Estate Planning Council of Saint Louis

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

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I. Introduction[1]

A. Adoption Generally. Adoption is an important method of modern family building. The 2010 Census indicated that nearly 4% of families with children under 18 include at least one child who has been adopted.[2] Some important issues regarding adoption as they relate to estate planning include: (i) the adoption of minors, including international adoptions; (ii) adoptions relating to surrogacy; (iii) "equitable adoptions" where a person is treated as a parent without having formally adopted a child; (iv) stepchild and foster child adoption; (v) adult adoptions, including the adoption of same-sex partners; and (vi) the treatment of adopted descendants individually and in defined classes in estate planning instruments under common law, state statutes and older documents that predate current equal treatment of children who have been adopted.

B. Historical Prevalence. It is said that adoptions peaked numerically in the United States in 1970 at 175,000 adoptions finalized annually.[3] Shortly thereafter, abortion was legalized, the use of oral contraceptives exploded, and unmarried mothers felt less societal pressure to give their children up for adoption. These factors caused a decline in the number of domestic adoptions in the US and fueled the rise of international adoptions.[4] The popularity of international adoption exploded in the 1990s and early 2000s, with rates tripling from 1990 to a peak in 2004.[5] However, due to increased regulations over a variety of concerns (including that not all such adoptions were voluntary), international adoption has fallen by 82% since 2004.[6] International adoptions also have an additional layer of complexity that may affect their prevalence.[7] For instance, depending upon the country of origin, the adopting parents may be subject certain restrictions and/or requirements

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[1] *See generally* Stephan R. Leimberg, Kim Kamin and Wendy S. Goffe, *The Tools & Techniques of Estate Planning for Modern Families (4th Ed. 2024),* Chapter 10 (with special thanks to Professor Kristine S. Knaplund for her contributions to the prior edition of the chapter), excerpt attached as the Addendum.

[2] *See* Rose M. Kreider and Daphne A. Loquist, Adopted Children and Stepchildren: 2010, U.S. Census Bureau (Apr. 2014), available at https://www.census.gov/library/publications/2014/demo/p20-572.html. *See also* University of Oregon Department of History, *Adoption Statistics*, The Adoption History Project (finding that 2-4% of American families have adopted); *2022 US Adoption Attitudes Survey,* Davis Thomas Foundation for Adoption (2022) (noting that in their representative sample, 8% of American adults reported having been adopted as children).

[3] Ellen Herman, *The Adoption History Project*, available at https://pages.uoregon.edu/adoption/topics/adoptionhistbrief.htm (last visited Oct. 20, 2022).

[4] PBS American Experience, *The Origins of Adoption in America*, available at https://www.pbs.org/wgbh/americanexperience/features/daughter-origins-adoption-america/ (last visited Oct. 20, 2022).

[5] *See* Mireya Navarro, *To Adopt, Please Press Hold*, (June 5, 2008), available at https://www.nytimes.com/2008/06/05/fashion/05adopt.html.

[6] *See* Congressional Coalition on Adoption Institute, Fact Sheet, (retrieved June 9, 2021), available at http://www.ccainstitute.org/resources/fact-sheets. *See* Ashley Westerman, Why International Adoption Cases in the U.S. Have Plummeted (June 25, 2018), available at https://www.npr.org/2018/06/25/623114766/why-international-adoption-cases-in-the-u-s-have-plummeted. *See also Trends in U.S. Adoptions 2010-2019,* Children's Bureau (April 2022), available at https://cwig-prod-prod-drupal-s3fs-us-east-1.s3.amazonaws.com/public/documents/adopted2010_19.pdf ("The number of intercountry adoptions decreased by 73 percent (8,065) from 2010 to 2019 and by 47 percent (2,667) from 2015 to 2019.").

[7] *See* Leimberg, Kamin & Goffe, Chapter 10 (noting that international adoptions "could theoretically create international estate planning issues—for instance if the country from which the child is adopted has forced heirship and the biological parents' rights are not terminated").

under the Hague Convention or may need to rely on either the Non-Hague Process or the Immediate Relative Process.[8]

C. Stranger to the Adoption. States began passing laws to expressly legalize adoption in the mid-1850s.[9] At the time, and for the decades that followed, succession laws were based on blood relationships and any deviation from this principle required express authorization either by legislation or by express language in the will or trust agreement.[10] Today, the assumption that one's "descendants" includes only one's blood or genetic descendants no longer holds true. This is due not only to changing social mores around adoption, but also the advent of assisted reproductive technology, whereby a birth mother may not be the genetic mother of her child. Nevertheless, the so-called "stranger-to-the-adoption rule" of long ago continues to be relevant when working with older trust instruments in jurisdictions that rely on interpretations of state law in effect at the time the trust was created, rather than on interpretations under current law.[11] While older wills and trusts may include express language excluding all adoptees, or those adopted as adults, such exclusionary language may also be implied for trusts executed in past decades under prior laws.[12]

D. Stepparent/Foster Parent Adoptions. A stepparent or foster-parent can adopt a minor child only where both biological parents have either: (i) provided explicit consent to terminate their parental rights, (ii) had their parental rights terminated by a court, (iii) are deceased, or (iv) some combination of the foregoing. Some states and the Uniform Probate Code ("UPC") have established special intestacy rules for children adopted by the spouse of one of the genetic parents. While a stepparent can adopt a child only once the other parent's rights have been terminated, either voluntarily or involuntarily, these special rules preserve the ability of the child to still inherit from the biological family. Under this exception, the child may inherit from the adopting stepparent and the stepparent's family, as well as from both genetic parents and their families.[13]

E. Adult Adoptions. Many states allow adults to adopt other adults. This commonly occurs where stepparents or foster-parents may adopt a child after the child has reached 18 years old. Prior to *Obergefell,*[14] same-sex couples would use adult adoption to establish a legally recognized relationship through which they could inherit or obtain other rights from each other.[15] While this practice is no longer necessary—and many of these adoptions have actually been undone so the

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[8] There are three ways for a child to immigrate to the U.S. based on adoption. If the child is adopted from a Hague country, the adopting parent can file Forms I-800A and I-800—allowing for the child to enter with an IH-3 or IH-4 immigrant visa. For a country that has not implemented the Hague Adoption Convention, the adopting parent can file Forms I-600A and/or I-600—allowing the child to enter with an IR-3 immigrant visa or an IR-4 immigrant visa. If the child does not meet the requirements of the first two options, the adoption parent may still be able to file a Petition for Alien Relative (Form I-130). For more information *see Bringing Your Internationally Adopted Child to the United States,* U.S. Citizenship and Immigration Services (last updated Apr. 11, 2023), available at https://www.uscis.gov/adoption/bringing-your-internationally-adopted-child-to-the-united-states.

[9] Jan Ellen Rein, *Relatives by Blood, Adoption, and Association: Who Should Get What and Why (The Impact of Adoptions, Adult Adoptions, and Equitable Adoptions on Intestate Succession and Class Gifts*), 37 Vand. L. Rev. 711, 716 (1984). Scholars have persuasively argued that these statutes did not create the institution of adoption, but rather formalized already existing relationships. *See, e.g.*, Naomi Cahn, *Perfect Substitutes or the Real Thing?* 52 Duke L.J. 1077, 1104 (2003); Barbara Bennett Woodhouse, *Waiting for Loving: The Child's Fundamental Right to Adoption*, 34, Cap. U.L. Rev. 297, 316 (Winter 2005).

[10] *See* Rein, *id*.

[11] Leimberg, Kamin & Goffe, Chapter 10.

[12] Leimberg, Kamin & Goffe, Chapter 10.

[13] *See, e.g.*, Tex. Estates Code § 201.054 (2009) (allowing an adopted child to inherit through biological parent(s) and adopted parent(s)).

[14] O*bergefell v. Hodges,* 576 U.S. 644 (2015).

[15] Leimberg, Kamin & Goffe, Chapter 10.

parties could marry one another—some of these relationships may still exist. Courts are divided on whether they are willing to allow inheritance from a non-parent relative based on adult adoption.[16] Under the Illinois statutory default, for example, a person adopted after reaching age 18 who never resided with the adoptive parent before attaining the age of 18 years, is not considered a descendant of the adoptive parent for purposes of inheriting from ancestors or relatives of the adoptive parent.[17]

F. Embryo Adoption**.** With the rise of in vitro fertilization ("IVF") in the 1990s through today, families and fertility clinics alike sought alternatives for the disposition of the embryos that were created in the IVF process. There are an estimated one million cryopreserved embryos in storage in the United States alone.[18] Embryo donation programs began in the early 1980s soon after IVF began and were initially administered by fertility clinics.[19] In 1997, Nightlight Christian Adoption established the first private embryo adoption program, the Snowflakes Embryo Adoption Program. Families who have been through IVF and have remaining embryos at the completion of their family building can choose an adoptive family to receive their embryos to build their own family.[20] Recent estimates are that over 8,400 children have been born to recipient families through embryo adoption.[21]

II. Intestacy Rights and Stranger to the Adoption

A. Court Interpretations of Stranger to the Adoption Rule.

1. Common Law Presumption Excluding Adoptees. If the will or trust explicitly excludes adoptees as descendants, should the child adopted by their genetic parent be excluded as a beneficiary? Inheritance at common law was based on blood relationships.[22] Once states began enacting legislation allowing adoption in the 1850s,[23] courts presumed that a settlor or testator who did not name a specific adopted descendant but rather used a class term did not mean to include anyone other than those related to them by blood. As the Virginia Supreme Court explained: "At common law, adopted persons were not included within the term *issue*, because that term was limited to the *natural descendants of a common ancestor*, ... was synonymous with lineal descendant, and connoted a *common blood stream*."[24] This presumption, often termed "stranger to the adoption," applied when a person was adopted by someone other than

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[16] *See* Susan Gary *et al.*, *Contemporary Trusts and Estates*, Chapter 2 (3d ed. 2016).

[17] *See* 755 ILCS 5/2-4(a) (1998). *Contra* Delaware law, 13 Del. C. 1953 § 920, which does not have any age restrictions that affect the inheritance rights of an adopted child ("Upon the issuance of a decree of adoption, the adopted child shall acquire the right to inherit from its adoptive parent or parents and from the collateral or lineal relatives of such adoptive parent or parents, and the adoptive parent or parents and the collateral or lineal relatives of the adoptive parent or parents shall at the same time acquire the right to inherit from the adopted child.").

[18] Risa Cromer, *'Our Family Picture Is A Little Hint of Heaven': Race, Religion and Selective Reproduction in US 'Embryo Adoption'*, Reproductive Biomedicine & Society Online, Volume 11, p 9-17 (Nov. 2020), available at https://www.sciencedirect.com/science/article/pii/S2405661820300137

[19] *Id.*

[20] *A Short History of Embryo Donation & Adoption*, Embryo Adoption Awareness Center (Jul. 25, 2022), available at https://embryoadoption.org/2022/07/history-embryo-adoption-donation/

[21] Jacqueline C. Lee, *et. al*., *Embryo Donation: National Trends and Outcomes, 2004-2019*, AM. J. OBSTET. GYNECOL. (Mar. 2023), available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9975076/

[22] Jan Ellen Rein, *Relatives by Blood, Adoption, and Association: Who Should Get What and Why (The Impact of Adoptions, Adults, Adult Adoptions, and Equitable Adoptions on Intestate Succession and Class Gifts)*, 37 VAND. L. REV. 711, 716 (1984).

[23] *Id*.

[24] *McGehee v. Edwards,* 268 Va. 15, 20; 597 S.E.2d 99, 102 (2004) (citations omitted) (italics added). *Accord, Bagwell v. Alexander*, 285 S.C. 331, 334 (1985); *In re Woodcock*, 103 Me. 214, 216; 68 A. 821, 822 (1907); *Union Planters Nat'l Bank v. Corbitt*, 63 Tenn. App. 430, 437 (1971).

the creator of the instrument. Absent contrary intent, the adopted person would be excluded from the class.

2. Court Interpretation of Common Law Presumption. To the extent wills and trusts are an expression of the decedent's intent, how should that intent be interpreted in the context of ART and LGBTQ+ family building? Would it matter if the will or trust were drafted decades ago, before such legal and technological advances were possible? In most older wills and trusts, the testators or settlors did not expressly say whether "descendants" or "grandchildren" were limited to those related to them by blood. In the absence of such direction, courts have taken four approaches in constructing the documents:[25]

   a. *Circumstances at Time of Creation*. Some tried to discern intent by looking at the circumstances at the time the instrument was executed. Subsequent events were ignored. As one court said, "[O]ne executing a will or trust . . . is entitled to rely on the law in effect at the time the instrument is created."[26]

   b. *Different Treatment Where Settlor Could Have Changed Document But Did Not*. A second approach was more lenient. As long as the will or trust was revocable, events subsequent to its execution should be taken in account, on the theory that the testator or settlor who knew of any changes could have revised their will or trust. For example, a Tennessee statute, Tenn. Code Sec. 32-3-101, expressly stated that a will is construed as if it were executed immediately prior to the testator's death. In these cases, children who have been adopted would be included in a class gift.

   c. *Disregard Common Law Presumption*. In a third group of states, courts disregarded the common law presumption by retroactively applying legislation that included adoptees in class terms. For example, a 1947 statute eliminating Maryland's "stranger to the adoption" rule was applied retroactively to an 1897 will because it was a rule of construction; membership in a class was determined by the law in effect when the class closes, not when the creator of the instrument dies.[27]

   d. *Presumption of Inclusion of Adoptees*. Finally, as a fourth approach, two states – California and Hawaii – never followed the common law presumption excluding children who have been adopted and instead always required express language to exclude them.[28]

3. Case Law.

   a. Inheritance Disallowed for Adopted-In Child.

      (1) *McGehee v. Edwards,* 268 Va. 15 (2004). Under the common law, adopted individuals were not typically included in the term "direct lineal descendants," unless specified otherwise in the document. Here, the Court emphasized that the trust language used in the relevant trusts should be interpreted according to the laws at the time of their execution in 1929-1931, which did not include children who had been adopted. The Court further cited Virginia Code Section 1-16, which mandated that "[n]o new law

[25] Kristine S. Knaplund and Sarah M. Johnson, *When ART and 23andMe Shake the Family Tree: Updating Estate Plans for Changing Families*, ACTEC 2020 Annual Meeting (Mar. 7, 2020).

[26] *Anderson v. BNY Mellon, N.A.,* 974 N.E. 2d 21, 28 (Mass. 2012). *See generally Parris v. Ballantine,* 330 So.3d 444 (holding that because adult adoption was not contemplatable at the time the 1971 was executed that the settlors did not intend to include adopted adult in the plain meaning of the phrase "lineal descendants"). *See also Hall v. Vallandingham,* 540 A.2d 1162 (applying the law in existence at the time of decedent's death).

[27] *Evans v. McCoy,* 291 Md. 562 (1981).

[28] *See, e.g., Estate of Stanford*, 315 P. 2d 681 (Cal. 1957); *see also O'Brien v. Walker*, 35 Haw. 104, 115 (1939).

shall be construed . . . in any way whatever to affect . . . any right accrued, or claim arising before the new law takes effect."[29]

(2) *Bird Anderson v. BNY Mellon,* 463 Mass. 299 (2012). In 1941, Anna Bird executed a will with a testamentary trust for the benefit of her child while living, then for grandchildren while living, and then for her respective issue, *per stirpes.* Anna died in 1942, leaving one child and three grandchildren. David, one of the grandchildren, had a biological child, Rachel, and two adopted children, Martin and Matthew. Pre-1958 trusts presumed, under the relevant Massachusetts statute at that time (G.L. c. 2010, Section 8) that descendants did not include adopted descendants. In 1958, however, Section 8 was amended ("1958 amendment") to reverse the presumption so that the term child included an adopted child, unless a contrary intent appeared in the instrument. The 1958 amendment applied only to instruments executed after August 26, 1958. David died in 2007, so Rachel started receiving distributions from the trust upon David's death. Massachusetts passed another amendment to Section 8 ("2009 amendment") that became effective on July 1, 2010, stating that descendants shall include those adopted, and enacted the legislation such that it was effective retroactively. In 2010, at the time of the 2009 amendment, Rachel was receiving income distributions and Marten and Matthew were not. Despite the statutory requirement that it be applied retroactively, the Court stated that they were "hesitant to apply rules affecting property rights retroactively because it is likely that testators, settlors, and grantors consult with attorneys and consider the existing state of the law when deciding how to draft instruments conveying inheritances . . . [and] under established principles, testators, settlors, and grantors are entitled to rely on the state of the law at the time of execution of a trust instrument."[30] Therefore, they found the retroactive application of the 2009 amendment not to be reasonable and in violation of due process, and the Court remanded the case to the Probate and Family Court.

b. Inheritance Allowed for Adopted-In Child.

(1) *O'Brien v Walker,* 35 Haw. 104 (1939). This is the oldest case in these materials, and it evidences that certain courts (as in Hawaii) have long ignored the stranger to the adoption rules. This case involved an appeal from the decree of the circuit judge of the first judicial circuit in Hawaii. John Cummins executed a trust in 1896. Upon the death of the last surviving child, the entire trust estate was to be distributed to the "lawful issue" of the surviving children. All four of John's children survived both John and his wife. One of the children, May Creighton had no biological children but had legally adopted Margaret Clark. The Court was asked to determine if Margaret, as an adopted child, should be included in the distribution of the trust estate. The Court looked to the surrounding circumstances to shed light on John's intention. The Court found that "[t]he record shows that he was a part–Hawaiian of sufficiently advanced age to have grown children at the time he executed the trust instrument in 1896. It is therefore a reasonable assumption that he was born near the close of the era of unwritten law ending in 1841 and therefore nurtured by a generation reverently familiar with the ancient Hawaiian customs and usage of adoptions as the law of the land."[31] The court further stated there was a presumption of fact that John:

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[29] *McGehee v. Edwards,* 268 Va. 15 (2004).

[30] *Bird Anderson v. BNY Mellon,* 463 Mass. 299 (2012).

[31] *O'Brien v. Walker,* at 127.

> "In respect to such a trustor a presumption of fact that he intended to include adopted children and not to discriminate against them in preference to his blood, unless the contrary clearly appears from the context of the deed and from the surrounding circumstances, in harmony with the ancient Hawaiian customs and usage of adoption, the unwritten era of which was not so distantly removed from the time of execution, would be more in order than the reverse blood–preference presumption of the less familiar and more distantly removed common law of England." [32]

Therefore, the Court found that John intended to include adopted children within the term "lawful issue" and that Margaret was entitled to a share of the class gift.

(2) *In re Stanford's Estate,* 49 Cal.2d 120 (1957). Decided eighteen years after *O'Brien v. Walker*, this California case also sought to find equal treatment for children who were adopted. Jane Stanford died in 1905 with a will that bequeathed assets into a testamentary trust. The net income from a portion of the trust was to be paid to the Jane's niece, Amy Hansen. Upon Amy's death, the corpus of her share of the trust was to be delivered to her children. The residue was left to Stanford University. Amy's son, Walter, predeceased her. In 1924, Amy then adopted her niece (an adult) and her niece's two minor children. One of the issues was whether Amy's three adopted children were considered beneficiaries under the trust. The Court noted, "It is clear from the authorities heretofore discussed that the class, children, was to remain open to additional children after the death of the testatrix, and it should be equally clear that children adopted after the death of the testatrix are included as remaindermen. . . . This court has squarely held that an adopted child has a status with respect to its adoptive parent identical to that of a child born of such parent and succeeds to the estate of an adoptive parent in the same manner as a child born of such parent." [33] Accordingly, the Court found that Amy's adopted children were to also be considered as beneficiaries under the trust.

(3) *Evans v. McCoy,* 291 Md. 562 (1981). Amos S. Evans, died in 1899 leaving behind a farm in Cecil County, Maryland. Amos' will stipulated that if all of his children, namely Rebecca and James, died without leaving issue, the farm would pass to his brothers' heirs. After James' death, Rebecca leased the family farm but was not satisfied with the income produced. She attempted to sell the property but encountered issues with the title—due to the conditions set in Amos' Will. In 1973 and then in 1976, Rebecca adopted two adults, Kathleen (21-year-old neighbor) and Janet (53-year-old cousin), in connection with the sale of the farm. The adoptions were suggested by Rebecca's attorney, as well as the buyer's attorney. The Court affirmed the decision of the trial court and noted that the present status of Maryland law on this issue was to treat adopted children as natural-born children for the purposes of interpretating wills and found that there was no evidence of a contrary intent in the will.

III. Adoption Out

A. Overview.[34] A minor child may be adopted by a stepparent under certain circumstances. A stepparent adoption generally requires the consent of both birth parents if living.[35] Stepparent adoptions are common when one birth parent dies, and the surviving parent remarries. Stepparent

[32] *Id. at 131-32.*

[33] *In re Stanford's Estate,* 49, Cal.2d at 135 (1957).

[34] *See* Leimberg, Kamin & Goffe, Chapter 10.

[35] *See, e.g.*, Ohio Rev. Code § 3107.06 (1989).

adoptions may also occur when an uninvolved biological parent agrees to relinquish parental rights so that the child may be adopted by the other parent's spouse.

B. DNA Testing. With the rise of DNA test kits and their revelations of genetic relatives to individuals who were adopted out of a family, the inheritance rights of adopted-out individuals and their adoptive and genetic families are being tested in ways and with frequency not previously experienced.

C. Statutory Law (Majority Rule). UPC Section 2-116 outlines the effect adoption has on intestate inheritance rights.

1. It indicates that exceptions apply to the general rule that adoption severs inheritance rights. UPC Section 2-116 states that unless an exception is met, if a parent-child relationship is established under the Code, the parent is a parent of the child, and the child is a child of the parent for purposes of intestate succession.

2. UPC Section 2-119(b) through (e) set forth those exceptions and clarifies that adoption severs the parent-child relationship with the adoptee's genetic parents, except in certain circumstances like stepparent adoptions. California, Colorado, New Jersey, and New Mexico have adopted UPC Section 2-119.

3. This can be particularly beneficial to a child who is being or was raised by more than one set of parents, because that child could be adopted by stepparents and inherit from them and through their stepfamily lines, in addition to through their biological parents. It also encourages a stepparent adoption of a child whose parent is deceased, given that the child would not be giving up the right to inherit from the deceased parent's side of the family (*e.g.*, grandparents, aunts, uncles, and more remote relatives) who may die intestate or with governing instruments that could be otherwise be interpreted to disinherit the child if not for the statute.[36]

4. Drafting attorneys should consider whether to allow children adopted by a biological parent's spouse after the death of the other biological parent to continue to be treated as a descendant of the deceased parent.

D. Minority View. In nine states, an adopted-out person may still be able to inherit from their biological family. And in some instances, it may be reciprocal. In these states, client questionnaires should ask whether the client has given up a child to adoption and, if so, that child needs to be expressly disinherited if that is the client's intent. Below are some specifics about the minority states.

1. Alaska, Illinois and Maine provide for a continuation of inheritance rights between the adopted-out child and the genetic parents if so-stated in the adoption decree.[37]

2. Illinois also allows the birth parents limited inheritance rights. They may acquire from the adopted child's estate any property gained from them as a gift, through a will, or under intestate laws.[38]

[36] *See* Leimberg, Kamin & Goffe, Chapter 10.

[37] ALASKA STAT. § 25.23.130(a)(1); 755 ILL. COMP. STAT. ANN. 5/2-4; ME. REV. STAT. tit. 18-C, § 2-117.

[38] 755 ILCS 5/2-4(b) (1998).

3. In Kansas, Louisiana, Oklahoma, Rhode Island, and Texas, an adoption decree terminates the right of the birth parent to inherit from the adopted child, but the adopted child may still inherit from the birth parent.[39]

4. Louisiana, in particular, will bring the adopted-out child and their descendants back into the fold of the birth family for inheritance purposes, stating: "the adopted child and his [sic.] descendants retain the right to inherit from his [sic.] former legal parent and the relatives of that parent".[40]

5. In Pennsylvania, an adopted person may inherit from the estate of a birth relative, other than a birth parent, who has maintained a familial relationship with the adopted person.[41]

E. Case Law. Below are some cases that addressed the issue of whether a stepparent adoption would sever the ability of the stepchild to continue to inherit from their biological parent's family.

1. *Hall v. Vallandingham*, 540 A.2d 1162 (Md. Ct. Spec. App. 1988). In this case, Maryland applied the law in existence at the time of the decedent's death, which worked to the detriment of the adopted-out children. Earl Vallandingham died in 1956, survived by his widow Elizabeth and their four children. Elizabeth remarried Jim Kilgore, who adopted the minor children. Twenty-five years later, in 1983, Earl's brother (the "decedent") died childless and unmarried, and so his estate passed to his siblings and the children of his deceased siblings. At the time of the children's adoption in 1958, Maryland's law clearly provided that children who have been adopted retained the right to inherit from their natural parents and relatives. But that law changed in 1969 when Maryland adopted what is now the majority position among the states, that adoption severs inheritance rights, even when the adoption is to a stepparent or relative. Therefore, the children who were adopted by their stepfather lost the right to inherit from their biological uncle, even though he had remained an uncle to them until his death.

2. *Walters v. Corder*, 146 N.E.3d 965 (Ind. Ct. App. 2020). Mildred Goodman created an irrevocable trust for her son, Charles, which was to distribute to the issue of Charles, *per stirpes*, at the death of the survivor of Charles and his spouse. Charles had a son David, who married Joan. David and Joan had three children together and later divorced. David had one child, Raquel, with his second wife. After the divorce, Joan's second husband adopted the three, minor children of David and Joan—with David's consent. At David's death, Raquel claimed that her half-siblings should not be included in the class of David's descendants under Mildred's trust because the adoption had severed their right to inherit from and through their biological father. The trust agreement did not define children or issue, so the Court looked to the settlor's intent. Finding no intent to exclude her grandchildren, the Court allowed the adopted-out children to be included in the class of beneficiaries, even though they could not have inherited from David or Mildred under Indiana intestacy law.

3. *Rogers v. Pratt,* 467 P.3d 651 (Okla. 2020). A mother had reconnected with the son she gave up for adoption as an infant. The son had even lived with her for several months after his adoptive parents had died. The birth mother's will stated that she had no children, and expressly

[39] KAN. STAT. ANN. § 59-2118; LA. CIV. CODE ANN. § art.199 (the adopted child and their descendants retain the right to inherit from their former legal parent and the relatives of that parent); 10A OKL. ST. ANN. § 1-4-906 (termination of parental rights through adoption precludes the parent from inheriting through the child but expressly allows the child to inherit through the parent); R.I. GEN. LAWS § 15-7-17 (the granting of the petition for adoption will not deprive an adopted child of the right to inherit from and through their natural parents in the same manner as all other natural children); TEX. EST. CODE § 201.054 (the adopted child inherits from and through the child's natural parent or parents, except in the case of adult adoption).

[40] La. Civ. Code art. 199

[41] 20 PA. CONS. STAT. ANN. § 2108.

disinherited all other family members. The son asserted his rights as a pretermitted heir and took his case all the way to the Oklahoma Supreme Court -- and won. While in most states, adoption severs the right to inherit, Oklahoma is one of the five states that expressly allows an adopted-out child to inherit from their genetic parent. The Oklahoma Supreme Court confirmed that the right to inherit from the genetic parents extends to other protections offered to children under law, including the right to inherit as pretermitted heirs.

IV. Adoptions by Grandparents and Other Relatives

A. Overview. Often a minor child whose parents are deceased may be adopted by a grandparent or other relative.[42] In such situations, there may be a concern that the adopted child may inherit from an intestate decedent or a trust through multiple family lines. The best result is when statutes address this problem. For example, in Illinois, a child who is adopted by a grandparent or other family member is entitled only to the largest share that child could inherit either as a child of the adoptive parent or as the child of the biological predeceased parent.[43] Trust drafters could also consider addressing this concern generically in their definition of how class gifts should be distributed.

B. Statutory Law. As with stepparent adoptions, UPC Section 2-119 allows a child adopted by their relatives to continue to inherit from and through their former biological parent even after the individual has been adopted by the grandparent or other relative.[44]

C. Case Law.

1. *In re Estate of Gallegos*, 499 P.3d 1058 (Colo. Ct. App. 2021). This case tested Colorado's adoption of the UPC exception allowing inheritance from former legal parents after an adoption by relatives. Joseph died in December 2016. He had two biological children: Patricia and Shennae. Patricia was born in 1990 and was adopted by her maternal grandparents in 1991. However, she maintained a relationship with Joseph throughout his life, and he named her as the beneficiary of his savings and retirement accounts. Shennae, who was born in 1989 and who otherwise had no relationship with Joseph, learned that Joseph was her father nearly two years after his death. Joseph died with no surviving spouse, and both biological daughters sought a share of his intestate estate. Colorado's version of UPC 2-119 allowed children who are adopted by relatives of either parent to inherit from said parent, so Patricia would have inherited from and through her father under the law. *See* § 15-11-119(3), C.R.S. 2020. However, Shennae argued that the UPC exception should not be applied here because it was passed nearly 20 years after Patricia's adoption was finalized. The Court of Appeals held that the right of children who have been adopted to inherit is determined by the inheritance laws in effect when the intestate died, and so Patricia and Shennae each inherited equal shares of the estate.

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[42] *Adoptions from Foster Care,* The Annie E. Casey Foundation (Nov. 18, 2021) (last updated Nov. 13, 2023), available at https://www.aecf.org/blog/adoption-statistics-2019 (noting that in 2021, "25% [of] children who left foster care were adopted by a family [member]").

[43] 755 ILCS 5/2-4(a) (1998) ("An adopted child and the descendants of the child who is related to a decedent through more than one line of relationship shall be entitled only to the share based on the relationship which entitles the child or descendant to the largest share."). Accord, Cal. Prob. Code § 6413 (1991).

[44] UPC Section 2-119(c) provides: "[Individual Adopted by Relative of Genetic Parent.] A parent-child relationship exists between both genetic parents and an individual who is adopted by a relative of a genetic parent, or by the spouse or surviving spouse of a relative of a genetic parent, but only for the purpose of the right of the adoptee or a descendant of the adoptee to inherit from or through either genetic parent."

2. *Murphy v. Shehan*, 633 S.W.3d 350 (Ky. Ct. App. 2021). This case was heard in Kentucky, which has not enacted the stepparent and relative adoption exceptions of the UPC. Here, the trustee of a testamentary trust brought action seeking declaratory judgment to determine who then-living descendants were for purposes of determining the recipients of a class gift after the death of testator's daughter. Kaleb Shehan, one of the genetic great-grandchildren of the testator, had been adopted by his father's stepbrother (Kaleb's step-uncle) after his father had lost his parental rights. Technically, the adoption should have severed Kaleb's genetic connection to the testator and established the step-uncle's family as Kaleb's ancestors. Similar to the *Walters v. Corder* case discussed under stepparent adoptions above, the court held that while Kaleb was no longer a legal heir of the settlor's family for purposes of intestacy, he remained a biological descendant for purposes of the trust's class gift to descendants.[45]

D. Gestational Carrier Considerations. In a few states where gestational carrier contracts are illegal or not recognized (*e.g.,* Michigan, Louisiana), the biological or intended parents using assisted reproductive technology may need to adopt their own child from the gestational carrier. Where the gestational carrier is a relative, such as a sister or cousin of the intended mother, would a state that has not adopted the new UPC exception sever the right of the child to inherit from their kin? Would a state that has adopted the UPC exception allowing inheritance from the birth mother and her family elevate the child at issue from niece, nephew or cousin once removed to the status of a child?

V. Adult Adoption Issues

A. Overview. Many states allow adults to adopt other adults.[46] The most common rationale for adult adoptions is to permit the person who functioned as a parent (often, a stepparent) to adopt a child after the child becomes a legal adult (typically at age 18),[47] for example if that child's biological parent was unwilling to give up his parental rights during the child's minority. However, adult adoption has also been used by same-sex couples to confer inheritance and other familial rights on their partner before the right to marry was granted by *Obergefell*, and even by heterosexual couples to include a spouse or romantic partner in a class gift under an irrevocable trust. At issue in these cases is often whether the adopting parent had a legitimate parent-child relationship with the adoptee. In the case of children who were foster children or stepchildren but could not be adopted until they were adults, the issues are particularly fraught when a court is unable to validate the relationship depending on the terms of the trust instrument.

B. Virtual Powers of Appointment through Adoption. One rationale for the "stranger to the adoption" rule was that the settlor would not want to create a virtual power of appointment in their beneficiaries by giving them the option to adopt strangers into the class. This concern was not unfounded. There are examples of adult adoptions being used to circumvent certain restrictions limiting the beneficiaries of a trust or a class of appointees.[48] Where a trust provides for descendants, but not for a spouse, one spouse may be inclined to divorce and then adopt the other in an effort to make the latter a beneficiary under a trust or testamentary instrument. In this case, adoption may bring the partner into the permissible class of recipients of the trust share upon the death of the current income beneficiary. Typically, this has been more successful when used to

[45] *Murphy,* 633 S.W.3d at 354 (noting that a "distinction must be made between legal lineage, which may be severed and biological lineage, which may not"). Notably, the holding in this case is narrow is scope, fact-dependent, and limited to the interpretation of the testamentary trust.

[46] *See, e.g.,* Pennsylvania Cons. Stat. 23 § 2311, which states that "[a]ny individual may be adopted regardless of [their] age or residence."

[47] The age of adulthood in most states for most purposes is 18. But in a few states the civil age of adulthood is 19 or 21. *See, e.g.,* https://wisevoter.com/state-rankings/age-of-majority-by-state/, https://juvenilecompact.org/age-matrix, and https://www.lawinfo.com/resources/adoption/adult-adoptions.html.

[48] *See, e.g.*, *Otto v. Gore*, 45 A.3d 120 (2012).

formalize an already existing relationship rather than solely to gain inheritance rights that would otherwise be lost.[49]

C. Statutory Law. If an instrument is silent on the issue of adult adoptions, a state statute may fill that silence by prohibiting it under most circumstances that would be deemed as trying to use adoption as a creative loophole to benefit a romantic partner.

1. An Illinois statute, for example, provides that a person adopted after reaching age eighteen, who never resided with the adoptive parent before attaining the age of eighteen years, is not considered a descendant of the adoptive parent for purposes of inheriting from ancestors or relatives of the adoptive parent.[50] California and Montana also have similar laws.[51]

2. Neighboring Indiana allows an adopted person to be included in a class gift if the adoption was prior to age 21.[52]

3. Statutes with these age restrictions make it difficult for beneficiaries of a trust to "rewrite" the terms of the trust by expanding the beneficiaries through an adult adoption proceeding. Any trust or other dispositive instrument created by the adoptive parent, of course, would not be impacted by this rule. Rather, any child adopted in an adult adoption by that transferor should be treated as a child of the transferor after the date of the adoption.

4. Query, however, if the age of maturity (18-21) is sufficient for these purposes as it can take time to formally adopt. States should strongly consider increasing this age to 22-25 or moving from age ranges to a facts and circumstances test of "parent-child" relationship for more flexibility for stepchild, foster child, and other similar adoption.

D. Case Law. Courts across the country have come to different results as to whether they are willing to allow inheritance based on an adult adoption. Before reaching the conclusion that an adult adoption will bring an individual into a class of beneficiaries, there must be a careful examination of the dispositive intent set forth in the instrument and the state law applicable to adopted heirs.[53]

1. Same Sex Couples.

a. *Adoption of Patricia S.*, 2009 ME 76, 976 A.2d 966 (2009). Here, Olive's parents established two trusts for her benefit and then for the benefit of her descendants. Olive had no biological descendants, and had adopted her partner, Patricia. The trustees of the trusts filed a petition in the Maine Probate Court seeking annulment of the adoption and a declaratory judgment that the adoption was null and void. In it, they alleged that the couple obtained the adoption by fraud in that they did not disclose their relationship to the court, and because, as New York residents at the time, Patricia and Olive had not fulfilled the statutory requirements of living or residing in Maine necessary to give the Knox County Probate Court jurisdiction to issue the decree of adoption. The adoption was upheld on

[49] Russell E. Utter, *The Benefits and Pitfalls of Adult Adoption in Estate Planning and Its Likely Future in Missouri*, 80 UMKC L. Rev. 266 (2011).

[50] 755 ILCS 5/2-4(a) (1998).

[51] *See, e.g.*, Cal. Prob. Code § 21115(b) (1994); Mont. Code Ann. § 72-2-715(3) (1993).

[52] In. St. 30-4-2.1-2.

[53] *See* Peter T. Wendel, *The Succession Rights of Adopted Adults: Trying to Fit a Square Peg into a Round Hole*, 43 Creighton L. Rev. 815 (2010) for an analysis of the law in this area.

appeal since the trustees failed to establish sufficient facts to show that Patricia had committed fraud.[54]

2. Adult Stepchildren.

   a. *Parris v. Ballantine*, 2020 WL 5740810 (Alabama). This case involved a Dynasty Trust created by a member of the DuPont family in 1971. The Dynasty Trust had divided into separate shares for children, and then again for the grandchildren. One of the grandchildren, Aimee, was diagnosed with terminal cancer. She had no biological children of her own, but she had helped raise her husband's son and had a parent-child relationship with him. Aimee adopted her stepson on her deathbed with the intention that he would inherit her trust, rather than allowing her trust to be added to her siblings' shares. The trust definition of descendants made no reference to adoption, so Alabama law controlled. Like most states, Alabama had a 1931 statute that allowed children who had been adopted to be included as descendants of their adoptive parents and ancestors for purposes of inheritance. However, the Supreme Court noted that the statute's use of the word "children" had been ruled in prior cases to include only those adopted as minor children. At the time of his adoption, Aimee's stepson was an adult. Further, at the time the trust was written in 1971, there was no legal mechanism for adult adoptions in Alabama. Therefore, the Supreme Court of Alabama held that the stepson was not a permissible beneficiary of the trust.[55]

   b. *In re Estate of Glen E. Johnson v. Johnson,* 2023 IL App (4th) 220488 (2023). Glen Johnson, the decedent, executed his will in 2001 when he was unmarried, and he devised all of his estate to his brother. In 2004, he married his wife, and eight years later he adopted his wife's four adult children (the "respondents"). The order of the adoption entered recited that, "[f]or purposes of inheritance and all other legal incidents and consequences it shall be the same as if [respondents] had been born" to the decedent and his wife. There is factual dispute as to whether the decedent was aware of this language. The decedent died in 2020. Because the four adult children were adopted after the execution of the decedent's will, they argued that they were entitled to the same portion of the decedent's estate that they would have received if the decedent had died intestate. The Court of Appeals affirmed the decision of the lower court and held that, "it is undisputed that respondents were adopted after attaining the age of 18 years and did not reside with decedent, their adoptive parent, prior to adoption. While these facts would defeat respondents' rights to inherit from decedent's lineal or collateral kin, they are still treated as heirs of decedent for the purposes of inheriting from *him.* As such, because they are neither provided for in decedent's will nor explicitly disinherited, they have the right under section 4-10 to elect to receive the share of decedent's estate they would have received in the case of intestacy."

3. Adoption to Create Trust Beneficiaries.

   a. *Otto v. Gore*, 45 A.3d 120 (Del. 2012). The Delaware Supreme Court refused to allow a Susan's adoption of her ex-husband, which would have made him eligible to inherit under a trust (the "Pokeberry Trust") created by Susan's parents. The Pokeberry Trust divided the

[54] *Adoption of Patricia S.,* 976 A.2d at 972 (noting that the term “lives” is not define din the statute but meant to be different, and less rigorous of a standard than “residing” and that “Olive and Patricia relied and acted on the advice of experienced counsel who had identified Maine, the location of their summer home, as a place where, by staying a few weeks, Patricia could qualify as a person with sufficient ties to Maine to be eligible for adoption.”).

[55] *Parris v. Ballantine,* 330 So. 3d at 452 (two dissenting Justices contended that the Alabama courts should give full faith and credit to Samuel’s adoption decree, as the Charleston County Family Court, after hearing evidence, adjudicated a parent-child relationship between Aimee and Samuel. The Justices further held that the 1971 Trust did not evidence a clear intent to exclude adopted children, and therefore, in 2016 when Aimee adopted Samuel, Samuel became a lineal descendant).

shares per capita among Susan's parents' grandchildren. The court held that the adoption was "for the sole, and improper, purpose of thwarting or circumventing" the settlors' intentions regarding the Pokeberry Trust by increasing the amount of shares allocated to Susan's branch of the family" and held that the ex-husband was barred from claiming any interest in the Pokeberry Trust due to unclean hands.[56]

b. *Levien v. Johnson*, NY Slip Op 30995(U) (Apr. 14, 2014). This is another case including adult adoptees in a class of trust beneficiaries. Here, the terms of the testamentary trust provided that, upon termination of the trust, the remainder was to be distributed to great-grandchildren, *per capita*. Two grandchildren each adopted an adult under Texas law, notified the trustee of the adoptions, and sought to have adopted adults declared great-grandchildren for purpose of sharing the remainder. The trustees refused to recognize the adopted adults as beneficiaries and sought a decree that the adopted adults should not share in the trust because it would violate the terms of the trust, the testator's intent, and the settlement with the grandchildren. The New York Surrogate Court held for the adopted adults, gave full faith and credit to the Texas adoption and reasoned that, under New York state law, "children" included all children who have been adopted (regardless of the fact the children were adults at the time of adoption) unless there is an express contrary intention.

E. Changes to Forms. Many planners use definitions of descendants that limit the inclusion of children who have been adopted to those who were adopted prior to age eighteen (18), consistent with the Alabama statute. This precludes stepparents from adopting their stepchildren once the stepchildren are emancipated, as would be necessary in a case where the biological parent would not release their parental rights. The authors recommend increasing the age to 21-25, to give the family time to accomplish an adult adoption, which can no longer be contested by the biological parent. Sample language:

> "Descendant" means a lineal descendant in the first, second or any other degree, whether by blood or by adoption prior to the adoptee reaching age twenty-five (25) (and whether born or so adopted before or after the execution of this Trust Agreement), of the ancestor designated, so long as such ancestor openly acknowledged the child as his or her own and did not refuse to support such child.

F. Skip Person Loophole for GST Purposes? Where unmarried partners are separated by a great age difference, a transfer in excess of the exemption may result in the application of the generation-skipping transfer tax (GST tax). A valid adoption of an unrelated individual who would otherwise be considered a skip person may avoid the generation assignment rules based on age, and instead allow application of the generation assignment rules based upon lineage from the transferor.

However, under regulations that went into effect in 2005, the IRS will analyze whether there is a bona fide parent/child relationship, or if the adoption was primarily for GST tax-avoidance purposes.[57] This determination is made based upon all of the facts and circumstances, but the following requirements must be satisfied:

1. A legal adoption took place between the adoptee and the adoptive parent;

2. The adoptee is a descendant of a parent or the adoptive parent (or the adoptive parent's spouse or former spouse); and

[56] *Otto v. Gore*, 45 A.3d at 136.

[57] Treas. Reg. § 26.2651-2(b).

3. The adoptee is under the age of eighteen at the time of the adoption.

VI. Parentage Issues in Modern Families

A. Adoption and Assisted Reproductive Technology.

1. Overview. The use of donor eggs and gestational carriers in assisted reproductive technology ("ART") have challenged the notion that the birth mother is always the biological mother of the resulting child. Gestational carriers can also give rise to the need for a genetic parent to adopt their own genetic child. Older trusts and wills may include a prohibition on adoption or require descendants to be in the "bloodline." Would a child adopted by their own genetic parents be excluded from a class gift? What about a non-genetic child whose donor-assisted conception status would never have been revealed but for DNA test kits – would that child be excluded from older definitions of descendants?

   Consider the following examples:

   a. *Intended Mothers with Genetic Ties to Child*. A woman who cannot or chooses not to become pregnant may instead use her egg and partner/donor sperm to create embryos, which are then carried to term by a gestational carrier. In some states, the intended mother will be able to obtain a pre-birth court order requiring that the intended mother's name be reflected on the birth certificate.[58] But in other states the gestational carrier, as the woman to give birth, will be named on the birth certificate and the intended mother, who is also the biological mother, must wait until after the child is born and either obtain a post-birth order or adopt the child.[59]

   b. *Single Man Wanting a Child*. If a single man wants to have his genetic child but has no female partner, he can use his own sperm, a donated egg, and a gestational carrier to produce a child that is related to him. In some states, because he is not married to the woman giving birth to the child, he must adopt the child even though he is the genetic father.

   c. *Male, Same-Sex Couples*. Where a gestational carrier is assumed to be the legal mother of the child, her husband, if she is married, will be assumed to be the legal father under the marital presumption.[60] As a result, a male, same-sex couple choosing to procreate using one of their sperm, a donor egg and a gestational carrier, may need to adopt the child or obtain a post-birth order because the gestational carrier's husband will be considered the child's father, even though one of the intended fathers is the biological father.

2. Statutory Law.

   a. *Legality of Surrogacy Contracts*. Surrogacy law is still evolving and varies across the U.S., with state laws ranging from very tolerant of surrogacy arrangements, to states where surrogacy is illegal and even a felony.

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[58] *See, e.g.*, CAL. FAM. CODE § 7633; DEL. CODE § 8-611. *See e.g., In re Doe,* 793 N.Y.S.2d 878 (N.Y. Surr. Ct., N.Y. County 2005) (case where California court issued pre-birth order).

[59] For example, in Tennessee, the birth mother is the legal mother even if she is a gestational carrier with no genetic relationship to the child.

[60] *See* John Lawrence Hill, *What Does It Mean to be a 'Parent'? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. Rev. 353, 372-73 (May 1991). Many states have enacted statutes to this effect, with some making the presumption irrebuttable. Id. at 373-74.

(1) Tolerant States. In states where surrogacy is permitted, there is a range of how the parents of the resulting child are determined. In the most tolerant states, a judge will grant a pre-birth order instructing the hospital to name both intended parents on the birth certificate. The most tolerant states include California, Connecticut, Delaware, the District of Columbia (where surrogacy was illegal and punishable through fines and jail time until 2019), Maine, New Hampshire, New Jersey, Nevada, Rhode Island, Vermont, and Washington.[61]

(2) Mostly Tolerant States. In a vast majority of states in the country, surrogacy is permitted, but outcomes may vary depending on the county, the judge and the facts involved. In some states, additional post-birth legal procedures may be required. Florida refers to surrogacy agreements as "pre-planned adoptions."[62]

(3) Slightly Intolerant States. In a handful of states such as Idaho, Tennessee, and Wyoming, surrogacy is neither expressly allowed nor prohibited, and there are significant hurdles to the intended parents being designated as legal parents.[63] In Virginia, the gestational carrier is named on the birth certificate and cannot relinquish her parental rights until 4 days after birth.[64] In Tennessee, the gestational carrier will be named as mother on the birth certificate unless the genetic material of both intended parents is used.[65] If donor sperm or a donor egg is used, the non-genetic intended parent will have to adopt the child.

(4) Void or Illegal Contracts. In Arizona, Indiana and Nebraska, surrogacy contracts are void and unenforceable. In Louisiana and Michigan, compensated surrogacy contracts are illegal and subject to criminal penalties.[66]

b. *Presumption of Parentage by Marriage*. Section 204 of the Uniform Parentage Act (2017) provides for a marital presumption that applies to an individual who is married to the child's birth mother. This is a codification of common law, recognized in most, if not all, states.[67] Consistent with the U.S. Supreme Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the 2017 UPA is express in providing that the marital presumption applies regardless of whether the birth mother's spouse is male or female. Under *Obergefell*, this statutory marital presumption in state law applies regardless of the gender of the birth mother's spouse and regardless of whether the particular state statute is gender neutral like the 2017 UPA.[68] Importantly, however, this excludes a presumption for same sex male

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[61] *See* Diane Hinson, *The United States Surrogacy Law Map*, https://www.creativefamilyconnections.com/us-surrogacy-law-map/ (last visited Apr. 2, 2022).

[62] FL ST § 63.213.

[63] *Id.*

[64] VA. CODE ANN. § 20.-162.A(3).

[65] *In re Adoption of A.F.C.*, 491 S.W.3d 316 (Tenn. 2014).

[66] MICH. COMP. LAWS SERV. §§ 722.855 and 722.857; Louisiana Surrogacy Bill HB 1102 took effect on August 1, 2016. This bill restricts gestational surrogacy to heterosexual married couples using their own gametes and places burdensome requirements on the arrangements, including a strict no compensation requirement. As a result, commercial surrogacy is prohibited in Louisiana, and the parties to any surrogacy agreement that is not sanctioned by the statute are subject to civil and criminal penalties.

[67] *See, e.g.*, N.Y. DOM. REL. LAW § 24, N.Y. FAM. CT. ACT § 417, D.C. CODE § 16-909(a).

[68] *See* Pavan v. Smith, 137 S. Ct. 2075 (2017).

couples that when the birth or genetic father is on the birth certificate, it is not as clear as it could be that the father's spouse at that time is also a presumed parent.

c. *Common Law*. At common law, a child born of artificial insemination during a marriage with the consent of both spouses was a legitimate child of the marriage. Most states have codified this common law rule to apply the marital presumption of parentage to the birth mother's spouse in the context of artificial insemination (*see, e.g*., N.Y. Domestic Relations Law § 73). Section 703 of the Uniform Parentage Act expands this presumption beyond artificial insemination by providing that "[a]n individual who consents . . . to assisted reproduction by a woman with the intent to be a parent of a child conceived by the assisted reproduction is a parent of the child."

2. Case Law.[69]

a. *In Re Doe,* 793 N.Y.S.2d 878 (N.Y. Surr. Ct., N.Y. County 2005). This case involved trusts created in 1959 for the benefit of the settlor's "issue" or "descendants." The trust specifically stated that adoptions shall not be recognized. The settlor's daughter and her husband entered into a California surrogacy arrangement in which the eggs of an anonymous donor were fertilized with the sperm of the settlor's daughter's husband and carried by a gestational surrogate. The twins born as a result of this arrangement were not genetically related to the settlor's daughter. The settlor's daughter and her husband, with the consent of the surrogate mother, obtained a Judgment of Parental Relationship, a pre-birth order, from the Superior Court of California to establish the settlor's daughter and husband as the twins' sole legal parents. The Court ruled that the adoption exception did not apply because under California law, the twins had not been adopted by the settlor's daughter and her husband.[70]

b. *Pavan v. Smith*, 137 S. Ct. 2075 (2017). Following the recognition of same sex marriage in 2015 in *Obergefell v. Hodges*,[71] the United States Supreme Court in *Pavan v. Smith*,[72] held that the assumption of parentage by marriage applied equally to the female spouse of a birth mother as to the male spouse of a birth mother, as to hold otherwise would deny "married same-sex couples access to the constellation of benefits that the State has linked to marriage."[73] The Court noted that the birth certificate was not "a device for recording biological parentage," since it mandated that the husband be named as the father in cases of a child conceived via anonymous sperm donation.[74]

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[69] *See generally Pueblo v Haas,* 2023 Mich. LEXIS 1124 (2023) (plaintiff sought joint custody of a child from defendant, whom she was in a long-term domestic partnership with for approximately ten years. During their relationship, the parties were unable to legally marry in Michigan and plaintiff had a child through in vitro fertilization. The Michigan Supreme Court found that defendant had developed a de facto parent-child relationship and extended the equitable-parent doctrine to defendant.

[70] *In re Doe,* 793 N.Y.S.2d at 881 (holding that "a judgment of parental relationship is entirely distinct from an adoption proceeding, and the two are governed by different divisions of the California Family Code and that "[a] California gestational surrogacy arrangement, where, as here, the surrogate mother is implanted with an egg fertilized in vitro, is not subject to the adoption statutes.") Until 2020, New York considered surrogacy contracts void and unenforceable. Nonetheless, the New York Surrogate's Court provided the California judgment full faith and credit.

[71] 135 S. Ct. 2071 (2015).

[72] *Pavan v. Smith*, 137 S. Ct. 2075 (2017).

[73] *Id*. at 2078.

[74] *Id*.

3. Planning Considerations. In the context of estate planning, surrogacy agencies generally will require that the testamentary documents of an intended parent provides for the following provisions during the term of the surrogacy contract (i.e., during the carrier's pregnancy):

    a. Naming a guardian of the person for any intended children in the event that the intended parent dies during the term of a pregnancy under a gestational carrier agreement; and

    b. Authorizing the personal representative to carry out the terms of a gestational carrier agreement and to establish parentage of any child born in connection therewith.

    c. The intended parents should also update their estate planning documents to provide for intended children, in the event one or both parents die during the surrogate's pregnancy or before an adoption is complete.

    d. In states where surrogacy contracts are less tolerated, the gestational carrier should update her own estate planning documents to attempt to disinherit the intended child, in the event the carrier dies before the intended parents' adoption is complete.

B. Equitable Adoption.

1. Overview. Intestacy laws and parentage acts have been slow to recognize fictive kin.

    a. A "fictive kin" relationship is one that a child has with "an individual who is not related by birth, adoption, or marriage to a child, but who has an emotionally significant relationship with the child."[75] Families of color and LGBTQ+ families are more likely to incorporate "fictive kin" and extended family into a single family unit than traditional White and heterosexual families.[76]

    b. In many states, fictive kin who have not been legally adopted but who maintain a parent-child relationship are not entitled to inherit in the event of intestacy. States that have recognized fictive kin in intestacy law refer to the relationship as "equitable adoption."

2. Statutory Law. Citing the principal that "equity will consider that done which ought to have been done,"[77] some states will apply the doctrine of equitable adoption when a child is raised by an extended family member or family friend as fictive kin. Some states' statutes simply do not distinguish between formal adoption and equitable adoption.[78] Others have enacted statutes that treat a child as having been adopted for purposes of intestacy if three elements are satisfied:[79]

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[75] American Legislative Exchange Council. The Kinship Care and Fictive Kin Reform Act, 2017.

[76] *See, e.g.*, ANDREW BILLINGSLY, CLIMBING JACOB'S LADDER (1992); ROBERT B. HILL, THE STRENGTH OF AFRICAN-AMERICAN FAMILIES: TWENTY-FIVE YEARS LATER 40 (1999); Michael J. Higdon, *When Informal Adoption Meets Intestate Succession: The Cultural Myopia of the Equitable Adoption Doctrine*, 43 WAKE FOREST L. REV. 223, 228 (2008); Julia J. Eger, *Legally Recognizing Fictive Kin Relationships: A Call for Action*, ABA Child Law Practice Today (Mar. 1, 2022), available at https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/january-december2022/fictivekin/ (last visited Oct. 20, 2022).

[77] *Estate of Wilson*, 111 Cal. App. 3d 242, 246 (1980).

[78] *See, e.g.*, *Cavanaugh v. Davis*, 235 S.W.2d 972 (Tex. 1951); *Cubley v. Barbee*, 73 S.W.2d 72 (Tex. 1934); *Broussard v. Weinberger*, 499 F.2d 969 (5th Cir. 1974); *Estate of Seader*, 76 P.3d 1236 (Wyo., 2003); *Pangarova v. Nichols*, 19 P.2d 688 (Wyo., 1966).

[79] *See, e.g.*, 20 CFR § 222.34 (Relationship resulting from equitable adoption for purposes of Railroad Retirement Act).

a. The relationship began during the child's minority;

b. It continued throughout the parties' lifetimes; and

c. It is established by clear and convincing evidence that the stepparent or foster parent would have adopted but for a legal barrier (*i.e.*, a biological parent did not give consent to adoption).

Upon satisfaction of these criteria, non-biological children who were never formally adopted by a deceased parent who died intestate may be entitled to take an intestate share from the decedent's estate; they are treated as if they were formally adopted during the decedent's lifetime. However, even with equitable adoption, the other protections extended to the parent-child relationship under inheritance laws -- such as inclusion in class gifts, pretermitted heir statutes and the ability to inherit from and through the ancestors and descendants of one's parents – are not extended to equitable adoptees.

3. Case Law.

a. *Pueblo v. Haas,* 2023 Mich. LEXIS 1124 (2023). Two women, plaintiff Carrie Pueblo and defendant Rachel Haas, were in a long-term relationship from the early 2000s to 2010s. During the course of their domestic partnership, same-sex marriage was prohibited in Michigan. In late 2007, Carrie and Rachel used in vitro fertilization to have a child with Rachel as the genetic mother and birth mother. Rachel was the only parent listed on the child's birth certificate. In 2020, Carrie filed a custody complaint seeking joint custody. Rachel argued that Carrie lacked standing as the parties had never married, and Carrie had no biological or adoptive relationship to the child. On appeal, the Michigan Supreme Court reversed the decision of the lower court and held that a person with no *biological* relationship to a child may establish parentage and assert custodial rights through "equitable-parent doctrine." The court noted that the public policy in Michigan is the recognition of equitable parenthood. "Because the parties are the same sex, they were barred from marrying in Michigan, were they resided during the relationship. . . . Unlike opposite-sex couples, same-sex couples did not have the option to obtain parental rights through marriage. The court can right some of this wrong by invoking its equity jurisprudence, which molds its decrees to do justice amid all the vicissitudes and intricacies of life."[80]

C. Changes to Forms. To allow children who have been equitably adopted by relatives, partners of legal parents and others to inherit from their effective parent, consider including an equitable adoption concept in the definition of descendants, such as:

> "Notwithstanding any contrary provision of applicable law, a person will be considered the child of another person if during such potential child's minority any of the following conditions apply and such potential parent has not expressly refuted his or her parental status: (i) such parent has been judicially determined to be the parent of such person in an action brought under applicable state law related to the determination of parentage; (ii) such parent has acknowledged himself or herself, in writing, to be the parent of such person; (iii) such parent has openly and notoriously recognized such person to be his or her child, determined by some or all of the following factors -- providing financial support to or for the benefit of such person, participating in such person's education, living with such person,

[80] *Pueblo v. Haas,* 2023 Mich. LEXIS 1124 (2003) (one of the dissenting justices held that extending the equitable-parent doctrine is inappropriate and ill-suited to provide plaintiff the relief she seeks and would likely result in far-reaching ramifications outside the child custody context).

> vacationing with such person and acknowledging such person as his or her child in social situations; or (iv) such parent and the mother or father of such person, at the time of such person's birth, are or were married or in a domestic partnership or civil union recognized under the law of the state of celebration."

Additional sample language is included as Exhibit 10A in the Addendum.

VII. Class Gifts/Public Policy

A. Public Policy Arguments. Given that adoption is so integral to how many parents build their families and the benefits of recognizing official familial relationships, there several public policy concerns that may arise. These concerns are heightened by the vast differences between states and how they view adoption and issues of inheritance.

1. For adult adoptions, there are concerns that strict age cut-offs can hurt foster children and step-children who were not eligible for adoption until they were no longer minors.

2. Even for minor children, in states where wills and trusts must be construed by applying the law in effect at the time the document was created, children born of assisted reproductive technology may be unfairly excluded. A better approach is proposed by Professor Kristine S. Knaplund, and followed by a warning of the possible discriminatory practices and abuses of privacy that would result if the approach was utilized:

> The best way to proceed is to find that excluding ART children violates public policy, and thus an express clause that "adoptions shall not be recognized," or the old common law presumption that adoptees are excluded, will not be applied to them. For the trustee to determine if the beneficiaries of the class are genetically related to the settlor, the trustee has two choices. They can require those whose genetic relationship to the settlor is doubtful to take a DNA test. This would include children of gay and lesbian couples, and children who are a different race, national origin, or ethnicity than their parents, [which raises issues of equal rights and discrimination.] Their other choice would be to require *all* potential beneficiaries to take a DNA test, thus raising … privacy issues. Because neither choice faced by the trustee is palatable, the choice should not be required in the first place, and children of ART should be presumed to be included in the class of descendants. [81]

3. The privacy issues raised by Professor Knaplund are not just limited to children of ART. There can be significant privacy concerns in any situation where a child has been adopted. Most personal representatives and trustees, and especially non-family member fiduciaries, do not want to have to be in the position to inquire from beneficiaries exactly how they became parents to their children. Similarly, most beneficiaries find such inquiries to be an extreme violation of their privacy.

4. There are also concerns where a same sex spouse may not have formally adopted their spouse's biological child assuming that they would constitute a legal parent by presumption. Yet while presumption of parentage rules have been expanded for same sex couples who are both women, the state statutes the authors have surveyed, continue to treat same sex couples who are men differently. A spouse is not entitled to the presumption of parentage of a biological father who is on the birth certificate as the spouse of a biological mother would be. Some of the definitions of descendants that are included in Exhibit 10A of the Addendum attempt to address this by permitting a

[81] Knaplund and Johnson, *supra* note 25.

presumption of parentage to any parent who is on a birth certificate, and the presumption could extend to a married partner who is an intended parent.

5. Finally, for class gifts, there can be public policy concerns that language excluding children who have been adopted can be overly broad and impractical to enforce.

B. Case Law. One recent case addressed some of these complexities.

1. *Todd v. Hilliard,* 633 S.W.3d 342 (Ky. Ct. App. 2021). In this case, a Settlor tried to exclude his son's adopted stepchildren from an irrevocable life insurance trust by amending the trust to prohibit his son from exercising a limited power of appointment in favor of "any person adopted by another person, the issue of any person so adopted by another person, or the ancestors of any person so adopted by another person." [82] The Court held the adoption restriction violated public policy. As an example, someone can be descended from an adopted person and not even know it. Therefore, the prohibition would be impossible to administer and illegal in that it rejected an entire class of people. Importantly, the court commented: "The law permits a person to dispose of their property as they see fit. However, when one wants to do so from beyond the grave, and with minimal and limited tax consequences, there is a small price to pay of at least a modicum of societal input."[83]

VIII. Conclusion

It is critical for estate planning professionals to help their clients understand whether and when a child who is adopted will be included in a class term such as "children," "nieces and nephews," "grandchildren," or "descendants" in any particular estate planning instrument or under the applicable intestacy statute. In most cases when a child unrelated to the parent is adopted to create a parent/child relationship, the child who is adopted should be entitled to inherit from and through an adopting parent. But the rules might depend on the age the child was when they were adopted, whether there was an actual parent-child relationship and when the governing instrument, if any, was executed. Older wills and trusts may include express language excluding all adoptees or certain adoptees such as those adopted as adults. This exclusionary language may also be implied for trusts executed decades ago. Working with clients to plan for, and anticipate ahead of time, issues relating to including children who have been adopted is an essential area of estate planning for advisors to become familiar with and to consider. [84]

[82] *Todd v. Hilliard,* 633 S.W.3d 342 (Ky. Ct. App. 2021).

[83] *Id.*

[84] Leimberg, Kamin & Goffe, Chapter 10.

IX. Addendum

PLANNING FOR ADOPTION

CHAPTER 10*

INTRODUCTION

This publication would not be complete without a discussion about the nuances of modern adoption in estate planning. The legal treatment of individuals who have been adopted has changed significantly since the mid-twentieth century, and there have been societal changes in how and when adoption is utilized.

Some of the more interesting issues relating to adoption realm include: (1) adoption of minors–including international adoptions, adoptions relating to surrogacy, and "informal adoptions" where a person is treated as a parent without having formally adopted a child, (2) step-child and foster child adoption, (3) adult adoptions, including the adoption of same-sex partners, and (4) the treatment in estate planning instruments of adopted descendants, either individually or as members of a defined class under common law, state statutes and older documents that predate current statutes requiring that children who have been adopted are to be treated as legal descendants. This chapter aims to address each of these issues.

This chapter also examines some related issues affecting adoption such as the implications of assisted reproductive technologies. Finally, the chapter provides practical tips on how to deal with many of these issues when working with trust instruments that did not anticipate these social and legal developments regarding adoption.

The language of adoption is evolving. In general, there is a move toward terms that are more inclusive and less stigmatizing. Two contrasting sets of terms are often referred to as "positive adoption language" and "honest adoption language."[1] Positive adoption language is intended to be sensitive to the feelings of the parties involved, and it includes the terms "birth mother" rather than "natural mother" or "real mother", "placing" rather than "surrendering", and use of the description "child who was adopted" rather than the label of "adopted child". "Honest adoption language" is often considered the original adoption terminology, where adoption was rarely a freely chosen option by all involved adults, rather a byproduct of powerlessness and a lack of resources for a birth mother. Without denying the realities of the anguish and loss inherent in the adoption experience, the authors have chosen, where appropriate, to employ positive adoption terminology.[2] It is

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*** This is an excerpt from Chapter 10 - Planning for Adoption in Stephan R. Leimberg, Kim Kamin and Wendy S. Goffe, *The Tools & Techniques of Estate Planning for Modern Families* (4th Ed. 2024) (with special thanks to Professor Kristine S. Knaplund for her contributions to the prior edition of the chapter).**

recommended that estate planning professionals also do their best to be sensitive to the language used with clients in describing adoption since those families who prefer to utilize positive adoption language may be offended by an estate planning professional who fails to do so.

HISTORICAL BACKGROUND

Before the nineteenth century, when it came to issues of inheritance and trusts, heirs and beneficiaries were ordinarily related by blood to the settlor of a trust. American states enacted legislation recognizing adoption only in the mid-1850s,[3] and in England adoption was not legally recognized until 1926.[4] In the United States, succession laws are based on the premise that inheritance rights are based on blood relationships and that any deviation from this principle required express authorization either by legislation or by a private dispositive instrument.[5] Academics studying this issue similarly observed and concluded that references to a relation by "blood" must, by definition, exclude anyone related by adoption.[6] Fearful of land being transmitted out of the family in a society ruled by primogeniture, a surviving spouse was entitled only to a life estate in real property of dower or curtesy.[7]

Historically these assumptions – that children and grandchildren were blood relatives, and those adopted were not – were largely true. A woman who gave birth was always the genetic mother before the advent of *in vitro* fertilization, and so determining maternity was simple. As Justice Kennedy once observed: "In the case of the mother the [parent-child] relation is verifiable from the birth itself."[8] Determining paternity was more difficult, but in the case of a married woman, the chance the husband was the father was very high. A recent metasurvey of sixty-seven previous studies of nonpaternity concluded that the nonpaternity rate was only 3.3 percent,[9] meaning that ninety-seven out of one hundred children were fathered by their mother's husband, and only three were not. A smaller study in one city found a nonpaternity rate of 3.7 percent.[10] Thus, historically a trust for one's "children," "grandchildren," or "descendants"[11] would include only one's blood relatives in the vast majority of cases.

ADVENT OF STATUTORY ADOPTION

Once adoptions were authorized by statute, courts interpreting the meaning of "children," "issue," and "descendants" in a will or trust assumed that adoptees were excluded from these terms because, by definition, they were not blood relatives.[12] Some trusts included express language to the effect that "adoptions shall not be recognized" but in most cases, the trusts or wills were silent on the matter, and courts were bound to discern the intent where the issue may not have been considered. If the creator of the trust had not specified whether adoptees should be included in class gifts, courts struggled with two questions: (1) what was the settlor's intent, and (2) which presumption on adoption should apply: the current presumption, or the one in effect when the settlor created the trust? In determining the settlor's intent, courts varied on whether they would look at evidence extrinsic to the trust itself, and the extent to which they would rely on statutory definitions of terms used in the trust such as "issue" or "descendants."

Early Cases

Early cases generally found that a settlor did not intend to include adoptees when using class terms such as "children," "issue," "heirs" and the like.[13] These early courts also struggled with the legal effects of adopting a child, beyond inheritance. States that imposed an inheritance tax typically exempted a child's share or taxed it at a lower rate. In Pennsylvania in 1859, for example, children and other lineal descendants were exempt from the inheritance tax, but a child who is adopted was still subject to the tax, with the logic that "giving an adopted son a right to inherit, does not make him a son in fact."[14] A statute that provided a share for a child *born* after the execution of the testator's last will did not apply to a child *adopted* after the will.[15] A state's anti-lapse statute, applicable in cases in which a child failed to survive a testator, did not apply to an adoptee, again because adoption did not make them a "child in fact."[16]

A second question courts faced in determining the meaning of the words used in the will or trust was whether the court should apply current law, or the law at the time the document became effective? Absent express language in the statute otherwise, courts routinely chose the latter, and continue to do so today.[17] In some cases, this decision to use the earlier law meant the court must construe a trust written decades ago.[18] An early exception was Alabama where in construing the intent of a testator who died in 1909, the court applied the more modern presumption that in the absence of a contrary intent, the adopted child is included in class terms such as "child" or "children."[19]

In ascertaining the settlor's intent whether to include adoptees in class terms, a court might look at the laws of intestacy at the time the trust came into effect, either on the theory that the settlor was bound to know the existing law,[20] or because the settlor expressly directed the court to look at that law.[21] But it turns out the impact of adoption on intestacy law was extraordinarily complex. As adoption is purely a creature of statute, the precise effects of an adoption varied widely from state to state depending on the exact language of that state's statutes. One author opined that "[t]here is probably more activity in the case and statutory law and in the writing upon the subject to inheritance by reason of adoption than in any other aspect of the law of intestacy."[22] A treatise in the early 1900's observed: "[B]y the act of adoption, the child becomes, in a legal sense, the child of the adoptive parent. The general effect of the adoption, therefore is, with few exceptions, to place the parties in the legal relation of parent and child, with all the legal consequences."[23]

The right of inheritance, however, was much more complicated. The statute might provide that the child who was adopted inherits from the adoptive parent, or the child who was adopted might have no inheritance rights.[24] Even if the child was an heir of the adoptive parent, in most states in the early 1900's, the child still could not inherit from the adoptive parent's ancestors, descendants or collateral relatives.[25] This is referred to as the "stranger to the adoption" rule.[26]

The Modern Era

In case law during the modern era, public policy has evolved to treat children who were adopted in the same manner as biologically related children, thus permitting terms such as

"issue" or "bodily issue" to be construed to mean a person who has been adopted persons (sometimes limited to adoption prior to a certain age), and in many states including adult adoptees, unless the will or trust expressly excluded them.[27] While the Restatement (First) of Property defined issue and descendants as related by blood,[28] the Restatement (Second) of Property followed its expanded meaning of "children" to include those adopted to apply as well to "issue" and "descendants."[29] Both the pre-1990 Uniform Probate Code Section 2-611,[30] and Sections 2-705 and 2-114 of the 1990 Uniform Probate Code include adopted persons in class terms.[31] Some trusts would expressly direct the court to apply intestacy law.[32]

The Restatement (First)'s presumption found in the Restatement (First) of Property that adoptees were excluded from various class terms aligned with another assumption that courts occasionally articulated, even as late as the mid-twentieth century: a settlor would not want to create a virtual power of appointment in their beneficiaries by giving them the option to adopt strangers into the class.[33]

This fear of creating a virtual power in a beneficiary is not unfounded. Numerous cases illustrate how willing beneficiaries are to adopt someone for the sole reason of allowing them to benefit from a trust, and some courts' willingness to go along with this choice.[34]

Some states have statutes that preclude the creation of a new beneficiary through an adult adoption. When the adopting parent is *not* the creator of the trust, will or other instrument, the adoptee is included only if during their minority they had lived as a regular member of the household of the adopting parent or of that parent's parent, brother, sister, or surviving spouse.[35] This is a variation on the "stranger to the adoption" rule, which established a parent-child relationship only between the adopting parent and the adoptee, but did not extend that relationship to other relatives.[36] As one court observed, "There is no such person as a grandchild by adoption."[37] The first adoption statutes rarely provided for inheritance between anyone other than the adopter and the adoptee. It was not until the 1950s that about twenty states had enacted such statutes.[38]

* * *

Exhibit 10A
Drafting Tips with Sample Language Relating to Adoption

1. Broad Inclusion of Adoption. An individual who has been adopted, and the descendants of such individual, shall be regarded as descendants of any adopting parent and of any ancestor of such adopting parent and shall be so regarded for all purposes herein.

2. Limiting Adoption by Parent-Child Relationship. An individual who has been adopted by, and had a parent-child relationship with, any adopting parent, and the descendants of such individual, shall be regarded as descendants of any adopting parent and of any ancestor of such adopting parent and shall be so regarded for all purposes herein.

3. Limiting Adoption by Age. Legal adoption before an individual who is adopted has reached the age of 25 years, but not thereafter, shall be equivalent to blood relationship.

4. Limiting Adoption With Reference to Initiation. Legal adoption that has been initiated by the time an individual who is adopted has reached the age of 25 years, but not thereafter, shall be equivalent to blood relationship.

5. Fiduciary Can Rely on Birth Certificate. A trustee may rely on a properly authenticated birth certificate as proof of parentage without any duty to seek further inquiry or evidence.

6. Birth Certificate Presumptions (Rebutted by Court). A parent identified on an individual's properly authenticated birth certificate shall be the presumed parent of the individual without further inquiry. Such presumption shall be rebutted–only if a court of valid jurisdiction determines that an identified parent has satisfied the burden of proof for a denial of parentage.

7. Birth Certificate Presumptions (Rebutted by Parent). A parent identified on an individual's most recent official birth certificate shall be presumed to be a parent of the individual without further inquiry. Such presumption can be rebutted only by the identified parent through whom that individual may have an interest in this trust.

8. Rules Regarding Ancestors and Descendants. A person who is treated as a child of an individual for purposes of this instrument and each descendant of that child also shall be treated as a descendant of all ancestors of such parent. Similarly, a person who is not treated as a child of an individual for purposes of this instrument shall not be treated as the descendant of that individual's ancestors, and the descendants of a person who is not treated as a child of an individual for purposes of this instrument shall not be treated as descendants of that individual or that individual's ancestors.

9. Rules Regarding Termination of Parental Rights. Despite any other provision of this instrument, a child whose parent consented to the termination of their rights as a parent shall not be considered such parent's child, unless and until such rights are reinstated.

ENDNOTES

[1] Merrill Perlman, *The Correct Language to Adopt*, Columbia Journalism Review (July 2019), https://www.cjr.org/language_corner/adoption-language.php; *See also* Theodora Blanchfield, *Honest Adoption Language vs. Positive Adoption Language,* Very Well Mind (Jan. 05, 2023), https://www.verywellmind.com/honest-adoption-language-vs-positive-adoption-language-7090633#; and https://info.adoptmatch.com/words-matter-adoption-terminology#.

[2] A table of positive adoption terminology can be found at: https://www.holtinternational.org/adoption/language.shtml.

3 Jan Ellen Rein, *Relatives by Blood, Adoption, and Association: Who Should Get What and Why (The Impact of Adoptions, Adult Adoptions, and Equitable Adoptions on Intestate Succession and Class Gifts)*, 37 Vand. L.Rev. 711, 716 (1984). Scholars have persuasively argued that these statutes did not create the institution of adoption, but rather formalized already existing relationships. *See, e.g.,* Naomi Cahn, *Perfect Substitutes or the Real Thing?* 52 Duke L.K. 1077, 1104 (2003); Barbara Bennett Woodhouse, *Waiting for Loving: The Child's Fundamental Right to Adoption*, 34, Cap. U.L.Rev. 297, 316 (Winter 2005).

4 William M. McGovern, Sheldon F. Kurtz and David M. English, *Wills, Trusts and Estates Including Taxation and Future Interests*, 4th ed. p. 107 (West 2010).

5 Jan Ellen Rein, *Relatives by Blood, Adoption, and Association: Who Should Get What and Why (The Impact of Adoptions, Adult Adoptions, and Equitable Adoptions on Intestate Succession and Class Gifts)*, 37 Vand. L.Rev. 711, 713 (1984) (citation omitted). For similar reasons, unadopted stepchildren do not inherit in intestacy in most states. William M. McGovern, Sheldon F. Kurtz and David M. English, *Wills, Trusts and Estates Including Taxation and Future Interests*, 4th ed. P. 115 (West 2010), citing Unif. Prob. Code §1-201(5), and Restatement (Third) of Property (Wills and Other Donative Transfers) §2.5, cmt. J (1999).

6 J. Wesley Oler, *Construction of Private Instruments Where Adopted Children Are Concerned: Part II*, 43 Mich. L.Rev. 901, 903 (1945) ("Express reference to relations by 'blood' naturally points to exclusion of one related by adoption only.") (Citations omitted). The exception at common law was for a spouse, and then only for personal property.

7 William M. McGovern, Sheldon F. Kurtz and David M. English, *Wills, Trusts and Estates Including Taxation and Future Interests*, 4th ed. pp. 49-50 (West 2010).

8 *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 62; 121 S. Ct. 2053, 2060 (2001).

9 Kermyt G. Anderson, *How Well Does Paternity Confidence Match Actual Paternity: Evidence From Worldwide Paternity Rates*, 47 Current Anthropology 513, 516 (June 2006).

10 Kermyt G. Anderson, Hillard Kaplan & Jane B. Lancaster, *Confidence of Paternity, Divorce and Investment in Children By Albuquerque Men*, 28 Evolution and Human Behavior 1 (2005).

[11] "Children" and "grandchildren" are single-generational terms, while "descendants" is a multi-generational term. *See, e.g.,* Cal. Probate Code §6205 (2002): "'Descendants' mean children, grandchildren, and their lineal descendants of all generations…"

[12] Only two states, California and Hawaii, had historically recognized a presumption that a child who was adopted as the child of the adopting parent. *See* Cal.Civ. §228 (1872)(Vol 1.)(repealed); *see generally In re Stanford's Estate*, 49 Cal.2d 120 (1957) (discussing the historical recognition of a child who was adopted by the state of California); *O'Brien v. Walker*, 35 Haw. 104 (1939)(outlining historical Hawaiian customs for adoption when analyzing whether a child who was adopted was properly identified as a descendant).

13 "Issue" and "heirs" are multi-generational terms. "Issue" is synonymous with "descendants" and thus encompasses children, grandchildren, and so on. "Heirs" means "heirs in intestacy," and indicates the persons designated to receive a decedent's property when there is no valid will. *See Schafer v. Eneu*, 54 Pa. 304, 306 (1867); and *In re Woodcock*, 103 Me. 214, 216; 68 A. 821, 821 (1907).

14 *Commonwealth v. Nancrede*, 32 Pa. 389, 390 (1859). *Accord, In re* Miller, 110 N.Y. 216; 18 N.E. 139 (1888); *Kerr v. Goldsborough*, 150 F. 289 (4th Cir. 1906); *Williams v. Ward*, 15 Cal. App. 3d 381, 387; 93 Cal. Rptr. 107, 111 (1971) (noting in dicta that if the adoptees were to inherit in intestacy, the law "will regard them as strangers for inheritance tax purposes."). *C.f.*, *Connor v. O'Hara*, 188 Md. 527; 53 A.2d 33 (1946) (interpreting Maryland adoption statute giving adopted child "the same rights of inheritance and distribution as to the [adopting parent's] estate" as exempting the child from inheritance child, distinguishing *Nancrede)*. A North Carolina statute similar to the Maryland law was held to apply to the state's anti-lapse statute. *Headen v. Jackson*, 255 N.C. 157; 120 S.E. 2d 598 (1961).

15 *Goldstein v. Hammell*, 236 Pa. 305, 306; 84 A. 772, 772 (1912). In *Russell v. Russell*, the Supreme Court of Alabama held that an 1870 will giving two-thirds of the estate to Russell's "children" did not include a child the testator adopted in 1885: "Though by adoption he is treated 'as a child,' he is not the child of the testator, and, it is manifest, he was not in contemplation when the testator made his will." 84 Ala. 48, 52; 3 So. 900, 901 (1887). Almost 100 years later, the court disavowed *Russell*, stating that "the language of the opinion [in *Russell*] contravenes that of the statute." *Sellers v. Blackwell*, 378 So. 2d 1106, 1108 (1979).

16 *Phillips's Estate*, 17 Pa. Super. 103 (1901).

17 *See, e.g., Lutz v. Fortune,* 758 N.E.2d 77, 81 (Ind. 2001) ("a will must be construed with regard to the law and statutes in effect at the time of the testator's death."); *O'Brien v. Walker,* 35 Haw. 104, 112 (1939) ("no statute can operate retroactively upon the intention of a trustor already effectual..."); *Scribner v. Berry,* 489 A.2d 8, 8 (Me. 1985) ("The rule of construction during the testator's lifetime was that a testator's reference to 'descendants' or 'issue' of testator's children did not include an adopted child of the testator's son."); *Williams v. Ward*, 15 Cal. App.3d 381, 384; 93 Cal. Rptr. 107, 109 (1971) (in determining whether testator who died in 1930 intended to include adult adoptees as his daughter's "children," the court noted that California law did not allow adult adoption until twenty-one years after his death); 3-30 Powell on Real Property §30.06[4] ("the earlier rule presuming noninclusion of adopted children unless contrary intent may still be applied in current cases because the will or inter vivos transfer was effective at the time the earlier will controlled."); 4-10 Murphy's Will Clauses: Annotations and Forms with Tax Effects §10.03 *Children and Other Descendants as Beneficiaries*, [ii] Application of Present or Prior Law, p. 30.

18 *See Matter of Duke*, 305 N.J. Super. 408, 415; 702 A.2d 1008, 1011 (1995); and *In re Ellison Grandchildren Trust*, 261 S.W.3d 111 (2008); *petition for review denied*, 2008 Tex. 1015 (Tex., Nov. 14, 2008). For a critique of the majority's reasoning in *Ellison*, *see* Gerry Beyer, *Family Law: Wills and Trusts,* 62 SMU .L.Rev. 1499, 1519-1520 (Summer 2009).

19 *Sellers v. Blackwell*, 378 So. 2d 1106, 1108 (Ala. 1979).

20 *See, e.g., In re Ellison Grandchildren Trust*, 261 S.W.3d 111, 121 (2008) ("we presume that [the settlor] Ellison Sr., by using the word 'descendants,' knew what the law in 1982 considered 'descendants' to encompass."); *Wells Fargo Bank v. Huse*, 57 Cal. App. 3d 927, 935; 129 Cal. Rptr. 522, 527 (1976) ("It is, of course, axiomatic that the testator is bound to know the existing statutes affecting testamentary dispositions..., and also that technical terms used in a will or similar document are deemed to have been used and accepted by the testator in accordance with its legal definition.") (citations omitted); *Mooney v. Tolles*, 111 Conn. 1, 11; 149 A. 515, 518 (1930); J. Wesley Oler, *Construction of Private Instruments Where Adopted Children Are Concerned: Part II*, 43 Mich. L.Rev. 901, 918 (1945) ("it is presumed that the instrument was executed in the light of knowledge of the then existing adoption law.") (citations omitted). One court went even further to construe a will as including adult adoptees despite the fact that the will was executed sixteen years before such adoptions were legal in the state. *In re Estate of Fortney,* 5 Kan. App. 2d 14; 611 P. 2d 599 (Kan. 1980) (1922 will created life estates for Elizabeth and John Fortney, and provided that if "both die *without heirs by birth, or by adoption,"* the property would go to specified persons; after Kansas allowed adult adoptions in 1939, John at age 90 adopted his wife's nephew, age 65, in 1975; court held that the testator was bound to know that the statute was subject to change by the legislature).

21 *See Commercial Trust Co. v. Adelung*, 40 A.2d 214, 216 (N.J. 1944).

22 Thomas E. Atkinson, *Handbook of the Law of Wills and Other Principles of Succession Including Intestacy and Administration of Decedents' Estates* 86 (1953 2nd ed.).

23 Walter C. Tiffany and Roger W. Cooley, *Handbook on the Law of Persons and Domestic Relations* 244 (2d ed. 1909).

24 *Id.* at 244-245.

25 *Id.* at 244 (citations omitted); *accord*, 316-317 (3d ed. 1921).

26 *See, e.g., In re Haight,* 63 Misc. 624, 625 (1909) ("As between foster parent and adopted child the statute gives the right of inheritance....But this right has never been extended, by statute or judicial interpretation, to the child to inherit from the collateral kin of the foster parent..."); *Ahlemeyer v. Miller*, 131 A. 54, 56 (N.J. 1925) ("where the grantor or testator is the adopting parent it is reasonable to presume that the adopted child was within the intended bounty of such grantor or testator. But where he is a stranger to the adoption such presumption does not prevail."); *In re Estate of Edwards*, 273 N.W.2d 118, 120 (S.D. 1978) (finding that an adopted child does not inherit from anyone but the adoptive parents themselves "is in line with the great weight of authority from other jurisdictions.") But *c.f. In re Estate of Coe*, 42 N.J. 485, 490-92; 201 A.2d 571, 574-75 (1964) (holding that an 1897 will with a bequest to a person's "lawful children" included adoptees on the grounds that "We cannot believe it probable that strangers to the adoption would differentiate between the natural child and the adopted child of another."; *Ahlemeyer* distinguished because it was a deed, not a will). For a discussion of the history of the "stranger-to-the-adoption" rule, *see* Naomi Cahn, *Perfect Substitutes or the Real Thing?* 52 Duke L.J. 1077, 1128-30 (April 2003).

27 *Hagaman v. Morgan*, 886 S.W.2d 398, 401-02 (Tex. 1994).

28 Restatement (First) of Property §287.

29 Restatement (Second) of Property (Donative Transfers) §25.4-25.9. If the adopted person's parent was not the donor, then the Restatement required that the parent either raise the child or contemplate that the child will be raised by them. *Id* at 25-4(2). In addition to adoptees, the Restatement 2nd also included nonmarital children and ART children in these terms. *Id.* 3-30 Powell on Real Property §30.08.

30 *See, e.g.* Fla. Stat. Ann. §732.608 (2010); Mo. Rev. Stat. §474.435 (1981).

31 *See, e.g.,* Alaska Stat. §13.12.705(a) (1996); Colo. Rev. Stat. §15-11-705(6) (1994); Haw. Rev. Stat. §560:2-705(1996). If the transferor is not the adopting parent, the statutes also place additional requirements in order for the adoptee to be included, such as living while a minor in the adopter's household.

32 *See Commercial Trust Co. v. Adelung*, 40 A.2d 214, 216 (N.J. 1944).

33 Edward C. Halbach, Jr., *The Rights of Adopted Children under Class Gifts*, 50 Iowa L.Rev. 971, 978 (Summer 1965) ("to allow inheritance in such a case would be to allow one person to create an heir for another by adoption."). *See* Peter T. Wendel, *The Succession Rights of Adopted Adults: Trying To Fit A Square Peg Into A Round Hole*, 43 Creighton L.Rev. 815 (April 2010); 3-30 Powell on Real Property §30.06[4].

34 *See Levien v. Johnson*, 2014 N.Y. Misc. LEXIS 1802 (Surr. Ct. N.Y. 2014); *Evans v. McCoy*, 291 Md. 562 (1981); and *Otto v. Gore*, 45 A.3d 120 (Del. 2012).

35 *See, e.g.,* Cal. Prob. Code §21115(b) (1994); Mont. Code Ann. §72-2-715(3) (1993). *See also*, Restatement (Second) of Property (Donative Transfers) §25.4-25.9.

36 For a discussion of the history of the "stranger-to-the-adoption" rule, *see* Naomi Cahn, *Perfect Substitutes or the Real Thing?* 52 Duke L.J. 1077, 1128-30 (April 2003).

37 *Trustees, Executors & Agency Co., Ltd. v. Rowley,* [1939] N.Z.L.R. (S.C.) 146 at 150, *cited in* J. Wesley Oler, *Construction of Private Instruments Where Adopted Children Are Concerned: Part I*, 43 Mich. L.Rev. 705, 726 (1945).

38 Edward C. Halbach, Jr., *The Rights of Adopted Children under Class Gifts*, 50 Iowa L.Rev. 971, 974 (Summer 1965) (citing 22 Iowa L.Rev. 145, 147 (1936) and 25 Brook. L.Rev. 231, 248 (1936).