#L-659.01

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Memorandum 92-26

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

INTRODUCTION

Probate Code Section 6408 describes when a parent-child relationship exists for the purpose of intestate succession where a child is adopted, is born out of wedlock, or is a foster child or stepchild. The section brings inquiries from puzzled lawyers, mostly as to the effect of adoption on inheritance. In September 1991, the Commission asked the staff to identify policy issues and recommend improvements in the section. Amendments to Section 6408 recommended by staff are set out in Exhibit 1. These amendments would get rid of the contorted language in subdivisions (b) and (c) that has caused most of the constructional problems with Section 6408.

Under Section 6408(a)-(c), the effect of adoption depends on several factors:

- Adoption by a stepparent generally does not affect inheritance in either direction between the adoptee and the natural parent who consented to the adoption.

- If one or both natural parents are dead, adoption by a non-stepparent generally does not affect "downstream" inheritance by the adoptee from natural relatives. However, "upstream" inheritance from or through the adoptee by natural relatives, other than by issue of the adoptee, natural siblings of the adoptee, or descendants of natural siblings, is cut off. ("Upstream" and "downstream" are used as a convenient shorthand. Property inherited by collateral relatives from or through the adoptee must first go upstream through a parent of the adoptee. Property inherited from or through a parent comes to the adoptee downstream from that parent.)

- If both natural parents are living, adoption by a non-stepparent substitutes the adoptive family for the natural family and cuts off all inheritance between the adoptee and natural relatives in both directions.

Section 6408(d)-(e) has two special rules for a child born out of wedlock and for a stepchild or foster child:

- Out-of-wedlock birth does not affect inheritance by the child from natural relatives, but natural relatives may not inherit from the child unless the parent or a relative of the parent acknowledged the child and contributed to its support or care.
- A foster child or unadopted stepchild may inherit from or through the foster parent or stepparent if the relationship began during the child's minority and continued throughout the parties' joint lifetimes and it is established by clear and convincing evidence that the foster parent or stepparent would have adopted the child but for a legal barrier.

EFFECT OF ADOPTION ON INHERITANCE

The staff recommendations in Exhibit 1 would restrict inheritance between an adoptee and the adoptee's natural relatives as follows:

- After a stepparent adoption, the staff would cut off "upstream" inheritance from the adoptee by the natural parent who consented to the adoption and by natural relatives of that parent. (The staff recommendation in Exhibit 1 would not cut off "downstream" inheritance by the adoptee from natural relatives, but the staff is divided on this.)
- After a non-stepparent adoption, the staff would cut off inheritance from or through the adoptee by the adoptee's natural siblings and their descendants.
- After a non-stepparent adoption, the staff would restrict "downstream" inheritance by the adoptee by permitting the adoptee to inherit from natural relatives only where the adoption occurs after the death of both natural parents.

The Executive Committee of the State Bar Estate Planning, Trust and Probate Section (Exhibit 3) wants all adoptions, including a stepparent adoption, to cut off inheritance between the adoptee and natural family in both directions. The Executive Committee believes adoptees should "inherit only from their adoptive families and not from their natural families, and vice versa," and would apply this "without exception."

Central Policy Issue -- Complete Substitution?

In continuing to permit "downstream" inheritance by the adoptee from natural relatives after a stepparent adoption, the staff recommendation is consistent with the Uniform Probate Code. See Uniform Probate Code § 2-114 (1991) (Exhibit 2). But there is impressive academic and judicial support for the complete substitution view of the State Bar, discussed below. For this reason, the staff thinks the central policy issue with Section 6408 is whether the Commission should go beyond the staff recommendation by accepting the State Bar view that an adoption should result in complete substitution of the adoptive for the natural family in all adoptions, stepparent and non-stepparent.

History of California Statute Before 1982

The provision on the effect of adoption on inheritance was first enacted in 1931, codifying case law. Review of Selected 1955 Code Legislation 140 (Cal. Cont. Ed. Bar 1955). Under the 1931 provision, adoption effected a substitution only of the immediate parental relationship. Although the adoptee inherited from the adoptive parents and not the natural parents, and the adoptive parents but not the natural parents inherited from the adoptee, the adoption had no effect on inheritance by or from relatives of the natural and adopting parents. The adoptee continued to inherit from relatives of the natural parents, and not from relatives of the adopting parents. Estate of Calhoun, 44 Cal. 2d 378, 384, 282 P.2d 880 (1955); 12 B. Witkin, Summary of California Law *Wills and Probate* § 143, at 178 (9th ed. 1990).

Failure of the 1931 statute to effect complete substitution of the adoptive family for the natural family produced an anomalous result in Estate of Calhoun, *supra*. There the adoptee died intestate, survived by a daughter of his adoptive parents and by a natural brother. All of the adoptee's estate was property he had inherited from his adoptive mother. Under the 1931 law then in effect, the court held the adoption substituted only the adoptive parents for the natural parents, and did not affect inheritance by relatives of either. Therefore, decedent's natural brother took in preference to the daughter of his adoptive parents.

This result was criticized in a dissent by Justice Traynor:

> [It] results in consequences totally at variance with the objective of making the relationship between adoptive parents and their adopted child as close to the natural relationship as possible. . . . Children who have been raised together as brothers and sisters are set against one another whenever intestate succession from another than their parent is involved, and rights of natural kindred whose existence or identity will frequently be unknown to the adoptive family are allowed to intervene between foster brothers and sisters who have known no others.

Justice Traynor noted that if a new birth certificate has been issued and original records have been sealed, "in many cases of intestate succession this policy of secrecy will have to be evaded or the estates of adopted children will perforce escheat to the state."

In response to *Calhoun*, the Legislature revised the law in 1955 to effect complete substitution of the adoptive family for the natural family. 12 B. Witkin, *supra,* § 143, at 178. The adoptee's right to inherit from relatives of the natural parents was cut off, and the adoptee was permitted to inherit from relatives of the adoptive parents. *Id.* § 144, at 179-80.

Inheritance After Stepparent Adoption -- Law After 1982

The Commission's 1982 wills and intestate succession recommendation proposed to relax the complete substitution rule of the 1955 law where adoption is by a stepparent, allowing inheritance in both directions between the adoptee and the noncustodial natural parent (usually the father) and that parent's relatives:

> [I]f the adoption is by the spouse of a natural parent (*i.e.*, a stepparent adoption), it is desirable that the adopted child inherit not only from or through the adoptive parent but also from or through the natural parent who gave up the child for adoption. For example, if a natural grandparent of the adopted child dies intestate, the child should be entitled to inherit; it is unlikely that the grandparent would disinherit the child, had the grandparent made a will, simply because the child was adopted by a stepparent.

On the question of the likely intent of a grandparent, the Commission's report cited a 1981 case construing a devise in the testator's will to issue of his deceased children. Estate of Garrison, 175 Cal. Rptr. 809 (1981) (not published in official reports). After

the will was executed, the testator's son was divorced, his wife took custody of their two sons (testator's grandsons), she remarried, her new husband adopted the two boys with consent of their natural father, and the natural father died. The appellate court held the testator's two adopted-out grandsons were entitled to share in his estate.

The court thought it was unlikely the testator would want to exclude a grandchild "merely because his son gave his consent" to adoption of the grandchild by the stepfather, citing a Pennsylvania case to the same effect. Since intestate succession law is a substitute for a will, it should conform to what most testators would want. The *Garrison* case and the Pennsylvania case support the Commission's 1982 recommendation that adoption by a stepparent should not preclude the adoptee from inheriting from or through the natural parent who consented to the adoption.

Probate Code Section 6408 allows inheritance in both directions -- by, from, or through the natural family after a stepparent adoption. This goes beyond *Garrison*, a "downstream" case. When the Commission recommended two-way inheritance in 1982, that was the rule of the 1977 Uniform Probate Code. In recommending the UPC rule, the Commission was persuaded by the need for national uniformity of intestate succession law:

> As a result of the mobility of contemporary society and the frequency of interstate property transactions, a decedent may leave property in several jurisdictions. Uniformity of the law of wills and intestate succession will help ensure that the decedent's intent is effectuated with a minimum of disruption of the estate. Uniformity also enables use of cases from other jurisdictions construing the law. The importance of national uniformity of probate and related law is recognized by the adoption in California of [various uniform acts].

The UPC was revised in 1990 to cut off "upstream" inheritance from or through the adoptee by the natural parent who consented to the adoption and by relatives of that parent. See Uniform Probate Code § 2-114(b) (1991) (Exhibit 2). The staff asked Professor Lawrence Waggoner, Chief Reporter for the UPC, why the two-way rule of the 1977 UPC was restricted in 1990 to eliminate "upstream" inheritance. He said it was because the intestate succession provisions of the UPC, like California law, are drafted in terms of two parents, and provide

for dividing the estate into two shares, one for or through each parent, if the decedent leaves no surviving spouse or issue. To allow inheritance by or through three parents (the two natural parents and the adopting stepparent) was "too complicated" from a drafting standpoint. He said the question is not very important because it "happens so rarely" that a parent or relative of a parent inherits from a child. (Inheritance by the child from or through the parent is more common, and the 1991 UPC still permits the adoptee to inherit from or through the parent who consented to the stepparent adoption.)

The staff recommends cutting off "upstream" inheritance by the noncustodial natural parent and his or her relatives from the adoptee after a stepparent adoption. There are three reasons to do this:

(1) It will avoid the danger mentioned by Justice Traynor of allowing natural kindred of the adoptee to intervene between the adoptee and adoptive family.

(2) Having the adoptee's intestate property go to the adopting stepparent, rather than the natural parent who consented to the adoption, seems to be what most adoptees would want, although this may be a hazardous guess. (The 1978 empirical study by the American Bar Foundation on public preferences for intestate succession law does not address public preferences about the effect of adoption on inheritance.)

(3) To the extent UPC states adopt the new, more restrictive UPC rule, it will promote national uniformity of intestate succession law. (Thirteen of the 15 UPC states now permit inheritance in both directions after a stepparent adoption, the same as California and the 1977 UPC.)

Should we go beyond the staff recommendation and cut off "downstream" inheritance by the adoptee from natural relatives after a stepparent adoption? The question is important because so many adoptions are stepparent adoptions. The California Department of Social Welfare reported in 1965 that in 1963 and 1964 there were 30,718 adoption petitions filed in California. Of these, about 30% were for stepparent adoptions. Another 8% were for adoptions by a blood relative of the adoptee. 18 Stan. L. Rev. 494, 505 (1966). (The California Department of Social Services told the staff that they no longer keep statistics on stepparent adoptions. The staff also checked

with Santa Clara County. They do not keep adoption statistics either.)

Cutting off inheritance in both directions after adoption by someone who is neither a stepparent nor a blood relative of the adoptee makes sense because most of these adoptions are made through child-placing agencies where the natural parent neither selects nor knows the adopting parents. 18 Stan. L. Rev., *supra*. Most children adopted through a child-placing agency are less than a year old. *Id.* at 505, n.60. Inheritance in this case cannot be based on an assumption of continued contact of the adoptee child with natural relatives. Review of Selected 1955 Code Legislation 142 (Cal. Cont. Ed. Bar 1955).

But when adoption is by a stepparent or blood relative, "contacts between adopted child and the natural family very likely continue to exist." 18 Stan. L. Rev., *supra*, at 505-06. This apparently was the policy underlying the two-way inheritance rule of the 1977 UPC. See Uniform Probate Code § 2-109, comment (1977). As noted in the *Garrison* case, *supra*, the adoptee's natural relatives would probably still want to include the adoptee in their wills. The intestate succession rule should conform to what natural relatives would probably want in their wills.

Nonetheless, an impressive array of academic and judicial opinion supports the complete substitution rule urged by the State Bar:

(1) Justice Traynor thought the complete substitution rule is best because it serves the "objective of making the relationship between adoptive parents and their adopted child as close to the natural relationship as possible," and avoids conflict between the adoptive child and natural children of the adopting stepparent "who have been raised together as brothers and sisters." Estate of Calhoun, 44 Cal. 2d 378, 388, 282 P.2d 880 (1955).

(2) In her treatise on family law, Professor Barbara Armstrong criticized the pre-1955 rule that adoption did not cut off inheritance by the adoptee from relatives of the natural parents. However, her criticism focused on agency adoptions where "for the good of the child, it is intended and made sure that neither the adopting parent nor the relinquishing parent shall know the other's identity." She concluded that inheritance by the adoptee from blood relatives makes sense "only

on the assumption of contact with those blood relatives." 2 B. Armstrong, California Family Law 1242-43 (1953). She did not discuss stepparent adoptions, and her reasoning may not apply to a stepparent adoption, where an assumption of no continued contact between the adoptee and consenting natural parent may be unjustified.

(3) Professor Richard Powell "strongly" recommends eliminating all inheritance between an adoptee and natural relatives. 7 R. Powell, The Law of Real Property ¶ 998[4][a], at 90-85 (1990 rev.). He says this has been the statutory trend since 1846, but he concedes that only one state (Michigan) has completely eliminated the right of the adoptee to inherit from natural relatives. *Id.*, at 90-88. Sixteen states permit two-way inheritance after a stepparent adoption (13 UPC states -- Alaska, Arizona, Florida, Hawaii, Idaho, Maine, Minnesota, Montana, Nebraska, New Mexico, North Dakota, South Carolina, and Utah -- plus California, Illinois, and Iowa). An additional four states permit downstream inheritance after a stepparent adoption -- Ohio, Massachusetts, Oregon, and Wisconsin. The latter three qualify this by requiring that the stepparent adoption be after the death of a natural parent. (For citations, see 8 Uniform Laws Annotated (West Cum. Supp. 1991), and 7 R. Powell, *supra,* at 90-88 n.115.)

(4) A 1967 student Comment says the complete substitution rule is:

> an apparent contradiction of the requirement that the child's welfare must be promoted by the adoption. But the right of succession in the estates of biological relatives is terminated in return for the statutory right of succession in the estates of adoptive relatives. The possible loss is compensated for by the statutory gain. This better rule gives the adopted child the same succession rights as his adoptive siblings. His welfare does not require, nor should he be entitled to, the advantage of succession rights in both families. [18 Hastings L.J. 377, 386 (1967).]

The staff is divided over whether we should recommend complete substitution of adoptive for natural relatives, thereby cutting off "downstream" inheritance by a person adopted by a stepparent. A majority of the staff would not go this far, but would keep "downstream" inheritance in such a case, the same as the 1991 UPC (Exhibit 2). The staff will ask for the views of family law practitioners on this question, as well as probate practitioners.

Inheritance Where Adoption Is After Death of Natural Parent

Under Section 6408, an adoptee still inherits from natural relatives if the adoption is after the death of either natural parent, and the natural parent and adoptee "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." This is true both in stepparent and non-stepparent adoptions.

The Commission's original 1982 wills and intestate succession recommendation did not permit inheritance by an adoptee from natural relatives in a non-stepparent adoption after the death of a natural parent. This suggestion came independently from two sources -- from Professor Edward Halbach, and from James Prosser, then Assembly Minority Consultant. Mr. Prosser's interest was prompted by a letter forwarded to him by Assemblyman Bill Baker of Walnut Creek that had come from a constituent.

For "upstream" inheritance by natural relatives of the adoptee from or through the adoptee, a non-stepparent adoption after the death of a natural parent cuts off inheritance by all natural relatives except the adoptee's descendants, wholeblood siblings, and descendants of siblings. This provision has caused more confusion than any other in Section 6408.

If we follow the 1991 UPC and State Bar Executive Committee recommendation, we would cut off "downstream" inheritance by the adoptee from natural relatives, and "upstream" inheritance from the adoptee by siblings and their descendants, when a non-stepparent adoption is after the death of a natural parent. But the staff is not persuaded that this would be an improvement in the law.

If the adoption is after the death of both natural parents, presumably there is no need for secrecy as to the identity of the natural parents, since there no risk they will interfere with the development of close family ties between the adoptee and adoptive family. It seems harder to justify allowing an adoptee to inherit from natural relatives in a non-stepparent adoption if only one natural parent has died and the other is still living, since there may be a need for secrecy about the identity of the living natural parent.

The staff recommends keeping the concept of Section 6408 that the adoptee may inherit from natural relatives in an after-the-death adoption, but restricting it so the adoption must be after the death of both natural parents. (One staff member would eliminate all inheritance by, from, or through natural relatives after adoption as discussed on pages 6-8, *supra*.)

Court's Authority To Change Inheritance Rights in Adoption Decree

Alaska adopted the UPC provision, but revised it to allow the court to expand statutory inheritance rights. Alaska cuts off inheritance between the adoptee and natural family in both directions "unless the decree of adoption specifically provides for the continuation of inheritance rights" between the adoptee and natural family. Alaska Stat. § 13.11.045. Colorado may permit the court to restrict inheritance rights in the adoption decree. See Colo. Rev. Stat. § 15-11-109 (1987), § 19-5-211 (Cum. Supp. 1989). *But see In re* Estate of David, 762 P.2d 745 (Colo. App. 1988).

We could give the court authority under Section 6408 to expand or restrict inheritance between the adoptee and natural family in the adoption decree. The staff-recommended rule that a person adopted by a stepparent may inherit from the noncustodial natural parent and relatives could be made subject to a court decree limiting those rights. And the staff-recommended rule cutting off "upstream" inheritance by natural relatives from the adoptee could be made subject to a court decree permitting natural relatives to inherit from the adoptee.

This has some appeal. It would allow the court to take into account the facts of the particular adoption. The court can determine when it is necessary to keep the identity of the natural family secret, and when that is unnecessary.

But the UPC does not have a provision giving courts authority to adjust inheritance rights. And if the court could adjust inheritance rights, it would require a search for the adoption decree or court records at the time of death to determine those rights. On balance, the staff recommends against giving the court authority to adjust inheritance rights in the adoption decree.

Equitable Discretion to Disregard Adoption

Section 6408(g) provides that nothing in the section affects or limits application of the judicial doctrine of equitable adoption. Under that doctrine, an agreement to adopt a child is enforceable for purposes of inheritance, even though the adoption was not completed. 10 B. Witkin, Summary of California Law *Parent and Child* § 345, at 391 (1989).

Attorney Rory Clark of Woodland Hills had a case involving the reverse fact situation. A child was adopted by her natural grandparents when she was nine years old. Both of her parents were living. The adoption was solely to permit the adopting grandparents to receive more social security benefits. The child continued to live with her natural parents.

Later, as an adult, she claimed inheritance through her natural parents. She asked the court to use its equitable powers to treat the adoption as though it had not happened, thus permitting her to inherit through her natural parents. She pointed out that she neither consented to nor benefited from the adoption. The case was heard as an uncontested matter. In the absence of any objection, the court decided to treat the grandparents' adoption as though it had not happened, allowing the adoptee to inherit through her natural parents.

Mr. Clark thought the statute should recognize this type of case. Subdivision (g) could be revised as follows:

> (g) Nothing in this section affects or limits application of the judicial doctrine of equitable adoption or other equitable doctrines for the benefit of the child or his or her descendants.

The staff is concerned this amendment may raise more questions than it answers. What are the "other equitable doctrines"? The facts of Mr. Clark's case are unusual. Neither he nor the staff has found any published decision on point. If the court has equitable power, apart from statute, to decline to recognize an opportunistic adoption of no benefit to the child, it is unlikely Section 6408 takes this power away. The staff recommends against amending subdivision (g) to refer to "other equitable doctrines."

INHERITANCE BY CHILD BORN OUT OF WEDLOCK

Paternity of an out-of-wedlock child may be established in a court proceeding under the Uniform Parentage Act during the father's lifetime, whether or not the father has held out the child as his own. Civ. Code § 7006(c). But under Section 6408(f), after the father's death, if the parents have not attempted to marry each other and no court order of paternity was made during the father's lifetime, the Uniform Parentage Act is restricted so that paternity may only be established if the father has openly and notoriously held out the child as his own. The advent of DNA typing may make this restriction obsolete.

A recent case applying Section 6408(f) held that, if the holding-out test is not satisfied, a child born out of wedlock may not use DNA typing after the father's death to establish a right to take from the father as a pretermitted heir. Estate of Sanders, 2 Cal. App. 4th 462 (1992).

The UPC (Exhibit 2) permits paternity to be established under the Uniform Parentage Act in the same way after the father's death as before. The Commission's 1982 recommendation proposed the UPC provision. The stricter requirement for proving paternity after the father's death was added to the Commission bill by the Legislature "to discourage dubious paternity claims from being made after the father's death for the sole purpose of inheritance." Estate of Sanders, *supra,* at 474 n.15.

The use of DNA typing in California courts was first approved in a 1991 criminal case, People v. Axell, 235 Cal. App. 3d 836, 1 Cal. Rptr. 2d 411 (1991). The opinion thoroughly discusses the scientific theory of DNA typing. The defense produced expert witnesses who testified that DNA typing is unreliable. However, the court noted that two of the testifying defense experts had written a law review article in which they conceded that DNA typing "is so well accepted that its accuracy is unlikely even to be raised as an issue in hearings on the admissibility of the new tests." *Id.* at 856 n.8. The court concluded the statistical likelihood of an erroneous match "is extraordinarily low." *Id.* at 860.

The court in Estate of Sanders, *supra,* noted that Section 6408 has

a harsh effect on a child born out of wedlock by penalizing the child for the mother's failure to obtain a paternity decree during the father's lifetime. The court thought this policy should be reviewed because of scientific advances in DNA typing, quoting from a 1988 Ohio case:

> Science has developed a means to irrefutably prove the identity of an illegitimate child's father. No longer are we dependent on fallible testimony, nor are we concerned that the decedent cannot be present to defend himself. The accuracy and infallibility of the DNA test are nothing short of remarkable. We live in a modern and scientific society, and the law must keep pace with these developments.

DNA typing has been in the news recently. The body of Dr. Josef Mengele was positively identified by comparing DNA from a bone fragment with DNA from a living son. The San Francisco Chronicle of April 15, 1992, described a two-year study by the National Research Council of the National Academy of Sciences. The Council's report was issued the preceding day. The report said the reliability of DNA typing

> depends on the quality of work in laboratories that apply the genetic technology. The committee said that setting standards and requiring certification of personnel would help ensure the technical quality of the evidence.

The staff talked to Dr. Jeffrey Morris, Director of Long Beach Genetics, a laboratory that does DNA typing. He said paternity may be established or ruled out after the father's death by reconstructing the DNA signature of the father by testing his close relatives and comparing that with the DNA of the child, or by DNA testing on a tissue sample taken from the body of the deceased father. A deceased person's DNA is "quite stable," but embalming does interfere. He said the error rate is negligible if the laboratory doing the test is careful and conscientious.

Caution in using DNA typing as prosecution evidence in criminal cases was urged in a recent law review article:

> The main criticism is not that it will never be reliable, but that the lack of uniform standards and quality controls allows the ambiguities and problems in technique to go unnoticed, thus resulting in the scientifically unreliable declaration of a match.

Comment, *The Dark Side of DNA Profiling: Unreliable Scientific Evidence Meets the Criminal Defendant,* 42 Stan. L. Rev. 465, 479

(1990). According to the Chronicle article, criminal defense lawyers fear DNA evidence may "persuade jurors to overlook any other evidence." The author of the law review article was less concerned about use of DNA typing by the defense in criminal cases, or in civil litigation such as paternity suits. 42 Stan. L. Rev., *supra* at 467 n.12, 468 n.13.

It seems unnecessary and unfair to exclude nearly conclusive DNA evidence of paternity after the father's death merely because the father did not openly and notoriously hold out the child as his own. According to Dr. Morris, DNA typing is just as efficacious for negating paternity as for establishing it. This was confirmed by Ann Hammond of Cellmark Diagnostics in Germantown, Maryland. So repeal of the holding-out test will not open the door to dubious paternity claims after death.

Although forensic DNA typing is not yet so well-established that it is entirely free of controversy, the staff is satisfied that the test is generally reliable and highly probative to establish or negate paternity. The staff thinks the *Sanders* court is right in calling for relaxation of the standards for proof of paternity after the father's death. The staff recommends adopting the 1991 UPC provision permitting the same proof of paternity after the father's death as before.

INHERITANCE INVOLVING FOSTER CHILD OR STEPCHILD

In 1986, we received a letter from attorney Dirk Van Tatenhove of Santa Ana recommending an amendment to Section 6408(e) along the following lines:

> (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~~ , the person and the foster parent or stepparent thereafter lived together at any time during the person's minority as though they were parent and child, and that relationship 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.

Mr. Van Tatenhove was involved in an heirship proceeding entitled *Estate of Claffey*. He represented blood relatives of the deceased

mother against her stepchildren who had maintained only minimal contact with her. At issue was the degree of contact required between the stepchildren and their stepmother to satisfy the "relationship" requirement of Section 6408.

The trial court agreed with Mr. Van Tatenhove's view that Section 6408 contemplates a relationship like that of parent and child. He thinks it would discourage this kind of meritless heirship petition if Section 6408 were clarified as he suggests.

His proposed new "living-together" test does have the attraction of making subdivision (e) more nearly parallel to subdivision (b) (adoption). On the other hand, in the *Claffey* heirship, the court also found the second test of Section 6408(e), that the stepmother would have adopted the stepchildren but for a legal barrier, was not satisfied. So the case did not turn on the relationship issue.

The staff did not include Mr. Van Tatenhove's suggestion in the amendments set out in Exhibit 1. It would have added 28 words to subdivision (e) without making it much clearer. The living together test is probably implied from the parent-child relationship already required by the subdivision. On balance, the staff thought it was not a significant enough substantive improvement to justify the extra verbiage.

INHERITANCE GENERALLY FROM CHILD NOT ACKNOWLEDGED OR NOT SUPPORTED

Under the 1991 UPC (Exhibit 2), if the parent has not openly treated the child as his or hers or has refused to support the child, inheritance from the child by that parent and his or her relatives is cut off in all cases, whether or not there has been an adoption, and whether or not the child was born out of wedlock. Under Section 6408, nonsupport or failure to acknowledge parentage affects only the right to inherit from or through a child born out of wedlock. Only a killer is precluded from inheriting generally.

Should there be a general requirement that to inherit from a child, the parent (probably the father in most cases) must have supported the child? Only New York appears to have such a rule. N.Y. Est. Powers & Trusts Law § 4-1.4 (McKinney 1981). None of the 15 UPC states have enacted this rule, although this is understandable because

the new rule was approved so recently.

The argument for adopting the UPC provision cutting off inheritance by a parent where the parent has not openly treated the child as his or hers or has refused to support the child is that the child probably would not want to benefit the absent parent in such a case. And the parent should not be rewarded after failing to live up to parental responsibilities.

Drawbacks of the UPC provision include the following:

(1) It penalizes relatives of the nonsupporting parent, not just the parent. If the father has refused to support the child and dies before the child, the father's siblings (the child's paternal uncles and aunts) cannot inherit from the child. This is probably not what the child would have wanted.

(2) It singles out nonsupport as the disqualifying factor. Other kinds of conduct, such as child abuse, defiance of parental authority, or commission of a crime (other than murder) against the family member, are not disqualifying.

(3) It may increase litigation by creating another factual issue.

The staff recommends against adopting the UPC provision cutting off inheritance by a parent who has not openly held out the child as his or hers, or who has refused to support the child.

CONCLUSION

Section 6408 involves difficult policy issues that require assumptions about likely factual situations where there is little or no empirical data. Regardless of how the policy issues are decided, the staff believes Section 6408 should be revised to eliminate or improve the tortured language of subdivisions (b) and (c) that cause so many constructional problems.

Respectfully submitted,

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Prob. Code § 6408 (amended). 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 subdivisions (b) , and (c), ~~and (d),~~ the relationship of parent and child exists between a person and ~~his or her~~ the person's natural parents, regardless of the marital status of the natural parents. The relationship of parent and child may be established under the Uniform Parentage Act, Part 7 (commencing with Section 7000) of Division 4 of the Civil Code.

(2) The relationship of parent and child exists between an adopted person and ~~his or her~~ the person's 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.~~ , except in either of the following circumstances:

(1) Adoption of a child by the spouse or surviving spouse of either natural parent has no effect on the relationship between the child and that natural parent, or on the right of the child or a descendant of the child to inherit from or through the other natural parent.

(2) Adoption of a child after the death of both natural parents has no effect on the right of the child or a descendant of the child to inherit through either natural parent.

~~(d)~~ (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.

~~(e)~~ (d) For the purpose of determining intestate succession by a person or ~~his or her~~ the person's descendants from or through a foster parent or stepparent, the relationship of parent and child exists between that person and ~~his or her~~ the person's 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)~~ (e) 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~~ the child's descendants.

Comment. Subdivision (b) of Section 6408 is amended to do the following:

(1) To substitute the rule of Section 2-114(b) of the Uniform

Probate Code (1991) concerning inheritance after a stepparent adoption. Under subdivision (b) as amended, adoption cuts off the right of natural relatives to inherit from or through the adoptee in all cases. Under former subdivision (b), natural relatives of a person adopted by a stepparent or adopted after the death of either natural parent could inherit from or through the adoptee if the other requirements of former subdivision (b) were satisfied (natural parent and child lived together at any time or natural parent was married to or cohabiting with other natural parent at conception and died before child's birth).

(2) To restrict the former rule that a person adopted after the death of either natural parent could inherit from natural relatives. Under subdivision (b) as amended, a person adopted by someone other than a stepparent may inherit from natural relatives only if the adoption was after the death of both natural parents.

In view of the amendments to subdivision (b), subdivision (c) is deleted as unnecessary.

Subdivision (f) is deleted, and a sentence drawn from Section 2-114(a) of the Uniform Probate Code (1991) is added to subdivision (a)(1). Thus, where a court order declaring paternity was not entered during the father's lifetime, paternity may be established after the father's death without having to show that the father openly and notoriously held out the child as his own. This changes the result in Estate of Sanders, 2 Cal. App. 4th 462, ___ Cal. Rptr. 2d ___ (1992).

Section 2–114. Parent and Child Relationship.

(a) Except as provided in subsections (b) and (c), for purposes of intestate succession by, through, or from a person, an individual is the child of his [or her] natural parents, regardless of their marital status. The parent and child relationship may be established under [the Uniform Parentage Act] [applicable state law] [insert appropriate statutory reference].

(b) An adopted individual is the child of his [or her] adopting parent or parents and not of his [or her] natural parents, but adoption of a child by the spouse of either natural parent has no effect on (i) the relationship between the child and that natural parent or (ii) the right of the child or a descendant of the child to inherit from or through the other natural parent.

(c) Inheritance from or through a child by either natural parent or his [or her] kindred is precluded unless that natural parent has openly treated the child as his [or hers], and has not refused to support the child.

COMMENT

Subsection (a). Subsection (a) sets forth the general rule: For purposes of intestate succession, a child is the child of his or her natural parents, regardless of their marital status. In states that have enacted the Uniform Parentage Act (UPA), the parent and child relationship may be established under the UPA. Non-UPA states should insert a reference to its own statute or, if it has no statute on the question, should insert the phrase "applicable state law."

Subsection (b). Subsection (b) contains exceptions to the general rule of subsection (a). Subsection (b) states the rule that, for inheritance purposes, an adopted individual becomes part of the adopting family and is no longer part of the natural family.

The revision of subsection (b) affects only the exception from the rule pertaining to the adoption of an individual by that individual's stepparent. As revised, an individual who is adopted by his or her stepparent (the spouse of the custodial natural parent) becomes part of the adopting stepparent's family for inheritance purposes but also continues to be part of the family of the custodial natural parent. With respect to the noncustodial natural parent and that parent's family, however, a different rule is promulgated. The adopted individual and the adopted individual's descendants continue to have a right of inheritance from and through that noncustodial natural parent, but that noncustodial natural parent and that noncustodial natural parent's family do not have a right to inherit from or through the adopted individual.

Subsection (c). Subsection (c) is revised to provide that neither natural parent (nor that natural parent's kindred) can inherit from or through a child unless that natural parent, mother or father, has openly treated the child as his or hers and has not refused to support the child. Prior to the revision, that rule was applied only to the father. The phrase "has not refused to support the child" refers to the time period during which the parent has a legal obligation to support the child.

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Re: LRC Memorandum 91-56
Inheritance by and from Adopted Persons

Dear Bob:

This will briefly summarize the policy decision made by the Executive Committee in connection with the above matter at its meeting on September 16, 1991.

Memorandum 91-56 sets forth a Staff proposal for technical amendments to Probate Code §6408 in order to deal with the problems raised in the Memorandum. More specifically, the subject matter of the proposed amendments is Subdivisions (b) and (c) of §6408 which deal with exceptions to the general rule that adopted persons inherit only from their adoptive families and not from their natural families.

As I explained at our meeting, the above exceptions to the general rule were enacted as part of the new Probate Code in 1983. Prior to that enactment, the general rule prevailed without exceptions.

The Executive Committee made a policy decision to return to the law as it existed prior to the 1983 amendment. In other words, the Executive Committee is in favor of the policy that adopted persons inherit only from their adoptive families and not from their natural families, and vice versa. The Executive Committee believes that this policy should be applied without exception.

I am hopeful that the Executive Committee's policy decision on this matter can get before the Law Review Commission before the Commission or the Staff expends any more time or effort on the technical amendments proposed in Memorandum 91-56.

If the policy adopted by the Executive Committee ultimately prevails, the entire section will have to be rewritten. (On the other hand, that might not be too big a job in that we'll be returning to previous law!)

With best wishes,

Sincerely,

Robert L. Sullivan, Jr.

RLSjr:adb

cc: William V. Schmidt