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Wills-Term "Children" as Including Adopted Children

Wills—Term "Children" as Including Adopted Children. Will directed that nephews and nieces take property after death of testator's widow and that "children" of any beneficiary predeceasing widow should take parent's share. A nephew, who died after death of widow, had adopted two children, one before and one after making of testator's will, on advice of testator, who knew that nephew and nephew's wife could not have natural children. Held, such grandnephew and grandniece by adoption are entitled to take under will, since presumption that testator who, in will, provides for own "child" or "children," includes adopted child, while testator who provides for "child" or "children" of another does not include adopted child of other person, is rebutted by extraneous circumstances.[1]

Evidence heard by the trial court conclusively established that Thomas G. H. Porter, adoptive father to appellant children, was the nephew of testator and died after the death of testator's wife. The Appellate Court sets out this fact in its opinion. Obviously then, since the will made provision for the grandnephews or grandnieces only in the instance of their parent predeceasing testator's widow, the adopted children here should not have taken under the will, but rather by descent. A condition precedent to the grandnephews or grandnieces taking under the will was not fulfilled. The nephew, Thomas G. H. Porter, being alive at the time of the death of the widow of the testator should have taken under the express terms of the will. His adopted children then, on his death, would take by descent under the terms of the Indiana statute conferring on the adopted child the right of inheritance from the adopting person.[2] The court in the instant case, however, entirely disregards this condition precedent to provision for the appellants, as it permits them to take under the will. Proceeding on the mistaken assumption that the will in fact provided for the "children" of Thomas G. H. Porter the court devotes its attention to the interpretation of this provision without regard to the unsatisfied condition of the nephew predeceasing testator's widow. The opinion of the court in this matter, however, merits some comment.

The primary meaning of "children" is the immediate legitimate offspring of the person indicated as parent.[3] The word "child" or "children" used in a

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14 Commonwealth v. Wotton (1909), 87 N. E. 202, 201 Mass. 81.

1 Beck et al. v. Dickinson et al. (1935), 192 N. E. 899.

2 Burns Indiana Statutes (1933), Sec. 3-109.

3 Pugh v. Pugh (1886), 105 Ind. 552, 5 N. E. 673; Duncan v. De Yampert (1913), 182 Ala. 528, 62 So. 673; Toucher v. Hawkins (1924), 158 Ga. 482, 123 S. E. 618; Arnold v. Alden (1898), 173 Ill. 229, 50 N. E. 704; Mullaney v. Monahan (1919), 232 Mass. 279, 122 N. E. 387; Wylie v. Lockwood (1881), 86 N. Y. 291; In re List's Estates (1925), 283 Pa. 255, 129 Atl. 64.

will, however, is necessarily latently ambiguous. In the field of latent ambiguities a subjective standard is the basis for the results there reached by way of construction. Whatever the technical rules of presumption may be, such rules are rebuttable, and apply in any event only where an ambiguity is in fact presented.[4] Parol evidence is admissible to explain such latent ambiguity, to prove what the testator really intended, and finally, the testator's subjective intention controls;[5] the word "children" means to the courts exactly what it meant to the testator; the mental picture the testator had is the one the court uses.

The intent of the testator then is to be determined not alone by the language of the will, but also by the condition of the testator's family and estate and any other extraneous circumstances surrounding the testator when the will was executed.[6] The court in the instant case correctly sets out and applies this universally accepted principle, modifying the language of Casper v. Helvie,[7] which failed to include extraneous circumstances as a source for determining the intent of the testator for purposes of rebutting presumptions as to the use in wills of the term "children." However, the court goes on in a dictum to restate the presumption adopted in the Casper Case that when one makes provision for his own child or children in his will, he will be deemed to have included an adopted child or children, but when he makes provision in his will for a child or children of some person other than himself, he will be deemed not to have included an adopted child or children of such other person.

How strong the necessity of the case, or the necessary implications arising out of the facts and circumstances surrounding the will must be in order to extend the primary meaning of "children" is a proposition upon which in the abstract form of statement the courts do not fully agree.[8] It is better presented in the concrete by a discussion of the meanings which the word may assume where adopted children are concerned. It should be noted that a statute conferring on the adopted child the right of inheritance from the adopting person[9] is not material to this immediate problem.[10] In Indiana under the rule of the Casper Case as restated in the instant case a gift to a

4 Gavit, "Indiana Law, Future Interests, Wills, Descent," pp. 65-66.

5 Waters v. Selleck (1930), 201 Ind. 593, 170 N. E. 20; Nading v. Elliott (1894), 137 Ind. 261, 36 N. E. 695; Mulvane v. Rude (1896), 146 Ind. 476, 45 N. E. 659; Brookover v. Branyan (1916), 185 Ind. 1, 112 N. E. 769; McClen v. Lehker (1919), 70 Ind. App. 185, 115 N. E. 789; Hall v. Curd (1932), 350 Ill. 23, 182 N. E. 799; In re Martin's Will (1931), 255 N. Y. 248, 174 N. E. 643; Conway v. Shea (1933), 183 N. E. 717; Greenleaf on Evidence (16th Ed.), pp. 416-417.

6 Skinner v. Spann (1911), 175 Ind. 672, 93 N. E. 1061; McCoy v. Houck (1912), 180 Ind. 634, 99 N. E. 97; Steiglitz v. Migatz (1914), 182 Ind. 549, 105 N. E. 465; Nelson v. Nelson (1904), 36 Ind. App. 331, 75 N. E. 679; Sigler v. Shelly (1914), 56 Ind. App. 685, 105 N. E. 403; Brookover v. Branyan (1916), 185 Ind. 1, 112 N. E. 769; In re Mitchell's Will (1914), 157 Wis. 327, 147 N. W. 332; La Rocque v. Martin (1931), 344 Ill. 522, 176 N. E. 734; Stearns v. Inhabitants of Brookline (1914), 219 Mass. 238, 107 N. E. 57; In re Thompson (1916), 217 N. Y. 111, 111 N. E. 762; Greenleaf on Evidence (16th Ed.), pp. 416-417.

7 (1924) 83 Ind. App. 116, 146 N. E. 123.

8 Day v. Webler (1919), 93 Conn. 308, 105 Atl. 618; Arnold v. Alden (1898), 173 Ill. 229, 50 N. E. 704; Cummings v. Plummer (1893), 94 Ind. 403; Ward v. Cooper (1892), 69 Miss. 789, 13 So. 827; In re King (1916), 217 N. Y. 358, 111 N. E. 1060; Hunt's Estate (1890), 133 Pa. 260, 19 Atl. 548; Runyon v. Mills (1920), 86 W. Va. 388, 103 S. E. 112; Page on Wills, vol. 1, No. 897, pp. 1502-1503.

9 Burn's Indiana Statutes, 1933, Sec. 3-109.

10 Russell v. Russell (1888), 84 Ala. 48, 3 So. 900; Casper v. Helvie (1924), 83 Ind. App. 166, 146 N. E. 123; Eureka Life Ins. Co. v. Geis (1913), 121 Md. 196, 88 Atl. 158; Russell v. Musson (1927), 240 Mich. 631, 216 N. W. 428; Melek v. Curators of University of Mo. (1923), 213 Mo. App. 572, 250 S. W. 614; Stout v. Cook (1910), 77 N. J. Eq. 153, 75 Atl. 583; Matter of Hopkins (1905), 92 N. Y. S. 463, 102 App. Div. 458; Lichter v. Thiers (1909), 139 Wis. 481, 121 N. W. 153.

"child" of one other than the testator prima facie means his own child and not an adopted child. This presumption has had a considerable following in the cases[11] and has been applied both where such designated person had not adopted the child before the execution of the will,[12] and where such designated person had adopted a child before the will was made.[13] The same rule was applied in re Yates' Estate[14] where the designated person was a woman childless and too old to bear children. Conversely, if the gift is to a "child" of the testator, it is said that it prima facie includes an adopted child.[15] The reason for this distinction is not apparent. As a practical matter the writer has observed throughout the Indiana cases and those of most other jurisdictions raising a question as to the meaning of "child" or "children" where an adopted child is concerned that the court will include the adopted child or not, depending on whether the testator knew of the adoption when he made the will.[16] If any distinction should be made, it would seem that "child" might include an adopted child, whether adopted by the testator or by another, if the testator knew of the adoption when he made the will, and otherwise not.[17] Certainly knowledge of the testator as to the adoption and approval thereof is to be considered in ascertaining the intention.[18]

The court in the instant case properly set out the substance of the subjective standard necessary to construction in the field of latent ambiguities, though it would seem that the court has given lip service to a presumption having no value or foundation in reason. The decision, however, should be without significance since it is based entirely on a mistaken assumption of fact.

C. Z. B.

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[11] Smith v. Thomas (1925), 317 Ill. 150, 147 N. E. 788; In re Woodcock (1907), 103 Me. 214, 68 Atl. 821; Wilder v. Wilder (1917), 116 Me. 389, 102 Atl. 110; Life Ins. Co. v. Geis (1913), 121 Md. 196, 88 Atl. 158; Blodgett v. Stowell (1905), 189 Mass. 142, 75 N. E. 138; Hutchins v. Browne (1925), 252 Mass. 423, 147 N. E. 899; Parker v. Carpenter (1915), 77 N. H. 453, 92 Atl. 955; In re Yates' Estate (1924), 281 Pa. 178, 126 Atl. 254.

[12] Hutchins v. Browne (1925), 252 Mass. 423, 147 N. E. 899; In re Estate of Puterbaugh (1918), 261 Pa. 235, 104 Atl. 601; Lichter v. Thiers (1909), 139 Wis. 481, 121 N. W. 153.

[13] In re Yates' Estate (1924), 281 Pa. 178, 126 Atl. 254.

[14] (1924) 281 Pa. 178, 126 Atl. 254.

[15] Casper v. Helvie (1924), 83 Ind. App. 166, 146 N. E. 123; Wilder v. Wilder (1917), 116 Me. 389, 102 Atl. 110.

[16] Bray v. Miles (1899), 23 Ind. App. 432, 55 N. E. 510 (In this case the child was adopted before the testator's death and took under the will).

Nickerson v. Hoover (1917), 70 Ind. App. 343, 115 N. E. 588 (In this case the child was adopted after the testator's death and did not take under the will).

Casper v. Helvie (1924), 83 Ind. App. 166, 146 N. E. 123 (In this case the child was adopted after the testator's death and did not take under the will).

See also Kohler's Estate (1901), 199 Pa. 455, 49 Atl. 286; Munie v. Gruenwald (1919), 289 Ill. 468, 124 N. E. 605; In re Truman (1905), 261 Pa. 235, 104 Atl. 601.

[17] Page on Wills, vol. 1, No. 900, pp. 1504-1505.

[18] Mooney v. Tolles (1930), 111 Conn. 1, 149 Atl. 515.

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