

## Second Supplement to Memorandum 92-52

Subject: Study L-659.01 - Parent-Child Relationship for Intestate Succession (Memo From North Committee on Adoptions)

Exhibit 1 is a memorandum from the North Committee on Adoptions commenting on Probate Code Section 6408. The Committee does not favor the complete substitution rule, but would keep "downstream" inheritance in most cases after a stepparent adoption.

The Committee advocates a highly complex scheme under which the adoption court could provide in the adoption decree what inheritance rights will be. A person over 12 being adopted by a stepparent could specify in the consent to adoption whether he or she wanted "upstream" inheritance to continue. A natural parent consenting to a stepparent adoption could specify whether "downstream" inheritance was to continue.

A court decree freeing a child from parental custody and control would cut off "upstream" inheritance. Under Civil Code Section 232.6, such a decree "terminates all parental rights and responsibilities with regard to the child." The staff has found no case saying that this terminates inheritance rights. Does this proposal merit further study?

In general, these proposals seem to go in the wrong direction. Our purpose in reexamining Probate Code Section 6408 has been to try to simplify it, but these proposals would make it significantly more complex.

Respectfully submitted,

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**Review and Recommendation Concerning Memorandum 92-26, on inheritance rights for intestate succession for adoptees.**

**Issue No. 1: Should the adoptive parents in a stepparent adoption inherit from the child to the exclusion of the parent who consented to, or whose rights were terminated in connection with, a stepparent adoption?**

[Please note that only the new adoptive parent "adopts" in a stepparent adoption; the natural parent whose rights continue merely consents. Current Probate Code Section 6408 does not clearly distinguish between the natural parent whose rights were terminated in the stepparent adoption, and the continuing natural parent. For convenience, this report refers to the parents after the stepparent adoption (including the natural parent whose rights were not affected) as the "adoptive" parents, although, in any event, the Probate Code wording needs tightening.]

The staff recommendation is to cut off such "upstream" inheritance by natural relatives after the adoption. The rationales are: to prevent contests between the family of natural kindred and the adoptive family; to follow the desires of the adoptee (although this is recognized as speculative); and, to promote national uniformity. The situation is recognized as rare.

The North Committee on Adoptions concurs with the recommendation, with the exception noted below. This view is grounded primarily in the rareness of the situation; a greatly complicated scheme is not appropriate for the isolated instances.

Any desire of the adoptee to include in his or her inheritance the parent whose relationship was ended by the stepparent adoption can be met, for an adoptee sufficiently mature and sophisticated, through a Will. It would be beneficial if adoptees, upon reaching the age of majority, were informed of the effects of the adoption on inheritance rights, just as they should be informed of their rights to obtain certain information concerning the adoption through the agency investigating the adoption.

However, stepparent adoptions often involve children who have had a continuing, close, loving and mutual relationship with the parent whose rights were terminated. Often it is because of this continuing relationship and love for the child that the parent consents to the stepparent adoption to facilitate the child's more complete assimilation into the family in which the child may spend most of his time. Since the consent of a child over 12 is required for an adoption, in such circumstance, the child should be able (with the help of a guardian ad litem, if necessary) to designate whether the adoption should affect the upstream rights of the parent whose rights are being terminated. This decision should be reflected in the Decree of Adoption.

For children under 12, there should be provision that the Decree can state that it shall not affect the upstream rights of the parent whose rights are being terminated. This will then become a subject for discussion in obtaining that parent's consent to the adoption.

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The upstream rights, if provided, should be personal to the parent whose rights were terminated, and not his relatives. Thus, that parent would have to survive the child. This does penalize the rare case in which siblings are split upon a dissolution, and the stepparent adoption terminates the natural sibling's legal relationship. But the exception is designed to deal with those cases in which a close familial relationship exists, but cannot be recognized by [current] law (but cf: Civil Code §4351.5) after the adoption.

If the Decree does not provide otherwise, the general rule of no upstream inheritance should apply.

Issue No. 2: Should the child inherit only from the adoptive parents in a stepparent adoption?

The current system allows "downstream" inheritance from the parent whose rights were terminated, and from such parent's relatives, in a stepparent adoption, if the child lived with the stepparent, as will commonly be the case. [Other, less frequent, situations also allow downstream inheritance.]

The staff recommendation is for a complete substitution of the adoptive family for the natural family. The supporting rationales are: 1) to serve the goal of making the adoptive relationship as similar as possible to a natural relationship; 2) to avoid conflict between the adoptive family siblings and the child; 3) to follow a perceived, but undocumented "trend" in the law; and, 4) to prevent the adopted child from having an advantage in inheritance due to the adoption.

The North Committee on Adoption does not find the rationales convincing. While making the adoptive relationship resemble, in law, the natural parent-child relationship is vital to prevent stigmatization of adoption, this rationale suggests only that the rights of the adopted child not be inferior. It can hardly justify denying a boon to the child. In fact, as opposed to law, the adoptive relationship is not the same as the natural relationship, especially in a stepparent adoption in which the existence of a "prior" parent is rarely a secret, and often a fact of daily life through continued contact. The legal fiction should not be respected when the rationale does not apply.

The problem of intra-family friction is no more apparent in the intestate situation than when the parent's Will names the adopted child; certainly no one would suggest denying the parent consenting to an adoption the ability to bequeath his or her largess on the loved child.

Inheritance is basically "unfair" to those who lack the opportunity. No sound basis exists for denying the adopted child an unexpected inheritance. The better question would be whether allowing downstream inheritance after the adoption is unfair to the surviving spouse and/or other children of the decedent; these are the persons whom the decedent may have expected to inherit exclusively. Another related issue is whether a predeceased trustor would expect the adopted child to share under a testamentary trust for descendants.

The basic recommendation by the North Committee on Adoption is that the parent consenting to the adoption be allowed to elect whether downstream inheritance is desired. The Consent form can be revised to elucidate the election and the effect; the consenting parent then can indicate an election which shall be incorporated into the Decree. This system helps insure that the consenting parent, the person whose estate is most affected by the rule, is aware of the issue and the result at the time of consent.

If no election is made, or for pre-election adoptions, the adopted child should continue to have downstream inheritance under the current rules concerning living with the parent, or the parent's death before the child's birth. An exception should be recognized when the parent whose rights were terminated has a surviving spouse or other children with whom the legal parental relationship continued until the parent's death. In such situation, the spouse or (non-adopted out) children should inherit to the exclusion of the adopted child.

The downstream rights from other relatives should be fixed in accordance with the adopted child's rights with respect to inheritance from the terminated parent as of the date of the decedent's death. If the death is before birth of the child, full inheritance should apply (under trusts for descendants, grandchildren and issue). If the relative's death occurs after the child's birth and before adoption, full inheritance should apply. If after the adoption, for pre-election adoptions, but in the absence of other non-adopted descendants of the parent (the spouse can be ignored), downstream inheritance should apply under the current criteria of whether the child lived with the parent, or the parent died before birth of the child. If the death is after the adoption under the recommended election scheme, the election made by the parent whose rights were terminated should apply.

When a parent's rights are terminated by court order (i.e., when the parent does not consent to the stepparent adoption), downstream rights should continue under the same rules, except that the Court should be permitted, upon a showing that retention of such rights would not be in the child's interest, to sever such inheritance rights in the Decree.

While a simple rule may be desired, the relationships connected with stepparent adoptions are varied. The rule should reflect the spectrum of the situations it must govern, and not artificially impose legal rules for simplicity alone.

These proposed rules recognize that the parental love for the child often continues in a stepparent adoption; the assumption should be that the parent consented to the adoption out of concern for, not disinterest in, the child's welfare. That concern would normally suggest the parent wishes the child to inherit; however, if the parent has a new spouse or other children, it is reasonable that the parent expects these relatives to inherit. The parent can provide for the adopted child by Will. The parent can also opt out if the consent is based upon a lack of interest in the child.

Other relatives should be presumed also to want to provide for the child. If the parent has elected to sever inheritance, then such relatives can provide by Will. The parent's actions after the relative's death should not affect inheritance from the relative.

Issue No. 3: What inheritance rights are appropriate with respect to natural relatives when the adoption occurs after the death of the natural parent?

This issue is apparently not limited to stepparent adoptions. It is not clear if the report was also including adoption of adults. The North Committee opinion here limits itself to adoption of minors.

The State Bar Executive Committee recommendation would terminate the current provisions allowing, in non-stepparent adoptions in such instance, "downstream" inheritance by the adoptee from natural relatives, and "upstream" inheritance from the adoptee descendants, wholeblood siblings and descendants of siblings, as provided in current law.

Much of the discussion by the report suggests a need for secrecy as an important consideration. In most stepparent adoptions, there never was any secrecy. In all independent adoptions, the names of the birth family and of the adoptive family are known to each other (Civil Code 222.20, definitions of "place for adoption" and "personal knowledge"). Independent adoptions constitute most infant adoptions in California. In a large percentage of agency adoptions, identifying information is exchanged. Thus, generally no "secrecy" needs to be protected.

The purported need for secrecy is also suspect. It is not clear why a child cannot develop a meaningful relationship with adoptive parents in the absence of secrecy. Secrecy implies that something needs to be hidden; actually, there is nothing shameful about an adoption. In Australia, when an open records system replaced the prior strictly confidential system, almost nobody opted to maintain confidentiality. In California, there has been a significant development of open adoptions in which the child maintains contact with the biological parents.

Other rationales will have to be sought to create policy in this area. One important distinction is the method of termination of the parental relationship. If the relationship is terminated under the Welfare and Institutions Code, or Civil Code §232, it is safer to assume that maintaining any relationship with the remaining biological parent is not in the child's interest; in this situation, "upstream" inheritance of the parent and relatives should be eliminated. As current law reflects, this rationale based upon parental unfitness does not logically apply to the wholeblood siblings and their descendants. However, inheritance by blood relatives perhaps unknown to the adoptee cannot be thought to be the adoptee's likely wish. Upstream inheritance of other natural siblings and relatives should be limited to the situation in which the adoptee dies without spouse, children or descendants, or siblings or parents within the adoptive family. Downstream inheritance should also be terminated, unless the court in the

termination action decrees otherwise on stipulation of the terminated parent, except in similar situations to the above in which the adopted child is the only near "relative", and an escheat of the estate or inheritance by distant relatives is otherwise threatened.

If the termination is by consent, then, absent an election otherwise, upstream and downstream inheritance should cease, except in the potential escheat situation. The election should be possible in the form of the consent. For adoptions prior to the introduction of the election right, the law should continue as it was at the time of consent; presumably, inheritance rights were explained by the social worker, or contained in the Statement of Understanding signed at the same time as the Consent.

Inheritance through relatives of the natural parent who died before the child's birth should not be terminated by an adoption to which such relatives had no ability to object. However, upstream inheritance should be limited to situations in which there are no other heirs in the adoptive family.

Issue No. 4: Should the court have authority to change inheritance rights in the adoption decree?

As indicated above, the North Committee on Adoptions supports this proposal. Adoption covers many situations, and the solutions need to be fluid. In some cases, a contested termination can be avoided if the parent whose rights are being terminated is accorded some respect as the natural parent; an offer to maintain the inheritance rights could be the face-saving solution. A court in a termination action could more easily rule that an adoption is in the best interests of a child if it could terminate parental control and responsibility but maintain the child's potential access to family wealth. Persons consenting to an adoption should have flexibility in affecting some aspects of the adoption which do not impinge upon the adoptive parents' parental control and relationship with the child.

The imagined difficulty in finding the adoption decree is highly exaggerated. The trend is for adoptees to have access to such records upon reaching majority. The current system, allowing some inheritance despite an adoption, still requires production of adoption decrees to establish the relationships.

While uniformity of probate law has some advantages, it is unlikely to be achieved in any event. It is not so important a tail as to wag the dog of adoption.

Issue No. 5: Equitable Discretion to Disregard Adoption. Should the court be able to disregard a legal adoption when the parent-child relationship in fact continued?

The adoption for purposes of obtaining increased social security benefit is an infrequent, although repeating, situation. [The best solution is not to allow adoption to be misused in this manner.] A proposed amendment would allow the court to disregard an adoption on "other equitable doctrines".

The North Committee on Adoption agrees with the rationale that the child should not be penalized for a sham adoption designed to benefit others. A court should have the power to disregard a sham adoption which did not result in a change of the actual (as opposed to legal) parent-child relationship during the child's minority. The wording should not be as loose as the proposal.

Issue No. 6: Inheritance rights in out-of-wedlock situations.

This is not strictly an adoption issue, and North will not make a recommendation.

However, the discussion of establishing paternity after the death of the decedent concerned itself exclusively with the reliability of the DNA testing, and the consequent undermining of the rationale of preventing "dubious" claims. This is not the only policy involved. Defeat of the decedent's expectations by a claim asserted by an unknown child must be considered. While penalizing the child for the mother's failure to bring a paternity action is unfair, there is no reason not to impose a statute of limitations on bringing a paternity action after the child reaches majority.

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