Best Friends and Relations: Construing "Issue" in Instruments and Intestacy Statutes

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Donative transfer—the conveyance of property from one owner to another without consideration—occurs in two general forms. First, express transfers are those events where an owner (hereinafter "creator") has manifested an intent to make the donative transfer, either inter vivos or at death, and that intent is given legal effect. This category includes all sorts of inter vivos gifts, gifts under wills and other similar testamentary transfers. Second, intestate transfers are of a more limited variety: ownership of property has ceased because of the owner's death without effective recognition by the owner of a donee. In such an event, the property descends to certain relatives of the decedent designated by the legislature, or absent such relatives, to the state via escheat.

In New York, in both classes of donative transfer, the intent of the owner plays a vital role. An express transfer requires a manifestation of the donor's intent. This manifestation, generally speaking, will be given effect. It follows that, if the express denotation of the intended donee is ambiguous, that ambiguity should be resolved, if
possible, by reference to the intention of the donor: the court should resolve the ambiguity the way the donor would have wished. An intestate transfer, on the other hand, presents by definition no effective indication of the decedent's intentions. It could be said that an intestate's testamentary scheme is completely ambiguous. The legislature resolves such ambiguities by apportioning the decedent's property among his next of kin in a manner that the legislature believes most similarly situated decedents would have chosen. Thus, issue take to the exclusion of parents and parents take to the exclusion of grandparents.

It will be accepted that some of the most common words employed to describe classes of beneficiaries in instruments of donative transfer and in intestacy statutes - "issue," "descendants," "children," "grandchildren," etc. - are inherently ambiguous. People may have biological issue that they would not consider issue for the purposes of donative transfer. For example, it seems unlikely that a donor or intestate would wish to favor a child surrendered at birth for adoption through an agency and never heard from again. On the other hand, it seems extremely likely that a creator or intestate would wish to favor certain biological strangers - for example, his or her own adoptive children. Between these extremes lie fact patterns made innumerable by the complexities of human relationships.

In the case of an express transfer, any such ambiguity can be avoided by specific drafting directed either at the particular fact pattern ("I direct that A.B. and his issue shall be considered issue of mine for the purposes of this instrument") or at a particular general pattern ("I direct that any person who is not born in wedlock or thereafter legitimized shall not be considered issue of mine for the purposes of this instrument"). However, failing such specific address, each ambiguity of this sort will be resolved either judicially through a construction proceeding or, more generally, through legislative mandate. In the case of an intestate transfer where there can be no specific address, any ambiguity must be resolved either by the legislature speaking on a general level to all similar situations or, failing

4. The New York Court of Appeals has relied on this general proposition as the basic premise of any construction proceeding. See, e.g., In re Thall, 18 N.Y.2d 186, 219 N.E.2d 397, 273 N.Y.S.2d 33 (1966); In re Fabbri, 2 N.Y.2d 236, 140 N.E.2d 269, 159 N.Y.S.2d 184 (1957).

5. EPTL § 4-1.1 (McKinney 1981); see also Uniform Probate Code [hereinafter "UPC"] §§ 2-101 to 2-106, 8 U.L.A. 56-66 (1983). Of course, the legislature's views may change over time and there is presently an effort on the part of the Radigan Commission to revise § 4-1.1. See N.Y.L.J. (Aug. 13, 1990) at 1.
such resolution, by a court construing the intestacy statute in the context of the particular fact pattern before it.

It seems certain that these words of class definition found in an instrument, or in an intestacy statute, barring express contrary definition or extremely unusual circumstances, must denote marital biological issue. The general question remains, however, whether such words, employed without express definition, should be construed as also including nonbiological but adoptive issue ("adopteds in"), biological issue adopted away from the natural family ("adopteds out") or biological but nonmarital issue ("nonmaritals"). Under present New York law, it is quite clear that, barring express indication to the contrary, such terms in instruments and in intestacy law do denote adopteds in and their issue.

As to the rights of adopteds out under instruments, In re Best, decided by the New York Court of Appeals, created a presumption that the word "issue" would not include those children adopted out by complete strangers to the adopted out's natural family. Best left open the question of exclusion if a child is adopted out by family members (hereinafter "hybrid adoptions"). This question was resolved thereafter by legislation that provided that a gift to issue, lawful issue, children, descendants, heirs, heirs at law, next of kin, distributees or any term of like import would be deemed to include persons adopted out by certain members of their natural families who would have been members of such a class but for the fact of

6. For, after all, the intention of the creator takes precedence over common usage. See supra notes 2-3 and accompanying text.
7. This proposition forms the premise underlying EPTL § 1-2.10.
10. Id. at 155, 485 N.E.2d at 1012-13, 495 N.Y.S.2d at 347.
11. N.Y. DOM. REL. LAW [hereinafter "DRL"] § 117 (McKinney 1988). Thus, In re Best governs the import of the word "issue" in cases of adopteds out where the adoption is by strangers and excludes the adopted out from the class gift. DRL §117 governs the import of the word "issue" and similar words in cases of adopteds out where the adoption is by certain classes of family members - whether biologically related or related through a prior adoption in (a hybrid adoption), and includes the adopted out in the class gift. Each sort of adoption by strangers or hybrid would appear to represent a large fraction of total adoptions in New York. Leg. Doc. (1985) No. 65(N) 9-10 citing Leg. Doc. (1963) No. 19 App. E. 158-59 (The Second Report of the Bennett Commission) and Leg. Doc. (1959) No. 44, 9F. In cases where the adoption is by classes of family members not governed by DRL §117, is would seem likely that these adopteds out would not be included in class gifts by reason of an expressio unius est exclusio alternius argument as to the intent of the legislature. However, it can be assumed that this third class of adopteds out, adopted by family members not within the classes expressly considered by DRL §117, is numerically small and perhaps insignificant.
their adoption.

Until recently, adopteds out were removed from their natural (preadoption) family in cases involving intestacy. The single historical exception to this rule was that an adoption by the spouse of a parent (stepparent) did not sever the relationship of the child with the natural parent.12 However, it was believed that this result—the general exclusion of adopteds out in the case of hybrid adoptions—was not in keeping with the presumed intent of a typical decedent.13 Accordingly, legislation was enacted allowing adopteds out in hybrid adoptions to appear in both their adoptive and biological family trees for purposes of intestacy.14

Nonmaritals also create ambiguity in donative transfers. Best spoke to this group and created a rebuttable presumption that the word “issue” includes nonmaritals when employed on an instrument.15 The New York Legislature has now enacted a bill that would require this construction for wills and revocable gifts of persons dying on or after September 1, 1991, unless the instrument contained an express provision to the contrary.16 On the intestacy side, nonmaritals always take from and through their natural mothers and from and through their natural fathers given prescribed proofs of paternity.17

This article will consider the range of problems raised by the treatment of nonmaritals and adopteds out in the law of donative transfer and will also consider New York’s legislative response to such problems. First, although legislation in this area is certainly well-intentioned, certain criticisms of the relevant statute will be offered. Second, the generally preemptive nature of a legislative solution will be examined and an argument advanced in favor of a more

12. EPTL § 4-1.1; DRL §117 (1)(d) (McKinney 1988) provides:
When a natural or adoptive parent, having lawful custody of a child, marries or remarries and consents that the step-parent may adopt such child, such consent shall not relieve the parent so consenting of any parental duty toward such child nor shall such consent or the order of adoption affect the rights of such consenting spouse and such adoptive child to inherit from and through each other and the natural and adopted kindred of such consenting spouse.
16. EPTL § 2-1.3(a)(3) (McKinney Supp. 1991). The act also requires this construction for all lifetime gifts made on or after September 1, 1991. Id. A nonmarital is deemed an “issue” of a beneficiary under an instrument if the beneficiary is the nonmarital’s mother or the nonmarital’s father, given the proofs of paternity prescribed by EPTL § 4-1.2 (McKinney 1981).
17. EPTL § 4-1.2 (McKinney 1981).
flexible approach.

I. *In re Best*

In *Best*, the court construed the will of Jennie Best. The will was executed in 1973, four months before Mrs. Best's death. Her will left her residuary estate in trust for Mrs. Best's daughter, Ardith Reid.\(^{18}\) Upon the death of Mrs. Reid, the trustees were "to divide said trust fund into as many shares or parts as there shall be . . . issue [of Mrs. Reid] . . . and to continue to hold each of such shares or parts in trust during the life of one of said persons."\(^{19}\)

Anthony Reid, born in 1963, was the sole issue of Ardith's only marriage.\(^{20}\) However, in 1952 Ardith had given birth to a nonmarital male child.\(^{21}\) Shortly after that birth, with the knowledge of Mrs. Best,\(^ {22}\) Ardith surrendered this child for adoption through an agency, and the adoption records were sealed.\(^ {23}\) After the death of Mrs. Best, the executors of her will learned of Ardith's nonmarital child.\(^ {24}\) Faced with the ambiguity of the word "issue" as used in Mrs. Best's will in light of the nonmarital child (or issue), the executors felt compelled to try to make that child a party to their accounting. Through the efforts of a detective and with the aid of the adoption agency (but not through the unsealing of the judicial records of the adoption), they were able to locate the child.\(^ {25}\)

The dispute, of course, was whether the nonmarital adopted out child should be included in the class of Ardith's "issue" in Mrs. Best's will. On the executors' account, the question was theoretical because the nonmarital adopted out child held only a contingent future interest in the trust (however the will was to be construed, he would have to survive his natural mother to receive a present income interest). But, on the trustees' account that followed the death of Mrs. Reid, the question of construction had to be addressed. Should the nonmarital adopted out child take equally with his marital half-

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20. *Id.*
21. *Id.*
23. *Id.*
24. A co-executor was Mrs. Best's brother who knew of the existence of the nonmarital child and its adoption out. Affidavit of Andrew Ian Cook at 2, Appellant's Appendix at 157. However, it does not seem that he prompted Mrs. Reid’s disclosure. Appellant's Brief at 4.
brother, or should he take nothing? Additionally, was Mrs. Best's intention (actual or presumed) to include this particular child within her gift or to exclude him? On previous appeals, each of the three courts which ruled on the point chose to consider the question as having two separate parts: (1) should the fact that the child was a nonmarital create a presumption of exclusion and (2) should the fact that the child was adopted out also give rise to such a presumption. The eventual decision of the New York Court of Appeals purported to give guidance in cases involving nonmaritals who are not adopted out and adopteds out who are not nonmaritals. To this extent, the opinion goes beyond the significant facts of the Best case.

A. "Issue" and Nonmarital Children

The Westchester County Surrogate's Court was the first court to deal with the question of nonmaritals. Surrogate Judge Brewster relied, in part, on the persuasive authority of a first department case, In re Hoffman. The court in Hoffman had concluded that the term "issue," when standing alone in an instrument without "express qualification," should denote nonmarital as well as marital children. The Hoffman conclusion, based partially on judicial perceptions as to present-day mores, reversed a prior and contrary rule of construction that nonmaritals should not share in a gift of "issue" without express qualification. Surrogate Judge Brewster, deciding

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26. This question had been raised before in open court. See In re Hoffman, 53 A.D.2d 55, 65, 385 N.Y.S.2d 49, 56 (1st Dep't 1976) ("The word 'issue' should be construed to refer to legitimate and illegitimate descendants alike in the absence of an express qualification by the testatrix."); In re Leventritt, 92 Misc. 2d 598, 400 N.Y.S.2d 298 (Sur. Ct. 1977) ("children should be construed to exclude nonmarital issue in the case of an instrument drafted later than 1951 - the date of [the] Hoffman will"). This presents the interesting question of whether the holding of Best is retroactive or prospective - an issue that was briefed for the court of appeals but not decided - and, if the latter, from what date?


28. Best, 116 Misc. 2d at 373, 455 N.Y.S.2d at 492-93.
30. Id. at 65, 385 N.Y.S.2d at 56.
31. Id. at 57, 385 N.Y.S.2d at 50.
in favor of the presumed inclusion of nonmaritals, also made reference to the EPTL definition of “issue” in section 1-2.10, which does not make any marital-nonmarital distinction. The court noted: “There is no language in the will itself suggesting an intention different from that defined by statute should be given to the word ‘issue.’”

Finally, the court considered Mrs. Best’s was awareness of the birth of the nonmarital child in 1952. She was also aware of the child’s immediate adoption. The court observed:

The decedent took no action to remove the nonmarital son from her [1973] will. While she may have been reluctant to acknowledge the existence of the birth of a nonmarital child to her daughter, an intent to exclude such child was not written into her will. It could easily have been included in her will by the simple direction that the bequest to her daughter’s issue be limited to “issue of a lawful marriage” or similar language which would not acknowledge or suggest that there was in fact a nonmarital child. Her failure to state her intention to disinherit the nonmarital child under the circumstances of her knowledge of the existence and adoption of such a child overcomes any inference of intent to disinherit which might arise from the secrecy which she maintained concerning the birth of a nonmarital child to her daughter.

The Appellate Division (Second Department) affirmed, per curiam.

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33. *Best I*, 116 Misc. 2d at 373, 455 N.Y.S.2d at 493. EPTL §1-2.10 (McKinney 1981) provides:
   (a) Unless a contrary intention is indicated:
      (1) Issue are the descendants in any degree from a common ancestor.
      (2) The terms “issue” and “descendants” in subparagraph [1] include adopted children.
   [There is no paragraph (b)].
   Article 1, part 2 of the EPTL provides definitions for a number of terms employed by the EPTL. It therefore is only applicable to the construction of instruments indirectly, through the argument that the drafter was probably familiar with the statutory definitions and, if a defined word was employed, probably intended that it would have the same meaning as it would in the statute. However, Article 1 definitions should be contrasted with the provisions of Article 2 which speak directly to instrument construction.

34. *Best I*, 116 Misc. 2d at 373-74, 455 N.Y.S.2d at 493. Of course, in a construction case, it is not necessarily relevant how the word should be construed as a matter of statutory interpretation. See supra note 33.

36. *Id.*
37. *Id.* (emphasis added).
38. *Id.* (emphasis added).
39. The Appellate Division is the intermediate level appellate court in New York State. *In re Best*, 102 A.D.2d 660, 477 N.Y.S.2d 431 (2d Dep’t 1984). There certainly is some merit in the summary handling of construction cases by appellate courts. First, evidence of intent
The court of appeals, on the subsequent appeal, agreed with the lower courts that the word "issue", when used in an instrument without other indication of the creator's intent, includes nonmarital children:

Contemporary social mores and constitutional doctrine governing the rights of children born out of wedlock suggest that drafters now view the unmodified term issue to refer to children born both in and out of wedlock [citation omitted], and we now hold this to be a rebuttable rule of construction (emphasis added). 40

B. "Issue" and "Adopteds Out"

In dealing with the second aspect of Best, the courts' conclusions differed regarding the question of whether "issue", without further indication of intent, should be construed to include natural children that were adopted out. Surrogate Brewster concluded that "adopteds out" should be within the class. 41 In reaching this result, he put great weight on Domestic Relations Law ("DRL"), section 117. 42 That statute provides that "adopted outs" generally should not inherit from their natural families in intestacy, but "[t]his 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 . . . or under any inter vivos trust instrument . . . executed by such natural parent or his or her kindred . . ." 43 The court noted the comment of the framers of this provision (the Bennett Commission): "This act is also intended to provide specifically that it does not affect any interest an adopted child might have under the will or inter vivos instrument of any member of his natural family. . . ." 44 The questions at this point were (1) whether DRL, section 117 was intended to prevent adopteds out from losing any interest they would have in a class gift but for the fact of their adoption or, to the contrary, (2) whether the

40. Best, 66 N.Y.2d at 154-55, 485 N.E.2d at 1012, 495 N.Y.S.2d at 347 (citation omitted)(emphasis added).
41. Best I, 116 Misc. 2d at 374, 455 N.Y.S.2d at 493.
42. Id. at 368-70, 455 N.Y.S.2d at 490-91.
43. Id. at 369-70, 455 N.Y.S.2d at 490.
44. Id. at 370, 455 N.Y.S.2d at 491.
subsection was to insure that adopteds out—by the fact of their adoption—would not lose gifts presumptably intended by the creator for them to have regardless of any adoption.

It was clear that DRL, section 117 was intended to strip inheritance rights from the adopted’s pre-adoption family only in intestacy. This was accomplished by the first clause of subdivision 2. The difficulty arose from the second clause, which was either redundant (and basically meaningless), or created a canon of construction in favor of including adopteds out, regardless of whether the adoption was by strangers or by family members. Surrogate Judge Brewster took the latter view. He concluded that an adopted out, whose existence and whereabouts might be protected by sealed records, was nonetheless presumptively interested in a gift to “issue” and, therefore, was a necessary party to a construction or accounting proceeding. He admitted his conclusion would create jurisdictional problems for fiduciaries. In his view, however, these problems resulted from “the failure of the legislature by its choice of language in framing DRL, section 117 to totally sever the rights of adopted out children to inherit . . . from or through its natural or biological parents.” Surrogate Brewster also admitted that his construction of DRL, section 117 would promote the violation of the secrecy that

45. There are difficulties with both positions. If the clause is redundant, why does it speak only to interests created by “natural parents or their natural or adopted kindred” as opposed to interests created by any creator? Of course, natural parents and their kindred would be those most likely to make class gifts that arguably would be intended to include adopteds out. On the other hand, if the clause has meaning, it creates a canon of construction that arguably limits freedom of testation - a creator could not expressly provide that class gifts should not benefit adopteds out - which makes the operative verb “shall not affect” ill-chosen.

46. Best 1, 116 Misc. 2d at 373, 455 N.Y.S.2d at 492.

47. If the adopted out could be “virtually represented” by a person whose identity was known for the purposes of Surrogate's Court and Procedure Act [hereinafter “SCPA”] § 315 (McKinney 1988), then the adopted out would not be a necessary party. For example, if a gift were given “to A for life and on A’s death to A’s issue then living,” and A had one child, B, whose child C, was adopted away, although C would be “issue” of A pursuant to Surrogate Judge Brewster’s view, it is probable that B would be permitted to “virtually represent” C. SCPA § 315(2)(a)(i) (McKinney 1988). It is assumed that the informational disclosure required by SCPA §§ 315(7) and 304(3) would not hinder virtual representation in the given instance. However, virtual representation was not available in the Best situation for Mrs. Reid had the present income interest, and her issue - arguably including the adopted out - had a future interest. So while section 315 can be of use in instances where the adopted out has a remainder contingent on the predecease of his or her parent, it does not resolve the problem to fiduciaries posed by Surrogate Judge Brewster’s interpretation in a “garden variety” case.

48. Best 1, 116 Misc. 2d at 374-75, 455 N.Y.S.2d at 493.

49. Id. at 374, 455 N.Y.S.2d at 493.
surrounds adoptions through agencies, and he urged that the legislature consider appropriate amendment: "To continue the existing statute without amendment will give rise to litigation, delays in the settlement of estates and distribution of property to persons not only unknown to a testator but to unintended beneficiaries." Although the appellate division affirmed *per curiam*, the court of appeals reversed on the issue of the presumptive inclusion of adopted out in gifts of "issue" and similar classes.

The court of appeals agreed with the surrogate that his conclusion would conflict with "powerful policy considerations"—the confidentiality of adoption decrees and the finality of judgments of descent. Accordingly, the court chose to read DRL §117 in a fashion contrary to the surrogate.

Only if a child adopted out of the family is specifically named in a biological ancestor's will, or the gift is expressly made to issue including those adopted out of the family, can the child take. In short, Domestic Relations Law §117 does not mandate that such a child receive a gift by implication.

The court limited this conclusion—that there was a presumption that an adopted out should be excluded from a class gift to "issue"—to cases of adoption by strangers to the biological family. The court saw adoptions within the family tree, which it termed "hybrid adoptions," as involving possibly different considerations.

II. Statutory Amendments

As *Best* worked its way through the appellate process, the New York Law Revision Commission considered the problem of hybrid

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50. *Id.* at 375, 455 N.Y.S.2d at 493-94.
51. *Id.* (emphasis added). It is a canon of legislative interpretation that a court in construing legislation should assume the legislature intended its legislation to be reasonable. On the other hand, Surrogate Brewster clearly wanted to emphasize, either for higher courts or the Law Revision Commission, the very real problems he faced with this statute. See *supra* note 45.
52. 102 A.D. 2d 660, 477 N.Y.S.2d 431 (1st Dep't 1984).
54. *Id.* at 155-56, 485 N.E.2d at 1012-13, 495 N.Y.S.2d at 347-48.
55. *Id.* at 156, 485 N.E.2d at 1013, 495 N.Y.S.2d at 348.
56. In a footnote the court noted:

Different considerations might apply in hybrid cases, such as where a child is adopted by two descendants in some degree from a biological parent or parents or by one such person and a spouse who is a total stranger to the family. That question is not before us and we express no opinion on it.

66 N.Y.2d at 155 n.1, 485 N.E.2d at 1012-13, 495 N.Y.S.2d at 347.
adoption in the twin contexts of intestate rights and construction of instruments. The classic problem addressed by the Commission was the death of one parent followed by the remarriage of the survivor and the adoption of the child or children by the stepparent. This adoption, by operation of DRL, section 117 as it then existed, cut the adopted child out of the deceased parent's family tree (although it inserted the child into the adopting stepparent's) for the purposes of intestacy. Also, the adoption out might well exclude the adoptee from class gifts made by the deceased parent's family after the fact of the adoption. The Law Revision Commission believed that these conclusions were not in keeping with the presumed intent of a typical deceased parent's family. The legislature enacted the proposed reforms in two parts. The first dealt with class gifts under instruments in 1986 and the second dealt with intestacy in 1987. In a less classic manner, the adopted out was also possibly disadvantaged when both parents had died, or when, because of the inability of the parents to care for the child, the child was adopted not by a stepparent but by a member of a parent's family.

DRL, section 117 now provides that in the case of the construction of instruments executed after the effective date of the amendment, unless the instrument expressly provided to the contrary, an adopted out child would share in class gifts made by his or her natural grandparents or their descendants if an adoptive parent was:

1) the spouse of the child's natural parent;
2) the child's natural grandparent; or
3) a descendant of such grandparent.

In the same vein, it is provided that in the case of persons dying intestate after the effective date of the amendment, an adopted out child would inherit from his or her natural grandparents or their descendants if an adoptive parent was:

1) the spouse of the child's natural parent;

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57. It should be recalled that § 117 was quite clear as to the inclusion in the case of intestacy. The ambiguity which faced the courts in Best arose in the context of construction. See supra note 42 and accompanying text.
58. The question, as usual, would be one of intent, either expressed or implied. However, in the classic case, especially where the instrument was created before the adoption out, it seems most unlikely that there could be any intention to exclude. In the opinion of Surrogate Brewster, but not of the court of appeals, DRL § 117 resolved this question in favor of the adopted out. See supra notes 41-42 & 53 and accompanying text.
59. Leg. Doc. (1986) No. 65 (B) at 35.
60. 1986 N.Y. Laws ch. 408.
2) the child's natural grandparent; or
3) a descendant of such grandparent.  

Several years after addressing the problems of adopted out, the Law Revision Commission turned its attention to nonmaritals. The rights of nonmaritals in intestacy were already governed by EPTL, section 4-1.2, which provides that a nonmarital can inherit from and through that person's natural mother and from and through that person's natural father so long as certain prescribed proofs of paternity are met. As to the rights of nonmaritals under instruments, the Law Revision Commission proposed and the legislature enacted an amendment to EPTL, section 2-1.3:

(a) Unless the creator expresses a contrary intention, a disposition of property to persons described in any instrument as the 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...

(3) Nonmarital children. For the purposes of this paragraph, a nonmarital child is the child of a mother and is the child of a father if the child is entitled to inherit from such father under section 4-1.2 of this chapter. The provisions of this paragraph shall apply to the wills of persons dying on and after September first, nineteen hundred ninety-one, to lifetime instruments theretofore executed which on said date are subject to the grantor's power to revoke or amend, and to all lifetime instruments executed on or after such date.

Accordingly, after Best and the statutory amendments to DRL, section 117 and EPTL, section 2-1.3, the law may be summarized as follows:

A. Express Instruments

1. As to instruments that become irrevocable on or after September 1, 1991 "issue" presumptively includes maternal nonmarital issue and paternal nonmarital issue under the circumstances set forth in EPTL, section 4-1.2.

2. As to instruments that become irrevocable before September 1, 1991 "issue" presumptively includes non-marital issue unless the Best presumption is rebutted or unless the amendment to EPTL, sec-

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62. DRL § 117 (McKinney 1988). The bill used the word "natural" although it is clear that this word was intended to mean preadoption relatives and thus include both biological and adoptive kin.

63. EPTL §4-1.2 (McKinney 1991).

64. EPTL §2-1.3 (McKinney 1981).
tion 2-1.3 can be seen as a legislative overruling of Best.

3. "Issue" does not include issue adopted out by strangers.

4. For instruments executed after September 1, 1986 by the preadoption grandparent of the adopted out or a descendant of a preadoptive grandparent, "issue" includes adopted out if the adoptive parent was:
   (i) the spouse of the preadoption parent; or
   (ii) the preadoptive grandparent or a descendant of such grandparent.

B. Intestacy

1. "Issue" includes maternal nonmarital issue and paternal nonmarital issue under the circumstances set forth in EPTL, section 4-1.2.

2. In the case of persons dying intestate after August 31, 1987, "issue" includes an adopted out if and only if the decedent was a preadoption grandparent, or a descendant of a preadoption grandparent, and the adoptive parent was:
   (i) the spouse of a preadoptive parent; or
   (ii) the preadoptive grandparent or a descendant of such grandparent.

Some examples may be in order. In almost every instance, an adopted child is "pasted into" the adoptive family tree and therefore can take from and through the adoptive parents. In most instances, an adopted child is removed from the natural family tree, and, therefore, after the adoption out will no longer be able to take from and through the natural parents. A parent who consents to adoption of his or her child by his or her spouse does not lose the existing relationship by reason of this adoption. In instances where a child is adopted away by a stepparent or certain relatives and the intestate is one of certain members of the child’s natural family, the

65. For the exceptions, see infra notes 72-74 and accompanying text.
66. DRL § 117(1)(c) (McKinney 1988). An adopted in can inherit as a grandchild of his or her adoptive mother’s and father’s parents. Presumptively, an adopted in will share in gifts under instruments to issue of his or her adoptive mother or father.
67. For the exceptions, see infra notes 69 and 70 and accompanying text.
68. DRL § 117(1)(b) (McKinney 1988). An adopted out will not inherit as a grandchild of his or her biological mother’s and father’s parents. Presumptively, an adopted out will not share in gifts under instruments to issue of his or her biological father or mother.
69. DRL § 117(1)(d) (McKinney 1988). A child adopted by a stepparent with the consent of the parent who is the spouse of the adopting stepparent will inherit as a grandchild from the consenting parent’s parents. Presumptively, such a child will continue to share in gifts under instruments to issue of the consenting parent.
child will not be removed from the natural family tree and still will be able to take through his or her natural parent who may or may not have consented to the adoption.\(^7\) In most instances,\(^7\) when a person would take as a member of both the natural and adoptive family trees because of a combination of the general rule\(^7\) and the just-noted rule,\(^7\) that person will take only in his or her natural capacity.\(^7\) The single exception to the rule preventing "double dipping"\(^7\) is when a person would take as a member of both the natural and adoptive family trees, and the intestate is that person's adoptive parent, that person will take only in his or her adoptive capacity.\(^7\)

### III. LIMITATIONS OF BEST

The general goal of construction is to determine and effectuate the intentions of the instrument's creator. If this is the sole value to be furthered by construction, each construction case therefore must be interpreted sui generis. The word "issue" employed in the Best will, on its face, is ambiguous as to whether the class it described included the nonmarital child surrendered for adoption.\(^7\) If the testatrix's intention governs, her will can be construed only with reference to the particular facts of the Best case.

Mrs. Best's daughter had a nonmarital child in 1952.\(^7\)

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70. A child adopted by a stepparent with the consent of the parent who is the spouse of the adopting stepparent, e.g., after the death of the other natural parent, will inherit as a grandchild from the parents of the deceased parents. Presumptively, the child will continue to share in gifts under instruments to issue of the deceased parents, created by certain relatives of the child.

71. For the exception, see infra note 75-76 and accompanying text.

72. The general rule permits adopteds to take as members of their adoptive families.

73. The rule permits a child adopted by a stepparent to remain in their natural family trees under certain circumstances.

74. DRL § 117(1)(e) (McKinney 1988). A child adopted after the decease of his parents, e.g., by his paternal grandfather, will inherit after his adoptive parent's death for the purposes, e.g., of a paternal aunt's intestacy as his adoptive parent's grandchild. Presumptively, the child will continue to share in gifts under instruments created, in other words, in his natural capacity, by certain relatives of the child to issue of his deceased natural grandparent (and adoptive parent) as a grandchild. Compare Uniform Probate Code (U.L.A.) § 2-114 (gives the child the larger of the two shares).

75. DRL § 117(1)(e) (McKinney 1988).

76. Id. A child adopted after the decease of his parents, for instance, by his paternal grandfather, will inherit in his adoptive parent's intestacy as his adoptive parent's (and natural grandparent) child. Presumptively, the child will share in gifts under instruments created by his adoptive parent (and natural grandparent) as a child. Compare Uniform Probate Code (U.L.A.) § 2-114 (gives the child the larger of the two shares).

77. Best, 66 N.Y.2d at 154, 485 N.E.2d at 1011-12, 495 N.Y.S.2d at 346-47.

78. Id. at 153, 485 N.E. 2d at 1011, 495 N.Y.S.2d at 346.
Best knew of this child,\textsuperscript{79} probably advised her daughter to surrender the child for adoption and certainly assisted her daughter in making such arrangements.\textsuperscript{80} Neither Mrs. Best nor her daughter participated in the raising of this child: they did not see him nor did they know his whereabouts after the adoption.\textsuperscript{81} It would seem that Mrs. Best was uncomfortable with the fact of this child, for she never mentioned its existence to many members of the family,\textsuperscript{82} quite possibly to spare the feelings of her daughter, her eventual son-in-law and their child. Some twenty years later, the drafter of her will, presumably at her instruction, employed the word "issue" to describe a class of beneficiaries.\textsuperscript{83} As Mrs. Best never mentioned the fact of the nonmarital child to the drafter,\textsuperscript{84} the drafter could not have been aware of the ambiguity of the word "issue" in describing a class the drafter thought would be easily defined. In addition, the nonmarital child was surrendered for adoption shortly after its birth.\textsuperscript{85} Mrs. Best's daughter (presumably with Mrs. Best's advice and approval, but certainly with her knowledge\textsuperscript{86}) legally severed her relationship with her child. The question before the several courts in \textit{Best}, therefore, was whether Mrs. Best intended to include this nonmarital adopted out child in her gift to her daughter's "issue." It is certainly possible to conclude that she did not.

The precise facts, which are crucial in determining Mrs. Best's donative intent, are not easily identified. Facts probably militating against the inclusion of this child in the class of "issue" for the purposes of the will include: (1) that the child was nonmarital; (2) that Mrs. Best appeared to feel, because of this child, some sense of stigma attached to her daughter; (3) that the child was immediately surrendered for adoption; (4) that the adoption was through an agency so that the records would be sealed; (5) that the surrender occurred shortly after birth before any parent-child or grandparent-grandchild bond could form; (6) that neither Mrs. Best nor her daughter participated in the upbringing of the child; (7) that neither Mrs. Best nor her daughter was aware of the continued whereabouts

\textsuperscript{79} \textit{Best}, 116 Misc. 2d at 374, 455 N.Y.S.2d at 493.
\textsuperscript{80} Id.
\textsuperscript{81} Appellant's Brief at 4.
\textsuperscript{82} \textit{Best}, 116 Misc. 2d at 374, 455 N.Y.S.2d at 493.
\textsuperscript{83} Id. at 366, 455 N.Y.S.2d at 488.
\textsuperscript{84} Affidavit of John F. Brosnan, Esq., Appendix at 152, 153. In fact, she provided the drafter with a family tree that did not reflect the existence of the nonmarital.
\textsuperscript{85} \textit{Best}, 116 Misc. 2d at 366, 455 N.Y.S.2d at 488.
\textsuperscript{86} Affidavit of Andre Ian Cook, Appendix at 156.
of the child or even his continued existence; (8) that Mrs. Reid did have subsequent marital issue; (9) that twenty years passed between the adoption and the drafting of the will; and (10) that Mrs. Best did not mention the possible existence of the child to the drafter of her will. A fact militating in favor of the inclusion of the child is that Mrs. Best knew of the existence of the nonmarital child although she did not acknowledge its existence to the drafter of her will. As the particular mix of facts present in Best is varied, the estimate of probable intent changes. It would seem that the more contact Mrs. Best and Ardith had with the child - for example, if he had not been surrendered for adoption or if he had been adopted by a family member and Mrs. Best and Ardith continued to play a role in his upbringing as "aunts" - the more likely it would have been that Mrs. Best intended to favor him.

However, although the primary purpose of a construction proceeding is to honor the presumed intention of the creator, it is not the sole concern. Public policies intrude on construction from a number of directions. Adopted ins are favored in law and, therefore, there is a statutory presumption that "issue" includes "adopted in" children. Nonmarital children certainly are not disfavored. Recent amendment of the intestacy statutes has made it progressively easier for nonmarital children to inherit from and through both their parents in intestacy. Most recently, the legislature has created a presumption that the word "issue" and like terms when used in instruments should be read to include nonmarital children of the mother and of the father, as long as the proofs of paternity required by EPTL, section 4-1.2 are complied with. Speaking generally, the sheer number of out-of-wedlock births suggests that modern society considers conception and giving birth out-of-wedlock without the opprobrium attached to those acts by previous generations. And to the extent there still is social disapproval, it surely should attach to

87. EPTL § 2-1.3 (McKinney 1981).
88. See In re Hoffman, 53 A.D.2d 55, 57-63, 385 N.Y.S.2d 49, 53-54 (1st Dep't 1976). For the most recent development in this line of enactments, see EPTL § 4-1.2 (McKinney Supp. 1991).
89. EPTL § 2-1.3(a)(3) (McKinney 1981).
90. In 1984, 27.1% of births in New York State were out of wedlock. N.Y. Times, Mar. 24, 1986, § B, at 8, col. 1. It is estimated that more than half of 1986 births given by young women aged 15 to 19 years in the United States will be out of wedlock; N.Y. Times, Mar. 4, 1986, § C, at 18, col. 4.
91. The court of appeals in Best noted that "contemporary social mores" suggested that drafters would not expect "issue" to be construed in a manner discriminatory to nonmarititals. 66 N.Y.2d 151, 154, 485 N.E.2d 1010, 1012, 495 N.Y.S.2d 345, 347 (1985).
the parents and not to the child.

There seems to be little question that the court of appeals and the legislature were correct to create a presumption that nonmaritals should be included within “issue” to the extent that the word to be construed referred to “issue” of the custodial parent or parents. Such a limited presumption would arise from presumed intent. If a creator wishes to favor the children of A, it seems likely that the creator wishes to favor those to whom A acts as a parent. In view of changes in social mores, it seems unlikely that the marital or nonmarital status of a child would matter, and, if it did, the creator could make this distinction expressly. However, if a creator wishes to favor the children of A, it seems less likely that the creator wishes to favor those biological issue of A, whom A does not see or know. In *Best*, the court did not expressly distinguish between nonmarital issue of custodial as opposed to noncustodial parents. This lack of distinction would seem to indicate its decision was based less on presumed intent and more on a policy of nondiscrimination: the marital or nonmarital status of a child does not attach from any act on the child’s part. Therefore, the law should support equal treatment for nonmaritals, barring actual evidence that a contrary intent was intended. The legislature followed the court’s lead and indeed extended it, requiring not only that there be a rebuttable presumption in favor of inclusion, but also that the rebutting of this presumption could only be effected by express provision in the instrument.

This broader treatment can be defended because the presumption will yield to an express provision to the contrary. However, the fact that the presumption is so broad may defeat the presumed desire on the part of the court and the legislature to promote the rights of nonmaritals. Drafters now routinely will raise in the abstract the question of inclusion or exclusion of nonmaritals. A creator, faced with an abstract question, may opt for exclusion of a nonmarital out of a desire for what passes for propriety. However, faced with the actuality of a long standing “regular-irregular” relationship or a single parent situation, the creator might well be inclined towards inclusion. By compelling action, the *Best* decision and the amendment to EPTL, section 2-1.3 may, in fact, promote injustice.

Privacy of persons is a second public policy addressed by the courts. In cases of nonmaritals not surrendered for adoption, this

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93. *Id.*
value is of minor importance with regard to the custodial parent or parents. Construing gifts to that parent’s “issue” to include the nonmarital child would not make public that which was private. On the contrary, by allowing the nonmarital child to take along with marital siblings, discrimination reflecting an archaic and unfair prejudice (of which the child might be painfully aware) can be limited. However, in the case of the noncustodial parent the situation is somewhat different. If gifts to that person’s “issue” are to be construed as including a nonmarital child, it would seem that that person will have to inform his or her family of the fact of that child, so that relations can expressly define the beneficiaries of their potential gifts. This the parent may be loathe to do, as it may require a confession of sexual irresponsibility and perhaps adultery. So creators working in ignorance of the actual facts, must choose blanket inclusion or exclusion. Also, in the case of instruments which are irrevocable, such a construction puts the interests of the nonmarital child at odds with those of the marital children. The noncustodial parent will almost certainly play a greater role in the upbringing of his or her marital children and may well feel a closer bond with them. These concerns may lead a noncustodial (male) parent to deny the paternity of the nonmarital or otherwise to attempt to evade responsibilities, both emotional and financial, owed the nonmarital child.

Ease of administration and judicial economy is a third public policy to be considered. Proof of paternity of nonmarital children can be burdensome. In the case of intestacy, the legislature has mandated mechanisms by which paternity may be acknowledged or proved, and these standards of proof are incorporated by reference into EPTL, section 2-1.3. However, there is no requirement as to when proof of paternity must be made. Therefore, because unknown but possible nonmarital children are necessary parties to an accounting proceeding, the fiduciaries of such a gift will be denied a complete discharge. It is possible that a male noncustodial parent will not know of the existence of the child, which will create problems of security of title and effective fiduciary discharge. This concern helped persuade the court of appeals in Best to hold that

94. EPTL § 4-1.2 (a)(2) (McKinney 1981).
95. It seems that paternity can be proved beyond reasonable doubt even if the father is dead. HANSEN & GURTLER, "TYPING OF A DEAD MAN BY A MICROABSORPTION METHOD: SOLUTION OF A PATERNITY CASE," 13 ANTIGENS 61 (1979). New York permits paternity to be shown by a "blood generic marker test" together with other evidence. EPTL § 4-1.2 (a)(2)(D) (McKinney 1981).
certain classes of adopteds out should not be presumed to be "issue." These problems are severely diminished in the case of a father who provides custodial care. Paternity will be assumed and, if asserted, probably will not be denied. Furthermore, the fact of the child will be well known to the father's family and it will be easy to make such child a party to any proceeding. Accordingly, both as a matter of presumed intent and from the values underlying the public polices which touch on the point, the presumption judicially announced and legislatively extended may be overbroad.

The Best court also spoke to the problem of adopted outs. If a child was surrendered for adoption to strangers, there is a presumption that a gift to his or her parents' "issue" shall not include the adopted out. The policies noted in connection with nonmarital children have impact on this point as well, but here the decision of the court of appeals seems more salutary.

First, as to the question of presumed intent, the fact that a child is surrendered for adoption usually results from the conclusion by the child's parents or society that the child would be better off in a new family unit. It seems not unusual that the creator of an interest - probably a family member of a parent - would concur in this conclusion. As such, the position of the court of appeals would seem to be sound as a matter of presumed intent. One possible exception to this conclusion may arise if the adoption occurs not as a result of surrender but because the death of both parents. There would be no grounds to conclude that a creator would wish to disinherit a child on this basis. However, there are other reasons, discussed below, why disinherance even in such instances should in fact result.

It is generally true that adoption is favored in law. However, this policy finds its effect in the complete (or almost complete) excision of the adopted from his or her natural family and the complete insertion of the child into the adoptive family. Obviously, a presumption that the child should take under a gift to "issue" leaves a strand connecting the child to his or her preadoptive status. It can be argued, of course, that the child's economic interest should not suffer

96. An example of such a strike suit was demonstrated in In re Leventritt, where the mother of the nonmarital intervenor had already agreed that the child was not issue of Mr. Leventritt as part of a settlement of a previous proceeding. 92 Misc. at 599-600, 400 N.Y.S.2d at 300.
97. As would appear to have been in the case of Best. See supra text accompanying notes 78-87.
98. See supra note 87 and accompanying text.
99. See supra text accompanying note 12 and notes 65-70.
for the failings of the natural parents. However, the stronger position would seem to be that the sociological interest of being a complete member of the new family should take precedence over economic interest. This position seems to be taken by the legislature in its basic formulation of section 117. Furthermore, persons with merely contingent interests may well be necessary parties in construction or accounting proceedings. In these instances, the new family unit, which the law has so carefully constructed, is broken down for what may produce no real economic interest at all.  

The right of privacy is allied with this conclusion and also supports the conclusion of the court of appeals. It is obviously important for the adopted child and the adoptive parents to bond into a new family unit. To this end there are statutory provisions for the sealing of adoption records. A presumption that the adopted out should share in a class gift breaks down the wall of privacy surrounding the gift, possibly without any economic gain to the child. It is true of course that the demands of privacy are strongest during the child's infancy and during that period in which the child's interest would be represented by a guardian ad litem. However, the proceeding would disclose the fact of the child and probably would require communication with the adoptive parents. On the other hand, as the court of appeals noted, if the adoption is not by strangers but by members of the natural family - a hybrid adoption - the fact of the adoption and the natural identity of the child will more probably be known and the importance of the value of privacy accordingly diminished.

Finally, the presumption regarding adopted outs announced by the court of appeals in Best also promotes judicial economy and ease of administration. In the case of adoption out by strangers, it is likely that the records will be sealed and thus the child will be difficult to locate. Therefore, there is a presumption that the child need not be found and made a party. In the case of an adoption by family members, the child is likely to be well known and readily available, and therefore these values are not so pressing.

100. In Best, for example, the adoptive parents contended that their son has been promised a "substantial legacy" in exchange for his coming forward. With hindsight, they regretted that they had allowed disclosure of the facts of his birth to occur. A good argument based on public policy could be made that, where the records have been sealed, a creator should not be permitted to require that a gift to "issue" should include adopted outs unless the specific adopted out can be named.

IV. LIMITATIONS OF DRL, SECTION 117 AMENDMENT RELATING TO INSTRUMENT CONSTRUCTION

The Best court acknowledged that its decision should not govern cases of hybrid adoptions - "where different considerations might apply." But by the amendment to DRL, section 117 enacted in 1986, an "adopted out" will now share in class gifts made by his or her natural grandparents or their descendants, unless the instrument expressly provides to the contrary if an adoptive parent was (1) the spouse of the child's natural parent, (2) the child's natural grandparent or (3) a descendant of such grandparent. As was stated previously, justification for an extension of class gifts was found in the presumed intent of the creator. Permitting adopted out to take only from natural grandparents or descendants thereof was justified by the statutory preclusion of inheriting from great-grandparents and more remote relatives through intestacy. The inclusion of adopted out adopted by a stepparent was not specially justified but, as this would seem to be the fact pattern where the old law would generally work the most obvious injustice, perhaps a particular justification was not thought necessary.

A presumption of the sort created by this amendment to DRL, section 117 relating to the construction of instruments automatically raises the question of whether it is too narrow or too broad. It is possible that the legislature, its attention focused on one sort of situation, failed to recognize that the relief it provided would be appropriate to other situations as well. Conversely, it is also possible

102. 66 N.Y.S.2d at 155 n.1, 485 N.E.2d at 1012, 495 N.Y.S.2d at 347.
103. There is a problem in the meshing of the Best presumption regarding the exclusion of adopted out who were adopted out by strangers and the DRL §117 presumption regarding the inclusion of adopted out who were adopted by certain family members. Best states that there is a rebuttable presumption that adopted out by strangers should be excluded but does not explain what sort of evidence will work a rebuttal. DRL §117 states that adopted out will not be included unless the instrument expressly provides to the contrary or the adoption out is by certain family members. Thus, the statute seems to amend the Best conclusion in the case of adopted out by strangers and make their exclusion more definite.
104. DRL § 117 (McKinney 1988); see supra text accompanying notes 60-76.
105. See supra note 56 and accompanying text.
106. However, no empirical studies were made on this point.
107. Leg. Doc. (1985) No. 65 [N] at 25. The statute governing intestate succession is EPTL § 4-1.1 (McKinney 1981). Compare EPTL § 4-1.1 (a)(8) (to grandparents or issue of grandparents) with EPTL § 4-1.1(a) (9) (McKinney 1981) (to great-grandparents or issue of great-grandparents but only if "the decedent was at the time of his death an infant or an adjudged incompetent.").
108. This creates, on the common law side, problems, beloved by legal method students, of "coordination" with the statutory enactment.
that the legislature, convinced that the relief is appropriate in one sort of situation, failed to consider that the relief as enacted will, on its face at least, apply to situations where it is not appropriate. DRL, section 117, as amended in this respect, would seem to have failings of both sorts.

First, it is clear that in the classic case - death of a parent followed by adoption by a stepparent - the amendment does a great deal of good. It seems unlikely that a creator, intending to benefit A's issue, would wish to limit the gift of A's issue in the case of (1) A's death, (2) A's spouse's remarriage, and (3) the adoption of A's issue by the second spouse. So, if A himself is the creator, the statute preserves the gift to A's children.\textsuperscript{109} Similarly, if the gift was created by a parent of A for A and A's issue,\textsuperscript{110} the statute would preserve the gift for the creator's grandchildren. However, again in the classic case (death of a parent followed by adoption by a stepparent), the restriction of the relief to instruments created by grandparents of the adopteds out and descendants of said grandparents seems unduly narrow. If the gift to A's issue is created by A's grandparents,\textsuperscript{111} it would seem just as probable as in the cases of gifts by A or A's parents that the class of beneficiaries should not change because of A's death, A's spouse's remarriage and adoption of A's issue by their stepparent. Further, in this last pattern, the problem caused by adoption out is particularly pernicious because adoption by a stepparent after a parent's death usually occurs when the parent dies prematurely. Therefore, it is likely that A's parents will be alive at the death of A, the remarriage of A's spouse and the adoption of A's children by their stepparent, and that gifts made by A's parents therefore can usually express their actual intent as to inclusion or exclusion. However, gifts by A's grandparents are likely to be fixed by such times by the deaths of their creators. So it would seem that the legislature carefully limited the remedial presumption to exclude those cases where it was most needed.

The classic case can also cause difficulties in the case of instru-

\textsuperscript{109} A typical gift of this sort would be by A to A's spouse for life, remainder to A's issue alive at the death of A's spouse. Under the old law, without specific drafting, adoption of A's issue by A's spouse's second spouse would arguably (the issue would be one of intent) exclude the adopted out children. This possibility might put an economic roadblock in the way of the best (social) interests of the child which would clearly be unsatisfactory.

\textsuperscript{110} A typical gift of this sort would be by A's parents, to A for life, to A's spouse for life, remainder to A's issue alive at the death of the survivor of A and A's spouse.

\textsuperscript{111} A typical gift of this sort would be by A's grandparent to A's parent for life, remainder to A or, if A does not survive that parent, to A's then living issue.
ments created by ancestors more remote than great grandparents of the adopted out, but the operation of the Rule against perpetuities makes such gifts rather rare. However, other fact patterns—excluded from the benefit of the statutory presumption—need to be examined. First, the premise of the statute in the context of the classic case is that a creator, who chooses to make a gift to A's issue, would not wish the objects of his or her bounty to vary because of A's death, A's spouse's remarriage and the adoption of A's children by the stepparent. But if this is so, why does it matter whether the creator is related to the adopted out at all? It is true that gifts by friends are less typical than gifts by family members, but, if a gift is made to A's issue, surely the presumed intent to include adopted out adopted by a stepparent is equally valid for both biologically related and biologically unrelated creators. Second, if the posited premise is correct, the presumption should be equally valid if the second natural parent dies and the child is adopted by the second spouse of the initial adoptive parent. And going somewhat beyond the classic case, if a gift is made to A's issue, and A dies and A's children are thereafter adopted, is it likely that a creator's intention to favor A's children will vary with the identity of the adoptive parent? It is true that where the adoption records are sealed there are countervales of privacy, judicial economy and ease of administration which may outweigh presumed intent. However, when the facts of the adoption are known, and these counter values cannot be served, a broader presumption in favor of inclusion than that provided by DRL, section 117 is warranted.

As the amendment of DRL, section 117 is arguably too narrow in the aspects just discussed, it can be argued that in other matters it speaks too broadly. The amendment protects the interests of adopted out in the case of instruments created by grandparents and their descendants. In instances where the death of the adopted out's parent is followed by remarriage of the surviving spouse and adoption by a stepparent, this result seems sound in the case of instruments created by grandparents, uncles and aunts. They would continue to see the adopted out as part of their family tree, as they almost certainly would have known the adopted out's deceased par-

112. The New York rule on remoteness of vesting (which now parallels the common law rule) is codified at EPTL § 9-1.1(b) (McKinney 1981).

113. If it is contended that this eventuality - both natural parents dying - is so rare that it can be disregarded, why then does DRL §117(1)(d) (McKinney 1988) seemingly speak to it in the area of parental duty, as well as in other instances discussed above?
ent. Also their instruments might well be irrevocable at the time of the adoption out, thus precluding the possibility of express inclusion or exclusion. However, when instruments created by first cousins or first cousins once removed are considered, these rationales begin to break down. It is likely that a creator will give a contingent remainder to the issue of his or her grandparents. It is possible that a creator, given a sparse family tree, might make this ultimate gift\textsuperscript{114} to the issue of his or her great grandparents. But in the instance of first cousins of the adopted out or, more clearly, in the case of first cousins once removed,\textsuperscript{115} it is less likely that they would consider the adopted out as part of their family tree. They may not have known the adopted out's deceased parent (their uncle or aunt or great-uncle or great-aunt); they may not know of the existence of the adopted out. Also, as their instruments will most likely be created after the fact of the death of the adopted out's parent or the adoption itself, their instruments can (and should, if the facts are known) address the situation expressly.

A second area where this amendment to DRL, section 117 may paint too broadly is in cases where the adopted out is a nonmarital child or where the adoption out is in the aftermath, not of death, but of divorce. For reasons discussed above,\textsuperscript{116} it is not as easy to include nonmarital children in class gifts made by the family of the noncustodial natural parent as it is to include them in class gifts made by the family of the custodial natural parent. Where the child is adopted by the spouse of the custodial natural parent, the arguments for exclusion for the purposes of instruments created by persons in the noncustodial parent's family tree are strengthened. As the natural parents have decided that the child should be part of the custodial parent's family, it seems more likely than not that the family of the noncustodial parent would accept this decision for the purposes of the construction of their instruments. After all, in this sort of situation, the family of the noncustodial parent might not know of the child. Furthermore, a contrary conclusion, that the child should remain within the family tree of the noncustodial parent, may disrupt

\textsuperscript{114} Or more properly a penultimate gift over, for it is prudent, especially given a sparsity of family members, to make an ultimate gift over to charity which provides the additional protections against escheat of possible infinite duration of the beneficiary and \textit{cy pres}.

\textsuperscript{115} Because of typical mortality, barring a family tree with exceptional age differentials within a generation, it is unlikely that a person would take under instruments created by more remote kin.

\textsuperscript{116} \textit{See supra} text accompanying notes 91-96.
the adoptive and actual family grouping by tending to reveal what
might otherwise have been appropriately concealed and by possibly
putting the child in a different economic posture than his or her sib-
lings with resultant disharmony.

Similar sorts of problems can exist if the adoption out follows a
divorce, especially a divorce filled with acrimony. Obviously, the di-
vorce itself does not affect the status of the issue of the marriage as a
matter of family law. However, the resolution of the custody issue,
both in law and in fact, may have a bearing on whether the noncus-
todial parent and the family of the noncustodial parent consider the
child as a continuing part of the family for the purpose of the con-
struction of instruments. Again, the arguments in favor of excluding
the child from the noncustodial parent's family are strengthened by
adoption of the child by the second spouse of the custodial parent.

It is not easy to say that the conclusions on these points enacted
by the legislature are wrong. It is easier to say that these conclusions
were reached by considering the most halcyon of fact patterns where
the nonmarital or adopted out child remains in the bosom of his or
her natural family surrounded by an aura of love. However, the leg-
islation was drafted, proposed and enacted without any reported de-
ographic data regarding how human beings regard their natural
kin who are adopted away in the myriad of human circumstances in
which such events may occur. Further, if these conclusions in the
area of instrument construction are reached as a matter of public
policy to favor nonmarital and adopted out issue, it is important to
recognize that these public policies are being allowed to override the
more general policy in favor of freedom of testation. It may be that
this is appropriate, but the weighing process should be a long
thoughtful one and the resolution not overbroad.

Fault can also be found with the method employed to effectuate
these reforms. The statute requires that an instrument expressly con-
tradict the mandated presumption: no other proof of a contrary in-
tention will carry the day. Certainly the requirement of express pre-
cision is aimed at judicial economy by limiting the number of
construction proceedings. However, this requirement accepts as its
price a certain number of unjust results. Were the courts beforehand
clogged with this sort of construction case? Further, because of the
reform, the matter will now be routinely addressed by drafters. This
will lead to the development of boiler-plate which, when matched
with unexpected facts, may still require construction. Finally, draft-
ers faced with dealing with all possible family situations may ex-
pressly overcome the legislative presumption and deliberately rein-
troduce ambiguity, preferring to trust the discretion of a trial judge
rather than their own prescience to resolve confusing fact patterns.

V. LIMITATIONS OF DRL, SECTION 117 AMENDMENT RELATING TO INTESTACY

DRL, section 117 was also amended with respect to the rights of adopteds out in intestacy. Under prior law, an adopted out lost all right to inherit in intestacy from and through his or her natural par-
ents with the sole and reasonable exception that a child adopted by
the spouse of a natural parent continued to be part of that living
parent's family tree for purposes of intestacy. However, the exclu-
sion of the adopted out from the family tree of the other parent for
the purposes of intestacy—especially when the adoption out follows
the death of that parent—was felt to be unfair and not in keeping
with the presumed intent of members of the family of the deceased
parent. Accordingly, DRL, section 117 now provides that adopteds
out will not lose their rights to inherit from and through either par-
ent if:

(1) the decedent is the adoptive child's natural grandparent or is the
descendant of such grandparent, and
(2) an adoptive parent
   (i) is married to the child's natural parent, or
   (ii) is the child's natural grandparent, or
   (iii) is descended from such grandparent, and the dece-
dent is the child's natural grandparent or a descendant of
such grandparent. 118

As was the case with the amendment regarding the construction
of instruments, it must be considered whether the line enacted by the
legislature is properly placed or whether its rule is excessively exclu-
sive or inclusive. Would a presumed "average" intestate wish a
broader class of adopteds out than that now protected by the amend-
ment to share as issue? Conversely, would this presumed average
intestate wish to exclude all or part of a class now included by the
statute?

On the side of excessive exclusivity, as the intestacy laws gen-

117. DRL § 117 (McKinney 1988). So, for example, if C is the child of H and W, and C
is eventually adopted by a subsequent spouse of W, the parent-child relationship for the pur-
poses of intestacy between H and C is severed, but the parent-child relationship between W
and C is not.
118. DRL § 117(1)(e) (in part).
ally preclude inheritance from ancestors more remote than grandparents of their descendants,119 any improper omission would result from those laws and not from the present amendment to DRL, section 117. But, on the side of inclusivity, the same sort of difficulties faced in the context of construction of instruments120 must be considered. For the classic case, death of a parent followed by the remarriage of the surviving parent and adoption out by a stepparent, the proposed amendment seems basically salutary. It may be that the second marriage and the adoption out are accompanied by a de facto termination of the grandparent-grandchild relationship. But if that is so, the deserted grandparent might well be induced by the fact of the termination to consult a lawyer and make a will. More pernicious, it seems, is the reverse situation where the grandparents continue a close relationship with their deceased child’s spouse and their grandchild. Most probably, they would not see a reason to consult a lawyer in the happy events of the remarriage and “adoption out.” Thus, without the present amendment, the adopted out grandchild would lose rights in intestacy which his or her grandparents may well have assumed remained in place.

Beyond the classic case the amendment seems less benign. Where the adoption is by a family member, for instance, the child’s maternal grandparents and not a stepparent, it would seem likely that the paternal relatives would assume such act severed their legal relationship with the child. This situation might well involve a nonmarital child whose parents are unable to undertake its upbringing due to their youth or other disability. In these circumstances, it is not unlikely that subsequent inter-family relations will not be cordial.

Further problems with the amendment center around adoptions out that follow divorce. The divorce severs the relationship between the husband and wife. Subsequent adoption, to many minds, severs the relationship between a parent and the child. It may be in the best interests of the child to be brought up as part of the new familial unit to the exclusion of the parent who permits the adoption out. In instances where the grandparents’ child surrenders the grandchild, it seems likely that the grandparents, because of the fact of the surrender, would no longer see that grandchild as part of the family tree. So it may be that the new amendment does exceed an

120. See supra text accompanying notes 114-16.
estimate of what the "average" intestate decedent would want or expect.

A peculiarity with the amendment is the differentiation of the right of the adopted out to inherit from his natural family and the right of the natural family to inherit from the adopted out. As has been noted, the amendment allows the adopted out to inherit from the natural family without regard to the means by which the parent-child relationship was severed, but it allows inheritance by the natural family only if the natural parent has died without the relationship of parent and child having been terminated previously. The mere existence of this differentiation is significant because the laws that govern intestacy are otherwise almost entirely a "two way" street. One notable exception is the fact that a "bad" parent—a parent who abandons or fails to support his or her minor children—cannot inherit from such a child while the child's right to take from the parent remains intact. In the case of adopteds out, it would seem that, in the eyes of the legislature, the act of the parent permitting the child to be adopted out of his rights is tantamount to "abandonment." This "bad" act taints the rights not only of the surrendering parent to take in intestacy but of that parent's entire family. With respect to the parent, the distinction may be a reasonable one. Permitting the child to be adopted will usually bring the parent in contact with a lawyer, and it can be hoped that through that relationship post adoption inheritance rights will be specifically addressed. The surrendering parent may or may not see the adopted out as an appropriate heir, and there seems little value in skewing the presumption against the child. In the case of inheritance from the child, it seems proper that the adoptive parents who are legally responsible for the child should get the first call on the child's assets. However, with respect to the surrendering parent's family, the distinction is less reasonable. This parent is less likely to have dealings with the lawyer because of the adoption. She may or may not feel that the adoption out severs her legal relationship with that child. But if it is concluded that such persons, on average, would feel that the relationship continues, and the adopted out should share in that family's intestacies, why should they not be able to receive from the adopted out as well? In any event, the distinction is anomalous and deserves greater justification.

121. See generally EPTL § 4-1.1 (McKinney 1981).
122. EPTL § 4-1.4 (McKinney 1981).
There is, of course, a fundamental and important difference between the construction of instruments and intestacy. Instruments are almost inevitably drafted by lawyers and thus, so long as changes in rules of construction are made prospectively, lawyers should be able to contend with virtually any twist on language imposed by the legislature. However, intestacy, almost by definition, rarely involves lawyers. Here the legislature must proceed with extreme caution and not impose apparently attractive theoretical conclusions without being quite certain they are also founded in reality because, in most instances, they will not be undone. It is easy to have sympathy for the adopted out. But it is also easy to forget the rights of the adopted out do not exist in a vacuum. If the adopted out is to share with other issue, this will reduce the inheritance of, for instance, the spouse and children of the intestate or grandchildren who were not surrendered for adoption. The adopted out will take to the exclusion of the intestate’s parents or brothers and sisters. Perhaps this is what the typical intestate would want in such circumstances. Perhaps not. But, in any event, the amendment goes a long way.

VI. Criticism of the General Solutions Enacted as Reforms

In both of the two areas under consideration—instrument construction and intestacy—the most important inquiry involves intent: the actual intent of the creator of an instrument, if such can be discerned, or if no intent can be discerned and in the case of intestacy, presumed intent. Society approves wholeheartedly of adoption, and there seems little question that adopted children should be imported into their new families for the purposes of both instrument construction and intestacy. If a contrary result is desired, the solution is the expression of that desire in the instrument of transfer. Nonmaritals may present a somewhat harder problem but, in the case of intestacy, and in the case of instrument construction, the legislature has resolved matters in favor of inclusion. In the case of a custodial parent, this inclusion seems sound. In the case of a noncustodial parent, particularly for construction purposes, it can be seen as open to attack. Adopteds out cause the greatest problems, as have been discussed above, and dividing lines—basically including persons adopted out by stepparents, grandparents or their descendants and excluding other adopteds out—have been accepted by the legislature both for instrument construction and intestacy. It has already been considered whether these lines fall in the right place. However, it can
be contended that, as to both nonmaritals and adopteds out, drawing a line or, at least, dealing with these classes as broadly as done previously, is not the proper solution at all.

The court of appeals in *Best* certainly reached the right conclusion on the facts of the case. For reasons of presumed intent but also for reasons of privacy and ease of administration, the nonmarital adopted out child should not be construed as a member of the class of "issue." The court's reasoning on the impact of the adoption out was sound as was its distinction between adoption out by strangers and hybrid adoption. The court did not need to go beyond this conclusion and beyond this reasoning.

The *Best* case, however, spurred the legislature to mandate that nonmaritals are to be included within gifts to "issue" unless specifically excluded. This conclusion certainly is more right than wrong. The world has changed and, both as a matter of presumed intent and as an expression of public policy against discrimination, nonmaritals should generally be included. However, presumed intent does not involve every fact pattern involving a nonmarital nor does public policy require inclusion in every instance. So, perhaps the legislature spoke too broadly.

However, this new presumption works to present injustice that is not remedied easily. Drafters and planners now must face the presumptions in favor of inclusion of nonmaritals and in favor of exclusion of adopteds out. If actual fact patterns exist, are known and are divulged to the drafters, they can be easily resolved in accordance with the creator's wishes. However, where specific drafting is not possible, drafters should be careful not to draw an abstract line where it will work injustice. This is not an easy task.

The legislature was correct in its belief that the state of DRL, section 117, prior to its amendments, was flawed. A child adopted by, for instance, a stepfather, lost all rights to inherit through intestacy from the child's natural father and the natural father's family. A similar adoption might well jeopardize the rights of that child under instruments created by the natural father and the natural father's family. Generally speaking, when the father-child relationship terminated through death, these were not unreasonable results. However, in correcting these flaws, the legislature made two errors.

First, they drafted too broadly. It is not that, in instances beyond the classic case, the results mandated by the legislature are universally wrong: in many instances they are right. But in many, perhaps most, instances they go in the wrong direction. Second, by
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requiring express intrinsic contradiction of their presumptions regarding instrument construction and by imposing positive statutory law in intestacy, the legislature preempted the authority of the courts to "tailor" the law to specific facts. This was not necessary. For example, in the case of intestate rights of nonmaritals, the legislature has included them in their maternal family trees in all events and in their paternal family trees if certain proofs of paternity have been established. In this way, the rights of nonmaritals are balanced with the needs of judicial administration to limit litigation, especially litigation entered into based on scanty evidence and primarily pursued to provoke a settlement offer. However, even in drawing this line, the legislature recognized that there were situations where the fact of the line would work substantial injustice. So EPTL 4-1.2 (a)(2)(c) allows a nonmarital to take in intestacy by and through his or her father if "paternity has been established by clear and convincing evidence and the father of the child has openly and notoriously acknowledged the child as his own." This, of course, provides a court with a range of discretion which can be exercised to prevent injustice in the case of the child of a "regular-irregular" relationship and to silence strike suits at least at an early stage. However, in the case of adopteds out, the recent statutory enactments do not allow any means of escape from unjust results; much of the human relations surrounding a particular adoption out may militate in favor of a conclusion contrary to that mandated by the general rules. In the "classic case," this may be proper, or so usually proper so as not to merit any exception. However, in the other instances seemingly covered by the act, it would be more reasonable to allow a judge more freedom to determine inclusion or exclusion on the totality of the circumstances. It is true that there would be a price to be paid in terms of the expenditure of judicial resources, but this could be reduced by limiting presumptions to cases where there is no convincing evidence, intrinsic or extrinsic, that would require a contrary results. As an alternative, the legislature could also give guidance to the courts by providing a series of factors to be considered in reaching a conclusion one way or the other. At the least, more flexibility

123. EPTL § 4-1.2(a)(2)(c) (McKinney 1981).
124. An admittedly incomplete list of such factors might include:
   1) knowledge of child by creator/intestate;
   2) knowledge of child by that parent who is the creator/intestate's relative;
   3) participation of creator/intestate in upbringing of child;
   4) participation of that parent who is the creator/intestate's relative in upbringing
should be provided in the intestacy area where it is unlikely that the legislatively imposed results will ever be consciously considered by a prospective intestate.

It is true that a flexible approach causes just as much difficulty as the enacted conclusions do to fiduciaries seeking a discharge. What is also needed, regardless of whether the rigid rules remain in place, is the provision of full protection for fiduciaries who account in ignorance of the existence of nonmaritals or adopted out or, with knowledge of the existence of an adopted out, but in instances where the records of the adoption are sealed. If the existence of possibly interested persons was concealed for reasons of fraud, of course remedies exist against the concealers. If the existence of possibly interested persons was concealed for reasons of privacy, the balancing of the rights of those involved is more difficult but, certainly, fiduciaries acting in good faith without knowledge should be protected in their discharge.

Human relationships are complex. They will not be made simple by legislative enactment. There was some injustice in the law prior to Best and the amendments to DRL, section 117. It could have been cured by limited enactments from which judges could extrapolate in appropriate circumstances. However, the imposition of broad conceptual solutions increases the risk of injustice. At the same time, the approach taken by the legislature preempts the ability of judges to do justice in the particular case before them.

5) age of child when adopted out; and
6) circumstances surrounding the fact of adoption out.