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Wills -- Anti-Lapse Statutes -- Adopted Children as Issue

Mack B. Pearsall

> the agent of the father if it is a motorboat instead of an automobile, even though the motorboat be furnished for the pleasure of the son. When one considers contradictions such as this, it becomes apparent that the Family Purpose Doctrine is not as much an extension of the principles of master and servant as an attempt to fix liability on one able to meet it.[12]

Perhaps it would have been better if liability under the doctrine had never been based on the theory of agency. If the courts had frankly stated that public policy required the adoption of the doctrine, they would not be haunted today by the inconsistency of their logic when refusing to apply the doctrine to new instrumentalities. But since social and economic considerations do not require an extension of the doctrine to motorboats, it is submitted that the decision of the North Carolina court in the principal case is correct.

However, it appears inconsistent to insist on legislative action before extending the doctrine to other instrumentalities in light of the fact that the doctrine was first adopted by the court.[13] The court did not require such action when it was faced with the great social impact brought about by the advent and ever increasing use of the automobile. Certainly, if the social and economic demands, once presented by the automobile, should call for an extension of the doctrine to other instrumentalities, the court should not fail to heed this call.

SAMUEL S. WOODLEY, JR.

Wills—Anti-Lapse Statutes—Adopted Children as Issue

In *Headen v. Jackson*[1] testatrix bequeathed all her property, which consisted solely of personalty, to her four children and her granddaughter, share and share alike. One of the children predeceased testatrix and left as her only survivor an adopted child.

After the testatrix's death the question arose whether the adopted child could be substituted as beneficiary in his mother's place and thereby prevent any lapse of the bequest. In a declaratory judgment action to determine the adopted child's rights, the lower court

[12] Sare v. Stetz, 67 Wyo. 55, 74-75, 214 P.2d 486, 493 (1950), citing Note, 16 NOTRE DAME LAW. 394, 396 (1941).

[13] The court in the principle case stated: "In this State [the doctrine] is not the result of legislative action, but is a rule of law adopted by the Court." 254 N.C. at 571, 119 S.E.2d at 787.

[1] 255 N.C. 157, 120 S.E.2d 598 (1961).

concluded that the child was not an "issue" within the meaning of G.S. § 31-42.1[2] which provides,

> Unless a contrary intent is indicated by the will, where a legacy of any interest in personal property not terminable at or before death of the legatee is given to a legatee who predeceases the testator, such legacy does not lapse but passes to such *issue* of the legatee as survive the testator in all cases where the legatee is issue of the testator or would have been a distributee of the testator if the legatee had survived the testator and there had been no will.

On appeal the supreme court held that the adopted child was an "issue" within the meaning of the statute; therefore, the gift to his mother did not lapse.[3] In reaching this decision the court relied primarily upon the portion of the adoption statute which reads, "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 parent or parents . . . ."[4]

The court set out a clear test[5] by which the rights of adopted children should be governed and adhered to the plain-meaning rule,[6]

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[2] N.C. GEN. STAT. § 31-42.1 (Supp. 1961). (Emphasis added.)

[3] The majority of the court seems to have misconstrued the provisions of G.S. § 31-42.1 which provide that there should be no lapse if the bequest was to child or other issue of the testator, or if the legatee would have been a distributee had the testator died intestate. In its opinion, the court indicated that even if the adopted child did not come within the term issue he could still take the share bequeathed his mother because he would have been a distributee of the testator had the testator died intestate. A careful reading of the statute discloses that this provision is applicable only to the original legatee and not to the person to be substituted. This fact was pointed out by the dissent.

[4] N.C. GEN. STAT. § 48-23(a) (Supp. 1961).

[5] "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 the adoption?' If lawyers and courts will look to this plain language of the statute, and avoid making exceptions not made in this statutory statement, persons adopting children in North Carolina can legally realize what they have hoped for, namely that the child they adopt will become their child, theirs fully, just as if he had been born to them, and without any exceptions and qualifications imposed by law to thwart their purpose." *A Survey of Statutory Changes in North Carolina in 1955,* 33 N.C.L. REV. 521, 522 (1955), quoted with approval in the principal case. 255 N.C. at 159, 120 S.E.2d at 599-600.

[6] "[I]f, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it

in concluding that the statute left no room for interpretation other than that the adopted child was meant to be included within the term "issue" as found in the statute.

The result reached by our court was certainly salutary and it does not appear to be out of line with what other jurisdictions have done when faced with the same problem. A review of those jurisdictions having the term "issue" in their anti-lapse statutes indicates that four have allowed the adopted child to be included;[7] three have not;[8] and in twelve the question has never arisen.[9] Thus, the *Headen* case aligns North Carolina with the majority of those jurisdictions which have decided this precise question.

This interpretation also seems to be in accord with the general view today that an adopted child should be included within the terms child,[10] descendant,[11] or heir,[12] found in anti-lapse statutes.

For many years, however, the view was that the adopted child

must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application." Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 202-03 (1819).

[7] Flynn v. Bredbeck, 147 Ohio St. 49, 68 N.E.2d 75 (1946); Industrial Trust Co. v. Taylor, 69 R.I. 153, 32 A.2d 269 (1943); Craft v. Blass, 8 Tenn. App. 498 (1928); *In re* Holcombe's Estate, 259 Wis. 642, 49 N.W.2d 914 (1951).

[8] McLeod v. Andrews, 303 Ky. 46, 196 S.W.2d 473 (Ct. App. 1946); Arnold v. Helmer, 327 Mass. 722, 100 N.E.2d 886 (1951); *In re* Russell's Estate, 284 Pa. 164, 130 Atl. 319 (1925).

[9] Colorado, Connecticut, Delaware, Georgia, Kansas, Michigan, Minnesota, Nebraska, South Carolina, Vermont, Virginia and West Virginia.

[10] Dean v. Smith, 195 Ark. 614, 113 S.W.2d 485 (1938); *In re* McEwan's Estate, 128 N.J. Eq. 140, 15 A.2d 340 (Prerogative Ct. 1940); Smallwood v. Smallwood, 121 N.J. Eq. 126, 186 Atl. 775 (Ct. Ch. 1936); *In re* Carleton's Will, 3 Misc. 2d 677, 151 N.Y.S.2d 338 (Surr. Ct. 1956); *In re* Horvath's Estate, 155 Misc. 734, 279 N.Y. Supp. 189 (Surr. Ct. 1935); *In re* Foster's Estate, 108 Misc. 604, 177 N.Y. Supp. 827 (Surr. Ct. 1919). *Contra,* Crawford v. Arends, 351 Mo. 1100, 176 S.W.2d 1 (1943); *In re* Martin's Will, 133 Misc. 80, 230 N.Y. Supp. 873 (Surr. Ct. 1928), holding the adopted child did not qualify; however, in the case of *In re* Walter's Estate, 270 N.Y. 201, 200 N.E. 786 (1936), the court said that the holding was inconsistent with its views and did not meet its approval. See generally Mechem, *Some Problems Arising Under Anti-Lapse Statutes,* 19 IOWA L. REV. 1, 5-6 (1933).

[11] *In re* Tibbetts' Estate, 48 Cal. App. 2d 177, 119 P.2d 368 (Dist. Ct. App. 1941); *In re* Moore's Estate, 7 Cal. App. 2d 722, 47 P.2d 533 (Dist. Ct. App. 1935); *In re* Harmount's Estate, 336 Ill. App. 322, 83 N.E.2d 756 (1949); Warren v. Prescott, 84 Me. 483, 24 Atl. 948 (1892); Hoellinger v. Molzhon, 77 N.D. 108, 41 N.W.2d 217 (1950); *In re* Buell's Estate, 167 Ore. 295, 117 P.2d 832 (1941); See generally Annot., 19 A.L.R.2d 1159 (1951). *Contra,* Raunch v. Metz, 212 S.W. 357 (Mo. 1919).

[12] Clark v. Clark, 76 N.H. 551, 85 Atl. 758 (1913).

should not be included within any of these terms.[13] The principal reason for the earlier result seems to have been the concept that adoption created a kinship only between the parties; therefore, the adopted child could not inherit from the collateral relatives of the adoptive parents.[14] Some courts, however, refused to adopt this rationale on the ground that this limitation on the child's inheritance was applicable only to intestacy.[15] Others concluded that the child did not seek to take by representation, but rather by the anti-lapse statute itself which created in the child an original right to take.[16]

If successful in meeting the limited inheritance argument, a court construing the term issue would perhaps be confronted with the problem that the blood relationship, which the term seems to connote, cannot be artificially created by statute.[17] The jurisdictions[18] which now include the adopted child within the term issue appear to have

[13] See Gammons v. Gammons, 212 Mass. 454, 99 N.E. 95 (1912) (issue); Raunch v. Metz, 212 S.W. 357 (Mo. 1919) (lineal descendants); *In re* Martin's Will, 133 Misc. 80, 230 N.Y. Supp. 734 (Surr. Ct.), *aff'd*, 224 App. Div. 873, 230 N.Y. Supp. 873 (1928) (child); Phillips v. McConica, 59 Ohio St. 1, 51 N.E. 445 (1898) (issue); *In re* Russell's Estate, 284 Pa. 164, 130 Atl. 319 (1925) (issue).

[14] This argument would no longer appear to be tenable under modern adoption statutes, which have equated the adopted and natural child with respect to the lineal and collateral relatives of the adoptive parents. For an excellent comparative study of inheritance rights of adopted children in all American jurisdictions, see Note, 25 BROOKLYN L. REV. 231, 242-46 (1959). See generally for the North Carolina view Hanft, *Thwarting Adoptions*, 19 N.C.L. REV. 127, 149-51 (1941).

[15] *In re* Moore's Estate, 7 Cal. App. 2d 722, 47 P.2d 533 (Dist. Ct. App. 1935) (lineal descendants); *In re* Foster's Estate, 108 Misc. 604, 177 N.Y. Supp. 827 (Surr. Ct. 1919) (child or descendant). *Contra, In re* Russell's Estate, 284 Pa. 164, 130 Atl. 319 (1925) (issue). The court here held that because the decedent had died testate, the status conferred upon the adopted child under intestate circumstances could not be used to bring the child within the term "issue" in the anti-lapse statute.

[16] *In re* Harmount's Estate, 336 Ill. App. 322, 83 N.E.2d 756 (1949) (descendant); Warren v. Prescott, 84 Me. 483, 24 Atl. 948 (1892) (lineal descendants); Hoellinger v. Molzhon, 77 N.D. 108, 41 N.W.2d 217 (1950) (lineal descendant).

[17] Crawford v. Arends, 351 Mo. 1100, 176 S.W.2d 1 (1943) (lineal descendants); Phillips v. McConica, 59 Ohio St. 1, 51 N.E. 445 (1898) (issue). The dissenting opinion in the *Headen* case argued that "issue" in its ordinary meaning meant a blood relationship existed. *Accord,* Barton v. Campbell, 245 N.C. 395, 95 S.E.2d 914 (1957); Bradford v. Johnson, 237 N.C. 572, 75 S.E.2d 632 (1953).

[18] Flynn v. Bredbeck, 147 Ohio St. 49, 68 N.E.2d 75 (1946), *overruling* Phillips v. McConica, 59 Ohio St. 1, 51 N.E. 445 (1898), which has arisen under an earlier adoption statute; Harrison v. Hillegas, 13 Ohio Op. 523 (P. Ct. 1939); Graves v. Graves, 155 N.E.2d 540 (Ohio P. Ct. 1956); Industrial Trust Co. v. Taylor, 69 R.I. 153, 32 A.2d 269 (1943); Craft v. Blass, 8 Tenn. App. 498 (1928); *In re* Holcombe's Estates, 259 Wis. 642, 49 N.W.2d 914 (1951).

abandoned strict adherence to the common law contruction of that term. Evidently they have concluded that legislatures have power to fix the legal status of individuals and the manner in which they shall be treated with respect to the devolution of property.

Taking cognizance of the legislature's power in this respect, courts faced with the question of the inclusion of adopted children under anti-lapse statutes have relied upon adoption statutes to determine what status has been bestowed upon such children. Once status has been determined, the courts then look to the anti-lapse statute to determine if the child has the status required by that statute. If it is determined that the adoption statute equates the natural and adopted child in all respects, the courts conclude that the adopted child must be allowed the same privilege of being substituted for the predeceasing beneficiary as would a natural child.[19] Courts following this procedure to determine an adopted child's rights to substitution necessarily consider legislative intent. In so doing, however, they do not limit their investigation solely to the intent behind the use of the particular term in the anti-lapse statute. Rather they construe the legislative intent in the adoption statute in conjunction with the use of the particular term used in the anti-lapse statute to determine what individuals were intended to be included therein.[20]

The majority in the *Headen* case adhered to the above approach by first determining the adopted child's status under the adoption statute and applying this determination to the anti-lapse statute. Thus, the court refused to draw an arbitrary line of distinction between the adopted and natural child when the legislature's express language was to the effect that no discrimination should exist. This type of judicial attitude would seem to be clearly in accord with the legislative intent evidenced in the adoption statute;[21] the purpose of adoption was to give the adoptive parents a child that would be a duplicate in all respects to a child which perhaps they

[19] *E.g.*, Flynn v. Bredbeck, 147 Ohio St. 49, 68 N.E.2d 75 (1946); Industrial Trust Co. v. Taylor, *supra* note 18; *In re* Holcombe's Estate, *supra* note 18. *Contra*, Arnold v. Helmer, 327 Mass. 722, 100 N.E.2d 886 (1951); Gammons v. Gammons, 212 Mass 454, 99 N.E. 95 (1912); *In re* Russell's Estate, 284 Pa. 164, 130 Atl. 319 (1925). These cases were decided on the basis that the adoption created a relation solely between the parties to the adoption or that the adoption statute did not sufficiently spell out that the adopted and natural child were to be equals in all respects.

[20] *Cf.* Craft v. Blass, 8 Tenn. App. 498 (1928) (the two statutes being *in pari materia* must be read together).

[21] N.C. GEN. STAT. § 48-23 (Supp. 1961).

could not naturally bear. This desired equivalence cannot be achieved if the courts draw a line of distinction between the adopted and natural child in the present situation.

It is hoped that the court will continue to apply the test set out in the *Headen* case whenever the rights of an adopted child are in question.[22] However, in order to eliminate any further need for judicial interpretation on the subject, it is submitted that the legislature incorporate this test into the adoption statute.

Such action would be a clear indication that the legislature intended to include an adopted child within the term issue whenever used by it in any statute. It is doubtful whether the court would force this construction of the term when found in a will.[23] Fear of trespassing on the testator's intent would be a logical basis for refusing to construe the term to include an adopted child in such case. If this fear be a deterrent, there are yet two other alternatives which might solve the problem.

The simplest of the two would be to replace the term "issue," now in the anti-lapse statute, with the term "child." It would appear that the problem could be solved by this change in view of the express language in the present adoption statute to the effect that the relation of parent and child is created by the adoption,[24] and recent cases holding that an adopted child comes within the term

[22] Notwithstanding the fact that the decision in the *Headen* case was five to two, the dissenting Justices argued that past decisions of the court had concluded that as far as defining the term issue in will cases the term meant lawfully begotten heirs only. *Accord,* Barton v. Campbell, 245 N.C. 395, 95 S.E.2d 914 (1957); Bradford v. Johnson, 237 N.C. 572, 75 S.E.2d 632 (1953). They further argued that since there had been a recent change in the adoption statutes but no corresponding change in the anti-lapse statute the legislature had not intended the adopted child to be allowed the benefit of the latter.

[23] In view of relatively late cases holding that the term issue in a will does not include an adopted child, Barton v. Campbell, *supra* note 22, and Bradford v. Johnson, *supra* note 22, it seems doubtful that the *Headen* decision will affect the term in will cases. In both of the above cases the court concluded that, as found in a will, the term issue in its natural and ordinary meaning meant lawfully begotten heirs of the body and that, notwithstanding the fact an adopted child could inherit by, through and from its adoptive parents, adoption could create only a legal relation and not one by blood. The *Headen* case dealt solely with the legislative intent behind the term in a statute and was in no way concerned with the intent of a testator. In an analogous situation the Wisconsin Supreme Court, having previously held that an adopted child came within the term issue as used in the anti-lapse statute, *In re* Holcombe's Estate, 259 Wis. 642, 49 N.W.2d 914 (1951), refused to include an adopted child within the same term found in a will. *In re* Breese's Estate, 7 Wis. 2d 422, 96 N.W.2d 712 (1959).

[24] N.C. GEN. STAT. § 48-23(a) (Supp. 1961).

children found in a will.[25] Alternatively, an amendment could be made to the present anti-lapse statute which would provide that an adopted child is to be considered within the term "issue" as used therein. In making such a change, the legislature would merely indulge the presumption that the testator would have desired the adopted child to receive equal treatment with the natural child of the original beneficiary. In view of the fact that the anti-lapse statute has as its basis a legislative presumption[26] that the testator would have made provision for the predeceasing beneficiary's issue had he known of the beneficiary's death, indulgence of this further presumption would not appear to be out of line with what has already been done.

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[25] *E.g.*, Bullock v. Bullock, 251 N.C. 559, 111 S.E.2d 837 (1960); Wachovia Bank & Trust Co. v. Green, 239 N.C. 612, 80 S.E.2d 771 (1954).

[26] "These statutes are said to be based upon the presumption that testator would have made provision for certain relatives of the deceased beneficiary, if his intention [*sic*] had been called to the death of the beneficiary, and he had had the opportunity to make such provision." 4 PAGE, WILLS § 1422, at 176 (Lifetime ed. 1941).