UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 39 | Number 2 Article 11

2-1-1961

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show any negligent act or forbearance on the part of the defendant which caused the accident. The evidence merely seemed to increase the probability that the accident was the result of some negligence of the driver by removing these possible non-negligent causes.

The apparent utilization of the underlying principle of *res ipsa* and a simultaneous rejection of the doctrine itself, as in the *Lane* decision, can only lead to uncertainty as to what evidence will be required to raise a question for the jury in unexplained single-car automobile accident cases. Under this decision it seems that where the plaintiff is unable to present evidence which affirmatively shows the cause of an accident, he may be able to withstand a nonsuit by producing testimony which tends to remove possible causes of the accident for which defendant would not be responsible. However, a question remains as to what possible causes must be removed before the case can be submitted to the jury. It appears that the plantiff must at least negative mechanical failure,[21] skidding,[22] blowouts,[23] negligence on the part of another traveler,[24] and sudden illness of the driver.[25]

The adoption of the doctrine of *res ipsa* and its application within the limits previously established by our court[26] would create a uniform set of rules for inferring negligence from circumstantial evidence. No such uniformity exists within the rule of *Lane v. Dorney*.

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Wills—Construction—Right of Adopted Children To Take Under a Will as "Grandchildren."

Adoption through judicial proceedings, a process nonexistent under the common law, received statutory sanction in the United States more than a century ago.[1] In recent years, as adoption steadily has

[21] Ferry v. Holmes & Barnes, Ltd., 12 La. App. 3, 124 So. 848 (1929).
[22] Springs v. Doll, 197 N.C. 240, 148 S.E. 251 (1929).
[23] Clodfelter v. Wells, 212 N.C. 823, 195 S.E. 11 (1938).
[24] Pridgen v. Produce Co., 199 N.C. 560, 155 S.E. 247 (1930).
[25] Cohen v. Petty, 65 F.2d 820 (D.C. Cir. 1933).
[26] "The principle does not apply: (1) when all the facts causing the accident are known and testified to by witnesses at the trial; (2) where more than one inference can be drawn from the evidence as to the cause of the injury; (3) where the existence of negligent defaut is not the more reasonable probability, and where the occurrence, without more, leaves the matter resting only in conjecture; (4) where it appears that the accident was due to a cause beyond the control of the defendant, such as the act of God or the wrongful or tortious act of a stranger; (5) when the instrumentality causing the injury is not under the exclusive control or management of the defendant; (6) where the injury results from accident as defined and contemplated by law." Spring v. Doll, 197 N.C. 240, 242, 148 S.E. 251, 252-53 (1929).

[1] Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743 (1956). This article contains an excellent discussion of the statutory evolvement in this country of the institution of adoption. In North Carolina statutory adoption reaches back to 1873. N.C. Pub. Laws 1872-73, ch. 155.

become more prevalent, an increasing number of jurisdictions have evinced a legislative intent to produce complete legal equivalence between relationship by adoption and relationship by blood.[2] Despite this legislative trend[3] such equivalence has not uniformly been recognized. One of the principal problems arising in this respect concerns the inclusion of adopted children within general terms of designation appearing in a will.[4] In cases involving this question the result normally is dependent on the determination of one (or both) of two considerations: *first,* to what extent an adopted child can be included in a term such as "children," "issue" or "descendants" as those words are used to identify persons in relation to the adoptive parent; and *second,* whether an adopted child can be considered the "grandchild," "nephew" or "cousin" of one other than the adoptive parent.

In *Bullock v. Bullock*[5] the testator devised his farm to four of his sons, *A, B, C,* and *D,* for life, with remainder in fee simple to their children. The provision as to the ultimate takers of the fee simple estate continued,

> [B]ut in case either of my [named] sons should die without leaving children capable of inheriting said lands, then . . . the part of said land that would go to such an (sic) one, or more of them, shall be and belong to the children of the one or those who remain; it being my desire and intention . . . that after their death . . . my grandchildren shall have the use of same . . . that is, my grandchildren from my said sons. . . .[6]

The will was executed in 1936, and *B* subsequently adopted two children, one in 1949 and one in 1950. No revision of the will was made after its execution; in 1957 the testator died, survived by the four named sons. Shortly afterwards *A* died without leaving children; several months later *B* died leaving only the children whom he had adopted. The remaining life tenants, *C* and *D,* and the three natural children of *D* joined as plaintiffs in a declaratory judgment action to obtain a construction of this item of the will. The trial court held that the adopted children should inherit under the will as if they were the natural children of *B.* The record on appeal did not show whether the testator knew of the adoptions or had the capacity to change his will,

[2] *E.g.,* GA. CODE ANN. §74-414 (Supp. 1958); KY. REV. STAT. §199.520(2) (1959).

[3] For a recent comparative compilation of inheritance rights granted by the adoption statutes of each of the American jurisdictions, see Note, 25 BROOKLYN L. REV. 231, 242-46 (1959).

[4] See generally Oler, *Construction of Private Instruments Where Adopted Children Are Concerned* (pts. I and II), 43 MICH. L. REV. 705, 901 (1945). This article furnishes an exhaustive analysis of cases bearing on this point.

[5] 251 N.C. 559, 111 S.E.2d 837 (1960).

[6] *Id.* at 560, 111 S.E.2d at 839. The testator had one other son besides the four named in this item of the will.

if he had so desired, after they were effected. The supreme court, in modifying the judgment below so as to exclude the adopted children, held that the language used by the testator disclosed an intention that only natural children of the four sons should take in remainder. The appellate opinion implicitly rejected any possibility that such intent should be determined in the light of statutes establishing the rights of adopted children.[7]

It is axiomatic that the intention of the testator is controlling in the construction of his will; to this end certain fundamental rules are adhered to as a basis for the determination of this intent. Thus, it is well settled in North Carolina that the testator's intention is to be gathered from the language he employed, supplemented when necessary by a consideration of the surrounding circumstances at the time of, or after, execution of the will.[8] Therefore, if by special context or surrounding circumstances it clearly appears that the testator actually meant to include an adopted child within a term of general designation (*e.g.*, "children"), such child should take under the will without regard to the status accorded him by the applicable adoption law.[9] Conversely, where context or a preponderance of circumstances indicate that the term was used in a sense comprehending only persons who attained the required relationship by birth, an adopted child will be excluded.[10]

Difficult problems of construction arise, however, when a situation develops that the testator had not anticipated. The instant case provides a typical situation of this sort—the "grandchildren" referred to were to be identified at a future time, after the testator's death, and at the time of the will's execution no child had been adopted who could assert this relationship to the testator. With reference to this class of cases it has been said that "the only legitimate inference from the context and surrounding circumstances is that the testator . . . has no actual intention whatever in respect to the difficulty which afterwards arises by the appearance of an adopted child."[11] If the testator had no real "intention" concerning a problem that later arises, then the process of construction necessarily becomes speculative.[12] In the con-

[7] The opinion made no reference to the adoption statutes.

[8] *E.g.*, Bradford v. Johnson, 237 N.C. 572, 75 S.E.2d 632 (1953); Wachovia Bank & Trust Co. v. Waddell, 237 N.C. 342, 75 S.E.2d 151 (1953); *In re* Will of Johnson, 233 N.C. 570, 65 S.E.2d 12 (1951).

[9] Kales, *Rights of Adopted Children*, 9 ILL. L. REV. 149, 158 (1914).

[10] In Estate of Pierce, 32 Cal. 2d 265, 196 P.2d 1 (1948), the evidence tended to show that the testator had made provision for the adoptive parent and his natural children upon an oral promise that the particular children in question would not be adopted. Kales, *supra* note 9, at 159.

[11] Kales, *supra* note 9, at 159.

[12] In former days common law courts applied certain rigidly fixed rules of construction and an answer was summarily found. GRAY, THE NATURE AND SOURCES OF THE LAW 174 (2d ed. 1927). Such inflexible standards have long since lost their appeal to the judiciary. 2 PAGE, WILLS § 916, at 792 (Lifetime

struction process most courts have taken the view that the adoption statutes constitute a factor to be considered in interpreting the language of the will.[13] The position taken by the North Carolina Supreme Court, however, does not completely accord with this premise; generally the adoption laws have been construed narrowly, on the ground that they were in derogation of the common law.[14] In a 1953 case, *Bradford v. Johnson*,[15] it was stated that the then existing statutes[16] dealing with inheritance rights of adopted children pertained only to intestacy, except as they served to "establish and define the parent and child relationship between the adoptive parents and the adopted child."[17] Where a donor had died testate, inclusion of adopted children within particular designations used in the will was deemed to depend solely upon ascertaining the intent of the testator, and this intent was determined without the aid of the statutes.

Subsequent to the *Bradford* case significant changes were effected in the North Carolina adoption statutes. Through a 1955 amendment[18] the legislature substantively accorded to the artificial relation the exact consequences attendant to the natural one. Thus, regarding the effect of a final order of adoption, the statute prescribes:

> The final order forthwith shall establish the relationship of parent and child . . . and . . . the child shall be entitled to inherit

ed. 1941) states, "They [rules of construction under the present approach] are more like statements of fact, which indicate the inferences of fact which the courts are inclined to draw from given states of evidence, in the absence of other evidence which justifies or requires a different inference, than they are like rules of law."

[13] *E.g.*, in Mooney v. Tolles, 111 Conn. 1, 7, 149 Atl. 515, 518 (1930), the court stated, "In the determination as to this intention several considerations are to be resorted to. One of these is the adoption statute in effect in the state at the time, it being presumed that the testatrix knew and acted in contemplation of the reciprocal rights and duties resulting from the existing statute." In Hayes v. St. Louis Union Trust Co., 280 S.W.2d 649 (Mo. 1955), it was stated that in construing wills in connection with the inclusion of adopted children the surrounding circumstances *and law* must be considered to discover the testator's intention. See Oler, *supra* note 4, at 918.

Depending on whether they elevated the adoptee to the status suggested by the particular term of designation, the statutes exerted either an exclusionary or inclusionary force. See Comer v. Comer, 195 Ga. 79, 23 S.E.2d 420 (1942) (adoptee excluded); *In re* Holden's Trust, 207 Minn.. 211, 291 N.W. 104 (1940) (adoptee included).

[14] *E.g.*, Grimes v. Grimes, 207 N.C. 778, 178 S.E. 573 (1935). As the statutory provisions surrounding adoption in this state were expanded, much uncertainty developed—both as to procedural aspects and with regard to the legal status acquired by the adoptee. See Fairley, *Inheritance Rights Consequent to Adoptions*, 29 N.C.L. Rev. 227 (1951); Hanft, *Thwarting Adoptions*, 19 N.C.L. Rev. 127 (1941); 30 N.C.L. Rev. 276 (1952).

[15] 237 N.C. 572, 75 S.E.2d 632 (1953).

[16] N.C. Sess. Laws 1947, ch. 832; N.C. Sess. Laws 1947, ch. 879; N.C. Sess. Laws 1949, ch. 300.

[17] Bradford v. Johnson, 237 N.C. 572, 578, 75 S.E.2d 632, 636 (1953).

[18] N.C. Sess. Laws 1955, ch. 813. For comment on the provisions inserted in the adoption statutes by this chapter, see *A Survey of Statutory Changes in North Carolina in 1955*, 33 N.C.L. Rev. 513, 521-24 (1955).

> real and personal property by, from, and through the adoptive parents in accordance with the statutes of descent and distribution. An adopted child shall have 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. . . .[19]

The second sentence of this subsection was added in its entirety; its terms seem unmistakably to give an adopted child the *status* of a child of the body of the adoptive parents and to extend this relation to the adopters' kin.[20] With this in mind, the question arises in relation to the *Bullock* case whether this change in the statutory setting should be accorded any weight in determining the testator's intention, since it occurred after the will was executed. Several factors indicate that it properly might be considered significant in ascertaining this intent. The status-conferring provisions of the amendment were given retroactive effect.[21] While it is true that the intent of the testator must be found as of the time he makes the will, if he designates a class, its membership can be the subject of subsequent legal variation.

The *Bullock* case apparently followed the rationale of *Bradford* as no reference was made to the present adoption statutes despite the broadening amendment intervening between the two decisions. The *Bullock* opinion stated that if the only designating term appearing in the instrument had been "children" of the testator's four sons, adopted children might have been permitted to take.[22] However, the use of the words

[19] N.C. GEN. STAT. § 48-23(a) (Supp. 1959).

[20] In this connection it has been held under the present law that for purposes of intestate succession adopted children bear the same relation to kindred of the adoptive parent as do natural children. Bennett v. Cain, 248 N.C. 428, 103 S.E.2d 510 (1958).

[21] N.C. Sess. Laws 1955, ch. 813, § 6. The absence of vested interests in the prospective beneficiaries eliminates constitutional obstacles. See, *e.g.*, Butterfield v. Sawyer, 187 Ill. 598, 58 N.E. 602 (1900).

[22] The court stated as a general rule: "[W]here no language showing a contrary intent appears . . . a child adopted either before or after the execution of the will, but prior to the death of the testator, where the testator knew of the adoption in ample time to have changed his will so as to exclude such child, if he so desired, such adopted child will be included in the word 'children' when used to designate a class which is to take under the will." 251 N.C. at 562-63, 111 S.E.2d at 840. This statement was made on the basis of prior decisions. Wachovia Bank & Trust Co. v. Green, 239 N.C. 612, 80 S.E.2d 771 (1954); Bradford v. Johnson, 237 N.C. 572, 75 S.E.2d 632 (1953); Smyth v. McKissick, 222 N.C. 644, 24 S.E.2d 621 (1943). The *Smyth* case reasoned that though an adopted child was not (then) constituted by law an heir of one other than the adoptive parent, the adoption legally qualified the adoptee as the "child" of such parent.

Distinctions based on the time the adoption occurred have been criticized. Oler, *supra* note 4, at 912-14. If the testator knew and apparently approved of an adoption prior to the execution of his will, it may be validly inferred that he intended to include the adopted child. But where the devise is to a class a contrary presumption should not obtain merely because the testator dies before any adoption was accomplished.

"children capable of inheriting" and "my grandchildren" in conjunction with the term "children" was interpreted to reveal the intention that only natural children of the testator's sons should share in the devise.

By preliminary construction the words "children capable of inheriting" were equated to legitimate issue of the sons. An earlier case[23] was cited for the proposition that an adopted child is not the issue of its adoptive parents, "issue," according to its technical meaning, being said principally to denote lawfully begotten heirs of the body.[24] As opposed to this, it might have been found that use of the phrase was only a reference to a class whose membership was left to be determined at a future time.[25] It then would follow that the testator, evidencing no specific intent, had only a general intention that any child who qualified as a member of the class should be included as a beneficiary.[26]

The court, following the leaning of earlier cases from several other jurisdictions,[27] stated that "the grandchildren of a testator, nothing else appearing, does not include an adopted child of a son or daughter of the testator."[28] It could be stated with equal force that mere absence of anticipation of adoption is a neutral element, indicating only that the testator had no definite intention regarding the matter.[29] It then would be but a short step to say that the intent of the legislature to give the adopted child the same status and rights as a natural child should not be disregarded.

Questions concerning the right of adopted children to take under a will have produced a legion of cases emanating from virtually every jurisdiction, but their value as authority is slight due to the wide variations in result, depending on the date of the decision and the status

[23] Bradford v. Johnson, 237 N.C. 572, 75 S.E.2d 632 (1953).

[24] Despite the strong connotation of blood relationship carried by the word "issue," it can be forcefully asserted that the prima facie meaning of the word has been altered by the present broad adoption statute. A well reasoned Minnesota opinion reached this result under a statutory provision to the effect that an adopted child should inherit from his adoptive parents or their relatives as if he were the legitimate child of such parents. *In re* Holden's Trust, 207 Minn. 211, 291 N.W. 104 (1940).

[25] See Kales, *supra* note 9, at 172.

[26] In *In re* Collins' Estate, 393 Pa. 195, 142 A.2d 178 (1958), this general reasoning was followed in holding adopted children included under a designation of "descendants." *But see* Oler, *supra* note 4, at 921.

[27] Comer v. Comer, 195 Ga. 79, 23 S.E.2d 420 (1942); Fidelity Union Trust Co. v. Hall, 125 N.J. Eq. 419, 6 A.2d 124 (1939); Dulfon v. Keasbey, 111 N.J. Eq. 223, 162 Atl. 102 (1932); *In re* Conant's Estate, 144 Misc. 743, 259 N.Y. Supp. 885 (Surr. Ct. 1932). Examination of these cases reveals some of the factors which courts formerly have relied upon to exclude adopted children.

A substantial number of cases have applied a judicially evolved presumption to the effect that when a will provides for a child of some person other than the testator, an adopted child will not be included unless other language specifically directs that he shall take. Annot., 70 A.L.R. 621 (1931), supplemented by 144 A.L.R. 670 (1943). *Contra, In re* Holden's Trust, 207 Minn. 211, 291 N.W. 104 (1940).

[28] 251 N.C. at 563, 111 S.E.2d at 840.

[29] *In re* Holden's Trust, 207 Minn. 211, 291 N.W. 104 (1940).

conferred on the adoptee by the particular statutory scheme. Moreover, the problems encountered in construing a will do not lend themselves readily to mere reliance on precedent, since each case brings forward a different set of circumstances.[30] It is significant, however, that the broadening of adoption laws in numerous jurisdictions has been accompanied by greatly increased reliance on the statutory policy, and the line of cases including adopted children within various designated classes has been markedly extended.[31]

The court's analysis in the *Bullock* case perpetuates an uncertainty in this area of the law that the 1955 addition to the adoption statutes apparently was designed to resolve. Naturally it is preferable, where terms of general designation are employed in a will, that the instrument state explicitly whether an adoptee is within the intendment of the expression used. If this is not done, it is submitted that the declared legislative policy in North Carolina should be treated as a strong factor in favor of the inclusion of adopted children.[32]

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[30] 2 PAGE, WILLS § 917, at 799-800 (Lifetime ed. 1941): "An attempt . . . to construe the separate phrases and clauses of the will in accordance with precedents is likely to lead at once to a total disregard of testator's intention, unless it happens that in the two wills taken each as a whole testator's intention is substantially the same, and to be carried out in the same way. Such a coincidence rarely happens except in the introductory clause and the attestation clause of a will."

[31] *E.g.*, Estate of Heard, 49 Cal. 2d 514, 319 P.2d 637 (1957); Breckinridge v. Skillman's Trustee, 330 S.W.2d 726 (Ky. 1959); Hayes v. St. Louis Union Trust Co., 280 S.W.2d 649 (Mo. 1955); St. Louis Union Trust Co. v. Hill, 336 Mo. 17, 76 S.W.2d 685 (1934); *In re* Collins' Estate, 393 Pa. 195, 142 A.2d 178 (1958); Vaughn v. Vaughn, 328 S.W.2d 326 (Civ. App. Tex. 1959).

[32] The weight this recommended constructional preference should be accorded might vary with the presence of other circumstances in a given case. The possibility of fraudulent misuse of adoption proceedings seems to influence judicial consideration of this problem. Oler, *supra* note 4, at 923-28. In this connection it should be remembered that the procedural safeguards of the statutes bring about scrutiny of all the circumstances surrounding any adoption.