

## Section 76 and 77 of the Child Welfare Act

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Commentary

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**SECTION 76 AND 77 OF THE CHILD WELFARE ACT.** In 1958 the Ontario Legislature ostensibly gave effect to the current of social opinion in favor of equating the legal positions of adopted children with those born in lawful wedlock through amendments to the Child Welfare Act.<sup>1</sup> Section 76 of the Act provides that:

- (1) *For all purposes* the adopted child, upon the adoption order being made, becomes the child of the adopting parent and the adopting parent becomes the parent of the adopted child as if the adopted child had been born in lawful wedlock to the adopting parent.
- (2) *For all purposes* the adopted child, upon the adoption order being made, ceases to be the child of the person who was his parent before the adoption order was made and that person ceases to be the parent of the adopted child. (Italics added).

Section 77 of the Act provides that the above provisions apply to every person heretofore adopted under the laws of Ontario and to every person adopted under the laws of any other province or territory of Canada or under the laws of any other country.

Thus, it appeared that the culmination of the progressive legislative process of placing the adopted child in the position of his naturally-born counterpart had been reached. Yet the decision of the

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<sup>29</sup> *Ibid.*, p. 89.

<sup>1</sup> R.S.O. 1960, c. 53.

majority of the Supreme Court of Canada in *Re Gage, Ketterer et al. v. Griffith et al.*<sup>2</sup> has established that although the status of an adopted child is now that of a natural child, their rights of succession under a will may be quite different.

In *Re Gage* the testator died in 1921 leaving a life estate to his daughter with the remainder to her children. At the time of the testator's death in 1921 there was no adoption legislation in the province. In 1930, subsequent to the enactment of such legislation, the daughter adopted three children. On January 1, 1959 the legislation making the adopted child a child for all purposes came into force and the daughter died on October 25th of the same year, having had no other children and being survived by the three she had adopted.

The majority of the Supreme Court held that the adopted children were not entitled to the remainder of the life estate, the intention of the testator, as extracted from a construction of his will, being that only children born of his daughter's body were to take. In the view of the majority, the language of Sections 76 and 77 could not be interpreted so as to thwart the testator's intention as expressed in his will. Since there was no adoption legislation in Ontario at the date of his death, the testator could not have intended by the use of the word "children" to include adopted children. The class of children who were to take under the will was therefore conclusively determined at the date of the testator's death.

In dissenting judgments, Judson and Ritchie, JJ., felt that the class could not be determined until the death of the life tenant, at which time the amendments to the Act had placed adopted children in the position of children for all purposes. As such they answered the description in the will, the meaning of which could not be considered apart from the statute.

The minority expressly adopted the approach of McRuer, C.J.H.C. in *Re Blackwell*,<sup>3</sup> a decision overruled by the majority in *Re Gage*.<sup>4</sup> In the *Blackwell* case, under a settlement made in 1932, a daughter of the settlor was given a life estate in a trust fund with a limited power of appointment of the remainder among her issue. There was provision for a gift over in the event of no issue surviving her. The testator died in 1932 and in 1940 the daughter, who had no issue, adopted a child.

<sup>2</sup> (1962), 31 D.L.R. (2d) 662, [1962] S.C.R. 241.

<sup>3</sup> [1959] O.R. 377, 20 D.L.R. (2d) 107.

<sup>4</sup> Justice is not done by *stare decisis* alone! No appeal was registered from the decision in *Re Blackwell* within the prescribed 15 days and when *Re Gage* was decided an application was made under Rule 497(1) for an order extending the time for appealing a decision of the High Court. The Ontario Court of Appeal, Laidlaw, J.A. dissenting, held that the desirability of there being a final and conclusive decision outweighed any equity in favor of the applicants even though none of the property in question had been dealt with to the prejudice of any of the parties concerned. Leave to appeal to the Supreme Court of Canada was subsequently refused. [1962] O.R. 832.

It was held that the adopted child was an apt subject of the power of appointment, since the presence of the words "for all purposes" in the legislation precluded the court from looking to the intention of the testator in determining the meaning of such terms as "issue" in the will.

The differing judicial attitudes resolve themselves into the question as to which is to be the governing consideration, the intention of the testator or the current of social thought in favor of equality for the adopted child. Included in the dichotomy are conflicting views as to the correct principles to be applied in the interpretation of statutes.

The majority of the Supreme Court in *Re Gage* affirmed the reasoning of Roach, J.A. in the Ontario Court of Appeal, denying the adopted children the right to take the remainder of the estate.<sup>5</sup> Armed with the established principle that where the word "child" is used in a testamentary document it means a natural child, unless the will indicates a contrary intention, Roach, J.A. successfully delivers the testator's intention and incubates it. Referring to Sections 76 and 77 of the 1958 legislation, he states:

Those sections make the status of adopted children, whether adopted prior or subsequent to the passing thereof, that of natural born children of the adopting parents. The question here, however, is not one of status but of the intention of the testator . . . [We] know without any doubt what the intention of the testator was. The only debatable question here is,—What was the intention of the Legislature in passing those two sections? Did it intend thereby, in addition to defining the status of adopted children, to interfere with the disposition of an estate made by a testator who had died prior to the passing of the legislation? Having stated that question, I answer it at once by saying that in my respectful opinion the Legislature did not so intend.<sup>6</sup>

In support of his conclusion the learned Judge affirms the principle that:

No legislation will be construed as thwarting the intention of a testator as expressed in his will, unless the language clearly and unmistakably indicates that the Legislature so intended and has effectively brought about that result.<sup>7</sup>

It is submitted that Roach, J.A., has been somewhat less successful in extracting the intention of the Legislature than that of the testator. It seems fair to assume the testator did not have adopted children in mind when he made his will, in the light of the lack of adoption legislation in the province at the time. Manifestly, he did not intend to benefit any specific children since the daughter had none when he made his will. What is more probable, however, is that the testator did not consider the question at all. His primary purpose was to confer a life estate upon his daughter and the reference to children could easily have been prompted by little more than a desire to effectively dispose of the residue when his daughter had died.

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<sup>5</sup> (1961), 28 D.L.R. (2d) 469; [1961] O.R. 540 (C.A.).

<sup>6</sup> *Ibid.*, 474.

<sup>7</sup> *Ibid.*, 473.

But, even admitting that the intention of the testator was not to benefit adopted children, it is by no means certain that the Legislature in Sections 76 and 77 has not "clearly and unmistakably" thwarted that intention. In *Re Blackwell*, McRuer, C.J.H.C. concludes that there is no sound ground by way of judicial decision for limiting the scope and meaning of the word "all" when the Legislature provides that "for all purposes" the adopted child, on the adoption order being made, becomes the child of the adopting parent. Clearly the Legislature has not expressly limited its language to the equalization of status. Applying the plain meaning of the word "all", in the words of McRuer, C.J.H.C., "A simple, plain, clear, comprehensive English word", it would seem that the Legislature has placed no limitation at all on its primary meaning.

In support of his view that the Legislature did not intend to interfere with the disposition of an estate made by a testator who had died prior to the passing of the legislation, Roach, J.A. cites the rule of construction against the retrospective operation of a statute enunciated in the English case of *Phillips v. Eyre*:<sup>8</sup>

Retrospective laws are, no doubt, *prima facie* of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law . . . Accordingly, the court will not ascribe retrospective force to new laws affecting rights, unless by express words or necessary implication it appears that such was the intention of the legislature.<sup>9</sup>

Applying this principle, Mr. Justice Roach concludes that if the adopted children were allowed to take, the vested rights of natural grandchildren would be interfered with and in effect, the result would amount to a confiscation by the state of their property and a distribution of it to the adopted children.

Yet it has been accepted, notably in the case of *West v. Gwynne*,<sup>10</sup> by the English Court of Appeal that a distinction must be drawn between retrospective operation and vested rights. There is a presumption that a statute speaks only to the future but no like presumption exists that an act is not intended to interfere with existing rights. Most acts of Parliament do in fact so interfere. However, if interference with vested rights is accepted as legitimate, then the presumption against retrospective operation would seem to be successfully rebutted by Section 77 of the 1958 Act which provides that children adopted prior to the passing of the Act shall be children of their adopting parents.

Still another canon of construction is that the words used must be interpreted in their ordinary grammatical sense unless there is something in the context or the object of the statute in which they

<sup>8</sup> (1870) L.R. 6 Q.B. 1.

<sup>9</sup> *Ibid.*, at p. 23.

<sup>10</sup> (1911), 104 L.T. 759.

occur, or in the circumstances with reference to which they are used, to show that they were used in a special sense.<sup>11</sup> In *New Plymouth v. Taranaki Electric-Power*,<sup>12</sup> the rule suggested is that words in a statute are presumed to be used correctly and exactly and not loosely and inexactly. A heavy burden of proof lies on those who question the rule which can only be discharged by showing something in the context of the enactment indicating that the loose and inexact meaning is to be preferred.

It is submitted that the context of the 1958 amendments to the Child Welfare Act and the object for which they were passed clearly do not indicate any restriction upon the language "for all purposes".

The original legislation in 1921 in Ontario did no more than confer a right of succession on the intestacy of an adopting parent and provided by Section 12 that "the word 'child' or its equivalent in any instrument shall include an adopted child unless the contrary plainly appears by the terms of the instrument".<sup>13</sup>

In the 1927 legislation it was provided that "the expressions 'child', 'children' and 'issue' where used in any disposition made after the making of an adoption order by the adopting parent, shall, unless the contrary intention appears, include an adopted child or children or the issue of an adopted child".<sup>14</sup> The limitation was prescribed in Section 5(6):

Save as herein provided and as to persons other than the adopting parent, the adopted child shall not be deemed the child of the adopting parent.

In the 1954 Child Welfare Act,<sup>15</sup> it is significant that the limitation of rights of adopted children to those acquired under subsequent instruments was omitted, but in Section 12 it was enacted that, except as provided, the adopted child shall not be deemed the child of the adopting parent. Conspicuous by its absence in the 1958 legislation is any limitation whatsoever except that imposed by Section 76(4) in relation to the laws relating to incest and to the prohibited degrees of consanguinity and affinity to which the Act is stated not to apply.

Thus, in the words of McRuer, C.J.H.C. in *Re Blackwell*:

All legislation in Ontario prior to 1958 had dealt with rights or interests of adopted children. There was a progressive legislative development toward putting the adopted child in substantially the same legal position as a child born in lawful wedlock. There were, however, legislative limitations both with respect to the extinguishment of rights acquired by birth and the creation of rights by adoption. . . . In the light of all this the legislative approach to the problem was changed in the 1958 Act. This Act did not purport to declare rights but created a legal relationship

<sup>11</sup> *Corp. of the City of Victoria v. Bishop of Vancouver Island*, [1921] 2 A.C. 384.

<sup>12</sup> [1933] A.C. 680.

<sup>13</sup> S.O. 1921, c. 55, s. 12.

<sup>14</sup> R.S.O. 1927, c. 189, s. 5(2).

<sup>15</sup> S.O. 1954, c. 8, Part IV.

from which legal rights and legal responsibilities flowed and likewise it destroyed the legal relationship arising out of the natural birth of the child.<sup>16</sup>

It is submitted that the limitations previously imposed on the complete equation of the legal positions of adopted and naturally-born children were therefore removed by the 1958 legislation, and further, that there is nothing in the context or in the object for which it was passed to justify any restriction upon the literal meaning of the words used.

In support of the view that the rights of adopted children to take under a devise to "issue" or "children" in a will are determined at the date of the testator's death, the Ontario Court of Appeal in *Re Gage* cited with approval the English decision of *Re Marshall*.<sup>17</sup> In that case a testator, domiciled in England, left a life interest to his wife. On her death it was provided that the residue of his estate be divided among certain cousins, the share of any cousin pre-deceasing the wife to be taken by that cousin's issue. One cousin, who pre-deceased the testator's wife, was domiciled in British Columbia and had adopted a child before the making of the will. The court, after an examination of adoption legislation in British Columbia, concluded that the rights and privileges conferred by it fell far short of those characterizing the status of a child, and further, that a testator in a bequest to children could not have had in mind adopted children with rights so limited.

The court held that the testator's death was the relevant date to be considered as to the extent of recognition to be given to a foreign adoption, and that subsequent legislation in the country of their domicile enlarging their rights was to be disregarded. Yet, as pointed out by Judson, J., in *Re Gage*, the decision in *Re Marshall* determines the extent of recognition to be given to a foreign adoption and not that to be given to a domestic adoption in the light of domestic legislation passed after the testator's death.

It would therefore seem that *Re Marshall* is distinguishable on its facts and that as an authority should be confined to questions of recognition of foreign adoptions. In situations similar to *Re Gage*, where it is impossible to determine who is to take the residue until the death of the life tenant, and the life tenant survives January 1, 1959, it is submitted that adopted children should qualify as "children" under the will regardless of when the testator has died.

One clear limitation upon the right of adopted children to take under bequests in a will was recognized in the decision of the Supreme Court of Canada, *Re Clement, Gardner v. Gardner*.<sup>18</sup> There the testator died prior to the existence of adoption legislation in the province, leaving a life estate to his sister with the remainder to

<sup>16</sup> [1959] O.R. 401.

<sup>17</sup> [1957] 1 Ch. 507.

<sup>18</sup> (1962), 31 D.L.R. (2d) 657.

her issue of any subsequent marriage. The sister married and adopted a daughter in 1924 who died in 1936 leaving three children. The testator's sister died in 1960 after the passing of Sections 76 and 77. It was held that the children of the adopted daughter were not entitled to the remainder since under the legislation in effect at the date of the adopted daughter's death she was not a child, nor were her children "issue" of the testator's sister for the purposes of the testator's will. Section 77 could have no application to a person who had died before the Act was passed. Clearly, it is not necessary to examine the intention of the testator to arrive at this decision, yet Locke, J. bases his disposition of the case on the fact that from the words used in the will the testator clearly intended only to benefit a child or children of his sister's body.

On the one hand, therefore, we have a recognized rule of testamentary construction that the intention of the testator is to be given effect through the court's interpretation of the words he uses to settle his estate. Balanced against this is a progressive legislative development directed expressly towards placing the adopted child in a position of legal equality with a natural child. The court in *Re Gage* has made a choice, but is it the right one?

Adoption legislation in the common law jurisdictions has been directed towards removing the consequences of the traditional common law attitude that a parent's rights and obligations in regard to a natural child were inalienable. The object of such legislation in the 20th century has been to secure the welfare of adopted children by giving them parity with the natural child. Thus, when the Legislature gives us a clear and comprehensive enactment which, on its face, purports to create this parity, it would seem unwise for the courts to attempt to limit it. There are many instances in which the courts disregard the expressed intention of a testator where it is felt that to give effect to it would be unjust in the circumstances. An example would be the rule in *Saunders v. Vautier*,<sup>19</sup> that when a vested interest has been given, restrictions postponing the enjoyment of the gift after the donee has become *sui juris* are ineffective. If the court is able to so disregard a clear intention of a testator, surely it should be able to give social policy, expressed in legislation, precedence over an intention which cannot be other than highly speculative.

In not having done so, the Supreme Court in *Re Gage* has pounded the principle that while all adopted and naturally-born children are equal, for some purposes the latter are more equal than the former.

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<sup>19</sup> (1841), 41 E.R. 482.