

TEXT OF COMMENTS TO SECTIONS AFFECTED BY  
2002 COMMISSION RECOMMENDATIONS: PART A

**CLRC Staff Note.** This document, the first of two parts, sets out the text of Official Comments to five Commission-sponsored bills enacted in the 2002 legislative session — 2002 Cal. Stat. chs. 68, 71, 72, 94, and 138. The source for each Comment is given in the accompanying Table of “Sections Affected by 2002 Commission Legislation: Part A.”

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## CIVIL CODE

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 Code § 1071 (repealed).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

**Comment.** Section 1071 is repealed as unnecessary.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

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 Code § 1073 (repealed).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

**Comment.** Section 1073 is repealed as unnecessary.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

## CODE OF CIVIL PROCEDURE

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### **Code Civ. Proc. § 269 (amended). Reporting of cases**

**Comment.** Subdivision (a) of Section 269 is amended to:

(1) Continue former Section 274c without substantive change.

(2) Refer to official reporters pro tempore, as well as official reporters. This is not a substantive change. See Gov't Code § 69941 (appointment of official reporter and official reporter pro tempore).

(3) Substitute “arguments of the attorneys” for “arguments of the prosecuting attorney,” consistent with standard practice. See, e.g., Gov't Code § 72194.5 (“arguments of the attorneys”).

(4) Substitute “prosecution” for “district attorney,” to reflect that the Attorney General sometimes acts as prosecutor in place of the district attorney. See Gov't Code § 12553 (disqualification of district attorney); see also Penal Code § 1424 (motion to disqualify district attorney).

(5) Make clear that it requires shorthand reporting regardless of whether a proceeding is conducted by a judge or by another type of judicial officer (e.g., a commissioner). For an exception to this rule, see Gov't Code § 70141.11 (court reporting for Contra Costa County commissioner).

(6) Make clear that a felony defendant, whether represented by counsel or in pro per, is entitled to a court reporter on request by the defendant personally or by the defendant's attorney (if any). This is not a substantive change. See generally *People v. Turner*, 67 Cal. App. 4th 1258, 1266, 79 Cal. Rptr. 2d 740 (1998) (“verbatim record is implicitly among the rights of which a defendant appearing in propria persona must be apprised”); *Andrus v. Municipal Court*, 143 Cal. App. 3d 1041, 1050, 192 Cal. Rptr. 341 (1983) (California confers right to free verbatim record “in felony proceedings by statute (Code Civ. Proc., § 269.)”); *In re Armstrong*, 126 Cal. App. 3d 565, 572, 178 Cal. Rptr. 902 (1981) (felony defendant “is, as a matter of right, entitled to have ‘taken down,’ all related testimony and oral proceedings”) (emphasis in original); *People v. Goudeau*, 8 Cal. App. 3d 275, 279-80, 87 Cal. Rptr. 424 (1970) (“In California felony proceedings a court reporter must be present if requested by the defendant, the district attorney, or on order of the court. (Code Civ. Proc., § 269.)”); *People v. Hollander*, 194 Cal. App. 2d 386, 391-93, 14 Cal. Rptr. 917 (1961) (denial of transcript to pro per indigent defendant was prejudicial error).

Subdivision (b) is amended to make clear that a nonparty is generally entitled to request preparation of a transcript. This is consistent with longstanding practice and conforms to constitutional constraints. See, e.g., *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (media request for transcript of preliminary hearing); *Fisher v. King*, 232 F.3d 391, 397 (4th Cir. 2000) (general public and press “enjoy a qualified right of access under the First Amendment to criminal proceedings *and the transcripts thereof*”) (emphasis added); *United States v. Antar*, 38 F.3d 1348, 1360-61 (3d Cir. 1994) (“First Amendment right of access must extend equally to transcripts as to live proceedings”); *United States v. Berger*, 990 F. Supp. 1054, 1057 (C.D. Ill.

1998) (“There is no question that a written transcript of the Governor’s deposition would be made available to the public upon the admission of his testimony before the jury.”); *State ex rel. Scripps Howard Broadcasting Co. v. Cuyahoga County Court of Common Pleas*, 73 Ohio St. 3d 19, 21, 652 N.E.2d 179 (1995) (right of access “includes both the live proceedings and the transcripts which document those proceedings”); see also *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 20 Cal. 4th 1178, 980 P.2d 337, 86 Cal. Rptr. 2d 778 (1999) (constitutional right of access applies to civil as well as criminal cases). A nonparty is entitled to a transcript of (1) a proceeding that was open to the public, see *Scripps Howard Broadcasting*, 73 Ohio St. 3d at 21; (2) a proceeding that was erroneously closed to the public, see generally *Press-Enterprise*, 478 U.S. at 15; and (3) a proceeding that was properly closed, once “the competing interests precipitating closure are no longer viable,” see *Phoenix Newspapers, Inc. v. United States Dist. Court*, 156 F.3d 940, 947-48 (9th Cir. 1998).

Subdivision (b) is also amended to refer to official reporters pro tempore, as well as official reporters.

Former subdivision (c) is continued in Section 271 without substantive change.

The other revisions in Section 269 are technical, nonsubstantive changes.

#### **Code Civ. Proc. § 271 (added). Computer-readable transcripts**

**Comment.** Section 271 continues former Section 269(c) without change, except to insert subdivisions, refer to official reporters pro tempore as well as official reporters, make clear that a computer-readable version of a transcript is available only where a person is entitled to a hard-copy version, and clarify how the provision applies where a transcript is corrected. These revisions are nonsubstantive. See Gov’t Code § 69941 (appointment of official reporter and official reporter pro tempore).

#### **Code Civ. Proc. § 274c (repealed). Reporting of limited civil cases and misdemeanor and infraction cases**

**Comment.** Former Section 274c is continued in Section 269(a) without substantive change.

#### **Code Civ. Proc. § 512.060 (amended). Issuance of writ of possession**

**Comment.** Subdivision (a)(2) of Section 512.060 is amended to recognize that an undertaking is not required in certain cases. See Section 515.010.

#### **Code Civ. Proc. § 514.020 (amended). Service of writ of possession**

**Comment.** Subdivision (a) of Section 514.020 is amended to recognize that an undertaking is not required in certain cases. See Section 515.010. A copy of the order for issuance of the writ is included so that the person served will receive the necessary information in cases where there is no undertaking.

The amendments in subdivision (b) are technical, nonsubstantive revisions to eliminate surplus language.

#### **Code Civ. Proc. § 515.010 (amended). Plaintiff’s undertaking**

**Comment.** Subdivision (b) is added to Section 515.010 to dispense with the plaintiff’s undertaking where the defendant has no interest in the property. This provision avoids the idle act of requiring an undertaking in the amount of zero dollars. Where there is no plaintiff’s undertaking, the last clause of subdivision (b) makes clear that the court must set an amount of the defendant’s undertaking to retain or regain possession under Section 515.020 sufficient to pay costs and damages the plaintiff may sustain by reason of the loss of possession of the property. See Section 515.020(b).

**Code Civ. Proc. § 515.020 (amended). Defendant’s undertaking**

**Comment.** Subdivision (a) of Section 515.020 is amended to recognize that the amount of the defendant’s undertaking may be set by the court pursuant to Section 515.010(b). The section is retabulated to permit easy reference to the contents of the undertaking. See Section 515.010(b).

**Code Civ. Proc. § 703.580 (amended). Hearing and order on exemption claim**

**Comment.** Subdivision (f) is added to Section 703.580 to govern the disposition of property where the matter is not determined within the 20-day statutory time limit, such as where the hearing on the exemption claim has been taken off calendar or for any other reason.

**Code Civ. Proc. § 703.610 (amended). Disposition of property during pendency of proceedings**

**Comment.** Subdivision (a) of Section 703.610 is amended to recognize other exceptions to the levying officer’s duty to hold the property that is subject to an exemption claim.

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EDUCATION CODE

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**Educ. Code § 41325 (technical amendment). Legislative intent concerning school district insolvency**

**Comment.** Subdivision (b)(1) of Section 41325 is amended to reflect the repeal of the former Bankruptcy Act and enactment of the Bankruptcy Code in 1978.

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EVIDENCE CODE

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**Evid. Code § 912 (amended). Waiver**

**Comment.** Section 912 is amended to make clear that it applies to the privilege for confidential communications between a domestic violence victim and counselor, which did not exist when the statute was originally enacted in 1965. See Sections 1037-1037.7 (domestic violence victim).

**Evid. Code § 917 (amended). Presumption of confidentiality**

**Comment.** Subdivision (a) of Section 917 is amended to make clear that it also applies to confidential communication privileges created after its original enactment in 1965. See Sections 1035-1036.2 (sexual assault victim), 1037-1037.7 (domestic violence victim). The presumption set forth in subdivision (a) applies regardless of how a communication is transmitted. In each instance, the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential.

Subdivision (b) is drawn from New York law (N.Y. C.P.L.R. 4548 (McKinney 2001)) and from language formerly found in Section 952 relating to confidentiality of an electronic communication between a client and a lawyer. For waiver of privileges, see Section 912 & Comment.

Under subdivision (c), the definition of “electronic” is broad, including any “intangible media which are technologically capable of storing, transmitting and reproducing information in human perceivable form.” Unif. Electronic Transactions Act, § 2 comment (1999) (enacted as Civ. Code § 1633.2).

For discussion of ethical considerations where a lawyer communicates with a client by electronic means, see Bus. & Prof. Code § 6068(e) (attorney has duty to “maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client”); ABA Standing Committee on Ethics & Professional Responsibility, Formal Op. 99-413 (“Protecting the Confidentiality of Unencrypted E-Mail”); ABA Standing Committee on Ethics & Professional Responsibility, Formal Op. 92-368 (“Inadvertent Disclosure of Confidential Materials”).

For examples of provisions on the admissibility of electronic communications, see Evid. Code §§ 1521 & Comment (Secondary Evidence Rule), 1552 (printed representation of computer information or computer program), 1553 (printed representation of images stored on video or digital medium); Civ. Code § 1633.13 (“In a proceeding, evidence of a record or signature may not be excluded solely because it is in electronic form.”). See also *People v. Martinez*, 22 Cal. 4th 106, 990 P.2d 563, 91 Cal. Rptr. 2d 687 (2000); *People v. Hernandez*, 55 Cal. App. 4th 225, 63 Cal. Rptr. 2d 769 (1997); *Aguimatang v. California State Lottery*, 234 Cal. App. 3d 769, 286 Cal. Rptr. 57 (1991); *People v. Lugashi*, 205 Cal. App. 3d 632, 252 Cal. Rptr. 434 (1988).

**Evid. Code § 952 (amended). “Confidential communication between client and lawyer” defined**

**Comment.** Section 952 is amended to delete the last sentence concerning confidentiality of electronic communications, because this rule is generalized in Section 917(b)-(c) applicable to all confidential communication privileges.

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## GOVERNMENT CODE

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**Gov’t Code § 43739 (repealed). Authorization for municipal bankruptcy**

**Comment.** Former Section 43739 is superseded by Section 53760. The substance of the grant of authority to file for municipal bankruptcy provided in the first sentence of this section is continued in new Section 53760. The reference to the ability of a city to refund indebtedness is not continued because it is unnecessary. Section 53760 provides the broadest possible state authorization for municipal bankruptcy filings. See Section 53760 Comment.

The second sentence is not continued because it is unnecessary. Section 43720 provides the scope of this article and does not exclude its application in bankruptcy proceedings. Whether or not debt is refunded pursuant to this article should be determined in the bankruptcy proceedings.

**Gov’t Code § 53760 (repealed). Authorization for municipal bankruptcy**

**Comment.** Former Section 53760 is superseded by a new Section 53760. The substance of the grant of authority to file for municipal bankruptcy provided in this section is continued in new Section 53760, which modernizes references to federal bankruptcy law. The Bankruptcy Act sections listed in former Section 53760 were repealed in 1978. See Bankruptcy Reform Act of 1978, Pub. L. No. 95-598. The “taxing agency or instrumentality” phrase was drawn from the predecessor Bankruptcy Act of 1898, as amended in 1937. This language has been replaced by the more general term “municipality” in the Bankruptcy Code. See 11 U.S.C. § 101(40) (Westlaw 2001), as amended by the Bankruptcy Reform Act of 1994. To the extent that former Section 53760 could be interpreted in a more limited fashion (*cf. In re County of Orange*, 183 B.R. 594, 605 (Bankr. C.D. Cal. 1995)), that limitation is not continued in new Section 53760.

**Gov’t Code § 53760 (added). Authorization for municipal bankruptcy**

**Comment.** Section 53760 supersedes former Sections 43739 (city bankruptcy), 53760 (taxing agency or instrumentality bankruptcy), and 53761 (state consent). The former sections contained obsolete references to repealed federal bankruptcy law. This section is intended to provide the broadest possible state authorization for municipal bankruptcy proceedings, and thus provides the specific state law authorization for municipal bankruptcy filing required under federal law. See 11 U.S.C. § 109(c)(2) (Westlaw 2001).

As recognized in the introductory clause of subdivision (a), this broad grant of authority is subject to specific limitations provided by statute. See, e.g., Ins. Code § 10089.21 (California Earthquake Authority precluded from resort to bankruptcy); Sts. & Hy. Code § 9011 (prerequisites to bankruptcy filing under Improvement Bond Act of 1915). See also Educ. Code § 41325 (control of insolvent school district by Superintendent of Public Instruction); Health & Safety Code § 129173 (health care district trusteeship).

**Gov't Code § 53761 (repealed). Consent to bankruptcy**

**Comment.** Former Section 53761 is superseded by Section 53760. The substance of the consent to file for municipal bankruptcy provided in this section is continued in new Section 53760, which modernizes references to federal bankruptcy law. The Bankruptcy Act sections listed in former Section 53760 were repealed in 1978. See Bankruptcy Reform Act of 1978, Pub. L. No. 95-598. To the extent that former Section 53761 could be interpreted to provide a more limited scope than federal law, that limitation is not continued.

**Gov't Code § 59125 (amended). Special Assessment and Bond Refunding Law of 1939**

**Comment.** Section 59125 is amended for consistency with the general authorization for municipal bankruptcy provided in Section 53760. See Section 53760 Comment. This is a technical, nonsubstantive revision.

**Gov't Code § 69950 (amended). Transcription fee**

**Comment.** Section 69950 is amended to conform to the rule that a nonparty is generally entitled to obtain a transcript. See Code Civ. Proc. § 269 & Comment.

The section is also amended to reflect changes in technology. When the provision was first enacted, carbon paper was still in use and it was routine to create a copy at the same time as the original. Now the original typically is made first, then copied.

The section is further amended to specify the fee where the person who purchases the original subsequently (as opposed to simultaneously) purchases a copy.

**Gov't Code § 72197 (repealed). Duties on assignment to municipal court**

**Comment.** Section 72197 is repealed to reflect unification of the municipal and superior courts pursuant to Article VI, Section 5(e), of the California Constitution.

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PENAL CODE

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**Penal Code § 190.9 (amended). Record in death penalty cases**

**Comment.** Subdivision (a) of Section 190.9 is amended to reflect unification of the municipal and superior courts pursuant to Article VI, Section 5(e), of the California Constitution.

Subdivision (a) is also amended to make clear that the clerk of the superior court is responsible for ordering transcription and preparation of the record in a death penalty case.

Subdivision (c) is amended to correct a cross-reference. The substance of former Code of Civil Procedure Section 269(c) is continued in Code of Civil Procedure Section 271.

**Penal Code § 1539 (amended). Transcript of special hearing**

**Comment.** Section 1539 is amended to make clear that it applies only to a special hearing in a felony case pursuant to Section 1538.5. This implements the principle that trial court unification did not change the extent to which court reporter services or electronic reporting is used in the courts. 1998 Cal. Stat. ch. 931, § 507; *Trial Court Unification: Revision of Codes*, 28 Cal. L. Revision Comm'n Reports 51, 60 (1998); see also 1997 Cal. Stat. ch. 279, § 3 (former Section 1538.5(g), (i)).

As before unification, Section 1539 does not address whether shorthand or other verbatim reporting is required at a special hearing in a misdemeanor case pursuant to the state or federal Constitution or some other provision of law. For cases relating to the extent to which a defendant may be constitutionally entitled to a verbatim record at public expense in a misdemeanor case, see *Ryan v. Commission on Judicial Performance*, 45 Cal. 3d 518, 541-42, 754 P.2d 724, 247 Cal. Rptr. 378 (1988); *Andrus v. Municipal Court*, 143 Cal. App. 3d 1041, 1049-56, 192 Cal. Rptr. 341 (1983); *In re Armstrong*, 126 Cal. App. 3d 565, 178 Cal. Rptr. 902 (1981).

Section 1539 is also amended to reflect elimination of the county clerk's role as ex officio clerk of the superior court. See former Gov't Code § 26800 (county clerk acting as clerk of superior court). The powers, duties, and responsibilities formerly exercised by the county clerk as ex officio clerk of the court are delegated to the court administrative or executive officer, and the county clerk is relieved of those powers, duties, and responsibilities. See Gov't Code §§ 69840 (powers, duties, and responsibilities of clerk of court), 71620 (trial court personnel).

## PROBATE CODE

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

**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**

**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**

**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"**

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

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

**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**

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

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

**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**

**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**

**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**

**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**

**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**

**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**

**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**

**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**

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

Former subdivision (b) is 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**

**Comment.** Subdivision (b) of Section 21110 is amended 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.

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**

**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”**

**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**

**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). Repeal of this section does not reject existing law on this subject, but is intended to eliminate any implication that the section is a complete statement of the existing law.

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

**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 transferor'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**

**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**

**Comment.** Section 21116 is not continued. It codified a presumption in favor of early vesting that is overbroad and inconsistent with the rule of deferred vesting applicable in some circumstances. See, e.g., Section 21114 (class gift to heirs, next of kin, relatives, and the like). Repeal of this section does not reject existing law on this subject, but is intended to eliminate any implication that the section is a complete statement of the existing law.

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

**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**

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

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

**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**

**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**

**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).

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

**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**

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

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

**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**

**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**

**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 21133-21135 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.

It should be noted that the presumption provided in subdivision (d) applies only 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.

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

**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**

**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). Repeal of this section does not reject existing law on this subject, but is intended to eliminate any implication that the section is a complete statement of the existing law.

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

**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). Repeal of this section does not reject existing law on this subject, but is intended to eliminate any implication that the section is a complete statement of the existing law.

**Prob. Code § 21138 (repealed). Act of transferor altering transferor’s interest in specifically devised 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). Repeal of this section does not reject existing law on this subject, but is intended to eliminate any implication that the section is a complete statement of the existing law.

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

**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.

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

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

## WATER CODE

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**Water Code § 24767 (amended). Irrigation districts, condition of modification plan**

**Comment.** Subdivision (b) of Section 24767 is amended to generalize the reference to federal bankruptcy law, in recognition of the repeal of the former Bankruptcy Act and enactment of the Bankruptcy Code. The limitation on the effectiveness of a bankruptcy court decree — requiring that it be made by a district court — is deleted.

**Water Code § 25115 (amended). Irrigation districts, approval of bondholders**

**Comment.** Subdivision (b) of Section 25115 is amended to generalize the reference to federal bankruptcy law, in recognition of the repeal of the former Bankruptcy Act and enactment of the Bankruptcy Code, and to conform to language used in federal law. The limitations on the effectiveness of a bankruptcy court order — requiring that it be made by a district court and that it



provide that it is binding on affected persons — are deleted. The content and effect of an order in bankruptcy are determined by federal law.

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