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Adoption: The Need in Montana for a Statute Expressly Defining the Inheritance Rights of Adopted Children

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the beneficiary is any other relation to the testator, or is a stranger to him. The reason for this is obvious; it is only the parent-child issue relation that falls under both the pretermission and anti-lapse statutes.

NORMAN ROBB

ADOPTION: THE NEED IN MONTANA FOR A STATUTE EXPRESSLY DEFINING THE INHERITANCE RIGHTS OF ADOPTED CHILDREN

Although the adoption of children was a thing unknown to the common law, it was a familiar practice under the Roman or civil law, and for this reason our modern statutes of adoption are taken from the latter. These statutes, then, modify the common law rules as to the succession of property whenever a question of adoption arises.[1] Since the statutes conferring adoption are not always clearly defined as to the inheritance rights of the adopted child, the result is that similar statutes are often interpreted differently.[2] In looking to decisions in states having similar statutes to Montana's concerning the inheritance rights of adopted children, the problems which arise under such statutes will be examined under the headings of inheritance *to, through,* and *from* the adopted child.

I. Inheritance to the Adopted Child

It is generally held that an adopted child will succeed by inheritance to the estate of the adopting parent in the same manner as a natural child.[3] In one Montana case which was a proceeding by a collateral relative of the testator to contest his will wherein the testator gave his estate to his adopted daughter, the court said that even if there were not a will, Elizabeth Meyer, being the adopted daughter of Simon Pepin, would succeed to all of his estate under the Statute as against the petitioner or any other collateral heirs.[4] The Statutes which the Court referred to are now R. C. M. 1947, Section 61-134, on the effect of adoption, and R. C. M. 1947, Section 91-403, on the succession to and distribution of estates. Neither of these Statutes define the inheritance

[1]Butterfield v. Sawyer, 187 Ill. 598, 58 N.E. 602 (1900).
[2]ATKINSON, WILLS, § 31, p. 6 (1937).
[3]In re Newman's Estate, 75 Cal. 213, 16 P. 887 (1888); 2 C. J. S. *Adoption* § 63; 1 Am. Jur. *Adoption of Children* § 59; 1 R. C. L. *Adoption of Children* § 29.
[4]In re Pepin's Estate, 53 Mont. 240; 163 P. 104 (1917).

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rights of adopted children, but the courts must still interpret them as to these rights. R. C. M. 1947, Section 61-134 provides:

> "A child when adopted may take the family name of the person adopting. After adoption the two shall sustain towards each other the legal relation of parent and child and have all the rights and be subject to all the duties of that relation."

R. C. M. 1947, Section 91-403 provides for the manner in which estates are distributed when not disposed of by will. It does not expressly mention the rights of adopted children by any provision. Atkinson, in his textbook on Wills has stated,

> "The rights of inheritance, where adoption is concerned, are sometimes clearly defined by the statutes. Often, however, the result is not evident from the statutory wording. In this situation the courts' decisions are influenced by their views as to how far the adopted child should be regarded in the same light as if he were the natural child of the adoptive parent."[5]

As the Montana case cited above is the only decision by our Supreme Court interpreting these Statutes, one cannot with certainty predict the result this Court would reach on other problems as to the adoptee's inheritance rights.

One of the problems that may come before our courts in the future is whether if an adoptee can inherit from his adoptive parents, he can also inherit from his natural parents.

> "An adopted child is, in a legal sense, the child both of its natural and of its adoptive parents, and is not, because of the adoption deprived of its right of inheritance from its natural parents, unless the statute expressly so provides."[6]

In a California case[7] decided under statutes[8] similar to Montana's, that Court held that the adopted child and its adoptive parents inherit from each other to the exclusion of the natural parents, but in a South Dakota decision[9] decided under statutes[10] also similar to Montana's the Court held that an adopted child could inherit from his natural parents as well as its adoptive parents. The South Dakota decision said the Court could not follow *In re Darling's Estate,* cited above, and criticized that decision because

[5] *Supra,* note 2.
[6] 1 R. C. R. *Adoption of Children* § 26; 1 Am. Jur. *Adoption of Children* § 57; Humphries v. Davis, 100 Ind. 274 (1884).
[7] In re Darling's Estate, 173 Cal. 221; 159 P. 606 (1916).
[8] Now, Cal. Civil Code 1949 II § 228, § 229.
[9] Sorenson v. Churchill, 51 S. D. 113; 221 N. W. 488 (1927).
[10] S. D., 1939 § 14.0407.

it allowed the adopted child to inherit from his natural grandparent, when he would not be allowed to inherit from his natural parents.

Other cases present the issue of whether or not an adopted child should be allowed to inherit in a dual capacity when he is adopted by a blood relative. In the recent case of *In re Benner's Estate*[11] and others[12] it has been held that when a child is adopted by a grandparent, the adopted grandchild can take his inheritance in his dual capacity (as a child of its adopting parent, and also by representation as the natural child of its deceased parent) in the absence of a statute forbidding this. There is a strong dissent in the *Benner* case which states that it was not the purpose of the Legislature that an adopted grandchild should ever receive more than a natural child, and also that the giving of a larger share to the adopted grandchild will cause greed and bad relations between the adopted brothers and sisters and the natural children. The dissent further says that because there have been so few appellate court decisions on this subject, neither opinion expressed here represents the weight of authority.

Another question which must be considered is, Can an adopted child inherit from relatives of the adoptive parents? It is the general view that an adoption statute will not be construed to make an adopted child an heir of relatives of the adoptive parent unless there is language in the statute clearly to that effect. In the construction of these statutes, however, there is a difference of opinion, even where the provisions are substantially similar.[13] In the case of *In re Bradley's Estate*,[14] under a statute which provided that the adopted child should be deemed for the purposes of inheritance to be born in lawful wedlock of the adopting parents, it was held that the adopted child could not inherit from a collateral kindred of the adopting parents. The Court's reason for this strict interpretation was that any statute which interrupted the natural course of descent of property (the principle that intestate property should descend to kindred of the blood) should be strictly construed as it contravenes the common law. But in *Denton v. Miller*[15] under a statute which provided that the adopted child was entitled to the same rights of person and property as children or heirs at law of the adopting parent, the Court held the adopted child would take by inheritance the

[11]_____Utah_____, 166 P(2d) 257 (1946).
[12]Wagner v. Varner, 50 Ia. 532 (1879); In re Bartman's Estate, 109 Kan. 87, 198 P. 192 (1921).
[13]38 A. L. R. 8.
[14]In re Bradley's Estate, 38 A. L. R. 1 (1925).
[15]Denton v. Miller, 110 Kan. 292, 203 P. 693 (1922).

same interest in the estate of a collateral relative of the adoptive parent as the natural child of such parent would take. This view has been sustained under relatively modern statutes and cases.[16]

The final question that presents itself under the heading of inheritance to an adopted child is, Can the adopted child inherit from its natural lineal or collateral relatives, excluding the natural parents? In the case of *In re Darling's Estate*[17] the Court allowed an adopted child to inherit from his natural grandparent even though they would not allow him to inherit from his natural parents. The Court stated:

> "So far as we have been able to find there is no decision under statutes anything like ours, to the effect that the adopted child has any right of inheritance as to the ancestors of collateral kindred of the adopting parents, or is deprived by the adoption of any rights of inheritance that he had as to the ancestors and collateral kindred of his parents by blood."

Although this seems to be the prevailing view as most courts will not interfere with the adoptee's right to inherit from his blood relatives unless there is an express statutory provision denying this right, the Court in the *Darling* case interpreted the California adoption statute as denying the adoptee the right to inherit from his natural parents, but as giving him the right to inherit from his natural grandparents. Interpretations like this make it very uncertain as to how the Montana Supreme Court would interpret this problem under a similar statute.

II. Inheritance Through the Adopted Child

It has generally been held that when the adopted child dies before his adoptive parents, the children of the adopted child will inherit their parent's share in the estate of the adopter.[18] In the California case of *In re Hebert's Estate*[19] the Court construed certain Statutes in the Probate Code as allowing the heirs of the decedent's adopted son who predeceased decedent to inherit personalty of the decedent. The Statute the Court construed was enacted after the California cases previously discussed were decided, and Montana does not have a similar statute. This Statute defines the rights of the adopted child as between its natural and adoptive parents but does not define the inheritance rights of

[16]1927 Minn. Stat. § 8630; McCune v. Oldham, 213 Ia. 1221; 240 N.W. 278 (1932); Sutton v. Kummer, 161 Minn. 426, 201 N.W. 925 (1925).
[17]*Supra*, note 7.
[18]In re Webb's Estate, 250 Penn. 179; P5 A. 419 (1925); 2 C. J. S. *Adoption* § 65; ATKINSON, WILLS, § 31, p. 67 (1937).
[19]42 Cal. App. (2nd) 664; 109 P(2nd) 729 (1941).

those who may inherit through the adopted child. It was argued in behalf of the decedent's natural, collateral relatives that the legislature in adopting this section had expressed the entire rights of inheritance of adopted children, and that adopted children could have no rights other than those expressly stated in the section. This argument was not sustained, and the Court implied from this Statute that heirs of adopted children would have rights although these rights were not expressed. However in an Alabama case where the Court discussed this point they said:

> "It is well settled that the right of adoption is purely statutory, and in derogation of the common law, and unless the statute by express provisions or necessary implications confers on the children of an adopted child the right of succession, such children do not inherit from the adopting child."[20]

This is another illustration of the need for express statutory provisions as to these rights.

III. Inheritance from the Adopted Child

> "In the absence of an express statutory provision defining the matter, there is a conflict of authority as to the course of succession upon the death of the adopted children; some hold the estate to vest in the natural kindred, while others hold it to vest in the foster or adoptive parents."[21]

Under the construction given the various state statutes by most courts the adoptive parents of a child dying intestate who leaves surviving him neither a widow, a child, nor a descendant of a child, inherit the estate of the child.[22]

In *Calhoun v. Bryant*[23] the Court, construing statutes on the rights of adopted children, stated that while these statutes did not contain any specific provision as to the right of inheritance, they did provide that, "after adoption the two shall sustain towards each other the relation of parent and child, having all the rights and duties of that relation." From this the Court held that the relation between foster parents and adopted children is the same as that between natural parents and children, and therefore an adoptive parent may inherit real property owned by an adopted child. Also in a Nebraska case[24] under a similar statute the Court held that an adoptive mother, rather than a natural father, was

[20]Meeks v. Cornelius, 224 Ala. 532, 14 So. (2nd) 145 (1943).
[21]2 C. J. S. *Adoption* § 64.
[22]170 A. L. R. 742.
[23]28 S. D. 266, 133 N. W. 266 (1911).
[24]In re Enyart's Estate, 116 Neb. 450; 218 N. W. 89 (1928).

entitled to inherit the state of an adopted child, and the court pointed out that the right conferred by this statute was a reciprocal one dependent upon the relation created by an adoption under the statute and that, since it had been held that an adopted child inherits from an adoptive parent, the converse was likewise true.[25]

In *Appeal of Simmons*[26] the Maine Court construed a Statute which provided that the adopted child should "sustain the same relation to them [the adoptive parents] and to their estate at all times as if born in lawful wedlock," as not bestowing rights of inheritance upon the adopting parents. The Court also stated that the words "relation to them" undoubtedly referred to personal relations—those of custody, obedience, education, and maintenance; and that the words "to their estate" referred to the distribution of the adopting parent's estate to the adopted child, and not the adopted child's estate to the adoptive parents.

Also in a New Jersey case[27] which was decided under a Statute which invested rights of inheritance upon the adopted child from the adopted parent as if the adopted child had been born to them in lawful wedlock, the Court held the adoptive father was not the next of kin of the adopted child, but that the blood relatives were the next of kin. The Court reached this result by the reasoning that the property of an adopted child will descend to his relatives by blood rather than to his relatives by adoption unless the statute by explicit provision or necessary construction excludes the former in favor of the latter.

The above cases are not cited in this comment for their holdings, but they are used to illustrate how the courts interpret adoption statutes when the rights of inheritance of adopted children are not expressly provided for. The South Dakota and Nebraska cases are liberal in their interpretations of statutes which are not well-defined as to the inheritance rights, while the Maine and New Jersey cases are quite strict in their interpretation.

Another point which has confronted the courts is, Do the kindred of the adoptive parents have the right of inheritance from the adopted child? In the case of *Dodson v. Ward*[28] the Court held that relations by blood are entitled to take in preference to the father of the adoptive parent. The Court said:

> "... even though the adoptive parent by virtue of

[25] *Supra*, note 22.
[26] 121 Me. 91; 115 A. 765 (1922).
[27] Heidecamp v. Jersey City etc., 69 N. J. Law 284, 55 A. 239 (1903).
[28] 31 N. M. 54; 240 P. 991 (1925); See also Baker v. Clowser, 158 Ia. 156, 138 N. W. 837 (1912); In re Frazier, 180 Ore. 232, 177 (P(2nd) 254, 170 A. L. R. 729 (1947).

> the statute may inherit from the adopted child by reason of the reciprocal relation of parent and child, yet in the absence of a statute extending the relation further, the co-called reciprocal relation stops there."

The opposite result was reached in *Lanferman v. Venzile*[20] where the Court, construing a statute similar to that in the above case, allowed the kindred (the natural children) of the adoptive father to inherit from the adopted child. However there is a strong dissent in this case which states that the majority of the Court is writing into the Statute an intent which it was never meant to have.

Conclusion

The purpose of this comment has been to illustrate within a limited scope the problems that can arise as to the inheritance rights of adopted children, and to make evident the need for an express statute defining these rights. The wording of R. C. M. Section 61-134, which provides that the adopted child shall have all the rights of the relation of parent and child, has been interpreted by courts in other states having statutes using similar phraseology as not giving the adopted child all of the rights of inheritance that pertain to that relation. Whether or not the Montana Supreme Court will construe this Statute as giving the adopted child all of the inheritance rights of a natural child is not certain.

This uncertainty can probably be most effectively removed by the adoption of Section twenty-seven of the Model Probate Code in Montana. This Section provides:

> "For the purpose of inheritance to, through and from a legally adopted child, such child shall be treated the same as if he were the natural child of his adopting parents, and he shall cease to be treated as the child of his natural parents for purposes of intestate succession."

This Section states clearly the rights of inheritance of the adopted child and of those who will take through and from the adopted child. As the Montana Statute on the effect of adoption was written with the intent that the adopted child should have all of the rights that pertain to the relation of parent and child, the enactment of this section of the Model Probate Code would expressly define those rights in respect to inheritance and so remove considerable uncertainty that will always remain until we

[20] 150 Ky. 751; 150 S. W. 1008 (1912); see also In re Dempster, 247 Mich. 459; 226 N. W. 243 (1929).

get specific decisions on all the points that may arise under the statutes of the traditional type; that process may take many years.

ROBERT J. HOLLAND

ATTRACTIVE NUISANCE IN MONTANA

The *Restatement of the Law of Torts*[1] provides that:

"A possessor of land is subject to liability for bodily harm to young children trespassing thereon caused by a structure or other artificial condition which he maintains upon the land, if

a. the place where the condition is maintained is one upon which the possessor knows or should know that such children are likely to trespass, and

b. the condition is one of which the possessor knows or should know and which he realizes or should realize as involving an unreasonable risk of death or serious bodily harm to such children, and

c. the children because of their youth do not discover the condition or realize the risk involved in intermeddling in it or in coming within the area made dangerous by it, and

d. the utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein."

Students of tort law will note with satisfaction that the Montana Supreme Court evidenced awareness of the implications of this statement in its recent decision of January 16, 1952, *Nichols v. Consolidated Dairies of Lake County.*[2]

The attractive nuisance doctrine traces its origin to an English case decided in 1841, wherein a defendant who left a horse and cart unattended on the street was held liable after a child climbed on the cart and was then thrown off and injured when the horse started suddenly at the urging of another child.[3]

Sioux City and Pacific R. R. Co. v. Stout,[4] decided by the United States Supreme Court in 1873, is generally considered the leading American case on the doctrine,[5] though there appear to

[1] § 339.
[2] .....Mont....., 239 P. (2d) 740 (1952).
[3] Lynch v. Nurdin, 1 Q.B. 29, 113 Eng. Rep. 1041 (1841).
[4] 17 Wall. (U.S.) 657 (1873).
[5] Hudson, *The Turntable Cases in the Federal Courts,* 36 HARV. L. REV. 826 (1922-23).