

For information
on 13 May 2004

**Bills Committee on
Adoption (Amendment) Bill 2003**

Effect of an Adoption Order on a Will made prior to the Order

Purpose

This paper provides information on the effect of an adoption order on an adopted child's entitlements under a will made by his/her birth parent prior to the granting of the adoption order.

Background

2. In considering the revised section 15 of the Adoption (Amendment) Bill 2003 (the Amendment Bill) at the meeting on 15 April 2004, Members requested, among others, that the Administration explain, in relation to a will made by a birth parent prior to an adoption order being granted, the effect of an adoption order on an adopted child's entitlements under the will.

Present Position

3. Section 15(2) of the Adoption Ordinance (Cap. 290) provides that :

“(2) In any *disposition* of property *made*¹, whether by instrument inter vivos or *by will* (including codicil), *after the date of an adoption order* -

(a)

¹ In the context of section 15(2) of the Adoption Ordinance, “disposition” refers to the document and not the benefit conferred by the document, and, therefore, the date on which a disposition by will would be regarded as “made” is the date of execution of the will incorporating the disposition and not the date of death of the testator, as shown by a decided case in the UK.

- (b) any reference (whether express or implied) to the child or children of the adopted person's natural parents or either of them shall, unless the contrary intention appears², be construed as not being, or as not including, a reference to the adopted person; and
- (c)

4. In the hypothetical case that a will is made before the date of an adoption order, the statutory rules of construction including that in section 15(2) of Adoption Ordinance do not apply. The question of how a conclusion is to be drawn in each case depends on the construction of the particular will, and the context or circumstances showing what the testator means by “children”. Subject to the actual construction of the will and the relevant context or circumstances, where the adopted child is referred to by name or there is clear evidence that the testator intends to benefit the adopted child, the adopted child should generally be entitled to a share in the estate of his/her birth parent(s) if the latter has/have made a will before the adoption order is granted containing a gift to his/her/their children as a class.

5. However, Members may also note that whether the child is legitimate or illegitimate and whether the will is made before or after the commencement of the Parent and Child Ordinance (Cap. 429) is relevant. The Parent and Child Ordinance 1993 (which came into force on 19 June 1993) reverses the previous presumption regarding the entitlements of illegitimate children. Under the previous law, references to relationships, such as children or nephews, were construed as meaning only legitimate persons or persons traced through legitimate relationships. This remains the law in respect of wills executed before 19 June 1993. Under the new law, the Parent and Child Ordinance provides that in any ordinance whenever enacted or document made after the commencement of the Ordinance (including a will), references (whether express or implied) to any relationship between two persons shall, unless the contrary intention appears, be construed as including legitimate and illegitimate relationships.

6. Notwithstanding the above, ultimately, it is a question of ascertaining the intention of the testator who is a birth parent, as to whether the child who is subsequently adopted may take under the will.

² Even where the statutory presumption is applicable (i.e. the disposition is made after the date of the adoption order and therefore reference to the children of the adopted person’s natural parents would be presumed not to cover the adopted person), this could be displaced by a contrary intention as shown by a decided case in the UK.

Presentation

7. Members may wish to take note of the contents above for information.

Health, Welfare and Food Bureau
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