Kentucky Law Journal

Volume 47 | Issue 1 Article 14

1958

Wills--Gift to Adopted Heirs--Adoption of Wife as Child

Glenn L. Greene Jr.
University of Kentucky

WILLS—GIFT TO ADOPTED HEIRS—ADOPTION OF WIFE AS CHILD—By her will, executed in 1914, Mrs. Luella Graybill set up a trust for her son, Robert, for life. On his death the remainder was to be distributed to Robert's "heirs at law according to the Law of Descent and Distribution in force in Kentucky at the time of his death".[1] Robert married the appellee, Louise W. Graybill in 1922, and less than four months later the testatrix died. In 1941, when Robert was 58 and Louise was 45 years old, Robert adopted his wife "as his legal heir at law and child". Robert died October 28, 1955 without a child having been born to him. Suit was filed by the trustee to have the court declare whether Louise, as Robert's adopted child, or his cousins, as his natural heirs, were entitled to the corpus. The lower court held Robert's wife, as his adopted child, was entitled to the trust estate. Upon appeal, the Court of Appeals of Kentucky *affirmed* (4 to 3). *Bedinger* v. *Graybill's Executor and Trustee,* 302 S.W. 2d 594 (Ky. 1957).

This case is important because it makes a far-reaching extension in the presumption that adopted children are included in a gift to heirs of a designated person. It holds the presumption includes adult persons adopted solely for the purpose of inheritance. It is also interesting because the adopted child was the adoptor's wife. The case turned on two questions, one involving construction, the other involving adoption of the wife by her husband. The first question was, whom did Luella Graybill intend to take the remainder? By the trust instrument it was given to "the heirs at law of my said son, Robert E. Graybill, according to the Law of Descent and Distribution in force in Kentucky at the time of his death". Ordinarily the phrase "heirs at law" is construed as referring to those persons who would inherit the property of the designated ancestor if he died intestate.[2] This means that Robert's widow would take one-half of the trust fund and his collateral kin the other half. In three Kentucky cases, where the gifts were to the heirs of *X* "according to the Kentucky statute of dis-

[1] Robert died in 1955. Under the statute of descent then in force, the order of Robert's heirs was as follows: (1) issue, (2) parents, (3) brothers and sisters and their descendants, (4) grandparents and their descendants, (5) spouse. In 1956, some eight months after Robert's death, the statute was amended by moving the surviving spouse into position (4) and grandparents and their descendants into position (5). KRS 391.010. Thus, if Robert had lived a year longer, his wife would have been entitled to all his property since the other claimants were no closer kin than cousins. The exact problem presented in Graybill can not arise with respect to persons dying after May 18, 1956.

[2] Simes and Smith, The Law of Future Interests (2d ed. 1956), sec. 728; Am. Law Prop., sec. 22.59; Cambron v. Pottinger, 301 Ky. 768, 193 S.W. 2d 472 (1946).

tributions",[3] "under the present statutes of descent in Kentucky",[4] "in accordance with the law laid down by the statutes of the State of Kentucky",[5] the widow of X was held entitled to her intestate share (statutory dower). On the basis of language used in the instrument these cases do not appear to be distinguishable from the case at bar. Thus under orthodox construction and according to prior cases in Kentucky, Robert's widow should be entitled in any event to one-half of the personal property held in trust. This construction and these cases were not, however, mentioned by the court, which for unknown reasons apparently assumed the widow did not take statutory dower in the property.

If the widow, as dowager, is eliminated, then (putting aside for the moment the widow's claim as adopted child) the entire property would pass to the collateral kin of Robert. There is evidence, however, that the testatrix did not intend to include collateral kin within the term "heirs". In 1922 she executed a codicil to her will which provided: "If my son, Robert, dies without heirs, the estate is to be divided between Foreign Missions and Kentucky Mountain School." When "heirs" appears in the phrase "if X die without heirs", the uniform construction is that it means "issue".[6] The reason for this construction is that very few people die without remote collateral kin (although they frequently die without itssue), and thus it is hard to believe that a testator had in mind a gift over only in the event no remote cousins could be found anywhere. This gift over in default of "heirs" indicates the testarix did not have in mind as "heirs" persons more remote than issue,[7] and thus she did not intend for the property to pass under her will to collateral relatives of Robert.

In the case at bar it was assumed by the trial court and the Court of Appeals that the word "heirs" excluded collateral kin. "Doubtless", observed the court, "the testatrix had in mind her son's family or his lineal descendants. This is underlined by the codicil, which was executed thirteen days before her son married."[8] "Family" includes a

[3] Clay v. Clay, 63 Ky. (2 Duv.) 295 (1866).
[4] Lee v. Belknap, 163 Ky. 418, 173 S.W. 1129 (1915).
[5] Vandyke v. Vandyke, 223 Ky. 49, 2 S.W. 2d 1057 (1928).
[6] Simes and Smith, *op. cit. supra* note 2, sec. 730; Prewitt v. Prewitt's Executors, 303 Ky. 772, 199 S.W. 2d 485 (1947).
[7] Because of this interpretation of the word "heirs", the collateral kin had to attack the codicil as too vague to be enforceable. Otherwise they would have had no standing to challenge the wife's claim. The trial court ruled the codicil was too indefinite to be valid, but the Court of Appeals refused to pass on the matter, presumably because it turned the case on the wife-adoption issue.
[8] 302 S.W. 2d at 597. "The point is that the testatrix in this negative manner at least expressed her will that the estate should not go to her son's collateral kin in default of 'heirs'." *Ibid.*

wife, and the court could have stopped right there. Since Robert died without ascendants or descendants, and collateral kin were excluded by construction, the only person who could qualify as an "heir" under the Kentucky statute of descent was his wife. But instead of stopping, the court, like a woman torn between two hats, turned from one construction to the other. Having excluded Robert's collaterals in one paragraph, it did an about-face in the next and included collaterals, then in the following paragraph turned around again to exclude collaterals,[9] then wrote the rest of its opinion on the assumption that collaterals were included. It is hard to reconcile a finding that "heirs" excludes collaterals and a finding that it includes them.[10] It is possible that, in its desire to reach the intriguing problem of wife-as-child, the court did not pay close enough attention to the construction problem and to its inconsistent statements relating thereto.

Assuming that testatrix intended to include collateral kin within the word "heirs", a second construction problem arises. Did she intend to include *adopted* persons as heirs? In 1953 the Kentucky Court of Appeals in *Major* v. *Kammer*[11] held, where there is no evidence of a contrary intent, an adopted child comes within the term "heirs" and will inherit *through* as well as from his adoptive parent. This decision reversed the long-standing presumption that when a gift is made to the heirs of a designated person, adopted children are not included. In *Graybill* three judges dissented, saying *Kammer* should be overruled and the presumption against adopted children being heirs should be resurrected. What the dissenters urge would be, in the opinion of most writers,[12] a step backward, and it would clearly be

[9] In the second paragraph, the court stated by "heirs" the testatrix had "designated whoever might be entitled to her son's estate under the statutes in effect at the time of his death", thus including collaterals at least to the extent of one-half. 302 S.W. 2d at 597. In the third paragraph the court remarked that had Robert "wished, he might have refrained from marriage and permitted the estate to go to the charities as directed in the codicil." *Ibid.* The only explanation of this last remark is that "heirs" does not include collaterals but does include heirs acquired by marriage, i.e. wife and issue.

[10] The only possible way of squaring them would be to say that the court was talking in the first and third paragraphs of the meaning of "heirs" in the codicil, in the second of the meaning of "heirs" in the will, and that the court was construing the word to mean one thing in the codicil and another thing in the will. But this interpretation—of dubious propriety—seems ruled out by the quotation in the text to which footnote 8 is attached. Furthermore, such interpretation raises the question whether a duly executed codicil excluding collateral kin, although unenforceable because too indefinite, revokes any provision in the will for collateral kin. Cf. *In re* Bernard's Settlement, [1916], 1 Ch. 552.

[11] 258 S.W. 2d 506 (Ky. 1953).

[12] See Kuhlmann, Intestate Succession By and From the Adopted Child, 28 Wash. U.L.Q. 221 (1943); Harper, Problems of the Family, 483-484 (1952); Nimis, The Illinois Adoption Law and Its Administration, Social Service Monograph No. 2.

against the weight of modern authority.[13] Nevertheless the dissenters have a point, or more precisely, half a point. To presume that most testators would intend for adopted *children* to take, when the gift is made to the heirs of a designated person, makes sense in the light of the contemporary feeling toward adoption. To presume they would intend for an adopted *adult* to take is quite another matter.[14] The adoption of adults is almost always for purposes of inheritance, not for integrating the adoptee into the family unit, not for creating a parent- child relationship. Indeed, adoption of adults hardly ever crosses the minds of most persons when they think of "adoption", so accustomed are they to thinking of adoption in connection with children. It is also apparent from the wording of the Kentucky adoption statute that the legislature had children in mind. The statute completely integrates the adoptee into the adoptive family and cuts off all legal relations with his natural family. The separate section providing that adults may be adopted with the same legal effect as if they were children conflicts on its face with at least two other statutes (to be pointed out later), and seems to be a not-wholly-thought-through afterthought.

Yet with two sentences the court extended the presumption of the *Kammer* case to include adopted adults. Said the court:

> The Kentucky adoption statute[15] "authorizes any adult person to adopt any person of any age. It, therefore, authorizes any adult person to make for himself an heir, irrespective of age."[16]

[13] Am. Law Prop., sec. 22.59, fn. 9; Meek v. Ames, 177 Kan. 565, 280 P. 2d 957 (1955). Cf. Carpenter v. United States, 168 F. 2d 369 (CA 3, 1948); Woodward v. U.S., 341 U.S. 112 (1951), construing National Service Life Insurance Act to allow inheritance by and from adopted children.

[14] The Kentucky inheritance tax separates legatees into three classes according to their closeness to the testator. KRS 140.070. Class A legatees, who are closest to the testator and pay the least tax, include spouse, parents, natural issue and children adopted during infancy. Persons adopted after infancy are Class C legatees and pay the most tax. This legislative judgment as to the natural objects of a person's bounty is pertinent to establishing presumptions respecting adopted persons. In both cases it is the feeling of most persons towards adoptees that is being sought.

[15] Act of 1940, Ch. 94: "(1) Any adult person who is a resident of Kentucky may petition the county court of the county of his legal domicile for leave to adopt a child or another adult. . . . (2) Any person may be adopted after arriving at the age of twenty-one years as well as children before reaching that age." The current statute, KRS 405.309, is substantially the same. For a discussion of motives in adult adoption, see Strahorn, Adoption in Maryland, 7 Md. L.R. 275 at 276, 283 (1943).

[16] 302 S.W. 2d at 598. The court also cited one case in point, which held a man could adopt a 43 year old woman of no kin and she would inherit through him as his heir. Brock v. Dorman, 339 Mo. 611, 98 S.W. 2d 672 (1936). It is pertinent to note that in this case there was testimony that the adoptee was reared during childhood by the adoptor and his wife and that a parent-child relationship had always existed. Hence the adoption was simply a belated recognition of a parent-child status.

Now this is a neat bundle of deceptive reasoning. The issue is not whether by the adoption statute a person can make an heir for his own property (to which the Court's reasoning applies), but whether the presumption that adopted children are included in a gift to the heirs of a designated person should be extended to cover an adopted adult. This should turn on the court's reading of the public mind respecting the power to send the property to an adult not related by blood nor adopted during infancy, as well as on legislative declarations of policy regarding adoption. With respect to the latter, the inheritance tax statute[17] is as pertinent as the adoption statute.

The consequence of this extension is that where there is a gift to the heirs of a designated person, such person has the power (by going through an adoption proceeding) of selecting the person who will take all or part of the property. In the ordinary case where property is left "to *X* for life, remainder to the heirs of *X*", *X* can send the property on his death to anyone he chooses, provided he has no wife or children. If he has a wife, she will probably get her intestate share (one-half in Kentucky), and *X* will have power to dispose of only one-half. If he has children, the adopted person would only get an equal share with the natural children. But by adoption *X* can entirely eliminate his ancestors and his collaterals. He can adopt, and thereby give the remainder to, an old friend, his mistress, a favorite counsin. In an extreme case he could arrange to sell the value of the remainder to *Y* and adopt *Y* as his heir. Because he can adopt an heir for his own property, does it follow that he should be able to do so with the property of another? Is this what the average or the ordinary or most testators intend? Perhaps not, but such is the effect of the holding.

Construing the words "heirs at law," the court could have given Robert's widow all, one-half or none. The second major issue in this case—which the court need never have reached—involved the startling proposition that a man may adopt his wife as his child. By way of a rule of construction the court had assumed that Luella Graybill intended to include an adopted person within the phrase "heirs at law", and the issue was: is the rule or presumption broad enough to cover a man's wife adopted as his child after marriage? The court held yes. If a man has the power by adoption to appoint the property after his death to any adult, discussed above, there is no reason to exclude the wife from the objects of the power. Adoption of an adult is principally to provide the adoptee with a fictional legal status for inheritance purposes, and it should be possible for the wife (as well as for friends, cousins and mistresses) to have this status.

[17] *Supra* note 13.

However, reasoning from this status to result in other situations, one can pose some rather bizarre questions. The woman is both wife and child. Is the marriage incestuous?[18] Is the husband entitled to claim two dependents on his income tax? If she divorces her husband, is he still liable for her support as a dependent adult child?[19] Since the wife must join in a petition of the husband to adopt a child,[20] is she her own child? If the husband adopts her as his child, and she adopts the husband as her child, is she her own mother and her husband her father and brother? There is no use in carrying these absurdities further. All they do is point up the fact that a person may have the status of child for inheritance purposes but for none other.

In reaching the result that a man can adopt his wife, the court relied on the sweeping breadth of the Kentucky adoption statute: *any* person may adopt *any* person. "The child so adopted shall be deemed for purposes of inheritance and succession and for all other legal consequences and incidents of the natural relation of parents and children. . . ."[21] It seems clear the statute cannot be taken as broadly as it reads. On its face it conflicts with the inheritance tax statute noted above. And the court assumes it does not modify the requirement of consanguinity for an incestuous marriage. Doubtless if wife-adoption became a prevalent practise, other problems than inheritance would arise which would require exceptions to the statute. But as pointed out above, if any other person can by a technical adoption proceeding achieve the status of child *for purpose of inheritance,* there seems no reason to carve an exception in the statute and deny such a privilege to the wife.

It should be noted that the wife's equities may have influenced the court in the *Graybill* case. The husband had a bronchial ailment and died "after a long illness which, in addition to imposing arduous nursing duties on his wife, exhausted in expenses that portion of his mother's estate which he was able to have advanced to him during his lifetime. . . . As the record disclosed . . . many of the relatives on the paternal side voluntarily wrote they wished Louis W. Graybill to have the estate and refused to make any claim therefor; others wrote they were entirely willing to abide by the decision of the Fayette

[18] The court noted that "KRS 402.010 declares to be incestuous only marriages between persons who are of 'kin to each other by consanguinity' in specified degrees." Thus marrying an adopted child not kin by consanguinity is not prohibited. 302 S.W. 2d at 600.

[19] KRS 405.020. And likewise, if he becomes destitute, must she support him as an indigent parent? KRS 405.080.

[20] KRS 199.470.

[21] Carroll's Ky. Stat. (1940 ed.); sec. 331b-8. Cf. the current statute, KRS 199.530(2).

Circuit Court. . . ."[22] Only the distant cousins on the maternal side appealed. Without other resources the amount involved, $64,000, was certainly not more than the widow would need for support.

The result seems to have been equitable and, indeed, since the testatrix excluded collateral kin by her codicil, probably what the testatrix would have wished if she could have been consulted. The only thing disturbing about the decision is the court's placing it on the broad ground that a person may adopt any person he pleases to take a child's share in property given to his heirs. It is believed that such a rule will come to plague the court, particularly when the life tenant leaves first line collaterals (brothers, sisters, nephews, nieces), and the court may exhibit a tendency to find on rather slight evidence an intention on the part of the testator that adopted children not be included when the "adopted child" was not adopted during infancy. Such is the usual fate of a good rule of construction pushed too far.

Glenn L. Greene, Jr.

[22] Appellee's Response to Petition for Rehearing, p. 8. On the other hand it should be noted that this assertion by appellee's counsel was made after the original decision was handed down, and that the case by pre-trial order was submitted for judgment on pleadings, stipulations and exhibits. These did not include any facts relating to the wife's financial need or to her loving and dutiful care of her husband. Any supposition that Louise Graybill had stronger equities in her favor than any other widow was, on the record before the Court, conjectural.