

Memorandum 97-9

Inheritance by Foster Child or Stepchild

Attached is a staff draft of a Tentative Recommendation on *Inheritance by Foster Child or Stepchild* to resolve a conflict in case law under Probate Code Section 6454. The Commission considered this draft at the November 1995 meeting, noted that the California Supreme Court had granted review in one of the conflicting cases, and decided to defer the matter until the case was decided. Last month, the Supreme Court dismissed the case as moot, so it is timely to take the issue up and resolve it.

Under existing law, a foster child or stepchild is treated as a natural child for purposes of inheritance if (1) the relationship with the foster parent or stepparent began during the child's minority and continued throughout the joint lifetimes of the child and foster parent or stepparent, and (2) it is established by clear and convincing evidence that the foster parent or stepparent would have adopted the child "but for a legal barrier" (usually failure of the natural parent to consent to the adoption). Prob. Code § 6454. This provision was enacted on Commission recommendation, and is intended to carry out the likely intent of an intestate decedent where a foster child or stepchild is involved.

The draft Tentative Recommendation would codify case law holding that the legal barrier must exist only at the time the adoption was contemplated or attempted, and would reject a case holding that the legal barrier must exist for life. Professor Edward Halbach and the Trust and Estate Administration Committee of the State Bar Probate Section reviewed the draft in 1995. Professor Halbach thought it was sound and, by a four to three vote, the State Bar Committee supported it. **The staff recommends the Commission approve the Tentative Recommendation for distribution to interested persons for comment.**

Respectfully submitted,

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CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

Inheritance by Foster Child or Stepchild

February 1997

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN April 30, 1997.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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SUMMARY OF TENTATIVE RECOMMENDATION

Existing law treats a foster child or stepchild as a natural child for purposes of inheritance if the relationship with the foster parent or stepparent began during the child's minority and continued throughout their 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." This recommendation would codify case law holding that the legal barrier to adoption need only exist at the time the adoption was contemplated or attempted, and rejects a case holding that the legal barrier must exist throughout their joint lifetimes.

INHERITANCE BY FOSTER CHILD OR STEPCHILD

For the purpose of intestate succession, a foster child or stepchild is treated as having a natural parent-child relationship with the foster parent or stepparent if their relationship began during the child's minority, continued for their 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."¹ The cases conflict on whether the legal barrier must exist during the joint lifetimes of the foster parent or stepparent and the child, or merely at the time the adoption was contemplated or attempted.²

The legal barrier to adoption is usually the natural parent's failure to consent.³ If it is clear the foster parent or stepparent would have adopted the child but for the natural parent's refusal to consent, to treat the relationship between the foster parent or stepparent and the foster child or stepchild the same as a natural relationship for the purpose of intestate succession carries out the likely intent of the decedent and avoids denying inheritance on technical or legalistic grounds. But parental consent is not required to adopt an adult.⁴ Thus a requirement that the legal barrier must continue for life would preclude inheritance by virtually all adults from or through their foster parent or stepparent.⁵ Such a construction would frustrate the underlying purpose of the statute to carry out the likely intent of the intestate decedent.⁶

The Commission recommends codifying case law limiting the existence of the required legal barrier to adoption to the time when adoption was contemplated or attempted.⁷ This relaxation of the standards for inheritance should not lead to an

1. Prob. Code § 6454.

2. Compare *Estate of Cleveland*, 17 Cal. App. 4th 1700, 22 Cal. Rptr. 2d 590 (1993) (legal barrier must exist during joint lifetimes of foster parent or stepparent and foster child or stepchild), with *In re Estate of Smith*, 48 Cal. App. 4th 1757, 42 Cal. Rptr. 2d 42 (1995) (legal barrier need only exist when adoption was contemplated or attempted), and *In re Estate of Stevenson*, 11 Cal. App. 4th 852, 14 Cal. Rptr. 2d 250 (1992) (same).

3. *In re Estate of Stevenson*, 11 Cal. App. 4th 852, 14 Cal. Rptr. 2d 250, 257 (1992). See also Prob. Code § 6454 Comment.

4. Fam. Code § 9302(b).

5. *In re Estate of Smith*, 48 Cal. App. 4th 1757, 42 Cal. Rptr. 42, 45, 48 (1995).

6. See *In re Estate of Smith*, 48 Cal. App. 4th 1757, 42 Cal. Rptr. 42, 43 (1995); *Estate of Cleveland*, 17 Cal. App. 4th 1700, 22 Cal. Rptr. 2d 590, 594 (1993).

7. This view is supported by the commentators. See 17 CEB Estate Planning & California Probate Reporter 22 (Aug. 1995) (decision and reasoning of *Estate of Smith* "seem sound"); San Francisco Daily Journal, July 18, 1995, at 5 (decision in *Estate of Smith* "makes more sense" than in *Estate of Cleveland*). One article calls for repeal of Section 6454, finding the section "vague" and that it injects "uncertainty into an area where predictability is essential." Meadow & Loeb, *An Anomalous Rule of Intestate Succession Triggers a Standoff in the Courts of Appeal*, 17 L.A. Law., No. 4, June 1994, at 34. But much of this article was devoted to showing how the conflict in the case law is the cause of much of the uncertainty. The recommended legislation will resolve that conflict and eliminate the uncertainty from that cause. Another article focuses on the stepchild, and recommends removing all requirements from Section 6454 except a

1 increase of manufactured claims because of the requirements that the parent-child
2 relationship must continue throughout their joint lifetimes, and that evidence of
3 intent to adopt must be clear and convincing.⁸
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requirement of a “legitimate family relationship” between the decedent and stepchild, a flexible concept that would require the court to examine the details of the family relationship. See Note, *Intestate Succession for Stepchildren: California Leads the Way, but Has It Gone Far Enough?*, 47 Hastings L.J. 257, 279-85 (1995). The recommended legislation does not go this far.

8. See Prob. Code § 6454.

1 PROPOSED LEGISLATION

2 **Prob. Code § 6454 (amended). Foster parent or stepparent**

3 SECTION 1. Section 6454 of the Probate Code is amended to read:

4 6454. For the purpose of determining intestate succession by a person or the
5 person's issue from or through a foster parent or stepparent, the relationship of
6 parent and child exists between that person and the person's foster parent or
7 stepparent if both of the following requirements are satisfied:

8 (a) The relationship began during the person's minority and continued
9 throughout the joint lifetimes of the person and the person's foster parent or
10 stepparent.

11 (b) It is established by clear and convincing evidence that the foster parent or
12 stepparent would have adopted the person but for a legal barrier existing at the
13 time the adoption was contemplated or attempted.

14 **Comment.** Subdivision (b) of Section 6454 is amended to require that the legal barrier to
15 adoption must have existed at the time the adoption was contemplated or attempted. This codifies
16 *In re Estate of Smith*, 48 Cal. App. 4th 1757, 42 Cal. Rptr. 2d 42 (1995), and *In re Estate of*
17 *Stevenson*, 11 Cal. App. 4th 852, 14 Cal. Rptr. 2d 250 (1992), and rejects *Estate of Cleveland*, 17
18 Cal. App. 4th 1700, 22 Cal. Rptr. 2d 590 (1993).
