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Trusts - Cestuis Que Trust - Whether or Not an Adopted Son of the Deceased Son of the Settlor Would Qualify as Being of Lawful, Issue or as a Grandchild under the Language Used in a Trust Agreement

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TRUSTS—CESTUIS QUE TRUST—WHETHER OR NOT AN ADOPTED SON OF THE DECEASED SON OF THE SETTLOR WOULD QUALIFY AS BEING OF LAWFUL Issue OR AS A GRANDCHILD UNDER THE LANGUAGE USED IN A TRUST AGREEMENT—The legal effect to be given to the words "lawful issue" and "grandchildren," as used in an inter vivos trust agreement executed in Illinois in 1928, was the crux of the problem involved in the recent case of Continental Illinois National Bank and Trust Company of Chicago v. Clancy.1 The suit was one brought by the trustee for construction of the language of the trust instrument. One of the defendants, the appellant in the case, contended that as a legally adopted son of a deceased son of the settlor, the adoption having occurred prior to creation of the trust in question, he was entitled to share in the distribution of the trust income.2 Other defendants, being the surviving children of the settlor, denied that the appellant had been legally adopted3 and further contested his right to be included among the trust beneficiaries because he was not of the blood of the settlor. The trial court entered a judgment against the claimant which was later affirmed by the Appellate Court for the First District. The Illinois Supreme Court granted leave to appeal, but it also affirmed when it concluded that the terms in question had a precise connotation in 1928 which would not encompass an adopted child.

In construing the language of the instrument to this conclusion, the Court noted the time-honored rule in Illinois that the true intention of the settlor or testator, as the case may be, is of paramount importance.

2 The trust was irrevocable in character and replaced a revocable trust established by the settlor in 1916 shortly before his second marriage. At the time the earlier trust was set up, the settlor had children from his first marriage, but no grandchildren, and the 1916 trust was for the benefit of his children. When the 1928 trust was established, the settlor had both children and grandchildren from his first marriage, but had no children from his second marriage. The 1928 trust was not to terminate until the death of the last survivor of the settlor's children, but the net income was payable periodically, from inception until termination, to the "lawful issue" of the settlor, and the particular defendant claimed by right of substitution in place of his deceased adoptive parent, one of the settlor's children who had died in 1954. On final distribution, the corpus was to be divided and paid over to "such of the grandchildren" of the settlor as should then be surviving.
3 The alleged adoption apparently took place in Iowa some four years prior to the execution of the trust agreement. The transaction itself, if not the legal effect thereof, was well known to the settlor at the time the trust was established. He appears to have referred to the child as one of his grandchildren in a holographic will made in 1947 and later probated in California: In re Clancy's Estate, 159 Cal. App. (2d) 218, 323 P. (2d) 763 (1958). The Illinois Supreme Court found it unnecessary to pass on the legality of the adoption, saying that for the purpose of reaching a conclusion on the point before it, the Court had assumed that a valid adoption had occurred.
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in determining the meaning of the language used. But, nevertheless, the Court held that the words "issue" and "grandchildren" had a "legal meaning" from case law and statutes in 1928 which indicated the settlor intended to exclude the adopted child here in question. To support this ruling, the Court cited five cases to a statement that "issue" in 1928 meant the same as "descendants" and did not include strangers to the blood.

Looking at the cases so cited, it is readily seen that they do not support such a premise. The first, Stewart v. Lafferty, was decided in 1957, and so the decision therein cannot have been a part of the case law in 1928. Further, the problem involved was whether a child adopted after the death of the testator would be included as a "descendant" of the testator's child. Any remarks made in that opinion as to the meaning of the word "issue" would not have given a settled legal meaning to "issue" in 1928. The second case cited, In re Estate of Tilliski, was decided in 1945 and involved the right of an adopted child to inherit from her natural mother. Remarks by the court in that case regarding the meaning of the words "issue" and "descendant" related to the adoption and inheritance statutes and did not involve a trust agreement or will. Thirdly, the court went even farther afield in citing Marsh v. Field, a case involving a question of whether "issue" would include an illegitimate child. No mention whatever was made in that opinion as to the meaning of the word in relation to an adopted child. Miller v. Wick was the fourth case cited by the court. The decision was rendered in 1924 and the problem before the court was whether a child adopted by the testator's nephew some four years after the testator's death could qualify as lawful issue under the following language:

". . . 'Said payments shall continue during the life of my said nephew or until such time in his life as he shall have a child, his lawful issue, . . .'. "

The court based its opinion partly on the grounds that the words "his lawful issue" were used to modify the word "child" and were superfluous
unless they were intended to give a more restrictive meaning to "child," and partly on indications elsewhere in the will that the testator did not intend for the nephew to become entitled to the principal of the bequest by adopting a child. At one point in its opinion, the court further stated that:

"The meaning to be attributed to the word 'issue' in a will depends upon the testator's intention as appears from the whole will."  

The final case cited to its premise by the court was *In re Howlett's Estate*. This was a 1951 Pennsylvania decision and could not have been a part of the case law and statutes of Illinois in 1928, even though it did involve an existing adoptee and his inclusion in the term "issue" and was decided adversely to the adoptee.

A search of Illinois case law up to 1928 effecting exclusion of existing adoptees from the term "issue" produced not a single case so holding. One decision was found, *Hale v. Hale* by the Appellate Court for the First District, holding that an adoptee was excluded by use of the word "descendant" because that word meant "issue," but the adoptee so excluded was adopted after the death of the testator. The court stated in *Miller v. Wick*, *supra*, that "issue" did not include an adoptee but, as indicated previously, the case did not involve a question of an adopted child taking property. The question was whether the adoptive parent could take by having adopted a child as his lawful issue. Further, the word "issue" was used to modify and restrict the word "child." In *Munie v. Gruenewald* a child adopted prior to the execution of the testator's will was allowed to take under the will. The case served to distinguish the rights of adoptees existing at the time the instrument being construed was created from the rights of future adoptees. However, the words there used were closely similar to "child of my child," and the case would not be decisive of the meaning of "issue."

With respect to statutory law in 1928, it was true that an adopted child could not inherit from the lineal or collateral kindred of the adopting parent. But not a single prior Illinois case was found which held the wording of the statute controlling as to the intention of the testator expressed by the language he used. In fact, in *Miller v. Wick, supra*, the court refused to determine the meaning of "issue" with respect to

10 Id. p. 275, p. 492.
13 259 Ill. 468, 124 N. E. 605 (1919).
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the statute of inheritance in a case which involved the construction of a will. This attitude was confirmed in 1931 in the decision of Moffet v. Cash, where a future adoptee was involved and the court stated:

"... The rights of inheritance of Malcolm W. Cash are not involved in the case. He claims nothing by inheritance but his claim is based on the provisions of the will, and, as we have stated, the question is one of the intention of the testator."

Even if, as was indicated by the court in Belfield v. Findlay, the testator is artificially presumed to have known the law and to have made his will in conformity therewith (a proposition inconsistent with determining actual intent), it would seem illogical to presume that the law as to inheritance, which is an involuntary method of distributing the property of a decedent, would attach to the language used in a will, which is a voluntary distribution of the decedent's property.

In reaching its conclusion, the court cites no authority for holding that an existing adoptee is excluded by the use of the word "grandchildren," and no decisions so holding have been found by the writer. Yet, the words similar to "child of my child" were found in Munie v. Gruenewald, supra, to include an existing adoptee. If there is, indeed, this settled difference between the two terms, it is one so technical that imputing an intention to a testator to include an adopted child by the use of one term but to exclude such child by use of the other does violence to the well-established rule that wills and trust agreements should be liberally construed to give effect to the intention of the testator or settlor.

What, then, does this decision mean to the law in Illinois with respect to adopted children taking property under a will? With respect to wills, the statute states that for purposes of determining property rights of any person under a written instrument executed after September 1, 1955 an adopted child will be deemed a natural child unless a contrary intent plainly appears by the terms of the instrument. In view of the legal meaning given by this opinion to the words "issue" and "grandchildren" in 1928, and with no intervening cases holding to the contrary, does the use of these words in a will executed after September 1, 1955 express a plain intent on the part of the testator that all adoptees, whether existing or future, be excluded? Another question arises with respect to the

15 346 Ill. 287, 178 N. E. 658 (1931).
16 Id. p. 293, p. 660.
17 389 Ill. 526, 60 N. E. (2d) 403 (1945).
statute of descent and distribution. The present statute allows adopted children to inherit from lineal and collateral kindred to their adoptive parents.\textsuperscript{19} They could not so inherit under the 1928 statutes.\textsuperscript{20} In view of the fact that the court held the 1928 statute as to inheritance by adoptees controlling in determining the settlor's intent in this case, would the result have been opposite if the language of the instrument had been "issue of my children?" Would it have been opposite if the present statute were involved? Does the use of the word "descendant" in relation to the testator express his intention to exclude all adoptees except his own since the statute considers an adopted child a "descendant of the adopting parent for purposes of inheritance from ... the lineal and collateral kindred of the adopting parent?" Does the legal meaning attached herein to the word "issue" mean that an adoptive parent intends to exclude his own adopted child by the use of the word in his will? Does the court intend that this decision should abolish a distinction heretofore made in determining a testator's intention between children adopted during his lifetime as to whom he has an actual intention, either to include or exclude, and those adopted after his death as to whom he usually has no intention? By finding a settled meaning in the words "issue" and "grandchildren" does the court hold that this decision is a binding precedent in future cases construing the same language? If so, this is in contradiction of the long-established rule that precedents are of little value in construing wills.\textsuperscript{21}

These are only a few of the questions that will arise as a result of this opinion. The decision makes it almost impossible for an attorney to advise a client as to the status of an adoptee under existing instruments where the language is "issue" of my child or in any case where later amendments of the adoption and inheritance statutes subsequent to 1928 are involved.

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\textsuperscript{19} Ibid.

\textsuperscript{20} Ill. Rev. Stat. 1927, Vol. 1, Ch. 4, § 5.