

Memorandum 85-65

Subject: Study L-800 - Probate Code (Abatement; Distribution of Interest and Income)

Attached to this Memorandum is a staff draft of provisions concerning abatement and distribution of interest and income accruing during administration. Also attached as Exhibit 1 are existing Sections 660-665 of the Probate Code which the draft would replace.

Two previous drafts were reviewed by our consultant, Professor Edward Halbach, and by the designated State Bar advisors, Matthew Rae and Irwin Goldring. This draft incorporates a number of their suggestions. The important questions raised by the draft are discussed below.

Location of Provisions in the New Probate Code

Professor Halbach thought these provisions should go in the chapter on rules of construction of wills. The staff agrees with Professor Halbach's view. These provisions apply only where there is a will, and, like the other rules of construction, are subject to a contrary intention of the testator. Ademption is closely related to abatement, and the ademption provisions are now found in the chapter on rules of construction of wills. The staff has therefore prepared this draft as a new Article 4 to be added to the existing chapter on rules of construction of wills.

Retroactive Application of New Provisions

The attached draft provides rules which are intended to carry out the likely intent of the testator, and the changes it makes to existing law are relatively minor. For this reason, the staff proposes to make the draft apply to all estates on and after the operative date, even though the will was drawn before the operative date and the testator dies before the operative date. Does the Commission approve the proposed retroactive application of the new provisions?

ABATEMENT

The most important policy questions presented by the attached draft are found in Section 6183 (abatement). These are (1) whether general devises should abate before specific devises or whether they should abate proportionately, and (2) whether within each class there should be a preference for the spouse and kindred of the testator, and perhaps also for kindred of the testator's spouse.

Preference for Specific Over General Devise

Under existing California law, specific devises do not generally have priority over general devises. If there is insufficient property to satisfy both, they abate proportionately. See Prob. Code §§ 750, 751, 753; 24 Calif. L. Rev. 744 (1936); 7 B. Witkin, Summary of California Law Wills and Probate § 450, at 5892 (8th ed. 1974).

Under the Uniform Probate Code and in the U.S. generally, general devises abate before specific devises. UPC § 3-902; 80 Am. Jur.2d Wills § 1737, at 791 (1975); Annot., 101 A.L.R. 704, 712 (1936).

The attached draft (Section 6183) departs from California's existing pro rata rule, and follows the UPC and general U.S. rule by requiring general devises to abate before specific ones (subject to the court's discretion to require a different abatement scheme to carry out the testator's express or implied purpose). Professor Halbach is not sure that the proposed change is an improvement.

The question should be decided on the basis of what the average testator would intend. The staff is inclined to favor the proposed rule requiring general devises to abate before specific ones (subject to the court's discretion to carry out the testator's intent) because of the disadvantageous effect on specific devises of the existing ademption and non-exoneration rules. If the subject of a specific devise no longer exists or is not a part of the testator's estate at death, the gift is adeemed (revoked) by extinction. No substitute gift is made, with the result that the specific devisee takes nothing. See 7 B. Witkin, supra § 218, at 5728. This sometimes harsh rule is based on the assumption that the testator intended to give that property and no other.

Under the newly-enacted non-exoneration rule, if the subject of a specific devise is encumbered, the specific devisee generally takes the property subject to the encumbrance. See Prob. Code §§ 6165, 6170.

In these two respects, a general devisee is in a better position than a specific devisee. A general gift is not subject to ademption, nor does it pass subject to an encumbrance, since no particular item of property is involved.

On the other hand, these advantages of a general devisee may be offset by the rule that a specific devise carries with it any earnings on the devise from the date of death (see proposed Section 6185), and by the tendency of a specific devise to appreciate in value between the time of death and distribution.

It seems more consistent with the assumption that the testator wanted the specific devisee to have the particular item of property to require general devises to abate before specific ones when the estate is insufficient to satisfy both.

Does the Commission approve the staff proposal to require general devises to abate before specific ones?

Preference Within Classes for Testator's Spouse and Kindred

The draft continues the existing rule that, within a class of devisees (specific or general), a devise to a spouse or kindred of the testator abates only after abatement of devises to persons not related to the testator. See proposed Section 6183(b) (continuing existing Section 752). Professor Halbach asks two questions:

(1) Is it good policy to favor the testator's spouse and kindred when the will is silent on the matter?

(2) If it is good policy, should the language be broadened to include kindred of the testator's spouse, the way we have done in the antilapse statute (Section 6147)?

The Uniform Probate Code does not state a preference for the testator's spouse or kindred, but it does say that "if the testamentary plan or the express or implied purpose of the devise would be defeated by the order of abatement stated in subsection (a), the shares of the distributees abate as may be found necessary to give effect to the intention of the testator." UPC § 3-902(b). The UPC Comment amplifies on this by saying that the quoted language

directs that consideration be given to the purpose of a testator. This may be revealed in many ways. Thus, it is commonly held that, even in the absence of statute, general legacies to a wife, or to persons with respect to which the testator is in loco parentis, are to be preferred to other legacies in the same class because this accords with the probable purpose of the legacies.

In other U.S. jurisdictions, it appears that there is generally no preference within classes of devisees where the will is silent. Although a few cases give preference for a gift for support or education, the "more accepted view" is that this fact alone does not create a preference. The presumption is that the testator intended equality, and the burden is on the claimant to show that he or she should have a preference. Thus the general rule is that, within classes, abatement is pro rata. 80 Am. Jur.2d Wills §§ 1737, 1741, at 792, 795-96 (1975).

The staff is inclined to favor a UPC-type provision, with no statutory preference for the testator's spouse and kindred, but with a provision that the court may direct abatement as necessary to give effect to the intention of the testator. This would give the court broad discretion without imposing a mechanical rule. Does the Commission favor such a revision?

If the Commission wants to keep the statutory preference within classes for the testator's spouse and kindred, should the favored class be broadened to include kindred of the testator's spouse, like the antilapse statute (Section 6147)?

DISTRIBUTION OF INTEREST AND INCOME

Except as noted below, the attached staff draft continues existing law concerning distribution of interest and income accruing during administration (Prob. Code §§ 660-665).

Simple or Compound Interest

In general, the rule applicable to executors, administrators, and trustees is that interest is simple interest unless the fiduciary has been guilty of a willful breach of duty or has intentionally violated the obligations of his or her trust. Civil Code § 2262 (trustee's liability); see Estate of Cousins, 111 Cal. 441, 452, 44 P. 182 (1896); Wheeler v. Bolton, 92 Cal. 159, 172-73, 28 P. 558 (1891). Existing Section 663(c) appears to state a limited exception to the

simple interest rule in the case of annuities, legacies for maintenance, or periodic payments under a trust, by requiring interest on unpaid accumulations to be compounded annually. The attached draft replaces this special rule with the general rule providing for simple interest except where there is a willful breach.

Application of Provisions to Income from Real Property

By their terms, the existing provisions apply to interest and income from personal property but not from real property. However, case law has applied these provisions to mixed funds of real and personal property, saying that:

Identical considerations are involved . . . in ascertaining the testator's intent whether the gift is a legacy for maintenance, a trust of personal property for that purpose . . . , or a similar trust consisting of both real and personal property The nature of the property placed in trust should not require different conclusions where it appears that the testator's motives and desires were identical.

Estate of Marre, 18 Cal.2d 184, 189, 114 P.2d 586 (1941).

Based on this reasoning, the proposed draft applies the interest and income provisions equally to real and personal property.

Interest on General Nonpecuniary Devise

The attached staff draft (proposed Section 6186) continues the existing rule (Prob. Code § 663(a)) that if a general pecuniary gift is not paid by one year from the testator's death, the gift bears interest thereafter. The UPC has a similar provision, although interest commences one year from appointment of a personal representative rather than one year from death. UPC § 3-904.

Most general gifts are pecuniary. General nonpecuniary gifts, such as "ten shares of stock in XYZ Corporation" where the testator owns many such shares, or "ten cattle from my herd" without specification as to which ten, are infrequent. Neither the staff draft, existing California law, nor the UPC provide any rule for interest on a general nonpecuniary devise. Professor Halbach would provide such a rule by extending proposed Section 6186 to general nonpecuniary gifts to provide for interest on the value of the gift commencing one year from death.

The staff has been unable to find any reported decision on the question of whether interest is payable on a general nonpecuniary devise. This is probably because most general devises are pecuniary. Should the staff do as Professor Halbach suggests and provide for interest on the value of a general nonpecuniary devise, commencing one year from death?

Respectfully submitted,

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CHAPTER 5. RULES OF CONSTRUCTION OF WILLS

Article 4. Abatement, Interest, and Income

- § 6180. Definitions
- § 6181. Testator's intention controls
- § 6182. Article applies to devises in trust, for life, or other period
- § 6183. Abatement
- § 6184. Rate of interest
- § 6185. Earnings on specific devise
- § 6186. Interest on general pecuniary devise
- § 6187. Devise of interest or income; annuities
- § 6188. Remaining income to residuary or intestate distributees
- § 6189. Transitional provision

DISPOSITION OF EXISTING SECTIONS

CHAPTER 5. RULES OF CONSTRUCTION OF WILLS

Article 4. Abatement, Interest, and Income§ 6180. Definitions

6180. As used in this article:

(a) "Annuity" means a general or demonstrative devise of certain specified sums periodically.

(b) A "demonstrative devise" is a general devise to be paid or taken first from a particular fund or particular property, and, if necessary, from the testator's general estate.

(c) A "general devise" is a devise which is to be taken or paid from the testator's general estate, and is not intended to give a specific thing.

(d) A "residuary devise" is a devise which is to be taken or paid from that which remains after all specific devises, demonstrative devises, general devises, and annuities have been made.

(e) A "specific devise" is a devise of a specific thing.

Comment. Subdivision (a) of Section 6180 continues a portion of subdivision (c) of former Section 662 without substantive change. See generally Estate of Luckel, 151 Cal. App.2d 481, 312 P.2d 24 (1957). The language that an annuity is a general or demonstrative devise is new, but is consistent with prior law. See 7 B. Witkin, Summary of California Law Wills and Probate § 214, at 5725 (8th ed. 1974).

Subdivision (b) continues subdivision (b) of former Section 662 without substantive change, except that the former provision that a demonstrative gift is to be taken from particular "personal" property is not continued. At common law, a devise of real property could not be demonstrative because every devise of real property was regarded as specific. In re Estate of Woodworth, 31 Cal. 595, 610 (1867). However, California follows the modern rule that real property may be the subject of a general or demonstrative devise. See id. at 613-614 (devise of "one half of all the real estate of which" testator might "die possessed"). The language in subdivision (b) that a demonstrative devise is a general devise and may, if necessary, be paid from the testator's general estate is new, but is consistent with prior law. See 7 B. Witkin, supra.

Subdivision (c) is consistent with subdivision (e) of former Section 662 ("[a]ll other legacies are general legacies") and with case law. See Estate of Buck, 32 Cal.2d 372, 374, 196 P.2d 769 (1948); Estate of Sullivan, 128 Cal. App.2d 144, 146, 274 P.2d 946 (1954); Estate of Jones, 60 Cal. App.2d 795, 798, 141 P.2d 764 (1943).

Subdivision (d) is consistent with subdivision (d) of former Section 662.

Subdivision (e) is consistent with subdivision (a) of former Section 662 and with case law. See Estate of Ehrenfels, 241 Cal.

App.2d 215, 221, 50 Cal. Rptr. 358 (1966). See also Section 32 ("devise" defined).

§ 6181. Testator's intention controls

6181. The provisions of this article apply in the absence of [a contrary] [an express contrary] intention of the testator.

Comment. Section 6181 continues former Section 660 and the introductory clause of subdivision (a) of former Section 664 without substantive change.

Note. The staff is uncertain about the language in brackets above. Existing Section 660 says the provisions of the chapter are controlled by a testator's "express intention." Subdivision (a) of existing Section 664 says, "[u]nless otherwise provided by the will of the testator" But existing Section 6165 says, "[t]he rules of construction in this article apply in the absence of a contrary intention of the testator." The staff does not want to change existing law in this respect, but it seems also that Section 6181 should be consistent with Section 6165.

§ 6182. Article applies to devises in trust, for life, or other period

6182. The devises to which this article applies include devises in trust or for life or for any other period.

Comment. Section 6182 continues a portion of subdivision (a) of former Section 663 and a portion of subdivision (a) of former Section 664 without substantive change. See also Section 32 ("devise" defined).

§ 6183. Abatement

6183. (a) Shares of distributees abate as provided in this section for all purposes, including payment of the testator's debts, expenses of administration, family allowance, satisfying a share of a spouse or child not provided for in the testator's will, and payment or preferred devises under the testator's will, and without any priority as between real and personal property.

(b) Except as provided in subdivision (d), shares of distributees abate in the following order:

- (1) Property not disposed of by the will.
- (2) Residuary devises.
- (3) General devises to persons not related to the testator.
- (4) General devises to the testator's spouse or kindred.

(5) Specific devises to persons not related to the testator.

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

(c) For the purpose of subdivision (b), annuities and demonstrative devises have the priority of specific devises to the extent of the value of the property or funds primarily charged with their satisfaction, and have the priority of general devises to the extent of a failure or insufficiency of the charged property or funds.

(d) If the will expresses an order of abatement, or if the testamentary plan or the express or implied purpose of the devise would be defeated by the order of abatement stated in subdivisions (b) and (c), the shares of the distributees abate as the court determines is necessary to give effect to the intention of the testator.

(e) If the subject of a preferred devise is sold or used incident to administration, abatement shall be achieved by appropriate adjustments in, or contribution from, other interests in the remaining assets.

Comment. Subdivision (a) of Section 6183 continues a portion of the first sentence of former Section 750 and a portion of the introductory clause of former Section 751 without substantive change. The provision that there is no preference or priority as between real and personal property is drawn from Section 3-902 of the Uniform Probate Code and is consistent with the first sentence of former Section 754 and with California case law. See In re Estate of Woodworth, 31 Cal. 595, 614 (1867).

Subdivision (b) supersedes the second sentence of former Section 750 and all of former Sections 751 and 752. The provision of former Section 750 that specific and general devises are proportionately liable for debts, expenses of administration, and family allowance unless the court exempts specific devises to carry out the intention of the testator, is superseded by the new rule under Section 6183 that specific devises abate only after general devises have abated unless the court imposes proportional liability to carry out the intention of the testator. The preference within general and specific devises for the spouse and kindred of the testator is consistent with former Section 752. See Estate of Buck, 32 Cal.2d 372, 376, 196 P.2d 769 (1948).

Subdivision (c) is drawn from the second sentence of subdivision (a) of Section 3-902 of the Uniform Probate Code and is consistent with subdivision (c) of former Section 662. See also Section 8130 (purchase of annuity by personal representative).

Subdivision (d) is drawn from subdivision (b) of Section 3-902 of the Uniform Probate Code and is consistent with the portions of former Sections 750-752 relating to giving effect to the testator's intention.

Subdivision (e) is drawn from subdivision (c) of Uniform Probate Code Section 3-902 and is consistent with former Section 753. See also Sections 32 ("devise" defined), 6180 ("annuity," "demonstrative

devise," "general devise," "residuary devise," and "specific devise" defined).

§ 6184. Rate of interest

6184. (a) When interest is payable under this article, the rate of interest is that payable on a money judgment entered in this state. Except as provided in subdivision (b), such interest is simple interest.

(b) If the personal representative is guilty of a willful breach of duty or has intentionally violated the obligations of his or her trust, interest is compounded annually.

Comment. The first sentence of subdivision (a) of Section 6184 continues portions of subdivisions (a) and (c) of former Section 663. For the rate of interest payable on a money judgment entered in this state, see Code Civ. Proc. § 685.010 (10 per cent per annum on unpaid principal). The second sentence of subdivision (a) and all of subdivision (b) are new and codify case law. See *Estate of Cousins*, 111 Cal. 441, 452, 44 P. 182 (1896); *Wheeler v. Bolton*, 92 Cal. 159, 172-73, 28 P. 558 (1891). Cf. Civil Code § 2262 (trustee's liability for interest) [to be superseded by proposed Section 973 of Probate Code, per Memo 85-32]. See also Section 59 ("personal representative" defined).

§ 6185. Earnings on specific devise

6185. (a) A specific devise carries with it the earnings on that specific property from the date of death, less taxes and other expenses attributable to that property during administration of the estate.

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

Comment. Section 6185 is new and codifies case law. See, e.g., *In re Estate of Daly*, 202 Cal. 284, 287, 260 P. 296 (1927) (stock); *Estate of McKenzie*, 199 Cal. App.2d 393, 400, 18 Cal. Rptr. 680 (1962) (inheritance from another estate); *Estate of Bixby*, 140 Cal. App.2d 326, 334, 295 P.2d 68 (1956) (stock). Section 8893 applies to specific devises both of real property and of personal property. See Sections 32 ("devise" defined), 6180 ("specific devise" defined).

§ 6186. Interest on general pecuniary devise

6186. Except as provided in Section 6187, if a general pecuniary devise is not paid prior to the first anniversary of the testator's death, the devise bears interest thereafter.

Comment. Section 6186 continues subdivision (a) of former Section 663 without substantive change. The language of subdivision (a) of former Section 663 that the section applied to gifts in trust is continued in substance in Section 8891. For the rate of interest, see Section 6184.

The introductory clause of Section 6186 is new and recognizes the special rule applicable to a general devise which is an annuity. Section 6186 applies to general devises both of real property and of personal property. See Sections 32 ("devise" defined), 6180 ("general devise" defined).

§ 6187. Devise of interest or income; annuities

6187. (a) In case of a devise of the interest or income of a specific fund, the interest or income accrues from the testator's death.

(b) Annuities commence at the testator's death and are due at the end of the annual, monthly, or other specified period.

(c) Whenever an annuitant, devisee of a devise for support or maintenance, or beneficiary of a trust is entitled to periodic payments or trust income commencing at the testator's death, he or she is entitled to interest on the amount of any unpaid accumulations of such payments or income held by the personal representative after the payment date, commencing one year after death.

Comment. Subdivision (a) of Section 6187 continues former Section 661 without substantive change. Subdivision (b) continues subdivision (b) of former Section 663. Subdivision (c) continues subdivision (c) of former Section 663 without substantive change.

Subdivisions (a) and (b) are closely related. Subdivision (a) applies to the case where the will makes a gift of interest or income of a specific fund. See, e.g., *Estate of Peterson*, 92 Cal. App.2d 677, 682, 207 P.2d 607 (1949) (gift of "entire net income" of trust estate); *Estate of Schiffmann*, 86 Cal. App.2d 638, 642-44, 195 P.2d 484 (1948) (gift of "entire net income received from the trust estate and available for distribution"); *Estate of DeLano*, 62 Cal. App.2d 808, 816, 145 P.2d 672 (1944) (gift of "net proceeds" of the trust); *Estate of Hyland*, 58 Cal. App.2d 556, 137 P.2d 73 (1943) (gift of "the net income, revenue and profit" from the trust "together with as much of the corpus and principal as may be necessary" for support); *Estate of Dasher*, 53 Cal. App.2d 721, 724-25, 128 P.2d 380 (1942) (gift of net income from trust estate, distinguished from annuity); *In re Estate of Lair*, 38 Cal. App.2d 737, 740, 102 P.2d 436 (1940) (gift of entire net income from trust). Subdivision (b) applies to annuities, which are gifts of certain sums periodically. See, e.g., *In re Estate of Smith*, 145 Cal. 118, 78 P. 369 (1904) (gift of "\$125.00 per month as long as she shall live"); *Estate of Murray*, 70 Cal. App.2d 300, 160 P.2d 880 (1945) (gift of specified monthly sums). There are also hybrid cases which have earmarks both of a devise of income and of an annuity. See, e.g., *Estate of Platt*, 21 Cal.2d 343, 131 P.2d 825

(1942) (gift of \$250 per month to wife, excess not exceeding \$250 to son, excess over that divided equally between wife and son); In re Estate of Watson, 32 Cal. App.2d 594, 90 P.2d 349 (1939) (gift of at least \$200 per month payable from residue only in the event a trust was established); In re Estate of McGirl, 125 Cal. App. 310, 13 P.2d 746 (1932) (gift of "interest upon said sum" of \$5,000 to be paid at \$25 per month). Whether the gift is a devise of interest or income of a specific fund under subdivision (a), or is an annuity under subdivision (b), the payments accrue from the testator's death.

Subdivision (a) governs the date of accrual of interest or income, not the date of payment. Estate of Platt, supra at 347, 131 P.2d at ____.

The language of subdivision (c) of former Section 663 that interest is computed on unpaid accumulations held "on each anniversary of the decedent's death" is superseded by Section 8892 (simple interest, compound interest). See also Section 32 ("devise" defined), 34 ("devisee" defined), 59 ("personal representative" defined), 6180 ("annuity" defined).

§ 6188. Remaining income to residuary or intestate distributees

6188. (a) Net income received during administration not paid out under other provisions of this article shall be distributed pro rata as income among all distributees of residuary or intestate property. If a distributee takes in trust or for life or for a term of years, the pro rata share of income is trust income or belongs to the tenant for life or the term of years.

(b) Net income under subdivision (a) includes net income from property sold during administration.

Comment. Section 6188 continues a portion of former Section 664 without substantive change. The portion of former Section 664 that net income is paid as provided in that section "[u]nless otherwise provided by the will of the testator" is continued in substance in Section 6181.

The reference in Section 6188 to intestate property is new, and recognizes that there may be a partial intestacy in testate estates. See also Sections 58 ("personal property" defined), 68 ("real property" defined), 6182 (article applies to devises in trust or for life or for any other period).

§ 6189. Transitional provision

6189. (a) The provisions of this article apply on the operative date without regard to when the will was executed or when the decedent died.

(b) A reference in a written instrument, including a will or trust, to a provision of former Chapter 8 (commencing with Section 160) of former Division 1, or former Chapter 11 (commencing with

Section 660) of former Division 3, shall be deemed to be a reference to the corresponding provisions of this article.

Comment. Subdivision (a) of Section 6189 supersedes subdivision (a) of former Section 665, and makes clear that this article applies to estate proceedings which are pending on the operative date.

Subdivision (b) continues subdivision (b) of former Section 665 without substantive change, and includes a reference to former Chapter 11 of Division 3 in which former Section 665 was found.

DISPOSITION OF EXISTING SECTIONS

DIVISION 3. ADMINISTRATION OF ESTATES OF DECEDENTS

CHAPTER 11. LEGACIES AND INTEREST

§ 660 (repealed). Testator's intention controls

Comment. Former Section 660 is continued in Section 6181 without substantive change.

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

Comment. Former Section 661 is continued in subdivision (a) of Section 6187 without substantive change.

§ 662 (repealed). Kinds of legacies

Comment. The first portion of subdivision (a) of former Section 662 is continued in subdivision (e) of Section 6180 ("specific devise" defined) without substantive change. The last portion of subdivision (a) (if specific gift fails, resort cannot be had to testator's other property) is governed by subdivision (e) of Section 6183 and by the provisions on ademption. See, e.g., Sections 6165, 6171-6173.

Subdivision (b) of former Section 662 is continued in subdivision (b) of Section 6180 ("demonstrative devise" defined) without substantive change.

The first portion of subdivision (c) of former Section 662 is continued in subdivision (a) of Section 6180 ("annuity" defined) without substantive change. The last portion of subdivision (c) is continued in subdivision (c) of Section 6183 without substantive change.

Subdivision (d) of former Section 662 is continued in subdivision (d) of Section 6180 ("residuary devise" defined) without substantive change.

Subdivision (e) of former Section 662 is continued in subdivision (c) of Section 6180 ("general devise" defined) without substantive change.

§ 663 (repealed). Interest; annuities

Comment. Subdivision (a) of Section 663 is continued in Sections 6182 (devises in trust), 6184 (rate of interest), and 6186 (interest on general pecuniary devise), without substantive change.

Subdivision (b) of Section 663 is continued in subdivision (b) of Section 6187.

Subdivision (c) of former Section 663 is superseded by Section 6184 (rate of interest, compounding) and by subdivision (c) of Section 6187 (interest on unpaid periodic payments). Under subdivision (c) of former Section 663, it appeared that interest on unpaid accumulations of periodic payments were compounded annually. Under Section 6184, interest is simple interest unless the personal representative is guilty of a willful breach of duty or has intentionally violated the obligations of the trust.

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

Comment. Former Section 664 is continued in Sections 6181 (testator's intention controls), 6182 (article applies to devises in trust, for life, or for any other period), and 6188 (remaining income goes to residuary or intestate distributees), without substantive change.

§ 665 (repealed). Transitional provision

Comment. Subdivision (a) of former Section 665 is superseded by subdivision (a) of Section 6189. Subdivision (b) of former Section 665 is continued in subdivision (b) of Section 6189 without substantive change.