

**RESOLUTION 11-05-07**

**DIGEST**

Intestate Succession: Community Property to Children of Predeceased Spouse

Amends Probate Code sections 6402.5 and 1207 to allow heirs of a predeceased spouse to inherit property attributed to that spouse in certain circumstances.

**RESOLUTIONS COMMITTEE RECOMMENDATION**

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Probate Code sections 6402.5 and 1207 to allow heirs of a predeceased spouse to inherit property attributed to that spouse in certain circumstances. This resolution should be approved in principle because it will remedy an inequity in existing law, notwithstanding the complexities it might create in distribution of intestate estates.

The present statute allows for intestate succession to a share of property of the decedent inherited from a predeceased spouse by heirs of the predeceased spouse where the decedent dies without issue. However if the decedent dies with issue, all of the estate goes to the decedent’s children, including that property acquired from a predeceased spouse, even if there are also children of the predeceased spouse alive.

There is no policy reason for this distinction. Where there are also issue of the predeceased spouse alive at the time of the decedent’s death, it is reasonable to assume that the expectations of the decedent and the predeceased spouse would be that the share of the decedent’s property which the decedent acquired from the predeceased spouse would pass either to the children of the predeceased spouse or, in the case of a blended family, equally to the children of both spouses.

This resolution effectively makes the intestate distribution of that part of a decedent’s estate which was acquired from a predeceased spouse the same whether or not the decedent leaves issue, and eliminates the disinheritance of the predeceased spouse’s children from their parent’s property by virtue of the fact that their parent’s surviving spouse left children.

**TEXT OF RESOLUTION**

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Probate Code sections 6402.5 and 1207 to read as follows:

- 1 §6402.5
- 2 (a) For purposes of distributing real property under this section if the decedent had a
- 3 predeceased spouse who died not more than 15 years before the decedent and there is no

4 surviving spouse ~~or issue of the decedent~~, the portion of the decedent's estate attributable to  
5 the decedent's predeceased spouse passes as follows:

6 (1) If the decedent is survived by issue of the predeceased spouse, to the surviving  
7 issue of the predeceased spouse; if they are all of the same degree of kinship to the  
8 predeceased spouse they take equally, but if of unequal degree those of more remote degree  
9 take in the manner provided in Section 240.

10 (1.5) If there is no surviving issue of the predeceased spouse but the decedent leaves  
11 issue, to the issue of the decedent.

12 (2) If there is no surviving issue of the predeceased spouse or the decedent but the  
13 decedent is survived by a parent or parents of the predeceased spouse, to the predeceased  
14 spouse's surviving parent or parents equally.

15 (3) If there is no surviving issue or parent of the predeceased spouse or issue of the  
16 decedent but the decedent is survived by issue of a parent of the predeceased spouse, to the  
17 surviving issue of the parents of the predeceased spouse or either of them, the issue taking  
18 equally if they are all of the same degree of kinship to the predeceased spouse, but if of  
19 unequal degree those of more remote degree take in the manner provided in Section 240.

20 (4) If the decedent is not survived by issue, parent, or issue of a parent of the  
21 predeceased spouse, to the next of kin of the decedent in the manner provided in Section  
22 6402.

23 (5) If the portion of the decedent's estate attributable to the decedent's predeceased  
24 spouse would otherwise escheat to the state because there is no kin of the decedent to take  
25 under Section 6402, the portion of the decedent's estate attributable to the predeceased  
26 spouse passes to the next of kin of the predeceased spouse who shall take in the same  
27 manner as the next of kin of the decedent take under Section 6402.

28 (b) For purposes of distributing personal property under this section if the decedent  
29 had a predeceased spouse who died not more than five years before the decedent, and there  
30 is no surviving spouse ~~or issue of the decedent~~, the portion of the decedent's estate  
31 attributable to the decedent's predeceased spouse passes as follows:

32 (1) If the decedent is survived by issue of the predeceased spouse, to the surviving  
33 issue of the predeceased spouse; if they are all of the same degree of kinship to the  
34 predeceased spouse they take equally, but if of unequal degree those of more remote degree  
35 take in the manner provided in Section 240.

36 (1.5) If there is no surviving issue of the predeceased spouse but the decedent leaves  
37 issue, to the issue of the decedent.

38 (2) If there is no surviving issue of the predeceased spouse or the decedent but the  
39 decedent is survived by a parent or parents of the predeceased spouse, to the predeceased  
40 spouse's surviving parent or parents equally.

41 (3) If there is no surviving issue or parent of the predeceased spouse or issue of the  
42 decedent but the decedent is survived by issue of a parent of the predeceased spouse, to the  
43 surviving issue of the parents of the predeceased spouse or either of them, the issue taking  
44 equally if they are all of the same degree of kinship to the predeceased spouse, but if of  
45 unequal degree those of more remote degree take in the manner provided in Section 240.

46 (4) If the decedent is not survived by issue, parent, or issue of a parent of the  
47 predeceased spouse, to the next of kin of the decedent in the manner provided in Section  
48 6402.

49 (5) If the portion of the decedent's estate attributable to the decedent's predeceased  
50 spouse would otherwise escheat to the state because there is no kin of the decedent to take  
51 under Section 6402, the portion of the decedent's estate attributable to the predeceased  
52 spouse passes to the next of kin of the predeceased spouse who shall take in the same  
53 manner as the next of kin of the decedent take under Section 6402.

54 (c) For purposes of disposing of personal property under subdivision (b), the  
55 claimant heir bears the burden of proof to show the exact personal property to be disposed of  
56 to the heir.

57 (d) For purposes of providing notice under any provision of this code with respect to  
58 an estate that may include personal property subject to distribution under subdivision (b), if  
59 the aggregate fair market value of tangible and intangible personal property with a written  
60 record of title or ownership in the estate is believed in good faith by the petitioning party to  
61 be less than ten thousand dollars (\$10,000), the petitioning party need not give notice to the  
62 issue or next of kin of the predeceased spouse. If the personal property is subsequently  
63 determined to have an aggregate fair market value in excess of ten thousand dollars  
64 (\$10,000), notice shall be given to the issue or next of kin of the predeceased spouse as  
65 provided by law.

66 (e) For the purposes of disposing of property pursuant to subdivision (b), "personal  
67 property" means that personal property in which there is a written record of title or  
68 ownership and the value of which in the aggregate is ten thousand dollars (\$10,000) or more.

69 (f) For the purposes of this section, the "portion of the decedent's estate attributable  
70 to the decedent's predeceased spouse" means all of the following property in the decedent's  
71 estate:

72 (1) One-half of the community property in existence at the time of the death of the  
73 predeceased spouse.

74 (2) One-half of any community property, in existence at the time of death of the  
75 predeceased spouse, which was given to the decedent by the predeceased spouse by way of  
76 gift, descent, or devise.

77 (3) That portion of any community property in which the predeceased spouse had  
78 any incident of ownership and which vested in the decedent upon the death of the  
79 predeceased spouse by right of survivorship.

80 (4) Any separate property of the predeceased spouse which came to the decedent by  
81 gift, descent, or devise of the predeceased spouse or which vested in the decedent upon the  
82 death of the predeceased spouse by right of survivorship.

83 (g) For the purposes of this section, quasi-community property shall be treated the  
84 same as community property.

85 (h) For the purposes of this section:

86 (1) Relatives of the predeceased spouse conceived before the decedent's death but  
87 born thereafter inherit as if they had been born in the lifetime of the decedent.

88 (2) A person who is related to the predeceased spouse through two lines of  
89 relationship is entitled to only a single share based on the relationship which would entitle  
90 the person to the larger share.

91 §1207.

92 (a) Subject to subdivision (b), where notice is required to be given to a decedent's  
93 beneficiaries, devisees, or heirs, notice need not be given to a person who, because of a  
94

95 possible parent-child relationship between a stepchild and a stepparent or between a foster  
96 child and a foster parent, may be (1) an heir of the decedent or (2) a member of a class to  
97 which a devise is made.

98 (b) Subdivision (a) does not apply where the person required to give the notice has  
99 actual knowledge of facts that (1) a person would reasonably believe give rise under Section  
100 6454 to the parent-child relationship between the stepchild and the stepparent or between the  
101 foster child and the foster parent, or (2) that the stepchild is a child of a predeceased spouse  
102 or registered domestic partner of the decedent and the spouse or registered domestic partner  
103 predeceased the decedent within the period of time prescribed in Section 6402.5.

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

PROPONENT: Riverside County Bar Association

### STATEMENT OF REASONS

Existing Law: Presently, if a spouse predeceases a decedent by more than 120 hours and the surviving spouse has children, all of the property of the decedent (including the community property and a share of the separate property of the predeceased spouse) is distributed to the children of the surviving spouse. As a result, any children of the predeceased spouse are automatically disinherited from any share in this property. Conversely, if the surviving spouse leaves no children and no surviving spouse, the property is distributed to the heirs of each spouse. Therefore, the fact that a surviving spouse dies with issue triggers disinheritance of parties who would otherwise be heirs.

This Resolution: The changes to this statute expand the provisions which presently only apply when the surviving spouse dies without issue and makes the statute apply even if the survivor left issue.

The Problem: Intestate succession is intended to provide distribution to the parties that a decedent would have most likely wanted to benefit if the decedent had executed a will. In many cases, this is accomplished by the present statutes. But, in the situation of a blended family, the results are often inconsistent with the intent of the decedent. For example, if both spouses have been married previously and have children from their prior marriages, which children inherit the community property will be dictated by which spouse survives. The survivor's children will receive all the community property and the predeceased spouse's children will receive nothing. In contrast, if the survivor leaves no issue and dies within 5 years (for personal property) or 15 years (for real property) of the predeceased spouse, the community and separate property of both spouses is divided among their respective heirs. This amendment would extend to blended families the same protection presently given to heirs of both spouses when they die without issue. Children will still be given priority over other heirs, but the children of both spouses will equally share the community property.

### IMPACT STATEMENT

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

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