

Memorandum 82-101

Subject: Study L-625 - Probate Law and Procedure (Share for Child Omitted From Will)

How much of the testator's estate should be given to a child omitted from the testator's will when it does not appear that the omission was intentional? The Commission and the staff have struggled with this problem.

The proposed legislation gives the omitted child a share equal to the average of the shares given by the will to the testator's other children living when the will is executed. If no children were then living, the omitted child receives an intestate share. See proposed Section 254.110.

Attorney Kenneth Klug (one of the State Bar members reviewing our proposals) objects to the average share concept. He believes it is "no less arbitrary" than the intestate share and has the disadvantage of being "more complicated." He concludes that we should keep the intestate share of existing law and the UPC "unless there appears to be a very good reason to make the change."

The staff agrees that the "average share" concept is complex and will be costly to administer. For example, if the will has trust provisions and the trustee has discretion to determine the shares of the children provided for in the trust, we believe that the court will have considerable difficulty in putting a value on the share of each child. We are persuaded that we should abandon the "average share" concept and that we should provide that the omitted child receives an intestate share. This means that if the testator dies leaving a surviving spouse, the omitted child will receive nothing unless there are children by a former marriage. In the latter case, the child will divide one-half of the separate property with the other children, including both the children of the former marriage and the children of the latter marriage. Under this scheme, there is a possibility that the children named in the will will be given gifts and that the omitted child will receive nothing because there is a surviving spouse. However, in that case, the inequity can be avoided if the will of the surviving spouse makes appropriate provision for the omitted child.

Respectfully submitted,

John H. DeMouilly
Executive Secretary