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Adopted Children Other Than Testator's Presumed to Take as "Children" Under His Will, Regardless of Time of Adoption

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ADOPTED CHILDREN OTHER THAN TESTATOR'S PRESUMED TO TAKE AS "CHILDREN" UNDER HIS WILL, REGARDLESS OF TIME OF ADOPTION

The original Pennsylvania adoption act of 1855, and all subsequent adoption statutes[1] have provided that an adopted child shall have all of the rights of a child and heir of his adoptive parents. In *In re Estate of Tafel*[2] the Pennsylvania Supreme Court has belatedly taken a major step to enforce that legislative mandate. The decision provides a new judicial presumption to be used in the construction of wills. Prior to *Tafel*, Pennsylvania courts had presumed that, absent any contrary intention in the will, the testator meant to *exclude* children adopted after his death from a gift or bequest to a "child" or "children" other than his own. That presumption has been overruled by *Tafel* and a testator will now be presumed to have intended to *include* children adopted at any time in a gift or bequest to those classes.

In February, 1935, Adolph Tafel executed a will in which he provided for a testamentary trust, to pay income from the corpus to his wife for as long as she should live. Upon her death, the corpus was to be divided into four equal shares, one for each of his children. Each child was to receive income from his share until his death, after which the corpus was to "go to such of his or her other children as may then be living and to the issue then living of such of them as may be dead." Failing such children (the testator's grandchildren) or the issue of such children, gifts over were provided. The testator died in July, 1935, and his widow died in 1945. His only son died in 1970, survived by two children (the appellants), who had been adopted six and nine years after the testator's death.

The Orphans' Court Division of the Court of Common Pleas of Philadelphia barred appellants from taking under Adolph Tafel's

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1. Act of May 4, 1855, No. 456, § 7 [1855] Pa. Laws 430 (repealed 1925); Act of May 19, 1887, No. 66 [1887] Pa. Laws 125 (repealed 1925); Act of May 9, 1889, No. 187 [1889] Pa. Laws 168 (repealed 1925); Act of June 1, 1911 [1911] Pa. Laws 539 (repealed 1925); Act of April 4, 1925, No. 93, § 1 [1925] Pa. Laws 127 (repealed 1970); Act of June 30, 1947, No. 491, § 1 [1947] Pa. Laws 1180 (repealed 1970); Act of August 26, 1953, No. 400, § 1 [1953] Pa. Laws 1411 (repealed 1970); PA. STAT. ANN. tit. 1, § 502 (Supp. 1972).

2. 449 Pa. 442, 296 A.2d 797 (1972) [hereinafter cited as *Tafel*].

will, relying on section 16(b) of the 1917 Wills Act[3] and *Holton Estate.*[4] The trial court applied the accepted presumption, that the testator wished to exclude children adopted after his will was executed. The Pennsylvania Supreme Court reversed the Orphans' Court, holding that, in the absence of a manifested contrary intent, it will be presumed that the testator intended to include children, adopted at any time, in a bequest or devise to a "child" or "children."

Adoption was not recognized at common law; consequently the original state adoption statutes[5] provided original definitions of the rights and relationships which they created. The significance of Pennsylvania's first adoption act is noted by the court in *Tafel*:

> 'This Act of 1855 has a four-fold significance: its declaration that an adopted child was the 'heir' of its adopting parents, its recognition of the existence of reciprocal rights of inheritance between an adopted child and its adoptive brothers and sisters, its omission to grant reciprocal rights of inheritance to the adopting parents and its recognition that estates of intestates might descend to and be distributed among persons not of the blood of the intestate.'[6]

The statute received very strict interpretation by the courts, especially in their treatment of adopted children as heirs of their adoptive parents,[7] and greater equality of inheritance rights between natural and adopted children has taken more than a century of slow and difficult progress.

Shortly after the passage of the 1855 Act, the Pennsylvania Supreme Court held that, "giving an adopted son a right to inherit does not make him a son in fact."[8] As a result of this construction of the Act, Pennsylvania courts did not treat adopted children as heirs of their adoptive parents in all instances. Thus, a child adopted after his adoptive parent had made a will, unlike afterborn natural children, could not take his intestate share against that will if it failed to provide for him.[9] In addition, adopted children were not permitted to inherit from collateral kindred of their

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3. PA. STAT. ANN. tit. 20, App. Ch. 2, § 228 (1950):
Whenever in any will a bequest or devise shall be made to the child or children of any person other than the testator, without naming such child or children, such bequest or devise shall be construed to include any adopted child or children of such other person who were adopted before the date of the will, unless a contrary intention shall appear by the will.

4. 399 Pa. 241, 159 A.2d 883 (1960) [hereinafter cited as *Holton*].

5. The first general adoption statute was passed by Massachusetts in 1851. Most states followed suit within the next quarter century. Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443, 456 (1971).

6. 449 Pa. 442, 447, 296 A.2d 797, 800 (1972) (quoting Collins Estate, 393 Pa. 195, 201, 142 A.2d 178, 182 (1958)).

7. *See* text accompanying notes 8-14 *infra.*

8. Commonwealth v. Nancrede, 32 Pa. 389, 390 (1859).

9. Goldstein v. Hammell, 236 Pa. 305, 84 A. 772 (1912).

adoptive parents.[10] More importantly, adopted children were denied the right of taking as "children" of their adoptive parents under any third person's will.[11] In *Puterbaugh's Estate*, the Pennsylvania Supreme Court stated its rationale for the distinction between the rights of adopted and natural children in construing a testator's intent:

> [I]t is quite . . . fair and proper to assume that he (the testator) knew . . . of the clear distinction the law makes between natural and adopted children; for instance that the giving the latter the right to inherit does not make him a child in fact. . . .[12]

The most common result of this line of cases was that, as in *Tafel*, adopted children were prevented from taking under a will of relatives of their adoptive parents who had predeceased their adoption.[13] The courts' determination to enforce the distinction between adopted and natural children is illustrated, however, by the fact that the testator's knowledge of an adopted child gave that child no greater right to take as the "child" of his adoptive parents. In *Yate's Estate*[14] it was held that, even though the child had been adopted long before the date of the will, the testator knew and referred to the child as the child of its adoptive mother and, at his death, the mother had had no natural children and was at an age at which that would be extremely unlikely, the adopted child could not take as a "child."

The Wills Act of 1917[15] partially remedied the inequitable treatment of adopted children under the law. Section 16(b) of that act stated that children, other than those of the testator, who had been adopted before the execution of his will would be included in a bequest or gift to a "child" or "children" made by that will. Although the statute addressed itself solely to inclusion of children adopted before the will's execution, it, like the 1855 Act, received consistently strict interpretation:

> [A]n examination of this statute clearly reveals the legislative intent; to *include* within the term 'child' or 'children' of a person other than the testator an adopted 'child' or 'children' provided, however, that such adoption took place

10. Burnett's Estate, 219 Pa. 599, 69 A. 74 (1908).
11. Schafer v. Eneu, 54 Pa. 304 (1867); Freeman's Estate (No. 1), 40 Pa. Super. 31 (1909).
12. 261 Pa. 235, 238-9, 104 A. 601 (1918).
13. *See* Schafer v. Eneu, 54 Pa. 304 (1867).
14. 281 Pa. 178, 126 A. 254 (1924).
15. PA. STAT. ANN. tit. 20, App. Ch. 2, § 228 (1950) [hereinafter cited as section 16(b), or in its entirety, the Wills Act of 1917]. *See* note 3 for the text of § 16(b).

before the execution of the will and to *exclude* such adopted child or children if the adoption took place after the execution of the will.[16]

The 1917 Wills Act, therefore, had the effect of declaring that adopted children were "children in fact," but only if they were adopted before the testator made his will.

In the century following the statutory recognition of adoption in 1855, the inheritance rights of adopted children were broadened by the legislature in a few limited areas. The Intestate Act of 1917 granted the right to inherit from the collateral kindred of adoptive parents.[17] A 1921 amendment to the 1917 Wills Act provided that a child adopted after the adoptive parent had made a will and not included therein, could take his intestate share in the parent's estate.[18] Finally, the Wills Act of 1947[19] extended the cut-off date created by the 1917 statute by providing that children of other persons adopted *before the testator's death* could take under his will as a "child" or "children." Both the 1956 Act[20] which amended the 1947 Wills Act and the newly enacted "Probate, Estate and Fiduciary Code"[21] perpetuate the language of the 1947 Act.

Thus, an adopted child's right of inheritance from his parents, regardless of the time of adoption, plus the right to stand in the adoptive parent's place and inherit from his collateral kindred were gradually secured. However, the strict interpretation of section 16(b)[22] remained. Adopted children could not take as "children," "descendants" or "issue" of their adoptive parents under the will of someone who had executed the will (or had died)[23] before their adoption and had designated one of those classes for a gift or bequest. The perpetuation of this presumption made this the only

16. Holton Estate, 399 Pa. 241, 247, 159 A.2d 883, 886 (1960). *See* Chambers Estate, 438 Pa. 22, 263 A.2d 746 (1970); Collins Estate, 393 Pa. 195, 142 A.2d 178 (1958); Corr's Estate, 338 Pa. 337, 12 A.2d 76 (1940).

17. PA. STAT. ANN. tit. 20, App. Ch. 1, § 102 (1950). For an interpretative discussion of this statute, see Cave's Estate, 326 Pa. 358, 362, 192 A. 460, 463 (1937).

18. 20 PA. STAT. ANN. tit. 20, App. Ch. 2, § 273 (1950).

19. PA. STAT. ANN. tit. 20, § 180.14(6) (1950).

20. PA. STAT. ANN. tit. 20, § 180.14(6) (Supp. 1972).

21. PA. STAT. ANN. tit. 20, § 2514(7) (eff. July 1, 1972) [hereinafter cited as the Probate, Estate & Fiduciary Code].

22. A traditional interpretative rule in Pennsylvania is that, in the interpretation of words used to express the testator's intent which have a legal or technical meaning, the law in effect at the testator's death must govern that interpretation. Collins Estate, 393 Pa. 195, 200, 142 A.2d 178, 181 (1958). In fact, the 1947 Wills Act specifically provides that all wills of persons who died before its effective date shall be construed in light of prior law. PA. STAT. ANN. tit. 20, § 180.22 (1950). Because of this, section 16(b) of the 1917 Wills Act has been, by far, the most predominantly interpreted statute in this area. Most wills involved are those of grandparents who made bequests or gifts to grandchildren as a class, their rights to vest upon the death of the testator's children. Consequently, the majority of the wills involved were probated before 1947.

23. Depending upon which wills act governed the interpretation of the will. *See* note 22 *supra.*

remaining distinction in the law between the inheritance rights of adopted and natural children. The court finally addressed itself to its unfairness and it became the victim of slow, but steady judicial attack, of which *Tafel* is the latest and most important example.

The Pennsylvania Supreme Court challenged the old presumption favoring natural over adopted children in two ways: first, by finding that the testator specifically intended to include adopted children in those classes of persons who would take under his will and, second, by changing the legal definition of the terms that were being interpreted. The first method, finding an intention contrary to the legal presumption, had little success. In *Holton*,[24] the testator set up a testamentary trust which provided in part for any children of his son. Two children were adopted by the son after the testator's death and the court refused to allow them to take under the will, basing its decision upon section 16(b). The majority asserted that if an intent to include after-adopted children can be found in the will, any statutory rule of interpretation such as section 16(b) is abandoned and the testator's intent is determinative. The majority could find no such intent, however, and refused the adopted children's claim.[25]

In dissent,[26] Mr. Justice Musmanno found that the testator was aware that his son could have no natural children and that he had used language in his will showing an intention to include any children his son might adopt within his bequest. Upon finding the intent to include adopted children, the dissent did not then abandon section 16(b) as the majority would have; rather Mr. Justice Musmanno contended that section 16(b) itself allowed the testator's intent to prevail because of its modifying phrase, "unless a contrary intention shall appear by the will."[27]

The dissent's reliance upon an interpretation of the last modifying phrase of section 16(b) as a basis for a rule of construction is significant because the court in *Tafel* also bases its new presumption on an interpretation of the same phrase.[28] Because section 16(b) only expressly creates a presumption that adopted children shall be included before the will's execution, the phrase, "unless a contrary intention shall appear by the will" would appear to modify only that express presumption. However, until *Tafel*, sec-

24. 399 Pa. 241, 159 A.2d 883 (1960).
25. *Id.* at 246, 159 A.2d at 885 (1960).
26. *Id.* at 249, 159 A.2d at 887 (dissenting opinion).
27. *See* note 3 for the entire text of § 16(b).
28. 449 Pa. 442, 449, 296 A.2d 797, 800 (1972).

tion 16(b) had consistently been interpreted as not only expressly including children adopted before the will, but also by implication excluding children adopted after the will's execution from a gift or bequest to "children."[29] In line with this interpretation of section 16(b), Mr. Justice Musmanno read the phrase "unless a contrary intention shall appear by the will" as also modifying the implied exclusion of children adopted after the will's execution. Therefore, he reasoned, if the will showed that the testator's intention were to include children adopted after his will was made, section 16(b) permitted this.

In *Chamber's Estate*[30] the court illustrated the majority position in *Holton, i.e.* if an intent to include after-adopted children can be found, a statutory rule of interpretation, such as section 16(b), cannot be used and the testator's intent controls. In *Chambers*, the court stated that a testator's intent can be ascertained from four factors: the language of the will, the scheme of distribution, the factual situation at the date of the will's execution, and the existing fact situation at the time of the court's decision.[31] The court found such an intent, based upon the testator's knowledge of one adopted grandson (who predeceased him) and other circumstances, such as knowledge that his daughter could have no natural children. Mr. Chief Justice Bell vigorously dissented, aring that any intent contrary to the rule of section 16(b) must be found within the four corners of the will.[32] The dissent's position was that the testator's knowledge of both a previous adoption and the daughter's inability to have natural children was not an adequate manifestation of an intention to include adopted children in the bequest to "children" under the will.

The dissenting opinion in *Holton* and the majority in *Chambers* represent a limited attempt by the court to circumvent the rule of construction embodied in section 16(b) by finding an intention on the part of the testator to include after-adopted children in his gifts or bequests to "children." The attempt was not successful because of disagreement within the court on how such an intent could be found, and its effectiveness as a general rule was limited by its necessary reliance upon the facts of each case.

A second, more direct method of challenging the old rule of section 16(b) was to change the legal meaning of the words employed in the will. The technical basis for differentiating between natural and adopted children had always been an interpretation of

29. *See* note 16 and accompanying text *supra.*
30. 438 Pa. 22, 263 A.2d 746 (1970) [hereinafter cited as *Chambers*].
31. *Id.* at 25, 263 A.2d at 748 (1970).
32. *Id.* at 28, 263 A.2d at 749 (dissenting opinion). Mr. Chief Justice Bell's interpretation of § 16(b) here is consistent with Mr. Justice Musmanno's in his dissenting opinion in *Holton. See* text accompanying notes 26-29 *supra.*

the words "children," "issue" or "descendants." An early case stated that "One adopted has the rights of a child *without being a child.*"[33] As late as 1963, the court referred to the words, "children," "grandchildren," "issue" and "lineal descendants" as "words of blood."[34] This was an interpretation of a will executed in 1889, and was probably correct for the time of execution. However, in construing more modern wills, the Pennsylvania Supreme Court is gradually deleting any connotation of blood line from these terms.

A major decision in the development of a more contemporary interpretation of these words was *Collins Estate*,[35] which held that children adopted after the death of the testatrix could take under her will as "descendants." Mr. Justice Jones, speaking for the court, stated that:

> Neither etymologically nor historically has the word 'descendants' acquired such significance that it points unerringly in this will—in the face of the legally accepted equation of status of an adopted child and a natural child—to an intent to exclude from a testatrix's bounty children legally adopted by her children.[36]

The court discussed the meaning of "issue" and decided that, although that classification does strongly connote a blood relationship, "issue" and "descendants" are not always or strictly synonymous.[37] Therefore, since "descendants" does not connote only natural children, the court provided a modern and definitive interpretation of the word's use in wills. As a result of *Collins*, adopted children, regardless of the time of their adoption, can take as "descendants" of their adoptive parents.

An harbinger of the *Tafel* decision came in Mr. Justice Roberts' dissenting opinion in *Fownes Trust*.[38] In interpreting the term "issue" as used in a testamentary trust the majority held that its meaning was limited to issue of the body, *i.e.* natural children. The dissent found that construction antiquated, stating:

> [G]iven two equally plausible views, I see no justification for discarding one which fosters the sound public policy of this Commonwealth to accord equality of treatment to adopted children in favor of one which perpetuates distinc-

33. Schafer v. Eneu, 54 Pa. 304, 306 (1867) (emphasis added).
34. Tower Estate, 410 Pa. 389, 393, 189 A.2d 870, 873 (1963).
35. 393 Pa. 195, 142 A.2d 178 (1958) [hereinafter cited as *Collins*].
36. *Id.* at 211, 142 A.2d at 186.
37. *Id.* at 209, 142 A.2d at 185.
38. 421 Pa. 476, 481, 220 A.2d 8, 11 (1966) (dissenting opinion in which Justices Musmanno and Jones joined).

> tions which no longer exist in the eyes of adoptive parents or enlightened modern people everywhere. Thus, the sound approach, as I view the matter, would be to adopt a rule of construction which, *in the absence of a clear expression in the instrument of the settlor's intention to the contrary,* would deem adoptees as embraced within such general designations as "issue" or "children."[39]

Justices Musmanno and Jones joined the dissent and the possibility of the transformation of the minority to a majority veiw became significantly stronger.

Tafel has accomplished half of the necessary transformation by reversing the old rule that, absent any manifestation of intent to the contrary, a testator is presumed to have intended that children adopted after the execution of his will were not included in a gift or bequest to a "child" or "children" of another person. The court substitutes a new presumption that, in the absence of any expressed intent to the contrary, minor children adopted after the execution of the will were intended to be *included.*[40] The old rule, as enunciated in *Holton Estate,*[41] is specifically overruled.[42] The presumption only applies when there is no expressed intent on the matter by the testator. The court has not limited the right to distinguish between adopted and natural children in a will, if a testator wishes to do so.[43] The new rule is limited in one respect—it does not apply where the adoptee was an adult at the time of adoption. This restriction is imposed to guard against adoptions undertaken "to prevent a gift over in default of a natural 'child' or 'children' and thus, in effect, rewrite the testator's will."[44]

The court, in *Tafel,* finds two bases of support for its decision: the first on grounds of legislative policy and the second founded upon modern conceptions of adoption. The expressed legislative policy of Pennsylvania has always been one of equal rights and privileges for both adopted and natural children. In regard to rights of inheritance, the policy has been specifically enunciated by the legislature in all of the adoption acts.[45] By effectuating that policy, *Tafel* must be viewed as an important step in observance of a legislative mandate that has been largely ignored in prior Pennsylvania case law.[46] The second basic rationale for the decision is that, in light of modern attitudes toward adopted children and their total acceptance into the family structure, the *Tafel* court feels that it is much more sensible and reasonable to believe that a testator meant to include, rather than exclude them as "children" in his

39. *Id.* at 484, 220 A.2d at 12.
40. 449 Pa. 442, 449, 296 A.2d 797, 800 (1972).
41. 399 Pa. 241, 159 A.2d 883 (1960).
42. 449 Pa. 442, 449, 296 A.2d 797, 800 (1972).
43. *Id.* at 452-4, 296 A.2d at 802-3.
44. *Id.* at 454, 296 A.2d at 803.
45. *Id.* at 447, 296 A.2d at 799 n.5.
46. *Id.* at 447, 296 A.2d at 800 n.6.

will. Adoption statutes did not create the social phenomenon of adoption, they merely recognized and regulated it.[47] Common attitudes toward adoption should therefore be given effect in the judicial construction of language dealing with the subject.[48] The dissent in *Fownes Trust*[49] is extensively quoted for the proposition that when there is no real expression of intent by the testator, modern attitudes dictate a presumption that adopted children are encompassed wthin the designation "children," especially in light of Pennsylvania's public policy of equality of adopted and natural children.[50] The court's reasoning in *Tafel* is sound here, as well. If a court is forced to rely upon a legal presumption, it is only logical that it embody prevailing attitudes and meanings. To hold otherwise would be to destroy the effectiveness and rationale of the presumption in the first place.

Because the court was bound to apply the 1917 Wills Act,[51] the presumption of exclusion of after-adopted children that is reversed by *Tafel* was derived from section 16(b). The court states that its new presumption is also founded upon a construction of section 16(b), specifically, the phrase, "unless a contrary intention appears."[52] It is difficult to understand how a construction of this modifying phrase can lead to the formulation of the new judicial presumption. It is submitted that reference to the phrase is an unnecessary technicality, because of the court's specific policy basis and its interpretation of the modern meaning of "child" and "children." The same result could have been reached by simply overruling the prior interpretation of section 16(b),[53] (which the court did) without introducing a confusing construction of any particular phrase. The fact that the court was forced to rely upon an interpretation of the 1917 Wills Act will not affect the application of the new rule, for it is in harmony with the other wills acts and the court specifically states[54] that it does not conflict with the new Probate, Estate, and Fiduciary Code. These statutes themselves represent legislative liberalization of the old rule, and are now subject to the rule enunciated in *Tafel*.

With the *Tafel* decision, the right of adopted children to take

47. As suport for this the court quotes from *In re* Coe, 42 N.J. 485, 489, 201 A.2d 571, 574 (1964).
48. 449 Pa. 442, 450, 296 A.2d 797, 801 (1972).
49. 421 Pa. 476, 481, 220 A.2d 8, 11 (1966) (dissenting opinion).
50. 449 Pa. 442, 451, 296 A.2d 797, 802 (1972).
51. *See* note 22 *supra*.
52. 449 Pa. 442, 449, 296 A.2d 797, 800 (1972).
53. *See* note 16 and accompanying text *supra*.
54. 449 Pa. 442, 453, 296 A.2d 797, 803 (1972).

as "descendants" and "children" of their adoptive parents, under anyone's will is now conclusively established. The decision is justified, both as a correct reading of the modern usage of the word "children" and as an expression of legislative policy. The danger of adoptions made only to frustrate the operation of a will should be effectively prevented by the exclusion of adult adoptions from the operation of the rule. The court notes that, while this presumption may not yet be the law in a majority of jurisdictions, many other jurisdictions have adopted it.[55] Hopefully, those which have not yet changed their rule will follow suit when the opportunity presents itself. The only important designation that remains tied to its older meaning is "issue." It is still the law in Pennsylvania that only natural children can take under this classification.[56] While it may be true that "issue" has had a stronger connotation of blood line than either "children" or "descendants," it is probably also true that today that connotation has largely vanished. In light of both the dissent in *Fownes Trust*[57] and *Tafel*, a re-litigation before the Pennsylvania Supreme Court of the question of whether adopted children qualify as "issue" would be especially timely.

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55. *Id.* at 449, 296 A.2d at 801, notes 8-9.
56. Benedum Estate, 427 Pa. 408, 235 A.2d 129 (1967); Howlett Estate, 366 Pa. 293, 77 A.2d 390 (1951).
57. 421 Pa. 476, 481, 220 A.2d 8, 11 (1966) (dissenting opinion).