

Memorandum 87-37

Subject: Study L-1038 - Abatement; Interest and Income Accruing  
During Administration

Attached is a redraft of abatement, and interest and income accruing during administration. The Commission has considered abatement twice (8/85, 9/86) and interest and income once (8/85). This draft reflects Commission decisions.

A prior version of this Memo (Memo 87-9) was on the agenda for the February 1987 meeting, but we did not get to it. Nonetheless, Professor Edward Halbach and State Bar Study Team 4 commented on the draft. This draft incorporates many of the suggestions made by Professor Halbach and Team 4.

The staff has split the draft into three pieces to go in separate parts of the code:

- (1) Definitions go in the front with other general definitions.
- (2) The interest and income provisions only apply to decedents' estates, and hence go in Part 10 (distribution) of Division 7 (administration of estates).
- (3) The abatement provisions apply to wills, trusts, deeds, and other instruments, and hence go in Division 11 (construction of wills, trusts, and other instruments).

Remaining policy issues are discussed below.

ABATEMENT

Cash Payment In Lieu of Sale of Specific Devise

Since what is now Section 21400 was last seen by the Commission, the staff revised subdivision (b) and added a new subdivision (c):

(b) ~~If property specifically devised is sold during administration, abatement shall be achieved by appropriate adjustments in or contribution from the remaining assets.~~ When distribution is made in estate administration, the court shall fix the amount each person shall contribute and reserve that amount from the person's distributive share.

(c) If a specific devisee is required to contribute, the specific devisee may pay the contribution out of personal assets in lieu of having his or her specific devise sold.

The staff deleted the first sentence of subdivision (b) because it appears to be a specific application (sale of specific devise) of Section 21401 (order of abatement generally), and therefore was redundant and confusing. Subdivision (c) is consistent with the apparent purpose of the existing provision from which subdivision (b) is drawn (Prob. Code § 753), and is a clearer statement than the existing provision. Does the Commission approve these revisions?

Preference for Testator's "Kindred"

Section 21401 states an abatement preference for the testator's kindred. State Bar Study Team 4 has several times suggested that we include a definition of "kindred" in the statute. In response to this suggestion, the staff has noted in the Comment to Section 21401 that:

As used in Section 21401, "kindred" means persons related to the transferor by blood (including halfbloods and persons born out of wedlock) and adopted persons, and, to a limited degree, stepchildren and foster children. Section 6152.

In a conforming revision to Section 6152 (near the end of the attached staff draft), the staff has added language to provide that Section 6152 (halfbloods, adopted persons, persons born out of wedlock, stepchildren, and foster children) applies in determining the persons who would be kindred of the transferor under Section 21401.

Existing language in Section 6152 now applies the complex rules of that section to determine who are kindred under the antilapse statute (Section 6147) and under Section 6151 (devise to "heirs"). ("Kindred" is a term now used in the antilapse statute.)

The staff has used a substantive conforming revision to Section 6152, rather than trying to define "kindred" in Section 21401, for two reasons: (1) to keep the existing scheme of Section 6152, and (2) because a definition in Section 21401 would have to be needlessly complex, reproducing the language of Section 6152. The staff thinks that the scheme as presently drafted (use of "kindred" in Section 21401, partial definition in Comment to Section 21401, and substantive provision in Section 6152) will work satisfactorily.

## INTEREST AND INCOME ACCRUING DURING ADMINISTRATION

### Commencement of Income From Testamentary Trust

This draft does not continue existing Section 661 which provides: "In case of a bequest of the interest or income of a certain sum or fund, the interest or income accrues from the testator's death." Although the language "a certain sum or fund" is ambiguous, the cases have uniformly applied it to refer to a testamentary trust. In the Comment to repealed Section 661, we note that the question of when income from a testamentary trust commences is governed by Section 16304(a) (Revised Uniform Principal and Income Act). That section provides:

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.

The commencement-at-death rule of Section 16304 is consistent with the commencement-at-death rule of Section 661, but Section 16304 is considerably clearer than Section 661.

We have abandoned an earlier proposal (circulated for comment but not considered by the Commission) that income from a general pecuniary devise in trust should commence one year after death. Under that proposal, the rule was different depending on whether the devise of income was from a residuary devise or a general pecuniary devise in trust: Income from a residuary devise in trust commenced at death, but income from a general pecuniary devise in trust commenced one year after death (subject to a contrary provision in the will).

Most lawyers who reviewed that proposal objected to the one-year-from-death rule for income from a general pecuniary devise in trust. Instead, they favored a commencement-at-death rule as RUPIA provides. This was the view of State Bar Study Team 4 (report of 8/28/86), the Probate, Trust and Estate Planning Section of the Beverly Hills Bar (Exh. 1, 1st Supp., Memo 86-60), the Executive Committee of the Probate and Trust Law Section of the L.A. County Bar (Valerie

Merritt letter of 8/25/86), attorney William Lyshak of Sacramento, and attorney Richard Kinyon of San Francisco.

Does the Commission approve the staff recommendation to repeal Section 661 and let the matter be governed by RUPA?

Liability for Expenses of Specifically Devised Property

At the 8/85 meeting, the Commission was concerned about the case where earnings on a specific devise are insufficient to pay taxes on the property and expenses of upkeep. There was support for a rule requiring such expenses to be paid by the estate for one year, and by the specific devisee thereafter. This is the rule in subdivision (b) of Section 12002.

Both State Bar Study Team 4 (report of 2/13/87) and the Executive Committee of the Probate and Trust Law Section of the L.A. County Bar (Valerie Merritt letter of 8/25/86) object to subdivision (b). The L.A. Bar wants all expenses of property specifically devised to be borne by the specific devisee, whether or not there is any income from the property. This is existing law. Estate of Reichel, 28 Cal. App.3d 156, 103 Cal. Rptr. 836 (1972). The L.A. Bar thinks existing law makes sense and should be continued:

The most common specific devise which does not generate sufficient income to pay its expenses is the personal residence of the decedent. Since normally the specific devisee has the ability to either allow the estate to rent the property (thereby generating income) or to live there (thereby getting the benefit of the use of the property), it is only fair that the specific devisee should bear the expenses. As a convenience to estate administration, perhaps the personal representative could be authorized to advance such expenses for a period of up to one year from the date of death of decedent, in order to protect and preserve the property, without any issue of surcharge of the representative for advancing the expenses during that period.

What is the Commission's view?

TRANSITIONAL PROVISION

In the previous draft, the chapter on interest and income accruing during administration had a codified transitional provision that applied the chapter to all estates on the operative date. Grace Banoff wrote on behalf of the Legislative Subcommittee on Estate

Planning, Trusts and Probate of the San Diego County Bar Association to urge that it apply only to estates of decedents who die on or after the operative date. The staff has accepted this suggestion by replacing the former provision with an uncodified section to go at the end of the bill (see page 14 of attached draft). We will review this rule when other portions of the 1988 probate bill are drafted. Is this satisfactory to the Commission?

Respectfully submitted,

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TENTATIVE RECOMMENDATION  
relating to  
ABATEMENT, AND INTEREST AND INCOME  
ACCRUING DURING ADMINISTRATION

Abatement

If property not disposed of by the will (intestate property) and residuary property are not sufficient to pay debts, expenses of administration, and family allowance, general and specific devises must be abated (reduced).<sup>1</sup> The statute appears to require general and specific devises to abate proportionately, but, under case law, general devises must be exhausted before specific devises are reduced.<sup>2</sup> The proposed law continues existing law as judicially construed by requiring general devises to be exhausted before specific devises are reduced.<sup>3</sup>

The proposed law also continues the special abatement rule for pretermission cases that all devises under the will abate

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1. Prob. Code § 750. See also Prob. Code §§ 736, 751-753. If the will designates the property to be used to pay debts, expenses of administration, or family allowance, the will controls. Prob. Code §§ 750-751. Within each class, the testator's spouse and kindred are preferred: Devises to nonrelatives within each class are exhausted before shares of a spouse or kindred are reduced. 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). The proposed law makes clear that the preference for the testator's spouse and kindred includes all those who may take from the decedent by intestate succession -- halfbloods, adoptees, persons born out of wedlock, and, in limited cases, stepchildren and foster children. See Prob. Code §§ 6406, 6408, 6408.5. Cf. Prob. Code § 6152.

2. Estate of Jenanyan, 31 Cal.3d 703, 711-12, 646 P.2d 196, 183 Cal. Rptr. 525 (1982).

3. In the proposed law, the abatement provisions apply to wills, trusts, deeds, and other instruments disposing of property at death. Hence the new provisions are located with other rules of construction for such instruments.

proportionately, whether specific, general, or residuary.<sup>4</sup>

Distribution of Interest and Income Accruing During Administration

Under existing law, expenses on property specifically devised are borne by the specific devisee, whether or not the property produces any income.<sup>5</sup> The proposed law qualifies this rule by providing that if earnings on the property are insufficient to pay expenses attributable to the property, the expenses shall be paid out of the estate for one year after the testator's death or until the property is distributed to the specific devisee, whichever occurs first. Thereafter, expenses are borne by the specific devisee. This rule more likely comports with the intent of the average testator.

In all other respects, the proposed law continues existing law concerning distribution of interest and income accruing during

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4. Prob. Code §§ 6562, 6573. In the conventional abatement situation where the estate is insufficient to satisfy fully the devises to those named in the will, it is consistent with the testator's probable intent to exhaust residuary devises first, then general, and finally specific ones. However, a different abatement rule is needed in pretermission cases because a large, unanticipated share is taken from the estate for the omitted spouse or child: An omitted spouse takes all community and quasi-community property and one-third or one-half of 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. The omitted spouse or child would likely have been a residuary devisee if the testator had thought to provide for him or her in the will. If the general abatement rule were applied in pretermission cases, the share of the omitted spouse or child would be taken first from residuary devisees. Since residuary devisees are usually those nearest and dearest to the testator, the result would likely be to take the shares of other family members to provide a statutory share for an omitted spouse or child. Thus the omitted spouse or child would likely receive a larger share than family members named in the will, a result probably contrary to the testator's intent. For this reason, the proposed law continues the existing proportional abatement rule for pretermission cases. Prob. Code §§ 6562, 6573. This carries out the testator's probable intent by requiring general and specific devisees to contribute proportionately with residuary devisees to make up the statutory share of the omitted spouse or child.

5. Estate of Reichel, 28 Cal. App.3d 156, 103 Cal. Rptr. 836 (1972).

administration.<sup>6</sup>

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6. Prob. Code §§ 660-665. The proposed law does not continue Probate Code Section 661, which provides that "[i]n case of a bequest of the interest or income of a certain sum or fund, the interest or income accrues from the testator's death." Although the language "a certain sum or fund" is ambiguous, the cases have applied this language to mean a testamentary trust. See, e.g., Estate of Petersen, 92 Cal. App.2d 677, 682, 207 P.2d 607 (1949); Estate of Schiffmann, 86 Cal. App.2d 638, 642-44, 195 P.2d 484 (1948); Estate of DeLano, 62 Cal. App.2d 808, 816, 145 P.2d 672 (1944); Estate of Hyland, 58 Cal. App.2d 556, 137 P.2d 73 (1943); Estate of Dasher, 53 Cal. App.2d 721, 724-25, 128 P.2d 380 (1942); In re Estate of Lair, 38 Cal. App.2d 737, 740, 102 P.2d 436 (1940). The question of when income from a testamentary trust commences is already governed by Probate Code Section 16304(a) (Revised Uniform Principal and Income Act) (income commences at death if trust instrument is silent).



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CONFORMING REVISION

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## DIVISION 1. PRELIMINARY PROVISIONS AND DEFINITIONS

PART 2. DEFINITIONS§ 23.5. Annuity

23.5. "Annuity" means a general devise or other donative transfer of a specified amount which is payable periodically.

Comment. Section 23.5 restates the first clause of subdivision (c) of former Section 662 without substantive change. The reference in Section 23.5 to an annuity as a "general" devise or gift is new, but is consistent with subdivision (c) of former Section 662 (if indicated fund fails, resort may be had to general assets as in case of general devise) and with case law. See Estate of Luckel, 151 Cal. App.2d 481, 493-95, 312 P.2d 24 (1957) (annuity is a "general charge on the testator's whole estate"). For the priority that an annuity has over other general devises, see Section 21401(b).

The description of an annuity as a general devise "or other donative transfer" recognizes that the definition may apply to instruments other than wills, such as trusts. The term "donative transfer" is used, for example, in Section 21100.

## CROSS-REFERENCES

## Definitions

Devise § 32

General devise § 42

§ 30. Demonstrative devise

30. "Demonstrative devise" means a general devise or other donative transfer that specifies the fund or property from which the devise or transfer is primarily to be made.

Comment. Section 30 restates subdivision (b) of former Section 662 without substantive change. The reference in Section 30 to a demonstrative devise as a "general" devise is new, but is consistent with prior law. See former Section 662(c) (if indicated fund fails, resort may be had to general assets as in case of general devise); 7 B. Witkin, Summary of California Law Wills and Probate § 214, at 5725 (8th ed. 1974) (same); Estate of Cline, 67 Cal. App.2d 800, 805-05, 155 P.2d 390 (1945) (demonstrative devise is "in the nature of" a general devise; reference to particular fund is for convenient method of payment); Johnston, Outright Bequests, in California Will Drafting § 11.92, at 401 (Cal. Cont. Ed. Bar 1965) (demonstrative devise is "similar to" general devise). For the priority that a demonstrative devise has over other general devises, see Section 21401(b).

The description of a demonstrative devise as a general devise "or other donative transfer" recognizes that the definition may apply to instruments other than wills, such as trusts. The term "donative transfer" is used, for example, in Section 21100.

## CROSS-REFERENCES

### Definitions

Devise § 32  
General devise § 42  
Property § 62

### § 42. General devise

42. "General devise" means a devise or other donative transfer from the general estate that does not give specific property.

Comment. Section 42 supersedes subdivision (e) of former Section 662 and is consistent with case law under the former provision. 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).

The description of a general devise as a devise "or other donative transfer" recognizes that the definition may apply to instruments other than wills, such as trusts. The term "donative transfer" is used, for example, in Section 21100.

## CROSS-REFERENCES

### Definitions

Devise § 32  
Property § 62

### § 69. Residuary devise

69. "Residuary devise" means a devise or other donative transfer of property that remains after all specific and general devises have been satisfied.

Comment. Section 69 restates subdivision (d) of former Section 662 without substantive change.

The description of a residuary devise as a devise "or other donative transfer" recognizes that the definition may apply to instruments other than wills, such as trusts. The term "donative transfer" is used, for example, in Section 21100.

## CROSS-REFERENCES

### Definitions

Devise § 32  
General devise § 42  
Property § 62  
Specific devise § 73

§ 73. Specific devise

73. "Specific devise" means a devise or other donative transfer of specifically identifiable property.

Comment. Section 73 restates a portion of subdivision (a) of former Section 662 without substantive change. See also Estate of Ehrenfels, 241 Cal. App.2d 215, 221, 50 Cal. Rptr. 358 (1966).

The description of a specific devise as a devise "or other donative transfer" recognizes that the definition may apply to instruments other than wills, such as trusts. The term "donative transfer" is used, for example, in Section 21100.

CROSS-REFERENCES

Definitions

Devise § 32

Property § 62

DIVISION 7. ADMINISTRATION OF ESTATES OF DECEDENTS

PART 10. DISTRIBUTION OF ESTATE

CHAPTER 8. INTEREST AND INCOME ACCRUING  
DURING ADMINISTRATION

§ 12000. Testator's intention controls

12000. The provisions of this chapter apply where the intention of the testator is not indicated by the will.

Comment. Section 12000 restates without substantive change former Section 660 and the introductory clause of subdivision (a) of former Section 664. The language of Section 12000 is drawn from Sections 6140(b) and 6165.

CROSS-REFERENCES

Definitions

Will § 88

§ 12001. Rate of interest

12001. When interest is payable under this chapter, the rate of interest is the legal rate on judgments.

Comment. Section 12001 restates portions of subdivisions (a) and (c) of former Section 663 without substantive change. The former language "the rate of interest payable on a money judgment in this state" is revised to read "the legal rate on judgments" to conform to the trust law. See Section 16441. For the legal rate on judgments, see Code Civ. Proc. § 685.010 (10 per cent per annum on unpaid principal). The rule of Section 12001 applies where the intention of the testator is not indicated by the will. Section 12000.

§ 12002. Earnings on and expenses of specific devise

12002. (a) A specific devise carries with it the earnings on the specified property from the date of death, less taxes and other expenses attributable to that property during administration of the estate.

(b) If the earnings on specifically devised property are not sufficient to pay expenses attributable to the property, including taxes on the property, the expenses shall be paid out of the estate for one year after the testator's death or until the property is distributed to the devisee, whichever occurs first. Thereafter, the expenses shall be borne by the devisee.

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

Comment. Section 12002 is new. Section 12002 applies to specific devises of real and personal property. See Sections 32 ("devise" defined), 73 ("specific devise" defined). The rule of Section 12002 applies where the intention of the testator is not indicated by the will. Section 12000.

Subdivision (a) of Section 12002 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).

Subdivision (b) changes the rule of Estate of Reichel, 28 Cal. App.3d 156, 103 Cal. Rptr. 836 (1972) (expenses on property specifically devised borne by specific devisee, whether or not the property produces income). If expenses relating to a specific devise are paid out of the estate pursuant to subdivision (b), they are imposed on distributees according to the abatement rules in Sections 21400-21403. Subdivision (b) authorizes payment from the estate to maintain the property, but not to improve it.

Subdivision (c) codifies case law. See Estate of McKenzie, supra at 399-400.

#### CROSS-REFERENCES

##### Definitions

- Devise § 32
- Devisee § 34
- Property § 62
- Specific devise § 73

#### § 12003. Interest on general pecuniary devise

12003. If a general pecuniary devise, including a general pecuniary devise in trust, is not distributed before the first anniversary of the testator's death, the devise bears interest thereafter.

Comment. Section 12003 restates a portion of subdivision (a) of former Section 663 without substantive change. The rule of Section 12003 applies where the intention of the testator is not indicated by the will. Section 12000.

The question of when an income beneficiary of a trust is entitled to have income commence is governed by Section 16304(a) (Revised Uniform Principal and Income Act).

## CROSS-REFERENCES

### Definitions

Devise § 32

General devise § 42

Trust § 82

Rate of interest § 12001

### § 12004. Annuity; interest on periodic payments

12004. (a) An annuity commences at the testator's death and shall be paid at the end of the annual, monthly, or other specified period.

(b) Whenever an annuitant, devisee of a devise for maintenance, or beneficiary of a trust, is entitled to periodic payments or trust income commencing at the testator's death, the annuitant, devisee, or beneficiary is entitled to interest on the amount of any unpaid accumulations of the payments or income held by the personal representative on each anniversary of the decedent's death. No interest accrues during the first year after the decedent's death.

Comment. Subdivision (a) of Section 12004 continues subdivision (b) of former Section 663 without change. The first sentence of subdivision (b) restates the first portion of subdivision (c) of former Section 663 without substantive change. The second sentence of subdivision (b) restates what appears to have been the substance of the last portion of subdivision (c) of former Section 663 (interest "computed from the date of such anniversary"). See 7 B. Witkin, Summary of California Law Wills and Probate § 449, at 5891 (8th ed. 1974); California Will Drafting Practice § 8.67, at 372, § 9.59, at 429 (Cal. Cont. Ed. Bar 1982).

The rule of Section 12004 applies where the intention of the testator is not indicated by the will. Section 12000.

## CROSS-REFERENCES

### Definitions

Annuity § 23.5

Devise § 32

Devisee § 34

Personal representative § 58

Trust § 82

Rate of interest § 12001

§ 12005. Remaining income to residuary or intestate distributees

12005. (a) Net income received during administration not paid under other provisions of this chapter and not otherwise devised 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 for the term of years.

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

Comment. Section 12005 restates a portion of former Section 664 without substantive change. The reference in Section 12005 to intestate property is new, and recognizes that there may be a partial intestacy in a testate estate.

The rule of Section 12005 applies where the intention of the testator is not indicated by the will. Section 12000.

CROSS-REFERENCES

Definitions

Devise § 32  
Property § 62  
Trust § 82

§ 12006. Reference in instrument

12006. 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 provision of this chapter.

Comment. Section 12006 continues the substance of subdivision (b) of former Section 665, and includes a reference to former Chapter 11 of Division 3 in which former Section 665 was found.

CROSS-REFERENCES

Definitions

Will § 88  
Trust § 82



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

(b) "Instrument" means a will, trust, deed, or other writing that designates a beneficiary or makes a donative transfer of property.

(c) "Transferor" means the testator, settlor, grantor, owner, or other person who executes an instrument.

Comment. Subdivision (a) of Section 21100 restates former Section 1030(f) without substantive change. Subdivisions (b) and (c) are new. Unless the provision or context otherwise requires, this division applies to both inter vivos and testamentary instruments. See Section 21101 (division applicable to wills, trusts, and other instruments).

CROSS-REFERENCES

Definitions

Personal representative § 58

Property § 62

Trust § 82

Trustee § 84

Will § 88

Note. Section 21100 was approved by the Commission and is in AB 708. It is included here to facilitate review of this draft.

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

21101. Unless the provision or context otherwise requires, this division applies to a will, trust, deed, and any other instrument.

Comment. Section 21101 is new.

CROSS-REFERENCES

Definitions

Instrument § 21100

Trust § 82

Will § 88

Note. Section 21101 was approved by the Commission and is in AB 708. It is included here to facilitate review of this draft.

§ 21102. Transferor's intention controls

21102. Except as provided in Part 5 (commencing with Section 21500), the provisions of this division apply where the intention of the transferor is not indicated by the instrument.

Comment. Section 21102 restates without substantive change a portion of the first sentence of former Section 750, paragraph (1) of former Section 751, and a portion of former Section 752. The language of Section 21102 is drawn from Sections 6140(b) and 6165. The "except" clause of Section 21102 recognizes that the provisions of Part 5 (commencing with Section 21500) may override the terms of an instrument.

CROSS-REFERENCES

Definitions

Instrument § 21100

Transferor § 21100

PART 4. ABATEMENT

§ 21400. Purposes for which abatement made

21400. (a) Except as provided in Sections 6562 and 6573, shares of beneficiaries abate as provided in this part for all purposes, including payment of the debts, expenses, and charges specified in Section 11420, satisfaction of devises, and payment of expenses on specifically devised property pursuant to Section 12002, and without any priority as between real and personal property.

(b) When a distribution is made during estate administration, the court shall fix the amount each person shall contribute and reserve that amount from the person's distributive share.

(c) If a specific devisee is required to contribute, the specific devisee may pay the contribution out of personal assets in lieu of having the specifically devised property sold.

Comment. Subdivision (a) of Section 21400 restates 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 priority as between real and personal property restates the first sentence of former Section 754 without substantive change, and is consistent with Section 3-902 of the Uniform Probate Code and with California case law. See In re Estate of Woodworth, 31 Cal. 595, 614 (1867).

Subdivision (b) of Section 21400 restates the last portion of former Section 753 without substantive change. Subdivision (c) is new.

## CROSS-REFERENCES

### Definitions

Beneficiary § 24  
Devise § 32  
Devisee § 34  
Property § 62  
Real property § 68  
Specific devise § 73

### § 21401. Order of abatement

21401. Except as provided in Sections 21402 and 21403:

(a) Shares of beneficiaries abate in the following order:

(1) Property not disposed of by the instrument.

(2) Residuary devises.

(3) General devises to persons other than the transferor's spouse or kindred.

(4) General devises to the transferor's spouse or kindred.

(5) Specific devises to persons other than transferor's spouse or kindred.

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

(b) Annuities and demonstrative devises have priority over other general devises against any property or fund to which they are charged. To the extent the fund or property is insufficient, the annuity or demonstrative devise may be made from the general estate as in the case of other general devises.

(c) Within each class as specified in this section, shares of beneficiaries abate pro rata.

Comment. Subdivision (a) of Section 21401 replaces the second sentence of former Section 750 and all of former Sections 751 and 752. Paragraphs (1) and (2) of subdivision (a) of Section 21401 restate the first portion of the second sentence of former Section 750 and all of former Section 751 without substantive change. The preference for specific devises in paragraphs (5) and (6) over general devises in paragraphs (3) and (4) continues the rule of Estate of Jenanyan, 31 Cal.3d 703, 711-12, 646 P.2d 196, 183 Cal. Rptr. 525 (1982).

The preference for spouse and kindred in paragraphs (4) and (6) of subdivision (a) continues the last portion of former Section 752. As used in Section 21401, "kindred" means persons related to the transferor by blood (including halfbloods and persons born out of wedlock) and adopted persons, and, to a limited degree, stepchildren and foster children. Section 6152. See also Estate of Buck, 32

Cal.2d 372, 376, 196 P.2d 769 (1948); Estate of DeSanti, 53 Cal. App.2d 716, 719-20, 128 P.2d 434 (1942).

Subdivision (b) of Section 21401 restates the last portion of subdivision (c) of former Section 662 without substantive change. With respect to the fund designated for payment of an annuity or demonstrative devise, the priority given by subdivision (b) controls over the priority that the transferor's spouse and kindred have for other general devises under paragraph (4) of subdivision (a). Thus a general devise to the transferors' spouse or kindred will abate before abatement of the fund designated for an annuity for a nonrelative that will reduce the annuity.

Subdivision (c) of Section 21401 restates a portion of the second sentence of former Section 750 and a portion of former Section 752 without substantive change, and supersedes the first portion of former Section 753 (if preferred devise sold, all devisees must contribute).

The order of abatement provided in Section 21401 applies where the intention of the transferor is not indicated by the instrument. Section 21102. If the instrument 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 21401, the shares of beneficiaries abate as the court determines is necessary to give effect to the intention or purpose of the transferor. Section 21402.

#### CROSS-REFERENCES

##### Definitions

Annuity § 23.5  
Beneficiary § 24  
Demonstrative devise § 30  
Devise § 32  
General devise § 42  
Instrument § 21100  
Person § 56  
Property § 62  
Residuary devise § 69  
Specific devise § 73  
Transferor § 21100

#### § 21402. Court discretion to carry out transferor's intent

21402. If the instrument 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 21401, the shares of beneficiaries abate as is necessary to give effect to the intention or purpose of the transferor.

Comment. Section 21402 is drawn from subdivision (b) of Section 3-902 of the Uniform Probate Code. Section 21402 is generally consistent with prior law. See former 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

Beneficiary § 24  
Devise § 32  
Instrument § 21100  
Transferor § 21100

### § 21403. No sale of specific devise to exonerate other devise

21403. When a transferor devises real property subject to a mortgage, deed of trust, or other lien and the intention is indicated by the instrument that the mortgage, deed of trust, or other lien is to be exonerated, other property specifically devised shall not be sold for the purpose of exonerating the encumbered property.

Comment. Section 21403 continues former Section 736 without substantive change. Section 21403 applies where the intention of the transferor is not indicated by the instrument. Section 21102.

## CROSS-REFERENCES

### Definitions

Devise § 32  
Property § 62  
Real property § 68  
Transferor § 21100  
Specific devise not exonerated § 6170

### Transitional provision

SEC. \_\_\_\_\_. This act applies only in cases where the decedent died on or after the operative date. In cases where the decedent died before the operative date, the law that would have applied had this act not been enacted shall apply.

CONFORMING REVISION

Probate Code § 6152 (amended). Halfbloods, adopted persons, and persons born out of wedlock

6152. Unless otherwise provided in the will:

(a) Except as provided in subdivision (b), halfbloods, adopted persons, persons born out of wedlock, stepchildren, foster children, and the issue of all such persons when appropriate to the class, are included in terms of class gift or relationship in accordance with the rules for determining relationship and inheritance rights for purposes of intestate succession.

(b) In construing a devise by a testator who is not the natural parent, a person born to the natural parent shall not be considered the child of that parent unless the person lived while a minor as a regular member of the household of the natural parent or of that parent's parent, brother, sister, spouse, or surviving spouse. In construing a devise by a testator who is not the adoptive parent, a person adopted by the adoptive parent shall not be considered the child of that parent unless the person lived while a minor (either before or after the adoption) as a regular member of the household of the adopting parent or of that parent's parent, brother, sister, or surviving spouse.

(c) Subdivisions (a) and (b) also apply in determining:

(1) Persons who would be kindred of the testator or kindred of a surviving, deceased, or former spouse of the testator under Section 6147.

(2) Persons to be included as issue of a deceased devisee under Section 6147.

(3) Persons who would be the testator's or other designated person's heirs under Section 6151.

(4) Persons who would be kindred of the transferor under Section 21401.

Comment. Section 6152 is amended to add paragraph (4) to subdivision (c).

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 restated in Section 12000 without substantive change.

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

Comment. Former Section 661 is not continued. Former Section 661 applied to a bequest of the interest or income of a certain sum or fund. As applied by case law under former Section 661, it appears that "certain sum or fund" referred to a testamentary trust. See, e.g., Estate of Petersen, 92 Cal. App.2d 677, 682, 207 P.2d 607 (1949); Estate of Schiffmann, 86 Cal. App.2d 638, 642-44, 195 P.2d 484 (1948); Estate of DeLano, 62 Cal. App.2d 808, 816, 145 P.2d 672 (1944); Estate of Hyland, 58 Cal. App.2d 556, 137 P.2d 73 (1943); Estate of Dasher, 53 Cal. App.2d 721, 724-25, 128 P.2d 380 (1942); In re Estate of Lair, 38 Cal. App.2d 737, 740, 102 P.2d 436 (1940). The question of when income from a testamentary trust commences is governed by Section 16304(a) (Revised Uniform Principal and Income Act).

§ 662 (repealed). Kinds of legacies

Comment. The first portion of subdivision (a) of former Section 662 is restated in Section 73 ("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 superseded by subdivision (b) of Section 21400 (abatement after sale of specifically devised property) and by the ademption rules. See, e.g., Sections 6165, 6171-6173.

Subdivision (b) of former Section 662 is restated in Section 30 ("demonstrative devise" defined) without substantive change.

The first portion of subdivision (c) of former Section 662 is restated in Section 23.5 ("annuity" defined) without substantive change. The last portion of subdivision (c) is restated in subdivision (b) of Section 21401 (priority of annuity or demonstrative devise) without substantive change.

Subdivision (d) of former Section 662 is restated in Section 69 ("residuary devise" defined) without substantive change.

Subdivision (e) of former Section 662 is superseded by Section 42 ("general devise" defined).

§ 663 (repealed). Interest; annuities

Comment. Subdivision (a) of former Section 663 is restated in Sections 12001 (rate of interest) and 12003 (interest on general pecuniary devise) without substantive change.

Subdivision (b) of former Section 663 is continued in subdivision (a) of Section 12004.

Subdivision (c) of former Section 663 is superseded by Section 12001 (rate of interest) and by subdivision (b) of Section 12004 (interest on unpaid periodic payments).

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

Comment. Subdivision (a) of former Section 664 is restated in Sections 12000 (testator's intention controls) and 12005 (remaining income to residuary or intestate distributees) without substantive change.

The provision of subdivision (b) of former Section 664 that no income received during administration shall be distributed as income of a general pecuniary legacy in trust is restated in the provision of Section 12005 that net income received during administration not paid out under Sections 12000-12004 goes to distributees of residuary or intestate property. The provision of subdivision (b) of former Section 664 that interest on a pecuniary legacy in trust shall be distributed as income to the trust is not continued, since the matter is governed by Section 16305(a) (Revised Uniform Principal and Income Act).

§ 665 (repealed). Transitional provision

Comment. Subdivision (a) of former Section 665 is superseded by an uncodified provision in the act repealing former Section 665. Subdivision (b) of former Section 665 is continued in Section 12006 without substantive change.

CHAPTER 12. PRESENTATION AND PAYMENT  
OF CLAIMS

§ 736 (repealed). No sale of specific devise to exonerate other devise

Comment. Former Section 736 is continued in Section 21403 without substantive change.



## CHAPTER 13. ABATEMENT

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

Comment. The first sentence of former Section 750 is continued in Sections 21102 and 21400(a) without substantive change. The first portion of the second sentence of former Section 750 is superseded by Section 21401. The last portion of the second sentence of former Section 750 (court discretion) is superseded by Section 21402.

### § 751 (repealed). Order of payment of legacies

Comment. Former Section 751 is superseded by Section 21401.

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

Comment. Former Section 752 is superseded by Section 21401.

### § 753 (repealed). Contribution after sale of property

Comment. The first portion of former Section 753 (if preferred devise sold, all others must contribute) is superseded by subdivision (c) of Section 21401 (pro rata abatement within each class). The last portion of former Section 753 (court to decree each person's contribution when distribution is made) is continued in subdivision (b) of Section 21400 without substantive change.