

Memorandum 86-59

Subject: Study L-1038 - Estate and Trust Code (Abatement)

Attached to this Memorandum are redrafted provisions concerning abatement, revised to reflect Commission decisions at the August 1985 meeting. The abatement provisions have been split out from those on interest and income and put in a separate article. The provisions on interest and income will be presented in a separate Memorandum.

Abatement of Specific and General Devises

The Commission decided that, when estate assets are insufficient to satisfy all specific and general devises, the devises should abate in proportion to their values, with court discretion to order some other abatement scheme if necessary to carry out the testator's intent. This rule is set out in Sections 6192-6193, attached.

In making this decision, the Commission was aware that it is almost the universal rule elsewhere that general devises are exhausted before specific devises are reduced. However, the staff erroneously advised the Commission that California at present follows the proportional rule the Commission adopted.

Although it appears that California did have a proportional rule before 1982, the staff has found a 1982 case in which the California Supreme court ruled that, in the absence of a contrary intent of the testator, general devises abate before specific ones. Estate of Jenanyan, 31 Cal.3d 703, 712, 646 P.2d 196, 183 Cal. Rptr. 525 (1982).

Although the staff does not urge that the Commission reconsider its decision to adopt a proportional rule, the Commission should be aware that we will not be following existing California law as the staff thought. Rather the proposed rule will be a change in California law, as well as a departure from the rule "almost universally followed" elsewhere. Id.

Our State Bar advisers prefer the proportional rule the Commission has adopted. Professor Halbach does not have a strong preference either way. Is the Commission satisfied with the proportional rule of proposed Section 6192?

### Preference for Testator's Spouse and Kindred

The Commission decided to continue the rule of existing law that, within classes, gifts to nonrelatives must be exhausted before gifts to the testator's spouse or kindred are reduced. See Prob. Code § 752; Estate of DeSanti, 53 Cal. App.2d 716, 720-21, 128 P.2d 434 (1942). This rule is stated in proposed Section 6192 attached.

In other U.S. jurisdictions, there is not an across-the-board preference for a spouse or kindred, although a few cases give a preference for gifts for support or education. See 80 Am. Jur.2d Wills §§ 1737, 1741, at 792, 795-96 (1975). The UPC does not codify a preference for spouse or kindred, but the court has broad discretion to find that that was what the testator intended. See UPC § 3-902. Moreover, the UPC Comment notes that "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."

Under the Jenanyan rule, general gifts are in a separate class from specific gifts. See also Estate of DiSanti, 53 Cal. App.2d at 719-20. It would seem to follow from this that, under the Jenanyan rule, general gifts to nonrelatives must be exhausted first, then general gifts to a spouse or kindred, then specific gifts to nonrelatives, and finally specific gifts to a spouse or kindred.

The effect of adopting a proportional rule of abatement is to treat general and specific gifts as a single class for this purpose. See proposed Section 6192. Thus, general and specific gifts to nonrelatives will abate completely before there is any reduction of general or specific gifts to a spouse or kindred. Since this is a probably a change in California law under Jenanyan, it will increase the disparity between nonrelatives on the one hand, and a spouse and kindred on the other. Is this the result the Commission wants?

### Court Discretion to Deviate From Abatement Rules

Proposed Section 6190 continues existing law by making the statutory abatement rules subject to a contrary intention in the testator's will. Should the court be able to look beyond express language of the will to determine the testator's intent concerning

abatement? The cases are not consistent. Compare Estate of Dolley, 265 Cal. App.2d 63, 70, 71 Cal. Rptr. 56 (1968) (requiring express provision in the will), with Estate of Jenanyan, 31 Cal.3d 703, 713-14, 646 P.2d 196, 183 Cal. Rptr. 525 (1982) (permitting extrinsic evidence).

The Uniform Probate Code gives the court broad discretion to deviate from the statutory abatement scheme "if the testamentary plan or the express or implied purpose of the devise" would otherwise be defeated. UPC § 3-902(b). The staff recommends the broad discretion of the UPC. The testator usually does not anticipate that the estate will be insufficient to carry out the will. It seems better to give the court latitude to do justice in a case the testator did not anticipate. Thus, Section 6193 contains the broad court discretion of the UPC, consistent with the Jenanyan case. Does the Commission approve Section 6193?

#### Abatement in Pretermisison Cases

Under existing law, when the testator's spouse or child omitted from the will gets a statutory share of the estate, a special abatement rule applies: The shares of all devisees under the will abate proportionately, whether specific, general, or residuary. Prob. Code §§ 6562, 6573 (attached as Exhibit 1, pink pages). Normally, residuary devises must be exhausted before resorting to general or specific devises. The attached staff draft does not disturb the special rule for pretermisison cases.

The reasons for a special rule in pretermisison cases are:

(1) The general rule requires exhaustion of residuary devises before resorting to general and specific gifts. But residuary devisees are usually those nearest and dearest to the testator, i.e., the testator's spouse and children. Thus if the general rule were applied in pretermisison cases, the result would likely be to take residuary devises to a spouse and children to provide a statutory share for an omitted spouse or child.

The statutory share of an omitted spouse or child is large in relation to the total estate: An omitted spouse takes all community and quasi-community property and one-third or one-half of the decedent's separate property. Prob. Code § 6560. An omitted child

may take as much as half of the decedent's separate property. Prob. Code §§ 6401-6402, 6570. Thus, if the general rule were applied, there would be a greater likelihood that the omitted spouse or child would receive a larger share than those mentioned in the will.

(2) The general rule exhausts residuary devises first because that is what the testator means by "residuary." However, pretermisison cases are by definition unanticipated by the testator. It serves no purpose to insist on a literal reading of the word "residuary" when the testator obviously did not anticipate the pretermisison award.

Does the Commission approve the staff recommendation to keep the special abatement rule for pretermisison cases?

Respectfully submitted,

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## Abatement

If the testator's estate is insufficient to satisfy all the devises made by the will, they must be reduced (abated) according to some formula. If the testator's will specifies how the devises shall be abated, the will controls.<sup>1</sup> If the will is silent, abatement is achieved according to statutory rules.<sup>2</sup> Under existing law, property not disposed of by the will is exhausted first, then residuary devises, then general devises, and finally specific devises.<sup>3</sup> Within each class, the testators' spouse and kindred are preferred, so that devises to nonrelatives within each class are exhausted first before shares of a spouse or kindred are reduced.<sup>4</sup>

The Commission recommends that, for the purpose of abatement, general and specific devises be treated as a single class so they will abate proportionately. It seems unlikely the testator would want to favor specific devisees over general ones, and that a proportional abatement rule will correspond more closely to the intent of the average testator. With this exception, the substance of the existing abatement rules is continued in the new law.<sup>5</sup>

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<sup>1</sup> Prob. Code §§ 750-752; Estate of Jenanyan, 31 Cal.3d 703, 712, 646 P.2d 196, 183 Cal. Rptr. 525 (1982).

<sup>2</sup> See Prob. Code §§ 750-753.

<sup>3</sup> Prob. Code §§ 750-751; Estate of Jenanyan, 31 Cal.3d 703, 711-12, 646 P.2d 196, 183 Cal. Rptr. 525 (1982).

<sup>4</sup> Prob. Code § 752; Estate of DeSanti, 53 Cal. App.2d 716, 719-21, 128 P.2d 434 (1942); In re Estate of Wever, 12 Cal. App.2d 237, 242, 55 P.2d 279 (1936).

<sup>5</sup> The Commission's recommendation to treat general and specific devises as a single class for the purpose of abatement will increase the disparity between the testator's spouse and kindred and nonrelatives created by the preference for a spouse and kindred. Under existing law, it appears that general gifts to nonrelatives must be abated first, then general gifts to the testator's spouse and kindred, then specific gifts to nonrelatives, and finally specific gifts to a spouse and kindred. See Prob. Code § 752; Estate of Jenanyan, 31 Cal.3d 703, 711-12, 646 P.2d 196, 183 Cal. Rptr. 525 (1982). Under the proposed law, general and specific gifts to nonrelatives will abate completely before there is any reduction of general or specific gifts to a spouse or kindred.

CHAPTER 5. RULES OF CONSTRUCTION OF WILLS

Article 5. Abatement

- § 6190. Testator's intention controls
- § 6191. Purposes for which abatement made
- § 6192. Order of abatement
- § 6193. Court discretion to carry out testator's intent
- § 6194. Abatement after sale or use incident to administration

DISPOSITION OF EXISTING SECTIONS

## CHAPTER 5. RULES OF CONSTRUCTION OF WILLS

Article 5. Abatement§ 6190. Testator's intention controls

6190. The provisions of this article apply where the intention of the testator is not indicated by the will.

Comment. Section 6190 continues the substance of a portion of the first sentence of former Probate Code Section 750, paragraph (1) of former Probate Code Section 751, and a portion of former Probate Code Section 752. The language of Section 6190 is drawn from Sections 6140(b) and 6165.

## CROSS-REFERENCES

## Definitions

Will § 88

§ 6191. Purposes for which abatement made

6191. Except as provided in Sections 6562 and 6573, shares of distributees abate as provided in this article for all purposes, including payment of the testator's debts, expenses of administration, family allowance, satisfaction of [preferred] devisees under the testator's will, and payment of expenses on specifically devised property pursuant to Section 6184, and without any priority as between real and personal property.

Comment. Section 6191 continues the substance of a portion of the first sentence of former Probate Code Section 750 and a portion of the introductory clause of former Probate Code Section 751. [The reference to "preferred" devisees means devisees which have a higher priority either under the decedent's will or under the abatement rules of this article.] 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 Probate Code Section 754 and with California case law. See In re Estate of Woodworth, 31 Cal. 595, 614 (1867).

## CROSS-REFERENCES

## Definitions

Devise § 32

Personal property § 57

Property § 62

Real property § 68

Will § 88

Note. The word "preferred" in Section 6191 is in brackets because our State Bar advisors have questioned the meaning and usefulness of the word. The staff has added bracketed language to the Comment to make the meaning of this word clear. Is this satisfactory?

§ 6192. Order of abatement

6192. Except as provided in Section 6193, shares of distributees abate in the following order:

(a) Property not disposed of by the will.

(b) Residuary devises.

(c) All other devises to persons not related to the testator, in proportion to the value or amount of each such devise.

(d) All other devises to the testator's spouse or kindred, in proportion to the value or amount of each such devise.

Comment. Section 6192 supersedes the second sentence of former Probate Code Section 750 and all of former Probate Code Sections 751 and 752. Under subdivisions (c) and (d) of Section 6192, general and specific devises have equal priority and must abate proportionately unless the court orders some other scheme pursuant to Section 6193. This changes the rule of Estate of Jenanyan, 31 Cal.3d 703, 711-12, 646 P.2d 196, 183 Cal. Rptr. 525 (1982).

Subdivisions (c) and (d) of Section 6192 continue the preference for the testators' spouse and kindred found in former Probate Code Section 752. See Estate of Buck, 32 Cal.2d 372, 376, 196 P.2d 769 (1948). However, in requiring general and specific gifts to persons not related to the testator to be exhausted before resorting to general and specific gifts to the testator's spouse or kindred, subdivisions (c) and (d) may change prior law. Under former Probate Code Section 752, the preference for the testator's spouse and kindred was only as between gifts of the same class. Estate of DeSanti, 53 Cal. App.2d 716, 719-20, 128 P.2d 434 (1942). For this purpose, general gifts may have been treated as a class separate from specific gifts. See Estate of Jenanyan, 31 Cal.3d 703, 712, 646 P.2d 196, 183 Cal. Rptr. 525 (1982). If so, general devises to the testator's spouse or kindred abated before specific devises to persons not related to the testator.

CROSS-REFERENCES

Definitions

Devise § 32

Person § 56

Property § 62

Will § 88



§ 6193. Court discretion to carry out testator's intent

6193. 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 Section 6192, the shares of the distributees abate as the court determines is necessary to give effect to the intention [or purpose] of the testator.

Comment. Section 6193 is drawn from subdivision (b) of Section 3-902 of the Uniform Probate Code. Section 6193 is generally consistent with prior law. See former Probate Code Sections 750-752; Estate of Jenanyan, 31 Cal.3d 703, 713-14, 646 P.2d 196, 183 Cal. Rptr. 525 (1982) (extrinsic evidence admissible concerning abatement).

CROSS-REFERENCES

Definitions

Court § 29  
Devise § 32  
Will § 88

Note. Professor Halbach suggests the addition of the bracketed words "or purpose" in Section 6193, so the language of the last portion of the sentence will be parallel to the introductory clause. Should we add these words?

§ 6194. Abatement after sale or use incident to administration

6194. 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. Section 6194 is drawn from subdivision (c) of Uniform Probate Code Section 3-902 and is consistent with former Probate Code Section 753. [The reference to "preferred" devises means devises which have a higher priority either under the decedent's will or under the abatement rules of this article.]

CROSS-REFERENCES

Definitions

Devise § 32

Note. The word "preferred" in Section 6194 is in brackets because our State Bar advisors have questioned the meaning and usefulness of the word. The staff has added bracketed language to the Comment to make the meaning of this word clear. Is this satisfactory?

## DISPOSITION OF EXISTING SECTIONS

### DIVISION 3. ADMINISTRATION OF ESTATES OF DECEDENTS

Probate Code § 750 (repealed). Abatement for payment of debts,  
expenses of administration, and family allowance

Comment. The first sentence of former Probate Code Section 750 is continued in Estate & Trust Code Sections 6190 and 6191 without substantive change. The first portion of the second sentence of former Probate Code Section 750 is superseded by Estate & Trust Code Section 6192. The last portion of the second sentence of former Probate Code Section 750 (court discretion) is superseded by Estate & Trust Code Section 6193.

Probate Code § 751 (repealed). Order of payment of legacies

Comment. Former Probate Code Section 751 is superseded by Estate & Trust Code Section 6192.

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

Comment. Former Probate Code Section 752 is superseded by Estate & Trust Code Section 6192.

Probate Code § 753 (repealed). Contribution after sale of property

Comment. Former Probate Code Section 753 is continued in Estate & Trust Code Section 6194 without substantive change.

Exhibit 1

ABATEMENT IN PRETERMISSION CASES (EXISTING LAW)

**§ 6562. Manner of satisfying share of omitted spouse**

(a) Except as provided in subdivision (b), in satisfying a share provided by this article:

(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 devisees in proportion to the value they may respectively receive under the testator's will. Such value shall be determined as of the date of the decedent's death.

(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.

**§ 6573. Manner of satisfying share of omitted child**

(a) Except as provided in subdivision (b), in satisfying a share provided by this article:

(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 devisees in proportion to the value they may respectively receive under the testator's will. Such value shall be determined as of the date of the decedent's death.

(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.