INTESTATE SUCCESSION RIGHTS OF ADOPTED CHILDREN IN MANITOBA: THE PODOLSKY CASE

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John Harry Podolsky and his wife Ruth Elizabeth had two daughters, Audrey Sharin and Karen Eileen. In 1969, the Podolskys were divorced. John Harry Podolsky never remarried. Ruth Elizabeth, however, married George Kosowan and, in February 1970, she and George Kosowan officially adopted Audrey Sharin and Karen Eileen. John Harry Podolsky died intestate on May 30, 1979, survived by his two daughters and his mother Natalka Podolsky. Who should succeed his estate, his daughters or his mother? They are the only people with a claim according to *The Devolution of Estates Act*[1] which is the basic source of intestate succession law in Manitoba. That *Act* provides that if an intestate dies leaving "issue" but no spouse, the estate is distributed "per stirpes among the issue"[2] and "issue" is defined as including "all lawful lineal descendants of the ancestor"[3]. Further, the *Act* states that if an intestate dies leaving no spouse or issue then the estate is distributed to the deceased's parents in equal shares if both are living, or, if one is dead, entirely to the survivor.[4]

Are Mr. Podolsky's daughters his lawful lineal descendants? If they are, they are entitled to his estate ahead of his mother. In view of the fact that Mr. Podolsky's daughters were adopted, following the Podolsky's divorce, by their mother and her second husband, sections of *The Child Welfare Act*[5] are germane to the question.

Up to 1974, *The Child Welfare Act* provided in ss. 96-97 as follows:

> **Effect of adoption of child.**
> **96(1)** Upon a decree of absolute adoption of a child being made
> (a) subject to subsection (2), all rights and duties as between the child and his natural parents or his parents under a previous adoption cease;
> (b) for all purposes, the child is the child of the adoptive parent and the adoptive parent is the parent of the child, as if the child had been born to the adoptive parent in lawful wedlock, and the child and his descendants stand in relation to the adoptive parent and his descendants, ascendants and kindred, and the adoptive parent and his descendants, ascendants and kindred stand in relation to the child and his descendants, in every way as if the child had been born to the adoptive parent in lawful wedlock;
> (c) the child takes the surname of its adoptive parent unless, in the case of a legitimate child, the adoptive parent requests that the child retain the surname under which his birth was registered;
> (d) the child is entitled to proper support and care from the adoptive parent;
> (e) the child and his descendants have the same rights to and interests in property under an intestacy of, or disposition by, any person as if the child had been born to the adoptive parent in lawful wedlock and the relationships mentioned in clause (b) were natural relationships, but such rights and interests may be expressly limited, restricted or negatived by the terms of any such disposition;
> (f) the adoptive parent is entitled to the services, wages, control and custody of the adopted child;
> (g) the adoptive parent and his descendants, ascendants and kindred have the same rights to and interests in property under an intestacy of or disposition by any

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1. R.S.M. 1970, c. D 70, as amended.
2. *Id.*, s. 6(4).
3. *Id.*, s. 5(b).
4. *Id.*, s. 8(1).
5. R.S.M. 1970, c. 80, as amended.

person as if the child had been born to the adoptive parent in lawful wedlock and the relationships mentioned in clause (b) were natural relationships, but such rights and interests may be expressly limited, restricted, or negatived by the terms of any such disposition; and

(h) all rights and duties as between the child and a person who has been appointed guardian of the person of the child, or to whom the care and custody of the child has been given under any previous court order or agreement cease and all rights and duties as between the child and the director or an agency in respect of guardianship of, or supervision over, the child cease.

Am.

Right to inherit from natural parent.

96(2) An adopted child does not by reason of the adoption lose the right to inherit from his natural parents or kindred.

Application of section to all adoptions.

96(3) Subject to subsection (4), this section applies to all adoptions made under The Child Welfare Act on or since the first day of September, 1924 and to all adoptions recognized under this Act whether made before or after the coming into force of this section.

Saving clause.

96(4) Nothing in this section affects any payment, delivery or conveyance of money or property made prior to the coming into force of this section.

En. S.M., 1961, (1st Sess.), c. 6, s. 2; am.

Adoption in another jurisdiction.

97 Where another province, state, or country has legislation respecting adoption that provides, or substantially provides, that upon the adoption of a child all rights and duties as between the child and the natural parents are to cease, either including or excluding the right to inherit from his natural parents or kindred, and the child is thereafter to be deemed to be the child of the adoptive parent or parents, a child adopted in, and in accordance with the law of, that jurisdiction shall be deemed to have been adopted under this Part.

En. S.M., 1961, (1st Sess.), c. 6, s. 2; am.

Clearly, up to 1974, on one basis or another, adopted children had dual intestate succession rights to the estates of their natural and adopting parents. If this were the way *The Child Welfare Act* read today, there would be no problem in the Podolsky case; the daughters would be without any doubt the lawful lineal descendants of their natural father. However, in 1974, *The Child Welfare Act* was repealed and re-enacted. Former s. 97 was not re-enacted and s. 96 was re-enacted with new wording, greatly reduced in length, and without former s. 96(2)[6]:

Effect of adoption order.

96(1) Upon the granting of an adoption order under this Part all prior parental ties of the child cease to exist under the law, and the relationship newly constituted by the order is valid for all lawful purposes and has the same effect as if the child had been born to the adopting parent(s).

Surname of child.

96(2) An adopted child takes the surname of his adopting parent(s) unless the adopting parent(s) requests that the child retain the surname under which his birth is registered.

In 1979, s. 96 was again amended to substitute the words "rights, duties and obligations between the child and his natural parents or his prior adoptive parents and guardians" for the words "parental ties of the child" in s. 96(1) and to substitute the word "parents" for "parent(s)" in s. 96(1) and s. 96(2).[7]

6. S.M. 1974, c. 30. The new s. 96 came into force January 31, 1975.

7. S.M. 1979, c. 22, s. 62.

Do these amendments to *The Child Welfare Act* affect the status of the daughters in relation to their father? Are they nonetheless his lawful lineal descendants? The 1979 amendments can be ignored for it only came into effect after Mr. Podolsky died (and after the Surrogate Court confirmed the intestacy in issuing Letters of Administration dated July 16, 1979).[8]

An application was made by Mr. Podolsky's administrator to the Court of Queen's Bench for advice and direction on the following question:

> When a natural parent of an adopted child dies intestate after 1975, do rights of inheritance from natural parents, which were formerly guaranteed to children adopted . . . before 1974 under The Child Welfare Act . . . s. 96(2), survive the amendments of the said Act by the deletion of the said s. 96(2) . . .

Deniset J., who heard the application, ruled that "rights of inheritance from natural parents, which were formerly guaranteed to children adopted . . . . before 1974 under The Child Welfare Act . . . . s. 96(2), survive the amendment of the said Act by the deletion of the said s. 96(2)" and thus Mr. Podolsky's estate was to be paid to his daughters, Audrey Sharon and Karen Eileen.[9] The learned justice gave no reasons.

The decision of Deniset J. was appealed. The Court of Appeal, composed of Hall, Matas, and O'Sullivan, J.J.A., was initially reluctant to proceed for it came to light that the motion to Deniset J. had been made in the name of Michael Podolsky, who was the brother and the original administrator of the estate of John Harry Podolsky; however, Michael Podolsky had died the day before the Originating Notice of Motion was filed. As well, even by the time of the appeal hearing no new personal representative of the estate had been appointed. Nonetheless, the Court agreed to proceed upon the assurance by counsel that this procedural matter would be perfected.

The strongest argument in favour of the mother was that the inference to be drawn from the changed wording of s. 96(1) and from the dropping of former s. 96(2) is that the 1974 amendments to *The Child Welfare Act* ended the daughters' status as lawful lineal descendants of their natural father. This argument favouring the mother is supported by two cases *Re Jobson*[10] and *Re Jensen*[11]. Both cases dealt with claims of natural parents or blood relatives to the estates of children who had been adopted by other people. The legislation in each case was similar to the current *Child Welfare Act*. There was a section similar to s. 96(1), but no section dealing expressly with inheritance. In each case the court simply was of the view that it is correct to infer from the legislation that inheritance to the estates of and by the natural parents and other blood relatives ceases on adoption.

At the hearing of the appeal, it was evident from questions put to counsel that the Court questioned whether the opening words of the 1974 version of s. 96(1), "Upon the granting of an adoption order under *this* Part . . . ." (emphasis added), indicates an intention on the part of the

8. S.M. 1979, c. 22, came into effect September 1, 1979. O'Sullivan J.A. in his judgment (*Infra* n. 12) wrongly states it as June 15, 1979, the day the Act received royal assent. *See* Man. Gaz., Aug. 25, 1979.

9. Unreported, Man. Q.B., Jan. 26, 1979.

10. (1912), 128 P. 938 (Calif. S.C.).

11. (1964), 47 D.L.R. (2d) 630 (B.C.S.C.).

Legislature that it is to apply only prospectively. The Court also wondered whether the right to inherit under *The Devolution of Estates Act* is a "parental tie" within the wording of s. 96(1) and whether the word "lawful" in the term "lawful lineal descendants" in *The Devolution of Estates Act* means "legitimate" or "with a legal tie".

The Court of Appeal upheld Deniset J.'s decision. O'Sullivan J.A. writing the judgment for the court,[12] reasoned, firstly, that the pre-1974 *Child Welfare Act* did not create succession rights in adopted children to the estates of their natural parents; s. 96(2) merely guaranteed or recognized those rights. The rights existed by virtue of *The Devolution of Estates Act*. Repeal of a statutory guarantee or recognition does not terminate the rights. Secondly, the learned justice was of the opinion that lineal descendancy is a matter of fact and not a parental tie; while the 1974 version of s. 96(1) severed all parental ties it did not change the relationship between adopted children and their natural parents from being one of lawful lineal descendancy to being one of unlawful lineal descendancy. Adopted children continued to be "lawful lineal descendants" of their natural parents and thus potentially entitled to succeed under *The Devolution of Estates Act*. Thirdly, O'Sullivan J.A. stated that if his foregoing conclusions were not correct, nonetheless the 1974 legislation applies only prospectively and does not govern an adoption, such as in the *Podolsky* case, which occurred in 1970.

I agree with the conclusion reached by both Courts in *Podolsky* that succession rights of adopted children have not been affected by the amendments to *The Child Welfare Act*. I agree with O'Sullivan J.A.'s first two reasons; concerning his first reason I might add that, apart from pre-1974 s. 96, the basis of intestate succession entitlement under the common law of England generally was,[13] and under *The Devolution of Estates Act* is, blood relationship, except with respect to spouses. Therefore, at common law and under *The Devolution of Estates Act* adopted children should be entitled to succeed on an intestacy to the estates of their natural parents. Turning to pre-1974 s. 96, the word "rights" in s. 96(1) would have to be stretched to the limit to include a succession expectation or hope, which is all that children have prior to the death of their parents. As well, since apart from s. 96(2), *The Child Welfare Act* is not a statute having to do with succession, one surely would not be inclined to interpret the word "rights" to include succession rights. Thus, I agree that pre-1974 s. 96(2) was only a recognition of otherwise existing succession rights and enacted *ex abundanti cautela*. Since it was not essential to the succession rights of adopted children, its mere repeal should be of no consequence.

However, I do not agree with Mr. Justice O'Sullivan's third reason for his decision. The law at which one should look in a case such as *Podolsky* is the governing succession law. This should not be confused with the legislation pursuant to which the children were adopted. The relevant law, therefore, is the succession law as of *the date of death* of the deceased. The date of adoption is irrelevant as is the question of whether changes made to *The Child Welfare Act* apply prospectively or retroactively.

12. (1980), 3 Man. R. (2d) 251 (Man. C.A.).
13. *See* T.E. Atkinson *Law of Wills*, (2nd ed., 1953) 37-42.
14. R.S.M. 1970, c. I 80.

Notwithstanding the reasons of O'Sullivan J.A., I think that the best reason for holding that Mr. Podolsky's estate goes to his daughters is that the term "parental ties" in the 1974 version of s. 96 was ambiguous. Thus, in view of the clear right of adopted children to succeed to the estate of their natural parents prior to 1974, the judicial presumption of statutory interpretation which requires legislatures to make changes in the law quite explicitly should have been applied with the resulting conclusion that the adopted children continued to enjoy dual succession rights. Similarly, s. 27 of *The Interpretation Act*[14] stipulates that when the Legislature tinkers with a statute, changes in the law are not to be inferred.

The Legislature, in 1979, scrapped the term "parental ties" and went back to the word "rights". Applying the comment made earlier about the word "rights" in regard to pre-1974 s. 96(1), I think that the aforementioned presumption of statutory interpretation and s. 27 of *The Interpretation Act* continue to be applicable to the current version of s. 96(1) and that adopted children continue to enjoy dual succession rights.

There are two further decisions which deserve to be noted, *Hillier* v. *Williams*[15] and *Roberts* v. *Roberts*.[16] The *Hillier* case had to do with an application for an adoption order made in April, 1979. It was not a succession case. It seems to me, from the reasons of Matas and O'Sullivan, J.J.A., who delivered the majority and minority judgments respectively in the *Hillier* case, that the Manitoba Court of Appeal was of the view that 1974 s. 96(1) of *The Child Welfare Act* severed succession rights between natural parents and a child who is adopted by other people. However, their comments in this regard were *obiter dicta* because the point was not in issue. It would appearl now that having considered the point directly the Court is of the opposite view.

Roberts v. *Roberts* is a case which supports the *Podolsky* disposition. In this case the legislation of Minnesota, different from that of Manitoba, expressly provided for succession as between the adopted child and adopting parents. It was silent regarding succession between the adopted child and the child's natural parents, although the version of the legislation in force at the time of the adoption had contained a section similar to our former s.96(2) which was subsequently dropped. The court indicated that the legislation to be considered was that at the time of death, and not the legislation at the time of adoption. Nonetheless, and notwithstanding the wording of the relevant legislation the Court refused to draw the inference from the legislation that an adopted child could not inherit from his or her natural parents.

The arguments concerning the intestate succession rights of adopted children are few and simple. I agree with Deniset J., the Manitoba Court of Appeal, and the *Roberts* case. I am not persuaded by the *Jobson* and *Jensen* cases. If the Legislature wishes to sever succession rights as between natural parents and adopted children it should say so expressly. This is surely not asking too much.

15. (1979), 14 R.F.L. (2d) 31 (Man. C.A.); appeal to S.C.C. quashed [1981] 1 W.W.R. 746.

16. (1924), 199 N.W. 581 (Minn. S.C.). *See also* Atkinson, *supra* n. 13, at 89, n. 16.

17. (1979), 14 R.F.L. (2d) 31 (Man. C.A.); appeal to S.C.C. quashed [1981] 1 W.W.R. 746.