

## Memorandum 91-56

Subject: Study L-659.01 - Inheritance Involving Adopted Child (Probate Code Section 6408)

Subdivision (c) of Probate Code Section 6408 (the "one-way inheritance" provision for adopted children, formerly subdivision (b) of Section 6408.5) is confusing. We have letters from attorney Marc Sallus of Los Angeles (Exhibit 1), Professor Jesse Dukeminier (Exhibit 2), and Professor Gail Brod (Exhibit 3), noting the difficulty of understanding this subdivision. The staff has found no appellate case interpreting it.

Subdivision (c) must be read with subdivisions (a) and (b). These three subdivisions provide:

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.

The question posed by Mr. Sallus (Exhibit 1) and Professor Dukeminier (Exhibit 2) is whether the parenthetical "except" clause of subdivision (c) is an affirmative grant of a right to inherit by

wholeblood brothers and sisters of the adopted child, or whether the restrictive requirements of subdivision (b) must be satisfied before such siblings may inherit. For reasons discussed below, the latter reading is correct.

Adoption Where No Prior Adoption Has Taken Place

If the adoption is by a stepparent and the living-together or posthumous birth requirement of paragraph (1) of subdivision (b) is satisfied, natural relatives may inherit from the adoptee, and the adoptee may inherit from natural relatives, under subdivision (b). The limitation of subdivision (c) does not apply, because subdivision (c) only applies to a non-stepparent adoption.

If the adoption is by a non-stepparent not after the death of a natural parent, there is no inheritance in either direction between the adoptee and the natural family under subdivision (b). In this case, subdivision (c) is superfluous -- subdivision (b) has already cut off natural adoption rights.

It is only where the adoption is both by a non-stepparent and after the death of a natural parent that subdivision (c) comes into play. Thus, the parenthetical "except" clause of subdivision (c), as applied to wholeblood siblings of an adoptee, can only apply in a very limited fact situation:

(1) It must be a non-stepparent adoption as provided in subdivision (c).

(2) Either the natural parent and adoptee must have lived together as parent and child, or the father must have died before the birth of the adoptee and have been married to or cohabiting with the adoptee's natural mother, under paragraph (1) of subdivision (b).

(3) The adoption must have been after the death of a natural parent under paragraph (2) of subdivision (b).

(4) Both adoptive parents must be deceased. (If either adoptive parent is living, the adoptive parent will inherit under Probate Code Section 6402(b) to the exclusion of natural and adoptive siblings.)

(5) The adoptee must die without issue. (If the adoptee dies with issue, the issue will inherit under Probate Code Section 6402(a) to the exclusion of natural and adoptive siblings.)

(6) If the adoptee leaves a surviving spouse, the adoptee must

have some separate property. (If the adoptee leaves a surviving spouse and only community and quasi-community property, the surviving spouse will inherit under Probate Code Section 6401 to the exclusion of natural and adoptive siblings.)

The following table shows the effect of these variables (this assumes both adoptive parents are deceased and adoptee dies unmarried):

	Adoptee inherit from natural relatives?	Natural relatives inherit from adoptee?
Stepparent adoption where either living-together test or posthumous birth test satisfied:	Yes	Yes
Non-stepparent adoption, not after the death of a natural parent:	No	Adoptee's issue, yes; other natural rela- tives, no.
Non-stepparent adoption after the death of a natural parent where either living-together test or posthumous birth test satisfied:	Yes	Adoptee's issue, wholeblood siblings, and issue of whole- blood siblings, yes; other natural rela- tives, no.

Professor Dukeminier (Exhibit 2) reads the statute differently. He reads the parenthetical "except" clause of subdivision (c) as an affirmative grant to the adoptee's natural siblings of a right to inherit from the adoptee, not subject to the restrictive requirements of subdivision (b). If this is correct, siblings would have a broader right to inherit from the adoptee than the adoptee would have to inherit from them. This would be an unacceptable anomaly.

The staff reading of Section 6408 -- that for a wholeblood natural sibling to inherit from or through the adopted person, the requirements of subdivision (b) must be satisfied -- is supported by the following:

(1) The Minutes (3/83) say the Commission approved a "scheme for more limited inheritance by the natural parent from the adopted-out child than inheritance by the adopted-out child from the natural parent."

(2) This is Professor Edward Halbach's view as noted by Mr. Sallus (Exhibit 2). (Although Section 6408 was originally Professor Halbach's idea, he is not to blame for the final draft.)

(3) The reference in subdivision (c) to a wholeblood brother or sister is in an "except" clause. We normally do not use an "except"

clause to grant affirmative rights. The "except" clause of subdivision (c) merely means the one-way limitation of subdivision (c) does not apply to a wholeblood brother or sister, leaving subdivision (b) as the determining provision.

The reason for allowing a person adopted after the death of a natural parent to inherit from natural relatives is that that is probably what the natural parent and natural relatives would want, and there is no competition between them and the adoptive family for this inheritance. But if natural relatives may inherit from the adopted child, they will compete with the adoptive family, an undesirable result. Thus the statute provides that inheritance by natural relatives from or through the adopted person is narrower than inheritance by the adopted person from or through natural relatives.

The staff sent a prior draft of this Memorandum to Professor Halbach for his review and comment. He is strongly of the view that we should not revise Section 6408 as extensively as in Exhibit 4. He notes that extensive amendments often have unintended results. He much prefers the modest revision of subdivision (c) set out below, and to say in the comment that this amendment is to negate reading the subdivision as giving an affirmative right to inherit to wholeblood siblings of the adoptee:

(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~~ may inherit 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.

#### Readoption After Prior Adoption

Professor Brod (Exhibit 3) suggested making clear that the references in subdivision (c) to a "parent" mean a natural parent. This should not be done, because the word "parent" in subdivision (c) is intended to include a prior adoptive parent. In a rare case, the adoption may be a readoption after a previous adoption. Thus, in that case, the first adoptive parent is cut off from inheriting from or through the readopted person, unless the second adoption is by the spouse or surviving spouse of the first adoptive parent.

Staff Recommendation

The staff recommends making clear that subdivision (c) is subordinate to subdivision (b) by revising Section 6408 as set out in Exhibit 4. The staff finds some appeal in Professor Halbach's plea for a more modest revision. But, on balance, the staff thinks the more extensive amendments in Exhibit 4 will make the statute clearer and easier for practitioners to use.

Respectfully submitted,

Robert J. Murphy III  
Staff Counsel

**OVERTON, LYMAN & PRINCE**

A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

LAWYERS

550 SOUTH FLOWER STREET  
LOS ANGELES, CALIFORNIA 90071  
TELEPHONE (213) 683-1100

GEORGE W. PRINCE, JR. 1887-1971  
EUGENE OVERTON 1880-1970  
EDWARD D. LYMAN 1881-1962

TELECOPIER (213) 626-3139  
CABLE ADDRESS "OLAP"  
TELEX: 67-4920

MARC L. SALLUS

DIRECT DIAL (213) 683-5309

October 23, 1985

EXPRESS MAIL

Nat Sterling, Esq.  
4000 Middlefield Road  
Suite D-2  
Palo Alto, California 94303

Re: Probate Code Section 6408.5

Dear Mr. Sterling:

It was a pleasure speaking with you the other day. I am presently involved in litigation involving the interpretation of Probate Code §6408.5. This matter arose when an adopted child died intestate. This dispute is presently centered upon the child's "adopted family" claiming interest in the estate versus the adopted child's natural whole blood sibling, who also claims the estate.

The whole blood sibling is relying upon Probate Code §6408.5(b) which states:

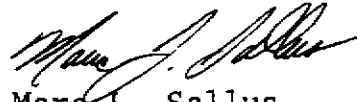
"Notwithstanding §6408: . . . (b) Neither a parent or a relative of a parent (except for the issue of the child or a whole blood brother or sister of the child or issue of such brother or sister) inherits from or through a child on the basis of a relationship of parent and child if the child has been adopted by someone other than the spouse or surviving spouse of that parent."

Nevertheless, I have been led to believe by Edmond C. Halbach, Jr., among others, that said section applies only if §6408.5(a) is satisfied. In other words, subsection (b) is applicable only if the natural parent and adopted person lived together at any time as parent and child; and the adoption was by the spouse of either the natural parents or after the death of either of the natural parents. I have been led to believe that in 1982 or 1983 letters and memoranda were written on this subject, expressly stating that the purpose of the statute was not to create a situation in which the natural siblings of an adopted child would be competing to inherit with the adopted family relations. If you have any documents,

Ltr. to Nat Sterling  
October 23, 1985  
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memos or letters addressing this issue I would greatly appreciate it if you could forward them to me via the enclosed self-addressed envelope. I look forward to hearing from you in the near future.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Marc L. Sallus", written in a cursive style.

Marc L. Sallus  
for OVERTON, LYMAN & PRINCE

MLS:dmk

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SANTA BARBARA • SANTA CRUZ

Mr. John DeMouilly  
California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, CA 94306  
May 13, 1991

SCHOOL OF LAW  
405 HILGARD AVENUE  
LOS ANGELES, CALIFORNIA 90024-1476

Dear John:

Now that I have dropped my opposition to your perpetuities statute, I want to ask you a favor. It involves the interpretation of Cal. Prob. Code § 6408.5.

I am working on this problem: A, the child of M and F, is adopted when he is an adult, by B. B is not A's stepparent. A dies. Can A's full natural brother, C (the son of M and F), inherit by intestate succession from A?

Prob. Code § 6408.5 (b) says that neither a parent nor a relative of a parent except for a wholeblood brother or sister inherits from the child if the child has been adopted by someone other than a stepparent. Under this section it appears that C can inherit from A.

I can find no Law Revision Commission Report on § 6408.5. It was apparently added in the Senate as an amendment to AB 25 (1983). See Cal. Law. Rev. Commn. Report p. 882. The only comment of the Senate Report is

Section 6408.5 is new and provides for cases where natural relatives may not inherit from or through an adopted child or a child born out of wedlock, even though the child may inherit from the natural relatives under Section 6408.

I find § 6408.5 mysterious. Does it really mean that the natural wholeblood siblings can inherit from a child adopted by someone not a stepparent? If so, does this mean that in every case of a decedent who was adopted and who dies without issue, the executor must search for natural wholeblood siblings to give notice to?

Any help you can give me on the legislative intent will be much appreciated.

Sincerely,

Jesse Dukeminier  
Maxwell Professor of Law



**Whittier College**  
School of Law

CALIF. LAW REV. COMMISSION

JAN 30 1991

RECEIVED

January 25, 1991

Mr. John H. DeMouilly  
California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, California 94303-4739

Dear Mr. DeMouilly:

Last semester, when I was teaching Wills and Trusts at the U.C.L.A. Law School, a class discussion brought to light a possible problem with new Probate Code section 6408(c).

The language of Probate Code section 6408(c) seems to preclude the adoptive parents and the relatives of the adoptive parents from inheriting from an adoptee in all adoptions except stepparent adoptions. I assume that what was intended was to preclude the natural parents and their relatives from inheriting from an adoptee but the language of the statute is not limited to natural parents and their relatives. Please compare the language of the December 1989 Law Revision Commission Comment to section 6408 which states:

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

I would appreciate it if you would let me know whether I have misconstrued the statute or misunderstood its intended meaning, or whether there is a problem with the language of Probate Code section 6408(c).

Sincerely,



Gail F. Brod,  
Professor of Law

Prob. Code § 6408 (technical amendment). 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 and subject to the following limitations :

~~{1} Except as provided in subdivisions (b), (c), and (d), the (a)~~  
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 , except 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 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.

(b) The relationship of parent and child exists between an adopted person and the person's adopting parent or parents.

~~(c) Neither-a~~ Notwithstanding the existence of the relationship of parent and child under this section, 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~~ Notwithstanding the existence of the relationship of parent and child under this section, 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 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.

(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 is amended to make nonsubstantive changes for the purpose of clarifying the rule that subdivision (a) must be satisfied for a wholeblood brother or sister of an adopted person or issue of that brother or sister to inherit from or through an adopted person.

Subdivisions (c) and (d) are "one-way inheritance" provisions. Subdivision (c) applies in a non-stepparent adoption after the death of a natural parent where the living together or cohabiting test of paragraph (1) of subdivision (a) is satisfied. Subdivision (c) cuts off the right to inherit from or through the adopted person by a parent and relatives of a parent (except for issue of the child or a

wholeblood brother or sister of the child or issue of that brother or sister), even though the adopted person may inherit from or through the parent under subdivision (a).

Subdivision (c) is not an independent grant of a right to inherit by issue, wholeblood siblings, or issue of wholeblood siblings. The right of wholeblood siblings to inherit from or through the adopted person, and the right of issue of the adopted person to inherit through the adopted person, are determined under subdivision (a). The right of issue of the adopted person to inherit from the adopted person (the natural parent of such issue) is determined under the first portion of subdivision (a), and is not affected by the "except" clause of subdivision (a).

Subdivision (c) may also apply where a child is adopted, and then later readopted by another adoptive parent or parents; inheritance rights of the first adoptive parent and his or her relatives are cut off as though the first adoptive parent were a "parent" under subdivision (c).