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WILLS-PRETERMITTED HEIR STATUTES-NEED TO STATE PARENT-CHILD RELATIONSHIP IN THE WILL.

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WILLS—PRETERMITTED HEIR STATUTES—NEED TO STATE PARENT-CHILD RELATIONSHIP IN THE WILL—Plaintiff alleged that she was an adopted daughter of testator, and, by reason thereof, claimed to be a pretermitted heir,[1] under a statute providing that if any person make his last will and die, leaving a child not named or provided for in such will, testator in so far as regards such child shall be deemed to die intestate, and such child shall be entitled to such proportion of the estate of the testator as if he had died intestate.[2] Plaintiff's claim was based on two provisions in the will. In the first, the testator declared that he had had no children, but in the event that any person could prove he was a child of the testator, to that person he gave five dollars. In the second provision testator devised to his adopted daughter certain property; the gift to plaintiff was in her name only and did not mention any relationship between testator and the plaintiff. Plaintiff claimed that the statute required the testator to remember the relationship, and that since testator denied any children, she was a pretermitted heir despite the gift to her. *Held,* plaintiff was sufficiently provided for in the will to preclude the operation of the statute. *Mares v. Martinez,* (N.M. 1949) 212 P. (2d) 772.

[1] Adopted children come within the terms of pretermitted heir statutes. Bakke v. Bakke, 175 Minn. 193, 220 N.W. 601 (1928); James v. Helmich, 186 Ark. 1053, 57 S.W. (2d) 829 (1933); 105 A.L.R. 1181 (1936).

[2] N.M. Stat. (1941) §32-107. For a discussion of the various types of statutes see, Mathews, "Pretermitted Heirs: An Analysis of Statutes," 29 COL. L. REV. 749 (1929).

The plaintiff's contention, that pretermitted heir statutes require that the parent-child relationship be recognized, is novel, and can be disregarded in view of the purposes of such statutes and what courts have held sufficient to preclude their operation. At common law if a parent left his child unprovided for in a will and left no intestate property, the child could take nothing.[3] And American common law jurisdictions have followed the idea of testamentary freedom and allowed a parent to disinherit his child.[4] Pretermitted heir statutes, based on the presumption that a parent desires to provide for his issue, were adopted to correct what was considered an evil, the exclusion or disinheritance of a child through oversight. The theory of the legislation is that the child should take his intestate share when he has been forgotten by the testator or omitted through accident.[5] Since the legislation is based on the presumption that a parent desires to provide for his child, and in this case the testator did provide for his child, there should be no question as to the applicability of the statute here. It would be difficult to say that testator had forgotten the plaintiff when he mentioned her name in the will and devised certain property to her. If the clause devising certain property to the plaintiff had stood alone in the will, there could be no doubt that the terms of the statute had been satisfied, despite the fact that the testator had not expressly mentioned the relationship. Where an adopted daughter was not mentioned in a will, but her four children were given a large part of the estate by name, the court held that the daughter had not been forgotten.[6] And, it has been held that a bequest to a son-in-law without mentioning that he was his son-in-law, rebutted the presumption that the daughter was forgotten; the court said that whenever the mention of one person, by a natural association of ideas, suggests another it may reasonably be inferred that the latter was not forgotten.[7] Courts have gone to extremes to find that a child has not been forgotten,[8] and never demand that the relationship be stated. But, plaintiff's argument is based on the fact that the testator denied the existence of any children. Several courts have held that such clauses in wills have no legal effect whatsoever.[9] These denying clauses will not operate to avoid the effect of the statutes and their presence in the will means nothing. Since the clause denying children has no meaning, and the devising clause is sufficient to preclude the operation of the statute, it would be unreasonable to say that their presence together in the will will bring the pretermitted heir statute into operation.

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[3] 1 PAGE, WILLS §525 (1941).

[4] McMurray, "Liberty of Testation and Some Modern Limitations Thereon," 14 ILL. L. REV. 96 (1919).

[5] ATKINSON, WILLS §47 (1937); McLean v. McLean, 207 N.Y. 365, 101 N.E. 178 (1913); Shackelford v. Washburn, 180 Ala. 168, 60 S. 318 (1912); Smith v. Steen, 20 N.M. 436, 150 P. 927 (1915).

[6] Woods v. Drake, 135 Mo. 393, 37 S.W. 109 (1896).

[7] Hockensmith v. Slusher, 26 Mo. 237 (1858).

[8] Guitar v. Gordon, 17 Mo. 408 (1853); Boucher v. Lizotte, 85 N.H. 514, 161 A. 213 (1932); Church v. Crocker, 3 Mass. 17 (1807).

[9] Goff v. Goff, 352 Mo. 809, 179 S.W. (2d) 707 (1944); In re Parrott, 45 Nev. 318, 203 P. 258 (1922).