVER OF RIGHTS

#### § 140. "Waiver" defined

140. As used in this chapter, "waiver" means a waiver by the surviving spouse of any of the rights listed in subdivision (a) of Section 141, whether executed before or during marriage.

**Comment.** Section 140 is new; it is adopted for drafting convenience.

#### § 141. Rights of surviving spouse that may be waived

141. (a) The right of a surviving spouse to any of the following may be waived in whole or in part by a waiver under this chapter:

(1) Property that would pass from the decedent by intestate succession.

(2) Property that would pass from the decedent by testamentary disposition in a will executed before the waiver.

(3) A probate homestead.

(4) The right to have exempt property set aside.

(5) Family allowance.

(6) The right to have an estate set aside under Article 2 (commencing with Section 640) of Chapter 10 of Division 3.

(7) The right to elect to take community or quasi-community property against the decedent's will.

(8) The right to take the statutory share of an omitted spouse.

(9) The right to be appointed as the executor or administrator of the decedent's estate.

(b) Nothing in this chapter affects or limits the waiver or manner of waiver of rights other than those referred to in subdivision (a), including but not limited to the right to property that would pass from the decedent to the surviving spouse by nonprobate transfer upon the death of the decedent, such as the survivorship interest under a joint tenancy, a Totten trust account, or a payable-on-death account.

**Comment.** Section 141 is new and is drawn in part from the first sentence of Section 2-204 of the Uniform Probate Code. Paragraphs (1) and (2) of subdivision (a) permit waiver of property, interests, or benefits that would pass to the spouse making the waiver by intestate succession or by virtue of a will of the other spouse executed before the waiver. Paragraphs (3), (4), and (5) are the same in substance as provisions found in Section 2-204 of the Uniform Probate Code and are consistent with prior California case law. See, *e.g.*, Estate of Howe, 81 Cal. App.2d 95, 183 P.2d 329 (1947) (probate homestead); *In re* Estate of Fulton, 15 Cal. App.2d 202, 59 P.2d 508 (1936) (exempt property); Estate of Brooks, 28 Cal.2d 748, 171 P.2d 724 (1946) (family allowance). Paragraph (6) is consistent with prior California case law. See *Soares v. Steidtmann*, 130 Cal. App.2d 401, 278 P.2d 953 (1955). Paragraph (7) is comparable to the provision in Section 2-204 of the Uniform Probate Code for waiver of the elective share under the Uniform Probate Code; paragraph (7), is consistent with prior California case law. See 7 B. Witkin, Summary of California Law *Wills and Probate* § 20, at

5541 (8th ed. 1974). Paragraph (8) is included to make clear that a spouse may waive the right to claim as an omitted spouse under Section 6560. Paragraph (9) is consistent with Section 406 (renunciation by executor).

Subdivision (b) makes clear that this chapter applies only to the waiver of the rights listed in subdivision (a). The law applicable to the waiver of other rights is not affected by this chapter. See, *e.g.*, Civil Code §§ 5133-5137.

**§ 142. Waiver must be in writing and signed by surviving spouse**

**142. A waiver under this chapter shall be in writing and shall be signed by the surviving spouse.**

**Comment.** Section 142 requires that a waiver be in writing and be signed by the surviving spouse in order to be effective under this chapter. See also Sections 143-145 (enforcement of waiver), 146 (alteration, amendment, or revocation of waiver).

**§ 143. Waiver enforceable as of right**

**143. A waiver that complies with Section 142 is enforceable unless the court determines either of the following:**

**(a) A full and complete disclosure of the property of the decedent was not provided to the surviving spouse prior to the execution of the waiver.**

**(b) The surviving spouse was not represented by independent legal counsel at the time of execution of the waiver.**

**Comment.** Section 143 establishes the basic standards of enforceability for a waiver. The court shall enforce the waiver unless the surviving spouse shows that he or she was not provided a full and complete disclosure of property *or* was not represented by independent legal counsel at the time of execution. By satisfying the conditions of disclosure and independent counsel, the parties can have certainty that their affairs will be governed in an agreed upon manner. If these conditions are not satisfied (for example, counsel may not have been sought at all or the surviving spouse may not have been separately represented), a waiver may still be enforceable under Section 144.

**§ 144. Waiver enforceable in discretion of court**

**144. (a) Except as provided in subdivision (b), a waiver that complies with Section 142 but is not**

enforceable under Section 143 is enforceable if the court determines either of the following:

(1) The waiver at the time of execution made a fair and reasonable disposition of the rights of the surviving spouse and the surviving spouse understood the effect of and voluntarily executed the waiver.

(2) The surviving spouse had, or reasonably should have had, an adequate knowledge of the property of the decedent and understood the effect of and voluntarily executed the waiver.

(b) If, after considering all relevant facts and circumstances, the court finds that enforcement of the waiver pursuant to subdivision (a) would be unconscionable under the existing facts and circumstances, the court may refuse to enforce the waiver, enforce the remainder of the waiver without the unconscionable provisions, or limit the application of the unconscionable provisions to avoid an unconscionable result.

**Comment.** Under subdivision (a) of Section 144, a waiver that is not enforceable pursuant to Section 143 may be enforceable if it is shown that the waiver at the time of execution made a fair and reasonable disposition of the rights of the surviving spouse or the surviving spouse had, or reasonably should have had, an adequate knowledge of the property of the other spouse. However, in both cases, it must also be shown that the surviving spouse understood the effect of and voluntarily executed the waiver agreement.

Subdivision (b) provides an “escape valve” from the liberal standards of enforceability provided by subdivision (a). It permits the court to refuse to enforce all or a portion of the waiver if the court finds that enforcement would be “unconscionable” under the existing facts and circumstances. Satisfaction of the standards of enforceability provided by subdivision (a) should insure in the vast majority of cases that the waiver was fairly made and properly enforceable. However, in the exceptional case, circumstances may have changed in a way that neither party may have contemplated and enforcement of the waiver in its entirety would now be unconscionable. In short, subdivision (b) provides a measure of flexibility. It should be emphasized, however, that this subdivision is not intended to apply in any but the extraordinary case and never applies where the conditions required by Section 143 are met.

**§ 145. Effect of waiver of all rights or complete property settlement**

145. Unless the waiver or property settlement provides to the contrary, a waiver under this chapter of “all rights” (or equivalent language) in the property or estate of a present or prospective spouse, or a complete property settlement entered into after or in anticipation of separation or dissolution or annulment of marriage, is a waiver by the spouse of the rights described in subdivision (a) of Section 141.

Comment. Section 145 supersedes former Section 80 and is drawn from the second sentence of Section 2-204 of the Uniform Probate Code. Nothing in Section 145 affects or limits the waiver or manner of waiver of rights other than those mentioned in subdivision (a) of Section 141. See Section 141(b) and Comment thereto.

**§ 146. Alteration or revocation of waiver**

146. (a) As used in this section, “agreement” means a written agreement signed by each spouse or prospective spouse altering, amending, or revoking a waiver under this chapter.

(b) A waiver under this chapter may not be altered, amended, or revoked except by a subsequent written agreement signed by each spouse or prospective spouse.

(c) An agreement is enforceable against a party to the agreement unless the court determines either of the following:

(1) A full and complete disclosure of the property of the other spouse was not provided to the spouse against whom enforcement is sought prior to the execution of the agreement.

(2) The spouse against whom enforcement is sought was not represented by independent legal counsel at the time of execution of the agreement.

(d) Except as provided in subdivision (e), an agreement that is not enforceable under subdivision (c) is enforceable if the court determines that the agreement at the time of execution made a fair and reasonable disposition of the rights of the spouses and the spouse against whom the agreement is sought to be enforced

understood the effect of and voluntarily executed the agreement.

(e) If, after considering all relevant facts and circumstances, the court finds that enforcement of the agreement pursuant to subdivision (d) would be unconscionable under the existing facts and circumstances, the court may refuse to enforce the agreement, enforce the remainder of the agreement without the unconscionable provisions, or limit the application of the unconscionable provisions to avoid an unconscionable result.

**Comment.** Section 146 precludes alteration, amendment, or revocation of a waiver by an oral agreement or by a writing executed by only one spouse and prescribes the conditions that must be satisfied if the agreement is to be enforceable. Subdivisions (c)-(e) are adapted from Sections 143 and 144.

#### **§ 147. Validity of waivers and agreements under prior law not affected**

147. Nothing in this chapter affects the validity or effect of any waiver, agreement, or property settlement made prior to January 1, 1985, and the validity and effect of such waiver, agreement, or property settlement shall continue to be determined by the law applicable to the waiver, agreement, or settlement prior to January 1, 1985.

**Comment.** Section 147 makes clear that the provisions of this chapter have no effect on waivers, agreements, or property settlements made prior to the operative date of this chapter. See also Section 141(b) (nothing in chapter affects or limits the waiver or manner of waiver of rights other than those referred to in subdivision (a) of Section 141).

## **CHAPTER 2. CONTRACTS CONCERNING WILL OR SUCCESSION**

#### **§ 150. Contracts concerning will or succession**

150. (a) A contract to make a will or devise, or not to revoke a will or devise, or to die intestate, if executed after December 31, 1984, can be established only by one of the following:

(1) Provisions of a will stating material provisions of the contract.

(2) An express reference in a will to a contract and extrinsic evidence proving the terms of the contract.

(3) A writing signed by the decedent evidencing the contract.

(b) The execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills.

**Comment.** Section 150 is the same in substance as Section 2-701 of the Uniform Probate Code and supersedes the last portion of subdivision (6) of Section 1624 of the Civil Code (Statute of Frauds). Subdivision (b) is consistent with prior case law. See *Daniels v. Bridges*, 123 Cal. App.2d 585, 589, 267 P.2d 343 (1954) (joint will); *Lich v. Carlin*, 184 Cal. App.2d 128, 133, 7 Cal. Rptr. 555 (1960) (mutual wills).

### CHAPTER 3. PROVISIONS IN WRITTEN INSTRUMENTS

#### § 160. Pay-on-death provisions in written instruments

160. (a) Any of the following provisions in an insurance policy, contract of employment, bond, mortgage, promissory note, deposit agreement, pension or profit-sharing plan, trust agreement, conveyance, or any other written instrument effective as a contract, gift, conveyance, or trust is not invalid because the instrument does not comply with the requirements for execution of a will, and this code does not invalidate the instrument or any of the following provisions:

(1) That money or other benefits theretofore due to, controlled by, or owned by a decedent shall be paid after the decedent's death to a person designated by the decedent in either the instrument or a separate writing, including a will, executed at the same time as the instrument or subsequently.

(2) That any money due or to become due under the instrument shall cease to be payable in event of the death of the promisee or the promisor before payment or demand.

(3) That any property which is the subject of the instrument shall pass to a person designated by the decedent in either the instrument or a separate writing,

including a will, executed at the same time as the instrument or subsequently.

(b) Nothing in this section limits the rights of creditors under any other law.

**Comment.** Section 160 is the same in substance as Section 6-201 of the Uniform Probate Code. The Uniform Probate Code language that any provision referred to in this section is “deemed to be nontestamentary” has been replaced by the language making the provision “not invalid because the instrument does not comply with the requirements for execution of a will.” This change is nonsubstantive.

Subdivision (a) makes clear what kinds of transfers on death are valid and is consistent with prior California decisions and statutes applicable to particular kinds of transfers. For example, a contract was upheld that provided that the manager of a business was to receive the business if the manager survived the owner, on the theory that it was additional compensation to the manager and could not be severed from the remainder of the agreement. *Estate of Howe*, 31 Cal.2d 395, 189 P.2d 5 (1948). The payment of employee death benefits to a designated beneficiary has long been statutorily recognized in California. See, e.g., Gov’t Code §§ 21332-21335 (public employees’ death benefits). See also Civil Code § 704 (payable-on-death designations in United States bonds and obligations); Fin. Code §§ 852.5, 7604.5, 11203.5, 14854.5, 18318.5 (account subject to payable-on-death designation); Prob. Code § 6321 (designation of trustee as payee of life insurance).

Paragraph (2) of subdivision (a) codifies prior case law. See *Bergman v. Ornbaun*, 33 Cal. App.2d 680, 92 P.2d 654 (1939) (unpaid installments under promissory note cancelled on death of promisee). See generally 7 B. Witkin, *Summary of California Law Wills and Probate* §§ 87-89, at 5607-09 (8th ed. 1974).

## PART 4. EFFECT OF HOMICIDE

### § 200. Wills and intestate succession

200. (a) A person who feloniously and intentionally kills the decedent is not entitled to any of the following:

(1) Any property, interest, or benefit under the will of the decedent, including any general or special power of appointment conferred by the will on the killer and any nomination of the killer as executor, trustee, or guardian made by the will.

(2) Any property of the decedent by intestate succession.

(3) Any of the decedent's quasi-community property the killer would otherwise acquire under Section 101 or 102 upon the death of the decedent.

(4) Any property of the decedent under Part 3 (commencing with Section 6500) or Part 4 (commencing with Section 6800) of Division 6.

(b) In the cases covered by subdivision (a):

(1) The estate of the decedent passes as if the killer had predeceased the decedent and Section 6145 does not apply.

(2) Property appointed by the will of the decedent to or for the benefit of the killer passes as if the killer had predeceased the decedent and Section 1389.4 of the Civil Code does not apply.

(3) Provisions of the will of the decedent nominating the killer as executor, trustee, or guardian shall be interpreted as if the killer had predeceased the decedent.

**Comment.** This part—Sections 200-206—supersedes former Section 258. This part is the same in substance as Section 2-803 of the Uniform Probate Code except that language is added to Section 200 so that the anti-lapse statute (Section 6145) will not substitute the killer's issue for the disqualified killer. This part makes three substantive changes in prior law:

(1) Under this part, the killer is disqualified from taking from the victim only if the killing is felonious and intentional. Under former Section 258, the killer was disqualified if the killing was accidental but was one within the felony murder rule.

(2) Under Section 204, the civil standard of proof (preponderance of the evidence) is used in the civil proceeding to disqualify the killer from taking from the victim. Under prior law, the criminal burden of proof (beyond a reasonable doubt) was used in the civil proceeding. *Estate of McGowan*, 35 Cal. App.3d 611, 619, 111 Cal. Rptr. 39 (1973).

(3) Under Section 204, an acquittal after a criminal trial has no effect in a subsequent civil proceeding. Under former Section 258, an acquittal was given conclusive effect in the later civil proceeding.

Under paragraph (3) of subdivision (a) of Section 200, one who feloniously and intentionally kills a spouse is entitled to no share of the decedent's quasi-community property, since for most purposes the decedent's quasi-community property is treated as

the decedent's separate property during the decedent's lifetime. See 7 B. Witkin, *Summary of California Law Community Property* § 125, at 5219 (8th ed. 1974). Under paragraph (2) of subdivision (a), however, the spousal killer is disqualified from taking the decedent's half of the community property by intestate succession, but the killer's one-half ownership interest in the community property (see Civil Code § 5105) is not affected. See also Prob. Code §§ 100, 103.

### § 201. Joint assets

201. A joint tenant who feloniously and intentionally kills another joint tenant thereby effects a severance of the interest of the decedent so that the share of the decedent passes as the decedent's property and the killer has no rights by survivorship. This section applies to joint tenancies in real and personal property, joint and multiple-party accounts in financial institutions, and any other form of co-ownership with survivorship incidents.

**Comment.** Section 201 is the same in substance as Section 2-803(b) of the Uniform Probate Code, and is consistent with prior California law. See, e.g., *Estate of Hart*, 135 Cal. App.3d 684 (1982); *Johansen v. Pelton*, 8 Cal. App.3d 625, 87 Cal. Rptr. 784 (1970). See also the Comment to Section 200.

### § 202. Life insurance and beneficiary designations

202. A named beneficiary of a bond, life insurance policy, or other contractual arrangement who feloniously and intentionally kills the principal obligee or the person upon whose life the policy is issued is not entitled to any benefit under the bond, policy, or other contractual arrangement, and it becomes payable as though the killer had predeceased the decedent.

**Comment.** Under Sections 202 and 203, if the killer is treated as having predeceased the decedent for the purpose of life insurance or other contractual benefits, the killer's heirs are similarly disqualified. *Meyer v. Johnson*, 115 Cal. App. 646, 2 P.2d 456 (1931). *Cf.* *Estate of Jeffers*, 134 Cal. App.3d 729 (1982) (killer may not designate alternate beneficiary of insurance proceeds). See also the Comment to Section 200.

### § 203. Other cases

203. In any case not described in Section 200, 201, or 202 in which one person feloniously and intentionally kills

another, any acquisition of property, interest, or benefit by the killer as a result of the killing of the decedent shall be treated in accordance with the principles of this part.

Comment. Section 203 makes clear that any other acquisition by the killer is treated in accordance with the principles of this part. See *Estate of Jeffers*, 134 Cal. App.3d 729 (1982) (killer may not designate alternate beneficiary of insurance proceeds).

**§ 204. Determination of whether killing was felonious and intentional**

**204.** A final judgment of conviction of felonious and intentional killing is conclusive for purposes of this part. In the absence of a conviction of felonious and intentional killing, the court may determine by a preponderance of evidence whether the killing was felonious and intentional for purposes of this part.

Comment. See the Comment to Section 200.

**§ 205. Good faith purchasers**

**205.** This part does not affect the rights of any person who, before rights under this part have been adjudicated, purchases from the killer for value and without notice property which the killer would have acquired except for this part, but the killer is liable for the amount of the proceeds or the value of the property.

Comment. See the Comment to Section 200.

**§ 206. Protection of obligors**

**206.** An insurance company, financial institution, or other obligor making payment according to the terms of its policy or obligation is not liable by reason of this part unless prior to payment it has received at its home office or principal address written notice of a claim under this part.

Comment. See the Comment to Section 200.

## PART 5. SIMULTANEOUS DEATH

### CHAPTER 1. GENERAL PROVISIONS

#### § 220. Proof of survival by clear and convincing evidence

220. Except as otherwise provided in this chapter, if the title to property or the devolution of property depends upon priority of death and it cannot be established by clear and convincing evidence that one of the persons survived the other, the property of each person shall be administered upon or distributed, or otherwise dealt with, as if that person had survived the other.

**Comment.** Section 220 supersedes former Section 296 and modifies the prior rule to require proof of survival by clear and convincing evidence. The introductory clause recognizes that Section 220 has limited application. Section 221 provides that this chapter does not apply to cases covered by Sections 103 (community and quasi-community property), 6143 (wills), or 6403 (survival of heirs). Other provisions of this chapter provide rules that apply to particular cases. See Sections 222 (survival of beneficiaries), 223 (survival of joint tenants), 224 (survival of insurance beneficiaries). The rule provided by Section 220 may be varied by a provision in the governing instrument. See Section 221. See also Sections 230-234 (proceeding to determine whether one person survived another).

#### § 221. Application of chapter

221. (a) This chapter does not apply in any case where Section 103, 6143, or 6403 applies.

(b) This chapter does not apply in the case of a trust, deed, or contract of insurance, or any other situation, where (1) provision is made dealing explicitly with simultaneous deaths or deaths in a common disaster or otherwise providing for distribution of property different from the provisions of this chapter or (2) provision is made requiring one person to survive another for a stated period in order to take property or providing for a presumption as to survivorship that results in a distribution of property different from that provided by this chapter.

**Comment.** Subdivision (a) of Section 221 makes clear that the provisions of this chapter do not apply in cases where Section 103 (effect on community and quasi-community property where married person does not survive death of spouse), 6143 (wills), or 6403 (intestate succession) applies.

Subdivision (b) provides that the distribution provision of a trust, deed, contract of insurance, or other instrument controls if it results in a different distribution of property than that provided for in this chapter. Subdivision (b) continues the substance of former Section 296.6 but omits the reference to “wills” (wills now being covered by Section 6143), substitutes “trust” for “living trusts,” adds language drawn from Section 2-601 of the Uniform Probate Code, and includes the substance of the 1953 revision of Section 6 of the Uniform Simultaneous Death Act. The 1953 revision, which was not previously adopted in California, inserted the phrase “or any other situation” and added the clause which appears as the last portion of clause (2) of subdivision (b) of Section 221.

## § 222. Survival of beneficiaries

**222.** (a) If property is so disposed of that the right of a beneficiary to succeed to any interest in the property is conditional upon surviving another person and it cannot be established by clear and convincing evidence that the beneficiary survived the other person, the beneficiary is deemed not to have survived the other person.

(b) If property is so disposed of that one of two or more beneficiaries would have been entitled to the property if he or she had survived the others, and it cannot be established by clear and convincing evidence that any beneficiary survived any other beneficiary, the property shall be divided into as many equal portions as there are beneficiaries and the portion of each beneficiary shall be administered upon or distributed, or otherwise dealt with, as if that beneficiary had survived the other beneficiaries.

**Comment.** Subdivision (a) of Section 222 is drawn from the first sentence of Section 2 of the Uniform Simultaneous Death Act, as Section 2 was revised in 1953. Subdivision (b) supersedes former Section 296.1. See also Sections 221 (provision of governing instrument prevails), 230-234 (proceeding to determine whether one person survived another).

**§ 223. Survival of joint tenants**

223. (a) As used in this section, "joint tenants" includes owners of property held under circumstances that entitled one or more to the whole of the property on the death of the other or others.

(b) If property is held by two joint tenants and both of them have died and it cannot be established by clear and convincing evidence that one survived the other, the property held in joint tenancy shall be administered upon or distributed, or otherwise dealt with, one-half as if one joint tenant had survived and one-half as if the other joint tenant had survived.

(c) If property is held by more than two joint tenants and all of them have died and it cannot be established by clear and convincing evidence that any of them survived the others, the property held in joint tenancy shall be divided into as many portions as there are joint tenants and the share of each joint tenant shall be administered upon or distributed, or otherwise dealt with, as if that joint tenant had survived the other joint tenants.

Comment. Section 223 supersedes former Section 296.2. The rule governing the dividing of the property is the same as under former law. See also Sections 221 (provision of governing instrument prevails), 230-234 (proceeding to determine whether one person survived another).

**§ 224. Life or accident insurance**

224. (a) If the insured and a beneficiary under a policy of life or accident insurance have died and it cannot be established by clear and convincing evidence that the beneficiary survived the insured, the proceeds of the policy shall be administered upon or distributed, or otherwise dealt with, as if the insured had survived the beneficiary.

(b) If the insured and the beneficiary are married to each other, this section applies regardless of whether the policy is community, quasi-community, or separate property.

(c) This section does not apply to an insurance policy issued prior to January 1, 1985, and any such insurance policy continues to be governed by the law applicable to the policy prior to January 1, 1985.

**Comment.** Section 224 supersedes former Section 296.3. The rule provided by this section is subject to contrary provisions in the insurance contract. See Section 221. See also Sections 230-234 (proceeding to determine whether one person survived another).

## **CHAPTER 2. PROCEEDINGS TO DETERMINE SURVIVAL**

### **§ 230. Petition for purpose of determining survival**

**230.** A petition may be filed under this chapter for any one or more of the following purposes:

(a) To determine for the purposes of Section 103, 220, 222, 223, 224, 6143, 6145, or 6403 whether one person survived another.

(b) To determine for the purposes of Section 1389.4 of the Civil Code whether issue of an appointee survived the donee.

(c) To determine for the purposes of Section 24606 of the Education Code whether a person has survived in order to receive benefits payable under the system.

(d) To determine for the purposes of Section 21371 of the Government Code whether a person has survived in order to receive money payable under the system.

(e) To determine for the purposes of a case governed by former Sections 296 to 296.8, inclusive, whether persons have died other than simultaneously.

**Comment.** Section 230 is a new provision that refers to various provisions that present an issue of survivorship. Sections 230-234 are drawn from former Sections 296.41 and 296.42.

### **§ 231. Persons authorized to file petition**

**231.** A petition may be filed under this chapter by any of the following:

(a) The executor or administrator of any person the priority of whose death is in issue under the applicable provision referred to in Section 230.

(b) Any other person interested in the estate of any such person.

**Comment.** Section 231 continues the substance of a portion of the first sentence of former Section 296.41.

**§ 232. Court where petition to be filed**

**232. (a)** The petition shall be filed in the estate proceeding in which the person filing the petition received his or her appointment or in the estate proceeding for the estate in which the person filing the petition claims an interest.

**(b)** The court that first acquires jurisdiction under this section has exclusive jurisdiction for the purposes of this chapter.

**Comment.** Subdivision (a) of Section 232 continues the substance of a portion of the first sentence of former Section 296.41. Subdivision (b) continues the substance of the last sentence of former Section 296.42.

**§ 233. Notice of hearing**

**233. (a)** The clerk shall set the petition for hearing by the court.

**(b)** Notice of the hearing on the petition shall be given for the period and in the manner required by Section 1200.5 to all of the following (other than persons joining in the petition):

**(1)** The executor or administrator of each person the priority of whose death is in issue if there is an executor or administrator for such person.

**(2)** All devisees of each person the priority of whose death is in issue.

**(3)** All known heirs of each person the priority of whose death is in issue.

**(4)** All persons (or their attorneys if they have appeared by attorneys) who have requested special notice as provided in Section 1202 in the proceeding in which the petition is filed or who have given notice of appearance in person or by attorney in that proceeding.

**(c)** Proof of giving of notice as required by this section shall be made at or before the hearing.

**Comment.** Subdivision (a) of Section 233 continues a portion of the second sentence of former Section 296.41. Subdivision (b) supersedes a portion of the second sentence and all of the third sentence of former Section 296.41. Subdivision (c) is drawn from a portion of the first sentence of former Section 296.42.

§ 234. Hearing; determination; order

234. At the hearing, the court shall hear the petition and any objections to the petition that may have been filed or presented. If the court determines that the named persons are dead and that it has not been established by clear and convincing evidence that one person survived another, the court shall make an order to that effect. If the court determines that the named persons are dead and that there is clear and convincing evidence that one person survived another, the court shall make an order setting forth the order in which the persons died. The order, when it becomes final, is a binding determination of the facts set forth in the order and is conclusive as against the personal representatives of the deceased persons named in the order and against all persons claiming by, through, or under any of the deceased persons.

Comment. Section 234 continues the substance of a portion of former Section 296.42 with the addition of the “clear and convincing evidence” standard.

## DIVISION 6. WILLS AND INTESTATE SUCCESSION

### PART 1. WILLS

#### CHAPTER 1. GENERAL PROVISIONS

§ 6100. Who may make a will

6100. An individual 18 or more years of age who is of sound mind may make a will.

Comment. Section 6100 continues the substance of a portion of the first sentence of former Section 20 and a portion of former Section 21 and is the same in substance as Section 2-501 of the Uniform Probate Code.

Note. In a separate recommendation, the Law Revision Commission has proposed that an emancipated minor be

authorized to make a will. See *Recommendation Relating to Emancipated Minors*, 16 Cal. L. Revision Comm'n Reports 183 (1982).

**§ 6101. Property subject to disposition by will**

**6101. A will may dispose of the following property:**

- (a) The testator's separate property.**
- (b) The one-half of the community property that belongs to the testator under Section 100.**
- (c) The one-half of the testator's quasi-community property that belongs to the testator under Section 101.**

**Comment.** Subdivision (a) of Section 6101 continues a portion of the first sentence of former Section 20. Subdivision (b) continues a portion of former Sections 21 and 201. Subdivision (c) continues a portion of former Section 201.5.

**§ 6102. Who may take a disposition by will**

**6102. A will may made a disposition of property to any person, including but not limited to any of the following:**

- (a) An individual.**
- (b) A corporation.**
- (c) An unincorporated association, society, lodge, or any branch thereof.**
- (d) A county, city, city and county, or any municipal corporation.**
- (e) Any state, including this state.**
- (f) The United States or any instrumentality thereof.**
- (g) A foreign country or a governmental entity therein.**

**Comment.** Section 6102 continues the substance of former Section 27, but omits the obsolete reference in the former section to repealed provisions (former Sections 259-259.2). For other provisions authorizing various entities to accept testamentary gifts, see, e.g., Cal. Const. art. 9, § 9 (University of California); Cal. Const. art. 20, § 2 (Stanford University and Huntington Library); Corp. Code § 10403 (corporation for prevention of cruelty to children or animals); Educ. Code §§ 19174 (county library), 33332 (State Department of Education), 35273 (school district), 70028 (California Maritime Academy); Harb. & Nav. Code §§ 6074 (harbor district), 6294 (port district), 6894 (river port district); Health & Safety Code §§ 8985, 9000 (public cemetery district), 32121 (hospital district); Pub. Res. Code

§§ 5101 (monuments in memory of California pioneers), 5158, 5196 (park commissioners). See also Gov't Code §§ 11005, 11005.1 ("gifts" to state or state agency).

## CHAPTER 2. EXECUTION OF WILLS

### § 6110. Execution of witnessed will

6110. (a) Except as provided in this part, a will shall be in writing and satisfy the requirements of this section.

(b) The will shall be signed either (1) by the testator or (2) in the testator's name by some other person in the testator's presence and by the testator's direction.

(c) The will shall be witnessed by one of the following methods:

(1) Be signed by at least two persons who (i) being present at the same time, witnessed either the signing of the will or the testator's acknowledgment of the signature or of the will and (ii) understand that the instrument they sign is the testator's will.

(2) Be acknowledged before a notary public at any place within this state.

**Comment.** Section 6110 supersedes former Section 50. Section 6110 relaxes the formalities required under former Section 50 by eliminating the requirements (1) that the testator's signature be "at the end" of the will, (2) that the testator "declare" to the witnesses that the instrument is his or her will, (3) that the witnesses' signatures be "at the end" of the will, (4) that the testator "request" the witnesses to sign the will, and (5) that the witnesses sign the will in the testator's presence. Section 6110 continues the requirements of former Section 50 that (1) the will be in writing, (2) that the will be signed by the testator or by someone else who signs the testator's name in the testator's presence and by the testator's direction, (3) that the will be signed or the testator acknowledge the signature in the presence of two witnesses who are present at the same time, and (4) that the witnesses sign the will.

Paragraph (1) of subdivision (c) requires that the signing or acknowledgment take place in the presence of the witnesses, present at the same time, but does not require that the witnesses sign in the presence of each other. This is consistent with prior law. See, *e.g.*, *In re Estate of Armstrong*, 8 Cal.2d 204, 209-10, 64 P.2d 1093 (1937).

The requirement of subdivision (c)(1)(ii) that the witness understand that the instrument being witnessed is a will replaces the former requirement that the testator “declare” to the witnesses that the instrument is his or her will. The new requirement codifies California decisional law which did not apply the former declaration requirement literally and held the requirement satisfied if it is apparent from the testator’s conduct and the surrounding circumstances that the instrument is a will. See 7 B. Witkin, *Summary of California Law Wills and Probate* § 118, at 5633-34 (8th ed. 1974). The witness may obtain the necessary understanding by any means. For example, the witness may know that the instrument is a will by examining the instrument itself or from the circumstances surrounding the execution of the will. Nothing in Section 6110 requires that the testator disclose the contents of the will.

Paragraph (2) of subdivision (c), which permits the testator to use a single witness when that witness is a notary public, is new. See generally Civil Code § 1189 (form of notary’s certificate of acknowledgment); Gov’t Code §§ 8200-8230 (provisions governing notaries public). Under paragraph (2), the acknowledgment must be made before a notary, and not before one of the various other officers referred to in Civil Code Section 1181 (judge, district attorney, etc.).

The introductory clause of Section 6110 recognizes that the validity of the execution of a will may be determined pursuant to some other provision of this part. See Sections 6111 (holographic will), 6221 (California statutory will), 6381-6385 (international will).

### § 6111. Holographic will

6111. (a) A will that does not comply with Section 6110 is valid as a holographic will, whether or not witnessed, if the signature and the material provisions are in the handwriting of the testator.

(b) If a holographic will does not contain a statement as to the date of its execution and:

(1) If the omission results in doubt as to whether its provisions or the inconsistent provisions of another will are controlling, the holographic will is invalid to the extent of the inconsistency unless the time of its execution is established to be after the date of execution of the other will.

(2) If it is established that the testator lacked testamentary capacity at any time during which the will might have been executed, the will is invalid unless it is established that it was executed at a time when the testator had testamentary capacity.

**Comment.** Section 6111 continues former Section 53. Subdivision (a) is the same in substance as Section 2-503 of the Uniform Probate Code. Subdivision (b) is not found in the Uniform Probate Code. Paragraph (1) of subdivision (b) is a clarifying provision designed to deal with the situation where the holographic will and another will have inconsistent provisions as to the same property or otherwise have inconsistent provisions. To deal specifically with this situation, paragraph (1) requires either that the holographic will be dated or that the time of its execution be shown to be after the date of execution of the other will. If the date of execution of the holographic will cannot be established by a date in the will or by other evidence to be after the date of execution of the other will, the holographic will is invalid to the extent that the date of its execution is material in resolving the issue of whether it or the other inconsistent will is to be given effect. Where the conflict between the holographic will and the other will is to only a portion of the property governed by the holographic will, the invalidity of the holographic will as to the property governed by the other will does not affect the validity of the holographic will as to other property. Paragraph (1) also covers the situation where both wills are holographic and undated and have inconsistent provisions on a particular matter; in such a case, Section 6111 applies to both wills. If it cannot be established that one of the holographic wills was executed after the other, neither will is valid insofar as the two wills are inconsistent; but, in such case, the validity of the consistent provisions of the two wills is not affected by the failure to establish time of execution.

Paragraph (2) of subdivision (b) applies to the situation where the testator lacked testamentary capacity at any time during which the holographic will might have been executed. Thus, if the testator lacks testamentary capacity at the time of his or her death and the holographic will is found with the testator's personal effects, the will is invalid unless it is established that the will was executed at a time when the testator did have testamentary capacity. This could be established, for example, by evidence of a person who saw the testator make the holographic will and can testify that the testator had testamentary capacity

at that time. Likewise, where a testator lacked testamentary capacity for a period prior to death and the undated holographic will is found in the testator's safe deposit box, it could be established that the will was executed at a time when the testator did have testamentary capacity if it were shown that the testator did not have access to the safe deposit box at any time after the testator lost the capacity to execute a will. Paragraph (2) does not invalidate a holographic will if it could not have been executed at a time when the testator lacked testamentary capacity. For example, if the testator becomes ill and requires hospitalization, loses his or her testamentary capacity and dies during the hospitalization period, and the testator's holographic will is found at the testator's home, the will must have been executed before the testator's hospitalization and therefore at a time when the testator had testamentary capacity.

**§ 6112. Who may witness a will**

**6112. (a) Any person generally competent to be a witness may act as a witness to a will.**

**(b) A will or any provision thereof is not invalid because the will is signed by an interested witness.**

**Comment.** Section 6112 is the same as Section 2-505 of the Uniform Probate Code and supersedes former Sections 51 and 52. Section 6112 changes the rule of former Section 51 which disqualified a subscribing witness from taking under the will unless there were two other disinterested subscribing witnesses. Under Section 6112, a person may be a witness to a will without forfeiting any benefits under the will. However, nothing in Section 6112 prevents undue influence from being inferred from the circumstances. A substantial gift by the will to a witness would be a suspicious circumstance that might suggest undue influence. See also Section 372.5 (devisee may contest gift to interested witness without being penalized by no-contest clause). Section 6112 is consistent with former Section 52 (testator's creditor may be competent witness).

**§ 6113. Choice of law as to execution of will**

**6113. A written will is valid if its execution complies with any of the following:**

**(a) The will is executed in compliance with Section 6110 or 6111 or Chapter 6 (commencing with Section 6200) or Chapter 11 (commencing with Section 6380).**

(b) The execution of the will complies with the law at the time of execution of the place where the will is executed.

(c) The execution of the will complies with the law of the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode, or is a national.

**Comment.** Section 6113 is the same in substance as Section 2-506 of the Uniform Probate Code and supersedes former Section 26. Section 6113 applies whether or not the will was executed in California. Former Section 26 applied only where a will executed outside California was offered for probate in California. The references to the provisions relating to California statutory wills and international wills are added to the Uniform Probate Code provision.

### CHAPTER 3. REVOCATION AND REVIVAL

#### § 6120. Revocation by subsequent will or by act

6120. A will or any part thereof is revoked by any of the following:

(a) A subsequent will which revokes the prior will or part expressly or by inconsistency.

(b) Being burned, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking it, by either (1) the testator or (2) another person in the testator's presence and by the testator's direction.

**Comment.** Section 6120 is the same in substance as Section 2-507 of the Uniform Probate Code and supersedes former Sections 72 and 74. The provision of former Section 74 requiring two witnesses to prove revocation of a will by someone other than the testator is not continued. Section 6120 is otherwise consistent with former Sections 72 and 74.

#### § 6121. Revocation of will executed in duplicate

6121. A will executed in duplicate or any part thereof is revoked if one of the duplicates is burned, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking it, by either (1) the testator or (2) another person in the testator's presence and by the testator's direction.

**Comment.** Section 6121 continues the substance of former Section 76.

**§ 6122. Revocation by annulment or dissolution of marriage; no revocation by other changes of circumstances**

**6122.** (a) Unless the will expressly provides otherwise, if after executing a will the testator's marriage is dissolved or annulled, the dissolution or annulment revokes all of the following:

(1) Any disposition or appointment of property made by the will to the former spouse.

(2) Any provision of the will conferring a general or special power of appointment on the former spouse.

(3) Any provision of the will nominating the former spouse as executor, trustee, conservator, or guardian.

(b) If any disposition or other provision of a will is revoked solely by this section, it is revived by the testator's remarriage to the former spouse.

(c) In case of revocation by dissolution or annulment:

(1) Property prevented from passing to a former spouse because of the revocation passes as if the former spouse failed to survive the testator.

(2) Other provisions of the will conferring some power or office on the former spouse shall be interpreted as if the former spouse failed to survive the testator.

(d) For purposes of this section, dissolution or annulment means any dissolution or annulment which would exclude the spouse as a surviving spouse within the meaning of Section 78. A decree of legal separation which does not terminate the status of husband and wife is not a dissolution for purposes of this section.

(e) No change of circumstances other than as described in this section revokes a will.

**Comment.** Section 6122 is the same in substance as Section 2-508 of the Uniform Probate Code. Section 6122 changes the former case law rule that dissolution or annulment of marriage has no effect on the will of either spouse. See *In re Estate of Patterson*, 64 Cal. App. 643, 646, 222 P. 374 (1923); 7 B. Witkin, *Summary of California Law Wills and Probate* § 150, at 5666 (8th ed. 1974). See also Sections 22 ("annulment of marriage")

defined), 36 (“dissolution of marriage” defined), Civil Code § 4352 (required notice in judgment of dissolution or nullity). For a comparable provision, see Section 6226 (California statutory will).

### § 6123. Revival of revoked will

6123. (a) If a second will which, had it remained effective at death, would have revoked the first will in whole or in part, is thereafter revoked by acts under Section 6120 or 6121, the first will is revoked in whole or in part unless it is evident from the circumstances of the revocation of the second will or from the testator’s contemporary or subsequent declarations that the testator intended the first will to take effect as executed.

(b) If a second will which, had it remained effective at death, would have revoked the first will in whole or in part, is thereafter revoked by a third will, the first will is revoked in whole or in part, except to the extent it appears from the terms of the third will that the testator intended the first will to take effect.

**Comment.** Section 6123 is the same in substance as Section 2-509 of the Uniform Probate Code and supersedes former Section 75. Section 6123 sets forth a presumption against revival of a previously revoked will, the same as under former Section 75. However, unlike former Section 75, where revocation of the second will is by an act such as destruction, Section 6123 permits the testator’s intent that the first will be revived to be shown by extrinsic evidence, thus producing results generally more consistent with the testator’s intent.

## CHAPTER 4. REFERENCE TO MATTERS OUTSIDE THE WILL

### § 6130. Incorporation by reference

6130. A writing in existence when a will is executed may be incorporated by reference if the language of the will manifests this intent and describes the writing sufficiently to permit its identification.

**Comment.** Section 6130 is the same as Section 2-510 of the Uniform Probate Code. Section 6130 codifies the doctrine of incorporation by reference which was recognized by prior California case law. See 7 B. Witkin, *Summary of California Law Wills and Probate* § 143, at 5660 (8th ed. 1974).

**§ 6131. Events of independent significance**

6131. A will may dispose of property by reference to acts and events that have significance apart from their effect upon the dispositions made by the will, whether the acts and events occur before or after the execution of the will or before or after the testator's death. The execution or revocation of a will of another person is such an event.

**Comment.** Section 6131 is the same as Section 2-512 of the Uniform Probate Code. Section 6131 codifies the doctrine of acts and events of independent significance. See generally 7 B. Witkin, *Summary of California Law Wills and Probate* § 147, at 5662-63 (8th ed. 1974).

**CHAPTER 5. RULES OF CONSTRUCTION OF WILLS****Article 1. General Provisions****§ 6140. Intention of testator**

6140. The intention of a testator as expressed in his or her will controls the legal effect of the dispositions in the will.

**Comment.** Section 6140 is the same in substance as the first sentence of Section 2-603 of the Uniform Probate Code.

**§ 6141. Rules of construction apply unless will indicates contrary intention**

6141. The rules of construction in this chapter apply unless a contrary intention is indicated by the will.

**Comment.** Section 6141 is the same in substance as the second sentence of Section 2-603 of the Uniform Probate Code. Some sections in this chapter contain their own provisions governing the manner in which the statutory rule may be varied by language in the will. See, *e.g.*, Sections 6142 (choice of law as to meaning and effect of will), 6143 (survival requirement).

**§ 6142. Choice of law as to meaning and effect of will**

6142. 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 the will unless the application of that law is contrary to any of the following:

(a) The rights of the surviving spouse in community and quasi-community property.

(b) The provisions of Part 3 (commencing with Section 6500).

(c) Any other public policy of this state otherwise applicable to the disposition.

**Comment.** Section 6142 supersedes former Section 100 and is consistent with Section 2-602 of the Uniform Probate Code. The reference in Section 2-602 of the Uniform Probate Code to elective share is replaced by a reference to the rights of the surviving spouse in community and quasi-community property. Subdivision (b) is drawn from the reference in Section 2-602 of the Uniform Probate Code to provisions relating to elective share, exempt property, and allowances. See also Section 78 (definition of “surviving spouse”).

#### § 6143. Requirement that devisee survive testator

6143. (a) A devisee who does not survive the testator does not take under the will.

(b) If it cannot be established by clear and convincing evidence that the devisee has survived the testator, it is deemed that the devisee did not survive the testator.

(c) Subdivision (b) does not apply if the testator’s will contains language (1) dealing explicitly with simultaneous deaths or deaths in a common disaster or (2) requiring that the devisee survive the testator for a stated period in order to take under the will.

**Comment.** Subdivision (a) of Section 6143 continues the substance of the first portion of former Section 92. The rule stated in subdivision (a) does not apply to the extent that a different intention is indicated by the will. See Section 6141. See also Section 6140.

Subdivisions (b) and (c) supersede former Sections 296 and 296.6 insofar as those sections applied to wills. Subdivision (b) is consistent with Section 220. See the Comment to that section. Subdivision (c) is drawn from a portion of Section 2-601 of the Uniform Probate Code.

If the devisee is kindred of the testator and fails to survive and leaves issue, Section 6145 (anti-lapse) will substitute the devisee’s issue for the devisee unless the will indicates a contrary intention (Section 6141).

For a provision governing the administration and disposition of community property and quasi-community property where one

spouse does not survive the other, see Section 103. See also Sections 230-234 (proceeding to determine whether devisee survived testator).

**§ 6144. Will passes all property including after-acquired property**

**6144.** Except as provided by Sections 1386.1 and 1386.2 of the Civil Code relating to powers of appointment, a will passes all property the testator owns at death including property acquired after execution of the will.

**Comment.** Section 6144 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 6144 is taken from former Sections 125 and 126 and is consistent with the Uniform Probate Code. See Uniform Probate Code §§ 2-604, 2-610. Section 6144 does not apply if a contrary intention is indicated by the will. See Section 6141.

**§ 6145. Anti-lapse**

**6145.** If a devisee who is kindred 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 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 the purposes of this section whether his or her death occurred before or after the execution of the will.

**Comment.** Section 6145 supersedes former Section 92, and is drawn from Section 2-605 of the Uniform Probate Code. Section 6145 continues the provision of former Section 92 that applies the anti-lapse provisions whenever the deceased devisee is “kindred” of the testator—that is, related to the testator by blood. *Cf. In re Estate of Sowash*, 62 Cal. App. 512, 516, 217 P. 123 (1923). Section 6145 does not apply if a contrary intention is indicated by the will. See Section 6141.

As to when a devisee is treated as if he or she predeceased the testator, see Section 6143 (simultaneous death). See also Sections

230-234 (proceeding to determine whether issue of deceased devisee survived the testator).

Section 6145 provides that, if the issue of the deceased devisee are of unequal degree of kinship to the devisee, the issue take by representation. Section 6405 prescribes the manner of division where representation is called for. In applying the provisions of Section 6145 where the issue of the deceased devisee take by representation, the degree of kinship to the deceased devisee determines the shares the issue will receive under the provisions of Section 6405.

### § 6146. Failure of devise

**6146. Except as provided in Section 6145:**

(a) If a devise other than a residuary devise fails for any reason, the property devised becomes a part of the residue.

(b) If the residue is devised to two or more persons and the share of one of the residuary devisees fails for any reason, the share passes to the other residuary devisee or to the other residuary devisees in proportion to their interests in the residue.

**Comment.** Section 6146 is the same in substance as Section 2-606 of the Uniform Probate Code. The rule stated in Section 6146 may be varied by the testator's will. See Section 6141. Subdivision (b) of Section 6146 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, 760-61, 272 P. 1060 (1928); *Estate of Anderson*, 166 Cal. App.2d 39, 42, 332 P.2d 785 (1958).

### § 6147. Halfbloods, adopted persons, and persons born out of wedlock

**6147. 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 6147 is the same as Section 2-611 of the Uniform Probate Code and supersedes former Section 108. The rule stated in Section 6147 may be varied by the testator's will. See Section 6141. To the extent that California cases have

addressed the matter, Section 6147 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 6406, 6408.

**§ 6148. Class gift to “heirs,” “next of kin,” “relatives,” or the like**

**6148.** A testamentary disposition, whether directly or in trust, to the testator’s or another designated person’s “heirs,” “next of kin,” “relatives,” or “family,” or to “the persons entitled thereto under the intestate succession laws,” or to persons described by words of similar import, means “heirs” as defined in Section 44 determined as if the testator or other designated person were to die intestate at the time when the testamentary disposition is to take effect in enjoyment.

**Comment.** Section 6148 supersedes the first sentence of former Section 123, and is drawn from Section 2514 of the Pennsylvania Consolidated Statutes, title 20. The former provision applied to all class gifts, while Section 6148 applies only to a class gift to “heirs” or a similarly described class. When possession is postponed to some future time, Section 6148 postpones the determination of class membership until that future time. Prior law was unclear. See Halbach, *Future Interests: Express and Implied Conditions of Survival*, 49 Calif. L. Rev. 297, 317-20 (1961). The effect of Section 6148 is to prevent the future interest from passing through the estate of one who does not survive until possession vests.

The rule stated in Section 6148 yields to a contrary intent expressed in the testator’s will. See Section 6141.

**§ 6149. Afterborn member of class**

**6149.** A person 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 6149 continues the substance of the second sentence of former Section 123 but makes clear that the rule is not limited to a child of the testator. Section 6149 is comparable to the rule in intestate succession. See Section 6407. The rule of Section 6149 yields to a contrary intent expressed in the testator’s will. See Section 6141.

**§ 6150. Devisees as owners in common**

**6150.** A devise of property to more than one person vests the property in them as owners in common.

**Comment.** Section 6150 continues former Section 29. The rule of Section 6150 yields to a contrary intent expressed in the testator's will. See Section 6141. This continues prior law. See former Section 29 (containing express provision that rule stated in the section yields to a contrary provision in will). See also Section 32 ("devise" means disposition of real or personal property by will).

**§ 6151. Common law rule of worthier title abolished**

**6151.** 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. This section applies to all cases in which a final judgment had not been entered as of September 18, 1959.

**Comment.** Section 6151 continues the substance of former Section 109. Section 6151 omits references to a "bequest" which appeared in former Section 109. As used in Section 6151, "devise" applies to dispositions by will of both real and personal property. See Section 32. See also Section 6148 (devise to heirs or next of kin).

**§ 6152. Direction in will to convert real property into money**

**6152.** If a will directs the conversion of real property into money, the property and its proceeds are deemed personal property from the time of the testator's death.

**Comment.** Section 6152 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).

## Article 2. Ascertaining Meaning of Language Used in the Will

### § 6160. Every expression given some effect; intestacy avoided

6160. The words of a will are to receive an interpretation that will give every expression some effect, rather than one that will render any of the expressions inoperative; and preference is to be given to an interpretation of a will that will prevent a total intestacy, rather than one that will result in a total intestacy.

**Comment.** Section 6160 continues the substance of former Section 102. The rules stated in Section 6160 yield to a contrary intent indicated by the will. See Section 6141.

### § 6161. Construction of will as a whole

6161. All the parts of a will are to be construed in relation to each other and so as, if possible, to form a consistent whole. If the meaning of any part of a will is ambiguous or doubtful, it may be explained by any reference to or recital of that part in another part of the will.

**Comment.** Section 6161 continues the substance of former Section 103 except for the provision of the former section that the last part must prevail where several parts of a will are absolutely irreconcilable. The rules stated in Section 6161 yield to a contrary intent indicated by the will. See Section 6141.

### § 6162. Words given their ordinary meaning; technical words

6162. The words of a will are to be given their ordinary and grammatical meaning unless the intention to use them in another sense is clear and their intended meaning can be ascertained. Technical words are not necessary to give effect to a disposition in a will. Technical words in a will are to be considered as having been used in their technical sense unless (1) the context clearly indicates a contrary intention or (2) it satisfactorily appears that the will was drawn solely by the testator and that the testator was unacquainted with the technical sense.

**Comment.** Section 6162 continues the substance of former Section 106.

### Article 3. Exoneration; Ademption

#### § 6170. No exoneration

**6170.** A specific devise passes the property devised subject to any mortgage, deed of trust, or other lien existing at the date of death, without right of exoneration, regardless of a general directive in the will to pay debts.

**Comment.** Section 6170 expands the rule stated in Section 2-609 of the Uniform Probate Code to cover any lien. This expansion makes Section 6170 consistent with Section 736. Section 6170 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). The rule stated in Section 6170 may be varied by the testator’s will. See Section 6141. See also Sections 32 (“devise” means a disposition of real or personal property by will), 62 (“property” defined).

#### § 6171. Change in form of securities

**6171.** (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 much of the devised securities as is a part of the estate at the time of the testator’s death.

(2) 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 of another entity owned by the testator as a result of a merger, consolidation, reorganization or other similar action initiated by the entity.

(4) 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 subdivision (a) are not part of the specific devise.

**Comment.** Section 6171 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 stated in Section 6171 may be varied by the testator's will. See Section 6141.

Under Section 6171, if the testator makes a specific devise of only a portion of the stock the testator owns in a particular company and there is a stock split or stock dividend, the specific devisee is entitled only to a proportionate share of the additional stock received. For example, if the testator owns 500 shares of stock in company A, devises 100 shares to his son, and the stock splits two for one, T's son is entitled to 200 shares, not 600.

**§ 6172. Unpaid proceeds of sale, condemnation, or insurance; property obtained as a result of foreclosure**

**6172.** A specific devisee has the right to the remaining specifically devised property and all of the following:

(a) 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.

(b) Any amount of an eminent domain award for the taking of the property unpaid at death.

(c) Any proceeds unpaid at death on fire or casualty insurance on the property.

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

**Comment.** Section 6172 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). *Cf.* *Estate of Newsome*, 248 Cal. App.2d 712, 56 Cal. Rptr. 874 (1967). See also Sections 32 ("devise" defined), 62 ("property" defined). The rules stated in Section 6172 may be varied by the testator's will. See Section 6141.

The rules of nonademption in Sections 6172-6177 are not exclusive, and nothing in these provisions is intended to increase the incidence of ademption in California. See Section 6178.

**§ 6173. Sale by conservator; payment of proceeds of specifically devised property to conservator**

**6173. (a)** Except as otherwise provided in this section, if specifically devised property is sold by a conservator, the specific devisee has the right to a general pecuniary devise equal to the net sale price of the property.

**(b)** Except as otherwise provided in this section, if an eminent domain award for the taking of specifically devised property is paid to a conservator, or if the proceeds on fire or casualty insurance on specifically devised property are paid to a conservator, the specific devisee has the right to a general pecuniary devise equal to the eminent domain award or the insurance proceeds.

**(c)** This section does not apply if, after the sale, condemnation, fire, or casualty, the conservatorship is terminated and the testator survives the termination by one year.

**(d)** The right of the specific devisee under this section is reduced by any right the specific devisee has under Section 6172.

**Comment.** Subdivisions (a) and (b) of Section 6173 are the same in substance as the first sentence of subdivision (b) of Section 2-608 of the Uniform Probate Code and are consistent with prior California case law. See *Estate of Packham*, 232 Cal. App.2d 847, 43 Cal. Rptr. 318 (1965). See also Sections 32 (“devise” defined), 62 (“property” defined). The rules stated in Section 6173 may be varied by the testator’s will. See Section 6141. See also Section 6178.

Subdivision (c) of Section 6173 revises the corresponding Uniform Probate Code language to refer to the conservatorship being terminated rather than to it being “adjudicated that the disability of the testator has ceased.” The application of subdivision (c) turns on whether a conservatorship has been terminated, and not on whether the testator has regained the capacity to make a will. Thus subdivision (c) provides a rule of administrative convenience and avoids the need to litigate the question of whether the conservatee had capacity to make a will after the time of the sale, condemnation, fire, or casualty.

Subdivision (d) of Section 6173 is the same in substance as the third sentence of subdivision (b) of Section 2-608 of the Uniform Probate Code.

**§ 6174. Ademption by satisfaction**

**6174. (a)** Property a testator gave during lifetime to a person is treated as a satisfaction of a devise to that person in whole or in part only if one of the following conditions is satisfied:

(1) The will provides for deduction of the lifetime gift.

(2) The testator declares in a contemporaneous writing that the gift is to be deducted from the devise or is in satisfaction of the devise.

(3) The devisee acknowledges in writing that the gift is in satisfaction.

(b) Subject to subdivision (c), for the 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.

(c) If the value of the gift is expressed in the contemporaneous writing of the testator, or in an acknowledgement of the devisee made contemporaneously with the gift, that value is conclusive in the division and distribution of the estate.

**Comment.** Subdivisions (a) and (b) of Section 6174 are the same in substance as Section 2-612 of the Uniform Probate Code and are consistent with former Section 1050. Subdivision (b) 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 (b), 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 a time after the testator's death, the property would be valued as of the date of death. Subdivision (c) continues a provision of former Section 1052, but adds the requirement that, if the donee's acknowledgment expresses the value of the gift, that value is binding on the court only if made contemporaneously with the gift. See also Sections 32 ("devise" defined), 34 ("devisee" defined), 62 ("property" defined). For a comparable intestate succession rule concerning advancements, see Section 6409.

**§ 6175. Contract for sale or transfer of specifically devised property**

**6175.** If the testator after execution of the will enters into an agreement for the sale or transfer of specifically devised property, the specific devisee has the right to the property subject to the remedies of the purchaser or transferee.

**Comment.** Section 6175 is drawn from former Section 77. See also Sections 32 (“devise” defined), 34 (“devisee” defined), 62 (“property” defined). The rule stated in Section 6175 may be varied by the testator’s will. See Section 6141. See also Section 6178.

**§ 6176. Testator placing charge or encumbrance on specifically devised property**

**6176.** If the testator after execution of the will places a charge or encumbrance on specifically devised property for the purpose of securing the payment of money or the performance of any covenant or agreement, the specific devisee has the right to the property subject to the charge or encumbrance.

**Comment.** Section 6176 continues the substance of a portion of former Section 78. See also Sections 32 (“devise” defined), 34 (“devisee” defined), 62 (“property” defined). The rule stated in Section 6176 may be varied by the testator’s will. See Section 6141. See also Section 6178.

**§ 6177. Act of testator altering testator’s interest in specifically devised property**

**6177.** If the testator after execution of the will alters, but does not wholly divest, the testator’s interest in specifically devised property by a conveyance, settlement, or other act, the specific devisee has the right to the remaining interest of the testator in the property.

**Comment.** Section 6177 continues the substance of a portion of former Section 78. See also Sections 32 (“devise” defined), 34 (“devisee” defined), 62 (“property” defined). The rule stated in Section 6177 may be varied by the testator’s will. See Section 6141. See also Section 6178.

**§ 6178. Rules stated in Sections 6172 to 6177 not exhaustive**

6178. The rules stated in Sections 6172 to 6177, inclusive, are not exhaustive, and nothing in those sections is intended to increase the incidence of ademption under the law of this state.

**Comment.** Section 6178 recognizes that the rules stated in Sections 6172 to 6177, inclusive, cover a number of special situations where a specific gift is not adeemed but do not cover all situations where a specific gift is not adeemed. Section 6178 also makes clear that the inclusion of these specific statutory rules is not intended to increase the incidence of ademption in California.

## **CHAPTER 6. CALIFORNIA STATUTORY WILL**

### **Article 1. Definitions and Rules of Construction**

**§ 6200. Application of definitions and rules of construction**

6200. Unless the provision or context clearly requires otherwise, these definitions and rules of construction govern the construction of this chapter.

**Comment.** Section 6200 continues the substance of the introductory clause of former Section 56.

**§ 6201. Testator**

6201. "Testator" means a person choosing to adopt a California statutory will.

**Comment.** Section 6201 continues subdivision (a) of former Section 56.

**§ 6202. Spouse**

6202. "Spouse" means the testator's husband or wife at the time the testator signs a California statutory will.

**Comment.** Section 6202 continues subdivision (b) of former Section 56. As to the effect of termination of the marriage by dissolution or annulment after execution of the will, see Section 6226.

**§ 6203. Executor**

**6203.** “Executor” means both the person so designated in a California statutory will and any other person acting at any time as the executor or administrator under a California statutory will.

**Comment.** Section 6203 continues subdivision (c) of former Section 56.

**§ 6204. Trustee**

**6204.** “Trustee” means both the person so designated in a California statutory will and any other person acting at any time as the trustee under a California statutory will.

**Comment.** Section 6204 continues subdivision (d) of former Section 56.

**§ 6205. Descendants**

**6205.** “Descendants” means children, grandchildren, and their lineal descendants of all degrees.

**Comment.** Section 6205 continues subdivision (e) of former Section 56.

**§ 6206. Class designation of “descendants” or “children”**

**6206.** (a) A class designation of “descendants” or “children” includes (1) persons legally adopted into the class during minority and (2) persons naturally born into the class (in or out of wedlock).

(b) A reference to “descendants” in the plural includes a single descendant where the context so requires.

**Comment.** Section 6206 continues the substance of subdivision (f) of former Section 56.

**§ 6207. Construction of genders and singular and plural**

**6207.** Masculine pronouns include the feminine, and plural and singular words include each other, where appropriate.

**Comment.** Section 6207 continues subdivision (g) of former Section 56.

**§ 6208. Use of “shall” or “may” in a California statutory will**

**6208. (a)** If a California statutory will states that a person shall perform an act, the person is required to perform that act.

**(b)** If a California statutory will states that a person may do an act, the person’s decision to do or not to do the act shall be made in the exercise of the person’s fiduciary powers.

**Comment.** Section 6208 continues the substance of subdivision (h) of former Section 56.

**§ 6209. Manner of distribution to “descendants”**

**6209.** Whenever a distribution under a California statutory will is to be made to a person’s descendants, the property shall be divided into as many equal shares as there are then living descendants of the nearest degree of living descendants and deceased descendants of that same degree who leave descendants then living; and each living descendant of the nearest degree shall receive one share and the share of each deceased descendant of that same degree shall be divided among his or her descendants in the same manner.

**Comment.** Section 6209 continues the substance of subdivision (i) of former Section 56. The rule stated in Section 6209 is consistent with the general rule concerning taking by representation. See Section 6405 (representation).

**§ 6210. Person**

**6210.** “Person” includes individuals and institutions.

**Comment.** Section 6210 continues subdivision (j) of former Section 56.

## **Article 2. General Provisions**

**§ 6220. Persons who may execute California statutory will**

**6220.** Any individual of sound mind and over the age of 18 may execute a California statutory will under the provisions of this chapter.

**Comment.** Section 6220 continues the substance of former Section 56.1.

**§ 6221. Method of executing California statutory will**

**6221.** (a) The only method of executing a California statutory will is for all of the following to occur:

(1) The testator shall complete the appropriate blanks and shall sign the will.

(2) Each witness shall observe the testator's signing and each witness shall sign his or her name in the presence of the testator.

(b) The execution of the attestation clause provided in the California statutory will by two or more witnesses satisfies Section 329.

**Comment.** Section 6221 continues the substance of former Section 56.2.

**§ 6222. Two California statutory wills; contents**

**6222.** (a) There are two California statutory wills:

(1) A California statutory will.

(2) A California statutory will with trust.

(b) Each California statutory will includes all of the following:

(1) The contents of the appropriate California Statutory Will Form, including the notice set out in Section 6240 or 6241.

(2) By reference, the full texts of each of the following:

(A) The definitions and rules of construction set forth in Article 1 (commencing with Section 6200).

(B) The clause set forth in Section 6242.

(c) The property disposition clause adopted by the testator.

(d) The mandatory clauses set forth in Section 6245 and, if applicable, 6246.

**Comment.** Section 6222 continues the substance of former Section 56.3.

**§ 6223. Effect of selection of more than one property disposition clause; effect of failure to make selection**

**6223.** If more than one property disposition clause appearing in paragraph 2.3 of a California Statutory Will Form is selected, or if none is selected, the property of a testator who signs a California statutory will shall be distributed to the testator's heirs as if the testator did not make a will.

Comment. Section 6223 continues former Section 56.4.

§ 6224. Effect of titles of clauses

6224. Only the texts of the property disposition clauses and the mandatory clauses shall be considered in determining their meaning. Their titles shall be disregarded.

Comment. Section 6224 continues former Section 56.5.

§ 6225. Revocation; amendment by codicil; effect of additions or deletions on form

6225. (a) A California statutory will may be revoked and may be amended by codicil in the same manner as other wills.

(b) Any additions to or deletions from the California statutory will on the face of the California Statutory Will Form, other than in accordance with the instructions, are ineffective and shall be disregarded.

Comment. Section 6225 continues former Section 56.6.

§ 6226. Revocation by dissolution or annulment of marriage

6226. (a) If after executing a California statutory will the testator's marriage is dissolved or annulled, the dissolution or annulment revokes any disposition of property made by the will to the former spouse and any nomination of the former spouse as executor, trustee, or guardian made by the will. If any disposition or nomination is revoked solely by this section, it is revived by the testator's remarriage to the former spouse.

(b) In case of revocation by dissolution or annulment:

(1) Property prevented from passing to a former spouse because of the revocation passes as if the former spouse failed to survive the testator.

(2) Provisions nominating the former spouse as executor, trustee, or guardian shall be interpreted as if the former spouse failed to survive the testator.

(c) For purposes of this section, divorce or annulment means any dissolution or annulment that would exclude the spouse as a surviving spouse within the meaning of Section 78. A decree of legal separation which does not

terminate the status of husband and wife is not a divorce or dissolution for purposes of this section.

(d) This section applies to any California statutory will, without regard to the time when the will was executed, if the testator dies after December 31, 1984.

**Comment.** Section 6226 is a new provision that is drawn from and is consistent with Section 6122. See the Comment to that section.

### **Article 3. Form and Full Text of Clauses**

#### **§ 6240. California Statutory Will Form**

6240. The following is the California Statutory Will Form:

#### **CALIFORNIA STATUTORY WILL**

##### **NOTICE TO THE PERSON WHO SIGNS THIS WILL:**

1. IT MAY BE IN YOUR BEST INTEREST TO CONSULT WITH A CALIFORNIA LAWYER BECAUSE THIS STATUTORY WILL HAS SERIOUS LEGAL EFFECTS ON YOUR FAMILY AND PROPERTY.

2. THIS WILL DOES NOT DISPOSE OF PROPERTY WHICH PASSES ON YOUR DEATH TO ANY PERSON BY OPERATION OF LAW OR BY ANY CONTRACT. FOR EXAMPLE, THE WILL DOES NOT DISPOSE OF JOINT TENANCY ASSETS OR YOUR SPOUSE'S SHARE OF COMMUNITY PROPERTY, AND IT WILL NOT NORMALLY APPLY TO PROCEEDS OF LIFE INSURANCE ON YOUR LIFE OR YOUR RETIREMENT PLAN BENEFITS.

3. THIS WILL IS NOT DESIGNED TO REDUCE DEATH TAXES OR ANY OTHER TAXES. YOU SHOULD DISCUSS THE TAX RESULTS OF YOUR DECISIONS WITH A COMPETENT TAX ADVISOR.

4. YOU CANNOT CHANGE, DELETE, OR ADD WORDS TO THE FACE OF THIS CALIFORNIA STATUTORY WILL. IF YOU DO, THE CHANGE OR THE DELETED OR ADDED WORDS WILL BE DISREGARDED AND THIS WILL MAY BE GIVEN

EFFECT AS IF THE CHANGE, DELETION, OR ADDITION HAD NOT BEEN MADE. YOU MAY REVOKE THIS CALIFORNIA STATUTORY WILL AND YOU MAY AMEND IT BY CODICIL.

5. IF THERE IS ANYTHING IN THIS WILL THAT YOU DO NOT UNDERSTAND, YOU SHOULD ASK A LAWYER TO EXPLAIN IT TO YOU.

6. THE FULL TEXT OF THIS CALIFORNIA STATUTORY WILL, THE DEFINITIONS AND RULES OF CONSTRUCTION, THE PROPERTY DISPOSITION CLAUSES, AND THE MANDATORY CLAUSES FOLLOW THE END OF THIS WILL AND ARE CONTAINED IN THE PROBATE CODE OF CALIFORNIA.

7. THE WITNESSES TO THIS WILL SHOULD NOT BE PEOPLE WHO MAY RECEIVE PROPERTY UNDER THIS WILL. YOU SHOULD CAREFULLY READ AND FOLLOW THE WITNESSING PROCEDURE DESCRIBED AT THE END OF THIS WILL. ALL OF THE WITNESSES MUST WATCH YOU SIGN THIS WILL.

8. YOU SHOULD KEEP THIS WILL IN YOUR SAFE-DEPOSIT BOX OR OTHER SAFE PLACE.

9. THIS WILL TREATS MOST ADOPTED CHILDREN AS IF THEY ARE NATURAL CHILDREN.

10. IF YOU MARRY OR DIVORCE AFTER YOU SIGN THIS WILL, YOU SHOULD MAKE AND SIGN A NEW WILL.

11. IF YOU HAVE CHILDREN UNDER 21 YEARS OF AGE, YOU MAY WISH TO USE THE CALIFORNIA STATUTORY WILL WITH TRUST OR ANOTHER TYPE OF WILL.

[A printed form for a California statutory will shall set forth the above notice in 10-point bold face type.]

## CALIFORNIA STATUTORY WILL OF

---

(Insert Your Name)

**Article 1. Declaration**

**This is my will and I revoke any prior wills and codicils.**

**Article 2. Disposition of My Property**

**2.1. PERSONAL AND HOUSEHOLD ITEMS.** I give all my furniture, furnishings, household items, personal automobiles and personal items to my spouse, if living; otherwise they shall be divided equally among my children who survive me.

**2.2. CASH GIFT TO A PERSON OR CHARITY.** I make the following cash gift to the person or charity in the amount stated in words and figures in the box which I have completed and signed. If I fail to sign in the box, no gift is made. If the person mentioned does not survive me, or the charity designated does not accept the gift, then no gift is made. No death tax shall be paid from this gift.

<p><b>FULL NAME OF PERSON OR CHARITY TO RECEIVE CASH GIFT (Name only one. Please print.).</b></p>	<p><b>AMOUNT OF GIFT</b> \$ _____</p> <p><b>AMOUNT WRITTEN OUT:</b> _____ Dollars</p>
	<p>_____ <b>Signature of Testator</b></p>

**2.3. ALL OTHER ASSETS (MY "RESIDUARY ESTATE").** I adopt only one Property Disposition Clause in this paragraph 2.3 by writing my signature in the box next to the title of the Property Disposition Clause I wish to adopt. I sign in only one box. I write the words "not

used" in the remaining boxes. If I sign in more than one box or if I fail to sign in any box, the property will be distributed as if I did not make a will.

**PROPERTY DISPOSITION CLAUSES (Select one.)**

(a) TO MY SPOUSE IF LIVING; IF NOT LIVING, THEN TO MY CHILDREN AND THE DESCENDANTS OF ANY DECEASED CHILD.

(b) TO MY CHILDREN AND THE DESCENDANTS OF ANY DECEASED CHILD. I LEAVE NOTHING TO MY SPOUSE, IF LIVING.

(c) TO BE DISTRIBUTED AS IF I DID NOT HAVE A WILL.

**Article 3. Nominations of Executor and Guardian**

**3.1. EXECUTOR (Name at least one.)**

I nominate the person or institution named in the first box of this paragraph 3.1 to serve as executor of this will. If that person or institution does not serve, then I nominate the others to serve in the order I list them in the other boxes.

FIRST EXECUTOR. \_\_\_\_\_

SECOND EXECUTOR. \_\_\_\_\_

THIRD EXECUTOR. \_\_\_\_\_

**3.2. GUARDIAN** (If you have a child under 18 years of age, you should name at least one guardian of the child's person and at least one guardian of the child's property. The guardian of the child's person and the guardian of the child's property may, but need not, be the same. An individual can serve as guardian of either the person or the property, or as guardian of both. An institution can serve only as guardian of the property.)

If a guardian is needed for any child of mine, then I nominate the individual named in the first box of this paragraph 3.2 to serve as guardian of the person of that child, and I nominate the individual or institution named in the second box of this paragraph 3.2 to serve as guardian of the property of that child. If that person or institution does not serve, then I nominate the others to serve in the order I list them in the other boxes.

FIRST GUARDIAN OF THE PERSON. \_\_\_\_\_

FIRST GUARDIAN OF THE PROPERTY. \_\_\_\_\_

SECOND GUARDIAN OF THE PERSON. \_\_\_\_\_

SECOND GUARDIAN OF THE PROPERTY. \_\_\_\_\_

THIRD GUARDIAN OF THE PERSON. \_\_\_\_\_

THIRD GUARDIAN OF THE PROPERTY. \_\_\_\_\_

**3.3. BOND.** My signature in this box means that a bond is not required for any individual executor or guardian named in this will. If I do not sign in this box, then a bond is required for each of those persons as set forth in the Probate Code.

I sign my name to this California Statutory Will on \_\_\_\_\_ at \_\_\_\_\_, \_\_\_\_\_  
Date City State

\_\_\_\_\_  
Signature of Testator

**STATEMENT OF WITNESSES (You must use two adult witnesses and three would be preferable.)**

Each of us declares under penalty of perjury under the laws of California that the testator signed this California statutory will in our presence, all of us being present at the same time, and we now, at the testator's request, in the testator's presence, and in the presence of each other, sign below as witnesses, declaring that the testator appears to be of sound mind and under no duress, fraud, or undue influence.

Signature \_\_\_\_\_ Residence Address: \_\_\_\_\_  
 Print Name \_\_\_\_\_  
 Here: \_\_\_\_\_

Signature \_\_\_\_\_ Residence Address: \_\_\_\_\_  
 Print Name \_\_\_\_\_  
 Here: \_\_\_\_\_

Signature \_\_\_\_\_ Residence Address: \_\_\_\_\_  
 Print Name \_\_\_\_\_  
 Here: \_\_\_\_\_

**Comment.** Section 6240 continues the substance of former Section 56.7.

**§ 6241. California Statutory Will With Trust Form**

**6241.** The following is the California Statutory Will With Trust Form:

**CALIFORNIA STATUTORY WILL WITH TRUST**

**NOTICE TO THE PERSON WHO SIGNS THIS WILL:**

**1. THIS FORM CONTAINS A TRUST FOR YOUR DESCENDANTS. IF YOU DO NOT WANT TO CREATE A TRUST, DO NOT USE THIS FORM.**

**2. IT MAY BE IN YOUR BEST INTEREST TO CONSULT WITH A CALIFORNIA LAWYER BECAUSE THIS STATUTORY WILL HAS SERIOUS LEGAL EFFECTS ON YOUR FAMILY AND PROPERTY.**

3. THIS WILL DOES NOT DISPOSE OF PROPERTY WHICH PASSES ON YOUR DEATH TO ANY PERSON BY OPERATION OF LAW OR BY ANY CONTRACT. FOR EXAMPLE, THE WILL DOES NOT DISPOSE OF JOINT TENANCY ASSETS OR YOUR SPOUSE'S SHARE OF COMMUNITY PROPERTY, AND IT WILL NOT NORMALLY APPLY TO PROCEEDS OF LIFE INSURANCE ON YOUR LIFE OR YOUR RETIREMENT PLAN BENEFITS.

4. THIS WILL IS NOT DESIGNED TO REDUCE DEATH TAXES OR ANY OTHER TAXES. YOU SHOULD DISCUSS THE TAX RESULTS OF YOUR DECISIONS WITH A COMPETENT TAX ADVISOR.

5. YOU CANNOT CHANGE, DELETE, OR ADD WORDS TO THE FACE OF THIS CALIFORNIA STATUTORY WILL. IF YOU DO, THE CHANGE OR THE DELETED OR ADDED WORDS WILL BE DISREGARDED AND THIS WILL MAY BE GIVEN EFFECT AS IF THE CHANGE, DELETION, OR ADDITION HAD NOT BEEN MADE. YOU MAY REVOKE THIS CALIFORNIA STATUTORY WILL AND YOU MAY AMEND IT BY CODICIL.

6. IF THERE IS ANYTHING IN THIS WILL THAT YOU DO NOT UNDERSTAND, YOU SHOULD ASK A LAWYER TO EXPLAIN IT TO YOU.

7. THE FULL TEXT OF THIS CALIFORNIA STATUTORY WILL, THE DEFINITIONS AND RULES OF CONSTRUCTION, THE PROPERTY DISPOSITION CLAUSES, AND THE MANDATORY CLAUSES FOLLOW THE END OF THIS WILL AND ARE CONTAINED IN THE PROBATE CODE OF CALIFORNIA.

8. THE WITNESSES TO THIS WILL SHOULD NOT BE PEOPLE WHO MAY RECEIVE PROPERTY UNDER THIS WILL. YOU SHOULD CAREFULLY READ AND FOLLOW THE WITNESSING PROCEDURE DESCRIBED AT THE END OF THIS WILL. ALL OF THE WITNESSES MUST WATCH YOU SIGN THIS WILL.

9. YOU SHOULD KEEP THIS WILL IN YOUR SAFE-DEPOSIT BOX OR OTHER SAFE PLACE.

10. THIS WILL TREATS MOST ADOPTED CHILDREN AS IF THEY ARE NATURAL CHILDREN.

11. IF YOU MARRY OR DIVORCE AFTER YOU SIGN THIS WILL, YOU SHOULD MAKE AND SIGN A NEW WILL.

[A printed form for a California Statutory Will With Trust shall set forth the above notice in 10-point bold face type.]

CALIFORNIA STATUTORY WILL  
WITH TRUST OF

---

(Insert Your Name)

Article 1. Declaration

This is my will and I revoke any prior wills and codicils.

Article 2. Disposition of My Property

2.1. PERSONAL AND HOUSEHOLD ITEMS. I give all my furniture, furnishings, household items, personal automobiles, and personal items to my spouse, if living; otherwise they shall be divided equally among my children who survive me.

2.2. CASH GIFT TO A PERSON OR CHARITY. I make the following cash gift to the person or charity and in the amount stated in words and figures in the box which I have completed and signed. If I fail to sign in the box, no gift is made. If the person mentioned does not survive me, or the charity designated does not accept the gift, then no gift is made. No death tax shall be paid from this gift.

<p><b>FULL NAME . OF PERSON OR CHARITY TO RECEIVE CASH GIFT (Name only one. Please print.).</b></p>	<p><b>AMOUNT OF GIFT</b> \$ _____</p> <p><b>AMOUNT WRITTEN OUT:</b> _____ Dollars</p>
	<p>_____ <b>Signature of Testator</b></p>

**2.3. ALL OTHER ASSETS (MY "RESIDUARY ESTATE").** I adopt only one Property Disposition Clause in this paragraph 2.3 by writing my signature in the box next to the title of the Property Disposition Clause I wish to adopt. I sign in only one box. I write the words "not used" in the remaining boxes. If I sign in more than one box or if I fail to sign in any box, the property will be distributed as if I did not make a will.

**PROPERTY DISPOSITION CLAUSES (Select one.)**

- (a) **TO MY SPOUSE IF LIVING; IF NOT LIVING, THEN IN ONE TRUST TO PROVIDE FOR THE SUPPORT AND EDUCATION OF MY CHILDREN AND THE DESCENDANTS OF ANY DECEASED CHILD UNTIL I HAVE NO LIVING CHILD UNDER 21 YEARS OF AGE.** \_\_\_\_\_

(b) TO MY CHILDREN  
 AND THE DE-  
 SCENDANTS OF  
 ANY DECEASED  
 CHILD IN ONE  
 TRUST TO PRO-  
 VIDE FOR THEIR  
 SUPPORT AND ED-  
 UCATION UNTIL I  
 HAVE NO LIVING  
 CHILD UNDER 21  
 YEARS OF AGE. I  
 LEAVE NOTHING  
 TO MY SPOUSE, IF  
 LIVING. \_\_\_\_\_

**Article 3. Nominations of Executor, Trustee, and  
 Guardian**

**3.1. EXECUTOR (Name at least one.)**

I nominate the person or institution named in the first  
 box of this paragraph 3.1 to serve as executor of this will.  
 If that person or institution does not serve, then I  
 nominate the others to serve in the order I list them in  
 the other boxes.

FIRST EXECUTOR. \_\_\_\_\_

SECOND EXECUTOR. \_\_\_\_\_

THIRD EXECUTOR. \_\_\_\_\_

**3.2. TRUSTEE (Name at least one.)**

Because it is possible that after I die my property may be put into a trust, I nominate the person or institution named in the first box of this paragraph 3.2 to serve as trustee of that trust. If that person or institution does not serve, then I nominate the others to serve in the order I list them in the other boxes.

FIRST TRUSTEE. \_\_\_\_\_

SECOND TRUSTEE. \_\_\_\_\_

THIRD TRUSTEE. \_\_\_\_\_

**3.3. GUARDIAN (If you have a child under 18 years of age, you should name at least one guardian of the child's person and at least one guardian of the child's property. The guardian of the child's person and the guardian of the child's property may, but need not, be the same. An individual can serve as guardian of either the person or the property, or as guardian of both. An institution can serve only as guardian of the property.)**

If a guardian is needed for any child of mine, then I nominate the individual named in the first box of this paragraph 3.3 to serve as guardian of the person of that child, and I nominate the individual or institution named in the second box of this paragraph 3.3 to serve as guardian of the property of that child. If that person or institution does not serve, then I nominate the others to serve in the order I list them in the other boxes.

FIRST GUARDIAN OF  
THE PERSON. \_\_\_\_\_

FIRST GUARDIAN OF  
THE PROPERTY. \_\_\_\_\_

SECOND GUARDIAN OF  
THE PERSON. \_\_\_\_\_

SECOND GUARDIAN OF  
THE PROPERTY. \_\_\_\_\_

THIRD GUARDIAN OF  
THE PERSON. \_\_\_\_\_

THIRD GUARDIAN OF  
THE PROPERTY. \_\_\_\_\_

3.4. BOND. My signature in this box means that a bond is not required for any individual (a) executor, (b) trustee, or (c) guardian named in this will. If I do not sign

in this box, then a bond is required for each of those persons as set forth in the Probate Code.

I sign my name to this California Statutory Will  
With Trust on \_\_\_\_\_ at \_\_\_\_\_, \_\_\_\_\_  
Date City State

\_\_\_\_\_  
Signature of Testator

**STATEMENT OF WITNESSES** (You must use two adult witnesses, and three witnesses would be preferable.)

Each of us declares under penalty of perjury under the laws of California that the testator signed this California statutory will with trust in our presence, all of us being present at the same time, and we now, at the testator's request, in the testator's presence, and in the presence of each other, sign below as witnesses, declaring that the testator appears to be of sound mind and under no duress, fraud, or undue influence.

Signature \_\_\_\_\_ Residence Address: \_\_\_\_\_  
Print Name  
Here: \_\_\_\_\_

Signature \_\_\_\_\_ Residence Address: \_\_\_\_\_  
Print Name  
Here: \_\_\_\_\_

Signature \_\_\_\_\_ Residence Address: \_\_\_\_\_  
Print Name  
Here: \_\_\_\_\_

**Comment.** Section 6241 continues the substance of former Section 56.8.

§ 6242. Full text of paragraph 2.1 of all California statutory wills

**6242.** The following is the full text of paragraph 2.1 of both California Statutory Will Forms appearing in this chapter:

If my spouse survives me, I give my spouse all my books, jewelry, clothing, personal automobiles, household furnishings and effects, and other tangible articles of a household or personal use. If my spouse does not survive me, the executor shall distribute those items among my children who survive me, and shall distribute those items in as nearly equal shares as feasible in the executor's discretion. If none of my children survive me, the items described in this paragraph shall become part of the residuary estate.

Comment. Section 6242 is the same as former Section 56.9.

§ 6243. Full text of property disposition clauses of California Statutory Will Form

**6243.** The following are the full texts of the property disposition clauses referred to in paragraph 2.3 of the California Statutory Will Form set forth in Section 6240:

(a) **TO MY SPOUSE IF LIVING; IF NOT LIVING, THEN TO MY CHILDREN AND THE DESCENDANTS OF ANY DECEASED CHILD.**

If my spouse survives me, then I give all my residuary estate to my spouse. If my spouse does not survive me, then I give all my residuary estate to my descendants who survive me.

(b) **TO MY CHILDREN AND THE DESCENDANTS OF ANY DECEASED CHILD. I LEAVE NOTHING TO MY SPOUSE, IF LIVING.**

I give all my residuary estate to my descendants who survive me. I leave nothing to my spouse, even if my spouse survives me.

(c) **TO BE DISTRIBUTED AS IF I DID NOT HAVE A WILL:**

The executor shall distribute my residuary estate to my heirs at law, their identities and respective shares to be determined according to the laws of the State of California in effect on the date of my death and relating to intestate succession.

**Comment.** Section 6243 continues the substance of former Section 56.10 except that the provision in the last paragraph of former Section 56.10 adopting the laws relating to the succession of separate property not acquired from a parent, grandparent, or predeceased spouse has been replaced by a reference to the law relating to intestate succession. This change will permit community property and quasi-community property to be governed by the intestate succession rules applicable to that property and recognizes that the special provisions relating to succession of property acquired from ancestors have not been continued.

**§ 6244. Full text of property disposition clauses of California Statutory Will With Trust Form**

**6244.** The following are the full texts of the property disposition clauses referred to in paragraph 2.3 of the California Statutory Will With Trust Form set forth in Section 6241:

(a) **TO MY SPOUSE IF LIVING; IF NOT LIVING, THEN IN ONE TRUST TO PROVIDE FOR THE SUPPORT AND EDUCATION OF MY CHILDREN AND THE DESCENDANTS OF ANY DECEASED CHILD UNTIL I HAVE NO LIVING CHILD UNDER 21 YEARS OF AGE.**

(1) If my spouse survives me, then I give all my residuary estate to my spouse.

(2) If my spouse does not survive me and if any child of mine under 21 years of age survives me, then I give all my residuary estate to the trustee, in trust, on the following terms:

(A) As long as any child of mine under 21 years of age is living, the trustee shall distribute from time to time to or for the benefit of any one or more of my children and the descendants of any deceased child (the beneficiaries) of any age as much, or all, of the (i) principal or (ii) net income of the trust, or (iii) both, as the trustee deems necessary for their health, support, maintenance, and education. Any undistributed income shall be accumulated and added to the principal. "Education" includes, but is not limited to, college, graduate, postgraduate, and vocational studies, and reasonably related living expenses. Consistent with the trustee's

fiduciary duties, the trustee may distribute trust income or principal in equal or unequal shares and to any one or more of the beneficiaries to the exclusion of other beneficiaries. In deciding on distributions, the trustee may take into account, so far as known to the trustee, the beneficiaries' other income, outside resources, or sources of support, including the capacity for gainful employment of a beneficiary who has completed his or her education.

(B) The trust shall terminate when there is no living child of mine under 21 years of age. The trustee shall distribute any remaining principal and accumulated net income of the trust to my descendants who are then living.

(3) If my spouse does not survive me and if no child of mine under 21 years of age survives me, then I give all my residuary estate to my descendants who survive me.

(b) TO MY CHILDREN AND THE DESCENDANTS OF ANY DECEASED CHILD IN ONE TRUST TO PROVIDE FOR THEIR SUPPORT AND EDUCATION UNTIL I HAVE NO LIVING CHILD UNDER 21 YEARS OF AGE. I LEAVE NOTHING TO MY SPOUSE, IF LIVING.

(1) I give all my residuary estate to the trustee, in trust, on the following terms:

(A) As long as any child of mine under 21 years of age is living, the trustee shall distribute from time to time to or for the benefit of any one or more of my children and the descendants of any deceased child (the beneficiaries) of any age as much or all, of the (i) principal, or (ii) net income of the trust, or (iii) both as the trustee deems necessary for their health, support, maintenance, and education. Any undistributed income shall be accumulated and added to the principal. "Education" includes, but is not limited to, college, graduate, postgraduate, and vocational studies, and reasonably related living expenses. Consistent with the trustee's fiduciary duties, the trustee may distribute trust income or principal in equal or unequal shares and to any one or more of the beneficiaries to the exclusion of other beneficiaries. In deciding on distributions, the trustee

may take into account, so far as known to the trustee, the beneficiaries' other income, outside resources, or sources of support, including the capacity for gainful employment of a beneficiary who has completed his or her education.

(B) The trust shall terminate when there is no living child of mine under 21 years of age. The trustee shall distribute any remaining principal and accumulated net income of the trust to my descendants who are then living.

(2) If no child of mine under 21 years of age survives me, then I give all my residuary estate to my descendants who survive me.

(3) I leave nothing to my spouse, even if my spouse survives me.

Comment. Section 6244 continues former Section 56.11.

§ 6245. Mandatory clauses of all California statutory wills

6245. The mandatory clauses of all California statutory wills are as follows:

(a) **INTESTATE DISPOSITION.** If the testator has not made an effective disposition of the residuary estate, the executor shall distribute it to the testator's heirs at law, their identities and respective shares to be determined according to the laws of the State of California in effect on the date of the testator's death relating to intestate succession.

(b) **POWERS OF EXECUTOR.** (1) In addition to any powers now or hereafter conferred upon executors by law, including all powers granted under the Independent Administration of Estates Act, the executor shall have the power to: (A) sell estate assets at public or private sale, for cash or on credit terms, (B) lease estate assets without restriction as to duration, and (C) invest any surplus moneys of the estate in real or personal property, as the executor deems advisable.

(2) The executor may distribute estate assets otherwise distributable to a minor beneficiary to (A) the guardian of the minor's person or estate, (B) any adult person with whom the minor resides and who has the care, custody, or control of the minor, or (C) a custodian,

serving on behalf of the minor under the Uniform Gifts to Minors Act of any state.

The executor is free of liability and is discharged from any further accountability for distributing assets in compliance with the provisions of this paragraph.

(3) On any distribution of assets from the estate, the executor shall have the discretion to partition, allot, and distribute the assets (A) in kind, including undivided interests in an asset or in any part of it, or (B) partly in cash and partly in kind, or (C) entirely in cash. If a distribution is being made to more than one beneficiary, the executor shall have the discretion to distribute assets among them on a pro rata or non-pro rata basis, with the assets valued as of the date of distribution.

(c) **POWERS OF GUARDIAN.** A guardian of the person nominated in the California statutory will shall have the same authority with respect to the person of the ward as a parent having legal custody of a child would have. A guardian of the estate nominated in a California statutory will shall have all of the powers conferred by law. All powers granted to guardians in this paragraph may be exercised without court authorization.

**Comment.** Section 6245 continues the substance of former Section 56.12 except that the provision of the former law adopting the laws relating to the succession of separate property not acquired from a parent, grandparent, or predeceased spouse has been replaced by a reference to the law relating to intestate succession. The reason for this change is stated in the Comment to Section 6243.

**§ 6246. Additional mandatory clauses for California statutory will with trust**

**6246.** In addition to the mandatory clauses contained in Section 6245, the California Statutory Will With Trust Form shall also incorporate the following mandatory clauses:

(a) **INEFFECTIVE DISPOSITION.** If, at the termination of any trust created in the California statutory will with trust, there is no effective disposition of the remaining trust assets, then the trustee shall distribute those assets to the testator's then living heirs at law, their identities and respective shares to be

determined as though the testator had died on the date of the trust's termination and according to the laws of the State of California then in effect relating to intestate succession.

(b) **POWERS OF TRUSTEE.** (1) In addition to any powers now or hereafter conferred upon trustees by law, the trustee shall have all the powers listed in Section 1120.2. The trustee may exercise those powers without court authorization.

(2) In addition to the powers granted in the foregoing paragraph, the trustee may:

(A) Hire and pay from the trust the fees of investment advisors, accountants, tax advisors, agents, attorneys, and other assistants for the administration of the trust and for the management of any trust asset and for any litigation affecting the trust.

(B) On any distribution of assets from the trust, the trustee shall have the discretion to partition, allot, and distribute the assets (i) in kind, including undivided interests in an asset or in any part of it, or (ii) partly in cash and partly in kind, or (iii) entirely in cash. If a distribution is being made to more than one beneficiary, the trustee shall have the discretion to distribute assets among them on a pro rata or non-pro rata basis, with the assets valued as of the date of distribution.

(C) The trustee may, upon termination of the trust, distribute assets to a custodian for a minor beneficiary under the Uniform Gifts to Minors Act of any state.

(3) The trustee is free of liability and is discharged from any further accountability for distributing assets in compliance with the provisions of this paragraph.

(c) **TRUST ADMINISTRATIVE PROVISIONS.** The following provisions shall apply to any trust created by a California statutory will with trust:

(1) The interests of trust beneficiaries are not transferable by voluntary or involuntary assignment or by operation of law and shall be free from the claims of creditors and from attachment, execution, bankruptcy, or other legal process to the fullest extent permissible by law.

(2) The trustee is entitled to reasonable compensation for ordinary and extraordinary services, and for all

services in connection with the complete or partial termination of any trust created by this will.

(3) All persons who have any interest in a trust under a California statutory will with trust are bound by all discretionary determinations the trustee makes in good faith under the authority granted in the California statutory will with trust.

**Comment.** Section 6246 continues former Section 56.13 with technical revisions. The provision of former law adopting the law relating to succession of separate property not acquired from a parent, grandparent, or predeceased spouse has been replaced by a reference to the law relating to intestate succession. The reason for this change is stated in the Comment to Section 6243.

**§ 6247. Will includes only texts of clauses as they exist when will executed**

6247. Except as specifically provided in this chapter, a California statutory will shall include only the texts of the property disposition clauses and the mandatory clauses as they exist on the day the California statutory will is executed.

**Comment.** Section 6247 continues the substance of former Section 56.14. See also Section 6226(d) (effect of marriage dissolution or annulment on disposition and nomination provisions).

**§ 6248. Substantive law unchanged unless specifically provided**

6248. Except as specifically provided in this chapter, nothing in this chapter changes the substantive law of California.

**Comment.** Section 6248 is drawn from Section 2 of 1982 Cal. Stats. ch. 1401.

## CHAPTER 7. UNIFORM TESTAMENTARY ADDITIONS TO TRUSTS ACT

**§ 6300. Testamentary additions to trusts**

6300. A devise, the validity of which is determinable by the law of this state, may be made by a will to the trustee of a trust established or to be established by the

testator or by the testator and some other person or by some other person (including a funded or unfunded life insurance trust, although the trustor has reserved any or all rights of ownership of the insurance contracts) if the trust is identified in the testator's will and its terms are set forth in a written instrument (other than a will) executed before or concurrently with the execution of the testator's will or in the valid last will of a person who has predeceased the testator (regardless of the existence, size, or character of the corpus of the trust). The devise is not invalid because the trust is amendable or revocable, or both, or because the trust was amended after the execution of the will or after the death of the testator. Unless the testator's will provides otherwise, the property so devised (1) is not deemed to be held under a testamentary trust of the testator but becomes a part of the trust to which it is given and (2) shall be administered and disposed of in accordance with the provisions of the instrument or will setting forth the terms of the trust, including any amendments thereto made before the death of the testator (regardless of whether made before or after the execution of the testator's will) and, if the testator's will so provides, including any amendments to the trust made after the death of the testator. A revocation or termination of the trust before the death of the testator causes the devise to lapse.

**Comment.** Section 6300 continues the substance of former Section 170 and is the same in substance as Section 2-511 of the Uniform Probate Code. See also Section 32 ("devise" means a disposition of real or personal property by will).

#### § 6301. Effect on prior wills

**6301.** This chapter does not invalidate any devise made by a will executed prior to September 17, 1965.

**Comment.** Section 6301 continues the substance of former Section 171. September 17, 1965, was the effective date of former Sections 170-173. See also Section 32 ("devise" means a disposition of real or personal property by will).

**§ 6302. Uniform construction**

6302. This chapter shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

Comment. Section 6302 continues former Section 172.

**§ 6303. Short title**

6303. This chapter may be cited as the Uniform Testamentary Additions to Trust Act.

Comment. Section 6303 continues former Section 173.

**CHAPTER 8. TRUST FOR INSURANCE OR  
EMPLOYEE BENEFITS****§ 6320. Definitions**

6320. As used in this chapter, unless the context otherwise requires:

(a) "Contract or plan" means any of the following:

(1) An insurance, annuity, or endowment contract (including any agreement issued or entered into by the insurer in connection therewith, supplemental thereto, or in settlement thereof).

(2) A pension, retirement benefit, death benefit, stock bonus, profit-sharing or employees' saving plan, or contract created or entered into by an employer for the benefit of some or all of his or her employees.

(3) Self-employed retirement plans, and individual annuities or accounts, established or held pursuant to the Internal Revenue Code as now or hereafter amended.

(b) "Designation" means a designation made pursuant to Section 6321.

Comment. Subdivision (a) of Section 6320 is drawn from former Section 175, but the language of paragraph (3) has been substituted for the former reference to the Self Employed Individuals' Tax Retirement Act of 1962. Subdivision (b) is new and is included for convenience in drafting.

**§ 6321. Designation of trustee as beneficiary, payee, or owner**

6321. A contract or plan may designate as a primary or contingent beneficiary, payee, or owner a trustee

named or to be named in the will of the person entitled to designate the beneficiary, payee, or owner. The designation shall be made in accordance with the provisions of the contract or plan or, in the absence of such provisions, in a manner approved by the insurer if an insurance, annuity, or endowment contract is involved, and by the trustee, custodian, or person or entity administering the contract or plan, if any. The designation may be made before or after the execution of the designator's will and is not required to comply with the formalities for execution of a will.

Comment. Section 6321 continues a portion of former Section 175.

§ 6322. Required provision in designator's will

6322. The designation is ineffective unless the designator's will contains provisions creating the trust or makes a disposition valid under Section 6300.

Comment. Section 6322 continues former Section 176.

§ 6323. Payment or transfer to trustee without administration

6323. Subject to the provisions of Section 6325, the benefits or rights resulting from the designation are payable or transferable directly to the trustee, without becoming subject to administration, upon or at any time after admission of the designator's will to probate. A designation pursuant to this chapter shall not be deemed to have the effect of naming a trustee of a separate inter vivos trust but the rights and benefits or the proceeds thereof when paid to the trustee shall be, or become a part of, the testamentary trust or trusts established pursuant to the designator's will or shall be added to an inter vivos trust or trusts if the disposition is governed by Section 6300.

Comment. Section 6323 continues former Section 177.

§ 6324. Extent to which rights and benefits subject to debts of designator

6324. Except as otherwise provided in the designator's will, the rights and benefits and their

proceeds paid or transferred to the trustee are not subject to the debts of the designator to any greater extent than if they were paid or transferred to a named beneficiary, payee, or owner other than the estate of the designator.

Comment. Section 6324 continues former Section 178.

§ 6325. Jurisdiction of court

6325. (a) The court in which the proceedings are pending for administration of the estate of the decedent has jurisdiction, before or after payment or transfer of benefits and rights or their proceeds to the trustee, to:

- (1) Determine the validity of the trust.
- (2) Determine the terms of the trust.
- (3) Fill vacancies in the office of trustee.
- (4) Require an undertaking of a trustee or successor trustee in its discretion and in such amount as the court may determine for the faithful performance of duties as trustee, subject to the provisions of Article 3 (commencing with Section 1540) of Chapter 12 of Division 1 of the Financial Code and Section 1127.5 of this code.
- (5) Grant additional powers to the trustee, as provided in Section 1120.2.
- (6) Instruct the trustee.
- (7) Determine, fix, or allow payment of compensation of a trustee as provided in Section 1122.
- (8) Hear and determine adverse claims to the subject of the trust by the personal representative, surviving spouse, or other third person.
- (9) Determine the identity of the trustee and the trustee's acceptance or rejection of the office and, upon request, furnish evidence of trusteeship to a trustee.
- (10) Order postponement of the payment or transfer of the benefits and rights or their proceeds.
- (11) Authorize or direct removal of the trust or assets of the trust to another jurisdiction pursuant to the procedure provided in Article 3 (commencing with Section 1139) of Chapter 19 of Division 3.
- (12) Make any order incident to the foregoing or to the accomplishment of the purposes of this chapter.

(b) The personal representative of the designator's estate, any trustee named in the will or designation or successor to such trustee, or any person interested in the estate or trust may petition the court for an order under this section. Notice of hearing of the petition shall be given in the manner provide in Section 1120, except as the court may otherwise order.

**Comment.** Section 6325 continues the substance of former Section 179.

**§ 6326. Applicability of provisions for administration of testamentary trusts**

6326. As to matters not specifically provided in Section 6325, the provisions of Chapter 19 (commencing with Section 1120) of Division 3 apply to the trust.

**Comment.** Section 6326 continues former Section 180.

**§ 6327. Appeal**

6327. An appeal may be taken from any of the following:

(a) Any order described in Section 1240 made pursuant to this chapter.

(b) An order making or refusing to make a determination specified in paragraph (1), (2), or (8) of subdivision (a) of Section 6325.

**Comment.** Section 6327 continues the substance of former Section 181.

**§ 6328. Absence of qualified trustee**

6328. If no qualified trustee makes claim to the benefits or rights or proceeds within one year after the death of the designator, or if satisfactory evidence is furnished within such one-year period showing that no trustee can qualify to receive them, payment or transfer may be made, unless the designator has otherwise provided, by the obligor to the personal representative of the designator or to those thereafter entitled, and the obligor is discharged from liability.

**Comment.** Section 6328 continues the substance of former Section 182.

**§ 6329. No effect on other trusts**

6329. Enactment of this chapter does not invalidate trusts, otherwise valid, not made pursuant to the provisions of this chapter.

**Comment.** Section 6329 continues a portion of former Section 184.

**CHAPTER 9. DEVISE SUBJECT TO UNIFORM GIFTS TO MINORS ACT****§ 6340. Devise to minor under this chapter**

6340. A testator may devise securities, money, life or endowment policies, annuity contracts, real estate, tangible personal property, or any other type of property, as these terms are defined or used in the California Uniform Gifts to Minors Act, Article 4 (commencing with Section 1154) of Chapter 3 of Title 4 of Part 4 of Division 2 of the Civil Code, to a person who is a minor as provided in this chapter.

**Comment.** Section 6340 continues the substance of former Section 186 as amended by 1982 Cal. Stats. ch. 591. See also Section 32 (“devise” means disposition of real or personal property by will).

**§ 6341. Applicability of Uniform Gifts to Minors Act**

6341. If a testator’s will provides that devised property shall be paid or delivered to a custodian subject to the California Uniform Gifts to Minors Act, all of the provisions of that act, including, but not limited to, the definitions and the provisions concerning powers, rights, and immunities contained in that act, are applicable to the devise during the period prior to distribution of the property.

**Comment.** Section 6341 continues the substance of former Section 186.1. See also Section 32 (“devise” means disposition of real or personal property by will).

**§ 6342. Designation of custodian**

6342. The devise under this chapter shall be made to a designated adult person or a trust company qualified to do business in this state with the words, in substance, “as

custodian for (name of minor) under the California Uniform Gifts to Minors Act." Failure to name a qualified custodian does not invalidate the devise as a devise permitted by this chapter. A variation in the wording of the devise from the wording set forth in this section shall be disregarded if the testator's intent to make a devise pursuant to this chapter appears from the will as a whole or from the wording of the devise.

**Comment.** Section 6342 continues the substance of former Section 186.2. See also Section 32 ("devise" means a disposition of real or personal property by will).

#### § 6343. Noncomplying devise

**6343.** Unless the will clearly requires otherwise, a devise which does not comply with the provisions of Sections 6340, 6341, and 6342, or a devise to a person who becomes an adult prior to the order for distribution, shall be deemed to be a direct devise to the person named as the minor for whom the property was to be held.

**Comment.** Section 6343 continues the substance of former Section 186.3. See also Section 32 ("devise" means a disposition of real or personal property by will).

#### § 6344. Distribution of property

**6344.** If a testator provides for a devise to be paid or delivered as provided in this chapter, the executor or administrator of the testator's estate, upon entry of an order for distribution, shall make distribution pursuant to the order for distribution by transferring the devised property in the form and manner provided by the California Uniform Gifts to Minors Act.

**Comment.** Section 6344 continues the substance of former Section 186.4. See also Section 32 ("devise" means a disposition of real or personal property by will).

#### § 6345. Successor or alternate custodians; compensation

**6345.** The testator in his or her will may provide for successor or alternate custodians and may specify the standard of compensation of the custodian.

**Comment.** Section 6345 continues the substance of former Section 186.5.

**§ 6346. Successor custodian**

**6346.** If a vacancy in the custodianship exists prior to full distribution of the devised property by the executor or administrator, a successor custodian shall be appointed for any undistributed property in the manner provided by the California Uniform Gifts to Minors Act.

**Comment.** Section 6346 continues the substance of former Section 186.6. See also Section 32 (“devise” means a disposition of real or personal property by will).

**§ 6347. Notice to and participation of custodian**

**6347.** (a) Except as otherwise provided in the will or ordered by a court, each custodian designated in the will and the person for whom the property is to be held shall be deemed a devisee for the purpose of receiving notices which may be required or permitted to be sent to a devisee in the estate of the testator.

(b) Unless required by the will or ordered by the court, a custodian does not have a duty to participate in the proceedings in the estate on behalf of the minor, and in no event does the custodian have a duty to so participate until the custodian has filed a written notice of acceptance of the office of custodian with the clerk of the court in which administration of the estate of the testator is pending.

**Comment.** Section 6347 continues the substance of former Section 186.7. See also Section 34 (“devisee” means a person designated in a will to receive a devise of real or personal property).

**§ 6348. Jurisdiction of court**

**6348.** Until distribution of the property pursuant to an order for distribution is completed, the court in which administration of the estate of the testator is pending has exclusive jurisdiction over all proceedings and matters concerning undistributed property, including, but not limited to, the appointment, declination, resignation, removal, bonding, and compensation of, and the delivery or transfer of the undistributed property to, a custodian. After distribution of any property is completed, the court has no further jurisdiction over the distributed property

and the property shall be held subject to the California Uniform Gifts to Minors Act in the same manner as if it had been a lifetime gift.

**Comment.** Section 6348 continues the substance of former Section 186.8.

#### § 6349. Not exclusive procedure

**6349.** This chapter shall not be construed as providing an exclusive method for making devises to or for the benefit of minors.

**Comment.** Section 6349 continues the substance of former Section 186.9. See also Section 32 (“devise” means a disposition of real or personal property by will).

### CHAPTER 10. FILING NOTICE OF WILL

#### § 6360. Filing notice of will

**6360.** (a) A person who has made a will may file a notice of will in the office of the Secretary of State.

(b) The notice of will shall contain the following information:

- (1) The name of the testator.
- (2) The testator’s address.
- (3) The testator’s social security or other individual-identifying number established by law, if any.
- (4) The testator’s date and place of birth.
- (5) A statement that the testator has made a will and the date of the will.
- (6) The place where the will is kept.

(c) The notice may include any of the following:

- (1) The name and address of the testator’s attorney.
- (2) The name and address of a person who has custody of the will or custody of a copy of the will.

(d) If the testator’s name is changed or if the place where the will is kept is changed, the testator may file a new notice of will containing the correct information. The new notice of will may also refer to the earlier notice of will.

(e) The filing of a notice of will, or the failure to file a notice of will, under this section does not affect the validity of the will.

**Comment.** Section 6360 provides a new voluntary procedure for filing a notice of the existence and location of a will. It is anticipated that this procedure will result in finding wills that otherwise might not have been found. Registration is voluntary. No search of the records is required, but a certificate reporting the information on file or that no information is on file may be filed in any proceeding in which that information is relevant. See Section 6364. Section 6360 does not require or permit the filing of the will itself. The procedure provided by this chapter is distinct from that provided under the International Wills Act. See Section 6389 (registry system for international wills information).

**§ 6361. Filing notice of revocation**

**6361. (a)** A person who has filed a notice of will pursuant to Section 6360 and who has revoked the will referred to in the notice may file in the office of the Secretary of State a notice of revocation of will.

**(b)** The notice of revocation of will shall contain the following information:

- (1)** The name of the person who is revoking the will.
- (2)** The person's address.
- (3)** The person's social security or other individual-identifying number established by law, if any.
- (4)** The person's date and place of birth.
- (5)** A statement that the will referred to in a notice of will filed by the person pursuant to Section 6360 has been revoked.

**(c)** The filing of a notice of revocation under this section does not itself revoke the will. The failure to file a notice of revocation under this section does not affect the validity of a revocation of a will.

**Comment.** Section 6361 is new. This section is intended to provide information as to the revocation of a will.

**§ 6362. Filing and indexing of notices; fee**

**6362.** Upon presentation of a notice of will or notice of revocation of will for filing and tender of the filing fee to the office of the Secretary of State, the notice shall be filed and indexed. The fee for filing and indexing a notice of will or notice of revocation of will is five dollars (\$5).

**Comment.** Section 6362 is new.

### § 6363. Release of information

**6363.** (a) Information filed pursuant to this chapter shall be kept in strictest confidence until the death of the testator.

(b) After the death of the testator, upon the request of a person who presents a death certificate or other satisfactory evidence of the testator's death, the Secretary of State shall issue a certificate reporting the information on file about the testator's will. If no information on the testator's will is on file, the Secretary of State's certificate shall state that fact. The fee for a certificate under this section is five dollars (\$5).

**Comment.** Subdivision (a) of Section 6363 is similar to a portion of Section 6389 in the International Wills Act. Subdivision (b) is drawn in part from Section 6389 of the International Wills Act. A certificate from the Secretary of State may be filed with the court in a proceeding where the existence of a will is relevant, as provided in Section 6364.

### § 6364. Filing of certificate in probate and other proceedings

**6364.** (a) A certificate of the Secretary of State issued pursuant to Section 6363 may be filed with the court in proceedings for probate of a will or for administration or in any other proceeding in which the existence of a will is relevant.

(b) Failure to file the certificate of the Secretary of State does not affect the validity of the proceeding.

**Comment.** Section 6364 permits a Secretary of State's certificate relating to whether there is notice of a will on file to be filed in any proceeding where the existence of a will is relevant.

### § 6365. Regulations

**6365.** The Secretary of State may prescribe the form of the notices, certificates, and requests for information under this chapter.

**Comment.** Section 6365 is similar to authority provided elsewhere. See, *e.g.*, Code Civ. Proc. §§ 488.375, 488.405 (notice of attachment prescribed by Secretary of State).

**§ 6366. Destruction of obsolete records**

6366. Ten years after the Secretary of State has received a request under this chapter for information accompanied by a death certificate or other satisfactory evidence of the testator's death, the Secretary of State may destroy the information filed pursuant to this chapter by the deceased testator and the record of that information.

Comment. Section 6366 permits destruction of obsolete records. The Secretary of State is permitted, but not required, to destroy the records.

**CHAPTER 11. UNIFORM INTERNATIONAL WILLS ACT**

Comment. Chapter 11 (commencing with Section 6380) continues the Uniform International Wills Act, formerly set forth in Chapter 2.5 (commencing with Section 60) of Division 1, without substantive change. The following table shows the corresponding sections of this chapter, former law, and the Uniform International Wills Act as set forth in the Uniform Probate Code.

<i>New Sections</i>	<i>Former Section</i>	<i>Uniform Probate Code Section</i>
6380	60	2-1001
6381	60.1	2-1002
6382	60.2	2-1003
6383	60.3	2-1004
6384	60.4	2-1005
6385	60.5	2-1006
6386	60.6	2-1007
6387	60.7	2-1008
6388	60.8, para. 1	2-1009
6389	60.8, para. 2	2-1010

For additional discussion, see the Comments following the sections in the Uniform Probate Code.

**§ 6380. Definitions**

6380. In this chapter:

- (a) "International will" means a will executed in conformity with Sections 6381 to 6384, inclusive.

(b) “Authorized person” and “person authorized to act in connection with international wills” means a person who by Section 6388, or by the laws of the United States including members of the diplomatic and consular service of the United States designated by Foreign Service Regulations, is empowered to supervise the execution of international wills.

§ 6381. Validity of international will

6381. (a) A will is valid as regards form, irrespective particularly of the place where it is made, of the location of the assets and of the nationality, domicile, or residence of the testator, if it is made in the form of an international will complying with the requirements of this chapter.

(b) The invalidity of the will as an international will does not affect its formal validity as a will of another kind.

(c) This chapter does not apply to the form of testamentary dispositions made by two or more persons in one instrument.

§ 6382. Requirements of international will

6382. (a) The will shall be made in writing. It need not be written by the testator himself or herself. It may be written in any language, by hand or by any other means.

(b) The testator shall declare in the presence of two witnesses and of a person authorized to act in connection with international wills that the document is his or her will and that he or she knows the contents thereof. The testator need not inform the witnesses, or the authorized person, of the contents of the will.

(c) In the presence of the witnesses, and of the authorized person, the testator shall sign the will or, if he or she has previously signed it, shall acknowledge his or her signature.

(d) If the testator is unable to sign, the absence of his or her signature does not affect the validity of the international will if the testator indicates the reason for his or her inability to sign and the authorized person makes note thereof on the will. In that case, it is permissible for any other person present, including the

authorized person or one of the witnesses, at the direction of the testator, to sign the testator's name for him or her if the authorized person makes note of this also on the will, but it is not required that any person sign the testator's name for him or her.

(e) The witnesses and the authorized person shall there and then attest the will by signing in the presence of the testator.

§ 6383. Additional provisions concerning form of will

6383. (a) The signatures shall be placed at the end of the will. If the will consists of several sheets, each sheet shall be signed by the testator or, if he or she is unable to sign, by the person signing on his or her behalf of, if there is no such person, by the authorized person. In addition, each sheet shall be numbered.

(b) The date of the will shall be the date of its signature by the authorized person. That date shall be noted at the end of the will by the authorized person.

(c) The authorized person shall ask the testator whether he or she wishes to make a declaration concerning the safekeeping of his or her will. If so and at the express request of the testator, the place where he or she intends to have his or her will kept shall be mentioned in the certificate provided for in Section 6384.

(d) A will executed in compliance with Section 6382 is not invalid merely because it does not comply with this section.

§ 6384. Certificate of authorized person

6384. The authorized person shall attach to the will a certificate to be signed by him or her establishing that the requirements of this chapter for valid execution of an international will have been fulfilled. The authorized person shall keep a copy of the certificate and deliver another to the testator. The certificate shall be substantially in the following form:



- 
- |     |                                      |
|-----|--------------------------------------|
| 12. | PLACE OF EXECUTION                   |
| 13. | DATE                                 |
| 14. | SIGNATURE and, if<br>necessary, SEAL |

\*to be completed if appropriate

§ 6385. Effect of certificate

6385. In the absence of evidence to the contrary, the certificate of the authorized person is conclusive of the formal validity of the instrument as a will under this chapter. The absence or irregularity of a certificate does not affect the formal validity of a will under this chapter.

§ 6386. Revocation

6386. The international will is subject to the ordinary rules of revocation of wills.

§ 6387. Source and construction of this chapter

6387. Sections 6380 to 6386, inclusive, derive from Annex to Convention of October 26, 1973, Providing a Uniform Law on the Form of an International Will. In interpreting and applying this chapter, regard shall be had to its international origin and to the need for uniformity in its interpretation.

§ 6388. "Authorized person" includes California lawyer

6388. Individuals who have been admitted to practice law before the courts of this state and who are in good standing as active law practitioners of this state are authorized persons in relation to international wills.

§ 6389. Registry system

6389. The Secretary of State shall establish a registry system by which authorized persons may register in a central information center information regarding the execution of international wills, keeping that information in strictest confidence until the death of the maker and then making it available to any person desiring information about any will who presents a death

certificate or other satisfactory evidence of the testator's death to the center. Information that may be received, preserved in confidence until death, and reported as indicated is limited to the name, social security or other individual-identifying number established by law, if any, address, date and place of birth of the testator, and the intended place of deposit or safekeeping of the instrument pending the death of the maker. The Secretary of State, at the request of the authorized person, may cause the information it receives about execution of any international will to be transmitted to the registry system of another jurisdiction as identified by the testator, if that other system adheres to rules protecting the confidentiality of the information similar to those established in this state.

## PART 2. INTESTATE SUCCESSION

### § 6400. Intestate estate

6400. Any part of the estate of a decedent not effectively disposed of by will passes to the decedent's heirs as prescribed in this part.

Comment. Section 6400 is the same in substance as Section 2-101 of the Uniform Probate Code and supersedes former Section 200 and the first portion of former Section 220. See also Section 6404 (escheat).

### § 6401. Intestate share of surviving spouse

6401. (a) As to community property, the intestate share of the surviving spouse is the one-half of the community property that belongs to the decedent under Section 100.

(b) As to quasi-community property, the intestate share of the surviving spouse is the one-half of the quasi-community property that belongs to the decedent under Section 101.

(c) As to separate property, the intestate share of the surviving spouse is as follows:

(1) The entire intestate estate if (A) there is no surviving issue of the decedent or (B) there are surviving issue of the decedent all of whom are issue of the surviving spouse also.

(2) One-half of the intestate estate if there are surviving issue of the decedent one or more of whom are not issue of the surviving spouse.

**Comment.** Section 6401 is drawn from Section 2-102A of the Uniform Probate Code.

Subdivision (a) is the same in substance as a portion of former Section 201. Upon the death of a married person, one-half of the community property belongs *to the surviving spouse* (Section 100); in the case of intestate succession, the other one-half of the community property, which belongs *to the decedent* (Section 100), goes to the surviving spouse under subdivision (a) of Section 6401. See also Section 28 (defining “community property”). Subdivision (a) is the same in substance as the Uniform Probate Code provision.

Subdivision (b) is the same in substance as a portion of former Section 201.5. Upon the death of a married person, one-half of the decedent’s quasi-community property belongs *to the surviving spouse* (Section 101); in the case of intestate succession, the other one-half of the decedent’s quasi-community property, which belongs *to the decedent* (Section 101), goes to the surviving spouse under subdivision (b) of Section 6401. The quasi-community property recaptured under Section 102 does not belong *to the decedent* even though the property is restored to the decedent’s estate; rather it is property that belongs *to the surviving spouse*. See Section 102 and Comment thereto. Accordingly, the surviving spouse does not take the recaptured property by intestate succession. See also Section 66 (defining “quasi-community property”). No provision comparable to subdivision (b) is found in the Uniform Probate Code since that code has no provisions relating to quasi-community property.

Community property and quasi-community property that passes to the surviving spouse under subdivisions (a) and (b) is subject to Sections 649.1 (election to have community and quasi-community property administered) and 649.2 (power to deal with community and quasi-community real property). As to the liability of the surviving spouse for debts of the deceased spouse, see Section 649.4.

Subdivision (c) changes prior California law. Under prior law, the surviving spouse received all of the decedent’s separate estate only if the decedent died without leaving surviving issue, parent, brother, sister, or descendant of a deceased brother or sister. See former Sections 221-224. Under subdivision (c), the surviving spouse takes all of the decedent’s separate property unless there are surviving issue of the decedent one or more of

whom are not issue of the surviving spouse. In the latter case, subdivision (c) gives one-half of the separate property to the surviving spouse and Section 6402 gives the remaining one-half of the separate property to the issue of the decedent (both those who are also the issue of the surviving spouse and those who are not).

**§ 6402. Intestate share of heirs other than surviving spouse**

**6402.** The part of the intestate estate not passing to the surviving spouse under Section 6401, or the entire intestate estate if there is no surviving spouse, passes as follows:

(a) To the issue of the decedent; if they are all of the same degree of kinship to the decedent they take equally, but if of unequal degree, then those of more remote degree take by representation.

(b) If there is no surviving issue, to the decedent's parent or parents equally.

(c) If there is no surviving issue or parent, to the issue of the parents or either of them, the issue taking equally if they are all of the same degree of kinship to the decedent, but if of unequal degree those of more remote degree take by representation.

(d) If there is no surviving issue, parent or issue of a parent, but the decedent is survived by one or more grandparents or issue of grandparents, half of the estate passes to the paternal grandparents if both survive, or to the surviving paternal grandparent, or to the issue of the paternal grandparents if both are deceased, the issue taking equally if they are all of the same degree of kinship to the decedent, but if of unequal degree those of more remote degree take by representation; and the other half passes to the maternal relatives in the same manner; but if there be no surviving grandparent or issue of grandparent on either the paternal or the maternal side, the entire estate passes to the relatives on the other side in the same manner as the half.

(e) If there is no surviving issue, parent or issue of a parent, grandparent or issue of a grandparent, but the decedent is survived by one or more children of a predeceased spouse, to such children equally.

**Comment.** Subdivisions (a) through (d) of Section 6402 are the same in substance as Section 2-103 of the Uniform Probate Code. Since under Section 6401 all community property and quasi-community property in the intestate estate passes to the surviving spouse, and all separate property passes to the surviving spouse unless the decedent leaves issue who are not also issue of the surviving spouse, Section 6402 will apply only to the decedent's separate property, and only in those situations where the decedent leaves no surviving spouse or leaves a surviving spouse and issue who are not issue of the surviving spouse. See also the Comment to Section 6401.

Subdivision (a) is consistent with former Section 222 except that the rule of representation is changed. See Section 6405 and Comment thereto. Subdivisions (b) and (c) are consistent with former Section 225 except for the new rule of representation. Subdivision (d) supersedes former Section 226 and restricts collateral inheritance to the decedent's grandparents and issue of grandparents, the same as Section 2-103 of the Uniform Probate Code. Under former Section 226, inheritance by blood relatives of the decedent was unlimited, no matter how remote the heir may have been.

Subdivision (e) is drawn from former Section 229 and gives the decedent's stepchildren a right to inherit the decedent's separate property as a last resort to prevent escheat. Unlike former Section 229, subdivision (e) applies to the decedent's separate property without regard to whether the property is attributable to the decedent's predeceased spouse, and only benefits children of a predeceased spouse, not grandchildren or more remote lineal descendants.

If there are no takers under Section 6401 or 6402, the decedent's estate escheats to the state. See Section 6404. However, after the estate has escheated, certain relatives of a predeceased spouse may be able to claim the escheated property. See Section 6820.

### § 6403. Requirement that heir survive decedent

**6403.** A person who fails to survive the decedent is deemed to have predeceased the decedent for the purpose of intestate succession, and the decedent's heirs are determined accordingly. If it cannot be established by clear and convincing evidence that a person who would otherwise be an heir has survived the decedent, it is deemed that the person failed to survive the decedent.

**Comment.** Section 6403 is consistent with Section 220. See the Comment to that section. For a provision governing disposition of community property and quasi-community property where a married person does not survive his or her spouse, see Section 103. See also Sections 230-234 (proceeding to determine whether one person survived another).

**§ 6404. Escheat if no taker**

**6404. Part 4 (commencing with Section 6800) (escheat) applies if there is no taker of the intestate estate under the provisions of this part.**

**Comment.** Section 6404 is comparable to Section 2-105 of the Uniform Probate Code. For provisions relating to escheat, see Sections 6800-6820. See also Code Civ. Proc. §§ 1300-1615 (unclaimed property).

**§ 6405. Representation**

**6405. If representation is called for by this code, the estate is divided into as many equal shares as there are surviving heirs in the nearest degree of kinship and deceased persons in the same degree who left issue who survive the decedent, and the shares shall pass as follows:**

**(a) Each surviving heir in the nearest degree shall receive one share.**

**(b) The share of each deceased person in the same degree shall be divided among the deceased person's issue, the issue taking equally if they are all of the same degree of kinship, but if of unequal degree those of more remote degree take by representation in the same manner as provided in this section.**

**Comment.** Section 6405 is the same in substance as Section 2-106 of the Uniform Probate Code. Section 6405 changes the former California rule under which distribution was per stirpes unless all surviving descendants were of the same degree of kindred to the decedent. See former Sections 221, 222. Under Section 6405, the primary division of the estate takes place at the first generation having any living members. This changes the rule of *Maud v. Catherwood*, 67 Cal. App.2d 636, 155 P.2d 111 (1945).

**§ 6406. Inheritance by relatives of half blood**

**6406. Relatives of the half blood inherit the same share they would inherit if they were of the whole blood.**

**Comment.** Section 6406 is the same as Section 2-107 of the Uniform Probate Code and supersedes former Section 254. Under former Section 254, half-blood relatives of the decedent who were not of the blood of an ancestor of the decedent were excluded from inheriting property of the decedent which had come to the decedent from such ancestor. Section 6406 eliminates this rule and puts half bloods on the same footing as whole blood relatives of the decedent. See also Section 6147 (construction of wills).

**§ 6407. Inheritance by afterborn heirs**

**6407. Relatives of the decedent conceived before the decedent's death but born thereafter inherit as if they had been born in the lifetime of the decedent.**

**Comment.** Section 6407 is the same in substance as Section 2-108 of the Uniform Probate Code and supersedes the second sentence of former Section 250. Section 6407 is consistent with Civil Code Section 29. See also Section 6149 (person 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).

**§ 6408. Parent-child relationship**

**6408. (a) If, for purposes of intestate succession, a relationship of parent and child must be established to determine succession by, through, or from a person:**

**(1) Except as provided in paragraph (3), the relationship of parent and child exists between a child and its natural parents, regardless of the marital status of the natural parents.**

**(2) The relationship of parent and child exists between a child and its adoptive parents.**

**(3) The relationship of parent and child does not exist between an adopted child and its natural parents, except that the adoption of a child by the spouse of a natural parent has no effect on the relationship between the child and either natural parent.**

**(b) For purposes of intestate succession, a parent and child relationship exists where such relationship is (1) presumed and not rebutted pursuant to the Uniform Parentage Act, Part 7 (commencing with Section 7000) of Division 4 of the Civil Code, or (2) established pursuant**

**to the Uniform Parentage Act. Nothing in this subdivision limits the methods by which the relationship of parent and child may be established.**

**Comment.** Section 6408 is the same in substance as Section 2-109 of the Uniform Probate Code and supersedes former Sections 255 and 257. Paragraph (3) of subdivision (a) changes the rule of former Section 257 so that in the case of a stepparent adoption, the adopted child may inherit from or through the adoptive parent and also from or through the natural parent who gave up the child for adoption.

Subdivision (b) continues the substance of subdivision (d) of former Section 255. The second sentence of subdivision (b) makes clear that the parent and child relationship may be established in such other proceedings as a child support action.

A person who is only a stepchild, foster child, grandchild, or more remote descendant is not a "child." See Section 26. A person who is only a stepparent, foster parent, or grandparent is not a "parent." See Section 54. See also Section 6147 (construction of wills).

The definitions of "child," "issue," and "parent" adopt the rules set out in Section 6408. See Sections 26, 50, 54.

#### **§ 6409. Advancements**

**6409. (a) If a person dies intestate as to all his or her estate, property the decedent gave during lifetime to an heir is treated as an advancement against that heir's share of the estate only if one of the following conditions is satisfied:**

**(1) The decedent declares in a contemporaneous writing that the gift is to be deducted from the heir's share of the estate or that the gift is an advancement against the heir's share of the estate.**

**(2) The heir acknowledges in writing that the gift is to be so deducted or is an advancement.**

**(b) Subject to subdivision (c), the property advanced is to be valued as of the time the heir came into possession or enjoyment of the property or as of the time of death of the decedent, whichever occurs first.**

**(c) If the value of the property advanced is expressed in the contemporaneous writing of the decedent, or in an acknowledgment of the heir made contemporaneously with the advancement, that value is conclusive in the division and distribution of the estate.**

(d) If the recipient of the property advanced fails to survive the decedent, the property is not taken into account in computing the intestate share to be received by the recipient's issue unless the declaration or acknowledgment provides otherwise.

**Comment.** Subdivisions (a), (b), and (d) of Section 6409 are the same in substance as Section 2-110 of the Uniform Probate Code and supersede the last portion of former Section 1050. Subdivision (c) supersedes a portion of former Section 1052. For a comparable rule concerning ademption by satisfaction, see Section 6174.

Section 6409 is consistent with former law with two exceptions:

(1) Under former Section 1053, if the donee of an advancement predeceased the donor, the advancement was deducted from the shares the heirs of the donee would receive from the donor's estate, while under Section 6409 the advancement is not charged against the donee's issue unless the declaration or acknowledgment provides otherwise.

(2) The provisions relating to the valuation of the property, which supersede former Section 1052, are consistent with the provisions of Section 6174 relating to ademption by satisfaction. See the Comment to that section.

#### § 6410. Debt owed to decedent

**6410. (a)** A debt owed to the decedent is not charged against the intestate share of any person except the debtor.

**(b)** If the debtor fails to survive the decedent, the debt is not taken into account in computing the intestate share of the debtor's issue.

**Comment.** Section 6410 is the same in substance as Section 2-111 of the Uniform Probate Code and is consistent with California case law. See *Estate of Berk*, 196 Cal. App.2d 278, 16 Cal. Rptr. 492 (1961).

#### § 6411. Inheritance by alien

**6411.** No person is disqualified to take as an heir because that person or a person through whom he or she claims is or has been an alien.

**Comment.** Section 6411 is the same in substance as Section 2-112 of the Uniform Probate Code and is consistent with other provisions of California law. See Cal. Const. Art. 1, § 20; Civil Code § 671.

**§ 6412. Dower and curtesy not recognized**

**6412.** The estates of dower and curtesy are not recognized.

**Comment.** Section 6412 continues the substance of former Section 5129 of the Civil Code and is the same in substance as Section 2-113 of the Uniform Probate Code.

**§ 6413. Persons related to decedent through two lines**

**6413.** A person who is related to the decedent through two lines of relationship is entitled to only a single share based on the relationship which would entitle the person to the larger share.

**Comment.** Section 6413 is the same in substance as Section 2-114 of the Uniform Probate Code. Section 6413 is made necessary by Section 6408 which creates a possibility that following a stepparent adoption the adopted child could inherit from the same person both as a natural and as an adopted child. See Comment to Uniform Probate Code § 2-114.

## **PART 3. FAMILY PROTECTION**

### **CHAPTER 1. TEMPORARY POSSESSION OF FAMILY DWELLING AND EXEMPT PROPERTY**

**§ 6500. Temporary right to remain in possession**

**6500.** Until the inventory is filed and for a period of 60 days thereafter, or for such other period as may be ordered by the court for good cause on petition therefor, the decedent's surviving spouse and minor children are entitled to remain in possession of the family dwelling, the wearing apparel of the family, the household furniture, and the other property of the decedent exempt from enforcement of a money judgment.

**Comment.** Section 6500 continues the substance of subdivision (a) of former Section 660. See also Code Civ. Proc. §§ 695.010-695.070, 703.010-704.990, 706.050-706.051 (property exempt from enforcement of money judgment). Other exemptions are listed in the Comment to Code of Civil Procedure Section 703.010.

**§ 6501. Interested person may file petition; notice of hearing**

**6501.** A petition for an order under Section 6500 may be filed by any interested person. The court clerk shall set the petition for hearing by the court, and the petitioner shall give notice of the hearing for the period and in the manner required by Section 1200.5.

**Comment.** Section 6501 is new and is drawn from former Section 662 (probate homestead). See also Section 48 (“interested person” defined).

**CHAPTER 2. SETTING ASIDE EXEMPT PROPERTY  
OTHER THAN FAMILY DWELLING**

**§ 6510. Setting aside exempt property**

**6510.** Upon the filing of the inventory or at any subsequent time during the administration of the estate, the court in its discretion may on petition therefor set apart all or any part of the property of the decedent exempt from enforcement of a money judgment, other than the family dwelling, to any one or more of the following:

- (a) The surviving spouse.
- (b) The minor children of the decedent.

**Comment.** Section 6510 continues the substance of a portion of subdivision (b) of former Section 660, except that Section 6510 permits the court to award the exempt property to the decedent’s minor children even where there is a surviving spouse, while the former section permitted an award to the minor children only in case of the death of the surviving spouse. This change in the former law adopts the rule as to a probate homestead under former Section 661, the substance of which is continued in Section 6521. Section 6510 permits, for example, the minor children to receive the furniture and household furnishings for a probate homestead set apart for the use of the minor children. See the Comment to Section 6521. See also the Comment to Section 6500 for a listing of provisions relating to property exempt from enforcement of a money judgment.

**§ 6511. Interested person may file petition; notice of hearing**

**6511.** A petition for an order under Section 6510 may be filed by any interested person. The court clerk shall set

the petition for hearing by the court, and the petitioner shall give notice of the hearing for the period and in the manner required by Section 1200.5.

**Comment.** Section 6511 is new and is drawn from former Section 662 (probate homestead). See also Section 48 ("interested person" defined).

### **CHAPTER 3. SETTING ASIDE PROBATE HOMESTEAD**

#### **§ 6520. Court may select and set apart probate homestead**

**6520.** Upon the filing of the inventory or at any subsequent time during the administration of the estate, the court in its discretion may on petition therefor select and set apart one probate homestead in the manner provided in this chapter.

**Comment.** Section 6520 continues the substance of a portion of subdivision (b) of former Section 660. Under Section 6520, establishment of a probate homestead is discretionary with the court. The factors to be used by the court in exercising discretion are set forth in Section 6523.

#### **§ 6521. Persons for whom probate homestead is to be set apart**

**6521.** The probate homestead shall be set apart for the use of one or more of the following persons:

- (a) The surviving spouse.
- (b) The minor children of the decedent.

**Comment.** Section 6521 continues subdivision (a) of former Section 661. Section 6521 permits the probate homestead to be set apart for minor children of the decedent even if there is a surviving spouse. This may be desirable, for example, if the minor children live apart from the surviving spouse or where the minor children are not children of the surviving spouse.

#### **§ 6522. Property from which probate homestead is to be selected**

**6522.** (a) The probate homestead shall be selected out of the following property, giving first preference to the community and quasi-community property of, or property owned in common by, the decedent and the person entitled to have the homestead set apart:

(1) If the homestead is set apart for the use of the surviving spouse or for the use of the surviving spouse and minor children, out of community property or quasi-community property.

(2) If the homestead is set apart for the use of the surviving spouse or for the use of the minor children, out of property owned in common by the decedent and the person entitled to have the homestead set apart, or out of the separate property of the decedent or, if the decedent was not married at the time of death, out of property owned by the decedent.

(b) The probate homestead shall not be selected out of property the right to possession of which is vested in a third person unless the third person consents thereto. As used in this subdivision, "third person" means a person whose right to possession of the property (1) existed at the time of the death of the decedent or came into existence upon the death of the decedent and (2) was not created by testate or intestate succession from the decedent.

**Comment.** Section 6522 continues subdivisions (b) and (c) of former Section 661. Section 6522 does not require that the probate homestead be selected out of real property. The probate homestead may be selected out of personal property such as a mobilehome. Under Section 6522, the court may select a homestead out of separate property of the decedent despite the availability of community or quasi-community property or property held in common by the decedent and the person in whose use the homestead is set apart. However, the court must give preference to property other than the separate property of the decedent for selection as a probate homestead.

Subdivision (b) limits the property from which the homestead may be selected. A probate homestead may not be created on property of which a third person has the right to possession, whether by partial ownership, lease, or otherwise, without the person's consent. The probate homestead can affect the possessory rights only of testate and intestate successors of the decedent. See also Sections 28 ("community property" defined), 66 ("quasi-community property" defined).

**§ 6523. Factors to be considered in setting apart probate homestead**

**6523. (a)** In selecting and setting apart the probate homestead, the court shall consider the needs of the surviving spouse and minor children, the liens and encumbrances on the property, the claims of creditors, the needs of the heirs or devisees of the decedent, and the intent of the decedent with respect to the property in the estate and the estate plan of the decedent as expressed in inter vivos and testamentary transfers or by other means.

**(b)** The court, in light of subdivision (a) and other relevant considerations as determined by the court in its discretion, shall:

**(1)** Select as a probate homestead the most appropriate property available that is suitable for that use, including in addition to the dwelling itself such adjoining property as appears reasonable.

**(2)** Set the probate homestead so selected apart for such a term and upon such conditions (including, but not limited to, assignment by the homestead recipient of other property to the heirs or devisees of the property set apart as a homestead) as appear proper.

**Comment.** Section 6523 continues former Section 664. Under Section 6523, the court has broad discretion in selecting the probate homestead and may take into account a wide variety of factors in exercising its discretion. Section 6523 expressly authorizes the court to condition the homestead on any terms that appear proper to the court. The court may select the homestead out of the separate property of the decedent but must give a preference to community or quasi-community property of or other property held in common by the decedent and the person for whose use the homestead is set apart. See Section 6522 and Comment thereto. The court must select the most appropriate property as the homestead and is not limited to the existing dwelling. The court is not limited to existing lots or parcels, but must set apart only so much of the property as is reasonable under the circumstances of the case.

**§ 6524. Duration of probate homestead; rights of parties**

**6524.** The property set apart as a probate homestead shall be set apart only for a limited period, to be designated in the order, and in no case beyond the lifetime of the

surviving spouse, or, as to a child, beyond its minority. Subject to the probate homestead right, the property of the decedent remains subject to administration including testate and intestate succession. The rights of the parties during the period for which the probate homestead is set apart are governed, to the extent applicable, by the Legal Estates Principal and Income Law, Chapter 2.6 (commencing with Section 731) of Title 2 of Part 1 of Division 2 of the Civil Code.

**Comment.** Section 6524 continues subdivision (d) of former Section 661. Section 6524 requires that the probate homestead be set apart only for a limited period, regardless whether the homestead is selected out of the separate property of the decedent or otherwise. Under Section 6524, the property set aside as a probate homestead remains subject to administration. The testate or intestate successors of the decedent or other successors to the property set aside as a probate homestead take the property subject to the probate homestead right. Any portion of the probate homestead that is the property of the person for whom the homestead was set apart remains vested in the person at the termination of the probate homestead right. The rights of the homestead recipients and remaindermen are governed by the Legal Estates Principal and Income Law, but the court setting apart the homestead may vary the requirements of that law where appropriate to do so. See Civil Code § 731.04. As to the rights of creditors during and after administration, see Section 6526.

#### § 6525. Petition and notice

**6525.** A petition to select and set apart a probate homestead may be filed by any interested person. The court clerk shall set the petition for hearing by the court, and the petitioner shall give notice of the hearing for the period and in the manner required by Section 1200.5.

**Comment.** Section 6525 continues the substance of former Section 662. See also Section 48 (“interested person” defined).

#### § 6526. Liability of property set apart as probate homestead for claims

**6526.** (a) Property of the decedent set apart as a probate homestead is liable for claims against the estate of the decedent, subject to the probate homestead right.

The probate homestead right in property of the decedent is liable for claims that are secured by liens and encumbrances on the property at the time of the decedent's death but is exempt to the extent of the homestead exemption as to any claim that would have been subject to a homestead exemption at the time of the decedent's death under Article 4 (commencing with Section 704.710) of Chapter 4 of Division 2 of Title 9 of Part 2 of the Code of Civil Procedure.

(b) The probate homestead right in the property of the decedent is not liable for claims against the person for whose use the probate homestead is set apart.

(c) Property of the decedent set apart as a probate homestead is liable for claims against the testate or intestate successors of the decedent or other successors to the property after administration, subject to the probate homestead right.

**Comment.** Section 6526 continues former Section 663. Subdivision (a) of Section 6526 sets the rules governing liability of probate homestead property for debts of the decedent. The first sentence makes clear that such property may be used to satisfy debts of the decedent, but any sale is subject to the probate homestead right of occupancy by the person for whose use the homestead is set apart. This codifies the rule of *In re Estate of Tittel*, 139 Cal. 149, 72 P. 909 (1903). The second sentence recognizes the common law rule that the probate homestead does not affect prior liens and encumbrances. See, e.g., *In re Estate of McCauley*, 50 Cal. 544 (1875); *In re Estate of Huelsman*, 127 Cal. 275, 59 P. 776 (1899). However, the court may select as a probate homestead property not subject to liens and encumbrances or property whose liens and encumbrances will be discharged in probate. See Section 6523 (discretion of court). Preexisting liens and encumbrances on the property may be satisfied out of the probate homestead right. If the property would have been exempt from enforcement of a claim secured by a lien or encumbrance at the time of the decedent's death, however, the homestead recipient may claim a homestead exemption for the probate homestead right.

Subdivision (b) states the rule governing liability of the probate homestead right for debts of the person for whose use the homestead is set apart. Subdivision (b) creates an absolute exemption for the probate homestead right, both as to prior and subsequently incurred debts, regardless of liens created on the

probate homestead right. Subdivision (b) does not preclude a creditor of the person for whose use the probate homestead is set apart from reaching any interest in the property the person may have apart from the probate homestead right; this may occur where the homestead was selected out of community property of or property held in common by the decedent and the person for whose use the homestead is set apart. In such a situation, the exemption from execution for a dwelling may be available to the person for whose use the homestead is set apart to protect his or her property interest.

Subdivision (c) states the rule governing liability of probate homestead property for debts of the heirs or devisees or other persons who may have acquired the property through administration. The probate homestead property is subject to administration and devolves as any other property, subject to the right of use of the homestead by the persons for whose use it is set apart. See Section 6524. Under subdivision (c) of Section 6526, the remainder interest but not the probate homestead right is subject to claims of creditors.

**§ 6527. Modification or termination of probate homestead right**

**6527.** (a) The court may by order modify the term or conditions of the probate homestead right or terminate the probate homestead right at any time prior to entry of a final decree of distribution of the decedent's estate if in the court's discretion to do so appears appropriate under the circumstances of the case.

(b) A petition for an order under this section may be filed by any of the following:

(1) The person for whose use the probate homestead is set apart.

(2) The testate or intestate successors of the decedent or other successors to the property set apart as a probate homestead.

(3) Persons having claims secured by liens or encumbrances on the property set apart as a probate homestead.

(c) Notice of the hearing on the petition shall be given to all the persons listed in subdivision (b) (other than the petitioner) for the period and in the manner required by Section 1200.5.

**Comment.** Section 6527 continues the substance of former Section 665 with the addition of subdivision (c). Section 6527 gives the court authority to modify the probate homestead right until the entry of the final decree of distribution in recognition of the possibility of changed circumstances.

#### CHAPTER 4. FAMILY ALLOWANCE

#### § 6540. Persons for whom family allowance may be made

**6540.** (a) The following are entitled to such reasonable family allowance out of the estate as is necessary for their maintenance according to their circumstances during administration of the estate:

- (1) The surviving spouse of the decedent.
- (2) Minor children of the decedent.
- (3) Adult children of the decedent who are physically or mentally incapacitated from earning a living and were actually dependent in whole or in part upon the decedent for support.

(b) The following may be given such reasonable family allowance out of the estate as the court in its discretion determines is necessary for their maintenance according to their circumstances during administration of the estate:

- (1) Other adult children of the decedent who were actually dependent in whole or in part upon the decedent for support.
- (2) A parent of the decedent who was actually dependent in whole or in part upon the decedent for support.

(c) If a person otherwise eligible for family allowance has a reasonable maintenance from other sources and there are one or more other persons entitled to a family allowance, the family allowance shall be granted only to those who do not have a reasonable maintenance from other sources.

**Comment.** Subdivision (a) of Section 6540 continues the substance of subdivision (a) of former Section 680. Subdivision (b) of Section 6540 continues the substance of subdivision (b) of former Section 680, with the addition of discretionary authority for the court to award family allowance to a parent of the decedent who was actually dependent in whole or in part on the

decedent for support. Subdivision (c) continues the substance of former Section 682.

The right of a surviving spouse to a family allowance may be waived in whole or in part, whether the waiver is executed before or during marriage. See Sections 140-147. As to the priority of the family allowance, see Section 950. See also Sections 750 (order of resort to estate assets), 754 (no priority as between sale of personal and real property).

### § 6541. Petition and notice

**6541. (a) The court may grant or modify a family allowance on petition of any interested person.**

**(b) With respect to an order for the family allowance provided for in subdivision (a) of Section 6540:**

**(1) Before the inventory is filed, the order may be made or modified either (A) ex parte or (B) after notice of the hearing on the petition has been given for the period and in the manner provided in Section 1200.5.**

**(2) After the inventory is filed, the order may be made or modified only after notice of the hearing on the petition has been given for the period and in the manner provided in Section 1200.5.**

**(c) An order for the family allowance provided in subdivision (b) of Section 6540 may be made only after notice of the hearing on the petition has been given for the period and in the manner required by Section 1200.5 to all of the following:**

**(1) All devisees.**

**(2) In the case of intestacy, to all known heirs of the decedent.**

**(3) All persons (or their attorneys if they have appeared by attorney) who have requested special notice as provided in Section 1202 or who have given notice of appearance in person or by attorney.**

**Comment.** Section 6541 continues the substance of a portion of former Section 681. See also Section 48 ("interested person" defined).

### § 6542. Time of commencement of allowance

**6542. A family allowance commences on the date of the court's order or such other time as may be provided in the court's order, whether before or after the date of the**

order, as the court in its discretion determines, but the allowance may not be made retroactive to a date earlier than the date of the decedent's death.

**Comment.** Section 6542 codifies existing practice. See Pigott, *Family Allowance*, in 1 California Decedent Estate Administration §§ 11.12, 11.15, 11.18-11.19, at 400, 404, 406 (Cal. Cont. Ed. Bar 1971). The prohibition against an order which is retroactive to a date earlier than the date of decedent's death continues the substance of a portion of subdivision (c) of former Section 680.

### § 6543. Termination of allowance

**6543.** (a) A family allowance shall terminate no later than the final settlement of the estate or, if the estate is insolvent, no later than one year after the granting of letters.

(b) Subject to subdivision (a), a family allowance shall continue until modified or terminated by the court or until such time as the court may provide in its order.

**Comment.** Subdivision (a) of Section 6543 continues portions of former Section 680. Subdivision (b) continues a portion of the first sentence of subdivision (a) of former Section 681. The authority in subdivision (b) for the court to make an order terminating a family allowance or to include a termination date in its original order is new, but was implied under the former sections. See Pigott, *Family Allowance*, in 1 California Decedent Estate Administration §§ 11.15, 11.28, at 404, 410 (Cal. Cont. Ed. Bar 1971).

### § 6544. Costs paid as expenses of administration

**6544.** The costs of proceedings under this chapter shall be paid by the estate as expenses of administration.

**Comment.** Section 6544 continues the substance of former Section 683.

### § 6545. No stay on appeal if undertaking furnished

**6545.** Notwithstanding Chapter 2 (commencing with Section 916) of Title 13 of Part 2 of the Code of Civil Procedure, the perfecting of an appeal from an order made under this chapter does not stay proceedings under this chapter or the enforcement of the order appealed from if the person in whose favor the order is made gives

an undertaking in double the amount of the payment or payments to be made to that person. The undertaking shall be conditioned that if the order appealed from is modified or reversed so that the payment or any part thereof to the person proves to have been unwarranted, the payment or part thereof shall, unless deducted from any preliminary or final distribution ordered in favor of the person, be repaid and refunded into the estate within 30 days after the court so orders following the modification or reversal, together with interest and costs.

**Comment.** Section 6545 continues the substance of a portion of former Section 684. Concerning enforcement of liability on the undertaking, see Code Civ. Proc. §§ 996.410-996.495.

## CHAPTER 5. SPOUSE AND CHILDREN UNPROVIDED FOR IN WILL

### Article 1. Omitted Spouse

#### § 6560. Share of omitted spouse

**6560.** Except as provided in Section 6561, if a testator fails to provide by will for his or her surviving spouse who married the testator after the execution of the will, the omitted spouse shall receive a share in the estate consisting of the following property in the estate:

(a) The one-half of the community property that belongs to the testator under Section 100.

(b) The one-half of the quasi-community property that belongs to the testator under Section 101.

(c) One-half of the separate property of the testator.

**Comment.** Section 6560 supersedes the portion of former Section 70 which had the effect of giving an omitted spouse the same share as the omitted spouse would have taken if the testator had died intestate. Section 6560 does not adopt the intestate share for a surviving spouse as the omitted spouse's share. Instead, Section 6560 specifies the share of the omitted spouse. The omitted spouse is not entitled to this share if the spouse was intentionally omitted from the will or has been otherwise provided for. See Section 6561.

As in the case of intestate succession, the omitted spouse takes all of the community and quasi-community property that is included in the testator's estate. In addition, the omitted spouse

takes half of the separate property in the testator's estate. Under former law, the omitted spouse took one-third, one-half, or all of the testator's separate property, depending on who the decedent's other surviving relatives were. See former Sections 221, 223, 224. By giving the omitted spouse a fixed one-half share of the decedent's separate property, Section 6560 permits the decedent's will to be given some effect with respect to the other half of the separate property. See Section 6562 (abatement of devises made by the will). See also Section 78 ("surviving spouse" defined).

**§ 6561. No share if spouse intentionally omitted or otherwise provided for**

**6561. The spouse does not receive a share of the estate under Section 6560 if any of the following is established:**

**(a) The testator's failure to provide for the spouse in the will was intentional and that intention appears from the will.**

**(b) The testator provided for the spouse by transfer outside the will and the intention that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or by other evidence.**

**(c) The spouse made a valid agreement waiving the right to share in the testator's estate.**

**Comment.** Section 6561 supersedes a portion of former Section 70 and is drawn in part from Section 2-301 of the Uniform Probate Code.

Subdivision (a) continues the substance of a portion of former Section 70. Subdivision (a) is consistent with the comparable provision of Section 2-301 of the Uniform Probate Code.

Unlike former Section 70, subdivision (b) provides that the spouse does not receive a share if the testator provided for the spouse by a "transfer outside the will" that was intended to be in lieu of a testamentary provision; former Section 70 recognized only the case where "provision has been made for the spouse by marriage contract." Subdivision (b) is the same in substance as a provision of Section 2-301 of the Uniform Probate Code.

Subdivision (c) recognizes that a spouse may waive the right to take property of the other spouse by testate or intestate succession. See Sections 140-147.

**§ 6562. Manner of satisfying share of omitted spouse**

**6562.** In satisfying a share provided by this article, the devises made by the will abate as provided in Chapter 13 (commencing with Section 750) of Division 3.

**Comment.** Section 6562 provides that the general California abatement rules apply for the purpose of satisfying the share of the omitted spouse.

**Article 2. Omitted Children****§ 6570. Share of omitted child born or adopted after execution of will**

**6570.** Except as provided in Section 6571, if a testator fails to provide in his or her will for a child of the testator born or adopted after the execution of the will, the omitted child shall receive a share in the estate equal in value to that which the child would have received if the testator had died intestate.

**Comment.** Sections 6570-6572 supersede former Section 90. Section 6570 limits the children that are considered to be pretermitted children in two significant ways:

(1) Unlike former Section 90, an omitted child living when the will was made does not receive a share of the estate under Section 6570 unless the child is one described in Section 6572 (child omitted solely because the testator mistakenly believed the child to be dead or was unaware of the birth of the child). When the omission is not based on such mistaken belief, it is more likely than not that the omission was intentional. See Evans, *Should Pretermitted Issue Be Entitled to Inherit?*, 31 Calif. L. Rev. 263, 269 (1943); Niles, *Probate Reform in California*, 31 Hastings L.J. 185, 197 (1979).

(2) Unlike former Section 90, Section 6570 does not protect omitted grandchildren or more remote issue of a deceased child of the testator. If the testator's child is deceased at the time the will is made and the testator omits to provide for a child of that child (the testator's grandchild), the omission would seem to be intentional in the usual case. If the testator's child is living when the will is made and is a named beneficiary under the will and dies before the testator leaving a child surviving, the testator's grandchild will be protected by the anti-lapse statute (Section 6145) which substitutes the deceased child's issue.

Former Section 90 gave an omitted child an intestate share in the deceased testator's estate. This rule is continued in Section

6570. Where the testator leaves a surviving spouse, the child may receive little or nothing. Under Section 6401, as under former law, the surviving spouse takes all of the community and quasi-community property by intestate succession. And, under the same section, the surviving spouse takes all of the separate property unless there are surviving issue of the decedent one or more of whom are not issue of the surviving spouse. Hence, the omitted child will receive a share only in those situations where the decedent leaves no surviving spouse or leaves a surviving spouse and issue who are not issue of the surviving spouse. As to the intestate share of the omitted child, see Sections 6401 and 6402.

Although the omitted child may receive nothing under this article, the child may be eligible to receive exempt property (Sections 6510-6511), probate homestead (Sections 6520-6527), and family allowance (Sections 6540-6545) if in need of support after the testator's death. See also Section 26 ("child" defined).

**§ 6571. No share if child intentionally omitted or otherwise provided for**

**6571. A child does not receive a share of the estate under Section 6570 if any of the following is established:**

**(a) The testator's failure to provide for the child in the will was intentional and that intention appears from the will.**

**(b) When the will was executed, the testator had one or more children and devised substantially all the estate to the other parent of the omitted child.**

**(c) The testator provided for the child by transfer outside the will and the intention that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or by other evidence.**

**Comment.** Section 6571 is the same in substance as a portion of Section 2-302 of the Uniform Probate Code. Subdivision (a) of Section 6571 continues the substance of the portion of former Section 90 that provided that the omitted child did not take if it appears from the will that such omission was intentional. See Estate of Smith, 9 Cal.3d 74, 79-80, 507 P.2d 78, 106 Cal. Rptr. 774 (1973) (extrinsic evidence inadmissible to prove intent to disinherit).

Subdivisions (b) and (c) are drawn from a portion of subsection (a) of Section 2-302 of the Uniform Probate Code.

Prior California law had no provision comparable to subdivision (b). Subdivision (c) substitutes more precise and complete language from Section 2-302 of the Uniform Probate Code for the phrase that the children “are unprovided for by any settlement, and have not had an equal proportion of the testator’s property bestowed on them by way of advancement” which appeared in former Section 90.

**§ 6572. Certain children treated as children born after execution of will**

**6572.** If at the time of execution of the will the testator fails to provide in the will for a living child solely because the testator believes the child to be dead or is unaware of the birth of the child, the child shall receive a share in the estate equal in value to that which the child would have received if the testator had died intestate.

**Comment.** Section 6572 is the same in substance as subsection (b) of Section 2-302 of the Uniform Probate Code, but Section 6572 expands the UPC provision to include the case where the testator is unaware of the birth of the child. Former Section 90 protected any omitted child in existence when the will was made, not just those children described in Section 6572. See the Comment to Section 6570.

**§ 6573. Manner of satisfying share of omitted child**

**6573.** (a) Except as provided in subdivision (b), in satisfying a share of the estate as required by Section 6570:

(1) The share shall first be taken from the testator’s estate not disposed of by will, if any.

(2) If that is not sufficient, so much as may be necessary to satisfy the share shall be taken from all the devisees in proportion to the value they may respectively receive under the testator’s will.

(b) If the obvious intention of the testator in relation to some specific devise or other provision of the will would be defeated by the application of subdivision (a), the specific devise or provision may be exempted from the apportionment under subdivision (a), and a different apportionment, consistent with the intention of the testator, may be adopted.

**Comment.** Section 6573 continues the substance of former Section 91. Under this article, the share of a pretermitted child

is satisfied out of the testator's probate estate. See also Sections 32 ("devise" means testamentary disposition of real or personal property), 34 ("devisee" means a person designated in a will to receive a devise).

## **PART 4. ESCHEAT OF DECEDENT'S PROPERTY**

### **CHAPTER 1. GENERAL PROVISIONS**

#### **§ 6800. Escheat of decedent's property**

**6800. (a)** If a decedent, whether or not the decedent was domiciled in this state, leaves no one to take his or her estate or any portion thereof by testate succession, and no one other than a government or governmental subdivision or agency to take the estate or a portion thereof by intestate succession, under the laws of this state or of any other jurisdiction, the same escheats at the time of the decedent's death in accordance with this chapter.

**(b)** Property that escheats to the state under this chapter, whether held by the state or its officers, is subject to the same charges and trusts to which it would have been subject if it had passed by succession and is also subject to the provisions of Title 10 (commencing with Section 1300) of Part 3 of the Code of Civil Procedure relating to escheated estates.

**Comment.** Section 6800 continues the substance of subdivisions (a) and (b) of former Section 231.

#### **§ 6801. Real property in this state**

**6801.** Real property in this state escheats to this state in accordance with Section 6800.

**Comment.** Section 6801 continues former Section 232.

#### **§ 6802. Tangible personal property customarily kept in this state**

**6802.** All tangible personal property owned by the decedent, wherever located at the decedent's death, that was customarily kept in this state prior to the decedent's death, escheats to this state in accordance with Section 6800.

Comment. Section 6802 continues former Section 233.

§ 6803. **Tangible personal property subject to control of superior court in this state**

6803. (a) Subject to subdivision (b), all tangible personal property owned by the decedent that is subject to the control of a superior court of this state for purposes of administration and disposition under Division 3 (commencing with Section 300) escheats to this state in accordance with Section 6800.

(b) The property described in subdivision (a) does not escheat to this state but goes to another jurisdiction if the other jurisdiction claims the property and establishes all of the following:

(1) The other jurisdiction is entitled to the property under its law.

(2) The decedent customarily kept the property in that jurisdiction prior to the decedent's death.

(3) This state has the right to escheat and take tangible personal property being administered as part of a decedent's estate in that jurisdiction if the decedent customarily kept the property in this state prior to the decedent's death.

Comment. Section 6803 continues former Section 234.

§ 6804. **Intangible personal property of decedent domiciled in this state**

6804. All intangible property owned by the decedent escheats to this state in accordance with Section 6800 if the decedent was domiciled in this state at the time of the decedent's death.

Comment. Section 6804 continues former Section 235.

§ 6805. **Intangible personal property subject to control of superior court in this state**

6805. (a) Subject to subdivision (b), all intangible property owned by the decedent that is subject to the control of a superior court of this state for purposes of administration and disposition under Division 3 (commencing with Section 300) escheats to this state in accordance with Section 6800 whether or not the

decedent was domiciled in this state at the time of the decedent's death.

(b) The property described in subdivision (a) does not escheat to this state but goes to another jurisdiction if the other jurisdiction claims the property and establishes all of the following:

(1) The other jurisdiction is entitled to the property under its laws.

(2) The decedent was domiciled in that jurisdiction at the time of the decedent's death.

(3) This state has the right to escheat and take intangible property being administered as part of a decedent's estate in that jurisdiction if the decedent was domiciled in this state at the time of the decedent's death.

**Comment.** Section 6805 continues former Section 236.

#### § 6806. Benefits distributable from certain trusts

6806. Notwithstanding any other provision of law, a benefit consisting of money or other property distributable from a trust established under a plan providing health and welfare, pension, vacation, severance, retirement benefit, death benefit, unemployment insurance or similar benefits does not pass to or escheat to the state under this chapter but goes to the trust or fund from which it is distributable, subject to the provisions of Section 1521 of the Code of Civil Procedure. However, if such plan has terminated and the trust or fund has been distributed to the beneficiaries thereof prior to distribution of such benefit from the estate, such benefit passes to the state and escheats to the state under this chapter.

**Comment.** Section 6806 continues subdivision (c) of former Section 231.

## CHAPTER 2. RIGHT TO ESCHEATED PROPERTY

#### § 6820. Right of relatives of predeceased spouse to escheated property

6820. (a) Subject to subdivision (c), if property in the estate of a decedent escheats and is distributed to the state, the following relatives of a spouse who predeceased

the decedent while married to the decedent have a right to the escheated property:

(1) Issue of deceased children of the predeceased spouse; if the issue are all of the same degree of kinship to the predeceased spouse they take equally, but if of unequal degree, then those of more remote degree take by representation.

(2) If there is no surviving issue, the predeceased spouse's parent or parents equally.

(3) If there is no surviving issue or parent, the issue of the parents of the predeceased spouse or either of them; if they are all of the same degree of kinship to the predeceased spouse they take equally, but if of unequal degree, then those of more remote degree take by representation.

(b) Notwithstanding any other statute:

(1) A person who claims property under subdivision (a) shall claim the property pursuant to this section, and the claim shall be determined and allowed, regardless of the amount of the claim, in the manner provided by subdivision (a) of Section 1352 of the Code of Civil Procedure.

(2) A claim pursuant to this section shall be made within five years after the date of the decree making the distribution to the state. A person who does not so claim the property is forever barred.

(3) A claim pursuant to this section shall not be determined until the time for making claims pursuant to this section has expired.

(c) A claim pursuant to this section shall be allowed only if no heir or named distributee of the decedent entitled to the property has claimed the property prior to the time the claim pursuant to this section is determined.

**Comment.** Section 6820 supersedes former Section 229 which gave inheritance rights to persons who were not relatives of the decedent. The inheritance rights of such persons are continued only to the extent provided in subdivision (e) of Section 6402 (children of predeceased spouse), but Section 6820 provides rights for other persons who are not heirs of a decedent to claim escheated property. Because the rights provided by Section 6820 are not rights of inheritance and are subordinate to rights of heirs, no notice of either probate or escheat need be given and

the persons provided the rights are not parties to the probate proceedings. See Section 328 (notice to each "heir").

Subdivision (a) prescribes the priority of classes of claimants to escheated property. Persons lower in priority are entitled to take only if there are no claimants higher in priority. See also Section 6405 (taking by representation). Subdivision (b) is comparable to Section 1027 (claims of heirs and devisees against escheated property). It provides for an administrative determination of claims under this section. Subdivision (c) makes clear that the rights provided in this section are subordinate to the rights of the decedent's heirs and devisees.

### **Operative date**

**SEC. 7. (a) Except as provided in subdivisions (b) and (c), this act becomes operative on January 1, 1985.**

**(b) After the effective date of this act, the Judicial Council and the Secretary of State may adopt any forms necessary so that the forms may be used when this act becomes operative.**

**(c) After the effective date of this act, the courts may adopt any rules necessary so that the rules will be effective when this act becomes operative.**

## CONFORMING AMENDMENTS, ADDITIONS, AND REPEALS

The Commission has prepared a companion bill to make the necessary revisions (amendments, additions, and repeals) of existing codes to conform them to the recommended provisions relating to wills and intestate succession.<sup>1</sup>

To save printing costs, the entire text of the conforming revisions bill is not set out in this report. Instead, only those sections of the bill that are of special significance are set out.

In the material that follows, for each section (or, in some cases, article) of the conforming revisions bill, a heading or caption is set out, followed in some cases by the text of the code section being amended, added, or repealed. The Comment to the section (or, in some cases, article) being amended, added, or repealed follows, whether or not the text of the statute is included in this report.

### **Civil Code § 224.1 (technical amendment). Order where consenting persons deceased**

**Comment.** Section 224.1 is amended to delete the reference to Sections 252 and 253 of the Probate Code which have been repealed. The repeal of these sections is nonsubstantive. This amendment to Section 224.1 makes no substantive change in the notice required by the section.

### **Civil Code § 226.12 (added). Notice to natural parent in case of stepparent adoption**

**226.12.** In the case of a stepparent adoption, the form prescribed by the State Department of Social Services for the consent of the natural parent shall contain substantially the following notice: "Notice to the natural parent who relinquishes the child for adoption: Adoption of your child by a stepparent does not affect the child's right to inherit your property or the property of other blood relatives."

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<sup>1</sup> The significant provisions of this bill are noted at various points in the discussion of the provisions of the new comprehensive statute in the preliminary portion of this publication.

**Comment.** Section 226.12 provides for a notice to the natural parent who consents to a stepparent adoption. The notice informs the natural parent that a stepparent adoption does not cut off the child's right to inherit from or through the natural parent who gave up the child for adoption. See Prob. Code § 6408.

**Civil Code § 730.05 (technical amendment). Income from a decedent's estate**

**Comment.** Section 730.05 is amended to substitute a reference to the provisions that replaced those formerly referred to in the section.

**Civil Code § 1389.4 (amended). Power of appointment**

**1389.4. (a)** Except as provided in subdivision (b), if an appointment by will or by instrument effective only at the death of the donee is ineffective because of the death of an appointee before the appointment becomes effective and the appointee leaves issue surviving the donee, the surviving issue of such appointee shall take the appointed property ; ~~per stirpes and not per capita~~, in the same manner as the appointee would have taken had the appointee survived the donee except that the property shall pass only to persons who are permissible appointees, including those permitted under Section 1389.5. *If the surviving issue are all of the same degree of kinship to the deceased appointee they take equally, but if of unequal degree then those of more remote degree take by representation as provided in Section 6405 of the Probate Code.*

(b) This section does not apply if either the donor or donee manifests an intent that some other disposition of the appointive property shall be made.

**Comment.** Section 1389.4 is amended to adopt the general rule of representation provided in the Probate Code. See also Prob. Code §§ 230-234 (proceeding to determine whether issue of an appointee survived the donee).

**Civil Code § 1624 (amended). Statute of frauds**

**Comment.** Section 1624 is amended to delete the last portion of subdivision 6 (agreement to devise or bequeath property or to

make any provision by will) which is superseded by Probate Code Section 150.

**Civil Code § 4352 (amended). Notice concerning will**

**4352.** Every *interlocutory and every* final judgment declaring a marriage a nullity or dissolving a marriage shall contain the following notice:

**Notice:** Please review your will. ~~Unless a provision is made in the property settlement agreement, this court proceeding does not affect your will and the ability of your former spouse to take under it.~~ *A final judgment of dissolution or annulment of marriage revokes any disposition made by your will to your former spouse. You should also review your insurance policies, retirement benefit plans, and other matters that you may want to change in view of the dissolution or annulment of your marriage.*

**Comment.** Section 4352 is amended to reflect the change in the law concerning the effect of divorce or annulment on provisions in the will of one spouse in favor of the other. See Prob. Code § 6122 and the Comment thereto.

**Civil Code § 5129 (repealed). Curtesy and dower abolished**

**Comment.** Former Section 5129 is continued in substance in Section 6412 of the Probate Code.

**Code of Civil Procedure § 353.5 (technical amendment).**

**Death of person against whom action may be brought**

**Comment.** Section 353.5 is amended to revise the reference to former Section 205 of the Probate Code in view of the recodification of that section as Section 649.4 of the Probate Code.

**Code of Civil Procedure § 377 (technical amendment).**

**Wrongful death**

**Comment.** Section 377 is amended to revise the reference to the intestate succession provisions of the Probate Code in view of the recodification of those provisions as Part 2 of Division 6 of the Probate Code.

**Code of Civil Procedure § 1443 (technical amendment).  
Payment of property to state; applicable law**

**Comment.** Section 1443 is amended to substitute a reference to the provision that supersedes former Section 231 which was formerly referred to in Section 1443.

**Education Code § 24606 (technical amendment). State Teachers' Retirement System; provisions applicable in simultaneous death and similar situations**

**Comment.** Section 24606 is revised in a manner consistent with Government Code Section 21371 (comparable provision of Public Employees' Retirement Law). For the provision relating to insurance policies, see Prob. Code § 224. See also Prob. Code §§ 230-234 (proceeding to determine whether one person survived in order to receive benefits payable under the system).

**Government Code § 21371 (technical amendment). Public Employees' Retirement Law; provisions applicable in simultaneous death and similar situations**

**Comment.** Section 21371 is amended to reflect the repeal of the Uniform Simultaneous Death Act (former Probate Code Sections 296-296.8) and the enactment of Probate Code Sections 220-234. For the provision relating to insurance policies, see Prob. Code § 224. See also Prob. Code §§ 230-234 (proceeding to determine whether one person survived in order to receive money payable under the system).

**Penal Code § 3524 (technical amendment). Action by prisoner for injury**

**Comment.** Section 3524 is amended to revise the reference to the intestate succession provisions of the Probate Code in view of the recodification of those provisions as Part 2 of Division 6 of the Probate Code.

**Probate Code § 282 (amended). Effect of disclaimer**

**282. (a)** Unless the creator of the interest provides for a specific disposition of the interest in the event of a disclaimer, the interest disclaimed shall descend, go, be distributed, or continue to be held (1) as to a present interest, as if the disclaimant had predeceased the creator

of the interest or (2) as to a future interest, as if the disclaimant had died before the event determining that the taker of the interest had become finally ascertained and the taker's interest indefeasibly vested. A disclaimer relates back for all purposes to the date of the death of the creator of the disclaimed interest or the determinative event, as the case may be.

*(b) Notwithstanding subdivision (a):*

*(1) If an interest created by intestate succession is disclaimed, the beneficiary is not treated as having predeceased the decedent for the purpose of determining the generation at which the division of the estate is to be made under Section 6405.*

*(2) The beneficiary of a disclaimed interest is not treated as having predeceased the decedent for the purpose of applying subdivision (d) of Section 6409 or subdivision (b) of Section 6410.*

**Comment.** Section 282 is amended to add subdivision (b). Paragraph (1) of subdivision (b) is a new provision designed to prevent an heir from disclaiming property for the purpose of increasing the intestate share of his or her line at the expense of other lines of the decedent's descendants. For example, suppose the decedent has two children: The disclaimant (C-1) is living and has two children (GC-1 and GC-2, the decedent's grandchildren). The decedent's other child (C-2) has predeceased the decedent leaving one child (GC-3). But for the disclaimer, C-1's share is one-half and GC-3 takes the other half. See Section 6405. If the disclaimant (C-1) is treated as having predeceased the decedent as provided in subdivision (a) of Section 282 and the per capita rule of Section 6405 is applied, the estate would be divided at the grandchildren's generation, with GC-1, GC-2, and GC-3 each taking one-third. Paragraph (1) of subdivision (b) precludes the disclaimer from reducing the estate to which GC-3 would otherwise be entitled were the disclaimer not exercised.

Paragraph (2) of subdivision (b) makes clear that the rule governing advancements and the rule governing charging a debt against an intestate share apply notwithstanding a disclaimer.

**Note.** Section 282 is a section proposed to be added to the Probate Code in a separate Commission recommendation. See *Recommendation Relating to Disclaimer of Testamentary and Other Interests*, 16 Cal. L. Revision Comm'n Reports 209 (1982).

**Probate Code § 300 (technical amendment). Passage of decedent's property**

**Comment.** Section 300 is amended to correct the reference to the intestate succession provisions which have been recodified as Part 2 of Division 6.

**Probate Code § 323 (technical amendment). Persons who may petition for probate**

**Comment.** Section 323 is amended to delete the reference to nuncupative wills, the provisions authorizing such wills having been repealed in 1982. See 1982 Cal. Stats. ch. 187.

**Probate Code § 328.3 (added). Duress, menace, fraud, or undue influence**

**328.3.** A will or part of a will procured to be made by duress, menace, fraud, or undue influence may be denied probate. A revocation procured by the same means may be declared void.

**Comment.** Section 328.3 continues the substance of former Section 22.

**Probate Code § 328.7 (added). Conditional will**

**328.7.** A will, the validity of which is made conditional by its own terms, shall be granted or denied probate, or denied effect after probate, in conformity with the condition.

**Comment.** Section 328.7 continues former Section 24.

**Probate Code § 350 (repealed). Proof of lost or destroyed will**

**350.** ~~No will shall be proven as a lost or destroyed will unless proved to have been in existence at the time of the death of the testator, or shown to have been destroyed by public calamity, or destroyed fraudulently in the lifetime of the testator, without his knowledge; nor unless its provisions are clearly and distinctly proved by at least two credible witnesses.~~

**Comment.** Former Section 350 is not continued. Thus, any revoked will may be proved in probate whether or not the will

is proved to have been in existence at the time of the death of the testator. The provisions of a lost or destroyed will are provable by a preponderance of the evidence and may be proved by a single witness. See also Sections 351 and 352.

**Probate Code § 351 (technical amendment). Proof of lost or destroyed will**

**Comment.** Section 351 is amended to make clear that the testimony that must be reduced to writing is the testimony of the witnesses whose testimony is offered to prove the provisions of the will. See former Section 350 which related to testimony offered to prove the provisions of the will. See also Section 374 (perpetuation of testimony of subscribing witnesses).

**Probate Code § 372.5 (added). Challenge of gift to witness despite no-contest clause**

**372.5.** Notwithstanding a provision in the will that one who contests or attacks the will or any of its provisions shall take nothing under the will or shall take a reduced share, any person interested may, without forfeiting any benefits under the will, contest a provision of the will which benefits a witness to the will if that witness is needed to establish the validity of the will.

**Comment.** Section 372.5 is new, and is added to ensure that a testamentary gift to a witness to the will may be challenged without penalty despite a no-contest clause in the will. Under prior law, a witness needed to establish the validity of the will was disqualified from taking under the will a share larger than his or her intestate share, without regard to whether there was any actual wrongdoing. See former Section 51. Under the new law, a witness is disqualified from taking under the will only if wrongdoing sufficient to nullify the gift is shown. See Sections 6112 (who may witness), 328.3 (duress, menace, fraud, undue influence).

**Probate Code § 422 (amended). Persons entitled to letters**

**Comment.** Section 422 is amended to change the former reference to “relatives” of a predeceased spouse to “children” of a predeceased spouse. Under the revised law, only children of a predeceased spouse may take by intestate succession. See Section

6402 (intestate share). See also Section 6820 (right of relatives of predeceased spouse to escheated property).

**Probate Code § 632 (technical amendment). Estates not exceeding \$30,000**

**Comment.** Section 632 is amended to substitute a reference to Section 649.1 which supersedes former Section 202.

**Probate Code § 640 (technical amendment). Authority to set aside estate**

**Comment.** Section 640 is amended to substitute a reference to the provision that replaced those formerly referred to in the section.

**Probate Code § 641 (technical amendment). Petition to set aside estate**

**Comment.** Section 641 is amended to substitute a reference to the provision that supersedes those formerly referred to in the section.

**Probate Code § 645 (technical amendment). Decree**

**Comment.** Section 645 is amended to substitute a reference to the provision that supersedes those formerly referred to in the section.

**Probate Code § 645.3 (technical amendment). Personal liability for unsecured debts of decedent**

**Comment.** Section 645.3 is amended to substitute references to the provisions that supersede those formerly referred to in the section. "Cross-complaints" is substituted for "counterclaims" since counterclaims are no longer recognized. See Code Civ. Proc. § 428.80.

**Probate Code §§ 649.1-649.5 (added). Administration of community and quasi-community property**

**Comment.** Sections 649.1-649.5 continue the substance of former Sections 202-205 and a portion of former Section 206. The source of each section is indicated below.

<i>New Section</i>	<i>Former Section</i>
649.1	202
649.2	203
649.3	204
649.4	205
649.5	206 (portion)

In Section 649.4, “cross-complaints” is substituted for “counterclaims” which appeared in former Section 205. The counterclaim has been abolished. See Code Civ. Proc. § 428.80.

**Probate Code § 650 (technical amendment). Petition to have community or quasi-community property not administered in the estate**

**Comment.** Section 650 is amended to correct the cross-references in view of the recodification of the provisions to which reference formerly was made. A reference to quasi-community property has been added to paragraph (5) of subdivision (a) to conform to Section 655 and to subdivision (c) to conform that subdivision to Section 649.1.

**Probate Code § 655 (technical amendment). Court order**

**Comment.** Section 655 is amended to correct the cross-references to former Sections 201 and 201.5 in view of the recodification of those provisions as Sections 100 and 101.

**Probate Code §§ 660-684 (repealed). Support of the family**

**Comment.** Former Sections 660-684 are superseded by Sections 6500-6545.

*Section 660.* Subdivision (a) of former Section 660 is continued in substance in Section 6500. Subdivision (b) of former Section 660 is superseded by Sections 6510 and 6520.

*Section 661.* Subdivision (a) of former Section 661 is continued in Section 6521. Subdivisions (b) and (c) of former Section 661 are continued in Section 6522. Subdivision (d) of former Section 661 is continued in Section 6524.

*Section 662.* Former Section 662 is continued in substance in Section 6525.

*Section 663.* Former Section 663 is continued in Section 6526.

*Section 664.* Former Section 664 is continued in Section 6523.

*Section 665.* Former Section 665 is continued in subdivisions (a) and (b) of Section 6527.

*Section 666.* Subdivision (a) of former Section 666 which defined “quasi-community property” is superseded by Section 66. Subdivision (b) of former Section 666 which defined “separate property” as not including quasi-community property is not continued. It is clear from the statutory context that separate property is not intended to include quasi-community property.

*Section 680.* Subdivision (a) of former Section 680 is continued in substance in subdivision (a) of Section 6540. Subdivision (b) of former Section 680 is continued in substance in subdivision (b) of Section 6540. The first sentence of subdivision (c) of former Section 680 is continued in substance in subdivision (a) of Section 6543. The portion of the second sentence of subdivision (c) of former Section 680 concerning the priority of the family allowance is not continued, since the matter is already covered by Section 950. The portion of the second sentence of subdivision (c) concerning retroactivity of the order to the date of death is continued in substance in Section 6542.

*Section 681.* Former Section 681 is continued in substance in Section 6541 and subdivision (b) of Section 6543.

*Section 682.* Former Section 682 is continued in substance in subdivision (c) of Section 6540.

*Section 683.* Former Section 683 is continued in substance in Section 6544.

*Section 684.* Former Section 684 is continued in substance in Section 6545.

### **Probate Code §§ 660-664 (added). Legacies and interest**

**Comment.** Sections 660-664 continue the substance of former Sections 160-163. The source of each section is indicated below.

<i>New Section</i>	<i>Former Section</i>
660	163
661	160
662	161
663	162
664	162.5

### **Probate Code § 704.2 (technical amendment). Claim for debts of deceased spouse**

**Comment.** Section 704.2 is amended to substitute a reference to Section 649.4 which continues the substance of former Section 205.

Probate Code § 736 (amended). No sale of specifically devised property to exonerate other encumbered property

736. When a testator devises ~~land~~ *real property* subject to a mortgage, deed of trust or other lien, *and notwithstanding Section 6170 the real property passes with a right of exoneration in accord with an intention indicated by the will*, other property specifically devised or bequeathed shall not be sold for the purpose of exonerating the encumbered property, unless a contrary intention *that the other property be sold is indicated by the will can be gathered from the terms of the will, read in the light of the circumstances surrounding its execution. A mere direction that all the testator's debts be paid is not sufficient evidence of such contrary intention.*

Comment. Section 736 is amended to reflect the new rule that unless the will provides for exoneration, a specific devise passes subject to any mortgage, deed of trust, or other lien. See Sections 6141, 6170.

Probate Code § 754 (amended). Sale of estate property

754. (a) In selling property to pay debts, legacies, family allowance or expenses, there shall be no priority as between personal and real property.

(b) When a sale of property of the estate is necessary for any ~~such~~ purpose *described in subdivision (a)*, or when it is for the advantage, benefit, and best interests of the estate and those interested therein that any property of the estate be sold, the executor or administrator may sell the ~~same~~ *property*, either at public auction or private sale, using his *or her* discretion as to which property to sell first, except as provided by Sections 750 and 751 ~~of this code.~~

The

(c) *If the property to be sold is the separate property of the decedent, the executor or administrator in making any such sale may sell the entire interest of the estate in the property or any lesser interest or estate therein.*

*(d) If the property to be sold is community or quasi-community property, the executor or administrator may sell half or less of the total amount of each class of fungible property, and half or less of each item of nonfungible property. The surviving spouse may object to a sale which does not comply with this subdivision without electing against the will of the decedent, unless the will expressly provides for an election if such objection is made.*

**Comment.** Section 754 is amended to provide different rules concerning how much estate property may be sold depending on whether the property is the separate property of the decedent or is community or quasi-community property.

Subdivision (c), which authorizes sale of the entire interest of the estate in the decedent's separate property or any lesser interest or estate therein, continues prior law.

Subdivision (d) is new and recognizes California's item theory of community property ownership, pursuant to which the surviving spouse has a half interest in each item of community property, rather than a half interest in the aggregate of all community property. See *Dargie v. Patterson*, 176 Cal. 714, 169 P. 360 (1917). Subdivision (d) provides a limited exception to item theory ownership in the case where the community property is fungible, such as shares of stock. In such a case, subdivision (d) authorizes sale (when otherwise necessary) of half of the total amount of such fungible property, rather than half of each item (*e.g.*, half of each share of stock) as strict application of the item theory would require. It was not clear under prior law how Section 754 applied to sales of community property in the estate.

**Probate Code § 1026 (added).** Delay in closing estate to pay family allowance

**1026.** Continuation of the administration of the estate as provided in Section 1025.5 for the purpose of paying a family allowance is not in the best interests of the estate or the persons interested therein unless the court finds both of the following:

(a) That the family allowance is needed by the recipient to pay for necessities of life, including education so long as pursued to advantage.

(b) That the needs of the recipient for continued family allowance outweigh the needs of the decedent's heirs or the beneficiaries under the decedent's will whose interests would be adversely affected by continuing the administration of the estate for this purpose.

**Comment.** Section 1026 is new and provides standards for the court in determining whether to continue administration of the estate to pay family allowance. Nothing in Section 1026 limits the power of the court to order a preliminary distribution of the estate. See Sections 1000-1004.

**Probate Code § 1050 (repealed). Gift before death**

**Comment.** Former Section 1050 is superseded by Sections 6174 and 6409.

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

**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 Sections 6174 and 6409. Former Section 1051 was a procedural section and has been omitted as unnecessary.

**Probate Code § 1052 (repealed). Determination of value**

**Comment.** Former Section 1052 is superseded by subdivisions (b) and (c) of Section 6174 and by subdivisions (b) and (c) of Section 6409. See the Comments to Sections 6174 and 6409.

**Probate Code § 1053 (repealed). Advancement to predeceased heir**

**Comment.** Former Section 1053 is superseded by subdivision (d) of Section 6409. The rule under former Section 1053 that if the donee of an advancement predeceases the donor, the amount of the advancement is deducted from the shares the heirs of the donee would receive from the donor's estate is reversed under Section 6409: The advancement is no longer charged against the donee's issue unless such a provision is included in a contemporaneous writing by the donor or in a contemporaneous written acknowledgment by the donee.

**Probate Code § 1054 (amended). Determination of questions as to advancements and adempptions**

1054. All questions ~~as to advancements made, or alleged to have been made, by the decedent to his heirs, may arising under Section 6174 (ademption) or 6409 (advancement)~~ shall be heard and determined by the court; and ~~must~~ shall be specified in the decree assigning and distributing the estate; and the decree of the court, when it becomes final, is conclusive on all parties interested in the estate.

**Comment.** Section 1054 is amended to refer to the section dealing with advancements and to extend the application of the section to adempptions.

**Probate Code § 1139 (technical amendment). Application of article**

**Comment.** Section 1139 is amended to substitute a reference to the provisions relating to life insurance and other trusts which replaced the provisions formerly referred to in the section.

**Probate Code § 1139.6 (technical amendment). Proceedings concerning other trusts**

**Comment.** Section 1139.6 is amended to revise the reference to the provisions relating to trusts for insurance or employee benefits in view of the recodification of those provisions as Chapter 8 of Part 1 of Division 6.

**Probate Code § 1215 (technical amendment). Notice in trust proceedings**

**Comment.** Section 1215 is amended to substitute a reference to the provisions that replaced the provisions formerly referred to in the section.

**Probate Code § 1871 (technical amendment). Rights not limited by this article**

**Comment.** Section 1871 is amended to delete the unnecessary reference listing the provisions concerning the general requirements that must be satisfied in order to make a will. A conservatee must satisfy those requirements—such as the

requirement of Section 6100 that the testator be of “sound mind”—in order to make a valid will.

**Probate Code § 2580 (technical amendment). Petition for conservator to exercise substituted judgment**

**Comment.** Section 2580 is amended to correct the reference in paragraphs (9) and (11) of subdivision (b), to transfer a portion of subdivision (b) (9) (relating to revoking revocable trusts) to subdivision (b) (10), and to make other nonsubstantive revisions.

**Note.** Subdivision (b) (9) substitutes a reference to a new disclaimer statute proposed in a separate recommendation. See *Recommendation Relating to Disclaimer of Testamentary and Other Interests*, 16 Cal. L. Revision Comm’n Reports 209 (1982).

**Probate Code § 3012 (technical amendment). Legal capacity with respect to community and homestead property**

**Comment.** Section 3012 is amended to delete the unnecessary reference listing the provisions concerning who may make a will. See the Comment to Section 1871.

**Operative date**

SEC. 48. This act shall become operative only if Assembly Bill \_\_\_\_\_ is chaptered and becomes effective January 1, 1984, and in that case this act shall become operative on January 1, 1985, the same as Assembly Bill \_\_\_\_\_.



# DISPOSITION OF EXISTING SECTIONS OF DIVISIONS 1, 2, AND 2b OF THE PROBATE CODE

**Note.** Set out below is a Comment to each section of existing Divisions 1, 2, and 2b of the Probate Code. These divisions will be repealed when the new wills and intestate succession provisions are enacted. The disposition of each section of the three repealed divisions is indicated in the Comment.

## DIVISION 1. WILLS

### CHAPTER 1. WHO MAY MAKE AND TAKE BY A WILL

#### Article 1. General Provisions

**§ 20 (repealed). Who may make a will; disposal of testator's property or body**

**Comment.** The first sentence of former Section 20 is continued in Sections 6100 and 6101. The second sentence of former Section 20 is superseded by the Uniform Anatomical Gift Act (Health & Safety Code §§ 7150-7157).

**§ 21 (repealed). Disposition of community property by will**

**Comment.** Former Section 21 is continued in Sections 6100 and 6101.

**§ 22 (repealed). Duress, menace, fraud, or undue influence**

**Comment.** Former Section 22 is continued in Section 328.3. See also Section 371 (claim of duress, menace, fraud, or undue influence triable by jury).

**§ 22.1 (repealed). Devise to nonprofit charitable corporation appointed guardian or conservator**

**Comment.** Former Section 22.1 is not continued. The former section served no useful purpose because the section was easily circumvented by the testator including in the will a substitutional gift to a trusted friend in the event the primary gift to the nonprofit charitable corporation was held invalid; since the failure of the gift would not benefit the testator's heirs, they were unlikely to attack it. *Cf.* 7 B. Witkin, *Summary of California Law Wills and Probate* § 34, at 5557 (8th ed. 1974) (discussing repeal of other analogous provisions); *Review of Selected 1971 California Legislation*, 3 Pac. L.J. 191, 197 (1972) (same).

**§ 23 (repealed). Conjoint or mutual will**

**Comment.** Former Section 23 is superseded by subdivision (b) of Section 150 ("[t]he execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills").

**§ 24 (repealed). Conditional will**

**Comment.** Former Section 24 is continued in Section 328.7.

**§ 25 (repealed). Codicil republishes will**

**Comment.** Former Section 25 is not continued. The original purpose of Section 25 was to extend the effect of a will to cover property acquired after the date of the will. Evans, *Comments on the Probate Code of California*, 19 Calif. L. Rev. 602, 608 (1931). However, under Section 6144, a will is construed to pass all property which the testator owns at death. Hence Section 25 is no longer needed.

§ 26 (repealed). **Validity of foreign will under law of another state**

Comment. Former Section 26 is superseded by Section 6113.

§ 27 (repealed). **Who may take testamentary dispositions**

Comment. Former Section 27 is superseded by Section 6102.

§ 28 (repealed). **Presumed vesting**

Comment. Former Section 28 is not continued. The question of when a testamentary disposition vests is left to case law development.

§ 29 (repealed). **Plural devisee or legatee**

Comment. Former Section 29 is continued in Sections 6141 and 6150.

## CHAPTER 2. EXECUTION OF WILLS

§ 50 (repealed). **Formal requirements for execution of an attested will**

Comment. Former Section 50 is superseded by Section 6110.

§ 51 (repealed). **Interested witness disqualified to take**

Comment. Former Section 51 is superseded by Section 6112. See also Section 372.5.

§ 52 (repealed). **Creditors as competent witnesses**

Comment. The substance of former Section 52 is continued in Section 6112.

§ 53 (repealed). **Holographic will**

Comment. Former Section 53 is continued in Section 6111.

## CHAPTER 2.1. CALIFORNIA STATUTORY WILLS

§ 56 (repealed). **Definitions and rules of construction**

Comment. Former Section 56 is continued in substance in Sections 6200-6210.

§ 56.1 (repealed). **Persons who may execute a California statutory will**

Comment. Former Section 56.1 is continued in substance in Section 6220.

§ 56.2 (repealed). **Method of executing California statutory will**

Comment. Former Section 56.2 is continued in substance in Section 6221.

§ 56.3 (repealed). **Two California statutory wills; contents**

Comment. Former Section 56.3 is continued in substance in Section 6222.

§ 56.4 (repealed). **Effect of selection of more than one property disposition clause; effect of failure to make selection**

Comment. Former Section 56.4 is continued in Section 6223.

§ 56.5 (repealed). **Effect of titles of clauses**

Comment. Former Section 56.5 is continued in Section 6224.

§ 56.6 (repealed). **Revocation; amendment by codicil; additions or deletions on form to be disregarded unless in accordance with instructions**

Comment. Former Section 56.6 is continued in Section 6225.

§ 56.7 (repealed). **California Statutory Will Form**

Comment. Former Section 56.7 is continued in substance in Section 6240.

§ 56.8 (repealed). **California Statutory Will With Trust Form**

Comment. Former Section 56.8 is continued in substance in Section 6241.

§ 56.9 (repealed). **Full text of paragraph 2.1 of California Statutory Will With Trust Form**

Comment. Former Section 56.9 is continued in Section 6242.

§ 56.10 (repealed). **Full text of property disposition clauses of California Statutory Will Form**

Comment. Former Section 56.10 is continued in substance in Section 6243, except that the former provision adopting the laws relating to the succession of separate property not acquired from a parent, grandparent, or predeceased spouse had been replaced by a reference in Section 6243 to the law relating to intestate succession. This change will permit community property and quasi-community property to be governed by the intestate succession rules applicable to that property and recognizes that the special provisions relating to succession of property acquired from ancestors have not been continued.

§ 56.11 (repealed). **Full text of property disposition clauses of California Statutory Will With Trust Form**

Comment. Former Section 56.11 is continued in Section 6244.

§ 56.12 (repealed). **Mandatory clauses of all California statutory wills**

Comment. Former Section 56.12 is continued in substance in Section 6245, except that the former provision adopting the laws relating to the succession of separate property not acquired from a parent, grandparent, or predeceased spouse has been replaced by a reference in Section 6245 to the law relating to intestate succession. See the Comment to former Section 56.10 concerning the effect of this change.

§ 56.13 (repealed). **Additional mandatory clauses for California statutory will with trust**

Comment. Former Section 56.13 is continued in substance in Section 6246, except that the former provision adopting the laws relating to the succession of separate property not acquired from a parent, grandparent, or predeceased spouse has been replaced by a reference in Section 6246 to the law relating to intestate succession. See the Comment to former Section 56.10 concerning the effect of this change.

§ 56.14 (repealed). **Will includes only texts of clauses as they exist when will executed**

Comment. Former Section 56.14 is continued in substance in Section 6247.

## CHAPTER 2.5. UNIFORM INTERNATIONAL WILLS ACT

§ 60 (repealed). **Definitions**

Comment. Former Section 60 is continued in Section 6380.

§ 60.1 (repealed). **Validity of international will**

Comment. Former Section 60.1 is continued in Section 6381.

§ 60.2 (repealed). **Requirements of international will**

Comment. Former Section 60.2 is continued in Section 6382.

§ 60.3 (repealed). **Additional requirements of international will**

Comment. Former Section 60.3 is continued in Section 6383.

§ 60.4 (repealed). **Certificate of authorized person**

Comment. Former Section 60.4 is continued in Section 6384.

§ 60.5 (repealed). **Effect of certificate**

Comment. Former Section 60.5 is continued in Section 6385.

§ 60.6 (repealed). **Revocation**

**Comment.** Former Section 60.6 is continued in Section 6386.

§ 60.7 (repealed). **Source and construction**

**Comment.** Former Section 60.7 is continued in Section 6387.

§ 60.8 (repealed). **Authorized persons; registry system**

**Comment.** The first paragraph of former Section 60.8 is continued in Section 6388. The second paragraph of former Section 60.8 is continued in Section 6389.

### CHAPTER 3. REVOCATION OF WILLS

§ 70 (repealed). **Effect of marriage on prior will**

**Comment.** Former Section 70 is superseded by Sections 6560-6562.

§ 71 (repealed). **Subsequent marriage; revocation as to issue**

**Comment.** Former Section 71 is superseded by Sections 6570-6573 (pretermitted children).

§ 72 (repealed). **Effect of subsequent will on prior will**

**Comment.** Former Section 72 is superseded by Section 6120.

§ 73 (repealed). **Instrument altering interest in property disposed of by will**

**Comment.** Former Section 73 is not continued. Informal revocation of a provision of the testator's will in the manner authorized under former Section 73 is no longer permitted. If the testator conveys away the entire interest in property which is also disposed of in the testator's will, the testamentary gift will be adeemed by extinction. See 7 B. Witkin, *Summary of California Law Wills and Probate* § 218, at 5728 (8th ed. 1974); Official Comment to Uniform Probate Code § 2-612. If the property is conveyed away in part, Section 6177 applies (no ademption or revocation where testator's interest is altered but not wholly divested) and the testamentary gift would not be adeemed.

§ 74 (repealed). **Revocation by writing or by act**

**Comment.** Former Section 74 is superseded by Section 6120.

§ 75 (repealed). **Effect of revocation of revoking will on prior will**

**Comment.** Former Section 75 is superseded by Section 6123.

§ 76 (repealed). **Effect of revoking duplicate will**

**Comment.** Former Section 76 is continued in substance in Section 6121.

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

**Comment.** Former Section 77 is continued in substance in Section 6175.

§ 78 (repealed). **No revocation by encumbrance**

**Comment.** Former Section 78 is continued in substance in Section 6176.

§ 79 (repealed). **Effect of revocation of a will on codicils**

**Comment.** Former Section 79 is not continued. Former Section 79 was not a complete statement of the law since the section had been qualified by a case which held that if the codicil is sufficiently complete to stand on its own as a will and the underlying will is revoked by the testator with the intent that the comprehensive terms of the codicil be given effect as the testator's final testamentary expression, the codicil becomes a will and is not revoked by revocation of the underlying will. *Estate of Cuneo*, 60 Cal.2d 196, 202, 384 P.2d 1, 32 Cal. Rptr. 409 (1963).

There is no provision in the Uniform Probate Code comparable to former Section 79. By the repeal of Section 79, the question of whether revocation of a will revokes its codicils is left to case law development.

§ 80 (repealed). Property settlement agreement waiving rights at death

Comment. Former Section 80 is superseded by Sections 140-147.

CHAPTER 4. KINDRED NOT MENTIONED IN  
WILL, WHO SHARE IN ESTATE

§ 90 (repealed). Omitted children and grandchildren

Comment. Former Section 90 is superseded by Sections 6570-6572 (pretermitted children).

§ 91 (repealed). Source of share of omitted children and grandchildren

Comment. Former Section 91 is continued in substance in Section 6573.

§ 92 (repealed). Anti-lapse

Comment. Former Section 92 is superseded by Section 6141, by subdivision (a) of Section 6143, and by Section 6145.

CHAPTER 5. INTERPRETATION OF WILLS

§ 100 (repealed). Domestic law governs domestic property

Comment. Former Section 100 is superseded by Section 6142 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 5373 (8th ed. 1974).

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

Comment. The first sentence of former Section 101 is superseded by Section 6120 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 Official Comment to Uniform Probate Code Section 2-507.

The second sentence of former Section 101 is continued in substance in Section 6140.

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.

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

Comment. Former Section 102 is continued in Section 6160.

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

Comment. Former Section 103 is continued in Section 6161, except that the last portion of the second sentence of former Section 103, which provided that if several parts of a will are irreconcilable the latter must prevail, is not continued.

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

Comment. Former Section 104 is not continued. Under the new law, a will is construed as a whole and so as to give every expression some effect. See Sections 6160, 6161.

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

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).

§ 106 (repealed). **Words taken in ordinary and grammatical sense; technical words**  
 Comment. Former Section 106 is continued in Section 6162.

§ 107 (repealed). **Devise of fee**  
 Comment. Former Section 107 is superseded by Sections 6141 and 6144.

§ 108 (repealed). **Class gift construed according to rules for intestate succession**  
 Comment. Former Section 108 is superseded by Section 6147.

§ 109 (repealed). **Devise or bequest to testator's own heirs or next of kin**  
 Comment. Former Section 109 is continued in Section 6151.

#### CHAPTER 6. EFFECT OF CERTAIN PROVISIONS

§ 120 (repealed). **Devise of land**  
 Comment. Former Section 120 is continued in substance in Sections 6141 and 6144.

§ 121 (repealed). **Devise of land; after-acquired interests**  
 Comment. Former Section 121 is continued in substance in Sections 6141 and 6144.

§ 122 (repealed). **Words referring to death or survivorship**  
 Comment. Former Section 122 is not continued. For a rule applicable to class gifts, see Section 6148.

§ 123 (repealed). **Scope of disposition to a class; afterborn child**  
 Comment. The first sentence of former Section 123 is superseded by Section 6148. The second sentence of former Section 123 is continued in Section 6149.

§ 124 (repealed). **Direction in will for conversion of real property**  
 Comment. Former Section 124 is continued in Section 6152.

§ 125 (repealed). **Disposition of all real or personal property; property included**  
 Comment. Former Section 125 is continued in substance in Section 6144.

§ 126 (repealed). **Residuary disposition**  
 Comment. Former Section 126 is continued in substance in Section 6144.

#### CHAPTER 7. CONDITIONS AND REMAINDERS

§ 140 (repealed). **Death of devisee or legatee of limited interest**  
 Comment. Former Section 140 is not continued, since it stated the obvious. Repeal of the section is not intended to change the law. See, *e.g.*, Estate of Rowley, 126 Cal. App.2d 571, 578, 272 P.2d 911 (1954).

§ 141 (repealed). **Conditional disposition defined**  
 Comment. Former Section 141 is not continued as unnecessary.

§ 142 (repealed). **Condition precedent defined; construction and operation**  
 Comment. Former Section 142 is not continued. The former section was not a modern statement of the law. The matters which the former section governed are left to case law development.

§ 143 (repealed). **Condition subsequent defined; operation**  
 Comment. Former Section 143 is not continued. The matters which the former section covered are left to case law development.

## CHAPTER 8. LEGACIES AND INTEREST

- § 160 (repealed). **Bequest of interest or income**  
Comment. Former Section 160 is continued in Section 661.
- § 161 (repealed). **Legacies; distinctions and designations**  
Comment. Former Section 161 is continued in Section 662.
- § 162 (repealed). **Interest on legacies; commencement annuities; interest on unpaid accumulations**  
Comment. Former Section 162 is continued in substance in Section 663.
- § 162.5 (repealed). **Distribution of income from property sold during administration**  
Comment. Former Section 162.5 is continued in Section 664.
- § 163 (repealed). **Testamentary intent controlling**  
Comment. Former Section 163 is continued in Section 660.

## CHAPTER 9. TESTAMENTARY ADDITIONS TO TRUSTS

- § 170 (repealed). **Testamentary additions to trusts**  
Comment. Former Section 170 is continued in substance in Section 6300.
- § 171 (repealed). **Effect on prior wills**  
Comment. Former Section 171 is continued in Section 6301.
- § 172 (repealed). **Uniform construction**  
Comment. Former Section 172 is continued in Section 6302.
- § 173 (repealed). **Short title**  
Comment. Former Section 173 is continued in Section 6303.

## CHAPTER 10. LIFE INSURANCE AND OTHER TRUSTS

- § 175 (repealed). **Designation of trustee as beneficiary, payee, or owner**  
Comment. Former Section 175 is continued in Section 6321.
- § 176 (repealed). **Requirement of provisions in the will**  
Comment. Former Section 176 is continued in Section 6322.
- § 177 (repealed). **Payment to trustee without administration**  
Comment. Former Section 177 is continued in Section 6323.
- § 178 (repealed). **Liability of rights and benefits to debts of designator**  
Comment. Former Section 178 is continued in Section 6324.
- § 179 (repealed). **Jurisdiction of court**  
Comment. Former Section 179 is continued in substance in Section 6325.
- § 180 (repealed). **Applicability of provisions for administration of testamentary trusts**  
Comment. Former Section 180 is continued in Section 6326.
- § 181 (repealed). **Appeal**  
Comment. Former Section 181 is continued in substance in Section 6327.
- § 182 (repealed). **Absence of qualified trustee**  
Comment. Former Section 182 is continued in Section 6328.

**§ 183 (repealed). Inheritance tax**

**Comment.** Former Section 183 is not continued, since the California inheritance tax has been repealed. See Rev. & Tax. Code § 13301.

**§ 184 (repealed). No effect on other trusts**

**Comment.** The first portion of former Section 184 is continued in Section 6329. The last portion of former Section 184 relating to inheritance tax laws is not continued, since the California inheritance tax has been repealed. See Rev. & Tax. Code § 13301.

**CHAPTER 11. BEQUESTS TO MINORS****§ 186 (repealed). Bequests to minors under this chapter**

**Comment.** Former Section 186 is continued in Section 6340.

**§ 186.1 (repealed). Applicability of Uniform Gifts to Minors Act**

**Comment.** Former Section 186.1 is continued in Section 6341.

**§ 186.2 (repealed). Designation of custodian**

**Comment.** Former Section 186.2 is continued in Section 6342.

**§ 186.3 (repealed). Noncomplying bequest**

**Comment.** Former Section 186.3 is continued in Section 6343.

**§ 186.4 (repealed). Distribution of property**

**Comment.** Former Section 186.4 is continued in Section 6344.

**§ 186.5 (repealed). Successor or alternate custodians; compensation**

**Comment.** Former Section 186.5 is continued in Section 6345.

**§ 186.6 (repealed). Successor custodian**

**Comment.** Former Section 186.6 is continued in Section 6346.

**§ 186.7 (repealed). Notice to and participation of custodian**

**Comment.** Former Section 186.7 is continued in Section 6347.

**§ 186.8 (repealed). Jurisdiction of court**

**Comment.** Former Section 186.8 is continued in Section 6348.

**§ 186.9 (repealed). Not exclusive procedure**

**Comment.** Former Section 186.9 is continued in Section 6349.

**CHAPTER 12. DISCLAIMER OF TESTAMENTARY AND OTHER INTERESTS****§§ 190-190.10 (repealed). Disclaimers**

**Note.** For the disposition of former Sections 190-190.10, see *Recommendation Relating to Disclaimer of Testamentary and Other Interests*, 16 Cal. L. Revision Comm'n Reports 209 (1982).

**DIVISION 2. SUCCESSION****§ 200 (repealed). Succession defined**

**Comment.** Former Section 200 is superseded by Section 6400.

**CHAPTER 1. COMMUNITY PROPERTY****§ 201 (repealed). Community property**

**Comment.** The portion of former Section 201 that deals with intestate succession is superseded by Section 100 and subdivision (a) of Section 6401. The portion of former

Section 201 that provided that half of the community property "is subject to the testamentary disposition of the decedent" is continued in Section 6101 (wills).

The last portion of former Section 201 relating to the applicability of Sections 202 and 203 is not continued. Former Sections 202 and 203 are continued in Sections 649.1 and 649.2. Sections 649.1 and 649.2 are self-executing. See also the Comment to Section 6401.

**§ 201.5 (repealed). Quasi-community property**

**Comment.** Section 201.5 is superseded by Section 66 (defining "quasi-community property") and Section 6101.

**§ 201.6 (repealed). Election of surviving spouse in real property in this state of non-domiciliary decedent**

**Comment.** Former Section 201.6 is continued in Section 120.

**§ 201.7 (repealed). Election of surviving spouse in quasi-community property**

**Comment.** Former Section 201.7, which required the surviving spouse to elect to take under or against the decedent's will unless the will provided to the contrary, is not continued. The repeal of former Section 201.7 leaves the question of whether an election is required to be determined as a matter of the testator's intent as that intent may be expressed or implied in the will. This makes the rule for quasi-community property the same as for community property: The surviving spouse is not forced to an election unless the decedent's will expressly so provides, or unless such a requirement should be implied to avoid thwarting the testator's apparent intent. See 7 B. Witkin, *Summary of California Law Wills and Probate* §§ 21-22, at 5542-44 (8th ed. 1974).

**§ 201.8 (repealed). Recapture by surviving spouse of certain quasi-community property**

**Comment.** The substance of the first and third sentences of former Section 201.8 are continued in Section 102. The second sentence of former Section 201.8, which required the surviving spouse to elect to take under or against the decedent's will, is not continued. Under the law as revised, the rule for quasi-community property is the same as for community property: The surviving spouse is not forced to an election unless the decedent's will expressly so provides, or unless such a requirement should be implied to avoid thwarting the testator's apparent intent. See 7 B. Witkin, *Summary of California Law Wills and Probate* §§ 21-22, at 5542-44 (8th ed. 1974).

**§ 202 (repealed). Election to have community and quasi-community property administered**

**Comment.** Former Section 202 is continued in Section 649.1.

**§ 203 (repealed). Power to deal with community and quasi-community real property**

**Comment.** Former Section 203 is continued in Section 649.2.

**§ 204 (repealed). Community and quasi-community property subject to administration**

**Comment.** Former Section 204 is continued in Section 649.3.

**§ 205 (repealed). Liability of surviving spouse for decedent's debts**

**Comment.** Former Section 205 is continued in Section 649.4.

**§ 206 (repealed). Community property held in certain revocable trusts**

**Comment.** The substance of former Section 206 is continued in Sections 104 and 649.5.

## CHAPTER 2. SEPARATE PROPERTY

### Article 1. Particular Provisions

**§ 220 (repealed). Succession to separate property**

**Comment.** Former Section 220 is superseded by Sections 101, 102, 140-147, and 6400.

**§ 221 (repealed). Distribution to surviving spouse and issue**

**Comment.** Former Section 221 is superseded by Sections 6401, 6402, and 6405.

- § 222 (repealed). **Distribution to issue where no surviving spouse**  
 Comment. Former Section 222 is superseded by Sections 6402 and 6405.
- § 223 (repealed). **Distribution to surviving spouse and immediate family where no issue**  
 Comment. Former Section 223 is superseded by Sections 6401, 6402, and 6405.
- § 224 (repealed). **Distribution to surviving spouse where neither issue nor immediate family**  
 Comment. Former Section 224 is superseded by Section 6401.
- § 225 (repealed). **Distribution to immediate family where neither issue nor spouse**  
 Comment. Former Section 225 is superseded by Sections 6402 and 6405.
- § 226 (repealed). **Distribution to next of kin where no spouse, issue, nor immediate family**  
 Comment. Former Section 226 is superseded by Sections 6402 and 6405.
- § 227 (repealed). **Unmarried minor decedent**  
 Comment. Former Section 227, which stated one variant of the ancestral property doctrine, is not continued. The ancestral property doctrine is abolished in California. See generally Niles, *Probate Reform in California*, 31 Hastings L.J. 185, 204 (1979); Evans, *Comments on the Probate Code of California*, 19 Calif. L. Rev. 602, 614 (1931).
- § 229 (repealed). **Distribution of property received from predeceased spouse; distribution to prevent escheat**  
 Comment. Subdivisions (a), (b), and (c) of former Section 229, which stated two variants of the ancestral property doctrine, are not continued. The ancestral property doctrine is abolished in California. See generally Niles, *Probate Reform in California*, 31 Hastings L.J. 185, 206-08 (1979); Reppy & Wright, *California Probate Code § 229: Making Sense of a Badly Drafted Provision For Inheritance by a Community Property Decedent's Former In-Laws*, 8 Community Prop. J. 107, 135 (1981).  
 Subdivisions (d) and (e) are superseded by provisions which permit certain relatives of a predeceased spouse of the decedent to claim an estate which has escheated to the state. See Section 6820.
- § 230 (repealed). **Distribution of property received from predeceased spouse**  
 Comment. Former Section 230 is superseded by Sections 6402 and 6405.

## Article 2. Escheat of Decedent's Property

- § 231 (repealed). **Escheat of decedents' property**  
 Comment. The substance of subdivisions (a) and (b) of former Section 231 (as amended by 1982 Cal. Stats. ch. 182) is continued in Sections 6404 and 6800. Subdivision (c) is continued in Section 6806.
- § 232 (repealed). **Real property**  
 Comment. Former Section 232 is continued in Section 6801.
- § 233 (repealed). **Tangible personal property wherever located**  
 Comment. Former Section 233 is continued in Section 6802.
- § 234 (repealed). **Tangible personal property subject to control of superior court for purposes of administration**  
 Comment. Former Section 234 is continued in Section 6803.
- § 235 (repealed). **Intangible personal property of decedent domiciled in state**  
 Comment. Former Section 235 is continued in Section 6804.
- § 236 (repealed). **Intangible personal property subject to control of superior court for purposes of administration**  
 Comment. Former Section 236 is continued in Section 6805.

## Article 3. General Provisions

## § 250 (repealed). Right of representation defined; posthumous child

Comment. The first sentence of former Section 250 is superseded by Section 6405. The second sentence is superseded by Section 6407.

## § 251 (repealed). Degree of kindred

Comment. Former Section 251 is not continued. The revised succession provisions use the term "degree of kinship" instead of "degree of kindred." See, e.g., Sections 6402, 6405. The term "degree of kinship" is not statutorily defined, since its meaning is well understood.

## § 252 (repealed). Lineal consanguinity

Comment. Former Section 252 is not continued. The revised succession provisions use the term "issue" instead of "lineal descendants." Compare Sections 6401, 6402, and 6405 with former Section 221. "Issue" is a defined term. See Section 50.

## § 253 (repealed). Collateral consanguinity

Comment. Former Section 253 is not continued. The terms "collateral heirs" and "collateral kindred" are not used in the revised succession provisions.

## § 254 (repealed). Kindred of the half blood

Comment. Former Section 254 is superseded by Section 6406.

## § 255 (repealed). Parent and child relationship

Comment. Former Section 255 is superseded by Section 6408.

## § 257 (repealed). Adopted child

Comment. Former Section 257 is superseded by Section 6408.

## § 258 (repealed). Effect of homicide

Comment. Former Section 258 is superseded by Sections 200-206.

## DIVISION 2b. SIMULTANEOUS DEATH

## CHAPTER 1. UNIFORM SIMULTANEOUS DEATH ACT

## § 296 (repealed). Disposition of property; insufficient evidence of survivorship

Comment. Former Section 296 is superseded by Section 220.

## § 296.1 (repealed). Beneficiaries taking successively under another's disposition of property

Comment. Former Section 296.1 is superseded by subdivision (b) of Section 222.

## § 296.2 (repealed). Joint tenants

Comment. Former Section 296.2 is superseded by Section 223.

## § 296.3 (repealed). Life or accident insurance

Comment. Former Section 296.3 is superseded by Section 224.

## § 296.4 (repealed). Community property

Comment. The first paragraph of former Section 296.4 is superseded by Section 103. The second paragraph is superseded by Sections 6402(e) and 6820.

## § 296.41 (repealed). Proceedings to determine simultaneous death

Comment. The first sentence of former Section 296.41 is superseded by Sections 230, 231, and 232. The remainder of former Section 296.41 is superseded by Section 233.

§ 296.42 (repealed). Proceeding by executor or administrator to determine simultaneous death

Comment. The portion of the first sentence of former Section 296.42 relating to proof of giving of notice is superseded by subdivision (c) of Section 233. The remainder of the first sentence and the second and third sentences are superseded by Section 234. The substance of the last sentence is continued in subdivision (b) of Section 232.

§ 296.5 (repealed). Prospective effect of chapter

Comment. Former Section 296.5 is not continued.

§ 296.6 (repealed). Inapplicability of chapter where provision made for different distribution

Comment. Former Section 296.6 is superseded by Section 221.

§ 296.7 (repealed). Construction to effect uniformity

Comment. Former Section 296.7 is not continued.

§ 296.8 (repealed). Short title

Comment. Former Section 296.8 is not continued.

## UNIFORM PROBATE CODE SECTIONS TO PROPOSED LAW

The following table shows the comparable provisions in the proposed law for Section 1-201 (General Definitions) and Article II (Intestate Succession and Wills) of the Uniform Probate Code. The provision of the proposed law may be the same as, or may be substantially different from, the comparable provision of the Uniform Code. In some instances, the Comment to the provision of the proposed law indicates the extent to which the provision is the same as the Uniform Code.

UNIFORM CODE	PROPOSED LAW	UNIFORM CODE	PROPOSED LAW
<b>General</b>		<b>Article II—</b>	
<b>Definitions</b>		<b>continued</b>	
§ 1-201 .....	§§ 20, 24, 26, 32, 34, 44, 48, 50, 54, 56, 70, 74, 82, 84, 88	§ 2-512 .....	§ 6131
		§ 2-513 .....	Not used.
		§ 2-601 .....	§ 6143
		§ 2-602 .....	§ 6142
		§ 2-603 .....	§§ 6140, 6141
		§ 2-604 .....	§ 6144
		§ 2-605 .....	§ 6145
		§ 2-606 .....	§ 6146
		§ 2-607 .....	§ 6171
		§ 2-608 .....	§ 6172
		§ 2-609 .....	§ 6170
		§ 2-610 .....	Civil Code § 1386.2 (already enacted)
		§ 2-611 .....	§ 6147
		§ 2-612 .....	§ 6174
		§ 2-701 .....	§ 150
		§ 2-801 .....	Not used.
			See generally §§ 260 to 295 (in <i>Recommendation Relating to Disclaimer of Testamentary and Other Interests</i> ).
		§ 2-802 .....	§ 78
		§ 2-803 .....	§§ 200 to 206
		§ 2-901 .....	Not used.
			See generally § 2586.
		§ 2-902 .....	Not used.
			See generally §§ 320, 321.
		§ 2-1001 .....	§ 6380
		§ 2-1002 .....	§ 6381
		§ 2-1003 .....	§ 6382
		§ 2-1004 .....	§ 6383
		§ 2-1005 .....	§ 6384
		§ 2-1006 .....	§ 6385
		§ 2-1007 .....	§ 6386
		§ 2-1008 .....	§ 6387
		§ 2-1009 .....	§ 6388
		§ 2-1010 .....	§ 6389
<b>Article II</b>			
§ 2-101 .....	§ 6400		
§ 2-102A .....	§ 6401		
§ 2-103 .....	§ 6402		
§ 2-104 .....	§ 6403		
§ 2-105 .....	§ 6404		
§ 2-106 .....	§ 6405		
§ 2-107 .....	§ 6406		
§ 2-108 .....	§ 6407		
§ 2-109 .....	§ 6408		
§ 2-110 .....	§ 6409		
§ 2-111 .....	§ 6410		
§ 2-112 .....	§ 6411		
§ 2-113 .....	§ 6412		
§ 2-114 .....	§ 6413		
§§ 2-201 to 2-203 .....	Not used.		
§ 2-204 .....	§§ 140 to 147		
§§ 2-205 to 2-207 .....	Not used.		
§ 2-301 .....	§§ 6560 to 6562		
§ 2-302 .....	§§ 6570 to 6573		
§§ 2-401 to 2-404 .....	Not used.		
	See generally §§ 6500 to 6545.		
§ 2-501 .....	§ 6100		
§ 2-502 .....	§ 6110		
§ 2-503 .....	§ 6111		
§ 2-504 .....	Not used.		
§ 2-505 .....	§ 6112		
§ 2-506 .....	§ 6113		
§ 2-507 .....	§ 6120		
§ 2-508 .....	§ 6122		
§ 2-509 .....	§ 6123		
§ 2-510 .....	§ 6130		
§ 2-511 .....	§§ 6300 to 6303		

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