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Inheritance By And From Illegitimates Under Maryland Intestacy Law

*Penman v. Ayers*¹

The appellee, who was a legitimate brother of the intestate claimed an exclusive right to inherit the real and personal estate of his intestate brother. The only other survivor was the appellant, whose claim was predicated on his status as the illegitimate half-brother of the intestate with the common ancestor being their mother. In affirming the lower court's decision in favor of the appellee, the Court of Appeals *held* that under Maryland intestacy statutes, an illegitimate brother cannot inherit real and personal property from his legitimate half brother who had died intestate.

The Civil Law² recognized the concubine, and its laws were much more indulgent to bastard children than the English Common Law, which was strongly in favor of marriage. Under the English system the bastard was considered the son of nobody, *nullius filius*. This complete bar to inheritance was ingrafted into the Common Law of every American jurisdiction except Connecticut.³ Hence, in England, if there were no legitimate heirs, the land escheated to the crown instead of passing to the illegitimates. Likewise, they could have no heirs but those of their own bodies. Collateral heirs were derived from a common ancestor, and since at Common Law an illegitimate had no legal ancestors, he could have no collateral kindred. Hence, if he died without issue and intestate, any land of which he was seized escheated to the lord of the fee.⁴

these shares shall be the same basis that is attributed to them under the Federal income tax law."

Another possibility would be the deletion of the present language in § 279(j) and the insertion of a clause providing that amounts paid in liquidation on dissolution of a corporation shall be treated as amounts paid for the sale or exchange of its stock. Such an amendment would be consistent with the theory that liquidation and sales of stock are similar in substance and should be treated alike under the tax laws. Other states, including Massachusetts and Kentucky have so amended their tax statutes. Under present Maryland law, however, an amendment of this nature would render these distributions completely non-taxable, because of our present policy not to tax capital gains or allow the deduction of capital losses. Art. 81, §§ 280(a), 283(a).

¹ 221 Md. 154, 156 A. 2d 638 (1959).

² GAVTT, BLACKSTONE'S COMMENTARIES ON THE LAW (1941), 368.

³ Eaton v. Eaton, 88 Conn. 286, 91 A. 191, 194 (1914); Vernier and Churchill, *Inheritance by and from Bastards*, 20 Iowa L. Rev. 216 (1935).

⁴ *Loc. cit. supra*, n. 2.

The only significant relief from the rigors and harshness of the Common Law doctrine of *nulius filius* has been the result of remedial legislation.⁵ While there are certain basic similarities in the statutes, there is no uniform scheme in the removal of the Common Law disabilities in the American states. Under present Maryland legislation, illegitimates can inherit from their mother, each other, and the descendants of each other;⁶ and they are placed in the bloodstream of their natural parents for purposes of inheritance if the father subsequently marries and acknowledges the child as his.⁷

In view of such remedial legislation, the Court of Appeals has been faced with the problem of determining whether the Legislature intended to include illegitimate children within the definitions of "children" or its equivalent as the word appears in various other statutes in the Annotated Code of Maryland. In Article 93, Section 329,⁸ it is provided that, if the surviving spouse of a testator elects to renounce the provisions made for his benefit by the will, he shall take dower in the lands plus one-half of the personal estate, so long as the testator has not left other descendants surviving. However, he only takes dower plus one-third if the deceased is survived by other descendants. The testatrix's husband in *Rowe v. Cullen*⁹ renounced the will and elected to take, in lieu thereof, his legal share in the wife's estate. His contention that the wife's illegitimate son was not a "descendant" within the meaning of the above statute was rejected by the Court. In referring to the statute, the Court indicated the intent of the legislature was unmistakable and it refused to give the word "descendant" a forced and unnatural meaning in order to gratify a harsh common law policy that has been repudiated for more than a century. Following the same general concept, the Court of Appeals in *Reese v. Starner*¹⁰ held that the mother of an illegitimate child was a "parent" within the meaning of Article 93, Section 135,¹¹ and she was therefore entitled to share equally with the widow in the estate of her illegitimate son.

⁵ Note, *Inheritance By, From and Through Illegitimates*, 84 U. of Pa. L. Rev. 531, 540 (1936).

⁶ 4 MD. CODE (1957) Art. 46, § 7.

⁷ 4 MD. CODE (1957) Art. 46, § 6.

⁸ 8 MD. CODE (1957) Art. 93, § 329.

⁹ 177 Md. 357, 9 A. 2d 585 (1939).

¹⁰ 106 Md. 50, 66 A. 443 (1907).

¹¹ MD. CODE (1957) Art. 93, § 135, provides that if the intestate leaves surviving a husband or widow, no child, parent, grandchild, brother, or sister of the intestate, the surviving husband or widow, as the case may be, shall be entitled to the whole.

While there are reasons for not allowing an adulterous or unwed parent to inherit from an illegitimate child, there seems to be no logical reason for not allowing the illegitimate to share in his natural parent's estate. In the *Rowe*¹² case the Court indicated that the:

“. . . trend of the law has been to give illegitimate children the status and privileges of legitimate children, except where that policy would affect the permanence and dignity of the institution of marriage, or the traditional rights and privileges of children born in lawful wedlock.”¹³

In 1919, an illegitimate dependent child was denied the right to recover under the Workmen's Compensation Act for the accidental death of her father.¹⁴ The Court in so holding reasoned that if the Legislature had intended illegitimate children to receive the benefit of the statute, it would have included them in the definition of "child" inasmuch as it was careful to define the word to include posthumous and adopted children.¹⁵ Apparently as a result of this case, the Legislature, in 1920, enacted an amendment to the Workmen's Compensation Act to permit an award for the benefit of an illegitimate child under similar circumstances.¹⁶ An illegitimate daughter of the deceased was not allowed to maintain an action under the Wrongful Death Statute in *W. B. & A. R. Co. v. State*.¹⁷ The Court indicated therein that:

"It is a rule of construction that prima facie the word 'child' or 'children' when used in a statute, will or deed means legitimate child or children. In other words bastards are not within the term 'child' or 'children'."¹⁸

In the same manner as with the Workmen's Compensation Act, the Wrongful Death Statute was amended, in 1937, to permit an illegitimate child to recover for the wrongful death of the mother and vice versa, but significantly, no mention was made as to recovery for the death of a father of an illegitimate child.¹⁹

¹² *Supra*, n. 9.

¹³ *Ibid.*, 362.

¹⁴ *Scott v. Independent Ice Co.*, 135 Md. 343, 109 A. 117 (1919).

¹⁵ *Ibid.*, 350. In accord, *Bell v. Terry and Tench Co.*, 177 App. Div. 123, 163 N.Y.S. 733 (1917).

¹⁶ 221 Md. 154, 160, 156 A. 2d 638 (1959).

¹⁷ 136 Md. 103, 111 A. 164 (1920).

¹⁸ *Ibid.*, 119.

¹⁹ *Supra*, n. 16, 160.

As an indication of its policy on the definition of the word "child," the General Assembly of the Maryland Legislature in 1937 provided that:

"The word child or its equivalent shall be construed to include any illegitimate child, except in matters of inheritance, descent or distribution of real and personal property, unless such a construction would be unreasonable."²⁰

The specific exception in matters of inheritance, descent or distribution seems to preclude the courts from expanding the definition of "child" to include illegitimate children in such statutes, even though there seemed to be no tendency on the part of the Court of Appeals to do so prior to the legislative clarification.

An illegitimate child can become legitimate only if the father subsequently marries the mother and acknowledges the child as his own.²¹ He is thereby made capable of inheriting and transmitting inheritance as if born in lawful wedlock. If for any reason the parents never marry, the child remains illegitimate and has no right to inherit from his father or other paternal relatives.²² This conclusion is *non sequitur* when viewed in relation to the reasons advanced for the position. The first reason, i.e., the uncertainty of paternity and resultant fear of fraudulent claims, seems illogical since paternity involves nothing more than a question of proof.²³ Besides, disinheritance by will can be resorted to in all jurisdictions except Louisiana.²⁴ The second reason, i.e., inflicting a penalty for the wrong done, the indulgence in illicit sexual intercourse, has the effect of punishing the innocent child, but not the erring parents.²⁵ The father and paternal relatives cannot inherit from an illegitimate as he is the "son of nobody."²⁶

²⁰ MD. LAWS (1937), Ch. 74; *Rowe v. Cullen*, 177 Md. 357, 363, 9 A. 2d 585 (1939).

²¹ 4 MD. CODE (1957) Art. 46, § 6.

²² *Ibid.* "This section sets out the only right of inheritance from the father given an illegitimate child by Maryland Statutes." The annotation cites *Scott v. Independent Ice Co.*, 135 Md. 343, 109 A. 117 (1919), but as pointed out in the principal case on page 160 the Workmen's Compensation Law was amended in 1920 to allow the illegitimate children who are dependent to recover Workmen's Compensation for the accidental death of their putative father.

²³ 7 C.J. 959; *Trout v. Burnett*, 99 S.C. 276, 83 S.E. 684 (1914).

²⁴ ATKINSON, WILLS (2nd ed. 1953) 138.

²⁵ Note, *Inheritance By, From and Through Illegitimates*, 84 U. of Pa. L. Rev. 531, 538 (1936); In *Re Vincent's Estate*, 189 Misc. 489, 71 N.Y.S. 2d 165 (1947).

²⁶ Note, *Inheritance By, From and Through Illegitimates*, *ibid.* In a few states the legislatures have stipulated that the father may succeed his

The Maryland Legislature has gone much further in relaxing the Common Law disabilities of inheritance by and from the mother and maternal relatives of the illegitimate. The Legislature in 1825²⁷ provided for inheritance of both real and personal property by illegitimate children and their descendants from their mother, or from each other, or from the descendants of each other, as the case may be, in like manner as if born in lawful wedlock. The Court was presented in *Miller et al. v. Stewart et al.*²⁸ with the converse of the situation provided for by this statute. In deciding that the surviving mother and her three legitimate children could not inherit from an illegitimate son who died intestate and without issue, the Court indicated that the Act of 1845, Chapter 120, only removed the disqualification so as to enable an illegitimate to inherit from the mother and from other illegitimate brothers and sisters. There was no reciprocity intended between the legitimate and illegitimate, and the Act recognized no relationship between them as brother and sister. The illegitimate was still in contemplation of the statute *nullius filius* except as to those situations specifically set forth therein. The Court referred in its opinion to the unreported case of *Medcalf v. Daley and Jones*,²⁹ which proved to be a direct precedent for the holding in the principal case, i.e., that an illegitimate child cannot inherit from a legitimate brother.

However, in *Barron v. Zimmerman*,³⁰ the Court allowed an illegitimate child to inherit by representation from his deceased mother's sister, reasoning that:

“. . . one who is in the position of a lawful begotten child for the purpose of inheriting from his mother should be regarded as a 'child' of the mother, within the intent of the law, for the purpose of succeeding to the estate which she would have inherited if she would have survived.”³¹

When a party takes by representation, the size of the share alone is determined by what the deceased parent's share would have been had he survived, but the right to inherit vests directly in the claimant; who in effect is taking in place of the deceased parent and not through him. It

illegitimate child if there has been mutual recognition or acknowledgment by the father of the relationship.

²⁷ Md. LAWS (1825), Ch. 156; *Penman v. Ayers*, 221 Md. 154, 156, 156 A. 2d 638 (1959).

²⁸ 8 Gill 129 (Md. 1849).

²⁹ *Ibid.*, 133.

³⁰ 117 Md. 296, 83 A. 258 (1912).

³¹ *Ibid.*, 300.

would therefore seem that the Court intended to place the illegitimate child in the bloodstream of his mother for purposes of inheritance even though the taking was by representation and not in his own right.

As pointed out earlier, the Act of 1825, Chapter 156³² provided for inheritance of both real and personal property by illegitimate children and their descendants from their mother, or from each other, or from the descendants of each other, as the case may be, in like manner as if born in lawful wedlock. In 1868,³³ the phrase "as if born in lawful wedlock" was deleted and it was further provided that if the illegitimate die without descendants, brothers, or sisters, or their descendants, his mother, if living, and her heirs at law, if she be dead, should inherit from the illegitimate in the same manner as if such illegitimate child had been born in lawful wedlock. The appellant in the principle case contended that, since the above statute allowed the legitimate to inherit from the illegitimate, by reciprocity the illegitimate child should be allowed to inherit from his legitimate half-brother. The Court was quick to point out that the legislature had not undertaken a wholesale removal of the Common Law obstacles to inheritance. The Court of Appeals has adopted and continues to adhere to strict rules of statutory construction to the effect that Common Law disabilities of illegitimates are to be removed only to the extent that the legislature has seen fit.³⁴ It, therefore, seems clear that if any further relaxation is to come about in Maryland, it will have to be the result of remedial legislation. However, a contrary position is taken by the courts in a majority of the American states. Those states generally apply liberal rules of construction reasoning that the preferable rule of construction is that the statute be construed as broadly as possible in order to remedy a gross and manifest injustice of the Common Law.³⁵

In summation, Maryland allows the illegitimate to inherit from (1) his mother, her other illegitimate children,

³² *Supra*, n. 27, 156.

³³ MD. LAWS (1868), Ch. 199; *ibid.*, 159. Other than minor changes in text and punctuation in 1888, the Act of 1868 has continued unchanged and is now 4 MD. CODE (1957) Art. 46, § 7.

³⁴ *McKeon v. State, Use of Conrad*, 211 Md. 437, 443, 127 A. 2d 635 (1956), defines strict construction to mean that a statute will not be construed beyond its natural meaning as the primary purpose in construing and interpreting a statute is to ascertain and to carry out the true intention of the legislature.

³⁵ *In Re Klingaman's Estate*, 128 A. 2d 311 (Del. 1957). See also *Morin v. Holliday*, 39 Ind. App. 201, 77 N.E. 861 (1906); *Matter of Hoagland's Estate*, 125 Misc. 376, 211 N.Y.S. 629 (1925); *Goodman v. Goodman*, 150 Va. 42, 142 S.E. 412 (1928).

and their descendants; (2) his lineal and collateral maternal relatives by representation; and (3) his natural parents and everyone in their bloodstream on the contingency that the father subsequently marries and acknowledges the illegitimate as his own. The following parties are allowed to inherit from the illegitimate: (1) his mother or her heirs at law, including legitimate children, if she be dead, providing the illegitimate has died without issue or collateral heirs, i.e., other illegitimates and their descendants; (2) other illegitimates of the same mother and their descendants.

The real question is how far the legislature in each particular jurisdiction should go in the removal of the Common Law disabilities on inheritance by and from bastards? There seems no valid reason for cutting off his rights of inheritance at the mother, or maternal relatives, or at the father if he subsequently marries the child's mother and acknowledges the child as his own. This writer recommends that they be completely removed and the illegitimate child, for purposes of inheritance, be placed in the bloodstream of his natural parents. All recent legislation tends in this direction, but few states have been willing to go this far. The erring parents could still protect their estates since in all jurisdictions but Louisiana they possess a complete right to disinherit even legitimate children by testamentary disposition.

The real evil is the illicit intercourse of the parents, not the birth of the bastard. The doctrine of *nullius filius* punishes the only innocent party to the whole affair, and the placing of a stigma on him has certainly had small deterrent effect on illegitimacy. Any punitive measures should in fairness fall upon the wrongdoing parents, not the illegitimate.

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