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Wills—Rights of Adopted Children

T's will, executed in 1900, devised property in trust for the benefit of her granddaughter, *A*, for life, and if *A* should die leaving a "child or children" surviving her, then to "such child or children", or if she died without "issue" surviving her, to other specified remaindermen. *T* died in 1908, prior to *A's* adoption of *X* in 1931. In 1965, *A* died survived only by *X*. Action was instituted by the trustee under *T's* will to determine inheritance rights as between *X* and the contingent remaindermen. The lower court held that *X* was not, in law, the child or issue of *A* and took nothing under *T's* will. *Held,* affirmed. "[A]n adopted child is not entitled to property devised or bequeathed to the 'child', 'children', or 'issue' of the adoptive parent unless a contrary intent is disclosed by the will . . . ; and, this is especially so where the adoption occurs after after the death of the testator, or even after the making of the will." *Security National Bank & Trust Co. v. Willim,* 153 S.E.2d 114, 120 (W. Va. 1967).

In rendering its decision in the principal case, the court discussed the West Virginia statute in effect when the will was executed.[1] This statute was considered in *Wheeling Dollar Savings & Trust Co. v. Stewart,*[2] in which the court held that the testator had not intended to include adopted children in his will. The adoption statute in effect at the time of the *Stewart* decision stated in effect that an adopted child could not take property under a will limiting the property expressly to the heirs of the body of the adopting parent(s).[3] In 1959, subsequent to the *Stewart* decision, the legislature amended the adoption statute[4] seemingly indicating that an adopted child was to be considered as the equal of a natural child for all purposes. This major policy revision was contained in the following language: "[T]he adopted child shall be, to all intents and for all purposes, the *child* of the person or persons so adopting him or her and shall be entitled to all the rights and privileges and subject to all the obligations of a natural child of such adopting parent or parents."[5] Again, in 1967, following the principal case, the legislature amended the adoption statute by inserting the words

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[1] W. VA. CODE ch. 122, § 4 (Barnes 1923). This is the forerunner to the current adoption statute, W. VA. CODE ch. 48, art. 4, § 5 (Michie Supp. 1967).
[2] 128 W. Va. 703, 37 S.E.2d 563 (1946).
[3] W. VA. CODE ch 122, § 4 (Barnes 1923).
[4] W. VA. CODE ch. 48, art. 4, § 5 (Michie 1966).
[5] *Id.* (emphasis added).

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"legitimate issue" in lieu of "child" as italicized in the above quoted portion.[6] At common law, "lawful issue" or "legitimate issue" included those who were children of a legally recognized marriage.[7] It would seem from these amendments that the West Virginia Legislature is attempting to reflect a social policy advocating a general presumption of adopted children being equal to natural children in *all* respects, including the fact situation presented by the principal case.

The West Virginia Supreme Court of Appeals has made it clear that wills containing ambiguous language will be construed by determining the testator's intent at the time of the will's execution. The determining factor used in the construction of the intent of the testator is the language expressed in the wills and codicils, with consideration given to all surrounding circumstances.[8] This intent must be ascertained by the will itself, when possible, and if the general intent of the testator is expressed in the will without inconsistencies, every word will be given effect.[9] But in case of ambiguity in the testamentary language, statutes in effect when the will was written which relate to descent, distribution, and adoption may be used as aids (not controlling factors) in determining this intent.[10]

In the principal case the statute in effect when *T's* will was written, stating that an adopted child was not capable of inheriting property limited expressly to the heirs of the body of the adopting

[6] W. VA. CODE ch. 48, art. 4, § 5 (Michie Supp. 1967).

[7] *In re* Sheffer's Will, 249 N.Y.S. 102, 105 (1931).

[8] *See, e.g.*, Mauzy v. Nelson, 147 W. Va. 764, 768, 131 S.E.2d 389, 391-92 (1963); Claymore v. Wallace, 146 W. Va. 379, 386, 120 S.E.2d 241, 246 (1961); Wooddell v. Frye, 144 W. Va. 755, 759, 110 S.E.2d 916, 919 (1959); Cuppett v. Neilly, 143 W. Va. 845, 850, 105 S.E.2d 548, 554 (1958); Weiss v. Soto, 142 W. Va. 783, 795, 98 S.E.2d 727, 736 (1957); Goetz v. Old Nat'l Bank of Martinsburg, 140 W. Va. 422, 429, 84 S.E.2d 759, 766 (1954); Harper v. Cumberland & Allegheny Gas Co., 140 W. Va. 193, 198, 83 S.E.2d 522, 526 (1954); Ball v. Ball, 136 W. Va. 852, 859, 69 S.E.2d 55, 58 (1952); Hunt v. Furman, 132 W. Va. 706, 710, 52 S.E.2d 816, 818 (1949); Stephenson v. Kuntz, 131 W. Va. 599, 612, 49 S.E.2d 235, 242 (1948); Wheeling Dollar Sav. & Trust Co. v. Stewart, 128 W. Va. 703, 706, 37 S.E.2d 563, 567 (1946); Hedrick v. Hedrick, 125 W. Va. 702, 706, 25 S.E.2d 872, 875 (1943).

[9] *See, e.g.*, Claymore v. Wallace, 146 W. Va. 379, 389, 120 S.E.2d 241, 247 (1961); Wooddell v. Frye, 144 W. Va. 755, 759, 110 S.E.2d 916, 919 (1959); Weiss v. Soto, 142 W. Va. 783, 795, 98 S.E.2d 727, 735 (1956); Goetz v. Bank of New Martinsburg, 140 W. Va. 422, 429-30, 84 S.E.2d 759, 766 (1954); Young v. Lewis, 138 W. Va. 425, 431, 76 S.E.2d 276, 280 (1953); Ball v. Ball, 136 W. Va. 852, 859, 69 S.E.2d 55, 60 (1952); Dingess v. Drake, 135 W. Va. 502, 508, 64 S.E.2d 601, 604 (1951); Bently v. Ash, 59 W. Va. 641, 646, 53 S.E. 636, 638 (1906); Graham v. Graham, 23 W. Va. 36, 41 (1883); Hinton v. Millburn, 23 W. Va. 166, 177 (1883).

[10] Security Nat'l Bank & Trust Co. v. Willim, 153 S.E.2d 114, 119 (W. Va. 1967).

parent(s),"[11] was considered influential by the court in determining *T's* intent. In addition the court considered the case of *Wheeling Dollar Savings and Trust Co. v. Stewart*[12] as "largely determinative of a proper decision in the instant case."[13] The *Stewart* case contained a fact situation similar to that in the principal case and the court concluded that the testator had not intended to include adopted children in his will. In doing so, the court equated "descendant and descendants" and "direct descendants" to natural children and considered the terms similar to the word "issue". In the principal case, the court construed the use of the words "child or children" and "issue" as used in the will as being synonymous and stated that it is generally held that the word "issue" refers to natural-born children, excluding adopted children. Thus, by applying the statute to the language of the will, the court felt that they could arrive at no other conclusion than to exclude the adopted child.

In many states today, a legislative policy of treating adopted and natural children as being equal can be found.[14] In 1962, twenty-four state statutes expressly provided for inheritance through and from the foster parents and ten others could be so construed.[15] Some states, where the statutes of descent and distribution provide that adoptees may inherit through as well as from their adoptive parents, have given great weight to this declaration of legislative policy through decisions in their courts.[16] Their courts have considered it a declaration in favor of treating an adoptee as the equal of a child born into the family for all purposes of succession, and rules of construction reflecting this policy have been judicially established.[17] In so doing, these courts have considered the policy declared or implied in the legislation as justification for these

[11] W. VA. CODE ch. 122, § 4 (Barnes 1923).

[12] 128 W. Va. 703, 37 S.E.2d 563 (1946).

[13] Security Nat'l Bank & Trust Co. v. Willim, 153 S.E.2d 114, 117 (W. Va. 1967).

[14] *See, e.g.*, ALA. CODE tit. 27 § 5 (1958); CAL. PROB. C. A., § 257 (1959); COLO. REV. STAT. ANN. § 153-2-4 (1963); N.D. CENT. CODE, §14-11-13 (1960); WASH. REV. CODE, § 26.32.140 (1961).

[15] Halbach, *The Rights of Adopted Children Under Class Gifts*, 50 IOWA L. REV. 974 n. 18 (1962). The author referred to REPORT OF NEW YORK TEMPORARY COMMISSION ON MODERNIZATION, SIMPLIFICATION AND REVISION OF THE LAW OF ESTATES, REP. No. 1.2c, 148, 154-55 (1962).

[16] Estate of Heard, 49 Cal. 2d 514, 521-22, 319 P.2d 637, 642 (1957); Estate of Stanford, 49 Cal. 2d 120, 315 P.2d 181 (1957); First Nat'l Bank of Kansas City v. Waldron, 406 S.W.2d 56, 59 (Mo. 1966); *In re* Estate of Coe, 42 N.J. 485, 489, 201 A.2d 571, 574 (1964); Conville v. Bakke, 400 P.2d 179, 191 (Okla. 1965). *Contra*, Orme v. Northern Trust Co., 172 N.E.2d 413, 420 (Ill. 1961); *In re* Trust of Miller, 133 Mont. 354, 323 P.2d 885 (1958); Thomas v. Thomas, 258 N.C. 590, 129 S.E.2d 239 (1963).

[17] Estate of Heard, 49 Cal. 2d 514, 521, 522, 319 P.2d 637, 642 (1957); *In re* Estate of Coe, 42 N.J. 485, 489, 201 A.2d 571, 574 (1964).

rules.[18] The social desirability of the adoptive child's complete integration into his new family is recognized as great by many writers.[19] However, a court's reluctance to establish a rule of construction favorable to adoptees may be explained by a fear that such a construction might be employed for purposes of financial gain.[20]

The above discussion seems to indicate that West Virginia may have a conflict between the legislature and judiciary which could present problems in the future concerning the status of adopted children as heirs. It appears to be the intent of the West Virginia Legislature to impress upon the courts their feeling that public policy demands that West Virginia fall in line with those states treating adoptees as natural children for all intents and purposes, including taking as a child or issue under a devise in a will.

However, the Supreme Court of West Virginia, though expressly reserving decision as to the effect of the 1959 amendment to the West Virginia adoption statute upon a will made after the effective date of the amendment, stated by dictum without limitation by reference to the admendment, that an adopted child shall not take under a devise to "children" or "issue" of the adoptive parent, unless a contrary intent is shown. This appears to place the opinion of the judicial branch of our state government in direct opposition to that of the legislative branch. When the problem again arises under the now existing 1967 amendment, the conflict between legislative intent and judicial precedent will hopefully be resolved.

However, the thorough and cautious attorney should always determine the testator's wishes as to the consideration of any after adopted children and provide for such when executing a will. By this practice of preventive law, the problem as outlined above may remain moot.

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[18] *Id.*

[19] *See, e.g.,* Merrill and Merrill, *Toward Uniformity in Adoption Law,* 40 Iowa L. Rev. 299, 318-19 (1955); Kennedy, *The Legal Effects of Adoption,* 33 Can. B. Rev. 751, 874-75 (1955).

[20] *See, e.g., In Re* Stanford's Estate, 49 Cal. 2d 120, 315 P.2d 681, 692 (1957). In this case, the court pointed out the possibility that by allowing adopted children to take as natural children, the institution of adoption might be used for self-advancement, fraud, or spite by using it to fullfill the requirement in a testator's will that the adoptor have children; Adrain v. Koch, 83 N.J. Eq. 484, 91 A. 123 (1914). In this case, the court discussed the problem concerning a member of the family being adopted by another member of the family. Where a statute allows adopted children to take under a will as natural children, a problem of double shares could arise.