

RESOLUTION 3-02-03

DIGEST

Wills: Effect of Legal Separation

Amends Probate Code section 6122 to clarify that a decree of legal separation does not terminate the marital status for purposes of inheritance under a will.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

None known.

Reasons:

This resolution amends Probate Code section 6122 to clarify that a decree of legal separation does not terminate the marital status for purposes of inheritance under a will. This resolution should be approved in principle because it removes any ambiguity in the code that a legal separation might terminate the status of husband and wife.

Section 6122 limits a former spouse's inheritance rights if the testator's marriage is dissolved or annulled after executing a will. Subdivision (d) provides, "A decree of legal separation which does not terminate the status of husband and wife is not a dissolution for purposes of this section." This language gives rise to an implication that a legal separation may affect the legal status of husband and wife for purposes of this statute.

A legal separation is designed to resolve financial issues between the parties and is distinct from an order dissolving the marital status. (*Estate of Lahey* (1999) 76 Cal.App.4th 1056.) This resolution eliminates the erroneous implication arising from subdivision (d), preventing any possible confusion a testator may have about the effect of a legal separation.

SECTION/COMMITTEE REPORT

TRUSTS AND ESTATES SECTION EXECUTIVE COMMITTEE

Recommendation: **Approve in principle.**

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Probate Code section 6122 to read as follows:

- 1 §6122
2 (a) Unless the will expressly provides otherwise, if after executing a will the testator's
3 marriage is dissolved or annulled, the dissolution or annulment revokes all of the following:
4 (1) Any disposition or appointment of property made by the will to the former spouse.
5 (2) Any provision of the will conferring a general or special power of appointment on the
6 former spouse.
7 (3) Any provision of the will nominating the former spouse as executor, trustee, conservator,
8 or guardian.
9 (b) If any disposition or other provision of a will is revoked solely by this section, it is
10 revived by the testator's remarriage to the former spouse.

11 (c) In case of revocation by dissolution or annulment:
12 (1) Property prevented from passing to a former spouse because of the revocation passes as
13 if the former spouse failed to survive the testator.
14 (2) Other provisions of the will conferring some power or office on the former spouse shall
15 be interpreted as if the former spouse failed to survive the testator.
16 (d) For purposes of this section, dissolution or annulment means any dissolution or
17 annulment which would exclude the spouse as a surviving spouse within the meaning of Section 78.
18 A decree of legal separation ~~which does not terminate the status of husband and wife~~ is not a
19 dissolution for purposes of this section.
20 (e) Except as provided in Section 6122.1, no change of circumstances other than as
21 described in this section revokes a will.
22 (f) Subdivisions (a) to (d), inclusive, do not apply to any case where the final judgment of
23 dissolution or annulment of marriage occurs before January 1, 1985. That case is governed by the
24 law in effect prior to January 1, 1985.

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

PROPONENT: Sacramento County Bar Association

STATEMENT OF REASONS

Existing Law: Provides circumstances under which a divorce or annulment revokes provisions of a testator's will that makes a disposition or appointment of property on a former spouse, confers a general or special power of appointment on a former spouse, or nominates the former spouse as executor, trustee, conservator, or guardian.

This Resolution: Clarifies that Probate Code section 6122 does not apply to spouses who obtain a legal separation.

The Problem: The current statute's reference to "a decree of legal separation which does not terminate the status of husband and wife" implies that there are decrees of legal separation that do terminate the status of husband and wife. A decree of legal separation that terminates the status of husband and wife is a dissolution, not a legal separation. Since Probate Code section 6122(d) makes the implication that a decree of legal separation that does terminate the status of husband and wife exists, one is forced to consider whether the statute is intended to apply if the spouse is no longer a "surviving spouse" as defined in Probate Code section 78. However, the sentence immediately preceding the sentence proposed to be amended makes specific reference to Probate Code section 78 with regards to dissolutions and annulments, but makes no reference to legal separations. This resolution would eliminate the language that creates an implication that a decree of legal separation that terminates the status of husband and wife exists and would thereby eliminate improper application of this statute.

IMPACT STATEMENT

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

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