

# CALIFORNIA LAW REVISION COMMISSION

## TENTATIVE RECOMMENDATION

### Probate Code Technical Corrections

December 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 February 15, 2003.**

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 also solicits comment concerning clarification of the “date of death valuation” provision of Probate Code Sections 21612 (share of omitted spouse) and 21623 (share of omitted child).

The recommendation was prepared pursuant to Resolution Chapter 166 of the Statutes of 2002.

## PROBATE CODE TECHNICAL CORRECTIONS

### 1 **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.

### 5 **Clarification or Repeal of “Date of Death Valuation”**

6 The Commission also solicits comment on possible clarification of the “date of  
7 death valuation” provision of Probate Code Section 21612 (share of omitted  
8 spouse), and by analogy, of Probate Code Section 21623 (share of omitted child).

9 If the maker of a will or trust marries after making the instrument and neglects  
10 thereafter to amend it to provide for the surviving spouse, the law gives the  
11 surviving spouse a share of the decedent’s estate (unless it is proved that the  
12 decedent intended not to provide for the surviving spouse or provided for the  
13 surviving spouse by other means).<sup>1</sup> The amount of the omitted spouse’s share  
14 depends on the community or separate property character of the estate.

15 The omitted spouse’s share is taken proportionately from the shares of the other  
16 beneficiaries, based on the value of the estate at the date of death.<sup>2</sup> The “date of  
17 death valuation” clause could be construed in such a way as to cause unintended  
18 results. If estate property declines substantially in value between the date of death  
19 and the date of distribution, that could result in the omitted spouse taking a larger  
20 portion of the estate, and the direct beneficiaries of the decedent taking a smaller  
21 portion of the estate, than they would otherwise be entitled to.

22 That is not the intention of the date of death valuation provision. The only  
23 equitable interpretation of the statute is that the date of death valuation determines  
24 the relative portion of each decedent’s share that will be obligated, not the total  
25 value of the property to be distributed. The statute (and Comment) could be  
26 revised to state this more clearly:

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

28 21612. (a) Except as provided in subdivision (b), in satisfying a share provided  
29 by this chapter:

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

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

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1. Prob. Code §§ 21610-21611.

2. Prob. Code § 21612(a)(2).

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

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

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

18 Notwithstanding the proposed clarification, the scheme remains complex,  
19 confusing, and arguably inequitable to a beneficiary in a case where the value of  
20 the property the beneficiaries are entitled to changes disproportionately between  
21 the date of death and the date of distribution. Would it be better to determine the  
22 proportionate obligations of beneficiaries based on valuations at the date of  
23 distribution rather than the date of death?

24 It may be argued that use of date of death valuations will achieve the closest  
25 approximation of the relative positions the decedent would have wanted for the  
26 beneficiaries. But is it worth the complexity, confusion, and potential inequity that  
27 can result?

28 The Commission solicits comment on whether the date of death valuation  
29 provision should be clarified, or whether it should be repealed, returning to a date  
30 of distribution valuation scheme. By analogy, the same considerations would  
31 apply to the date of death valuation provision found in Probate Code Section  
32 21623 (share of omitted child).

## PROPOSED LEGISLATION

### 33 **Prob. Code § 1004 (amended). Lis pendens**

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

35 1004. If a proceeding under this code affects the title to or the right of possession  
36 of real property, notice of the pendency of the proceeding may be filed pursuant to  
37 Section 409 Title 4.5 (commencing with Section 405) of Part 2 of the Code of  
38 Civil Procedure.

39 **Comment.** Section 1004 is amended to reflect relocation of the lis pendens statutes from  
40 former Code of Civil Procedure Section 409 to Code of Civil Procedure Section 405 *et seq.* See  
41 1992 Cal. Stat. ch. 883, §§ 1, 2.

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

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

3 6327. An appeal may be taken from any of the following:

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

6 (b) An order making or refusing to make a determination specified in paragraph  
7 (1), (2), or (8) of subdivision (a) of Section 6325.

8 (c) As provided in ~~Section 17207~~ 1304 for an order made pursuant to Section  
9 6326.

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

13 Subdivision (c) is amended to reflect relocation of the trust appeals statute from former Section  
14 17207 to Section 1304. See 1997 Cal. Stat. ch. 724, §§ 11, 29.

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

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

17 8852. (a) The personal representative shall take and subscribe an oath that the  
18 inventory contains a true statement of the property to be administered in the  
19 decedent's estate of which the personal representative has knowledge, and  
20 particularly of money of the decedent and debts or demands of the decedent  
21 against the personal representative. The oath shall be endorsed upon or attached to  
22 the inventory.

23 (b) If there is more than one personal representative, each shall take and  
24 subscribe the oath. If the personal representatives are unable to agree as to  
25 property to be included in the inventory, any personal representative may petition  
26 for a court order determining whether the property is to be administered in the  
27 decedent's estate.

28 The determination shall be made pursuant to the procedure provided in ~~Chapter~~  
29 ~~11 (commencing with Section 9860) of Part 5~~ Part 19 (commencing with Section  
30 850) of Division 2 or, if there is an issue of property belonging or passing to the  
31 surviving spouse, pursuant to Chapter 5 (commencing with Section 13650) of Part  
32 2 of Division 8.

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

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

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

38 9761. If a partnership existed between the decedent and another person at the  
39 time of the decedent's death, on application of the personal representative, the  
40 court may order any surviving partner to render an account pursuant to Section  
41 ~~15043, 15510, or 15634,~~ or 16807 of the Corporations Code. An order under this  
42 section may be enforced by the court's power to punish for contempt.

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

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

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

6       9884. This chapter does not prohibit the purchase of property of the estate by the  
7 personal representative or the personal representative's attorney pursuant to a  
8 contract in writing made during the lifetime of the decedent if the contract is one  
9 that can be specifically enforced and the requirements of ~~Chapter 11 (commencing~~  
10 ~~with Section 9860)~~ Part 19 (commencing with Section 850) of Division 2 are  
11 satisfied.

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

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

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

17       10151. (a) The personal representative may enter into a written contract with any  
18 of the following:

19       (1) Where the public auction sale will be held in this state, an auctioneer who  
20 ~~holds a valid license under Chapter 3.7 (commencing with Section 5700) of~~  
21 ~~Division 3 of the Business and Professions Code to conduct a public auction sale~~  
22 ~~and to secure purchasers by that method for any personal property of the estate to~~  
23 ~~the extent authorized under Chapter 3.7 (commencing with Section 5700) of~~  
24 ~~Division 3 of the Business and Professions Code~~ is qualified to conduct business  
25 under Title 2.95 (commencing with Section 1812.600) of Part 4 of Division 3 of  
26 the Civil Code.

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

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

34       (c) The contract may provide for payment to the auctioneer of a fee,  
35 commission, or other compensation out of the proceeds of sale and for  
36 reimbursement of expenses, but the contract is binding and valid as against the  
37 estate only for such amounts as the court allows pursuant to Section 10167. No  
38 liability of any kind is incurred by the estate under the contract or a sale unless the  
39 sale is approved by the court, except for the obligations of the estate to the  
40 purchaser of personal property as to which title passes pursuant to Section 10259  
41 without court confirmation or approval. The personal representative is not  
42 personally liable on the contract by reason of execution of the contract.

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

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

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

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

13 10534. (a) Subject to the partnership agreement and the provisions of the  
14 Uniform Partnership Act (~~Chapter 1 (commencing with Section 15001) of 1994~~  
15 Chapter 5 (commencing with Section 16100) of Title 2 of the Corporations  
16 Code), the personal representative has the power to continue as a general partner in  
17 any partnership in which the decedent was a general partner at the time of death.

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

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

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

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

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

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

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

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

36 11952. (a) Notice of the hearing on the petition shall be given as provided in  
37 Section 1220 to the personal representative and to the persons entitled to  
38 distribution of the undivided interests.

39 (b) At the hearing the persons entitled to distribution of the undivided interests  
40 shall be considered the parties to the proceeding whether or not they have

1 appeared or filed a responsive pleading. No one shall be considered as a plaintiff  
2 or as a defendant.

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

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

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

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

11 13601. (a) To collect salary or other compensation under this chapter, an  
12 affidavit or a declaration under penalty of perjury under the laws of this state shall  
13 be furnished to the employer of the deceased spouse stating all of the following:

14 (1) The name of the decedent.

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

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

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

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

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

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

25 (6) "Sections 13600 to 13605, inclusive, of the California Probate Code require  
26 that the earnings of the decedent, including compensation for unused vacation, not  
27 in excess of five thousand dollars (\$5,000) net, be paid promptly to the affiant or  
28 declarant."

29 (7) "Neither the surviving spouse, nor anyone acting on behalf of the surviving  
30 spouse, has a pending request to collect compensation owed by another employer  
31 for personal services of the decedent under Sections 13600 to 13605, inclusive, of  
32 the California Probate Code."

33 (8) "Neither the surviving spouse, nor anyone acting on behalf of the surviving  
34 spouse, has collected any compensation owed by an employer for personal  
35 services of the decedent under Sections 13600 to 13605, inclusive, of the  
36 California Probate Code except the sum of \_\_\_\_ dollars (\$\_\_\_\_) which was  
37 collected from \_\_\_\_."

38 (9) "The affiant or declarant requests that he or she be paid the salary or other  
39 compensation owed by you for personal services of the decedent, including  
40 compensation for unused vacation, not to exceed five thousand dollars (\$5,000)  
41 net, less the amount of \_\_\_\_ dollars (\$\_\_\_\_) which was previously collected."

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

3 (e) (b) Reasonable proof of the identity of the surviving spouse shall be provided  
4 to the employer. If a guardian or conservator is acting for the surviving spouse,  
5 reasonable proof of the identity of the guardian or conservator shall also be  
6 provided to the employer. Proof of identity that is sufficient under Section 13104  
7 is sufficient proof of identity for the purposes of this subdivision.

8 (d) (c) If a person presenting the affidavit or declaration is a person claiming to  
9 be the guardian or conservator of the estate of the surviving spouse, the employer  
10 shall be provided with reasonable proof, satisfactory to the employer, of the  
11 appointment of the person to act as guardian or conservator of the estate of the  
12 surviving spouse.

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

15 **Prob. Code § 19054 (amended). When notice is excused**

16 SEC. 10. Section 19054 of the Probate Code is amended to read:

17 19054. Notwithstanding Section 19050, the trustee need not give notice to a  
18 creditor even though the trustee has knowledge of the creditor if either of the  
19 following conditions is satisfied:

20 (a) The creditor has filed a claim as provided in this part.

21 (b) The creditor has demanded payment and the trustee elects to treat the  
22 demand as a claim under Section ~~19153~~ 19154.

23 **Comment.** Section 19054 is amended to correct an incorrect cross-reference. See Section  
24 19154 (election to treat demand as claim).

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

26 SEC. 11. Section 21401 of the Probate Code is amended to read:

27 21401. Except as provided in Sections ~~6562~~ 21612 (omitted spouse) and ~~6573~~  
28 21623 (omitted children) and in Division 10 (commencing with Section 20100)  
29 (proration of taxes), shares of beneficiaries abate as provided in this part for all  
30 purposes, including payment of the debts, expenses, and charges specified in  
31 Section 11420, satisfaction of gifts, and payment of expenses on specifically  
32 devised property pursuant to Section 12002, and without any priority as between  
33 real and personal property.

34 **Comment.** Section 21401 is amended to reflect relocation of former Section 6562 to Section  
35 21612 (via former Section 26112) (share of omitted spouse) and of former Section 6573 to  
36 Section 21623 (share of omitted child). See 1997 Cal. Stat. ch. 724, §§ 17, 34.

37 **Prob. Code § 26112 (renumbered and amended). Share of omitted spouse**

38 SEC. 12. Section 26112 of the Probate Code is renumbered and amended, to  
39 read:

40 ~~26112~~ 21612. (a) Except as provided in subdivision (b), in satisfying a share  
41 provided by this chapter:

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

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

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

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

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

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

25 ☞ **Note.** The Commission solicits comment on whether the date of death valuation provision of  
26 this section should be repealed, rather than clarified.

27 **Prob. Code § 21623 (amended). Share of omitted child**

28 SEC. 13. Section 21623 of the Probate Code is amended to read:

29 21623. (a) Except as provided in subdivision (b), in satisfying a share provided  
30 by this chapter:

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

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

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

1       **Comment.** Subdivision (a)(2) of Section 21623 is amended to make clear that it is the  
2 proportionate obligation of each beneficiary, rather than the total amount of the obligation, that is  
3 determined based on the date of death valuation. Thus for example if there are two beneficiaries  
4 entitled to receive property valued equally as of the date of death, the proportionate amount that  
5 will be taken from each is one-half the value of property distributed to each, regardless of the  
6 relative value of the property on the date of the distribution.

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

11       ☞ **Note.** The Commission solicits comment on whether the date of death valuation provision of  
12 this section should be repealed, rather than clarified.

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