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PARENT AND CHILD - EFFECT OF ADOPTION ON LEGAL STATUS OF CHILD

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PARENT AND CHILD — EFFECT OF ADOPTION ON LEGAL STATUS OF CHILD — In 1933 the appellants adopted the child of the appellees, and the decree declaring them to be the adoptive parents concluded with the words, "With leave to parents to occasionally see the child." The natural parents, who were living apart, filed several petitions in the court to see the child at stated intervals. These petitions were granted. The adoptive parents, in 1936, filed a petition alleging that the repeated visits of the natural father and mother were prejudicially affecting the child's nervous condition, and impairing his health, and praying that the provision under the decree be altered. Upon submission of testimony the chancellor refused to grant the petition modifying the decree, but ordered that the natural mother be given the right to have the child with her between stated hours one day each month. On appeal from this order, it was *held* that the original adoption decree should be altered as asked by the petitioner, for the exclusive right to custody of the child was in the adoptive parents. In describing the effect of the decree of adoption, the court stated, "the adopted child is endowed with the status of a natural child of the adoptive parent. An infant who has been adopted, as in the case at bar, by a husband and wife, becomes the child of both adopting parents. . . . The adoptive parents were substituted for the infant's natural parents with all their rights, duties, and obligations." *Spencer v. Franks*, (Md. 1937) 195 A. 306 (quotation at p. 310).

Inasmuch as adoption was unknown to the common law, the terms of the statutes making provision for that procedure are of primary importance in determining the effect of adoption on the status of the child adopted. Although some statutes are comparatively restricted in describing this effect,[1] it is more common for them to involve very general terms.[2] The opinions of the courts

[1] In New Jersey it is provided that "Upon the entry of such decree of adoption, the parents of the child, if living, shall be divested of all legal rights and obligations due from them to the child, or from the child to them; and the child shall be free from all legal obligations of obedience and maintenance on the part of the child, as if the child had been born to them in lawful wedlock; and the child shall be invested with every legal right, privilege, obligation and relation in respect to education, maintenance and the rights of inheritance to real estate, or to the distribution of personal estate . . . as if born to them in lawful wedlock. . . ." The statute then proceeds to describe in some detail what the effect of adoption shall be in certain specific instances. N. J. Rev. Stat. (1937), § 9: 3-9.

[2] Cal. Civ. Code (Deering, 1937), § 228: "After adoption, the two shall sustain towards each other the legal relation of parent and child, and have all the rights and be subject to all the duties of that relation."

1 Pa. Ann. Stat. (Purdon, 1930), § 4: "the court or judge shall make a decree so finding and reciting the facts at length and directing that the person proposed to be adopted shall have all the rights of a child and heir of such adopting parent or parents, and be subject to the duties of such child."

frequently reflect the statutory phrases, and hence it is not unusual to find judicial descriptions of the effect of adoption as broad as that stated by the court in the instant case.[3] But inspection of cases in which the status of the adopted child was put in issue reveals the necessity of distinction between what the courts have *said* and what they have *held*. The controversy frequently revolves around the use of the word "child" or "issue" or a similar term in statutes other than the adoption statute. In the case of inheritance statutes it has been pointed out elsewhere [4] that generally the rights of the adopted child are not the same as those of a natural, legitimate child. With respect to statutes taxing inheritances, it has been consistently held that exemptions of bequests to "children" or "issue" do not include such gifts to adopted children.[5] A diversity of opinion exists as to whether the use of the word "children" in an anti-lapse statute includes adopted children, and the variation in the decisions has evoked the comment that they are in "hopeless confusion." [6] There is division of authority on the question of the effect of adoption of a child in revoking a previously executed will under circumstances where the birth of a child would bring that result,[7] and the courts are not agreed as to whether an adopted child is within the pretermitted heir statutes.[8] Where the outcome of litigation turns on the relation of the adopted child to persons other than the adoptive parents, it is clear that his status is not necessarily the same as if he had been born to the adoptive parents. Thus where a statute gives a right of action for wrongful death to the "next of kin," one line of authority takes the position that the

[3] Re Roderick, 158 Wash. 377, 291 P. 325 (1930); Denton v. James, 107 Kan. 729, 193 P. 307 (1920); Bilderback v. Clark, 106 Kan. 737, 189 P. 977, 9 A. L. R. 1622 at 1627 (1920).

[4] 22 IOWA L. REV. 145 (1937).

[5] Matter of Miller, 110 N. Y. 216, 18 N. E. 139 (1888); Succession of Frigalo, 123 La. 71, 48 So. 652 (1909); Commonwealth v. Nancrede, 32 Pa. 389 (1859); State ex rel. Walton v. Yturria, 109 Tex. 220, 204 S. W. 315 (1918); L. R. A. 1918F 1079. Kerr v. Goldsborough, (C. C. A. 4th, 1906) 150 F. 289.

[6] Phillips, Executor v. McConica, Gd., 59 Ohio St. 1, 51 N. E. 445 (1898). Use of the word "issue" in an anti-lapse statute held not to include adopted child despite the fact that the adoption statute provided that an adopted child should be "to all intents and purposes the child . . . of the person so adopting him or her." Matter of Martin, 133 Misc. 80, 230 N. Y. S. 734, affd. 224 App. Div. 873 (1928); Matter of Horn, 256 N. Y. 294, 176 N. E. 399 (1931); Matter of Walter, 270 N. Y. 201, 200 N. E. 786 (1936); 25 CAL. L. REV. 81 at 85 (1936).

[7] To the effect that an adopted child is not included in such a statute see Davis v. Fogle, 124 Ind. 41, 23 N. E. 860 (1889); In re Comassi, 107 Cal. 1, 40 P. 15 (1895); Evans v. Evans, (Tex. Civ. App. 1916) 186 S. W. 815. Contra: In re Book, 90 N. J. Eq. 549, 107 A. 435 (1918); Glascott v. Brogg, 111 Wis. 605, 87 N. W. 853 (1901); 1 AM. JUR. 661 (1936).

[8] In re Hebb's Estate, 134 Wash. 424, 235 P. 974 (1925), followed by In re Roderick, 158 Wash. 377, 291 P. 325 (1930); the adopted child was held to be within the terms of the statute with reference to the will of his natural father. In re Stevens, 83 Cal. 322, 23 P. 379 (1890), seems to have assumed that the adopted child was within the statute. For a detailed discussion see 22 KY. L. J. 600 (1934).

action belongs to the next of kin by blood.[9] And an adopted child is not a "dependent" within the meaning of a workmen's compensation act so as to enable him to recover for the death of the father of his adoptive father, although a natural grandchild could have so recovered.[10] The relationship of the child to his natural grandparents and natural kindred is not changed,[11] nor is the adopted child of a widow's first husband an "heir" within the meaning of a statute controlling the disposition of her inherited property after remarriage.[12] When private legal instruments use the term "child," "heir" and similar words, the status of the adopted child is a matter of dispute. It seems to be generally held that when a testator refers to "children" the word does not include those adopted after his death.[13] Under the statute involved in the principal case it has been held that the adopted child is not included in the term "right heirs" of a life tenant when used by a testator in a will.[14] And when the testator is referring to children other than his own, the general view seems to be that the burden is on the adopted child to establish the intention to include him in the term.[15] In trust deeds, despite broadly phrased adoption statutes, the adopted child is not included in the term "child" or "children" unless the intention to so include him plainly appears.[16] From the above differentiations between an adopted child and a natural child, it seems apparent that the court, in the instant case,

[9] Heidecamp v. Jersey City, Hoboken & Patterson St. R. R., 69 N. J. L. 284, 55 A. 239 (1903); Jackson's Adm. v. Alexiou, 223 Ky. 95, 3 S. W. (2d) 177 (1928). Contra: Cowden's Case, 225 Mass. 66, 113 N. E. 1036 (1916); Carpenter v. Buffalo Gen. Electric Co., 213 N. Y. 101, 106 N. E. 1026 (1914). See Boswell v. Lake Shore El. R. R., 35 Ohio C. C. 522, 88 Ohio St. 563, 105 N. E. 767 (1911), where "parent" as used in the Federal Employers' Liability Acts was held to mean natural parent despite broad terms in the Ohio adoption statute. This was overruled in Ransom v. New York Central & St. L. R. R., 93 Ohio St. 223, 112 N. E. 586 (1915).

[10] Winkler v. New York Car Wheel Co., 181 App. Div. 239, 168 N. Y. S. 826 (1917).

[11] Although an adopted child inherits from its foster parents the same as a natural child in New York, it is not the kin of a brother of deceased foster father. Hopkins v. Hopkins, 202 App. Div. 606, 195 N. Y. S. 605 (1922). Relationship to natural grandparents not changed: Bosey v. Darling, 173 Cal. 221, 159 P. 606 (1916). Rights of adopted child not changed with respect to natural kin: In re Monroe's Ex., 132 Misc. 279, 229 N. Y. S. 476 (1928); Moore v. Moore, 35 Vt. 98 (1862).

[12] Barnes v. Allen, 25 Ind. 222 (1865).

[13] Re Puterbaugh, 261 Pa. 235, 104 A. 601, 5 A. L. R. 1277 at 1280 (1918), and cases noted therein. See Gilliam v. Guaranty Trust Co., 186 N. Y. 127, 78 N. E. 697 (1906), for use of "heirs at law" by a testator; Yates Estate, 281 Pa. 178, 126 A. 254 (1924).

[14] Eureka Life Ins. Co. v. Geis, 121 Md. 196, 88 A. 158 (1913).

[15] Casper v. Helvie, (Ind. App. 1925) 146 N. E. 123 (1925); Wyeth v. Stone, 144 Mass. 441, 11 N. E. 729 (1887). See 29 MICH. L. REV. 391 (1930); 1 PAGE, WILLS, 2d ed., § 900 (1926).

[16] Wilder v. Butler, 116 Me. 389, 102 A. 110 (1917); 2 MINN. L. REV. 300 (1918); Yates Estate, 281 Pa. 178, 126 A. 254 (1924). But see Gilliam v. Guaranty Trust Co., 186 N. Y. 127, 78 N. E. 697 (1906).

indulged in an unwarranted generalization in reaching an admittedly sound result.[17]

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[17] The Wisconsin Supreme Court has reached a similar result. In Stickles v. Reichardt, 203 Wis. 579, 234 N. W. 728 (1931), the court held that a contract between the adoptive parents and the natural parent permitting the latter to see the child periodically was void as adverse to the best interests of the child.