

## Wills--Decedent Estate Law--Adoption (Matter of Walter, 270 N.Y. 201 (1936))

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ciple of liability.<sup>23</sup> A review of the most recent decisions handed down shows such a diversity of opinion that its future path is a matter of mere conjecture.<sup>24</sup>

E. F. A.

WILLS—DECEDENT ESTATE LAW—ADOPTION.—Testatrix left a will devising and bequeathing all her property, both real and personal, to her brother. The brother predeceased her leaving surviving the plaintiff, his adopted daughter, and no other children or descendants. The defendant administrator contends that the gift lapsed as Section 29 of the Decedent Estate Law,<sup>1</sup> which provides that if a legatee or devisee who is a brother, sister, child or descendant of the testator predeceases said testator, the property will vest in a surviving descendant, is limited to blood relatives. *Held*, for the plaintiff. The gift to the brother did not lapse but passed to the adopted daughter pursuant to Section 29 of the Decedent Estate Law, as the words "child" and "descendant" in the statute are not limited in meaning to blood relatives. *Matter of Walter*, 270 N. Y. 201, 200 N. E. 786 (1936).

A child when adopted is the same as a natural child for the purposes of inheritance from its foster parents,<sup>2</sup> except that, as to the limitation over of property in trust dependent on the foster parent dying without heirs, such child shall not be deemed to sustain such a relation to its foster parent as to defeat rights of remaindermen.<sup>3</sup> Similarly, the foster parents inherit from an adopted child, as though the child was born to them in lawful wedlock.<sup>4</sup> The adopted child, how-

<sup>23</sup> Instant case, dissenting opinion of Lehman, J., at p. 451; *cf.* Kirby v. Newman, 239 N. Y. 470, 147 N. E. 69 (1925).

<sup>24</sup> Leonard v. City of Hornellsville, 166 N. Y. 590, 59 N. E. 1125 (1899); Schneyer v. Leblang Realty Corp., *et al., etc.*, N. Y. L. J., Sept. 28, 1936.

<sup>1</sup> N. Y. DECEDENT ESTATE LAW § 29, reads as follows: "Whenever any estate, real or personal, shall be devised or bequeathed to a child or other descendant of the testator, or to a brother or sister of the testator, and such legatee or devisee shall die during the lifetime of the testator, leaving a child or other descendant who shall survive such testator, such devise or legacy shall not lapse, but the property so devised or bequeathed shall vest in the surviving child or other descendant of the legatee or devisee, as if such legatee or devisee had survived the testator and had died intestate."

<sup>2</sup> Matter of Cook, 187 N. Y. 253, 79 N. E. 991 (1907); Carpenter v. Buffalo Gen. Elec. Co., 213 N. Y. 101, 106 N. E. 1026 (1914); Matter of Horn, 256 N. Y. 294, 176 N. E. 399 (1931); Dodin v. Dodin, 16 App. Div. 42, 44 N. Y. Supp. 800 (2d Dept. 1897), *aff'd*, 162 N. Y. 635, 57 N. E. 1108 (1900).

<sup>3</sup> N. Y. DOM. REL. LAW § 114; Matter of Horn, 256 N. Y. 294, 176 N. E. 399 (1931); Dodin v. Dodin, 16 App. Div. 42, 44 N. Y. Supp. 800 (2d Dept. 1897), *aff'd*, 162 N. Y. 635, 57 N. E. 1108 (1900); Von Beck v. Thomsen, 44 App. Div. 373, 60 N. Y. Supp. 1094 (1st Dept. 1899).

<sup>4</sup> Gilliam v. Guaranty Trust Co., 186 N. Y. 127, 78 N. E. 697 (1906); Matter of Cook, 187 N. Y. 253, 79 N. E. 991 (1907); Carpenter v. Buffalo

ever, is not left in this case solely dependent upon the adoption statutes and the expressions of the courts, sufficient though they might prove to be. Section 29 of the Decedent Estate Law covers the facts above presented.<sup>5</sup> The words "child" and "descendant" in the statutes of descent and distribution, have not been limited in meaning to blood relatives, but have been properly construed to take in children adopted by the decedent.<sup>6</sup> In the same manner, an after-born child under Section 26 of the Decedent Estate Law,<sup>7</sup> which provides that unless a testator's child born after the making of the testator's last will is provided for he shall take as if the parent had died intestate, has been held to include a legally adopted child.<sup>8</sup> A construction of a will to avoid intestacy is favored by the courts,<sup>9</sup> and their interpretation of Section 29 of the Decedent Estate Law, so as to include an adopted child, tends toward the furtherance of such policy.

H. K.

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Gen. Elec. Co., 213 N. Y. 101, 106 N. E. 1026 (1914); U. S. Trust Co. v. Hoyt, 150 App. Div. 621, 135 N. Y. Supp. 849 (1st Dept. 1912).

<sup>5</sup>Supra note 1. For similar cases see: Matter of Foster, 108 Misc. 604, 177 N. Y. Supp. 827 (1919); Matter of Horvath, 155 Misc. 734, 279 N. Y. Supp. 189 (1935).

<sup>6</sup>Matter of Cook, 187 N. Y. 253, 79 N. E. 991 (1907); Matter of Horn, 256 N. Y. 294, 176 N. E. 399 (1931); Matter of Foster, 108 Misc. 604, 177 N. Y. Supp. 827 (1919); Matter of Horvath, 155 Misc. 734, 279 N. Y. Supp. 189 (1935). For same interpretation of similar statutes in other states see: *In re Winchester's Estate*, 140 Cal. 468, 74 Pac. 10 (1903); *Gray v. Holmes*, 57 Kan. 217, 45 Pac. 596 (1896); *Power v. Hafley*, 85 Ky. 671, 4 S. W. 683 (1887); *Warren v. Prescott*, 84 Me. 483, 24 Atl. 948 (1892).

<sup>7</sup>N. Y. DECEDENT ESTATE LAW §26, reads as follows: "Whenever a testator shall have a child born after the making of a last will, either in the lifetime or after the death of such testator, and shall die leaving such child, so after-born, unprovided for by any settlement, and neither provided for, nor in any way mentioned in such will, every such child shall succeed to the same portion of such parent's real and personal estate, as would have descended or been distributed to such child, if such parent had died intestate, and shall be entitled to recover the same portion from the devisees and legatees in proportion to and out of the parts devised and bequeathed to them by such will."

<sup>8</sup>*Bourne v. Dorney*, 184 App. Div. 476, 171 N. Y. Supp. 264 (2d Dept. 1918), *aff'd*, 227 N. Y. 641, 126 N. E. 901 (1919). A similar statute in Illinois was construed in the same manner. See *Hopkins v. Gifford*, 309 Ill. 363, 141 N. E. 178 (1923).

<sup>9</sup>*Du Bois v. Ray*, 35 N. Y. 162 (1866); *Phillips v. Davies*, 92 N. Y. 199 (1883); *Meeks v. Meeks*, 161 N. Y. 66, 55 N. E. 278 (1899); *Matter of Ossman v. Van Roemer*, 221 N. Y. 381, 117 N. E. 576 (1917); *Waterman v. N. Y. Life Ins. & Trust Co.*, 237 N. Y. 293, 142 N. E. 668 (1923).