#L-659.01 rm293
07/22/92

Memorandum 92-52

Subject: Study L-659.01 - Parent-Child Relationship for Intestate Succession (Probate Code Section 6408)

ACTION RECOMMENDED BY STAFF

Effect of Adoption on Inheritance

Constructional problem. Last September, the Commission considered constructional problems with subdivision (c) of Probate Code Section 6408. Subdivision (c) is the "one-way inheritance provision," applicable where a child is adopted by someone other than a stepparent. It prevents natural relatives of the adoptee from inheriting from or through the adoptee, except for wholeblood siblings of the adoptee and their issue. The text of Section 6408 is set out in Exhibit 1.

The main problem involves the exception for siblings and issue, the question being whether the "except" clause is an affirmative grant of a right to inherit, or whether the "except" clause is subject to the living-together and other requirements of subdivision (b), set out below. The March 1983 minutes show the Commission intended subdivision (c) to be subject to subdivision (b), and that the parenthetical "except" clause is not an affirmative grant of a right to inherit.

This can be clarified by amending subdivision (c) as follows:

> (b) The relationship of parent and child does not exist between an adopted person and the person's natural parent unless both of the following requirements are satisfied:
>
> (1) The natural parent and the adopted person lived together at any time as parent and child, or the natural parent was married to, or was cohabitating with, the other natural parent at the time the child was conceived and died before the birth of the child.
>
> (2) The adoption was by the spouse of either of the natural parents or after the death of either of the natural parents.
>
> (c) Neither a parent nor a relative of a parent (except for the issue of the child or , if the requirements of paragraphs (1) and (2) of subdivision (b) are satisfied, 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.

Is it worth putting in a bill to make a merely technical amendment? There is some risk that any amendment will invite legislative review of and controversy over other provisions of Section 6408. The Commission might lose control of the situation. This risk may be avoided by adding the following language to the Comment, without making any amendment to Section 6408:

> For a wholeblood brother or sister of the child or the issue of that brother or sister to inherit from or through the child under subdivision (c), the requirements of subdivision (b) must be satisfied. This is because inheritance under subdivision (c) is only "on the basis of the relationship of parent and child." Under subdivision (b), the relationship of parent and child does not exist between an adopted person and the person's natural parent unless the living-together or other requirements of paragraph (1) of subdivision (b) are satisfied, and the adoption was after the death of either natural parent. If the adoption was by the spouse of either natural parent, by its terms subdivision (c) does not apply.

UPC provision. At the September 1991 meeting, there was some sentiment on the Commission to simplify Section 6408 along the lines of Uniform Probate Code Section 2-114. The UPC section provides:

> 2-114. (a) Except as provided in subsections (b) and (c), for purposes of intestate succession by, through, or from a person, an individual is the child of his [or her] natural parents, regardless of their marital status. The parent and child relationship may be established under [the Uniform Parentage Act] [applicable state law] [insert appropriate statutory reference].
>
> (b) An adopted individual is the child of his [or her] adopting parent or parents and not of his [or her] natural parents, but adoption of a child by the spouse of either natural parent has no effect on (i) the relationship between the child and that natural parent or (ii) the right of the child or a descendant of the child to inherit from or through the other natural parent.
>
> (c) Inheritance from or through a child by either natural parent or his [or her] kindred is precluded unless that natural parent has openly treated the child as his [or hers], and has not refused to support the child.

A majority of the Commission thought we should not make such a drastic substantive revision, and that rather we should merely try to make the section clearer. The Commission asked the staff to write a memorandum setting out the policies underlying Section 6408 and the reasons for the present provisions. That was done in Memorandum 92-26, distributed for the May meeting. Memorandum 92-26 was not considered by the

Commission. Instead, the Commission put the matter over to September so Professor Edward Halbach could be present. As a consultant to the Commission on probate law, Professor Halbach helped develop Section 6408.

On July 2, the staff met with Robert Sullivan and Monica Dell'Osso of the State Bar Probate Section, and with Professor Halbach. Professor Halbach feels strongly that Section 6408 is satisfactory in its present form. He says it was arrived at after exhaustive consideration of policy issues with virtual unanimity among Commissioners and State Bar representatives, and best carries out the likely intent of intestate decedents and persons who make class gifts in wills. A majority of the staff agrees that major substantive revisions of Section 6408 are not needed. Perhaps the drafting of Section 6408 could be improved, subject to the risk that the Legislature might make other amendments to Section 6408 that the Commission would find undesirable.

State Bar view. A majority of the Executive Committee of the State Bar Probate Section thinks Section 6408 is too complex, and should be simplified by adopting a rule that completely substitutes the adoptive family for the natural family after an adoption, no exceptions.

Policy question and governing principles. The policy question presented by the divergent staff and State Bar positions is whether Section 6408 should be revised to cut off inheritance between the adoptee and natural relatives in the two cases where it is now permitted -- (1) after a stepparent adoption, and (2) where the adoption is after the death of a natural parent. This should be considered in light of the following principles:

(1) Intestate succession law, as a statutory will substitute, should carry out the likely intent of most decedents.

(2) Inheritance between an adoptee and natural relatives should depend on the likelihood of continued post-adoption contact between the adoptee and natural relatives. In most cases of adoption by a non-stepparent where both natural parents are living, there will not be continued post-adoption contact between the adoptee and natural relatives. The identity of the natural relatives may even be secret. This is the reason for the rule in the introductory clause of

subdivision (b), generally cutting off inheritance between an adoptee and natural relatives.

(3) When adoption is by a stepparent, contacts between the adoptee and natural relatives are likely to continue. 18 Stan. L. Rev. 494, 505 (1966). This is the reason for the exception in subdivision (b)(2) permitting inheritance between the adoptee and natural relatives after a stepparent adoption.

(4) We should minimize competition between natural and adoptive relatives for the estate of a deceased adoptee. This justifies more restrictive inheritance by natural relatives from the adoptee than by the adoptee from natural relatives, and is the reason for the one-way inheritance rule of subdivision (c).

Staff recommendation. The staff would not make substantive revisions to the adoption rules in subdivisions (b) and (c). The staff does not favor the complete substitution rule urged by the State Bar. Although we know of no empirical studies to suggest that natural relatives would generally want to benefit the adoptee by will after a stepparent adoption, neither is there empirical evidence to the contrary. In the absence of public clamor to eliminate inheritance between an adoptee and natural relatives after a stepparent adoption, and lacking empirical evidence showing this to be inconsistent with the desire of most decedents, the staff thinks a compelling case for revision cannot be made. Section 6408 is at least consistent with the UPC rule allowing inheritance by the adoptee from natural relatives after a stepparent adoption. Uniform Probate Code § 2-114 (1991), *supra*.

The State Bar argument for simplicity merely addresses the drafting problem, and is not based on policy arguments. Even advocates of the complete substitution rule must allow for an exception so a stepparent adoption will not cut off inheritance between the adoptee and the custodial natural parent. UPC Section 2-114(b), *supra*, has this exception.

In summary, the staff would do no more than solve the constructional problem in subdivision (c), either by amending it or by adding language to the Comment as set out above.

CHANGES NOT RECOMMENDED BY STAFF

Inheritance Involving Foster Child or Stepchild

The draft in Exhibit 1 does not change the rule in subdivision (e) on inheritance involving a foster child or stepchild. Mr. Sullivan said the Executive Committee of the Probate Section would delete subdivision (e) in the interest of simplicity.

The staff would keep subdivision (e). It only applies where there is a relationship similar to a parent-child relationship and the foster parent or stepparent would have adopted the child but for a legal barrier -- usually the natural parent's refusal to consent. This is comparable to the doctrine of equitable adoption, and seems to carry out the likely intent of the foster parent or stepparent in most cases. We have received very few complaints about subdivision (e).

In 1986, we received a letter from attorney Dirk Van Tatenhove of Santa Ana recommending an amendment to subdivision (e) as follows:

> (e) For the purpose of determining intestate succession by a person or his or her descendants from or through a foster parent or stepparent, the relationship of parent and child exists between that person and his or her foster parent or stepparent if (1) the relationship began during the person's minority ~~and~~ , the person and the foster parent or stepparent thereafter lived together at any time during the person's minority as though they were parent and child, and that relationship continued throughout the parties' joint lifetimes and (2) it is established by clear and convincing evidence that the foster parent or stepparent would have adopted the person but for a legal barrier.

Mr. Van Tatenhove thinks meritless heirship petitions would be discouraged if subdivision (e) were amended as he suggests. He was involved in an heirship proceeding, *Estate of Claffey*. He represented blood relatives of the deceased mother against her stepchildren who had maintained only minimal contact with her. At issue was the degree of contact required between the stepchildren and their stepmother to satisfy the "relationship" required by subdivision (e). At trial, the jury found against the stepchildren. The verdict was affirmed on appeal, the court holding that subdivision (e) contemplates a family relationship like that of parent and child. Estate of Claffey, 209 Cal. App. 3d 254, 257-59, 257 Cal. Rptr. 197 (1989). But the court did not go so far as to require that the stepchild and stepparent had actually lived together.

Mr. Van Tatenhove's proposed new "living-together" test would make subdivision (e) more nearly parallel to subdivision (b) (adoption). But it would go beyond the holding of *Claffey*. The staff thinks subdivision (e) as construed by *Claffey* is satisfactory and would not revise it.

Establishing Paternity After the Father's Death

Subdivision (f) of Section 6408 provides that, for inheritance, paternity may be established after the death of the alleged father only by "clear and convincing evidence that the father has openly and notoriously held out the child as his own." This restriction does not apply during the father's lifetime. Memorandum 92-26 argued that this restriction was to discourage dubious paternity claims after the father's death, and that because of scientific advances in DNA typing, the restriction was no longer necessary. The memorandum concluded that subdivision (f) could therefore be replaced by a provision that the parent and child relationship may be established under the Uniform Parentage Act, the same after the father's death as before.

Professor Halbach says the post-death proof restriction is not to discourage dubious paternity claims, but rather is to carry out the likely intent of the father by disinheriting an unknown child. If the father was unaware of the existence of the child, obviously the father could not provide for the child by will. If during the father's lifetime the child would have had to sue the father to establish paternity, it seems unlikely the father would have provided for the child by will, although perhaps the father might resist a support obligation but still wish to benefit the child on his death. Professor Halbach argues that we should not permit the child to establish a claim to the father's estate after the father's death where that seems contrary to the father's likely intent.

Professor Halbach would do no more than to revise paragraph (2) of subdivision (f) to say that, after the father's death, paternity may be

> established by clear and convincing evidence that the father has openly ~~and notoriously held out~~ treated the child as his own.

He would not amend Section 6408 solely to make this change. He would make this change only if other provisions of Section 6408 are being amended. The staff agrees with Professor Halbach's conclusion.

Court Authority To Change Inheritance Rights in Adoption Decree

Alaska adopted UPC Section 2-114, but revised it to allow the court to expand statutory inheritance rights: Alaska cuts off inheritance between the adoptee and natural family in both directions "unless the decree of adoption specifically provides for the continuation of inheritance rights" between the adoptee and natural family. Alaska Stat. § 13.11.045. Colorado may permit the court to restrict inheritance rights in the adoption decree. See Colo. Rev. Stat. § 15-11-109 (1987), § 19-5-211 (Cum. Supp. 1989). *But see In re* Estate of David, 762 P.2d 745 (Colo. App. 1988).

We could give the court authority to expand or restrict inheritance between the adoptee and natural family in the adoption decree. This would allow the court to consider the facts of the particular adoption. The court could determine when it is important to keep the identity of the natural family secret and when that is unnecessary.

But the UPC does not have a provision giving courts authority to adjust inheritance rights. If the court could adjust inheritance rights, it would require a search for the adoption decree or court records at the time of death to determine those rights. The staff recommends against giving the court authority to adjust inheritance rights in the adoption decree.

Equitable Discretion to Disregard Adoption

Section 6408(g) says nothing in the section affects or limits application of the judicial doctrine of equitable adoption. Under that doctrine, an agreement to adopt a child is enforceable for purposes of inheritance, even though the adoption was not completed. 10 B. Witkin, Summary of California Law *Parent and Child* § 345, at 391 (1989).

Attorney Rory Clark of Woodland Hills had a case involving the reverse fact situation. A child was adopted by her natural grandparents when she was nine years old. Both of her parents were living. The adoption was solely to permit the adopting grandparents to receive more social security benefits. The child continued to live with her natural parents.

Later, as an adult, she claimed inheritance through her natural parents. She asked the court to use its equitable powers to treat the adoption as though it had not happened, permitting her to inherit through her natural parents. She argued that she had not consented to or benefited from the adoption. The case was heard as an uncontested matter. In the absence of any objection, the court decided to treat the grandparents' adoption as though it had not happened, allowing the adoptee to inherit through her natural parents.

Mr. Clark thought the statute should recognize this type of case. Subdivision (g) could be revised as follows:

> (g) Nothing in this section affects or limits application of the judicial doctrine of equitable adoption or other equitable doctrines for the benefit of the child or his or her descendants.

The staff is concerned this revision may raise more questions than it answers. What are the "other equitable doctrines"? The facts of Mr. Clark's case are unusual. Neither he nor the staff found any published decision on point. If the court has equitable power, apart from statute, to decline to recognize an opportunistic adoption of no benefit to the child, it is unlikely Section 6408 takes this power away. The staff recommends against amending subdivision (g) to refer to "other equitable doctrines."

Effect of Adoption by Single Parent

Last year we received a letter from attorney Brennan Newsom of San Francisco. He had case involving a non-stepparent adoption. The adoption was accomplished by only one member of a married couple. Mr. Newsom asked whether the adoption cut off inheritance between the adoptee and both natural parents, or only one natural parent. The answer is unclear.

Subdivision (b) of Section 6408 says that if the living-together and other requirements of subdivision (b) are not satisfied, a parent-child relationship does not exist between the adoptee and his or her natural "parent" (singular). Subdivision (c) says a "parent" (singular) does not inherit from or through a child after a non-stepparent adoption. Mr. Newsom thought subdivisions (b) and (c) were inconsistent, but he concluded that the adoption by one adopting parent

cut off inheritance between the adoptee and both natural parents. The staff thinks this conclusion is not compelled by Section 6408.

UPC Section 2-114 says an adoptee is the child of the adopting "parent or parents" and not of his or her natural "parents" (plural). The staff talked to Professor Lawrence Waggoner, Chief Reporter for the UPC. He thought the UPC probably cuts off inheritance between the adoptee and both natural parents after a non-stepparent adoption.

Professor Halbach thinks the problem is not worth addressing in the statute. He believes courts will construe the statute to achieve sensible results on the facts. The staff agrees, and would not try to solve Mr. Newsom's problem by amending Section 6408.

Inheritance Generally From Child Not Acknowledged or Not Supported

Under UPC Section 2-114(c), *supra,* if the parent has not openly treated the child as his or hers or has refused to support the child, inheritance from the child by that parent and his or her relatives is cut off in all cases, whether or not there has been an adoption, and whether or not the child was born out of wedlock. Under Section 6408, nonsupport or failure to acknowledge parentage affects only the right to inherit from or through a child born out of wedlock. Only a killer is precluded from inheriting generally.

Should there be a general requirement that to inherit from a child, the parent (probably the father in most cases) must have supported the child? Only New York appears to have such a rule. N.Y. Est. Powers & Trusts Law § 4-1.4 (McKinney 1981). None of the 15 UPC states have enacted this rule, although this is understandable because the new UPC rule was only approved two years ago.

The argument for adopting the UPC provision cutting off inheritance by a parent where the parent has not openly treated the child as his or hers or has refused to support the child is that the child probably would not want to benefit the absent parent in such a case. And the parent should not be rewarded after failing to live up to parental responsibilities.

Drawbacks of the UPC provision include:

(1) It penalizes relatives of the nonsupporting parent, not just the parent. If the father has refused to support the child and dies

before the child, the father's siblings (the child's paternal uncles and aunts) cannot inherit from the child. This is probably not what the child would have wanted.

(2) It singles out nonsupport as the disqualifying factor. Other kinds of conduct, such as child abuse, defiance of parental authority, or commission of a crime (other than murder) against the family member, are not disqualifying.

(3) It may increase litigation by creating another factual issue.

The staff recommends against adopting the UPC provision cutting off inheritance by a parent who has not openly held out the child as his or hers, or who has refused to support the child.

Respectfully submitted,

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TEXT OF PROBATE CODE SECTION 6408
AS AMENDED BY 1992 CAL. STAT. CH. 163

Prob. Code § 6408. Parent and child relationship

6408. (a) A relationship of parent and child is established for the purpose of determining intestate succession by, through, or from a person in the following circumstances:

(1) Except as provided in subdivisions (b), (c), and (d), the relationship of parent and child exists between a person and his or her natural parents, regardless of the marital status of the natural parents.

(2) The relationship of parent and child exists between an adopted person and his or her adopting parent or parents.

(b) The relationship of parent and child does not exist between an adopted person and the person's natural parent unless both of the following requirements are satisfied:

(1) The natural parent and the adopted person lived together at any time as parent and child, or the natural parent was married to, or was cohabitating with, the other natural parent at the time the child was conceived and died before the birth of the child.

(2) The adoption was by the spouse of either of the natural parents or after the death of either of the natural parents.

(c) 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.

(d) If a child is born out of wedlock, neither a parent nor a relative of a parent (except for the issue of the child or a natural brother or sister of the child or the issue of that brother or sister) inherits from or through the child on the basis of the relationship of parent and child between that parent and child unless both of the following requirements are satisfied:

(1) The parent or a relative of the parent acknowledged the child.

(2) The parent or a relative of the parent contributed to the support or the care of the child.

(e) For the purpose of determining intestate succession by a person or his or her descendants from or through a foster parent or stepparent, the relationship of parent and child exists between that person and his or her foster parent or stepparent if (1) the relationship began during the person's minority and continued throughout the parties' joint lifetimes and (2) it is established by clear and convincing evidence that the foster parent or stepparent would have adopted the person but for a legal barrier.

(f) For the purpose of determining whether a person is a "natural parent" as that term is used in this section:

(1) A natural parent and child relationship is established where that relationship is presumed and not rebutted pursuant to the Uniform Parentage Act, Part 3 (commencing with Section 7600) of Division 12 of the Family Code.

(2) A natural parent and child relationship may be established pursuant to any other provisions of the Uniform Parentage Act, except that the relationship may not be established by an action under subdivision (c) of Section 7630 of the Family Code unless either (A) a court order was entered during the father's lifetime declaring paternity or (B) paternity is established by clear and convincing evidence that the father has openly and notoriously held out the child as his own.

(g) Nothing in this section affects or limits application of the judicial doctrine of equitable adoption for the benefit of the child or his or her descendants.