Study L-661 October 29, 2002

First Supplement to Memorandum 2002-35

Inheritance Involving Nonmarital Child: *Griswold* Case (Comments of State Bar Trusts & Estates Section)

Attached as an Exhibit to this supplemental memorandum are comments of the Trusts and Estates Section of the State Bar addressed to Probate Code Section 6452 (inheritance by or through parent of out of wedlock child).

Do Not Change Existing Law as to Nonmarital Parent

The State Bar Section believes the standard of existing law — inheritance only if the natural parent acknowledged and supported or cared for the child — is appropriate and should be preserved. The intestate succession law approximates the likely intent of an intestate decedent.

The Bar would **not** supplement the standard of existing law with an "openly treated" or comparable requirement, the comments of the Supreme Court justices in *Griswold* notwithstanding. The Bar is concerned that would improperly inject into the law a value judgment as to how parents should interact with their children. And it would create a subjective standard, leading to more litigation and less predictable outcomes than current law.

Extend Existing Law as to Marital Parent

The Bar would, however, take existing law one step further and apply the same standard — acknowledge and support or care for the child — as a prerequisite to inheritance by a **married** parent, not just an unmarried parent. The Bar argues that would more likely effectuate the intent of an intestate decedent:

> Current Section 6452 properly predicts that most decedents would not want their parent to inherit if that parent had failed to contribute to the support or the care of the decedent during childhood. This expectation should not be restricted to children born out of wedlock. A child born of married parents, one or both of whom fails to contribute to their child's support or care, is no more likely to want to see that parent (or that parent's other relatives) inherit from the child than is a child born out of wedlock.

Exhibit pp. 2-3.

The staff in Memorandum 2002-35 argues against such an extension of the law on the grounds that (1) the problem of abandonment is not as great for married as for unmarried parents, (2) the proposed rule would inject a potential litigation issue into every case involving inheritance by or through a parent, (3) once we start imposing behavioral prerequisites to inheritance, where do we stop? (4) until now, the limited application of Section 6452 to nonmarital parents does not seem to have caused anyone any concern, and (5) very few states have adopted this rule.

The Bar's response to these concerns is that such an extension might lead to some additional litigation but it will not occur in the ordinary case where married parents support or care for their children.

> Only where there is a question of whether the married parent actually contributed to the support or care of his or her child might there be the possibility of additional litigation, and this is exactly the sort of situation in which the deceased child would likely not want the non-supporting parent to inherit. Any possibility of increased litigation is balanced by the fact that this rule of intestate succession will more closely follow the anticipated intent of the decedent.

Exhibit p. 3.

The Bar proposes a rather simple revision along the following lines:

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

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

As phrased, the statute appears to require an affirmative showing of acknowledgment and support or care before a parent or a parent's relatives could inherit from a child. This would seem to unduly complicate many intestate succession cases by requiring proof that is not now required. The Bar suggests that at least the acknowledgment requirement would be satisfied by the statutory presumption of parentage of a married cohabiting couple. The staff does not think this would be sufficient. If the Commission recommends expansion of the section, the issue needs to be dealt with directly.

The staff is dubious about the value of the proposed expansion. How often will the situation being addressed arise? Is it worth complicating the law for this undoubtedly rare type of case?

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

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October 29, 2002

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4000 Middlefield Road, Room D-1
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Re: Inheritance Involving Nonmarital Child

Dear Mr. Sterling:

On behalf of the Trusts and Estates Section of the State Bar of California, I would like to comment on the California Law Revision Commission's study of Inheritance Involving Nonmarital Child, and the Staff Memorandum 2002-35, of August 12, 2002, which discusses the issues raised by the application of Probate Code Section 6452 and the opinion of the California Supreme Court in *Estate of Griswold* (2001) 25 Cal.4th 904.

Our Section has reviewed the Staff Memorandum and the issues raised therein. We commend the Staff on its presentation of the possible alternative formulations of the intestacy rule codified by Section 6452 and the potential ramifications if different alternatives were adopted. Our views on the issues raised by the Staff Memorandum follow.

There Should Be No Change To The Substantive Standards Under Which A Natural Parent Or Relative Of That Parent Inherits From Or Through A Child

Our Section has taken the position that no change is needed in the substantive standards for determining when a parent or a relative of a parent may inherit from or through a child. We

believe that the current standard, which requires that "[t]he parent or relative of the parent acknowledged the child" and "[t]he parent or relative of the parent contributed to the support or the care of the child" provides the best balance of the competing interests identified in the Staff Memorandum. We believe that the basic guide for determining intestate succession rules is the likely intent of the decedent – in this case the deceased child. As such, a deceased child would not be likely to want his or her parent to inherit if they did not acknowledge the child or contribute to the support or the care of the child.

At page 12 of the Staff Memorandum, the Staff identified as alternative (6) the repeal of Section 6452. Our section does not believe that this alternative, which would allow parents to inherit from or through children that they have refused to acknowledge or have not provided support or care, reflects the likely intent of decedents. It should not become a rule of intestate succession. We thus oppose the repeal of Section 6452.

The Staff identifies three additional alternatives at page 12 of the Staff Memorandum that would change the law in the other direction by imposing additional restrictions on the right of a parent to inherit from or through a deceased child. Alternatives (1), (2), and (3) all would require a court to look more closely at the parent-child relationship before granting a parent or a relative of a parent the right of intestate succession from or through a deceased child. While each of these three alternatives have the value of addressing the concerns expressed by Justice Baxter (writing for the majority) and Justice Brown (concurring) in *Estate of Griswold*, they have offsetting disadvantages that lead us to recommend that they not be adopted. First, we are concerned that the more restrictive standards reflected by alternatives (1), (2), and (3) could be construed as codifying value judgments on how parents should interact with their children beyond those currently reflected in Section 6452. Second, we anticipate that judicial inquiries into whether a particular parent-child relationship met the standard of alternative (1), (2), or (3) could become more subjective than under current law, thus potentially leading to more litigation and/or less predictable outcomes that under current law. We therefore recommend that alternatives (1), (2), and (3) not be adopted by the Commission.

Section 6452 Should Be Expanded To Apply To All Parent-Child Relationships, Not Just Parents Of Children "Born Out Of Wedlock".

Our Section supports one modification of the current law, alternative (5) as set forth at page 12 of the Staff Memorandum. We recommend that Section 6452 be expanded to set forth the rule of intestate succession for all parents who inherit from or through their deceased children, not just parents who are inheriting from or through children born out of wedlock.

As previously stated, the rules of intestate succession are premised upon an attempt to predict how most decedents would have wanted their estates to pass upon their death. Current

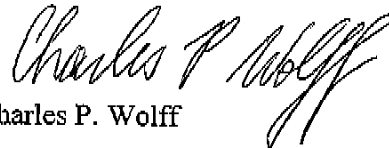
Section 6452 properly predicts that most decedents would not want their parent to inherit if that parent had failed to contribute to the support or the care of the decedent during childhood. This expectation should not be restricted to children born out of wedlock. A child born of married parents, one or both of whom fails to contribute to their child's support or care, is no more likely to want to see that parent (or that parent's other relatives) inherit from the child than is a child born out of wedlock. We therefore support the amendment of Section 6452 to broaden its coverage to all parent-child relationships by eliminating the introductory phrase of the statute: "If a child is born out of wedlock,..."

We would expect that the first criterion of Section 6452 – that the parent "acknowledged" the child -- would be presumptively satisfied when a child is born to parents that are married. Thus, the parent's right to intestate succession would depend on whether "[t]he parent or a relative of the parent contributed to the support or the care of the child."

We recognize that expanding Section 6452 in the manner we propose might lead to some additional litigation between intestate heirs of children born to married parents. However, we expect that most parents who are married when their children are born will have contributed to the support or care of the child; there will not be litigation in these cases. Only when there is a question of whether the married parent actually contributed to the support or care of his or her child might there be the possibility of additional litigation, and this is exactly the sort of situation in which the deceased child would likely not want the non-supporting parent to inherit. Any possibility of increased litigation is balanced by the fact that this rule of intestate succession will more closely follow the anticipated intent of the decedent.

Christopher Moore currently plans to attend the Commission meeting on November 8, 2002 on behalf of our Committee. Thank you for your consideration of these comments.

Very truly yours,



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