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Dempsey Cox
University of Kentucky

The only evidence tending to show that defendant was negligent was that adduced from the circumstances surrounding the accident *before* the material facts were revealed. The testimony of the defendant and his companion, corroborated by the very physical facts of the accident, namely, that the car remained stationary for over thirty minutes, completely erased any circumstantial evidence of defendant's negligence. It is, therefore, earnestly believed that the decision rendered herein was ill-advised, that the trial court's handling of the case was proper, and that its decision should have been affirmed.[35]

DELMER ISON

ADOPTED CHILD AS "LEGAL HEIR" UNDER ADOPTIVE GRANDPARENT'S WILL – ISAACS v. MANNING

The issue in *Isaacs* v. *Manning* was whether an adopted daughter of a beneficiary could qualify as heir of the beneficiary under a testamentary trust.[1] The will left an estate in trust for the children of the testator, with the following provision:

> "Upon the death of any of my five children the trust as to a fifth part of my estate allotted to the one so dying shall cease and the estate held for such child shall be paid to the legal heirs of such deceased child."[2]

The following statute was in effect at the testator s death:

> Carroll's Kentucky Statutes, section 2071, "Any person may state that he is desirous of adopting a person and making him capable of inheriting as heir-at-law of such petitioner; and [the] court shall have authority to make an order declaring such person heir-at-law of such petitioner, and as such capable of inheriting as though such person were the child of such petitioner. "[3]

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64 Mich. 676, — 31 N.W 578, 581 (1887), has ably set forth the rule in regard to probabilities: "The jury are not warranted in finding a fact established by [even] a greater probability, unless, also, the evidence satisfied them that the fact exists. The conclusion that it exists may be drawn from a preponderance of probabilities in its favor, but the probabilities must be such that the conclusion may be and is drawn, or it is not proved." In the instant case, the fact to be proved was one of negligence. The finding by the trial court that there was no evidence tending to prove that the fact of negligence existed, supported by the valued testimony of the defendant and his companion corroborated by the physical facts of the accident, certainly warranted the conclusion that the fact of negligence did not exist and the "probability," if any, was removed, leaving nothing in the scales to be weighed by the jury against the defendant's evidence.

[35] Upon retrying the case, a verdict was returned for the plaintiff. No mention of this was made in the case, but it would not be unfair, I think, to regard the opinion of the appellate court as one in which the court sought either to lay the loss upon the insurance company or to encourage the carrying of insurance in the future by the defendant. In either event, the effect of such a policy can only lead to a higher rate of insurance for automobile owners.

[1] 312 Ky. 326, 227 S.W 2d 418 (1950).

[2] *Id.* at 326, 227 S.W 2d at 419.

[3] CARROLL s KENTUCKY STATUTES secs. 2071-2072b, repealed in 1940; KY. REV. STAT. sections 405.140-405.240, provisions for adoption, repealed in 1946;

The facts were that the claimant was legally adopted and the heir-at-law of her adoptive parent. The adoption occurred over a year before the execution of the will and over five years before the death of the testator. The court reasonably assumed because of the time lapse that the testator had received notice of the adoption. The term "legal heirs" was used, without the addition of any expression of intent in the will or from the circumstances to limit as to blood. The Court of Appeals held that the adopted child, although the natural child of another beneficiary,[4] was entitled to take as the legal heir of the adoptive parent, being a member of the class designated in the will.

The appellees cited the case of *Woods* v. *Crump*[5] as authority for denying the existence of any claim in the adopted child as a legal heir. That decision declared that a deed of gift, conveying a life estate to a daughter, with remainder to her "heirs" in fee simple, did not include as her heir one whom she adopted forty years after the execution of the deed. This case was distinguished by the court in the *Manning* case. The distinguishing grounds stated were the factual situation and the use of the single term "heirs." Clearly, the facts of the two cases are distinguishable for in the one there was prior adoption; in the other, a subsequent adoption. One other factor was mentioned in the opinion of the principal case. The *Woods* case, though involving the construction of a deed, gratuitously discussed an adopted child's right to inherit from others than the adoptive parents. The *Manning* case was concerned with a direct bequest under a will and not intestacy. However, a factual distinguishment does not express the tenor of the *Manning* case. The only difference in terminology was the use of "legal heirs" in the principal case as compared with the word "heirs" in the *Woods* case. Yet, the court made reference to an artificial construction of the word "heirs" and refused to extend the interpretation advanced in the *Woods* case.

In most states the adopted child inherits from the adoptive parents,[6] but gen-

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KY. REV. STAT. sections 405.250-405.280, adoption, repealed in 1950, effective June 15, 1950; KY. REV. STAT. (Supp.) sections 199.470-199.590, adopted in 1950, effective June 15, 1950.

The current statute applicable to this problem is KY. *REV. STAT. (Supp.)* sec. 199.530 which provides:

(1) After the entry of the order of adoption provided for in KRS 199.520, the court shall enter a judgment of adoption in which judgment the name of the child shall be changed to conform with the prayer of the petition, and the judgment, including the caption, shall contain only the adopted name of the child, without any reference whatsoever to its former name.

(2) Any child adopted pursuant to the provisions of KRS 199.470 to 199.520 shall be considered, for the purposes of inheritance and succession and for all other legal considerations, the natural, legitimate child of the parents adopting it. A child so adopted shall be freed from all legal obligations of maintenance and obedience to its natural parents, except that where the adopting parent of the child is married to the natural parent of the child, the relation of the child to that natural parent shall not in any way be altered by the adoption and the rights and obligations of the natural parent and the adopting parent to the child shall be the same as if the child were the natural child of both the natural parent and the adopting parent. The judgment of adoption shall include the applicable provisions of this subsection.

[4] Although such facts may result in unequal distribution, it was not a controlling consideration as to the issue of the case.

[5] 283 Ky 675, 142 S.W 2d 680 (1940). This decision was criticized as adopting an artificial construction of the term "heirs" in 29 KY. L. J. 481 (1940-41).

[6] Bilderback v. Clark, 106 Kan. 737, 189 P 977 (1920); Sanderson v. Adams, 278 Ky. 24, 128 S.W 2d 223 (1939). Lanferman v. Vanzile, 150 Ky. 751, 150

erally not from the ancestors and collateral kindred of the predeceased adoptive parents. The prevailing view seems to be that the adoption is personal and creates no relationship of law between the child and the adoptive parents kindred.[8]

Isaacs v. *Manning* seems contra to *Copeland* v. *State Bank & Trust Co.*[9] The will in the latter case created a life trust for the testator's children, and provided that if a child died without "children" the proportion of the fund being enjoyed should revert and pass as a gift over. Upon the death of a daughter, the proportionate share reverted to the estate and an adopted child of the daughter received nothing. The Court of Appeals stated that the term "heirs" and words of similar import in a will refer to natural and blood relationships and do not include an adopted child in the absence of circumstances clearly expressing such an intent. It is to be noted that the word "children" rather than "heirs" or "legal heirs" was the term under construction. The adoption in the *Copeland* case was subsequent to the execution of the will and the death of the testator; whereas, the principal case involved a previously adopted child. These facts weaken the conclusion of a contra holding for they permit the cases to be distinguished.

Construction of the adopted child's right to take under a will does not involve the right of inheritance, but concerns the testator's intention with respect to sharing in his estate. The courts tend to limit the word "heirs" in a will so as to exclude adopted children, except where there is a clear expression of intent to include an adopted child.[10] This intent may, naturally, be inferred from the language of the will or from the circumstances of the case. Quite often the language of a gift over following a life estate or a trust fund for life may be sufficiently definite to include adopted children of the life tenant or beneficiary. This result is reached even in face of the prevailing rule to exclude adopted children. The comments of the Restatement of Property express a view favoring the inclusion of adopted

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S.W 1008 (1912); Merritt v. Morton, 143 Ky. 133, 136 S.W 133 (1911); Atchison v. Atchison's Ex'rs., 89 Ky., 488, 12 S.W 942 (1890); Clarkson v. Biley, 185 Va. 82, 38 S.E. 2d 22 (1946).

In re Pence's Estate, 117 Cal. App. 323, 4 P 2d 202 (1931); Woods v. Crump, 283 Ky. 675, 142 S.W 2d 680 (1940); Sanderson v. Adams, 278 Ky. 24, 128 S.W 2d 223 (1939); Merritt v. Morton, 143 Ky. 133, 136 S.W 133 (1911); Taylor v. Taylor, 162 Tenn. 482, 40 S.W 2d 393 (1931); In re Estate of Bradley, 185 Wis. 393, 201 N.W 973 (1925); 1 AM. JUR. ADOPTION, p. 662. The following cases have permitted such inheritance, either directly or by representation: McCune v. Oldham, 213 Iowa 1221, 240 N.W 678 (1932); Denton v. Miller, 110 Kan. 292, 203 P 693 (1922); Stearns v. Allen, 183 Mass. 404, 67 N.E. 349 (1903); In re Waddell's Estate, 131 Wash. 566, 230 P. 822 (1924). "Previous to the enactment of KRS 405.200, the law was well settled in this jurisdiction that an adopted child inherits from his foster parent, but does not inherit through such parent from the latter's kindred." Eversole v. Kentucky River Coal Corp., 298 Ky. 321, 182 S.W 2d 392 (1944). The 1940 adoption act was construed as enacted to change the existing law as it affected the succession rights of adopted children. The Kentucky Court held under the 1940 adoption act that adopted children could inherit through the adoptive parents. Kolb v. Ruhl's Adm'r., 303 Ky. 604, 198 S.W 2d 326 (1946).

[8] Merritt v. Morton, 143 Ky. 133, 136 S.W 133 (1911).

[9] 300 Ky. 432, 188 S.W 2d 1017 (1945).

[10] Comer v. Comer, 195 Ga. 79, 23 S.E. 2d 420 (1942); Beck v. Dickinson, 99 Ind. App. 463, 192 N.E. 899 (1934); Cook v. Underwood, 209 Iowa 641, 228 N.W 629 (1930); *see* Copeland v. State Bank & Trust Co., 300 Ky. at 444, 188 S.W 2d at 1023.

children as heirs.[11] This view is positive in that adoption does not justify exclusion in the absence of intent to limit heirs to blood relations.

Although the Kentucky Court of Appeals, in the latest interpretation of the word "heirs" has apparently adopted a liberal attitude, the decision falls squarely within the scope of the general rule construing "heirs" in reference to an adopted child taking under a will. The factual situation of *Isaacs* v. *Manning* would support the conclusion that a reasonable interpretation shows the existence of the necessary intent to include the adopted child.

DEMPSEY COX

IS A LESSOR OF MOTOR VEHICLES A CONTRACT CARRIER?

An increasing number of manufacturers and shippers who are located a greater distance from their consumers than their competitors face the realization that the soaring cost of transportation has materially weakened their competitive position. Others find that new markets have opened up for their products in places which are served by the existing carriers only indirectly or not at all with the result that the new markets are to them no markets at all. These and other situations have resulted in a diligent search by the shipper for a cheaper, more rapid, and more direct conveyance of his products.

One way in which shippers have avoided these difficulties has been the transportation of their goods by some motor carrier under contract to haul goods according to the route, schedule, and rate which is most suitable for their specific type of hauling. A route can thus be worked out which is more direct and a schedule drawn in accordance with production plans. The effect of this is a quicker turnover with less need for a large amount of working capital. The one thing that deters every shipper from accomplishing this seemingly Utopian result is the fact that every interstate contract carrier must obtain a permit from the Interstate Commerce Commission before he will be allowed to operate over a new route or haul a new type of goods.[1] The chances of the manufacturer being able to find an operating contract carrier with the authority to transport the particular goods over the particular route wanted are comparatively nil. He must then find a carrier willing to transport his goods according to his specifications. Once this is done, the carrier must file an application to secure a permit allowing him to so transport the goods. Due in part, no doubt, to the opposition of nearly every common carrier which operates over any part of the proposed route and the overcrowded condition of our highways, the Commission has become increasingly reluctant to issue any new permits.[2]

The shipper may avoid the necessity of complying with these Governmental controls which are incident to obtaining permits for contract carriers and still retain most of the benefits which are concomitant with that type of shipping by using his own trucks and men. This method of transportation brings with it, however, the necessity of buying trucks and repair equipment which might be too great a

[11] Restatement, Property, sec. 305, comment Y (1940).

[1] 49 Stat. 552 (1935), 49 U.S.C. sec. 309(a) (1946).
49 Stat. 552 (1935), 49 U.S.C. sec. 309(b) (1946).

[2] From October 31, 1948, to October 31, 1949, the Interstate Commerce Commission withdrew 186 more permits than it granted. Sixty-Third Annual Report of the Interstate Commerce Commission 104 (1949).