

AMENDED IN SENATE MAY 19, 2005

AMENDED IN ASSEMBLY MARCH 10, 2005

CALIFORNIA LEGISLATURE—2005—06 REGULAR SESSION

ASSEMBLY BILL

No. 204

Introduced by Assembly Member Harman

January 31, 2005

An act to amend Sections 249.5 ~~and 294.7~~, 249.6, and 249.8 of the Probate Code, relating to decedents' estates.

LEGISLATIVE COUNSEL'S DIGEST

AB 204, as amended, Harman. Decedents' estates: posthumously conceived children.

(1) Existing law provides for the distribution of a decedent's estate among heirs and beneficiaries. Existing law provides that, for purposes of determining rights to property to be distributed upon the death of a decedent, a child of the decedent conceived after the decedent's death, other than a child conceived as a result of human cloning, is deemed to have been born in the decedent's lifetime if the child or his or her representative proves by clear and convincing evidence that specified conditions are satisfied. Those conditions include the requirement that ~~the child or the child's representative has given written notice by certified mail that the decedent's genetic material was available for the purpose of posthumous conception~~ *decedent specify in writing that his or her genetic material shall be used for posthumous conception of a child of the decedent, and that the specification may be revoked or amended only by a signed writing.*

~~This bill would instead require that the decedent's spouse or registered domestic partner or some other designated person, as~~

~~specified, has given that written notice also require that specification, and any revocation or amendment thereof, to be dated.~~

~~(2) Existing law bars a decedent's child, conceived after the decedent's death, or the child's representative from making a claim against the person making or receiving the distribution of the decedent's property when the claim is based on wrongful distribution and written notice has not been given in a timely manner, as specified.~~

~~This bill would specify that that provision applies to a decedent's child, conceived after the death of the decedent, who is subject to the provision of law that requires that notice be given.~~

~~(2) Existing law, for purposes of determining rights to property to be distributed upon a decedent's death, requires the person designated by the decedent to use his or her genetic material to be either the spouse or registered domestic partner of the decedent or some other person designated by the decedent, as specified. This provision also requires a posthumously conceived child or his or her representative to give written notice by certified mail that the decedent's genetic material was available for posthumous conception.~~

~~This bill would revise that provision to delete the reference to the spouse or registered domestic partner and would require the person designated by the decedent to control the use of the genetic material to give that written notice.~~

~~(3) Existing law provides that a person with the power to control the distribution of the decedent's property or death benefits does not incur liability for making a distribution or payment if that distribution or payment occurred prior to receiving notice or actual knowledge of the existence of genetic material.~~

~~This bill would also provide that each person to whom payment, delivery, or transfer of the decedent's property is made shall be personally liable to any person having a superior right by testate or intestate succession from the decedent. The bill would specify the limitations on that liability and would provide that an action to impose liability shall be barred 3 years after distribution to the holder of the decedent's property or 3 years after discovery of fraud, whichever is later.~~

Vote: majority. Appropriation: no. Fiscal committee: no.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION. 1. Section 249.5 of the Probate Code is amended
2 to read:

3 249.5. For purposes of determining rights to property to be
4 distributed upon the death of a decedent, a child of the decedent
5 conceived *and born* after the death of the decedent shall be
6 deemed to have been born in the lifetime of the decedent, and
7 after the execution of all of the decedent’s testamentary
8 instruments, if the child or his or her representative proves by
9 clear and convincing evidence that all of the following conditions
10 are satisfied:

11 (a) The decedent, in writing, specifies that his or her genetic
12 material shall be used for the posthumous conception of a child
13 of the decedent, subject to the following:

14 (1) The specification shall be signed *and dated* by the
15 decedent and at least one competent witness.

16 (2) The specification may be revoked or amended only by a
17 writing, signed *and dated* by the decedent and at least one
18 competent witness.

19 ~~(3) The person *A person* is designated by the decedent to use
20 the genetic material shall be either of the following:~~

21 ~~(A) The spouse or registered domestic partner of the decedent,
22 as of the decedent’s date of death.~~

23 ~~(B) Some other person named in the specification as approved
24 by the decedent to be the person designated by the decedent to
25 use the genetic material for posthumous conception. *control the
26 use of the genetic material.*~~

27 (b) ~~The person named in subparagraph (A) or (B) of paragraph
28 (3) of subdivision (a) designated by the decedent to control the
29 use of the genetic material~~ has given written notice by certified
30 mail, return receipt requested, that the decedent’s genetic
31 material was available for the purpose of posthumous conception.
32 The notice shall have been given to a person who has the power
33 to control the distribution of either the decedent’s property or
34 death benefits payable by reason of the decedent’s death, within
35 four months of the date of issuance of a certificate of the
36 decedent’s death or entry of a judgment determining the fact of
37 the decedent’s death, whichever event occurs first.

1 (c) The child was in utero using the decedent's genetic
2 material and was in utero within two years of the date of issuance
3 of a certificate of the decedent's death or entry of a judgment
4 determining the fact of the decedent's death, whichever event
5 occurs first. This subdivision does not apply to a child who
6 shares all of his or her nuclear genes with the person donating the
7 implanted nucleus as a result of the application of somatic
8 nuclear transfer technology commonly known as human cloning.

9 ~~SEC. 2. Section 249.7 of the Probate Code is amended to~~
10 ~~read:~~

11 ~~249.7. If the written notice required pursuant to Section 249.5~~
12 ~~is not given in a timely manner to any person who has the power~~
13 ~~to control the distribution of either the decedent's property or~~
14 ~~death benefits payable by reason of the decedent's death, that~~
15 ~~person may make the distribution in the manner provided by law~~
16 ~~as if any child of the decedent conceived after the death of the~~
17 ~~decedent had predeceased the decedent without heirs. Any child~~
18 ~~of a decedent conceived after the death of the decedent who is~~
19 ~~subject to Section 249.5, or that child's representative, shall be~~
20 ~~barred from making a claim against either the person making the~~
21 ~~distribution or the recipient of the distribution when the claim is~~
22 ~~based on wrongful distribution and written notice has not been~~
23 ~~given in a timely manner pursuant to Section 249.5 to the person~~
24 ~~making that distribution.~~

25 ~~SEC. 2. Section 249.6 of the Probate Code is amended to~~
26 ~~read:~~

27 249.6. (a) Upon timely receipt of the notice required by
28 Section 249.5 or actual knowledge by a person who has the
29 power to control the distribution of either the decedent's property
30 or death benefits payable by reason of the decedent's death, that
31 person may not make a distribution of property or pay death
32 benefits payable by reason of the decedent's death before two
33 years following the date of issuance of a certificate of the
34 decedent's death or entry of a judgment determining the fact of
35 decedent's death, whichever event occurs first.

36 (b) Subdivision (a) does not apply to, and the distribution of
37 property or the payment of benefits may proceed in a timely
38 manner as provided by law with respect to, any property if the
39 birth of a child *or children* of the decedent conceived after the

1 death of the decedent will not have an effect on any of the
2 following:

- 3 (1) The proposed distribution of the decedent's property.
- 4 (2) The payment of death benefits payable by reason of the
5 decedent's death.
- 6 (3) The determination of rights to property to be distributed
7 upon the death of the decedent.
- 8 (4) The right of any person to claim a probate homestead or
9 probate family allowance.

10 (c) Subdivision (a) does not apply to, and the distribution of
11 property or the payment of benefits may proceed in a timely
12 manner as provided by law with respect to, any property if the
13 person named in ~~subparagraph (A) or (B) of paragraph (3) of~~
14 subdivision (a) of Section 249.5 sends written notice by certified
15 mail, return receipt requested, that the person does not intend to
16 use the genetic material for the posthumous conception of a child
17 of a decedent. This notice shall be signed by the person named in
18 ~~subparagraph (A) or (B) of paragraph (3) of~~ subdivision (a) of
19 Section 249.5 and at least one competent witness.

20 (d) A person who has the power to control the distribution of
21 either the decedent's property or death benefits payable by reason
22 of the decedent's death, shall incur no liability for making a
23 distribution of property or paying death benefits if that person
24 made a distribution of property or paid death benefits prior to
25 receiving notice or acquiring actual knowledge of the existence
26 of genetic material available for posthumous conception purposes
27 or the written notice required by subdivision (b) of Section 249.5.

28 (e) *Each person to whom payment, delivery, or transfer of the*
29 *decedent's property is made pursuant to this section is personally*
30 *liable to any person having a superior right by testate or*
31 *intestate succession from the decedent. The aggregate of the*
32 *personal liability of a person shall not exceed the fair market*
33 *value, valued as of the time of the transfer, of the property paid,*
34 *delivered, or transferred to the person under this section, less the*
35 *amount of any liens and encumbrances on that property at that*
36 *time.*

37 (f) *In addition to any other liability a person may have*
38 *pursuant to this section, any person who fraudulently secures the*
39 *payment, delivery, or transfer of the decedent's property*
40 *pursuant to this section shall be liable to the person having a*

1 superior right for three times the fair market value of the
2 property.

3 (g) An action to impose liability under this section shall be
4 barred three years after the distribution to the holder of the
5 decedent’s property, or three years after the discovery of fraud,
6 whichever is later. The three year period specified in this
7 subdivision may not be tolled for any reason.

8 SEC. 3. Section 249.8 of the Probate Code is amended to
9 read:

10 249.8. Notwithstanding Section 249.6, any interested person
11 may file a petition in the manner prescribed ~~under~~ in Section 248
12 or 17200 requesting a distribution of property of the decedent or
13 death benefits payable by reason of decedent’s death that are
14 subject to the delayed distribution provisions of Section 249.6.
15 The court may order distribution of all, or a portion of, the
16 property or death benefits, if at the hearing it appears that
17 distribution can be made without any loss to any interested
18 person, including any loss, either actual or contingent, to a
19 decedent’s child who is conceived after the death of the decedent.
20 The order for distribution shall be stayed until any bond required
21 by the court is filed.