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Who's Whose: DNA, Parenthood and Inheritance

By Nancy Reinhardt and Mark A. Lester

Science is changing and improving lives, but it is also intruding into the often-described staid practice of probate. Because it is unlikely that clients will be completely truthful about their lives with their partners or spouses, as well as their attorneys, estate planners will likely have to approach a discussion of the problems with the definition of “child.”

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EFFECTIVE JANUARY 1, 2019, CALIFORNIA Probate Code § 6453(b)(3) now includes provision for the use of DNA collected during the lifetime of the parent to establish a natural parent-child relationship that would determine *intestate* succession when it would otherwise be impossible for the parent to hold the child out as his or her own during that parent's lifetime.¹

The 2019 amendment continues a trend in California law that started with the adoption of the Uniform Parentage Act in 1975 of eliminating different treatment between legitimate and illegitimate children for purposes of inheritance as set forth in PC § 6450(a)—“[t]he relationship of parent and child exists between a person and the person's natural parents, regardless of the marital status of the natural parents.”²

This article will examine the historical basis for “impossibility”—the status of current law under PC § 6453(b)(3), the direction that law may take in the future, and what draft language should be considered in light of current law.

Pre-1975 Law

Prior to 1975, California law recognized a difference between the ability of legitimate and illegitimate children to inherit from a parent's estate and even found that a challenge to different and discriminatory treatment of illegitimate children for intestate succession purposes did not violate equal protection or due process provisions of the California constitution.

In *Estate of Ginocchio*, a case of first impression as to constitutional challenges, the court cited to several cases from other jurisdictions that held the distinction between legitimate and illegitimate children in succession laws is not arbitrary and not without reasonable legal basis.³

The *Ginocchio* Court justified joining those other jurisdictions for three reasons:

- There was no vested right to succession, inheritance is subject to such conditions and limitations as the legislature may prescribe.
- The state has a paramount interest in encouraging the institution of marriage and discouraging the birth of illegitimate children.

- Statutes which provide that the illegitimate child takes only from and through his/her mother in the absence of an acknowledgment of his/her father embody nothing more than the presumed intent of the deceased.

The court thus reasoned that since each person is constitutionally free to dispose of his/her property in an unfettered manner, it cannot be said that statutes reflecting the probable intent of individuals are unreasonable.⁴

1983 Revisions

Beginning in 1983, the California Probate Code moved toward the equal treatment of legitimate and illegitimate children in intestate estates by adding former PC § 6408(a)(1), which provided that “[e]xcept as provided in subdivisions (b), (c), and (d), the relationship of parent and child exists between a person and his or her natural parents, regardless of the marital status of the natural parents.”⁵

In further defining a “natural parent,” former PC § 6408(f) provided that “for the purpose of determining whether a person is a ‘natural parent,’ as that term is used in this section...

- A natural parent and child relationship is established where that relationship is presumed and not rebutted pursuant to the Uniform Parentage Act, Part 7 (commencing with Section 7000) of Division 4 of the Civil Code.
- A natural parent and child relationship may be established pursuant to any other provisions of the Uniform Parentage Act, except that the relationship may not be established by an action under subdivision (c) of Section 7006 of the Civil Code unless either a court order was entered during the father's lifetime declaring paternity; or paternity is established by clear and convincing evidence that the father has openly and notoriously held out the child as his own.”⁶

Estate of Sanders and Use of DNA

In *Estate of Sanders*, the Probate Court was first confronted with the potential use of DNA to establish parentage for intestate succession purposes.⁷

In that case, the guardian *ad litem* (the mother) sought to compel genetic DNA tests from some of decedent's adult children to establish that her daughter was a child of



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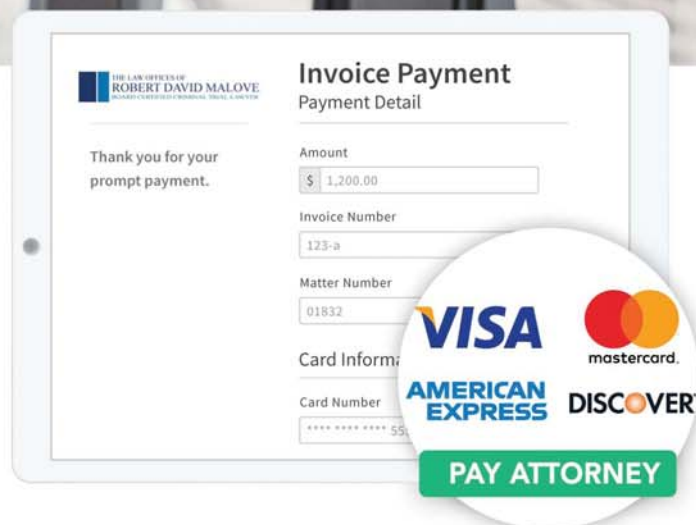
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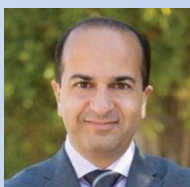
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the decedent-putative father and, therefore, entitle her to participation in the probate proceedings.

The Court of Appeal affirmed the trial court's declination to order DNA testing noting that neither the mother nor the children of the decedent-putative father were parties to the probate proceeding.⁸

In addition, PC § 6408 does not allow establishment of paternity by way of DNA testing in the probate proceedings as it provides that the relationship of a parent and child is established for purposes of intestate succession where a natural parent and child relationship is presumed and not rebutted pursuant to the Uniform Parentage Act, or that a natural parent and child relationship "may be established" pursuant to other provisions of the Uniform Parentage Act.

Thus, where there is no un rebutted presumption of paternity, and there is neither a court decree declaring paternity which was entered during decedent's lifetime—nor clear and convincing evidence that the father openly and notoriously held out his child—there are no means to establish paternity for heirship purposes.⁹

In further analyzing the legislative history of the adoption of PC § 6408, the *Sanders* Court noted that the California Legislature rejected an earlier version of the statute which would have allowed establishment of the parent and child relationship largely without restriction.

Accordingly, the *Sanders* Court declined to expand the methods by which the natural parent-child relationship can be established, including the admission of DNA evidence.¹⁰

1990 Statutory Revisions

In 1990, former PC § 6408(f)—the establishment of a natural parent-child relationship provisions—was incorporated into new PC § 6453(b) and further amended in 1993 to add (b)(3) to include a new category of "impossibility."

Accordingly, PC § 6453(b) thus provided that "a natural parent and child relationship may be established pursuant to any other provisions of the Uniform Parentage Act, except that the relationship may not be established by an action under subdivision (c) of Section 7630 of the Family Code unless a court order was entered during the father's lifetime declaring paternity; paternity is established by clear and convincing evidence that the father has openly held out the child as his own; or it was impossible for the father to hold out the child as his own and paternity is established by clear and convincing evidence."¹¹

Cheyanna M. and Impossibility

With respect to impossibility, the court in *Cheyanna M. v. A. C. Nielson Co.* noted that "[t]he legislative history indicates that the 'impossibility' provision was enacted to cover the situation...where the father dies before the child is born."¹²

A report, prepared by the Office of Senate Floor Analyses with respect to the amendment to PC § 6453 in 1993, described the situations in which the “impossibility” provision was meant to apply:

“In a current case in Kern County, the alleged father (unmarried) was in an automobile accident which left him paralyzed. His son was born the same day as the father’s accident. The father was in traction until his death 28 days later.

“In another Los Angeles County case, the alleged father (unmarried) was killed while the mother of the illegitimate child was still pregnant. Under these facts, if the father did not hold out the child as his own, no court order establishing paternity could have been entered during the father’s lifetime. Current law would bar the child from establishing paternity.

“This bill would offer another alternative for establishing the parent-child relationship.”¹³

In *Cheyanna M.*, the purported child of the decedent (the purported father), who was killed in an auto-pedestrian accident, brought a wrongful death action against the motorist and his employer.

That action was consolidated with the separate action by the parents of the deceased-purported father, who then moved for summary judgment on the ground that the purported child lacked standing to pursue the action because she could not establish paternity.

In reversing the trial court’s granting of the summary judgment, the *Cheyanna M.* Court held that the term “children,” within the meaning of the wrongful death statute, is defined in accordance with the laws of intestate succession, and, given the decedent’s death prior to the child’s birth, it was impossible for decedent to have held the child out as his own.¹⁴ It was not determinative that he had taken no such steps to “hold the child out as his own” while the child was in utero.¹⁵

2018 Statutory Revisions

PC § 6453(b)(3) was amended in 2018 to include the possible use of genetic DNA evidence in establishing paternity by clear and convincing evidence. PC § 6453 was also amended so as to be gender neutral by use of the terms “parent” and “parentage” rather than from the male point of view only of “his own” and “father”.

Effective January 1 of this year, PC § 6453(b)(3) now provides with respect to the third option for proving parentage that, “It was impossible for the parent to hold out the child as that parent’s own and parentage is established by clear and convincing evidence, which may



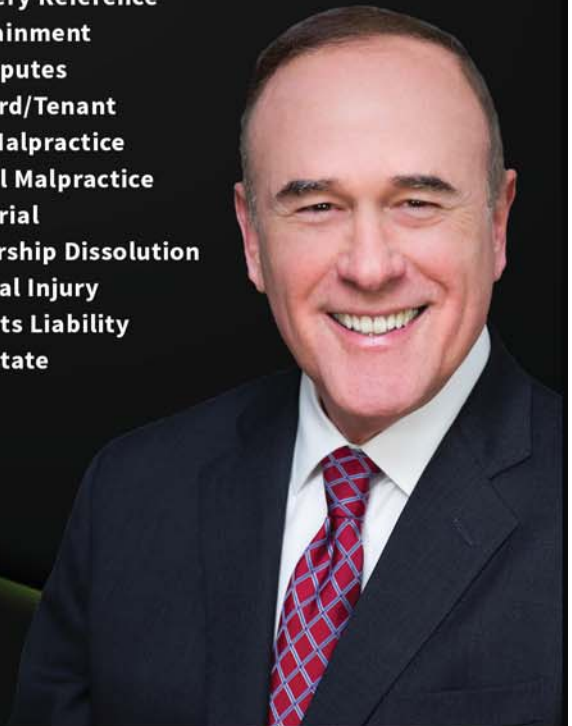
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include genetic DNA evidence acquired during the parent's lifetime."¹⁶

As originally proposed, the collection of DNA evidence was unlimited as to time; the final version, however, requires that genetic DNA evidence must be acquired during the parent's lifetime in order to be used to establish parentage by clear and convincing evidence.

What is also clear from PC § 6453(b)(3), as revised, is that the impossibility component of proving parentage is still a two-step process. First, it must have been impossible for the parent to have held the child out as the parent's own, and, second, that parentage must be established by clear and convincing evidence, which may include genetic DNA evidence. At the present time, it is not sufficient by itself that the purported child simply presents genetic DNA evidence as proof of parentage.¹⁷

To date, the only reported case interpreting "impossibility" under PC § 6453(b)(3) has been in the "traditional" situation where the purported father of the out-of-wedlock child died before the birth of the child making it impossible for the father to have declared the child his own.¹⁸

Given the availability and relative ease of DNA testing, however, which discloses previously unknown biological connections, what if a child's mother is mistaken as to the identity of the father of her child? What if that mistake was not discovered for many years after the child's birth, but after the biological father's death so that the father never knew about the child and thus never had the opportunity to hold the child out as his own?

Assume the same circumstances except rather than being simply mistaken, the mother affirmatively chooses to keep the biological father's name unknown to her child?

Do either of these fact patterns constitute impossibility of the parent to hold out the child as the late discovered parent's own?

While the authors believe that the first situation is a mistake, not an impossibility, and the second situation is a fraud perpetrated by the mother on her child, and also not an impossibility, it is also possible that under the right set of facts—such as a child who presents as having been deprived of any family for his/her life—the Probate Court, which is a court of equity, could well expand the definition of "impossible" to cover either or both of these situations.

“
A probate judge
presented with
compelling facts
of injustice may
bring unintended
beneficiaries.”

Defining Child for the Purposes of Estate Planning

Although PC § 6453 applies to *intestate* succession proceedings, the proactive estate planner should review the definition of "child" as used in their wills and trusts to make sure whether their definition of "child" could include or exclude later discovered children. PC § 26 defines "child" as "any individual entitled to take as a child under this code by intestate succession from the parent whose relationship is involved."

Given the issues raised above, samples of an inclusive definition of child include:

- a.) Whenever in this Agreement the term "child", "children" or "living issue" is used, it is intended to refer to John, Jane, and any other children hereafter born to or adopted by me, as a class—e.g.: "We have no predeceased children." John J. Smith, Sr. has a child, Betty Jane (Smith) Jones, from a prior relationship. No provision is being made for her in this trust and she shall be treated as if she predeceased the death of both settlors without issue then surviving.
- b.) The term "issue" or "living issue" shall include my children and their child or children whether or not any such child is adopted—"Whenever in this Agreement



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c.) The term “grandchildren” shall include any child or children born to, adopted by or living with any of my children—Notwithstanding the foregoing, the terms “child”, “children”, “grandchild”, “grandchildren”, and “issue” shall only include those persons with whom a natural parent and child relationship under Probate Code § 6453 is established during that child’s lifetime (except Betty (Smith) Jones, daughter of John J. Smith, Sr.).”

Conclusion

Science is changing and improving lives, but it is also intruding into the often-described staid practice of probate.

Because it is unlikely that clients will be completely truthful about their lives with their partners or spouses, as well as their attorneys, estate planners will likely have to approach a discussion of the problems with the definition of “child.” They will also have to address whether an inclusive or exclusive definition is desired with the understanding that they inform their clients that there are new laws that need to be discussed.

Without affirmatively addressing this definition in one’s documents, a probate judge presented with compelling facts of injustice may bring unintended beneficiaries into your estate plans. By failing to address the definition of “child” when drafting estate planning papers and documenting those client discussions and client wishes in the files, the attorney increases his or her risk of discipline, a charge of malpractice, and, most importantly, an ill-served client. 

¹ Cal. Prob. Code § 6453(b)(3).

² Cal. Prob. Code § 6450(a).

³ *Estate of Ginochio*, 43 Cal.App.3d 412 (1974).

⁴ *Ibid.* at 418 – 419.

⁵ Cal. Prob. Code § 6408(a)(1).

⁶ Cal. Prob. Code § 6408(f).

⁷ *Estate of Sanders*, 2 Cal.App.4th 462(1992).

⁸ *Ibid.* at 468 – 469.

⁹ *Ibid.* at 470 – 471.

¹⁰ *Ibid.* at 472.

¹¹ Cal. Prob. Code § 6453(b).

¹² *Cheyanna M. v. A. C. Nielson Co.*, 66 Cal.App.4th 855 (1988).

¹³ *Ibid.* at 877.

¹⁴ *Ibid.* at 861-862.

¹⁵ *Ibid.* at 871.

¹⁶ Cal. Prob. Code § 6453(b)(3).

¹⁷ *Estate of Sanders*, 2 Cal.App.4th 462(1992); *Estate of Britel*, 236 Cal.App.4th 127 (2015).

¹⁸ *Cheyanna M. v. A. C. Nielson Co.*, 66 Cal.App.4th 855 (1988).

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