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Wills—Right of Illegitimate Child Under Anti Lapse Statute

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RECENT DECISIONS

Law, relates to a tax allocable to the share of the surviving spouse theretofore determined." In re *Peters' Will* 275 App. Div. 950, 89 N. Y. S. 2d 651, 652 (2d Dep't 1949), *affirming*, 88 N. Y. S. 2d 142 (Surr. Ct. 1949). Apparently the First Department has, in the instant case, adopted that statement as a logical resolution of the two statutes.

However, if a testator directs that taxes be paid from the residuary estate, the apportionment statute by its own terms does not apply and the limitation on the widow's maximum share is calculated after deducting taxes on the estate as a whole. In re *Ryan's Will* 280 App. Div. 410, 114 N. Y. S. 2d 1 (1st Dep't 1952).

As the right of election is by definition intended to guarantee the widow a minimum amount regardless of her husband's wishes, it seems anomalous that the testator be allowed to reduce the statutory grant by providing for payment of taxes.

Though the court in the instant case has reached a just result by interpreting "any estate tax" to mean the tax allocable to the widow's share of the estate, it is submitted that the legislature should resolve the conflict with the definition of the *Ryan* case that the same words mean all estate taxes.

Irving Brott

WILLS — RIGHT OF ILLEGITIMATE CHILD UNDER ANTI LAPSE STATUTE

Testator named his sister residuary legatee of his will. She predeceased him leaving as her only survivor a child allegedly born out of wedlock. Testator's two brothers, who are his sole heirs, contend the bequest lapsed and they take by intestacy. *Held*: assuming illegitimacy, such a child is a child within the meaning of the "anti lapse" statute. In re *Anonymous' Estate*, 204 Misc. 1045, 126 N. Y. S. 2d 749 (Surr. Ct. 1953).

Under the laws of intestacy, an illegitimate child may take from his mother providing there are no other lawful issue. N. Y. DECEDENT ESTATE LAW § 83 (13); In re *Anonymous*, 165 Misc. 62, 300 N. Y. Supp. 292 (Surr. Ct. 1937). However he may not take from his father, In re *Vincent's Estate*, 189 Misc. 489, 71 N. Y. S. 2d 165 (Surr. Ct. 1947); nor his mother's collateral relatives either as a direct heir or as a representative. *Matter of Cady*, 257 App. Div. 129, 12 N. Y. S. 2d 750 (3d Dep't 1939), *aff'd*, 281 N. Y. 688, 23 N. E. 2d 18 (1939). On the other hand, an adopted child may take from his foster mother or father even though there are natural children. N. Y. DOMESTIC RELATIONS LAW § 115; but he may not take from the collaterals of his foster parents. *Hopkins v. Hopkins*, 202 App. Div. 606, 195 N. Y. Supp. 605 (4th Dep't 1922), *aff'd*, 236 N. Y. 545; 142 N. E. 277 (1923).

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The "anti lapse" statute provides that when a devise or bequest is made to a child, or decedent, or brother, or sister, of the testator and such legatee or devisee predeceases the testator leaving a child or other descendant the devise or legacy shall not lapse but will vest in such child or descendant of the legatee or devisee, as if such legatee or devisee had survived the testator and had died intestate. N. Y. DECEDENT ESTATE LAW § 29.

The issue before the court in the instant case was whether an illegitimate child is entitled to the benefit of the "anti lapse" statute as a child of a legatee or devisee. An adopted child has been held to be such a child upon the grounds that § 115 of the Domestic Relations Law treats an adopted child as a natural child and in addition such a child would be an heir of his foster parents under the laws of intestacy. *In re Walter's Estate*, 270 N. Y. 201, 200 N. E. 786 (1936).

Petitioners in the instant case argued that since the illegitimate child would be taking from his mother's collaterals the "anti lapse" statute does not apply. The surrogate dismissed this contention by following the reasoning laid down in, *In re Walter's Estate, supra*, and stated that the "anti lapse" statute provides that a child shall inherit ". . . as if such legatee or devisee had survived the testator and died intestate." Here, if the mother had survived the testator and died intestate, the illegitimate child would have been deemed her child or heir since there are no other lawful issue. N. Y. Decedent Estate Law § 83 (13). He therefore concluded that since this illegitimate child would have taken under the laws of intestacy, he comes within the express terms of the "anti lapse" statute and is a child within its meaning. *Accord, Goodwin v. Colby*, 64 N. H. 401, 13 Atl. 866 (1887); *Cherry v. Mitchell*, 108 Ky. 1, 55 S. W. 689 (1900).

It should be noted that by this interpretation the laws of intestacy and the "anti lapse" statute reach different results. If the testator in the instant case had died intestate the illegitimate child could not take his mother's intestate share as her representative, *Matter of Lawer*, 76 Misc. 117, 136 N. Y. Supp. 325, (Surr. Ct. 1912), whereas a lawful child could, N. Y. DECEDENT ESTATE LAW § 83 (6); but because there is a will the illegitimate may now inherit her bequest under the "anti lapse" statute. See *In re Walter's Estate, supra*, where the reasoning of the court leads to a similar result where adopted children are concerned.

It is the opinion of this writer that the mere fact that an illegitimate child may take from his mother by intestacy does not conclusively establish his status as a child within the meaning of the "anti lapse" statute. However, it is submitted that the surrogate reached a proper result by following the reasoning of the *Walter's* case.

Harry T. Dixon