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# The Magic Circle: Inclusion of Adopted Children in Testamentary Class Gifts

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# THE MAGIC CIRCLE: INCLUSION OF ADOPTED CHILDREN IN TESTAMENTARY CLASS GIFTS

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## I. INTRODUCTION

In two recent Texas appellate court decisions, the courts were faced with the problem of deciding whether a testator meant to include, or at least did not intend to *exclude*, adopted children in a testamentary class gift.[1] Often a testator will make a bequest or declare the beneficiary of a trust to be not just one individual, but a group of persons. A will may declare that property is bequeathed to the testator's brothers and sisters or to her children. The question becomes: May an adopted sibling or child share in such a gift? Courts across the United States have struggled with this issue in recent years, and an increasing number are holding that gifts to children, issue, or lineal descendants do not necessarily exclude adopted children. However, in both Texas cases, the courts held that the adopted children could not take as members of the class.[2] The purpose

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1. Sharp v. Broadway Nat'l Bank, 761 S.W.2d 141 (Tex. App.—San Antonio 1988, no writ); Diemer v. Diemer, 717 S.W.2d 160 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).

2. Sharp v. Broadway Nat'l Bank, 761 S.W.2d 141, 145 (Tex. App.—San Antonio 1988,

of this article is to illustrate that this result is contrary to both the modern trend of court decisions nationwide and the prevailing public policy regarding adoption, particularly as exemplified by state adoption statutes.

## II. THE HISTORY OF ADOPTION LAW

### A. *Generally*

Adoption was recognized in ancient civilizations, most notably in Rome. Under Roman civil law, an adoptee was completely integrated into the adopting family for all purposes, including inheritance.[3] Adoption served two important functions. First, the adopted child carried out the sacred familial religious rites. Second, the adoptee preserved the family name and property for posterity.[4] In contrast, the common-law system did not treat adoption as an important legal institution. The English common law placed great emphasis on bloodlines for purposes of inheritance. As a result, England did not recognize adoption in its common law,[5] and did not formally legitimize adoption by statute until 1926.[6] In 1846, Mississippi became the first American state to enact a statute permitting adoption.[7] Texas and Louisiana, states with a civil-law tradition, also recognized adoption during the mid-nineteenth century.[8]

Adoption laws became widespread in this country because of a social welfare interest in homeless and dependent children, not because of

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no writ) (clear intent to share only with relatives of the whole blood); Diemer v. Diemer, 717 S.W.2d 160, 162 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.) (only blood relatives included in class).

3. *See* Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743, 744-45 (1956). For additional information on the history of adoption, see Kuhlmann, *Intestate Succession By and From the Adopted Child*, 28 WASH. U.L.Q. 221 (1943); Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443 (1972).

4. 7 R. POWELL, THE LAW OF REAL PROPERTY ¶ 1004 (1989); Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743, 744 (1956).

5. 7 R. POWELL, THE LAW OF REAL PROPERTY ¶ 1004 (1989); Kuhlmann, *Intestate Succession By and From the Adopted Child*, 28 WASH. U.L.Q. 221, 222 (1943); Comment, *Adopted Children in Pennsylvania: A Class Without A Clause*, 17 VILL. L. REV. 1066, 1067 (1972).

6. Kuhlmann, *Intestate Succession By and From the Adopted Child*, 28 WASH. U.L.Q. 221, 222 (1943) (discussing the Adoption Act, 16 & 17 Geo. 5, ch. 29 § 5(2) (1926)).

7. 7 R. POWELL, THE LAW OF REAL PROPERTY ¶ 1004 n.1 (1989). The statute, 1846 Miss. Laws, ch. 60, gave courts the power to make any person the heir of the petitioner.

8. *See* Law of Jan. 16, 1850, ch. 39, § 1, 1850 Tex. Gen. Laws 36, 3 H. GAMMEL, LAWS OF TEXAS 474 (1898); Fuselier v. Masse, 4 La. 423 (1832). *See also* Comment, *Adopted Children in Pennsylvania: A Class Without A Clause*, 17 VILL. L. REV. 1066, 1068 (1972); 7 R. POWELL, THE LAW OF REAL PROPERTY ¶ 1004 (1989).

concerns with heirship or family survival.[9] Prior to the 1850s, orphaned or neglected children were cared for through the English system of putting out, which involved placing the child with another family, usually a relative, or through apprenticeship or indenture systems.[10] The industrial revolution and the large influx of immigrants during the mid- to late-nineteenth century led to increased urban poverty, an increasing number of destitute children, and the economic exploitation of these children.[11]

At the same time that these economic and social forces were straining the existing child welfare system, a Christian reform movement began. Philanthropists worked to place dependent children in family homes rather than in institutions.[12] Many families later sought to legally recognize their new members, and placed pressure on state legislatures to enact adoption statutes.[13] Massachusetts was the first state to adopt a general adoption act in 1851.[14] As a result of the historical development of American adoption law, the primary concern of the modern law is the welfare of the adopted child.[15] In addition, under American law, an adoption is intended to sever any ties which may still exist with the natural family and to transplant or assimilate the adoptee into a new family.[16] Why, then, should an adopted child be excluded from sharing a class gift?

### *B. Adopted Children and Class Gifts*

The answer lies, in part, in the *stranger to the adoption* rule. This rule of will construction is used when a testator's intent is unstated or unclear, and creates a rebuttable presumption that adopted children are excluded from participation in class gifts.[17] The rule does not apply when the testator herself is the adopting parent, since the testator would

9. *See* 7 R. POWELL, THE LAW OF REAL PROPERTY ¶ 1004 (1989); Kuhlmann, *Intestate Succession By and From the Adopted Child*, 28 WASH. U.L.Q. 221, 223-24 (1943).

10. Rein, *Relatives By Blood, Adoption, and Association: Who Should Get What and Why*, 37 VAND. L. REV. 711, 715 (1984).

11. *Id.* at 716.

12. *Id.*

13. *Id.*; *see also* Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443, 488-89 (1972).

14. Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443, 465 (1972).

15. Rein, *Relatives by Blood, Adoption, and Association: Who Should Get What and Why*, 37 VAND. L. REV. 711, 717 (1984).

16. 7 R. POWELL, THE LAW OF REAL PROPERTY ¶ 1004 (1989).

17. Rein, *Relatives by Blood, Adoption, and Association: Who Should Get What and Why*, 37 VAND. L. REV. 711, 713 (1984).

presumably include her own adopted children in a class gift.[18] Thus the rule applies only to third-party donors, or strangers to the adoption. The roots of this rule lie in the English common law tradition, with its concern for blood relationships.[19] It is important to note, however, that even in states embracing the stranger to the adoption rule, it is merely a rule of construction, and will not prevail over an expressed intent to include the adopted children of the testator.[20]

Courts have also established other exceptions. For example, if the donor knew of the adoption and the adoption antedated execution of the will or other instrument creating the class gift, then adopted members of the class would be included.[21] If a parent could not have natural-born children, and this fact was known to the testator, the adopted children would be included.[22] Other courts, including those in Texas, appear to draw a distinction between class gifts to children and class gifts to bodily heirs, issue, or lineal descendants[23] by including adopted persons in a class gift to children, but excluding them when the class is described by a

18. *See* Halbach, *Issues About Issue: Some Recurrent Class Gift Problems*, 48 MO. L. REV. 333, 337 (1983); *see generally* Rein, *Relatives by Blood, Adoption, and Association: Who Should Get What and Why*, 37 VAND. L. REV. 711, 733 (1984); Comment, *Toward Equal Treatment of Adopted Children Under Testamentary Class Gifts: Iowa's Rejection of the Stranger to the Adoption Rule in* Elliott v. Hiddleson, 67 IOWA L. REV. 845, 849 (1982). The rule was first invoked by the Maine Supreme Judicial Court in *In re* Woodcock, 68 A. 821 (Me. 1907).

19. *See* Kulhmann, *Intestate Succession By and From the Adopted Child*, 28 WASH. U.L.Q. 221, 233-34 (1943); Rein, *Relatives by Blood, Adoption, and Association: Who Should Get What and Why*, 37 VAND. L. REV. 711, 733 (1984); Comment, *Toward Equal Treatment of Adopted Children Under Testamentary Class Gifts: Iowa's Rejection of the Stranger to the Adoption Rule in* Elliott v. Hiddleson, 67 IOWA L. REV. 845, 845 (1982). *See also* the discussion concerning intent in subpart III(B)(1) *infra*.

20. Comment, *Toward Equal Treatment of Adopted Children Under Testamentary Class Gifts: Iowa's Rejection of the Stranger to the Adoption Rule in* Elliott v. Hiddleson, 67 IOWA L. REV. 845, 849 (1982). *See also* the discussion concerning intent in subpart III(B)(1) *infra*.

21. Rein, *Relatives by Blood, Adoption, and Association: Who Should Get What and Why*, 37 VAND. L. REV. 711, 733-34 (1984); *see* Halbach, *The Rights of Adopted Children Under Class Gifts*, 50 IOWA L. REV. 981, 982-83 (1965); *see also*, Comment, *Toward Equal Treatment of Adopted Children Under Testamentary Class Gifts: Iowa's Rejection of the Stranger to the Adoption Rule in* Elliott v. Hiddleson, 67 IOWA L. REV. 845, 850 n.52 (1982) and accompanying text.

22. Halbach, *The Rights of Adopted Children Under Class Gifts*, 50 IOWA L. REV. 971, 984 (1965); Rein, *Relatives by Blood, Adoption, and Association: Who Should Get What and Why*, 37 VAND. L. REV. 711, 734 (1984).

23. *Compare* Vaughn v. Gunter, 458 S.W.2d 523, 527 (Tex. Civ. App.—Dallas) (allowing adopted child to share in conveyance to children), *aff'd*, 461 S.W.2d 599 (Tex. 1970) *with* Sharp v. Broadway Nat'l Bank, 761 S.W.2d 141, 143-44 (Tex. App.—San Antonio 1988, no writ) (adopted children did not share in gift to lineal descendants) *and* Diemer v. Diemer, 717 S.W.2d 160, 162 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.) (adopted children not included in gift to issue). The cases are discussed in more detail in part IV *infra*.

term with blood or biological connotations.[24] As the next section illustrates, although many states are rejecting the stranger to the adoption rule, adopted children are by no means universally accepted as full family members for purposes of class gifts.

## III. THE MODERN TREND—STATUTES AND CASES

### *A. Statutory Law*

Adoption law in the United States is primarily a creature of statute, rather than of common law.[25] The intent of modern adoption law is to make the adopted child part of a new family and to treat the adoptee as a natural-born child.[26] States uniformly permit the adopted child to inherit from the adopting parents by intestate succession.[27] With some exceptions, state statutes also permit an adopted child to inherit *through* the adopting parents;[28] the adoptee may inherit not only from the adopting parent, but from that parent's relatives as well. These provisions, however, generally apply only to intestacy situations.

A few states have expressly addressed the problem of including adopted children in a class gift created by a will or trust. They have created a statutory presumption reversing the stranger to the adoption rule. Connecticut, for example, provides that words such as "child," "issue," "heir," "grandchild," or plurals thereof, specifically include

24. *See* Rein, *Relatives by Blood, Adoption, and Association: Who Should Get What and Why*, 37 VAND. L. REV. 711, 734 (1984); *see also* Halbach, *The Rights of Adopted Children Under Class Gifts*, 50 IOWA L. REV. 971, 980 (1965). At common law, the words issue or heirs of the body could operate to create a fee tail, an estate that could only pass to the lineal, bodily descendants of the original grantee. *See* J. CRIBBET & C. JOHNSON, PRINCIPLES OF THE LAW OF PROPERTY 47-51 (3d ed. 1989).

25. *See* 7 R. POWELL, THE LAW OF REAL PROPERTY ¶ 1004 (1989).

26. *See* Kuhlmann, *Intestate Succession By and From the Adopted Child*, 28 WASH. U.L.Q. 221, 248 (1948); Rein, *Relatives by Blood, Adoption, and Association: Who Should Get What and Why*, 37 VAND. L. REV. 711, 717 (1984).

27. *See, e.g.*, ALA. CODE § 26-10-5(b) (1986); ALASKA STAT. § 25.23.130(2) (1988); ARK. STAT. ANN. § 9-9-215(2) (1987); COLO. REV. STAT. § 19-5-211(1) (1987); FLA. STAT. ANN. § 63.172(1)(c) (West 1985); IND. CODE § 29-1-2-8 (West Supp. 1989); IOWA CODE ANN. § 633.223(1) (West Supp. 1989); MINN. STAT. ANN. § 259.29 (Sub. 1) (West 1982); MO. ANN. STAT. § 453.090(2) (Vernon 1986); NEV. REV. STAT. § 127.160 (1987); N.J. STAT. ANN. § 9:3-50(b) (West Supp. 1989); 20 PA. CONS. STAT. ANN. § 2108 (Purdon Supp. 1989); R.I. GEN. LAWS § 15-7-16(a) (1988); TENN. CODE ANN. § 31-2-105(1) (1984 and Supp. 1988); TEX. FAM. CODE ANN. § 16.09(b) (Vernon 1986); WASH. REV. CODE ANN. §§ 11.02.005(4), 11.04.085 (1987); W. VA. CODE § 48-4-11(b) (1986); WYO. STAT. § 1-22-114(b) (1977); *see* 7 R. POWELL, THE LAW OF REAL PROPERTY ¶ 1005 (1989).

28. 7 R. POWELL, THE LAW OF REAL PROPERTY ¶ 1005 (1989). For example, Vermont restricts the adoptee's right to inherit through the adopting parents. VT. STAT. ANN. tit. 15, § 448 (1974).

adopted children unless a contrary intention is indicated.[29] Maryland, Massachusetts, Oregon, Rhode Island, and Texas have similar statutes.[30] Some of these statutes have provisions limiting their application to documents executed after a certain date.[31] The North Carolina statute makes similar provisions applicable retroactively to *all* instruments.[32] The Louisiana statute specifically includes adoptees as forced heirs of their adoptive parents' estates.[33] The Vermont statute, on the other hand, expressly excludes adopted children from a class gift made to heirs of the body.[34] The vast majority of states, however, have failed to specifically address the problem of including adopted children in testamentary or inter vivos class gifts in their statutes, leaving the issue with the courts.

### *B. Case Law*

Courts increasingly are rejecting the stranger to the adoption presumption, replacing it with a presumption favoring inclusion of the adoptee in a class gift.[35] Many courts, however, hold fast to the traditional view and the policy arguments advanced by each side are outlined in this next section.

#### *1. Policy and the Issue of Intent*

A key tenet of construction is that a will or trust instrument should be construed in a manner designed to carry out the grantor's intent.[36] When dealing with an adopted child and a class gift, donors generally do

29. CONN. GEN. STAT. ANN. § 45-64a(4) (West Supp. 1989).

30. MD. FAM. LAW CODE ANN. § 5-308(d) (1984); MD. EST. & TRUSTS CODE ANN. §§ 1-205, 1-207 (1974); MASS. GEN. LAWS ANN. ch. 210, § 8 (West 1987); OR. REV. STAT. § 112.195 (1983); R.I. GEN. LAWS § 15-7-16(a) (1988); TEX. FAM. CODE ANN. § 16.09(c) (Vernon 1986).

31. For example, the Connecticut statute, CONN. GEN. STAT. ANN. § 45.64a(10) (West Supp. 1989), applies to documents executed after October 1, 1959; the Maryland statute, MD. FAM. LAW CODE ANN. § 5-308(d) (1984), applies to those persons adopted after June 1, 1947, even if the document was executed prior to that date; the Massachusetts statute, MASS. GEN. LAWS ANN. ch. 210, § 8 (West 1987), applies to documents executed after August 26, 1958; and the Rhode Island statute, R.I. GEN. LAWS § 15-7-16(a) (1988), applies to estates that have vested in persons after April 20, 1962.

32. N.C. GEN. STAT. § 48-23(3) (Supp. 1988).

33. LA. CIV. CODE ANN. art. 214 (West Supp. 1989).

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

35. *See* Rein, *Relatives by Blood, Adoption, and Association: Who Should Get What and Why*, 37 VAND. L. REV. 711, 735 (1984). Halbach indicated a similar trend in his 1965 article. Halbach, *The Rights of Adopted Children Under Class Gifts*, 50 IOWA L. REV. 971, 997-98 (1965).

36. *See* Halbach, *The Rights of Adopted Children Under Class Gifts*, 50 IOWA L. REV. 971, 975 (1965); Rein, *Relatives by Blood, Adoption, and Association: Who Should Get What and Why*, 37 VAND. L. REV. 711, 732 (1984).

not address the problem of including an adoptee in the class. The common law simply presumed that adopted children were not included in a class gift, other than one from the adopting parents,[37] and many courts still follow this presumption.[38] Other states, conversely, have simply reversed the presumption and hold that in the absence of evidence to the contrary a testator *did* intend to include adopted children in a class gift.[39]

37. *See supra* notes 18-20 and accompanying text.

38. Some fairly recent cases reaching this conclusion are: Schapira v. Connecticut Bank & Trust Co., 528 A.2d 367 (Conn. 1987) (adoptive granddaughter not included in trust distribution to issue or next of kin); Skoog v. Fredell, 332 N.W.2d 333 (Iowa 1983) (adopted child of grantor's granddaughter was not entitled to take a remainder interest as an heir of the body); Scribner v. Berry, 489 A.2d 8 (Me. 1985) (adoptive grandson not included in testamentary gift to descendants or issue); Tootle v. Tootle, 490 N.E.2d 878 (Ohio 1986) (adopted children of settlor's daughter were not entitled to share in trust distribution to heirs of the body); Calhoun v. Campbell, 763 S.W.2d 744 (Tenn. 1988) (children of adopted son of income beneficiary under testamentary trust did not constitute lineal descendants in order to take under will); Sharp v. Broadway Nat'l Bank, 761 S.W.2d 141 (Tex. App.—San Antonio 1988, no writ) (adopted children of testator's sister did not take under will as lineal descendants); Hyman v. Glover, 348 S.E.2d 269 (Va. 1986) (adoptive granddaughter did not take as issue under will).

39. Modern courts began to reject the stranger to the adoption rule in the 1960s and early 1970s. *See* Johns v. Cobb, 402 F.2d 636 (D.C. Cir. 1968) (adopted child allowed to take under two different wills as issue of his adoptive mother), *cert. denied*, 393 U.S. 1087 (1969); Haskell v. Wilmington Trust Co., 304 A.2d 53 (Del. 1973) (adopted son of settlor's son could share in trust proceeds under gift to issue); Chase Manhattan Bank v. Mitchell, 251 A.2d 128 (N.J. 1969) (adopted children of testator's daughter could take as descendants under will); *In re* Thompson, 250 A.2d 393 (N.J. 1969) (child adopted by testator's daughter after testator's death could take as issue under will); *In re* Estate of Coe, 201 A.2d 571 (N.J. 1964) (adopted children included in bequest to lawful children of will beneficiary); Estate of Tafel, 296 A.2d 797 (Pa. 1972) (adoptive grandchildren included in gift to children of testator's son).

In recent years courts have continued to follow this trend. *See* Gotlieb v. Klotzman, 369 So. 2d 798 (Ala. 1979) (adopted children of settlor's nephew may take as descendants); Wielert v. Larson, 404 N.E.2d 1111 (Ill. 1980) (adopted grandchildren of testator were included in gift to issue of their body); *In re* Estate of Nicolaus, 366 N.W.2d 562 (Iowa 1985) (adopted child of testator's son included in gift to issue); *In re* Estates of Leggett, 378 N.W.2d 467 (Mich. 1985) (adopted granddaughter included in trust remainder to issue of settlor's daughter), *cert. denied*, 476 U.S. 1171 (1986); *In re* Trusts of Harrington, 250 N.W.2d 163 (Minn. 1977) (adopted children of settlor's daughter took as issue of the body under trust); *In re* Estate of Leonard, 514 A.2d 822 (N.H. 1986) (adopted children of testatrix's son took under testamentary trust as lineal descendants); Hines v. First Nat'l Bank & Trust Co., 708 P.2d 1078 (Okla. 1985) (adopted child permitted to take as issue under will).

The Pennsylvania courts have decided several cases on this issue. In addition to Estate of Tafel, 296 A.2d 797 (Pa. 1972), the leading case cited above, other Pennsylvania cases include: Estate of Riley, 446 A.2d 903 (Pa. 1982) (adopted children of testator's grandchildren could take as issue under will); Estate of Sykes, 383 A.2d 920 (Pa. 1978) (adopted children of testator's niece could take as issue under will); *In re* Estate of Ogden, 509 A.2d 1271 (Pa. Super. Ct. 1986) (adopted children of settlor's grandniece could take as heirs of the body or children of the body of trust beneficiary); and *In re* Estate of Ketcham, 495 A.2d 594 (Pa. Super. Ct. 1985) (child adopted as an infant, but not child adopted as an adult, included in gift to issue of children of testatrix).

Courts that have refused to permit adopted children to participate in a class gift justify this result in a variety of ways. First, some courts still cling to the notion that there is a natural preference for grantors to leave property to their own flesh and blood, not to outsiders.[40] This tendency may be more pronounced when the gift is made to a class defined by terms with strong bloodline connotations such as heirs of the body, or issue of the body.[41] Other courts do not necessarily assume a preference for blood relatives, but are reluctant to expand the rights of adopted children at the expense of an unrelated grantor. These courts construe the adoption statutes very strictly, and may be reluctant to overturn precedent in order to include adopted children in a class gift.[42]

In some cases, the courts might be willing to permit an adopted child to take under a class gift that was made in a recently executed document. However, testamentary or trust instruments may have been executed twenty or more years before the gift in question would vest. The law at the time of execution of the instrument may have clearly excluded adopted children from participating in class gifts under the stranger to the adoption rule. This retroactivity problem is discussed in subpart III(B)(2) of this Article. Finally, courts will often exclude adult adoptees from participating in class gifts, fearing fraud or abuse of the adoption process. This is discussed in greater detail below.[43]

Courts that include adopted children as grantees of a class gift advance a variety of arguments to support their position. Some courts re-

40. *See* Halbach, *Issues About Issue: Some Recurrent Class Gift Problems*, 48 MO. L. REV. 333, 338 (1983); Comment, *Toward Equal Treatment of Adopted Children Under Testamentary Class Gifts: Iowa's Rejection of the Stranger to the Adoption Rule in* Elliott v. Hiddleson, 67 IOWA L. REV. 845, 852-53 (1982).

41. *See* Halbach, *The Rights of Adopted Children Under Class Gifts*, 50 IOWA L. REV. 971, 980 (1965); Rein, *Relatives by Blood, Adoption, and Association: Who Should Get What and Why*, 37 VAND. L. REV. 711, 734 (1984). *See also* Connecticut Bank & Trust Co. v. Hills, 254 A.2d 453 (Conn. 1969) (the term descendants connotes relationship by blood in its ordinary meaning); Skoog v. Fredell, 332 N.W.2d 333 (Iowa 1983) (grantor intended to exclude adopted children by use of the words heirs of her body in conveyance); Poertner v. Burkdoll, 439 P.2d 393 (Kan. 1968) (normal legal concept of issue includes only lineal heirs, not adopted children); Tootle v. Tootle, 490 N.E.2d 878 (Ohio 1986) (use of term heirs of the body intended to exclude adopted children); Diemer v. Diemer, 717 S.W.2d 160 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.) (references to issue in will clearly connotes blood relationship and excludes adopted children).

42. *See* Comment, *Toward Equal Treatment of Adopted Children Under Testamentary Class Gifts: Iowa's Rejection of the Stranger to the Adoption Rule in* Elliott v. Hiddleson, 67 IOWA L. REV. 845, 851 (1982). *See also* Schapira v. Connecticut Bank & Trust Co., 528 A.2d 367 (Conn. 1987) (even though court may agree with principle that stranger to the adoption rule is outmoded, it is bound by legislative policy indicating a more orderly transition to inclusion of adopted children in class gifts); Poertner v. Burkdoll, 439 P.2d 393 (Kan. 1968) (statutory definition of issue, which includes adoptees, is limited to section on intestate succession).

43. *See infra* subpart III(B)(3).

ject the traditional consanguinity concerns, reasoning that a grantor would, in fact, be likely to intend inclusion of adopted children in the conveyance.[44] In light of modern law and policy, a family today is more than simply a set of biological relationships, it is one of psychological and emotional bonds as well.[45]

Similarly, many courts justify the inclusion of adopted children in a gift made under a will or trust as being more consistent with the modern goals of adoption law. One of these goals is severance of the child from his former family and union of the child with a new family unit. Inclusion of adoptees in class gifts is also consistent with the intestacy statutes, which treat adopted children as natural-born children.[46]

Some courts use a technical approach, holding that words such as children, descendants, or issue would normally include all members of the class, whether adopted or not. According to this view, it would be easy to exclude adopted children from a class by use of appropriate language. As one court has stated, a competent draftsman would not simply use the word "issue" to exclude adopted children from participating in a class gift.[47]

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44. *In re* Estate of Nicolaus, 366 N.W.2d 562 (Iowa 1985) (presumption that testator intended to treat adopted children the same); *In re* Trust of Harrington, 250 N.W.2d 163 (Minn. 1977) (presumption that adopted children will inherit); Chase Manhattan Bank v. Mitchell, 251 A.2d 128 (N.J. 1969) (presumption exists in favor of adopted child); Estate of Riley, 446 A.2d 903 (Pa. 1982) (testator intends to include adopted children). *See* Rein, *Relatives by Blood, Adoption, and Association: Who Should Get What and Why*, 37 VAND. L. REV. 711, 734, 738-39 (1984); Comment, *Toward Equal Treatment of Adopted Children Under Testamentary Class Gifts: Iowa's Rejection of the Stranger to the Adoption Rule in* Elliott v. Hiddleson, 67 IOWA L. REV. 845, 852 (1982). *See also* Kales, *Rights of Adopted Children*, 9 ILL. L. REV. 149, 164 (1914), which indicates that adopted children could be presumed to share in class gifts to children or issue as early as 1914.

45. *See* Kuhlmann, *Intestate Succession By and From the Adopted Child*, 28 WASH. U.L.Q. 221, 248 (1943) (adopted child today is made full standing member of new family); Comment, *Toward Equal Treatment of Adopted Children Under Testamentary Class Gifts: Iowa's Rejection of the Stranger to the Adoption Rule in* Elliott v. Hiddleson, 67 IOWA L. REV. 845, 853 (1982) (child is term of origin, not status); *see also* Estate of Tafel, 296 A.2d 797, 801 (Pa. 1972) (most strangers to an adoption likely to accept relationships established by adoptive parents).

46. *See supra* notes 25-34 and accompanying text; Rein, *Relatives by Blood, Adoption, and Association: Who Should Get What and Why*, 37 VAND. L. REV. 711, 806-07 (1984); Wielert v. Larson, 404 N.E.2d 1111 (Ill. App. Ct. 1980) (shift in public policy and broadened definitions); *In re* Estates of Leggett, 378 N.W.2d 467 (Mich. 1985) (statute provides that issue includes adopted person), *cert. denied*, 476 U.S. 1171 (1986); Tootle v. Tootle, 490 N.E.2d 878, 883-84 (Ohio 1986) (Douglas, J., dissenting) (statute enacted to place adopted children in same position as natural-born children); Makoff v. Makoff, 528 P.2d 797, 799-801 (Utah 1974) (Crockett, J., dissenting) (discrimination against adopted child is contrary to statutory law and out of harmony with policy considerations).

47. Johns v. Cobb, 402 F.2d 636, 637 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1087 (1969). *See also In re* Estate of Coe, 201 A.2d 571, 577 (N.J. 1964) ("[A] competent draftsman

A few courts have held that facts and circumstances, found either within the donative document or outside of it, may determine whether the adopted children should be permitted to take under a class gift. In a New York case,[48] a trust agreement permitted each donee to appoint his share to anyone he chose, and in default of such appointment, the share would go to the donee's issue then living. Furthermore, if a donee died, either without exercising the power of appointment or without issue, then the share would go to the donee's spouse who, of course, would be unrelated by blood to the settlor of the trust.[49] The court of appeals held that adopted children were not excluded under this trust, since any person, including those unrelated to the settlor by blood, could share in the proceeds of the trust.[50] The Pennsylvania Supreme Court has enumerated four factors to be considered in determining the intent of a grantor: 1) the words of the instrument; 2) the scheme of distribution; 3) the circumstances surrounding the execution of the will; and 4) any other facts bearing on the question.[51] However, cases from other states show that reliance on extrinsic facts and circumstances may lead to conflict concerning the donor's actual intent.[52]

A final policy argument in favor of nondiscrimination against adopted children is a historical one. In ancient times, the only purpose of adoption was to continue the family line,[53] and the argument has been made that our modern legal analysis should not ignore this historically

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would not deliberately pick a word which instead of controlling the context is easily colored by it."); Halbach, *The Rights of Adopted Children Under Class Gifts*, 50 IOWA L. REV. 971, 980 (1965) ("The draftsman is not likely to choose his language with an objective of producing a particular result with respect to this type of question, for if his attention were directed to this matter at the stage of drafting the question would not have been left unanswered.").

48. *In re* Banker's Trust Co., 291 N.E.2d 137 (N.Y. 1972).

49. *Id.* at 138.

50. *Id.* at 140-41.

51. Estate of Sykes, 383 A.2d 920, 921 (Pa. 1978). The court found that the testator did not intend to exclude adopted children from a gift to his niece's issue, despite the fact he limited her power of appointment to blood relatives in the same document.

52. In *In re* Estate of Leonard, 514 A.2d 822 (N.H. 1986), the New Hampshire Supreme Court found that the testatrix did not intend to exclude her son's adopted children from a gift to lineal descendants, despite the fact that she referred specifically to these children by name and as her grandchildren elsewhere in the document.

The dissent in Chase Manhattan Bank v. Mitchell, 251 A.2d 128, 130-31 (N.J. 1969) (Jacobs, J., dissenting), argued that since extrinsic evidence tended to show that the testator was obsessed with his own bloodline, his daughter's adopted children should not be included in a gift to descendants. This justice referred to a book written by the testator which contained several references to bloodlines. The majority held that the testator's intent was not clear and that the adopted children could participate in the class gift. *Id.* at 129. Estate of Sykes, 383 A.2d 920, 922 (Pa. 1978) (facts and circumstances do not jutsify a particular view).

53. *See supra* notes 3-16 and accompanying text.

significant fact.[54]

*2. The Retroactivity Problem*

In determining the likely intent of a class gift donor, courts will often focus on the exact timing of events. The courts will look at when the will or trust instrument was drafted, when any statutes affecting the rights of adopted children were passed, and when the class gift takes effect.[55] For example, assume a donor executes a will or a trust containing a class gift in 1940. Children who could become members of the class are adopted in 1950. The donor dies in 1960, and the class gift does not vest until 1970. What law, statute, or presumption should govern the inclusion of adoptees as members of the class? Should it be the law in effect at the time of the execution of the instrument, the time of the donor's death, or at the time the gift would actually vest in the class members?

The courts are split on this issue.[56] Some take a very traditional view, reasoning that a grantor is presumed to know the law and therefore must intend that the law in effect at the time of the execution of the instrument, or the law in effect at the death of the grantor in the case of a will, should be applied.[57] This interpretation tends to exclude adopted children from participating in such class gifts.[58]

Other courts have reasoned that modern public policy should prevail, holding the law in effect at the time the class gift becomes effective is the proper law to apply.[59] This tends to permit adopted children to take

54. *See* Comment, *Toward Equal Treatment of Adopted Children Under Testamentary Class Gifts: Iowa's Rejection of the Stranger to the Adoption Rule in* Elliott v. Hiddleson, 67 IOWA L. REV. 845, 852 n.63 (1982).

55. *See* Rein, *Relatives by Blood, Adoption, and Association: Who Should Get What and Why*, 37 VAND. L. REV. 711, 737 (1984).

56. *Id.* at 737-41.

57. *See* Schapira v. Connecticut Bank & Trust Co., 528 A.2d 367, 371 (Conn. 1987) (applied law in effect at time trust was created in 1919; held statute which would include adopted children prospective in application); Scribner v. Berry, 489 A.2d 8 (Me. 1985) (applied law in effect at time of testator's death); Calhoun v. Campbell, 763 S.W.2d 744 (Tenn. 1988) (applied law in effect at time testator executed will); Makoff v. Makoff, 528 P.2d 797 (Utah 1974) (applied law in effect at time trust was created); *In re* Fortwin Trust, 203 N.W.2d 711 (Wis. 1973) (remanding case with direction to apply law effective at time trust was executed).

58. On the other hand, the Supreme Court of Oklahoma applied the rule in Hines v. First Nat'l Bank & Trust Co., 708 P.2d 1078 (Okla. 1985) and included the adopted child in a gift to issue. In *Hines*, the executor and other beneficiaries of the will argued that the date of the adoption (1950) should determine the applicable law, rather than the date of testator's death (1967). The adoption law was revised in 1957, and the court permitted the adoptee to participate in the class gift pursuant to the 1957 statute. *Id.* at 1079-80. *See also* Southside Baptist Church v. Drennen, 362 So. 2d 854 (Ala. 1978) (admitting adopted children into class when law changed between time of will execution and time of testator's death).

59. *See* Benz v. Wilmington Trust Co., 333 A.2d 169 (Del. 1975) (affirming presumption that class of beneficiaries is to be determined by applicable law on date members of the class

under a class gift, since modern law and policy favor treating adopted children as natural-born children.[60]

As one author has argued, a more honest approach would recognize that most testators probably did not (and still do not) consider whether or not to include adopted children in their class gifts.[61] If a donor wishes to specifically exclude adopted children from a gift made to issue or descendants, it is a simple matter to insert a specific provision in the will or trust instrument.[62]

### 3. *Adult Adoptions*

One final concern expressed by the courts in this area is the possibility that parties may use adoption to defeat the donor's purposes and to direct property to strangers. A beneficiary under a will or trust may adopt a neighbor, friend, or lover in order to prevent others from eventually taking the property.[63] In *Cross v. Cross*,[64] the testator's son was given a power of appointment to distribute the estate to a descendant of the testator. The son adopted an adult friend and exercised the power of appointment in favor of his adopted son. The Illinois court refused to validate the exercise of the power of appointment, reasoning that this was contrary not only to the testator's intent, but also to the intent and spirit of the adoption laws.[65] The same result has been reached by the Pennsylvania courts. In *Estate of Goal*,[66] one of the beneficiaries of a trust adopted a forty-one-year-old man in an attempt to ensure his participation in a remainder gift to the adopting man's children.[67] Similarly, in

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are to be ascertained); Haskell v. Wilmington Trust Co., 304 A.2d 53, 54 (Del. 1973) (creating presumption that law in effect on date beneficiaries are ascertained is applicable law for deciding whether adopted children should be included in class gift); *In re* Estates of Leggett, 378 N.W.2d 467 (Mich. 1985) (ruling that later-enacted statute overcomes common law presumption against including adopted children in class gifts), *cert. denied*, 476 U.S. 1171 (1986).

60. *See supra* notes 25-35 and accompanying text.

61. Rein, *Relatives by Blood, Adoption, and Association: Who Should Get What and Why*, 37 VAND. L. REV. 711, 741 (1984).

62. *Id.*

63. *See* Halbach, *Issues About Issue: Some Recurrent Class Gift Problems*, 48 MO. L. REV. 333, 338 (1983); Rein, *Relatives by Blood, Adoption, and Association: Who Should Get What and Why*, 37 VAND. L. REV. 711, 758-59 (1984).

64. 532 N.E.2d 486 (Ill. App. Ct. 1988).

65. *Id.* at 488-89. The court also used the traditional intent of the testator rule, reasoning that this trust showed a clear intent to exclude this particular appointee under the trust, since the testator knew of her son's long-term residence with the man, and specifically limited possible appointees to her descendants.

66. 551 A.2d 309 (Pa. Super. Ct. 1988).

67. *Id.* at 312. The court declined to enforce the gift since the primary motivation behind the adoption was to secure the inheritance.

*Estate of Ketcham*,[68] while the court permitted an individual who was adopted as a child to participate in a class gift to surviving issue, the court refused to allow another person who was adopted as an adult to share in the trust distribution.[69] In *O'Connell v. Riggs National Bank of Washington D.C.*,[70] the District of Columbia Court of Appeals refused to permit the adopted daughter of a deceased trust beneficiary to receive the corpus of a trust in preference over other blood relatives of the testator. The trust beneficiary, childless at the age of seventy-six, had adopted appellant, who was then age thirty-four. The beneficiary died two months later.[71] In reaching its decision, the court did not focus on the timing of the adoption, but on the presumed intent of the testator.[72]

Other courts have permitted an adult adoptee to take under a will or trust, despite the perception that the adoption was an attempt to divert property from other heirs. For example, in *Evans v. McCoy*,[73] a seventy-six-year-old woman adopted her twenty-one-year-old neighbor and three years later also adopted her fifty-three-year-old cousin. The adoptions were intended to facilitate the sale of some farm land. The Maryland court permitted the adoptees to take as issue of the adopting parent and thus defeat the devise of the farmland to other remaindermen.[74]

Similarly, in *In re Estate of Fortney*,[75] a Kansas court allowed an adult adoption to defeat the claims of the remaindermen. In *Fortney*, a ninety-year-old life tenant and his wife adopted the wife's sixty-five-year-old nephew. The nephew received the property as an "[heir] by birth or adoption" over the objections of other lineal descendants of the testator.[76]

In the unusual case of *Bedinger v. Graybill's Executor*,[77] a Kentucky appellate court held it was permissible for a husband to adopt his wife

68. 495 A.2d 594 (Pa. Super. Ct. 1985).

69. *Id.* at 597. The court determined the sole purpose of the adoption was to secure the inheritance.

70. 475 A.2d 405 (D.C. Cir. 1984).

71. *Id.* at 407.

72. The court found that the testator demonstrated an intent to keep the property in the family. Evidence of this intent included: specific money bequests to his brothers and sisters; a cross-remainder to his next of kin if one of his daughters died without issue; a spendthrift clause in the trust; and the fact that the law in effect at the time of the creation of the trust would exclude adopted children from taking the remainder. *Id.* at 408-09.

73. 436 A.2d 436 (Md. 1981).

74. *Id.* at 441-42. It is interesting to note that the court permitted the adult adoptees to take as issue even though the will in question became effective in 1899, before the adoption statute provided for adult adoption in 1937.

75. 611 P.2d 599 (Kan. Ct. App. 1980).

76. *Id.* at 602-03. In *Fortney*, the other lineal descendants were the nieces and nephews (or their children and grandchildren) of the original donors.

77. 302 S.W.2d 594 (Ky. 1957).

and make her his legal heir at law. In *Bedinger*, the donor created a trust, giving her son a life estate and providing that the corpus would then be distributed to his heirs at law. The son and his wife had no children so, after nineteen years of marriage, the husband adopted his wife.[78] The court rejected arguments that this was contrary to the testator's intent,[79] or that the adoption itself violated public policy concerns about incest or the common law unity of husband and wife.[80]

In *Estate of Pittman*,[81] the court allowed adult adoptees to share in a class gift to children, even though the will had been executed and the testator had died prior to the recognition of adult adoptions in California. However, the *Pittman* court required that adult adoptees establish that they were taken into the adopting home as minors, were reared by the adopting parents, and were later actually adopted.[82] The court thus created an exception in cases where the adult adoptees were able to establish a true familial or parent-child relationship prior to the time of the adoption itself.[83]

Some state adoption statutes limit adult adoptions. For example, a state may require the adopting parent be a certain number of years older than the adopted child,[84] or that the parties be related.[85] Other states require the parties to have established some sort of parent-child relationship during the adoptee's minority before approving the adoption.[86] The

78. *Id.* at 596.

79. *Id.* at 597.

80. *Id.* at 597, 599-600.

81. 163 Cal. Rptr. 527 (Cal. Ct. App. 1980).

82. *Id.* at 531.

83. *Id.*

84. *See* CAL. CIV. CODE § 227p(a) (West Supp. 1990) (any adult may adopt a younger adult person); VA. CODE ANN. § 63.1-222(iv) (Supp. 1988) (statute requires the adoptee be at least fifteen years younger than petitioner and the parties must have known each other for at least five years and have been residents of the Commonwealth for those five years). Virginia also permits adult adoptions where the parties established some sort of parent-child relationship before the adoptee reached age eighteen. VA. CODE ANN. § 63.1-222(i) (Supp. 1989). For a general discussion of adult adoption, *see* I. SLOAN, THE LAW OF ADOPTION AND SURROGATE PARENTING 55-61 (1988).

85. *See* ILL. ANN. STAT. ch. 40 ¶ 1504 (Smith-Hurd 1980) (to adopt an adult, the parties must be related or have resided together for two years before commencement of adoption); VA. CODE ANN. § 63.1-222(ii) (Supp. 1989) (may adopt adult niece or nephew with no living parents who has lived in petitioner's home for at least three months).

86. *See* IDAHO CODE § 16-1501 (1979) (adults may be adopted in cases where adoption did not occur during adoptee's minority by reason of inadvertence, mistake, or neglect, and the parties had a parent-child relationship); OHIO REV. CODE ANN. § 3107.02(b)(3) (Anderson 1989) (adult adoption permissible if adoptee established parent-child relationship with petitioners during minority).

The Oregon statute specifically addresses the class gift/adult adoption problem by excluding persons adopted as adults from the statutory presumption that includes adopted children in class gifts made in wills, deeds, or other instruments. OR. REV. STAT. § 112.195 (1987).

modern trend, however, is to permit adult adoption by any person.[87]

As one author has noted, the case of adult adoptees is one where the stranger to the adoption rule may be justified.[88] An adult adoptee should not be presumed to be a member of a class described in terms of blood relationships. This need not be an irrebuttable presumption, but one which can be overcome upon a showing that the parties to the adoption had a parent-child type of relationship.[89] The adult adoption area is one where traditional concerns about thwarting the likely intent of a class gift donor are justified.

## IV. THE TEXAS LAW

Two Texas appellate courts have recently addressed the question of whether or not adopted children should be included in class gifts made under a will or trust.[90] In both cases, the courts' answer to this question was no.[91] This article suggests that the better view would include adopted children in such gifts.

The Texas Supreme Court has not decided any cases directly on this issue in recent years. In *Vaughn v. Vaughn*,[92] a 1960 case, the court held that an adopted child was not entitled to benefit from a will provision that would create a new trust for each child born to the testator's son.[93] The testator's will created two initial trusts, one for each of the testator's sons. The trusts were later to be divided into sub-trusts: one for the testator's sons, one for each of his grandchildren or their descendants,

87. I. SLOAN, THE LAW OF ADOPTION AND SURROGATE PARENTING 55-56 (1988). *See* GA. CODE ANN. § 19-8-16(a) (1982); TEX. FAM. CODE ANN. § 16.51 (1986).

In some states, court decisions may modify the statutory language. For example, the New York statute is general in nature, and would seem to permit any adult adoption. N.Y. DOM. REL. LAW § 110 (McKinney 1988). In *In re* Adoption of Robert Paul P., 471 N.E.2d 424 (N.Y. 1984), a 57 year-old man sought to adopt a 50 year-old man. The parties had lived together for twenty-five years and sought the adoption for a variety of reasons, but did not have a parent-child relationship. The court held that adoption may not be used as a vehicle to legitimize a sexual relationship, be it homosexual or heterosexual. *Id.* at 425. This area is another, totally separate problem involved with adult adoption.

88. Rein, *Relatives by Blood, Adoption, and Association: Who Should Get What and Why*, 37 VAND. L. REV. 711, 809 (1984).

89. *Id.*

90. Sharp v. Broadway Nat'l Bank, 761 S.W.2d 141 (Tex. App.—San Antonio 1988, no writ); Diemer v. Diemer, 717 S.W.2d 160 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).

91. Sharp v. Broadway Nat'l Bank, 761 S.W.2d 141, 145 (Tex. App.—San Antonio 1988, no writ) (unambiguous intent to exclude adopted child); Diemer v. Diemer, 717 S.W.2d 160, 162 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.) (intended to exclude adopted children).

92. 161 Tex. 104, 337 S.W.2d 793 (1960).

93. *Id.* at 110, 337 S.W.2d at 797.

and one for each grandchild born after the testator's death. The testator died in 1955. A child was born in 1956 and adopted that same year by one of the sons.[94] The court held the adopted child could not require the trustees to establish a new trust for his benefit. The court relied on the use of the term "born," holding that it limited trust participation to natural-born children.[95] The court also relied on extrinsic evidence: the testator had created two inter vivos trusts, in 1946 and 1951, both of which made specific provision for adopted children.[96]

In *Cutrer v. Cutrer*,[97] decided in 1961, the Texas Supreme Court applied the stranger to the adoption rule to hold that an adopted child was excluded from taking under trust gifts to children and heirs of the body.[98] However, the court in *Cutrer* relied on an older probate statute,[99] in effect at the time of the donor's death, rather than the statute applicable at the time the class gift vested.[100]

Although both *Vaughn* and *Cutrer* seem to indicate that Texas courts will continue to follow the traditional adoption rules, it is important to remember that both cases were decided more than twenty-five years ago. The repudiation of the stranger to the adoption rule did not begin in earnest in American law until the late 1960s and early 1970s.[101] Another consideration is the 1984 Texas Supreme Court decision in *Lehman v. Corpus Christi National Bank*.[102] In *Lehman*, the testator's will specifically included adopted persons in the definition of descendants. The court held that the will unambiguously included a person who had

94. *Id.* at 106-07, 337 S.W.2d at 793-94.

95. *Id.* at 110, 337 S.W.2d at 792.

96. *Id.*

97. 162 Tex. 166, 345 S.W.2d 513 (1961).

98. *See id.* at 172, 345 S.W.2d at 517. The court stated that the term issue clearly connotes a blood relationship, and the phrase heirs of the body was also limited to lineal blood relatives. The court indicated that, in a traditional sense, a child is a descendant of the first degree. Further, the trusts in question used the terms children and issue interchangeably.

99. Adoption of Minor Children Act, ch. 177, § 9, 1931 Tex. Gen. Laws 300, 302, *repealed by* Family Code Act, ch. 543, § 3, 1973 Tex. Gen. Laws 1458. The statute provided that an adopted child should be "deemed and held to be, for every purpose, the child of its parent or parents by adoption as fully as though born of them in lawful wedlock."

The court also relied on its prior decision in Hoch v. Hoch, 140 Tex. 475, 168 S.W.2d 638 (1943), which limited the application of the 1931 statute to the parties to the adoption.

100. Cutrer v. Cutrer, 162 Tex. 166, 174, 345 S.W.2d 513, 518-19 (1961). *See supra* notes 55-62 and accompanying text.

101. *See supra* note 39. Even in *Cutrer*, two justices dissented, arguing that the statute in effect at the time the remainder vested, rather than the statute in effect at the time of donor's death, should be controlling; that heirs of the body should be construed to mean children and that children includes adopted children; and that modern public policy favored the treatment of an adopted child as if he were a natural-born child. Cutrer v. Cutrer, 162 Tex. 166, 176, 345 S.W.2d 513, 520 (1961) (Griffin & Hamilton, JJ., dissenting).

102. 668 S.W.2d 687 (Tex. 1984).

been adopted as an adult.[103] The language of the will made that decision a relatively simple one for the court. In addition, the court went on to indicate that Texas has specifically rejected the stranger to the adoption rule.[104] The court further stated that the rule was contrary to the public policy of the state of Texas.[105] However, it is unclear whether the two recent Texas appellate court decisions follow the principles set forth in *Lehman*.

The first case, *Diemer v. Diemer*,[106] involved the construction of a will provision affecting the issue of the testator's children. B.P. Diemer, the testator, died in 1959. His will, executed in 1956, conveyed life estates in various parcels of land to Thyra and Elizabeth, the testator's daughters, and to Upton, the testator's son, with remainder interests to their descendants. Another paragraph conveyed a life estate to Ted, another son, and his descendants. However, if Ted were to die without issue then a contingent remainder was conveyed to the issue of Thyra, Elizabeth, and Upton.[107]

Ted was married twice. His first wife, with whom he had no children, died in 1962. Ted remarried in 1964; his second wife had a child from a previous marriage. Ted formally adopted his wife's son, James Scott, in 1968, when James was twenty-three years old.[108] The testator's other children all had natural-born children at the time of testator's death in 1959.[109]

The problem in *Diemer* was whether or not James Scott should be permitted to take as the remainderman after Ted's life estate terminated. The court held that James could not inherit under the terms of the will.[110] First, the court recited the premise that wills should be construed in accord with the intent of the testator. That intent should be determined from the will instrument itself, if possible.[111] Analyzing the

103. *Id.* at 688.

104. *Id.* (citing Vaughn v. Gunter, 458 S.W.2d 523 (Tex. Civ. App.—Dallas), *aff'd*, 461 S.W.2d 599 (Tex. 1970)). In *Vaughn*, an adopted child was permitted to participate in a class gift made to children. The court relied on changes in Texas statutory adoption law, changes in public policy regarding adoption, and the fact that no intention to exclude adopted children could be found in the trusts. *Id.* at 526.

105. Lehman v. Corpus Christi Nat'l Bank, 668 S.W.2d 687, 688 (Tex. 1984).

106. 717 S.W.2d 160 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).

107. *Id.* at 161.

108. *Id.* at 163.

109. *Id.* at 162.

110. *Id.*

111. *Id. See also* Gee v. Read, 606 S.W.2d 677 (Tex. 1980) (primary object of construing will is to determine intent of testator; intent should be determined from language in document); Frost Nat'l Bank v. Newton, 554 S.W.2d 149, 154 (Tex. 1977) (in unambiguous will, intent must be ascertained from four corners of document).

language of the document, the court reasoned the testator must have had a reason for using the term "descendants" in several paragraphs of the will, then changing to the term "issue" in another section.[112] The word "issue" was given its traditional meaning, connoting a blood relationship.[113] Secondly, although not explicitly indicating it was doing so, the court clearly considered extrinsic evidence in attempting to ascertain the testator's intent. The fact that at the time of the will's execution Ted was the testator's only child with no natural offspring was used to explain the intentional use of the word "issue" in his bequest.[114]

In another portion of the opinion, the court held that James could participate in a bequest to Ted's children. This conveyance was made under the will of Dora Diemer, who was B.P.'s wife and Ted's mother. Her will, however, specifically indicated that the terms children or child would include legally adopted children.[115] The court found that the testatrix's intent to include adopted children was clear, and that the testatrix did not intend to exclude a person who was adopted as an adult, such as James Scott.[116]

In *Sharp v. Broadway National Bank*,[117] the San Antonio Court of Appeals held that adopted children could not take as lineal descendants under a testamentary trust.[118] In *Sharp*, John Yates, the testator, died in 1964. His will had been executed in 1953. The will created a trust to benefit the testator's whole-blooded sisters and brothers and their descendants. At the time of the testator's death, one of his whole-blooded brothers had predeceased him, leaving four children: L.S. Yates, Mayana Sharp, Estelle Holmes, and Allison Yates. Both L.S. Yates and Mayana Sharp had adopted children. When L.S. Yates and Mayana Sharp died, the trustee refused to disburse trust income to the adoptees

112. Diemer v. Diemer, 717 S.W.2d 160, 162 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).

113. *Id.* The court cited White v. Taylor, 155 Tex. 392, 286 S.W.2d 925 (1956), for the proposition that words used in a will should be given their ordinary and usual meaning. The court then cited *Cutrer* for the proposition that the term issue clearly connotes a blood relationship. However, the *Cutrer* court also considered adoptees to be excluded from a gift to the class of children, which is clearly contrary to modern law and policy. In modern usage, issue may be considered the equivalent of children.

114. Diemer v. Diemer, 717 S.W.2d 160, 162 (Tex. App.— Houston [14th Dist.] 1986, writ ref'd n.r.e.). "All of the children, with the exception of Ted Diemer, had natural children. . . . The only time B.P. Diemer used the term 'issue' was in his bequest to Ted Diemer, his only child without natural children."

115. *Id.* at 163.

116. *Id. But see* Foster v. Foster, 641 S.W.2d 693 (Tex. App.—Fort Worth 1982, no writ) (court indicates that Texas law does not generally give adopted adult same inheritance rights as adopted minor child).

117. 761 S.W.2d 141 (Tex. App.—San Antonio 1988, no writ).

118. *Id.* at 143-44.

and sought a declaratory judgment that they were excluded from participation in the trust under the provisions of the will. The trial court granted summary judgment in favor of the trustee.[119]

The appellate court attempted to ascertain the intent of the testator from the language in the will. The testator had included a statement of intent, indicating he wished the greatest benefit under the will to go to his relatives of the whole blood, not to strangers or relatives of the half-blood.[120] The will then established a testamentary trust, and provided that the trust income should be distributed to the testator's brothers, sisters, nieces, nephews, and their lineal descendants. The court found that by reference to strangers in the will, the testator intended to exclude persons who were not blood relatives; since adopted children are not related by blood, they would be excluded.[121] Further, the court held that the statement of intent, expressing a preference for blood relatives, modified and defined the term lineal descendants to include only relatives of the whole blood.[122]

## V. CONCLUSION

Unfortunately, without actually using the term, these recent cases position Texas among the minority of jurisdictions still clinging to the outmoded stranger to the adoption rule. In neither case did the court assume that adopted children should participate in the class gift, but instead focused on the presumed intent of the testator.[123] Without a clear declaration of intent, however, it is difficult to determine the testator's true intent from the will document itself. The court will almost of necessity start with a certain presumption, or favor a particular outcome

119. *Id.* at 143.

120. The statement of intent indicated:

> It is my primary purpose will, desire and intention to dispose of all my property in a fair, honest, just and normal manner so that MY RELATIVES OF THE WHOLE BLOOD AND/OR THEIR ISSUE SHALL RECEIVE THE GREATEST BENEFIT THEREFROM AND NOT any STRANGERS, OR RELATIVES OF THE HALF BLOOD, OR THEIR ISSUE. . . .

*Id.* at 143.

121. *Id.* at 145. The court cited Vaughn v. Vaughn, 161 Tex. 104, 337 S.W.2d 793 (1960) for the proposition that adopted children are "children born to strangers," and should be excluded from the gift in this case.

122. Sharp v. Broadway Nat'l Bank, 761 S.W.2d 141, 145 (Tex. App.—San Antonio 1988, no writ).

123. *Id.* at 144. The court found that will construction involved a question of the testator's intent, not a question of the right to inherit. Diemer v. Diemer, 717 S.W.2d 160, 162 (Tex. App.— Houston [14th Dist.] 1986, writ ref'd n.r.e.) (intent from will, not will from intent). In *Sharp*, the court did point out that adopted children were presumed by statute to be included in class gifts, but then demoted the presumption to "no[thing] more than an aid to be employed in the construction of the will, and is not controlling." 761 S.W.2d at 144.

through its choice of construction maxims and its interpretation of the will terms. In both *Sharp* and *Diemer*, the courts construed arguably unclear terms in such a way as to exclude adopted children. Although both courts believed they had determined the testator's actual intent, it is this author's view that both cases were wrongly decided.

Like many states, Texas has enacted statutory provisions indicating that adopted children should be treated as natural-born children. The Texas Probate Code provision to this effect was enacted in 1955, and it states that adopted children may inherit by and through their parents and their parents' kin.[124] The Probate Code also specifically includes adopted children under the definition of child.[125] The Texas Family Code echoes this provision and further states that the terms child, descendant and issue, and similar terms presumptively include adopted children unless the context or express language of the document indicates otherwise.[126] Although testators may make any conveyances they wish, and exclude any person they wish, it appears to be the public policy of this state to start with a presumption in favor of inclusion of adopted children in testamentary class gifts.

The decision in *Diemer*[127] hinged on the meaning of the word issue and the use of extrinsic facts to ascertain the testator's likely intent regarding his son's adopted child. The court chose to construe the term issue in its traditional sense, connoting a blood relationship.[128] Many courts are moving away from this interpretation of issue and are instead construing it to be the equivalent of children or descendants.[129] This interpretation is certainly more in line with the modern view of the family as a social, psychological unit, rather than simply a biological group. There is really no reason to assume that the testator in *Diemer* meant to distinguish descendants from issue in his will. The choice of the term "issue" could merely refer to children; if the beneficiary never had children, he was not likely to have descendants either.

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124. TEX. PROB. CODE ANN. § 40 (Vernon 1980).

> For purposes of inheritance under the laws of descent and distribution, an adopted child shall be regarded as the child of the parent or parents by adoption, such adopted child and its descendants inheriting from and through the parent or parents by adoption and their kin the same as if such child were the natural legitimate child of such parent or parents by adoption. . . .

125. TEX. PROB. CODE ANN. § 3(b) (Vernon 1980).

126. TEX. FAM. CODE ANN. § 16.09(c) (Vernon 1986).

127. Diemer v. Diemer, 717 S.W.2d 160 (Tex. App.— Houston [14th Dist.] 1986, writ ref'd n.r.e.).

128. *Id.* at 162.

129. *See supra* notes 44-47 and accompanying text.

In *Sharp*,[130] the court used a statement of intent contained in the testator's will to interpret the words lineal descendants. Since the testator indicated that he wanted to benefit relatives of the whole blood, the court found that adopted children were excluded.[131] However, it is possible that the testator's primary concern was with his half-brother, or with those persons who were related only by marriage, and that it was those persons that he meant to exclude in his will. Admittedly, *Sharp* presents a stronger case against the adoptees than *Diemer*, yet in both cases it would have been easy enough for the testator to exclude adopted children from participation under a will by a simple and straightforward directive. In light of modern case law, policy, and statutes, it is preferable to create a rebuttable presumption in favor of the adoptees.

130. Sharp v. Broadway Nat'l Bank, 761 S.W.2d 141 (Tex. App.—San Antonio 1988, no writ).

131. *Id.* at 145.