First Supplement to Memorandum 92-52

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

Attached are three letters on Probate Code Section 6408:

Exhibit 1: Letter from attorney Charles Collier (LA).
Exhibit 2: Letter from attorney Ken Klug (Fresno.)
Exhibit 3: Letter from attorney Brennan Newsom (SF).

Provision for Inheritance After Stepparent Adoption is Sound

Mr. Collier (Exhibit 1) thinks the policy is sound of not cutting off inheritance between the adoptee and natural relatives after a stepparent adoption. He is less certain about continued inheritance between the adoptee and natural relatives when the adoption is after the death of natural parent.

Undesirable to Have Several Bodies of Law

Mr. Klug (Exhibit 2) agrees with the conclusion in the basic Memorandum that substantive revisions of Section 6408 are undesirable. He is concerned that, because a substantive change would have to be prospective so as not to disrupt vested rights, there would be two sets of rules. Which rule would apply would depend on the date of death. And Section 6408 applies to class gifts in wills (Prob. Code § 6152), as well as in intestacy. Creating a new rule might require the redrafting of many instruments.

Rather than simplifying the task of probate lawyers, substantive revisions of Section 6408 might well make their job more difficult. Mr. Klug says "[f]requent changes disorient attorneys and increase the risk that both the advice and the drafting may be erroneous."

Adoption by One Person

Mr. Newsom (Exhibit 3) asks what happens in a non-stepparent adoption if only one person adopts? Does that cut off inheritance from or through both natural parents or only one? Under Section 6408(b), a non-stepparent adoption cuts off inheritance between the adoptee and the adoptee's natural "parent" (singular). Mr. Newsom thinks this cuts off inheritance from both natural parents where the adoptee is adopted by one person. The staff reads this the other way: Use of the

singular ("parent") suggests that adoption by one person cuts off inheritance from or through only one natural parent.

But there are problems of application. Which parent is cut off -- the parent of the same gender as the adopting person? What if the adoption is by one member of a couple, both of whom are of the same gender? The staff thinks the possible fact situations are too varied to try to spell out in the statute. The staff recommends leaving this question to the interpretation and application by the courts.

Respectfully submitted,

Robert J. Murphy
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August 27, 1992

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Robert J. Murphy
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303

Re: Probate Code Section 6408

Dear Bob:

Reference is made to our telephone conversation about the above section and your subsequent letter of July 23 and Memorandum 92-52.

Section 6408 is a very difficult section to understand and apply, but that per se is not a reason for limiting some of the provisions therein.

With reference to Section 6408(c), I believe a careful reading would make paragraph (b) applicable under the existing language as it is premised upon "the relationship of parent and child" which in turn is dependent upon subparagraph (b). However, I think if (c) were amended language could be inserted after "the relationship of parent and child" to state "as defined in subparagraph (b)."

I believe the exception in (b) is an appropriate exception recognizing the parent-child relationship where the adoption is by the spouse of either of the natural parents. I don't recall the rationale, however, for the language at the end of (b)(2) "or after the death of either of the natural parents."

In most instances where a parent had died, the adoption, if not by a step-parent, is likely to be by a relative, such as grandparents or a sibling of the deceased parent, and, therefore, the relationship of parent and child will be

established as a result of the adoption by another family member.

While recognizing the policy question governing principal recited on page three, paragraph (2) of Memo 92-52, I question whether the language in (b)(2) dealing with adoption after the death of either spouse is really necessary. If that language were eliminated, it would clarify (b) and (c) and limit the right of inheritance to the step-parent adoption situation.

In looking at the language of (c), the first line refers to "neither a parent nor a relative of the parent." Would that be clarified by referring to a "natural parent" or relative of a "natural parent?"

Assuming that the Commission decides that it wants to only clarify Section 6408, this could be handled in a comment rather than any change in the language of this section itself.

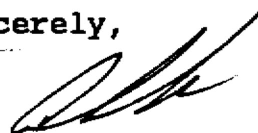
I would favor retention of the right to inherit after a step-parent adoption, but am not persuaded that the right of inheritance after death of one of the parents is appropriate where there has been an adoption.

As to the other comments in Memo 92-52, I am not inclined to change subdivision (e) or subdivision (f).

The Alaska variation on UPC Section 2-114 does not impress me as being practical in adoption decrees.

I hope these comments will of help to the Staff and the Commission. If I can be of further assistance, please let me know.

Sincerely,



Charles A. Collier, Jr.

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August 28, 1992

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Mr. Robert J. Murphy
California Law Revision Commission
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Re: Probate Code Section 6408
(LRC Memorandum 92-52)

Dear Bob:

I have previously encouraged the Law Revision Commission to refrain from revisiting policy issues and changing the substance of statutes. My "anti-tinkering" philosophy is based on my perception that frequent statutory changes are a disservice to the public. In the estate planning area, the public relies on attorneys to advise on the law of descent and to draft provisions which implement testamentary desires. Frequent changes disorient attorneys and increase the risk that both the advice and the drafting may be erroneous. If we know what the law is, we can deal with it; if we only think we know what the law is, we can deal with it incorrectly.[1]

While I concur with the position of the EPTPLS Executive Committee that a return to the pre-1982 law would provide a simple solution to a complex problem, I do not believe it is time to return to the pre-1982 law. Were we to enact the Executive Committee's proposal, we would be faced with a ten-year period in which the inheritance rights of adopted persons would be different from those rights before and after that period. Although a change in intestate succession rights may become less acute over time, locking in different rules by which to interpret Wills and trusts would create a horrendous result.

The interpretation to be given to Wills and trusts is governed by Probate Code §6152, which incorporates much of §6408. Section 6152 applies to testators dying after 1984.

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[1]I am reminded of a statement whose source escapes me. It goes something like this: It really doesn't matter whether we drive on the right side of the road or the left side; what matters is that we don't change too often.

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It will apply to trusts established by those testators for a period up to the time measured by the rule against perpetuities. With respect to class definitions (e.g., "issue"), attorneys now need to be aware that different rules apply to pre-1985 trusts than those which apply to post-1984 trusts. It is probably not in anyone's interest to insert additional dates for application of the former rule. Thus, while I do not necessarily agree with the existing policies, I don't think its in anyone's interest to change those policies at this time.

My recommendation that the policies should be maintained should not be construed to mean that the language of the existing statutes should be maintained. Sections 6408 and 6152 are not exactly models of clarity, but I think they work.[2]

The main conceptual problem I have with §6408 is that subsections (a), (b), (f) and (g) all deal with defining the relationship between parent and child; whereas subsections (c), (d) and (e) all deal rules of with inheritance notwithstanding the parent-child relationship.

Similarly, relationships for purposes of Will construction are defined in §6152. The relationships in both sections seem to be identical, but different language is used. It would be less confusing for me if both sections were redrafted to use the same language to express the same concepts. If you wish, I would be happy to try to work up simpler language. However, I do not suggest changing the policy behind the concepts.

Very truly yours,

Kenneth M. Klug

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[2]When faced with a specific factual situation, one can track through the statutes and determine whether a particular person is included or excluded. But I don't think I could easily explain the statute to a client or express an opinion as to the operation of the statute on the specific factual case without actually tracking through the statute. I would like to think that my limited ability to understand the sections is a result of the statutory language and not my personal failings.

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November 6, 1991

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Gentlepersons:

I am an attorney in San Francisco involved in a Will contest arising out of a Will executed by a Decedent who died on December 12, 1989 and whose Will was dated November 14, 1989. The contest involves the interpretation (or misinterpretation) of Section 6408 of the Probate Code. I believe Section 6408 to be ambiguous in the following respects;

1. Section 6408(b) sets forth that "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 co-habitating 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.

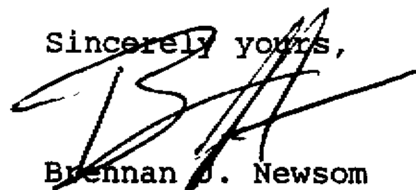
In my particular case, an adult was adopted in 1973 by a gentleman who was married. The adopting father died in 1981. His wife did not join in the adoption. Although she lived with her husband and the Adoptee/Decedent and believed that she was his adopted mother. The question before me is whether or not the rights of the biological mother and/or father had been cut off as of the date of the adoption, namely in 1973. Since the biological father was alive at the time of the adoption I think there is little doubt that the adoption cuts off any rights of intestacy which he might have had or which the adoptee would have had through his father. However, since the adopting father's wife did not join in the Petition for Adoption, did the adoption nevertheless cut off the rights of inheritance of the biological mother who survives to this day. It is clear to me that a literal reading of Section 6408(b)(1) and (2) would result in the cut off of the biological

mother from all rights of intestate succession to the estate of the adopted child. You will note that the Statute set forth that the relationship of parent and child does not exist between the adopted person and the person's natural parent (note that the parent is singular not plural) unless both of the following requirements are satisfied; in my case neither (b)(1) or (b)(2) is satisfied and therefore it would seem as if the relationship of parent and child does not exist between the adopted person and the person's natural surviving mother.

However, Probate Code Section 6408(c) states "Neither a parent nor a relative of a parent (except for the issue of the child or a whole blood brother and sister) inherits from or through a child on the basis of the relationship of the parent and child if the child has been adopted by someone other than the spouse or surviving spouse of that parent. In this case, a Will devising property to various friends and relatives is being challenged by the biological mother and a biological brother and sister. Thus, there seems to be an internal inconsistency between 6408(b)(1) and 6408(b)(2) and 6408(c).

Your comments would be appreciated.

Sincerely yours,



Brennan J. Newsom

BJN:ll