House
Legislative
Analysis
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HEIRS OUT-OF-WEDLOCK

House Bill 4561 as enrolled
Second Analysis (4-21-94)

Sponsor: Rep. Timothy L. Walberg
House Committee: Judiciary
Senate Committee: Family Law, Criminal Law, and Corrections

THE APPARENT PROBLEM:

The Revised Probate Code governs inheritance from a Michigan resident. Among other things, it specifies who is to inherit what proportion of an estate when a person dies intestate (that is, without a will), or when a will predated the birth of a child (in such a situation, the child's share is generally what it would have been if the person had died intestate). One matter not explicitly addressed recently has received attention: whether a child conceived and born following a rape should be considered an heir of the man who committed the rape.

In the case that has recently arisen, according to the attorney representing the now-grown child, a 42-year-old uncle raped a 17-year-old niece, who became pregnant as a result of that rape and later gave birth to a daughter. In August 1992, 50 years later, the man died. The daughter filed a petition in probate court in September 1992 seeking to inherit and also asking for exhumation of the body for DNA testing. The probate court allowed the exhumation, which was performed in October, and subsequent genetic testing confirmed the likelihood that the man was the woman's father. The parties have recently settled the case, but as yet the court has made no formal determination on the question of heirship.

Many believe that fairness to children born out of wedlock demands that the probate code recognize them as heirs when a man dies intestate. Indeed, the code now specifies that such children may inherit in any of three situations (in addition, of course, to when a man provides for them in his will): when the man and the mother together acknowledged in writing that the child was his, when the man and the mother together requested a new birth certificate, and when the man and the child had a mutually acknowledged parent-child relationship that began before the child turned eighteen and continued until the death of one or the other. Case law has established another route of inheritance for a child born out of wedlock: when a paternity action under the paternity act has led to a man being determined to be the father of a child (Easley v. John Hancock Insurance Co, 403 Mich 521 [1978]).

It has been proposed that the probate code be amended to in addition provide for children born out of wedlock as a result of rape, and to establish additional inheritance rights for children born out of wedlock.

THE CONTENT OF THE BILL:

The bill would amend the Revised Probate Code to do the following:

** include a child conceived as a result of sexual assault ("nonconsensual sexual conduct") among the heirs of the man who committed the assault, if the man had failed to provide for that child in his will. The child would be an heir whether or not the mother was married to someone else at the time of the assault. The child's share would be assigned as is done for children who are born after a will was made, meaning that the child would receive an intestate share of the estate, unless it was apparent from the will that the man intended not to make a provision for the child.

** recognize for the purposes of intestate succession the child of a father whose paternity had been established through an action under the paternity act. (This would place into statute the decision of the Supreme Court in Easley.)

** specify that the biological father of a child born out of wedlock, or born or conceived during a marriage but not the issue of that marriage, would be considered the natural father of that child for the

purposes of intestate succession from the father to the child only. (This provision would in effect allow paternity for the purposes of inheritance to be established by some means other than those explicitly mentioned by the statute.) The provision would not extinguish a child's right to inherit from another person considered to be the child's natural or legal father under another provision of law. Further, the provision would not apply to a child who was adopted before the death of his or her biological father.

** specify that a child born out of wedlock, or born or conceived during a marriage but not the issue of that marriage, would receive an intestate share of a parent's estate, if that parent had failed to provide for the child in his or her will, and if it appeared that the omission was not intentional.

The bill would not apply to estates closed before the bill's effective date.

MCL 700.111 and 700.127

FISCAL IMPLICATIONS:

The House Fiscal Agency says that the bill would have no fiscal implications. (6-14-93) The Senate Fiscal Agency says that the bill would have no fiscal impact on state or local government. (10-6-93)

ARGUMENTS:

For:

The bill would provide equitable treatment for children born out of wedlock, particularly children conceived and born as the result of a rape. For some time, the trend has been to destigmatize and normalize the status of "illegitimate" children; to do otherwise would be akin to blaming the victim. However, the laws of inheritance continue to lack full recognition of the rights of children born out of wedlock. By explicitly providing for the inheritance rights of all children born out of wedlock, the bill would treat all children fairly. The rights of testators would not be ignored, however: a person could continue to disinherit a child by specifically saying so in his or her will.

Against:

The bill presents a number of difficulties of implementation. First, it would make virtually all estates vulnerable to possibly fraudulent claims from would-be heirs claiming to be illegitimate children. How are such claims to be proved, if not by the means (written acknowledgement, paternity action, etc.) already recognized? Taken to extremes, the bill raises the prospect of regular exhumations and DNA testing; as exhumation and DNA testing were performed in the case that evidently gave rise to the bill, the possibility is not as far-fetched as it might seem. At a minimum, the probate court would be excessively burdened with trying to sort out and evaluate the proofs offered by people claiming to be illegitimate children.

To avoid challenges from purported illegitimate children, perhaps it would become routine to include in a will a provision that specifically excluded any person claiming to be an illegitimate child. However, if such provisions became commonplace and were accepted by the courts, then the aims of the bill--to provide for the inheritance rights of out-of-wedlock heirs--would be thwarted.

Response:

Arguably, a blanket provision excluding unnamed illegitimate children would violate the public policy established by the bill.