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of real property. Furthermore, should social and legal classifications be identical? Also there remains the question of whether it is constitutional to change present legal racial classifications to create uniformity when the reclassification would operate to the detriment of some persons.

These problems do not detract from the desirability of uniformity in the miscegenation statutes; they should be considered and solved and the solution incorporated into new statutes that would preclude the ludicrous results possible under the present statutes.

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EFFECT OF ADOPTION UPON ADOPTIVE PARENT'S WILL

Florida has two overlapping statutes dealing with the inheritance rights of adopted children.[1] Under these enactments, the adopted child is "the child and legal heir of the adopting parent or parents, entitled to all the rights and privileges, and subject to all obligations, of a child born to such parent or parents in lawful wedlock."[2] He is also the lineal descendant and heir-at-law of the adopter and takes as such under both the intestacy and homestead laws of the state.[3] Full inheritance rights from the natural parents are preserved, but the natural parents may not inherit from the adopted child.[4] Further, the child may take by intestacy from the other children, both adopted and natural, of his adopting parents; the adoptive parents and their remaining children may similarly inherit from him.[5] But the child's rights are limited by the courts to those given him by statute; he may not take by intestacy from other relatives of his adopting parents nor may they take from him.[6] If a child is adopted twice, he loses those rights of inheritance gained by the first adoption, in the absence of a writing showing that the first adopter, despite the subsequent

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[1]FLA. STAT. §§72.22, 731.30 (1957).

[2]*Id.* §72.22.

[3]Church v. Lee, 102 Fla. 478, 136 So. 242 (1931). *But see* Passmore v. Morrison, 63 So.2d 297 (Fla. 1953).

[4]FLA. STAT. §§72.22, 731.30 (1957).

[5]*Id.* §731.30 (1957).

[6]*In re* Poole's Estate, 153 Fla. 610, 15 So.2d 323 (1943); *In re* Hewett's Estate, 153 Fla. 137, 13 So.2d 904 (1943).

proceedings, still regarded the child as his own for purposes of inheritance.[7]

Since 1947 it has been possible to adopt adults in Florida.[8] The sole result of such adoption is to grant the adopted adult those limited rights of inheritance set forth in section 731.30 of Florida Statutes 1957.[9] No provision exists requiring the surrender of these rights by the adopted adult upon a subsequent adoption.

Despite their breadth, the Florida adoption statutes are silent as to the effect of adoption upon a pre-existing will of the adopting parent. A series of hypothetical problems will illustrate the perplexities that may result.

FAILURE TO MENTION THE ADOPTED CHILD

> H *and* W, *a couple with a son* S *and a daughter* D, *adopt a child* C. *At the time of adoption* H *has in existence a will leaving one third of his estate to* W, *one third to* S, *and one third to* D. H *subsequently dies without altering his will.*

It has not been determined whether *C* shares in the estate of *H.* A child born to a testator after the execution of the will is entitled to that part of the testator's estate which he would have taken had the parent died intestate, unless the will indicates that the omission was intentional or unless the child has received by advancement a portion of the estate equal to his intestate share.[10] The Florida Supreme Court has not considered the applicability of this law to the analogous situation of the after-adopted child.

Examination of cases in other jurisdictions does little to answer the question. Nevertheless, circumstances surrounding all decisions unfavorable to the adopted child differ from those presently existing in Florida by one or both of two prominent factors: (1) the adoption statutes of the particular state integrate the adopted child within the adoptive family less fully than do the corresponding Florida laws;[11] (2) the statute protecting pretermitted children voids the previously executed will instead of merely suspending it with regard

[7] FLA. STAT. §72.22 (1957).

[8] *Id.* §§72.33-.39.

[9] *Id.* §72.38.

[10] *Id.* §731.11.

[11] *E.g.,* Hamilton v. Smith, 264 Ala. 199, 86 So.2d 283 (1956) (rule subsequently altered by legislature); *In re* Boyd's Estate, 270 Pa. 504, 113 Atl. 691 (1921); *accord,* Lee v. Foley, 224 Miss. 684, 80 So.2d 765 (1955).

to the pretermitted child.[12] The courts are reluctant to bring the adopted child within the statute when it results in voiding the will. These statutory distinctions are significant; the wording of the Florida adoption statute may well induce the Florida courts to grant an after-adopted child the same rights under the pretermitted child statute as one born after the making of the will.[13]

If the pretermitted child statute is applied to the after-adopted child, it must next be determined whether the omission to provide for *C* was intentional. Clearly enough, if express language disinheriting any after-acquired issue is found in the will, *C* will not take. Difficulties arise when it becomes necessary to resort to facts outside the will to determine the testator's intentions. Redfearn declares that parole evidence is not admissible to show that the testator made his will in contemplation of later acquiring further issue.[14] There are no Florida cases on this point. However, in a case involving the statute that protects the after-acquired spouse,[15] a Florida trial court has been held justified in inquiring into the circumstances surrounding the making of a will.[16] The Florida Supreme Court, in an opinion by Justice Sebring, declared:[17]

> "It is our view that the provision contained in the statute [relating to the pretermitted spouse], to the effect that the surviving spouse shall share in the estate of the decedent unless the will discloses an intention not to make such provision, does not mean that such intention must be written into the will in express words; but that such result may follow as an unavoidable inference from the conditions and circumstances of the parties at the time of the execution of the instrument."

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[12]*E.g.,* Davis v. Fogle, 124 Ind. 41, 23 N.E. 860 (1890); Succession of Carre, 212 La. 839, 33 So.2d 655 (1948); Crew v. Looney, 300 S.W.2d 368 (Tex. Civ. App. 1957).

[13]For cases favorable to the adopted child see *e.g.,* Woolford v. Woolford, 31 Del. Ch. 579, 76 A.2d 5 (Orphans' Ct. 1950); Alexander v. Samuels, 177 Okla. 323, 58 P.2d 878 (1936); Marshall v. Marshall, 25 Tenn. App. 309, 156 S.W.2d 449 (1941); Annots., 24 A.L.R.2d 1085 (1952), 105 A.L.R. 1176 (1936). 1 REDFEARN, WILLS AND ADMINISTRATION OF ESTATES IN FLORIDA §90 (3d ed. 1957), declares that although it was probably not the intent of the legislature under FLA. STAT. §731.30 to give the adopted child the rights of the pretermitted child, the enactment of §72.22 in 1943 rendered the limitations of the former statute immaterial.

[14]1 REDFEARN, *op. cit. supra* note 13.

[15]FLA. STAT. §731.10 (1957).

[16]Perkins v. Brown, 158 Fla. 21, 27 So.2d 521 (1946).

[17]*Id.* at 24, 27 So.2d at 523. See also *In re* Estate of Day, 7 Ill.2d 348, 131 N.E.2d 50 (1955).

Despite this general language, the desire to prevent casual disinheritance of the after-acquired child might well lead the courts to exclude parol evidence of intent or of surrounding circumstances when the rights of the pretermitted child are being determined. The wording of the two statutes, although similar, differs sufficiently to permit such a distinction.

AMBIGUOUS BEQUESTS

H's will, executed prior to the adoption of C, *leaves one half of his estate to* W, *the remaining half to be divided equally among the "children" of* H.

Three different results may be reached with respect to the rights of *C*. (1) It may be held that he is not a pretermitted child within the meaning of section 731.11 of Florida Statutes 1957, and also that he is not one of the "children" of *H* within the contemplation of the will. In this event *C* will receive nothing. (2) He may be declared to fall within the provision in *H*'s will for his "children." The pretermitted child statute then will have no effect upon the result and *C* will receive one sixth of *H*'s estate, sharing equally with *S* and *D*. (3) The court may decide that *C* was not provided for in the will and is therefore entitled, as a pretermitted child, to an intestate share in *H*'s estate. Thus *C* will receive either two ninths or one fourth of *H*'s estate,[18] depending upon whether *W* is credited with a dower portion or a child's part in computing *C*'s intestate share.

Although the applicability of the pretermitted child statute has been previously discussed, it remains necessary to consider the precise meaning of the word *children* as used in a will. The terms *children, heirs, descendants, issue,* and the like have caused untold litigation. The most frequently employed terms are usually defined as follows:

Children — a person's sons and daughters.[19]

Descendants — those persons in the blood stream of a common ancestor.[20]

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[18]*Cf. In re* Hatfield's Estate, 153 Fla. 817, 16 So.2d 57 (1943).

[19]Miller v. Finegan, 26 Fla. 29, 7 So. 140 (1890); Watterson v. Thompson, 404 Ill. 515, 89 N.E.2d 381 (1949). See also RESTATEMENT, PROPERTY §267, comment *c*, §292, comment *a* (1940).

[20]*In re* Hewett's Estate, 153 Fla. 137, 13 So.2d 904 (1943). See also RESTATEMENT, PROPERTY §292 (1940).

Heirs — those people appointed by law to succeed in the event of intestacy.[21]

Issue — a person's descendants.[22]

It is commonly declared, however, that these words will be construed interchangeably when necessary so as to give effect to the testator's intent.[23] The precise word used in the will is of importance, since the child is more likely to share in a devise to the "heirs" of *H* than in one to *H*'s "issue."[24] The controlling factor, however, is the language of the applicable adoption statute.

The usual objective of the courts in the interpretation of wills is to give effect to the intent of the testator as expressed in the will. When the testator is the adoptive parent, he is presumed to have intended to provide for the adopted children, regardless of the time of execution of the will.[25] A contrary presumption exists, however, that a testator does not intend to provide for the adopted children of another person.[26] Thus, if *H*'s will leaves part of the estate to his grandchildren, this presumption would become operative to exclude the adopted child of the testator's son. However, the court will usually look not only to the will but also to surrounding circumstances to determine the intent.[27] With extrinsic evidence, the presumption of exclusion may be overcome by showing that the adoption

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[21]Arnold v. Wells, 100 Fla. 1470, 131 So. 400 (1930). See also RESTATEMENT, PROPERTY §305 (1940).

[22]Lawrence v. Westfield Trust Co., 1 N.J. Super. 423, 61 A.2d 899 (Ch. 1948); *In re* Phelps' Will, 90 N.Y.S.2d 861 (County Ct. 1949). See also RESTATEMENT, PROPERTY §265, §292, comment *a* (1940).

[23]*E.g.*, McLeod v. Dell, 9 Fla. 427, 443 (1861); In the Matter of Upjohn's Will, 304 N.Y. 366, 374, 107 N.E.2d 492, 495 (1952). See also RESTATEMENT, PROPERTY §§290, 292, 309 (1940).

[24]*Compare* Brock v. Dorman, 339 Mo. 611, 98 S.W.2d 672 (1936) (child adopted by testator's son after testator's death entitled to share in remainder bequeathed to "heirs" of son), *with* Howlett Estate, 366 Pa. 293, 77 A.2d 390 (1951) (child adopted by testator's son 10 years before execution of will not entitled to share in remainder to son's "issue" despite statute directing that remainders to "children" shall be shared by adopted child.

[25]Mesecher v. Leir, 241 Iowa 818, 823, 43 N.W.2d 149, 151 (1950) (dictum); Central Trust Co. v. Hart, 82 Ohio App. 450, 460, 80 N.E.2d 920, 925 (1948) (dictum); see RESTATEMENT, PROPERTY §287 (1944).

[26]*E.g.*, Comer v. Comer, 195 Ga. 79, 23 S.E.2d 420 (1942); *In re* Chapple's Estate, 338 Mich. 246, 61 N.W.2d 37 (1953); Rhode Island Hosp. Trust Co. v. Sack, 79 R.I. 493, 90 A.2d 436 (1952).

[27]*E.g.*, Morgan v. Keefe, 135 Conn. 254, 63 A.2d 148 (1948); Mesecher v. Leir, *supra* note 25; Central Trust Co. v. Hart, *supra* note 25.

took place prior to the execution of the will or before the testator's death and that he knew of the adoption.[28]

A similar problem exists when property is left to a person who predeceases the testator. Assume that *A*, a sister of *H*, leaves property to *H*, who then dies, *A* dying shortly thereafter. Under these circumstances the anti-lapse statute comes into play. The Florida statute declares that property willed to a predeceased blood relative of the testator shall be given to the lineal descendants of the legatee.[29] Again there are no Florida decisions on which to rely, but most courts that have passed on the question would apparently permit *C* to share with the other heirs of *H*.[30] Section 731.30, specifically declaring the adopted child the lineal descendant of his adopting parents, supports this view. Although the adoption takes place prior to the testator's death in all such cases, what bearing will the presence or absence of the testator's knowledge of the adoption have on the ultimate result? Must the testator have known of the adoption prior to the execution of the will? The decisions in this area are written in terms of the precise phraseology of the anti-lapse and adoption statutes involved. However, the cases constantly reiterate, in buttressing decisions for the adopted child, that the testator knew of the adoption prior to his death.[31]

PROVISION FOR CHILD IN FORMER STATUS

H *and* W, *following the death of their only child* D, *adopt* D's *only son* C. *Shortly after the adoption* H *dies.* H's *will, prepared after* D's *death but prior to the adoption of* C, *leaves $20,000 to* C, *"the only child of my late daughter* D," *and the rest of his estate to* W.

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[28]In the Matter of Upjohn's Will, 304 N.Y. 366, 107 N.E.2d 492 (1952) (testator knew prior to execution of will); *In re* Uihlein's Estate, 269 Wis. 170, 68 N.W.2d 816 (1955) (speaks in terms of "date of death"). *Contra,* Yates's Estate, 281 Pa. 178, 126 Atl. 254 (1924) (since overruled by statute).

[29]FLA. STAT. §731.20 (1957).

[30]See, *e.g.,* Estate of Tibbetts, 48 Cal. App.2d 177, 119 P.2d 388 (1941); *In re* Estate of Harmount, 336 Ill. App. 322, 83 N.E.2d 756 (1949); In the Matter of Upjohn's Will, *supra* note 28. *But see* Arnold v. Helmer, 327 Mass. 722, 100 N.E.2d 886 (1951).

[31]*E.g.,* In the Estate of McEwan, 128 N.J. Eq. 140, 15 A.2d 340 (Perog. Ct. 1940); In the Matter of Walter, 270 N.Y. 201, 200 N.E. 786 (1936). *But see* Crawford v. Arends, 351 Mo. 1100, 176 S.W.2d 1 (1943); Phillips v. McConica, 59 Ohio St. 1, 51 N.E. 443 (1898).

A court attempting to resolve this problem by an application of the relevant pretermitted child statute is immediately confronted by two questions:

(1) Is the provision for *C* as the child of *D* sufficient to prevent him from taking an intestate share of *H*'s estate?
(2) If *C* is entitled to an intestate share, may he also take property left him in the will?

If the testator refers in his will to a child as "my son" and later adopts him, there is little doubt that the child will be limited to the provision made for him in the will.[32] But when the will refers to a subsequently adopted child as "my friend" or "the boy whom I have raised," the tendency is to hold that the child has not been provided for in the will and that he takes under the pretermitted child statute.[33] Two paths may be followed in reaching this result. The first and more simple is to exclude from consideration matters extrinsic to the precise terminology of the will. Thus, if there is nothing in the will itself that can be construed as a provision for adoption or provision against that contingency, the subsequently adopted child is entitled to take by intestacy.[34] This conclusion is expedited if the applicable statute, as in Florida, grants the pretermitted individual an intestate share "unless it appears from the will" that the testator intended otherwise.[35] The other possible approach consists of a realistic attempt to ascertain the testator's actual intent. *In the Matter of de Coppet*,[36] although involving the application of the New York statute relating to the pretermitted spouse, summarizes the criteria:[37]

"(1) When a testator marries after making a will, it is revoked [as to the spouse] unless the manner of reference to the

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[32]In the Matter of Kelly, 182 Misc. 491, 44 N.Y.S.2d 438 (Surr. Ct. 1943).

[33]Fulton Trust Co. v. Trowbridge, 126 Conn. 369, 11 A.2d 393 (1940); *In re* Estate of Reed, 19 N.J. Super. 387, 88 A.2d 690 (County Ct. 1952); In the Matter of Guilmartin, 156 Misc. 699, 282 N.Y. Supp. 525 (Surr. Ct. 1935), *aff'd*, 250 App. Div. 762, 293 N.Y. Supp. 665 (2d Dep't 1937), *aff'd*, 277 N.Y. 689, 14 N.E.2d 627 (1938). *But see* Bowdlear v. Bowdlear, 112 Mass. 184 (1873).

[34]See Fulton Trust Co. v. Trowbridge, 126 Conn. 369, 11 A.2d 393 (1940).

[35]Sandon v. Sandon, 123 Wis. 603, 101 N.W. 1089 (1905); *cf.* Levine v. Ramler, 325 Mass. 141, 89 N.E.2d 339 (1949).

[36]142 Misc. 816, 255 N.Y. Supp. 544 (Surr. Ct. 1932).

[37]*Id.* at 818, 255 N.Y. Supp. at 547. See also In the Matter of Kelly, *supra* note 32.

individual named as legatee is such as fairly to warrant the view that the reference or bequest to her is in her prospective or new status of wife.

"(2) If the reference to her is in a different status, then the provision for her does not save the will from revocation.

"(3) If the reference to her is by her maiden name, but the period of time between the making of the will and the marriage of the parties is short, and the provision in the will is of such a character as to indicate that it was made by the testator with the change of status in mind, then the provision in the will may be construed to have been made in contemplation of the new status, and the presumption of revocation is overthrown.

"(4) If the language of the will is of such a character as to be fairly construed as indicating that the testator, with the prospective status in mind, made the provision for the individual considered in his or her prospective status, even though there be a considerable lapse of time between the making of the will and the marriage of the testator, such language so construed overthrows the presumption."

A further consideration may be the length of time elapsing between the legatee's change of status and the demise of the testator.[38] The above test was developed in New York in mitigation of a statutory provision forbidding the reception of evidence to rebut the presumption of revocation of a will on the testator's subsequent marriage. Thus it has been necessary for the decisions to distinguish between inadmissible parol evidence and admissible proof of the existing state of material facts at the time the will was made.[39]

Can the adopted child take the legacies in the will in addition to the intestate share? The question has never been answered directly. *In the Matter of Bent*[40] refused to permit a widow to take a double share for the reason that it would be contrary to legislative intent and productive of an absurd and unjust result. The courts have long disagreed as to the share of an intestate estate to which a grandchild of the decedent is entitled when that grandchild is also the decedent's

[38]See Bowdlear v. Bowdlear, 112 Mass. 184 (1873).

[39]*E.g.*, In the Matter of de Coppet, 142 Misc. 816, 255 N.Y. Supp. 544 (Surr. Ct. 1932); In the Matter of Bent, 142 Misc. 811, 255 N.Y. Supp. 538 (Surr. Ct. 1932).

[40]142 Misc. 811, 255 N.Y. Supp. 538 (Surr. Ct. 1932).

adopted son. The difficulty lies in deciding in which capacity the child may take, or if he may take in both.[41] Perhaps the most sensible result is to permit the child to take in that capacity which gives him the greater interest.[42] It is logical to argue that upon his adoption the child loses his status as a grandchild and may consequently take only as a son. This view, however, is directly opposed to the usual holding that the child retains all those rights of inheritance within his natural family of which he is not specifically deprived by statute.[43] An argument may be made in Florida, under an application of the *expressio unius* canon, that since the Florida adoption statutes specifically preserve the rights of the adopted child to inherit from his natural parents, his other rights within the natural family are abrogated.[44]

CONCLUSION

As far as may be, reality should meet expectations. Ideally, the results of adoption should conform to prevalent beliefs as to the effects of adoption. The Florida enactments do not meet this test. The two statutes setting forth the inheritance rights of adopted children should, at a minimum, be consolidated. More desirable still would be a fresh legislative attempt to deal with these problems.

Perhaps the best solution would be to sever the adopted child completely from his former family, unless his rights are expressly reserved by the adoption decree, and integrate him fully within the adoptive family.[45] Although unwilling and unknowing members of

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[41]*E.g.*, Estate of Wilson, 95 Colo. 159, 33 P.2d 969 (1934); Wagner v. Varner, 50 Iowa 532 (1879); *In re* Benner's Estate, 109 Utah 172, 166 P.2d 257 (1946) (double shares permitted). *Contra,* Burnes v. Burnes, 132 Fed. 485 (W.D. Mo. 1904), *aff'd,* 137 Fed. 781 (8th Cir.), *cert. denied,* 199 U.S. 605 (1905) (inheritance in dual capacity not permissible even though not barred by precise terminology of statutes); Delano v. Bruerton, 148 Mass. 619, 20 N.E. 308 (1889) (statute did not intend such an anomaly); Morgan v. Reel, 213 Pa. 81, 62 Atl. 253 (1905) (statute did not intend double shares).

[42]See Head v. Leak, 61 Ind. App. 253, 111 N.E. 952 (1916).

[43]See Annot., 37 A.L.R.2d 333 (1954).

[44]Estate of Ries, 259 Wis. 453, 49 N.W.2d 483, (1951) (interpreting a statute similar to FLA. STAT. §72.22 (1957).

[45]The English provision, Adoption Act, 1950, 14 GEO. 6, c. 26, §13, might well serve as a model: "Where, at any time after the making of an adoption order, the adopter or the adopted person or any other person dies intestate in respect of any real or personal property, . . . that property shall devolve in all respects as if the adopted person were the child of the adopter born in lawful wedlock and were

the new family may have heirs thrust upon them, they have the power to provide against any such contingency by proper dispositions of their property. More serious are the objections that property passing under instruments drawn prior to an adoption might come into strange hands against the will of the owner, or that adoptions might be made solely in hope of profit from such pre-existing instruments. These difficulties can be eliminated by a properly drawn statute.[46]

More easily remedied are the deficiencies in the pretermitted child statute. This provision should be altered so as to clearly apply to the after-adopted child. The kinds of evidence receivable under this enactment should be more definitely specified, and the adopted child should be precluded from taking both a legacy under the will and an intestate share under the statute. These alternatives should be mutually exclusive. Problems in this area can also be reduced if the lawyer carefully instructs his client on the effects of adoption.

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not the child of any other person.

". . . .

" (2) In any disposition of real or personal property made, whether by instrument inter vivos or by will (including codicil), after the date of an adoption order—

(a) any reference (whether express or implied) to the child or children of the adopter shall, unless the contrary intention appears, be construed as, or as including, a reference to the adopted person;

(b) any reference (whether express or implied) to the child or children of the adopted person's natural parents or either of them shall, unless the contrary intention appears, be construed as not being, or as not including, a reference to the adopted person; and

(c) any reference (whether express or implied) to a person related to the adopted person in any degree shall, unless the contrary intention appears, be construed as a reference to the person who would be related to him in that degree if he were the child of the adopter born in lawful wedlock and were not the child of any other person."

[46] *Ibid.*