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# Wills and Estates

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donated would be substantially altered if the fund were divided between the contending organizations.

The court stated that the rules governing charitable trusts were applicable. The court recognized the judicial doctrine of *cy pres* and said that where it becomes impracticable or impossible to administer a charitable trust according to its terms, a court of equity will assume jurisdiction and, if a general charitable intent is found, direct the trustees to administer the same to a purpose as nearly like that of the original purpose as possible. The doctrine was not applicable in the present case because of the specific intent of the donors.

This case illustrates that the Arkansas Supreme Court strictly construes the purpose for which public donations are made, and if there is any deviation from the stated original purpose, then, in all probability, it will be required that the funds be returned to the donors. Such a strict construction would not be practicable, however, in the event a list of the donors with the amount of each gift was not readily available.

*Donald E. Snyder.*

## WILLS AND ESTATES

### Twice Adopted Child — Rights of Inheritance

*Arkansas.* In *Hawkins v. Hawkins*,[1] a case of first impression, the Arkansas court joined the majority camp in holding that a twice adopted child remains an heir and inherits from its first adoptive parents. The question in the case was whether or not the brothers and sisters of Jacob B. Hawkins, the first adoptive parent of Clyde Eugene Brown, had sufficient interest to maintain a suit to contest the validity of Hawkins' will. The decision was that

[1] .....Ark....., 236 S. W. 2d 733 (1951).

Clyde Eugene Brown was the legal heir and the contest could not proceed to a valid judgment unless he was a party to the suit.

The opinion discusses the two views that prevail in the United States and concludes that the greater number of authorities and the sounder reasoning support the holding that a twice adopted child does inherit from its first adoptive parent. The basis for the minority view is explained in the *Hawkins* opinion:

> . . . [W]hen, by the second adoption, the first adoptive parents were relieved of all legal responsibility for the care and education of the child it would logically follow that the child would lose its right of inheritance.[2]

The *Hawkins* opinion rejects this reasoning and states:

> We cannot agree that this is sound logic and submit that it is contrary to the reason for the well established rule that an adopted child does inherit from its natural parents . . . , because a natural parent is likewise not legally obligated to support and educate a child which has been adopted.[3]

Support for this analogy is found in other decisions. In *Roberts v. Roberts*[4] the Supreme Court of Minnesota decided that an adoption did not take away the right of the child to inherit from its natural parents. There is no more reason why a second adoption should take away the right of inheritance conferred by the first adoption. A Washington case, In Re *Egley*,[5] concludes: "The rights of an adopted child are fixed at the time of the adoption and can no more be taken away than the rights of a child born in lawful wedlock." The view accepted by the Arkansas court has been expressed in many other states.[6]

The Arkansas Supreme Court dealt with the problem in the principal case in a wise and learned fashion. Its opinion, which is

[2] 236 S. W. 2d at 735, citing *In re* Talley's Estate, 188 Okla. 338, 109 P. 2d 495 (1951).

[3] *Ibid.*

[4] 160 Minn. 140, 199 N. W. 581 (1924).

[5] 16 Wash. 2d 681, 134 P. 2d 943, 946, 145 A. L. R. 821 (1943).

[6] The court cites several jurisdictions that hold in accord. Holmes v. Curl, 189 Iowa 246, 178 N. W. 406 (1920); Patterson v. Browning, 146 Ind. 160, 44 N. E. 993 (1896); *In re* Sutton's Estate, 161 Minn. 426, 201 N. W. 925 (1925). See authorities collected in 2 C. J. S., *Descent and Distribution*, p. 456.

not of undue length, recognizes the split of authority on the point, states the strongest arguments offered by each side, and properly bases its decision upon the reasoning that seems most impressive and appears to be in accord with the weight of authority. The court is to be commended for its approach to the question. It apparently relied upon the strong public policy expressed by the Arkansas Legislature in extending every right to the adoptive parents and to the adopted child "as if the child had been born to the parents in legal wedlock".[7]

### HOLOGRAPHIC WILL — PLACE OF SIGNATURE .....

*Arkansas.* In *Weems v. Smith*[8] the majority of the Supreme Court of Arkansas followed a desire to effectuate the intent of the testator rather than to adhere strictly and literally to the Statute of Wills. The question was whether or not the testator had signed at the end of the will. The court suggested that this was one of the multitude of cases which must be determined largely in the light of its own facts.

Testator committed suicide immediately after preparing a writing wholly in his own handwriting expressing his appreciation for services rendered to him as an invalid by Sallie, his sister-in-law, who had been his loyal and faithful housekeeper for many years. The writing, so far as material, was as follows:

> . . . Sallie god Bless you
> for being so Sweet & good To
> Me this house blong to you
> and every Sidney Smith (Signed)
> every thing in it
> Dear Sallie you was so sweet and good To Me

As can be seen, the words "everything in it" (referring to the house) appeared after the signature, as also did the concluding statement "Dear Sallie you was so sweet and good To me."

The majority of the court held the instrument to be a valid holo-

[7] ARK. STAT. 1947 ANN. § 56-109.
[8] .....Ark.....,  237 S. W. 2d 880 (1951).

graphic will of Smith, written with a sense of impending death and having other testamentary qualities. It was obvious to the majority, as it must be to anyone who looks at the instrument as a whole, that the words "everything in it" appearing under the signature, form a part of the sentence before the signature. Thus, there was no such intervening space between the provisions of the will to suggest that the instrument was not signed at the end of the testamentary disposition.

As for the writing at the very bottom of the will, since it was not a dispositive provision, it did not affect the will one way or the other. The court contrasted this sentence with an expression in *Borchers v. Borchers*.[9] There it was held that an unsigned postscript to a letter, "Papa, if I die for my country, I want you to receive my insurance money. Goodbye.", was not a valid holographic will. This case involved a clause that attempted to dispose of property, while in the principal case the clause did not attempt to dispose of property. The *Weems* case falls within a rule which has been expressed as follows, "The validity of the will is not affected by superfluous or useless words which follow the signature."[10]

The court correctly concluded that substantial compliance with the statutory requirement that a testator subscribe at the end of the will had been effected.

The dissenting opinion adhered to the literal rule, ignoring the real purpose of the statute, which is to prevent fraud. Reliance was placed upon statements made in certain treatises to the effect that if the statute specifically provides that the holographic will must be signed at the end, a will not so signed is invalid.[11] But these treatises cite as their authority either the *Borchers* case or some case like it which is readily distinguished from the instant case. Here the three words in question, "everything in it", are ob-

[9] 145 Ark. 426, 224 S. W. 729 (1920).

[10] 57 AM. JUR., *Wills*, p. 440.

[11] ATKINSON, WILLS (1937) § 118; 1 PAGE, WILLS (3d ed. 1941) § 370.

viously a part of the sentence just to the left of the signature; whereas in the *Borchers* case the entire dispositive clause appeared after the signature in the form of an unsigned postscript.

The dissent states dogmatically that the will was not signed at the end and fails to look at the will as a whole. It seems unjust to apply a mechanical rule without distinguishing facts and circumstances.

### CONSTRUCTION OF WILL — INTENT OF TESTATOR

*Oklahoma.* In *Miller v. Hodges*[12] the court took the basic concept in the construction of wills expressed in the Oklahoma statutes:[13]

> A will is to be construed according to the intention of the testator. Where his intention cannot have effect to its full extent, it must have effect as far as possible.

and arrived at an intelligent, fair, and correct interpretation of the will of Edward J. Miller.

The question arose as to whether Ida May Miller, wife of decedent, was devised a vested interest in the estate of Edward J. Miller which she could transmit by will. The provision to be construed was the third paragraph of Edward Miller's will, which stated:

> At the death of my wife, or if she remarry, then at the time of her remarriage, I do hereby give, devise and bequeath all of my property . . . as follows, to-wit: To my son . . . ¼ interest; to my daughter . . . ¼ interest; to my son . . . ¼ interest; to my wife, Ida May Miller, if then living, or if deceased to her legal heirs, a ¼ interest.

Ida May Miller did not remarry but died devising the ¼ interest apportioned to her to the children named in the above excerpt.

Plaintiffs were the legal heirs of Ida May Miller, who contended that they had an interest in the ¼ interest in the Edward J. Miller estate. Defendants were the three children of Edward J. Miller, to whom the ¼ interest was devised by Ida May Miller, They contended that the ¼ interest vested in Ida May Miller,

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12 ..... Okla....., 231 P. 2d 678 (1951).

13 84 OKLA. STAT. ANN. (Perm. Ed.) § 151.

whether she remarried or not, so that she could transfer it to them by will.

The supreme court upheld the trial court's judgment in favor of plaintiffs, saying that study of the will convinced them that the intent of the testator was clearly expressed that the 1/4 interest apportioned to his wife should be vested in her heirs and distributed to them at her death if she did not remarry.

The defendants contended that Ida May Miller was vested with an undivided 1/4 interest because of the rule favoring the vesting of estates generally.[14] The court rebutted this argument by referring to the Oklahoma statutes which provide that a will is to be construed according to the intention of the testator. A clear and plain devise, such as here involved, cannot be affected by the reasons asserted by defendants.

Reference was made also to earlier decisions, in particular *Munger v. Elliot*,[15] in which was stated the principle that all rules of construction and presumptions are subordinate to the ascertained intent of the testator. In *Wilson v. Berryhill*[16] the court said that regardless of the technical definition of words used in a will, if the meaning of the testator is clearly expressed, the latter will be given effect in construing the will.

The decision in the instant case is clearly in line with the great majority of decisions and authorities in the field of construction of wills.[17] In *Hordenbergh v. Ray*[18] the cardinal rule in the construction of wills and codicils was said to be that "the intention of the testator must be ascertained if possible, and . . .given effect . . . " Atkinson[19] states the principle in a different way and says that rules of construction should be flexibly applied so as not to defeat the intention manifested by the testator in the will.

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[14] 33 AM. JUR. *Life Estates and Remainders*, § 102.
[15] 187 Okla. 19, 100 P. 2d 876, 877 (1940).
[16] 181 Okla. 213, 73 P. 2d 449 (1937).
[17] See 69 C. J., *Wills*, § 1118, p. 52.
[18] 151 U. S. 112 (1893).
[19] ATKINSON. WILLS (1937) § 267.