

April 1963

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Recommended Citation

Stephen G. Young, *Wills--Rights of an Adopted Child to Take as a Class Remainderman*, 65 W. Va. L. Rev. (1963).

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Wills—Right of an Adopted Child to Take as a Class Remainderman

T's will devised property to his son, *A*, for life, then the remainder to the "children" of *A* in fee simple or, in default of such remaindermen, to *T*'s other children. *T* died in 1926. In 1949, *A* adopted a son, *D*. In 1955, the North Carolina adoption statute was amended, retroactively, to confer upon an adopted child "the same legal status, including all legal rights and obligations of any kind whatsoever, as he would have had if he were born the legitimate child of the adoptive parents" *A* died in 1961 and his brothers and sister brought a declaratory judgment action to determine the rights of the parties under *T*'s will. *Held*, under these circumstances the testator did not intend that a child adopted after his death should share under a provision for surviving children of his son. Two justices dissented, reasoning that the members of the class of remaindermen, i.e. *A*'s children, could not be ascertained until *A*'s death, and at that time *D* was for all purposes *A*'s child. *Thomas v. Thomas*, 129 S.E.2d 239 (N.C. 1963).

Whereas the practice and principles of adoption have been common in civilizations since the Babylonians compiled the Code of Hammurabi around 2250 B.C., adoption was viewed somewhat askance by the Anglo Saxons, perhaps because of adherence to the principles of consanguinity in the feudal system. *Hockaday v. Lynn*, 200 Mo. 456, 98 S.W. 585 (1906). Adoption being unknown to the common law and in derogation of it, statutes of adoption have always been more or less strictly construed as against the adopted child. *Hockaday v. Lynn, supra*. It was said, "God only can make an heir." 3 COKE UPON LITTLETON [191.a], V.(3.) (1812). West Virginia has had provisions for statutory adoption since 1882. W. Va. Acts, 1882, ch. 132, § 4. The present West Virginia adoption statute, W. VA. CODE ch. 48, art. 4, § 5 (Michie 1961), enacted in 1959, is quite similar to the subject North Carolina adoption statute, N.C. GEN. STAT. § 48-23 (Michie Supp. 1961).

The North Carolina court spoke with optimism in *Headen v. Jackson*, 255 N.C. 157, 120 S.E.2d 598 (1961). Thinking that the 1955 amendment had clarified the rights of the adopted child, Justice Higgins quoted from a *Survey of Statutory Changes in North Carolina in 1955*, 33 N.C.L. REV. 521, 522 (1955): "Whatever the problem is concerning an adopted child his standing and his legal rights can be measured by this clear test: 'What would his standing

and his rights be if he had been born to his adoptive parents at the time of adoption?" Within two years the North Carolina court had an opportunity to apply this enlightened approach in the instant case. Justice Higgins found himself writing the dissent to this case while the majority refused to consider the implications of the *Headen* case, distinguishing it as being interpretive of the anti-lapse statute only.

The "great majority" of cases have been unwilling to confer class membership upon an adopted child as a "child" or "issue" under a will of a stranger to the adoption where the adoption occurs after the testator's death. Annot., 86 A.L.R.2d 48, 58 (1962). The cases are more evenly divided as to membership as "heirs" or "descendants." Annot., 86 A.L.R.2d 84, 91 (1962). Bear in mind, however, the words of Justice Storey as quoted in *Wheeling Dollar Savings & Trust Co. v. Stewart*, 128 W. Va. 703, 708, 37 S.E.2d 563 (1946). ". . . Any attempt to classify . . . [wills cases], much less to harmonize them, is full of the most perilous labor. . . ."

The combinations of situations which might arise under the adoption statutes are numerous, and it is far beyond the scope of this comment to deal with them. The adoption statutes might have been enacted before or after execution of the will, the testator's death, the adoption of the child, or the birth of a subsequently born natural child. The adoption may or may not operate retroactively or apply to testacy as well as intestacy. The class in question might be termed children, lawful children, heirs, legal heirs, issue, legal issue, descendants, direct descendants, lineal descendants, and other appellations of this sort. Having opened this Pandora's box of possibilities it is difficult to pick up a thread which runs through the lot. These possibilities are dealt with at length in Annot., 86 A.L.R.2d 12 (1962).

In the instant case, the majority builds its opinion upon the testator's intent, ascertained from the language of the will considered in the light of the conditions and circumstances existing at the time the will was made. At the time of execution of the will and thereafter until *T's* death there were no adoption statutes which would allow an adopted child of *A* to take under the will, therefore, the court reasoned, *T* could not have intended an adopted child to be a member of the class.

Although it is true that the paramount rule in construing a will is that the testator's intent controls and must be given effect, *Weiss*

v. *Soto*, 142 W. Va. 783, 98 S.E.2d 727 (1957), the true inquiry is not what the testator meant to express but what the words he has used do express. *Weiss v. Soto, supra*. As in the instant case, some courts have been so anxious to pick the will from the horns of the adoption dilemma that they have wholly disregarded another rule of property—a rule for vesting of contingent remainders at the point of distribution, thereby giving effect to the testator's expressed intent. Where *T* leaves property to *A* for life, remainder to *A*'s children as shall be living at *A*'s death, then no one can know who these children are until *A*'s death. See *Nat'l Bank of Fairmont v. Kenney*, 113 W. Va. 890, 895, 170 S.E. 177 (1933). If prior to *A*'s death the law declares that adopted son *D* is *A*'s child for all purposes, it would appear that when the role is called upon *A*'s death, *D* should be permitted to answer as a member of the class of remaindermen unless this was clearly contrary to *T*'s expressed intent. This is the position of courts which recognize the legislature's authority to confer all rights within the eye of the law that a natural child would have had. The Minnesota court puts it this way: "We have come to realize that it is not the biological act of begetting offspring—which is done even by animals without any family ties—but the emotional and spiritual experience of living together that creates a family." *In Re Patrick's Will*, 259 Minn. 193, 106 N.W.2d 888 (1960). Accord, *In Re Heard's Estate*, 49 Cal. App. 2d 514, 319 P.2d 637 (1957); *Edmands v. Tice*, 324 S.W.2d 491 (Ky. 1958); *Hayes v. St. Louis Union Trust Co.*, 280 S.W.2d 649 (Mo. 1955); *Smith v. Hunter*, 86 Ohio St. 106, 99 N.E. 91 (1912); *Vaughn v. Vaughn*, 328 S.W.2d 326 (Tex. Civ. App. 1959).

Apparently the liberal approach is not without its drawbacks; consider *In Re Stanford's Estate*, 49 Cal. App.2d 120, 315 P.2d 681 (1957). The court there held that even though, as the default legatee contended, the purpose of the adoption was to exclude said legatee from the estate, such purpose would be insignificant as long as the adoption was valid. 31 So. CAL. L. REV. 441 (1958).

In the instant case, it is anomalous that the majority should cite *Belfield v. Findlay*, 389 Ill. 526, 60 N.E.2d 403 (1945), as presenting the identical question as was before them. The *Belfield* case was decided by applying a statute expressly forbidding an adopted child from taking property from the lineal kindred of his adoptive father by right of representation. The Illinois statute was almost identical to the one confronting the West Virginia court in *Wheeling Dollar Savings & Trust Co. v. Stewart*, 128 W. Va. 703,

37 S.E.2d 563 (1946). Both North Carolina, N.C. Acts, 1955, ch. 813, § 5, and West Virginia, W. Va. Acts, 1959, ch. 47, have since amended their statutes so that they now purport to extend to an adopted child the same legal status as that of a legitimate child.

In the *Stewart* case, the West Virginia court looked to the rights of the adopted child under the adoption statute in constructing the testator's intent. Unlike the court in the instant case, the West Virginia court applied the statute in effect at the time of adoption. The West Virginia court impliedly would have admitted the adopted child to the class of "heirs" or "legal heirs." *Wheeling Dollar Savings & Trust Co. v. Stewart*, *supra* at 712. There is a split of authority as to which adoption statutes are controlling where the statutes are not expressly retroactive. Annot., 18 A.L.R. 2d 960 (1951).

Recognizing the merit of the progressive minority holding and the liberal bent of some of the majority, it would appear that the Supreme Court of Appeals of West Virginia might now go either way in delineating the rights of an adopted child under a stranger's will. In any event a prudent attorney would be well advised to have his client expressly state his intent as to adopted children so that the instrument will not be left to construction in the courts.

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ABSTRACTS

Due Process—Jurisdiction—Minimum Contact Not Satisfied

P, a resident of West Virginia, brought this action for personal injury sustained from the exploding of a defective pipe which *D*, a Texas corporation, sold to a company that used it in its business in West Virginia. Under W. VA. CODE ch. 31, art. 1, § 71 (Michie 1961), *P* obtained substituted service of process and brought this action in West Virginia. *P* offered no evidence that *D* was incorporated in, ever did business in, or ever made a contract to be performed in West Virginia. *D* moved to dismiss for lack of jurisdiction. *Held*, motion to dismiss sustained. Mere commission of a tort did not establish the necessary "minimum contacts" to afford jurisdiction; and the West Virginia statute, in conferring jurisdiction over *D*, resulted in an extraterritorial application of law in