SURROGATE'S COURT : NEW YORK COUNTY

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In the Matter of the Judicial Settlement of the Account of JPMorgan Chase Bank N.A., as Trustee of a Trust created under Article THIRD of the Last Will and Testament of

BIRDIE COOK,

Deceased.

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File No. 1792-1934

GLEN, S.

This final accounting by JPMorgan Chase Bank N.A., as trustee of a trust created under Article THIRD of the will of Birdie Cook, is contested by Linda Kay Parke[1], adopted child of decedent's daughter, Edith Jane Donner. The sole issue is whether Linda should take as a remainder beneficiary. The objectant has moved for summary judgment pursuant to section 3212 of the CPLR.

Birdie Cook died on July 13, 1934, survived by Edith. In her will, decedent left her residuary estate to Edith with remainder to Edith's children. Article THIRD of such will reads:

> "Upon the death of the said Edith Jane Donner I direct my trustees to divide the principal of the said trust, or so much thereof as may then remain, into as many shares as shall equal the number of children of my said daughter her surviving and children dying before her leaving descendants her surviving...."

Approximately three years after her mother's death, Edith had a child, Dennis Riise.[2] Some ten years later, Edith adopted a child, Linda Kay Parke, the objectant here. Edith died on January 11,

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[1] Linda Kay Parke appears in this proceeding by her conservator, Linda Martin.

[2] Although duly served, Dennis Riise has not appeared in this proceeding.

2007, and the trust by its terms has now terminated. The trustee argues that by virtue of a former section of the Domestic Relations Law known as the "precautionary addendum" – applicable to decedent's will – the remainder must be distributed solely to Dennis; Linda's only objection is based on the proposition that the terms of Article THIRD of the will entitle her to one half of the remainder.

Motion for Summary Judgment

Both parties concede that their dispute is resolvable as a matter of law, not of fact, and each seeks summary judgment. The sole issue before this court is whether the precautionary addendum bars objectant from taking as a remainder beneficiary.

Precautionary Addendum

Decades before decedent's death, New York had enacted a statute prescribing equality between natural children and adoptees in the eyes of the law (L 1887, ch 703). Section 114[3] of the Domestic Relations Law in effect at the time of decedent's death outlined the inheritance rights of adopted children. In paragraph three, it stated,

> "The foster parents or parent and the foster child shall sustain toward each other the legal relation of parent and child and shall have all the rights and be subject to all the duties of that relation including the rights of inheritance from each other."

However, to prevent fraud by attempts to cut off a remainder through the adoption of a child, the fourth paragraph of section 114 provided an exception to the equal inheritance rights of adoptees. The exception, referred to in case law as the precautionary addendum, prohibited adoptees from taking an interest where their doing so would defeat the rights of remainder

[3] Domestic Relations Law § 114 was re-enacted as § 115, by L 1938, ch 606, and renumbered § 117 by L 1961, ch 147).

beneficiaries.

It read,

> "As respects the passing and limitation over of real or personal property dependent under the provisions of any instrument on the foster parent dying without heirs, the foster child is not deemed the child of the foster parent so as to defeat the rights of remaindermen."

The statute itself was ultimately repealed (*see* L 1963, ch 406), although the addendum remains in full force and effect for wills of decedents dying before March 1, 1964.

The trustee asserts that the foregoing provision bars Linda from taking as a remainder beneficiary of this pre-1964 trust, pointing out that any share to her would reduce Dennis's share of the remainder, *i.e.*, "defeat" his claim to the full remainder. Although the trustee concedes that case law has tended to narrow the addendum's adverse impact on adoptees, it argues that the 1961 decision of our Court of Appeals in *Matter of Ricks* (10 NY2d 231 [1961]) nevertheless mandates a ruling against the adoptee's claim to a remainder interest in this case.

As it happens, the result in this case is dictated not by *Ricks,* but instead by the subsequent Court of Appeals decision in *Matter of Park* (15 NY2d 413 [1965]). The trusts in *Park* were created under the will of a decedent who died in 1909. The trusts were for the lifetime benefit of testator's surviving children, respectively, and the will provided that the remainder of each trust "shall be distributed among the [lifetime beneficiary's] issue him or her surviving in equal shares." In the case of one such trust, the only child of the lifetime beneficiary had predeceased her, but his natural daughter and his adopted son survived her. The Court of Appeals was called upon to consider the precautionary addendum in relation to the adoptee's interest, if any, in the remainder. The resulting analysis was somewhat complicated, but for present purposes its critical aspect is clear: where a case does not involve "a foster parent dying

without heirs...and [therefore] ... defeat[ing] the rights of remaindermen," the precautionary addendum simply does not apply (*Matter of Parks*, at 417). Freed of the addendum's restraint, the *Park* court reasoned that, as an incident of the equality that is statutorily accorded adoptees, trust creators presumptively intend to include adoptees among beneficiaries who are described by a "generic term expressing parent-child relationship." Accordingly, the Court of Appeals ruled that the adoptee was entitled to share in the *Park* remainder.

Although the majority's analysis in *Park* purported to be reconcilable with the Court's analysis in *Ricks* (15 NY2d, at 419),[4] at least one court has described the signals respectively sent by these decisions as "contradictory and confusing" (*Matter of Gardiner*, 113 AD2d 651, 659 [2d Dept 1985]) (*compare, e.g., Matter of Schermerhorn*, NYLJ, Aug. 9, 1968, at 9, col 6, *affd without op,* 33 AD2d 891 [1st Dept] *with Matter of Carll*, 34 AD2d 793 [2d Dept *affd* 27 NY2d 917). However, there is no present need to determine whether *Ricks* and *Parks* are indeed reconcilable, in view of the fact that *Parks* in any event spoke later and squarely to a case such as this, decidedly in the adoptee's favor. For, as *Park* established, where, as here, the "foster parent" would not have died without issue even in the absence of the adoption in question, the

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[4]In *Ricks*, the grantor had created the trust in question for the lifetime benefit of her son, with the corpus at the son's death to be held in further trust for "the descendants of [my] son, James B. Ricks ...." At the time the trust was established, James had three natural children, but he thereafter adopted two additional children. At James's death Special Term was asked to determine whether the adoptees were among those entitled to secondary income interests as James's "descendants." Special Term ruled that they were. On appeal, the First Department reversed, holding that, "It is only when the instrument by its context indicates a contrary intention, or properly considered extraneous facts point to a different conclusion, that the words 'issue' and 'descendants' will be held to include adopted children." The Court of Appeals affirmed the First Department. In ruling against the adoptees with respect to the income interests then in dispute, the Court paused to note that adoptees would ultimately fare no better with respect to the remainder, not only for the reasons stated by the First Department and for the sake of consistency, but also by dint of the precautionary addendum.

addendum has no application. The record contains nothing that would offset the presumption that this adoptee was within the testator's intendment when she directed the benefits to the life beneficiary's children.

Accordingly, movant Linda Kay Parke is granted summary judgment on her claim to a one-half share of the remainder pursuant to Article THIRD of decedent's will.

This decision constitutes the order of the court.

SURROGATE

Dated: January 19, 2011