Buffalo Law Review

Volume 15 | Number 1 Article 16

10-1-1965

Decedents Estates—Testamentary Trusts—Adopted Children Now Presumed Included Within Class Term "Issue" as Used in Wills and Testamentary Trusts

Ronald J. Thomas

Witenski or its legislative counterpart aimed toward reducing the chances of an indigent becoming the unfortunate victim of malfeasance resulting from inept representation or a sham defense by assigned counsel. The serious problem of adequacy or quality of assigned representation is yet to be acted upon by the legislature or remedied by the courts[49] of this State. This writer recommends that the qualifications of all attorneys participating in any of the assigned counsel programs be approved by the Appellate Division of their respective Departments, using whatever standards or criteria the judiciary deem necessary. Also in this area, there is a lack of a standard workable test of indigency. Since indigency is a very relative concept and not readily definable, perhaps some more attention might be devoted to defining the maximum limits between the deserving indigent and persons who might try to avail themselves of the opportunity to gain free counsel while being reasonably able to retain their own counsel.[50] Only the future will bear out the success or failure of this governmental attempt to overcome one of the many inequalities in a social structure which purports to guarantee equal civil rights and liberties to all of its members. The ultimate democratic goal of the elimination of wealth as a factor affecting the quality and quantity of justice doled out to an individual may perhaps never be completely achieved, but a more substantial equality can now at least be realized by persons in this jurisdiction encumbered by the burden of poverty.

DAVID A. GRZYWNA

DECEDENTS ESTATES—TESTAMENTARY TRUSTS—ADOPTED CHILDREN NOW PRESUMED INCLUDED WITHIN CLASS TERM "ISSUE" AS USED IN WILLS AND TESTAMENTARY TRUSTS

William G. Parks, the testator, died in 1909 creating testamentary trusts for each of his surviving children. The income payable to each child for life and " 'as each of said children . . . dies, the principal of the trust fund of such child . . . shall be distributed among his issue . . . in equal shares.' "[1] *A*, one of the testator's children, an income beneficiary for life, died in 1961. *B*, *A*'s son predeceased her. *B*'s sole survivors were a natural daughter, *C*, and an adopted son, *D*. The issue in this case concerns the rights of the two children, *C* and *D*, to take the portion of the principal of the trust fund which would have gone to their parent *B* had he survived his mother *A*. In determining the respective rights of the two children according to the provisions of the will the surrogate decreed that the adopted child, *D* must be excluded from

49. But see People v. Tomaselli, 7 N.Y.2d 350, 165 N.E.2d 551, 197 N.Y.S.2d 697 (1960). See generally Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 Nw. U.L. Rev. 289 (1964).

50. Silverstein, *supra* note 26, at 105-22.

1. In the Matter of the Estate of Park, 15 N.Y.2d 413, 416, 207 N.E.2d 859, 859, 260 N.Y.S.2d 169, 170 (1965).

participation in the distribution of the trust on the ground that there was no intention, express or implied, in the testator's will, to include the adopted child within the term *issue* as used in the will.[2] The Appellate Division affirmed the order holding that the law firmly establishes that absent any evidence to the contrary in any instrument, "issue" shall include only those who are related to the named ancestor by blood.[3] On appeal, a divided Court of Appeals, amid vigorous dissent, *held,* order reversed. Under the words of section 117 of the Domestic Relations Law[4] the presumption is that the testator (settlor) must know that in the light of New York policy an adopted child has exactly the same legal relation to the parent as the natural child and absent a stated purpose to exclude such a child, he must be deemed included in the generic terms, "heirs," "child," "issue," etc. The court also held that the precautionary addendum of section 117[5] is inapplicable. The addendum provides that where there is a limitation over dependent on the foster parent dying without heirs— a foster child is not to be deemed the child of the foster parent so as to defeat rights of remaindermen. The court held the addendum inapplicable in this case because the natural child, *C,* did survive, hence her father did not die without an heir. *In the Matter of the Estate of Park,* 15 N.Y.2d 413, 207 N.E.2d 859, 260 N.Y.S.2d 169 (1965).

Adoption was unknown to the common law and now exists solely by virtue of statute. New York State's first general statute concerning adoption was enacted in 1873 and by it the adopted child became entitled to all the rights and subject to all the duties arising from the legal relationship of parent and child, except the right of inheritance.[6] By the laws of 1887 this specific denial of inheritance was amended to read, "including the right of inheritance."[7] This amendment also contained a precautionary addendum, that if a limitation over of real property under any instrument was dependent on the foster parents death without heirs, the adopted child would not sustain

2. In the Matter of the Estate of Park, 39 Misc. 2d 665, 241 N.Y.S.2d 911 (Surr. Ct. 1963).

3. In the Matter of the Estate of Park, 20 A.D.2d 926, 249 N.Y.S.2d 703 (2d Dep't 1964).

4. N.Y. Sess. Laws 1961, ch. 147, § 1, art. VII, Title IV, § 117. The third paragraph read: "The foster parents or parent and the foster child shall sustain toward each other the legal relation of parent and child and shall have all the rights and be subject to all the duties of that relation *including the rights of inheritance from each other.*" (Italics supplied.)

5. N.Y. Sess. Laws 1961, ch. 147, § 1, art. VII, Title IV, § 117. The addendum read: "As respects the passing and limitation over of real or personal property dependent under the provisions of any instrument on the foster parent dying without heirs, the foster child is not deemed the child of the foster parent so as to defeat the rights of remaindermen." (Deleted in March, 1964.)

6. N.Y. Sess. Laws 1873, ch. 830, § 10, read: "A child, when adopted, shall take the name of the person adopting, and the two thenceforth shall sustain toward each other the legal relation of parent and child, and have all the rights and be subject to all the duties of that relation, *excepting the right of inheritance,* except that as respects the passing and limitation over of real and personal property, under and by deeds, conveyances, wills, devises and trusts, said child adopted shall not be deemed to sustain the legal relation of child to the person so adopting. (Italics supplied.)

7. N.Y. Sess. Laws 1887, ch. 703, § 1.

the legal relationship of child to his foster parents so as to deprive a remainderman.[8] The literal scope of the phrase "including the right of inheritance" was soon clarified in 1896 however, when, upon consolidation into the Domestic Relations Law, it was amended to read, "including the right of inheritance from each other."[9] In 1909 this part of the Domestic Relations Law was renumbered as section 114.[10] Later amendments renumbered section 114 as section 115, preserved the adopted child's rights of inheritance from his natural parents and granted reciprocal inheritance rights to the natural and adopted children of the foster parents.[11] Except for later reenactment of section 115 as section 117[12] the statute remained unchanged until 1963. Then, the New York legislature completely eliminated the precautionary addendum and changed the third paragraph,[13] thus authorizing inheritance by the adopted child from his foster parents and their kindred and at the same time substantially eliminating all inheritance rights of the child from his natural parents.[14] The Decedent Estate Law was also amended by the same legislature. The newly inserted section provides that the adopted child will be included within generic terms commonly used in wills unless the instrument specifically provides to the contrary.[15] These changes in the statutory law are intended to resolve the confusion and uncertainty in the case law as to the extent to which an adopted child is included in bequests to persons described by such terms as "issue," "children," "descendants," etc. The amendments are viewed as the ultimate steps in what has been this state's growing public policy for seventy years, that of placing the adopted child as far as possible within the blood stream of his new family and giving him all the rights and duties of a natural

8. N.Y. Sess. Laws 1887, ch. 703, § 1, read in part: ". . . except that as respects the passing and limitation over of real and personal property, under and by deeds, conveyances, wills, devises and trusts, dependent upon the person adopting dying without heirs, said child adopted shall not be deemed to sustain the legal relation of child to the person so adopting *so as to defeat the rights of remaindermen, . . .*" (Italics supplied.)

9. N.Y. Sess. Laws 1887, ch. 703, § 1.

10. N.Y. Sess. Laws 1909, ch. 19, § 1.

11. N.Y. Sess. Laws 1938, ch. 606, § 1; N.Y. Sess. Laws 1940, ch. 442, § 1.

12. N.Y Sess. Laws 1961, ch. 147, § 1.

13. N.Y. Dom. Rel. Law, § 117, L. 1963, ch. 406. The third paragraph now reads: "The foster parents or parent and the foster child shall sustain toward each other the legal relation of parent and child and shall have all the rights and be subject to all the duties of that relation including the rights of inheritance from and through each other *and the natural and adopted kindred of the foster parents or parent.*" (Italics supplied.)

14. N.Y. Dom. Rel. Law, § 117, reads in part: "The rights of a foster child to inheritance and sucession from and through his natural parents shall terminate upon the making of the order of adoption except as hereinafter provided." The only exception being where a natural parent remarries and consents to the adoption of the child by the spouse. In such case, the right of the adopted child to inherit from the natural family is unaffected by the adoption.

15. N.Y. Decedents Estate Law, § 49, effective March, 1964, provides in part: "A will or any other written instrument prescribing the devolution of property rights which refers to issue, lawful issue, children, grandchildren, descendants, heirs-at-law, next of kin, distributees or words of like import is deemed and shall be construed to include a reference to persons duly adopted by a person whose natural child would be a member of that class unless the will or other instrument specifically provides to the contrary."

child.[16] These new amendments apply however, only to estates and wills of persons dying on or after their effective date, March, 1964. Thus the present case was unaffected by the change.

An examination of the case law interpreting section 117 of the Domestic Relations Law and dealing with problems of participation of adopted children in bequests and devises to "issue," "children," "descendants," etc., reveals confusion and uncertainty as to the extent of such participation to be enjoyed by adopted children. The courts have struggled to determine whether an adopted child is to be included within these generic terms in order to allow him to share in the bequest or devise on an equal basis with the natural offspring. The New York "rule" has been held to be that the limitation in the will, viz., "issue," "children," "descendant," etc., will be held to designate only those related to the named ancestor by blood unless a contrary intent to include the adopted child can be gleaned from the language, context, or circumstances of the instrument.[17] Thus the presumption that the adopted child is to be excluded from bequest to "issue" of his foster parents, unless rebutted by extraneous facts showing the testator's intent to benefit the child, has governed most of the decisions.[18] Where the testator knew of the adoption, such knowledge has been considered an extraneous circumstance indicating an intent to include the adopted child in the terms "issue" etc.[19] The "rule" however has not been followed in a

16. Second Report of the Temporary State Commission on the Modernization, revision and simplification of the Law of Estates, Reports 1.2C and 1.3B (1963).

17. In the Matter of the Will of Upjohn, 304 N.Y. 366, 107 N.E.2d 492 (1952); In the Matter of Ricks, 12 A.D.2d 395, 212 N.Y.S.2d 548 (1st Dep't 1961), *aff'd*, 10 N.Y.2d 231, 176 N.E.2d 726, 219 N.Y.S.2d 30 (1961); In the Matter of Smith, 14 Misc. 2d 205, 177 N.Y.S.2d 280 (Surr. Ct. 1958).

18. Trowbridge v. Trowbridge, 182 Misc. 191, 48 N.Y.S.2d 180 (Sup. Ct. 1944), *aff'd*, 269 App. Div. 826, 56 N.Y.S.2d 413 (1st Dep't 1945); In the Matter of the Estate of Taintor, 32 Misc. 2d 160, 222 N.Y.S.2d 882 (Surr. Ct. 1961); In the Matter of Peabody's Will, 17 Misc. 2d 656, 185 N.Y.S.2d 591 (Surr. Ct. 1959); In the Matter of the Estate of Fales, 16 Misc. 2d 106, 183 N.Y.S.2d 5 (Surr. Ct. 1959); In the Matter of the Will of Cooke, 8 Misc. 2d 103, 165 N.Y.S.2d 806 (Surr. Ct. 1957); In the Matter of Price Will, 4 Misc. 2d 1023, 163 N.Y.S.2d 34 (Surr. Ct. 1956); In the Matter of Nicol, 3 Misc. 2d 898, 148 N.Y.S.2d 854 (Surr. Ct. 1956); In the Matter of the Estate of Holt 206 Misc. 789, 134 N.Y.S.2d 416 (Surr. Ct. 1954); In the Matter of Bauer, 205 Misc. 551, 128 N.Y.S.2d 815 (Surr. Ct. 1954); In the Matter of Clark, 137 N.Y.S.2d 252 (Surr. Ct. 1954); In the Matter of the Will of Hall, 127 N.Y.S.2d 445 (Surr. Ct. 1954); In the Matter of Eagan, 204 Misc. 856, 125 N.Y.S.2d 634 (Surr. Ct. 1953); In the Matter of Denton, 195 Misc. 938, 91 N.Y.S.2d 203 (Surr. Ct. 1949); In the Matter of the Will of Schmadeke, 80 N.Y.S.2d 372 (Surr. Ct. 1948); In the Matter of Stecher, 190 Misc. 502, 73 N.Y.S.2d 595 (Surr. Ct. 1947); In the Matter of the Estate of Coddleback, 174 Misc. 322, 20 N.Y.S.2d 862 (Surr. Ct. 1940); In the Matter of the Estate of Marsh, 143 Misc. 609, 257 N.Y. Supp. 514 (Surr. Ct. 1932); In the Matter of the Estate of Cotheal, 121 Misc. 665, 202 N.Y. Supp. 268 (Surr. Ct. 1923), see cases cited in note 17, *supra*.

19. In the Matter of the Will of Upjohn, 304 N.Y. 366, 107 N.E.2d 492 (1952); In the Matter of Bergan, 27 Misc. 2d 804, 208 N.Y.S.2d 653 (Surr. Ct. 1960); In the Matter of the Will of Camp, 6 Misc. 2d 593, 161 N.Y.S.2d 252 (Surr. Ct. 1957); In the Matter of the Will of Myer, 205 Misc. 880, 129 N.Y.S.2d 531 (Surr. Ct. 1954); In the Matter of Fedders, 187 Misc. 207, 61 N.Y.S.2d 340 (Surr. Ct. 1946); In the Matter of Ward, 9 A.D.2d 950, 195 N.Y.S.2d 933 (2d Dep't 1959), *aff'd*, 9 N.Y.2d 722, 174 N.E.2d 326, 214 N.Y.S.2d 340 (1961), where the extraneous circumstance indicating the testatrixes intent was testimony that she, before her death, favored adoption generally and that she approved and advocated adoption for her childless daughter.

significant number of cases, thus making any declaration of the status of adopted children in the disposition of testamentary benefits uncertain.[20] These opposing cases have applied a contrary presumption, that of including the adopted child within the terms "issue," "children," "descendents," etc., unless an intent to exclude him from the class can be found in the will. A reading of the third paragraph of section 117, reveals a legislative intent to place the adopted child and the foster parents in the same legal relation as parent and natural child and grant them all the "rights" of that relation "including the rights of inheritance from each other."[21] Such language indicates legislative concern for the status of the adopted child in intestate situations, for there are no "rights," nor is there any "inheritance," in the strict legislative sense of these terms, in cases where the deceased dies intestate. However, a reading of the next paragraph of section 117, the addendum,[22] indicates a legislative intent to limit the participation of adopted children in testate controversies for there obviously can be no remaindermen where there is no will or trust instrument. Thus the former paragraph would only be applicable to an adopted child involved in intestate controversies, while the addendum would only be applicable to cases where the adopted child claims inclusion under the terms of a will or trust instrument. The statute however, has not so been applied. Most of the cases that have denied the adopted child any participation in bequests and devises to "issue," "children," etc., have done so by reliance on well-settled case law without any consideration of the Domestic Relations Law.[23] On the other hand, some courts that have allowed such participation in testate controversies have relied on a partial reading of the third paragraph of section 117 which provides for the legal relation and rights of inheritance. They have read this paragraph only insofar as it creates the same legal relation and have ignored the following intestate language.[24] Other courts that have reached the same result, that of allowing the adopted child to be included in the class terms used by a testator or settlor, have done so by disregarding the proper intestate import of the words of the third paragraph of section 117. They have, in effect, failed to use the language of the

20. Gilliam v. Guaranty Trust Co., 186 N.Y. 127, 78 N.E. 697 (1906); Von Beck v. Thomsen, 44 App. Div. 373, 60 N.Y. Supp. 1094 (1st Dep't 1899), *aff'd*, 167 N.Y. 601, 60 N.E. 1121 (1899); United States Trust Co. of N.Y. v. Hoyt, 150 App. Div. 621, 135 N.Y. Supp. 849 (1st Dep't 1912); In the Matter of the Will of Charles, 200 Misc. 452, 102 N.Y.S.2d 497 (Surr. Ct. 1951), *aff'd*, 279 App. Div. 741, 109 N.Y.S.2d 103 (1st Dep't 1951), *aff'd*, 304 N.Y. 776, 109 N.E.2d 76 (1952); In the Matter of the Will of Cohn, 184 Misc. 258, 55 N.Y.S.2d 797 (Surr. Ct. 1944), *aff'd*, 271 App. Div. 775, 66 N.Y.S.2d 408 (1st Dep't 1946), *aff'd*, 297 N.Y. 536, 74 N.E.2d 471 (1947); In the Matter of the Trust of Sands (Barbita), 20 Misc. 2d 647, 190 N.Y.S.2d 584 (Sup. Ct. 1959); In the Matter of the Will of Weller, 7 Misc. 2d 366, 165 N.Y.S.2d 531 (Sup. Ct. 1957); In the Matter of the Will of Mackie, 202 Misc. 795, 109 N.Y.S.2d 402 (Surr. Ct. 1952); In the Matter of the Estate of Hecker, 178 Misc. 449, 33 N.Y.S.2d 365 (Surr. Ct. 1942).

21. N.Y. Sess. Laws 1961, ch. 147, § 1, art. VII, Title IV, § 117; for text see note 4 *supra*.

22. N.Y. Sess. Laws 1961, ch. 147, § 1, Art. VII, Title IV, § 117; for text see note 5 *supra*.

23. See cases cited in note 18 *supra*.

24. *E.g.*, In the Matter of the Will of Charles, 200 Misc. 452, 456, 102 N.Y.S.2d 497, 500 (Surr. Ct. 1951).

statute in its correct restrictive sense as meaning something obtained through laws of descent and distribution from an intestate. Instead, they have used the language as pertaining to devise.[25] Hence, the courts that have applied a presumption of inclusion of the adopted child within the common generic class terms, have done so by reliance on either a partial reading of the third paragraph of the statute or an incorrect application of it contrary to its legislative purpose, to testate controversies. Cases dealing with intestate controversies over inheritance rights of adopted children have relied on the third paragraph of the statute and have held that it allows an adopted child to take only from, not through, the estate of his deceased foster parents.[26] There have been instances where such intestate cases have been relied on as authority by courts applying a presumption of exclusion in testate controversies.[27] Hence, it can be seen that section 117 of the Domestic Relations Law has given the courts little guidance in dealing with cases involving the participation of adopted children in bequests and devises from their foster kindred.

The effect of the precautionary addendum, added to the statute in 1896,[28] has also often led to varied and complex results. Many cases prior to 1952 which involved a limitation over upon the death of the foster parent dying without issue,[29] followed one of the first cases ever to be decided under the statute, *Matter of Leask*,[30] and held that the adopted child must be excluded from the bequest. These cases however, all concerned a child who had been adopted *after* the death of the testator, hence there had apparently been no opportunity for the courts to make use of the dicta in the *Leask* case, that the rights of remaindermen would be determined in accordance with the testator's intention. In *Matter of Upjohn*,[31] decided in 1952, the Court of Appeals was faced for the first time with an adoption *before* the testator's death. The court held that the testator's knowledge of the adoption meant that he intended to include the adopted child as issue and that the precautionary addendum which was "designed to safeguard the intention of the testator and not defeat it,"[32] did not

25. *E.g.*, In the Matter of the Will of Cohn, 184 Misc. 258, 55 N.Y.S.2d 797 (Surr. Ct. 1944), *aff'd*, 271 App. Div. 775, 66 N.Y.S.2d 408 (1st Dep't 1946), *aff'd*, 297 N.Y. 536, 74 N.E.2d 471 (1944); In the Matter of the Trust of Sands (Barbita), 20 Misc. 2d 647, 190 N.Y.S.2d 584 (Sup. Ct. 1959); In the Matter of the Estate of Hecker, 178 Misc. 449, 33 N.Y.S.2d 365 (Surr. Ct. 1942).

26. Hopkins v. Hopkins, 202 App. Div. 606, 195 N.Y. Supp. 605 (4th Dep't 1922), *aff'd*, 236 N.Y. 545, 142 N.E. 277 (1923); In the Matter of Reynold's Estate, 81 N.Y.S.2d 312 (Surr. Ct. 1948).

27. *E.g.*, In the Matter of the Estate of Slavens, 4 Misc. 2d 82, 149 N.Y.S.2d 73 (Surr. Ct. 1956).

28. N.Y. Sess. Laws 1961, ch. 147, § 1, art. VII, Title IV, § 117; for text see note 5 *supra*.

29. Trowbridge v. Trowbridge, 182 Misc. 191, 48 N.Y.S.2d 180 (Sup. Ct. 1944), *aff'd*, 269 App. Div. 826, 56 N.Y.S.2d 413 (2d Dep't 1944); Guaranty Trust Co. v. Brunton, 74 N.Y.S.2d 254 (Sup. Ct. 1947); In the Matter of Bauer, 205 Misc. 551, 128 N.Y.S.2d 815 (Surr. Ct. 1954); In the Matter of Eagan's Will, 110 N.Y.S.2d 438 (Surr. Ct. 1952); In the Matter of Semon, 195 Misc. 938, 91 N.Y.S.2d 203 (Surr. Ct. 1949).

30. In the Matter of Leask, 197 N.Y. 193, 90 N.E. 652 (1910).

31. In the Matter of Upjohn, 304 N.Y. 366, 107 N.E.2d 492 (1952).

32. *Id.* at 379, 107 N.E.2d at 498.

apply. Hence, in the *Upjohn* case and the cases that followed it,[33] the addendum has either yielded or been applied according to the testator's intent, which as shown, has been determined from the time of adoption. Where the issues in the past cases have concerned the participation of adopted children with natural children rather than remaindermen, the result has favored the adopted children.[34] The addendum has been applied where the adversity of interest existed not between a natural child and the adopted child but between the adopted child and "specified remaindermen" where the named individual dies without a natural child.[35] However, the rights of remaindermen, according to the *Upjohn* case, are not absolute but exist and will be made effective in accordance with the maker's intention.[36]

A "fresh reading" of section 117 of the Domestic Relations Law in the instant case has led the majority to proclaim that the words of the statute, "shall have all the rights" of the relation of "parent and child," can be read in no other way but to mean "that natural children and foster children be treated as equals in legal rights."[37] The Court announces that the presumption, "in response to the requirements of a statute such as the Domestic Relations Law," is that the testator or settlor "must know" that in the light of New York policy a foster child has exactly the same legal relation to the parent as the natural child.[38] Hence, the adopted child is deemed included within the common generic class term "issue," as used by the testator, unless the instrument specifically provides for his exclusion. The presumption applied by the Court has, as already noted, been applied in a significant number of past cases.[39]

The Court in creating this presumption, has read paragraph three of section 117[40] only as creating the same legal relation for the adopted child to the parent as a natural child. It has thus failed to give cognizance to the remainder of paragraph three of section 117 which, by its language, indicates a legislative intent to have it apply to cases of intestacy. The majority has

33. In the Matter of the Will of Bergan, 27 Misc. 2d 804, 208 N.Y.S.2d 653 (Surr. Ct. 1960); In the Matter of the Will of Camp, 6 Misc. 2d 593, 161 N.Y.S.2d 252 (Surr. Ct. 1957); In the Matter of the Will of Myer, 205 Misc. 880, 129 N.Y.S.2d 531 (Surr. Ct. 1954); In the Matter of the Trust of Day, 10 A.D.2d 220, 198 N.Y.S.2d 760 (1st Dep't 1960), where the court not only allowed an adopted child, who had been adopted 10 years before the testator's death, to participate in the trust, but went even further to allow a child adopted 7 years after the death to share in the trust.

34. In the Matter of the Estate of Walter, 270 N.Y. 201, 200 N.E. 786 (1936); In the Matter of Horn, 256 N.Y. 294, 176 N.E. 399 (1931); In the Matter of the Will of Charles, 200 Misc. 452, 102 N.Y.S.2d 497 (Surr. Ct. 1951), *aff'd*, 279 App. Div. 741, 109 N.Y.S.2d 103 (1st Dep't 1951), *aff'd*, 304 N.Y. 766, 109 N.E.2d 76 (1952).

35. In the Matter of the Will of Charles, 200 Misc. at 460, 102 N.Y.S.2d at 504.

36. In the Matter of the Will of Upjohn, 304 N.Y. 366, 107 N.E.2d 492 (1952).

37. Instant case at 416, 207 N.E.2d at 860, 260 N.Y.S.2d at 170. The majority, in its fresh reading, relies on two of the earliest cases that considered the statute, Carpenter v. Buffalo Gen. Elec. Co., 213 N.Y. 101, 106 N.E. 1026 (1914) and In the Matter of the Estate of Cook, 187 N.Y. 253, 79 N.E. 991 (1907).

38. Instant case at 415, 207 N.E.2d at 860-61, 260 N.Y.S.2d at 170.

39. See cases cited in note 20.

40. N.Y. Sess. Laws 1961, ch. 147, § 1, art. VII, Title IV, § 117; for text see note 4.

read the statute with but one end in mind, that of placing the adopted child as far as possible within the blood stream of his new family, thus effectuating what has been proclaimed to be New York's developing public policy for almost seventy years. In effectuating such policy the majority has, in effect, disregarded public policy with respect to the law of wills; that the search for the testator's intention is of primary and major significance in such cases. It may be argued that the Court has provided for the proper effect of such intention in providing that any explicit purpose stated in a will to exclude an adopted child will negate the presumption. There is, however, only one way in which due judicial respect for this basic principle of the law of wills can be shown, and it definitely is not by declaring what a testator "must know," as the present decision has done. The presumption itself must be based on a quest for the probabilities of intention. Such probabilities may often be determined by a look back to the common import, interpretation, and application given such generic terms as "issue" by testators. What did "issue" mean to most people? Was not such a term commonly thought to have a biological flavor? These must be some of the relevant considerations in determining a likelihood of intention and subsequently basing a presumption on that likelihood. The validity of the present presumption is highly questionable. It has been created "in response to the requirements" of what at best can be described as an ambiguous statute and has been based on what the majority deems the testator to have known of public policy. It could well be that it is a "subverting of the intention of past settlors and testators," as the dissent proclaims.[41]

In announcing that the addendum does not apply in the present case because "the foster parent would have in no case died without heirs"[42] and thus the act of adoption would not itself and alone cut off any remainder rights, the court has adhered to a strict reading of the addendum followed in a number of other cases.[43] Although the Court's statement of the provisions of the will does not indicate that there was a limitation over dependent on the foster parent dying without heirs, there was in fact such a limitation over in the will.[44] Thus the Court's conclusion, based on the presence of a natural heir, is explained. The minority feels however, that the inclusion of the adopted child has resulted in a denial of one half of the remainder to the natural child as remainderman. However, if the wording of the addendum is to be strictly adhered to, then the dissent's argument must fail. By its very language the addendum only applies to the kind of remainder that makes its vesting dependent on the foster parent dying without issue. Here the vesting of the natural child's remainder is dependent only on the foster parent's death, hence it clearly does not fall within the terms of the addendum.

41. Instant case at 420, 207 N.E.2d at 862, 260 N.Y.S.2d at 173.
42. *Ibid.*
43. In the Matter of the Estate of Walter, 270 N.Y. 201, 200 N.E. 786 (1936); In the Matter of the Will of Horn, 256 N.Y. 294, 176 N.E. 399 (1931); In the Matter of Leask, 197 N.Y. 193, 90 N.E. 652 (1910). For text of addendum see note 5 *supra.*
44. Brief for Appellant, p. 15c.

The present decision is significant when looked at for its narrow precedential value. There can be little doubt that the Court, as presently constituted, will continue to apply the same presumption and strict reading of the statute. The history of litigation concerning the status of adopted children in bequests and devises to a class has exhibited persistent concern for these children. One court, in excluding an adopted child from participation because of an absence of intention of the testator to favor the child, seemed wholly dissatisfied with the presumption applied in the greater number of cases when it stated that "any consideration of the problem by search for an intention to benefit the adopted child does not give section 115 [of the Domestic Relations Law] real effect."[45] Thus it would seem that the decision in the instant case has, for the immediate future, settled a frequent and troublesome source of litigation in the law of estates as applied to wills and trust instruments of persons dying before the 1963 legislative amendments.[46] Whether the ends achieved by the Court justify the means used however, is highly doubtful. The Court has, in its task of creating certainty in the law and promulgating the public policy regarding adopted children, left behind it scarred and battered remnants of principles of the law of wills.

RONALD J. THOMAS

EVIDENCE—AFFIDAVIT CONCERNING JURORS' UNAUTHORIZED VIEW INADMISSIBLE AS GROUND FOR NEW TRIAL

One defendant was convicted of burglary in the third degree and possession of burglary instruments as a felony, the other defendant was convicted of the same burglary count and possession of burglary instruments as a misdemeanor. Defendants moved to set aside the verdict and for a new trial based on an affidavit of defendants' trial counsel alleging that certain of the jurors told him shortly after the verdict was rendered that during the trial, without direction of the court, they had visited the premises where the crimes were allegedly committed. On a joint appeal from an affirmance of the trial court's order denying the motions, *held*, affirmed, three judges dissenting. Jurors may not impeach their own duly rendered verdict by statements averring their own misconduct outside the jury room presented in the form of hearsay affidavits, and although an unauthorized view of such premises is improper, it is not, without more, such an impropriety as to require granting of a new trial. *People v. DeLucia*, 15 N.Y.2d 294, 206 N.E.2d 324, 258 N.Y.S.2d 377 (1965), *cert. denied*, 34 U.S.L. Week 3106 (U.S. Oct. 12, 1965).

45. In the Matter of the Estate of Taintor, 32 Misc. 2d 160, 163, 222 N.Y.S.2d 882, 885 (Surr. Ct. 1961).

46. The presumption to be applied is now the same for all cases. In controversies where the testator or settlor has died prior to the 1964 effective date of the amendments, the presumption will be applied by "virtue" of the present case. Where the testator or settlor has died after the effective date, the presumption by virtue of Section 49 of the Decedent's Estate Law will control. For text of statute see note 15 *supra*.