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## WILLS-PRETERMITTED HEIR STATUTE-INCORPORATION BY REFERENCE

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WILLS—PRETERMITTED HEIR STATUTE—INCORPORATION BY REFERENCE—Plaintiff, adopted daughter of Mr. and Mrs. Burdick, deceased, left them some years before their deaths. Mr. Burdick provided in his will that plaintiff was to get two legacies, and Mrs. Burdick, who died after her husband, did not specifically mention plaintiff, but provided that the residue of her estate should be distributed as provided in her husband's will. She subsequently revoked this provision by a codicil which gave the residue to one Langley. Plaintiff claimed a share of the estate under the Arkansas "pretermitted child" statute.<sup>1</sup> *Held*, Mrs. Burdick's reference to her husband's will incorporated it into her own will, and this was sufficient mention of plaintiff to preclude her claiming, by virtue of the statute, a share, as pretermitted child, of her foster mother's estate. The codicil revoking the incorporating provision did not serve

<sup>1</sup> Ark. Stat. (Pope, 1937) §§ 14524, 14525.

to delete the will incorporated by reference, but left it as a provision of testatrix's will which, although of no effect in passing property, was still a part of the will. *Kinnear v. Langley*, (Ark. 1946) 192 S.W. (2d) 978.

It is well to keep in mind the basic policy which has brought about the various "pretermitted heir" statutes. In general, it can be said that in the United States, the policy is to provide for those cases where the testator through inadvertence has failed to include one of his children or their descendants in his will.<sup>2</sup> Arkansas is one of the states whose statute<sup>3</sup> presumes that children born prior to the execution of the will have been pretermitted if not mentioned therein, either as a class or individually.<sup>4</sup> The case of *Gerrish v. Gerrish*<sup>5</sup> is represented as on all fours with the principal case on the question of incorporation by reference of a document mentioning an otherwise unmentioned child. In that case testatrix's husband by his will had provided that she was to have a life interest in his residuary estate and on her death it was to go to his children and the children of deceased children. All testatrix said in her will was that personal property left her for life by her husband should be distributed as he directed in his will. A casual examination should show that actually this provision was ineffective to pass any property. The Oregon court held that this was sufficient reference to the husband's will to incorporate its provisions into testatrix's will, and therefore, the children took nothing as pretermitted heirs. Still, it can fairly be said that she was not unmindful of her children in that she referred to a dispositive provision in their favor. In the principal case, there was a trust in favor of testatrix for life, and at her death, part of it was to be paid to plaintiff, but it does not appear from the report that testatrix referred specifically to this fund in her will. The incorporating provision reads: "All other property of which I may die seized, either real or personal, shall revert back to the estate of my deceased husband, George H. Burdick, and shall be distributed as provided in his last will and testament."<sup>6</sup> Whether testatrix has property of her own to which she referred here is not apparent, nor is her husband's will sufficiently reported to indicate just what disposition would have been made of the estate had this provision remained effective, but aside from the gift after the trust for life mentioned above, the only time plaintiff is mentioned in Mr. Burdick's will is in one provision which gives her one dollar directly. The principal case can be clearly distinguished from the *Gerrish* case in that there is no specific mention of a dispositive provision in favor of the child. In that case, Prim, J., said: "This portion of the will of James Gerrish is clearly referred to in the will of the testatrix, and the provisions thereof adopted as a portion of her will."<sup>7</sup> Certainly, the Oregon court treated only the provisions specifically referred to as incorporated in the later will. One

<sup>2</sup> Mathews, "Pretermitted Heirs: An Analysis of Statutes," 29 COL. L. REV. 748 at 750 (1929).

<sup>3</sup> Ark. Stat. (Pope, 1937) § 14525.

<sup>4</sup> Mathews, "Pretermitted Heirs: An Analysis of Statutes," 29 COL. L. REV. 748 at 752. In the case of *Yeates v. Yeates*, 179 Ark. 543, 16 S.W. (2d) 996 (1929), it appeared that some mention was made of children, but it was not clear to the court just how many children were referred to by the testator. The court held that since the number of children referred to was indefinite, the will was ambiguous so far as they were concerned, and they took as pretermitted heirs.

<sup>5</sup> 8 Ore. 351 (1880).

<sup>6</sup> Principal case at 979.

<sup>7</sup> *Gerrish v. Gerrish*, 8 Ore. 351 at 353 (1880).

may incorporate part of another's will<sup>8</sup> and it would seem that that was just what was done in these two cases. But perhaps the biggest hurdle the court has to cross is the revocation by codicil of this, the only clause in testatrix's will, which can possibly be said to refer to plaintiff. This leap the court makes by saying that while the dispositive provisions are nullified, the clause itself is not deleted nor erased from the will, but rather goes along with the rest of the instrument, carrying with it necessarily the document which it incorporated by reference. Such a revoked provision is ignored in construing and interpreting the will, but continues to exist in fact. It would seem somewhat easier to reach this conclusion if the child were actually mentioned in the particular clause which for some reason or other became inoperative, as is the situation in a Rhode Island<sup>9</sup> decision cited in the principal case; but here the effect of the codicil is to revoke a provision which disposes of property, which disposition incorporates an alien document, which document incidentally mentions plaintiff! It is certainly true that a child is not pretermitted if, though mentioned in the will, he is given nothing.<sup>10</sup> And the position of the court here is that the effect of the incorporation and subsequent revocation by codicil is the "same as if Mrs. Burdick had said, 'I name my adopted daughter, Hazel Burdick, but leave her nothing.'" <sup>11</sup> Granting the incorporation of Mr. Burdick's will, this construction might not be too far-fetched. But the revocation effectively removes the prior will from consideration and would seem to delete plaintiff's name at the same time, if indeed it was ever a part of testatrix's will. "If a codicil contains an express revocation clause, it revokes such provisions of the will as are specified in such revocation clause."<sup>12</sup> The intention of the testatrix should certainly rule, but it is impossible to say just what provision she would have made had she known that her daughter was still living. It appears that the Arkansas statute<sup>13</sup> is directed toward such a situation as this, in that it is one of the jurisdictions where the unmentioned prior born child is presumed to be pretermitted.<sup>14</sup> Plaintiff's name is as effectively deleted as if the incorporating provision were erased physically. "Under our statutes no reference is made to the intention of the testator and therefore, the child . . . takes his intestate share where he is not expressly mentioned in the will or referred to as a class."<sup>15</sup>

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<sup>8</sup> 1 PAGE, WILLS, 3d ed., § 266, note 5 (1941).

<sup>9</sup> *Faucher v. Bouchard*, 47 R.I. 150, 131 A. 556 (1926).

<sup>10</sup> 1 PAGE, WILLS, 3d ed., § 528 (1941).

<sup>11</sup> Principal case at 983.

<sup>12</sup> 1 PAGE, WILLS, 3d ed., § 468 at p. 855 (1941).

<sup>13</sup> Ark. Stat. (Pope, 1937) § 14525.

<sup>14</sup> See note 4, *supra*. Another recent Arkansas decision, *Taylor v. Cammack*, (Ark. 1946) 193 S.W. (2d) 323, held that a reference to "heirs" was sufficient mention of children born prior to the execution of the will to preclude the application of the statute. A possible explanation of these decisions may be that the Arkansas court is seeking to relieve against a statute, the effect of which is to create an unnatural presumption. It would seem that where children born prior to the execution of a will are omitted, it is probable that they were not included because the testator intended not to include them, rather than because he forgot them.

<sup>15</sup> Meriwether, "Pretermitted Child Statutes," 8 UNIV. ARK. L. S. Bul. 64 at 65 (1940).