Adoption in Greek Law: Some Comparisons with the Roman World

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Greek society has to be considered as highly important for comparison with Rome[1] in regard to adoptions. The Mediterranean context leads to an expectation of close comparability. A study of adoption in 4th century Athens by Lene Rubinstein has uncovered one important area of similarity between Greece and Rome; individual initiative was the crucial element in the preservation of families (*oikoi*), rather than active intervention by the community.[2] Conclusions reached in Rubinstein's study do not uncover significant changes in focus in Athenian adoptions as compared with the high Classical period of the 6th-5th centuries. As in Rome most cases about which anything is known involve adult adoptees rather than children and this is closely related to the focus in these societies on the interests of the adopter rather than the adoptee. There is preference for adoption of agnatic relatives. A further point is that an adoption may also be seen as a method for a person of standing, but lacking descendants, not merely to continue his line but also to ensure that his own interests are protected in old age. In the case of both Greece and Rome, there has been some discussion over whether adoption was largely for the rich. This is an unanswerable problem, since data are inadequate, but it true that the more property the adopter had, the greater the rewards for the adoptee. It is surely to be expected that adoption would be commoner in such cases.[3]

Nonetheless, clear distinctions between Greece and Rome can be detected. One interesting difference from Rome was that an adoptive relationship was no bar to marriage at Athens.[4] In fact, it was common to

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1 This article continues from my survey of the relationship between adoption and succession in Roman society: H Lindsay, "'Adoption and Succession in Roman Law", (1998) 3(1) *Newcastle Law Review* 57. Both articles form part of a larger project on adoption in Roman society. I am pleased to thank Professor Brian Bosworth for his comments on a draft of the present piece.

2 L Rubinstein, *Adoption in 4th Century Athens*, Copenhagen: Museum Tusculanum Press, 1993, at 1-15. A useful study of the role of the household and its relationship to issues of gender and property is L Foxhall, "Household, Gender and Property in Classical Athens", (1989) 39 *Classical Quarterly* 22. Foxhall argues that in Greek society this critical focus on households had primacy over individuals and their rights over property.

3 See Rubinstein's survey of all known cases for the 4th century, above n2, at 30.

4 ARW Harrison, *The Law of Athens I*, Oxford: Oxford University Press, 1968 at 23.

adopt a son(s) for marriage to a daughters. An instance of this is revealed by the Demosthenic speech *Against Spoudias* (XLI).[5] It has been thought probable that an Athenian could not adopt a son without so marrying him. Apparently an illegitimate could not be legitimated by adoption, again in clear contrast with the Roman situation. The difficulty which would be encountered in trying to adopt an illegitimate at Athens would be in proving that an illegitimate was a citizen and hence eligible for adoption.[6] Foundlings also presented special problems: the finder of an exposed child might treat it as a slave or free, but had no rights over it. The reason was that adoption of a minor was a reciprocal transaction between the adopter and the adopted child's father or representative.[7]

In Greece, as elsewhere, there was always a close tie between adoption and the making of wills. The earliest case for which there is evidence is the adoption of Achilles by Phoinix.[8] Later, under Solon, it is clear that a childless man could choose an heir whom he adopted. Already at this stage it seems that an adopted son could not in turn adopt.[9] If the adopter had a daughter, but no son, he could choose a husband for her whom he adopted. To satisfy the agnatic preference, in the absence of sons, adoption might extend to agnatic nephews. Even nieces were a possibility for adoption. If a niece was chosen she would succeed as an heiress (*epikleros*). The role of such heiresses was clear; they were merely temporarily inserted into the inheritance net and were to be married to a close male relative to generate male children to restore agnatic succession.[10] In each case the aim of adoption was similar to Rome in that it included perpetuation of family name and family cults as the *quid pro quo* for the inheritance. What is not found at Rome is the epiklerate system. This difference can be seen as a reflection of the immense importance placed on the preservation of the *oikos*, especially in Athenian society.[11] Individual interests were not so

[5] In this case, a certain Polyeuktos adopted his wife's brother, Leokrates, to marry to one of his two daughters (thus clearly an *inter vivos* adoption: see below). The plaintiff in the case had married the other daughter, and claimed that under the terms of the marriage contract he was to have had 40 minae as a portion to go with his wife. 30 minae were to be paid outright, while the remaining ten minae were guaranteed to be paid by the heir, Leokrates, after the death of Polyeuktos. However, there was a quarrel between Leokrates and Polyeuktos, and as a result Leokrates severed all connection with the family. Leokrates' wife was then remarried to Spoudias (the defendant). See Table 1 for the family tree. Polyeuktos mortgaged his house to the plaintiff to cover the outstanding part of the marriage portion (no longer payable by Leokrates since he had relinquished the role of heir to Polyeuktos). After an attempt at a negotiated settlement after the death of Polyeuktos, the plaintiff brought his action to recover his monies - as well as making additional demands. His case was supported by the will of Polyeuktos. The case shows that the renunciation of an adoption could complicate many aspects of the financial position of the testator.

[6] Above n4, at 69.

[7] Above n4, at 71.

[8] Iliad 9.494ff.

[9] M Gagarin, *Early Greek Law*, Berkeley: University of California Press, 1986 at 78.

[10] On the epiklerate, see L Gernet, "Sur l'epiclerate", (1921) 34 *Revue des Etudes Grecques* at 337-379.

[11] As outlined in L Foxhall, above n2.

completely subordinated to the interests of the household in Roman society.

Greek adoptions could be arranged as *inter vivos*, testamentary or posthumous adoptions.

Inter vivos (as probably originally contemplated by Solon)

We know something of the procedures for adoptions in cases of this sort from the 4th century orator Isaios.[12] In one passage it becomes clear that introduction to the phratry is the absolutely critical element of the social recognition:

> "... he adopted me not by writing in a will ... but being in good health and of perfectly sound mind he adopted me and introduced me to his phratry in the presence of my opponents and got me enrolled as a member of his deme and of his orgeon group ..."[13]

Interestingly, primary emphasis is not on acceptance within the *oikos*, but at this more public level, by phratry and deme.[14] It is these public acknowledgements that the testamentary and posthumous heirs cannot claim. The procedure was in essence similar to enrolment of a natural son, with a consequent concern over the origin of the candidate as son of a citizen woman.[15] In Rome it can be noticed that many of the legal features were also aimed at giving an adoptive son a status that as far as possible replicates that of a natural son. Some complications ensue under Roman law when limited rights of inheritance are retained within the family of origin.[16] In Greece the adoptee was now heir to his adoptive parent's estate and consequently lost the right of succession to his natural father or his natural father's relatives. He still had a claim on property left by his mother's relatives. Isaios emphasised that an adoption only impacted upon

[12] The most important edition of the speeches of Isaios is that of W Wyse, *The Speeches of Isaeus*, Cambridge: Cambridge University Press, 1904. This work is still very valuable since the author was only too well aware of the gap between what was claimed in court on behalf of the client and the actual situation between the parties. There is an accessible translation with brief notes in the Loeb series *Isaeus* (translated by ES Forster) London: Heinemann, 1927. All citations are from this translation.

[13] Isaios II.14. Wyse considers possible identifications of the orgeon group. His view that the orgeon group was a private religious association rather than a subordinate group within the phratry is the better view: W Wyse, above n11, at 250.

[14] See EM Harris, "A Note on Adoption and Deme Registration", (1996) 11 Tyche 123-127. Harris examines the question of whether an adopted son who returned to the household of his natural father retained membership of the deme of the adoptive father. On the structure of the phratries see A Andrewes, "Philochoros on Phratries", (1961) *81 Journal of Hellenic Studies* 1.

[15] Isaios VII.16.

[16] See H Lindsay, above n1.

the relationship with the father; the mother remained the mother whether he remained in his father's house or was adopted out.[17] In an *inter vivos* adoption the adopted son had immediate and uncontested rights to his inheritance, and was effectively in as strong a position as a natural son of the adoptive parent. The adoptive son during the lifetime of the adopter was expected to have a relationship with his adoptive father which imitated that of a biological father-son relationship. But clearly there remained an awareness of the gap between this aim and the social consequences of the institution. It goes without saying that adoptions by will or posthumously could not ever be organised on this basis.

In Isaios there are several illuminating examples of the operation of *inter vivos* adoptions. Very often the choice of adoptee seems to be from close kin. The speech on the adoption of Menekles[18] is of particular interest because the adoptive father survived for some 23 years after encompassing the adoption. His brother and his brother's son put in a claim for the estate. The son whom Menekles chose for adoption was in fact the brother of his second wife, with whom he had parted on friendly terms after their union proved barren. His first marriage had also been childless. His brother's claim on the estate was based on a challenge under a law of Solon, on the ground that it had been made "... under the influence of a woman ...".[19]

Since a legitimate or adopted son who was adopted within the lifetime of the adopter had an automatic right to the inheritance without application to the court, the adopted son was able to thrust back on the claimant the burden of proving that the adoption was invalid. In doing so he obtained support for his contention that the adoption was valid from his father-in-law Philonides. The brother of the deceased thus had to resort to a charge of perjury by Philonides; the adopted son made the speech in defence of his father-in-law and in the process pleaded his own right to inherit.

The prosecutor's claim was based on the contention that there was no legal marriage to the adoptee's sister, and that the adoption had been due to her influence. To support this the prosecutor seems to have contended that the sister was never dowered. The adoptee gave evidence that a dowry of 20 minae was paid, and morever points out that it was natural for Menekles to look to the family of his old friend Eponymous for an adoptive son when his own marriages had proved fruitless. It was certainly not the second wife who determined the adoption.

Interesting points emerge about the expectations generated by an adoption. Here the adopted son made much of his behaviour replicating the dutiful behaviour of a natural son and the fact that he had performed all due rights over him after his death. It also becomes evident that the disputed inheritance, has in the meantime, become virtually valueless (or so

[17] Isaios VII.25.
[18] Isaios II.
[19] W Wyse, above n11, at 232-237.

the adopted son claimed) and therefore the aim of the adoptee is merely to vindicate the memory of his adoptive father (in this way he attempted to make much of the contrast between his own duteous conduct and the venal interests of the prosecution). See Table 1 for the family tree.

There is a very clear statement in this speech of the aims of the adopter Menekles; he hoped to put an end to his childless condition, to have someone to tend his old age, bury him when he died, and thereafter carry out the customary rites.[20] Some of his considerations in choosing an adoptee were also discussed. His brother only had one son, and therefore we are told he suffered from compunction over depriving him of male offspring by asking for an only son in adoption.[21] In the absence of other close relatives he turned to the family from whom he had hoped to get heirs initially.[22] Also interesting is the alleged consultation of the two sons of Eponymous as to which of them would like the role of adoptee.[23]

Comparable consultative processes are revealed in the case on the estate of Apollodoros (VII; dated after 357-356 BC).[24] This was a case where an *inter vivos* adoption had been attempted but was still incomplete when the adopter died. Nevertheless, all the main stages of the adoption had been carried through. The facts are as follows. Three brothers Eupolis, Mneson and Thrasyllos I had inherited the family fortune; Mneson died without issue, and Thrasyllos I died in the Sicilian expedition of 415-413 BC, leaving a son, Apollodoros I. This son had as his guardian Eupolis. The widow of Thrasyllos remarried to Archedamos, who helped his stepson obtain redress when he discovered that the guardian was defrauding him. As a result of the close relationship which developed between stepfather and Apollodoros I, Apollodoros I determined to adopt Archedamos' grandchild, since he had himself lost his only child. Thus he planned to adopt the son of his half-sister but himself died before the formalities of the adoption had been completed. The adoptee was registered with the phratry but not yet with the deme (although he was admitted to the deme after the adoptive father's death). The estate was then claimed by the wife of Pronapes, a daughter of Eupolis. Her sister's son, Thrasyboulos, with an equal claim, refused to press it since he was said by the speaker to have accepted the validity of the adoption. Because the adoption had not been formally completed, although it was clear that there was an intention to complete, this had created the legal problem and thus the estate had become vacant, and claimable under the law. Clearly Thrasyllos II had a strong claim in equity. See Table 2 for the family tree.

In the introduction to this case some very clear contrasts are made between adoptions *inter vivos* and those under a testamentary disposition. It is pointed out that the very process of committing the adoption to

[20] Isaios II.10
[21] See also Isaios II.21.
[22] Isaios II.11.
[23] Isaios II.12.
[24] W Wyse, above n11, at 548-550.

a will, rather than realising it during the lifetime of the adopter, enshrines secrecy and thus leaves the adoption more open to challenge.[25] Even with adoption *inter vivos* it seems to have been possible to challenge an adoption on grounds of insanity.[26] In the speech about the estate of Pyrrhos[27], it is claimed that all adoptive cases are open to challenge:

> "... all blood-relations think they have the right to dispute a bequest to an adopted son. In order therefore that suits for such estates may not be brought by any chance claimant and that persons may not dare to demand the adjudication of them as vacant inheritances, adopted sons apply to the court for adjudication ..."[28]

However it is clear that testamentary and posthumous adoptions were more vulnerable and it is not surprising that many of the cases dealing with adoption in Isaios actually concern these. What the speaker in the case of the estate of Apollodorus claims about the manner of his own adoption is of great interest since his aim is to highlight the authenticity of the adoptive process:

> "... Apollodoros had a son whom he brought up and dearly cherished, as indeed was only natural. As long as this child lived, he hoped to make him heir to his property; but when he fell ill and died in the month of Maemacterion of last year, Apollodoros, depressed by his misfortunes and viewing his advanced age with regret, did not fail to bethink him of the family at whose hands he had in earlier years received kindness; so he came to my mother, his own sister, for whom he had a greater regard than for anyone else, and expressed a wish to adopt me and asked her permission, which was granted. He was so determined to act with all possible haste that he straightway took me to his own house and entrusted me to the direction of all his affairs, regarding himself as no longer capable of managing anything himself, and thinking that I should be able to do everything. When the Thargelia came round, he conducted me to the altars, and to the members of the families and the phratry. Now these bodies have a uniform rule, that when a man introduces his own son or an adopted son, he must swear with his hand upon the victims that the child whom he is introducing, whether his own or an adopted son, is the offspring of an Athenian mother and born in wedlock; and even after the introducer has done this, the other members still have to pass a vote, and if their vote is favourable, they then, and not till then, inscribe him on the official register; such is the exactitude with which the formalities are carried out. Such being the rule, the members of the families and of the phratry having full confidence in Apollodoros and being well aware that I was his sister's son, passed on an unanimous vote and inscribed my name in the public register, after Apollodoros had sworn with his hand upon the victims. Thus I was adopted by him in his lifetime, and my name inscribed in the public register

[25] Isaios VII.1-2.
[26] Isaios II.14.
[27] Of uncertain date c 350 BC, Isaios III; W Wyse, above n11, at 276ff.
[28] Isaios III.61.

as Thrasyllos the son of Apollodoros, after he had adopted me in this manner, as the laws had given him the power to do ..."[29]

Later in the speech he is even more explicit about the method of choice of adoptee:

"... Since such was the disposition of the cousins towards one another and so grave the resentment towards Apollodoros who adopted me, how could he have done better than follow the course which he did? Would he, in heaven's name, have done better if he had chosen a child from the family of one of his friends and adopted him and given him his property? But even such a child's own parents would not have known owing to his youth whether he would turn out a good man or worthless. On the other hand, he had had experience of me, having sufficiently tested me; he knew well what had been my behaviour towards my mother and father, my care for my relatives and my capacity for managing my own affairs. He was well aware that in my official capacity as thesmothete I have been neither unjust nor rapacious. It was then not in ignorance, but with full knowledge that he was making me master of his property. Further I was no stranger but his own nephew; the services which I had rendered him were not unimportant but very considerable; he knew that I was not a man devoid of public spirit, who would be likely to squander his possessions, as my opponents have squandered the property which composes the estate, but that I should be anxious to act as trierarch and go on service and act as choregus and do everything else that the state requires, as he himself had done. Since I was his kinsman, his friend, his benefactor, and a man of public spirit, and had been approved as such, who could maintain that my adoption was not the act of a man of sound judgement? Indeed I have already performed one of those acts, the promise which had won his approval for I have acted as gymnasiarch at the festival of Prometheus in the present year with a liberality which all my fellow-tribesmen acknowledge ..."[30]

Several points can be noted. The speaker aims to show that his status as an adult and a person who is a close kin to the adopter makes him most eminently suited for the role of adopted son. The contrast is drawn with the unsuitable notion of bringing in a minor who is outside the family. The argument appears to rely on widespread acceptance of this analysis of the advantages of adult adoption. Also emphasised was the opportunity the adopter had to become thoroughly acquainted with the character and capacities of his chosen adoptee and the replication of the social role of the adoptive father.

In Rome *inter vivos* adoptions took two separate forms. These were *adoptio* which was adoption of a son still under *patria potestas*, and *adrogatio* which was adoption of an independent person (*sui iuris*). *Adrogatio* had to be ratified by the *Comitia Curiata* since it involved the extinction of a family, while *adoptio* involved a series of mancipations in the presence of

[29] Isaios VII.14-17.
[30] Isaios VII.33 -VII.36.

the praetor. The *Comitia Curiata* had a role not unlike that of the phratry but emphasis seems to have centred more on its collective view of the benefits of the adoption and how best to settle the adopter's estate rather than on the future of the household as such.[31] With an *adoptio* the adopted son became a member of his adoptive father's tribe and probably also his *gens*, but little is known of the mechanics of this. Only the procedure in the presence of the praetor is well known.

Adoptions by will (a development of 1)

Here there was a nomination of an heir in a will – a so-called testamentary adoption. The beneficiary was to succeed as adopted son or daughter. There are differences from the Roman context where such adoptions seem to have required no more than taking an inheritance under the condition of taking the testator's name. In Greece the adoptee had to have the will formally ratified by an inheritance procedure, the *epidikasia* and this involved adjudication by the people's court.[32] This meant that he was not in so strong a position as the *inter vivos* adoptee – he had to wait for legal process. In this sense the adoptee was on a equal footing with the collaterals of the deceased, although the adoptee was in a possibly weaker position, not necessarily having an existing claim to the phratry and deme of the adopter. The posthumous adoption, the third category of adoptions, has many similarities:

With testamentary dispositions, as has already been noted, the opportunity for questioning the authenticity of the will seems often to have been a bone of contention. In the case on the estate of Nikostratos[33], two cousins of the deceased are in contest with a person who claims to have been adopted under his will (Chariades). The aim of the claimants in this case is to show that the will is a forgery. The method is to blacken the character of the witnesses on the ground that they are friends of Chariades, the alleged beneficiary, and to claim that they have perjured themselves on his behalf. As this shows, a major weakness in the adoptee's case is that the alleged witnessing of the will occurred overseas. In the case of the estate of Astyphilos[34], the speaker tries to show that the deceased had not (as claimed) adopted a son under a will. The estate had come into possession of his opponent Kleon, his first cousin, as a result of the claimant's absence overseas on military service. Much depends on the moral right of the claimant to inherit on grounds that the alleged adoptee, Kleon's son, did not bury Astyphilos.[35] Some interesting points about testamentary

[31] Aulus Gellius *Noctes Atticae* 5.19.
[32] See Isaios VI.3.
[33] Isaios IV, dated soon after 374 BC, in W Wyse, above n11, at 367ff.
[34] Isaios IX, dated after 371 BC, in W Wyse, above n11, at 625-628.
[35] Isaios IX.4.

adoptions emerge from the discussion. What is clear is that secrecy provisions commonly surrounded such dispositions and provided the claimant with room to manoeuvre and attempt to show that the will was a forgery.

> "Moreover, Kleon himself, being apparently no fool, when Astyphilos was adopting his son and making the will, ought to have summoned any relatives whom he knew to be in the city and practically any other person with whom he knew Astyphilos to be intimate. For no one could have prevented Astyphilos from devising his property to whomsoever he wished; but the fact that the will was not made in secret would have been strong evidence in Kleon's favour. Furthermore, if Astyphilos wished that no one should know that he was adopting Kleon's son, or that he had left a will, no one else's name ought to have been inscribed on the document as witness; but if it appears that he made a will in the presence of witnesses, and those witnesses were not taken from among those who were most intimate with him, but were chance persons, was there any probability that the will was genuine? For my part I cannot believe that anyone, when he was adopting a son, would have ventured to summon any other persons as witnesses except those with whom he was about to leave that son, to take his own place as an associate for the future in their religious and civic acts. Moreover, no one ought to be ashamed of summoning the largest possible number of witnesses to the execution of such a will when there is a law which permits a man to bequeath his property to whomsoever he wishes."[36]

Problems could arise through the effluxion of time. In the case on the estate of Philoktemon,[37] a testamentary adoption was disputed where the beneficiary, Chaerestratos, did not immediately take up the inheritance. Chaerestratos was in fact a son of one of Philoktemon's sisters. When the adoptive father, Philoktemon, died in c376 BC, his father was still alive; as a result, Philoktemon's estate was, at that stage, of little value. Furthermore, in order to take up an inheritance under a testamentary adoption, an application to the courts was required. This meant that it did not become worthwhile in financial terms for the potential adoptee, Chaerestratos, to make a claim until later. In fact the testator's father did not die for some 12 years, aged by then 96, and it is at this point that the monies become contested. See Table 3 for the family tree.

A kinsman, Androkles, attempted to obtain the estate first by demanding possession of a daughter of Euktemon, the widow of Chaereas, as an *epikleros*. Then he claimed that the estate was not liable to adjudication because Euktemon had left two legitimate sons. There was also a claim that Philoktemon had left no will. The strength of the claim was enhanced by the fact that Euktemon had introduced the elder of these supposed sons to his phratry as his son. To counter this, Chaerestratos had to prosecute Androkles and his associate for perjury in their protestation.

[36] Isaios IX.11.
[37] Isaios VI: 364 BC in W Wyse, above n11, at 483-488.

He worked on proving the will of Philoktemon and disproving the legitimacy of the sons of Euktemon (alleged to be sons of a slave prostitute and a freedman), children Euktemon was induced to introduce to his phratry through her wiles. Various other manoeuvres were undertaken to bolster the position but it seems probable that they were unsuccessful. Inscriptional evidence from a later date shows Chaerestratos as son of Phanostratos, not son of Philoktemon.[38]

Sometimes claims under a will could be rendered doubtful by the discovery of an additional will. In these cases it is perhaps not surprising that counterclaims of perjury were something of a commonplace. An example is provided by the case on the estate of Dikaiogenes II. This man was a member of a family which held several high posts in the state over a lengthy period. It is clear that initially this case concerned a substantial estate. Dikaiogenes II left no issue, although he had 4 married sisters. Proxenos, husband of his father's sister, and a descendant of that Harmodios who had been involved in the slaying of the tyrant Hipparchos in 514 BC, produced a will under which his own son, Dikaiogenes III, was testamentarily adopted as son of the deceased and as heir to one third of the estate. This will was accepted; Dikaiogenes III took his portion and the remainder was divided between the 4 sisters. See Table 4 for the family tree.

Twelve years later Dikaiogenes III produced another will under which the entire estate fell to himself. By then one sister was dead and two others had lost their husbands but Polyaratos, husband of the eldest sister, was still extant. He acted for his wife and the surviving sisters. The court, however, favoured Dikaiogenes III; although Polyaratos hoped to make a counter-move by bringing an action for perjury, he died before this was possible.

Another ten years passed. In this time the children of the sisters had reached maturity and one of them, Menexenos II, brought a successful action for perjury against Lykon who had been a witness in support of the genuineness of the second will. At this point Dikaiogenes III offered to restore his mother's share of the estate to Menexenos II, on the condition that he abstain from further legal action. Menexenos II, in disregard for his cousins, accepted this deal but it was not honoured. At this point he made common cause with his cousins for the whole estate on the grounds that the first will had been annulled in favour of the second, which was now found defective as a result of the conviction of Lykon for perjury.

The problem for their claim was that Dikaiogenes III had been recognised as the adopted son of Dikaiogenes II, as his friend Leochares protested on his behalf. The claimants were forced to change tack and go after Leochares as a false witness. Leochares lost the case and this time Dikaiogenes in fact agreed to abide by the terms of the first will; that is,

[38] Inscriptiones Graecae II.1177.11.

he was to surrender two-thirds of the estate. The prosecutors accepted this arrangement after sureties were taken to guarantee that Dikaiogenes III fulfilled his promise. One of these sureties was Leochares.

By now, twenty two years had elapsed since the death of the testator. In the meantime Dikaiogenes had sold, mortgaged and otherwise dealt with the assets in question; there was little remaining to be recovered from him and so the claimants resorted to suing Leochares in his role as surety. This action was taken by Menexenos III, son of Polyaratos and the eldest sister of Dikaiogenes II, whose role was to compel Leochares to discharge his liability as surety. This then, was the main aim of the suit. It served to show how easily testamentary dispositions of any type could be subjected to challenge. It also shows the dangers of acting as witness in adoption cases; Leochares was sued for the original value of a virtually worthless estate.

Posthumous adoptions

When a man died intestate leaving no son, one of his heirs, usually his heir by the rules of intestate succession, could be made his adoptive son posthumously, having to marry the *epikleros*, if one existed. This act is called *poesis* or *eispoesis*.[39] What is interesting here is that a posthumous adoption could be carried out without any requirement for the presence of the adopter or any willed act on his part. Some confusions have crept into modern discussions of this institution – it has been seen as sign of the collective responsibility of the community for seeing to the future of the *oikos* of the deceased. However, it appears that a person could only be posthumously adopted in this manner if he had already been recognised as the intestate heir of the deceased by the people's court under the inheritance procedure mentioned above and known as *epidikasia* – or *diadikasia* if there were several competing claims.[40] What should be underlined here is that this is still to be seen as an act willed by the deceased, in the sense that his intention is arbitrated by the people's court[41] and should not be thought of as an intrusion into his decisions by the body politic.[42] The idea was that in the event that a deceased had failed to nominate his heir testamentarily, his personal choice should be determined as on all fours with the rules of intestate succession and thus merely mediated by the people's court. The archon was in some way which is far from clear, involved in cases of posthumous adoption.[43] In all probability, he was

[39] For the terminology see ARW Harrison, above n4.
[40] L Rubinstein, above n2, at 1-15.
[41] Compare Isaios VI.30.
[42] L Rubinstein, above n2, at 105-112.
[43] Dem XLIII 75. On the role of the archon see Aristotle, *Athenaion Politeia* 55-59 (*"Ath Pol"*), and PJ Rhodes, *A Commentary on the Aristotleian Athenaion Politeia*, Oxford: Oxford University Press, 1981, at 612-668. For the range of the archon's ambit in relation to civil

there to decide on the comparative strength of competing claims under the rules of intestacy. Clearly the whole procedure was a useful legal mechanism for clearing up an untidy situation. It also represented a considerable broadening of the scope of succession arrangements as compared with Roman procedures, where no such provision was attested. An adopted son under the posthumous adoption would be in a strong position to take up the inheritance since by definition he was already a person who had been awarded the inheritance in the people's court. Since he was already identified by the legal process which adopted him posthumously, he was in a stronger immediate position than the testamentary heir.

In the case on the estate of Aristarchos,[44] some of the problems that could arise in such cases are revealed. Aristarchos I had two sons, Kyronides and Democharés, and two daughters. Kyronides was adopted *inter vivos* by his maternal grandfather, Xenainetos I, and passed out of the family (presumably as an infant or very young adult) and Democharés became heir to his father's estate. When Aristarchos I died his brother Aristomenes became guardian of his children (an indication of their age). Democharés died before reaching adulthood.[45] Eventually succession became vested in a surviving daughter. It is her son who was the plaintiff. See Table 5 for the family tree.

Under the epiklerate rule, the estate and the surviving daughter of Aristrachos I might have been claimed by Aristomenes or his son Apollodoros. In fact, she married a husband with no connection to the family; had there been no male heir to Aristarchos I and had she been married under the epiklerate rule, her male offspring would have been the inevitable successors to the estate. Meanwhile, Aristomenes gave his own daughter to Kyronides and handed to him the estate of Aristarchos I, despite the fact that Kyronides had left the family as result of adoption by his maternal grandfather, Xenainetos I. Kyronides had two sons, Xenainetos II and Aristarchos II, of whom the latter was alleged to have been adopted posthumously by Aristarchos I. This is disputed by the speaker, son of the surviving daughter of Aristarchos I. When Aristarchos II fell in battle without issue, after enjoying the property during his lifetime, he bequeathed the property to his brother Xenainetos II. It emerges that the archon has forced the speaker to recognise the posthumous adoption of Aristarchos II.[46] This put him in a difficult position which he

and criminal matters see *Ath Pol* 56.6ff, where his overall supervision of claims to inheritances and heiresses is mentioned.

[44] Isaios X, c 378-371 BC, in W Wyse, above n11, at 649-652.

[45] Isaios X.4.

[46] Isaios X.2. This is made clear by the fact that the archon has forced the plaintiff to add to his petition at the preliminary inquiry that his mother was sister of Aristarkhos II. This has the effect of acknowledging the posthumous adoption, and as a result it changes the status of the plaintiff's claim in relation to the inheritance from grandson of Aristarkhos I to nephew of Aristarkhos II. The plaintiff's only hope is to prove that the adoption of Aristarkhos II has been illegal - difficult since it seems that the matter has already been legally determined.

tries to put in a better light in the following passage:

> ".. I think you are all aware, gentlemen, that the introduction of adopted children is always carried out by a will, the testator simultaneously devising his estate and adopting the son, and that this is the only legal method. If therefore anyone shall assert that Aristarchos I himself made a will, he will be saying what is not true; for while he possessed a legitimate son Democharesthe could not have wished to do so and he was not permitted to devise his property to anyone else. Again if they declare that Democharesthe adopted Aristarchos II after the death of Aristarchos I, they will be likewise lying. For a minor is not allowed to make a will; for the law expressly forbids any child – or woman – to contract for more than the disposal of a bushel of barley. Now evidence has been given you that Aristarchos I predeceased his son Democharesthe and that the latter died after his father; and so even supposing they had made wills, Aristarchos II could never have inherited this property under their wills. Nor again could Kyronides give Aristarchos I a son by adoption; he could it is true have returned to his father's family, if he had left a son in the family of Xenaetetos I, but there is no law which permits him to introduce a son of his own to take his place ..."[47]

The archon's perspective in granting the posthumous adoption in this case may reflect a subterranean feeling in Greek thinking that a son who had been adopted out (such as Kyronides) continued to have some moral right of inheritance in his family of origin, regardless of other factors.

Getting out of an Adoption

A case of dispute between adopter and adoptee is known, but the precise procedure for annulling an adoption in Greece is far from clear. Inheritance rights at least could not be withdrawn[48] There was a law limiting the right for an adoptee to return to the *oikos* of his natural father and he was guaranteed his right to an equal share in the inheritance left by the adopter even if the adopter had subsequently begotten natural sons after the adoption. Once the adopted son had produced heirs for his adoptive father he was entitled to return to his natural family[49] – but the consequence of this was to place him in a different *oikos* from the heir to the adoptive parent.[50]

An interesting case, which shows that this may not have been seen as a disincentive in every case, is discussed by Goody.[51] In Demosthenes'

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47 Isaios X.9 - X.11.
48 L Rubinstein, above n11, at 33-61.
49 See Dem XLIV.64.
50 Isaios VI 44; X.11.
51 J Goody, *Production and Reproduction*, Cambridge: Cambridge University Press, 1976 at 72.

Speech *Against Leochares*,[52] Archiades had died without issue, leaving a brother, Meidylides, and the grandson of a sister, called Leokrates. The brother had an advantage as intestate heir, but was out of the country when Archiades died. Leokrates had himself recorded as the posthumous adopted son and entered into possession of the property. On return Meidylides was angry but was persuaded to avoid legal action. In the meantime Leokrates transferred the estate to his own son Leostratos, who was in turn incorporated in Archiades' clan and deme. Leostratos did the same with his son Leokrates II. At this point Meidylides' lineal descendants made a claim on the property against Leokrates II, whose brother Leochares is defendant in the case after Leokrates II died without issue. Clearly the serial adoption arrangements made by Leokrates and Leostratos served a very practical purpose – as each of them produced heirs, they returned to their natal *oikos*, but kept the estate in the family. Thus each *oikos* was kept intact and there seems to be little sense of distress on the part of Leokrates and Leostratos at the separation of interests so produced. On the other hand, the prosecution claimed that something illegal had happened. Their claim was that an adoption could not be preserved through three separate lives. This is surely a valid complaint, if the idea is that the original posthumous adoption is taking effect in the case of Leokrates II (as was claimed by the prosecution at *Against Leochares*, who also alleged various improprieties over the whole procedure by which the descendants of Leokrates had continued their claim to the estate).[53] Since Leokrates II died without issue, there was a further problem for the claim of Leochares to the estate since his father Leostratos had returned to his natal deme of Eleusis. To which family did he belong? It seems that an attempt has been made to register Leochares as son of Archiades.[54] See Table 6 for the family tree.

What emerges from all this are certain holes in the rules about proof of status in the Greek world. If the allegations levelled by the prosecution in this case are valid, it is clear that Leokratos, Leostratos, Leokrates II and Leochares had been bending the rules as far as they could. They tried confusions such as making surreptitious entries in deme lists to buttress their position against the competing claim. A critical point emerged at the end of the speech. Under Solon's laws an adoptive son could not dispose of property by will within a family which he had entered as a result of adoption. The measure was clearly intended to give primacy to lineal descendants and this was a very strong argument in favour of the interests of the plaintiff Aristodemos.

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[52] Dem. XLIV.
[53] *Against Leochares* 17- 44.
[54] *Against Leochares* 46ff.

Qualifications for the Adopter and Adoptee

As was required for the making of a will, an adopter had to be a male citizen of age with no legitimate sons alive. It is not clear whether the presence of a son's son also disqualified a candidate. If he had a son(s) who were minors he could still adopt some other person in a will and the adoption would only take place if the natural son(s) died before coming of age. This may partly explain certain forensic speeches in which we find adoptive sons defending themselves against attacks from intestate heirs of their adoptive fathers.[55] Also, although sometimes adoptive children would directly correspond to the heirs under an intestacy, these cases show that resentments might occur if a childless man chose from completely outside that group or perhaps if he promoted someone in the pecking order of the intestate heirs. If there were daughters only, he could adopt conditional on marriage to her. If, after adopting a son, he had sons born to him, the adopted son was entitled to share the estate with the others.

Women could not adopt and other social restrictions related to inheritance and capacity were closely related in their focus. Thus women had restrictions on disposing of more than a small amount of property and their welfare was overseen with great particularity by the *kyrios;* in the event that a woman did inherit significant wealth, the epiklerate ensured that women were at best temporary custodians of the inheritance, and this was quickly channelled back into the male line under the supervision of proximate male relatives. The Athenian woman was not seen as suited to the process of choosing an heir to be adopted and could not do so legally. If a male died leaving only female descendants, his daughter or daughters would become *epikleroi* on his death. Both the inheritance and the female descendant(s) would become objects for determination by an *epidikasia.*[56] Under the epiklerate, the nearest male relative would only gain control over the inheritance if an agreement was reached that he would marry the girl. Here the intention was not that this relative should be heir but rather his role was as administrator of the estate until a son (or sons) came of age.[57]

Sometimes the situation might be simplified by the existence of a daughter who already had male issue. In such cases grandsons might be adopted by their maternal grandfathers. It is worth noticing that if such an adoption was not encompassed before the decease of the grandfather, an *epikleros* would not in fact be continuing her father's line as such, since her male offspring would belong within their own natural father's *oikos.*

Some uncertainty subsists over the adoption of women. Again, the

[55] L Rubinstein, above n2, at 62ff.
[56] ARW Harrison, above n4, at 9-12.
[57] L Rubinstein, above n2, at 87-104.

testator could not ensure that the family line would be continued – since an adopted woman's offspring would go to the *oikos* of the husband. Rubinstein suggests that cases of this sort would be explicable if we imagined that posthumous adoptions of sons born of the *epikleros* were something of a commonplace.[58] However, a difficulty is also acknowledged. How would the *kyrios* respond to the obligation to provide for the posthumous adoption of one of the sons born to him from an *epikleros*? It is suggested that arrangements of this kind would have been informal and far from mandatory.

A man himself adopted was thereby disqualified from adopting but in the event of renunciation of adoption (as mentioned above, this was something which was possible after the adoptee had produced an heir for his adoptive father), he could then adopt provided that he had no other son. The reason was that he had now returned to his natural family. It has been thought that the aim of disqualifying an adopted son from adopting was to ensure that the inheritance would return to the adopter's family in the event that the adopted son did not succeed in continuing the oikos as intended.[59]

In the case on the estate of Pyrrhos,[60] an adopted son had died without issue and the dispute centred on the identity of next-of-kin. Under these circumstances (lack of an heir), the adopted son had no right to dispose of the property – this would pass by law to the legal heir. Pyrrhos had adopted his sister's son Endios, and made a will leaving his property to him. When Pyrrhos died, Endios succeeded to the property without question and enjoyed it for some twenty years before his death. He died without issue. Two days after the death of Endios the estate was claimed by one Xenocles on behalf of his wife, Phile. He claimed she was the legitimate daughter of Pyrrhos and seems to have tried to seize a portion of the property. His claim was opposed by the sister of Endios, who was his next-of-kin. She was represented by her younger son. See Table 7 for the family tree.

Xenocles protested that the estate could not be claimed by the sister because Pyrrhos had a legitimate daughter in the form of Phile. In evidence he claimed that his wife's mother, who was sister to a certain Nicodemos, had been legitimately married to Pyrrhos. The story was that Phile was the legitimate offspring of that union. But a charge of perjury had already been successfully brought against Xenocles and thus the illegitimacy of Phile was beyond question. The speaker was bringing a further charge of perjury against Nicodemos because he had substantiated Xenocles' claim in regard to Pyrrhus' marriage to his sister. It has to be assumed that in thus supporting the claims of Pyrrhos' sister to the estate many of the same arguments were being raised against Nicodemos as on the occasion

[58] L Rubinstein, above n2, at 87-104.
[59] L Rubinstein, above n2, at 16-32.
[60] Isaios III; c 350 BC, in W Wyse, above n11, at 273-284.

of Xenocles' conviction for perjury.

Argument was based on the improbability of the circumstances; it included argument that there was no dowry as well as demonstrating conspicuous weakness in other proofs of the marriage; the defendants claimed the marriage had only been witnessed by one person. Others, who claimed to have been at the ceremony, also appeared to have given inconsistent evidence (for example over whether the child was called Phile or Kleitarete). Two interesting arguments were raised during the case; one was that if Phile was legitimate, the adoptive son Endios ought to have married her as an *epikleros* rather than let her go to another[61] and secondly, that it would be shameful for both the uncle Nicodemos and for Endios, if a legitimate daughter of Pyrrhos, had been allowed to marry with the claimed levels of dowry. The complicated facts of this case show how an adoption, which failed to remedy a deficit in male heirs, could lead to intricate family squabbling.

Other disqualifications included mental incapacity brought about by madness, senility, drugs, sickness and the like. Already the laws of Solon had made provision to prevent those who disposed of their property through adoption from depriving legitimate heirs of their inheritance.

As in Rome, through adoption, a childless Athenian was able to generate an artificial order of inheritance or even to import an heir from outside the family group. He could control the fate of his daughter by choosing an adoptive son, rather than allowing her to fall into the hands of a close male relative whose succession to his goods and chattels might be uncongenial. It is conceivable that a son could also be adopted without the requirement that he marry an existing daughter.

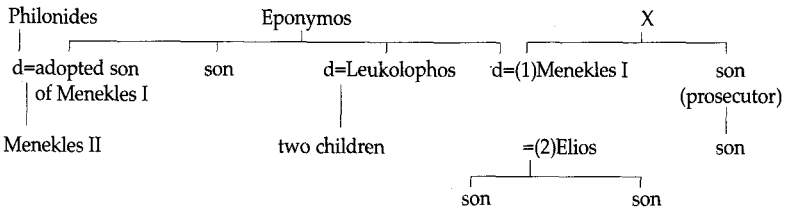
To qualify to be adopted, a person had to be of Athenian parentage on both sides. This seems to mean that he had to be child of a union by *engue*.[62] Parental consent was required of a minor. It can be assumed that even a boy of age could have his adoption vetoed by his father if he was an only son. Daughters could be adopted and thus become *epikleroi*, though this happened less often than the adoption of sons. Here again there is an important difference from Roman society. It was usual to choose a relative to adopt but there was no legal ban against adopting a complete stranger. A magistrate who had not rendered his accounts could not be adopted, nor could anyone condemned to *atimia* but sons of such people probably were eligible. Isaios mentions adoption as a method employed to evade parental financial disabilities:

> "... other people indeed, when they have had monetary losses, introduce their children into other families in order that they may not share in their parents' loss of civic rights ..."[63]

[61] Isaios III.51.
[62] R Just, *Women in Athenian Law and Life*, London: Routledge,1989 at 47-50.
[63] Isaios X.17.

The focus in every type of case was largely on the needs of the adopter rather than the adoptee. Since the aim was to provide the adopter with a descendant, in most known cases the subjects were adults rather than very young children. Some reasons for this prejudice have already been discussed, but it may partly relate to the idea of providing for old age as well as continuation of the family line. In the Greek world the interests of the *oikos* do seem to transcend individual interests with more regularity than in the cases from the Roman world where sufficient detail is available.

Table 1



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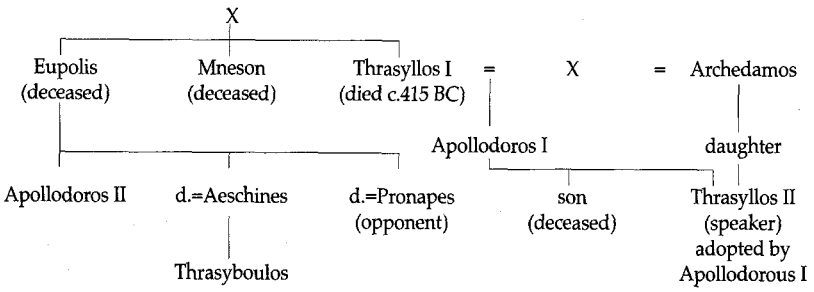

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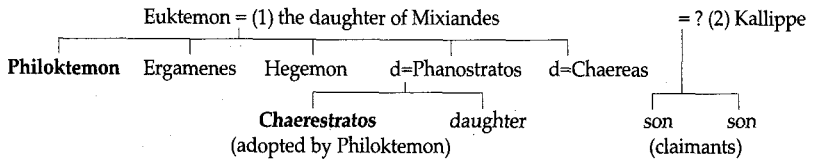

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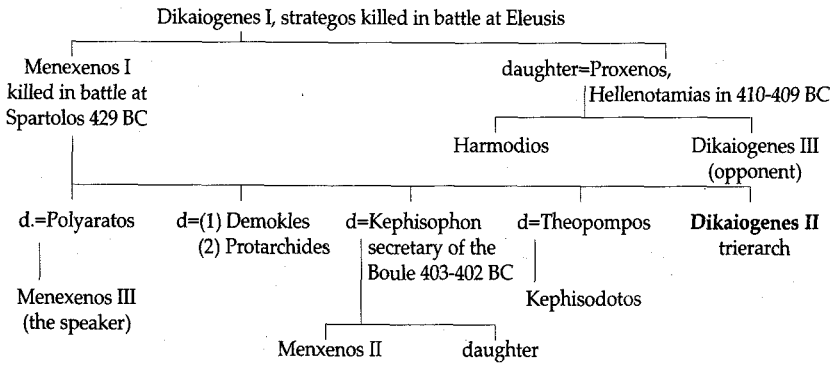

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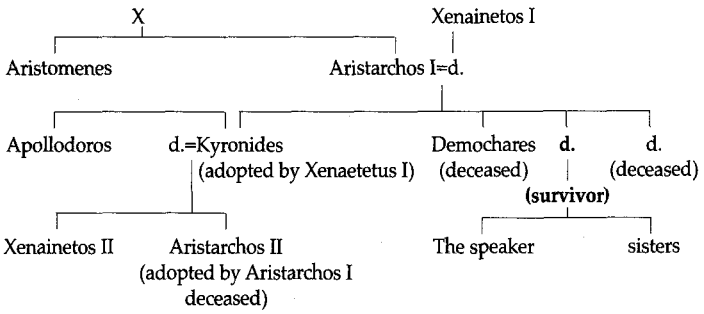

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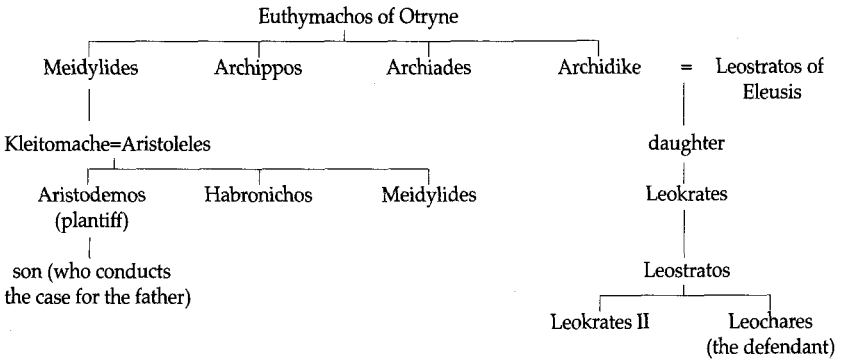

Table 7