RESOLUTION 07-06-2013 (As Amended and Adopted)

DIGEST

Probate: Decedent's Erroneous Belief of Child's Death or Unawareness of Birth

Amends Probate Code section 21622 to ~~require a testator to use language in a testamentary instrument demonstrating specific intent to disinherit~~ *permit* a child the parent did not know existed *to receive an intestate share*.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History:

Similar to Resolution 01-05-2011 which was withdrawn, and to Resolution 04-03-2012 which was disapproved.

Reasons:

~~This resolution amends Probate Code section 21622 to require a testator to use language in a testamentary instrument demonstrating specific intent in order to disinherit a child the parent did not know existed. This resolution should be disapproved because it goes too far in changing the well-established burden of proof for children whose parents erroneously believed them dead, and does not make clear how a testator who desired to do so could effectively exclude any unknown children from inheriting.~~

~~Unlike~~ *Like* prior versions of this Resolution, *this measure seeks* ~~which sought~~ to alleviate the burden only on those children whose parents – always fathers – were unaware of their birth, ~~this resolution now also seeks to alleviate the burden on those children whose parents erroneously believed them to be dead~~. The existing burden on the latter group of children is of long standing, and is appropriate. On the other hand it is true that the legislative history of Section 21622 suggests that the possibility of placing the same burden on a child whose birth the father was unaware of was unintentional, and resulted from an effort to allow such children to inherit in certain circumstances. It appears that when the Legislature added that protection it inadvertently also may have required that such child also prove that the father's lack of unawareness of the child's birth was the sole reason for its omission, which is an almost insurmountable burden. ~~However, this Resolution would now make it easier for children whose parents erroneously thought them dead to inherit, which is a step too far.~~

~~Additionally, the Resolution would allow testators to disinherit all unknown children provided that they include language evidencing such a specific intent in their will, and provides that the currently used boilerplate language would not suffice. But it is highly likely that this Resolution would result in estate planners using as a matter of course new boilerplate that ostensibly demonstrates a specific intent to disinherit all unknown children, thereby undermining the resolution's original purpose.~~

TEXT OF RESOLUTION

RESOLVED, that the Conference of California Bar Associations recommends that legislation be sponsored to amend Probate Code section 21622 to read as follows:

§ 21622

If, at the time of the execution of all of decedent's testamentary instruments effective at the time of decedent's death, the decedent failed to provide for a living child: (a) solely because the decedent believed the child to be dead or (b) because the decedent was unaware of the birth of the child, the child shall receive a share in the estate equal in value to that which the child would have received if the decedent had died without having executed any testamentary instruments.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS

The Problem: Section 21622 imposes on a child born before the making of its parent's estate plan and omitted from that plan the enormous burden of proving that there was no other reason for the parent to disinherit the child other than the erroneous belief of death or lack of awareness of its birth. In other words, the child has to prove that *if* its parent knew it was still alive or knew of the child's existence the parent would not have disinherited the child, an inherently speculative proposition. This is an enormous burden to meet. If one does not know one has a child, it is the rare case indeed where one would ever consider disinheriting that child. As the Supreme Court said with respect to erroneous belief of death, "[o]ne does not disinherit a dead person." (*Estate of Torregano* (1960) 42 Cal.2d 234, 252.) Similarly, one is unlikely to formulate reasons to disinherit a child that one never knew existed.

The Solution: This resolution would eliminate the burden imposed on a mistakenly-omitted child to prove that the mistaken belief of death or unawareness of the child's birth was the *sole* reason for the omission from a will~~, and would allow such a child to inherit except where the will clearly shows a specific contrary intent by the decedent. The resolution thus adheres to California policy affording complete testamentary freedom~~.

~~A similar resolution in 2012 to remove the word "solely" was objected to by TexComm and other delegations because it allowed for no exception to such a child inheriting, and would have deprived a testator of the testamentary freedom to intentionally disinherit children that he did not know existed. To address those objections this resolution provides that if a clear and specific intent appears in the decedent's testamentary instruments to nevertheless disinherit the mistakenly-omitted child such a child will not inherit. Thus, the resolution adheres to California policy favoring complete testamentary freedom.~~

~~However, general disinheritance clauses and other similar boilerplate clauses containing statements such as "I have intentionally not provided for anyone not named in the will" are present in almost all attorney-prepared testamentary instruments. It would vitiate the statute's purpose of protecting *most* mistakenly-omitted children were such clauses to be given effect in~~

this context. The presence of such clauses does not reflect any true consideration by the decedent of what he would have done had he discovered that he had a child that he did not know existed, or had a decedent learned that a pre-deceased child was not, in fact, predeceased. This resolution would therefore require that the intent to disinherit be shown with language that truly reflects consideration by the decedent of those possibilities, and not by mere boilerplate. While it is true that the term "general disinheritance clause" is not defined in the Probate Code, such clauses have been discussed widely in the case law (see, e.g., *Estate of Torregano* (1960) 54 Cal.2d 234, 252-253), and the courts will therefore be able to construe this statute without difficulty.

IMPACT STATEMENT
This resolution does not affect any other law, statute or rule.

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COUNTER-ARGUMENT(S) TO RESOLUTION 07-05-2013

EXECUTIVE COMMITTEE OF THE TRUSTS & ESTATES SECTION THE STATE BAR OF CALIFORNIA

This resolution deletes the word "solely" from Probate Code 21622, thus lessening the burden on a child to show that he or she was omitted from the decedent's estate plan because the decedent believed the child to be deceased or was unaware of the birth of the child. The Executive Committee of the Trusts and Estates Section of the State Bar of California (TEXCOM) opposes this resolution for several reasons.

First, the rationale relates solely to a child of whose birth the decedent was unaware. However, removal of the word "solely" also lessens the burden on a child who is disinherited and whom the decedent believed to be deceased. The proponent of the resolution has offered no explanation for this change in long-standing law relating to a child who is erroneously believed to be deceased.

Second, the rationale indicates that it is based upon the assumption that a parent would want to provide for a child of whose birth the parent is unaware, and therefore the burden to qualify as an omitted child should be lessened. It is our experience that a client generally does not want to provide for a child of whom they are "unaware," and therefore a child with whom the client has no relationship, except a mere biological connection which is unknown to the client. It therefore is our position that the burden to show an entitlement to inheritance as an omitted child in these circumstances should continue to be on the "unknown child."

Furthermore, the additional language that references a "decedent's specific contrary intention" creates a potentially different test than the one set forth in Probate Code Section 21621(a) and

~~therefore will lead to inconsistency in the law. We believe that if Probate Code 2 Section 21622 is to be revised, it should provide that the same exclusions set forth in Probate Code Section~~
~~21621 apply to an omitted child under Probate Code Section 21622 as an omitted child born after~~
~~the execution of the client's estate plan documents.~~

Most attorney drafted estate plans specifically define the class of intestate heirs known to the testator and address what interests they should receive, if any. To allow "unknown children" living at the time of execution of such a plan the right to later claim an intestate interest creates more uncertainty and does not further testamentary freedom. If during one's lifetime, the child becomes "known," and the individual wishes to provide for such a child, the testator is aware of how to modify the plan so as to reflect such a change. If no change is made, the burden should be on the child to show that the testator would have wanted to provide for him or her.

Disclaimer

This position is only that of the TRUSTS and ESTATES SECTION of the State Bar of California. This position has not been adopted by either the State Bar's Board of Trustees or overall membership, and is not to be construed as representing the position of the State Bar of California.

Membership in the TRUSTS and ESTATES SECTION is voluntary and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.