Testamentary Revocation by Adoption of a Child

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TESTAMENTARY REVOCATION BY ADOPTION OF A CHILD

Children, as commonly considered under statutes providing for revocation of wills in certain instances, fall into three classes: (a) pretermitted (those born at the time but unmentioned in the will); (b) those born after the execution of the will and unprovided for; and (c) posthumous children. Are adopted children to be classed with these?

In dealing with the problem of adoption there are naturally both the adoption statutes and the testamentary revocation statutes to be considered. The typical statute on adoption declares the adopted child shall have all the rights and privileges of a natural born child. Some enter into greater detail than others, but the apparent intent was generally to place the adopted child on a par with a natural born child, at least so far as concerns the proprietary rights and privileges of the adopters and the adopted as well as other rights and privileges growing out of the domestic relation.

If the wills statute provides for revocation either entire or pro tanto by the subsequent birth of children, does that statute apply to adopted children who have been pretermitted or adopted after the execution of the will? There are two conflicting lines of opinion in the matter. One group of decisions declares that the wills statute must be construed strictly as applying only to natural born children, emphasizing the word “birth” found in the statute or the word “issue.” The court will not interpolate “or the adoption of a child” into the statute.

1 Under such statutes as that of Alabama, which simply make an adopted child capable of inheriting, an adopted child, unmentioned in the will, would not be entitled to the rights of a natural born child. See Russell v. Russell, 84 Ala. 48, 3 So. 900 (1888); Carroll’s Kentucky Statutes (1930), sec. 2071.

2 Commassi’s Estate, 107 Cal. 1, 40 P. 15 (1895); Davis v. Fogle, 124 Ind. 41, 23 N. E. 860 (1890); Suc. of McRacken, 162 La. 443, 110 So. 645 (1927); Evans v. Evans, 188 S. W. 815 (Tex. Civ. App. 1916).

3 Davis v. Fogle, supra, n. 2. On the other hand, in Indiana, where the problem of revocation is not involved, an adopted child may be considered a child of the deceased, see Bray v. Miles, infra, n. 16.
There is another line of authority, however, in which the courts find it necessary to give full effect to the adoption statute. The statute declares its purpose is to place the adopted child in the exact position in all respects with a natural born child, save that it recognizes that the legislature cannot create the fact of birth. Thus, if the adopted child has all the rights of a natural child, he has the right to have the will, which fails to mention him, disregarded so far as he is concerned and revoked *pro tanto*.

Under such a construction the fact that the adopted child lost its foster parents by death and was readopted by others does not prevent a revocation of the will of the first adoptive parent because of the later adoption. The law creates a capacity in the adopted child which is the exact equivalent of a natural born child. So subsequent marriage and adoption of a child is sufficient as a substitute for the common law rule of marriage and birth, to revoke the entire will. If, however, provision has been made in the will for the child before it was adopted, there is no revocation, which rule again corresponds to the rule applicable to the birth of a child.

A good many statutes provide for *pro tanto* revocation only, i.e., that an omitted child shall take such share as he would have taken if the parent had died intestate. Others, again, declare that there is a revocation of the entire will in such a case, but the former alternative seems a far more appropriate provision.

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4 *In re Hebb's Estate*, 134 Wash. 424, 235 P. 974 (1925); *In re Roderick's Estate*, 291 Pac. 325 (Wash. 1930).


6 *Glascott v. Bragg*, 111 Wis. 605, 87 N. W. 353 (1901).


8 *Flanigan v. Howard*, 200 Ill. 396, 65 N. E. 782 (1902); *Dreyer v. Dreyer*, supra, n. 5; *Rendell's Estate*, 244 Mich. 194, 221 N. W. 116, 27 Mich. L. Rev. 357 (1928); *Remmers v. Remmers*, 239 S. W. 509 (Mo. 1922); *Bourne v. Dorney*, 171 N. Y. S. 264 (App. D. 1918). So where the foster parent has agreed not to disinherit the child, an attempted disinherition by will has no effect and the child will take as if testator had left no child, *In re Schmidt's Will*, 273 P. 21 (Col. 1928).

9 *Hilpire v. Claude*, 109 Ia. 159, 80 N. W. 332, 77 A. S. R. 524 (1899); *Surman v. Surman*, 21 Ohio App. 434, 153 N. E. 873 (1916). In Pennsylvania, which disfavors the adopted child, the former statute provided for *pro tanto* revocation as to a pretermitted child, while the statute of 1920 causes an entire revocation. *Goldstein v. Hammell*, 236
The position taken in New York may be the subject of debate. It was held some years ago in the surrogate court that an adopted child was indeed in the same position as a natural born child but that neither, on being omitted from the will, could claim a revocation under the statute. In a later case, after a change in the statute, the Appellate Division held the revocation applied as well to adopted children as to natural born children and that the former will was pro tanto revoked by the adoption of a child. In a subsequent case in the surrogate court it was held that the adoption of a child by a sister of testatrix, who was a legatee, did not prevent the lapse of the legacy when the sister predeceased the testatrix, leaving such adopted child living. Thus, in Re Martin’s Will, the statute provided that if a beneficiary under a will shall predecease testator, there shall be no lapse, if such beneficiary should leave issue surviving the testator. Testatrix made a gift to her sister, who predeceased testatrix, leaving a surviving adopted child. It was held that a lapse was not avoided. While the problem is more or less analogous to the problem of revocation considered above, the decision does not necessarily determine the other issue. The anti-lapse statute is not on all fours with a revocation statute. This case, however, is opposed to the decision of an earlier surrogate case.

If the child were adopted before the execution of the will occurred, in the states last mentioned above, he is like any other pretermitted heir and the will is either revoked pro tanto or entirely.

Pa. 305, 84 A. 772 (1912); In re Boyd’s Estate, 270 Pa. 504, 113 A. 691 (1921).

Gregory’s Estate, 37 N. Y. S. 925 (Sur. 1896).

Bowen v. Dorney, supra, n. 8.


Thomas v. Maloney, 142 Mo. App. 193, 126 S. W. 522 (1910) (What amounted to specific performance of a promise to adopt was enforced in order that the promisee might take as a pretermitted child); Remmers v. Remmers, supra, n. 8 (pretermitted adopted child held to be the equivalent of "issue" and the rule that there is a pro tanto revocation is one of law and not of intent); In re Book’s Will, 90 N. J. Eq. 549, 107 A. 435 (1919). (An unusual statute, 4 Comp. Stat.
Assume that by statute the failure of a parent to make mention of the issue of a deceased child in his will causes a pro tanto revocation of the will of the grandparents as to such issue. It seems correct to say that if the only child of such deceased child is one he has adopted, there would be the same result as if such child were the issue of the deceased child. So where the will divides the estate between the children equally and provides that in case of the death of any one or more of them, the share of those dying shall pass to their children, an adopted child should take the share of one who predeceased the testator. Where a statute declares, in effect, that if a spouse dies without leaving issue and intestate and such decedent has received any property by descent from the spouse who predeceased such decedent, such property shall go back to the brothers and sisters of the predeceased spouse; the adoption of a child prevents the property thus received from going back. The adopted child has therefore the capacity of "issue." So where O makes a voluntary conveyance of personalty in trust for the use of his children and in case he should die without issue then over, the child adopted thereafter prevents the gift over from taking effect and is equivalent to "issue." On the whole, where the statute purports to create in an adopted child the same capacity with reference to its adoptive parent that a natural child has to its parent, it may be said that a majority of the courts give effect to such intention and refuse by strict construction of the revocation statute, to repudiate the express terms of the adoption statute. Other courts have felt impressed with the argument that revocation by such a circumstance, being outside the express letter of the revocation statute, could not be thus accomplished. But cases where the adoption

(1910), N. J., p. 5865, declares, in effect, that if testator makes a will having at the time no living issue and does not provide for prospective issue or mention such prospective issue, then if he later dies leaving issue or a wife enceinte, the will shall be void. Held, will not revoked because at time it was executed he had an adopted child.) See also cases mentioned in n. 4, supra.

15 In re Hebb's Estate, supra, n. 4.
16 Bray v. Miles, 23 Ind. App. 432, 54 N. E. 446, 55 N. E. 510 (1899). (But see the rule laid down in Martin's Will, supra, n. 12, where the adoption of a child did not prevent the lapsing of a legacy).
statute is not so all inclusive, simply giving, for example, inheritable capacity, should not be used as arguments against revocation where the more inclusive statute is involved.

**Legitimation**

The effect of the acknowledgment and legitimation of illegitimate children is in general similar in principle to that of adoption and in those states where the adoption statute does not confer upon adopted children the capacity of natural born children, probably legitimation also does not. One case has been found where the question of revocation has been directly raised by legitimation, and the holding was against revocation. On the other hand, where full effect, including right to have parent's will revoked, is given to the adoption statute similar effect is probably given to legitimation. In a number of cases we may draw inferences regarding revocation where the problem of conflict of laws arises. Thus, for example, in England legitimation elsewhere did not create capacity to inherit land at common law or rather under the statute of Merton, and that rule has been followed in some American states. This is probably no longer the law there.

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19 *Davis v. King*, 89 N. C. 441 (1883); *Padelford's Estate*, 190 Pa. St. 35, 42 A. 381 (1901) (A child born after wife's adultery and repudiated by testator in his will, was acknowledged by him in a compromise agreement, in which he was to provide for its support. Such acknowledgment did not revoke the will, which was republished after the acknowledgment. It may be observed, however, that the will expressly mentioned and repudiated her).

20 *Caballero's Suc. v. Executor*, 24 La. Ann. 573 (1872) (T lived in concubinage with a woman of color in a state which forbade intermarriage. He removed from there to Spain and the two intermarried there and their children, being legitimated, became forced heirs of the testator, whose will had been executed prior to the legitimation).


22 *Brown v. Finley*, 157 Ala. 424, 47 So. 577 (1908) (Child adopted in Louisiana, where parents were domiciled, not an heir to land in Alabama). See also *Lingen v. Lingen*, 45 Ala. 410 (1871) (Father and mother domiciled in Alabama when child was begotten, went to France where child was born and was acknowledged by the father there and legitimated, but parents never intermarried. It does not clearly appear whether either of the parents were domiciled in France at time of legitimation. Held, foreign legitimation ineffective in Alabama, unless law of Alabama is complied with which requires intermarriage of the parents also and relies on English rule); see also *Hood v. McGhee*, 237 U. S. 611 (1915) (Full faith and credit clause does not require Alabama to recognize as heir of land a child adopted by parents domiciled
A number of states hold that the status of an adopted or legitimated child created under foreign laws will be given full effect under the law of the forum. We may infer therefore that revocation of a will would also be one of the consequences of such recognition where such child was pretermitted, or adopted or legitimated after the will had been executed.24

THE ROMAN LAW

The adoption concept, as also that of legitimation, was not one existing in the common law, but it came to us by 'adaptation' from the Roman law;25 and some brief comparisons of the effect of adoption upon the revocation of wills in Roman Law with the effect in our law may be of interest.26

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24 Administration of Estates Act (1925), s. 45, sub. s. 1; s. 46, sub. s. 1, Legitimacy Act of 1926, 5 C. 60; 43 Law Q. Rev. 22 (1927). (Offspring of slave marriage legitimated in Georgia. "Statute not" in harmony with our system upon the capacity of persons to inherit real estate," confers no such power. Result may be accounted for on dissimilarity of statutes and state policy). See Compiled Laws of Florida (1927), sec. 5493, which gives inheritance capacity in Florida to a child adopted in another state; Barnum v. Barnum, 42 Md. 251, 307 (1875) (Statute of Arkansas, where parents were domiciled, legitimated claimant. Act has no extra-territorial effect. This case distinguished on the facts and the declaration as to extra-territorial effect overruled by Halloway v. Safe Deposit Co., 151 Md. 321, 134 A. 1497 (1926). The legitimation under the law of Nevada made such child an heir in Maryland), Re Donald (1928), 4 D. L. R. 181 (Sask.) (Child adopted in state of Washington before Adoption Act of Saskatchewan, not an heir there).

25 Woodward's Appeal, 87 Conn. 152, 70 A. 453 (1908). (Adoption in Wisconsin creates power to inherit), Shack v. Hawe, 137 La. 249, 114 N. W. 916 (N. Y. adoption creates capacity to inherit), James v. James, 35 Wash. 655, 77, 1082 (1904) (Adoption in Iowa given full effect), Caldwell's Succession, 114 La. 195, 38 So. 140 (1905). See appendix for further list of authorities on this subject.

26 See the Law of Adoption by J. F. Brosnan, 22 Col. L. Rev. 232 (1922).

Some readily available authorities on Roman Law are as follows: Buckland, "A Textbook of Roman Law" (1921), pp. 121-8; I. Roby, "Roman Private Law" (1903), pp. 55-62; Willis and Oliver on Roman Law (1829), passim.; Sandar's Justinian's Inst., p. 45; Inst. of Gaius, bk. 2, Sec. 156; Davis v. Fogle, supra, n. 2; Sohm's Institutes of Roman Law (Translated by Ledlie, 3rd ed. (1907), pp. 439-431, 501-578;
In the first place, prior to Justinian the Roman law distinguished between the adoption of a stranger and the adoption of a grandchild (child of an unemancipated son). In the former case, the adoption created a *suus heres* and the will became void (*ruptum*), whereas the adopted grandchild was already a *suus heres* and no such effect resulted. Since our concept of the *patria potestas* radically differs, the two adoptions would generally be indistinguishable in effect.

The Roman law also distinguished between the adoption of an infant and the adoption of one who is *sui juris*, whereas we generally do not.\(^27\) This grows out of the fundamental difference in the purpose of adoption between the two systems, which it is not the present purpose to discuss. The former in Roman law was called *adoptio* and the latter *adrogatio*. There was a difference also in the procedure which emphasized the distinction between the two. The latter was one means by which universal suggestion might be accomplished.

A will in Roman law was revoked by the advent of a *postumus heres*, unless he were expressly mentioned in the will in advance and disinherited. Thus, a will might become void (*irritum*) by the death of a *suus heres*, who left children who thus would become *sui heredes* of the testator. At common law, birth of children after the making of the will or after the death of the testator or even the passing over of a child, leaving him unmentioned in the will, did not revoke a will unless along with such fact there was the additional fact of subsequent marriage.

In Roman law a testator's own will was invalidated through the adoption of himself by another because a person in *manu* did not have testamentary power. Such a result would scarcely occur in our law. In addition to the fact that such adoption is

\(^{27}\) But see *First Nat. Bank v. Mott*, 133 So. 78 (Fla. 1931) (Adult married woman cannot be adopted by another so as to entitle adopted person to inherit. Child means a minor. Here the adoption took place under the law of Connecticut and Florida Statutes, Sec. 3624, recognizes a foreign adoption). For variations in the requirements of American statutes, such as that the adopter must be older than the adopted person and similar requirements, see the Law of Adoption by J. F. Brosnan, 22 Col. L. Rev. 332 (1922).
not a statutory ground of revocation, there is usually statutory provision regarding the age limit below which wills cannot be validly executed by the testator.

Again, in classical Roman law the adopted person lost all rights of inheritance from his blood relatives as he no longer belonged to the familia of his blood father. This was changed by the legislation of Justinian. Our statutes on adoption have uniformly been construed to permit an adopted person to inherit directly from his blood parents and also from his adoptive parents, but they have not been construed generally to authorize inheritance in the collateral lines.

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APPENDIX

ARTICLES AND NOTES ON ADOPTION AND LEGITIMATION

6 Can. Bar Rev. 729 (1928), Wills—Standards of Interpretation, Adopted Child, discusses Re Donald (1928), 4 D. L. R. 187 (Sask.). Court feels bound by Burnefel v. Burnefel, 20 Sask. L. R. 407 (1926), 2 D. L. R. 123, which holds that a child adopted in a state which gives him the privileges of one born in lawful wedlock is not entitled to be a distributee in another jurisdiction. Note points out this distinction: The right as a distributee depends upon the statute of the place where the property is, but in the p. c. the language of the will, when properly interpreted, includes this child and should be a question of construction of a will rather than the application of the statute; 45 Harv. L. Rev. 890-896 (1932), Effect of Statutes Altering the Position of Illegitimate Children in the Judicial Construction of Wills; 9 Ill. L. Rev. 149-174 (1914), Rights of Adopted Children, by A. M. Kales; 31 W. Va. L. Rev. 251 (1925), The Status of Legislation and Adoption, by E. L. Dodrill; 22 Col. L. Rev. 332-342 (1922), The Law of Adoption, by J. F. Brosnan (Discusses the Roman law origin of adoption, the peculiarities of statutes in various states, and advocates a uniform statute on adoption); 22 Mich. L. Rev. 637, 651 (1924), Goodrich, Legitimation and Adoption in the Conflict of Laws; 14 Cal. L. Rev. 420 (1926), Legitimation Through Acts, Acknowledgment, Who are Parents of Legitimated Child?; 5 Can. Bar Rev. 186 (1927), The Legitimation and Adoption Act; 34 Law Quart. Rev. 402-411 (1918), The Passing of the Bastard Eigne, by Charles Sweet; 36 Law Quart. Rev. 255-267 (1920), Legitimation by Subsequent Marriage, by J. Dundas White; 43 Harv. L. Rev. 652 (1930), Adoption—Rights of Child in Estate of One Who Made Invalid Contract to Adopt Him.


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