



FAMILY LAW SECTION

THE STATE BAR OF CALIFORNIA

LEGISLATIVE PROPOSAL (FL-2007-14)
DATE OF SEPARATION FOR COUPLES
LIVING SEPARATE BUT NOT APART

TO: Larry Doyle, Chief Legislative Counsel, State Bar Office of Governmental Affairs

FROM: Peter Walzer

DATE: August 31, 2006

RE: Amending §771(a) of the Family Code re Date of Separation for Couples Living Separate but Not Apart

SECTION ACTION AND CONTACTS:

Date of Approval by Section Executive Committee: August 15, 2006

Approval vote: Unanimous

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DIGEST: Would amend Family Code §771(a) to establish a rebuttable presumption that spouses or domestic partners have separated, and that their earnings and accumulations therefore have become their separate property, upon the occurrence of one of the following events: (1) They begin residing in separate residences following a communication by one spouse or registered domestic partner to the other of his/her intent to end their relationship; or (2) the filing and service of a petition for dissolution of marriage, legal separation, nullity, or to terminate a domestic partnership. Specifies that spouses and domestic partners may be “separated” under this section notwithstanding the fact that they may be still sharing the same residence.

The amendments shall not be retroactive and will apply only to the earnings and accumulations of spouses or registered domestic partners acquired subsequent to the effective date of the amendments.

PURPOSE:

Family Code §771 provides the earnings and accumulations of married persons and registered domestic partners are community property during their marriage, but become the separate property of the spouse/partner who earned them “while living separate and apart” from the other spouse/partner. Under existing California case law, there is often a lack of certainty as to when spouses/partners are living separate and apart. This uncertainty leads, in many cases, to prolonged litigation as to when parties’ earnings and accumulations become their separate property.

The proposed amendments would address the issue very narrowly, by simply making clear that couples can be living separate and apart even while sharing the same residence, in certain limited circumstances. In this, the amendments are intended to prospectively overrule the California Court of Appeal’s holding in *In re Marriage of Norviel* (2002) 102 Cal.App.4th 1152, 126 Cal.Rptr.2nd 148, that spouses are generally required to establish separate residences as a predicate to date of separation.

ILLUSTRATIONS: Husband files for dissolution but remains in house jointly owned with wife for three months for economic reasons. The two sleep in separate bedrooms, have no intimate relations, share no social activities or meals, and communicate only as absolutely necessary. After three months, husband moves into an apartment. Under current law (*Marriage of Norviel*), the two are not “separated” until the date of husband’s move, even though they clearly have been truly separated since the time he filed for dissolution.

DOCUMENTATION: See *In re Marriage of Norviel* (2002), 102 Cal.App.4th 1152, 126 Cal.Rptr.2^d 148, discussed above.

HISTORY: No similar legislation has been introduced in this area. §771 was enacted as part of the enactment of the Family Code in 1994 (A.B.2650, Chapter 162, Statutes of 1992), and continued without change prior Civil Code §5118. The section was amended in 1999 to add subdivision (b), relating to the separate property of unemancipated minors, by SB 1162 (Burton), Chapter 940.

PENDING LITIGATION: None known.

LIKELY SUPPORT AND OPPOSITION:

The Board of Directors of the Southern California Chapter of the American Academy of Matrimonial Lawyers will support the proposal. No opposition is anticipated.

FISCAL IMPACT: None.

GERMANENESS: Issues relating to the division of property during dissolution and the determination of support are within the experience and expertise of the members of the executive committee of the Family Law Section.

TEXT OF PROPOSAL

SECTION 1. Section 771 of the Family Code is amended to read:

771. The earnings and accumulations of a spouse *or registered domestic partner* and the minor children living with, or in the custody of, the spouse *or registered domestic partner*, while separated from the other spouse *or other registered domestic partner*, are the separate property of the spouse *or domestic partner*. *It will be a presumption affecting the burden of proof that spouses or registered domestic partners are "separated" under this act upon the first to occur of the following: (1) their residing in separate residences following a communication by one spouse or registered domestic partner to the other of his/her intent to end their relationship; or (2) the filing and service of a petition for dissolution of marriage, legal separation, nullity, or to terminate a domestic partnership. This presumption may be overcome by a preponderance of the evidence. Spouses and domestic partners may still be "separated" under this section notwithstanding the fact that they may be still sharing the same residence.*

(b) Notwithstanding subdivision (a), the earnings and accumulations of an unemancipated minor child related to a contract of a type described in Section 6750 shall remain the sole legal property of the minor child.