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ADOPTION -TRUSTS-WILLS- ADOPTED CHILD'S RIGHT TO TAKE UNDER A TRUST FOR "ISSUE"

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ADOPTION — TRUSTS — WILLS — ADOPTED CHILD'S RIGHT TO TAKE UNDER A TRUST FOR "ISSUE" — The settlor established a trust with himself, his wife, and his four children as beneficiaries. Under the trust deed the property was to vest in the "lawful issue" of the settlor's children on the death of his last surviving child. *Held*, that the term "lawful issue" included the plaintiff (an adopted child of settlor's daughter). *Walker v. Obrien*, (C. C. A. 9th, 1940) 115 F. (2d) 956, cert. den. (U. S. 1941) 61 S. Ct. 829.

The problem whether an adopted child is included in the term "issue" or "children" may arise in applying the laws of intestate succession or in the construction of wills or trusts. In the case of intestacy, the determination of whether an adopted child will take by intestate succession is purely a problem of statutory construction.[1] However, as in the principal case, when a will is being interpreted it is generally said that the intent of the testator, not the adoption statute, governs,[2] and this is likewise true when a trust is involved.[3] Determining the testator's intent is frequently a difficult task, the result depending primarily on the circumstances of each particular case. It is generally held that a testator intends to include his own adopted child within the meaning of the word "issue," [4] the presumption of intent being based on the moral obligation he owes to the child.[5] When the testator is not the adopting parent, however, ordinarily the adopted child is not included, for it is presumed that the testator favors those of

[1] 4 VERNIER, AMERICAN FAMILY LAWS, § 262 (1931); 38 A. L. R. 8 (1925). The court cites two cases involving intestate succession as being in point. In re Newman's Estate, 75 Cal. 213, 16 P. 887 (1888); Estate of Kamauoha, 26 Hawaii 439 (1922).

[2] New York Life Ins. & Trust Co. v. Viele, 161 N. Y. 11, 55 N. E. 311 (1899); Puterbaugh's Estate, 261 Pa. 235, 104 A. 601, 5 A. L. R. 1277 at 1280 (1918); 23 MICH. L. REV. 313 (1925).

[3] Rodgers v. Miller, 43 Ohio App. 198, 182 N. E. 654 (1932); In re Thompson's Estate, 202 Minn. 648, 279 N. W. 574 (1938).

[4] Russell v. Russell, 84 Ala. 48, 3 So. 900 (1887); Virgin v. Marwick, 97 Me. 578, 55 A. 520 (1903).

[5] In re Woodcock, 103 Me. 214, 68 A. 821 (1907).

his own blood.[6] This presumption may be rebutted if it is shown that the testator knew of, or was fond of, the child.[7] Some writers have maintained that the testator should be deemed to have used the terms "heirs" or "issue" in light of the definitions in the adoption statutes and therefore an adopted child should be included under those terms.[8] This should clearly be so when the statute expressly states that the term "child" in a trust or will includes any adopted child unless the intent is clearly shown to be opposite.[9] When the statute, as the one in the principal case,[10] purports to give the adopted child "all the rights of a natural child," it was at one time held that the settlor is presumed to have used the words according to the statutory definition unless a contrary intent appears.[11] But this position was seriously weakened by the subsequent apparent overruling of several of the leading cases to this effect.[12] However, the Minnesota court in a recent case, after a careful consideration of the authorities, decided that an adopted child should be included on the basis of the statutory definition.[13] This decision and the principal case seem to indicate a trend toward the reinstatement of the former position. It has been suggested by Professor Warren that such is desirable, for, since an adopted child of the testator himself is prima facie included, a child adopted by a third party should be included also.[14]

[6] Casper v. Helvie, 83 Ind. App. 166, 146 N. E. 123 (1925); 2 SIMES, FUTURE INTERESTS, § 415 (1936).

[7] Ansonia Nat. Bank v. Kunkel, 105 Conn. 744, 136 A. 588 (1927). Contra, In re Hoyt's Estate, 120 Misc. 188, 197 N. Y. S. 828 (1923). As to effects of adoption after the instrument was executed, see 38 A. L. R. 8 (1925).

[8] 2 SIMES, FUTURE INTERESTS, § 415 (1936); KALES, ESTATES AND FUTURE INTERESTS, 2d ed., § 588 (1920).

[9] See the statute involved in Tirrell v. Bacon, (C. C. Mass. 1880) 3 F. 62.

[10] Hawaii Rev. Laws (1935), § 4527.

[11] Sewall v. Roberts, 115 Mass. 262 (1874); Bray v. Miles, 23 Ind. App. 432, 54 N. E. 446, 55 N. E. 510 (1899); Hartwell v. Tefft, 19 R. I. 644, 35 A. 882 (1896); In re Olney, 27 R. I. 495, 63 A. 956 (1906). These cases have often been cited by writers, and the latter two were relied on in the principal case.

[12] Casper v. Helvie, 83 Ind. App. 166, 146 N. E. 123 (1925), overruling Bray v. Miles, 23 Ind. App. 432, 54 N. E. 446, 55 N. E. 510 (1899); Smith v. Bradford, 51 R. I. 289, 154 A. 272 (1931), overruling In re Olney, 27 R. I. 495, 63 A. 956 (1906), and Hartwell v. Tefft, 19 R. I. 649, 35 A. 882 (1896); Hutchins v. Browne, 253 Mass. 55, 147 N. E. 899 (1925) [decided under an act passed subsequent to Sewall v. Roberts, 115 Mass. 262 (1874), supra note 11].

[13] Holden v. First Nat. Bank & Trust Co. of Minneapolis, 207 Minn. 211, 291 N. W. 104 (1940).

[14] Warren, "The Progress of the Law 1919-1920: Estates and Future Interests," 34 HARV. L. REV. 508 at 529 (1921).