

Memorandum 85-1

Subject: Study L-630 - Wills and Intestate Succession (Follow-up
Legislation 1985)

Our consultant, Professor Dukeminier, has identified an apparent omission in Section 6147 of the Probate Code. This section is the anti-lapse statute.

The omission is described in the attached letter from Professor Dukeminier. He would amend Section 6147 to read in substance as follows:

6147. (a) As used in this section, "devisee" means a any of the following:

- (1) A devisee who is kindred of the testator.
- (2) A devisee who is the surviving or deceased spouse of the testator who has issue who are kindred of the testator.
- (3) A devisee who is kindred of a surviving, deceased, or former spouse of the testator.

(b) Subject to subdivision (c), if a devisee is dead when the will is executed, or is treated as if he or she predeceased the testator, or fails to survive the testator or until a future time required by the will, the issue of the deceased devisee take in his or her place by representation. A devisee under a class gift is a devisee for the purpose of this subdivision unless his or her death occurred before the execution of the will and that fact was known to the testator when the will was executed.

(c) The issue of a deceased devisee do not take in his or her place if the will expresses a contrary intention or a substitute disposition.

Is this a desirable change? What if the testator had three children by a former marriage and the devisee spouse has one child by the testator and two by a previous marriage? The three children of the testator's former marriage would get nothing; the deceased devisee spouse's share would go to her three children (only one of whom is related to the testator).

Consideration should be given to deleting the language "who has issue who are kindred of the testator" from subdivision (a)(2) of Section 6147 as revised above. This language can result in some odd results. Suppose the devisee is the second wife of the testator. She has three children by the former marriage and one by the testator. The four children would divide the devise. Suppose she does not have a child by the testator. Then her children would get nothing. What if the testator's child dies before the testator?

Respectfully submitted,

John H. DeMouilly
Executive Secretary

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October 2, 1984

Mr. John DeMouilly
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94306

Dear John:

Re: Cal. Probate Code § 6147
Lapse Statute

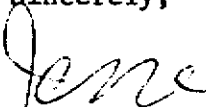
Classroom discussion has revealed a possible inequitable result in the application of the above statute, which the Commission may wish to remedy.

The lapse statute (Cal. Prob. Code § 6147) does not apply to devises to spouses. Take this case: H devises 3/4 of his estate to W and 1/4 to charity. H has one or more children by W, whom H assumes will be provided for by W's will. Therefore the children are given nothing (or maybe only token gifts) by H's will. W predeceases H. H dies without changing his will. The gift to W lapses, the lapse statute does not apply, and the charity--as the other residuary legatee--takes everything under Cal. Prob. Code § 6148(b). This is surely not a result that H would want.

This result will come about if the devise to W is a pecuniary gift (perhaps a pecuniary marital deduction gift) or a residuary gift.

Perhaps Section 6147(a) should be amended to include as a devisee a spouse who has children by the testator.

Sincerely,


Jesse Dukeminier
Professor of Law

JD:mrs