

## Memorandum 84-79

Subject: Study L-659 - Wills and Intestate Succession (Parent-Child Relationship)

Professor Dukeminier, our consultant, has written to point out that certain provisions of Assembly Bill 25, as amended by Assembly Bill 2290, create two problems that he believes require clarification. His letter is attached as Exhibit 1. You should read his letter for a discussion of the two problems. The text of the provisions is set out in Exhibit 2.

The staff believes that the courts would reach sound results if these provisions were to be interpreted by the courts, but we also believe that the statutory provisions should be amended to clarify them and avoid the problems. The necessary clarification can be accomplished by amending Sections 6408 and 6408.5 of the Probate Code as set out in Exhibit 2 attached.

We recommend that the Commission approve these provisions for introduction in bill form in December of this year. Should the bill be made an urgency bill so that it would take effect immediately upon enactment? Should the bill contain a provision stating that it is declaratory of existing law?

Respectfully submitted,

John H. DeMouly  
Executive Secretary

UNIVERSITY OF CALIFORNIA, LOS ANGELES

UCLA

BERKELEY · DAVIS · IRVINE · LOS ANGELES · RIVERSIDE · SAN DIEGO · SAN FRANCISCO



SANTA BARBARA · SANTA CRUZ

SCHOOL OF LAW  
LOS ANGELES, CALIFORNIA 90024

September 7, 1984

Mr. John DeMouilly  
 Executive Secretary  
 California Law Revision Commission  
 4000 Middlefield Road, Room D-2  
 Palo Alto, CA 94306

Dear John:

Re: Probate Code §§ 6408, 6408.5

Classroom discussion of Probate Code §§ 6408 and 6408.5 has revealed two problems the Commission may wish to consider.

1. Depriving natural parent of inheritance rights. These sections appear to deprive a parent who refuses to consent to the adoption of his or her child of inheritance rights under the following circumstances. Suppose that H1 and W1 have a child, A. Then H1 and W1 divorce, and W1 remarries. Her new Husband, H2, wants to adopt A, but H1 refuses to consent. Under section 6408, the relationship between H2 and A "has the same effect as if it were an adoptive relationship." If H1 had consented to adoption, and there were a formal adoptive relationship between H2 and A, H1 (and his ancestors and collateral relatives) could no longer inherit from A under section 6408.5. Therefore it appears that H1 has lost his inheritance rights by his refusal to permit H2 to adopt A.

I doubt very much if this was the intent of the legislature. It seems punitive, and my class can think of no good reason for penalizing H1 for refusing to agree to an adoption of his child (over whom he may have sole or joint custody or visiting rights). It has been suggested that these sections deprive H1 of substantive due process because they lack a rational basis. In any case, I think the Law Revision Commission may want to look into this and recommend amending the code.

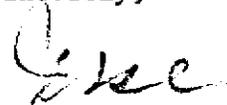
These sections have ramifications beyond the simple illustration above, which may lead to very strange and unintended results. Here are a couple of situations. (1) If W1 and H1 both remarry, and H2 and W2 both want to adopt A, and W1 refuses to consent to the adoption by W2, and H1 refuses to consent to the adoption by H2, both W1 and H1 appear to have lost their inheritance rights. A's heirs are A's stepparents (or what might be

Mr. John DeMouilly  
September 7, 1984  
Page Two

called "quasi-adoptive" stepparents). (2) If H1 loses his inheritance rights by refusing to consent, they are not restored if H2 later dies. Thus if A dies many years after H2 dies, leaving H1 alive, H1 is not an heir of A.

2. Effect on equitable adoption. Section 6408 says the relationship between a child and a foster parent has the same effect as adoption if begun during the child's minority and the foster parent would have adopted the child but for a legal barrier. Does this eliminate the doctrine of equitable adoption in California? Take this case. H and W take baby B into their home at two months of age. No formal adoption takes place, but H and W hold B out to the public as their child and in all respects treat B as their child. Under the doctrine of equitable adoption, as usually applied, B will be treated as their child for purposes of inheriting from H and W on the theory that H and W made an implied promise to adopt B and, having broken that promise, are estopped to deny that a formal adoption took place. Under section 6408, B inherits from H and W if they would have adopted B "but for a legal barrier." There is no legal barrier in this case. Can B claim their estates under equitable adoption or does section 6408 provide the exclusive route for recognizing B's claim? The section says "if"; it does not say "if, and only if." The answer is, I think, uncertain.

Sincerely,



Jesse Dukeminier  
Professor of Law

JD:mrs

Exhibit 2

An act to amend Sections 6408 and 6408.5 of the Probate Code, relating to probate law.

The people of the State of California do enact as follows:

16883

SECTION 1. Section 6408 of the Probate Code is amended to read:

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 Section 6408.5, the relationship of parent and child exists between a person and his or her ~~other~~ 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.

(3) The relationship between a person and his or her foster parent or stepparent has the same effect as if it were an adoptive relationship if (A) the relationship began during the person's minority and continued throughout the parties' joint lifetimes and (B) it is established by clear and convincing evidence that the foster parent or stepparent would have adopted the person but for a legal barrier.

(b) For the purpose of determining whether a person is a "natural parent" as that term is used in Section 6408 and 6408.5:

(1) A natural parent and child relationship is established where that relationship is presumed and not rebutted pursuant to the Uniform Parentage Act, Part 7 (commencing with Section 7000) of Division 4 of the Civil 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 7006 of the Civil 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.

(c) Nothing in this section affects or limits the judicial doctrine of equitable adoption.

Comment. Subdivision (c) is added to Section 6408 to make clear that the section has no effect on the judicial doctrine of equitable adoption. See Estate of Stewart, 122 Cal. App.3d 625, 627, 176 Cal. Rptr. 142 (1981) ("A so-called 'equitable adoption' is no more than a legal fiction permitting specific performance of a contract to adopt . . .").

16951

SEC. 2. Section 6408.5 of the Probate Code is amended to read:  
6408.5. Notwithstanding Section 6408:

(a) The relationship of parent and child does not exist between an adopted person and his or her natural parent unless (1) the natural parent and adopted person lived together at any time as parent and child and (2) the adoption was by the spouse of either of the natural parents or after the death of either of the natural parents.

(b) 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 such 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.

(c) If a child is born out of wedlock, 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 between that parent and child unless the parent both (1) acknowledged the child and (2) contributed to the support or the care of the child.

(d) For the purposes of subdivisions (a) and (b), a person shall not be considered to be an adopted person in either of the following cases:

(1) Where the relationship between the person and his or her foster parent or stepparent is given the same effect under paragraph (3) of subdivision (a) of Section 6408 as if it were an adoptive relationship.

(2) Where a relationship is given the same effect as if it were an adoptive relationship by application of the judicial doctrine of equitable adoption.

Comment. Subdivision (d) is added to Section 6408.5 to make clear that inheritance based on the relationship between a natural parent and his or her child is not affected by the fact that the child is treated as an adopted child in the situation described in paragraph (3) of subdivision (a) of Section 6408 or in case of an "equitable adoption." In such case, the child inherits from or through both the natural parents and the "adoptive" parents; and the natural parents and relatives of the natural parents, as well as the "adoptive" parents and relatives of the adoptive parents, inherit from or through the child.