



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 24

**Succession Rights
of Adopted Children**

WORKING PAPER

APRIL 1971

SUCCESSION RIGHTS OF ADOPTED CHILDREN

INTRODUCTION

The Law Reform Committee has been asked to consider any alterations desirable in the law relating to the succession rights of adopted children.

The Committee having completed its first consideration of the matter now issues this working paper. The paper does not represent the final views of the Committee.

Comments and criticisms are invited. The Committee requests that they be submitted by the 8 June 1971.

Copies of the paper are being forwarded to –

The Chief Justice and Judges of the Supreme Court,

The Judges of the District Court,

The Law Society,

The Magistrates Institute,

The Law School,

The Crown Law Department,

The Public Trustee,

The Child Welfare Department,

The Registrar General's Office,

Private trustee companies,

Other Law Reform Commissions and Committees with which this Committee is in correspondence.

The Committee may add to this list.

The research material on which this paper is based is at the offices of the Committee and will be made available on request.

TERMS OF REFERENCE

1. “To consider any alterations desirable in the law relating to the succession rights of adopted children.”

PRESENT LAW

2. The law in Western Australia is contained in sections 7 and 8 of the *Adoption of Children Act 1896-1964* (see Appendix A for text). These provisions were based on sections 5 and 6 of the New Zealand *Adoption of Children Act 1881* (since repealed) which in turn appears to have been derived from legislation enacted in Massachusetts in 1851.

3. The effect of these provisions, so far as the right to succeed to the estate of the adopting parent is concerned, is to place the adopted child in the same position as a child born in lawful wedlock to that parent. However, the adopted child is not deemed to have this status when it comes to deciding who is entitled to succeed on the intestacy of the lineal or collateral kindred of the adopting parent.

As a corollary, an adopted child is left in undisturbed possession of his succession rights by virtue of his being of blood relationship to his natural parents. Thus the adopted child is entitled to succeed on the intestacy of his natural parents as well as on the intestacy of his adoptive parents.

4. By implication, the statute preserves the rights of the natural brothers and sisters of an adopted child to succeed as next of kin on his intestacy (*re Ballance, deceased* [1950] N.Z.L.R. 843).

THE LAW ELSEWHERE

5. Generally speaking, the law of all other Australian jurisdictions completely assimilates the position of the adopted child to that of a child born in lawful wedlock of the adopting parents and completely severs the relationship between himself and his natural parents and their kindred. Appendix B of this paper contains the text of the relevant section of the

Adoption of Children Ordinance 1965 (A.C.T.), the draft of which provided the model for the other jurisdictions.

6. The enactment of broadly uniform legislation concerning adoption was the outcome of meetings of the Attorneys General in 1963. In 1964 Western Australia enacted the uniform provisions relating to the assumption of jurisdictions, the effect of interstate and foreign adoptions and some provisions governing the procedure for adoption, but left untouched the sections setting out the effect of an adoption order.

7. New South Wales and South Australia make special provision for the case where, one parent having died, the other re-marries and together with the new spouse adopt the child or children of the first marriage. In such a case these two jurisdictions preserve the right of the child to succeed on the intestacy of the lineal or collateral kindred of the deceased parent.

8. Other features of the uniform Australian legislation are –

- (a) Saving provisions are enacted, preserving certain dispositions made before the commencement of the Act;
- (b) The maker of an instrument is empowered to vary its terms to take into account the new legislation;
- (c) Trustees and personal representatives are protected against distributing property without notice of the existence of an adopted child.

9. The United Kingdom (the *Adoption Act 1958*) and New Zealand (the *Adoption Act 1955*) have completely assimilated the position of the adopted child to a child born in lawful wedlock except that adopted children on their issue cannot take as "children" or "grandchildren" etc. under settlements, wills and intestacy unless the adoption was effected before the date of the settlement or the death of the testator or intestate.

COMMITTEE'S PROVISIONAL VIEWS

10. The Committee thinks that the present law in Western Australia is inappropriate when considered against the desirability of completely assimilating the adopted child into his new family. From figures supplied by the Child Welfare Department, it appears that almost 90% of adopted children are under three years of age at the time of adoption. That Department endeavours to ensure that the placements it makes are confidential and that there is no contact between the natural and the adopting parents or the adopted child and its natural parents. In these circumstances it appears undesirable to prohibit the adopted child from inheriting from the kindred of his adoptive parents and unreal to preserve his rights of inheritance from his natural kin. In this regard attention is drawn to the Government's intention to introduce legislation to give illegitimates rights of succession and rights under the Testators Family Maintenance legislation.

11. It is possible that the severing of a child's rights of succession from his natural kindred may amount to a considerable financial disadvantage if the natural parents or either of them is of substantial financial means. There may therefore be a case for ensuring that whatever information may reasonably be available on this point should be placed before the Judge hearing the adoption application. This could be done by obliging the Child Welfare Department to include such information in the written report required under s.5(8b) of the *Adoption of Children Act* or by ensuring that the child is represented by counsel at the hearing.

12. The complete assimilation of the legal position of the adopted child with that of the child born in lawful wedlock to the adopting parent was proposed by the Government in 1964, but the Law Society objected that to do so could adversely affect the rights of those children who are adopted by the surviving natural parent and his or her new spouse. New South Wales and South Australia have made special provision for this case (see paragraph 7 above) and there would seem to be no objection on the grounds of uniformity to a similar provision being enacted in Western Australia should it be thought desirable to do so. Provision could be made not only for the case where the original family comes to an end by the death of one parent, but also where it comes to an end by divorce.

13. The Committee is however inclined to the view that no exception should be made. It is not difficult to imagine other cases where it is tempted to preserve the pre-adoption succession rights of the child and thus to make even further inroads into the principle of assimilation. The New South Wales and South Australian provisions give the adopted child in such cases the best of both worlds, since he not only retains his pre-adoption succession rights, but gains succession rights in relation to his adoptive family. This seems difficult to justify. Again it might be desirable to follow the procedure outlined in paragraph 11 above and leave the court to approve the adoption or not as the case demands.

14. **Perpetuities:** One result of equating the position of an adopted child with that of a child born in lawful wedlock is that, in contrast to the present law (see proviso (1) of s.7 of the *Adoption of Children Act*), a reference in an instrument to the children of the adopting parent would include an adopted child, even though the instrument was executed before the adoption.

This may cause difficulties in relation to the rule against perpetuities and similar matters, and an extension of s.102 of the *Property Law Act 1969*, which makes certain presumptions about the capacity to bear a child, would seem to be required to cover adopted children.

APPENDIX A

SECTIONS 7 & 8 OF THE ADOPTION OF CHILDREN ACT 1896-1964

Adopted child to
have legal status of
legitimate child.
Amended by No.84
of 1962, s.2.

7. When an order of adoption has been made, the adopted child shall, for all purposes, civil and criminal, and as regards all legal and equitable liabilities, rights, benefits, privileges, and consequences of the natural relation of parent and child, be deemed in law to be the child born in lawful wedlock of the adopting parents.

Exception

Provided always, that such adopted child or the issue of that child shall not by such adoption –

- (1) acquire any right, title, or interest whatsoever in any property which would devolve on any child or remoter issue of the adopting parent by virtue of any deed, will, or instrument whatsoever prior to the date of such order of adoption, unless it is expressly so stated in such deed, will or instrument; nor
- (2) be entitled to take property expressly limited to the heirs of the body of the adopting parent, nor property from the lineal or collateral kindred of such parent by right of representation; nor
- (3) acquire any property vested or to become vested in any child of lawful wedlock of the adopting parent in the case of the intestacy of such last mentioned child, or otherwise than directly through such adopting parent.

Adopting parent to
have legal status or
natural parent.

8. When an order of adoption has been made the adopting parent shall, for all purposes, civil, criminal, or otherwise howsoever, be deemed in law to be the parent of such adopted child, and be subject to all liabilities parent affecting such child as if such child had been born to such adopting parent in lawful wedlock; and such order of

adoption shall thereby terminate all the rights and legal responsibilities and incidents existing between the child and his or her natural parents, except the right of the child to take property as heir or next of kin of his natural parents directly or by right of representation.

APPENDIX B

AUSTRALIAN CAPITAL TERRITORY

THE ADOPTION OF CHILDREN ORDINANCE 1965

General effect of
adoption orders.

33. (1) For the purposes of the laws of the Territory, but subject to this Ordinance and to the provisions of any law of the Territory that expressly distinguishes in any way between adopted children and children other than adopted children, upon the making of an adoption order –

- (a) the adopted child becomes a child of the adopter or adopters, and the adopter or adopters become the parent or parents of the child, as if the child had been born to the adopter or adopters in lawful wedlock;
- (b) the adopted child ceases to be a child of any person who was a parent (whether natural or adoptive) of the child before the making of the adoption order, and any such person ceases to be a parent of the child;
- (c) the relationship to one another of all persons (including the adopted child and an adoptive parent or former parent of the adopted child) shall be determined on the basis of the foregoing provisions of this subsection so far as they are relevant;
- (d) any existing appointment of a person, by will or deed, as guardian of the adopted child ceases to have effect; and
- (e) any previous adoption of the child (whether effected under the law of the Territory or otherwise) ceases to

have effect.

2.

Effect of orders as regards dispositions of property, etc.

34.(1) The provisions of sub-section (1) of the last preceding section have effect in relation to dispositions of property, whether by will or otherwise, and whether made before or after the commencement of this Ordinance, except that –

- (a) those provisions do not affect a disposition of property by a person who, or by persons any of whom, died before the commencement of this Ordinance; and
- (b) those provisions do not affect a disposition of property that has taken effect in possession before the commencement of this Ordinance.

(2) The provisions of sub-section (1) of the last preceding section do not apply in relation to an agreement or instrument (not being a disposition of property) made or executed before the commencement of this Ordinance.

(3) Where –

- (a) before the commencement of this Ordinance, a person made, by an instrument other than a will, a disposition of property;
- (b) the disposition had not taken effect in possession before the commencement of this Ordinance; and
- (c) it did not appear from the instrument that it was the intention of that person to include adopted children as objects of the disposition,

that person may, notwithstanding that the instrument could not, apart from this sub-section, be revoked or varied, by a like instrument, vary the first-mentioned instrument to exclude adopted children (whether adopted under this Ordinance or otherwise) from participation in any right, benefit or privilege under the instrument.

(4) In relation to a disposition of property by a person who, or by persons any of whom, died before the commencement of this Ordinance, an adoption order made under this Ordinance has the same effect as if the repealed Ordinances had continued in force and the adoption order had been made under those Ordinances.

(5) Nothing in the last preceding section or in this section affects the operation of any provision in a will or other instrument (whether made or coming into operation before or after the commencement of this Ordinance) distinguishing between adopted children and children other than adopted children.

Adoption order not to affect the distribution of property by trustees or personal representatives unless notice given.

37. (1) Notwithstanding any other provision of this Ordinance, trustees or personal representatives may, subject to this section, convey, transfer or distribute property to or among the persons appearing to be entitled to the property without having ascertained whether or not an adoption has been effected by virtue of which a person is or is not entitled to an interest in the property.

(2) A trustee or personal representative conveying, transferring or distributing property in the manner referred to in the last preceding sub-section shall not be liable to a person claiming directly or indirectly by virtue of an adoption unless the trustee or personal representative has notice of the claim before the time of the conveyance, transfer or distribution.

(3) Nothing in this section prejudices the right of a person to

follow property into the hands of a person, other than a purchaser for value, who has received it.