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Wills--Effect in Kentucky of Adoption of a Child on a Prior Made Will

James D. Allen
University of Kentucky

Jo M. Ferguson
University of Kentucky

statement that he gave it to her for her own benefit. The wife prevailed over the named beneficiary, despite the fact the policy contained the usual provision for written application and endorsement of change. "A life policy . . . may be assigned or otherwise disposed of as other choses. Conditions . . . requiring that notice of assignment be given to the insurer . . . are not meant . . . to curtail [insured's] right to change the beneficiary of the policy, or to assign it."[28] This case has never been overruled, and later cases of a similar nature have apparently recognized its authority.[29] The court erred in the *Lockett* case in not recognizing that a life insurance policy is a third party beneficiary contract, in which only the insured's interest, which ceases at his death, is properly assignable. Perhaps the court's failure to mention the *Lockett* case in a recent decision involving somewhat similar facts, indicates a change of opinion.[30]

An important question which remains for the future is the sufficiency of a formal application for change of beneficiary which is sent to the insurer without the policy, though the policy is in the possession of the insured, who omits to send it merely through oversight or ignorance. It is submitted that in such case the insured has not "done all that he could do to comply with the requirements",[31] but it is doubtful if the court would fail to give effect to the insured's intention on that account.

SUMMARY

In summarizing, it may be said that Kentucky will recognize an attempted change as effectual when: the insurer has neglected or unreasonably refused to make the change, and the insured has otherwise substantially complied with the requirements; the failure to comply is due to the refusal of the custodian of the policy to give it up; the insured has "substantially complied" by doing all that he could do *without difficulty* to comply, even though his death occurs before any notice reaches the company.

Jo M. FERGUSON

WILLS—EFFECT IN KENTUCKY OF ADOPTION OF A CHILD ON A PRIOR MADE WILL

Kentucky provides by statute that when a child is born after the execution of a will in which no provision has been made for him, the will is revoked to the extent that the afterborn child takes the same share he would have taken had his parent died intestate.[1] This statute,

[28] Id. at 301, 80 S. W. at 1152.

[29] Harden v. Harden, 191 Ky. 331, 230 S. W. 307 (1921); Metropolitan L. Ins. Co. v. Brown's Admr., 222 Ky. 211, 300 S. W. 599 (1927). (But the decision did not follow the *Lockett* case, on the ground the factual situations were different.)

[30] *Supra*, note 23.

[31] *Supra*, note 18.

[1] Kentucky Statutes (Carroll's 1936) sections 4847 and 4848; Sneed v. Ewing, 28 Ky. (5 J. J. Marsh.) 460, 22 Amer. Dec. 41 (1831); Knut v. Knut, 22 Ky. L. Rep. 972, 58 S. W. 583 (1900).

contrary to the common law rule,[2] in effect adopts the civil law rule,[3] now operative by statute in most states.[4] The statutes either revoke the will pro tanto so that the child can take as if the testator had died intestate,[5] or revoke it completely.[6]

The question arises as to whether an adopted child comes under the provisions of these statutes. In other states having similar statutes there is a conflict on the point.[7] The effect of the adoption on the will depends to a great extent on the interpretation placed on the adoption statute of the particular state in the light of the revocaion statute.[8] The problem in Kentucky is whether the words "born" and "after-born child" in the revocation statute will be so construed as to give effect to the purpose indicated in the adoption statute,[9] that the adopted child shall be put as nearly as possible on an equal footing with the natural child. Although a few jurisdictions have taken into consideration the literal wording of the revocation statute, and held it inapplicable to adopted children,[10] the majority of courts have taken a contrary view.[11]

The question of revocation of a will by the adoption of a child has never presented itself in Kentucky. The answer to this question is indicated to some degree by the decisions construing the provisions of the adoption statute in respect to the status of the adopted child. At an early date the court recognized that the words "children" and

[2] 1 Page, Wills (2nd ed., 1926) sec. 479; Rood, Wills (2nd ed., 1926) sec. 382; 1 Alexander, Wills (1917) 733; Ann. Cases 1913D 1318.

[3] Ann. Cases 1913D 1322.

[4] Alabama—Code (1923) secs. 10585, 10586; Delaware—Laws (1915) secs. 3251, 3252; Nebraska—Comp. Stat. (1922) sec. 1266; New York—Cons. Laws (1918), p. 1750, sec. 26; Texas—Civ. Stat. (1920) Arts. 7865, 7866. For a full list of the statutes see Rood, Wills (2nd ed., 1926) 322, n. 54 and 55.

[5] *ibid.*

[6] *ibid.*

[7] Adopted children are within the terms of the statute: Hopkins v. Gifford, 309 Ill. 363, 141 N. E. 178 (1923); Helpire v. Claude, 109 Iowa 159, 80 N. W. 332 (1899); Dreyer v. Schrick, 105 Kan. 495, 185 Pac. 30 (1919); Fishburne v. Fishburne, 171 S. C. 408, 172 S. E. 426 (1934). Contra: In re Comassi's Estate, 107 Cal. 1, 40 Pac. 15 (1895); Davis v. Fogle, 124 Ind. 41, 23 N. E. 860 (1890).

[8] See Alvin E. Evans, Testamentry Revocation by Adoption of a Child (1934), 22 Ky. L. J. 600.

[9] Kentucky Statutes (Carroll's, 1936) sec. 2071. (The adoption order shall "declare such person heir-at-law of such petitioner, and as such, capable of inheriting as though such person were the child of such petitioner".)

[10] In re Comassi's Estate, 107 Cal. 1, 40 Pac. 15 (1895); Davis v. Fogle, 124 Ind. 41, 23 N. E. 860 (1890).

[11] Flannigan v. Howard, 200 Ill. 396, 65 N. E. 782 (1902); Hopkins v. Gifford, 309 Ill. 363, 141 N. E. 178 (1923); Helpire v. Claude. 109 Iowa 159, 80 N. W. 332 (1899); Dreyer v. Schrick, 105 Kan. 495, 185 Pac. 30 (1919); In re Rendell's Estate, 244 Mich. 197, 221 N. W. 116 (1928); Bourne v. Dorney, 171 N. Y. S. 264 (1918); Surman v. Surman, 22 Ohio App. R. 472, 153 N. E. 873 (1925); In re Hebb's Estate, 134 Wash. 424, 235 Pac. 974 (1925).

"issue" as used in the statute of descent and distribution. are not necessarily confined to children and issue born in lawful wedlock.[12] In *Power* v. *Hafley*,[13] the first case in which the effect of an adoption was discussed at length, the court declared in interpreting the statute of descent and distribution:

> "The word 'children' may include in its meaning children born in lawful wedlock and children made legitimate by the marriage of their parents, and children by adoption, for the latter are the legal children of their adoptive parents."

Under a statute which provided that if the deceased left no issue, his widow was entitled to one-half of the surplus personalty, whereas she was entitled to only one-third if the deceased left issue, the word "issue" was interpreted to include an adopted child. "The adoption . . . gives the one adopted the status of a child with all the capacity to inherit what it would have, if in fact the child of the one adopting it."[14] Furthermore, under the statutes of descent and distribution the words "parent" and "child" are not restricted to denote only the natural relationship.[15] The Kentucky court has always seemed to have the utmost tenderness for the rights of adopted children. Even in a case where children were first adopted by one person, and then by another, the second adoption was said not to destroy their right of inheritance from the first adoptive parent.[16] The court said that the intent of the adoption statute "is to create the same relations between an adopted child and its adoptive father as a child bears . . . to its own father, as near as may be."[17] Therefore, since a child may inherit from a natural parent although he has been adopted by another, he may inherit from his first adoptive parent, though he has later been adopted by another. Cancellation of the contract of adoption after death of the adoptive parent does not deprive the child of its rights under the original article of adoption.[18] Where an adopted child dies before the person adopting him, leaving children, those children inherit the estate of the person who adopted their deceased parent as if they were his grandchildren.[19] The duties of a legitimate natural parent and a voluntary adopting parent are the same with reference to the rights and obligations growing out of the relation.[20]

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[12] Drain v. Violett, 65 Ky. (2 Bush) 155, 157 (1867). (A natural son who had been adopted by a special act of the legislature was held to be "issue" of his father.)

[13] 85 Ky. 671, 4 S. W. 683 (1887).

[14] Atchison v. Atchison's Exrs., 89 Ky. 488, 493, 12 S. W. 942, 944 (1890).

[15] Lanferman v. Vanzile, 150 Ky. 751, 150 S. W. 1003 (1912).

[16] Viller v. Watson's Admx., 168 Ky. 631, 182 S. W. 869 (1916).

[17] *id.* at 639, 182 S. W. at 872.

[18] Russell's Admr. v. Russell's Guardian, 14 Ky. Law Rep. 236 (1892).

[19] Power v. Hafley, 85 Ky. 671, 4 S. W. 683 (1887); Wilcox v. Sams, 213 Ky. 696, 281 S. W. 832 (1926).

[20] Commonwealth v. Kirk, 212 Ky. 646, 279 S. W. 1091 (1926).

There are only slight suggestions of the possibility of a less sympathetic attitude toward the adopted child. In *Lanferman* v. *Vanzile*[21] three judges in a strong dissent declared that "kindred" means "relatives by blood" and that "the courts should depart from this elemental blood-guideship only when enforced to do so by an inexorable statutory demand." There is a trace of this idea of blood-relationship as the basis of all inheritance laws in an earlier case.[22]

Since most of the dicta in the Kentucky cases indicate a sympathy for the view of the majority of jurisdictions,[23] it seems almost certain that when this question is decided, Kentucky will be found in agreement with the weight of authority. It is submited that desirable social results are to be gained in following the majority rule. The adult by adopting the child takes upon himself the responsibility of caring for the child and giving him an equal start in life with other children. In order to fulfill the apparent intention of the adult in adopting the child, it is necessary to permit the child to inherit from the adult, and he should not be prevented from inheriting through the negligence or oversight of the adult.

JAMES D. ALLEN
JO M. FERGUSON

HUSBAND AND WIFE—DIVORCE—ASSIGNABILITY OF ALIMONY

It is the purpose of this note to discuss the assignability of alimony when the assignment is for (1) a future installment, (2) assignment of a gross award, and (3) an assignment of an installment which has already accrued and is past due.

Before entering into a discussion of the question we shall consider the nature and purposes of alimony, the various things to be taken into consideration by the courts in making the award, and also the interests of the parties and the public in relation thereto.

Alimony is considered as being an allowance which a husband, by order of the court, pays to his wife, living separate from him, for her maintenance.[1] The amount to be awarded for alimony depends upon a great variety of considerations and is governed by no fixed rules.[2] The ability of the husband to pay;[3] the needs of the wife; the acquisition of the estate;[4] whether there are children to be supported and educated,

[21] 150 Ky. 751, 150 S. W. 1008, 1011 (1912).
[22] Merritt v. Morton Admx., 143 Ky. 133, 136 S. W. 133 (1911).
[23] See note 11, supra.
[1] Chase v. Chase, 55 Me. 21 (1869); Odom v. Odom, 36 Ga. 286 (1867).
[2] Richmond v. Richmond, 2 N. J. Eq. 90 (1838); Ricketts v. Ricketts, 4 Gill 105 (Md. 1846); Burr v. Burr, 7 Hill 207 (N. Y., 1843); McGee v. McGee, 10 Ga. 477 (1851).
[3] Small v. Small, 28 Neb. 843, 45 N. W. 248 (1880); Battey v. Battey, 1 R. I. 212 (1845); Bursler v. Bursler, 5 Pick. 427 (Mass., 1827); McCrocklin v. McCrocklin, 41 Ky. (2 B. Mon.) 370 (1842); McGrady v. McGrady, 48 Mo. App. 668 (1892).
[4] Fishli v. Fishli, Ky. (2 Litt.) 327 (1822); Robbins v. Robbins, 101 Ill. 416 (1882); Stevens v. Stevens, 49 Mich. 504, 13 N. W. 835 (1882).