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WILLS--ADOPTED CHILD AS "ISSUE" WITHIN MEANING OF ANTI-LAPSE STATUTE

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WILLS—ADOPTED CHILD AS "ISSUE" WITHIN MEANING OF ANTI-LAPSE STATUTE—Testatrix, by her will, left the residue of her estate to her two sisters, their heirs and assigns forever. Appellee, an adopted daughter of one sister who predeceased testatrix, claimed one half of the residue by substitution under the Ohio anti-lapse statute.[1] *Held*, an adopted child is "issue" within the meaning of the anti-lapse statute, which in terms provides that issue of a predeceased devisee will take. Appellee takes by substitution for her adoptive mother. *Flynn v. Bredbeck*, (Ohio 1946) 68 N.E. (2d) 75.

The process of adoption, and the rights and obligations arising therefrom, are of purely statutory origin, being unknown to the common law. The statutory provisions for adoption and for the status of the adopted child thereafter, vary with the different states, and the interpretations given the statutes by the courts vary even more widely.[2] The statutes generally provide that the adopted child will have the same rights of maintenance, education, inheritance, and distribution of personal estate as if born to the adopting parents in lawful wedlock.[3] Several statutes make the exception that he may not inherit property expressly limited to the heirs of the body of the adopting parents.[4] In determining whether an adopted child is included by such words as "child," "heir," "descendant," and "issue," the courts quite generally agree that if the testator is the adopting parent, the child is included, unless a contrary intent is shown in the will.[5] It is presumed that in adopting a child, the parent intended to confer upon him all the rights of a natural child, and would therefore intend that the adopted child be included. But where the question is whether the adopted child is included so as to take through, rather than from the adopting parent, there is a wide divergence of opinion. The prevailing view is that an adopted child is not included unless it is clearly shown that the testator intended to include him.[6] The fact that the testator knew of the adoption when he made the will is evidence of such intent.[7] However, there is a strong minority of courts which give a more liberal construction to "child," "issue," and such words, so as to include adopted

[1] Ohio Gen. Code (Page, 1938) § 10504-73. "When a devise of real or personal estate is made to a child or other relative of the testator, if such child or other relative was dead at the time the will was made, or dies thereafter, leaving issue surviving the testator, in either case such issue shall take the estate devised as the devisee would have done, if he had survived the testator. . . ."

[2] See, in general, 4 VERNIER, AMERICAN FAMILY LAWS 408-452 (1931).

[3] See, for example, Ohio Gen. Code (Page, 1938) § 10512-19; R.I. Gen Laws (1938) c. 420 § 6; 4 PAGE, WILLS, 3d ed., 189 (1941).

[4] Ohio Gen. Code (Page, 1938) § 10512-19; R.I. Gen. Laws (1938) c. 420 § 6.

[5] 2 SIMES, FUTURE INTERESTS 223 (1936); 3 PAGE, WILLS, 3d ed., 143 (1941); 3 PROPERTY RESTATEMENT, §§ 287, 292 (1940).

[6] 2 SIMES, FUTURE INTERESTS 223 (1936); Mechem, "Some Problems Arising Under Anti-Lapse Statutes," 19 IOWA L. REV. 1 (1933); See annotation, 70 A.L.R. 621 (1931).

[7] See authorities cited in note 6.

children within them.[8] While it would be difficult, in view of the existing variety of statutes, to make an accurate tabulation of where the different states stand on the question, legislation and judicial decisions since the turn of the century indicate a slight trend toward the minority view adopted by the Ohio court in the principal case.[9] The Ohio court here departs from a consistent line of decisions [10] limiting the rights of inheritance of adopted children, thus recognizing the right of such children to inherit through, as well as from the adopting parents. To support the conclusion reached, the court relied heavily upon the revision of the statute under which prior cases had been decided,[11] and upon a prior case [12] involving the construction of the statutory inheritance rights of a "designated heir," as indicating and requiring a more liberal attitude toward inheritance rights of adopted children. While the result reached in the principal case is a salutary one, and justifiable under a broad reading of the revised statute, an interpretation of the statute reaching the opposite conclusion would be more consistent with past decisions of the Ohio court. In revising the adoption statute, the legislature clearly intended to broaden the inheritance rights of adopted children, but whether they intended to go this far is open to question. The revised statute enumerates classes which include an adopted child, without listing the term "issue," and it retains the provision that the adopting child may not inherit property limited to the heirs of the body of the adopting parent. The Ohio court has held, in cases that involve the same question as in the principal case, that the word "issue" means child of the body, or heir of the body, and does not include an adopted child.[13] It would appear that the court, apart from statutory requirements, seized this opportunity to liberalize its attitude toward adoption of children, and to make the inheritance rights of such children more nearly equal to those of natural children.

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[8] Warren v. Prescott, 84 Me. 483, 24 A. 948 (1892); Hartwell v. Tefft, 19 R.I. 644, 35 A. 882 (1896), 34 L.R.A. 500 (1897); Clark v. Clark, 76 N.H. 551, 85 A. 758 (1913); In re Foster's Estate, (N.Y. Surr. Ct. 1919) 177 N.Y.S. 827; Mechem, "Some Problems Arising Under Anti-Lapse Statutes," 19 IOWA L. REV. 1 (1933).

[9] See, for example, Pa. Ann. Stat. (Purdon, 1930) tit. 20, § 228; see also 1 C.J. 1401 and 2 C.J.S. 455.

[10] Quigley v. Mitchell, 41 Ohio St. 375 (1884); Phillips v. McConica, 59 Ohio St. 1, 51 N.E. 445 (1898); Theobald v. Fugman, 64 Ohio St. 473, 60 N.E. 606 (1901); Albright v. Albright, 116 Ohio St. 668, 157 N.E. 760 (1927).

[11] The revisions made to the prior statute [Ohio Gen. Code (Throckmorton, 1926) § 8030] were the deletion of the first sentence, which provided for recording of adoption papers, and the addition of the following clause: ". . . but [adopted child] shall be capable of inheriting property expressly limited by will or by operation of law to the child or children, heir or heirs at law, or next of kin, of the adopting parent or parents, or to a class including any of the foregoing. . . ." Ohio Gen. Code, (Page, 1938) § 10512-19.

[12] Cochrel v. Robinson, 113 Ohio St. 526, 149 N.E. 871 (1925); upheld the right of a designated heir to inherit from the designator, to the exclusion of the designator's relatives by affinity. It did not involve the question of inheriting, through the designator, from blood relatives of the designator.

[13] Phillips v. McConica, 59 Ohio St. 1, 51 N.E. 445 (1898); Theobald v. Fugman, 64 Ohio St. 473, 60 N.E. 606 (1901).