

Memorandum 86-88

Subject: Study L-1029 - Estate and Trust Code (Marital Deduction
Gifts--draft of tentative recommendation)

At the February 1986 meeting the Commission reviewed the existing statute governing construction of marital deduction gifts in wills and trusts. The Commission also heard a presentation by Bob Mills, draftsman of the existing statute, indicating that a few clarifying changes in the statute might be helpful. The Commission asked Mr. Mills if he would be willing to assist the Commission by providing a draft of the suggested changes, and Mr. Mills agreed. Mr. Mills has sent the staff a draft of the changes, which the staff has incorporated in the draft tentative recommendation attached to this memorandum.

In addition to these clarifying changes, Mr. Mills notes the possibility of adding a provision that holds harmless a personal representative from liability to a holder of a beneficial interest as a result of a QTIP election. He offers the Kansas statute as illustrative:

The executor of any decedent's estate subject to the jurisdiction of this state is hereby authorized to file a qualified terminable interest property election with respect to any property in which the surviving spouse has a "qualifying income interest for life" as defined in 26 U.S.C. 2056(b)(7), as in effect on January 1, 1982, without liability to any holder of a beneficial interest under the instrument governing the disposition of property in the decedent's estate, whether said instrument was executed before or after the effective date of Public Law 97-34.

The staff has incorporated the substance of this provision in the draft also. See Section 21526 (QTIP election).

The most significant changes made in the draft, however, are not these relatively minor technical and substantive revisions. The draft statute has been radically reorganized. The reason for the reorganization is that the marital deduction gift provisions apply to trusts as well as wills, as do many of the general rules of construction applicable to testamentary instruments. To make this more

clear, and to allow adequate room in the code for the rules of construction, we have created at the end of the code a new Division 11: Construction of Wills, Trusts, and Other Instruments. We intend to collect in this division other rules of construction, such as abatement, no contest clauses, and the like, that apply to all testamentary instruments.

We have also broken down the marital deduction gift provisions into several chapters so as to separate the marital deduction gift provisions from other statutes governing gifts intended to comply with Internal Revenue Code requirements.

The Commission should review this reorganization to determine whether it appears appropriate. Also, policy issues are noted in Notes following a few of the sections.

Respectfully submitted,

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Staff Draft

Tentative Recommendation
relating to
MARITAL DEDUCTION GIFTS

Existing law governing construction of marital deduction gifts in wills¹ applies to marital deduction gifts in trusts as well.² To help make this relationship more clear, the new code relocates the marital deduction gift provisions to a new division of the code devoted to construction of wills, trusts, and other instruments. The new code also reorganizes the marital deduction gift provisions to group them separately from other unrelated provisions³ governing compliance with Internal Revenue Code requirements.

The new code also makes several clarifying revisions in the marital deduction gift provisions, relating to the interaction of the statute with a qualified terminable interest property (QTIP) trust election:⁴

1. Prob. Code §§ 1030-1039.

2. Prob. Code § 15005 (law applicable to marital deduction gifts in trust) (Cal. Stats. 1986, ch. 820, operative July 1, 1987), which continues former Prob. Code § 1138.14 without substantive change.

3. Provisions governing construction of charitable remainder unitrusts and annuity trusts are currently intermingled with marital deduction gift provisions. See Prob. Code § 1032. In addition to regrouping the charitable trust provisions, the new code adds comparable rules of construction for charitable lead trusts. See Internal Revenue Code § 170(f)(2)(b).

4. Int. Rev. Code § 2056(b)(7).

(1) In the case of a pre-September 13, 1986, instrument that contains a formula marital deduction gift, existing law appears to require that the gift be reduced by any amount passing under a QTIP trust election.⁵ The new code remedies this defect by making clear that a QTIP trust election may be made without thereby reducing the amount passing under the formula marital deduction gift.

(2) The Internal Revenue Code requires that under a QTIP trust election the surviving spouse must be entitled to all income from the property.⁶ Where accrued income is unpaid at the time of death of the surviving spouse, however, existing law provides that the accrued but unpaid income becomes part of principal.⁷ The new code cures this discrepancy by requiring that the unpaid income be distributed to the surviving spouse or pursuant to a power of appointment exercised by the surviving spouse.⁸

(3) Exercise of the QTIP trust election may have the effect of shifting the estate tax burden among ultimate beneficiaries of the property. The fiduciary should be able to make the election in an appropriate case, however, free of concern about potential liability to beneficiaries who are adversely affected by the election. The new code adds a provision to make clear that the election may be made without liability to a beneficiary under the instrument. This provision is drawn from Kansas law.⁹

5. Prob. Code § 1034(c).

6. Int. Rev. Code § 2056(b)(7)(B)(ii)(I).

7. Prob. Code §§ 1035(e) (QTIP trust excepted) and 16304 (Revised Uniform Principal and Income Act).

8. It is conceivable that proposed regulations may be adopted that enable the unpaid income to pass with principal. A change in the law is recommended nonetheless, since such regulations may never become final or may be found to be inconsistent with the underlying law.

9. 79 K.S.A. § 1537d (1984).

OUTLINE

DIVISION 11. CONSTRUCTION OF WILLS, TRUSTS, AND OTHER INSTRUMENTS

Part 1. General Provisions (§ 21100)

Part 2. Special Rules Governing Wills (§ 21200)

Part 3. Exoneration and Ademption (§ 21300)

Part 4. Abatement and Interest and Income (§ 21400)

Part 5. Compliance with Internal Revenue Code (§ 21500)

Part 6. No Contest Clauses (§ 21600)

DIVISION 11. CONSTRUCTION OF WILLS, TRUSTS, AND OTHER INSTRUMENTS

PART 1. GENERAL PROVISIONS

CHAPTER 1. SCOPE AND DEFINITIONS

- § 21100. Definitions
- § 21101. Division applicable to wills, trusts, and other instruments

PART 5. COMPLIANCE WITH INTERNAL REVENUE CODE

CHAPTER 1. GENERAL PROVISIONS

- § 21500. "Internal Revenue Code" defined
- § 21501. Application of part
- § 21502. Bona fide purchaser
- § 21503. No inference as to prior law
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CHAPTER 2. MARITAL DEDUCTION GIFTS

- § 21520. Definitions
- § 21521. Application of chapter
- § 21522. Marital deduction gifts
- § 21523. Maximum marital deduction for instrument dated September 13, 1981, or earlier
- § 21524. Marital deduction gift in trust
- § 21525. Survivorship requirement for marital deduction gift
- § 21526. QTIP election

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- § 21540. Charitable remainder unitrusts and annuity trusts
- § 21541. Charitable lead trusts
- § 21542. Satisfaction of a pecuniary gift

COMMENTS TO REPEALED SECTIONS

CONFORMING CHANGES

DIVISION 11. CONSTRUCTION OF WILLS, TRUSTS, AND OTHER INSTRUMENTS

PART 1. GENERAL PROVISIONS

CHAPTER 1. SCOPE AND DEFINITIONS

§ 21100. Definitions

21100. Unless the provision or context otherwise requires, as used in this division:

(a) "Decedent" means the testator, settlor, grantor, or other person who executes an instrument that makes a disposition of property on the person's death.

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

(c) "Instrument" means a will, trust, deed, or other instrument that makes a disposition of property on a person's death.

Comment. Subdivisions (a) and (b) of Section 21100 are new. Subdivision (b) restates former Probate Code Section 1030(f) without substantive change.

CROSS-REFERENCES

Definitions

Personal representative § 58
Property § 62
Trust § 82
Trustee § 84
Will § 88

§ 21101. Division applicable to wills, trusts, and other instruments

21101. Unless the provision or context otherwise requires, this division applies to a will, trust, deed, and any other instrument that makes a disposition of property on a person's death.

Comment. Section 21101 is new.

CROSS-REFERENCES

Definitions

Property § 62
Trust § 82
Will § 88

Note. The Commission intends to develop this division to incorporate rules of construction applicable to testamentary instruments generally. Matters to be incorporated in this division will include the rules of construction of wills currently found in Sections 6140 to 6178, abatement and distribution of interest and income, no contest clauses, and other relevant provisions.

PART 5. COMPLIANCE WITH INTERNAL REVENUE CODE

CHAPTER 1. GENERAL PROVISIONS

§ 21500. "Internal Revenue Code" defined

21500. As used in this part, "Internal Revenue Code" means the United States Internal Revenue Code of 1954, as amended from time to time. A reference to a provision of the Internal Revenue Code refers as well to any subsequent provision of law enacted in its place.

Comment. Section 21500 restates former Probate Code Section 1030(g) without substantive change.

§ 21501. Application of part

21501. (a) This part applies to a distribution made after January 1, 1983, whether the decedent died before, on, or after that date. However, this part does not apply to an instrument the terms of which expressly or by necessary implication make this part inapplicable.

(b) By an appropriate statement made in an instrument, the decedent may incorporate by reference the terms of this part, or any of its provisions, as it exists at the time the decedent executes the instrument. The effect of incorporating this part or any of its provisions in an instrument is to make the incorporated provision a part of the instrument as though the language of the incorporated provision were set forth verbatim in the instrument. Unless an instrument incorporating a provision of this part expressly provides otherwise, the instrument automatically incorporates the provision's amendments.

Comment. Section 21501 restates former Probate Code Section 1031 without substantive change. This part applies to trusts as well as wills. Section 21101 (division applicable to wills, trusts, and other instruments). Cf. former Probate Code Section 15005 (law applicable to marital deduction gifts in trust).

CROSS-REFERENCES

Definitions

Decedent § 21100

Instrument § 21100

Note. The provisions of existing law vary as to time a will is "signed" or "executed". Execution should be the critical date, and this draft uses execution consistently throughout.

§ 21502. Bona fide purchaser

21502. The failure to comply with the provisions of this part does not invalidate the interest of a good faith purchaser, lessee, or encumbrancer for value in property acquired without knowledge of an alleged violation of this part.

Comment. Section 21502 restates former Section 1039 without substantive change.

CROSS-REFERENCES

Property § 62

Note. Existing law applies this section to real property only. Since the BFP protection given by this section is not limited to recorded transactions, we see no reason to restrict its application, and accordingly have expanded it to any property.

§ 21503. No inference as to prior law

21503. No inference as to the law as it might have existed before the enactment of this part, or before the enactment of the previously existing provisions the substance of which this part restates, shall be drawn from the enactment of this part or from the enactment of the previously existing provisions the substance of which this part restates.

Comment. Section 21503 restates former Probate Code Section 1037 without substantive change.

§ 21504. Severability clause

21504. If a provision of this part or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the part that can be given effect without the invalid provision or application, and to this end the provisions of this part are severable.

Comment. Section 21504 restates former Probate Code Section 1038 without substantive change.

CROSS-REFERENCES

Definitions

Person § 56

CHAPTER 2. MARITAL DEDUCTION GIFTS

§ 21520. Definitions

21520. As used in this chapter:

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

(b) "Marital deduction gift" means a disposition of property made in an instrument that is intended to qualify for the marital deduction.

Comment. Section 21520 restates former Probate Code Section 1030(b) and (d) without substantive change.

CROSS-REFERENCES

Definitions

Instrument § 21100

Internal Revenue Code § 21500

Property § 62

§ 21521. Application of chapter

21521. This chapter 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").

Comment. Section 21521 restates the fourth sentence of former Probate Code Section 1032(a) without substantive change.

CROSS-REFERENCES

Definitions

Marital deduction § 21520

Trust § 82

§ 21522. Marital deduction gifts

21522. (a) If an instrument contains a marital deduction gift, the provisions of the instrument, 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 instrument contains a marital deduction gift depends upon the intention of the decedent at the time the instrument is executed.

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

(c) A marital deduction gift may be satisfied only with property that qualifies for the marital deduction.

Comment. Subdivisions (a) and (b) of Section 2152 restate the first three sentences of subdivision (a) of former Probate Code Section 1032. Subdivision (c) restates former Probate Code Section 1033(b) without substantive change.

CROSS-REFERENCES

Definitions

Decedent § 21100
Fiduciary § 21100
Instrument § 21100
Internal Revenue Code § 21500
Marital deduction § 21520
Marital deduction gift § 21520
Property § 62

Note. This section includes the only reference in the statute to regulations adopted under the Internal Revenue Code. Should these be made part of the definition of the Code for purposes of this statute, so that compliance with requirements of the Code includes compliance with requirements of the Regulations?

§ 21523. Maximum marital deduction for instrument dated September 13, 1981, or earlier

21523. If an instrument executed on or before September 13, 1981, indicates the decedent's intention to make a gift that will provide the decedent's estate with the maximum amount qualifying for the marital deduction, then the instrument passes to the recipient an amount equal to the maximum amount qualifying for the marital deduction that would have been allowed as of the date of the decedent'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 decedent'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 assets, except for assets constituting qualified terminable interest property under Section 2056(b)(7) of the Internal Revenue Code, that (1) pass from the decedent to the decedent's surviving spouse under the instrument or outside of the instrument and (2) qualify for the marital deduction.

Comment. Section 21523 restates former Probate Code Sections 1030(c) and 1034 with the addition in subdivision (c) of a provision to make it possible to make a "QTIP" trust election in a pre-September 13, 1981, instrument under Internal Revenue Code Section 2056(b)(7) without thereby reducing the formula marital deduction gift on a dollar-for-dollar basis.

CROSS-REFERENCES

Definitions

Decedent § 21100
Instrument § 21100
Internal Revenue Code § 21500
Marital deduction § 21520
Property § 62
Surviving spouse § 78

Note. Bob Mills points out that in this draft revision of Section 21523(c), "I have not specifically said that the exception that I have added would not apply if the will specifically directed that it not apply. I recognize that it would be possible, although highly unlikely, that an individual would consciously decide to reduce the formula marital deduction bequest by the amount of property that was Q-tipped. The most common situation where the proposed amendment would be useful would be if the will was pre-ERTA and set up a conventional by-pass trust with no thought given to the Q-tip election, since it did not then exist."

§ 21524. Marital deduction gift in trust

21524. If an instrument indicates the decedent's intention to make a marital deduction gift in trust, in addition to the other provisions of this chapter, each of the following provisions also applies to the trust:

(a) The only income beneficiary of a marital deduction trust is the decedent's surviving spouse.

(b) Subject to subdivision (e), the income beneficiary is entitled to all of the trust income until the trust terminates.

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

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

(e) Notwithstanding subdivision (d) of Section 16304, in the case of qualified terminable interest property resulting from an election pursuant to Section 2056(b)(7) of the Internal Revenue Code, on 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 21524 restates former Probate Code Section 1035 with revision of subdivision (e) to provide for qualification of a QTIP trust that is silent about the payment of income between the last distribution date of the trust and the date of the surviving spouse's death and, beyond that, to provide for qualification of a QTIP trust that mandates payment of income to the remaindermen.

CROSS-REFERENCES

Definitions

Beneficiary § 24
Decedent § 21100
Fiduciary § 21100
Instrument § 21100
Marital deduction gift § 21520
Property § 62
Surviving spouse § 78
Trust § 82
Trustee § 84
Will § 88

Note. In connection with subdivision (e), Bob Mills notes that, "Substantively, the problem that we are seeking to address is not clearly real since the proposed regulations would permit the income interest to qualify even if income between the last distribution date and the date of the surviving spouse's death went to the remaindermen. I nevertheless think that an amendment is in order since the proposed regulations may never become final or, even if they do, some court or the IRS itself may decide someday that such regulations are not consistent with underlying law."

§ 21525. Survivorship requirement for marital deduction gift

21525. If an instrument contains a marital deduction gift, whether outright or in trust and whether or not there is a specific reference to this part, a survivorship requirement expressed in the instrument in excess of six months does not apply to the property passing under the marital deduction gift, but shall be limited to a six-month period beginning with the decedent's death.

Comment. Section 21525 restates former Probate Code Section 1036 without substantive change.

CROSS-REFERENCES

Definitions

Decedent § 21100
Instrument § 21100
Marital deduction gift § 21520
Property § 62
Trust § 82

§ 21526. QTIP election

21526. (a) This chapter neither requires nor prohibits a fiduciary making the election referred to in Section 2056(b)(7) of the Internal Revenue Code.

(b) The fiduciary may make the election without liability to a beneficiary under the instrument, whether the instrument was executed before, on, or after the effective date of Public Law 97-34.

Comment. Subdivision (a) of Section 21526 restates former Probate Code Section 1033(b) without substantive change. Subdivision (b) is new; it is drawn from 79 Kansas Statutes Annotated, Section 1537d (1984).

CROSS-REFERENCES

Definitions

Beneficiary § 24
Fiduciary § 21100
Instrument § 21100
Internal Revenue Code § 21500

CHAPTER 3. MISCELLANEOUS PROVISIONS

§ 21540. Charitable remainder unitrusts and annuity trusts

21540. If an instrument indicates the decedent's intention at the time the instrument 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 instrument, 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 an action or have a power that impairs the charitable deduction. After the death of the decedent, the provisions of the instrument may be augmented in any manner consistent with subdivision (e) of Section 2055 of the Internal Revenue Code on a petition provided for in Part 5 (commencing with Section 17000) of Division 9.

Comment. Section 21540 restates subdivision (b) of former Probate Code Section 1032 without substantive change.

CROSS-REFERENCES

Definitions

Decedent § 21100
Fiduciary § 21100
Instrument § 21100
Internal Revenue Code § 21500

§ 21541. Charitable lead trusts

21541. If an instrument indicates the decedent's intention at the time the instrument is executed to comply with the Internal Revenue Code requirements for a charitable lead trust as described in Section 170(f)(2)(b) of the Internal Revenue Code, the provisions of the instrument, including any power, duty, or discretionary authority given to a fiduciary, shall be construed to comply with the provisions of that section in order to conform to that intent. In no event shall the fiduciary take an action or have a power that impairs the charitable deduction. After the death of the decedent, the provisions of the instrument may be augmented in any manner consistent with that intent upon a petition provided for in Part 5 (commencing with Section 17000) of Division 9.

Comment. Section 21541 is new; it extends the general approach of Section 21540 (charitable remainder unitrusts and annuity trusts) to include charitable lead trusts.

CROSS-REFERENCES

Definitions

Decedent § 21100
Fiduciary § 21100
Instrument § 21100
Internal Revenue Code § 21500

§ 21542. Satisfaction of a pecuniary gift

21542. (a) If an instrument authorizes the fiduciary to satisfy a pecuniary gift 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 instrument expressly provides otherwise. If the instrument permits the fiduciary to value an asset selected for distribution as of a date other than the date of distribution, then, unless the instrument 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 gift as stated in, or determined by, the instrument.

(b) As used in this section, "pecuniary gift" means a disposition of property made in an instrument that either is expressly stated as a fixed dollar amount or is a dollar amount determinable by the provisions of the instrument.

Comment. Subdivision (a) of Section 21542 restates former Probate Code Section 1033(a) without substantive change. Subdivision (b) restates former Probate Code Section 1030(a) without substantive change.

CROSS-REFERENCES

Definitions

Fiduciary § 21100
Instrument § 21100
Property § 62

Note. We have located this provision here temporarily because it seems to have relevance particularly for tax purposes. However, by its terms it is much broader and perhaps should be located among the general provisions governing construction of instruments.

COMMENTS TO REPEALED SECTIONS

Probate Code § 1030 (repealed)

Comment. Subdivision (a) of former Section 1030 is restated in Estate and Trust Code Section 21542(b) (satisfaction of a pecuniary gift) without substantive change. Subdivisions (b) and (d) are restated in Estate and Trust Code Section 21520 (definitions) without substantive change. Subdivision (c) is restated by general language in Estate and Trust Code Section 21523 (maximum marital deduction for instrument dated September 13, 1981, or earlier). Subdivision (e) is restated in Estate and Trust Code Section 88 ("will" defined) without substantive change. Subdivision (f) is restated in Estate and Trust Code Sections 21100 (definitions) and 10 (singular and plural) without substantive change. Subdivision (g) is restated in Estate and Trust Code Section 21500 ("Internal Revenue Code" defined) without substantive change. Subdivision (h) is superseded by general language in the provisions to which it related.

Probate Code § 1031 (repealed)

Comment. Former Section 1031 is restated in Estate and Trust Code Section 21501 (application of part) without substantive change.

Probate Code § 1032 (repealed)

Comment. The first three sentences of subdivision (a) of former Section 1032 are restated in Estate and Trust Code Section 21522(a)-(b) (marital deduction gifts) without substantive change. The fourth sentence is restated in Estate and Trust Code Section 21521 (application of chapter) without substantive change. The fifth sentence is restated in Estate and Trust Code Section 21526 (QTIP election) without substantive change.

Subdivision (b) is restated in Estate and Trust Code Section 21540 (charitable remainder unitrusts and annuity trusts) without substantive change.

Probate Code § 1033 (repealed)

Comment. Subdivision (a) of former Section 1033 is restated in Estate and Trust Code Section 21542(a) (satisfaction of a pecuniary gift) without substantive change. Subdivision (b) is restated in Estate and Trust Code Section 21522(c) (marital deduction gifts) without substantive change.

Probate Code § 1034 (repealed)

Comment. Former Section 1034 is restated in Estate and Trust Code Section 21523 (maximum marital deduction for instrument dated September 13, 1981, or earlier), with the addition of a provision to make it possible to make a "QTIP" trust election in a pre-September 13, 1981, instrument under Internal Revenue Code Section 2056(b)(7) without thereby reducing the formula marital deduction bequest on a dollar-for-dollar basis.

Probate Code § 1035 (repealed)

Comment. Former Section 1035 is restated in Estate and Trust Code Section 21524 (marital deduction gift in trust), with provision for qualification of a QTIP trust that is silent about the payment of income between the last distribution date of the trust and the date of the surviving spouse's death and, beyond that, with provision for qualification of a QTIP trust that mandates payment of income to the remaindermen.

Probate Code § 1036 (repealed)

Comment. Former Section 1036 is restated in Estate and Trust Code Section 21524 (survivorship requirement for marital deduction gift) without substantive change.

Probate Code § 1037 (repealed)

Comment. Former Section 1037 is restated in Estate and Trust Code Section 21503 (no inference as to prior law) without substantive change.

Probate Code § 1038 (repealed)

Comment. Former Section 1038 is restated in Estate and Trust Code Section 21504 (severability clause) without substantive change.

Probate Code § 1039 (repealed)

Comment. Former Section 1039 is restated in Estate and Trust Code Section 21502 (bona fide purchaser) without substantive change.

CONFORMING CHANGES

Prob. Code § 15005. Law applicable to marital deduction gifts in trust
(added by 1986 Cal. Stats. ch. 820) (repealed)

SEC. . Section 15005 of the Probate Code is repealed.

~~15005. (a) Except as provided in subdivision (b), Article 3 (commencing with Section 1030) of Chapter 16 of Division 3 applies to gifts, whether outright or in trust, made in a trust.~~

~~(b) This section does not apply to any trust if its terms expressly or by necessary implication make this section inapplicable to it.~~

~~(c) For purposes of this section, references in Article 3 (commencing with Section 1030) of Chapter 16 of Division 3 to a "testator" refer to the settlor and references to a "will" refer to a trust.~~

Comment. Section 15005 is omitted because it is no longer necessary. See Section 21101 (division applicable to wills, trusts, and other instruments).

Prob. Code § 16304. When right to income arises; apportionment
of income (added by 1986 Cal. Stats. ch. 820)

SEC. . Section 16304 of the Probate Code is amended to read:

16304. (a) An income beneficiary is entitled to income from the date specified in the trust instrument or, if none is specified, from the date an item of property becomes subject to the trust. In the case of an item of property becoming subject to a trust by reason of a person's death, it becomes subject to the trust as of the date of the death of the person even though there is an intervening period of administration of the person's estate.

(b) Upon property becoming subject to a trust by reason of a person's death:

(1) Receipts due but not paid at the date of death of the person are principal.

(2) Receipts in the form of periodic payments (other than corporate distributions to stockholders), including rent, interest, or annuities, not due at the date of the death of the person shall be treated as accruing from day to day. That portion of the receipt accruing before the date of death is principal and the balance is income.

(c) In all other cases, any receipt from income-producing property is income even though the receipt was earned or accrued in whole or in part before the date when the property became subject to the trust.

(d) If an income beneficiary's right to income ceases by death or in any other manner, all payments actually paid to the income beneficiary or in the hands of the trustee for payment to the income beneficiary before such termination belong to the income beneficiary or to his or her personal representative. All income actually received by the trustee after such termination shall be paid to the person next entitled to income by the terms of the trust. This subdivision is subject to subdivision (e) of Section 21524 and does not apply to income received by a trustee under subdivision (b) of Section 16305.

(e) Corporate distributions to stockholders shall be treated as due on the day fixed by the corporation for determination of stockholders of record entitled to distribution or, if no date is fixed, on the date of declaration of the distribution by the corporation.

Comment. Subdivision (d) of Section 16304 is amended to recognize a QTIP election under Section 21524(e).