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# Adoption -- The Problem of Decent and Distribution: A Need for Legislation

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## NOTES

### *Adoption*

#### THE PROBLEM OF DESCENT AND DISTRIBUTION: A NEED FOR LEGISLATION

### *Introduction*

Adoption in the United States is fast becoming an everyday remedy for childless couples desiring the companionship and joy of children in their homes. In 1948 it was estimated that petitions for adoption ran well over 50,000,<sup>1</sup> which fact is driving, and will drive, many complex problems to the offices of attorneys everywhere. The American Law Institute recognized the importance of this field in 1952, when it issued a monograph on Family Law in its series on continuing legal education.<sup>2</sup> An important question which is largely unanswered in this field concerns intestate succession. As the American Law Institute recognizes, it "is a fruitful source of litigation."<sup>3</sup>

### *A Concrete Example*

A typical situation in this field which will serve to illustrate the conclusion of the American Law Institute has recently been presented to the courts of Illinois. At the age of ten, in 1918, Victor Mueller was taken to Chicago from the State of Wisconsin and was immediately adopted by his aunt and uncle. Within two weeks he was home again with his natural parents in Wisconsin who, in 1920, readopted him. Victor never again visited or corresponded with his aunt or uncle. In 1936 the uncle died, and in 1952, the aunt passed away. In the probate court, the blood relatives of the childless aunt were adjudged to be her heirs; but on appeal the circuit court held that the re-adoption of Mueller did not alter his right to inherit from his first adoptive parents, and it reversed the probate court and held Victor to be the sole heir of the aunt.

The appellate court reinstated the probate court's ruling,<sup>4</sup> and appeal was taken to the Supreme Court of Illinois, as a case of first impression, on the issue of whether a child may inherit from successive sets of adoptive parents. In its decision, one justice dis-

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<sup>1</sup> LEAVY, *THE LAW OF ADOPTION IN ALL 48 STATES* (1948).

<sup>2</sup> WINNET & GIBSON, *FAMILY LAW* (1952).

<sup>3</sup> *Id.* at 53.

<sup>4</sup> *In re Leichtenberg's Estate*, 5 Ill. App. 2d 336, 125 N.E.2d 277 (1955).

senting, the court affirmed the appellate court and held Victor could not inherit as sole heir.<sup>5</sup>

The Illinois statutes applicable to adoption and intestate succession do not provide a "yes or no" answer,<sup>6</sup> so the court was left to decide the question with sparse legislative aid. This turned the problem into one of statutory interpretation and common sense. The court reviewed decisions from Kentucky, Kansas, Iowa, Washington, Arkansas and New York which held the child may inherit from the first adoptive parents. But the Illinois court felt that these cases were a "snow-balling" resulting from a wrong interpretation and extension of two rather early Indiana<sup>7</sup> and Kentucky<sup>8</sup> cases which allowed inheritance where the adoptive parents died prior to the second adoption. The minority view of Michigan and Oklahoma<sup>9</sup> disallowing inheritance presented a more practical view which the Illinois Supreme Court chose to follow. This latter view recognizes the fallacy in the reasoning of the majority of states that since adoption gives the child the rights of a natural child he is to be treated the same as a natural child. The majority fails to realize that inheritance is allowed from a child's natural parents because, regardless of the status of the child, the child is of their blood. On the other hand, the Illinois court argued that an adopted child cannot be the adopted child of successive parents at the same time, for when there is a new adoption the prior adoption with its rights and obligations is terminated. As a second ground, the right to inherit was disallowed on the basis of a strict interpretation of the Illinois statute on adoption.<sup>10</sup> The court felt that the legislature intended inheritance only in cases it specified on the theory that "... the enumeration of certain things in a statute implies the exclusion of all others."<sup>11</sup> A further practical reason was advanced due to the difficulty that could arise in a converse situation, where the child dies intestate with several sets of adoptive parents surviving. The court felt that a contrary result, in the

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<sup>5</sup> *In re Leichtenberg's Estate*, 131 N.E.2d 487 (Ill. 1956).

<sup>6</sup> ILL. ANN. STAT. c. 3, § 165 (Smith-Hurd Supp. 1955), merely provides that the child may inherit from his adoptive parents and their lineal and collateral kindred; and that the adoptive parent can inherit from the child to the exclusion of the child's natural parents, just as if the adoptee were a natural child. Further, the statute states the natural parents and natural collateral relatives of the child can inherit what the child received through them.

<sup>7</sup> *Patterson v. Browning*, 146 Ind. 160, 44 N.E. 993 (1896).

<sup>8</sup> *Russell's Adm'r v. Russell's Guardian*, 14 Ky. L. Rep. 236 (1892).

<sup>9</sup> *In re Carpenter's Estate*, 327 Mich. 195, 41 N.W.2d 349 (1950); *In re Klapp's Estate*, 197 Mich. 615, 164 N.W. 381 (1917); *In re Talley's Estate*, 188 Okla. 338, 109 P.2d 495 (1941).

<sup>10</sup> See note 6 *supra*.

<sup>11</sup> *In re Leichtenberg's Estate*, *supra* note 5, at 490.

case before it, would allow these several sets to acquire the child's estate, and hence there would result confusion in the heirship.

The dissenting justice, on the other hand, took the plausible view that the adoption statute is remedial in form and that a liberal construction should follow, since historically, Illinois legislative policy has been to give the child broad inheritance rights. Only by express limitation could the child be deprived of these rights. He felt that the child will not be given the equality of a natural child if he does not get the right to inherit from prior adoptive parents. The theory was advanced that adoption is precisely similar to the natural relation of parent and child, and a "natural" child never loses his right to inherit from his "natural" parents. Any other result, the justice said, is discrimination in contravention of what he called a consistent legislative policy to give equality.<sup>12</sup>

#### *The Dilemma of the Courts*

Clearly this case shows the dilemma into which the courts have been placed. They are asked by lawyers to settle a dispute which the statute does not cover. What can they do? Accept a strict interpretation of the statute because of the possibilities of difficulty that a contrary result might bring about in tracing heirship? Or are they *compelled* to accept a liberal rule as the dissent above pleads for, on the well known axiom that a remedial statute must be liberally interpreted? Why are courts placed in this position and where does the fault lie?

The purpose of this discussion is to illustrate how a case like the *Leichtenberg* case can be avoided by twelve or fifteen lines in the statutes of any state; fifteen lines that will prevent years of litigation and serious depletion of estates. This is the remedy, but the foundation of the problem is in the historical development of adoption in a common law system.

#### *The Status of the Law—Historical Development*

Adoption is a purely statutory creature, being unknown at common law,<sup>13</sup> and although it was present under the ancient civilizations, it has been borrowed by the common law from Roman law.<sup>14</sup> The first American statute was passed by Massachusetts in 1851;<sup>15</sup> England did not recognize adoption until 1926.<sup>16</sup> The importance of these statutes lies in the fact that

<sup>12</sup> *Id.* at 491.

<sup>13</sup> *In re Jaren's Adoption*, 223 Minn. 561, 27 N.W.2d 656, 660 (1947); *In re Holibaugh's Will*, 33 N.J. Super. 232, 109 A.2d 706, 708 (County Ct. 1954).

<sup>14</sup> PECK, *DOMESTIC RELATIONS* § 123 (3d ed. 1930); Kuhlmann, *Intestate Succession by and from the Adopted Child*, 28 WASH. U. L. Q. 221, 222 (1943).

<sup>15</sup> MASS. STAT. OF 1851, c. 324.

<sup>16</sup> The Adoption of Children Act, 1926, 16 & 17 Geo. 5, c. 29; see compiler's comment, 9 THE COMPLETE STAT. OF ENGLAND 827 (1929).

their purpose was to provide for the betterment of the child and society and not for heirship,<sup>17</sup> which can still be seen to-day.<sup>18</sup> As in any field of law, unless it is comprehensively covered difficulties will result.

*The Status of the Law — Case Law*

Over the years, nine examples of the shortcomings of the adoption statutes have appeared in regard to intestate succession in the state cases to give impetus to this need for legislation. They involve: (1) whether or not a child can inherit from his natural parents after he has been adopted;<sup>19</sup> (2) whether or not he can inherit from his natural relatives;<sup>20</sup> (3) whether or not he can succeed to the estate of his adoptive parents;<sup>21</sup> (4) or succeed to the estate of the lineal or collateral kindred of his adoptive parents;<sup>22</sup> (5) whether or not the child can inherit the

<sup>17</sup> Eggleston v. Landrum, 210 Miss. 645, 50 So.2d 364, 366 (1951); *In re Havsgord's Estate*, 34 S.D. 131, 147 N.W. 378, 379 (1914); Kuhlmann, *supra* note 14, at 223-4. The English act made no mention of intestate succession from the adopter, (1926) 16 & 17 Geo. 5, c. 29, § 5(2), nor did the Massachusetts act go beyond making the child a natural child for inheritance purposes, except he could not inherit property limited to heirs of the adopter's body or from the latter's collateral or lineal relatives. MASS. STAR. OF 1851, c. 324, § 6. The real purpose of these statutes was to give the children better chances for upbringing. MASS. STAR. OF 1851, c. 324, § 5.

<sup>18</sup> See: N.D. REV. CODE § 14-1111 (Supp. 1953), ". . . the child shall be deemed and taken to be the child of the petitioner or petitioners . . ." and § 14-1116 which provides ". . . the relation of parent and child shall be deemed to have come into existence as of the date [of the decree] . . ." which is the complete adoption law! S.D. CODE § 14.0407 (Supp. 1952), and UTAH CODE ANN. § 78-30-10 and 11 (1953), are to the effect that the legal relation of parent and child and the rights of that relationship exist between the adopters and the child; and no rights are left in the natural parents.

<sup>19</sup> *In re Kay's Estate*, 127 Mont. 172, 260 P.2d 391 (1953) (allowed); *Wailles v. Curators of Central College*, 363 Mo. 932, 254 S.W.2d 645 (1953) (denied).

<sup>20</sup> *In re Penfield's Estate*, 81 F. Supp. 622 (D.D.C. 1949) (allowed); *In re Ries' Estate*, 259 Wis. 453, 49 N.W.2d 483 (1951) (denied).

<sup>21</sup> It is stated in *Calhoun v. Bryant*, 28 S.D. 266, 133 N.W. 266, 271 (1911), that inheritance does not arise out of the parent and child relationship, whether a natural or adopted child, for inheritance is a creature of the statute. *Accord: In re Cuddeback's Will*, 174 Misc. 322, 20 N.Y.S.2d 862 (Surr. Ct. 1940); *In re Howlett's Estate*, 366 Pa. 293, 77 A.2d 390 (1951). Also, *In re Uihlein's Estate*, 269 Wis. 170, 69 N.W.2d 816 (1955), where an adopted child was not "issue" within the statute giving it the "legal status of a natural child" for inheritance from its adopted mother. *Compare with Scott v. Scott*, 247 Fed. 976 (D. Idaho 1917), where even though the statute specified "issue," a remedial act making the child a natural child *did* give the child the rights of an "heir of the body" without any exceptions.

<sup>22</sup> *In re Eddins' Estate*, 66 S.D. 109, 279 N.W. 244 (1938) (denied from grandfather by adoption). *Accord, Jacobs v. Schulmeyer*, 117 Ind. App. 275, 70 N.E.2d 435 (1947); *Phillips v. McConica*, 59 Ohio St. 1, 51 N.E. 445 (1898); *Pylman v. First Nat'l Bank of Beaumont*, 247 S.W.2d 580 (Tex. 1952) (denied since legal relation of parent and child is applicable only to

estate of his first adoptive parents when adopted a second time;<sup>23</sup> (6) whether or not a child can inherit in a dual capacity when adopted by a blood relative;<sup>24</sup> (7) whether or not he can inherit from the natural children of the adoptive parents;<sup>25</sup> (8) whether or not an adopted child is an "heir to the body" of his adoptive parents so as to be allowed to inherit,<sup>26</sup> and (9) what consequences to the child's estate if he dies without spouse or issue after the adoption.<sup>27</sup>

Much of the disagreement in the decisions in the above areas can be attributed to the problem of whether the courts should interpret vague statutes liberally as remedial statutes, or strictly as statutes in derogation of the common law. It is hoped that the subsequent discussion of three of the above fields will make the dilemma of the courts clearer and possibly give a solution to this seemingly irreconcilable conflict.

Although it is generally thought and stated that an adopted child

<sup>23</sup> *continued*

parent and child, not to collateral relatives). Only if the statute allows inheritance "through" the natural parents can the child so inherit. *In re Cave's Estate*, 326 Pa. 358, 192 Atl. 460 (1937). *But cf. Staley v. Honeyman*, 98 N.E.2d 429 (Ohio 1950), *aff'd*, 157 Ohio St. 61, 104 N.E.2d 172 (1952).

<sup>23</sup> *In re Myres' Estate*, 205 Misc. 880, 129 N.Y.S.2d 531 (Surr. Ct. 1954) (allowed); *In re Leichtenberg's Estate*, 131 N.E.2d 487 (Ill. 1956) (denied).

<sup>24</sup> *In re Benner's Estate*, 109 Utah 172, 166 P.2d 257 (1946) (allowed); *Morgan v. Reel*, 213 Pa. 81, 62 Atl. 253 (1905) (denied).

<sup>25</sup> *In O'Connell v. Powers*, 291 Mass. 153, 197 N.E. 162 (1935), and in *In re Masterson's Estate*, 108 Wash. 307, 183 Pac. 93 (1919), under statutes making the adopted child the legal child of the adoptive parents, the courts felt that under a liberal interpretation the adopted children could succeed to the estates of intestate natural children of the adopters. Under similar statutes a contrary result was reached in *Welch v. Funchess*, 220 Miss. 691, 71 So. 2d 783 (1954), the court stating that the adopters cannot make an heir for their kindred; and in *Wilson v. Anderson*, 232 N.C. 212, 59 S.E.2d 836 (1950), based on a strict interpretation of the statute creating a status unknown at common law. See also, *Batcheller-Durkee v. Batcheller*, 39 R.I. 45, 97 Atl. 378 (1916).

<sup>26</sup> *Scott v. Scott*, 247 Fed. 976 (D. Idaho 1917) (allowed); *Wheeling Dollar Sav. & Trust Co. v. Stewart*, 128 W. Va. 703, 37 S.E.2d 563 (1946) (denied).

<sup>27</sup> Where the statute established the legal relationship of parent and child, the adoptive parent succeeded to the intestate child's estate in *In re Havsgord's Estate*, 34 S.D. 131, 147 N.W. 378 (1914); and in *Calhoun v. Bryant*, 28 S.D. 266, 133 N.W. 266 (1911); but not in *Rumans v. Lighthizer*, 363 Mo. 125, 249 S.W.2d 397 (1952), where it went to the blood relatives of the child in preference to her adoptive mother. See *In re Fordor*, 202 Misc. 1100, 117 N.Y.S.2d 331, 333 (Surr. Ct. 1952), where the collateral relatives of the foster parents were held to be legal kin over the natural parents and relatives. *Contra*, *National Bank of Lima v. Hancock*, 85 Ohio App. 1, 88 N.E.2d 67 (1948).

never loses his right to inherit from his natural parents where there is no statute to the contrary,<sup>28</sup> there are two cases to the contrary.<sup>29</sup> These latter two cases give rise to serious consideration of the theory that a child never ceases to be the child of its natural parents. Today, with adoption becoming an everyday occurrence and children being raised from infancy as the child of the adopters, it seems that the interest that the child has in his natural parents' estates should be reconsidered.

The reasoning of the majority rule generally follows the theories that there is no statute present excluding the right, that adoption gives *additional* rights, and that consanguinity is a bond not easily broken, especially where the child does not consent;<sup>30</sup> or the reasoning merely follows blindly the decisions of early tribunals.<sup>31</sup> Further, to reach the result desired, one court invoked the doctrine of strict interpretation of the statute; because the statute did not exclude the child, the child could inherit.<sup>32</sup> Another court reached the same result by a liberal interpretation of a remedial statute!<sup>33</sup>

The minority view, on the other hand, looks at the statute — generally to the effect that all legal rights and duties as between natural parents and children cease on adoption — with the result that the statute is interpreted to mean what it says, the right ceases. Moreover, in making the child a natural child of the adoptive parents, Missouri and New Hampshire feel that the child should not get additional rights by adoption but only the rights of a natural child, the right to inherit solely from and through his "parents." This latter view would seem more in line with the modern social results of adoption which effect a complete severance of the relation between the natural parents and the child upon the finality of the decree. It must be remembered that the adoption statutes are for the benefit of the child and society, and generally

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<sup>28</sup> *Glanding v. Industrial Trust Co.*, 29 Del. Ch. 517, 46 A.2d 881, 888 (Sup. Ct. 1946); *In re Tilliski's Estate*, 390 Ill. 273, 61 N.E.2d 24 (1945); *In re Kay's Estate*, 127 Mont. 172, 260 P.2d 391 (1953).

<sup>29</sup> *Wailes v. Curators of Central College*, 363 Mo. 932, 254 S.W.2d 645 (1953); *Young v. Bridges*, 86 N.H. 135, 165 Atl. 272 (1933).

<sup>30</sup> *In re Tilliski's Estate*, and *In re Kay's Estate*, *supra* note 28; *Sorenson v. Churchill*, 51 S.D. 113, 212 N.W. 488 (1927); *In re Sauer's Estate*, 216 Wis. 289, 257 N.W. 28 (1934).

<sup>31</sup> *Roberts v. Roberts*, 160 Minn. 140, 199 N.W. 581 (1924); *In re Kay's Estate*, *supra* note 28.

<sup>32</sup> *In re Roderick's Estate*, 158 Wash. 377, 291 Pac. 325 (1930).

<sup>33</sup> *In re Tilliski's Estate*, *supra* note 28. Further confusion in the intestate succession field in Illinois is exemplified by the recent case in *In re Leichtenberg's Estate*, 131 N.E.2d 487 (Ill. 1956), wherein the Illinois Supreme Court used a strict interpretation of the statute to prevent a twice adopted child from inheriting from his first set of adoptive parents.

the adoptive parents are better able to be good parents than the natural parents.<sup>34</sup> Generally the child will get a greater inheritance from the adoptive parents than he would have gotten from his natural parents. Thus, the argument that the giving up of the child by the parents should not deprive him of his inheritance rights is pure idealism, not in line with everyday realism in this field. Recognizing this anachronism, fourteen jurisdictions now expressly prohibit the effect of this fiction by statutory fiat to the effect that once adopted, the child loses his right to inherit by intestacy from his natural parents.<sup>35</sup>

The second problem is one which was mentioned earlier. It is the problem of whether or not a child loses his right to inherit from a set of first adoptive parents by a subsequent adoption. By careful analysis, this problem should receive the same negative decision as the right to inherit from natural parents. For here, there is not even the argument of consanguinity. It would be unreasonable to give a child, the object of a second adoption, greater inheritance rights than the inheritance rights of a child who was the object of only one adoption.

Yet this problem is still with us in the absence of express statutory provisions, and again the courts have had to make the law with conflicting results. As a primary and self-evident statement, it is universally agreed that if the right to inherit vests in the child by reason of the death of the adoptive parent prior to a second adoption, the second adoption cannot divest the child of his right to inherit.<sup>36</sup> The conflict arises where the child is adopted a second time before the death of the first adoptive parent. A dictum in the case of *Patterson v. Browning*<sup>37</sup> summarily said that dual inheritance was allowable on the analogy of the right to inherit from the natural parent. The first case on the spe-

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<sup>34</sup> See excellent discussion in *In re Havsgord's Estate*, 34 S.D. 131, 147 N.W. 378 (1914).

<sup>35</sup> ARIZ. CODE ANN. § 27-207 (Supp. 1952); CAL. PROB. CODE ANN. § 257 (Deering Supp. 1955); CONN. GEN. STAT. § 6869 (1949); DEL. CODE ANN. tit. 13, § 920 (1953), D.C. CODE ANN. § 16-222 (Supp. 1955); HAWAII REV. LAWS § 12278 (1945); MINN. STAT. ANN. § 529.29 (Supp. 1954); Nev. Stat. 46th Sess. 1953, c. 332, § 16; N.J. STAT. ANN. § 9:3-30 (Supp. 1955); N.M. STAT. ANN. § 29-1-17 (1953); N.C. GEN. STAT. § 29-1 (Supp. 1955); OHIO REV. CODE ANN. § 3107.13 (Page 1954); PA. STAT. ANN. tit. 20, § 1.8 (Purdon 1950); VA. CODE ANN. § 63-358 (Supp. 1954).

<sup>36</sup> *Patterson v. Browning*, 146 Ind. 160, 44 N.E. 993 (1896); *Russell's Adm'r v. Russell's Guardian*, 14 Ky. L. Rep. 236 (1892); *In re Camp's Estate*, 131 Cal. 469, 63 Pac. 736 (1901); accepted in *In re Leichtenberg's Estate*, 131 N.E.2d 487 (Ill. 1956); and *In re Talley's Estate*, 188 Okla. 338, 109 P.2d 495 (1941).

<sup>37</sup> 146 Ind. 160, 44 N.E. 993, 994 (1896).



cific subject was *Villier v. Watson*,<sup>38</sup> which made the *Patterson* dictum law. (although not citing the latter case) on the basis that the second adoption merely changed the right of parental control, not the right of inheritance. No consent to loss of inheritance was given by the child. This case was followed by *Dreyer v. Schrick*,<sup>39</sup> which accepted the *Patterson* reasoning and also based its decision on the added ground that no statute prohibited dual inheritance. Cases in Arkansas,<sup>40</sup> Iowa,<sup>41</sup> Minnesota,<sup>42</sup> New York,<sup>43</sup> Washington<sup>44</sup> and Tennessee<sup>45</sup> followed this reasoning and allowed the child to inherit. Further, a Louisiana court<sup>46</sup> recently reached the same result solely on the ground that the right to inherit vests at adoption.

On the other hand, California,<sup>47</sup> Illinois,<sup>48</sup> Michigan,<sup>49</sup> Oklahoma<sup>50</sup> and the dissent in a 5-4 Washington decision<sup>51</sup> have taken an opposite view, mainly on the ground that there is a difference in relation between an adopted child and a natural child, so as to overcome the *Patterson* analogy. They felt that *two* inheritances are enough—one from natural parents and one from *one* set of adoptive parents. The discussion in the *Leichtenberg* case<sup>52</sup> illustrates that public policy dictates this result.<sup>53</sup> As seen from the discussion concerning the right and reason for not inheriting from

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<sup>38</sup> 168 Ky. 631, 182 S.W. 869 (1916). This case according to *In re Talley's Estate*, *supra* note 36, and *In re Leichtenberg's Estate*, *supra* note 36, reached this result solely on the basis of the *Russell* case, *supra* note 36. From the writer's reading of this case, the court reached its result by the reasoning just mentioned and *not* the *Russell* case.

<sup>39</sup> 105 Kan. 495, 185 Pac. 30 (1919).

<sup>40</sup> *Hawkins v. Hawkins*, 218 Ark. 423, 236 S.W.2d 733 (1951).

<sup>41</sup> *Holmes v. Curl*, 189 Iowa 246, 178 N.W. 406 (1920).

<sup>42</sup> *In re Sutton's Estate*, 161 Minn. 426, 201 N.W. 925 (1925).

<sup>43</sup> *In re Myres' Estate*, 205 Misc. 880, 129 N.Y.S.2d 531 (Surr. Ct. 1954).

<sup>44</sup> *In re Egley's Estate*, 16 Wash. 2d 681, 134 P.2d 943 (1943).

<sup>45</sup> *Coonrad v. Sailors*, 186 Tenn. 294, 209 S.W.2d 859 (1948).

<sup>46</sup> *Succession of Gambina*, 225 La. 674, 73 So. 2d 800 (1954).

<sup>47</sup> *In re Zaepfel's Estate*, 102 Cal. App. 2d 774, 228 P.2d 600 (1951); the court held under the predecessor of CAL. PROB. CODE ANN. § 257 (Deering Supp. 1955), that where the child could not inherit from the natural parent neither could he from a prior adopter, and further it disproved the reasoning of the *Sutton* case, note 42 *supra*, and stated that a second adoption severs all the rights, including inheritance, under the first.

<sup>48</sup> *In re Leichtenberg's Estate*, 131 N.E.2d 487 (Ill. 1956).

<sup>49</sup> *In re Carpenter's Estate*, 327 Mich. 195, 41 N.W.2d 349 (1950); *In re Klapp's Estate*, 197 Mich. 615, 164 N.W. 381 (1917).

<sup>50</sup> *In re Talley's Estate*, 188 Okla. 338, 109 P.2d 495 (1941).

<sup>51</sup> *In re Egley's Estate*, 16 Wash. 2d 681, 134 P.2d 943, 947 (1943).

<sup>52</sup> See note 48 *supra*.

<sup>53</sup> In this connection see a fine discussion in *In re Talley's Estate*, *supra* note 50, 109 P.2d at 498.

natural parents, the reasoning is doubly strong in this situation.<sup>54</sup>

The last problem, in this series, is whether an adopted child can inherit a dual share of his adoptive parent's estate when the adopter is a blood relative. The common occurrence is that upon the death of the child's parents a grandparent adopts him. Subsequently the grandparent dies intestate, with the typical intestate statute providing that each of the intestate's children take equally with the descendants of any deceased child taking that child's share. In this situation the child by the letter of the statute is entitled to two shares, *viz.*, the share through his deceased parent and a share as a legal child of the decedent. Again, by this loophole in the statutes, the courts have been presented with the problem of whether the child should take two shares because of this oversight by the legislature.

Here also there are conflicting decisions. One line of authority holds that the child can take two shares on the theory that, as seen in many cases in the general area, since the statute does not prohibit it; the child could take two shares;<sup>55</sup> or that adoption gives "additional rights."<sup>56</sup> But the dissent in *In re Benner's Estate*<sup>57</sup> hits the crux of the matter when it states that adoption is presumed to be more beneficial than the natural relation that did exist. After this presumption, however, the intent of legal adoption is to give equality with the status of a natural child, not to give the adopted child more. Therefore, any type of dual inheritance is inconsistent *per se*. This reasoning, as was the reasoning disallowing dual inheritance from natural and prior adoptive parents, seems to be much more in conformance with the present day sociological treatment of adoption as taking the place of, and being treated fully as, the natural relationship of parent and child.

#### *The Status of the Law—Statutory Provisions*

To date there is no statute which expressly covers all the problem areas mentioned earlier, but some do cover as many as

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<sup>54</sup> See note 47 *supra*.

<sup>55</sup> *In re Wilson's Estate*, 95 Colo. 159, 33 P.2d 969. (1934); *In re Benner's Estate*, 109 Utah 172, 166 P.2d 257. (1946).

<sup>56</sup> *Wagner v. Varner*, 50 Iowa 532 (1879); *In re Bartram's Estate*, 109 Kan. 87, 198 Pac. 192 (1921).

<sup>57</sup> 166 P.2d 257 at page 260 (1946). *Accord*, inheritance only as a natural child, *Delano v. Bruerton*, 148 Mass. 619, 20 N.E. 308 (1889); and *Morgan v. Reel*, 213 Pa. 81, 62 Atl. 253 (1905). A unique Indiana rule allows only one share — the largest one. *Billings v. Head*, 184 Ind. 361, 111 N.E. 177 (1916), and its companion case, *Head v. Leak*, 61 Ind. App. 253, 111 N.E. 952 (1916).

six points.<sup>58</sup> Other states are conspicuous by mentioning none.<sup>59</sup> The statutes of fifteen jurisdictions<sup>60</sup> allow an adopted child to inherit from his natural parents, while fourteen<sup>61</sup> forbid it. In eleven<sup>62</sup> an adopted child can inherit from other natural relatives, while in six<sup>63</sup> he cannot. In only Idaho, Montana, Nebraska, North Dakota, Oregon, South Dakota, Utah and Wyoming are there no express provisions allowing the adopted child to inherit from his adoptive parents, while the remaining forty-four jurisdictions grant the inheritance.<sup>64</sup> Fifteen jurisdictions<sup>65</sup> allow the

<sup>58</sup> Louisiana, Maine, Massachusetts, Pennsylvania, Vermont and Wisconsin. See notes 60-77 *infra*.

<sup>59</sup> Idaho, Montana, North Dakota, South Dakota, Utah and Wyoming. See notes 60-77 *infra*.

<sup>60</sup> ALA. CODE ANN. tit. 27, § 5 (1940); ARK. STAT. ANN. § 56-109 (1947); FLA. STAT. ANN. § 731.30 (Supp. 1954); IND. ANN. STAT. § 3-121 (Burns 1946); KY. REV. STAT. ANN. § 199.530 (Baldwin 1955); LA. CIV. CODE ANN. art. 214.4 (West 1952); ME. REV. STAT. ANN. c. 158, § 40 (1954); MD. ANN. CODE art. 16 § 86(b) (1951); MASS. ANN. LAWS c. 210, § 7 (1955); MICH. STAT. ANN. § 27.3178 (549) (Supp. 1955); N.Y. DOM. REL. LAW § 115; R.I. Pub. Laws 1955, c. 3483; TEX. PROB. CODE § 40 (1956); VT. REV. STAT. § 9954 (1947); WIS. STAT. § 322.07 (1953).

<sup>61</sup> See note 35 *supra*.

<sup>62</sup> ALA. CODE ANN. tit. 27, § 5 (1940); ARK. STAT. ANN. § 56-109 (1947); LA. CIV. CODE ANN. art. 214.3 (West 1952); ME. REV. STAT. ANN. c. 158, § 40 (1954); MD. ANN. CODE art. 16, § 86 (b) (1951); MASS. ANN. LAWS c. 210 § 7 (1955); MICH. STAT. ANN. § 27.3178 (549) (Supp. 1955); R.I. Pub. Laws 1955, c. 3483; TEX. PROB. CODE § 40 (1956); VT. REV. STAT. § 9954 (1947); WIS. STAT. § 322.07 (1953).

<sup>63</sup> CAL. PROB. CODE ANN. § 257 (Deering Supp. 1955); CONN. GEN. STAT. § 6869 (1949); DEL. CODE ANN. tit. 13, § 920 (1953); D. C. CODE ANN. § 16-222 (Supp. 1955); Nev. Stat. 46th Sess. 1953, c. 332, § 16; PA. STAT. ANN. tit. 20, § 1.8 (Purdon 1950).

<sup>64</sup> ALA. CODE ANN. tit. 27, § 5 (1940); ALASKA COMP. LAWS ANN. § 21-3-21 (1949); ARIZ. CODE ANN. § 27-207 (Supp. 1952); ARK. STAT. ANN. § 56-109 (1947); CAL. PROB. CODE ANN. § 257 (Deering Supp. 1955); COLO. REV. STAT. ANN. § 152-2-4 (1953); CONN. GEN. STAT. § 6869 (1949); DEL. CODE ANN. tit. 13, § 920 (1953); D.C. CODE ANN. § 16-222 (Supp. 1955); FLA. STAT. ANN. § 731.30 (Supp. 1954); GA. CODE ANN. § 74.414 (Supp. 1955); HAWAII REV. LAWS § 12278 (1945); ILL. ANN. STAT. c. 3, § 165 (Smith-Hurd Supp. 1955); IND. ANN. STAT. § 3-121 (Burns 1946); IOWA CODE ANN. § 600.6 (1950); KAN. GEN. STAT. ANN. §§ 59-501, 59-506 (1949); KY. REV. STAT. ANN. § 199.530 (Baldwin 1955); LA. CIV. CODE ANN. art. 214 (West 1952); ME. REV. STAT. ANN. c. 158, § 40 (1954); MD. ANN. CODE art. 93, § 142 (1951); MASS. ANN. LAWS c. 210, § 7 (1955); MICH. STAT. ANN. § 27.3178 (549) (Supp. 1955); MINN. STAT. ANN. § 259.29 (Supp. 1954); Miss. Laws Ex. Sess. 1955, c. 34; MO. ANN. STAT. § 453.090 (1952); Nev. Stat. 46th Sess. 1953, c. 332, § 16; N.H. REV. STAT. ANN. § 461:6 (1955); N.J. STAT. ANN. § 9:3-30 (Supp. 1955); N.M. STAT. ANN. § 29-1-17 (1953); N.Y. DOM. REL. LAW § 115; N.C. GEN. STAT. §§ 29-1, 48-23 (1950); OHIO REV. CODE § 3107.13 (Page 1954); OKLA. STAT. ANN. tit. 10, § 52 (1951); PA. STAT. ANN. tit. 20, § 1.8 (Purdon 1950); P.R. LAWS ANN. tit. 31, (Supp. 1955); TENN. CODE ANN. § 36-126 (Supp. 1955); TEX. PROB. CODE § 40 §§ 533, 2363 (1955); R.I. Pub. Laws 1955, c. 3483; S.C. CODE § 19-52.11

child to succeed to the estate of his adoptive kin, while seven do not.<sup>66</sup> Wisconsin allows inheritance from first adoptive parents while Massachusetts and New Jersey cut the inheritance off by the second adoption if it is not vested.<sup>67</sup> Where there is a question of dual capacity, the Indiana<sup>68</sup> statute follows its case law and allows the larger share, while Colorado<sup>69</sup> allows a choice of either. Illinois and Pennsylvania<sup>70</sup> follow the preferable view which allows inheritance only in the capacity of an adopted child, with Louisiana<sup>71</sup> merely requiring no dual inheritance. Eight states<sup>72</sup> direct that succession be allowed amongst the natural children and the adopted child. Missouri<sup>73</sup> expressly says that an adopted child takes as "an heir of the body," with four other states<sup>74</sup> allowing this result by other language, but seven states<sup>75</sup> prohibit an adopted child from taking any property limited to heirs of the adopter's body. Finally, a great diversity of language appears when the succession from an intestate child occurs. The general rule is that the child's estate goes to the adopters or their kin to the exclusion of the natural parents and relatives<sup>76</sup> with

<sup>64</sup> continued

(1956); VT. REV. STAT. § 9954 (1947); VA. CODE ANN. § 63-358 (Supp. 1954); WASH. REV. CODE §§ 11.04.020, 26.32.140 (1952); W. VA. CODE ANN. § 4759 (1955); WIS. STAT. § 322.07 (1953).

<sup>65</sup> Arkansas, Connecticut, Delaware, Illinois, Maryland, Michigan, Minnesota, Mississippi, Nevada, North Carolina, Oklahoma, Pennsylvania, Texas, Virginia and Wisconsin. See note 64 *supra*.

<sup>66</sup> CAL. PROB. CODE ANN. § 257 (Deering Supp. 1955); LA. CIV. CODE ANN. art. 214.2 (West 1952); ME. REV. STAT. ANN. c. 158, § 40 (1954); MASS. ANN. LAWS c. 210, § 7 (1955); R.I. Pub. Laws 1955, c. 3483; VT. REV. STAT. § 9954 (1947); W. VA. CODE ANN. § 4759 (1955).

<sup>67</sup> WIS. STAT. § 322.08 (1953); MASS. ANN. LAWS c. 210, § 7 (1955); N.J. STAT. ANN. §§ 9:3-18(f), 9:3-30 (Supp. 1955).

<sup>68</sup> IND. ANN. STAT. § 6-209 (Burns 1953).

<sup>69</sup> COLO. REV. STAT. ANN. § 152-2-4 (1953).

<sup>70</sup> ILL. STAT. ANN. c. 3, § 165 (Smith-Hurd Supp. 1955); PA. STAT. ANN. tit. 20, § 1.8 (Purdon 1950).

<sup>71</sup> LA. CIV. CODE ANN. art. 214.1 (West 1952).

<sup>72</sup> FLA. STAT. ANN. § 731.30 (Supp. 1954); Miss. Laws Ex. Sess. 1955, c. 34; N.J. STAT. ANN. § 9:3-30 (Supp. 1955); N.Y. DOM. REL. LAW § 115; S.C. CODE § 19-52.11 (Supp. 1955); TENN. CODE ANN. § 36-126 (Supp. 1955); VT. REV. STAT. § 9954 (1947); W. VA. CODE ANN. § 4759 (1955).

<sup>73</sup> MO. ANN. STAT. § 453.090 (1952).

<sup>74</sup> ARIZ. CODE ANN. § 27-207 (Supp. 1952) (full heir); FLA. STAT. ANN. § 731.30 (Supp. 1954) (lineal descendent); IND. ANN. STAT. § 3-121 (Burns 1946) (natural heir); WASH. REV. CODE § 26.32.140 (1952) (heir).

<sup>75</sup> ME. REV. STAT. ANN. c. 158, § 40 (1954); N.H. REV. STAT. ANN. § 461:6 (1955); OHIO REV. CODE § 3107.13 (Page 1954); OKLA. STAT. ANN. tit. 10, § 52 (1951); R.I. Pub. Laws 1955, c. 3483; VT. REV. STAT. § 9954 (1947); W. VA. CODE ANN. § 4759 (1955).

<sup>76</sup> ALASKA COMP. LAWS ANN. § 21-3-21 (1949); CAL. PROB. CODE ANN. § 257 (Deering Supp. 1955); CONN. GEN. STAT. § 6869 (1949); DEL. CODE ANN.

some variations.<sup>77</sup> Georgia<sup>78</sup> provides simply that the adopter cannot succeed, and Nebraska<sup>79</sup> merely specifies the natural parents cannot succeed.

A further statutory proviso that is common is to the effect that if the adopting parent is the spouse of a natural parent (a step-parent), the provisions in the statute for the extinguishment of the rights and duties of the natural relationship, including inheritance, shall not apply.<sup>80</sup> This saving clause is essential and advisable. Without it, under the letter of the law, the child could not inherit the parent's estate even though the parent was in fact still the natural parent.

### Conclusion

If capable of breakdown to a single point, the problem that the

<sup>76</sup> continued

tit. 13, § 920 (1953); D.C. CODE ANN. § 16-222 (Supp. 1955); FLA. STAT. ANN. § 731.30 (Supp. 1954) (parents only); HAWAII REV. LAWS § 12278 (1945) (parents only); ILL. ANN. STAT. c. 3, § 165 (Smith-Hurd Supp. 1955) (see, however, *infra* note 77); IOWA CODE ANN. §§ 600.6, 636.32, 636.42 (1950) (see, however, *infra* note 77); KAN. GEN. STAT. ANN. § 59-507 (1949); KY. REV. STAT. ANN. § 199.530 (Baldwin 1955); LA. CIV. CODE ANN. art. 214, 214.2, 214.5 (West 1952) (parents only); ME. REV. STAT. ANN. c. 158, § 40 (1954); MD. ANN. CODE art. 93 § 142 (1951); MICH. STAT. ANN. § 27.3178 (156) (Supp. 1955) (see, however, *infra* note 77); MINN. STAT. ANN. § 259.29 (Supp. 1954); MISS. LAWS EX. SESS. 1955. c. 34; MO. ANN. STAT. § 453.090 (1952); NEB. REV. STAT. § 43.111 (1952); NEV. STAT. 46th Sess. 1953, c. 332, § 16; N.J. STAT. ANN. § 9:3-30 (Supp. 1955); N.M. STAT. ANN. § 29-1-17 (1953); N.Y. DOM. REL. LAW § 115; N.C. GEN. STAT. §§ 29-1, 48-23 (1950); OHIO REV. CODE § 3107.13 (Page 1954); OKLA. STAT. ANN. tit. 10, § 53 (1951) (but only property taken by adopted child through adopting parents); ORE. REV. STAT. § 109.041 (1955); PA. STAT. ANN. tit. 20, § 1.8 (Purdon 1950); P.R. LAWS ANN. tit. 31, §§ 533, 2363 (1955); S.C. CODE § 19-52.11 (Supp. 1955); TENN. CODE ANN. § 36-126 (Supp. 1955) (but only property acquired after adoption); TEX. PROB. CODE § 40 (1956); VT. REV. STAT. § 9954 (1947); VA. CODE ANN. § 63-358 (Supp. 1954); WASH. REV. CODE § 26.32.140 (1952); W. VA. CODE ANN. § 4759 (1955).

<sup>77</sup> Provisions to the effect that property acquired from natural parents and relatives go back to them as if there were no adoption are found in: ILL. ANN. STAT. c. 3, § 165 (Smith-Hurd Supp. 1955); ME. REV. STAT. ANN. c. 158, § 40 (1954); MASS. ANN. LAWS c. 210, § 7 (1955); WIS. STAT. § 322.07 (1953). ARK. STAT. ANN. § 56-109 (1947), MICH. STAT. ANN. § 27.3178 (156) (Supp. 1955) (for realty) and N.H. REV. STAT. ANN. § 461:6 (1955), merely provide that such property returns to the natural parents. The Indiana and Iowa statutes send the property back to the natural parents and their heirs if the child has no heirs. IND. ANN. STAT. § 3-121 (Burns 1946); IOWA CODE ANN. § 636.43 (1950).

<sup>78</sup> GA. CODE ANN. § 74.414 (Supp. 1955).

<sup>79</sup> NEB. REV. STAT. § 43.111 (1952).

<sup>80</sup> See, as typical, D.C. CODE ANN. § 16-222 (Supp. 1955); N.J. STAT. ANN. § 9:3-30 (Supp. 1955); OHIO REV. CODE § 3107.13 (Page 1954); PA. STAT. ANN. tit. 20, § 1.8 (Purdon 1950).

courts are constantly straining to decide is whether the case before them should be treated in a liberal fashion, on the theory that the incomplete statute in force is a remedial enactment; or, on the other hand, should the problem be handled strictly with rules of construction such as *expressio unius est exclusio alterius*? Should the statute be read literally, or should a strict construction be required of statutes in derogation of the common law, thus ignoring the demands of modern day society? If the courts approach the problem on a case-to-case basis, looking at the result best for the child and society, they may be inconsistent in their reasoning.<sup>81</sup> That this irritant of the courts is present cannot be denied. There is a constant surge of cases. That this may become a tidal wave is foreseeable, with the increasing number of adoptions and the constant demand that has outweighed the supply, as has been proven by the rise of "black-market" babies. To cure this evil, the present litigation and the possible increase, as well as a great depletion of estates, the writer strongly feels the only solution is complete and comprehensive legislation that encompasses the legal problems and ideas of today.

#### *Solution*

As seen from the foregoing discussion the ideal statute would expressly cut off all the rights of the child to inherit from his natural parents and relatives under intestacy laws. This recommendation is based on three practical reasons: first, there is generally a complete severance from the natural parents, and the child benefits by this severance;<sup>82</sup> second, the child benefits by acquiring more suitable parents and their name and way of life; and, third, the law desires him to have the same, not more, than natural children. Dual inheritance would negate this purpose of the law.

Next, the statute should provide that the child be made a full child of the adoptive parents with the right to inherit from and through them, along with the parents' natural and other adopted children and their kin. Also, the child should be given the right to inherit as a "heir of the body."

Further, if the child dies, the laws of intestacy should apply, and the intestate should be treated as a natural child of the adoptive family and their kin for all purposes with no exceptions.

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<sup>81</sup> Contrast the liberal approach by the Illinois Supreme Court in *In re Tilliski's Estate*, 390 Ill. 273, 61 N.E.2d 24 (1945), and the strict approach in *In re Leichtenberg's Estate*, 131 N.E.2d 487 (Ill. 1956).

<sup>82</sup> See discussion of this point in *Wailes v. Curators of Central College*, 362 Mo. 932, 254 S.W.2d 645 (1953); *Young v. Bridges*, 86 N.H. 135, 165 Atl. 272 (1933); and by the dissenting justice in *In re Benner's Estate*, 109 Utah 172, 166 P.2d 257, 260 (1946).

Also, if the child were adopted by a blood relative, then the child should be considered only as "a child" and not as any other type of relative. These provisions should further be supplemented by a provision that adoption cuts off rights of inheritance from prior adoptive parents and their kin, unless vested before the latter adoption, just the same as in the case of natural parents.

A saving proviso, that the child loses no rights when adopted by a spouse of a natural parent, is also a necessary point as seen earlier.<sup>83</sup>

A statute containing these elements would be a great advance in this field of law and would make it modern and workable in application to people's daily lives. It must be reiterated that the absence of these elements is a shortcoming that the courts should not reasonably have to bear, for inheritance is a creature of the legislatures. They are duty-bound to make clear and complete any rights and mandates they give—not in general, vague and inadequate terms as they have done to date.

*James M. Corcoran, Jr.*

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<sup>83</sup> In support of these conclusions see similar recommendations thirteen years ago: Kuhlmann, *Intestate Succession By and From the Adopted Child*, 28 WASH. U.L.Q. 221 (1943).