



**Estate Planning Council
of Saint Louis**

Family By Choice – Adoption and its Surprising Impact on Estate Plans

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Speaker Biography – Kim Kamin



Kim Kamin is a partner and the Chief Wealth Strategist at Gresham Partners LLC, an independent multi-family office managing approximately \$8.7 billion for about 120 ultra-high net worth families nationally. Kim leads Gresham's development and implementation of estate, wealth transfer, philanthropic, educational and fiduciary planning activities. Previously she was a partner in the Private Clients group at a large law firm.

Kim is an adjunct professor at the Northwestern University Law School and is on faculty for the Certified Private Wealth Advisor® (CPWA®) program through the University of Chicago Booth

School of Business Executive Education.

Kim is a Regent for the American College of Trust and Estate Counsel (ACTEC), is Past President of the Chicago Estate Planning Council (CEPC) and on the Leaders Council for the UHNW Institute. Additionally, Kim serves on advisory boards for multiple local charities.

Kim serves on the Editorial Advisory Board of *Trusts & Estates Magazine*, has published on a wide variety of topics, and is also a frequent lecturer in a variety of venues across the country. She has been the co-executive editor and co-author for the past two editions of the Leimberg Library Tools & Techniques book, *Estate Planning for Modern Families*. (4th Ed. 2024).

Kim received her B.A., *with distinction and departmental honors*, from Stanford University and her J.D. from the University of Chicago Law School. She is an AEP® (Distinguished) and a 21/64 Certified Advisor.

Speaker Biography – Sarah Moore Johnson



Sarah Moore Johnson is a founding partner of Birchstone Moore LLC, a boutique law firm focusing on estate planning and estate administration for ultra-high net worth clients in DC, Maryland and Virginia. Ms. Johnson is a leader in the Washington, DC estate planning community, having chaired the Estate Planning Committee of the DC Bar Taxation Section, served on the Steering Committee of the DC Bar Estates, Trust and Probate Law Section, and as a Past President of the Washington, D.C. Estate Planning Council. She is also an active Fellow of the American College of Trust and Estate Counsel (ACTEC) and has been ranked as a top wealth planning attorney by Chambers and Partners, Best Lawyers, and the Washingtonian magazine.

Ms. Johnson is a frequent and award-winning speaker on tax and estate planning topics, from the Heckerling Institute on Estate Planning and national meetings of ACTEC and the ABA Taxation and RPTE Sections, to local estate planning councils and regional symposiums across the country. She was recognized by the American Bar Association Taxation Section as a Nolan Fellow in 2008 for her leadership as a young lawyer. Ms. Johnson is a graduate of Wake Forest University and the University of Georgia School of Law. She serves on the Board of Trustees of the Greater Washington Community Foundation.

INTRODUCTION



Introduction

- ❖ Adoption Generally and Historical Prevalence
- ❖ Wide Range of Legal Issues:
 - Minors (e.g., international adoptions)
 - Stepchildren and foster children
 - Adults (e.g., romantic partners)
 - Surrogacy and other assisted reproduction
 - Intestacy statute defaults (adoption in vs. adoption out)
 - Equitable or informal adoptions
 - Governing instrument definitions and class gifts

Program Overview

- ❖ Stranger to the Adoption Rule (Adoption In)
- ❖ Interstate Laws and Adoption (Adoption Out)
- ❖ Adoption by Grandparents and Other Relatives
- ❖ Adult Adoption
- ❖ Parentage Issues in Modern Families
- ❖ Class Gifts and Public Policy
- ❖ Concluding Remarks
- ❖ Q&A

STRANGER TO THE ADOPTION RULE



Stranger to the Adoption: Overview

- ❖ Common law inheritance was based on blood relationships
- ❖ When state statutes started legalizing adoption in the 1850s, courts still presumed a class gift excluded anyone other than blood relations
- ❖ In most states, if an adoptee wasn't specifically referenced in the governing instrument, they were treated as a legal child only of an adopting parent, not of an adopting parent's ancestors or collateral relatives
- ❖ This was called the "Stranger to the Adoption" rule

Poll #1



Stranger to the Adoption: Court Methodology

- ❖ If “descendant” isn’t defined in an old instrument, courts take four approaches in document construction:
 - Rely on law and circumstances at time of creation and ignore subsequent changes
 - Different treatment where settlor could have changed document but didn’t
 - Disregard old common law presumption by retroactively applying modern legislation
 - Presumption of inclusion for adoptees in jurisdictions where court determines the rule didn’t apply

Stranger to the Adoption: Cases Where Adoptee Excluded

- ❖ *McGehee v. Edwards*, 268 Va. 15 (2004)
 - Trusts executed 1929-1931 were silent on defining lineal descendants, so trial court followed 1978 law to include adopted descendants. On appeal, court reversed, determining that no new law should disrupt property rights accrued before the law takes effect.
- ❖ *Bird Anderson v. BNY Mellon*, 463 Mass. 299 (2012)
 - Court declined to apply 2009 legislation to 1941 trust that would allow adopted persons to retroactively be included in trusts because retroactive application would violate due process.

Stranger to the Adoption: Cases Where Adoptee Included

- ❖ *O'Brien v Walker*, 35 Haw. 104 (1939)
 - For trust instrument executed in 1896, Court presumed settlor intent to include adopted descendants because of Hawaiian custom favoring adoption
- ❖ *In re Stanford's Estate*, 49 Cal.2d 120 (1957)
 - For trust under 1905 Will, Court permitted niece's adopted children to take as remainder beneficiaries
- ❖ *Evans v. McCoy*, 291 Md. 562 (1981)
 - Court applied Maryland law that treats adopted children as natural born to an 1899 Will because there was no evidence of contrary intent

INTESTATE LAWS AND ADOPTION



Adopted Out Person's Rights to Inherit from Birth Family

❖ **Majority Rule** (UPC Section 2-116):

- An adopted child is child only of adopted parent(s) for purposes of intestate succession
- Adoption severs the right to inherit from birth family

❖ **Exceptions** (UPC Section 2-119(b) through (e):

- Stepparent adoptions
- Grandparent adoptions
- Children born of surrogacy who are adopted by intended parents

Adopted Out Person's Rights to Inherit from Birth Family

- ❖ **Minority View:** In 9 states, an adopted out person may still inherit from birth family in certain circumstances:
 - Alaska, Illinois, Maine: Only if continued inheritance rights are included in adoption decree
 - Pennsylvania: Adopted out person can inherit from birth relatives (other than parent) if familial relationship exists
 - Kansas, Louisiana, Oklahoma, Rhode Island, Texas: Adopted out child inherits from birth parent (but birth parent cannot inherit from child)
 - Louisiana: Adopted out child and their descendants inherit from birth parent and the birth parent's relatives

Poll #2



Cases Interpreting Statutory Law

- ❖ *Hall v. Vallandingham*, 540 A.2d 1162 (Md. Ct. Spec. App. 1988)
 - Maryland applied state intestacy law to disallow children adopted by stepfather from inheriting from their biological uncle.
- ❖ *Walters v. Corder*, 146 N.E.3d 965 (Ind. Ct. App. 2020)
 - Indiana ignored state intestacy law and looked to testator intent, finding grandmother would not have wanted to disinherit her grandchildren who were adopted by their stepfather

Cases Interpreting Statutory Law (cont.)

- ❖ *Rogers v. Pratt*, 467 P.3d 651 (Okla. 2020)
 - Oklahoma applied intestacy law to allow adopted out son to inherit as pretermitted heir.
 - Oklahoma is one of the minority states that allows adopted out children to inherit from birth parents
 - Facts were favorable – mother had reconnected with adopted out son and they even lived together for a while

ADOPTIONS BY GRANDPARENTS AND OTHER RELATIVES



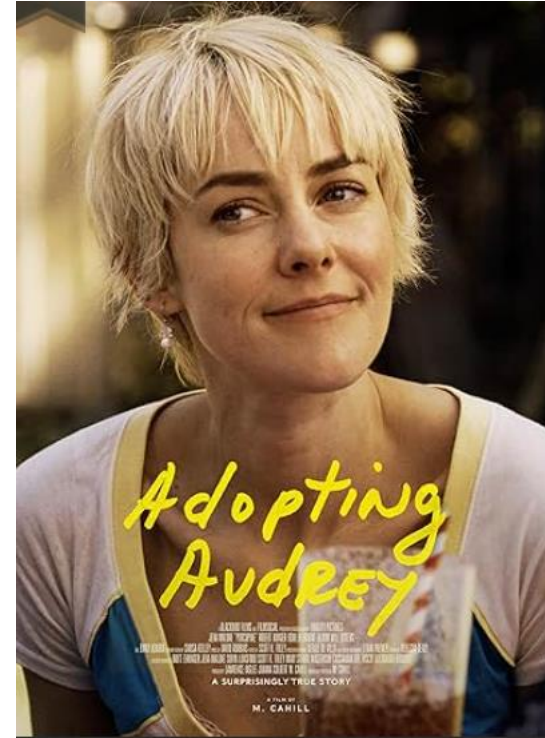
Adoption by Relatives: Overview

- ❖ A child whose parents are deceased may be adopted by grandparent or other relative
- ❖ Concern is that adopted child may inherit from intestate decedent through multiple family lines
- ❖ Statutory Law
 - Illinois: Child is entitled only to largest share they could inherit as either a child of adoptive parent or as child of biological parent
 - UPC 2-119 allows child adopted by relative to inherit from and through birth parent

Adoption by Relatives: Case Law

- ❖ *In re Estate of Gallegos*, 499 P.3d 1058 (Colo. Ct. App. 2021)
 - Case tested Colorado's version of UPC 2-119 and upheld right of child adopted by grandparents to inherit from father
- ❖ *Murphy v. Shehan*, 633 S.W.3d 350 (Ky. Ct. App. 2021)
 - Kentucky has no law allowing persons adopted by relatives to maintain inheritance from birth parents
 - However, court relied on grantor's intent and allowed adopted out child to inherit under class gift to descendants

ADULT ADOPTION



Adult Adoption: Overview

- ❖ **Formalize Parent-Child Relationships:** Often used by stepparents and foster parents to adopt children when they have to wait until the child is an adult
- ❖ **Romantic Partners:** *Before Obergefell*, used by same sex couples to confer inheritance and other familial rights
- ❖ **Virtual Powers of Appointment:** Can be used to add desired beneficiaries a class gift under an irrevocable trust or to fit a beneficiary within a limited special power of appointment (e.g., when is limited to “descendants”)

Adult Adoption: Statutory Law

- ❖ States often prohibit persons adopted as adults from inheriting where adoption being used as creative loophole
 - E.g., IL, CA and MT all require person adopted after age 18 to have resided with the adoptive parent prior to turning 18 to inherit from relatives other than parent
 - Indiana requires adoption to occur prior to age 21 to allow inclusion in class gift
- ❖ Adults in those states are still treated as child of adopting parent for purposes of inheriting directly from that parent

Adult Adoption: Case Law

- ❖ Same Sex Couples:
 - *Adoption of Patricia S.*, 2009 ME 76, 976 A.2d 966 (2009)
- ❖ Adult Stepchildren:
 - *Parris v. Ballantine*, 2020 WL 5740810 (Ala.)
 - *In re Estate of Glen E. Johnson v. Johnson*, 2023 IL App (4th) 220488
- ❖ Adoption to Create Trust Beneficiaries:
 - *Otto v. Gore*, 45 A.3d 120 (Del. 2012)
 - *Levien v. Johnson*, NY Slip Op 30995(U) (Apr. 14, 2014)

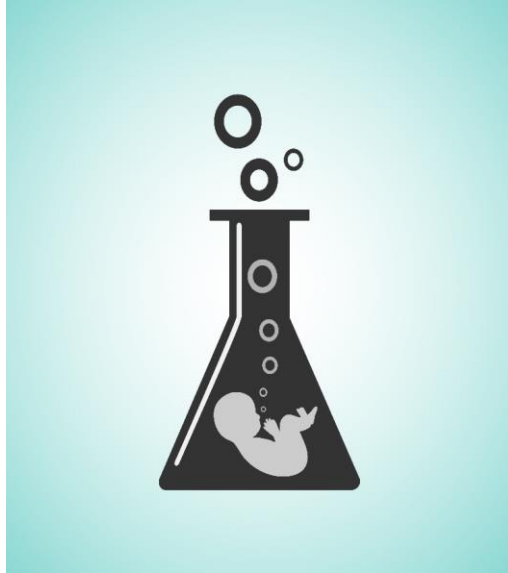
Adult Adoption: Planning Considerations

- ❖ Definition of Descendants
 - Consider increasing age at least to 22-25 to allow time for foster and stepparent adoptions
- ❖ Skip Person Loophole for GST Purposes?
 - 2005 Treasury Regs prohibit if abusive

Poll #3



PARENTAGE ISSUES IN MODERN FAMILIES



Adoption and ART: Overview

- ❖ Donor eggs, sperm and embryos challenge traditional definitions of descendants as being “of the bloodline”
- ❖ In states where gestational carrier contracts are illegal or not recognized, intended parents may have to adopt their genetic child
- ❖ Technology has created challenges for class gifts in older wills and trusts

Adoption and ART: Statutory Law

- ❖ Legality of Surrogacy Contracts
 - Dangerous states: AZ, IN, NE, LA, MI
- ❖ Presumption of Parentage by Marriage – applies to both genders after *Obergefell*
 - *Pavan v. Smith*, 137 S. Ct. 2075 (2017)
 - Also, Uniform Parentage Act § 204
- ❖ Common Law – child born of artificial insemination during marriage is child of both spouses

Adoption and ART: Case Law

- ❖ *In Re Doe*, 793 N.Y.S.2d 878 (N.Y. Surr. Ct., N.Y. County 2005)
 - Trusts created in 1959 specifically excluded adopted descendants
 - Court held children born of donor egg and gestational carrier considered descendants because not actually adopted by mother
- ❖ Sarah's family anecdote

Adoption and ART: Planning Considerations

- ❖ Planning for Intended Parents
 - Name guardians for intended child(ren)
 - Authorize Executor to carry out terms of gestational carrier contract and establish parentage of any child born thereunder
 - Include intended children in estate plan
- ❖ Planning for Gestational Carrier
 - Expressly disinherit the intended child, in event carrier dies before intended parents can adopt

Poll #4



Equitable Adoption: Overview

❖ Fictive Kin

- A relationship between a child and an individual who is not related by birth, adoption, or marriage to the child, but who has an emotionally significant relationship with the child
- Prevalent in families of color and LGBTQ+ families

❖ Equitable Adoption

- Some states statutorily recognize the parent-child relationship of fictive kin for intestacy purposes only
- Does not apply to class gifts, pretermitted heirs, or inheritance from ancestors or descendants of the parent

Equitable Adoption: Case Law

- ❖ *Pueblo v. Haas*, 2023 Mich. LEXIS 1124 (2023)
 - Lesbian couple in long term relationship had a child who was genetically related and born to one of them
 - Upon termination of relationship, partner sought custody rights, which were granted by Michigan Supreme Court
 - Public policy is to recognize “equitable parenthood”

Equitable Adoption: Drafting Considerations

- ❖ To allow children who have been equitably adopted to inherit from the person considered their parent, consider including a provision in the definition of descendants
- ❖ Requirements: Open and notorious recognition of such person as their child, determined by factors such as:
 - Providing Financial support
 - Participating in the child's education, registering as parent with school system
 - Cohabitation with the child
 - Vacationing with the child
 - Acknowledging the child as their own in social situations

CLASS GIFTS AND PUBLIC POLICY



Public Policy Considerations

- ❖ Privacy and equal protection
 - DNA Testing (IVF, Surrogacy, Race, Ethnicity)
 - Class Gifts
 - Trustee reliance on birth certificates
- ❖ *Todd v. Hilliard*, 633 S.W.3d 342 (Ky. Ct. App. 2021)
 - Settlor's attempt to exclude son's adopted stepchildren by excluding any adopted person from definition of descendant thwarted by court as being against public policy

Considerations for Defining Descendants

- ❖ Broad Inclusion
- ❖ Limiting by Parent-Child Relationship
- ❖ Limiting by Age
- ❖ Limiting with Reference to Age at Initiation of Proceedings
- ❖ Fiduciary Can Rely on Birth Certificate
- ❖ Birth Certificate Presumptions Rebutted by Court
- ❖ Birth Certificate Presumptions Rebutted by Parent
- ❖ Rules Regarding Ancestors and Descendants
- ❖ Termination of Parental Rights

CONCLUDING REMARKS



Q & A



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