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## Wills--A New Construction of Lawful Issue Advances the Status of Adopted Children

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The net effect of this decision was to require the defendant to sustain the ultimate burden of proving his lack of negligence by showing the actual cause of the accident.<sup>28</sup> It makes the doctrine of *res ipsa loquitur* into a presumption of negligence when the defendant can be said to have superior knowledge of the cause of the occurrence. The usual rule is that the doctrine raises only a permissible inference from which the jury *may* find for the plaintiff.<sup>29</sup>

These two cases do then give effect to the superior knowledge factor. They do not however, give it the broad effect advocated by the plaintiff in the *Salgo* case. They indicate a tendency to put the physician at a procedural disadvantage when the injured person is unable to explain the cause of his injury.

What application *res ipsa loquitur* will have in future malpractice cases is conjectural. It is fortunate that the law has been clarified at least in part by the *Salgo* case so that the physician will not be called upon to explain merely because an unusual injury occurs while the plaintiff is under anesthesia.

The future may depend in part on the willingness of medical men to testify and thus overcome on their own initiative the so-called "conspiracy of silence."<sup>30</sup> It will also depend on the courts' willingness to acknowledge that even in the medical profession where the stakes may well be a human life there is an element of calculated risk.

W. R. Mackey

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#### WILLS—A NEW CONSTRUCTION OF "LAWFUL ISSUE" ADVANCES THE STATUS OF ADOPTED CHILDREN

Since the right to adopt children is purely statutory,<sup>1</sup> the legal and social status of the adopted child depends to some extent upon the language of the statutes which define the rights and duties of individuals concerned in the adoption process.<sup>2</sup> Within the limits allowed by the language of the legislature, it has been the policy of the California judiciary to accord adopted children the same rights as those enjoyed by the natural offsprings of the adopting family. This salutary principle was reaffirmed and extended by the Supreme Court of California in a recent case where the validity of the policy was considered within the framework of the law of testamentary disposition.<sup>3</sup> The court's conviction that the principle should be preserved was expressed in an opinion which stressed both the social benefit inherent in its result, and the need for greater equality occasioned by the ever increasing exercise of the statutory right to adopt homeless children.

The problem presented to the California Supreme Court in the *Estate of Heard*<sup>4</sup> was one of testamentary construction. It did not concern the law of intestate succession. The court stated: "Testamentary provisions should be construed as far as possible in harmony with law and public policy. . . ."<sup>5</sup> The very Act<sup>6</sup> which en-

<sup>28</sup> *Id.* at 299, 188 P.2d at 17 (dissenting opinion).

<sup>29</sup> See notes 4 and 5 *supra*.

<sup>30</sup> See discussion in article, *The California Malpractice Controversy*, 9 STAN. L. REV. 731 (1957).

<sup>1</sup> *In Re Jobson's Estate*, 164 Cal. 312, 128 Pac. 938 (1912).

<sup>2</sup> See CAL. CIV. CODE §§ 221-230.

<sup>3</sup> *Estate of Heard*, 49 Cal. 2d ....., 319 P.2d 637 (1957).

<sup>4</sup> *Ibid.*

<sup>5</sup> *Id.* at 527, 319 P.2d at 642; see 95 C.J.S., *Wills* § 589.

<sup>6</sup> *Supra* note 2.

abled adoption expressed the philosophy that the adopted child should sustain *to its adoptive parent* the legal relation of a child, with all the concomitant rights and duties of that relationship. The Probate Code provided:

"An adopted child *succeeds to the estate of one who has adopted him*, the same as a natural child . . . . An adopted child *does not* succeed to the estate of a natural parent when the relationship between them has been severed by the adoption . . . ." <sup>7</sup>  
(Emphasis added.)

While these declarations of public policy did not concern the law of testamentary disposition, they were instrumental in the development of a body of law which placed the adopted child in two family trees. By the terms of these statutes the relationship of the adopted child with his natural and adoptive parents was altered. But the relationship with his natural and adoptive grandparents was not changed. The *Heard* case concerned the will of an adoptive grandmother. Should an adopted child of her son be considered the "lawful" issue of her son when that term was used in the will to designate a class of legatees?

An early California case which seems to reflect the *spirit* of the enabling Act held that an adopted child was within the meaning of the word "issue" for inheritance tax purposes.<sup>8</sup> Other California cases reflect the *letter* of the Probate Code previously quoted, in holding that an adopted child inherits *from, but not through*, the adopting parents.<sup>9</sup> These cases, and the statutes which preceded them, suggest that the adopted child has not, in the relatively recent past, enjoyed a position of absolute equality with the natural offspring of the adopting family. This was the status of the adopted child in the Probate Courts when Emma Heard's will was drafted in 1935, and when it became effective upon her death in 1939. The benevolent disposition of the courts was still fettered by the language of the existing legislation.

The anomalous position of the adopted child was changed by the legislature in 1955. The Probate Code section<sup>10</sup> establishing the right of an adopted child to take by intestate succession was amended. The amended Probate Code now provides:

"An adopted child shall be deemed a descendant of one who has adopted him, the same as a natural child, *for all purposes of succession by, from, or through the adopting parent* the same as a natural parent. . . ." <sup>11</sup> (Emphasis added)

As far as inheritance is concerned, the adopted child has attained the position of equality formerly denied.

Despite the furtherance of the policy of "equality" in the area of intestate succession, there remained a possibility of "inequality" in the area of testamentary disposition where the draftsman used *generic words of purchase*. This very possibility was considered by the Supreme Court of California in the *Heard* case on the last day of 1957. The question was unanimously resolved in favor of the adopted child. The circumstances which surrounded the determination are as significant as the law which preceded it. The opinion illustrates the relative

<sup>7</sup> CAL. PROB. CODE § 257 (before amendment in 1955).

<sup>8</sup> Estate of Winchester, 140 Cal. 468, 74 Pac. 10 (1903).

<sup>9</sup> Estate of Pierce, 32 Cal. 2d 285, 196 P.2d 1 (1948); *In re Darling*, 173 Cal. 221, 159 Pac. 606 (1916).

<sup>10</sup> *Supra* note 7.

<sup>11</sup> CALIF. PROB. CODE § 257 (as amended, 1955).

weight the court assigns to the policy of "equality for adopted children" when that policy is balanced against an ostensibly competing principle of testamentary construction.

Emma Heard died testate in 1939. Her will provided that her residual estate should be held in trust: the total income to be distributed to several beneficiaries for their lives, and then to their surviving "lawful issue," until a final time for distribution of the principal. One of the beneficiaries was her married, but childless, son John. If John died without surviving issue, his share of the income was to be paid to a cousin of the testatrix, who was also receiving a share of the income under the terms of the will. John adopted a son in 1950. In 1955 John died, but the time for the distribution of the principal has not yet arrived. The trustee petitioned the court for instructions as to the proper allocation of John's share of the income. The Superior Court decided that John's adopted son (John Wilkerson Heard III) was "lawful issue" of John, and that he was entitled to a share of the income under the terms of the will. The District Court of Appeal<sup>12</sup> reversed this order, citing an imposing list of authorities for the proposition that adopted children are not within the meaning of "lawful issue" when those words are used in a will to designate legatees, and certainly not when they have been adopted by someone other than the testatrix several years after her death. The following excerpts were among those quoted by the District Court of Appeal:

"Issue is a word whose primary meaning, in the absence of anything to show a contrary intent, is that of legitimate lineal descendants indefinitely. . . . It [lawful issue] does not include adopted children."<sup>13</sup>

"Unless the context shows a different intention, the term 'issue' does not include . . . stepchildren or adopted children."<sup>14</sup>

"The weight of authority in this country seems to be that the 'children,' 'issue,' or 'descendants' of a son or daughter would not include adopted . . . children of that son or daughter."<sup>15</sup>

"Technical words are not necessary to give effect to any species of disposition by a will; but technical words in a will are to be taken in their technical sense, unless the context clearly indicates a contrary intention, or unless it satisfactorily appears that the will was drawn solely by the testator, and that he was unacquainted with such technical sense."<sup>16</sup>

The sole question to be decided by the California Supreme Court in the *Estate of Heard*<sup>17</sup> was: shall the words "lawful issue of my son John," when used as words of purchase in a will, include a child who was adopted by John several years after the death of the testatrix? The court answered this question in the affirmative, evidently unimpressed by the treatises on the law of wills, for they were not mentioned in the opinion. The section of the Probate Code, quoted above, providing that technical words in a will shall be given their technical meaning, did not receive attention in the opinion either. Instead, the opinion referred to the Restatement of Contracts<sup>18</sup> to substantiate the proposition that words in a private instrument should be construed according to statutory and

<sup>12</sup> *Estate of Heard*, 149 Cal. App. 2d ..... , 308 P.2d 502 (1957).

<sup>13</sup> PAGE, WILLS § 1027 (lifetime ed., 1941).

<sup>14</sup> THOMPSON, WILLS § 278 (3rd ed., 1947).

<sup>15</sup> STEVENSON, DRAFTING WILLS AND TRUST INSTRUMENTS—DISPOSITIVE PROVISIONS § 12.3, (1955).

<sup>16</sup> CAL. PROB. CODE § 106.

<sup>17</sup> *Supra* note 3.

<sup>18</sup> RESTATEMENT, CONTRACTS § 234 (1933).

case law. It is remarkable that the only California statutory and case law within the opinion dealing with both adopted children and "lawful issue" pertains to intestate succession. This reference is rather perplexing in view of the fact that the court reiterates the sole issue of the case at page 528:

"... [W]e are not concerned with inheritance but rather with whether the words 'lawful issue' used in a will include an adopted child."

That Emma Heard executed her will in 1935 with an intention that her estate should devolve upon an unanticipated stranger to her blood is at least a questionable contention. She used a rather narrow term to describe the beneficiaries. A cardinal principle in the construction of a will is that the intention of the testator is paramount.<sup>19</sup> Where the terms of a will are ambiguous, the ambiguity should be resolved in favor of those in the blood line of the testator.<sup>20</sup> These observations make it apparent that the Supreme Court of California was not constrained by authority to make this determination, nor were they oblivious to the considerations which led the District Court of Appeal to a contrary decision. Why then, did the court reach this conclusion?

The opinion clearly indicates that the advancement of the status of adopted children to a position of equality with natural offspring of the adopting family is a socially desirable evolution in the law. Adoption is becoming more commonplace, and as a matter of policy, the process of advancement should be accelerated. Such acceleration has been accomplished by the legislature in the area of intestate succession by the 1955 revision of the Probate Code. The substance of the court's philosophy seems to be epitomized in the following excerpt from a New York opinion which was quoted at page 524:

"Embodied in our adoption statute is the fundamental concept that the relationship of parent and child, with all the personal and property rights incident to it may be established, independently of blood ties, by operation of law. . . . 'In the eye of the law, therefore, adopted children are lineal descendants of their foster parent. They are in the line of descent from him through the command of the statute, the same as if that line had been established by nature.' *Matter of Cook's Estate*, 187 N. Y. 253, 261 (79 N.E. 991, 994). In harmony with the legislative policy thus expressed, the adoption statute has been most liberally and beneficently applied."<sup>21</sup>

The Civil Code and the recently amended Probate Code, when read together, express essentially the same legislative policy relied upon by the New York Courts.<sup>22</sup>

The *Heard* case does not decide that a testator can not exclude an adopted child from a class from which legatees will be ascertained at some future time. The case suggests, however, that if such exclusion is intended, it must be clearly manifested in the will. A testator desiring that his property devolve upon his genealogical descendants must now use words of *exclusion*, as well as words of *inclusion*, if he is to be assured that his intention will be given effect. Perhaps the

<sup>19</sup> CAL. PROB. CODE § 101.

<sup>20</sup> Estate of Rutan, 119 Cal. App. 2d 592, 260 P.2d 111 (1953).

<sup>21</sup> *In Re Upjohn's Will*, 304 N.Y. 366, 107 N.E.2d 492, 494 (1952).

<sup>22</sup> CAL. CIV. CODE § 228: "... After adoption, the two shall sustain towards each other the legal relation of parent and child, and have all the rights and be subject to all the duties of that relation."

CAL. PROB. CODE § 257: "An adopted child shall be deemed a descendant of one who has adopted him, the same as a natural child, for all purposes of succession by, from, or through the adopting parent the same as a natural parent. . . ."