Study L-661 November 20, 2002

Memorandum 2002-63

Inheritance Involving Nonmarital Child
(Draft of Tentative Recommendation)

At the November 2002 meeting the Commission considered Probate Code Section 6452 and the *Estate of Griswold*, 25 Cal. 4th 904, 24 P.3d 1191, 108 Cal. Rptr. 2d 165 (2001), relating to the rule that a birth parent may not inherit from a child born out of wedlock unless that parent has acknowledged and supported or cared for the child. The Commission decided not to recommend a departure from the standard of existing law.

The Commission also considered the suggestion of the State Bar Trusts and Estates Section that the existing statute should be extended to apply to inheritance by a marital as well as a nonmarital parent of a child. Under this proposal, Section 6452 would be revised along the following lines:

> **Prob. Code § 6452 (amended). Inheritance by or through natural parent**
>
> 6452. ~~If a child is born out of wedlock, neither~~ Neither a natural parent nor a relative of that parent inherits from or through ~~the~~ a child on the basis of the parent and child relationship between that parent and the child unless both of the following requirements are satisfied:
>
> (a) The parent or a relative of the parent acknowledged the child.
>
> (b) The parent or a relative of the parent contributed to the support or the care of the child.
>
> **Comment**. Section 6452 is amended to apply broadly to a natural parent of a child regardless of whether the child was born in or out of wedlock. This is the rule of Uniform Probate Code Section 2-114.

The Commission was split over whether this change should be made. The Commission asked the staff to draft the proposed change in the form of a tentative recommendation for further review, and to bring it back with additional analysis of the pros and cons of such an expansion. A draft tentative recommendation is attached to this memorandum.

In favor of the expansion is that, if the policy of the statute is sound, there is no reason to limit its application to a child born out of wedlock. The fact that a child's parents happened to be married or unmarried at the time of birth should not be the determining factor as to inheritance rights. To the extent the policy of the statute requires a parent to assume parental duties if the parent is to receive parental rights, that policy applies equally regardless of the parent's marital status. To the extent the policy of the statute is to effectuate the presumed intent of the decedent, it is likely that a decedent would not want to benefit a neglectful parent whether or not the parent was married at the time of birth.

Opposed to the expansion is that it will increase litigation and unnecessarily complicate what should be routine probate proceedings. Granted, a married parent may refuse to acknowledge and support or care for a child of the marriage, but that circumstance is less likely to occur than where a child is born outside of a marriage. Is this a significant enough problem in practice that it merits adding further complexity to the law? We have not generally heard of problems in the real world — this appears to be primarily a theoretical or academic concern. We have amended Probate Code Section 6452 five times previously, and every time we seem to cause more problems than we cure. Who knows what the unintended consequences of the proposed expansion may be?

To the staff's mind, a major concern with the proposed expansion is the proof problem that is inherent in the existing statute. As phrased, the statute requires that the parent of a nonmarital child who seeks to inherit from that child must make an affirmative showing of acknowledgment and support or care. We are not troubled by this requirement as presently applied because (1) where there has been no marriage to create a presumption of parentage, it is appropriate that a person claiming to be a birth parent should be required to establish a nexus, and (2) the number of cases where proof will be required is relatively small.

But an expansion of the statute to apply to all parents, marital as well as nonmarital, would dramatically escalate the proof problem. And what would be the point of requiring a marital parent to prove acknowledgment of the child, when the law already presumes a parental relationship by virtue of the marriage? See Fam. Code § 7540 (presumption that child is of the marriage). The existing acknowledgment standard is ill-suited for application to parents of a child born within a marital relationship.

The State Bar Section suggests that proof of the marital relationship would be all that is necessary here, since that would trigger the presumption. We could, and perhaps should, provide that by statute. E.g.:

> **Prob. Code § 6452 (amended). Inheritance by or through natural parent**
>
> 6452. ~~If a child is born out of wedlock, neither~~ Neither a natural parent nor a relative of that parent inherits from or through ~~the~~ a child on the basis of the parent and child relationship between that parent and the child unless both of the following requirements are satisfied:
>
> (a) The parent or a relative of the parent acknowledged the child. This subdivision is satisfied by proof that the parents of the child were married to each other at the time of the child's birth.
>
> (b) The parent or a relative of the parent contributed to the support or the care of the child.
>
> **Comment**. Section 6452 is amended to apply broadly to a natural parent of a child regardless of whether the child was born in or out of wedlock. This is the rule of Uniform Probate Code Section 2-114.
>
> Subdivision (a) is amended for consistency with the marital parentage presumption of the Family Code. See Fam. Code § 7540.

But what about the other prong of the statutory test — that the parent contributed to the support or care of the child? Presumably, for most marital parents this should not be a problem, although a parent might be hard put to come up with receipts for food or clothing purchased for the child many years earlier. Perhaps eyewitness testimony could be used as proof that the parent cared for the child during the child's minority. But what's the point? Why put the parents through this exercise? It will be a rare case where the parents of a child born during marriage cannot show any contribution at all to support or care. It is only where the birth occurs outside the marriage relationship that the possibility of failure of support or care becomes substantial, and the current statute is narrowly aimed at that situation.

Perhaps the proof issues could better be addressed by reversing the burden. In the case of a marital child, inheritance would be allowed unless the person seeking to disinherit the parent proves the parent's failure to acknowledge and contribute to support or care of the child. Something along the following lines could work:

Prob. Code § 6452 (amended). Inheritance by or through natural parent

6452. ~~If a child is born out of wedlock, neither~~ (a) Neither a natural parent nor a relative of that parent inherits from or through ~~the~~ a child on the basis of the parent and child relationship between that parent and the child unless both of the following requirements are satisfied:

~~(a)~~ (1) The parent or a relative of the parent acknowledged the child.

~~(b)~~ (2) The parent or a relative of the parent contributed to the support or the care of the child.

(b) If the natural parents of a child were married to each other at the time of the child's birth, the requirements of subdivision (a) are presumed to be satisfied. If the natural parents of a child were not married to each other at the time of the child's birth, the requirements of subdivision (a) are presumed not to be satisfied. The presumptions created by this subdivision are presumptions affecting the burden of producing evidence.

Comment. Section 6452 is amended to apply broadly to a natural parent of a child regardless of whether the child was born in or out of wedlock. This is the rule of Uniform Probate Code Section 2-114.

Subdivision (b) codifies the effect of existing law with respect to a nonmarital child. With respect to a marital child, the provision is intended to avoid the necessity of routine proof in the ordinary case of inheritance by or through the parents of the child.

Again, the staff thinks the question here is whether such a revision of the law is worth it, given the relative infrequency of the problem and the likelihood of unintended consequences.

Respectfully submitted,

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Executive Secretary

#L-661

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

Staff Draft

TENTATIVE RECOMMENDATION

Inheritance Involving Nonmarital Child

November 2002

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 **[Date To Be Determined].**

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

The Commission has reviewed Probate Code Section 6452, which limits the right of a nonmarital parent to inherit from a child the parent has neither acknowledged nor supported or cared for, in light of the opinion of the Supreme Court in *Estate of Griswold*, 25 Cal. 4th 904, 24 P.3d 1191, 108 Cal. Rptr. 2d 165 (2001). The Commission has concluded that the standard of existing law is satisfactory, but should be extended to limit the inheritance right of a marital parent as well.

This recommendation was prepared pursuant to Resolution Chapter 166 of the Statutes of 2002.

INHERITANCE INVOLVING NONMARITAL CHILD

Under the rules of inheritance, if a person dies intestate without issue, the person's parents (and through them, other relatives) are entitled to inherit some or all of the decedent's estate.[1] However, Probate Code Section 6452 limits the ability of the parents of a nonmarital child to inherit from that child. The statute imposes two prerequisites:

> 6452. If a child is born out of wedlock, neither a natural parent nor a relative of that parent inherits from or through the child on the basis of the parent and child relationship between that parent and the child unless both of the following requirements are satisfied:
>
> (a) The parent or a relative of the parent acknowledged the child.
>
> (b) The parent or a relative of the parent contributed to the support or the care of the child.

Section 6452 represents a departure from the common law (and traditional statutory) rules governing inheritance. The traditional rules do not generally impose behavioral prerequisites to inheritance.[2] The statute seeks to codify the presumed intention of a decedent who was never acknowledged, supported, or cared for by a parent — such a decedent would be unlikely to want that parent to inherit.

A recent case — *Estate of Griswold*[3] — suggests that the standard of Section 6452 may fail to capture the likely intent of the decedent where there has been acknowledgment and support but no other contact between the decedent and parent. Both the majority[4] and concurring[5] opinions in *Griswold* question the policy of the statute as applied to the facts, and suggest legislative attention to the matter.

The Law Revision Commission has taken this occasion to review the policy and history of Probate Code Section 6452. The statute was first enacted in 1983, and

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1. Prob. Code §§ 6401, 6402.

2. The major exception is the statutory preclusion of inheritance by a murderer. Prob. Code § 250. See also Prob. Code § 259 (abuse of elder or dependent adult).

3. 25 Cal. 4th 904, 24 P.3d 1191, 108 Cal. Rptr. 2d 165 (2001).

4. "We do not disagree that a natural parent who does no more than openly acknowledge a child in court and pay court-ordered child support may not reflect a particularly worthy predicate for inheritance by that parent's issue, but section 6452 provides in unmistakable language that it shall be so." 108 Cal. Rptr. 2d at 181.

5. "I doubt most children born out of wedlock would have wanted to bequeath a share of their estate to a 'father' who never contacted them, never mentioned their existence to his family and friends, and only paid court-ordered child support. I doubt even more that these children would have wanted to bequeath a share of their estate to that father's other offspring." 108 Cal. Rptr. 2d at 181.

has been amended five times since then, in response to various fact situations illustrated by the cases.[6] The Commission's review suggests that, no matter what standard may be provided in the law, there will be fact situations in which application of the standard appears inequitable.

A minority of jurisdictions in the United States, like California, impose some limitation on the right of a birth parent to inherit from the child. The most common standard, drawn from the Uniform Probate Code and in use in a dozen states, precludes inheritance unless the birth parent "openly treated" the child as the parent's own and did not refuse to support the child.[7] A half dozen states preclude inheritance if the birth parent has "abandoned" the child.[8]

The Commission does not believe either of these standards would be an improvement over existing California law. They are open-ended, undefined, and subjective. They invite inconsistent application from judge to judge.[9] In many situations they would not be as protective of the presumed intent of the decedent as existing law.[10] They also have significant drawbacks from an administration of

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6. The statute was originally enacted as Section 6408.5(b). See 1983 Cal. Stat. ch. 842, § 55. As enacted it required either acknowledgment or support. It was amended (and renumbered as Section 6408.5(c)) in 1984 to require both acknowledgment and support or care. See 1984 Cal. Stat. ch. 892, §42.

In 1985 the statute was amended to allow acknowledgment and support or care by a relative of a parent, and to allow direct inheritance by children and siblings. See 1985 Cal. Stat. ch. 982, § 22; *Effect of Adoption or Out of Wedlock Birth on Rights at Death*, 18 Cal. L. Revision Comm'n Reports 289 (1986).

The section was renumbered in 1990 (1990 Cal. Stat. ch. 79, § 14) and again in 1993 (1993 Cal. Stat. ch. 529, § 5), when it became Section 6452. At that time the provision for direct inheritance by children was repealed. See 1993 Cal. Stat. ch. 529, § 5; *Parent and Child Relationship for Intestate Succession*, 23 Cal. L. Revision Comm'n Reports 991, 1004-05 (1993).

The exception for direct inheritance by siblings was repealed in 1996. See 1996 Cal. Stat. ch. 862; *Inheritance From or Through Child Born Out of Wedlock*, 26 Cal. L. Revision Comm'n Reports 13 (1996).

7. See Uniform Probate Code, Section 2-114(c) (1990); see also Ala. Code § 43-8-48(2) (2001); Ariz. Rev. Stat. § 14-2114(c) (2001); Del. Code Ann. tit. 12, § 508(2) (2001); Idaho Code § 15-2-109(b) (2001); Ky. Rev. Stat. Ann. § 391.105(1)(c) (2001); Me. Rev. Stat. Ann. tit. 18, § 2-109(2) (2001); Miss. Code Ann. § 91-1-15(3)(d)(i) (2001); Mont. Rev. Stat. § 474.060(2) (2001); Neb. Rev. Stat. Ann. § 30-2309(2) (2001); S.C. Code Ann. § 62-2-109(2) (2001); Tenn. Code. Ann. § 31-2-105(a)(2)(2001); Va. Code Ann. § 64.1-5.1(3) (2001).

The Georgia "openly treated" statute has been repealed. See former Ga. Ann. Code § 53-2-4(b)(2). The Georgia statute had been held unconstitutional because it applied only to a father and not a mother. Rainey v. Chever, 270 Ga. 519, 520, *cert. denied*, 527 U.S. 1044 (1999); see generally Long, *Rainey v. Chever: Expanding a Natural Father's Right to Inherit from His Illegitimate Child*, 51 Mercer L. Rev. 761 (2000).

8. See Conn. Gen. Stat. § 45a-439(a)(1) (2001); N.Y. Est., Powers & Trusts Law § 4-1.4(a) (Consol. 2002); N.C. Gen. Stat. § 31A-2 (2001); Ohio Rev. Code Ann. § 2105.10; Va. Code Ann. § 64.1-16.3(B) (2001).

9. See discussion in Monopoli, *"Deadbeat Dads": Should Support and Inheritance Be Linked?*, 49 U. Miami L. Rev. 257, 292 (1994).

10. For example, it has been held that a showing that the mother voluntarily relinquished custody of the child to the father when the child was four, infrequently visited and communicated with the child, and never contributed to the child's support, did not establish abandonment for the purpose of Civil Code Section 206.5. The court held that to have abandonment, there must be an intent to abandon. Stark v. Alameda, 182 Cal. App. 2d 20, 23-24, 5 Cal. Rptr. 839 (1960).

It is not even clear that an openly treated standard would have altered the result in *Griswold*. Acknowledgment of parentage in open court, and regular payment of child support into court (all of which

justice perspective — in a contested case the fact of open treatment or abandonment could not be proved simply but would require a court inquiry into the circumstances, and could serve as an inducement to a fraudulent claim.

By contrast, the more objective acknowledge and support or care for standard of existing Probate Code Section 6452 appears to work well in most cases. It is easily administered and provides a rough measure of justice. It is an unusual case, such as *Griswold*, where a parent acknowledges and supports the child and yet there is no other contact, knowledge, or involvement of the parent or parent's family. The Commission recommends that the standard of existing law be left unchanged, understanding that there will be an occasional case where the result may appear inequitable. But the law of intestate succession is intended to provide a rough measure of justice for the ordinary case; it is not clear that another standard would be better.

The Commission does recommend that the existing limitation on inheritance by a birth parent be extended to married as well as unmarried parents. As a practical matter, most marital parents will have acknowledged and supported or cared for a child of the marriage. But a married parent may neglect a child just as an unmarried parent may. The Commission sees no reason to discriminate in favor of a married parent for purposes of inheritance from a child.

The Uniform Probate Code does not distinguish between marital and nonmarital parents — inheritance from or through a child by a birth parent (or the parent's kindred) is precluded unless the birth parent has satisfied the prerequisites for inheritance. It makes no difference whether the parent was married or unmarried.[11] A few states have adopted this rule.[12]

One concern with such an expansion is that it injects a potential litigation issue into every case involving inheritance by or through a parent. However, the burden on the court system should not be substantial due to the relative infrequency of a child predeceasing its parents and leaving no issue but an estate worth litigating. Moreover, proof of acknowledgment and support or care should be routine for the parent in the usual case, should the inheritance right be challenged.

PROPOSED LEGISLATION

Prob. Code § 6452 (amended). Inheritance by or through natural parent

SECTION 1. Section 6452 of the Probate Code is amended, to read:

6452. ~~If a child is born out of wedlock, neither~~ Neither a natural parent nor a relative of that parent inherits from or through the child on the basis of the parent

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are a matter of public record, and all of which occurred in *Griswold*), could well be viewed by many as "open treatment" of the child as the parent's own.

11. Uniform Probate Code § 2-114(a) (1990).

12. See discussion in Monopoli, 49 U. Miami L. Rev. at 271.

and child relationship between that parent and the child unless both of the following requirements are satisfied:

(a) The parent or a relative of the parent acknowledged the child.

(b) The parent or a relative of the parent contributed to the support or the care of the child.

Comment. Section 6452 is amended to apply broadly to a natural parent of a child regardless of whether the child was born in or out of wedlock. This is the rule of Uniform Probate Code Section 2-114.
