

First Supplement to Memorandum 92-26

Subject: Study L-659.01 - Parent-Child Relationship for Intestate Succession (Views of Professor Halbach)

Professor Edward Halbach is "very concerned" about the staff proposal in the basic memo to make significant substantive revisions to Probate Code Section 6408. The following is a summary of his views:

The Commission gave thorough consideration to the policy alternatives in 1982. Section 6408 effectuates Commission decisions made then, and expresses sound policy. Professor Halbach has no strong objection to eliminating "upstream" inheritance from an adoptee by the noncustodial natural parent and his or her relatives after a stepparent adoption. But he strongly objects to the complete substitution rule being urged for all adoptions by the Executive Committee of the State Bar Probate Section. He disagrees with Professor Powell that the complete substitution rule "has been the statutory trend since 1846" (basic memo, page 8). Professor Halbach said in fact the modern trend has been away from the complete substitution rule.

On relaxing the standard of proof of paternity after death of the alleged father, Professor Halbach said the question has nothing to do with reliability of evidence. Therefore the availability of DNA typing is irrelevant. He said we should keep the requirement in post-death paternity litigation that the deceased father "openly and notoriously held out the child as his own" during lifetime because we do not want a child claiming a share of the estate under circumstances where the alleged father may not have known of the child's existence. As a will substitute, intestate succession law should conform to the likely intent of the decedent. The decedent would be unlikely to make a devise to an out-of-wedlock child whom he never acknowledged as his own.

Professor Halbach concedes there may be constructional problems in Section 6408(b)-(c). He thinks we should limit our effort to correcting the constructional problems, without doing a radical overhaul of the section.

Professor Halbach cannot attend the May meeting when this is scheduled for consideration, nor can he attend the July meeting. He is an effective spokesman. The staff thinks his presence would be helpful to the Commission when this matter is considered. It appears he can attend the September meeting in Oakland. The staff suggests this be put over to the September meeting so Professor Halbach can be present.

Respectfully submitted,

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