

Third Supplement to Memorandum 84-2

Subject: Study L-626 - Probate Law and Procedure (Omission of
Developmentally Disabled Child From Testator's Will)

The Commission's new wills and intestate succession law changes the former rule concerning a pretermitted heir. Under the old rule, if the testator omitted his or her child from the will and it did not appear from the will that the omission was intentional, the child received an intestate share whether the child was born before or after the making of the will. The new rule is more restrictive: If the omitted child was living when the will was made and the testator was aware of that fact, the assumption is that the omission was intentional; the child therefore receives nothing. Only a child born after the making of the will, or born before the making of the will where the testator is unaware of the birth of the child or believes the child to be dead, is protected by the new pretermismission provision. See Sections 6570-6572.

We have received a letter from the State Department of Developmental Services requesting that the Commission restore the old pretermismission rule where the omitted child is developmentally disabled. A copy of the letter is attached to this Supplement as Exhibit 1. The letter argues that "[i]n many instances, heirs with developmental disabilities are omitted as beneficiaries, as the testators are aware that the heirs are receiving support services in a state hospital or through a regional center and do not recognize their need for funds."

The staff does not think there should be special rule of pretermismission where the child is developmentally disabled. The purpose of the pretermismission rule is to protect the testator against forgetfulness, not to provide a share for the child on public policy grounds where the testator intended the contrary. See 7 B. Witkin, Summary of California Law Wills and Probate § 5, at 5524 (8th ed. 1974). If a developmentally disabled child is omitted from the testator's will and is later institutionalized, the special rule urged in Exhibit 1 would produce different results depending on whether the testator died before or after institutionalization of the child, a distinction that cannot be justified

on the basis of what the testator intended when the will was drawn. The special rule is not needed to protect the omitted child, since the child is adequately protected by the provisions for family allowance (Sections 6540-6545), probate homestead (Sections 6520-6527), and setting aside exempt property (Sections 6510-6511).

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

DEPARTMENT OF DEVELOPMENTAL SERVICES

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December 12, 1983

The Honorable Alister McAlister
State Assembly
State Capitol
Sacramento, CA 95814

Dear Mr. McAlister:

The Department of Developmental Services recently completed its review of bills signed by the Governor this session. At that time department staff brought to my attention AB 25 regarding probate law.

The department is concerned about a possible adverse impact of Probate Code Sections 6570 through 6573 regarding testate succession of pretermitted heirs on persons with developmental disabilities.

In many instances, heirs with developmental disabilities are omitted as beneficiaries, as the testators are aware that the heirs are receiving support services in a state hospital or through a regional center and do not recognize their need for funds. Under current law when wills are silent regarding heirs with developmental disabilities, such persons have been able to apply for and receive their share of decedents estates as pretermitted heirs. The changes in Sections 6570 through 6573 preclude such action.

The department proposes to amend the Probate Code to make an exception under specified circumstances for persons with developmental disabilities (see enclosure).

I apologize for not bringing this problem to your attention when AB 25 was before the Legislature. If you have any concerns regarding this proposed change, please contact Phyllis Gadei, Assistant to the Director for Legislation. She can be reached at 323-3032.

Sincerely,

A handwritten signature in black ink, appearing to read "Gary D. Macomber", with a long horizontal flourish extending to the right.

GARY D. MACOMBER
Director

Enclosure

PROBATE CODE

6574. If a testator fails to provide in his or her will for a child of the testator and such child at any time was a resident or patient in a state hospital or a recipient of regional center services pursuant to Division 4.1, Division 4.5, Division 6 or Division 7 of the Welfare and Institutions Code, whether born before or after the making of the will or before or after the death of the testator, unless it appears from the will that such omission was intentional, such child succeeds to the same share in the estate of the testator as if the testator died intestate.

This section shall not apply if such child is provided for by any settlement or has had an equal proportion of the testator's property bestowed on him or her by way of advancement.