

Memorandum 97-62

Inheritance by Foster Child or Stepchild

Attached is a staff draft of a recommendation on *Inheritance by Foster Child or Stepchild* to resolve a conflict in case law under Probate Code Section 6454. Also attached are the following communications commenting on the Tentative Recommendation:

	<i>Exhibit pp.</i>
1. James Deeringer, Ex. Comm., State Bar Probate Section	1
2. Robert Maize	2
3. Bridget Harris	3
4. Richard Bartke	4
5. Ruth Ratzlaff	5
6. Daniel Doonan	6

General Comments

Probate Code Section 6454 permits a foster child or stepchild to inherit from or through the foster parent or stepparent if the relationship began during the child's minority, 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." The attached recommendation would codify cases holding that the legal barrier must exist only at the time the adoption was contemplated or attempted. Mr. Maize and Mr. Doonan favor the recommendation.

Ms. Ratzlaff would repeal Section 6454, and Mr. Bartke appears to be of the same view. We have heard before that 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.

Another criticism we have heard previously is that it may be difficult to prove an adoption was "contemplated," and that that requirement is of marginal value

in eliminating dubious claims. But difficulty of proof itself will tend to eliminate dubious claims. Moreover, contemplation will have to be established by clear and convincing evidence. The staff believes these are strong safeguards, and that an improved Section 6454 will effectuate the intent of most decedents.

Supreme Court Review Granted in *Estate of Joseph*

On June 11, 1997, the California Supreme Court granted review in *Estate of Joseph*, one of the two cases the attached recommendation would overturn. The *Joseph* case held that, for a foster child or stepchild to inherit from or through a foster parent or stepparent, the “legal barrier” must exist throughout their joint lifetimes. Since this can only rarely be satisfied, this construction of Section 6454 effectively renders it a nullity. Perhaps the Supreme Court will resolve this case as the Commission is recommending, making legislation unnecessary.

The Executive Committee of the State Bar Probate Section prefers to wait until the Supreme Court decides the *Joseph* case before proceeding with the recommendation. When the Commission considered a similar recommendation in 1995, the California Supreme Court had granted review in another case construing Section 6454 (*Estate of Smith*). The Commission deferred the recommendation until the Court decided that case. **However, the staff recommends proceeding with this recommendation because of continued uncertainty and litigation under Section 6454, and because of the need to clarify the effect of a child refusing to consent to his or her own adoption, discussed below.**

Refusal of Child Over 12 to Consent to Adoption

What if the attempted adoption is of a child over the age of 12 and the legal barrier to adoption is the child’s refusal to consent? See Fam. Code §§ 8602, 9320 (consent of prospective adoptee over the age of 12 required); *Estate of Cleveland*, 17 Cal. App. 4th 1700, 1708 n.10, 22 Cal. Rptr. 2d 590, 596 n.10 (1993). To permit the child to inherit because of his or her refusal to consent has been called “ridiculous.” Oldman & Cooley, *Lineage Limits: The Struggle to Define Barriers to Adoption*, San Francisco Daily Journal, April 16, 1997, at 5. Any revision of Section 6454 should address this question.

Possible legal barriers to adoption are: (1) the proposed adoptee is a minor and is less than ten years younger than the person wishing to adopt (Fam. Code § 8601); (2) a natural parent refuses to consent to adoption of a minor (*id.* §§ 8604,

9003, 9006); (3) a proposed adoptee over the age of 12 refuses to consent (*id.* § 8602); (4) the person who wishes to adopt is married and his or her spouse refuses to consent (*id.* § 9301), (5) the proposed adoptee is married and his or her spouse refuses to consent (*id.* § 9302). And the court may decline to approve an adoption that is not in the proposed adoptee’s best interest. *Id.* § 8612.

Courts have struggled with the meaning of “legal barrier” in the inheritance statute. See, e.g., *Estate of Lind*, 209 Cal. App. 3d 1424, 1436, 257 Cal. Rptr. 853 (1989). The Comment to Section 6454 gives some help by saying the section “applies, for example, where a foster child or stepchild is not adopted because a parent of the child refuses to consent to the adoption.” In all four cases cited in the recommendation (*Joseph, Smith, Cleveland, and Stevenson*), and in one of the two cases cited in the Comment (*Claffey*), the legal barrier to adoption was refusal of one or both natural parents to consent. In the other case cited in the Comment (*Lind*), the legal barrier to adoption was that the proposed adoptee was an adult. At the time of the contemplated adoption in *Lind* (1942), California did not permit adult adoptions, but now does, so the adoptee’s adulthood is no longer a “legal barrier.” The staff considered replacing “legal barrier” with “lack of required consent of a natural parent” to solve the problem of refusal by the proposed adoptee. But the statutory language should probably be broad enough to include the case where the required 10-year age difference is not satisfied, or where a spouse of the adopting person or proposed adoptee refuses to consent. **Accordingly, the staff would keep the “legal barrier” language, but make clear it does not include refusal of the prospective adoptee to consent (shown in double underscore):**

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

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

(b) It is established by clear and convincing evidence that the foster parent or stepparent would have adopted the person but for a legal barrier existing at the time the adoption was contemplated or attempted, other than that person’s refusal to consent or agree to the adoption.

Divorce of Stepparent From Natural Parent

Ms. Harris says the stepparent's divorce from the natural parent should cut off the right of the child to inherit from the stepparent under Section 6454. **The staff opposes this suggestion.** Divorce cuts off the right of a divorcing spouse to inherit from the other, but divorce has no effect on the right of natural children to inherit. Neither should divorce cut off the right of a child to inherit from a stepparent who has shown affinity for the child by seeking to adopt. There is no reason to suppose that divorce would generally change the attitude of the stepparent toward the stepchild.

Might there be a question whether a divorcing stepparent ceases to be a "stepparent" for the purpose of Section 6454, thus precluding the stepchild from inheriting from or through that person? We could negate such a construction by adding the following to the Comment to Section 6454:

Divorce of the foster parent or stepparent does not affect the right of the foster child or stepchild to inherit from or through the foster parent or stepparent under this section.

Non-Legal Barriers to Adoption

Mr. Doonan suggests expanding the cases in which the foster child or stepchild may inherit under Section 6454 by recognizing possible barriers to adoption other than "legal" barriers. He suggests permitting the foster child or stepchild to inherit when the adoption is thwarted by threats, or by concern for the possibility of suicide of the natural parent. **The staff would not go so far.** The staff believes the attached recommendation is sound in following a middle course between the extremes of (1) repealing the section, or (2) allowing the foster child or stepchild to inherit whenever there is a "legitimate family relationship" with the foster parent or stepparent as advocated by a law review article in *Hastings Law Journal* (see footnote 7 in the recommendation).

Respectfully submitted,

Robert J. Murphy
Staff Counsel

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August 15, 1997

JAMES L. DEERING

Law Revision Commission
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AUG 18 1997

File: _____

Robert Murphy
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Palo Alto, CA 94303-4739

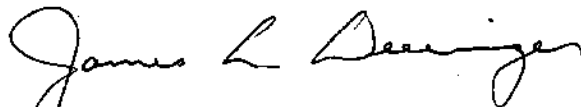
Re: Inheritance By Foster Child or Step Child

Dear Bob:

The Executive Committee of the Estate Planning, Trust and Probate Law Section of the State Bar has recently considered the Commission's tentative recommendation with regard of Probate Code § 6454, concerning inheritance from or through a foster parent or step parent.

Our feeling is that we should defer any attempt to revise the statute until the California Supreme Court has decided the appeal that is currently pending before the court on this issue.

Very truly yours,



JAMES L. DEERING

JLD:crc

cc: Don E. Green, Chair
Warren Sinsheimer, III

Date: Mon, 19 May 1997 13:12:54 -0700
From: "Robert K. Maize, Jr." <rmaize00@counsel.com>
Reply-To: r.maize.law@counsel.com
Organization: Maize Law Corporation
MIME-Version: 1.0
To: Commission@clrc.ca.gov
Subject: Inheritance by Foster Child or Stepchild

Dear Commission:

I am writing in response to the Tentative Recommendation "Inheritance by Foster Child or Stepchild".

I fundamentally agree with the change being proposed, as a general provision.

However, for the documents that I draft, I use this provision of the California Probate Code as an introduction to the discussion of the inclusion or exclusions of others persons with the testator's (or grantor's) children and lineal descendants for purposes of disposing of the testator's estate. I then discuss this concept of the possible inclusion of step children, and suggest to my clients that they specific inclusion adopted individuals up to the age of 21 to 25 as a general provision, so that a professional subsequently reviewing the document can see that an adult adoption, at a relatively young age, is specifically approved.

I hope my comments on how I handle the issue with my clients will be of assistance in the further consideration of the question step-children and foster children being able to inherit as natural born children.

Very truly yours,
Robert K. Maize, Jr., Attorney
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BRIDGET MCINERNEY HARRIS

Law Revision Commission
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MAY 30 1997

May 29, 1997

File: _____


Robert Murphy, Staff Counsel
California Law Revision Commission
4000 Middlefield road, Room D-1
Palo Alto, CA 94303-4739

Re: Inheritance by Foster Child or Stepchild

Dear Mr. Murphy:

I would like to receive a copy of the tentative recommendation concerning inheritance by a foster or stepchild. My recommendation is that the possibility of intestate succession terminate upon the termination of the marriage between the stepparent and the natural parent.

Sincerely


Bridget McInerney Harris

BMH:cb
nc\052997

After Thoughts

A little probate humor for all of you
(yes, Virginia, it *does* exist)

Special Addendum: CLRC Tentative Recommendation for Inheritance

This proposal was faxed in by Richard H. Bartke, a Richmond probate attorney.

"Dear John:

I, too, have struggled with a number of estates regarding foster children or step-children. I deem myself to be a practical person, and look for the simple solution. How about this for a modest proposal:

1. We get the State Legislature to enact a process whereby people can go to court to change the status of step-children and foster children so that they become like natural children. I am not too good at making up names, but why don't we call this process "Adoption."

2. For those who choose not to use adoption, or cannot, why don't we get the State Legislature to permit the leaving of parts or all of the estate after death to anyone, including foster and step-children. For lack of a better name, why don't we call these "Wills."

3) If these processes are in place for generations, soon everyone in the State will have heard of "Adoptions" and "Wills."

4) We will be able to conclude that those who do not use Adoption, and who do not use their Will, have made that decision during their lifetime. Then we can leave their estates as they left them.

Very truly yours,

/s/

Richard H. Bartke"

RUTH E. RATZLAFF

Attorney at Law

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Law Revision Commission
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JUN 30 1997

June 27, 1997

File: _____

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: Inheritance by Foster Child or Stepchild

Dear CLRC:

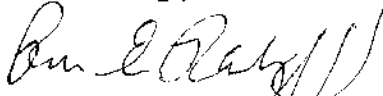
I have reviewed your tentative recommendation on inheritance by foster child or stepchild.

I agree that existing law could use some changing. My preference, however, would be for the change to be in the direction of eliminating inheritance by a foster child or step child at any point. Leaving this avenue open invites expensive litigation in gray areas of law and memory. As the definition of "family" gets broadened, it's going to get worse rather than better.

How many grandparents are raising grandchildren? These grandchildren deserve an inheritance as much or perhaps more than their own parents, but do not come within the textbook definition of stepchild or foster child.

The problem is better solved by making preparation of testamentary documents less burdensome so that the Legislature and the courts don't have to struggle to determine what the decedent would have wanted to have happen to his or her estate.

Sincerely,



Ruth E. Ratzlaff

Date: Mon, 7 Jul 1997 01:14:57 -0400
From: "Daniel J. Doonan" <DDOONAN@compuserve.com>
Subject: Inheritance By Foster Child or Stepchild
To: "comment@clrc.ca.gov" <comment@clrc.ca.gov>
MIME-Version: 1.0

I agree with the proposed change to Probate Code Sec. 6454 to provide "existing at the time the adoption contemplated or attempted. The term "legal barrier" might be expanded to it's broadest interpretation to include circumstances or events that, while not specifically legal barriers, preclude the "legal barrier" such as a non-consenting natural parent from arising. [such as an act or acts by a natural parent that results in or precludes the contemplated adoption from going beyond contemplation, i.e threats, possibilities of, or probabilities of, the natural parent taking his or her life because of the contemplated adoption, and a child's desire to be adopted.

Daniel J. Doonan, Esq.
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#L-659

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Inheritance by
Foster Child or Stepchild

September 1997

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739
650-494-1335 FAX: 650-494-1827

SUMMARY OF 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 cases holding that the legal barrier must exist throughout their joint lifetimes.

This recommendation was prepared pursuant to Resolution Chapter 38 of the Statutes of 1996.

1 INHERITANCE BY FOSTER CHILD OR STEPCHILD

2 For the purpose of intestate succession, a foster child or stepchild is treated as
3 having a natural parent-child relationship with the foster parent or stepparent if the
4 relationship began during the child's minority, continued for their joint lifetimes,
5 and it is established by clear and convincing evidence that the foster parent or
6 stepparent would have adopted the child "but for a legal barrier."¹ The cases
7 conflict on whether the legal barrier must exist throughout the joint lifetimes of the
8 foster parent or stepparent and the child, or merely at the time the adoption was
9 contemplated or attempted.²

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

21 The Commission recommends codifying case law limiting the existence of the
22 required legal barrier to adoption to the time when adoption was contemplated or
23 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 throughout joint lifetimes of foster parent or stepparent and foster child or stepchild), with *In re Estate of Smith*, 42 Cal. Rptr. 2d 42 (1995) (legal barrier need only exist when adoption was contemplated or attempted — opinion not published in official reports), and *In re Estate of Stevenson*, 11 Cal. App. 4th 852, 14 Cal. Rptr. 2d 250 (1992) (legal barrier need only exist when adoption was contemplated or attempted). See also *Estate of Joseph*, 61 Cal. Rptr. 2d 803 (1997), review granted June 11, 1997.

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*, 42 Cal. Rptr. 42, 45, 48 (1995) (opinion not published in official reports).

6. See *In re Estate of Smith*, 42 Cal. Rptr. 42, 43 (1995) (opinion not published in official reports); *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, *Heirs Unapparent: 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

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
4

cause. Another article focuses on the stepchild, and recommends removing all requirements from Section 6454 except a 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. 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.

PROPOSED LEGISLATION

Prob. Code § 6454 (amended). Inheritance from or through foster parent or stepparent

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

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

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

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

Comment. Subdivision (b) of Section 6454 is amended to require that the legal barrier to adoption must have existed at the time the adoption was contemplated or attempted. This codifies *In re Estate of Smith*, 48 Cal. App. 4th 1757, 42 Cal. Rptr. 2d 42 (1995), and *In re Estate of Stevenson*, 11 Cal. App. 4th 852, 14 Cal. Rptr. 2d 250 (1992), and rejects *Estate of Cleveland*, 17 Cal. App. 4th 1700, 22 Cal. Rptr. 2d 590 (1993). See also *Estate of Joseph*, 61 Cal. Rptr. 2d 803 (1997), review granted June 11, 1997.
