

## RESOLUTION 6-09-02

### DIGEST

#### Omitted Spouse: Restriction on Intestate Share for Spouse

Amends Probate Code section 21611 to limit the option of a spouse to take against a will and to limit the intestate share of a spouse married to the decedent for less than six months.

### RESOLUTIONS COMMITTEE RECOMMENDATION

#### DISAPPROVE

#### Reasons:

Amends Probate Code section 21611 to limit the option of a spouse to take against a will and to limit the intestate share of a spouse married to the decedent for less than six months. This resolution should be disapproved because the proposed amendment to subdivision (c) is inconsistent with the balance of the section and because the proposed amendment to subdivision (e) substantially shifts the burdens concerning intestate distribution of estates without justification.

Probate Code section 21611 states in its first sentence that it applies to spouses who are not provided for in the decedent's testamentary documents (i.e., the spouses addressed in Probate Code Section 21610). However, the proposed amendment to subdivision (c) applies only to situations in which the spouse is provided for in the decedent's testamentary documents. Thus, this portion of the resolution would never apply to any situation because other provisions of the Probate Code would govern the spouse's rights.

The proposed amendment to subdivision (e) would shift the burden of showing that the testator intended to provide for an omitted spouse to the omitted spouse, in contravention of the established policy within the rest of the Probate Code to presume wherever possible that testator intended to provide for such spouse and children. Currently, where documents are drafted prior to a marriage or the birth of a child, the failure to mention the spouse or child in a document is presumed to be the result of not knowing that they existed, and not the result of an intentional omission. The proposed language would create a presumption that, unless other evidence were introduced, the failure to mention a spouse was intentional rather than an oversight.

In situations where a decedent married when incapacitated or otherwise in a position to be taken advantage of, legal remedies already exist for the annulment of such a marriage. (See, Fam. Code, § 2250.) To require a spouse who happens to marry the testator within six months of death and does not know, or does not discuss with the testator, the testator's estate planning documents to prove that the testator intended to provide for the spouse would substantially alter longstanding public policy.

### SECTION/COMMITTEE REPORT

## TRUST AND ESTATE SECTION

Recommends: Oppose

Reasons: The Section believes that the proposed resolution requires further study as it relates to the rights of married people and may have unintended consequences. In particular, the Section is concerned by deathbed marriages where the surviving spouse is seeking to be treated as an omitted spouse if the estate planning documents have not been changed. However, other spouses may die within 6 months of marriage by accident or unexpected illness. Innocent spouses would be cut out by the resolution. The matter has been assigned to the Trust and Estates Committee for further study.

## TEXT OF RESOLUTION

RESOLVED that the Conference of Delegates recommends that the legislation be sponsored to amend Probate Code section 21611 to read as follows:

- 1     § 21611  
2             The spouse shall not receive a share of the estate under Section 21610 if any of the  
3     following is established:  
4             (a) The decedent's failure to provide for the spouse in the decedent's testamentary  
5     instruments was intentional and that intention appears from the testamentary instruments.  
6             (b) The decedent provided for the spouse by transfer outside of the estate passing by  
7     the decedent's testamentary instruments and the intention that the transfer be in lieu of a  
8     provision in said instruments is shown by statements of the decedent or from the amount of the  
9     transfer or by other evidence.  
10            (c) The decedent provided for the spouse in the decedent's testamentary  
11 instruments; however, if the spouse's share of separate property under the testamentary  
12 instruments is less than the spouse would take under Section 21610 (c), the spouse shall take  
13 that share of separate property, but the total share, including the share under the  
14 testamentary instruments and the share under Section 21610 (c), shall not be more than one-  
15 half of the value of the separate property in the estate.  
16            ~~(c)~~(d) The spouse made a valid agreement waiving the right to share in the decedent's  
17     estate.  
18            (e) The marriage between the decedent and the spouse took place within the six  
19 (6) months before the decedent's death, unless it is shown by statements of the decedent  
20 that the decedent intended to provide for the spouse, but was unable to do so.

(Proposed new language underlined, language to be deleted stricken.)

PROPONENT: Sacramento County Bar Association

STATEMENT OF REASONS

Existing Law: Allows a surviving spouse, no matter when the marriage occurs, to take a statutory share. It also allows the spouse to take both under the will and by the statute.

This Resolution: Would modify the statute so that if the marriage occurs within six months before death, there would be no statutory share unless the spouse could demonstrate that the decedent was making efforts to provide for the spouse. It would also limit the statutory share of separate property to one-half of the property, thus not allowing the spouse to take one-half of the separate property, and any gift under the will.

The Problem: Marriages performed shortly before death confer substantial rights. They should be subject to greater scrutiny. This resolution would prevent a person from marrying an ill person just before death with the goal of inheriting as an omitted spouse, with certain conditions. Another problem with the statute is that it seems to allow, and the cases do not clearly prevent, a spouse from taking both the statutory share and the gift under the will. For instance, if a decedent had made a will giving one-third to a friend, then married the friend without changing the will, the spouse would receive up to one-half of the separate property, plus one-third of the other one-half. This result should be permitted only if clearly contemplated by the decedent. This resolution would solve the problem.

#### IMPACT STATEMENT

This proposed resolution does not affect any other law, statute or rule.

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RESPONSIBLE FLOOR DELEGATE: Borden D. Webb

#### COUNTERARGUMENTS

##### ORANGE COUNTY BAR ASSOCIATION

**Proposed § 21611(c).** The language of this subsection is confusing and inconsistent with § 21610. Section 21610 provides that an omitted surviving spouse shall receive certain property if the marriage occurred **after all of the decedent's testamentary documents have been executed**. Section 21611 provides exceptions to § 21610 so that the surviving spouse does not receive the share of the property described in § 21610 even though the marriage occurred after the decedent had executed all his/her testamentary documents. The underlying concept behind these two sections is to provide for an **unintentionally** omitted spouse.

Contrary to § 21610, the proposed subsection (c) assumes that the decedent **has** provided for the

spouse in testamentary documents and then goes on to provide an additional share of something for the spouse. That "something" is confusing. The proposed subsection talks about "separate property" -- presumably the decedent's separate property—although it does not say so. Under this subsection the spouse is to receive a share of the separate property in an amount keyed to the amount of separate property received under § 21610. But by definition, the spouse would not receive anything under § 21610(c) because that section only applies if the spouse is entirely omitted under the testamentary documents.

**Proposed § 21611(c).** No sound policy reason exists for the six month limitation. Furthermore the idea of allowing evidence of any type of "statement" by the decedent that the decedent really intended to provide for the spouse will create uncertainty and offer an incentive for manufactured evidence. The surviving spouse: "Yes he told me at dinner one night that he was going to include me in his will." Finally what kinds of situations are contemplated by the phrase "but was unable to do so." Does this mean physical incapacity only? What?

#### SAN DIEGO COUNTY BAR ASSOCIATION

We have no objection to part (c) of the proposal, which clarifies existing law. Part (e) seeks to penalize and discriminate against short-term marriages without demonstrating a compelling public policy for such discrimination.

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