

STATE OF CALIFORNIA

**CALIFORNIA LAW
REVISION COMMISSION**

RECOMMENDATION

Probate Code Technical Corrections

March 2003

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative. The Comments are legislative history and are entitled to substantial weight in construing the statutory provisions. For a discussion of cases addressing the use of Law Revision Commission materials in ascertaining legislative intent, see the Commission's most recent *Annual Report*.

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STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

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March 7, 2003

To: The Honorable Gray Davis
Governor of California, and
The Legislature of California

This recommendation proposes technical corrections to the Probate Code to address defects in numbering that have been brought to the attention of the Law Revision Commission. It includes clarification of the “date of death valuation” provision of Probate Code Sections 21612 (share of omitted spouse) and 21623 (share of omitted child).

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

Respectfully submitted,

David Huebner
Chairperson

PROBATE CODE TECHNICAL CORRECTIONS

Numbering Corrections

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

Clarification of “Date of Death Valuation”

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

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

That is not the intention of the date of death valuation provision. Date of death valuation is used to determine the relative portion of each decedent’s share that will be obligated, not the total value of the property to be distributed. The statute (and Comment) should be revised to state this more clearly:

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1. Prob. Code §§ 21610-21611.
 2. Prob. Code § 21612(a)(2).

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

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

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

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

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

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

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

A parallel change should be made to Probate Code Section 21623, governing the share of an omitted child.

PROPOSED LEGISLATION

Prob. Code § 1004 (amended). Lis pendens

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

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

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

Prob. Code § 2356.5 (amended). Conservatee with dementia

SEC. 2. Section 2356.5 of the Probate Code is amended to read:

2356.5. (a) The Legislature hereby finds and declares:

(1) That people with dementia, as defined in the last published edition of the “Diagnostic and Statistical Manual of Mental Disorders,” should have a conservatorship to serve their unique and special needs.

(2) That, by adding powers to the probate conservatorship for people with dementia, their unique and special needs can be met. This will reduce costs to the conservatee and the family of the conservatee, reduce costly administration by state and county government, and safeguard the basic dignity and rights of the conservatee.

(3) That it is the intent of the Legislature to recognize that the administration of psychotropic medications has been, and can be, abused by caregivers and, therefore, granting powers to a conservator to authorize these medications for the

treatment of dementia requires the protections specified in this section.

(b) Notwithstanding any other provision of law, a conservator may authorize the placement of a conservatee in a secured perimeter residential care facility for the elderly operated pursuant to Section 1569.698 of the Health and Safety Code, or a locked and secured nursing facility which specializes in the care and treatment of people with dementia pursuant to subdivision (c) of Section 1569.691 of the Health and Safety Code, and which has a care plan that meets the requirements of Section 87724 of Title 22 of the California Code of Regulations, upon a court's finding, by clear and convincing evidence, of all of the following:

(1) The conservatee has dementia, as defined in the last published edition of the "Diagnostic and Statistical Manual of Mental Disorders."

(2) The conservatee lacks the capacity to give informed consent to this placement and has at least one mental function deficit pursuant to subdivision (a) of ~~Section 812~~ *Section 811*, and this deficit significantly impairs the person's ability to understand and appreciate the consequences of his or her actions pursuant to subdivision (b) of ~~Section 812~~ *Section 811*.

(3) The conservatee needs or would benefit from a restricted and secure environment, as demonstrated by evidence presented by the physician or psychologist referred to in paragraph (3) of subdivision (f).

(4) The court finds that the proposed placement in a locked facility is the least restrictive placement appropriate to the needs of the conservatee.

(c) Notwithstanding any other provision of law, a conservator of a person may authorize the administration of medications appropriate for the care and treatment of

dementia, upon a court's finding, by clear and convincing evidence, of all of the following:

(1) The conservatee has dementia, as defined in the last published edition of the "Diagnostic and Statistical Manual of Mental Disorders."

(2) The conservatee lacks the capacity to give informed consent to the administration of medications appropriate to the care of dementia, and has at least one mental function deficit pursuant to subdivision (a) of ~~Section 812~~ *Section 811*, and this deficit or deficits significantly impairs the person's ability to understand and appreciate the consequences of his or her actions pursuant to subdivision (b) of ~~Section 812~~ *Section 811*.

(3) The conservatee needs or would benefit from appropriate medication as demonstrated by evidence presented by the physician or psychologist referred to in paragraph (3) of subdivision (f).

(d) Pursuant to subdivision (b) of Section 2355, in the case of a person who is an adherent of a religion whose tenets and practices call for a reliance on prayer alone for healing, the treatment required by the conservator under subdivision (c) shall be by an accredited practitioner of that religion in lieu of the administration of medications.

(e) A conservatee who is to be placed in a facility pursuant to this section shall not be placed in a mental health rehabilitation center as described in Section 5675 of the Welfare and Institutions Code, or in an institution for mental disease as described in Section 5900 of the Welfare and Institutions Code.

(f) A petition for authority to act under this section shall be governed by Section 2357, except:

(1) The conservatee shall be represented by an attorney pursuant to Chapter 4 (commencing with Section 1470) of Part 1.

(2) The conservatee shall be produced at the hearing, unless excused pursuant to Section 1893.

(3) The petition shall be supported by a declaration of a licensed physician, or a licensed psychologist within the scope of his or her licensure, regarding each of the findings required to be made under this section for any power requested, except that the psychologist has at least two years of experience in diagnosing dementia.

(4) The petition may be filed by any of the persons designated in Section 1891.

(g) The court investigator shall annually investigate and report to the court every two years pursuant to Sections 1850 and 1851 if the conservator is authorized to act under this section. In addition to the other matters provided in Section 1851, the conservatee shall be specifically advised by the investigator that the conservatee has the right to object to the conservator's powers granted under this section, and the report shall also include whether powers granted under this section are warranted. If the conservatee objects to the conservator's powers granted under this section, or the investigator determines that some change in the powers granted under this section is warranted, the court shall provide a copy of the report to the attorney of record for the conservatee. If no attorney has been appointed for the conservatee, one shall be appointed pursuant to Chapter 4 (commencing with Section 1470) of Part 1. The attorney shall, within 30 days after receiving this report, do one of the following:

(1) File a petition with the court regarding the status of the conservatee.

(2) File a written report with the court stating that the attorney has met with the conservatee and determined that the petition would be inappropriate.

(h) A petition to terminate authority granted under this section shall be governed by Section 2359.

(i) Nothing in this section shall be construed to affect a conservatorship of the estate of a person who has dementia.

(j) Nothing in this section shall affect the laws that would otherwise apply in emergency situations.

(k) Nothing in this section shall affect current law regarding the power of a probate court to fix the residence of a conservatee or to authorize medical treatment for any conservatee who has not been determined to have dementia.

(l)(1) Until such time as the conservatorship becomes subject to review pursuant to Section 1850, this section shall not apply to a conservatorship established on or before the effective date of the adoption of Judicial Council forms that reflect the procedures authorized by this section, or January 1, 1998, whichever occurs first.

(2) Upon the adoption of Judicial Council forms that reflect the procedures authorized by this section or January 1, 1998, whichever occurs first, this section shall apply to any conservatorships established after that date.

Comment. Section 2356.5 is amended to correct incorrect section references.

Prob. Code § 3121 (amended). Petition

SEC. 3. Section 3121 of the Probate Code is amended to read:

3121. The petition shall set forth all of the following information:

(a) The name, age, and residence of each spouse.

(b) If one or both spouses is alleged to lack legal capacity for the proposed transaction, a statement that the spouse has a conservator or a statement of the facts upon which the allegation is based.

(c) If there is a conservator of a spouse, the name and address of the conservator, the county in which the

conservatorship proceeding is pending, and the court number of the proceeding.

(d) If a spouse alleged to lack legal capacity for the proposed transaction is a patient in or on leave of absence from a state institution under the jurisdiction of the State Department of Mental Health or the State Department of Developmental Services, the name and address of the institution.

(e) The names and addresses of all of the following persons:

(1) Relatives within the second degree of each spouse alleged to lack legal capacity for the proposed transaction.

(2) If the petition is to provide gifts or otherwise affect estate planning of the spouse who is alleged to lack capacity, as would be properly the subject of a petition under Article 10 (commencing with Section 2580) of Chapter 6 of Part 4 (substituted judgment) in the case of a conservatorship, the names and addresses of the persons identified in Section 2581.

(f) A sufficient description of the property that is the subject of the proposed transaction.

(g) An allegation that the property is community property *and, if the proposed transaction involves property in which a spouse also has a separate property interest, an allegation of good cause to include that separate property in the transaction.*

(h) The estimated value of the property.

(i) The terms and conditions of the proposed transaction, including the names of all parties thereto.

(j) The relief requested.

Comment. Section 3121 is amended to implement Section 3100(b) (transaction involving separate property interest).

Prob. Code § 3144 (amended). Court order

SEC. 4. Section 3144 of the Probate Code is amended to read:

3144. (a) The court may authorize the proposed transaction if the court determines all of the following:

(1) The property that is the subject of the proposed transaction is community property of the spouses *and, if the proposed transaction involves property in which a spouse also has a separate property interest, that there is good cause to include that separate property in the transaction.*

(2) One of the spouses then has a conservator or otherwise lacks legal capacity for the proposed transaction.

(3) The other spouse either has legal capacity for the proposed transaction or has a conservator.

(4) Each of the spouses either (i) joins in or consents to the proposed transaction, (ii) has a conservator, or (iii) is substantially unable to manage his or her own financial resources or resist fraud or undue influence. Substantial inability may not be proved by isolated incidents of negligence or improvidence.

(5) The proposed transaction is one that should be authorized under this chapter.

(b) If the proposed transaction is to provide gifts or otherwise affect estate planning of the spouse who is alleged to lack capacity, as would be properly the subject of a petition under Article 10 (commencing with Section 2580) of Chapter 6 of Part 4 (substituted judgment) in the case of a conservatorship, the court may authorize the transaction under this chapter only if the transaction is one that the court would authorize under that article.

(c) If the court determines under subdivision (a) that the transaction should be authorized, the court shall so order and may authorize the petitioner to do and perform all acts and to execute and deliver all papers, documents, and instruments necessary to effectuate the order.

(d) In an order authorizing a transaction, the court may prescribe such terms and conditions as the court in its

discretion determines appropriate, including, but not limited to, requiring joinder or consent of another person.

Comment. Section 3144 is amended to implement Section 3100(b) (transaction involving separate property interest).

Prob. Code § 6327 (amended). Appealable orders

SEC. 5. Section 6327 of the Probate Code is amended to read:

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

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

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

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

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

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

Prob. Code § 8852 (amended). Inventory oath

SEC. 6. Section 8852 of the Probate Code is amended to read:

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

(b) If there is more than one personal representative, each shall take and subscribe the oath. If the personal representatives are unable to agree as to property to be included in the inventory, any personal representative may petition for a court order determining whether the property is to be administered in the decedent's estate. The determination shall be made pursuant to the procedure provided in ~~Chapter 11 (commencing with Section 9860) of Part 5~~ *Part 19 (commencing with Section 850) of Division 2* or, if there is an issue of property belonging or passing to the surviving spouse, pursuant to Chapter 5 (commencing with Section 13650) of Part 2 of Division 8.

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

Prob. Code § 9761 (amended). Partnership account

SEC. 7. Section 9761 of the Probate Code is amended to read:

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

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

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

SEC. 8. Section 9884 of the Probate Code is amended to read:

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

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

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

SEC. 9. Section 10151 of the Probate Code is amended to read:

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

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

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

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

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

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

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

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

SEC. 10. Section 10534 of the Probate Code is amended to read:

10534. (a) Subject to the partnership agreement and the provisions of the Uniform Partnership Act (~~Chapter 1 (commencing with Section 15001) of 1994 (Chapter 5~~

(commencing with Section 16100) of Title 2 of the Corporations Code), the personal representative has the power to continue as a general partner in any partnership in which the decedent was a general partner at the time of death.

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

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

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

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

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

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

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

SEC. 11. Section 11952 of the Probate Code is amended to read:

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

(b) At the hearing the persons entitled to distribution of the undivided interests shall be considered the parties to the

proceeding whether or not they have appeared or filed a responsive pleading. No one shall be considered as a plaintiff or as a defendant.

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

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

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

SEC. 12. Section 13601 of the Probate Code is amended to read:

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

- (1) The name of the decedent.
- (2) The date and place of the decedent's death.
- (3) Either of the following, as appropriate:

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

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

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

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

(6) "Sections 13600 to 13605, inclusive, of the California Probate Code require that the earnings of the decedent,

including compensation for unused vacation, not in excess of five thousand dollars (\$5,000) net, be paid promptly to the affiant or declarant.”

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

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

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

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

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

(d) (c) If a person presenting the affidavit or declaration is a person claiming to be the guardian or conservator of the estate of the surviving spouse, the employer shall be provided with reasonable proof, satisfactory to the employer, of the

appointment of the person to act as guardian or conservator of the estate of the surviving spouse.

Comment. Section 13601 is amended to correct subdivision enumeration. It was incorrectly enumerated on enactment. See 1990 Cal. Stat. ch. 79, § 14.

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

SEC. 13. Section 19054 of the Probate Code is amended to read:

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

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

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

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

Prob. Code § 21401 (amended). Abatement

SEC. 14. Section 21401 of the Probate Code is amended to read:

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

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

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

SEC. 15. Section 26112 of the Probate Code is renumbered and amended, to read:

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

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

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

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

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

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

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

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

SEC. 16. Section 21623 of the Probate Code is amended to read:

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

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

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

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

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

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

