

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

Rules of Construction for Trusts and Other Instruments

March 2001

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 July 31, 2001.

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

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

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 A number should be repealed because they restate the common law (but do so in an incomplete fashion), because they duplicate other statutes, or because they unduly inhibit the ability of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

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

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

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

3 **Background**

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

8 Problems in the application of the extended rules have become apparent.³ The
9 Law Revision Commission has concluded that a comprehensive review of this
10 matter is appropriate. The Commission retained Professor William McGovern of
11 UCLA Law School as a consultant. Professor McGovern’s background study⁴ is
12 available on the Commission’s website.⁵

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

16 **Overview of Existing Law**

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

23 Extension of the rules of construction beyond wills has been driven by the
24 evolution of the inter vivos trust and other nonprobate transfer instruments as will
25 substitutes. The concept of uniform rules of construction finds support in the
26 Restatement of Trusts, which notes that a revocable inter vivos trust is ordinarily
27 subject to rules of construction applicable to testamentary dispositions.⁶ The
28 Uniform Trust Code likewise provides that, “The rules of construction that apply
29 in this state to the interpretation of and disposition of property by will also apply
30 as appropriate to the interpretation of the terms of a trust and the disposition of the

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

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

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

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

5. See <http://www.clrc.ca.gov/ftpcontents.html#Studies>.

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

1 trust property.”⁷ More problematic is extension of the same rules to other forms of
2 donative transfer, such as irrevocable trusts, deeds, joint tenancy, and insurance
3 policies.

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

9 **General Approach**

10 The rules of construction are intended as aids to interpretation where the
11 instrument being construed is silent or ambiguous. They are default rules in the
12 sense that if the instrument is clear on the matter, they are inapplicable.⁹

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

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

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

29 **Application of Rules of Construction**

30 The rules of construction are, by their terms, applicable to wills, trusts, deeds,
31 and any other “instrument.”¹⁰ This is a sweeping provision, since an instrument
32 may be any writing that designates a beneficiary or makes a donative transfer of
33 property.¹¹

7. Uniform Trust Code § 112 (2000).

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

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

10. Section 21101.

11. Section 45.

1 The Law Revision Commission has concluded that most of the rules of
2 construction may appropriately be applied to all instruments. There are some
3 exceptions, however. The existing statute makes clear that the rules of construction
4 apply “[u]nless the provision or context otherwise requires.”¹² This limitation is
5 satisfactory and does not require further elaboration. The following rules of
6 construction should have limited application:¹³

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

12 ☞ *The Commission particularly requests input as to whether Sections 21109*
13 *(requirement that transferee survive transferor) and 2110 (anti-lapse) should be*
14 *limited in their application so that they do not apply to an irrevocable transfer,*
15 *such as an irrevocable trust. See discussion below.*

16 **Intention of Donor**

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

22 The reference in Section 21102(a) to expressions of the donor’s intention “in the
23 instrument” should not be construed to preclude reformation in the case of a
24 mistaken writing.¹⁶ Modern theory as expounded in the academic literature, the
25 Uniform Probate Code, and the Restatement of Property, all support the concept
26 that reformation should be available for inter vivos instruments, as it is for wills.¹⁷

27 Likewise, the rules of construction should apply only where the intention of the
28 maker of the instrument cannot be ascertained.¹⁸ Language in Section
29 21102(b) suggests that the rules of construction may only be overridden by an
30 expression of contrary intention in the instrument itself.¹⁹ However, existing law

12. Section 21101.

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

14. Section 21102(a).

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

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

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

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

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

1 allows extrinsic evidence of a testator’s intent to rebut the presumptive effect of
2 the rules of construction.²⁰

3 The Commission’s Comment to Section 21102 explains that, notwithstanding
4 the implication of the statute, extrinsic evidence may be admissible for some
5 purposes:

6 Nothing in this section limits the extent to which extrinsic evidence admissible
7 under former law may be used to determine the transferor’s intent as expressed in
8 the instrument. See generally 12 B. Witkin, *Summary of California Law Wills and*
9 *Probate* §§ 245-47, at 280-84 (9th ed. 1990). Cf. Section 6111.5 (will); Estate of
10 Anderson, 56 Cal. App. 4th 235, 65 Cal. Rptr. 2d 307 (1997) (extrinsic evidence
11 admissible). See also Section 12206 (limitation in will of time for administration
12 of estate is directory only).

13 Thus under the parol evidence rule extrinsic evidence may be available to
14 explain, interpret, or supplement an expressed intention of the transferor. Code
15 Civ. Proc. § 1856. Likewise, the court has authority to reform an instrument for
16 mistake or imperfection of writing. Cf. Code Civ. Proc. § 1856(e); Estate of
17 Smith, 61 Cal. App. 4th 259, 71 Cal. Rptr. 2d 424 (1998) (contestant bears burden
18 of proof of mistake as to testamentary intent). It should be noted that before
19 granting reformation, courts require that the evidence of mistake be clear and
20 convincing; reformation is denied, for example, if the donor’s testimony is
21 equivocal and unsupported by disinterested witnesses. See W. McGovern, S.
22 Kurtz & J. Rein, *Wills, Trusts and Estates* § 6.4 (1988).

23 ☞ *The Commission particularly requests input on the following questions:*

24 (1) *Whether existing law is satisfactory concerning the extent to which extrinsic*
25 *evidence may be admissible to explain dispositive provisions of an instrument or*
26 *may be otherwise admissible to show the donor’s intent.*

27 (2) *Whether the explanation in the Comment is satisfactory concerning the*
28 *authority of the court to reform an instrument for mistake or otherwise interpret*
29 *the meaning of the instrument or the intention of the donor.*

30 (3) *Whether the language of Section 21102 requires liberalization either to*
31 *recognize the effect of existing law or to further enable use of extrinsic evidence in*
32 *appropriate circumstances.*

33 **Terminology**

34 *Testamentary gift.* The existing rules of construction make use of the term
35 “testamentary gift” to describe a transfer in possession or enjoyment that takes
36 effect at or after death.²¹ This terminology is misleading. It suggests the rules are
37 limited to gifts made by will, whereas the rules are intended to apply to nonprobate
38 transfers as well.²² The Commission recommends substitution of the term “at-
39 death transfer.” This term is more consistent with the transfer-transferor-transferee

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

21. Section 21104.

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

1 terminology used throughout the rules of construction.²³ It also is more consistent
2 with contemporary usage.

3 *Beneficiary.* The existing rules of construction are inconsistent in their use of the
4 terms “beneficiary” and “transferee” to refer to the donee of a donative transfer.²⁴
5 Both terms are defined in the Probate Code,²⁵ and either would work equally well
6 in this context. Because “transferee” is the term predominantly used in the existing
7 rules of construction, the Commission recommends that that term be used
8 consistently throughout, replacing “beneficiary” in the instances where it occurs.

9 **Presumption That Property Vests in Common**

10 Section 21106 recapitulates the common law presumption that a transfer to two
11 or more persons vests the property transferred to them as tenants in common,
12 absent an expressed intent otherwise.²⁶ This statement of the law is incomplete²⁷
13 and unnecessary.²⁸ The Commission recommends that it be repealed in reliance on
14 the equivalent but more accurate rendition of the concept in the Civil Code.²⁹ The
15 Civil Code is the more appropriate location for the provision in light of its
16 significant application to transactions outside the donative transfer context as well.

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

18 Section 21108 abolishes the common law doctrine of worthier title, that a
19 grantor cannot convey an interest to the grantor’s own heirs. The provision
20 duplicates Civil Code Section 1073. Both provisions were enacted in 1959 on
21 recommendation of the Law Revision Commission.³⁰ At that time the Commission
22 observed that, “The Probate Code provision is recommended only out of an
23 abundance of caution since it is generally agreed that the American doctrine of
24 worthier title does not apply to testamentary transfers.”³¹

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

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

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

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

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

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

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

30. 1959 Cal. Stat. ch. 122.

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

1 Since then circumstances have changed, and the principal contemporary
2 relevance of the doctrine of worthier title is to trusts.³² The duplicative provision
3 in the Civil Code is unnecessary. The statutes would be simplified by its repeal.

4 The transitional provision³³ included in Section 21108 in 1959 is now obsolete,
5 and likewise should be repealed.

6 **Requirement that Beneficiary Survive Donor**

7 The beneficiary of a donative transfer must survive the donor in order to take the
8 gift.³⁴ This rule of construction is unduly broad as drafted. It is appropriately
9 applied to wills (codifying the common law rule) and to trusts (will substitutes).³⁵
10 But its application to deeds is problematic. It could be read to require a beneficiary
11 or donee to survive the settlor or donor in order to retain a gift. It is unlikely the
12 existing statute was intended to rescind a completed transfer of property if the
13 beneficiary were to predecease the donor.³⁶ The statute should be limited to gifts
14 intended to take effect at or after the death of the donor.

15 *☞ The Commission particularly requests input as to whether Section 21109*
16 *should be further limited in its application so that it does not apply to other*
17 *irrevocable transfers, such as an irrevocable trust.*

18 **Antilapse Statute**

19 A fundamental rule of donative transfer law is that a gift to a beneficiary fails (or
20 lapses) if the beneficiary does not survive the donor.³⁷ The antilapse statute is
21 designed to prevent lapse of a gift to the donor's kindred who predecease the
22 donor, unless it is clear that the donor's intention was that such a gift should
23 lapse.³⁸

24 Existing California law has been criticized because it appears to allow "mere
25 words of survival" in an instrument to negate the antilapse statute, and because it
26 appears to extend the antilapse statute to future interests.³⁹ Whether mere words of
27 survival in an instrument should be allowed to negate the antilapse statute, and
28 whether the antilapse statute should apply to the gift of a future interest in an
29 instrument, may depend on the circumstances of the particular case. The

32. The issue arises when the settlor of a trust wants to terminate or modify a trust that gives an interest to the settlor's "heirs."

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

34. Section 21109(a).

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

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

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

38. Section 21110.

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

1 Commission recommends that the statute continue to remain silent on these points,
2 leaving the matter to case law development.

3 In this connection, the Commission recommends that language be deleted from
4 the existing statute to the effect that a provision in an instrument requiring survival
5 for a specific time overrides the antilapse statute.⁴⁰ That provision could be read to
6 imply that other language in an instrument does not override the antilapse statute.
7 In fact, the controlling test is the donor's intention.⁴¹

8 ☞ *The Commission particularly requests input as to whether Section 2110*
9 *should be limited in its application so that it does not apply to an irrevocable*
10 *transfer, such as an irrevocable trust.*

11 **Failure of Transfer**

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

15 The existing statute inexplicably treats a future interest in the same manner as a
16 residuary gift. The result is to create intestacy in many instances. Take, for
17 example, a devise "to A for life, remainder to B if B survives A." Under Section
18 21111, a failed gift of the future interest is precluded from going to the residuary
19 beneficiaries, resulting in an intestacy. This anomaly should be eliminated from
20 the statute, and a future interest treated the same as other gifts.

21 ☞ *Section 21111 is also the subject of legislation pending in the 2001 session.*
22 *See AB 873 (Harman).*

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

24 The California statute governing determination of beneficiaries entitled to take
25 under a class gift contains a number of ambiguities.⁴² The statute is based on an
26 earlier version of Uniform Probate Code Section 2-711; the current version of the
27 Uniform Probate Code resolves the ambiguities.⁴³ The Commission recommends
28 that the California statute be recast in conformity with the current version of the
29 Uniform Probate Code.

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

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

42. Section 21114.

43. The uniform code version resolves the following issues:

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

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

1 **Halfbloods, Adopted Persons, Persons Born Out of Wedlock, Stepchildren, and**
2 **Foster Children**

3 Section 21115 incorporates intestacy rules in interpreting class gifts, but fails to
4 indicate which rules apply — those in effect at the time the instrument is executed
5 or those in effect at the time the transfer takes effect in enjoyment. By comparison,
6 in construing a gift to “heirs” under Section 21114, the determination is made as of
7 the time when the transfer is to take effect in enjoyment and according to the
8 intestate succession law in effect at that time. There is no apparent reason to use
9 different choice of law rules in the determination of “heirs” as opposed to “issue.”
10 Section 21115 should be conformed to Section 21114 on this point, and the
11 determination made under the intestate succession laws in effect at the time the
12 transfer is to take effect in enjoyment.

13 **Vesting of Testamentary Disposition**

14 Section 21116 creates a presumption that interests vest at the donor’s death,
15 whereas a gift of a future interest to a class such as children or heirs does not vest
16 until the date of distribution.⁴⁴ Besides the inconsistency created by Section 21116,
17 its presumption in favor of early vesting unduly limits the ability of the court to
18 consider all the circumstances in construing the intent of an instrument. The
19 Commission recommends its repeal.

20 **Change in Form of Securities**

21 The provisions applicable to a gift of securities that have changed form (for
22 example by sale, merger, reinvestment, and the like)⁴⁵ are based on Uniform
23 Probate Code Section 2-605. The Uniform Probate Code has since been revised to
24 make clear that it applies regardless of whether the gift is characterized as general
25 or specific. The Uniform Probate Code is also limited to gifts made by will, thus
26 avoiding internal inconsistencies inherent in the California statute’s application to
27 other instruments.⁴⁶ The Commission recommends that California law be
28 conformed to the revised Uniform Probate Code.

29 **Ademption**

30 Existing Probate Code Sections 21133–21135 provide rules for construing the
31 donor’s intent where the donor has made a specific gift of property but the
32 property is no longer part of the donor’s estate. That could occur because during
33 the donor’s lifetime the specifically given property was sold, foreclosed on,
34 replaced, disposed of as part of a conservatorship estate, delivered to the
35 beneficiary, or the like. The existing California provisions are based on the pre-

44. Sections 21113, 21114.

45. Section 21132.

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

1 1990 version of the Uniform Probate Code.⁴⁷ Since then, the Uniform Probate
2 Code has been revised to address problems that have been identified. The
3 California version of these provisions should be conformed to the Uniform Probate
4 Code as revised, excluding its general presumption of nonademption of specific
5 devises.⁴⁸

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

7 The statutes applicable to a specific gift of property that is subject to a contract
8 of sale or transfer,⁴⁹ or is subject to a charge or encumbrance,⁵⁰ or as to which the
9 donor has an altered interest,⁵¹ are derived from older Probate Code provisions
10 dealing with ademption, and no longer serve a useful purpose. They state the
11 obvious but are not exhaustive,⁵² whereas the case law on ademption is adequate
12 and would effectuate the donor's intent.⁵³ The provisions may be repealed without
13 loss.

14 **Elimination of Redundant Provisions**

15 A number of the rules of construction expressed in the Probate Code are
16 redundant and should be repealed, either because their substance is covered more
17 adequately elsewhere in the codes⁵⁴ or because they merely restate the common
18 law but fail to accurately capture its nuances.⁵⁵

19 Other rules of construction appear both in the Probate Code and elsewhere.⁵⁶
20 These provisions should be consolidated in the Probate Code, so that practitioners
21 and others may easily find all relevant rules of construction in one location.

22 **Effective Dates**

23 As a general principle, the rules of construction apply retroactively to all
24 instruments, regardless of their date of execution.⁵⁷ This is consistent with the
25 purpose of rules of construction, which apply in circumstances where the intent of
26 the maker of the instrument cannot be ascertained.⁵⁸ It is also consistent with the
27 general approach of the Probate Code to apply new law except where it would

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

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

49. Section 21136.

50. Section 21137.

51. Section 21138.

52. Section 21139.

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

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

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

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

57. Section 21140(a).

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

1 create substantial injustice,⁵⁹ and with the principle that improvements in the law
2 should be broadly applied.

3 Section 21140(b) creates an exception to retroactive application of the rules of
4 construction in a case where former Sections 1050-1054 would apply to a decedent
5 who died before January 1, 1985. This provision is obsolete. The statutes it refers
6 to have relevance to very few cases,⁶⁰ and the likelihood of such an issue arising in
7 the future with respect to a pre-1985 decedent is remote. In the interest of
8 simplification of the law, this provision should be repealed.

9 **Law Revision Commission Comments**

10 The basic rules of construction for wills were enacted in 1983 on
11 recommendation of the Law Revision Commission.⁶¹ As with all Commission-
12 sponsored legislation, there were Comments accompanying the statutes explaining
13 their derivation, their relation to other statutes, aids to construction, and other
14 useful information.⁶²

15 These statutes were in place for 10 years before they were generalized and
16 relocated.⁶³ Because this task was not performed by the Law Revision
17 Commission, the Commission commentary to these sections was lost in the
18 process.

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

23 **Conforming Revisions**

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

59. Section 3.

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

61. See former Section 6140 *et seq.*

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

63. See Sections 21101-21140.

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

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PROPOSED LEGISLATION

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

PART 1. RULES OF INTERPRETATION

CHAPTER 1. GENERAL PROVISIONS

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

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

Comment. The amendment to Section 21101 is technical.

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

Prob. Code § 21102 (technical amendment). Intention of transferor

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

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

Nothing in this section limits the extent to which extrinsic evidence admissible under former law may be used to determine the transferor’s intent as expressed in the instrument. See generally 12 B. Witkin, *Summary of California Law Wills and Probate* §§ 245-47, at 280-84 (9th ed. 1990). Cf. Section 6111.5 (will); *Estate of Anderson*, 56 Cal. App. 4th 235, 65 Cal. Rptr. 2d 307 (1997) (extrinsic evidence admissible). See also Section 12206 (limitation in will of time for administration of estate is directory only).

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

☞ The Commission particularly requests input on the following questions:

1 (1) Whether existing law is satisfactory concerning the extent to which extrinsic evidence may
2 be admissible to explain dispositive provisions of an instrument or may be otherwise admissible
3 to show the donor's intent.

4 (2) Whether the explanation in the Comment is satisfactory concerning the authority of the
5 court to reform an instrument for mistake or otherwise interpret the meaning of the instrument or
6 the intention of the donor.

7 (3) Whether the language of Section 21102 requires liberalization either to recognize the effect
8 of existing law or to further enable use of extrinsic evidence in appropriate circumstances.

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

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

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

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

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

27 **Prob. Code § 21104 (amended). "At-death transfer" defined**

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

29 21104. As used in this part, ~~"testamentary gift"~~ "at-death transfer" means a
30 transfer ~~in possession or enjoyment~~ that takes effect in enjoyment at or after death.

31 **Comment.** Section 21104 is amended to make substitute the term "at-death transfer" for
32 "testamentary gift." As used in this part, an at-death transfer does not include a lifetime gift.

33 The reference to a transfer "in possession" is deleted as superfluous. See, e.g., Sections 21112-
34 21114 (transfer "in enjoyment").

35 ☞ **Note.** The Commission particularly requests input on whether references in existing law here
36 and elsewhere to a transfer in "possession or" enjoyment are in fact superfluous.

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

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

40 21105. Except as otherwise provided in Sections 641 and 642, a will passes all
41 property the testator owns at death, including property acquired after execution of
42 the will.

43 **Comment.** The amendment to Section 21105 is technical. Section 21105 continues former
44 Section 6142.

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

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

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

8 ~~21106. A transfer of property to more than one person vests the property in them~~
9 ~~as owners in common.~~

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

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

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

15 21107. If an instrument directs the conversion of real property into money at the
16 transferor's death, the real property and its proceeds shall be deemed personal
17 property from the time of the transferor's death.

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

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

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

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

28 21108. The law of this state does not include ~~(a)~~ (1) the common-law rule of
29 worthier title that a transferor cannot devise an interest to his or her own heirs or
30 ~~(b)~~ (2) a presumption or rule of interpretation that a transferor does not intend, by a
31 transfer to his or her own heirs or next of kin, to transfer an interest to them. The
32 meaning of a transfer of a legal or equitable interest to a transferor's own heirs or
33 next of kin, however designated, shall be determined by the general rules
34 applicable to the interpretation of instruments. ~~This section applies to all cases in~~
35 ~~which a final judgment had not been entered as of September 18, 1959.~~

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

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

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

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

1 21109. (a) A transferee of an at-death transfer who fails to survive the transferor
2 or until any future time required by the instrument does not take under the
3 instrument.

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

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

10 **Comment.** Subdivision (a) of Section 21109 is amended to limit its application. See Section
11 21104 (“at-death transfer” defined).

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

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

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

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

25 ☞ The Commission particularly requests input as to whether Section 21109 should be further
26 limited in its application so that it does not apply to other irrevocable transfers, such as an
27 irrevocable trust.

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

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

30 21110. (a) Subject to subdivision (b), if a transferee is dead when the instrument
31 is executed, or is treated as if the transferee predeceased the transferor, or fails to
32 survive the transferor or until a future time required by the instrument, the issue of
33 the deceased transferee take in the transferee’s place in the manner provided in
34 Section 240. A transferee under a class gift shall be a transferee for the purpose of
35 this subdivision unless the transferee’s death occurred before the execution of the
36 instrument and that fact was known to the transferor when the instrument was
37 executed.

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

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

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

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

19 In addition to the limitations prescribed in subdivision (b), Section 21110 is also subject to the
20 general principle that rules of construction such as this section do not apply if it is determined that
21 the transferor intended a contrary result even though not expressed in the instrument. See Section
22 21102 (rules of construction inapplicable to extent contrary intention of transferor is expressed in
23 instrument or otherwise determined by court). Matters the court might take into account in
24 determining whether or not the transferor intended that issue of a deceased beneficiary should
25 take in the beneficiary’s place may include (1) whether the result of a survival requirement would
26 be to disinherit a branch of the transferor’s lineal descendants, (2) whether the result of a survival
27 requirement would be to pass property to persons expressly disinherited by the instrument or to
28 the state by escheat, and (3) other persuasive evidence of the transferor’s likely intent.

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

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

40 Subdivision (c) makes the antilapse statute apply not only to kindred of the transferor but also
41 to kindred of a surviving, deceased, or former spouse of the transferor. Thus, if the transferor
42 were to make a transfer to a stepchild who predeceased the transferor, Section 21110 will make a
43 substitute gift to issue of the predeceased stepchild. The term “kindred” was taken from former
44 Probate Code Section 92 (repealed by 1983 Cal. Stat. ch. 842, § 18) and refers to persons related
45 by blood. *Cf. In re Estate of Sowash*, 62 Cal. App. 512, 516, 217 P. 123 (1923). In general, an
46 adoptee is kindred of the adoptive family and not of the adoptee’s natural relatives. See Section
47 21115. See also *Estate of Goulart*, 222 Cal. App. 2d 808, 35 Cal. Rptr. 465 (1963). As to when a
48 transferee is treated as if he or she predeceased the transferor, see Section 220 (simultaneous
49 death). See also Sections 230-234 (proceeding to determine survival), 240 (manner of taking by
50 representation), 250 (effect of feloniously and intentionally killing decedent), 21115(c)(1), (2)
51 (half bloods, adopted persons, persons born out of wedlock, stepchildren, foster children, and
52 issue of such persons, as “kindred” or “issue”).

1 ☞ The Commission particularly requests input as to whether Section 2110 should be limited in its
2 application so that it does not apply to an irrevocable transfer, such as an irrevocable trust.

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

4 SEC. _____. Section 21111 of the Probate Code is amended to read:
5 21111. Except as provided in Section 21110:

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

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

13 **Comment.** Section 21111 is amended to treat future interests in the same manner as other gifts.

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

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

23 ☞ **Note.** Section 21111 would be amended by legislation pending in the 2001 session. See AB
24 873 (Harman). If that legislation is enacted, the revisions proposed here will be incorporated into
25 the text of the section as amended.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- 34 (1) Application of the section to interests acquired by operation of law.
35 (2) Application of escheat principles.
36 (3) Application of the law of another state, based on the designated person's domicile.
37 (4) Elimination of the special rule for ancestral property.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2 21118. (a) If an instrument authorizes a fiduciary to satisfy a pecuniary gift
3 wholly or partly by distribution of property other than money, property selected
4 for that purpose shall be valued at its fair market value on the date of distribution,
5 unless the instrument expressly provides otherwise. If the instrument permits the
6 fiduciary to value the property selected for distribution as of a date other than the
7 date of distribution, then, unless the instrument expressly provides otherwise, the
8 property selected by the fiduciary for that purpose shall have an aggregate fair
9 market value on the date or dates of distribution that, when added to any cash
10 distributed, will amount to no less than the amount of the pecuniary gift as stated
11 in, or determined by, the instrument.

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

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

17 CHAPTER 2. ASCERTAINING THE MEANING OF LANGUAGE
18 USED IN THE INSTRUMENT

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

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

22 21120. The words of an instrument are to receive an interpretation that will give
23 every expression some effect, rather than one that will render any of the
24 expressions inoperative. Preference is to be given to an interpretation of an
25 instrument that will prevent intestacy failure of a transfer, rather than one that will
26 result in an intestacy failure of a transfer.

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

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

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

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

34 21121. All the parts of an instrument are to be construed in relation to each other
35 and so as, if possible, to form a consistent whole. If the meaning of any part of an
36 instrument is ambiguous or doubtful, it may be explained by any reference to or
37 recital of that part in another part of the instrument.

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

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

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

4 21122. The words of an instrument are to be given their ordinary and
5 grammatical meaning unless the intention to use them in another sense is clear and
6 their intended meaning can be ascertained. Technical words are not necessary to
7 give effect to a disposition in an instrument. Technical words ~~in an instrument~~ are
8 to be considered as having been used in their technical sense unless (a) the context
9 clearly indicates a contrary intention or (b) it satisfactorily appears that the
10 instrument was drawn solely by the transferor and that the transferor was
11 unacquainted with the technical sense.

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

14 CHAPTER 3. EXONERATION AND ADEMPTION

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

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

17 21131. A specific gift passes the property transferred subject to any mortgage,
18 deed of trust, or other lien existing at the date of death, without right of
19 exoneration, regardless of a general directive to pay debts contained in the
20 instrument of transfer.

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

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

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

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

37 ~~21132. (a) If the transferor intended a specific gift of certain securities rather~~
38 ~~than the equivalent value thereof, the beneficiary of the specific gift is entitled~~
39 ~~only to:~~

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

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

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

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

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

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

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

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

14 21132, (a) If a testator executes a will that devises securities and the testator then
15 owned securities that meet the description in the will, the devise includes
16 additional securities owned by the testator at death to the extent the additional
17 securities were acquired by the testator after the will was executed as a result of
18 the testator's ownership of the described securities and are securities of any of the
19 following types:

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

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

26 (3) Securities of the same organization acquired as a result of a plan of
27 reinvestment.

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

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

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

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

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

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

1 21133. A recipient of a specific gift has ~~the right to the remaining property~~
2 ~~specifically given a right to the property specifically given, to the extent the~~
3 ~~property is owned by the transferor at the time the gift takes effect in enjoyment,~~
4 and all of the following:

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

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

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

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

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

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

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

24 This section is generally similar to prior California case law. See, e.g. Estate of Shubin, 252
25 Cal. App. 2d 588, 60 Cal. Rptr. 678 (1967); cf. Estate of Newsome, 248 Cal. App. 2d 712, 56 Cal.
26 Rptr. 874 (1967). See also Sections 32 (“devise” defined), 62 (“property” defined). The rules
27 stated in Section 21133 apply in the absence of a contrary intention of the transferor. See Section
28 21102.

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

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

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

33 21134. (a) Except as otherwise provided in this section, if specifically given
34 property is sold or mortgaged by a conservator or by an agent acting within the
35 authority of a durable power of attorney for an incapacitated principal, the
36 beneficiary transferee of the specific gift has the right to a general pecuniary gift
37 equal to the net sale price of, or the amount of the unpaid loan on, the property.

38 (b) Except as otherwise provided in this section, if an eminent domain award for
39 the taking of specifically given property is paid to a conservator or to an agent
40 acting within the authority of a durable power of attorney for an incapacitated
41 principal, or if the proceeds on fire or casualty insurance on, or recovery for injury
42 to, specifically gifted property are paid to a conservator or to an agent acting
43 within the authority of a durable power of attorney for an incapacitated principal,

1 the recipient of the specific gift has the right to a general pecuniary gift equal to
2 the eminent domain award or the insurance proceeds or recovery.

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

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

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

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

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

21 Subdivisions (a) and (b) are consistent with prior California case law. See Estate of Packham,
22 232 Cal. App. 2d 847, 43 Cal. Rptr. 318 (1965). See also Sections 32 (“devise” defined), 62
23 (“property” defined). The rules stated in Section 21134 apply in the absence of a contrary
24 intention of the transferor. See Section 21102. See also Section 21139.

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

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

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

34 21135. (a) Property given by a transferor during his or her lifetime to a
35 beneficiary person is treated as a satisfaction of a ~~testamentary gift~~ an at-death
36 transfer to that person in whole or in part only if one of the following conditions is
37 satisfied:

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

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

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

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

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

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

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

16 Section 21135 is amended for conformity with Uniform Probate Code Section 2-609. (Section
17 21135 is based on former Uniform Probate Code Section 2-612, which is superseded by Uniform
18 Probate Code Section 2-609.) As to the construction of provisions drawn from uniform acts, see
19 Section 2.

20 Section 21135 is also amended to correct terminology. See Section 21104 (“at-death transfer”
21 defined). The reference to “possession or” enjoyment is deleted as superfluous. See also Section
22 11640 (hearing and order resolving questions arising under Section 21135). For a comparable
23 intestate succession rule concerning advancements, see Section 6409.

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

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

26 ~~21136. If the transferor after execution of the transfer instrument enters into an~~
27 ~~agreement for the sale or transfer of specifically given property, the beneficiary of~~
28 ~~the specific gift has the right to the property subject to the remedies of the~~
29 ~~purchaser or transferee.~~

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

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

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

35 ~~21137. If the transferor after execution of the transfer instrument places a charge~~
36 ~~or encumbrance on specifically given property for the purpose of securing the~~
37 ~~payment of money or the performance of any covenant or agreement, the~~
38 ~~beneficiary of the specific gift has the right to the property subject to the charge or~~
39 ~~encumbrance.~~

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

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

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

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

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

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

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

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

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

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

22 CHAPTER 4. EFFECTIVE DATES

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

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

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

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

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

33 CONFORMING REVISIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 (3) Provisions of the will of the decedent nominating the killer as executor,
26 trustee, or guardian shall be interpreted as if the killer had predeceased the
27 decedent.

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

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

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

33 6103. Except as otherwise specifically provided, Chapter 1 (commencing with
34 Section 6100), Chapter 2 (commencing with Section 6110), Chapter 3
35 (commencing with Section 6120), Chapter 4 (commencing with Section 6130),
36 ~~Chapter 5 (commencing with Section 6140)~~, Chapter 6 (commencing with Section
37 6200), and Chapter 7 (commencing with Section 6300) of this division, and Part 1
38 (commencing with Section 21101) of Division 11, do not apply where the testator
39 died before January 1, 1985, and the law applicable prior to January 1, 1985,
40 continues to apply where the testator died before January 1, 1985.

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

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

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

6 6205. “Descendants” mean children, grandchildren, and their lineal descendants
7 of all generations, with the relationship of parent and child at each generation
8 being determined as provided in Section 6152 21115. A reference to
9 “descendants” in the plural includes a single descendant where the context so
10 requires.

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

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

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

14 6409. (a) If a person dies intestate as to all or part of his or her estate, property
15 the decedent gave during lifetime to an heir is treated as an advancement against
16 that heir’s share of the intestate estate only if one of the following conditions is
17 satisfied:

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

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

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

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

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

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

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

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

40 11640. (a) When all debts have been paid or adequately provided for, or if the
41 estate is insolvent, and the estate is in a condition to be closed, the personal

1 representative shall file a petition for, and the court shall make, an order for final
2 distribution of the estate.

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

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

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