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INTESTATE SUCCESSION BY AND FROM THE ADOPTED CHILD

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The general function of the law is to enable individuals to live together in society with minimum friction in their contacts with each other. The job is one that is never finished. As changes occur in the economic and social structure, new types of factual situations arise and the law is continually confronted with new challenges.

When the institution of adoption first appeared on the American scene, the usual family relationships were disturbed. For the first time in a common-law country provision was made whereby a parent-child and family status could be established through a means other than natural birth. To the extent that the common law was developed in contemplation of a family relationship based upon blood-ties, adjustments had to be made to recognize the innovations effected by adoption.

One of the implicit problems arising out of the situation was that of altering the course of intestate succession to take into account the creation of new and the severance of old ties of affection as well as the changed economic relationship between the adopted child and its natural and adoptive families.

Although many states attempted to meet the problem at an early date, the status of adoption has changed as the years passed and has affected the degree of transmutation of the adopted child from the natural to the adoptive family. It is therefore necessary to reexamine the existing rules of law governing intestate succession by and from the adopted child in order to determine whether the law, in this limited sphere, is performing its function in contemporary society.

THE FUNCTION OF ADOPTION

An intelligent appraisal of the intestate succession law and its relationship to adoption is impossible unless the function of adoption is understood and appreciated. It has a history dating

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back to antiquity and was known to the Babylonians, Hebrews, Egyptians and other early peoples.[1] The Roman law recognized adoption as a convenient method of providing a family heir to save the family from extinction and to perpetuate the rights of family religious worship.[2] Consequently, the early Roman law provided for a complete substitution of the adoptive in lieu of the natural relationship.[3] It should be noted in passing that the Romans used adoption as a device to promote the welfare of the family as a unit rather than the welfare of the child or of the society in general.

The provisions of the Roman law were accepted by other civil-law countries despite changes in religious and social conditions and the principal motive for adoption continued to be that of heirship.[4] In fact, the first legislation on the subject of adoption in Texas[5] and Alabama[6] was patterned after the civil-law provisions with heirship constituting the dominant purpose.

Adoption was not recognized by the English common law.[7] Its use as an heirship device in England was probably precluded by the nature of the English feudal system and the English reverence for heirs of the blood of the ancestor. It is significant that even when adoption was finally legalized in England by Parliament in 1926, the Adoption Act made no provision for any change in the common-law scheme of intestate succession.[8]

In view of our common-law heritage, it is therefore not surprising to find no sign of adoption legislation in the United States during the early years of our history. It is generally recognized[9] that the first adoption statute in this country was

1. One of the most complete accounts of the history of adoption has been given by Judge Lamm in the oft-cited case of Hockaday v. Lynn (1906) 200 Mo. 456, 98 S. W. 585.

2. Brosnan, The Law of Adoption (1922) 22 Col. L. Rev. 332.

3. At a later date, however, the Justinian Code changed the law to permit the adoptee to retain his rights of succession in his natural family. The Roman law of adoption is discussed in 2 Sherman, *Roman Law in the Modern World* (3d ed. 1937) 83 et seq.

4. Peck, *Adoption Laws in the United States* (1925) U. S. Dept. of Labor, Children's Bur. Pub. No. 148, p. 1, fn. 2.

5. The first Texas legislation was established by an act of January 16, 1850. See Tex. Gen. Stat. Law (1859) 33.

6. See Ala. Code (1852) 385.

7. This fact is recited by innumerable cases and authorities. See, e. g., Peck, *Domestic Relations* (3d ed. 1930) 352; Madden, *Persons and Domestic Relations* (1931) 354.

8. (1926) 16&17 Geo. V c. 29 §5 (2).

9. See, e. g., Knox, *The Family and the Law* (1941) 98, and Ricks, *Legal Aspects of Adoption* (1937) 4. The Texas and Alabama acts of 1850, supra,

passed by Massachusetts in 1851.[10] The noteworthy fact, however, is not the date of the first enactment. The real significance of the Massachusetts Act of 1851 lies in the fact that in content and purpose it was entirely without precedent. Although there is no statement of policy set forth in the statute, a perusal of its provisions reveals a purpose to establish an institution to ameliorate the condition of the neglected and dependent child. Inheritance rights were only incidentally considered. For the first time in the long history of adoption the interests of the child became the primary concern of the law.

It is interesting to consider the background of the Massachusetts legislation. Until the middle of the nineteenth century, children who had been neglected by their families were also ignored by society and the state. The devices of apprenticeship and indenture helped to alleviate the undesirable conditions, but these procedures were relics of an economic and social era long past.[11] The industrial revolution not only accentuated the existing problem but broadened its scope. Industrial home production gave way to machine and factory production and the old methods of apprenticeship and indenture became unsatisfactory and inadequate to cope with the new situation.

The growing seriousness of the problem gradually gave birth to the realization that there existed a community responsibility for the welfare of dependent children. Child welfare activity and legislation began to develop. In 1849 the American Female Guardian Society was incorporated in New York with authority to place children in suitable employment with some proper person in conformity with the state laws dealing with indigent persons.[12] And at approximately the same time, the Children's Aid Society of New York was founded with the original purpose of sending destitute city children to distant country homes; this is reported to have been the beginning of systematized child-placing in America.[13] The 1851 Massachusetts adoption statute

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fns. 5 and 6, antedated the Massachusetts statute, but they were patterned after the civil law and are not considered as a part of the history of American adoption statutes. Moreover, Texas was not a state of the Union in 1850.

10. Mass. Acts & Resolves of 1851, c. 324.

11. An Elizabethan statute had established these institutions as part of the common law. (1601) 43 Eliz. c. 2.

12. N. Y. Laws of 1849, c. 244 §6.

13. Brooks, *Adventuring in Adoption* (1939) 102.

was a part of the same movement and was designed to provide a method whereby a homeless child could be placed in a home and become a part of a family.

The fact that adoption legislation in the United States was enacted for the welfare of the child is further established by a report of a group of Commissioners appointed in 1865 to codify the law of the State of New York. It recited that the total absence of any adoption provision was one of the most glaring defects of New York law; that thousands of children were actually, though not legally adopted each year; that there was no method whereby the adopting parents could secure the children to themselves, except by an inappropriate and fictitious apprenticeship which permitted the natural parents to reclaim their child when they saw it grow to an age of usefulness and intelligence; and that there were many childless parents who would gladly adopt children, but for their well-grounded fears that they could never hold them securely.[14] It is significant that no mention is made in the report of inheritance rights and that the proposed statute embodied no provision on the subject.[15]

It is plain, therefore, that the American institution of adoption was sustained by a current of opinion looking to individual personal needs, especially of the child, rather than to the needs of the larger family or of continuity in property units and management—a current heralding the characteristic nineteenth century American growth of social and legal emphasis on the small or immediate family and its highly personalized relations.[16]

The Development of Intestacy Provisions as a Part of Adoption Legislation in the United States

Although the Massachusetts legislators in 1851 were not primarily concerned with inheritance rights, they did partially recognize the fact that the new institution of adoption would have implications in the field of intestate succession. An express provision was enacted to permit the adoptee to succeed to the adoptor's estate, but none of the other factual possi-

14. N. Y. Comsrs. Rep. (1865) 36.

15. The statute submitted by the Commissioners was not passed. The first New York adoption statute was enacted in 1873. (N. Y. Laws of 1873, c. 830.)

16. See any American study of The Family. In part this new emphasis on the immediate family was an outgrowth of the mobility of the population.

bilities were covered. There was no provision with respect to the child's right to inherit from the adoptor's lineal or collateral relatives or from natural parents and kin, and no mention was made of the rights of the adoptive or natural parents or relatives to inherit from the adopted child. So completely was interest centered on the immediate problem of the child that the resulting relationships of the new family situation were not considered.

In the typical American fashion of statutory borrowing, the Massachusetts statute was used as the model for similar legislation enacted in other jurisdictions throughout the country. It was substantially copied by Wisconsin[17] in 1853, Maine[18] in 1855, New Hampshire[19] in 1862, Oregon[20] in 1864, Rhode Island[21] in 1866, and Minnesota[22] in 1876. In practically every instance the inheritance provisions were as inadequately treated as they were in the original Massachusetts act.

To the extent that express provisions were inserted in the early statutes, they were, with few exceptions, conciliatory and conservative—designed to make certain that the time-honored course of intestate succession among blood relatives would not be disrupted by the innovation. For example, the New York statute expressly stated that no inheritance rights were to be conferred by the adoption.[23] This provision remained in effect for a period of fourteen years. In 1887 the New York legislature permitted the adoptor and the adoptee to inherit from each other but expressly declared that the child's right of inheritance and succession from natural parents should remain unaffected by the adoption.[24]

Although it became customary to give the adoptee the right of succession from the adoptor, the legislatures were reluctant to accord reciprocal rights to the adoptor. This reluctance can probably be attributed to a desire to protect the child and discourage predatory adoption. In Illinois, for example, the first adoption statute expressly provided that the "adopted father or

17. Wis. Acts of 1853, c. 85.
18. Me. Laws of 1855, c. 189.
19. N. H. Laws of 1862, c. 2603.
20. Ore. Laws of 1864, 692.
21. R. I. Laws of 1866, c. 627.
22. Minn. Laws of 1876, c. 41.
23. N. Y. Laws of 1873, c. 830.
24. N. Y. Laws of 1887, c. 703.

mother shall never inherit from the child."[25] When succession rights were eventually given to the adoptors, they were carefully limited to property that the adoptee had obtained from the adoptors by gift, bequest, devise or descent.[26] This form of limited inheritance for the adoptor gradually gained in popularity and today can be found in a number of statutes.[27]

Moreover, it is impossible to find an early statute which, in express terms, created reciprocal rights of intestate succession between the adoptee and the adoptor's lineal or collateral relatives.

Generally speaking there were relatively few provisions dealing with intestacy problems. The legislatures pioneering in adoption statutes apparently failed to give serious consideration to this aspect of the adoptive relationship.

The problems, however, were inherent in the new relationship and as they came to the surface, the legislatures in a few jurisdictions attempted to meet them by inserting express provisions into the statutes. The added provisions oftentimes effected some degree of departure from the common-law theory that consanguinity should govern the course of descent.

The history of the Pennsylvania statute offers a good example of the general manner in which the legislation in this field has developed. The first Pennsylvania statute was adopted in 1855. It contained a provision that the adoptee should become an heir of the adoptor and it even went further to permit the adoptee and the adoptor's legitimate children to inherit from and through each other as if all had been children of the same parent.[28] (The latter provision evidences a recognition of the small-family relationship and is definitely not typical of the early statutes.) In 1877 a provision was added to permit the adoptor to inherit from the adoptee, to the exclusion of the latter's natural parents and kin, such property as the adopted child inherited or derived from the adoptor or the adoptive relatives.[29] It was not until 1915 that the adoptor was permitted to inherit regardless of the source from which the adoptee's intestate estate was derived.[30]

25. Ill. Laws of 1867, 133.
26. Ill. Rev. Stat. (Hurd, 1874) 129.
27. Infra, pp. 228-232.
28. Pa. Laws of 1855, 491.
29. Pa. Laws of 1887, 53.
30. Pa. Laws of 1915, 580.

The 1915 amendment went further and provided that the adoptor and adoptee should inherit not only from but also through each other as fully as if the adoptee had been born a lawful child of the adopting parent.[31] Two years later the statute was again amended, this time to permit adoptive relatives to inherit and take from and through the adoptee to the exclusion of the adoptee's natural parents, grandparents and collateral relatives. By the same act it was provided that the adoptee shall not be entitled to inherit from or through the natural parents, grandparents or collateral relatives.[32] In 1941 another factual possibility was given statutory recognition in the form of an amendment covering the situation in which the adoptee's natural parent is a spouse of the adoptor.[33]

Whereas the history of the Pennsylvania legislation is illustrative of the spasmodic and piecemeal development of the legislation on this subject, few states have progressed as far as Pennsylvania toward achieving a complete statutory coverage of the problem.[34]

AN ANALYSIS OF THE PRESENT-DAY STATUTES IN THE UNITED STATES

A comparative analysis of the existing statutory provisions in forty-nine[35] jurisdictions serves to reveal the manner in which the intestacy aspects of adoption are presently covered.[36]

I. Intestacy rights between adoptor and adoptee.

A. Right of adoptee to inherit from adoptor.

36 states permit the adoptee to inherit the same as a legitimate natural-born child:

Alabama	Kansas	Ohio
Arizona	Kentucky	Oklahoma
Arkansas	Louisiana	Oregon

31. Ibid.
32. Pa. Laws of 1917, 429 §16 a, b.
33. Pa. Laws of 1941, 424.
34. There are comparatively few jurisdictions which have approached what might be recognized as a statutory codification of the law. The District of Columbia and Texas statutes are relatively complete. (See Appendix for citations to current statutes.)
35. The forty-eight states plus the District of Columbia.
36. The statutory references on which the classification is premised are listed in the Appendix. In a few cases, the provisions are set forth in the section of the statutes dealing with intestate estates. More often, they are a part of the adoption statutes.

California	Maryland	Pennsylvania
Colorado	Massachusetts	Rhode Island
Connecticut	Michigan	South Carolina
Delaware	Minnesota	Texas
District of Columbia	Missouri	Vermont
Florida	Nevada	Virginia
Illinois	New Hampshire	Washington
Indiana	New Jersey	West Virginia
Iowa	New York	Wisconsin

5 states provide that the right of inheritance shall depend upon the decree of adoption:[37]

Maine	Tennessee
Mississippi	Wyoming
North Carolina	

8 states have statutes which are not explicit:[38]

Georgia	Nebraska	South Dakota
Idaho	New Mexico	Utah
Montana	North Dakota	

B. Right of the adoptor to inherit from the adoptee.

19 states expressly permit the adoptor to inherit as if he or she were the natural parent of the adoptee:

Alabama	Kansas	Pennsylvania
California	Kentucky	Rhode Island
Colorado	Louisiana	Texas[39]
Connecticut	Minnesota	Vermont
District of Columbia	Missouri	Wisconsin
Florida	Nevada	
Iowa	New York	

15 states regard the source of the adoptee's estate as determinative of the adoptor's right to inherit:[40]

37. One of the states (Miss.) provides that there shall be no right of inheritance unless there be a court order to that effect at the time of adoption; the other four states (Me., N. Car., Tenn. and Wyo.) provide that the right to inherit shall exist unless limited by the decree of the court.

38. No attempt is made in this statutory analysis to resolve any statutory ambiguity by reference to court decisions. The classification is based solely on the face value of the statute, disregarding the possibility of interpretation in one direction or the other. The statutes in these eight states ordinarily provide that the adoptee and adoptor shall sustain toward each other the legal relation of parent and child and have all the rights and be subject to all the duties of that relation.

39. The Texas provisions are apparently contradictory. This classification is based on article 46a, section 9, which seems to supersede article 2572.

40. No attempt has been made to sub-classify the various provisions in these states. Some provide that the adoptor shall inherit all of the estate except that which comes from the adoptee's natural parents or kin; others provide that the adoptor or his kin shall inherit only that portion which came from the adoptor.

Arizona	Maryland	Ohio
Arkansas	Massachusetts	Oklahoma
Illinois	Michigan	Virginia
Indiana	New Hampshire	Washington
Maine	New Jersey	West Virginia

10 states have statutes which are not explicit:[41]

Idaho	North Carolina	Utah
Montana	North Dakota	Wyoming
Nebraska	Ohio	
New Mexico	South Dakota	

3 states have no provision on this subject:

Delaware	Mississippi	South Carolina

2 states expressly deny the adoptor the right to inherit:

Georgia	Tennessee

II. Intestacy rights between adoptee and natural parents.

A. Right of adoptee to inherit from natural parents.

12 states expressly permit the adoptee to inherit:

Alabama	Indiana	New York
Arkansas	Massachusetts	Ohio
Florida	Michigan	Texas
Kentucky	New Jersey	West Virginia

5 states expressly deny the right:

California	District of Columbia	
Connecticut	Louisiana	Pennsylvania

32 states have no explicit provision:[42]

Arizona	Mississippi	Rhode Island
Colorado	Missouri	South Carolina
Delaware	Montana	South Dakota
Georgia	Nebraska	Tennessee
Idaho	Nevada	Utah
Illinois	New Hampshire	Vermont
Iowa	New Mexico	Virginia
Kansas	North Carolina	Washington
Maine	North Dakota	Wyoming
Maryland	Oklahoma	Wisconsin
Minnesota	Oregon	

41. See footnote 38, supra.

42. Many of these states have provisions to the effect that the natural parents shall be freed of all obligations and duties toward the adoptee and the latter shall be freed of all obligations of maintenance and obedience; others provide that the adoptee shall be treated in all respects as the child of the person adopting; others have a provision that all rights and duties and all legal relationship shall cease.

B. Right of natural parents to inherit.

8 states expressly deny the right:

California	Florida	"Pennsylvania"
"Colorado"[43]	Kansas	Texas[44]
District of Columbia	New York	

15 states expressly or impliedly permit the natural parents to inherit all that the adoptive parents or relatives are prohibited from inheriting:[45]

Arizona	Maryland	Ohio
Arkansas	Massachusetts	Oklahoma
Illinois	Michigan	Virginia
Indiana	New Hampshire	Washington
Maine	New Jersey	West Virginia

3 states permit the natural parents to take only in the absence of adoptive relatives:[46]

Iowa	Kentucky[47]	Wisconsin

23 states have no explicit provision and their statutes are subject to diverse interpretation:[48]

Alabama	Missouri	Rhode Island
Connecticut	Montana	South Carolina
Delaware	Nebraska	South Dakota
Georgia	New Mexico	Tennessee
Idaho	Nevada	Utah
Louisiana	North Carolina	Vermont
Minnesota	North Dakota	Wyoming
Mississippi	Oregon	

III. Intestacy rights between adoptee and adoptive relatives.

A. Right of adoptee to inherit:

2 states grant the right as to lineal and collateral adoptive relatives:

Connecticut	Minnesota

6 states grant the right to inherit from natural children of adoptor, but make no express reference to the ascendant or collateral relatives:

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43. Quotation marks indicate that the law may be interpreted to permit inheritance in the absence of adoptive relatives.

44. See footnote 39, supra.

45. See footnote 39, supra. When the statute provides that the adoptive relatives are to take a certain portion of the adoptee's estate, it is often left to implication that the natural parents are to take the balance of the estate.

46. See also footnote 43, supra.

47. Natural parents take in the absence of adopting parents and ahead of adoptive relatives.

48. For the different types of provisions, see footnote 42, supra.

District of Columbia[49]	New Jersey	Ohio
Massachusetts[50]	New York	Texas

6 states deny the right to inherit from lineal or collateral kin by right of representation:

Illinois	Oklahoma	Rhode Island
Maine	Oregon	West Virginia

35 states have no provision on the subject.

B. Right of adoptive relatives to inherit.

9 states permit the adoptive relatives to inherit:

Colorado	Kentucky[51]	Pennsylvania
District of Columbia	Minnesota	Texas
Iowa	Nevada	Wisconsin

4 states permit natural children of adoptor to inherit but make no express reference to ascendant or collateral relatives:

Massachusetts[52]	New York
New Jersey	Ohio

14 states regard the source of the adoptee's estate as determinative of the adoptive relative's right:

Arizona	Maryland	Oklahoma
Arkansas	Massachusetts	Virginia
Illinois	Michigan	Washington
Indiana	New Jersey	West Virginia
Maine	Ohio	

22 states have no provision on the subject.

IV. Intestacy rights as between adoptee and natural relatives.

The statutes generally contain no provision on this subject and an accurate or helpful analysis is impossible.

The foregoing analysis reveals a surprising degree of dissimilarity among the statutory provisions. It is difficult to find any two states with identical provisions governing succession by and from the adopted child. In fact, it would require a skilled mathematician to calculate the number of variations in the rules covering the several phases of the problem.

49. The District of Columbia statute could be construed to permit inheritance from all lineal adoptive relatives, whether ascendant or descendant.

50. The Massachusetts statute expressly denies the right to inherit from collateral adoptive kin, but makes no reference to ascendant lineal relatives of the adoptor.

51. Adoptive and natural relatives share equally.

52. See footnote 50, supra.

A few trends may be noted: An increasing number of states accord intestacy rights to the adoptive parents and relatives but there is still a reluctance to permit the adoptee to inherit from the adoptor's relatives. It is also possible to discern the beginning of a movement to deny the child's right to inherit from the natural parents and an even more pronounced tendency to cut off the natural parents' right to succeed to the intestate estate of the adoptee.

The most striking and general feature of the present-day provisions is the serious inadequacy in their coverage of the problem. In some respects in a few jurisdictions there have been improvements over the early statutes, but, generally speaking, the statutory provisions fail in their duty to state the law which shall govern in such circumstances. Where attempts have been made to deal more widely with the matter, the product has obviously suffered from the lack of skilled draftsmanship, studied consideration, and a genuine appreciation of the problem. It follows that the statutes furnish little guidance to either the layman or the lawyer who is searching for the law. The ambiguity and incompleteness of the provisions lead only to confusion, uncertainty and misunderstanding, and are provocative of unnecessary litigation.

The Law as It Has Been Developed by the Courts

In the absence of clear and positive legislative declarations of the law, the courts have been compelled to determine the law which shall govern intestate succession by and from an adopted child. Although the courts have attempted to describe their task as limited to an interpretation of the statutes, it must be recognized that the statutes are frequently inadequate and that the courts have, in reality, written the law to fill in the gaps left by the legislatures. This fact is further substantiated by the obviously different constructions which various courts have placed on statutes substantially similar in wording. It remains, therefore, to examine and analyze the law on this subject as it has been established by the courts.

The adoptee's right to inherit from the relatives of the adoptor:[53]—The success of the adoptee's efforts to share in the

53. The right to inherit from the adoptor is generally covered by statute (see statutory analysis, pp. 228-232), and there has been little or no litigation on this question.

intestate estate of his adoptive relatives has in practically every instance[54] depended upon the court's inclination to interpret the applicable statute either in a strict or liberal manner. The loosely-worded statutes are putty in the hands of judges and the court decisions have been molded by the judicial temper with which the problem has been approached.

The strict-construction courts have permitted the adoptee to inherit only from the adoptor and not from the adoptor's lineal or collateral kin, either directly or through the right of representation.[55] Inasmuch as it is reasonable to assume that both

54. In one or two cases the court has been able to ascertain the legislative intent from a study of the history of the statutory provision. See, e. g., In re Sauer's Estate (1934) 216 Wis. 289, 257 N. W. 28.

55. The following citations do not include cases which have been superseded by a complete and express statutory provision either granting or denying the right of inheritance from adoptive relatives. Cases involving wills are labelled and included where the decision hinged upon a construction of the intestacy statutes. The parenthetical insertions describe the relation between the decedent and the adoptee. *Fed.:* Shoemaker v. Newman (1933) 62 App. D. C. 120, 65 F. (2d) 208 [cert. den. (1933) 290 U. S. 656] (grandfather). *Cal.:* In re Pence's Estate (1931) 117 Cal. App. 323, 4 P. (2d) 202 (will case; uncle); In re Jones' Estate (1935) 3 Cal. App. (2d) P. (2d) 1071 (second cousin). *Colo.:* In re Warr's Estate (Colo. 1943) 137 P. (2d) 408. *Ky.:* Merritt v. Morton (1911) 143 Ky. 133, 136 S. W. 133 (grandparent); Sanders v. Adams (1939) 278 Ky. 24, 128 S. W. (2d) 223 (dictum in will case); Woods v. Crump (1940) 283 Ky. 675, 142 S. W. (2d) 680 (dictum in case involving a deed). *Mich.:* Moritz v. Callender (1939) 291 Mich. 190, 289 N. W. 126 (will case; uncle). *Mo.:* (The strict construction rule will apparently be applied to all cases where the adoption took place prior to the Missouri act of 1917.) Hockaday v. Lynn (1906) 200 Mo. 456, 98 S. W. 585 (uncle); McIntyre v. Hardesty (Mo. 1941) 149 S. W. (2d) 334 (will case; great-great-grandparent); Weber v. Griffiths (Mo. 1942) 159 S. W. (2d) 670 (sister). The language in two recent cases indicates that the Missouri courts may permit inheritance if the child was adopted pursuant to the 1917 act. (McIntyre v. Hardesty, supra, and St. Louis Union Trust Co. v. Hill (Mo. 1934) 76 S. W. (2d) 685. *N. Y.:* Kettell v. Baxter (1906) 50 Misc. 428, 100 N. Y. S. 529; In re Powell's Estate (1920) 112 Misc. 74, 183 N. Y. S. 939 (aunt); Hopkins v. Hopkins (1922) 202 App. Div. 606, 195 N. Y. S. 605 [aff'd, 236 N. Y. 545, 142 N. E. 277] (uncle); In re Brenner's Estate (1933) 149 Misc. 412, 267 N. Y. S. 765; In re Cuddeback's Will (1940) 174 Misc. 322, 20 N. Y. S. (2d) 862 (will case); cf. In re Hecker's Estate (1942) 178 Misc. 449, 33 N. Y. S. (2d) 365, wherein the court, as dictum in a case involving a will, stated that "the trend of the more recent decisions has been to extend rather than to restrict the right of inheritance of an adopted child." (In U. S. Trust Co. v. Hoyt (1915) 115 Misc. 663, 190 N. Y. S. 166 [aff'd by Ct. of App. (1918) 119 N. E. 1083] the New York court adopted a liberal approach, but in subsequent cases the courts have refused to follow it and in the Brenner case, supra, the Hoyt case was said to have little value as an authority.) *N. Car.:* Grimes v. Grimes (1935) 207 N. C. 778, 178 S. E. 573 (grandparent). *Ohio:* Quigley v. Mitchell (1884) 41 Ohio 375 (grandparent); Phillips v. McConica (1898) 59 Ohio 1, 51 N. E. 445 (will case; great-grandparent); Pickering v. Koesling (1928) 30 Ohio App. 201, 164 N. E. 537 (uncle); Southern Ohio Sav. Bank & T.

the courts and legislatures following this rule have been prompted by similar considerations, it is interesting to analyze the judicial attitude underlying this line of decisions.

The decisions seem to be attributable to a reverence for blood relationship. The common-law scheme of intestate succession was established on the principle of consanguinity and these courts regard consanguinity as so fundamental in the statutes of descent and distribution that it cannot be ignored unless a statute, by express language or inexorable implication, so directs. In one of the most cited cases on this subject[56] the judge stated that "the blood tie is the open sesame to unlock the treasure of inheritance" and that a stranger to the blood must be excluded.

In at least two jurisdictions,[57] the right to inherit property by reason of blood relationship has been exalted to the position of a natural right. It is therefore naturally given precedence over the so-called artificial right arising from an adoption. The Wisconsin court in the *Bradley* case referred to the consanguinity principle as "a tenet of justice, intuitively and generally recognized, and crystallized into forms of law by common consent,"[58] and denied the adoptee's claim to share in a four million dollar estate.[59]

It is common practice on the part of the strict-constructionist

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Co. v. Boyer (Ohio 1940) 31 N. E. (2d) 161 (dictum). *Okla.:* In re Captain's Estate (Okla. 1942) 130 P. (2d) 1002 (brother). Note however, the strong dissent of two judges. *Ore.:* In re Hayes' Estate (Ore. 1939) 86 P. (2d) 424 (will case; grandparent); Cf., In re Buell's Estate (Ore. 1941) 117 P. (2d) 832. *S. Dak.:* In re Eddin's Estate (S. D. 1938) 279 N. W. 244 (grandparent). *Tenn.:* Helms v. Elliott (1890) 89 Tenn. 446, 14 S. W. 930 (natural child of adoptor); Taylor v. Taylor (1931) 162 Tenn. 482, 40 S. W. (2d) 393 (uncle). *Texas:* Fletcher v. Persall (Tex. Civ. App. 1934) 75 S. W. (2d) 170 (uncle). *R. I.:* Batcheller-Durkee v. Batcheller (1916) 39 R. I. 45, 97 Atl. 378. *Utah:* In re Harrington's Estate (Utah 1938) 85 P. (2d) 630 (grandparent). *Vt.:* Moore v. Estate of Moore (1862) 35 Vt. 98 (uncle). *Wis.:* In re Bradley's Estate (1925) 185 Wis. 393, 201 N. W. 973 (uncle).

56. Hockaday v. Lynn (1906) 200 Mo. 456, 98 S. W. 585.

57. North Carolina [Grimes v. Grimes (1935) 207 N. C. 778, 178 S. E. 573] and Wisconsin [In re Bradley's Estate (1925) 185 Wis. 393, 201 N. W. 973].

58. (1925) 201 N. W. 973, 974. Wisconsin is practically the only state which persists in holding that the right to inherit property is a natural right which the legislature cannot destroy. This principle was enunciated in Nunnemacher v. State (1906) 129 Wis. 190, 108 N. W. 627.

59. The applicable statute provided that the adoptee should be deemed for purposes of inheritance and succession the same as if born in natural wedlock except that he should not be capable of taking property limited to heirs of the body.

courts to proceed on the theory that adoption is a contractual relationship.[60] From this premise it is reasoned that only the adopting parents are parties to the contract and that, although they have a perfect right to obligate themselves to make the child their heir, they are powerless to extend this right to permit the adoptee to inherit from persons not parties to the contract.

Moreover, these courts frequently resort to the rule of construction that statutes in derogation of the common law must be strictly construed.[61] It is indicative of the weakness of this argument that the courts are not consistent in urging its application. For example, the Wisconsin court in the *Bradley* case[62] admits that general provisions of adoption statutes should be liberally construed to carry out their beneficent purpose, but refuses to permit a liberal construction to divert the descent of property from its natural course. A Tennessee court earnestly contends that the statute should be liberally construed when the adoptee is seeking to inherit from the adoptor, but that the rule of strict construction should apply when the adoptee seeks to inherit from a relative of the adoptor.[63]

Although the "derogation of common law" rule has been used as a convenient argument by courts trying to justify a strict interpretation, its applicability to adoption cases is extremely questionable.

The strict-construction decisions presently constitute the weight of authority, but there is a growing list of courts that construe the statutes liberally and permit the adoptee to inherit from the adoptive relatives.[64] These courts have held that adop-

60. The contract theory is set forth in the following cases cited in footnote 55, supra. Merritt v. Morton (Ky.), Hockaday v. Lynn and Weber v. Griffiths (Mo.), In re Hayes' Estate. (Ore.), In re Eddin's Estate (S. D.), and In re Bradley's Estate (Wis.).

61. See, e. g., the opinions in the following cases cited in footnote 55, supra. Hockaday v. Lynn (Mo.), Grimes v. Grimes (N. C.), In re Captain's Estate (Okla.), In re Eddin's Estate (S. D.), Helms v. Elliott (Tenn.), and In re Bradley's Estate (Wis.).

62. (1925) 185 Wis. 393, 201 N. W. 973.

63. Marshall v. Marshall (Tenn. 1941) 156 S. W. (2d) 449, 452.

64. *Iowa:* Schick v. Howe (1908) 137 Iowa 249, 114 N. W. 916 (grandparent); McCune v. Oldham (1932) 213 Iowa 1221, 240 N. W. 678 (aunt). *Kan.:* Riley v. Day (1913) 88 Kan. 503, 129 Pac. 524 (grandparent); Denton v. Miller (1922) 110 Kan. 292, 203 Pac. 693 (uncle); In re Riemann's Estate (1927) 124 Kan. 539, 262 Pac. 16 (uncle). *Neb.:* In re Taylor's Estate (1939) 8 Neb. S. Ct. J. 639, 285 N. W. 538 (grandparent). *Pa.:* In re Cave's Estate (1937) 326 Pa. 358, 192 Atl. 460 (great-aunt). *Wash.:*

tion statutes, including the intestacy provisions, should be construed to effectuate the humane policy which prompted their enactment—the promotion of the welfare of the child. From this premise these courts reason that the legislature intended to give the adopted child the status of a natural child and all of the incidents of that status, including the capacity to inherit from lineal and collateral adoptive relatives as well as from the adoptor.

These courts refuse to follow the "derogation of common law" rule of construction.[65] As stated by the dissenting judge in a 1942 Oklahoma case, "principles of construction are out of place and pernicious if they are . . . sought to destroy the effect of a legislative enactment, and to warp it from the true and plain meaning of the legislature."[66]

It is significant that the liberal position is espoused chiefly by courts west of the Mississippi River.[67] Perhaps the peculiar geographical division can be explained, in part, by the fact that the principle of consanguinity did not take as firm a hold in the western states where pride was taken in an asserted freedom from "hide-bound tradition."

The judicial trend appears to be toward the liberal rule and a recognition of the adoptee's right to succeed to the estate of adoptive relatives. Even some of the strict-construction courts have been wavering. In a recent Ohio case,[68] for example, the court ridicules the idea, expressed in an earlier opinion,[69] to the effect that consanguinity is a sacred and unimpeachable principle. The North Carolina court in 1940 admitted that sentiment and concern with the humanities and social adjustments would dictate a different conclusion than that which it felt compelled to reach.[70] And a New York court has recently expressed itself to the effect that the trend of recent decisions has been to ex-

In re Masterson's Estate (1919) 108 Wash. 307, 183 Pac. 93 (natural child of adoptor); In re Waddell's Estate (1924) 131 Wash. 566, 230 Pac. 822 (uncle). *Wyo.:* In re Cadwell's Estate (1920) 26 Wyo. 412, 186 Pac. 499 (uncle). It should be noted that one of the strongest liberal opinions is that by the dissenting judges in In re Captain's Estate (Okla. 1942) 130 P. (2d) 1002, 1009. (The parenthetical notation in each case refers to the adoptive relation between the decedent and the adoptee.)

65. See, e. g., In re Riemann's Estate (1927) 124 Kan. 539, 262 Pac. 16.
66. In re Captain's Estate (Okla. 1942) 130 P. (2d) 1002, 1009.
67. See footnote 64, supra.
68. White v. Meyer (1940) 66 Ohio App. 549, 37 N. E. (2d) 546.
69. Phillips v. McConica (1898) 59 Ohio 1, 51 N. E. 445.
70. Ward v. Howard (1940) 217 N. C. 201, 7 S. E. (2d) 625, 629.

tend rather than to restrict the right of inheritance of an adopted child.[71]

The adoptee's right to inherit from natural parents and kin:[72]—In view of the split of authority on the question just considered, one would also expect to find a disagreement among the courts on the question involving the adoptee's right to succeed to the intestate estate of natural parents and kin. But the decisions evidence almost unanimous agreement among the courts. The generally applicable rule is that the adoption should not be held to deprive the adoptee of the right to inherit from natural relatives, unless there is an express statutory provision denying such right.[73]

Some courts contend that the natural course of descent between blood kindred should not be severed unless the legislature has clearly so directed;[74] other courts place emphasis upon the proposition that the adoptee, who is usually an infant when adopted, should not be deprived of the right to inherit inasmuch as his intelligent consent to the adoption could not have been secured;[75] and it is possible to find both of these positions taken

71. This was dictum by Surrogate Judge Foley in a case involving a will. In re Hecker's Estate (1942) 178 Misc. 449, 33 N. Y. S. (2d) 365.

72. The same rule is generally applicable whether the intestate be a natural parent or relative. But see the California situation, footnote 73, infra.

73. (Where express statute now covers the subject, earlier cases are omitted.) *Cal.:* In re Darling's Estate (1916) 173 Cal. 221, 159 Pac. 606, permitting inheritance from grandparent even though the statute expressly severs the right to inherit from parents. *Colo.:* In re Wilson's Estate (1934) 95 Colo. 159, 33 P. (2d) 969. *Iowa:* Wagner v. Varner (1879) 50 Iowa 532. *Kan.:* Dreyer v. Schrick (1919) 105 Kan. 495, 185 Pac. 30 (dictum): In re Bartram's Estate (1921) 109 Kan. 87, 198 Pac. 192. *Minn.:* Roberts v. Roberts (1924) 160 Minn. 140, 199 N. W. 581. *Miss.:* Sledge v. Floyd (1925) 139 Miss. 398, 104 So. 163, holding that, in the absence of a provision in the adoption decree, the right of inheritance will be allowed. *Mo.:* Clarkson v. Hatton (1898) 143 Mo. 47, 44 S. W. 761 (dictum). A Federal Court in Burnes v. Burnes (1904) 132 Fed. 485 [aff'd in 137 Fed. 781 (cert. den. 199 U. S. 605)] declared (dictum) such a rule to be the Missouri law. *N. Y.:* In re Landers' Estate (1917) 100 Misc. 635, 166 N. Y. S. 1036. (Every New York statute since 1887 has provided that the child's right of inheritance from his natural parents shall remain unaffected by the adoption. The Landers case held that the rule should be extended to permit the child to inherit from his natural kin. The rule is quoted with approval in In re Gourlay's Estate (1940) 173 Misc. 930, 19 N. Y. S. (2d) 122.) *S. Dak.:* Sorenson v. Churchill (1927) 51 S. D. 113, 212 N. W. 488. *Wash.:* In re Roderick's Estate (1930) 158 Wash. 377, 291 Pac. 325.

74. See, e. g., In re Roderick's Estate (1930) 158 Wash. 377, 291 Pac. 325.

75. See, e. g., Delano v. Bruerton (1889) 148 Mass. 619, 20 N. E. 308. This argument is associated, in some jurisdictions, with the idea that adoption is a contractual status and that precaution must be taken to protect the rights of the child who was not a party to the contract.

in the same opinion.[76] It therefore appears that in a case of this nature, both the consanguinity principle and the welfare-of-the-child theory can be used to reach the same conclusion, whereas they lead to conflicting decisions in a case where the adoptee seeks to inherit from adoptive relatives. This may explain the fact that the courts are in substantial agreement on the instant question.

Although the rule has the effect in practically every state of permitting inheritance from both natural and adoptive parents, the courts have not been bothered by this fact. They merely state that in the absence of statute there is no policy preventing dual inheritance.

An interesting problem arises where the child has been adopted by a natural relative. It is not uncommon for a child to be adopted by a natural grandparent, and upon the latter's intestate death, the courts have been called upon to decide whether the child is entitled to inherit, in his dual capacity, two distinct shares—one share as an adopted child, and the other as a natural grandchild.

Decisions in Colorado,[77], Iowa,[78] and Kansas[79] have sanctioned the child's right to take two separate shares. The Iowa and Kansas courts recognized the inequality resulting from such a decision, but concluded that it is created by statute and that exceptional cases of apparent hardship and inequality must occasionally occur. On the other hand, the Colorado court attempted to rationalize its decision by asserting that the grandparent could use either the medium of a will or the procedure of adoption to increase the normal intestate share of the grandchild. (This reasoning appears rather tenuous in view of the absence of any evidence to indicate that the child had been adopted for inheritance purposes.)

The contrary position has been taken by the courts in Indiana,[80] Massachusetts,[81] and Pennsylvania[82] as well as by a Fed-

76. See, e. g., In re Wilson's Estate and Sorenson v. Churchill, supra, fn. 73.

77. In re Wilson's Estate (1934) 95 Colo. 159, 33 P. (2d) 969.

78. Wagner v. Varner (1879) 50 Iowa 532.

79. In re Bartram's Estate (1921) 109 Kan. 87, 198 Pac. 192.

80. Billings v. Head (1916) 184 Ind. 361, 111 N. E. 177; Head v. Leak (1916) 61 Ind. App. 253, 111 N. E. 952.

81. Delano v. Bruerton (1889) 148 Mass. 619, 20 N. E. 308.

82. Morgan v. Reel (1905) 213 Pa. 81, 62 Atl. 253. Since this decision was rendered, the Pennsylvania statute has been amended to prohibit inheritance from natural kin. (See statutory analysis, pp. 228-232).

eral district court.[83] Although these courts sanction dual inheritance when the child is adopted by a stranger, they deny the right in cases where the adoptor is a natural relative. The attempts made to justify a different rule in the two situations have not been satisfactory,[84] and there is disagreement among these courts with respect to the one capacity in which the child should be permitted to inherit.[85] This problem will be difficult to handle as long as the courts continue to recognize the adoptee's right to inherit from both natural and adoptive relatives.

The concept of dual inheritance has one other implication which deserves brief consideration. A child once adopted is sometimes adopted a second time and it is necessary for the courts to pass upon the child's right to inherit from the first adoptor and, in some states, from the relatives of the first adoptor.

One group of courts has been influenced by the analogy provided by the rule which permits the adopted child to inherit from the natural parent and has decided that the child should inherit from the first adoptor.[86] This type of decision requires an acceptance of the view that the first adoption stands for all time unless formally annulled.

Contrariwise the courts in two jurisdictions have ruled that the second adoption automatically revokes and supersedes the first adoption and terminates all incidents (including inheritance rights) of any relationship that may have existed between the first adoptor and the adoptee.[87]

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83. Burnes v. Burnes (1904) 132 Fed. 485 (dictum).

84. The Indiana court dogmatically states that the legislature did not intend that an adopted child should ever inherit more than would a natural child of the adoptor. (Billings v. Head, supra, fn. 80) The Pennsylvania court reasoned that the act of adoption had the effect of transferring the child from the class of grandchildren to the class of children and that the former class became merged in the latter. (Supra, fn. 82) The Massachusetts decision recites that the general rule is designed to protect the infant's rights and that there is no need for such a saving provision in cases of this nature. Supra, fn. 81)

85. The Massachusetts rule permits inheritance only in the capacity of an adopted child, presumably because this generally results in the greater inheritance. (Supra, fn. 81) The Indiana rule, however, permits the child to inherit in whichever capacity will permit the greater inheritance. (Head v. Leak, supra, fn. 80)

86. See Patterson v. Browning (1896) 146 Ind. 160, 44 N. E. 993; Holmes v. Curl (1920) 189 Iowa 246, 178 N. W. 406; Dreyer v. Schrick (1916) 105 Kan. 495, 185 Pac. 30; Villier v. Watson's Adm'x (1916) 168 Ky. 631, 182 S. W. 869; In re Estate of Sutton (1925) 161 Minn. 426, 201 N. W. 925; In re Egley's Estate (Wash. 1943) 134 P. (2d) 943.

87. Michigan [In re Klapp's Estate (1917) 197 Mich. 615, 164 N. W. 881] and Oklahoma [In re Talley's Estate (1941) 188 Okla. 338, 109 P.

The foregoing paragraphs have been devoted to a consideration of the rule permitting dual inheritance and to a discussion of the satellite problems that have followed in its orbit. The rule could claim the distinction of unanimous approval by the courts but for a comparatively recent decision in New Hampshire wherein the Supreme Court of that state held that adoption terminates the right of the child to succeed to the intestate estate left by a natural relative.[88] In view of the fact that this decision involved the construction of a statute which was definitely subject to the contrary interpretation[89] and that it constitutes the only exception to the general rule, it merits brief special attention.

The court views adoption as effecting a complete change in status whereby natural relatives become strangers and others take their place. It relies principally upon the statutory provision which directs that the adopted child shall acquire the status of a natural child of the adopting parent.

In answer to the argument that the infant adoptee should not be deprived of the right to inherit from natural kin, the court states that such loss, if any, is more than offset by the total benefits and advantages accruing to the child as a result of the adoption. The purpose of adoption, says the court, is to afford the child the same opportunity enjoyed by other children and not to give the adopted child the undue advantage which results from the application of the rule of dual inheritance.

The New Hampshire decision marks a sharp and significant break from the general rule and suggests a new and fundamental approach to the problem. Perhaps it will serve as a nucleus for other decisions contrary to the present weight of authority.

(2d) 495]. Although a will was involved in the Oklahoma case, the adoptee was not mentioned in it and his right to inherit turned upon his right to claim the intestate share of an adopted child.

88. Young v. Bridges (1933) 86 N. H. 135, 165 Atl. 272. In Stamford Trust Co. v. Lockwood (1922) 98 Conn. 337, 119 Atl. 218, the Connecticut court rendered a decision which can be interpreted as opposing the dual-inheritance rule, but the case involves a will, and cannot be cited without qualification.

89. The applicable statute contained a provision governing the distribution of an intestate adoptee's estate in the event it included property received by gift "or inheritance" from the natural kin. This language could have been relied upon to indicate legislative recognition of a right on the part of the child to continue to inherit from the natural parents and kin. But the court construed this provision to have reference only to property inherited prior to adoption or property inherited from a testate estate.

Inheritance from the adoptee:—A logical extension of the majority judicial attitude expressed in the first of the two preceding sections would also call for a rule giving preference to natural kin over the adoptive relatives as intestate successors of the adoptee.[90] But the use of logical reasoning is misleading. The present alignment of authority indicates that the courts are in substantial agreement on the proposition that adoptive kin should be preferred.[91]

In this type of situation the courts have generally been influenced by the human aspects of the situation. Their decisions evidence a hostile attitude toward the demands of natural parents and kin who abandoned the child and disclaimed all duty and responsibility toward it, and sympathy for the claims of the adoptive parents and kin whose kindness and affection and whose expenditure of time, labor and money were directly or indirectly responsible for the fact that the adoptee left an estate to be distributed.

A few of the courts have in this connection considered the effect that the rule of law enunciated in their decisions might have upon the institution of adoption.[92] They refuse to sanction a rule permitting natural relatives to inherit the fruit of the adoptor's labor because they fear that such a rule would tend

90. The discussion in this section is predicated upon the assumption that the adoptee was not survived by lineal descendants and that provision had been made for the intestacy rights of a surviving spouse.

91. *Cal.:* In re Jobson's Estate (1912) 164 Cal. 312, 128 Pac. 938, permitting widow of adoptor to inherit but refusing to pass upon the rights of collateral adoptive relatives. *Ga.:* Alexander v. Lamar (1939) 188 Ga. 278, 3 S. E. (2d) 656, permitting inheritance by adoptive sister although statute precludes inheritance by adoptor. *Iowa:* In re Fitzgerald's Estate (1937) 223 Iowa 141, 272 N. W. 117, interpreting a slightly ambiguous statute. *Miss.:* Brewer v. Browning (1917) 115 Miss. 358, 76 So. 267. *Mo.:* Shepherd v. Murphy (1933) 332 Mo. 1176, 61 S. W. (2d) 746, distinguishing the earlier case of Reinders v. Koppelmann (1878) 68 Mo. 482. *Neb.:* In re Enyart's Estate (1928) 116 Neb. 450, 218 N. W. 89. *N. Y.:* Carpenter v. Buffalo General Electric Co. (1914) 213 N. Y. 101, 106 N. E. 1026; In re Hollstein's Estate (1937) 251 App. Div. 771, 295 N. Y. S. 598; In re Heye's Estate (1933) 149 Misc. 890, 269 N. Y. S. 530. *S. Dak.:* Calhoun v. Bryant (1911) 28 S. D. 266, 133 N. W. 266. *Wis.:* In re Hood's Estate (1931) 206 Wis. 227, 239 N. W. 448, upholding constitutionality of statute giving adoptive kin preferential claim. Contra: *N. Mex.:* Dodson v. Ward (1925) 31 N. M. 54, 240 Pac. 991, where the court followed the consanguinity principle. *N. Car.:* Edwards v. Yearby (1915) 168 N. C. 663, 85 S. E. 19. (Other cases have been decided on this point but they have been rendered obsolete by the enactment of express statutory provisions.)

92. See, e. g., Alexander v. Lamar (Ga.) and Shepherd v. Murphy (Mo.) ibid.

to discourage adoptions. This pragmatic approach could be more extensively used to advantage by legislatures as well as the courts in the consideration of other problems in this field.

Although few would quarrel with the majority rule on this question, it must be recognized that it is contrary in theory and result to the rule denying the adoptee's right to inherit from adoptive relatives.[93] When both rules prevail within a single jurisdiction, it becomes difficult, if not impossible, to reconcile them.[94] Although the courts deny the adoptee's right to inherit from the adoptive relatives because he is a stranger to the blood and not a party to the adoption contract, they conveniently forget these arguments when the case involves the adoptive relative's claim to share in the adoptee's intestate estate. The rules applicable in these two types of cases should be consistent and it is submitted that the relationship between them needs to be reexamined in many jurisdictions by either the courts or the legislatures.[95]

A survey of the court decisions leads to the inescapable conclusion that the courts have not been successful in bringing either order or certainty out of the confusion created by the statutory provisions. The decisions are conflicting between jurisdictions and even within given jurisdictions and few courts have evidenced an overall understanding or appreciation of the general problem. Unfortunately, the judicial talents have been dissipated in working out independent decisions in individual cases rather than employed in the formulation of integrated rules consistent with and in furtherance of the institution of adoption.

THE CONFLICT OF LAWS PROBLEM[96]

The extreme diversity among the statutes and decisions on this subject has created an interesting and important problem

93. See discussion in text, pp. 233-234, and cases cited in footnote 55.

94. This inconsistency arises as a result of court decisions in California, New York and South Dakota. (Compare case citations for these states in footnote 55 with those in footnote 91.) Missouri is not included because the Shepherd v. Murphy case cited in footnote 91 was decided under the terms of the 1917 Act whereas the cases cited in footnote 55 involve adoptions which took place under an earlier statute.

95. The inconsistency arises in some states (e. g. Wisconsin) from the express statutory provisions. See statutory analysis, supra, pp.

96. The purpose of this division is primarily to indicate the existence of the conflict of laws problem. No attempt will be made to present an exhaustive review of this aspect of the subject under consideration. For

in the conflict of laws. The rule is well established in the field of intestate succession that movables shall be distributed in accordance with the law of the decedent's domicil and that the descent of immovables shall be governed by the law of the state in which the land is situated.[97] Adoption, however, introduces a new variable and raises a question concerning the weight to be given to the law of the state of adoption.

To a limited extent the problem has received legislative attention,[98] but it has generally been one for the courts to solve. The basic issue to be decided by the courts is whether intestacy rights are incidental to the adoption status or whether they constitute an integral and fixed part of the status, which, when once created by one state, must be recognized by the law of a different state.

There are a few cases holding that the intestacy rights are a part of the adoptive status and should be controlled by the law of the state of adoption.[99] But the majority rule on the question favors the principle that intestacy rights are merely incidental to the adoption status.[100] As recently expressed by a Pennsylvania court, the full faith and credit clause requires only that a court recognize the adoption status of a child adopted in another state; it does not compel one state to recognize the law of a foreign state with respect to the effect of adoption on the scheme of intestate succession.[101]

In view of the fact that inheritance provisions developed as an incidental feature of the American law of adoption,[102] the prevailing rule appears sound. The minority rule would be pref-

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a more complete review of the cases, see Note (1942) 14 Miss. L. J. 269 and Note (1931) 73 A. L. R. 964.

97. See, e. g., 2 Beale, *Conflict of Laws* (1935) §245.1 (land) §303.2 (movables). This rule is also accepted by the American Law Institute. Restatement, *Conflict of Laws* (1934) §245 (land) §303 (movables). (1934) §247 (land), §305 (movables).

98. A few states have express statutes determining the intestacy rights of a child adopted in a foreign state. The subject does not merit extensive citations.

99. Shaver v. Nash (1930) 181 Ark. 1112, 29 S. W. (2d) 298; Slattery v. Hartford-Connecticut Trust Co. (1932) 115 Conn. 163, 161 Atl. 79; In re Sunderland (1882) 60 Iowa 732, 13 N. W. 655; Shick v. Howe (1908) 137 Iowa 249, 114 N. W. 916; Brewer v. Browning (1917) 115 Miss. 358, 76 So. 267.

100. See Note (1931) 73 A. L. R. 964, 973. The prevailing rule is approved by the American Law Institute. Restatement, *Conflict of Laws* (1934) sec. 247 (land), sec. 305 (movables).

101. In re Zoell's Estate (1942) 345 Pa. 413, 29 A. (2d) 31. Cf. Hood v. McGehee (1915) 237 U. S. 611.

102. See discussion of this point in text, supra, p. 232 and following.

erable only in the event it could be shown that the principal function of adoption is to serve as an inheritance device.

In addition to the foregoing problem, there is another question which deserves brief mention at this point. Oftentimes, an amendment of a statute causes a conflict between the provisions which governed at the time of adoption and those which are in effect at the time of the intestate's death. Although it is not the usual type of conflict of laws problem, a "conflict of laws in time" creates issues somewhat resembling those involved when the laws of two different jurisdictions are in conflict.

With only one exception, the courts have held that inheritance rights are merely an incident of the adoption status and that 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.[103] 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.[104]

The Missouri rule is unsound from two standpoints: (1) It overlooks the fact, just mentioned, that the American institution was established for a purpose other than to serve as an inheritance device. (2) It contravenes the well-established principle that no intestacy rights can arise prior to the death of the intestate.

A Proposed Uniform Codification of the Law

The legislatures and the courts have failed in their responsibility to provide just and adequate rules of law to cope with the intestacy problems created by the development of the American institution of adoption. The uncertainty and inequality evident in the law have frequently resulted in unjust, unanticipated, and unconscionable dispositions of intestate estates affected by an adoption.

As a consequence, the foresighted have been obliged to rely

103. The following citations are merely illustrative and do not include all authority on the point: Brooks Bank & Trust Co. v. Rorabacher (1934) 118 Conn. 202, 171 Atl. 655; In re Rasmussen's Estate (1911) 114 Minn. 324, 131 N. W. 325; Anderson v. French (1915) 77 N. H. 509, 93 Atl. 1042; Dodin v. Dodin (1897) 16 App. Div. 42, 44 N. Y. S. 800 [aff'd 162 N. Y. 635, 57 N. E. 1108]; In re Whitcomb's Will (1939) 170 Misc. 579, 10 N. Y. S. (2d) 824; Calhoun v. Bryant (1911) 28 S. D. 266, 133 N. W. 266; Hoch v. Hoch (Tex. Civ. App. 1942) 162 S. W. (2d) 433.

104. McIntyre v. Hardesty (Mo. 1941) 149 S. W. (2d) 334; Weber v. Griffiths (Mo. 1942) 159 S. W. (2d) 670.

upon wills or trust instruments to make certain that their estates will be properly distributed. In the absence of such precautionary measures, the interested claimants have too often found it necessary to engage in time-consuming and expensive litigation in order to determine their respective rights.[105] There is an urgent need for a comprehensive and uniform codification of intestacy provisions carefully and intelligently designed in order that they may work in harmony with and as an integral part of the American institution of adoption.

The drafting of such provisions requires an understanding of the present status of adoption as a societal institution. Although the function of the American institution of adoption has remained the same since its origin almost a century ago, its status has not remained constant.

The pioneering legislators who enacted the first adoption statutes did not envision the abuses that were to develop and the problems that were to arise from the new legislation, and few administrative safeguards were provided. Adoptions were generally effected through the medium of private contract or deed.[106] State supervision of adoption proceedings was almost unknown. No provision was made for case investigations and practically no steps were taken to insure the proper placement of the child. Records were either inadequate or non-existent and there was no requirement that the consent of the natural parents be secured.

In the absence of proper administrative supervision, adoption became contaminated by ignorant blundering and commercialism. Bootleg adoptions of bargain-counter babies became widespread and testified to the serious inadequacy of social regulation.[107]

Moreover, the conception of adoption as an institution created

105. One writer states that there were 87 reported court decisions on this subject in 32 jurisdictions during the 10 year period 1926-1937. [Brooks, *Adventuring in Adoption* (1939) 136.] To this figure must be added the hundreds of cases which never reach the volumes of reported cases.

106. This probably accounts for the development by the courts at an early date of the concept that adoption is a contractual status. They failed to look beyond the mere procedural formality by which the broader social status was created.

107. Knox, *The Family and the Law* (1941) 109. Prior to 1922 it is reported to have been a common practice in Virginia, for example, for commercial maternity homes to sell babies born in their institutions. Ricks, *Legal Aspects of Adoption* (1937) 4.

for the welfare of the child was a new one, and the general public had to be convinced that it differed from and offered something better than the apprenticeship and indenture systems.[108] Coupled with this initial prejudice was the unfavorable reputation which soon developed from the fact that the children were frequently misplaced. Oftentimes the child was unfit for adoption and more often the adoptors were unfit to undertake parental duties. Briefly stated, the institution of adoption was all right in theory but in practice it left much to be desired.

It was in this atmosphere that the currently-prevailing rules governing intestate succession by and from the adopted child, first developed. It is therefore not surprising to find a reluctance on the part of the legislatures and the courts to permit an adoption to upset the normal succession of intestate estates. Instead of holding that the consanguinity principle[109] should not be departed from unless there is clear statutory language, the courts during this period might have achieved the same result by a more realistic and persuasive argument to the effect that the adoption procedures were too questionable to merit a revision of the well-established common-law rules of intestate succession.

The situation today, however, presents a sharp contrast to that which existed when the intestacy rules were formulated. Through the reform activities of social agencies and the Federal Children's Bureau during the past twenty-five years, corrective and remedial legislation has been enacted in all but a few states to stamp out the above-mentioned abuses, and the social aspects of adoption legislation have been given new emphasis.

Adoptions by contract and deed have generally been discarded in favor of more formal and adequate judicial proceedings.[110]

108. Peck, *Adoption Laws in the United States* (1925) U. S. Dept. of Labor, Children's Bur. Pub. No. 148, p. 3.

109. The consanguinity principle had its origin during the feudal ages and at that time served as a useful means to an end. Its importance and utility as a guiding principle in the distribution of intestate estates has diminished. (Witness the gradual diappearance of the doctrine of ancestral estates in the law of intestate succession.) There should be no hesitancy to depart from it whenever it appears that another type of relationship is stronger than that created by blood-ties. One of the most illustrative instances in which the consanguinity principle has been departed from is in the case of husband-wife relationship where the marital status is generally recognized as creating stronger bonds than those which exist between certain collateral relatives.

110. The legislatures have gradually come to the realization that adoption is more than a contractual transaction and that it is an institution dealing with human values. (Peck, op. cit., supra, fn. 108). This legis-

In most states adoption has been placed under the supervision of courts or other state agencies equipped for social diagnosis, and child-placing agencies are now licenced and carefully regulated. There are statutory requirements for thorough pre-adoption case investigations to determine whether the child is physically and mentally fit for the prospective home and whether the adoptors are qualified to assume the responsibilities of parenthood. At the same time the rights of the natural parents are guarded by provisions making their consent a condition precedent to adoption in all but a few exceptional cases. Moreover, provision is generally made for a trial period of a few months prior to legal adoption.

Other incidental safeguards have also been provided. For example, adequate records of case histories are kept in files which are wisely designated as private, and advertising of and for children to be adopted has been prohibited.[111]

In other words, adoption no longer takes place by chance or through commercial dealings. The necessary administrative and supervisory procedures are now afforded and considerable care is taken to protect the interests not only of the child but of the natural and adoptive parents as well. One author, referring to adoptions, has said that "we need fear them no more than natural births, nor announce any different conclusions as to their outcome."[112]

The significant fact is that adoption has become a popular institution.[113] Foster home care has substantially replaced the care of dependent children by orphan homes and other state institutions.[114] In every state orphan asylums and other private or state agencies provide adoption services,[115] and it has been

lative development should serve to convince certain courts of the fundamental fallacy in deciding cases on the theory that they are dealing with a lifeless contract. But the false concept continues to survive in some jurisdictions. See, e. g., the recent Missouri case of Weber v. Griffiths (Mo. 1942) 159 S. W. (2d) 670, 674. Cf. Matter of Ziegler (1913) 82 Misc. 346, 143 N. Y. S. 562 [aff'd (1914) 161 App. Div. 589, 146 N. Y. S. 881].

111. More complete discussions concerning these recent developments in adoption legislation may be found in numerous sources. See, e. g., Clarke, *Social Legislation* (1940) 308: Heisterman, A Summary of Legislation on Adoption (1935) 9 Soc. Serv. Rev. 269; Brooks, *Adventuring in Adoption* (1939) 122-3.

112. Gallagher, *The Adopted Child* (1936) 70.

113. Pendleton, New Aims in Adoption (1930) 151 Ann. Amer. Academy 154, 161.

114. Grace Abbott on Adoption, 1 Ency. of Soc. Sci., 459, 462.

115. (May 15, 1939) 33 Time 39.

estimated that 16,000 children are adopted each year.[116] In fact, the demand for children to adopt has exceeded the supply.[117]

The present status of adoption has prompted one writer to describe it as "social birth."[118] The phrase is well chosen and aptly expresses the fact that the adopted child is now regarded as completely a part of the adoptor's family as if it had been born into the family. The relatives as well as the immediate family customarily accept the child into the family circle as a matter of course.

On the other side of the picture, adoption today results in a complete severance of all contacts between the adopted child and the natural family. The adoptee becomes such an integral part of the adoptive family that it is best for all concerned that all relationship with the natural family be discontinued. It is only the adoptive family which the child knows and, except for the private files of case histories, the identity and existence of natural kin are completely forgotten.

Adoption is today generally recognized as a procedure afforded by society whereby a new and satisfactory family status can be established for the benefit of a child who had the misfortune of being deprived of the family relationships normally provided by natural parents and their kin. In legal and social contemplation the child is taken from his natural family and made a member of a new family with full standing as though one of its blood.

When viewed against this realistic setting, the majority rules governing intestate succession by and from the adopted child appear ridiculously out of place and shamefully immodern. It is evident that the intestacy law has not kept pace with the growth of adoption on the American scene.

After reviewing the facts concerning the operation and status of adoption as a societal institution, the pattern to be followed in drafting the uniform and codified law becomes clear and well-defined. The provisions should unquestionably be designed pursuant to and in furtherance of the currently-prevailing social

116. Mackenzie, A Boom in Adoptions, The New York Times Magazine (Nov. 10, 1940) 6. The author's statement is based upon figures published by the Federal Children's Bureau.

117. Clarke, *Social Legislation* (1940) 308; Baylor & Monachesi, *The Rehabilitation of Children* (1939) 29.

118. Brooks, *Adventuring in Adoption* (1939) 132.

attitude that adoption effects a complete substitution of families. This requires the embodiment in statute form of the following scheme of intestate succession by and from the adopted child:

The adopted child and the adoptive parents and their lineal and collateral relatives should inherit from and through each other to the same extent and in the same manner as though the child were the natural child of the adoptor, and all intestate succession rights between the adopted child and the natural relatives and kin should be completely severed.[119]

APPENDIX

Statutory Provisions Governing Intestate Succession by and from the Adopted Child

Ala. Code (1940) tit. 27 §§5, 9.
Ariz. Code Ann. (1939) §§39-103, 27-208.
Ark. Stat. (Pope's Cum. Supp. 1942) §262.
Cal. Prob. Code (Deering, 1941) §257.
Colo. Stat. Ann. (1935) c. 4 §5.
Conn. Gen. Stat. (1935 Supp.) p. 689.
Del. Laws of 1937, c. 187, p. 622.
D. C. Code (1941) §16-205.
Fla. Stat. (1941) §731.30.
Ga. Laws of 1941, c. 74-4.
Idaho Code (1932) §§31-1108, 31-1109.
Ill. Rev. Stat. (1941) c. 3 §165; c. 4 §§8, 11.
Ind. Acts of 1941, c. 146 §§7, 8.
Iowa Code (1938) §§10501.6, 12017, 12027, 12028.
Kans. Gen. Stat. (1939 Supp.) §§59-507, 59-2103.
Ky. Rev. Stat. (Baldwin's, 1941) §§391.080, 405.200.
La. Gen. Stat. (Dart, 1939) §§4839.31, 9734.6.
Me. Rev. Stat. (1930) c. 80 §38.
Md. Code (Flack, 1939) art. 16 §81.
Mass. Ann. Laws (1933) c. 210 §7.
Mich. Comp. Laws (1940 Supp.) §§16289-2 (86), 16289-10 (5).
Minn. Stat. (Mason, 1927) §8630.
Miss. Code (1930) §358.
Mo. Rev. Stat. (1939) §9614.
Mont. Rev. Code (1935) §§5863-5864.
Neb. Comp. Stat. (1929) §43-109.
Nev. Comp. Laws (1931-1941 Supp.) §1065.04.
N. H. Rev. Laws (1942) c. 345 §5.

119. Express provision should, however, be made for three types of factual situations which are somewhat out of the ordinary: (1) When the child is adopted by a natural relative, he should be recognized for inheritance purposes only in the capacity as an adopted child and intestate succession by and from the child should proceed as though the child had been born to the adoptor. (2) When the adoptor is a stepparent, inheritance between the child and his adoptive relatives should be determined by the general rule outlined in the text, but the intestacy rights between the child and the natural family should not be severed. (3) When a child once adopted is adopted a second time, all inheritance rights between the child and the first adoptive family should be terminated as of the date of the second adoption.

N. J. Stat. Ann. (1939) §9: 3-9.
N. Mex. Stat. (1929) c. 2 §113.
N. Y. Cons. Laws (McKinney) Dom. Rela. Law §115.
N. Car. Code (1939) §§137(6), 191(6).
N. Dak. Comp. Laws (1913) §4448.
Ohio Code Ann. (1940) §10512-19.
Okla. Stat. (1941) tit. 10 §§52, 53, 56.
Ore. Comp. Laws (1940) §§63-407, 63-408.
Pa. Stat. (1936) tit. 20 §§101, 102; Laws of 1941, p. 424.
R. I. Gen. Laws (1938) c. 420 §§6, 7.
S. Car. Code of Laws (1942) §8679.
S. Dak. Code (1939) §14.0407.
Tenn. Code (1938) §9570.
Tex. Stat. Ann. (Vernon's Civil) arts. 46a (sec. 9), 2572.
Utah Rev. Stat. (1933) §§14-4-11, 14-4-12.
Vt. Laws of 1941, p. 61.
Va. Acts of 1940, p. 424.
Wash. Rev. Stat. (Remington, 1932) §1699.
W. Va. Acts of 1941, c. 27 §8.
Wis. Stat. (1939) §322.07.
Wyo. Rev. Stat. (1931) c. 20 §215.