

Memorandum 89-56

Subject: Study L-659 - New Probate Code (Miscellaneous Issues)

Examination of Wrongdoer in Guardianship-Conservatorship Proceedings

Exhibit 1 to this Memorandum is a letter from attorney Marc Hankin of Beverly Hills. Mr. Hankin points out that Section 2616 of guardianship-conservatorship law (examination under oath concerning assets of estate) is confusing: It incorporates by reference some, but not all, of the parallel provisions concerning decedents' estates. The staff agrees with Mr. Hankin and recommends that Section 2616 be revised as a self-contained article as set out in Exhibit 2.

Parent-Child Relationship in Intestate Succession

Probate Code Sections 6408 and 6408.5 specify when an adoptee inherits from or through the natural parents and vice versa. The staff proposes to consolidate these two sections into one longer section to make their interrelationship clearer. We would do this in our bill to enact the new Probate Code (AB 759). Although ordinarily short sections are preferred to long ones, in this case the law is confusing because Section 6408 appears to be a complete statement of the law, while Section 6408.5 modifies Section 6408 by a "notwithstanding" clause. A draft to accomplish this as attached as Exhibit 3. Changes to existing law are shown in underscore and strikeout. Does the Commission approve this consolidation?

Fraud in Procuring Order Admitting Will to Probate or Appointing
Personal Representative

Under Probate Code Section 8007, a court order admitting a will to probate or appointing a personal representative is not conclusive if it is procured by fraud. "Fraud" in this context means extrinsic, not intrinsic, fraud. Estate of Crisler, 83 Cal. App. 2d 431, 188 P.2d 772 (1948).

Extrinsic fraud is that which prevents a fair adversary hearing by deliberately keeping a party in ignorance of the proceeding or in some other way fraudulently preventing the party from presenting a claim or defense. An order procured by extrinsic fraud is subject to collateral

attack. *Id.*; 8 B. Witkin, *California Procedure Attack on Judgment in Trial Court* § 204, at 602 (3d ed. 1985).

Intrinsic fraud is fraud occurring during the course of an adversary proceeding. An order procured by intrinsic fraud is not subject to collateral attack. The theory is that intrinsic fraud will ordinarily be exposed during the proceeding by diligence of the party and counsel, and that occasional unfortunate results of undiscovered perjury or other intrinsic fraud must be endured in the interest of stability of judgments. 8 B. Witkin, *supra* § 221, at 625.

The staff recommends that Section 8007 be conformed to case law by adding the word "extrinsic" in paragraph (1) of subdivision (b) as set out in Exhibit 4.

Respectfully submitted,

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April 21, 1989

IN REPLY
REFER TO:

Our file no. MC2LTMR5.HL

Arthur K. Marshall
Judge of the Superior Court (Ret.)
300 S. Grand Avenue - 29th Floor
Los Angeles, CA 90071

CA LAW REV. COMM'N

MAY 09 1989

R E C E I V E D

Dear Judge Marshall:

It was a pleasure meeting you at the Beverly Hills Bar Association lecture on April 18, 1989 when we heard Judge Goldin speak.

Thank you for offering to take the time to consider what may be an unreasonable disparity between provisions of the Probate Code applicable to decedents' estates and the estates of conservatees. As you know, Probate Code §612 allows for double damages against any person who embezzles, conceals, smuggles, or fraudulently disposes of any property of a decedent. Effective July 1, §612 will be repealed, and Probate Code §8874 will take its place, saying essentially the same thing.

The estates of conservatees do not enjoy the same protections that §612 now affords to decedents' estates. Under Probate Code §2616, as recently amended, it would appear that a conservatee's estate generally does not benefit from the double damages protection that §8874 will afford to decedents' estates. However, if the evildoer is not in the county where letters of conservatorship are issued, it would seem that the conservatee will enjoy the double damages protection that a decedent's estate now enjoys, because Probate Code §2616 (as recently amended) provides that "the rights and duties of the parties shall be governed by [Section 8870(d) et. seq.]."

It would seem that conservatees, who are living human beings who need their assets in order to maintain themselves, should enjoy the same double damages protection that the law now provides in §612 and will soon provide in §8874 to decedents' estates..

-1-

April 19, 1989
Page 2

Thank you for taking the time to read this. If I can be of service in any way, please do not hesitate to call or write.

Very truly yours,



Marc B. Hankin

MBH/sd

mc2ltmrs.hl

-2-

Article heading (added)

SEC. _____. An article heading is inserted immediately preceding Section 2616 of the Probate Code to read:

Article 2.5. Examination Concerning Assets of Estate

Probate Code § 2616 (amended). Examination concerning assets of estate

SEC. _____. Section 2616 of the Probate Code is amended to read:

2616. A petition may be filed under this ~~section~~ article by any one or more of the following:

- (1) The guardian or conservator.
- (2) The ward or conservatee.
- (3) A creditor or other interested person, including persons having only an expectancy or prospective interest in the estate.

~~(b) The petition may allege any one or more of the following:~~

~~(1) A named person is suspected of having embezzled, concealed, smuggled, or falsely or fraudulently obtained or wrongfully disposed of any property of the ward or conservatee.~~

~~(2) A named person has in such person's possession, or has knowledge of, any instrument in writing belonging to the ward or conservatee.~~

~~(3) A named person asserts a claim against the ward or conservatee or the estate.~~

~~(4) The estate asserts a claim against a named person.~~

~~(e) Upon the filing of a petition under this section, the court may cite the named person to appear before the court, and~~

(b) Upon the filing of a petition under this article, the court may order that a citation be issued to a person to answer interrogatories, or to appear before the court and be examined under oath, or both, concerning any of the following allegations made in the petition:

(1) The person has wrongfully taken, concealed, or disposed of property of the ward or conservatee.

(2) The person has knowledge or possession of any of the following:

(A) A deed, conveyance, bond, contract, or other writing that contains evidence of or tends to disclose the right, title, interest, or claim of the ward or conservatee to property.

(B) An instrument in writing belonging to the ward or conservatee.

(3) The person asserts a claim against the ward or conservatee or the estate.

(4) The estate asserts a claim against the person.

(c) If the citation requires the person to appear before the court, the court and the petitioner may examine the named person under oath upon the matters recited in the petition. ~~If the named person is not in the county where letters issued, the examination shall be made under this section but otherwise the procedure and the rights and duties of the parties shall be governed by the provisions of Article 2 (commencing with Section 8870) of Chapter 2 of Part 3 of Division 7.~~

(d) Disobedience of a citation issued pursuant to this section may be punished as a contempt of the court issuing the citation.

Comment. Subdivision (b) of Section 2616 has been revised to conform it more closely to subdivision (a) of Section 8870 (decedents' estates).

The last sentence of subdivision (c), which incorporated by reference Sections 8871-8874 (decedents' estates), has been deleted. In its place, provisions drawn from Sections 8871-8874 have been added to this article. See Sections 2617-2619.5.

Subdivision (d) is new and continues Section 8870(c) as that section was applied to guardianship and conservatorship proceedings by former subdivision (c) of Section 2616.

For general provisions, see Sections 1000-1004 (rules of practice), 1020-1023 (petitions and other papers), 1040-1050 (hearings and orders), 1240-1242 (citations).

Probate Code § 2617 (added). Written interrogatories

SEC. _____. Section 2617 is added to the Probate Code, to read:

2617. Interrogatories may be put to a person cited to answer interrogatories under Section 2616. The interrogatories and answers shall be in writing. The answers shall be signed under penalty of perjury by the person cited. The interrogatories and answers shall be filed with the court.

Comment. Section 2617 is new and continues Section 8871 as that section was applied to guardianship and conservatorship proceedings by former subdivision (c) of Section 2616.

Probate Code § 2618 (added). Examination in court

SEC. Section 2618 is added to the Probate Code, to read:

2618. (a) At an examination, witnesses may be produced and examined

on either side.

(b) If upon the examination it appears that the allegations of the petition are true, the court may order the person to disclose the person's knowledge of the facts.

(c) If upon the examination it appears that the allegations of the petition are not true, the person's necessary expenses, including reasonable attorneys' fees, shall be charged against the petitioner or allowed out of the estate, in the discretion of the court.

Comment. Section 2618 is new and continues Section 8872 as that section was applied to guardianship and conservatorship proceedings by former subdivision (c) of Section 2616.

Probate Code § 2619 (added). Citation to person controlling estate property

SEC. _____. Section 2619 is added to the Probate Code, to read:

2619. (a) On petition of the guardian or conservator, the court may issue a citation to a person who has possession or control of property in the estate of the ward or conservatee to appear before the court and make an account under oath of the property and the person's actions with respect to the property.

(b) Disobedience of a citation issued pursuant to this section may be punished as a contempt of the court issuing the citation.

Comment. Section 2619 is new and is drawn from Section 8873 (decedents' estates).

Probate Code § 2619.5 (added). Double damages

SEC. _____. Section 2619.5 is added to the Probate Code, to read:

2619.5. A person who in bad faith has wrongfully taken, concealed, or disposed of property in the estate of the ward or conservatee is liable for twice the value of the property, recoverable in an action by the guardian or conservator for the benefit of the estate.

Comment. Section 2619.5 is new and continues Section 8874 as that section was applied to guardianship and conservatorship proceedings by former subdivision (c) of Section 2616.

Probate 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 Section 6408.5, 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 a 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 cohabiting 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 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.

(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.

~~(b)~~ (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.

~~(e)~~ (f) For the purpose of determining whether a person is a "natural parent" as that term is used in Section 6408 and 6408.5 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 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.

~~(d)~~ (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.

Comment. Section 6408 continues Sections 6408 and 6408.5 of the repealed Probate Code without substantive change. Subdivisions (a), (b), (c), and (d) of former Section 6408 are now designated as subdivisions (a), (e), (f), and (g), respectively. Subdivisions (a), (b), and (c) of former Section 6408.5 are now found in subdivisions (b), (c), and (d), respectively, of Section 6408.

Section 6408 is drawn in part from Section 2-109 of the Uniform Probate Code (1987).

In case of an adoption coming within subdivision (b), the adopted child may inherit from or through the adoptive parent and also from or through the natural parent who gave up the child for adoption or through the natural parent who died preceding the adoption. The following examples indicate in various situations whether an adopted child or the issue of an adopted child may inherit from or through the child's natural parent.

Example 1. Child never lived with either mother or father; both parents relinquish child for adoption. The adopted child's relationship with both natural parents' families is severed. The

-7-

requirements of subdivision (b) are not satisfied.

Example 2. Child's mother and father were married or lived together as a family. Child lives with mother and father. Father dies. Mother relinquishes child for adoption. The adopted child remains a member of both the deceased father's family and of the relinquishing mother's family. The requirement of subdivision (b) is satisfied because the adoption was "after the death of either of the natural parents."

Example 3. Child's mother and father were married or lived together as a family until father died. Child lives with mother but not father because father dies prior to child's birth. Mother relinquishes child for adoption. The adopted child remains a member of both the deceased father's family and of the relinquishing mother's family. Child remains a member of the deceased father's family because the father died before the birth of the child (satisfying the subdivision (b)(1) requirement) and the adoption was after the death of the father (satisfying the subdivision (b)(2) requirement).

Example 4. Child lives with father's family but not with mother or father because mother died shortly after child's birth. Father relinquishes child for adoption. Child is not a member of either the deceased mother's family or the relinquishing father's family. This is the result even if the father is the legitimate or acknowledged father of the child and has supported the child, since the relationship fails to meet the requirement of subdivision (b)(1) that the natural parent (the father) and the adopted person have "lived together." The child does not remain a member of the deceased mother's family because the mother never lived as a parent and child with the child and the mother died after the birth of the child.

In case of an adoption described in subdivision (c), the natural relatives cannot inherit from the adopted child, even though under paragraph (1) of subdivision (a) the child could inherit from the natural relatives.

Subdivision (e) applies, for example, where a foster child or stepchild is not adopted because a parent of the child refuses to consent to the adoption. See also *Estate of Lind*, 209 Cal. App. 3d 1424 (1989); *Estate of Claffey*, 209 Cal. App. 3d 254 (1989). Even though the requirements of subdivision (e) are satisfied, the natural parent may continue to inherit from the child under paragraph (1) of subdivision (a). The foster parent or stepparent may not inherit from the child: Paragraph (2) of subdivision (a) does not apply because the adoption was not completed, and subdivision (e) does not apply because that subdivision applies only to inheritance by the foster child or stepchild or the child's issue "from" or "through" a foster parent or stepparent, not to inheritance "by" a foster parent or stepparent. The child, however, may inherit both from the natural parent under paragraph (1) of subdivision (a), and from the foster parent or stepparent under subdivision (e).

Subdivision (g) makes clear that Section 6408 has no effect on the judicial doctrine of equitable adoption for the benefit of the child or his or her descendants. See, e.g., *Estate of Wilson*, 111 Cal. App. 3d 242, 168 Cal. Rptr. 533 (1980).

The definitions of "child" (Section 26), "issue" (Section 50), and "parent" (Section 54) adopt the rules set out in Section 6408. See also Section 6152 (construction of wills).

Probate Code § 6408.5 (repealed). Inheritance by natural relatives from or through adopted child or child born out of wedlock

SEC. _____. Section 6408.5 of the Probate Code is repealed.

6408.5. Notwithstanding subdivisions (a) and (b) of Section 6408:

(a) The relationship of parent and child does not exist between an adopted person and his or her natural parent unless both of the following requirements are satisfied:

(1) The natural parent and adopted person lived together at any time as parent and child, or the natural parent was married to or was cohabiting 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.

(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 (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.

Comment. Former Section 6408.5 is continued in Section 6408 without substantive change. Subdivision (a) of former Section 6408.5 is continued in subdivision (b) of Section 6408 without change. Subdivision (b) of former Section 6408.5 is continued in subdivision (c) of Section 6408 without change. Subdivision (c) of former Section 6408.5 is continued in subdivision (d) of Section 6408 without change.

Probate Code § 8007 (technical amendment). Determination of jurisdiction conclusive

8007. (a) Except as provided in subdivision (b), an order admitting a will to probate or appointing a personal representative, when it becomes final, is a conclusive determination of the jurisdiction of the court and cannot be collaterally attacked.

(b) Subdivision (a) does not apply in either of the following cases:

(1) The presence of extrinsic fraud in the procurement of the order.

(2) The court order is based on the erroneous determination of the decedent's death.

Comment. Paragraph (1) of subdivision (b) of Section 8007 is amended to make clear that the fraud referred to is extrinsic fraud. This is consistent with case law. See Estate of Robinson, 19 Cal. 2d 534, 121 P.2d 734 (1942); Estate of Grisler, 83 Cal. App. 2d 431, 188 P.2d 772 (1948).