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#L-1029

Second Supplement to Memorandum 85-63

Subject: Study L-1029 - Estates and Trusts Code (Marital Deduction  
Gifts--staff draft)

Attached to this supplementary memorandum are the staff draft provisions relating to marital deduction gifts. These redrafted provisions were formerly located in Exhibit 2 to Memorandum 85-63.

Respectfully submitted,

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Exhibit 1

CHAPTER 5. RULES OF CONSTRUCTION OF WILLS

Article 5. Marital Deduction Gifts

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## CHAPTER 5. RULES OF CONSTRUCTION OF WILLS

Article 5. Marital Deduction Gifts§ 6180. Definitions

6180. As used in this article:

(a) "Pecuniary devise" means a gift in a will that either is expressly stated as a fixed dollar amount or is a gift of a dollar amount determinable by the provisions of the will.

(b) "Marital deduction" means the federal estate tax deduction allowed for transfers under Section 2056 of the Internal Revenue Code.

(c) "Maximum marital deduction" means the maximum amount qualifying for the marital deduction.

(d) "Marital deduction gift" means a gift intended to qualify for the marital deduction.

(e) "Fiduciary" means personal representative, trustee, guardian, conservator, or any other legal representative.

(f) "Internal Revenue Code" means the United States Internal Revenue Code of 1954, as amended from time to time. Each reference to a section of the Internal Revenue Code refers as well to any subsequent provisions of law enacted in its place.

(g) "Gift" refers to all devises made in a will.

Comment. Section 6180 continues former Probate Code Section 1030 without substantive change. See also Sections 32 ("devise" defined), 88 ("will" defined), 58.5 ("personal representative" defined), 10 (singular includes plural).

§ 6181. Application of article

6181. (a) This article applies to any distribution made after January 1, 1983, whether the testator died before, on, or after that date. However, this article does not apply to any will the terms of which expressly or by necessary implication make this article inapplicable.

(b) By an appropriate statement made in the testator's will, a testator may incorporate by reference the terms of this article, or any of its provisions, as it may exist at the time the testator signs

the will. The effect of incorporating this article or any of its provisions in a will is to make the incorporated provision a part of the will as though the language of the incorporated provision was set forth verbatim in the will. Unless a will incorporating any provision of this article expressly provides otherwise, the will automatically incorporates any of the provision's amendments.

Comment. Section 6181 continues former Probate Code Section 1031 without substantive change. This article applies to trusts as well as wills. See Section 15005 (law applicable to marital deduction gifts in trust).

#### § 6182. Marital deduction gifts

6182. (a) If a will contains a marital deduction gift, the provisions of the will, including any power, duty, or discretionary authority given to a fiduciary, shall be construed to comply with the marital deduction provisions of the Internal Revenue Code and the regulations thereunder in order to conform to the intent of the gift. Whether the will contains a marital deduction gift depends upon the intention of the testator at the time the will is executed.

(b) If the testator has adequately evidenced an intention to make a marital deduction gift, the fiduciary shall not take any action or have any power that may impair the deduction.

(c) This article does not apply to a trust that qualifies for the marital deduction under Section 20.2056(e)-2(b) of the Code of Federal Regulations (the so-called "estate trust").

(d) This article neither requires nor prohibits a fiduciary making the election referred to in Section 2056(b)(7) of the Internal Revenue Code.

Comment. Section 6182 continues subdivision (a) of former Probate Code Section 1032 without substantive change.

#### § 6183. Charitable remainder unitrusts and annuity trusts

6183. (a) If a will indicates the testator's intention at the time the will is executed to comply with the Internal Revenue Code requirements for a charitable remainder unitrust or a charitable remainder annuity trust as each is defined in Section 664 of the Internal Revenue Code, the provisions of the will, including any

power, duty, or discretionary authority given to a fiduciary, shall be construed to comply with the charitable deduction provisions of Section 2055 of the Internal Revenue Code and the charitable remainder trust provisions of Section 664 of the Internal Revenue Code in order to conform to that intent. In no event shall the fiduciary take any action or have any power that may impair the charitable deduction. After the death of the testator, the provisions of the will may be augmented in any manner consistent with subdivision (e) of Section 2055 of the Internal Revenue Code upon a petition provided for in [subdivision (b) of Section 1120] of the Estates and Trusts Code.

Comment. Section 6183 continues subdivision (b) of former Probate Code Section 1032 without substantive change.

§ 6184. Satisfaction of a pecuniary devise

6184. (a) If a will authorizes the fiduciary to satisfy a pecuniary devise wholly or partly by distribution of property other than money, an asset selected for that purpose shall be valued at its fair market value on the date of distribution, unless the will expressly provides otherwise. If the will permits the fiduciary to value an asset selected for distribution as of a date other than the date of distribution, then, unless the will expressly provides otherwise, the assets selected by the fiduciary for that purpose shall have an aggregate fair market value on the date or dates of distribution which, when added to any cash distributed, will amount to no less than the amount of the pecuniary devise as stated in, or determined by, the will.

(b) A marital deduction gift shall be satisfied with only assets that qualify for the marital deduction.

Comment. Section 6184 continues former Probate Code Section 1033 without substantive change.

§ 6185. Maximum marital deduction for will dated September 13, 1981, or earlier

6185. If a will signed on or before September 13, 1981, indicates the testator's intention to make a gift that will provide the testator's estate with the maximum marital deduction, then the

will pass to the recipient an amount equal to the maximum marital deduction that would have been allowed as of the date of the testator's death for federal estate tax purposes under federal law as it existed before August 13, 1981, (before the applicability of the Economic Recovery Tax Act of 1981) adjusted under all of the following, if applicable:

(a) The provisions of Section 2056(c)(1)(B) and (C) of the Internal Revenue Code as were in effect immediately before the Economic Recovery Tax Act of 1981, if required.

(b) So that the testator's gross estate does not include any property by reason of Section 2602(c)(5)(A) of the Internal Revenue Code.

(c) To reduce the amount passing under the gift by the final federal estate tax values of any other asset (1) passing from the testator to the testator's surviving spouse under the testator's will or outside of the will and (2) that qualifies for the marital deduction.

Comment. Section 6185 continues former Probate Code Section 1034 without substantive change.

#### § 6186. Marital deduction gift in trust

6186. If a will indicates the testator's intention to make a marital deduction gift in trust, in addition to the other provisions of this article, each of the following provisions also applies to the trust:

(a) The only income beneficiary of a marital deduction trust shall be the testator's surviving spouse.

(b) The income beneficiary shall be entitled to all of the trust income until the trust terminates.

(c) The trust income shall be payable to the income beneficiary not less frequently than annually.

(d) The income beneficiary shall have the right to require that the trustee of the trust make any unproductive property productive or to convert it into productive property within a reasonable time.

(e) Except in the case of a qualified terminable interest property resulting from an election pursuant to Section 2056(b)(7) of

the Internal Revenue Code, upon termination of the trust, all of the remaining trust assets, including accrued or undistributed income, shall pass either to the income beneficiary or pursuant to the exercise of a general power of appointment granted to the income beneficiary in favor of the income beneficiary's estate or to any other person or entity, in trust or outright. The general power of appointment shall be exercisable by the income beneficiary alone and in all events and the income beneficiary, or a fiduciary acting in behalf of the income beneficiary if the income beneficiary is then a minor or incompetent, may exercise the power in a will or an instrument other than a will unless the instrument creating the power specifically directs otherwise.

Comment. Section 6186 continues former Probate Code Section 1035 without substantive change.

§ 6187. Survivorship requirement for marital deduction gift

6187. If a will contains a marital deduction gift, whether outright or in trust and whether or not there is a specific reference to this article, any survivorship requirement expressed in the will in excess of six months shall not apply to the property passing under a marital deduction, but shall be limited to a six-month period beginning with the testator's death.

Comment. Section 6187 continues former Probate Code Section 1036 without substantive change.

§ 6188. No inference as to prior law

6188. No inference as to the law as it might have existed before the enactment of this article, or before the enactment of the previously existing provisions the substance of which this article continues, shall be drawn from the enactment of this article or from the enactment of the previously existing provisions the substance of which this article continues.

Comment. Section 6188 continues former Probate Code Section 1037 without substantive change.

§ 6189. Severability clause

6189. If any provision of this article or application thereof to any person or circumstances is held invalid, that invalidity shall not affect other provisions or applications of the article that can be given effect without the invalidated provision or application, and to this end the provisions of this article are declared to be severable.

Comment. Section 6189 continues former Probate Code Section 1038 without substantive change.

§ 6190. Bona fide purchaser

6190. The failure to comply with the provisions of this article shall not invalidate the interest of a good faith purchaser, lessee, or encumbrancer for value in real property acquired without knowledge of an alleged violation of this article.

Comment. Section 6190 continues the substance of former Section 1039.



Exhibit 2

Probate Code § 1030 (repealed)

Comment. Former Section 1030 is continued without substantive change in Section 6180 (definitions).

Probate Code § 1031 (repealed)

Comment. Former Section 1031 is continued without substantive change in Section 6181 (application of chapter).

Probate Code § 1032 (repealed)

Comment. Former Section 1032 is continued without substantive change in Sections 6182 (marital deduction gifts) and 6183 (charitable remainder unitrusts and annuity trusts).

Probate Code § 1033 (repealed)

Comment. Former Section 1033 is continued without substantive change in Section 6184 (satisfaction of a pecuniary devise).

Probate Code § 1034 (repealed)

Comment. Former Section 1034 is continued without substantive change in Section 6185 (maximum marital deduction for will dated September 13, 1981, or earlier).

Probate Code § 1035 (repealed)

Comment. Former Section 1035 is continued without substantive change in Section 6186 (marital deduction gift in trust).

Probate Code § 1036 (repealed)

Comment. Former Section 1036 is continued without substantive change in Section 6187 (survivorship requirement for marital deduction gift).

Probate Code § 1037 (repealed)

Comment. Former Section 1037 is continued without substantive change in Section 6188 (no inference as to prior law).

Probate Code § 1038 (repealed)

Comment. Former Section 1038 is continued without substantive change in Section 6189 (severability clause).

Probate Code § 1039 (repealed)

Comment. Former Section 1039 is continued without substantive change in Section 6190 (bona fide purchaser).