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FiduciaryLITIGATION

The precautionary addendum and inheritance

The not-yet-extinct distinction between adopted and biological remaindermen

For nearly half a century, the right of adopted child to inherit from and through the adoptive parent or parents has been absolute and unequivocal. Under Domestic Relations Law (DRL) § 117, which derived from DRL § 115 and DRL former § 114, adopted children will have the same inheritance rights as biological children.

By EDWARD C. RADIN
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This principle, however, was not always so clear. The "Precautionary Addendum" may affect dispositions to adopted remaindermen where the disposition is through the will of an individual who died before March 1, 1964, or through lifetime trust agreements that were originally irrevocable or became irrevocable before that date.

This month's testator executed his will in February 1949 and died in February 1951. His will contained a bequest of all tangible personal property to his spouse; if she predeceased him, then to his surviving daughters, who were each identified specifically by their names and who included an adopted daughter.

The will also created a trust, which provided income to the testator's spouse during her lifetime and, upon the expiration of the measuring life, to his surviving daughters in equal shares. Once again, each daughter, including the adopted daughter, was identified specially by her name.

In the event that the "said daughters shall not then be living but shall have left lawful descendants then surviving, the descendants of the daughter so dying shall take, per stirpes, the share she would have taken hereunder if living."

The testator was survived by his spouse, four biological daughters, and one adopted daughter. Three of the biological daughters predeceased the spouse (i.e. their mother). One of those three biological daughters adopted a daughter of her own (the "Adopted Remainderman"). When the spouse died, a dispute arose: whether the adopted remainderman was entitled to a share of the trust assets or if the trust assets would be divided between the biological remaindermen only.

If the testator died after March 1, 1964, the answer would have been clear: The adopted remainderman would be treated equally with the biological remaindermen. But because the testator died in 1951, the precautionary addendum may affect the dispositions under his will. The precautionary addendum provided:

As respects the passing and limitation over of real or personal property dependent under the provisions of any instrument on the foster [i.e. adoptive] parent dying without heirs, the foster [i.e. adopted] child is not deemed the child of the foster [i.e. adoptive] parent so as to defeat the rights of remaindermen, DRL former § 114, L. 1391, ch. 562.

The Court of Appeals, however, in recognition of the state's policy to treat adopted children and biological children equally, has placed an interpretative gloss on the application of the precautionary addendum, narrowing its affect on dispositions involving adopted remaindermen, *In Matter of Park*, 15 N.Y.2d 413 (1965), the court held that the precautionary addendum was limited to cases where "the act of adoption itself and alone cut off a remainder," *Id.* at 418. See also *Matter of Gardiner*, 69 N.Y.2d 66, 73 (1986); *Matter of Silberman*, 23 N.Y.2d 98 (1968); *Matter of Boehner*, 94 A.D.3d 477 (1st Dep't 2012); *Matter of Claman*, 31 Misc. 3d 852 (Sur. Ct., N.Y. County 2011).

Additionally, as has been mentioned in the prior columns, in estate practice, the testator's intent is often paramount. See Estates, Powers & Trusts Law § 2-1.3(a)(1) ("Unless the creator expresses a contrary intention, a disposition of property to persons described in any instrument as the issue, children, descendants, heirs, heirs at law, next of kin, distributees (or by any term of like import) of the creator or of another, includes ... [a]dopted children and their issue in their adoptive relationship.").

In *Park*, the Court of Appeals held that "[i]n the absence of an explicit purpose stated in the will or a trust instrument to exclude [an adopted] child, [the adopted child] must be deemed included, whether the word 'heir,' 'child,' 'issue' or other generic term expressing the parent-child relationship is used," *Park*, 15 N.Y.2d at 417. Three years later, the Court of Appeals extended this holding to include "grandchildren," see *Silberman*, 23 N.Y.2d at 106-07.

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In the instant case, the adopted remainderman wins on both of those counts. First, the precautionary addendum did not apply because the disposition to the adopted remainderman did not defeat the dispositions to the biological remaindermen but would only reduce their share. Moreover, the testator identified his daughters by their names, including his adopted daughter, which evidenced a clear intent to treat adopted remaindermen equally as biological remaindermen.

As the title of this column implies, estate practitioners will soon be able to ignore the precautionary addendum altogether, and treat adopted remaindermen and biological children equally without resorting to any additional analysis. Until then, however, every estate practitioner should carefully determine whether any remaindermen were adopted.

As always, if there is any possibility of such a scenario, then an attempt to garner as much evidence of intent as possible, sooner rather than later, is warranted. Though always difficult, extrinsic evidence can be used and is usually much easier to obtain in the beginning.

Last, not from a litigation perspective, but rather from a planning perspective, if the applicable instrument contains a power of appointment, consider exercise of the power, even if the distribution would otherwise pass without such exercise, if necessary to direct the remainder to the appropriate beneficiaries.

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