

**APPENDIX 7**

STATE OF CALIFORNIA

**CALIFORNIA LAW  
REVISION COMMISSION**

RECOMMENDATION

**Inheritance by Foster Child or Stepchild**

**October 1997**

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

#### NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative.

Cite this report as *Inheritance by Foster Child or Stepchild*, 27 Cal. L. Revision Comm'n Reports 625 (1997).

STATE OF CALIFORNIA

PETE WILSON, Governor

## CALIFORNIA LAW REVISION COMMISSION

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October 9, 1997

To: The Honorable Pete Wilson  
*Governor of California*, and  
The Legislature of California

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 would also make clear that the legal barrier to adoption does not include refusal of the child to consent or agree to the adoption.

This recommendation was prepared pursuant to Resolution Chapter 102 of the Statutes of 1997.

Respectfully submitted,

Christine W.S. Byrd  
*Chairperson*



## 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 the 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."<sup>1</sup> The cases conflict on whether the legal barrier must exist throughout the joint lifetimes of the foster parent or stepparent and the child, or merely at the time the adoption was contemplated or attempted.<sup>2</sup>

The legal barrier to adoption is usually the natural parent's failure to consent.<sup>3</sup> If it is clear the foster parent or stepparent

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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* Estate of Smith, 42 Cal. Rptr. 2d 42 (1995) (legal barrier need only exist when adoption was contemplated or attempted — opinion not certified for publication in official reports), *and* 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 and opinion superseded*, 939 P.2d 745, 65 Cal. Rptr. 2d 345 (June 11, 1997).

3. See *Stevenson*, 11 Cal. App. 4th at 866, 14 Cal. Rptr. 2d at 257. See also Prob. Code § 6454 Comment. Possible legal barriers to adoption are: (1) the proposed adoptee is a minor and is less than 10 years younger than the person wishing to adopt (Fam. Code § 8601); (2) a natural parent refuses to consent to the 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. The recommended legislation would make clear that, for the purpose of Probate Code Section 6454, the legal barrier to adoption does not include refusal of the proposed adoptee to consent or agree to the adoption. To permit the child to inherit because of his or her refusal to consent has been

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.<sup>4</sup> Thus a requirement that the legal barrier must continue for life would preclude inheritance by virtually all adults from or through a foster parent or stepparent.<sup>5</sup> Such a construction would frustrate the underlying purpose of the statute to carry out the likely intent of the intestate decedent.<sup>6</sup>

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.<sup>7</sup> This

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called "ridiculous." Oldman & Cooley, *Lineage Limits: The Struggle to Define Barriers to Adoption*, S.F. Daily J., April 16, 1997, at 5.

4. Fam. Code § 9302(b).

5. See *Smith*, 42 Cal. Rptr. at 45, 48.

6. See *id.* at 43; *Cleveland*, 17 Cal. App. 4th at 1706, 22 Cal. Rptr. 2d at 594.

7. This view is supported by the commentators. See 17 CEB Est. Plan. & Cal. Prob. Rep. 22 (Aug. 1995) (decision and reasoning of *Estate of Smith* "seem sound"); Oldman & Cooley, *Extended Family: Determining Heirship Without Adoption*, S.F. Daily J., July 18, 1995, at 5 (decision in *Estate of Smith* "makes more sense" than in *Estate of Cleveland*).

One article calls for repeal of Probate Code 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 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*

relaxation of the standards for inheritance should not lead to an increase of manufactured claims because of the requirements that the parent-child relationship must continue throughout their joint lifetimes, and that evidence of intent to adopt must be clear and convincing.<sup>8</sup> The Commission also recommends making clear that the required legal barrier to adoption does not include refusal of the proposed adoptee to consent or agree to the adoption.

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*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, other than that person's refusal to consent or agree to the adoption.*

**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 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). Subdivision (b) is also amended to make clear that the legal barrier referred to in this section does not include refusal of the proposed adoptee to consent or agree to the adoption.

The continuous relationship contemplated by Section 6454 is a family relationship between the foster parent and foster child or between the stepparent and stepchild. Estate of Claffey, 209 Cal. App. 3d 254, 258-59, 257 Cal. Rptr. 197, 199-200 (1989). It does not require that the status of foster child or stepchild continue for life, however, so long as a parent and child relationship continues to exist. Thus, the fact that the foster child status terminates after the time the adoption was contemplated or attempted does not affect the child's right to inherit under Section 6454, as long as a parent-child relationship continues. See, e.g., Estate of Lind, 209 Cal. App. 3d 1424, 257 Cal. Rptr. 853 (1989). Likewise, divorce of the stepparent does not affect the right of the stepchild to inherit from or

through the stepparent under this section. *Cf.* Estate of Stevenson, *supra*, 11 Cal. App. 4th at 862, 14 Cal. Rptr. 2d at 254-55 (seven-year separation).

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