

STATE OF CALIFORNIA

# **CALIFORNIA LAW REVISION COMMISSION**

RECOMMENDATION

## **Rules of Construction for Trusts and Other Instruments**

November 2001

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.

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STATE OF CALIFORNIA

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CALIFORNIA LAW REVISION COMMISSION

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November 15, 2001

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

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 A number of the rules should be repealed because they restate the common law (but do so in an incomplete fashion), because they repeat other statutes, or because they unduly inhibit the ability of a court to ascertain a 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 is submitted pursuant to Resolution Chapter 78 of the Statutes of 2001.

Respectfully submitted,

Joyce G. Cook  
*Chairperson*



## RULES OF CONSTRUCTION FOR TRUSTS AND OTHER INSTRUMENTS

### Background

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

Problems in the application of the extended rules have become apparent.<sup>3</sup> The Commission has concluded that a comprehensive review of this matter is appropriate. The Commission retained Professor William McGovern of UCLA Law School as a consultant.<sup>4</sup>

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

### Overview of Existing Law

The rules of construction — “Rules for Interpretation of Instruments” — are found in Division 11, Part 1 (Sections 21101-21140), of the Probate Code. All of the rules of con-

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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); 1983 Cal. Stat. ch. 842 (former Prob. Code § 6140 *et seq.*). All further statutory references are to the Probate Code, unless otherwise indicated.

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* (March 2000). The background study is available from the Commission’s website at <<http://www.clrc.ca.gov/pub/Printed-Reports/BKST-811-McGovernRulesConst.pdf>>.

struction are based on previously existing Probate Code provisions applicable to wills. The basic idea of the 1994 extension to trusts and other instruments was to achieve uniformity among the common estate planning instruments.

Extension of the rules of construction beyond wills has been driven by the evolution of the inter vivos trust and other nonprobate transfer instruments as will substitutes. The concept of uniform rules of construction finds support in the Restatement of Trusts, which notes that a revocable inter vivos trust is ordinarily subject to rules of construction applicable to testamentary dispositions.<sup>5</sup> The Uniform Trust Code likewise provides: “The rules of construction that apply ... to the interpretation of and disposition of property by will also apply as appropriate to the interpretation of the terms of a trust and the disposition of the trust property.”<sup>6</sup> More problematic is extension of the same rules to other forms of donative transfer, such as inter vivos gifts, deeds, joint tenancies, and insurance policies.

Many of the original 1983 California rules of construction applicable to wills were based on the pre-1990 Uniform Probate Code.<sup>7</sup> Since then, a number of the Uniform Probate Code provisions have been revised, but the California statutes have not been adjusted. The Commission proposes revising several of the California statutes to parallel the 1990 Uniform Probate Code changes.

### **General Approach**

The rules of construction are intended as aids to interpretation where the instrument is silent or ambiguous. Rules of

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

6. Unif. Trust Code § 112 (2000).

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

construction are default rules in the sense that, if the instrument is clear on the matter, they are inapplicable.<sup>8</sup>

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

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

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

### **Application of Rules of Construction**

The rules of construction are, by their terms, applicable to wills, trusts, deeds, and any other "instrument."<sup>9</sup> This is a sweeping provision, since an instrument may be any writing that designates a beneficiary or makes a donative transfer of property.<sup>10</sup>

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

9. Section 21101.

10. Section 45.

The Commission has concluded that most of the rules of construction may appropriately be applied to all instruments. There are some exceptions, however. The existing statute makes clear that the rules of construction apply “[u]nless the provision or context otherwise requires.”<sup>11</sup> This limitation is satisfactory and does not require further elaboration. The following rules of construction should have limited application:<sup>12</sup>

- Section 21105 — instrument passes all property including after-acquired property (limited to will)
- Section 21109 — requirement that transferee survive transferor (limited to at-death transfer)
- Section 21132 — change in form of securities (limited to at-death transfer)
- Section 21133 — proceeds of specific gift (limited to at-death transfer)
- Section 21135 — ademption by satisfaction (limited to at-death transfer)

### **Intention of Donor**

The rules of construction should apply only where the intention of the maker of the instrument cannot be ascertained.<sup>13</sup> Language in Section 21102 suggests that the rules of construction may only be overridden by an expression of contrary intention in the instrument itself. However, existing law allows extrinsic evidence of a testator’s intent to rebut the presumptive effect of the rules of construction.<sup>14</sup>

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11. Section 21101.

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

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

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

Likewise, although the intention of a donor “as expressed in the instrument” controls the legal effect of dispositions made in the instrument,<sup>15</sup> expressions in the instrument are not the exclusive means by which a donor’s intention may be ascertained.<sup>16</sup> Under the parol evidence rule, for example, extrinsic evidence is admissible on the issue of a mistake or imperfection of the writing.<sup>17</sup>

The Commission believes the statute as currently phrased is overbroad. The role of extrinsic evidence in the determination of the donor’s intention should be recognized in the statute. The Commission recommends addition of the following language to Section 21102: “Nothing in this section limits the use of extrinsic evidence, to the extent otherwise authorized by law, to determine the intention of the transferor.”<sup>18</sup>

It should be noted that the Commission in this recommendation does not address or propose to affect the law governing reformation of an instrument to effectuate the intention of the donor in case of mistake or for other cause.

### Terminology

*Testamentary gift.* The existing rules of construction use the term “testamentary gift” to describe a transfer in possession or enjoyment that takes effect at or after death.<sup>19</sup> This terminology is misleading. It suggests the rules are limited to gifts

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15. Section 21102(a).

16. For a recent example of the use of extrinsic evidence to determine the transferor’s intent, see *Estate of Guidotti*, 90 Cal. App. 4th 1403, 109 Cal. Rptr. 2d 674 (2001).

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

18. The Commission’s Comment notes that the proposed language would neither expand nor limit the extent to which extrinsic evidence admissible under existing law may be used to determine the transferor’s intent as expressed in the instrument — the provision would simply recognize the availability of extrinsic evidence notwithstanding the apparently absolute language of Section 21102.

19. Section 21104.

made by will, whereas the rules are intended to apply to non-probate transfers as well.<sup>20</sup> Moreover, the definition is confusing in its ambiguous reference to the time a transfer “takes effect.” The Commission recommends substitution of the term “at-death transfer,” defined as a transfer that is revocable during the lifetime of the transferor. This term is more consistent with the transfer-transferor-transferee terminology used throughout the rules of construction.<sup>21</sup> It also is more consistent with contemporary usage, and better effectuates its application to nonprobate transfers.

While a joint tenancy is a form of at-death transfer, it is unique in that the rules of construction peculiar to at-death transfers are generally inapplicable to it. For example, since the distinguishing feature of joint tenancy tenure is the right of survivorship, application of antilapse principles to joint tenancy would defeat the transferor’s intention. The proposed law excludes joint tenancy from the special treatment given other at-death transfers.

*Beneficiary.* The existing rules of construction are inconsistent in their use of the terms “beneficiary” and “transferee” to refer to the donee of a donative transfer.<sup>22</sup> Both terms are defined in the Probate Code,<sup>23</sup> and would work equally well in this context. Because “transferee” is the term predominantly used in the existing rules of construction, the Commission recommends that the term be used consistently throughout, replacing “beneficiary” in the instances where it occurs.

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

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

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

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

### **Presumption that Property Vests in Common**

Section 21106 recapitulates the common law presumption that a transfer to two or more persons vests the property transferred to them as tenants in common, absent an expressed intent otherwise.<sup>24</sup> This statement of the law is incomplete and unnecessary.<sup>25</sup> The Commission recommends that it be repealed in reliance on the equivalent but more accurate rendition of the concept in the Civil Code. The Civil Code is the more appropriate location for the provision in light of its significant application to transactions outside the donative transfer context.

### **Common Law Doctrine of Worthier Title**

Section 21108 abolishes the common law doctrine of worthier title, that a grantor cannot convey an interest to the grantor's own heirs. This section repeats Civil Code Section 1073. The dual codification was first enacted in 1959<sup>26</sup> on recommendation of the Commission. At that time the Commission observed that "the Probate Code provision is recommended only out of an abundance of caution since it is generally agreed that the American doctrine of worthier title does not apply to testamentary transfers."<sup>27</sup>

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24. For another codification of the common law presumption, see Civ. Code § 683.

25. There are numerous exceptions to the rule stated that are not reflected in the statement. See, e.g., Sections 5100 *et seq.* (multiple-party accounts), 5500 *et seq.* (Uniform TOD Security Registration Act). In addition, both the common law and other statutes cover the issue completely. See, e.g., 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.

26. 1959 Cal. Stat. ch. 122.

27. *Recommendation Relating to the Doctrine of Worthier Title*, 2 Cal. L. Revision Comm'n Reports D-5 (1959).

Since 1959 circumstances have changed, and the principal contemporary relevance of the doctrine of worthier title is to trusts.<sup>28</sup> The duplicative provision in the Civil Code is unnecessary and should be repealed.

The transitional provision<sup>29</sup> in Section 21108, dating from 1959, is obsolete and should be repealed.

### **Requirement that Beneficiary Survive Donor**

The beneficiary of a donative transfer must survive the donor in order to take the gift.<sup>30</sup> This rule is unduly broad. It is appropriately applied to wills (codifying the common law rule) and to trusts (will substitutes),<sup>31</sup> but its application to deeds is problematic. The statute could be read to require a beneficiary or donee of an outright gift of property to survive the settlor or donor in order to retain a gift.

The statute was not intended to rescind a completed transfer of property if the beneficiary were to predecease the donor.<sup>32</sup> The statute should be limited to gifts that remain revocable during the lifetime of the donor.<sup>33</sup>

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28. 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."

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

30. Section 21109(a).

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

32. 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).

33. The limitation to revocable gifts changes the traditional common law and California rule illustrated by *Randall v. Bank of America*, 48 Cal. App. 2d 249, 119 P.2d 754 (1941) (remainder interest in revocable trust held not divested by beneficiary's failure to survive settlor; upon settlor's death the trust property passed to deceased beneficiary's estate). However, the reference in Section 21109 to survival "until a future time required by the instrument" does not change the result of other future interest cases that have generally refused to find an implied condition of survival where the instrument fails expressly to impose

### Antilapse Statute

A fundamental rule of donative transfer law is that a gift to a beneficiary fails (lapses) if the beneficiary does not survive the donor.<sup>34</sup> The antilapse statute is designed to prevent lapse of a gift to the donor's kindred who predecease the donor, unless it is clear that the donor intended the gift to lapse.<sup>35</sup>

Existing law has been criticized because (1) it appears to allow "mere words of survival" in an instrument to negate the antilapse statute, and (2) it appears to extend the antilapse statute to future interests.<sup>36</sup>

With respect to "mere" words of survival, the donor's inclusion of such words in an instrument may well reflect the

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such a condition, such as *Estate of Stanford*, 49 Cal. 2d 120, 315 P.2d 681 (1957) (testamentary trust for A for life, remainder to A's "children"; despite class gift form, remainder passed to estate of child who predeceased A), and *Estate of Ferry*, 55 Cal. 2d 776, 361 P.2d 900, 13 Cal. Rptr. 180 (1961) (even though the interest in question was subject to another condition precedent, court refused to find an implied condition of survival). See also Restatement (Second) of Property (Donative Transfers) § 27.3 (1987).

In most jurisdictions, however, a transferor's use of a flexible, multi-generation class designation ("issue" or "descendants") is sufficient to support a finding that survival is required to the date of "distribution" (i.e., the termination of all preceding interests), there being no risk of excluding a line of the designated ancestor's descendants. Restatement (Second) of Property (Donative Transfers) § 28.2 (1987); *Altman v. Rider*, 191 S.W.2d 577 (Ky. App. 1956). Because, in other cases of these general types, the primary concern is the risk of disinheriting lines of descent if survival is required, the possibility that Section 21110 (extended antilapse provision) may substitute the issue of deceased beneficiary might influence courts in the interpretation of future interest provisions that do not expressly deal with questions of survival. Cf. Section 21102; Restatement (Third) of Trusts § 49, cmt. c, illus. 3 (1999); *Dewire v. Haveles*, 404 Mass. 274, 534 N.E.2d 782 (1989). See also *Matter of Welles' Will*, 173 N.E.2d 876 (N.Y. 1961) (4-3 decision struggling with potentially harsh or unintended effect of language conferring remainder on "all my grandchildren then living").

34. 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.").

35. Section 21110.

36. The extensive academic debate over these points is summarized in McGovern, *supra* note 4, at 10-22.

donor's intention that the gift lapse if the beneficiary fails to survive. The existing statute, however, could be read to imply that such language in an instrument is ineffective unless it requires survival for a specific time.<sup>37</sup> The Commission recommends revision of the law to state directly that a provision in an instrument requiring the transferee to survive the donor constitutes an intention of the donor that the antilapse statute not apply.

Whether the antilapse statute should apply to the gift of a future interest depends on the circumstances of the particular case. The Commission recommends that the statute continue to remain silent on this point, leaving the matter to case law.

### **Failed Transfer**

Section 21111 provides rules for treatment of a failed transfer. A failed specific gift passes by intestacy, absent an alternate or residuary disposition. A failed residuary gift passes to the remaining residuary beneficiaries proportionately.

The existing statute does not state what happens if a residuary gift to a sole beneficiary or to a remainder beneficiary fails. The proposed law would correct this defect by making clear that, absent operation of the antilapse statute, the failed gift passes in the donor's estate. The proposed law also makes clear that in case of an intestacy, the intestate distribution is determined pursuant to the general class gift rules.<sup>38</sup>

Under the existing statute, it is unclear whether a gift of "my estate" is to be treated as a general gift or as a residuary gift. The proposed law makes clear that such a gift is to be

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37. 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.

38. See Section 21114.

treated as a residuary gift. Thus, if a gift of “my estate” fails, it would go to other residuary beneficiaries or, if none, pass by intestacy.

### **Class Gift to Heirs, Next of Kin, Relatives, and the Like**

The statute governing determination of beneficiaries entitled to take under a class gift contains a number of ambiguities.<sup>39</sup> The statute is based on an earlier version of Uniform Probate Code Section 2-711; the current version resolves the ambiguities.<sup>40</sup> The Commission recommends that the California statute be recast in conformity with the current version of the Uniform Probate Code.

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

Section 21115 incorporates intestacy rules in interpreting class gifts, but fails to indicate which rules apply — those in effect at the time the instrument is executed or those in effect at the time the transfer takes effect in enjoyment. By comparison, in construing a gift to “heirs” under Section 21114, the determination is made as of the time when the transfer is to take effect in enjoyment and according to the intestate succession law in effect at that time.

There is no apparent reason to use different rules in the determination of “heirs” as opposed to “issue.” Section 21115 should be conformed to Section 21114 on this point, and the

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39. *Id.*

40. The current version of the Uniform Probate Code 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 24-25.

determination made under the intestate succession laws in effect at the time the transfer is to take effect in enjoyment.

### **Vesting of Testamentary Disposition**

Section 21116 creates a presumption that interests vest at the donor's death, whereas a gift of a future interest to a class such as children or heirs does not vest until the date of distribution.<sup>41</sup> Besides the inconsistency created by Section 21116, its presumption in favor of early vesting unduly limits the ability of the court to consider all the circumstances in construing the intent of an instrument. The Commission recommends its repeal.

### **Satisfaction of Pecuniary Gift by Property Distribution**

Section 21118 provides rules for valuing property used in satisfaction of a pecuniary gift. The statute has been criticized because it would allow overfunding of a marital (or charitable) deduction gift, as well as overfunding of a bypass trust or other pecuniary gift at the expense of a marital (or charitable deduction) residue.<sup>42</sup> The statute may also run afoul of the generation-skipping transfer tax requirement that assets allocated in satisfaction of a pecuniary gift must fairly reflect net appreciation or depreciation in the value of all assets available for funding the gift.<sup>43</sup>

To cure these problems, the Commission recommends that the applicable standard be drawn from current Treasury Regulations. Thus the property selected for satisfaction of a pecuniary gift would "fairly reflect net appreciation and depreciation (occurring between the valuation date and the

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41. Sections 21113, 21114.

42. See *The Obsolete "Minimum Worth" Provision*, 16 CEB Est. Plan. & Cal. Prob. Rep. 60 (1994).

43. *Id.*

date of distribution) in all of the assets from which the distribution could have been made.”<sup>44</sup>

### **Change in Form of Securities**

The provisions applicable to a gift of securities that have changed form (e.g., by sale, merger, or reinvestment)<sup>45</sup> are based on Uniform Probate Code Section 2-605. The Uniform Probate Code has been revised to make clear that it applies regardless of whether the gift is characterized as general or specific. The Uniform Probate Code is also limited to gifts made by will, thus avoiding internal inconsistencies inherent in the California statute’s application to other instruments.<sup>46</sup> The Commission recommends that California law be conformed to the revised Uniform Probate Code, and limited in its application to at-death transfers generally.

### **Ademption**

Sections 21133–21135 provide rules for construing the donor’s intent where the donor has made a specific gift of property but the property is no longer part of the donor’s estate. This could occur because during the donor’s lifetime the specifically given property was sold, foreclosed on, replaced, disposed of as part of a conservatorship estate, delivered to the beneficiary, and the like. The existing California provisions are based on the pre-1990 version of the Uniform Probate Code.<sup>47</sup> Since then, the Uniform Probate

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44. See Treas. Reg. § 26.2642-2(b)(2) (1996) (valuation).

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. See, e.g., Neumann & Shore, *Outright Noncharitable Gifts*, in 1 California Will Drafting § 12.61, at 298-99 (Cal. Cont. Ed. Bar, 3d ed. 1992).

47. See McGovern, *supra* note 4, at 28-29.

Code has been revised to address problems that have been identified.

The California version of these provisions should be conformed to the Uniform Probate Code as revised, excluding its general presumption of nonademption of specific devises.<sup>48</sup> The proposed law would also fill a gap in the statute governing ademption by satisfaction — an inter vivos gift of property to the beneficiary named in the instrument is a satisfaction of that specific gift.

### **Changes to Property that Is the Subject of a Specific Gift**

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

### **Elimination of Redundant Provisions**

A number of the rules of construction expressed in the Probate Code are redundant and should be repealed, either because their substance is covered more adequately else-

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

49. Section 21136.

50. Section 21137.

51. Section 21138.

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

where<sup>53</sup> or because they merely restate the common law but fail to accurately capture its nuances.<sup>54</sup>

Other rules of construction appear in the Probate Code and are duplicated elsewhere.<sup>55</sup> These provisions should be consolidated in the Probate Code, so that practitioners and others may easily find all relevant rules of construction in one location.

### **Effective Dates**

As a general principle, the rules of construction apply retroactively to all instruments, regardless of their date of execution.<sup>56</sup> This is consistent with the purpose of rules of construction, which apply in circumstances where the intent of the maker of the instrument cannot be ascertained.<sup>57</sup> It is also consistent with the general approach of the Probate Code to apply new law except where it would create substantial injustice.<sup>58</sup>

Section 21140(b) creates an exception to retroactive application of the rules of construction in a case where Sections 1050-1054 would have applied to a decedent who died before January 1, 1985. This provision is no longer necessary. The statutes it refers to have relevance to very few cases,<sup>59</sup> and the likelihood of such an issue arising in the future with respect

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

54. See Section 2113 (afterborn member of class); McGovern, *supra* note 4, at 24.

55. Compare Civ. Code § 1071 and Prob. Code § 21112 (conditions referring to issue); Civ. Code § 1073 and Prob. Code § 1073 (common law doctrine of worthier title abolished).

56. Section 21140(a).

57. Section 21102. See also, McGovern, *supra* note 4, at 30-32.

58. Section 3.

59. Sections 1050-1054 dealt with the effect of an advancement to an heir in determining the heir's intestate share.

to a pre-1985 decedent is remote. In the interest of simplification of the law, the provision should be repealed.

### **Conforming Revisions**

When Sections 6140-6179 were renumbered in 1994 as Sections 21110-21140, the implementing legislation did not make conforming revisions in other statutes.<sup>60</sup> There remain a half-dozen cross references in the codes to the obsolete section numbers. Appropriate conforming revisions are included in this recommendation.<sup>61</sup>

### **Law Revision Commission Comments**

The basic rules of construction for wills were enacted in 1983<sup>62</sup> on recommendation of the Commission. As with all Commission-sponsored legislation, Comments accompanied the statutes, explaining their derivation and relation to other statutes and to case law, and providing aids to construction and other useful information.<sup>63</sup>

These statutes were in place for 10 years before they were generalized and relocated.<sup>64</sup> Because this task was not done on Commission recommendation, the Official Comments to these sections were lost in the process.

As part of the present study, the Commission has prepared new Comments for the rules of construction. The new Comments are based on the old Comments, with revisions to reflect changes made in the generalization and relocation pro-

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60. See 1994 Cal. Stat. ch. 806.

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

62. See Section 6140 *et seq.*, 1983 Cal. Stat. ch. 842.

63. 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).

64. See Sections 21101-21140.

cess, as well as to reflect changes proposed in this recommendation.



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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 at-death transfer), 21135 (ademption of at-death transfer by satisfaction). See also Section 45 (“instrument” defined).

**Prob. Code § 21102 (amended). 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.

*(c) Nothing in this section limits the use of extrinsic evidence, to the extent otherwise authorized by law, to determine the intention of the transferor.*

**Comment.** The amendment to subdivision (b) of Section 21102 is technical.

The 1994 enactment of Section 21102 extended 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.

Subdivision (c) is added to make clear the admissibility of extrinsic evidence under this section, including for the purpose of rebutting the presumed intention attributed to a transferor by a rule of construction. Subdivision (c) neither expands nor 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 e.g., *Estate of Russell*, 69 Cal. 2d 200, 215-16, 444 P.2d 353, 70 Cal. Rptr. 561 (1968). 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); *Estate of Guidotti*, 90 Cal. App. 4th 1403, 109 Cal. Rptr. 2d 674 (2001) (use of extrinsic evidence). See also Section 12206 (limitation in will of time for administration of estate is directory only). Likewise, 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.

Nothing in this section affects the law governing reformation of an instrument to effectuate the intention of the transferor in case of mistake or for other cause.

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

SEC. \_\_\_\_\_. Section 21103 of the Probate Code is amended to read:

21103. The meaning and legal effect of a disposition in an instrument ~~shall be~~ *is* determined by the local law of a particular state selected by the transferor in the instrument unless the application of that law is contrary to the rights of the surviving spouse to community and quasi-community property, to any other public policy of this state applicable to

the disposition, or, in the case of a will, to Part 3 (commencing with Section 6500) of Division 6.

**Comment.** The amendments to Section 21103 are technical. The 1994 enactment of Section 21103 extended former Section 6141 (wills) to trusts and other instruments. See also Section 21101 (application of part).

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

**Prob. Code § 21104 (amended). “At-death transfer” defined**

SEC. \_\_\_\_\_. Section 21104 of the Probate Code is amended to read:

21104. As used in this part, “~~testamentary gift~~” “*at-death transfer*” means a transfer ~~in possession or enjoyment that takes effect at or after death that is revocable during the lifetime of the transferor, but does not include a joint tenancy or joint account with right of survivorship.~~

**Comment.** Section 21104 is amended to replace the former definition of “testamentary gift.” As used in this part, an at-death transfer does not include an irrevocable lifetime transfer, such as an outright gift or an irrevocable trust. An at-death transfer does include a will and a revocable trust, as well as a pay-on-death account, “Totten” (or bank account) trust, beneficiary designation under an insurance policy or pension plan, and the like. An irrevocable beneficiary designation is usually subject to a survival requirement pursuant to the terms of its governing instrument for purposes of Section 21109 (requirement that transferee survive transferor).

The term is used in Sections 21109 (requirement that transferee survive transferor), 21110 (anti-lapse), 21117 (classification of at-death transfer), 21132 (change in form of securities), 21133 (proceeds of specific gift), and 21135 (ademption by satisfaction).

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

SEC. \_\_\_\_\_. Section 21105 of the Probate Code is amended to read:

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

**Comment.** The amendment to Section 21105 is technical. The 1994 enactment of Section 21105 continued former Section 6142.

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 the section limits the extent to which extrinsic evidence admissible under former law may be used to determine the testator's intent as expressed in the will. See Section 21102 (intention of transferor).

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

SEC. \_\_\_\_\_. Section 21106 of the Probate Code is repealed.

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

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

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

SEC. \_\_\_\_\_. Section 21107 of the Probate Code is amended to read:

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

**Comment.** The amendment to Section 21107 is technical. The 1994 enactment of Section 21107 extended former Section 6144 (wills) to trusts and other instruments. See also Section 21101 (application of part).

This section is declaratory of the common law doctrine of equitable conversion. See *In re Estate of Gracey*, 200 Cal. 482, 488-89, 253 P. 921 (1927). See generally 11 B. Witkin, Summary of California Law *Equity* §§163-66, at 842-47 (9th ed. 1990). Nothing in the 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 Witkin, *id.*; Section 21102 (intention of transferor).

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

SEC. \_\_\_\_\_. Section 21108 of the Probate Code is amended to read:

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

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

The 1994 enactment of Section 21108 extended former Section 6145 (wills) to trusts and other instruments. See also Sections 21101 (application of part), 21114 (class gift to heirs, next of kin, relatives, and the like). For background on this section, see *Recommendation and Study Relating to the Doctrine of Worthier Title*, 2 Cal. L. Revision Comm'n Reports D-1 (1959).

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

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

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

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

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

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

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

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

The at-death transfer provision of Section 21109 changes the traditional common law and California rule illustrated by *Randall v. Bank of America*, 48 Cal. App. 2d 249, 119 P.2d 754 (1941) (remainder interest in revocable trust held not divested by beneficiary’s failure to survive settlor; upon settlor’s death the trust property passed to deceased beneficiary’s estate). However, language of this section referring to survival “until a future time required by the instrument” does not change the result of other future interest cases that have generally refused to find an implied condition of survival where the instrument fails expressly to impose such a condition, such as *Estate of Stanford*, 49 Cal. 2d 120, 315 P.2d 681 (1957) (testamentary trust for A for life, remainder to A’s “children”; despite class gift form, remainder passed to estate of child who predeceased A), and *Estate of Ferry*, 55 Cal. 2d 776, 361 P.2d 900, 13 Cal. Rptr. 180 (1961) (even though the interest in question was subject to another condition precedent, court refused to find an implied condition of survival). See also Restatement (Second) of Property (Donative Transfers) § 27.3 (1987).

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

For a provision governing the administration and disposition of community property and quasi-community property where one spouse

does not survive the other, see Section 103. See also Sections 230-234 (proceeding to determine whether devisee survived testator).

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

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

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

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

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

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

In applying the provision of subdivision (b) relating to a substitute gift, care must be taken not to ascribe to the transferor too readily or too broadly an intention to override the antilapse statute, the purpose of which is to lessen the risk of serious oversight by the transferor. For example, by providing a substitute taker, the transferor may very well intend to override the antilapse statute in the ordinary case. If, however, the substitute taker has also predeceased the transferor, the transferor may have intended that the antilapse statute should apply to the first taker.

In addition to the limitations prescribed in subdivision (b), Section 21110 is also subject to the general principle that rules of construction such as this section do not apply if it is determined that the transferor intended a contrary result. See Section 21102 (intention of transferor).

Section 21110 does not make a substitute gift in the case of a class gift where a person otherwise answering the description of the class was dead when the instrument was executed and that fact was known to the transferor. It is consistent with *Estate of Steidl*, 89 Cal. App. 2d 488, 201 P.2d 58 (1948) (antilapse statute applied where class member died before testator but after execution of will).

Subdivision (c) makes the antilapse statute apply not only to kindred of the transferor but also to kindred of a surviving, deceased, or former spouse of the transferor. Thus, if the transferor were to make a transfer to a stepchild who predeceased the transferor, Section 21110 will make a substitute gift to issue of the predeceased stepchild. The term "kindred" was taken from former Section 92 (repealed by 1983 Cal. Stat. ch. 842, § 18) and refers to persons related by blood. *In re Estate of Sowash*, 62 Cal. App. 512, 516, 217 P. 123 (1923). In addition, an adoptee is generally kindred of the adoptive family and not of the natural relatives. See Section 21115 (halfbloods, adopted persons, persons born out of wedlock, stepchildren, and foster children, plus issue of such persons, as "kindred" or "issue"). See also *Estate of Goulart*, 222 Cal. App. 2d 808, 35 Cal. Rptr. 465 (1963).

As to when a transferee is treated as having predeceased the transferor, see Sections 220 (simultaneous death), 282 (effect of disclaimer), 250 (effect of feloniously and intentionally killing decedent), 6122 & 5600 (effect of dissolution of marriage), See also Sections 230-234 (proceeding to determine survival), 240 (manner of taking by representation).

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

SEC. \_\_\_\_\_. Section 21111 of the Probate Code is amended to read:

21111. ~~Except as provided in Section 21110:~~

~~(a) If a transfer, other than a residuary gift or a transfer of a future interest, (a) Except as provided in subdivision (b) and subject to Section 21110, if a transfer fails for any reason, the property is transferred as follows:~~

(1) If the transferring instrument provides for an alternative disposition in the event the transfer fails, the property is transferred according to the terms of the instrument.

(2) If the transferring instrument does not provide for an alternative disposition but does provide for the transfer of a residue, the property becomes a part of the residue transferred under the instrument.

(3) If the transferring instrument does not provide for an alternative disposition and does not provide for the transfer of a residue, *or if the transfer is itself a residuary gift*, the property is transferred to the decedent's estate.

(b) *If Subject to Section 21110, if a residuary gift or a future interest is transferred to two or more persons and the share of a transferee fails for any reason, and no alternative disposition is provided, the share passes to the other transferees in proportion to their other interest in the residuary gift or the future interest.*

*(c) A transfer of "all my estate" or words of similar import is a residuary gift for purposes of this section.*

*(d) If failure of a future interest results in an intestacy, the property passes to the heirs of the transferor determined pursuant to Section 21114.*

**Comment.** Section 21111 is amended to clarify the treatment of a failed residuary gift.

Under subdivision (a)(1), an alternative disposition may take the form of a transfer of specifically identifiable property (specific gift) or a transfer from general assets of the transferor (general gift) that includes the specific property.

The 1994 enactment of Section 21111 extended former Section 6148 (wills) to trusts and other instruments. See also Section 21101 (application of part). This section is drawn from Section 2-606 of the

Uniform Probate Code (1987). As to the construction of provisions drawn from uniform acts, see Section 2.

With respect to a residuary devise, subdivision (b) abolishes the “no residue of a residue” rule, illustrated by *Estate of Murphy*, 157 Cal. 63, 106 P. 230 (1910). It preserves the change made by former Section 6148 in the California case law rule that if the share of one of several residuary devisees fails, the share passed by intestacy. See, e.g., *Estate of Russell*, 69 Cal. 2d 200, 215-16, 444 P.2d 353, 70 Cal. Rptr. 561 (1968); *In re Estate of Kelleher*, 205 Cal. 757, 760-61, 272 P. 1060 (1928); *Estate of Anderson*, 166 Cal. App. 2d 39, 42, 332 P.2d 785 (1985).

For purposes of this section, a gift of “my estate” is a residuary gift rather than a general gift. Subdivision (c). In the case of a failed gift of a portion of an estate or residue, this section may be applied in appropriate circumstances so as to prevent an intestacy or a distorted disposition.

Where a failed gift is transferred to the decedent’s estate under this section, it will often result in an intestacy. *Cf.* Section 21114 (class gift to heirs, next of kin, relatives, and the like).

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

SEC. \_\_\_\_\_. Section 21112 of the Probate Code is amended to read:

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

**Comment.** The amendment to Section 21112 is technical. The 1994 enactment of Section 21112 extended former Section 6149 (wills) to trusts and other instruments. See also Section 21101 (application of part).

The section overrules California’s much criticized theory of indefinite failure of issue established by *In re Estate of Carothers*, 161 Cal. 588, 119 P. 926 (1911). See generally 12 B. Witkin, *Summary of California Law Wills and Probate* §§ 279-80, at 310-12 (9th ed. 1990). Section 6149 adopts the majority view of the Restatement of Property. See Witkin, *id.* § 280, at 310-12; Annot., 26 A.L.R.3d 407 (1969); Restatement of Property § 269 (1940). Under Section 21112, if the

transfer is “to *A* for life, remainder to *B* and *B*’s heirs, but if *B* dies without issue, then to *C*,” the transfer is read as meaning “if *B* dies before *A* without issue living at the death of *A*.” If *B* survives *A*, whether or not *B* then has living issue, *B* takes the transfer absolutely. If *B* predeceases *A* with issue then living but at the time of *A*’s subsequent death *B* does not have living issue, the transfer goes to *C*.

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

SEC. \_\_\_\_\_. Section 21113 of the Probate Code is repealed.

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

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

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

**Comment.** Section 21113 is repealed as unnecessary. It inadequately codified the common law “rule of convenience,” failing to include its common law exceptions. See Restatement (Second) of Property §§ 26.1-26.2 (1987).

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

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

~~21114. A transfer of a present or future interest to the transferor’s or another (a) If a statute or an instrument provides for transfer of a present or future interest to, or creates a present or future interest in, a designated person’s “heirs,” “heirs at law,” “next of kin,” “relatives,” or “family,” or to “the persons entitled thereto under the intestate succession laws,” or to persons described by words of similar import, is a transfer to those who would be the transferor’s or other designated person’s heirs, their identities and respective shares shall be determined as if the transferor or other~~

~~designated person were to die intestate at the time when the transfer is to take effect in enjoyment and according to the California statutes of intestate succession of property not acquired from a predeceased spouse in effect at that time words of similar import, the transfer is to the persons, including the state under Section 6800, and in the shares, that would succeed to the designated person's intestate estate under the intestate succession law of the designated person's domicile if the designated person died when the transfer is to take effect in enjoyment.~~ If the designated person's surviving spouse is living but is remarried at the time the transfer is to take effect in enjoyment, the surviving spouse is not an heir of the designated person for purposes of this section.

*(b) As used in this section, "designated person" includes the transferor.*

**Comment.** Section 21114 is amended to conform to Uniform Probate Code Section 2-711 (1993). The amendment clarifies a number of issues:

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

The 1994 enactment of Section 21114 extended former Section 6151 (wills) to trusts and other instruments. See also Section 21101 (application of part). The former section was drawn from Section 2514 of the Pennsylvania Consolidated Statutes, Title 20, and established a special rule for a class gift to an indefinite class such as the transferor's or another designated person's "heirs," "next of kin," "relative," "family," and the like. As Section 21114 applies to a transfer of a future interest, the section is consistent with Section 21109 in that Section 21114 establishes a constructional preference against early vesting. However, Section 21114 differs from Section 21109 in that one who does not survive until the future interest takes effect in enjoyment is not deemed a member of the indefinite class described in Section 21114 (such as "heirs"), is therefore not a "transferee" under the class gift, and no substitute gift will be made by the antilapse statute (Section 21110). If the transfer of a future interest is to a more definite class such as "children," one coming within that description who fails to survive until

the transfer takes effect in enjoyment does not take under the instrument (Section 21109) but may nonetheless be a “deceased transferee” under the antilapse statute (Section 21110) permitting substitution of the deceased transferee’s issue. See Sections 21109 & 21110 Comments. See also Section 21115(c)(3) (rules for determining persons who would be heirs of transferor or other person).

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

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

SEC. \_\_\_\_\_. Section 21115 of the Probate Code is amended to read:

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

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

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

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

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

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

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

**Comment.** Subdivision (d) is added to Section 21115 for consistency with the choice of law rules of Section 21114. The 1994 enactment of Section 21115 extended former Section 6152 (wills) to trusts and other instruments. See also Section 21101 (application of part).

Subdivision (a) is drawn from Section 2-611 of the Uniform Probate Code (1987). As to the construction of provisions drawn from uniform acts, see Section 2. To the extent that California cases had addressed the matter, subdivision (a) is consistent with prior California law. See 12 B. Witkin, *Summary of California Law Wills and Probate* §§ 287-90, at 320-23 (9th ed. 1990). For the rules for determining relationship and inheritance rights for purposes of intestate succession, see Sections 6406, 6408. Under some circumstances stepchildren and foster children are included in terms of class gift or relationship pursuant to the rules for intestate succession. See Section 6408 (when stepchild or foster child treated the same as adopted child).

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

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

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

SEC. \_\_\_\_\_. Section 21116 of the Probate Code is repealed.

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

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

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

SEC. \_\_\_\_\_. Section 21117 of the Probate Code is amended to read:

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

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

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

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

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

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

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

**Comment.** Section 21117 is amended to correct terminology. See Section 21104 (“at-death transfer” defined). The 1994 enactment of Section 21117 extended former Section 6154 (wills) to trusts and other instruments. See also Section 21101 (application of part).

For the priority that a demonstrative gift has over other general gifts and the priority that an annuity has over other general gifts, see Section 21403(b). See also *Recommendation Relating to Interest and Income During Administration*, 19 Cal. L. Revision Comm’n Reports 1019 (1988); *Comments to Conforming Revisions and Repeals*, 19 Cal. L. Revision Comm’n Reports 1031, 1089-90 (1988); *Communication from*

*the California Law Revision Commission Concerning Assembly Bill 2841*, 19 Cal. L. Revision Comm'n Reports 1201, 1228-29 (1988).

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

SEC. \_\_\_\_\_. Section 21118 of the Probate Code is amended to read:

21118. (a) If an instrument authorizes a fiduciary to satisfy a pecuniary gift wholly or partly by distribution of property other than money, property selected for that purpose shall be valued at its fair market value on the date of distribution, unless the instrument expressly provides otherwise. If the instrument permits the fiduciary to value the property selected for distribution as of a date other than the date of distribution, then, unless the instrument expressly provides otherwise, the property selected by the fiduciary for that purpose shall have ~~an aggregate fair market value on the date or dates of distribution that, when added to any cash distributed, will amount to no less than the amount of the pecuniary gift as stated in, or determined by, the instrument~~ *fairly reflect net appreciation and depreciation (occurring between the valuation date and the date of distribution) in all of the assets from which the distribution could have been made.*

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

**Comment.** Section 21118 is amended to incorporate the standard of Treasury Regulations Section 26.2642-2(b)(2) (1996) (valuation).

## CHAPTER 2. ASCERTAINING THE MEANING OF LANGUAGE USED IN THE INSTRUMENT

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

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

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

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

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

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

SEC. \_\_\_\_\_. Section 21121 of the Probate Code is amended to read:

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

**Comment.** The amendment to Section 21121 is technical. The 1994 enactment of Section 21121 extended former Section 6161 (wills) to trusts and other instruments. See also Section 21101 (application of part).

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

SEC. \_\_\_\_\_. Section 21122 of the Probate Code is amended to read:

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

**Comment.** The amendment to Section 21122 is technical. The 1994 enactment of Section 21122 extended former Section 6162 (wills) to trusts and other instruments. See also Section 21101 (application of part).

### CHAPTER 3. EXONERATION AND ADEMPMENT

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

SEC. \_\_\_\_\_. Section 21131 of the Probate Code is amended to read:

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

**Comment.** The amendment to Section 21131 is technical. See Section 45 (“instrument” defined). The 1994 enactment of Section 21131 extended former Section 6170 (wills) to trusts and other instruments. See also Section 21101 (application of part). See also Section 21117(a) (“specific gift” defined).

This section expands the rule stated in Section 2-609 of the Uniform Probate Code (1987) to cover any lien. This expansion makes Section 21131 consistent with Section 21404. As to the construction of provisions drawn from uniform acts, see Section 2. Former Section 6170

reversed the prior California case law rule that, in the absence of an expressed intention of the testator to the contrary, if the debt which encumbers the devised property is one for which the testator was personally liable, the devisee was entitled to “exoneration,” that is, to receive the property free of the encumbrance by having the debt paid out of other assets of the estate. See 12 B. Witkin, *Summary of California Law Wills and Probate* § 624, at 654-55 (9th ed. 1990). The rule stated in Section 21131 applies in the absence of a contrary intention of the transferor. See Section 21102. See also Sections 32 (“devise” means a disposition of real or personal property by will), 62 (“property” defined).

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

SEC. \_\_\_\_\_. Section 21132 of the Probate Code is repealed.

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

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

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

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

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

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

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

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

SEC. \_\_\_\_\_. Section 21132 is added to the Probate Code, to read:

21132. (a) If a transferor executes an instrument that makes an at-death transfer of securities and the transferor then owned securities that meet the description in the instrument, the transfer includes additional securities owned by the transferor at death to the extent the additional securities were acquired by the transferor after the instrument was executed as a result of the transferor's ownership of the described securities and are securities of any of the following types:

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

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

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

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

**Comment.** New Section 21132 supersedes former Section 21132 (change in form of securities). The 1994 enactment of Section 21132 extended former Section 6171 (wills) to other at-death transfers. See also Section 21101 (application of part). The new section is based on Uniform Probate Code Section 2-605 (1990); the former section was based on Uniform Probate Code Section 2-605 (1987). As to the construction of provisions drawn from uniform acts, see Section 2.

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

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

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

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

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

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

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

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

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

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

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

Section 21133 is amended for conformity with Uniform Probate Code Section 2-606(a) (1990). (Section 21133 is based on former Uniform Probate Code Section 2-608(a) (1987), which is superseded by Uniform

Probate Code Section 2-606(a) (1990).) As to the construction of provisions drawn from uniform acts, see Section 2.

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

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

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

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

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

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

(c) *This For the purpose of the references in this section to a conservator, this section does not apply if, after the sale, mortgage, condemnation, fire, or casualty, or recovery, the*

conservatorship is terminated and the transferor survives the termination by one year.

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

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

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

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

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

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

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

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

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

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

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

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

(4) *The property given is the subject of a specific gift of that property to that person.*

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

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

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

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

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

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

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

SEC. \_\_\_\_\_. Section 21136 of the Probate Code is repealed.

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

**Comment.** Section 21136 is not continued. The matter is governed by case law. See, e.g., 12 B. Witkin, *Summary of California Law Wills and Probate* § 314 *et seq.*, at 347-50 (9th ed. 1990).

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

SEC. \_\_\_\_\_. Section 21137 of the Probate Code is repealed.

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

**Comment.** Section 21137 is not continued. The matter is governed by case law. See, e.g., 12 B. Witkin, *Summary of California Law Wills and Probate* § 314 *et seq.*, at 347-50 (9th ed. 1990).

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

SEC. \_\_\_\_\_. Section 21138 of the Probate Code is repealed.

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

**Comment.** Section 21138 is not continued. The matter is governed by case law. See, e.g., 12 B. Witkin, *Summary of California Law Wills and Probate* § 314 *et seq.*, at 347-50 (9th ed. 1990).

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

SEC. \_\_\_\_\_. Section 21139 of the Probate Code is amended to read:

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

**Comment.** The 1994 enactment of Section 21139 extended former Section 6178 (wills) to trusts and other instruments. See also Section 21101 (application of part). Section 21139 is amended to reflect repeal of Sections 21136-21138.

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

## CHAPTER 4. EFFECTIVE DATES

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

SEC. \_\_\_\_\_. Section 21140 of the Probate Code is amended to read:

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

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

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

## CONFORMING REVISIONS

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

SEC. \_\_\_\_\_. Section 1071 of the Civil Code is repealed.

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

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

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

SEC. \_\_\_\_\_. Section 1073 of the Civil Code is repealed.

~~1073. The law of this State does not include (1) the common law rule of worthier title that a grantor cannot convey an interest to his own heirs or (2) a presumption or rule of interpretation that a grantor does not intend, by a grant to his own heirs or next of kin, to transfer an interest to them. The meaning of a grant of a legal or equitable interest to a grantor's own heirs or next of kin, however designated, shall~~

~~be determined by the general rules applicable to the interpretation of grants. This section shall be applied in all cases in which final judgment has not been entered on its effective date.~~

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

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

SEC. \_\_\_\_\_. Section 221 of the Probate Code is amended to read:

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

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

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

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

SEC. \_\_\_\_\_. Section 230 of the Probate Code is amended to read:

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

(a) To determine for the purposes of Section 103, 220, 222, 223, 224, ~~6146, 6147~~, 6211, 6242, 6243, ~~6244~~, or 6403,

21109, 21110, or other provision of this code whether one person survived another.

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

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

(d) To determine for the purposes of Section ~~21374~~ 21509 of the Government Code whether a person has survived in order to receive money payable under the system.

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

**Comment.** Section 230 is amended to correct cross-references. References to former provisions that have been repealed are replaced by references to the provisions, if any, that have superseded them. Subdivision (e), relating to determinations under the former Uniform Simultaneous Death Act, is repealed as obsolete.

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

SEC. \_\_\_\_\_. Section 250 of the Probate Code is amended to read:

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

(1) Any property, interest, or benefit under a will of the decedent, or a trust created by or for the benefit of the decedent or in which the decedent has an interest, including any general or special power of appointment conferred by the will or trust on the killer and any nomination of the killer as executor, trustee, guardian, or conservator or custodian made by the will or trust.

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

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

(4) Any property of the decedent under Part 5 (commencing with Section 5700) of Division 5.

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

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

(1) The property interest or benefit referred to in paragraph (1) of subdivision (a) passes as if the killer had predeceased the decedent and Section 21110 does not apply.

(2) Any property interest or benefit referred to in paragraph (1) of subdivision (a) which passes under a power of appointment and by reason of the death of the decedent passes as if the killer had predeceased the decedent, and Section 1389.4 of the Civil Code 673 does not apply.

(3) Any nomination in a will or trust of the killer as executor, trustee, guardian, conservator, or custodian which becomes effective as a result of the death of the decedent shall be interpreted as if the killer had predeceased the decedent.

**Comment.** Section 250 is amended to correct a cross-reference.

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

SEC. \_\_\_\_\_. Section 6103 of the Probate Code is amended to read:

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

January 1, 1985, continues to apply where the testator died before January 1, 1985.

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

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

SEC. \_\_\_\_\_. Section 6205 of the Probate Code is amended to read:

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

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

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

SEC. \_\_\_\_\_. Section 6409 of the Probate Code is amended to read:

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

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

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

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

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

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

**Comment.** Section 6409 is amended for conformity with Section 21135. It is consistent with Uniform Probate Code Section 2-109 (1990).

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

SEC. \_\_\_\_\_. Section 11640 of the Probate Code is amended to read:

11640. (a) When all debts have been paid or adequately provided for, or if the estate is insolvent, and the estate is in a condition to be closed, the personal representative shall file a petition for, and the court shall make, an order for final distribution of the estate.

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

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

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

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