DEFINITIONS OF CHILDREN AND DESCENDANTS: CONSTRUING AND DRAFTING WILLS AND TRUST DOCUMENTS

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I. INTRODUCTION

The family portrayed in *The Adventures of Ozzie and Harriet*, a television show broadcast in the 1950s and 1960s, is often used as the example of the prototypical American family: two parents of different sexes, married to each other, with two children born to the parents during the marriage.[1] Today a popular television show, *Modern Family*, portrays three families: (1) a family that looks similar to the family headed by Ozzie and Harriet Nelson, except that the family has three children, and the children are probably less well behaved than the Nelson boys; (2) a family that consists of a man married to his second wife, the wife, her child (his stepchild), and a child of the husband and wife; and (3) a family headed by two men in a committed relationship who have adopted a daughter.[2]

The model of the family portrayed in *Ozzie and Harriet* was never the reality for many American families, but the family reflected in this television show matches the idea of family reflected in inheritance laws and many estate planning documents.[3] As adoption became more common in the twentieth century, both laws and documents were modified to include adopted children,[4] but the statutory modifications did not always apply to older documents.[5] Further, the rules that included adopted children in the

1. Tinky "Dakota" Weisblat, *The Adventures of Ozzie and Harriet,* MUSEUM BROADCAST COMM., http://www.museum.tv/eotvsection.php?entrycode=adventuresof (last visited May 1, 2013).

2. *About the Show*, ABC, http://beta.abc.go.com/shows/modern-family/about-the-show (last visited May 1, 2013).

3. *See* discussion *infra* Part IV.

4. *See infra* Part III.A.

5. *See infra* Part IV.A and accompanying notes.

family tree assumed adoptions that created a parent-child relationship and not something else.[6]

The families portrayed in *Modern Family* reflect different forms of families. Both unmarried and married partners may have and bring with them a child or children from a prior marriage or relationship. Adoption is an accepted way of creating a parent-child relationship, and a stepparent-stepchild relationship may be close even if not legally recognized.

Beyond the families portrayed on television, other issues confront modern families in the United States. Many different-sex and same-sex partners live in long-term, unmarried relationships.[7] Families have children who are not genetically related to the adults raising them and are never legally adopted.[8] Stepfamilies create relationships that are never legally recognized.[9] Birth parents or their extended families may continue to maintain relationships with children adopted by others.[10] A surviving partner may use frozen gametes to create a child years after the death of the child's genetic parent.[11]

These changes to family structures matter to estate planners because legal definitions of "children" and "descendants" may determine who takes under a will or trust.[12] A testator making a distribution on his death to his own children will likely know who the children are and can plan accordingly, but an outright distribution under a will to the testator's descendants can raise questions if a deceased descendant's widow hopes to create a child using the descendant's frozen sperm or if a descendant adopted his adult partner without the testator's knowledge.[13] Even more critical, a definition of descendants may dictate which persons take the remainder interest in a trust after a life estate.[14] If a settlor has been dead for many years, determining the settlor's intent when she used the term descendant will be particularly difficult.[15]

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6. *See infra* Part V.B.1.

7. *Households and Families: 2010*, U.S. CENSUS BUREAU 15 (Apr. 2012), *available at* http://www.census.gov/prod/cen2010/briefs/c2010br-14.pdf.

8. *Id.* at 2.

9. *See infra* Part V.B.

10. David Cray, *Open Adoption: New Report Details Increase*, HUFFINGTON POST (Mar. 21, 2012, 7:40 AM), http://www.huffingtonpost.com/2012/03/21/open-adoption-increase_n_1371122.html.

11. Benjamin Carpenter, *A Chip off the Old Iceblock: How Cryopreservation Has Changed Estate Law, Why Attempts to Address the Issue Have Fallen Short, and How to Fix It*, 21 CORNELL J.L. & PUB. Pol'y 347, 358–59 (2011).

12. *See, e.g.*, UNIF. PROB. CODE § 1-201 (2010). Family law creates its own definitions of the parent-child relationship for purposes of custody and child support. *See, e.g.*, UNIF. PARENTAGE ACT (2002). The definitions are similar but not identical to those that apply for intestacy or trust construction. This article may point out some places in which the rules differ, but the article focuses on the definition of the parent-child relationship for inheritance purposes and does not attempt to distinguish between the definition for inheritance and the definition for custody and child support.

13. *See* Carpenter, *supra* note 11, at 401–04.

14. *See* UNIF. PROB. CODE § 2-708 (2010).

15. *See infra* Part II.

This article focuses on the definitions of children and descendants in estate planning documents. When a will or trust uses one of these terms without defining it, the default definition will most likely derive from the state intestacy statute.[16] A testator or settlor may not understand what the statutory definition provides and may assume a definition based on a personal understanding of the term.[17] Intestacy statutes differ from state to state and may be amended over time, making comprehension more difficult for lay individuals. Although a court may apply the intestacy statute in effect at the time and place a settlor created a trust, over time some changes may become so much a part of the definition that the court may apply the changes to documents that pre-date the changes.[18]

Given the differences in personal preferences and the continuing changes in the statutory definitions of children and descendants, providing definitions in estate planning documents has become both more important and more difficult. The need for personalized definitions reflects the fact that no one-size-fits-all definition of children or descendants will work. An estate planner must identify appropriate questions and provide different drafting solutions based on a client's preferences. Using one generic form will not provide the best outcome for all clients.

This article begins with an examination of the principles used to interpret language in a will or trust document.[19] The Restatement (Third) of Property provides rules of construction that may assist in interpretation and identify issues that can be addressed in estate planning documents.[20] The article next describes current intestacy statutes and examines the recent amendments to the definitions of parent and child in the Uniform Probate Code (UPC).[21] This section of the article considers issues involving children adopted into or out of a family and children produced through assisted reproductive technology, especially those conceived post-humously.[22]

Many existing documents do not reflect the changes in the way people now think about children and descendants, and even documents drafted with attention to the myriad issues raised in this article will not be able to address all future changes. With that in mind, the article reviews cases from Illinois and New York where parties asked courts to construe the term descendant in the face of changes in generally accepted meanings and changes in legal rules.[23]

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16. *See infra* Part II.A.
17. *See infra* Part II.
18. *See infra* text accompanying notes 169–216.
19. *See infra* Part II.
20. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 11.3 (2003).
21. *See infra* Part III.
22. *See infra* Part III.
23. *See infra* Part IV.

The article concludes with an examination of the questions estate planning lawyers should ask their clients based on the issues raised in the article.[24] This final section discusses ways that drafting can carry out the wishes of testators and settlors, if estate planning lawyers can determine those wishes.[25] An appendix provides examples of language to include in documents.[26]

II. INTERPRETING DISPOSITIVE DOCUMENTS

A. Donor's Intent

Donative freedom is a basic principle of American inheritance law.[27] Thus, a testator or settlor has the power to determine the fate of her property after death by executing a will or establishing a trust.[28] A few restrictions on donative freedom exist[29] and a share might be provided for a surviving spouse in spite of the donor's intentions,[30] but for the most part the donor can dictate the ultimate recipient of the property. The difficulty donors face is that words are slippery.[31] Ambiguities creep into documents in a variety of ways and if a term or phrase is ambiguous, a party may ask a court to construe the ambiguity.[32]

In determining the meaning of a term in a trust document,[33] a court will try to ascertain the settlor's intent.[34] To do so, the court can consider the document as a whole and can also consider extrinsic evidence.[35]

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24. *See infra* Part V.

25. *See infra* Part V.

26. *See infra* Appendix I.

27. *See* Lee-ford Tritt, *Liberating Estates Law From the Constraints of Copyright*, 38 RUTGERS L.J. 109, 111 (2006).

28. *See, e.g.*, UNIF. PROB. CODE § 2-101(a) (2010).

29. A will or trust cannot provide for an illegal purpose. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 (1999); RESTATEMENT (THIRD) OF TRUSTS § 29(a) (2003). A court may refuse to give effect to a provision that the court determines is against public policy. RESTATEMENT (THIRD) OF TRUSTS § 29(c), cmt. j. (2003). For example, a provision that required a beneficiary to divorce a spouse in order to receive a gift would likely be void as against public policy. *See id.*

30. Most common law states provide an elective share for a disinherited spouse. *See, e.g.*, UNIF. PROB. CODE § 2-201 (2010).

31. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 11.1(a) (2003).

32. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 11.2 (2003).

33. Interpretation questions arise in both wills and trust documents. This article discusses the issues primarily by reference to trusts because many of the issues will arise long after the settlor's death, whether a trust is created under a will or by agreement.

34. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 (2003).

35. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.2, cmt. b (2003). Trust law has long permitted extrinsic evidence in interpreting trusts. *Id.* Although the comment says that the plain meaning rule is outdated and that a court should consider extrinsic evidence whether or not a term is ambiguous, some courts continue to apply the plain meaning rule, which states that a court can consider extrinsic evidence only if the terms of the trust are ambiguous. *Id.*; RESTATEMENT (THIRD) OF TRUSTS § 21, cmt. A (2003). In contrast, probate law has relied on the

Extrinsic evidence might provide information about how the settlor viewed family members and that information could give an understanding of the use of terms in the document. In a document drafted by a lawyer, the legal meaning of terms used will be assumed.[36] If evidence that the settlor intended a different meaning exists, the settlor's intent can inform the understanding of the term, but if no evidence exists, the "customary legal connotations"[37] will apply in an interpretation of the terms.[38]

For terms like child and descendant, a court can usually find the legal meaning by referring to intestacy law.[39] A court will look to the statutes in place at the time the donor created the document and consider any cases interpreting those statutes.[40] Thus, in thinking about using those terms in documents, an understanding of current intestacy law is crucial. The difficulty is that intestacy law is not static.[41] In recent years changes to the definitions of child and descendants have occurred, and more changes are likely.[42]

Before examining the current state of intestacy statutes, a review of constructional rules and preferences will be helpful. A court may use rules of construction and preferences to guide its interpretation of a document.[43] If the rules and preferences set forth in the Restatement (Third) of Property differ from the state's intestacy statutes then the court may instead use the intestacy statutes to guide its interpretation, assuming that the settlor had executed the document in that state.[44] A number of differences exist between the Restatement's articulation of rules of construction and the intestacy laws in effect in many states, suggesting that, in some respects, the Restatement may be aspirational rather than a reflection of existing law. A court may use either the Restatement or the state's intestacy statute as

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written document unless the words are ambiguous. *See, e.g.*, Carter v. Carter, 965 N.E.2d 1146, 1152 (2012) ("Where the trust contains language that is unambiguous and clear, the intent must be ascertained from that language; extrinsic evidence may be admitted to aid the interpretation only if the document is ambiguous.").

36. § 10.2, cmt. e.

37. *Id.*

38. *See id.*

39. *See id.* Many state statutes provide that the terms will be interpreted as provided in the intestacy statutes. *See* UNIF. PROB. CODE § 2-705(a) (2010).

40. *See infra* Part IV.A (discussing Illinois cases applying Illinois statutes to the term "descendants").

41. *See* MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE 238–40 (1989); Peter J. Harrington, Comment, *Untying the Knot: Extending Intestacy Benefits to Non-Traditional Families by Severing the Link to Marriage*, 25 J. C.R. & ECON. DEV. 323, 329–35 (2011).

42. *See, e.g.*, COLO. REV. STAT. ANN. §§ 15-11-115 to 15-11-122 (2012). Colorado recently adopted revisions to its intestacy definitions of child and descendant based on revisions to the Uniform Probate Code. *Id.*

43. *See* Richard F. Storrow, *Judicial Discretion and the Disappearing Distinction Between Will Interpretation and Construction*, 56 CASE W. RES. L. REV. 65, 80–82 (2005).

44. *Compare In re* Martin B., 841 N.Y.S. 2d 207, 211 (Sur. Ct. 2007) (citing the Restatement) *with* Cont'l Bank v. Herguth, 617 N.E. 2d 852, 854 (1993) (citing the Illinois intestacy statute).

guidance, depending on which one helps to determine a construction that appears more likely to be in keeping with the settlor's intent.[45]

B. Ambiguity

If the meaning of a term in a document is ambiguous, a number of rules of construction and constructional preferences will assist the court in construing the term.[46] These rules and preferences provide "generalized intuitions about donors' intentions."[47] A lawyer drafting a trust will attempt to make the settlor's intent clear but terms like children and descendant, which may seem to have a clear meaning, may become ambiguous as family relationships and legal rules change.[48] For example, does the term descendant include a nonmarital grandchild or a grandchild who was adopted out of the family of the child of the settlor? Does the term include a grandchild adopted as an adult or a child conceived after the death of the parent who was a child of the settlor? An ambiguity arises if extrinsic evidence shows that the meaning of a term may be uncertain.[49] The rules of construction and constructional preferences may then be used to interpret the terms if additional evidence of the settlor's intent is not available or is insufficient.[50] An exploration of these rules and preferences is useful to provide information about the tools a court might use to interpret a term and also to indicate the difficulty of drafting a definition of these terms that will work for all settlors.

1. Rules of Construction

The Restatement (Third) of Property describes several rules of construction in connection with the terms children and descendants, both of which create class gifts when used.[51] Under the Restatement, a rule of construction will control the interpretation unless evidence shows that the donor intended a different meaning.[52] When that evidence creates further ambiguity, constructional preferences may help.[53]

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45. *Id*.

46. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 11.3 (2003). A rule of construction controls the meaning of a term if the rule applies and the settlor did not provide other evidence as to the settlor's meaning. If the settlor provided other evidence but the meaning is still unclear, constructional preferences may be used to determine the meaning. *Id.*

47. § 11.3, cmt. d.

48. *See supra* Part I.

49. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 11.1 (2003).

50. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 11.2 (2003).

51. *Id*. at Introductory Note, Ch. 14. A "class gift" is one that identifies members of a group by the use of a term to refer to the "class." *Id.*

52. § 11.3(a).

53. § 11.3(a)–(b).

a. Adopted Children—Inheritance from Adoptive Parent and Family

The Restatement (Third) of Property includes a rule of construction for determining whether an adopted child is included in the terms children or descendants.[54] The rule treats an adopted child as the child of the adopting parent for purposes of construing the adopting parent's estate planning documents.[55] The rule treats an adopted child as the child of the adopting parent for purposes of construing someone else's dispositive document only if: "(A) the adoption took place before the child reached the age of majority; or (B) the adopting parent: (i) functioned as a parent of the child before the child reached the age of majority; or (ii) was the child's stepparent or foster parent."[56]

Although the Restatement (Third) provides this guidance as a rule of construction, a state statute may provide that the terms children and descendants are instead construed according to intestacy rules.[57] The 2008 Amendments to the UPC (2008 UPC Amendments) track the Restatement's rule of construction,[58] but many state statutes do not.[59] For example, the Oregon statute provides that an adopted child will be included if the child was adopted as a minor or lived as a member of the household of the adopting parent while a minor.[60] The Oregon statute would not include a stepchild who did not live with the adopting stepparent as a minor.[61] Further, the Restatement's rule of construction would include as a parent someone who "functioned as a parent" without requiring that the child live in the household with the parent.[62] Other factors can be considered,

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54. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 14.5 (2003).

55. § 14.5(1).

56. § 14.5(2).

57. UNIF. PROB. CODE § 2-705(a) (2010).

58. § 2-705(f).

59. *See infra* note 60 and accompanying text. In 2008, the Uniform Law Commission approved amendments to the UPC's definition of parent and child for intestacy purposes. *See generally* Susan N. Gary, *We Are Family: The Definition of Parent and Child for Succession Purposes*, 34 ACTEC J. 171 (2008); Sheldon F. Kurtz & Lawrence W. Waggoner, *The UPC Addresses the Class-Gift and Intestacy Rights of Children of Assisted Reproduction Technologies*, 35 ACTEC J. 30 (2009); Lee-Ford Tritt, *Sperms and Estates: An Unadulterated Functionally Based Approach to Parent-Child Property Succession*, 62 SMU L. REV. 367, 407–13 (2009); Lee-Ford Tritt, *Technical Correction or Tectonic Shift: Competing Default Rule Theories Under the New Uniform Probate Code*, 61 ALA. L. REV. 273, 300–12 (2010). Although few states have adopted the changes at this time, in the future states may adopt some or all of these amendments. More importantly for the purposes of this article, even if intestacy statutes themselves do not incorporate all the amendments, the provisions provide ideas for how to address the definition of child in estate planning documents.

60. OR. REV. STAT. § 112.195 (2011).

61. *Id. See also* 755 ILL. COMP. STAT. 5/2-4(a) (2012). Illinois provides that for purposes of inheritance from someone other than the adoptive parent, the adopted child will be considered a descendant or collateral relative through the adoptive parent unless the child is adopted after age 18 and "never resided with the adopting parent before attaining the age of 18 years. . . ." *Id.*

62. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 14.5(2) (2010), Reporter's Note 5 (citing Principles of the Law of Family Dissolution: Analysis and Recommendations

including factors such as "providing moral and ethical guidance," "providing economic support," and "participating in decisionmaking regarding the child's welfare."[63]

b. Adoption—Continued Inheritance from Genetic Parents

A second rule of construction states that an adopted child will continue to inherit from the child's genetic parents if the child is adopted by: (1) a spouse or domestic partner of a genetic parent; (2) a relative of a genetic parent or the spouse or domestic partner of a relative of a genetic parent; (3) someone nominated by a deceased genetic parent to be the child's guardian; or (4) anyone who adopts the child after the death of a genetic parent if the child "does not subsequently become estranged" from the genetic family.[64] As the article will discuss when reviewing the current state of intestacy statutes, this rule of construction does not track intestacy laws in several respects.[65]

c. Nonmarital Children

A third rule of construction relates to nonmarital children. Such children are children of their genetic parents but will be included in a class gift established by someone other than a genetic parent only if: (1) the genetic parent functioned as the child's parent; (2) a grandparent or descendant of a grandparent of the genetic parent functioned as the child's parent; (3) a spouse or domestic partner of a genetic parent, grandparent, or descendant of a grandparent functioned as a parent; or (4) the genetic parent intended to function as a parent "but an event, such as death or incapacity, intervened to prevent the genetic parent from functioning in that capacity."[66] Thus, a nonmarital child will be considered a descendant of the genetic parent's parent (the child's grandparent), as long as the grandchild lived with the genetic parent or with a relative like an aunt or uncle.

d. Children Conceived Using Assisted Reproductive Technology

A final rule of construction deals with a child conceived using assisted reproductive technology (ART) whose birth mother did not act as a surrogate.[67] In this situation, the child's parents include the birth mother

§ 2.03(3)). A comment refers to factors listed in the Principles of the Law of Family Dissolution and while those factors include custodial responsibility, the Principles explain that "[i]t usually includes, but does not necessarily require, residential or overnight responsibility." *Id.*

63. *Id.*

64. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 14.6 (2003).

65. *See infra* Part III.

66. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 14.7(2) (2003).

67. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 14.8 (2003).

and any person who consented to the ART with the intent to become a parent to the child.[68] The intent to parent the child can be shown by a signed writing or by evidence that the person functioned as a parent "within a reasonable time after the child's birth" or "intended to function as the child's other parent within a reasonable time after the child's birth but was prevented from doing so by an event such as death or incapacity."[69] If the child was conceived posthumously, the decedent's intent to be treated as a parent must be shown by clear and convincing evidence.[70]

2. Constructional Preferences

To construe a document in the way most likely to follow a particular settlor's intent, the foundational preference in construing an ambiguity is for a meaning "that is more in accord with common intention than other plausible constructions."[71] If a general understanding of a term exists, the settlor is deemed to have understood and intended the use of the term in this way, at least if no evidence indicates otherwise.[72] The preference for finding a common intention guides the construction of the terms child and descendant.[73]

The Restatement lists a number of constructional preferences derived from this foundational preference, including a preference for a construction that is more in accord with public policy than other constructions.[74] As public policy changes, for example, to include adopted children as members of the adoptive family, the change in public policy may affect a document drafted many years earlier.[75] The Restatement also notes a preference for a "construction that favors family members over non-family members."[76] That preference raises interesting issues when the question is whether someone is a family member.

III. CURRENT INTESTACY LAW

If a document does not define child or descendant for purposes of a will or trust and if a lawyer drafted the document, a court will typically use

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68. *Id.*
69. § 14.8(2).
70. § 14.8(2)(B)(iii).
71. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 11.3(c) (2003).
72. § 11.3(a).
73. § 11.3(c).
74. § 11.3(c)(6).
75. A change in public policy influenced the decisions in Illinois that concluded that an adopted child should be considered a descendant. *See infra* text accompanying notes 169–216. The comments to the Restatement note that the preferences for a construction that carries out common intention and a construction that accords with public policy have led to the rule of construction that adopted children are included in class gifts, unless evidence shows a different intention. § 11.3, cmt. b.
76. § 11.3(c)(3).

the relevant state's intestacy statute to provide a definition for the term.[77] A court will usually look to the statute in effect at the time the will or trust was executed.[78] The use of the intestacy statutes for definitions also follows the Restatement's constructional preferences because the intestacy statutes presumably follow both common intent and public policy.[79] As already noted, however, the intestacy statutes do not always follow the Restatement's rules of construction.[80] A court may be more inclined to follow the state's intestacy statutes but if a document is ambiguous in a way that calls into question the application of the intestacy statutes, a court may choose to follow the Restatement's rules of construction instead.[81]

Because intestacy statutes provide the default rules, a review of current intestacy laws concerning children and descendants is useful.[82] These rules also provide examples of different ways to draft documents that include or exclude children or descendants.[83] In the discussion that follows, the parent-child relationship described is the relationship that applies for intestacy purposes. Family law statutes may reach a different result with respect to who will be treated as a parent or child for purposes of custody or support.[84] An intestacy statute may deem someone a parent who was not a legal parent under the family law statute for that state.[85] This article does not attempt to describe the differences between intestacy rules and the rules applicable for family law purposes.

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77. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 (2003).

78. *See infra* Part IV.A (describing Illinois cases and a statute that ultimately required an interpretation based on a revised statutory definition).

79. § 11.3 cmt. b.

80. *See supra* Parts II–III.

81. The court in *In re Martin B.* found the Restatement's rule of construction more closely aligned with the settlor's intent than the New York intestacy statute. *In re* Martin B., 841 N.Y.S.2d 207, 211 (Sur. Ct. 2007). *See infra* text accompanying notes 129–47.

82. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS Ch. 2, intro. Note (2003).

83. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.5 (2003).

84. A situation reported in the New York Times describes an unmarried, different-sex couple who arranged to have a baby using in vitro fertilization. Ginia Bellafante, *When the Law Says a Parent Isn't a Parent*, N.Y. TIMES (Feb. 2, 2013), http://www.nytimes.com/2013/02/03/nyregion/a-custody-battle-after-the-law-says-a-parent-isnt-a-parent.html?_r=o. The couple used a donor's sperm and a child was born. *Id.* The couple raised the child together from July 2012, until mid-December when the mother took the baby to New Jersey. *Id.* She rented an apartment there and committed suicide on New Year's Day. *Id.* The baby was taken by child protective services and the baby's intended father filed a petition for custody. *Id.* Under the laws of New York, he is not the baby's legal father because he is not genetically related to the baby and had not taken steps to adopt the baby before the mother's death. *Id.* Under the UPC's intestacy rules, he is likely considered the baby's father because he functioned as a parent after the baby's birth and would continue to function as a parent but was prevented from doing so by the state of New York. UNIF. PROB. CODE § 2-705(f) (2010).

85. *See* N.Y. DOM. REL. LAW § 73 (McKinney 2008); UNIF. PROB. CODE § 2-120 (2010).

A. Adoption

Intestacy statutes generally provide that adoption cuts off the right of inheritance between the genetic[86] parent and child, replacing it with inheritance between the adoptive parent and child.[87] The inheritance rules follow the idea that adopted children take a position in the new family and cut ties with their birth parents and their families.[88] In an adoption by new parents who are strangers to the birth parents this makes sense, and inheritance based on treating the child as a member of the new family and not of the prior family likely follows the intent of most people.[89] As societal norms around adoption have evolved, different types of adoptions have developed. To accommodate these changes, some intestacy statutes have added exceptions or modifications to the general rule.[90]

1. Stepparent Adoption

One variation on family adoption is an adoption by a stepparent. If a father dies, the mother may remarry and the new spouse may raise the mother's children as a stepparent or may adopt the children. If an intestacy statute provides that an adoption dissolves the parent-child relationship between the child and the parents who were parents prior to the adoption, then the parent whose spouse adopts the child will no longer be a parent for intestacy purposes.[91] To address this problem, a typical exception in intestacy statutes is the so-called stepparent exception.[92] The exception provides that if a spouse of a parent adopts a child, the parent-child relationship will continue to exist between the spouse who was already a

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86. *See* UNIF. PROB. CODE § 2-109 (1969). The 1969 Uniform Probate Code uses the term "natural parent" to mean birth parents who were, in 1969, the genetic parents. *See* UNIF. PROB. CODE § 2-109 (1990). The 1990 Uniform Probate Code, as amended, uses the term "genetic parent" to mean the parents who contributed genetic material to create the child. *Id.* This article uses the term genetic parent with the meaning used in the 1990 Uniform Probate Code, as amended.

87. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.5(2) (2003). UNIF. PROB. CODE § 2-109; UNIF. PROB. CODE §§ 2-118, 2-119 (2010). Although early intestacy laws provided for descendants related by blood and not adoption, states began to adopt formal rules on adoption in the mid-nineteenth century so that by the twentieth century, adoption created a parent-child relationship that was treated as a legal relationship for intestacy and other purposes. *See* Jan Ellen Rein, *Relatives by Blood, Adoption, and Association: Who Should Get What and Why (The Impact of Adoptions, Adult Adoptions, and Equitable Adoptions on Intestate Succession and Class Gifts)*, 37 VAND. L. REV. 711, 714–17 (1984).

88. *See* UNIF. PROB. CODE § 2-119, cmt. (2010). RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.5(2)(A) & cmts. d, e (2003).

89. *See* § 2-119, cmt.; § 2.5(2)(A) & cmts. d, e.

90. *See infra* Part III.A.1–2.

91. *See* UNIF. PROB. CODE § 2-119(a) (2010). Parents who were parents before the adoption might be the genetic parents, prior adoptive parents, or parents as determined under the UPC's parent-child provisions. *See* §§ 2-115 to -121.

92. *See, e.g.*, § 2-119(b).

parent and the child.[93] The UPC and other statutes limit this exception to an adoption by someone married to the adoptive parent, so the exception does not extend to adoption by an unmarried partner.[94]

In addition to preserving the parent-child relationship between the non-adoptive parent and child, the stepparent exception also continues the child's right to inherit from and through the former parent.[95] The applicability of the exception varies by state. Some states permit the child to inherit through the former parent only if the adoption occurs after the former parent's death,[96] while other states and the UPC apply the exception even if the former parent is alive and permitted the adoption by relinquishing parental rights.[97]

The stepparent exception reflects the idea that the former parent's family may continue to have a family relationship with the adopted child, even after the adoption.[98] For example, if the genetic mother dies and the genetic father remarries, the genetic mother's parents and siblings may still maintain close relationships with the children even if the stepmother adopts the children. If a genetic parent relinquishes parental rights to permit an adoption, that genetic parent's family may be less likely to maintain relationships with the children, but in some families the relationships may continue.[99] In either case, the child will be able to inherit through the former parent under the stepparent exception but family members will not inherit from the child.[100]

2. Children Adopted Out of a Family

A few intestacy statutes provide additional rules related to adoption and the continuation of family ties when a child is adopted out of a family.[101] The intestacy statute in Texas provides that adoption does not cut off inheritance rights between a child and his genetic parents.[102] This statute provides for inheritance through genetic parents regardless of whether the adoptive parents are related to the genetic parents and regardless of whether the child and the former parents have maintained any

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93. *Id*.

94. *See id.* (applying the exception if the adoptive parent is "the spouse" of the genetic parent). *See* Laura M. Padilla, *Flesh of My Flesh, but Not My Heir: Unintended Disinheritance,* 36 BRANDEIS J. FAM. L. 219 (1997–98).

95. § 2-119(b).

96. *See, e.g.*, OR. REV. STAT. § 112.175(2)(b) (2012).

97. § 2-119(b).

98. *See* UNIF. PROB. CODE § 2-119, cmt. (2010).

99. *See* Susan N. Gary, *The Probate Definition of Family: A Proposal for Guided Discretion in Intestacy,* 45 MICH. J. L. REFORM 787, 800–01 (2012).

100. *See* UNIF. PROB. CODE §§ 2-119(c), (d) (2010).

101. *See* TEX. PROB. § 40 (West 2011); 20 PA. CONS. STAT. ANN. § 2108 (West Supp. 2011).

102. PROB. § 40.

sort of relationship.[103] Hence, a child adopted by strangers at birth can still inherit from her genetic parents if she can identify them.[104]

In contrast, Pennsylvania's intestacy statute focuses on whether the child continued to have a functional relationship with family members after an adoption.[105] The Pennsylvania statute limits inheritance by an adopted-out child to situations in which the person whose estate is being distributed "maintained a family relationship with the adopted person."[106] The Pennsylvania statute applies both to stepparent adoption and to adoption by a relative of the child's legal parent, but it does not apply to adoption by a non-relative.[107] The Pennsylvania statute does not provide a bright-line rule but instead allows a court to limit inheritance to situations in which the child and a relative of the child's former parent had maintained contact.[108]

The 2008 UPC Amendments provide that a person will continue to be treated as the child of the people who were his parents prior to an adoption if a relative or the spouse of a relative of either of his genetic parents adopts him.[109] "Relative" is defined to mean a descendant of the grandparent of the child.[110] The status of parent will also continue if a child is adopted after the death of her parents, even if the adoption is a stranger adoption.[111] In both cases, the reason for the exception is an assumption that a relationship will continue between the child and the relatives of the former parent, but the statute does not require evidence of a functional relationship.[112] As with the stepparent exception, the parent-child relationship applies for inheritance by the child but not by others from the child.[113]

3. Adoption Not Complete When Prospective Parent Dies

The 2008 UPC Amendments treat a child who is in the process of being adopted as an adopted child when an adoptive parent dies so long as the adoption is completed under any of the following circumstances: (1) the child is being adopted by a married couple and the surviving spouse successfully adopts the child; (2) the child is being adopted by a stepparent and the genetic parent (to whom the stepparent is married) survives the

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103. *Id.*
104. *Id.*
105. 20 PA. CONS. STAT. ANN. § 2108.
106. *Id.*
107. *Id.*
108. *Id.*
109. UNIF. PROB. CODE § 2-119(c) (2010).
110. UNIF. PROB. CODE § 2-115(9) (2010).
111. § 2-119(d); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 14.6 (2003) (including as a child a person adopted by a non-relative only if the "child does not subsequently become estranged" from the genetic family).
112. *See* § 2-119(d).
113. *See id.*

stepparent by 120 hours; or (3) the child is being adopted by the spouse of a parent who is a parent under the UPC rules that apply to children created through assisted reproductive technology.[114]

B. Children of Assisted Reproductive Technology

1. 2008 UPC Amendments

As the ways in which a child may be created become more complicated, questions arise concerning the identity of the parent. The Uniform Parentage Act provides rules to determine when a person is a parent for family law purposes.[115] In 2008 the Uniform Law Commission amended the UPC's parent-child definition to include some of the ideas from the Uniform Parentage Act.[116] The rules address gestational mothers and persons who donate gametes and construct rules that tend to treat as parents those who intend to be parents.[117] The UPC's definition of parent includes someone who functioned as a parent no later than two years after the child's death.[118] The UPC defines what it means to "function as a parent"[119] as guidance for a court making that determination.

2. Posthumously Conceived Children

A particular issue within the subject of assisted reproductive technology is the conception of a child after the death of the child's genetic mother or father.[120] Two early cases involving posthumously conceived

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114. UNIF. PROB. CODE § 2-118(b)–(c) (2010).

115. *See* UNIF. PARENTAGE ACT § 102 (2002).

116. UNIF. PROB. CODE § 2-115, cmt (2010).

117. UNIF. PROB. CODE § 2-120 (2010). A person not genetically related to a child who intended to parent a child but was unable to do so due to "death, incapacity, or other circumstances" will nonetheless be treated as a parent. § 2-120(f)(2)(B).

118. § 2-120(f).

119. UNIF. PROB. CODE § 2-115(4) (2010). The comment to this subsection lists the parental duties that appear in Reporter's Note No. 4 to § 14.5 of RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS (2003). § 2-115(4), cmt.

120. Numerous articles discuss legal issues relating to posthumously conceived children. *See*, *e.g.*, Benjamin Carpenter, *A Chip off the Old Iceblock: How Cryopreservation Has Changed Estate Law, Why Attempts to Address the Issue Have Fallen Short, and How to Fix It*, 21 CORNELL J.L. & PUB. Pol'y 347 (2011); Ronald Chester, *Freezing the Heir Apparent: A Dialogue on Postmortem Conception, Parental Responsibility, and Inheritance*, 33 HOUS. L. REV. 967 (1996); Joseph H. Karlin, Comment, *"Daddy, Can You Spare A Dime?": Intestate Heir Rights of Posthumously Conceived Children*, 79 TEMPLE L. REV. 1317 (2006); Robert J. Kerekes, *My Child . . . But Not My Heir: Technology, the Law, and Post-Mortem Conception*, 31 REAL PROP. PROB. & TR. J. 213 (1996); Charles P. Kindregan Jr., *Dead Dads: Thawing an Heir from the Freezer*, 35 WM. MITCHELL L. REV. 433 (2009); Kristine S. Knaplund, *Children of Assisted Reproduction,* 45 MICH. J.L. REFORM 899 (2012); Kristine S. Knaplund, *Postmortem Conception and a Father's Last Will*, 46 ARIZ. L. REV. 91 (2004) [hereinafter Knaplund, *Postmortem Conception*; Browne Lewis, *Graveside Birthday Parties: The Legal Consequences of Forming Families Posthumously*, 60 CASE W. RES. L. REV. 1159 (2010); Kathryn Venturatos Lorio,

children determined that the child or children qualified under the state intestacy statutes as children of the deceased parent for purposes of determining eligibility for social security benefits.[121] The cases addressed three elements: proof of the genetic relationship, consent of the deceased parent to the use of the gametic material to create a child, and the length of time between the death of the parent and the birth of the child.[122] Several subsequent cases determined the posthumously conceived child not to be a child of the deceased father.[123] All of these cases depend on interpretations of state intestacy statutes.[124] As Charles Kindregan wrote, "at least for Social Security purposes state inheritance law must either expressly allow for posthumous conception of a child or contain language which is sufficiently vague to permit such an interpretation."[125]

In 2012, the United States Supreme Court decided *Astrue v. Capato*, holding that the Social Security Administration properly relied on state law to determine whether two children conceived posthumously using the sperm of their mother's deceased husband were children of the decedent for purposes of receiving the decedent's social security benefits.[126] Thus, future decisions will depend on state intestacy statutes and state interpretations of those statutes. Some states have enacted statutes that specifically address the issue of posthumously conceived children.[127] Other statutes remain ambiguous because they were enacted long before posthumous conception became feasible.[128]

Conceiving the Inconceivable: Legal Recognition of the Posthumously Conceived Child, 34 ACTEC J. 154 (2008). *See also* Knaplund, *Postmortem Conception*, *supra*, at 102–03 (citing numerous additional articles concerning posthumous conception and inheritance).

121. *See* Woodward v. Comm'r of Soc. Sec. 760 N.E.2d 257, 272 (Mass. 2002); *In re* Estate of Kolacy, 753 A.2d 1257, 1263–64 (N.J. Super. Ct. Ch. Div. 2000).

122. *See* Woodward v. Comm'r of Soc. Sec. 760 N.E.2d 257, 272 (Mass. 2002); *In re* Estate of Kolacy, 753 A.2d 1257, 1263–64 (N.J. Super. Ct. Ch. Div. 2000).

123. Finley v. Astrue, 270 S.W.3d 849, 853 (Ark. 2008) (involving implantation of an embryo after a husband's death); Khabbaz v. Comm'r of Soc. Sec., 930 A.2d 1180, 1189 (N.H. 2007); Stephen v. Comm'r of Soc. Sec., 386 F. Supp. 2d 1257, 1265 (Fla. 2005).

124. *See Finley*, 270 S.W.3d at 850; *Khabbaz*, 930 A.2d at 1186; *Stephen*, 386 F. Supp. 2d at 1265; *Woodward*, 760 N.E.2d at 259; *Kolacy*, 753 A.2d at 1258. In an additional case, the Ninth Circuit held a determination under the intestacy statute unnecessary because the children qualified for social security benefits as legitimate children of their deceased father, as determined under Arizona law. Gillett-Netting v. Barnhart, 371 F.3d 593, 598 (9th Cir. 2004).

125. Kindregan, *supra* note 120, at 446.

126. Astrue v. Capato, 132 S. Ct. 2021, 2034 (2012).

127. *See, e.g.*, CAL. PROB. CODE § 249.5 (West 2002).

128. *See, e.g.*, OR. REV. STAT. § 112.075 (2011) (defining the time to determine whether someone is an heir as the date of death but including "persons conceived before the death of the decedent and born alive thereafter"). The Supreme Court of Arkansas construed a similar statute—one requiring "conception" before the decedent's death—when it confronted a situation involving frozen embryos that were created before the decedent's death and implanted after his death. *See Finley*, 270 S.W.3d at 853. The parties argued over whether the creation of the embryos met the requirement in the statute for conception before death. *Id.* The court noted: "Not only does the instant statute fail to specifically address such a scenario, but it was enacted in 1969, which was well before the technology of in vitro fertilization was developed." *Id.* The court ruled that the child was not entitled to inherit under the

Although most of the cases have been brought to determine eligibility for social security benefits, at least one case determined that posthumously conceived children were children of their deceased father for purposes of a trust.[129] In *In re Martin B.*, the settlor created seven trusts for his wife and "issue."[130] During his wife's life, the trustee had the power to distribute principal among the issue, so the trustee brought a construction proceeding to determine whether grandchildren conceived posthumously were issue within the meaning of the terms of the trust.[131]

When the settlor died, his wife and one of his two sons survived him.[132] His other son, James, died of Hodgkins Lymphoma a few months before his father.[133] When James was diagnosed, he was married but had no children.[134] He deposited sperm, with instructions that it be cyropreserved and that if he died, it should be held subject to his wife's direction.[135] James died January 13, 2001, and a few years later his wife conceived two children through in vitro fertilization using the cyropreserved sperm.[136] The two boys were born October 15, 2004 and August 14, 2006.[137]

The surrogate's court reviewed New York's statutes relating to inheritance by posthumously conceived children as takers under intestacy or under wills.[138] New York law limits inheritance rights to children conceived during the decedent parent's life, both for intestacy purposes and for purposes of a will.[139] Although these statutes did not include the posthumously conceived grandchildren, the court did not find the statutes dispositive with respect to the trusts.[140] The important consideration, according to the court, was the settlor's intent when he created the trusts.[141] The court conceded that the settlor would not have imagined in 1969 that his son might have children related to him genetically but conceived after his death.[142] However, the court noted, "the absence of specific intent should not necessarily preclude a determination that such children are members of the class of issue."[143] The court used the Restatement of

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intestacy statute and "strongly encourage[d]" the legislature to revisit the statute and address the issue directly. *Id.* at 855.

129. *In re* Martin B., 841 N.Y.S.2d 207, 208 (N.Y. Sup. Ct. 2007).

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 209.

139. N.Y. EST. POWERS & TRUSTS LAW § 4-1.1(c) (McKinney 2002) (intestacy); N.Y. EST. POWERS & TRUSTS LAW § 5-3.2 (McKinney 2002) (under a will).

140. *In re* Martin B., 841 N.Y.S.2d at 209–10.

141. *Id.* at 211–12.

142. *Id.* at 211.

143. *Id.*

Property as support for its finding that the children were members of the class within the terms of the trust.[144] The court quoted the Restatement as follows:

> [U]nless the language or circumstances indicate that the transferor had a different intention, a child of assisted reproduction [be] treated for class-gift purposes as a child of a person who consented to function as a parent to the child and who functioned in that capacity or was prevented from doing so by an event such as death or incapacity.[145]

The court concluded that the settlor "intended all members of his bloodline to receive their share."[146] The court held that the two boys were issue and descendants for purposes of the trusts and pointed out the need for the legislature to address issues raised by biotechnology.[147]

The 2008 UPC Amendments provide that a child conceived posthumously will be considered a child of the deceased parent "if the child is: (1) in utero not later than 36 months after the [parent's] death; or (2) [is] born not later than 45 months after the [parent's] death."[148] The UPC also requires that the decedent consented to the use of the genetic material with the intent to be treated as a parent of the child.[149] A written document stating the intent to be a parent can be used to establish the intent but if no document exists, other evidence that the person intended to be a parent but was prevented from doing so by incapacity, death, or other circumstances can be used.[150] If the genetic parents were married and if the surviving parent is the birth mother, or if the surviving parent functions as a parent within two years of the child's birth, then consent is presumed.[151] Only if clear and convincing evidence establishes that the deceased parent did not intend to be treated as a parent of the child will the decedent not be treated as a parent.[152] Thus, if the genetic parents were married and if the genetic

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144. *Id.* (citing RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 14.8 (2003)).

145. *Id.* (alteration in original).

146. *Id.* at 212.

147. *Id.*

148. UNIF. PROB. CODE § 2-120(k) (2010) (brackets in original). The comments explain,

> The 36-month period in subsection (k) is designed to allow a surviving spouse or partner a period of grieving, time to make up his or her mind about whether to go forward with assisted reproduction, and a reasonable allowance for unsuccessful attempts to achieve a pregnancy. The 36-month period also coincides with section 3-1006, under which an heir is allowed to recover property improperly distributed or its value from any distributee during the later of three years after the decedent's death or one year after distribution.

Id. § 2-120(k) cmt. The 45-month period creates certainty if the date of conception is uncertain. *See id.*

149. § 2-120(f).

150. § 2-120(f)(2)(B). Section 2-120(f)(2)(C) requires clear and convincing evidence of intent to parent a child conceived posthumously, but the presumption of intent in section 2-120(h) will apply in many situations.

151. *See* §§ 2-120(f)(2)(C), (h)(2), 2-121(f).

152. *See* §§ 2-120(f)(2)(C), (h)(2), 2-121(f).

material was deposited before death, the decedent will almost certainly be considered to have intended to be treated as a parent.[153]

Even if the presumption of consent does not apply, consent can be established by facts and circumstances that establish the deceased parent's intent.[154] The surviving parent can show that the deceased parent intended to function as a parent but died before being able to do so.[155] Evidence that the decedent deposited genetic material combined with testimony of the survivor that the two of them discussed using the material to have children will probably suffice.[156] The UPC does not require evidence that the decedent considered or consented to being treated as a parent of a child if the child were conceived posthumously.[157]

The UPC definition of the parent and child relationship will likely result in a finding of consent in any posthumous conception case as long as the genetic material was deposited before death and not harvested after death.[158] The relative ease of finding consent under the UPC differs from the requirement in the Uniform Parentage Act and the American Bar Association's Model Act Governing Assisted Reproductive Technology that the consent given by the deceased parent be in writing and consent to posthumous conception.[159] A state legislature can discuss the issue of consent when it considers adoption of the UPC Amendments, but the UPC provisions may simply be adopted without much consideration of the ways consent may be treated. The fact that committees considering the question of consent have reached different conclusions highlights the importance of asking a client for the client's views.[160]

Although reaching the determination that an individual consented to be a parent is relatively easy under the UPC, a posthumously conceived child will be considered a child of the deceased genetic parent only if the child is in utero or born within the prescribed time periods.[161] In *In re Martin B.*, one or both of the children would not have been considered descendants

153. *See* §§ 2-120(f)(2)(C), (h)(2), 2-121(f).

154. § 2-121(e)(2). The provision requires clear and convincing evidence. *Id.*

155. § 2-120(f)(2)(B).

156. *See id.*

157. *See* § 2-120(f)(2), (h)(2). In contrast, the Uniform Parentage Act requires the consent to posthumous conception to be written. UNIF. PARENTAGE ACT § 707 (2002).

158. *See* Knaplund, *Postmortem Conception*, *supra* note 120, at 100 (explaining that section 2.5, comment 1 of the Restatement of Property reaches this result).

159. UNIF. PARENTAGE ACT § 707; ABA Model Act Governing Assisted Reproductive Tech. § 607 (Feb. 2008), *available at* http://apps.americanbar.org/family/committees/artmodelact.pdf.

160. *See, e.g.*, UNIF. PROB. CODE § 2-120(f)(2), (h)(2) (2010); UNIF. PARENTAGE ACT § 707 (2002). Of course the differences may relate to the different purposes of the statutes. The UPC determines relationships for purposes of distributions of property under intestacy, wills or trusts, while a determination under the Uniform Parentage Act affects issues like custody, the duty of support, and decision-making for a minor child. UNIF. PROB. CODE § 2-103 (2010); UNIF. PARENTAGE ACT § 607 (2002).

161. UNIF. PROB. CODE § 2-120(k) (2010).

under the UPC.[162] Both children were born more than forty-five months after the decedent's death, but the first child was born just two days after the forty-five month period ended.[163] Depending on when implantation occurred, the first child may have met the in utero deadline.[164] The second child, born twenty-two months after his brother, would certainly not have met the deadline.[165]

IV. CHANGES IN DEFINITIONS CHANGE DOCUMENTS

As discussed, a court will typically construe a term based on its legal definition.[166] If the definition of issue or descendants in the intestacy statute changed between the time the settlor executed a trust document and the time the trustee must determine the members of the class, the court must decide which version of the intestacy statute controls.[167] Courts in Illinois and New York have struggled with how to define terms in documents executed years before the trustee must determine members of the class created by the terms.[168] These cases serve as examples of how courts might construe terms with changed meanings and also serve as reminders of the importance of defining the terms in documents. Courts have dealt with changing definitions in the past and will continue to do so in the future.

A. Illinois: Treatment of Adopted Persons—Common Law Presumption and Statutory Changes

Illinois courts have faced the question of whether the term descendant —when used in an early twentieth century document—includes adopted children.[169] These cases examined legislative changes that purported to affect documents executed before enactment of the legislation.[170] The analysis across several cases suggests the difficulties courts will face as definitions change more dramatically over time.[171]

Prior to 1955, Illinois courts presumed that an adopted person would not be considered a descendant under a will or trust unless the document contained express language that the testator or settlor intended to include the adopted person as a descendant.[172] In 1955, the Illinois Legislature

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162. *In re* Martin B., 841 N.Y.S.2d 207, 210–11 (N.Y. Sur. Ct. 2007).
163. *Id.* at 208.
164. *Id.*
165. *Id.* at 211.
166. *See supra* Part II.
167. *See* Cont'l Bank, N.A. v. Herguth, 617 N.E.2d 852, 855–56 (Ill. App. Ct. 1993).
168. *See id.* at 857. *See also In re* Libby's Estate, 134 N.Y.S.2d 839, 840 (1954).
169. *See Cont'l Bank*, 617 N.E.2d at 857.
170. *Id.* at 854.
171. *See id.*
172. *Id*.

modified the statute to provide that in documents executed on or after September 1, 1955, "an adopted child is deemed a natural child unless the contrary intent plainly appears by the terms" of the document.[173] In 1989, the legislature amended the statute again, this time extending the presumption in favor of adopted children to documents regardless of the execution date.[174] An adopted child would take as a descendant "unless . . . the intent to exclude such child is demonstrated by the terms of the instrument by clear and convincing evidence."[175]

1. Evidence of Intent to Exclude

After the 1989 amendments, adopted and nonmarital descendants of the settlor of a trust created in 1926 requested income payments that the trust directed be made to the "lawful descendants" of each child of the settlor after the child's death.[176] Continental Bank, as trustee of the trust, brought an action to construe the trust.[177] The Illinois Court of Appeals noted that its task was to give effect to the intent of the settlor.[178] The trust provided for income to be distributed to the settlor's lawful descendants and on the death of the last of the descendants alive in 1926 to distribute the corpus "among the lawful descendants of the grantor * * * then living, *per stirpes*."[179] The court considered "the law in effect in 1926, through the prism of the presumption [enacted in 1989], to determine [whether] the terms . . . were so unambiguously defined that they provide[d] clear and convincing proof of an intent to exclude adopted[]" children.[180] The court found that, through the settlor's use of the terms descendants and *per stirpes*, the settlor intended to exclude adopted descendants.[181] The court found that "the settlor manifested his actual intent by using terms which were clearly defined and with settled meaning to limit the class of eligible

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> A child so adopted shall be deemed, for the purposes of inheritance by such child, * * * the child of the parents by adoption, the same as if he had been born to them in lawful wedlock, except that he shall not be capable of taking property expressly limited to the body or bodies of the parents by adoption, nor property from the lineal or collateral kindred of such parents by right of representation.

Id. (citing ILL. REV. STAT. 1925, ch. 4, par. 5.).

173. *Id.* (citing ILL. REV. STAT. 1955, ch. 3, par. 165).

174. *Id.*

175. *Id.* The statute provided that alternatively the presumption would not apply if:

> An adopting parent of an adopted child, in the belief that the adopted child would not take property under an instrument executed before September 1, 1955, acted to substantially benefit such adopted child when compared to the benefits conferred by such parent on the child or children born to the adopting parent.

Id. (*citing* ILL. REV. STAT. 1989 ch. 1101/2, par. 2-4(f)(1)–(2)).

176. *Id.*

177. *Id.*

178. *Id.* at 855.

179. *Id.* at 854.

180. *Id.* at 855.

181. *Id.* at 856–57.

takers to his blood offspring."[182] The court viewed the terms as evidence of the settlor's intent to exclude adopted children.[183]

Although the nonmarital descendants were children of the adopted descendants and therefore excluded, the court addressed the issue of whether—assuming arguendo that the adopted descendants took under the trust—the nonmarital descendants would share in the trust.[184] The court concluded that the settlor's use of the word "lawful" showed the intent of the settlor to exclude nonmarital descendants from the trust.[185] The court analyzed the question of whether nonmarital descendants were to be included in the trust by looking to "the 'plain and ordinary' meaning of the term 'lawful' . . . in 1926."[186] The court found that the term excluded nonmarital children in 1926.[187]

2. Evidence to Overcome the Presumption—"Descendants" Not Enough

Just two years after *Herguth*, the Illinois courts again considered the question of what evidence was sufficient to overcome the presumption that a settlor intended to include adopted children when using the term descendants in a testamentary trust instrument.[188] In *First National Bank v. King* the court agreed with the dissent in *Herguth* and found that simply using the term descendant did not demonstrate specific intent with respect to adopted children.[189]

When Louis F. Swift Sr. died, his 1936 will created three trusts.[190] He created one of the trusts for his daughter-in-law, Lydia Niblack Swift, and it provided income to her for life and after her death, "to the lawful descendants, then surviving, in equal shares per stirpes, of my deceased son Alden B. Swift and said Lydia Niblack Swift."[191] Upon termination of the trust, the settlor directed the trustee to distribute the corpus of the trust in the same manner.[192] When an adopted grandchild requested that she receive a share of the trust distribution, the trustee, First National Bank of Chicago, brought an action to construe the trust.[193]

The language used in the Swift trust was similar to that used in the Herguth trust but this time, the court concluded that the use of legal terms by themselves did not constitute clear and convincing evidence of the

182. *Id.* at 856.
183. *See id.*
184. *Id.* at 857.
185. *Id.* at 858.
186. *Id.* at 857.
187. *Id.*
188. *See* First Nat'l Bank v. King, 651 N.E.2d 127, 128 (Ill. 1995).
189. *See id.*
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.* at 128–29.

settlor's actual intent to exclude adopted children.[194] The court pointed out that the meaning of the term descendant is itself a presumption of what the settlor intended.[195] By itself, the settlor's use of the term does not indicate whether the settlor considered the question of including adopted children.[196] The court stated that the clear and convincing evidence standard required something more than the use of the term descendant in the document.[197] However, the dissent argued that the court rewrote Swift's will and that, "[w]hen Louis F. Swift executed his will in 1936, he was entitled to use and rely on words that had a definite, known, and accepted legal meaning."[198]

3. Interpretation Struggles Continue

While the Illinois presumption continues to apply even after *King*, someone who attempts to rebut the presumption must present evidence beyond the settlor's use of legal terms that, at the time used, would have excluded adopted children.[199] In addition, the Illinois Legislature added a refinement to the statute in 1997: A child adopted after attaining the age of eighteen will be included as a descendant of the adopting parent for purposes of inheritance from collateral or lineal relatives of the adopting parent only if the child resided with the adopting parent before reaching the age of eighteen.[200]

Two cases from 2007 applied the Illinois statutes and demonstrate the continuing difficulty of construing language that purports to define descendant.[201] In *Altenheim German Home v. Bank of America*, a trust settled in 1961 provided for the trust principal "to be distributed under certain circumstances to (1) any 'surviving legitimate child or children born to or legally adopted by' Herman III [(the settlor's son)] and Barbara [(the settlor's daughter-in-law)] and (2) any 'descendants' of any 'surviving legitimate child or children born to or legally adopted by" Herman III or Barbara.[202]

The Illinois Appellate Court for the Second District noted that if the settlor used only the term descendant, the presumption to include adopted children would have applied.[203] In this document, however, the provision for grandchildren addressed the possibility of adopted grandchildren while

194. *Id.* at 130–31.
195. *See id.*
196. *Id.*
197. *Id.* at 131.
198. *Id.* at 133 (Meiple, J., dissenting).
199. *See In re* Estate of Roller, 880 N.E.2d 549, 557–59 (Ill. App. Ct. 2007).
200. 755 ILL COMP. STAT. 5/2-4(a), (e) (West 2007).
201. *See generally* Altenheim German Home v. Bank of America, 875 N.E.2d 1172 (Ill. App. Ct. 2007); *In re* Estate of Roller, 880 N.E.2d 549 (Ill. App. Ct. 2007).
202. *Altenheim*, 875 N.E.2d at 1176.
203. *Id.* at 1181.

the provision for great-grandchildren did not.[204] Altenheim German Home argued that the proximity of the two sections and the inclusion of adopted grandchildren followed by silence with respect to adopted great-grandchildren indicated the settlor's intent to exclude all adopted descendants beyond any adopted grandchildren.[205] However, the court noted that in 1961 (when the trust document was executed), the lawyer drafting the document would have known that silence was not sufficient to exclude adopted descendants.[206] If the settlor had intended to exclude adopted great-grandchildren, the settlor should have done so explicitly.[207] The court further determined that the "clear and convincing evidence" standard enacted in 1989 applied to the construction of the language.[208] Under that standard, more than silence was needed to overcome the presumption that the adopted great-grandchildren were descendants.[209]

In *In re Estate of Roller*,[210] the Illinois Appellate Court for the Fourth District considered language in a 1948 trust agreement that provided for the "natural children" and "heirs of the body" of the settlor's children.[211] The settlor's genetic grandchildren argued that their adopted brother should not receive distributions from the trust.[212] The court had to determine whether use of those terms showed clearly and convincingly that the settlor intended to exclude adopted children.[213] The court held that it did not.[214] The court indicated that to meet the clear and convincing standard, the document must include language indicating that the settlor considered whether to exclude adopted children.[215] The use of legal terms, even terms that suggested genetic children, was not sufficient by itself.[216]

In *Roller* the court discussed the development of the statutory presumption and noted that it "represents a dramatic shift in public policy to construe written instruments in favor of adoptees."[217] The recognition that a shift in public policy can affect documents executed years earlier suggests that future shifts in public policy may change documents drafted today. To most twenty-first century observers, the shift to include adopted children likely seems a good result, at least if the shift includes those children who are adopted as minors in a true parent-child relationship. A future policy

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204. *Id.*
205. *Id.* at 1174–75.
206. *Id.* at 1182.
207. *Id.*
208. *See id.* at 1181–82.
209. *Id.*
210. *See generally In re* Estate of Roller, 880 N.E.2d 549 (Ill. App. Ct. 2007).
211. *Id.* at 550.
212. *Id.* at 552.
213. *Id.* at 552–53.
214. *Id.* at 556–57.
215. *Id.* at 559.
216. *See id.*
217. *Id.* at 558.

shift, perhaps related to stepchildren or posthumously conceived children, might also produce salutary results, but from the perspective of today's settlors, it is difficult to imagine policy changes with the near-universal appeal of including adopted children.

B. New York: Two Construction Issues

1. Per Stirpes or Per Capita

Throughout the 1950s and 1960s in New York, courts considered whether the term descendant used in a trust document should be interpreted like the term issue as used in the intestacy statutes.[218] In *In re Libby's Estate*, the court construed a 1929 trust that provided for the settlor's wife for life and then to the settlor's daughter or, if the daughter did not survive, to the daughter's descendants, and if there were none, to the wife's "heirs."[219]

The daughter predeceased the wife, leaving behind a child and two grandchildren.[220] The court considered whether it should distribute the trust entirely to the deceased daughter's child, following a *per stirpes* distribution, or if it should distribute the trust in three shares—one for the child and one for each of the grandchildren—a *per capita* distribution.[221] The court stated that "[t]he ancient common-law rule favored *per capita* distribution among descendants in all degrees where the gift or conveyance was to 'issue' or 'descendants.'"[222] The court explained that although a presumption for *per capita* distribution existed, the presumption could be overcome by evidence that the settlor intended a *per stirpes* distribution.[223] The court noted that by using the term heirs the settlor referenced the intestacy statute, and a 1921 revision to the intestacy statute had provided for a *per stirpes* distribution.[224] Although the document the court construed was a trust and not a will, the court found it appropriate to refer to the intestacy statute.[225] Even though the statute used the word issue and the trust document used the term descendant, the court determined that the settlor intended a *per stirpes* distribution.[226]

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218. *See generally*, *e.g.*, *In re* Libby's Estate, 134 N.Y.S.2d 839 (1954); *In re* Gardiner's Will, 191 N.Y.S.2d 520 (1959).
219. *See In re Libby*, 134 N.Y.S.2d at 840.
220. *See id.*
221. *See id.*
222. *Id.* (emphasis added).
223. *See id.* at 841.
224. *See id.* at 842.
225. *See id.*
226. *See id.*

In a 1959 case, *In re Gardiner's Will*, the court reached a different result, perhaps due to different family circumstances.[227] The decedent, a lawyer who drafted his own will, created a trust for his wife with part of the remainder to his brother, and if his brother predeceased the wife, then the remainder would pass to the brother's descendants.[228] The brother predeceased the wife, leaving behind a daughter and two grandchildren.[229] The deceased brother's daughter and her husband were divorced, and her former husband had custody of the children.[230] The court noted that the daughter's interest in the trust was "subject to the claims of assignees, subassignees [sic], and judgment creditors."[231]

The court found the decedent's use of the term descendants to mean that the decedent intended a *per capita* distribution, under the common law meaning of the term descendants.[232] The court distinguished the term descendants from issue—the term used in the intestacy statute—and concluded that by using the term descendants, the decedent intended the *per capita* meaning of the term.[233] The court noted: "The normal and legal meaning of the term 'descendants' has generally encompassed the offspring in all degrees of a deceased common ancestor, without regard to any particular descendant having a living parent."[234]

The court found that when the legislature used the term issue in the intestacy statute, it changed the presumption of *per capita* distribution for the word issue, but it did not change the meaning of the term descendants.[235] The court discussed other cases, including *In re Libby's Estate,* and explained that in each case in which the court's decision resulted in a *per stirpes* distribution, the court found evidence that the settlor intended that distribution.[236] In this case, the court determined that the settlor meant *per capita*.[237] One wonders if the existence of creditors affected the outcome. In any event, the analysis in the two cases serves as a reminder that in hindsight, evidence of intent can be found in many ways.

In a relatively recent case, *In re Estate of Goodwin*, the surrogate's court again addressed the question of whether descendants and issue have the same or different meanings.[238] The trust language the court construed gave a remainder interest to "descendants, share and share alike."[239] Philip

227. *See generally In re* Gardiner's Will, 191 N.Y.S.2d 520 (1959).
228. *Id.* at 524–25.
229. *See id.*
230. *See id.* at 524.
231. *Id.*
232. *See id.* at 531.
233. *See id.* at 527–31.
234. *Id.* at 528.
235. *See id.*
236. *See id.* at 525–26.
237. *Id.* at 526.
238. *In re* Estate of Goodwin, 739 N.Y.S.2d. 239, 245–46 (Sur. Ct. Greene Cnty. 2002).
239. *Id.* at 241–42.

Goodwin created the trust at issue in 1937 under his will.[240] The court reviewed the history of the terms issue and descendants and discussed the presumption of *per capita* distribution—especially the change in that presumption by the enactment of the *per stirpes* distribution in the intestacy statute—and concluded that the terms have synonymous meanings.[241] The argument that in 1937 a settlor might have used the term descendants because its meaning was different from issue did not persuade the court.[242] However, the court found that the language "share and share alike" provided evidence that Mr. Goodwin intended a *per capita* distribution.[243] The court stated that because Mr. Goodwin had the advice of a lawyer, he knew that the term descendants carried with it a *per stirpes* meaning and therefore used the additional language to indicate his intent that the remainder be distributed on a *per capita* basis.[244]

In all three of these cases, the courts sought a determination of the donor's intent and used the legal meaning of the terms as a starting point.[245]

2. Should the Term "Descendants" Include Adopted Children?

As recently as 1964, the surrogate's court in Westchester County explained in *In re Andrus' Will* that the term descendants is ambiguous with respect to whether it includes adopted children.[246] The court further explained that extrinsic evidence could be used to determine the testator's intent with respect to the term.[247] Consideration of circumstances surrounding the testator at the time of execution, but not events happening later, could bear on the testator's intent.[248] In the case, the testator knew of one adopted grandchild before his death and expressed the intent that the grandchild share in the trust.[249] The court noted that it must determine the testator's intent at the time he executed the will, and the expression of intent concerning the grandchild came later.[250] However, the court found sufficient evidence of the settlor's intent to include adopted children in reports of "the testator's affection for orphaned or destitute children."[251] The court also stated: "The recent trend in judicial decisions appears to have

240. *Id.* at 240–41.
241. *Id.* at 245–46.
242. *See id.*
243. *Id.* at 247.
244. *Id.* at 246.
245. *See id.* at 245; *In re* Libby's Estate, 134 N.Y.S.2d 839, 841 (N.Y. App. Spec. Term 1954); *In re* Gardiner's Will, 191 N.Y.S.2d 520, 525 (Sur. Ct. Kings Cnty 1959).
246. *In re* Andrus's Will, 253 N.Y.S.2d 373, 377 (Sur. Ct. Winchester Cnty. 1964).
247. *Id.*
248. *Id.*
249. *Id.*
250. *Id.* at 378.
251. *Id.* at 379.

favored the placing of an adopted child on the same plane as natural children for the purpose of inheritance."[252]

In a case only a few years earlier, *In re Rick's Trust*,[253] the Court of Appeals of New York reached the opposite result regarding construction of a trust despite the fact that the grantor herself submitted an affidavit indicating her intent that an adopted descendant share in the trust.[254] Because the adopted children had been adopted after the execution of the trust instrument, the court held that they could not defeat the interests of the remaindermen of the trust.[255] The precautionary addendum doctrine complicated the court's analysis of the term descendants.[256] A provision in the domestic relations law provided that adoptive parents and children could inherit from each other and then said: "As respects the passing and limitation over of real or personal property dependent under the provisions of any instrument on the [adoptive] parent dying without heirs, the [adoptive] child is not deemed the child of the [adoptive] parent so as to defeat the rights of remaindermen."[257]

As the dissent pointed out, this provision was an attempt to prevent an adoption undertaken for the purpose of defeating a remainder interest when the person with a life estate expected to die without descendants.[258] The dissent wrote forcefully that the majority "permitted the public policy of this State, of equality of adopted children with natural children, to be defeated."[259]

New York repealed the precautionary addendum doctrine in 1963, but the doctrine continues to apply, potentially, to pre-1964 trusts.[260] In *In re Park's Estate* the court of appeals included adopted children in the term descendants,[261] but in *In re Strong's Will*, the surrogate's court of Broome County distinguished *In re Park's Estate* and refused to allow an adopted child to take as her father's descendant.[262] These cases serve as reminders of the difficulty of knowing and drafting clearly a settlor's intent.[263]

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252. *Id.* at 380.

253. *See generally Matter of* Ricks, 10 N.Y.2d 231 (N.Y. 1961).

254. *Id.* at 234.

255. *Id.* at 234–36.

256. *Id.*

257. *Id.* at 235 (quoting N. Y. DOM. REL. LAW § 115 (repealed 1963)).

258. *Id.* at 236.

259. *Id*.

260. *Compare* N.Y. DOM. REL. LAW § 115 (repealed 1963), *with* N.Y. DOM. REL. LAW § 117(1) (McKinney 2010) (Provisions in force prior to March 1, 1964 apply to lifetime instruments executed before said date.).

261. *In re* Park's Estate, 15 N.Y. 2d 413, 418–19 (N.Y. 1965).

262. *In re* Strong's Will, 264 N.Y.S. 2d 84, 88 (Sur. Ct. 1965).

263. *See generally* Byrle M. Abbin, *Interaction of Total Return Trusts and the Definition of Income Regs.*, 32 EST. PLAN. 3, 6 (Aug. 2005) (illustrating that problems are created when laws are changed after trust documents are created).

A recent case, *Estate of E. MacGregor Strauss*, held that adopted descendants did not take a remainder interest because their situation fell within the precautionary addendum doctrine.[264] The trust provided for income to L for life, and then to L's three children for life, and on the death of each child, the remainder to the child's descendants, or if none, to L's descendants.[265] One child had adopted two stepchildren as adults.[266] The court found that if the adopted children took the remainder interest in their father's share, they would cut off the remaindermen who would otherwise take that share.[267] The court held that the precautionary addendum doctrine applied to the facts and refused to allow the adopted stepchildren to take their father's share.[268] The adopted stepchildren did receive a share, albeit a smaller one, as L's descendants—the remaindermen whose interest was protected by the precautionary addendum doctrine.[269] The court construed the term descendants to include the adopted stepchildren but applied the precautionary addendum doctrine to prevent them from taking their father's share directly.[270]

V. STRATEGIES

Will and trust forms typically define children and descendants to include children born "before or after my death" and to include adopted children.[271] Sometimes documents will limit adopted children to children adopted before a specified age, but the age may be supplied by the form rather than the personal wishes of the testator or settlor.[272] An estate planner needs to identify questions to ask the client and provide different options depending on the client's preferences. However, even thinking about how to raise the issues can be difficult. An eighty-year-old client might have difficulty understanding how she could have great-grandchildren conceived after a grandchild's death.

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264. Peter C. Valente & Susan P. Witkin, *Continue Relevance of Precautionary Addendum to Adopted Individuals*, N.Y.L.J. (June 17, 2011), *available at* http://www.law.com/jsp/law/article.jsp?id=1202497577690. *See also In re* Boehner, 941 N.Y.S.2d 155, 156–57 (N.Y. App. Div. 2012) (affirming the New York County Surrogate's Court decision described in the Valente and Witkin article.).

265. *See* Valente & Witkin, *supra* note 264.

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. Joseph J. Hanna Jr. & Campbell Richardson, WILL AND TRUST FORMS 1 (3d ed. 1997).

272. *Id.*

A. The Settlor's Children

A settlor will understand the need to make decisions about her own children and will know what she wants to do with respect to her own children. For the document to match her wishes, however, the estate planner must remember to ask appropriate questions to identify whom to include or exclude.[273] The estate planner should not rely on the term children unless the settlor confirms that all the children, and only the children intended to benefit, will meet the statutory definition of child.

A settlor may want to exclude a child or the child's descendants. For example, a settlor might have a child who is legally his child but who has been estranged for many years. The settlor might want to disinherit the estranged child and any of that child's descendants. The settlor can do so in the document but if the trust agreement simply uses the term children, the estranged child may be included.[274] Another settlor might have a nonmarital child who is the settlor's legal child, but the settlor may not want the child to share in the trust. The settlor's spouse may not know about the child, so the settlor may be reluctant to discuss the child's existence with the lawyer.[275]

In other situations, a settlor may want to include a child who does not fit within the legal definition of children. A settlor might have raised a niece after the death of the girl's parents. The settlor might not have adopted the niece but might consider the niece her child. The term child might not include the niece without some additional explanation in the document. If a settlor has stepchildren, the settlor should identify them in the document and clarify whether they will be treated as children for purposes of the trust. Discussion of stepchildren may be difficult if the settlor wants to avoid the discussion because it will raise difficult issues for the settlor and a spouse.[276] Even so, if the settlor intends that the trust include only genetic children and not stepchildren, silence can lead to questions and arguments after the settlor's death.

Yet another settlor might be in the process of using assisted reproductive technology to create a child. The settlor will know, or should know, that frozen gametes could be used after the settlor's death.[277] That settlor's document should address the question of whether a child created after the settlor's death will be included as a beneficiary.

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273. *See* Deborah L. Jacobs, *12 Estate Planning Questions that Might Make You Squirm*, FORBES (July 24, 2012, 5:54 AM), http://www.forbes.com/sites/deborahjacobs/2012/07/24/twelve-estate-planning-questions-that-might-make-you-squirm.

274. *See* Karlin, *supra* note 120, at 1337.

275. *See* Jacobs, *supra* note 273.

276. *See id.*

277. *See* Lorio, *supra* note 120, at 163.

For the definition of child of the settlor, the document should explicitly say who counts as a child. If after-born or after-adopted children should be included (for most settlors this will be the case), then the language should address whether posthumously conceived children should be included and whether there is an age cut-off for posthumous birth of a child. With respect to children of the settlor alive when the document is executed, the document should identify any children who should be included or excluded and do not fit within the current legal definition of child. The settlor should identify by name and explicitly include or exclude stepchildren, nonmarital children, estranged children, and any other person the settlor considers their child.

Although identifying the children who should take by name is useful, the drafter should create a class of children and not merely list them by name. That is, the class should provide for after-born or after-adopted children as well as the children identified by name. If the document only identifies the children by name, then an after-born child may not be included.[278] If the document is a will, the pretermitted child doctrine may add the child to the class of children, but a subsequent codicil could cut the child out again.[279] A class gift is appropriate unless the settlor is certain that there will be no additional children (and a settlor's "certainty" is rarely something an estate planner should rely on for drafting decisions).

B. The Settlor's Descendants

A settlor creating a trust that will continue for two or more generations must consider how to define descendants.[280] The settlor may die before future generations of descendants are born, making decisions about whom to include or exclude difficult. If a settlor is older, he may not understand assisted reproductive technology's continually evolving options, and because the technology will continue evolving, predicting future possibilities will be impossible.[281]

1. Adoption

A trust document typically includes a child "born to or adopted by" a descendant as a descendant.[282] If a settlor wants to exclude all adopted

278. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 13.1 (2003).

279. *See* UNIF. PROB. CODE § 2-302 (2010).

280. *See* RESTATEMENT (SECOND) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 28.2 (1988).

281. Shayne & Christine Quigley, *Defining Descendants: Science Outpaces Traditional Heirship*, 38 EST. PLAN. J. 14, 15 (2011).

282. Hanna & Richardson, *supra* note 271.

children, the document must say so explicitly.[283] Most settlors will want to include children adopted into a parent-child relationship; the conversation between the estate planning lawyer and the settlor might begin here.

Although the relationship between adoptive parent and adoptive child is usually a parent-child relationship, sometimes adoption is used to create a family relationship between adults who may be friends or unmarried partners. Before same-sex marriage and domestic partnerships were legally available in some states, a few same-sex couples used adoption in an effort to create a legal relationship.[284] Although those couples sought benefits other than inheritance rights, the adoptions had consequences for inheritance, at least as between the adoptive parent and child.[285]

In a few other situations, the purpose behind the adoption has been to create inheritance rights.[286] For example, in *Minary v. Citizens Fidelity Bank & Trust Co.*,[287] a trust provided for the settlor's husband and three sons for their lives, and when the last of them died, to the settlor's heirs.[288] One son had no children and adopted his wife in an attempt to make her a beneficiary of the trust.[289] The attempt failed.[290] More recently, a Florida man adopted his girlfriend to make her his child for purposes of an irrevocable trust he had created.[291]

If the settlor wants to limit the definition of descendants to exclude adopted descendants who are not adopted into a parent-child relationship, one option is a functional definition that asks the trustee to determine whether the adoption created a parent-child relationship.[292] Although functional definitions of family members raise evidentiary issues, perhaps an "I know it when I see it" definition would be sufficient. The settlor could give the trustee discretion to determine whether, based on circumstances known to the trustee, the adoption created a parent-child relationship. A functional definition should effectively exclude adopted spouses and partners but with respect to stepchildren, the determination of

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283. SECOND REPORT OF THE TEMPORARY STATE COMM'N ON THE MODERNIZATION, REVISION AND SIMPLIFICATION OF THE LAW OF ESTATES, N.Y. LEGIS. DOC. No. 15, 152 (1963).

284. *See, e.g.*, *In re* Adult Anonymous II, 452 N.Y.S.2d 198 (1982) (allowing adoption to create a family relationship between two men, implicitly recognizing that a parent-child relationship did not exist).

285. *See id.*

286. *See, e.g.*, Minary v. Citizens Fid. Bank & Trust Co., 419 S.W.2d 340, 341 (Ky. 1967).

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.* at 344.

291. Daphne Duret, *Goodman Children's Guardian Objects to Polo Magnate's Adoption of His Girlfriend*, PALM BEACH POST (Feb. 9, 2012, 6:12 AM), *available at* http://www.palmbeachpost.com/news/nes/goodman-childrens-guardian-objects-to-polo-magnate/nL3w5/.

292. Susan N. Gary, *The Parent Child Relationship Under Intestacy Statutes*, 32 U. MEMPHIS L. REV. 643, 680–83 (2002) (proposing a functional definition of child for intestacy statutes).

what it means to "function in a parent-child relationship" could be more difficult.[293]

The settlor and lawyer may use other options for excluding some adopted persons if they conclude that more guidance in the trust document will be helpful and that a functional definition may be difficult to administer.[294] These options may not reach the settlor's desired result in all cases, but they may approximate the settlor's intent, be easier to administer, and be less likely to result in litigation.[295]

For example, the trust document might include an adopted descendant only if the adoption occurs before the child reaches a specified age. A young age (for example, age five) will mean that a parent-child relationship is likely, but such a young age will exclude many stepchildren for whom a parent-child relationship existed. Age twenty-five would provide time for an adoption of a stepchild after the child reached the age of majority and could give permission for the adoption.[296] However, a limit of age twenty-five presents the risk that an adoption will occur for inheritance purposes, without a parent-child relationship or with a limited parent-child relationship.[297] A stepparent might adopt a stepchild at the request of a spouse, even if the stepchild had a limited relationship with the stepparent.[298]

Even age twenty-five might exclude some children for whom a true parent-child relationship existed. If a stepparent married a spouse with three children, ages 12, 14, and 20, and then six years later adopted all three children, two of the children would be included as descendants but the oldest would not.

When a child is adopted into one family, the adoption usually severs ties with another family.[299] This may not be the case if the adoption occurs after a parent's death because the relatives of the parent may continue to have a relationship with the child.[300] For example, if a child's parents die in

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293. A trustee might be faced with a situation in which a descendant of the settlor adopted a stepchild who spent weekends with the descendant and his wife, but lived primarily with the stepchild's birth father and the birth father's second wife. The stepchild had a close relationship with both sets of parents, but did not live permanently with the stepfather who adopted him. Does it matter if the adoption occurred so that the stepchild would inherit more from the trust than from his birth father's estate? The trustee's decision could be more difficult if the trustee is one of the settlor's two sons and the stepfather is the other son in the example. The trustee's decision about the adopted stepchild could affect the amount the trustee's own children would receive from the trust, if his brother had no other children. *See generally* Gary, *supra* note 292 (explaining that settlors often favor biological children).

294. *Ability of Legatee-Husband to Adopt Wife to Bring Her Within Terms of Will*, 1958 WASH. U. L. J. 97, 106–08 (1958), *available at* http://digitalcommons.law.wustl.edu/lawreview/vol1958/iss1/9.

295. *Id.*

296. *See* TEX. FAM. CODE ANN. § 162.504 (West 1995).

297. *See* Brynne E. McCabe, *Adult Adoption: The Varying Motives, Potential Consequences, and Ethical Considerations*, 22 QUINNIPIAC PROB. L.J. 300, 301 (2009).

298. *See id.* at 300.

299. *See, e.g.*, UNIF. PROB. CODE § 2-119(a), cmt. (2010).

300. *See id.*

an accident and the sister of the child's mother adopts the child, the child may continue to have a relationship with the father's relatives even after the adoption. In a variety of circumstances a settlor may want to include children who were "adopted out" and are no longer legal descendants. If so, the UPC provisions provide ideas for whom to include.[301] A settlor may want to include children adopted by a relative of the deceased descendant, by a relative of the deceased descendant's spouse, or even by strangers if both the descendant and spouse died before the adoption.[302]

2. Stepchildren

The circumstances surrounding stepchildren also differ. If the stepparent adopts the stepchild, then the child may be considered a descendant as an adopted child.[303] As discussed, if the adoption occurs after the stepchild becomes an adult and can consent to the adoption, then a definition of descendant that excludes someone adopted after a specified age could prevent the stepchild from being included.[304] In many families, the stepparent does not adopt the stepchild but may raise the stepchild as part of the family. If the parent and stepparent marry when the child is young and the stepchild lives in the household with the stepparent, the stepchild and stepparent may have a close relationship. Conversely, if the child lives with the other parent, the stepparent may be less involved in raising the child. Finally, if the parent and stepparent marry when the stepchild is an adult, the stepparent and stepchild may have a close relationship or may have only minimal contact.

Creating a definition that includes or excludes stepchildren will be difficult because so many different types of relationships exist among step-relatives.[305] Stepfamilies may have close family bonds but limited legal bonds or the legal relationships may be created years after the family relationship began.[306] Other stepfamily relationships may be limited or antagonistic. For many settlors, a decision to exclude step-descendants may be the easiest strategy, one that avoids a definition that risks being significantly over-inclusive as future generations enter into multiple marriages.

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301. *See* § 2-119.

302. *See id.*

303. *See* UNIF. PROB. CODE § 2-118(a) (2010).

304. *See supra* text accompanying notes 296–98.

305. *See* Kim A Feigenbaum, *The Changing Family Structure: Challenging Stepchildren's Lack of Inheritance Rights*, 66 BROOK. L. REV. 167, 175–79 (2000).

306. *See id.*

3. Nonmarital Children

Nonmarital children are treated as children under intestacy statutes, so they will be included as descendants unless the document provides otherwise.[307] If a settlor wants to exclude descendants born outside a marriage, the document must say so.[308] Rather than drafting a blanket exclusion of nonmarital children into a definition of descendants, an estate planner can help a settlor think about why the settlor wants to exclude nonmarital children.

A settlor might be thinking about excluding a child born from a brief sexual encounter, but simply excluding nonmarital children will exclude children in a variety of circumstances.[309] One child might be born to a mother who decided to use artificial insemination to become pregnant and who intended to raise the child on her own. A second child might be born to a different-sex couple who chose not to marry before having the child and might marry later or might remain unmarried. A third child might be born to a same-sex couple who would have married but lived in a state that prohibited same-sex marriage. And a fourth child might be born as a result of a sexual encounter without the intention of creating a family. A blanket exclusion of nonmarital children would exclude all of these children, even if the settlor intended only to exclude the fourth child.

Even if the estate planner determines the intent behind the exclusion of nonmarital children, drafting the exclusion may be difficult. For example, if the settlor's concern were that the child be raised in a two-parent household, an exclusion of nonmarital children would be both over-exclusive and underinclusive.[310] A married couple might have a child together but later dissolve their marriage and live apart. The child might be raised by one of them and might lose contact with one of the parents. In contrast, two parents might raise children together but might not marry and in some states, the decision to raise children without being legally married may be forced on the parents by state laws that prevent a same-sex couple from marrying.

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307. *See, e.g.*, UNIF. PROB. CODE § 2-117 (2010).

308. *See id*.

309. *See* Carmen Solomon-Fears, *Nonmarital Childbearing: Trends, Reasons, and Public Policy Interventions*, CONG. RES. SERVICE (Nov. 20, 2008), *available at* www.fas.org/sgp/crs/misc/RL34756.pdf.

310. *See* George B. Reese, *Best Friends and Relations: Construing "Issue" in Instrument and Intestacy Statutes*, 4 HOFSTRA PROP. L.J. 71, 87–88 (1990).

4. Posthumously Conceived Children

A number of issues relating to children conceived through ART exist and a document might try to identify some of these issues.[311] The difficulty with ART issues is that the technology continues to change, and planning for the changes is challenging at best.[312] If a descendant uses ART to create a child, a state's intestacy statute may be unclear as to whether the descendant is a parent.[313] For example, if a descendant and a woman decide to create a child using donor sperm, the man who intended to be the father of that child might not be considered the father under family law or intestacy law. Under the UPC, the man would be the child's father even if the man did not adopt the child but under the intestacy laws of some states, the man might not be considered the child's father.[314] If the man died, a determination of parentage for purposes of the trust would be necessary. To include a child conceived under these circumstances, a document could incorporate some of the UPC language. Alternatively, a document might rely on intestacy law, but with respect to children conceived using ART the trust document might include a direction to use intestacy law in effect at the time of the distribution to incorporate future changes in reproductive technology.

If a descendant stores gametic material but dies before the material is used, the document can provide guidance for whether a child created posthumously will be considered a descendant. Two issues should be addressed—the decedent's consent to use of the material and limits for when a child must be born to be considered a descendant.[315] With respect to consent, the document can require consent in writing or establishment by other evidence. The document might require that the consent specifically address the posthumous use of the gametic material or simply indicate consent to use of the material for ART. In considering the time period, the settlor should consider balancing the need for certainty with the need for the surviving parent to be able to grieve and to make a careful decision.[316] The settlor may also want to provide a second time period if one child is born to a surviving partner so the partner could have a second child, who would also be included.[317]

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311. *See supra* Part III.B; Benjamin C. Carpenter, *Sex Post Facto: Advising Clients Regarding Posthumous Conception*, AM. C. TR. & EST. COUNS. J. (Forthcoming 2013).

312. *See* Kurtz & Waggoner, *supra* note 59.

313. *See supra* notes 121–22 and accompanying text.

314. *See* Kurtz & Waggoner, *supra* note 59, at 32. *See also* UNIF. PROB. CODE §§ 2-116, 2-120(f) (2010).

315. *See* Carpenter, *supra* note 311.

316. *See* Gary, *supra* note 59, at 183.

317. *See generally* Bruce Stone, *The New Genesis in Estate Planning*, 47 U. MIAMI, HECKERLING INST. ON EST. PLAN. 8-1 (2013).

VI. CONCLUSION

In conclusion, it is useful to keep in mind the statement of the settlor in *In re Rick's Trust*,[318] who was appalled to find that the irrevocable inter vivos trust she created excluded adopted descendants.[319] The court quotes from an affidavit she filed:

> "In 1950 when the agreement was executed," she wrote, "I assumed that an adopted child was considered to be the same as a natural child. If there had been adopted children in 1950 or if any problem had arisen at that time I would have instructed my attorney to use whatever language was necessary to include adopted children. Since there were no adopted children in 1950 and no such problem was presented, I did not so instruct my attorney, but it was not my intention to exclude adopted children from participation in the trust fund."[320]

Although "no such problem was presented" at the time her attorney drafted the trust agreement, the attorney should have considered the later possibility of such a situation.[321] Drafting attorneys must try to imagine problems and challenges that do not currently exist and then try to help settlors make reasonable decisions about how to address the situations in their documents.

318. *See generally In re* Ricks Trust, 176 N.E.2d 726 (1961).
319. *Id.*
320. *Id.* at 728.
321. *Id.*

VII. APPENDIX I

A. Drafting Suggestions[322]

The first sentence is the beginning of a paragraph (or section, depending on the structure of the document) that defines descendant. All of the additional provisions are optional additions and will depend on the settlor's intent. Some of the additional provisions are alternative provisions. Some of these provisions might also be appropriate for a definition of child of the settlor.

1. Initial Sentence

The term descendant with respect to a person refers to the person's child or children and other lineal descendants of the person, whether born to or adopted by the person, except as provided in this paragraph.

2. Should Nonmarital Children Be Included?

A child born to a person will be included in the term descendant only if:

(1) The child is born while the person is legally married to the child's other parent.

(2) The child is born while the person is legally married or a registered domestic partner of the child's other parent [the document would need to define registered domestic partner as someone registered in a state that authorizes registered domestic partnerships or civil unions].

(3) The child is born while the person is in a committed relationship with the child's other parent, whether or not the person is married to the other parent and whether or not the person subsequently marries the other person.

(4) The person legitimizes the child in a legal proceeding entered into by the person voluntarily.

(5) The person functions as a parent to the child for at least two years following the child's birth.

(6) The person is the female birth parent of the child, unless a decree of adoption terminates the female birth parent's parental rights.

(7) The person is the male birth parent of the child and the child lived for a significant time as a minor in the household of the male birth parent or the male birth parent's parent, brother, sister or the surviving spouse of the

322. The sentences in brackets provide descriptions of what that paragraph is referring to for clarification. They are the author's drafting suggestions and can be changed or removed upon the drafter's discretion.

male birth parent, unless a decree of adoption terminates the male birth parent's parental rights. Whether a child has lived for a significant time as a minor in the household shall be determined by the Trustee, in the Trustee's [sole][reasonable] discretion.

3. Should Adopted Children Be Included?

a. Age Limit

A child adopted by a person will be included in the term descendant only if:

> The child is adopted after having lived in the household of the person as a minor;
> The child is adopted by the person prior to attaining age [5] [12] [18] [21] [25].[323]

[If an age limit is used consider making the age refer to the time the adoption proceeding began rather than the completion of the proceeding, which may be beyond the control of the adoptive parent.]

b. Adoption Begun Before Death

An adoption begun before the person's death, if the adoption is legally completed within [two] years after the person's death, shall be deemed completed prior to the person's death.

c. Adoption by Someone Other Than Descendant

A child who would be a descendant for purposes of this trust but was adopted by the spouse [or partner] of the child's birth parent or after the death of the child's birth parent will continue to be a descendant of both birth parents unless the decree of adoption terminates the parental rights of the birth parent who is a descendant under the terms of this trust.

4. Posthumously Conceived Children

A child born more than [ten months] [two years] [three years] after the death of a person will not be considered a child of the person.

A child born more than ten months after the death of a person will be considered the child of the person only if (1) the child is born no later than [three] years after the death of the person; (2) the person's genetic material

323. The numbers in brackets represent examples of what the settlor can insert.

was used to create the child; and (3) the person consented [in writing] to the use of the genetic material to create a child [after the person's death].

5. Exclusions

The definition of descendant does not include a child who is a stepchild, a foster child, or a child due to equitable adoption unless the child meets the requirements of this [paragraph] as the child of a person by birth or adoption.