Vanderbilt Law Review

Volume 37
Issue 4 *Issue 4 - Symposium: The Winds of Change in Wills, Trusts, and Estate Planning Law*

Article 3

5-1984

Relatives by Blood, Adoption, and Association: Who Should Get What and Why

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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)

*Jan Ellen Rein**

I. INTRODUCTION

Within the past fifty years formal adoption has evolved from a relative rarity to become a truly popular means of ushering newcomers into a family. An estimated 150,000 children are adopted annually.[1] A recent United States Senate committee report indicates that adoptees constitute approximately five percent of our citizenry and that the relationships created affect up to a third of

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The author wishes to acknowledge the research assistance of John C. Wilson, Gonzaga University School of Law, Class of 1983, and Benjamin R. Simpson, Gonzaga University School of Law, Class of 1984. Special thanks go to Josefa E. O'Malley, Gonzaga University School of Law, Class of 1984, and Charles E. Maduell, Gonzaga University School of Law, Class of 1985, for their research assistance and unstinting work on the technical aspects of this manuscript.

Throughout this Article male pronouns will be used whereever the use of phrases like "his or her" would be textually awkward.

An abbreviated version of this Article will appear in W. MCGOVERN & J. REIN, HANDBOOK ON THE LAW OF WILLS, TRUSTS, AND FUTURE INTERESTS, to be published by West Publishing Co.

1. *Adoption in America, 1981: Hearing Before the Subcomm. on Aging, Family and Human Services of the Senate Comm. on Labor and Human Resources*, 97th Cong., 1st Sess. 6 (1981) (statement of Sen. Jepson) [hereinafter cited as *Adoption in America*]. Although the Children's Bureau stopped keeping adoption statistics after 1975, statistics based on incomplete reports from only 42 of the 50 states listed approximately 104,000 adoptions for 1975. U.S. DEP'T OF HEALTH, EDUC., AND WELFARE, ADOPTIONS IN 1975, 1, 7 PUB. No. (SRS) 77-03259 (1977) [hereinafter cited as ADOPTIONS IN 1975]. Between 1965 and 1971 over one million children were adopted. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1976, at 321 (97th ed. 1976).

the United States population.[2]

While adoption today is a commonplace and socially acceptable means of begetting children, our succession laws have not kept up with this modern day fact of life. Adoption, like biological begetting, creates a network of family relationships that extends far beyond the nuclear family. In order to give the relationships that adoption creates full recognition in accordance with the attitudes of today's society, we must reform our succession laws to accommodate this newly popular institution. Although the courts and legislatures have made some progress in this direction, even the most progressive states have not fully addressed the multifarious ramifications of adoptive relationships on succession. The less progressive states still treat the adoptee in matters of succession like a second class family member within his adoptive family and, conversely, give him largely unusable and unwarranted rights of succession within his biological family. Even the most well-meaning legislative attempts to integrate adoptive relationships into our succession laws have been piecemeal and disorganized. Judicial efforts have been understandably hampered by the restraints of separation of powers.

This Article explores the questions that courts and legislatures must address in order to integrate the social phenomenon of adoption into our succession laws, monitors the progress that has and has not been made in dealing with these questions, and proposes a comprehensive approach to the treatment of adoptees in matters of succession. Specifically, part II introduces the traditional approach to relationship by adoption, while part III compares the past and present goals of adoption. Part IV discusses the legal status of adoptees in the context of intestate succession. This discussion explores past and present trends and examines the special policy considerations that apply to in-family adoptions. Part V discusses the treatment of adopted-in and adopted-out children under class gifts and also addresses the retroactivity issue which has sharply divided our courts. Part VI deals with adult adoptions and the special problems they pose in succession cases, both testate and intestate. Part VII explores the uncharted terrain of equitable (informal) adoption. It explains the theoretical bases for equitable adoption, discusses the consequences of equitable adoption, and suggests more realistic criteria for judging equitable adoption claims. Part VII concludes by discussing the special policy consid-

2. *Adoption in America*, *supra* note 1, at 114, 119.

erations that should guide the courts in deciding how far to extend the equitable adoption doctrine.

II. Relationship by Adoption: The Nature of the Problem

The popularity of adoption today necessitates the full integration of this new institution and the relationships it creates into our succession laws. Progress in this direction has been slow because of the common-law reverence for blood as the basis of succession. Following the maxim "*Solus Deus facit haerdem, non homo*" (God alone makes the heir, not man),[3] our succession law started with the assumption that inheritance rights are based on consanguinity and that any deviation from this principle requires express authorization either by legislation or by a private dispositive instrument.[4] This assumption underlies society's traditional reluctance to cut off an adoptee's inheritance rights from biological relatives or to recoguize inheritance rights of an adoptee vis-a'-vis the kin of his adoptors absent a compelling statutory mandate.[5] The results produced by this traditional attitude work at cross-purposes with the modern goal of adoption—to promote the adoptee's welfare by giving him a "fresh start" as a full-fledged member of his adoptive family.[6]

The traditional preoccupation with blood ties is now on the wane. Nevertheless, progress toward accommodating our succession laws to the phenomenon of relationship by adoption remains halting. Adoption statutes have tended to focus on the qualifications for adoption and the procedures for perfecting it. Until re-

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3. *See* Note, *Adopted Children: Inheritance Through Intestate Succession, Wills and Similar Instruments*, 42 B.U.L. Rev 210, 210 (1962) (quoting Co. Litt. 191a § 6, n.3.).

4. *See* Binavince, *Adoption and the Law of Descent and Distribution: A Comparative Study and a Proposal for Model Legislation*, 51 Cornell L.Q. 152, 154-58 (1966); Comment, *The Adopted Child's Inheritance from Intestate Natural Parents*, 55 Iowa L. Rev. 739, 739-41 (1970). The court in Dodson v. Ward, 31 N.M. 54, 60, 240 P. 991, 993 (1925), emphatically expressed this view.

5. For some illustrative cases, see Hawkins v. Hawkins, 218 Ark. 423, 236 S.W.2d 733 (1951); Estate of Kruse, 120 Cal. App. 2d 254, 260 P.2d 969 (1953); *In re* Tilliski's Estate, 390 Ill. 273, 61 N.E. 2d 24 (1945); Estate of Ballentine, 81 N.W.2d 259 (N.D. 1957). The terms "hiological" and "natural" will be used interchangeably in this Article to denote blood relatives.

6. The Washington Supreme Court clearly enunciated this view of the goal of modern adoption in *In re* Estates of Donnelly, 81 Wash. 2d 430, 436-38, 502 P.2d 1163, 1166-68 (1972); *see also* Children's Bureau, U.S. Dep't of Health, Educ., and Welfare, Legislative Guides for the Termination of Parental Rights and Responsibilities and the Adoption of Children 28-29 (1961) [hereinafter cited as Termination of Parental Rights]; Comment, *Intestate Succession, Sociology, and the Adopted Child*, 11 Vill. L. Rev. 392, 400 (1966); authorities cited *infra* notes 33-36.

cently state legislatures did not concern themselves with the impact this new institution might have on our laws of either testate or intestate succession. Even recent attempts to deal with the ramifications of adoption on succession have been piecemeal, the statutes often providing no guidance for situations that arise. The resulting picture is one of uneven progress and great diversity among the states.[7]

Considering the impact of adoption on succession, two major areas of inquiry exist. First, what rules should determine *intestate* succession by, from, and through an adopted person? Second, what rules of construction should determine whether class designations like "children," "issue," or "heirs" used in private dispostive instuments include persons who allege membership in the class by virtue of adoption? Related questions that cut across both areas of inquiry concern whether a person adopted as an adult should receive the same treatment as one adopted as a child, and what status a court should accord the "equitably adopted" child who is not adopted with statutory formalities, but may nevertheless be able to maintain a claim in equity to part of his putative adoptor's estate.

III. The Goals of Adoption: Past and Present

No judgment ought be made about how our succession laws should treat adoptees without a historical perspective on the purposes of adoption, past and present.[8] In early Rome and in other ancient cultures, adoption served a primarily religious function associated with ensuring a legitimate male heir to carry out sacred obligations.[9] Even after the religious overtones vanished, civil law countries viewed adoption principally as a vehicle for perpetuating the adoptor's name and property rather than as a means of benefiting the adoptee. The English common law did not recognize adoption at all; England finally legalized it by statute in 1926.[10]

Although Americans have always farmed out children in some fashion, adoption as known today did not fully emerge until the

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7. For a detailed discussion of this development in the various states with extensive references to statutes and case authority as well as commentary on the subject, see 7 R. Powell, The Law of Real Property §§ 1004-1007 (R. Rohan rev. ed. 1982).

8. For a brief introduction to the history of adoption, see Binavince, *supra* note 4, at 154-58; Kuhlman, *Intestate Succession By and from the Adopted Child*, 28 Wash. U.L.Q. 221, 222-24 (1943). For more extensive historical treatments, see Huard, *The Law of Adoption: Ancient and Modern*, 9 Vand. L. Rev. 743 (1956); Presser, *The Historical Background of the American Law of Adoption*, 11 J. Fam. L. 443 (1971).

9. Presser, *supra* note 8, at 445-48.

10. Adoption of Children Act, 1926, 16 & 17 Geo. 5, ch. 29.

mid-nineteenth century when general adoption legislation was introduced on a wave of social welfare reform.[11] Before then child placement in this country was an informal affair, involving almost no governmental regulation. An English practice called "putting-out" came with the Puritans to the American colonies. The practice, followed by rich and poor alike, was to send one's offspring to another family for more objective discipline and training than a fond parent could provide.[12] In short, society viewed the "putting-out" period as a phase of the child's education and preparation for a useful role in society.[13]

Although the colonial system initially served purposes other than the placement of orphans, it was conveniently available to fill the breech in those cases as well. Upon the death of one or both parents, a child was simply "put-out" for a suitable blood relative, usually designated in the decedent's will, to raise. Orphaned or abandoned children without family connection were less fortunate. Waifs too young for apprenticeship went to public almshouses where they were sustained and given a rudimentary education until they were useful enough to be either "bound-out" (indentured or apprenticed) or sent to uninvestigated homes.[14] Although some attention went to the child's well-being, this placement served mainly to relieve the public of a ward while providing economic benefit to the master or mistress who received the child. Some orphans may have been lucky enough to get a real family situation out of this arrangement. The public almshouses, however, made little organized effort to place children in an amiable environment or to protect them from exploitation.[15] In a parallel development, wealthy eighteenth century patriarchs began incorporating orphans and the children of less fortunate relatives into their households.[16] Families wishing to formalize the arrangement obtained private legislation, the effect of which varied, depending on the jurisdiction, from merely changing the child's surname to conferring lim-

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11. *See, e.g.*, 1855 Me. Acts ch. 189; 1851 Mass. Acts ch. 324.

12. *See* Presser, *supra* note 8, at 456-58; 1 A. CALHOUN, A SOCIAL HISTORY OF THE AMERICAN FAMILY 172, 203 (1917).

13. Recall that the public school system we take for granted was then nonexistent.

14. *See* 1 A. CALHOUN, *supra* note 12, at 124-27; H. WITMER, E. HERZOG, E. WEINSTEIN & M. SULLIVAN, INDEPENDENT ADOPTIONS 33-34 (1963).

15. Although laws eventually were passed that sought to protect apprentices and indentured servants from exploitation, no evidence suggests that these statutes were invoked regularly. *See* 1 A. CALHOUN, *supra* note 12, at 307-10.

16. *See* 1 A. CALHOUN, *supra* note 12, at 232; 2 A. CALHOUN, *supra* note 12, at 23, 144; Presser, *supra* note 8, at 459-61.

ited heirship rights in the event of the adoptor's intestacy.[17]

By the nineteenth century changing economic and social conditions combined to make these once reasonably workable child placement systems completely unworkable.[18] The industrial revolution brought as its byproduct the blight of widespread urban poverty. This development, combined with the tidal wave of immigrants that hit American shores, caused already inadequate almshouses and orphanages to overflow with destitute, dependent children. The traditional child placement and welfare practices were simply unable to cope with this growing tide of unfortunate children. While some agencies tried to ensure that apprenticiable youths were "bound-out" to suitable masters, the sheer numbers requiring placement probably made careful scrutiny impossible in most cases.[19] The cutthroat economic atmosphere of the times made it tempting for masters and mistresses to use their charges as unpaid labor and to dispense with the child rearing side of the arrangement. Thus, children who failed to die of disease or neglect in overcrowded orphanages were left increasingly defenseless against economic exploitation in an American version of *Oliver Twist.*

Around this time a revival of Christian philanthropy swept the nation. The plight of America's homeless children naturally invited the attention of Christian reformers who, through religiously affiliated private agencies, began to shift the focus of their efforts toward the placement of infants and young children in homes where they would be treated more like family members than servants.[20] The advent of public education facilitated these early placement efforts by sparing recipient families the cost of educating the placed child. The prototype of adoption as we know it today emerged from this kind of placement. As the families that took in these young adoptees sought to formalize the arrangement through private statutes, the state legislatures felt increasingly pressured to enact general adoption legislation.[21]

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17. *See* Presser, *supra* note 8, 461-64.

18. For a detailed chronicle of this development, see Presser, *supra* note 8, at 470-89.

19. "[T]here is little evidence of any adequate inquiry into the circumstances of the persons receiving children, or of any system of subsequent oversight. The children, after leaving the doors of the institution, were in too large measure lost sight of." H. FOLKS, THE CARE OF DESTITUTE, NEGLECTED, AND DELINQUENT CHILDREN 64-65 (1902).

20. *See* Presser, *supra* note 8, at 482-88.

21. *Id.* at 477. Although legislatures enacted general statutes designed to facilitate adoptions and make a public record thereof before this time, the Massachusetts legislature passed the first comprehensive adoption act providing for the welfare of adopted children in 1851. 1851 Mass. Acts ch. 324. Examples of the earlier statutes generally requiring merely

The official legislative histories of these first adoption laws give no clue as to the motives of the legislators who drafted them. But one may surmise that these statutes were a response to the prevailing socioeconomic conditions, and that the statutes reflected a glacial shift in public attitudes from the notions of apprenticeship and service to the notion that child placement should primarily serve the welfare of the dependent child.[22]

Modern adoption statutes are replete with statements that make it clear that the primary focus of today's adoption laws is the well-being of the adopted child.[23] The requirement of many modern adoption statutes that prospective adoptors pass a rigorous screening process before the adoption is finalized illustrates this concern.[24] In the case of the out-of-wedlock infant given to strangers for adoption, society generally deems it in the adoptee's best interests to make him a full-fledged member of his adoptive family. This assimilation can occur only if the adopting family treats the adoptee in all respects, including matters of succession, as though he had been born into his adoptive family. Furthermore, it is apparent that an adoptee's retention of ties with his biological family can undermine the psychological aspect of this assimilation. Thus, the Washington Supreme Court has described the broad objective of Washington's "overlapping adoption and inheritance statutes"[25] as "giving the adopted child a 'fresh start' by treating him as the natural child of the adoptive parent, and severing all ties with the past."[26] Similarly, the North Carolina Supreme Court in a 1981 decision discerned a "legislative intent that the legal effect of a final order of adoption . . . be substitution of the adoptive in place of the natural family and severance of legal ties with the child's natural family . . . ."[27]

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the filing of a deed of adoption appear in 1846 Miss. Laws ch. 60; 1850 Tex. Gen. Laws p. 36, ch. 39.

22. Presser, *supra* note 8, at 470-71, 515-16.

23. *See, e.g.*, CAL. CIV. CODE § 227 (West 1982); ILL. ANN. STAT. ch. 40, § 1525 (Smith-Hurd 1980); N.Y. DOM. REL. LAW § 114 (McKinney 1977); TEX. FAM. CODE ANN. § 16.08 (Vernon 1975); VA. CODE § 63.1-230 (1981-82).

24. *See, e.g.*, CAL. CIV CODE § 226 (West 1982); ILL. ANN. STAT. ch. 40, § 1508 (Smith-Hurd 1980); N.Y. DOM. REL. LAW §§ 113-116. (McKinney 1977); TEX. FAM. CODE ANN. § 16.03 (Vernon 1975); VA. CODE § 63.1-223 (1981-82).

25. *In re* Estates of Donnelly, 81 Wash. 2d 430, 438, 502 P.2d 1163, 1167 (1972).

26. *Id.* at 436, 502 P.2d at 1166. Four justices dissented regarding the narrow holding of the *Donnelly* majority. *Donnelly*, however, concerned what will be described as an in-family adoption, an adoption in which the same considerations may not apply. *See infra* notes 69-80 and accompanying text.

27. Crumpton v. Mitchell, 303 N.C. 657, 664, 281 S.E.2d 1, 6 (1981).

IV. Intestate Succession By, From, and Through Adopted Persons

A. *The Ramifications of Adoption on Intestate Succession*

Although adoption as we know it has existed for over a hundred years, our succession laws have only recently begun to focus on adoptive relationships.

In dealing with the impact of adoption on intestate succession, a well considered statute should resolve the following questions: (1) Can the adoptee and the adoptor inherit from each other? (2) Can the adoptee inherit through the adoptor from the the adoptor's kindred? (3) Can the adoptor's kindred inherit from and through the adoptee? (4) Should the adoptee's former ability to inherit from his biological parents and their kindred be retained or abolished? (5) Should the former ability of the biological parents and their kindred to inherit from the adoptee be retained or abolished? (6) Should any of these questions be answered differently in relative adoption cases when the adoptor is either a stepparent or a blood relative of the adoptee? (7) How should these questions be answered with respect to inheritance by, from, and through the descendants of an adoptee? (8) Should these questions be answered differently with respect to inheritance by, from, and through a person who is adopted as an adult? (9) Assuming some inheritance rights are preserved between an adoptee and his biological kindred, should an individual adopted by a blood relative—for example, a natural grandparent—be allowed to inherit from and through the adoptor in two capacities, once as an adoptive and once as a natural relative? (10) In the case of successive adoptions, should mutual inheritance rights be recognized between the adoptive child and both sets of adoptive relatives?[28]

Unfortunately, the statutes of too many states are silent or vague on many of these points, leaving much to be filled in by case law. The Kansas[29] and South Dakota[30] statutes, for example, while creating a parent-child relationship between the adoptor and the adoptee (and in Kansas terminating the biological parents' rights of inheritance *from* the adoptee) are completely silent about whether the adoptee may still inherit from his biological parents and kindred and are also completely silent about possible inheri-

28. Similar formulations of some of these questions appear in 7 R. Powell, *supra* note 7, § 1004, and M. Rheinstein & M. Glendon, The Law of Decedent's Estates' 43 (1971).

29. Kan. Stat. Ann §§ 59-501, -507, -2103 (1983).

30. S.D. Codified Laws Ann §§ 25-6-12, -16, -17 (1976).

tance rights between the adoptee and his other relatives by adoption. The Oklahoma Statute establishes full reciprocal rights of inheritance between the adoptee and his adoptive family and denies the biological parents and kindred inheritance from the adopted child, but does not say whether the adoptee has rights of inheritance from his biological parents and relatives in addition to his inheritance rights within the adoptive family.[31] Illinois restricts inheritance by biological parents and kin *from* the adoptee to properties that the adoptee acquired from them by gift, will, or inheritance, but is silent concerning the adoptee's ability to inherit from his biological parents and relatives.[32] Most statutes make no distinction between adult adoptees and persons adopted during minority. Similarly, most statutes fail to mention the adoptee's own descendants, although it seems that when the adoptee has full status within his adoptive family this status should establish complete rights of inheritance by, from, and through the adoptee's descendants within that family.

B. The Modern Trend—Complete Transplantation

We must assess the adequacy of state provisions for succession by, from, and through an adopted person against the goals of modern adoption. As indicated, the primary focus today is on the adopted child's welfare. The goal in nonrelative adoption cases is to achieve a complete severence of the child from his biological family and a total transplantation of the child into his adoptive family.[33] The Uniform Probate Code (UPC) intestacy provision,

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31. *See* OKLA. STAT. ANN. tit. 10, § 60.16 (West Supp. 1983). Case law has filled in this omission by allowing an adopted child to inherit from both adoptive and natural parents. *See, e.g.*, Meadow Gold Dairies v. Oliver, 535 P.2d 290 (Okla. 1975); *In re* Estate of Marriot, 515 P.2d 571 (Okla. 1973).

32. *See* ILL. ANN. STAT. ch. 110 ½, § 2-4 (Smith-Hurd 1978).

33. *See supra* notes 25-27 and accompanying text. In *In re* Estates of Donnelly, 81 Wash. 2d 430, 502 P.2d 1163 (1972), the Washington Supreme Court looked at the statutory provisions requiring (1) that all adoption files "be sealed and not open to inspection," WASH. REV. CODE ANN. § 26.32.150 (1961), (2) that "the records of the registrar be kept secret," *id.* § 26.32.120, and (3) that the adopted child's new birth certificate "bear the new name of the child and the names of the adoptive parents . . . but . . . make no reference to the adoption of the child," *id.* § 70.58.210. From its review of these and similar provisions, the court concluded that a "legislative policy of providing a 'clean slate' to the adopted child permeates our scheme of adoption." Further, the majority found that "the only conclusion consistent with the spirit of our overlapping adoption and inheritance statutes is that RCW 11.04.085 [a statute tersely stating that an adopted child is not an heir of his natural parents] was intended to transfer all rights of inheritance out of the natural family upon adoption and place them entirely within the adopted family." 81 Wash. 2d at 437-38, 502 P.2d at 1167; *see also* UNIF. ADOPTION ACT § 14, Commissioner's note, 9 U.L.A. 45 (1971); SECOND

enacted in fourteen states, reflects that goal in matters of inheritance through its definition of "child," which provides that "[i]f, for purposes of intestate succession, a relationship of parent and child must be established to determine succession by, through, or from a person, . . . an adopted person is the child of an adopting parent and not of the natural parents . . . ."[34] The Uniform Adoption Act, enacted in six states, also seeks total substitution of the adoptive family for the biological family in the typical situation.[35] In spite of these two uniform acts, the movement to transplant the adoptee into his adoptive family for all purposes[36] has been sadly disorganized, and some states continue to lag behind.

C. *States Restricting Inheritance Within the Adoptive Family*

While most jurisdictions now recognize reciprocal inheritance rights between the adoptee and the relatives of the adoptive parents, several states still deny or limit such reciprocal rights. The Vermont statute, for example, expressly prohibits inheritance between the adopted child and his adoptive ancestral and collateral relatives.[37] The Alabama statute, in granting the adopted child the limited right to inherit "from his adopting parents and through

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REPORT OF THE TEMPORARY STATE COMM'N ON THE MODERNIZATION, REVISION AND SIMPLIFICATION OF THE LAW OF ESTATES TO THE GOVERNOR AND THE LEGISLATURE, N.Y. LEG. DOC. No. 19 app. E at 146[204] (1963) [hereinafter cited as N.Y. LEG. DOC. No. 19]. For a discussion of "in-family" or "relative" adoptions, see *infra* notes 69-80 and accompanying text.

34. UNIF. PROBATE CODE (UPC) § 2-109, *8* U.L.A. *66* (1982); ALASKA STAT. §§ 13.06.005-.36.100 (1972); ARIZ. REV. STAT. ANN. §§ 14-1101 to -7307 (1975); COLO. REV. STAT. §§ 15-10-101 to -17-101 (1973); FLA. STAT. ANN. §§ 731.006-735.302 (West 1976); HAWAII REV. STAT. §§ 560:1-101 to :8-102 (1976); IDAHO CODE §§ 15-1-101 to -7-307 (1979); ME. REV. STAT. ANN. tit. 18-A, §§ 1-101 to 8-401 (1981); MICH. COMP. LAWS ANN. §§ 700.1-.993 (West 1980); MINN. STAT. ANN. §§ 524.1-101 to .8-103 (1975); MONT. CODE ANN. §§ 72-1-101 to -5-502 (1983); NEB. REV. STAT. §§ 30-2201 to -2902 (1979); N.M. STAT. ANN. §§ 45-1-101 to -7-401 (1978); N.D. CENT. CODE §§ 30.1-01-01 to -35-01 (1976); UTAH CODE ANN. § 75-1-101 to -8-101 (1978).

35. UNIF. ADOPTION ACT § 14, 9 U.L.A. 44-45 (1971); ARK. STAT. ANN. §§ 56-101 to -125 (Supp. 1979); MONT. CODE ANN. §§ 40-8-101 to -202 (1983); N.M. STAT. ANN §§ 40-7-1 to -7-28 (1978); N.D. CENT. CODE §§ 14-15-01 to -15-23 (1981); OHIO REV. CODE ANN. §§ 3107.01-.19. (Page 1980); OKLA. STAT. ANN. tit. 10, §§ 60.1-.23 (West 1981).

36. For examples of state statutes that adopt the modern view without adopting the specific provisions of either the UPC or the Revised Uniform Adoption Act, see CAL. PROB. CODE § 257 (West 1956); GA. CODE ANN § 74-413 (1981); N.H. REV. STAT. ANN §§ 170-B:20, :22 (1977); N.J. STAT. ANN. § 9:3-50 (West Supp. 1981). A recent student work lists 25 states that achieve a total substitution of the adoptive for the biological family, but the statutes are so rife with gaps and exceptions that this listing is not totally accurate. *See* Case Comment, *Adoption—Intestate Succession—The Denial of a Stepparent Adoptee's Right to Inherit from an Intestate Natural Grandparent: In re* Estate of Holt, 13 N.M.L. REV. 221, 229 n.50 (1983).

37. VT. STAT. ANN. tit. 15, § 448(9) (1974).

them from their natural and adopted children," suggests by omission that the adoptee cannot inherit through his adoptive parents from their ancestral and collateral kindred.[38] Some courts interpreting similarly incomplete statutes have given them a liberal construction to further the primary goal of adoption.[39] But in South Dakota where the statute is silent on this question,[40] the supreme court held that an adopted child could not inherit through his predeceased adoptive father from his adoptive paternal grandfather.[41] The court reasoned that the clause of the statute providing that "[a]fter adoption *the two* . . . shall sustain towards each other the legal relation of parent and child" restricted the effects of adoption to the relationship between the adopted child and the adoptive parent. According to this narrow view, adoption makes the adoptee the child of his adoptor, but does not make him the grandchild or issue of his adoptor's parents. The court offered several traditional arguments to support its narrow interpretation. First, the court argued that adoption is a contractual arrangement, binding only the adoptor, the adoptee, and his natural parents. As a companion argument, the court urged that while the adopting parents have the right to adopt a person as their heir, they have no right to foist an heir on their relatives, "who are not parties to the contract of adoption."[42] These arguments ignore the fact that a child's birth always imposes a potential heir on the relatives of his biological parents, yet no one would suggest that the child should not inherit from his blood relatives because they had not consented to his conception. In the typical case of the child adopted as an infant, adoption effects the equivalent of a natural birth into the new family. Indeed, it has been called a "social birth."[43] Thus, upon entering his adoptive family the adopted child, like his biological counterpart, acquires not only new parents but also new

38. ALA. CODE § 26-10-5 (1975). Oddly enough, however, the same statute gives all of the adopting parents' natural and adopted kindred rights of inheritance from the adopted child and his descendants.

39. *See In re* Estate of Taylor, 136 Neb. 227, 285 N.W. 538 (1939); *In re* Masterson's Estate, 108 Wash. 307, 183 P. 93 (1919); *In re* Caldwell's Estate, 26 Wyo. 412, 186 P. 499 (1920). The Nebraska and Washington legislatures have since modernized the statutes to make them more complete. *See* NEB. REV. STAT. § 30-2309 (1980); WASH. REV. CODE §§ 11.02.005(4), 26.32.140 (1974).

40. *See* S.D. CODIFIED LAWS ANN. §§ 25-6-16 to -17 (1976).

41. *In re* Eddin's Estate, 66 S.D. 109, 279 N.W. 244 (1938).

42. *Id.* at 110-11, 279 N.W. at 245. (quoting R.C. 1919 § 209, *amended by* S.D. CODIFIED LAWS ANN. § 25-6-16 (1976)) (emphasis added).

43. *See* Note, *Intestate Succession and Adoption in Utah: A Need for Legislation*, 1969 UTAH L. REV. 56, 60.

siblings, grandparents, aunts, uncles, and cousins. The South Dakota court's narrow view, which it recently reaffirmed,[44] is out of harmony with today's concept of adoption as a socially sanctioned means of creating true family ties.[45]

The South Dakota Supreme Court's final justification for its restrictive reading of the statute was that explicit or inexorable statutory mandate must authorize any deviation from the principle that inheritance follows blood.[46] This attitude runs directly against the principle that courts should construe remedial legislation liberally to further the policy of the statute. In adoption cases that policy is to promote the well-being of the adoptee by making him a full-fledged member of his new family.[47] The discrimination against the adoptee that occurs in Vermont, Alabama, and South Dakota is bound to retard achievement of this goal by making the adopted child feel like a second-class family member. As a justice of the Utah Supreme Court remarked in discussing this exclusion from full inheritance rights, "He is a member of the family, yet he is not, and the realization of this fact by him and other members of the family leaves an area of rejection which is, in many instances, more important psychologically than is concern over material values."[48]

In the converse situation the South Dakota Supreme Court has ruled that an adoptee's adoptive relatives cannot inherit through the predeceased adoptive parents from the intestate adoptee.[49] This rule is bound to create resentment and disharmony within the adoptive family, especially when the intestate estate in-

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44. *See In re* Estate of Edwards, 273 N.W.2d 118 (S.D. 1978).

45. As Justice Loevinger of the Minnesota Supreme Court stated:

> We have come to realize that it is not the biological act of begetting offspring—which is done even by animals without any family ties—but the emotional and spiritual experience of living together that creates a family. The family relationship is created far more by love, understanding, and mutual recognition of reciprocal duties and bonds, than by physical genesis.

In re Trust Created by Will of Patrick, 259 Minn. 193, 196, 106 N.W.2d 888, 890 (1960) (footnote omitted).

46. This is a variation of the old saw that statutes in derogation of the common law must be strictly construed.

47. *See supra* notes 33-36 and accompanying text.

48. *In re* Smith's Estate, 7 Utah 2d 405, 409, 326 P.2d 400, 403 (1958) (dissenting opinion). The Utah Supreme Court, using arguments identical to those just discussed, adhered to the same view as the South Dakota Supreme Court until the Utah legislature rescued adopted children from the court by enacting UPC § 2-109 in UTAH CODE ANN. § 75-1-101 to -8-101 (1978). For an excellent discussion and critique of the Utah cases, see Note, *supra* note 43.

49. *In re* Estate of Edwards, 273 N.W.2d 118 (S.D. 1978).

herited by the adoptee's biological kin to the exclusion of his adoptive kin consists entirely of property derived from the adoptive family.

D. States Continuing Inheritance Ties with the Adoptee's Biological Family

Several states have bucked the modern legislative trend toward a complete transplant by statutorily continuing to allow the adopted-away child to inherit from his biological parents or kindred.[50] Furthermore, in some states with statutes silent on this question, case law has recognized the adoptee's right to inherit from his natural family.[51] For example, in a 1976 case a court allowed the intestate's adopted-away illegitimate daughter, who did not learn of intestate's identity as her biological mother until she was eighteen, to inherit from the intestate to the exclusion of the intestate's adoptive sister.[52] In another case, a court permitted the intestate's natural son whom she had relinquished for adoption at the age of three months to inherit from her to the exclusion of the intestate's brother.[53] The courts taking this position expand on the consangninity argument—that express statutory mandate is necessary to break the right of inheritance created by blood—by arguing that the adoptee, unlike his natural and adoptive parents, has had no oportunity to consent to his adoption and, therefore, should not

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50. The Alabama, Louisiana, Texas, Vermont, and Wyoming statutes expressly preserve the right of the adoptee to inherit from his natural parents and kindred. *See* ALA. CODE § 26-10-5 (1975); LA. CIV. CODE ANN. art. 214 (West Supp. 1982); TEX. FAM. CODE ANN § 15.07 (Vernon 1975); VT. STAT. ANN. tit. 15, § 448(9) (1974); WYO. STAT. § 2-4-107 (1977).

51. *See In re* Tilliski's Estate, 390 Ill. 273, 61 N.E.2d 24 (1945); Meadow Gold Dairies v. Oliver, 535 P.2d 290 (Okla. 1975); Harrell v. McDonald, 90 S.D. 482, 242 N.W.2d 148 (1976); Sorenson v. Churchill, 51 S.D. 113, 212 N.W. 488 (1927). The natural parents and kin are usually denied a reciprocal right of inheritance from the adopted-away child. Thus, Alabama and Vermont expressly exclude the adoptee's natural parents and kindred from such inheritance while Illinois restricts the natural parents and kindred to properties the adoptee acquired from them by gift, will, or inheritance. *Compare* ILL. ANN. STAT. ch. 110 ½, § 2-4 (1978) *with* ALA. CODE § 26-10-5 (1975) *and* VT. STAT. ANN. tit. 15, § 448(9) (1974). The Wyoming statute is not clear, but by giving the adoptive parents and kindred the right to inherit from the adoptee, seems to exclude the natural parents and kin. WYO. STAT. § 2-4-107 (1977). Although South Dakota case law permits the relatives of the natural parents to inherit from the adopted-away child, *see In re* Estate of Edwards, 273 N.W.2d 118 (S.D. 1978), it does not permit the natural parents themselves to do so. The theory behind this distinction seems to be that the natural parents, unlike the relatives, were privy to the adoption contract and, by consenting to the adoption, agreed to give up any right to inherit from the adopted-away child. All of these states make an exception permitting the natural parent to inherit when the adopting parent is a spouse of the natural parent.

52. Harrell v. McDonald, 90 S.D. 482, 242 N.W.2d 148 (1976).

53. Sorenson v. Churchill, 51 S.D. 113, 212 N.W. 488 (1927).

lose his birthright by virtue of an adoption to which he did not agree.[54]

Although exceptional cases always will arise, recognition of continuing ties of inheritance between the adoptee and his biological family seems undesirable in the typical case from the standpoint of practicality and public policy. The majority of adoptees are relinquished for adoption at infancy.[55] The adoption file is almost invariably sealed to ensure that the identity of the biological and adoptive parents will remain confidential. Hence, as a practical matter, it is usually difficult if not impossible for the adoptee or his blood relatives to find each other.[56] Even if these practical difficulties were overcome, association of the natural relatives with the adopted child, whether through intestacy proceedings or otherwise, may often disturb a young adoptee by dividing his loyalties between the natural and adoptive relatives and by prematurely forcing him to face the rejection of his relinquishment for adoption. The very purpose of state regulations requiring sealed adoption records is to protect the adoptive family from post adoption disruption, thereby strengthening the new family unit and promoting the adoptee's assimilation into it. Recognition of continuing ties of inheritance with the adoptee's natural family runs at cross-pur-

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54. *See* Harrell v. McDonald, 90 S.D. 482, 484, 242 N.W.2d 148, 149 (1976), (quoting with approval Sorenson v. Churchill, 51 S.D. 113, 212 N.W. 488 (1927)). *But cf.* Estate of Carriger, 4 Kan. App. 2d 590, 609 P.2d 685 (1980) (adopted-away child not eligible for family allowance out of father's estate). Questions concerning the status of an adopted-away child vis-á-vis his natural parents and kindred also can arise in a class gift setting. *See infra* notes 125-50 and accompanying text.

55. Due to the relative scarcity of "healthy white infants" available for adoption, placement of older children is on the rise. *See* W. MEEZAN, ADMIN. FOR CHILDREN, YOUTH AND FAMILIES U.S. DEP'T OF HEALTH AND HUMAN SERVICES, PUB. No. (OHDS) 80-30288, ADOPTION SERVICES IN THE STATES 1 (1980). Nevertheless, the great majority of placements to unrelated adoptors still involve infants. The percentage distribution by age of children at the time of placement in 1975 was as follows:

Under 1 year	63%
1 year to 6 years	25%
Over 6 years	12%

Id. at 2 (citing ADOPTIONS IN 1975, *supra* note 1).

56. W. MEEZAN, *supra* note 55, at 33. The Washington State Supreme Court made this point in *In re* Estates of Donnelly, 81 Wash. 2d 430, 437-38, 502 P.2d 1163, 1167 (1972). Moreover, a law that recognizes an adoptee's right to inherit from his natural relatives creates uncertainty in titles because usually only the adoptive parents and the adoption agency know the identity and whereabouts of the adoptee. *See* N.Y. LEG. DOC. No. 19, *supra* note 33, at 111; Note, *supra* note 43, at 68 n.72. For a discussion of the jurisdictional and administrative mishaps that failure to achieve total severance from biological relatives can create, see *In re* Estate of Best, 116 Misc. 2d 365, 455 N.Y.S.2d 487 (Sur. Ct. 1982). See Morris v. Ulbright, 558 S.W.2d 660 (Mo. 1977), discussed *infra* note 150, for an example of a nightmarish title dispute.

poses with this policy.[57] This position is not necessarily antithetical to the view that it may under certain circumstances be desirable to authorize the opening of the adoption file when the adoptee reaches majority. Once the adoptee reaches adulthood, post adoption disruption is no longer a concern and the adoptee is sufficiently mature to deal with the revelation of his roots. In any event, an adoptee can fulfill the psychological need to know the identity of his biological parents without having a right to inherit from his natural relatives.[58]

The courts that permit an adoptee to inherit from his blood relatives are actually assuming that natural filiation must survive adoption.[59] The upshot of this assumption is that the adoptee is given dual sources of inheritance. This right to inherit from two sets of relatives, natural and adoptive, affords the adoptee an advantage denied biological children.

In addition to these policy objections, the recognition of such dual filiation can lead to bizarre and inequitable results in a fairly common fact pattern. The adoption of an orphan by a grandparent, aunt, or other blood relative is not uncommon. If the adoptor or some other natural relative on the same side of the family should die intestate, the question may arise whether the adoptee can take a double share by inheriting from the decedent in two capacities—once as a relative by adoption and once as a biological relative. Cases in Utah and Kansas have held that a grandchild

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57. As a Washington appellate court recently put it. "One important objective of the relinquishment and adoption statutes is to protect the adopting parents, the child, and the new family relationship from subsequent disturbance by the natural parents." *In re* Santore, 28 Wash. App. 319, 327, 623 P.2d 702, 707 (1981); *see also In re* Estates of Donnelly, 81 Wash. 2d 430, 502 P.2d 1163 (1972); UNIF. ADOPTION ACT § 14 Commissioner's note (1971); N.Y. LEG. DOC. No. 19, *supra* note 56, at 111; Binavince, *supra* note 4, at 183-84. Professor Binavince spells out the policy considerations in greater detail:

> The need for a psychological environment that assures successful adoption dictates the complete removal of the child from his natural family. Maintaining the child's connection with his natural family casts serious obstacles in the path of achieving mutual affection and responsibility within the adoptive family. It leaves the child uncertain as to whom he should treat as "parents." Besides, prospective adoptive parents obviously desire, and are entitled to, a protected privacy and free use of the discretion approximating that of a natural filial relationship. The fact that children are adopted at an early age hopefully assures full assimilation into the adoptive family before the child reaches the age of discretion. It is extremely doubtful that the child will find it to his advantage, even at an advanced age, to be continuously exposed to the unfortunate events that led to his adoption.

Binavince, *supra* note 4, at 183-84.

58. For a judicial discussion and recognition of this need, see Mills v. Atlantic City Vital Statistics Dep't, 148 N.J. Super, 302, 372 A.2d 646 (Ch. Div. 1977).

59. Binavince, *supra* note 4, at 166.

adopted by his grandparent can inherit twice from the same decedent, once in his status of adopted child and again by representation as a natural grandchild.[60] While this result may at first blush appear advantageous to the child, the resentment it creates is likely to damage his standing within the family.[61] A 1975 Illinois case carried this incongruity one step further by holding that an orphan adopted by a sister of the intestate could inherit a double share from the intestate by taking once as the intestate's adoptive niece and again as a representive of her natural parent, who was another sibling of the intestate.[62] Courts that sanction this kind of inequity rely on the traditional line that adoption creates additional rights but does not divest the child of existing rights absent express statutory divestiture.[63] These anomalous results are a direct outgrowth of the misconception that natural filiation must survive adoption. In jurisdictions which follow the modern rule that inheritance rights between the adoptee and his biological kindred cease upon adoption, the phenomenon of an adoptee taking twice from the same decedent should not occur. Thus, in New Jersey, which follows the modern view, a chancery court had no difficulty in holding that when the decedent's parents adopted the daughters of the decedent's sisters, the daughters could inherit from the decedent only as sisters and, by being adopted, lost any right of inheritance they formerly had as the decedent's nieces.[64]

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60. *In re* Bartram's Estate, 109 Kan. 87, 198 P. 192 (1921); *In re* Benner's Estate, 109 Utah 172, 166 P.2d 257 (1946) (subsequently overruled by the Utah legislature through UTAH CODE ANN. § 75-2-109 (1978)). *Contra* Billings v. Head, 184 Ind. 361, Ill N.E. 177 (1916); Delano v. Bruerton, 148 Mass. 619, 20 N.E. 308 (1889). The legislatures in Indiana and Massachusetts have since amended the statutes to prohibit inheritance by the adoptee from natural kindred. IND. CODE ANN. § 29-1-2-9 (Burns 1972); MASS. ANN. LAW ch. 210, § 7 (Michie/Law. Co-op. Supp. 1983-84).

61. As Justice Turner of the Utah Supreme Court explained:

> After the relationship of a parent of adoption and child is created, can there by anything of greater moment for a child's happiness and general welfare than the love and respect of brothers and sisters of adoption and the love and respect of the boys and girls born of his own natural parents? If we are concerned primarily with the welfare of the child we must be concerned with the preservation of these relationships. They cannot exist when the adopted child gives evidence of such a covetous nature that he would take a dual inheritance at the expense of these.

In re Benner's Estate, 109 Utah 172, 179, 166 P.2d 257, 260 (1946) (dissenting opinion).

62. *See In re* Estate of Cregar, 30 Ill. App. 3d 798, 333 N.E. 2d 540 (1975). The facts have been streamlined in the interest of readability. The court held inapplicable to the facts of this case a statute preventing the adoptee from inheriting in two capacities *from the estate of his adoptor.*

63. *See id.* at 804-05, 333 N.E. 2d at 545; *In re* Bartram's Estate, 109 Kan. 87, 90-91, 198 P. 192, 194 (1921)(quoting with approval from Wagner v. Varner, 50 Iowa 532 (1879)).

64. Crego v. Monfilleto, 104 N.J. Super. 416, 250 A.2d 161 (1969).

Some courts have carried the traditional assumption that natural filiation survives adoption still another step to the extreme of holding that a twice adopted child can inherit from both sets of adoptive parents. These courts reason that when a child is adopted he becomes the equivalent of a biological child to his adoptors. The courts conclude that the legal parent-child relationship, once established, like its natural counterpart, cannot be severed by a subsequent adoption unless a statute expressly so provides.[65] The analogy of the first adoptor to a natural parent can achieve the opposite and more desirable result in a jurisdiction that abolishes the child's inheritance ties with his natural family upon adoption. Thus, in a 1980 case, *In re Estate of Luckey*,[66] the Nebraska Supreme Court reasoned that the Nebraska statute terminating the relationship between an adopted child and his natural parents mandated that the analogous relationship between the first adoptors and the child be likewise terminated by a later adoption to which the first adoptors consented. Chief Justice Krivosha commented:

> It makes little or no sense to suggest that the law intended that if one were a natural parent and an adoption occurred, all relationship, including the right to inherit by intestacy, would terminate, but if one were an adoptive parent who later consented to a subsequent adoption, the relationship would not terminate and the right to inherit would continue. Once the second adoption occurs, there is no longer any legal relationship between the relinquishing parent and the child. Any other reading of § 30-2309 would be absurd.[67]

Using this logic a court in a UPC state or any other state that follows the modern policy of complete transplantation should have no difficulty in reaching the preferable result of *Luckey*. Nevertheless, because it is desirable for the legislatures to make this explicit, the drafters of the UPC should consider enactment of a proviso to make it clear that in the event of successive adoptions the child shall be deemed the natural child of his most recent adoptors

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65. *See* Hawkins v. Hawkins, 218 Ark. 423, 236 S.W.2d 733 (1951); Holmes v. Curl, 189 Iowa 246, 178 N.W. 406 (1920); Dreyer v. Schrick, 105 Kan. 495, 185 P. 30 (1919); *In re* Egley's Estate, 16 Wash. 2d 681, 134 P.2d 943 (1943). *But see* Quintrall v. Goldsmith, 134 Colo. 410, 306 P.2d 246 (1957); *In re* Estate of Leichtenberg, 7 Ill. 2d 545, 131 N.E.2d 487 (1956); *In re* Carpenter's Estate, 327 Mich. 195, 41 N.W.2d 349 (1950) (reasoning that the adoptee cannot simultaneously be the adopted child of multiple sets of adoptive parents and, thus, that the most recent adoption abolishes all rights and duties created by the prior adoption). For the present state of Washington law, see *In re* Estates of Donnelly, 81 Wash. 2d 430, 502 P.2d 763 (1972); WASH. REV. CODE ANN. §§ 11.04.085, 26.32.140 (1979).

66. 206 Neb. 53, 291 N.W.2d 235 (1980).

67. *Id.* at 57, 291 N.W.2d at 238.

and shall not be deemed a child of his prior adoptors.[68]

E. In-Family Adoptions

While cutting off inheritance ties between the adoptee and his natural family is usually best, arguably these ties should remain in the case of some in-family adoptions. In-family adoptions, also called relative adoptions, typically occur as follows: (1) An orphaned child is adopted by a blood relative, usually a grandparent; (2) a young unwed mother lets her parents adopt and raise her illegitimate child; (3) one biological parent dies while still married to the other, and the surviving biological parent eventually marries a new spouse who adopts the child; or (4) following divorce of the biological parents the custodial parent remarries and the stepparent adopts the child with the consent of, or after the death of, the noncustodial parent.

The policy considerations differ depending on whether the adoption is in-family or to strangers. Yet, in dealing with the impact of adoption on succession, many states do not differentiate between the two types of adoption. The number of in-family adoptions is certainly siguificant enough to warrant separate consideration by our legislatures. Of the completed adoptions officially recorded in 1975, sixty-three percent were relative adoptions.[69] Not surprisingly, considering the rising divorce rates, stepparent adoptions accounted for eighty-five percent of those relative adoptions.[70]

Let us examine the outcome of some typical relative adoption cases in a jurisdiction which follows the modern rule that inheritance rights between the adoptee and his natural kindred cease upon adoption. Jack and Jill, the parents of Junior, are killed in an accident. Jill's parents, Junior's maternal grandparents, adopt Junior. Junior will inherit from his parents because they died prior to the adoption. Upon adoption, Junior will gain the right to inherit from and through his adoptive parents, his natural maternal grandparents, but will lose the right to inherit from and through

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68. *See* O'Connell & Effland, *Intestate Succession and Wills: A Comparative Analysis of the Law of Arizona and the Uniform Probate Code*, 14 ARIZ. L. REV. 206, 219 (1972). A few states have enacted such a proviso. *See, e.g.*, IND. CODE ANN. § 29-1-2-9 (Burns 1972); N.H. REV. STAT. ANN § 170-B:22 (1977); *see also* COLO. REV. STAT. § 15-11-109 (1973) (case law has supplied the proviso in Quintrall v. Goldsmith, 134 Colo. 410, 306 P.2d 246 (1957)).

69. W. MEEZAN, *supra* note 55, at 52.

70. *Id.* at 50-51.

his pateral kindred unless some exception is made.[71] This result obtains despite the likelihood that Junior will continue to have a family relationship with his paternal grandparents and other paternal relatives. An even more common scenario is the following. Jack dies, either while still married to or after divorcing Jill. Jill eventually remarries and consents that her new husband adopt Junior. Upon adoption, Junior will gain the right to inherit from and through his adoptive father.[72] His inheritance rights from and through Jill, his biological mother, will remain.[73] But unless some exception is made, Junior will lose the right to inherit from and through his paternal relatives even though the natural associations and ties of affection with his father's family will likely continue.[74]

When strangers adopt a child, many good reasons support cutting off all ties with the adopted child's biological relatives. The child's bonding with his adoptive family is disturbed if the child's biological relatives interfere with the new family. To prevent this kind of harassment authorities seal the child's orignial birth certificate and all records of the adoption, making it almost impossible for the adoptee and his blood relatives to find each other. This confidentiality also shields the biological parents from public exposure and spares them the mental anguish of knowing where the child is; confidentiality thus allows the emotional wound of relinquishment to heal. Finally, if legal ties with the biological family

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71. *See* Reeves v. Bailey, 53 Cal. App. 3d 1019, 126 Cal. Rptr. 51 (1975) (dictum); Thornberry v. Timmons, 406 S.W.2d 151 (Ky. 1966).

72. *See supra* notes 33-36 and accompanying text.

73. Many states have statutory provisos expressly preserving the relationship between the child and the natural parent whose spouse adopts the child. *See, e.g.*, N.H. REV. STAT. ANN § 170-B:20 (1977) ("[B]ut, when a child is adopted by a stepparent, his relationship to his natural parent who is married to the stepparent shall in no way be altered by reason of the adoption."); N.J. STAT. ANN § 9:3-50 (1981); WYO. STAT. ANN. § 2-4-107(a)(i) (1977); *see also* U.P.C. § 2-109, 8 U.L.A. 66 (1982) ("except that adoption of a child by the spouse of a natural parent has no effect on the relationship between the child and either natural parent"). Even without such a proviso, that a court would deny mutual rights of inheritance between the child and the custodial natural parent under these circumstances seems almost inconceivable since such parent's rights would not ordinarily be terminated by his or her spouse's adoption of the child.

74. This was the holding on almost identical facts in *In re* Estato of Holt, 95 N.M. 412, 622 P.2d 1032 (1981) (child adopted by stepfather after noncustodial father's death denied heirship in paternal grandmother's estato); *In re* Estates of Donnelly, 81 Wash. 2d 430, 502 P.2d 1163 (1972) (child adopted by widowed mother's new spouse denied heirship in paternal grandfather's estate); *In re* Estato of Topel, 32 Wis. 2d 223, 145 N.W.2d 162 (1966) (child adopted by stepfather after noncustodial father's death denied heirship in paternal grandfather's estate). The Wisconsin legislature later overruled *Topel* by statute. *See* WIS. STAT. ANN. § 851.51(2)(b) (West 1971). For a critique of the *Holt* decision, see Case Comment, *supra* note 36.

remain, the necessity of searching for adopted-away children complicates the settlement of decedents' estates.[75]

The foregoing considerations do not usually apply when the adoption occurs within the child's original family. Members of the original family usually know about the adoption and continue their associations with the child.[76] In cases in which natural associations and emotional bonds remain, continuing ties of inheritance may make sense. Certainly the matter warrants legislative consideration. Of course, any jurisdiction making an exception to the modern rule terminating biological inheritance for in-family adoptions should also enact a proviso to avoid the phenomenon of an adoptee taking in two capacities from the very same decedent.[77]

The UPC makes a limited exception to the modern rule of total severance from natural relatives by providing that if the spouse of one biological parent adopts the child, the adoption does not affect the child's relationship with *either* natural parent.[78] This exception is both too broad and too narrow. It is too broad because it applies when the other parent is still alive, but has surrendered the child for adoption by the ex-spouse's new husband or wife. Except in the case of illegitimate children, a stepparent cannot adopt his spouse's child while the other parent is alive unless the other parent has failed to support the child, abandoned the child, consented to the adoption, or had his parental status terminated for cause.[79] The preservation of the child's relationship with a parent who has voluntarily relinquished the child for adoption or abandoned him in some manner seems wrong. The approach of the Revised Uniform Adoption Act is preferable because it preserves the relation-

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75. *See supra* notes 56-57 and accompanying text; *see also* Case Comment, *supra* note 36, at 228, 230.

76. Two recent opinions from New York's judiciary have remarked on the differences between "relative" adoptions and adoptions to strangers. *See ex rel.* Sibley v. Sheppard, 54 N.Y.2d 320, 429 N.E.2d 1049, 445 N.Y.S.2d 420 (1981); *In re* Estate of Best, 116 Misc. 2d 365, 455 N.Y.S.2d 487 (Sur. Ct. 1982). In *Sibley*, the issue was grandparent visitation.

77. For a discussion of this phenomenon, see *supra* notes 60-64 and accompanying text. For example, the UPC preserves the relationship between the child and both natural parents in the stepparent adoption situation, *see* U.P.C. § 2-109(1), 8 U.L.A. 66 (1982), and provides that "[a] person who is related to the decedent through 2 lines of relationship is entitled to only a single share based on the relationship which would entitle him to the larger share," see U.P.C. § 2-114, 8 U.L.A. 72 (1982). Because the UPC only makes an exception in the stepparent adoption situation, the only case that might produce the dual inheritance phenomenon in a UPC state is that in which the adopting stepparent is a relative (e.g., a sibling) of the dead natural parent.

78. U.P.C. § 2-109(1), 8 U.L.A. 66 (1982).

79. *See generally* Comment, *A Survey of State Law Authorizing Stepparent Adoptions Without the Noncustodial Parent's Consent*, 15 AKRON L. REV. 567 (1982).

ship between the child and the other natural parent only if that parent has died "without the relationship of parent and child having been previously terminated."[80] Both the UPC and the Uniform Adoption Act exceptions are too narrow because they do not cover the case of a child adopted by a blood relative—for example, a parent—of his biological mother or father. Unless some exception is made, this classic in-family adoption will terminate all inheritance rights between the child and the nonadopting side of his natural family. Because of the likelihood that a family relationship between the child and the nonadopting side of his family will continue, the retention of inheritance ties between the adoptee and that side of his family seems reasonable.

V. The Status of Adoptees Under Class Gifts

If a donor executes a will, trust, or other private instrument making a class gift to someone's "children," "grandchildren," "nieces and nephews," "issue," "heirs,"[81] or "descendants," can one who claims membership in the designated class by dint of adoption share in the gift? Two illustrations suffice. Suppose *T* devises property to *A* for life, remainder to *A*'s "children." *A* has one biological child, *X*, and later adopts another child, *Y*. Should *Y*, who was adopted into the status of *A*'s child, share in the devise the same as *X*, who was born into that status? Suppose now that *T* devises property to *A* for life, remainder to *A*'s "nieces and nephews." *A*'s brother, *B*, adopts a boy named *Z*. In designating *A*'s nephews did *T* intend that *Z*, who was adopted into the status of *A*'s nephew take the remainder the same as though he had that status by birth? With adoption creating an increasing number of relationships, construction problems of the type just illustrated have become the subject of a seemingly endless stream of

80. Unif. Adoption Act § 14, 9 U.L.A. 44-45 (1971). Other commentators share this view. *See* Brantley & Effland, *Inheritance, The Share of The Surviving Spouse, and Wills: Arkansas Law and the Uniform Probate Code Compared*, 3 Ark. Little Rock L. Rev. 361, 373-74 (1980). This author recognizes, however, that sometimes a parent consents to the adoption of his child out of an honest and selfless belief that such adoption will best serve the child's welfare. Such parents typically continue to maintain emotional and financial ties with the child after the adoption. These are cases of placing the child's ultimate well-being above the parent's own ego. To cover these cases a court should have the power, upon a showing of good cause, to preserve the child's inheritance rights from the relinquishing natural parent.

81. The discussion in this section assumes that neither the doctrine of worthier title nor the Rule in Shelley's Case is applicable.

litigation.[82]

We start with the proposition that whether or not an adoptee partakes depends on the donor's intent in using the terminology he used. The status of adoptees under the adoption, descent, and distribution statutes is not controlling on this issue.[83] When the transferor's intent is clear from the instrument,[84] or clearly shown by surrounding circumstances or other admissible extrinsic evidence, that intent should be honored.[85] In most instances, however, the instrument is totally unenlightening and it is probably safe to assume that the question never presented itself to the donor's mind for, if it had, he would have expressed his desires explicitly. In this, the vast majority of cases, the court must find the donor's intent somehow and does so by indulging in a presumption as to what the average donor using the language he used must have intended. Here is where the adoption statutes and the statutes of descent and distribution come in by the back door. Most courts now view these statutes as reflective of community attitudes toward adoptees and thus, by inference, reflective of the attitude of the particular donor as a member of the community. As Justice Weintraub of the New Jersey Supreme Court explained, "[t]he important point is that the statute reflects the feeling and attitude of the

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82. *See generally* Halbach, *The Rights of Adopted Children Under Class Gifts*, 50 IOWA L. REV. 971 (1965); Note, *The Dilemma of Adoptees in the Class Gift Structure—The Kentucky Approach: A Rule Without Reason*, 59 KY. L.J. 921 (1971); Comment, *Eligibililty of Adopted Children to Take by Intestate Descent and Under Class Gifts in Missouri*, 34 Mo. L. REV. 68 (1969). For the problems posed by adoption in determining maximum class membership, see Fetters, *The Determination of Maximum Membership in Class Gifts in Relation to Adopted Children: In re Silberman's Will Examined*, 21 SYRACUSE L. REV. 1 (1969).

83. *See* Estate of Pierce, 32 Cal. 2d 265, 269, 196 P.2d 1, 3-4 (1948); *see also In re* Estate of Nicol, 152 N.J. Super. 308, 377 A.2d 1201 (1977); Security Nat'l Bank & Trust Co. v. Willim, 151 W. Va. 429, 153 S.E.2d 114 (1967).

84. *See, e.g.*,Wachovia Bank & Trust Co. v. Andrews, 264 N.C. 531, 142 S.E.2d 182 (1965); Vaughn v. Vaughn, 161 Tex. 104, 337 S.W.2d 793 (1960) (court considered the use of the word "born" to show a clear intent to exclude adoptees). Commenting that "[b]irth is not synonymous with adoption," the court in *Wachovia* deemed the word "born" sufficient to rebut a statutory presumption in favor of adoptees. 264 N.C. at 538, 142 S.E.2d at 187. How much weight courts should give words and phrases chosen out of habit by a drafter is a question that this Article considers.

85. *See, e.g., In re* Ward's Will, 9 A.D. 2d 950, 195 N.Y.S.2d 933 (1959), *aff'd*, 9 N.Y.2d 722, 174 N.E.2d 326, 214 N.Y.S. 2d 340 (1961). For a discussion on this phase of the construction process, see generally 4 W. BOWE & D. PARKER, PAGE ON WILLS §§ 30.6-.10 (rev. ed. 1961). Courts and legislatures, however, often promulgate the modern pro-inclusion constructional preference with a companion rule requiring that donor's contrary intent be expressed within the four corners of the instrument. *See infra* notes 98-99 and accompanying text. In this writer's view, a rigid rule rejecting extrinsic evidence in all cases is a mistake.

average man and hence its policy should be followed unless the benefactor explicity reveals a contrary purpose."[86]

A. *Instruments Executed by an Adoptive Parent*

As a general rule, a class gift that designates the transferor's own "children," "issue," or "heirs" includes a child adopted by the transferor himself. This is generally true even when the adoption takes place after execution of the dispositive instrument.[87] A few courts have departed from this general rule to avoid letting the adoptee take in two capacities when the adoptor-transferor is the adoptee's natural grandparent and the class gift includes both children and grandchildren of the transferor.[88]

B. *Instruments Executed by Someone Other than the Adoptive Parent*

The cases of greatest difficulty have been those in which an adoptee seeks to take under an instrument executed by someone other than the adoptive parent. The intent of the donor, not the adoptor, controls, but the donor's actual intent is usually nonexistent or unascertainable. Until quite recently the prevailing presumption was that when a person not a party to the adoption made a gift to someone else's "children," "issue," "grandchildren," or other class of relations, he did not intend to include anyone not biologically born into the class. This "stranger-to-the-adoption" doctrine, which presumptively barred one from entering a designated class by virture of adoption when the donor was not the adoptor,[89] probably reflected the traditional English reverence for bloodlines in inheritance and property dispositions. One must also remember that in the early twentieth century when this doctrine developed, adoption was not as widespread and socially accepted as it is today. Also, the adopted child in those days had only a limited status within his adoptive family under most state intestacy laws.

Even in its heyday, the "stranger-to-the-adoption" presumption yielded to an affirmative showing of intent to include the adoptee. One circumstance sometimes held to rebut the presump-

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86. *In re* Coe, 42 N.J. 485, 489, 201 A.2d 571, 574 (1964).

87. *See* Halbach, *supra* note 82, at 976 nn.23-28 and accompanying text; Note, *supra* note 82, at 928 nn.51-55 and accompanying text.

88. *See, e.g.*, Einstein v. Michaelson, 107 Misc. 661, 177 N.Y.S. 474 (Sup. Ct. 1919).

89. *See* 2 AM. JUR. 2D *Adoption* § 98 (1962); Halbach, *supra* note 82, at 978 nn.33-53 and accompanying text; Annot., 86 A.L.R.2d 12, 17 (1962).

tion was that the adoption antedated execution of the instrument and the donor knew of the adoption.[90] A less commonly employed exception was that if the parent of the designated class was apparently incapable of having children, the court would presume that the donor contemplated the possibility of children being adopted into the class.[91] If the donor designated the adoptor's "heirs" or "next of kin" as the beneficiary class, an adoptee could generally take because courts presumed that the donor referred to the applicable statutes of descent and distribution under which an adopted child would always be an heir of his adoptive parent.[92] A few courts drew distinctions between terms like "children" on the one hand and "issue" or "bodily heirs" on the other because they thought the latter terms had a peculiarly biological connotation.[93] Most courts, particularly in recent years, have questioned the usefulness of such distinctions.[94]

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90. *See, e.g.*, Mesecher v. Leir, 241 Iowa 818, 43 N.W.2d 149 (1959); *In re* McEwan's Estate, 128 N.J. Eq. 140, 15 A.2d 340 (Prerog. Ct. 1940); Estate of Breese, 7 Wis. 2d 422, 96 N.W.2d 712 (1959); *see also* 2 AM. JUR. 2D *Adoption* § 98 (1962); Annot., 86 A.L.R.2d 12, 18 (1962).

91. *See* Halbach, *supra* note 82, at 984 nn.62-63 and accompanying text.

92. On the other hand, if the donor designated his own "heirs" as the beneficiary class, an adoptee would not necessarily take because until quite recently adopted children were denied inheritance rights through their adoptive parents from their adoptive parents' lineal and collateral kindred.

93. *See, e.g.*, Poertner v. Burkdoll, 201 Kan. 41, 439 P.2d 393 (1968); Holter v. First Nat'l Bank & Trust Co., 135 Mont. 27, 336 P.2d 701 (1959); *In re* Fisler, 131 N.J. Eq. 310, 25 A.2d 265 (Prerog. Ct. 1942), *aff'd*, 133 N.J. Eq. 421, 30 A.2d 894 (1943), *overruled, In re* Thompson, 53 N.J. 276, 250 A.2d 393 (1969); *see also* Note, *supra* note 82, at 929-30 nn.53-65 and accompanying text.

94. As Chief Justice Weintraub commented:

> [W]e would not, as an original matter, distinguish among issue, descendants, children and heirs, since ordinarily the word is not selected by the testator but rather by the scrivener, who, if he were conscious of the question whether adopted children should be in or out, would elicit the testator's wish and express it unequivocally . . . . [A] competent draftsman would not deliberately pick a word which instead of controlling the context is easily colored by it.

In re Estate of Coe, 42 N.J. 485, 494, 201 A.2d 571, 577 (1964); *see also In re* Trusts Created by Agreement with Harrington, 311 Minn. 403, 410, 250 N.W.2d 163, 167 (1977). *In Harrington* Justice Scott of the Minnesota Supreme Court said:

> Given the judicial history of the rights of adopted children, the use of the term "issue of her body" without further elaboration is not sufficiently explicit to exclude an adopted child from the benefits of this trust. To hold otherwise would cast a cloud over this state's policy toward adopted children and add to the reports another mindless case based on sham "intent" manifested in virtually meaningless common-law phrases. This trustor, we believe, had no intent at all regarding inclusion or exclusion of adopted children. In such a case, a strong public policy provides a better reason for decision than an old common law phrase.

Id. at 410, 250 N.W.2d at 167. *Contra* Moore v. McAlester, 428 P.2d 266 (Okla. 1967). Al-

With family relationships routinely being established by adoption, courts have increasingly questioned the assumption underlying the "stranger-to-the-adoption" rule. The majority opinion in *In re Estate of Coe*[95] aptly expressed the judicial attitude prevailing today, saying:

> We cannot believe it probable that strangers to the adoption would differentiate between the natural child and the adopted child of another. Rather we believe it more likely that they accept the relationships established by the parent whether the bond be natural or by adoption and seek to advance those relationships precisely as that parent would. None of us discriminates among children of a relative or friend upon a biological basis . . . . We ought not impute to others instincts contrary to our own.[96]

Most courts which have had occasion recently to consider the issue have jettisoned the "stranger-to-the-adoption" rule and have replaced it with a presumption that a donor intends to include persons entering the designated class by adoption unless the instrument expressly excludes them.[97] One court has taken the emphatic view that explicit language must be used to exclude an adoptee so that no mere inference based on "interpretation of words which

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though Oklahoma had adopted the Uniform Adoption Act, which has a strong presumption in favor of adoptees, the Oklahoma Supreme Court in *McAlester* held that the adopted child of testator's daughter was not "issue of her body," explaining that the phrase " 'issue of her body' has a clear and well-defined meaning. It is not ambiguous or doubtful. It is such a phrase as is customarily used (as distinguished from the word 'issue') for one purpose and one purpose only to exclude adopted children from the class described." *Id.* at 270.

95. 42 N.J. 485, 201 A.2d 571 (1964).

96. *Id.* at 492, 201 A.2d at 575 (1964) (citations omitted). Justice Neely of the West Virginia Supreme Court expressed it more pungently. *See infra* note 112 and accompanying text.

97. *See, e.g., In re* Estate of Heard, 49 Cal. 2d 514, 319 P.2d 637 (1957); Brown v. Trust Co., 230 Ga. 301, 196 S.E.2d 872 (1973) (gift of remainder under testamentary trust to testator's "nephews and nieces" presumptively includes child adopted by one of testator's sisters); Elliott v. Hiddleson, 303 N.W.2d 140 (Iowa 1981) (gift of remainder to children's "lineal heirs" under testamentary trust presumptively includes child adopted by daughter after testator's death); *In re* Thompson, 53 N.J. 276, 250 A.2d 393 (1969) (postponed testamentary gift to daughter's "lawful issue" presumptively includes child adopted by daughter after testator's death); *In re* Estate of Coe, 42 N.J. 485, 201 A.2d 571 (1964) (bequest to "lawful children" of Theodora presumptively includes children adopted by Theodora after testatrix' death); Estate of Tafel, 449 Pa. 442, 296 A.2d 797 (1972) (gift of remainder to child's "children" under testamentary trust presumptively includes children adopted by son after testator's death); Vaughn v. Gunter, 458 S.W.2d 523 (Tex. Civ. App.), *aff'd*, 461 S.W.2d 599 (1970) (gift of remainder to son's "children" under *inter vivos* trust presumptively includes child adopted by son after settlor's death); Wheeling Dollar Sav. & Trust Co. v. Hanes, 237 S.E.2d 499 (W. Va. 1977) (gift of remainder to life beneficiary's "children" under irrevocable *inter vivos* trust presumptively includes children adopted by life beneficiary after settlor's death); *see also* McCaleb v. Brown, 344 So. 2d 485 (Ala. 1977); Wallin v. Torson, 88 Mich. App. 775, 279 N.W.2d 310 (1979); *In re* Estate of Park, 15 N.Y.2d 413, 207 N.E.2d 859, 260 N.Y.S.2d 169 (1965).

generations of careless draftsmen have taught are frequently used synonymously with child or children" will suffice to exclude adoptees from class gifts.[98] Moreover, although authority is scant, extrinsic evidence of an intent to exclude adoptees may not be admissible to rebut the new presumption.[99]

The complete turnabout just described has been effected in some states by the enactment of statutory presumptions favoring adoptees in the construction of class gifts.[100] In other states this turnabout represents a judicial response to the legislative policy expressed in modern statutes of putting adoptees on the same footing as biological children, thus granting the adopted child the same status as a natural child with respect to intestate succession by, from, and through his adoptive parents.[101] Courts that have judicially created the new presumption have reasoned that when the

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98. Wheeling Dollar Sav. & Trust Co. v. Hanes, 237 S.E.2d 499, 504 (W. Va. 1977); *accord* Weilert v. Larson, 84 Ill. App. 3d 151, 154, 404 N.E.2d 1111, 1113 (1980) (the term "issue of their body" does not show plain intent to exclude adoptee in view of statutory presumption that "an adopted child is deemed a natural child unless a contrary intent is plainly shown [by the terms of the instrument]"); *In re* Trusts Created by Agreement with Harrington, 311 Minn. 403, 250 N.W.2d 163 (1977). According to the *Harrington* court, "[a]dopted children are conclusively presumed to have the same rights as any other children under a will or similar document, unless adopted children are explicitly excluded . . . ." *Id.* at 411, 250 N.W.2d at 167. "The fact that trustor here used the term "issue of the body" rather than lawful issue is too slender a reed to outweigh that presumption." *Id.* at 408, 250 N.W.2d at 166 (footnoto omitted). *Contra* Moore v. McAlester, 428 P.2d 266 (Okla. 1967).

99. Gotlieb v. Klotzman, 369 So. 2d 798 (Ala. 1979) (judicial presumption favoring adoptee; court will not look beyond the "four corners of the instrument" unless latent ambiguities exist); Wilmington Trust Co. v. Chichester, 369 A.2d 701 (Del. 1976) (judicial presumption favoring adoptee; extrinsic evidence of intent to exclude inadmissible absent ambiguity in instrument itself), *aff'd*, 377 A.2d 11 (Del. 1977); Wielert v. Larson, 84 Ill. App. 3d 151, 404 N.E. 2d llll (1980) (statutory presumption requires that contrary intent plainly appear by the terms of the instrument).

100. *See, e.g.*, Brown v. Trust Co. of Georgia, 230 Ga. 301, 196 S.E.2d 872 (1973). Vaughn v. Gunter, 458 S.W.2d 523 (Tex. Civ. App.), *aff'd*, 461 S.W.2d 599 (1970) (applying 1951 statutory amendment codified in TEX. FAM. CODE ANN. § 16.09 (Vernon 1975)). Some of the statutory presumptions, like the Georgia enactment cited herein, apply only to the construction of wills, although a court might apply the presumption by analogy to an *inter vivos* transfer. U.P.C. § 2-611 states a rule of construction favoring the inclusion of adoptees, halfbloods, and illegitimate children in class gift terminology, but it too is limited to the construction of wills. U.P.C. § 2-611, 8 U.L.A. 151 (1982). Warner v. First Nat'l Bank, 242 Ga. 661, 251 S.E.2d 511 (1978), later overruled the decision in *Brown* on the question of the effective date of the law to be used in construing the instrument.

101. *See, e.g.*, Elliott v. Hiddleson, 303 N.W.2d 140 (Iowa 1981); *In re* Estate of Coe, 42 N.J. 485, 201 A.2d 571 (1964) (in construing 1897 instrument, court could not rely on statutory presumption expressly made applicable only to instruments executed after July 1, 1954); Wheeling Dollar Sav. & Trust Co. v. Hanes, 237 S.E.2d 499 (W. Va. 1977). For an interesting case in which a court surcharged trustees for failure to confirm an adoptee's status as a trust beneficiary once the jurisdiction's highest court adopted the new presumption, see Estate of Sewell, 487 Pa. 379, 409 A.2d 401 (1979).

donor's actual intent cannot be found, they should assume that his intent was in harmony with public policy. UPC section 2-611, which governs the construction of generic terms in wills, simply states that "adopted persons . . . are included in class gift terminology . . . in accordance with rules for determining relationships for purposes of intestate succession."[102]

C. *The Retroactivity Problem*

The "stranger-to-the-adoption"[103] rule may be buried in most jurisdictions, but it continues to rule from the grave in a surprising number of cases. The problem arises as follows: Donor executes an *inter vivos* or testamentary trust in 1920, providing for his daughter for life, with remainder to her "children" or "issue." Donor dies in 1921. Daughter later has both biological and adoptive children and dies in 1983, at which time the corpus becomes distributable. In 1920 when the donor executed the instrument, adopted children had only a limited status under the domiciliary state's intestacy laws, and the "stranger-to-the-adoption" rule was in full flower. By the time the life tenant dies in 1983 the jurisdiction has rejected the "stranger-to-the-adoption" presumption as unsoimd and has replaced it with a presumption favoring the inclusion of adoptees. In deciding whether the donor intended adoptees to share in the remainder, can the court apply the new presumption or must it apply the presumption in vogue when the donor executed the instrument (or, alternatively died) even though the court now feels the old presumption was a bad guide to donative intent? The courts have divided sharply on this issue.[104]

Occasionally, the retroactivity issue is felt to be decided by statute. Some statutes expressly provide for retroactive application of the new presumption.[105] If the new presumption is statutory and

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102. The inclusionary rule of U.P.C. § 2-611 is given retroactive effect by virtue of § 8-101(5) which provides that "any rule of construction or presumption providod in this Code applies to instruments executed . . . before the effective date unless there is a clear indication of a contrary intent." U.P.C. § 8-101(5), 8 U.L.A. 565 (1982).

103. *See supra* notes 89-94 and accompanying text.

104. For discussions on retroactive application of new rules of construction in construing dispositive instruments, see generally Halbach, *Stare Decisis and Rules of Construction in Wills and Trust*, 52 CALIF. L. REV. 921 (1964); Levin, *Section 6104(d) of the Pennsylvania Rule Against Perpetuities: The Validity and Effect of the Retroactive Application of Property and Probate Law Reform*, 25 VILL. L. REV. 213 (1980).

105. *See, e.g.*, MD. ANN. CODE art. 16, § 78(c) (1981). The pro-inclusion rule of U.P.C. § 2-611, when read together with U.P.C. § 8-101(5), has this effect as well; *see supra* note 102.

by its terms applicable only prospectively, the court may feel that the legislation itself forbids retroactive application of the modern constructional preference.[106] Even when the statute is silent on the matter, or when the pro-adoptee presumption is judicial in origin, however, a substantial number of courts have refused to apply the new rule to old instruments.[107] As one commentator has noted, this prospective-only approach results in a kind of "time layering," with different rules being applied and opposite results being obtained in identical transactions depending on the "effective time selected for choice of law."[108] It also produces unpredictability in the construction of older instruments with an attendant increase in litigation.[109]

At the root of decisions refusing to apply the new presumption of inclusion retroactively is an assumption that the average American citizen of fifty or eighty years ago would not have wished non-blood related adoptive family members to partake of his bounty. This assumption may or may not be true. We know that medieval England's feudal landholding system promoted a preoccupation with bloodlines.[110] We also know that, although feudal trappings like primogeniture never took hold in the United States, the British colonists largely incorporated English precedent into the fabric of American law. What we do not know is whether the common American citizen shared the xenophobia that American lawmakers

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106. *See, e.g.*, Shortridge v. Sherman, 84 Ill. App. 3d 981, 406 N.E.2d 565 (1980) (alternative holding). *But see In re* Estate of Coe, 42 N.J. 485, 201 A.2d 571 (1964). In *In re* Estate of Coe the legislature's enactment of a presumption applicable only prospectively did not stop the New Jersey Supreme Court from fashioning its own rule favoring adoptees and applying it retroactively, the majority's reasoning apparently being that since the courts made the "stranger-to-the-adoption" rule, the courts could abolish it before the legislative abolition became effective.

107. *See, e.g.*, Riggs Nat'l Bank v. Summerlin, 445 F.2d 201 (D.C. Cir.), *cert. denied sub nom.* Kelclner v. Summerlin, 404 U.S. 851 (1971); Nunnally v. Trust Co. Bank, 243 Ga. 42, 252 S.E.2d 468, *aff'd*, 244 Ga. 697, 261 S.E.2d 621 (1979) (second appeal); Wachovia Bank & Trust Co. v. Andrews, 264 N.C. 531, 142 S.E.2d 182 (1965); Central Trust Co. v. Bovey, 25 Ohio St. 2d 187, 267 N.E.2d 427 (1971).

108. Levin, *supra* note 104, at 215 (footnote omitted).

109. Some courts may chafe at the distasteful "stranger-to-the-adoption" rule and seek to escape its effects by the backdoor of "discovered" contrary intent speculatively gathered from unconvincing details of the particular litigation. For a lengthy examination of this phenomenon, see Halbach, *supra* note 82.

110. Since land was the primary source of political power, social status, and wealth, medieval English property owners naturally wished to keep family property in the family bloodlines. *See generally* T. BERGIN & P. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 9 (1966); 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 34-73, 171-85 (5th ed. 1942); 1 F. POLLOCK & F. MAITLAND, HISTORY OF ENGLISH LAW 363 (2d ed. reissued 1968).

so readily accepted from English legal precedent. A plausible legal argument can be made that courts should not apply the new pro-adoptee presumption to old instruments. Nevertheless, since we do not know how the average American citizen of yesteryear felt about adoptees, this writer believes it preferable to assume that his intent was consistent with the attitudes and policies behind our present overlapping adoption and succession laws.[111] As the West Virginia Supreme Court said in judicially promulgating the new pro-inclusion presumption for retroactive construction of a 1938 trust instrument:

> While there may be testators and trustors who are so concerned with medieval concepts of "bloodline" and "heirs of the body" that they would truly be upset at the thought that their hard-won assets would one day pass into the hands of persons not of their blood, we cannot formulate general rules of law [presumably the court meant rules of construction] for the benefit of eccentrics.[112]

Opinions refusing to give the new pro-adoptee presumption retroactive application have offered a confusing array of reasons. Courts have said (1) that to apply the new presumption retroactively would constitute a deprivation of property without due process of law in violation of the fourteenth amendment;[113] (2) that

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111. For a recent appellate decision following this tack, see *In re* Sollid, 32 Wash. App. 349, 647 P.2d 1033 (1982).

112. Wheeling Dollar Sav. & Trust Co. v. Hanes, 237 S.E.2d 499, 503 (W. Va. 1977). In the New Jersey *In re Estate of Coe* decision the writer of the majority opinion commented, "nor should be [sic] think we are different from our ancestors of 1877 . . . . [T]he adoption act of that year [referring to New Jersey's first general adoption statute] did not amend human nature; it yielded to it." 42 N.J. 485, 492, 201 A.2d 571, 575 (1964).

113. *See, e.g.*, Wachovia Bank & Trust Co. v. Andrews, 264 N.C. 531, 142 S.E.2d 182 (1965). The traditional assumption has been that a court cannot apply a substantive rule retroactively to divest or diminish a vested property interest. Not all courts have agreed with this assumption and the Supreme Court has never definitively decided the issue. *See* Levin, *supra* note 104, at 216, 223, 226-31. In favor of the new rule's retroactive application to class gifts, it may be argued that all class gifts are by nature subject to fluctuation (increase or decrease of class membeship) and that accordingly class gifts cannot be said to be totally vested until further fluctuation is rendered impossible by distribution or by some other event. However, because of the elusive and chameleon-like quality of concepts like vested versus contingent and substantive versus procedural, any attempt to decide questions of retroactive application on the basis of whether the interest in question vested before the enunciation of the new rule or whether the rule is substantive or procedural is bound to lead to chaotic results and ultimate judicial despair. *See* State St. Bank & Trust Co. v. D'Amario, 368 Mass. 542, 333 N.E.2d 407 (1975). Distinctions based on whether the change is judicial or legislative also fall in the category of distinctions without a difference because the practical effect of retroactive application is the same whether the rule is judicial or legislative. Obviously, once property has been distributed to a class of beneficiaries under the old rule, a new rule cannot be used to divest the beneficiaries of what they have already received. Beyond that, courts must decide the question of retroactive application *vel non* on the basis

the best guide to a donor's actual intent is the law existing at the time the donor executed the instrument or, alternatively, at the time of the donor's death;[114] (3) that the donor or his drafter relied on the then existing state of the law in framing his dispositions;[115] and (4) that an intent to exclude the adoptee is discernable from the instrument as a whole so that reliance on any presumption, new or old, is unnecessary.[116] Particularly confusing are the opinions that glide from one reason to an inconsistent reason in a manner which makes the actual basis of the court's refusal to apply the new rule impossible to discern.[117]

Despite the reliance argument and the other objections just noted, a considerable number of courts have been willing to apply the new pro-adoptee rule of construction to old instruments.[118] The reasoning of the court in *Haskell v. Wilmington Trust Com-*

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of fairness and practical policy. For a more extensive discussion and suggestions regarding the proper criteria for deciding questions of retroactivity, see Levin, *supra* note 104.

114. *See, e.g.*, Riggs Nat'l Bank v. Summerlin, 445 F.2d 201 (D.C. Cir.), *cert. denied sub nom.* Kelchner v. Summerlin, 404 U.S. 851 (1971); Nunnally v. Trust Co. Bank, 244 Ga. 697, 261 S.E.2d 621 (1979); Shortridge v. Sherman, 84 Ill. App. 3d 981, 406 N.E.2d 565 (1980) *cert. denied sub nom.* Shartel v. Blasingham, 450 U.S. 921 (1981); Central Trust Co. v. Bovey, 25 Ohio St. 2d 187, 267 N.E.2d 427 (1971).

115. *See, e.g.*, Riggs Nat'l Bank v. Summerlin, 445 F.2d 201 (D.C. Cir.), *cert. denied sub nom.* Kelchner v. Summerlin, 404 U.S. 851 (1971).

116. *See, e.g., id.*; Wachovia Bank & Trust Co. v. Andrews, 264 N.C. 531, 142 S.E.2d 184 (1965).

117. Riggs Nat'l Bank v. Summerlin, 445 F.2d 201, 208 (D.C. Cir.), *cert. denied sub nom.* Kelchner v. Summerlin, 404 U.S. 851 (1971), is an example. The majority began by purporting to find an actual intent to exclude adoptees based on factors the import of which were a "mystery" to the dissenting judge as well as this writer, but ended up with the reason that "the draftsman must have known and relied upon the long-established principle in the construction of wills that the law which may be regarded as relevant in ascertaining the intent of the testator is that which was in existence at the time of his death." *Id.* at 208 (citations omitted). Another example is Wachovia Bank & Trust Co. v. Andrews, 264 N.C. 531, 142 S.E.2d 182 (1965). The court began by saying that retroactive application of a pro-adoptee statutory presumption by its terms applicable retroactively would violate the federal and state constitutions. In response to counsel's argument that this application would not be constitutionally infirm because the presumption merely created a rule of evidence to employ in ascertaining the testator's intent when the donor executed the will, the court switched to the argument that the word "born" in the disposition indicated an intent to exclude adoptees. Besides entertaining doubts regarding the significance of the passing use of the word "born" in introducing a class, this writer was left wondering whether or not the court would have applied the new presumption had the word "born" not appeared in the instrument.

118. *See, e.g.*, Gotlieb v. Klotzman, 369 So. 2d 798 (Ala. 1979); Haskell v. Wilmington Trust Co., 304 A.2d 53 (Del. 1973); Elliott v. Hiddleson, 303 N.W.2d 140 (Iowa 1981) (retroactive application without discussion of the issue); *In re* Thompson, 53 N.J. 276, 250 A.2d 393 (1969); *In re* Estate of Coe, 42 N.J. 485, 201 A.2d 571 (1964); Wheeling Dollar Sav. & Trust Co. v. Hanes, 237 S.E.2d 499 (W. Va. 1977).

pany[119] shows that a court which favors retroactive operation can also play the reliance-intent game with a different outcome, of course. The Delaware Supreme Court in *Haskell* justified retroactive application of the new presumption on the ground that when a donor makes a gift to a class whose membership is determinable in the indefinite future, he is presumed to know that the laws governing membership in the class may change prior to distribution and, therefore, is presumed "to have intended that the statutes in effect at the time the gift becomes operative be resorted to in determining membership in the class."[120]

A more realistic approach is to recognize frankly that we do not know what the typical donor *circa* 1920 would have said (had he been asked) about an adoptee sharing his gift. Thus, any reliance on the state of the law governing the status of adoptees, whether it be existing law or the law that may develop in the future, is largely mythical or, as Justice Cardozo might have said, is "a figment of excited brains."[121] In the vast majority of cases the donor or his drafter probably did not think about the matter at all, much less rely on the law to fill in the donor's intent.[122] Once this is recognized, concerns about violating some reliance interest or unconstitutionally divesting a property disposition disappear. In using the new presumption, the court is simply applying an evidentiary rule that it believes best reflects the attitudes of the average person, not only now but also at the time of the instrument's execution.[123] In those extremely rare cases when the instrument reliably reveals an actual intent one way or the other, courts still will respect the donor's justifiable reliance on his own clearly expressed intent.

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119. 304 A.2d 53 (Del. 1973); *see also* Wilmington Trust Co. v. Huber, 311 A.2d 892 (Del. Ch. 1973).

120. 304 A.2d at 54 (quoting Major v. Kammer, 258 S.W.2d 506, 508 (Ky. 1953)).

121. The picture of the bewildered litigant lured into a course of action by the false light of decision, only to meet ruin when the light is extinguished and the decision is overruled, is for the most part "a figment of excited brains." B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 122 (1921).

122. As Professor Halbach points out,

> [i]f a question concerning the disposition of property under certain conditions occurs to a lawyer while drafting a non-negotiated, unilateral instrument, *even if he knows* the relevant rule, he does not deliberately omit covering the point in reliance upon a presumption of intent, especially one that is overcome by faint—or imagined—glimpses of contrary intent.

Halbach, *supra* note 104, at 947.

123. For cases appearing to follow this approach, see *In re* Thompson, 53 N.J. 276, 250 A.2d 393 (1969); *In re* Estate of Coe, 42 N.J. 485, 201 A.2d 571 (1964); Wheeling Dollar Sav. & Trust Co. v. Hanes, 237 S.E.2d 499 (W. Va. 1977).

D. Adopted-Away Children

Thus far this Article has been concerned with the constructional rules that determine whether class designations like "children" or "issue" in private dispositive instruments should *include* persons who allege membership in the class by virtue of adoption. The converse of this problem is whether courts should hold these terms to *exclude* persons who have been adopted-out of the donor's biological family. Suppose, for example, that *T* executes a testamentary trust directing paying of income to his son, *S*, for life, with corpus distributable to *S*'s children. When *T* executes the will, *S* is married to *W* and has a biological child, *X*. After *T*'s death *S* and *W* divorce. *W* remarries, whereupon *S* consents that *W*'s new spouse, *X*'s stepfather, adopt *X*. *S* also remarries and has another biological child, *Y*. In a state which follows the modern view that adoption removes the adoptee from the bloodstream of his biological family, at least for the purposes of intestate succession, should *X* share in the distribution of corpus along with *Y*? Should it make any difference that the adoption-out was to a complete stranger rather than to a stepparent or to some other person known to the biological family?

Athough a few cases concern gifts from a relinquishing parent to his own children, most involve instruments executed by a more remote relative—usually a grandparent or great-aunt of the adopted-out child. Many of the cases involve stepparent adoptions as illustrated above. Since divorce is epidemic, more and more cases like this will arise to plague the courts.

Although many factual variations exist, typically the problem is that the child meets the class description when the donor executes the instrument, but because of a subsequent adoption-out or change in state law, no longer meets the class description when the gift becomes distributable. Yet the issue is not the technical status of the child in the eyes of the law. Strictly speaking, the issue is whether this particular donor meant to include the adopted-out child whether or not he technically answers the class description. As some judges have said, "[t]he question . . . is one of identity of donees, not the right of inheritance."[124] The task then is to find the

124. Estate of Garrison, 175 Cal. Rptr. 809, 816 (1981). Similarly, in *In re* Estate of Daigle, 642 P.2d 527, 529 (Colo. Ct. App. 1982) the court said "[t]he question . . . is 'one of identity and not the right of inheritance.'" *Id.* (quoting with approval from Monroney v. Mercantile-Safe Deposit & Trust Co., 291 Md. 546, 556, 435 A.2d 788, 793 (Md. App. 1981), which in turn quoted with approval from *In re* Taylor's Estate, 357 Pa. 120, 124, 53 A.2d 136, 138 (1947)).

donor's intent at the time he executed the instrument. Alas, once again, the instrument itself does not address the question, and what the donor would have said had he thought about the matter is anyone's guess.

The courts are sharply divided on how to deal with the adopted-out child in the class gift setting, some including and others excluding the claimant on comparable facts.[125] For example, two 1981 decisions, *Crumpton v. Mitchell*[126] and *Estate of Garrison*,[127] reached opposite conclusions in construing instruments made by relatives other than the relinquishing parent before the claimants were adopted-out to stepparents. In each case the adoption-out did not occur until after the donor's death. *Crumpton* concerned a deed to Ruth Crumpton for life, remainder to Ruth's living issue per stripes. One of Ruth's sons predeceased her, leaving five children, two of whom were adopted-out to their stepfather before Ruth died. The North Carolina Supreme Court refused to let the adopted-out claimants take along with the remaining issue

125. Several tangential issues concerning adopted-out children exist. For example, should a court deem an adopted-out child unmentioned in the will of his relinquishing biological parent pretermitted? Most cases have held that the answer should be "no." *See, e.g.*, Estate of Dillehunt, 175 Cal. App. 2d 464, 346 P.2d 245 (1959); Wailes v. Curators of Central College, 363 Mo. 932, 254 S.W.2d 645 (1953). Conversely, most courts have held that an adopted-in child should come within the pretermitted child statute applicable to his own adoptor's will. *See, e.g., In re* Estate of Frizzell, 156 So. 2d 558 (Fla. Dist. Ct. App. 1963), *cert. dismissed*, 162 So. 2d 666 (1964); *In re* Matter of Jackson, 117 N.H. 898, 379 A.2d 832 (1977); *In re* Will of Stier, 74 Misc. 2d 634, 345 N.Y.S.2d 913 (1973). Similarly, the question arises whether courts should deem adopted-out children class A beneficiaries of their biological relatives for inheritance tax purposes. The courts have gone both ways on this issue. *See, e.g.*, People v. Estate of Murphy, 29 Colo. App. 195, 481 P.2d 420 (1971); Estate of Carlson, 479 Pa. 421, 388 A.2d 726 (1978). *But see* Estate of Dennery, 52 Cal. App. 3d 393, 124 Cal. Rptr. 910 (1975); Barnum v. Department of Revenue, 270 Or. 867, 530 P.2d 28 (1974). Adopted-in children should qualify, as most cases have held, for preferable inheritance tax treatment when taking from their adoptive relatives. *See, e.g., In re* Estate of Iacino, 189 Colo. 513, 542 P.2d 840 (1975); Palmer v. Kingsley, 27 N.J. 425, 142 A.2d 833 (1958); *In re* Will of Clark, 87 N.M. 108, 529 P.2d 1229 (1974). Finally, the question arises whether adopted-out children should qualify as "heirs" or "issue" to prevent a lapse under antilapse statutes designed to carry out the donor's presumed intent to save the gift of a predeceased blood relative for the relative's issue. Except for stepparent adoptions and other relative adoptions, the answer should he "no." *See, e.g., In re* Estate of Goulart, 222 Cal. App. 2d 808, 35 Cal. Rptr. 465 (1963); Turner v. Weeks, 384 So. 2d 193 (Fla. Dist. Ct. App. 1980). *But see* Estate of Esposito, 57 Cal. App. 2d 859, 135 P.2d 167 (1943). For discussion of an analogous problem, see *supra* text accompanying note 124. Adopted-in children clearly should qualify under the terms of antilapse statutes, and most courts have so held. *See, e.g., In re* Estate of Blacksill, 124 Ariz. 130, 602 P.2d 511 (1979); *In re* Estate of Baker, 172 So. 2d 268 (Fla. App. 1965); Headen v. Jackson, 255 N.C. 157, 120 S.E.2d 598 (1961). *But see* Arnold v. Helmer, 327 Mass. 722, 100 N.E.2d 886 (1951).

126. 303 N.C. 657, 281 S.E.2d 1 (1981).

127. 122 Cal. App. 3d 7, 175 Cal. Rptr. 809 (1981).

of Ruth, holding that the term "issue" excludes "persons adopted-out of the family unless a contrary intent plainly appears from the terms of the deed."[128] The court referred to the state's adoption and intestacy laws making the adoptee a legal stranger to his biological bloodline and reasoned that it should resolve any constructional problem by asking whether the claimant could take under the instrument had he been born into his adoptive family instead of his biological family.[129] Any other approach, the court said, would violate the spirit of state laws severing the adoptee from his natural family. *Garrison* concerned a substitutional gift of corpus under a testamentary trust to the lawful issue of any son who predeceased the income beneficiary, testator's wife. The adopted-out claimants in *Garrison* were the only grandchildren the testator had at the time he executed his will. The California appellate court included the *Garrison* claimants, reasoning that because they were still a part of the biological family when the testator executed his will they were indentifiable as objects of his donative intent and that this intent was not affected by their later "unanticipated adoption."[130] The *Garrison* court distinguished *Estate of Russell*,[131] an earlier California appellate case reaching the opposite result, on the ground that the excluded great-grandchild was born after testator Russell's death and, therefore, was never know to him. Justice Langford dissented from the *Garrison* majority's refusal to follow *Russell*. The dissent urged that in the interest of predictability and uniformity of will construction, the law should presume a testator to have had an intent compatible with state law regarding the modern-day consequences of adoption unless he has affirmatively expressed a contrary intent.[132]

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128. 303 N.C. at 665, 281 S.E.2d at 6.

129. *Id.* at 663, 281 S.E.2d at 5 (quoting with approval *A Survey of Statutory Changes in North Carolina in 1955*, 33 N.C.L. REV. 513, 522 (1955)).

130. 175 Cal. Rptr. at 815. The Wisconsin Supreme Court made this identity approach even more explicit in Estate of Zastrow, 42 Wis. 2d 390, 166 N.W.2d 251 (1969). *Zastrow* concerned a substitutional gift to the "children of the body" of her nephew, Robert, in the event he predeceased her, which he did. The stepfather of Robert's two sons (testatrix' great-nephews) adopted them after the testatrix executed her will but before she died. In holding that these adopted-out great-nephews took under the will the court seemed to reason that they clearly were identifiable as the children of the body of Robert when the testatrix executed her will. Therefore, according to the court, they were the objects of the testatrix' donative intent as fully as if the will named them by name, and their later adoption did not affect this intent.

131. 17 Cal. App. 3d 758, 95 Cal. Rptr. 88 (1971).

132. An interesting sidenote is that the *Garrison* grandmother who lived to see the adoption-out of these grandsons "cut [them] off without a sou." 175 Cal. Rptr. at 819. Of course, as the dissent pointed out, the grandmother's actions could not "be used to impute a

Several cases have presented instruments executed years after the claimant's adoption out of the family. *Commerce Trust Co. v. Duden*[133] dealt with an *inter vivos* trust. At the settlor's death the corpus was to be divided into separate trusts for the benefit of the settlor's sons or, upon certain contingencies, for the benefit of their "children, both natural and adopted." One of the settlor's sons had relinquished his only child to the child's stepfather twenty years before the trust's execution. The *Duden* court excluded the settlor's adopted-away grandson. It did so by imputing to the settlor an awareness of the legal consequences of adoption and presuming that the settlor meant to include only those persons legally in her son's bloodstream. "Any other conclusion," the court said, "would do violence to the adoption laws of this state and the public policy embodied therein.[134] In *Monroney v. Mercantile-Safe Deposit and Trust Co.*[135] the presumption that the donor was aware of existing state law at the time of execution worked to produce the opposite result. As in *Duden*, the adoption-out in *Monroney* occurred years before the donor executed the trust. At the time the donor executed the testamentary trust, however, state law still permitted adoptees to inherit from their biological relatives. The law was not amended to remove adopted-away children from their biological bloodstream until after the testatrix died. The court first found an intent not to exclude claimant from the fact that the testatrix knew of the adoption-out and still used class gift terminology. It then went on to hold for the claimant, reasoning that the subsequent changes in the state's adoption and intestacy laws did not affect testatrix' intent. As the *Monroney* court saw it, "[w]hen Edna signed her will and when she died Michael was the son of John even though he was adopted-out of the family of John." *Ergo*, "Edna's gift to the children of John includes Michael."[136] Interestingly, the North Carolina Supreme Court in *Crumpton* anticipated and rejected this line of argument, stating that its exclusionary construction would apply "regardless of whether the [instrument] was executed before or after entry of the final order of adoption

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similar state of mind to the testator at the time he drew the will." *Id.* Her disherison of these grandchildren, however, does throw ice water on the majority's assumption that any grandparent who knew the grandchildren would want to provide for them even if they were later adopted-out of the family. 175 Cal. Rptr. at 819.

133. 523 S.W.2d 97 (Mo. Ct. App. 1975).

134. *Id.* at 101.

135. 435 A.2d 788 (Md. 1981).

136. *Id.* at 796.

and regardless of whether it was executed before or after enactment of [the statute construed to exclude adopted-out children from class gift terminology]."[137]

A 1982 case, *In re Estate of Best*,[138] allowed an illegitimate son adopted out to strangers twenty-one years before his biological grandmother made her testamentary trust to share in income distributions under the trust along with a later born legitimate grandchild. The court felt driven to this result by New York's statute that severed intestate succession ties between the adoptee and his biological family but stated that its terms "shall not affect the right of any child to distribution of property under the will of his natural parents or their natural . . . kindred . . . ."[139] Noting the mischief a potential adopted-out class of lurking unknown beneficiaries might create in the settlement of estates, the court urged the New York legislature to amend its statute to bar such claimants from taking under the wills of their biological kindred unless expressly included.[140]

As noted, a few cases have dealt with instruments that the relinquishing parent himself executed. In *DePrycker v. Brown*[141] the court held a residuary gift to the decedent's own "children who survive" to exclude the testator's biological child by a prior marriage whom the testator's ex-wife's second husband had adopted.[142] A 1982 Colorado case, *In re Estate of Daigle*,[143] reached the opposite result. The court allowed adopted-out children of a first marriage to take along with the children of a second marriage under the will of their biological father. The *Daigle* court reasoned that the laws in effect when the testator executed his will barred only intestate succession from the child's biological father and, thus, did not affect what the court viewed as the primary meaning of the term "children" in his will.

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137. 303 N.C. at 665, 281 S.E.2d at 6.

138. 116 Misc. 2d 365, 455 N.Y.S.2d 487 (Sur. Ct. 1982).

139. *Id.* at 368-69, 455 N.Y.S.2d at 490 (quoting N.Y. DOM. REL. LAW. § 117 (McKinney 1977)). The court also speculated that the testatrix' knowledge of the birth and adoption-out of her illegitimate grandchild coupled with her failure to exclude the grandchild by limiting the income gift to her daughter's lawfully begotten issue meant that the testatrix did not intend to exclude her illegitimate grandchild.

140. 116 Misc. 2d at 375, 455 N.Y.S.2d at 494.

141. 358 So. 2d 1140 (Fla. Dist. Ct. App. 1978).

142. The court followed an earlier Florida decision that used the adoption statute's severence of legal ties between adoptees and their natural parents to deny an adopted-out child a claim for the wrongful death of his biological father. *See* Gessner v. Powell, 238 So. 2d 101 (Fla. 1970).

143. 642 P.2d 527 (Colo. App. 1982).

The colliding holdings and competing rationalia of the cases just surveyed cry out for guidelines to bring predictability to this corner of the law. In all but one of the cases reviewed the donor's intent ranged from completely unascertainable to speculative at best. Absent a clear indication of inclusionary intent, decisions like *Crumpton v. Mitchell* and *Commerce Trust Co. v. Duden*[144] seem justified in presuming that the donor's intent was compatible with the public policy expressed in modern statutes removing the adopted child from the blood stream of his biological family.[145] This exclusionary presumption represents the better approach. One aspect of the *Crumpton* and *Duden* decisions, however, did give this writer some pause. In each case the court held that the exclusionary presumption would control unless the instrument itself plainly expressed a contrary intent. Because the issue still is what the donor in fact intended, we should not applaud any absolute prohibition of extrinsic evidence without examining its reason.[146] When such reason does not exist, neither should the prohibition.

One may defend a strict exclusionary rule such as the rule the *Crumpton* and *Duden* courts applied on the ground that it is needed to facilitate the expeditious settlement of trusts and estates and to foster predictability in the construction of class gifts.[147] Specifically, a rule giving adopted-out persons access to the wills and trusts of long lost relatives invites jurisdictional mishaps described by Surrogate Judge Brewster in *In re Estate of Best*[148] as follows:

> Where . . . a child is adopted out of the family and the will directs distribution to a class of which the adopted out child would be a member, the failure to cite such adopted out child results in a failure to achieve complete jurisdiction. As the existence of an adopted out child may not be known to biological kindred of the adopted out child making a will directing distribution to a class, a careful will draftsman must protect against this contingency to avoid

144. For a discussion of *Crumpton* and *Duden*, see *supra* notes 126, 128-29 & 133-34 and accompanying text.

145. The exclusionary presumption of *Crumpton* and *Duden* has been codified in WIS. STAT. ANN. § 851.51(3) (West 1971).

146. For example, the court should disallow extrinsic evidence if it is of questionable reliability or if there is a sound policy reason for excluding it.

147. Justice Langford made this argument dissenting in *Estate of Garrison*, when he said: "The truth is we do not and cannot know what the testator's intent would have been with respect to adoption-out, if he had thought about it. There should be some degree of uniformity and predictability in the construction of wills under these circumstances." 175 Cal. Rptr. at 819 (Langford, J., dissenting).

148. 116 Misc. 2d 365, 455 N.Y.S.2d 487 (Sur. Ct. 1982).

a possible failure of jurisdiction in a subsequent proceeding.[149]

Moreover, lenient evidentiary rules that allow claimants to get their feet in the door may encourage adoptees to declassify their adoption files and to do some fortune hunting among their biological roots.[150] Accordingly, Judge Brewster urged passage of a proviso denying adopted-out claimants access to the wills of their biological kindred unless expressly included. Judge Brewster warned that "[t]o continue the existing statute without amendment will give rise to litigation, delays in the settlement of estates and the distribution of property to persons not only unknown to a testator but to unintended beneficiaries."[151] Yet cases may arise that do not present the dangers just described. Some flexibility should be retained for such cases.

This writer suggests a compromise between the absolute bar to extrinsic evidence à la *Crumpton* and *Duden* urged by Judge Brewster and a rule permitting extrinsic evidence in all class gift

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149. *Id.* at 375, 455 N.Y.S.2d at 493.

150. As Judge Brewster put it, failure to achieve total severance in succession matters:

> presents a reason to seek to breach the privacy of adoption proceedings which the legislature has provided the adopted child, the natural parents and the adoptive parents. It is not unreasonable to anticipate that resourceful adopted children, learning of this statute, will seek to break the seal and open their adoption proceedings to obtain the names of their natural parents and their kindred with a view to obtaining information which will lead them to wills of biological kindred which contain directions for distribution to a class of which they are members.

Id. at 375, 455 N.Y.S.2d at 493-94.

151. *Id.* at 375, 455 N.Y.S.2d at 494. Morris v. Ulbright, 558 S.W.2d 660 (Mo. 1977), illustrates the mischief even a known adopted-out claimant may cause. The *Ulbright* grantors, after reserving a life estate for themselves, deeded real property to their son "Logan . . . and his bodily heirs." Under Missouri law this created a life estate in Logan Sr. with a contingent remainder in fee in Logan Jr., Logan Sr.'s only child. Three years after execution of the fee tail deed Logan Jr.'s stepfather adopted him. After the grantors died, Logan Sr. and the other heirs conveyed the land to a couple named Alspaugh. Apparently, the parties to this conveyance believed that they represented all outstanding interests in the property. Following the death of Logan Sr., the Alspaughs conveyed the property to Dorothy and Ralph Ulbright. Whether or not these Ulbrights were related to the original grantors is not clear. After his last conveyance the adopted-out Logan Jr. swept in from the wings to snatch title as Logan Sr.'s bodily heir from the Ulbrights who, following an attorney's advice that their title was good, had already improved the land. The Missouri Supreme Court held for the adopted-out Logan. The court's theory was that Logan Jr. took as a purchaser under the original fee tail deed rather than as an heir of his father and that, therefore, the Missouri statute cutting off all ties between an adoptee and his natural parents did not prevent him from taking title under the deed. The dissent rightly criticized the majority for failing to ask whether a child adopted out by his biological father can any longer be described as his biological father's bodily heir, whether he claims as a purchaser under a deed or by inheritance from such biological father. The Ulbrights, in a separate proceeding, sought unsuccessfully to recover the value of their improvements from Logan Jr. *See* Morris v. Ulbright, 591 S.W.2d 245 (Mo. Ct. App. 1979).

cases involving adopted-out claimants. A real difference exists between the in-family adoption and the adoption to strangers. With in-family adoptions the adoptee's new name and whereabouts remain known to his biological kindred; with adoptions to strangers, by contrast, the new identity and whereabouts of the adoptee is purposely hidden from his biological family. Because of the jurisdictional uncertainties, instability of titles, and other mischief a potential class of unknown beneficiaries may inject into the settlement of trusts and estates, the courts should refuse to consider evidence outside the instrument itself in any case in which the adoption-out was to strangers. If donors want to include adopted-out relatives with whom they no longer have contact, the law should require them to say so in the instrument itself. When, however, the adoptee and his biological relatives continue to know each other because the adoption occurred within the biological family, the hazards catalogued by Judge Brewster in *In re Estate of Best*[152] are not as great. Therefore, a court, in its discretion, may permit extrinsic evidence of the donor's actual intent without compromising the expeditious settlement of trusts and estates.

VI. The Impact of Adult Adoptions on Intestate Succession and Class Gifts

Adult adoptions pose special problems in the application of intestacy laws and the construction of class gifts. The adoption of an adult is not an uncommon occurrence. Adult adoptions are being increasingly utilized for a variety of social and economic purposes and today enjoy widespread recognition within our legal system. Thus, while two states flatly prohibit the adoption of an adult[153] and some others restrict the practice by requiring a specified age differential or relationship between the adoptor and his adult adoptee,[154] most states permit adult adoptions without quali-

152. *See supra* notes 148-51 and accompanying text.

153. *See* Appeal of Ritchie, 155 Neb. 824, 53 N.W.2d 753 (1952); Ariz. Rev. Stat. Ann § 8-102 (Supp. 1974-1983).

154. *See, e.g.*, Cal. Civ. Code § 227p (West 1982) (adoptee must be younger than adoptor); Hawaii Rev. Stat. § 578-1.5 (1976) (adoptee must be the adoptor's niece, nephew, or stepchild); N.J. Stat. Ann § 2A:22-2 (Supp. 1983-1984) (adoptee must be at least 10 years younger than adoptor); P.R. Laws Ann. tit. 31, § 531 (1967) (adoptee must be at least 16 years younger than adoptor). Such restrictions do little to alleviate the problems that adult adoptions pose. Some states require a showing that the adoptee lived with the adoptor a specified number of years or that he had a filial relationship with the adoptor during his minority. *See, e.g.*, Idaho Code § 16-1501 (1979) (adult adoption allowed only if adult would have been adopted as a minor but for the adoptor's inadvertence); Ill. Rev. Stat. ch. 40, §

fication. Moreover, the statutory procedures are generally much simpler for adult adoptions than for child adoptions.[155] In most adult adoption cases, for example, there is no home investigation nor is parental consent required.[156] As one court commented, "[a]doption of adults is ordinarily quite simple and almost in the nature of a civil contract."[157] The adoption need not change the life-style of either party to the adoption as the obligation of support and other parental obligations associated with the adoption of a minor do not exist in the case of adult adoptions.[158] Indeed, in many cases the adoptee, who may have children of his own, does not change his surname, live with the adoptor, or change his life in any way following the adoption.[159]

The motives revealed in adult adoption cases are a testament to the fertility of human imagination. A wealthy, unmarried attorney adopted his stenographer-mistress, who was married to another, in order to deny his blood relatives standing to contest his will in her favor.[160] Tax conscious individuals have adopted collateral relatives or strangers in an effort to qualify them for the lower inheritance tax rate reserved for lineal relatives.[161] A Colorado adoption was consummated to circumvent a zoning ordinance restricting residential use of property to related individuals.[162] In New York, where the highest court recently held private homosex-

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1504 (1980) (unrelated adult adoptee must have resided with adoptor for two years); OHIO REV. CODE ANN. § 3107.02 (Page 1980 & Supp. 1982) (adult may be adopted ouly if disabled, mentally retarded, or if adoptor and adoptee established a child-parent relationship while adoptee was still a minor); VA. CODE § 63.1-222 (1980) (adoptee must have resided with adoptor for one year during minority).

155. Wadlington, *Adoption of Adults: A Family Law Anomaly*, 54 CORNELL L. REV. 566, 571-73 (1969); Note, *Adult Adoptions*, 1972 WASH. U.L.Q. 253, 257-58 (1972).

156. Wadlington, *supra* note 155, at 571-73; Note, *supra* note 155, at 257-58. Some states, however, do require that the adoptor's spouse consent to the adoption of another adult. *See, e.g.*, CAL. CIV. CODE § 227p (West 1982); CONN. GEN. STAT. ANN. § 45-67 (1981); PA. STAT. ANN. tit. 23, § 2711 (Purdon Supp. 1983-1984).

157. *In re* Estate of Griswold, 140 N.J. Super. 35, 52, 354 A.2d 717, 726 (1976).

158. A California case, Williams v. Ward, 15 Cal. App. 3d 381, 384-87, 93 Cal. Rptr. 107, 109-11 (1971), noted these distinctions between adult and child adoptions. For a more detailed treatment of the differences between adult and child adoptions, see Wadlington, *supra* note 155, at 570-74; Note, *supra* note 155, at 255-60.

159. *See, e.g., In re* Estate of Fortney, 5 Kan. App. 2d 14, 611 P.2d 599 (1980); Evans v. McCoy, 291 Md. 564, 436 A.2d 436 (1981); *In re* Estate of Griswold, 140 N.J. Super. 35, 354 A.2d 717 (1976).

160. *See* Greene v. Fitzpatrick, 220 Ky. 590, 295 S.W. 896 (1927).

161. *See, e.g.*, McLaughlin v. People, 403 Ill. 493, 87 N.E.2d 637 (1949). This ploy will not work in states like Colorado that have enacted provisos denying adult adoptees inheritance tax breaks reserved for child adoptees. COLO. REV. STAT. § 39-23-112 (1982).

162. *See* W.D.A. v. City & County of Denver, 632 P.2d 582 (Colo. 1981).

uality between consenting adults constitutionally protected from prosecution,[163] homosexual couples are beginning to use adoption as a vehicle for gaining formal recognition as a family unit.[164] Adoptions like the ones just described may become routine because, as a New York judge recently noted, "the trend, in most jurisdictions in recent years has been to loosen restrictions and to deemphasize the benefits to the parties and the motive for adoption when the adoptee is an adult."[165] Adult adoptions are frequently motivated by a desire to manipulate succession by qualifying the adoptee as an heir or bringing him within the terms of a pre-existing trust or devise to prevent the vesting of a substitutional gift-over. In the private class gift setting these attempts to redirect the original donor's bounty through adoption invariably take place long after the donor has died. In a 1973 Minnesota case, *In re Adoption of Berston*,[166] the twenty-nine year old petitioner sought to adopt his fifty-three year old mother to bring her within the terms of a trust his late father had made after divorcing the mother to benefit the petitioner, the petitioner's issue, or an educational institution.[167] The Minnesota Supreme Court allowed the adoption but refused to say whether its decree would qualify the fifty-three year old adoptee as a trust beneficiary. Two justices dissented on the ground that an adoption "for the sole purpose of frustrating the intent of an express trust"[168] violated public policy.

As *Berston* illustrates, adult adoption cases present two distinct issues which our jurists frequently blur in their deliberations. First, should the adoption be allowed at all? Second, once allowed,

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163. *See* People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980).

164. In a 1981 case a male couple, fearing that disapproving relatives might set aside their property arrangements, sought adoption to "establish a more permanent legal bond" and thus "facilitate inheritance, the handling of their insurance policies and pension plans, and the acquisition of suitable housing." *In re* Adoption of Adult Anonymous, 106 Misc. 2d 792, 793, 435 N.Y.S.2d 527, 528 (Fam. Ct. 1981). Similarly, in a 1982 adoption case, the men testified that they wished to express their "emotional bond" by formalizing "themselves as a family unit." *In re* Adult Anonymous II, 88 A.D.2d 30, 35, 452 N.Y.S.2d 198, 201 (1982). By adoption, the couple also hoped to avoid eviction from their apartment, which the landlord originally had leased to the older man with the condition that only members of his immediate family occupy the apartment. The court found this was "not a frivolous consideration" because the landlord had been evicting tenants for minor lease violations in an effort to co-op the building and the couple wished to remain and purchase their apartment when the building did go co-operative. *Id.* at 32, 452 N.Y.S.2d at 200.

165. *In re* Adoption of Adult Anonymons, 106 Misc. 2d 792, 796, 435 N.Y.S.2d 527, 529 (Fam. Ct. 1981).

166. 296 Minn. 24, 206 N.W.2d 28 (1973).

167. *Id.*

168. *Id.* at 28, 206 N.W.2d at 31 (dissenting opinion).

what consequences should the adoption have in matters of succession? This Article does not address the first issue because it has been covered adequately by other commentators.[169] This writer will, however, offer guidelines for resolution of the second issue, which is cropping up with increasing frequency to plague our courts. This inquiry will be complicated by the fact that not all adult adoptions are sought for ulterior motives. The same considerations of love and duty that we expect in child adoptions motivate some adult adoptions. An adoptor may wish to adopt an adult he has raised from childhood to validate an earlier attempt at adoption that either failed for procedural reasons or for lack of funds. A stepparent who actually raises his stepchild and wishes to adopt the child all along may be prevented from consumating the adoption until the stepchild reaches the age of majority, at which time the other biological parent's consent is no longer required. But then, to muddy things, there are the borderline cases in which there is evidence of a parent-child type relationship yet it also appears that this adult's adoption was partly motivated by cupidity.[170]

A brief look at the agonies of one jurisdiction in dealing with the consequences of adult adoptions will set the stage for our survey of recent decisions and suggestions for reform.

A. *The Kentucky Blues—One Jurisdiction's Struggle with the Consequences of Adult Adoption*

In cases concerning child adoptions, Kentucky was one of the first jurisdictions to grope its way toward replacement of the "stranger-to-the-adoption" rule with a presumption favoring the inclusion of adoptees in class designations.[171] During the transition period, the most famous case in the annals of so-called fraudulent adoptions, *Bedinger v. Graybill's Executor & Trustee*,[172] hit the Kentucky judiciary. *Bedinger* involved a testamentary trust in

169. *See* Wadlington, *supra* note 155 (urging that the phenomenon of adult adoption is a perversion of the adoption process that has no place in the realm of family law); Note, *supra* note 155 (arguing that with appropriate safeguards against ahuse, adult adoptions can serve a useful role as an estate planing device).

170. *See, e.g.*, Wilson v. Johnson, 389 S.W.2d 634 (Ky. 1965); *In re* Trusts Created by Agreement with Harrington, 311 Minn. 403, 250 N.W.2d 163 (1977).

171. See the decisions in Isaacs v. Manning, 312 Ky. 326, 227 S.W.2d 418 (1950), and Major v. Kammer, 258 S.W.2d 506 (Ky. 1953), which eroded Kentucky's "stranger-to-the-adoption" rule as formerly articulated in Copeland v. State Bank & Trust Co, 300 Ky. 432, 188 S.W.2d 1017 (1945).

172. 302 S.W.2d 594 (Ky. 1957).

which the testatrix provided for her son, Robert, for life with a remainder to the son's heirs at law as of the time of his death. A codicil provided that in the event Robert died without heirs, the estate should "be divided between Foreign Missions & Ky. Mountain School."[173] Eighteen years after the testatrix' death, Robert (age fifty-eight) and his wife (age forty-five) were childless. Not wishing to see any part of the corpus go to his cousins or the designated charities, Robert proceeded to adopt his wife as his child and lawful heir. Thirty-two years after the testatrix' death Robert died. The court permitted the wife to take the entire corpus as his heir at law. The court felt impelled toward this result both by Kentucky's intestacy laws, which did not distinguish between child adoptees and adult adoptees, and by its decision in *Major v. Kammer*,[174] a child adoptee case in which the court held that class designations like "heirs" or "heirs at law" include adoptees unless the instrument itself shows a contrary intent. The court rejected the argument that it should ignore the adoption on policy grounds as sanctioning incest because, as the court pointed out, the adoptor and adoptee were not related by blood.[175]

In two 1965 adult adoption cases, *Wilson v. Johnson*[176] and *Pennington v. Citizens Fidelity Bank & Trust Co.*,[177] the Kentucky court seized upon class designations like "child" or "children" to distinguish the facts from *Bedinger* and thus avoid what even the *Bedinger* majority admitted was an absurd result. *Wilson* and *Pennington* reasoned that since most donors employ terms like "child" or "children" in their commonly understood sense, these donors did not mean to include one who was no longer a child in the lay sense when the adoption took place. *Pennington* concerned a devise to the child or children of the testatrix' daughter, Annie. Many years after the testatrix died, the seventy-one year old childless Annie adopted her seventy-four year old husband that he might take under the will. The court simply observed that the husband was no longer a child.[178]

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173. *Id.* at 596.

174. 258 S.W.2d 506 (Ky. 1953).

175. 302 S.W.2d at 600.

176. 389 S.W.2d 634 (Ky. 1965).

177. 390 S.W.2d 671 (Ky. 1965).

178. Courts from other jurisdictions have used terms like "child" or "children" to exclude adult adoptees. *See, e.g., In re* Estate of Comley, 90 N.J. Super. 498, 218 A.2d 175 (1966); *In re* Nicol's Trust, 39 Misc. 2d 674, 241 N.Y.S.2d 775 (1963). First National Bank of Dubuque v. Mackey, 338 N.W.2d 361. (1983) (same result with no statutory presumption). The New Mexico Supreme Court, however, came to the opposite conclusion, reasoning that

In 1967 the facts in *Minary v. Citizens Fidelity Bank & Trust Co.*[179] nearly foiled the Kentucky court again. *Minary* involved a testamentary trust directing payment of income to the testatrix' sons for life and payment of corpus to whomever of the testatrix' heirs survived the life beneficiaries or to the First Christian Church of Louisville. Thirty-five years after the testatrix died, her childless son adopted his wife to qualify her as a remainder beneficiary. The magical term "children" was missing! Unlike *Bedinger*, however, this trust directed payment of corpus to the *testatrix'* heirs rather than the life beneficiary's heirs. The court rejected the wife's claim, thus in effect overruling *Bedinger*. Although the court in *Minary* could have distinguished *Bedinger* on the basis of the language used, the court rightly observed that "no useful purpose could be served by so distinguishing them," stating that:

> Even though the statute permits such adoption and even though it expressly provides that it shall be 'with the same legal effect as the adoption of a child,' we, nevertheless, are constrained to view this practice to be an act of subterfuge which in effect thwarts the intent of the ancestor whose property is being distributed and cheats the rightful heirs. We are faced with a situation wherein we must choose between carrying out the intent of deceased testators or giving a strict and rigid construction to a statute which thwarts that intent.[180]

The court opted for honoring the testator's intent. Of course, the court was wrong in assuming its laudable decision might violate Kentucky's statutes for, as discussed earlier, the question in such cases is not the technical status of the adoptee under the adoption and intestacy laws. The real issue is whether this particular donor meant to include this particular adoptee. The court's clear-cut approach to the problem is, nevertheless, commendable. As we shall see, not all jurisdictions have taken such a clean approach.

Ten years after *Minary* the beleaguered Kentucky judiciary was called upon to decide whether an adult adoptee could inherit through his adoptor from the intestate estate of his adoptor's relative. Because intestacy laws rather than a private instrument governed the case, the court permitted the inheritance, limiting the rule of *Minary* to testamentary dispositions.[181] The reasons why the court may have been compelled to this result are explored below.

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the adult adoptee is the legal child of his adoptor. *See* Delaney v. First Nat'l Bank, 73 N.M. 192, 386 P.2d 711 (1963).

179. 419 S.W.2d 340 (Ky. 1967).

180. *Id.* at 343.

181. Harper v. Martin, 552 S.W.2d 690 (Ky. App. 1977).

B. *The Consequences of Adult Adoption for Intestate Estates*[182]

Most intestate succession schemes, including the scheme of the UPC, treat the adult adoptee exactly like the child adoptee. Specifically, the adult adoptee inherits from and through his adoptor and loses all rights of inheritance within his biological family. Conversely, the adult adoptee's kindred by adoption may inherit from him while his biological relatives may no longer do so. In some states these results are mandated by an express statutory provision.[183] In others they obtain because the intestacy statutes fail to say anything about the consequences of adult adoption.[184]

No one seriously questions the right of the adult adoptee to inherit from his own adoptor as the creation of one's own heir through adoption is a practice followed by ancient civilizations and long accepted in our own jurisprudence.[185] The controversial question is whether society should countenance the use of adoption laws to qualify an adult as the heir of a stranger to the adoption. The policy reasons for allowing this in child adoptions, which simulate biological birth into the adoptive family, do not exist in the case of adult adoptions.

Professor Halbach believes that the problem of manipulative adoption is far more pressing in the class gift setting where the adoption invariably occurs long after the donor's death than it is in cases in which the question is one of succession to the intestate estate of a stranger to the adoption.[186] He reasons that any adoption which might affect intestate succession will occur during the intestate's lifetime so that he will have an opportunity to defend himself by making a will excluding the adult adoptee. While it is true that the opportunities for mischief are greatly increased when the aim is to qualify the adoptee under a private instrument, we should not oversimplify matters by ignoring the real opportunities

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182. For a discussion of the statutes, see generally Wadlington, *supra* note 155, at 573-74; Note, *supra* note 155, at 261-62. The UPC fails to make a distinction between persons adopted as minors and persons adopted as adults. *See* U.P.C. § 2-109, 8 U.L.A. 66 (1982).

183. *See, e.g.*, GA. CODE ANN. § 19-8-16 (1982); KY. REV. STAT. § 405.390 (1982); MD. ANN. CODE. art. 16, § 82 (1981).

184. *See, e.g.*, CAL. PROB. CODE § 257 (West 1956); IND. CODE ANN. § 29-1-2-8 (West 1972); N.Y. DOM. REL. LAW § 117 (McKinney 1977).

185. For reference to ancient practices, see *supra* note 9 and accompanying text. For early American precedent, see Collamore v. Learned, 171 Mass. 99, 50 N.E. 518 (1898) (Holmes, J.).

186. *See* Halbach, *The Rights of Adopted Children Under Class Gifts*, 50 IOWA L. REV. 971, 988 (1965).

for mischief that also exist when the lure is an intestate estate. First of all, response by will is not always possible. Most state statutes do not even require that the parties to an adult adoption serve notice of the adoption on their parents or other blood relatives.[187] Because the adult adoptee need not change his surname or even live with his adoptor, the relatives whose estates the adoption may affect may not even be aware of the adoption. How can one respond to something he does not even know has occurred? A 1977 Kentucky case, *Harper v. Martin*,[188] presented an interesting variation on this problem. A woman dying of cancer adopted a forty-seven year old man for the sole purpose of making him an heir of an incompetent relative who lacked a will. The court permitted the adult adoptee to inherit through his adoptor from the incompetent's intestate estate even though the intestate had lacked the capacity to make a defensive will before dying.

To understand a decision like *Harper* one must remember that such cases are governed by the intestacy laws in which the intent of the particular intestate, even if known, is irrelevant. Because Kentucky's intestacy laws treated adult adoptees exactly like child adoptees, the court had little choice but to permit the inheritance unless it wished to take the difficult route of implying an exception to the statute's literal meaning to avoid "an unreasonable or absurd result."[189] The terse opinion in *Harper* did not even allude to the explanation just given. The court simply consoled itself with the thought that although Martin lacked the capacity to disinherit the adult adoptee, he did not "while competent . . . prepare a plan for the disposition of his estate which would be thwarted by the adoption."[190]

Another consideration often overlooked is that adult adoption also affects the status of the adoptee's biological parents and kindred who may no longer inherit from the adoptee. Again, these relatives may not even be aware of their change of status because the adoption of an adult does not require parental consent in the vast

187. *See, e.g.*, ARK. STAT. ANN. § 56-207 (Supp. 1983); R.I. GEN.LAWS § 15-7-5 (1970); WASH. REV. CODE ANN. § 26.32.110 (Supp. 1983-1984).

188. 552 S.W.2d 690 (Ky. App. 1977).

189. In Williams v. Williams, 23 N.Y.2d 592, 599, 246 N.E.2d 333, 337, 298 N.Y.S.2d 473, 479 (1969), the New York Court of Appeals said:

> [Courts should] not blindly apply the words of a statute to arrive at an unreasonable or absurd result. If the statute is so broadly drawn as to include the case before the court, yet reason and statutory purpose show it was obviously not intended to include that case, the court is justified in making an exception through implication.

190. 552 S.W.2d at 692.

majority of jurisdictions.

The problems outlined above are significant enough to warrant attention. Because the restraints of separation of powers make our judiciary understandably reluctant to carve judicial exceptions to intestacy statutes that treat adult and child adoptees alike, the solutions, if any, must come from the various state legislatures. Legislation either requiring notice to the adoptee's and adoptor's relatives within a certain degree of consangninity or permitting the court to limit inheritance rights in adult adoption cases to the rights between the adoptor and his adoptee could lessen the opportunities for abuse affecting intestate succession. When the latter approach is taken, a corollary measure should be enacted permitting the court to retain reciprocal inheritance ties between the adoptee and his biological family. The element of discretion in this approach gives the court the flexibility to tailor its adoption decree to the purpose of the adoption and the relationship between the adoptor and his adoptee. A few states have attempted fragmentary solutions.[191] Legislatures that have embraced the UPC and other legislatures that have not distingnished between adult and child adoptions should consider enacting provisions of the type suggested.

C. Should Adult Adoptees Be Included in Class Gift Designations?

Should adult adoptees reap the bounty of a stranger to the adoption via inclusion in class gift designations irrevocably sealed by the donor's death long before the gift becomes distributable? Once again our task is to find the donor's intent at the time he executed the instrument. Some courts have purported to find the donor's intent in the instrument itself by distinguishing between generic terms like "children," thought to have a familial connotation, and "heirs," thought to have a technical connotation. This writer has already commented on the uselessness of such distinctions as a guide to actual intent.[192] Other courts have sought to conjure up the long dead donor's intent by assuming he relied on

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191. A Florida statute, FLA. STAT. ANN. § 63.062 (West Supp. 1983), requires that the adult adoptee's biological parents either consent to the proposed adoption or be served with notice thereof. Vermont's statute, VT. STAT. ANN. tit. 15, § 448 (1974), allows an adopted adult to inherit from, but not through, his adoptor. Unfortunately, in Vermont, the same restriction applies to child adoptees. A New Jersey statute retains inheritance ties between the adult adoptee and his biological parents. N.J. STAT. ANN. § 2A:22-2 (West 1952).

192. *See supra* notes 93-94 & 176-77 and accompanying text.

the law governing adoptees in effect when he executed the instrument. Thus, two California appellate decisions denied adult adoptees the benefits of a testamentary trust partly on the ground that California had not even legalized adult adoptions when the testator executed the wills in question.[193] A Kansas decision, however, turned this argument around, reasoning that the donor in making his class gift must have anticipated later changes in the law that might affect membership in the class.[194] As indicated in our discussion of the retroactivity problem, any reliance on the state of the law governing the status of adoptees, whether it be the law existing when the instrument was executed or the law that might develop in the future, is largely mythical.[195] Here again, the courts must realize that reference to generic terms in the instrument or to the state of the law at a given time as a guide to actual intent is an exercise in futility.[196] It seems safe to assume that the donor never thought about the possibility of adult adoptions at all, much less relied on the law to fill in his intent; if he had he would have expressed his desire explicitly.[197]

Notwithstanding the dearth of tangible guides to actual intent in adult adoption cases, common sense tells us that a donor would normally expect anyone partaking of his bounty to be a true family member and not just some willing adult adopted for the purpose of reducing or defeating a gift-over to others. As some courts have pointed out, diversion of donative assets to artificial adoptees has the effect of giving the adoptor a power of appointment over the subject property.[198] On the other hand, the same familial bonds of love and duty commonly associated with child adoptions prompt

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193. *See* Abramovic v. Brunken, 16 Cal. App. 3d 719, 94 Cal. Rptr. 303 (1971); Williams v. Ward, 15 Cal. App. 3d 381, 93 Cal. Rptr. 107 (1971).

194. *In re* Estate of Fortney, 5 Kan. App. 2d 14, 611 P.2d 599 (1980).

195. *See supra* notes 113-23 and accompanying text.

196. *See id.*

197. As a New Jersey probate judge expressed it,

> [t]here being nothing in the language of the will which by itself reveals a clear intent to either include or exclude an adult adoptee, and nothing to indicate that the subject was either discussed or considered, it is probable that the subject was not thought about and that there was therefore no specific intent of either the testator or the draftsman of the will . . . .

In re Estate of Griswold, 140 N.J. Super. 35, 42, 354 A.2d 717, 721 (1976).

198. A California appellate court expressed this sentiment as follows: "When there is an adult adoption . . . there is opportunity for a life tenant . . . to reduce the remainder simply by adoption of willing adults. It is improbable that the testator intended such results. If he had wished to give his daughter power of appointment, he could have done so." Williams v. Ward, 15 Cal. App. 3d 381, 386, 93 Cal. Rptr. 107, 110 (1971); *see also In re* Estate of Griswold, 140 N.J. Super. at 60-61, 354 A.2d at 722.

some adult adoptions—especially stepparent adoptions. The task, then, is to develop a sensible and workable approach that will weed out the fortune hunters while permitting inclusion of adult adoptees who would be natural objects of the donor's bounty. Professor Halbach, in what he terms the "*loco parentis*" concept, has suggested that the basic inclusionary presumption for adoptees "be limited to children who were *adopted* at a *relatively early* age and reared by the adoptive parents."[199] Since "relatively early age" presumably means sometime during minority, although this is not entirely clear, Professor Halbach apparently would limit the inclusionary presumption to child adoptees. This approach has not been widely used for reasons that will appear from an examination of a few recent decisions.

Three recent cases, *In re Estate of Fortney*,[200] *Estate of Pittman*,[201] and *Evans v. McCoy*,[202] demonstrate that the basic inclusionary presumption formulated with child adoptees in mind (when applied in conjunction with laws that treat adult and child adoptees alike for intestacy purposes) is a major stumbling block to sensible resolution of adult adoption cases. The *Fortney* testators, by reciprocal wills made long before Kansas legalized adult adoptions, devised land to their children, Elizabeth and John, with a proviso that if both should die "without heirs by birth or by adoption," the property should go to the children of the testators' siblings. At age ninety the childless John adopted his wife's sixty-five year old nephew, Lloyd, in order to keep the property from the collateral relatives. In an opinion tinged with a note of regret, the court allowed the mature adoptee, Lloyd, to take as an heir per the terms of the original devise.[203] The *Fortney* court felt compelled to this result by earlier precedent which it read as holding that donors must be presumed "to know the legislature might change both the age of majority and the limitation that only minors could be

199. Halbach, *supra* note 187, at 990 (emphasis added).

200. 5 Kan. App. 2d 14, 611 P.2d 599 (1980).

201. 104 Cal. App. 3d 288, 163 Cal. Rptr. 527 (1980).

202. 291 Md. 562, 436 A.2d 436 (1981).

203. The court followed a 1955 decision of its supreme court, Meeks v. Ames, 177 Kan. 565, 280 P.2d 957 (1955), which applied the basic inclusionary presumption to a teenage minor adoptee, and the Kansas adoption and intestacy laws, which treat adult and child adoptees alike. The *Fortney* court felt that *Meeks*, although not directly on point, governed by analogy because *Meeks* permitted a 19 year old adoptee to take under the will of a testator who died before the legislature authorized adult adoptions and before it extended the age of minority from 18 to 21.

adopted."[204] The effect of the decision in *Fortney* was to confer the benefit of the basic pro-adoptee presumption on adult adoptees. As we shall see, this grants adult adoptees a tremendous procedural advantage.

The testatrix in *Pittman* died in 1915 with a testamentary trust creating a contingent gift of income and corpus to the children and more remote issue of her eight children per stirpes. One of the testatrix' late grandsons had adopted his two stepsons, who had lived with him as teenagers, when they were thirty-three and thirty-one. The trustee requested instructions as to whether these adult adoptees should share in the per stirpital distributions of income and corpus under the trust. Inspired by Professor Halbach's "*loco parentis*" concept, the *Pittman* court formulated a three-step approach for resolving the claims of adult adoptees under instruments executed prior to 1951—the date when adult adoptions became legal in California. First, class designations in wills executed prior to 1951 presumptively would exclude adult adoptees. Second, an exception to this exclusion would apply to adult adoptees raised as minors in the home of their adoptors. Third, the court would make an exception to the exception when "the purpose of the adoption was to diminish or defeat the income and remainder interests of other beneficiaries 'for purposes of financial gain or as a spite device.' "[205] The court remanded the matter to the lower court to afford the claimants an opportunity to prove that they came within the *Pittman* court's "*loco parentis*" exception. In effect, the appellate court in *Pittman* retained the traditional "stranger-to-the-adoption" rule for adult adoptees claiming under pre-1951 instruments, but gave the claimants an opportunity to rebut it. The three-pronged *Pittman* rule, albeit unnecessarily elaborate, provides a good approach that can and should apply to the construction of instruments executed both before and after the legalization of adult adoptions. What is so discouraging about the *Pittman* case is that the court completely undid its good work by assuming it would be forced to apply its judicially created inclusionary presumption to adult adoptees claiming under instruments executed after California's recognition of adult adoptions. The court was wrong in assuming this because the status of adult adoptees under state adoption and intestacy laws does not control

204. *See* 5 Kan. App. 2d at 18-19, 611 P.2d at 603.

205. 104 Cal. App. 3d at 295, 163 Cal. Rptr. at 531 (quoting Halbach, *supra* note 187, at 988, which in turn quoted Oler, *Construction of Private Instruments Where Adopted Children Are Concerned*, 43 MICH. L. REV. 901, 938 (1945)).

the construction of private instruments. The court is free to formulate whatever presumption seems most likely to carry out the donor's intent in construing a private instrument. The latter statement assumes, of course, that the state legislature has not carved in cement an inclusionary presumption applicable to adult adoptees.

Evans v. McCoy[206] is illustrative of a case in which legislatively imposed rigidity drove the court to a bad approach. The testator died in 1899 with a will devising a 200-acre farm to his children in fee, determinable in the event all of them died without living issue in which case the farm was to go to the testator's brothers' heirs. The testator had two children, James and Rebecca. James died in 1962 without issue. At age seventy-six the childless Rebecca contracted to sell the farm. The buyers, however, rejected title upon learning of the defeasing condition. Upon the advice of counsel, Rebecca proceeded to adopt her twenty-one year old neighbor, and the sale closed. When Rebecca died in 1978, the heirs of one of the testators' brothers brought an action to eject the buyers. After buyers won the first round, the collateral heirs appealed. In deciding the appeal the Maryland Court of Appeals was confronted with a Maryland statute which mandated that generic terms such as "child," "issue," or "heirs" in private instruments include adoptees unless the terms of the instrument plainly showed a contrary intent. The statute expressly made application of this inclusionary statutory presumption retroactive to old instruments if the adoption occurred after 1947, as it did in *Evans*. Another Maryland statute provided that the adoption of an adult should have the same legal effect as the adoption of a minor. In the face of what the *Evans* court termed the "unfortunate rigidity" of this legislation,[207] the court was constrained to hold that the adult adoptee qualified as Rebecca's "issue" because this term did not plainly express an intent to exclude such adoptees.[208]

The court toyed with the idea of applying Professor Halbach's *"loco parentis"* exception, but rejected this approach because it amounted to a judicial repeal of the statutory rule of construction. The *Evans* court could have sprung this legislative trap by relying

206. 291 Md. 562, 436 A.2d 436 (1981).

207. *Id.* at 584, 436 A.2d at 447.

208. Having been hamstrung by the statutory presumption, the *Evans* court comforted itself with the thought that since the terms of the devise permitted Rebecca to transfer the fee to strangers if she left issue, its decision in favor of the buyers and free alienability did not mangle the testator's unclear intent too badly.

on the rubric that an exception to the literal terms of a statute will be implied when its terms produce an unintended and absurd result. Because most courts understandably blanch at the thought of taking such a drastic out, relief from rigid all inclusive statutory presumptions of the Maryland stripe will probably have to come from the legislatures that enacted them in the first place.[209] Accordingly, states that have enacted UPC section 2-611's inclusionary rule for testamentary instruments should consider amending it to provide needed flexibility at least regarding claimants seeking inclusion via adult adoption.[210]

Fortunately, most states do not have a statutory rule because the basic pro-adoptee presumption has been ushered in by judicial decree. In these jurisdictions the courts must unshackle themselves from the notion that the recognition of adult adoptees under state adoption and intestacy laws requires that courts treat them like child adoptees in the construction of private instruments. The highest courts of Pennsylvania and Kentucky have taken that first important step. When the Pennsylvania Supreme Court in *Estate of Tafel*[211] replaced the traditional "stranger-to-the-adoption" rule with a presumption favoring the inclusion of adoptees in class designations, it expressly limited the new rule to cases in which the adoptee was a minor at the time of the adoption.[212] After strug-

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209. *See supra* note 189. But recently one brave court faced with the legislative rigidity problem refused to apply the literal terms of the statute, saying:

> We do not believe, however, that the Legislature intended the statutory presumption to be automatically enforced in all cases without regard to the circumstances surrounding the adoption procedure. Notwithstanding our conclusion that the terms of the trust do not evidence an intent to exclude adopted persons generally, this Court is convinced that it should not enforce the statutory presumption where there has been an abuse of the adoption process and where the end result would violate the settlor's probable intent and normal expectations.

In re Nowel's Estate, 128 Mich. App. 174, ___, 339 N.W.2d 861, 863 (1983).

210. A Wisconsin statute offers a solution by extending its inclusionary rule applicable to all instruments only to those adoptees who have been adopted as minors or raised as a member of the adoptor's household from "the child's 15th birthday or before." WIS. STAT. ANN. § 851.51(3) (West 1971). Oregon legislation limits inclusion to one "adopted as a minor or after having been a member of the household of the adoptive parent while a minor." OR. REV. STAT. 112, 195 (1981). A 1983 amendment to California's Probate Code, albeit more detailed in its provisions, takes the same approach. CAL. PROB. CODE §§ 6152, 6408 (1983) (effective Jan. 1, 1985). Although such provisions are an improvement over the all inclusive statutes, the rigidity inherent in any statutory solution may prevent sensible resolution in some fact situations.

211. 449 Pa. 442, 296 A.2d 797 (1972).

212. By the restriction of this rule of construction to minor adoptions we serve and effectuate the purpose of preventing an adult adoptee . . . from being considered a testamentary "child". . . where such adoption is undertaken by a person other than

gling for a decade with the manipulative adoption problem that the Pennsylvania Supreme Court anticipated, the Kentucky Court of Appeals in *Minary v. Citizens Fidelity Bank & Trust*[213] refused to extend the benefit of the inclusionary presumption to adult adoptees when the effect would thwart the donor's intent and cheat the rightful takers.

A county probate court sitting in New Jersey bravely sought to free itself from imagined statutory constraints in *In re Estate of Griswold.*[214] The adult adoptee in *Griswold* contended that a 1951 revision of New Jersey's overlapping adoption and succession statutes created an inclusionary presumption for adult adoptees in class gifts. The court disagreed, but held, *inter alia*, that even if this statutory presumption did exist, the court should not apply it retroactively to an instrument executed in 1950. Although the judge's opinion waffled on this issue, the main thrust of his opinion seemed to be that, because of the opportunities for fraud, courts should not apply the inclusionary presumption to adult adoptees. As Judge Long pungently commented,

> [A]pplication of the [inclusionary] rule . . . to adult adoptions would . . . be an open invitation to the diversion of remainders, "treasure hunts" and even the sale of filiations to obtain the benefit of remainders in trusts established many years ago. Without safeguards ordinarily present in child adoptions, including the obligation of support, the risk is substantial and should not be taken.[215]

Judge Long tersely summed up the motives behind the adoption of the adoptor's forty-one year old stepson, who had never lived with the adoptor by noting that "[i]f there had not been a Griswold trust no one would have thought of the adoption."[216]

While decisions like *Tafel*, *Minary*, and *Griswold* represent a step in the right direction, they offer little guidance as to how a trial court should procedurally go about weeding out fortune hunters while permitting inclusion of adult adoptees who would be regarded as natural objects of the donor's bounty. Allocation of a presumption is one way to accomplish this. Because he who has the benefit of the presumption wins when evidence of the donor's

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the testator to prevent a gift over in default of a natural "child" . . . and thus, in effect, rewrite the testator's will.

Id. at 454, 296 A.2d at 803.

213. 419 S.W.2d 340 (Ky. 1967). See *supra* text accompanying notes 179-80 for a discussion of the decision in *Minary*.

214. 140 N.J. Super. 35, 354 A.2d 717 (1976).

215. *Id.* at 55, 354 A.2d at 728.

216. *Id.* at 63, 354 A.2d at 732-33.

intent is evenly balanced or lacking entirely, the presumption chosen is often outcome determinative.[217] The reader will recall Professor Halbach's suggestion that the basic inclusionary presumption "be limited to children who were *adopted* at a *relatively early age* and reared by the adoptive parents."[218] Although Professor Halbach deliberately leaves what he means by a "relatively early age" unclear, his "*loco parentis*" proposal seems to reserve the inclusionary presumption for minor adoptees in most cases.

Looking back over the cases, this writer suspects that the courts have had a threefold problem with Professor Halbach's idea. First, Professor Halbach has not clarified how the courts should procedurally implement his "*loco parentis*" concept. Second, the courts seem concerned that blanket retention of the "stranger-to-the-adoption" rule for adult adoptees might wrongly exclude claimants raised by their adoptors, but not adopted during minority because of legal impediments or lack of funds.[219] Third, the courts have been extremely reluctant to apply one rule to adult adoptees and another to minor adoptees in the face of statutes giving adult adoptions the same effect as child adoptions for intestacy purposes.[220]

Courts and legislatures should resolve these concerns as follows. The "stranger-to-the-adoption" presumption should be applied to all adult adoptees in the first instance for two reasons. First, the circumstances surrounding adult adoptions do not provide the safeguards against abuse that usually exist in more heavily regulated child adoptions. Second, application of the inclusionary presumption gives the adult adoptee too great a procedural advantage, which usually produces an absurd result, particularly when the court refuses to look beyond the instrument to the actual relationship of the parties and the circumstances surrounding the adoption. Admittedly, use of the exclusionary presumption will place all adult adoptees at an evidentiary disadvantage in contro-

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217. Judge Long's opinion in *Griswold* rightly observed that the ultimate disposition of controversies over the donor's intent "may depend upon whether there is a presumption and, if so, what the presumption is and whether the surrounding circumstances indicate a contary intent and overcome the presumption." *Id.* at 41, 354 A.2d at 720.

218. Halbach, *supra* note 187, at 990 (emphasis added); *see supra* note 199 and accompanying text.

219. *See, e.g.*, Estate of Pittman, 104 Cal. App. 3d 288, 294, 163 Cal. Rptr. 527, 531 (1980).

220. Judge Rodowsky, writing for the Maryland court in *Evans v. McCoy*, expressed this concern, saying that "[t]he line cannot be drawn between adults and minors since adoption of adults is expressly permitted." 291 Md. 562, 582, 436 A.2d 436, 446 (1981).

versies over the donor's intent but this presumption, like any other, is rebuttable. If the adoptee can convince the trier of fact that he and his adoptor enjoyed the functional equivalent of a normal parent-child relationship, he should prevail. Factors for consideration include (1) the age at which the adoptee entered the adoptor's home, (2) the length of time the adoptee lived there, (3) the length of time the adoptor actually supported the adoptee, and (4) the nature and extent of the parenting role assumed by the adoptor vis-á-vis the adoptee. Anyone who could reasonably be regarded as a natural object of the donor's bounty should have no difficulty in meeting his burden of proof on this "*loco parentis*" issue. An inquiry into the motives behind the adoption should be unnecessary since anyone who would be a natural object of the donor's bounty should be included even if a desire to qualify the adoptee as a beneficiary partly motivated the adoption. This simplified approach should dispose of the objection sometimes voiced that since financial gain might also motivate some child adoptions, courts and legislatures should not draw the line between child and adult adoptions.[221]

The widespread judicial belief that courts must treat adult and child adoptees alike in the construction of private instruments has proved to be a major stumbling block to the sensible resolution of adult adoptee claims. When legislatures have codified the basic inclusionary presumption by statute and made it applicable to adult adoptees, either expressly or by necessary implication, relief will probably have to come from the legislatures themselves. In all other cases the courts must come to realize that, regardless of the status of adult adoptees under state adoption and intestacy laws, they are free to use whatever presumption seems most likely to carry out the donor's intent. It seems clear that the "stranger-to-the-adoption" rule is the only presumption that makes sense when adult adoptees are concerned.

While most existing instruments understandably fail to address manipulative adoption, today's scrivener should ideally anticipate the problem and draft against it. The instrument might, for example, condition inclusion on an unbiased trustee's finding that the claimant would (under all the circumstances) be regarded as a natural object of the donor's bounty.

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221. The instrument could provide guidelines for the trustee's determination by enumerating the factors listed *supra*. Professor Halbach suggests a similar, albeit more narrowly worded, drafting solution. *See* Halbach, *Issues About Issie: Some Recurrent Class Gift Problems*, 48 Mo. L. REV. 333, 348 (1983).

VII. EQUITABLE ADOPTION

Our review of succession by, from, and through adopted persons would be incomplete without a discussion of the so-called equitably adopted child. Although not adopted with statutory formalities, the equitably adopted child may be able to maintain a claim in equity to at least some of the benefits that come with the status of a biological or legally adopted child. Typically, these claims present the following scenario. A child, Fred, is taken into a foster home at a tender age.[222] Fred may be an orphan, or his biological parents may be unable or unwilling to care for him. The parties to this new custodial arrangement are primarily concerned that Fred be raised in a family environment so that his physical and emotional needs may be met. Hence, the prospect of formal adoption by the foster parents may or may not be discussed at the time custody is transferred. The foster parents raise Fred in their home, treating him in all respects as their child and representing him to the public as their child. They may tell Fred that he is their adopted child. Just as often, however, the foster parents say nothing and, having entered the home as an infant and knowing no other home, Fred naturally assumes that the foster parents are his parents.[223] In either case, Fred grows up with the belief that he is the biological child or at least the legally adopted child of his foster parents. The foster parents may make an attempt at formal adoption that fails because of some technical defect in the adoption proceeding.[224] Usually, however, the foster parents make no attempt to effect a formal adoption. One foster parent dies, leaving all to the surviving foster parent. Upon the surviving foster parent's death intestate, Fred claims the right to inherit from the only parent he knows. To his dismay, he is told, usually by the intestate's collateral blood relatives, that because he is not the intestate's biological or formally adopted child, he has no right to inherit under the statutes of descent and distribution, which provide

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222. *See* Note, *Equitable Adoption: They Took Him into Their Home and Called Him Fred*, 58 VA. L. REV. 727 (1972). Although terms like "foster parent," "foster family," and "foster home" generally suggest a relationship more limited than the relationship that equitable adoption creates, this Article uses such terms to avoid cumbersome, but more accurate, phrases like "equitable adoptor" or "putative adoptive family."

223. *See, e.g.*, Barlow v. Barlow, 170 Colo. 465, 463 P.2d 305 (1969) (child placed in custody of foster parents when 10 days old; did not learn he was not their biological child until he reached age 34).

224. *See, e.g.*, Young v. McClannahan, 187 Iowa 1184, 175 N.W. 26 (1919) (adoptive parents failed to record adoptive instrument); Cubley v. Barbee, 123 Tex. 411, 418, 73 S.W.2d 72, 76 (1934) ("careless lawyer" neglected to file adoption deed).

only for legal spouses and relatives by blood or formal adoption.

To correct the injustice that would result were the intestacy laws woodenly applied, most jurisdictions grant equitable relief, when appropriate, to the extent of permitting Fred to take the child's share he would have inherited had the foster parent legally adopted him. The doctrinal heading under which courts grant this relief is variously called "equitable adoption," "virtual adoption," "de facto adoption," or "adoption by estoppel."[225] No matter the label, we shall see that unless the foster parent has made a substantial attempt to comply with formal adoption proceedings, a court will almost invariably condition the granting of relief on a showing that the foster parent agreed to formally adopt the foster child.[226] The courts have traditionally limited the doctrine to narrow circumstances, reasoning that the adoption statutes are in derogation of the common law and thus provide the exclusive means for effecting an adoption or obtaining its benefits. Pennsylvania, for example, limits application of the doctrine to the situations in which minor deviations from the statutory procedures have occurred.[227]

When an equitably adopted foster child is permitted to inherit from his foster parent, an intestate share goes to one whom the law views as a complete stranger to the intestate. That equity commonly permits this is startling given that inheritance rights derive exclusively from the statutes of descent and distribution under which informal adoptees have no standing whatsoever. When the equitable adoption doctrine is confined to its original con-

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225. For earlier commentary on the doctrine, see generally Bailey, *Adoption "By Estoppel,"* 36 TEX. L. REV. 30 (1957); Note, *supra* note 222; Note, *Equitable Adoption and the Contract to Adopt*, 40 N.D.L. REV. 183 (1964); Comment, *Adoption by Estoppel: History and Effect*, 15 BAYLOR L. REV. 162 (1963); Comment, *Equitable Adoption: A Necessary Doctrine?*, 35 S. CAL. L. REV. 491 (1962); Comment, *The Doctrine of Equitable Adoption*, 9 SW. L.J. 90 (1955).

226. Thus, in Cavanaugh v. Davis, 149 Tex. 573, 235 S.W.2d 972 (1951), the court said:

> [I]t was incumbent upon respondent to plead and prove . . . that: . . . [the foster mother] undertook to effect a statutory adoption but failed to do so because of some defect in the instrument of adoption or in its execution or acknowledgment, or because of the failure to record it; *or* [the foster mother] agreed with respondent, or with respondent's parents or with some other person in loco parentis that she would adopt respondent. The effort to comply with the statute in the [former] instance and the agreement to adopt in the [latter] instance are a necessary predicate for the interposition of the equity powers of the courts to decree an adoption by estoppel in favor of one who, acting under and by virtue of such defective proceeding or such agreement, confers affection and benefits upon the other.

Id. at 576, 235 S.W.2d at 974 (emphasis added).

227. *See In re* Sulewski, 113 Pa. Super. 301, 173 A. 747 (1934).

text—inheritance from the foster parent—the overwhelming equities in the child's favor demand that some exception be made to prevent a species of fraud upon the child.[228] But invariably the facts of real life overflow the channels that the judiciary originally carved and present novel questions never contemplated at the inception of a doctrine. Hence, like most doctrines designed to provide relief in an appealing case, the equitable adoption doctrine has become a Pandora's Box, emitting the following host of perplexing questions. Can the equitably adopted child inherit through the foster parent from the foster parent's blood relatives?[229] Can the foster parent or his blood relatives inherit from a deceased equitably adopted child to the exclusion of the child's blood relatives?[230] If the equitably adopted child is entitled to inherit from his foster parent, is he also entitled to inherit from his biological parent?[231] When the equitably adopted child does inherit from his foster parent is he entitled to the lower inheritance tax rate available to biological and legally adopted children?[232] Does an equitably adopted child have standing to contest the unfavorable will of his

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228. Thus, in Wooley v. Shell Petroleum Corp. 39 N.M. 256, 264, 45 P.2d 927, 932 (1935), the New Mexico Supreme Court remarked that in view of the "child's equity . . . nothing but fraud could result if the law of descent were allowed to take its course." Similary, in Cubley v. Barbee, 123 Tex. 411, 73 S.W.2d 72 (1934), the Texas Supreme Court, after noting that "it would be a manifest fraud upon [the foster child] to now permit those who claim under [the foster mother] to assert the invalidity of the adoption proceedings," explained that:

> [e]quity follows the law except in those matters which entitle the party to equitable relief, although the strict rule of law be to the contrary. It is at this point that their paths diverge. As the archer bends his bow that he may send the arrow straight to the mark, so equity bends the letter of the law to accomplish the object of its enactment.

Id. at 425, 428, 73 S.W. 2d at 79, 81 (emphasis omitted) (quoting in part Holloway v. Jones, 246 S.W. 587, 591 (Mo. 1922)).

229. For a recent case saying "no," see Pouncy v. Garner, 626 S.W.2d 337 (Tex. Civ. App. 1981) (following Asbeck v. Asbeck, 369 S.W.2d 915 (Tex. 1963), and Mennes v. Cowgill, 359 Mo. 697, 223 S.W.2d 412 (1949), *cert. denied*, 338 U.S. 949 (1950)). *But cf.* Wheeling Dollar Sav. & Trust Co. v. Singer, 250 S.E.2d 369 (W. Va. 1978) (permitting equitably adopted daughter of life beneficiary of testamentary trust to take remainder as life beneficiary's child under will that a stranger to the equitable adoption executed).

230. *See* Estate of Riggs, 109 Misc. 2d 644, 440 N.Y.S.2d 450 (1981) (no); Geiger v. Estate of Connelly, 271 N.W. 2d 570 (N.D. 1978) (no); Heien v. Crabtree, 369 S.W.2d 28 (Tex. 1963) (no).

231. This author's research has not yet uncovered a case directly on point.

232. *See* Wooster v. Iowa State Tax Comm'n 230 Iowa 797, 298 N.W. 922 (1941) (no); Goldberg v. Robertson, 615 S.W.2d 59 (Mo. 1981) (no). *But see In re* Estate of Radovich, 48 Cal. 2d 116, 308 P.2d 14 (1957) (yes); Estate of Reid, 80 Cal. App. 3d 185, 145 Cal. Rptr. 451 (1978) (yes). In two other cases, *In re* Estate of Van Cleve, 610 S.W.2d 620 (Mo. 1981), and Calvert v. Johnston, 304 S.W.2d 394 (Tex. Civ. App. 1957), the courts avoided the question by finding that no equitable adoption had occurred.

foster parent?[233] After divorce, does the foster parent have a continuing duty to support his equitably adopted child,[234] and, if so, is the biological parent still liable for child support? Can the equitably adopted child recover a workmen's compensation death benefit for the death of this foster parent?[235] Can the foster parent recover a workmen's compensation death benefit for the death of his equitably adopted foster child?[236] Can the equitably adopted child bring a wrongful death action for the death of his foster parent?[237] Can the foster parent bring a wrongful death action for the death of his equitably adopted child?[238] When a stranger to the informal adoption makes a gift in a private instrument to someone else's "children," "issue," "grandchildren," or "heirs," can one enter the

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233. *See* Vincent v. Bronis, 365 S.W.2d 835 (Tex. Civ. App. 1963) (yes). A later case, *In re* Estate of Staehli, 86 Ill. App. 3d 1, 407 N.E.2d 741 (1980), concerned a foster granddaughter's attempt to contest her foster grandfather's will. The court avoided the question by finding no equitable adoption, hut seemed to assume that petitioner would have had standing to contest had decedent equitably adopted her natural mother.

234. *See* Ellison v. Thompson, 240 Ga. 594, 242 S.E.2d 95 (1978) (no). Pierce v. Pierce, 645 P.2d 1353 (Mont. 1982) (no). *But see In re* Marriage of Valle, 53 Cal. App. 3d 837, 126 Cal. Rptr. 38 (1975) (yes) (following Clevenger v. Clevenger, 189 Cal. App. 2d 658, 11 Cal. Rptr. 707 (1961), in which the court indicated it would order support if the record established an equitable adoption); Wener v. Wener, 35 A.D.2d 50, 312 N.Y.S.2d 815 (1970) (yes); Lewis v. Lewis, 85 Misc. 2d 610, 381 N.Y.S.2d 63 (1976) (yes). In most of the cases imposing liability, the foster father represented to the child that he was the natural father; this was not the case in *Ellison*. Hence, although the Georgia Court flatly held that virtual adoption does not extend to child support controversies, this factual difference may explain in part the apparent conflict. In two other cases, Sargeant v. Sargeant, 88 Nev. 223, 495 P.2d 618 (1972), and Fuller v. Fuller, 247 A.2d 767 (D.C. 1968), the courts avoided the question by finding that no equitable adoption had occurred.

235. In House v. House, 222 S.W.2d 337 (Tex. Civ. App. 1949), the court avoided the question by finding that no equitable adoption had occurred hut seemed to assume that the foster child could partake of the benefit were equitable adoption estahlished.

236. *See* Servantez v. Aguirre, 456 S.W.2d 467 (Tex. Civ. App. 1971) (no). *But see* Jones v. Loving, 363 P.2d 512 (Okla. 1961) (yes).

237. *See* Grant v. Sedco Corp., 364 So. 2d 774 (Fla. Dist. Ct. App. 1978) (no) (following Limbaugh v. Woodall, 121 Ga. App. 638, 175 S.E. 2d 135 (1970)). *But see* Bower v. Landa, 78 Nev. 246, 253, 371 P.2d 657, 661 (1962) (yes, equitable adoptee would be entitled to inherit from foster parent and therefore comes within Nevada wrongful death statute's term "heirs," defined as "any person entitled to inherit the estate of a decedent"). In Greer Tank & Welding, Inc. v. Boettger, 609 P.2d 548 (Alaska 1980), the court allowed decedent's former stepson a claim as a dependent under Alaska's wrongful death statute, which lists as wrongful death beneficiaries decedent's "husband or wife, and children . . . *or other dependents*." *Id.* at 550 (emphasis added).

238. *See In re* Estate of Edwards, 106 Ill. App. 3d 635, ____, 435 N.E.2d 1379, 1382 (1982) (no, foster parent does not come within the term 'next of kin' in wrongful death statute); Whitechurch v. Perry, 137 Vt. 464, 472, 408 A.2d 627, 632 (1979) (no, Vermont wrongful death statute's "term 'next of kin' . . . denotes those persons most nearly related to the decedent *by blood*," and but for special statutory provisions, "would not include the parties to a statutory adoption.").

designated class by way of equitable adoption?[239]

The conflict of authority on these questions[240] suggests that the time has come to reexamine the equitable adoption doctrine with a view to developing guidelines for its future application. In approaching equitable adoption one must address two distinct questions. First, what criteria should be used to determine whether a child has been equitably adopted? Second, if the court finds that a child has been equitably adopted, what consequences should flow from that determination, or in other words, what status can the equitably adopted child gain through use of the doctrine?[241] To answer these questions one must have a clear understanding of the theoretical tools available for analysis of the cases and of the policy considerations that may be helpful in determining whether, assuming an equitable adoption has occurred, the court should grant the remedy requested.

A. The Theoretical Bases of Equitable Adoption

In decreeing an informally adopted child's right to share in his foster parent's estate, the courts sometimes invoke the maxim that "equity regards as done that which ought to have been done."[242] This is an admittedly slim reed on which to base an extreme departure from the statutes of descent and distribution. Understandably the courts have struggled to come up with some kind of theory to explain the laudable results achieved in the decisions. Two theories have emerged: the contract theory and the estoppel theory. Courts using the contract theory presuppose that the foster parent as promisor has contracted to effect a legal adoption and that by granting relief the court is specifically enforcing that contract. Thus, in sanctioning a deviation from the intestacy statutes for a foster child, the Utah Supreme Court explained:

> It is generally recognized that where a child's parents agree with the adoptive

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239. *See* Wheeling Dollar Sav. & Trust Co. v. Singer, 250 S.E.2d 369 (W.Va. 1978) (yes). *But cf.* Robinson v. Robinson, 283 Ala. 257, 215 So. 2d 585 (1967) (equitable adoption of child did not prevent life tenant's death without issue).

240. *See supra* notes 229-39 and accompanying text.

241. Both determinations are frequently complicated by conflicts of laws considerations that are beyond the scope of this Article and have been treated adequately elsewhere. *See, e.g.*, Kucherig v. California Co., 410 F.2d 222 (5th Cir.), *cert. denied*, 396 U.S. 887 (1969); *In re* Estate of Johnson, 100 Cal. App. 2d 73, 223 P.2d 105 (1950); Schultz v. First Nat'l Bank, 220 Or. 350, 348 P.2d 22 (1959); Smith v. Green, 4 Or. App. 533, 480 P.2d 437 (1971); Annot., 81 A.L.R. 2d 1128 (1962).

242. Calista Corp. v. Mann, 564 P.2d 53, 60 (Alaska 1977); Tuttle v. Winchell, 104 Neb. 750, 758, 178 N.W. 755, 757 (1920).

> parents to relinquish all their rights to the child in consideration of the adoptive parents' agreement to adopt such child, and to care and provide for it the same as though it were their own child, and such agreement is fully performed by all parties connected with such contract except there is no actual adoption, the courts *will decree specific performance of such contract* and thereby award to the child the same distributive share of the adoptive parent's estate as it would have been entitled to had the child actually been adopted as agreed.[243]

Courts using the estoppel theory stress the child's performance of filial services for the foster parent and purport to protect the child "against the fraud of the adoptive parents' neglect or design in failing to do that which he in equity was obligated to do."[244] The Texas Supreme Court expressed the essence of the estoppel rationale when it spoke of:

> an estoppel in pais to preclude adoptive parents and their privies from asserting the invalidity of adoption proceedings or, at least, the status of the adopted child, when, by performance upon the part of the child, the adoptive parents have received all the benefits and privileges accruing from such performance, and they by their representations induced such performance under the belief of the existence of the status of adopted child.[245]

It is often difficult to tell whether the court is proceeding on a contract analysis or an estoppel analysis since the decisions commonly contain elements of both theories.[246] Regardless of the theory used,

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243. *In re* Williams' Estates, 10 Utah 2d 83, 85, 348 P.2d 683, 684 (1960) (emphasis added). For other cases stressing the contractual aspects of the situation, see Habecker v. Young, 474 F.2d 1229 (5th Cir. 1973) (applying Florida law); *In re* Estate of Lamfrom, 90 Ariz. 363, 368 P.2d 318 (1962); Laney v. Roberts, 409 So. 2d 201 (Fla. Dist. Ct. App. 1982); Williams v. Murray, 239 Ga. 276, 236 S.E.2d 624 (1977).

244. Jones v. Guy, 135 Tex. 398, 403, 143 S.W. 2d 906, 909 (1940).

245. Cubley v. Barbee, 123 Tex. 411, 425-26, 73 S.W. 2d 72, 79-80 (1934) (quoting Annot., 27 A.L.R. 1365, 1365 (1923)). In a similar vein is the oftquoted statement of the Supreme Court of Missouri that

> [O]ne who takes a child inte his home as his own, receiving the benefits accruing to him on account of that relation, assumes the duties and burdens incident thereto, and that where justice and good faith require it the court will enforce the rights incident to the statutory relation of adoption. The child having performed all the duties pertaining to that relation, the adoptive parent will be estopped in equity from denying that he assumed the corresponding obligation. In equity it will be presumed that he did everything which honesty and good conscience required of him in justification of his course . . . . [H]e who has taken possession of a child in the capacity of an adopting parent cannot escape the duties and liabilities incident to that capacity by failing to follow the forms that the statute has prescribed to that end.

Holloway v. Jones, 246 S.W. 587, 591 (Mo. 1922). For estoppel based decisions quoting and following Holloway v. Jones, see Mize v. Sims, 516 S.W.2d 561 (Mo. Ct. App. 1974); Wooley v. Shell Petroleum Corp. 39 N.M. 256, 45 P.2d 927 (1935); Jones v. Guy, 135 Tex. 398, 143 S.W.2d 906 (1940); Cubley v. Barbee, 123 Tex. 411, 73 S.W.2d 72 (1934).

246. *See, e.g.*, Calista Corp. v. Mann, 584 P.2d 53 (Alaska 1977); Ramsay v. Lane, 507 S.W.2d 905 (Tex. Civ. App. 1974).

unless they find substantial compliance with the adoption statutes, the courts almost unanimously require that a contract to adopt be proved before they will grant equitable relief.[247]

Although the contract and estoppel theories are widely accepted, the facts of most cases do not fit either of these traditional legal constructs very well. The contract analysis is particulary artificial because it is difficult to find a mutuality of remedy, and other aspects of the so-called contract seem dredged up for the occasion. The widespread assumption is that the consideration for the foster parent's promise to adopt consists of two elements: the transfer of custody and the child's performance of services for the foster parent.[248] The courts also seem to assume that the contract is between the natural parents, or other persons relinquishing custody, on the one hand and the foster parents on the other.[249] This relegates the child to the role of a third party beneficiary, and indeed, some courts speak in terms that classify the child as such.[250] The problem with this classification is that the child supplies at least half of the consideration. As one commentator has noted, if "enforcement

247. Thus, in Cavanaugh v. Davis, 149 Tex. 573, 577, 235 S.W.2d 972, 974 (1951), the court said: "In no case has this Court upheld the adoptive status of a child in absence of proof of an agreement of contract to adopt. . . . The necessity for the existence of a contract or agreement has been recognized by the courts of many of our states." *See also* Hanks v. Hanks, 281 Ala. 92, 199 So. 2d 169 (1967), Bowden v. Caldron, 554 S.W.2d 25 (Tex. Civ. App. 1977). Some courts have intimated that maintenance of a family relationship alone might be sufficient for equity to intervene. *See, e.g.*, Holloway v. Jones, 246 S.W. 587, 591 (Mo. 1922). Others have attenuated the contract requirement to mere meaninglessness. *See, e.g.*, Herring v. McLemore, 248 Ga. 808, 286 S.E.2d 425 (1982); Williams v. Murray, 239 Ga. 276, 236 S.E.2d 624 (1977). Apparently, only one court has expressly done away with the requirement that the claimant show a contract to adopt. *See* Wheeling Dollar Sav. & Trust Co. v. Singer, 250 S.E. 2d 369 (W. Va. 1978). Two California cases dealing with the question of a foster parent's continuing child support obligation have impliedly dispensed with the contract requirement by failing to mention it. *See In re* Marriage of Valle, 53 Cal. App. 3d 837, 126 Cal. Rptr. 38 (1975); Clevenger v. Clevenger, 189 Cal. App. 2d 658, 11 Cal. Rptr. 707 (1961).

248. *See, e.g., In re* Estate of Lamfrom, 90 Ariz. 363, 368 P.2d 318 (1962); Laney v. Roberts, 409 So. 2d 201 (Fla. Dist. Ct. App. 1982); Williams v. Murray, 239 Ga. 276, 236 S.E.2d 624 (1977). The court in *In re* Estate of Lanfrom made this explicit, stating that: "the considerations flowing to the promisor must be twofold: (a) the promisee parents must turn the child over to the promisor, and (b) the child must give filial affection, devotion, association and obedience to the promisor during the latter's lifetime. . . ." 90 Ariz. at 367, 368 P.2d at 321.

249. *See, e.g.*, cases cited *supra* note 247.

250. *See, e.g.*, Prince v. Prince, 194 Ala. 455, 69 So. 906 (1915); Hilt v. Hooper, 203 S.W.2d 334 (Tex. Civ. App. 1947). In an early case, Van Dyne v. Vreeland, 11 N.J. Eq. 370 (1857), the court said: "It is objected that this agreement cannot be enforced by the [child], because he was not a party to it. But he was the party for whose benefit the agreement was made. . . . [T]he most valuable portion of [the consideration] . . . has been rendered by the [child] himself." *Id.* at 379.

is . . . contingent upon the child's 'performance,' . . . [this] requirement would seem to be foreign to the theory of third party beneficiaries."[251] If the child is a primary party to the contract rather than a third party beneficiary, then we must assume that the natural parents or other persons surrendering custody to the foster parent have contracted on his behalf as his agent. After all, the child is usually too young to speak for himself.[252] Some opinions appear to assume that the child is the real party to the alleged adoption contract, the natural parents acting merely in a representative capacity.[253]

Whether the child is a third party beneficiary or a primary party, the question arises whether anyone has the authority to make a legal contract designating the child's adoptor.[254] Implicit in the cases predicating relief on proof of a contract to adopt is the assumption that the biological parents or persons *in loco parentis* have this authority.[255] This assumption requires the qualification that the child's welfare overrides any private agreement for adoption. A biological parent might be bound by his promise to relinquish custody should the court find the relinquishment to be in the child's best interests. But no court would enforce a new custodial arrangement or agreed-upon adoption which it found to be inimi-

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251. Comment, *The Doctrine of Equitable Adoption*, 9 Sw. L. J. 90, 94 (1955) (footnote omitted); *see also* Bailey, *supra* note 225, at 35 n.19 (author notes that "[r]egarded as a third-party-beneficiary contract it must be conceded that the arrangement is characterized by most peculiar features, since the courts uniformly recognize that the child's services constitute the performance bargained for by the adopting parent").

252. *See, e.g.*, Luker v. Hyde, 260 Ala. 248, 69 So. 2d 421 (1953) (child entered foster home as infant); Barlow v. Barlow, 170 Colo. 465, 463 P.2d 305 (1969) (contract for adoption made with unwed mother before child's birth); Winder v. Winder, 218 Ga. 409, 128 S.E.2d 56 (1962); Bank of Maryville v. Topping, 216 Tenn. 597, 393 S.W.2d 280 (1965) (child entered foster home when six weeks old); Heien v. Crabtree, 369 S.W.2d 28 (Tex. 1963).

253. In Price v. Price, 217 S.W.2d 905, 906 (Tex. Civ. App. 1949), and Howell v. Thompson, 190 S.W.2d 597, 599 (Tex. Civ. App. 1945), the courts spoke of a requirement that the child prove a contract between himself or *someone acting on his behalf* and the would-be adoptor. In Wooley v. Shell Petroleum Corp. 39 N.M. 256, 264, 45 P.2d 927, 932 (1935) (emphasis added), the court spoke of "the child's performance *of the promise made in his behalf*," but went on to classify the child's action as one of estoppel rather than contract.

254. A promise to relinquish parental rights and a promise to allow a particular person to adopt are distinguishable.

255. In Foster v. Cheek, 212 Ga. 821, 825, 96 S.E.2d 545, 548 (1957), the court indicated that the biological mother could ratify a grandparent's agreement to allow another to adopt, and in Besche v. Murphy, 190 Md. 539, 545, 59 A.2d 499, 502 (1948), the court indicated that a person *in loco parentis* would have authority to make an agreement for adoption of the child. *Cf.* Winder v. Winder, 218 Ga. 409, 412, 128 S.E.2d 56, 58 (1962) (holding that doctors and nurses who attended the child's delivery had no legal right "to contract for disposition of the child"; the resulting invalidity of the "contract" barred the child's claim).

cal to the child's welfare.[256]

Most states have enacted regulations for the screening and approval of prospective adoptors,[257] and some state statutes prohibit private adoption arrangements.[258] In any state that prescribes investigative procedures designed to ensure the suitability of a prospective adoptor, the idea of a binding private contract for adoption must be taken with a grain of salt. In all fairness, the courts recognize the weakness of the contract rationale. They concede that the "contract" cannot be specifically enforced after the foster parent's death.[259] A corpse cannot adopt anyone. Moreover, the vastly prevailing view is that an equitably adopted child cannot obtain the status of a legally adopted child.[260] Specific performance is equally unfeasible during the lifetime of the parties for two reasons. First, it is arguable that the promisor does not breach his contract until he dies without having effected a legal adoption. Second, equity has long adhered to the rule that it will not command performance of a contract involving personal services or the assumption of an intimate relationship.[261]

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256. *See* Beach v. Bryan, 155 Mo. App. 33, 133 S.W. 635 (1911). As stated in Besche v. Murphy, 190 Md. 539, 59 A.2d 499 (1948):

> The [adoption] statute involves action by the court, looking always to the best interest of the child. . . . [A]doption is not a contract alone between the parties. It requires judicial determination of the advisability of permitting such action, and if a court decrees otherwise, it is not within the power of one person to adopt another.

Id. at 544, 59 A.2d at 501-02.

257. *See supra* note 23 and accompanying text.

258. *See, e.g.*, MASS. GEN. ANN. LAWS ANN. ch. 28A, § 11(c) (West 1981) "No person unrelated to . . . a child by blood or marriage . . . shall receive such a child for purposes of adoption except from a licensed or approved placement agency."). Section 15 of the Massachusetts law provides criminal penalties for violation of this section. *See also infra* note 391 and accompanying text.

259. In Laney v. Roberts, 409 So. 2d 201, 202 (Fla. Dist. Ct. App. 1982), the court remarked that "[s]uch an action seeks the specific performance of an agreement to adopt after the death, intestate, of the last surviving putative foster parent, when, paradoxically, the agreement can no longer be specifically performed." In a similar vein, Justice Watson of the New Mexico Supreme Court explained:

> The relief afforded . . . is generally classified as specific performance of contract . . . but the classification is not accurate. A specific performance of a contract to adopt is impossible after the death of the parties who gave the promise. Equity was driven to the fiction that there had been an adoption. That fiction being indulged, the case was not one of specific performance. It remained merely to apply the statutes of descent and to decree the succession.

Wooley v. Shell Petroleum Corp., 39 N.M. 256, 263-64, 45 P.2d 927, 931-32 (1935).

260. *See infra* notes 321-72 and accompanying text.

261. *See, e.g.*, Williams v. Richardson, 523 F.2d 999, 1005 (2d Cir. 1975) (Van Graafeiland, J., concurring); Northern Del. Indus. Dev. Corp. v. E.W. Bliss Co., 245 A.2d 431, 434 (Del. Ch. 1968); DeRivafinoli v. Corsetti, 4 Paige Ch. 264 (N.Y. 1833). These points were brought home in Besche v. Murphy, 190 Md. 539, 59 A.2d 499 (1948), as follows:

One commentator, unable to find a bilateral contract in the typical arrangement, has suggested that courts view the transaction as a unilateral contract in which the act of living as the child of the foster parent serves as the child's acceptance of the foster parent's offer to adopt in exchange for this act.[262] The problem with this or any other contract theory is that the child is usually too young when he enters the foster home to know of any contract or to understand its import if he did know of it.[263] All such a child knows is that he is being maintained in the home in which he finds himself. Having no better offers of shelter and nurture, he has no place else to go. Surely, the child's performance of filial services is more explicable as a natural response to the circumstance that the foster home is the only home he knows than it is explicable as a premeditated performance of some bargain supposedly entered into on his behalf. In this typical case, can a court honestly find any contractual meeting of the minds or consideration flowing between the foster child and his foster parent?

The estoppel theory comes closer to explaining the cases than does the contract analysis. The courts may insist on finding an agreement to adopt, but they recognize that, while the language of contracts is used, the real reason for granting a decree of equitable adoption is that equity estops the foster parent and his privies from denying the relationship they represented to the child. Thus, the New Mexico Supreme Court, after expressing the view that a "decision . . . is not properly to be reached by pigeonholing it as one for specific performance, and then simply applying the law of contracts," continued by pointing out "that the real classification of the remedy is that of estoppel."[264]

> [the child] could not have filed a bill for specific performance against [the foster mother] during the latter's lifetime. There would have been no mutuality of remedy to enforce such a contract, because personal services on the part of the child would be involved, that being part of the obligation of a daughter. Such a contract could not have been enforced against the [child], and consequently the [child] could not have enforced it against [the foster mother] . . . . The relationship of parent and child is of the most intimate, personal nature. Equity will not ordinarily enforce a contract to create such relationship.

Id. at 543-44, 59 A.2d at 501-02. In Menees v. Cowgill, 359 Mo. 697, 223 S.W.2d 412 (1949), *cert. denied*, 338 U.S. 949 (1950), and Van Dyne v. Vreeland, 11 N.J. Eq. 370 (1857), however, limited equitable relief was granted during the foster parent's life. In *Menees*, however, relief against the still living foster mother was merely declaratory.

262. *See* Comment, *Equitable Adoption: A Necessary Doctrine?*, 35 S. CAL. L. REV. 491, 495 (1962).

263. *See, e.g.*, cases cited *supra* note 252.

264. Wooley v. Shell Petroleum Corp. 39 N.M. 256, 264-65, 45 P.2d 927, 932 (1935) (quoting in part Cubley v. Barbee, 123 Tex. 411, 432, 73 S.W.2d 72, 83 (1934)). In *Cubley*

"[E]quitable estoppel is a rule of fundamental fairness whereby a party is precluded from benefiting from his inconsistent conduct which has induced reliance to the detriment of another."[265] Its essential elements are: (1) a promise or representation of fact; (2) actual and reasonable reliance on the promise or representation; and (3) resulting detriment.[266] Some courts add that the relying party must lack the representator's knowledge of the true state of affairs.[267] Albeit the estoppel rationale is less strained than the contract analysis, it, too, has its theoretical weaknesses when applied to the typical cases.

The estoppel elements that pose the greatest difficulty in the equitable adoption context are actual reliance and detriment. Detriment in the economic sense will usually be difficult to prove because the foster parents have given the child the home, education, and support that the biological parents were presumably unwilling or unable to provide. With respect to reliance, the cases are vague regarding whether the child's detrimental reliance must be on the contract to adopt per se or upon the representation of status. At least some cases actually "indicate the former."[268] Reliance on the agreement itself is usually impossible because a young child cannot comprehend the import of a contract. Reliance on a representation of status is almost as difficult to establish. It seems safe to assume that most children, even if they knew of their lack of status, would remain in the foster home and continue to act as dutiful children simply because they would have no other viable option. Not surprisingly, courts which adhere strictly to the reliance requirement find themselves rejecting meritorious equitable adoption claims for

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the Texas Supreme Court said:

> [T]he real classification of the remedy is that of estoppel. In those cases which designate the proceedings as suits for specific performance, the courts generally recognize that performance cannot be decreed within the usual meaning of that term. . . . However, the technical classification here is of no consequence. The defendants . . . are plainly estopped from asserting the invalidity of the deed of adoption . . . .

Id.; see also Calista Corp. v. Mann, 564 P.2d 53, 60-62 (Alaska 1977); Mize v. Simms, 516 S.W.2d 561, 564 (Mo. Ct. App. 1974).

265. *In re* Marriage of Valle, 53 Cal. App. 3d 837, 840, 126 Cal. Rptr. 38, 41 (1975) (citations omitted).

266. *See* Ricketts v. Scothorn, 57 Neb. 51, 57, 77 N.W. 365, 367 (1898); E.A. Coronis Assocs. v. M. Gordon Constr. Co., 90 N.J. Super. 69, 79, 216 A.2d 246, 252 (1966); Panorama Residential Protective Ass'n v. Panorama Corp., 28 Wash. App. 923, 934, 627 P.2d 121, 129 (1981).

267. *See, e.g., In re* Marriage of Valle, 53 Cal. App. 3d 837, 841, 126 Cal. Rptr. 38, 41 (1975).

268. *See* Comment, *Adoption by Estoppel: History and Effect*, 15 BAYLOR L. REV. 162, 169 & n.39 (1963).

want of the requisite reliance.[269] The opinions of these courts suggest that equity will intervene only on behalf of a child who is so calculating, covetous, and ungrateful that he is willing to perform filial services in the family home only on condition that he get an heirship out of it.

Because strict insistence on the reliance requirement would defeat the child's claim in so many worthy cases, the courts have often interpreted and applied the requirement leniently. *Laney v. Roberts*,[270] a contract based case, and *Ramsay v. Lane*,[271] an estoppel based case, are illustrative. Each case involved a claim to an intestate share of the deceased foster parent's estate. The claimant in *Laney* admitted that she knew she was not formally adopted and denied that she was aware of any contract to adopt. This testimony made it logically impossible for her to claim that she performed as a child in consideration of an adoption agreement or in reliance upon a representation of adoptee status. The court, nevertheless, allowed her claim. Similarly, the court in *Ramsay* recited as an apparently uncontroverted fact that the claimant and her foster parents discussed the possibility of legal adoption but decided to forego formal proceedings because of the cost.[272] Although

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269. In Garcia v. Saenz, 242 S.W.2d 230 (Tex. Civ. App. 1951), a boy was 10 when he learned he was not his uncle's natural child, yet he remained in his uncle's home and continued his filial duties as before. The court gave as one of its reasons for refusing to decree an estoppel the finding that "[t]here was no evidence presented which would show that [the child] had performed his tasks by reason of any reliance upon representations made to him which induced such performance under the belief that he was an adopted child." *Id* at 231. Similarly, in Calvert v. Johnston, 304 S.W.2d 394 (Tex. Civ. App. 1957) the claimant testified that he would have continued to live with his foster parents even had he known he was not formally adopted. In refusing to decree an equitable adoption, the court reasoned in part that even if it found a contract to adopt, it did not find reliance on its performance. *See id.* at 398. In cases following a contract analysis, the same problems of detriment and reliance arise in the guise of a search for consideration. *In re* Estate of Staehli, 86 Ill. App. 3d 1, 407 N.E. 2d 741 (1980), is illustrative. The claimant sought standing to contest her foster grandfather's will. The court refused to grant standing, explaining *inter alia* that:

> [n]either consideration nor a substantial change in position as a result of the purported oral contract finds a basis in the factual allegations . . . . The only inference of consideration is plaintiff's representation that she provided care, comfort and society to decedent for a number of years; but this circumstance . . . is as fully or more readily explainable as a natural outgrowth of being raised in the same household as decedent occupied and partially under his care.

Id. at 4, 407 N.E.2d at 744. The nature of the relief sought may partly account for the courts' stringency in *Calvert* and *Staehli*. For example, the *Calvert* claimant commanded little sympathy as he had already been willed his foster parent's entire estate and was seeking an equitable adoption decree merely to obtain more favorable inheritance tax treatment.

270. 409 So. 2d 201 (Fla. Dist. Ct. App. 1982).

271. 507 S.W.2d 905 (Tex. Civ. App. 1974).

272. *See id.* at 906.

the conclusion was irresistible that the claimant did not count on being formally adopted, the *Ramsay* court found sufficient evidence of reliance, stating "there is evidence that the Durhams represented that Jo Ann was their child by their words and actions. An inference can be drawn that by such conduct Jo Ann was led to believe that she had been adopted, and that she continued the family relationship in reliance on the agreement."[273] While the result in *Ramsay* may be correct, one winces at the fiction of reliance in the face of such evidence. Because of the proof problems associated with the reliance requirement in equitable adoption cases, Alaska has dispensed with it.[274] Similarly, though not as explicit in jettisoning the reliance requirements as the Alaska court, a Missouri opinion pointed out the unfairness of requiring someone taken in as a child to prove reliance, stating:

> [A] child's love, affection, companionship and service need not be given in response to an offer to adopt communicated to him, as is contended for by defendant . . . . "Equity acts to protect the child," and equitable adoption is not based upon direct communication to the child but rather upon the ground that it is " '. . . inequitable and unjust to allow one to fail to comply with an agreement made with the parent or custodian of a child to adopt it, when he has taken the child at such an age that it had no will or choice in the matter, that, after the child has performed everything contemplated by the relation provided for, the intended adoptive parent or his heirs will be estopped to deny the adoption,' " . . . We do not cast a burden upon a child of tender age to remember events beyond his little comprehension.[275]

Although, as indicated, any finding of reliance on a contract or representation of adoptive status is bound to be fictional, one senses that in the typical case the child does suffer a species of detrimental reliance, however difficult to articulate or prove. This detriment is psychological. Any child who grows up with the belief that he is a natural child of the only parents he knows is bound to be distressed when he learns that society views him as a legal stranger to his family. A few cases have recognized that the real harm is intangible. Justice Tobriner remarked in *Clevenger v. Clevenger*[276] that the putative father's representation that he was the child's natural father "would induce the child to hold himself out to the community as [his] natural son . . . only to suffer the abrupt removal of that status, and to undergo the subsequent social injury."[277] Justice Tobriner quoted with approval from *Gossett*

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273. *Id.* at 907.
274. *See* Calista Corp. v. Mann, 564 P.2d 53, 62 & n.22 (Alaska 1977).
275. Mize v. Sims, 516 S.W.2d 561, 566 (Mo. Ct. App. 1974).
276. 189 Cal. App. 2d 658, 11 Cal. Rptr. 707 (1961).
277. *Id.* at 671-72, 11 Cal. Rptr. at 715. Justice Tobriner went on to find, however, that

v. Ullendorff,[278] a fascinating older case, that spells out the psychological damage suffered by the child. The facts in *Gossett* are worth reciting. The putative mother acquired one week old twins from the biological parents, brought them home, and represented them to her husband and the community as born to her and her husband. The twins were raised in all respects as the children of the putative parents. More than twenty years later, the putative mother tried to avoid sharing the putative father's estate with the twins by revealing that the deceased was not their natural father. The *Gossett* court acknowledged that detriment could not "be said to exist in a material sense,"[279] but recognized the mental injury, stating that:

> no one can say what the psychological reaction upon them may be on the discovery that the person whom they had all their lives learned to love and revere as their father was not their parent in fact. So in a sense it is entirely possible that the two children have been injured by the deceitful or disingenuous conduct of the complainant during the years in which to gratify her own purposes she secured the assurance of personal and domestic satisfaction and comfort by her course of conduct.[280]

Reviewing the cases, one suspects that the theoretical impediments to the use of estoppel in equitable adoption cases are more semantic than real. Courts have traditionally applied estoppel in a commercial context, which has colored the terminology of reliance and detriment. But the underlying principle of fundamental fairness remains constant whether the context is commercial or familial. A California appellate court has made the most realistic attempt to translate the traditional estoppel elements into the terms of a typical equitable adoption case. That court indicated that:

> in order to establish an estoppel vis-a-vis the putative father, there must be a showing that (1) the putative father represented to the child that he was his father; (2) the child relied upon the representation by accepting and treating the putative father as his father; (3) the child was ignorant of the true facts; and (4) the representation was of such duration that it frustrated the realistic opportunity to discover the natural father and to reestablish the child-parent relationship between the child and the natural father.[281]

This framework could accommodate most meritorious equitable

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the factual record before the court in that case did not support the elements of estoppel.

278. 114 Fla. 159, 154 So. 177 (1934).

279. *Id.* at 167, 154 So. at 180.

280. *Id.* at 168-69, 154 So. at 181.

281. *In re* Marriage of Valle, 53 Cal. App. 3d 837, 841, 126 Cal. Rptr. 38, 41 (1975) (paraphrasing with approval Clevenger v. Clevenger, 189 Cal. App. 2d 658, 11 Cal. Rptr. 707 (1961)).

adoption claims.[282]

B. Proof of the Contract to Adopt

As stated earlier, the claimant must usually show that the foster parent made a contract to formally adopt him before a court will grant relief.[283] This seems to be true whether the court proceeds on a contract analysis or an estoppel analysis. Even if the theoretical problems just discussed in connection with the contract and estoppel theories are overcome, the claimant still encounters serious proof problems in meeting this contract requirement.

The alleged contract to adopt will usually be oral. Traditionally the courts have viewed these parol contracts with "grave suspicion" because claimants usually assert these agreements only after the alleged adoptor has died and can no longer dispute the claim.[284] Hence, the standard of proof for a contract to adopt is high. Most courts purport to require evidence "so clear, cogent, and convincing as to leave no reasonable doubt as to the fact that such agreement was made."[285] A minority merely require proof by a preponderance of the evidence.[286] Although a few courts have insisted on direct evidence of a contract,[287] most permit proof by circumstantial evidence such as "the acts, conduct and admissions of the parties."[288] Though no one factor is conclusive to establish or

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282. This framework is probably flexible enough to cover even the situation of the claimant in *Ramsay v. Lane* who did not count on being legally adopted. *See supra* notes 271-72 and accompanying text. By the time a child like the claimant in *Ramsay* is mature enough to comprehend his lack of status, it is usually too late for him to reestablish ties with his biological family or to act on his knowledge in any other way.

283. *See supra* note 226 and accompanying text.

284. *See* Burdick v. Grimshaw, 113 N.J. 591, 597, 168 A. 186, 189 (N.J. Ch. 1933); Cavanaugh v. Davis, 149 Tex. 573, 583, 235 S.W.2d 972, 978 (1951); House v. House, 222 S.W.2d 337, 338-39 (Tex. Civ. App. 1949).

285. Barlow v. Barlow, 170 Colo. 465, 473, 463 P.2d 305, 309 (1969); *see also In re* Estate of Van Cleve, 610 S.W.2d 620, 622 (Mo. 1981); Keller v. Lewis County, 345 Mo. 536, 543, 134 S.W.2d 48, 51 (1939); Johnson v. Olson, 71 S.D. 486, 489, 26 N.W.2d 132, 133-34 (1947).

286. *See* Moran v. Alder, 570 S.W.2d 883 (Tex. 1978); *see also* Roberts v. Caughell, 65 So. 2d 547 (Fla. 1953) (followed in Laney v. Roberts, 409 So. 2d 201 (Fla. App. 1982)).

287. *See* Luker v. Hyde, 260 Ala. 248, 69 So. 2d 421 (1953); Franzen v. Hallmer, 404 Ill. 596, 89 N.E.2d 818 (1950).

288. Cavanaugh v. Davis, 149 Tex. 573, 578, 235 S.W.2d 972, 975 (1951); *see also In re* Estate of Lamfrom, 90 Ariz. 363, 367, 368 P.2d 318, 321 (1962) ("[T]he contract to adopt need not be express but may be implied from the acts, conduct, and admissions of the adopting parties.") (footnote omitted)). "The word 'adopt' need not necessarily appear in [the] agreement, so long as the contract comprehends and intends a legal adoption." Williams v. Murray, 239 Ga. 276, 236 S.E.2d 624, 625 (1977) (citation omitted) (oral agreement between biological mother and foster parents in which the mother gave "my youngest

to defeat proof of the contract, courts have found certain factors suggestive of the existence of a contract to adopt.[289] It will help the claimant's case if he can show that he assumed the foster parent's surname, was referred to as the foster parent's child, and addressed the foster parent as "mommy" or "daddy." As one commentator has noted, "the strongest type of circumstantial evidence consists of statements made by the adopting parent during his lifetime from which the agreement may be inferred."[290] But proof of a family relationship alone will not suffice. The cumulative effect of the circumstantial evidence must point to some sort of an understanding between the alleged adoptor and the biological parents or their counterparts.[291] If absolutely no evidence of such an understanding appears, or if the alleged contract is invalid for some reason,[292] the claim will fail notwithstanding ample proof that the child and foster parent enjoyed the functional equivalent of a normal parent-child relationship.

The requirement that emerges from the decisions is that statements or conduct claimed to establish a contract to adopt must be unequivocally referable to such an agreement. This requirement explains the cases that distinguish between a mere intention to adopt versus a promise to adopt[293] or between an agreement to rear and educate versus a contract to adopt.[294] When the alleged adoptor is the child's stepparent the courts almost invariably find the proof insufficient on the grounds that the conduct of the par-

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daughter, . . . which is about two years old to raise as their own" found sufficient); *see also* Benefield v. Faulkner, 248 Ala. 615, 618, 29 So. 2d 1, 4 (1947) (written agreement to "treat . . . and care for [foster son] in every particular as if he were his own child" found sufficient).

289. *See* Holland v. Martin, 355 Mo. 767, 198 S.W.2d 16 (1946).

290. Comment, *The Doctrine of Equitable Adoption*, 9 Sw. L.J. 90, 101-02 (1955).

291. *See* Bailey, *supra* note 225, at 30, 39 n.36.

292. *See, e.g.*, King v. Heirs & Beneficiaries of Watkins, 624 S.W.2d 252 (Tex. Ct. App. 1981); Winder v. Winder, 218 Ga. 409, 128 S.E.2d 56 (1962); Rucker v. Moore, 186 Ga. 747, 109 S.E. 106 (1938); Franzen v. Hallmer, 404 Ill. 596, 89 N.E.2d 818 (1950). In each case the court intimated that the parties surrendering the child to the foster parents lacked authority to contract for the child's adoption. In *Rucker* the court remarked: "The evidence in the instant case, even if sufficient to show a contract of adoption with some person, failed to show that the contract was entered into with the father or mother of the child, or that the contract, if made, was ratified by either parent . . . ." 186 Ga. at 748, 199 S.E. at 108. The claimants in *Franzen* came from a Catholic orphanage. Although both biological parents were dead, the court indicated that the orphanage lacked authority to contract for the children's adoption. After reading the court's opinion this writer was left wondering whether, according to the court, anyone would have authority to contract on behalf of these orphans.

293. *See, e.g.*, House v. House, 222 S.W. 2d 337 (Tex. Civ. App. 1949); King v. Heirs & Beneficiaries of Watkins, 624 S.W.2d 252 (Tex. Ct. App. 1981).

294. *See, e.g.*, Garcia v. Saenz, 242 S.W.2d 230 (Tex. Civ. App. 1951).

ties was as consistent with a normal stepparent-stepchild relationship as it was with a contract to adopt.[295]

Courts that emphasize the high standard of proof are trying to ensure that the alleged promisor truly intended to adopt the child. A benevolent person may, of course, take in a homeless child without intending to adopt him. Courts fear that if they relaxed the standard of proof a person could not help out a needy child without having a de facto adoption foisted upon him after death. The Missouri Supreme Court articulated this concern in an oft quoted passage in which the court remarked:

> We might again call attention to the wisdom of the rule as to the character and quantum of proof required . . . to support adoption by estoppel . . . . If this rule is relaxed, then couples, childless or not, will be reluctant to take into their homes orphan children, and for the welfare of such children, as well as for other reasons, the rule should be kept and observed. No one, after he or she has passed on, should be adjudged to have adopted a child unless the evidence is clear, cogent, and convincing so as to leave no reasonable doubt.[296]

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295. *See, e.g.*, C. St. Foodland v. Estate of Renner, 596 P.2d 1170 (Alaska 1979); *In re* Estate of Van Cleve, 610 S.W.2d 620 (Mo. 1981); House v. House, 222 S.W.2d 337 (Tex. Civ. App. 1949). The relief requested in each cash was atypical, which may explain in part the stringency of the decisions. In C. St. Foodland the Alaska Supreme Court stressed the master's finding that "Mr. Renner treated Lewis no differently than any good stepparent would" and concluded the "[s]uch treatment, without more, does not show the implied agreement to adopt necessary for a finding of equitable adoption. 596 P.2d at 1171. In Lee v. Green, 217 Ga. 860, 126 S.E.2d 417 (1962), the Georgia Supreme Court reached the same result by finding a want of consideration rather than a want of proof. The court reasoned that since the stepparent could expect to receive the affection and filial obedience of his stepchildren whether or not he adopted them, the alleged promise te adopt did not have any consideration.

296. Benjamin v. Cronan, 338 Mo. 1177, 1188, 93 S.W.2d 975, 981 (1936). The Texas Supreme Court expressed the same concern as follows:

> It would not have been unnatural when viewed in the light of common knowledge and experience for this aunt to take her orphaned infant niece and rear her to maturity, giving her all the care and advantage of which the aunt was capable, receiving in return that which was justly due in the way of affection and normal services, without any agreement or intention on the part of the aunt to adopt the child and thereby make her a legal heir to her property. Someone had to care for the respondent or she would have become a charge upon the public. The question here is raised, as is ordinarily true in such cases, when the lips of the alleged adoptor have been sealed by death and in an effort to establish an interest in property. Such claims should be received with caution. Before one should be decreed to be the adopted child and heir of another in the absence of compliance with the statute prescribing a simple method of effecting the status, proof of the facts essential to invoke the intervention of equity should be clear, nnequivocal and convincing.

Cavanaugh v. Davis, 149 Tex. 573, 583, 235 S.W.2d 972, 978 (1951). In a similar vien a Texas appellate court remarked:

> Acts of human kindness referable to an undertaking to rear and educate a helpless child do not prove an agreement to adopt. Nor is loco parentis the equivalent of adoption . . . . The devolution of the estates of benevolent families and the operation of the

Whatever the stated standard of proof, courts can apply it with varying degrees of strictness depending on whether or not they want to find a contract. An example of lenient application is *Williams v. Murray*,[297] in which the only evidence supporting a contract to adopt was that the foster parents treated the child as a daughter and that the biological mother had orally given them "my youngest daughter, . . . which is about two years old to raise as their own."[298] The Georgia Supreme Court found this sufficient to sustain a jury verdict of virtual adoption. By contrast, at the strict end of the spectrum is *Luker v. Hyde*.[299] The claimant in *Luker* entered the home of James and Emma Snead, the foster parents, when she was only a few weeks old. The court's opinion recites that she was known in school as Lillie Snead, that she called the Sneads "Mama" and "Daddy," that the Sneads described Lillie as their daughter in naming her the beneficiary of their modest life insurance policies, and that "Lillie helped about the home and was a great comfort to [the Sneads] to whom no child was ever born."[300] A disinterested witness testified that Emma Snead said in his presence that she and James had adopted Lillie and that she showed him some papers captioned "Contract of Adoption" containing the names of James Snead, Lillie, and Lillie's biological father. Notwithstanding this testimony and other direct evidence of a written contract to adopt, the Alabama Supreme Court entertained "grave doubt" regarding the existence of the alleged contract and refused to decree an equitable adoption because no proof of its terms and provisions existed.[301]

The willingness to find a contract to adopt also varies with the relief requested. When the claimant goes beyond the traditional claim to an intestate share and demands the status of a legally adopted child for other purposes, he is less likely to succeed in establishing an equitable adoption. For example, in *Calvert v. Johnston*[302] the claimant, who had already taken under his foster fa-

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laws of descent and distribution do not rest upon a showing so tenuous and slender as is here presented.

Garcia v. Saenz, 242 S.W.2d 230, 232 (Tex. Civ. App. 1951). Notwithstanding these concerns, the Texas Supreme Court later indicated that the correct standard of proof is a "preponderance of the evidence." *See* Moran v. Alder, 570 S.W.2d 883, 885 (Tex. 1978).

297. 239 Ga. 276, 236 S.E.2d 624 (1977).

298. *Id.* at 277, 236 S.E.2d at 625.

299. 260 Ala. 248, 69 So. 2d 421 (1954).

300. *Id.* at 250, 69 So. 2d at 422.

301. *Id.* at 254, 69 So. 2d at 425.

302. 304 S.W.2d 394 (Tex. Civ. App. 1957).

ther's will, sought the more favorable inheritance tax status accorded biological and legally adopted children. In *House v. House*[303] the claimant sought a share of the workmen's compensation benefit paid on account of her stepfather's accidental death. Although in each case there was evidence on which a lenient court might have found the existence of a contract to adopt, the courts in both cases avoided granting the extraordinary relief requested by finding that no equitable adoption had occurred.[304]

C. *Suggested Criteria for Equitable Adoption*

Having seen how the courts test equitable adoption claims, we are ready to address our initial inquiry: What criteria should a court use to determine whether a child has been equitably adopted? We may begin by asking why most courts insist that the claimant prove a contract to adopt before equitable relief will be granted.[305] The cases already discussed suggest that the purpose is to assure the court that the foster parent intended to adopt the child as his heir and that the child grew up in the belief that he

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303. 222 S.W.2d 337 (Tex. Civ. App. 1949).

304. When claim affects realty and the alleged contract is oral, some courts have assumed the applicability of the Statute of Frauds provision requiring contracts for the sale of land to be in writing. *See, e.g., In re* Rivolo's Estate, 194 Cal. App. 2d 773, 15 Cal. Rptr. 268 (1961) and Luker v. Hyde, 200 Ala. 248, 69 So. 2d 421 (1954). A contract to adopt, however, unlike a contract to make a will or to die intestate, does not fetter the promisor's disposition of his estate since he can disinherit an adopted child just as he might disinherit a biological child. Therefore, some courts have taken the more logical position that contracts to adopt are not within the Statute of Frauds. *See, e.g.,* Tuttle v. Winchell, 104 Neb. 750, 178 N.W. 755 (1920); Jones v. Guy, 135 Tex. 398, 143 S.W.2d 906 (1940). The court in *Jones* drew the distinction between a contract to adopt and a contract to convey land as follows:

> It is our opinion that the effect of sustaining an estoppel in pais to preclude the adoptive parents and their privies from asserting the invalidity of adoption proceedings or at least the status of the adopted child . . . is not enforcing a parol contract for the sale of real estate. This is true for the obvious reason that an adopted child does not inherit property in virtue of the status of an adopted child alone but depends upon the intestacy of the adoptive parent, together with the statutes of descent and distribution. Moreover, the status of an adopted child with respect to the property of the adoptive parent is the same as that of parent's own children . . . . Mr. Pierce [the foster parent] had the right to dispose of his property by will . . . .

135 Tex. 398, 406, 143 S.W.2d 906, 910. Occasionally one sees the argument that a promise to adopt carries with it an implied promise to leave the child a share of the promisor's estate. *See, e.g., In re* Lanfrom's Estate, 90 Ariz. 363, 368 P.2d 318 (1962). This viewpoint seems to stretch an already thin and largely fictional agreement to encompass matters never contemplated by the parties. Even if a court applies the Statute of Frauds, the child's performance and the foster parent's part performance, if clearly referable to the contract, should suffice to remove the contract from its bar. Laney v. Roberts, 409 So. 2d 201 (Fla. App. 1982).

305. *See supra* text accompanying note 226.

was legally adopted.[306] The assumption seems to be that if the foster parent promised to formally adopt the child, he must have communicated that intention to the child, so that the representation needed for an estoppel may also be inferred.[307] The courts thus use the contract requirement as a rough divining rod to distinguish between the cases that do and do not merit extraordinary equitable intervention. The finding *vel non* of a contract to adopt is not, however, a reliable indicator of the meritoriousness of a child's claim. One can readily find cases in which the child loses for failure to establish the requisite contract, although on the equities he clearly deserved to participate in his foster parent's estate. In two such cases the court denied equitable relief to children raised in the foster home from infancy and treated in all respects like biological children because the parties who surrendered the children to the foster parents were not competent to contract for their adoption.[308]

The contract requirement imparts an appearance of guidance and predictability. Yet one must question whether this requirement is as useful a guide as it might first appear. As indicated, in most cases the finding of a contract to adopt is largely fictional,[309] as is any finding that a child of tender years relied on a contract or representation of adoptive status.[310] Moreover, even if the usual arrangement can be found to constitute a bona fide contract, the court's freedom to find or not find a contract according to how strictly it applies the standard of proof can produce different results on identical facts.[311]

In view of the artificiality of the contract requirement and its malleability to achieve whatever result the court desires, a more realistic guide would better serve both bench and bar. A better test for the meritoriousness of these claims is whether the foster parent led the child to believe that he was a biological or legally adopted

306. *See supra* text accompanying notes 293-96; Laney v. Roberts, 409 So. 2d 201 (Fla. App. 1982).

307. *See, e.g., supra* note 296 and accompanying text; *see also* Bailey, *supra* note 225, at 41-42.

308. *See* Winder v. Winder, 218 Ga. 409, 128 S.E.2d 56 (1962); Rucker v. Moore, 186 Ga. 747, 199 S.E. 106 (1938). For other cases in which meritorious claims foundered for inability to prove the requisite contract, see Luker v. Hyde, 200 Ala. 248, 69 So. 2d 421 (1954); Franzen v. Hallmer, 404 Ill. 596, 89 N.E.2d 818, (1950); King v. Heirs and Beneficiaries of Watkins, 624 S.W.2d 252 (Tex. Ct. App. 1981).

309. *See supra* notes 248-63 and accompanying text.

310. *See supra* notes 269 & 270-75 and accompanying text.

311. *See supra* notes 297-304 and accompanying text.

member of his foster family. If estoppel is the true basis for the granting of equitable relief,[312] whether or not a contract existed or even whether or not the foster parent intended to formally adopt the child should be beside the point. The courts should hold that the only finding essential to raise an estoppel is that the foster family's acts or omissions induced the child to believe that he was the foster parent's biological or formally adopted child. As one commentator has noted, "a most effective means of leading a child to believe that it will be entitled to all the rights of a natural child is to refrain from revealing the fact that it is not a natural child."[313] This holding out, whether by affirmative representation or by silence, is all that is needed to invoke the doctrine of adoption by estoppel against the foster parents or their privies. This suggestion presupposes a community belief that one who appears to be the child's parent, although he lacks intent to adopt the child, should have a legal as well as a moral obligation to disabuse the child of the misconception that society will treat him like any other child at the death of the only parents he knows.[314]

An approach that focuses on what the foster parent reasonably led the child to believe rather than what the foster parent intended eliminates the need to chase after the phantom contract to adopt. It also eliminates the need for any rigid rules regarding the age beyond which equitable adoption cannot occur.[315] Looking at our basic question—what the child was led to believe—the usual inference would be that the older the child the less likely he would be to believe that he was a natural or formally adopted child. On the other hand, a child who enters the home as an infant or toddler, who is treated like a biological child and is never told otherwise would quite understandably believe that he was the child of the people who raised him, regardless of the actual intent of the foster parents or the existence *vel non* of a contract to adopt.

Some courts have attenuated the contract requirement to near meaninglessness.[316] But only one court, the West Virginia Supreme Court of Appeals, has used the approach this Article suggests and

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312. *See supra* notes 248-81 and accompanying text.

313. Bailey, *supra* note 225, at 42 n.49.

314. Obviously, this disclosure cannot be made until the child is able to comprehend its import, but in most cases, the child can be meaningfully informed well before the foster parent's death.

315. *See, e.g.*, Thompson v. Mosleey, 344 Mo. 240, 245, 125 S.W.2d 860, 862 (1939) (no equitable adoption of one who was an adult at the time the agreement to adopt was made).

316. *See supra* note 298 and accompanying text.

expressly jettisoned the contract requirement. That court, in *Wheeling Dollar Savings & Trust Co. v. Singer*,[317] listed the circumstances tending to establish an equitable adoption,[318] noted that a finding of equitable adoption is usually predicated on proof of an express or implied contract to adopt, and then observed:

> While the existence of an express contract of adoption is very convincing evidence, an implied contract of adoption is an unnecessary fiction created by courts as a protection from fraudulent claims. We find that if a claimant can, by clear, cogent and convincing evidence, prove sufficient facts to convince the trier of fact that his status is identical to that of a formally adopted child, except only for the absence of a formal order of adoption, a finding of an equitable adoption is proper without proof of an adoption contract.[319]

This writer submits that other jurisdictions should follow the lead of West Virginia in dispensing with the contract requirement and focusing instead on what the foster family received and what it led the child to expect.[320]

D. The Consequences of Equitable Adoption

The foregoing section advocated that the contract requirement be scrapped and that the test for equitable adoption be modified to focus on what the foster child was reasonably led to believe. This section addresses our second inquiry: Once a court finds that a child has been equitably adopted, what consequences should flow from that determination? For example, should an equitably adopted child be given the more favorable inheritance tax status

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317. 250 S.E.2d 369 (W. Va. 1978).

318. The circumstances enumerated by the court were:

> the benefits of love and affection accruing to the adopting party . . ., the performances of services by the child . . .; the surrender of ties by the natural parent . . .; the society, companionship and filial obedience of the child . . .; an invalid or ineffectual adoption proceeding . . .; reliance by the adopted person upon the existence of his adoptive status . . .; the representation to all the world that the child is a natural or adopted child . . .; and the rearing of the child from an age of tender years by the adopting parents.

Id. at 373-74 (citations omitted).

319. *Id.* at 374.

320. The *Wheeling* case concerned a gift under a long-term trust to the life beneficiary's children. Neither the trustor, who died long before the alleged equitable adoption, nor her heirs, whom the trust named as alternate takers, could be said to be claiming through the alleged adopting parent. Thus, the only disturbing aspect of the *Wheeling* decision is that the court did not give in-depth treatment to the question of whether, even assuming the child had been equitably adopted, the donor could be said to have intended to include equitably adopted children on the same basis as biological and formally adopted children. Notwithstanding the strong equities in the child's favor on such an issue, strong policy reasons for resisting such an assumption exist. This aspect of the case is discussed in the next subsection on the consequences of equitable adoption.

accorded biological and legally adopted children? Can an equitably adopted child inherit through his deceased foster parent from the foster parent's lineal and collateral kindred? Does equitable adoption work in reverse so that the foster parent and his relatives can inherit from the equitably adopted child? In short, does an equitably adopted child have the same status as a legally adopted child?

In the typical equitable adoption case, the child receives the same share of his foster parent's estate he would have received had he been legally adopted. But some cases present more novel claims for relief that require the court to consider whether to treat the child as legally adopted for other purposes.[321] In dealing with the consequences of equitable adoption most decisions have limited the child to relief against the foster parent or his successorial privies and have denied the foster parent or his privies any standing in equity against the equitably adopted child. A few decisions, however, have gone beyond the traditional confines of the equitable adoption doctrine to give relief approximating a de facto legal adoption.[322] Do these cases augur a trend toward treating the equitably adopted child like a legally adopted child for all purposes? Do these decisions have a sound theoretical basis and, more importantly, have the courts thought through the policy implications of treating the equitable adoptee like a legal adoptee in all respects?

In evaluating the cases we must remember that equitable adoption is a remedy fashioned by equity and that the true basis of granting relief is that the parties against whom relief is sought have acted in such a way as to estop themselves from denying that they legally adopted the child. Therefore, theoretically it should follow that the test for all claims should be whether the party against whom the effects of legal adoption are sought has done anything to warrant the raising of an estoppel.

Most courts considering the matter have made it clear that a decree of equitable adoption does not confer the status of a legally adopted child. These courts have viewed compliance with the statutory procedures for adoption as the exclusive means, short of biological begetting, by which a legal parent-child relationship may be created. In a 1981 case, *Pouncy v. Garner*,[323] the claimant sought to inherit the intestate estate of his dead foster parents' daughter by claiming to be her brother by equitable adoption. Although will-

321. *See supra* notes 229-39 and accompanying text.

322. *See, e.g.*, Estate of Reid, 80 Cal. App. 3d 185, 145 Cal. Rptr. 451 (1978); Wheeling Dollar Sav. & Trust Co. v. Singer, 250 S.E.2d 369 (W. Va. 1979).

323. 626 S.W.2d 337 (Tex. Ct. App. 1981).

ing to admit the equitable adoption, the court rejected his claim on the ground that "the estoppel to deny the adopted status does not operate or work against collateral kindred not in privity with the adoptive parents."[324] Similarly, in *Menees v. Cowgill*[325] the claimant sought to inherit by representation the intestate estate of the sister of her long dead foster father. In denying relief the Missouri Supreme Court said:

> While it is in effect admitted that the appellant would have been entitled to a decree of equitable adoption against Guy M. Cowgill [the foster father] . . . she is not entitled to such a decree as against the collateral kind of his sister, who were not parties to the adoption contract and who are not bound thereby. No equities exist in her favor as against them authorizing a decree of equitable adoption by him as against them. . . .
>
> If Guy M. Cowgill had legally adopted appellant in compliance with statutory requirements, the adoption would have been binding on all persons . . ., but in an equitable proceeding based upon contract, only the parties thereto or those in privity with them are bound. Equity acts only against specific individuals and, in such case, one person may be bound and not another.[326]

Several cases have dealt with an attempt by relatives of the foster parents to inherit from the foster parents' deceased equitably adopted children. The relatives did not succeed in any of these cases because the equitably adopted children had done nothing to invoke the aid of equity against them.[327] In two of the cases the property escheated to the state apparently because the intestate

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324. *Id.* at 342 (following Asbeck v. Asbeck, 369 S.W.2d 915 (Tex. 1963)). Bank of Maryville v. Topping, 216 Tenn. 597, 393 S.W.2d 280 (1965), presented the question of whether the widow and biological issue of a predeceased foster child could inherit through him from the estate of the foster mother. The foster mother's estate was treated as intestate property because her holographic will's residuary clause was too vague to be given effect. The Tennessee Supreme Court denied the inheritance, holding that Tennessee would not recognize the equitable adoption doctrine when, as here, neither "a substantial compliance with the adoption statute" nor "a contract of adoption and inheritance" was present. *Id.* at 605, 393 S.W.2d at 284. The court did say, however, that if an equitable adoption existed on the facts presented, the dead foster child's widow and issue would take through him from the foster mother's estate. *Id.* at 602, 393 S.W.2d at 282. Although the beginning of the opinion seems to reject categorically the equitable adoption doctrine *in toto*, a close reading of the opinion shows that Tennessee does afford equitable relief under a different label in cases presenting either a substantial effort to comply with the adoption statute or "a contract of adoption and inheritance." *Id.* at 605, 393 S.W.2d at 284.

325. 359 Mo. 697, 223 S.W.2d 412 (1949), *cert. denied*, 338 U.S. 949 (1950).

326. *Id.* at 707-08, 223 S.W.2d at 418. *But cf.* Wheeling Dollar Sav. & Trust Co. v. Singer, 250 S.E.2d 369 (W. Va. 1978) (permitting equitably adopted daughter of life beneficiary of testamentary trust to take remainder as life beneficiary's child under will executed by a stranger to the equitable adoption).

327. *See In re* Estate of Riggs, 109 Misc. 2d 644, 440 N.Y.S.2d 450 (Sur. Ct. 1981); Geiger v. Estata of Connelly, 271 N.W.2d 570 (N.D. 1978); Heien v. Crabtree, 369 S.W.2d 28 (Tex. 1963).

foster children's biological relatives were unknown.[328] Thus, a number of cases clearly establish that the equitably adopted child cannot inherit through his foster parents from their relatives and that equitable adoption does not work in reverse to give the foster parents or their privies any rights against the equitably adopted child. It would seem to follow that mutual inheritance rights would continue to exist between the equitably adopted child and his biological family.[329]

When it comes to the status of equitably adopted children under inheritance tax statutes the cases have not been so uniform.[330] The highest courts of two states have refused to grant equitable adoptees the favorable tax treatment accorded biological and legally adopted children. In a 1981 decision, *Goldberg v. Robertson*,[331] the Missouri Supreme Court denied an equitably adopted child the lower inheritance tax rate, explaining that it had "carefully circumscribed"[332] the equitable adoption doctrine to fit the doctrine's sole justification that it would be inequitable to allow one who has failed to formalize the parent-child relationship, after receiving its benefits, to deny the child's adoptive status. In *Wooster v. Iowa State Tax Commission*[333] the Iowa Supreme Court made this more explicit:

> The principle which the court has sought to apply . . . is to do justice and equity . . . to one who, though having filled the place of a natural born child, through inadvertence or fault has not been legally adopted. In such case, property recompense has been measured in the amount fixed by the statutes of descent and distribution. But we have never held . . . that in so doing our decision so cured the defects in the adoption as to effect a legal adoption as though the statutory proceedings had been fully complied with. Since the matter of adoption is strictly statutory and cannot be effected by the mere agreement of the interested parties, with better reason may it be said that it cannot be effected by estoppel in pais, or by conduct.[334]

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328. *See* Geiger v. Estate of Connelly, 271 N.W.2d 570 (N.D. 1978); Heien v. Crabtree, 369 S.W.2d 28 (Tex. 1963). Interestingly, the relatives' claim in *Heien* failed notwithstanding that the Texas Probate Code governing inheritance from and through adopted children defined the term "child" to include "an adopted child, whether adopted by any existing or former statutory procedure, *or by acts of estoppel* . . . ." 369 S.W.2d at 30 (dissenting opinion).

329. Unfortunately, no case law exists directly on point.

330. Some older cases have denied even legal adoptees the lower tax rate applicable to biological children. *See, e.g., In re* Strunk's Estate, 369 Pa. 478, 87 A.2d 485 (1952); State v. Yturria, 109 Tex. 220, 204 S.W. 315 (1918).

331. 615 S.W.2d 59 (Mo. 1981).

332. *Id.* at 62.

333. 230 Iowa 797, 298 N.W. 922 (1941).

334. *Id.* at 800, 298 N.W. at 924. (quoting Caulfield v. Noonan, 229 Iowa 955, 295 N.W. 466 (1940)).

If equitable adoption is based on estoppel, it is difficult to see how state taxing authorities could do anything to estop themselves from denying a legal adoption that did not in fact occur. Taxing authorities do not usually involve themselves in arrangements for the child's upbringing.[335]

Notwithstanding the logic of these arguments, the California courts have given equitable adoptees the status of legally adopted children for inheritance tax purposes.[336] *In re Estate of Radovich*[337] concerned the rate classification of George Radovich, who, in a probate proceeding to establish his property rights, had received the estate he would have inherited from his intestate foster father had he been legally adopted. In holding that the state should assess George at the lower tax rate applicable to natural and formally adopted children, the California Supreme Court seemed to reason that the probate proceeding was an heirship proceeding in rem and, therefore, binding on the whole world, including the California state taxing authorities.[338] The high courts of Missouri and Iowa have expressly rejected the idea of equitable adoption as an in rem adjudication.[339] As Justice Welliver said in *Goldberg v. Robertson*, "[a]n *equitable adoption* is an *in personam* action, binding only on the parties to the action and those in privity with them."[340] The niceties of the distinction between proceedings in rem and proceedings in personam would not necessarily, in this author's view, dictate the *Wooster* holding over the holding of *Radovich*. Another concern which inclines this writer to prefer the position of *Wooster* and *Goldberg* over that of *Radovich* is that formal adoption procedures designed to ensure suitable placement of adoptees may be eroded if courts give informal and formal adop-

335. As the *Wooster* opinion put it, "[o]bviously, when a party fails to take the steps required by the state to effectuate a legal adoption the estoppel against said party resulting from such noncompliance . . . does not bar the state from standing upon the facts as they actually exist in making classifications for inheritance tax purposes." *Id.* at 803, 298 N.W. at 925.

336. *See In re* Estate of Radovich, 48 Cal. 2d 116, 308 P.2d 14 (1957); Estate of Reid, 80 Cal. App. 3d 185, 145 Cal. Rptr. 451 (1978).

337. 48 Cal. 2d 116, 308 P.2d 14 (1957).

338. *Id.* at 123, 308 P.2d at 19. As the dissent in *Radovich* pointed out, the majority's rationale is at odds with the view of other jurisdictions that a decree of equitable adoption is not strictly speaking a declaration of heirship, but rather is an equitable remedy fashioned to correct injustice by giving the equitably adopted child what he would have received had his foster parent taken the necessary legal steps to make him an heir. *Id.* at 129-30, 308 P.2d at 23 (Schauer, J., dissenting; joined by McComb, J.).

339. *See* Goldberg v. Rebertson, 615 S.W.2d 59 (Mo. 1981); Wooster v. Iowa State Tax Comm'n, 230 Iowa 797, 298 N.W. 922 (1941).

340. 615 S.W.2d at 63.

tions the same effect. This consideration will be addressed following review of the cases.

Even nontraditional claims by the child against the foster parent or his estate have a sounder theoretical basis than claims by or against third parties. Thus, a court has granted an equitably adopted child standing to contest the unfavorable will of his foster parent.[341] A number of cases have cropped up presenting the question whether one who has equitably adopted a child may be compelled to support that child after divorce breaks up the family unit. Although this kind of scenario usually provides some basis for the raising of an estoppel, the jurisdictions have gone both ways on this issue.

The courts of New York and California have fixed unofficial parents with continuing liability for the support of their equitably adopted children. *Wener v. Wener*[342] presented the following scenario. A childless New York couple heard that an infant whose birth was imminent would be available for adoption in Florida. According to the court's findings the husband arranged "for his wife to go to Florida and bring the infant back to New York. He picked them up at the airport upon their return and drove them back to the parties' apartment, where a bassinet, bottles, and diapers were waiting."[343] A year later the husband and wife separated and divorce proceedings ensued. Although the husband sent the child an Easter card signed "Love Dad," in the divorce proceedings he denied any obligation to support the child whom he never legally adopted. In affirming the trial court's holding that the husband was liable for the child's support, the appellate court commented:

> We cannot ignore the realities of this infant's plight. . . . This infant was taken from her natural mother when but a few days old, albeit with her mother's consent. Her natural parents and their whereabouts are unknown (no one has ever suggested she be returned to them) and she has never been legally adopted. Still, the parties at bar are the only "parents" she has ever known. Having brought the child into their home, they must, of necessity, shoulder the burden of her support.[344]

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341. *See* Vincent v. Bronis, 365 S.W.2d 835 (Tex. Civ. App. 1963). A later case, *In re* Estate of Staehli, 86 Ill. App. 3d 1, 407 N.E.2d 741 (1980), concerned a foster granddaughter's attempt to contest her foster grandfather's will. The court avoided the question by finding no equitable adoption, but seemed to assume that the petitioner would have had standing to contest had the decedent equitably adopted her natural mother.

342. 35 A.D.2d 50, 312, N.Y.S.2d 815 (1970).

343. *Id.* at 52, 312 N.Y.S.2d at 817.

344. *Id.* at 53, 312 N.Y.S.2d at 818. The *Wener* court relied in part on an earlier New York decision, Gursky v. Gursky, 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (1963), that fixed liability for the support of a child who, with the husband's consent, had been conceived by

A California case, *In re Marriage of Valle*,[345] presented facts similar to those in *Wener*. The Valles, a childless couple, brought the husband's young niece and nephew from Mexico to live with them in California. The birth certificates by which the children entered the country listed the Valles as the biological parents. Three years later the Valles separated and in the ensuing dissolution proceedings Mr. Valle denied any obligation to support the children unless the court awarded him custody. The court estopped Mr. Valle from denying paternity for support purposes because the couple had led the children to believe that they were their natural parents and had thereby frustrated any "realistic opportunity to reestablish the child-parent relationship between the children and their natural parents."[346] The *Valle* court stressed that "the estoppel runs in favor of the child, not the spouse."[347] By contrast, *Lewis v. Lewis*,[348] a 1976 New York case, fixed liability for child support on an unofficial father by finding an estoppel in favor of his spouse. The *Lewis* fact pattern is probably fairly common. Mr. Lewis married the natural mother of Kim, a three year old child by another man. After the marriage he listed himself on Kim's birth certificate as her natural father. In a divorce action brought several years later, the wife, although conceding that Mr. Lewis was not Kim's biological father, sought to hold him liable for her support. Noting that Mr. Lewis had listed himself as and assumed the role of Kim's father, the court found that the wife "was justified in relying upon his sincerity in being responsible for the child" and concluded that "the theory of equitable estoppel now prevents the husband from denying that assumption of responsibility upon which his wife relied."[349]

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artificial insemination. The *Gursky* court found that technically the child was born out of wedlock, but nevertheless, in annulment proceedings held the husband primarily responsible for the child's support "on the basis for [sic] an implied contract to support or by reason of application of the doctrine of equitable estoppel." *Id.* at 1089, 242 N.Y.S.2d at 412.

345. 53 Cal. App. 3d 837, 126 Cal. Rptr. 38 (1975), (following Clevenger v. Clevenger, 189 Cal. App. 2d 658, 11 Cal. Rptr. 707 (1961), in which the court had indicated it would order support if the record established an estoppel regarding the child).

346. 53 Cal. App. 3d at 842, 126 Cal. Rptr. at 42.

347. *Id.* at 841, 126 Cal. Rptr. at 41.

348. 85 Misc. 2d 610, 381 N.Y.S.2d 631 (1976).

349. *Id.* at 612-13, 381 N.Y.S.2d at 633. In a District of Columbia case presenting facts almost identical to the facts in *Lewis*, the court refused to find that an equitable adoption had occurred and, thus, never squarely decided whether an equitable adoptor is liable for his equitably adopted child's support. *See* Fuller v. Fuller, 247 A.2d 767 (D.C. 1968). Another decision which avoided the question is that of the Nevada Supreme Court in Sargeant v. Sargeant, 88 Nev. 223, 495 P.2d 618 (1972).

Contrary to these New York and California decisions, the high courts of Montana and Georgia appear to have taken the position that the doctrine of equitable adoption has no place in controversies over child support or custody. *Pierce v. Pierce*,[350] a 1982 Montana case presenting facts very similar to the facts in *Lewis*, concerned a stepfather who had assumed a father role vis-à-vis his stepson and had falsely signed an affidavit of parentage. After holding that the stepfather had no standing in the divorce proceedings to contest the biological mother's custody of the child, the Montana Supreme Court concluded that the stepfather accordingly had no continuing duty to support his equitably adopted child. The stepfather was thus left with no parental rights but with no parental obligations either. The Georgia case, *Ellison v. Thompson*,[351] presented an odd twist that may crop up quite frequently in our divorce prone society. Following divorce of the biological parents, the biological mother remarried, and her second husband formally adopted her two toddlers. When this second marriage ended in divorce, the biological father, husband number one, reassumed some of his former parental role. In support proceedings the trial court found that husband number one had virtually readopted his children and held him liable for their support. On appeal, the Georgia Supreme Court said that "the theory 'virtual adoption' is not applicable to a dispute as to who is legally responsible for the support of minor children"[352] and refused to hold husband number one liable for child support. *Ellison* might be distinguished from decisions attaching child support liability on equitable adoptors because in *Ellison*, unlike in most other cases, the child had an official adoptive father to look to for support.[353] The *Ellison* court, however, did not rely on this consideration; instead, it categorically held that the doctrine of virtual adoption does not extend to child support controversies.

Should the equitable estoppel theory be used in child support litigation? Certainly, as *Ellison* illustrates, the doctrine can inject complexity into child support disputes involving multiple parent figures. On the other hand, in a case like *Wener v. Wener* in which

350. _ Mont. _, 645 P.2d 1353 (1982).

351. 240 Ga. 594, 242 S.E.2d 95 (1978).

352. *Id.* at 596, 242 S.E.2d at 97.

353. "The adoption by Gunn [husband number two] of the children relieved Ellison [husband number one] of all obligations and created the relationship of parent and child between Gunn and the children. Gunn is therefore legally responsible for the support of the children as long as this relationship continues to exist." *Id.*

the child has no one but the equitable adoptors to look to for support,[354] it would seem that the court has no choice but to use the doctrine to ensure the child's maintenance. Whenever the parties induce the child to look to them as his only parents, a sound theoretical basis exists for estopping the equitable adoptors from denying the obligations of the parent-child relationship thus represented. On balance it seems that courts may appropriately use the equitable adoption doctrine to fix child support liability. But courts should limit its application to situations in which, by their actions, the equitable adoptors have denied the child any real opportunity to reestablish ties with his biological or official adoptive parents.

The courts have dealt with a miscellany of other questions concerning the consequences of equitable adoption. For example, litigants have raised the question whether an equitably adopted child may recover a workmen's compensation death benefit for the death of his foster parent. A Texas case avoided the question by finding that no equitable adoption had occurred but seemed to assume that the foster child could partake of the benefit were equitable adoption established.[355] In the converse situation another Texas decision denied a foster parent's claim to recover a workmen's compensation benefit for the accidental death of the equitably adopted child he had raised from infancy.[356]

Courts have also examined the ramifications of equitable adoption in the context of wrongful death claims. The results vary depending on the terms of the applicable statute. *Grant v. Sedco Corp.*[357] concerned a claim for the foster mother's death brought by her minor equitable adoptee's guardian under Florida's statute, which included the decedent's "minor children" as wrongful death beneficiaries. The Florida court held that one who did not legally qualify as the decedent's child could not maintain a child's claim under the statute.[358] A Nevada case, *Bower v. Landa*,[359] decided

354. *See supra* notes 342-44 and accompanying text.

355. *See* House v. House, 222 S.W.2d 337 (Tex. Civ. App. 1949).

356. *See* Servantez v. Aguirre, 456 S.W.2d 467 (Tex. Civ. App. 1979). *But cf.* Jones v. Loving, 363 P.2d 512 (Okla. 1961) (allowing a claim by biological mother for the death of her adopted-away son after an incomplete attempt to readopt him as her child).

357. 364 So. 2d 774 (Fla. Dist. Ct. App. 1978).

358. The court followed and quoted with approval a Georgia decision, Limbaugh v. Woodall, 121 Ga. App. 638, 175 S.E.2d 135 (1970), which held that "the terms 'child' or 'children' as used in our wrongful death statutes do not encompass one claiming to be like a child as to another acting in loco parentis, even when such relationship obtains under an agreement to 'adopt' but the legal adoption has never transpired." *Id.* at 641, 175 S.E.2d at

under a differently worded statute, permitted such a claim. After an automobile accident killed both of his foster parents, the equitably adopted child intervened in a wrongful death action brought for the benefit of the foster father's siblings. An earlier Utah probate proceeding had decreed the child the estate he would have inherited from his foster father had he been legally adopted. The Nevada Supreme Court allowed the equitably adopted child's claim to the exclusion of the siblings' claim, reasoning that, because the child had been decreed his foster father's entire estate, he came within the Nevada wrongful death statute's term "heirs," which, said the court, "includes any person entitled to inherit the estate of a decedent."[360] This rationale seems a bit shaky because a decree of equitable adoption is not strictly speaking a declaration of heirship but rather is an equitable remedy fashioned to correct injustice by giving the child the estate he would have received had the foster parents taken the necessary steps to make him an heir. Moreover, if the wrongful death claim is tested against the estoppel theory, it is difficult to see who is estopped. The claim is not against the foster parent or his estate, and it seems doubtful that either the foster parent's collateral relatives or the wrongful death defendants would have done anything to warrant the raising of an estoppel against them. If these claims are to be allowed, this should be accomplished by amendment of the wrongful death statutes to include the decedent's *dependents* as beneficiaries whether or not they legally qualify as his children. In the converse situation several courts have denied equitable adoptors standing to sue for the wrongful deaths of their equitably adopted children[361] because, as stated in a 1982 Illinois decision, a "foster parent does not come within the term 'next of kin' in the wrongful death statute."[362]

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359. 78 Nev. 246, 371 P.2d 657 (1962).

360. *Id.* at 253, 371 P.2d at 661; *cf.* Greer Tank & Welding Inc. v. Boettger, 609 P.2d 548, 550 (Alaska 1980) (Decedent's former stepson was allowed to claim as a dependent under Alaska's wrongful death statute, which lists as wrongful death beneficiaries decedent's "husband or wife, and children . . . *or other dependents.*" (emphasis added)).

361. *See, e.g., In re* Estate of Edwards, 106 Ill. App. 3d 635, 435 N.E.2d 1379 (1982); Whitchurch v. Perry, 137 Vt. 464, 408 A.2d 627 (1979).

362. *In re* Estate of Edwards, 106 Ill. App. 3d 635, _, 435 N.E.2d 1379, 1382 (1982).

A unique and complex area deserving treatment beyond the scope of this Article is the status of the equitably adopted child in qualifying for the benefits under social welfare legislation. In cases arising under the Social Security Act some courts have permitted equitably adopted children to qualify for benefits when the federal statute does not mandate formal adoption proceedings and state law would recognize the adoption. See 42 U.S.C. §§ 402(d), 416 (1976 & Supp. 1981) for provisions defining the term "child" for purposes of old age,

A construction problem of particular difficulty arises when a stranger to the informal adoption makes a gift to someone else's "children," "issue," or "heirs," and a claimant seeks to qualify as a member of the designated class by dint of equitable adoption. Suppose, for example, that *T* in 1940 executes a testamentary trust directing payment of income to his son *S* for life with corpus distributable either to *S*'s issue or to *T*'s next of kin as of *S*'s death in the event *S* dies without issue. After *T* dies, *S*, who has no biological issue, takes another's child, *X*, into his home, raises *X* as his own, but never formalizes the relationship by legal adoption. When *S* dies in 1983, *X* claims the fund as *S*'s equitably adopted child, and *T*'s collateral relatives claim the fund as *T*'s next of kin. Should the trustee distribute the corpus to *X* or to *T*'s collateral relatives? Although some courts might approach the matter by asking whether *X* legally qualifies as *S*'s issue, that is not really the question. Strictly speaking the question is whether *T* meant to include an informally adopted child like *X* in the class even though he does not qualify as *S*'s issue. Alas, once again, the instrument is totally unenlightening and the court must fashion a presumption concerning what the average donor using the language *T* used must have intended.

Although few reported cases deal with the equitably adopted child in the class gift setting, more such cases may arise as the adoption by estoppel doctrine expands. The highest courts of Alabama and West Virginia already have had occasion to grapple with the problem. The Alabama case, *Robinson v. Robinson*,[363] presented the following facts. The testator died in 1937 with a will

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survivor's or disability insurance benefits under the Social Security Act. For cases allowing benefits, see Blair *ex rel.* Brown v. Califano, 650 F.2d 840 (6th Cir. 1981); Williams v. Richardson, 523 F.2d 999 (2d Cir. 1975). For a case disallowing benefits, see King v. Schweiker, 647 F.2d 541 (5th Cir. 1981). Statutes providing aid to dependent children are concerned more with the needs of the child than with the relationship between the child and his custodian. The relationship between the child and his custodian will, however, determine under which section the child receives benefits, which may, in turn, affect the amount of benefits. Needy children living with a statutorily designated blood relative qualify for benefits under 42 U.S.C. § 606 (1976 & Supp. 1981), which also covers formal adoptees. Youngsters living with more distant relatives or strangers, however, qualify for benefits under 42 U.S.C. § 608 (1976 & Supp. 1981). One court seemed to indicate that § 608 would also apply when a legal adoption is still incomplete yet an equitable adoption is evident. *See* Cannon v. Illinois, Dep't Pub. Aid, 76 Ill. App. 3d 910, 395 N.E.2d 732 (1979). For a case in which the court allowed a claimant qualified under § 606 to choose § 608 instead and thus receive a higher award, see Miller v. Youakim, 440 U.S. 125 (1979). For legislative history on these provisions, see Social Security Act Amendments of 1950, 1950 U.S. CODE CONG. & AD. NEWS 3287, 3350.

363. 283 Ala. 257, 215 So. 2d 585 (1967).

devising approximately 1500 acres of farm and pasture land known as the "McCarty Place" to one son for life and directing conveyance of the remainder to the children of another son in the event that the life tenant should die without children.[364] Although the life tenant never had any biological children, he and his wife did develop a close relationship with a lad named George for whom they provided an education and a bedroom in their home. The testator never knew George, who was born two years after he died. When George was about twenty years old, his biological parents agreed to let the life tenant and his wife adopt him.[365] Formal adoption proceedings were actually commenced, but the decree of adoption did not become final until eleven months after the life tenant died with a will purporting to devise the "McCarty Place" to George. The Alabama Supreme Court held that, because the decree was not final, George was not a legally adopted child when the life tenant died and that, for purposes of the contingency in the testator's will, the equitable adoption of George did not prevent the life tenant's death without children. The court held that George was entitled to share in his foster father's estate as an equitable adoptee but, because the foster father's interest in the "McCarty Place" ended with his death, the foster father's estate had no realty for George to take. Had his foster father only lived another eleven months George would have owned a chunk of the "McCarty Place," but the fates and the Alabama Supreme Court conspired to leave George empty handed.[366]

At the other end of the spectrum in approach is the decision of the West Virginia Supreme Court in *Wheeling Dollar Savings & Trust Co. v. Singer*.[367] *Wheeling* involved a testamentary trust that directed payment of income to the testatrix' niece, Lyda, for life and payment of corpus to Lyda's children or, if she died without children, to the testatrix' heirs at law.[368] When Lyda died, a woman named Ada, whom Lyda had taken from an orphanage when Ada was eight years old and whom Lyda had raised as her own child, claimed the fund. Lyda never legally adopted Ada. The

364. The terms of the devise have been simplified for the sake of readability.

365. One surmises that a desire to keep the "McCarty Place" from passing entirely to the children of the life tenant's brothers partly motivated the proposed adoption.

366. That the adoption did not become final in time spared the court the agony of having to decide whether the testator's use of the term "children" contemplated a person adopted as an adult by the life tenant. For a refresher on that coustruction problem, see *supra* notes 193-221 and accompanying text.

367. 250 S.E.2d 369 (W. Va. 1978).

368. The terms of the trust have been simplified for the sake of readability.

West Virginia Supreme Court held that if Ada could prove "by clear, cogent and convincing evidence" that she "stood from an age of tender years in a position *exactly* equivalent to a formally adopted child," she would be entitled to the fund as Lyda's equitably adopted child.[369] Neither the testatrix, who died long before the alleged equitable adoption, nor her heirs, who were named as alternate takers, were claiming through the alleged adopting parent. Neither the testatrix nor her heirs had done anything to warrant the raising of an estoppel against them. The practical effect of the court's decision, therefore, was to give the equitably adopted child the same status as a biological or legally adopted child vis-á-vis parties who had nothing whatsoever to do with the alleged informal adoption. The court did draw one distinction between the legal adoptee and the equitable adoptee, pointing out that "[t]he formally adopted child need only produce his adoption papers to guarantee his treatment as an adopted child" whereas the equitably adopted child must prove his position "by clear, cogent and convincing evidence."[370] The court indicated, however, that once the equitably adopted child overcame the high proof hurdle, the court would treat her in all respects like a formally adopted child. Indeed, as the court saw it, the question was "whether adherence to formal adoption procedures . . . is the exclusive method by which a person may be accorded the protections of adoptive status in West Virginia."[371] The court proceeded to answer that question in the negative, commenting that:

> Our family centered society presumes that bonds of love and loyalty will prevail in the distribution of family wealth along family lines, and only by affirmative action, i.e., writing a will, may this presumption be overcome. An equitably adopted child in practical terms is as much a family member as a formally adopted child and should not be the subject of discrimination. He will be as loyal to his adoptive parents, take as faithful care of them in their old age, and provide them with as much financial and emotional support in their vicissitudes, as any natural or formally adopted child.[372]

One may certainly sympathize with the court's position. However, it is disappointing that the court did not explore in depth the question whether we should presume a stranger to the informal adoption meant to include someone else's equitably adopted child

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369. 250 S.E.2d at 373. In the same opinion the court jettisoned the requirement that an adoption contract be proved to establish an equitable adoption. *See supra* notes 317-20 and accompanying text.

370. 250 S.E.2d at 373.

371. *Id.*

372. *Id.*

or consider the policy implications of treating the equitable adoptee in all respects like a formally adopted child.

Should we presume that a stranger to the informal adoption meant to include someone else's equitably adopted child in his private gift? Should tax departments give an equitably adopted child the more favorable inheritance tax status accorded biological and legally adopted children? Should a court permit an equitably adopted child to inherit through his foster parents from their lineal and collateral kindred? In short, should equitable adoptees be given legal adoptee status and thus receive the benefits of formal adoption from parties who have done nothing to warrant the raising of an estoppel against them? Were the equitable adoptee's natural expectations the only consideration, the answer to this question would be a resounding "yes." There are, however, other considerations that must be weighed in the balance. The theoretical difficulty of bringing *Wheeling* and the inheritance tax cases within the estoppel doctrine is obvious. What is less obvious but ultimately more important is the erosive effect that such equivalent treatment of formal and informal adoptees may have on our formal adoption procedures. A look at our adoption procedures is needed to appreciate the policy considerations at stake.

In early America child placement and adoption was an informal affair.[373] Even when legislatures enacted general adoption legislation on a wave of social reform in the mid-nineteenth century, some of those first statutes permitted one person to adopt another simply by filing a deed of adoption.[374] Such laissez-faire informality is now a thing of the past. Today all states require a judicial decree to establish the legal status of adoptive parent and child.[375] The stringency of the procedures necessary to consummate an adoption vary from state to state and within each state depending on the nature of the adoption and the relationship of the prospective adoptor to the prospective adoptee. Still, the generalization may be made that adoption today is a formal, closely regulated process designed to ensure suitable placement of the child.

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373. *See supra* notes 8-21 and accompanying text.

374. For example, the first Missouri statute authorizing adoption, 1856 Mo. Laws 59, permitted the adoption of children by deed. In 1917 the Missouri legislature prohibited the adoption of children by deed or private agreement and gave the juvenile courts exclusive jurisdiction over the adoption of children. 1917 Mo. Laws 193. For other examples of early legislation permitting adoption by deed, see statutes cited *supra* note 21.

375. *See* Comment, *Moppets on the Market: The Problem of Unregulated Adoptions*, 59 YALE L.J. 715, 725 (1950).

Procedurally two types of adoptions exist—agency adoptions and independent adoptions.[376]

The state regulates and licenses agencies authorized to place children for adoption. Typically trained social workers subject the prospective adoptors to rigorous investigation regarding their ability to provide a good home before the agency will even place them on the agency's waiting list for a child. The average waiting period is approximately five years.[377] Even after the agency places the child, the adoption cannot become final until the expiration of a trial period during which the court directs its own investigation to ensure that the placement is working out satisfactorily.[378] According to a July 1983 news story the cost of adopting a child through an agency in Spokane, Washington, ranges from $2500 to $5000 or more.[379] One private agency broke the costs down as follows: "For a newborn, fees are $25 for the initial application; $550 for the home study; $4500 for the actual adoption—which includes the mother's hospitalization, attorney fees, and miscellaneous expenses."[380]

Independent adoptions are those adoptions not orchestrated by agencies. Such adoptions, also called private adoptions, are legal in most states. When the adoptor is the child's stepparent or blood relative, one of the biological parents or some other blood relative usually arranges placement. Private adoptions by strangers are generally orchestrated by intermediaries—typically doctors, lawyers, or well-meaning friends or relatives of an unwed mother. Since these intermediaries generally lack any expertise in child placement, the child gets very little official protection at this preplacement stage. Once the placement occurs, however, the procedures are the same as the procedures for an agency adoption.[381] Specifically, almost all state statutes mandate a trial period and home investigation before the adoption can be granted.[382] Some

376. *See generally Black-Market Adoptions*, 22 CATH. LAW. 48 (1976); Grove, *Independent Adoptions: The Case for the Gray Market*, 13 VILL. L. REV. 116 (1967).

377. J. MCNAMARA, THE ADOPTION ADVISOR 75 (1975). A recent news story reports that in the state of Washington "the wait averages about six years" for the most sought after adoptees. *See* Huessy, *More Young Moms Consider Adoption Option*, The Spokesman-Review, July 17, 1983, at B1, col 1.

378. *See, e.g.*, GA. CODE ANN. § 19-8-12 (1982); ILL. ANN. STAT. ch. 40, § 1508 (Smith-Hurd 1980); PA. STAT. ANN. tit. 23, § 2535 (Purdon Supp. 1983-1984).

379. Huessy, *supra* note 377, at B1, col. 1.

380. *Id.* at B1, cols. 4-5.

381. *See generally Black-Market Adoptions*, *supra* note 376, at 52-54; Grove, *supra* note 376, at 121-25.

382. *See, e.g.*, CAL. CIV. CODE §§ 224n, 226.6 (West 1982 & Supp. 1983); N.Y. DOM.

states require that a social worker or licensed agency conduct this home investigation.[383] Other jurisdictions permit the judge to appoint any person deemed competent by the court.[384] Thus, the main feature that distinguishes the independent adoption from the agency adoption is the lack of preplacement investigation in the former.

In nonrelative independent adoptions the adopting couple typically pays for the biological mother's prepartum maintenance and medical costs through birth. When the middleman is a lawyer, a fee will be charged for professional services connected with the adoption. The states have enacted various regulations to promote the child's welfare as the paramount consideration and to protect the private adoption process from unscrupulous intermediaries more interested in making a profit than in placing the child with suitable parents.[385] Some regulations prohibit private placement by anyone other than the child's biological parent, relative, or guardian.[386] Others require that a report be filed with the appropriate child welfare department before or shortly after the child is placed so that the department may begin a prompt investigation.[387] Some statutes require disclosure of all expenses paid in connection with the adoption,[388] and others provide criminal sanctions for profiteering in child placement.[389] A few states require approval by the court or a child welfare agency before placement is allowed.[390]

REL. LAW §§ 112, 116 (McKinney 1977); OHIO REV. CODE ANN. § 3107.13 (Page Supp. 1982); TEX. FAM. CODE ANN. §§ 16.031, .04 (Vernon 1975 & Supp. 1982-1983).

383. *See, e.g.*, CONN. GEN. STAT. ANN § 45-63 (West 1981); ILL. ANN. STAT. ch. 40, § 1508 (Smith-Hurd 1980); R.I. GEN. LAWS § 15-7-11 (Supp. 1982).

384. *See, e.g.*, KY. REV. STAT. § 199.510 (1982); PA. STAT. ANN. tit. 23, § 2535 (Purdon Supp. 1983-1984); WASH, REV. CODE ANN. § 26.32.090 (Supp. 1983-1984).

385. *See generally Black-Market Adoptions, supra* note 376, at 56-61; Grove, *supra* note 376, at 125-33. For a discussion of the ethical problems facing even the well-meaning lawyer who is not in it for the money, but seeks to make a nice couple happy rather than to find the best home for child, see Address by the Honorable Alfred L. Podolski, *Abolishing Baby Buying: Limiting Independent Adoption Placement* (Aug. 13, 1975) *printed in* 9 FAM. L. Q. 547, 551-53 (1975).

386. *See, e.g.*, MICH. COMP. LAWS ANN. § 722.124 (West. Supp. 1983-1984); NEB. REV. STAT. § 43-701 (1978); N.Y. SOC. SERV. LAW § 374(2) (McKinney 1983).

387. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-108(A) (1974); COLO. REV. STAT. § 19-4-110(1) (1973); FLA. STAT. ANN. § 63.092(1) (West Supp. 1976); MINN. STAT. ANN. § 257.03 (West 1982); N.H. REV. STAT. ANN. § 170-B:14(II) (1978).

388. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-114(A) (1974); CAL. CIV. CODE § 224r (West 1982); FLA. STAT. ANN. § 63.097 (West Supp. 1976).

389. *See, e.g.*, MASS. ANN. LAWS ch. 210, § 11A (Michie/Law Co-op. 1981); MICH. COMP. LAWS ANN. § 710.13 (West 1968); N.J. STAT. ANN. § 2A: 96-7 (West 1976); OKLA. STAT. ANN. tit. 21, § 866 (West 1983).

390. *See, e.g.*, KY. REV. STAT. ANN. § 199.470 (Baldwin 1982); MICH. COMP. LAWS ANN.

These safeguards appear in varying combinations in most state statutes. Finally, four states completely outlaw private placements in all cases except those cases in which the adoptor is a stepparent or blood relative of the child.[391]

Although weaknesses exist in some of our adoption schemes, the regulations just described make it clear that the whole process for both agency and private adoptions is designed to ensure that the child is placed in a suitable environment. By contrast the process of equitable adoption is completely unregulated. In most cases the placement of the child does not come to the attention of any official until after the child is grown and the foster parents have died. What will happen to formal adoption procedures if courts and legislatures give equitable adoptees all the rights and privileges accorded formal adoptees? If the adopting public becomes aware that they can achieve the equivalent of legal adoption through an informal agreement or representation of status, they may avoid and eventually undermine state supervised formal adoption procedures. Why should prospective adoptors endure the investigations, trial periods, red-tape, reporting requirements, and expenses involved in formal adoption when they can achieve all the consequences of formal adoption by informal means? As one court put it,

> If taking a child into a home, rearing such child, giving it the family name, calling such child a daughter, and holding such child out to the relatives and friends as a daughter, is sufficient to establish a lawful adoption, then there would be no need for any statutory authority or judicial proceeding.[392]

What is to stop the would-be adoptor from simply finding an unwed mother or other custodian who is willing to sell the baby for a price that is competitive with the cost of most formal adoptions? It is true that the lack of protection equitable adoption provides for the foster parent in the event the biological parents decide to reclaim the child would deter many prospective adoptors from taking this route.[393] The skeptical reader may also be asking whether prospective adoptors would really consider the legal effects of informal

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§ 722.559 (West 1968); MO. REV. STAT. § 453.110 (1977); OHIO REV. CODE ANN. § 5103.16 (Page 1981). Of these statutes, only the Ohio statute mandates a preplacement investigation before the court approves the placement.

391. *See* CONN. GEN. STAT. ANN. § 45-63 (West 1981); DEL. CODE ANN. tit. 13, § 904 (1981); MASS. GEN. LAWS ANN. ch. 28A, § 11 (West 1983); MINN. STAT. ANN. § 259.22(2) (West 1982).

392. Belden v. Armstrong, 93 Ohio App. 307, 312-13, 113 N.E.2d 693, 696 (1951).

393. *See, e.g., In re* Perales, 52 Ohio St. 2d 89, 369 N.E.2d 1047 (1977); Trevino v. Garcia 627 S.W.2d 147 (Tex. 1982).

adoption in deciding what course to follow. Perhaps many would not and it may be that formal adoption procedures would be better protected by more direct sanctions against informal adoption. Meanwhile, pending such solutions, courts should not encourage completely unregulated equitable adoptions by putting informal adoptees on the same footing as formal adoptees. The courts that are teetering on the brink of treating equitable adoptees in all respects like legal adoptees seem unaware or only dimly aware of the indirect effect such equivalent treatment might have on the formal adoption process.

One might ask whether circumvention of adoption procedures would always bring about bad results. In some cases, particularly those cases in which the child is given to relatives, unregulated placement may work out just fine. Nevertheless, even our regulated formal adoption schemes have been vulnerable to abuse by unscrupulous persons who are in the business of placing children for profit. Independent nonrelative adoptions orchestrated by middlemen, called the grey market in adoption lingo, are particularly subject to this kind of abuse. Whenever the middleman receives an under-the-table payment over and above the reasonable fee for professional services, the transaction crosses the line of legitimacy to become a black market sale of baby flesh to the highest bidder. The widespread availability of contraception and legal abortion has brought about a shortage of infants available for adoption.[394] The scarcest adoptees in greatest demand are healthy white infants dubbed " 'Gerber babies' because they resemble the picture used in marketing Gerber brand infant food and clothing."[395]

Couples unwilling to endure the scrutiny and long wait required for an agency placement have been willing to pay fees in the range of $10,000, $20,000, or even $25,000 for a healthy, white newborn.[396] In these transactions the child's welfare receives no consideration. The only criterion for placement is whether the prospective adoptors can pay whatever fee the black market traffic will

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394. *See Hearings on Examination and Exploration of Existing and Proposed Federal Policies Affecting the Adoption of Children and Their Placement in the Foster Care System Before the Subcomm. on Children and Youth of the Senate Comm. on Labor and Public Welfare*, 94th Cong., 1st Sess. 6 (1975) [hereinafter cited as *1975 Hearings*].

395. Huessy, *supra* note 377, at B1, col 1. This news story, however, also reports that the number of young mothers considering adoption-out as an alternative to abortion or keeping the child is on the increase. *Id.* at B1, col. 3.

396. *1975 Hearings*, *supra* note 394, at 175; *see also* Breasted, *Baby Brokers Reaping Huge Fees*, N.Y. Times, June 28, 1977, at 1, col. 1; Klemesrud, *Adoption Costs Soar as Births Decline*, N.Y. Times, Feb. 20, 1973, at 1, col. 4.

bear. Although the object of a black market transaction may be lucky enough to find himself in a good home, such a happy result is completely fortuitous. In 1975 the executive director of the Child Welfare League of America estimated that four or five thousand black market adoptions occur each year.[397] The black market in babies has produced such tragedies as the placement of children with alleged child molesters[398] or with people who turned out to be psychotic.[399] It is beyond the scope of this Article to enter the debate over whether states should ban all independent adoptions in an effort to eliminate the black market. Suffice it to pose the query that if such sordid abuses can occur in the regulated market of formal adoptions, what atrocities might we expect in the completely unregulated market of equitable adoptions?

With the foregoing considerations in mind, this author believes that courts and legislatures should carefully limit the consequences of equitable adoption to granting the child relief against his foster parents and their privies. Specifically, the equitably adopted child should have a claim against an intestate foster parent's estate, should have standing to contest the will of a testate foster parent, and should be able to claim child support from a foster parent whose actions have made it impractical for the child to get support from others. On the other hand, a court should deny relief when the equitably adopted child seeks full adoptee status vis-á-vis relatives of the foster parents, taxing authorities, or others who did nothing to estop themselves. Claims made by the foster parents or their relatives to full legal status as the equitably adopted child's heir or wrongful death beneficiary should likewise be dismissed.

In taking this position the author acknowledges that were the child's normal expectations our only concern, he should be treated as a legally adopted child for all purposes. Yet, sympathies for the equitably adopted child cannot be indulged without risking erosion of formal adoption procedures and thus sacrificing the larger good of ensuring suitable placement for all children to the exigencies of the individual case.

The effect of the limited status rule suggested is that the equitably adopted child will not be a member of his foster family for all purposes and, thus, will continue to have reciprocal rights of inher-

397. 1975 *Hearings, supra* note 394, at 31.

398. *See* NEV. ATT'Y GEN., ADOPTION PRACTICES IN NEVADA 19 (1961).

399. *See* Gallese, *Black-Market Babies: Couples Pay Big Fees to Get Children Fast*, Wall St. J., Sept. 14, 1971, at 1, col. 4.

itance within his biological family. The possibility thus afforded of dual inheritance from the biological and foster parents is perhaps unfortunate. Another unfortunate byproduct of this limited status rule is that the foster family from whom the child received nurture and, possibly, property will not be able to inherit from him. These results are the price we must pay for the continuing efficacy of our adoption procedures.

VIII. CONCLUSION

In dealing with the impact of adoption on succession, legislatures and courts should provide rules of inheritance and canons of construction that fully address the problems that arise while furthering the humanitarian goals of modern adoption. We have seen that the primary goal of the typical nonrelative adoption is to sever the child from his biological family and to assimilate him into his adoptive family as if he had been born into it.

In regulating intestate succession by, from, and through adopted persons, several consanguinity minded states have fallen far short of furthering these goals of adoption. By denying mutual rights of inheritance between the adoptee and the relatives of his adoptors, these states have given the adoptee only grudging second class recognition within his adoptive family. At the same time consanguinity oriented states have unwisely assumed that biological filiation must survive adoption. Wherever this unwarranted assumption persists, the adoptee is treated in matters of inheritance like a two-headed freak, differentiated from natural children by his dual sources of inheritance. The failure of these states to treat an adopted child like any other child is brought into sharp relief by those cases that grant the adoptee the dubious privilege of being permitted to inherit in two capacities from the very same decedent.

Even the more progressive states could improve their statutes. These statutes laudably achieve total substitution of the adoptive family for the biological family in the typical case but fail to address the questions that arise to plague the courts in the atypical in-family and adult adoption cases.

Most state legislatures have ignored the special problems that in-family adoptions pose. The attempted solutions are neither comprehensive nor well thought out. For example, legislatures that have embraced the UPC have enacted provisos to preserve mutual inheritance ties between the child and *both* biological parents when the adoptor is a stepparent. Because it seems wrong to pre-

serve the inheritance rights of a parent who has relinquished his child to a stepparent, such exceptions should be refined along the lines of section 14 of the Revised Uniform Adoption Act. The progressive states also fall short in failing to provide for the case of the child adopted by a blood relative, typically a grandparent. When the adoption does not remove the adoptee emotionally from his original family, the state legislatures should provide an exception to preserve the inheritance rights between the adoptee and the nonadopting side of his family. A well-considered intestacy statute should also make it clear that in the event of successive adoptions, the child shall be deemed the natural child of his most recent adoptors and shall not be deemed a child of his prior adoptors.

Our state intestacy statutes have not coherently addressed the phenomenon of adult adoption. As we have seen, the adoption of an adult is ordinarily quite simple. One adult can usually adopt another willing adult without obtaining anyone's consent. Moreover, most intestate succession schemes treat the adult adoptee exactly like a child adoptee. This situation invites the use of adoption laws to qualify adults as the heirs of persons who may know nothing of the adoption or the adoptee. The opportunities for abuse could be lessened by legislation either requiring notice to all relatives whose estates the adoption might affect or permitting a court that grants an adult adoption decree to restrict inheritance rights as the situation may warrant.

In the construction of class gifts, most courts and some legislatures have recently rejected the "stranger-to-the-adoption" rule in favor of a presumption that, unless the instrument provides otherwise, the donor intended to include adoptees in class designations like "children" or "issue." This trend represents a great step forward in ensuring that the canons of construction governing class gifts are in harmony with present societal attitudes toward adoption. Nevertheless, while the present constructional preference represents a vast improvement over the obsessive concern with consanguinity embodied in the "stranger-to-the-adoption" rule, serious construction problems still await resolution.

One perplexing problem still outstanding is the retroactivity problem inherent in the construction of old instruments. A court that has recently embraced the new inclusionary presumption may conclude that it must, nevertheless, apply the "stranger-to-the-adoption" rule in vogue when the donor executed the instrument. The refusal to apply the new presumption retroactively permits in-

consistent results on identical facts within the same jurisdiction depending on the fortuity of when the instrument was executed. It also perpetuates a rule the courts now believe to have been a bad guide to donative intent. The retroactivity issue is one on which the courts have sharply divided. Apart from the merits of the debate, in today's highly mobile society this division of authority is unfortunate in and of itself. The donor might execute the instrument in one state and die domiciled in another, thus compounding the choice of law possibilities with a concomitant increase in unpredictability as to titles. In view of the unlikelihood that anyone actually relied on the "stranger-to-the-adoption" rule in drafting instruments, the courts that have refused to apply the new presumption retroactively should consider changing their stand. This change would promote much needed uniformity in the treatment of adoptees under class gifts and would give a final and decent burial to what probably always was a bad presumption.

Even when retroactivity is not a problem the danger exists that courts will apply the new presumption too rigidly. Some states have ushered in the new inclusionary presumption by legislation. These statutory presumptions typically provide that adoptees take under class gifts the same as natural children unless the instrument expressly excludes them. The all-or-nothing terms in which such statutes are cast preclude the courts from considering circumstances extrinsic to the document even though common sense may cry out for such inquiry in some cases. States with rigidly worded statutory presumptions should consider redrafting them to provide that adoptees are included unless the language of the instrument *or surrounding circumstances* clearly indicate otherwise. Because the courts have inherent power to redefine and refine their own precedents, promulgation of the pro-adoptee presumption by judicial rule has distinct advantages over legislative attempts. Yet, although authority is thus far scant, some courts have limited themselves by holding that they will presume inclusion unless language in the instrument itself shows a contrary intent. The difficulties the courts have had in dealing with adopted-out claimants and adult adoptees illuminate the adverse consequences of such rigidity, whatever its source.

Adult adoptions are frequently misused to misdirect and pervert a donor's dispositive plan after his death. Common sense tells us that a donor's natural expectation would be that the legal relationship created by adoption would correspond functionally with a normal parent-child relationship. The prospect of a manipulative

adult adoption would never occur to most donors. It is therefore unreasonable to expect that instruments will contain language excluding adult adoptees. A court's refusal or inability to examine circumstances beyond the instrument itself will defeat the donor's natural expectations in most class gift cases concerning claimants adopted as adults. Because most state statutes make no distinction between adult and child adoptees, manipulative adult adoption schemes have all too often succeeded simply because the court assumed that it had to apply the inclusionary presumption and, the instrument heing silent, could not find a way to exclude the adoptee. The legislatures should not hamstring the judiciary and the judiciary should not hamstring itself into a position in which the courts are powerless to protect the donor's clear, albeit unexpressed, intent.

In the class gift setting, the courts should apply the "stranger-to-the-adoption" presumption to all adult adoptees in the first instance. They should, however, give the adoptee the opportunity to rebut the exclusionary presumption by reliable extrinsic evidence showing that he and his adoptor enjoyed the functional equivalent of a normal parent-child relationship. If the adoptee can convince the trier of fact on this issue, he should prevail. This approach should enable the courts to protect the donor from imposition without barring the door irrevocably against adult adoptees who were actually reared by their adoptors.

Flexibility is also needed in class gift cases involving adopted-out claimants. In keeping with the policy behind modern intestacy laws making the adoptee a legal stranger to his biological bloodstream, the basic presumption should be that the donor meant to exclude claimants who have been adopted out of the donor's biological family. When the adoption takes place within the family so that the adoptee and his biological relatives remain acquainted, the court should have the discretion to permit rebuttal of this exclusionary presumption by convincing extrinsic evidence. On the other hand, when the adoption-out is to strangers, the jurisdictional uncertainties, instability of titles, and other mischief a potential class of unknown beneficiaries might inject into the settlement of estates is of sufficient nuisance value to warrant an absolute prohibition of extrinsic evidence. If donors want to include adopted-out relatives with whom the family no longer has contact, they should be required to say so in the instrument itself.

The claims arising out of an equitable adoption scenario pose special problems. In developing criteria for determining whether

an equitable adoption has occurred, the courts should scrap the contract requirement and focus on what the child was reasonably induced to believe rather than on what the foster parents agreed to do or intended to do. Once the court finds an equitable adoption, however, it should scrupulously limit the consequences of that finding. When the child's claim is against the foster parents or their privies, a court should ordinarily grant relief. But when the child goes beyond the foster parents and their privies and seeks legal adoptee status vis-á-vis parties who have done nothing to estop themselves, a court should deny relief. Equitable adoption should not be made the de facto equivalent of statutory adoption. In taking this position, the author recognizes that were the child's normal expectations the only concern, society should treat him as a legally adopted child for all purposes. However, sympathies for the equitably adopted child cannot be indulged without threatening the fabric of our adoption procedures and thus sacrificing the larger good of ensuring suitable placement for all children to the exigencies of the particular case.

This Article has examined the impact of adoption on succession from every angle and found the existing state of the law wanting in purpose and consistency. Although states have made significant progress in some areas, it is evident that courts and legislatures must make a concerted effort along the lines suggested in this Article to bring our adoption laws, intestacy laws, and canons of construction into a harmonious working relationship.