

Memorandum 2002-62

**Probate Code Technical Corrections
(Draft of Tentative Recommendation)**

At the November 2002 meeting, the Commission directed the staff to prepare corrective legislation to cure various technical problems in the Probate Code that have been brought to the Commission's attention.

Numbering Revisions

A staff draft tentative recommendation to correct numbering defects in the Probate Code is attached. Most of these were identified for us by John Hanft of the Witkin Legal Institute.

If approved by the Commission, **the staff would circulate the tentative recommendation with a short comment period.** These are technical revisions that should not require much study by interested persons.

Share of Omitted Spouse

The Commission asked the staff to consider possible clarification of Probate Code Section 21612 (that section is also the subject of a technical renumbering correction in the attached draft tentative recommendation). Section 21612 specifies how the shares of the other beneficiaries abate in order to satisfy the statutory share of an omitted spouse.

Probate Code Section 21612

If the maker of a will or trust marries after making the instrument and neglects thereafter to amend it to provide for the surviving spouse, the law gives the surviving spouse a share of the decedent's estate (unless it is proved that the decedent intended not to provide for the surviving spouse or provided for the surviving spouse by other means). Prob. Code §§ 21610-21611. The amount of the omitted spouse's share depends on the community or separate property character of the estate.

The omitted spouse's share is taken proportionately from the shares of the other beneficiaries, based on the value of the estate at the date of death:

21612. (a) Except as provided in subdivision (b), in satisfying a share provided by this chapter:

(1) The share will first be taken from the decedent's estate not disposed of by will or trust, if any.

(2) If that is not sufficient, so much as may be necessary to satisfy the share shall be taken from all beneficiaries of decedent's testamentary instruments in proportion to the value they may respectively receive. **This value shall be determined as of the date of the decedent's death.**

(b) If the obvious intention of the decedent in relation to some specific gift or devise or other provision of a testamentary instrument would be defeated by the application of subdivision (a), the specific devise or gift or provision may be exempted from the apportionment under subdivision (a), and a different apportionment, consistent with the intention of the decedent, may be adopted.

The date of death valuation clause was adopted by the Commission at its November 1983 meeting. There are no staff memoranda addressing it, and it was not circulated for comment before it was enacted in 1984. It has not been construed in a reported case.

A Hypothetical

We have received correspondence concerned that the "date of death valuation" clause appears to cause unintended results. If estate property declines substantially in value between the date of death and the date of distribution, it could result in the omitted spouse taking a larger portion of the estate, and the direct beneficiaries of the decedent taking a smaller portion of the estate, than they should be entitled to.

It is clear to the staff that this is not the intention of the statute, and indeed is a misconstruction of it. The statute does not say the omitted spouse is entitled to a share of the estate based on the value of the estate at the date of death. It says that the proportionate obligations of beneficiaries as between each other are determined by date of death values.

Take, for example, a decedent who wills high tech stock to one beneficiary and a piece of real estate to another. On the date of death, each asset is worth \$1,000,000. Therefore, the proportionate obligations of the beneficiaries are equal — each is proportionately responsible for one-half. The question is, one-half of what? One-half of the amount the beneficiary ultimately receives, or one-half the amount the omitted spouse ultimately receives?

This question is important. Suppose in our hypothetical that on the date of distribution one year later, the stock has declined in value and is worth half what it was, while the real estate has appreciated in value and is worth twice what it was. The total estate to be distributed is now \$2,500,000. Assuming the omitted spouse takes half of that (\$1,250,000), how do the shares of the two beneficiaries abate? If each is responsible for one-half the omitted spouse's share, each will have to remit \$625,000, which in the case of the stock beneficiary exceeds the value of the property that beneficiary would otherwise receive! Whereas if each beneficiary is responsible for one-half the amount of that beneficiary's distribution, the stock beneficiary will be required to give up \$250,000 and the real estate beneficiary \$1,000,000, thereby yielding the total of \$1,250,000 that goes to the omitted spouse.

The staff believes **the only equitable interpretation of the statute is that the date of death valuation determines the relative portion of each decedent's share that will be obligated.** This can readily be clarified in the statute and Comment:

Prob. Code § 21612 (amended). Share of omitted spouse

21612. (a) Except as provided in subdivision (b), in satisfying a share provided by this chapter:

(1) The share will first be taken from the decedent's estate not disposed of by will or trust, if any.

(2) If that is not sufficient, so much as may be necessary to satisfy the share shall be taken from all beneficiaries of decedent's testamentary instruments in proportion to the value they may respectively receive. ~~This value~~ The proportion of each beneficiary's share that may be taken pursuant to this subdivision shall be determined as of the date of the decedent's death.

(b) If the obvious intention of the decedent in relation to some specific gift or devise or other provision of a testamentary instrument would be defeated by the application of subdivision (a), the specific devise or gift or provision may be exempted from the apportionment under subdivision (a), and a different apportionment, consistent with the intention of the decedent, may be adopted.

Comment. Subdivision (a)(2) of Section 21612 is amended to make clear that it is the proportionate obligation of each beneficiary, rather than the total amount of the obligation, that is determined based on the date of death valuation. Thus for example if there are two beneficiaries entitled to receive property valued equally as of the date of death, the proportionate amount that will

be taken from each is one-half the value of property distributed to each, regardless of the relative value of the property on the date of the distribution.

Of course, this is small solace to the beneficiary of high tech stock who has watched helplessly as the expected inheritance dropped in value over the course of the year and then is obligated to give up half of what's left. The personal representative of the estate should have taken action to protect the value of the estate during that period, and there could be some liability there. Perhaps the personal representative will have a bond from which the disappointed beneficiary can be made whole.

A Further Complication

Take the example above, but assume that in addition to the stocks and real estate devised to the beneficiaries, the decedent also leaves intestate a bank account worth \$1,000,000. The bank account does not change significantly in value over the year, so at the time of distribution the estate is worth \$3,500,000. The surviving spouse's one-half share will be \$1,750,000.

Under subdivision (a)(1) of Section 21612, the first \$1,000,000 would come from the bank account, leaving \$750,000 to be apportioned between the beneficiaries. But under the apportionment scheme described above, each beneficiary is required to give up 50% of the distribution, which will yield an amount in excess of the amount to which the omitted spouse is entitled. The statute requires further adjustment.

If we are to follow through with the concept that each beneficiary is obligated for 50% of the amount of the distribution to that beneficiary, we will need to abate the actual contribution for which each is liable. Thus of the \$1,250,000 for which the two are potentially liable, only half of that amount is required, so the obligation of each should abate by half. Therefore the amount for which the stock beneficiary is ultimately liable is \$125,000 and the amount for which the real estate beneficiary is ultimately liable is \$500,000, yielding the \$750,000 needed to make up the difference owed to the omitted spouse.

It all works, but how do we explain this in statutory language? The staff cannot think of a straightforward way to do it. Instead, **we would just explain the operation of the statute in the Comment.** This would not be the first time we have used the Comment to give examples of how to apply general language in a statute, particularly in the probate area.

A paragraph could be added to the Comment along the following lines:

Comment. Subdivision (a)(2) of Section 21612 is amended to make clear that it is the proportionate obligation of each beneficiary, rather than the total amount of the obligation, that is determined based on the date of death valuation. Thus for example if there are two beneficiaries entitled to receive property valued equally as of the date of death, the proportionate amount that would be taken from each is one-half the value of property distributed to each, regardless of the relative value of the property on the date of the distribution.

In a case where the share of the omitted spouse is partially satisfied pursuant to subdivision (a)(1), the obligation of the beneficiaries for the remainder abates proportionately. Thus if half the share of the omitted spouse is satisfied pursuant to subdivision (a)(1), the amount for which each of the beneficiaries is otherwise responsible pursuant to subdivision (a)(2) is reduced by half.

Is There a Better Way?

The existing scheme is complex, confusing, and arguably inequitable to a beneficiary in a case where the value of the property the beneficiaries are entitled to changes disproportionately between the date of death and the date of distribution. Wouldn't it be better to determine the proportionate obligations of beneficiaries based on date of distribution values rather than date of death values?

It must be remembered that the date of death proportionate valuation scheme was concocted by the Commission in the early '80s with no clear justification. There may be a good reason for it. For example, it could be argued that use of date of death valuations will achieve the closest approximation of the relative positions the decedent would have wanted for the beneficiaries.

But is it really worth the confusion, complexity, and inequity that can result? The staff believes that **the Commission should seriously consider eliminating the date of death valuation scheme** and returning to former law on the matter. That would greatly simplify the law, and would ensure that no beneficiary would be required to give up a disproportionate share of that beneficiary's actual distribution.

Prob. Code § 21612 (amended). Share of omitted spouse

21612. (a) Except as provided in subdivision (b), in satisfying a share provided by this chapter:

(1) The share will first be taken from the decedent's estate not disposed of by will or trust, if any.

(2) If that is not sufficient, so much as may be necessary to satisfy the share shall be taken from all beneficiaries of decedent's testamentary instruments in proportion to the value they may respectively receive. ~~This value shall be determined as of the date of the decedent's death.~~

(b) If the obvious intention of the decedent in relation to some specific gift or devise or other provision of a testamentary instrument would be defeated by the application of subdivision (a), the specific devise or gift or provision may be exempted from the apportionment under subdivision (a), and a different apportionment, consistent with the intention of the decedent, may be adopted.

Comment. Subdivision (a)(2) of Section 21612 is amended to eliminate the requirement that the proportionate obligations of the beneficiaries for the share of the omitted spouse be based on date of death valuations. Instead, the proportion is based on the value of property received by the beneficiaries at distribution.

We could include this proposal in the tentative recommendation being distributed, and get feedback from probate experts on it. We could circulate alternative drafts — (1) clarification of the date of death valuation scheme and (2) elimination of the date of death valuation scheme.

Probate Code Section 21623

Probate Code Section 21623 parallels Section 21612. It provides for the share of an omitted child:

21623. (a) Except as provided in subdivision (b), in satisfying a share provided by this chapter:

(1) The share will first be taken from the decedent's estate not disposed of by will or trust, if any.

(2) If that is not sufficient, so much as may be necessary to satisfy the share shall be taken from all beneficiaries of decedent's testamentary instruments in proportion to the value they may respectively receive. This value shall be determined as of the date of the decedent's death.

(b) If the obvious intention of the decedent in relation to some specific gift or devise or other provision of a testamentary instrument would be defeated by the application of subdivision (a), the specific devise or gift or provision of a testamentary instrument may be exempted from the apportionment under subdivision (a),

and a different apportionment, consistent with the intention of the decedent, may be adopted.

Whatever changes we propose for Section 21612, the staff sees no reason not also to propose for Section 21623.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

CALIFORNIA LAW REVISION COMMISSION

Staff Draft

TENTATIVE RECOMMENDATION

Probate Code Technical Corrections

November 2002

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN [Date To Be Determined].

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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SUMMARY OF TENTATIVE RECOMMENDATION

This recommendation proposes technical corrections to the Probate Code to address defects in numbering that have been brought to the attention of the Law Revision Commission. The recommendation was prepared pursuant to Resolution Chapter 166 of the Statutes of 2002.

1 **PROBATE CODE TECHNICAL CORRECTIONS**

2 This recommendation proposes technical corrections to the Probate Code to
3 address defects in numbering that have been brought to the attention of the Law
4 Revision Commission.

PROPOSED LEGISLATION

5 **Prob. Code § 1004 (amended). Lis pendens**

6 SECTION 1. Section 1004 of the Probate Code is amended to read:

7 1004. If a proceeding under this code affects the title to or the right of possession
8 of real property, notice of the pendency of the proceeding may be filed pursuant to
9 ~~Section 409~~ Title 4.5 (commencing with Section 405) of Part 2 of the Code of
10 Civil Procedure.

11 **Comment.** Section 1004 is amended to reflect relocation of the lis pendens statutes from
12 former Code of Civil Procedure Section 409 to Code of Civil Procedure Section 405 *et seq.* See
13 1992 Cal. Stat. ch. 883, §§ 1, 2.

14 **Prob. Code § 6327 (amended). Appealable orders**

15 SEC. 2. Section 6327 of the Probate Code is amended to read:

16 6327. An appeal may be taken from any of the following:

17 (a) Any order described in ~~Section 7240~~ Part 3 (commencing with Section 1300)
18 of Division 3 made pursuant to this chapter.

19 (b) An order making or refusing to make a determination specified in paragraph
20 (1), (2), or (8) of subdivision (a) of Section 6325.

21 (c) As provided in Section ~~17207~~ 1304 for an order made pursuant to Section
22 6326.

23 **Comment.** Subdivision (a) of Section 6327 is amended to reflect relocation of the estate
24 administration appeals statutes from former Section 7240 to Section 1300 *et seq.* See 1997 Cal.
25 Stat. ch. 724, §§ 11, 18.

26 Subdivision (b) is amended to reflect relocation of the trust appeals statute from former Section
27 17207 to Section 1304. See 1997 Cal. Stat. ch. 724, §§ 11, 29.

28 **Prob. Code § 8852 (amended). Inventory oath**

29 SEC. 3. Section 8852 of the Probate Code is amended to read:

30 8852. (a) The personal representative shall take and subscribe an oath that the
31 inventory contains a true statement of the property to be administered in the
32 decedent's estate of which the personal representative has knowledge, and
33 particularly of money of the decedent and debts or demands of the decedent
34 against the personal representative. The oath shall be endorsed upon or attached to
35 the inventory.

36 (b) If there is more than one personal representative, each shall take and
37 subscribe the oath. If the personal representatives are unable to agree as to

1 property to be included in the inventory, any personal representative may petition
2 for a court order determining whether the property is to be administered in the
3 decedent's estate.

4 The determination shall be made pursuant to the procedure provided in ~~Chapter~~
5 ~~11 (commencing with Section 9860) of Part 5~~ Part 19 (commencing with Section
6 850) of Division 2 or, if there is an issue of property belonging or passing to the
7 surviving spouse, pursuant to Chapter 5 (commencing with Section 13650) of Part
8 2 of Division 8.

9 **Comment.** Section 8852 is amended to reflect relocation of the statutes relating to conveyance
10 or transfer of property claimed to belong to the decedent or another person from Section 9860 *et*
11 *seq.* to Section 850 *et seq.* See 2001 Cal. Stat. ch. 49, §§ 1, 4.

12 **Prob. Code § 9761 (amended). Partnership account**

13 SEC. 4. Section 9761 of the Probate Code is amended to read:

14 9761. If a partnership existed between the decedent and another person at the
15 time of the decedent's death, on application of the personal representative, the
16 court may order any surviving partner to render an account pursuant to Section
17 15043, 15510, ~~or~~ 15634, or 16807 of the Corporations Code. An order under this
18 section may be enforced by the court's power to punish for contempt.

19 **Comment.** Section 9761 is amended to reflect the repeal of former Corporations Code Section
20 15043 and its replacement by provisions of the Uniform Partnership Act of 1994 relating to
21 winding up partnership business. See 1996 Cal. Stat. ch. 1003, §§ 1.2, 2.

22 **Prob. Code § 9884 (amended). Purchase of estate property**

23 SEC. 5. Section 9884 of the Probate Code is amended to read:

24 9884. This chapter does not prohibit the purchase of property of the estate by the
25 personal representative or the personal representative's attorney pursuant to a
26 contract in writing made during the lifetime of the decedent if the contract is one
27 that can be specifically enforced and the requirements of ~~Chapter 11 (commencing~~
28 ~~with Section 9860)~~ Part 19 (commencing with Section 850) of Division 2 are
29 satisfied.

30 **Comment.** Section 9884 is amended to reflect relocation of the statutes relating to conveyance
31 or transfer of property claimed to belong to the decedent or another person from Section 9860 *et*
32 *seq.* to Section 850 *et seq.* See 2001 Cal. Stat. ch. 49, §§ 1, 4.

33 **Prob. Code § 10151 (amended). Public auction sale contract**

34 SEC. 6. Section 10151 of the Probate Code is amended to read:

35 10151. (a) The personal representative may enter into a written contract with any
36 of the following:

37 (1) ~~Where the public auction sale will be held in this state, an auctioneer who~~
38 ~~holds a valid license under Chapter 3.7 (commencing with Section 5700) of~~
39 ~~Division 3 of the Business and Professions Code to conduct a public auction sale~~
40 ~~and to secure purchasers by that method for any personal property of the estate to~~
41 ~~the extent authorized under Chapter 3.7 (commencing with Section 5700) of~~

1 Division 3 of the Business and Professions Code is qualified to conduct business
2 under Title 2.95 (commencing with Section 1812.600) of Part 4 of Division 3 of
3 the Civil Code.

4 (2) Where the public auction sale will be held outside this state pursuant to an
5 order made under Section 10254, an auctioneer who is legally permitted in the
6 jurisdiction where the sale will be held to conduct a public auction sale and to
7 secure purchasers by that method for the personal property authorized to be sold
8 by public auction sale in that jurisdiction under the court order.

9 (b) The contract shall be one that is legally enforceable under the law of the
10 jurisdiction where made.

11 (c) The contract may provide for payment to the auctioneer of a fee,
12 commission, or other compensation out of the proceeds of sale and for
13 reimbursement of expenses, but the contract is binding and valid as against the
14 estate only for such amounts as the court allows pursuant to Section 10167. No
15 liability of any kind is incurred by the estate under the contract or a sale unless the
16 sale is approved by the court, except for the obligations of the estate to the
17 purchaser of personal property as to which title passes pursuant to Section 10259
18 without court confirmation or approval. The personal representative is not
19 personally liable on the contract by reason of execution of the contract.

20 (d) The contract may provide that personal property of two or more estates being
21 administered by the same personal representative may be sold at the same public
22 auction sale. Items of personal property may be sold separately or in a lot with
23 other items from the same estate. A sale pursuant to the contract shall be with
24 reserve. The auctioneer shall comply with the instructions of the personal
25 representative with respect to withdrawal of items, risk of loss, place of delivery,
26 warranties, and other matters.

27 **Comment.** Section 10151 is amended to reflect repeal of the Auctioneer and Auction Licensing
28 Act (Bus. & Prof. Code § 5700 *et seq.*) and its replacement by the Auctioneer and Auction
29 Companies law (Civ. Code § 1812.600 *et seq.*). See 1993 Cal. Stat. ch. 1170, §§ 1, 2.

30 **Prob. Code § 10534 (amended). Continuation of partnerships and businesses**

31 SEC. 7. Section 10534 of the Probate Code is amended to read:

32 10534. (a) Subject to the partnership agreement and the provisions of the
33 Uniform Partnership Act (~~Chapter 1 (commencing with Section 15001) of 1994~~
34 Chapter 5 (commencing with Section 16100) of Title 2 of the Corporations
35 Code), the personal representative has the power to continue as a general partner in
36 any partnership in which the decedent was a general partner at the time of death.

37 (b) The personal representative has the power to continue operation of any of the
38 following:

39 (1) An unincorporated business or venture in which the decedent was engaged at
40 the time of the decedent's death.

41 (2) An unincorporated business or venture which was wholly or partly owned by
42 the decedent at the time of the decedent's death.

1 (c) Except as provided in subdivision (d), the personal representative may
2 exercise the powers described in subdivisions (a) and (b) without giving notice of
3 proposed action under Chapter 4 (commencing with Section 10580).

4 (d) The personal representative shall comply with the requirements of Chapter 4
5 (commencing with Section 10580) if the personal representative continues as a
6 general partner under subdivision (a), or continues the operation of any
7 unincorporated business or venture under subdivision (b), for a period of more
8 than six months from the date letters are first issued to a personal representative.

9 **Comment.** Section 10534 is amended to reflect repeal of the Uniform Partnership Act and its
10 replacement by the Uniform Partnership Act of 1994. See 1996 Cal. Stat. ch. 1003, §§ 1.2, 2.

11 **Prob. Code § 11952 (amended). Hearing on petition**

12 SEC. 8. Section 11952 of the Probate Code is amended to read:

13 11952. (a) Notice of the hearing on the petition shall be given as provided in
14 Section 1220 to the personal representative and to the persons entitled to
15 distribution of the undivided interests.

16 (b) At the hearing the persons entitled to distribution of the undivided interests
17 shall be considered the parties to the proceeding whether or not they have
18 appeared or filed a responsive pleading. No one shall be considered as a plaintiff
19 or as a defendant.

20 (c) Any objection to the jurisdiction of the court shall be made and resolved in
21 the manner prescribed in ~~Chapter 11 (commencing with Section 9860) of Part 5~~
22 Part 19 (commencing with Section 850) of Division 2.

23 **Comment.** Section 11952 is amended to reflect relocation of the statutes relating to
24 conveyance or transfer of property claimed to belong to the decedent or another person from
25 Section 9860 *et seq.* to Section 850 *et seq.* See 2001 Cal. Stat. ch. 49, §§ 1, 4.

26 **Prob. Code § 13601 (amended). Collection of salary or other compensation**

27 SEC. 9. Section 13601 of the Probate Code is amended to read:

28 13601. (a) To collect salary or other compensation under this chapter, an
29 affidavit or a declaration under penalty of perjury under the laws of this state shall
30 be furnished to the employer of the deceased spouse stating all of the following:

31 (1) The name of the decedent.

32 (2) The date and place of the decedent's death.

33 (3) Either of the following, as appropriate:

34 (A) "The affiant or declarant is the surviving spouse of the decedent."

35 (B) "The affiant or declarant is the guardian or conservator of the estate of the
36 surviving spouse of the decedent."

37 (4) "The surviving spouse of the decedent is entitled to the earnings of the
38 decedent under the decedent's will or by intestate succession and no one else has a
39 superior right to the earnings."

40 (5) "No proceeding is now being or has been conducted in California for
41 administration of the decedent's estate."

1 (6) “Sections 13600 to 13605, inclusive, of the California Probate Code require
2 that the earnings of the decedent, including compensation for unused vacation, not
3 in excess of five thousand dollars (\$5,000) net, be paid promptly to the affiant or
4 declarant.”

5 (7) “Neither the surviving spouse, nor anyone acting on behalf of the surviving
6 spouse, has a pending request to collect compensation owed by another employer
7 for personal services of the decedent under Sections 13600 to 13605, inclusive, of
8 the California Probate Code.”

9 (8) “Neither the surviving spouse, nor anyone acting on behalf of the surviving
10 spouse, has collected any compensation owed by an employer for personal
11 services of the decedent under Sections 13600 to 13605, inclusive, of the
12 California Probate Code except the sum of ____ dollars (\$____) which was
13 collected from ____.”

14 (9) “The affiant or declarant requests that he or she be paid the salary or other
15 compensation owed by you for personal services of the decedent, including
16 compensation for unused vacation, not to exceed five thousand dollars (\$5,000)
17 net, less the amount of ____ dollars (\$____) which was previously collected.”

18 (10) “The affiant or declarant affirms or declares under penalty of perjury under
19 the laws of the State of California that the foregoing is true and correct.”

20 (e) (b) Reasonable proof of the identity of the surviving spouse shall be provided
21 to the employer. If a guardian or conservator is acting for the surviving spouse,
22 reasonable proof of the identity of the guardian or conservator shall also be
23 provided to the employer. Proof of identity that is sufficient under Section 13104
24 is sufficient proof of identity for the purposes of this subdivision.

25 (d) (c) If a person presenting the affidavit or declaration is a person claiming to
26 be the guardian or conservator of the estate of the surviving spouse, the employer
27 shall be provided with reasonable proof, satisfactory to the employer, of the
28 appointment of the person to act as guardian or conservator of the estate of the
29 surviving spouse.

30 **Comment.** Section 13601 is amended to correct subdivision numbering. It was incorrectly
31 numbered on enactment. See 1990 Cal. Stat. ch. 79, § 14.

32 **Prob. Code § 21401 (amended). Abatement**

33 SEC. 10. Section 21401 of the Probate Code is amended to read:

34 21401. Except as provided in Sections ~~6562~~ 21612 (omitted spouse) and ~~6573~~
35 21623 (omitted children) and in Division 10 (commencing with Section 20100)
36 (proration of taxes), shares of beneficiaries abate as provided in this part for all
37 purposes, including payment of the debts, expenses, and charges specified in
38 Section 11420, satisfaction of gifts, and payment of expenses on specifically
39 devised property pursuant to Section 12002, and without any priority as between
40 real and personal property.

1 **Comment.** Section 21401 is amended to reflect relocation of former Section 6562 to Section
2 21612 (via 26112) (share of omitted spouse) and of former Section 6573 to Section 21623 (share
3 of omitted child). See 1997 Cal. Stat. ch. 724, §§ 17, 34.

4 **Prob. Code § 26112 (renumbered). Share of omitted spouse**

5 SEC. 11. Section 26112 of the Probate Code is renumbered, to read:

6 ~~26112~~ 21612. (a) Except as provided in subdivision (b), in satisfying a share
7 provided by this chapter:

8 (1) The share will first be taken from the decedent's estate not disposed of by
9 will or trust, if any.

10 (2) If that is not sufficient, so much as may be necessary to satisfy the share shall
11 be taken from all beneficiaries of decedent's testamentary instruments in
12 proportion to the value they may respectively receive. This value shall be
13 determined as of the date of the decedent's death.

14 (b) If the obvious intention of the decedent in relation to some specific gift or
15 devise or other provision of a testamentary instrument would be defeated by the
16 application of subdivision (a), the specific devise or gift or provision may be
17 exempted from the apportionment under subdivision (a), and a different
18 apportionment, consistent with the intention of the decedent, may be adopted.

19 **Comment.** Former Section 26112 is renumbered as 21612. It was incorrectly numbered on
20 enactment. See 1997 Cal. Stat. ch. 724, § 34.