

RESOLUTION 07-02-2013

DIGEST

Probate: Intestate Succession of Surviving Domestic Partner

Amends Probate Code section 6401 to clarify that surviving domestic partners are entitled to a one-half share of the community and quasi-community property of a decedent.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Probate Code section 6401 to clarify that surviving domestic partners are entitled to a one-half share of the community and quasi-community property of a decedent. This resolution should be approved in principle because it removes an ambiguity created by existing law which suggests that surviving domestic partners are not entitled to the same intestate share of some property as a surviving spouse.

Probate Code section 6401 provides the rules for intestate succession by a surviving spouse and domestic partner. Subdivision (c) of section 6401 provides an intestate share of share of separate property to both surviving spouses and surviving domestic partners. However, subdivisions (a) and (b) of section 6401, which determine the intestate share of community and quasi-community property, fail to specifically provide a share for surviving domestic partners, and only mention surviving spouses. This omission creates uncertainty, and leaves open the possibility that a court might construe the legislature's failure to mention surviving domestic partners in subdivisions (a) and (b) as intentional.

In fact, nothing in the legislative history of this code section suggests that failure to provide an intestate share of community and quasi-community property to surviving domestic partners was intentional. Other statutory provisions make clear that it was an unintentional oversight. Family Code section 297.5, subdivision (c) (incorrectly referred to in the resolution's Statement of Reasons as section 279.5), which is part of the domestic partnership law, provides a general rule that a surviving registered domestic partner shall generally have the same rights, protections, and benefits as a surviving spouse. Presumably, under that default general rule, subdivisions (a) and (b) of Probate Code section 6401 would be construed as also applying to a surviving domestic partner. However, as it stands, a court might construe the legislature's failure to mention surviving domestic partners in subdivisions (a) and (b) as intentional. While the counterargument submitted by the Orange County Bar Association points out that this resolution will not fix all ambiguity with respect to property division and intestate succession, as various other statutes also relate to domestic partnerships, this resolution is an important start. This resolution would eliminate uncertainty in an important area of the law, and will also facilitate a clearer understanding of this Probate Code section by those unfamiliar with Family Code section 297.5.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Association 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 or surviving
3 domestic partner, as defined in subdivision (b) of Section 37, is the one-half of the community
4 property that belongs to the decedent under Section 100.

5 (b) As to quasi-community property, the intestate share of the surviving spouse or
6 surviving domestic partner, as defined in subdivision (b) of Section 37, is the one-half of the
7 quasi-community property that belongs to the decedent under Section 101.

8 (c) As to separate property, the intestate share of the surviving spouse or surviving
9 domestic partner, as defined in subdivision (b) of Section 37, is as follows:

10 (1) The entire intestate estate if the decedent did not leave any surviving issue, parent,
11 brother, sister, or issue of a deceased brother or sister.

12 (2) One-half of the intestate estate in the following cases:

13 (A) Where the decedent leaves only one child or the issue of one deceased child.

14 (B) Where the decedent leaves no issue but leaves a parent or parents or their issue or the
15 issue of either of them.

16 (3) One-third of the intestate estate in the following cases:

17 (A) Where the decedent leaves more than one child.

18 (B) Where the decedent leaves one child and the issue of one or more deceased children.

19 (C) Where the decedent leaves issue of two or more deceased children.

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

PROPONENT: Sacramento County Bar Association

STATEMENT OF REASONS

The Problem: Currently Probate Code Section 6401 provides for an intestate share of community and quasi-community property as to the surviving spouse only. As to separate property it provides for either a surviving spouse or surviving domestic partner. This creates a problem because under Family Code Section 279.5(a), any place where “spouse” is listed in the probate code, it is also applies to a “domestic partner.” However, because domestic partner language is included in subsection (c), and not subsections (a) and (b), it could be interpreted as an intentional omission, rather than an error. Further, practitioners who do not have an annotated code would not necessarily know about the Family Code Section 279.5(a), which has served as a poor excuse for a band-aid in these situations.

This Solution: Under the proposed amendment, Probate Code Section 6401 would clarify that surviving domestic partners are entitled to a one-half share of the community and quasi-community property of the decedent in addition to the existing provisions for separate property.

This will make it unnecessary for practitioners to know about, or refer to Family Code Section 279.5(a), and will alleviate any confusion caused by the omission.

LEGISLATIVE HISTORY

Not known

IMPACT STATEMENT

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

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COUNTER-ARGUMENT(S) TO RESOLUTION 07-02-2013

ARGUMENT IN SUPPORT BY FAMILY LAW SECTION OF THE STATE BAR OF CALIFORNIA

Approve in principle

Rationale: The Executive Committee of the Family Law Section of the State Bar of California (FLEXCOM) believes Probate Code Section 6401 should be amended to clarify the statutory language, which currently provides for an intestate share of community and quasi-community property as to the surviving spouse only, but as to separate property provides for either a surviving spouse or surviving domestic partner. In light of Family Code Section 297.5(a), this would appear to be a clarification, and not a substantive change.

Disclaimer:

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's Board of Trustees 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 sources.

ORANGE COUNTY BAR ASSOCIATION

The policy behind the proposed change in Probate Code § 6401 is commendable. However, the term “community property” applied to the intestate share of a surviving domestic partner introduces an ambiguity. Family Code § 760 defines community property as “all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in this state.” Domestic partners are not “married” nor do they acquire property during a marriage. However, domestic partners should have intestate succession rights comparable to spouses.

While Family Code § 297.5 confers on domestic partners the same rights, protections, and benefits, and subjects them to the same responsibilities, obligations, and duties as spouses, nothing in the Family Code or Probate Code defines property acquired during the domestic partnership as “community property” although arguably such a definition might be implied from Family Code § 299(a)(7).

The term “quasi-community property” (defined in Family Code § 125) has the same ambiguity when applied to the rights of domestic partners in Probate Code § 6401.

In order for the proposed amendment to Probate Code § 6401 unambiguously to have the desired effect, Family Code § 760 requires an amendment defining property acquired during a domestic partnership by a domestic partner as community property. A similar amendment to Family Code 125 defining quasi-community property is also required.