1972

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COMMENT

ADOPTED CHILDREN IN PENNSYLVANIA: A CLASS WITHOUT A CLAUSE

I. INTRODUCTION*

While adoption was somewhat of a rarity in the United States fifty years ago, it has steadily grown in acceptance and popularity. Today, most states attempt by legislation to equate the adopted child to the natural-born child for all purposes, including the right to share in the estates of the deceased parents. Notwithstanding this trend to vest equal rights in adopted children, both the Pennsylvania legislature and judiciary continue to differentiate between the natural-born and the adopted child in regard to inheritance rights.

The problem involved can best be described by setting forth the facts of a typical situation with which a court (or legislature) is confronted. In his will X leaves property to Y for life, remainder over at Y’s death to Y’s “children,” “issue,” “heirs,” or “descendants.” Y adopts a child. The problem which faces the court is whether the adoptee shares in the class gift on Y’s death. The problem is further complicated since it is necessary to consider the time of the adoption, not only in relation to the execution of the will, but also in relation to the death of the testator. Moreover, the court must consider the applicable statute governing the construction of wills, which, depending upon interpretation, may or may not give full import to the rationale underlying adoption statutes.

It is the purpose of this Comment to examine the inheritance rights of adoptees in Pennsylvania, to point out the weaknesses and inconsistencies of the interpretations of those rights, and finally to make specific proposals for a badly needed reform of these rights in Pennsylvania.

* The Pennsylvania legislature recently enacted a major recodification of the laws of decedents and trust estates. Act of June 30, 1972, Pamph. L. 164. The new Probate, Estates and Fiduciaries Code repeals prior laws, including the Wills Act of 1947 and the Intestate Act of 1947. The substantive provisions of these laws, however, are reproduced almost identically in the new Probate Code. The enactment of the Code occurred during the publication process, preventing the indication of the new statutory citations in this Comment; the references herein to the 1972 supplement of Pennsylvania Statutes indicate amendments occurring before the enactment of the Probate Code. Although the reader is cautioned that the statutory citations in this Comment should be cross-referenced to the new Probate Code, the substantive law of estates and probate in Pennsylvania is virtually unchanged. The analysis and proposals presented in this Comment are unaffected by the recodification of Pennsylvania law.

2. See, e.g., CONN. GEN. STAT. REV. § 45-65a (1960).

(1066)
II. History of Adoption

Although adoption was recognized by the Code of Hammurabi approximately 2000 years before the birth of Christ, it only reached its zenith in ancient Rome. Roman adoption, very closely tied to religious beliefs and usually carried out by a solemn rite, indicated the adoptee's admission into a new worship and into a new family. As thus practiced, adoption encompassed a complete severance of the adoptee's relationship with his natural family and a complete union with the adopter's family. By the time of the Justinian Codes, an adopted child was recognized for all purposes as a member of the adopting family. Moreover, under the early civil law, an unemancipated adopted male child had inheritance rights equivalent to his unemancipated natural brothers and also had rights superior to the adult progeny of his adopting parents. The latter sons, by reason of their emancipation, were not considered members of the family and could not be heirs.

Notwithstanding the ancient development of adoption, the authorities agree that adoption never played as significant a role in our common law heritage. The English system of inheritance ascribed much importance to the concepts of primogeniture and of blood of the first purchaser. The common law experience was cogently propounded by Lord Coke:

[L]ands are derived from one to another, because it is wrought and vested by the act of law, and right of blood, unto the worthiest and next of the blood and kindred of the ancestor, and therefore it hath not in the common law altogether the same signification that it hath in the civil law . . . [B]y the common law he is only heire which succeedeth by right of blood.

This principle remained the law of England until 1926, when adoption in the Roman sense was finally recognized by statute.

In the United States, even though Indian custom furnished some precedent for recognizing the adopted child's rights of inheritance from the adopting parents, the courts refused to recognize these practices,

5. Id. at 743.
6. Id. at 744.
7. See Hardgrove, Futility of Resort to Roman Law for Interpretation of Statutes on Adoption, 9 Marq. L. Rev. 239, 244 (1925).
8. Id.
10. 11 L. Coke, Coke on Littleton § 237b (Am. ed. 1912).
11. Adoption of Children Act, 16 & 17 Geo. 5, c. 29, § 2 (1926).
noting, "the right of adoption is contrary to natural law and we have been unable to find any case reported where adoption by custom has been sanctioned or maintained." Adoption was nonetheless revived somewhat earlier in the United States than in England. It appeared in statutory form in various states during the early and middle nineteenth century, beginning with Louisiana and Texas probably as a result of their background in the civil law, which derived primarily from the Roman law.

A. Adoption in Pennsylvania

1. Statutory Genesis

Originally, there was no general law of adoption in Pennsylvania. Adoption was only permitted in particular cases by specific acts of the legislature. The first general adoption act in the Commonwealth was that of 1855. While this adoption statute has been amended and superseded on various occasions, the relevant language in regard to inheritance has remained unchanged. From the Act of 1855 (section 7) through the Act of 1970 (section 502), the acts have provided in identical language that the adopted child "shall have all the rights of a child and heir of the adopting parent . . . ."

2. The Equalization Argument

Since the enactment of the 1855 Act, the direction of the law in Pennsylvania has apparently been toward equalization of the rights of natural and adopted children. As the courts have continuously stated, a valid adoption "severs the child from his natural family tree and engrafts him upon that of his new parentage . . . ." However, despite this generally progressive approach toward adoption, the courts, in considering the effect of adoption upon the determination of general designees in wills and trust instruments, have denied equality to the adoptee in all but a few cases.

14. See e.g., Teal v. Sevier, 26 Tex. 516 (1863); Fuselier v. Masse, 4 La. 423 (1832). See also Huard, supra note 4, at 747. The first common law jurisdiction to pass an adoption statute was Massachusetts in 1851. Mass. Gen. Laws ch. 324 (1851).
17. The Act of 1855 was amended by the Act of Apr. 2, 1872, Pamph. L. 31 (adoption by deed), by the Act of May 19, 1887, Pamph. L. 53 (inheritance by adoptive parents), and by the Act of May 9, 1889, Pamph. L. 168 (adoption by adults). These acts were superseded by the Act of Apr. 4, 1925, Pamph. L. 127, which was amended by the Act of Apr. 26, 1929, Pamph. L. 822, which was again amended from time to time until being superseded by Act of July 24, 1970, Pa. Stat. tit. 1, §§ 101 et seq. (Supp. 1971).
instances. Specifically, in the area of inheritance rights, the Pennsylvania courts have evidently adhered to the principles of the common law despite the contrary legislative policy underlying the adoption act.

The courts have avoided the specific statutory proviso of equalization by rationalizing that: (1) the will was executed before the statute was enacted; or (2) the testator died before the statute was enacted; or (3) a resort to the applicable wills or estates statutes is sufficient, thereby circumventing the adoption statute altogether. Accordingly, one commentator has concluded:

Since adoption is a legislative creature, the common-law technique of interpreting statutes enables the courts to impose their traditional conservatism even upon progressive legislation. The courts construe adoption legislation within the framework of the common law, which did not even recognize adoption much less inheritance through adoptive filiation.

While the Pennsylvania judiciary has given some recognition to the legislative policy of equalization, it has not yet disavowed the common law refusal to recognize adoption. Moreover, while there is little contrariety of opinion that the intention of the testator or settlor must prevail, in the absence of an express or implied intent to include or exclude adopted children, courts should not infer a discriminatory attitude on the part of the testator.

20. See Collins' Estate, 393 Pa. 195, 142 A.2d 178 (1958), in which Justice (now Chief Justice) Jones proclaimed:

A review of the decisions under the Act of 1855 and subsequent adoption and inheritance statutes ... indicates that, even though the legislature expressly declared an adopted child to be both a child and an heir of his adopting parents, our courts in many instances failed to grant such a status to the adopted child. Id. at 202, 142 A.2d at 182. See also Fownes Trust, 421 Pa. 476, 481, 220 A.2d 8, 11-12 (1966) (dissenting opinion); Holton Estate, 399 Pa. 241, 249-61, 159 A.2d 883, 887-93 (1960) (dissenting opinion).

21. Pa., Stat. tit. 1, § 502 (Supp. 1971). See Brock's Assigned Estate (No. 3), 312 Pa. 92, 100, 166 A. 785, 788 (1933), in which the court reiterated the rule that “[a] purpose to disregard sound public policy must not be attributed to the law-making power, except upon the most cogent evidence.”


23. Binavince, supra note 1, at 158. As an illustration of that to which Professor Binavince was referring, see Cave's Estate, 326 Pa. 338, 192 A. 460 (1937), wherein the court noted:

The right of adopted children to inherit from kindred of their adoptive parents is dependent entirely upon statutory enactments, and because the "call of the blood" is one of the most firmly rooted instincts of human nature, courts tend to a strict construction of such legislation. In the absence of a plain legislative mandate to the contrary a stranger to the adoption proceedings should not have his property diverted from its natural course of descent to the heirs of his blood. Id. at 359, 192 A. at 461. This case appears to be a clear example of the ancient principle of constriction that statutes in derogation of the common law are to be strictly construed.

part of the testator. On the contrary, they should look to the equalizing language of the adoption act as support for conferring the bequest upon the adopted children.

III. PENNSYLVANIA STATUTORY DEVELOPMENT

A. Intestate Provisions

Although beyond the scope of this Comment, the rights of adopted children to inherit under Pennsylvania’s intestate provisions merit a brief discussion. Since 1855 the law in Pennsylvania has progressed such that the adopted child today is recognized as a member of the adoptive parent’s family for all purposes of intestate succession. In Cave’s Estate, the Supreme Court of Pennsylvania, interpreting the Intestate Act of 1917, held that in cases of actual intestacy, the adopted child could inherit from collateral relatives as well as from his adoptive parents. The court considered the effect of the statute to be to engraft the child to his new parentage “for all purposes of inheritance.” The statute presently in effect in Pennsylvania retains the rule set forth in Cave’s Estate. Thus, in cases of actual intestacy, an adopted child is no longer discriminated against, but is treated as a member of his adoptive parents’ family.

Previous Pennsylvania cases had held that, in a distribution “under the intestate laws of Pennsylvania,” an adoptee could inherit, since the

25. As stated in Collins’ Estate: “[W]e will not, in the absence of any evidence, impugn to testatrix a discriminatory attitude.” 393 Pa. at 212, 142 A.2d at 187.

26. For an excellent history of the development of the rights of adopted children under the intestate acts from 1885 to 1917, see Cave’s Estate, 326 Pa. 358, 192 A. 460 (1937).

27. Id.


   Section 16. (a) Any minor or adult person adopted according to law . . . shall . . . inherit . . . as fully as if the person adopted had been born a lawful child of the adopting parent or parents.

   (b) The person adopted shall, for all purposes of inheritance and taking by devolution, be a member of the family of the adopting parent or parents . . . . Adopted persons shall not be entitled to inherit or take from or through their natural parents . . . .

29. 326 Pa. at 366, 192 A. at 464.


   For purposes of descent by, from and through an adopted person he shall be considered the issue of his adopting parent or parents and not the issue of his natural parents: Provided, That if a natural parent shall have married the adopting parent, the adopted person for purposes of descent by, from and through him shall also be considered the issue of such natural parent.

31. The comments of the Joint State Government Commission stated specifically that “[t]his section is intended to retain the rule of Cave’s Est. . . . and Reamer’s Est. . . . .” Id. (Commission’s comment).

Reamer’s Estate, 331 Pa. 117, 200 A. 35 (1938), like Cave’s Estate, held that, under section 16 of the Intestate Act of 1917, an adopted child had the same inheritance rights from the collateral kindred of his adoptive parents as did the natural children of such parents.
adoption acts of the Commonwealth so provided. It had also been suggested that even a person not legally adopted might have intestate inheritance rights as a third party beneficiary — as for example, when foster parents contract with others to treat a child as their own. Furthermore, concerning the inheritance rights of an adopted child in regard to his natural parents, it was generally held that such an inheritance by the child from his natural ascendants and collaterals was not permitted.

B. Wills Acts

1. Pre-1917

Prior to the Wills Act of 1917, Pennsylvania courts consistently held that adopted children could not participate in testamentary gifts to a "child" or "children." In fact, this principle is still applied by the courts in construing gifts which were made prior to the Wills Act of 1917.

In Commonwealth v. Nancrede, a case which dealt with the construction of a collateral inheritance statute and which provided the basis for later decisions concerning the rights of an adoptee as a "child" in a testamentary instrument, it was held that property devised to an adopted son was subject to the inheritance tax because, "[g]iving an adopted son a right to inherit, does not make him a son in fact." Thus, the basis for the decision was not a construction of the testamentary instrument, but rather a construction of the collateral inheritance statute.

32. See Johnson's Appeal, 88 Pa. 346 (1879). See also Estate of Rowan, 132 Pa. 299 (1890).
33. See McDaniel's Estate, 305 Pa. 17, 156 A. 338 (1931), in which a contract between the decedent and a children's home providing that a foster child should have the interest of a natural child in decedent's estate, was held enforceable against the estate of intestate promisor.
34. In Morgan v. Reel, 213 Pa. 81, 62 A. 253 (1905), the court held that an adopted grandchild could not inherit from both her adopted and natural parents. This holding was codified in both the Act of 1917 and the Act of 1947. As a natural corollary, it is also clear that the adopted child cannot inherit through the relations of his natural parents. See Zoell's Estate, 345 Pa. 413, 29 A.2d 31 (1942) (natural uncle); Fisher v. Robinson, 329 Pa. 305, 198 A. 81 (1938) (natural parent); Crossley's Estate, 135 Pa. Super. 524, 7 A.2d 539 (1939) (natural grandparent).
37. When determining adopted children's inheritance rights, the courts are bound by those statutes in force at the time of the intestate's death, or, where there is a will, by the terms of the will itself. See In re Cilley, 400 Pa. 567, 163 A.2d 302 (1960); Holton Estate, 399 Pa. 241, 159 A.2d 883 (1960); Collins' Estate, 393 Pa. 195, 142 A.2d 178 (1958); Howlett's Estate, 336 Pa. 293, 77 A.2d 390 (1951).

The Wills Act of 1947, which went into effect on January 1, 1948, applied to the wills of all persons dying on or after that date. For persons dying before that date, the earlier law was controlling. PA. STAT. tit. 20, § 180.22 (1950).
38. 32 Pa. 389 (1859).
39. Id. at 390. In Commonwealth v. Henderson, 172 Pa. 135, 33 A. 368 (1895), and Commonwealth v. Ferguson, 137 Pa. 595, 20 A. 870 (1890), the court reaffirmed the Nancrede rule that the Adoption Act of May 4, 1855, Pamph. L. 430, did not amend the Inheritance Tax Act of 1826.
The earliest Pennsylvania case actually construing a testamentary gift to adopted children was *Schafer v. Eneu.*40 That court, relying completely on *Nancrede,* excluded the adoptee from taking under a testamentary gift to "children." The *Schafer* court, although it purported to quote *Nancrede,* actually misapplied the *Nancrede* reasoning, which involved the construction of a tax statute, to the situation it faced, namely the construction of a testamentary instrument.41 Because of this misapplication, the presumption evolved that a testator does not intend an adoptee to share in a gift to "children." Notwithstanding this questionable interpretation, *Schafer* is consistently set forth as authority in cases construing the rights of adoptees.42

In *Corry's Estate,*43 decided in 1940, the law of the pre-1917 period was extended to exclude an adoptee by reason of being the "child" of another, in a case involving special powers of appointment. The testator had died in 1912, leaving a will executed in 1906. He had created a trust for his daughter for life and had given her a power to appoint "amongst such of her said children and descendants of children," with a gift over to this class in default of appointment. The daughter had no natural children but adopted a son in 1930, eighteen years after the testator's death. She attempted to exercise her power in his favor. The court held that the attempted appointment was invalid and that the gift over was effective, saying:

Prior to the passage of the Wills Act of June 7, 1917 . . . it was the established rule that adopted children could not participate in testamentary gifts to "children" . . . . As the testator died five years before the effective date of the Wills Act, this is the rule that must govern the interpretation of his will.44

It was generally permissible for adopted persons to be included if such was the testator's intent. However, such an intent was very difficult to prove since the courts presume an intent to *exclude* the adoptee absent a showing that the testator intended otherwise.45 Furthermore, the proof of

40. 54 Pa. 304 (1867).
41. The *Schafer* court quoted *Nancrede* as follows: Giving an adopted son a right to inherit does not make him a son in fact, and he is so regarded in law, only to give the right to inherit.
42. See generally Comment, *The Adoptee of Another: Is He a "Child"?*, 26 U. Pitt. L. Rev. 563, 564-65 (1965). The author pointed out that the *Nancrede* court clearly did not intend its statements to apply either to the inheritance laws or to the construction of private documents.
43. 338 Pa. 337, 12 A.2d 76 (1940).
44. Id. at 340, 12 A.2d at 78 (citations omitted).
45. An exception to the required onerous burden of proof appears to have been made where the beneficiaries were described by reference to the intestate law. Thus, it
intent necessary to rebut this presumption had to appear in the will itself. Thus, the strict rule of *Yates' Estate*, holding extrinsic evidence of intent inadmissible, presumably remains good law.46

2. **Wills Act of 1917**

Section 16(b) of the Wills Act of 1917 provided:

Whenever in any will a bequest or devise shall be made to the child or children of any person other than the testator, without naming such child or children, such bequest or devise shall be construed to include any adopted child or children of such other person who were adopted before the date of the will, unless a contrary intention shall appear by the will.47

Thus, the Act of 1917 made two major changes in the prior case law: (1) an adoptee of the testator was included within a gift by the testator to his “child” or “children,” even after execution of the testamentary instrument; and (2) where the gift was to the “child” or “children” of one other than the testator, only those children adopted before the will was executed were included. However, both statutory rules of construction could be overcome by showing a contrary intention within the will itself.

In deciding the rights of an adoptee who was adopted after the execution of the will, the Pennsylvania Supreme Court interpreted the 1917 Act in *Holton Estate*48 and held that the legislative intent was to include adoptees within the terms “child” or “children” provided the adoption took place before the will was executed.49

It should be noted that the effect of this statute is limited, in that: (1) it included adopted children of others only if the adoption occurred before

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46. 281 Pa. 178, 126 A. 254 (1924). In both *Yates' Estate* and *Corr's Estate*, the extrinsic evidence, although ruled inadmissible, was nevertheless considered in reaching a decision. In the opinion of at least one commentator, it would appear that “proof of such facts as the date of the adoption and whether the testator knew of it should be admissible to show the background of the intent expressed in the will, but how much more or less than this can be shown remains uncertain.” P. BREGY, PENNSYLVANIA INTESTATE, WILLS AND ESTATES ACTS OF 1947 3156-57 (1949).

47. Act of June 7, 1917, Pamph. L. 403, § 16(b), codified in Pa. Stat. tit. 20, § 228 (1950). Section 16(a) provided:

   Whenever in any will a bequest or devise shall be made to the child or children of the testator, without naming such child or children, such bequest or devise shall be construed to include any adopted child or children of the testator, unless a contrary intention shall appear by the will.


49. *Id.* at 247, 159 A.2d at 886. The effect of the Act was intimated in dicta in *Corr's Estate*, where the court said: “But even if the Wills Act were applicable here, [the adopted child's] position would be no better, because that statute modifies the former rule of construction only as to persons adopted *before* the execution of the will.” 388 Pa. at 340, 12 A.2d at 78. See text accompanying notes 43-46 *supra*. See also *Hull Estate*, 13 Pa. D. & C.2d 17 (Orphans' Ct. Lanc. 1957); *Biddle Estate*, 66 Montg. Co. L.R. 291 (Orphans' Ct. Montg. 1950).
the testator's execution of the will; and (2) it applied only when the gift was to a "child" or "children," and not if the gift were to "issue," "descendants," "heirs," or some other similar classification.

3. **Wills Act of 1947**

The Wills Act of 1947, which repealed the 1917 Act and is the present law, changed the prior statute in several respects. In the 1947 Act, a single provision covers all situations: any child who is adopted before the testator's death is regarded as the child of the adopting parents for all purposes of will construction, unless a contrary intent appears in the will. Thus, under the present rule of construction, gifts to children of others now includes persons adopted after the will is executed, so long as such adoption has taken place before the death of the testator. However, even under this liberalized act, an adoptee still does not share in a gift of a future interest when the adoption occurs after testator's death but before the class closes.

Furthermore, the provisions of the 1947 Act apply to any description of the will's beneficiary in terms of relationship. Thus, the present provision eliminates the construction problem posed where the will provided for someone other than "child" or "children," since the presumption applies to bequests "to a person or persons described by relationship to the testator or to another" and not only to a "child."

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53. Section 14(6) provided:

In the absence of a contrary intent appearing therein, wills shall be construed as to real and personal estate in accordance with the following rules:

(6) *Adopted children.* In construing . . . a will making a devise or bequest to a person or persons described by relationship to the testator or to another, any person adopted before the death of the testator shall be considered the child of his adopting parent or parents and not the child of his natural parents . . . .


54. The Commissioners, in their comments to Section 14(6), indicated that the testator's death was made the critical date to avoid "the possibility of adoptions for the sole purpose of preventing a gift over in default of issue." Pa. Stat. tit. 20, § 180.14(6) (1950) (Commission's comment), as amended Pa. Stat. tit. 20, § 180.14(6) (Supp. 1972).


56. The Estates Act of 1947 had a provision, similar to that in the Wills Act, for interpreting gift provisions in *inter vivos* transfers. Section 14(3) of the Estates Act provided in pertinent part:

Adopted children. In construing a conveyance to a person or persons described by relationship to the conveyor or to another, any person adopted before the effective date of the conveyance shall be considered the child of his adopting parent or parents and not the child of his natural parents . . . .

IV. Construction of Instruments Under the Wills Act of 1917

The remainder of this Comment will deal primarily with construction of wills under the 1917 Act. Specifically, the problems in this area are: 1) May a child adopted after the execution of the will, but before testator’s death, take under the Act? 2) May a child adopted after the testator’s death share in a gift to children under the Act? and 3) May an adopted child be included in a gift to “children,” “heirs,” “issue,” or other similar classifications under the Act?

A. Basic Rules of Construction

It is basic to the interpretation of wills that the testator’s intention prevails where the language used is clear and unambiguous. Only when his intent is unknown or inconclusive should rules of construction be used. As the Pennsylvania Supreme Court has stated:

It is now hornbook law (1) that the testator’s intent is the polestar and must prevail; and (2) that his intent must be gathered from a consideration of (a) all the language contained in the four corners of his will and (b) his scheme of distribution and (c) the circumstances surrounding him at the time he made his will and (d) the existing facts; and (3) that technical rules or canons of construction should be resorted to only if the language of the will is ambiguous or conflicting or the testator’s intent is for any reason uncertain.67

These rules of construction are based upon the presumed intention of the testator and the public policy of the time.68 An examination of recent cases reveals that, although the court has usually reiterated old decisional rules to the effect that adoptees are presumed not to be included in gifts to “children,” this majority position has been weakened, since the former minority position has, on occasion, prevailed in the court.

B. Cases Construed Under the 1917 Wills Act

In Collins’ Estate,69 a 1912 will of a 1921 decedent contained a gift of a remainder interest to the “descendants” of those who held life interests. A unanimous court held that adoptees were included within the “descendants,” even though the adoptions took place nine and twelve years after the testator’s death. The court reasoned that the 1917 Act did not say that “descendants” cannot include persons adopted after the date of the will — therefore they may be included.69 If the intention of Collins’ was

58. See Comment, supra note 42, at 563. The author sets forth the hypothesis that such rules of construction no longer satisfy the demands of public policy which call for the adoptee to be treated equally in all respects with natural children.
60. Although the court may have been correct in that the precise wording of the statute did not preclude after-adopted “descendants,” this position seems to be incon-
to break away from the older cases and put Pennsylvania law in line with
the modern trend, later cases illustrate that this intention has been frus-
trated. Although Collins' has never been overruled, subsequent cases
have limited it to its facts.61

In Holton Estate,62 a divided court,63 refused to extend the rule
as announced in Collins’. Holton involved a will executed in 1929 by a
testator who died in 1931, and a child adopted after the will’s execution,
but prior to testator’s death. The child was excluded from a gift in the
will to the life-tenant’s “children,” even though there was an alternative
gift to “descendants” of deceased children of the life tenant. The court
looked to the intention of the testator, both express and implied, to deter-
mine whether he might have contemplated the inclusion or exclusion of
adopted children from the word “children,” but found the will silent.
Having determined that there was no such intent, the court looked to the
language of the controlling statute and found against the adoptees.64 In
its discussion of section 16(b) of the 1917 Wills Act, the court stated:

An examination of this statute clearly reveals the legislative intent: to
include within the term “child” or “children” of a person other than
the testator an adopted “child” or “children” provided, however, that
such adoption took place before the execution of the will, and to
exclude such adopted child or children if the adoption took place
after the execution of the will.65

It is submitted that this conclusion was unwarranted, since section 16(b)
was phrased only in the affirmative. If the legislature wanted to exclude
such adoptees, it would have been a simple process to so provide. An
alternative inference, more consistent with the legislative policy of equaliza-
tion, would have been to view adoptees as being explicitly included in
certain gifts, whereas, in other situations, such inclusion or exclusion could
have been left to the discretion of the courts.66

consistent with its prior definition of “descendants” in Howlett's Estate, 366 Pa. 293, 77
A.2d 390 (1951). In Howlett's Estate, the court refused to go beyond a literal reading
of section 16(b) of the Wills Act of 1917 (see text accompanying note 47 supra),
and confined its reading to the precise wording, i.e., “child or children.” The court
went on to say, by way of dicta, that “descendants” and “issue” were synonymous
terms. Id. at 299, 77 A.2d at 393.

61. Cases such as Bell Estate, 439 Pa. 433, 267 A.2d 862 (1970), and Fownes
Trust, 421 Pa. 476, 220 A.2d 8 (1966), held that Collins' applied only in gifts to
“descendants.”


63. The late Justice Musmanno, in a well-reasoned dissent, argued that the
reasoning in Collins' should apply to a gift to “children.” Id. at 249-61, 159 A.2d at
887-93 (dissenting opinion).

64. It should be noted that the court dismissed the argument that the juxtaposition
of the words “children” and “descendants” required application of the Collins'
rationale. Instead, the court distinguished Collins' and stated that the testator’s
reference to “child” was to members of a third generation class, while the reference
to “descendants” was to members of a fourth generation class. Id. at 245, 159 A.2d
at 885.

65. Id. at 247, 159 A.2d at 886.

The court continued\textsuperscript{67} to adhere to the more conservative view until 1970 when \textit{Chambers' Estate}\textsuperscript{68} was decided. In that case the testator adopted a child in 1929 and executed his will in 1930 in which he left a gift to his daughter's "children, if any." Testator died in 1933, two years after the adopted child died, but in 1937 there was a new adoption. The court held that the later adoptee, adopted after the execution of the will and after the death of the testator, was included in the bequest. The court never overruled \textit{Holton}\textsuperscript{69} but based its decision on the rationale that court-interpreted intent must give way to the testator's actual intent, where the latter can be ascertained. The court found such actual intent in the circumstances surrounding the execution of the will; the testator knew that the daughter was incapable of bearing children, and he had been pleased with her first adoption. Thus, there appeared to be a reversal in trend and philosophy on the part of the court, and a movement toward the earlier, more liberal rule of \textit{Collins}'.

In a very recent\textsuperscript{70} decision, \textit{Bell Estate},\textsuperscript{71} the court interpreted the will of the testator who died in 1937. His daughter had married in 1926, and in 1932 it was medically established that her husband was permanently sterile. In 1936 the daughter adopted a child with testator's approval. Testator's will, executed in 1934, established a trust with income payable to his daughter for life, remainder to her "children." This will was republished shortly after the adopted child was brought into the daughter's home, but before the formal adoption papers were signed. The court held, in a per curiam opinion, that the adopted child was not included in the

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\textsuperscript{67} In \textit{Tower Estate}, 410 Pa. 389, 189 A.2d 870 (1963), the court continued in its refusal to extend \textit{Collins}'. In that case a testator created a testamentary trust in an 1899 will, which began with "words of blood," such as "children," "grandchildren," "issue," and "lineal descendants." The court held that the testator intended to include only relatives of his blood and to exclude strangers to the blood. Therefore, a grandchild's adopted children were not allowed to share with the natural grandchildren.

In \textit{Fownes Trust}, 421 Pa. 476, 220 A.2d 8 (1966), the court had to construe an irrevocable trust which gave income to the settlor's daughter, then to her "children, and to the issue per stirpes of any child who may have predeceased her." \textit{Id.} at 478, 220 A.2d at 9. The court held that after-adopted children of the daughter were excluded. The majority opinion placed great reliance on \textit{Howlett's Estate} and found an intent on the part of the settlor, merely from the use of the terms "children" and "issue," to benefit "his blood line and only his blood line." \textit{Id.} at 480, 220 A.2d at 10. However, a cogent dissent by Justice Roberts, in which Justices Musmanno and Jones concurred, urged the court to re-evaluate its position to bring its decisions in line with public policy long expressed by the adoption and intestate laws. \textit{Id.} at 481-84, 220 A.2d at 11-12. But see \textit{Benedum Estate}, 427 Pa. 408, 235 A.2d 129 (1967); \textit{Pennington Trust}, 421 Pa. 334, 219 A.2d 353 (1966).


\textsuperscript{69} See notes 48-49 and accompanying text supra.

\textsuperscript{70} Although there has been an even more recent case, \textit{Holloway Trust}, 50 Pa. D. & C.2d 667, aff'd \textit{per curiam}, 444 Pa. 624, 281 A.2d 631 (1971), cert. denied \textit{sub. nom.}, Hay v. Truscott, 405 U.S. 1042 (1972), no opinion was filed with the decision.


gift. A two-part concurring opinion was also filed. Part I of the opinion assumed that the Chambers’ approach was correct but, in reaching a different conclusion, distinguished it on three grounds. First, the language used in Chambers’ was simply “children,” while in Bell the phrase was “children of her.” Secondly, the Bell instrument contained other dispositive clauses which were couched in terms of “child or issue.” Therefore, the concurring opinion concluded that the testator’s intent was that issue take after the death of his children, and since the court had consistently defined issue as meaning issue of the body, adopted children would be excluded. Finally, the opinion distinguished Chambers’ on the ground that there the infertile spouse was the wife, while in Bell it was the husband.

In light of Bell, therefore, it seems that the pendulum has again swung toward the more conservative approach. Just as previous decisions retreated from the liberal rule of Collins’, there now appears to be a similar retreat from the liberal decision in Chambers’.

C. Possibilities of Fraud

There is always the possibility that fraud may be involved in the transfer of property, especially at death. Thus, adoption, which injects additional legatees into the scheme of inheritance and devolution of property, has been looked upon with suspicion by both courts and legislatures. For instance, the comment to section 14(b) of the Wills Act of 1947 stated:

In requiring adoptions to be made before the testator’s death, [this section] avoids the possibility of adoptions for the sole purpose of preventing a gift over in default of issue.

Furthermore, courts have generally been overly cautious where adoptees qualify under the will to take a remainder interest, since, in this situation, the life tenant may simply adopt a child to defeat the gift over to others. However, “[w]ould parents assume the responsibility and burdens of raising children merely to defeat the intentions of the deceased testator?”

72. The concurring opinion was filed by the late Justice Cohen, and Chief Justice Bell and Justice Eagen joined. Justice Pomeroy joined in Part I. Id. at 437–41, 267 A.2d at 864–66.
73. See notes 95–100 and accompanying text infra.
It is easy to see the abuses which might arise if childless persons unable to have children could, by adopting children, defeat the rights of others and in effect divert the estate of the testator to persons who were strangers to his intention. 32 Pa. D. & C. at 548.
76. See, e.g., Corr’s Estate, 338 Pa. 337, 12 A.2d 76 (1940); Freeman’s Estate (No. 1), 40 Pa. Super. 31 (1909). In these two cases, a life tenant having power to appoint the remainder among his children or kin was held to be without power to appoint the fee to his adult adoptee.
77. Comment, supra note 42, at 578.
The assumption that parents adopt for this purpose defeats the basic objectives of adoption, and it is submitted that this situation would be an extraordinary occurrence.

Admittedly, the reasons for an adoption may be suspect if it occurs a short time before the adoptive parent dies or if the adoptee is an adult. In *Holloway Trust*, the testator, established a trust which left a life estate to his son with remainder to his son's "child or children." The son, at 79 years of age, adopted a 67 year old mother of two grown children while he was on his deathbed with cancer. Given this factual situation, the court did not allow the adopted adult to take. One of the reasons for the court's decision was its apprehension over the facts of the case:

Although this adoption ... is a strange and questionable phenomenon, we are without authority to challenge collaterally the decree of the California court [which granted the adoption] and must give it full faith and credit ... We may, however, question the judgment and common sense of the court which sanctioned such a peculiar and unnatural adoption.

Notwithstanding such suspicions, fraud is never to be presumed but must be pleaded and proved. However, it is only one consideration in weighing the equities of a particular case and should not automatically permeate every controversy in this area. As has been suggested, there could be a statutory presumption against the adoption if the adoptee has passed a particular age or if it is apparent that the sole purpose of the adoption is for the disposition of property. It is submitted that by making the presumption rebuttable, all parties to the contest could be adequately protected.

D. Interpretation of Specific Words and Phrases

1. Direct indication to restrict gifts to blood line of testator

At the outset, it should be noted that the testator may indicate in his will an express intention to restrict gifts to those of the testator's or to a designated person's blood. For instance, "born" and "of the body" indicate the testator's specific meaning to include only natural offspring.

78. In Schafer v. Eneu, 54 Pa. 304 (1867), it appeared that the last of three children adopted by the life tenant was adopted one day before she died. *See* Oler, supra note 74, at 925.
80. *Id.* at 670.
82. *See* Comment, supra note 42, at 578. Another commentator, during a discussion of possible statutory changes iterated:

[T]he specter of sinister adoptions could be obviated by a refusal to recognize adoptions of adults or at least adoptions having no legal significance or purpose other than for the disposition of property.

Thus, in *Stewardson's Estate*,\(^{84}\) the court held that the provision for the "next of kin of the blood" of a designated person indicated that adopted children who might have otherwise been included as next of kin must, in light of the phrase used, be excluded from the designated class. Similarly, in *Benedum Estate*,\(^{85}\) the adopted daughter of a deceased nephew, one of the testator's life tenants, was excluded in the gift of income to the nephew's "living children" and "living issue of a deceased child," because the testator had provided that "the words child, children, and issue . . . shall include only issue of the body of my niece and nephews."\(^ {86}\)

2. Child or Children

Prior to the passage of the Wills Act of 1917, the Pennsylvania courts consistently construed the words "child" or "children" to include only natural children and thus excluded adopted children from taking testamentary gifts or bequests.\(^{87}\) In *Schafer v. Eneu*,\(^ {88}\) the testator died in 1851 leaving a life estate to his daughter with remainder to "her children." The court ruled that the devise did not include children adopted by the daughter if the adoption occurred prior to the Act of 1855. In addition, the court reasoned that the interests of the natural children had vested prior to the adoption act and it was not within the power of the legislature to take away a vested interest and give it to such persons as the daughter might adopt.\(^ {89}\) Subsequently, the court held, in *Puterbaugh's Estate*,\(^ {90}\) that a child adopted by testator's son was not to be included in a gift to the "child or children" of that son. The court determined that the word "children," when it appeared in a will, should be confined to its natural import except where the testator had clearly shown an intention to give the word a broader meaning. From these and other cases,\(^ {91}\) it can be seen that the courts of this Commonwealth have not given much attention to the words of the adoption statute and much less to the policy underlying it.

In cases decided under the Wills Act of 1917, *Holton Estate*\(^ {92}\) represents the courts' continued adherence to the prior cases which have limited the construction of children to progeny. In *Holton*, the court held that

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86. Id. at 409-10, 235 A.2d at 131.
88. 54 Pa. 304 (1867).
89. Id. at 306-07.
91. See, e.g., Yates' Estate, 281 Pa. 178, 126 A. 254 (1924), where the court held that the adopted child of the life tenant must be excluded in a gift to "child or children" of the life tenant notwithstanding that the child had been adopted prior to execution of will, that the testator had known the child, and that the testator knew that his sister (the life tenant) could not have natural children.
children adopted after testator’s death were not included in a gift to the “children” of testator’s son. The court reasoned that the statute impliedly excluded the child.93 Even though Chambers’ Estate94 permitted an adopted child to participate in a gift to the life tenant’s “children if any,” and could be considered to be in keeping with the more recent developments, the decision appears to have been limited to its facts since the court was able to ascertain the actual intention of the testator.

3. Issue

The first significant case interpreting the word “issue” under the Wills Act of 1917 was Russell’s Estate,95 in which an adoptee was held not to be issue of a devisee or legatee within the meaning of section 15(b) of the Act.96 In 1951, Howlett’s Estate97 reiterated this rule of construction holding that a child adopted ten years before the testator’s death was nonetheless excluded in a gift to “issue.” The court strongly posited:

“Issue” is not synonymous with “children.” “Issue” means issue of the body, offspring, progeny, natural children, physically born or begotten by the person named as parent . . . . An adopted child is issue of his natural parents and not of his adopted ones . . . .98

Thus, it is clear in Pennsylvania99 that, under the 1917 Act,100 “issue” is construed to include only natural children.

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93. 399 Pa. at 247, 159 A.2d at 886.
94. 438 Pa. 22, 253 A.2d 746 (1970). See text accompanying notes 68–70 supra. Accord, In re Coe, 42 N.J. 485, 201 A.2d 571 (1964), noted in 10 Vill. L. Rev. 192 (1964); In re Silberman’s Will, 23 N.Y.2d 98, 242 N.E.2d 736, 295 N.Y.S.2d 478 (1968). In In re Coe, the testatrix directed in her will that one-half of the trust income for life be paid to her foster child with remainder to the “lawful children” of the life tenant. The court held that a child adopted after testatrix’s death was included within “lawful children.” In re Silberman, the adopted grandchildren of testator were held to be included in the “children” of the life tenant. See Pa. Stat. tit. 46, § 601(21) (1969) (part of the statutory construction act which provided that “child” or “children” included children by birth or adoption).
95. 284 Pa. 164, 130 A. 319 (1925). The rule was extended in Coble’s Estate, 58 Pa. D. & C. 632, 635 (Orphans’ Ct. Frank. 1947), where the court found that the word “issue” was not contemplated within the construction of § 16(b) of the Wills Act of 1917. See text accompanying note 47 supra.
99. The sister states of New Jersey and New York have taken a contrary position in regard to “issue” and have been guided by their Adoption Acts which, in language virtually identical to the Pennsylvania Adoption Act, confer the equal rights on adoptees. See In re Thompson, 53 N.J. 276, 250 A.2d 393 (1969); In re Estate of Park, 15 N.Y.2d 413, 207 N.E.2d 859, 260 N.Y.S.2d 169 (1965), noted in 51 Corn. L.Q. 875 (1966).
4. Descendants

In Howlett's Estate,101 the Pennsylvania Supreme Court remarked that "issue" and "descendants" were synonymous terms.102 However, the court in Collins' Estate103 construed a gift to "descendants" to include children adopted by the life tenant. The Collins' court distinguished Howlett asserting that the statement equating "issue" and "descendants" was merely dicta and unnecessary for the disposition of the case104 and that "neither etymologically nor legally does the word 'descendants' connote a blood relationship."105

Collins' Estate still remains the law in Pennsylvania,106 but it has been limited to its facts by later supreme court decisions, presumably because its language illuminates the equalization of relationship principle.107

5. Heirs, Next of Kin, and the Like

Post-1855108 cases held that a testamentary gift to "heirs" of a person included his adopted children regardless of when the adopting occurred. In other words, the Pennsylvania courts have taken a position seemingly inconsistent with their decisions in cases dealing with "issue" and "children," by giving the term "heir" the effect given it in the adoption statute. Therefore, in the absence of a contrary intent taken from the will, the terms "heir" and "next of kin" are construed to include those who would take under the intestate laws if the testator were to die intestate, which construction gives full application to the holding of Cave's Estate.109

While these cases are distinguishable on their facts from cases of wills making gifts to children, issue, and the like, as a matter of judicial construction and principle, it is submitted that the words alone are not

102. Id. at 299, 77 A.2d at 393.
104. Id. at 209, 142 A.2d at 185.
105. Id. at 208, 142 A.2d at 185.
108. See Johnson's Appeal, 88 Pa. 346, 353 (1879), wherein the court, allowing the adoptee to take, strongly noted: The Act of 1855 . . . declares . . . "that such child shall . . . have all the rights of a child and heir of such adopting parents . . . ." Thus we see that the appellant is, so far as legislative power can so make her, both child and heir of . . . [her adoptive father,] and if notwithstanding she yet cannot inherit her adopted father's estate, it is because the courts, under the name of judicial interpretation, have repealed the statute. See also Kohler's Estate, 199 Pa. 455, 49 A. 286 (1901); Rowan's Estate, 132 Pa. 299, 19 A. 82 (1890). Cf. Adamson's Estate, 58 Pa. D. & C. 511 (Orphans' Ct. Phila. 1947). Thus it appears that the Pennsylvania courts have given effect to the term "heir" and not "child" in the Adoption Act. See Casner, Construction of Gifts to Heirs and the Like, 53 HARV. L. REV. 207, 208–09 (1939).
Discernably different. If the will was written after 1855, it is reasonable to assume that a testator should have realized that a class gift made to either children or issue may be enlarged by both natural and adopted children. Moreover, such an interpretation would appear to be mandated if the adoption act is to have any efficacy and meaning.\textsuperscript{110}

Furthermore, drafters of wills often use words more or less interchangeably, especially in clauses regarding the residuary legatee of the decedent or trust estate.\textsuperscript{111} That a court, absent a demonstration of the testators' specific intent, can infer a particular meaning from such words — usually a meaning that discriminates against adopted children — disregards sound public policy.

V. Proposals for the Courts and Legislature

While many of the previously discussed problems could be avoided by improved draftsmanship, the law should nonetheless provide the best possible framework within which private instruments can be drafted. It is thus proposed that the Pennsylvania legislature adopt the following recommendation amending both the Wills and Estates Acts of 1947:

(1) In both will and trust instruments, gifts, devises, and bequests to children, issue, descendants, heirs, next of kin, grandchildren, and to all other generic classifications used or employed in private instruments shall be presumed, in the absence of a clear manifestation of intent to the contrary, to include any person legally adopted into the class to the same extent as any person born into the class, without regard to the time and place of adoption or the testator's or settlor's knowledge of such adoption.

(2) If any person included in subsection (1) is over the age of 18 at the time of adoption, a rebuttable presumption excluding this person from the class shall exist.

(3) Where the rebuttable presumption of subsection (2) arises, the court shall determine the rights of this adoptee with reference to the general intent of the person creating the class gift as evidenced by the instrument, its execution, and general extrinsic information relative to the adoption, and with reference to the public policy of Pennsylvania as embodied in section 502 of the Adoption Act.\textsuperscript{112}


Pertaining to wills and trusts executed under the 1917 Wills and Estates Acts, the courts should adopt, suá sponte, the following rules of construction:

(1) In the absence of a clear expression in the instrument of the testator's or settlor's intention to the contrary, an adopted person shall be included within the designated class.

(2) The terms "child," "issue," "descendant," "heir," "next of kin," and all similar generic classifications shall be construed by the court to include adopted persons absent specific intent to the contrary.

(3) There shall be a rebuttable presumption of exclusion of the adopted person from the class if such person is over 18 years of age.\(^{113}\)

If the courts follow these rules, "the policy of equality which has otherwise marked the area of adoption and the rights of adopted children"\(^{114}\) will become a reality with respect to the inheritance rights of adopted children in Pennsylvania.

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\(^{113}\) Justice Roberts, in his dissenting opinion in *Fownes Trust* (see note 67 supra), proposed the second rule of construction, stating:

The sound approach . . . would be to adopt a rule of construction which, *in the absence of a clear expression in the instrument of the settlor's intention to the contrary*, would deem adoptees as embraced within such general designations as "issue" or "children."

*Fownes Trust*, 421 Pa. at 483-84, 220 A.2d at 12 (emphasis supplied by the court). See also *In re Estate of Park*, 15 N.Y.2d 413, 417, 207 N.E.2d 859, 860-61, 260 N.Y.S.2d 169, 169-71 (1965), where the court held:

A testator . . . must know that in light of New York policy a foster child has exactly the same "legal relation" to the parent as a natural child. In the absence of an explicit purpose stated in the will . . . to exclude such a child, he must be deemed included, whether the word "heir," "child," "issue" or other generic term expressing the parent-child relationship is used.


See also *Halbach*, supra note 112, at 990-93; Note, *supra* note 112, at 951. *But see* Restatement of Property § 287 (1940), which provided in pertinent part:

(1) When the limitation is in favor of the "children" of a designated person, all persons adopted by the designated person are excluded from the possible takers thereunder except when a contrary intent of the conveyor is found from additional language or circumstances.