

# PODOLSKY V. PODOLSKY — A FURTHER COMMENT

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As Professor Harvey, in his comment, has thoroughly covered the facts of the *Podolsky* case<sup>1</sup> and the legislation pertinent to it, this comment will be confined to an examination of the main thrust of Mr. Justice O'Sullivan's decision.

The decision turns on his judgment of what constitutes "lawful lineal descentence." There was never any dispute among the parties that the Respondents were originally the lawful lineal descendants of John Podolsky, as they were born to his lawful wedded wife during his marriage to her. The question to be answered is "Did the lawfulness of the Respondents' lineal descendency survive their adoption by their mother and her second husband?"

In the course of his explanation as to why the Respondents' adoptions do not affect their status as the lawful lineal descendants of John Podolsky, the learned judge comments upon the effect of *The Child Welfare Act*<sup>2</sup> generally and the effect of the 1974 and 1979 amendments to the *Act*.

## The Child Welfare Act

The impotence of *The Child Welfare Act* in affecting the inheritance rights of "issue", as defined by *The Devolution of Estates Act*<sup>3</sup>, is illustrated by the learned judge's relegation of the "saving clause" (i.e. the former s. 96(2) of *The Child Welfare Act*), to the category of a guarantee. The learned judge supports his view with the observation that being a lineal descendant is not a tie, but a fact. This statement of lineal descendency is dependent only upon conditions precedent to the child's birth, that is, that the child be born to a couple in lawful wedlock.

Professor Harvey's point that the legislature should have made its intentions clearer if it wishes to erase succession rights between adopted children and natural parents is well taken. However, when we consider the possible extrapolation from Mr. Justice O'Sullivan's line of reasoning in the instant case, this may offer no solution to the problem. If section 96(2) of *The Child Welfare Act* in its pre-1974 form is only capable of providing a guarantee to rights that arise by virtue of *The Devolution of Estates Act*, then is it not arguable that even a clearly worded amendment negating such succession rights will be of no effect? If this interpretation is correct, then it would follow that an amendment to *The Devolution of Estates Act* changing the definition of issue would be necessary.

To this writer, such a suggestion seems inappropriate. *The Child Welfare Act* is the statute which defines the process by which children can be adopted and which defines the effects of such a newly constituted relationship. It is certainly effective in destroying such basic rights as custody and (in most cases) access rights between adopted children and natural parents. Why then, one might ask, should succession rights be treated so differently?

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1. (1980), 3 Man. R. (3d) 251 (Man. C.A.).  
2. R.S.M. 1970, c. C-80, as amended.  
3. R.S.M. 1970, c. D-70, as amended.

The main consideration for a court in determining whether to grant an adoption, and, therefore, the consideration in determining the consequent rights and obligations, is the best interests of the child. So, it would seem appropriate to apply the same consideration to the issue of succession between adopted children and their natural parents. Although Mr. Justice O'Sullivan does not comment directly on this point in the instant case, his views are made clear in his judgment in *Hillier and Hillier v. Williams*:

"The evidence is that the natural Father is a man of some means. To deprive the children of their right to inherit from him would not be to their advantage, especially if they are to have a continuing relationship with him."<sup>4</sup>

It is startling that in the *Hillier* case, which was decided only seven months prior to the instant case, Mr. Justice O'Sullivan was of the opinion that a decree absolute of adoption would have the effect of destroying succession rights between the adopted children and their natural parents. This writer agrees with Professor Harvey that the learned judge was not bound by his obiter comments in the *Hillier* case, but is it not interesting that in both cases his decisions, which have turned on opposite interpretations of the effect of an adoption order, have each time stood to protect the adopted child's right to inherit from natural parents? It could be inferred from this about-face that the learned judge thinks that this is a right worthy of protection, and one that is inevitably in the best interests of the child.

With the greatest respect, this writer takes the opposite view. The enhancement of an adopted child's natural wealth may well be made at the expense of 1) the child's emotional stability and 2) the stability of the adoptive family unit. The Respondents in the instant case were adults and so the facts do not warrant either of these concerns. Yet the effect would be much different if the "lawful lineal descendents" were children who had been adopted shortly after birth, and who had never known their natural parents.

#### The 1974 and 1979 Amendments

In the light of Mr. Justice O'Sullivan's considered opinion regarding the lack of power of *The Child Welfare Act* as outlined above, it would seem unnecessary for him to comment on the 1974 and 1979 amendments. However, he does so, and, in both cases, he finds that the amendments are not indicative of any intention by the legislature to destroy the rights of an adopted child to inherit from its natural parents.

The learned judge concludes that these amendments do not make unlawful the lineal descendency of the Respondents from their natural Father. In his words, lineal descendency cannot be one of the prior parental ties that ceases to exist under the law because "lineal descendency is not a tie. It is a fact."<sup>5</sup> That is quite correct. Lineal descendency is a fact, but lawful lineal descendency by its very name alone is not a fact, and it is the lawfulness of the Respondents' lineal descendency that has been the question in issue throughout the case. It is respectfully submitted that the lack of consideration of the concept of lawfulness at this stage of the judge's reasoning constitutes a serious gap.

4. (1979), 14 R.F.L. (2d) 31 (Man. C.A.), at 40.

5. *Supra* n. 1, at 255.

It is conceded that the 1974 amendments are not, in terms of positive language, very clear. However, it is submitted that the repeal of the very clear former s. 96(2), on the face of it, is indicative of the legislature's intention to sever succession rights between adopted children and their natural parents. It is further submitted that lawful lineal descendency can be considered as one of the "prior parental ties." A tie is a type of linkage that can be undone or severed just as the chain of lawful lineal descendance can be broken by a decree of adoption.

O'Sullivan, J.A., interprets the 1979 amendments in such a way as to further confirm his view that the legislature did not intend to destroy the status of adopted children as lawful lineal descendents of their Father. He states that the cessation of rights between the adopted child and his natural parents does not include the right to inherit, as this is a right that arises subsequent to the death of the natural parent.

It is submitted that this distinction drawn by the learned judge is a semantic one. Death of a parent does not create the right to inherit; it is merely the final event which realizes a right created beforehand by the legal relationship that existed during the lives of the parties. Furthermore, does it not seem peculiar that it is only upon the death of the natural parent that the links with the adopted child are re-established?

### Conclusion

This writer agrees with Professor Harvey that the legislature should do a better job in making its intentions clear through its drafting. However, it is submitted that the *Podolsky* decision does not reflect the intentions of the legislature nor does it reflect a realistic attitude to what, as a general rule, would be in the best interests of most adopted children with regard to inheritance. Unlike Professor Harvey, this writer is most convinced by the case of *Re Jensen*<sup>6</sup>, in which Branca, J., examines the section of the *British Columbia Adoption Act*<sup>7</sup> that corresponds with the S. 96 of the *Manitoba Child Welfare Act*, and observes that the adopting parents are in law the adopted child's mother and father. Following this observation to its most reasonable conclusion, he finds that there is created an irrebuttable presumption that the adopted child was born in lawful wedlock to the adopting parents. On the basis of this presumption, there remains no possibility of succession links between the adopted child and its natural parents.

Branca, J.'s effort in the *Jansen* case to arrive at a decision that achieves harmony between the laws relating succession and adoption is commendable. As a result of the *Podolsky* decision, such harmony does not exist in Manitoba.

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6. (1964) 47 D.L.R. (2d) 630 (B.C. S.C.).

7. R.S.B.C. 1960, c. C-4.

