

Memorandum 2001-26

Rules of Construction for Trusts: Draft Tentative Recommendation

Attached to this memorandum is a draft tentative recommendation on the rules of construction for trusts and other instruments. The draft implements decisions made at the Commission's December 2000 meeting.

The staff will circulate the tentative recommendation for comment after approval by the Commission, either as presented here or as revised.

This memorandum summarizes the changes made by the staff in response to issues raised by the Commission at the December meeting.

Prob. Code § 21102. Intention of transferor

Perhaps the most controversial aspect of this draft is its treatment of extrinsic evidence in determining the transferor's intent. Pursuant to the Commission's direction, the draft liberalizes admissibility of extrinsic evidence by repealing subdivision (a) of Section 21102 and broadening subdivision (b). The Comment elaborates application of the "clear and convincing evidence" standard for reformation of an instrument, and a Note is added calling for reaction to this proposal.

~~21102. (a) The intention of the transferor as expressed in the instrument controls the legal effect of the dispositions made in the instrument.~~

~~(b) The rules of construction expressed in this part apply where the do not apply to the extent a contrary intention of the transferor is not indicated by expressed in the instrument or is otherwise determined by the court.~~

Comment. Subdivision (a) of Section 21102 is repealed. The intention of the transferor controls the legal effect of the dispositions made in the instrument, but expressions in the instrument are not the exclusive means by which a transferor's intention as to the legal effect of a disposition may be ascertained. See generally 12 B. Witkin, *Summary of California Law Wills and Probate* §§ 245-247, at 280-284 (9th ed. 1990). Under the parol evidence rule, for example, extrinsic evidence may be available to explain, interpret, or supplement an expressed intention of the transferor. Code Civ. Proc. § 1856. Likewise, this section does not

limit the authority of the court to reform an instrument for mistake or imperfection of writing. Cf., Code Civ. Proc. § 1856(e) (parol evidence rule); Estate of Smith, 61 Cal. App. 4th 259, 71 Cal.Rptr. 2d 424 (1998) (contestant bears burden of proof of mistake as to testamentary intent). It should be noted that before granting reformation, courts require that the evidence of mistake be clear and convincing; reformation is denied, for example, if the donor's testimony is equivocal and unsupported by disinterested witnesses. See W. McGovern, S. Kurtz & J. Rein, Wills, Trusts and Estates § 6.4 (1988).

Subdivision (b) is amended to make clear that extrinsic evidence may be used to demonstrate an intention of the transferor contrary to the rules of construction in this part. See also Section 6111.5 (will); Estate of Anderson, 56 Cal. App. 4th 235, 65 Cal. Rptr. 2d 307 (1997) (extrinsic evidence admissible).

☞ **Note.** The Commission particularly requests input on the revisions proposed here, and on whether the explanation in the Comment is satisfactory concerning the authority of the court to reform an instrument for mistake.

Prob. Code § 21104. “At death transfer” defined

After struggling with various terminological issues, the staff has come down on the side of the ungainly phrase, “at death transfer”:

21104. As used in this part, “~~testamentary gift~~” “at death transfer” means a transfer ~~in possession or enjoyment~~ that takes effect in enjoyment at or after death.

Other terms, such as “donative transfer”, have too many different connotations, and eliminating the definition in favor of a longhand phrase proves to be too awkward.

Prob. Code § 21109. Requirement that transferee survive transferor

Should the survival requirement be limited to revocable trusts and not apply to irrevocable trusts? An argument can be made for that, but the staff concluded not to so limit it. How does an irrevocable trust differ in any practical way from a will after the testator has become incompetent? Yet we don't limit application of this section to “irrevocable” wills. For simplicity and consistency, the staff would treat all at death transfers alike with respect to the survival requirement. Evidence of a transferor's contrary intention is admissible to overcome this rule of construction in an appropriate case.

21109. (a) A transferee of an at death transfer who fails to survive the transferor or until any future time required by the instrument does not take under the instrument.

~~(b) If it cannot be established by clear and convincing evidence that the transferee has survived the transferor, it is deemed that the beneficiary did not survive the transferor.~~

~~(c) If it cannot be established by clear and convincing evidence that the transferee survived until a future time required by the instrument, it is deemed that the transferee did not survive until the required future time.~~

Comment. Subdivision (a) of Section 21109 is amended to limit its application. See Section 21104 (“at death transfer” defined).

Subdivisions (b) and (c) are deleted as unnecessary. The general “clear and convincing evidence” standard of Section 220 applies.

Prob. Code § 21110. Anti-lapse

The Commission decided to simplify the antilapse statute, but to elaborate its operation in the Comment. The draft statute and Comment are set out below for Commission review.

21110. (a) Subject to subdivision (b), if a transferee is dead when the instrument is executed, or is treated as if the transferee predeceased the transferor, or fails to survive the transferor or until a future time required by the instrument, the issue of the deceased transferee take in the transferee’s place in the manner provided in Section 240. A transferee under a class gift shall be a transferee for the purpose of this subdivision unless the transferee’s death occurred before the execution of the instrument and that fact was known to the transferor when the instrument was executed.

~~(b) The issue of a deceased transferee do not take in the transferee’s place if the instrument expresses a contrary intention or a substitute disposition. A requirement that the initial transferee survive for a specified period of time after the death of the transferor constitutes a contrary intention. A requirement that the initial transferee survive until a future time that is related to the probate of the transferor’s will or administration of the estate of the transferor constitutes a contrary intention.~~

(c) As used in this section, “transferee” means a person who is kindred of the transferor or kindred of a surviving, deceased, or former spouse of the transferor.

Comment. Section 21110 is amended to delete from subdivision (b) the specific instances of expressed contrary intention, to avoid the implication that those are the exclusive expressions that constitute a contrary intention. Thus, a requirement that the initial transferee survive for a specified period of time after the death of

the transferor, or a requirement that the initial transferee survive until a future time that is related to the probate of the transferor's will or administration of the estate of the transferor, may well constitute a contrary intention. (In this connection, it should be noted that technical words in an instrument are to be considered as having been used in their technical sense. See Section 21122.) And, while expressions of that type may well indicate an intention that the antilapse statute not apply, other expressions of contrary intention in an instrument may also be sufficient to override the antilapse statute.

In applying the provision of subdivision (b) relating to a substitute gift, care must be taken not to ascribe to the testator an overly broad intention to override the antilapse statute. For example, by providing a substitute taker, the transferor may well intend to override the antilapse statute in the ordinary case, but not necessarily where the substitute taker has also predeceased the transferor. In that situation, the transferor may have intended that the antilapse statute should apply.

In addition to the limitations prescribed in subdivision (b), Section 21110 is also subject to the general principle that rules of construction such as this section do not apply if it is determined that the transferor intended a contrary result even though not expressed in the instrument. See Section 21102 (rules of construction inapplicable to extent contrary intention of transferor is expressed in instrument or otherwise determined by court). Matters the court might take into account in determining whether or not the transferor intended that issue of a deceased beneficiary should take in the beneficiary's place may include (1) whether the result of a survival requirement would be to disinherit a branch of the transferor's lineal descendants, (2) whether the result of a survival requirement would be to pass property to persons expressly disinherited by the instrument or to the state by escheat, and (3) other persuasive evidence of the transferor's likely intent.

Prob. Code § 21133. Proceeds of specific gift

The Commission suggested the staff take a look at the general presumption against ademption of specific devises codified in the new Uniform Probate Code. The staff has generalized that provision in subdivision (f):

21133. A recipient of a specific gift has the right to the remaining property specifically given a right to the property specifically given owned by the transferor at the time the gift takes effect in enjoyment and all of the following:

(a) Any balance of the purchase price (together with any security interest agreement) owing from a purchaser to the

transferor at death the time the gift takes effect in enjoyment by reason of sale of the property.

(b) Any amount of an eminent domain award for the taking of the property unpaid at death the time the gift takes effect in enjoyment.

(c) Any proceeds unpaid at death on fire or casualty insurance on or other recovery for injury to the property.

(d) Property owned by the transferor at death the time the gift takes effect in enjoyment and acquired as a result of foreclosure, or obtained in lieu of foreclosure, of the security interest for a specifically given obligation.

(e) Real or tangible personal property owned by the transferor at the time the transfer is effective that the transferor acquired as a replacement for specifically given real or tangible personal property.

(f) The value of the specifically given property, to the extent the property is not owned by the transferor at the time the gift takes effect in enjoyment and its value or its replacement is not covered by subdivisions (a) to (e), unless the facts and circumstances indicate that ademption of the gift was intended by the transferor or ademption of the gift is consistent with the transferor's manifested plan of distribution.

Commission Comments for Rules of Construction

The staff has added Comments to all sections, based on the original Commission Comments for construction of wills. In some cases, we have made technical amendments to statutes in order to provide an occasion for the Commission Comment.

The staff wishes to acknowledge the assistance of the Institute for Legislative Practice on this part of the project. The Institute did the basic work of conversion of the old Comments, including updating Witkin citations and checking for recent case law, as well as converting from old section numbers to new and from will terminology to donative transfer terminology.

Please note that Comments to Sections 21101, 21109, and 21110 are set out in this memorandum to illustrate specific points. These Comments have been edited so as to focus on the particular issue under consideration. For the full text of the Comments, including the material culled from original Commission Comments on construction of wills, please refer to the draft tentative recommendation attached to this memorandum.

Conforming Revisions

In the course of putting together the tentative recommendation draft, the staff discovered that when the State Bar relocated former Probate Code Sections 6140-6179 to their current residence at Probate Code Sections 21110-21140, they neglected to make conforming changes. There are about a half-dozen cross references in the codes to old section numbers that should be adjusted. The staff has added these to the draft. See proposed amendments to Prob. Code §§ 221, 230, 250, 6103, 6205, and 11640.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

Staff Draft

Tentative Recommendation

RULES OF CONSTRUCTION FOR TRUSTS
AND OTHER INSTRUMENTS

SUMMARY OF TENTATIVE RECOMMENDATION

The Law Revision Commission in this recommendation surveys the existing Probate Code rules of construction for wills, trusts, and other estate planning instruments. The rules have been criticized in recent years as being overly broad.

The Commission concludes that several of the rules should be limited in their application. A number should be repealed because they restate the common law (but do so in an incomplete fashion), because they duplicate other statutes, or because they unduly inhibit the ability of the court to ascertain the donor's intent.

The Commission recommends further clarifications of existing statutes and improvements in terminology, and correction of statutes containing obsolete references to former law. The Commission has developed official Comments explaining the derivation of, and providing other relevant information concerning, the Probate Code rules of construction.

This recommendation was prepared pursuant to Resolution Chapter 81 of the Statutes of 1999.

1 R U L E S O F C O N S T R U C T I O N F O R T R U S T S
2 A N D O T H E R I N S T R U M E N T S

3 **Background**

4 Modern rules of construction for wills were enacted in California in 1983 on
5 recommendation of the Law Revision Commission.¹ Subsequent legislation
6 sponsored by the State Bar Estate Planning, Trust and Probate Law Section
7 extended the rules of construction to trusts and other instruments.²

8 Problems in the application of the extended rules have become apparent.³ The
9 Law Revision Commission has concluded that a comprehensive review of this
10 matter is appropriate. The Commission retained Professor William McGovern of
11 UCLA Law School as a consultant. Professor McGovern’s background study⁴ is
12 available on the Commission’s website — www.clrc.ca.gov.

13 This recommendation proposes adjustments in the rules of construction to ensure
14 their proper functioning in the environment of their expanded application to trusts
15 and other instruments.

16 **Overview of Existing Law**

17 The rules of construction — “Rules for Interpretation of Instruments” — are
18 now found in Part 1 (Sections 21101-21140) of Division 11 of the Probate Code.
19 All of the rules of construction are based on previously existing Probate Code
20 provisions applicable to wills. The basic idea of the 1994 extension to trusts and
21 other instruments was to achieve uniformity among the common estate planning
22 instruments.

23 Extension of the rules of construction beyond wills has been driven by the
24 evolution of the inter vivos trust and other nonprobate transfer instruments as will
25 substitutes. The concept of uniform rules of construction finds support in the
26 Restatement of Trusts, which notes that a revocable inter vivos trust is ordinarily
27 subject to rules of construction applicable to testamentary dispositions.⁵ The
28 Uniform Trust Code likewise provides that, “The rules of construction that apply
29 in this state to the interpretation of and disposition of property by will also apply
30 as appropriate to the interpretation of the terms of a trust and the disposition of the

1. See *Tentative Recommendation Relating to Wills and Intestate Succession*, 16 Cal. L. Revision Comm’n Reports 2301 (1982); 17 Cal. L. Revision Comm’n Reports 822 (1983); former Prob. Code § 6140 *et seq.* Except as otherwise noted, all further references are to the Probate Code.

2. 1994 Cal. Stat. ch. 806; see Sections 21101-21140.

3. See, e.g., Cunningham, *The Hazards of Tinkering with the Common Law of Future Interests: The California Experience*, 48 Hastings L.J. 667 (1997).

4. McGovern, *Rules of Construction: Probate Code Sections 21101-21140*, ____ Cal. L. Revision Comm’n Reports ____ (____).

5. Restatement (Third) of Trusts § 25(2).

1 trust property.”⁶ More problematic is extension of the same rules to other forms of
2 donative transfer, such as irrevocable trusts, deeds, joint tenancy, and insurance
3 policies.

4 Many of the original 1983 California rules of construction applicable to wills
5 were based on the pre-1990 Uniform Probate Code.⁷ A number of the Uniform
6 Probate Code provisions have since been altered in the source but not in
7 California. In several instances the Law Revision Commission proposes that the
8 1990 Uniform Probate Code changes should be paralleled in California.

9 **General Approach**

10 The rules of construction are intended as aids to interpretation where the
11 instrument being construed is silent or ambiguous. They are default rules in the
12 sense that if the instrument is clear on the matter, they are inapplicable.⁸

13 Even though the instrument may be silent on a point, there may nonetheless be
14 clear extrinsic evidence of the donor’s intent. The rules of construction should not
15 apply where the donor’s intent on the issue can be determined.

16 Rules of construction are necessarily blunt instruments. They are designed to
17 provide the result that would most likely be embraced by most donors, had they
18 addressed the point. A particular rule of construction inevitably will yield an
19 inappropriate result in some circumstances for a particular donor; but the rule can
20 be overridden for that donor by a showing of the donor’s intention in the
21 circumstances, even though not expressed in the instrument.

22 The rules of construction result from the interplay of two conflicting lines of
23 legal thought. One approach would minimize the role of rules of construction and
24 free the court to make the most appropriate determination of the donor’s intent.
25 The other approach would seek to maximize guidance to the parties by providing
26 presumptive answers for the most common situations, thereby limiting litigation
27 over these issues. The tension between the two approaches can be seen in the
28 various issues addressed in this recommendation.

29 **Application of Rules of Construction**

30 The rules of construction are, by their terms, applicable to wills, trusts, deeds,
31 and any other “instrument.”⁹ This is a sweeping provision, since an instrument
32 may be any writing that designates a beneficiary or makes a donative transfer of
33 property.¹⁰

6. Uniform Trust Code § 112 (2000).

7. See *Tentative Recommendation Relating to Wills and Intestate Succession*, 16 Cal. L. Revision Comm’n Reports 2301 (1982).

8. See 21102(b) (“The rules of construction expressed in this part apply where the intention of the transferor is not indicated by the instrument.”).

9. Section 21101.

10. Section 45.

1 The Law Revision Commission has concluded that most of the rules of
2 construction may appropriately be applied to all instruments. There are some
3 exceptions, however. The existing statute makes clear that the rules of construction
4 apply “[u]nless the provision or context otherwise requires.”¹¹ This limitation is
5 satisfactory and does not require further elaboration. The following rules of
6 construction should have limited application:¹²

- 7 • Section 21105 — instrument passes all property including after-acquired
8 property (limited to will)
- 9 • Section 21109 — requirement that transferee survive transferor (limited to at
10 death transfer)
- 11 • Section 21132 — change in form of securities (limited to will)

12 **Intention of Donor**

13 The intention of a donor “as expressed in the instrument” controls the legal
14 effect of dispositions made in the instrument.¹³ It should be noted, however, that
15 expressions in the instrument are not the exclusive means by which a donor’s
16 intention may be ascertained. Under the parol evidence rule, for example, extrinsic
17 evidence is admissible on the issue of a mistake or imperfection of the writing.¹⁴

18 The reference in Section 21102(a) to expressions of the donor’s intention “in the
19 instrument” should not be construed to preclude reformation in the case of a
20 mistaken writing.¹⁵ Modern theory as expounded in the academic literature, the
21 Uniform Probate Code, and the Restatement of Property, all support the concept
22 that reformation should be available for inter vivos instruments, as it is for wills.¹⁶

23 For these reasons, subdivision (a) of Section 21102 should be repealed. The
24 Commission’s proposed Comment to that provision explains that extrinsic
25 evidence may be available for purposes of reformation, subject to a clear and
26 convincing evidence standard:

27 The intention of the transferor controls the legal effect of the dispositions made
28 in the instrument, but expressions in the instrument are not the exclusive means
29 by which a transferor’s intention as to the legal effect of a disposition may be
30 ascertained. See generally 12 B. Witkin, *Summary of California Law Wills and*
31 *Probate* §§ 245-47, at 280-84 (9th ed. 1990). Under the parol evidence rule, for
32 example, extrinsic evidence may be available to explain, interpret, or supplement

11. Section 21101.

12. The Commission has cross-referenced examples of rules of construction that are limited by their terms in the Commentary to Section 21101.

13. Section 21102(a).

14. Code Civ. Proc. § 1856(e). The parol evidence rule applies to wills, among other instruments. Code Civ. Proc. § 1856(h).

15. *Cf.* Estate of Smith, 61 Cal. App. 4th 259, 71 Cal. Rptr. 2d 424 (1998) (contestant bears burden of proof on mistake as to testamentary intent).

16. See discussion in W. McGovern, S. Kurtz & J. Rein, *Wills, Trusts and Estates* § 6.1 (1988); see also Restatement (Second) of Property § 34.7 cmt. d(1990).

1 an expressed intention of the transferor. Code Civ. Proc. § 1856. Likewise, this
2 section does not limit the authority of the court to reform an instrument for
3 mistake or imperfection of writing. *Cf.* Code Civ. Proc. § 1856(e) (parol evidence
4 rule); Estate of Smith, 61 Cal. App. 4th 259, 71 Cal. Rptr. 2d 424 (1998)
5 (contestant bears burden of proof of mistake as to testamentary intent). It should
6 be noted that before granting reformation, courts require that the evidence of
7 mistake be clear and convincing; reformation is denied, for example, if the
8 donor’s testimony is equivocal and unsupported by disinterested witnesses. See
9 W. McGovern, S. Kurtz & J. Rein, *Wills, Trusts and Estates* § 6.4 (1988).

10 ☞ *The Commission particularly requests input as to whether Section 21102*
11 *requires further revision to address the issue of reformation, or whether the*
12 *proposed Comment explaining its operation is satisfactory.*

13 The rules of construction should apply only where the intention of the maker of
14 the instrument cannot be ascertained.¹⁷ In this respect, existing law specifying the
15 effect of the rules of construction is unduly narrow.¹⁸ The law should be revised to
16 make clear that the rules of construction do not apply to the extent a contrary
17 intention of the donor is expressed in the instrument “or is otherwise determined
18 by the court.” This would be consistent with existing law that allows extrinsic
19 evidence of a testator’s intent to rebut the presumptive effect of the rules of
20 construction.¹⁹

21 **Terminology**

22 *Testamentary gift.* The existing rules of construction make use of the term
23 “testamentary gift” to describe a transfer in possession or enjoyment that takes
24 effect at or after death.²⁰ This terminology is misleading. It suggests the rules are
25 limited to gifts made by will, whereas the rules are intended to apply to nonprobate
26 transfers as well.²¹ The Commission recommends substitution of the term “at
27 death transfer.” This term is more consistent with the transfer-transferor-transferee
28 terminology used throughout the rules of construction.²² It also is more consistent
29 with contemporary usage.

30 *Beneficiary.* The existing rules of construction are inconsistent in their use of the
31 terms “beneficiary” and “transferee” to refer to the donee of a donative transfer.²³

17. See discussion of “General Approach” *supra*.

18. See Section 21102(b) (rules apply where intention of testator “not indicated by the instrument”).

19. See Section 6111.5; Estate of Anderson, 56 Cal. App. 4th 235, 65 Cal. Rptr. 2d 307 (1997) (extrinsic evidence admissible).

20. Section 21104.

21. See discussion of “Application of Rules of Construction” *supra*.

22. The Probate Code definitions of “transferor” and “transferee” are not in alphabetical sequence. *Cf.* Sections 81 (“transferor” defined) and 81.5 (“transferee” defined). The Commission does not recommend realignment at present.

23. Compare, e.g., Sections 21109 and 21110 (“transferee”) with Sections 21134 and 21135 (“beneficiary”).

1 Both terms are defined in the Probate Code,²⁴ and either would work equally well
2 in this context. Because “transferee” is the term predominantly used in the existing
3 rules of construction, the Commission recommends that that term be used
4 consistently throughout, replacing “beneficiary” in the instances where it occurs.

5 **Presumption that Property Vests in Common**

6 Section 21106 recapitulates the common law presumption that a transfer to two
7 or more persons vests the property transferred to them as tenants in common,
8 absent an expressed intent otherwise.²⁵ This statement of the law is incomplete²⁶
9 and unnecessary.²⁷ The Commission recommends that it be repealed in reliance on
10 the equivalent but more accurate rendition of the concept in the Civil Code.²⁸ The
11 Civil Code is the more appropriate location for the provision in light of its
12 significant application to transactions outside the donative transfer context as well.

13 **Common Law Doctrine of Worthier Title Abolished**

14 Section 21108 abolishes the common law doctrine of worthier title, that a
15 grantor cannot convey an interest to the grantor’s own heirs. The provision
16 duplicates Civil Code Section 1073. Both provisions were enacted in 1959 on
17 recommendation of the Law Revision Commission.²⁹ At that time the Commission
18 observed that, “The Probate Code provision is recommended only out of an
19 abundance of caution since it is generally agreed that the American doctrine of
20 worthier title does not apply to testamentary transfers.”³⁰

21 Since then circumstances have changed, and the principal contemporary
22 relevance of the doctrine of worthier title is to trusts.³¹ The duplicative provision
23 in the Civil Code is unnecessary. The statutes would be simplified by its repeal.

24 The transitional provision³² included in Section 21108 in 1959 is now obsolete,
25 and likewise should be repealed.

24. See Sections 24 (“beneficiary” defined), 81.5 (“transferee” defined).

25. See Civil Code Section 683 for another codification of the common law presumption.

26. There are numerous exceptions to the rule stated that are not reflected in the statement. See, e.g., Section 5100 *et seq.* (multiple-party accounts); Section 5500 *et seq.* (Uniform TOD Security Registration Act).

27. Both the common law and other statutes cover the issue completely. See, e.g., Civ. Code § 686.

28. Civ. Code § 686 (“Every interest created in favor of several persons in their own right is an interest in common, unless acquired by them in partnership, for partnership purposes, or unless declared in its creation to be a joint interest, as provided in Section 683, or unless acquired as community property.”).

29. 1959 Cal. Stat. ch. 122.

30. *Recommendation Relating to The Doctrine of Worthier Title*, 2 Cal. L. Revision Comm’n Reports D-5 (1959).

31. The issue arises when the settlor of a trust wants to terminate or modify a trust that gives an interest to the settlor’s “heirs.”

32. “This section applies to all cases in which a final judgment had not been entered as of September 18, 1959.” Section 21108.

1 **Requirement that Beneficiary Survive Donor**

2 The beneficiary of a donative transfer must survive the donor in order to take the
3 gift.³³ This rule of construction is unduly broad as drafted. It is appropriately
4 applied to wills (codifying the common law rule) and to trusts (will substitutes).³⁴
5 But its application to deeds is problematic. It could be read to require a beneficiary
6 or donee to survive the settlor or donor in order to retain a gift. It is unlikely the
7 existing statute was intended to rescind a completed transfer of property if the
8 beneficiary were to predecease the donor.³⁵ The statute should be limited to gifts
9 intended to take effect at or after the death of the donor.

10 **Antilapse Statute**

11 A fundamental rule of donative transfer law is that a gift to a beneficiary fails (or
12 lapses) if the beneficiary does not survive the donor.³⁶ The antilapse statute is
13 designed to prevent lapse of a gift to the donor's kindred who predecease the
14 donor, unless it is clear that the donor's intention was that such a gift should
15 lapse.³⁷

16 Existing California law has been criticized because it appears to allow "mere
17 words of survival" in an instrument to negate the antilapse statute, and because it
18 appears to extend the antilapse statute to future interests.³⁸ Whether mere words of
19 survival in an instrument should be allowed to negate the antilapse statute, and
20 whether the antilapse statute should apply to the gift of a future interest in an
21 instrument, may depend on the circumstances of the particular case. The
22 Commission recommends that the statute continue to remain silent on these points,
23 leaving the matter to case law development.

24 In this connection, the Commission recommends that language be deleted from
25 the existing statute to the effect that a provision in an instrument requiring survival
26 for a specific time overrides the antilapse statute.³⁹ That provision could be read to
27 imply that other language in an instrument does not override the antilapse statute.
28 In fact, the controlling test is the donor's intention as expressed in the instrument
29 or determined by the court.⁴⁰

33. Section 21109(a).

34. California imposes a comparable survival requirement on pay on death accounts and Totten trusts. Section 5302.

35. See, e.g., Cunningham, *The Hazards of Tinkering with the Common Law of Future Interests: The California Experience*, 48 Hastings L.J. 667, 690-91 (1997).

36. See Section 21109(a) ("A transferee who fails to survive the transferor or until any future time required by the instrument does not take under the instrument.").

37. Section 21110.

38. The extensive academic debate over these points is summarized in McGovern, *supra* note 4, at ____.

39. See Section 21110(b) ("A requirement that the initial transferee survive for a specified period of time after the death of the transferor constitutes a contrary intention. A requirement that the initial transferee survive until a future time that is related to the probate of the transferor's will or administration of the estate of the transferor constitutes a contrary intention.")

40. Sections 21102, 21110.

1 **Failure of Transfer**

2 Section 21111 provides rules for treatment of a failed transfer. A failed specific
3 gift passes with the residue; a failed residuary gift passes to the remaining
4 residuary beneficiaries proportionately.

5 The treatment of a gift of “all my estate” is unclear under this scheme. A
6 clarification should be added that such a gift is treated as a residuary gift; this will
7 close a potentially endless loop in the statute.

8 The existing statute inexplicably treats a future interest in the same manner as a
9 residuary gift. The result is to create intestacy in many instances. Take, for
10 example, a devise “to A for life, remainder to B if B survives A.” Under Section
11 21111, a failed gift of the future interest is precluded from going to the residuary
12 beneficiaries, resulting in an intestacy. This anomaly should be eliminated from
13 the statute, and a future interest treated the same as other gifts.

14 **Class Gift to Heirs, Next of Kin, Relatives, or the Like**

15 The California statute governing determination of beneficiaries entitled to take
16 under a class gift contains a number of ambiguities.⁴¹ The statute is based on an
17 earlier version of Uniform Probate Code Section 2-711; the current version of the
18 Uniform Probate Code resolves the ambiguities.⁴² The Commission recommends
19 that the California statute be recast in conformity with the current version of the
20 Uniform Probate Code.

21 **Halfbloods, Adopted Persons, Persons Born Out of Wedlock, Stepchildren, and
22 Foster Children**

23 Section 21115 incorporates intestacy rules in interpreting class gifts, but fails to
24 indicate which rules apply — those in effect at the time the instrument is executed
25 or those in effect at the time the transfer takes effect in enjoyment. By comparison,
26 in construing a gift to “heirs” under Section 21114, the determination is made as of
27 the time when the transfer is to take effect in enjoyment and according to the
28 intestate succession law in effect at that time. There is no apparent reason to use
29 different choice of law rules in the determination of “heirs” as opposed to “issue.”
30 Section 21115 should be conformed to Section 21114 on this point, and the
31 determination made under the intestate succession laws in effect at the time the
32 transfer is to take effect in enjoyment.

41. Section 21114.

42. The uniform code version resolves the following issues:

- (1) Application of the section to interests acquired by operation of law.
- (2) Application of escheat principles.
- (3) Application of the law of another state.
- (4) Elimination of the special rule for ancestral property.

See discussion in McGovern, *supra* note 4, at ____.

1 **Vesting of Testamentary Disposition**

2 Section 21116 creates a presumption that interests vest at the donor's death,
3 whereas a gift of a future interest to a class such as children or heirs does not vest
4 until the date of distribution.⁴³ Besides the inconsistency created by Section 21116,
5 its presumption in favor of early vesting unduly limits the ability of the court to
6 consider all the circumstances in construing the intent of an instrument. The
7 Commission recommends its repeal.

8 **Change in Form of Securities**

9 The provisions applicable to a gift of securities that have changed form (for
10 example by sale, merger, reinvestment, and the like)⁴⁴ are based on Uniform
11 Probate Code Section 2-605. The Uniform Probate Code has since been revised to
12 make clear that it applies regardless of whether the gift is characterized as general
13 or specific. The Uniform Probate Code is also limited to gifts made by will, thus
14 avoiding internal inconsistencies inherent in the California statute's application to
15 other instruments.⁴⁵ The Commission recommends that California law be
16 conformed to the revised Uniform Probate Code.

17 **Ademption**

18 Existing Probate Code Sections 21133–21135 provide rules for construing the
19 donor's intent where the donor has made a specific gift of property but the
20 property is no longer part of the donor's estate. That could occur because during
21 the donor's lifetime the specifically given property was sold, foreclosed on,
22 replaced, disposed of as part of a conservatorship estate, delivered to the
23 beneficiary, or the like. The existing California provisions are based on the pre-
24 1990 version of the Uniform Probate Code.⁴⁶ Since then, the Uniform Probate
25 Code has been revised to address problems that have been identified. The
26 California version of these provisions should be conformed to the Uniform Probate
27 Code as revised, including extending to specific gifts its presumption of
28 nonademption of specific devises.⁴⁷

29 **Changes to Property the Subject of a Specific Gift**

30 The statutes applicable to a specific gift of property that is subject to a contract
31 of sale or transfer,⁴⁸ or is subject to a charge or encumbrance,⁴⁹ or as to which the

43. Sections 21113, 21114.

44. Section 21132.

45. To apply the California law in a trust context would require that additional stock be both owned by the transferor and be part of the trust estate. Such gifts are not used by well-advised drafters in any event. See, e.g., 1 California Will Drafting § 12.61 (Cal. Cont. Ed. Bar, 3d ed. 1992).

46. See McGovern, *supra* note 4, at ____.

47. See proposed subdivision (f) of Section 21133 (proceeds of specific gift) *infra*.

48. Section 21136.

49. Section 21137.

1 donor has an altered interest,⁵⁰ are derived from older Probate Code provisions
2 dealing with ademption, and no longer serve a useful purpose. They state the
3 obvious but are not exhaustive,⁵¹ whereas the case law on ademption is adequate
4 and would effectuate the donor's intent.⁵² The provisions may be repealed without
5 loss.

6 **Elimination of Redundant Provisions**

7 A number of the rules of construction expressed in the Probate Code are
8 redundant and should be repealed, either because their substance is covered more
9 adequately elsewhere in the codes⁵³ or because they merely restate the common
10 law but fail to accurately capture its nuances.⁵⁴

11 Other rules of construction appear both in the Probate Code and elsewhere.⁵⁵
12 These provisions should be consolidated in the Probate Code, so that practitioners
13 and others may easily find all relevant rules of construction in one location.

14 **Effective Dates**

15 As a general principle, the rules of construction apply retroactively to all
16 instruments, regardless of their date of execution.⁵⁶ This is consistent with the
17 purpose of rules of construction, which apply in circumstances where the intent of
18 the maker of the instrument cannot be ascertained.⁵⁷ It is also consistent with the
19 general approach of the Probate Code to apply new law except where it would
20 create substantial injustice,⁵⁸ and with the principle that improvements in the law
21 should be broadly applied.

22 Section 21140(b) creates an exception to retroactive application of the rules of
23 construction in a case where former Sections 1050-1054 would apply to a decedent
24 who died before January 1, 1985. This provision is obsolete. The statute it refers
25 to have relevance to very few cases,⁵⁹ and the likelihood of such an issue arising in
26 the future with respect to a pre-1985 decedent is remote. In the interest of
27 simplification of the law, this provision should be repealed.

50. Section 21138.

51. Section 21139.

52. See, e.g., 12 B. Witkin, *Summary of California Law Wills and Probate* § 314 *et seq.* (9th ed. 1990).

53. Compare, e.g., Sections 21109(b)-(c) and 220 (requirement that transferee survive transferor).

54. See Section 2113 (afterborn member of class); McGovern, *supra* note 4, at ____.

55. See, e.g., Civ. Code § 1071 and Prob. Code § 21112 (conditions referring to issue).

56. Section 21140(a).

57. Section 21102. See also, McGovern, *supra* note 4, at ____.

58. Section 3.

59. The effect of an advancement to an heir in determining the heir's intestate share.

1 **Law Revision Commission Comments**

2 The basic rules of construction for wills were enacted in 1983 on
3 recommendation of the Law Revision Commission.⁶⁰ As with all Commission-
4 sponsored legislation, there were Comments accompanying the statutes explaining
5 their derivation, their relation to other statutes, aids to construction, and other
6 useful information.⁶¹

7 These statutes were in place for 10 years before they were generalized and
8 relocated.⁶² Because this task was not performed by the Law Revision
9 Commission, the Commission commentary to these sections was lost in the
10 process.

11 As part of the present study, the Commission has prepared new commentary for
12 the rules of construction. The new commentary is based on the old Comments,
13 with revisions to reflect changes made in the generalization and relocation process,
14 as well as to reflect changes proposed in this recommendation.⁶³

15 **Conforming Revisions**

16 When former Probate Code Sections 6140-6179 were moved to their current
17 location at Probate Code Sections 21110-21140, the implementing legislation did
18 not make conforming revisions in other statutes. There remain a half-dozen cross
19 references in the codes to the obsolete section numbers. Appropriate conforming
20 revisions are added by this recommendation.⁶⁴

60. See former Section 6140 *et seq.*

61. See *Recommendation Relating to Wills and Intestate Succession*, 16 Cal. L. Revision Comm'n Reports 2301 (1982); 17 Cal. L. Revision Comm'n Reports 822 (1983).

62. See Sections 21101-21140.

63. In some cases, if no other change is necessary, the Commission proposes a technical amendment to a section to provide a basis for the Law Revision Commission Comment.

64. See proposed amendments to Sections 221, 230, 250, 6103, 6205, and 11640 *infra*.

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PROPOSED LEGISLATION

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

PART 1. RULES OF INTERPRETATION

CHAPTER 1. GENERAL PROVISIONS

Prob. Code § 21101 (technical amendment). Application of part

SEC. _____. Section 21101 of the Probate Code is amended to read:
21101. Unless the provision or context otherwise requires, this part ~~shall apply~~
applies to a will, trust, deed, and any other instrument.

Comment. The amendment to Section 21101 is technical.

Section 21101 makes the rules of construction in this part applicable to a governing instrument of any type, except to the extent the application of a particular provision is limited by its terms to a specific type of donative disposition or governing instrument. See, e.g., Sections 21105 (will passes all property including after-acquired property), 21109 (requirement for at death transfer that transferee survive transferor), 21132 (change in form of securities disposed of by will). See also Section 45 (“instrument” defined).

Prob. Code § 21102 (amended). Intention of transferor

SEC. _____. Section 21102 of the Probate Code is amended to read:
21102. (a) ~~The intention of the transferor as expressed in the instrument controls the legal effect of the dispositions made in the instrument.~~
(b) ~~The rules of construction expressed in this part apply where the~~ do not apply to the extent a contrary intention of the transferor is not indicated by expressed in the instrument or is otherwise determined by the court.

Comment. Subdivision (a) of Section 21102 is repealed. The intention of the transferor controls the legal effect of the dispositions made in the instrument, but expressions in the instrument are not the exclusive means by which a transferor’s intention as to the legal effect of a disposition may be ascertained. See generally 12 B. Witkin, *Summary of California Law Wills and Probate* §§ 245-47, at 280-84 (9th ed. 1990). Under the parol evidence rule, for example, extrinsic evidence may be available to explain, interpret, or supplement an expressed intention of the transferor. Code Civ. Proc. § 1856. Likewise, this section does not limit the authority of the court to reform an instrument for mistake or imperfection of writing. *Cf.* Code Civ. Proc. § 1856(e) (parol evidence rule); Estate of Smith, 61 Cal. App. 4th 259, 71 Cal. Rptr. 2d 424 (1998) (contestant bears burden of proof of mistake as to testamentary intent). It should be noted that before granting reformation, courts require that the evidence of mistake be clear and convincing; reformation is denied, for example, if the donor’s testimony is equivocal and unsupported by disinterested witnesses. See W. McGovern, S. Kurtz & J. Rein, *Wills, Trusts and Estates* § 6.4 (1988).

Subdivision (b) is amended to make clear that extrinsic evidence may be used to demonstrate an intention of the transferor contrary to the rules of construction in this part. See also Section 6111.5 (will); Estate of Anderson, 56 Cal. App. 4th 235, 65 Cal. Rptr. 2d 307 (1997) (extrinsic evidence admissible).

1 ☞ **Note.** The Commission particularly requests input on the revisions proposed here, and on
2 whether the explanation in the Comment is satisfactory concerning the authority of the court to
3 reform an instrument for mistake.

4 **Prob. Code § 21103 (technical amendment). Choice of law as to meaning and effect of**
5 **instrument**

6 SEC. _____. Section 21103 of the Probate Code is amended to read:

7 21103. The meaning and legal effect of a disposition in an instrument ~~shall be~~ is
8 determined by the local law of a particular state selected by the transferor in the
9 instrument unless the application of that law is contrary to the rights of the
10 surviving spouse to community and quasi-community property, to any other public
11 policy of this state applicable to the disposition, or, in the case of a will, to Part 3
12 (commencing with Section 6500) of Division 6.

13 **Comment.** The amendments to Section 21103 are technical. Section 21103 extends former
14 Section 6141 (wills) to trusts and other instruments. See also Section 21101 (application of part).

15 This section is consistent with Section 2-602 of the Uniform Probate Code (1987). The
16 reference in Section 2-602 of the Uniform Probate Code to elective share is replaced by a
17 reference to the rights of the surviving spouse to community and quasi-community property. The
18 reference to Part 3 (commencing with Section 6500) of Division 6 is drawn from the reference in
19 Section 2-602 of the Uniform Probate Code to provisions relating to elective share, exempt
20 property, and allowances. As to the construction of provisions drawn from uniform acts, see
21 Section 2. See also Section 78 (definition of “surviving spouse”).

22 **Prob. Code § 21104 (amended). “At death transfer” defined**

23 SEC. _____. Section 21104 of the Probate Code is amended to read:

24 21104. As used in this part, ~~“testamentary gift”~~ “at death transfer” means a
25 transfer ~~in possession or enjoyment~~ that takes effect in enjoyment at or after death.

26 **Comment.** Section 21104 is amended to make substitute the term “at death transfer” for
27 “testamentary gift.” As used in this part, an at death transfer does not include a lifetime gift.

28 The reference to a transfer “in possession” is deleted as superfluous. See, e.g., Sections 21112-
29 21114 (transfer “in enjoyment”).

30 **Prob. Code § 21105 (technical amendment). Will passes all property including after-**
31 **acquired property**

32 SEC. _____. Section 21105 of the Probate Code is amended to read:

33 21105. Except as otherwise provided in Sections 641 and 642, a will passes all
34 property the testator owns at death, including property acquired after execution of
35 the will.

36 **Comment.** The amendment to Section 21105 is technical. Section 21105 continues former
37 Section 6142.

38 The section is drawn from Section 2-603 of the Uniform Probate Code (1987). As to the
39 construction of provisions drawn from uniform acts, see Section 2. Nothing in the section limits
40 the extent to which extrinsic evidence admissible under former law may be used to determine the
41 testator’s intent as expressed in the will. See also Section 21102 Comment (intention of
42 transferor).

43 **Prob. Code § 21106 (repealed). Transferees as owners in common**

44 SEC. _____. Section 21106 of the Probate Code is repealed.

1 ~~21106. A transfer of property to more than one person vests the property in them~~
2 ~~as owners in common.~~

3 **Comment.** Section 21106 is repealed as incomplete and unnecessary. *Cf.* Civ. Code § 686
4 (what interests are in common).

5 **Prob. Code § 21107 (technical amendment). Direction in instrument to convert real**
6 **property into money**

7 SEC. _____. Section 21107 of the Probate Code is amended to read:

8 21107. If an instrument directs the conversion of real property into money at the
9 transferor's death, the real property and its proceeds shall be deemed personal
10 property from the time of the transferor's death.

11 **Comment.** The amendment to Section 21107 is technical. Section 21107 extends former
12 Section 6144 (wills) to trusts and other instruments. See also Section 21101 (application of part).

13 This section is declaratory of the common law doctrine of equitable conversion. See *In re*
14 *Estate of Gracey*, 200 Cal. 482, 488-89, 253 P. 921 (1927). See generally 11 B. Witkin, *Summary*
15 *of California Law Equity* §§163-66, at 842-47 (9th ed. 1990). Nothing in the section limits the
16 extent to which extrinsic evidence admissible under former law may be used to determine the
17 transferor's intent as expressed in the instrument. See generally Witkin, *id.*; Section 21102
18 *Comment* (intention of transferor).

19 **Prob. Code § 21108 (amended). Common law doctrine of worthier title abolished**

20 SEC. _____. Section 21108 of the Probate Code is amended to read:

21 21108. The law of this state does not include (a) the common-law rule of
22 worthier title that a transferor cannot devise an interest to his or her own heirs or
23 (b) a presumption or rule of interpretation that a transferor does not intend, by a
24 transfer to his or her own heirs or next of kin, to transfer an interest to them. The
25 meaning of a transfer of a legal or equitable interest to a transferor's own heirs or
26 next of kin, however designated, shall be determined by the general rules
27 applicable to the interpretation of instruments. ~~This section applies to all cases in~~
28 ~~which a final judgment had not been entered as of September 18, 1959.~~

29 **Comment.** Section 21108 is amended to remove an obsolete transitional provision.

30 Section 21108 extends former Section 6145 (wills) to trusts and other instruments. See also
31 Section 21101 (application of part); Section 21114 (class gift to heirs, next of kin, relatives, or the
32 like). For background on this section, see *Recommendation and Study Relating to the Doctrine of*
33 *Worthier Title*, 2 Cal. L. Revision Comm'n Reports D-1 (1959).

34 **Prob. Code § 21109 (amended). Requirement that transferee survive transferor**

35 SEC. _____. Section 21109 of the Probate Code is amended to read:

36 21109. (a) A transferee of an at death transfer who fails to survive the transferor
37 or until any future time required by the instrument does not take under the
38 instrument.

39 ~~(b) If it cannot be established by clear and convincing evidence that the~~
40 ~~transferee has survived the transferor, it is deemed that the beneficiary did not~~
41 ~~survive the transferor.~~

1 ~~(e) If it cannot be established by clear and convincing evidence that the~~
2 ~~transferee survived until a future time required by the instrument, it is deemed that~~
3 ~~the transferee did not survive until the required future time.~~

4 **Comment.** Subdivision (a) of Section 21109 is amended to limit its application. See Section
5 21104 (“at death transfer” defined).

6 Subdivisions (b) and (c) are deleted as unnecessary. The general “clear and convincing
7 evidence” standard of Section 220 applies.

8 Section 21109 extends former Section 6146 (wills) to trusts and other instruments. See also
9 Section 21101 (application of part). The question of whether or not survival is required is to be
10 determined according to general rules of construction. See, e.g., Section 21102 (intention of
11 transferor).

12 With respect to a class gift of a future interest, Section 21109 must be read together with
13 Section 21114. If the transferee fails to survive but is properly related to the transferor or the
14 transferor’s spouse, the antilapse statute may substitute the transferee’s issue. See Section 21110.
15 See also Section 21112 (conditions referring to “issue”).

16 For a provision governing the administration and disposition of community property and quasi-
17 community property where one spouse does not survive the other, see Section 103. See also
18 Sections 230-234 (proceeding to determine whether devisee survived testator).

19 **Prob. Code § 21110 (amended). Anti-lapse**

20 SEC. _____. Section 21110 of the Probate Code is amended to read:

21 21110. (a) Subject to subdivision (b), if a transferee is dead when the instrument
22 is executed, or is treated as if the transferee predeceased the transferor, or fails to
23 survive the transferor or until a future time required by the instrument, the issue of
24 the deceased transferee take in the transferee’s place in the manner provided in
25 Section 240. A transferee under a class gift shall be a transferee for the purpose of
26 this subdivision unless the transferee’s death occurred before the execution of the
27 instrument and that fact was known to the transferor when the instrument was
28 executed.

29 (b) The issue of a deceased transferee do not take in the transferee’s place if the
30 instrument expresses a contrary intention or a substitute disposition. ~~A requirement~~
31 ~~that the initial transferee survive for a specified period of time after the death of~~
32 ~~the transferor constitutes a contrary intention. A requirement that the initial~~
33 ~~transferee survive until a future time that is related to the probate of the~~
34 ~~transferor’s will or administration of the estate of the transferor constitutes a~~
35 ~~contrary intention.~~

36 (c) As used in this section, “transferee” means a person who is kindred of the
37 transferor or kindred of a surviving, deceased, or former spouse of the transferor.

38 **Comment.** Section 21110 is amended to delete from subdivision (b) the specific instances of
39 expressed contrary intention, to avoid the implication that those are the exclusive expressions that
40 constitute a contrary intention. Thus, a requirement that the initial transferee survive for a
41 specified period of time after the death of the transferor, or a requirement that the initial transferee
42 survive until a future time that is related to the probate of the transferor’s will or administration of
43 the estate of the transferor, may well constitute a contrary intention. (In this connection, it should
44 be noted that technical words in an instrument are to be considered as having been used in their
45 technical sense. See Section 21122.) And, while expressions of that type may well indicate an

1 intention that the antilapse statute not apply, other expressions of contrary intention in an
2 instrument may also be sufficient to override the antilapse statute.

3 In applying the provision of subdivision (b) relating to a substitute gift, care must be taken not
4 to ascribe to the testator an overly broad intention to override the antilapse statute. For example,
5 by providing a substitute taker, the transferor may well intend to override the antilapse statute in
6 the ordinary case, but not necessarily where the substitute taker has also predeceased the
7 transferor. In that situation, the transferor may have intended that the antilapse statute should
8 apply.

9 In addition to the limitations prescribed in subdivision (b), Section 21110 is also subject to the
10 general principle that rules of construction such as this section do not apply if it is determined that
11 the transferor intended a contrary result even though not expressed in the instrument. See Section
12 21102 (rules of construction inapplicable to extent contrary intention of transferor is expressed in
13 instrument or otherwise determined by court). Matters the court might take into account in
14 determining whether or not the transferor intended that issue of a deceased beneficiary should
15 take in the beneficiary's place may include (1) whether the result of a survival requirement would
16 be to disinherit a branch of the transferor's lineal descendants, (2) whether the result of a survival
17 requirement would be to pass property to persons expressly disinherited by the instrument or to
18 the state by escheat, and (3) other persuasive evidence of the transferor's likely intent.

19 Section 21110 extends former Section 6147 (wills) to trusts and other instruments. See also
20 Section 21101 (application of part).

21 The first sentence of subdivision (a) is drawn from the first sentence of Uniform Probate Code
22 Section 2-605 (1987). The second sentence of subdivision (a) is drawn from the second sentence
23 of Uniform Probate Code Section 2-605; but, unlike the Uniform Probate Code, Section 21110
24 does not make a substitute gift in the case of a class gift where a person otherwise answering the
25 description of the class was dead when the instrument was executed and that fact was known to
26 the transferor. As to the construction of provisions drawn from uniform acts, see Section 2. The
27 second sentence of subdivision (a) is consistent with *Estate of Steidl*, 89 Cal. App. 2d 488, 201
28 P.2d 58 (1948) (antilapse statute applied where class member died before testator but after
29 execution of will).

30 Subdivision (c) makes the antilapse statute apply not only to kindred of the transferor but also
31 to kindred of a surviving, deceased, or former spouse of the transferor. Thus, if the transferor
32 were to make a transfer to a stepchild who predeceased the transferor, Section 21110 will make a
33 substitute gift to issue of the predeceased stepchild. The term "kindred" was taken from former
34 Probate Code Section 92 (repealed by 1983 Cal. Stat. ch. 842, § 18) and refers to persons related
35 by blood. *Cf. In re Estate of Sowash*, 62 Cal. App. 512, 516, 217 P. 123 (1923). In general, an
36 adoptee is kindred of the adoptive family and not of the adoptee's natural relatives. See Section
37 21115. See also *Estate of Goulart*, 222 Cal. App. 2d 808, 35 Cal. Rptr. 465 (1963). As to when a
38 transferee is treated as if he or she predeceased the transferor, see Section 220 (simultaneous
39 death). See also Sections 230-234 (proceeding to determine survival), 240 (manner of taking by
40 representation), 250 (effect of feloniously and intentionally killing decedent), 21115(c)(1), (2)
41 (half bloods, adopted persons, persons born out of wedlock, stepchildren, foster children, and
42 issue of such persons, as "kindred" or "issue").

43 **Prob. Code § 21111 (amended). Failure of transfer**

44 SEC. _____. Section 21111 of the Probate Code is amended to read:

45 21111. Except as provided in Section 21110:

46 (a) If a transfer, other than a residuary gift ~~or a transfer of a future interest~~, fails
47 for any reason, the property transferred becomes a part of the residue transferred
48 under the instrument.

49 (b) If a residuary gift ~~or a future interest~~ is transferred to two or more persons
50 and the share of a transferee fails for any reason, the share passes to the other

1 transferees in proportion to their other interest in the residuary gift ~~or the future~~
2 ~~interest.~~

3 (c) A disposition of “all my estate” or words of similar import is a residuary gift
4 for purposes of this section.

5 **Comment.** Section 21111 is amended to treat future interests in the same manner as other gifts.
6 Subdivision (c) is added to clarify an ambiguity in application of the statute.

7 Section 21111 extends former Section 6148 (wills) to trusts and other instruments. See also
8 Section 21101 (application of part). This section is the same in substance as Section 2-606 of the
9 Uniform Probate Code (1987). As to the construction of provisions drawn from uniform acts, see
10 Section 2.

11 With respect to a residuary devise, subdivision (b) preserves the change made by former
12 Section 6148 in the California case law rule that if the share of one of several residuary devisees
13 fails, the share passed by intestacy. See e.g., *Estate of Russell*, 69 Cal. 2d 200, 215-216, 444 P.2d
14 353, 70 Cal. Rptr. 561 (1968); *In re Estate of Kelleher*, 205 Cal. 757, 760-761, 272 P. 1060
15 (1928); *Estate of Anderson*, 166 Cal. App. 2d 39, 42, 332 P.2d 785 (1985).

16 **Prob. Code § 21112 (technical amendment). Conditions referring to “issue”**

17 SEC. _____. Section 21112 of the Probate Code is amended to read:

18 21112. A condition in a transfer of a present or future interest that refers to a
19 person’s death “with” or “without” issue, or to a person’s “having” or “leaving”
20 issue or no issue, or a condition based on words of similar import, is construed to
21 refer to that person’s being dead at the time the transfer takes effect in enjoyment
22 and to ~~his or her~~ that person either having or not having, as the case may be, issue
23 who are alive at the time of enjoyment.

24 **Comment.** The amendment to Section 21112 is technical. Section 21112 extends former
25 Section 6149 (wills) to trusts and other instruments. See also Section 21101 (application of part).

26 The section overrules California’s much criticized theory of indefinite failure of issue
27 established by *In re Estate of Carothers*, 161 Cal. 588, 119 P. 926 (1911). See generally 12 B.
28 Witkin, *Summary of California Law Wills and Probate* §§ 279-80, at 310-12 (9th ed. 1990).
29 Section 6149 adopts the majority view of the Restatement of Property. See Witkin, *id.* § 280, at
30 310-12; *Annot.*, 26 A.L.R.3d 407 (1969); *Restatement of Property* § 269 (1940). Under Section
31 21112, if the transfer is “to A for life, remainder to B and B’s heirs, but if B dies without issue,
32 then to C,” the transfer is read as meaning “if B dies before A without issue living at the death of
33 A.” If B survives A, whether or not B then has living issue, B takes the transfer absolutely. If B
34 predeceases A with issue then living but at the time of A’s subsequent death B does not have
35 living issue, the transfer goes to C.

36 **Prob. Code § 21113 (repealed). Afterborn member of class**

37 SEC. _____. Section 21113 of the Probate Code is repealed.

38 ~~21113. (a) A transfer of a present interest to a class includes all persons~~
39 ~~answering the class description at the transferor’s death.~~

40 ~~(b) A transfer of a future interest to a class includes all persons answering the~~
41 ~~class description at the time the transfer is to take effect in enjoyment.~~

42 ~~(c) A person conceived before but born after the transferor’s death or after the~~
43 ~~time the transfer takes effect in enjoyment takes if the person answers the class~~
44 ~~description.~~

1 **Comment.** Section 21113 is repealed as unnecessary. It inadequately codifies the common law
2 “rule of convenience,” failing to include its common law exceptions. See Restatement of Property
3 2d §§ 26.1-26.2.

4 **Prob. Code § 21114 (amended). Class gift to heirs, next of kin, relatives, or the like**

5 SEC. _____. Section 21114 of the Probate Code is amended to read:

6 21114. ~~A transfer of a present or future interest to the transferor’s or another~~ If a
7 statute or an instrument provides for transfer of a present or future interest to, or
8 creates a present or future interest in, a designated person’s “heirs,” “heirs at law,”
9 “next of kin,” “relatives,” or “family,” or to “the persons entitled thereto under the
10 intestate succession laws,” or to persons described by words similar import, is a
11 transfer to those who would be the transferor’s or other designated person’s heirs,
12 their identities and respective shares shall be determined as if the transferor or
13 other designated person were to die intestate at the time when the transfer is to
14 take effect in enjoyment and according to the California statutes of intestate
15 succession of property not acquired from a predeceased spouse in effect at that
16 time words of similar import, the transfer is to the persons, including the state
17 under Section 6800, and in the shares, that would succeed to the designated
18 person’s intestate estate under the intestate succession law of the designated
19 person’s domicile if the designated person died when the transfer is to take effect
20 in enjoyment. If the designated person’s surviving spouse is living but is remarried
21 at the time the transfer is to take effect in enjoyment, the surviving spouse is not an
22 heir of the designated person for purposes of this section.

23 **Comment.** Section 21114 is amended to conform to Uniform Probate Code Section 2-711. The
24 amendment clarifies a number of issues, including:

- 25 (1) Application of the section to interests acquired by operation of law.
26 (2) Application of escheat principles.
27 (3) Application of the law of another state, based on the designated person’s domicile.
28 (4) Elimination of the special rule for ancestral property.

29 See *Rules of Construction for Trusts and Other Instruments*, ____ Cal. L. Revision Comm’n
30 Reports ____ (____).

31 Section 21114 extends former Section 6151 (wills) to trusts and other instruments. See also
32 Section 21101 (application of part). The former section was drawn from Section 2514 of the
33 Pennsylvania Consolidated Statutes, Title 20, and established a special rule for a class gift to an
34 indefinite class such as the transferor’s or another designated person’s “heirs,” “next of kin,”
35 “relative,” “family,” or the like. As Section 21114 applies to a transfer of a future interest, the
36 section is consistent with Section 21109 in that Section 21114 establishes a constructional
37 preference against early vesting. However, Section 21114 differs from Section 21109 in that one
38 who does not survive until the future interest takes effect in enjoyment is not deemed a member
39 of the indefinite class described in Section 21114 (such as “heirs”), is therefore not a “transferee”
40 under the class gift, and no substitute gift will be made by the antilapse statute (Section 21110). If
41 the transfer of a future interest is to a more definite class such as “children,” one coming within
42 that description who fails to survive until the transfer takes effect in enjoyment does not take
43 under the instrument (Section 21109) but may nonetheless be a “deceased transferee” under the
44 antilapse statute (Section 21110) permitting substitution of the deceased transferee’s issue. See
45 the Comments to Sections 21109 and 21110. See also Section 21115(c)(3) (rules for determining
46 persons who would be heirs of transferor or other person).

1 By postponing the determination of class membership until the gift takes effect in enjoyment
2 where the class is indefinite (e.g., to “heirs,”), Section 21114 should reduce the uncertainty of
3 result under prior law. See Halbach, *Future Interests: Express and Implied Conditions of*
4 *Survival*, 49 Cal. L. Rev. 297, 317-20 (1961). Section 21114 is consistent with *Estate of Easter*,
5 24 Cal. 2d 191, 148 P.2d 601 (1944).

6 **Prob. Code § 21115 (amended). Halfbloods, adopted persons, persons born out of wedlock,**
7 **stepchildren, and foster children**

8 SEC. _____. Section 21115 of the Probate Code is amended to read:

9 21115. (a) Except as provided in subdivision (b), halfbloods, adopted persons,
10 persons born out of wedlock, stepchildren, foster children, and the issue of these
11 persons when appropriate to the class, are included in terms of class gift or
12 relationship in accordance with the rules for determining relationship and
13 inheritance rights for purposes of intestate succession.

14 (b) In construing a transfer by a transferor who is not the natural parent, a person
15 born to the natural parent shall not be considered the child of that parent unless the
16 person lived while a minor as a regular member of the household of the natural
17 parent or of that parent’s parent, brother, sister, spouse, or surviving spouse. In
18 construing a transfer by a transferor who is not the adoptive parent, a person
19 adopted by the adoptive parent shall not be considered the child of that parent
20 unless the person lived while a minor (either before or after the adoption) as a
21 regular member of the household of the adopting parent or of that parent’s parent,
22 brother, sister, or surviving spouse.

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

24 (1) Persons who would be kindred of the transferor or kindred of a surviving,
25 deceased, or former spouse of the transferor under Section 21110.

26 (2) Persons to be included as issue of a deceased transferee under Section 21110.

27 (3) Persons who would be the transferor’s or other designated person’s heirs
28 under Section 21114.

29 (d) The rules for determining intestate succession under this section are those in
30 effect at the time the transfer is to take effect in enjoyment.

31 **Comment.** Subdivision (d) is added to Section 21115 for consistency with the choice of law
32 rules of Section 21114. Section 21115 extends former Section 6152 (wills) to trusts and other
33 instruments. See also Section 21101 (application of part).

34 Subdivision (a) is the same in substance as Section 2-611 of the Uniform Probate Code (1987).
35 As to the construction of provisions drawn from uniform acts, see Section 2. To the extent that
36 California cases had addressed the matter, subdivision (a) is consistent with prior California law.
37 See 12 B. Witkin, *Summary of California Law Wills and Probate* §§ 287-90, at 320-23 (9th ed.
38 1990). For the rules for determining relationship and inheritance rights for purposes of intestate
39 succession, see Sections 6406, 6408. Under some circumstances stepchildren and foster children
40 are included in terms of class gift or relationship pursuant to the rules for intestate succession. See
41 Section 6408 (when stepchild or foster child treated the same as adopted child).

42 Subdivision (b) precludes the adoption of a person (often an adult) solely for the purpose of
43 permitting the adoptee to take under the testamentary instrument of another. Subdivision (b) also
44 construes a transfer to exclude a child born out of wedlock (where the transferor is not the parent)
45 if the child never lives while a minor as a regular member of the parent’s household. A child is
46 included in class gift terminology in the transferor’s instrument if the child lived while a minor or

1 as a regular member of the household of the parent's spouse or surviving spouse. As a result, a
2 child born of a marital relationship will almost always be included in the class, consistent with the
3 transferor's likely intent.

4 Subdivision (c) makes clear that the rules stated in subdivisions (a) and (b) apply for the
5 purposes of the antilapse statute (Section 21110) and in construing transfers (Section 21114).

6 **Prob. Code § 21116 (repealed). Vesting of testamentary disposition**

7 SEC. _____. Section 21116 of the Probate Code is repealed.

8 ~~21116. A testamentary disposition by an instrument, including a transfer to a~~
9 ~~person on attaining majority, is presumed to vest at the transferor's death.~~

10 **Comment.** Section 21116 is not continued. It codified a presumption in favor of early vesting
11 that limited the ability of the court to consider all the circumstances in construing the intent of an
12 instrument.

13 **Prob. Code § 21117 (amended). Classification of at death transfer**

14 SEC. _____. Section 21117 of the Probate Code is amended to read:

15 ~~21117. Testamentary gifts~~ At death transfers are classified as follows:

16 (a) A specific gift is a transfer of specifically identifiable property.

17 (b) A general gift is a transfer from the general assets of the transferor that does
18 not give specific property.

19 (c) A demonstrative gift is a general gift that specifies the fund or property from
20 which the transfer is primarily to be made.

21 (d) A general pecuniary gift is a pecuniary gift within the meaning of Section
22 21118.

23 (e) An annuity is a general pecuniary gift that is payable periodically.

24 (f) A residuary gift is a transfer of property that remains after all specific and
25 general gifts have been satisfied.

26 **Comment.** Section 21117 is amended to correct terminology. See Section 21104 ("at death
27 transfer" defined). Section 21117 extends former Section 6154 (wills) to trusts and other
28 instruments. See also Section 21101 (application of part).

29 For the priority that a demonstrative gift has over other general gifts and the priority that an
30 annuity has over other general gifts, see Section 21403(b). See also *Recommendation Relating to*
31 *Interest and Income During Administration*, 19 Cal. L. Revision Comm'n Reports 1019 (1988);
32 *Comments to Conforming Revisions and Repeals*, 19 Cal. L. Revision Comm'n Reports 1031,
33 1089-90 (1988); *Communication from the California Law Revision Commission Concerning*
34 *Assembly Bill 2841*, 19 Cal. L. Revision Comm'n Reports 1201, 1228-29 (1988).

35 **Prob. Code § 21118 (unchanged). Satisfaction of pecuniary gift by property distribution**

36 21118. (a) If an instrument authorizes a fiduciary to satisfy a pecuniary gift
37 wholly or partly by distribution of property other than money, property selected
38 for that purpose shall be valued at its fair market value on the date of distribution,
39 unless the instrument expressly provides otherwise. If the instrument permits the
40 fiduciary to value the property selected for distribution as of a date other than the
41 date of distribution, then, unless the instrument expressly provides otherwise, the
42 property selected by the fiduciary for that purpose shall have an aggregate fair
43 market value on the date or dates of distribution that, when added to any cash

1 distributed, will amount to no less than the amount of the pecuniary gift as stated
2 in, or determined by, the instrument.

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

6 **Note.** There is no Law Revision Commission Comment for Section 21118. The text is set out
7 here for completeness.

8 CHAPTER 2. ASCERTAINING THE MEANING OF LANGUAGE
9 USED IN THE INSTRUMENT

10 **Prob. Code § 21120 (amended). Every expression given some effect; failure of transfer**
11 **avoided**

12 SEC. _____. Section 21120 of the Probate Code is amended to read:

13 21120. The words of an instrument are to receive an interpretation that will give
14 every expression some effect, rather than one that will render any of the
15 expressions inoperative. Preference is to be given to an interpretation of an
16 instrument that will prevent ~~intestacy~~ failure of a transfer, rather than one that will
17 result in ~~an intestacy failure of a transfer~~.

18 **Comment.** Section 21120 is amended to more fully implement its application to trusts and
19 other instruments. Section 21120 extends former Section 6160 (wills) to trusts and other
20 instruments. See also Section 21101 (application of part).

21 This part does not apply to an instrument if its terms expressly or by necessary implication
22 make this part inapplicable. See Section 21101 (application of part).

23 **Prob. Code § 21121 (technical amendment). Construction of instrument as a whole**

24 SEC. _____. Section 21121 of the Probate Code is amended to read:

25 21121. All the parts of an instrument are to be construed in relation to each other
26 and so as, if possible, to form a consistent whole. If the meaning of any part of an
27 instrument is ambiguous or doubtful, it may be explained by any reference to or
28 recital of that part in another part of the instrument.

29 **Comment.** The amendment to Section 21121 is technical. Section 21121 extends former
30 Section 6161 (wills) to trusts and other instruments. See also Section 21101 (application of part).

31 **Prob. Code § 21122 (technical amendment). Words given their ordinary meaning; technical**
32 **words**

33 SEC. _____. Section 21122 of the Probate Code is amended to read:

34 21122. The words of an instrument are to be given their ordinary and
35 grammatical meaning unless the intention to use them in another sense is clear and
36 their intended meaning can be ascertained. Technical words are not necessary to
37 give effect to a disposition in an instrument. Technical words ~~in an instrument~~ are
38 to be considered as having been used in their technical sense unless (a) the context
39 clearly indicates a contrary intention or (b) it satisfactorily appears that the

1 instrument was drawn solely by the transferor and that the transferor was
2 unacquainted with the technical sense.

3 **Comment.** The amendment to Section 21122 is technical. Section 21122 extends former
4 Section 6162 (wills) to trusts and other instruments. See also Section 21101 (application of part).

5 CHAPTER 3. EXONERATION AND ADEMPATION

6 **Prob. Code § 21131 (technical amendment). No exoneration**

7 SEC. _____. Section 21131 of the Probate Code is amended to read:

8 21131. A specific gift passes the property transferred subject to any mortgage,
9 deed of trust, or other lien existing at the date of death, without right of
10 exoneration, regardless of a general directive to pay debts contained in the
11 instrument of transfer.

12 **Comment.** The amendment to Section 21131 is technical. See Section 45 (“instrument”
13 defined). Section 21131 extends former Section 6170 (wills) to trusts and other instruments. See
14 also Section 21101 (application of part).

15 This section expands the rule stated in Section 2-609 of the Uniform Probate Code (1987) to
16 cover any lien. This expansion makes Section 21131 consistent with Section 21404. As to the
17 construction of provisions drawn from uniform acts, see Section 2. Former Section 6170 reversed
18 the prior California case law rule that, in the absence of an expressed intention of the testator to
19 the contrary, if the debt which encumbers the devised property is one for which the testator was
20 personally liable, the devisee was entitled to “exoneration,” that is, to receive the property free of
21 the encumbrance by having the debt paid out of other assets of the estate. See 12 B. Witkin,
22 Summary of California Law *Wills and Probate* § 624, at 654-55 (9th ed. 1990). The rule stated in
23 Section 21131 applies in the absence of a contrary intention of the transferor. See Section 21102.
24 See also Section 32 (“devise” means a disposition of real or personal property by will), 62
25 (“property” defined).

26 **Prob. Code § 21132 (repealed). Change in form of securities**

27 SEC. _____. Section 21132 of the Probate Code is repealed.

28 ~~21132. (a) If the transferor intended a specific gift of certain securities rather~~
29 ~~than the equivalent value thereof, the beneficiary of the specific gift is entitled~~
30 ~~only to:~~

31 ~~(1) As much of the transferred securities as is a part of the estate at the time of~~
32 ~~the transferor’s death.~~

33 ~~(2) Any additional or other securities of the same entity owned by the transferor~~
34 ~~by reason of action initiated by the entity excluding any acquired by exercise of~~
35 ~~purchase options.~~

36 ~~(3) Securities of another entity owned by the transferor as a result of a merger,~~
37 ~~consolidation, reorganization or other similar action initiated by the entity.~~

38 ~~(4) Any additional securities of the entity owned by the transferor as a result of a~~
39 ~~plan of reinvestment if it is a regulated investment company.~~

40 ~~(b) Distributions prior to death with respect to a security specifically given and~~
41 ~~not provided for in subdivision (a) are not part of the specific gift.~~

42 **Comment.** Former Section 21132 is superseded by new Section 21132 (change in form of
43 securities).

1 **Prob. Code § 21132 (added). Change in form of securities**

2 SEC. _____. Section 21132 is added to the Probate Code, to read:

3 21132, (a) If a testator executes a will that devises securities and the testator then
4 owned securities that meet the description in the will, the devise includes
5 additional securities owned by the testator at death to the extent the additional
6 securities were acquired by the testator after the will was executed as a result of
7 the testator's ownership of the described securities and are securities of any of the
8 following types:

9 (1) Securities of the same organization acquired by reason of action initiated by
10 the organization or any successor, related, or acquiring organization, excluding
11 any acquired by exercise of purchase options.

12 (2) Securities of another organization acquired as a result of a merger,
13 consolidation, reorganization, or other distribution by the organization or any
14 successor, related, or acquiring organization.

15 (3) Securities of the same organization acquired as a result of a plan of
16 reinvestment.

17 (b) Distributions in cash before death with respect to a described security are not
18 part of the devise.

19 **Comment.** New Section 21132 supersedes former Section 21132 (change in form of
20 securities). Section 21132 extends former Section 6171 (wills) to trusts and other instruments. See
21 also Section 21101 (application of part). The new section is based on Uniform Probate Code
22 Section 2-605 (1990); the former section was based on Uniform Probate Code Section 2-605
23 (1987). As to the construction of provisions drawn from uniform acts, see Section 2.

24 This section is generally consistent with prior California case law. See 12 B. Witkin, Summary
25 of California Law *Wills and Probate* §§ 317-18, at 350-51 (9th ed. 1990). The rules stated in
26 Section 21132 apply in the absence of a contrary intention of the transferor. See Section 21102.

27 Under Section 21132, if the transferor makes a specific gift of only a portion of the stock the
28 transferor owns in a particular company and there is a stock split or stock dividend, the specific
29 transferee is entitled only to a proportionate share of the additional stock received. For example, if
30 the transferor owns 500 shares of stock, transfers 100 shares to a child, and the stock splits two
31 for one, the child is entitled to 200 shares, not 600.

32 **Prob. Code § 21133 (amended). Proceeds of specific gift**

33 SEC. _____. Section 21133 of the Probate Code is amended to read:

34 21133. A recipient of a specific gift has ~~the right to the remaining property~~
35 specifically given a right to the property specifically given owned by the transferor
36 at the time the gift takes effect in enjoyment and all of the following:

37 (a) Any balance of the purchase price (together with any security interest
38 agreement) owing from a purchaser to the transferor at death the time the gift takes
39 effect in enjoyment by reason of sale of the property.

40 (b) Any amount of an eminent domain award for the taking of the property
41 unpaid at death the time the gift takes effect in enjoyment.

42 (c) Any proceeds unpaid at death on fire or casualty insurance on or other
43 recovery for injury to the property.

1 (d) Property owned by the transferor at death the time the gift takes effect in
2 enjoyment and acquired as a result of foreclosure, or obtained in lieu of
3 foreclosure, of the security interest for a specifically given obligation.

4 (e) Real or tangible personal property owned by the transferor at the time the
5 transfer is effective that the transferor acquired as a replacement for specifically
6 given real or tangible personal property.

7 (f) The value of the specifically given property, to the extent the property is not
8 owned by the transferor at the time the gift takes effect in enjoyment and its value
9 or its replacement is not covered by subdivisions (a) to (e), unless the facts and
10 circumstances indicate that ademption of the gift was intended by the transferor or
11 ademption of the gift is consistent with the transferor's manifested plan of
12 distribution.

13 **Comment.** Section 21133 extends former Section 6172 (wills) to trusts and other instruments.
14 See also Section 21101 (application of part).

15 Section 21133 is amended for conformity with Uniform Probate Code Section 2-606(a).
16 (Section 21133 is based on former Uniform Probate Code Section 2-608(a), which is superseded
17 by Uniform Probate Code Section 2-606(a).) As to the construction of provisions drawn from
18 uniform acts, see Section 2.

19 This section is generally similar to prior California case law. See, e.g. Estate of Shubin, 252
20 Cal. App. 2d 588, 60 Cal. Rptr. 678 (1967); cf. Estate of Newsome, 248 Cal. App. 2d 712, 56 Cal.
21 Rptr. 874 (1967). See also Sections 32 (“devise” defined), 62 (“property” defined). The rules
22 stated in Section 21133 apply in the absence of a contrary intention of the transferor. See Section
23 21102.

24 The rules of nonademption in Sections 2133-21135 are not exclusive, and nothing in these
25 provisions is intended to increase the incidence of ademption in California. See Section 21139.

26 **Prob. Code § 21134 (amended). Effect of conservatorship on specific gift**

27 SEC. _____. Section 21134 of the Probate Code is amended to read:

28 21134. (a) Except as otherwise provided in this section, if specifically given
29 property is sold or mortgaged by a conservator or by an agent acting within the
30 authority of a durable power of attorney for an incapacitated principal, the
31 beneficiary transferee of the specific gift has the right to a general pecuniary gift
32 equal to the net sale price of, or the amount of the unpaid loan on, the property.

33 (b) Except as otherwise provided in this section, if an eminent domain award for
34 the taking of specifically given property is paid to a conservator or to an agent
35 acting within the authority of a durable power of attorney for an incapacitated
36 principal, or if the proceeds on fire or casualty insurance on, or recovery for injury
37 to, specifically gifted property are paid to a conservator or to an agent acting
38 within the authority of a durable power of attorney for an incapacitated principal,
39 the recipient of the specific gift has the right to a general pecuniary gift equal to
40 the eminent domain award or the insurance proceeds or recovery.

41 (c) This For the purpose of the references in this section to a conservator, this
42 section does not apply if, after the sale, mortgage, condemnation, fire, or casualty,
43 or recovery, the conservatorship is terminated and the transferor survives the
44 termination by one year.

1 (d) For the purpose of the references in this section to an agent acting with the
2 authority of a durable power of attorney for an incapacitated principal, (i)
3 “incapacitated principal” means a principal who is an incapacitated person, (ii) no
4 adjudication of incapacity before death is necessary, and (iii) the acts of an agent
5 within the authority of a durable power of attorney are presumed to be for an
6 incapacitated principal.

7 (e) The right of the beneficiary transferee of the specific gift under this section
8 shall be reduced by any right the beneficiary transferee has under Section 21133.

9 **Comment.** Section 21134 extends former Section 6173 (wills) to trusts and other instruments.
10 See also Section 21101 (application of part).

11 Section 21134 is amended for conformity with Uniform Probate Code Section 2-606(b).
12 (Section 21134 is based on former Uniform Probate Code Section 2-608(b), which is superseded
13 by Uniform Probate Code Section 2-606(b).) As to the construction of provisions drawn from
14 uniform acts, see Section 2.

15 Subdivisions (a) and (b) are consistent with prior California case law. See Estate of Packham,
16 232 Cal. App. 2d 847, 43 Cal. Rptr. 318 (1965). See also Sections 32 (“devise” defined), 62
17 (“property” defined). The rules stated in Section 21134 apply in the absence of a contrary
18 intention of the transferor. See Section 21102. See also Section 21139.

19 Subdivision (c) revises the corresponding Uniform Probate Code language to refer to the
20 conservatorship being terminated rather than to it being “adjudicated that the disability of the
21 testator has ceased.” The application of subdivision (c) turns on whether a conservatorship has
22 been terminated, and not on whether the transferor has regained the capacity to make an
23 instrument of transfer. Thus subdivision (c) provides a rule of administrative convenience and
24 avoids the need to litigate the question of whether the conservatee had capacity to make an
25 instrument of transfer after the time of the sale, condemnation, fire, or casualty.

26 **Prob. Code § 21135 (amended). Ademption by satisfaction**

27 SEC. _____. Section 21135 of the Probate Code is amended to read:

28 21135. (a) Property given by a transferor during his or her lifetime to a
29 beneficiary person is treated as a satisfaction of a ~~testamentary gift~~ an at death
30 transfer to that person in whole or in part only if one of the following conditions is
31 satisfied:

32 (1) The instrument provides for deduction of the lifetime gift from the
33 ~~testamentary gift~~ at death transfer.

34 (2) The transferor declares in a contemporaneous writing that the transfer ~~is to be~~
35 ~~deducted from the testamentary gift~~ or is in satisfaction of the testamentary gift at
36 death transfer or that its value is to be deducted from the value of the at death
37 transfer.

38 (3) The transferee acknowledges in writing that the gift is in satisfaction of the
39 ~~testamentary gift~~ at death transfer or that its value is to be deducted from the value
40 of the at death transfer.

41 (b) Subject to subdivision (c), for the purpose of partial satisfaction, property
42 given during lifetime is valued as of the time the transferee came into possession
43 ~~or enjoyment of the property~~ or as of at the time of death of the transferor,
44 whichever occurs first.

1 (c) If the value of the gift is expressed in the contemporaneous writing of the
2 transferor, or in an acknowledgment of the transferee made contemporaneously
3 with the gift, that value is conclusive in the division and distribution of the estate.

4 (d) If the transferee fails to survive the transferor, the gift is treated as a full or
5 partial satisfaction of the gift, as appropriate, in applying Sections 21110 and
6 21111 unless the transferor’s contemporaneous writing provides otherwise.

7 **Comment.** Section 21135 extends former Section 6174 (wills) to trusts and other instruments.
8 See also Section 21101 (application of part).

9 Section 21135 is amended for conformity with Uniform Probate Code Section 2-609. (Section
10 21135 is based on former Uniform Probate Code Section 2-612, which is superseded by Uniform
11 Probate Code Section 2-609.) As to the construction of provisions drawn from uniform acts, see
12 Section 2.

13 Section 21135 is also amended to correct terminology. See Section 21104 (“at death transfer”
14 defined). The reference to “possession or” enjoyment is deleted as superfluous. See also Section
15 11640 (hearing and order resolving questions arising under Section 21135). For a comparable
16 intestate succession rule concerning advancements, see Section 6409.

17 **Prob. Code § 21136 (repealed). Contract for sale or transfer of specifically devised property**

18 SEC. _____. Section 21136 of the Probate Code is repealed.

19 ~~21136. If the transferor after execution of the transfer instrument enters into an~~
20 ~~agreement for the sale or transfer of specifically given property, the beneficiary of~~
21 ~~the specific gift has the right to the property subject to the remedies of the~~
22 ~~purchaser or transferee.~~

23 **Comment.** Section 21136 is not continued. The matter is governed by case law. See, e.g., 12 B.
24 Witkin, Summary of California Law *Wills and Probate* § 314 *et seq.* (9th ed. 1990).

25 **Prob. Code § 21137 (repealed). Transferor placing charge or encumbrance on specifically**
26 **devised property**

27 SEC. _____. Section 21137 of the Probate Code is repealed.

28 ~~21137. If the transferor after execution of the transfer instrument places a charge~~
29 ~~or encumbrance on specifically given property for the purpose of securing the~~
30 ~~payment of money or the performance of any covenant or agreement, the~~
31 ~~beneficiary of the specific gift has the right to the property subject to the charge or~~
32 ~~encumbrance.~~

33 **Comment.** Section 21137 is not continued. The matter is governed by case law. See, e.g., 12 B.
34 Witkin, Summary of California Law *Wills and Probate* § 314 *et seq.* (9th ed. 1990).

35 **Prob. Code § 21138 (repealed). Act of transferor altering transferor’s interest in specifically**
36 **devised property**

37 SEC. _____. Section 21138 of the Probate Code is repealed.

38 ~~21138. If the transferor after execution of the transfer instrument alters, but does~~
39 ~~not wholly divest, the transferor’s interest in property that is specifically given by~~
40 ~~a conveyance, settlement, or other act, the beneficiary of the specific gift has the~~
41 ~~right to the remaining interest of the transferor in the property.~~

42 **Comment.** Section 21138 is not continued. The matter is governed by case law. See, e.g., 12 B.
43 Witkin, Summary of California Law *Wills and Probate* § 314 *et seq.* (9th ed. 1990).

1 **Prob. Code § 21139 (amended). Rules stated in Sections 21133 to 21135 not exhaustive**

2 SEC. _____. Section 21139 of the Probate Code is amended to read:

3 21139. The rules stated in Sections 21133 to ~~21138~~ 21135, inclusive, are not
4 exhaustive, and nothing in those sections is intended to increase the incidence of
5 ademption under the law of this state.

6 **Comment.** Section 21139 extends former Section 6178 (wills) to trusts and other instruments.
7 See also Section 21101 (application of part). Section 21139 is amended to reflect repeal of
8 Sections 21136 to 21138.

9 This section recognizes that the rules stated in Sections 21133-21135 cover a number of special
10 situations where a specific gift is not adeemed but do not cover all situations where a specific gift
11 is not adeemed. This section also makes clear that the inclusion of these specific statutory rules is
12 not intended to increase the incidence of ademption in California.

13 CHAPTER 4. EFFECTIVE DATES

14 **Prob. Code § 21140 (amended). Effective dates**

15 SEC. _____. Section 21140 of the Probate Code is amended to read:

16 21140. (a) ~~Except as otherwise provided and subject to subdivision (b), this~~ This
17 part applies to all instruments, regardless of when they were executed.

18 (b) ~~The repeal of former Sections 1050, 1051, 1052, and 1053 and the~~
19 ~~amendment of former Section 1054, by Chapter 842 of the Statutes of 1983, do not~~
20 ~~apply to cases where the decedent died before January 1, 1985. If the decedent~~
21 ~~died before January 1, 1985, the case is governed by the former provisions as they~~
22 ~~would exist had Chapter 842 of the Statutes of 1983 not been enacted.~~

23 **Comment.** Section 21140 is amended to delete the transitional provision in subdivision (b).

24 CONFORMING REVISIONS

25 **Civ. Code § 1071 (repealed). Conditions referring to issue**

26 SEC. _____. Section 1071 of the Civil Code is repealed.

27 ~~1071. Where a future interest is limited by a grant to take effect on the death of~~
28 ~~any person without heirs, or heirs of his body, or without issue, or in equivalent~~
29 ~~words, such words must be taken to mean successors, or issue living at the death~~
30 ~~of the person named as ancestor.~~

31 **Comment.** Section 1071 is repealed as unnecessary. It duplicates Probate Code Section 21112.

32 **Civ. Code § 1073 (repealed). Common law doctrine of worthier title abolished**

33 SEC. _____. Section 1073 of the Civil Code is repealed.

34 ~~1073. The law of this State does not include (1) the common law rule of worthier~~
35 ~~title that a grantor cannot convey an interest to his own heirs or (2) a presumption~~
36 ~~or rule of interpretation that a grantor does not intend, by a grant to his own heirs~~
37 ~~or next of kin, to transfer an interest to them. The meaning of a grant of a legal or~~
38 ~~equitable interest to a grantor's own heirs or next of kin, however designated, shall~~
39 ~~be determined by the general rules applicable to the interpretation of grants. This~~

1 ~~section shall be applied in all cases in which final judgment has not been entered~~
2 ~~on its effective date.~~

3 **Comment.** Section 1073 is repealed as unnecessary. It duplicates Probate Code Section 21108.

4 **Prob. Code § 221 (amended). Exceptions to applicability of chapter**

5 SEC. _____. Section 221 of the Probate Code is amended to read:

6 221. (a) This chapter does not apply in any case where Section 103, ~~6146~~, 6211,
7 or 6403 applies.

8 (b) This chapter does not apply in the case of a trust, deed, or contract of
9 insurance, or any other situation, where (1) provision is made dealing explicitly
10 with simultaneous deaths or deaths in a common disaster or otherwise providing
11 for distribution of property different from the provisions of this chapter or (2)
12 provision is made requiring one person to survive another for a stated period in
13 order to take property or providing for a presumption as to survivorship that results
14 in a distribution of property different from that provided by this chapter.

15 **Comment.** Section 221 is amended to delete the reference to former Section 6146, which has
16 been repealed. The former section is superseded by Section 21109 (requirement that transferee
17 survive transferor), which is amended to delete its special rules in reliance on this chapter.

18 **Prob. Code § 230 (amended). Petition for purpose of determining survival**

19 SEC. _____. Section 230 of the Probate Code is amended to read:

20 230. A petition may be filed under this chapter for any one or more of the
21 following purposes:

22 (a) To determine for the purposes of Section 103, 220, 222, 223, 224, ~~6146~~,
23 ~~6147~~, 6211, 6242, 6243, ~~6244~~, ~~or~~ 6403, 21109, 21110, or other provision of this
24 code whether one person survived another.

25 (b) To determine for the purposes of Section ~~1389.4 of the Civil Code~~ 673
26 whether issue of an appointee survived the donee.

27 (c) To determine for the purposes of Section ~~24606~~ 24611 of the Education Code
28 whether a person has survived in order to receive benefits payable under the
29 system.

30 (d) To determine for the purposes of Section ~~21371~~ 21509 of the Government
31 Code whether a person has survived in order to receive money payable under the
32 system.

33 (e) To determine for the purposes of a case governed by former Sections 296 to
34 296.8, inclusive, repealed by Chapter 842 of the Statutes of 1983, whether persons
35 have died other than simultaneously.

36 **Comment.** Section 230 is amended to correct cross-references. References to former provisions
37 that have been repealed are replaced by references to the provisions, if any, that have superseded
38 them.

1 **Prob. Code § 250 (amended). Wills, intestate succession, and family protection**

2 SEC. _____. Section 250 of the Probate Code is amended to read:

3 250. (a) A person who feloniously and intentionally kills the decedent is not
4 entitled to any of the following:

5 (1) Any property, interest, or benefit under the will of the decedent, including
6 any general or special power of appointment conferred by the will on the killer and
7 any nomination of the killer as executor, trustee, or guardian made by the will.

8 (2) Any property of the decedent by intestate succession.

9 (3) Any of the decedent's quasi-community property the killer would otherwise
10 acquire under Section 101 or 102 upon the death of the decedent.

11 (4) Any property of the decedent under Part 3 (commencing with Section 6500)
12 of Division 6.

13 (b) In the cases covered by subdivision (a):

14 (1) The estate of the decedent passes as if the killer had predeceased the
15 decedent and Section ~~6147~~ 21110 does not apply.

16 (2) Property appointed by the will of the decedent to, or for the benefit of, the
17 killer passes as if the killer had predeceased the decedent, and Section ~~1389.4~~ of
18 ~~the Civil Code~~ 673 does not apply.

19 (3) Provisions of the will of the decedent nominating the killer as executor,
20 trustee, or guardian shall be interpreted as if the killer had predeceased the
21 decedent.

22 **Comment.** Section 250 is amended to correct cross-references. References to former provisions
23 that have been repealed are replaced by references to the provisions that have superseded them.

24 **Prob. Code § 6103 (amended). Application of certain chapters where testator died before**
25 **January 1, 1985**

26 SEC. _____. Section 6103 of the Probate Code is amended to read:

27 6103. Except as otherwise specifically provided, Chapter 1 (commencing with
28 Section 6100), Chapter 2 (commencing with Section 6110), Chapter 3
29 (commencing with Section 6120), Chapter 4 (commencing with Section 6130),
30 ~~Chapter 5 (commencing with Section 6140)~~, Chapter 6 (commencing with Section
31 6200), and Chapter 7 (commencing with Section 6300) of this division, and Part 1
32 (commencing with Section 21101) of Division 11, do not apply where the testator
33 died before January 1, 1985, and the law applicable prior to January 1, 1985,
34 continues to apply where the testator died before January 1, 1985.

35 **Comment.** Section 6103 is amended to correct a cross-reference. Former Chapter 5 (rules of
36 construction of wills) has been repealed and is superseded by Sections 21101-21140 (rules for
37 interpretation of instruments).

38 **Prob. Code § 6205 (amended). "Descendants"**

39 SEC. _____. Section 6205 of the Probate Code is amended to read:

40 6205. "Descendants" mean children, grandchildren, and their lineal descendants
41 of all generations, with the relationship of parent and child at each generation
42 being determined as provided in Section ~~6152~~ 21115. A reference to

1 “descendants” in the plural includes a single descendant where the context so
2 requires.

3 **Comment.** Section 6205 is amended to correct a cross-reference.

4 **Prob. Code § 6409 (amended). Advancements**

5 SEC. _____. Section 6409 of the Probate Code is amended to read:

6 6409. (a) If a person dies intestate as to all or part of his or her estate, property
7 the decedent gave during lifetime to an heir is treated as an advancement against
8 that heir’s share of the intestate estate only if one of the following conditions is
9 satisfied:

10 (1) The decedent declares in a contemporaneous writing ~~that the gift is to be~~
11 ~~deducted from the heir’s share of the estate or that the gift is an advancement~~
12 ~~against the heir’s share of the estate~~ or that its value is to be deducted from the
13 value of the heir’s share of the estate.

14 (2) The heir acknowledges in writing that the gift is to be so deducted or is an
15 advancement or that its value is to be deducted from the value of the heir’s share
16 of the estate.

17 (b) Subject to subdivision (c), the property advanced is to be valued as of the
18 time the heir came into possession ~~or~~ enjoyment of the property or as ~~of~~ at the time
19 of death of the decedent, whichever occurs first.

20 (c) If the value of the property advanced is expressed in the contemporaneous
21 writing of the decedent, or in an acknowledgment of the heir made
22 contemporaneously with the advancement, that value is conclusive in the division
23 and distribution of the intestate estate.

24 (d) If the recipient of the property advanced fails to survive the decedent, the
25 property is not taken into account in computing the intestate share to be received
26 by the recipient’s issue unless the declaration or acknowledgment provides
27 otherwise.

28 **Comment.** Section 6409 is amended for conformity with Section 21135 and with Uniform
29 Probate Code Section 2-109.

30 **Prob. Code § 11640 (amended). Petition and order**

31 SEC. _____. Section 11640 of the Probate Code is amended to read:

32 11640. (a) When all debts have been paid or adequately provided for, or if the
33 estate is insolvent, and the estate is in a condition to be closed, the personal
34 representative shall file a petition for, and the court shall make, an order for final
35 distribution of the estate.

36 (b) The court shall hear and determine and resolve in the order all questions
37 arising under Section ~~6174~~ 21135 (ademption by satisfaction) or Section 6409
38 (advancements).

39 (c) If debts remain unpaid or not adequately provided for or if, for other reasons,
40 the estate is not in a condition to be closed, the administration may continue for a

- 1 reasonable time, subject to Chapter 1 (commencing with Section 12200) of Part 11
 - 2 (time for closing estate).
 - 3 **Comment.** Section 11640 is amended to correct a cross-reference.
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