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401(k) TALK

Precautionary addendum: A tale of two siblings

Adoption conjures mixed emotions, even stigma, for some and our society has struggled with its meaning. Commendably, the trend in America is to treat adopted children the same as children born into the family. I want to examine that trend from the point of view of a trust and estates practitioner.

My firm recently was consulted by out-of-state counsel for a putative heiress — we'll call her Allison — who stood to inherit a large sum from a testamentary trust created by her paternal grandmother. Gram executed her will at the office of her New York lawyer in 1960 and passed away peacefully two years later.

By MICHAEL A. BURGER
Daily Record Columnist

Gram amassed some wealth during her long life and, in addition to making a generous bequest to her only child, Captain Bert, bequeathed $2 million to her testamentary trustees, directing them to pay income in equal parts to the American Cancer Society and Women's American ORT until Aug. 13, 2009, when the trust would terminate and the residue would be paid equally to the descendents of Gram's only child. Failing any such descendants, it would be paid to the above-named charities.

Allison wanted to know her rights as a residuary beneficiary under Gram's trust in light of a recent allegation regarding her biological ancestry. At a recent family gathering on Long Island, her sister, Amy, told her "you're adopted and you're not getting any of Gram's money."

"You can't mean it!" Allison protested, looking at their father, Captain Bert.

Her father only smiled and shrugged, good-naturedly offering her a peanut.

Allison did not know she was adopted, although there certainly was cause for suspicion. She had talents and attributes uncommon to the family, but also was less intelligent and not as good-looking as Amy.

The next week, Allison was served with a citation and petition from the trustee's lawyer formally demanding the Surrogate approve its proposed final accounting, reflecting payment of the entire trust residue to Amy. As an exhibit to the petition was an uncharitable letter from Amy's lawyer protesting Amy's having to share $2 million with "an adopted and dim-witted, homely girl."

A California domiciliary, Allison took the trustee's petition to a respected trusts and estates lawyer there who reviewed the matter and referred it to my firm for litigation before a New York Surrogate Court Judge.

We first confirmed Amy's claim that Allison was adopted as a baby in 1971 from a carnival booth. It seems Allison's adoptive father won the ball toss and her adoptive mother, intending instead to select a cupie doll prize, was distracted and accidentally pointed at the game-tender's infant daughter.

Allison's adoptive father, a lawyer by education and training, successfully argued she was "within the bounded perimeter of the booth," therefore was subject to be claimed as a prize. The adoption also was later formalized under state law in May 1978.

We next analyzed the trustee's legal position, which reasoned that any trust created prior to the March 1, 1964 amendment to what is now Section 117 of the state's Domestic Relation's Law was subject to the "precautionary addendum," an old statutory provision creating a presumption against the inclusion of adopted children in legacies where such inclusion would defeat the rights of remaindermen.

The precautionary addendum was applicable only to instruments executed before March 1, 1964 and provided: "As respects the passing and limitation over of real or personal property dependent under the provisions of any instrument on the foster parent dying without heirs, the foster child is not deemed the child of the foster parent so as to defeat the rights of remaindermen." DRL § 115 (pre-March 1, 1964, later renumbered DRL § 117).

The precautionary addendum originally was written in 1887 and, in the parlance of the time, an adoptive parent was known as a "foster" parent. See generally, *Estate of Lawrence*, 86 Misc 2d 579, 584 (N.Y. Surr. Ct., Kings County 1974).

The trustee's attorney noted correctly that in 1961 the New York State Court of Appeals affirmed a lower court's holding that: "In general a limitation in favor of 'issue' or 'descendants' will be construed to include only persons who have a blood relationship

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to the ancestor. The terms 'have a biological flavor, connoting persons who have in fact been generated by the designated person.' It is only when the instrument by its context indicates a contrary intention, or properly considered extraneous facts point to a different conclusion, that the words 'issue' and 'descendants' will be held to include adopted children." *In re Ricks' Trust,* 12 AD2d 395, 396 (First Dept.) (citations omitted), aff'd, 10 NY2d 231, 234 (1961) (*per curiam*) (the term "descendants" employed by the trust settlor held to describe only natural born or bloodline children despite an affidavit of the settlor substantially to the contrary).

Ricks and the precedent on which it relied viewed adoption as fraught with the possibility of fraud on a testator or trust settlor who was a "stranger to the adoption" and should not be bound thereby. The rationale behind Ricks and the precautionary addendum was to avoid allowing an adoption to frustrate the intent of the grantor whose intent may have included a different donee in the absence of natural born issue or descendents.

Consider the dissent of Judge Van Voorhis in the subsequent case of *Estate of Park,* 15 NY2d 413 (1965), which held that an adopted child is entitled to share in a class gift with his natural born sister in his adoptive family: "The tendency is strong today to ignore heredity, and to discount the sense of responsibility which formerly existed to make financial provision for the heirs or descendants of the body. It is customary to look askance at the desire of an ancestor to endeavor to protect his bloodlines, insofar as may be done, in the changing circumstances of ensuing generations. The abandonment of regard for one's descendants is one of the reasons for the increasing sense of irresponsibility toward the support of illegitimate children. If blood does not count, then it is rational to go on the theory that they might equally well be the children of someone else." *Estate of Park,* 15 NY2d at 420 (Van Voorhis, J., dissenting).

The area of law was litigated vigorously for decades by prospective heirs, with varying and inconsistent results, sometimes hinging on the precise words employed by the attorney-draftsmen to describe future legatees (e.g., "issue" or "descendants").

While it appears the courts initially applied the precautionary addendum liberally, establishing a presumption against adopted children, the tide eventually turned to favor the inclusion of adopted children in class gifts. See, e.g., *Estate of Park,* 15 N.Y.2d 413 (1965) (the term "issue" held to include adopted children). Perhaps the public policy shift in recognition of adoptees' inheritance rights under pre-1964 will and trust instruments is related to the state Legislature's decision to eradicate precautionary addenda entirely as to all instruments executed on or after March 1, 1964. See DRL §117 (2009); see also *Matter of Piel,* 10 NY3d 163, 169 (2008) (effectively affirming Monroe County Surrogate Edmund A. Calvaruso) (applying presumption against adopted-out children inheriting from biological parents to pre-1964 instruments); cf. *Evans v. McCoy,* 291 Md. 562, 436 A2d 436 (1981) (judicially applying prospective adoption inheritance statute retroactively); accord *Estate of Sewell,* 487 Pa. 379, 409 A2d 401 (1979); *In Re Gates,* 53 N.J. 415, 251 A2d 128 (1969).

The decision in *Park* followed a shift in the court's membership but the reasoning behind that court's apparent departure from *Ricks* otherwise is vague:

In *Matter of Ricks* (10 NY2d 231) the court was able to say the statutory addendum had direct and literal application to the case's facts. Since in the present case the foster parent in no event would have died "without heirs," the statutory language is not controlling. *Park,* 15 NY2d at 419.

A review of the record in *Ricks* indicates the contest involved adopted and natural born children. *Ricks* seemed to suggest the natural born siblings whose shares would be diluted by their adopted siblings were to be regarded as remaindermen as well for purposes of the precautionary addendum.

The apparent shift in favor of including adopted children in class gifts in instruments executed prior to 1964 is confirmed decisively by *In re Accounting of Silberman,* 23 NY2d 98 (1968) and *Matter of the Estate of Brooks,* 32 NY2d 752 (1973). These later Court of Appeals cases establish that "in the absence of an explicit purpose stated in the Will or a Trust instrument, to exclude [an adopted] child ... must be deemed included, whether the word 'heir', 'child', 'issue' or other generic term expressing the parent-child relationship is used." *Silberman,* 23 NY2d at 104 (quoting *Matter of Park,* 15 NY2d at 417). "It is clear from *Park* that the parent-child relationship contemplated need not be between the [settlor] and beneficiary." *Silberman,* 23 NY2d at 107. "It must be borne in mind that the rule of *Park* is that adopted children are included in the absence of an expression of a specific intent to exclude adopted children." *Id.*

In short, *Ricks* is no longer good law.

Park did away with any ambiguity in the generic terms issue and descendant. In its place? A presumption in favor of the adopted child, which as stated in *Park,* can be rebutted only by "an explicit purpose stated in the Will." *Id.* at 108-09. Under *ejustem generis,* "issue," "descendants," "children," etc., are interchangeable; those to whom the term refers, in the same class, are to be treated alike. *In re Silberman's Will,* 23 NY2d at 107.

In *Brooks,* 32 NY2d 752 (1973), *supra,* the Court of Appeals affirmed the Appellate Division's determination that adopted children are "issue" in the absence of any indication of an intent to exclude them, but found the adoptee in question ineligible to inherit based on the precautionary addendum. While there is a presumption in favor of included an adopted child, the appellant in *Brooks* was ineligible to share in the trust residuary because he would have been the only legatee in his "class," which would have defeated the right to the alternate class of remaindermen, in violation of the precautionary addendum. The Appellate Division cited *Matter of Carll,* 34 AD2d 793 (Second Dept. 1970), with approval, noting the only time an adopted child would be

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disregarded is where he or she stands alone to defeat the rights of a different class of remaindermen.

In Gram's testamentary trust, as in *Silberman, supra,* there is "a natural child of the [adoptive] parent alive which negate[s] the applicability of the 'precautionary addendum' of the statute." *Matter of Carll,* 34 AD2d 793, 794 (Second Dept. 1970); see also *Matter of the Estate of Nichol,* 32 AD2d 541, 542 (Second Dept. 1969) ("In our opinion, the presumption to include Appellant as an adopted child was not rebutted by 'an explicit purpose stated in the Will'") (citations omitted).

For a more recent Court of Appeals treatment of the subject, in a slightly different context, consider the following from Matter of Gardiner, 69 NY2d 66 (1986): "In *Matter of Park* (15 NY2d 412), ... we concluded the precautionary addendum did not prevent an adopted child from sharing a trust remainder equally with a biological child because, even if there had been no adoption, the biological child still would have cut off the remainder; the precautionary addendum, we held there, should be limited to cases where 'the act of adoption itself and alone cut off a remainder.'" *Id.* at 73-74.

The rule is stated simply: "[T]he precautionary addendum has not precluded an adopted child's inheritance in cases where the adoption simply has brought a child within an existing class." *Id.* at 74. The court was unanimous on the issue in Allison's case: Even the lone dissenting judge agreed the precautionary addendum did not apply to a contest between "natural" and adopted children. *Id.* at 79-80 (Meyer, J., dissenting).

The trend in favor of placing adopted children on equal footing with their adoptive siblings continues. The *Gardiner* court strictly interpreted the precautionary addendum to allow an adopted child with adoptive siblings and who frustrated the rights of remaindermen, to receive the final trust distribution. That is particularly remarkable when one considers the adoptee was a 32-year-old California lawyer who was adopted as an adult by an elderly and childless life tenant with a history of terminal illness and no "natural" children. *Matter of Gardiner,* 69 NY2d at 76 (Meyer, J., dissenting).

On Allison's behalf, we filed an objection to the trustee's petition and sent a detailed letter to the trustee's attorney setting forth our view of the law. The trustee elected to stand down, declining to advocate against Allison's status as co-residuary beneficiary.

Allison now spends her days with her husband and three bright children drinking banana daiquiris and playing 21 and Rummy Q for pennies.

Michael A. Burger is a litigation partner in the law firm of Davidson Fink LLP, online at www.davidsonfink.com. He dedicates this column to his two beautiful, generous and brilliant sisters, Ali and Amy.