Study L-659 November 1, 1995

First Supplement to Memorandum 95-61

Inheritance From or Through a Foster Parent or Stepparent

Letter From State Bar Trust and Estate Administration Committee

Attached is a letter from Monica Dell'Osso, Chair of the Trust and Estate Administration Committee of the State Bar Estate Planning, Trust and Probate Law Section. By a four to three vote, the Committee supports the staff draft of a Tentative Recommendation on *Inheritance From or Through a Foster Parent or Stepparent* attached to the basic Memorandum. The majority agrees with the staff that Probate Code Section 6454 should be preserved and improved, not repealed, because it approximates the likely intent of most decedents.

The minority thought testators do not routinely wish to include stepchildren or foster children in their estates, a view with which the staff agrees. But the question should be narrower: If it can be shown by clear and convincing evidence that an intestate decedent would have adopted a stepchild or foster child but for a legal barrier, it seems fair to assume the decedent would have included such a child in his or her will, if there had been one.

The draft statute would require the legal barrier to exist at the time the adoption was contemplated or attempted. The Committee is concerned that "contemplation" of an adoption "may be difficult to prove and is of marginal value in eliminating marginal or dubious claims." But difficulty of proof itself will tend to eliminate marginal or dubious claims. Moreover, the claimant will have an extraordinary burden — contemplation will have to be established by clear and convincing evidence. The staff continues to believe these are strong safeguards, and that an improved Section 6454 will effectuate the intent of most decedents.

Supreme Court Hearing Granted in Estate of Smith

The staff draft would codify two appellate cases, *Estate of Smith* and *Estate of Stevenson*, and reject a third, *Estate of Cleveland*. On September 28, 1995, the California Supreme Court granted a hearing in the *Smith* case. One alternative would be to defer action on the staff draft until the Supreme Court decides *Smith*.

On the other hand, if the Commission endorses the *Smith-Stevenson* rule as the staff draft proposes, it might influence the outcome of the Supreme Court case. And if the Supreme Court adopts the *Smith-Stevenson* rule, we still might want to add the recommended language to Section 6454 so the statute will reflect case law.

Respectfully submitted,

Robert J. Murphy
Staff Counsel

Oct 31,1995 05:36PM FROM Calleton-Merritt TO 14154941827 P.03

Oct. 31. 1995 3:29PM LARSON & BURNHAM No. 4481 P. 2/3

ESTATE PLANNING, TRUST AND PROBATE LAW SECTION

THE STATE BAR OF CALIFORNIA

555 FRANKLIN STREET
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October 31, 1995 *REPLY TO:*

<u>By Facsimile and U. S. Mail</u>

Valerie J. Merritt
Calleton & Merritt
500 North Grand Boulevard, Suite 975
Glendale, CA 91203-1923

Re: Memorandum 95-61: Inheritance From or <u>Through a Foster Parent or Stepparent</u>

Dear Valerie:

On October 30, 1995 the members of the Trust and Estate Administration Committee met by conference call. Seven members of the committee participated. They voted four to three in favor of the proposed amendment to Probate Code section 6454.

There was general agreement on the appropriateness of eliminating the requirement that a legal barrier to adoption should continue for life. However, the vote regarding the amendment turned on broader considerations.

Those who supported the amendment believe that the statute reflects the intent of most decedents. The "clear and convincing" evidence standard ensures that a foster child or stepchild who takes under the statute would be one whom the decedent genuinely wanted to be an heir.

The opponents of the proposal questioned whether the statute actually articulated the perspective of most decedents. A common experience is that testators do not routinely wish to include stepchildren or foster children in their estates. Since this statute applies to the construction of wills, trusts, deeds and other instruments, the fact that it may not accurately reflect a

common dispositive intent was troubling. While the "clear and convincing" standard would place a limitation on marginal claims, the opponents felt that the statute as drafted might nevertheless lead to a result not anticipated by the decedent.

There was also concern about inclusion of the word "contemplated" in subsection (b) of the statute. An attempt to adopt could be broadly interpreted to include not only filing of an actual petition but also inquiries made of a lawyer or others regarding the feasibility of adoption proceedings. Therefore serious efforts or investigation would come within the ambit of this term. By contrast, "contemplation" of an adoption may be difficult to prove and is of questionable value in eliminating marginal or dubious claims.

If you have any questions regarding the above, please contact me.

Very truly yours,

Monica Dell'Osso

MDO:ss
cc: Arthur H. ("Mike") Bredenbeck
[illegible]