St. John's Law Review

Volume 51, Fall 1976, Number 1 Article 14

Use of Term "Issue" in a Will Presumed to Encompass Illegitimates

St. John's Law Review

Follow this and additional works at: https://scholarship.law.stjohns.edu/lawreview

Recommended Citation

St. John's Law Review (1976) "Use of Term "Issue" in a Will Presumed to Encompass Illegitimates," *St. John's Law Review*: Vol. 51 : No. 1 , Article 14.
Available at: https://scholarship.law.stjohns.edu/lawreview/vol51/iss1/14

This Recent Development in New York Law is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact lasalar@stjohns.edu.

litigation will involve realistic inquiry into the merits of individual claims, rather than mechanical application of a dogmatic formulation.

Furthermore, the *Micallef* decision is in conformity with the view, recently expressed by both the legislative[157] and judicial[158] branches in New York, that rigid, absolute rules of liability which prevent the assertion of meritorious claims should be replaced with flexible rules allowing inquiry into the individual merits of each case. Continued judicial refusal to reexamine a rule that was established a quarter-century ago and has since been the subject of much criticism would have been unjustified, for, as one court stated in a different context, courts "act in the finest common-law tradition when [they] adapt and alter decisional law to produce common-sense justice."[159]

Use of term "issue" in a will presumed to encompass illegitimates.

An examination of recent judicial decisions on both the federal and state levels evinces an increased concern for the rights of illegitimates.[160] The extent to which children born out of wedlock enjoy the same rights as legitimates is far from settled, however, inasmuch as conflicting decisions continue to appear.[161] One troublesome ques-

[157] *See* ch. 69, § 1, [1975] N.Y. Laws 95 (McKinney) (codified at CPLR 1411-13)(comparative negligence statute). It is interesting to note that the legislature's enactment of this chapter was viewed by some commentators as a legislative overruling of *Campo*. *See* FRUMER & FRIEDMAN, *supra* note 134, § 7.02, wherein the authors note that in recommending the statute to the legislature, the Judicial Conference specifically stated that under the new statute the patent danger rule should only be a factor in diminishing damages. The *Micallef* Court, however, based its decision on other grounds, since the cause of action accrued prior to the effective date of the comparative negligence law. *See* CPLR 1413.

[158] *See, e.g.*, Dole v. Dow Chem. Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

[159] Woods v. Lancet, 303 N.Y. 349, 355, 102 N.E.2d 691, 694 (1951) (Desmond, J.).

[160] *See, e.g.*, New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973) (illegitimates have right to receive welfare benefits); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972) (illegitimates have right to receive workmen's compensation death benefits upon death of father); Levy v. Louisiana, 391 U.S. 68 (1968) (illegitimates have standing to sue for wrongful death of mother); *cf.* Stanley v. Illinois, 405 U.S. 645 (1972) (father entitled to hearing on his fitness to retain custody of his illegitimate child); Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968) (mother has standing to sue for wrongful death of illegitimate child). Decisions on the state level have had a similar effect. *See, e.g., In re* Johnson, 75 Misc. 2d 502, 348 N.Y.S.2d 315 (Sur. Ct. Bronx County 1973) (illegitimates have standing to sue for wrongful death of father); Prudential Ins. Co. of America v. Hernandez, 63 Misc. 2d 1058, 314 N.Y.S.2d 188 (Sup. Ct. N.Y. County 1970) (illegitimates entitled to proceeds of father's life insurance policy); *cf.* Holden v. Alexander, 39 App. Div. 2d 476, 336 N.Y.S.2d 649 (2d Dep't 1972) (father has standing to sue for wrongful death of illegitimate child).

[161] While the Supreme Court has struck down as violative of the equal protection clause several statutory schemes which distinguished between legitimates and illegitimates, *see*

tion concerns the right of an illegitimate to take under a will which bequeaths property to the "issue" of either the testator or some other party. Recently, the Appellate Division, First Department, in In re *Estate of Hoffman*,[162] took an important step towards the elimination of the legal impediments suffered by illegitimate children by holding that absent an express intention to the contrary, use of the word issue in a will encompasses both legitimate and illegitimate children.[163] In so holding, the court expressly overruled well-established precedent steeped in common law tradition.[164]

In *Hoffman*, the testatrix's will established a trust for the benefit of her two cousins, and provided that upon the death of one of the original beneficiaries his share of the income was to pass to his issue for the remainder of the trust terms. Upon the death of one of the cousins, his son and daughter became beneficiaries of his share. Subsequently, the son died, survived by two illegitimate children.[165] Reversing a ruling by the surrogate, the first department held that the illegitimate children were issue, and were entitled as such to receive the son's share of the trust income.

Noting that the specific question before it had never been decided by the Court of Appeals,[166] the *Hoffman* panel was aware of the existence of a substantial body of lower court precedent holding that absent an expressed intent of the testator, the word issue is rebuttably presumed to encompass only legitimate children.[167] The

---

cases cited in note 160 *supra*, the Court, in Labine v. Vincent, 401 U.S. 532 (1971), upheld the right of a state to exclude illegitimates from the statutory scheme of intestate succession. Similarly, EPTL § 4-1.2(a)(2), which provides that an illegitimate cannot inherit from his father in intestacy without a timely order of filiation, has recently been upheld by the Court of Appeals. *In re* Lalli, 38 N.Y.2d 77, 340 N.E.2d 721, 378 N.Y.S.2d 351 (1975).

[162] 53 App. Div. 2d 55, 385 N.Y.S.2d 49 (1st Dep't 1976).

[163] *Id.* at 65, 385 N.Y.S.2d at 56.

[164] *See* cases cited in note 167 *infra*.

[165] 53 App. Div. 2d at 56, 385 N.Y.S.2d at 50. In order to legitimize a child born out of wedlock, his parents must subsequently marry. DRL § 24. For purposes of intestate succession, however, an illegitimate may always inherit from or through his mother, EPTL § 4-1.2(a)(1), but may only inherit from his father if "an order of filiation declaring paternity in a proceeding instituted during the pregnancy of the mother or within two years from the birth of the child" has been obtained during the father's lifetime. EPTL § 4-1.2(a)(2). In *Hoffman*, there had been neither a filiation order nor a subsequent marriage.

[166] 53 App. Div. 2d at 58, 385 N.Y.S.2d at 51.

[167] *Id.* at 56, 385 N.Y.S.2d at 50. Prior cases interpreted issue as including only legitimate issue unless a contrary intent is shown. *See, e.g.*, Central Trust Co. v. Skillin, 154 App. Div. 227, 138 N.Y.S. 884 (2d Dep't 1912); *In re* Underhill, 176 Misc. 737, 28 N.Y.S.2d 984 (Sur. Ct. N.Y. County 1941). Apparently, the reasoning of these cases was not based upon the statutory scheme or public policy of the state, but rather upon traditional social mores. At common law an illegitimate child was considered a *filius nullius*, a son of no one. 53 App. Div. 2d at 57, 385 N.Y.S.2d at 50-51. He was unable to inherit from either parent, nor could

court rejected this view as a discriminatory anachronism which places on the illegitimate an often insurmountable burden of proof.[168] It is improper, said the appellate division, for a court "under the guise of determining the testatrix's intent [to] substitute its own preference as to the legatees who shall take under the will."[169] As further support for its holding, the court declared that if issue were to have the same meaning as "lawful issue," the word "lawful" would be rendered meaningless.[170]

The *Hoffman* court also drew upon recent decisions of the United States Supreme Court holding various state statutes that discriminated against illegitimates to be violative of the equal protection clause. The Court has condemned legitimacy-based classifications that precluded illegitimates from maintaining wrongful death suits,[171] as well as statutes that barred them from obtaining the proceeds of workmen's compensation awards.[172] In a later case, however, asserting that states have the authority to govern the intestate distribution of property, the Court upheld a state statute which eliminated acknowledged illegitimates from intestate succession unless escheat is the only alternative.[173] Notwithstanding this decision, the *Hoffman* court declared that equal protection considerations strongly support its decision since to hold otherwise "would

---

they inherit from him. For a discussion of the reasons for this attitude, see Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477, 489-500 (1967). Such an attitude is far less prevalent today. *See, e.g., In re* Estate of Jensen, 162 N.W.2d 861, 878 (N.D. 1968), wherein the court overturned the provisions of the state's intestacy succession statute that disinherited illegitimates because such an attitude is patently unfair and a denial of equal protection. *But see* Labine v. Vincent, 401 U.S. 532 (1971).

[168] 53 App. Div. 2d at 56-57, 385 N.Y.S.2d at 50. Proving the intent of the testator is a great burden because for this purpose intent is determined as of the time the instrument is executed. Determining this intent years later is a very difficult task and, as a practical matter, the rebuttable presumption often becomes irrebuttable. Reliance on precedent would have forced the court to substitute an ancient preference for legitimates as legatees or devisees, when in fact this might not accurately reflect the testatrix's intent. *See id.* at 63 n.8, 385 N.Y.S.2d at 55 n.8.

[169] *Id.* at 64, 385 N.Y.S.2d at 55. The court also indicated that it could not be said with any degree of certainty that the testatrix intended to bequeath her property only to the legitimate issue of the beneficiaries. For the court to impute such an intent to the testatrix when "the bequest to her cousins was of paramount concern in establishing the trust" would be to "attribute to her a state of mind not at all supported by the facts." *Id.*

[170] *Id.* at 60, 385 N.Y.S.2d at 52.

[171] Glona v. American Guar. Liab. Ins. Co., 391 U.S. 73 (1968); Levy v. Louisiana, 391 U.S. 68 (1968).

[172] Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972).

[173] Labine v. Vincent, 401 U.S. 532 (1971). The Louisiana intestacy statute at issue in *Labine* was upheld as not violative of the equal protection clause because the Court found there was a valid state interest in making a quick and final determination of the ownership of an intestate decedent's property.

require us to hold that illegitimates enjoyed a lesser status than legitimate children before the law in cases such as the one before us."[174] In light of the apparent contradictions in the relevant United States Supreme Court cases[175] and the weight of contrary New York precedent, the first department has taken a bold step. It is submitted that although the rule announced in *Hoffman* is preferable, the decision may not be in conformity with present law.

From a social standpoint, the decision rectifies the inequality borne out of the ancient prejudice which punished the illegitimate child for the sins of his parents.[176] Moreover, the traditional presumption against inclusion of illegitimates may be subject to consti-

---

[174] 53 App. Div. 2d at 66, 385 N.Y.S.2d at 57 (footnote omitted). In light of the sweeping rationale enunciated in *Hoffman*, one wonders how the first department would deal with a challenge to the constitutionality of EPTL § 4-1.2(a)(2), which prohibits an illegitimate from inheriting from the intestate estate of his father absent a timely order of filiation. Concededly, a similar statute has been upheld by the United States Supreme Court, *see* note 173 and accompanying text *supra*, but this would not preclude a finding that EPTL § 4-1.2(a)(2) is violative of the state constitution. Such a determination appears highly unlikely, however, inasmuch as the Court of Appeals has recently upheld the constitutionality of the statute. *In re* Lalli, 38 N.Y.2d 77, 340 N.E.2d 721, 378 N.Y.S.2d 351 (1975). A strong argument might be made that by allowing an illegitimate to inherit from the intestate estate of his father only if an order of filiation is entered within two years of birth, the illegitimate is being unjustly penalized due to the inaction of one or both of his parents. *See* Gray & Rudovsky, *The Court Acknowledges the Illegitimate:* Levy v. Louisiana *and* Glona v. American Guarantee & Liability Insurance Co., 118 U. PA. L. REV. 1, 25 (1969). A particularly glaring example of this inequity would be where the parents of the illegitimate enter into an agreement providing that the father is to provide for the child's support, but do not obtain an order of filiation.

[175] Commentators have been highly critical of Labine v. Vincent, 401 U.S. 532 (1971), *discussed in* note 173 *supra*, because it appears to be inconsistent with Levy v. Louisiana, 391 U.S. 68 (1968), and Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968), *discussed in* text accompanying note 171 *supra*. *See* Petrillo, Labine v. Vincent: *Illegitimates, Inheritance, and the Fourteenth Amendment*, 75 DICK. L. REV. 377, 388-91 (1971); Note, *Illegitimacy and Equal Protection*, 49 N.Y.U.L. REV. 479 (1974). One commentator has pointed out, as indicative of the inconsistency, that at least one court confronted with an intestacy succession law that disinherited illegitimates in the period between *Levy* and *Labine* invalidated the statute relying on *Levy*. Petrillo, Labine v. Vincent: *Illegitimates, Inheritance, and the Fourteenth Amendment*, 75 DICK. L. REV. 377, 385-86 (1971), *citing In re* Estate of Jensen, 162 N.W.2d 861 (N.D. 1968). Although the cases can be distinguished in that *Labine* involved property rights, whereas the *Levy* and *Glona* decisions sounded in tort, many commentators have criticized *Labine* as lacking a sound analytical basis because the Supreme Court upheld the intestacy statute with apparent disregard for the consequences of the statutory scheme. Petrillo, Labine v. Vincent: *Illegitimates, Inheritance, and the Fourteenth Amendment*, 75 DICK. L. REV. 377, 389 (1971); Note, Labine v. Vincent: *Louisiana Denies Intestate Succession Rights to Illegitimates*, 38 BROOKLYN L. REV. 428, 447 (1971). Prior to *Labine*, many commentators had expected that illegitimacy would be characterized as a "suspect" classification. Note, *Illegitimacy and Equal Protection*, 49 N.Y.U.L. REV. 479 (1974).

[176] *See* Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477, 498-500 (1966).

tutional attack as a violation of the equal protection clause,[177] since the aforementioned decisions of the United States Supreme Court have raised a serious implication that most legitimacy-based classifications are not rationally related to any valid state purpose.[178]

Nothing in New York's statutory scheme explicitly precludes the result in *Hoffman,* although the decision does engender some inconsistency. EPTL section 1-2.10 defines issue simply as "descendants in any degree from a common ancestor,"[179] thus leaving it unclear whether the term embraces illegitimates.[180] While many sections of the EPTL refer to issue or similar terms, only one such provision expressly includes illegitimates.[181] This express inclusion in one section might lead to the conclusion that those provisions which are silent on the matter should be interpreted as excluding illegitimates. Such a harsh result, however, finds little support. In its report to the legislature, the Temporary Commission on Estates recommended a sympathetic attitude toward illegitimate children.[182] Indeed, the Commission's primary concern was with fairness and equity for all parties involved. The Commission stated:

> The recommendations of this report are intended to grant to illegitimates in so far as practicable rights of inheritance on a par with those enjoyed by legitimate children while protecting innocent adults and those rightfully interested in their estates from fraudulent claims of heirship . . . .[183]

Interpreting this report, one noted commentator has concluded that "[a]ny doubt as to whether an illegitimate child qualifies under a given section of the EPTL should be resolved in favor of inclusion of the illegitimate."[184] It would appear therefore that illegitimate

---

[177] 53 App. Div. 2d at 66, 385 N.Y.S.2d at 57. The *Hoffman* court noted that judicial use of the presumption that the term issue encompasses only legitimate children could constitute state action since it was "nothing more than the substitution of judicial preference for a testator's intent." *Id.*, 385 N.Y.S.2d at 56, *citing* Shelley v. Kraemer, 334 U.S. 1 (1948).

[178] *See* cases cited in notes 171-72 *supra.*

[179] EPTL § 1-2.10(2).

[180] *See* 9 P. ROHAN, NEW YORK CIVIL PRACTICE ¶ 1-2.10[2] (1975).

[181] EPTL § 3-3.3(b) provides in pertinent part that "as used in this section the terms 'issue,' 'surviving issue,' and 'issue surviving' include adopted children and illegitimate children." Other sections of the EPTL use such terms as "issue," "children," "heirs," and "distributees" without specifically including illegitimates within their meaning. *E.g.*, EPTL §§ 5-4.4(a), 6-5.6, 6-5.8.

[182] *See* TEMPORARY STATE COMM'N ON THE MODERNIZATION, REVISION AND SIMPLIFICATION OF THE LAW OF ESTATES, FOURTH REPORT, N.Y. LEG. DOC. No. 19, at 233-68 (1965).

[183] *Id.* at 265-66.

[184] 9 P. ROHAN, NEW YORK CIVIL PRACTICE ¶ 4-1.2[4], at 4-60 (1975). Professor Rohan states that the Commission was aware of cases which were favorable to illegitimates and did

children should be included within the term issue as defined in section 1-2.10. Although the section 1-2.10 definition is not determinative in construing a will, this interpretation supports the holding reached by the *Hoffman* court.

One unfortunate result of the *Hoffman* decision is that it does create an apparent anomaly in New York law. The Court of Appeals has recently upheld the constitutionality of EPTL section 4-1.2(a),[185] which provides that in intestacy, an illegitimate is to inherit both from and through his natural mother, but only *from* his father, and even then only if there has been an order of filiation entered within two years of birth. Although *Hoffman* obviously did not fall within the ambit of section 4-1.2(a) since it involved a construction problem, the court's use of a presumption favoring illegitimates to allow inheritance through the father does seem somewhat inconsistent with the continued viability of section 4-1.2(a).

It is submitted that this inconsistency would best be resolved not by a return to the presumption against illegitimates, but rather by amendment of the statutory scheme. Thus, EPTL section 4-1.2(a) should be amended to permit an illegitimate to inherit from and through his father in all cases. The legislature should also amend the EPTL to provide that words such as "issue," "children," and "descendants," be construed to include illegitimates absent a clear contrary intention,[186] thereby codifying the *Hoffman* decision. Even without these changes, however, *Hoffman* indicates that draftsmen must take great care in preparing a will so that the testator's intent is indicated by the exact wording. Thus, to prevent illegitimates from inheriting, a bequest or devise should be specifically limited to legitimates.[187]

---

not disapprove of them. *Id.* Most commentators favor inclusion of the illegitimate in class gifts. *See, e.g., id.* (¶) 4-1.2[5]; 3 R. POWELL, THE LAW OF REAL PROPERTY ¶¶ 339, 359, 360 (P. Rohan ed. 1974). *See also* Krause, *Bring the Bastard into the Great Society—A Proposed Uniform Act on Legitimacy,* 44 TEX. L. REV. 829 (1966). Section 18 of Professor Krause's proposed act deals with inheritance. *Id.* at 839.

[185] *In re* Lalli, 38 N.Y.2d 77, 340 N.E.2d 721, 378 N.Y.S.2d 351 (1975).

[186] EPTL § 1-2.10, which defines issue, should be amended to include illegitimates. Moreover, EPTL § 2-1.3, which provides that absent a contrary intent a disposition to issue includes adopted and posthumous children, should also be amended to include illegitimates.

[187] *See* Note, *Testamentary Dispositions to "Children" as Including Illegitimates—A Change in Wisconsin Law?,* 57 MARQ. L. REV. 173, 182-86 (1973).