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LEGISLATION

NEW YORK'S LAW OF ESTATES AND DISTRIBUTION: THE NEW STATUS OF THE ADOPTED CHILD

Currently, the New York Law of Estates and Distribution is undergoing a vigorous study. Various problems are being analyzed and legislation is being recommended to the Legislature by the Commission on Estates.[1] On March 1, 1964, many changes which resulted from these studies were officially enacted into law. Basically, most of the amendments were added to conform the laws of estates to the complex changes of society and to eliminate the diverse viewpoints reflected by court decisions. The purpose of this note is to examine two selected amendments, Section 117 of the Domestic Relations Law and Section 49 of the Decedent Estate Law, and compare the old law with the new law, thus demonstrating the significance of the changes. Section 117 establishes the right of an adopted child to succeed to the property of his foster parents and their kin, while section 49 governs the rights of adopted children as members of a class.

Adopted Children — Intestate Distribution

Beginning with March 1, 1964 the adopted child and the foster parent:

> 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.*[2]

Section 117 further provides that the relationship between a foster child and his natural parents is now terminated upon the making of the order of adoption.[3] Previously, an adoption had

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[1] 1963 N.Y. LEG. DOC. No. 19, SECOND REPORT OF THE TEMPORARY STATE COMM'N ON THE MODERNIZATION, REVISION AND SIMPLIFICATION OF THE LAW OF ESTATES [hereinafter cited as SECOND REP.].

[2] N.Y. DOM. REL. LAW § 117. The italicized words indicate the additions which became effective March 1, 1964.

[3] *Ibid.* There is an exception in the case of a natural or foster parent remarrying and subsequently consenting to the adoption by the stepmother or stepfather. It is provided that the order of adoption shall not "affect the rights of such consenting spouse and such foster child to inherit from and through each other and their natural and adopted kindred."

no effect upon the inheritance rights of an adopted child; thus, he could succeed to the property of his natural parents as if no adoption had taken place.[4] Before analyzing the significance of these changes, an examination of the history of New York's adoption laws will be made in order to show the position of the law prior to the recent amendment.

History

Adoption was unknown at common law and exists today only by virtue of statute.[5] In New York the earliest adoption statute specifically withheld any rights of inheritance between an adopted child and his foster parents,[6] but these rights were expressly provided for fourteen years later.[7] At that time it was also provided that both the heirs and the next of kin of the adopted child were to be treated as if the latter was the natural child of the foster parents.[8] However, it is interesting to note that the rights of inheritance only applied to adopted children taken from private custody, and not to those taken from institutions.[9] The New York statutes were subsequently amended, but these changes did not substantially affect the inheritance rights of the adopted child.[10] Thus, the law continued to permit the adopted child to inherit from both his natural parents and his foster parents. However, the adopted child could not inherit from the collateral relatives of the foster parents,[11] but conversely, the foster parents' collateral kindred could inherit from the adopted child.[12]

The problem of the adopted child and intestate distribution may be divided into three areas. The first concerns the rights of inheritance of the adopted child himself; the second, the rights of those who inherit from the adopted child; and the third, the rights of the distributees of the foster child.

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[4] N.Y. Sess. Laws 1938, ch. 606, § 1.

[5] Carroll v. Collins, 6 App. Div. 106, 109, 40 N.Y. Supp. 54, 56 (2d Dep't 1896). See N.Y. DOM. REL. LAW § 110 where adoption is defined as "the legal proceeding whereby a person takes another person into the relation of child and thereby acquires the rights and incurs the responsibilities of parent in respect of such other person."

[6] N.Y. Sess. Laws 1873, ch. 830, § 10.

[7] N.Y. Sess. Laws 1887, ch. 703, § 10.

[8] *Ibid.*

[9] United States Trust Co. v. Hoyt, 150 App. Div. 621, 627, 135 N.Y. Supp. 849, 853-54 (1st Dep't 1912).

[10] N.Y. Sess. Laws 1931, ch. 562; N.Y. Sess. Laws 1916, ch. 453; N.Y. Sess. Laws 1915, ch. 352.

[11] Hopkins v. Hopkins, 202 App. Div. 606, 195 N.Y. Supp. 605 (4th Dep't), *aff'd mem.*, 236 N.Y. 545, 142 N.E. 277 (1922).

[12] In the Matter of Estate of Hollstein, 251 App. Div. 771, 295 N.Y. Supp. 598 (3d Dep't 1937).

In the first category, before amendment, it was provided that the adopted child could inherit from and through his natural parents as though no adoption had taken place.[13] Thus, in the case of *In the Matter of Landers*,[14] the intestate was survived by both a sister and a half-sister. Prior to the death of the intestate, the half-sister[15] had been legally adopted by another family. Nevertheless, the court relying on the statute held that the half-sister should share equally in the intestate distribution, since a natural child's inheritance rights remain unaffected by adoption.

As a result of the 1964 revision, the half-sister apparently would not inherit. The statute expressly provides that the foster child's right of inheritance from and through his natural parents shall terminate upon adoption.[16] Although brothers and sisters do not inherit in the above manner, but instead inherit in their own right, the intent of the Legislature extends beyond the words of the statute. It is provided that the intent is to sever all ties with the natural family.[17]

The adopted child also inherits from his foster parents and their children.[18] However, before the revision he did not inherit from the collateral relatives of the foster parents. Thus, in *Hopkins v. Hopkins*,[19] the plaintiff was adopted, and eleven years later her foster father died. Subsequently, the father's brother died intestate, leaving a brother and a sister. In a suit by the adopted child to take by representation, the plaintiff was denied recovery since the statute had no provision extending the adopted child's right to inheritance from the next of kin of the foster parent. The result would be different since amended section 117 now states specifically that the relationship between the foster parent and the foster child includes the right to inherit through each other.[20]

In the second category the natural parents, their children and their collateral kindred do not inherit from the adopted child.[21] In the case of *In the Matter of Estate of Heye*,[22] a child was

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[13] N.Y. Sess. Laws 1915, ch. 352, § 114.

[14] 100 Misc. 635, 166 N.Y. Supp. 1036 (Surr. Ct. 1917). See In the Matter of Adler, 202 Misc. 1100, 117 N.Y.S.2d 331 (Surr. Ct. 1952).

[15] Half-blood inherits the same as full blood. See N.Y. DECED. EST. LAW § 83(12).

[16] N.Y. DOM. REL. LAW § 117.

[17] SECOND REP.

[18] N.Y. DOM. REL. LAW § 117.

[19] *Supra* note 11. See In the Matter of Hall, 234 App. Div. 151, 254 N.Y. Supp. 564 (3d Dep't 1931), *aff'd mem.*, 259 N.Y. 637, 182 N.E. 214 (1932).

[20] N.Y. DOM. REL. LAW § 117.

[21] *Ibid.*

[22] 149 Misc. 890, 269 N.Y. Supp. 530 (Surr. Ct. 1933), *aff'd mem.*, 241 App. Div. 907, 271 N.Y. Supp. 1042 (4th Dep't 1934). See In the Matter of

left in the custody of her mother as the result of a prior divorce. Subsequently she was adopted. The court, relying on the principle that the effect of adoption is to exclude inheritance rights of all natural kindred, held that the natural father was excluded from any right to take part of the child's estate. The decision in this case would still be followed because the amended Domestic Relations Law continues to provide for the exclusion of the foster child's natural parent. A corollary to this is the fact that foster parents and their children, both natural and adopted, and the collateral kindred of the foster parents inherit from the adopted child.[23]

The third category consists of the distributees of the foster child. The foster child's right of inheritance extended to his distributees.[24] Thus, in the case of *In the Matter of Estate of Whitcomb*,[25] it was stated that the children of a deceased daughter were entitled to their intestate share from their uncle, the natural child of their mother's father. This situation remains unaffected by the recent amendment.

A Comparison With Other Jurisdictions

In this area there is a divergence among the statutes of other states. Many states allow the adopted child to share in the distribution of both the real and personal property of his natural parents,[26] while others prohibit the adopted child from inheriting anything from them.[27] On the question of intestate succession by the adopted child from his foster parents and their kindred, the states are generally in accord in allowing an adopted child to inherit from his foster parents.[28] As for his right to inherit from the kindred of his foster parents, the general rule is that the adopted child may not take unless the statute specifically

Estate of Meyer, 204 Misc. 265, 122 N.Y.S.2d 686 (Surr. Ct.), *aff'd mem.*, 282 App. Div. 860, 124 N.Y.S.2d 841 (1st Dep't 1953).

[23] N.Y. DOM. REL. LAW § 117. For a case discussing the rights of collateral kindred, see In the Matter of Estate of Hollstein, *supra* note 12.

[24] N.Y. DOM. REL. LAW § 117.

[25] 170 Misc. 579, 10 N.Y.S.2d 824 (Surr. Ct. 1939).

[26] *E.g.*, FLA. STAT. ANN. § 731.30 (1963); ME. REV. STAT. ANN. ch. 158, § 40 (1954); TEX. PROB. CODE § 40 (1956). In the absence of statute, adoption does not terminate the child's right to inherit from his natural kindred. Wilson v. Wilson, 95 Colo. 159, 33 P.2d 969 (1934); Benner v. Garrick, 109 Utah 172, 166 P.2d 257 (1946). See LEAVY, LAW OF ADOPTION ch. 10 (1954).

[27] *E.g.*, CAL. PROB. CODE § 257; N.C. GEN. STAT. § 29-17 (1949); VA. CODE ANN. § 63-358 (1950).

[28] *E.g.*, CONN. GEN. STAT. REV. § 45-65 (1959); MASS. GEN. LAWS ANN. ch. 210, § 7 (1955); MICH. STAT. ANN. § 27.3178(549) (1959).

provides otherwise.[29] However, the statutes of certain states provide that the adopted child may inherit from both the natural and adopted children of the foster parents.[30] With respect to the parents, natural and foster, the majority view is that the foster take to the exclusion of the natural.[31] Other jurisdictions permit natural parents or their kindred to inherit from the adopted child only that property which came to the latter from the family of the natural parents.[32]

Significance of the Recent Amendment

Embodied in our adoption statute is the fundamental social concept that the relationship of parent and child, with all the personal and property rights incident to it, may be established, independently of blood ties by operation of law. . . .[33]

One of the goals of the recent amendment is to further effectuate the principle expressed in the above quotation. An argument that has been made against permitting an adopted child to inherit from the kindred of his foster parents is that the child is being forced on the collateral relatives. However, this is fallacious since the collateral kindred do not have control over their natural heirs either, and consequently, the adopted child is not really forced on the collateral relative to any greater degree than a natural child. Since the consent of the natural relatives has nothing to do with an heir at law, why should such consent be required in adoption cases?

Prior to the amendment of Section 117 of the Domestic Relations Law, the adopted child possessed the right to inherit from his natural parents. The main reason for eliminating this right is that it may prove injurious to the adopted child if his natural

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[29] Brooks Banks & Trust Co. v. Rorabacher, 118 Conn. 202, 171 Atl. 655 (1934); Smyth v. McKissick, 222 N.C. 644, 24 S.E.2d 621 (1943). Several examples of statutes allowing the adopted child to inherit from the kindred of the foster parents are: CAL. PROB. CODE § 257; CONN. GEN. STAT. REV. § 45-65 (1959); ORE. REV. STAT. § 111.210 (1963). Several examples of statutes allowing the adopted child to inherit from his foster parents but not their kindred are: ARK. STAT. ANN. § 56-109(c) (1957); ME. REV. STAT. ANN. ch. 158, § 40 (1954); TENN. CODE ANN. § 36-127 (1955).

[30] *E.g.*, FLA. STAT. ANN. § 731.30 (1963); TENN. CODE ANN. § 36-126 (1955); VT. STAT. ANN. tit. 15, § 448 (1958).

[31] *E.g.*, DEL. CODE ANN. tit. 13, § 920 (1953); IDAHO CODE ANN. §§ 16-1508-09 (1947); MONT. REV. CODES ANN. § 61-212 (1947); OKLA. STAT. ANN. tit. 10, §§ 53-54 (1941); WASH. REV. CODE § 26.32.140 (Supp. 1963).

[32] *E.g.*, ARK. STAT. ANN. § 56-109(b) (1957); MASS. ANN. LAWS ch. 210, § 7 (1955); TENN. CODE ANN. § 36-126 (1955).

[33] In the Matter of Will of Upjohn, 304 N.Y. 366, 373, 107 N.E.2d 492, 494 (1952).

family is revealed, since knowledge of the identity of an unknown family could severely unsettle a child.[34]

Also, the elimination of the adopted child's right to inherit from two family trees is one of the final steps in bringing to the adopted child the same status as that of the natural child.

Adopted Children as Members of a Class

Before the enactment of Section 49 of the Decedent Estate Law, the use of words such as "child," "children" and "lawful issue" in a will was subject to various interpretations. Generally, the cases held that in determining whether the adopted child was intended to be included under any of the above terms, it was necessary to consider the facts and circumstances surrounding the making of the will and the words of the will in its entirety.[35] If it then appeared that it was the testator's intent to include the adopted child, the will would be construed as such.[36]

Section 49 provides that a will "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."[37] The difficulty with the old approach was apparent. The testator's intent was not susceptible to a simple determination, since there was no definite rule or standard to apply to a specific case. The test was rather a combination of several factors, and thus the cases resulted in many different conclusions and interpretations.

Two basic factors which must be considered in analyzing the cases in this area are: (1) the time of the adoption, whether it occurred before or after the death of the person executing the will, and (2) whether or not a gift over is involved.

Adoption Before — No Gift Over

In this situation the courts generally favored the inclusion of the adopted child. Thus, in the case of *In the Matter of Estate of Mawhinney*,[38] the question was whether an adopted son was a child within the meaning of the provisions of Section 17 of the Decedent Estate Law. This section limits bequests to charitable and benevolent associations to not more than one-half of the

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[34] Note, *Property Rights As Affected By Adoption*, 25 BROOKLYN L. REV. 231, 241 n.46 (1959).

[35] In the Matter of Will of Upjohn, *supra* note 33, at 375, 107 N.E.2d at 495-96.

[36] *Ibid.*

[37] N.Y. DECED. EST. LAW § 49.

[38] 146 Misc. 30, 261 N.Y. Supp. 334 (Surr. Ct. 1932), *aff'd mem.*, 239 App. Div. 874, 264 N.Y. Supp. 984 (3d Dep't 1933).

estate of the testator when he leaves a child surviving.[39] The son was adopted before the death of the testator, and the court held the former to be a child within the meaning of section 17. In another case,[40] the Court of Appeals held Section 29 of the Decedent Estate Law, which provides that property devised to one who predeceased the testator "shall vest in the surviving child or other descendant of the legatee or devisee, as if such legatee or devisee had survived the testator and had died intestate," to apply to a child adopted before the death of the testatrix. Finally, it was held that a legacy to a son of an adopted daughter, the adoption occurring before the death of the testator, was taxable at the same rate as if the son was a natural grandchild.[41]

Adoption After — No Gift Over

No concrete rule could be formulated in this category. In the case of *In the Matter of Estate of Weller*,[42] the testator left his estate to his children, and further provided that upon their death, the estate was to pass to the latter's "legal representatives." One daughter died leaving only an adopted son, whom she had adopted subsequent to the testator's death. It was stated that in the absence of contrary intent there was no reason to exclude the adopted son from the class of "legal representatives."[43] In the case of *In the Matter of Will of Guilmartin*,[44] the testatrix made a will leaving part of the estate in trust for a friend. At the time the will was executed, she did not have a daughter, but subsequently, one was adopted. Section 26 of the Decedent Estate Law provides that if a testator has a child born after the making of the will, he shall succeed to the parent's property as if the parent died intestate. The court held this section applicable to the adopted child, and therefore found the will a nullity. On the other hand, in the case of *In the Matter of Estate of Peabody*,[45] the testatrix created two trusts, naming her son as the life bene-

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[39] N.Y. DECED. EST. LAW § 17 provides: "No person having a husband, wife, child, or descendant or parent, shall . . . devise or bequeath to any benevolent, charitable . . . association . . . more than one-half part of his or her estate . . . ."

[40] In the Matter of Estate of Walter, 270 N.Y. 201, 200 N.E. 786 (1936).

[41] In the Matter of Estate of Cook, 187 N.Y. 253, 79 N.E. 991 (1907). In the area of constructive ownership of stock, the adopted child is treated as the natural child. INT. REV. CODE OF 1954, § 318.

[42] 7 Misc. 2d 366, 165 N.Y.S.2d 531 (Sup. Ct. 1957).

[43] For a case employing similar reasoning, see In the Matter of Will of Cohn, 184 Misc. 258, 55 N.Y.S.2d 797 (Surr. Ct. 1944), *aff'd mem.*, 271 App. Div. 775, 66 N.Y.S.2d 408 (1st Dep't 1946), *aff'd mem.*, 297 N.Y. 536, 74 N.E.2d 471 (1947).

[44] 277 N.Y. 689, 14 N.E.2d 627 (1938).

[45] 17 Misc. 2d 656, 185 N.Y.S.2d 591 (Surr. Ct. 1959).

ficiary. It was further provided that upon the son's death, the corpus was to be paid to the living child or children of the son, or per stirpes to any descendant of a deceased child. A child was adopted subsequent to the death of the testatrix. The court held that since the adoption took place eleven years after the testatrix's death, her intent could not have been to include the adopted child.[46] In a recent case, a child was adopted almost sixteen years after the creation of a trust. It was reasoned that the trust agreement providing for distribution per stirpes was limited to natural children, in the absence of contrary language in the agreement itself or evidence of extraneous facts showing that the settlor intended to include adopted children.[47]

When a Gift Over Is Involved

Before the revision, Section 117 of the Domestic Relations Law provided:

> 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.[48]

The language of the statute appeared to prevent a foster child from inheriting from his foster parent in the absence of an affirmative contrary intent in decedent's will. In the case of *In the Matter of Will of Horn,*[49] it was stated that the statute was aimed at the possibility of the severance of future estates by adoption. The rationale of the court was that it would require little effort for a person without any children to subsequently adopt one and thus eliminate the remainderman. Consequently, the court held this was the only situation when the adopted child was not allowed to inherit. By implication, therefore, if a child is adopted prior to the testator's death or if the adoption takes place after the testator's death, but does not affect the rights of remaindermen, the "limitation over" provision of section 117 will not apply. Thus, the child would be included in the class of "lawful issue," "children" and language of similar import. However, this has not been the standard consistently applied by the courts.

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[46] In the Matter of Estate of Smith, 14 Misc. 2d 205, 177 N.Y.S.2d 280 (Surr. Ct. 1958); In the Matter of Holt, 206 Misc. 789, 134 N.Y.S.2d 416 (Surr. Ct. 1954).

[47] In the Matter of Estate of Dickson, 32 Misc. 2d 1000, 225 N.Y.S.2d 471 (Sup. Ct. 1962); see In the Matter of Estate of Pryor, 38 Misc. 2d 722, 238 N.Y.S.2d 689 (Surr. Ct. 1963).

[48] N.Y. DOM. REL. LAW § 117.

[49] 256 N.Y. 294, 176 N.E. 399 (1931).

1. *Adoption Before*

In the early case of *New York Life Ins. & Trust Co. v. Viele,*[50] a will provided for a trust with income to the decedent's daughter for life and remainder to the daughter's "lawful issue" with a provision for a "limitation over" if no issue survived. A child was adopted before the death of the testator, but nevertheless, the court held that the testator did not manifest an intent to include the adopted child, and that when used, the words "lawful issue" meant descendants when nothing contrary is indicated in the will. On the other hand, in the more recent case of *In the Matter of Will of Upjohn,*[51] a will provided for the creation of trusts and the payment of trust income to designated beneficiaries. Upon the death of the beneficiaries, payments were then to be made to their "lawful issue" or "descendants." A "limitation over" was further provided, and a child was adopted ten years prior to the execution of the will. The court stated that the intent of the testator was to include the adopted child. The fact that the testator knew the adopted child and made visits to the parents' home was emphasized.[52] Thus, the "limitation over" provision of section 117 was held to be pre-empted by the testator's affirmative intent.[53]

2. *Adoption After*

In the situation where the adoption occurred after the testator's death and a gift over was involved, the decisions of the courts are apparently in conflict. In the case of *In the Matter of Will of Charles,*[54] a child was adopted subsequent to the death of the testatrix. The testatrix devised property to her daughter's children or if none survived the daughter, then to the latter's brothers or their lawful issue. The court reasoned that this implied an intention on the part of the testatrix to include those in a filial relation with her daughter, and this would include her adopted children. In the recent case of *In the Matter of Estate of Ward,*[55] the testatrix died leaving a will under which a separate trust was created for

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[50] 161 N.Y. 11, 55 N.E. 311 (1899).

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

[52] *Id.* at 376-77, 107 N.E.2d at 497.

[53] Other cases that have adopted the same viewpoint are: In the Matter of Estate of Jacobson, 28 Misc. 2d 1063, 213 N.Y.S.2d 458 (Surr. Ct. 1961); In the Matter of Will of Bergen, 27 Misc. 2d 804, 208 N.Y.S.2d 653 (Surr. Ct. 1960); In the Matter of Will of Camp, 6 Misc. 2d 593, 161 N.Y.S.2d 252 (Surr. Ct. 1957).

[54] 200 Misc. 452, 102 N.Y.S.2d 497 (Surr. Ct., *aff'd mem.*, 279 App. Div. 741, 109 N.Y.S.2d 103 (1st Dep't 1951), *aff'd mem.*, 304 N.Y. 776, 109 N.E.2d 76 (1952).

[55] 9 App. Div. 2d 950, 195 N.Y.S.2d 933 (2d Dep't 1959), *aff'd mem.*, 9 N.Y.2d 722, 174 N.E.2d 326, 214 N.Y.S.2d 340 (1961).

each of her three children, giving them the income for life with the remainder going to their lawful issue upon death. There was also a provision for a "limitation over" if one of the children died without issue. One son adopted a child after the death of the testatrix. The court held that the evidence indicated that the testatrix was in favor of adoption and desired to treat her children equally; therefore, the intent of the testatrix was clearly established.[56]

On the other hand, there are numerous cases which appear to reach contrary results. In an early case,[57] the testator created a trust for his nephew for life with remainder to the latter's children. The will provided that if there were no children, the remainder would then revert and become part of the residuary estate of the testator. After the latter's death the nephew adopted a child. The court reasoned that the testator did not intend the adopted child to take and thus defeat the rights of remaindermen. In the case of *In the Matter of Estate of Rockefeller,*[58] a trust indenture provided that the remainder interest was to go to the life beneficiary's children, but if he should die without children then over to certain charities. The court held that the "limitation over" provision prevented the adopted child from inheriting since the grantor failed to show an intent to include the adopted child in the inheritance. Finally, in the case of *In the Matter of Estate of Ricks,*[59] a trust was created with income to be paid to the grantor's son during his lifetime. Upon the latter's death the income was made payable to the son's descendants provided that the grantor's granddaughter was still alive. The son adopted a child after the trust became effective. It was held that only when the will or the surrounding facts and circumstances indicate a contrary intention, will the word "descendant" be construed to include adopted children.[60]

It is apparent from the foregoing authorities that the uncertainty of the courts in construing a will which left property to beneficiaries such as "children," "descendants" or "lawful issue" was a serious problem. Since the courts did not formulate concrete

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[56] *Accord,* In the Matter of Sands, 20 Misc. 2d 647, 190 N.Y.S.2d 584 (Sup. Ct. 1959); In the Matter of Estate of Wallerstein, 33 Misc. 2d 801, 226 N.Y.S.2d 273 (Surr. Ct. 1962), where the court held that extrinsic evidence justified the finding that the testator intended to include adopted children in the language "to the surviving issue of myself and my wife."

[57] In the Matter of Estate of Leask, 197 N.Y. 193, 90 N.E. 652 (1910).

[58] 15 App. Div. 2d 131, 222 N.Y.S.2d 219 (1st Dep't 1961).

[59] 12 App. Div. 2d 395 (1st Dep't), *aff'd per curiam,* 10 N.Y.2d 231, 176 N.E.2d 726, 219 N.Y.S.2d 30 (1961).

[60] *Accord,* In the Matter of Estate of Taintor, 32 Misc. 2d 160, 222 N.Y.S.2d 882 (Surr. Ct. 1961), *aff'd mem.,* 16 App. Div. 2d 768, 228 N.Y.S.2d 461 (1st Dep't 1962).

guidelines as to when an adopted child was included in the above classes, it was necessary for the Legislature to take affirmative action, and thus eliminate the many problems presented in this area.

A Comparison With Other Jurisdictions

The recent trend in other states has been towards the inclusion of the adopted child in the class designation of "children," "heirs," "lawful issue" and similar language.[61] However, certain states are still faced with the intent problem which was prevalent in New York before the recent revision. In California, a statute provides that adopted children have the same relation to their foster parents as do natural children for purposes of succession.[62] However, in the case of *In the Matter of Estate of Pierce,*[63] it was held that adopted children were not included in the designated class of "lawful issue." In its rationale, the court stated that the testator's intent must be derived from the language of the will itself or from circumstances under which it was executed. The state of Illinois appears to have adopted an approach similar to that of California. Although the statute provides that a lawfully adopted child is deemed a descendant of the adopting parents for inheritance purposes,[64] in the case of *Stewart v. Lofferty,*[65] it was held that an adopted child is presumed not to be included in the class designation of "children," absent contrary language in the will itself or in surrounding circumstances. Pennsylvania has adopted another approach. There it is provided that in construing a will any person adopted *before* the testator's death shall be considered the child of his adopting parents.[66] By negative inference, therefore, a child adopted after the death of the testator will not be included in the class designation of "lawful issue," "descendant," "children" or words of similar import. Finally, Ohio has been described by one writer as a state which, by both legislation and liberal court interpretation, has progressed toward the elimination of "petty legal distinctions" in the relation of adopted children to their foster parents and relatives.[67] There, the statute provides that the adopted child shall have the same status and rights as the natural child for all purposes under the

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[61] *E.g.*, CONN. GEN. STAT. REV. § 45-65 (1959); MASS. GEN. LAWS ANN. ch. 210, § 8 (1955); N.J. STAT. ANN. § 9:3-30B (1960).

[62] CAL. PROB. CODE § 257.

[63] 32 Cal. 2d 265, 196 P.2d 1 (1948); See 22 So. CAL. L. REV. 89 (1948).

[64] ILL. ANN. STAT. ch. 3, § 14 (Smith-Hurd 1961).

[65] 12 Ill. 2d 224, 145 N.E.2d 640 (1957).

[66] PA. STAT. ANN. tit. 20, § 180.14 (1950).

[67] 23 OHIO ST. L.J. 586, 588-89 (1962).

laws of the state.[68] Although this provision does not specifically include the situation referring to the adopted child as a member of a class, in the case of *Tiedthe v. Tiedthe*,[69] a will leaving the corpus of a trust to the "heirs" of the testator upon the death of the life tenant was construed to include the adopted child of the latter.

Conclusion

Generally, before the revision, courts favored the adopted child when the issue was whether the adopted child should participate equally with the natural child. However, if the choice was between the adopted child or a contingent remainderman, then the cases favored the latter, indicating that the "limitation over" provision of section 117 would apply, but this in turn would yield to the intent of the testator. However, the problem arose that it was extremely difficult to determine this intent.[70] The uncertainty of the law is now terminated, and the courts no longer have to search for an intent which may or may not have existed, since section 49 provides that unless the will specifically provides to the contrary, the use of words such as "lawful issue," "children," or "descendants," shall be construed to include persons duly adopted.

Furthermore, this amendment represents a significant step in bestowing upon the adopted child the same status as the natural child. One authority has stated that it is preferable to force those who do not desire their property to leave the blood line to exclude the adopted child by the addition of a specific provision in a will than to deprive those who, in many cases, have been closer to the deceased than the so-called next of kin.[71]

The second major change in this area has been the repeal of the "limitation over" subdivision of section 117. Thus, the adopted child now inherits even in the situation where, if it were not for the adoption, the property would have reverted to the remainderman. Once again, this change represents a step toward giving the adopted child the same rights as the natural child.[72]

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[68] OHIO REV. CODE ANN. § 3107.13 (Baldwin 1963).

[69] 157 Ohio St. 554, 106 N.E.2d 637 (1952).

[70] This is further complicated by the restrictions imposed by the parol evidence rule. Parol evidence as to what the testator said concerning his intention cannot be admitted, except to explain ambiguities, since this would defeat the statutory requirement of a written will. RICHARDSON, EVIDENCE § 605 (8th ed. 1955); 9 WIGMORE, EVIDENCE § 2472 (3d ed. 1940).

[71] Merrill, *Toward Uniformity in Adoption Law*, 40 IOWA L. REV. 299, 319 (1955).

[72] This is expressly provided for in § 117 of the Domestic Relations Law, but was previously subject to the "limitation over" subsection.

The sections analyzed are two of the more significant revisions in the estate area. However, there were also many other changes adopted by the Legislature such as those dealing with intestate distribution,[73] the settlement of small estates without formal administration,[74] simplification of probate practice,[75] and the payment of legal fees of an attorney-fiduciary prior to the settlement of account.[76] One authority has called these present changes the most significant legislation in the estate area since the 1930's.[77]

THE "NO-KNOCK" AND "STOP AND FRISK" PROVISIONS OF THE NEW YORK CODE OF CRIMINAL PROCEDURE

Recently, in response to a message from Governor Rockefeller[1] urging favorable action on proposals submitted by the Combined Council of Law Enforcement Officials,[2] the New York Legislature enacted into law two statutes of major import concerning criminal procedure. These acts, commonly called "No-Knock"[3] and "Stop and Frisk,"[4] have been met with both commendation and criticism in the press.[5]

The purpose of this note is to discuss the factors which prompted the passage of such legislation, the probable effect of the provisions upon the field of criminal procedure, and the various constitutional issues which the acts present.

THE "NO-KNOCK" BILL

The "No-Knock" provision amends New York's Code of Criminal Procedure by permitting a police officer, in executing

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[73] N.Y. DECED. EST. LAW § 83.
[74] N.Y. SURR. CT. ACT § 137.
[75] N.Y. SURR. CT. ACT §§ 140-42, 146, 153.
[76] N.Y. SURR. CT. ACT § 231-b. For a comprehensive analysis of these changes and many others, see SECOND REP.
[77] Arenson, *1963 Legislation Affecting Law of Trusts and Estates*, 9 N.Y.L.F. 439 (1963).

[1] 1964 N.Y. LEG. DOC. No. 1, GOVERNOR'S MESSAGES TO THE LEGISLATURE, Crime and Criminal Justice 14-15.
[2] The Council is composed of the major law enforcement officials of the State of New York, including, among others, the Attorney General, and the New York State District Attorneys' Association.
[3] N.Y. CODE CRIM. PROC. § 799 (effective July 1, 1964).
[4] N.Y. CODE CRIM. PROC. § 180-a (effective July 1, 1964).
[5] See, *e.g.*, Time, March 20, 1964, p. 48; N.Y. Times, March 9, 1964, p. 8, col. 1.