Kentucky Law Journal

Volume 29 | Issue 4 Article 8

1941

The Right of an Adopted Child to Succeed to an Estate Limited to the Heirs of his Foster Parent

J. Granville Clark
University of Kentucky

CASE COMMENTS

THE RIGHT OF AN ADOPTED CHILD TO SUCCEED TO AN ESTATE LIMITED TO THE HEIRS OF HIS FOSTER PARENT

A deeded land to *B*, his daughter, for her natural life, then to her "heirs" in fee simple. Forty years after the conveyance and five years before the death of *B*, she and her husband legally adopted *C* as their heir, with the right of inheriting from them the same as if he had been the issue of marriage. *C* attempted by this action to be adjudged the sole owner of the land, there being no other children of *B* and her husband. *Held:* The grantor did not intend to embrace in the term "heirs" a stranger in blood thereafter adopted by his daughter, and such adopted child does not take. *Woods* v. *Crump*, 283 Ky. 675, 142 S. W. (2d) 680 (1940).*

Adoption establishes a *status*, and it has been defined to be the act by which relation of paternity and affiliation are recognized as legally existing between persons not so related by nature,[1] or as the taking into one's family the child of another as son and heir, and conferring on it a title to the rights and privileges of a natural child.[2] The adoption theory, although stated repeatedly in the cases to be a concept unknown to our common law ancestors, was known to the ancients of Greece and Rome and probably to other ancient peoples, being practiced among continental nations under the civil law from remotest antiquity.[3] Furthermore, the custom of adoption was followed by the American Indians and was observed by the performance of either of two rites, baptism or the transfusion of blood.[4]

---

* The adoption statutes were repealed by the legislature in 1940, Acts of the General Assembly of the Commonwealth, Chapter 94, page 376 (1940).

[1] Sheffield v. Franklin, 151 Ala. 492, 44 So. 373 (1907); Morrisson v. Sessions, 70 Mich. 297, 38 N. W. 249 (1888).

[2] Non-she-po v. Wa-win-ta, 37 Ore. 213, 62 Pac. 15 (1900).

[3] *Supra*, note 1 and 2.

[4] Smith, *Our Western Border*, pg. 76 (1914). Colonel Smith described his adoption into an Indian tribe as follows: "At length one of the chiefs made a speech, which was delivered to me by an interpreter, and was as followeth: 'My son, you are now flesh of our flesh, and bone of our bone. By the ceremony which was performed this day, every drop of white blood was washed out of your viens; . . . after what has happened this day you are now one of us by an old strong law and custom. My son, you have nothing to fear; we are now under the same obligations to love, support and defend you, that we are to love, support and defend one another; therefore, you are to consider yourself as one of our people'."

The statute in Kentucky on the process of adoption is as follows:[5]

> "Any person twenty-one years of age, may, by petition filed in the circuit court of the county of his residence, state, in substance, that he is desirous of adopting a person, and making him capable of inheriting as heir-at-law of such petitioner; and said court shall have authority to make an order declaring such person heir-at-law of such petitioner, and as such, capable of inheriting as though such person were the child of such petitioner; but no such order shall be made if the petitioner be a married man or woman, unless the husband or wife join in the petition."

Under section 2072[6] the legislature further provides that,

> ". . . if said child shall die intestate, any property owned by such child so adopted at the time of the death of such child shall descend under the intestate laws of this state in the same manner as if the child were the natural child of those who adopted it, except such property, if any, which it may have inherited from its blood relations."

Thus where an adopted child dies intestate leaving property not inherited from its blood relations and his nearest foster kindred is his grandfather by adoption, the grandfather by adoption will take the property.

After examining the two statutes one might conclude that in Kentucky an adopted child should inherit from its foster parent's kindred as they take from the adopted child any property not inherited from its blood relations. But the court in *Merrit* v. *Morton*[7] held that an adopted child could not inherit from kindred of its foster parents, for the act of the foster parent in adopting the child is a contract into which they entered with those having the lawful custody of the child; an agreement personal to themselves. While they have a perfect right to bind themselves to make the child their heir, they are powerless to extend this right on his part to inherit from others. Vernier has criticized this construction of such a statute for it makes the legislation one-sided; but such is the law in Kentucky today.[8]

The decision in the *Merrit* case prompted the holding in *Sanders* v. *Adams*[9] that where a foster father's parent devised land to his child for the child's natural life and then to the "children" of the life tenant, the adopted child of the life tenant could not inherit from its foster father's parent because the latter was not a party to the contract of adoption. But in this case the remaindermen took by purchase and not by inheritance. This result, however, is in accord with the holdings of a majority of the courts in that they are disposed to con-

---

[5] Kentucky Statutes (Carroll, 1936) sec. 2071.
[6] Kentucky Statutes (Carroll, 1936).
[7] 143 Ky. 133, 136 S. W. 133 (1911). Also see Brooks Bank and Trust Co. v. Rorabacher, 171 Atl. 655, 118 Conn. 202 (1934); Grimes v. Grimes, 207 N. C. 778, 178 S. E. 573 (1935).
[8] 4 Vernier, American Family Laws, sections 262 and 263 (1936).
[9] 278 Ky. 24, 128 S. W. (2d) 223 (1939).

fine the word "children" to its natural import, it being observed that the word "children" and not "heirs" was used; thus, they exclude adopted children.[10] The *Sanders* case is the only Kentucky decision cited by the court in *Woods* v. *Crump* where the adopted child's claim was based on purchase rather than on descent. There seems to be perceptible here a strange confusion between acquisition by descent and acquisition by purchase. For example, *A* dies intestate and only two people claim to take his estate, *B* and *C*. *B* is a natural child of a child and *C* is an adopted child of a child. Under the theory set forth in *Merritt* v. *Morton*, *B* will take the property because an adopted child can not inherit from kindred of his foster parents.

A different problem is presented where *A* leaves property by will to *X*, his daughter, for her natural life and at her death to her heirs in fee simple. The heirs do not take by descent but rather by purchase and to say that *C* can not take under the will because he has been adopted and therefore can not inherit from kindred of its foster parents is *a non sequitur*. In Illinois where the adoption statutes are similar to those of Kentucky, the court held that a deed conveying a remainder in fee to the "heirs generally" of a life tenant, if he should die leaving no child, gives the remainder to an adopted child, such child being the only statutory heir of the foster parents.[11] In that case the term "heirs" was defined as those "who succeed to the intestate's property," and it was held that in the absence of a contrary intention the words of the deed should be construed in their ordinary meaning. The court treated the adopted child as taking by purchase and not by descent saying the question was one of the intention of the grantor.

The recent case, *Woods* v. *Crump*, involved a transfer of real estate to *B* for life, remainder to the "heirs" of *B*. *B* left as her only heir an adopted child *C*. The problem is not the adopted child's right to inherit from the grantor, rather the issue is whether the adoption statute in Kentucky is sufficiently broad to include an adopted child where there is a gift of the remainder to the "heirs" of the life tenant. The precise question, the court says is whether or not the grantor intended to embrace within the term "heirs" a child who might later be adopted by the life tenant. It must be remembered that there has been no express declaration of the intention of the grantor and any attempt to determine his intention is conjectural. This inquiry as to the grantor's fictitious intention should be answered by the reading of the entire deed in the light of the statute. In the absence of facts showing a different intention, the grantor is presumed to have used words in their ordinary sense.[12] The Kentucky court held that *C* did not take because the grantor did not intend to include a subsequently adopted child in the term "heirs". It cited

[10] 2 C. J. S. 455 (1936).

[11] Butterfield v. Sawyer, 187 Ill. 598, 58 N. E. 602 (1900). See note (1920) 5 A. L. R. 1282.

[12] *Supra*, note 9.

an Ohio decision holding that the term "heirs" as used in a deed to describe the remaindermen, included an adopted child of the life tenant.[13] It was presumed in that case that the grantor intended the words in the deed should have their ordinary meaning, and that to exclude an adopted child the grantor would have to do so expressly. The Kentucky court said that the Ohio statute on adoption[14] was much broader than the Kentucky provision and that the cases were distinguishable. It is submitted that the Statute in Kentucky is sufficiently broad to include an adopted child in a deed where the remaindermen are described as "her heirs". It must be admitted that the adopted child is an heir of the foster parent. Suppose *A* conveys land to *B*, a stranger, for his life and at *B's* death to *B's* heirs. *B* has an adopted child, his only heir-at-law, who claims the land. The Kentucky court could scarcely hold that the adopted child did not take the land, because by the statutory provisions of this Commonwealth the adopted child is the heir of the foster parent. Should it make any difference if *A* is the adopted child's foster father's parent? It seems difficult to frame language more direct and expressive than that used in the Kentucky Statute showing the intention to place an adopted child upon an absolute equality with natural children. Certainly the grantor, in the principal case, should be presumed to know that it was possible for the life tenant to adopt a child and that such child would be an heir of the life tenant. It is submitted that the fictitious intent of the grantor should not be allowed to overrule the ordinary interpretation of the words of the deed.

When the court supplied words limiting succession to the daughter's heirs-at-law, who should be of her blood, it amended rather than construed the deed. The word "heirs" has an ascertained meaning, and here scarcely requires interpretation. There being nothing in other portions of the deed to indicate that the word "heirs" was not used in its ordinary sense, the court departed from that primarily meaning of the term for the purpose of giving effect to what it guessed was the intention of the grantor, feeling perhaps that such a departure constituted a fairer distribution of the property. The grantor should have expressly limited the remaindermen to heirs of the daughter's blood if he intended this result.

J. GRANVILLE CLARK

CAN A THIRD PARTY BENEFICIARY WHO IS NOT A PAYEE ENFORCE A CONTRACT FOR HIS BENEFIT?

In contemplation of divorce, H, the husband, made a valid contract with W, his wife, providing that he would pay her a certain sum monthly for the support and maintenance of their children

[13] Laws v. Davis, 34 Ohio App. 157, 170 N. E. 601 (1930).

[14] ". . . the adopted child shall stand in the same relation for all purposes to such declarant as he or she would be in if they were a child born in lawful wedlock . . .", as cited in Laws v. Davis, *supra* note 13.