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Specific Performance of Contract to Adopt - Besche v. Murphy

SPECIFIC PERFORMANCE OF CONTRACT TO ADOPT

Besche v. Murphy[1]

Plaintiff—appellant was cared for by an elderly aunt after the death of her parents. When she was eight years old (1893) the decedent and her husband orally offered to adopt her provided they were given unconditional custody. The child was told she was being adopted, both her given and surname were changed, and she was thereafter known as the daughter of decedent in all aspects of her life although she was never adopted as provided by statute in 1892. When in 1907 she married, invitations were extended by her foster mother to the wedding of "her daughter". The foster mother died testate in 1946 leaving no husband or issue surviving, in fact no children had ever been born to her. By her will she bequeathed the sum of five hundred dollars "unto Stella Besche whom I raised since childhood", then after several other pecuniary bequests she gave all the rest and residue of her estate to "those persons who under the laws of the State of Maryland would take in case of intestacy". Plaintiff asked to be accorded the same rights of inheritance and distribution in the estate as if she had been formally adopted, in which case she would be the only one entitled to receive the residuary estate. The trial court dismissed the bill and the Court of Appeals affirmed, stating that the court could not declare an adoption after the death of the testatrix and in the absence of such adoption the plaintiff did not come within or constitute the class of those to whom the property was left.

Appellant relied strongly upon *Clayton v. Heptasophs.*[2] In that case, plaintiffs while young children, were taken to be reared in 1881 before the enactment of any legal method of adoption in the State. In 1894, after such legislation had been enacted the foster father took out a certificate of insurance in the defendant organization, naming the plaintiffs as beneficiaries and describing them therein as "adopted children". At that time the rules of the society permitted the designation of children as beneficiaries without specifying if adopted children were included. In 1913, the by-laws were amended to allow payment of benefits to adopted children only if legally adopted. The foster father

[1] 59 A. 2d 499 (Md. 1948).
[2] 130 Md. 31, 99 A. 949 (1917).

continued to pay the fees on the certificate until his death in 1915 but he never complied with the adoption statute. The Court of Appeals decided in favor of plaintiff's right to recover through an estoppel against the society, which had accepted payments for 21 years in knowledge of the status of the children. As the Court pointed out these children could not have been legally adopted in 1913 as they were then adults and the then extant law did not cover the adoption of adults. In the opinion, Judge Stockbridge made the following *dictum* statement which is supported by the apparent weight of authority in this country, and relied upon by appellant in the instant case, "the authorities very generally establish the proposition that a parol obligation by a person to adopt the child of another as his own, accompanied by the virtual, though not statutory adoption, and acted upon by both parties during the obligor's life, may be enforced upon the death of the obligor, *who dies without disposing of the property by his will*".[3]

To this contention the Court replied that the residuary clause in decedent's will indicated that she did not intend to die intestate as to any part of her property. The direction that the residue of her estate should go to those persons who, under the laws of the State of Maryland, would take in the case of intestacy, did not create an intestacy, but simply provided a means by which it may be determined who are the beneficiaries of the residue. The Court stated that such beneficiaries take under the will and not under the intestacy statute,[4] citing *Suman v. Harvey*.[5] In this case the executors were directed to convert an estate into cash and to distribute the proceeds among the heirs at law and next of kin of the testatrix "who may be entitled thereto under the laws of Maryland". There was an attempt to show that the testatrix intended that children of his deceased first cousin should take along with surviving first cousins, but the court said that only those answering the description at the time of testatrix's death were entitled to share in the estate, and as the statute of descent and distribution did not entitle such children to take as heirs at law and next of kin, no evidence was admissible to vary the terms of the will, quoting Jarman on Wills to the effect

[3] *Ibid*, 36.

[4] By laws of 1916, Ch. 325, descent of realty is same as for distribution of personalty, as codified in Md. Code (1939), Art. 46, Sec. 1. See also, Md. Code (1939), Art. 93, Sec. 132: "If there be children and no other descendants, the surplus shall be divided equally amongst them;" and Sec. 133, providing for representation by children of a deceased child.

[5] 114 Md. 241, 79 A. 197 (1911).

that persons answering the description at the death of testator take the property "in the character of devisee and not as formerly by descent."[6]

The first square presentment of this question to the Maryland Court of Appeals was embodied in this case. The decision is of interest because of the light it throws on the attitude of the Maryland Court toward certain aspects of the adoption status.[7]

The common law did not recognize adoption, and statutory adoption was not provided in Maryland[8] until 1892[9] and even later in England,[10] being brought about through the influence primarily of the civil law countries (and through them to the civil law states here) where it has long been known, principally as a device for fixing inheritance rights.[11] Being in derogation of the common law, the common law courts have required strict compliance with the statute before recognizing an adoption.[12] It is on this ground also that some courts have held that a contract to adopt does not admit of specific performance after death. That this construction is the proper one has been questioned as contrary to the implied legislative intent to change completely the common law so as to conform to the civil law concept of the adoptive status.[13]

Inheritance rights, like most matters pertaining to adoption, are regulated generally by statute.[14] The general rule construes such statutes liberally in respect to the adopted child's right to share the estate of his foster parents, even to the extent of decreasing the share of the surviving spouse,[15] but not usually with respect to inheritance from ancestors or collaterals. According to this view one cannot make a child the relative of another, not a party to the

[6] 2 JARMAN, WILLS, 905.

[7] For a review of the then extant adoption law see Strahorn, *Adoption in Maryland* (1943), 7 Md. L. Rev. 275. A survey of the recent revision of the statute is in preparation, later to be published in the REVIEW.

[8] Md. Laws 1892, Ch. 244. See present statute, Md. Code Supp. (1947) Art. 16, Secs. 85A-85S.

[9] Hiss v. McCabe, 45 Md. 77 (1876), dictum statement that an "adopted" daughter was not a daughter who could claim by inheritance; Fisher v. Wagner, 109 Md. 243, 71 A. 999 (1909), dictum statement that it was proper that the "adopted" son did not take inasmuch as the adoption law of 1892 had been passed subsequent to the death of the testator.

[10] 16 and 17 Geo. V., C. 29.

[11] Anno., 39 Am. St. Rep. 210; Ann. Cas. 1914D, 572.

[12] Anno., Ann. Cas. 1916 D 1110.

[13] Markover v. Krauss, 132 Ind. 294, 31 N. E. 1047 (1892); see also 17 L. R. A. 806, anno., 16 A. L. R. 1024.

[14] Massachusetts apparently passed the first adoption statute in 1851. This statute was used as a model by other states. In all the early statutes, the inheritance provisions were inadequately treated.

[15] *Supra*, n. 13.

contract, by the process of adopting him oneself, although some states allow the adopted child to take by representation.[16] The adopting parent has the same right to disinherit his adopted child as if his natural child.[17] Prior to 1947,[18] the Maryland adoption statute provided,[19] the effect of such decree of adoption shall be to entitle the child so adopted to the same rights of inheritance and distribution as to the petitioner's estate,—as if born to such petitioner in lawful wedlock—; and[20] the term child or its equivalent in a deed, grant, will or other written instrument shall be held to include any child adopted by the person executing the same, unless the contrary plainly appears by the term thereof, whether such instrument be executed before or after the adoption.[21]

A contract to adopt is not ordinarily considered to be against public policy *per se*.[22] Consideration is adequate if the obligations of the filial relationship are performed and past performances will serve to take such a contract, if oral, outside the Statute of Frauds.[23] A contract to adopt may not ordinarily be sued on for specific performance, during the lifetime of the adopting parent however, for want of mutuality of remedy.[24] As pointed out by the Maryland Court the law here provided that adoption proceedings might only be consummated where the best interests of the child so directed and equity would not ordinarily enforce a contract to create such a relationship.

As expected, executory contracts for adoption of children have come before the courts for enforcement almost always after the death of the promisor and for the purpose of recovering from his estate the share of the child claimed by virtue of the contract. Laches will not operate as a

[16] Note, *Wills—Adopted Child Not Included in Devise to Children of Testator's Son* (1925), 34 Yale L. J. 805; but see Eureka Life Ins. Co. v. Geis, 121 Md. 196, 88 A. 158 (1913), and MacNabb v. Sheridan, 181 Md. 245, 29 A. 2d 271 (1942). Maryland has now enacted the liberal view, see Md. Code Supp. (1947), Art. 93, Sec. 139A.

[17] Malaney v. Cameron, 99 Kan. 70, 161 P. 1180 (1916), affirming judgment on rehearing, 98 Kan. 620, 159 P. 19 (1916), additional rehearing denied, 99 Kan. 677, 162 P. 1172 (1917).

[18] Repealed in toto by Md. Laws 1947, Ch. 599.

[19] Md. Code (1939), Art. 16, Sec. 81.

[20] Md. Code (1939), Art. 16, Sec. 83.

[21] Compare Md. Code (1947 Supp.) Art. 16, Secs. 85 K (a), (c), M.

[22] Lynn v. Hockaday, 162 Mo. 111, 61 S. W. 885, 85 Am. St. Rep. 480 (1901), and many others.

[23] Chehak v. Battles, 133 Iowa 107, 110 N. W. 330, 8 L. R. A. (N. S.) 1130, 12 Ann. Cas. 140 (1907); Nowack v. Berger, 133 Mo. 24, 34 S. W. 489, 31 L. R. A. 810, 54 Am. St. Rep. 663 (1896); Clayton v. Heptasophs, supra, n. 2.

[24] Reed v. Reed, 165 Md. 604, 169 A. 798 (1934). Carlin v. Bacon, 322 Mo. 435, 16 S. W. 2d 46, 69 A. L. R. 1 (1929).

defense to an action brought at this time,[25] and authority is overwhelming in holding that the fact the contract was made with a third person for the benefit of the child will not prevent enforcement by the child.[26] The standards of proof required to establish the contract, either written or oral, have usually been rigorous, and it has been held that a mere declaration of an intention to adopt is insufficient.[27] Nevertheless a parol agreement to adopt may be established by the acts, admissions, and conduct of the parties, and inferences therefrom.[28] Two types of cases may be distinguished, a promise to make the child the heir of the promisor, either distinct from any agreement to adopt, or as a part, express or implied, of a contract of adoption; and a contract for adoption without any provision in respect of property rights of the child. In the latter case, the relief prayed is usually to obtain the property right given by statute to an adopted child.[29]

The decisions of the courts have not been unanimous in respect to the enforcement of such contracts. Those courts which will decree specific performance of a contract to make the child an heir, or to adopt with the incidental right of inheritance, do not undertake to alter the status of the parties or to hold that the child takes as an heir, since they generally agree that equity does not have power to decree an adoption.[30] Rather the relief allowed derives from the power of equity to enforce a contract fully performed on one side by decreeing performance of the promise of inheritance even if only implied from the agreement to adopt.[31] In other words, equity places the child in a posi-

[25] Carlin v. Bacon, *ibid.*

[26] See Anno. 2 A. L. R. 1198, 73 A. L. R. 1395.

[27] Heath v. Cuppel, 163 Wis. 62, 157 N. W. 527 (1916).

[28] Roberts v. Roberts, 223 F. 775, (C. C. A. 8th, 1915), cert. denied 239 U. S. 639 (U. S. 1915).

[29] *Supra*, n. 22.

[30] *Supra*, n. 17. But in Missouri, the statutory method of adoption has been held to be merely permissive, and an adoption may be accomplished by a fully executed contract alone, Lindsley v. Patterson, 177 S. W. 826, (Mo. 1915) L. R. A. 1915 F. 680.

[31] The following states may be considered to have given support in a proper case to the inheritance rights of the "quasi-adopted" child: Arizona, Florida, Georgia, Illinois, Iowa, Kansas, Michigan, Minnesota, Missouri, Montana, Nebraska, New Jersey, New Mexico, New York, Ohio, Oklahoma, South Dakota, Texas. In addition the decisions of the following states tend in that direction: Alabama, Arkansas, California. Recent decisions from these jurisdictions are Stanley v. Wacaster, 206 Ark. 872, 178 S. W. 2d 50 (1944); Butler v. Ross, 188 Ga. 329, 4 S. E. 2d 21 (1939); Bergman v. Carson, 226 Iowa 449, 284 N. W. 442 (1939); Thompson v. Moseley, 344 Mo. 240, 125 S. W. 2d 860 (1939); In re Clarke's Estate, 105 Mont. 401, 74 P. 2d 401, 114 A. L. R. 496 (1937). Many others are noted in the opinion. In addition see In re Blehn's Estate, 41 Ariz. 403, 18 P. 2d 1112 (1933) and Sunior v. Sunior, 20 Ohio App. 479, 152 N. E. 729 (1925).

tion equal to that which he would have occupied in respect of inheritance, but conditional upon his having fully performed the obligations of a child to the adopting parent.[32] When this consideration fails as when the parent dies before the child becomes a member of his family and the adoption itself was invalid, an agreement to make the child his heir was held to be unenforceable against his estate.[33] In this connection it is of interest to note one case where relief sought was denied because it asked to establish an adoption after the death of the parties agreeing to adopt;[34] and others in which a child is allowed to take as the natural child of its adopting parent through an estoppel worked upon the legal heirs which was based upon an agreement to adopt followed by virtual but not statutory adoption, or as is sometimes stated, estoppel against the adopting parents or their privies.[35] A defective adoption has sometimes been construed as a contract to adopt.[36] In general, where there is an agreement to adopt and nothing more, relief has more often been limited to cases where the adopting parent died intestate, and this point is given special emphasis by the Maryland Court. Certainly where there is a will, the claim by an "adopted" child of an agreement that he should inherit should be closely scrutinized if justice is to be accorded natural children. As pointed out by the Oklahoma Court in *Clemons v. Clemons*,[37] one having custody of another's child is not compelled to adopt him or to make him an heir.

A minority takes the position that no rights are conferred where the statute is not fully complied with, hence no adoption, no inheritance.[38] In this group also might be included those cases holding that in the absence of a clause

[32] In Wooley v. Shell Petroleum Corp., 39 N. Mex. 256, 45 P. 2d 927 (1935), the Court held that specific performance of a contract to adopt, being impossible after promisor's death, equity will indulge fiction, that there was an adoption, apply statute of descent and distribution, and decree succession of children to prevent fraudulent destruction of their equity.

[33] Jaffee v. Jacobson, 48 F. (C. C. A. 8th, 1891) 21.

[34] St. Vincent's Infant Asylum v. Central Wisconsin Trust Co., *infra*, n. 36.

[35] In re Gunn's Estate, 227 Mich. 368, 198 N. W. 983 (1924). See also, Thompson v. Moreley, *supra*, n. 31; Milligan v. McLaughlin, 94 Neb. 171, 142 N. W. 675 (1913); 46 L. R. A. (N. S.) 1134. Jones v. Guy, 135 Tex. 398, 143 S. W. 2d 906 (1940); 142 A. L. R. 77.

[36] Anderson v. Blakesly, 155 Iowa 430, 136 N. W. 210 (1912); but *contra*, St. Vincent's Infant Asylum v. Central Wisconsin Trust Co., 189 Wis. 483, 206 N. W. 921 (1926).

[37] 193 Okla. 412, 145 P. 2d 928 (1943).

[38] St. Vincent's Infant Asylum v. Central Wisconsin Trust Co., *supra*, n. 36. Davis v. Jones' Adm'r., 94 Ky. 320, 22 S. W. 331, 42 Am. St. Rep. 360 (1893). Benson v. Nicholas, 246 Pa. 229, 92 A. 139, Ann. Cas. 1916 D 1109 (1914).

saving existing contracts in subsequent legislation, contracts of adoption entered into at a time when there was no statutory method of adoption will be ineffective to give the child any of the attributes of an heir.[39]

As far as the legally adopted child is concerned, his rights of inheritance will not be impaired by circumstances that the Statute of Descent and Distribution does not refer to adopted children, as he is generally held to be included by the term "children" as used in the statute, and even by the word "issue" in some cases.[40] But inheritance under this construction is usually limited to cases where strict compliance with the statute of adoption has obtained.[41] The right of the legally adopted child to take under a will is governed by the intent of the testator rather than by the right of the child as an heir, and the tendency is to construe the term "children" narrowly so as to exclude adopted children unless a contrary intent appears.[42] In the construction of instruments much emphasis is placed upon the term of the adoption statute, if the act puts an adopted child in the same place as a child by birth for purposes of inheritance the adopted child will be included by the term "children" in instruments executed by adopting parent only; but if the act deems the adopted child to be the same as if born of the marriage of the adopting parents the adopted child is included by the term "children" in instruments executed by anyone.

The full faith and credit clause of the Constitution of the United States requires only that a court recognize the adoption status of a child adopted in another state; it does not compel one state to recognize the law of a foreign state with respect to the effect of adoption on the scheme of intestate succession.[43]

Several Maryland decisions are of interest in this connection. In *Eureka Life Ins. Co. v. Geis,*[44] the mother of the adopting parent devised certain ground rents to her own "right heirs". The Court held that the adopted grandchild could not take, and cited the statute[45] to the effect that

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[39] Wall v. McEnnery's Estate, 105 Wash. 445, 178 P. 631 (1919).

[40] Anno., 30 L. R. A. (N. S.) 914; Ann. Cas. 1915 B, 786; L. R. A. 1918 F, 1084.

[41] In re Carroll's Estate, 219 Pa. 440; 68 A. 1038, 123 Am. St. Rep. 673 (1908).

[42] In re Puterbaugh's Estate, 261 Pa. 235, 104 A. 601, 5 A. L. R. 1277 (1918); *contra*, in re Woodcock, 103 Me. 214, 68 A. 821, 125 Am. St. Rep. 291 (1907).

[43] In re Zoell's Estate, 345 Pa. 413, 29 A. 2d 31 (1942).

[44] *Supra*, n. 16.

[45] Md. Code (1939), Art. 16, Sec. 83.

an adopted child was then included by the term "child" only in an instrument executed by the adopting parent. In a similar case, but one involving an intestacy, *MacNabb v. Sheridan,*[46] appellee was an adopted daughter of a brother of descendent who had predeceased him. The property had been sold by a trustee appointed by the Court and the auditor's report of the sale had excluded the adoptive niece. Her exceptions were sustained by the trial court and the trustee appealed, but he was not joined by any of the other heirs. The Court of Appeals glossed over the question of the rights of the adoptive niece entirely, by finding that the statute[47] which permitted an appeal by a trustee alone was not applicable here and so they had no occasion to reverse a lower ruling which was probably erroneous as the law then stood.

In contrast to *Clayton v. Heptasophs*[48] where an estoppel was permitted to prevent the disinheritance of children not legally adopted, we have *Legion of Honor v. Green.*[49] The by-laws of the society provided that beneficiaries under the society's certificates were limited to "relations" and "dependents", and the certificates provided for their own avoidance in the case of false representations. Decedent's beneficiary was listed as his niece, but she was neither related nor dependent upon him. Estoppel based on knowledge of truth by official of society who witnessed the application was rejected, and recovery was denied both because of falsity in the certificate and failure to come within the permissible classes. *Zimmerman v. Thomas*[50] presented several facets of the adoption question to the Maryland Court. In that case a hospital had been authorized by statute to bind out the children in its care, and the plaintiff was so bound out prior to the enactment of any statute of adoption. The adopting parent's brother left property to the "children" of that parent, and plaintiff's right to inherit thus came up.

The Court held that the enabling act and the indenture did not constitute a valid adoption, although most of the attributes of that status were included by the relationship created. "Child" in a legal document being construed as adopted child only when used in documents executed by the adopting parent, the Court indicated that plaintiff would

[46] *Supra,* n. 16.

[47] Md. Code (1939), Art. 5, Sec. 43.

[48] *Supra,* n. 2.

[49] 71 Md. 263, 17 A. 1048, 17 Am. St. Rep. 27 (1889).

[50] 152 Md. 263, 136 A. 637 (1927).

have been precluded in this case even if properly adopted under the 1892 act.[51]

In the principal case, the Maryland court states it is not asked to decree appellant the adopted child of decedent, but only to place her in the same testamentary position. It then says that since it cannot declare her to be the child (by adoption) of testatrix, it cannot place her in the desired testamentary position. The only conclusion remaining is that Maryland will not permit specific performance of a contract to adopt nor any of its equitable attributes, at least where there is not an actual intestacy. It has been said[52] "it is significant that the liberal position (re inheritance by adopted child) is expressed chiefly by courts west of the Mississippi River. Perhaps the peculiar geographical division can be explained, in part, by the fact that the principle of consanguinity did not take a firm hold in the Western states, where pride was taken in an asserted freedom from "hide-bound tradition". In 1947 the rights of adopted children were further liberalized by the Maryland Legislature with respect to inheritance from collaterals.[53] If the instant question should arise again, might not the Maryland Court construe this enactment as an expression of legislative policy tending toward a more liberal interpretation of the adoptive status in general?

[51] But see Md. Code Supp. (1947), Art. 93, Sec. 139A, quoted *infra*, n. 53.

[52] Kuhlmann, *Intestate Succession By and From the Adopted Child* (1943), 28 Wash. U. Law Quart. 221, 236.

[53] Md. Code Supp. (1947), Art. 93, Sec. 139A: "In the application of the provisions of this sub-title there shall be no distinction between a legally adopted child and a child by birth, to the end that such adopted child shall take from, through and as a representative of its adopting parent or parents, and the lineal or collateral kindred of such adopting parent or parents in the same manner as a child by birth and to the end that upon the death of an adopted child intestate without surviving descendants, such child's property, exclusive of the share of such child's surviving spouse, shall pass and be distributed in the same manner as if such child had been born to such adopting parent or parents in lawful wedlock."