

Rights of Adopted Children Under Pre-1949 Class Gifts

In *Nunnally v. Trust Company Bank*,¹ the Georgia Supreme Court held constitutional Georgia's 1941 adoption statute,² which provided that the act of adoption should not affect the adoptive child's relationship with anyone other than the adopting parents and the natural parents. The 1941 act was challenged by two adopted children who, the court held, were excluded from sharing in a class gift to "issue" of grandchildren at the termination of a trust created by the adopting father's grandmother, whose will became effective while the 1941 act was in force.

Testatrix executed her will in 1942 and died in 1945. The will created a trust to pay income to her daughter for life and directed the trustee to divide the trust assets at the daughter's death and distribute the shares to the daughter's four children or to the "issue" of any children who may have predeceased their mother. After testatrix' death, her grandson adopted two sons. When testatrix' daughter died, the trustee brought an action for construction of the will to determine whether the adopted children were takers under the gift to "issue." The trial court applied the adoption law as of the time the trust terminated and held that the adopted sons took as the grandson's issue. The Georgia Supreme Court reversed and remanded, holding that the law as of the time the will took effect should control.³

On remand, the adopted children urged that the 1941 adoption statute violated the equal protection clause by invidiously discriminating between children born into a family and those adopted into it.⁴ The trial court found that the 1941 adoption statute was patently invidious, but that the fourteenth amendment was not violated because there was no state action.⁵ The Georgia Supreme Court affirmed the decision, but did so on the opposite reasoning that, while there was state action, the discrimination was rationally related to the valid state purpose of providing for the orderly disposition of property.⁶

1. 244 Ga. 697, 261 S.E.2d 621 (1979).

2. 1941 Ga. Laws 300.

3. *Nunnally v. Trust Co. Bank*, 243 Ga. 42, 43, 252 S.E.2d 468, 469 (1979).

4. 244 Ga. at 698-99, 261 S.E.2d at 623.

5. *Id.* at 697, 261 S.E.2d at 622.

6. *Id.* at 701, 261 S.E.2d at 624.

Since adoption did not exist at common law, the problem of inheritance and succession by adopted children is a relatively recent one. The Georgia statute of 1941 resolved this problem to some extent by providing that "[i]f the court is satisfied that a final order of adoption should be entered, the court shall enter a decree of adoption, declaring the said child to be the adopted child of the petitioner, and capable of inheriting his estate."⁷ After removing the legal rights and obligations of the natural parents, the act provided that "[t]o all other persons the adopted child shall stand as if no such act of adoption had been taken."⁸ Under the 1941 act, Georgia courts held that an adopted child could not inherit from the adopting parents' relatives unless expressly included under a will.⁹

Beginning in 1949, however, Georgia law has made the act of adoption effective as to all persons. The statute was amended to provide that an "adopted child shall be considered in all respects as if it were a child of natural bodily issue of petitioner or petitioners, and shall enjoy every right and privilege of a natural child of petitioner or petitioners to inherit under the laws of descent and distribution in the absence of a will and to take under the provisions of any instrument of testamentary gift, bequest, devise or legacy unless expressly excluded therefrom."¹⁰ The supreme court sanctioned a broad reading of the 1949 amendment when it held that the adoption of a child worked a revocation of the adopting parent's will because the act of adoption "is the equivalent in law of the birth of a child."¹¹

With the change in the adoption statute, it was inevitable that questions would arise as to the rights of children adopted after the 1949 amendment under instruments which became effective before the amendment. Oddly enough, the question seems to have first appeared in Georgia in a controversy over the effect of a similar change in Pennsylvania law. In *Carnegie v. First National Bank*,¹² the supreme court held that Georgia law determined whether the earlier or the later Pennsylvania law governed. The court said that the intent of the testator controlled on that

7. 1941 Ga. Laws 305.

8. *Id.* at 306.

9. 244 Ga. at 698, 261 S.E.2d at 623. In *Comer v. Comer*, 195 Ga. 79, 23 S.E.2d 420 (1942), the excluded child was adopted by one of testator's children, who died, and thereupon the child was adopted by another of testator's children.

10. 1949 Ga. Laws 1157. The 1949 act survives in substantially the same form at GA. CODE ANN. § 74-413 (Supp. 1980). The act became effective August 25, 1949, thirteen months after the adoption of Winship Nunnally III on July 20, 1948, and four months before the adoption of Berry Nunnally on December 17, 1949. Brief for Petitioner at 2, *Trust Co. Bank v. Nunnally*, No. C-39800 (Fulton Sup. Ct., June 8, 1978).

11. *Thornton v. Anderson*, 207 Ga. 714, 64 S.E.2d 186 (1951).

12. 218 Ga. 585, 129 S.E.2d 780 (1963). Like *Nunnally*, this case dealt with the rights of an adopted son of a testatrix' grandson.

issue and found such intent in the following language: "said trust shall then terminate and the whole or any portion thereof remaining unsold shall be vested, but not before, absolutely in such persons and for such estates and proportions as would take the same under the intestate laws of the State of Pennsylvania had I died intestate possessed thereof. . . ."¹³ Accordingly, the court held that Pennsylvania law as of the termination of the trust should be followed in determining the remaindermen.

In *Brown v. Trust Co.*,¹⁴ the supreme court was faced squarely with the question as it arose under Georgia law. Admitting that the intention of the testator was not so clear as in *Carnegie*, the court was still able to gather from the four corners of the trust instrument that the law at the termination of the trust controlled.¹⁵ But the court went on to hold that

where a trust is created so as to terminate at some future date when a class of beneficiaries is to be determined, unless the trust instrument itself provides expressly that a statutory rule other than that in effect at the date of termination shall be applied, then the statutory rule in effect at the date of the termination of the trust shall be applied.¹⁶

Five years later, the holding in *Brown* was disapproved by dictum in *Warner v. First National Bank*.¹⁷ Although the will in *Warner* became effective after the 1949 amendment, the court went out of its way to disapprove *Brown* under the more general rule that a testator's intent is to be given effect whenever possible. The court found it "more logical to assume that a testator intends for the law in effect on the date of his death to control the disposition of his property under his will."¹⁸ Reversing itself, the court said that "in the absence of an *express* contrary intention, a will is to be construed according to the law in effect at the testator's death."¹⁹ The question arose again in the first appearance of *Nunnally*.²⁰ The court applied the dictum in *Warner* without analysis and, since testatrix' will expressed no intention regarding the law to be used in its construction, the court held that the law in effect at her death controlled.²¹

13. *Id.* at 589, 129 S.E.2d at 784 (emphasis in original).

14. 230 Ga. 301, 196 S.E.2d 872 (1973). The gift was to nieces and nephews of the testator, who died in 1948.

15. *Id.* at 303, 196 S.E.2d at 874.

16. *Id.*

17. 242 Ga. 661, 251 S.E.2d 511 (1978).

18. *Id.* at 664, 251 S.E.2d at 513.

19. *Id.* (emphasis added).

20. 243 Ga. 42, 252 S.E.2d 468 (1979).

21. *Id.* at 43, 252 S.E.2d at 469.

When *Nunnally* appeared before the supreme court the second time,²² the adopted sons sought to have section 11 of the 1941 act declared unconstitutional as violating the equal protection clause of the United States and Georgia Constitutions. In analyzing this contention, the court considered *Lalli v. Lalli*,²³ in which the United States Supreme Court rejected an equal protection challenge to a statute conditioning the rights of illegitimates to inherit from their fathers. The standard set forth in *Lalli* was "whether the statute's relation to the state interests it is intended to promote is so tenuous that it lacks the rationality contemplated by the Fourteenth Amendment."²⁴ This almost toothless standard could be applied by the Georgia court because the classification created by the adoption statute did not affect or include any suspect categories such as race, which would require strict scrutiny.

The court pointed out that its conclusion could not be based merely upon any lack of wisdom in the legislature's choice. The court said that the state has an interest in the orderly disposition of property, which interest is advanced by its laws of succession. These laws may properly be based on the presumed intentions of decedents that their property pass within their bloodlines, instead of to an adopted child who is brought into the family by the affirmative act of the adopting parents.²⁵ The court concluded that the 1941 adoption statute, like the statutes denying heir status to sons- and daughters-in-law, is not irrational as related to the state objective of orderly disposition.²⁶ Therefore, there was no invidious discrimination in the 1941 statute.²⁷

The court in *Nunnally* took a dogmatic tone towards those who would criticize the state's system of inheritance, saying that "it is solely within the province of the state to prescribe for such succession as it deems necessary."²⁸ Traditionally that has been so, but the state must be rational in the application of its system. *Lalli*, which the court cited for the general meaning of the equal protection clause, did not hold that a state could provide for arbitrary disposition of property by inheritance, however orderly. The statute in *Lalli* required certain proof of paternity before an illegitimate could inherit from its father. In upholding this proof requirement, the Supreme Court found that it was rationally related to the

22. 244 Ga. 697, 261 S.E.2d 621 (1979).

23. 439 U.S. 259 (1978). The authority of *Lalli*, at least as to its particular factual setting, may not be long-lasting; the decision was 5-4 and only three members joined in the opinion of the court.

24. *Id.* at 273.

25. 244 Ga. at 699-701, 261 S.E.2d at 623-24.

26. *Id.* at 701, 261 S.E.2d at 624.

27. *Id.* at 702, 261 S.E.2d at 625.

28. *Id.* at 699-700, 261 S.E.2d at 624.

state's goal of having orderly disposition of property by avoiding fraudulent claims of heirship.²⁹ Given that adoption is a matter of judicial decree, an adopted child would have none of the proof problems contemplated by the statute in *Lalli*. Therefore, the concept of orderly disposition of property, as used in that case, may not be applicable to laws restricting the inheritance rights of adopted children. The court did not explain why it would be more orderly to exclude, rather than include, adopted children as takers under class gifts.

The only issue presented in *Nunnally* was whether section 11 of the 1941 act was unconstitutional on its face. The court did not discuss, and the parties apparently did not raise, the issue of whether the 1941 act was unconstitutionally applied to the son adopted under the 1949 act. He might have contended that the state treats similarly situated people unequally when it allows some children adopted under the 1949 act to take under testamentary class gifts and refuses to allow other children to take these gifts, simply because of the date of the testator's death. In treating *Nunnally* strictly as a will construction case, to be governed by the intent of the testator under the general rule, the court ignored Berry Nunnally's rights as based upon his status under the 1949 statute. That status was of "natural bodily issue"³⁰ of the grandson. To deny such a child the benefits of a class gift to the "issue"³¹ of the grandson on the ground that the state presumes that the testatrix did not intend to include the adopted children does not seem to serve any state purpose at all. Certainly it does not serve the goal of the orderly disposition of property. It would be much easier for the state to determine whether a child was adopted under the 1949 amendment than to determine whether a testator "expressed" an intent to allow the law at the termination of the trust to control.

It would not do to criticize the court too harshly on this point, since the issue apparently was not considered. It is appropriate, however, to repeat and re-emphasize criticisms of the Georgia adoption law made by one commentator.³² Taking a child completely out of one family and placing him into another is a very complicated business and the laws regulating this process have not been carefully conceived or written. The legislature, while admittedly working in a piecemeal fashion to patch these laws together, has at least moved towards the goal of complete integration of the adopted child into its new family. The Georgia courts, on the other hand, have favored the application of rules of construction over the spirit and

29. 439 U.S. at 268-71.

30. 1949 Ga. Laws 1157, 1158.

31. 243 Ga. at 43, 252 S.E.2d at 469. The language of the will was arguably broader than that of the statute.

32. Comment, *Domestic Relations—The Legal Consequences of Adoption in Georgia—Inheritance Rights and Wrongful Death Actions*, 23 MERCER L. REV. 1003 (1972).

apparent intent of the statutes.³³ The results, as in *Nunnally*, can sometimes be what no one intended.

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33. *Id.* at 1009.