

Memorandum 87-82

Subject: Study L-1038 - Abatement (Review of Comments on Tentative Recommendation)

Attached to this memorandum is a copy of the Commission's tentative recommendation on abatement. The recommendation was distributed for comment this summer, and the comments received are also attached to this memorandum. The comments are analyzed following the particular sections of the draft to which they relate. In addition to these specific comments, we also received general expressions of approval from the following persons.

Henry Angerbauer, CPA, Concord

Wilbur L. Coats, Poway

Judge William E. Fox, Paso Robles ("I feel that these amendments will be a great improvement over the old law, and will save a lot of time, trouble and expense. I thoroughly approve of these proposed amendments.")

Richard E. Llewellyn II, Los Angeles

John G. Lyons, San Francisco (Exhibit 4) ("I find this proposal excellent.")

Charles E. Ogle, Morro Bay

Jeffrey A. Dennis-Strathmeyer, California Continuing Education of the Bar (Exhibit 2) ("The proposed abatement statute is acceptable.")

Judge Robert R. Willard, Ventura ("In my opinion they have substantial merit in both clarification and improvement of the statutes involved.")

Respectfully submitted,

Nathaniel Sterling

Assistant Executive Secretary



Writer's Direct Dial Number

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COUNTY OF ORANGE

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 ASSISTANTS

SEP 03 1987

September 1, 1987

C E I

California State Law Revision Commission
 4000 Middlefield Road, Suite D-2
 Palo Alto, California 94303-4739

Ladies and Gentlemen:

| | |
|---------------------|-----------------------|
| VICTOR T. BELLERUE | SUSAN STROM |
| JOHN R. GRISET | DAVID BEALES |
| EDWARD M. DURAN | TERRY C. ANDRUS |
| IRYNE C. BLACK | CLAUDIA L. COWAN |
| RICHARD D. OVIEDO | JAMES L. TURNER |
| O.M. MOORE | PETER L. COHON |
| BENJAMIN P. DE MAYO | NICHOLAS S. CHRISOS |
| HOWARD SERBIN | DAVID G. EPSTEIN |
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| ROBERT L. AUSTIN | HOPE E. SNYDER |
| DONALD H. RUBIN | THOMAS C. AGIN |
| DAVID R. CHAFFEE | SHERIE A. CHRISTENSEN |
| CAROL D. BROWN | SUSAN M. NILSEN |
| BARBARA L. STOCKER | SARA L. PARKER |
| JAMES F. MEADE | SHARON LOWSEN |
| STEFEN H. WEISS | |

DEPUTIES

Thank you for sending me your tentative recommendations relating to accounts, abatement, rules of procedure in probate, and litigation involving decedents.

My comments on matters of special interest follow. As with my previous comments to you, please note that these are my individual views. I do not write here as a representative of the Orange County Counsel, the Orange County Public Administrator/Public Guardian, or the County of Orange.

I. Recommendations Relating To Accounts:

- A. Proposed Section 10900:** I do not support the proposed change. In the particular case of the Orange County Public Administrator/Public Guardian, it would probably cost money to change the form of accounts as allowed by the proposed law, due to modifications that would be needed in the computer system. Of more general interest, I do not think an account which only summarizes categories of receipts, disbursements, etc., generally gives interested persons sufficient information about how an estate has been managed. If an account only lists, for example, the amount of rents received, but not the specific payments, this will only engender more calls and questions from interested persons. While 10901 would provide a procedure to obtain the supporting documentation, I believe it would be fairer to require the party presenting the account to list all receipts therein, rather than to require the recipient of the account to pursue the information under 10901. After all, the preparer had to have the individual receipts available when preparing the account, so as to provide the total.

This matter is perhaps most important where the recipient of an account will be the successor administrator. The Public Administrator fairly often succeeds a personal representative who has mismanaged an estate or absconded. The accounting by the former administrator or his attorney is often the starting point for determining a surcharge and for

determining what needs to be done to close the estate. In receiving such an account, I, as attorney for the successor, would want to know, for example, not just the total of rents received but exactly which months' rent the predecessor did collect. This may be something I would need to know promptly, and it should be a part of the account.

- B. Proposed Sections 10952 and 10953: I support these changes. It will be helpful to have the sixty-day time limit. In the past, it sometimes takes the predecessor representative too long to present his account. This, of course, delays the administration of the estate and collection of any surcharge.
- C. Proposed Section 11000(c): I support this change. Perhaps a note should clarify whether the exact amount of fees must be set forth.
- D. Proposed Section 11002: I support the discontinuance of a jury trial being available in a contest of an allowed claim.
- E. Proposed Section 11005(b): I support the proposed change.

II. Recommendations Relating to Abatement:

- A. Proposed Section 21402: The explicit preference for specific gifts over general gifts makes the statute comply with the case law as I understand it.
- B. Proposed Section 21403: I support this, as it seems to be the most likely way to carry out implied testamentary intent.
- C. Proposed Section 21405: I support the addition of (b). This sets forth a solution that not only can help a beneficiary, but can make the eventual distribution as much as possible the way the testator wanted it.

III. Recommendations Relating To Rules Of Procedure In Probate:

- A. Proposed Section 7050(b): I support this provision.
- B. Proposed Section 7200: I support this provision.
- C. Proposed Section 7240(a): I think it is helpful to have this explicit provision that orders granting or revoking letters of special administration are not appealable.
- D. Proposed Section 7241(b): I support this addition.

IV. Recommendations Relating To Litigation Involving Decedent:

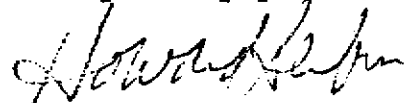
A. Proposed Section 505: I am not certain of all the ramifications of the proposed change, but in general the proposal appears to me to be a good one. Expanding the procedure to estates that do not qualify under 13100 seems particularly well-taken.

B. Proposed Section 9103(a): I support this addition.

V. General Comment:

The Commission may recall that I appeared at one of your recent meetings and commented in opposition to one of your proposals. I did not then also take the opportunity to indicate that I have supported the vast majority of your proposals and have found a number of them helpful in my work. Let me use this occasion to thank you for your good work.

Very truly yours,



Howard Serbin
Deputy County Counsel

HS:mm

cc: William A. Baker, Public Administrator/Public Guardian
Carol Gandy, Asst. Public Administrator/Public Guardian
Dwight G. Tipping, Jr., Supv. Deputy Public Administrator
Laurence M. Watson, Assistant County Counsel
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Nicholas S. Chrisos, Deputy County Counsel



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September 3, 1987

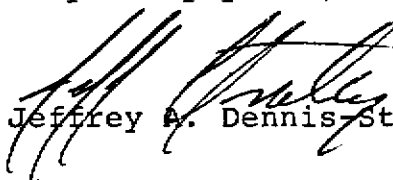
John H. DeMouilly, Esq.
Executive Director
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Study L-1038: Abatement

Dear John:

The proposed Abatement statute is acceptable. I would prefer that the priority for gifts to relatives in Probate Code Section 21402 be limited to relatives within a reasonable degree of kinship. Also, your cross-references to definitions should refer to the definitions of the types of gifts in Probate Code Section 662.

Very truly yours,


Jeffrey A. Dennis-Strathmeyer

JAD-S:dp

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September 3, 1987

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Gentlemen:

Thank you for permitting me to review Tentative Recommendations #L-1025, #L-1027, #H-408 and #L-1038.

TR #L-1025 entitled "LITIGATION INVOLVING DECEDENT" is excellent. Hopefully, the legislature will follow your recommendations.

(NOTE: Reference is made in the footnote on page 8 to "Claim covered by insurance §9354". At page 10 reference is made to §9354 in §554 (b). I have trouble with these references. There is no §9354 in my Probate Code; there is no §9354 in AB 708 [Harris]; in your January 1987 Blue Book entitled RECOMMENDATIONS relating to Probate Law (received in my office July 13, 1987) I can find no §9354 in Part 4, Creditors Claims. To further complicate this matter, the July 1986 TR Study L 1025 at page 23 contains a comment which reads as follows: "Comment §9354 continues formal Probate Code §732 without substantive change". I agree. On the other hand, §732 relates to "Converting Attachment Lien to Judgement Lien"? WHERE DO I GO FROM HERE?)

TR #L-1027 entitled "ACCOUNTS" embodies the procedures followed in my office. May I offer two suggestions?

First: when I report the reasons for the delay in distribution of an estate as required by §1025.5 of the Probate Code, I include an interim account. In my opinion, this should be mandatory;

Second: in almost every probate it is necessary, after final distribution, to file a brief account supplemental to the final account to pick up additional interest, refunds, unused closing expenses, etc. which cannot be determined until several weeks or months after actual distribution. I suggest this be required by statute. In the absence of a request by an interested distributee, no hearing need be held nor approval sought from the court with respect to such supplemental account.

With respect to TR #H-408 relating to "UNIFORM DORMANT MINERAL INTERESTS ACT", I have no comment. I have never had occasion, in my practice, to get involved in this problem. On the other hand I am happy to know that the California statutes offer guidance.

With respect to TR #L-1038 entitled "ABATEMENT", locating the new provisions with the other rules of construction of wills, trusts, and other instruments is appropriate.

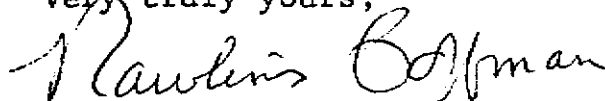
With respect to TR #L-1048 entitled "RULES OF PROCEDURE IN PROBATE", the new limitations on jury trials in the probate court met with my approval. As a matter of fact I would hope that §1081 could be amended to deny jury trials in 1080 proceedings.

I agree that contents of the judgment rule should be left to Judicial Council rule. This in turn should eliminate §1050.

Section 1020 requires the signature of all petitioners; §1021 requires verification by only one of several petitioners. Why the inconsistency?

Please keep me on your mailing list.

Very truly yours,

A handwritten signature in cursive script that reads "Rawlins Coffman". The signature is written in dark ink and is positioned above the printed name.

RAWLINS COFFMAN

RC:mm

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September 4, 1987


California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: # L-1038
Tentative Recommendation
relating to Abatement

Gentlemen:

I find this proposal excellent, particularly
Section 21402 Order of Abatement. I see no prob-
lems.

Very truly yours,


John G. Lyons

JGL:MS

**ESTATE PLANNING, TRUST AND
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September 9, 1987

Mr. John H. DeMouilly
Executive Director
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94303

Re: LRC TR's re Abatement & Accounts

Dear John:

I have enclosed copies of Study Team 4's technical report on the TR for Abatement and the TR for Accounts. The reports represent the opinions of the team only. The reports have not been reviewed by the Executive Committee. I am sending them to you for your information and comment. They are intended to assist in the technical review of those sections involved.

Very truly yours,

James V. Quillinan
James V. Quillinan
Attorney at Law

JVQ/h1

Encls.

cc: Chuck Collier Jim Opel
 Keith Bilter Jim Devine
 Irv Goldring Lloyd Homer

CA LAW REV. COMM'N

SEP 10 1987

RECEIVED

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PLEASE REFER TO
FILE NO.
TEAM4001.03L

September 9, 1987

By Fax

James Quillinan, Esq.
444 Castro Street, #900
Mountain View, CA 94041

Re: Tentative Recommendation Relating to Abatement

Dear Jim:

On September 3, 1987, Team 4 (Harley Spitler, Jim Willett and I) discussed Tentative Recommendation Relating to Abatement. Team 4's comments about the above-referenced Tentative Recommendation are as follows:

1. Section 21400 - Abatement Subject to Transferor's Intent;
Comment.

Team 4 believes that the reference to "It" in line 6 of the Comment is unclear. Since prior case law is so critical to the interpretation of the abatement of general and specific devises, Team 4 suggests that the reference be clarified, and the relationship with existing case law emphasized.

2. Section 21405 - Contribution in Case of Abatement.

Team 4 suggests that for purposes of clarifying the duty of the personal representative, the second sentence of section 21405(a) be deleted as written and restated in either of the following ways:

(1) The personal representative shall reduce the distributee's share by that amount; or

(2) The personal representative shall deduct that amount from the distributee's share.

James Quillinan, Esq.
September 9, 1987
Page 2

Thank you for your consideration.

Cordially,

Kathryn A. Ballsun

KATHRYN A. BALLSUN
A Member of
STANTON AND BALLSUN
A Law Corporation

KAB/rwm

cc: Richard Polse, Esq.
Harley Spitler, Esq.
Janet Wright, Esq.
Clare Springs, Esq.
William Hoisington, Esq.
Lloyd Homer, Esq.
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September 12, 1987

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Attn: Robert J. Murphy III, Esq.

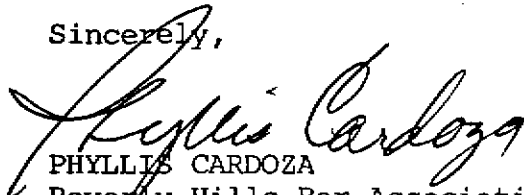
Re: Study L-1038, Abatement
Tentative Recommendation - July, 1987

Gentlemen:

Enclosed are the comments of our Committee regarding the above study, which you requested by September 15th.

Our chair, Ken Petrulis will attend the Commission meeting on Thursday and Friday, September 18-19, 1987 at the State Bar offices in Los Angeles.

Sincerely,



PHYLLIS CARDOZA
Beverly Hills Bar Association
Probate, Trust and Estate Planning Section
Legislative Committee
PC:pk
Enc.

cc: Kenneth G. Petrulis, Esq.
Jeffrey A. Altman, Esq.
Kenneth A. Feinfield, Esq.
David Gutman, Esq.
Marc B. Hankin, Esq.
Linda D. Hess, Esq.
Laura Kimche Horwitch, Esq.
Janet McCoy, Esq.
Ralph V. Palmieri, Esq.
Bruce D. Sires, Esq.
James J. Stewart, Esq.
Melinda J. Toooh, Esq.
Lance M. Weagant, Esq.

September 10, 1987

BEVERLY HILLS BAR ASSOCIATION
PROBATE TRUST AND ESTATE PLANNING SECTION
LEGISLATIVE COMMITTEE
Kenneth G. Petrulis, Esq., Chair
Phyllis Cardoza, ILA, Vice Chair
James J. Stewart, Esq., Member

CALIFORNIA LAW REVISION COMMISSION
Study L-1038 - Abatement
Tentative Recommendation 7/23/87

INTRODUCTION (Pages 1 and 2)

1. For the reasons in our comment to §21401 below, we suggest the first 4 lines of the first paragraph on page 1 be amended to read as follows:
"If property . . . are not sufficient to pay debts, expenses of administration, death taxes payable from residue, and family allowance"
[added language underlined]
2. For clarity, we suggest the second sentence of the first paragraph of page 2 be amended to read:
"The proposed law conforms statutory language to existing case law by requiring general devisees to be exhausted before specific devisees are reduced."
3. Footnote 8 would be more clear if the following language from Footnote 4 of the Introduction to the 7-9-87 version of the Tentative Recommendation were reinstated:
"For this reason, the proposed law continues the existing proportional abatement rule for pretermisison. Prob. Code §§6562, 6573. This carries out the testator's intent by requiring general and specific devisees to contribute proportionally with residuary devisees to make up the statutory share of the omitted spouse or child."

DIVISION 11. CONSTRUCTION OF WILLS, TRUSTS, AND OTHER INSTRUMENTS
PART 4. ABATEMENT

§21400. Purposes for which abatement made

1. We applaud the addition of the brief descriptions after the code sections mentioned in the first sentence.
2. Once again (see our letter of 6-15-87) we ask that some mention be made in the Comment, if not the code section, to show that death taxes are clearly one of the "charges specified in Section 11420" (Line 5 of §21401).

See Estate of Cochran (1973), 30 CA3d 892; 106 CR 700.
In that case, the will directed that estate taxes be paid out of the residue, but the residue was not sufficient to do so after specific devises, debts, attorney fees and expenses of administration. The Court ruled that to the extent of the remaining unpaid death taxes, the specific beneficiaries are subject to prorated tax burdens as though no tax allocation clause appeared in the will.

See also Estate of Nesbitt (1958), 158 CA2d 630, 323 P2d 474.

In spite of Cochran, practitioners and legal commentators have been unclear on how to abate when, but for estate taxes chargeable to residue, there would be no abatement. It would thus be helpful to have it spelled out, as §11420 puts state and federal taxes in a separate category from the other charges, and doesn't specifically mention estate (death) taxes.

3. In the Comment, the third line from the bottom, is 1867 the correct year in the Woodworth citation?

§21402. Order of Abatement

The use of "relatives" throughout is a great improvement over "spouse and kindred", which had been used in the past, because "kindred" was giving everyone a lot of trouble. You have saved a lot of words, too!

7/23/87

TENTATIVE RECOMMENDATION

relating to

ABATEMENT

If property not disposed of by a decedent's will (intestate property) and residuary property are not sufficient to pay debts, expenses of administration, or family allowance, existing statutory and case law require general and specific devises to be abated (reduced).¹ The proposed law extends the abatement rules to trusts and other donative transfers in addition to dispositions by will, since the same problems may also arise concerning nontestamentary dispositions.²

For purposes of abatement, the testator's spouse and kindred are preferred over nonrelatives. A gift to a nonrelative is exhausted before a comparable gift to a relative is reduced.³ The proposed law makes clear that the preference for relatives includes all those who might take from the decedent by intestate succession. This includes halfbloods, adoptees, persons born out of wedlock, and, in limited cases, stepchildren and foster children.⁴ The same policies that favor giving such persons an intestate share also favor giving such persons a preference in abatement.

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.

2. For this reason the new provisions are located with other rules of construction of wills, trusts, deeds, and other instruments.

3. Prob. Code § 752; *Estate of De Santi*, 53 Cal. App. 2d 716, 719-21, 128 P.2d 434 (1942); *In re Estate of Wever*, 12 Cal. App. 2d 237, 242-3, 55 P.2d 279 (1936).

4. See Prob. Code §§ 6406, 6408, 6408.5. Cf. Prob. Code § 6152.

Statutory language appears to require general and specific devises to abate proportionately,⁵ but case law makes clear that general devises must be exhausted before specific devises are reduced.⁶ The proposed law conforms statutory language to existing law by requiring general devises to be exhausted before specific devises are reduced.

Proportionate abatement is retained, however, in cases of omitted heirs.⁷ Application of the general abatement rule to such cases instead of the proportionate rule would likely result in the omitted spouse or child receiving a larger share than family members named in the will as residuary devisees,⁸ a result probably contrary to the testator's intent.

5. Probate Code Section 750 states that "all property devised and bequeathed is liable ... in proportion to the value or amount of the several devises and legacies."

6. Compare Prob. Code § 750 with Estate of Jenanyan, 31 Cal. 3d 703, 711-12, 646 P.2d 196, 183 Cal. Rptr. 525 (1982).

7. Prob. Code §§ 6562, 6573.

8. This is a consequence of the large, unanticipated share taken from the residuary devisees 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.

PROPOSED LEGISLATION

Probate Code § 736 (repealed). Exonerating encumbered property

SEC. . Article 2 (commencing with Section 736) of Chapter 12 of Division 3 of the Probate Code [AB 708] is repealed.

Comment. For the Comment to former Section 736, see the Appendix to this recommendation.

Probate Code §§ 750-753 (repealed). Abatement

SEC. . Chapter 13 (commencing with Section 750) of Division 3 of the Probate Code [AB 708] is repealed.

Comment. For the Comments to former Sections 750 to 753, see the Appendix to this recommendation.

Probate Code §§ 21400-21405 (added). Abatement

SEC. . Part 4 (commencing with Section 21400) is added to Division 11 of the Probate Code, to read:

Note. Rawlins Coffman, Red Bluff (Exhibit 3) finds the location of the new abatement provisions with the other rules of construction of wills, trusts, and other instruments, to be "appropriate."

The Legislative Committee of the Probate, Trust and Estate Planning Section of the Beverly Hills Bar Association (Exhibit 6) offers some editorial improvements in the explanatory text of the recommendation, which the staff will incorporate in the next draft.

PART 4. ABATEMENT

§ 21400. Abatement subject to transferor's intent

21400. Notwithstanding any other provision of this part, if the instrument provides for abatement, or if the transferor's plan or the purpose of the transfer would be defeated by abatement as provided in this part, the shares of beneficiaries abate as is necessary to effectuate the instrument, plan, or purpose.

Comment. Section 21400 is generally consistent with prior law. See former Sections 736, 750-752 [AB 708]; Estate of Jenanyan, 31 Cal. 3d 703, 713-14, 646 P.2d 196, 183 Cal. Rptr. 525 (1982). It is drawn from Uniform Probate Code Section 3-902(b).

CROSS-REFERENCES

Definitions

Beneficiary § 24
Instrument § 21100 [AB 708]
Transferor § 21100 [AB 708]

Note. State Bar Study Team 4 (Exhibit 5) believes the Comment should be clarified and the relationship of Section 21400 to existing law emphasized. We would revise the Comment, consistent with their suggestion, as follows:

Section 21400 generalizes a number of provisions in existing statutes, and is consistent with case law. See former Sections 736, 750-752 [AB 708]; *Estate of Jenanyan*, 31 Cal. 3d 703, 713-14, 646 P.2d 196, 183 Cal. Rptr. 525 (1982). The text of the section is drawn from subdivision (b) of Section 3-902 of the Uniform Probate Code.

§ 21401. Purposes for which abatement made

21401. Except as provided in Sections 6562 (omitted spouse) and 6573 (omitted children) and in Division 10 (commencing with Section 20100) (proration of taxes), shares of beneficiaries abate as provided in this part for all purposes, including payment of the debts, expenses, and charges specified in Section 11420 [AB 708], satisfaction of gifts, and payment of expenses on specifically devised property pursuant to Section 12003 [to be drafted], and without any priority as between real and personal property.

Comment. Section 21401 supersedes a portion of the first sentence of former Section 750 and a portion of the introductory clause of former Section 751. The provision that there is no priority as between real and personal property restates a provision formerly found in the California statutes. See former Section 754 (first sentence). It is consistent with existing case law. See, e.g., *In re Estate of Woodworth*, 31 Cal. 595, 614 (1867). See also Section 3-902 of the Uniform Probate Code. This section is subject to Section 21400 (abatement subject to transferor's intent).

CROSS-REFERENCES

Definitions

Beneficiary § 24
Property § 62
Real property § 68

Note. The Legislative Committee of the Probate, Trust and Estate Planning Section of the Beverly Hills Bar Association (Exhibit 6) believes the section or Comment should refer specifically to death taxes as one of the charges specified in Section 11420 to which these abatement rules apply. They state that, "practitioners and legal commentators have been unclear on how to abate when, but for estate

taxes chargeable to residue, there would be no abatement. It would thus be helpful to have it spelled out, as §11420 puts state and federal taxes in a separate category from the other charges, and doesn't specifically mention estate (death) taxes. The staff thinks it would be incorrect to refer to death taxes here since death taxes are governed by the tax proration statute rather than by the abatement statute.

§ 21402. Order of abatement

21402. (a) Shares of beneficiaries abate in the following order:

(1) Property not disposed of by the instrument.

(2) Residuary gifts.

(3) General gifts to persons other than the transferor's relatives.

(4) General gifts to the transferor's relatives.

(5) Specific gifts to persons other than the transferor's relatives.

(6) Specific gifts to the transferor's relatives.

(b) For purposes of this section, a "relative" of the transferor is a person who would be entitled to take property from the transferor under Part 2 (intestate succession) of Division 6 if the transferor died intestate and there were no other person having priority.

Comment. Paragraphs (1) and (2) of subdivision (a) of Section 21402 restate the first portion of the second sentence of former Section 750 and all of former Section 751, and generalize them to apply to other gifts as well as devises. The preference for specific gifts in paragraphs (5) and (6) over general gifts 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 relatives in paragraphs (4) and (6) over nonrelatives in paragraphs (3) and (5) continues the last portion of former Section 752. See also *Estate of Buck*, 32 Cal. 2d 372, 376, 196 P.2d 769 (1948); *Estate of De Santi*, 53 Cal. App. 2d 716, 719-21, 128 P.2d 434 (1942).

Under subdivision (b), "relatives" includes the transferor's blood relatives other than those who may not take from the transferor by intestate succession because of an adoption. Section 6408.5 (adoption). "Relatives" also includes persons other than blood relatives who may take from the transferor by intestate succession under Sections 6408 and 6408.5 (adoptive, foster parent, and stepparent relationships).

This section is subject to Section 21400 (abatement subject to transferor's intent).

CROSS-REFERENCES

Definitions

Beneficiary § 24
Instrument § 21100 [AB 708]
Property § 62
Transferor § 21100 [AB 708]

Note. John G. Lyons, San Francisco (Exhibit 4), particularly finds this section excellent, and sees no problems.

The Legislative Committee of the Probate, Trust and Estate Planning Section of the Beverly Hills Bar Association (Exhibit 6) believes the terminology of this section ("relatives" rather than "spouse and kindred") is a great improvement.

The explicit preference for specific gifts over general gifts complies with case law, as Howard Serbin, Deputy County Counsel of Orange County (Exhibit 1), understands it.

This section prefers the testator's relatives over nonrelatives for purposes of abatement. Jeffrey A. Dennis-Strathmeyer, California Continuing Education of the Bar (Exhibit 2), suggests that the priority for gifts to relatives be limited to relatives within a reasonable degree of kinship. This makes some sense to the staff, but where do you draw the line? One possibility is by reference to the priority for appointment of a personal representative, which goes through the ranks of kinship as far as issue of grandparents and children of a predeceased spouse before lumping together the other remaining next of kin. This parallels the intestate succession order of inheritance, although that scheme goes beyond children and pulls in any issue of grandparents or of a predeceased spouse before moving to other next of kin.

Mr. Strathmeyer also suggests it would be useful in the cross-references to include a reference to the statutory descriptions of types of devises (general, specific, residuary, etc.). The Staff will do this.

§ 21403. Abatement within classes

21403. (a) Except as provided in subdivision (b), shares of beneficiaries abate pro rata within each class specified in Section 21402.

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

Comment. Subdivision (a) of Section 21403 restates a portion of the second sentence of former Section 750 and a portion of former Section 752, and supersedes the first portion of former Section 753 (if preferred devise sold, all devisees must contribute), and generalizes them to apply to other gifts as well as devises.

Subdivision (b) restates the last portion of subdivision (c) of former Section 662, and generalizes it to apply to other gifts as well as devises. With respect to the fund designated for payment of an annuity or demonstrative gift, the priority given by subdivision (b) controls over the priority that the transferor's relatives have for other general gifts under Section 21402 (a)(4). Thus a general gift to the transferor's relatives will abate before abatement of the fund designated for an annuity for a nonrelative.

This section is subject to Section 21400 (abatement subject to transferor's intent).

CROSS-REFERENCES

Definitions

Beneficiary § 24

Property § 62

Note. Howard Serbin, Deputy County Counsel of Orange County (Exhibit 1), supports this section. "It seems to be the most likely way to carry out implied testamentary intent."

§ 21404. No exoneration by abatement of specific gift

21404. If an instrument requires property that is the subject of a specific gift to be exonerated from a mortgage, deed of trust, or other lien, a specific gift of other property does not abate for the purpose of exonerating the encumbered property.

Comment. Section 21404 restates former Section 736 and generalizes it to apply to exoneration of personal as well as real property and to apply to other gifts as well as devises. This section is subject to Section 21400 (abatement subject to transferor's intent).

CROSS-REFERENCES

Definitions

Instrument § 21100 [AB 708]

Property § 62

Specific devise not exonerated § 6170

§ 21405. Contribution in case of abatement

21405. (a) When a distribution is made during estate administration, the court shall fix the amount each distributee must contribute for abatement. The personal representative shall reserve that amount from the distributee's share.

(b) If a specific gift is required to abate, the beneficiary of the specific gift may satisfy the contribution for abatement out of personal assets instead of out of the property that is the subject of the specific gift.

Comment. Subdivision (a) of Section 21405 restates the last portion of former Section 753 without substantive change. Contribution may be required for abatement for any purpose, including sale of property for payment of debts or expenses or family allowance. See Section 21401 (purposes for which abatement made). Subdivision (b) is new.

CROSS-REFERENCES

Definitions

Beneficiary § 24

Personal representative § 58

Property § 62

Note. The second sentence of subdivision (a) specifies the duty of the personal representative to reserve the amount of a distributee's abatement contribution from the distributee's share. State Bar Study Team 4 (Exhibit 5) suggests that this can be clarified, and offers the following alternative phrasings:

(1) The personal representative shall reduce the distributee's share by that amount; or

(2) The personal representative shall deduct that amount from the distributee's share.

The staff is happy with any of these three formulations. Which does the Commission prefer?

Howard Serbin, Deputy County Counsel of Orange County (Exhibit 1), supports the addition of subdivision (b). He states, "This sets forth a solution that not only can help a beneficiary, but can make the eventual distribution as much as possible the way the testator wanted it."

§ 21406. Transitional provision

21406. (a) This part applies to a gift made on or after July 1, 1989. In the case of a gift made before July 1, 1989, the law that would have applied had this part not been enacted shall apply.

(b) For purposes of this section a gift by will is made on the date of the decedent's death.

APPENDIX

DISPOSITION OF EXISTING PROBATE CODE SECTIONS

DIVISION 3. ADMINISTRATION OF ESTATES OF DECEDENTS

CHAPTER 12. CLAIMS AGAINST DECEDENT

Article 2. Exonerating Encumbered Property

§ 736 (repealed). Exonerating encumbered property

Comment. Former Section 736 is restated in Sections 21400 (abatement subject to transferor's intent) and 21404 (exoneration by abatement of specific gift), which generalize it to apply to exoneration of personal as well as real property and to apply to other gifts as well as devises.

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 restated in Sections 21400 (abatement subject to transferor's intent) and 21401 (purposes for which abatement made), which generalize it to apply to other gifts as well as devises. The second sentence is restated in Sections 21400 (abatement subject to transferor's intent) and 21402 (order of abatement), which generalize it to apply to other gifts as well as devises.

§ 751 (repealed). Order of payment of legacies

Comment. Former Section 751 is restated in Sections 21401 (purposes for which abatement made) and 21402 (order of abatement), which generalize it to apply to other gifts as well as devises.

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

Comment. Former Section 752 is superseded by Sections 21400 (abatement subject to transferor's intent) and 21402 (order of abatement).

§ 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 (a) of Section 21403 (abatement within classes). The last portion of former Section 753 (court to decree each person's contribution when distribution is made) is restated in subdivision (b) of Section 21405 (contribution in case of abatement) without substantive change.