

Memorandum 90-61

Subject: Study L-300 - Probate Homestead (Technical Correction)

Attached to this memorandum is a letter we have received from a Matthew Bender editor who in the course of preparing materials relating to the probate homestead noticed an anomaly in the statute. As drafted, Probate Code Section 6522 appears to say that the decedent's separate property may be used for a probate homestead that is being set aside for the surviving spouse alone, and the separate property is likewise available if the probate homestead is being set aside for the decedent's children alone, but the decedent's separate property may not be used for a probate homestead for the surviving spouse and children together. This obviously does not make sense and was not intended.

That implication in the statute is easily corrected:

6522. (a) The probate homestead shall be selected out of the following property, giving first preference to the community and quasi-community property of, or property owned in common by, the decedent and the person entitled to have the homestead set apart:

(1) If the homestead is set apart for the use of the surviving spouse or for the use of the surviving spouse and minor children, out of community property or quasi-community property.

(2) If the homestead is set apart for the use of the surviving spouse or for the use of the minor children or for the use of the surviving spouse and minor children, out of property owned in common by the decedent and the ~~person~~ persons entitled to have the homestead set apart, or out of the separate property of the decedent or, if the decedent was not married at the time of death, out of property owned by the decedent.

(b) The probate homestead shall not be selected out of property the right to possession of which is vested in a third person unless the third person consents thereto. As used in this subdivision, "third person" means a person whose right to possession of the property (1) existed at the time of the death of the decedent or came into existence upon the death of the decedent and (2) was not created by testate or intestate succession from the decedent.

Comment. Section 6522 is amended to remove any implication that the decedent's separate property may not be used for a probate homestead for the surviving spouse and

minor children. It should be noted that property owned in common by the decedent and the persons entitled to have the homestead set apart may be used for a probate homestead only if owned in common by the decedent and all persons for whom it is set apart or if consented to by the owners.

Because this is merely a technical clarification, we would not circulate it for comment but would simply incorporate it in probate legislation this session or next, as may be convenient.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

**Matthew Bender****MAR 07 1990****RECEIVED**

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March 5, 1990

Mr. Stan Ulrich
California Law Revision Commission
4000 Middlefield Road, Suite D-2
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Dear Mr. Ulrich:

I have been working on one of our publications that covers law of decedent's estates, and have encountered what appears to be an anomaly in Probate Code section 6522, pertaining to probate homesteads. I wanted to point it out in case it were something the Commission might want to address.

As we analyze it, Probate Code section 6522(a) authorizes recourse to the following property for a probate homestead, based on who is to be the recipient:

<u>Homestead Recipient</u>	<u>Property Available for Homestead</u>
Surviving spouse:	Community or quasi-community property under (a)(1) Property owned commonly with the deceased, or the deceased's separate property under (a)(2)
Minor children:	Property owned commonly with the deceased, or the deceased's separate property under (a)(2)
<u>Surviving spouse</u> <u>and minor children:</u>	Community or quasi-community property under (a)(1)

We are reading subdivisions (a)(1) and (2) as limitations on what property may be used for a probate homestead, dependent on who the homestead recipient is to be. We read the language in subdivision (a) preceeding subdivision (1) as creating a preference for community, quasi-commuity or commonly owned property only when subdivivisions (1) and (2) operate to allow resort to separate property.



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The conclusion we arrive at seems anomalous in that a surviving spouse with no children could resort to the decedent's separate property for a probate homestead, but a probate homestead for the use of both a surviving spouse and minor children is more restricted, with no resort to the decedent's separate property allowed.

I would appreciate it if you could let me know if we have misapprehended the statute or failed to see the underlying rationale, or if it is a matter the Commission might wish to address. My direct line is (415) 446-7322, should you wish to call. Thank you for your time.

Yours very truly,

George A. Meier
Executive Editor