

## Memorandum 2001-85

**Rules of Construction for Trusts (Draft of Recommendation)**

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Attached to this memorandum is a staff draft recommendation on *Rules of Construction for Trusts and Other Instruments*. The draft incorporates decisions from the Commission's September meeting.

The Commission was interested in further input on several questions:

(1) Should the rules of construction address the matter of reformation of instruments? If so, what should the statute or Comments say about it?

(2) Should the rules of construction be amended so that they no longer single out, as constituting an intention of the transferor to override the antilapse statute, certain types of clauses in an instrument requiring a beneficiary to survive until a specified time?

(3) Does the antilapse statute need to be revised to make clear that it does not cover outright or irrevocable transfers made during the transferor's lifetime?

The staff assembled a working group of representative experts who have been interested and involved in this project. The group consisted of Charlie Wolff (State Bar Probate Section), Jeff Strathmeyer (Publisher Editor, CEB Estate Planning and California Probate Reporter), Dick Kinyon (President of Probate Section, Bar Association of San Francisco), Prof. Bill McGovern (Commission consultant on rules of construction), and Prof. Ed Halbach (longtime Commission consultant on probate law). The group spent a day reviewing the issues identified by the Commission, and other issues as well.

This memorandum reports the results of the working group discussions. The memorandum also proposes draft revisions representing a synthesis of working group discussions, followup communications by meeting participants, and further analysis and revision by the staff.

**Prob. Code § 21102. Intention of transferor**

There was general agreement that the Probate Code should eventually address reformation of instruments. However, this should be done carefully in a separate project. The Comment to Section 21102 (along with a few other clarifying revisions) should note that the statute does not deal with the issue:

**Comment.** The amendment to subdivision (b) of Section 21102 is technical.

Section 21102 extends former Section 6140 (wills) to trusts and other instruments. See also Section 21101 (application of part). The section is drawn from Section 2-603 of the Uniform Probate Code (1987). As to the construction of provisions drawn from uniform acts, see Section 2.

Subdivision (c) is added to make clear the admissibility of extrinsic evidence under this section, including for the purpose of rebutting the presumed intention attributed to a transferor by a rule of construction. Subdivision (c) neither expands nor limits the extent to which extrinsic evidence admissible under former law may be used to determine the transferor's intent as expressed in the instrument. See e.g., *Estate of Russell*, 69 Cal. 2d 200, 215-16, 444 P.2d 353, 70 Cal. Rptr. 561 (1968). See generally 12 B. Witkin, *Summary of California Law Wills and Probate* §§ 245-47, at 280-84 (9th ed. 1990). Cf. Section 6111.5 (will); *Estate of Anderson*, 56 Cal. App. 4th 235, 65 Cal. Rptr. 2d 307 (1997) (extrinsic evidence admissible); *Estate of Guidotti*, 90 Cal. App. 4th 1403, 109 Cal. Rptr. 2d 674 (2001) (use of extrinsic evidence). See also Section 12206 (limitation in will of time for administration of estate is directory only). Likewise, under the parol evidence rule extrinsic evidence may be available to explain, interpret, or supplement an expressed intention of the transferor. Code Civ. Proc. § 1856.

Nothing in this section affects the law governing reformation of an instrument to effectuate the intention of the transferor in case of mistake or for other cause.

Whether the Commission has the time and resources to undertake such a project immediately is another question.

#### **Prob. Code § 21104. “At-death transfer” defined**

As currently drafted, Section 21104 would provide:

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

**Comment.** Section 21104 is amended to substitute the term “at-death transfer” for “testamentary gift.” As used in this part, an at-death transfer does not include a lifetime gift. The reference to a transfer “in possession” includes a transfer to the trustee of a trust.

There was a consensus of the group that the language of existing law is ambiguous — what does it mean for a transfer to “take effect” at or after death? We assume it's the transferor's death being referred to here, but that's not clear.

When does a transfer take effect in any event — the date of execution of the instrument, the date the instrument becomes irrevocable, the date title changes hands, etc.?

It was noted that the purpose of the section is to distinguish irrevocable lifetime transfers such as gifts and deeds from transfers made by instruments such as wills and will substitutes (e.g., revocable trusts) that do not become “final” until the transferor dies. The suggestion was made that the purpose could be better effectuated by focusing on the revocability of the instrument rather than on the time it “takes effect”:

21104. (a) ~~As used in this part, “at-death transfer” means a transfer in possession or enjoyment that takes effect at or after death that is revocable during the lifetime of the transferor.~~

(b) A joint tenancy or joint account with right of survivorship is not an at-death transfer.

**Comment.** Section 21104 recasts the former definition of “testamentary gift.” As used in this part, an at-death transfer does not include an irrevocable lifetime transfer, such as an outright gift or an irrevocable trust. An at-death transfer does include a will and a revocable trust, as well as a pay-on-death account, “Totten” (or bank account) trust, beneficiary designation under an insurance policy or pension plan, and the like. An irrevocable beneficiary designation is usually subject to a survival requirement pursuant to the terms of its governing instrument for purposes of Section 21109 (requirement that transferee survive transferor).

The term is used in Sections 21109 (requirement that transferee survive transferor), 21117 (classification of at-death transfer), 21132 (change in form of securities), 21133 (proceeds of specific gift), and 21135 (ademption by satisfaction).

This would have the effect of covering wills, living trusts, beneficiary designations in various instruments, insurance policies, etc. It would have the effect of excluding lifetime gifts and irrevocable trusts.

**Prob. Code § 21109. Requirement that transferee survive transferor**

Ed Halbach would augment the Comment to this section with additional material that explains the operation of the section with respect to future interests:

The at-death transfer provision of Section 21109 changes the traditional common law and California rule illustrated by *Randall v. Bank of America*, 48 Cal. App. 2d 249, 119 P.2d 754 (1941) (remainder interest in revocable trust held not divested by beneficiary’s failure to survive settlor; upon settlor’s death the trust

property passed to deceased beneficiary's estate). However, language of this section referring to survival "until a future time required by the instrument" does not change the result of other future interest cases that have generally refused to find an implied condition of survival where the instrument fails expressly to impose such a condition, such as *Estate of Stanford*, 49 Cal. 2d 120, 315 P.2d 681 (1957) (testamentary trust for A for life, remainder to A's "children"; despite class gift form, remainder passed to estate of child who predeceased A), and *Estate of Ferry*, 55 Cal.2d 776, 361 P.2d 900, 13 Cal.Rptr. 180 (1961) (even though the interest in question was subject to another condition precedent, court refused to find an implied condition of survival). See also Restatement Second, Property (Donative Transfers) § 27.3.

Professor Halbach's proposed Comment language goes on to note that:

In most jurisdictions, however, a transferor's use of a flexible, multi-generation class designation ("issue" or "descendants") is sufficient to support a finding that survival is required to the date of "distribution" (i.e., the termination of all preceding interests), there being no risk of excluding a line of the designated ancestor's descendants. Restatement Second, Property (Donative Transfers) § 28.2; *Altman v. Rider*, 191 S.W.2d 577 (Ky. App. 1956). Because, in other cases of these general types, the primary concern is the risk of disinheriting lines of descent if survival is required, the possibility that Section 21110 (extended antilapse provision) may substitute the issue of deceased beneficiary might influence courts in the interpretation (Section 21102) of future interest provisions that do not expressly deal with questions of survival. Cf. Restatement Third, Trusts § 49, Comment c, Illustration 3; *Dewire v. Haveles*, 404 Mass. 274, 534 N.E.2d 782 (1989). See also *Matter of Welles' Will*, 173 N.E.2d 876 (N.Y. 1961) (4-3 decision struggling with the potentially harsh or unintended effect of the language conferring a remainder on "all my grandchildren then living").

The staff thinks this additional language may be more appropriate for the preliminary part of the recommendation than for the Comment.

#### **Prob. Code § 21110. Anti-lapse**

The antilapse statute is the most critical of the rules of construction, and the issue the working group focused most of its attention on. Some additional clarifying revisions to the statute are set out below:

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 or is treated as failing to survive the transferor of an at-death transfer 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.~~

(c) ~~As used in this section, "transferee" means a person, other than a joint tenant, who is kindred of the transferor or kindred of a surviving, deceased, or former spouse of the transferor.~~

A key issue in the antilapse statute is whether or when a transfer such as to my "surviving" children should be read as an intention to override the antilapse statute. If such language is read as overriding the antilapse statute, and if a child of the transferor, for example, predeceases the transferor, then that child's line of descent could be inadvertently excluded.

This question is highly fact-dependent — what did the particular transferor intend by using the language "surviving"? Was it really the transferor's intention to disinherit a line of descent, if that would be the result, or was it just casual language thrown into the instrument without appreciation of its effect? Suppose the "surviving" language is part of a check box on a standard form beneficiary designation, or part of fine-print boilerplate in an insurance policy?

The State Bar committee takes the position that words such as "surviving" are generally used advisedly by instrument drafters and should be given their intended meaning. Other attendees at our meeting expressed doubt about that position, particularly in some settings. After extended discussion, the working group thought it might be possible to leave the statute silent on the point but provide more fully developed commentary about ascertaining the intention of the transferor.

The following Comment revision is a possibility:

**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 only 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 or that those expressions necessarily evidence a contrary intention.~~

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 transferor too readily or too broadly an intention to override the antilapse statute, the purpose of which is to lessen the risk of serious oversight by a transferor. For example, by providing a substitute taker, the transferor may very well intend to override the antilapse statute in the ordinary case, but not necessarily where. If, however, the substitute taker has also predeceased the transferor. In that situation, the transferor may have intended that the antilapse statute should apply to the first taker. 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). 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). See Section 21102 (intention of transferor).

Under this section words of survival, such as a gift to my children "if they survive me," or a gift to "my surviving children" may be significant language suggesting an intention of the transferor that the anti-lapse statute does not apply. However, such language may also be used casually or without the possible descendants of a transferee in mind. The risk of misconstruction is particularly apparent in a beneficiary designation, trust will document that is nevertheless valid, and the like. Other factors to be considered may include: whether the words appear in an instrument that otherwise appears to be competently drafted; whether the result of a survival requirement would be to substantially 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.

Joint tenancy title is in the nature of an express requirement of survival. Subdivision (c) is revised to recognize this circumstance.

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

The first sentence of subdivision (a) is drawn from the first sentence of Uniform Probate Code Section 2-605 (1987). The second sentence of subdivision (a) is drawn from the second sentence of Uniform Probate Code Section 2-605; but, unlike the Uniform Probate Code, or merely, e.g., to exclude those issue of the deceased devisee from taking certain tangible personal property; the closeness of the relationship of the "issue" to the transferor (e.g., transferor's grandchildren); and whether the "issue" in question had been born at the time the document was executed. (Consider a devise to "my surviving children" in a will executed 30 years ago by a testator who was then 35 years of age and married with two young children and, of course, no grandchildren.)

Section 21110 does not make a substitute gift in the case of a class gift where a person otherwise answering the description of the class was dead when the instrument was executed and that fact was known to the transferor. ~~As to the construction of provisions drawn from uniform acts, see Section 2. The second sentence of subdivision (a) It is consistent with *Estate of Steidl*, 89 Cal. App. 2d 488, 201 P.2d 58 (1948) (antilapse statute applied where class member died before testator but after execution of will).~~

Subdivision (c) makes the antilapse statute apply not only to kindred of the transferor but also to kindred of a surviving, deceased, or former spouse of the transferor. Thus, if the transferor were to make a transfer to a stepchild who predeceased the transferor, Section 21110 will make a substitute gift to issue of the predeceased stepchild. The term "kindred" was taken from former Probate Code Section 92 (repealed by 1983 Cal. Stat. ch. 842, § 18) and refers to persons related by blood. *Cf. In re Estate of Sowash*, 62 Cal. App. 512, 516, 217 P. 123 (1923). In general addition, an adoptee is generally kindred of the adoptive family and not of the adoptee's natural relatives. See Section 21115 (halfbloods, adopted persons, persons born out of wedlock, stepchildren, and foster children, plus issue of such persons, as "kindred" or "issue"). See also *Estate of Goulart*, 222 Cal. App. 2d 808, 35 Cal. Rptr. 465 (1963).

As to when a transferee is treated as if he or she predeceased the transferor, see Sections 220 (simultaneous death), 230-234 (proceeding to determine survival), 240 (manner of taking by representation), 6122 and 5600 (effect of dissolution of marriage), 282 (effect of disclaimer), and 250 (effect of feloniously and intentionally killing decedent), 21115(c)(1), (2) (half bloods, adopted persons, persons born out of wedlock, stepchildren, foster children, and issue of such persons, as "kindred" or "issue"). See also

Sections 240 (manner of taking by representation) and 230-234 (proceeding to determine survival).

The language of this section has been adapted by the Commission to make clear that the antilapse statute merely prescribes what happens when an instrument requires survival — it does not impose such a requirement. The survival issue is dealt with in Section 21109 (requirement that transferee survive transferor).

**Prob. Code § 21111. Failure of transfer**

There are several deficiencies in this section as drafted:

(1) It does not state what happens if a residuary gift to one beneficiary or to a remainder beneficiary fails.

(2) In the case of a future interest that fails and eventually passes intestate, the statute does not specify the time as of which intestacy rules are to be applied — the time of the transferor's death or the time the future interest fails.

(3) The statute fails to deal with fractional gifts of the remainder of an estate.

These problems could be addressed by the following revisions to the section and Comment:

~~21111. Except as provided in Section 21110:~~

~~(a) If a transfer, other than a residuary gift or a transfer of a future interest, (a) Except as provided in subdivision (b) and subject to Section 21110, if a transfer fails for any reason, the property is transferred as follows:~~

~~(1) If the transferring instrument provides for an alternative disposition in the event the transfer fails, the property is transferred according to the terms of the instrument.~~

~~(2) If the transferring instrument does not provide for an alternative disposition but does provide for the transfer of a residue, the property becomes a part of the residue transferred under the instrument.~~

~~(3) If the transferring instrument does not provide for an alternative disposition and does not provide for the transfer of a residue, or if the transfer is itself a residuary gift, the property is transferred to the decedent's estate.~~

~~(b) If Subject to Section 21110, if a residuary gift or a future interest is transferred to two or more persons and the share of a transferee fails for any reason, and no alternative disposition is provided, the share passes to the other transferees in proportion to their other interest in the residuary gift or the future interest.~~

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

(d) If failure of a future interest results in an intestacy, the property passes to the heirs of the transferor determined pursuant to Section 21114.

**Comment.** Section 21111 is amended to ~~treat future interests in the same manner as other gifts~~ clarify the treatment of a failed residuary gift.

Under subdivision (a)(1), an alternative disposition may take the form of a transfer of specifically identifiable property (specific gift) or a transfer from general assets of the transferor (general gift) that includes the specific property.

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

With respect to a residuary devise, subdivision (b) abolishes the “no residue of a residue” rule, illustrated by Estate of Murphy, 157 Cal. 63, 106 Pac. 230 (1910). It preserves the change made by former Section 6148 in the California case law rule that if the share of one of several residuary devisees fails, the share passed by intestacy. See e.g., Estate of Russell, 69 Cal. 2d 200, 215-16, 444 P.2d 353, 70 Cal. Rptr. 561 (1968); *In re Estate of Kelleher*, 205 Cal. 757, 760-61, 272 P. 1060 (1928); Estate of Anderson, 166 Cal. App. 2d 39, 42, 332 P.2d 785 (1985).

For purposes of this section, a gift of “all my estate” is a residuary gift rather than a general gift. Subdivision (c). In the case of a failed gift of a portion of an estate or residue, this section may be applied in appropriate circumstances so as to prevent an intestacy or a distorted disposition.

It should be noted that where a failed gift is transferred to the decedent’s estate under this section, it will often result in an intestacy. Cf. Section 21114 (class gift to heirs, next of kin, relatives, or the like).

### **Prob. Code § 21114. Class gift to heirs, next of kin, relatives, or the like**

A concern was raised that Section 21114 as revised makes it unclear that the measuring life for a future interest may be the transferor’s as well as another designated person’s. This could be cured by writing a reference to the transferor back into the section:

21114. (a) If a statute or an instrument provides for transfer of a present or future interest to, or creates a present or future interest in, a designated person’s “heirs,” “heirs at law,” “next of kin,”

“relatives,” or “family,” or words of similar import, the transfer is to the persons, including the state under Section 6800, and in the shares, that would succeed to the designated person’s intestate estate under the intestate succession law of the designated person’s domicile if the designated person died when the transfer is to take effect in enjoyment. If the designated person’s surviving spouse is living but is remarried at the time the transfer is to take effect in enjoyment, the surviving spouse is not an heir of the designated person for purposes of this section.

(b) As used in this section, “designated person” includes the transferor.

### **Prob. Code § 21135. Ademption by satisfaction**

It was noted that there is a gap in Section 21135 that should be filled. We need to add another paragraph to subdivision (a) as revised:

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

(1) The instrument provides for deduction of the lifetime gift from the at-death transfer.

(2) The transferor declares in a contemporaneous writing that the gift is in satisfaction of the at-death transfer or that its value is to be deducted from the value of the at-death transfer.

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

(4) The property given is the property specifically identified in the at-death transfer to that person.

### **Conclusion**

Some of the foregoing proposals are fairly straightforward and technical in nature. The staff sees nothing in them that would suggest they should be recirculated for further comment.

The same does not necessarily apply to the proposals on Sections 21104 (“at-death transfer” defined) and 21110 (antilapse). Both sections are key, the issues are complex, and the working group was not unanimous as to the proposed solutions. Perhaps we will have reached a consensus by the time of the November meeting.

It is not clear that further circulation of proposed revisions will be helpful in any event. We have so far been unable to get many people to focus on this

project. That is probably due in part to the fact that the rules of construction are default rules, applicable where the intention of the transferor is unclear. The attorneys we deal with tend to be knowledgeable, competent drafters, whose instruments adequately address the types of problems the rules of construction are designed to cure.

The working group we assembled to review the draft was outstanding. We will not be able to do better than that, no matter how much extra time we give ourselves to circulate drafts for comment. Depending on the decisions made at the Commission meeting, it may be appropriate to finalize the recommendation on the basis of the working group's input.

Respectfully submitted,

Nathaniel Sterling  
Executive Secretary

SUMMARY OF *STAFF DRAFT*  
RECOMMENDATION

RULES OF CONSTRUCTION FOR TRUSTS  
AND OTHER INSTRUMENTS

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 78 of the Statutes of 2001.

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.<sup>1</sup> 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.<sup>2</sup>

8    Problems in the application of the extended rules have become apparent.<sup>3</sup> 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 study is  
12   available on the Commission’s website.<sup>4</sup>

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 Division 11, Part 1 (Sections 21101-21140), 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.<sup>5</sup> 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

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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* (March 2000). The URL for this study is <http://www.clrc.ca.gov/pub/Printed-Reports/BKST-811-McGovernRulesConst.pdf>.

5. Restatement (Third) of Trusts § 25(2) (1992).

1 trust property.”<sup>6</sup> More problematic is extension of the same rules to other forms of  
2 donative transfer, such as inter vivos gifts, 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.<sup>7</sup> A number of the Uniform  
6 Probate Code provisions have since been altered in that Code but not in California.  
7 In several instances the Law Revision Commission proposes that the 1990  
8 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.<sup>8</sup>

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.”<sup>9</sup> 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.<sup>10</sup>

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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.”<sup>11</sup> This limitation is  
5 satisfactory and does not require further elaboration. The following rules of  
6 construction should have limited application:<sup>12</sup>

- 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 at-death transfer)
- 12 • Section 21133 — proceeds of specific gift (limited to at-death transfer)
- 13 • Section 21135 — ademption by satisfaction (limited to at-death transfer)

#### 14 **Intention of Donor**

15 The rules of construction should apply only where the intention of the maker of  
16 the instrument cannot be ascertained.<sup>13</sup> Language in Section 21102 suggests that  
17 the rules of construction may only be overridden by an expression of contrary  
18 intention in the instrument itself. However, existing law allows extrinsic evidence  
19 of a testator’s intent to rebut the presumptive effect of the rules of construction.<sup>14</sup>

20 Likewise, although the intention of a donor “as expressed in the instrument”  
21 controls the legal effect of dispositions made in the instrument,<sup>15</sup> expressions in  
22 the instrument are not the exclusive means by which a donor’s intention may be  
23 ascertained.<sup>16</sup> Under the parol evidence rule, for example, extrinsic evidence is  
24 admissible on the issue of a mistake or imperfection of the writing.<sup>17</sup>

25 The Commission believes the statute as currently phrased is overbroad. The role  
26 of extrinsic evidence in the determination of the transferor’s intention should be  
27 recognized in the statute. The Commission recommends addition of the following  
28 language to Section 21102:

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

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

15. Section 21102(a).

16. For a recent example of the use of extrinsic evidence to determine the transferor’s intent, see *Estate of Guidotti*, 90 Cal.App.4th 1403, 109 Cal.Rptr.2d 674 (2001).

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

1 Nothing in this section limits the use of extrinsic evidence, to the extent  
2 otherwise authorized by law, to determine the intention of the transferor.<sup>18</sup>

### 3 **Terminology**

4 *Testamentary gift.* The existing rules of construction make use of the term  
5 “testamentary gift” to describe a transfer in possession or enjoyment that takes  
6 effect at or after death.<sup>19</sup> This terminology is misleading. It suggests the rules are  
7 limited to gifts made by will, whereas the rules are intended to apply to nonprobate  
8 transfers as well.<sup>20</sup> The Commission recommends substitution of the term “at-  
9 death transfer.” This term is more consistent with the transfer-transferor-transferee  
10 terminology used throughout the rules of construction.<sup>21</sup> It also is more consistent  
11 with contemporary usage.

12 *Beneficiary.* The existing rules of construction are inconsistent in their use of the  
13 terms “beneficiary” and “transferee” to refer to the donee of a donative transfer.<sup>22</sup>  
14 Both terms are defined in the Probate Code,<sup>23</sup> and either would work equally well  
15 in this context. Because “transferee” is the term predominantly used in the existing  
16 rules of construction, the Commission recommends that that term be used  
17 consistently throughout, replacing “beneficiary” in the instances where it occurs.

### 18 **Presumption That Property Vests in Common**

19 Section 21106 recapitulates the common law presumption that a transfer to two  
20 or more persons vests the property transferred to them as tenants in common,  
21 absent an expressed intent otherwise.<sup>24</sup> This statement of the law is incomplete<sup>25</sup>  
22 and unnecessary.<sup>26</sup> The Commission recommends that it be repealed in reliance on  
23 the equivalent but more accurate rendition of the concept in the Civil Code.<sup>27</sup> The

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18. The Commission’s Comment notes that the proposed language would neither expand nor limit the extent to which extrinsic evidence admissible under existing law may be used to determine the transferor’s intent as expressed in the instrument — the provision would simply recognize the availability of extrinsic evidence notwithstanding the apparently absolute language of Section 21102.

19. Section 21104.

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

21. 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.

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

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

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

25. 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).

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

27. 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.”).

1 Civil Code is the more appropriate location for the provision in light of its  
2 significant application to transactions outside the donative transfer context as well.

### 3 **Common Law Doctrine of Worthier Title Abolished**

4 Section 21108 abolishes the common law doctrine of worthier title, that a  
5 grantor cannot convey an interest to the grantor's own heirs. The provision  
6 duplicates Civil Code Section 1073. Both provisions were enacted in 1959 on  
7 recommendation of the Law Revision Commission.<sup>28</sup> At that time the Commission  
8 observed that, "The Probate Code provision is recommended only out of an  
9 abundance of caution since it is generally agreed that the American doctrine of  
10 worthier title does not apply to testamentary transfers."<sup>29</sup>

11 Since then circumstances have changed, and the principal contemporary  
12 relevance of the doctrine of worthier title is to trusts.<sup>30</sup> The duplicative provision  
13 in the Civil Code is unnecessary. The statutes would be simplified by its repeal.

14 The transitional provision<sup>31</sup> included in Section 21108 in 1959 is now obsolete,  
15 and likewise should be repealed.

### 16 **Requirement that Beneficiary Survive Donor**

17 The beneficiary of a donative transfer must survive the donor in order to take the  
18 gift.<sup>32</sup> This rule of construction is unduly broad as drafted. It is appropriately  
19 applied to wills (codifying the common law rule) and to trusts (will substitutes).<sup>33</sup>  
20 But its application to deeds is problematic. It could be read to require a beneficiary  
21 or donee to survive the settlor or donor in order to retain a gift. It is unlikely the  
22 existing statute was intended to rescind a completed transfer of property if the  
23 beneficiary were to predecease the donor.<sup>34</sup> The statute should be limited to gifts  
24 intended to take effect at or after the death of the donor.

### 25 **Antilapse Statute**

26 A fundamental rule of donative transfer law is that a gift to a beneficiary fails (or  
27 lapses) if the beneficiary does not survive the donor.<sup>35</sup> The antilapse statute is  
28 designed to prevent lapse of a gift to the donor's kindred who predecease the

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28. 1959 Cal. Stat. ch. 122.

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

30. 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."

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

32. Section 21109(a).

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

34. 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).

35. 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.").

1 donor, unless it is clear that the donor’s intention was that such a gift should  
2 lapse.<sup>36</sup>

3 Existing California law has been criticized because it appears to allow “mere  
4 words of survival” in an instrument to negate the antilapse statute, and because it  
5 appears to extend the antilapse statute to future interests.<sup>37</sup> Whether mere words of  
6 survival in an instrument should be allowed to negate the antilapse statute, and  
7 whether the antilapse statute should apply to the gift of a future interest in an  
8 instrument, may depend on the circumstances of the particular case. The  
9 Commission recommends that the statute continue to remain silent on these points,  
10 leaving the matter to case law development.

11 In this connection, the Commission recommends that language be deleted from  
12 the existing statute to the effect that a provision in an instrument requiring survival  
13 for a specific time overrides the antilapse statute.<sup>38</sup> That provision could be read to  
14 imply that other language in an instrument does not override the antilapse statute.  
15 In fact, the controlling test is the donor’s intention.<sup>39</sup>

16 As a technical matter, the antilapse statute as currently drafted would appear to  
17 apply to property held in joint tenancy.<sup>40</sup> Since the distinguishing feature of joint  
18 tenancy tenure is the right of survivorship,<sup>41</sup> application of antilapse principles to  
19 joint tenancy would defeat the transferor’s intent. The law should directly exclude  
20 joint tenancy from application of the antilapse statute.

### 21 **Failure of Transfer**

22 Section 21111 provides rules for treatment of a failed transfer. A failed specific  
23 gift passes by intestacy, absent an alternate or residuary disposition. A failed  
24 residuary gift passes to the remaining residuary beneficiaries proportionately.

25 The existing statute inexplicably precludes a future interest from being treated in  
26 the same manner as other non-residuary gifts. Take, for example, a devise “to A  
27 for life, remainder to B if B survives A.” Under Section 21111, a failed gift of the  
28 future interest is precluded from going to alternate or residuary beneficiaries,  
29 resulting in an intestacy. This anomaly should be eliminated from the statute, and a  
30 future interest treated the same as other gifts.

31 Under the existing statute, the treatment of a gift of “all my estate” is unclear. If  
32 it is treated as a general gift, failure of the gift is likely to result in an intestacy. If

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36. Section 21110.

37. The extensive academic debate over these points is summarized in McGovern, *supra* note 4, at 10-22.

38. 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.”)

39. Sections 21102, 21110(b) (1st sent.).

40. See Section 21101 (rules of construction apply to deeds, among other instruments).

41. See, e.g., Sterling, *Joint Tenancy and Community Property in California*, 14 Pac.L.J. 927 (1983).

1 it is treated as a residuary gift, failure is likely to result in the gift going to other  
2 residuary beneficiaries. Since the latter result is more likely in accord with the  
3 transferor’s intent, the statute should be revised to make clear that a gift of “all my  
4 estate” is treated as a residuary gift.

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

6 The California statute governing determination of beneficiaries entitled to take  
7 under a class gift contains a number of ambiguities.<sup>42</sup> The statute is based on an  
8 earlier version of Uniform Probate Code Section 2-711; the current version of the  
9 Uniform Probate Code resolves the ambiguities.<sup>43</sup> The Commission recommends  
10 that the California statute be recast in conformity with the current version of the  
11 Uniform Probate Code.

12 **Halfbloods, Adopted Persons, Persons Born Out of Wedlock, Stepchildren, and**  
13 **Foster Children**

14 Section 21115 incorporates intestacy rules in interpreting class gifts, but fails to  
15 indicate which rules apply — those in effect at the time the instrument is executed  
16 or those in effect at the time the transfer takes effect in enjoyment. By comparison,  
17 in construing a gift to “heirs” under Section 21114, the determination is made as of  
18 the time when the transfer is to take effect in enjoyment and according to the  
19 intestate succession law in effect at that time. There is no apparent reason to use  
20 different choice of law rules in the determination of “heirs” as opposed to “issue.”  
21 Section 21115 should be conformed to Section 21114 on this point, and the  
22 determination made under the intestate succession laws in effect at the time the  
23 transfer is to take effect in enjoyment.

24 **Vesting of Testamentary Disposition**

25 Section 21116 creates a presumption that interests vest at the donor’s death,  
26 whereas a gift of a future interest to a class such as children or heirs does not vest  
27 until the date of distribution.<sup>44</sup> Besides the inconsistency created by Section 21116,  
28 its presumption in favor of early vesting unduly limits the ability of the court to  
29 consider all the circumstances in construing the intent of an instrument. The  
30 Commission recommends its repeal.

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42. Section 21114.

43. 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 24-25.

44. Sections 21113, 21114.

1 **Satisfaction of Pecuniary Gift by Property Distribution**

2 Section 21118 provides rules for valuing property used in satisfaction of a  
3 pecuniary gift. The statute has been criticized because it would allow overfunding  
4 of a marital (or charitable) deduction gift, as well as overfunding of a bypass trust  
5 or other pecuniary gift at the expense of a marital (or charitable deduction)  
6 residue.<sup>45</sup> The statute may also run afoul of the generation skipping transfer tax  
7 requirement that assets allocated in satisfaction of a pecuniary gift must fairly  
8 reflect net appreciation or depreciation in the value of all assets available for  
9 funding the gift.<sup>46</sup>

10 To cure these problems, the Commission recommends that the applicable  
11 standard be drawn from current Treasury Regulations. Thus the property selected  
12 for satisfaction of a pecuniary gift would “fairly reflect net appreciation and  
13 depreciation (occurring between the valuation date and the date of distribution) in  
14 all of the assets from which the distribution could have been made.”<sup>47</sup>

15 **Change in Form of Securities**

16 The provisions applicable to a gift of securities that have changed form (for  
17 example by sale, merger, reinvestment, and the like)<sup>48</sup> are based on Uniform  
18 Probate Code Section 2-605. The Uniform Probate Code has since been revised to  
19 make clear that it applies regardless of whether the gift is characterized as general  
20 or specific. The Uniform Probate Code is also limited to gifts made by will, thus  
21 avoiding internal inconsistencies inherent in the California statute’s application to  
22 other instruments.<sup>49</sup> The Commission recommends that California law be  
23 conformed to the revised Uniform Probate Code, and limited in its application to  
24 at-death transfers generally.

25 **Ademption**

26 Existing Probate Code Sections 21133–21135 provide rules for construing the  
27 donor’s intent where the donor has made a specific gift of property but the  
28 property is no longer part of the donor’s estate. That could occur because during  
29 the donor’s lifetime the specifically given property was sold, foreclosed on,  
30 replaced, disposed of as part of a conservatorship estate, delivered to the  
31 beneficiary, or the like. The existing California provisions are based on the pre-  
32 1990 version of the Uniform Probate Code.<sup>50</sup> Since then, the Uniform Probate

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45. See *The Obsolete “Minimum Worth” Provision*, 16 CEB Estate Planning & California Probate Reporter 60 (December 1994).

46. *Ibid.*

47. See Treas. Reg. § 26.2642-2(b)(2) (valuation).

48. Section 21132.

49. 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).

50. See McGovern, *supra* note 4, at 28-29.

1 Code has been revised to address problems that have been identified. The  
2 California version of these provisions should be conformed to the Uniform Probate  
3 Code as revised, excluding its general presumption of nonademption of specific  
4 devises.<sup>51</sup>

### 5 **Changes to Property the Subject of a Specific Gift**

6 The statutes applicable to a specific gift of property that is subject to a contract  
7 of sale or transfer,<sup>52</sup> or is subject to a charge or encumbrance,<sup>53</sup> or as to which the  
8 donor has an altered interest,<sup>54</sup> are derived from older Probate Code provisions  
9 dealing with ademption, and no longer serve a useful purpose. They state the  
10 obvious but are not exhaustive,<sup>55</sup> whereas the case law on ademption is adequate  
11 and would effectuate the donor's intent.<sup>56</sup> The provisions may be repealed without  
12 loss.

### 13 **Elimination of Redundant Provisions**

14 A number of the rules of construction expressed in the Probate Code are  
15 redundant and should be repealed, either because their substance is covered more  
16 adequately elsewhere in the codes<sup>57</sup> or because they merely restate the common  
17 law but fail to accurately capture its nuances.<sup>58</sup>

18 Other rules of construction appear both in the Probate Code and elsewhere.<sup>59</sup>  
19 These provisions should be consolidated in the Probate Code, so that practitioners  
20 and others may easily find all relevant rules of construction in one location.

### 21 **Effective Dates**

22 As a general principle, the rules of construction apply retroactively to all  
23 instruments, regardless of their date of execution.<sup>60</sup> This is consistent with the  
24 purpose of rules of construction, which apply in circumstances where the intent of  
25 the maker of the instrument cannot be ascertained.<sup>61</sup> It is also consistent with the  
26 general approach of the Probate Code to apply new law except where it would  
27 create substantial injustice,<sup>62</sup> and with the principle that improvements in the law  
28 should be broadly applied.

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51. Unif. Prob. Code (1990) § 2-606(a).

52. Section 21136.

53. Section 21137.

54. Section 21138.

55. Section 21139.

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

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

58. See Section 2113 (afterborn member of class); McGovern, *supra* note 4, at 24.

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

60. Section 21140(a).

61. Section 21102. See also, McGovern, *supra* note 4, at 30-32.

62. Section 3.

1 Section 21140(b) creates an exception to retroactive application of the rules of  
2 construction in a case where former Sections 1050-1054 would apply to a decedent  
3 who died before January 1, 1985. This provision is obsolete. The statutes it refers  
4 to have relevance to very few cases,<sup>63</sup> and the likelihood of such an issue arising in  
5 the future with respect to a pre-1985 decedent is remote. In the interest of  
6 simplification of the law, this provision should be repealed.

### 7 **Conforming Revisions**

8 When former Probate Code Sections 6140-6179 were moved to their current  
9 location at Probate Code Sections 21110-21140, the implementing legislation did  
10 not make conforming revisions in other statutes. There remain a half-dozen cross  
11 references in the codes to the obsolete section numbers. Appropriate conforming  
12 revisions are added by this recommendation.<sup>64</sup>

### 13 **Law Revision Commission Comments**

14 The basic rules of construction for wills were enacted in 1983 on  
15 recommendation of the Law Revision Commission.<sup>65</sup> As with all Commission-  
16 sponsored legislation, there were Comments accompanying the statutes explaining  
17 their derivation, their relation to other statutes, aids to construction, and other  
18 useful information.<sup>66</sup>

19 These statutes were in place for 10 years before they were generalized and  
20 relocated.<sup>67</sup> Because this task was not performed by the Law Revision  
21 Commission, the Commission commentary to these sections was lost in the  
22 process.

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

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

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

65. See former Section 6140 *et seq.*

66. 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).

67. See Sections 21101-21140.

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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 at-death transfer), 21135 (ademption of at-death transfer by satisfaction). 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 intention of the transferor is not indicated by the instrument.  
(c) Nothing in this section limits the use of extrinsic evidence, to the extent otherwise authorized by law, to determine the intention of the transferor.

**Comment.** The amendment to subdivision (b) of Section 21102 is technical.

Section 21102 extends former Section 6140 (wills) to trusts and other instruments. See also Section 21101 (application of part). The section is drawn from Section 2-603 of the Uniform Probate Code (1987). As to the construction of provisions drawn from uniform acts, see Section 2.

Subdivision (c) is added to make clear the admissibility of extrinsic evidence under this section. Subdivision (c) neither expands nor limits the extent to which extrinsic evidence admissible under former law may be used to determine the transferor’s intent as expressed in the instrument. See generally 12 B. Witkin, *Summary of California Law Wills and Probate* §§ 245-47, at 280-84 (9th ed. 1990). Cf. Section 6111.5 (will); Estate of Anderson, 56 Cal. App. 4th 235, 65 Cal. Rptr. 2d 307 (1997) (extrinsic evidence admissible); Estate of Guidotti, 90 Cal. App. 4th 1403, 109 Cal. Rptr. 2d 674 (2001) (use of extrinsic evidence). See also Section 12206 (limitation in will of time for administration of estate is directory only). Likewise, under the parol evidence rule extrinsic evidence may be available to explain, interpret, or supplement an expressed intention of the transferor. Code Civ. Proc. § 1856.

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

3 SEC. \_\_\_\_\_. Section 21103 of the Probate Code is amended to read:

4 21103. The meaning and legal effect of a disposition in an instrument shall be is  
5 determined by the local law of a particular state selected by the transferor in the  
6 instrument unless the application of that law is contrary to the rights of the  
7 surviving spouse to community and quasi-community property, to any other public  
8 policy of this state applicable to the disposition, or, in the case of a will, to Part 3  
9 (commencing with Section 6500) of Division 6.

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

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

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

20 SEC. \_\_\_\_\_. Section 21104 of the Probate Code is amended to read:

21 21104. As used in this part, ~~“testamentary gift”~~ “at-death transfer” means a  
22 transfer in possession or enjoyment that takes effect at or after death.

23 **Comment.** Section 21104 is amended to substitute the term “at-death transfer” for  
24 “testamentary gift.” As used in this part, an at-death transfer does not include a lifetime gift. The  
25 reference to a transfer “in possession” includes a transfer to the trustee of a trust.

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

28 SEC. \_\_\_\_\_. Section 21105 of the Probate Code is amended to read:

29 21105. Except as otherwise provided in Sections 641 and 642, a will passes all  
30 property the testator owns at death, including property acquired after execution of  
31 the will.

32 **Comment.** The amendment to Section 21105 is technical. Section 21105 continues former  
33 Section 6142.

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

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

39 SEC. \_\_\_\_\_. Section 21106 of the Probate Code is repealed.

40 ~~21106. A transfer of property to more than one person vests the property in them~~  
41 ~~as owners in common.~~

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

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

3 SEC. \_\_\_\_\_. Section 21107 of the Probate Code is amended to read:

4 21107. If an instrument directs the conversion of real property into money at the  
5 transferor's death, the real property and its proceeds shall be deemed personal  
6 property from the time of the transferor's death.

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

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

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

16 SEC. \_\_\_\_\_. Section 21108 of the Probate Code is amended to read:

17 21108. The law of this state does not include (a) (1) the common-law rule of  
18 worthier title that a transferor cannot devise an interest to his or her own heirs or  
19 ~~(b) (2)~~ a presumption or rule of interpretation that a transferor does not intend, by a  
20 transfer to his or her own heirs or next of kin, to transfer an interest to them. The  
21 meaning of a transfer of a legal or equitable interest to a transferor's own heirs or  
22 next of kin, however designated, shall be determined by the general rules  
23 applicable to the interpretation of instruments. ~~This section applies to all cases in~~  
24 ~~which a final judgment had not been entered as of September 18, 1959.~~

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

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

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

31 SEC. \_\_\_\_\_. Section 21109 of the Probate Code is amended to read:

32 21109. (a) A transferee who fails to survive the transferor of an at-death transfer  
33 or until any future time required by the instrument does not take under the  
34 instrument.

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

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

41 **Comment.** Subdivision (a) of Section 21109 is amended to clarify and limit its application. See  
42 Section 21104 ("at-death transfer" defined).

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

1 Section 21109 extends former Section 6146 (wills) to at-death transfers. See Section 21104  
2 (“at-death transfer” defined). The question of whether or not survival is required in other cases is  
3 determined according to general rules of interpretation and construction. See, e.g., Section 21102  
4 (intention of transferor).

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

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

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

13 SEC. \_\_\_\_\_. Section 21110 of the Probate Code is amended to read:

14 21110. (a) Subject to subdivision (b), if a transferee is dead when the instrument  
15 is executed, or is treated as if the transferee predeceased the transferor, or fails to  
16 survive the transferor or until a future time required by the instrument, the issue of  
17 the deceased transferee take in the transferee’s place in the manner provided in  
18 Section 240. A transferee under a class gift shall be a transferee for the purpose of  
19 this subdivision unless the transferee’s death occurred before the execution of the  
20 instrument and that fact was known to the transferor when the instrument was  
21 executed.

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

29 (c) As used in this section, “transferee” means a person, other than a joint tenant,  
30 who is kindred of the transferor or kindred of a surviving, deceased, or former  
31 spouse of the transferor.

32 **Comment.** Section 21110 is amended to delete from subdivision (b) the specific instances of  
33 expressed contrary intention, to avoid the implication that those are the exclusive expressions that  
34 constitute a contrary intention. Thus, a requirement that the initial transferee survive for a  
35 specified period of time after the death of the transferor, or a requirement that the initial transferee  
36 survive until a future time that is related to the probate of the transferor’s will or administration of  
37 the estate of the transferor, may well constitute a contrary intention. (In this connection, it should  
38 be noted that technical words in an instrument are to be considered as having been used in their  
39 technical sense. See Section 21122.) And, while expressions of that type may well indicate an  
40 intention that the antilapse statute not apply, other expressions of contrary intention in an  
41 instrument may also be sufficient to override the antilapse statute.

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

1 In addition to the limitations prescribed in subdivision (b), Section 21110 is also subject to the  
2 general principle that rules of construction such as this section do not apply if it is determined that  
3 the transferor intended a contrary result even though not expressed in the instrument. See Section  
4 21102 (rules of construction inapplicable to extent contrary intention of transferor is expressed in  
5 instrument). Matters the court might take into account in determining whether or not the  
6 transferor intended that issue of a deceased beneficiary should take in the beneficiary's place may  
7 include (1) whether the result of a survival requirement would be to disinherit a branch of the  
8 transferor's lineal descendants, (2) whether the result of a survival requirement would be to pass  
9 property to persons expressly disinherited by the instrument or to the state by escheat, and (3)  
10 other persuasive evidence of the transferor's likely intent.

11 Joint tenancy title is in the nature of an express requirement of survival. Subdivision (c) is  
12 revised to recognize this circumstance.

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

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

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

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

38 SEC. \_\_\_\_\_. Section 21111 of the Probate Code is amended to read:

39 21111. Except as provided in Section 21110:

40 (a) If a transfer, other than a residuary gift ~~or a transfer of a future interest~~, fails  
41 for any reason, the property is transferred as follows:

42 (1) If the transferring instrument provides for an alternative disposition in the  
43 event the transfer fails, the property is transferred according to the terms of the  
44 instrument.

45 (2) If the transferring instrument does not provide for an alternative disposition  
46 but does provide for the transfer of a residue, the property becomes a part of the  
47 residue transferred under the instrument.

1 (3) If the transferring instrument does not provide for an alternative disposition  
2 and does not provide for the transfer of a residue, the property is transferred to the  
3 decedent's estate.

4 (b) If a residuary gift ~~or a future interest~~ is transferred to two or more persons  
5 and the share of a transferee fails for any reason, the share passes to the other  
6 transferees in proportion to their other interest in the residuary gift or the future  
7 interest.

8 (c) A transfer of "all my estate" or words of similar import is a residuary gift for  
9 purposes of this section unless the transferring instrument provides for an  
10 alternative disposition in the event the transfer fails.

11 **Comment.** Section 21111 is amended to treat future interests in the same manner as other gifts.  
12 Under subdivision (a)(1), an alternative disposition may take the form of a transfer of specifically  
13 identifiable property (specific gift) or a transfer from general assets of the transferor (general gift)  
14 that includes the specific property.

15 Section 21111 extends former Section 6148 (wills) to trusts and other instruments. See also  
16 Section 21101 (application of part). This section is drawn from Section 2-606 of the Uniform  
17 Probate Code (1987). As to the construction of provisions drawn from uniform acts, see Section  
18 2.

19 With respect to a residuary devise, subdivision (b) preserves the change made by former  
20 Section 6148 in the California case law rule that if the share of one of several residuary devisees  
21 fails, the share passed by intestacy. See e.g., Estate of Russell, 69 Cal. 2d 200, 215-16, 444 P.2d  
22 353, 70 Cal. Rptr. 561 (1968); *In re Estate of Kelleher*, 205 Cal. 757, 760-61, 272 P. 1060 (1928);  
23 Estate of Anderson, 166 Cal. App. 2d 39, 42, 332 P.2d 785 (1985).

24 For purposes of this section, a gift of "all my estate" is a residuary gift rather than a general  
25 gift. Subdivision (c).

26 **Prob. Code § 21112 (technical amendment). Conditions referring to "issue"**

27 SEC. \_\_\_\_\_. Section 21112 of the Probate Code is amended to read:

28 21112. A condition in a transfer of a present or future interest that refers to a  
29 person's death "with" or "without" issue, or to a person's "having" or "leaving"  
30 issue or no issue, or a condition based on words of similar import, is construed to  
31 refer to that person's being dead at the time the transfer takes effect in enjoyment  
32 and to ~~his or her~~ that person either having or not having, as the case may be, issue  
33 who are alive at the time of enjoyment.

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

36 The section overrules California's much criticized theory of indefinite failure of issue  
37 established by *In re Estate of Carothers*, 161 Cal. 588, 119 P. 926 (1911). See generally 12 B.  
38 Witkin, Summary of California Law *Wills and Probate* §§ 279-80, at 310-12 (9th ed. 1990).  
39 Section 6149 adopts the majority view of the Restatement of Property. See Witkin, *id.* § 280, at  
40 310-12; Annot., 26 A.L.R.3d 407 (1969); Restatement of Property § 269 (1940). Under Section  
41 21112, if the transfer is "to A for life, remainder to B and B's heirs, but if B dies without issue,  
42 then to C," the transfer is read as meaning "if B dies before A without issue living at the death of  
43 A." If B survives A, whether or not B then has living issue, B takes the transfer absolutely. If B  
44 predeceases A with issue then living but at the time of A's subsequent death B does not have  
45 living issue, the transfer goes to C.

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

2 SEC. \_\_\_\_\_. Section 21113 of the Probate Code is repealed.

3 ~~21113. (a) A transfer of a present interest to a class includes all persons~~  
4 ~~answering the class description at the transferor's death.~~

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

7 ~~(c) A person conceived before but born after the transferor's death or after the~~  
8 ~~time the transfer takes effect in enjoyment takes if the person answers the class~~  
9 ~~description.~~

10 **Comment.** Section 21113 is repealed as unnecessary. It inadequately codifies the common law  
11 "rule of convenience," failing to include its common law exceptions. See Restatement of Property  
12 2d §§ 26.1-26.2.

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

14 SEC. \_\_\_\_\_. Section 21114 of the Probate Code is amended to read:

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

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

34 (1) Application of the section to interests acquired by operation of law.

35 (2) Application of escheat principles.

36 (3) Application of the law of another state, based on the designated person's domicile.

37 (4) Elimination of the special rule for ancestral property.

38 See *Rules of Construction for Trusts and Other Instruments*, \_\_\_\_ Cal. L. Revision Comm'n  
39 Reports \_\_\_\_ (\_\_\_\_).

40 Section 21114 extends former Section 6151 (wills) to trusts and other instruments. See also  
41 Section 21101 (application of part). The former section was drawn from Section 2514 of the  
42 Pennsylvania Consolidated Statutes, Title 20, and established a special rule for a class gift to an  
43 indefinite class such as the transferor's or another designated person's "heirs," "next of kin,"  
44 "relative," "family," or the like. As Section 21114 applies to a transfer of a future interest, the

1 section is consistent with Section 21109 in that Section 21114 establishes a constructional  
2 preference against early vesting. However, Section 21114 differs from Section 21109 in that one  
3 who does not survive until the future interest takes effect in enjoyment is not deemed a member  
4 of the indefinite class described in Section 21114 (such as “heirs”), is therefore not a “transferee”  
5 under the class gift, and no substitute gift will be made by the antilapse statute (Section 21110). If  
6 the transfer of a future interest is to a more definite class such as “children,” one coming within  
7 that description who fails to survive until the transfer takes effect in enjoyment does not take  
8 under the instrument (Section 21109) but may nonetheless be a “deceased transferee” under the  
9 antilapse statute (Section 21110) permitting substitution of the deceased transferee’s issue. See  
10 the Comments to Sections 21109 and 21110. See also Section 21115(c)(3) (rules for determining  
11 persons who would be heirs of transferor or other person).

12 By postponing the determination of class membership until the gift takes effect in enjoyment  
13 where the class is indefinite (e.g., to “heirs,”), Section 21114 should reduce the uncertainty of  
14 result under prior law. See Halbach, *Future Interests: Express and Implied Conditions of*  
15 *Survival*, 49 Cal. L. Rev. 297, 317-20 (1961). Section 21114 is consistent with *Estate of Easter*,  
16 24 Cal. 2d 191, 148 P.2d 601 (1944).

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

19 SEC. \_\_\_\_\_. Section 21115 of the Probate Code is amended to read:

20 21115. (a) Except as provided in subdivision (b), halfbloods, adopted persons,  
21 persons born out of wedlock, stepchildren, foster children, and the issue of these  
22 persons when appropriate to the class, are included in terms of class gift or  
23 relationship in accordance with the rules for determining relationship and  
24 inheritance rights for purposes of intestate succession.

25 (b) In construing a transfer by a transferor who is not the natural parent, a person  
26 born to the natural parent shall not be considered the child of that parent unless the  
27 person lived while a minor as a regular member of the household of the natural  
28 parent or of that parent’s parent, brother, sister, spouse, or surviving spouse. In  
29 construing a transfer by a transferor who is not the adoptive parent, a person  
30 adopted by the adoptive parent shall not be considered the child of that parent  
31 unless the person lived while a minor (either before or after the adoption) as a  
32 regular member of the household of the adopting parent or of that parent’s parent,  
33 brother, sister, or surviving spouse.

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

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

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

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

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

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

45 Subdivision (a) is drawn from Section 2-611 of the Uniform Probate Code (1987). As to the  
46 construction of provisions drawn from uniform acts, see Section 2. To the extent that California

1 cases had addressed the matter, subdivision (a) is consistent with prior California law. See 12 B.  
2 Witkin, Summary of California Law *Wills and Probate* §§ 287-90, at 320-23 (9th ed. 1990). For  
3 the rules for determining relationship and inheritance rights for purposes of intestate succession,  
4 see Sections 6406, 6408. Under some circumstances stepchildren and foster children are included  
5 in terms of class gift or relationship pursuant to the rules for intestate succession. See Section  
6 6408 (when stepchild or foster child treated the same as adopted child).

7 Subdivision (b) precludes the adoption of a person (often an adult) solely for the purpose of  
8 permitting the adoptee to take under the testamentary instrument of another. Subdivision (b) also  
9 construes a transfer to exclude a child born out of wedlock (where the transferor is not the parent)  
10 if the child never lives while a minor as a regular member of the parent's household. A child is  
11 included in class gift terminology in the transferor's instrument if the child lived while a minor or  
12 as a regular member of the household of the parent's spouse or surviving spouse. As a result, a  
13 child born of a marital relationship will almost always be included in the class, consistent with the  
14 transferor's likely intent.

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

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

18 SEC. \_\_\_\_\_. Section 21116 of the Probate Code is repealed.

19 ~~21116. A testamentary disposition by an instrument, including a transfer to a~~  
20 ~~person on attaining majority, is presumed to vest at the transferor's death.~~

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

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

25 SEC. \_\_\_\_\_. Section 21117 of the Probate Code is amended to read:

26 21117. ~~Testamentary gifts~~ At-death transfers are classified as follows:

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

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

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

32 (d) A general pecuniary gift is a pecuniary gift within the meaning of Section  
33 21118.

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

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

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

40 For the priority that a demonstrative gift has over other general gifts and the priority that an  
41 annuity has over other general gifts, see Section 21403(b). See also *Recommendation Relating to*  
42 *Interest and Income During Administration*, 19 Cal. L. Revision Comm'n Reports 1019 (1988);  
43 *Comments to Conforming Revisions and Repeals*, 19 Cal. L. Revision Comm'n Reports 1031,  
44 1089-90 (1988); *Communication from the California Law Revision Commission Concerning*  
45 *Assembly Bill 2841*, 19 Cal. L. Revision Comm'n Reports 1201, 1228-29 (1988).

1 **Prob. Code § 21118 (amended). Satisfaction of pecuniary gift by property distribution**

2 SEC. \_\_\_\_\_. Section 21118 of the Probate Code is amended to read:

3 21118. (a) If an instrument authorizes a fiduciary to satisfy a pecuniary gift  
4 wholly or partly by distribution of property other than money, property selected  
5 for that purpose shall be valued at its fair market value on the date of distribution,  
6 unless the instrument expressly provides otherwise. If the instrument permits the  
7 fiduciary to value the property selected for distribution as of a date other than the  
8 date of distribution, then, unless the instrument expressly provides otherwise, the  
9 property selected by the fiduciary for that purpose shall ~~have an aggregate fair~~  
10 ~~market value on the date or dates of distribution that, when added to any cash~~  
11 ~~distributed, will amount to no less than the amount of the pecuniary gift as stated~~  
12 ~~in, or determined by, the instrument~~ fairly reflect net appreciation and depreciation  
13 (occurring between the valuation date and the date of distribution) in all of the  
14 assets from which the distribution could have been made.

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

18 **Comment.** Section 21118 is amended to incorporate the standard of Treasury Regulations  
19 Section 26.2642-2(b)(2) (valuation).

20 CHAPTER 2. ASCERTAINING THE MEANING OF LANGUAGE  
21 USED IN THE INSTRUMENT

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

24 SEC. \_\_\_\_\_. Section 21120 of the Probate Code is amended to read:

25 21120. The words of an instrument are to receive an interpretation that will give  
26 every expression some effect, rather than one that will render any of the  
27 expressions inoperative. Preference is to be given to an interpretation of an  
28 instrument that will prevent intestacy failure of a transfer, rather than one that will  
29 result in an intestacy failure of a transfer.

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

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

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

36 SEC. \_\_\_\_\_. Section 21121 of the Probate Code is amended to read:

37 21121. All the parts of an instrument are to be construed in relation to each other  
38 and so as, if possible, to form a consistent whole. If the meaning of any part of an  
39 instrument is ambiguous or doubtful, it may be explained by any reference to or  
40 recital of that part in another part of the instrument.



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

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

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

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

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

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

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

15     SEC. \_\_\_\_\_. Section 21132 is added to the Probate Code, to read:

16     21132. (a) If a transferor executes an instrument that makes an at-death transfer  
17 of securities and the transferor then owned securities that meet the description in  
18 the instrument, the transfer includes additional securities owned by the transferor  
19 at death to the extent the additional securities were acquired by the transferor after  
20 the instrument was executed as a result of the transferor's ownership of the  
21 described securities and are securities of any of the following types:

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

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

28     (3) Securities of the same organization acquired as a result of a plan of  
29 reinvestment.

30     (b) Distributions in cash before death with respect to a described security are not  
31 part of the transfer.

32     **Comment.** New Section 21132 supersedes former Section 21132 (change in form of  
33 securities). Section 21132 extends former Section 6171 (wills) to other at-death transfers. See also  
34 Section 21101 (application of part). The new section is based on Uniform Probate Code Section  
35 2-605 (1990); the former section was based on Uniform Probate Code Section 2-605 (1987). As  
36 to the construction of provisions drawn from uniform acts, see Section 2.

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

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

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

2 SEC. \_\_\_\_\_. Section 21133 of the Probate Code is amended to read:

3 21133. A recipient of an at-death transfer of a specific gift has the right to the  
4 remaining property specifically given a right to the property specifically given, to  
5 the extent the property is owned by the transferor at the time the gift takes effect in  
6 possession or enjoyment, and all of the following:

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

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

12 (c) Any proceeds unpaid at death the time the gift takes effect in possession or  
13 enjoyment on fire or casualty insurance on or other recovery for injury to the  
14 property.

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

18 (e) Real or tangible personal property owned by the transferor at the time the gift  
19 takes effect in possession or enjoyment that the transferor acquired as a  
20 replacement for specifically given real or tangible personal property.

21 **Comment.** Section 21133 extends former Section 6172 (wills) to trusts and other instruments.  
22 See also Section 21101 (application of part). The section is limited in its application to at-death  
23 transfers — transfers in possession or enjoyment that take effect at or after death. See Section  
24 21104 (“at-death transfer” defined). See also Section 21117(a) (“specific gift” defined).

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

29 This section is generally similar to prior California case law. See, e.g. Estate of Shubin, 252  
30 Cal. App. 2d 588, 60 Cal. Rptr. 678 (1967); cf. Estate of Newsome, 248 Cal. App. 2d 712, 56 Cal.  
31 Rptr. 874 (1967). See also Sections 32 (“devise” defined), 62 (“property” defined). The rules  
32 stated in Section 21133 apply in the absence of a contrary intention of the transferor. See Section  
33 21102.

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

36 **Prob. Code § 21134 (amended). Effect of conservatorship or power of attorney on specific**  
37 **gift**

38 SEC. \_\_\_\_\_. Section 21134 of the Probate Code is amended to read:

39 21134. (a) Except as otherwise provided in this section, if specifically given  
40 property is sold or mortgaged by a conservator or by an agent acting within the  
41 authority of a durable power of attorney for an incapacitated principal, the  
42 beneficiary transferee of the specific gift has the right to a general pecuniary gift  
43 equal to the net sale price of, or the amount of the unpaid loan on, the property.

44 (b) Except as otherwise provided in this section, if an eminent domain award for  
45 the taking of specifically given property is paid to a conservator or to an agent

1 acting within the authority of a durable power of attorney for an incapacitated  
2 principal, or if the proceeds on fire or casualty insurance on, or recovery for injury  
3 to, specifically gifted property are paid to a conservator or to an agent acting  
4 within the authority of a durable power of attorney for an incapacitated principal,  
5 the recipient of the specific gift has the right to a general pecuniary gift equal to  
6 the eminent domain award or the insurance proceeds or recovery.

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

11 (d) For the purpose of the references in this section to an agent acting with the  
12 authority of a durable power of attorney for an incapacitated principal, (1)  
13 “incapacitated principal” means a principal who is an incapacitated person, (2) no  
14 adjudication of incapacity before death is necessary, and (3) the acts of an agent  
15 within the authority of a durable power of attorney are presumed to be for an  
16 incapacitated principal.

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

19 **Comment.** Section 21134 extends former Section 6173 (wills) to trusts and other instruments.  
20 See also Section 21101 (application of part). See also Section 21117(a) (“specific gift” defined).

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

25 Subdivisions (a) and (b) are consistent with prior California case law. See Estate of Packham,  
26 232 Cal. App. 2d 847, 43 Cal. Rptr. 318 (1965). See also Section 62 (“property” defined). The  
27 rules stated in Section 21134 apply in the absence of a contrary intention of the transferor. See  
28 Section 21102. See also Section 21139.

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

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

37 SEC. \_\_\_\_\_. Section 21135 of the Probate Code is amended to read:

38 21135. (a) Property given by a transferor during his or her lifetime to a  
39 beneficiary person is treated as a satisfaction of a ~~testamentary gift~~ an at-death  
40 transfer to that person in whole or in part only if one of the following conditions is  
41 satisfied:

42 (1) The instrument provides for deduction of the lifetime gift from the  
43 testamentary gift at-death transfer.

44 (2) The transferor declares in a contemporaneous writing that the ~~transfer is to be~~  
45 ~~deducted from the testamentary gift or gift~~ is in satisfaction of the testamentary

1 gift at-death transfer or that its value is to be deducted from the value of the at-  
2 death transfer.

3 (3) The transferee acknowledges in writing that the gift is in satisfaction of the  
4 testamentary gift at-death transfer or that its value is to be deducted from the value  
5 of the at-death transfer.

6 (b) Subject to subdivision (c), for the purpose of partial satisfaction, property  
7 given during lifetime is valued as of the time the transferee came into possession  
8 or enjoyment of the property or as of the time of death of the transferor, whichever  
9 occurs first.

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

13 (d) If the transferee fails to survive the transferor, the gift is treated as a full or  
14 partial satisfaction of the gift, as appropriate, in applying Sections 21110 and  
15 21111 unless the transferor's contemporaneous writing provides otherwise.

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

18 Section 21135 is amended for conformity with Uniform Probate Code Section 2-609. (Section  
19 21135 is based on former Uniform Probate Code Section 2-612, which is superseded by Uniform  
20 Probate Code Section 2-609.) As to the construction of provisions drawn from uniform acts, see  
21 Section 2.

22 Section 21135 is also amended to correct terminology. See Section 21104 (“at-death transfer”  
23 defined). See also Section 11640 (hearing and order resolving questions arising under Section  
24 21135). For a comparable intestate succession rule concerning advancements, see Section 6409.

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

26 SEC. \_\_\_\_\_. Section 21136 of the Probate Code is repealed.

27 ~~21136. If the transferor after execution of the transfer instrument enters into an~~  
28 ~~agreement for the sale or transfer of specifically given property, the beneficiary of~~  
29 ~~the specific gift has the right to the property subject to the remedies of the~~  
30 ~~purchaser or transferee.~~

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

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

35 SEC. \_\_\_\_\_. Section 21137 of the Probate Code is repealed.

36 ~~21137. If the transferor after execution of the transfer instrument places a charge~~  
37 ~~or encumbrance on specifically given property for the purpose of securing the~~  
38 ~~payment of money or the performance of any covenant or agreement, the~~  
39 ~~beneficiary of the specific gift has the right to the property subject to the charge or~~  
40 ~~encumbrance.~~

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

1 **Prob. Code § 21138 (repealed). Act of transferor altering transferor's interest in specifically**  
2 **devised property**

3 SEC. \_\_\_\_\_. Section 21138 of the Probate Code is repealed.

4 ~~21138. If the transferor after execution of the transfer instrument alters, but does~~  
5 ~~not wholly divest, the transferor's interest in property that is specifically given by~~  
6 ~~a conveyance, settlement, or other act, the beneficiary of the specific gift has the~~  
7 ~~right to the remaining interest of the transferor in the property.~~

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

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

11 SEC. \_\_\_\_\_. Section 21139 of the Probate Code is amended to read:

12 21139. The rules stated in Sections 21133 to ~~21138~~ 21135, inclusive, are not  
13 exhaustive, and nothing in those sections is intended to increase the incidence of  
14 ademption under the law of this state.

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

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

22 CHAPTER 4. EFFECTIVE DATES

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

24 SEC. \_\_\_\_\_. Section 21140 of the Probate Code is amended to read:

25 21140. (a) ~~Except as otherwise provided and subject to subdivision (b), this~~ This  
26 part applies to all instruments, regardless of when they were executed.

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

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

33 CONFORMING REVISIONS

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

35 SEC. \_\_\_\_\_. Section 1071 of the Civil Code is repealed.

36 ~~1071. Where a future interest is limited by a grant to take effect on the death of~~  
37 ~~any person without heirs, or heirs of his body, or without issue, or in equivalent~~  
38 ~~words, such words must be taken to mean successors, or issue living at the death~~  
39 ~~of the person named as ancestor.~~

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

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

2 SEC. \_\_\_\_\_. Section 1073 of the Civil Code is repealed.

3 ~~1073. The law of this State does not include (1) the common law rule of worthier~~  
4 ~~title that a grantor cannot convey an interest to his own heirs or (2) a presumption~~  
5 ~~or rule of interpretation that a grantor does not intend, by a grant to his own heirs~~  
6 ~~or next of kin, to transfer an interest to them. The meaning of a grant of a legal or~~  
7 ~~equitable interest to a grantor's own heirs or next of kin, however designated, shall~~  
8 ~~be determined by the general rules applicable to the interpretation of grants. This~~  
9 ~~section shall be applied in all cases in which final judgment has not been entered~~  
10 ~~on its effective date.~~

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

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

13 SEC. \_\_\_\_\_. Section 221 of the Probate Code is amended to read:

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

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

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

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

27 SEC. \_\_\_\_\_. Section 230 of the Probate Code is amended to read:

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

30 (a) To determine for the purposes of Section 103, 220, 222, 223, 224, ~~6146~~,  
31 ~~6147~~, 6211, 6242, 6243, ~~6244~~, or 6403, 21109, 21110, or other provision of this  
32 code whether one person survived another.

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

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

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

1 (e) To determine for the purposes of a case governed by former Sections 296 to  
2 296.8, inclusive, repealed by Chapter 842 of the Statutes of 1983, whether persons  
3 have died other than simultaneously.

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

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

8 SEC. \_\_\_\_\_. Section 250 of the Probate Code is amended to read:

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

11 (1) Any property, interest, or benefit under a will of the decedent, or a trust  
12 created by or for the benefit of the decedent or in which the decedent has an  
13 interest, including any general or special power of appointment conferred by the  
14 will or trust on the killer and any nomination of the killer as executor, trustee,  
15 guardian, or conservator or custodian made by the will or trust.

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

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

19 (4) Any property of the decedent under Part 5 (commencing with Section 5700)  
20 of Division 5.

21 (5) Any property of the decedent under Part 3 (commencing with Section 6500)  
22 of Division 6.

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

24 (1) The property interest or benefit referred to in paragraph (1) of subdivision (a)  
25 passes as if the killer had predeceased the decedent and Section 21110 does not  
26 apply.

27 (2) Any property interest or benefit referred to in paragraph (1) of subdivision  
28 (a) which passes under a power of appointment and by reason of the death of the  
29 decedent passes as if the killer had predeceased the decedent, and Section 1389.4  
30 ~~of the Civil Code 673~~ does not apply.

31 (3) Any nomination in a will or trust of the killer as executor, trustee, guardian,  
32 conservator, or custodian which becomes effective as a result of the death of the  
33 decedent shall be interpreted as if the killer had predeceased the decedent.

34 **Comment.** Section 250 is amended to correct a cross-reference.

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

37 SEC. \_\_\_\_\_. Section 6103 of the Probate Code is amended to read:

38 6103. Except as otherwise specifically provided, Chapter 1 (commencing with  
39 Section 6100), Chapter 2 (commencing with Section 6110), Chapter 3  
40 (commencing with Section 6120), Chapter 4 (commencing with Section 6130),  
41 ~~Chapter 5 (commencing with Section 6140)~~, Chapter 6 (commencing with Section  
42 6200), and Chapter 7 (commencing with Section 6300) of this division, and Part 1

1 (commencing with Section 21101) of Division 11, do not apply where the testator  
2 died before January 1, 1985, and the law applicable prior to January 1, 1985,  
3 continues to apply where the testator died before January 1, 1985.

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

7 **Prob. Code § 6205 (amended). “Descendants”**

8 SEC. \_\_\_\_\_. Section 6205 of the Probate Code is amended to read:

9 6205. “Descendants” mean children, grandchildren, and their lineal descendants  
10 of all generations, with the relationship of parent and child at each generation  
11 being determined as provided in Section ~~6152~~ 21115. A reference to  
12 “descendants” in the plural includes a single descendant where the context so  
13 requires.

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

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

16 SEC. \_\_\_\_\_. Section 6409 of the Probate Code is amended to read:

17 6409. (a) If a person dies intestate as to all or part of his or her estate, property  
18 the decedent gave during lifetime to an heir is treated as an advancement against  
19 that heir’s share of the intestate estate only if one of the following conditions is  
20 satisfied:

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

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

28 (b) Subject to subdivision (c), the property advanced is to be valued as of the  
29 time the heir came into possession or enjoyment of the property or as of the time  
30 of death of the decedent, whichever occurs first.

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

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

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

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

2 SEC. \_\_\_\_\_. Section 11640 of the Probate Code is amended to read:

3 11640. (a) When all debts have been paid or adequately provided for, or if the  
4 estate is insolvent, and the estate is in a condition to be closed, the personal  
5 representative shall file a petition for, and the court shall make, an order for final  
6 distribution of the estate.

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

10 (c) If debts remain unpaid or not adequately provided for or if, for other reasons,  
11 the estate is not in a condition to be closed, the administration may continue for a  
12 reasonable time, subject to Chapter 1 (commencing with Section 12200) of Part 11  
13 (time for closing estate).

14 **Comment.** Section 11640 is amended to correct a cross-reference.

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