THE SUCCESSION RIGHTS OF ADOPTED ADULTS: TRYING TO FIT A SQUARE PEG INTO A ROUND HOLE

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I. INTRODUCTION

Hypothetical: assume Howard meets Wendy, they fall in love, and they get married. Thereafter Howard dies, and then his father, Fred, dies with no surviving spouse. Can Wendy inherit from Fred? No. Spouses have limited inheritance rights. They can inherit from each other, but not through each other.¹

Hypothetical: assume Howard meets Wendy, they fall in love, but instead of marrying her, Howard adopts her. Thereafter Howard dies, and then his father, Fred, dies with no surviving spouse. Can Wendy inherit from Fred? Yes. As a general rule, an adopted adult is treated the same as an adopted child with full inheritance rights.² The adoptee has the right to inherit from and through the adoptive parent, and the adoptive parent has the right to inherit from and through the adoptee.³ Wendy would have the right to inherit from and through Howard, permitting her to share in the distribution of Fred’s intestate estate. Why? Does it make sense to award an adopted adult greater inheritance rights than a spouse?

The traditional analysis of the issue of the inheritance rights of an adopted adult has focused on the issue as a variation on the classic adoption scenario. Inasmuch as the legal effect of an adoption is to create a legally recognized parent-child relationship,⁴ the issue becomes whether there is any reason not to treat an adopted adult the same way as an adopted child. Finding none, the traditional analysis grants the parties the full inheritance rights that attach to a classic parent-child relationship.⁵ The traditional analysis is consistent with a formal, status based analysis of the issue.⁶

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1. See infra note 68 and accompanying text.
2. See infra note 117 and accompanying text.
3. See infra notes 106 and 117 and accompanying text.
4. See infra note 91 and accompanying text.
5. See infra notes 106 and 117 and accompanying text.
6. See infra notes 20-23, 26-47, 92-103 and accompanying text.
The problem with the traditional analysis of the issue of the inheritance rights of an adopted adult is the way the issue is framed virtually dictates the conclusion. By presupposing that an adult adoption creates a parent-child relationship, the analysis over-focuses on the legal status of the parties and fails to take into proper consideration the underlying relationships between the parties. The status of the parties is only relevant to the extent it represents the underlying relationship between the parties in the paradigm scenario—inheritance rights are based on paradigms. The nature of the underlying relationship in the paradigm scenario is what justifies the presumed intent and corresponding inheritance rights that attach themselves to the status based relationship. A more intent based, functional approach to the different familial paradigms should focus on the nature of the underlying relationship between the parties.

The nature of the underlying relationship is important because virtually all inheritance rights come in two sizes: full and partial. Full inheritance rights permit the parties to inherit from and through each other. Partial inheritance rights permit the parties to inherit from each other, but not through each other. All heirs have full inheritance rights save one—spouses. This distinction is consistent with the difference in the nature of the underlying relationships. Historically all heirs were related by blood, and therefore all heirs were members of the same extended family, save one—spouses. Spousal relationships are “add-on” relationships. Spousal relationships are between two consenting adults, who consider themselves equals and enter into a committed relationship. A spousal relationship is not intended to affect or displace any relationship either spouse has with his or her respective family members, it is intended to be in addition to those relationships. Accordingly, spousal inheritance rights are “add-on” inheritance rights, not substituted inheritance rights. Each spouse’s right to inherit from the other is in addition to that spouse’s pre-existing inheritance rights. The additional inheritance rights do not affect or displace any pre-existing inheritance rights. Each spouse retains full inheritance rights with that spouse’s respective underlying family members.

Inasmuch as inheritance rights are a function of the underlying relationship in the paradigm case, an analysis of the issue of the inheritance rights of an adopted adult should start with the nature of

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7. See infra notes 96-97 and accompanying text.
8. See infra notes 105-08 and accompanying text.
9. See infra notes 105-08 and accompanying text.
10. See infra notes 105-08 and accompanying text.
11. See infra notes 108-09 and accompanying text.
12. See infra notes 108-09 and accompanying text.
the underlying relationship between the parties in the paradigm case. In particular, in the paradigm case, is the underlying relationship between an adopted adult and the adoptive parent(s) more like a spousal relationship or more like a parent-child relationship? The difficulty in analyzing that question is that there are a number of reasons one might adopt an adult. In light of these different reasons, and consistent with the status based approach, the law of inheritance has simply assumed that it is best to treat the adopted adult the same as an adopted child. The different adult adoption scenarios, however, can be grouped into three sub-paradigms: (1) the same-sex partner adult adoption paradigm; (2) the heir designation adult adoption paradigm; and (3) the stepparent/foster parent adult adoption paradigm.

The paradigm relationship underlying the same-sex partner adult adoption scenario involves two consenting adults, who consider themselves equals and seek legal recognition of their committed relationship that they consider a spousal type relationship but the state refuses recognize. The same-sex partners' relationship is much more like a spousal relationship than a parent-child relationship and should be treated as such for inheritance rights purposes.

The paradigm relationship underlying the heir designation adult adoption scenario is a relationship between two individuals that typically began after both had reached the age of majority, and the adopting party is seeking to qualify the adoptee as an heir under a testamentary instrument of a third party. Although this relationship is not as analogous to a spousal relationship as the same-sex adult adoption scenario, it is closer to the spousal relationship than it is to the classic parent-child relationship. Accordingly, the relationship should be treated as such for inheritance rights purposes.

The stepparent/foster parent adult adoption scenario, however, is more like a classic parent-child relationship. In the typical stepparent/foster parent adult adoption scenario, the adoptee, while a minor, lives for a period of time with the adopting parent, as a regular member of the adopting parent's household, but the adoption does not occur until after the adoptee reaches the age of majority. This relationship is analogous to the classic parent-child relationship and should be treated as such for inheritance rights purposes.

Analyzing the issue of the inheritance rights of an adopted adult from the functional perspective of the underlying relationships in the

13. See infra notes 118-42 and accompanying text.
14. See infra notes 119-20 and accompanying text.
15. See infra notes 122-24 and accompanying text.
16. See infra notes 125-30 and accompanying text.
17. See infra notes 131-38 and accompanying text.
18. See infra notes 141-42 and accompanying text.
paradigm scenarios and the presumed intent of the parties that flows from those relationships, it becomes apparent that the relationships underlying the different adult adoption sub-paradigm scenarios can be differentiated so that the corresponding inheritance rights more closely match the presumed intent of the parties. The general rule should be that adopted adults inherit from each other, but not through each other, and do not qualify under a class gift in a testamentary instrument executed by a third party unless the instrument expressly includes adopted adults or the adoptee is specifically named as a beneficiary. An exception, however, should be recognized for adult adoptions where the adoptee lived for a period of time while a minor with the adoptive parent as a regular member of the adoptive parent’s family. In such stepparent/foster parent adoptions, even though the adoption does not occur until the adoptee is an adult, a parent-child relationship should be recognized. Such a statutory scheme would better reflect the presumed intent of the average decedent.

II. HISTORICAL AND THEORETICAL BACKGROUND: STATUS APPROACH VS. CONTRACT APPROACH

A. Status Based Approach

One of the great–and on-going–debates in the law is whether legal rights and obligations should be assigned based on status or contract. The status approach is typically characterized by a formalistic analysis focusing on strict, rigid objective requirements, usually associated with a legally recognized relationship that facilitates determining whether a person or situation is entitled to a standardized set of rights and/or obligations. Under a status based approach, a particular set of rights and/or obligations automatically attach themselves to the legally recognized status, and often those rights and obligations can be achieved only by entering into the legally recognized status.

Analytically, the status based approach is also a “box-based” approach. Under a status based approach, there are a limited number of

19. See infra notes 143-60 and accompanying text.

20. “Legal scholars such as Sir Henry Maine and Emile Durkheim viewed legal development as a movement from the simple to the complex, from relationships of status or ascription to relationships based on contract or achievement.” Barbara A. Lavin-McEleney, Criminality and Democracy in Ancient Systems of Law, 44 CRIM. L. BULL. 6 (2008) (Footnotes omitted).


22. Clarke, supra note 21.
boxes into which a situation legally can be placed. The situation is analyzed to determine into which box it fits. Once it is determined in which “box” the situation or relationship belongs, the situation or relationship is assigned all the rights and/or obligations associated with that box.23

B. CONTRACT BASED APPROACH

In contrast, the contract based approach takes more of a case-by-case, fact-sensitive approach that typically focuses on the subjective intent of the parties, even to the extent of permitting the parties to customize the rights and/or obligations involved.24 Whether a relationship or situation qualifies for a particular legal recognition is based less on strict, rigid requirements and more on whether the parties have adequately expressed their intent for the status. Moreover, the contract based approach permits greater flexibility in arranging the rights and/or obligations associated with the legal relationship so that they can be more finely tuned to fit individual situations, thereby permitting more customized rights and/or obligations, and greater freedom.25 Rights and obligations arise, and exist, only to the extent the parties so intend. A contract based approach is less “box” oriented and more “spectrum” oriented. The different possible status characterizations typically constitute the two ends of the spectrum. The contract based approach permits the parties to create their own combination of rights and/or obligations at different points along the spectrum.

C. TRADITIONAL APPROACH: STATUS > INTENT; MODERN TREND: INTENT > STATUS

Historically the law has favored a status based approach to assigning rights and duties, particularly with respect to property related rights and obligations, but the modern trend increasingly is to take more of an intent based approach.26 This status versus intent battle is evident in the evolution of marriage law. Upon marriage, each party takes on the legal status of being a spouse, and as a spouse, each

23. See Clarke, supra note 21, at 609.
party has certain rights and obligations. Historically the law took a status based approach to the institution of marriage and the status of being a spouse. As a general rule, one could only achieve the status of spouse by entering into a valid marriage, and one could only terminate the status of spouse by entry of a valid divorce decree (or death). One could not opt out of the rights and obligations of being a spouse regardless of the clarity of the parties' intent. Analytically, there was only one box, a spousal box, and either a party qualified as a spouse and received all the rights and obligations appertaining thereto, or the party did not qualify as a spouse and did not receive the spousal rights and obligations.

Under the modern trend, increasingly one can achieve spousal rights and obligations contractually. If the parties do not enter into a valid marriage ceremony, but nevertheless contract for spousal rights and obligations, the courts tend to enforce their agreement. Moreover, even if the parties enter into a valid marriage ceremony, the parties can opt out of the rights and obligations that have historically been associated with the status of being a spouse through a valid agreement.
A pre-nuptial agreement is an example of a contract based approach that permits the parties to customize the rights and obligations that arise out of their spousal status. Visually, instead of a box-based analysis of the rights and obligations of the parties, the parties are free to contract for whatever combination of rights and obligations they deem best on the spousal relationship spectrum.

Another example of the traditional status based approach versus the more modern trend intent based approach is the law of concurrent estates. At common law, assuming the parties were not married, there were basically only two boxes: joint tenancy versus tenancy in common. One could achieve the status of being a joint tenant with a right of survivorship only by satisfying the four unities of time, title, interest, and possession. The status of being a joint tenant with right of survivorship lasted only as long as the parties maintained the four unities. Even if the instrument creating the concurrent estate expressly stipulated that the parties were joint tenants with right of survivorship where the parties did not satisfy the four unities, then they were not accorded the status of joint tenants nor the right of survivorship.

Under the modern trend, intent based approach, as long as the parties clearly express their intent to create a joint tenancy with right of survivorship, they receive the right of survivorship even if the four unities are not satisfied. The modern trend abolishes the unities of time and title, permitting a joint tenancy even if the “two-to-transfer” rule is not satisfied. The modern trend abolishes the unity of interest, permitting unequal shares among joint tenants. Moreover, once

34. See Difonzo, supra note 30, at 934-35; see Sciarrino & Duke, supra note 33, at 88-89.
35. Technically, at early common law, there were five form of concurrent estates: (1) joint tenancy, (2) tenancy in coparcenary, (3) tenancy in common, (4) tenancy in partnership, and (5) tenancy by the entirety. Relatively early on, however, the tenancy in coparcenary and the tenancy in partnership were either abolished or have been obsolete for all practical purposes. Damaris Rosich-Schwartz, Tenancy By the Entirety: The Traditional Version of the Tenancy is the Best Alternative For Married Couples, Common-Law Marriages, and Same-Sex Partnerships, 84 N.D. L. REV. 23, 25-26 (2008). Hence the focus, for unmarried couples, on joint tenancy versus tenancy in common. See also Tom R. Russell, Title 60, Section 74 of the Oklahoma Statutes: A Unique Form of Tenancy By the Entirety, 58 OKLA. L. REV. 317, 319 (2005); Dan L. Burk, Muddy Rules For Cyberspace, 21 CARDOZO L. REV. 121, 131 (1999).
37. Id.
38. Id.
39. Id.
40. Id. (indicating the modern trend).
the joint tenancy with right of survivorship is created, certain transfers of interest by one of the parties (mortgage, lease) that at common law automatically would have severed the four unities and terminated the joint tenancy no longer do so. The modern trend assumes the parties did not intend to sever the joint tenancy in such circumstances. The modern trend focuses more on intent than formalities. The concurrent estate analysis is no longer a box-based approach with only two options – joint tenancy versus tenancy in common. Now the analysis is a spectrum based approach with the two traditional options, joint tenancy versus tenancy in common, the ends of the spectrum and with other options available, based on the intent of the parties, at different points along the spectrum.

D. Status versus Contract: Pros and Cons

The advantages of the status based approach are that it promotes certainty and uniformity. The status based approach errs on the side of standardization—a “one size fits all” mentality. The status based approach has the advantage of minimizing, if not eliminating, transaction costs. For example, in the marriage context, the status based approach saves the parties to the marriage the costs of negotiating what should be the exact legal rights and obligations between the parties. The status based approach also tends to minimize transaction costs of third parties who deal with the parties to the legal relationship. Such third parties can safely assume certain rights and duties with respect to the parties, thereby saving those third parties the costs of investigating to ascertain the exact scope of the rights and obligations of the respective parties.

The contract based approach has the advantage of promoting the individual intent of the parties and maximizing customization. The parties can put together a combination of rights and/or obligations that maximizes their individual preferences. The contract based approach maximizes individual utility but increases costs. The parties must negotiate and draft the terms of their intent. To safely deal with the parties or property, third parties must inquire as to the exact scope of the individual’s rights and duties with respect to the property.

41. Id.
42. Id.
43. See Clarke, supra note 21, at 609.
46. See Pierce, supra note 24, at 609.
III. THE LAW OF SUCCESSION RIGHTS GENERALLY

A. NON-PROBATE VS. PROBATE

To the extent the crux of the status versus contract debate is that the status approach exalts formalism over intent, at first blush that criticism appears to have little relevance to the law of succession. The law of succession can be boiled down to a single issue: who gets a decedent's property when that decedent dies. As is often the case in the law, the answer is "it depends." Who gets a decedent's property depends first on whether the property is non-probate or probate, and second on whether the decedent died testate or intestate.\(^48\) A party can opt out of probate by creating a valid non-probate instrument. The nature and terms of the non-probate instrument provide for who takes the property, by operation of law or contract, when the decedent dies.\(^49\) The decedent's intent, as expressed in the non-probate instrument, controls.

B. PROBATE TESTATE VS. INTESTATE

Any property owned by the decedent that is not held in a valid non-probate instrument falls to probate.\(^50\) Who takes the decedent's probate property depends on whether the decedent dies testate or intestate.\(^51\) A decedent dies testate if the decedent dies with a valid will; a decedent dies intestate if the decedent dies without a valid will.\(^52\) If the decedent dies testate, the terms of the will constitute the decedent's express intent as to who takes the decedent's probate property upon death. Subject only to a limited number of spousal and fam-
ily protection doctrines, as a general rule, if a decedent dies testate, the decedent’s express intent will be honored. The decedent’s property will pass according to the decedent’s wishes.

Inasmuch as the law of succession permits a decedent to opt out of probate by creating a valid non-probate instrument, and it permits a decedent to opt out of intestacy by creating a valid will, the law of succession permits intent to trump status. The status versus contract debate, and the criticisms of the status based approach, would appear to have little relevance to the law of succession. But upon closer examination, it becomes apparent that the status based approach still plays a significant, if not dominant, role in the process of determining who takes a decedent’s property when that decedent dies.

C. Determining Decedent’s Express Intent – Status versus Intent

1. Non-Probate Instrument

First, while in theory the law of succession takes an intent based approach to the issue of who gets a decedent’s property by permitting a decedent to opt of intestacy by executing a non-probate instrument, historically the law has taken a status based approach to what constitutes a valid non-probate instrument. Historically there were basically four “boxes” that a non-probate arrangement could fit into to qualify as a valid non-probate transfer: (1) a joint tenancy/tenancy by the entirety (a concurrent estate with a right of survivorship), (2) a life insurance contract, (3) a legal life estate and remainder, or (4) an inter vivos trust. If the arrangement being analyzed did not fit into one of the four non-probate boxes, regardless of the clarity of the party’s intent that the property pass non-probate, the arrangement fell to probate.
The modern trend is to take much more of an intent based approach to what qualifies as a non-probate arrangement, thereby permitting a party greater flexibility in expressing and customizing non-probate property arrangements. A joint tenancy qualifies as a valid non-probate transfer even if it does not meet the traditional four unities as long as the parties intend for the concurrent ownership to constitute a joint tenancy with right of survivorship. All contracts with a payable on death provision, not just life insurance contracts, qualify as valid non-probate transfers. Increasingly states are recognizing transfer on death deeds as a valid non-probate transfers, not just legal life estates and remainders. Consistent with the modern trend contract based approach, the law of succession has expanded the number and type of documents that can qualify as valid non-probate transfers.

2. Last Will and Testament

Similarly, on the probate side, the status approach versus contract approach is reflected in the analysis of what constitutes a valid will. Assuming a testator has testamentary capacity, whether a document constitutes a valid will is a function of the state's Wills Act formalities statute and the degree of compliance the courts require with respect to the statutory requirements. Historically, the courts required absolute strict compliance with the Wills Act formalities, one-hundred percent compliance, often resulting in wills being declared invalid even though the court was convinced the decedent intended the document to be the decedent's will. This strict compliance approach is consistent with a status based approach to the issue of whether the decedent died testate or intestate. The strict compliance approach put more emphasis on formalism, often at the expense of the decedent's intent.

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56. See supra notes 39-42 and accompanying text.
Consistent with the intent based approach, the modern trend reduces the focus on formalistic compliance with the Wills Act formalities and shifts the focus to the decedent’s intent. The modern trend lowers the degree of compliance one must achieve with respect to satisfy the Wills Act formalities. Under the modern trend, some jurisdictions require only substantial compliance with the statutory requirements: as long as there is clear and convincing evidence the decedent intended the document to be the decedent’s will, and as long as there is clear and convincing evidence the decedent substantially complied with the state’s Wills Act formalities, the document should be probated and the decedent’s intent honored. More recently, a handful of jurisdictions and the Uniform Probate Code have lowered the degree of compliance even further. Under what is known as the harmless error approach, as long as there is clear and convincing evidence that the decedent intended the document to be the decedent’s last will and testament, the court should probate the will despite its failure to comply with the statutory requirements. Lowering the statutory compliance threshold for what constitutes a valid will favors the intent based approach over a status based approach.

IV. THE INTESTATE SCHEME – STATUS VERSUS INTENT

While the status approach to what constitutes a valid testamentary instrument, non-probate or will, is rather subtle—inasmuch as it was a status based analysis to an intent based approach—the status approach to the intestate distribution scheme could hardly be more obvious. The intestate scheme addresses who gets the decedent’s probate property if that decedent dies without a will—that is, without expressing the decedent’s testamentary intent. If a decedent dies intestate, a decedent’s property will pass through a state’s descent and

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61. Matter of Will of Ranney, 589 A.2d 1339, 1345 (N.J. 1991). “Professor Langbein, the ‘architect’ of substantial compliance, proposed that a court should validate a will that does not comply with every will formality if ‘the noncomplying document express[es] the decedent’s testamentary intent, and [if] its form sufficiently approximat[es] Wills Act formality to enable the court to conclude that it serves the purposes of the Wills Act.’” See Glover, supra note 60, at 429-30, quoting from John H. Langbein, Substantial Compliance with the Wills Act, 88 Harv. L. Rev. 489, 489 (1975).


distribution statute.\textsuperscript{65} The widely held assumption is that decedent’s intent should reign supreme even if a decedent dies intestate, that is, that a state’s descent and distribution scheme should reflect the decedent’s \textit{presumed} intent.\textsuperscript{66} While the details of each state’s descent and distribution statutes vary, the statutes are surprisingly similar in their core provisions. There is wide-spread agreement that if a decedent dies intestate, the presumed intent is that the decedent’s probate property should go to the decedent’s family.\textsuperscript{67} In addition, there is wide-spread agreement that in giving the property to a decedent’s family members, a surviving spouse takes first,\textsuperscript{68} and after a surviving spouse, the order of takers is fairly consistent: issue, parents, issue of parents, grandparents, issue of grandparents, and next of kin.\textsuperscript{69} If the decedent has no surviving taker in any of these categories of heirs, the property escheats to the state.\textsuperscript{70}

A. \textbf{Traditional/Prevailing Approach = Status Based}

1. \textbf{Qualifying as a Spouse}

In analyzing who qualifies as an heir under the different categories of family members, the law has tended to take a rather strict, status approach.\textsuperscript{71} In determining who qualifies as a spouse, virtually all jurisdictions\textsuperscript{72} require that the parties must have exchanged vows


\textsuperscript{66} Stephanie J. Willbanks, \textit{Parting is Such Sweet Sorrow, But Does it Have to be so Complicated? Transmission of Property at Death in Vermont}, 29 VT. L. Rev. 895, 916 (2005); see Tritt I, supra note 64, at 278-79; see Tritt II, supra note 64, at 116 n. 19.

\textsuperscript{67} Irene D. Johnson, \textit{A Suggested Solution to the Problem of Intestate Succession in Nontraditional Family Arrangements: Taking the “Adoption” (and the Inequity) Out of the Doctrine of “Equitable Adoption,”} 54 St. Louis U. L.J. 271, 289 n. 63 (2009); see Mann, supra note 60, at 1051.


\textsuperscript{70} John V. Orth, \textit{Is the State the Last Heir?} 13 Green Bag 2d 73 (2009).

\textsuperscript{71} See Willbanks, supra note 66, at 914; see Higdon, supra note 69, at 253-55.

\textsuperscript{72} Assuming cohabitants do not marry and do not qualify as registered same-sex partners, relatively few states offer inheritance benefits to unmarried cohabitants. See John E. Wallace, \textit{Note, The Afterlife of the Meretricious Relationship Doctrine: Applying the Doctrine Post Mortem}, 29 Seattle U. L. Rev. 243, 256 (2005) (“Under the vast ma-
in a valid marriage ceremony. As a general rule, cohabitants do not qualify as spouses,\(^7\) and only a handful of jurisdictions recognize common law marriage.\(^4\) If either cohabitants or parties to a common law marriage were able to claim spousal status, the courts would be required to undertake a case-by-case analysis of their relationships to determine if the particular relationship qualified. The intestate scheme favors a more status based paradigm approach, thereby avoiding the uncertainty, the costs of administration,\(^5\) and the potential for fraud associated with the fact sensitive inquiry into each fact pattern.\(^6\)

Further evidence of the traditional status based approach to who qualifies as an heir is evident on the back side of the spousal relationship. Assuming a party has achieved the status of a spouse, the test for whether the relationship has been terminated is as rigid and formalistic as the test for whether the parties have created the relationship. For inheritance rights purposes, the parties remain “spouses” until a valid final divorce decree is entered, regardless of the intent of the parties and the stage of the divorce proceedings.\(^7\) In some community property jurisdictions, the marriage ends for community prop-


\(^74\). Patricia A. Cain, DOMA and the Internal Revenue Code, 84 Chi.-Kent L. Rev. 481, 495 (2009); Perry Dane, A Holy Secular Institution, 58 Emory L.J. 1123, 1145-46 n. 61 (2009).

\(^75\). Wash. Rev. Code Ann. § 26.16.140 (West 1997) (“When spouses or domestic partners are living separate and apart, their respective earnings and accumulations shall be the separate property of each.”); Cal. Fam. Code § 771(a) (1999) (“The earnings and accumulations of a spouse . . . while living separate and apart from the other spouse, are the separate property of the spouse.”).


\(^77\). Nancy M. Gould & Joseph P. Warner, Probate of the Intestate Estate, MPRM MA-CLE 3-1 2008 (discussing Massachusetts rule that “a judgment for divorce is not final until ninety days after the entry of a judgment nisi . . . and, therefore, if a decedent dies within the nisi period, the surviving spouse is an heir . . . .”); see also Flammia v. Maller, 66 N.J.Super. 440, 444, 169 A.2d 488, 490 (App.Div.1961) (court held that plaintiff could inherit from decedent as her husband, even though decedent had lived with another man for years, because Mexican divorce was invalid on procedural grounds).
property purposes once the parties are living apart and separate, and one party has clearly conveyed to the other party the intent that the marriage is over. For community property purposes, the law takes more of an intent based approach. But for inheritance rights purposes, the law takes a decidedly status based approach to the analytical process, holding that the parties remain spouses, regardless of their intent, until the final divorce decree has been entered.

2. Qualifying as an Issue

To qualify as an issue, one must establish a parent-child relationship; in analyzing whether a parent-child relationship exists, the law has taken a status based approach. The problem with the status based approach is that because several variables overlap, historically it has been difficult to tell which variable controlled. The paradigm familial relationships underlying the intestate distribution is the traditional nuclear family: a married couple, the wife gives birth to a child, and the wife and husband contributed the genetic material (the egg and sperm) to create the child. Does the resulting parent-child status arise out of (1) the genetic relationship between the parties, (2) the marital status of the parents, (3) the family law based legally-recognized parent-child relationship, (4) the functional parent-child relationship between the parties, or (5) some combination of these variables? Historically, the law of inheritance rights has struggled to answer that question.

B. CHILDREN BORN OUT OF WEDLOCK

The troubled history behind the inheritance rights of children born out of wedlock supports that the position that parent-child status historically was based, at least in part, on the marital status of the natural parents. At common law, if the natural parents were married at the time the child was born, the moment the child was born a

80. See Foster, supra note 79, at 200 ("At the dawn of the twenty-first century, the inheritance system stands as one of the last bastions of the traditional American family. Many of its rules and doctrines appear frozen in time, remnants of a bygone era of nuclear families bound together by lifelong affection and support."); Megan Pendleton, Note, Intestate Inheritance Claims: Determining A Child’s Right to Inherit When Biological and Presumptive Paternity Overlap, 29 CARDOZO L. REV. 2823, 2822-24 (2008).
81. Technically as long as the parents were married when the child was conceived, a parent-child relationship arose the moment the child was born alive, under the posthumously born rule; but that detail is beyond the scope of this discussion.
parent-child relationship was recognized and inheritance rights attached themselves to the relationship; if the child was born out of wedlock, however, the child was a child of no one.\textsuperscript{82} The child was a \textit{"nullius filius,"} the \textit{"heir to nobody . . . ."}\textsuperscript{83} Over time, however, states began to shift to include a parent-child relationship based on genetics, but only with respect to the natural mother who gave birth to the child, not the natural father unless the father married the mother and acknowledged the child.\textsuperscript{84}

Not until the Supreme Court of the United States forced the states to provide a mechanism for a child born out of wedlock to establish a parent-child relationship based on paternity did the law shift to a primarily genetics based status analysis.\textsuperscript{85} The marital status of the parents is no longer a controlling variable. It is, at best, an overlapping variable. The Supreme Court's opinions shifted the focus more to a genetic based relationship between the parties. But whether that variable alone is sufficient, or whether some functional component must also be present, is unclear and varies by state.\textsuperscript{86} The primary variable, however, appears to be genetics. If that is the case, however, it is easy to understand why modern reproductive technology has proved so challenging to the traditional status based approach to

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\textsuperscript{83} Lingen v. Lingen, 45 Ala. 410, 413 (1871) (quoting 1 Wendell's Blackstone, 459).


\textsuperscript{86} Allen E. Shoenberger, \textit{Alternative Visions of the Family: The European Constitutional Perception of Family Law: Comparison With American Jurisprudence}, 18 \textit{Transnat'l L. & Contemp. Probs.} 419, 455 n. 312 (2009) ("Compare \textit{Lali v. Lali}, 439 U.S. 259 (1978) (holding unconstitutional statute permitting inheritance by illegitimate child only if father's parentage established during the lifetime of the father), \textit{Labine v. Vincent}, 401 U.S. 532 (1971) (holding constitutional statute requiring formal acknowledgment during lifetime of father to permit inheritance), and \textit{Mathews v. Lucas}, 427 U.S. 495 (1976) (holding statutory requirement that social security survivor's benefits for illegitimate children requires demonstration of both paternity and actual receipt of benefits from the father during the father's lifetime constitutional), with \textit{Jiminez v. Weinberger}, 417 U.S. 628 (1974) (invalidating intestate inheritance of disability benefits unless illegitimate children proved that they were living with the father at time of death or else supported by the father at that time.").
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recognizing a parent-child relationship for inheritance rights purposes.\(^{87}\)

C. ADOPTED CHILDREN

The historical uncertainty over what was the controlling variable for purposes of establishing the parent-child status is also evident in the troubled history behind the inheritance rights of adopted children. Assuming a traditional nuclear family, the moment a child was born alive to a married couple, a parent-child relationship arose and full inheritance rights attached themselves to that relationship.\(^{88}\) The genetically based relationship, once created, could not be changed. The traditional assumption was that "only God, not man, can make an heir."\(^{89}\) At common law, like it or not, children were the children of their biological parents and as a general rule could not have a legally recognized parent-child relationship with anyone else—until the evolution of the law of adoption.\(^{90}\) The law of adoption created a mechanism for moving a child, legally, from one family to another. The general effect of an adoption is to create a "new" parent-child relationship.\(^{91}\) To the extent adoption creates a parent-child relationship, the natural issue that follows is whether it should be recognized as a parent-child relationship for all purposes, including inheritance rights. Is the status underlying the parent-child relationship based on nature (genetics) or nurture (being raised in one's legally recognized family)?

1. Traditional Approach – Status Based on Nature

Prior to the development of the law of adoption, the law of inheritance rights generally took a status based approach based on nature: genetics.\(^{92}\) Consistent with that approach, one can understand why

\(^{87}\) See generally Shapo, supra note 84, at 1098-99; see Belfi, supra note 82, at 117-34.


\(^{89}\) 18 AM. JUR. PROOF OF FACTS 2D Equitable Adoption § 1 (1979) (quoting Edward W. Bailey, Adoption "By Estoppel," 36 Tex. L. Rev. 30, 30 (1957)).

\(^{90}\) Margaret M. Mahoney, Permanence and Parenthood: The Case For Abolishing the Adoption Annulment Doctrine, 42 Ind. L. Rev. 639, 652-53 (2009); Terry L. Turnipseed, Scalia's Ship of Revulsion Has Sailed: Will Lawrence Protect Adults Who Adopt Lovers to Help Ensure Their Inheritance From Incest Prosecution?, 32 Hamline L. Rev. 95, 107 (2009).

\(^{91}\) Black's Law Dictionary defines adoption as "The creation of a parent-child relationship by judicial order between two parties who usually are unrelated . . . ." BLACK'S LAW DICTIONARY 52 (8th ed. 2004); see Turnipseed, supra note 90, at 107.

\(^{92}\) See supra note 79; see also Naomi Cahn, Perfect Substitutes or the Real Thing? 52 Duke L.J. 1077, 1126-27 (2003).
some states were reluctant, even after recognizing the law of adoption, to grant an adopted child full inheritance rights with the child’s “new” family.\textsuperscript{93} While the law of adoption legally moved the child from the child’s “old” family to the “new” family, the genetic relationship did not change. Biologically, the child was still the natural parents’ child. Taken to its extreme, this approach would not have recognized any inheritance rights between adoptees and their adoptive parents. But failure to recognize any inheritance rights would require one to completely ignore the adoption. Clearly the adoption reflected and constituted some legal relationship between the adopted child and that child’s adoptive parents. Accordingly, it is understandable that some jurisdictions recognized limited inheritance rights between the adoptive child and the adoptive parents, permitting the adopted child to inherit from but not through the adoptive parents, while maintaining inheritance rights between the adopted child and the child’s genetic parents.\textsuperscript{94}

2. Modern Trend – Status Based on Legally Recognized Family?

While historically the law of succession struggled with the inheritance rights of an adopted child, a consensus has emerged under the modern trend. The modern trend follows the “substitution” principle—that the adoption substitutes the adoptive family for the child’s genetic family for all purposes, including inheritance rights. The adopted child can inherit from and through the adoptive parents, the adoptive parents can inherit from and through the child, and the child’s relationship with the natural parents is severed.\textsuperscript{95} At first blush one might argue that the substitution principle is nothing more than a “substituted” status based approach: instead of the status being based on the adoptee’s genetic family, the substitution principle shifts the status to one based on the adoptee’s legally recognized family.

That type of status based thinking is what led to the prevailing approach to the inheritance rights of an adopted adult. To the extent

\begin{itemize}
\item \textsuperscript{94} See Cahn, supra note 92, at 1126-32; see Fuller, supra note 93, at 1189, 1203-09; E. Gary Spitko, Open Adoption, Inheritance, and the “Uncleing” Principle, 48 SANTA CLARA L. REV. 765, 772 (2008).
\item \textsuperscript{95} Homer H. Clark, Jr., The Law of Domestic Relations in the United States 930 (West Publishing Co. 2d ed. 1988) (“If the adoption of a child is to have any consequences at all for inheritance purposes, it must mean that the adopted child inherits from his adoptive parents. In fact that is the universal rule today.”); see also Victoria Mikessell Mather, The Magic Circle: Inclusion of Adopted Children in Testamentary Class Gifts, 31 S. Tex. L. REV. 223, 227 (1990); and Spitko, supra note 94, at 772-73.
\end{itemize}
adoption generally creates a parent-child relationship, and the modern trend follows the substitution principle, the status based approach applies the same formalism to an adopted adult, legally moving the adopted adult into the adoptive parent’s family. The adoption of an adult is deemed to create a parent-child relationship, regardless of the age of the adoptee, and the adoptive family is substituted for the adoptee’s biological family for inheritance purposes, regardless of the nature of the underlying relationships.

3. Modern Trend – A Functional Approach to Competing Paradigms?

While the shift in inheritance rights associated with the classic adopted child scenario can be explained as simply a shift from a status based approach focusing on genetics to a status based approach focusing on a legally recognized relationship, an alternative explanation for the modern trend substitution principle is that it reflects a shift from a status based approach to a functional, intent based approach to the conflicting paradigms inherent in the classic adoption paradigm. From a historical perspective, the development of the law of adoption presented a challenge to the law of inheritance rights because of the overlapping competing status variables. The development of adoption forced the law of inheritance rights to pick what was the controlling variable in the parent-child status relationship: genetics (the natural family) or the law (the legal family). Following an adoption, should inheritance rights be based on the natural parent-child relationship or the legal parent-child relationship?

While the law of inheritance rights struggled with the issue at first, in the end the modern trend arguably resolved the issue by adopting more of an intent based, functional approach. Inheritance rights are based on presumed intent. If a decedent dies intestate, it is too expensive to undertake a case-by-case investigation of a decedent’s presumed intent, and the potential for fraud increases as well. Instead, the intestate scheme is based on presumed intent, a presumed intent that arises out of a presumed underlying relationship that is based on a paradigm scenario that justifies the presumed intent. While the correlation may not be perfect, most studies defend the basic intestate scheme employed by the typical intestate scheme.

96. See Higdon, supra note 69, at 252; E. Gary Spitko, An Accrual/Multi-Factor Approach to Intestate Inheritance Rights for Unmarried Committed Partners, 81 Ore. L. Rev. 255, 284-89 (2002); see Monopoli, supra note 79, at 870-71.
97. No doubt the actual intent of some decedents who die intestate does not match the intestate distribution scheme. Nevertheless, at the macro level, a number of different articles evidence that the typical intestate scheme mirrors the basic distribution patterns of decedent who die testate. See Glover, supra note 60, at 419 n. 61; see Mar-
The paradigm classic adoption scenario is a variation of the paradigm nuclear family—a married couple adopting a young child, typically a newborn. In the adoption paradigm there is no meaningful relationship between the adopted newborn and the natural parents—other than genetics. In contrast, the adopted newborn moves in with the adoptive parents, and for all practical purposes becomes a part of their family. The adoptee participates in all the usual family activities. Consistent with the "fresh start" theory of adoption, the adoptive parents take the child in and treat the child like the child was a natural born child of theirs. Functionally, within the adoptive family, the adopted child is treated like a natural child. The logical assumption is that the adoptive parents, and the other members of the adoptive family, love the child as they would a natural child of their own and want the child to be treated the same as a natural child.

This presumed intent based on a functional analysis of the underlying paradigm relationship supports granting full inheritance rights between the adopted child and the adoptive parents. The adopted child should be entitled to inherit from and through the adoptive parents, and the adoptive parents should be entitled to inherit from and through the adoptive child. For inheritance rights purposes, no distinction should be drawn between the adopted child and a natural born child of the adoptive parents.


100. Naomi R. Cahn, Children's Interests in a Familial Context: Poverty, Foster Care, and Adoption, 69 Ohio St. L.J. 1189, 1210 (1999).


102. That the shift to the substitution principle constitutes a shift to more of a functional, intent based approach to the presumed relationships in the paradigm scenario is supported by increasing recognition of sub-rules and sub-paradigms within the adoption inheritance rights arena. These 'new' inheritance rights are based more on intent than on status. Increasingly states are recognizing a sub-paradigm for the stepparent adoption scenario. In the stepparent adoption scenario, the paradigm scenario is the birth of a child to his or her natural parents, the child lives with one or both natural parents for a period of time, and then one of the natural parents marries a new party, the stepparent, and the stepparent adopts the child. If one were to apply the substitution principle strictly, i.e., a status based approach to it, the child's relationship with the natural parent of the same gender as the stepparent should be completely severed, and the child's relationship with the stepparent should be substituted therefore. But increasingly that
is not the approach the law is taking. Increasingly states are recognizing that the paradigm stepparent adoption scenario differs from the classic adoption scenario. The child being adopted typically is not a newborn, the child typically is a minor. The child lived for some period of time with both natural parents. Because the child lived for some period of time with both natural parents, the child has a meaningful parent-child relationship with both natural parents and their respective families. While the stepparent adoption reflects a meaningful relationship with the adopting stepparent, it does not necessitate a severance of the parent-child relationship between the adopted child and his or her natural parent of the same gender as the stepparent. In the paradigm situation, the child had a meaningful relationship with the natural parent and the presumption should be that the meaningful relationship will continue even after the divorce. The new approach to the stepparent adoption scenario takes into consideration the practical considerations of likely real world relationships, not just genetics and/or court orders. Accordingly, increasingly under the modern trend a sub-paradigm is statutorily recognized for the stepparent adoption scenario and the child keeps his or her right to inherit from and through his or her natural parent of the same gender as the stepparent. See Fuller, supra note 93, at 1188-1230; UNIF. PROB. CODE § 2-119(b) (2008); CAL. PROB. CODE § 6451 (West Supp. 2008).

Similarly, adoption sub-paradigms based on the nature of the underlying relationship have been recognized in a number of jurisdictions for post-death adoptions. The post-death adoption differs from the classic adoption in many of the same respects as the stepparent adoption scenario. The child being adopted typically is not a newborn, the child typically is a minor. The child lived for some period of time with both natural parents. Because the child lived for some period of time with both natural parents, the child has a meaningful parent-child relationship with both natural parents and their respective families. While the adoption reflects a meaningful relationship with the adoptive parents, it does not necessitate a severance of the parent-child relationship between the adopted child and his or her natural parent of the same gender as the stepparent. In the paradigm situation, the child had a meaningful relationship with the natural parent and the presumption should be that the meaningful relationship will continue even after the death of one or both of the natural parents. The new approach to the post-death adoption scenario takes into consideration the practical considerations of likely real world relationships, not just genetics and/or court orders. Accordingly, increasingly under the modern trend a sub-paradigm is statutorily recognized for the post-death adoption scenario and the child keeps his or her right to inherit from and through his or her natural parent of the same gender as the stepparent. See Fuller, supra note 93, at 1188-1230; UNIF. PROB. CODE § 2-119(b) (2008); CAL. PROB. CODE § 6451 (West Supp. 2008).

The development of the sub-paradigm adoption scenario reflects more of an intent based approach to the law of inheritance rights. By recognizing sub-paradigms based on the nature of the underlying relationships, the law of inheritance rights is acknowledging that the key to the presumed intent is a presumed relationship and the intent that goes hand and hand with that presumed relationship. The underlying presumed relationship and the intent that goes with the relationship should drive the inheritance rights. If the underlying presumed relationship and the intent that goes with that relationship do not support the inheritance rights, one should question the inheritance rights. In such scenarios, it is difficult, if not impossible, not to base the inheritance rights on presumed intent. While other public policy considerations may overlap, to the extent the law of inheritance rights is supposed to reflect the presumed intent of the average decedent in the paradigm situation, other public policy considerations may support the natural intent of the parties that arises out of the paradigm relationship, it is questionable whether they should supplant the presumed intent of the party.

The law of inheritance rights has statutorily recognized sub-paradigms for the stepparent adoption scenario, the post-death adoption scenario, and the in-family adoption scenario. Susan N. Gary, We Are Family: The Definition of Parent and Child For Succession Purposes, 34 ACTEC J. 171, 176 (2008); see Fuller, supra note 93, at 1219-24; UNIF. PROB. CODE § 2-119(d) (2008); CAL. PROB. CODE § 6451 (West Supp. 2008).

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V. SUCCESSION RIGHTS OF ADOPTED ADULTS – STATUS VERSUS INTENT

A. COMPETING VARIABLES AND PARADIGM RELATIONSHIPS

Just as the law of adoption presented a challenge to the law of inheritance rights because of the overlapping status variables (genetic family versus legal family), the law of adult adoption presents a challenge to the law of inheritance rights because of overlapping paradigm variables and overlapping paradigm scenarios. The law of adult adoption not only overlaps the variables of genetic family versus legal family, adult adoptions also overlap competing paradigm relationships: a parent-child relationship versus a spousal type relationship. Under the traditional, status based approach to adult adoption the analysis has tended to focus on the adoption paradigm. An adoption is deemed to create a new parent-child relationship, but the underlying relationship is between two consenting adults. A more thorough analysis would include a comparison and analysis of the underlying relationships.

B. PARENT-CHILD RELATIONSHIP VS. SPOUSAL RELATIONSHIP

The overlap in underlying paradigm relationships is important because all inheritance rights are based on either a parent-child relationship or a spousal relationship. Assuming a typical intestate scheme, all heirs save one, a spouse, are related by blood through some combination of parent-child relationship relationships. Accordingly, as family members, heirs related by blood receive full inheritance rights: the right to inherit from and through each other. On the other hand, spouses are related by law, by marriage. Spouses

The time has come to recognize a sub-paradigm for the adult adoption scenario.

103. See supra note 91 and accompanying text.


receive only partial inheritance rights: the right to inherit from each
other, but not through each other. 108 A spouse has a limited inheritance right because a spousal relation-
ship is intrinsically different from a parent-child relationship. A
spousal relationship is one that is entered into voluntarily, that is
based upon a relationship that typically began when both parties were
adults. From a relationship perspective and from an inheritance
rights perspective, it is not a “substitution” relationship but rather an
“add-on” relationship. Parties who marry each other are adding a spe-
cial, legally recognized relationship to each party’s already existing
family based relationships. The marriage relationship is not intended
to replace, nor does it legally replace, any family based relationships.
Spouses retain all the same inheritance rights they had before they
married. Each spouse retains the right to inherit from and through
each spouse’s respective family members. The marriage merely adds
on to those rights the right to inherit from each other. Accordingly,
spouses can inherit from each other, but not through each other.

C. ADOPTED CHILD AND SCOPE OF INHERITANCE RIGHTS

Recognizing that inheritance rights come in two scopes, full and
limited, adds to the historical analysis of the adopted child. Recogniz-
ing that adoption created a legal relationship between the adopted
child and the adoptive parents, one of the follow-up issues was what
size inheritance rights should the adopted child have. Initially, many
states gave the adopted child only limited inheritance rights, the right
to inherit from, but not through, the adoptive parents, on the theory
that the adoptive child was not really a true member of the adoptive
family, but an “add-on” member. 109 That approach was consistent
with the traditional status based approach that awarded full inheri-
tance rights only to genetically related family members.

To a degree the traditional approach to the inheritance rights of
an adopted child was also consistent with the intent based approach.
When first enacted in the mid-nineteenth century, the law of adoption
was a new development, one that conflicted with the traditional and
then prevailing social norms. 110 Accordingly, limiting the adopted

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108. Maureen B Cohon, Where the Rainbow Ends: Trying to Find a Pot of Gold for Same-Sex Couples in Pennsylvania, 41 Duq. L. Rev. 495, 496 n. 11 (2003); Sol Lovas,

109. See supra note 94 and accompanying text.

child's right to inherit from, but not through, the adoptive parents arguably was consistent with the then prevailing attitude towards adoption and an adopted child. Over time, however, adoption has become well accepted.\footnote{111} The prevailing societal view of adoption is not only favorable, it considers the adopted child a child of the adopting family for all purposes. The prevailing substitution principle is consistent with that prevailing view. To the extent there was some historical ambiguity as to the basis of the inheritance rights of an adopted child, the prevailing view takes an intent based, functional approach to the conflicting paradigm variables—it favors the legally-recognized family over the genetically based family.

D. ADOPTED ADULT AND SCOPE OF INHERITANCE RIGHTS

It is time to take an intent based, functional approach to the issue of the inheritance rights of an adopted adult. The prevailing status based approach to the inheritance rights of an adopted adult simply assumes that an adopted adult should be treated the same as adopted child, no doubt in part because many people find the whole idea of an adopted adult unusual, if not wrong.\footnote{112} The nearly universally recognized purpose of the law of adoption is to help children.\footnote{113} The dominant principle of American adoption law is everything should be in the "best interest of the child."\footnote{114} The law of adoption assumes that the typical adoptee is a child, a minor.\footnote{115} The institution of adoption was not developed with an eye towards adult adoption. Nevertheless, the overwhelming majority of states permit adult adoption, though some impose additional conditions or restrictions on such adoptions.\footnote{116} Moreover, following the adoption, the general rule is the adopted adult is treated the same as an adopted child for inheritance purposes.\footnote{117}

\footnote{111. See Youmans, supra note 110, at 71.}
\footnote{112. See Turnipseed, supra note 90, at 106-10.}
\footnote{113. Kari E. Hong, Parens Patri[archy]: Adoption, Eugenics, and Same-Sex Couples, 40 CAL. W. L. REV. 1, 13 (2003).}
\footnote{114. See Hong, supra note 113, at 13; Carol Sanger, Separating From Children, 96 COLUM. L. REV. 375, 441-42 (1996).}
\footnote{115. See Foy, supra note 104, at 110-13.}
\footnote{116. Brynne E. McCabe, Note, Adult Adoption: The Varying Motives, Potential Consequences, and Ethical Considerations, 22 QUINNIPIAC PROB. L.J. 300, 302-06 (2009); see Turnipseed, supra note 90, at 107-09; Angie Smolka, That's the Ticket: A New Way of Defining Family, 10 CORNELL J.L. & PUB. POL'Y 629, 638-39 (2001).}
\footnote{117. See Foy, supra note 104, at 119 ("Generally, an adult who is adopted subsequently is considered an heir or issue of the adopting parent; the adopted adult has the same inheritance rights as an adopted minor child."); Higdon, supra note 69, at 270 n. 283 ("[T]he law of intestate succession is already blind to a child's age when determining an adopted or biological child's share . . . ."); Kelly Galica Peck, A Detailed Look at Revocable Trusts and How to Adapt Them to Meet Your Needs, 2008 WL 7411328, 10 (2008)("Any adopted child is a legal child of the adopting parent without limitation on the age of the adoptee.")}
The adopted adult has the right to inherit from and through the adoptive parent(s), and the adoptive parent(s) have the right to inherit from and through the adopted adult.

The issue of whether adult adoptions should be permitted is beyond the scope of this Article, but assuming they should be, it does not necessarily follow that adopted adults should be treated the same as adopted children for all purposes. In particular, since inheritance rights are based on presumed intent, and presumed intent is based on an underlying paradigm familial relationship, the better analysis would be to ask whether the paradigm relationships underlying the adult adoption scenario supports full inheritance rights: is the paradigm relationship underlying an adult adoption scenario more like a spousal relationship or more like a parent-child relationship?

Part of the challenge in analyzing the issue of the inheritance rights of an adopted adopt is that there is not one paradigm adopted adult relationship or scenario. One might want to adopt an adult for a variety of reasons. The absence of a single adult adoption paradigm supports avoiding the issue and simply sticking with the knee-jerk assumption that an adoption creates a parent-child relationship regardless of the age of the adoptee—end of analysis. While there are a variety of different reasons why one might adopt an adult, most of them can be grouped into one of three sub-paradigms.

1. The Same-Sex Partner Adopted Adult Sub-Paradigm

The first adult adoption sub-paradigm is the one that probably gets the most attention these days: same-sex partners where one partner adopts the other. In jurisdictions that do not recognize same-sex marriage, or an alternative legal arrangement that permits same-sex couples to create legally recognized rights and obligations between themselves, adoption may be the next best option. The analysis of whether this relationship is more like the paradigm spousal relationship or more like the paradigm parent-child relationship could not be easier. The relationship typically started when both parties were adults. The parties actually desire the status of spouses but the state refuses to permit them to enter into that legal status. By one party adopting the other, the parties get the benefit of having at least some legal recognition of their relationship.

118. See Foy, supra note 104, at 118-19; see McCabe, supra note 116, at 300-02.
120. See Turnipseed, supra note 90, at 110; see McCabe, supra note 116, at 307; see Smolka, supra note 116, at 638-39.
between the same-sex partners a parent-child relationship, however, is demeaning to the parties.121 It is not a parent-child relationship. Both parties are adults, consenting adults, who wish to be treated as adults with legal rights connected to their relationship. Ideally the parties would prefer that the legal rights be those of spouses, but if that is not an option, the legal rights connected to adoption may be better than nothing.

In addition, because both parties are adults, both partners typically have a full parent-child relationship with their respective biological parents and extended family members. Relationships that stretch back to their birth and that are expected to—and should be encouraged to—continue until the death of the respective parties. Yet if the adult adoption is treated as having created a new parent-child relationship, the effect of the adoption is legally to sever the adult adoptee’s parent-child relationship with the adoptee’s biological parents and family, and to move the adoptee legally into the adoptive party’s family, giving the adoptee full inheritance rights in the adoptive party’s family.122 Yet the underlying paradigm relationship is not that of a child being taken into and raised by the adoptive family, it is of two adults seeking to enter into a committed relationship. It is of two adult seeking to enter into an “add-on” relationship, one that recognizes the special relationship between the parties but does not affect the underlying and on-going relationships they have with their respective family members. Stripping the adopted adults of their parent-child status with their biological parents is not only too high a price to impose for legal recognition of their relationship, it is inconsistent with the underlying paradigm familial relationships and serves no purpose—other than to deter adult adoptions.

Moreover, granting the adopted adult full inheritance rights between the parties creates the anomaly—some may say poetic justice—of an adopted adult having greater rights than a spouse. Spouses can inherit only from each other, not through each other.123 Adopted

121. Lisa R. Zimmer, Note, Family, Marriage, and the Same-Sex Couple, 12 CARDOZO L. REV. 681, 690 (1990) ("[E]ven if the use of adult adoption is routinely accepted by the courts, it would remain an inappropriate method to achieve the legal status of family. Adoption creates a parent-child status between its participants. As such, it provides neither an adequate definition for the relationship resulting from the adult adoption (which is neither marriage, nor real parenthood) nor an adequate resolution of the testamentary and dissolution problems inherent in same-sex cohabitation.") (citations omitted, but one included to SEXUAL ORIENTATION AND THE LAW, § 1.05[4] (1987) for the position that granting the parties ‘parent-child’ status may have adverse psychological consequences for the parties).

122. See Foy, supra note 104, at 110-20; see Snodgrass, supra note 119, at 84; see Turnipseed, supra note 90, at 101 n. 26.

123. See supra note 108 and accompanying text.
adults can inherit from and through each other.124 Yet the nature of the underlying paradigm relationships, particularly where the parties to the adult adoption were actually seeking the status of spouses, evidences the illogic of legally treating this adult adoption scenario the same as the classic child adoption scenario.

The paradigm relationship underlying same-sex couples who use adoption as a substitute for marriage argues that the adopted adult scenario should be treated more like a spousal relationship than a parent-child relationship for inheritance rights purposes. It is an “add-on” relationship that should have “add-on” consequences in terms of the inheritance rights associated with the adoption. The parties should have the right to inherit from each other, but not through each other; and the adoption should not affect their inheritance rights with their other family members.

2. The Heir Designation Adopted Adult Sub-Paradigm

A second sub-paradigm scenario that often triggers an adult adoption is an adoption to create an heir.125 The issue is an heir for whom—the adoptive parent or the adoptive parent's extended family? If an heir for the adoptive parent only, there arguably is little reason to object from an inheritance rights perspective.126 The adoptive parent always has the right to execute a will devising the property to the other party. Nevertheless, the parties may favor adoption because it has other benefits associated with it over simply designating that party a beneficiary in a will. In particular, if one expects a challenge to one's will, adopting the devisee can deprive others of their standing to challenge the will, forcing those who wish to challenge the devise to challenge the whole adoption process.127

The more problematic heir designation adult adoption scenario, however, is where an adult is adopted to qualify the adoptee as an heir under a third party's testamentary instrument. In this scenario, a settlor creates a trust for the benefit of the settlor's children, and upon the death of a child, each child's share is to be distributed to the child's children.128 One of the settlor's children has no children. The child

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124. See supra note 117 and accompanying text.
125. See Turnipseed, supra note 90, at 99; see Foy, supra note 104, at 119; see McCabe, supra note 116, at 306.
126. See Rein, supra note 101, at 755 (“No one seriously questions the right of the adult adoptee to inherit from his own adoptive parent as the creation of one's own heir through adoption is a practice followed by ancient civilizations and long accepted in our own jurisprudence.”); see Turnipseed, supra note 90, at 100.
127. See Turnipseed, supra note 90, at 101; see Foy, supra note 104, at 120-21.
decides rather than letting the share fail, the child will adopt a spouse or friend 129 to qualify the adopted adult as a taker under the trust.130

Analyzed from the perspective of the paradigm relationships underlying the adoption and the probable intent that accompanies those relationships, it seems difficult, if not impossible, to justify treating this adoption as creating a parent-child relationship as that term is used to describe the parent-child relationship following a classic adoption.131 In the heir designation adult adoption scenario, the relationship between the adoptee and the adoptive parent started when both parties were adults. The adoptee personally consented to the adoption. The adoptive parent did not take the adoptee in and raise the adoptee from an early age. The typical adoptee has a full parent-child relationship with the adoptee's biological parents, a parent-child relationship that stretches back to the party's birth and that is expected to—and should be encouraged to—continue until the death of the respective parties. Yet if the adoption is treated as having created a parent-child relationship, the effect of the adoption is legally to sever the adult adoptee’s parent-child relationship with the adoptee's biological parent of the same gender as the adoptive parent and to move the adoptee legally into the adoptive parent's family, giving the adoptee full inheritance rights in the adoptive parent's family.

But the underlying paradigm relationship is not that of a child being taken into and raised by the adoptive family.132 It is an adult trying to designate an heir, an heir for a class gift under a third

W. Beyer, Wills and Trusts, 62 SMU L. Rev. 1499, 1519-21 (2009) (discussing the Texas Court of Appeals opinion in In re Ray Ellison Grandchildren Trust, 261 S.W.3d 111 pet. denied (Tex. App. 2008). Professor Beyer accuses the court of rewriting the trust to exclude adopted adults from a class gift because the court thought that was the settlor's intent though it was not the statutory scheme. The dissent called it a case of "bad facts make bad law . . ." Id. at 127-28 (Simmons, J., dissenting.) One could also say it is a case of bad statutory rules make bad case law— as the courts try to avoid what they think is a "wrong" result under a statute that fails to address the situation. See also Jeffrey N. Pennell, It's Not Your Father's Buick, Anymore: Estate Planning For the Next Generation(s) of Clients, SP053 ALI-ABA 1429 n. 65 (2009) ("Many states have no rule dealing with the adult adoption issue at all, under any circumstance.").

129. See Mather, supra note 95, at 234-37.
130. See Foy, supra note 104, at 120.
131. See Turnipseed, supra note 90, at 129; Ann-Marie Rhodes, The Law of Succession in the 21st Century—A Symposium, 43 REAL PROP. TR. & EST. L.J. 433 (2008) ("The textbook case of Minary v. Citizens Fidelity Bank & Trust Co. is a good example of a situation in which the legal status of parent—child is at odds with the actual conduct of the parties.").
132. See Turnipseed, supra note 90, at 129; In re Adoption of Robert Paul P., 63 N.Y.2d 233, 234 (N.Y. 1984) (the adoptive parties desired an adoption "for social, financial and emotional reasons. . . . [The Family Court] concluded . . . the parties lacked any semblance of a parent-child relationship.").
party's testamentary instrument. To permit the adult adoptee to qualify as a taker under a third party's testamentary instrument is, de facto, to say that the adoptive parent has a general power of appointment if that adoptive parent is willing to adopt the designated adult. Inasmuch as the testamentary instrument in question could have given the adoptive parent that power, and did not, to permit the adoptive parent to use the adoption to create a de facto general power of appointment appears inconsistent with the testamentary intent of the party who created the instrument. Hence the reason many courts historically have judicially grafted an exception onto the probate statutes to distinguish the adult adoption scenario, refusing to permit the adopted adult to qualify as a taker on the grounds that it would undermine the decedent's intent.

In addition, if the decedent does not intend for the adopted adult to qualify as a "grandchild" under the decedent's testamentary instruments, the logical assumption is that the decedent does not intend for the adopted adult to qualify as a "grandchild" for purposes of intestate distribution. The Uniform Probate Code and the Restatement (Third) of Property: Wills and Other Donative Transfers, bar an adopted adult in the paradigm same-sex adult adoption scenario and the heir designation adult adoption scenario from taking under a testamentary instrument of another, no doubt on the assumption that such a result would be inconsistent with the intent of the decedent who created the testamentary instrument; however, the Uniform Probate Code and the Restatement (Third) of Property: Wills and Other Donative Transfers, permit the same adopted adult to take under intestacy if the party who created the testamentary instrument were to die intestate. Such distinction is questionable.


134. See Rein, supra note 101, at 758-59.

135. Ralph C. Brashier, Children and Inheritance in the Nontraditional Family, 1996 UTAH L. REV. 93, 165 (1996); Lynn D. Wardle, A Critical Analysis of Interstate Recognition of Lesbigay Adoptions, 3 AVE MARIA L. REV. 561, 601-09 (2005) (discussing a number of cases where the court declined to recognize an adopted adult as qualifying the adoptee to take under the terms of a testamentary instrument that was in effect when the adoption occurred. As the Illinois Court of Appeals said in 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. ... This practice does great violence to the intent and purpose of our adoption laws, and should not be permitted. If there had been no trust, there would undoubtedly have been no adoption."); see also UPC §2-705(c) (1969); UPC §2-705 (2008).

136. UPC §2-705 (2008); Restatement (Third) of Prop.: Wills and Other Donative Transfers § 14.5.
If the intent of the average decedent is not to include adopted adults for purposes of their testamentary instruments, the intent of the average decedent should be not to include adopted adults for purposes of intestacy. The probate code, both the statutes governing intestacy and those governing the construction of testamentary instruments, should reflect “the feeling and attitude of the average man . . . .”137 To permit the adopted adult to take under either scenario would undermine the typical decedent’s intent. The paradigm relationship underlying the same-sex partner adult adoption and the heir designation adult adoption is not a true parent-child relationship. One of the leading Family Law treatises agrees; criticizing courts and statutes for treating the adult adoption paradigm as creating a parent-child relationship:

The adoption of adults is treated by statutes and courts as if it were similar to the adoption of children, . . . . Functionally, the adoption of adults is entirely dissimilar to the adoption of children, serving different purposes and creating few of the problems which arise out of the adoption of children. A better way of describing the adoption of adults would be “the designation of an heir”, but neither courts nor statutes do so. In fact, however, the adoption of an adult is merely the method by which one may designate an heir. (Emphasis added.)136

The law of intestacy generally has been criticized by trust and estate scholars for being overly-deferential to family law when analyzing who qualifies as an heir.139 When it comes to adopted adults, however, it is family law scholars who criticize the law of intestacy for failing to see the obvious and fundamental difference between the classic adoption paradigm involving a child and the adopted adult paradigm.140 In the adopted adult paradigm, the underlying relationship is more like a spousal relationship, supporting “add-on” inheritance rights: the right to take from each other, but not through.

3. Stepparent/Foster Parent Adopted Adult Sub-Paradigm

The third sub-paradigm adult adoption scenario, however, does involve an adult adoption arising out of a parent-child relationship. The paradigm scenario involves a stepparent or foster parent who
starts a relationship with the adoptee while the adoptee is a minor. Typically the adoptee moves in and lives with the stepparent/foster parent while the adoptee is a minor. Typically the stepparent/foster parent plays an important role in the upbringing and development of the child, developing a special bond with the child. For all practical purposes, the stepparent/foster parent plays the same role as an adoptive parent while the adoptee is a minor, but without the legal recognition. The adoption, however, does not take place until the child reaches the age of majority. While such an adoption technically is an adult adoption, it is in name only. In such paradigm situations, the underlying relationship is more like a true parent-child relationship than a spousal relationship, and the relationship should have full inheritance rights. The adoptee should be entitled to inherit from and through the adoptive parent, and the adoptive parent should be entitled to inherit from and through the adoptee.

VI. THE SUCCESSION RIGHTS OF ADOPTED ADULTS: A FUNCTIONAL APPROACH TO THE CONFLICTING PARADIGMS

Inasmuch as there is no single adult adoption paradigm scenario, should that justify applying the status based approach—the adoption creates a parent-child relationship and full inheritance rights attach themselves to the adoption? Such rights appear inconsistent with the intent of the typical decedent in the same-sex partner adult adoption paradigm and the designated heir adult adoption paradigm, but it would be consistent with the typical decedent's probable intent in the stepparent/foster parent adult adoption paradigm. Inasmuch as two out of the three sub-paradigm adult adoption scenarios do not involve a true parent-child relationship, should that justify applying only an "add-on" set of inheritance rights—should all adult adoptees receive the right to inherit from, but not through, each other only, with these added inheritance rights having no effect on either party's other inheritance rights? Fortunately, the law need not choose because a well

141. See Turnipseed, supra note 90, at 99-100; Foy, supra note 104, at 118.
142. Some jurisdictions already recognize a special rule for the foster parent adoption scenario, but they require, in addition to the requirement that the relationship begin during the minority of the adoptee and last throughout the joint lifetimes of the parties, clear and convincing evidence that the foster parent would have adopted the child but for a legal barrier. See Cal. Prob. Code § 6454 (1993). The typical legal barrier is the natural parent's refusal to consent to the adoption. The requirement that there must be "clear and convincing evidence that the foster parent would have adopted the child but for a legal barrier" arguably is to minimize fraudulent claims of attempted adoption where no adoption actually occurred. In the case of an adopted adult, the adoption did occur, but after the adoptee reached adulthood. The issue then becomes what inheritance rights should follow from the adoption.
A well drafted statute on the succession rights of an adopted adult should begin by recognizing that as a general rule, the typical adult adoption paradigm is an “add-on” relationship that does not establish a parent-child relationship, and thus the typical adult adoption should grant only limited inheritance rights (the right to inherit from, not through). A well drafted statute on the succession rights of an adopted adult, however, should also recognize an exception for the stepparent/foster parent adult adoption scenario where a parent-child relationship, with full inheritance rights, should be recognized:

(a) Subject to paragraph (b), adoption of an adult does not create a parent-child relationship for inheritance rights purposes. The adoptee has the right to inherit from, but not through, the adopting party and the adopting party has the right to inherit from, but not through, the adoptee.

(b) Where the relationship between the adopting party and the adoptee began while the adoptee was a minor, and the adoptee lived for a period of time while a minor with the adopting party as a regular member of the household of the party, even though the adoption does not occur until after the adoptee reaches the age of majority, the adoption creates a parent-child relationship for inheritance rights purposes. The adoptee has the right to inherit from and through the adopting party as a child of the adopting party, and the adopting party inherits from and through the adoptee as a parent of the adoptee.

Even if a jurisdiction were inclined to adopt this approach, a handful of issues remain. First, assuming, arguendo, an adult adoption under paragraph (a) does not create a parent-child relationship for inheritance rights purposes, but only the right to inherit from each other, where in the hierarchy of heirs does the relationship fit? In all jurisdictions, a surviving spouse takes first, followed typically by issue, then parents, then issue of parents, and then on to more collateral relatives. If the parties to an adult adoption have only the right to take from but not through each other, should the parties be treated like spouses for inheritance purposes—that is, should they take first? If not, should they be added to the second tier of takers, issue, or should the law of inheritance rights recognize a new special category of takers, adopted adults, who take after spouses but before children?

143. See supra notes 141-42 and accompanying text.
144. See supra notes 68-69 and accompanying text.
B. Where in the Inheritance Line Should Adopted Adults Stand?

While advocates of a functional approach to inheritance rights may argue that the adopted adult under paragraph (a) should be treated like a spouse, and therefore take first, there are obvious legal and social problems with doing so. The adult adoption should be treated legally as an "add-on" relationship, not a "substitution" relationship. Each party is still free to marry or adopt other adults, and subsequent adult adoptions or marriage would not affect the prior adult adoption. From an inheritance rights perspective, if adopted adults were accorded the same inheritance status and rights as a spouse and the adoptive party were to subsequently marry or adopt another adult, then the result would be a form of legal polygamy. While an analogous result can occur under a putative spouse scenario, the law does not sanction such a result, it merely tries to provide for it. Permitting an adopted adult to inherit as a spouse would implicitly sanction, from an inheritance rights perspective, the potential for a form of polygamy. The social and legal ramifications of such a result evidence the obvious problems with taking such a functional approach to the inheritance rights of an adopted adult.

Assuming, arguendo, adopted adults should not be granted the right to inherit from each other as spouses, should they inherit from each other, but not through each other, as parent and child? Under the prevailing status based approach, that is the most obvious alternative, but it fails to take into consideration that the underlying rela-

\[145.\] One of the disadvantages of using adoption as a substitute for marriage is that unlike marriage, adoption is virtually impossible to undo. See Turnipseed, supra note 90, at 101 n. 26; Cohen, supra note 108, at 500. Even if the personal relationship between the parties ends, the legal relationship does not, creating the awkward situation where recognizing inheritance rights is inconsistent with the intent of the parties, but the status based approach to inheritance prevents a case-by-case analysis. Such a possibility, however, supports the proposal of limiting the inheritance rights of adopted adults to the right to inherit from each other, and not through, thereby minimizing the scope of the frustrated intent.

\[146.\] Black's Law Dictionary defines polygamy as "The state or practice of having more than one spouse simultaneously." BLACK'S LAW DICTIONARY 1197 (8th ed. 2004). Inasmuch as the adoptee is technically not a spouse, obviously the decedent is not guilty of polygamy; but if the adopted adult were given spousal status for inheritance purposes it could lead to scenarios where the decedent would be treated as if he or she had more than one spouse. At a minimum this would dilute a 'spouse's' share by distributing it among more than one party, not to mention the social, cultural, and family law implications of permitting such claims. See Arthur S. Leonard, Ten Propositions About Legal Recognition of Same-Sex Partners, 30 CAP. U. L. REV. 343, 347-48 (2002).

tionship in the same-sex partner adult adoption scenario is one between consenting adults who view themselves as equals. Even though traditionally it has legally been called a parent-child relationship, from a relationship perspective one party does not stand in a parental relationship to the other.\textsuperscript{148} Both parties want to be treated as equals. Should the parties be treated as equals with the same inheritance rights vis-à-vis each other, just as spouses have equal inheritance rights vis-à-vis each other, or should there be unequal inheritance rights as there are in a parent-child relationship (where the child inherits as an issue, but the parent inherits only if there are no issue)? A strong argument can be made for equal inheritance rights. Both parties could be granted the right to inherit from each other standing in line right after spouses, or as a "child" of each other. That way, in the event either party has a spouse or subsequently marries, there is no legal conflict between the inheritance rights of the legally recognized spouse and the adopted adult.

Moreover, if the adopted adults have children, granting adopted adults their own special status after spouses but before issue would more likely comport with the intent arising out of the familial relationship. A party who adopts an adult could have children. In such a familial paradigm, the adopted adult typically is functioning as a parent, not as another child. To accord the adopted adult "child" status for inheritance rights purposes would be inconsistent with the underlying relationships and intent, and would be inconsistent with the time of death protections accorded a surviving parent.\textsuperscript{149}

Viewing the adopted adult as part of a larger immediate family argues for recognizing a new, special status for adopted adults, one that grants them the right to take immediately after a spouse and before issue. How much an adopted adult should take would be comparable to the amount a spouse would take. The amount should depend on the decedent's family situation. If the jurisdiction qualifies the spouse's share based on whether the decedent has surviving issue, parent, or issue of parent,\textsuperscript{150} then the inheritance rights of a party to an adult adoption should be based on whether the decedent has surviving issue, parent, or issue of parent. Granted, there is still the risk

\textsuperscript{148} See supra note 138 and accompanying text.


\textsuperscript{150} A spouse's intestate share varies from jurisdiction to jurisdiction depending on who else in the immediate family survives the decedent. See Brown II supra note 105, at 144-45 n. 83; Frederick R. Schneider, Recommendations For Improving Kentucky's Inheritance Laws, 22 N. Ky. L. Rev. 317, 332-37 (1995).
that there may be more than one adopted adult, but that is a risk the parties involved would bear out of the share for the adopted adult. In the typical same-sex adopted adult scenario, if there were more than one adopted adult, then the assumption is the party would opt out of intestacy by executing a will or non-probate instrument to ensure that the current partner is properly treated. The burden would be similar to that of spouses who have separated and have no intent to reconcile, but they have not finalized their divorce yet.

There are, however, problems with granting adopted adults inheritance rights comparable to that of spouses, even if not at the spousal level. First, that approach, while arguably fitting the same-sex partner adopted adult paradigm, does not fit the heir designation adopted adult paradigm. In this latter situation, the adoptive parent typically is trying to create a parent-child relationship for inheritance rights purposes. The adoptive parent wants the adoptee recognized as a “child,” so the adoptee can have the inheritance rights of a child under a testamentary instrument of a third party, but the adoptee typically does not want to recognize the adoptive parent as a “child” or for the adoptive parent to have the inheritance rights of a child. Moreover, the adoptive parent may have other family members. The adoptive parent may be married and may have children. The adoptive parent may be adopting the adoptee primarily to provide other legal benefits, such as insurance or visitation rights, to the adoptee but not want to grant the adoptee inheritance rights greater than a child would have. Granting an adopted adult special inheritance rights greater than a child’s status in the heir designation sub-paradigm would be inconsistent with the parties’ intent and greatly reduce what would go to the adoptive parent’s children, thereby reducing the chances that such adoptions might occur. On the other hand, treating the adopted adult relationship as a legal parent-child relationship for determining where in the line of heirs the adoptee and adoptive parent take, but limiting the inheritance rights to the right to inherit from each other, would work well in the heir designation adopted adult scenario.

Because there is no single adult adoption paradigm, determining where in the hierarchy of heirs the adopted adult should stand and how much that adopted adult should take is complicated. There is no single formula that works well for both the same-sex adult adoption paradigm and the heir designation adopt adoption paradigm. Theoretically, there are two options. The first is to propose two formulas,

151. See supra notes 128-130 and accompanying text.
152. See Foy, supra note 104, at 118-19; Wardle, supra note 135, at 596-97; Zimmer, supra note 121, at 689.
one for each sub-paradigm. In the same-sex partners adopted adult sub-paradigm, the adopted adult could inherit after a spouse, but before the adoptive parent's issue, and the amount they should stand to inherit could be the same formula as that for a spouse. In the heir designation adopted adult sub-paradigm, the adopted child could inherit as a child, with the right to inherit from but not through the adoptive parent, and the adoptive parent could inherit as a parent, with the right to inherit from but not through the adoptee.

The problem with the two-formula approach is how to distinguish when each should apply. One of the principal characteristics of the prevailing status based approach to inheritance rights is it permits probate courts to dispose of a decedent's property based on objective variables, not subjective variables. While adult adoption is an objective variable that permits creating a special set of inheritance rights for adopted adults, the controlling variable is the legal record of the adoption. And the special rule for the stepparent/foster parent sub-paradigm is defensible because of the objective variable associated with it: the requirement that the adoptee lived for a period of time as a minor with the adoptive parent, an objective variable. The only way to distinguish the same-sex partner adoption from the heir designation adoption, however, is to investigate the intent of the parties to the adoption on a case-by-case basis. Such evidence greatly increases the costs associated with the distinction and opens the probate process to a greater potential for fraud. While such an approach would promote the parties' intent, it would do so at a cost that the probate system to date has been unwilling to undertake. And if a jurisdiction were to undertake such an investigation, there would be little justification for limiting the case-by-case investigation to such scenarios. A subjective approach to inheritance rights would open the door to a pure functional approach to determining a decedent's heirs. To ask the probate system to reject the traditional, objective status based, paradigm based approach because of the benefits associated with doing so in the adult adoption scenario is asking too much.

So while from a normative perspective the two-formula proposal is laudable, from a positive perspective the more viable option is, in both the same-sex adopted adult paradigm and the heir designation


154. See Lewis, supra note 153, at 199 (discussing the same concerns as applied to the issue of determining which cohabitants intended a spousal relationship).
adopted adult paradigm, to treat the parties as having entered into a parent-child relationship, but to limit their inheritance rights to the right to inherit from each other, and not through each other.\textsuperscript{155} In addition, such an approach is easy to implement statutorily:

(a) Subject to paragraph (b), adoption of an adult does not create a parent-child relationship for inheritance rights purposes. The adoptee has the right to inherit from, but not through, the adopting party \textit{as if the adoptee were a child of the adopting party}, and the adopting party has the right to inherit from, but not through, the adoptee \textit{as if the adopting party were a child of the adoptee}.

(b) Where the relationship between the adopting party and the adoptee began while the adoptee was a minor, and the adoptee lived for a period of time while a minor with the adopting party as a regular member of the household of the adopting party, even though the adoption does not occur until after the adoptee reaches the age of majority, the adoption creates a parent-child relationship for inheritance rights purposes. The adoptee has the right to inherit from and through the adopting party as a child of the adopting party, and the adopting party inherits from and through the adoptee as a parent of the adoptee.

If either party wishes the other party to the adult adoption to have greater inheritance rights, that is, spousal type rights, that party is free to execute a will that expresses the intent that the other party takes from the estate as if the other party were a spouse.

Lastly, what succession rights should an adopted adult have under the terms of a testamentary instrument of another? Despite the legality of adult adoptions, the average person arguably is surprised to hear that the law permits one adult to adopt another.\textsuperscript{156} The average person thinks the idea of adult adoption is strange, if not wrong. When the average person thinks of the typical adoption, the average person immediately assumes it involves a minor child. The

\textsuperscript{155} In addition, granting adopted adults special inheritance status after spouses and before issue would, in the minds of many, be too close to treating them like spouses. While that may be their intent, many are opposed to such granting same-sex partners that status. Otherwise more states would permit same-sex marriage. While technically granting adopted adults inheritance rights comparable to those of a spouse is consistent with the probably intent arising out of the underlying relationship, and the law of inheritance should be based on probable intent at the paradigm level, inheritance rights are statutorily based and there are the political challenges of getting such a law enacted in jurisdictions that already oppose same-sex marriage. While arguments can be made that inheritance rights are a form of private law, not public law, and therefore granting adopted adults spousal like inheritance rights should not be seen as making a public statement about the underlying relationship, such arguments are more normative than positive.

\textsuperscript{156} See supra note 112 and accompanying text.
substitution principle reflects the thinking and assumptions of the average person. The average person assumes that the classic adoption scenario involves a minor, if not a newborn; that the adoption means the child is moving from the child’s genetic family to an adoptive family; that the child moves in with the adoptive family and becomes a part of the adoptive family; that the adoptive family should be substituted for the child genetic family; that the law should recognize a parent-child relationship between the child and the adoptive family, not the child’s genetic family; and that the adopted child should be entitled to inherit from and through the adoptive parents, and the adoptive parents should inherit from and through the adopted child.

In contrast, the average person does not think the adopted adult should fit into the substituted principle. The party being adopted is not a child. The average person does not think of the adopted adult as a child of the adoptive party or as a spouse of the adoptive party. In construing and giving effect to class gifts in testamentary instruments executed by others an adopted adult should not qualify as a member of the class unless the class definition expressly includes adopted adults. If not expressly included in the express definition of the class, an adopted adult should have no succession rights based on the adopted adult’s relationship with the adoptive parent. In addition, in applying other probate doctrines where extending parent-child status to the parties would result in the adoptee qualifying for greater succession rights, that is, anti-lapse, the adoptee should not count as a child of the adoptive parent as a general rule.

If, however, the adult adoption arises out of a relationship that began while the adoptee was a minor, and the adoptee lived for some period of time while a minor with the adoptive parent, the adoptee should qualify as a child of the adoptive parent for purposes of construing and giving effect to class gift in testamentary instruments executed by third parties other than the adoptive parent, and the adoptive parent should qualify as a parent of the adoptee for purposes of construing and giving effect to class gift in testamentary instruments executed by third parties other than the adoptee.

(a) Subject to paragraph (b), adoption of an adult does not create a parent-child relationship for inheritance rights purposes. The adoptee has the right to inherit from, but not through, the adopting party as if the adoptee were a child of the adopting party, and the adopting party has the right to

157. Except in the case of a stepparent or foster parent adult adoption where the relationship between the adoptee and the adoptive parent began while the adoptee was a minor and the minor lived for a period of time while a minor with the adoptive parent.
159. See supra notes 141-42 and accompanying text.
inherit from, but not through, the adoptee as if the adopting party were a parent of the adoptee. These inheritance rights do not affect the inheritance rights of either the adoptee or the adopting party with respect to their other respective family members.

(b) Where the relationship between the adopting party and the adoptee began while the adoptee was a minor, and the adoptee lived for a period of time while a minor with the adopting party as a regular member of the household of the adopting party, even though the adoption does not occur until after the adoptee reaches the age of majority, the adoption creates a parent-child relationship for inheritance purposes. The adoptee has the right to inherit from and through the adopting party as a child of the adopting party, and the adopting party inherits from and through the adoptee as a parent of the adoptee. These inheritance rights do not otherwise affect the inheritance rights of either the adoptee or the adopting party with respect to their other respective family members.\textsuperscript{160}

(c) \emph{In construing a transfer by a transferor who is not the adopting party, a person adopted as an adult shall not be considered the child of the adopting party unless the adoptee, while a minor, lived as a regular member of the household of the adopting parent.}

(d) \textit{Subdivisions (c) shall also apply in determining:

(1) Persons who meet the degree of relationship test under the anti-lapse doctrine.
(2) Persons to be included as issue of a deceased beneficiary under the anti-lapse doctrine.
(3) Persons who would be a transferor's or other designated person's heirs, family, relatives, next of

\textsuperscript{160} It should be noted that this proposal is inconsistent with the prevailing view that a child cannot have more than two parents who can inherit from the child. Under the classic substitution principle, a child can have no more than two parents. This is the traditional nuclear family model, and this is the classic adoption paradigm. Increasingly the law is beginning to recognize, however, that from a relational perspective, it is possible to have more than two parents, and that the law can recognize such relationships without abandoning the status based, paradigm approach to inheritance rights. The exceptions to the classic adoption rule—the stepparent adoption rule, the post-death adoption rule, and the in-family adoption rule—all have the effect of recognizing that the child can have three or more parents from whom the child can inherit, but only two parents who can inherit from the child. The logic of that distinction is questionable, but that issue is beyond the scope of this article. If, however, a jurisdiction were inclined to continue that approach, as applied to the adult adoption scenario, then the last sentence of paragraph (b) should be revised as follows to reflect that while it too should be an exception to the classic adoption complete substitution approach, it does have some effect on the adoptee's legal relationship with his or her natural parents: The adoptee also retains the right to inherit from and through his or her natural parents, but the natural parents lose the right to inherit from or through the adoptee.
VI. CONCLUSION

Inheritance rights constitute an irrebuttable presumed intent based on a presumed relationship arising out of certain familial paradigms. Many have criticized this approach as needlessly status based at the expense of individual intent. While admittedly true at the normative level, at the practical level the alternative—a case-by-case, open-ended investigation into a decedent's intent—is prohibitively expensive and opens the door too much for the potential for fraud. Nevertheless improvements short of a pure functional approach can be made to the intestate scheme and the law of succession by identifying more familial paradigms and tailoring the presumed intent associated with the underlying relationships more closely to the probable intent of the parties.

By recognizing exceptions to the classic adoption rule for stepparent/foster parent adoptions, post-death adoptions, and in-family adoptions, the law is moving in that direction. Similarly, the law of inheritance and succession rights should recognize an exception from the classic adoption rule for adult adoptions. Doing so would promote the typical decedent's intent, the primary goal of the intestate scheme, while simultaneously reducing litigation with respect to an adopted adult's succession rights under the testamentary instruments of others.