The Adopted Child and Testamentary Class Gifts*

JOHN RICHARD STEINCIPHER

Although adoption had been established in ancient civilizations as a means of perpetuating the family by the creation of heirs,¹ due to feudalism's affinity for consanguinity² and the subscription to the maxim "Solus Deus facit haerdem, non homo" (God alone makes the heir, not man),³ this institution was not recognized by the common law. When finally introduced in this country by statute during the middle nineteenth century, disparate views were taken as to the purpose of adoption; some jurisdictions saw this as being intended for the furtherance of the child's welfare,⁴ while others adhered to the Roman civil law's intendment of creating heirs.⁵ Even among the latter jurisdictions, inheritance rights were treated quite incidentally, with the primary emphasis being placed upon the qualifications and procedures for adoption.⁶ The failure to adequately define the adoptee's status, coupled with the common law's favoritism of blood relatives in succession

* The author wishes to acknowledge his reliance upon the prior commentary and analysis of other legal writers — particularly the works of Professor Oler and Professor Halbach and that of the editor of ANNOT., 86 A.L.R.2d 12 (1962) — whose endeavors permit this "nut-shell" treatment.


² Huard, The Law of Adoption: Ancient and Modern, 9 VAND. L. REV. 743, 745 (1956). Adoption was not instituted in England until passage of the Adoption of Children Act, 1926, 16 & 17 Geo. 5, c. 29.


⁴ The first United States statute providing for adoption — MASS. ACTS & RESOLVES c. 324 (1851)—declared as its primary purpose the furtherance of the child's general welfare. See, Note, 1958 WASH. U. L. Q. 97.

⁵ Tex. GEN. STAT. LAW 33 (1859) and ALA. CODE § 385 (1852). This difference in philosophy, and its impact upon the adoptees' status, is discussed in Kuhlmann, Intestate Succession By and From The Adopted Child, 28 WASH. U. L. Q. 221, 224-25 (1943).

matters, invoked immediate resistance to attempts to bring adoptees within class gifts prescribed by private instruments. Even where legislation acknowledged the adoptee’s status as an “heir,” his status as a “child” was often denied. As stated in *Schafer v. Eneu*:

> Adopted children are not children of the person by whom they have been adopted, and the Act of Assembly does not attempt the impossibility of making them such . . . . The right to inherit from the adopting parent is made complete, but the identity of the child is not changed. One adopted has the rights of a child without being a child.

Thus, although the adoptee’s right to succeed under the laws governing intestacy is acknowledged, *Schafer v. Eneu* denies that he is a “child” of the adopter as that term is employed in a private instrument. 8

While the adoptive child’s right to inherit *from* his adopting parents came to be established by statute, 9 or, in the absence of specific legislative fiat, to be supplied by the courts, 10 the judiciary was left to resolve the question of an adoptee’s right to inherit *through* his adopters. This matter was rarely defined in the early legislation. 11 Perhaps responding to the majority of courts’ denial of this right, 12 the number of statutes allowing such inheritance has in-

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7 54 Pa. 304, 306 (1867).
8 The rationale of this decision, and, indeed, the subject of this paper, are exhaustively treated in Oler, *Construction of Private Instruments Where Adopted Children are Concerned* (pts. 1 & 2), 43 Mich. L. Rev. 705, 901 (1945).
9 Woerner, *Legal Status of Adopted Children*, 31 Cent. L. J. 66, 68-69 (1890). An example of the legislative developments in this area is provided by reference to the laws of New York. Thus the earliest New York adoption statute (N.Y. Sess. Laws, 1873, ch. 830, § 10) specifically withheld any rights of inheritance between an adopted child and his foster parents. However, these rights were expressly provided for fourteen years later. N.Y. Sess. Laws, 1887, ch. 703, § 10. See, Note, 38 St. John’s L. Rev. 380, 381 (1964).
12 Halbach, *supra* note 6, at 974.
creased from two — thirty years ago\(^{18}\) — to twenty at the last count.\(^{14}\) Yet the statutory ability to inherit under the will of one other than the adopter is not determinative of the right to take under the terms of the particular instrument before the court.

The essential inquiry has become one of whether an adoptee qualifies for inclusion where the testamentary instrument\(^{16}\) employs class terms like "children" or "heirs." This conclusion ultimately depends upon the testator's intention.\(^{18}\) While the court will give effect to expressions in the instrument as to the inclusion or exclusion of adoptees,\(^{17}\) where this is absent, the court must embark upon a quest for the maker's intention—the meaning which he probably ascribed to the class terms used. As noted by Professor Oler, a real intention is seldom discoverable; rather,

the "intention" to which reference is made must often be supplied by the courts 'to fill up a casus omissi,' and largely represents a union of judicially envisaged social desirability with conjecture as to what the conveyor probably would have intended had he thought about the matter.\(^{18}\)

In this search, the court will often pay heed to the statutes governing intestate succession as illustrative of "public policy," but rarely considers them controlling; usually the question is decided "by resort to the specific presumption

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\(^{13}\) Note, 22 IOWA L. REV. 145, 147 (1936).


\(^{15}\) This discussion has been so confined as most of the litigation on this question arises in the will context, and the same considerations generally control the interpretation of other private instruments such as inter vivos trusts, deeds, and insurance policies.

\(^{16}\) PAGE, WILLS § 30.6-.10 (rev. ed. Bowe-Parker 1961).

\(^{17}\) In Benedict v. New York Trust Co., 48 N.J. Super. 286, 137 A.2d 446, aff'd, 50 N.J. Super. 177, 141 A.2d 340 (1958), the court held that a clause specifically excluding adopted children from a class was not a violation of public policy, since a testator is permitted to exclude members of his own family. But, contrast that decision with Edmands v. Tice, 324 S.W.2d 491 (Ky. 1958), rev'd on other grounds, Wilson v. Johnson, 389 S.W.2d 634 (Ky. 1965).

\(^{18}\) Oler, Construction of Private Instruments Where Adopted Children are Concerned, 43 MICH. L. REV. 705, 708-09 (1945).
applicable to the category of fact situations into which the case best fits.\textsuperscript{19}

Adherence to the rule of construction which predicates the ultimate disposition upon the testator's intention, as determined "from the four corners of the will and the surrounding circumstances,"\textsuperscript{20} obliges the courts to weigh and examine a number of interlacing factors. While a particular decision may reflect the influence of a multiple of these elements, nevertheless certain divisions are suggested into which the cases may be grouped according to lines of primary emphasis. Not all jurisdictions find the language utilized in defining the class controlling. Instead, the court's conclusion may rest upon traditional presumptions or rules of construction, or upon the whole language of the will, including those words which modify the class terms employed. Other courts may take a different approach, and may closely examine the circumstances surrounding the execution of the instrument, including the time of the child's adoption. And, as previously indicated, many jurisdictions find assistance in the legislation establishing adoption, defining the adoptee's status, and specifying his rights of inheritance.

Before treating these "divisions," it should be noted that little litigation has arisen where the adoptee claims under an instrument executed by his adoptive parent. From a very early date,\textsuperscript{21} a child adopted by the transferor has been deemed included in the transferor's gifts to his own "children" or "heirs," and this rule has applied even though the child was not adopted until after the instrument's exe-

\textsuperscript{19} Halbach, \textit{supra} note 6, at 975.

\textsuperscript{20} ANNOT., 86 A.L.R.2d 12, 19 (1962).

\textsuperscript{21} Sewall v. Roberts, 115 Mass. 262 (1874); Martin v. Aetna Life Ins. Co., 73 Me. 25 (1881).
cution.\textsuperscript{22} Although, in the latter instance, it is difficult to conclude that the testator in fact intended that result, this interpretation is supported by those statutes allowing an adoptee to inherit from his adopter and imposing parental responsibility upon the adopter, as well as by the belief that "persons who would have enough affection for a child to adopt it as their own would probably intend that it should be included in a reference to their children."\textsuperscript{23} One exception to this conclusion was signalled by the case of \textit{Adrian v. Koch}\.\textsuperscript{24} In that action, the court held that the testator’s adopted child, who was also his natural grandchild, was not entitled to take a share in the residuary fund as one of \textit{my children living at the death of my said wife}, the court emphasizing that, if the adoptee were to share as a "child," she would take a much larger share in the estate than would be received by any of the other children or grandchildren and that nothing in the will indicated that such a result was intended.\textsuperscript{25}

In addition to this child-grandchild (double-share) exclusion, a number of cases have held that a child adopted by the testator was not within a class designated as "heirs" (or the like) of the testator; yet these decisions frequently

\textsuperscript{22} In \textit{In re McEwan’s Estate}, 128 N.J. Eq. 140, 15 A.2d 340 (1940), the court observed that when a will contains a provision for the testator’s own children, a child adopted by him either before or after making the will is presumed to be within the class so described, since the testator is under an obligation to regard the relationship as that of parent and child.

See also \textit{In re Woodcock}, 103 Me. 214, 68 Atl. 821 (1907), where the court declared that one who makes provision for his own "child or children," should be held to have included his own adoptees since he is under a moral (if not legal) obligation to make provision for such a child.


\textsuperscript{24} 83 N.J. Eq. 484, 91 Atl. 123, aff’d, 84 N.J. Eq. 195, 93 Atl. 1083 (1914).

\textsuperscript{25} See also \textit{Clarke v. Rathbone}, 221 Mass. 574, 109 N.E. 651 (1915), and \textit{Einstein v. Michaelson}, 107 Misc. 661, 177 N.Y. Supp. 474 (Sup. Ct. 1919).
turn upon the existence of an identifiable intention to exclude such adoptee (or his representative).26

Thus the problem which has most often commanded the courts' attention relates to the inclusion of an adoptee within a class gift from one other than the adopter. As noted, for purposes of acquiring a measure of perspective in this analysis, these decisions will be initially grouped in certain categories drawn upon the basis of those factors receiving the courts' primary emphasis. Because the quaere centers upon the transferor's intention and is therefore a matter of interpretation, attention is first directed to those jurisdictions which rely upon traditional or established rules of construction and presumptions.

Presumptions and Rules of Construction: Although the traditional common law presumption that a testator is presumed to have favored those of his own blood in a disposition27 may be deemed inapplicable where the gift purports to run to the "children" or "heirs" of an adopting parent to whom the testator is not related,28 nevertheless there are instances where this presumption is invoked.29 Thus in In re Woodcock,30 the court held that an adopted

26 In Warden v. Overman, 155 Iowa 1, 135 N.W. 649 (1912), the court deemed the testatrix's adoptee not within a gift of the residuary estate to "lawful heirs," in part, because the testatrix described the adoptee as her "young friend," and called her by her family name — not the testatrix's.

See also In re Session's Estate, 70 Mich. 297, 38 N.W. 249 (1888), Bernero v. St. Louis Union Trust Co., 287 Mo. 602, 230 S.W. 620 (1921), and Hassell v. Frey, 131 Tex. 578, 117 S.W.2d 413 (Tex. Civ. App. 1938).


28 The Minnesota court, in In re Holden's Trust, 207 Minn. 211, 291 N.W. 104 (1940), criticized this presumption favoring blood relatives where that was invoked in cases where an adoptee claimed to be included within a class in a testamentary gift, and refused to apply such presumption where the testatrix was not related to the adopting parent by blood.

29 The presumption might be found applicable where the testator refers to his own "heirs," and a child adopted by another, e.g., the testator's son or brother, claims to be included. In some states the adoptee would be excluded, even though natural children of such son or brother would take as the testator's "heirs." See for example, Brown v. Wright, 194 Mass. 540, 80 N.E. 612 (1907), and In re Slaven's Estate, 4 Misc.2d 82, 149 N.Y.S.2d 73 (Surrogate Ct. 1956).

30 103 Me. 214, 68 Atl. 821 (1907). See also: Bridgeport-City Trust Co. v. Buchtenkirk, 143 Conn. 531, 124 A.2d 231 (1956).
child of the transferor's son was not within a provision to the sons' "child or children," since, in making the devise over from his own children to their children the testator is presumed to have intended this to go to *children of his blood* as opposed to strangers to his blood, *e.g.*, the adoptee. In part, this rationale issues from the notion that the adoption statutes do not render the adoptee a "natural child as to relatives of the adoptive parents," and that to hold otherwise "would make it possible for property of a testator to be diverted to strangers of his blood without his knowledge or consent."  

Similar to this "stranger-to-the-blood" presumption is another presumption which assumes that absent a contrary intention appearing in the will or indicated by other extraneous evidentiary facts, a testator who is a stranger-to-the-adoption contemplated only the natural offspring of the named parent as the objects of his bounty. While this exclusionary rule is not without some "modern justification in the fact that few conveyors are likely to desire the designated parent to have power, by adopting any person he may choose, in effect to appoint the subject matter of the conveyance to such person," it has recently come under criticism. An example, is the reluctance of the court in *In the Matter of Estate of Coe* to 

...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.

Although the stated-presumption that an adopted child is not assumed to have been included in a class gift from a

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34 3 *Powell, Real Property* ¶ 358, at 123-24 (1952).

stranger to the adoption is a recurring theme in many decisions, its importance is often minimized due to the presence of additional elements prompting an exclusionary construction. Indeed, these elements generally appear to have been more determinative of the courts' conclusion than the stated-presumption. Among such factors are the particular terms used to define the class, as well as the words modifying these terms and the whole language of the (testamentary) instrument.

**INTERPRETATION OF THE TERMINOLOGY EMPLOYED IN THE INSTRUMENT:** Since the matter of ascertaining the testator's intention is largely one of determining the meaning which he ascribed to the particular words or phrase employed, the latter often have an inherent force of their own which contributes to (or prompts) the courts' decision. As a general proposition, technical terms are taken in their technical sense, and other words are construed according to their natural or ordinary meaning. Thus, although some jurisdictions have resisted attempts to lift particular terms from their context, many jurisdictions deem the specific phrase or term employed highly persuasive. As a consequence, if the word or words utilized connote blood relationship, an adopted child will be excluded from the class. This has often been the result where the class is described by the terms “children,” “issue,” or “descendants”; these labels are considered to be invested with a “biological flavor.” Illustrative of this view is the statement in *In re Leask,* that

the words ‘leaving a child or children,’ as used by the testator, had reference to the natural offspring of the

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36 Oler, supra note 18, at 711.

37 In *In re Upjohn's Will,* 304 N.Y. 366, 107 N.E.2d 492 (1952), the New York court declared that the words “issue” and “descendants” were “not to be decided in vacuo,” but that their meaning was to be ascertained by “considering the context of the entire instrument and the background of facts and circumstances existing when the will was made.” See also: Prince v. Nugent, 93 R.I. 149, 172 A.2d 743 (1961).

38 3 Powell, Real Property § 360 (1952).

THE ADOPTED CHILD

life beneficiary — to a child or children born to him in wedlock and who should survive him. The testator or contemplated actual parentage — a relation dependent upon the operation of natural laws in marital intercourse and which would not arise without the intervention of natural laws favorable to procreation and birth of offspring.

Indeed, at least with respect to the inclusion of adoptees within the class-term "children," the predisposition against this has taken the form of a highly authoritative presumption. Section 287 of the Restatement of Property provides that when a limitation is in favor of the "children" of a designated person, children adopted by such person are excluded from the possible takers except where a contrary intention of the conveyor is found from additional language or circumstances.

Although there are instances where the term "children" has been held synonymous to the term "heirs," usually the latter (or the similar terms "lawful heirs," "legal heirs," "heirs at law," or "next of kin") is construed as referring to the laws of descent and distribution governing intestates. Despite the overwhelming weight of authority to the contrary, some jurisdictions have taken the position that the terms "child" or "children" are broad enough to encompass adopted children. For example, see Schwarz v. Rabe, 129 Kan. 430, 283 Pac. 642 (1930). In In re Patrick's Will, 259 Minn. 193, 106 N.W.2d 888 (1960), the court announced that the term "children" was to be liberally construed because of the statutory declaration which gave adoptees the same rights as natural children.

Although the court, in Bullock v. Bullock, 251 N.C. 559, 111 S.E.2d 837 (1960), proclaimed that the term "children" ordinarily includes adopted children, it denied that there could be "grandchildren" by adoption.

Sometimes this approach may result in an adoptee's exclusion from the class defined by the "heirs." See the cases collected in Annot., 86 A.L.R.2d 12, 89 (1962). However, a different result may be effected if the court deems the term "children" inclusionary. Dyer v. Lane, 202 Ark. 571, 151 S.W.2d 678 (1941).

It is also of consequence to note that when "heirs" appears in the phrase "if X die without heirs," this is usually taken to connote issue since very few people die without remote collateral kin although they frequently die without issue, and thus it is difficult to assume that the testator contemplated a gift over only in the event no remote cousins could be found anywhere. Simes & Smith, Future Interests § 730 (2d ed. 1956). See, on this proposition, Note, 47 Ky. L. J. 149, 150 (1958).
tacy. And, as nearly every state provides by statute that an adoptee is an "heir" of his adoptive parents, the adoptee is most often considered included within a class defined by such a term.

Since the announced inquiry is one designed to discover the testator's intention, courts are sometimes confronted with definite indications of this in the form of additional language modifying the terms "child" or "heirs." Thus a court has admitted the blood-line connotation of the phrase "child or children born during my lifetime," as well as that of the reference to "heirs of the blood."

Yet, as noted, even in the absence of such additional indicators, many courts continue to draw artificial (at least from the standpoint of policy) distinctions between the terms "children" and "heirs." Other jurisdictions refuse to do so, in part because of the recognition that had the draftsman wished to effect a specific result through his choice of terms, he would have utilized clear and unassailable language. Hence, much of the litigation on this matter may not be distinguished upon the basis of the particular class descriptions used; rather, many courts resort to a consideration of a number of interplaying factors. One of the most important of these factors is the regard given the circumstances surrounding the execution of the instrument.


But contrast: In re Clarke's Estate, 125 Neb. 625, 251 N.W. 279 (1933); Hall v. Crandall, 25 Del. Ch. 339, 20 A.2d 545 (Ch. 1941); and, Old Colony Trust Co. v. Wood, 321 Mass. 519, 74 N.E.2d 141 (1947) — holding that such language does not refer to the statutes of intestate succession.

43 Vernier, American Family Laws § 262 (1936).


46 Cahill v. Cahill, 402 Ill. 416, 84 N.E.2d 380 (1949).

47 Halbach, supra note 6, at 980.
CIRCUMSTANCES SURROUNDING THE EXECUTION OF THE INSTRUMENT: Where the indicia of intention is lacking from the terms employed to define the class, or the court is reluctant to accord any special meaning to such terms, and where little is gained by an examination of the "four corners" of the will, resort is frequently made to the circumstances attending the execution of the instrument. Assuming the admissibility of such evidence, the most important factor appears to be the time of adoption in relation to the time of the will's execution.

Although there are decisions contra, many jurisdictions have declared an adoptee included within a gift to "children" where the adoption preceded the making of the instrument. This has almost universally been the result where the testator was shown to have approved of the adoption, and some courts have drawn this conclusion from the mere fact that the testator knew of the adoption. In

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48 The admissibility of such extrinsic evidence will often depend upon the court's determination as to the ambiguity of the terms employed. Contrast: Wachovia Bank & Trust Co. v. Green, 238 N.C. 339, 78 S.E.2d 174 (1953), where the court deemed a provision for "any child or children" to be unequivocal, with Central Trust Co. v. Hart, 82 Ohio App. 450, 80 N.E.2d 920 (1948), where the court found the terms "issue" and "children" to be ambiguous.


50 In re McEwan's Estate, 128 N.J. Eq. 140, 15 A.2d 340 (1940); Mesecher v. Leir, 241 Iowa 818, 43 N.W.2d 149 (1950); and Bradford v. Johnson, 237 N.C. 572, 75 S.E.2d 632 (1953).


52 This is the position taken by the RESTATEMENT, PROPERTY § 287 (b) (1940). Compare: In re McEwan's Estate, 128 N.J. Eq. 140, 15 A.2d 340 (1940) and Mesecher v. Leir, 241 Iowa 818, 43 N.W.2d 149 (1950), with In re Dudley's Will, 168 Misc. 695, 6 N.Y.S.2d 489 (Surr. Ct. 1938) (contra).
addition, some jurisdictions have even gone so far as to include the adoptee in a gift to "children," where the adoption took place after the instrument's execution but before the transferor's death—reasoning that there was ample opportunity to alter the will if the testator desired the adoptee's exclusion. The (majority) view opposing this inference is perhaps best expressed in the following statement from *Dulfon v. Keasbey*:

It is suggested that, as the testator permitted his will to stand after hearing of the adoption, an inference arises that he intended that the child should take his adopting parents' place in the event of the latter's [sic] death. The inference is not permissible. The will speaks the testamentary intention as of its date; its effect is as of the testator's death.

Occasionally a court is prompted to emphasize the circumstantial likelihood that the person to whose "children" or "heirs" the gift is directed, may have natural children. Where the possibility of procreation is recognized at the date of execution, this has been an influential factor in denying the adoptee's inclusion within the class. In contrast, where the possibility of having natural children ap-

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54 See: *Bradford v. Johnson*, 237 N.C. 572, 75 S.E.2d 632 (1953). In *In re Clarke's Estate*, 125 Neb. 625, 251 N.W. 279 (1933), the court stated that had the adoptee been adopted before the testator's death, to the testator's knowledge in time to change his will, such child would have been included in a provision for the "heirs at law" of the testator's son.

55 *111 N.J. Eq. 223, 162 Atl. 102, 105 (Ch. 1932).*

56 *Accord: In re Wait's Estate*, 42 N.Y.S.2d 735 (Surr. 1943), and *Peck v. Green*, 266 Ala. 321, 96 So.2d 169 (1957). See also, *Russell v. Musson*, 240 Mich. 631, 216 N.W. 428 (1927), where the testator had executed his will and was incompetent before the adoption; inclusion was denied.

pears remote, some jurisdictions have weighed this in the adoptee’s favor — allowing him to take.58

As previously indicated, while persons adopted after the transferor’s death rarely69 are considered within a class gift to “children,”690 such adoptees are often61 held entitled to share in a class gift to “heirs” (or the like).62 Though this again may issue from the evaluation of a number of criteria, the courts adopting this view frequently rest their analysis upon specific or implied reference to the statutes governing intestate succession. Similarly, the analysis of the body of relevant legislation has provided many jurisdictions with the means for discovering or supplying the testator’s intention.

EFFECT OF LEGISLATION: Insofar as the institution of adoption is the creature of statute, viewed broadly, the existence of enabling legislation constitutes an indispensable prerequisite to raising the issue of an adoptee’s inclusion within a testamentary (or inter vivos) class gift. Illus-
trative of this initial dependence upon legislation are those decisions withholding the adoptee from inclusion in a class because the statute authorizing adoption, or conferring a particular status upon the adopted child, had not been enacted until after the transferor’s death. Today, all states provide for adoption per se, although the evolution of this institution has been marked by disparity both with respect to the adoptee’s status as a member of his new “family,” and with respect to his rights of inheritance.

As disclosed in earlier discussion (supra, page 32), the adoptee’s right to take under the laws of intestate succession was initially confined to inheriting from (as opposed to through) his adopting parents in many jurisdictions. And while many courts have denied the relevance of such statutes in discovering the testator’s intention, the laws of descent and distribution have frequently been invoked to rationalize the adoptee’s exclusion from a class. With the widespread enactment of legislation allowing an adoptee to inherit through his adopting parents, some courts concluded that the judicially established rules of construction should reflect this policy — even though that entail-


64 At the last count, but twenty states allowed the adoptee’s inheritance through his adoptive parents. Note, 25 Brooklyn L. Rev. 231, 248 (1959).

65 In In re Puterbaugh’s Estate, 261 Pa. 235, 104 Atl. 601 (1918), the court announced that the statutes governing adoption shed no light on the testator’s intention in making a gift to his son’s “child or children.” Accord: Wheeling Dollar Savings & Trust Co. v. Stewart, 128 W. Va. 703, 37 S.E.2d 563 (1946); and Central Trust Co. v. Hart, 82 Ohio App. 450, 80 N.E.2d 920 (1948).


68 As stated in Note, 1958 Wash. U. L. Q. 97, 104: “many courts find it easier to allow an adoptee to take under the will of one other than the adopter when the adoption statute provides that the adoptee can take through as well as from his adopter.”

69 In re Stanford’s Estate, 49 Cal.2d 120, 315 P.2d 681 (1957); In re Heard’s Estate, 49 Cal.2d 514, 319 P.2d 637 (1957); and In re Patrick’s Will, 259 Minn. 193, 106 N.W.2d 888 (1960).
ed the repudiation of the courts' former position. 69 Indeed, upon the adoption of legislation declaring the adoptive child's status to be identical to that of a "natural-born child," some courts focused upon that manifestation of "public policy" and instituted a "rebuttable presumption that the testator intended to follow the public policy set forth by the legislature and therefore to include the adoptees." 70 Because this (new) presumption was applied by the California court, the adoptee was deemed within a class defined by the phrase "child or children," 71 as well as within a class defined by the terms "lawful issue." 72

Although it may be somewhat premature to elevate the increasing frequency of such an attitude to the status of "a trend," 73 evidence of such a movement has been recently provided by a number of state legislatures. Thus, New York recently enacted a statute declaring that a private instrument "shall be construed to include a reference to persons duly adopted by a person whose natural child would be a member of that class unless the will or other instrument specifically provides to the contrary." 74 Similar legislation had previously been established in Connecti-


71 In re Stanford's Estate, 49 Cal.2d 120, 315 P.2d 681 (1957).

72 In re Heard's Estate, 49 Cal.2d 514, 319 P.2d 637 (1957).

73 See Note, 35 WASH. L. REV. 268, 274 (1960), which concludes that there is a "trend toward recognition of equal status for natural born and adoptive children in all respects."


CONCLUSIONS AND SUGGESTED SOLUTIONS

Despite this increasing tendency to accord the adoptee a status fully equivalent to that of a natural child, the majority of courts nevertheless continue (if one may rely upon precedent) to subscribe to the presumption adverse to the adoptee’s inclusion in a class gift from a “stranger-to-the-adoption.” In effect, these jurisdictions thereby deny that adoption “brings the adoptee into the clan as completely as does the process of birth.” While the exclusionary rule may once have in fact reflected the “popular attitudes of the time,” the modern conception of adoption refutes the existence of such a hostile public consensus today. At least in adoption legislation, the trend is

75 Conn. Gen. Stat. Ann. § 45-65a (1960) — providing that the words “child,” “descendant,” or “heir,” should be deemed to include a lawfully adopted child unless the instrument clearly indicates the contrary intention.

76 Ga. Code Ann. § 74-414 (1964) — establishing the adopted child’s presumptive right to share in class gifts under private instruments.

77 Mass. Gen. Laws Ann. ch. 210, § 8 (1958) — providing that the use of the word “child” in a deed, trust or settlement shall include an adopted child to the same extent as if he had been born to that parent, unless the contrary plainly appears by the terms of the instrument.

78 Pa. Stat. Ann. Tit. 20, ch. 2, § 228 (1957) — providing that, whenever a bequest or devise is made in a will to the child or children of any person other than the testator, without naming such child or children, the gift is to be construed to include any adopted child or children of such other person who were adopted before the date of the will, unless a contrary intention appears in the will.


81 Merrill & Merrill, Toward Uniformity in Adoption Law, 40 Iowa L. Rev. 299, 318 (1955).

82 Halbach, The Rights of Adopted Children Under Class Gifts, 50 Iowa L. Rev. 971, 987 (1965). Yet, as early as 1914, at least one commentator suggested that adoptees should be treated as natural children for purposes of construction. Kales, Rights of Adopted Children, 9 Ill. L. Rev. 149, 165 (1914).
clearly towards the recognition that: "The adopted child is the child, for all purposes, of his new family... and [is] no longer a member of his old." Acknowledging this, even the erstwhile objection that the treatment of an adoptee as a "child" of his adopting parents would allow them to provide an heir or class beneficiary to succeed to the property of another, loses force. Obviously, procreation has this same effect, and as the adoptee is now deemed to occupy a status in the family identical with that of a natural child, the only difference remaining is biological. Even this difference becomes of little consequence with the current admission that

... it is not the biological act of begetting offspring ... 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.

Yet one cannot deny that the exclusionary presumption continues to draw support from the recognition that adoption may be utilized as an instrument of financial gain or as

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83 Kennedy, The Legal Effects of Adoption, 33 CAN. B. REV. 751, 874-75 (1955). To complete the process of placing the adoptee in the position of having been born into his adoptive family, many states have eliminated his right of inheritance from and through his natural parents. Note, 25 BROOKLYN L. REV. 231, 247 (1959).

Illustrative of this is the recent enactment by the Washington State Legislature (to become effective on January 1, 1967) of a declaration that "A lawfully adopted child shall not be considered an heir of his natural parents for purposes of this title." WASH. REV. CODE § 11.04.085. The avowed purpose of that section is to disallow an adoptee's succession to property of his natural parents under the laws of intestate distribution. Although the primary reason given for the enactment of that provision was the belief that "it recognizes the expectations of the natural mother of an illegitimate placed for adoption," (Stewart & Steincipher, Probate Reform in Washington, 39 WASH. L. REV. 873, 877 (1965)) it may well prompt the Washington court's departure from the traditional presumption. For, unless that interpretation follows, the adopted child is placed in a highly prejudiced position. It is thus opined that Trueax v. Black, 53 Wn.2d 537, 335 P.2d 52 (1959), should be overruled insofar as it institutes the presumption hostile to adoptees. See: Note, 35 WASH. L. REV. 268 (1960).


85 In re Patrick's Will, 259 Minn. 193, 106 N.W.2d 888, 890 (1960).
a spite device.\textsuperscript{88} This hazard is particularly extant where legislation authorizes the adoption of adults — a practice employed both to reduce inheritance tax liability\textsuperscript{87} and to affect succession. With respect to the latter, a blatant (and perhaps distressing) example is \textit{Bedinger v. Graybill’s Executor & Trustee}.\textsuperscript{88} There, the testatrix’s son adopted his wife, thus qualifying her to share in the remainder given by the testatrix’s will to her son’s “heirs at law according to the Law of Descent and Distribution in force in Kentucky at the time of his death.”\textsuperscript{89} Admitting that adult-adoptions are “almost always for purposes of inheritance, not for integrating the adoptee into the family unit, nor for creating a parent-child relationship,”\textsuperscript{90} this is a possibility which must be considered in judicial and legislative declarations favoring the inclusion of adoptees in class gifts. Indeed, in attempting to avoid the exclusionary rule by drafting, the draftsman must account for the “adult-adoption” contingency.

\textbf{Drafting as a Solution:} Obviously, the most efficacious means to avoid controversy concerning an adoptee’s inclusion within a class gift is through precision in drafting the instrument. Where such a gift is made, there should accompany it a clear statement as to the testator’s intention to include or exclude\textsuperscript{91} adopted children. In addition, the draftsman is obliged to deal with the “adult-adoptee” possibility, since the testator may desire the inclusion of

\begin{itemize}
\item \textsuperscript{88}Oler, \textit{Construction of Private Instruments Where Adopted Children are Concerned}, 43 Mich. L. Rev. 901, 938 (1945).
\item \textsuperscript{87}Stewart & Steincipher, \textit{Probate Reform in Washington}, 39 Wash. L. Rev. 873, 877 (1965).
\item \textsuperscript{88}302 S.W.2d 594 (Ky. 1957).
\item \textsuperscript{89}Other examples of claimed misuse of adoption are: Commercial Trust Co. of New Jersey v. Adelung, 136 N.J. Eq. 37, 40 A.2d 214 (Ch. 1944); and \textit{In re Stanford’s Estate}, 49 Cal.2d 120, 315 P.2d 681 (1957). With respect to the \textit{Stanford} case, see the text discussion accompanying note 99, infra.
\item \textsuperscript{90}Note, 47 Ky. L. J. 149, 152 (1958).
\item \textsuperscript{91}As previously noted, clauses excluding adoptees from class gifts have been deemed not violative of “public policy,” Benedict v. New York Trust Co., 48 N.J. Super. 286, 137 A.2d 446, aff’d, 50 N.J. Super. 177, 141 A.2d 340 (1958).
\end{itemize}
children adopted in tender years and raised as members of the family, but may wish the exclusion of adults adopted for the sole purpose of sharing in the class. Again, a clear statement on this matter is required. 92

Although drafting thus provides a ready solution to this problem, the wealth of litigation comments upon the recurrent failure of transferors (and their draftsmen) to seize this opportunity. As a solution, the employment of precise, unambiguous language turns upon appreciation for the problem — appreciation which, manifestly, is often lacking. In this context, it is difficult to justify the existing "hostile" presumption merely by noting that the problem may be eliminated through conscientious and provident drafting; this is an instance where prevailing ignorance demands legal assistance. Some legislatures have responded to this request. 93

Legislative Solutions: The pattern of recent legislation on this problem has been to provide that adopted children should be treated as natural-born progeny for purposes of divining the meaning of private instruments; absent evidence of a contrary intention, this preponderates in favor of the adoptee's inclusion within a class gift. While that admittedly is a significant improvement, nevertheless it is defective in the failure to deal with the possibility of adult-adoptions. Hence it is opined that the statutes of Texas 94 and Indiana 95 are superior models for a proposed general legislative solution. These statutes provide that, for purposes of construing class gifts, adoptees are to be treated as if they were natural-born children in the absence of evidence of a contrary intention, if such adoption was made during the adoptee's minority. Not only do these en-

92 See the suggestion to this effect in Note, 31 So. Cal. L. Rev. 441, 446 (1958).
93 These statutes are cited and discussed in notes 74-79, supra.
actions have the virtue of simplicity, but they also clearly operate in a manner "preventing interference with the probable expectations of transferors through abuse of adoption."

JURIDICAL SOLUTIONS: Since the presumption hostile to adoptees is the creature of the courts, it seems fair to conclude that they should also respond to the dictates of the modern view of adoption. Judicial abdication, in deference to legislative action, is unwarranted, particularly in light of the characteristic lethargy of legislatures and the want of flexibility inherent in legislation. As previously noted, some courts have responded to the modern equation of adoptees with natural-born children and have announced a rebuttable presumption that the testator intended to include adoptees in the class gift. Again, as with much of the recent legislation in this area, though this "presumption" is commendable in spirit, it fails to adequately account for adult (or spite) adoptions. An example of this deficiency is illustrated by the court's statement in In re Stanford's Estate. Confronted by the claim that the adoption was not made in good faith but was made to exclude the University, the court noted that this fact was of doubtful value unless it proved the invalidity of the adoption — which it did not.

While it be admitted that modern adoption philosophy clearly supports a judicial presumption including adoptees in class gifts, the application of such a rule of construction appears justified only where the adoptee was in fact taken when a child. The adoption of adults is foreign to the

96 In Illinois, although it is provided by statute that a lawfully adopted child is deemed a descendant of the adopting parents for inheritance purposes — ILL. ANN. STAT. ch. 3, § 14 (Smith-Hurd 1961) — in Stewart v. Lafferty, 12 Ill.2d 224, 145 N.E.2d 640 (1957), the court nevertheless concluded that an adopted child is to be presumed without the class designation of "children," absent contrary language in the will itself or in contrary indications from the surrounding circumstances.


99 49 Cal.2d 120, 315 P.2d 681 (1957).
customary (or layman's) conception of this institution, and contradicts the theory under which an adoptee is now considered equal in status to the natural child, e.g., the adoptee's complete, personal integration into the family unit. The integrity of the transferor's (now acknowledged) intention to include adoptees must be safeguarded in the genesis of this proposed presumption, and to that end, Professor Halbach has proffered a suggestion of considerable merit:

... it would be desirable for courts to develop a special concept of in loco parentis to be coupled with the constructional preference for the inclusion of adoptees. The basic rule of inclusion could thereby be limited to children who were adopted at a relatively early age and reared by the adoptive parents.  

Whether the revision demanded by the recent definition of an adoptee's status takes the form of legislation or a remodeled judicial presumption, the search remains one of discovering the testator's intention. And although this new presumption will not assure predictability in every instance, at least the courts will no longer depart from social truth and discriminate against adoptees because of mere physical genesis. Instead, the courts may comply with the spirit of the ancient Latin maxim: Ratio est legis anima; mutata legis ratione mutatur et lex. (Reason is the soul of the law; the reason of the law being changed, the law is also changed.)  

This, through recognition of the fact that the law has evolved to the point where it indeed, "seems better social engineering to make those who strongly dislike the idea of property going away from the blood-line or who disapprove of a particular individual, take the initiative."  

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100 Halbach, supra note 97, at 990. Professor Halbach believes it unnecessary to state the details as to what constitutes an early age, noting that that should depend upon all the circumstances of the case.

