South Carolina Law Review

Volume 17
Issue 1 *1963-1964 Survey Issue*

Article 20

1964

Wills and Trusts

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Recommended Citation

Karesh, Coleman (1964) "Wills and Trusts," *South Carolina Law Review*: Vol. 17 : Iss. 1 , Article 20.
Available at: https://scholarcommons.sc.edu/sclr/vol17/iss1/20

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WILLS AND TRUSTS

COLEMAN KARESH*

Contract to Will

Two cases involving alleged contracts to make a will were passed upon by the South Carolina Supreme Court in the period under review. No new principle of law appears in either and the decision in each turned upon the facts.

In the first of the cases, *Brown v. Graham*,[1] the plaintiffs alleged that they were illegitimate children and that their father had contracted to devise certain land to them but had breached his contract by devising the land to his wife, who in turn had left the land by her will to the defendants. The prayer was for specific performance. The master found for the plaintiffs, but was reversed by the trial judge. The supreme court affirmed the holding of the trial court. The pivotal issue in the case was whether a contract had been made; the master found that there was a contract, the trial court and the supreme court held that there was not.

The South Carolina Supreme Court pointed out that, even if there had been a promise or agreement, it must have possessed all the essential elements of a contract to justify a finding that a contract had been made. Further, the court adverted to the rule that in an action to establish an alleged contract to make a will, the burden is upon the claimant and that the ordinary rules in civil actions demanding only a preponderance of the evidence do not apply to actions to enforce a parol contract to make a will—that "such contracts are regarded with suspicion and will not be sustained unless established by definite, clear, cogent and convincing evidence, a higher degree of proof than is necessary in the usual civil case."[2] The plaintiffs did not meet these requirements.

The second case, *Hayes v. Israel*,[3] is somewhat more complex than the first in that it involved an alleged contract by husband and wife to make mutual irrevocable wills. The plaintiff, seeking specific performance, alleged that he and his wife had agreed, by way of contract, to make irrevocable reciprocal wills and that

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1. 242 S.C. 491, 131 S.E.2d 421 (1963).
2. *Id.* at 493, 131 S.E.2d at 422.
3. 242 S.C. 497, 131 S.E.2d 506 (1963).

such wills had been made, but that the wife without notice to him had revoked her will and by another will had left her property to the defendants, subject to a life estate in the husband in a portion of certain land. The answer to the complaint by the only defendant who answered contained a general denial and a plea of the Statute of Frauds. Both the master and the trial judge found, from the facts, that a contract was made between the plaintiff and his wife and specific performance was allowed. The South Carolina Supreme Court affirmed.[4]

In reaching its result the court followed its earlier holding in *Looper v. Whitaker*[5] that the fact that husband and wife make reciprocal wills is not sufficient in itself to constitute proof that they were made pursuant to contract, and it reiterated the rule that:

> [W]hen an oral contract to make mutual wills is relied upon it is necessary that such contract be established by clear, cogent and convincing evidence which carries irresistible conviction to the mind that such a contract actually existed and that the parties thereto understood and acquiesced to its terms.

Reviewing the evidence, the court, in affirming, must have concluded necessarily that the plaintiff met this high standard of proof; yet the statement appears that:

> [I]n equity cases, findings of fact by a master concurred in by a Circuit Judge will not be disturbed on appeal unless

4. The opinion, while noting that the Statute of Frauds had been interposed as a defense, makes no further mention of it, since the appellant did not advance it as a ground of appeal and limited his appeal to the question of the existence of a contract. The master had concluded that the execution of his will by the plaintiff was such part performance as would remove the case from the statute, under the authority of Turnipseed v. Sirrine, 57 S.C. 559, 35 S.E. 757, 76 Am. St. Rep. 580 (1899), and Stuckey v. Truett, 124 S.C. 122, 117 S.E. 192 (1923). There was no exception to this holding, and the statute is accordingly not mentioned in the trial court's decree. The authority of *Turnipseed v. Sirrine* is questioned in White v. McKnight, 146 S.C. 59, 70, 143 S.E. 552 (1928). Its value is particularly doubtful since, while the testatrix there whose will had been revoked in alleged breach of contract had owned land at the time her will was made, she owned none at her death—a fact which, the court pointed out, made the 4th section of the statute relating to the transfers of interests in land inapplicable; and its remarks as to part performance related to the 17th section of the statute affecting sales of personal property. In *Stuckey v. Truett,* which was not a case of mutual wills, a husband had orally promised his wife that if she would devise her property to him, he would thereafter will it to her family. She died leaving a will under which her property went to her husband, but the husband failed to carry out his agreement. It was not the mere making of the will by the wife but the fact that she had actually left the property in reliance on her husband's promise that was treated as part performance.

5. 231 S.C. 219, 98 S.E.2d 266 (1957).

> it is shown that such findings are without evidence to support them or are against the clear preponderance of the evidence.[6]

And again, in concluding, this statement:

> When the foregoing testimony is taken into consideration along with the circumstances under which the wills were made, this Court cannot say that the findings of the Master, concurred in by the Circuit Court, are without evidentiary support or against the clear preponderance of the evidence.[7]

It is at least arguable that the rule as to concurrent findings falls far short of, and is incompatible with, the rule, in cases of this kind, which calls for "irresistible conviction."[8]

Trusts—Discretionary Powers

In *Page v. Page*[9] the question in issue concerned the exercise of discretionary powers by a testamentary trustee. The will gave the residuary estate to a named trustee:

> [T]o be expended for any emergent needs of my son, Kermit R. Page [the plaintiff], and my three grandchildren . . . the Trustee to be the judge of the necessity of paying out any of said funds. This is to provide against any misfortune to my said son that would incapacitate him as a provider for himself and his family, or any unforeseen happening to any of one said children that would make necessary any expenses that my said son could not reasonably meet.[10]

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6. Hayes v. Israel, 242 S.C. 497, 500, 131 S.E.2d 506, 507 (1963).

7. *Id.* at 502, 131 S.E.2d at 508.

8. In Young v. Levy, 206 S.C. 1, 32 S.E.2d 889 (1944), which was an action for specific performance of an alleged oral contract to make a will, the court rejected concurrent findings of the master and the circuit judge, because in the majoritys view the requirement of strict proof was not met. Confronted with the rule as to concurrent findings, which was expressed particularly in Alderman v. Alderman, 178 S.C. 9, 181 S.E. 897, 105 A.L.R. 102 (1935), Mr. Justice Stukes, speaking for the majority, said (p. 27):

> I have not undertaken to state all of the lengthy testimony. I repeat that a reading and rereading of it leaves me unconvinced of the truth of respondent's allegations, certainly as to the degree of conviction necessary in such a case. Perhaps if it were an ordinary equity appeal from concurrent factual findings of master and judge, and uninfluenced by errors of law, my view would be different and I could conscientiously agree to application of the rule of *Alderman v. Alderman*. . . .

9. 243 S.C. 312, 133 S.E.2d 829 (1963).

10. *Id.* at 314, 133 S.E.2d at 830-31. The transcript of record setting out the will shows that the concluding portion of the item in which the quoted language appears provided that upon the death of the plaintiff the "unexpended balance that may be on hand" should be equally divided and paid over to the grandchildren as each reached twenty-one. Record, p. 28.

The trustee named did not accept the trust and the First National Bank of Myrtle Beach in substitution administered the trust. It paid taxes and insurance on property devised by the same will to the plaintiff. The bank subsequently merged with the South Carolina National Bank of Charleston, which placed a different construction upon the will and refused to pay taxes and insurance as its predecessor had done. This action was thereupon brought against the plaintiff's children and the trustee bank seeking a construction of the will so as to direct the trustee not only to pay the taxes and insurance then due but also to pay all the future income to the plaintiff. The complaint alleged in substance that the plaintiff's financial condition was such as to justify the relief which he asked. The trustee's contention in answer was that the language of the trust did not warrant the use of the trust funds as the plaintiff demanded. The lower court held in accordance with the prayer of the plaintiff—directing the payment of taxes and insurance and ordering future income to be paid to him—"since to do so would be in the best interest of all the individual parties to this suit and since it could in nowise affect the defendant trustee."[11] The South Carolina Supreme Court reversed.

The court, after pointing out the distinction between mandatory and discretionary powers, characterized the powers under the will in suit as discretionary, pointing particularly to the language "the trustee to be the judge of the necessity of paying out any of said funds." It further declared that a trustee cannot exercise an arbitrary discretion and that the sanctioned discretion is controlled by the intent manifested in the language of the trust. Since the expenditure of trust funds was limited to circumstances which, in the trustee's judgment, constituted a "misfortune" producing an "emergent need," there necessarily was discretion in the trustee to determine the existence of such circumstancs. The court thereupon undertook to define "misfortune" and "emergent needs"—the substance being that they do not embrace "happenings which are recurring and foreseeable in the ordinary course of events but rather refer to an event or circumstance which might not occur and which was not reasonably foreseeable or anticipated at the time of the will's execution."[12]

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11. Record, p. 32, Page v. Page, 243 S.C. 312, 133 S.E.2d 829 (1963).
12. Page v. Page, *supra* note 11.

In the light of these principles the court concluded that there was no abuse of discretion, under the facts, in the trustee's failing to pay the taxes and insurance—which were foreseeable and recurring items—nor in its resistance to the plaintiff's demands for payment of all future income to him, and that the trustee having thus acted in good faith the court would not interfere. Further, the court observed, the plaintiff was seeking the court to substitute its discretion for that of the trustee. This, the court said, it could not do, and "'the mere fact that if the discretion had been conferred upon the Court, the Court would have exercised the power differently is not a sufficient reason for interfering with the exercise of the power by the trustee.'"[13]

Finally, the court declared that "the burden is not upon the trustee to show good reasons for its actions but rather is upon those who question its actions to prove an abuse of discretion,"[14] and that the plaintiff had failed to carry the burden by showing that the plaintiff's "claimed lack of financial resources is insufficient or unavailable due to any 'misfortune' which would require the trustee to alleviate an 'emergent need' such as to warrant this Court granting the relief sought on the grounds that the trustee had abused its discretion."[15]

Purchase Money Resulting Trusts

In the period under review the South Carolina Supreme Court had before it two cases involving purchase money resulting trusts and in each the attempt of the claimant to establish such a trust was unsuccessful.

In the first of the cases, *Hodges v. Hodges*,[16] the plaintiff sued her husband for divorce and also asked that she be declared to be equitable owner of a one-half interest in real and personal property in the husband's name. With respect to the claim of ownership the plaintiff asserted in the complaint that she had

13. *Ibid.* Quoting from II SCOTT, THE LAW OF TRUSTS § 187 (2d ed. 1956).

14. Page v. Page, *supra* note 11, at 317, 133 S.E.2d at 832.

15. *Ibid.* No point is made in the case as to the propriety of exercising discretionary power by a successor trustee. It must have been assumed on both sides that the power could be exercised by one succeeding to the original trustee. In his will the settlor named a trustee and provided for a substitute. The original trustee, as the case discloses, did not accept the trust; no mention is made of the named substitute, but apparently there was no acceptance here either. Unless the discretion vested in the named original and substitute trustees was intended to be personal to them, the power would of course pass to successors in the office. RESTATEMENT (SECOND), TRUSTS § 196 (1959). *Cf.* Singleton v. Cuttino, 105 S.C. 44, 89 S.E. 385 (1916).

16. 243 S.C. 299, 133 S.E.2d 816 (1963).

contributed money toward the purchase of a house under an agreement with her husband that title was to be taken in their joint names, but that she had learned just before the suit that title had been taken by the husband solely in his name. The master's finding was that the plaintiff, under the facts, was not entitled to a divorce, nor was she entitled to a resulting trust. The circuit judge reversed the master in both respects, and he in turn was reversed by the South Carolina Supreme Court, which agreed with the findings of the master.

The court, noting that the master and the circuit judge had disagreed in their conclusions, proceeded to determine the questions according to its own view of the evidence, and it gave consideration to the fact that the master had observed the witnesses and so on. The court, in the light of the rule that "the evidence required to establish either a constructive or resulting trust must be clear, definite, unequivocal and convincing,"[17] determined that the evidence was "clearly insufficient" to establish a resulting trust in the wife's favor. Referring to the now well known case of *Green v. Green*,[18] the court stated the applicable rules as follows:

> Concisely stated, in order for a resulting trust to arise, such must arise, if at all, at the time the purchase is made. The funds must then, or prior thereto, be advanced and invested. A trust will not result from funds subsequently furnished. Authorities quoted there support the proposition that, incurring an absolute obligation to pay, as a part of the original transaction to purchase, at or before the time of conveyance, may suffice, in lieu of actual payment.[19]

Without going into the evidence, it is sufficient to say that the court determined that the wife did not meet the test of payment at or before the time of acquisition of title by her husband or of any obligation to pay; and, in fact, the court declared that it was "led to the conclusion that it was highly improbable that any of her funds of any consequence went even indirectly into the purchase of the real property."[20]

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17. *Id.* at 306, 133 S.E.2d at 819.

18. 237 S.C. 424, 117 S.E.2d 583 (1960).

19. Hodges v. Hodges, 243 S.C. 299, 306-07, 133 S.E.2d 816, 819-20 (1963).

20. *Id.* at 308, 133 S.E.2d at 820. No particular issue was made as to the personal property. A division recommended by the master was accepted.

The treatment of the alleged trust throughout the case was on the basis of a purchase money resulting trust. In view of the allegation in the complaint and the attempted proof that the husband had promised to take title in the

In the second of the cases, *Stevens v. Stevens*,[21] the plaintiff was an estranged husband who sought to establish a resulting trust to the extent of a one-half interest in real property, title to which was in the name of the defendant, his wife. His contention was that he had contributed fifty per cent of the cost of the property and improvements, with the understanding that he and his wife would each own a one-half interest. The defendant's principal contentions in answer were that the property was paid for largely out of her own earnings, and that contributions made by the husband were a gift.

The master, to whom the case was referred, found that the plaintiff failed to establish his claim by the necessary high degree of proof. The findings of the master were upheld by the circuit court. The South Carolina Supreme Court affirmed.

The South Carolina Supreme Court pointed to the rule that the claimant of a purchase money resulting trust has the burden of establishing the trust by clear, definite and convincing evidence. Keeping in mind the principle that concurrent findings of master and judge in an equity case would not be disturbed unless unsupported by the evidence or against the clear weight of the evidence, the court reviewed the extensive testimony and agreed with the conclusions below. The court stated that assuming the plaintiff had contributed fifty per cent or more towards the purchase of the property and its improvement:

> [S]ince the conveyance was made to his wife for whom he was under a legal obligation to provide, the presumption is that his contribution towards his purchase thereof was a gift to her. While such presumption is one of fact and not of law and may be rebutted by parol evidence or circumstances showing a contrary intention, it is of itself a circumstance sufficient to raise an inference that a gift was intended and

joint names of himself and his wife, it is equally appropriate—probably more so—to term the consequent trust, if the facts warranted, a constructive, rather than a resulting, trust. If the husband, occupying as such a confidential relationship to his wife, promised to buy the property in their joint names, the breach of the promise by taking title in his own name could well be said to give rise to a constructive trust. The requirements for payment of definite sums at particular times would not necessarily come into play. See discussion of this problem in the survey article on *Green v. Green*, Karesh, *Wills and Trusts, 1960-1961 Survey of S.C. Law,* 14 S.C.L.Q. 227, 264 n. 84 (1962). In any event, since the proof to establish a constructive trust must be clear and convincing, it is fairly plain from the evidence that the wife did not meet the required degree of proof to establish that kind of trust and would have been equally unsuccessful from that point of attack.

21. 244 S.C. 113, 135 S.E.2d 725 (1964).

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> to cast the burden upon the one seeking to enforce a resulting trust, here the plaintiff, to prove that he did not intend to make a gift to his wife. The presumption of a gift also applies to improvements made by the husband upon property which he knows belongs to his wife.[22]

The efforts of the plaintiff throughout were of course largely directed to an attempt to overthrow the presumption of a gift, but, without relating the evidence, it is enough to say that he did not convince the court—just as he had not convinced the master and the circuit court—that he did not intend a gift to his wife. The plaintiff's explanation for having title placed in the name of his wife was that he wished the family home to be secure against judgments that might be obtained against him in his occupation as a locomotive engineer—he was aware that judgments had been obtained against railroads and engineers jointly. On this the court remarked that, if the plaintiff's version was true:

> [I]t is apparent that title was placed in the name of his wife as a gift so as to relieve the property of any obligations that he might create in his business and thereby promote the family security. If this was his purpose . . . it could have been accomplished only by divesting himself of every semblance of title. It must be presumed that he intended that the conveyance to his wife would accomplish such purpose.[23]

The court further observed that the fact that the parties had thereafter fallen into discord could not change the legal effect of the original transaction—it could not change the gift into a trust.

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22. *Id.* at 117, 135 S.E.2d at 727.

23. *Id.* at 118-19, 135 S.E.2d 727-28. The husband who buys property in his wife's name of course takes a calculated risk. In the first place, as here, he is faced with the presumption of a gift, which is difficult to overcome. If, in order to safeguard the family home against future creditors, he makes a gift in this fashion to his wife, a subsequent marital rift will find his wife quite naturally holding on to the property; and there is the not infrequent case of the wife devising the property away from her husband or permitting it through intestacy to pass in part to her relatives. On the other hand, if it is demonstrated that the wife was to hold the property in trust, the purpose of handling the property in this way would be defeated if creditors of the husband sought to reach the property, since, being his equitably, it would be available to them. And if there were no creditors attempting to pursue their claims against the property, a wife who had in fact agreed to hold the property in trust might successfully contend that the purpose being to conceal the husband's ownership equity should not enforce the trust—either as an express or a resulting trust. See RESTATEMENT (SECOND), TRUSTS §§ 63, 444 (1959); Annot., 117 A.L.R. 1464 (1938). *Cf.* All v. Prillaman, 200 S.C. 279, 20 S.E.2d 741, 159 A.L.R. 997 (1942).

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Finally, in his appeal the plaintiff asked the court to overrule or modify the principle that the presumption of a gift arises when a husband pays the purchase price for property taken in his wife's name. The court refused to grant the petition, and the principle remains unaltered.[24]

LEGISLATION

Presumptions

The Statute of Descent and Distribution[25] was amended by the 1964 General Assembly by addition of the following:[26]

> (11) Whenever any person shall be presumed dead by reason of disappearance or long unexplained absence under the common law rule in this State and such person shall have been unmarried at the time of such disappearance and when last heard from, then such person shall further be presumed to have died intestate, unmarried and without issue.

Apparently the purpose of the amendment is to state a definitive rule of presumptions in the facts mentioned. So far as the presumption of intestacy is concerned, the provision appears to follow general law.[27] It is not clear whether, before the amendment, there was a presumption or not of marriage following the disappearance of one known to have been unmarried at the time, although it may be implicit in the case of *Still v. Hutto*[28] that

24. It has been noted that the court declared that in order to establish a resulting trust the plaintiff must establish such a trust by clear, convincing and definite evidence. In a case where the presumption of a gift—not a trust—arises from payment of the purchase price, the claimant has a two-fold burden: first, to show the payment of the purchase price or a definite portion, and, second to show facts to overthrow the presumption of a gift. Unquestionably he must show by such clear and convincing evidence the fact of payment, but apparently this case requires him also by the same kind of proof to rebut the presumption against him. On this latter point there is some diversity of opinion, and it has been urged by a high authority that such a rigid degree of proof should not be required. III SCOTT, THE LAW OF TRUSTS § 443 (2d ed. 1956). On aspects of the problem locally, see Karesh, *Wills and Trusts, 1959-1960 Survey of S.C. Law,* 13 S.C.L.Q. 96, 109 n. 25 (1960) reviewing Privette v. Garrison, 235 S.C. 119, 110 S.E.2d 17 (1959), which the court in this case cites as requiring a high degree of proof, and, which, like this case, involved a claim by a husband.

25. S.C. CODE ANN. § 19-52 (1962).

26. S.C. CODE ANN. § 19-52 (11) (Supp. 1964), S.C. ACTS & J. RES. 1964, No. 938.

27. 16 AM. JUR. *Descent & Distr.* § 56 (1938); 26A C.J.S. *Descent & Distr.* § 2, at 519 (1956).

28. 48 S.C. 415, 26 S.E. 713 (1896). The syllabus states the proposition: "Where a man leaves the State *unmarried* and *childless,* and has not been heard from for seven years, he will be presumed dead, but it will not be pre-

there is no presumption that he remained unmarried. Equally, if not more, important, this case states that there is no presumption that the party had no issue even though he was unmarried when last heard from. The amendment obviously is intended to change the rule of this case and to place the burden upon the one asserting the fact of marriage, or issue or both.[29] The change brings the rule into conformity with the view of the majority of courts.[30]

Adoption—Inheritance

The 1964 General Assembly enacted a comprehensive adoption law,[31] the details of which are by now known to the members of the bar. Relevant to this area of the Survey is the portion of the act dealing with succession by and from adopted children. The then current section regulating inheritance—section 19-52.1 of the South Carolina Code, 1962, was, with other statutes, specifically repealed. The applicable section embraced in the new law provides in part as follows:

> Section 12. After the final decree of adoption is entered, the relation of parent and child and all the rights, duties and other legal consequences of the natural relation of child and parent shall thereafter exist between such adopted child and the person adopting such child and the kindred of the adoptive parents. From the date the final decree of adoption is entered, the adopted child shall be considered a natural child of the adopting parents for all inheritance purposes, both by and from such child, to the exclusion of the natural or blood parents or kin of such child. These rules of inheritance shall also apply to all the parties where

sumed that he died childless, and the party alleging such fact must prove it." The case involved a will which contained a provision that if a beneficiary died without child or children the property was to go in a certain way. Obviously, most cases would involve intestacies. Under the rule in this case, given the disappearance of a person for a sufficient period to raise a presumption of death, collateral heirs of such a person who was last known to be unmarried and childless would be faced with the practically impossible burden of proving their right to the inheritance, even though no spouse or descendants of the missing party were known to exist to make a claim in opposition to theirs.

29. As to a woman who had disappeared, the important question in a case might be not whether she had married and had had children but only whether she had had children—since illegitimate children can inherit from the mother. S.C. CODE ANN. § 19-53 (1962).

30. 26A C.J.S. *Descent & Distr.* § 81, at 719 (1956).

31. S.C. CODE ANN. § 10-2587.1-.18 (Supp. 1964); S.C. ACTS & J. RES. 1964, No. 703.

one of the natural parents is united in bonds of matrimony to the other adopting parent.

Unlike earlier statutes which at least placed in doubt adoption of adults, the new law—section 17—permits such adoptions, but in such cases sections 1 through 12 of the act do not apply, except that if the court finds it to the best interests of the persons involved, a decree of adoption may be entered which shall have the legal consequences stated in section 12. It is not quite clear whether a decree of adoption of an adult person will automatically and in itself produce the consequences of section 12, or whether the decree must in specific terms so provide.

Another relevant feature of some importance is that the new act contains an express repealer of section 10-2587 of the Code, which contained a restriction, somewhat ambiguous, upon the amount that an adopted child who was illegitimate could take from the estate of the adoptive parent.

Reverting to section 12, it will be seen that its provisions are far-reaching. How far it goes beyond the section which it repealed—section 19-52.1—is difficult to assess because of some uncertainty in the language of the repealed statute, which has not been construed judicially since its enactment in 1954.[32] If the language of section 12 means what it seems to mean, the adopted child is to be treated as removed from the bloodstream of his natural parents and placed into the bloodstream of his adoptive parents. An exception would seem to exist where the adoptive parent is married to the natural father or mother of the child—the child would not be removed from the bloodstream of the natural parent. If, for example, a widow with a child married, and the stepfather adopted the child, the tie between the child and the deceased father's family would be severed but not the tie between the child and his mother and her family. This assumption appears, however, to be at odds with the concluding sentence of section 12, but it could surely not be intended that, in the case suggested, the child would not inherit from the mother or her relatives.[33]

Although it is not stated specifically that the adopted child shall inherit from his adoptive parents, or they from him, or that

32. S.C. ACTS & J. RES. 1954, No. 698.

33. Compare the provision on this point in the repealed statute (§ 19-52.1): "provided, however, that where one of the natural parents be united in bonds of matrimony to the other adopting parent then in such event the rules of inheritance as above set out shall attach as said child were the natural child of both such parents"—the proviso following an exclusion of the natural parents.

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he shall inherit from the kin of the adoptive parents, or they from him, it seems reasonably clear that these are necessary implications from the broad provisions in the act that for all inheritance purposes the adopted child is to be regarded as a natural child, that the legal consequences of the natural relation of parent and child shall exist between the adopted child and the kindred of the adoptive parents, and the exclusion of the kindred of the natural parents. Admittedly these are only assumptions whose validity must await judicial determination.[34]

Some hypothetical cases may be suggested in the light of these assumptions:

(1) *A* is the adopted child of *B*. *B* dies survived by *A*. *C*, brother of *B*, dies intestate. *A* would take, although he is not related by blood to *C*.

(2) *A* is the adopted child of *B* and *C*. *B* and *C* die. *B* has a brother *D*. *A* dies. *D* would take.

(3) *A* and *B* are children of *C* and *D*, both deceased. *A* is adopted by *X*, and *B* by *Y*. *A* dies. *B* would not take.

(4) *A* is the child of *B*. *B* abandons *A*. *A* is adopted by *C*. *B* dies. *A* does not inherit from *B*.

(5) *A* is adopted by *B* and *C*. *D* is adopted also by *B* and *C*. *B* and *C* have a natural child *E*. *A* dies. *D* and *E* inherit from *A*.

(6) *A* is adopted by *B* and *C*. *D* is also adopted by *B* and *C*. *B* and *C* have natural children *E* and *F*. *E* dies. *A*, *D* and *F* take from *E*, although *A* and *D* are not related by blood to *E*, and *F* is. (Compare the situation of the brother of the half-blood who is excluded by the brother of the whole blood. See next example.)

(7) *A* is adopted by *B* and *C*. *B* and *C* have a natural child *D*. *B*, by an earlier marriage, has a child *E*. *D* dies. *A*, not related by blood, would exclude *E*, who is related to *D* by blood and is in the same degree as *A*. (The resolution of this incongruity would be to eliminate the distinction between kindred of the whole and half blood, which has produced abnormal results in situations other than adoptions.)

(8) The same as in (7) except that *A* dies. *E* would be excluded by *D*.

(9) *A* is adopted by *B*, child of *C*. *B* dies. Thereafter *C* dies. *A* inherits from *C*, although no act of *C* brought *A* into the family.

34. For annotations on the subject and analysis of the various statutes, see Annot., 37 A.L.R.2d 333 (1954); Annot., 43 A.L.R.2d 1183 (1955).

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(10) *A* is adopted by *B*, child of *C*. *B* dies. Thereafter *A* dies. *C* inherits from *A*.

The case examples given involve intestacies and of course there can be many variations. In the area of testate succession, the factual situations would not be as numerous. It may be assumed without strain that "all inheritance purposes" would embrace succession by will as well as by intestacy, and that "legal consequences" would, in context, likewise embrace it. Some suppositious testacy cases, based on the stated assumptions, are also suggested:

(1) *T* by will makes a gift to *A*, his adopted child. *A* has a natural child *B*. *A* dies before *T*. There is hardly doubt, under both the old and the new law, that *B* will take from *T* under the Anti-lapse Statute.[35]

(2) *T* by will makes a gift to *A*, his natural child. *A* adopts *B*. *A* dies before *T*. It is probable that under the law as it existed prior to the 1964 act, *B* would take from *T* under the Anti-lapse Statute. The same, perhaps a greater, probability exists under the new law.

(3) *T* by will makes a gift to *A*, his natural child. Thereafter *T* adopts *B*. Under both the old and the new law *B* will participate in the gift to *A* as a pretermitted child taking by staute.[36]

Constructional questions may present more difficulty. For example, the constructional rule is that a gift to the children of a third person is, in the absence of a contrary intention, exclusive of adopted children.[37] Whether the legislation will affect the rule is problematic. Similar questions may arise as to gifts to such persons as "descendants," "issue," "heirs," "heirs of the body"—whether these classes relate to the testator or third persons. It is evident also that like problems will arise in inter vivos transfers employing the same terms.

Jurisdiction of Probate Courts

The present South Carolina constitutional provision as to the jurisdiction of probate courts is article 5, section 19, as follows:

35. S.C. CODE ANN. § 19-237 (1962), See Annot., 15 A.L.R. 1265 (1921).

36. S.C. CODE ANN. § 19-236 (1962). See Fishburne v. Fishburne, 171 S.C. 408, 172 S.E. 426 (1934), applying the statute to a case where testator provided for an adopted child after the will adopted another child; the latter was treated as an after-born child and permitted to take. See Annot., 105 A.L.R. 1176 (1936); Annot., 19 A.L.R.2d 1159 (1951).

37. Annot., 70 A.L.R. 621 (1931); Annot., 144 A.L.R. 670 (1943).

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> The Court of Probate shall remain as now established in the County of Charleston. In all other Counties of the State jurisdiction in all matters testamentary and of administration, in business appertaining to minors, and the allotments of dower, in cases of idiocy and lunacy, and persons non compos mentis, shall be vested as the General Assembly may provide, and until such provision such jurisdiction shall remain in the Court of Probate as now established.

By joint resolution[38] the 1964 General Assembly has proposed an amendment to be submitted for approval in the ensuing general election which would amend the provision by substituting the following:

> Jurisdiction in matters testamentary and of administration, in matters appertaining to minors and to persons mentally incompetent, shall be vested as the General Assembly may provide, and until such provision and jurisdiction shall remain as now provided by law.

It is evident that the most noticeable change is to strip the Probate Court of Charleston County of its seemingly privileged —though in reality unprivileged—position as the only constitutional court in the probate system, and to make it as amenable to the authority of the legislature as the probate courts of the other counties.[39] The effect of the amendment, if adopted, would be to make general legislation affecting the probate courts uniformly applicable throughout the state and to dispel doubts concerning the application of such legislation to the Charleston court. With the change, that court will have taken from it whatever unique judicial prerogatives may have remained from the period prior to the adoption of the 1895 constitution, but, more importantly, it will be afforded legislatively conferred powers which might be denied to it under the present version of the constitution which seems to lock in its powers to those existing at the time of adoption. The fate of the amendment may have been decided by the time this Survey is published.

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38. S.C. ACTS & J. RES. 1964, No. 1079.

39. For comments on the constitutional and non-constitutional status of probate courts, see Karesh, *Probate Court Jurisdiction Over Testamentary Trusts,* 2 S.C.L.Q. 13 (1949), and particularly, as to Charleston County, pp. 17, 18, n. 6.