As Seen In Nassau Lawyer June, 2007

Uncertainty continues over inheritance rights of adopted-out children

Despite the numerous cases that have attempted to clarify the law regarding the inheritance rights of children who have been placed for adoption, who are known as "adopted-out children," questions on the topic continue to arise. The term "adopted-out" child, commonly used by the courts, refers to a child adopted out of his or her biological family, *i.e.*, a child placed for adoption by his or her biological family.[1] Our recent article[2] discussed the Court of Appeals' 2005 decision in *Matter of the Estate of Murphy*,[3] which held that when an adopted-out child is specifically provided for in his or her birth-parent's will, but predeceases the testator, his or her children are entitled to take that share pursuant to section 3-3.3 of the Estates Powers and Trusts Law, commonly referred to as the "anti-lapse statute." In the recent decision of *Matter of Accounting by Fleet Bank*,[4] decided in March of 2007 the Appellate Division addressed the other issue of the inheritance rights of adopted-out children, this time, as it pertains to trusts.

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In *Fleet Bank*, the grantor had established two trusts for the benefit of her daughter, Barbara W. Piel. The first trust provided for income distributions to Barbara during her lifetime and equal distributions of principal to her "descendants" after her death. The second trust also provided for income to Barbara for life, with the principal to be divided equally upon her death "for each then living child of hers." Barbara died in 2003, triggering the principal distribution provisions of both trusts.

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Elizabeth McNabb, the respondent, was born out of wedlock and placed for adoption. The petitioners, the respondent's biological sisters, were a product of Barbara's marriage. The respondent argued that she was entitled to a portion of each of the two trusts, as she was a living child and a descendant of Barbara. Relying on the Court of Appeals' 1985 decision in *Matter of Best*,[5] the Surrogate of Monroe County disagreed and held that Elizabeth, as an adopted-out child, was not deemed to be Barbara's "descendant" or "child." The court held that Elizabeth was not a member of the class of intended individuals who constituted remaindermen.

The Appellate Division reversed, distinguishing *Best* from the case before it. In *Best*, the Court of Appeals held that an adopted-out child born out of wedlock was not entitled to a portion of a trust estate created by his biological grandmother to her daughter's issue.[6] Applying the then-effective version of section 117 of the Domestic Relations Law, which "terminate[d] all rights of intestate succession," but did not "affect the right of any child to distribution of property under the will of his natural parents or their natural or adopted kindred,"[7] the Court held that an adopted-out child is not entitled to take in a class gift from a birth relative unless "specifically named in the biological ancestor's will, or the gift is expressly made to issue including those adopted out of the family."[8]

The rationale for the Court's holding in *Best* was threefold, including: 1. the importance of the adopted-out child's assimilation into the adoptive family, 2. the maintenance of confidential adoption records, and 3. the preservation of the stability of real property titles and other rights passing under Surrogate's Court decrees.[9] As a result of *Best*, in 1986 the Legislature amended section 117, adopting a modified version of the Court's decision. The amendment provides that unless a will expressly includes an adopted-out child by name or classification not based on the parent-child or family relationship, adopted-out children and their issue are deemed to be strangers to birth relatives.[10]

In holding that the Surrogate erred in its reliance upon *Best*, the Appellate Division in *Fleet Bank* held that the fact that the respondent was adopted out of the family did not eliminate her as a "descendant" or "child." Instead, it determined that because the trusts at issue were created in 1926 and 1963, respectively, they were to be interpreted under the version of section 117 that was in effect at that time. In 1964, after the creation of both trusts, the statute was amended to sever the adopted child from the biological family, followed by further clarifying amendments in 1966 and 1973, which were applied by the Court in *Best*. Relying upon the timing of the amendments, however, the Appellate Division held that the policy considerations behind the decision in *Best* were inapplicable to *Fleet Bank*.

In attempting to construe the trust instrument, the *Fleet Bank* court attempted to rely on the grantor's intent, a factor that is always considered controlling in such cases. The intent of the grantor in this case, however, was not easily discerned. The court noted that the use of the term "issue" in an instrument is always very ambiguous, as are the similar terms "descendant" or "child," as utilized by the grantor in this case. Thus, the court was unable to determine whether the grantor intended to include the adopted-out child within either or both of those classes as they were described in the trust instrument or even whether the grantor was aware that the respondent had been born.

In attempting to determine the grantor's intent, the court also considered the law in effect at the time of the trust's execution. The presumption that grantors are aware of the law when executing trusts, coupled with the interpretation of the terms of the trusts according to the law in effect in 1926 and 1963, as explained above, led the Appellate Division to conclude that the respondent's adopted-out status did not eliminate her from the class of "descendants" or "children" as provided by the trusts. The court rejected the petitioner's contention that Elizabeth's status as a non-marital child automatically excluded her from the class of Barbara's descendants or children as provided in the trusts. Instead, the court explained that the former Decedent Estate Law Section 89, as it read at the time of the creation of the first trust in 1926, recognized a non-marital child's status as the descendant of his or her parent, although that conclusion was drawn from a provision which allowed such children to inherit from their mothers if no "lawful issue" existed. Furthermore, the former section 117 of the Domestic Relations Law also provided that adopted-out children were entitled to inherit from and through their biological and adoptive parents. Consequently, the Appellate Division held that Elizabeth was not excluded from the class of Barbara's descendants and children based on the laws of devise and distribution that were in effect at the time the trusts at issue were executed.

The *Fleet Bank* decision reflects the longstanding uncertainty regarding the inheritance rights of adopted-out children. While *Best* was regarded as the controlling case on the issue for over two decades, the distinction set forth in *Fleet Bank* emphasizes the importance of various factors, including the time of the trust execution. Until the Court of Appeals addresses these facts, the laws in effect at the time of a trust's creation will be controlling to determine how to construe the instrument properly.

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1. *See* generally *Matter of Estate of Best*, 66 NY2d 151, 152-53, 495 NYS2d 345 (1985) ("The question presented is whether a child born out of wedlock, who is adopted out of his biological family at birth, is entitled to a share of a trust estate devised by his biological grandmother to her daughter's issue."); *Matter of Estate of Seaman*,78 NY2d 451, 457, 576 NYS2d 838 (1991) ("From this, it follows that when the Legislature restored the right of the adopted-out child to inherit from the natural family under the circumstances specified in Domestic Relations Law § 117(1)(e), it also restored the right of the adopted-out child's issue to do so"); Note, When Blood Isn't Thicker Than Water: The Inheritance Rights of Adopted-out Children In New York, 53 Brooklyn L Rev 1007 (1988).
2. Eric W. Penzer, "Court of Appeals Clarifies Inheritance Rights of Adopted Out Children," Nassau Lawyer, January 2006.
3. —-NE2d——, 2005 WL 2777565, N.Y. Slip Op. 07864 (Oct. 27, 2005).
4. 3/23/2007 NYLJ 22, (col 1) (4th Dept)
5. 66 NY2d 151, 495 NYS2d 345 (1985).
6. *Id*. at 152-53, 495 NYS2d at 346.
7. *Id*. at 156, 495 NYS2d at 348 (quoting DRL §117).
8. *Id*.
9. *See id*. at 155-156, 495 NYS2d at 347-348.
10. *Murphy*, 2005 WL 2777565 at *4.