"Adoptions Shall Not Be Recognized": The Unintended Consequences for Dynasty Trusts

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INTRODUCTION

A benefactor establishes an irrevocable trust for the benefit of her children, grandchildren, and future descendants, with the express provision that "adoptions shall not be recognized." Years later, the settlor's daughter and her husband, using a donated ovum and the husband's sperm, hire a gestational carrier to carry the child to term. A California court declares the daughter to be the mother, although she is genetically and biologically unrelated to the child. Is the child a beneficiary of the trust? In *In re Doe*,[1] a New York court struggled with this issue, one likely to arise again as multigenerational trusts collide with new ways of creating children. This Article will for the first time explore the interpretation of dynasty trusts established either when courts presumed the settlor intended to exclude adoptees as beneficiaries or with express language excluding adoptees. Assisted insemination, *in vitro* fertilization, the use of gestational carriers, and the

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1. *In re* Doe, 793 N.Y.S.2d 878 (Sur. Ct. 2005).

abolition of the Rule Against Perpetuities in many jurisdictions have combined to vastly complicate the interpretation of old trusts and the drafting of new ones. If these old presumptions or the new express language are applied literally to children conceived through assisted reproductive technologies (ART), the result will be to exclude many children the settlor would likely intend to be included, while including others that logically should be omitted. The main thesis of this Article is that ART children must be viewed through a different lens than those conceived coitally in order to carry out the trust settlor's intent. In addition to proposing methods for courts to interpret language in trusts created decades before assisted reproductive techniques, this Article will recommend language to be included in the drafting of new trusts.

Part II of this Article will briefly discuss the common law rationale that class terms such as "children" or "descendants" invariably meant those related by blood, and that once American states enacted legislation formalizing adoptions in the mid-nineteenth century, "adoptees" were *not* related to the transferor by blood. Part III explores two key changes in the twentieth century: the increase in multigenerational trusts due to alterations in the tax code and in the Rule Against Perpetuities, and more recently, scientific advances that allow embryos to be created and transferred outside the body. Part IV examines current law on whether adoptees are included in class gifts in wills and trusts, and then proposes two solutions to deal with children of assisted reproduction: how to draft language in new trusts and how to interpret language in decades-old trusts. Part V concludes the Article.

I. THE COMMON LAW: "CHILDREN," "DESCENDANTS," AND "ISSUE" ARE RELATED BY BLOOD

Before the nineteenth century, children and grandchildren were ordinarily related to the settlor by blood. American states enacted legislation allowing adoption only in the mid-1850s,[2] and in England adoption was legislated in 1926.[3] As Professor Rein observed in her classic article on the impact of adoptions on inheritance, "Following the maxim '*Solus Deus facit haerdem, non homo*' (God alone makes the heir, not man), our succession law started with the assumption that inheritance rights are based on consanguinity and that any deviation from this principle requires express authorization either by legislation or by a private

2. 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, 716 (1984). Scholars have persuasively argued that these statutes did not create the institution of adoption, but rather formalized already existing relationships. *See, e.g.*, Naomi Cahn, *Perfect Substitutes or the Real Thing?*, 52 DUKE L.J. 1077, 1104 (2003); Barbara Bennett Woodhouse, *Waiting for Loving: The Child's Fundamental Right to Adoption*, 34 CAP. U. L. REV. 297, 316 (2005).

3. WILLIAM M. MCGOVERN ET AL., WILLS, TRUSTS AND ESTATES INCLUDING TAXATION AND FUTURE INTERESTS 107 (4th ed. 2010).

dispositive instrument."[4] Forty years earlier, an article in the Michigan Law Review made a similar point: "Express reference to relations by 'blood' naturally points to exclusion of one related by adoption only."[5] The exception at common law was for a spouse, and then only for personal property; fearful of land being transmitted out of the family in a society ruled by primogeniture, a widow or widower was entitled only to a life estate in real property of dower or curtesy.[6]

Until the advent of ART in the 1950s, these assumptions—that children and grandchildren were blood relatives, and those adopted were not—were largely true. The woman who gave birth was always the genetic mother before the advent of *in vitro* fertilization, and so determining maternity was simple: as Justice Kennedy observed, "In the case of the mother the [parent-child] relation is verifiable from the birth itself."[7] Determining paternity was more difficult, but in the case of a married woman, the common law generally presumed that the husband was the father, and usually that assumption was correct. There were exceptions, of course. If the wife had an extramarital affair, the child would not be genetically related to the husband. The ancient Romans recognized this risk; as soon as the wife notified her husband that she was pregnant, he was required "to send guards or to give notice to her that she is not pregnant by him . . . ."[8] Otherwise, he "is compelled to acknowledge the offspring."[9] The guards likely were to "[p]revent a changeling from being passed off as the husband's child."[10] But the assumption that the husband was the child's father was likely correct in the vast majority of cases. A recent metasurvey of sixty-seven previous studies of nonpaternity concluded that the nonpaternity rate was only 3.3%,[11] meaning that ninety-seven out of one hundred children were fathered by their mother's husband, and only three were not. A smaller study in one city found a nonpaternity rate of just 3.7%.[12] Thus, before adoption, assisted insemination, and *in vitro* fertilization, a trust for one's "children,"

4. Rein, *supra* note 2, at 713 (citation omitted). For similar reasons, unadopted stepchildren do not inherit in intestacy in most states. MCGOVERN ET AL., *supra* note 3, at 115 (citing UNIF. PROB. CODE § 1-201(5) and RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.5 cmt. j (1997)).

5. J. Wesley Oler, *Construction of Private Instruments Where Adopted Children are Concerned: Part II*, 43 MICH. L. REV. 901, 903 (1945) (citations omitted).

6. MCGOVERN ET AL., *supra* note 3, at 49–50.

7. Tuan Anh Nguyen v. I.N.S., 533 U.S. 53, 62 (2001).

8. Kristine S. Knaplund, *Baby Without a Country: Determining Citizenship for Assisted Reproduction Children Born Overseas*, 91 DENV. L. REV. 335, 340 (2014) (quoting BRUCE W. FRIER & THOMAS A.J. MCGINN, A CASEBOOK ON ROMAN FAMILY LAW 105 (2004)).

9. *Id.*

10. *Id.*

11. Kermyt G. Anderson, *How Well Does Paternity Confidence Match Actual Paternity? Evidence from Worldwide Nonpaternity Rates*, 47 CURRENT ANTHROPOLOGY 513, 516 (2006).

12. Kermyt G. Anderson et al., *Confidence of Paternity, Divorce, and Investment in Children by Albuquerque Men*, 28 EVOLUTION & HUM. BEHAV. 1 (2007).

"grandchildren," or "descendants"[13] would include only one's blood relatives in the vast majority of cases.

II. AMERICA IN THE 1850S: WITH STATUTES AUTHORIZING ADOPTIONS, HOW SHOULD "CHILDREN" AND SIMILAR CLASS TERMS BE DEFINED?

Once adoptions were authorized by statute, courts interpreting the meaning of "children," "issue," and "descendants" in a will or trust assumed that adoptees were excluded from these terms because, in most cases, they were not blood relatives.[14] Some trusts included express language to the effect that "adoptions shall not be recognized," but in most cases, the trusts or wills were silent on the matter, and courts were bound to discern the intent of one who may not have thought about the issue.[15] If the creator of the trust had not specified whether adoptees should be included in class gifts, courts struggled with two questions: (1) what was the settlor's intent? and (2) what presumption on adoption should apply—the current presumption, or the one in effect when the settlor created the trust? In determining the settlor's intent, courts varied on whether they would look at evidence extrinsic to the trust itself, and the extent to which they would rely on statutory definitions of terms used in the trust—terms such as "issue" or "descendants" for example.

Early cases generally found that a settlor did not intend to include adoptees when using class terms such as "children," "issue," "heirs," and the like.[16] In 1867, the Supreme Court of Pennsylvania was asked to construe an 1851 trust that gave the rent of certain real property to the settlor's daughter for her life, "and upon her decease to convey the same to her children and the heirs of her children for ever."[17] Nine years after the settlor's death, his daughter adopted three children; she died in 1861.[18] Noting that Pennsylvania's 1855 adoption statute allowed an adopter to make a person her *heir*, the court distinguished this from being her *child*: "One

13. "Children" and "grandchildren" are single-generational terms, while "descendants" is a multigenerational term. *See, e.g.*, CAL. PROB. CODE § 6205 (2015) ("'Descendants' mean children, grandchildren, and their lineal descendants of all generations.").

14. This statement is supported by the cases cited throughout this Section. *See infra* notes 15–114.

15. As in note 14, the statements within this sentence are supported by the cases cited throughout Section II. *See infra* notes 16–114. Particularly, *In re* Doe, 793 N.Y.S.2d 878, and *In re* Leask, 90 N.E. 652, 652–53 (N.Y. 1910), contain specific examples of trusts with express language. Cases containing trusts and wills that were silent include: Fiduciary Tr. Co. v. Silsbee, 187 A.2d 396, 396 (Me. 1963); *In re* Woodcock, 68 A. 821, 821 (Me. 1907); Cutrer v. Cutrer, 345 S.W.2d 513 (Tex. 1961); Schafer v. Eneu, 54 Pa. 304, 306 (1867).

16. "Issue" and "heirs" are multigenerational terms. "Issue" is synonymous with "descendants" and thus encompasses children, grandchildren, and so on. "Heirs" means "heirs in intestacy," and indicates the persons designated to receive a decedent's property when there is no valid will. WILLIAM M. MCGOVERN, SHELDON F. KURTZ & DAVID M. ENGLISH, WILLS, TRUSTS AND ESTATES INCLUDING TAXING AND FUTURE INTERESTS 6, 11 (4th ed. 2001).

17. *Schafer*, 54 Pa. at 306.

18. *Id.* at 304.

adopted has the rights of a child with out being a child."[19] Thus, the three adoptees were not entitled to take from the settlor's trust because they did not meet the description of being his daughter's children.[20] Similarly, a testator who died in 1891 had provided in his will for his children, and should one of his children die leaving a child or children, that child would receive the same share as his parent.[21] One son died leaving a daughter whom he had adopted in 1882, eight years before the testator's 1890 will, but the court found that the adoptee did not qualify as his child, citing "a presumption that the testator intended 'child or children' of his own blood, and did not intend his estate to go to a stranger to his blood."[22]

These early courts also struggled with the legal effects of adopting a child beyond the obvious one of inheritance. States that imposed an inheritance tax typically exempted a child's share or taxed it at a lower rate. In Pennsylvania in 1859, for example, children and other lineal descendants were exempt from the inheritance tax, but an adopted child still paid the tax: "Giving an adopted son a right to inherit, does not make him a son in fact."[23] A statute that provided a share for a child *born* after the execution of the testator's last will did not apply to a child *adopted* after the will because the adoption did not make the person a child of the adopter.[24] A state's anti-lapse statute, applicable in cases in which a child failed to survive a testator, did not apply to an adoptee, again because adoption did not make her a "child in fact."[25]

The Supreme Court of Hawaii in 1939 considered the settlor's intent in giving the remainder of a trust to the life tenant's "lawful issue."[26] The Court observed that "the general rule of construction throughout the United States and England" was that "issue," when used in a will or trust instrument, was presumed

19. *Id.*

20. *Id.* at 306–07.

21. *In re Woodcock*, 68 A. at 821.

22. *Id.* at 822.

23. Commonwealth v. Nancrede, 32 Pa. 389, 390 (1859); *accord* Kerr v. Goldsborough, 150 F. 289 (4th Cir. 1906); Williams v. Ward, 93 Cal. Rptr. 107, 111 (Cal. Ct. App. 1971) (noting in dicta that if the adoptees were to inherit in intestacy, the law "will regard them as strangers for inheritance tax purposes"); *In re* Miller, 18 N.E. 139 (N.Y. 1888); *cf.* Connor v. O'Hara, 53 A.2d 33 (Md. Ct. App. 1946) (interpreting Maryland adoption statute giving adopted child "the same rights of inheritance and distribution as to the [adopting parent's] estate" as exempting the child from inheritance tax, distinguishing *Nancrede*). A North Carolina statute similar to the Maryland law was held to apply to the state's anti-lapse statute. Headen v. Jackson, 120 S.E.2d 598 (N.C. 1961).

24. Goldstein v. Hammell, 84 A. 772, 772 (Pa. 1912). In *Russell v. Russell*, the Supreme Court of Alabama held that an 1870 will giving two-thirds of the estate to Russell's "children" did not include a child the testator adopted in 1885: "Though by adoption he is treated 'as a child,' he is not the child of the testator, and, it is manifest, he was not in contemplation when the testator made his will." 3 So. 900, 901 (1888). Almost 100 years later, the court disavowed *Russell*, stating that "the language of the opinion [in *Russell*] contravenes that of the statute." Sellers v. Blackwell, 378 So. 2d 1106, 1108 (Ala. 1979).

25. *In re* Phillips's Estate, 17 Pa. Super. 103 (1901).

26. O'Brien v. Walker, 35 Haw. 104, 113 (1939).

to mean "children of the blood" and thus excluded adoptees.[27] However, Hawaii's ancient customs and longstanding use of adoption proved to be an exception to the rule. In *O'Brien v. Walker,* a trust created by settlors who were part-Hawaiian (the husband) and Hawaiian (the wife) blood, and who had lived in Hawaii all their lives, was presumed to include adoptees as "issue" unless the trust and surrounding circumstances indicated that was not the settlors' intent.[28] The court emphasized the unique history of Hawaii, including its adoption statute enacted in 1841, ten years before the Massachusetts statute, and concluded that "Hawaii's legal heritage is more comparable to the civil law which recognizes adoptions, than to the common law which does not."[29]

Texas trusts created by a family in the 1940s provided for interests to be paid to "children" and "heirs of the body."[30] First construing the word "children," the Supreme Court of Texas found that an adopted person was ordinarily excluded from that class "unless a contrary intent is disclosed by additional language or circumstances."[31] To presume otherwise would allow "the designated parent to have power, by adopting any person he may choose, in effect to appoint the subject matter of the conveyance to such person."[32] The court's conclusion was further bolstered by its reading of the trusts to use the words "children" and "issue" interchangeably, "and the latter term clearly connotes blood relationship."[33] The court, citing the Restatement of the Law of Property, similarly concluded that "'heirs of [the] body[]' . . . ordinarily embraces only lineal blood descendants of the designated person."[34] Thus, because the settlor's intention at the time the trusts were created determines who is included in the class of "children" and "heirs of the body," the adopted children were excluded from the trust.[35]

Similarly, in 1963 the Supreme Judicial Court of Maine was asked to decide the meaning of "issue" in a testamentary trust created in 1933 for the benefit of the testator's children for life, and then to their issue.[36] One of the testator's sons had adopted a child (as with *Cutrer*, his stepson) shortly before the testator's death.[37] Citing the "stranger to the adoption" rule, the court noted that "issue" usually connotes a blood relationship, although since the word was used in a

27. *Id.*

28. *Id.* at 131–32.

29. *Id.* at 125. As an example of this history, the court cited King Kamehameha III's adoption of Prince Alexander Liholiho in April 1853; the Prince ascended to the throne on his adoptive father's death the following year. *Id.* at 131.

30. *Cutrer*, 345 S.W.2d 513.

31. *Id.* at 169*; accord* Casper v. Helvie, 146 N.E. 123 (Ind. Ct. App. 1925); Cook v. Underwood, 228 N.W. 629 (Iowa 1930); *In re* Puterbaugh's Estate, 104 A. 601 (Pa. 1918); Union Trust Co. v. Campi, 151 A. 131 (R.I. 1930).

32. *Cutrer*, 345 S.W.2d at 516.

33. *Id.* at 517.

34. *Id.* at 517 (citing RESTATEMENT (FIRST) OF PROP. § 287 (AM. LAW INST. 1940)).

35. *Id.*

36. *Silsbee*, 187 A.2d at 396.

37. *Id.* at 398.

will, the intention of the testator was paramount.[38] Still, the presumption applied that the testator "did not intend his estate to go to a stranger to his blood"[39]—that is, an adoptee.

A second question courts faced in ascertaining the meaning of the words used in the will or trust was whether the court should apply current law, or the law at the time the document became effective. Absent express language in the statute otherwise, courts routinely chose the latter and continue to do so today.[40] One exception was in Alabama; in construing the intent of a testator who died in 1909, the Supreme Court of Alabama applied the more modern presumption that in the absence of a contrary intent, the adopted child is included in class terms such as "child" or "children."[41]

In some cases, this decision to use the earlier law meant the court must construe a trust written decades ago. In *Matter of Duke*, a 1924 trust provided for the settlor's daughter, the heiress Doris Duke, for her life, then for "her lineal descendants."[42] In 1988, Ms. Duke adopted Chandi Heffner, then thirty-five years old, under New Jersey's adult adoption statute.[43] After Ms. Duke died in 1993, Ms. Heffner sought a court order that she was entitled to income from the trust, whose principal was estimated to be worth $170,000,000, as Ms. Duke's sole surviving descendant.[44] While Ms. Heffner argued that present law governed, or alternatively, the law of New York should govern because the attorney-scrivener was from New York, the trust itself stated that it is

> executed by a resident of the State of New Jersey in said State, is intended to be made, administered and given effect under and in accordance with the present existing laws and statutes of said State, notwithstanding it may be administered and the beneficiaries thereof may be located . . . in other states . . . .[45]

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38. *Id.* at 399.

39. *Id.*

40. *See, e.g.*, *Williams*, 93 Cal. Rptr. at 109 (in determining whether testator who died in 1930 intended to include adult adoptees as his daughter's "children," the court noted that California law did not allow adult adoption until twenty-one years after his death); *O'Brien*, 35 Haw. at 112 ("[N]o statute can operate retroactively upon the intention of a trustor already effectual . . . ."); Lutz v. Fortune, 758 N.E.2d 77, 81 (Ind. App. Ct. 2001) ("[A] will must be construed with regard to the law and statutes in effect at the time of the testator's death."); Scribner v. Berry, 489 A.2d 8, 8 (Me. 1985) ("The rule of construction during the testator's lifetime was that a testator's reference to 'descendants' or 'issue' of testator's children did not include an adopted child of the testator's son."); 4 JOSEPH HAWLEY MURPHY, MURPHY'S WILL CLAUSES: ANNOTATIONS AND FORMS WITH TAX EFFECTS § 10.03 (2016); 3 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 30.06[4] (Michael Allen Wolf ed., 2015) ("[T]he earlier rule presuming noninclusion of adopted children unless contrary intent may still be applied in current cases because the will or inter vivos transfer was effective at the time the earlier rule controlled.").

41. Sellers v. Blackwell, 378 So. 2d 1106, 1108 (Ala. 1979).

42. Matter of Duke, 702 A.2d 1008, 1011 (N.J. Super. Ct. Ch. Div. 1995).

43. *Id.*

44. *Id.*

45. *Id.* at 1012.

The court held that "the plain and only meaning" of the trust was that New Jersey law from 1924 must be used, and that law did not allow adult adoptees to take as lineal descendants.[46] Similarly, a Texas court interpreting the term "descendants" in a 1982 trust held that the term was not ambiguous, and thus adult adoptees did not take from a third party's trust.[47] Despite the fact that Texas amended its statute in 1951 to say that adoptees were included unless the instrument clearly excluded them,[48] some Texas courts, like the court in *Ellison*, still found an intent to exclude adoptees from class gifts. For example, a 1954 trust that provided for children of the settlor's granddaughter "including any other great grandchildren who may be born after my death" was found to specifically exclude adopted great grandchildren because the testator "intended the word 'born' to mean children born to his granddaughter."[49]

In ascertaining the settlor's intent whether to include adoptees in class terms, a court might look at the laws of intestacy at the time the trust came into effect, either on the theory that the settlor was bound to know the existing law,[50] or because the settlor expressly directed the court to look at that law. But it turns out the impact of adoption on intestacy law was extraordinarily complex. As adoption is purely a creature of statute, being unknown at common law, the precise effects of an adoption varied widely from state to state depending on the exact language of the statute. One author opined, "There is probably more activity in the case and statutory law and in the writing upon the subject to inheritance by reason of

46. *Id.* at 1013–15.

47. *In re* Ray Ellison Grandchildren Tr., 261 S.W.3d 111, 120, 127 (Tex. App. 2008). For a critique of the majority's reasoning in *Ellison*, see Gerry W. Beyer, *Wills and Trusts*, 62 SMU L. REV. 1499, 1519–20 (2009).

48. Ortega v. First RepublicBank Fort Worth, N.A., 792 S.W.2d 452, 454 (Tex. 1990).

49. Martin v. Neel, 379 S.W.2d 422, 424 (Tex. Civ. App. 1964); *accord* Ortega, 792 S.W.2d at 452. *But see* Penland v. Agnich, 940 S.W.2d 324, 327 (Tex. App. 1997) (finding that a trust for "lawful issue" was intended to benefit adoptees because the trust included many nonblood individuals as beneficiaries).

50. *See, e.g.*, Wells Fargo Bank v. Huse, 129 Cal. Rptr. 522, 527 (Ct. App. 1976) (citations omitted) ("It is, of course, axiomatic that the testator is bound to know the existing statutes affecting testamentary dispositions . . . , and also that technical terms used in a will or similar document are deemed to have been used and accepted by the testator in accordance with its legal definition."); Mooney v. Tolles, 149 A. 515, 518 (Conn. 1930); *In re* Ray Ellison Grandchildren Tr., 261 S.W.3d at 121 ("[W]e presume that [the settlor] Ellison Sr., by using the word 'descendants,' knew what the law in 1982 considered 'descendants' to encompass."); Oler, *supra* note 5, at 918 (citations omitted) ("[I]t is presumed that the instrument was executed in the light of knowledge of the then existing adoption law."). One court went even further to construe a will as including adult adoptees despite the fact that the will was executed sixteen years before such adoptions were legal in the state. Matter of Estate of Fortney, 611 P.2d 599 (Kan. Ct. App. 1980). In this case, a 1922 will created life estates for Elizabeth and John Fortney, and provided that if "both die *without heirs by birth, or by adoption*," the property would go to specified persons. *Id.* at 601 (emphasis added). After Kansas allowed adult adoptions in 1939, John, at age 90, adopted his wife's nephew, age 65, in 1975. *Id.* at 600. The court held that the testator was bound to know that the statute was subject to change by the legislature. *Id.* at 599.

adoption than in any other aspect of the law of intestacy."[51] Tiffany and Cooley's 1909 treatise observed that "[b]y the act of adoption, the child becomes, in a legal sense, the child of the adoptive parent. The general effect of the adoption, therefore is, with few exceptions, to place the parties in the legal relation of parent and child, with all the legal consequences."[52] The right of inheritance, however, was much more complicated. The statute might provide that the child inherits from the adoptive parent, or the child might have no inheritance rights.[53] Even if the child were an heir of the adoptive parent, in most states at that time "he cannot take, by representation, from the adoptive parent's kindred, either lineal or collateral."[54] This is often called the "stranger to the adoption" rule.[55] As one Missouri court stated, "The blood tie is the open sesame to unlock the treasure of inheritance."[56] While ordinarily a child adopted by the testator would inherit under her will, a court might find otherwise: for example, in a 1909 Iowa will giving the residue to "my lawful heirs," the court found that the testator used the phrase to mean heirs of the blood and not her adopted daughter.[57] Treatises and cases also parsed the difference between "heirs of the body" and "issue" noting that the terms are not synonymous.[58] A 1988 Mississippi case stated that "[i]t is quite plain that heirs of the body literally excludes adopted children."[59] Page on Wills noted that

51. THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS AND OTHER PRINCIPLES OF SUCCESSION INCLUDING INTESTACY AND ADMINISTRATION OF DECEDENTS' ESTATES § 23 (2d ed. 1953).

52. WALTER C. TIFFANY & ROGER W. COOLEY, HANDBOOK ON THE LAW OF PERSONS AND DOMESTIC RELATIONS 244 (2d ed. 1909) [hereinafter TIFFANY & COOLEY, HANDBOOK SECOND EDITION].

53. *Id.* at 244–45.

54. *Id.* at 244 (citations omitted); *accord* WALTER C. TIFFANY & ROGER W. COOLEY, HANDBOOK ON THE LAW OF PERSONS AND DOMESTIC RELATIONS 316–17 (3d ed. 1921) [hereinafter TIFFANY & COOLEY, HANDBOOK THIRD EDITION].

55. *See, e.g.*, Ahlemeyer v. Miller, 131 A. 54, 56 (N.J. 1925), *aff'd*, 137 A. 534 (1927) ("Where the grantor or testator is the adopting parent, it is reasonable to presume that the adopted child was within the intended bounty of such grantor or testator; but, where he is a stranger to the adoption such presumption does not prevail."); *In re* Haight, 118 N.Y.S. 745, 746 (Sur. Ct. 1909) ("As between foster parent and adopted child the statute gives the right of inheritance . . . . But this right has never been extended, by statute or judicial interpretation, to the child to inherit from the collateral kin of the foster parent . . . ."); *In re* Estate of Edwards, 273 N.W.2d 118, 119–20 (S.D. 1978) (finding that an adopted child does not inherit from anyone but the adoptive parents themselves "is in line with the great weight of authority from other jurisdictions."). *But cf. In re* Estate of Coe, 201 A.2d 571, 575 (N.J. 1964) (holding that a 1897 will with a bequest to a person's "lawful children" included adoptees on the grounds that "[w]e cannot believe it probable that strangers to the adoption would differentiate between the natural child and the adopted child of another."). *Ahlemeyer* is distinguished because it was a deed, not a will. 131 A. 54, 56 (Sup. Ct. 1925), *aff'd*, 137 A. 543 (1927). For a discussion of the history of the "stranger-to-the-adoption" rule, see Naomi Cahn, *Perfect Substitutes or the Real Thing?*, 52 DUKE L.J. 1077, 1128–30 (2003).

56. Hockaday v. Lynn, 98 S.W. 585, 588 (Mo. 1906).

57. Warden v. Overman, 135 N.W. 649, 652 (Iowa 1912).

58. JAIRUS WARE PERRY, A TREATISE ON THE LAW OF TRUSTS AND TRUSTEES 621 (7th ed. 1929).

59. Posey v. Webb, 528 So. 2d 833, 835 (Miss. 1988).

there is "a strong tendency to treat 'issue' as equivalent to heirs of the body" and thus exclude adoptees, while some courts have held the terms are not synonymous and thus included adoptees.[60] A Texas court in 1986 stated that "[i]n the ordinary and usual sense, the term 'issue' clearly connotes a blood relationship," although "the term is not as strong a word of limitation as are 'heirs of the body.'"[61] Still, a later Texas case held that the public policy of the state was to treat adopted children in the same manner as children, and thus, terms such as "issue" or "bodily issue," even though they generally refer to blood relationships, should be construed to mean adopted persons, including adult adoptees, unless the will or trust expressly excludes them.[62] While the Restatement (First) of Property defined "issue" and "descendants" as related by blood,[63] the Restatement (Second) of Property followed its expanded meaning of "children" to include those adopted to apply as well to "issue" and "descendants."[64] Both the pre-1990 Uniform Probate Code section 2-611,[65] and sections 2-705 and 2-114 of the 1990 Uniform Probate Code include adopted persons in class terms.[66]

Some trusts would expressly direct the court to apply intestacy law. For example, a New Jersey trust created in 1924 provided for the settlor and his wife for their lives, and then directed the trust fund to be paid "to the next of kin of the Settlor according to the laws of the State of New Jersey in force at this date providing for the distribution of the personal estate of persons dying intestate."[67] Shortly after his wife's death in 1940, the settlor adopted his wife's son by a prior marriage (the settlor's stepson), then age thirty, and two years later adopted his stepson's four-year-old daughter.[68] Because New Jersey law did not allow adult adoptions until 1925, a year after the trust was created, the court found that the adopted daughter was the sole heir in intestacy, and thus received the entire trust fund.[69]

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60. 4 WILLIAM J. BOWE & DOUGLAS H. PARKER, PAGE ON THE LAW OF WILLS § 34.22 (2d ed. 2000).

61. Diemer v. Diemer, 717 S.W.2d 160, 162 (Tex. App. 1986).

62. Hagaman v. Morgan, 886 S.W.2d 398, 402 (Tex. App. 1994).

63. RESTATEMENT (FIRST) OF PROP. § 287 (AM. LAW. INST. 1940).

64. RESTATEMENT (SECOND) OF PROP.: WILLS AND DONATIVE TRANSFERS §§ 25.4, 25.9 (AM. LAW. INST. 1987). If the adopted person's parent was not the donor, then the Restatement (Second) required that the parent either raise the child or contemplate that the child will be raised by him or her. *Id.* § 25.4(2). In addition to adoptees, the Restatement (Second) also included nonmarital children and ART children in these terms. *Id.*; *see also* POWELL, *supra* note 40, § 30.08.

65. *See, e.g.*, FLA. STAT. ANN. § 732.608 (West 2017); MO. ANN. STAT. § 474.435 (West 2017).

66. *See* UNIF. PROBATE CODE §§ 2-114, 2-705 (2011); *see, e.g.*, ALA. CODE § 13-12-705(a) (2017); COLO. REV. STAT. ANN. § 15-11-705(6) (West 2011); HAW. REV. STAT. ANN. § 560:2-705 (West 2008). If the transferor is not the adopting parent, the statutes also place additional requirements in order for the adoptee to be included, such as living while a minor in the adopter's household.

67. Commercial Tr. Co. of N.J. v. Adelung, 40 A.2d 214, 216 (N.J. Ch. 1944).

68. *Id.*

69. *Id.* at 219.

If a trust was found to exclude adopted children, could one argue a violation of the Privileges and Immunities Clause? In *Lutz v. Fortune*, a will executed in 1939 created a trust providing for the testator's children and grandchildren, but if one of the grandchildren "should die prior to the termination of this trust leaving a child or children . . . , then such child or children . . . shall take" that grandchild's share.[70] In 1968, one of the grandchildren, Evie Lutz, adopted her husband's grandchild; Evie died two years later survived by the one adopted child.[71] The trust finally ended in 1997 when the testator's last surviving child died at the age of 109.[72] Applying the law in effect in 1942 when the testator died, the court concluded that the testator did not intend to include an adopted child when he referred to his grandchildren's "child or children" because "[t]here is nothing in Fortune's will or in extraneous circumstances that would rebut the presumption that Fortune intended to exclude adopted children."[73] Further, the court found no violation of the Privileges and Immunities Clause of the Indiana Constitution because the complained-of action was not by the State but rather by a private individual.[74] Similarly, a testamentary trust created in Georgia in 1945 was held to presumptively exclude adopted children.[75] The adopted great-grandsons argued that a statutory presumption favoring those within the testator's bloodline violated the Equal Protection clause of the U.S. Constitution and Article I, Section II, Part II of the Georgia State Constitution, a claim rejected by the Supreme Court of Georgia.[76] "As long as these distinctions are rationally related to the state's interest in seeking the most orderly system possible for passing title from one person to another so that the state knows at all times exactly what is owned by whom, then the distinctions are constitutionally sound."[77]

The presumption that adoptees were excluded from various class terms aligned with another assumption that courts occasionally articulated in the mid-twentieth century: a settlor would not want to create a virtual power of appointment in his beneficiaries by giving them the option to adopt strangers into the class.[78] As one commentator observed in 1945,

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70. Lutz v. Fortune, 758 N.E.2d 77, 79 (Ind. Ct. App. 2001).

71. *Id.* at 79–80.

72. *Id.* at 79.

73. *Id.* at 83.

74. *Id.* at 84. In contrast, an intestacy statute violated Vermont's "common benefits" provision of its constitution when applied to exclude a stranger to the adoption in *MacCallum v. Seymour*, 686 A.2d 935 (Vt. 1996).

75. Nunnally v. Tr. Co. Bank, 261 S.E.2d 621, 625 (Ga. 1979), *cert. denied*, 445 U.S. 964 (1980).

76. *Id.* at 622.

77. *Id.* at 699.

78. Edward C. Halbach, Jr., *The Rights of Adopted Children Under Class Gifts*, 50 IOWA L. REV. 971, 978 (1965) ("[T]o allow inheritance in such a case would be to allow one person to create an heir for another by adoption."); *see also* Peter T. Wendel, *The Succession Rights of Adopted Adults: Trying to Fit a Square Peg into a Round Hole*, 43 CREIGHTON L. REV. 815, 843 (2010); POWELL, *supra* note 40.

> No one can read the cases on this subject without soon becoming aware of what for the most part is an unexpressed but nonetheless perceptible attitude of fear on the part of courts that, unless they guard well against it, the institution of adoption may be an implement of self-advancement, fraud or spite in the hands of adopters seeking to use it deliberately to meet the requirements of an instrument, such as a will, that the adopters have children.[79]

As a New York court opined in determining that language contingent on the life tenant, Thomas C. Hoagland, "leaving no children surviving him" excluded any children he adopted, "[o]ther language would have been used if [the testator] had intended thus to confer upon Thomas C. Hoagland a virtual power of appointment."[80] Similarly, a North Carolina court, in construing the testator's intent, considered whether the person had been adopted before or after the testator's death, and concluded, "a child adopted by such person after the testator's death does not take."[81] The court noted, "To hold otherwise would make it possible for property of a testator to be diverted to strangers of his blood without his knowledge or consent."[82] A California Court of Appeal, in rejecting the claims of potential beneficiaries adopted as adults years after the testamentary trust became effective, concluded that "[i]f [the testator] had wished to give his daughter power of appointment, he could have done so."[83] Construing a trust in Missouri which gave the income to the settlor's daughter for life, then the principal to the daughter's children, the court refused to include a child adopted by the daughter nine years after the testator died, stating, "one who has a life estate cannot convey away the remainder by a deed of adoption any more than by a deed in any other form."[84]

This fear of creating a virtual power in a beneficiary is not unfounded. Several cases illustrate how willing beneficiaries are to adopt someone in order to allow them to benefit from the trust, and some courts' willingness to go along with this option.

In *Levien v. Johnson*, a 1979 testamentary trust established for the benefit of the testator's descendants provided that, after paying the income to the testator's grandchildren for a period of time, the trust would be distributed in equal shares to

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79. Oler, *supra* note 5, at 923–24. The author later concludes that, given the safeguards of modern adoption statutes, "this fear is not well grounded." *Id.* at 938.

80. *In re* Leask, 90 N.E. 652, 652–53 (N.Y. 1910); *accord* Cutrer v. Cutrer, 345 S.W.2d 513, 516 (Tex. 1961).

81. Bradford v. Johnson, 75 S.E.2d 632, 638 (N.C. 1953).

82. *Id.*; *accord* Cochran v. Cochran, 95 S.W. 731, 732 (Tex. App. 1906) ("We think it equally clear that she [the testator] did not intend that the estate in remainder devised to her grandchildren could be defeated by the adoption by L.L. Cochran of an heir."); Woods v. Crump, 142 S.W.2d 680, 681–82 (Ky. 1940) (explaining a person adopted almost forty years after the deed was executed would permit the adopter "to defeat the intention of her grantor by substituting another and different remainderman than those designated by the grantor in his deed or other conveyance.").

83. *Williams*, 93 Cal. Rptr. at 110.

84. Melek v. Curators of Univ. of Mo., 250 S.W. 614, 615 (Mo. Ct. App. 1923).

his then living great grandchildren.[85] In 2010, two of the trust's income beneficiaries, both grandchildren of the testator, sued the trustees seeking to compel them to invade the principal for their benefit and for other relief.[86] In July 2012, the two grandsons settled for $350,000, and agreed that they would "relinquish all rights as beneficiaries of income and/or principal of the Trust," and to "make no further requests of the Trustees for income or principal."[87] Three months later, each grandson legally adopted an adult in Texas. Those two adopted adults then claimed a share as great grandchildren of the testator. Noting that the will did not mention adoptions or state that trust beneficiaries would be limited to blood relations, the New York court applied a statutory rule of construction, enacted in 1963, that

> [U]nless the creator expresses a contrary intention, a disposition of property to persons described in any instrument as the issue, children, descendants, heirs, heirs at law, next of kin, distributees (or by any term of like import) of the creator or of another, includes . . . [a]dopted children and their issue in their adoptive relationship . . . .[88]

The court rejected claims that the adoptions were unique and unforeseeable, a sham, or acted to defeat the rights of the remainder beneficiaries, and allowed the two adopted adults to take as part of the class.[89]

In a second case, testator Amos Evans gave the remainder of his property to his daughter Rebecca, but provided, "[i]n the event that all of my children . . . shall die without issue living at the time of their death . . . then I give devise and bequeath the said rest and remainder . . . unto my brothers James H. Evans and William S. Evans and their heirs . . . ."[90] In 1970, Rebecca wanted to sell the property but her buyer rejected the title due to the "gift over" language.[91] A legal research service suggested that an adoption might solve the problem, so at age seventy-six, Rebecca and her husband adopted a married neighbor, and the sale was completed.[92] To be on the safe side, three years later, Rebecca and her husband adopted a second adult, a first cousin on her mother's side, stating that her reason to adopt was "on account of this land in Maryland."[93] Rebecca died two years later, in 1978, leaving the two adopted children but no biological children. A suit by the disappointed children of William Evans, who would have taken the property had Rebecca died without leaving issue, failed.[94]

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85. Levien v. Johnson, No. 1983-3059/D, slip. op. at 3 (N.Y. Sur. Ct. Apr. 15, 2014).
86. *Id.* at 2.
87. *Id.* at 3.
88. *Id.* at 7 (quoting N.Y. EST. POWERS & TR. LAW § 2-1.3(a) (McKinney 2008)).
89. *Id.* at 8–11, 17.
90. Evans v. McCoy, 436 A.2d 436, 437 (Md. 1981).
91. *Id.* at 437–38.
92. *Id.* at 438.
93. *Id.*
94. *Id.* at 441–42, 447.

A third example is found in a recent Delaware case. In *Otto v. Gore,* a trust beneficiary tried to increase her children's share of the principal by adopting her ex-husband, the father of her children, on his promise to give any part of the principal he received to their children.[95] The scheme might have worked, but the court found that an irrevocable trust had been created at an earlier date and so the beneficiaries could not be altered.[96] In yet another example, the Supreme Court of Minnesota granted the petition of a twenty-nine-year-old man to adopt his fifty-three-year-old mother in order to make her his heir and thus (he hoped) qualify her as a beneficiary of a trust created by her ex-husband, although the court noted that "[t]he interpretation of the trust must be decided in other proceedings directly presenting that issue."[97]

A few states have statutes that preclude someone from creating a new beneficiary through an adult adoption. When the adopting parent is *not* the creator of the trust, will or other instrument, the adoptee is included only if he or she lived while a minor as a regular member of the household of the adopting parent or of that parent's parent, brother, sister, or surviving spouse.[98] This is a variation on the old "stranger to the adoption" rule, which established a parent-child relationship only between the adopter and the adoptee, but did not extend that relationship to other relatives.[99] As one court observed, "There is no such person as a grandchild by adoption."[100] The first adoption statutes rarely provided for inheritance between anyone other than the adopter and the adoptee; it was not until the 1950s that about twenty states had such laws.[101] New York, for a time, was especially concerned with an adoption for the purpose of defeating the rights of a remainderperson, and thus an 1887 statute refused to recognize an adoptee in that instance in order to prevent "fraud."[102] Former Section 115 of New York's Domestic Relations Law, which applied to wills of those dying before March 1, 1964, provided, "As respects the passing and limitation over of real or personal property dependent under the provisions of any instrument on the foster parent dying without heirs, the foster child is not deemed the child of the foster parent so as to defeat the rights of the

95. 45 A.3d 120, 129 (Del. 2012).

96. *Id.* at 136–37.

97. Berston v. Minn. Dep't of Pub. Welfare, 206 N.W.2d 28, 30 (Minn. 1973).

98. *See, e.g.*, CAL. PROB. CODE § 21115(b) (West 2011); MONT. CODE ANN. § 72-2-715(3) (West 2009).

99. For a discussion of the history of the "stranger-to-the-adoption" rule, see Cahn, *supra* note 2, at 1128–30.

100. Oler, *supra* note 5, at 903 (citing *Trustees, Executors & Agency Co., Ltd. v. Rowley* [1939] NZLR 146 (SC) at 150 (N.Z.)).

101. Halbach, Jr., *supra* note 78, at 974 (citing Note, *Legislation and Decisions on Inheritance Rights of Adopted Children*, 22 IOWA L. REV. 145, 147 (1936) and Note, *Property Rights as Affected by Adoption*, 25 BROOKLYN L. REV. 231, 248 (1959)).

102. *Id.* at 989 n.79.

remaindermen."[103] Thus, one of the settlor's sons was treated as having no surviving children, despite his adoption of an eleven-year-old child.[104]

On occasion a court may balk at recognizing an adult adoptee on public policy grounds. A 1932 Kentucky trust paid income to the testator's husband and to her three sons, and on the death of the last surviving beneficiary, was to pay the principal to her "then surviving heirs, according to the laws of descent and distribution then in force in Kentucky . . . ."[105] One of the sons had no issue but in 1959 adopted his wife, and she survived him.[106] The court found the adoption to be "an act of subterfuge which in effect thwarts the intent of the ancestor whose property is being distributed and cheats the rightful heirs," and thus refused to allow the wife to take.[107]

In a Colorado case of first impression, a 1956 trust created in Illinois provided that, on the death of the settlor's son, the trust would be divided into equal shares among his living children, and stated that "child" and "descendant" includes "persons legally adopted by my said son."[108] The son had three children with his first wife. In 1979, four years after the settlor died, the son adopted his second wife.[109] Despite the trust language to treat adoptees as beneficiaries, the court held that the son was using adoption "contrary to the intent of the settlor as set forth in the instrument."[110] Similarly, a New Jersey court held that a trust beneficiary's adoption of his forty-one-year-old stepson was "an abuse of the adoption process and of the will and a violation of testator's intent" amounting to fraud.[111] While the "primary motive" for the adoption was to benefit the beneficiary's wife and stepson by making them eligible for the trust remainder, "[t]his motive necessarily involved the motive to divert the remainder" from the beneficiary's nieces and nephews, who had the gift over.[112] The court concluded, "If there had not been a Griswold trust no one would have thought of the adoption."[113] Similarly, despite the fact that

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103. *In re* Washburn's Will, 264 N.Y.S.2d 33, 38 (N.Y. App. Div. 1965) (quoting N.Y. DOM. REL. LAW § 115 (repealed 1963)).

104. *Id.* New York was also willing to apply its anti-lapse statute to a devisee's adopted daughter unless the effect was to divest a remainder. *See In re* Walter's Estate, 200 N.E. 786 (N.Y. 1936).

105. Minary v. Citizens Fid. Bank & Tr. Co., 419 S.W.2d 340, 341 (Ky. 1967).

106. Minary v. Minary, 395 S.W.2d 588, 588 (Ky. 1965).

107. *Minary*, 419 S.W.2d at 343; *accord* Cross v. Cross, 532 N.E.2d 486, 488–89 (Ill. App. Ct. 1988) ("The adoption of an adult solely for the purpose of making him an heir of an ancestor under the terms of a testamentary instrument known and in existence at the time of the adoption is an act of subterfuge.") (citing *Minary*, 419 S.W.2d 340). *Contra* Bedinger v. Graybill's Ex'r & Tr., 302 S.W.2d 594 (Ky. 1957) (finding the adopted wife was entitled to the corpus of the trust on facts similar to those in *Minary*).

108. *In re* Trust Created by Belgard, 829 P.2d 457, 458 (Colo. App. 1991).

109. *Id.* at 458–59.

110. *Id.* at 460.

111. *In re* Estate of Griswold, 354 A.2d 717, 731 (N.J. Cty. Ct. 1976).

112. *Id.* at 732.

113. *Id.*; *see also In re* Nowels Estate, 339 N.W.2d 861, 863 (Mich. Ct. App. 1983) (holding that the fifty-five-year-old daughter's adoption of her forty-two-year-old cousin in order to make the cousin a trust beneficiary was "an abuse of the adoption process and where the end result would violate the

Missouri has allowed adult adoptions for over one hundred years, and the trust contained language defining "issue" as including "an adopted child or children," the court balked when a beneficiary adopted his secretary and her son, his nephew, and three friends so that they could benefit from the trust.[114] "Common sense tells us that [the settlor], by inserting adopted children into the class she described as Neilson's 'issue,' intended to include only individuals with some familial bond to her family—individuals to whom Neilson felt a familial bond of love and duty."[115]

III. TWO MAJOR CHANGES IN THE TWENTIETH CENTURY: MULTIGENERATIONAL TRUSTS AND ASSISTED REPRODUCTION

At common law, a settlor could provide for her children and grandchildren in a trust, even stipulating that the grandchildren must reach the age of twenty-one, but the Rule Against Perpetuities ended the trust after that.[116] In addition to preventing nonvested interests from floating through time indefinitely, thus making title unmarketable,[117] the Rule allowed "dead hand" control only for the lives of those known to the settlor (such as her children) plus the period of minority of their children (the settlor's grandchildren).[118] Perhaps more importantly for multigenerational trusts, the Rule also required all classes to close, and all conditions precedent to be satisfied by each member of that class, within that period.[119] Thus, at common law, a trust created by A's parent that provided for A for life, then to A's children for their lives, and then the principal to be distributed to A's grandchildren, was void as to the grandchildren, because it could not be guaranteed that the class of A's grandchildren would close within A's life plus twenty-one years.[120] Similarly, a trust that specified a condition for the grandchildren to meet could cause problems. Suppose the trust required each grandchild to reach the age of twenty-five years before the principal could be distributed. Under the "all or

settlor's probable intent and normal expectations."). Similarly, in *Rhay v. Johnson*, a beneficiary adopted a sixty-five-year-old friend, the court stated, "the motivation for adopting Mr. Rhay was in part to affect the result under the Sheltons' testamentary remainder plan," which gave the principal to the issue of the body of the beneficiary-adopter. 867 P.2d 669, 674 (Wash. Ct. App. 1994).

114. Davis v. Neilson, 871 S.W.2d 35, 36 (Mo. Ct. App. 1993).

115. *Id.* at 38 (citing 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, 758 (1984)).

116. John Chipman Gray's classic formulation of the Rule was, "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 878 (Vicki Been et al. eds., 9th ed. 2013) (quoting JOHN C. GRAY, THE RULE AGAINST PERPETUITIES § 201, at 191 (Roland Gray ed., Little, Brown & Co. 4th ed. 1942) (1886)).

117. *Id.* at 880.

118. *Id.* at 882.

119. *Id.* at 906.

120. Why is A the measuring life, and not A's children, assuming A had children when the trust was created? The "fertile octogenarian" doctrine presumed that A would have another child after the trust was created, and that the later-born child would be the last child to die well after the deaths of A and the rest of A's children, thus belatedly closing the class of grandchildren. *Id.* at 877.

nothing" rule, even if we could close the class of grandchildren within the time limit, we would still need to guarantee that every possible grandchild would reach the age of twenty-five, or die, within that same time limit.

Starting with Pennsylvania in 1947,[121] a number of states modified the common law rule to allow beneficiaries to "wait and see" if a violation of RAP occurred, rather than destroy the interest at the outset because a violation might occur. Reform truly accelerated with a change in federal tax law in 1986, which enabled tax savings if one created a series of income interests (also known as "life estates"), which typically are found in a trust. Robert Sitkoff and Max Schanzenbach's comprehensive analysis of these changes noted,

> As the practicing bar digested the [Tax Reform] Act [of 1986] and grasped the nature of the . . . tax, it became apparent that making use of the transferor's exemption in a perpetual trust had significant long-term tax advantages . . . . Given prevailing choice-of-law principles and the shift in the nature of wealth from land to financial assets (making trust assets portable), it was only a matter of time until jurisdictional competition sparked a race to abolish the Rule Against Perpetuities.[122]

Today, companies tout their state's laws allowing perpetual trusts. When asked why it might be important to establish a trust in South Dakota, Liberty National Bank answered, "unlike most states whose trust laws limit how long a trust can last, South Dakota is one of the few states that have *no such time limits*; therefore, your properly established South Dakota trust can remain active and grow *forever*."[123] In considering "Delaware vs. Texas—Which is Better For Trusts?" author Jim Dossey notes that Delaware allows a perpetual trust for personal property, while Texas still follows the Rule Against Perpetuities, yet concludes, "If someone wants a dynasty trust, there are other states such as Alaska or Nevada that are better."[124] Today, trusts that once would have ended with grandchildren can now go on for generations, requiring courts to continue to interpret what a long-dead settlor would have wanted decades—or even possibly centuries—ago.

The second recent change to consider is assisted reproductive technology (ART). With the advent of assisted insemination in the twentieth century,[125] the

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121. *Id.* at 892 (citing 20 PA. STAT. AND CONS. STAT. ANN. § 6104(b) (West 2005)).

122. Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 373–74 (2005).

123. *Estate Planning & Trust Administration*, LIBERTY NAT'L BANK, https://www.libertynationalonline.com/wealth-trust.htm [https://perma.cc/M9LC-F43X] (last visited Mar. 31, 2017).

124. Jim Dossey, *Delaware vs. Texas—Which is Better for Trusts?*, DOSSEY & JONES, PLLC (Mar. 28, 2015), http://www.dossey.com/Blog/2015/March/Delaware-Vs-Texas-Which-is-Better-For-Trusts-.aspx [https://perma.cc/JMQ8-NS7X].

125. A doctor first reported assisted insemination (AI) in a human in 1884 at a medical school, but the procedure was not widely used until several decades later. Anne Reichman Schiff, *Frustrated Intentions and Binding Biology: Seeking AID in the Law*, 44 DUKE L.J. 524, 533 (1994). Fresh sperm was used until the introduction of the first human sperm bank in 1952 in Iowa. Alexis C. Madrigal, *The*

presumption that a child of the marriage was genetically related to the parents, and an adopted child was not, became more muddled. The first assisted reproduction technique, assisted (or artificial) insemination (AI), allowed a woman to become pregnant noncoitally through the direct injection of sperm into her cervix or uterus via a device such as syringe. As a result, the man to whom she was married might be the genetic father of the child if his sperm was used (termed "assisted insemination by husband," or AIH), or he might not if donor sperm was used ("assisted insemination by donor," or AID). While the common law generally assumed that a child born to a married woman was the child of her husband,[126] early cases struggled with the status of these AI children and their parents. An Illinois case held that a woman who used AID with or without her husband's consent had committed adultery, and thus the resulting child was illegitimate.[127] Other courts found that if the husband had consented to the procedure, the doctrine of equitable estoppel applied so that he must support the child.[128] California declared in 1968 that a child conceived through AID "does not have a 'natural father,' as that terms [sic] is commonly used" and sought a "lawful father" instead, who they found in a husband who had consented in writing to his wife's insemination for the purpose of creating a child.[129] Some of these issues were resolved in section 5 of the 1973 Uniform Parentage Act (UPA), which provided that the child was the legal offspring of a husband who had consented to his wife's insemination, as long as the donor sperm was provided to a licensed physician.[130] A number of states adopted updated versions of the UPA, which deleted the word "married" so that the statute applied to an unmarried woman who uses assisted insemination,[131] or to other assisted reproduction procedures such as the donation of ova.[132]

Surprising Birthplace of the First Sperm Bank, THE ATL. (Apr. 28, 2014), http://www.theatlantic.com/technology/archive/2014/04/how-the-first-sperm-bank-began/361288/ [https://perma.cc/6H74-W3GE]. The use of AI in animals before the 1950s was well documented. *See, e.g.*, R.H. Foote, *The History of Artificial Insemination: Selected Notes and Notables*, J. ANIMAL SCI. (2002) https://www.asas.org/docs/publications/footehist.pdf?sfvrsn=0 [https://perma.cc/K5DT-8BPL] (documenting insemination of dairy cows in 1936 in New York, Minnesota, and Wisconsin, and "phenomenal growth" of AI in the 1940s, with insemination of "hundreds of thousands of cows and publication of more than 100 research papers").

126. John Lawrence Hill, *What Does It Mean to Be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 372–73 (1991). Today, many states have enacted statutes to this effect, with some making the presumption irrebuttable. *Id.* at 373–74.

127. Gursky v. Gursky, 242 N.Y.S.2d 406, 411 (Sup. Ct. 1963) (citing Doornbos v. Doornbos, No. 54 S. 14981 (Super. Ct. Dec. 13, 1954), *aff'd*, 139 N.E.2d 844 (1956)).

128. *See, e.g.*, R.S. v. R.S., 670 P.2d 923, 926–27 (Kan. Ct. App. 1983); Estate of Gordon, 501 N.Y.S.2d 969, 970 (Sur. Ct. 1986); *Gursky*, 242 N.Y.S.2d at 411.

129. People v. Sorenson, 68 Cal. 2d 280, 284–86 (1968); *see also* Kristine S. Knaplund, *The New Uniform Probate Code's Surprising Gender Inequities*, 18 DUKE J. GENDER L. & POL'Y 335, 337 (2011).

130. Unif. Parentage Act § 5 (Unif. Law Comm'n 1973) (amended 2002).

131. *See, e.g.*, CAL. FAM. CODE § 7613(b) (West 2013) (amended 2017); 750 ILL. COMP. STAT. ANN. 40/3 (West 2009) (repealed 2017).

132. *See, e.g.*, COLO. REV. STAT. § 19-4-106 (2009); DEL. CODE ANN. tit. 13, § 8-702 (2006); FLA. STAT. § 742.14 (2016).

In 1979, the New England Journal of Medicine published a survey on physician use of assisted insemination, resulting in a dramatic increase in the practice.[133] A government survey of physicians and medical fertility societies in 1987 estimated that 172,000 women used artificial insemination in 1986–87, resulting in approximately 65,000 live births, with 54% using artificial insemination by husband (AIH) (35,000 births) and the rest using artificial insemination by donor (AID) (30,000 births).

A woman's ability to give birth to a child not genetically related to her came about in 1973 in England with the first "test tube baby," Louise Brown;[134] three years later, America's first *in vitro* fertilization (IVF) baby was born after forty-one tries.[135] With IVF, the egg and the sperm are combined in the laboratory and allowed to develop into a pre-embryo, which is then implanted in a woman's uterus.[136] Because both the egg and the sperm must be handled outside the body, either one (or both) can come from a donor. Today, more than 1.5% of all babies born in the United States are conceived via IVF.[137]

With ART commonly in use today, there are several ways a parent might have no genetic connection to his or her child, and ways an adoptive parent might be the genetic parent of the child he or she adopts.

First, thousands of women each year use assisted insemination by donor.[138] If these women have a male partner, he presumably knows he is not the genetic father of the child, although the child may not know that, nor may the rest of the family. But it turns out that many couples who thought they were contracting for insemination with the husband's sperm were not getting what they bargained for. Sometimes the mixing of the husband's sperm with donor sperm was deliberate; other times it was a mistake. When doctors first began to offer AI, the

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133. U.S. CONG. OFF. OF TECH. ASSESSMENT, OTA-13P-BA-48, ARTIFICIAL INSEMINATION: PRACTICE IN THE UNITED STATES: SUMMARY OF A 1987 SURVEY—BACKGROUND PAPER 4, box 1-A (1988).

134. Mary Duenwald, *After 25 Years, New Ideas in the Prenatal Test Tube*, N.Y. TIMES (July 15, 2003), http://www.nytimes.com/2003/07/15/health/after-25-years-new-ideas-in-the-prenatal-test-tube.html.

135. Randi Hutter Epstein, *Howard W. Jones Jr., a Pioneer of Reproductive Medicine, Dies at 104*, N.Y. TIMES (July 31, 2015), https://www.nytimes.com/2015/08/01/science/howard-w-jones-jr-a-pioneer-of-reproductive-medicine-dies-at-104.html.

136. AM. SOC'Y FOR REPROD. MED., THIRD PARTY REPRODUCTION: A GUIDE FOR PATIENTS 18 (2012), https://www.asrm.org/uploadedFiles/ASRM_Content/Resources/Patient_Resources/Fact_Sheets_and_Info_Booklets/thirdparty.pdf.

137. Jen Christensen, *Record Number of Women Using IVF to Get Pregnant*, CNN (Feb. 18, 2014), http://www.cnn.com/2014/02/17/health/record-ivf-use/ [https://perma.cc/SRF7-5MFC] (citing SOC'Y FOR ASSISTED REPROD. TECH., SART CLINIC NATIONAL SUMMARY REPORT (2014), https://www.sartcorsonline.com/rptCSR_PublicMultYear.aspx?ClinicPKID=0#help) [https://perma.cc/7E9F-W3JM]).

138. One study estimated that about 75,000 babies each year are born in the United States using AID. *New Sperm Bank Opens for Donor Applications and Testing*, XYTEX CORP. (July 28, 2010), https://www.xytex.com/new-sperm-bank-opens-for-donor-applications-and-testing/ [https://perma.cc/NBU3-MNKT].

practice was unregulated, making errors and deliberate substitutions easier to occur. In 1959, a common practice of doctors using AIH was to mix donor sperm in with the husband's sperm in order to increase the chances of conception.[139] By 1979, this practice had apparently mostly ended; in a 1977–1978 survey of physicians performing artificial insemination by donor, of the 471 respondents, only two doctors replied that they mixed donor semen with the husband's semen.[140] However, others continued to deliberately mix sperm. A sperm bank founder in Great Britain is suspected of fathering as many as 600 children by secretly using his own sperm at his London-based clinic from the 1940s through the 1960s.[141] In 1992, Cecil Jacobson, a Virginia doctor, was found guilty on fifty-two counts of fraud and perjury in a case in which he substituted his own sperm in place of a donor.[142] A couple sued a Connecticut doctor alleging he used his own sperm rather than the patient's husband's after a DNA test performed in 2004 indicated that the husband was not the biological father. The suit was quickly settled.[143] In 2014, a Utah couple who had contracted with a fertility clinic for AIH discovered through a DNA test that their twenty-one-year-old daughter was not related to her father, but was likely related to a deceased part-time employee of the clinic.[144] News reports and cases also contain evidence in which embryos have been deliberately switched, so that the pregnant woman is misled regarding the identity of those providing the gametic material. A widely reported scandal occurred at a University of California, Irvine fertility clinic in 1995. Dr. Ricardo Asch and his partner at UCI's Center for Reproductive Health, Dr. Jose Balmaceda, were allegedly appropriating the embryos of patients for use in other infertile patients without the knowledge or consent of

139. S.J. Behrman, *Artificial Insemination*, 10 FERTILITY AND STERILITY 248, 252 (1959) ("Wherever practicable[,] it was deemed advisable that the husband's sperm be mixed with that of the donor for the satisfaction and protection of the husband.").

140. Martin Curie-Cohen, Lesleigh Luttrell & Sander Shapiro, *Current Practice of Artificial Insemination by Donor in the United States*, 300 NEW ENG. J. MED. 585, 587 (1979).

141. Randy Kreider, *Did Sperm Bank Founder Father 600 Children?*, ABC NEWS (Apr. 9, 2012), http://abcnews.go.com/Blotter/sperm-bank-founder-father-600-children/story?id=16104054 [https://perma.cc/6AF9-QZZE]. DNA tests on eighteen children conceived at the clinic concluded that Dr. Bertold Weisner, the clinic founder, was the father of twelve of them. *Id.*

142. *Doctor Is Found Guilty in Fertility Case*, N.Y. TIMES (Mar. 5, 1992), http://www.nytimes.com/1992/03/05/us/doctor-is-found-guilty-in-fertility-case.html. DNA tests presented at trial established he had fathered fifteen children; prosecutors alleged he may have fathered as many as seventy-five children. *Id.* Dr. Jacobson was sentenced to five years in prison and ordered to pay $116,805 in fines and restitution. *Fertility Doctor Gets Five Years*, N.Y. TIMES (May 9, 1992), http://www.nytimes.com/1992/05/09/us/fertility-doctor-gets-five-years.html.

143. Debra Friedman, *Wrong Man's Sperm Produces Twins—and a Shocking Accusation*, HOUS. CHRON. (Nov. 12, 2009), http://www.chron.com/life/mom-houston/article/Wrong-man-s-sperm-produces-twins-and-a-1748054.php [https://perma.cc/K6DC-WJU8].

144. Lauren F. Friedman, *At-Home Genetic Testing Reveals a Sperm-Swapping Nightmare*, BUS. INSIDER (Jan. 8, 2014), http://www.businessinsider.com/23andme-test-reveals-artificial-insemination-nightmare-2014-1 [https://perma.cc/9QA9-56FR].

any of the parties involved.[145] The result was that infertile women gave birth to the genetic children of other infertile couples seeking help from the clinic.[146]

The above examples all involved the deliberate substitution of another's genetic material. Sperm and embryos have also been switched by mistake according to news reports and court cases. In 1992, a woman alleged that a doctor told her minutes after her AI that she was mistakenly given the sperm of an unknown donor rather than her husband's sperm; the suit was settled.[147] In 1995, a couple in Florida using IVF was informed ten days after their twins were born that the wrong sperm was used to fertilize the wife's ova; they filed suit in 1996, alleging the mistake "has torn their lives apart."[148] In 2013, a Canadian doctor was reprimanded and suspended from practice after admitting that he had used the wrong semen to impregnate three women.[149] One of the three children born as a result discovered when he was twenty-three-years old that his father's sperm had not been used in the procedure but instead an unknown man's, with the result that his medical history was unknown.[150] In 2002, two couples undergoing IVF treatments at Leeds General Infirmary in Great Britain discovered that the eggs of Mrs. A had been fertilized with the sperm of Mr. B; Mrs. A later gave birth to twins.[151] Several reports detail embryos mistakenly implanted in the wrong recipient in California in 2000, London in 2002, Ohio in 2009, and Italy in 2014.[152] Perhaps the most famous embryo

145. Kimi Yoshino, *UCI Settles Dozens of Fertility Suits*, L.A. TIMES (Sept. 11, 2009), http://articles.latimes.com/2009/sep/11/local/me-uci-fertility11 [https://perma.cc/V5K7-FDKL]. The two doctors fled the country; the United States sought extradition of Dr. Asch from Mexico, but the request was denied in 2011 on the basis of double jeopardy after his acquittal in Argentina. Kim Christensen, *Doctor with Ties to Fertility Scandal Won't Be Extradited by Mexico*, L.A. TIMES (Apr. 1, 2011), http://articles.latimes.com/2011/apr/01/local/la-me-0401-asch-20110401 [https://perma.cc/4PDX-EYQR]. The UCI clinic was closed, and the University paid more than $27 million to affected patients. Teri Sforza, *Should UC Go After Fertility Fraud Doctor's Assets?*, ORANGE CTY. REG. (Jan. 25, 2011), http://www.ocregister.com/taxdollars/strong-477882-asch-http.html [https://perma.cc/4BZX-VVSB].

146. Kimi Yoshino, *UCI Settles Dozens of Fertility Suits*, L.A. TIMES (Sept. 11, 2009), http://articles.latimes.com/2009/sep/11/local/me-uci-fertility11 [https://perma.cc/7CMK-79AW] (citing settlement paid to Shirel and Steve Crawford).

147. Tracy Weber, *Suit Claimed Wrong Sperm Used at Saddleback Center*, L.A. TIMES (June 9, 1995), http://articles.latimes.com/1995-06-09/news/mn-11207_1_wrong-sperm [https://perma.cc/HG2V-6PJG]. The clinic's doctor was an associate of the UCI doctors who allegedly deliberately misappropriated embryos. *Id.*

148. *Father Isn't the Father: Couple File Suit*, ORLANDO SENTINEL, Nov. 14, 1996, 1996 WLNR 5274799.

149. Tom Blackwell, *'Worst Nightmare': Respected Fertility Doctor Impregnated Three Women with the Wrong Sperm*, NAT'L POST (Jan. 31, 2013, 10:18 AM), http://news.nationalpost.com/news/canada/respected-fertility-doctor-and-order-of-canada-member-admits-using-wrong-sperm-in-three-artificial-inseminations.

150. *Id.*

151. *IVF Mix-Up Father 'Seeks Child Access'*, BBC NEWS WORLD EDITION (Nov. 6, 2002, 10:35 AM), http://news.bbc.co.uk/2/hi/health/2409043.stm [https://perma.cc/A6K6-QB7N].

152. *See, e.g.*, *Couples Battle in Italy over IVF Twins Implanted in Wrong Woman*, YAHOO! NEWS (Aug. 8, 2014), http://news.yahoo.com/couples-battle-italy-over-ivf-twins-implanted-wrong-143918928.html [https://perma.cc/UX2K-J7WT] (finding an error through a genetic test for illness

mix-up occurred in New York in 1998, when an embryo containing the Rogerses' genetic material was implanted in Donna Fasano along with a second embryo containing the Fasanos's genetic material.[153] Less than two months after the IVF procedure, both couples were notified of the mistake, and later that year, Donna Fasano gave birth to two babies: the Rogerses' genetic child and her own genetic child.[154] While the Fasanos agreed to relinquish custody of the first child to the Rogerses, they insisted on visitation rights, resulting in a lawsuit by the Rogerses.[155] While such mistakes are rare, they do occur. Just as with babies switched at birth at the hospital,[156] occasionally sperm or embryos are switched. If the gestating mother

when woman was three months pregnant); *Embryo Mix-Up Hospital Named*, BBC NEWS WORLD ED. (Nov. 4, 2002, 1:33 PM), http://news.bbc.co.uk/2/hi/health/2395809.stm [https://perma.cc/XTM4-9E8M] (discussing a sperm mix-up stating that another hospital had recently transferred the wrong embryos into two patients); *IVF Embryo Mix-Up Mother Could Lose Child*, DAILY MAIL, http://www.dailymail.co.uk/health/article-312908/IVF-embryo-mix-mother-lose-child.html (last updated Aug. 5, 2004, 12:11 PM) (noting that genetic parents sued a California woman for custody of three-year-old son; clinic knew of mistake within minutes of the procedure in 2000 but opted not to tell the parents at that time); Stephanie Smith, *Fertility Clinic to Couple: You Got the Wrong Embryos,* CNN HEALTH (Sept. 22, 2009, 5:02 PM), http://www.cnn.com/2009/HEALTH/09/22/wrong.embryo.family/ [https://perma.cc/5NM7-TSZS] (noting that an Ohio woman learned ten days after implantation that she had mistakenly received another couple's embryo). A British report stated that serious errors and near misses, such as sperm and embryo mix-ups and destruction of embryos, had tripled between 2007 and 2014, resulting in ten such errors a week. Sophie Borland, *IVF Clinic Blunders Treble in Three Years as Ten Mistakes Every Week Bring Heartbreak to Couples*, DAILY MAIL (Aug. 12, 2011, 9:29 PM), http://www.dailymail.co.uk/health/article-2025501/IVF-clinic-blunders-10-mistakes-week-bring-heartbreak-couples.html.

153. Perry-Rogers v. Fasano, 715 N.Y.S.2d 19 (N.Y. App. Div. 2000).

154. *Id.* The trial court enforced the parties' agreement allowing visitation by the Fasanos, but the appellate court reversed and denied visitation. Rejecting the Rogerses' argument that the case should be decided on the fact that the Fasanos were "genetic strangers" to the Rogerses' child, the court found that a "gestational mother" might have some rights under New York law. *Id.* at 71–73. However, in this case, the court found that "any bonding on the part of Akeil [Rogers] to his gestational mother and her family was the direct result of the Fasanos' failure to take timely action upon being informed of the clinic's admitted error. Defendants [Fasanos] cannot be permitted to purposefully act in such a way as to create a bond, and then rely upon it for their assertion of rights to which they would not otherwise be entitled." *Id.* at 76.

155. *Id.* Both Perry-Rogers and Fasano also sued the doctors responsible for the mistaken implantations. Fasano v. Nash, 723 N.Y.S.2d 181 (N.Y. App. Div. 2001); Perry-Rogers v. Obasaju, 723 N.Y.S.2d 28 (N.Y. App. Div. 2001).

156. *See, e.g.*, Mays v. Twigg, 543 So. 2d 241, 242 (Fla. Dist. Ct. App. 1989) (two babies switched at birth in Florida in 1978; mistake discovered ten years later after one child died); Pope v. Moore, 403 S.E.2d 205, 206 (Ga. 1991) (two babies switched at birth in Georgia in 1983); Susan Dominus, *The Mixed-Up Brothers of Bogotá*, N.Y. TIMES MAG. (July 9, 2015), https://www.nytimes.com/2015/07/12/magazine/the-mixed-up-brothers-of-bogota.html?_r=0 (two sets of identical twins mixed at hospital in Colombia and raised as fraternal twins; mistake discovered when twins were in mid-twenties); Michael D. Shear, *Mother of Switched Baby Sues for $31M*, WASH. POST (May 25, 1999), http://www.washingtonpost.com/wp-srv/local/daily/may99/baby25.htm [https://perma.cc/2T2S-DA9N] (two babies switched at birth in Virginia in 1995). *See generally* Jennifer L. Foote, *What's Best for Babies Switched at Birth? The Role of the Court, Rights of Non-Biological Parents, and Mandatory Mediation of the Custodial Agreements*, 21 WHITTIER L. REV. 315 (1999).

and her newborn child are different races,[157] as was the case with Donna Fasano in New York and Mrs. A in Leeds, the mistake is certain to be detected. It's possible that other mix-ups or deliberate substitutions have occurred that have never been discovered.

In addition to all these instances in which a presumed parent in fact has no genetic connection to the child, there are a number of times in ART when a genetic parent adopts his or her own child, further blurring the line between a "natural born child" and an "adopted child." While a genetic parent might occasionally adopt his or her own naturally conceived child,[158] the incidence is infrequent enough that courts are still willing to maintain the presumption that an adopted child is *not* one's genetic child. But in ART, such children are routinely adopted. Consider these three scenarios:

Scenario A: Ann is diagnosed with cancer; the recommended medical treatment is likely to destroy her fertility. She opts to cryopreserve her ova, fertilized with her husband's sperm, before she undergoes treatment. Later, she and her husband enter into an agreement with a gestational carrier, who is implanted with the pre-embryo that Ann and her husband cryopreserved, and successfully gives birth. While some states are willing to enter a pre-birth order declaring that Ann and her husband are the parents, making adoption unnecessary,[159] in several states both Ann and her husband must adopt the resulting child even though they are the genetic parents, because another woman gave birth to the child and is therefore the

157. For a discussion of how race may have played a role in the decision in *Perry-Rogers v. Fasano*, see generally Leslie Bender, *Genes, Parents, and Assisted Reproductive Technologies: ARTs, Mistakes, Sex, Race, & Law*, 12 COLUM. J. GENDER & L. 1, 1–3 (2003).

158. For example, in *In re J.H.*, 313 A.2d 874, 875–76 (D.C. 1974), a father was permitted to adopt his out-of-wedlock son in order to establish inheritance rights. *See also* King v. Ochoa, 285 S.W.3d 602, 604 (Ark. 2008); Bridges v. Nicely, 497 A.2d 142, 147–48 (Md. 1985). While Florida generally allows a genetic parent to adopt his or her own child, a genetic mother could not use adoption in order to terminate the rights of the natural father. *See* L.J.R. v. T.T., 739 So. 2d 1283, 1284, 1287 (Fla. Dist. Ct. App. 1999). *See generally* Ashley L. Driver, *Confusing Plain Language: The Compelling but Counterintuitive Need for Adoption by a Biological Parent*, 63 ARK. L. REV. 139 (2010).

159. *See, e.g.*, CAL. FAM. CODE § 7962(e) (West 2017).

presumed mother.[160] Florida refers to surrogacy agreements as "pre-planned adoptions."[161]

Scenario B: Bob, a single man, wants to have his genetic child but has no female partner. He uses a donated ovum,[162] his own sperm, and a gestational carrier to create a child that is related to him. In some states, because he is not married to the woman giving birth to his child, he must adopt even though he is the genetic father.[163]

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160. A married couple in Alaska will usually adopt the child. Diane Hinson, *Gestational Surrogacy in Alaska*, CREATIVE FAM. CONNECTIONS, LLC, http://www.creativefamilyconnections.com/us-surrogacy-law-map/alaska [https://perma.cc/6S94-HTBQ] (last visited Feb. 11, 2017). In Delaware, the married couple may file for a pre-birth order declaring parentage, which will be issued after birth. Diane Hinson, *Gestational Surrogacy in Delaware*, CREATIVE FAM. CONNECTIONS, http://www.creativefamilyconnections.com/us-surrogacy-law-map/delaware [https://perma.cc/J5PN-9PP6] (last visited Feb. 11, 2017). In Nebraska, the gestational carrier will be listed as the mother on the birth certificate; the intended mother (Ann in this scenario) must complete a stepparent adoption. Diane Hinson, *Gestational Surrogacy in Nebraska*, CREATIVE FAM. CONNECTIONS, LLC, http://www.creativefamilyconnections.com/us-surrogacy-law-map/nebraska [https://perma.cc/J67U-WRP8] (last visited Feb. 11, 2017). For a discussion of the complications arising from stepparent and step-partner adoptions, see Peter Wendel, *Inheritance Rights and the Step-Partner Adoption Paradigm: Shades of the Discrimination Against Illegitimate Children*, 34 HOFSTRA L. REV. 351 (2005).

161. Leora I. Gabry, *Procreating Without Pregnancy: Surrogacy and the Need for a Comprehensive Regulatory Scheme*, 45 COLUM. J. L. & SOC. PROBS. 415, 428 (2012) (citations omitted).

162. *See, e.g.*, COLO. REV. STAT. ANN. § 19-4-106(2) (West 2009) ("A donor is not a parent of a child conceived by means of assisted reproduction . . . ."); FLA. STAT. ANN. § 742.14 (West 2016) ("The donor of any egg, sperm or preembryo, other than the commissioning couple . . . shall relinquish all maternal or parental rights and obligations with respect to the donation or the resulting children."); N.M. STAT. ANN. § 40-11A-702 (West 2010) ("Donors of eggs, sperm or embryos are not the parents of a child conceived by means of assisted reproduction."); OKLA. STAT. ANN. tit. 10, § 555 (West 1990) ("An oocyte donor shall no right, obligation or interest with respect to a child born as a result of a heterologous oocyte donation from such donor."); UTAH CODE ANN. § 78B-15-702 (West 2008) ("A donor is not a parent of a child conceived by means of assisted reproduction.").

163. Louisiana requires the intended parent to adopt the child once the gestational carrier relinquishes her parental rights. Diane Hinson, *Gestational Surrogacy in Louisiana*, CREATIVE FAM. CONNECTIONS, LLC, http://www.creativefamilyconnections.com/us-surrogacy-law-map/louisiana [https://perma.cc/GZV4-L45D] (last visited Feb. 11, 2017). In Alabama, adoption is more readily available than a pre-birth parentage order. Diane Hinson, *Gestational Surrogacy in Alabama*, CREATIVE FAM. CONNECTIONS, http://www.creativefamilyconnections.com/us-surrogacy-law-map/alabama [https://perma.cc/MYQ3-R6ZD] (last visited Feb. 11, 2017). Florida's statutes, FLA. STAT. ANN. §§ 742.13–.17 (West 2016), limit enforceable gestational surrogacy contracts to married couples, and so a single parent's best option is to "consider a pre-planned adoption under Chapter 63 or a maternity/paternity action." Diane Hinson, *Gestational Surrogacy in Florida*, CREATIVE FAM. CONNECTIONS, LLC, http://www.creativefamilyconnections.com/us-surrogacy-law-map/florida [https://perma.cc/7SSX-855N] (last visited Feb. 11, 2017). In the District of Columbia, surrogacy contracts are void, but a court will grant a second-parent adoption if the birth and contract were in another state. Diane Hinson, *Gestational Surrogacy in the District of Columbia*, CREATIVE FAM. CONNECTIONS, LLC, http://www.creativefamilyconnections.com/us-surrogacy-law-map/dc [https://perma.cc/CTK9-Z5YM] (last visited Feb. 11, 2017). If Bob used a gestational carrier in India to carry his child, Indian law requires him to adopt the child. *See* Silvia Spring, *Fertility Tourism: Childless Couples Try India*, NEWSWEEK (Apr. 11, 2006, 8:00 PM), http://newsweek.com/fertility-tourism-childless-couples-try-india-107551 [https://perma.cc/2QTH-MAFU]. For a discussion of some of the complications that may arise from surrogacy, see Seema Mohapatra, *Stateless Babies & Adoption*

Scenario C: Clarice is in a committed relationship with her female partner, Debbie, but is not married to her.[164] The couple uses Clarice's egg and anonymously donated sperm to create a pre-embryo that is implanted in Debbie, who gives birth to the child. Debbie will be presumed the mother because she gave birth and she is not a gestational carrier; she intends to parent the child along with Clarice. But because Clarice is not married to Debbie, she may need to adopt the baby, even though she is the genetic mother.[165] Even if Clarice is married to Debbie, she might still adopt the child in an abundance of caution.[166] Such a case occurred with Mona A. and Ingrid A., a New York couple who were legally married in the Netherlands in 2004.[167] The couple later used IVF to fertilize Mona's ova with anonymously donated sperm; the pre-embryo was implanted in Ingrid, who gave birth to a child in 2008.[168] The birth certificate listed only Ingrid as a parent, although both Ingrid and Mona lived together and raised Sebastian. While New York law recognized the foreign same-sex marriage, and thus considered Sebastian to be Mona's child as well as Ingrid's, Mona sought to adopt him because, "Unfortunately, while this is the case in New York, the same recognition and protection of Mona's parental rights does not currently exist in the rest of this country, or in most other nations in the world."[169] The judicial decree of adoption, unlike the marriage, would be entitled to full faith and credit in other states.[170]

Scams: A Bioethical Analysis of International Commercial Surrogacy, 30 BERKELEY J. INT'L L. 412, 414–17 (2012). For a history of the gestational surrogacy business in India, see Usha Rengachary Smerdon, *Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India*, 39 CUMB. L. REV. 15 (2008).

164. If Clarice and Debbie were married, the U.S. Supreme Court has held that a state cannot refuse to list Clarice's spouse as the other parent simply because she is the same sex as the birth mother. Pavan v. Smith, 137 S. Ct. 2075 (2017).

165. Clarice may need to choose her jurisdiction carefully: she needs a state willing to have two parents who are both female, and one in which a genetic parent can adopt her own child. For a discussion of the hurdles she may face as part of an unmarried same-sex couple, see Cynthia Grant Bowman, *The New Illegitimacy: Children of Cohabiting Couples and Stepchildren*, 20 AM. U. J. GENDER SOC. POL'Y & L. 437 (2012); Mark Strasser, *Interstate Recognition of Adoptions: On Jurisdiction, Full Faith and Credit, and the Kinds of Challenges the Future May Bring*, 2008 BYU L. REV. 1809 (2008); Rhonda Wasserman, *Are You Still My Mother? Interstate Recognition of Adoptions by Gays and Lesbians*, 58 AM. U. L. REV. 1 (2008). Now that same-sex marriage is recognized in all fifty states, the first hurdle—two parents who are both female—may no longer be an issue, but *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), did not address the parentage issue for same-sex marriage.

166. *See In re* Adoption of Sebastian, 879 N.Y.S.2d 677, 679, 682, 684 (Sur. Ct. 2009).

167. *Id.* at 679.

168. *Id.*

169. *Id.* at 682. In 2009, when *In re Adoption of Sebastian* was decided, the federal government and other states could refuse to recognize Mona and Ingrid's marriage under the federal Defense of Marriage Act (DOMA), 1 U.S.C. § 7 (1996), *invalidated by* United States v. Windsor, 133 S. Ct. 2675, 2696 (2013).

170. *See In re* Adoption of Sebastian, 879 N.Y.S.2d at 691.

IV. CURRENT LAW ON WHETHER ADOPTEES ARE INCLUDED IN CLASS GIFTS

Today in many states, once a person is adopted, he or she will be included in classes such as "issue," "descendants," or "grandchildren" established by the adopter's relatives, unless the will or trust expresses a contrary intent.[171] California construed Jane Stanford's 1905 will and trust to include adoptees, concluding that, "It has been the policy of this state, at least since the adoption of the Civil Code, to accord to adopted children the same status as natural children."[172]

The Supreme Court of California acknowledged the possibility that adoption could be used for "avaricious or spiteful purposes" but found the likelihood of such use to be "slight under modern adoption statutes contemplating a thorough investigation into such matters as the motives of the prospective adopter."[173] Recently, the Nebraska Supreme Court recognized an adult adoptee as the sole trust beneficiary despite the adoptee's testimony that one goal of the adoption was to prevent the other beneficiaries from receiving it should the adopter die childless, and the adoptee was instructed by his adopter to keep the adoption secret.[174] The Supreme Court of Pennsylvania had at one time found a presumption that testators and settlors intended to exclude adoptees,[175] but reversed itself a few years later to "adopt a presumption that the testator intended to *include* any 'child' or 'children' who were adopted."[176] The court noted the new position might not be a majority but had been accepted by many jurisdictions, citing cases from California, District of Columbia, Kentucky, Minnesota, New Jersey, New York, and Ohio.[177] Recent cases in Georgia, Maine and Iowa have also held that a will or trust that refers to "children," "grandchildren," "issue," and similar group terms includes

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171. *See, e.g.*, IDAHO CODE ANN. § 15-2-611 (West 2016) ("Half bloods, adopted persons and persons born out of wedlock are included in class gift terminology and terms of relationship in accordance with rules for determining relationships for purposes of intestate succession . . . ."); N.Y. EST. POWERS & TRUSTS LAW § 2-1.3(a) (McKinney 2008) ("Unless the creator expresses a contrary intention, a disposition of property to persons described in any instrument as the issue, children, descendants, heirs, heirs at law, next of kin, distributees (or by any term of like import) of the creator or of another, includes: (1) Adopted children and their issue in their adoptive relationship."). A Comment to the official text of the Idaho statute states, "The purpose of this section is to facilitate a modern construction of gifts, usually class gifts, in wills." IDAHO CODE ANN. § 15-2-611 (West 2016); *see also* Ralph C. Brashier, *Children and Inheritance in the Nontraditional Family*, 1996 UTAH L. REV. 93, 154 (1996) ("The old 'stranger-to-the-adoption' rule . . . has largely, and properly, gone out of fashion.") (citations omitted).

172. *In re* Estate of Stanford, 315 P.2d 681, 682, 689 (Cal. 1957).

173. *Id.* at 693 (quoting J. Wesley Oler, *Construction of Private Instruments Where Adopted Children Are Concerned*, 43 MICH. L. REV. 705, 710 (1945)).

174. *In re* Trust of Nixon, 763 N.W.2d 404, 407, 410–11 (Neb. 2009). The court noted that the settlor defined "issue" to include "persons legally adopted" but Nebraska did not recognize adult adoptions in 1985, the date of the adoption; the adoption was legal in California, and the Nebraska court held that it was entitled to full faith and credit, and did not violate Nebraska public policy. *Id.* at 407–08.

175. *In re* Estate of Holton, 159 A.2d 883, 892 (Pa. 1960).

176. *In re* Estate of Tafel, 296 A.2d 797, 800 (Pa. 1972).

177. *Id.* at 801 n.9.

those adopted into the class.[178] The states with statutory form wills make this clear. For example, Michigan includes the following statement in the "definitions" section: "'Descendants' or 'children' includes . . . individuals legally adopted . . . ."[179] Both the Wisconsin "basic will" and the "basic will with trust" include this notice: "This will treats adopted children as if they are birth children."[180] Massachusetts and New Mexico have enacted the Uniform Statutory Will Act, which states in its definitional section that "an adopted individual is the child of the adopting parents and not of the natural parents, but an individual adopted by the spouse of a natural parent is also the child of either natural parent."[181] Because "issue" is determined at each generation by using the definition of "child," the term would include all adopted-in persons.[182] California at one time had a statutory will with trust which stated, unhelpfully, "This will treats most adopted children as if they are natural children,"[183] but that section has been repealed; today, California has only a statutory form will, which has no information about the status of adopted children.[184]

Solution 1: How to Draft a Trust Now that May Include ART Children?

A trust or will drafted today will presumptively include adoptees in all class gifts. As noted, this effectively gives a power of appointment to some beneficiaries, who can create a "grandchild" or other relative by adopting a friend or spouse. The first, and most important step, is for the drafter to discuss with the client what s/he means by terms such as "children" or "descendants." Professor Featherston's #1 drafting tip is,

> *Define who are the remainder beneficiaries:* For example, what does the settlor actually mean in the use of terms like "children," "grandchildren," "descendants," "issues," or "nieces or nephews"? Are step-children, nonmarital children, scientifically generated descendants, pretermitted

178. *See, e.g.*, Elrod v. Cowart, 672 S.E.2d 616, 617, 619 (Ga. 2009) (noting "only the four corners of the will must be examined to determine whether adopted persons are expressly excluded"; and an adult adopted thirty-two years after testator's death held to be included); *In re* Estate of Nicolaus, 366 N.W.2d 562, 565 (Iowa 1985); Gannett v. Old Colony Tr. Co., 153 A.2d 122, 123 (Me. 1959) (where "my issue" included issue of testator's adopted son); 3 RICHARD R. POWELL, POWELL ON REAL PROPERTY §§ 30.06, 30.08 (2015). For a discussion of *Elrod*, see Mary F. Radford, *Wills, Trusts, Guardianships, and Fiduciary Administration*, 61 MERCER L. REV. 385, 390–91 (2009).

179. MICH. COMP. LAWS ANN. § 700.2519(2) (definitions subsection (c)) (West 2011).

180. WIS. STAT. ANN. § 853.55(9) (West, Westlaw through 2017 Act 58); WIS. STAT. ANN. § 853.56(9) (West, Westlaw through 2017 Act 58).

181. MASS. GEN. LAWS ANN. ch. 191B, § 1(1) (West 2016); N.M. STAT. ANN. § 45-2A-2(A) (West, Westlaw through the end of the First Regular and Special Sessions of the 53rd Legislature 2017).

182. MASS. GEN. LAWS ANN. ch. 191B, § 1(2) (West 2016); N.M. STAT. ANN. § 45-2A-2(B) (West, Westlaw through the end of the First Regular and Special Sessions of the 53rd Legislature 2017).

183. 1990 Cal. Stat. 191 (repealed 1991). California law retains the "stranger to the adoption" rule for adoptees who did not live in a parent-child relationship with the adopter while minors. CAL. PROB. CODE § 21115(b).

184. CAL. PROB. CODE § 6240 (West 2009).

> children, adopted children and adults who are adopted as adults to be included within those terms?[185]

Similarly, Murphy's Will Clauses advises,

> During the estate planning conference, the client is asked, or should be asked, the details regarding the members of the client's family . . . . It is important to consider whether the client wishes to include or exclude children adopted into or out of the family, children born out of wedlock, children of a spouse and another individual, or otherwise, including children conceived via assisted insemination or gestational surrogate.[186]

Some trusts include express language to the effect that "adoptions shall not be recognized" for the purpose of ascertaining beneficiaries. A phrase such as, "The terms 'child,' 'children,' and 'issue' as used in this instrument are *[intended/not intended]* to include adopted persons and their issue"[187] could be incorporated into the trust. When a clause excluding adoptees is incorporated, the settlors may be especially interested in confining the benefits of the trust to blood relatives, thus excluding stepchildren, foster children, and others; they may also be worried about a beneficiary using the absence of such language as a virtual power of appointment. However, because of ART, excluding adoptees will not guarantee either that all beneficiaries are blood related (because children or grandchildren may have been conceived with donor sperm or ova, but not adopted), or that those who are adopted are not blood related, as discussed in Part III. If a settlor is only troubled by the second concern, that allowing adoptions gives a beneficiary a virtual power of appointment, the phrase is often modified to exclude only those adopted as adults or after a specified age, such as fourteen, or to exclude those who did not live in a parent-child relationship with the adopter as a minor. For example, a trust might specify that "[a] child adopted before he or she attains eighteen (18) years of age (but not after attaining that age) shall be treated under this Trust Agreement as a child of his or her adopting parents and a descendant of their ancestors."[188]

While language excluding adult adoptees will have the desired results of including ART children and curtailing the use of adoption as a power of

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185. Thomas M. Featherston, Jr., Wills and Revocable Trusts—What's Best for the Client? 11 (Aug. 11, 2011) (unpublished manuscript) (on file with Baylor Law School), http://www.baylor.edu/content/services/document.php/159730.pdf [https://perma.cc/6C6K-3LVJ].

186. 4 JOSEPH HAWLEY MURPHY, MURPHY'S WILL CLAUSES: ANNOTATIONS AND FORMS WITH TAX EFFECTS § 10.03(1) (2016).

187. 9 CLARK A. NICHOLS ET AL., NICHOLS CYCLOPEDIA OF LEGAL FORMS ANNOTATED § 217:1725 (2016).

188. E-mail from James Roberts, Esq., to author (July 13, 2015) (on file with author). Similar language for wills is found in *California Transactions Forms: Estate Planning*: "As used in this Will, the terms 'children,' 'issue,' 'descendants,' and other class gift terms shall include persons adopted prior to attaining majority." 4 THOMAS C. TAYLOR, JR., CALIFORNIA TRANSACTIONS FORMS: ESTATE PLANNING § 19:144 (2016).

189. *See, e.g.*, CAL. FAM. CODE § 9302 (West 2013) (stating, in adult adoption proceedings, "[t]he consent of the parents of the proposed adoptee . . . is not required.").

appointment, it may also have an unintended effect in the case of stepchildren and foster children. A stepparent may wish to adopt his or her spouse's children with another partner, but may be unable to do so because that partner objects to their adoption. Once the stepchild reaches the age of majority, the stepparent no longer needs the consent of the stepchild's other parent, and the adoption can proceed, but only as an adult adoption. Similar complications may arise with a foster child. Thus, language that focuses on whether the adopter and adoptee have a parent-child relationship might be preferable to an age cutoff. For example, in interpreting class gifts made by a transferor who is not the adoptive parent, California by statute excludes adoptees unless they lived while a minor as a regular member of the household of the adopting parent or of a specified relative of that parent.[190]

While drafters may want to include language on whether adoptions are recognized, determining beneficiary status should *not* depend on a genetic test. For a few children conceived coitally, and for many more children conceived through ART, there may be unwelcome surprises, with family members discovering years after the fact that one's lineage is not as expected. Courts and legislatures have long recognized the potentially disruptive effect of revealing that a man who has acted as a child's father for years or even decades is not genetically related to the child. The California statute at issue in the U.S. Supreme Court case *Michael H. v. Gerald D.,* in which the biological father was denied the right to establish paternity of a child of a married woman, was originally enacted in 1872.[191] While the common law was primarily concerned with preventing children from being declared illegitimate, "[a] secondary policy concern was the interest in promoting the 'peace and tranquility of States and families,' . . . a goal that is obviously impaired by facilitating suits against husband and wife asserting that their children are illegitimate."[192] Even if a paternity action is allowed to be filed, some states require a finding that paternity testing be in the best interests of the child.[193] In addition, we must keep in mind that these trusts will certainly last for decades and possibly for centuries. Science continues to advance; today in Great Britain, it is legal to replace some of the mother's mitochondrial DNA so that the child has genetic material from three people, not two.[194] An earlier process involving replacement of cytoplasm resulted in babies with three genetic parents, a procedure performed in New Jersey with more than thirty women until the FDA stopped the

190. CAL. PROB. CODE § 21115(b).

191. Michael H. v. Gerald D., 491 U.S. 110, 117 (1989).

192. *Id.* at 125 (citations omitted).

193. *See, e.g.*, Michael M. v. Giovanna F., 5 Cal. App. 4th 1272, 1285 (1992); *In re* Marriage of Ross, 783 P.2d 331 (Kan. 1990); *In re* Paternity of Adam, 903 P.2d 207 (Mont. 1995); McDaniels v. Carlson, 738 P.2d 254 (Wash. 1987).

194. Judith Daar, *Multi-Party Parenting in Genetics and Law: A View from Succession*, 49 FAM. L.Q. 71, 71–74 (2015).

practice in 2001.[195] As ART continues to evolve, we may have "designer babies" with no genetic parents, assembled from a menu of genes from a variety of people or even synthetically manufactured, making a genetic test even more problematic.

Thus, the key steps in drafting new trusts are to consult with the settlor on the definitions of children, grandchildren, and other class terms, and give the trustee adequate guidance is what is meant by those terms.

Solution 2: How to Interpret a Decades-Old Trust that Now Excludes ART Children?

In a decades-old trust, the presumption that adopted children are excluded would ordinarily be the starting point. Some jurisdictions may hold that trust designations to "children," "descendants," and the like are unambiguous, and so extrinsic evidence would be inadmissible to clarify the definition. Even those jurisdictions that allow reformation of an unambiguous document would not provide relief here since the predicate of proving a mistake by the testator would be missing.[196] At the same time, for the typical settlor or testator, "child," "issue," "descendants," and other similar terms probably meant a genetic parent-child relationship and therefore one would argue that ART children conceived with nondonor gametes but adopted by the genetic parents should be included. "'The court's endeavor is to put itself in testator's position in so far as possible in the effort to accomplish what he would have done had he 'envisioned the present inquiry.'"'[197] Courts today are more flexible in looking at the circumstances of adoption.

> Society is highly aware that adoption today is not a one-size-fits-all enterprise. Some adoptions are of newborns, some are not; some are of blood relatives, some are not; and some are open, some are confidential. These situations and others have led judges and legislatures in some states to retreat from bright-line demarcations of inheritance rights beyond the child and parent in favor of a more complex, fact-sensitive determination involving actual interaction and intent.[198]

Thus, the best approach may be to follow the lead of Professor Halbach, who has advocated "a special concept of *loco parentis* to be coupled with the

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195. *Id.* at 74; *see also* Kristine S. Knaplund, *Synthetic Cells, Synthetic Life, and Inheritance*, 45 VAL. U. L. REV. 1361, 1376 (2011).

196. *See, e.g.*, UNIF. PROB. CODE § 2-805 (1969) (amended 2010); N.D. CENT. CODE ANN. § 30.1-10-05 (West, Westlaw Current through the 2017 Regular Session of the 65th Legislative Assembly); N.M. STAT. ANN. § 45-2-805 (West, Westlaw Current through the end of the First Regular and Special Sessions of the 53rd Legislature 2017); UTAH CODE ANN. § 75-2-805 (West, Westlaw Current through the 2017 First Special Session); Erickson v. Erickson, 716 A.2d 92, 98–100 (Conn. 1998); *In re* Estate of Herceg, 747 N.Y.S.2d 901 (Sur. Ct. 2002). *See generally In re* Estate of Duke, 352 P.3d 863 (Cal. 2015). The doctrine was first advanced in John H. Langbein & Lawrence W. Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. PA. L. REV. 521 (1982).

197. *In re* Estate of Griswold, 354 A.2d 717, 723 (N.J. Morris Cty. Ct. 1976) (citing *In re* Estate of Burke, 222 A.2d 273 (N.J. 1966); Fidelity Union Tr. Co. v. Robert, 178 A.2d 185 (N.J. 1962); Bank of New York v. Black, 13 A.2d 393 (N.J. 1958)).

198. Anne-Marie Rhodes, *On Inheritance and Disinheritance*, 43 REAL PROP., TR. & EST. L.J. 433, 440–41 (2008) (citations omitted).

constructional preference for the inclusion of adoptees. The basic rule of inclusion could thereby be limited to children who were adopted at a relatively early age and reared by the adoptive parents."[199] A California case adopted Halbach's *loco parentis* test with a three-step approach for adult adoptees which first presumptively excluded them from wills executed before 1951 (when California's statute was enacted), but made an exception for those raised as a minor in the adopter's home; the court then created an "exception to the exception" in cases where "the purpose of the adoption was to diminish or defeat the income and remainder interests of other beneficiaries 'for purposes of financial gain or as a spite device.'"[200] Halbach's *loco parentis* approach has been criticized as impractical to implement, especially for those courts reluctant to draw different lines for those adopted as adults rather than minors, and paying insufficient attention to the impediments to adopting minors such as a natural parent's objection or lack of money.[201] Still, in the case of ART children adopted by a genetic parent, a court may well be willing to include that child in the class given this test.

A *loco parentis* test is also preferable to a more technical decision turning on whether the ART child was adopted. In *In re Doe*, a trust created in 1959 for the benefit of the settlor's "issue or descendants" and their spouses stated, "adoptions shall not be recognized."[202] K. Doe, the settlor's daughter, and her husband, both New York residents, contracted with a gestational carrier in California to be implanted with donor eggs fertilized in vitro with the sperm of K. Doe's husband.[203] After the gestational carrier gave birth to twins, a California court issued a Judgment of Parental Relationship declaring K. Doe and her husband as the twins' sole legal parents.[204] Are the twins included in the trust for the settlor's issue or descendants? The twins were not genetically related to the settlor or his daughter, but the New York court held they were included because under California law they were not adopted. The court also noted that the trust provided for other nonblood beneficiaries, such as the children's spouses. Despite the fact that New York law considers surrogate parenting contracts "void and unenforceable,"[205] the court found that New York allowed a judgment of parentage, and gave full faith and credit to the California proceeding.[206] Had the Does carried out their gestational agreement in another state such as Alaska or Nebraska,[207] the Does would have

199. Halbach, Jr., *supra* note 78, at 990.

200. Estate of Pittman, 104 Cal. App. 3d 288, 295 (1980). Iowa adopted Professor Halbach's approach in *Elliott v. Hiddleson*, 303 N.W.2d 140, 144–45 (Iowa 1981).

201. Rein, *supra* note 2, at 759.

202. *In re* Doe, 793 N.Y.S.2d at 879.

203. *Id.* at 880.

204. *Id.*

205. N.Y. DOM. REL. LAW § 122 (McKinney 2016).

206. *In re* Doe, 793 N.Y.S.2d at 882.

207. *See supra* note 160 and accompanying text.

adopted the children, and the trust language might have been read to exclude them. A *loco parentis* test, in contrast, would include the children whether adopted or not.

CONCLUSION

Thousands of children are born each year using assisted reproductive technology,[208] and the numbers are likely to increase given improvements in the science. Cultural trends also suggest increased use of ART. The percentage of older women having a first child has increased significantly in recent years, with nine times as many first births to women over thirty-five in 2012 than four decades earlier.[209] Because human fertility begins to decline after age thirty, many of these first-time moms will need ART.[210] In addition, if same-sex couples want to have children, they must either use ART or adopt. Now that the U.S. Supreme Court has

208. In addition to the estimated 75,000 babies born each year using AID, see *Become a Sperm Donor*, N. AM. CRYOBANK, http://nacryobank.com/about/ [https://perma.cc/8P83-PFMY] (last updated 2015), the Centers for Disease Control reported that in 2012, over 9,000 babies were born using donated embryos, an increase of over fifty percent from ten years ago. CTRS. FOR DISEASE CONTROL & PREVENTION, 2012 ASSISTED REPRODUCTIVE TECHNOLOGY: NATIONAL SUMMARY 5 (Nov. 2014), https://www.cdc.gov/art/pdf/2012-report/national-summary/art_2012_national_summary_report.pdf [https://perma.cc/5DL4-JMTW]. These figures do not include Americans traveling abroad for ART, a number that is also increasing. *See, e.g.*, *Fertility Tourism: The Choice Is Yours in Thailand*, THE ECON. TIMES (Aug. 7, 2006, 12:24 AM), https://widget.economictimes.indiatimes.com/news/international/Fertility-tourism-The-choice-is-yours-in-Thailand/articleshow/1863291.cms [https://perma.cc/4KB9-TCZZ] (noting that foreigners, including those from the United States, come to Thailand because it is much cheaper); Kate Kelland, *Unequal Access Drives Fertility Tourism, Experts Say*, REUTERS (Sept. 14, 2010, 1:21 PM), http://www.reuters.com/article/us-fertility-tourism-idUSTRE68C57P20100914 (noting that more than one hundred countries now offer fertility services to foreigners); Jennifer Kirby, *These Two Americans Want Babies Through Indian Surrogates. It's Not Been Easy*, NEW REPUBLIC (Dec. 10, 2013), http://www.newrepublic.com/article/115873/fertility-tourism-seeking-surrogacy-india-thailand-mexico (noting that two American couples who employed surrogates in India); Felicia R. Lee, *Driven By Costs, Fertility Clients Head Overseas*, N.Y. TIMES (Jan. 25, 2005), http://www.nytimes.com/2005/01/25/national/25fertility.html?pagewanted=print&position=&_r=0 (noting that a small number of Americans go to South Africa, Israel, Italy, Germany and Canada, where costs are often much lower than in the United States); Silvia Spring, *Fertility Tourism: Childless Couples Try India*, NEWSWEEK (Apr. 11, 2006, 8:00 PM), http://newsweek.com/fertility-tourism-childless-couples-try-india-107551 [https://perma.cc/K9YG-6PLF] (noting that the "number of surrogate births in India has more than doubled in the past three years," bringing in more than $450 million a year, with the number of British and Americans increasing dramatically); Mark Semple, *Surrogacy in Mexico Gaining Momentum*, GLOBAL IVF (Jan. 7, 2014), http://globalivf.com/2014/01/07/surrogacy-in-mexico/ (noting that India's decision in 2010 to outlaw same-sex couples and singles from using IVF has led to increased travel of U.S. couples to Mexico); *Women Flock to Mexico For 'Fertility Tourism'*, LA OPINIÓN (June 6, 2007), https://web.archive.org/web/20080307003019/http:/news.newamericamedia.org/news/view_article.html?article_id=dfc49cd48d45a18c9100a1b4dc921df4 (noting that a director of a Tijuana-assisted reproduction clinic stated that seventy percent of his patients come from the U.S.).

209. T.J. MATHEWS & BRADY E. HAMILTON, NAT'L CTR. FOR HEALTH STATISTICS, NCHS DATA BRIEF NO. 152, FIRST BIRTHS TO OLDER WOMEN CONTINUE TO RISE 6 (2014), https://www.cdc.gov/nchs/data/databriefs/db152.pdf [https://perma.cc/V3YN-3RNU].

210. *The Cost of Fertility Treatment 'Tourism'*, BBC NEWS SCOT. (Apr. 24, 2011), http://www.bbc.co.uk/news/uk-scotland-13181119 [https://perma.cc/H72Q-4BYV].

recognized same-sex marriage,[211] it is possible that more same-sex couples will have children. Are these ART children included when a testator or settlor provides for her "descendants" or "nieces and nephews"? The old assumptions—that children and issue are related to one by blood, and those adopted are not—need to give way to the new reality of how thousands of children are conceived today. Trusts created decades ago and still operative today force trustees and courts to struggle to carry out the intent of a settlor who never imagined that an embryo could be created in a laboratory, and need to be interpreted with today's science in mind. Those drafting new trusts must take care to update their language to include those conceived noncoitally, and perhaps even anticipate a future where one's "relatives" are not related at all. This Article has provided solutions to carry out a settlor's intent both in the case of trusts established in the 1930s or 1940s (or even earlier), and in the creation of new trusts.

211. *Obergefell*, 135 S. Ct. at 2604–05. Note that parentage issues may still be at issue for a same-sex married couple. *See, e.g.*, Richard Vaughn, *Even If Kim Davis Issues Marriage License, LGBT Intended Parents Need Court Order Granting Parental Rights*, INT'L FERTILITY L. GROUP (Sept. 10, 2015), https://www.iflg.net/lgbt-intended-parents-need-court-order-even-if-kim-davis-issues-marriage-license/ [https://perma.cc/75Y7-EXAV].