

RESOLUTION 3-01-03

DIGEST

Intestate Succession: Disinheriting Unknown Parent

Amends Probate Code section 6401 to provide a surviving spouse's intestate share will not be decreased in favor of a decedent's parent or issue of that parent of whom the decedent was unaware.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History:

Similar to resolution 6-08-02, which was disapproved.

Reasons:

This resolution amends Probate Code section 6401 to provide a surviving spouse's intestate share will not be decreased in favor of a decedent's parent or issue of that parent of whom the decedent was unaware.

This resolution should be disapproved because it is vague and does not fully correct the problem outlined in *Estate of Griswold* (2001) 25 Cal.4th 904.

Intestate succession is governed entirely by statute, and is designed to carry out "the intent a decedent without a will is most likely to have had." (16 Cal. Law Revision Com. Rep. (1982) p. 2319.) In relevant part, section 6401 entitles a surviving spouse to all of a decedent's separate property if the decedent leaves no issue, parent, sibling, or sibling's issue. However, the surviving spouse is entitled to only half the separate property if the decedent leaves issue, a parent or issue of the parents.

In *Griswold*, the surviving spouse received only half her husband's separate property, with the other half going to half-siblings through a father the decedent never knew. It seems unlikely a decedent who does not know his or her natural parent would want that unknown parent, or the issue of that unknown parent, to inherit. Writing for the Court in *Griswold*, Justice Janice Brown suggested the Legislature should remedy this defect in our intestate succession statutes.

This resolution is an attempt to prevent the sort of unintended result reached in *Griswold*. However, it is vague as drafted because it fails to establish criteria to determine the quality or quantity of a child's "awareness." Every child is aware, in some sense, that he or she has parents.

Before a solution to the *Griswold* problem can be reached, a reasonable and workable definition of "unaware" must be formulated. Practical problems of proof must be addressed, taking into consideration that the person whose awareness is at issue—the decedent—is not available to provide evidence. And other sections of the Probate Code dealing with intestate succession, such as sections 6450 et seq., must also be considered.

COMMITTEE REPORT

TRUSTS AND ESTATES SECTION EXECUTIVE COMMITTEE

Recommendation: **DISAPPROVED**

Reasons:

This resolution would create uncertainty regarding the meaning of "unaware." This subject matter is already under study by the Law Revision Commission and, in the opinion of many of the committee members, the *Griswold* case was not decided improperly, as the father in that case had paid child support

to the child from which he inherited.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Probate Code section 6401 to read as follows:

- 1 §6401
2 (a) As to community property, the intestate share of the surviving spouse is the one-half of
3 the community property that belongs to the decedent under Section 100.
4 (b) As to quasi-community property, the intestate share of the surviving spouse is the one-
5 half of the quasi-community property that belongs to the decedent under Section 101.
6 (c) As to separate property, the intestate share of the surviving spouse is as follows:
7 (1) The entire intestate estate if the decedent did not leave any surviving issue, parent,
8 brother, sister, or issue of a deceased brother or sister.
9 (2) One-half of the intestate estate in the following cases:
10 (A) Where the decedent leaves only one child or the issue of one deceased child.
11 (B) Where the decedent leaves no issue but leaves a parent or parents or their issue or the
12 issue of either of them.
13 (3) One-third of the intestate estate in the following cases:
14 (A) Where the decedent leaves more than one child.
15 (B) Where the decedent leaves one child and the issue of one or more deceased children.
16 (C) Where the decedent leaves issue of two or more deceased children.
17 (d) The provisions of subdivision (c)(2)(B) of this Section shall not apply as to a parent and
18 the issue of a parent of whom the decedent was unaware, unless the decedent was a victim of child
19 abduction, as defined in Sections 278 and 278.5 of the Penal Code.

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

PROPONENT: Santa Barbara County Bar Association

STATEMENT OF REASONS

Existing Law: Allows property of an intestate decedent to pass to a parent the decedent did not know and/or the issue of decedent's parent of which decedent was unaware.

This Resolution: Allows the entire separate property of such a decedent to go to his widow. In that intestate succession is supposed to provide for a disposition of property that is most likely what an intestate decedent would have wanted, this resolution would better address that effort. All of a decedent's separate property would go to his widow; one-half of his separate property would not go to a parent the decedent had never known, or even more remotely, half-siblings he had never known.

The Problem: Under section 6401(c)(2)(b), if a decedent is married, has separate property, dies intestate, and has a parent of whom he/she is entirely unaware, or there are issue of such a parent, then that parent or his/her issue are entitled to one-half of the decedent's estate.

This issue was addressed in *Estate of Griswold* (2001) 25 Cal.4th 904, and the Supreme Court reluctantly held that given these facts, the widow of the deceased would only receive one-half of her husband's separate property, and the other half would go to half-siblings through a father the decedent had never known.

The language regarding Penal Code sections 278 and 278.5 is to cover those situations where the decedent was unaware of his/her parent because of the wrong doing of a parent who abducted the decedent early in life and hid from the decedent the identity of his/her other parent.

IMPACT STATEMENT

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

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COUNTERARGUMENT

SAN DIEGO COUNTY BAR ASSOCIATION

The resolution is vaguely worded, and does not clearly focus on the decedent's knowledge of the identity of the parent. The underlying intent of the resolution is worthy of support if the proponent amended it to clarify the intent and proper application.