

Leg. Prog.

January 15, 1998

Memorandum 98-2**1998 Legislative Program**

This memorandum reviews the status of studies in the Commission's 1998 legislative program. The staff will amplify on these matters at the meeting.

AB 707 — Real Property Covenants

AB 707 (Ackerman) was approved by the Assembly Judiciary Committee on January 13. It now goes to the Assembly floor. We have received expressions of concern from Chevron, and are working with them.

SB 177 — Best Evidence Rule

SB 177 (Kopp) was approved by the Senate Judiciary Committee on January 13, without amendment. It now goes to the Senate floor.

SB 209 and 261 — Judicial Review of Agency Action

SB 209 and 261 (Kopp) failed passage in Senate Judiciary Committee on January 13. For further information, see Memorandum 98-6.

SB 453 — Administrative Law Judge Code of Ethics

SB 453 (Solis) is on the inactive file in the Senate. The measure includes both the administrative law judge code of ethics and a provision renaming workers compensation referees as administrative law judges. The measure is being held until the workers compensation referees decide how they wish to proceed.

SCR 65 — Annual Resolution of CLRC Authority

SCR 65 (Kopp) is the Commission's annual resolution of authority. We have not yet resolved the question whether authority to study issues in judicial administration should be included in the resolution or made a part of trial court unification legislation.

Trial Court Unification

The Commission has not finalized its report on trial court unification. We have submitted our preliminary materials to Legislative Counsel to be put in proper

form for introduction. Senator Lockyer has not indicated his proposed schedule for enactment of the SCA 4 implementing legislation. For further information on this study, see Memorandum 98-3.

Business Judgment Rule

The Commission revised its recommendation on the business judgment rule at the December 1997 meeting to relocate the hostile takeover and derivative action exceptions to the “interested director” section. This revision is subject to ratification by the Commission when a quorum is present. See the Minutes of the December meeting.

The staff has submitted the revised draft to Legislative Counsel to be prepared for introduction. The staff is taking steps to find an appropriate author for this legislation.

Inheritance Involving Stepparent or Foster Parent

This recommendation is too small to warrant a separate bill. The staff has transmitted it to the Assembly Judiciary Committee for possible inclusion in a committee omnibus probate bill.

The recommendation resolves a conflict in Court of Appeal cases. However, the Supreme Court has now issued its decision in *Estate of Joseph*, 98 Daily Journal DAR 335 (Jan. 13, 1998), which resolves the conflict in a way not recommended by the Commission. The ruling is described in the attached newspaper article. Because the Supreme Court’s decision goes the wrong way, the staff believes the Commission should continue to pursue its recommended legislation. The Commission’s recommendation is supported by the State Bar probate section.

Response to Demand for Production of Documents in Discovery

If the Commission approves a final recommendation on this matter (currently being circulated as a tentative recommendation) in the near future, it may be possible to add it to an omnibus civil procedure bill if one is available.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

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PROBATE LAW

Inheritance Rights of Foster Children Limited

■ The high court, in issuing a narrow ruling, acknowledges that very few foster and stepchildren will be able to take advantage of a new law.

By Philip Carrizosa
Daily Journal Senior Writer

Taking a strict view of a special probate law, the California Supreme Court ruled Monday that a woman raised by foster parents since she was 3 years old cannot inherit from her foster father's estate despite his unsuccessful attempts to adopt her.

Settling a conflict in the appeal courts, the justices said the "legal barrier" that prevented the adoption disappeared when the child became

an adult, yet the foster father never adopted the woman; so she cannot now inherit from his estate.

The 6-1 decision in *Estate of Joseph*, 98 Daily Journal D.A.R. 335, gives a narrow construction to a 1983 law that is unique to California.

First offered by Professor Edward C. Halbach Jr. of Boalt Hall School of Law, a consultant to the California Law Revision Commission, the statute allows foster and stepchildren to inherit from their foster or step-parents' estate in certain, limited situations such as when some "legal barrier" prevents the adoption.

In giving the law a narrow application, the majority acknowledged that very few adult foster children or stepchildren will be able to take advantage of the special law since they will rarely be able to show a lifetime barrier to adoption. But the majority said, that appears to be

consistent with the law's design as well as injecting "a strong dose of certainty" to otherwise sticky inheritance cases.

The ruling denies inheritance rights to the 41-year-old woman, Kim Barnum-Smith, who sought to become the sole heir to the small estate of a childless Berkeley couple who took her in and raised her.

Gladys and Louis Joseph paid her way through college, and Joseph gave her away at her wedding.

When she was a child, the Josephs would occasionally ask her biological parents for permission to adopt the girl, but the parents consistently refused. Finally, the Josephs stopped asking.

After Joseph died in 1995, Barnum-Smith filed letters of administration for his estate and asked to inherit his entire estate as the sole heir because Mrs. Joseph already had died. But

Alameda Superior Court Judge David C. Lee ruled that while Barnum-Smith satisfied the common-law definition of a foster child, she did not satisfy section 6454 of the Probate Code, which requires "clear and convincing evidence that the foster parent or stepparent would have adopted the person but for a legal barrier."

That barrier disappeared when Barnum-Smith turned 18 in 1974, and the consent of her biological parents was no longer needed, yet the Josephs still did not adopt her, the trial judge said.

Joseph also failed to provide for Barnum-Smith in a will, Lee noted, saying the Josephs could have changed their feelings toward their foster daughter. Since Barnum-Smith was thus not legally an heir, Lee revoked her letters of administration and appointed Joseph's brother, James C. Joseph, as special administrator of the

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Foster Daughter Can't Inherit

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estate.

The Court of Appeal in San Francisco upheld Lee's decision last March, but then the state high court agreed to review the matter.

In affirming the lower courts, the justices sided with the Los Angeles appeal court decision in *Estate of Cleveland*, 17 Cal.App.4th 1700 (1993), and expressly disapproved of the San Jose appeal court's opinion in *Estate of Stevenson*, 11 Cal.App.4th 852 (1991).

Like *Cleveland*, the high court said section 6454 permits a foster or stepchild to inherit only if the legal barrier to adoption began during their childhood and "continued throughout the joint lifetimes" of both the children and the parents. The court rejected *Stevenson's* opinion that the legal barrier needed to exist only when an adoption was attempted or contemplated.

"Our reading of Probate Code section 6454 serves the passing of the estate of an intestate foster parent or stepparent in accordance with his likely intent at the time of death," wrote Justice Stanley Mosk.

"True, at death, the foster child or stepchild might have been a friend to the foster parent or stepparent. But a friend, as such, is not an heir," Mosk added.

"The result of all this may indeed be that a parent-child relationship will be deemed to exist only in exceptional circumstances. That, however, does not seem to be against the provision's design, but rather in conformity therewith."

Such a reading "eliminates, or at least reduces, marginal claims, whether genuine or sham, based on little more than an assertion that such a barrier existed only at a time at which adoption was contemplated or attempted," Mosk reasoned.

The court rejected *Stevenson's* rationale that a foster or stepparent may think adoption is not so important once a child reaches adulthood. Adoption is still important for estate tax planning, insurance policies, recovery for wrongful death and even visitation rights with grandchildren, the court said.

Finally, the justices also refused to be influenced by a new recommendation made by the Law Revision Commission last October that sides with *Stevenson*. "As we have explained, the provision seems to have been designed to apply only in exceptional circumstances," Mosk wrote. Whether the recommendation becomes law is up to the Legislature, he added.

Joining in Mosk's opinion were Chief Justice Ronald M. George and Justices Joyce L. Kennard, Marvin Baxter, Kathryn Mickle Werdegard and Janice R. Brown.

In dissent, Justice Ming W. Chin contended, "The majority rewrites the statute so as to render it virtually inapplicable to adult foster children or stepchildren, who seldom (if ever) could demonstrate a lifetime legal barrier to adoption."

"This narrow construction is neither compelled by the words of the statute nor necessary to effectuate the Legislature's intent," Chin wrote. "On the contrary, *Stevenson's* interpretation, which has the express endorsement of the commission that drafted the statute for the Legislature, is both more logical and more consistent with the available indicia of legislative intent."

Chin argued that the court should have left it up to probate judges to determine "as a factual matter" whether foster or stepparents would have wanted their foster or stepchildren to inherit from their estates.

'At death, the foster child or stepchild might have been a friend ... but a friend is not an heir.'

Stanley Mosk, justice

Two Berkeley attorneys for James Joseph said they were going to break out a bottle of champagne to celebrate their victory. If the court had given the law a broad construction, there would have been "people coming out of the woodwork, making spurious claims," said Dena R. Thaler. "There could have even been claims against the descendants of foster parents."

A contrary ruling also "would go against the public policy of this state to encourage the adoption of foster children," said Kathleen Marie Moura.

Although it's not clear why the Josephs did not adopt Barnum-Smith after she became an adult, James Joseph generally believes that his brother was in some way disappointed in her, Thaler said. Barnum-Smith was taken in because her parents already had four or five children and the Josephs had none, Thaler said. In addition, Barnum-Smith's father was Gladys' grandnephew. "So they were doing each other a favor," she said.

Berkeley attorney Thomas V. Roland, who represents Barnum-Smith, expressed disappointment with the ruling, but predicted that it will soon be overruled because the Legislature will adopt the Law Revision Commission's recommendation.

"That's probably going to become law because the current ruling means the statute applies to practically nobody. I think the Law Revision Commission did not intend that nor did Legislature," Roland said.

Although such a law would come too late to help his client, Roland said he has already taken action to assist his client, filing a copy of Louis Joseph's 1985 will and codicil in probate court within hours of the high court's ruling. The codicil refers to Barnum-Smith as Joseph's daughter and gives her a share of the proceeds if the Joseph home is sold, he said.