PRETERMITTED HEIRS

AN OVERVIEW FOR OKLAHOMA LAWYERS

Updated in April 2024 by:

1. Introduction.

Disposing of property is an inalienable natural right throughout a person's lifetime; however, the right to control disposition of property after death and the right of inheritance are statutory. *In Re Estate of Jackson*, 2008 OK 83. With respect to the rights of a child of the testator to inherit from a parent, the controlling statutes are 84 O.S. §§ 131-134. These statutes remain unchanged since their codification in 1910. The Oklahoma Supreme Court has noted that Oklahoma took a different approach to the problem of pretermitted heirs than other states, describing Oklahoma's approach as a "hybrid distinct from [other] nationally-recognized approaches to the problem…" *Crump's Est. v. Freeman*, 1980 OK 80, n.7.

When a will contains no provision for a child born after the making of the will, the child succeeds to the same portion of the testator's real and personal property as if the testator had died intestate. 84 O.S. § 131. While Section 131 only applies to a child of the decedent born after the making of the will, 84 O.S. § 132 provides a statutory method of inheritance for a child of the testator (and the issue of any predeceased child) whom a testator *unintentionally* fails to provide for or name in his or her will, whether born before or after the making of the will. Section 132 is not a limitation on a testator's power to dispose of his or her property as he or she sees fit (in contrast to the "forced heir" statute with respect to a spouse at 84 O.S. § 44(B)(1)); but rather, Section 132 acts as an assurance that certain heirs (again, a child and the issue of a predeceased child) are not *unintentionally omitted* from a will. It does so by securing them the minimum statutory share of the estate unless the will in question gives a clear expression of *intentional omission*. It does not protect a child against a testator's bequest of a pittance to the child, so long as the child isn't unintentionally omitted. *In re Estate of Jackson*, 2008 OK 83. The statutes

protecting pretermitted heirs apply to all wills, including holographic wills. *Estate of Chester*, 2021 OK 12.

By the terms of the statute, it must "appear" from the will that the testator intended to leave the child (or issue of a predeceased child) with nothing. In the case of a pretermitted heir, 84 O.S. § 133 provides a statutory method for how to satisfy the requirements of Sections 131 and 132. 84 O.S. § 134 states that if a pretermitted heir has received their proportion of the estate by way of advancement during the testator's lifetime, then in that event they receive nothing further from the estate by virtue of being a pretermitted heir. To date, no published opinions have provided any guidance on the application of Section 134.

2. The Statutes.

Section 131 - Determining Share for Afterborn Child Unprovided for in Will

> Whenever a testator has a child born after the making of his will, either in his lifetime or after his death, and dies leaving such child unprovided for by any settlement, and neither provided for nor in any way mentioned in his will, the child succeeds to the same portion of the testator's real and personal property that he would have succeeded to if the testator had died intestate.
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> 84 O.S. §131

Section 132 - Determining Share for Child Unintentionally Omitted from Will

> When any testator omits to provide in his will for any of his children, or for the issue of any deceased child unless it appears that such omission was intentional, such child, or the issue of such child, must have the same share in the estate of the testator, as if he had died intestate, and succeeds thereto as provided in the preceding section.
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> 84 O.S. §132

Section 133 - Determination of Share Assigned to Afterborn or Omitted Child

> When any share of the estate of a testator is assigned to a child born after the making of a will, or to a child, or the issue of a child, omitted in a will as hereinbefore mentioned, the same must first be taken from the estate not disposed of by the will, if any; if that is not sufficient, so much as may be necessary must be taken from all the devisees, or legatees, in proportion to the value they may respectively receive under the will, unless the obvious intention of the testator in

> relation to some specific devise or bequest or other provision in the will, would thereby be defeated; in such case such specific devise, legacy or provision may be exempted from such apportionment, and a different apportionment, consistent with the intention of the testator, may be adopted.
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> 84 O.S. §133

Section 134 - Determination of Share Assigned to Afterborn or Omitted Child

> If such children, or their descendants, so unprovided for, had an equal proportion of the testator's estate bestowed on them in the testator's lifetime, by way of advancement, they take nothing in virtue of the provisions of the three preceding sections.
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> 84 O.S. §134

3. Establishing Heirship.

The first step in establishing that a child (or issue of a predeceased child) of a testator is a pretermitted heir is to establish that they are in fact the testator's child (or issue of a predeceased child). With respect to children born out of wedlock, 84 O.S. § 215, which has been held to apply to both intestate and testate proceedings, states:

> For inheritance purposes, a child born out of wedlock stands in the same relation to his mother and her kindred, and she and her kindred to the child, as if that child had been born in wedlock. For like purposes, every such child stands in identical relation to his father and his kindred, and the latter and his kindred to the child, whenever: (a) the father, in writing, signed in the presence of a competent witness acknowledges himself to be the father of the child, (b) the father and mother intermarried subsequent to the child's birth, and the father, after such marriage, acknowledged the child as his own or adopted him into his family, (c) the father publicly acknowledged such child as his own, receiving it as such, with the consent of his wife, if he is married, into his family and otherwise treating it as if it were a child born in wedlock, or (d) the father was judicially determined to be such in a paternity proceeding before a court of competent jurisdiction.

In addition, the Oklahoma Supreme Court has held that the Uniform Parentage Act, 10 O.S. §§ 7700-101 *et seq.*, which became effective in Oklahoma in 2006, also applies to determine parentage in both testate and intestate probate proceedings. Under the Act, all children, whether born to parents who are married or not, are treated the same and paternity testing, including DNA-testing of deceased individuals, applies for all

purposes of establishing a parent-child relationship. *In the Matter of the Estate of Dickson*, 2011 OK 96 (5-4 decision with written dissent expressing concerns about the need for finality in probate proceedings).

Adopted children of the testator are included in the protections for pretermitted heirs, except that adopted children do not take property expressly limited in the will to the "body" of the testator or "natural born children" of the testator; nor do they take property from lineal or collateral kindred of their adoptive parent by right of representation. *Alexander v. Samuels*, 1936 OK 260; *Smith v. Smith*, 2017 OK CIV APP 56. In addition, a child adopted by another also stands to inherit from their birth parent, regardless of the termination of the birth parent's parental rights (which does however negate the birth parent's right to inherit from the child). 10A O.S.§ 1-4-906; *Rogers v. Pratt*, 2020 OK 27; *Matter of Estate of Flowers*, 1993 OK 19.

4. Determining if an Heir is Pretermitted or Intentionally Omitted.

In *In Re Estate of James*, 2020 OK 7, the Oklahoma Supreme Court provided the following summary of its precedent on determining if an heir is pretermitted or intentionally omitted from a will:

> Cases are legion holding that the prime purpose in construing a will is to arrive at and give effect to the intent of the testator. Since 1928, this Court has consistently interpreted this statute to the effect that an intentional omission to provide for the testator's issue must appear clearly within the four corners of the testamentary document itself[1]. In other words, was there an omission of the will contestant completely, either by name or class? Is there any language in the will manifesting the omission as an intentional act?
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> Even the disposition of the entire estate does not alone evince an intent to omit a child or a deceased child's issue. Intent to disinherit must appear upon the face of

[1] The four corners of the will may include a document which is successfully incorporated by reference into the will. In re Estate of Richardson, 2002 OK CIV APP (published by order of the Court of Civil Appeals, certiorari denied).

> the will in strong and convincing language. It is also well established that the intent to disinherit must appear within the four corners of the testamentary document, and that extrinsic evidence is inadmissible unless ambiguities appear on the face of the will.
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> We have previously noted that there are many ways a person can express the intention to omit to provide for his or her children, including: 1) expressly state that the named child is to receive nothing; 2) provide only a nominal amount for the child who claims to be pretermitted; 3) name a child, but then leave them nothing; 4) declare any child claiming to be pretermitted take nothing; or 5) specifically deny the existence of members of a class to which the claimant belongs coupled with a complete disposition of the estate.

The Court in *Estate of James* also established that a failed bequest to a child named in a will does not, as a matter of law, render the child pretermitted. In *Estate of James*, the testator bequeathed a specific bank account, and nothing else, to one child by name. However, due to an apparent mistake, misunderstanding or inaction by the testator, the specific bequest failed because the bank account had a designated pay-on-death beneficiary other than the child. The designation of a pay-on-death beneficiary made the account a non-probate asset, passing to the designated beneficiary outside of the probate and leaving the child bequeathed the account in the testator's will to take nothing.

False statements by the testator in his or her will, whether knowingly false or not, that one or more of his or her children do not exist have resulted in several published opinions resolving the pretermitted heir claims of falsely denied heirs. For many years, *In the Matter of the Estate of Hester*, 1983 OK 93 stood for the proposition that false claims regarding the non-existence of children, when coupled with a will that otherwise disposed of the entire estate, did not render the will ambiguous on its face, thus not opening the door to extrinsic evidence of the testator's intent and generally dooming the claims of purported pretermitted heirs in those cases. The Court's decision in *Rogers v. Estate of Pratt*, 2020 OK 27, appears to have overturned

this precedent, at least in scenarios involving a testator that has placed a child for adoption and later falsely denies the existence of the child in his or her will.

In *Rogers*, the Court was faced with a scenario where the testator had placed a son for adoption at birth and subsequently left her entire estate to her caregivers and friends, explicitly stating in her will that she had no children. Her son, who had reconnected with the testator later in her life, claimed to be pretermitted. The Court held that the testator's statement in her will that she had no children, coupled with a complete disposition of her estate to others, did not in this case decisively prove her intent to exclude her son. The Court found that the existence of the adoption decree, coupled with the will's false statement that the testator had no children, rendered the will ambiguous, requiring consideration of external evidence to ascertain the testator's intent. Ultimately, the Court established that the testator's son who had been placed for adoption was the pretermitted heir and sole child of the testator, thus inheriting her entire estate under the laws of intestate succession.

While *Rogers* may seem to be a sharp break from prior precedent regarding false claims regarding the non-existence of children in wills and pretermitted heir determinations, the case can be read to be limited in its application to scenarios involving adoption. While the opinion in *Rogers* purports to overrule *Hester* "to [an] extent," the opinion also notes that the facts of *Rogers* (a case involving an adoption) and *Hester* (a case not involving an adoption) are distinguishable and states that the rationale of *In the Matter of Estate of Flowers*, 1993 OK 19 (a case involving an adoption) is more persuasive. Additional support for the proposition that the application of *Rogers* should be confined in scenarios involving adoptions comes from the fact that the Court in *Estate of James*, a unanimous opinion issued approximately three months prior to *Rogers*, and also authored by Justice Kauger, approvingly cites *Hester* for the proposition that

a testator may express intention to omit a child by, "specifically deny[ing] the existence of members of a class to which the claimant belongs coupled with a complete disposition of the estate."

Furthermore, the Court in *Rogers* was clearly troubled by evidence of the testator's apparent lack of capacity and the circumstances under which Pratt executed her will. The will was executed shortly after the testator underwent surgery, while she was on medication, and without a comprehensive review of the will's contents with her lawyer. The Court stated that these facts, which are extrinsic evidence admissible only because the Court found the provisions of the will ambiguous, raised doubts about the testator's cognitive abilities and intent to exclude her son intentionally.

The Oklahoma Court of Civil Appeals has also published several opinions regarding false claims of the non-existence of children in wills and pretermitted heir determinations. The case *In Re Estate of Livsey v. Wood*, 2008 OK CIV APP involved a testator with six natural children who falsely stated in his will that he had "one and only one child," named that child, specifically disinherited that child, and left his entire estate to others. The Court of Civil Appeals ruled that there was no strong or convincing language evidencing the testator's intent to disinherit his five other children, a result that seems to run contrary to Oklahoma Supreme Court precedent in *Hester* as cited with approval in *Estate of James*. *Estate of Livsey* was published by order of the Court of Civil Appeals (thus of no precedential authority) and certiorari to the Oklahoma Supreme Court was sought and unanimously denied.

The Oklahoma Court of Civil Appeals addressed another scenario involving a false statement in a will concerning the existence of a child in the case of *Matter of Estate of Jones*, 2023 OK CIV APP 48. In *Estate of Jones*, the testator explicitly acknowledged two children and

a grandchild by name, but also explicitly and falsely stated that he had no other children. The will declared a complete disposition of the testator's estate and emphasized that *any person not mentioned was intentionally and deliberately not included*. The Court of Civil Appeals ruled that the language in the will indicated an intentional omission of any unknown lineal descendants, including the testator's son who was not named in the will and was claiming pretermitted heir status. This case, which included oral argument at the Court of Civil Appeals, was also published by order of that court (thus of no precedential authority) and certiorari to the Oklahoma Supreme Court was also sought and denied (by a vote of 8 to 1).

The Oklahoma Court of Civil Appeals has also recently ruled that a testator making a specific devise of a piece of real property to "all relatives" of the testator was sufficient to defeat the claim of the testator's daughters, who were not otherwise named in the will, to be deemed pretermitted heirs. In *Matter of the Estate of Shepherd*, 2023 OK CIV APP 24, the Court of Civil Appeals ruled a disposition to "all relatives" was a testamentary disposition to a class that included every person answering the description of the class, and the testator's daughters were her "relatives" on the date of her death. Thus, the daughters were not omitted from the testator's will. The dissenting opinion in the case argued that the testator's devise to "all relatives" did not effectively identify any person or entity as the beneficiary, making it ambiguous at best and likely failing entirely for lack of a named beneficiary. This case was published by order of the Court of Civil Appeals (thus of no precedential authority) and certiorari to the Oklahoma Supreme Court was not sought.

Finally, the Oklahoma Court of Civil Appeals has weighed in on a pretermitted heir case where the testator's will named a child that was living at the time of the execution of the will, but that subsequently predeceased the testator while leaving issue. In *Matter of Estate of Kane*, 1992

OK CIV APP 36, the testator's will provided for her son, but stated that in the event her son predeceased her, then his share was to go to the testator's daughter. The issue of the testator's predeceased son, who were not acknowledged in the will, claimed to be pretermitted heirs. The Court of Civil Appeals considered the applicability of Title 84 O.S. § 177[2] and Title 84 O.S. § 144[3] and ruled that the language of those statues make it clear that they become operative only in the event the testator fails to make a contingent bequest in the case of the death of the primary beneficiary. In this case, the Court of Civil Appeals found that the residuary clause of the testator's will clearly shows her intent to leave her estate to her daughter in the event the testator's son predeceased her, thus the predeceased son's issue were not pretermitted heirs. This case was published by order of the Court of Civil Appeals (thus of no precedential authority) and certiorari to the Oklahoma Supreme Court was not sought.

5. Satisfying the Share of the Pretermitted Heir.

Historically, the published decisions of Oklahoma's appellate courts have focused on whether an heir is pretermitted (84 O.S.§§ 131 and 132 questions) and until recently there had been no published cases dealing with how to administer an estate upon the determination that an heir was in fact pretermitted (an 84 O.S.§ 133 question). This changed with the *Estate of Parker*, 2023 OK 50.

In *Estate of Parker*, the testator left a holographic will that specifically bequeathed an anticipated worker's compensation settlement to his brother but did not mention the testator's

[2] Title 84 O.S.§ 177 speaks to this situation as follows: "If a devisee or legatee dies during the lifetime of the testator, the testamentary disposition to him fails, unless an intention appears to substitute some other in his place, except as provided in [Title 84 O.S. § 142]."

[3]Title 84 O.S.§ 142 provides: "When any estate is devised or bequeathed to any child or other relation of the testator, and the devisee or legatee dies before the testator, leaving lineal descendants, such descendants take the estate so given by the will, in the same manner as the devisee or legatee would have done had he survived the testator."

two daughters. The anticipated worker's compensation settlement comprised the vast majority of the estate's assets. The trial court determined the daughters were pretermitted heirs and that they were entitled to an intestate share of the estate (i.e., the entire estate between them), thereby making the holographic will ineffective as a transfer of the worker's compensation award to the testator's brother. The trial court's decision was affirmed by the Court of Civil Appeals.

The Oklahoma Supreme Court, while agreeing with the courts below that the daughters were pretermitted heirs, disagreed with the holding of the Court of Civil Appeals that 84 O.S.§ 133 did not apply in this case. The text of 84 O.S.§ 133 provides that the share of any pretermitted heir or heirs is first satisfied from any assets not specifically gifted to another in the will (i.e., from the residuary estate). However, if the residuary estate is insufficient to provide the pretermitted heir or heirs their minimum statutory share, then all others receiving property in the will have their respective shares reduced proportionately to provide for the pretermitted heir or heirs *unless* "the obvious intention of the testator in relation to some specific devise or bequest or other provision in the will, would thereby be defeated." In which case, the probate court can fashion some other apportionment to better match the testator's intent, which is exactly what the Court in Estate of Parker remanded the case to the trial court to do in light of Section 133. Three Justices joined in a dissent to say that if Section 133 is applied as the majority holds, then Section 132 would be functionally meaningless. Justice Kauger wrote a specially concurring opinion to say that she concurs with remanding the matter to the trial court for an equitable division of the estate, but that she believes the specific bequest to the testator's brother should be honored in total.

Of note, the Court in *Rogers* in the second to last sentence of the opinion states, "[a]s the only child of the testator, [son] takes [testator's] entire estate according to the laws of intestate

succession." However, the will at issue in Roger did include some specific bequests that the foregoing statement suggests were not to be honored despite Section 133. This would seem to be inconsistent with the outcome of *Estate of Parker*, and particularly incongruous with Justice Kauger's concurring opinion in *Estate of Parker* that stands so strongly for honoring the testator's specific bequest pursuant to Section 133 even if it results in the pretermitted heirs receiving next to nothing from the residuary of the estate. Given that Justice Kauger authored the opinion in *Rogers*, one could conclude that the Court's comment in Rogers that disregards the application of Section 133 to the case is merely dicta and the Court was not intending to make a statement about the application of Section 133.

6. Asserting a Pretermitted Heir Claim.

A pretermitted heir is not required to file a pleading setting forth a claim to the estate before the probate court can distribute the heir's statutorily entitled share. In fact, where the probate court recognizes an heir of the testator as a pretermitted heir, it has no discretion to deny such heir his or her statutory share of the estate, regardless of fact that the heir failed to make a claim prior to issuance of the decree of distribution. "The trial court was obligated to protect the [pretermitted granddaughter's] interests as an heir to the estate…" *Matter of Estate of Dorn*, 1989 OK CIV APP 49 (published by order of Oklahoma Court of Civil Appeals; certiorari denied); *Boyes' Estate v. Boyes*, 1939 OK 85. Further, the question whether the omission or an heir from a testator's will was intentional is not a will contest because it is not an attempt to deny admission of a will to probate; therefore, it does not implicate a "no contest" provision. *In re Estate of Richardson*, 2002 OK CIV APP 69 (published by order of Oklahoma Court of Civil Appeals; certiorari denied).

A valid decree of distribution bars a claimed pretermitted heir unless their rights are asserted in the administration proceedings. *Gassin v. McJunkin*, 1935 OK 629. In the event an

heir claiming to be pretermitted is a minor, a claim to vacate the decree of distribution must be made within one year from the time the claiming party obtains majority. 12 O.S. § 700. In its 2023 case *Matter of the Estate of Georges*, 2023 OK 123, the Oklahoma Supreme Court expressed its concern over the need for finality in probate proceedings, especially considering the present widespread availability of DNA-testing to the general public. In *Georges*, the Court denied a man's attempt to vacate a 15-year-old final decree in a probate on the theory that he was a pretermitted heir of the decedent. The claimed pretermitted heir (who had a presumed father not the decedent) had never been adjudicated the son of the decedent but based his claims on the recently obtained results of a commercially available DNA test.

Of note in *Georges*, the party claiming to be a pretermitted heir based his request to vacate the probate decree on a claim that the proponents of the decedent's will committed fraud upon the probate court by falsely claiming that the decedent had no other heirs besides those listed in the will. The Court's analysis leans heavily on Title 58 O.S. § 67 and its dictate that a will is deemed conclusive three months after admission to probate, which the Court stated is the applicable statute of limitations when a party challenges an already closed probate based on fraud. This case blends a pretermitted heir issue with what the Court frames as a will contest (the attempt to vacate the probate decree based on a fraud claim). However, a pretermitted heir claim is not a will contest. A will contest is an attempt to deny admission of a will to probate; a pretermitted heir claim is an attempt to receive a share of the estate *despite* the terms of a will that has already been admitted to probate.

Nevertheless, one can understand *Georges* as demonstrating the Court's concern over the need for finality in probate proceedings and skepticism concerning claims that would extend the time to bring a claim to vacate a final probate decree.

7. Choice of Law.

With respect to the probate of an estate of non-residents of Oklahoma, Oklahoma law applies to the determination of the rights of pretermitted heirs to Oklahoma property. *In re Estate of Boyd*, 2014 OK CIV APP 20 (published by order of Oklahoma Court of Civil Appeals; certiorari not sought); *In re Estates of McClean*, 2010 OK CIV APP 24 (published by order of Oklahoma Court of Civil Appeals; certiorari denied).

8. Application to Non-Probate Assets.

The pretermitted heir statute applies only to wills; it does not apply to non-probate assets like revocable inter vivos trusts. *Welch v. Crow*, 2009 OK 20; *In re Estate of Jackson*, 2008 OK 83.

9. Estate Planning Best Practices.

As the published cases involving pretermitted heir issues demonstrate, this is an area fraught with peril for unwary estate planners. All would be wise to include a "catch all" provision in the wills they draft as a last line of defense against claims of purported pretermitted heirs, whether those heirs are falsely claimed by the testator to not exist or truly unknown to the testator at the time of execution of the will. Such "catch all" provisions could use language deemed effective in *Bridgeford v. Estate of Chamberlain*, 1977 OK 206, to wit: "in the event any person whomsoever should contest the validity of this Will and establish in a court of competent jurisdiction that he or she is an heir of mine . . . then I hereby expressly…bequeath unto such person…the sum of $5.00 and no more." Alternatively, the provision could declare that any child claiming to be pretermitted takes nothing, an approach that withstood scrutiny in *Dilks v. Carson,* 1946 OK 108. Both approaches may evince the level of intentional omission on the part of the testator that Oklahoma's appellate courts have found sufficient regardless of the varied

factual circumstances that pretermitted heir cases can present—at least in cases that do not involve adoption.[4]

[4] In Rogers v. Pratt, 2020 OK 27, the will contained the following: "I further state that I have numerous other living relatives and that it is my specific intention that they or their heirs receive absolutely nothing from my estate, except as stated hereinafter." The inclusion of this language in the will did not prevent the Court from finding the will ambiguous on intent to omit a child that the testator had given up for adoption.