

# Should Pretermitted Issue Be Entitled To Inherit?

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THE question of what language in a will is a sufficient mention of the testator's issue to prevent them claiming, as "pretermitted" heirs, the right to inherit under the statute of succession, again comes up in the recent case of *Estate of Price*.<sup>1</sup>

The testatrix had two sons, Arthur and Walter, and two grandchildren who were children of another son (Merton) who had died about three weeks before she executed her will. She left all her estate to her two sons and declared, "I purposely refrain from leaving anything . . . to any other person or persons, and in the event that any other person or persons shall either *directly or indirectly* contest this . . . will . . . I give to such person or persons contesting said will the sum of \$1 and no more, hereby declaring that I have only at this date two surviving children, to wit: my said two sons above named."<sup>2</sup>

Had the testatrix "omitted to provide" for the grandchildren, and, if so, were the grandchildren among the "other persons" whom the testatrix had in mind, so that it could be said that "it appears from the will that such omission was intentional"?

The language of the will shows some confusion of thought, if we are to suppose that the testatrix used the word "contest" in its technical sense; because a successful contestant would not be bound by the terms of the will, whereas a losing contestant would get \$1 instead of nothing. While it is true, as the court decided, that the claim of a pretermitted heir is not technically a "contest," would it not seem (in view of the futility of the provision just mentioned, as applied to a technical "contest") that what Mrs. Price meant by "directly or indirectly" contesting, was flouting the terms of the will by making a claim to some part of her estate? If that is what she meant, then she did provide in her will for any heir, other than her two sons, who might come forward to claim an inheritance;

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<sup>1</sup> (1942) 56 A. C. A. 366, 132 P. (2d) 485.

<sup>2</sup> *Ibid.* at 367, 132 P. (2d) at 486.

and the grandchildren, of course, were the only "persons" who could make such a claim, as they were the only other heirs.

In holding that the grandchildren were pretermitted, in that they were neither "provided for" nor intentionally excluded, the court had to distinguish *Estate of Trickett*,<sup>3</sup> where, after certain specific bequests, the excluding clause read, ". . . all other property . . . is to be divided amongst the four children mentioned . . . & not their heirs or any other relatives or friends of mine."<sup>4</sup> In that case (in addition to the widow) the heirs, as in the *Price* case, were children (named) and grandchildren (not named), and it was held that the will, by the reference to "any other relatives", showed that the exclusion of the grandchildren was intentional.

It is very hard to see any difference between the two cases. In the *Price* case the court said that the reference to her "two surviving children" indicated that she knew Merton was dead; "But," says the court, "there is not a word in the will to indicate that she knew he had been married, that he was the father of two children, or that either of these children was then living."<sup>5</sup> As a matter of fact, the grandchildren were then aged twelve and nine years, respectively, which fact would seem to be provable circumstance to consider in interpreting the will. Strange it would be if their grandmother had never heard of them. The *Trickett* case did not require that knowledge of the existence of the testator's issue appear from the words of the will.

Three justices of the supreme court (an insufficient number, being less than a majority) voted for a hearing of the *Price* case by their court, evidently leaning toward the opinion that the decision should correspond to that in the *Trickett* case; but it is an odd circumstance that of the justices who signed the opinion in the *Trickett* case, neither of the two who are still living and still members of the supreme court was among the three who voted for a hearing in the *Price* case.

The question of how definite the reference must be to disinherit issue, immediately brings up an inquiry as to the purpose of the law which safeguards the right of inheritance to issue who are not mentioned in a will. This law does not apply to any heirs other than issue. Neither the testator's spouse, parent, brother, or sister,

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<sup>3</sup> (1925) 197 Cal. 20, 239 Pac. 406.

<sup>4</sup> *Ibid.* at 22, 239 Pac. at 407.

<sup>5</sup> *Supra* note 1, at 370, 132 P.(2d) at 487.

even though an heir at law, has any right to inherit merely because he or she is not mentioned. Unquestionably the doctrine of pretermission (called "preterition" in *Bouvier's Law Dictionary*)<sup>6</sup> arose because of the chance that a father with numerous progeny might unintentionally have overlooked one or more of them when preparing his will. According to Bouvier, the civil law, whence it originated, did not apply the doctrine to the will of a mother, but only to the will of a father.

To what extent is there any justification for the continuance of this doctrine? My own paternal grandfather was one (the youngest) of fifteen children; my paternal grandmother one of thirteen. But my grandfather was born in the last year of the eighteenth century, and my grandmother about the same time. In my own lifetime it has been very unusual to know or even to hear of families (in this country) of more than seven or eight, and even that number is now rare. Conditions do not make for the large families of colonial days.

To what extent, to be specific, is the injustice which may arise once in a very great while from forgetting about one's offspring, overbalanced by the injustice of thwarting the testator's desires as expressed in his will, by a rule of law with which he may not be familiar or which he may not have met by a sufficiently definite statement of intention to disinherit?

I have seen holographic wills leaving the entire estate to the wife and containing no mention of minor children, with the result that the testator's desire to leave a small estate intact is thwarted by the doctrine of pretermission, and the estate is divided into a number of portions, some requiring guardianship proceedings continuing for many years. Again, a testator desires to cut off an unworthy son by ignoring him; but the law steps in and presents the son with property which the testator thought others deserved or needed more.

As long as the law remains unchanged, however, we will be met from time to time with the problem of construing the indefinite or indirect expressions of a testator's intention to disinherit some offspring not mentioned by name; and it might be useful to give a short review of some of the California cases.

In *Estate of Hassell*,<sup>7</sup> a contingent provision was made for one only of the testator's four children. The will then declared, "Those of my heirs not herein mentioned has been omitted by me with full

<sup>6</sup> (2d ed. 1843) 362.

<sup>7</sup> (1914) 168 Cal. 287, 142 Pac. 838.

knowledge thereof."<sup>8</sup> Notwithstanding the recognition by the court that it was "well established" that the intent that any children shall not share in the estate "must appear upon the face of the will strongly and convincingly,"<sup>9</sup> it was held that the three children not provided for had been sufficiently identified by the expression "my heirs not herein mentioned," to show an intention to exclude them from the inheritance.

In *Estate of Lindsay*,<sup>10</sup> the will read, "I purposely bequeath all my property to my wife, P L, knowing that she . . . will provide for our son C L . . . Should any other person or persons present themselves claiming to be heirs of mine, I give and bequeath to such person or persons the sum of . . . \$5.00."<sup>11</sup> To the claim of two daughters the court answered that, "The case is, in its essence, not distinguishable from *Estate of Hassell*,"<sup>12</sup> and affirmed a decree which left out the children. Incidentally, the same trial judge sat in both the *Hassell* and the *Lindsay* cases.

The supreme court, in the *Lindsay* case, pointed out, however, that in *Boman v. Boman*,<sup>13</sup> the United States circuit court of appeals, in construing a similar statute of the State of Washington, had held that the word "heirs" was not specific enough to show that the testator had in mind, by that reference, his unnamed children.

If the intent to disinherit a child must appear "strongly and convincingly," the federal case would seem to adhere to the rule better than the California cases above cited. It is quite possible, in each of these cases, that before the general disinheritance of (or trivial provision for) "all other heirs," the testator had intended, but had inadvertently omitted, to provide for his other children or some one or more of them.

In *Estate of Minear*,<sup>14</sup> the testator declared, "I am a single man, I have never been married . . . Now if there should be any other or others than the ones that I have named in my will above that claim to be my lawful heirs and can and do prove that they are, to each of them I will \$5.00."<sup>15</sup> Here there was no reference, before the "lawful heirs" clause, to any child or children, and the appellants,

<sup>8</sup> *Ibid.* at 288, 142 Pac. at 839.

<sup>9</sup> *Ibid.*

<sup>10</sup> (1917) 176 Cal. 238, 168 Pac. 113.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> (C. C. A. 9th, 1892) 49 Fed. 329.

<sup>14</sup> (1919) 180 Cal. 239, 180 Pac. 535.

<sup>15</sup> *Ibid.*

who claimed to be children, argued that this differentiated the case from *Estate of Lindsay*, where, as in *Estate of Hassell*, the testator had at least made mention of *one* of several children, thus showing that he had his children in mind; but the court gave weight to the testator's declaration that he was a single man and had never been married as an indirect averment that he had no children, and therefore must have had children—as a class—in mind in referring to any persons that claim to be my lawful heirs.

Substantially the same testamentary language led to the same holding in *Estate of Allmaras*,<sup>16</sup> although it required a reversal of the lower court. The supreme court denied a hearing. I would say that it is even clearer that the testator's children or putative children were in his mind as persons to be excluded, in the *Minear* and *Allmaras* wills, although the word child is not used, than it is in the *Hassell* and *Lindsay* wills.

We now come to a case where an heir (a grandchild) who neither received anything from the estate nor, concededly, was in anyway mentioned in the will, directly or indirectly, was held, nevertheless, to have been *provided for*, and therefore not pretermitted. At first blush this would seem to be posing a conundrum; but let us take a look at *Estate of Carter*.<sup>17</sup>

Testatrix gave certain property to her daughter, and "my other property . . . to my three sons." One son died before his mother, leaving issue, appellant. When Mrs. Carter died she had no property other than that willed to her daughter. Had she "omitted to provide *in her will*"<sup>18</sup> for the grandson, or can it be said that she had made provision for him?

Under the theory that a gift of the Washington Monument would have been a "provision" for the son had he lived,<sup>19</sup> the court lassoes section 92 of the California Probate Code and sets it up as a bar against the son's issue, who, as a lineal descendant of kindred (the son) of the testatrix, takes, under section 92, "the estate so given by the will" to the son (in this case nothing better than "empty sausage and wind pudding"). The court had authority for holding that a legacy to a son was "provision" for the son's issue in a dictum

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<sup>16</sup> (1938) 24 Cal. App. (2d) 457, 75 P.(2d) 557.

<sup>17</sup> (1942) 49 Cal. App. (2d) 251, 121 P.(2d) 540.

<sup>18</sup> CAL. PROB. CODE §90.

<sup>19</sup> Citing *Estate of Callaghan*, (1898) 119 Cal. 571, 51 Pac. 860.

expressed in both the principal and the concurring opinion in *Estate of Todd*,<sup>20</sup> one such declaration being:

"The testator has not, therefore, omitted to provide for the issue of any deceased child within the meaning of Section 90. He has provided for such issue by operation of law; . . ."<sup>21</sup>

But, we may ask, reverting to the *Carter* case, assuming that Mrs. Carter did "provide" for her son by leaving him something she did not have, *did she provide for her grandchild in her will*, as required by section 90, or was it not the *statute* (section 92), rather than the will, which made the provision for the grandchild? It has been held that a person taking under Civil Code section 1310 (now California Probate Code section 92) as the descendant of a deceased relative of the testator takes, not by any provision of the will, but by virtue of a statute of succession. In *Estate of Goetz*,<sup>22</sup> there was a legacy to one Lesage, a nephew, who predeceased the testator, leaving children surviving him. In connection with applying a rule of interpretation, the court declared, "Here there was no legacy to the children. . . ."<sup>23</sup> It was held that Lesage's children took by virtue of the statute, that is, by succession. This holding was not taken into consideration by the writer of either opinion in the *Todd* case.

*Estate of Todd* is an important case on the law of pretermission, but as it has already been reviewed,<sup>24</sup> I shall merely point out that that case holds that the statute of pretermission now protects issue who are not even presumptive heirs at the time the will is written (such as grandchildren whose parents are living when the will is executed, or who are born after the making of the will) and who as likely as not are not in the mind of the testator, and even if they are, would not ordinarily be mentioned unless the testator's attention was called to the ruling in the *Todd* case. Should the law step in to give such grandchildren property which the testator expressly leaves to others? Or would they not be treated fairly enough by taking, under section 92, the share of the estate, if any, that was intended for their parent who has predeceased the testator?

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<sup>20</sup> (1941) 17 Cal. (2d) 270, 276, 109 P. (2d) 913, 916.

<sup>21</sup> Traynor, J. concurring, *ibid.* at 277, 109 P. (2d) at 916.

<sup>22</sup> (1910) 13 Cal. App. 292, 109 Pac. 492.

<sup>23</sup> *Ibid.* at 297, 109 Pac. at 493.

<sup>24</sup> (1941) 29 CALIF. L. REV. 661.

It would seem that the statute does at least as much harm as good. It is doubtful if, since we no longer have extremely large families, there is any need to upset a testamentary disposition in order to protect issue not mentioned. And since, in so many cases, the court has construed almost any general language as indicating an intent to exclude, the statute does not furnish very much protection, anyway, to an omitted and really forgotten child. In the occasional case where the child or grandchild is held to be pretermitted and the testator's will consequently is held to be inoperative *pro tanto*, will the testator's real desire be fulfilled or thwarted? If it is believed that in most such cases the testator's wishes are frustrated, the statute should be repealed.