#L-625 7/1/82

Sixth Supplement to Memorandum 82-70

Subject: Study L-625 - Probate Code (Tentative Recommendation--Wills Generally §§ 200.010-204.470)

Attached is the first portion of Part 1 of Division 2 relating to wills.

This material presents a policy issue that should be considered by the Commission. The Uniform Probate Code includes rules of construction and these rules are included in the recommended legislation. In addition, the recommended legislation includes a number of provisions taken from the existing California Probate Code that are not included in the Uniform Probate Code.

Section 204.010 of the recommended legislation (drawn from Section 2-603 of the Uniform Probate Code) provides that the intention of the testator as expressed in the will controls the legal effect of the provisions of and dispositions in the will. The section further provides that the rules of construction expressed in the chapter (which relates to interpretation of wills) apply unless a contrary intention is indicated by the will. The staff believes that this section--which provides that the intent expressed in the will determines the legal effect of the will--is a better standard than the provisions of the Probate Code that are continued in the following sections of the recommended legislation:

§ 204.310. Every expression given some effect; intestacy avoided
§ 204.320. Construction of will as a whole
§ 204.340. Words taken in ordinary and grammatical sense; technical words
§ 204.350. Words referring to death or survivorship
§ 204.090. Scope of disposition to a class; afterborn child (the afterborn child portion of this section appears to be merely an application of the general rule stated in Section 220.080; the remainder of the section is unnecessary)

Other provisions are of doubtful value. These provisions include:

§ 204.100. Vesting
§ 204.210. Conditional disposition defined

Other provisions that may have some value but are not included in the Uniform Probate Code include:

§ 204.120. Direction in will for conversion of real property
§ 204.130. Death of devisee of limited interest

§ 204.220. Condition precedent defined; construction and operation
§ 204.230. Condition subsequent defined; operation
§ 204.330. Clear and distinct devise
§ 204.450. Contract for sale or transfer of specifically devised property
§ 204.460. Testator placing charge of encumbrance on specifically devised property
§ 204.470. Act of testator altering testator's interest in specifically devised property

Respectfully submitted,

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Execution of Wills

Formal Requirements

California law provides for both witnessed and unwitnessed (holographic) wills.[1] The basic requirements for execution of a witnessed will are that it be in writing, signed by the testator, and witnessed by two witnesses.[2] In addition to these basic requirements, California law also imposes a ritual: The testator must gather both witnesses together at the same time, must declare to them that the document to be signed is his or her will, must sign at the end and request them to sign, and they must sign at the end.[3]

The execution ceremony adds little to the basic requirements that a will be in writing, signed, and witnessed. In most cases there is no reasonable doubt about the testator's intent and no suspicion of fraud.[4] The technical requirements simply make it more difficult to execute a will and operate to invalidate an otherwise valid will for failure to strictly comply with the formalities.

For purposes of ensuring testamentary intent and preventing fraud, it should be sufficient that the testator either signs the will in the presence of a witness or tells the witness that the will is the testator's or that the signature is the testator's. It should be unnecessary that this be done in the presence of both witnesses or that all signatures be affixed at the same time or at the end of the will.

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1. The proposed law continues the existing provision relating to holographic wills (Prob. Code § 53) without substantive change. California also has statutory provisions governing international wills (Prob. Code §§ 60-60.8) and California statutory wills (Prob. Code §§ 56-56.14). The proposed law continues the provisions relating to international wills without substantive change. The provisions relating to California statutory wills are continued with conforming and technical revisions. See discussion under "California Statutory Will," infra.

2. Prob. Code § 50.

3. Although each witness must sign the will in the testator's presence, the witnesses need not necessarily sign in the presence of each other. In re Estate of Dow, 181 Cal. 106, 183 P. 794 (1919); In re Estate of Armstrong, 8 Cal.2d 204, 209, 64 P.2d 1093 (1937); In re Estate of Miner, 105 Cal. App. 593, 595, 288 P. 120 (1930).

4. Niles, Probate Reform in California, 31 Hastings L.J. 185, 210 (1979).

The proposed law eliminates these execution formalities to simplify California law and improve the likelihood that a document actually intended as the testator's will is valid. This makes California law uniform with other jurisdictions that have adopted the Uniform Probate Code,[5] which likewise omits needless execution formalities that have the effect of invalidating wills.[6]

Interested Witness

Under existing law, a subscribing witness is disqualified from taking under the will unless there are two other disinterested subscribing witnesses.[1] This rule has not succeeded in preventing fraud or undue influence, and in most cases of undue influence the influencer is careful not to sign as a witness.[2] The disqualification of a subscribing witness from taking under the will too often penalizes the innocent member of the testator's family who witnesses a home-drawn will.

Under the proposed law, an interested person is permitted to witness the will without forfeiting any benefits under the will.[3] A substantial gift by will to a witness would, however, be a suspicious circumstance that could be challenged on grounds of undue influence. The extent to which a witness is interested should go to the credibility of the witness without requiring an automatic forfeiture of benefits under the will.[4]

One concern with this approach is that when considered along with the relaxation of execution formalities it could provide increased

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5. Uniform Probate Code § 2-502.

6. The relaxed Uniform Probate Code approach to execution of wills represents the overwhelming weight of modern judicial and scholarly opinion. See Niles, Probate Reform in California, 31 Hastings L.J. 185, 210 (1979).

1. Prob. Code § 51. If the interested witness would be entitled to an intestate share of the estate if the will were not established, the disqualification is limited so that the interested witness may take the lesser of (1) the amount provided in the will or (2) the intestate share. It should be noted that under California law the fact that a subscribing witness is "interested" does not invalidate the will. See Estate of Tkachuk, 73 Cal. App.3d 14, 17-20, 139 Cal. Rptr. 55 (1977).

2. Comment to Uniform Probate Code § 2-505.

3. This is the approach of Uniform Probate Code § 2-505.

4. Niles, Probate Reform in California, 31 Hastings L.J. 185, 210 (1977).

opportunities for fraud or undue influence to be exercised on the testator.[5] However, no reason appears why will contestants would be less able to bring all salient facts to the court's attention under this approach than under existing rules.[6]

Choice of law

If a will is executed outside California and is offered for probate in California, the will is valid if it was executed according to the law of any of the following states:[1] (1) California; (2) the state where the will was executed; (3) the state where the testator was domiciled on the date the will was executed; or (4) the state where the testator was domiciled at the time of death. However, if a will is executed in California and is offered for probate in California, the will is valid only if it is executed in accordance with California law, even though the testator may have been domiciled in another state at the time of execution and the will would be valid under the law of that state.

Public policy favors law that carries out the testator's intent by validating the will whenever possible. To this end, the California rule that recognizes the validity of a will executed outside California if valid under the law of another appropriate jurisdiction should be extended. Under the proposed law, a will executed inside California is likewise valid for California purposes if it would be valid under the law of another appropriate jurisdiction. This is consistent with the Uniform Probate Code choice of law rule[2] in an area where national uniformity is plainly advantageous.

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5. State Bar of California, The Uniform Probate Code: Analysis and Critique 44 (1973).

6. Joint Editorial Board for the Uniform Probate Code, Response of the Joint Editorial Board 13 (1974).

1. Prob. Code § 26.

2. Uniform Probate Code § 2-506.

Proof of Destruction

Under California law, a will may be revoked by being burned, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking it, either by the testator or by another person in the testator's presence and by the testator's direction.[1] However, California law requires two witnesses if the will is destroyed by another person at the testator's direction but not if the will is destroyed by the testator in person.[2]

The reason for this difference in treatment is obscure. A person who fraudulently destroys a will after the testator's death need only allege that the testator destroyed it in person in order to avoid the two-witness rule. The rule does not prevent fraud but serves mainly to frustrate the testator's intent by excluding proof by a single credible witness that the will was destroyed in the testator's presence and at the testator's direction for the purpose of revoking it. Accordingly, the proposed law eliminates the two-witness requirement.[3]

Presumption That Lost Will Was Revoked

If a will was in the possession of the testator before death but after death the will cannot be found, California case law presumes that the testator destroyed the will with intent to revoke it.[1] The Uniform Probate Code has the opposite rule: The contestant of a will has the burden of establishing that the will has been revoked.[2] The Uniform

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1. Prob. Code § 74.

2. See Prob. Code § 74; Estate of Olmsted, 122 Cal. 224, 54 P. 745 (1898); 7 B. Witkin, Summary of California Law Wills and Probate § 151, at 5667 (8th ed. 1974). It is not clear under Section 74 either whether the witnesses must be eyewitnesses or whether the person who destroyed the will is a qualified witness. See French & Fletcher, A Comparison of the Uniform Probate Code and California Law With Respect to the Law of Wills, in Comparative Probate Law Studies 347 n.51 (1976).

3. This is consistent with Uniform Probate Code § 2-507.

1. 7 B. Witkin, Summary of California Law Wills and Probate § 381, at 5844 (8th ed. 1974).

2. Uniform Probate Code § 3-407. It appears that this provision applies whether the will is physically available or not. See French & Fletcher, A Comparison of the Uniform Probate Code and California Law With Respect to the Law of Wills, in Comparative Probate Law Studies 351 n.62 (1976).

Probate Code rule is preferable for several reasons: (1) The disappearance of the testator's will is at least as likely to have occurred innocently as it is to have occurred fraudulently.[3] (2) A presumption of revocation makes it easier for a person to cause intestacy by destroying the testator's will. (3) The public policy against intestacy favors a presumption that the will has not been revoked. Accordingly, the proposed law replaces the presumption of revocation with a rule that places the burden of proving revocation on the contestant of a will.[4]

Revival of Revoked Will

Under California law, if the testator's first will is revoked by a second will and the second will is then revoked, whether the first will is thereby revived depends upon the manner of revocation: If the second will is revoked by an instrument, the first will is not revived unless the revoking instrument contains terms showing that the testator intended

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3. This is particularly true where the testator executed two or more duplicate original wills, retaining one and perhaps leaving another with the attorney. Cases have arisen where the testator's duplicate could not be found after death and the presumption of revocation has been applied, even though other duplicate originals were still in existence. See Annot., 17 A.L.R.2d 805 (1951). However, it is likely the testator assumed that since there were other executed originals of the will it was not necessary to preserve the one in the testator's possession.

4. Section 79 of the Probate Code which provides that "revocation of a will revokes all its codicils" is also repealed. This apparently absolute rule is qualified by a case holding that if the codicil is sufficiently complete to stand on its own as a will and the underlying will is revoked by the testator with the intent that the comprehensive terms of the codicil be given effect as the testator's final testamentary expression, the codicil becomes a will. Estate of Cuneo, 60 Cal.2d 196, 202, 384 P.2d 1, 32 Cal. Rptr. 409 (1963). Repeal of Section 79 would leave the matter to be resolved as a question of the testator's intent in the particular case and would thus be more consistent with present California law than the somewhat inaccurate statement of Section 79.

the first will to be revived.[1] If the second will is revoked not by an instrument but by a physical act such as destruction, the revocation does not revive the first will, regardless of what the testator intended; extrinsic evidence of the testator's intent to revive the first will is inadmissible.[2]

Existing law frustrates the intent of the testator who destroys a second will intending thereby to revive the first.[3] The proposed law provides instead that if the testator revokes the second and revoking will by a physical act such as destruction, the first will may be revived if it is evident from the circumstances of the revocation or from the testator's contemporary or subsequent declarations that the testator intended the first will to take effect as executed.[4] This rule is subject to the general hazard of admitting parol evidence in probate proceedings.[5] However, it is more likely than existing law to effectuate the testator's actual intent and to avoid intestacy.

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1. Prob. Code § 75. Under California law, revocation may sometimes be accomplished in an instrument which is not executed with the formalities of a will. See Prob. Code § 73. The proposed law omits this provision. See discussion under "Ademption of Specific Gifts," infra. Also, the California anti-revival rule does not apply to a revoking codicil which is later revoked; revocation of a codicil leaves the original will intact. Estate of Hering, 108 Cal. App.3d 88, 166 Cal. Rptr. 298 (1980); Bird, Revocation of a Revoking Codicil: The Renaissance of Revival in California, 33 Hastings L.J. 357, 370-74 (1981).

2. In re Estate of Lones, 108 Cal. 688, 689, 41 P. 771 (1895); Bird, supra note 1, at 362. n.34; see Prob. Code § 75. The only relief that might be afforded in California would be to avoid the revocation of the second will by applying the doctrine of dependent relative revocation. Niles, Probate Reform in California, 31 Hastings L.J. 185, 214 (1977).

3. See Evans, Comments on the Probate Code of California, 19 Calif. L. Rev. 602, 611-12 (1931); Ferrier, Revival of a Revoked Will, 28 Calif. L. Rev. 265, 273, 276 (1940); Niles, supra note 2, at 214.

4. This is the rule of Uniform Probate Code § 2-509.

5. See Bird, supra note 1, at 377 n.117; T. Atkinson, Handbook of the Law of Wills § 92, at 477 (2d ed. 1953).

Revocation by Dissolution or Annulment

The California rule is that dissolution or annulment of the testator's marriage has no effect on dispositive provisions in the will in favor of the former spouse.[1] This rule generally produces results contrary to what the average person would have wanted had the person thought about the matter. In most cases where the testator fails to change a will following dissolution of marriage, the failure is inadvertent.[2]

Under the proposed law, dissolution or annulment of marriage revokes any disposition made by will to the former spouse unless the will expressly provides otherwise.[3] This rule is consistent with the weight of scholarly opinion[4] and with the rule of the Uniform Probate Code.[5] The rule corresponds to what most persons would intend in such a situation.

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1. See In re Estate of Patterson, 64 Cal. App. 643, 646, 222 P. 374 (1923); 7 B. Witkin, Summary of California Law Wills and Probate § 150, at 5666 (8th ed. 1974). The California Legislature recently reaffirmed this rule. See 1980 Cal. Stats. ch. 1188, § 1 (codified as Civil Code § 4352).

2. The attorney representing a party to a marriage dissolution or annulment proceeding will review the party's will, insurance beneficiaries, joint tenancies, and the like in connection with the property settlement agreement. However, the number of dissolution cases that are handled by the parties themselves without the benefit of legal counsel appears to be increasing, and this development makes it more likely that a party will overlook changing his or her will following the dissolution of the marriage.

3. The recommended legislation makes a conforming revision in the recently enacted provision of the Family Law Act (Civil Code § 4352) requiring that notice of the effect of dissolution or annulment of marriage be included in every final judgment of dissolution or annulment.

4. See Niles, Probate Reform in California, 31 Hastings L.J. 185, 212 (1979); Evans, Comments on the Probate Code of California, 19 Calif. L. Rev. 602, 610 (1931); Turrentine, Introduction to the California Probate Code, in West's Annotated Codes, Probate Code 38 (1956). Accord, State Bar of California, The Uniform Probate Code: Analysis and Critique 45 (1973). But see Note, The Effect of Divorce on Wills, 40 So. Cal. L. Rev. 708, 714-15 (1967).

5. Uniform Probate Code § 2-508. The proposed law also adopts the Uniform Probate Code rule that dissolution or annulment revokes any provision conferring a general or special power of appointment on the former spouse and any nomination of the former spouse as executor, trustee, conservator, or guardian, unless the will expressly provides otherwise.

Missing Wills

Probate of Valid But Missing Will

A valid, unrevoked will that cannot be found after the testator's death is denied probate under existing California law unless it is established that the will was in existence at the testator's death or that the will was destroyed during the testator's lifetime and without the testator's knowledge, either fraudulently or by public calamity.[1] The rule that denies probate to a missing will under these circumstances--in cases where there is no reasonable doubt that there was such a will and that it was valid and unrevoked at the testator's death--is a substantial defect in the California law.[2] The proposed law repeals the rule so that any valid, unrevoked will is provable whether or not the will is physically in existence.[3]

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1. See Prob. Code § 350; French & Fletcher, A Comparison of the Uniform Probate Code and California Law With Respect to the Law of Wills, in Comparative Probate Law Studies 351-54 (1976); Niles, Probate Reform in California, 31 Hastings L.J. 185, 213 (1977).

2. See Niles, supra note 1, at 214, 213, 218; Turrentine, Introduction to the California Probate Code, in West's Annotated California Codes, Probate Code 38 (1956); Note, Statutory Restrictions on Probate of Lost Wills: Judicial Inroads on Restrictions, 32 Calif. L. Rev. 221 (1944). The California rule which excludes a valid but missing will from probate has also been criticized as "legal sophistry" (Niles, supra at 213), and a "misguided statute" (9 J. Wigmore, Evidence in Trials at Common Law § 2523, at 577 (Chadbourn rev. 1981). Not only does California law sometimes have the undesirable effect of excluding a valid, unrevoked will from probate, but it may also prevent the court from applying the ameliorative doctrine of dependent relative revocation to avoid injustice. For example, if the testator destroys a first will in the mistaken belief that a second will is valid, the law will presume that the testator intended to revoke the first will only if the second will were valid. In other words, the revocation is not absolute, but is relative to and dependent on the validity of the second will. 7 B. Witkin, Summary of California Law Wills and Probate § 155, at 5670 (8th ed. 1974). By requiring the will to be "in existence" at the testator's death, Section 350 appears to preclude application of the doctrine of dependent relative revocation to save the destroyed first will. L. Simes & P. Basye, Problems in Probate Law 300 (1946); see Niles, supra at 213.

3. This is the common law rule and the rule under the Uniform Probate Code. L. Simes & P. Basye, Problems in Probate Law 298 (1946).

Proof Requirements for Missing Will

If a missing will is admitted to probate, California law requires the be "clearly and distinctly proved by at least two credible witnesses."[1] This extraordinary proof requirement increases the hazard that the terms of a valid, unrevoked will may not be provable.[2] The requirement that at least two witnesses prove the provisions of a missing will has not worked satisfactorily in those states that have such a rule.[3] The quality of evidence cannot be measured in terms of the number of witnesses; the question is rather one of the credibility of the witnesses. There may well be cases in which only one witness is available, but the witness is of such credibility that no further proof is necessary, and none should be required.

The proposed law repeals California's extraordinary proof and two-witness requirements for proof of the terms of a missing will. It adopts the rule that proof is by a preponderance of the evidence and requires no minimum number of witnesses. This will avoid the situation where the terms of a valid and unrevoked will are known but nonetheless not provable.

Interpretation of Wills

Choice of Law as to Interpretation

Under California law, a testator may in the will select the law of any state to be used in construing the will with respect to real and personal property located in California.[1] If the property is located outside California, the traditional choice of law rules prevail.[2]

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1. Prob. Code § 350.

2. French & Fletcher, supra note __, at 354.

3. L. Simes & P. Basye, Problems in Probate Law 302-03 (1946).

1. Prob. Code § 100; 7 B. Witkin, Summary of California Law Wills and Probate § 49, at 5573 (8th ed. 1974).

2. The traditional choice of law rules are: With respect to dispositions of real property, the rules of construction that would be applied by the courts of the state where the property is located are used. With respect to dispositions of personal property, the rules of construction that would be applied by the courts of the state where the testator was domiciled at death are used. 7 B. Witkin, Summary of California Law Wills and Probate § 49, at 5573 (8th ed. 1974).

The proposed law permits the testator to designate in the will the law to be applied in construing the will.[3] This will enable consistent treatment of the testator's property in all jurisdictions in which the property may be located.

Exoneration

Under existing law, if a will devises land that is subject to a mortgage, deed of trust, or other lien, and the will makes clear whether the testator intended that the devisee take the land subject to or free of the encumbrance, the clearly expressed intention controls.[1] However, if the testator's intention does not appear from the will and the debt is one for which the testator is personally liable, the devisee is entitled to "exoneration," that is, to receive the land free of the encumbrance by having the debt paid out of other assets of the estate.[2]

The proposed law abolishes the doctrine of exoneration.[3] It is unrealistic to presume the testator would intend to give encumbered property free of an encumbrance the testator had no thought of discharging

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3. This is also the rule adopted in the Uniform Probate Code § 2-602. The Uniform Probate Code makes clear that the law selected by the testator may not contravene the forum state's provisions for protection of the testator's family or "any other public policy" of the forum state. The proposed law would additionally make clear that the testator may not contravene the interests of the surviving spouse in community or quasi-community property.

1. See 7 B. Witkin, Summary of California Law Wills and Probate § 456, at 5895-96 (8th ed. 1974).

2. 7 B. Witkin, supra note 1; French & Fletcher, A Comparison of the Uniform Probate Code and California Law With Respect to the Law of Wills, in Comparative Probate Law Studies 379-80 (1976). The impact of this rule is diminished in California because of anti-deficiency legislation which provides that on a purchase money mortgage or deed of trust for real property, no personal liability may be imposed on the debtor. Code Civ. Proc. § 580b. Hence, in such a case no exoneration is required. 7 B. Witkin, supra § 457, at 5896; French & Fletcher, supra at 380. Moreover, exoneration does not apply to one who takes as a surviving joint tenant unless the will so provides, and a direction in the will to "pay all debts" is not a sufficient statement of the testator's intent that the surviving joint tenant should take the property free and clear of the encumbrance. 7 B. Witkin, supra.

3. This is consistent with Uniform Probate Code § 2-609. Under the proposed law the testator may indicate in the will that the devisee is to take the property free of encumbrances, and the testator's intent controls.

during lifetime.[4] The proposed law conforms more closely to the intent of the average testator than existing California law.

Ademption of Specific Gifts

Under existing law, if a will makes a gift of specific property and the property no longer exists at the testator's death or is no longer a part of the estate, the gift is said to be "adeemed" (revoked). No monetary equivalent is substituted for the gift, with the result that the testamentary provision is nullified.[1]

Because of the harsh effects of ademption, the California courts have sought to avoid ademption whenever possible by applying various constructional rules.[2] In addition, several statutes state special rules that save a testamentary gift from ademption.[3]

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4. 7 B. Witkin, supra note 1, § 457, at 5896.

1. See 7 B. Witkin, Summary of California Law Wills and Probate § 218, at 5728 (8th ed. 1974); Note, Ademption and the Testator's Intent, 74 Harv. L. Rev. 741, 741 (1961). If it is the testator's intent to give a general legacy rather than a specific one, there will be no ademption, since a general legacy is not subject to ademption. 7 B. Witkin, supra § 218, at 5729.

2. 7 B. Witkin, supra note 1, § 218, at 5729; French & Fletcher, A Comparison of the Uniform Probate Code and California Law With Respect to the Law of Wills, in Comparative Probate Law Studies 385 (1976).

3. Prob. Code §§ 77 (no ademption of specific gift that is subject of executory contract of sale) and 78 (no ademption of specific gift if testator alters but does not wholly divest interest in property by conveyance, encumbrance, or other act).

   Probate Code Section 73, which is cast in terms of revocation, is more accurately viewed as an ademption provision. It provides that a gift of specific property is revoked if the testator alters his or her interest in the property and the instrument that makes the alteration either expresses the testator's intent to revoke or contains provisions wholly inconsistent with the will. Section 73 is superfluous. If the property is wholly conveyed away by the testator, the matter will be adequately covered by the common law doctrine of ademption by extinction, and the gift will be considered to be adeemed in such a case. 7 B. Witkin, supra note 1, § 218, at 5728; Comment to Uniform Probate Code § 2-612. If the property is only partly conveyed away, Probate Code Section 78 will apply, and the testamentary gift would not be adeemed. Section 73 has also sometimes been applied in the context of determining the effect on a will of a marital settlement agreement incident to dissolution. French & Fletcher, supra note 2, at 344 n.48 (1976). However, this application of Section 73 has been superseded by Section 80 specifically to deal with this problem.

The Uniform Probate Code identifies a number of other special situations where a specific gift should not be adeemed. This is where a stock split, merger, or the like, alters the character of the securities given,[4] where there are unpaid proceeds of sale, condemnation, or insurance on damaged or destroyed property that was devised,[5] or where a secured note given by will has been foreclosed and the property used as security is in the testator's estate as a result of the foreclosure.[6] The proposed law adds these Uniform Probate Code rules of nonademption to the existing California statutes. The Uniform Probate Code rules deal with matters not covered by California statute and are generally consistent with California decisional law. To the extent California decisional law has not dealt with all these matters, the provisions will clear up uncertainties and provide useful rules.

Ademption of General Gifts

Under existing law, if the testator makes an inter vivos gift to a person who also is given a general legacy under the will, the inter vivos gift is not deducted from the general legacy unless the testator's intent that it be deducted is expressed in writing or unless the donee so acknowledges in writing.[1] The proposed law continues existing law

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Probate Code Section 72 includes a provision that when a second will contains dispositive provisions wholly inconsistent with the dispositive provisions of a prior will, the court need not give effect to the appointment of an executor in the first will even though the second will is silent on the matter if that appears consistent with the testator's intent. This special provision is also unnecessary since it is consistent with the general rule that the testator's intent governs.

4. Uniform Probate Code § 2-607. The problem of changes before the testator's death in securities that have been specifically given by will is a recurring problem in California. State Bar of California, The Uniform Probate Code: Analysis and Critique 52 (1973). To the extent that the California cases have dealt with the problem, California decisional law is closely similar to the UPC. French & Fletcher, supra note 2, at 383.

5. Uniform Probate Code § 2-608(a). California decisional law is roughly similar. French & Fletcher, supra note 2, at 384. Accord, State Bar of California, the Uniform Probate Code: Analysis and Critique 52-53 (1973).

6. Uniform Probate Code § 2-608(b).

1. Prob. Code § 1050. Section 1050 also provides that if an inter vivos gift is made of specific property also given by will, an ademption will occur. This special application of the doctrine of

but makes clear that if the testator's writing is other than a will the writing must be "contemporaneous" with the gift,[2] and delays the date of valuation of the property if the donee's possession or enjoyment of the property is delayed.[3]

Anti-Lapse Statute

At common law, if after a will was executed a beneficiary named in the will became unable or unwilling to take and the will made no substitute gift, the gift was said to "lapse" and either passed under the residuary clause of the will or, if there was no residuary clause or if the lapsed gift was a residuary gift, passed by the rules of intestacy.[1] The purpose of an anti-lapse statute is to carry out the presumed intent of the testator when that intent cannot be determined from the will.[2] California has a provision designed to prevent lapse by substituting issue of the predeceased beneficiary if the beneficiary is "kindred" of

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ademption is redundant and is not codified in the proposed law. Cf. Comment to Uniform Probate Code § 2-612 ("[i]f the devise is specific, a gift of the specific property during lifetime would adeem the devise by extinction rather than by satisfaction, and this section would be inapplicable").

2. Although Probate Code Section 1050 does not require that the testator's writing be contemporaneous with the gift, one California case appears to have accepted that rule. See In re Estate of Hayne, 165 Cal. 568, 574, 133 P. 277 (1913).

3. In this case, the property is valued as of the time the donee comes into possession or enjoyment or the date of the testator's death, whichever time is the earlier. This clarification is drawn from Uniform Probate Code § 2-612.

1. T. Atkinson, Handbook of the Law of Wills § 140, at 777-78, 784 (2d ed. 1953); 7 B. Witkin, Summary of California Law Wills and Probate § 224, at 5735 (8th ed. 1974). The most common cause of lapse is death of the beneficiary, but lapse may also be caused by a disclaimer or by dissolution of a corporate beneficiary. T. Atkinson, supra § 140, at 777. If the will beneficiary was already unable to take when the will was made, the gift was said to be "void," with generally the same consequences as in the case of lapse.

2. T. Atkinson, Handbook of the Law of Wills § 140, at 779 (2d ed. 1953); 7 B. Witkin, Summary of California Law Wills and Probate § 225, at 5736 (8th ed. 1974). For this reason, the anti-lapse statute is not automatically applied. The testator's intention as

the testator--that is, related to the testator by blood.[3]

The proposed law does not continue the kindred limitation of the anti-lapse statute; the anti-lapse statute applies whether or not the predeceased beneficiary was related to the testator.[4] This more liberal rule permits the children of the spouse of the testator to take a gift given by will to the spouse if the spouse dies before the testator.[5] Likewise, a gift made by will to a brother or sister or nephew or niece of the testator's spouse will not lapse if the beneficiary dies before

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indicated in the will must be ascertained if possible. See Estate of Salisbury, 76 Cal. App.3d 635, 639, 143 Cal. Rptr. 81 (1978); 7 B. Witkin, supra.

3. Prob. Code § 92; cf. In re Estate of Sowash, 62 Cal. App. 512, 516, 217 P. 123 (1923). In California, "kindred" includes those related by adoption. 7 B. Witkin, Summary of California Law Wills and Probate § 226, at 5737 (8th ed. 1974); French & Fletcher, A comparison of the Uniform Probate Code and California Law With Respect to the Law of Wills, in Comparative Probate Law Studies 370 N.112 (1976).

4. This will align California with the eight states that follow a similar rule--Georgia, Kentucky, New Hampshire, North Carolina, Rhode Island, Tennessee, Virginia, and West Virginia. French, Application of Antilapse Statutes to Appointments Made by Will, 53 Wash. L. Rev. 405, 408 (1978).

   The proposed law also makes clear that the anti-lapse statute applies to class gifts whether the gift "lapsed" or was "void." This is probably the law in California despite some conflict in the cases. See Estate of Steidl, 89 Cal. App.2d 488, 201 P.2d 58 (1948); French & Fletcher, A Comparison of the Uniform Probate Code and California Law With Respect to the Law of Wills, in Comparative Probate Law Studies 372 (1976); Niles, Probate Reform in California, 31 Hastings L.J. 185, 215 (1979).

5. As used in Probate Code Section 92, "kindred" means a blood relative and does not include the testator's spouse. See In re Estate of Sowash, 62 Cal. App. 512, 217 P. 123 (1923); 7 B. Witkin, Summary of California Law Wills and Probate § 226, at 5737 (8th ed. 1974).

the testator leaving issue. The adoption of the more liberal anti-lapse provision of the proposed law will make the general anti-lapse rule conform to the anti-lapse rule applicable to powers of appointment.[6]

Failed Residuary Gift

Under California law, if the residuary clause of a will makes a gift to two or more named persons and one of them predeceases the testator, the anti-lapse statute is first applied to make a substitution for the predeceased taker.[1] However, if the residuary gift does not come within the anti-lapse statute (either because the named taker is not kindred to the testator[2] or dies without issue) and thus cannot be saved, the failed gift is a "residue of a residue" and passes by intestacy.[3]

The proposed law avoids intestacy by abolishing the residue of a residue rule and providing instead that the failed gift passes to the surviving residuary beneficiary or to two or more surviving residuary beneficiaries in proportion to their interests in the residue.[4] This provision conforms more closely to the intent of the average decedent than does existing law, and also avoids intestacy.[5]

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6. Civil Code § 1389.4.

1. French & Fletcher, A Comparison of the Uniform Probate Code and California Law With Respect to the Law of Wills, in Comparative Probate Law Studies 372 (1976); Niles, Probate Reform in California, 31 Hastings L.J. 185, 215 (1979).

2. See discussion under "Anti-lapse Statute," supra.

3. French & Fletcher, supra note 1, at 372-73; Niles, supra note 1, at 215.

4. This is the rule of Uniform Probate Code § 2-606.

5. See Niles, supra note 1, at 218.

405/393

DIVISION 2. WILLS AND INTESTATE SUCCESSION

PART 1. WILLS

CHAPTER 1. GENERAL PROVISIONS

§ 200.010. Who may make a will

200.010. An individual 18 or more years of age who is of sound mind may make a will.

Comment. Section 200.010 continues the substance of a portion of the first sentence of former Section 20 and all of former Section 21 and is the same in substance as Section 2-501 of the Uniform Probate Code.

405/881

§ 200.020. Property subject to disposition by will

200.020. A will may dispose of the following property:

(a) The testator's separate property.

(b) The one-half of the community property that belongs to the testator under Section 110.010.

(c) The one-half of the testator's quasi-community property that belongs to the testator under Section 110.020.

Comment. Subdivision (a) of Section 200.020 continues a portion of the first sentence of former Section 20. Subdivision (b) continues a portion of former Sections 21 and 201. Subdivision (c) continues a portion of former Section 201.5.

405/896

§ 200.030. Who may take a disposition by will

200.030. A will may make a disposition of property to any person, including but not limited to any of the following:

(a) An individual.

(b) A corporation.

(c) An unincorporated association, society, lodge, or any branch thereof.

(d) A county, city, city and county, or any municipal corporation.

(e) Any state, including this state.

(f) The United States or any instrumentality thereof.

(g) A foreign country or a governmental entity therein.

Comment. Section 200.030 continues the substance of former Section 27, but omits the obsolete reference in the former section to repealed provisions (former Sections 259-259.2). For other provisions authorizing various entities to accept testamentary gifts, see, e.g., Cal. Const. art. 9, § 9 (University of California); Cal. Const. art. 20, § 2 (Stanford University and Huntington Library); Corp. Code §§ 9501 (nonprofit corporation), 10403 (corporation for prevention of cruelty to children or animals); Educ. Code §§ 19174 (county library), 33332 (State Department of Education), 35273 (school district), 70028 (California Maritime Academy); Harb. & Nav. Code §§ 6074 (harbor district), 6294 (port district), 6894 (river port district); Health & Safety Code §§ 8985, 9000 (public cemetery district) 32121 (hospital district); Pub. Res. Code §§ 5101 (monuments in memory of California pioneers), 5158 (park commissioners).

968/897

CHAPTER 2. EXECUTION OF WILLS

§ 201.010. Execution of witnessed will

201.010. Except as provided in this part, a will shall be in writing and satisfy both of the following requirements:

(1) The will shall be signed either (A) by the testator or (B) in the testator's name by some other person in the testator's presence and by the testator's direction.

(2) The will shall be signed by at least two persons each of whom witnessed either (A) the signing of the will by the testator or (B) the testator's acknowledgment either that the testator signed the will or that the will is the testator's will.

Comment. Section 201.010 is the same in substance as Section 2-502 of the Uniform Probate Code, and supersedes former Section 50. Section 201.010 substantially relaxes the formalities required under former Section 50 by eliminating the requirements (1) that the testator's signature be "at the end" of the will, (2) that the testator "declare" to the witnesses that the instrument is his or her will, (3) that the witnesses' signatures be "at the end" of the will, (4) that the testator "request" the witnesses to sign the will, (5) that the witnesses sign the will in the testator's presence, and (6) that the witnesses have been "present at the same time."

The introductory clause of Section 201.010 recognizes that the validity of the execution of a will may be determined pursuant to some other provision of this part. See Sections 201.020 (holographic will), 201.040 (will valid under law of another jurisdiction), 205.210 (California statutory will), 210.020-210.060 (international will).

§ 201.020. Holographic will

201.020. (a) A will that does not comply with Section 201.010 is valid as a holographic will, whether or not witnessed, if the signature and the material provisions are in the handwriting of the testator.

(b) If a holographic will does not contain a statement as to the date of its execution and:

(1) If the omission results in doubt as to whether its provisions or the inconsistent provisions of another will are controlling, the holographic will is invalid to the extent of the inconsistency unless the time of its execution is established to be after the date of execution of the other will.

(2) If it is established that the testator lacked testamentary capacity at any time during which the will might have been executed, the will is invalid unless it is established that it was executed at a time when the testator had testamentary capacity.

Comment. Section 201.020 continues the substance of former Section 53. Subdivision (a) is the same in substance as Section 2-503 of the Uniform Probate Code. Subdivision (b) is not found in the Uniform Probate Code. Paragraph (1) of subdivision (b) is a clarifying provision designed to deal with the situation where the holographic will and another will have inconsistent provisions as to the same property or otherwise have inconsistent provisions. To deal specifically with this situation, paragraph (1) requires either that the holographic will be dated or that the time of its execution be shown to be after the date of execution of the other will. If the date of execution of the holographic will cannot be established by a date in the will or by other evidence to be after the date of execution of the other will, the holographic will is invalid to the extent that the date of its execution is material in resolving the issue of whether it or the other inconsistent will is to be given effect. Where the conflict between the holographic will and other will is to only a portion of the property governed by the holographic will, the invalidity of the holographic will as to the property governed by the other will does not affect the validity of the holographic will as to other property. Paragraph (1) also covers the situation where both wills are holographic and undated and have inconsistent provisions on a particular matter; in such a case, Section 201.020 applies to both wills. If it cannot be established that one of the holographic wills was executed after the other, neither will is valid insofar as the two wills are inconsistent; but, in such case, the validity of the consistent provisions of the two wills is not affected by the failure to establish time of execution.

Paragraph (2) of subdivision (b) applies to the situation where the testator lacked testamentary capacity at any time during which the holographic will might have been executed. Thus, if the testator lacks testamentary capacity at the time of his or her death and the holographic will is found with the testator's personal effects, the will is invalid unless it is established that the will was executed at a time when the testator did have testamentary capacity. This could be estab-

lished, for example, by witnesses who saw the testator make the holographic will and can testify that the testator had testamentary capacity at that time. Likewise, where a testator lacked testamentary capacity for a period prior to death and the undated holographic will is found in the testator's safe deposit box, it could be established that the will was executed at a time when the testator did have testamentary capacity if it were shown that the testator did not have access to the safe deposit box at any time after the testator lost the capacity to execute a will. Paragraph (2) does not invalidate a holographic will if it could not have been executed at a time when the testator lacked testamentary capacity. For example, if the testator becomes ill and requires hospitalization, loses his or her testamentary capacity and dies during the hospitalization period, and the testator's holographic will is found at the testator's home, the will must have been executed before the testator's hospitalization and therefore at a time when the testator had testamentary capacity.

968/888

§ 201.030. Who may witness a will

201.030. (a) Any person generally competent to be a witness may act as a witness to a will.

(b) A will or any provision thereof is not invalid because the will is signed by an interested witness.

Comment. Section 201.030 is the same as Section 2-505 of the Uniform Probate Code, and supersedes former Sections 51 and 52. Section 201.030 changes the rule of former Section 51 which disqualified a subscribing witness from taking under the will unless there were two other disinterested subscribing witnesses. Under Section 201.030, a person may be a witness to a will without forfeiting any benefits under the will. Section 201.030 is consistent with former Section 52 (testator's creditor may be competent witness).

7908

§ 201.040. Choice of law as to execution of will

201.040. A written will is valid if its execution complies with any of the following:

(a) The will is executed in compliance with Section 201.010 or 201.020 or Chapter 6 (commencing with Section 205.010) or Chapter 12 (commencing with Section 210.010).

(b) The execution of the will complies with the law at the time of execution of the place where the will is executed.

(c) The execution of the will complies with the law of the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode, or is a national.

Comment. Section 201.040 is new and supersedes former Section 26. Section 201.040 is the same in substance as Section 2-506 of the Uniform Probate Code. The references to the provisions relating to California statutory wills and international wills are added.

968/889

CHAPTER 3. REVOCATION AND REVIVAL

§ 202.010. Revocation by writing or by act

202.010. A will or any part thereof is revoked by any of the following:

(a) A subsequent will which revokes the prior will or part expressly or by inconsistency.

(b) Being burned, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking it, by either (1) the testator or (2) another person in the testator's presence and by the testator's direction.

Comment. Section 202.010 is the same in substance as Section 2-507 of the Uniform Probate Code, and supersedes former Sections 72 and 74. The provision of former Section 74 requiring two witnesses to prove revocation of a will by someone other than the testator is not continued. Section 202.010 is otherwise consistent with former Sections 72 and 74. See also Section 351.5 (lost will not presumed revoked).

404/125

§ 202.020. Effect of revoking duplicate will

202.020. A will executed in duplicate is revoked if one of the duplicates is burned, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking it, by either (1) the testator or (2) another person in the testator's presence and by the testator's direction.

Comment. Section 202.020 continues the substance of former Section 76.

968/900

§ 202.030. Revocation by divorce; no revocation by other changes of circumstances

202.030. (a) Unless the will expressly provides otherwise, if after executing a will the testator's marriage is dissolved or annulled, the dissolution or annulment revokes all of the following:

(1) Any disposition or appointment of property made by the will to the former spouse.

(2) Any provision of the will conferring a general or special power of appointment on the former spouse.

(3) Any provision of the will nominating the former spouse as executor, trustee, conservator, or guardian.

(b) If any disposition or other provision of a will is revoked solely by this section, it is revived by the testator's remarriage to the former spouse.

(c) In case of revocation by dissolution or annulment:

(1) Property prevented from passing to a former spouse because of the revocation passes as if the former spouse failed to survive the testator and Section 204.050 does not apply.

(2) Other provisions of the will conferring some power or office on the former spouse shall be interpreted as if the former spouse failed to survive the testator.

(d) For purposes of this section, dissolution or annulment means any divorce, dissolution, annulment, or adjudication of nullity which would exclude the spouse as a surviving spouse within the meaning of Section 100.470. A decree of legal separation which does not terminate the status of husband and wife is not a divorce or dissolution for purposes of this section.

(e) No change of circumstances other than as described in this section revokes a will.

Comment. Section 202.030 is the same in substance as Section 2-508 of the Uniform Probate Code. Section 202.030 changes the former case law rule that dissolution or annulment of marriage has no effect on the will of either spouse. See In re Estate of Patterson, 64 Cal. App. 643, 646, 222 P. 374 (1923); 7 B. Witkin Summary of California Law Wills and Probate § 150, at 5666 (8th ed. 1974). See also Section 205.260 (California statutory will); Civil Code § 4352 (required notice in judgment of dissolution or nullity).

101/177

§ 202.040. Revival of revoked will

202.040. (a) If a second will which, had it remained effective at death, would have revoked the first will in whole or in part, is thereafter revoked by acts under Section 202.010 or 202.020, the first will

is revoked in whole or in part unless it is evident from the circumstances of the revocation of the second will or from testator's contemporary or subsequent declarations that the testator intended the first will to take effect as executed.

(b) If a second will which, had it remained effective at death, would have revoked the first will in whole or in part, is thereafter revoked by a third will, the first will is revoked in whole or in part, except to the extent it appears from the terms of the third will that the testator intended the first will to take effect.

Comment. Section 202.040 is the same in substance as Section 2-509 of the Uniform Probate Code and supersedes former Section 75. Section 202.040 sets forth a presumption against revival of a previously revoked will, the same as under former Section 75. However, unlike former Section 75, where revocation of the second will is by an act such as destruction, Section 202.040 permits the testator's intent that the first will be revived to be shown by extrinsic evidence, thus producing results generally more consistent with the testator's intent.

7907

CHAPTER 4. REFERENCE TO MATTERS OUTSIDE THE WILL

§ 203.010. Incorporation by reference

203.010. A writing in existence when a will is executed may be incorporated by reference if the language of the will manifests this intent and describes the writing sufficiently to permit its identification.

Comment. Section 203.010 is the same in substance as Section 2-510 of the Uniform Probate Code. Section 203.010 codifies the doctrine of incorporation by reference which was recognized by prior California case law. See 7 B. Witkin, Summary of California Law, Wills and Probate § 143, at 5660 (8th ed. 1974).

7906

§ 203.020. Events of independent significance

203.020. A will may dispose of property by reference to acts and events that have significance apart from their effect upon the dispositions made by the will, whether the acts and events occur before or after the testator's death. The execution or revocation of a will of another person is such an event.

Comment. Section 203.020 is the same as Section 2-512 of the Uniform Probate Code. Section 203.020 codifies the doctrine of acts and

events of independent significance which appears to have been accepted as the rule in California. See 7 B. Witkin, Summary of California Law Wills and Probate § 147, at 5662-63 (8th ed. 1974).

4462

CHAPTER 5. RULES OF CONSTRUCTION OF WILLS

Article 1. General Provisions

§ 204.010. Intention of testator

204.010. The intention of a testator as expressed in his or her will controls the legal effect of the provisions of and dispositions in the will.

Comment. Section 204.010 is drawn from the first sentence of Section 2-603 of the Uniform Probate Code.

968/628

§ 204.015. Rules of construction apply unless will indicates contrary intention

204.015. Except to the extent the rule otherwise provides, the rules of construction in this chapter apply unless a contrary intention is indicated by the will.

Comment. Section 204.015 is drawn from the second sentence of Section 2-603 of the Uniform Probate Code. Section 204.015 recognizes that some sections in this chapter contain their own provisions governing the manner in which the statutory rule may be varied by language in the will. See, e.g., Sections 204.020 (choice of law as to meaning and effect of will), 204.030 (120-hour survival requirement).

4461

§ 204.020. Choice of law as to meaning and effect of wills

204.020. The meaning and legal effect of a disposition in a will shall be determined by the local law of a particular state selected by the testator in the will unless the application of that law is contrary to the provisions of this code relating to any of the following:

(a) The rights of the surviving spouse in community and quasi-community property.

(b) The provisions of Chapter 1 (commencing with Section 250.010), Chapter 2 (commencing with Section 250.110), Chapter 3 (commencing with

Section 251.010), Chapter 4 (commencing with Section 252.010), and Chapter 5 (commencing with Section 253.010), and Chapter 6 (commencing with Section 254.010) of Part 3.

(c) Any other public policy of this state otherwise applicable to the disposition.

Comment. Section 204.020 supersedes former Section 100 and is the same in substance as Section 2-602 of the Uniform Probate Code. The reference in UPC Section 2-602 to elective share is replaced by a reference to the rights of the surviving spouse in community and quasi-community property. Subdivision (b) is drawn from the reference in UPC Section 2-602 to provisions relating to elective share, exempt property, and allowances; subdivision (b) includes reference to the new family maintenance provisions of California law. See also Section 100.470 (definition of "surviving spouse").

7901

§ 204.030. Requirement that devisee survive testator by 120 hours

204.030. (a) A devisee who does not survive the testator by 120 hours is treated as if the devisee predeceased the testator. If the time of death of the testator or of the devisee, or the time of death of both, cannot be determined, and it cannot be established that the devisee has survived the testator by 120 hours, it is deemed that the devisee did not survive for the required period.

(b) Subdivision (a) does not apply if the testator's will contains language (1) dealing explicitly with simultaneous deaths or deaths in a common disaster or (2) requiring that the devisee survive the testator for a stated period in order to take under the will.

Comment. The first sentence of subdivision (a) and all of subdivision (b) of Section 204.030 are the same in substance as Section 2-601 of the Uniform Probate Code except that subdivision (b) omits the UPC provision that made the 120-hour survival rule not applicable if the will merely required the devisee to "survive the testator." Under Section 204.030, the 120-hour survival rule applies unless the will either deals explicitly with simultaneous deaths or deaths in a common disaster or requires survival for a longer or shorter period stated in the will in order to take under the will. The second sentence of subdivision (a) is drawn from the second sentence of Section 2-104 of the Uniform Probate Code. The requirement that the devisee survive the testator by 120 hours is new to California law. For a provision governing the administration and disposition of community property and quasi-community property where one spouse does not survive the other by 120 hours, see Section 110.040. See also Sections 114.510-114.550 (proceeding to determine whether devisee survived testator by 120 hours).

§ 204.040. Will passes all property including after-acquired property

204.040. Except as provided by Sections 1386.1 and 1386.2 of the Civil Code relating to powers of appointment, a will passes all property the testator owns at death including property acquired after execution of the will.

Comment. Section 204.040 is the same in substance as Section 2-604 of the Uniform Probate Code and continues the substance of former Sections 120, 121, 125, and 126. The "except" clause of Section 204.040 is taken from former Sections 125 and 126 and is consistent with the Uniform Probate Code. See Uniform Probate Code §§ 2-604, 2-610. Section 204.040 does not apply if a contrary intention is indicated by the will. Section 204.015.

7905

§ 204.050. Anti-lapse

204.050. If a devisee is dead at the time of execution of the will, fails to survive the testator, or is treated as if he or she predeceased the testator, the issue of the deceased devisee who survive the testator by 120 hours take in place of the deceased devisee and if they are all of the same degree of kinship to the devisee they take equally, but if of unequal degree then those of more remote degree take by representation. One who would have been a devisee under a class gift if he or she had survived the testator is treated as a devisee for the purposes of this section whether his or her death occurred before or after the execution of the will.

Comment. Section 204.050 supersedes former Section 92, which limited the application of the anti-lapse provision to the case of a predeceased devisee who was "kindred" of the testator. Unlike former Section 92, the anti-lapse provisions of Section 204.050 substitute the issue of the predeceased devisee, whether or not the predeceased devisee is related to the testator. This revision makes Section 204.050 consistent with Civil Code Section 1389.4 (powers of appointment). Section 204.050 does not apply if contrary intention is indicated by the will. See Section 204.015.

As to when a devisee "is treated as if he or she predeceased the testator," see Section 204.010 (requirement that devisee survive testator by 120 hours). The 120-hour survival requirement in Section 204.050 is consistent with the 120-hour survival requirement of Section 204.010. See also Sections 114.510-114.550 (proceeding to determine whether issue of deceased devisee survived the testator).

§ 204.060. Failure of testamentary provision

204.060. Except as provided in Section 204.050:

(a) If a devise other than a residuary devise fails for any reason, the property devised becomes a part of the residue.

(b) If the residue is devised to two or more persons and the share of one of the residuary devisees fails for any reason, the share passes to the other residuary devisee or to the other residuary devisees in proportion to their interests in the residue.

Comment. Section 204.060 is the same in substance as Section 2-606 of the Uniform Probate Code. The rule stated in Section 204.060 may be varied by the testator's will. Section 204.015. Subdivision (b) of Section 204.060 changes the former California case law rule that if the share of one of several residuary devisees fails, the share passes 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, 272 P. 1060 (1928); Estate of Anderson, 166 Cal. App.2d 39, 42, 332 P.2d 785 (1958).

28843

§ 204.070 [Reserved]

27859

§ 204.080. Construction of generic terms to accord with relationships as defined for intestate succession

204.080. Halfbloods, adopted persons, and persons born out of wedlock are included in class gift terminology and terms of relationship in accordance with rules for determining relationships for purposes of intestate succession.

Comment. Section 204.080 is the same as Section 2-611 of the Uniform Probate Code, and supersedes former Section 108. To the extent that California cases have addressed the matter, Section 204.080 is consistent with prior California law. See 7 B. Witkin, Summary of California Law Wills and Probate §§ 197-200, at 5708-12 (8th ed. 1974). For the rules for determining relationships for purposes of intestate succession, see Sections 220.070, 220.090.

404/983

§ 204.090. Scope of disposition to a class; afterborn child

204.090. A testamentary disposition to a class includes every person answering the description at the testator's death; but when the

possession is postponed to a future period, it includes also all persons coming within the description before the time to which possession is postponed. A child conceived before but born after a testator's death, or any other period when a disposition to a class vests in right or in possession, takes, if answering to the description of the class.

Comment. Section 204.090 continues former Section 123. See generally 7 B. Witkin, Summary of California Law Wills and Probate §§ 194, 201, 204, at 5705-06, 5712, 5715-16 (8th ed. 1974). The second sentence of Section 204.090 is comparable to the rule in intestate succession. See Section 220.080.

30173

§ 204.100. Vesting

204.100. (a) Testamentary dispositions, including devises to a person on attaining majority, are presumed to vest at the testator's death.

(b) A devise of property to more than one person vests the property in them as owners in common.

Comment. Subdivision (a) of Section 204.100 continues former Section 28. Subdivision (b) continues former Section 29. The rules of Section 204.100 yield to a contrary intent expressed in the testator's will. Section 204.015. This continues prior law. See 7 B. Witkin, Summary of California Law Wills and Probate § 184, at 5696 (8th ed. 1974) (discussing former Section 28); former Section 29 (containing express provision that the section yields to a contrary will). See also Section 100.090 ("devise" means testamentary disposition of real or personal property).

7903

§ 204.110. Common law rule of worthier title abolished

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

Comment. Section 204.110 continues the substance of former Section 109. Section 204.110 omits references to a "bequest" which appeared in former Section 109. As used in Section 204.110, "devise" applies to testamentary dispositions of both real and personal property. See Section 100.090.

7902

§ 204.120. Direction in will for conversion of real property

204.120. If a will directs the conversion of real property into money, the property and its proceeds are deemed personal property from the time of the testator's death.

Comment. Section 204.120 is the same in substance as former Section 124. This section is declaratory of the common law doctrine of equitable conversion. See In re Estate of Gracey, 200 Cal. 482, 488, 253 P. 921 (1927). See generally 7 B. Witkin, Summary of California Law Equity §§ 118-121, at 5337-40 (8th ed. 1974).

405/879

§ 204.130. Death of devisee of limited interest

204.130. The death of a devisee of a limited interest before the testator's death does not defeat the interest of persons in remainder who survive the testator.

Comment. Section 204.130 is the same in substance as former Section 140. See generally 7 B. Witkin, Summary of California Law Wills and Probate §§ 184-193, at 5696-5705 (8th ed. 1974). "Devisee" means a person designated in a will to receive real or personal property. Section 100.100.

999/357

Article 2. Conditional Dispositions

§ 204.210. Conditional disposition defined

204.210. A conditional disposition is one which depends upon the occurrence of some uncertain event, by which it is either to take effect or be defeated.

Comment. Section 204.210 is the same as former Section 141.

§ 204.220. Condition precedent defined; construction and operation

204.220. A condition precedent in a will is one which is required to be fulfilled before a particular disposition takes effect. It is to be deemed performed when the testator's intention has been substantially, though not literally, complied with. Nothing vests until such condition is fulfilled, except where fulfillment is impossible, in which case the disposition vests, unless the condition was the sole motive thereof and the impossibility was unknown to the testator or arose from an unavoidable event subsequent to the execution of the will.

Comment. Section 204.220 is the same as former Section 142.

13604

§ 204.230. Condition subsequent defined; operation

204.230. A condition subsequent is where an estate or interest is so given as to vest immediately, subject only to be divested by some subsequent act or event. A testamentary disposition, when vested, can not be divested unless upon the occurrence of the precise contingency prescribed by the testator for that purpose.

Comment. Section 204.230 is the same as former Section 143.

27948

Article 3. Ascertaining Meaning of Words Used in the Will

§ 204.310. Every expression given some effect; intestacy avoided

204.310. The words of a will are to receive an interpretation which will give to every expression some effect, rather than one which will render any of the expressions inoperative; and of two modes of interpreting a will, that is to be preferred which will prevent a total intestacy.

Comment. Section 204.310 continues former Section 102.

28282

§ 204.320. Construction of will as a whole

204.320. Where the meaning of any part of will is ambiguous or doubtful, it may be explained by any reference thereto, or recital

thereof, in another part of the will. All the parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole; but where several parts are absolutely irreconcilable, the latter must prevail.

Comment. Section 204.320 continues former Section 103.

28283

§ 204.330. Clear and distinct devise

204.330. A clear and distinct devise can not be affected by any reasons assigned therefor, or by any other words not equally clear and distinct, or by inference or argument from other parts of the will, or by an inaccurate recital of or reference to its contents in another part of the will.

Comment. Section 204.330 continues former Section 104. See also Section 100.090 ("devise" means a testamentary disposition of real or personal property).

28290

§ 204.340. Words taken in ordinary and grammatical sense; technical words

204.340. The words of a will are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected, and that other can be ascertained. Technical words are not necessary to give effect to any species of disposition by a will; but technical words in a will are to be taken in their technical sense, unless the context clearly indicates a contrary intention, or unless it satisfactorily appears that the will was drawn solely by the testator, and that the testator was unacquainted with such technical sense.

Comment. Section 204.340 continues former Section 106.

3464

§ 204.350. Words referring to death or survivorship

204.350. Words in a will referring to death or survivorship, simply, relate to the time of the testator's death, unless possession is

actually postponed, when they must be referred to the time of possession.

Comment. Section 204.350 continues former Section 122.

404/093

Article 4. Exoneration; Ademption

§ 204.400. No exoneration

204.400. A specific devise passes the property devised 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 in the will to pay debts.

Comment. Section 204.400 expands the rule stated in Section 2-609 of the Uniform Probate Code to cover any lien. This expansion makes Section 204.400 consistent with Section 736. Section 204.400 reverses 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 7 B. Witkin, Summary of California Law Wills and Probate § 456, at 5895-96 (8th ed. 1974). The rule stated in Section 204.400 may be varied by the testator's will. See Section 204.015.

405/340

§ 204.410. Change in form of securities

204.410. (a) If the testator intended a specific devise of certain securities rather than the equivalent value thereof, the specific devisee is entitled only to:

(1) As much of the devised securities as is a part of the estate at time of the testator's death.

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

(3) Securities of another entity owned by the testator 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 testator as a result of a plan of reinvestment if it is a regulated investment company.

(b) Distributions prior to death with respect to a specifically devised security not provided for in subdivision (a) are not part of the specific devise.

Comment. Section 204.410 is the same in substance as Section 2-607 of the Uniform Probate Code, and is generally consistent with prior California case law. See 7 B. Witkin, Summary of California Law Wills and Probate § 220, at 5730-31 (8th ed. 1974). The rules of nonademption in Sections 204.410-204.470 are not exclusive, and nothing in these provisions is intended to increase the incidence of ademption in California. The rules stated in Sections 204.410-204.470 may be varied by the testator's will. Section 204.015.

405/368

§ 204.420. Unpaid proceeds of sale, condemnation, or insurance; property obtained as a result of foreclosure

204.420. A specific devisee has the right to the remaining specifically devised property and all the following:

(a) Any balance of the purchase price (together with any security interest) owing from a purchaser to the testator at death by reason of sale of the property.

(b) Any amount of an eminent domain award for the taking of the property unpaid at death.

(c) Any proceeds unpaid at death on fire or casualty insurance on the property.

(d) Property owned by the testator at death as a result of foreclosure, or obtained in lieu of foreclosure, of the security for a specifically devised obligation.

Comment. Section 204.420 is the same in substance as subdivision (a) of Section 2-608 of the Uniform Probate Code, and is generally similar to prior California case law. See, e.g., Estate of Shubin, 252 Cal. App.2d 588, 60 Cal. Rptr. 678 (1967); Estate of Newsome, 248 Cal. App.2d 712, 56 Cal. Rptr. 874 (1967). See also the Comment to Section 204.410.

405/878

§ 204.430. Sale by conservator; payment of proceeds of specifically devised property to conservator

204.430. (a) Except as otherwise provided in this section, if specifically devised property is sold by a conservator, the specific

devisee has the right to a general pecuniary devise equal to the net sale price of the property.

(b) Except as otherwise provided in this section, if an eminent domain award for the taking of specifically devised property is paid to a conservator, or if the proceeds on fire or casualty insurance on specifically devised property are paid to a conservator, the specific devisee has the right to a general pecuniary devise equal to the eminent domain award or the insurance proceeds.

(c) This section does not apply if, after the sale, condemnation, fire, or casualty, the conservatorship is terminated and the testator survives the termination by one year.

(d) The right of the specific devisee under this section is reduced by any right the specific devisee has under Section 204.420.

Comment. Subdivisions (a) and (b) of Section 204.430 are the same in substance as the first sentence of subdivision (b) of Section 2-608 of the Uniform Probate Code, and are consistent with prior California case law. See Estate of Packham, 232 Cal. App.2d 847, 43 Cal. Rptr. 318 (1965). See also the Comment to Section 204.410.

Subdivision (c) of Section 204.430 revises the corresponding Uniform Probate Code language to refer to termination of the conservatorship rather than to an "adjudication 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 testator has regained the capacity to make a will. 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 a will after the sale, condemnation, fire, or casualty.

Subdivision (d) of Section 204.430 is the same in substance as the third sentence of subdivision (b) of Section 2-608 of the Uniform Probate Code.

404/092

§ 204.440. Ademption by satisfaction

204.440. (a) Property a testator gave during lifetime to a person is treated as a satisfaction of a devise to that person in whole or in part, only if one of the following conditions is satisfied:

(1) The will provides for deduction of the lifetime gift.

(2) The testator declares in a contemporaneous writing that the gift is to be deducted from the devise or is in satisfaction of the devise.

(3) The devisee acknowledges in writing that the gift is in satisfaction.

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

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

Comment. Subdivisions (a) and (b) of Section 204.440 are the same in substance as Section 2-612 of the Uniform Probate Code and are consistent with former Section 1050. Subdivision (b) changes the rule under former Section 1052 that, if the value of the property given is not established by the testator or acknowledged by the donee, it is valued as of the date of the gift. Under subdivision (b), the gift is valued as of the time the devisee came into possession or enjoyment of the property or as of the time of death of the testator, whichever occurs first. Thus, if the devisee does not come into possession or enjoyment of the property until after the testator's death, the property would be valued as of the date of death. Subdivision (c) continues a provision of former Section 1052, but adds the requirement that, if the donee's acknowledgment expresses the value of the gift, that value is binding in the court only if made contemporaneously with the gift.

404/091

§ 204.450. Contract for sale or transfer of specifically devised property

204.450. If the testator after execution of the will enters into an agreement for the sale or transfer of specifically devised property, the specific devisee has the right to the property subject to the remedies of the purchaser or transferer.

Comment. Section 204.450 is drawn from former Section 77.

404/966

§ 204.460. Testator placing charge or encumbrance on specifically devised property

204.460. If the testator after execution of the will places a charge or encumbrance on specifically devised property for the purpose of securing the payment of money or the performance of any convenant or agreement, the specific devisee has the right to the property subject to the charge or encumbrance.

Comment. Section 204.460 continues the substance of a portion of former Section 78.

§ 204.470. Act of testator altering testator's interest in specifically devised property

204.470. If the testator after execution of the will alters, but does not wholly divest, the testator's interest in specifically devised property by a conveyance, settlement, or other act, the specific devisee has the right to the remaining interest of the testator in the property.

Comment. Section 204.470 continues the substance of a portion of former Section 78.