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Decedents' Estates and Trusts—Trust Disposition, Not Ambiguous, Not Construed to Include After-Adopted Children

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to find that grandchildren included more remote descendants. The Court reasoned that where the language is clear and unambiguous there must be a clear showing of unmistakeable intent to the contrary to raise a construction problem.

The three dissenting judges stated that the intent as found in the whole will was controlling and that there did appear an overall stirpital intent which was contrary to the limitation over to "my grandchildren then living." The dissent, accordingly, would have allowed the descendants of the deceased grandchildren to share with the grandchildren who survived the life tenant.

P. D. C.

TRUST DISPOSITION, NOT AMBIGUOUS, NOT CONSTRUED TO INCLUDE AFTER-ADOPTED CHILDREN

In *In re Ricks' Trust*,[17] the Court of Appeals construed a provision of Section 115 of the Domestic Relations Law as restricting the over-all purpose of the section; that of enlarging on the rights of adopted children.

The action was for construction of a trust agreement. The agreement provided for the income from the trust to go to James Ricks during his life, then to his descendants during a secondary measuring life, and the remainder to his descendants. At the time the trust was created in 1950 James Ricks had only natural born children. Subsequently he adopted children, thus giving rise to the question of whether the adopted children are entitled to share in the trust income during the secondary measuring life along with the natural born children.

The Appellate Division held that they were not so entitled.[18] In general, a limitation in favor of "issue" or "descendants" will be construed to include only persons who have a blood relationship to the ancestor.[19] Only when the instrument itself, or certain extraneous facts show contrary intent, will the words be held to include adopted children. In this case the word "descendants" is used in the same manner in other clauses of the agreement, and this, along with provisions for distribution *per stirpes*, reflects concern only with regard to the blood lines. The Appellate Division noted that

> It has been consistently held in similar circumstances, where a child has been adopted after the death of the testator, that the adopted child does not fall within the class of persons designated as "issue" or "descendants" in the will.[20]

The Appellate Division also distinguished the present case from *In re*

17. 10 N.Y.2d 231, 219 N.Y.S.2d 30 (1961).
18. 12 A.D.2d 395, 212 N.Y.S.2d 548 (1st Dep't 1961).
19. 3 Powell, Real Property 132 (1952); New York Life Ins. & Trust Co. v. Vicle, 161 N.Y. 11, 55 N.E. 311 (1899).
20. Supra note 18 at 397, 212 N.Y.S.2d at 548. See In re Peabody's Will, 17 Misc. 2d 656, 185 N.Y.S.2d 591 (Surr. Ct. 1959); In re Cook's Will, 8 Misc. 2d 103, 165 N.Y.S.2d 806 (Surr. Ct. 1957); In re Hilt's Estate, 5 Misc. 2d 862, 160 N.Y.S.2d 801 (Surr. Ct. 1957), aff'd, 4 A.D.2d 1013, 168 N.Y.S.2d 925 (1st Dep't 1957).

Upjohn's Will[21] and *In re Ward's Will*,[22] upon which appellants relied. In the *Upjohn* case the testator knew of the adoption prior to the making of the will. In the *Ward* case the child was adopted after the will was drafted, but testimony showed that the testatrix favored adopted children generally, had advocated the adoption of children by her daughter, and desired to treat all three of her children equally in disposing of her estate.

The Court of Appeals affirmed the Appellate Division for the reasons which that court stated, and in addition held that since "the language of the instrument directs distribution in the same verbiage which is employed in directing the passing of the remainder at the termination of the trust,"[23] the settlor probably did not intend different meanings to be attached to the same verbiage in different parts of the instrument. Thus, Section 115 of the Domestic Relations Law, paragraph four, which provides that

> As respects the passing and limitation over of real or personal property dependent under the provisions of any instrument on the foster parent dying without heirs, the foster child is not deemed the child of the foster parents so as to defeat the rights of remaindermen,

applies to the trust income during the secondary measuring life as well as to the remainder, and only the natural born children are entitled to share in trust income.

The Court of Appeals, in this decision, has succeeded in narrowing the intended coverage of Section 115, which was designed to broaden the personal and real property rights of adopted children.[24] Indeed, this is the main fault which the dissent finds with the majority opinion.[25]

Judge Fuld, in dissent, argued that the public policy of the state was to enlarge upon, not restrict, the rights of adopted children; that the word "descendants" was not ambiguous in the present instrument since the settlor used it to describe the legal successors of James Ricks, which included adopted children;[26] that if it was ambiguous, the fourth paragraph of Section 115 was not applicable since it was intended to operate only on the contingency of the foster parent dying without heirs and was designed to prevent fraud, neither of which conditions existed here; and that if there was an ambiguity it was resolved by the settlor's affidavit stating that if there had been any adopted children in 1950, or if the question had arisen, she would have included them in the trust as it was not her intention to exclude adopted children. As to the affidavit, the Appellate Division correctly noted that it should only be admitted to resolve an ambiguity,[27] and the court found none. Furthermore, the fact

21. 304 N.Y. 366, 107 N.E.2d 492 (1952).
22. 9 N.Y.2d 722, 214 N.Y.S.2d 340 (1961).
23. Supra note 17 at 234, 219 N.Y.S.2d at 31.
24. Supra note 21 at 373, 107 N.E.2d at 494.
25. Supra note 17 at 234, 219 N.Y.S.2d at 32.
26. N.Y. Dec. Est. Law § 83.
27. 2 Scott, Trusts 1158-1159 (2d ed. 1956); 9 Wigmore, Evidence § 2471 (3d ed. 1940); Annot. 51 A.L.R.2d 820 (1955).

that the settlor states in the affidavit that had the problem arisen in 1950 she would have made provisions in the instrument for adopted children, indicates that the possibility of an adopted child had never occurred to her when the word "descendants" was used.

It seems that except for the affidavit, the dissent's points are well taken. The courts take a step backward when they narrowly construe a statute to arrive at a conclusion opposed to the stated public policy of the state. Given that public policy, the Court should not have enlarged upon a restriction in the statute that was intended to be a limited one. Nor should it have so narrowly construed the word "descendants," for, as the dissent pointed out, a construction more in keeping with public policy was available. Given the decision, however, it appears that it would be wise to consider the possibility of adopted children and make appropriate provisions, when drawing up a will or trust agreement.

T. C. L.

INTEREST OF REMAINDERMAN PREDECEASING LIFE TENANT VESTED SUBJECT TO DIVESTMENT

In *In re Larkin's Will*[28] the Surrogate's Court held that the interest of a remainderman dying prior to the life tenant was divested by his death and his share passed to his children. The Appellate Division reversed, holding that the remainder interest was indefeasibly vested and was not contingent upon the remainderman surviving the life tenant.[29] The Court of Appeals reversed the Appellate Division and reinstated the decree of the Surrogate's Court.[30]

The third paragraph of testator's will bequeathed a life estate to his wife and disposed of the remainder interest in the following language: "I give, devise and bequeath said residence property and the furnishings in the residence thereon, at the death of my said wife, Catherine C. Larkin, to my three sons . . . , share and share alike." The fourth paragraph set up a trust fund for his wife with two of the sons as trustees and provided: "At her death, my said trustees shall divide the securities and balance then remaining in their hands. . . ." The eleventh paragraph stated: "In the event that any of my said sons should die leaving descendants, said descendants shall take the share of any such deceased son, per stirpes and not per capita."

One of the remaindermen predeceased the life tenant survived by a widow and three children. His will provided that his widow was to take his entire estate. The contest is between the widow and one of the children of the remainderman. Under the construction adopted by the Appellate Division the remainder interest became property of the remainderman at the death of the testator and passed to his widow under the terms of his will.

28. 9 N.Y.2d 88, 211 N.Y.S.2d 175 (1961).
29. 11 A.D.2d 596, 200 N.Y.S.2d 565 (3d Dep't 1960).
30. Supra note 28.