

**RESOLUTION 3-03-03**

**DIGEST**

Surviving Spouse: Limit on Statutory Share of Decedent’s Property

Amends Probate Code section 21611 to provide that an omitted spouse’s total share of decedent’s estate be limited to one-half of the estate, regardless of how received.

**RESOLUTIONS COMMITTEE RECOMMENDATION**

DISAPPROVE

History:

Similar to resolution 6-09-02, which was withdrawn.

Reasons:

This resolution amends Probate Code section 21611 to provide that an omitted spouse’s total share of decedent’s estate be limited to one-half of the estate, regardless of how received. This resolution should be disapproved because it contains a flaw that may result in the spouse receiving more than the intended share.

This resolution covers those situations where a testator provides for an individual in his will and later marries that individual, but does not revise his will to include that person as a spouse. This situation may occur when the marriage takes place after the will is executed, and the individual is given a gift in the will without the contemplation of subsequent marriage. Under the prevailing case law of *Estate of Poisl* (1955) 44 Cal.2d 147 and *Estate of Katleman* (1993) 13 Cal.App.4th 51, most judges would rule that the “omitted spouse” takes both the pre-marriage bequest and the intestate share.

While in principle this resolution addresses a potential problem in carrying out the intent of the testator, its means of implementation is flawed. Although current law may substantially reduce the share of remaining beneficiaries, it is conceivable that a testator may intend to give an “omitted spouse” both the gift and the statutory share. Under this resolution a spouse who is entitled to only a one-third intestate share might actually get more than intended.

**SECTION/COMMITTEE REPORT**

**TRUSTS AND ESTATES SECTION EXECUTIVE COMMITTEE**

Recommendation: DISAPPROVE

Reasons:

In the opinion of the committee, this resolution would unsettle existing case law and lead to a wrong result.

**TEXT OF RESOLUTION**

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that 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 following
- 3     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 the  
7 decedent's testamentary instruments and the intention that the transfer be in lieu of a provision in  
8 said instruments is shown by statements of the decedent or from the amount of the transfer or by  
9 other evidence.

10 (c) The decedent provided for the spouse in the decedent's testamentary instruments;  
11 however, if the spouse's share of separate property under the testamentary instruments is less than  
12 the spouse would take under Section 21610 (c), the spouse shall take that share of separate property,  
13 but the total share, including the share under the testamentary instruments and the share under  
14 Section 21610 (c), shall not be more than one-half of the value of the separate property in the estate,  
15 unless the decedent's intention to provide the testamentary gift(s) and the statutory share is clearly  
16 set forth in the instruments.

17 (d) The spouse made a valid agreement waiving the right to share in the decedent's estate.

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

PROPONENT: Sacramento County Bar Association

#### STATEMENT OF REASONS

Existing Law: Allows a surviving spouse to take a statutory share of a deceased spouse's estate, under certain conditions. It also apparently allows the spouse to take both under the will and by the statute.

This Resolution: Limits 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: The existing statute seems to allow, and the cases do not clearly prevent, a spouse from taking both a statutory share, as an omitted spouse, and any gifts 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 resolution does not affect any other law, statute or rule.

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