

## St. John's Law Review

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Volume 60  
Number 2 *Volume 60, Winter 1986, Number 2*

Article 4

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June 2012

### Judicial Limitations on the Rights of Adopted Children to Inherit From Their Natural Relatives as Issue: *In re Best*

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#### Recommended Citation

Crowe, John J. (1986) "Judicial Limitations on the Rights of Adopted Children to Inherit From Their Natural Relatives as Issue: *In re Best*," *St. John's Law Review*: Vol. 60 : No. 2 , Article 4.  
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# COMMENTS

## JUDICIAL LIMITATIONS ON THE RIGHTS OF ADOPTED CHILDREN TO INHERIT FROM THEIR NATURAL RELATIVES AS ISSUE: IN *re BEST*

In making a class gift in a testamentary instrument, a testator may use the term "issue" as a word of donation equivalent to the term "descendants."<sup>1</sup> Traditionally, children adopted out of their natural families were considered issue, and retained full inheritance rights from their natural parents and kindred.<sup>2</sup> Children

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<sup>1</sup> See 7A W. HEATON & A. WARREN, *THE PROCEDURE AND LAW OF SURROGATE'S COURTS OF THE STATE OF NEW YORK*, ¶ 48, ¶1. (G. Markuson ed. 1972)[hereinafter cited as WARREN'S HEATON]. While there has not been a settled definition of a class gift, it has been defined with some accuracy as a "gift of an aggregate sum to a body of persons uncertain in number at the time of the gift . . . who are to take in equal or some other definite proportions, the share of each being dependent for its amount upon the ultimate number of persons." *Id.*; see also 5 AMERICAN LAW OF PROPERTY § 22.4 (Casner ed. 1952)(class gifts are made to an entity not to separate and distinct individuals) [hereinafter cited as Casner]. Despite the lack of a consummate definition, gifts to classes of relatives such as grandchildren, children, descendants, and issue have been considered class gifts. See 7A WARREN'S HEATON, *supra* at § 22.36.

In New York, the term issue has been held to be a word of donation equivalent to the term descendants unless a meaning to the contrary is indicated. See *In re Farmer's Loan & Trust Co.*, 213 N.Y. 168, 172, 107 N.E. 340, 342-43 (1915); *Schmidt v. Jewett*, 195 N.Y. 486, 490, 88 N.E. 1110, 1111 (1909); 9 ROHAN, N.Y. CIV. PRAC., EPTL ¶1-2.10[1] (ed. 1985). In *Estates, Powers and Trusts Law* section 1-2.10 the New York Legislature provides that "(a) Unless a contrary intention is indicated: (1) Issue are the descendant's in any degree from a common ancestor. (2) The terms 'issue' and 'descendants' . . . include adopted children." N.Y. EST. POWERS & TRUSTS LAW §1-2.10 (McKinney 1977).

<sup>2</sup> See *In re Landers*, 100 Misc. 635, 642, 166 N.Y.S. 1036, 1040 (Sur. Ct. Oneida County 1917). The *Landers* court concluded that for inheritance purposes, an adopted child may be considered the child of two families. *Id.* at 642, 166 N.Y.S. at 1040. New York courts consistently have held that a child's right to inherit from his natural kindred was not affected by adoption out of his natural family. See *In re Fodor*, 202 Misc. 1100, 1102, 117 N.Y.S.2d 331, 333 (Sur. Ct. Bronx County 1952); *In re Ferris*, 79 N.Y.S.2d 12, 13 (Sur. Ct. Westchester County 1948); *In re Gourlay*, 173 Misc. 930, 937, 19 N.Y.S.2d 122, 128 (Sur. Ct. Kings County 1940). See also 7B WARREN'S HEATON, *supra* note 1, at § 92, ¶6(b)(adopted child retains rights of inheritance from natural brother or sister); Rein, *Relatives by Blood*,

born out of wedlock, however, were not recognized as their natural parents' issue, and were denied full rights of inheritance.<sup>3</sup> More recently, the inheritance rights of nonmarital children have been expanded by the New York courts through the recognition of such children as the issue of their natural parents.<sup>4</sup> Conversely, the New

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*Adoption and Association: Who Should Get What and Why*, 37 VAND. L. REV. 711, 723 (1984)(some states allow adopted children to inherit from natural parents because adoptee did not consent to adoption, therefore should not forfeit his birthright by virtue of such adoption); Recent Legislation, *New York's Law of Estates and Distribution: The New Status of the Adopted Child*, 38 ST. JOHN'S L. REV. 380, 381-82 (1964)(prior to 1964 adopted persons were entitled to inherit from and through natural parents as if adoption had not occurred).

A natural parent, however, has been denied the right to inherit from the child he gave up for adoption. *See, e.g.*, *Carpenter v. Buffalo Gen. Elec. Co.*, 213 N.Y. 101, 106, 106 N.E. 1026, 1028 (1914)(natural father excluded from sharing in intestate distribution of adopted-out son's property); *In re McCabe*, 205 Misc. 198, 200, 127 N.Y.S.2d 726, 728 (Sur. Ct. N.Y. County 1953)(father forfeits inheritance rights from his natural child once child is surrendered for adoption); *In re Heye*, 149 Misc. 890, 898, 269 N.Y.S. 530, 540 (Sur. Ct. Monroe County 1933)(neither natural father nor other natural kindred of decedent have standing to contest will of decedent given up for adoption), *aff'd*, 241 App. Div. 907, 271 N.Y.S. 1042 (4th Dep't. 1934).

<sup>3</sup> *See, e.g.*, *In re Underhill*, 176 Misc. 737, 739, 28 N.Y.S.2d 984, 986 (Sur. Ct. N.Y. County 1941)(use of word issue refers only to "lawful issue and . . . exclude[s] illegitimate offspring."); *In re Gould*, 172 Misc. 396, 403, 15 N.Y.S.2d 392, 400 (Sur. Ct. N.Y. County 1939)(illegitimate children of testator's son later legitimized by marriage precluded from sharing in trust as issue); *Braun v. Gilsdorff*, 126 Misc. 366, 367, 214 N.Y.S. 243, 244 (Sup. Ct. N.Y. County 1926)(testator intended to include only lawful and legitimate children by use of term issue).

Under common law an illegitimate child had no inheritance rights because he was considered "*filius nullius*, the child of no one." *Id.* *See* M. SUSSMAN, J. CATES & D. SMITH, *THE FAMILY AND INHERITANCE* 20 (1970) [hereinafter cited as *Sussman*]. Furthermore, no one could inherit from an illegitimate except his spouse, *see* J. DUKEMINIER & S. JOHANSON, *WILLS, TRUSTS, AND ESTATES* 113 (3rd ed.1984), or his legitimate children or their issue, *See* SUSSMAN, *supra*, at 20. For a discussion of the history of common law regarding the harsh treatment of illegitimates, *see* Helmholz, *Support Orders, Church Courts, and the Rule of Filius Nullius: A Reassessment of the Common Law*, 63 VA. L. REV. 431 (1977).

Prior to 1965, New York varied from the common law rule by allowing illegitimates to inherit in intestacy from the mother, if the mother had no legitimate children. Ch. 547 [1855] N.Y. Laws; *see In re Anonymous*, 165 Misc. 62, 65, 300 N.Y.S. 292, 296 (Sur. Ct. Kings County 1937); Comment, *Right of an Illegitimate Child to Inherit Under Intestacy Statutes: In re Estate of Lalli*, 22 N.Y.L. SCH. L. REV. 103, 111 (1974)(New York abrogated common law by allowing illegitimate child to inherit from his mother when she dies without bearing any legitimate children).

In 1965, the New York Legislature enacted section 83-a of the Decedent Estate Law, Ch. 958, [1965] N.Y. LAWS 2220, which provided that for intestacy purposes, an illegitimate child shall be considered the legitimate child of his mother, regardless of whether the mother was survived by other children. *Id.* The act also allowed the child to inherit from his father if an adjudication of paternity was issued during the lifetime of the father. *Id.*

<sup>4</sup> *See, e.g.*, *In re Hoffman*, 53 App. Div. 2d 55, 65, 385 N.Y.S.2d 49, 57 (1st Dep't. 1976)(absent express qualifications by testatrix issue "should be construed to refer to legiti-

York Legislature has restricted the inheritance rights of adopted children by terminating their right to share in the intestate distribution of their natural parents' property.<sup>5</sup> Recently, in *In re Best*,<sup>6</sup> the New York Court of Appeals acknowledged the rights of nonmarital children to inherit under the term issue, but further restricted the inheritancy rights of adopted children by holding that a nonmarital son adopted out of his natural family was not entitled to inherit a share of a trust estate devised by his natural grandmother to her daughter's issue.<sup>7</sup>

In *Best*, the decedent grandmother, Jessie C. Best, who died in 1973, left a will which designated her daughter as income beneficiary of a residuary trust.<sup>8</sup> The will provided that upon the daugh-

mate and illegitimate descendants alike"); *In re Lyden*, 96 Misc. 2d 920, 921, 409 N.Y.S.2d 700, 701 (Sur. Ct. Erie County 1978)(unless testator displayed contrary intent, terms such as issue or children include illegitimate descendants); *In re Leventritt*, 92 Misc. 2d 598, 604, 400 N.Y.S.2d 298, 302 (Sur. Ct. N.Y. County 1977)(in will executed after 1951, terms issue, descendants and children include nonmarital children).

Section 4-1.2 of New York's Estates, Powers and Trusts Law currently governs the intestacy rights of nonmarital children, and provides that a child born out of wedlock may inherit as the issue of his mother and maternal kindred, and as the issue of his father and paternal kindred under certain circumstances. N.Y. EST. POWERS & TRUSTS LAW § 4-1.2 (McKinney 1981); Although section 4-1.2 has liberalized the intestacy rights of non-marital children, the right to inherit from a natural father is not unqualified. *See, e.g., In re Flemm*, 85 Misc. 2d 855, 865, 381 N.Y.S.2d 573, 579 (Sur. Ct. Kings County 1975)(illegitimate son not considered distributee of paternal father since no order of filiation was entered during lifetime of father); *In re Thomas*, 81 Misc. 2d 891, 893-94, 367 N.Y.S.2d 182, 184-85 (Sur. Ct. Erie County 1975)(nonmarital daughter not distributee of father due to lack of filiation order proving paternity and lack of proof of valid marriage).

<sup>5</sup> *See* N.Y. DOM. REL. LAW § 117 (McKinney 1977). Section 117, enacted in 1963, provides in pertinent part:

1. After the making of an order of adoption the natural parents of the adoptive child shall be relieved of all parental duties toward and of all responsibilities for and shall have no rights over such adoptive child or to his property by descent or succession, except as hereinafter stated.

The rights of an adoptive child to inheritance and succession from and through his natural parents shall terminate upon the making of the order of adoption except as hereinafter provided. The adoptive parents or parent and the adoptive 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 and through each other and the natural and adopted kindred of the adoptive parents or parent. . . . 2. This section shall apply only to the intestate descent and distribution of real and personal property and shall not affect the right of any child to distribution of property under the will of his natural parents or their natural or adopted kindred . . . .

*Id.*

<sup>6</sup> 66 N.Y.2d 151, 485 N.E.2d 1010, 495 N.Y.S.2d 345 (1985).

<sup>7</sup> *Id.* at 155-56, 485 N.E.2d at 1012-13, 495 N.Y.S.2d at 347-48.

<sup>8</sup> *Id.* at 153, 485 N.E.2d at 1011, 495 N.Y.S.2d at 346. *See* 116 Misc. 2d 365, 365, 455

ter's death the trust was to be divided equally among the daughter's surviving issue.<sup>9</sup> Three years later it was discovered that the decedent's daughter, who had one son by her husband, had given birth to another child out of wedlock in 1952, and that this child had been immediately adopted out of the family.<sup>10</sup> After a search authorized by the decedent's daughter, the identity of the adopted-out son was discovered.<sup>11</sup> When the daughter died in 1980, the adopted-out son instituted an action<sup>12</sup> claiming that he was entitled to receive income from the residuary trust as the issue of the daughter, his natural mother.<sup>13</sup> The surrogate court agreed and concluded that the adopted-out son had the right to receive an equal share of the income from the trust fund.<sup>14</sup> The appellate division affirmed in a *per curium* opinion.<sup>15</sup>

In an opinion by Judge Titone, the Court of Appeals reversed

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N.Y.S.2d 487, 488 (Sur. Ct. Westchester County 1982).

<sup>9</sup> 66 N.Y.2d at 153, 484 N.E.2d at 1011, 495 N.Y.S.2d at 346. The will directed that upon the death of decedent's daughter, Ardith Reid, the trustees were to " 'divide . . . [the] trust fund into as many shares or parts as there shall be . . . issue . . . and to continue to hold each of such parts or parts[sic] in trust during the life of one of said persons.' " *Id.*

<sup>10</sup> *Id.* The executors of the will, who were also the trustees of the trust, originally believed that the decedent's daughter had given birth to only one child, Anthony R. Reid, born to her in 1963 while she was married. *Id.* However, new information regarding the existence of a nonmarital, adopted-out son born in 1952 was confirmed by the decedent's daughter. *Id.*

<sup>11</sup> *Id.* The search for the adopted-out son was instituted on the advice of the executors, who believed that the unidentified child should be included in the proposed accounting procedure for jurisdictional purposes. *Id.* When the adopted-out son was made a party to the accounting proceeding, the representatives of the marital son did not file any objections. 116 Misc. 2d. at 366, 455 N.Y.S.2d at 849.

<sup>12</sup> 116 Misc. 2d at 366, 455 N.Y.S.2d at 489. Following the death of the testatrix's daughter, her marital son received income from the trust immediately, but payments were withheld from the nonmarital son. *Id.* As a result, the adopted-out son filed a petition to order an accounting by the trustees, thereby placing the question of his status as issue before the court. *Id.*

<sup>13</sup> *Id.* at 367, 455 N.Y.S.2d at 489. The adopted-out son contended that his right to inherit from his natural family should not be affected by his adoption into another family, since the term issue included both marital and nonmarital children in the absence of a contrary intent. *Id.*

<sup>14</sup> *Id.* at 374, 455 N.Y.S.2d at 493. Surrogate Brewster determined that the adopted-out son's right to the trust was not terminated by section 117 of the Domestic Relations Law because the statute applied only to intestate distribution. *Id.* at 372-73, 455 N.Y.S.2d at 492. The surrogate court further held that the term issue included both marital and nonmarital children. *Id.* at 373, 455 N.Y.S.2d at 493. Surrogate Brewster reasoned that because the decedent knew of the existence of the nonmarital child, and no evidence of an intent to disinherit him was present, he was entitled to a share of the trust. *Id.* at 374, 455 N.Y.S.2d at 493.

<sup>15</sup> *In re Best*, 102 App. Div. 2d 660, 477 N.Y.S.2d 431 (2d Dep't. 1984).

the appellate division's decision and granted the marital son's motion for summary judgment.<sup>16</sup> The court agreed with both lower courts' recognition of nonmarital children as the issue of their natural parents,<sup>17</sup> but refused to include nonmarital children who had been adopted out of their natural families as issue.<sup>18</sup> The court cited the adopted child's need to assimilate into his or her new family,<sup>19</sup> and the necessity of maintaining the confidentiality of adoption records<sup>20</sup> as policy reasons for denial of the plaintiff's right of inheritance from his natural family.<sup>21</sup> Judge Titone found that in light of the statute's legislative purpose, the language of section 117 of the Domestic Relations Law did not preserve the right of an adopted child to inherit under a class gift as the issue of his natural kindred.<sup>22</sup> In addition, the court stated that an adopted child could inherit under the will of a natural relative only when the child is specifically named in the will, or if the term issue is expressly defined to include children adopted out of the family.<sup>23</sup>

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<sup>16</sup> *In re Best*, 66 N.Y.2d at 152-53, 485 N.E.2d at 1011, 495 N.Y.S.2d at 346.

<sup>17</sup> *Id.* at 154-55, 485 N.E.2d at 1012, 495 N.Y.S.2d at 347. The court, citing "contemporary social mores" and constitutional considerations, recognized nonmarital children as issue of their natural parents, and held this to be a rebuttable presumption. *Id.*

<sup>18</sup> *Id.* at 155, 485 N.E.2d at 1012, 495 N.Y.S.2d at 347. The Court of Appeals distinguished the inheritance rights of an adopted-out child who is entitled to a right of inheritance from his adoptive family as their issue, from that of the nonmarital child, who would have no rights of inheritance from anyone, but for the recognition of his status as issue of his natural family by the courts. *Id.* Judge Titone expressed concern about allowing an adopted child to have rights of inheritance flowing from two families. *Id.*

<sup>19</sup> *Id.* The court reasoned that allowing adopted children to inherit class gifts as the issue of his or her natural family would be contrary to the stated legislative policy of engrafting the child upon new parentage. *Id.*

<sup>20</sup> *Id.* The court cited section 114 of the Domestic Relations Law, which states, in pertinent part, that all adoption orders "shall be filed in the office of the court granting the adoption and the order shall be entered in books which shall be kept under seal." . . . N.Y. DOM. REL. LAW § 114 (McKinney 1977).

<sup>21</sup> *In re Best*, 66 N.Y.2d at 155-56, 485 N.E.2d at 1012-13, 495 N.Y.S.2d at 347-48. The court also expressed concern that if adopted children were considered the issue of their natural parents, the stability of property rights passing under decrees of the surrogate court would be undermined. *Id.* at 156, 485 N.E.2d at 1013, 495 N.Y.S.2d at 348. In addition, the court questioned whether surrogate court decrees could ever truly be finalized, since an unknown, nonmarital, adopted-out child could surface and claim under a will as the issue of a natural relative. *Id.*

<sup>22</sup> *Id.* at 156, 485 N.E.2d at 1013, 495 N.Y.S.2d at 348. The court stated that the clear purpose of the statute was "to place the adopted child, for inheritance purposes in the bloodstream of his new family just as a natural child and sever insofar as possible all connection with the natural family." *Id.* (quoting Temporary State Commission on the Modernization, Revision and Simplification of the Law of Estates, Second Report, N.Y. LEGIS. DOC. [1963] No. 19, p. 25, 147\*). For a discussion of section 117, see *supra* note 5.

<sup>23</sup> 66 N.Y.2d at 156, 485 N.E.2d at 1013, 495 N.Y.S.2d at 348. The court concluded that

Writing in dissent, Judge Jasen contended that the majority had read the applicable statutory law narrowly in order to limit the inheritance rights of children adopted out of their natural families.<sup>24</sup> Judge Jasen asserted that because the decedent did not qualify her use of the term issue, the court should refrain from substituting its own "restrictive interpretation" on the testamentary language.<sup>25</sup>

While the *Best* court's reliance on important policy considerations was both valid and pragmatic, it is submitted that the court's analysis of the applicable statutory law and its legislative history was deficient, and that the *Best* decision is inconsistent with current statutory law in New York. This Comment will explore the conflict between *Best* and the applicable statutory provisions, and propose legislative amendments which would consider policy rationale together with the intent of the testator.

#### NONMARITAL CHILDREN AS ISSUE

Under the common law, words such as child or issue did not entitle a nonmarital child to inherit under a will as the beneficiary of a class gift.<sup>26</sup> However, in *In re Hoffman*<sup>27</sup> the appellate divi-

although a child adopted into a family is considered the issue of the adoptive family, he does not also remain the issue of his natural family. *Id.*

<sup>24</sup> *Id.* at 159, 485 N.E.2d at 1015, 495 N.Y.S.2d at 350. (Jasen J., dissenting). Judge Jasen argued that the majority unduly limited the meaning of Domestic Relations Law section 117(2) while construing section 117(1) in an "overly expansive" manner. *Id.*

<sup>25</sup> *Id.* at 160, 485 N.E.2d at 1016, 495 N.Y.S.2d at 351 (Jasen, J., dissenting). Judge Jasen asserted that neither the statutory definition of the term issue, nor the testamentary language in the will made a distinction between adopted-out children and other children. *Id.*

<sup>26</sup> See, e.g., *Olmsted v. Olmsted*, 190 N.Y. 458, 467, 83 N.E. 569, 571 (1908) (illegitimate children of unlawful second marriage not considered issue), *aff'd*, 216 U.S. 386 (1910); *Central Trust Co. v. Skillin*, 154 App. Div. 227, 230, 138 N.Y.S. 884, 886 (1912) ("[a]t common law the words 'child', 'son', 'issue', even when unqualified by the adjective 'lawful', excluded all but the latter class"); *Braun v. Gilsdorf*, 126 Misc. 366, 366-67, 214 N.Y.S. 243, 243-44 (Sup. Ct. N.Y. County 1926) (children of bigamous marriage are deemed illegitimate and not recognized as issue).

<sup>27</sup> 53 App. Div. 2d 55, 65, 385 N.Y.S.2d 49, 56 (1st Dep't. 1976). In *Hoffman*, the testatrix died in 1951 leaving a will which established a trust fund for her two cousins. *Id.* at 56, 385 N.Y.S.2d. at 50. The will provided that upon the death of one cousin, the income from the remaining one-half share should be paid to that cousin's issue. *Id.* One cousin died in 1965 and was survived by a daughter and a son; the son died in 1972, and was survived by two children born out of wedlock. *Id.* The surrogate court ruled that the son's two nonmarital children could not inherit because the term issue referred only to lawful issue, unless a contrary intent was expressed. *Id.* The appellate division, however, reversed, concluding that the testatrix intended the word issue to include both legitimate and illegitimate descendants. *Id.* at 67, 385 N.Y.S.2d at 57.

sion cited a change in the social attitudes toward nonmarital children, and concluded that the word issue, if not defined in a will, should be interpreted to include legitimate and illegitimate descendant's alike.<sup>28</sup> It is suggested that while the *Best* court correctly followed the *Hoffman* decision concerning the status of nonmarital children as issue, it failed to properly apply existing law in examining the right of an adopted child to inherit from his natural family, regardless of whether the child was born in or out of wedlock.

#### INHERITANCE RIGHTS OF ADOPTED CHILDREN: STATUTORY ANALYSIS

Because adoption was not recognized at common law,<sup>29</sup> the adopted child did not have the right to inherit from his adoptive family.<sup>30</sup> However, the legitimate child adopted out of his family retained all inheritance rights from his natural family.<sup>31</sup> In New York, because adoption is purely statutory,<sup>32</sup> only the Legislature

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<sup>28</sup> *Id.* at 57, 385 N.Y.S.2d at 50. The court noted that recent decisions and statutory changes required a rejection of any "inferior social or legal status for illegitimates." *Id.* at 57, 60-61, 385 N.Y.S.2d at 50, 53.

The *Hoffman* court also relied upon expanded rights afforded illegitimates under the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 66, 385 N.Y.S.2d at 56-57; see, e.g., *Trimble v. Gordon*, 430 U.S. 762, 767 (1977)(classifications based on illegitimacy demand heightened level of scrutiny); *Levy v. Louisiana*, 391 U.S. 68, 72 (1968)(discrimination against illegitimates declared "invidious"); *Glonn v. American Guarantee & Liability Ins. Co.*, 391 U.S. 73, 76 (denial of equal protection to withhold relief because child born out of wedlock)(1968). *But see* *Labine v. Vincent*, 401 U.S. 532, 537-40 (1971)(Court upheld Louisiana statutory scheme which denied right of intestate inheritance to illegitimates from their fathers).

<sup>29</sup> See *People ex rel. Sibley v. Sheppard*, 54 N.Y.2d 320, 327, 429 N.E.2d 1049, 1052, 445 N.Y.S.2d 420, 423 (1981); *In re Thorne*, 155 N.Y. 140, 143, 49 N.E. 661, 662 (1898); T. ATKINSON, *LAW OF WILLS* 86 (2d ed. 1953); J. DUKEMINIER & S. JOHANSON, *supra* note 3, at 111.

<sup>30</sup> See E. WYPSKI, *THE LAW OF INHERITANCE* 59 (4th ed. 1984). Common law recognized rights of inheritance only in blood relationships. *Id.* An adopter could not make an adoptee his heir by the process of adoption alone. *Id.*; Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743, 745-46 (1956); Note, *Property Rights As Affected By Adoption*, 25 BROOKLYN L. REV. 231, 231 (1959).

<sup>31</sup> See Temporary State Commission on the Modernization, Revision and Simplification of the Law of Estates, Second Report, N.Y. LEGIS. DOC. [1963] No. 19, p. 152 ("in absence of statute, adoption does not terminate child's right to inherit from natural parents") [hereinafter cited as Report [1963]]; see also *supra* note 2 and accompanying text.

<sup>32</sup> See *In re Robert Paul P.*, 63 N.Y.2d 233, 237-38, 471 N.E.2d 424, 426, 481 N.Y.S.2d 652, 654 (1984); *In re Eaton*, 305 N.Y. 162, 165, 111 N.E.2d 431, 434 (1953); *Carroll v. Collins*, 6 App. Div. 106, 109, 40 N.Y.S. 54, 56 (1896).

In 1873, New York enacted its first adoption statute, the language of which specifically excluded adopted children from inheriting from their adoptive parents. Ch. 830, § 10, [1873] N.Y. LAWS 1243. Fourteen years later, this statute was amended to provide adopted children with inheritance rights from adoptive parents, but not from adoptive kindred. Ch. 703, § 10,



has the power to alter lines of inheritance with respect to adopted children.<sup>33</sup> Under statutory rules of construction, such adoption statutes should be strictly construed because they are in derogation of the common law.<sup>34</sup>

In discussing section 117 of the Domestic Relations Law, the court determined that this legislation did not mandate inheritance by the adopted-out son under the term issue in his natural grandmother's will.<sup>35</sup> If the decedent in *Best* had died intestate, the right of the adopted-out son to inherit as the issue of decedent's daughter would have been cut off by section 117.<sup>36</sup> In 1966, subsection 2 was added to section 117 to clarify the purpose of the statute by specifically providing that any interest an adopted child might have under the will of a natural parent was not to be affected by the termination of the child's intestacy rights of inheritance.<sup>37</sup> It is

[1887] N.Y. LAWS 909. This section was merged into the Domestic Relations Law in 1896, and clearly provided that the rights of inheritance between adoptive parent and adopted child flow to and from one another. Ch. 272, § 64, [1896] N.Y. LAWS. (renumbered N.Y. DOM. REL. LAW § 114 by Ch. 19, § 1, [1909] N.Y. LAWS 14). The statute remained virtually unchanged until 1963, when the Legislature reenacted it as section 117, thus allowing inheritance rights to flow between adoptive parent and child and through "the natural and adopted kindred of the adoptive parents or parent." N.Y. DOM. REL. LAW § 117 (McKinney 1977). For an in depth discussion of the history of section 117 and its effects on inheritance rights, see Note, *Adopted Child as Member of a Class - Query; Have Such Class Words as "Heir", "Kin", "Descendant", "Issue" and Like General Terms Lost All Biological Flavor in Their Relation to an Adopted Child?*, 11 N.Y.L.F. 522, 522-26 (1966); Recent Cases, *Adopted Children Now Presumed Included Within Class Term "Issue" as Used in Wills and Testamentary Trusts*, 15 BUFFALO L. REV. 209, 209-12 (1966).

<sup>33</sup> See *In re Malpica-Orsini*, 36 N.Y.2d 568, 570, 331 N.E.2d 486, 488, 370 N.Y.S.2d 511, 514 (1975); *Carpenter v. Buffalo Gen. Elec. Co.*, 213 N.Y. 101, 107, 106 N.E. 1026, 1028 (1914); *In re Cook*, 187 N.Y. 253, 260, 79 N.E. 991, 993 (1907). The Court of Appeals has stated that the Legislature completely controls the relationship between an adopted child and his adoptive parents, and that only the Legislature "may give heritable blood when nature did not." *Carpenter*, 213 N.Y. at 107, 106 N.E. at 1028 (citing *In re Cook*, 187 N.Y. at 260, 79 N.E. at 993).

<sup>34</sup> See *In re Robert Paul P.*, 63 N.Y.2d 233, 238, 471 N.E.2d 424, 426, 481 N.Y.S.2d 652, 654 (1984); *In re Santacose*, 271 App. Div. 11, 16, 61 N.Y.S.2d 1, 5 (4th Dep't. 1946); *In re Marsh*, 143 Misc. 609, 613-14, 257 N.Y.S. 514, 519 (Sur. Ct. Kings County 1932).

<sup>35</sup> *In re Best*, 66 N.Y.2d at 156, 485 N.E.2d at 1013, 495 N.Y.S.2d at 348.

<sup>36</sup> See, e.g., *In re Nelson*, 107 Misc. 2d 1035, 1036, 436 N.Y.S.2d 594, 595 (Sur. Ct. Erie County 1981)(adopted-out siblings of decedent cannot share in intestate distribution of decedent's property); *In re Deflacieuz*, 87 Misc. 2d 845, 847-48, 386 N.Y.S.2d 603, 604-05 (Sur. Ct. Orange County 1976)(adopted-out brother of intestate decedent barred from inheritance under section 117).

<sup>37</sup> See N.Y. DOM. REL. LAW § 117(2)(McKinney 1977). Although brief, the legislative history to this amendment establishes that section 117 was not intended to affect the inheritance rights of an adopted child from a natural parent in non-intestacy situations. See Temporary (Bennett) Commission on the Law of Estates, FOURTH REPORT, N.Y. LEGIS. DOC. [1965] No. 19, p. 102, 104; 7A Warren's Heaton, *supra* note 1, at § 38 ¶1(b).

submitted that in refusing to permit the adopted son to take under the will, the court failed to strictly construe the language of section 117(2), and afforded insufficient weight to its legislative history.<sup>38</sup>

Class gifts can be bequeathed by using a number of phrases or terms which name a particular group as beneficiary.<sup>39</sup> According to statutory law in New York, a child adopted out of his natural family is not a member of the designated class if that class is designated as heirs, heirs at law, next of kin or distributees.<sup>40</sup> However, the term issue, which is defined by statute to include "descendants in any degree from a common ancestor,"<sup>41</sup> does not indicate that adopted-out children should be excluded from a class of beneficiaries so designated by a natural relative.<sup>42</sup>

Moreover, the Legislature has provided the adopted child with a presumption of class inclusion by his adoptive parents and kindred under the term issue.<sup>43</sup> If a testator wishes to exclude chil-

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<sup>38</sup> See *In re Best*, 66 N.Y.2d at 159, 485 N.E.2d at 1015, 495 N.Y.S.2d at 350 (Jasen, J., dissenting). Judge Jasen contended that the majority overemphasized section 117(1) in its analysis, while giving too little weight and attention to subsection (2)). *Id.*

<sup>39</sup> See WARREN'S HEATON, *supra* note 1, at § 48 ¶1(a). Testamentary gifts made to children, issue, grandchildren, brothers and sisters and descendants have been considered class gifts. *Id.* Gifts to heirs, next of kin, and relatives are also considered class gifts. *Id.*; CASNER, *supra* note 1, at § 22.56.

<sup>40</sup> See N.Y. EST. POWERS & TRUSTS LAW § 2-1.1 (McKinney 1981). Section 2-1.1 provides that "the terms 'heirs', 'heirs at law', 'next of kin' or any term of like import means the distributees, as defined in § 1-2.5 [of the Estate Powers & Trusts Law]". *Id.* Under § 1-2.5, a distributee is defined as a "person entitled to take or share in the property of a decedent under the statutes governing descent and distribution." N.Y. EST. POWERS & TRUSTS LAW § 1-2.5 (McKinney 1981). The New York descent and distribution statutes govern the intestate succession of a decedent's estate. See N.Y. EST. POWERS & TRUSTS LAW § 4-1.1 (McKinney 1981). Because section 117 of the Domestic Relations Law terminates the adopted child's intestate inheritance rights from his natural ancestor, such child may not inherit under class terms controlled by 4-1.1. See Memorandum of the Law Revision Commission Relating to Inheritance Rights of Children Adopted Out of a Class by Persons Related to them by Blood or by Marriage, [1985] N.Y. LAW REV. COMM'N REP. 449, 464-65. [hereinafter cited as Law Revision Comm'n Rep. 1985].

<sup>41</sup> See N.Y. EST. POWERS & TRUSTS LAW § 1-2.10 (McKinney 1981).

<sup>42</sup> Compare N.Y. EST. POWERS & TRUSTS LAW § 1-2.10 (class gifts to issue not controlled by rules of intestate distribution) with N.Y. EST. POWERS & TRUSTS LAW § 2-1.1 & 1-2.5 (class gifts to heirs, heirs at law, next of kin or distributees governed by rules of intestate succession).

<sup>43</sup> See N.Y. EST. POWERS & TRUSTS LAW § 2-1.3 (McKinney 1981), which provides:

(a) Unless the creator expresses a contrary intention, a disposition of property to persons described in any instrument as the issue, lawful issue, children, descendants, heirs, heirs at law, next of kin, distributees (or by any term of like import) of the creator or of another, includes: (1) Adopted children and their issue. (2) Children conceived before, but born alive after such disposition becomes effective.

dren adopted into his family from a class disposition to issue, he must expressly do so.<sup>44</sup> Conversely, the Legislature has not provided a similar presumption of inclusion of adopted-out children in class gifts to issue made by their natural relatives.<sup>45</sup> However, in *In re Hall*,<sup>46</sup> a recent case factually similar to *Best*,<sup>47</sup> Surrogate Roth held that an adopted-out child could inherit as issue of his natural kindred. The *Hall* decision reasoned that a presumption of inclusion for adopted-out children was unnecessary because section 117 of the Domestic Relations Law had no effect on the rights of such children to take under the will of a natural parent.<sup>48</sup> Surrogate Roth stated that because children adopted out of a family remain in the bloodline of their natural ancestors, their right to inherit from these ancestors remains unaffected unless expressly restricted

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The presumption of inclusion provided by § 2-1.3 has been recognized by the New York courts. *See, e.g., In Re Nicol*, 19 N.Y.2d 207, 211, 225 N.E.2d 530, 530, 278 N.Y.S.2d 830, 831 (Sur. Ct. Orange County 1976) (adopted children held to be included in trust indenture under terms issue and surviving issue); *In re Duval*, N.Y.L.J., Apr. 21, 1980, at 16, col. 4 (Sur. Ct. Suffolk County 1980) (adopted children of decedent's granddaughter presumed included within class "heirs and next of kin of my blood"). Prior to the re-enactment of former Decedent Estate Law section 49, Ch. 310 [1966] N.Y. LAWS 942, as current section 2-1.3, the Court of Appeals held that absent a contrary intention to exclude adopted children from the adoptive family, terms expressing a parent-child relationship, such as issue, included the adopted child. *In Re Park*, 15 N.Y.2d 413, 417, 207 N.E.2d 859, 861, 260 N.Y.S.2d 169, 171 (1965); *In re Grace*, 46 Misc. 2d 878, 880, 261 N.Y.S.2d 236, 238 (Sur. Ct. Nassau County 1965).

<sup>44</sup> *See* Report [1963], *supra* note 31, appendix f, p.163. The purpose of section 49 of the Decedent Estate Law, the predecessor to the current section 2-1.3 of the Estates Powers & Trusts Law is discussed in the State Commission Report. *Id.* The report states:

The advantage of the . . . proposal is that any presumption against the inclusion of the adopted child in an estate would be removed. It would compel authors of instruments creating life and other temporary estates to consider the rights of adopted children and if so minded to include a provision abrogating this statute . . . [the state] would preserve to the authors of such instruments the right to exclude adopted children from participating in the class of remainderman.

*Id.* at 176-77.

<sup>45</sup> *See In re Hall*, N.Y.L.J., Jan. 31, 1985, at 6, col. 2 (Sur. Ct. N.Y. County 1985). *See also* N.Y. EST. POWERS & TRUSTS LAW § 2-1.3 (McKinney 1981) (presumption of inclusion into adoptive family does not apply to family who surrenders child for adoption).

<sup>46</sup> N.Y.L.J., Jan. 31, 1985, at 6, col. 5.

<sup>47</sup> *Compare In re Best*, 66 N.Y.2d at 152-53, 485 N.E.2d at 1011, 495 N.Y.S.2d at 346 (grandson adopted out of family sought inclusion as issue of his natural mother in grandmother's will) *with In re Hall*, N.Y.L.J., Jan. 31, 1985, at 6, col. 2 (adopted-out grandson's children sought inclusion as issue of natural mother in grandfather's will).

<sup>48</sup> *In re Hall*, Jan. 31, 1985, at 6, cols. 2-3. In *Hall*, the court asserted that prior to 1964 adopted-out children had both intestate rights of inheritance and testamentary rights under a will of a natural relative. *Id.* at col. 2. Because section 117 only terminated intestacy rights, adopted-out children did not require a statutory presumption in their favor to be included in the wills of their natural kindred. *Id.*

by statutory law.<sup>49</sup>

There is currently no statutory limitation on the use of the term issue with respect to adopted-out children.<sup>50</sup> It is submitted, therefore, that the rights of adopted-out children to inherit as issue under the will of a natural relative should be preserved by the common law rule. In limiting the inheritance rights of adopted-out children, the *Best* court acted contrary to statutory authority and legislative intent and thus engaged in judicial legislation.<sup>51</sup>

#### PROBLEMS REGARDING TESTATOR INTENT AND PUBLIC POLICY

The main purpose of a will construction proceeding is to determine the intent of the testator.<sup>52</sup> If the intent cannot be ascertained from the language of the will, a court may apply certain rules of construction to provide a reasonable intent under the particular circumstances.<sup>53</sup> It is submitted that the *Best* court set forth a rule of construction that may defeat the testator's intent in certain situations. For example, this problem may arise in hybrid adoption cases, such as the adoption of a child by a stepparent or family member.<sup>54</sup> In applying the New York anti-lapse statute<sup>55</sup> to hybrid adoptions, courts have held that the adopted-out children of a beneficiary who predeceased the testator were entitled to take

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<sup>49</sup> *Id.* at cols. 2-3.

<sup>50</sup> See N.Y. EST. POWERS & TRUSTS LAW §§ 1-2.10, 2-1.1, 1-2.5 & 4-1.1 (McKinney 1981); *supra* note 43.

<sup>51</sup> *Cf. In re Malpica-Orsini*, 36 N.Y.2d 568, 571, 331 N.E.2d 486, 488, 370 N.Y.S.2d 511, 514 (1975) (courts are not empowered to extend the reach of legislation); *Bright Homes v. Wright*, 8 N.Y.2d 157, 162, 168 N.E.2d 515, 517, 203 N.Y.S.2d 67, 70 (1960) ("courts are not supposed to legislate under the guise of interpretation;" existing evils should be corrected by Legislature); *People v. Foster*, 297 N.Y. 27, 31, 74 N.E.2d 224, 225 (1947) (court may not expand scope of statute).

<sup>52</sup> See *In re Cord*, 58 N.Y.2d 539, 544, 449 N.E.2d 402, 404, 462 N.Y.S.2d 622, 624 (1983); *In re Jones*, 38 N.Y.2d 189, 191, 341 N.E.2d 565, 567, 379 N.Y.S.2d 55, 58 (1975); 7 WARREN'S HEATON, *supra* note 1, at § 16, ¶1.

<sup>53</sup> See 7 WARREN'S HEATON, *supra* note 1, at § 16, ¶2. Rules of construction are based on past experience and should presumably reflect what the majority of testators would intend given the testamentary language. *Id.* at 2(a). These fictitious presumptions provide the courts and attorneys with a degree of predictability in drafting and interpreting testamentary instruments. *Id.*

<sup>54</sup> See LAW REVISION COMM'N REP. 1985, *supra* note 40, at 470-71.

<sup>55</sup> N.Y. EST. POWERS & TRUSTS LAW § 3-3.3 (McKinney 1981). Under the New York anti-lapse statute, testamentary dispositions made to issue, brothers or sisters do not lapse if one of the beneficiaries predecease the testator. Instead, the disposition vests in the surviving beneficiaries *per stirpes*, unless the will provides to the contrary. See N.Y. EST. POWERS & TRUSTS LAW § 3-3.3(a) (McKinney 1981).

as class designees in the testator's will.<sup>56</sup> In future cases involving hybrid adoptions under the anti-lapse statute, it is suggested the *Best* rule would preclude inheritance by the adopted-out child, thereby causing the lapse of the bequest and defeat of the testator's intent.

Notwithstanding the judicial legislation aspects of the *Best* opinion,<sup>57</sup> the court did raise important policy considerations in support of its decision.<sup>58</sup> The adopted child should be assimilated as fully as possible into his or her adoptive family, while severing the child's ties with his natural family.<sup>59</sup> The *Best* court held that allowing adopted-out children to inherit from their natural kindred would breach the confidentiality of adoption records and, consequently hinder the assimilation process into the new family.<sup>60</sup> The

<sup>56</sup> See *In re Bissell*, 74 Misc. 2d 330, 332, 342 N.Y.S.2d 718, 720 (Sur. Ct. Allegany County 1973). In *Bissell*, a hybrid adoption arose when the children involved were adopted by their stepfather after their biological father, the named beneficiary, died. *Id.* at 331, 342 N.Y.S.2d at 719. The court in *Bissell* discussed section 117 of the Domestic Relations Law and determined that because the case involved a disposition by will, the rights of the adopted-out children were preserved by subdivision 2 of section 117. *Id.* at 331-32, 342 N.Y.S.2d at 719-20; see *supra* note 5 and accompanying text. The court also cited the New York anti-lapse statute, N.Y. EST. POWERS & TRUSTS LAW § 3-3.3, in support of its decision. 74 Misc. 2d at 332, 342 N.Y.S.2d at 720. In noting that the testatrix made no effort to change her will after the children were adopted, the court declared that the testatrix' original intent to include the children in her will was not affected by the changes in the family structure. *Id.* at 331-32, 342 N.Y.S.2d at 719-20.

On facts similar to *Bissell*, the Pennsylvania Supreme Court reached the same conclusion and permitted an adopted-out child to inherit as the issue of her paternal grandfather, relying on the testamentary language as evidence of the intent of the testator. In *re Tracy*, 464 Pa. 300, 301, 346 A.2d 750, 751-52 (1975). In *Tracy*, after the natural parents divorced, the wife's second husband adopted her child. *Id.* at 301, 346 A.2d at 751. The court stated under the circumstances "[i]t is unlikely that [the grandfather] would have desired to exclude [the child] from benefits under the trust merely because his son gave his consent to her adoption by her stepfather." *Id.* at 302, 346 A.2d at 752.

<sup>57</sup> See *supra* note 51 and accompanying text.

<sup>58</sup> See *In re Best*, 66 N.Y.2d at 155-56, 485 N.E.2d at 1012-13, 495 N.Y.S.2d 347-48; *supra* notes 21-22 and accompanying text.

<sup>59</sup> See *Doe v. Roe*, 37 App. Div. 2d 433, 436, 326 N.Y.S.2d 421, 425 (2d Dep't. 1971); *Charles v. James*, 56 Misc. 2d 1056, 1058, 290 N.Y.S.2d 993, 995 (Family Ct. Kings County 1968).

The 1963 Temporary State Commission report stated that the purpose of granting adopted children full rights of inheritance from adoptive parents and kindred was "to carry out a public policy of placing the adopted child so far as possible within the bloodlines of his new family for inheritance purposes." REPORT [1963], *supra* note 31, at appendix E, p. 147; see Rein, *supra* note 2 at 717 (for assimilation and succession purposes, adopted children must be treated as if born into adoptive family).

<sup>60</sup> See *In re Best*, 66 N.Y.2d at 155, 485 N.E.2d at 1012-13, 495 N.Y.S. 2d at 347-48; see N.Y. DOM. REL. LAW § 114 (McKinney 1977), which provides in pertinent part that:

[A]ll [adoption orders] . . . shall be filed in the office of the court granting the

court further stated that the stability of property titles and the finality of surrogate court decrees would always be in doubt.<sup>61</sup> While the policy considerations raised by the court need to be addressed, it is suggested that the Legislature could more effectively remedy these problems, and provide the necessary deference to the testator's intent.<sup>62</sup>

#### PROPOSED STATUTORY AMENDMENT

The *Best* court stated that it would not express an opinion with respect to hybrid adoption situations.<sup>63</sup> It is submitted that the court's reluctance to address hybrid situations may result in the unwarranted denial of inheritance rights of adopted children from their natural families.

In 1985, the New York State Law Revision Commission proposed a legislative solution to the problems raised in the *Best* case.<sup>64</sup> The Commission suggested a statutory distinction between

adoption and the order shall be entered in books which shall be kept under seal

. . .

. . . No order for disclosure or access and inspection shall be granted except on good cause shown and on due notice to the adoptive parents . . .

*Id.* The policy of confidentiality also encompasses the medical records of the adopted child and his natural parents; however, such records may be provided for the child or adoptive parents as long as information identifying the natural parents is eliminated. N.Y. Soc. SERV. LAW § 373-a (McKinney 1983).

Recently, in *In re Walker*, 64 N.Y.2d 354, 476 N.E.2d 298, 486 N.Y.S.2d 899 (1985), the New York Court of Appeals stated that the policy of confidentiality protects the adopted child from discovering disturbing facts concerning the child's birth or parents, and insures the privacy and identity of the natural parents while protecting the privacy of the relationship between the adoptive parents and the adopted child. *Id.* at 361, 476 N.E.2d 298, 302, 486 N.Y.S.2d 899, 903; *see also In re Linda F. M.*, 52 N.Y.2d 236, 239-40, 418 N.E.2d 1302, 1304, 437 N.Y.S.2d 283, 285 (1981)(good cause for disclosure of natural parents identity not met by mere desire to know who parents are). *But cf. In re Anonymous*, 92 Misc. 2d 224, 226-27, 399 N.Y.S.2d 857, 859 (Sur. Ct. Queens County 1977)(psychiatric problems of adopted person stemming from adoption itself constituted good cause for disclosure).

<sup>61</sup> *In re Best*, 66 N.Y.2d at 156, 485 N.E.2d at 1013, 495 N.Y.S.2d at 348. The court noted that the possibility would always exist that a nonmarital child who was adopted out of the family might surface, thereby upsetting surrogate decrees. *Id.* The court also recognized the difficulty in conducting a complete search for an adopted-out child, especially if his existence was never known to the survivors. *Id.*

<sup>62</sup> *See In re Kane*, N.Y.L.J., Dec. 6, 1985, at 17, col. 4. On facts similar to *Best*, Surrogate Radigan asserted that such situations involving nonmarital, adopted-out children as issue presented problems that called for "corrective measures to be enacted into law . . ." *Id.* at cols. 4-5.

<sup>63</sup> *In re Best*, 66 N.Y.2d at 155 n.1, 485 N.E.2d at 1012 n.1, 495 N.Y.S.2d at 347 n.1.

<sup>64</sup> *See Law Revision Comm'n Rep.* 1985, *supra* note 40. The proposal offers two possible amendments to Domestic Relations Law section 117. *Id.* at 481-85 The first proposed

children adopted by natural relatives or stepparents and those adopted by non-relatives or remote kindred.<sup>65</sup> Under this distinction children within the former group would be permitted to inherit as the issue of natural descendants, but those in the latter group would be excluded.<sup>66</sup>

Notwithstanding this proposal, situations may arise where a child is adopted by non-relatives or remote kindred but, nevertheless, remains in contact with his natural family.<sup>67</sup> Instead of denying such a child inheritance rights, as the Commission's proposal would, it is suggested that a provision be added to the Commission's proposal that would grant judges discretion to permit such a child to inherit as the issue of his natural relatives upon a showing of good cause.<sup>68</sup> The good cause standard could be met by proving

amendment seeks to ensure intestate rights of inheritance for adopted children from their natural parents if the child is adopted by a close relative or a stepparent. *Id.* The second proposed amendment limits the changes of section 117 to the inheritance rights of adopted children under wills of natural descendants. *Id.* at app. C; see *infra* notes 65-66 and accompanying text.

<sup>65</sup> Law Revision Comm'n Rep. 1985, *supra* note 40, at 468-69, 472. The Commission's proposal in appendix C of the report suggests amending Domestic Relations Law § 117 to provide, in pertinent part:

2 (a) As to the wills of persons . . . or to inter vivos instruments . . . a designation of a class of persons based upon natural relationship shall, unless the will or instrument expresses a contrary intention, be deemed to include an adoptive child who was a member of such class prior to adoption only if:

(1) an adoptive parent (i) is married to the child's natural parent, (ii) is the child's natural grandparent, or (iii) is a descendant of such grandparent, and

(2) the testator or creator is the child's natural grandparent or a descendant of such grandparent.

*Id.* at app. C, iii. The Commission also proposes the amendment of sections 2-1.3 and 3-3.3 of the Estates, Powers and Trusts Law to refer to issue in those sections subject to the proposed changes in section 117 of the Domestic Relations Law. *Id.* at iii-iv.

<sup>66</sup> *Id.* at 472. The Commission contended that children who are adopted by close relatives or stepparents will almost always be known to their natural families and vice versa. *Id.* Natural relatives presumably would want their natural issue to share in class gifts given to issue, despite their adoption out of the family. *Id.* at 480. Furthermore, because it is likely their identities will be known, jurisdictional problems would be avoided since the children could be easily located. *Id.* at 472.

<sup>67</sup> See A. SOROSKY, A. BARAN & R. PANNER, *THE ADOPTION TRIANGLE* 207-14 (1978). The authors introduced the concept of "open adoption" in 1976. *Id.* at 207. Open adoption requires the natural parent(s) to give up all rights to the child upon adoption, but permits them to receive information regarding the child's welfare and activities, and to maintain continuing contact with the child. *Id.* See also R. LASNIK, *A PARENT'S GUIDE TO ADOPTION* 125 (1979) (open adoption viable option for unwed mothers who cannot accept permanent separation from child).

<sup>68</sup> Cf. N.J. STAT. ANN. § 9:3-50(a) (West 1976 & Supp. 1985). This statute is similar to section 117 of the New York Domestic Relations Law in that it terminates the rights of an adopted child to inherit under intestacy laws from a natural parent. See *id.* However, the

contacts between the child and his natural family sufficient to establish a probable intent to include the child as issue.<sup>69</sup> The Commission's proposal, coupled with this additional proviso, would effectively consider the policy concerns raised by the *Best* court, while affording deference to the probable intent of the testator.

#### CONCLUSION

In New York, the rights of adopted children to inherit from their natural parents and kindred are legislative creations, and should be restricted only by legislative action. The *Best* court failed to properly interpret the applicable statutory provisions, and abrogated the common law by prohibiting adopted children from inheriting as the issue of a natural relative under a will. Further, in constructing this rule, the court did not consider the intent of a testator in situations involving hybrid adoptions. The court's omission of any discussion of these issues may lead to confusion in future will construction proceedings, and may result in the unwarranted denial of inheritance rights to adopted children in certain hybrid situations. The proposal set forth in this Comment would create a statutory rule that would address the policy concerns of the *Best* court while also heeding the probable intent of a testator.

*John J. Crowe*

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New Jersey statute also provides that "[f]or good cause, the court may in the judgment provide that the rights of inheritance from or through a deceased parent will not be affected or terminated by the adoption." *Id.*

Although section 9:3-50(a) deals only with intestacy rights, it is submitted that the inclusion of a good cause provision in the proposed changes to section 117 would provide the courts with flexibility in situations where a nonrelative has adopted a child and contact between the child and his natural family is maintained, or where strong evidence can be established of an intent by the natural relative to include the adopted child within the class defined as issue.

<sup>69</sup> *Cf. In re Adoption of Children by F.*, 170 N.J. Super. 419, 425 (Probate Div. 1979)(after adoption by stepfather, children permitted to contact and visit with natural father); *In re Gerald G.G.*, 61 App. Div. 2d 521, 523, 403 N.Y.S.2d 57, 59 (2d Dep't 1978)(natural father visited son numerous times, paid his son's plane fare so son could visit him, provided financial support, and exchanged telephone calls and letters with son); *In re Tracy*, 464 Pa. 300, 302, 346 A.2d 750, 751-52 (1975)(adopted child visited with natural grandfather, and received birthday gifts and tuition funds from grandfather).