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Wills and Probate

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WILLS AND PROBATE

Wills and Probate—Testate Succession—Rights of Adopted Children. In *Trueax v. Black*,[1] the Washington court held that intention of the testator controlled in determining whether an adopted child was a "child" within the terms of a will, rejecting the trial court's conclusion that such intent should be determined in the light of statutes establishing the rights of an adopted child.

The will in question was executed in 1900 and became effective at the testator's death four years later. Under the terms of the will, certain property was devised to the testator's daughter for life, with remainder to her child or children living at her death. In the event she died without children living, the remainder passed to the testator's four sons, three daughters, and two grandsons, all of whom were named in the residuary clause.

Twenty-two days after settlement of the estate, the life tenant, who was past thirty-five and unmarried, adopted her niece, a daughter of one of the nine remaindermen specifically named. The life tenant died in 1955 without having a natural child born to her. The successors in interest to the nine contingent remaindermen brought this action to have their rights in the property determined. The defendants, who claimed through the life tenant and the adopted child, prevailed in the trial court. The trial court held that the governing statute[2] vested the same right of inheritance in an adopted child that a child born in lawful wedlock has by virtue of his natural birth. In view of previous decisions[3] reflecting a liberal interpretation regarding the rights of adopted children, the statute was deemed applicable to testate succession as well as intestate succession.

The cases relied on by the trial court were distinguished on appeal because they concerned the bearing of adoption statutes upon the adoptee's right to inherit under intestacy laws or the question of an

[1] 53 Wn.2d 537, 335 P.2d 52 (1959).

[2] BAL. CODE § 6483: "[The child] ... shall be, to all intents and purposes, the child and legal heir of his or her adopter or adopters, entitled to all the rights and privileges and subject to all the obligations of a child of the adopter or adopters begotten in lawful wedlock. ..." Compare with the present statute, RCW 26.32.140 (1955): "Effect of Decree of Adoption. [The child] ... shall be, to all intents and purposes, and for all legal incidents, the child, legal heir, and lawful issue of his or her adopter or adopters, entitled to all rights and privileges, *including the right ... to take under testamentary disposition*, and subject to all the obligations of a child of the adopter or adopters begotten in lawful wedlock." [Emphasis added.]

[3] *In re* Egley's Estate, 16 Wn.2d 681, 134 P.2d 943 (1943); *In re* Hebb's Estate, 134 Wash. 424, 235 Pac. 974 (1925); *In re* McCorkle's Estate, 128 Wash. 556, 223 Pac. 1038 (1924); *In re* Masterson's Estate, 108 Wash. 307, 183 Pac. 93 (1919); Van Brocklin v. Wood, 38 Wash. 384, 80 Pac. 530 (1905).

adopted child being pretermitted in a will. The court chose to rely principally on an early Pennsylvania case[4] and a more recent Georgia case.[5] Following the reasoning of *In re Puterbaugh's Estate,*[6] the court held that the adoption statute guaranteeing the same right of inheritance to adopted children as natural born children pertains only to the laws of intestate succession. Where the donor dies testate, the court's primary duty was deemed to be that of interpretation of the will in an effort to ascertain and carry out the intent of the testator. After looking at the circumstances surrounding the making of the will, the court concluded that this particular adoptee could not have been intended to take to the exclusion of those named in the residuary clause.

It is indeed surprising that the court, after evidencing a kindly attitude toward the status of adopted children through a line of decisions reaching back more than fifty years, should now adjudicate the rights of adopted children with regard to testate succession in such a frosty manner. In 1905, in construing the same adoption statute that was in effect when the will in question was executed,[7] the court determined that the statute conferred more than a right of inheritance.[8] The words of the statute entitling adopted children to all rights and privileges of a child begotten in lawful wedlock were recognized by the court to mean exactly that. In *In re Masterson's Estate,*[9] the court said that one of the rights and privileges of a natural child is to inherit from brother and sister, and if an adopted child does not have the same right, the effect of the statute[10] is denied. The view that an adopted child is "issue" within the meaning of the statute[11] was accepted in 1924.[12] In *In re Hebb's Estate,*[13] an adopted son was held to be a descendant of his adoptive father within the meaning of the statute.[14] The court went further than most jurisdictions in *In re Egley's Estate.*[15] It was there held that an adopted child may inherit from his first adoptive parents even though subsequently adopted a second time by others. This decision, coupled with a prior one which held that an adopted child may

[4] *In re* Puterbaugh's Estate, 261 Pa. 235, 104 Atl. 601 (1918).
[5] Comer v. Comer, 195 Ga. 79, 23 S.E.2d 420 (1942).
[6] 261 Pa. 235, 104 Atl. 601 (1918).
[7] See note 2 *supra.*
[8] Van Brocklin v. Wood, 38 Wash. 384, 80 Pac. 530 (1905).
[9] 108 Wash. 307, 183 Pac. 93 (1919).
[10] REM. CODE § 1699. (The wording of the statute was substantially the same as BAL. CODE § 6483 set out in note 2 *supra.*)
[11] *Ibid.*
[12] *In re* McCorkle's Estate, 128 Wash. 556, 223 Pac. 1038 (1924).
[13] 134 Wash. 424, 235 Pac. 974 (1925).
[14] REM. CODE § 1699. See note 2 *supra.*
[15] 16 Wn.2d 681, 134 P.2d 943 (1943).

inherit from his natural parents or kindred as well as from his adoptive parents,[16] left the adopted child in a favorable position, since he might inherit from natural, adoptive, and subsequent adoptive parents.

In spite of this trend, when faced for the first time with the problem of testate succession of the adopted child under the will of one not the adopter, the court chose to disregard the statute entirely. Although accepting the reasoning of *In re Puterbaugh's Estate*[17] and *Comer v. Comer*,[18] the court made no effort to compare the adoption statutes of those jurisdictions with the Washington statute. Previously the court had recognized differences in the statutes, upon which the cases turn, to be of prime importance. In *In re Hebb's Estate*,[19] a Texas decision[20] was distinguished because the Texas statute conferred only the rights and privileges of a legal heir on an adoptee. The Washington court recognized that the statute of this state was materially different and declared the Texas case to be of no authority with respect to interpretation of the rights of adopted children under the Washington statute.

An examination of *In re Puterbaugh's Estate*[21] reveals that the statute in effect at the time the instrument in question was executed was much narrower than the statute in effect at the time of the execution of the will in question here. The Pennsylvania statute,[22] as construed,[23] conferred the status of an heir upon the adopted child. The question in the *Puterbaugh* case was whether the adoptee was a "child" under the terms of the will. The adoptee could not qualify as a "child" because the statute did not elevate him to that status. The court could therefore say that the adoption statute was not controlling, and was of no importance in determining the intent of the testator. When we look to the controlling Washington adoption statute,[24] however, we find the broad language that adopted children are to be considered for "all intents and purposes" the same as natural born children. The statute confers the

[16] *In re* Roderick's Estate, 158 Wash. 377, 291 Pac. 325 (1930).
[17] 261 Pa. 235, 104 Atl. 601 (1918).
[18] 195 Ga. 79, 23 S.E.2d 420 (1942).
[19] 134 Wash. 424, 235 Pac. 974 (1925).
[20] State *ex rel.* Walton v. Yturria, 109 Tex. 220, 204 S.W. 315 (1918).
[21] 261 Pa. 235, 104 Atl. 601 (1918).
[22] Pa. Act of 1887 (P.L. 53 § 1) read in part: "[The adopted child] ... shall have all the rights of a child and heir of the adopting parent." See note 23, *infra*.
[23] Schafer v. Eneu, 54 Pa. 304 (1867), in interpreting the Act of 1855, predecessor to Act of 1887, the court disregarded the word "child" in the statute and declared the adopted child to be only an heir of his adopted parents. The court determined that nothing in the statute gave adopted children the right to inherit from collateral relatives or kindred of the adoptive parent. This interpretation attached to the Act of 1887 and was followed in subsequent cases until revision of the statute by Act of 1917 (P.L. 429 § 16(a)), which gave the adopted child the right to take as a child and heir, "as fully as if the person adopted had been born a lawful child of the adopting parent. . . ."
[24] BAL. CODE § 6483. See note 2 *supra*.

status of a child and, contrary to the Pennsylvania statute, elevates the adoptee to the status necessary to take under the terms of the will in question. The adoption statute cannot here be rightly disregarded as of no importance in determining the testator's intent. Rather, the question becomes whether the testator can be charged with knowledge of the statute and of the fact that adopted children are thereby elevated to the same status as natural born children.

It is significant to note that a growing number of jurisdictions have accepted the reasoning that the statute should be considered in determining testamentary intention.[25] Where the statute gives the adoptee the necessary status, the testator is presumed to have acted in contemplation of the operation of the statute.[26] By accepting the rule of the *Puterbaugh* case, the court followed one of the few cases in which an adoption statute was disregarded completely in determining the intent of the testator.[27] The Pennsylvania statute[28] no longer restricts the adoptee to the status of an heir and now confers all the rights of a natural child. A recent decision from that jurisdiction[29] reflects the view that an adopted child should be allowed to take as a "child" under a will, unless the testator has evidenced an intent to exclude him. The *Puterbaugh* case is, in its own jurisidiction, but a hollow shell of precedent.

An examination of *Comer v. Comer*,[30] the second case relied on by the court, reveals that it was decided on the basis of an even more narrowly drafted statute.[31] The statute in effect at the time of the execution of the instrument in question declared that with regard to all persons other than the adoptive parents, the adopted child should stand as if no adoption had taken place. The will under consideration required the remainderman to be "issue" of the life tenant. It was held that an adopted child could not be "issue" because the term refers to

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[25] *In re* Heard's Estate, 49 Cal.2d 514, 319 P.2d 637 (1957). *In re* Collins' Estate, 393 Pa. 195, 142 A.2d 178 (1958). See article in 43 MICH. L. REV. 901 (1945).

[26] *In re* Stanford's Estate, 49 Cal.2d 120, 315 P.2d 681 (1957); Mooney v. Tolles, 111 Conn. 1, 149 Atl. 515 (1930).

[27] Oler, *Construction of Private Instruments Where Adopted Children Are Concerned*, 43 MICH. L. REV. 901, 918 (1945).

[28] PA. STAT. ANN. tit. 20, § 101, (1950).

[29] *In re* Collins' Estate, 393 Pa. 195, 142 A.2d 178 (1958).

[30] 195 Ga. 79, 23 S.E.2d 420 (1942).

[31] GA. CODE ANN. § 74-404 (1935). "... [T]he relation between... [the adopter] and the adopted child shall be, as to their rights and liabilities, the relation of parent and child.... To all other persons the adopted child shall stand as if no such act of adoption had been taken." This statute was changed by the Act of 1949, p. 1157, to give adopted children the rights of a natural child, including the right to inherit under the laws of descent and to take under a will or other instrument unless expressly excluded therefrom. See GA. CODE ANN. § 74-414 (1958).

a natural or blood relationship, and adoption is but an artificial relationship. The court then applied the presumption that the law favors keeping property in the line of ancestral descent.[32] The adoption statute was disregarded.

The *Comer* case is another example of a situation in which the status conferred on the adoptee by the statute did not bring him within the terms of the will. Because of the differences in the wording of the adoption statute when compared with the Washington statute, the reasoning should not have been relied on for determination of the instant case.

After concluding that the adoption statute did not apply to the problem of testate succession, the court attempted to determine whether the testator intended adopted children to take under the terms of his will. The reasoning of other courts was followed: that no mention of adopted children in a will must presumptively mean exclusion of such children.[33] It could have been stated with at least equal force that mere absence of anticipation of adoption is a neutral element, indicating only that the testator had no intention either way.[34] It would then have been but a short step to say that the overriding intention of the legislature should not be disregarded.[35] It might also have been declared that the term "child or children" in the will was a reference to a class, whose membership was left to future determination. It would then follow that the testator, evidencing no specific intent, must have had the general intent that all members of the class qualifying at the time of distribution should be regarded and included, adoptive children as well as natural born children.[36] There is also case authority in Washington for the principle that construction of a will, when necessary, should conform most nearly to the general laws of inheritance.[37]

Another of the court's reasons for concluding that the testator did not contemplate adoption was the fact that the life tenant did not have any children living at the execution of the instrument. From this fact the court concluded that the testator's primary objective was to provide

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[32] Ross v. Bateman, 200 Tenn. 148, 291 S.W.2d 584 (1956), cited by the court, was based partly on this presumption. The ancestral descent presumption could not be applied to the facts in the instant case, because the adopted child was of a blood relationship. Even if she were allowed to take, the channel of natural descent would not be disturbed.

[33] *In re* Wehrhane's Estate, 23 N.J. 205, 128 A.2d 681 (1957); and Ross v. Bateman, *supra* note 32, both cited by the court, followed this reasoning.

[34] *In re* Holden's Trust, 207 Minn. 211, 291 N.W. 104 (1940).

[35] Haver v. Herder, 96 N. J. Eq. 554, 126 Atl. 661 (1924); *In re* Collins' Estate, 393 Pa. 195, 142 A.2d 178 (1958).

[36] *In re* Collins' Estate, *supra* note 35.

[37] *In re* Levas' Estate, 33 Wn.2d 530, 206 P.2d 482 (1949); *In re* Lambell's Estate, 200 Wash. 220, 93 P.2d 352 (1939).

for his daughter during her life and, at her death, to allow his other children and two grandchildren to share the estate. The court apparently did not consider the possibility that such a person might be more likely to adopt than to have natural children. It is noteworthy that support for the conclusion that an adopted child was within the testator's contemplation has been found in the circumstance that at the time of execution of the will which referred to another's child or children, it was evident that the person mentioned had little prospect of having natural children.[38]

The fact that the adoptee was a granddaughter in existence at the time of execution of the will, but was not provided for, was also important in the court's determination that the testator did not intend her to take as a "child" under the will, to the exclusion of named remaindermen. Absent other facts, a contrary conclusion would be equally justifiable. Could it not be said that the testator would have preferred adoption of a granddaughter to adoption of a stranger? The fact that the court narrowed the decision to this particular adoptee, however, may be an indication that a different approach will be applied in a subsequent case where the adoptee is a stranger to the testator.

One glance in any legal encylopedia or digest will reveal that the question of whether relationship by adoption is equivalent to relationship by blood has produced a legion of cases. They emanate from virtually every jurisdiction in the country. The opinions vary according to the status conferred on adoptees by statute and the date the decision was rendered. Viewed historically or empirically, the result of the Washington court in this case is in accord with the majority rule, which might be stated as follows: Unless expressly provided, a child adopted after the death of the testator is not qualified to take as a "child" under the terms of a will. Most of the decisions formulating or expounding this rule, however, were rendered in a less enlightened age, when adoption was neither as common nor as accepted as it is today. With few exceptions, decisions reflecting the view that an adopted child is not a "child" under these circumstances were decided in the shadow of an adoption statute conferring a lesser status on the adoptee than was required to meet the qualification of the will in question.[39] As before mentioned, few courts have disregarded the adoption statute entirely and made their determination solely on the basis of the testator's intent.[40] A strong minority of earlier cases and the most recent decisions

[38] Ansonia Nat'l Bank v. Kunkel, 105 Conn. 744, 136 Atl. 588 (1927).
[39] Oler, *supra* note 27.
[40] *Id.* at 918.

have been more liberal with respect to the rights of adopted children. There is a trend toward recognition of equal status for natural born and adoptive children in all respects.[41]

The result in the instant case may have been just as between the parties, but the court's analysis introduces confusion into this area of law in Washington. A decision based upon the testator's intent rule of construction offers no general rule applicable to similar future cases. Predictability is impossible with this approach. Any guess as to what was in the testator's mind fifty or sixty years ago is as good as another. The probabilities are great that the testator did not contemplate the possibility of adoption in the first place, or his intention one way or another would have been expressed. By declaring adoption statutes to be of no effect in determining testate succession, the status of hundreds of adopted children in the state of Washington has been cast into doubt. If they have not been specifically provided for in wills, they may be judicially disinherited in the future should the approach in this case be followed. It is submitted that the reason for the acceptance by the court of the testator's intent approach, and the ensuing result of the case, is to be found in the court's reluctance to sanction power in the hands of the life tenant to divest the rights of the remaindermen through use of adoption proceedings. Whether the approach of this decision will be followed in a situation where this question is not present or where the adopted child is a stranger to the testator is an open question.

There should be no distinction between testate and intestate succession under the terms of the adoption statute. This is the view of the Washington legislature as evidenced by the present statute,[42] prior statutes[43] and the most recent cases in other jurisdictions.[44]

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WORKMEN'S COMPENSATION

Workmen's Compensation—Employees for Short Term Are Covered by Act. In *Wilkie v. Department of Labor & Indus.*,[1] the Washington Supreme Court directly ruled, as it has so often in the past

[41] *In re* Heard's Estate, 49 Cal.2d 514, 319 P.2d 637 (1957); *In re* Stanford's Estate, 49 Cal.2d 120, 315 P.2d 681 (1957); *In re* Collins' Estate, 393 Pa. 195, 142 A.2d 178 (1958).

[42] See note 2 *supra*.

[43] See notes 2, 10 *supra*.

[44] See note 41 *supra*.

[1] 53 Wn.2d 371, 334 P.2d 181 (1959).