

RESOLUTION 03-08-2010

DIGEST

Family Law: Putative Spouse May Elect Community Property Division

Amends Family Code section 2251 to allow for the equal division of quasi-marital property only upon request of the putative spouse.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Family Code section 2251 to allow for the equal division of quasi-marital property only upon request of the putative spouse. This resolution should be approved in principle because it would clarify the equitable intent of the putative spouse doctrine.

Courts are routinely called upon to interpret the legislative intent of statutes. Attempts by the court to decipher the intent of the legislature in Family Code section 2251 have persisted since the 1969 enactment of its predecessor, Family Code section 4452. The most recent attempt came in *In Re Marriage of Tejada* (2009) 179 Cal.App.4th 973, 982.

In *Tejada*, the court specifically explored whether the equity-based putative spouse doctrine should be applied only for the benefit of the spouse with a good faith belief in the validity of the marriage. It noted that other related provisions of the Family Code supported an inference that the legislature intended to treat “guilty” and “innocent” parties to a putative marriage differently. (*Id.* at 984.) It acknowledged that commentators are split as to why sections 2254 and 2255 grant relief only to “innocent” parties, while section 2251 does not. The court embraced the position that the expression of some things in a statute necessarily means the exclusion of other things not expressed. The reality here is that the court was left to guess what the legislature intended. The result is that the party who entered the marriage in good faith as well as the one who committed fraud in entering into the marriage both receive all the privileges of putative status under existing law. (If both parties have a good faith belief in the validity of the marriage, they both receive the benefits of a putative spouse.) Left as is, the statute allows a “guilty” party to reap the fruits of fraud.

The opposing view is that under the current interpretation, both parties would be bound by the community property rule had the marriage been valid, and therefore neither is harmed by this result. The foreclosure of relief by the legislature under section 2254 and 2255, however, supports allowing the party without fault to choose whether the property acquired during the union should be divided as quasi-marital property. This resolution would therefore promote the equitable purpose of the putative spouse doctrine without abandoning the public policy of community property.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Family Code section 2251 to read as follows:

- 1 §2251
2 (a) If a determination is made that a marriage is void or voidable and the court finds
3 that either party or both parties believed in good faith that the marriage was valid, and a
4 party found to have held such belief requests such orders, the court shall:
5 (1) Declare the party or parties to have the status of a putative spouse.
6 (2) If the division of property is in issue, divide, in accordance with Division 7
7 (commencing with Section 2500), that property acquired during the union which would
8 have been community property or quasi-community property if the union had not been void
9 or voidable. This property is known as “quasi-marital property.”
10 (b) If the court expressly reserves jurisdiction, it may make the property division at
11 a time after the judgment.

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

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS

Existing Law: In *In re Marriage of Tejada* (2009) 179 Cal.App.4th 973, the court held that property acquired during marriage would be treated as community even when the putative spouse did not want such a result.

This Resolution: Would clarify that Family Code section 2251 applies only when the putative spouse elects such application.

The Problem: Family law has evolved to ensure that a person who enters into a marriage in good faith will not lose all marital rights if it later turns out that the other spouse was married or otherwise had knowledge that the marriage was in fact void. For instance Family Code section 2254 restricts an award of spousal support to the spouse who held the good faith belief in the marriage/the putative spouse. Family Code section 2255 limits an award of fees to the putative spouse. Likewise Family Code section 2251 should require the application of community property rules only when the putative spouse wishes to opt for that application. Otherwise, the “guilty” spouse who knew the marriage was void (for instance because he or she was already married) would benefit from laws that should protect the spouse who is free from fraud.

IMPACT STATEMENT

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

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**COUNTER ARGUMENTS
FAMILY LAW SECTION**

RECOMMENDATION: APPROVE IN PRINCIPLE

The Family Law Section Executive Committee (FLEXCOM) has reviewed proposed Resolution 05-08-2009 and voted to support it, 15-0-1. FLEXCOM agrees that the putative spouse should have the option of whether or not he/she wants to divide the assets and debts of the marriage pursuant to community property laws, or elect to opt out of the community division. Currently under *Marriage of Tejada* the court must divide the property pursuant to Family Code Section 2251, even if the putative spouse does not want to do so. This resolution, if it became law, would overturn this case.

This position is only that of the Family Law Section of the State Bar of California. This position has not been adopted by either the State Bar Board of Governors or overall membership and is not to be construed as representing the position of the State Bar of California.

Membership in the Family Law Section is voluntary, and funding for section activities, including all legislative activities, is obtained entirely from voluntary services.