

Legis. Prog.

May 10, 2002

Memorandum 2002-20**2002 Legislative Program**

Attached to this memorandum is a chart showing the status of bills in the Commission's 2002 legislative program. Exhibit p. 13. This memorandum presents additional information concerning a few matters.

We will update this memorandum at the meeting with any further information we have at that time.

COMMISSION RECOMMENDATIONS**AB 568 (Dutra) — Double Liability Problem in Home Improvement Contracts**

Assembly Member Dutra is reviewing amendments based on the Commission's recommendation on this topic, *The Double Liability Problem in Home Improvement Contracts*, 31 Cal. L. Revision Comm'n Reports 281 (2001). As of this writing, the final form of the amendments have not been decided. Tentatively, however, we believe the section will read as follows, when it is first heard in the Senate Judiciary Committee later this month:

Civ. Code § 3125 (added). Limitation on owner's liability

SECTION 1. Section 3125 is added to the Civil Code, to read:

3125. (a) Notwithstanding any other provisions in this title, if a home improvement contract is executed in an amount not exceeding twenty-five thousand dollars (\$25,000), the owner may set off the amount of good-faith payments to the original contractor against the aggregate amount of enforceable mechanic's liens and stop notice claims, regardless of whether changes in the contract have increased the contract price to an amount exceeding twenty-five thousand dollars (\$25,000), subject to the following limitations:

(1) The setoff may not exceed twenty-five thousand dollars (\$25,000).

(2) The setoff does not apply as to amounts that are due and unpaid by the owner under the home improvement contract.

(b) The owner's receipt of a preliminary 20-day notice is not sufficient to prevent payment in good faith.

(c) As used in this section, “home improvement contract” has the meaning provided by Section 7151.2 of the Business and Professions Code.

AB 568 is intended to implement the fundamental policy recommended by the Commission — to protect a minimal level of good-faith payments made by homeowners under small home improvement contracts. The proposal was scaled to provide a workable, enactable remedy at the lower end of the market where abuse is most likely to occur. The language of Section 3125 just quoted varies quite a bit from the Commission’s proposed language, but the Commission has recognized that the bill author would likely have to make some adjustments as political circumstances dictate. The staff has been working with Mr. Dutra’s staff to address his concerns, as well as input Mr. Dutra is getting.

The Commission’s recommendation proposed to implement this policy as follows:

Civ. Code § 3113 (added). Limitation on owner’s liability

SECTION 1. Section 3113 is added to the Civil Code, to read:

3113. (a) Notwithstanding any other provisions in this title, in the case of a home improvement contract in an amount less than fifteen thousand dollars (\$15,000), including extras and change orders, the aggregate amount of mechanic’s liens and stop notices that may be enforced is limited to the amount remaining unpaid to the original contractor under the contract. Payments made to the original contractor in good faith discharge the owner’s liability to all claimants to the extent of the payments.

(b) As used in this section, “home improvement contract” has the meaning provided by Section 7151.2 of the Business and Professions Code.

Comment. Section 3113 protects owners who, in good faith, pay the prime contractor according to the terms of a home improvement contract. This section is intended to shield owners from liability to pay twice for the same work, materials, or equipment in cases where subcontractors and suppliers do not receive payments that have been made by the owner. As made clear by the introductory clause of subdivision (a), this section provides an exception to the “direct lien” rule in Sections 3123 and 3124. Existing rights and procedures under this title remain applicable as to the amount remaining unpaid by the owner.

31 Cal. L. Revision Comm’n Reports 295.

The version of Section 3125 quoted earlier, which is likely to be amended into AB 568, differs in several respects from the specifics of the Commission proposal:

(1) The section is renumbered to fit in Article 4 (commencing with Section 3123) (“Amount of Lien”), instead of Article 2 (commencing with Section 3110) (“Who Is Entitled to Lien”). The relocation is consistent with the switch in emphasis from limiting enforcement to providing a setoff.

(2) The protection applies to home improvement contracts up to \$25,000, instead of under \$15,000. The \$25,000 figure is within the range of numbers the Commission has considered acceptable.

(3) Under the Commission’s Section 3113, the protection for good-faith payments was lost if the home improvement contract went over the cap due to extras or change orders. Mr. Dutra believed this was too drastic. Thus, Section 3125(a)(1) limits the amount of the setoff protection to the same level as the threshold cap, in cases where changes in the contract push it above the cap. At the February meeting, the Commission rejected the approach of protecting *all* good-faith payments, regardless of amount, where the contract went over the cap due to extras and change orders. The concern was that contracts could be executed under the cap and later expanded without limit, with the consequence that there would be no limit on the amount of protected payments. This was deemed inconsistent with the intention to limit the remedy to the lower end of the home improvement market. Section 3125(a), however, addresses this concern by limiting the protection to the same amount as the cap, thereby eliminating the all-or-nothing effect of a change order that takes a protected home improvement contract over the cap.

(4) Section 3125(b) is intended to anticipate an obvious question that would arise the first time the rule is applied. Routine preliminary notices should not disrupt good faith; otherwise in almost all cases, the protection for good-faith payments would be eliminated.

Despite these differences, AB 568 is intended as an implementation of the Commission’s basic recommendation and the Commission should continue to sponsor the legislation. With this in mind, the Commission’s Comment to the legislation needs to be revised and expanded. The staff proposes the following:

Comment. Section 3125 provides protection for owners who, in good faith, pay the prime contractor according to the terms of a home improvement contract. Subject to certain limitations, this

section is intended to shield owners from liability to pay twice for the same labor, services, equipment, or materials, in cases where subcontractors and suppliers do not receive payments that have been made by the owner. As recognized by the introductory clause of subdivision (a), this section provides an exception to the “direct lien” rule in Sections 3123 and 3124.

The protection for good-faith payments by homeowners under this section is limited to home improvement contracts executed in an amount not exceeding \$25,000, as provided in subdivision (a). Once this requirement is met, the owner’s good-faith payments are protected by way of the setoff right up to \$25,000, even though the total contract amount may go over the \$25,000 qualifying level because of extras or change orders. See subdivision (a)(1).

Existing rights and procedures under this title remain applicable as to the amount remaining unpaid by the owner. Thus, the owner may not use a setoff against claims to the extent that the owner has not paid for labor, services, equipment, or materials performed under the home improvement contract. See subdivision (a)(2).

The operation of these limitations is illustrated in the following examples:

(1) *\$25,000 contract; no changes; owner pays full amount to prime contractor:* The owner would have a \$25,000 setoff and is fully protected from double payment liability, regardless of the extent to which claimants (subcontractors and suppliers) remain unpaid by the prime contractor.

(2) *\$25,000 contract; plus \$10,000 in changes; owner pays full amount to prime contractor:* The owner has a \$25,000 setoff, but can be liable for up to \$10,000 in double payments.

(a) If the prime contractor absconds with the full \$35,000, paying no one, claimants would share in \$10,000 pro rata.

(b) If the prime contractor pays out at least \$10,000, leaving \$25,000 or less unpaid, the owner would not be liable.

(3) *\$20,000 contract; no changes; owner pays \$12,000 to prime contractor; job completed:* The owner has up to a \$12,000 setoff, but will be liable for \$8,000 remaining unpaid under the contract. See subdivision (a)(2).

(a) If the prime contractor absconds with \$12,000, paying no one, claimants have claims for \$20,000 and would share in \$8,000 pro rata, after the owner's \$12,000 setoff. This is not a double payment, however, since the owner had not paid the \$8,000 for work done.

(b) If the prime contractor pays out \$5,000, leaving \$15,000 in unpaid claims, the owner is still liable for the unpaid \$8,000, but would not have to pay the \$7,000 in double payment liability. In

this case, the setoff only applies to \$7,000 of the total amount of claims.

(4) *\$20,000 contract; no changes; owner pays \$12,000 to prime contractor; job incomplete:* The amounts from example (3) would be reduced to the level of the reasonable value of the work, instead of the contract price. Thus, if that value is \$15,000:

(a) The owner would be liable for the unpaid \$3,000, in example (3)(a).

(b) The owner would be liable for \$3,000, but not \$7,000 double payment liability, in example (3)(b).

(5) *\$20,000 contract; no changes; owner pays \$6,000 to prime contractor; job completed:* The owner has up to a \$6,000 setoff, but will be liable for \$14,000 remaining unpaid under the contract.

(a) If the prime contractor absconds with \$6,000, paying no one, claimants have claims for \$20,000 and would share in \$14,000 pro rata, after the owner's \$6,000 setoff -- this is not a double payment since the owner hadn't paid the \$14,000.

(b) If the prime contractor pays out \$4,000, leaving \$16,000 in unpaid claims, the owner is still liable for unpaid \$14,000, but would not have to pay the \$2,000 in double payment liability -- in this case the setoff only applies to \$2,000 of the total amount of claims.

(6) *\$25,000 contract; plus \$10,000 in changes; owner pays \$19,000 to prime contractor; job completed:* The owner has up to a \$19,000 setoff, but is liable up to \$16,000 (the difference between total contract amount plus changes, and the amount paid to the prime contractor):

(a) If the prime contractor absconds with \$19,000, paying no one, claims could total \$35,000, but the owner could set off the \$19,000 already paid, leaving \$16,000 for claimants to share. This is not a double payment, since the owner had not paid the \$16,000.

(b) If the prime contractor pays out \$11,000, leaving \$24,000 in unpaid claims, the owner is still liable for the unpaid \$16,000, but would not have to pay the \$8,000 in double payment liability (the difference between \$16,000 remaining unpaid by the owner and the total unpaid claims).

(c) If the owner pays some claimants directly, they are taken out of the pool, thereby reducing the total remaining unpaid. Thus, if the owner pays a supplier \$6,000 directly, using the numbers in example (6)(b), unpaid claims total \$18,000, the owner is still liable for \$10,000, and the double payment protection is the same — \$8,000 (the difference between \$18,000 and \$10,000, which is fully covered by the \$19,000 setoff credit).

(7) \$25,000 contract; plus \$10,000 in changes; owner pays \$27,000 to prime contractor; job completed: The owner has up to a \$25,000 setoff, with a \$2,000 double liability exposure, and is also liable for up to \$8,000 in unpaid claims:

(a) If the prime contractor absconds with \$27,000, paying no one, claims could total \$35,000. The owner could set off \$25,000 of the \$27,000 paid to the prime contractor (because of the cap on total setoff allowance), leaving \$10,000 for claimants to share. \$2,000 would be double payment and \$8,000 fresh payment. In other words, when totally satisfied, the owner may have had to pay out \$37,000 on the \$35,000 home improvement contract, but has avoided \$23,000 in double payment liability.

(b) If the prime contractor pays out \$11,000, leaving \$24,000 in unpaid claims, the owner is still liable for the unpaid \$8,000, but would not have to pay the \$16,000 in double payment liability (the difference between \$8,000 remaining unpaid by the owner and the total unpaid claims).

(8) \$27,000 contract; owner pays prime \$27,000; job complete: This situation is not covered because the home improvement contract is over the \$25,000 entry level.

Subject to Commission approval and revision, this Comment will be included in background material presented to the legislative committees when the bill is heard later this month.

AB 1784 (Harman) — Rules of Construction for Trusts and Other Instruments

Before AB 1784 was heard in the Assembly Judiciary Committee, we received an expression of concern from the Judicial Council about a number of its provisions. After a conference call in which representatives of the Judicial Council, the State Bar Estate Planning, Trust and Probate Law Section, and the Commission's staff participated, we agreed to the amendments and Comment revisions set out in Exhibit pp. 1-8.

The staff believes these revisions improve the bill. Generally they clarify potentially ambiguous provisions. Three of the changes we would categorize as substantive rather than clarifying, but also an improvement over the bill as introduced. The substantive changes are:

(1) Restoration of existing Probate Code Section 21109(c). Close analysis demonstrates that the overlap with Probate Code Section 220 is not complete.

(2) Specification of the law of the transferor's domicile for construing a class gift under choice of law principles pursuant to Probate Code Section 21114. This

will simplify the problem of ascertaining the applicable rules and will most closely conform to the transferor's likely intent.

(3) Elimination of proposed Probate Code Section 21113(e), relating to a specific gift of real or tangible personal property no longer in the transferor's estate at the time of death. This will leave existing law as it is, and allow greater flexibility in ascertaining the transferor's likely intent.

The bill as amended is supported by both the State Bar Section and the California Judges Association. It was approved by the Assembly Judiciary Committee on the consent calendar. The staff recommends that the Commission ratify the revisions.

SB 1316 (Senate Judiciary Committee) — Trial Court Restructuring: Statutory Revision

The bill has been amended twice — once to incorporate the Commission's final recommendation on the matter and a second time to correct Legislative Counsel's errors in implementing the first set of amendments.

Stay of Mechanics Lien Enforcement Pending Arbitration

Although the Commission approved this recommendation after the bill introduction deadline, the staff is seeking a vehicle for it this session. If we are unable to locate an appropriate bill to receive it this session, we will include the proposal in our 2003 legislative program.

ALSO OF INTEREST

ACR 125 (Papan) — Protection of Personal Information

ACR 125 would direct the Commission to study, report on, and prepare recommended legislation concerning the protection of personal information relating to or arising out of financial transactions. Assembly Member Papan has indicated his intention to amend the measure to make the study contingent on availability of funding, and to authorize expenditure of private funds for the study. (If the resolution is approved by the Legislature, we must be circumspect about any acceptance of private funds for the study.)

The Assembly budget subcommittee asked us for an estimate of the cost of this project. The staff calculates a minimum of \$149,500 over a two year period. The subcommittee has approved an augmentation of the Commission's budget in the amount of \$75,000 for the first year of this study.

SCR 81 (Machado) — Uniform Money Services Act

SCR 81 would direct the Commission, through existing resources, to study and make recommendations to the Legislature concerning the advisability of California consolidating and revising its licensing laws governing money transmission, sales and issuance of payment instruments, sales and issuance of traveler's checks, check cashing, and currency exchange, into a single law similar to the Uniform Money Services Act. The study would be made with the assistance of the Department of Corporations and the Department of Financial Institutions, and with technical assistance from the regulated industry. The study would be due by December 31, 2004.

A copy of the measure is attached as Exhibit pp. 9-12. It is scheduled for hearing in the Senate Judiciary Committee on May 14. The staff will report on this matter at the Commission meeting.

Respectfully submitted,

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Assistant Executive Secretary

Nathaniel Sterling
Executive Secretary

Draft Revisions to AB 1784
(affected language highlighted by bold)

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

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

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

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

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

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

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

The 1994 enactment of Section 21109 extended former Section 6146 (wills) to at-death transfers. See Section 21104 (“at-death transfer” defined). The question of whether or not survival is required in other cases is determined according to general rules of interpretation and construction. See, e.g., Section 21102 (intention of transferor).

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) of Property (Donative Transfers) § 27.3* (1987).

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

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

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

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

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 or until a future time required by the instrument, the issue of the deceased transferee take in the transferee’s place in

the manner provided in Section 240. A transferee under a class gift shall be a transferee for the purpose of this subdivision unless the transferee's death occurred before the execution of the instrument and that fact was known to the transferor when the instrument was executed.

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

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

Comment. Subdivision (b) of Section 21110 is amended ~~to delete the reference to a specified period of time, in order~~ to avoid the implication that a specific period of time is the only expression of survival that constitutes a contrary intention. While an expression of that type may well indicate an intention that the antilapse statute not apply, other survival requirements in an instrument may also be sufficient to override the antilapse statute.

In applying the provision of subdivision (b) relating to a substitute gift, care must be taken not to ascribe to the 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 the transferor. For example, by providing a substitute taker, the transferor may very well intend to override the antilapse statute in the ordinary case. If, however, the substitute taker has also predeceased the transferor, 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. See Section 21102 (intention of transferor).~~

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. 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 Section 92 (repealed by 1983 Cal. Stat. ch. 842, § 18) and refers to persons related by blood. *In re Estate of Sowash*, 62 Cal. App. 512, 516, 217 P. 123 (1923). In addition, an adoptee is generally kindred of the adoptive family and not of the 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 having predeceased the transferor, see Sections 220 (simultaneous death), 282 (effect of disclaimer), 250 (effect of feloniously and intentionally killing decedent), 6122 & 5600 (effect of dissolution of marriage), See also Sections 230-234 (proceeding to determine survival), 240 (manner of taking by representation).

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

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

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

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

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

Comment. Section 21113 is repealed as unnecessary. It inadequately codified the common law "rule of convenience," failing to include its common law exceptions. See Restatement (Second) of Property §§ 26.1-26.2 (1987). **Repeal of this section does not reject existing law on this subject, but is intended to eliminate any implication that the section is a complete statement of the existing law.**

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

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

~~21114. A transfer of a present or future interest to the transferor's or another (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 to "the persons entitled thereto under the intestate succession laws," or to persons described by words of similar import, is a transfer to those who would be the transferor's or other designated person's heirs, their identities and respective shares shall be determined as if the transferor or other designated person were to die intestate at the time when the transfer is to take effect in enjoyment and according to the California statutes of intestate succession of property not acquired from a predeceased spouse in effect at that time 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 transferor'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.~~

Comment. Section 21114 is amended to conform to Uniform Probate Code Section 2-711 (1993). The amendment clarifies a number of 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, based on the **designated person's transferor's** domicile.
- (4) Elimination of the special rule for ancestral property.

The 1994 enactment of Section 21114 extended former Section 6151 (wills) to trusts and other instruments. See also Section 21101 (application of part). The former section was

drawn from Section 2514 of the Pennsylvania Consolidated Statutes, Title 20, and established a special rule for a class gift to an indefinite class such as the transferor's or another designated person's "heirs," "next of kin," "relative," "family," and the like. As Section 21114 applies to a transfer of a future interest, the section is consistent with Section 21109 in that Section 21114 establishes a constructional preference against early vesting. However, Section 21114 differs from Section 21109 in that one who does not survive until the future interest takes effect in enjoyment is not deemed a member of the indefinite class described in Section 21114 (such as "heirs"), is therefore not a "transferee" under the class gift, and no substitute gift will be made by the antilapse statute (Section 21110). If the transfer of a future interest is to a more definite class such as "children," one coming within that description who fails to survive until the transfer takes effect in enjoyment does not take under the instrument (Section 21109) but may nonetheless be a "deceased transferee" under the antilapse statute (Section 21110) permitting substitution of the deceased transferee's issue. See Sections 21109 & 21110 Comments. See also Section 21115(c)(3) (rules for determining persons who would be heirs of transferor or other person).

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

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

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

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

Comment. Section 21116 is not continued. It codified a presumption in favor of early vesting ~~that limited the ability of the court to consider all the circumstances in construing the intent of an instrument is overbroad and inconsistent with the rule of deferred vesting applicable in some circumstances. See, e.g., Section 21114 (class gift to heirs, next of kin, relatives, and the like). Repeal of this section does not reject existing law on this subject, but is intended to eliminate any implication that the section is a complete statement of the existing law.~~

Prob. Code § 21120 (amended). Every expression given some effect, failure of transfer avoided

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

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

Comment. Section 21120 is amended to more fully implement its application to trusts and other instruments. The 1994 enactment of Section 21120 extended former Section 6160 (wills) to trusts and other instruments. See also Section 21101 (application of part).

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

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

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

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

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

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

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

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

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

Comment. The 1994 enactment of Section 21133 extended former Section 6172 (wills) to trusts and other instruments. See also Section 21101 (application of part). The section is limited in its application to at-death transfers — transfers that are revocable during the transferor’s lifetime but become effective on the transferor’s death. See Section 21104 (“at-death transfer” defined). See also Section 21117(a) (“specific gift” defined).

Section 21133 is amended for conformity with Uniform Probate Code Section 2-606(a) (1990). (Section 21133 is based on former Uniform Probate Code Section 2-608(a) (1987), which is superseded by Uniform Probate Code Section 2-606(a) (1990).) As to the construction of provisions drawn from uniform acts, see Section 2.

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

The rules of nonademption in Sections 21133-21135 are not exclusive, and nothing in these provisions is intended to increase the incidence of ademption in California. See Section 21139.

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

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

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

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

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

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

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

Comment. The 1994 enactment of Section 21134 extended former Section 6173 (wills) to trusts and other instruments. See also Sections 21101 (application of part), 21117(a) (“specific gift” defined).

Section 21134 is amended for conformity with Uniform Probate Code Section 2-606(b) (1990). (Section 21134 is based on former Uniform Probate Code Section 2-608(b) (1987), which is superseded by Uniform Probate Code Section 2-606(b) (1990).) As to the construction of provisions drawn from uniform acts, see Section 2.

Subdivisions (a) and (b) are consistent with prior California case law. See *Estate of Packham*, 232 Cal. App. 2d 847, 43 Cal. Rptr. 318 (1965). See also Section 62 (“property” defined). The rules stated in Section 21134 apply in the absence of a contrary intention of the transferor. See Section 21102. See also Section 21139 (rules stated in Sections 21133 to 21135 not exhaustive).

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

It should be noted that the presumption provided in subdivision (d) applies only for the purpose of the references in this section to an agent acting with the authority of a durable power of attorney for an incapacitated principal.

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

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

21135. (a) Property given by a transferor during his or her lifetime to a *beneficiary person* is treated as a satisfaction of a ~~testamentary gift~~ *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 testamentary gift *at-death transfer*.

(2) The transferor declares in a contemporaneous writing that the ~~transfer is to be deducted from the testamentary gift or gift~~ is in satisfaction of the ~~testamentary gift 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 ~~testamentary gift 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 same property that is** the subject of a specific gift **of that property** to that person.*

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

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

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

Comment. The 1994 enactment of Section 21135 extended former Section 6174 (wills) to trusts and other instruments. See also Section 21101 (application of part).

Section 21135 is amended for conformity with Uniform Probate Code Section 2-609 (1990). (Section 21135 is based on former Uniform Probate Code Section 2-612 (1987), which is superseded by Uniform Probate Code Section 2-609 (1990).) As to the construction of provisions drawn from uniform acts, see Section 2.

Section 21135 is also amended to fill gaps and correct terminology. See Sections 21104 ("at-death transfer" defined), 21117 (classification of at-death transfer). See also Section 11640 (hearing and order resolving questions arising under Section 21135). For a comparable intestate succession rule concerning advancements, see Section 6409.

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

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

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

Comment. Section 21136 is not continued. The matter is governed by case law. See, e.g., 12 B. Witkin, *Summary of California Law Wills and Probate* § 314 *et seq.*, at 347-350 (9th ed. 1990). **Repeal of this section does not reject existing law on this subject, but is intended to eliminate any implication that the section is a complete statement of the existing law.**

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

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

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

Comment. Section 21137 is not continued. The matter is governed by case law. See, e.g., 12 B. Witkin, Summary of California Law *Wills and Probate* § 314 *et seq.*, at 347-350 (9th ed. 1990). **Repeal of this section does not reject existing law on this subject, but is intended to eliminate any implication that the section is a complete statement of the existing law.**

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

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

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

Comment. Section 21138 is not continued. The matter is governed by case law. See, e.g., 12 B. Witkin, Summary of California Law *Wills and Probate* § 314 *et seq.*, at 347-350 (9th ed. 1990). **Repeal of this section does not reject existing law on this subject, but is intended to eliminate any implication that the section is a complete statement of the existing law.**

Introduced by Senator Machado

April 22, 2002

Senate Concurrent Resolution No. 81—Relative to the Uniform Money Services Act.

LEGISLATIVE COUNSEL'S DIGEST

SCR 81, as introduced, Machado. Uniform Money Services Act.

This measure would direct the California Law Revision Commission, with the assistance of the Department of Corporations and the Department of Financial Institutions, to conduct a study and make a recommendation to the Legislature by December 31, 2004, regarding the advisability of California consolidating and revising licensing laws relating to money transmission, sales and issuance of payment instruments, sales and issuance of traveler's checks, check cashing, and currency exchange into a single law similar to the Uniform Money Services Act proposed by the National Conference of Commissioners on Uniform State Laws.

Fiscal committee: yes.

- 1 WHEREAS, Under current law, businesses providing various
2 nonbank money services are regulated under at least four different
3 licensing laws that do not encompass the entire range of nonbank
4 money services businesses available in the expanding
5 marketplace; and
6 WHEREAS, The four licensing laws for nonbank money
7 services, including the laws regulating transmitters of money
8 abroad (Chapter 14 (commencing with Section 1800) of Division
9 1 of the Financial Code), the Travelers Checks Act (Chapter 14A
10 (commencing with Section 1850) of Division 1 of the Financial

1 Code), the Check Sellers, Bill Payers and Proraters Law (Division
2 3 (commencing with Section 12000) of the Financial Code), and
3 the Payment Instruments Law (Division 16 (commencing with
4 Section 33000) of the Financial Code), are administered by two
5 separate regulatory agencies, the Department of Corporations and
6 the Department of Financial Institutions, in addition, check
7 cashers are licensed and regulated (Title 1.6F (commencing with
8 Section 1789.30 of Part 4 of Division 3 of the Civil Code) and
9 currency exchangers are also regulated (Chapter 21.5
10 (commencing with Section 22515) of Division 8 of the Business
11 and Professions Code); and

12 WHEREAS, The fundamental activities of these nonbank
13 money services businesses all involve fiduciary responsibility
14 over the receipt of money on behalf of individuals and businesses;
15 and

16 WHEREAS, The different licensing and regulatory laws do not
17 have consistent licensing and regulatory approaches, including
18 safety and soundness, reporting, examination, and enforcement
19 provisions; and

20 WHEREAS, These licensing and regulatory laws may be
21 viewed as antiquated in their jurisdictional boundaries, both in
22 terms of activities regulated and in terms of the licensing of
23 physical locations in the State of California, and the laws have gaps
24 in regulatory scope; and

25 WHEREAS, In recent years new nonbank businesses have
26 emerged using new technologies such as stored value and the
27 Internet to perform money services transactions that may not come
28 within the definitions under the current nonbank money services
29 laws, including allowing an individual to send money, paying bills
30 on behalf of an individual, or facilitating electronic purchases; and

31 WHEREAS, The lack of regulatory oversight over new high
32 technology funds transfer businesses may pose a risk of loss to
33 persons who entrust their money to businesses not falling within
34 the regulatory jurisdiction of the existing licensing laws; and

35 WHEREAS, Businesses subject to the jurisdiction of the current
36 licensing and regulatory laws are disadvantaged by new
37 businesses providing nonbank money services that may fall
38 outside the jurisdiction of the existing laws; and

39 WHEREAS, Many states have adopted licensing and regulatory
40 laws that consolidate money transmission (including Internet

1 funds transmission) and sales and issuance of payment instruments
2 (including stored value products) in one statute, thereby allowing
3 the regulatory agency to issue one license for diverse functions;
4 and

5 WHEREAS, The Money Transmitter Regulators Association
6 has approved and recommended a model legislative outline that
7 has formed the basis for legislation enacted in several states and
8 that provides a template for the essential elements to be included
9 in a unitary licensing law; and

10 WHEREAS, The National Conference of Commissioners on
11 Uniform State Laws has also approved and recommended for
12 enactment in all states the Uniform Money Services Act; and

13 WHEREAS, The Uniform Money Services Act sets forth a
14 comprehensive regulatory scheme for nonbank entities engaging
15 in the following types of financial activities: money transmission,
16 such as wire transfers, that include Internet payment mechanisms,
17 such as online bill payment services, Internet funds transfer
18 services, and similar types of services; the sale of payment
19 instruments, such as money orders, traveler’s checks, and stored
20 value; check cashing; and foreign currency exchange; and

21 WHEREAS, There has been an increased interest in the
22 adequacy of the consumer protections provided by the exemption
23 for certain consumer credit counselors under the Check Sellers,
24 Bill Payers and Proraters Law; and

25 WHEREAS, There has been a recent increased focus on the
26 adequacy of the consumer protections provided under the laws
27 regulating transmitters of money abroad; and

28 WHEREAS, Many entities are licensed under one or more of
29 the existing laws regulating nonbank money services, thereby
30 increasing the compliance costs for the regulated entities, as well
31 as the costs imposed on the state agencies entrusted with the
32 responsibility of administering these licensing laws; and

33 WHEREAS, Different regulatory standards apply to check
34 cashers and currency exchange businesses on the one hand and
35 money transmitters and traveler’s checks and payment instrument
36 issuers on the other; and

37 WHEREAS, The traditional marketplace for nonbank money
38 services, individuals who lack an affiliation with a banking
39 institution, has expanded with the growth of money services
40 businesses through the Internet and otherwise to add additional

1 customers, while the existing licensing and regulatory laws
2 applicable to money services businesses may have failed to evolve
3 to recognize the new marketplace; now, therefore, be it

4 *Resolved by the Senate of the State of California, the Assembly*
5 *thereof concurring,* That the California Law Revision
6 Commission, with the assistance of the Department of
7 Corporations and the Department of Financial Institutions, and
8 with technical assistance from the regulated industry, is hereby
9 directed through existing resources to study and make a
10 recommendation to the Legislature by December 31, 2004,
11 regarding the following:

12 (1) Whether it is necessary and appropriate to consolidate the
13 existing licensing laws regulating money transmission, sales and
14 issuance of payment instruments, sales and issuance of traveler's
15 checks, check cashing, and currency exchange businesses into a
16 single law based upon the Uniform Money Services Act, the model
17 legislation outline of the Money Transmitters Regulators
18 Association, and whether additional provisions are necessary
19 under any recodification to reflect the concerns articulated herein;

20 (2) Whether the licensing laws relating to the sale or issuance
21 of traveler's checks, payment instruments, and funds transmission
22 should be modified in any manner to deal with the emergence of
23 new high technology funds transfer vehicles, such as Internet
24 funds transmission and stored value products;

25 (3) Whether some or all of the existing licensing laws can be
26 combined so that cost savings can be achieved for both the
27 regulated entities and the appropriate regulator as a result of
28 consolidated licensing procedures used in other states;

29 (4) Set forth consumer protections for businesses offering
30 consumer credit counseling in addition to money services; and

31 (5) Set forth any additional provisions deemed necessary and
32 appropriate; and be it further

33 *Resolved,* That the Secretary of the Senate transmit copies of
34 this resolution to the California Law Revision Commission, the
35 Department of Corporations, and the Department of Financial
36 Institutions.

Status of 2002 Commission Legislative Program

As of May 10, 2002

	AB 568	AB 1770	AB 1784	AB 1857	ACA 15	ACR 123	SB 1316	SB 1322	SB 1323	SB 1371	SB 2061
Introduced	2/21/01	Jan 9	Jan 14	Jan 30	Jan 7	Jan 7	Jan 24	Jan 28	Jan 29	Feb 7	Feb 22
	Apr 8		Apr 30	Mar 19	Apr 2		May 1	Mar 13	Mar 7		Apr 29
		Apr 2	May 7	Apr 9	Apr 9	Apr 9	Apr 23	Mar 19	Mar 20	Mar 19	May 7
Last Amended				Apr 24	Apr 30*	May 8	May 13				
				May 2	May 9			Apr 4	Apr 4	Apr 4	
Policy Committee											
Fiscal Committee											
Passed House											
Policy Committee											
Fiscal Committee											
Passed House											
Concurrence & Enrollment											
Governor	Received										
	Approved										
Secretary of State	Date										
	Chapter #										

Bill List: AB 568 (Dutra): Double Liability Problem in Home Improvement Contracts
 AB 1770 (Papan): Evidence of Prejudgment Deposit Appraisal in Eminent Domain
 AB 1784 (Harman): Rules of Construction for Trusts and Other Instruments
 AB 1857 (Wayne): Administrative Rulemaking Refinements
 SB 1316 (Senate Judiciary Committee): Trial Court Restructuring (Statutory Revision)
 SB 1322 (Ackerman): Debtor-Creditor Technical Revisions
 SB 1323 (Ackerman): Municipal Bankruptcy
 SB 1371 (Morrow): Cases in Which Court Reporter Is Required
 SB 2061 (Morrow): Electronic Communications and Evidentiary Privileges

ACA 15 (Wayne): Trial Court Restructuring (Constitutional Amendment)
 ACR 123 (Wayne): Resolution of Authority

Also of Interest:
 ACR 125 (Papan): Protection of Personal Information
 SCR 81 (Machado): Uniform Money Services Act

KEY
 Italics: Future or speculative
 “—”: Not applicable
 *: Double referral, not fiscal
 [date] : Deadline