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## Eligibility of Adopted Children to Take by Intestate Descent and under Class Gifts in Missouri

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# Comments

## ELIGIBILITY OF ADOPTED CHILDREN TO TAKE BY INTESTATE DESCENT AND UNDER CLASS GIFTS IN MISSOURI

### I. INTRODUCTION

There was no adoption at common law, and consequently adoption statutes have received a strict construction by the courts.<sup>1</sup> The doctrine of consanguinity, which long controlled matters of descent and distribution, has also stood as a barrier to change in the adoption area, thus, the courts, when called upon to construe adoption legislation within the common law framework of intestate descent, have been overtly hostile to viewing an adopted child as within the blood line.<sup>2</sup> In construing limitations contained in written instruments, the courts have been no less opposed to adopted children taking; the doctrine of consanguinity, as well as strict construction of the instrument, is also frequently the basis for the disallowance of the adopted child's taking under the instrument.<sup>3</sup>

Adoption, however, has experienced a steady growth in acceptance and popularity, and a feeling of social reform has led to recent legislation in almost every state which attempts to place the adopted child in parity with natural-born

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1. The Hebrews and Romans recognized adoption for the express purpose of creating an heir. *See Hockaday v. Lynn*, 200 Mo. 456, 98 S.W. 585 (1906), one of the best researched, and probably the most frequently cited history of adoption. England did not pass such legislation until 1926, but no provision was made for any change in the course of intestate succession, the child being denied the right to inherit from the adopting parents. Adoption Act, 1926, 16 & 17 Geo. V., c. 29, § 2. The Adoption Act, 1950, 14 Geo. 6, c. 26, § 13, gave adopted children the same rights to intestate succession as natural children and created a presumption that they were included in class gifts to the children of their adoptive parents.

2. The almost fanatical devotion to blood line is aptly illustrated in *Hockaday v. Lynn*, 200 Mo. 456, 466, 98 S.W. 585, 587 (1906):

. . . [I]t may be said that the laws of descent and distribution . . . are universally built on, and around, the idea of blood kinship. Inheritance flows naturally with the blood. . . . So deep does that notion run in the human breast and through our case-made law that, if it be ignored in a will, the fact of such unhappy and unnatural disposition of property may be put in as evidence tending to show testator's incapacity, or undue influence, and, when united with other facts, may be sufficient to set the will aside.

3. *See, e.g., Grundmann v. Wilde*, 346 Mo. 327, 332, 141 S.W.2d 778, 780 (1940), wherein the court held that the use of "lawful issue" in a will did not include an adopted child by "any stretch of the imagination." *See also Oler, Construction of Private Instruments Where Adopted Children Are Concerned: I*, 43 MICH. L. REV. 705, 729 (1945).

children for all purposes. Nevertheless, the inclusion of adopted children in class gifts constitutes an ever-increasing source of litigation and confusion. The reasons for the litigation and confusion are basically two: (1) poor draftsmanship of both the private written instruments involved and of the adoption legislation, and (2) a refusal on the part of the judiciary to accept fully the institution of adoption.<sup>4</sup> The latter refusal, bottomed upon a reverence for blood relationship, pervades Missouri case law, albeit very subtly, and may be best thought of in these terms:

No one can read the cases on this subject without soon becoming aware of what for the most part is an unexpressed but nonetheless perceptible attitude of fear on the part of the courts that, unless they guard well against it, the institution of adoption may be an implement of self-advancement, fraud or spite in the hands of adoptors seeking to use it deliberately to meet requirements . . . that the adoptors have children.<sup>5</sup>

This "fear" should be borne in mind throughout the following discussion.

## II. INTESTATE DESCENT

### A. *The Adoption Act of 1857*<sup>6</sup>

The first Missouri enactment on adoption, in 1857, reflected the prevailing feeling that the adopted child was an interloper to the blood line. It was narrow and conservative, granting the adopted child only minimal rights,<sup>7</sup> practically omitting any mention of inheritance,<sup>8</sup> and in general "designed to make certain the time-honored course of intestate succession among blood relatives would not be

4. At first the reason for this refusal appeared to the writer to be nothing more than obstinacy on the part of the courts. It was only through talks with various members of the Faculty that the reason for this became clear. The adopted child was not looked upon with favor in earlier times, in fact his status may be likened to that of an illegitimate child. It is only within about the last fifty years that the idea of fully incorporating the adopted child into the family has become accepted. Thus, for those of my generation who may feel the courts are being "obstinate," I pass along this information and remind you that many of the instruments coming before the courts were written fifty to eighty years ago when adopted children were not favored.

5. Oler, *Construction of Private Instruments Where Adopted Children Are Concerned*: II, 43 MICH. L. REV. 901, 923 (1945). See Halbach, *The Rights of Adopted Children Under Class Gifts*, 50 IOWA L. REV. 971, 987-989 (1965).

6. Mo. Laws 1856, at 59.

7. The adopted child was entitled to "support and maintenance" and "proper and humane treatment," but these rights were limited to "parties executing the deed of adoption." The "deed" was executed and recorded "as in the conveyance of real estate." Subsequent treatment by the courts leads one to wonder if perhaps the Legislature was not clairvoyant in treating realty deeds and adoption deeds the same.

8. The Act provided only that a person could adopt "any" child by deed "as his or her heir and devisee[?]." Fortunately, one of the first cases did add the requirement of consent to the adoption by the natural parents. In the *Matter of Charles B. Clements*, 78 Mo. 352, 355 (1883). This is now covered by sections 453.030 and 453.040, RSMo 1959.

disrupted by the innovation."<sup>9</sup> The courts were quick to note the legislative shortcomings:

The statute in question, it must be confessed, is quite imperfect and very unskillfully drawn . . . . It may not be out of place here to express the hope that the defects of the statute will at an early day be remedied by appropriate legislation, as cases which can easily be imagined may arise thereunder, that will be incapable of any very satisfactory solution.<sup>10</sup>

Unfortunately, these words went unheeded for thirty-four years, and absent clear and positive legislative declarations, it was left to the courts to determine the law.

The leading Missouri case intestate succession rights of adopted children is *Hockaday v. Lynn*.<sup>11</sup> The question, deemed one of first impression, was whether an adopted child was "kindred" and succeeded by representation to the interest of an adopting parent in the real estate of the latter's brother, who died intestate. The court noted that adoption was not recognized under common law and only a blood relative was able to inherit. In construing the new adoption statute, this strong principle of consanguinity was controlling. Thus, even if the statute of adoption is read into the statute of descent and distribution,<sup>12</sup> "the adopted child is so let in only for the purpose of preserving in full its right of inheritance from its adoptive parent and the door to inheritance is shut and its bolt shot at that precise point."<sup>13</sup> Thus, *Hockaday v. Lynn* embraced the majority rule giving the adopted child full inheritance rights from the adoptive parents, but denying any inheritance through the adoptive parents. Another rationale for this position was that adoption was essentially a contractual relationship, and, although the adopting parents were free to obligate themselves, they could not create a right in the adopted child to inherit from those who were not a party to the contract.<sup>14</sup>

The majority rule as accepted in *Hockaday v. Lynn* was given full effect by the Missouri courts. In *Bernero v. Goodwin*,<sup>15</sup> the question was whether the natural child of an adopted child was a "descendant" and could succeed to the adopted child's share upon the death intestate of the adopting parent. The court held:

9. Kuhlmann, *Intestate Succession by and from the Adopted Child*, 28 WASH. U.L.Q. 221, 225 (1943).

10. Hough, C.J., In the Matter of Charles B. Clements, 78 Mo. 342, 354, 356 (1883).

11. 200 Mo. 456, 98 S.W. 585 (1906).

12. In *Fosburg v. Rogers*, 114 Mo. 122, 21 S.W. 82 (1893), the court noted that the statute of descent and distribution, while establishing the course of succession, did not define how the status is created which gives the capacity to inherit. The adoption statute gives the adopted child some status under the statute of descent but only as far as he is able to inherit from the adoptive parents. Limbaugh, *Adoption of Children in Missouri*, 2 Mo. L. REV. 300, 311 (1937).

13. *Hockaday v. Lynn*, 200 Mo. 456, 468, 98 S.W. 585, 588 (1906). See Limbaugh, *supra* note 12, at 311 for cases holding that an adopted child is able to inherit from his adoptive parents; Kuhlmann, *supra* note 9, at 233-35.

14. Kuhlmann, *supra* note 9, at 234.

15. 267 Mo. 427, 184 S.W. 74 (1916).

If an adopted child dies during the life of its adopting parent, leaving children, such children are for most, if not for all, purposes, regarded as natural grandchildren of the adopting parent, and are entitled to represent their parent and to receive from the estate of his adopting parent what he would have been entitled to receive had he lived until after such parent's death.<sup>16</sup>

In *Moran v. Stewart*<sup>17</sup> the court was presented with a related problem. The testator devised land in fee to his adopted son. The dower statute provided that if a husband died leaving no "children" then the widow could elect to have one-half the estate subject to her husband's debts in lieu of her usual dower right. The widow contended the adopted son could not be "children" because this would defeat her dower right under the statute. The court held that the adoption statute and the statute on descent and distribution were to be read into the dower statute, and thus, the "circumstances under which a widow has a right to elect did not exist . . . because [testator] died leaving a child capable of inheriting from him."<sup>18</sup>

In yet another context, the case of *Thomas v. Malone*<sup>19</sup> further emphasized that for all purposes of inheriting from the adopting parent, the adopted child would be viewed as though he were a natural child. The case involved a will whereby testator left everything to his third wife, making no mention of a child taken in, but never formally adopted, by testator and a former wife. The court held that there was a contract to adopt, that the facts sufficiently established an equitable adoption, and that the contract to adopt carried "the incidental right of heirship which, as in the case of a natural child, may be cut off only by the will of the adoptive parent in which the adoptive child is mentioned,"<sup>20</sup> thus granting the adopted child the rights of a pretermitted heir.

Although, under the contract rationale, the courts were willing to allow the adopting parent to create an heir for himself, they refused to allow the adopting parent to make himself an heir, partly because the 1857 Act was unclear on this point, and partly because of a desire to prevent possible predatory adoption. Thus, in *Reinders v. Koppelman*<sup>21</sup> testator, the adopting father, devised and bequeathed all his property to his wife and then provided: "After the decease of my said wife, Anna Koppelman, the property then left shall be divided as follows: One-half shall be given to our said adopted daughter Johanna . . ."<sup>22</sup> Johanna survived the testator but predeceased the widow, intestate, unmarried and without issue. The court, assuming that one-half of the remainder had vested in Johanna, held that the interest passed to Johanna's natural father rather than the adopting mother, because the adoption statute was silent as to any change in the law of descent from

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16. *Id.* at 433, 184 S.W. at 75. *Accord*, *Williams v. Rollins*, 271 Mo. 150, 195 S.W. 1009 (1917).

17. 122 Mo. 295, 26 S.W. 962 (1894).

18. *Id.* at 300, 26 S.W. at 963.

19. 142 Mo.App. 193, 126 S.W. 522 (K.C. Ct. App. 1910).

20. *Id.* at 198, 126 S.W. at 524.

21. 68 Mo. 482 (1878).

22. *Id.* at 489-90.

the adopted child, and the court had "no authority to depart from the rules of descent established in the general statute on that subject."<sup>23</sup> The court further noted that it made no difference from where the adopted child got her property; that is, whether it was from the natural or the adoptive parents.

In summary, under the Adoption Act of 1857 the adopted child was treated as the lawful child of his adoptive parents for all purposes of inheritance from them, but the relationship went no further.

### B. *The Adoption Act of 1917*

The statute enacted in 1917 was a dramatic departure from the Act of 1857, although by no means an innovation in the United States.<sup>24</sup> Except for one change made in 1947, discussed *infra*, it is still in effect today:

When a child is adopted in accordance with the provisions of this article, all legal relationship, and all rights and duties, between such child and its natural parents shall cease and determine. Said child shall thereafter be deemed and held to be for every purpose, the child of its parent or parents by adoption, as fully as though born to them in lawful wedlock. Said child shall be entitled to proper support, nurture and care from said parents by adoption, and shall be capable of inheriting from, and as the child of said parents as fully as though born to them in lawful wedlock. Said parent or parents by adoption shall be entitled to the service, wages, control, custody, and company of said adopted child, and shall be capable of inheriting from, and as the parents of, said adopted child as fully as though the child had been born to them in lawful wedlock. *Provided, however,* that neither said adopted child nor said parents by adoption shall be capable of inheriting from or taking through each other property expressly limited to heirs of the body of such child or parent by adoption.<sup>25</sup>

In the leading case of *St. Louis Union Trust Co. v. Hill*,<sup>26</sup> the court recognized the complete break being made with the past as to adoptions under the new act:

The Legislature had a right to and did in strong and emphatic language change the blood stream of an adopted child. Under our present statutes [an adopted child] . . . becomes the child of its adopting parents *for every purpose* as fully as though born to the adopting parents in lawful wedlock. In other words, the adopted child was taken out of the blood stream of its natural parents and placed, by the operation of law, in the blood stream of its adopting parents . . . .

23. *Id.* at 500.

24. Massachusetts is generally credited with enactment of the first adoption legislation in a common law jurisdiction. MASS. ACTS & RESOLVES OF 1851, c. 324. That act is essentially the one enacted by Missouri in 1917.

25. § 1101, RSMo 1919.

26. 336 Mo. 17, 25, 76 S.W.2d 685 (En Banc 1934) (emphasis the court's). *Accord*, *Shepherd v. Murphy*, 332 Mo. 1176, 61 S.W.2d 746 (1933). The court here held that the natural parents could not inherit from the adopted child, but that the adoptive parents and adoptive relatives are able to inherit from the adopted child.

The language of the adoption statute, as construed in *Hill*, indicated a shift in priorities. Concern over the welfare of the child, and fully incorporating him into his new family, were emphasized, while intestacy rights were treated as merely incidental to the adoption status.

The case of *Vreeland v Vreeland*,<sup>27</sup> as far as intestacy is concerned, showed how much of a complete break the Act of 1917 had made. In *Vreeland*, a son of an adopted half-sister was claiming to take by representation a one-fourth share in the estate of the deceased half-sister's half-brother. The court held that an adopted child was able to inherit *through* his adoptive parents. The court supported its decision by saying that, in reference to the 1917 Act, "the legislature has by 'express statute' and 'inexorable implication' granted to adopted children the same rights with reference to inheritance as natural children."<sup>28</sup> Given this shift in priorities, it might seem strange that within ten years after passage of the 1917 Act, Missouri could be classified as the only jurisdiction denying adopted children inheritance rights by refusing to follow a settled rule of construction:

With only one exception, the courts have held that inheritance rights are merely an incident of the adoption status and there is no reason to depart from the normal rule that intestacy rights should be determined by the law in effect at the time of the intestate's death. There are, however, two recent Missouri cases which hold that inheritance rights should be controlled by the law in force at the time of adoption.<sup>29</sup>

A look at the two cases reveals the Missouri Supreme Court was not quite as perverse as might appear. Both cases, *McIntyre v. Hardesty*<sup>30</sup> and *Weber v. Griffiths*,<sup>31</sup> involved a child equitably adopted<sup>32</sup> prior to the 1917 Act. The court noted that the Adoption Act of 1917 provided that when a child was adopted "in accordance with" its provisions, it would "thereafter" be treated as a natural child for all purposes.<sup>33</sup> The court then held that, although there had been an equitable adoption under the Act of 1857, the 1917 Act required adoption "in accordance with" its provisions to obtain the broader inheritance rights, and that, regardless,

27. 296 S.W.2d 55 (Mo. 1956).

28. *Vreeland v. Vreeland*, 296 S.W.2d 55, 59 (Mo. 1956). See also Note, 25 BROOK. L. REV. 231, 242-246 (1959), in which there is a table of statutes showing the effect of adoption on inheritance in 53 American jurisdictions.

29. Kuhlmann, *Intestate Succession By and From the Adopted Child*, 28 WASH. U.L.Q. 221, 244 (1943). See also Annot., 18 A.L.R.2d 960 (1959); T. ATKINSON, WILLS § 1 (2d ed. 1953).

30. 347 Mo. 805, 149 S.W.2d 334 (1941); child sought to take as "kindred" of adopting parent's grandmother, discussed in Note, *Domestic Relations—1917 Adoption Statute—Inheritance from Kindred of Adoptive Parents*, 27 WASH. U.L.Q. 569 (1941).

31. 349 Mo. 145, 159 S.W.2d 670 (1941), Child sought to take as "heir" of natural-born daughter of adopting parents.

32. See *Thomas v. Malone*, 142 Mo.App. 193, 126 S.W. 522 (K.C. Ct. App. 1910), and *supra* note 19, as to equitable adoption under the Adoption Act of 1857. In *Vreeland v. Vreeland*, 296 S.W.2d 55 (Mo. 1956), the half-sister was adopted in 1924.

33. § 1101, RSMo 1919.

the 1917 Act only applied prospectively—"thereafter"—thus limiting the pre-1917 equitably adopted children to inheritance *from*, but not *through*, the adopting parents.

Although defensible as a matter of literal statutory construction, the court possibly could have decided these cases in favor of the adopted children. As indicated earlier,<sup>34</sup> Missouri borrowed heavily from the Massachusetts statute for the Adoption Act of 1917, but in so doing the Legislature failed to keep in mind that the Massachusetts statute had been that state's initial enactment on adoption, and therefore, quite naturally, only spoke prospectively. By treating this language ("in accordance with the provisions of this article") as inadvertent surplusage, the court could have construed the 1917 Act as applicable to all adopted children for intestate descent purposes. In 1941, when the two cases were decided, this was arguably more in line with the social policy favoring adoption. The court, however, did not so decide, and the decisions, although possibly socially objectionable, were not legally incorrect.

The Adoption Act of 1917 signaled a complete break with the past, but due to an oversight of the Legislature, the Massachusetts statute was followed too closely, and instead of solving inheritance problems of adopted children, new ones were created by dividing adopted children into two classes—those adopted before 1917, and those adopted after 1917—with drastically different rights.

### C. *The Amendment of 1943*

The problem created by the wording of the Act of 1917, and brought to light by *McIntyre v. Hardesty* and *Weber v. Griffiths*, received relatively quick legislative attention:

Any person adopted by deed of adoption or agreement of adoption in writing prior to 1917 and wherein said instrument was filed for record prior to July 1, 1917, shall hereafter be deemed and held to be for every purpose the child of its parent or parents by adoption as fully as though born to them in lawful wedlock, and such adoption shall have the same force and effect as an adoption under the provisions of this chapter, including all inheritance rights.<sup>35</sup>

The first case thereafter was *Crawford v. Arends*,<sup>36</sup> decided only five days after passage of the Amendment. Involved was the right of a child, adopted by deed in 1916, to take as a "lineal descendant" under an anti-lapse statute.<sup>37</sup> Testatrix, a cousin of the deceased adopting parent, executed the will in 1933 and

34. See discussion *supra* note 25.

35. Mo. Laws 1943, p. 353, § 9616a, now § 453.150, RSMo 1959.

36. 351 Mo. 1100, 176 S.W.2d 1 (En Banc 1943).

37. § 528, RSMo 1939, as amended, now § 474.460, RSMo 1959 (emphasis added):

. . . when any estate shall be devised to any . . . relative of the testator, and such devisee shall die before the testator, leaving *lineal descendants*, such descendants shall take the estate . . . as such devisee would have done in case he had survived the testator.



died in 1941. The court first held that "relative" under the anti-lapse statute means a blood relative, and it would be an unnatural construction to allow a person out of the blood line to be a "lineal descendant" of this relative. Under the pre-1917 adoption statute, an adopted child, as discussed *supra*, would not be considered by force of statute to be a blood relative of adoptive collateral relatives. On motion to modify or clarify,<sup>38</sup> respondent advanced the 1943 Amendment as a basis for her claim. The court noted that the adopted child was within the wording of the 1943 Amendment, but that the statute's wording was: "shall hereafter be deemed and held." Thus, construction of the statute and the adopted child's rights thereunder, if any, were not and could not have been before the trial court for adjudication and consequently were not available on appeal: "We cannot treat the cause as an original proceeding and determine the meaning and effect of the statute." Implicit, but not discussed, was the question of the retroactive effect of such a statute, a question yet to be decided by the Missouri courts.<sup>39</sup> In short, the inference was that the 1943 Amendment could be effective in the future, but it could have no effect on an interest which vested and was litigated before enactment of the statute.

The Amendment of 1943 was designed to destroy the distinction between pre-1917 and post-1917 adoptions. Although it was unavailable in *Crawford v. Arends*, the inference was it would be effective in the future, at least as to inheritance rights provided for in the Act of 1917 where an intestate died after 1943.

#### D. The Amendment of 1947

The 1947 statute re-enacted the 1917 provisions, but omitted the proviso previously governing limitations to bodily heirs,<sup>40</sup> and substituted the following:

Said adopted child shall be capable of inheriting from and taking through his parent or parents by adoption property limited expressly to heirs of the body of such parent or parents by adoption.<sup>41</sup>

Those writing in this area of the law felt that the 1947 statute was the *coup de grace* to pre-1917 law insofar as inheritance was concerned, and that the law clearly reflected the social policy favoring adoption:

38. 351 Mo. 1100, 1110, 176 S.W.2d 1, 7 (En Banc 1943).

39. See, however, the dictum in *Commerce Trust Co. v. Weed*, 318 S.W.2d 289, 299 (Mo. 1958), *infra* note 126.

40. § 1101, RSMo 1919 had limited inheritance under such limitations:

*Provided, however*, that neither said adopted child nor said parents by adoption shall be capable of inheriting from or taking through each other property expressly limited to heirs of the body of such child or parent by adoption.

41. Now § 453.090, RSMo 1959. See Cook, *Adoption Revisited*, 27 Mo. L. REV. 391 (1962), for a section by section commentary on the law in effect in 1947 and which law remains in effect today. See also P. PETERSON & W. ECKHARDT, *POSSESSORY ESTATES, FUTURE INTERESTS AND CONVEYANCES IN MISSOURI*, § 64 (1952).

Accordingly, then, it seems clear beyond question that an adopted child now has every right of inheritance *from or through* its adoptive parents, without limitation, which it would have if it were their blood child.<sup>42</sup>

Unfortunately, the statute begins with the familiar "in accordance with the provisions of this chapter," and again uses the phrase "shall thereafter be deemed and held." Should the court follow the reasoning established in *McIntyre v. Hardesty* and *Weber v. Griffiths*, then there may be created yet another class of adopted children—those adopted after 1947.

### E. Future Problems

The current status of adopted children's inheritance rights is somewhat uncertain in Missouri. The recalcitrant attitude of the courts has been more than matched by the missionary zeal of the welfare agencies and others concerned with adoptable children. These latter groups have constantly pushed for broader legislation fully to incorporate the adopted child into his new family, and the current Missouri statutes indicate a high degree of success. Unfortunately, their success has created new problems for the adopted child in that current legislation has frequently resulted in "overkill."

#### 1. Natural Parents

A current trend seems to be to cut the adopted child off completely from the natural parents.<sup>43</sup> This can have disastrous results. For example, if *H* and *W* are divorced and *W* remarries, and *W* and her new husband adopt the children of the *H-W* marriage, presumably this would prevent the children from inheriting from *H* or his relatives. Should *H* then die intestate, his children, the most natural objects of his bounty, would take nothing. Arguably, the children are being deprived of an inheritance right without due process of law. It may be desirable in such cases to treat such a child as heir to both the natural and adoptive parents.<sup>44</sup>

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42. TAUB, *Adopted Children's Inheritance Rights Under Missouri Law*, 5 J. MO. BAR 69, 74 (1949) (emphasis added).

43. See, e.g., MINN. STAT. ANN. § 259.29 (1959). *Contra*, MICH. STAT. ANN. § 27.3178 (549) (1962). Whether or not the Missouri Statute, § 453.090 RSMo 1959, has this effect is unclear. But the case of *Wailes v. Curators of Central College*, 363 Mo. 932, 254 S.W.2d 645 (1953), disallowed the adopted child's taking from the natural parents or family. In this case, the adopted children claimed that they were able to attack their natural grandparent's will as pretermitted heirs. The court relied on the following language of the statute in saying that the adopted children were not pretermitted heirs, "... all legal relationships and all rights and duties between such child and his natural parents shall cease and determine." See Note, 25 BROOK. L. REV. 231, 242-246 (1965).

Also, the Supreme Court of Missouri has held that after adoption the natural family is not able to inherit from the adoptive child. *Shepherd v. Murphy*, 332 Mo. 1176, 61 S.W.2d 746 (1933).

44. Some statutes, e.g., MD. ANN. CODE, art. 16, § 78 (Supp. 1966), attempt to do this, but the wording is highly ambiguous. Connecticut seems to have accomplished this rather simply:

When one of the parents of a minor child and the surviving parent has remarried, adoption of such child by the person with whom such

## 2. Conflict of Laws

Conflict of laws rules could cause much trouble in this area. Fortunately, most jurisdictions which have considered the question seem to have followed the *Restatement* approach,<sup>45</sup> and the question of adoption is handled like that of marriage. If the status is valid where created, it is valid everywhere, but the incidents thereof are determined by the law of the state confronted with the principal question.<sup>46</sup> Thus, inheritance of movables is determined by the law of decedent's domicile, and inheritance of land by the law of the state where the land is located, even though these states give the adopted child greater or lesser rights than the state creating the relationship.<sup>47</sup>

### F. Conclusion—Intestate Descent

Problems with pre-1917 intestacy law should be almost ended. In the first place, the Adoption Act of 1917 has been in effect for over fifty years and this time factor alone should leave few collateral relatives of anyone adopted prior to 1917.<sup>48</sup>

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marriage is contracted shall not affect the rights of such child to inherit from the relatives of the deceased parent.

CONN. GEN. STAT. ANN. § 45-65 (1960).

Of course, before death the natural, non-adoptive parent could have provided for the adopted child by will.

Mississippi probably has the most unique system. It provides for rather full inheritance powers, but the decree in Chancery can specifically provide otherwise. MISS. CODE ANN. § 1269-06 (Supp. 1958).

45. RESTATEMENT, CONFLICT OF LAWS (1934).

46. RESTATEMENT, CONFLICT OF LAWS §§ 143, 305 (1934). *Accord*, Mutual Life Ins. Co. v. Benton, 34 F.Supp. 859 (W.D. Mo. 1940). *But see* St. Louis Union Trust Co. v. Kaltenbach, 353 Mo. 1114, 186 S.W.2d 578 (1945), wherein the court refused to deny the adopted child the right to inherit from its natural father, partially because the court felt the adoption statute did not destroy this right, but mainly because the California adoption did not measure up to the Missouri procedure:

However, in any event, we do not think it would be reasonable to hold that a minor child loses his rights of inheritance through his own father by a proceeding of which his father had no notice and in which no guardian ad litem was appointed to represent and protect the interest of such child.

This question may now be settled in favor of the *Restatement* view by § 453.170, RSMo 1959.

47. Goodrich, *Legitimation and Adoption in the Conflict of Laws*, 22 MICH. L. REV. 637 (1924); Taintor, *Adoption in the Conflict of Laws*, 15 U. PRR. L. REV. 222 (1954); Uhlenhopp, *Adoption in Iowa*, 40 IOWA L. REV. 228 (1955), the entire Winter issue being devoted to a seminar on adoption.

48. Rumans v. Lighthizer, 363 Mo. 125, 249 S.W.2d 397 (1952), shows one of the problems remaining. The facts were that an adopted child died intestate in 1948. She was survived by her natural brother and sister and by collateral relatives of her adoptive parents. The court held that her property passed to her natural brother and sister. This was because the child had been equitably adopted and her deed of adoption was not filed under pre-1917 law. In this situation, the 1943 statute, which gave those adopted before 1917 the advantage of the more liberal Adoption Act of 1917, did not apply. The 1943 statute only helped those whose deed of adoption was filed for record prior to July 1, 1917.

Secondly, the great majority of estates today, at least those worth litigating, will involve a written instrument. The principles established remain viable, however, and will play a significant part in interpretation and construction of written limitations using terminology frequently found in statutes of descent and distribution.

### III. LIMITATIONS TO HEIRS, NEXT OF KIN, ETC.

#### A. Interpretation or Construction of Written Instruments

When a written instrument is involved, the question is no longer the *right* of an adopted child to take, but whether or not the testator or grantor *intended* the adopted child to share.<sup>49</sup> Many instruments coming before the courts today were written before 1930, and some are over fifty years old.<sup>50</sup> Thus, the persons executing these instruments were born and raised around 1900, a time when adoption was neither common nor accepted.<sup>51</sup> Although such a testator or grantor might have wished to exclude adopted children if asked, the question was probably not asked, and therefore a search for an "intention" becomes, in most cases, purely fictitious. In short: "Obviously one cannot hope to find the testator's intention when this is unascertainable from available sources, or never existed in his own mind."<sup>52</sup> Therefore, although the testator's intention should be observed if manifested, it is submitted that such is rarely present and the cases should be resolved according to rules of construction.<sup>53</sup>

#### B. Missouri Rules

Although the Missouri courts seem overly prone to search for an intent, there has developed a system of rules of construction which aid in, and on occasions replace, the search. With few exceptions, however, the rules are incapable of any definitive statement, because the innumerable word combinations presented to the courts almost defy categorization. Nevertheless, there are certain basic propositions which will normally apply. The most important of these in the present context is that, by using intestate terminology, such as "heirs," the testator *presumably* meant his estate to go to those who would have taken on intestacy, and, absent

49. Brock v. Dormann, 339 Mo. 611, 614, 98 S.W.2d 672, 674 (1936).

50. See, e.g., Ratermann v. Ratermann, 405 S.W.2d 891 (Mo. 1966), discussed *infra*, involving trust deeds executed in 1905.

51. See note 4 *supra*, as to the feeling present at that time. It must be kept in mind the problems presented involve class gifts. A gift to an adopted child by name presents no problem.

52. T. ATKINSON, WILLS § 146 (2d ed. 1953).

53. T. ATKINSON, *op. cit. supra* note 52, distinguishes interpretation and construction as follows:

While the difference is not always recognized, it is helpful to draw a distinction between interpretation and construction. The former is the process of discovering the meaning or intention of the testator from permissible data. Construction, in its narrow sense, consists of assigning meaning to the instrument when the testator's intention cannot be fully ascertained from proper sources. . . . In other words, construction is necessary only when interpretation fails.

a clear manifestation to the contrary, the general rule is that an adopted child will be included in a class designation if, under the pertinent laws of descent and distribution, he would have taken on intestacy.<sup>54</sup>

The above rule requires that, if an adopted child is to qualify as an "heir," then he must be elevated to that status by virtue of a statute. This introduces the highly important variable of the time at which such a statute operates: (1) with a will, the question may be whether the applicable law is that in effect at the time of execution, at the time of testator's death, at the time of vesting of the gift, or at the time of the distribution of the gift; (2) with a deed, the question may be whether the applicable law is that in effect at the time of delivery, at the time of vesting of the gift, or at the time of distribution of the gift. The position most frequently taken in Missouri is that, even though the members of the class may be determined at a later date, whether a testator or grantor intended to include an adopted child within a described class is to be determined by the law in effect at the *time of execution* of the will, deed or other instrument.<sup>55</sup> As noted in the previous section, the general rule of construction in matters of intestacy is different from the rule above as the law in force at the time the inheritance becomes effective governs.<sup>56</sup> In certain situations, analogous to intestacy cases, coupled with the wording involved and the intent of the testator, have led to possible violations of the "time of execution" rule.<sup>57</sup>

The early cases did, however, create a rather subtle, but important, distinction which removed the time variable from consideration. The distinction was between gifts defined in terms of relationship to the testator or grantor, and those defined in terms of relationship to the legatee/devisee or grantee.<sup>58</sup> Thus, if a devise was

54. Oler, *Construction of Private Instruments Where Adopted Children are Concerned: I*, 43 MICH. L. REV. 705, 739 (1945); 2 L. SIMES AND A. SMITH, *FUTURE INTERESTS*, § 732 (2d ed. 1956). For Missouri cases, see *Hayes v. St. Louis Union Trust Co.*, 280 S.W.2d 649 (Mo. 1955), "heirs and survivors"; *St. Louis Trust Co. v. Greenough*, 282 S.W.2d 474 (Mo. 1955), "descendant"; *Brock v. Dormann*, 339 Mo. 611, 98 S.W.2d 672 (1936), "heirs"; *St. Louis Union Trust Co. v. Hill*, 336 Mo. 17, 76 S.W.2d 685 (En Banc 1934), "heirs at law"; *Ranch v. Metz*, 212 S.W. 357 (Mo. En Banc 1919) "heirs." For recent cases from other jurisdictions, see 2 SIMES & SMITH, *supra*, § 728, and generally Annot., 86 A.L.R.2d 12 (1962).

55. *Ratermann v. Ratermann*, 405 S.W.2d 891 (Mo. 1966); *First Nat'l Bank v. Sullivan*, 394 S.W.2d 273 (Mo. 1965); *St. Louis Union Trust Co. v. Greenough*, 282 S.W.2d 474 (Mo. 1955); *Leeper v. Leeper*, 347 Mo. 442, 147 S.W.2d 660 (1941); *Wyeth v. Merchant*, 34 F. Supp. 785 (W.D. Mo. 1940), *aff'd* 120 F.2d 242 (8th Cir. 1941); *Brock v. Dormann*, 339 Mo. 611, 98 S.W.2d 672 (1936); *St. Louis Union Trust Co. v. Hill*, 336 Mo. 17, 76 S.W.2d 685 (En Banc 1934).

56. *Kuhlmann, Intestate Succession by and from the Adopted Child*, 28 WASH. U.L.Q. 221, 244 (1943).

57. *Commerce Trust Co. v. Weed*, 318 S.W.2d 289 (Mo. 1958).

58. *Halbach, The Rights of Adopted Children Under Class Gifts*, 50 IOWA L. REV. 971, 979 (1965); *Taub, Adopted Children's Inheritance Rights Under Missouri Law*, 5 J. MO. BAR 69 (1949), states the Missouri position:

In effect, the Court thus amplified the statute to mean that an adopted child may not take from kindred, except if the terms of the will or grant define takers in terms which include the relationship of the adopted child to the adoptive parent, so that it may be presumed testator or grantor intended the adopted child to take.

made by *A* to his son *B*, but if *B* should predecease, then to "my heirs," and *B* did predecease *A*, then *B*'s adopted child would take nothing unless the statute of adoption would have made him *A*'s heir at the time the will was executed. If, however, the devise was by *A* to *B* for life, and after his death to "*B*'s heirs," then *B*'s adopted child would take.<sup>59</sup> This is but a logical extension of the general rule of *Hockaday v. Lynn*<sup>60</sup> allowing inheritance *from*, but not *through*, adoptive parents.

The above rules, and the variations thereon created by the words in the instrument involved, provide the basis for most of the Missouri decisions.

### C. Cases

#### 1. Heirs<sup>61</sup>

There are various terms used to designate those who take real property upon intestacy: "heirs," "lawful heirs," "legal heirs," "heirs at law," or "heirs generally." Despite consanguinity importance in intestate descent problems, consanguinity has not had much impact on construction of limitations using such terms, with the important variable being "time," as pointed out above in part III. B.

In *Rauch v. Metz*,<sup>62</sup> there was an equitable adoption between 1865 and 1881. The will was executed in 1913 and the testator died in 1914. The testator was a brother of Elizabeth Metz, and the residuary clause of his will provided: "To Elizabeth Metz, or in the event of her death her heirs shall receive one-thirteenth." Appellant, the adopted daughter of Elizabeth, sought to participate equally in the devise with a natural-born son of Elizabeth. The court held that appellant would participate equally because the relationship was defined in terms of Elizabeth—"her heirs"—and, as indicated above,<sup>63</sup> a relationship defined in such terms places emphasis upon the relationship itself, and disregards of the time variable. A second possible reason for the decision was the fact that the child was adopted before the will was executed, and the testator, knowing of this, intended to include the adopted child; however, the court did not point to this consideration.<sup>64</sup>

59. *Hayes v. St. Louis Union Trust Co.*, 280 S.W.2d 649 (Mo. 1955), eight trusts for the benefit of settlor's children then living or "their heirs and survivors"; *Brock v. Dormann*, 339 Mo. 611, 98 S.W.2d 672 (1936), to son for life, "and after his death to go to his heirs"; *Rauch v. Metz*, 212 S.W. 357 (Mo. En Banc 1919), involving both types with the adopted child taking under some, but not others—the distinction is very clearly drawn.

60. 200 Mo. 456, 98 S.W. 585 (1906). Mo. LAWS 1856, at 59.

61. Now defined in § 472.010(14), RSMo 1959:

"Heirs" denotes those persons including the surviving spouse, who are entitled under the statutes of intestate succession to the real and personal property of the decedent on his death intestate.

62. 212 S.W. 353, 212 S.W. 357 (Mo. En Banc 1919).

63. See notes 58 and 59 *supra*, and the discussion relating thereto.

64. See Annot., 86 A.L.R.2d 12, 89 (1962), for the general proposition that adoption prior to execution may be a basis for assuming testator meant to include the adopted child; Oler, *Construction of Private Instruments Where Adopted Children Are Concerned: II*, 43 MICH. L. REV. 901, 909-912 (1945).

In *St. Louis Union Trust Co. v. Hill*,<sup>65</sup> the court went somewhat further. The will, executed in 1918, created a trust and provided: “. . . and upon the death of any child, his or her share shall be distributed, free from trust, to his or her heirs-at-law. . . .” The adoptions occurred in 1929, eleven years after the date of execution and *after testator's death*. It was argued that “heirs-at-law” were to be limited to blood relatives because later in the will the testator speaks of his “children” or his “grandchildren.” The court held in favor of inclusion of the adopted children because all the acts occurred after the Adoption Act of 1917, and, by this Act, an adopted child was treated as a natural child and is able to inherit through his adoptive parents. This result places primary emphasis upon time.<sup>66</sup> Notice that the court took the above argument as true that “heirs-at-law” are limited to blood relatives. If it had not done so it could have reached the same result on the theory that the property was to pass to the “heirs-at-law” of any child and an adopted child could inherit from his adoptive parent.<sup>67</sup>

In *Hayes v. St. Louis Union Trust Co.*,<sup>68</sup> the testator devised his property in trust for the benefit of his eight children or “their heirs and survivors,” the trust to last for the life of the surviving child, with remainder to the “grandchildren” per capita. The court held that the adopted daughter of testator's son was within the relationship expressed—“*their* heirs”—and held further that:

The word “grandchildren” may include an adopted child. In this case, the testator, in stating the general purposes of his will, by using the word “heirs,” included the adopted child. To be consistent, therefore, we must hold that the word “grandchildren” included the adopted child in question.<sup>69</sup>

Purely by dictum, the court offered another basis for the decision in *Hayes*. The time sequence involved was: 1915—will executed; 1917—first codicil; 1918—second codicil; 1919—testator died; 1921—adoption. The court felt the two codicils avoided the problem of the change in the adoption law in 1917, and thereby brought the situation within the broad rationale of *St. Louis Union Trust Co. v. Hill*:<sup>70</sup>

However, we may take into consideration the fact that after the 1917 Adoption Act . . . became effective, the testator added two codicils . . . . There is respectable authority to the effect that a will speaks from the

65. 336 Mo. 17, 22, 76 S.W.2d 685, 687 (En Banc 1934). See also Annot., 36 A.L.R.2d 12, 91 (1962).

66. There is an additional factor the opinion does not make clear. Even though the adoptions occurred after testator's death, testator may have foreseen and approved of the taking. Testator's will was dated April 4, 1918, testator died September 5, 1918, and testator's son was married to a divorcee with two sons, the children involved in this case, on September 27, 1918. Thus, although the actual adoption did not occur until 1929, it is quite possible the testator knew the children prior to execution of the will.

67. See notes 58, 59, and 60 *supra*, and related text.

68. 280 S.W.2d 649 (Mo. 1955).

69. *Id.* at 655.

70. 336 Mo. 17, 76 S.W.2d 685 (En Banc 1934).

time a codicil . . . is executed. . . . The above rule has been applied in cases where statutes were changed after the date of the original will and before the date of the execution of a codicil.<sup>71</sup>

The reasoning used in *Hayes* to equate "heirs" and "grandchildren," may be used in reverse fashion to prevent the adopted child's sharing. In *Naylor v. McRuer*,<sup>72</sup> the testator devised his property in trust for his two natural children, and provided that "after the death of the survivor of my children aforesaid, I direct said trustee . . . to account to and turn over to the natural heirs of my said daughter and son the residue and remainder of the estate." The case did not involve adopted children, but in seeking to determine the meaning of "natural heirs," the court said that "natural" limited the technical meaning of "heirs" to "those heirs becoming so in 'the usual and ordinary course of nature,' as contradistinguished from heirs by adoption." The court then went on to equate "natural heirs" with "heirs of the body."

## 2. Next of Kin

The rules applied and the results obtained when a will or trust instrument employs terms such as "next of kin" or "kindred" are the same as those obtained when the term "heirs" is used.<sup>73</sup> Frequently, both appear in the same instrument.<sup>74</sup> The term has almost entirely disappeared from the Missouri statute,<sup>75</sup> and has been replaced by some of the terms discussed below.

# IV. LIMITATIONS TO CHILDREN, HEIRS OF THE BODY, ETC.

## A. Missouri Rules

The basic rules discussed above in part III. B are generally applicable here, except that references to intestate descent statutes are infrequent. The doctrine of consanguinity becomes highly important, as the argument frequently advanced is that "the ordinary, natural, normal or primary meaning of the word [children,

71. *Hayes v. St. Louis Union Trust Co.*, 280 S.W.2d 649, 655 (Mo. 1955).

72. 248 Mo. 423, 154 S.W. 772 (1912). See also 2 L. SIMES & A. SMITH, *FUTURE INTERESTS* § 729 (2d ed. 1956).

73. See generally Oler, *Construction of Private Instruments Where Adopted Children Are Concerned: I*, 43 MICH. L. REV. 705, 739 (1945); 2 L. SIMES & A. SMITH, *FUTURE INTERESTS* § 727 (2d ed. 1956); Annot., 86 A.L.R.2d 12, 88 (1962).

74. See, e.g., *St. Louis Union Trust Co. v. Kaltbach*, 353 Mo. 1114, 186 S.W.2d 578 (1945), to be held in trust "for the benefit of the heirs named" and "to descend to next nearest of kin."

75. § 474.010(3), RSMo 1959, is the only portion of the rules of descent using the term:

If there is no surviving spouse or kindred of the decedent entitled to inherit, the whole shall go to kindred of the wife or husband of the decedent, in like course as if such wife or husband had survived the decedent and then died entitled to the property.

See also T. ATKINSON, *WILLS* § 18 (2d ed. 1953).



etc.] connotes relationship by blood and excludes adopted children."<sup>76</sup> When a change in the adoption statute did bring an adopted child within the "meaning of the word," such as "children," there remained the "time of execution" rule as a bar to the adopted child's taking. Thus, the problem was the same, but the emphasis shifted to consanguinity.

## B. Cases

### 1. Children<sup>77</sup>

Adoption has been present in Missouri for over a century, and the idea of one adopted being termed a "child" can hardly be held as unusual. Nevertheless, Missouri has consistently held that the term "child" or "children" does not normally include adopted children.

The leading case in Missouri, and frequently cited by other jurisdictions, is *Leeper v. Leeper*.<sup>78</sup> Grantor conveyed land to his son in 1900 as follows: ". . . to William F. Leeper, during his natural life and at his death to his heirs, but should he die without children then to his full brothers and their heirs." In 1904 the grantor died, in 1934 William adopted a child, and in 1938 William died. Having been adopted under the Adoption Act of 1917, the child seemed to be within the term "children," and the *Hill* case<sup>79</sup> indicated the fact the grantor predeceased the adoption would not preclude the child's taking.

The court held that the law in effect at the time of execution of a deed governs its construction, that the law in effect in 1900 did not place an adopted child "within the classification of a natural born child," and that:

The court in the *Hill* case did not, and we find no decision of this court that does, undertake to take the present meaning of the word "children" as now used in deeds written subsequent to the enactment of the 1917 adoption statutes, and to make such meaning applicable to the word "children" as used in a deed written prior to the act when, under the law then in force, the word "children" did not mean, or include adopted children.<sup>80</sup>

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76. Oler, *Construction of Private Instruments Where Adopted Children Are Concerned*: I, 43 MICH. REV. 705, 712 (1945); 2 L. SIMES & A. SMITH, FUTURE INTERESTS § 724 (2d ed. 1956); Annot., 86 A.L.R.2d 12, 48 (1962).

77. Now defined in § 472.010(2), RSMo 1959:

"Child" includes an adopted child but does not include a grandchild or other more remote descendants, nor, except as provided in section 474.060, RSMo, an illegitimate child.

See also Rowan, *Wills—Construction of "Children" to Include Adopted Children*, 5 MO. L. REV. 259 (1940).

78. 347 Mo. 442, 147 S.W.2d 660 (1941), (cited in 2 L. SIMES & A. SMITH, FUTURE INTERESTS § 546 (2d ed. 1967 Supp.)). Accord, *Melek v. Univ. of Missouri*, 213 Mo.App. 572, 250 S.W. 614 (K.C. Ct. App. 1923), the will, executed in 1902, gave a life estate to testator's daughter, remainder to her "children." A child adopted in 1912 was the daughter's only survivor. Held: "Children" did not include adopted child. See also 2 L. SIMES & A. SMITH, FUTURE INTERESTS § 546 (2d ed. 1956); Annot., 86 A.L.R.2d 12, 48 (1962).

79. *St. Louis Union Trust Co. v. Hill*, 336 Mo. 17, 76 S.W.2d 685 (En Banc 1934). The case involved construction of "heirs-at-law," but dictum indicated the same result with the words "children" or "grandchildren."

80. 347 Mo. at 454, 147 S.W.2d at 666.

## 2. Heirs of the Body

The term "bodily heirs" or "heirs of the body" quite naturally carries the strongest connotation of blood line and operates most effectively to exclude adopted children by its own weight.<sup>81</sup> The connotation is no less strong today, at least if unaffected by the Amendment of 1947.<sup>82</sup> Thus, in *First Nat'l Bank v. Sullivan*,<sup>83</sup> testator, who died in 1928, executed a will in 1923 creating a trust for the benefit of his daughter for life, remainder to the "heirs of her body," but "if my said daughter have no heirs of her body at her death, then to my heirs at law, per stirpes and not per capita, their heirs and assigns forever."<sup>84</sup> The trust terminated in 1963 upon the death of the daughter, who was survived by a child adopted in 1953.

The court in *Sullivan* first held that the "heirs at law" were to be determined and their remainders vest as of the termination date rather than the date of testator's death, because otherwise the daughter would be an "heir" and beneficiary of the trust, and this was "sufficient to indicate that the heirs were to be determined as of a later time when he would no longer be an heir . . ." This reasoning was not applied to the remainder to "heirs of the body," however, which would have allowed the adopted child to take by virtue of the Amendment of 1947:<sup>85</sup>

. . . we do not find that the testator intended that the qualification of those who were to make up the class "heirs of the body of my said daughter" were to be judged in accordance with the laws in effect at the time of [the daughter's] death. . . This is in accordance with the general

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81. *Clarkson v. Hatton*, 143 Mo. 47, 44 S.W. 761 (1898), wherein land was deeded in 1858 to John Clarkson and his "bodily heirs." Earlier case held these were words of limitation giving John a life estate, remainder in fee to his "bodily heirs," or if none, to his heirs. In 1887, John adopted a son, who survived John and claimed the property. The court held:

It was not within the power of John Clarkson to take away the statutory estate so created and vested in his brothers and sisters if he had no bodily heirs, and confer the same upon an adopted child. The right to inherit by virtue of a deed of adoption does not make the beneficiary a "bodily heir"—a child, in fact—of the adopting parent or parents.

It should be noted again that prior to the 1947 statute the adoption statutes left no doubt as to the blood line connotation of "heirs of the body":

*Provided, however,* that neither said adopted child nor said parents by adoption shall be capable of inheriting from or taking through each other property expressly limited to heirs of the body of such child or parent by adoption. § 1101, RSMo 1919.

82. This was reversed in 1947 by the following provision:

Said adopted child shall be capable of inheriting from and taking through his parent or parents by adoption property limited expressly to heirs of the body of such parent or parents by adoption. §453.090(4), RSMo 1959.

83. 394 S.W.2d 273 (Mo. 1965). See also 2 L. SIMES & A. SMITH, FUTURE INTERESTS § 546 (2d ed. 1956), case cited in 1967 Supp.

84. *Id.* at 277.

85. Now § 453.090(4), RSMo 1959.

rule that whether an adopted child is embraced within the meaning of a described class of beneficiaries in a will is governed by the law in force at the time the will or other instrument was executed.<sup>86</sup>

### 3. Lineal Descendants<sup>87</sup>

The addition of the limiting word "lineal" to "descendants" was sufficient to establish a blood line connotation, and an early case, involving intestacy, disallowed an adopted child from taking as a "lineal descendant."<sup>88</sup> This has been modified somewhat. In *Commerce Trust Co. v. Weed*,<sup>89</sup> testator's daughter adopted a daughter in 1909. Shortly before his death in 1927, testator executed his will whereby he created a trust with life income to his daughter, remainder to testator's "lineal descendants." The court found that the remainder was contingent, and that testator not only intended no interest to vest until the termination date, but that "the qualification of those who were to make up that class were to be judged according to their situation on that date."<sup>90</sup> Thus, conceding that the adopted child was not a "lineal descendant" of testator under the Act of 1857 under which she was adopted, the court held the acts of 1943 and 1947, giving the adopted child the status of one adopted under the Act of 1917, clearly brought the adopted child within the term "lineal descendant." Note that straight application of the general rule that the law in effect at the time of execution governs might have accomplished the same result of bringing the child within the broader provisions of the 1917 Act. This depends on how the court would construe the 1943 Amendment which treats children adopted before 1917 the same as those adopted after 1917. Against the adopted child taking, it could be argued that, in 1927, the law did not allow an adopted child to take through his adoptive parents. This is because the child was not adopted in "accordance with" the 1917 Act. Also, the statute of 1943, which placed those adopted before 1917 and after 1917 on the same footing, had not been passed. But the question is not discussed.

### 4. Descendants

Although it has been indicated that "descendants" may have a blood line connotation similar to that of "heirs of the body,"<sup>91</sup> the term never achieved that status in Missouri. The case of *St. Louis Union Trust Co. v. Greenough*<sup>92</sup> involved

86. 394 S.W.2d at 281. See generally Note, 34 U.M.K.C.L. REV. 490 (1966).

87. § 472.010(22), RSMo 1959 now defines:

"Lineal descendants" includes adopted children and their descendants.

88. *Rauch v. Metz*, 212 S.W. 357 (Mo. En Banc. 1919), where the term appeared in an anti-lapse statute. The term "relatives" appeared in the same sentence and had been construed as limited to blood line. The two terms were equated. See also 2 L. SIMES & A. SMITH, FUTURE INTERESTS § 725 (2d ed. 1956).

89. 318 S.W.2d 289 (Mo. 1958).

90. *Id.* at 298.

91. *Oler, Construction of Private Instruments Where Adopted Children Are Concerned: I*, 43 MICH. L. REV. 705, 728 (1945).

92. 282 S.W.2d 474 (Mo. 1955), relying heavily upon *Hayes v. St. Louis Union Trust Co.*, 280 S.W.2d 649 (Mo. 1955). *Accord, In re Collins' Estate*, 393 Pa. 195, 143 A.2d 178 (1958).

a will executed in 1908, with codicils in 1910, 1911, and 1912, which created a trust with income to testator's daughter for life, remainder to her children, or if none, to the daughter's brothers and sisters or "descendants of brothers and sisters."<sup>93</sup> The testator died in 1913, and in 1918 a natural child of one of the "sisters" adopted a child, who survived his adoptive parent, and claimed as "descendant." The court held:

For at the very least, *Hayes* [v. State Louis Union Trust Co.] demonstrates that in will construction this court will construe "descendants of brothers and sisters" to include an adopted child of a sister's daughter whether or not that language was used in a will executed prior to the enactment of the 1917 Adoption Act, *unless* from the whole will testator's contrary intention appears.<sup>94</sup>

The wording of the last clause is highly significant. Prior to this case, when a will had been executed before the Adoption Act of 1917, the courts usually required a showing the testator intended to include adopted children.<sup>95</sup> This case is significant in that it reverses the presumption as to the exclusion of adopted children—"unless from the whole will testator's contrary intention appears." This may be an indication of the court more fully accepting adoption. Also, the wording of the above clause seems to reject the "time of execution" rule. But the case does not reject the rule in that the class "descendants of brothers and sisters" refers to the grantee; and, since 1857, an adopted child can inherit from his adoptive parents.

#### 5. Issue<sup>96</sup>

The courts have had difficulty with "issue" or "lawful issue" in determining the strength of the blood line connotation. In *Grundmann v. Wilde*,<sup>97</sup> the testator died in 1900, devising a life estate to his children, remainder in fee to "their lawful issue." One of the children was survived by a son, adopted in 1916. The court prefaced its discussion of the merits with the observation that testator's "blood relatives, his heirs, are favorites of the law and entitled to first consideration in doubtful expressions." It is not surprising that the court then held that "by no stretch of imagination could it be ruled that the phrase 'lawful issue' . . . includes an adopted child of either of said children of the testator."<sup>98</sup>

93. The will actually set up a trust with income to testator's daughter for life and, if there were no "children" or "descendants of a child," the remainder was to go to her brothers and sisters per stirpes. However, the court construed this will to have the same meaning as set out in the text.

94. 282 S.W.2d at 483 (emphasis the court's).

95. See, e.g., *Wyeth v. Merchant*, 34 F. Supp. 785, 789 (W.D. Mo. 1940), *aff'd* 120 F.2d 242 (8th Cir. 1941).

96. Now defined in § 472.010(16), RSMo 1959:

"Issue" of a person, when used to refer to persons who take by intestate succession, includes adopted children and all lawful lineal descendants, except those who are the lineal descendants of living lineal descendants of the intestate.

97. 346 Mo. 327, 141 S.W.2d 778 (1940).

98. *Id.* at 332, 141 S.W.2d at 780.

In *Wyeth v. Merchant*,<sup>99</sup> the court ascribed an even stronger blood line connotation to "issue." The will, executed in 1900, created a trust for the life of a granddaughter, but should she die "without issue," then to a son. The granddaughter adopted a daughter and the problem was whether the adopted child was an "issue" of the granddaughter. The court placed much emphasis upon time, noting that the adoption statute in effect at the date of execution did not place an adopted child within the blood line. The court then equated "issue" and "heirs of the body," and held that, absent a contrary intention, the prima facie meaning of the term, by its own weight, precluded an adopted child from being included.<sup>100</sup>

In *Kindred v. Anderson*,<sup>101</sup> the testatrix executed a will in 1898 in which she devised all her real estate to a son, but if he should die "without issue," then all the real estate was to go to her other children. The son adopted a daughter in 1934, and died in 1946. The court noted that "issue," although prima facie meaning blood issue, was less restrictive than "children," and held that since "children" included adopted children at the time of execution, then issue certainly should also. However, the decision was also based on two other factors. First, the court believed that the phrase "should he died without issue" involved inheritance from adoptive parents, not adoptive collateral relatives. Under the adoption statute in effect in 1898, an adoptive child could inherit property from an adoptive parent.<sup>102</sup> Second, it was found that the testatrix intended that the deceased adopting parent take in any manner in preference to the other devisees. This strong reliance on intent may make the above meaning of issue merely dictum.

## V. THE ADOPTED CHILD'S STATUS TODAY

### A. Generally

The Adoption Act of 1917 with the Amendments of 1943 and 1947 clearly indicated popular support for the institution of adoption, and the Missouri courts seemed to ease away from the strict construction posture they had held for so long. Courts, however, are notoriously slow in accepting social changes, waiting to see if the change is to be permanent before following. As the preceding discussion indicates, during this period of "wait and see," Missouri compiled a rather amorphous conglomerate of decisions and rules, interspersed with bursts of liberal-

99. 34 F. Supp. 785 (W.D. Mo. 1940), *aff'd* 120 F.2d 242 (8th Cir. 1941).

100. 34 F. Supp. at 789-90; Oler, *Construction of Private Instruments Where Adopted Children Are Concerned*, 43 MICH. L. REV. 705, 729 (1945). *Accord*, *Graves v. Graves*, 349 Mo. 722, 163 S.W.2d 544 (1942), where the will provisions used "issue" and "heirs of the body" interchangeably and indiscriminately. Also *accord*; *Fiduciary Trust Co. v. Silsbee*, 159 Me. 6, 12, 187 A.2d 396, 399 (1963); *In re Miller's Trust*, 133 Mont. 354, 323 P.2d 885 (1958). *See also* 2 L. SIMES & A. SMITH, *FUTURE INTERESTS* § 546 (2d ed. 1956).

101. 357 Mo. 564, 209 S.W.2d 912 (1948).

102. The court also questioned the rule that class members were to be defined as of the date of execution, rather than the date the class members were determined. But this was because *at the time the will was executed* there was a statute saying that the phrase dying "without issue" means issue living at the death of the person named as ancestor.

ity, which made it exceedingly difficult to predict the result with any given word or phrase.

In 1966, the Supreme Court of Missouri was presented with a trilogy of cases which could have ended much of the confusion which had prevailed in the law. The cases would also have provided a basis for full acceptance of the adopted child, for it must be conceded that, barring a major social upheaval, acceptance of adoption is an accomplished fact. The court, however, continued to follow, if not worsen, the confusion which existed. It is submitted that a major reason for the decisions was a false search for the transferor's intention, when in truth there was no manifestation of intent and the question should have been one of construction.

Rules of construction are essentially presumptions which have as their basis either (1) what it is thought the "typical" testator would have wanted, or (2) the furtherance of some general policy of the law.<sup>103</sup> The first basis assumes not only that a "typical" testator or grantor can be fashioned, but also that such a person executed the instrument being construed. Since each will or deed is a unique act, it seems preferable that, if the absence of intent requires some conformity, such conformity should at least be in accord with prevailing policies in effect at the time of construction.

The discussion above leads to the question of what is the general policy of the law toward adopted children taking under class gifts. This general policy is to be found in the statutes on adoption and how the legislature intended them to apply. When a testator makes a will, he is presumed to know the meaning of existing statutes which might affect testamentary dispositions. Today, under Missouri law, an adopted child is treated "for every purpose as though he is a natural child"<sup>104</sup> of the adoptive parents. Under this view, an adopted child should be presumed to be able to take under a class gift. Recent cases in other states indicate that if the testator or grantor fails to manifest his intention adequately, then the court should follow a construction which favors the general policy of the law.<sup>105</sup> This latter method of construction is more desirable than the old method in which the adopted child was presumed not to take. But in certain situations, limits should be placed on the presumption that an adopted child is to take. As pointed out before, there is some fear by the courts that a person might use adoption to pick an heir who could succeed to the property of another. The courts should still take

103. T. ATKINSON, WILLS § 146 (2d ed. 1953).

104. Now § 453.090, RSMo 1959.

105. See, e.g., *In re Heard's Estate*, 49 Cal.2d 514, 319 P.2d 637 (1957). The will executed in 1935 gave the remainder to a son, or, if he is dead, to his "lawful issue;" but if there is not a "lawful issue," then to one Mary Cummings. The son died in 1955, but he had adopted a child in 1950. The court held that the adopted child was a "lawful issue" because no intent could be found and under the statutes of adoption an adopted child was treated as a natural child. See also *In re Nash*, 265 Minn. 412, 122 N.W.2d 104 (1963). In this case the court, from examining the will, was not able to find intent one way or the other. The court then looked at the statutes on adoption when the will was executed, and the adopted child was able to take.

this into consideration, but if a family raises an adopted child from early youth this danger clearly is not present.<sup>106</sup>

B. *Ratermann v. Ratermann*<sup>107</sup>

This case involved three irrevocable, inter vivos trusts created in 1905, the settlor dying in 1938. Two of the trusts were for the benefit of the settlor's children for life, with remainder to the children's "issue," or in default thereof to settlor's "heirs." The third trust was for the benefit of settlor's wife, who predeceased settlor, remainder to his children "absolutely," but if a child be dead, "the issue of said child shall take," or in default of such "issue" to settlor's "heirs." One of the children, Sophia, died in 1928, survived by her husband and a son, Victor, adopted in 1918. Subsequent to Sophia's death, in 1931, her husband adopted Madeline, the appellant, who survived both the husband and Victor as of the date of termination. Madeline brought suit contending that the word "child" and other definitive language in the trust instruments should be construed according to the statutes in effect when the trusts terminated, that under these statutes Victor was Sophia's "issue" and settlor's "heir," and that Madeline, as Victor's sole heir, was entitled to his portion of the three trusts. The Supreme Court of Missouri held that the law in effect at the time the instrument was executed determined whether an adopted child was within a designated class. They then found that in 1905 "issue" and related terms meant a child of the blood, and under the adoption statute in effect in 1905, an adopted child was not treated as a natural born child. This precluded Victor from sharing, or Madeline through him. By applying the above reasoning, the court seems to have found that the intent of the testator was to exclude the adopted child.

The language used in the trust instruments in *Ratermann* to describe takers upon the death of one of settlor's children was "issue of such deceased child." As pointed out previously,<sup>108</sup> Missouri has created a distinction between gifts defined in terms of relationship to the grantor and those in terms of relationship to the grantee-adopting parent. The adopted child has been allowed to take in the latter situation because, since 1857, an adopted child can take from his adoptive parents. Here the limitation definitely speaks to the children's "issue," not the settlor's, and this argument gains weight from the fact that the final gift over was specifically to "my heirs," indicating a distinction was being made.<sup>109</sup>

Under one trust Victor took, if at all, as "heir" of the settlor, presumably meaning "heir" as of the date of execution, and application of the above rule argues against Victor taking because the statutes of 1905 did not bring Victor within the term. Heirs of an intestate, of course, cannot be determined until his

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106. Halbach, *The Rights of Adopted Children Under Class Gifts*, 50 IOWA L. REV. 971, 987-993 (1965).

107. 405 S.W.2d 891 (Mo. 1966).

108. See notes 58 and 59 *supra*, and discussion related thereto.

109. See *Kindred v. Anderson*, 357 Mo. 564, 209 S.W.2d 912 (1948), and notes 101 and 102, *supra*.

death,<sup>110</sup> and the general rule of construction in intestacy cases is that the law in force at the time the inheritance becomes effective governs whether an adopted child is an heir.<sup>111</sup> The question which arises is why should the rule be different because the word "heirs" is written in a trust deed? Granted the settlor is free to restrict his gift as he will, but it is another thing to say the adopted child's rights become static as of the date of execution by virtue of the use of the term "heirs." Arguably this may be a denial of equal protection of the law because the court has applied this rule only to adopted children, with the intestacy rule applying to natural heirs.<sup>112</sup> Whether or not it is a denial of equal protection, Pennsylvania<sup>113</sup> has held the general rule may be contra to Missouri's position:

But, even though testamentary intent is to be construed as of the date of execution of a will, if the words employed to express the intent have a legal or technical meaning, they are to be so interpreted according to the law in effect at the testator's death unless the will contains a clearly expressed intention to the contrary. . . . Appellants, even though their adoption took place subsequent to the execution date of the will, were at the time [for distribution] . . . in the eyes of the law in exactly the same relationship to testatrix daughter as though born of her body.<sup>114</sup>

C. *First National Bank of Kansas City v. Waldron*<sup>115</sup>

This case involved four inter vivos trusts created in June of 1928. Income was given to settlor's four children for life, with gift over to "their children, born in lawful wedlock." One of the children was survived by a daughter, adopted in December of 1928, and a son adopted in 1931. The trustee sought a declaratory judgment as to whether "their children, born in lawful wedlock" included the adopted children. In affirming the trial court, the Supreme Court of Missouri rejected the contention that the phrase was only meant to exclude illegitimate children, and held that, when coupled with the provision excluding the daughter's spouse, it clearly showed settlor's intention to limit takers to the blood line.

It could be argued that the court in *Waldron* should have reached a different result on two grounds. First, the gift over was to "their children, born in lawful

110. T. ATKINSON, *WILLS* § 1, at 4 (2d ed. 1953).

111. T. ATKINSON, *op. cit. supra* note 110, at 92. But in Missouri, the court will look at the adoption statute in effect at the time the child was adopted to see whether an adopted child takes an intestate share. However, since the 1943 amendment, which treats children adopted before and after 1917 the same, the court is really looking at the adoption statute when the adopted child becomes an heir.

112. *See, e.g., First Nat'l Bank v. Sullivan*, 394 S.W.2d 273, 281 (Mo. 1965). "This is in accordance with general rule that whether an adopted child is embraced within the meaning of a described class of beneficiaries in a will is governed by the law in force at the time the will or other instrument was executed."

113. *In re Collins' Estate*, 393 Pa. 195, 143 A.2d 178 (1958), where the term involved was "descendants." *Accord, Breckenridge v. Shillman's Trustee*, 330 S.W.2d 726, 727 (Ky. 1960), in which the court said: "In determining whether an adopted child comes within a class of remaindermen designated by will to take at the expiration of a life estate, the adoption statute in effect at the latter time controls, and not the statute in effect at testator's death."

114. 393 Pa. at 200, 210, 142 A.2d at 181, 186.

115. 406 S.W.2d 56 (Mo. 1966).



wedlock," and as has been indicated at several points, when the relationship is defined in terms of the adoptive parent, then the adopted child may take. Second, both the execution of the trust instrument and the adoptions occurred after 1917, and the applicable statute provided that one adopted under its provisions was entitled to inherit from and through his adoptive parents" as fully as though born to them in lawful wedlock."<sup>116</sup> However, the court answered this latter contention by holding that a person may by deed give property to whomever he wants and, when there is clear and unambiguous intent, the court should follow the wishes of the grantor. When there is a clear intent, adopted children should be excluded even though the adoption statute gives an adopted child the same property rights as a natural child.

Another reason for the court's decision in *Waldron* turned upon a finding that "their children, born in lawful wedlock" was more restrictive than "heirs of the body," and the statute prohibited an adopted child from taking property "expressly limited to heirs of the body."<sup>117</sup> It may be argued that the use of the phrase "heirs of the body" is but the means chosen by the Legislature to indicate a policy limitation on taking by adopted children. Thus, the specific words would not have to be used and "their children, born in lawful wedlock" could come within the general idea of limitation. It is submitted, however, that the qualifying words "expressly limited" require the use of the phrase "heirs of the body" and no other. Missouri has indicated,<sup>118</sup> and an Ohio case has clearly held,<sup>119</sup> that this latter interpretation is correct.

#### D. *Knob College v. Jones Store Co.*<sup>120</sup>

This case involved a trust deed executed by Frances Dean<sup>121</sup> on February 25, 1925, for the benefit of her daughter, Alice Green, her grandsons, Dean and

116. § 1101, RSMo 1919.

117. § 1101, RSMo 1919 (emphasis added), which remained unchanged until 1947.

118. *St. Louis Union Trust Co. v. Hill*, 336 Mo. 17, 26, 76 S.W.2d 685, 689 (En Banc 1934), dictum:

If he [testator] did not want an adopted child to have any of his property he could have easily provided for such a contingency in his will by expressly limiting his property to go to the bodily heirs of his son, but he did not do so. (Emphasis the court's.)

But see *Wyeth v. Merchant*, 34 F. Supp. 785 (W.D. Mo. 1940), *aff'd* 120 F.2d 242 (8th Cir. 1941) and notes 99 and 100, *supra*, and related text, in which the court seems to follow the former interpretation.

119. *Dollar Sav. & Trust Co. v. Musto*, 88 Ohio L. Abs. 62, 181 N.E.2d 734 (1961), considered identical statutory language, when it was contended "issue" was within the intentment of "heirs of the body," and held:

And, although she [testatrix] could have been more specific and used the wording of the statute, had she intended to exclude adopted children, she did not do so. . . . We are fully cognizant of the fact that Charles' adopted daughter did not become so for sixteen years after [testatrix]'s death and seventeen years after the will was drawn.

120. 406 S.W.2d 675 (Mo. 1966).

121. The court in an aside noted that Mrs. Dean was the former wife of Oliver Dean, whose will was construed in *First Nat'l Bank v. Sullivan*, 394 S.W.2d 273 (Mo. 1965), discussed *supra* notes 96-99.

Alvah Green, "and such other children, if any, as may be born to said Alice Dean Green before the termination of the trust." The trust was to end "[u]pon the death of Alice Dean Green" or the first of January, 1945, whichever occurred later, with the remainder to be "at once vested in the children of Alice Dean Green . . . and/or the heirs, legatees or devisees of such children." Knox College claimed as residuary legatee of Allen Green, sole legatee of Alvah, while Jones Store Co.'s only interest was that of lessee of the land involved in the trust. Alice Green, having been predeceased by both her sons, Dean in 1941 and Alvah in 1943, died October 28, 1963, survived by Alvah's widow, Deane Maitland Green, whom Alice had adopted July 30, 1953. The Supreme Court of Missouri reversed the trial court and held: (1) that the language of the trust instrument created alternative contingent remainders with fee simple title to vest in either the children or "the heirs, legatees or devisees of such children" upon termination; (2) that Mrs. Dean, by making specific provision for only blood relatives, had indicated "born to" was intended to include only natural-born children; and, (3) that the use of "children" in other parts of the trust referred to children "born to" Alice Dean Green.

The court cited cases from several jurisdictions which had held "born" was not synonymous with "adoption,"<sup>122</sup> but the main basis for denying the taking was *Waldron*, and all the arguments made against *Waldron* are equally applicable here: (1) the relationship was defined in terms of the grantee-adopting parent; (2) both execution of the instrument and the adoption occurred after 1917—in fact the adoption occurred after the Amendment of 1947,<sup>123</sup> which allowed adopted children to take property limited to "heirs of the body."

A possible basis for the decision relates to the "fear" of the judiciary that "adoption may be an implement of self-advancement, fraud or spite in the hands of adoptors seeking to use it deliberately to meet requirements . . . that the adoptors have children."<sup>124</sup> At the time the trust was established in 1925, Alice

122. 406 S.W.2d at 690.

123. Now § 453.090(4), RSMo 1959. The case of *In re Nash*, 265 Minn. 412, 122 N.W.2d 104 (1963), contains strong language contrary to this decision. The phrase was "any other issue of said son who may hereafter be born," and the court said:

Where a purpose to grant or withhold benefits with respect to adopted children is not clear, we hold that the settlor is presumed to intend that adopted children be included in the category of issue of a life tenant "who may hereafter be born." Stated differently, one who seeks to exclude adopted children from the benefits of such a trust has the burden of proving by a fair preponderance of the evidence that this was what settlor had in mind.

The strength of the case is lessened by the fact that the settlor himself had an adopted child. See also *First Nat'l Bank v. Waldron*, 406 S.W.2d 56 (Mo. 1966), in which *In re Nash* was not followed because the court found a clear and unambiguous intent to exclude adopted children. See note 115 *supra* and related text.

124. Oler, *Construction of Private Instruments Where Adopted Children Are Concerned: II*, 43 MICH. L. REV. 901, 923 (1945).

Green already had two sons. Both sons were deceased by 1943, thirteen years later, placing Alice at a fairly advanced age. In 1953, ten years later, Alice adopts an adult, her daughter-in-law. This certainly smacks of adoption to satisfy the trust requirements, and it may have played some part in the court's decision.

#### E. Future Problems

A problem which the courts have not yet dealt with in detail is presented by statutes which attempt to place earlier adoptions in parity with those under the more favorable law.<sup>125</sup> Arguably, such statutes may be violative of due process. For example, *T* dies in 1940, devising his property to *B* for life, remainder in fee to the heirs of the body of *B*. Since the statute in effect in 1940 is the Act of 1917, adopted children are expressly excluded from taking under class gifts limited to heirs of the body. In 1945, *B* has *C-1*, a natural child. In 1947, the statute is amended to include adopted children within the term heirs of the body and is clearly made retroactive. In 1949, *B* adopts *C-2*. *B* dies in 1950. Arguably the class was enlarged and *C-1*'s portion diminished by the Amendment of 1947 placing *C-2* on a parity and bringing him within the term "heirs of the body."<sup>126</sup> This example serves as but a warning of the many problems yet to be met and answered.

### VI. PROPOSED LEGISLATIVE SOLUTIONS

#### A. Generally

The question of adopted children taking under class gifts "has probably occasioned more litigation in the last ten years than any other construction problem . . ."<sup>127</sup> Yet, as of 1966, statutes dealing with the rights of adopted children to take under class gifts have been enacted in only a few states.<sup>128</sup> Further, as of

125. § 453.150, RSMo 1959, from Laws 1943:

Any person adopted by deed of adoption or agreement of adoption in writing prior to 1917, and wherein said instrument was filed for record prior to July 1, 1917, shall hereafter be deemed and held to be for every purpose the child of its parent or parents by adoption as fully as though born to them in lawful wedlock, and such adoption shall have the same force and effect as an adoption under the provisions of this chapter, including all inheritance rights.

126. Missouri has recognized that such a result may occur. In *Commerce Trust Co. v. Weed*, 318 S.W.2d 289 (Mo. 1958), at 299 the court said:

It should be noted that there is nothing contained in either of the Acts [1943 and 1947] under consideration which would indicate an intent to disturb any rights or titles that had vested before the effective date of said Acts. A statute is not retrospective in its operation unless it impairs some vested right.

127. Fratcher, *Toward Uniform Succession Legislation*, 41 N.Y.U.L. REV. 1037, 1079 (1966); T. ATKINSON, WILLS § 23 (2 ed. 1953).

128. Halbach, *The Rights of Adopted Children Under Class Gifts*, 50 IOWA L. REV. 971, 993 (1965). See, e.g., CONN. GEN. STAT. ANN. 45-65a (1960).

The words "child," "children," "issue," "descendant," "descendants," "heir," "heirs," "lawful heirs," "grandchild," and "grandchildren," when used in the singular or plural, in any will or trust instrument, shall, un-

1966, only a slight majority of common law jurisdictions expressly allow an adopted child to inherit intestate property from adoptive collateral relatives.<sup>129</sup> This void in the law has produced at least four proposals for uniform legislation.

### B. *Model Probate Code*<sup>130</sup>

The oldest of the proposals, the *Model Probate Code* has been the basis for much reform. It played a large part in the formulation of the *Missouri Probate Code*. Section 27 was the only section which dealt exclusively with inheritance rights of adopted children, and it was rather restrained:

For the purpose of inheritance to, through and from a legally adopted child, such child shall be treated the same as if he were the natural child of his adopting parents, and he shall cease to be treated as the child of his natural parents for purposes of intestate succession.<sup>131</sup>

The comment to the section indicates an adopted child is not "issue" but is only given the rights of issue as to intestate succession. The provision fails to deal adequately with the problem presented by children of divorced couples who are subsequently adopted by one of the natural parents and a stepparent; *i.e.*, the section completely cuts the adopted child off from the remaining natural parent and thereby deprives him of inheritance from one who is most likely to wish the child to share in any inheritance. The section is aimed at bringing a child completely within the new family, but at the cost of a valuable inheritance right.

### C. *Uniform Probate Code*<sup>132</sup>

Although still in the draft stage, this is the proposed successor to the *Model Probate Code*. After adopting the intestate succession provision of the model act as it stood, the *Uniform Probate Code* adds:

Devises in wills to the children, issue, descendants, heirs, next of kin, distributees, relatives and heirs of the body of any person, shall be presumed, in the absence of a clear manifestation of intent to the contrary, to include adopted children who would take under these limitations if they were unadopted legitimate natural children of their adoptive parents, without regard to the time or place of adoption or the testator's knowledge of such adoption. Such devises shall be presumed, similarly, to exclude

less such document clearly indicates a contrary intention, include legally adopted persons . . . . The provisions of this section shall apply to wills and trust instruments executed subsequent to October 1, 1959.

129. Binavince, *Adoption and the Law of Descent and Distribution: A Comparative Study and a Proposal for Model Legislation*, 51 CORNELL L. Q. 152, 174 (1966); Kuhlmann, *Intestate Succession by and from the Adopted Child*, 28 WASH. U. L. Q. 221, 227-31 (1943).

130. MODEL PROBATE CODE § 27 (Simes 1946).

131. MODEL PROBATE CODE § 27, at 65 (Simes 1946).

132. Fratcher, *supra* note 127, commenting on the First Tentative Draft of Revised Part II.

adopted children who would take under these limitations only as children of their natural parents.<sup>133</sup>

This provision is more in line with current feeling. The adopted child is included when the "problem" words are used unless the one executing the instrument *clearly* manifests a contrary intent. The provision is also preferable because it deals in terms of presumptions rather than absolutes. Further, it would to a certain extent reverse the Missouri emphasis on time of adoption—"without regard to time"—as to adoption before or after execution, and eliminate the question of testator's knowledge, which is of no importance with natural births, thereby allowing complete incorporation of the adopted child into the adoptive family.

The provision does leave two problems. First, it only deals with wills, not inter vivos trusts, and it is the latter which are becoming more and more the source of litigation. Second, there is no indication as to whether the provision is meant to be retroactive, and therefore available for current problems.<sup>134</sup>

#### D. *Uniform Adoption Act*<sup>135</sup>

This proposal seeks to draw all the legislation pertaining to adoption together rather than having part in the probate code and part elsewhere. The section pertaining to inheritance provides:

(1) After the final decree of adoption is entered the relation of parent and child and all the rights, duties and other legal consequences of the natural relation of child and parent shall thereafter exist between such adopted child and the adoptive parents adopting such child [and the kindred of the adoptive parents]. From the date of the final decree of adoption, the child shall be entitled to inherit real and personal property from [and through] the adoptive parents in accordance with the statutes of descent and distribution, and the adoptive parents shall be entitled to inherit real and personal property from and through the child in accordance with said statutes.

(2) After a final decree of adoption is entered, the natural parents of the adoptive child, unless they are the adoptive parents or the spouse of an adoptive parent shall be relieved of all parental responsibilities for said child and have no rights over such adopted child or his property by descent and distribution.<sup>136</sup>

133. FTD II, § 209(b), now contained in UNIFORM PROBATE CODE § 2-609 (Third Working Draft 1967), with substantial change in wording.

134. See CONN. GEN. STAT. ANN. 45-65a (1960), which says that this statute which includes adopted children under class gifts applies to wills and trust instruments executed after October 1, 1959; ILL. REV. STAT. ch. 3, § 14 (1961), applies to any written instrument executed on or after September 1, 1955; MD. ANN. CODE, art. 16, § 78(c) (Supp. 1964), for a will or any instrument executed before June 1, 1947 it only applies to those adopted after this date.

135. Merrill, *Toward Uniformity in Adoption Law*, 40 IOWA L. REV. 299 (1955).

136. UNIFORM ADOPTION ACT § 12, 9 U.L.A. 29, 35 (1957).

This proposed act has three weaknesses. First, it leaves up to local policy the question of whether or not an adopted child is able to inherit from the relatives of the adoptive parent.<sup>137</sup> Second, the act fails to deal with the problem of whether the adopted child should continue to inherit from natural parents. Third, it makes no mention of wills and trust instruments which are involved in so much litigation today.

#### E. Binavince's Proposal<sup>138</sup>

Binavince's proposal has a provision governing inheritance between the adopted child and lineal and collateral relatives of the adoptive parents which is very appealing:

Section 3. The status, line and degree of relationship, and the right, preference and share in the inheritance which the adopted child, his spouse and descendants shall have toward the relatives of the adoptive parents . . . shall be that status, line and degree of relationship, and right, preference and share in the inheritance which the general laws of this state established between such relatives and the natural legitimate child, or spouse and descendants of such natural legitimate child, of the adoptive parent.

This provision clearly treats the adoptive child as a member of the adoptive parents' family. Further, this proposal deals more fully with the problems of adoption by stepparents and legitimate parents. Again, however, the adopted child is completely stripped of inheritance from the other legitimate parent, with the attendant problems.

Finally Binavince's proposal has the following provision dealing with the problem of adopted children taking under class gifts:

Section 7. Any express or implied reference in any law, regulation, contract, agreement, gift, will or any instrument to the child, or the spouse and descendants of such child, of the adoptive parent shall be construed to include the adopted child, his spouse and descendants.

Here the adopted child is further intergrated into the adoptive parents' family. This provision is much broader than the construction provision of the *Uniform Probate Code*.

## VII. CONCLUSION

Adoption has now been allowed in Missouri for over a century, and statutory changes have gone quite far in acclimating the adopted child to his new family.<sup>139</sup>

137. Binavince, *Adoption and the Law of Descent and Distribution: A Comparative Study and a Proposal for Model Legislation*, 51 CORNELL L.Q. 152, 173 (1966).

138. *Ibid.*

139. The Probate Code adopted in 1955 went a step further in this process by specifically defining "child," "issue" and "pretermitted child" as including adopted children. §§ 472.010(2), (16) and 474.240, RSMo 1959.

There is still room for much improvement; for example, the proposed construction provisions of the *Uniform Probate Code*. Overall, however, Missouri compares quite favorably with other jurisdictions. The area commends itself to uniformity, and perhaps passage of such uniform statutes will prevent problems in the future.

The judicial attitude of Missouri in construing limitations, however, is another matter. The trilogy cases of *Ratermann*, *Waldron* and *Knox College* have nullified much of the effectiveness of the legislative effort, and the break with the past envisioned in the broad language of *Hill*<sup>140</sup> seems bleakly remote, if not overruled. The problems are enormously complex and greatly intensified by the face-off between two of the law's favorites, children and property rights. Although further legislative efforts may prevent problems in the future, there is little, if anything, legislation can do to solve the problems which will face the courts tomorrow and for many years to come. The best solution for this problem would be a re-evaluation by the judiciary of the bases underlying the rules of construction in such cases, and a frank recognition that it is the welfare of the child which is most important. Therefore, if the succession statute or written instrument is ambiguous, then all doubts should be resolved in favor of inclusion of the adopted child. Hopefully, the result would be exclusion of the adopted child only when there is a clear, unequivocal manifestation that such was truly intended.

In the final analysis, however, there is no reason to depend upon statutes or case law where a written instrument is involved. Although it is an easy matter to criticize the judiciary, and even though much such criticism may be warranted, it is the attorney who draws the instrument in the first instance. If the instrument is clear in its meaning, then one need have little fear of judicial action. Thus, clarity in drafting remains, as always, the best answer.

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140. *St. Louis Union Trust Co. v. Hill*, 336 Mo. 17, 76 S.W.2d 685 (En Banc 1934).