#L-659.01

rm152
09/11/91

First Supplement to Memorandum 91-56

Subject: Study L-659.01 - Inheritance Involving Adopted Child Under Probate Code Section 6408 (Additional Comments)

Letter From Professor Dukeminier

Exhibit 1 is a letter from Professor Jesse Dukeminier suggesting more revisions to subdivision (c) of Probate Code Section 6408. He would delete from the parenthetical "except" clause the words "or a wholeblood brother or sister of the child or the issue of that brother or sister". The staff does not recommend this deletion.

If we make this deletion, and keep the revisions in Exhibit 4 to the basic memo, subdivision (c) would look like this:

> (c) ~~Neither a~~ Notwithstanding the existence of the relationship of parent and child under this section, neither a parent nor a relative of a parent (except for the issue of the child ~~or a wholeblood brother or sister of the child or the issue of that brother or sister~~) inherits from or through a child on the basis of the relationship of parent and child if the child has been adopted by someone other than the spouse or surviving spouse of that parent.

Professor Dukeminier justifies this deletion as follows: He notes the staff view that subdivision (c) applies only if the adoption was after the death of a natural parent under subdivision (b). He finds it hard to justify permitting a natural sibling to inherit from the adoptee if the adoption was after the death of a natural parent, but not if both natural parents were living at the time of the adoption. By making his deletion, a wholeblood sibling of the adoptee would not inherit from the adoptee in either case, eliminating what he sees as an inconsistency.

This provision was added to the Commission's 1983 probate bill while it was pending in the Legislature. It was suggested by James Prosser, Assembly Minority Consultant, and by Miles Adams of San Ramon. See Memo 83-22. Mr. Adams had written to his Assemblyman, Bill Baker, who was considering seeking to amend the Commission bill on his own to deal with this problem.

The reason to allow wholeblood siblings to inherit from the adoptee after an adoption by a stepparent or after the death of a natural parent is that in such a case there is presumably a greater

likelihood that the adoptee will continue to have contact with these siblings. If the adoptee dies as a child, he or she could not have made a will. Prob. Code § 6100. Intestate succession law is a statutory will substitute, and inheritance by natural siblings in this case is probably what the adoptee would have wanted.

If the adoptee was an adult when adopted, the distinction between an adoption after the death of a natural parent and other adoptions is more difficult to justify. An adult adoptee is probably well acquainted with the natural family, whether the adoption was after the death of a natural parent or not. But an adult adoptee can make a will to provide for siblings who could not take by intestacy under Section 6408 if the adoption occurred while both natural parents were living and was not by a stepparent.

Professor Dukeminier asks whether on the adoptee's death the adoptee's personal representative has a duty to search for wholeblood siblings of the adoptee if the requirements of Section 6408 are satisfied. The personal representative must serve notice of a petition for administration of the estate on each heir of the decedent "so far as known to or reasonably ascertainable by the petitioner." Prob. Code § 8110. It is recommended that the personal representative construct a family tree as a checklist. 1 California Decedent Estate Practice § 7.21 (Cal. Cont. Ed. Bar 1990 rev.). But the personal representative has no duty to seek out unknown heirs. Stevens v. Torregano, 192 Cal. App. 2d 105, 13 Cal. Rptr. 604 (1961). So the provision for inheritance by wholeblood siblings of the adoptee does not impose an unreasonable burden on the personal representative.

The staff does not recommend the deletion from subdivision (c) suggested by Professor Dukeminier because the revisions to Section 6408 proposed in Exhibit 4 to the basic memo are clarifying only. The staff is reluctant to make substantive revisions to Section 6408, particularly since we just recommended its reenactment in the new Probate Code. Also, the Commission adopted the language that Professor Dukeminier would delete partly at the urging of a legislator.

Comments of Professor Halbach

Professor Edward Halbach finds the revisions in Exhibit 4 to the basic memo acceptable. But he thinks we should address the problem raised by Professor Gail Brod in her letter (Exhibit 3 to the basic

memo). She was concerned that subdivision (c) might be read to preclude an adoptive parent and relatives of an adoptive parent from inheriting from his or her adopted child, contrary to common sense. She wanted to add the word "natural" before "parent" in subdivision (c). We declined to do this because "parent" there is intended to refer both to a natural parent and to a prior adoptive parent.

Professor Halbach would solve her problem very simply by revising subdivision (c) to say that neither a parent nor a relative of a parent "inherits from or through a child on the basis of the relationship of parent and child if the child has been adopted by someone other than that parent or the spouse or surviving spouse of that parent." The staff thinks this is a good suggestion, and recommends it. The staff would also change "has been adopted" to "is adopted" to make clear that this refers to the most recent adoption, if there is more than one. With the revisions in Exhibit 4 to the basic memo, the revision suggested by Professor Halbach, and the one recommended by staff, subdivision (c) would read:

> (c) ~~Neither a~~ Notwithstanding the existence of the relationship of parent and child under this section, neither a parent nor a relative of a parent (except for the issue of the child or a wholeblood brother or sister of the child or the issue of that brother or sister) inherits from or through a child on the basis of the relationship of parent and child if the child ~~has been~~ is adopted by someone other than that parent or the spouse or surviving spouse of that parent.

Professor Halbach still thinks it would be clearer that subdivision (c) is subject to subdivision (b) if "inherits" were changed to "may inherit" in subdivision (c) as shown on page 4 of the basic memo. He thinks "may inherit" is less likely to be read as an affirmative grant of a right to inherit than "inherits." The staff thinks this is a slender reed on which to rely, and thinks the "notwithstanding" language is enough. Professor Dukeminier agrees with this conclusion.

Respectfully submitted,

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September 5, 1991

Mr. Robert J. Murphy III
Calif. Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94306

Dear Bob:

Re: Memo 91-56
Inheritance from Adopted Children

I have your memorandum explaining § 6408(c) of the Probate Code. I strongly support your clarifying revision in Exhibit 4. I wrote you about § 6408 after receiving an opinion letter from an estates partner in a leading Los Angeles firm saying that § 6408(c) gives wholeblood natural siblings a right to inherit from an adopted person independent of § 6408(b). It seems pretty clear that the statute needs clarification when you give it an opposite interpretation.

In view of your explanation of the requirements for the parenthetical "except" clause of § 6408(c) to operate, I wonder if we wouldn't be better off repealing the exception for wholeblood siblings and their issue. This "except" clause applies, as you say, in very limited fact situations, but where it applies it can create problems and arbitrary results.

(1) Where the requirements stated on page 2 of your memo are met, is it the personal representative's duty to search for wholeblood natural siblings of an adopted decedent? Will this lead to attempts to open "sealed" adoption records?

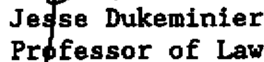
(2) What is the purpose of requirement (3) in your list, that the adoption take place after the death of a natural parent? This leads to arbitrary results, unjustifiable to clients in a number of cases. Consider these two:

(a) A couple has two infant children, A and B. They decide they cannot raise them, so they offer them for adoption. A is adopted by Mr. & Mrs. X, and B is adopted by Mr. & Mrs. Y. Years later A dies, leaving no surviving spouse, issue, or adoptive parents. Under your explanation of the statute, B does not inherit from A because the natural parents were alive at the time of the adoption. But if A's father had been dead then, and A's mother had decided that she could not raise the children and gave them up for adoption, B would inherit from A. I find it hard to see an explanation for these different results.

(b) A, an adult, is adopted by X, an older adult. A has a natural wholeblood brother, B. A dies unmarried, without issue, intestate, survived by a daughter of his adoptive father, D, and the natural wholeblood brother, B. According to your explanation of the statute, B takes an intestate share of A's estate if A was adopted after the death of A's natural mother or father, but does not take if A was adopted while A's natural mother and father were both alive. I cannot see a convincing reason why B's rights should turn upon that fact.

Section 6408 seems to me to need rethinking.

Sincerely,



Jesse Dukeminier
Professor of Law

JD:dhb