

Children of Assisted Reproduction vs. Old Dynasty Trusts: A New Approach

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I. INTRODUCTION

In the next few years, courts will struggle to interpret trusts written decades ago to determine if class terms such as “issue” or “grandchildren” include children conceived using assisted reproductive technology (ART). In some instances, ART children—those conceived using assisted insemination¹ or *in vitro* fertilization (IVF)²—are not genetically related to their parents because donated sperm or ova are used. In other cases, because the intended parents employed a gestational carrier, they may adopt the child even if they are the biological parents. This raises a significant issue for these old trusts, created at a time when the common law in many states presumed that the settlors would only want to benefit those related to them by blood. While the trust may not have stated expressly that “adoptions are not recognized,” most jurisdictions used the common law presumption to exclude a child adopted by someone other than the creator of the instrument.³ Whether the case involved a testamentary trust with principal to “issue” executed in Montana in 1945⁴ or in Tennessee in 1957,⁵ a 1947 South Carolina will giving real property to the testator’s son and then to the son’s “surviving children,”⁶ or an *inter vivos* trust created in Texas with future interests in both “children” and “issue,”⁷ the courts often found that these

1. Assisted insemination, also termed artificial insemination or intrauterine insemination, is a type of fertility treatment involving placing sperm directly in the uterus using a syringe or similar instrument. *Intrauterine Insemination (IUI) Overview*, MAYO CLINIC (July 16, 2019), <https://www.mayoclinic.org/tests-procedures/intrauterine-insemination/about/pac-20384722> [<https://perma.cc/JXB3-T4XK>].

2. With *in vitro* fertilization (IVF), ova—eggs—are removed from the woman and fertilized with sperm in the lab, allowed to develop into pre-embryos, and then placed back in the uterus. See *What Is IVF?*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/pregnancy/fertility-treatments/what-ivf> [<https://perma.cc/M2YK-ADH2>].

3. See Jan Ellen Rein, *Relatives by Blood, Adoption, and Association: Who Gets What and Why (The Impact of Adoptions, Adult Adoptions, and Equitable Adoptions on Intestate Succession and Class Gifts)*, 37 VAND. L. REV. 711, 713 (1984).

4. *Miller v. First Nat’l Bank & Trust Co. (In re Trust of Miller)*, 323 P.2d 885, 886 (Mont. 1958).

5. *Union Planters Nat’l Bank v. Corbitt*, 474 S.W.2d 139, 141 (Tenn. Ct. App. 1971).

6. *Bagwell v. Alexander*, 329 S.E.2d 771, 772 (S.C. Ct. App. 1985).

7. *Cutrer v. Cutrer*, 345 S.W.2d 513, 514 (Tex. 1961).

terms included only those with a blood relationship to the settlor or testator, and excluded those adopted.⁸

Cases on adoptees provide a cautionary tale on how courts should *not* proceed to analyze class terms for ART children. While many courts have been forced to decide whether adoptees are included in class terms,⁹ so far, only one reported case has looked at whether ART children are beneficiaries of a trust that states “adoptions shall not be recognized,”¹⁰ while a second case has ducked the issue,¹¹ but many more are sure to follow. Today there are a large number of active trusts, and some legal life estates with remainders, that were created at a time when the common law presumption applied to exclude adoptees in many jurisdictions.¹² These trusts and estates will continue for decades, and someone will need to figure out who constitutes the settlor’s issue, grandchildren, or nieces and nephews. These beneficiaries may well include ART children, as thousands are born each year, many of whom are not genetically related to one or both parents or who are adopted even if they are related—and the numbers are increasing. With the widespread availability of direct-to-consumer genetic testing, it is simple to determine if someone is genetically related to the settlor or testator.¹³ The adoption cases suggest that when the stakes are high, the question of who should be included as a beneficiary may well be litigated.

This Article analyzes applying class terms to ART children through the lens of seventy-four deeds, *inter vivos* trusts, wills, and testamentary trusts created at a time when the vast majority of jurisdictions followed the common law presumption that adoptions shall not be recognized.¹⁴ All

8. See, e.g., *In re Trust of Miller*, 323 P.2d at 889; *Bagwell*, 329 S.E.2d at 772; *Corbitt*, 474 S.W.2d at 143; *Cutrer*, 345 S.W.2d at 516–17.

9. See, e.g., *In re Trust of Miller*, 323 P.2d at 889; *Bagwell*, 329 S.E.2d at 772; *Corbitt*, 474 S.W.2d at 143; *Cutrer*, 345 S.W.2d at 516–17.

10. *In re Doe*, 793 N.Y.S.2d 878, 879–80 (N.Y. Sur. Ct. 2005).

11. See *McGehee v. Edwards*, 597 S.E.2d 99, 101 (Va. 2004).

12. See Rein, *supra* note 3, at 737.

13. See *What Is Direct-to-Consumer Genetic Testing?*, U.S. NAT’L LIBR. MED. (Oct. 29, 2019), <https://ghr.nlm.nih.gov/primer/dtcgeneticstesting/directtoconsumer> [<https://perma.cc/BGC7-EJQP>].

14. These seventy-four documents were selected from reported cases based on three criteria: (1) the trust, deed, or will created a future interest in a class that could include an adopted—or ART—child whose parent was *not* the settlor or testator; (2) the interests were initially created at a time when the common law presumption applied in the vast majority of states; and (3) as many states as possible were included—only Alaska, Arizona, Idaho, Nevada, and North Dakota were missing from the initial database of 145. Kristine Knaplund,

these documents created a future interest in a class such as issue, grandchildren, nieces and nephews, or descendants entitled to income or principal. Part II will discuss ART children, and how they are like—and unlike—adopted children as potential class members. Part III will detail the ways courts have dealt with the common law presumption that class members must be related by blood to the settlor or testator, and thus excluded those who are adopted. Part IV will look at four potential consequences if the common law presumption is applied to ART children who either are not related by blood, or who have been adopted: invasion of privacy, stigma for children of same-sex couples, fracturing of family ties, and more litigation, and suggest alternative solutions including decanting, modification, and a “rule of construction” approach. Part V concludes the Article.

II. ART CHILDREN VS. ADOPTED CHILDREN

In the United States, the institution of adoption predates assisted reproduction by at least 100 years. States first enacted laws on adoption in the 1850s,¹⁵ forcing courts to decide whether a settlor or testator meant to include adoptees in class terms. For example, an 1851 trust of real property provided for the settlor’s daughter for her life and then “to convey the same to her children.”¹⁶ The daughter had adopted three children after the settlor’s death; did they qualify as beneficiaries?¹⁷ The Supreme Court of Pennsylvania said no; Pennsylvania’s 1855 adoption statute made them her *heirs* but not her *children*.¹⁸ This presumption, known as the “stranger to the adoption” rule, was included in the First *Restatement of Property*.¹⁹ The issue occurred often enough that some testators or settlors included express clauses in their wills or trusts on whether those adopted by their relatives were meant to be part of class gifts.²⁰

Adopted Database (June 3, 2019) (unpublished spreadsheet) (on file with author). I then eliminated the intestacy cases, because those would be decided by current law, and cases dealing with adult adoptions for reasons explained later. *See infra* notes 252–53.

15. Rein, *supra* note 3, at 716 n.21. Massachusetts enacted one of the first adoption statutes in 1851. Ellen Sherman, *Timeline of Adoption History*, ADOPTION HIST. PROJECT (Feb. 24, 2012), <https://pages.uoregon.edu/adoption/timeline.html> [<https://perma.cc/JL2W-MRNK>].

16. Schafer v. Eneu, 54 Pa. 304, 304 (1867).

17. *Id.* at 304–05.

18. *See id.* at 306.

19. *See, e.g., In re Trust Under Agreement of Vander Poel*, 933 A.2d 628, 634 (N.J. Sup. Ct. App. Div. 2007); *see also* RESTATEMENT (FIRST) OF PROP.: FUTURE INTERESTS § 287 (AM. LAW INST. 1940).

20. *See, e.g., Conn. Bank & Tr. Co. v. Coffin*, 569 A.2d 531, 531 (Conn. 1990) (holding that testamentary trusts included language that “issue” did not include adoptees and their issue); *Davis v. Neilson*, 871 S.W.2d 35, 36 (Mo. Ct. App. 1993) (“The will defined ‘issue’ as including ‘an adopted child or children.’”); *Diemer v. Diemer*, 717 S.W.2d

By contrast, medical intervention for infertility in humans is much more recent. While assisted insemination was widely used in animals in the early twentieth century,²¹ the first study in humans was not published until 1943.²² The ability to freeze and thaw sperm became feasible in the 1950s,²³ but courts expressed concern whether the child was legitimate²⁴ until the 1973 Uniform Parentage Act²⁵ declared that a consenting husband was the child's father.²⁶ *In vitro* fertilization developed even later. Louise Brown, the first IVF baby, was born in England in 1978.²⁷ Three years after Louise Brown, the first IVF child was born in the United States in 1981.²⁸ It was not until 1983 that the first IVF baby was born using a donated egg.²⁹

Today, thousands of ART children are born each year who are not genetically related to one or both parents, and the numbers are increasing. Some experts estimate that as many as 60,000 children are born via assisted

160, 163 (Tex. App. 1986) (“The use of the term ‘child’ or ‘children’ . . . shall be understood to mean . . . legally adopted children of either of my said children.”).

21. See R.H. Foote, *The History of Artificial Insemination: Selected Notes and Notables*, 80 J. ANIMAL SCI. 1, 3 (2002), <https://www.asas.org/docs/publications/footehist.pdf?sfvrsn=0> [<https://perma.cc/85RN-HZ2D>].

22. W. Ombelet & J. Van Robays, *Artificial Insemination History: Hurdles and Milestones*, 7 FACTS VIEWS & VISION OBGYN 137, 142 (2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4498171> [<https://perma.cc/Z3D7-XBTU>].

23. See *id.*; see also Eric M. Walters et al., *The History of Sperm Cryopreservation*, in SPERM BANKING: THEORY AND PRACTICE 1, 1 (Allan A. Pacey & Mathew J. Tomlinson eds., 2009).

24. See, e.g., *Gursky v. Gursky*, 242 N.Y.S.2d 406, 411 (Sup. Ct. 1963) (holding that child conceived via assisted insemination “is not the legitimate issue of the husband”); Kristine S. Knaplund, *The New Uniform Probate Code’s Surprising Gender Inequities*, 18 DUKE J. GENDER L. & POL’Y 335, 337 (2011).

25. UNIF. PARENTAGE ACT § 5 (1973) (UNIF. LAW COMM’N, amended 2002). For examples, see Kristine S. Knaplund, “Adoptions Shall Not Be Recognized”: *The Unintended Consequences for Dynasty Trusts*, 7 U.C. IRVINE L. REV. 545, 562 n.128 (2017).

26. See Ombelet & Robays, *supra* note 22, at 142.

27. Laura Sanders, *40 Years After the Birth of the First IVF Baby, a Look Back at the Birth of a New Era*, SCI. NEWS (July 25, 2018, 6:00 AM), <https://www.sciencenews.org/blog/growth-curve/40-years-ivf-baby-louise-brown> [<https://perma.cc/PFZ3-RXAT>].

28. Victor Cohn, *First U.S. Test-Tube Baby Is Born*, WASH. POST (Dec. 29, 1981), https://www.washingtonpost.com/archive/politics/1981/12/29/first-us-test-tube-baby-is-born/a6f3de2f-422f-43bd-9b45-0d798ed18e8e/?utm_term=.3dadfb1e7786 [<https://perma.cc/V3M5-BLQL>].

29. Jeff Wang & Mark V. Sauer, *In Vitro Fertilization (IVF): A Review of 3 Decades of Clinical Innovation and Technological Advancement*, 2 THERAPEUTICS & CLINICAL RISK MGMT. 355, 356 (2006), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1936357> [<https://perma.cc/2AUT-JZ27>].

insemination by donor each year in the United States.³⁰ As for IVF, the Centers for Disease Control track all forms of ART other than assisted insemination—those that involve removing the egg and fertilizing it outside the woman’s body—and reports that these ART procedures, while still a small percentage of births nationwide, have doubled in the past decade, and as of 2017 accounted for 1.7% of births in the United States.³¹ Donor eggs were used in 24,300 ART cycles³² in 2016,³³ up from 16,976 ten years before.³⁴

These numbers do not include the thousands of Americans who travel abroad every year for fertility treatments.³⁵ *In vitro* fertilization and gestational surrogacy can cost significantly less in other countries.³⁶ The numbers

30. Jacqueline Mroz, *Their Children Were Conceived with Donor Sperm. It Was the Wrong Sperm*, N.Y. TIMES (June 3, 2019), <https://www.nytimes.com/2019/06/03/health/sperm-banks-fertility-artificial-insemination.html> [https://perma.cc/6J4U-8PRB].

31. *Assisted Reproductive Technology (ART)*, CENTERS FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/art/artdata/index.html> [https://perma.cc/4HEL-B29R].

32. CDC, 2016 ASSISTED REPRODUCTIVE TECHNOLOGY: NATIONAL SUMMARY REPORT 46 (2016), <https://www.cdc.gov/art/pdf/2016-report/ART-2016-National-Summary-Report.pdf> [https://perma.cc/A8VY-EPWE]. An ART cycle begins when a woman starts taking fertility drugs or is monitored for follicle production, and, if successful, proceeds to egg retrieval. *Id.* at 63. The eggs—or ova—are combined with sperm and eventually planted in the uterus. *Id.*

33. *Id.* at 46. One reason for the increase may be pro-life groups that encourage the “adoption” of frozen embryos. Jasmine Taylor-Coleman, *The Americans Who ‘Adopt’ Other People’s Embryos*, BBC NEWS (July 18, 2016), <https://www.bbc.com/news/magazine-36450328> [https://perma.cc/FK6J-D5JT].

34. CDC, 2006 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES: NATIONAL SUMMARY AND FERTILITY CLINIC REPORTS 56 (2006), https://www.cdc.gov/art/pdf/archived/2006-ART_508tagged.pdf [https://perma.cc/248R-CHVZ]. The Centers for Disease Control do not track ova fertilized with donated sperm.

35. Anna Medaris Miller, *Should You Travel Abroad for IVF?*, U.S. NEWS (Dec. 15, 2015), <https://health.usnews.com/health-news/patient-advice/articles/2015-12-15/should-you-travel-abroad-for-ivf> [https://perma.cc/34F6-H72L] (estimating that 60,000 to 84,000 Americans a year go outside the United States for reproductive health care); see Kevin Ponniah, *In Search of Surrogates, Foreign Couples Descend on Ukraine*, BBC NEWS (Feb. 13, 2018), <https://www.bbc.com/news/world-europe-42845602> [https://perma.cc/C298-FUAJ] (noting that surrogacies often use donor eggs); Julissa Treviño, *Medical Tourism Is Booming in Mexico*, PAC. STANDARD (Jan. 9, 2018), <https://psmag.com/economics/medical-tourism-is-booming-in-mexico> [https://perma.cc/4DBB-TE67] (“People most commonly travel to Mexico for procedures that include . . . fertility treatments.”).

36. Compare Rachel Gurevich, *How Much Does IVF Really Cost?*, VERY WELL FAM., <https://www.verywellfamily.com/how-much-does-ivf-cost-1960212> [https://perma.cc/P6HM-YAGJ] (last updated Mar. 20, 2019) (providing that the average cost for one IVF cycle in the United States is \$12,000), and CCRM Colorado: *IVF Costs & Fertility Treatment Costs*, CCRM FERTILITY, <https://www.ccrmivf.com/colorado/treatment-costs> [https://perma.cc/Q4K5-2KYT] (noting that it costs \$15,897 for one IVF cycle with fresh embryo transfer, \$23,983 for frozen embryo transfer, and 15% off for Colorado residents), with Alex Sunshine, *How Much Does IVF Cost in Your Country?—All Prices Revealed*, SUNSHINE EGG DONATION AGENCY (Mar. 27, 2019), <https://www.eggdonors.asia/blog/how-much-ivf-cost> [https://

also do not include children born via extramarital affairs,³⁷ and children who are mistakenly switched at birth.³⁸ They also do not include couples who contracted for assisted insemination by husband (AIH) but instead unknowingly received donor sperm, either by mistake or by design. When AIH was first offered in the 1950s, doctors often combined the husband's sperm with donor sperm to improve results.³⁹ While this practice had been largely abandoned by the late 1970s,⁴⁰ some rogue doctors or their staff continued to deliberately include their own sperm in that provided to patients. A doctor in Virginia fathered at least fifteen children and is suspected of fathering as many as seventy-five.⁴¹ At least three dozen people have learned through the genetic website 23andMe that a fertility doctor in Indianapolis is their father.⁴² A sperm bank founder in Great Britain is suspected of

perma.cc/8LT5-6XUG] (listing one IVF cycle in Finland at \$3,267, Korea at \$1,600, Latvia at \$2,500, and United States at \$10,000). For surrogacy, West Coast Surrogacy in California estimates a contract at between \$90,000 to \$130,000. *West Coast Surrogacy Costs & Fees*, W. COAST SURROGACY, <https://www.westcoastsurrogacy.com/surrogate-program-for-intended-parents/surrogate-mother-cost> [https://perma.cc/P7K7-T74X]. The cost of a surrogacy contract in Ukraine is advertised as \$30,000 “all inclusive” at Ela Woman. *Cost for Surrogacy (Self) in Ukraine*, ELA WOMAN, <https://www.elawoman.com/Ukraine> [https://perma.cc/S27X-2W7W].

37. The percentage of such children is very small, perhaps less than 1%. See Rob Brooks, *What Are the Chances That Your Dad Isn't Your Father?*, CONVERSATION (Apr. 15, 2014, 4:37 PM), <http://theconversation.com/what-are-the-chances-that-your-dad-isnt-your-father-24802> [https://perma.cc/7TJZ-4VW2] (citing estimates between 1% and 3%, and 0.7% and 2%); Carl Zimmer, *Fathered by The Mailman? It's Mostly an Urban Legend*, N.Y. TIMES (Apr. 8, 2016), <https://www.nytimes.com/2016/04/12/science/extramarital-paternity-less-common-than-assumed-scientists-find.html> [https://perma.cc/C7T7-N9JE] (providing that this percentage is no more than 1%).

38. For examples, see Knaplund, *supra* note 25, at 566 n.156.

39. See S.J. Behrman, *Artificial Insemination*, 10 FERTILITY & STERILITY 248, 252 (1959).

40. See Martin Curie-Cohen, Lesleigh Luttrell & Sander Shapiro, *Current Practice of Artificial Insemination by Donor in the United States*, 300 NEW ENG. J. MED. 585, 587 (1979) (citing that of a 1977–1978 survey of 471 doctors who practiced assisted insemination, only two reported mixing donor sperm with the husband's sperm).

41. *Doctor Is Found Guilty in Fertility Case*, N.Y. TIMES (Mar. 5, 1992), <https://www.nytimes.com/1992/03/05/us/doctor-is-found-guilty-in-fertility-case.html> [https://perma.cc/N8C2-ABCP]. The doctor was found guilty of fifty-two counts of fraud and perjury for deliberately substituting his own sperm. *Id.*

42. Mahir Zaveri, *A Fertility Doctor Used His Own Sperm on Unwitting Women. Their Children Want Answers.*, N.Y. TIMES (Aug. 30, 2018), <https://www.nytimes.com/2018/08/30/us/fertility-doctor-pregnant-women.html> [https://perma.cc/2R4T-3DTR]. Dr. Cline, who acknowledged using his own sperm in assisted insemination, pleaded guilty to two charges of obstruction of justice for lying to state investigators. *Id.* By 2019, the number of women found to have been impregnated by Dr. Cline had risen to at least forty-six. Mroz, *supra* note 30. A former staffer at a clinic in Utah is suspected of being the biological

fathering more than 600 children.⁴³ In addition, problems with “switched embryos” have been reported, where a woman has been implanted with someone else’s embryo, either by mistake⁴⁴ or deliberately.⁴⁵ In all these cases, at least one person raising the child is not genetically related to him or her.

Will the nonbiological parent be included on the child’s birth certificate? Today, if the parents of the ART child are married and a heterosexual couple, and the wife gives birth to the child, the answer is yes, even if donated gametes are used.⁴⁶ The common law marital presumption has for centuries held that the husband of the woman who gives birth is presumed to be the child’s father.⁴⁷ Once the technology of assisted insemination became available, some states enacted provisions declaring the husband, and not the donor, to be the father; others simply relied on the marital presumption to achieve the same result.⁴⁸ Historically, the marital presumption had ratified the husband as the father of his wife’s child “without too close an examination of biology.”⁴⁹ In order to ensure the legitimacy of the child, the common law precluded others from asserting paternity of a married

father of at least one child. Laura F. Friedman, *At-Home Genetic Testing Reveals a Sperm-Swapping Nightmare*, BUS. INSIDER (Jan. 8, 2014, 6:19 PM), <https://www.businessinsider.com/23andme-test-reveals-artificial-insemination-nightmare-2014-1> [<https://perma.cc/N6MW-W943>].

43. Randy Kreider, *Did Sperm Bank Founder Father 600 Children?*, ABC News (Apr. 9, 2012), <https://abcnews.go.com/Blotter/sperm-bank-founder-father-600-children/story?id=16104054> [<https://perma.cc/TMU3-8VW6>]. DNA tests on eighteen children found that twelve were fathered by the clinic founder. *Id.*

44. E.g., Sharon Kirkey, *Switched Embryos and Wrong Sperm: IVF Mix-Ups Lead to Babies Born with ‘Unintended Parentage,’* NAT’L POST, <https://nationalpost.com/health/ivf-mix-ups-lead-to-babies-born-with-unintended-parentage> [<https://perma.cc/97E5-L3SV>] (last updated July 31, 2016); Guilia McDonnell & Nieto Del Rio, *Couple Says Their Embryo Was Implanted into Wrong Woman. They Had to Fight to Get Their Son*, L.A. TIMES (July 11, 2019, 7:32 PM), <https://www.latimes.com/la-me-glendale-fertility-clinic-lawsuit-20190710-story.html> [<https://perma.cc/YBD6-XFMG>].

45. See Kimi Yoshino, *UCI Settles Dozens of Fertility Lawsuits*, L.A. TIMES (Sept. 11, 2009, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2009-sep-11-me-uci-fertility11-story.html> [<https://perma.cc/7QC7-N2DR>]. For more details, see Knaplund, *supra* note 25, at 564–67.

46. See *Assisted Reproductive Technology (ART) and Surrogacy Abroad*, U.S. DEP’T ST.—BUREAU CONSULAR AFF., <https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/us-citizenship/Assisted-Reproductive-Technology-ART-Surrogacy-Abroad.html> [<https://perma.cc/N6U6-3FXU>].

47. Kristine S. Knaplund, *Baby Without a Country: Determining Citizenship for Assisted Reproduction Children Born Overseas*, 91 DENV. L. REV. 335, 345–46 (2014).

48. Douglas Nejaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2292–93 (2017).

49. June Carbone & Naomi Cahn, *Parents, Babies, and More Parents*, 92 CHI.-KENT L. REV. 9, 15 (2017).

woman's child unless the husband had no access to his wife. Thus, "the law assumed, but did not in fact require, blood ties."⁵⁰

This trend continued with states that allowed same-sex couples to marry before the U.S. Supreme Court recognized this as a fundamental right in *Obergefell v. Hodges*:⁵¹ they all held that the nonbiological spouse was entitled to the marital presumption, at least when there was no third party to rebut the presumption.⁵² The Supreme Court agreed in 2017, holding that Arkansas must list a woman's spouse on a child's birth certificate as the other parent, because the state's definition of "father," like the definition in many states, was not necessarily biological.⁵³ Thus, at least if the same-sex couple is married, the same-sex spouse will be named as a parent on the birth certificate under the same criteria as a nonbiological husband.⁵⁴ In some jurisdictions, even an unmarried nonbiological partner may be named as a parent.⁵⁵

The issue of the birth certificate is more complicated if a gestational carrier is used. For heterosexual couples and lesbian couples, the option exists for the female partner to give birth to the child; in that case, states will apply the presumption that the woman who gives birth is the mother, and list her as such on the birth certificate.⁵⁶ If a gestational carrier is used, however, then the woman who gives birth is *not* intended to be the one who raises the child. The Centers for Disease Control define a "gestational carrier" or "gestational surrogate" as "[a] woman who gestates, or carries, an embryo that was formed from the egg of another woman with the

50. Nejaime, *supra* note 48, at 2272.

51. 135 S. Ct. 2584, 2608 (2015).

52. June Carbone & Naomi Cahn, *Marriage and the Marriage Presumption Post-Obergefell*, 84 UMKC L. REV. 663, 667 (2016).

53. Pavan v. Smith, 137 S. Ct. 2075, 2078–79 (2017).

54. Nejaime, *supra* note 48, at 2294, 2363 app. A, 2373 app. D. An unmarried partner with no genetic or legal link to the child may be in a different legal position, as a Michigan court held in *Sheardown v. Gustella*. 920 N.W.2d 172, 178 (Mich. Ct. App. 2018) (concluding no standing to assert child custody for female in same-sex unmarried couple who was not genetically related to child).

55. Nejaime, *supra* note 48, at 2370 app. C; *see also, e.g., In re Dee J.*, 13 N.E.3d 627, 630 (Ill. App. Ct. 2018) (finding that a same-sex couple married in Iowa in 2009 and treated as unmarried in Illinois, which did not recognize validity of marriage until June 1, 2014, had a child conceived through assisted insemination by donor with express consent of nonbiological partner who cared for child after she was born, and court held that nonbiological partner was parent).

56. *See, e.g., CAL. FAM. CODE § 7610(a)* (Deering 2019).

expectation of returning the infant to its intended parents.”⁵⁷ Some states will issue a “pre-birth order” or its equivalent to allow the intended parents, rather than the gestational carrier and her spouse, to be named as the child’s parents on the birth certificate.⁵⁸ In other states, however, the intended parents will adopt the child even though their gametes were used by the gestational carrier, because the gestational carrier gave birth and is therefore the presumed mother.⁵⁹

Even if the spouse’s or partner’s name is on the birth certificate, if the couple is same-sex, it is clear to all that both members of the couple cannot be the genetic parents of the child. Thus, a subgroup of ART children is different from the others. With many ART children—those conceived using donated sperm or ova by a heterosexual couple—there is no reason for others to know of a third party’s involvement unless the couple discloses it. Unless a heterosexual couple is open about their reproductive struggles, others may not know that donated sperm or ova were used. But if someone has reason to know of the use of ART, the adoption cases suggest that when enough money is involved, others are willing to press the issue as to whether the ART children should be excluded from the class.⁶⁰

III. THE COMMON LAW PRESUMPTION EXCLUDING ADOPTEES, AND ITS APPLICATION TO ART CHILDREN

Inheritance at common law was based on blood relationships.⁶¹ The one exception was for a spouse;⁶² even stepchildren, who may have been raised as family members for years, would not inherit in intestacy under

57. CDC, *supra* note 32, at 64.

58. See, e.g., CAL. FAM. CODE § 7962(e) (2019). Delaware allows a pre-birth order to name the intended parents but stays enforcement until after the child’s birth. DEL. CODE ANN. tit. 13, § 8-611(b) (2019).

59. In Nebraska, for example, the gestational carrier is listed as the mother on the birth certificate with the biological father; the intended mother then adopts the child and moves to amend the birth certificate. Diane Hinson, *Gestational Surrogacy in Nebraska*, CREATIVE FAM. CONNECTIONS, <https://www.creativefamilyconnections.com/us-surrogacy-law-map/nebraska> [<https://perma.cc/847P-UNAW>]. In Alabama, while obtaining a pre-birth order is “sometimes possible, . . . post-birth adoptions are considered an easier and more efficient alternative.” Diane Hinson, *Gestational Surrogacy in Alabama*, CREATIVE FAM. CONNECTIONS, <https://www.creativefamilyconnections.com/us-surrogacy-law-map/alabama> [<https://perma.cc/9V44-HZ29>]. In Florida, an order to name the intended parents on the birth certificate can only be made after the child is born. Diane Hinson, *Gestational Surrogacy in Florida*, CREATIVE FAM. CONNECTIONS, <https://www.creativefamilyconnections.com/us-surrogacy-law-map/florida> [<https://perma.cc/Q7FU-9PFE>].

60. See *infra* Part III.

61. See Rein, *supra* note 3, at 713–16.

62. WILLIAM M. MCGOVERN, SHELDON F. KURTZ & DAVID M. ENGLISH, WILLS, TRUSTS AND ESTATES: INCLUDING TAXATION AND FUTURE INTERESTS 49–50 (4th ed. 2010).

most statutes.⁶³ Once states started enacting legislation allowing adoption in the 1850s,⁶⁴ courts presumed that a settlor or testator who did not name a specific adopted grandchild or niece but rather used a class term did not mean to include anyone other than those related to her by consanguinity.⁶⁵ As the Virginia Supreme Court explained, “At common law, adopted persons were not included within the term ‘issue,’ because that term was limited to the ‘natural descendants of a common ancestor,’ was synonymous with lineal descendant, and connoted a ‘common blood stream.’”⁶⁶ This presumption, often termed “stranger to the adoption,” applied when a person was adopted by someone other than the creator of the instrument.⁶⁷ Absent contrary intent, the adopted person would be excluded from the class.

The same assumption of a preference of blood relatives applied for settlors of *inter vivos* trusts. As one court said: “Ever since 1842, the statutory definition has been that ‘[t]he word “issue” . . . shall include all the lawful lineal descendants of the ancestor.’ Our courts have interpreted the statute [to include] . . . only the descendants in the blood line of the ancestor and excluding adopted children.”⁶⁸

Courts in the adoption cases used four approaches to discern intent when an express clause as to adoptees was lacking, all the while admitting that the maker did not appear to consider the issue. As one court said, “The court’s endeavor is to put itself in testator’s position in so far as possible in the effort to accomplish what he would have done had he ‘envisioned the present inquiry.’”⁶⁹ Commentators at the time agreed that courts were trying to discern “intent” in cases where none truly existed.⁷⁰ As one author stated,

63. *Id.* at 107.

64. *See* Sherman, *supra* note 15.

65. *See, e.g.,* Rein, *supra* note 3, at 797–98.

66. *McGehee v. Edwards*, 597 S.E.2d 99, 102 (Va. 2004) (citations omitted) (first quoting *Munday v. Munday*, 178 S.E. 917, 919 (Va. 1935); and then quoting *Fletcher v. Flanary*, 38 S.E.2d 433, 435 (Va. 1946)); *accord In re Woodcock*, 68 A. 821, 822 (Me. 1907); *Bagwell v. Alexander*, 329 S.E.2d 771, 772 (S.C. Ct. App. 1985); *Union Planters Nat’l Bank v. Corbitt*, 474 S.W.2d 139, 142 (Ten. Ct. App. 1971).

67. *See, e.g., In re Trust Under Agreement of Vander Poel*, 933 A.2d 628, 634 (N.J. Sup. Ct. App. Div. 2007); *see also In re Estate of Wehrhane*, 128 A.2d 681, 689 (1957) (Weintraub, J., dissenting), *overruled in part by In re Coe’s Estate*, 201 A.2d 571 (N.J. 1964).

68. *Amoskeag Tr. Co. v. Preston*, 222 A.2d 158, 159 (N.H. 1966).

69. *In re Estate of Griswold*, 354 A.2d 717, 723 (N.J. Prob. Ct. 1976) (quoting *Fidelity Union Tr. Co. v. Robert*, 178 A.2d 185, 187 (N.J. 1962)).

70. J. Wesley Oler, *Construction of Private Instruments Where Adopted Children Are Concerned: I*, 43 MICH. L. REV. 705, 708–09 (1945).

“A real intention, of course, is seldom discoverable. The ‘intention’ . . . largely represents a union of judicially envisaged social desirability with conjecture as to what the conveyor probably would have intended had he thought about the matter.”⁷¹ Another writer agreed: “The very fact that the difficulty has arisen is often the clearest proof that the testator or settlor never thought of the matter at all, for if he had, it is hardly possible that he would not have expressed his desires in the clearest terms.”⁷²

The first approach, followed by many states, considered only facts and law evident at the time the document was executed; subsequent events were disregarded. “The object of a court in construing a will is to ascertain the testator’s intent at the time it was executed,”⁷³ one court declared. “Whether [an adoptee] is entitled to an interest in the trust estates depends upon the intention of the settlors, and their intention as it existed at the time the trusts were created is determinative.”⁷⁴ Another court was even clearer:

[T]he fact that the child was not adopted until after the execution of the will precludes an intent to include the child. It is suggested that, as the testator permitted his will to stand after hearing of the adoption, an inference arises that he intended that the child should take his adopting parents’ place in the event of the latter’s death. The inference is not permissible. The will speaks the testamentary intention as of its date; its effect is as of the testator’s death.⁷⁵

This group applied the law in effect when the instrument was written. Some courts asserted that “the testator is bound to know the existing statutes affecting testamentary dispositions,”⁷⁶ and thus whether an adoptee was an “heir,” for example. The law, including cases, intestacy succession, and other statutes, plus the public policy of the state at the time the will or trust was executed, could be taken into account, and the court may “impute knowledge of this law and policy to the testator.”⁷⁷ One court stated categorically

71. *Id.*

72. Albert M. Kales, *Rights of Adopted Children*, 9 ILL. L. REV. 149, 159–60 (1914); see also MAX RHEINSTEIN, *THE LAW OF DECEDENTS’ ESTATES: INTESTACY, WILLS, PROBATE AND ADMINISTRATION* 385 (2d ed. 1955) (“What we carry out is not . . . the testator’s real intention but rather his hypothetical intention, the intention which he is likely to have had if he had his mind applied to the problem.”); William B. Rector, Jr., Note, *Wills—Construction—Right of Adopted Children To Take Under a Will as “Grandchildren,”* 39 N.C. L. REV. 203, 205 (1961) (“With reference to this class of cases it has been said that ‘the only legitimate inference from the context and surrounding circumstances is that the testator . . . has no actual intention whatever in respect to the difficulty which afterwards arises by the appearance of an adopted child.’” (citing Kales, *supra*, at 159)).

73. *Young v. First Wis. Tr. Co. (In re Will of Mitchell)*, 184 N.W.2d 853, 857 (Wis. 1971).

74. *Cutrer v. Cutrer*, 345 S.W.2d 513, 519 (Tex. 1961).

75. *Dulfon v. Keasbey*, 162 A. 102, 105 (N.J. Ch. 1932).

76. *Wells Fargo Bank v. Huse*, 129 Cal. Rptr. 522, 527 (Ct. App. 1976).

77. *Estate of Pittman*, 163 Cal. Rptr. 527, 529 (Ct. App. 1980).

that “[t]he current statutory law and public policy is irrelevant.”⁷⁸ Some courts saw it as a matter of fairness to the one creating the document: “[O]ne executing a will or trust is entitled to rely on the law in effect at the time the instrument is created.”⁷⁹

A second approach was more lenient: as long as the will or trust was revocable, events subsequent to its execution should be taken in account, on the theory that the testator or settlor who knew of any changes could have revised the will or trust. As one court noted:

The testator . . . had ample time to change his will in order to rule out his adopted grandsons as ‘grandchildren,’ if he so desired, which he did not do. This fact provided further evidence that he approved of the adoptions and wanted the boys to share in his estate.⁸⁰

Another court refused to apply a change in the presumption retroactively: “In our opinion, the testator intended that his will should be construed under the law prevailing at the time of his death. So construed, the terms of the trust did not include adopted children of those collateral relatives of the testator who were the primary beneficiaries.”⁸¹ A Tennessee statute expressly states that a will is construed as if it were executed immediately prior to the testator’s death.⁸²

In a third group of states, courts disregarded the common law presumption by retroactively applying legislation that included adoptees in class terms. In *Evans v. McCoy*, for example, an 1897 will created a defeasible fee in the testator’s daughter and son, but if they died without surviving issue, to the testator’s brothers.⁸³ Almost eighty years later, the daughter, who had no children, adopted two adults.⁸⁴ After her death, her brother’s sons brought an action in ejectment.⁸⁵ The Maryland Court of Appeals held that the 1947 statute eliminating Maryland’s stranger to the adoption rule could be applied retroactively to the 1897 will because it was a rule of construction, and membership in a class was determined by the law in effect when the

78. *In re Will of Mitchell*, 184 N.W.2d at 857.

79. *Bird Anderson v. BNY Mellon, N.A.*, 974 N.E.2d 21, 28 (Mass. 2012) (declaring that a 2009 retroactive statute as applied to an irrevocable, pre-1958 testamentary instrument was unconstitutional).

80. *Conn. Nat’l Bank & Tr. Co. v. Chadwick*, 585 A.2d 1189, 1197 (Conn. 1991); *accord Weitzel v. Weitzel*, 239 N.E.2d 263, 269 (Ohio C.P. Cuyahoga Cty. 1968).

81. *Calhoun v. Campbell*, 763 S.W.2d 744, 750 (Tenn. 1988).

82. TENN. CODE ANN. § 32-3-101 (2019); *see Calhoun*, 763 S.W.2d at 748.

83. 436 A.2d 436, 437 (Md. 1981).

84. *Id.*

85. *Id.* at 438.

class closes, not when the creator of the instrument dies.⁸⁶ Similarly, Michigan's 1966 statute reversing the common law presumption was held to apply to a 1936 will, on the theory that the legislature's language left them no discretion: "Section 128 provides that the term "'issue" . . . shall be construed to include *any* adopted person.' This language is mandatory and leaves no room for a court to carve out an exception where the settlor's death preceded the enactment of § 128."⁸⁷

Finally, as a fourth approach two states, California and Hawaii, did not follow the common law presumption excluding adopted children. In *In re Estate of Stanford*, the Supreme Court of California was asked to construe a will executed in 1903, and the court ruled that "[i]t has been the policy of this state, at least since the adoption of the Civil Code, to accord to adopted children the same status as natural children."⁸⁸ Similarly, a California Court of Appeal interpreted a 1933 irrevocable trust to include great-grandchildren adopted after the trust was created: "As early as 1888 it was established in California that the word 'issue' included both adopted and natural children."⁸⁹ In Hawaii, the state supreme court faced the issue of whether a grandchild adopted eighteen years after the 1896 irrevocable deed of trust was meant to be included as "lawful issue."⁹⁰ Noting the "ancient customs of [Hawaiian] people had not only sanctioned adoptions and regarded adopted children as children of the blood," the court included the adoptee in the class.⁹¹

How might a court discern intent in the case of ART children when the testator or executor most likely never considered the possibility? The science involved, especially for *in vitro* fertilization, is much later than virtually all of our seventy-four wills, trusts, and deeds.⁹² Nearly three-quarters of the documents were in effect before 1945,⁹³ and thus before

86. *Id.* at 437; *accord* *Bowles v. Bradley*, 461 S.E.2d 811, 814 (S.C. 1995) (applying rule of construction); *see* *First Nat'l Bank v. King*, 651 N.E.2d 127, 131–32 (Ill. 1995) (discussing that the rule is procedural, not substantive, so it may be applied retroactively).

87. *Fithian v. Papalini (In re Estates of Leggett)*, 378 N.W.2d 467, 469 (Mich. 1985); *cf.* *Scribner v. Berry*, 489 A.2d 8, 9 (Me. 1985) (construing similar language to apply only to testators who died after the effective date of Maine's statute).

88. 315 P.2d 681, 689 (Cal. 1957).

89. *Wells Fargo Bank v. Huse*, 129 Cal. Rptr. 522, 525 (Ct. App. 1976).

90. *O'Brien v. Walker*, 35 Haw. 104, 108 (1939).

91. *Id.* at 116, 136; *accord In re Estate of Cunha*, 49 Haw. 273, 297 (1966).

92. *See, e.g., Ashley Eskew & Emily Jungheim, A History of Developments to Improve In Vitro Fertilization*, 114 MO. MED., May–June 2017, at 156, 156–59.

93. *See Peck v. Green*, 96 So. 2d 169, 172 (Ala. 1956); *Bank of Am. v. Most Worshipful Grand Lodge of Free & Accepted Masons (In re Estate of Heard)*, 319 P.2d 637, 638 (Cal. 1957); *In re Pierce's Estate*, 196 P.2d 1, 3 (Cal. 1948); *Conn. Nat'l Bank & Tr. Co. v. Chadwick*, 585 A.2d 1189, 1190 (Conn. 1991); *Conn. Bank & Tr. Co. v. Bovey (In re Estate of Walker)*, 292 A.2d 899, 900 (Conn. 1972); *Lewis v. Green*, 389 So.

even assisted insemination was routinely used in humans; the last of the documents became effective in 1979, a year after IVF was first successful, and two years before the first IVF baby was born in the United States.⁹⁴ While testators or executors creating wills or trusts in the 1920s, 1930s, or 1940s might well have had an opinion about adopted relatives, they would have had no reason to anticipate kin created through ART, and so trying to discern their intent on the matter is impossible. Thus, ART children differ significantly from adopted children in the matter of the maker's intent in these old documents: the creator never considered children conceived with a third-party's sperm or ova. The problem is, this separates certain ART children—those conceived with donated gametes—from others—those who are genetically related to the testator or settlor but were adopted because

2d 235, 238 (Fla. Dist. Ct. App. 1980); *First Nat'l Bank v. King*, 651 N.E.2d 127, 128 (Ill. 1995); *Sennot v. Collet-Oser*, 344 N.E.2d 783, 784 (Ill. App. Ct. 1976); *Lutz v. Fortune*, 758 N.E.2d 77, 79 (Ind. Ct. App. 2001); *Casper v. Helvie*, 146 N.E. 123, 123 (Ind. Ct. App. 1925); *Skoog v. Fredell*, 332 N.W.2d 333, 334 (Iowa 1983); *Cook v. Underwood*, 228 N.W. 629, 630 (Iowa 1930); *In re George Parsons 1907 Trust*, 170 A.3d 215, 217 (Me. 2017); *Fiduciary Tr. Co. v. Silsbee*, 187 A.2d 396, 397 (Me. 1963); *In re Woodcock*, 68 A. 821, 821 (Me. 1907); *Bird Anderson v. BNY Mellon, N.A.*, 974 N.E.2d 21, 25 (Mass. 2012); *Fithian v. Papalini (In re Estates of Leggett)*, 378 N.W.2d 467, 467 (Mich. 1985); *Veneklasen v. Salvation Army (In re Estate of Graham)*, 150 N.W.2d 816, 816 (Mich. 1967); *Everett v. Dockery*, 33 So. 2d 313, 314 (Miss. 1948); *Kindred v. Anderson*, 209 S.W.2d 912, 914 (Mo. 1948); *Graves v. Graves*, 163 S.W.2d 544, 546 (Mo. 1942); *Melek v. Curators of Univ. of Mo.*, 250 S.W. 614, 615 (Mo. Ct. App. 1923); *Amoskeag Tr. Co. v. Preston*, 222 A.2d 158, 159 (N.H. 1966); *In re Thompson*, 250 A.2d 393, 394 (N.J. 1969); *Ahlemeyer v. Miller*, 131 A. 54, 55 (N.J. 1925); *Dulfon v. Keasbey*, 162 A. 102, 104 (N.J. Ch. 1932); *Hutton v. Ribsamen (In re Washburn's Will)*, 264 N.Y.S.2d 33, 36 (App. Div. 1965); *In re Leask*, 90 N.E. 652, 652 (N.Y. 1910); *Peele v. Finch*, 200 S.E.2d 635, 638 (N.C. 1973); *Allen v. Allen*, 132 S.E.2d 909, 909 (N.C. 1963) (per curiam); *Bradford v. Johnson*, 75 S.E.2d 632, 633 (N.C. 1953); *Ohio Citizens Bank v. Mills*, 543 N.E.2d 1206, 1207 (Ohio 1989); *Tootle v. Tootle*, 490 N.E.2d 878, 879 (Ohio 1986); *Moore v. McAlester*, 428 P.2d 266, 267 (Okla. 1967); *Estate of Tafel*, 296 A.2d 797, 798 (Pa. 1972); *In re Estate of Fownes*, 220 A.2d 8, 9 (Pa. 1966); *In re Trust of Pennington*, 219 A.2d 353, 355 (Pa. 1966); *In re Estate of Holton*, 159 A.2d 883, 884 (Pa. 1960); *In re Puterbaugh's Estate*, 104 A. 601, 601 (Pa. 1918); *R.I. Hosp. Tr. Co. v. Hooker*, 219 A.2d 772, 773 (R.I. 1966); *Turner v. Turner*, 196 S.E.2d 498, 499 (S.C. 1973); *Calhoun v. Campbell*, 763 S.W.2d 744, 744 (Tenn. 1988); *Cutrer v. Cutrer*, 345 S.W.2d 513, 515 (Tex. 1961); *Cochran v. Cochran*, 95 S.W. 731, 731 (Tex. Civ. App. 1906); *In re Smith's Will*, 112 A. 897, 897 (Vt. 1921); *Langhorne v. Langhorne*, 186 S.E.2d 50, 50 (Va. 1972); *McGehee v. Edwards*, 597 S.E.2d 99, 100 (Va. 2004); *Trueax v. Black*, 335 P.2d 52, 52 (Wash. 1959); *Wheeling Dollar Sav. & Tr. Co. v. Hanes*, 237 S.E.2d 499, 501 (W. Va. 1977); *Sec. Nat'l Bank & Tr. Co. v. Willim*, 153 S.E.2d 114, 115 (W. Va. 1967), *overruled by Wheeling Dollar Sav. & Tr. Co. v. Hanes*, 237 S.E.2d 499 (W. Va. 1977); *Young v. First Wis. Tr. Co. (In re Will of Mitchell)*, 184 N.W.2d 853, 854 (Wis. 1971).

94. See *Sanders*, *supra* note 27.

a gestational carrier was named as their mother on the birth certificate. This bifurcation would encourage genetic testing, a result which is undesirable for reasons detailed in Part IV.

The issue of the document creator's intent arises only in those jurisdictions that follow the first or second approaches to the adoption cases: those that follow the common law presumption that a class term excludes those that are not biologically related to the settlor or testator, such as adoptees. Instruments in states that follow the third or fourth approaches are not a problem for us. The third approach would retroactively apply a presumption that adoptees, or those not related by blood to the settlor or testator, are included in class terms absent contrary evidence, and so presumably ART children would be included. Those following the fourth approach, California and Hawaii, did not exclude adoptees from class terms. However, many states still follow the first and second approaches,⁹⁵ and so we need to explore the consequences of applying the common law presumption to these old trusts.

Courts following the first two approaches engaged in a highly detailed, fact specific examination of the circumstances surrounding the execution of the document and various personal circumstances of the creator's family. A presumption that "children" did not include adoptees was defeated by testimony that the testator knew his daughter could not have children and encouraged her to adopt,⁹⁶ or the fact that the testator knew of the adoption with ample time to change his will if he desired to exclude such child.⁹⁷ Including nonblood relatives as beneficiaries of the will or trust might also demonstrate a willingness to include adoptees in a class term such as "lawful issue."⁹⁸ The testimony of the drafting attorney that the testator or settlor had expressed a desire to include adoptees could be persuasive.⁹⁹ Testimony by the testator's wife that he would disinherit his nephew if he adopted two children as planned was regarded as convincing in another case: the wife had an income interest in the testamentary trust but did not stand to gain if the adopted children were excluded.¹⁰⁰ In contrast, testimony

95. See Knaplund, *supra* note 25, at 570–71.

96. Ziehl v. Maine Nat'l Bank, 383 A.2d 1364, 1373 (Me. 1978).

97. Chadwick, 585 A.2d at 1196–97; Bradford, 75 S.E.2d at 636–27; cf. Dulfon, 162 A. at 105 (refusing to consider post-execution facts).

98. Penland v. Agnich, 940 S.W.2d 324, 327 (Tex. App. 1997) (construing 1945 will with bequests to the testator's wife's nephew and to his wife's siblings, including her half-brothers).

99. See, e.g., Zimmerman v. First Nat'l Bank, 348 So. 2d. 1359, 1366 (Ala. 1977) (construing a testamentary trust); Parker v. Mullen, 255 A.2d 851, 853 (Conn. 1969) (construing a testamentary trust).

100. *In re Pierce's Estate*, 196 P.2d 1, 5 (Cal. 1948).

from the one who stood to take all in place of the adoptee was found to be of “insufficient weight and value to overcome the usual presumption.”¹⁰¹

Courts paid particular attention to the precise wording of the class gift. The terminology most frequently causing concern was “issue” (40%), “descendants” (4%), or a combination of the two “issue or descendants,” “issue/descendants” (3%), for a total of 47% of the sample.¹⁰² Next in frequency was “children” (32%) and variations such as “child and issue” (5%) for a total of 37%; “bodily issue” or “bodily heirs” (5%), “grandchildren” and variations such as “grandchildren and issue” (5%), and finally “heirs” and “heirs by” a particular person (4%).¹⁰³ Stepchildren were adopted in

101. *In re Estate of Nicolaus*, 366 N.W.2d 562, 569–70 (Iowa 1985) (ruling on a declaratory action to resolve whether an adopted granddaughter was included in “issue” where her uncle, the testator’s son who would receive all of the inheritance instead of adoptee, testified that testator intended to distinguish between adopted and natural children).

102. For cases using the terminology issue, see *Bilsky v. Bilsky*, 455 S.W.2d 901, 901 (Ark. 1970); *Bank of Am. v. Most Worshipful Grand Lodge of Free & Accepted Masons (In re Estate of Heard)*, 319 P.2d 637, 638 (Cal. 1957); *Conn. Bank & Tr. Co. v. Coffin*, 569 A.2d 531, 531 (Conn. 1990); *Lewis v. Green*, 389 So. 2d 235, 235 (Fla. Dist. Ct. App. 1980); *Nunnally*, 252 S.E.2d 468, 469 (Ga. 1979); *Sennot*, 344 N.E.2d 783, 783 (Ill. App. Ct. 1976); *Nicolaus*, 366 N.W.2d 562, 562 (Iowa 1985); *In re George Parsons 1907 Trust*, 170 A.3d 215, 216 (Me. 2017); *Fiduciary Tr. Co. v. Silsbee*, 187 A.2d 396, 396 (Me. 1963); *Bird Anderson v. BNY Mellon, N.A.*, 974 N.E.2d 21, 25 (Mass. 2012); *Fithian v. Papalini (In re Estates of Leggett)*, 378 N.W.2d 467, 467 (Mich. 1985); *Veneklasen v. Salvation Army (In re Estate of Graham)*, 150 N.W.2d 816, 816 (Mich. 1967); *Everett v. Dockery*, 33 So. 2d 313, 314 (Miss. 1948); *Kindred v. Anderson*, 209 S.W.2d 912, 912 (Mo. 1948); *Graves v. Graves*, 163 S.W.2d 544, 546 (Mo. 1942); *Miller v. First Nat’l Bank & Tr. Co. (In re Trust of Miller)*, 323 P.2d 885, 885 (Mont. 1958); *Amoskeag Tr. Co. v. Preston*, 222 A.2d 158, 159 (N.H. 1966); *In re Thompson*, 250 A.2d 393, 393 (N.J. 1969); *Peele v. Finch*, 200 S.E.2d 635, 635 (N.C. 1973); *In re Trust of Fownes*, 220 A.2d 8, 8 (Pa. 1966); *In re Trust of Pennington*, 219 A.2d 353, 353 (Pa. 1966); *Bowles v. Bradley*, 461 S.E.2d 811, 811 (S.C. 1995); *Penland*, 940 S.W.2d at 324; *Makoff v. Makoff*, 528 P.2d 797, 797 (Utah 1974); *In re Estate of Underwood*, 56 Va. Cir. 393, 395 (Cir. Ct. 2001); *In re Trusts of Sollid*, 647 P.2d 1033, 1033 (Wash. Ct. App. 1982); *In re Smith’s Will*, 112 A. 897, 897 (Vt. 1921); *Langhorne v. Langhorne*, 186 S.E.2d 50, 50 (Va. 1972); *Young v. First Wis. Tr. Co. (In re Will of Mitchell)*, 184 N.W.2d 853, 853 (Wis. 1971). For cases using the terminology “descendants,” see *First Nat’l Bank v. King*, 651 N.E.2d 127, 127 (Ill. 1995); *Calhoun v. Campbell*, 763 S.W.2d 744, 744 (Tenn. 1988); *McGehee v. Edwards*, 597 S.E.2d 99, 100 (Va. 2004). For cases using the terminology “issue and descendants,” see *Scribner v. Berry*, 489 A.2d 8, 8 (Me. 1985); *Hutton v. Ribsamen (In re Washburn’s Will)*, 264 N.Y.S.2d 33, 36 (App. Div. 1965).

103. For cases using the terminology “children,” see *Zimmerman*, 348 So. 2d at 1360; *Peck v. Green*, 96 So. 2d 169, 169 (Ala. 1956); *In re Pierce’s Estate*, 196 P.2d at 3; *Parker v. Mullen*, 255 A.2d 851, 853 (Conn. 1969); *Lutz v. Fortune*, 758 N.E.2d 77, 79 (Ind. Ct. App. 2001); *Casper v. Helvie*, 146 N.E. 123, 123 (Ind. Ct. App. 1925); *Ziehl v. Maine Nat’l Bank*, 383 A.2d 1364, 1364 (Me. 1978); *In re Woodcock*, 68 A. 821, 821

13% of the cases.¹⁰⁴ Only two of the cases had express language on adoptees: *inter vivos* and testamentary trusts executed by one father for his son and the son's issue excluded adoptees,¹⁰⁵ and a testamentary trust included adoptees in the term "issue."¹⁰⁶ The cases ranged from 1906 to 2017, with a median of 1972, a bottom quartile of 1958 and below, and the top quartile at 1985 and above.¹⁰⁷ The most common document was the testamentary trust (60%),¹⁰⁸ followed by wills (19%), *inter vivos* trusts (16%), and deeds (5%).¹⁰⁹ The

(Me. 1907); *Melek v. Curators of Univ. of Mo.*, 250 S.W. 614, 615 (Mo. Ct. App. 1923); *Ahlemeyer v. Miller*, 131 A. 54, 55 (N.J. 1925); *In re Leask*, 90 N.E. 652, 652 (N.Y. 1910); *Allen v. Allen*, 132 S.E.2d 909, 909 (N.C. 1963) (per curiam); *Bradford v. Johnson*, 75 S.E.2d 632, 632 (N.C. 1953); *Ohio Citizens Bank v. Mills*, 543 N.E.2d 1206, 1207 (Ohio 1986); *In re Estate of Holton*, 159 A.2d 883, 883 (Pa. 1960); *Estate of Tafel*, 296 A.2d 797, 797 (Pa. 1972); *In re Puterbaugh's Estate*, 104 A. 601, 601 (Pa. 1918); *R.I. Hosp. Tr. Co. v. Hooker*, 219 A.2d 772, 774 (R.I. 1966); *Turner v. Turner*, 196 S.E.2d 498, 499 (S.C. 1973); *Bagwell v. Alexander*, 329 S.E.2d 771, 771 (S.C. Ct. App. 1985); *Cochran v. Cochran*, 95 S.W. 731, 731 (Tex. Civ. App. 1906); *Trueax v. Black*, 335 P.2d 52, 52 (Wash. 1959); *Wheeling Dollar Sav. & Tr. Co. v. Hanes*, 237 S.E.2d 499, 499 (W. Va. 1977). For cases using a variation of the terminology "children" such as "child and issue," see *In re Pierce's Estate*, 196 P.2d at 3; *Cutrer v. Cutrer*, 345 S.W.2d 513, 514 (Tex. 1961); *Sec. Nat'l Bank & Tr. Co. v. Willim*, 153 S.E.2d 114, 114 (W. Va. 1967), *overruled by* *Wheeling Dollar Sav. & Tr. Co. v. Hanes*, 237 S.E.2d 499 (W. Va. 1977). For cases using the term "bodily issue" or "bodily heirs," see *Skoog v. Fredell*, 332 N.W.2d 333, 333 (Iowa 1983); *Posey v. Webb*, 528 So. 2d 833, 833 (Miss. 1988); *Tootle v. Tootle*, 490 N.E.2d 878, 878 (Ohio 1986); *Moore v. McAlester*, 428 P.2d 266, 266 (Okla. 1967). For cases using the terminology "grandchildren" and its variants, see *Conn. Nat'l Bank & Tr. Co. v. Chadwick*, 585 A.2d 1189, 1189 (Conn. 1991); *In re Maloney Trust*, 377 N.W.2d 791, 792 (Mich. 1985); *Dulfon v. Keasbey*, 162 A. 102, 102 (N.J. Ch. 1932); *Ortega v. First Republicbank Fort Worth*, 792 S.W.2d 452, 453 (Tex. 1990). For cases that use the terminology "heirs" and "heirs by," see *Brown v. Johnson*, 97 S.W.3d 924, 924 (Ark. Ct. App. 2003); *Cook v. Underwood*, 228 N.W. 629, 630 (Iowa 1930); *Alley v. Strickland*, 302 S.E.2d 866, 866 (S.C. 1983) (per curiam).

104. For cases that involved stepchildren, see *Zimmerman*, 348 So. 2d at 1362; *Whitfield v. Matthews*, 334 So. 2d 876, 877 (Ala. 1976); *Coffin*, 569 A.2d at 531; *In re Estate of Nicolaus*, 366 N.W.2d at 563; *Silsbee*, 187 A.2d at 398; *Kindred*, 209 S.W.2d at 914; *In re Trust of Fownes*, 220 A.2d at 10; *Makoff*, 528 P.2d at 798; *In re Trusts of Sollid*, 647 P.2d at 1035; *Hanes*, 237 S.E.2d at 501.

105. *Coffin*, 569 A.2d at 532.

106. *In re Estate of Underwood*, 56 Va. Cir. at 395.

107. See the cases in Appendices A–D, of which 25% of cases occurred before 1958, 50% of the cases occurred before 1972, and 75% of the case occurred before 1985.

108. This includes one life insurance trust.

109. For cases that included a testamentary trust, see *Zimmerman*, 348 So. 2d at 1360; *Peck v. Green*, 96 So. 2d 169, 169 (Ala. 1956); *Bilsky v. Bilsky*, 455 S.W.2d 901, 901 (Ark. 1970); *Bank of Am. v. Most Worshipful Grand Lodge of Free & Accepted Masons (In re Estate of Heard)*, 319 P.2d 637, 637 (Cal. 1957); *In re Pierce's Estate*, 196 P.2d 1, 3 (Cal. 1948); *Conn. Nat'l Bank & Tr. Co. v. Chadwick*, 585 A.2d 1189, 1189 (Conn. 1991); *Coffin*, 569 A.2d at 531 (Conn. 1990); *Parker v. Mullen*, 255 A.2d 851, 851 (Conn. 1969); *Lewis v. Green*, 389 So. 2d 235, 235 (Fla. Dist. Ct. App. 1980); *Nunnally v. Tr. Co. Bank*, 252 S.E.2d 468, 468 (Ga. 1979), *aff'd*, 261 S.E.2d 621 (Ga. 1979); *First Nat'l Bank v. King*, 651 N.E.2d 127, 127 (Ill. 1995); *Lutz v. Fortune*, 758 N.E.2d 77, 77

years in which the documents were first effective covered a wide range, from 1868 to 1979, with a median of 1935; the bottom quartile was 1920

(Ind. Ct. App. 2001); *In re Estate of Nicolaus*, 366 N.W.2d at 564; *Scribner v. Berry*, 489 A.2d 8, 8 (Me. 1985); *Ziehl v. Maine Nat'l Bank*, 383 A.2d 1364, 1366 (Me. 1978); *Silsbee*, 187 A.2d at 396; *Bird Anderson v. BNY Mellon, N.A.*, 974 N.E.2d 21, 21 (Mass. 2012); *Fithian v. Papalini (In re Estates of Leggett)*, 378 N.W.2d 467, 467 (Mich. 1985); *Veneklasen v. Salvation Army (In re Estate of Graham)*, 150 N.W.2d 816, 817 (Mich. 1967); *Melek v. Curators of Univ. of Mo.*, 250 S.W. 614, 615 (Mo. Ct. App. 1923); *Miller v. First Nat'l Bank & Tr. Co. (In re Trust of Miller)*, 323 P.2d 885, 885 (Mont. 1958); *Amoskeag Tr. Co. v. Preston*, 222 A.2d 158, 159 (N.H. 1966); *In re Thompson*, 250 A.2d 393, 394 (N.J. 1969); *Dulfon v. Keasbey*, 162 A. 102, 102 (N.J. Ch. 1932); *Hutton v. Ribsamen (In re Washburn's Will)*, 264 N.Y.S.2d 33, 33 (App. Div. 1965); *In re Leask*, 90 N.E. 652, 652 (N.Y. 1910); *Wachovia Bank & Tr. Co. v. Andrews*, 142 S.E.2d 182, 182 (N.C. 1965); *Bradford v. Johnson*, 75 S.E.2d 632, 632 (N.C. 1953); *Moore v. McAlester*, 428 P.2d 266, 266 (Okla. 1967); *Estate of Tafel*, 296 A.2d 797, 797 (Pa. 1972); *In re Estate of Holton*, 159 A.2d 883, 883 (Pa. 1960); *In re Puterbaugh's Estate*, 104 A. 601, 601 (Pa. 1918); *R.I. Hosp. Tr. Co. v. Hooker*, 219 A.2d 772, 772 (R.I. 1966); *Bowles v. Bradley*, 461 S.E.2d 811, 811 (S.C. 1995); *Pate v. Ford*, 360 S.E.2d 145, 146 (S.C. Ct. App. 1987), *rev'd*, 376 S.E.2d 775 (S.C. 1989); *Calhoun v. Campbell*, 763 S.W.2d 744, 744 (Tenn. 1988); *Ortega v. First Republicbank Fort Worth, N.A.*, 792 S.W.2d 452, 452 (Tex. 1990); *Penland v. Agnich*, 940 S.W.2d 324, 324 (Tex. App. 1997); *In re Smith's Will*, 112 A. 897, 897 (Vt. 1921); *Langhorne v. Langhorne*, 186 S.E.2d 50, 50 (Va. 1972); *In re Estate of Underwood*, 56 Va. Cir. at 393; *In re Trusts of Sollid*, 647 P.2d at 1034; *Sec. Nat'l Bank & Tr. Co. v. Willim*, 153 S.E.2d 114, 114 (W. Va. 1967), *overruled by* *Wheeling Dollar Sav. & Tr. Co. v. Hanes*, 237 S.E.2d 499 (W. Va. 1977); *Young v. First Wis. Tr. Co. (In re Will of Mitchell)*, 184 N.W.2d 853, 853 (Wis. 1971). For cases that included a will, see *Casper v. Helvie*, 146 N.E. 123, 123 (Ind. Ct. App. 1925); *Cook v. Underwood*, 228 N.W. 629, 630 (Iowa 1930); *In re Woodcock*, 68 A. 821, 821 (Me. 1907); *Posey v. Webb*, 528 So. 2d 833, 833 (Miss. 1988); *Everett v. Dockery*, 33 So. 2d 313, 314 (Miss. 1948); *Kindred*, 209 S.W.2d at 914; *Graves v. Graves*, 163 S.W.2d 544, 546 (Mo. 1942); *Peele v. Finch*, 200 S.E.2d 635, 635 (N.C. 1973); *Tootle v. Tootle*, 490 N.E.2d 878, 879 (Ohio 1986); *Alley v. Strickland*, 302 S.E.2d 866, 866 (S.C. 1983) (per curiam); *Turner v. Turner*, 196 S.E.2d 498, 499 (S.C. 1973); *Bagwell v. Alexander*, 329 S.E.2d 771, 771 (S.C. Ct. App. 1985); *Cochran v. Cochran*, 95 S.W. 731, 731 (Tex. Civ. App. 1906); *Trueax v. Black*, 335 P.2d 52, 52 (Wash. 1959). For cases that included an *inter vivos* trust, see *Whitfield*, 334 So. 2d at 876; *Conn. Bank & Tr. Co. v. Bovey*, 292 A.2d 899, 900 (Conn. 1972); *Sennot v. Collet-Oser*, 344 N.E.2d 783, 784 (Ill. App. Ct. 1976); *In re George Parsons 1907 Trust*, 170 A.3d 215, 216 (Me. 2017); *In re Maloney Trust*, 377 N.W.2d 791, 791 (Mich. 1985); *Ohio Citizens Bank v. Mills*, 543 N.E.2d 1206, 1206 (Ohio 1986); *In re Trust of Fownes*, 220 A.2d at 8; *Cutrer v. Cutrer*, 345 S.W.2d 513, 518 (Tex. 1961); *Makoff*, 528 P.2d at 798; *McGehee v. Edwards* 597, S.E.2d 99, 100 (Va. 2004); *In re Trusts of Sollid*, 647 P.2d at 1034; *Hanes*, 237 S.E.2d at 499. For cases that included a deed, see *Brown v. Johnson*, 97 S.W.3d 924, 924 (Ark. Ct. App. 2003); *Skoog v. Fredell*, 332 N.W.2d 333, 333 (Iowa 1983); *Ahlemeyer v. Miller*, 131 A. 54, 55 (N.J. 1925); *Allen v. Allen*, 132 S.E.2d 909, 909 (N.C. 1963) (per curiam).

and earlier, and the top quartile was 1945 or later.¹¹⁰ The gap between the effective date of the instrument and the date of decision was very wide, with a range of five to one hundred ten years and a median of thirty-six years; the bottom quartile was nineteen years or fewer, and the top quartile was forty-nine years or more.¹¹¹ The interests in dispute in 85% of the cases were either the principal (64%) or the remainder (21%), with disputes over an income interest in 15% of the cases.¹¹² The remaining two cases involved a defeasible fee and a sale restraint.¹¹³

How did courts using the first two approaches interpret this terminology? Not surprisingly, results varied. The Arkansas Supreme Court declared that the phrase “without issue” was a technical term similar to “heirs of the body,” neither of which included adoptees.¹¹⁴ “Lawful issue,” which the testator equated to the children of his sons, opined a New Jersey court, “meant his sons’ children begot, as in Genesis; those of his loins, the stock

110. See the cases in Appendices A–D, of which 25% of the cases had documents first effective before 1920, 50% effective before 1935, and 75% effective before 1945.

111. See the cases in Appendices A–D.

112. For cases that involved the principal, see *Zimmerman*, 348 So. 2d at 1362; *Peck*, 96 So. 2d at 169; *Bilsky*, 455 S.W.2d at 901–02; *In re Estate of Heard*, 319 P.2d at 639–40; *In re Pierce’s Estate*, 196 P.2d at 3; *Chadwick*, 585 A.2d at 1190; *Bovey*, 292 A.2d at 900; *Parker*, 255 A.2d at 852; *Lewis*, 389 So. 2d at 242; *Nunnally*, 252 S.E.2d at 468; *King*, 651 N.E.2d at 128; *Sennot*, 344 N.E.2d at 784–85; *Lutz*, 758 N.E.2d at 79; *In re Estate of Nicolaus*, 366 N.W.2d at 564; *In re George Parsons 1907 Trust*, 170 A.3d at 217; *Scribner*, 489 A.2d at 8; *Ziehl*, 383 A.2d at 1366; *Silsbee*, 187 A.2d at 397–98; *In re Estates of Leggett*, 378 N.W.2d at 467; *In re Estate of Graham*, 150 N.W.2d at 817; *Melek*, 250 S.W. at 615; *In re Trust of Miller*, 323 P.2d at 886; *Preston*, 222 A.2d at 161; *In re Thompson*, 250 A.2d at 394; *Ahlemeyer*, 131 A. at 55; *Dulfon*, 162 A. at 103; *In re Washburn’s Will*, 264 N.Y.S.2d at 33, 36–37; *In re Leask*, 90 N.E. at 652; *Bradford*, 75 S.E.2d at 632; *Mills*, 543 N.E.2d at 1207; *Moore*, 428 P.2d at 267–68; *Estate of Tafel*, 296 A.2d at 798; *In re Trust of Fownes*, 220 A.2d at 9; *In re Trust of Pennington*, 219 A.2d 353, 355 (Pa. 1966); *In re Estate of Holton*, 159 A.2d at 885; *In re Puterbaugh’s Estate*, 104 A. at 601; *Bowles*, 461 S.E.2d at 812; *Pate*, 360 S.E.2d at 149; *Calhoun*, 763 S.W.2d at 745–56; *Cutrer*, 345 S.W.2d at 514–15; *Penland*, 940 S.W.2d at 325; *Langhorne*, 186 S.E.2d at 51; *In re Smith’s Will*, 112 A. at 897; *Hanes*, 237 S.E.2d at 501; *Willim*, 153 S.E.2d at 115–16; *In re Mitchell’s Will*, 184 N.W.2d at 855. For cases involving remainders, see *Brown*, 97 S.W.3d at 925; *Casper*, 146 N.E. at 123; *Skoog*, 332 N.W.2d at 333; *Cook*, 228 N.W. at 630; *In re Woodcock*, 68 A. at 821; *Posey*, 528 So. 2d at 833; *Everett*, 33 So. 2d at 315; *Graves*, 163 S.W.2d at 546; *Peele*, 200 S.E.2d at 635; *Allen*, 132 S.E.2d at 909; *Tootle*, 490 N.E.2d at 883; *Alley*, 302 S.E.2d at 866; *Turner*, 196 S.E.2d at 499; *Bagwell*, 329 S.E.2d at 771; *Cochran*, 95 S.W. at 733; *Trueax*, 335 P.2d at 52–53. For cases involving income interest, see *Whitfield*, 334 So. 2d at 877; *Lewis*, 389 So. 2d at 240; *King*, 651 N.E.2d at 128; *In re George Parsons 1907 Trust*, 170 A.3d at 216; *Bird Anderson*, 974 N.E.2d at 24; *In re Maloney Trust*, 377 N.W.2d at 792; *Andrews*, 142 S.E.2d at 183; *Hooker*, 219 A.2d at 773–74; *Ortega*, 792 S.W.2d at 453; *Makoff*, 528 P.2d at 798; *In re Trusts of Sollid*, 647 P.2d at 1034.

113. See *Kindred*, 209 S.W.2d at 912; *In re Estate of Underwood*, 56 Va. Cir. at 393.

114. *Bilsky*, 455 S.W.2d at 903; *accord* *Union Planters Nat’l Bank v. Corbitt*, 474 S.W.2d 139, 142 (Tenn. Ct. App. 1971).

of which he was the ancestor; and not children artificially created by law.”¹¹⁵ Similarly, the Montana Supreme Court declared that, “The word ‘issue’ in its commonly accepted sense means ‘issue of the body, offspring, progeny, natural children, physically born or begotten by the person named as parent.’”¹¹⁶ Some courts stated that “issue” meant the same as “descendants,” thus excluding adoptees,¹¹⁷ others found the two different.¹¹⁸ A Texas court held that by changing the class term in his will from “descendants” to “issue,” the testator “expressed an intent that only blood relatives . . . be included in the class of remaindermen.”¹¹⁹ A remainder to “children” might exclude adoptees,¹²⁰ or might be presumed to include them.¹²¹ Using more specific language, such as “children . . . born to” the settlor’s son¹²² or a daughter’s heirs “by” a particular person¹²³ meant adopted children were excluded. As an Alabama court observed, “Had the trustor intended that adopted children be included in his irrevocable trust it is passing strange that he would specifically use the words ‘born to my son.’ It seems obvious he intended to favor his blood descendants with

115. *Dulfon*, 162 A. at 105.

116. *In re Trust of Miller*, 323 P.2d at 886 (quoting *In re Kay’s Estate*, 260 P.2d 291, 294 (Cal. App. Dep’t Super. Ct. 1953)).

117. See, e.g., *Schapira v. Conn. Bank & Tr. Co.*, 528 A.2d 367, 370 (Conn. 1987) (upholding trial court determination that “the term ‘issue’ primarily signifies descendants of the body, and that in the absence of a contrary intent of the settlor, adopted children are presumed to be excluded”); *Everett*, 33 So. 2d at 315 (“[T]he term ‘issue’ in common parlance and as used generally by the community signifies lineal descendants,—and certainly adopted children are not lineal descendants.”).

118. See, e.g., *In re Trust of Fownes*, 220 A.2d 8, 10 (Pa. 1966) (“This case under the language of this trust [to the issue per stirpes] is clearly distinguishable from Collins’ Estate where the crucial word involved was ‘descendants.’” (citations omitted)); *Bowles v. Bradley*, 461 S.E.2d 811, 813–14 (S.C. 1995) (“Since long before 1959, ‘issue’ has been held to embrace all lineal descendants of a settlor.”).

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

120. *Conn. Bank & Tr. Co. v. Bovey*, 292 A.2d 899, 902 (Conn. 1972) (“[T]he word ‘children,’ in its primary meaning connotes blood relationship and except where the testator or settlor is the adopting parent, will not be construed as embracing an adopted child unless a clear intent appears that the word be given a more extended meaning.” (quoting *Parker v. Mullen*, 255 A.2d 851, 853 (Conn. 1969))).

121. *Conn. Nat’l Bank & Tr. Co. v. Chadwick*, 585 A.2d 1189, 1196 (Conn. 1991) (“In view of this type of adoption statute, words such as ‘children’ and ‘grandchildren’ are more likely used to include adopted children than words which distinctly and emphatically connote lineal blood relationship, such as ‘issue’ or ‘descendants.’”).

122. E.g., *Whitfield v. Matthews*, 334 So. 2d 876, 877 (Ala. 1976).

123. E.g., *Brown v. Johnson*, 97 S.W.3d 924, 927 (Ark. Ct. App. 2003).

the fruit of his bounty.”¹²⁴ Even after declaring that adopted persons were generally included in class terms,¹²⁵ the West Virginia Supreme Court of Appeals found the language employed by a testator, “a child or children . . . born of her body,” to be clear and unambiguous in requiring a biological origin and thus excluding adoptees.¹²⁶ Similarly, limiting a remainder to great-grandchildren “born after my death” meant that adoptees were not beneficiaries of the trust.¹²⁷

A court might rely on “common understanding of human nature and an average experience with it”¹²⁸ in interpreting the word “issue” in a trust. One court stated:

A normal mother would rarely be reconciled—much less desire—that her son through the adoption of a child stranger to her blood and possessing a living natural father should thereby effect a diversion from her own daughter and foreseeably from her own sister of one-half of this trust income upon the son’s death and preclude her blood kin from any derivative participation in one-half of the trust corpus.¹²⁹

Several statutes drew a distinction between a trust or deed that provided for “issue” rather than “bodily issue,” or “heirs” rather than “bodily heirs.” For example, a 1941 Wisconsin statute¹³⁰ defined “issue” as including adoptees as descendants of the ancestor, but specifically excluded adoptees from “heirs of the body” until the law was changed in 1945.¹³¹ Missouri law provided that the adopted child became the child of its adopting parents for every purpose, with one exception: when the inheritance was limited to “heirs of the body” of such child or parents by adoption.¹³² Ohio law was the same.¹³³ Courts in Iowa, Mississippi, Oklahoma, West Virginia, and Washington made similar distinctions. Although a 1981 Iowa case, *Elliott v. Hiddleson*,¹³⁴ had abolished the stranger to the adoption rule absent contrary intent, a 1935 deed specifying that the remainder should go to “the heirs of the granddaughter’s body” was sufficient to show such contrary

124. *Whitfield*, 334 So. 2d at 877.

125. *Wheeling Dollar Sav. & Tr. Co. v. Hanes*, 237 S.E.2d 499, 501 (W. Va. 1977).

126. *Reedy v. Propst*, 288 S.E.2d 526, 530 (W. Va. 1982).

127. *Ortega v. First Republicbank Fort Worth, N.A.*, 792 S.W.2d 452, 454 (Tex. 1990) (citing *Martin v. Neel*, 379 S.W.2d 422, 423 (Tex. Civ. App. 1964)).

128. *Fiduciary Tr. Co. v. Silsbee*, 187 A.2d 396, 400 (Me. 1963).

129. *Id.*

130. WIS. STAT. § 322.07 (1941) (amended 1945).

131. *Smith v. Reinhart (In re Trusts of Adler)*, 140 N.W.2d 119, 223 (Wis. 1966).

132. MO. REV. STAT. § 1101 (1917) (current version at MO. REV. STAT. § 453.110 (2019)); *St. Louis Union Tr. Co. v. Hill*, 76 S.W.2d 685, 688 (Mo. 1934).

133. See OHIO GEN. CODE § 8030 (1921) (current version at OHIO REV. STAT. ANN. § 3107.15 (West 2019)); *Tootle v. Tootle*, 490 N.E.2d 878, 879 (Ohio 1986)).

134. 303 N.W.2d 140, 144–45 (Iowa 1981).

intent, and adoptees were not included.¹³⁵ The Supreme Court of Mississippi found the phrase “heirs of the body” to be unambiguous: “It is quite plain that heirs of the body literally excludes adopted children,” and thus an adopted child was not a remainder person in a 1950 will.¹³⁶ Oklahoma adopted the Uniform Adoption Act in 1957,¹³⁷ which provided that from the date of the adoption decree, the adopted child inherits from and through the adoptive parent, but still the Supreme Court of Oklahoma held that a testamentary trust with a remainder to the issue of his daughter’s body excluded an adopted child.¹³⁸ In West Virginia, in a will executed in 1967, real property vested in the testator’s daughter “upon the condition that a child or children are born of her body;” the court found this language “clear and unambiguous” to “indicate an element of biological origin absent from the more general terms ‘issue,’ ‘descendants,’ ‘child,’ ‘heirs,’ or ‘natural children.’”¹³⁹ A comment in the 1940 *Restatement of Property* was in accord with this view:

Adopted child as a claimant. An adopted child of the designated ancestor is not an heir of his body. Thus, unless a contrary intent of the conveyer is found from additional language or circumstances, an adopted child is not included in a limitation to the “heirs of the body” of a designated person.¹⁴⁰

Confusion continued after the common law presumption was reversed, and adoptees were included in class terms such as “grandchildren,” “issue” or “heirs” unless a contrary intent was found. The law was changing rapidly. In 1936, only a handful of states allowed adoptees to inherit through the adopter: California¹⁴¹ and Hawaii¹⁴² by case law, Minnesota by statute,¹⁴³

135. *Skoog v. Fredell*, 332 N.W.2d 333, 335 (Iowa 1983).

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

137. OKLA. STAT. tit. 10, § 60.16 (West 1996) (current version at OKLA. STAT. tit. 10, § 7505-6.5 (West 2019)); *Moore v. McAlester*, 428 P.2d 266, 269 (Okla. 1967).

138. *Moore*, 428 P.2d at 271.

139. *Reedy v. Propst*, 288 S.E.2d 526, 530 (W. Va. 1982).

140. RESTATEMENT (FIRST) OF PROP. § 306 cmt. g (AM. LAW INST. 1940).

141. In a will executed in 1903, decedent created a testamentary trust for her niece for life, then to her niece’s children. Decedent died in 1905; her niece adopted three persons in 1924 and died in 1954 survived by them. Bd. of Tr. of Leland Stanford Junior Univ. v. Reynolds (*In re Estate of Stanford*), 315 P.2d 681, 682 (Cal. 1957).

142. An 1896 irrevocable deed of trust paid income to children for life, then to the lawful issue of the children aforesaid then surviving. In 1914, one of the trustor’s four children adopted an infant. See generally *O’Brien v. Walker*, 35 Haw. 104 (1939).

143. Note, *Legislation and Decisions on Inheritance Rights of Adopted Children*, 22 IOWA L. REV. 145, 147 n.12 (1936). The Note also lists Connecticut, but that is clearly in error, given cases such as *Connecticut National Bank & Trust Co. v. Chadwick* and *Connecticut*

thus including adoptees in class terms such as “children” or “issue.” By 1959, that number had grown to twenty-three states that presumed that adoptees were included in such terms because they were able to inherit from collateral relatives,¹⁴⁴ and by 1962, there were as many as thirty-four such jurisdictions.¹⁴⁵ What was sufficient for a contrary intent to now *exclude* an adoptee from a class term in these states? A Minnesota court held that a settlor creating a life estate followed by a remainder in the issue of the life tenant’s body was *not* sufficient evidence to exclude adoptees.¹⁴⁶ An Illinois court found the opposite: a testator who made gifts over to the “lawful issue” of his children clearly intended to include adoptees by eschewing the court’s “road map to anyone desiring to exclude adopted children from his will.”¹⁴⁷ The court defined the class as the heirs of his body, or to children of the blood of his children, or to children born to his children.¹⁴⁸ Citing the 1940 *Restatement of Property*, the Iowa Supreme Court agreed: a remainder in the “heirs of her body” manifested a blood relationship between the grantor and the holder of the estate, and thus indicated a contrary intent.¹⁴⁹

While most courts held that specifying that a child or heir must be *born* to a particular person or after a specified date was contrary intent,¹⁵⁰ that was not enough to reverse the presumption for a Michigan court. An irrevocable *inter vivos* trust that provided for each of the settlor’s grandchildren living on February 1, 1975, plus additional grandchildren born after February 1, 1975, was held to include adopted children born before 1975

Bank & Trust Co. v. Coffin applying the common law rule well beyond 1936. *See generally Conn. Nat’l Bank & Tr. Co. v. Chadwick*, 585 A.2d 1189 (Conn. 1991); *Conn. Bank & Tr. Co. v. Coffin*, 569 A.2d 531 (Conn. 1990).

144. *See* Marylin Klosty, Note, *Property Rights as Affected by Adoption*, 25 BROOK. L. REV. 231, 242–46 (1959).

145. Edward C. Halbach, Jr., *The Rights of Adopted Children Under Class Gifts*, 50 IOWA L. REV. 971, 974 n.18 (1965) (citing SECOND REPORT OF THE TEMPORARY STATE COMMISSION ON THE MODERNIZATION, REVISION, AND SIMPLIFICATION OF THE LAW OF ESTATES 154–55 (1963)). Another author asserts only twenty-six jurisdictions allowed adoptees to succeed from a collateral relative at this time. Emilio S. Binavince, *Adoption and the Law of Descent and Distribution: A Comparative Study and a Proposal for Model Legislation*, 51 CORNELL L.Q. 152, 174 n.97 (1966).

146. *See, e.g., In re Trusts Created by Agreement with Harrington*, 250 N.W.2d 163, 167 (Minn. 1977) (“[I]ssue of her body . . .”).

147. *Chi. Title & Tr. Co. v. Vance*, 529 N.E.2d 1134, 1137 (Ill. 1988).

148. *Id.*

149. *Skoog v. Fredell*, 332 N.W.2d 333, 335 (Iowa 1983) (citing RESTATEMENT (FIRST) OF PROP. § 306 cmt. g (AM. LAW INST. 1940)).

150. *See, e.g., Ortega v. First Republicbank Fort Worth, N.A.*, 792 S.W.2d 452, 456 (Tex. 1990), *aff’g sub nom Martin v. Neel*, 379 S.W.2d 422 (Tex. 1964). “The use of the words ‘great-grandchildren who may be born after my death’ renders it most improbable that he was referring to children born to strangers.” *Martin*, 379 S.W.2d at 424.

but adopted thereafter.¹⁵¹ The terms “born” and “date of birth,” the court explained, “appear to us to be convenient ways of explaining the mechanics of the administration of the trust . . . [rather than] an intent to exclude adopted grandchildren.”¹⁵² Thus, while specifying that someone must be an “heir of the body” or “born to” a particular person was once seen as sufficient intent to limit the class to those related by blood to the settlor or testator, once the presumption was reversed, these same terms were often seen in a very different light.

IV. FOUR CONSEQUENCES IF WE FOLLOW THE LEAD OF THE ADOPTION CASES FOR ART CHILDREN

We are now at a point where trustees are beginning to ask courts for advice on whether ART children are included in class terminology. So far, just two cases have been published on the issue. The 2005 New York case, *In re Doe*,¹⁵³ tackled the issue squarely. The settlor had created an *inter vivos* trust for his daughter’s descendants that expressly provided that “adoptions shall not be recognized.”¹⁵⁴ The daughter, K. Doe, had used a donor egg, her husband’s sperm, and a gestational carrier in California to become the parent of twins who were not biologically related to her or to the settlor.¹⁵⁵ The trustee asked the court for instructions: are the twins beneficiaries of the trust?¹⁵⁶ The court concluded that they were, for two reasons. First, the court found that the settlor’s “no adoption” language was not intended to exclude all those not related to him by blood, since he included spouses of certain relatives in the trust.¹⁵⁷ Second, under California law, K. Doe and her husband had received a judgment of parental relationship; they had not formally adopted the twins.¹⁵⁸ In the second case, decided the year before *Doe*, the Virginia Supreme Court ducked the issue. Trustees of eleven *inter vivos* trusts created in 1929, 1930, and 1931 for the settlor’s descendants had petitioned the lower court to determine the beneficiaries; one beneficiary filed an answer asking the court to decide if those conceived through assisted reproduction were included in the class, along with those

151. *In re Maloney Trust*, 377 N.W.2d 791, 792 n.4 (Mich. 1985).

152. *Id.* at 794.

153. 793 N.Y.S.2d 878 (N.Y. Sur. Ct. 2005).

154. *Id.* at 879–80.

155. *Id.*

156. *See id.*

157. *Id.* at 880.

158. *Id.* at 881.

who were adopted.¹⁵⁹ The Supreme Court defined the issue on appeal as concerning only the adopted persons and did not consider ART children at all.¹⁶⁰

In the next decade, these questions from trustees and beneficiaries are likely to become more frequent, and courts may not have the option of avoiding them. Will we go down the same path as courts did in the 1950s, finely parsing the language, finding different results if a settlor uses “issue” rather than “descendants,” or guessing what the settlor’s intent might have been? Or will we adopt a better strategy to deal with these cases now, before they become more common? If we choose the first strategy and follow the reasoning of the adoption cases, as the New York court did in *Doe*, we face at least four unsettling consequences.

A. A Presumption that ART Children Must Be Genetically Related to the Settlor Will Lead to an Increase in Demands for Genetic Testing, Prompting Privacy Concerns

Many states, in interpreting a will, trust, or deed executed decades ago, apply the law when the document was executed or became irrevocable and thus employ the common law presumption that adoptees are not included in class gifts. Just since 2000 there have been cases in Indiana,¹⁶¹ Massachusetts,¹⁶² Maine,¹⁶³ and Virginia¹⁶⁴ interpreting trusts created between 1907 and 1942 using the presumption. As discussed earlier, courts assumed that the common law presumption embodied a preference for blood relatives, as did words such as “issue,” “descendants,” and the like.¹⁶⁵

If the issue is raised, then potential beneficiaries might insist on all class members—not just ART children—submit to genetic testing. If genetic testing is ordered, scholars have raised a number of privacy concerns.

Direct-to-consumer (DTC) genetic testing requires a person to submit a cheek swab or other tissue sample to a company, such as Ancestry.com or

159. *McGehee v. Edwards*, 597 S.E.2d 99, 100–01 (Va. 2004).

160. *Id.* at 102.

161. *E.g.*, *Lutz v. Fortune*, 758 N.E.2d 77, 79 (Ind. Ct. App. 2001) (interpreting “issue” in a 1942 testamentary trust).

162. *E.g.*, *Bird Anderson v. BNY Mellon, N.A.*, 974 N.E.2d 21, 26–27 (Mass. 2012) (applying retroactively a 1958 law reversing the common law presumption violated substantive due process).

163. *E.g.*, *In re George Parsons 1907 Trust*, 170 A.3d 215, 216 (Me. 2017) (interpreting “issue” in a 1907 *inter vivos* trust).

164. *McGehee v. Edwards*, 597 S.E.2d 99, 100 (Va. 2004) (interpreting “direct lineal descendants” in a 1929 *inter vivos* trust).

165. *See supra* notes 61–68 and accompanying text.

23andMe.¹⁶⁶ The resulting report allows the identification of the person's relatives in the vast genetic database, relatives who have *not* consented to having their identities revealed.¹⁶⁷ In addition, some DTC genetic providers allow or encourage submission of a third-party's samples.¹⁶⁸ For example, the DTC company Bio-Gene DNA advises, "If you choose to test someone without their knowledge, there are samples that provide a better opportunity for obtaining a usable genetic profile than others. Much of our testing is done using samples such as hair, fingernail clippings, ear wax swabs, a toothbrush, cigarette butts, and chewing gum."¹⁶⁹ DNA Solutions, another DTC company, similarly advises consumers on how to take a secret DNA test, with success rates given for each of the listed samples, such as nail clippings, nasal discharge, and a tooth brush.¹⁷⁰ Billionaire Kirk Kerkorian reportedly used dental floss obtained from Hollywood producer Steve Bing's trash to establish that Bing, not Kerkorian, was the father of a child borne by Kerkorian's wife Lisa Bonder Kerkorian.¹⁷¹ Companies that claim to require consent before testing DNA may not, in fact, do so.¹⁷² A 2009 article in which a reporter, Michael Reilly, sent his colleague's DNA to three

166. *How Does AncestryDNA Work?*, ANCESTRYDNA, <https://www.ancestry.com/dna/lp/how-does-ancestrydna-work> [<https://perma.cc/FA45-MCEQ>]; *How It Works*, 23ANDME, <https://www.23andme.com/howitworks> [<https://perma.cc/HYR4-ANW3>].

167. "Siblings share around half their DNA. Half siblings share a quarter; and first cousins, on average, share 12.5%." Amy Dockser Marcus, *DNA Testing Forces Wrenching Choices for Family Historians*, WALL ST. J., July 20, 2019, at A1.

168. James W. Hazel & Christopher Slobogin, *Who Knows What, and When?: A Survey of the Privacy Policies Proffered by U.S. Direct-to-Consumer Genetic Testing Companies*, 28 CORNELL J.L. & PUB. POL'Y 35, 64 (2018).

169. *Alternative/Non-Standard DNA Samples*, JOURNEY GENETIC TESTING, <https://dna-paternity-testing.com/alternative-samples> [<https://perma.cc/F2AA-W5RH>].

170. *Secret Paternity Test*, DNA SOLUTIONS, <https://www.dnanow.com/secret-dna-test.htm> [<https://perma.cc/T4QF-WK4V>].

171. Harvey Day, *Daughter of Casino Billionaire Kirk Kerkorian Whose Mother Faked a DNA Test Showing He Was Her Real Father in Messy Paternity Battle Will Get \$8.5m From His Will*, DAILY MAIL (Aug. 23, 2016), <https://www.dailymail.co.uk/news/article-3754264/Daughter-casino-billionaire-Kirk-Kerkorian-took-fake-DNA-test-hide-fact-wasn-t-real-father-8-5million-will.html> [<https://perma.cc/LSP9-VG88>]; Robert W. Welkos, *Billionaire Takes New Legal Tack Regarding Child*, L.A. TIMES (Aug. 9, 2007, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2007-aug-09-me-kerkorian9-story.html> [<https://perma.cc/QPV5-ZVTV>].

172. See Michael Reilly & Peter Aldhous, *Special Investigation: How My Genome Was Hacked*, NEW SCIENTIST (Mar. 28, 2009), <https://www.newscientist.com/article/mg20127013-800-special-investigation-how-my-genome-was-hacked> [<https://perma.cc/KWQ8-DZZF>].

companies found that the three DTC genetic testers did not check Reilly's assertion that the DNA was his own.¹⁷³

Federal laws are no help on this front: the Genetic Information Nondiscrimination Act of 2008 (GINA)¹⁷⁴ is concerned with employers and health insurers discriminating by using these genetic tests,¹⁷⁵ and the Health Insurance Portability and Accountability Act (HIPAA)¹⁷⁶ defines "covered entities"¹⁷⁷ in a way that excludes a trust beneficiary.¹⁷⁸ Many state laws on surreptitious DNA testing are inadequate as well. Georgia and New York, for example, have too narrow a definition of genetic testing for our purposes, covering only health-related testing.¹⁷⁹ Colorado, like Georgia, declares that "[g]enetic information is the unique property of the individual to whom the information pertains," but then specifies that "[t]he intent of this section is to prevent information derived from genetic testing from being used to deny access to group disability insurance or long-term care insurance coverage."¹⁸⁰ Wisconsin bans employers, but not others, from nonconsented genetic testing.¹⁸¹ Alaska's statute has been described as "probably the most comprehensive,"¹⁸² prohibiting a person from collecting a DNA sample, performing a DNA analysis, retaining the sample, or disclosing the results, "unless the person has first obtained the informed and written consent of the person,"¹⁸³ but then states that the consent requirement does not apply to DNA samples collected or analyzed for the purpose of determining paternity.¹⁸⁴ Unless one is in a state like New Hampshire with a comprehensive ban on surreptitious genetic testing,¹⁸⁵

173. *Id.*

174. 42 U.S.C. § 2000ff (2012).

175. *Id.* § 2000ff-1.

176. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (1996).

177. "The HIPAA Privacy Rule . . . applies to health plans, health care clearinghouses, and those health care providers that conduct certain health care transactions electronically." *The HIPAA Privacy Rule*, HHS, <https://www.hhs.gov/hipaa/for-professionals/privacy/index.html> [<https://perma.cc/7T32-LX6M>]; see also 45 C.F.R. § 160.102 (2018).

178. See Hazel & Slobogin, *supra* note 168, at 40.

179. GA. CODE ANN. § 33-54-3 (2019); N.Y. EXEC. LAW § 292 (LexisNexis 2019).

180. COLO. REV. STAT. § 10-3-1104.7(1)(a), (d) (2019).

181. WIS. STAT. § 111.372 (2019).

182. Elizabeth E. Joh, *DNA Theft: Recognizing the Crime of Nonconsensual Genetic Collection and Testing*, 91 B.U. L. REV. 665, 687 (2011).

183. ALASKA STAT. § 18.13.010(a)(1) (2019).

184. *Id.* § 18.13.010(b)(3). The Alaska statute could provide a remedy if the results are used in a way forbidden by Alaska law. *Id.* § 18.13.010(a)(1). For example, Michael Cole consented to a DNA test and to nine projects at Family Tree DNA but alleged he had not consented to having his full DNA test results publicly disclosed on another website; he sued and survived a motion to dismiss. *Cole v. Gene by Gene, Ltd.*, No. 1:14-cv-00004-SLG, 2019 WL 2571244, at *1 (D. Alaska June 21, 2019).

185. See N.H. REV. STAT. ANN. § 141-H:1 to -H:6 (2018).

a trust beneficiary that suspected that her sibling or cousin was not biologically related to the settlor could send in her own cheek swab for comparison, plus a sample secretly obtained from her relative's hairbrush or Q-tip. If her suspicions are confirmed, the beneficiary could then move for a court order that the relative prove a biological connection to the settlor.¹⁸⁶

Even those who have consented to DNA testing have reported the disruptions that have ensued when they learned that their ancestry was different from family lore. When a woman discovered through a DNA test that her father was not related biologically to his parents, "I really lost all my identity . . . I felt adrift. I didn't know who I was—you know, who I really was."¹⁸⁷ Another who discovered several half siblings on DNA websites reported being angry and confused; his half sibling said, each time she found a new relative, "You just relive this nightmare, every single time."¹⁸⁸ The stakes go up considerably when the results of the DNA can exclude the person from the trust. Some of the trusts in the case study have generous assets: one *inter vivos* trust was worth \$2 million in 1966, or \$15.5 million today;¹⁸⁹ a testamentary trust had \$4.6 million in principal in 1965,¹⁹⁰ or \$37,398,000 in 2019.¹⁹¹

The incentives for beneficiaries to demand DNA testing, and the possibility of surreptitious testing, raise serious privacy issues. Some scholars have argued that anonymous donors have a privacy right in keeping their identity confidential, which can implicate the fundamental right to procreate.¹⁹²

186. Both DNA Solutions and Bio-Gene DNA estimate the success rate from hair samples at 80%; the Q-tip sample was estimated at 80% by DNA Solutions if two Q-tips are submitted, and 65% by Bio-Gene DNA. *Alternative/Non-Standard DNA Samples*, *supra* note 169; *Secret Paternity Test*, *supra* note 170. Bio-Gene DNA lists the success rate for a cheek swab as 99.99%. *Secret Paternity Test*, *supra* note 170.

187. Libby Copeland, *She Thought She Was Irish—Until a DNA Test Opened a 100-Year-Old Mystery*, CHI. TRIB. (July 29, 2017, 4:13 PM), <https://www.chicagotribune.com/news/environment/ct-dna-test-mystery-family-tree-20170729-story.html> [<https://perma.cc/JD8P-35K7>].

188. Zaveri, *supra* note 42.

189. *In re Trust of Fownes*, 220 A.2d 8, 9 n.2 (Pa. 1966).

190. *Sec. Nat'l Bank & Tr. Co. v. Willim*, 153 S.E.2d 114, 116 (1967), *overruled by* *Wheeling Dollar Sav. & Tr. Co. v. Hanes*, 237 S.E.2d 499 (W. Va. 1977).

191. *See Inflation Calculator*, CPI INFLATION CALCULATOR, <https://www.in2013dollars.com/us/inflation/1965?endYear=2019&amount=4600000> [<https://perma.cc/38GQ-BXTP>].

192. *See, e.g.,* Mary Patricia Byrn & Rebecca Ireland, *Anonymously Provided Sperm and the Constitution*, 23 COLUM. J. GENDER & L. 1, 6 (2012); Abigail Hoglund-Shen, *Direct-*

Because nonconsenting relatives can be traced through these DNA tests,¹⁹³ greater protections may be needed to protect those relatives.¹⁹⁴ DTC sites have recently been used to identify more than a dozen suspects in murder and rape investigations, even though the suspects themselves had not placed their DNA on the websites.¹⁹⁵ The suspected Golden State Killer, for example, was identified by police uploading data from crime scene DNA to an online database, GEDMatch, with almost one million DNA profiles, and finding several matches that were the equivalent of third cousins.¹⁹⁶ Police then used other information, such as the physical description of the attacker, age, and location, to gather abandoned material from the suspect for further DNA analysis, to compare with the crime scene DNA sample.¹⁹⁷ One study estimates that “more than 30% of individuals in the forensic databases can also be linked to a sibling, parent, or child in a consumer database.”¹⁹⁸

Few DNA companies or laws protect these interests. A 2017 survey of DTC genetic test policies found that 71% of the companies—thirty-three of fifty-five—stated that the consumer’s genetic information could be used internally by the company for purposes other than providing results to the consumer.¹⁹⁹ Regarding ownership of the genetic material or the resulting data, 73% of DTC companies had no express policy in 2017, while 18%

to-Consumer Genetic Testing, Gamete Donation, and the Law, 55 FAM. CT. REV. 472, 476–77 (2017).

193. This was true as early as 2004, when a person used a DTC genetic test and several online search engines to find the anonymous sperm donor who was his father. Alison Motluk, *Anonymous Sperm Donor Traced on Internet*, NEW SCIENTIST (Nov. 2, 2005), <https://www.newscientist.com/article/mg18825244-200-anonymous-sperm-donor-traced-on-internet> [<https://perma.cc/2K9A-LGEF>].

194. See, e.g., Natalie Ram, *DNA by the Entirety*, 115 COLUM. L. REV. 873 (2015) (proposing that DNA identification and analysis be governed by a framework akin to tenancy by the entirety).

195. Jocelyn Kaiser, *We Will Find You: DNA Search Used to Nab Golden State Killer Can Home in on About 60% of White Americans*, SCI. MAG. (Oct. 11, 2018, 2:00PM), <https://www.sciencemag.org/news/2018/10/we-will-find-you-dna-search-used-nab-golden-state-killer-can-home-about-60-white> [<https://perma.cc/GTK2-Q2AV>]; Colleen Shalby, *DNA Analysis Identifies Suspect in Series of Rapes from Early 1990s*, L.A. TIMES (July 1, 2019, 8:30 PM), <https://www.latimes.com/local/lanow/la-me-ln-dna-evidence-assault-20190701-story.html> [<https://perma.cc/VP4W-5WVL>]; Rachel Weiner, *Alexandria Rape Suspect Challenging DNA Search Used to Crack Case*, WASH. POST (June 10, 2019, 10:16 AM), https://www.washingtonpost.com/local/public-safety/alexandria-rape-suspect-challenging-dna-search-used-to-crack-case/2019/06/10/24bd0e34-87a5-11e9-a870-b9c411dc4312_story.html [<https://perma.cc/HUW7-5Q86>].

196. Kaiser, *supra* note 195. These third cousins had submitted their profiles from Ancestry.com or 23andMe to GEDMatch.com to search for relatives on the website. *Id.*

197. Weiner, *supra* note 195.

198. Kaiser, *supra* note 195.

199. See Hazel & Slobogin, *supra* note 168, at 52.

said the company owned it, and 13% said it belonged to the consumer.²⁰⁰ Only a handful of states have laws stating that the genetic information belongs to the consumer.²⁰¹ Thus, in most states, a person could surreptitiously analyze another's DNA without consequence. If courts interpret an old trust as requiring beneficiaries to be related by blood to the settlor, this could encourage beneficiaries to routinely ask for DNA testing.

B. A Presumption that ART Children Must Be Genetically Related to the Settlor Will Have a Disparate Impact on Children of Same-Sex Couples, Potentially Leading to Stigma

The Williams Institute at UCLA School of Law estimates that 4.5% of the adult population of the United States identifies as lesbian, gay, bisexual, or transgender (LGBT)—about 11,343,000 people.²⁰² Just like their heterosexual counterparts, many LGBT adults are in stable family relationships. A 2016–2017 study estimated that about 1.5% of young LGB people ages eighteen to twenty-five, 15% of those ages thirty-four to forty-one, and 25% of those ages fifty-two to fifty-nine were married to a same-sex partner, while overall 47% of the youngest group to 87% of the oldest group were in a same-sex relationship.²⁰³ A Gallup poll from the same period found that 10.2% of LGBT Americans were married, and 61% overall were in a same-sex relationship.²⁰⁴

While public support for same-sex marriage has grown, with 62% supporting it in a 2017 Pew Research survey compared to 37% ten years earlier,²⁰⁵ violence and stigma remain.²⁰⁶ Members of the LGBT community experience

200. *Id.* at 52–53.

201. *See, e.g.*, COLO. REV. STAT. § 10-3-1104.7(1)(a) (2017); GA. CODE ANN. § 33-54-1(1) (2018); 1997 La. Acts 1418. Oregon's statute says the information is "private and must be protected." OR. REV. STAT. § 192.537(1) (2018).

202. *Adult LGBT Population in the U.S.*, WILLIAMS INST., <https://williamsinstitute.law.ucla.edu/research/lgbt-adults-in-the-us> [https://perma.cc/5VXD-WCYC].

203. ILAN H. METER & EVAN A. KRUGER, WILLIAMS INST., *LEGALLY MARRIED LGB PEOPLE IN THE UNITED STATES 1* (2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Married-LGB-People-in-US.pdf> [https://perma.cc/DM7S-C6VL].

204. David Masci, Anna Brown & Jocelyn Kiley, *5 Facts About Same-Sex Marriage*, PEW RES. CTR. (June 24, 2019), <https://www.pewresearch.org/fact-tank/2017/06/26/same-sex-marriage> [https://perma.cc/AF8D-SSKN].

205. *Id.*

206. *See* Lisa Rapaport, *Gay Fathers Face Stigma as Parents*, REUTERS (Jan. 15, 2019, 1:37 PM), <https://www.reuters.com/article/us-health-lgbt-gay-dads/gay-fathers-face-stigma-as-parents-idUSKCN1P92TS> [https://perma.cc/7E38-8DJP].

proportionately more hate crimes, such as murder and assault, than members of other minority groups.²⁰⁷ The 2017 FBI Hate Crime Report found that 16% of single-bias hate crimes were the result of sexual orientation bias.²⁰⁸ Close to 10% of gay and lesbian persons, and 30% of those who are transgender, report that they have been refused health care because of their identity.²⁰⁹ Federal health regulations, such as policies on HIV and bans on blood and organ donations, trade on stereotypes of gay men, contributing to stigma.²¹⁰

Heterosexual couples can easily conceal their use of donated gametes so long as they choose donors who physically resemble them. Same-sex couples do not have the choice of concealment: it is readily apparent that a third person must have supplied a gamete, and thus a donor, whether anonymous or not,²¹¹ must have been involved.

A same-sex spouse is in a different position to the outside world. As Nancy Polikoff has observed, “[A] female spouse will always know that she is not the biological parent of her spouse’s child.”²¹² Those outside the same-sex couple will also know that one of the two spouses is not the biological parent of the child. If courts read “no adoptees” to mean “genetic relationships only,” that creates a target for the children of same-sex couples, who have always been created with a third person’s gametes. This could potentially lead to more stigma for these children since they will, once again, be different from their peers.

207. Haeyoun Park & Iaryna Mykhalyshyn, *L.G.B.T. People Are More Likely To Be Target of Hate Crimes than Any Other Minority Group*, N.Y. TIMES (June 16, 2016), <https://www.nytimes.com/interactive/2016/06/16/us/hate-crimes-against-lgbt.html> [<https://perma.cc/A3EB-99XW>].

208. *2017 Hate Crime Statistics 2017*, U.S. DEP’T JUST., <https://ucr.fbi.gov/hate-crime/2017/topic-pages/incidents-and-offenses> [<https://perma.cc/4MLU-ABQP>].

209. Dhruv Khullar, *Stigma Against Gay People Can Be Deadly*, N.Y. TIMES (Oct. 9, 2018), <https://www.nytimes.com/2018/10/09/well/live/gay-lesbian-lgbt-health-stigma-laws.html> [<https://perma.cc/M3MJ-SNHS>].

210. Russell K. Robinson & David K. Frost, *The Afterlife of Homophobia*, 60 ARIZ. L. REV. 213, 213–14 (2018).

211. The “free sperm” movement allows donors and recipients to match via the internet or other social media, and thus donors are not anonymous. Susan Frelich Appleton, *Between Binaries: Exploring the Legal Boundaries of Nonanonymous Sperm Donation*, 49 FAM. L.Q. 93, 110 (2015). In some cases, the donor may have a role in the child’s life after the child’s birth. *See id.* In addition, a 2008–2010 General Social Survey found that “13% of women who identify as lesbian have had sex with a man in the last five years; 2% have had sex with a man in the last year.” Nancy D. Polikoff, *Response: And Baby Makes . . . How Many? Using In re M.C. To Consider Parentage of a Child Conceived Through Sexual Intercourse and Born to a Lesbian Couple*, 100 GEO. L.J. 2015, 2017–18 (2012). These women might choose to become pregnant through sexual intercourse rather than via assisted insemination.

212. Polikoff, *supra* note 211, at 2026–27.

*C. A Presumption that ART Children Must Be Genetically Related to the
Settlor Will Cause Enormous Disruptions in Families, Pitting
Siblings, Cousins, and Other Family Members
Against Each Other*

Two data points indicate that interpreting “adoptions shall not be recognized” as requiring a blood relationship with the settlor will cause enormous family disruptions: an examination of how courts have dealt with the adoption cases, and the more recent litigation on ART cases.

The seventy-four adoption cases in my database often pitted adoptees against their siblings, cousins, and other relatives. In twelve of the seventy-four cases (16%), the biological relatives were the initiating party with claims in conflict with the adoptees.²¹³ In the nine cases initiated by the adoptee, the natural relatives also actively opposed giving any interest to the adoptees by filing motions or appealing an adverse judgment.²¹⁴ Over half of the cases, forty out of seventy-four (54%), were initiated by a trustee, executor, or administrator filing a petition for instructions or for construction of the document, or seeking approval of an accounting, which would *appear* to be neutral.²¹⁵ However, in three of these cases the trustees took a position either for or against including adoptees.²¹⁶ In another nineteen cases initiated

213. See, e.g., *Casper v. Helvie*, 146 N.E. 123, 123 (Ind. Ct. App. 1925) (involving natural grandson’s action for partition of real property versus adopted granddaughter, his cousin); *Peele v. Finch*, 200 S.E.2d 635, 635 (N.C. 1973) (granting life tenant’s natural sister summary judgment regarding real property; appealed by adopted child of life tenant’s deceased sister); *In re Trusts of Sollid*, 647 P.2d 1033, 1033 (Wash. Ct. App. 1982) (involving dispute that arose between natural child and adopted grandchildren concerning their rights as beneficiaries of *inter vivos* and testamentary trusts). For all twelve cases, see Appendix A.

214. See, e.g., *Brown v. Johnson*, 97 S.W.3d 924, 924 (Ark. Ct. App. 2003) (involving an adopted child’s filed action against natural sibling to be declared owner of half of real property conveyed by deed; both parties appealed); *Calhoun v. Campbell*, 763 S.W.2d 744, 744 (Tenn. 1988) (involving natural son of testator’s niece who claimed entire principal of trust against niece’s adopted grandchildren, his cousins; adoptive grandchildren filed action); *Fithian v. Papalini (In re Estates of Leggett)*, 378 N.W.2d 467, 467 (Mich. 1985) (involving adopted child who brought successful claim to take under a will; natural children appealed; reversed; adopted child appealed; reversed). For all nine cases, see Appendix B.

215. For all forty cases, see Appendix C. In the remaining thirteen cases, which can be found in Appendix D, there was either no conflict, or it could not be ascertained who had initiated the court proceeding or whether the residuary beneficiaries were related to the settlor or testator.

216. *Lutz v. Fortune*, 758 N.E.2d 277, 277–80 (Ind. 2001) (involving trustees, the settlor’s natural great-grandchildren, who petitioned for distribution of the trust and a ruling that an adopted great grandchild was not a beneficiary; adoptee appealed); *Makoff v. Makoff*, 528 P.2d 797, 797–99 (Utah 1974) (involving trustees who sued for construction; trustees

by a trustee, executor, or administrator, the natural relatives played an active role in opposing the adoptees' claims.²¹⁷ Rarely did the adopted person's claim impact only nonrelatives.²¹⁸ Instead, allowing an adopted grandchild or niece to have an interest diminished some or all of a natural relatives' share in all but two of the cases.

Thus, we find cases in which siblings sued their sisters and brothers,²¹⁹ uncles and aunts opposed their nieces and nephews,²²⁰ and cousins battled cousins.²²¹ Some cases dragged on for years and involved multiple appeals. In one case involving trusts created in 1927, a construction suit was settled

and adoptee nephew appealed from granting of motion for summary judgment filed by natural children, and denial of motion for summary judgment filed by trustees and adoptee); *Sec. Nat'l Bank & Tr. Co. v. Willim*, 153 S.E.2d 114, 114 (W. Va. 1967) (involving trustee who petitioned for construction of will; trustee and natural nieces and nephews of testator alleged that testator's adopted grandchild could not take as "issue"), *overruled by* *Wheeling Dollar Sav. & Tr. Co. v. Hanes*, 237 S.E.2d 499 (W. Va. 1977).

217. See, e.g., *Conn. Nat'l Bank & Tr. Co. v. Chadwick*, 585 A.2d 1189, 1198 n.4 (Conn. 1991) (involving trustee who filed declaratory judgment action to determine if adopted grandchildren were beneficiaries of trust; natural grandchildren opposed including grandchildren adopted after execution of will); *In re Estate of Nicolaus*, 366 N.W.2d 562, 564, 568 (Iowa 1985) (involving trustee who filed declaratory action to resolve whether adopted granddaughter was "issue;" her uncle, testator's son who would receive all instead of half to adoptee, testified that testator intended to distinguish between adopted and natural children); *Alley v. Strickland*, 302 S.E.2d 866, 866 (S.C. 1983) (per curiam) (involving biological children and grandchildren who appealed construction of will that included adopted grandchild). For a complete list, see Appendix A & C.

218. *Veneklasen v. Salvation Army (In re Estate of Graham)*, 150 N.W.2d 816, 816 (Mich. 1967) (involving adopted son who sued to be deemed only "issue" of testator's niece; if no issue, gift over to Salvation Army); *Melek v. Curators of Univ. of Mo.*, 250 S.W. 614, 614 (Mo. Ct. App. 1923) (involving adopted grandchild who sued to construe will, with gift over to university if adoptee was deemed to have no interest).

219. See, e.g., *Bird Anderson v. BNY Mellon, N.A.*, 974 N.E.2d 21, 21 (Mass. 2012) (involving natural child who sought declaratory judgment against trustees and two adopted brothers); *Allen v. Allen*, 132 S.E.2d 909, 909 (N.C. 1963) (per curiam) (involving a declaratory judgment for construction of a deed filed by natural children versus their adopted sister, originally their first cousin); *Bagwell v. Alexander*, 329 S.E.2d 771, 771-72 (S.C. Ct. App. 1985) (involving a life tenant and his adopted son who filed suit against life tenant's brothers and sisters and their issue for an order for the sale of real property bequeathed to life tenant and his surviving children).

220. *Skoog v. Fredell*, 332 N.W.2d 333, 333-34 (Iowa 1983) (involving adopted granddaughter who filed action to interpret deed against her aunt and uncle; adoptee appealed); *Posey v. Webb*, 528 So. 2d 833, 833 (Miss. 1988) (involving natural children who filed petition to partition land; opposed adopted niece as beneficiary of remainder interest); *Ahlemeyer v. Miller*, 131 A. 54, 54-55 (N.J. 1925) (involving uncle who filed action in ejectment against adopted nephew); *Tootle v. Tootle*, 490 N.E.2d 878, 878-79 (Ohio 1986) (involving adopted grandchildren who filed motion to terminate trust against trustee/natural uncle).

221. *Graves v. Graves*, 163 S.W.2d 544, 544-46 (Mo. 1942) (involving adopted nephew's child who filed petition to construe testator's will against trustee and testator's natural nephew; trustee and nephew demurred; adoptee appealed); *In re Estate of Underwood*, 56 Va. Cir. 393, 395 (Cir. Ct. 2001) (involving adopted grandchildren who petitioned to determine their rights under testator's will and codicil against natural sons and grandchildren).

and a decree entered in 1962, but the beneficiaries found themselves back in court on a similar issue in 1976.²²² In 1994, the trustees of George Parsons' 1907 trust asked a probate court for instructions on whether adopted children were included as beneficiaries; twenty years later, a beneficiary asked for a declaratory judgment on the same issue.²²³ The wills executed in 1938 by a husband and wife in Michigan resulted in litigation that went to the Michigan Court of Appeals, then, after receiving leave to appeal, to the Supreme Court of Michigan, with rehearing denied, and a writ of certiorari to the U.S. Supreme Court also denied.²²⁴ In another case, the court noted, "This is the second time this will has been construed, and it will not be the last."²²⁵ Some of the cases were battles over how many beneficiaries would share the proceeds, but in almost a third—twenty-four out of seventy-four—the suit was for the entire property, raising the stakes considerably.²²⁶ In these twenty-four cases, the trust or deed stated that the interest would go to the beneficiary's "children" or "issue" or "heirs of his body," but the beneficiary was survived only by the child she had adopted.²²⁷

222. *Sennot v. Collet-Oser*, 344 N.E.2d 783, 784 (Ill. App. Ct. 1976).

223. *In re George Parsons 1907 Trust*, 170 A.3d 215, 217 (Me. 2017).

224. *Fithian v. Papalini (In re Estates of Leggett)*, 378 N.W.2d 467, 467 (Mich. 1985), *reh'g denied*, 424 Mich. 1205 (1986), *cert. denied*, *Papalini v. Fithian*, 476 U.S. 1171 (1986); *Fithian v. Papalini (In re Estates of Leggett)*, 419 Mich. 933 (1984).

225. *Lewis v. Green*, 389 So. 2d 235, 235–37 (Fla. Dist. Ct. App. 1980) (footnote omitted) (citing *Green v. Lewis*, 151 So. 270 (Fla. 1933), *aff'd*, 153 So. 901 (1934) (mem.)).

226. For cases involving litigation of the entire property, see generally *Bank of Am. v. Most Worshipful Grand Lodge of Free & Accepted Masons (In re Estate of Heard)*, 319 P.2d 637 (Cal. 1957); *Conn. Bank & Tr. Co. v. Bovey*, 292 A.2d 899 (Conn. 1972); *Casper v. Helvie*, 146 N.E. 123 (Ind. Ct. App. 1925); *In re Estate of Nicolaus*, 366 N.W.2d 562 (Iowa 1985); *Skoog v. Fredell*, 332 N.W.2d 333 (Iowa 1983); *Ziehl v. Maine Nat'l Bank*, 383 A.2d 1364 (Me. 1978); *Veneklasen v. Salvation Army (In re Estate of Graham)*, 150 N.W.2d 816 (Mich. 1967); *Everett v. Dockery*, 33 So. 2d 313 (Miss. 1948); *Kindred v. Anderson*, 209 S.W.2d 912 (Mo. 1948); *Graves*, 163 S.W.2d 544; *Melek v. Curators of Univ. of Mo.*, 250 S.W. 614 (Mo. Ct. App. 1923); *Ahlemeyer v. Miller*, 131 A. 54 (N.J. 1925); *Hutton v. Ribsamen (In re Washburn's Will)*, 264 N.Y.S.2d 33 (App. Div. 1965); *In re Leask*, 90 N.E. 652 (N.Y. 1910); *Allen v. Allen*, 132 S.E.2d 909 (N.C. 1963) (*per curiam*); *Moore v. McAlester*, 428 P.2d 266 (Okla. 1967); *Estate of Tafel*, 296 A.2d 797 (Pa. 1972); *In re Puterbaugh's Estate*, 104 A. 601 (Pa. 1918); *Turner v. Turner*, 196 S.E.2d 498 (S.C. 1973); *Bagwell v. Alexander*, 329 S.E.2d 771 (S.C. Ct. App. 1985); *Calhoun v. Campbell*, 763 S.W.2d 744 (Tenn. 1988); *Cochran v. Cochran*, 95 S.W. 731 (Tex. Civ. App. 1906); *Trueax v. Black*, 335 P.2d 52 (Wash. 1959); *Sec. Nat'l Bank & Tr. Co. v. Willim*, 153 S.E.2d 114, 115 (W. Va. 1967), *overruled by Wheeling Dollar Sav. & Tr. Co. v. Hanes*, 237 S.E.2d 499 (W. Va. 1977).

227. See, e.g., *Ahlemeyer*, 131 A. at 54; *Moore*, 428 P.2d at 268; *Cochran*, 95 S.W. at 731.

Over and over, we see family members willing to sue each other over whether to exclude adopted children. The most recent litigation on ART children and their inclusion in dynasty trusts, *In re Doe*,²²⁸ follows this same pattern, with a similar analysis by the court. Just as in the adoption cases, the New York court in *Doe* tried to glean the settlor's intent when he stated that "adoptions shall not be recognized."²²⁹ Did he mean to exclude his daughter's child created with an anonymously donated egg and carried by a gestational surrogate? Here, though, the question of the settlor's intent is arguably quite different than in the typical adoption case. While adoptions had been carried out for decades before these trusts were established, and thus settlors were presumed to be aware that a beneficiary might adopt a child in the future, no such assumption can be made about our settlors regarding ART in the vast majority of these trusts. Only six of the seventy-four instruments were created in 1960 or later; the writer would have to have been quite knowledgeable about assisted insemination to be aware that the technique was being offered in the late 1950s.²³⁰ And of course, only one of these wills, trusts, or deeds was created at a time when any other method of ART was available: the latest one was created when the testator died in 1979,²³¹ while Louise Brown, the first *in vitro* fertilization baby, was born in England in 1978,²³² and another five years elapsed before a baby was born using a donated egg.²³³ While the settlors or testators of these old instruments may have had an opinion as to whether *adopted* children should be beneficiaries, they certainly did not have one regarding *ART* children because, in the vast majority of cases, the techniques simply did not exist. As the court found in *Doe*, "The reproductive technologies involved in this case—in vitro fertilization and gestational surrogacy—were established in the 1970s, well after these trusts were settled. It is unlikely that the settlor's views of these methods of reproduction can be discovered."²³⁴ The court in *Doe* then examined whether the settlor intended to exclude all nonblood relations, and concluded that he did not, because he

228. *In re Doe*, 793 N.Y.S.2d 878, 880 (N.Y. Sur. Ct. 2005).

229. *Id.* at 879.

230. See Wendy Kramer, *A Brief History of Donor Conception*, HUFFPOST, https://www.huffpost.com/entry/a-brief-history-of-donor-conception_b_9814184 [<https://perma.cc/JBX2-E37D>] (last updated Dec. 6, 2017).

231. *Pate v. Ford*, 360 S.E.2d 145, 148–49 (S.C. Ct. App. 1987), *rev'd*, 376 S.E.2d 775 (S.C. 1989).

232. Sanders, *supra* note 27.

233. *Third-Party Reproduction: Sperm, Egg, and Embryo Donation and Surrogacy*, AM. SOC'Y FOR REPROD. MED., <https://www.reproductivefacts.org/news-and-publications/patient-fact-sheets-and-booklets/documents/fact-sheets-and-info-booklets/third-party-reproduction-sperm-egg-and-embryo-donation-and-surrogacy> [<https://perma.cc/FT5E-TYJS>].

234. *In re Doe*, 793 N.Y.S.2d at 880.

provided for the spouses of some beneficiaries.²³⁵ In a second line of analysis, the court noted that K. Doe's children were not adopted; under California law, they received a judgment of parental relationship under an entirely different section of the California Family Code, even though K. Doe was not genetically related to the twins.²³⁶

In *Doe*, we have a court parsing the language in much the same way as in the adoption cases: What specific words did the settlor use? What did the settlor intend? While these are admirable goals, they threaten to put us in the same confrontational loop with ART children as with adopted children, with little to gain.

D. A Presumption that ART Children Must Be Related to the Settlor Will Result in More Litigation than a Simpler, Better Solution

The adoption cases require the language of each individual trust, will, or deed to be examined, and the intent of each settlor to be queried, in order to determine if adopted beneficiaries are in or out. If courts adopt a similar approach to ART children, we can expect the same result as in the adoption cases: years of litigation, family members suing each other, and relatives finding to their surprise that their biological origins are not what they had assumed.

Are there better solutions? One suggestion has been the relatively new process of decanting, in which the contents of the old trust are “decanted” into a new trust with some new terms.²³⁷ Decanting can be seen as “a form of trust modification initiated by the trustee,”²³⁸ or as analogous to “a nongeneral power of appointment.”²³⁹ New York was the first state to enact a statute authorizing trustees to decant, in 1992.²⁴⁰ Today, over half the

235. *Id.* 880–81.

236. *Id.* at 881.

237. Melissa J. Willms, *Decanting Trusts: Irrevocable, Not Unchangeable*, 6 EST. PLAN. & COMMUNITY PROP. L.J. 35, 36–37 (2013).

238. *Id.*

239. Stewart E. Sterk, *Trust Decanting: A Critical Perspective*, 38 CARDOZO L. REV. 1993, 2001 (2017).

240. See 1992 N.Y. Laws 3520 (codified as amended at N.Y. EST. POWERS & TRUSTS LAW § 10-6.6 (McKinney 2019)); David Restrepo, *New York's Decanting Statute: Helping an Old Vintage Come to Life or Spoiling the Settlor's Fine Wine?*, 34 PACE L. REV. 479, 480 (2014).

states have decanting statutes.²⁴¹ While decanting can have many uses, especially in modifying a trust to allow tax benefits, there is one thing decanting cannot do: “No decanting statute permits a trustee to add an entirely new beneficiary.”²⁴² And that, it can be argued, is precisely what we are trying to do here. We are not dealing with trusts that give the trustee unlimited discretion to invade the principal, or even limited discretion to invade. In fifteen of the seventy-four cases, the task was simply to distribute the remainder in the deed or will by construing a class term; in another forty-five cases, the trustee was divvying up the principal of the *inter vivos* or testamentary trust.²⁴³ No discretion was involved in any of these sixty

241. Stephanie Vara, *Two Cheers for Decanting: A Partial Defense of Decanting Statutes as a Tool for Implementing Freedom of Disposition*, 32 QUINNIPIAC PROB. L.J. 23, 24–25 (2018).

242. *Id.* at 32 & n.28.

243. For cases that construe a class term, see *Brown v. Johnson*, 97 S.W.3d 924, 925 (Ark. Ct. App. 2003); *Casper v. Helvie*, 146 N.E. 123, 123 (Ind. Ct. App. 1925); *Skoog v. Fredell*, 332 N.W.2d 333, 333 (Iowa 1983); *Cook v. Underwood*, 228 N.W. 629, 630 (Iowa 1930); *In re Woodcock*, 68 A. 821, 821 (Me. 1907); *Posey v. Webb*, 528 So. 2d 833, 833 (Miss. 1988); *Everett v. Dockery*, 33 So. 2d 313, 315 (Miss. 1948); *Graves v. Graves*, 163 S.W.2d 544, 546 (Mo. 1942); *Peele v. Finch*, 200 S.E.2d 635, 635 (N.C. 1973); *Allen v. Allen*, 132 S.E.2d 909, 909 (N.C. 1963) (per curiam); *Tootle v. Tootle*, 490 N.E.2d 878, 883 (Ohio 1986); *Alley v. Strickland*, 302 S.E.2d 866, 866 (S.C. 1983) (per curiam); *Turner v. Turner*, 196 S.E.2d 498, 499 (S.C. 1973); *Bagwell v. Alexander*, 329 S.E.2d 771, 771 (S.C. Ct. App. 1985); *Cochran v. Cochran*, 95 S.W. 731, 733 (Tex. Civ. App. 1906); *Trueax v. Black*, 335 P.2d 52, 52–53 (Wash. 1959). For cases divvying up the principle, see *Zimmerman v. First Nat'l Bank*, 348 So. 2d 1359, 1362 (Ala. 1977); *Peck v. Green*, 96 So. 2d 169, 169 (Ala. 1956); *Bilsky v. Bilsky*, 455 S.W.2d 901, 901–02 (Ark. 1970); *Bank of Am. v. Most Worshipful Grand Lodge of Free & Accepted Masons (In re Estate of Heard)*, 319 P.2d 637, 639–40 (Cal. 1957); *In re Pierce's Estate*, 196 P.2d 1, 3 (Cal. 1948); *Conn. Nat'l Bank & Tr. Co. v. Chadwick*, 585 A.2d 1189, 1190 (Conn. 1991); *Conn. Bank & Tr. Co. v. Bovey*, 292 A.2d 899, 900 (Conn. 1972); *Parker v. Mullen*, 255 A.2d 851, 852 (Conn. 1969); *Lewis v. Green*, 389 So. 2d 235, 242 (Fla. Dist. Ct. App. 1980); *Nunnally v. Tr. Co. Bank*, 252 S.E.2d 468, 468 (Ga. 1979), *aff'd*, 261 S.E.2d 621 (Ga. 1979); *First Nat'l Bank v. King*, 651 N.E.2d 127, 128 (Ill. 1995); *Sennot v. Collet-Oser*, 344 N.E.2d 783, 784–85 (Ill. App. Ct. 1976); *Lutz v. Fortune*, 758 N.E.2d 77, 79 (Ind. Ct. App. 2001); *In re Estate of Nicolaus*, 366 N.W.2d 562, 564 (Iowa 1985); *In re George Parsons 1907 Trust*, 170 A.3d 215, 217 (Me. 2017); *Scribner v. Berry*, 489 A.2d 8, 8 (Me. 1985); *Ziehl v. Maine Nat'l Bank*, 383 A.2d 1364, 1366 (Me. 1978); *Fiduciary Tr. Co. v. Silsbee*, 187 A.2d 396, 397–98 (Me. 1963); *Fithian v. Papalini (In re Estates of Leggett)*, 378 N.W.2d 467, 467 (Mich. 1985); *Veneklasen v. Salvation Army (In re Estate of Graham)*, 150 N.W.2d 816, 817 (Mich. 1967); *Melek v. Curators of Univ. of Mo.*, 250 S.W. 614, 615 (Mo. Ct. App. 1923); *Miller v. First Nat'l Bank & Tr. Co. (In re Trust of Miller)*, 323 P.2d 885, 886 (Mont. 1958); *Amoskeag Tr. Co. v. Preston*, 222 A.2d 158, 161 (N.H. 1966); *In re Thompson*, 250 A.2d 393, 394 (N.J. 1969); *Dulfon v. Keasbey*, 162 A. 102, 103 (N.J. Ch. 1932); *Hutton v. Ribsamen (In re Washburn's Will)*, 264 N.Y.S.2d 33, 33, 36–37 (App. Div. 1965); *In re Leask*, 90 N.E. 652, 652 (N.Y. 1910); *Bradford v. Johnson*, 75 S.E.2d 632, 632 (N.C. 1953); *Ohio Citizens Bank v. Mills*, 543 N.E.2d 1206, 1207 (Ohio 1986); *Moore v. McAlester*, 428 P.2d 266, 267–68 (Okla. 1967); *Estate of Tafel*, 296 A.2d 797, 798 (Pa. 1972); *In re Trust of Fownes*, 220 A.2d 8, 9 (Pa. 1966); *In*

cases. Only ten cases involved interpretation of an income interest, but again, the trustee had no discretion as to the income²⁴⁴ or the principal.²⁴⁵ The key precondition for decanting, discretion by the trustee,²⁴⁶ is missing in these old trusts and wills.

Decanting can also be used to give an existing beneficiary a new power of appointment. In that case, “a trustee can decant to allow a beneficiary to distribute trust property to a non-beneficiary or an individual who is not

re Trust of Pennington, 219 A.2d 353, 355 (Pa. 1966); *In re* Estate of Holton, 159 A.2d 883, 885 (Pa. 1960); *In re* Puterbaugh’s Estate, 104 A. 601, 601 (Pa. 1918); *Bowles v. Bradley*, 461 S.E.2d 811, 812 (S.C. 1995); *Pate v. Ford*, 360 S.E.2d 145, 149 (S.C. Ct. App. 1987), *rev’d*, 376 S.E.2d 775 (S.C. 1989); *Calhoun v. Campbell*, 763 S.W.2d 744, 745–56 (Tenn. 1988); *Cutrer v. Cutrer*, 345 S.W.2d 513, 514–15 (Tex. 1961); *Penland v. Agnich*, 940 S.W.2d 324, 325 (Tex. App. 1997); *In re* Smith’s Will, 112 A. 897, 897 (Vt. 1921); *Langhorne v. Langhorne*, 186 S.E.2d 50, 51 (Va. 1972); *Wheeling Dollar Sav. & Tr. Co. v. Hanes*, 237 S.E.2d 499, 501 (W. Va. 1977); *Sec. Nat’l Bank & Tr. Co. v. Willim*, 153 S.E.2d 114, 115–16 (W. Va. 1967), *overruled by* *Wheeling Dollar Sav. & Tr. Co. v. Hanes*, 237 S.E.2d 499 (W. Va. 1977); *Young v. First Wis. Tr. Co. (In re* Will of Mitchell), 184 N.W.2d 853, 855 (Wis. 1971).

244. See, e.g., *Whitfield v. Matthews*, 334 So. 2d 876, 877 (Ala. 1976) (discussing a trust “for the benefit of the children now or later born to my son” provided that the trustee pay “the income” to the beneficiaries); *Lewis*, 389 So. 2d at 241 (providing the text of the will stating that on the death of a named beneficiary, “I then direct that the proportion of the income of such deceased person or persons, be divided among the issue of such deceased person”); *King*, 651 N.E.2d at 128 (providing after the first life tenant’s death, pay “the net income” to the lawful descendants of the settlor’s son and his wife); *In re George Parsons 1907 Trust*, 170 A.3d at 216 (“[On an income beneficiary’s death, her] share of the Trust income was to be paid to her surviving ‘issue’ upon her death”); *Bird Anderson v. BNY Mellon, N.A.*, 974 N.E.2d 21, 21, 24 (Mass. 2012) (discussing trust provided that “the income” was to be paid to three named beneficiaries, and on their deaths, to their issue); *In re Maloney Trust*, 377 N.W.2d 791, 792 (Mich. 1985) (separating income into “equal funds for each of the settlor’s grandchildren”); *Wachovia Bank & Tr. Co. v. Andrews*, 142 S.E.2d 182, 183 (N.C. 1965) (“After paying the expense of handling the trust, [the trustees] shall divide the annual income into twenty equal parts [and paid as follows] . . .”); *Makoff v. Makoff*, 528 P.2d 797, 798 (Utah 1974) (“The entire net income . . . shall be divided each year into equal shares as follows: One share for the then living issue of each of the following named sons of the Settlor . . .”); *In re Trusts of Sollid*, 647 P.2d 1033, 1033 (Wash. Ct. App. 1982) (providing that in case of the death of one of the named children, the Trustees shall hold the property for the use of his or her issue and pay “the income” to them).

245. See, e.g., *Bird Anderson*, 974 N.E.2d at 25 (“[On termination of the trust,] the principal is to be paid to the then income beneficiaries in the same proportions as they are entitled to receive income distributions.”); *In re Trusts of Sollid*, 647 P.2d at 1033–34 (“Upon the death of the last of the three named beneficiaries, [children,] then the corpus of the trust shall be delivered and paid to the then surviving issue [grandchildren], including lineal descendants, of the three beneficiaries, per stirpes”).

246. *Willms, supra* 237, at 39.

a permissible appointee.”²⁴⁷ The Uniform Trust Decanting Act, for example, allows the trustee to create a power of appointment in a remainder beneficiary of the first trust so long as the power takes effect after the power holder is a current beneficiary.²⁴⁸ But as we have seen time and time again, the remainder beneficiaries—the natural issue—do not want these others to take a share, or in some cases, the entire remainder. Why in the world would they exercise the power in their favor?

A third possible way to use decanting overlaps with modification. A trustee can decant to add a definitional phrase of what the settlor meant by the term “issue” or “grandchildren.” That, too, raises a number of hurdles. First, the trustee must know what the settlor’s intent was, and it is highly unlikely the settlor decades ago had any thoughts on ART children. The trustee also must be willing to commit to a position on the settlor’s intent. Even on the more transparent issue of intent regarding adopted children, recall that of our seventy-four cases, the trustees or executors took a position on whether adoptees were included or excluded in a class term in only three of them.²⁴⁹ The duty of loyalty may be an obstacle as well. The *Restatement of Trusts* requires a trustee to deal with beneficiaries “impartially,”²⁵⁰ but how exactly does one do that when choosing whether “grandchildren” is composed of solely the natural issue or also includes those who have been adopted or conceived via ART? This means that decanting, like modification or even a motion to construe the trust, will all lead to the same result: extended litigation over what the settlor “meant” by the trust’s terms when applied to ART children.

A better solution has been applied in the few states that interpret this problem as a rule of construction, and thus apply the law as of the time the class is formed. After all, those creating trusts and wills use class terms such as “grandchildren” or “descendants” in order to allow members to join and leave the group over time. In the adoption cases, the chief objection to allowing adoptees to take is that, in effect, this creates a virtual power of appointment in a parent.²⁵¹ Courts were especially troubled when the sole motivation for adoption was to create an interest in someone else’s property. When the beneficiary of a 1932 testamentary trust adopted his wife the court called this “an act of subterfuge which in effect thwarts the intent of the ancestor whose property is being distributed and cheats the rightful

247. Vara, *supra* note 241, at 51.

248. UNIF. TR. DECANTING ACT § 11(d)(4) (UNIF. LAW COMM’N 2015).

249. See *supra* note 216 and accompanying text.

250. RESTATEMENT (SECOND) OF TRUSTS § 183 (AM. LAW INST. 1959).

251. See, e.g., *In re Leask*, 90 N.E. 652, 654 (N.Y. 1910); *Woods v. Crump*, 142 S.W.2d 680, 684 (Ky. 1940); *Melek v. Curators of Univ. of Mo.*, 250 S.W. 614, 615 (Mo. Ct. App. 1923).

heirs.”²⁵² An Illinois court quoted *Minary v. Citizens Fidelity Bank & Trust Co.* in terming a beneficiary’s adoption of his roommate “an act of subterfuge,” and stated, “If there had been no trust, there would undoubtedly have been no adoption.”²⁵³

ART children are unlikely to raise these same concerns. The child will come into the family as a minor and be raised as part of the family. Unlike cases such as *Minary*, in which the beneficiary adopted his wife, there is a true parent-child relationship between ART children and those raising them. And it seems highly unlikely that one will say, as a parallel to the court in *Cross v. Cross*, “If there had been no trust, there would undoubtedly have been no [ART],”²⁵⁴ especially in the case of *in vitro* fertilization, in which a couple may have spent tens of thousands of dollars and many months enduring medical procedures in order to conceive. ART children would ordinarily meet the *loco parentis* test proposed by Professor Edward Halbach, in which he would include those “who were adopted at a relatively early age and reared by the adoptive parents.”²⁵⁵ Courts in California²⁵⁶ and Iowa²⁵⁷ have cited Halbach in determining whether adoptees were intended to be part of a class.

The courts using the third approach,²⁵⁸ in which the word “issue” or “grandchildren” is seen as ambiguous and thus subject to rules of construction, have an even greater reason to find that the creator’s intent is not clear in the case of ART children. The settlor or testator of these old trusts and wills had no thought at all on children created in lab test tubes or using frozen sperm. As with adopted children, the starting point should be that ART children are included in these class terms, absent express language excluding them from the trust, will, or deed. Class terms such as “issue” or “grandchildren” should include those family members who are regarded as such, without requiring DNA tests to prove that they belong there.

252. *Minary v. Citizens Fid. Bank & Tr. Co.*, 419 S.W.2d 340, 341–43 (Ky. 1967).

253. *Cross v. Cross*, 532 N.E.2d 486, 489 (Ill. App. Ct. 1988).

254. *Id.*

255. Edward C. Halbach, Jr., *The Rights of Adopted Children Under Class Gifts*, 50 IOWA L. REV. 971, 990 (1965).

256. *In re Estate of Pittman*, 163 Cal. Rptr. 527, 529 (Ct. App. 1980) (involving a 1914 will that was executed before adult adoptions were legal in California).

257. *Elliott v. Hiddleson*, 303 N.W.2d 140, 144–45 (Iowa 1981) (rejecting stranger to the adoption presumption in Iowa).

258. *See supra* Part III.

V. CONCLUSION

Each year, thousands of children are conceived using assisted insemination, *in vitro* fertilization, gestational surrogates, and other forms of assisted reproduction. In many cases, the parents of these children have turned to ART because of infertility issues, or because they are not a heterosexual couple, and thus their children are not genetically related to one or both of them. In some cases, as in *In re Doe*²⁵⁹ and *McGehee v. Edwards*,²⁶⁰ these children are potential beneficiaries of a trust created decades before, at a time when a majority of states applied the common law presumption that a settlor or testator preferred that only blood relatives benefit, and thus adoptions shall not be recognized. Today, the Uniform Probate Code,²⁶¹ Restatement Third of Property,²⁶² and most states, either by statute or case law,²⁶³ have abolished the stranger to the adoption presumption, at least for those adopted as minors, and thus assume that adoptees are included in class terms even though they are not related by blood to the testator or settlor. The same starting point should prevail for ART children. My roadmap of seventy-four adoption cases, illustrating the family disruptions, invasions of privacy, stigma to same-sex families, and lengthy litigation likely to follow if we insist that a settlor way back in 1930 meant to exclude children until proven otherwise, all point to this much better solution.

259. *In re Doe*, 793 N.Y.S.2d 878, 880 (N.Y. Sur. Ct. 2005).

260. *McGehee v. Edwards*, 597 S.E.2d 99, 102 (Va. 2004).

261. UNIF. PROBATE CODE § 2-705 (UNIF. LAW COMM'N 2010).

262. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 14.5 (AM. LAW INST. 2011).

263. MCGOVERN, KURTZ & ENGLISH, *supra* note 62, at 111.

VI. APPENDIX A: SUIT FILED BY NATURAL RELATIVES
AGAINST ADOPTEES

Ahlemeyer v. Miller, 131 A. 54, 54–55 (N.J. 1925) (uncle filed action in ejectment against adopted nephew).

Allen v. Allen, 132 S.E.2d 909, 909 (N.C. 1963) (per curiam) (declaratory judgment for construction of a deed filed by natural children against their adopted sister, originally their first cousin).

Bird Anderson v. BNY Mellon, N.A., 974 N.E.2d 21, 21 (Mass. 2012) (natural child sought declaratory judgment against trustees and two adopted brothers).

Casper v. Helvie, 146 N.E. 123, 123 (Ind. Ct. App. 1925) (natural grandson's action for partition of real property against adopted granddaughter, his cousin).

Kindred v. Anderson, 209 S.W.2d 912, 912, 914 (Mo. 1948) (nephew and natural relative sued alleging adoptee could not take as "issue;" will devised property to testator's son but if he died without issue, to testator's other children; son died survived by his adopted daughter).

Lewis v. Green, 389 So. 2d 235, 235–37 (Fla. Dist. Ct. App. 1980) (natural granddaughter and her descendants sued adopted great-grandchildren, other grandchildren, and trustee for declaration as to parties' rights to income and corpus; adoptees appealed).

In re George Parsons 1907 Trust, 170 A.3d 215, 217 (Me. 2017) (natural child filed complaint requesting declaratory judgment that adoptee was not a beneficiary of *inter vivos* trust; natural child is probably uncle of adopted child but may be cousin).

Peck v. Green, 96 So.2d 169, 169, 172 (Ala. 1956) (natural children filed bill in equity seeking division of principal of testamentary trust; appealed by adopted child, their sister).

Peele v. Finch, 200 S.E.2d 635, 635 (N.C. 1973) (life tenant's natural sister granted summary judgment regarding real property; appealed by adopted child of life tenant's deceased sister).

Posey v. Webb, 528 So. 2d 833, 833 (Miss. 1988) (will gave life estate to daughter and the heirs of her body, otherwise to testator's son; daughter died survived by three natural children and one adopted son; natural children

filed petition to partition land, and they opposed adopted sister as beneficiary of remainder interest).

In re Trusts of Sollid, 647 P.2d 1033, 1033 (Wash. Ct. App. 1982) (dispute arose between natural child and adopted grandchildren concerning their rights as beneficiaries of *inter vivos* and testamentary trusts; both *inter vivos* and testamentary trusts provided income for three children for life and on each child's death, her share of income to that child's issue; if child dies with no issue, then income paid to surviving children. On death of last child, pay corpus to surviving issue [grandchildren] including lineal descendants. One child died leaving three adopted stepchildren only).

Trueax v. Black, 335 P.2d 52, 52 (Wash. 1959) (testator's natural children, two grandchildren, and adopted grandchild had contesting claims for ownership of farmland in decedent's will; will gave farmland to daughter for life, then to her children; if none, to testator's other children and two named grandchildren. Daughter adopted her niece, testator's grandchild not named in will, and died survived only by adoptee).

VII. APPENDIX B: SUIT FILED BY ADOPTEES AGAINST NATURAL
RELATIVES

Bagwell v. Alexander, 329 S.E.2d 771, 771–72 (S.C. Ct. App. 1985) (life tenant and his adopted son filed suit against life tenant’s brothers and sisters and their issue for an order for the sale of real property bequeathed to life tenant and his surviving children).

Brown v. Johnson, 97 S.W.3d 924, 924 (Ark. Ct. App. 2003) (adopted child filed action against natural sibling to be declared owner of half of real property conveyed by deed; both parties appealed de novo review of decision to exclude adopted child).

Calhoun v. Campbell, 763 S.W.2d 744, 744 (Tenn. 1988) (natural son of testator’s niece claimed entire principal of trust against children of niece’s adopted grandson, his cousins; grandchildren filed action).

Cutrer v. Cutrer, 345 S.W.2d 513, 513 (Tex. 1961) (mother sued on behalf of adopted son that he be declared heir of the body of her husband’s trust, which otherwise would go to husband’s sister and mother).

Graves v. Graves, 163 S.W.2d 544, 544, 546 (Mo. 1942) (adopted nephew’s child filed petition to construe testator’s will against trustee and testator’s natural nephew; trustee and nephew, the adoptee’s uncle, demurred; adoptee appealed).

Fithian v. Papalini (*In re Estates of Leggett*), 378 N.W.2d 467, 467 (Mich. 1985) (daughter’s adopted child brought successful claim to take under a testamentary trust; natural children of other daughter appealed; reversed; adopted child appealed; reversed. Testamentary trust for daughter for life, then to her issue; otherwise to other daughter. Daughter survived by adopted child).

Skoog v. Fredell, 332 N.W.2d 333, 334–35 (Iowa 1983) (adopted great-granddaughter filed action to interpret deed against her aunt and uncle; adoptee appealed. Deed gave granddaughter a life estate, then to heirs of her body; court held that adopted great-granddaughter was not heir of her body).

Tootle v. Tootle, 490 N.E.2d 878, 878 (Ohio 1986) (adopted grandchildren filed motion to terminate trust against trustee/natural uncle).

In re Estate of Underwood, 56 Va. Cir. 393, 395 (Cir. Ct. 2001) (adopted grandchildren petitioned to determine their rights under testator's will and codicil against natural sons and grandchildren).

VIII. APPENDIX C: SUIT FILED BY TRUSTEE, EXECUTOR,
ADMINISTRATOR, OR OTHER FIDUCIARY

Bold = litigation by natural relatives against adoptee.

Alley v. Strickland, 302 S.E.2d 866, 866 (S.C. 1983) (per curiam) (**biological children and grandchildren appealed construction of will that included adopted grandchild**).

Amoskeag Tr. Co. v. Preston, 222 A.2d 158, 161 (N.H. 1966) (trustees brought action to construe “issue” in trust; settlor’s daughter adopted a child).

Bilsky v. Bilsky, 455 S.W.2d 901, 901–03 (Ark. 1970) (trustee filed petition for construction of “issue” in trust; **natural son appealed against his adopted niece**).

Cochran v. Cochran, 95 S.W. 731 (Tex. Civ. App. 1906) (executor sued for construction of will “if son dies without issue, then to two of testator’s grandchildren;” **grandchildren appealed against son’s wife**).

Conn. Nat’l Bank & Tr. Co. v. Bovey, 292 A.2d 899, 900 (Conn. 1972) (action by trustee for construction of whether “child” or “children” in an *inter vivos* trust included an adopted child; appealed by adopted grandchild).

Conn. Nat’l Bank & Tr. Co. v. Chadwick, 585 A.2d 1189, 1198 n.4 (Conn. 1991) (trustee filed declaratory judgment action to determine if adopted grandchildren were beneficiaries of trust; **natural grandchildren opposed including grandchildren adopted after execution of will**).

Conn. Bank & Tr. Co. v. Coffin, 569 A.2d 531, 531 (Conn. 1990) (trustee brought action to determine if adopted grandchildren were “issue” and thus beneficiaries of trust; included adopted-out granddaughter but excluded adopted-in grandchildren).

Dulfon v. Keasbey, 162 A. 102, 105 (N.J. Ch. 1932) (executor sued for construction of testamentary trust with income to testator’s wife and three sons; if a son died during wife’s life leaving lawful issue, to that son’s children. Held “children” does not include son’s adopted child).

Everett v. Dockery, 33 So. 2d 313, 314–15 (Miss. 1948) (suit probably initiated by executor, possibly Everett, for construction of will. Held life estates to son and daughter, then to their children, but if died without issue, to other sibling. **Appeal by son and his children against his sister’s adopted children**).

Fiduciary Tr. Co. v. Silsbee, 187 A.2d 396, 396 (Me. 1963) (action for construction of testamentary trust for her children and their “issue.” Held adopted grandson was not issue.).

First Nat’l Bank v. King, 651 N.E.2d 127, 127 (Ill. 1995) (trustee filed action for declaratory judgment as to whether adopted child was a “lawful descendant” entitled to receive income and corpus along with natural child; **natural child appealed**).

In re Trust of Fownes, 220 A.2d 8, 9 (Pa. 1966) (in an accounting action for an *inter vivos* trust, the court held the adopted son of settlor’s deceased grandson was not “issue” and thus not entitled to income).

Bank of Am. v. Most Worshipful Grand Lodge of Free & Accepted Masons (*In re* Estate of Heard), 319 P.2d 637, 637 (Cal. 1957) (trustee petitioned for instructions on how income from testamentary trust should be distributed; **cousin’s natural children appealed decision to include adopted children**).

In re Estate of Holton, 159 A.2d 883, 883 (Pa. 1959) (adopted grandchildren filed exceptions to an adjudication in the audit of an account of a testamentary trust awarding natural grandchildren a portion of income and principal of a trust; adoptees appealed).

In re Leask, 90 N.E. 652, 654 (N.Y. 1910) (trustees filed accounting; adopted grandchild objected because trustees did not account to her or recognize her as beneficiary, but named testator’s nieces and nephews instead. Testamentary trust for testator’s son for life, then to son’s surviving child).

Lutz v. Fortune, 758 N.E.2d 77, 77 (Ind. Ct. App. 2001) (**trustees are natural great-grandchildren who petitioned for distribution of trust and a ruling that adopted great-grandchild was not a beneficiary**; adoptee appealed).

Makoff v. Makoff, 528 P.2d 797, 797 (Utah 1974) (trustees sued for construction; trustees and adoptee nephew appealed from granting of motion for summary judgment filed by natural children, and denial of motion for summary judgment filed by trustees and adoptee).

In re Maloney Trust, 377 N.W.2d 791, 791 (Mich. 1985) (trustee petitioned for instruction on whether “grandchildren born after” certain date included adopted grandchildren; adoptees appealed).

McGehee v. Edwards, 597 S.E.2d 99, 99–100 (Va. 2004) (trustees asked court to determine if “direct lineal descendants” included out of wedlock children. **Natural descendant also asked court to decide if ART children**

were included. Court held that those adopted by direct lineal descendants were included; **natural descendants appealed**).

Young v. First Wis. Tr. Co. (*In re* Will of Mitchell), 184 N.W. 2d 853, 854 (Wis. 1971) (trustee petitioned for construction of will; adopted great-grandchildren appealed. Testamentary trust provided for testator's children for life, then to each child's surviving children; if such child leaves no surviving child, to testator's remaining children. Testator's grandson died survived by two adopted daughters).

Moore v. McAlester, 428 P.2d 266, 268 (Okla. 1967) (trustee filed an accounting; **heirs contended that property could not go to adoptee because not "issue of her body."** Testamentary trust for testator's daughter, then to the issue of her body, but if none, to testator's sons. Daughter survived by her adopted daughter).

In re Estate of Nicolaus, 366 N.W.2d 562, 562–63 (Iowa 1985) (trustee filed declaratory action to resolve whether adopted grandchild was "issue;" **her uncle, testator's son who would receive all instead of half to adoptee, testified that testator intended to distinguish between adopted and natural children**).

Nunnally v. Tr. Co. Bank, 252 S.E.2d 468, 468 (Ga. 1979), *aff'd*, 261 S.E.2d 621 (Ga. 1979) (trustee initiated suit for construction of will to determine if adopted great-grandchildren included in trust. Testamentary trust for daughter for life, then to daughter's four children or to the issue of predeceased child. One grandchild adopted two sons).

Ohio Citizens Bank v. Mills, 543 N.E.2d 1206, 1206 (Ohio 1986) (trustee filed construction action for *inter vivos* trust; **natural child and adoptees filed cross motions for summary judgment.** The 1944 trust provided for settlor's daughter, with ultimate distribution to settlor's living grandchildren and to the living children of each deceased grandchild. One grandson adopted his two stepdaughters, then died survived by the two adoptees and a natural son).

Ortega v. First Republicbank Fort Worth, N.A., 792 S.W.2d 452, 453 (Tex. 1990) originally *sub nom. Martin v. Neel*, 379 S.W.2d 422, 422 (Tex. 1964) (trustee brought suit to construe the trust created in the will as to whether adopted great-grandchildren were beneficiaries; adoptees appealed in 1964 and again in 1990. Testamentary trust for the children of deceased's

granddaughter, including “great-grandchildren who may be born after my death.”).

Parker v. Mullen, 255 A.2d 851, 852 (Conn. 1969) (trustees filed final account for distribution to living children of testator’s brothers, sisters, brothers-in-law, and sister-in-law; **one natural beneficiary objected to the inclusion of an adopted child as beneficiary**).

Pate v. Ford, 360 S.E.2d 145, 145; (S.C. Ct. App. 1987) (executor and trustee petitioned to construe wills on whether “natural born grandchildren” included those born after wills executed), *rev’d*, 376 S.E.2d 775 (S.C. 1989).

Penland v. Agnich, 940 S.W.2d 324, 324 (Tex. App. 1997) (trustees brought a declaratory judgment action to construe “lawful issue” in testamentary trust; **natural grandchildren appealed** against adopted grandchildren. It is unclear if they are siblings or cousins).

In re Trust of Pennington, 219 A.2d 353, 353 (Penn. 1966) (in trust accounting, issue arose whether son’s adopted daughter was “issue;” court awarded balance of trust to settlor’s brother).

In re Pierce’s Estate, 196 P.2d 1, 1 (Cal. 1948) (trustee petitioned for instructions on whether adopted children of deceased nephew were beneficiaries; **trustee, also a beneficiary, appealed order declaring that adoptees were beneficiaries**. Testamentary trust for children of a deceased niece and nephew for life, then to their lawful issue. One beneficiary, the nephew’s son, survived by two adopted stepdaughters).

R.I. Hosp. Tr. Co. v. Hooker, 219 A.2d 772, 772 (R.I. 1966) (action by trustee to determine if adopted child entitled to share of income. Testamentary trust for niece for life, then to her children. Niece survived by three natural children and an adopted child, the child of her predeceased daughter).

Scribner v. Barry, 489 A.2d 8, 8 (Me. 1985) (co-trustees petitioned for construction of testamentary trust; appealed by adopted grandson against testator’s daughter and daughter’s two children).

Sec. Nat’l Bank & Tr. Co. v. Willim, 153 S.E.2d 114, 114 (W. Va. 1967) (trustee petitioned for construction of will; trustee and **natural nieces and nephews of testator alleged that testator’s adopted grandchild could not take as “issue.”**), *overruled by* *Wheeling Dollar Sav. & Tr. Co. v. Hanes*, 237 S.E.2d 499 (W. Va. 1977).

Sennot v. Collet-Oser, 344 N.E.2d 783, 784 (Ill. App. Ct. 1976) (trustees sued for construction of *inter vivos* trust to determine “surviving issue” of son’s and daughter’s trust; determined it did not include adopted grandchildren but only natural grandchildren. **Natural grandchild moved for judgment**

on the pleadings or summary judgment that adopted grandchildren had no interest in trust. Adoptees appealed).

In re Thompson, 250 A.2d 393, 393 (N.J. 1969) (in an accounting action, trust paid to natural grandchild but not adopted grandchild, his brother; adoptee objected).

Wachovia Bank & Tr. Co. v. Andrews, 142 S.E.2d 182, 184–85 (N.C. 1965) (trustee instituted action for judicial determination of rights of parties; **natural born nieces, nephews, great nieces, and great nephews asserted that adopted children were not beneficiaries of trust as great nieces and nephews. First cousins against first cousins.**)

Hutton v. Ribsamen (In re Washburn's Will), 264 N.Y.S.2d 33, 33 (N.Y. App. Div. 1965) (Trustee brought account for testamentary trust, with payment to testator's adopted granddaughter's child; **testator's son's widow appealed.**)

Wheeling Dollar Sav. & Tr. Co. v. Hanes, 237 S.E.2d 499, 499 (W. Va. 1977) (Trustee brought declaratory judgment for aid in construing *inter vivos* trust which provided for son for life, then to son's widow and his children or descendants. Son adopted his two stepdaughters; adopted stepdaughters, the testator's grandchildren, appealed).

Whitfield v. Matthews, 334 So. 2d 876, 876–77 (Ala. 1976) (trustee sought construction of an *inter vivos* trust providing for "children now or later born to my son." Son had three natural children and one adopted).

Zimmerman v. First Nat'l Bank, 348 So. 1359, 1360–62 (Ala. 1977) (trustee brought declaratory judgment actions to construe the testamentary trusts: all the rest in trust for daughter for life, then to daughter's children for their education and support, with half paid as each attains twenty-five and other half at thirty-five years of age. Daughter was survived by two natural children and three adopted children).

IX. APPENDIX D: NO CONFLICT WITH NATURAL
RELATIVES OR CANNOT TELL

Bowles v. Bradley, 461 S.E.2d 811, 811 (S.C. 1995) (adopted great-granddaughter filed suit for order construing “issue” in irrevocable *inter vivos* trust and will to include her; guardian *ad litem* for potential beneficiaries appealed).

Bradford v. Johnson, 75 S.E.2d 632, 632–34 (N.C. 1953) (trustee brought declaratory judgment action; appealed by guardian *ad litem* for issue of natural nieces and nephews. One nephew had adopted a son, and the daughter of a nephew had adopted a daughter).

Cook v. Underwood, 228 N.W. 629, 629–30 (Iowa 1930) (suit filed on behalf of adopted granddaughter to construe grandfather’s will; estate divided equally between testator’s two sons; adopted granddaughter appealed).

Veneklasen v. Salvation Army (*In re Estate of Graham*), 150 N.W.2d 816, 816–17 (Mich. 1967) (adopted son sued to be deemed the issue of testator’s niece; if no issue, gift over to Salvation Army).

Langhorne v. Langhorne, 186 S.E.2d 50, 50–51 (Va. 1972) (“[w]hen distribution of trust was sought,” court ordered it distributed to two natural grandchildren; adopted grandchild appealed).

Melek v. Curators of Univ. of Mo., 250 S.W. 614, 614–15 (Mo. Ct. App. 1923) (adopted grandchild sued to construe testamentary trust for daughter for life, then to daughter’s children, with gift over to university. Daughter was survived by adopted child).

Miller v. First Nat’l Bank & Tr. Co. (*In re Trust of Miller*), 323 P.2d 885, 885 (Mont. 1958) (no description of how suit started; adopted grandson appealed. Testamentary trust gave half of income to one son and other half to other son; if either died before age fifty leaving issue and wife then that son’s share to issue and wife; otherwise, to other son).

In re Puterbaugh’s Estate, 104 A. 601, 601 (Pa. 1918) (will left estate to testator’s son for life, then to his children, with gift over to residuary legatees. Son died leaving only adopted child; no indication residuary legatees were related to testator).

In re Smith’s Will, 112 A. 897, 899 (Vt. 1921) (no description of how suit started; probate court ruled that adopted granddaughter was issue entitled to income of testamentary trust; someone appealed, and Vermont Supreme Court reversed).

Estate of Tafel, 296 A.2d 797, 797 (Pa. 1972) (adopted grandchildren sought to take under testamentary trust as children of deceased son, along with testator's natural grandchildren; adoptees appealed).

Turner v. Turner, 196 S.E.2d 498, 498–99 (S.C. 1973) (legatee under son's will sued adopted grandson; legatee appealed).

In re Woodcock, 68 A. 821, 821–22 (Me. 1907) (administrator of will filed accounting distributing remainder to testator's natural grandchildren and son; adopted granddaughter appealed).

Ziehl v. Maine Nat'l Bank, 383 A.2d 1364, 1364–66 (Me. 1978) (suit for declaratory judgment brought on behalf of adopted granddaughter; cannot tell if contingent beneficiaries are related to testator).

X. APPENDIX E: ALL OR NOTHING LIST

Ahlemeyer v. Miller, 131 A. 54, 54 (N.J. 1925) (uncle filed action in ejectment against adopted nephew).

Bagwell v. Alexander, 329 S.E.2d 771, 771–72 (S.C. Ct. App. 1985) (life tenant and his adopted son filed suit against life tenant’s brothers and sisters and their issue for an order for the sale of real property bequeathed to life tenant and his surviving children).

Bilsky v. Bilsky, 455 S.W.2d 901, 901–03 (Ark. 1970) (trustee filed petition for construction of “issue” in trust; natural son appealed against his adopted niece).

Calhoun v. Campbell, 763 S.W.2d 744, 744 (Tenn. 1988) (natural son of testator’s niece claimed entire principal of trust against children of niece’s adopted grandson, his cousins; grandchildren filed action).

Casper v. Helvie, 146 N.E. 123, 123 (Ind. Ct. App. 1925) (natural grandson’s action for partition of real property against adopted granddaughter, his cousin).

Cochran v. Cochran, 95 S.W. 731 (Tex. Civ. App. 1906) (executor sued for construction of will “if son dies without issue, then to two of T’s grandchildren;” grandchildren appealed against son’s wife).

Conn. Nat’l Bank & Tr. Co. v. Bovey, 292 A.2d 899, 900 (Conn. 1972) (action by trustee for construction of whether “child” or “children” in an *inter vivos* trust includes an adopted child; appealed by adopted grandchild).

Cook v. Underwood, 228 N.W. 629, 629 (Iowa 1930) (suit filed on behalf of adopted granddaughter to construe grandfather’s will that if daughter died without direct heirs her share went to testator’s sons; estate divided equally between testator’s two sons; adopted granddaughter appealed).

Everett v. Dockery, 33 So. 2d 313 (Miss. 1948) (suit probably initiated by executor, possibly Everett, for construction of will. Held life estates to son and daughter, then to their children, but if died without issue, to other sibling. Appeal by son and his children against his sister’s adopted children).

Veneklasen v. Salvation Army (*In re Estate of Graham*), 150 N.W.2d 816, 816 (Mich. 1967) (adopted son sued to be deemed the “issue” of testator’s niece; if no issue, gift over to Salvation Army).

Graves v. Graves, 163 S.W.2d 544, 544, 544 (Mo. 1942) (adopted nephew’s child filed petition to construe testator’s will against trustee and testator’s natural nephew; trustee and nephew, adoptee’s uncle, demurred; adoptee appealed. Will devised land to two nephews and heirs of their bodies;

testamentary trust paid half of principal to each nephew at age forty or if died before to pay to survivor. Adoptee does not count, and all went to other nephew).

Kindred v. Anderson, 209 S.W.2d 912, 912, 912 (Mo. 1948) (nephew/natural relative sued alleging adoptee could not take as “issue.” Will devised property to her son but if he died without issue, to testator’s other children. Son died survived by adopted daughter).

In re Leask, 90 N.E. 652, 654 (N.Y. 1910) (trustees filed accounting; adopted grandchild objected because trustees did not account to her or recognize her as beneficiary, but named testator’s nieces and nephews instead. Testamentary trust for testator’s son for life, then to son’s surviving child).

Fithian v. Papalini (In re Estates of Leggett), 378 N.W.2d 467, 467 (Mich. 1985) (daughter’s adopted child brought successful claim to take under a testamentary trust; natural children of other daughter appealed; reversed; adopted child appealed; reversed. Testamentary trust for daughter for life, then to her issue; otherwise to other daughter. Daughter survived by adopted child).

Melek v. Curators of Univ. of Mo., 250 S.W. 614, 614 (Mo. Ct. App. 1923) (adopted grandchild sued to construe testamentary trust for daughter for life, then to daughter’s children, with gift over to university. Daughter was survived by adopted child).

Miller v. First Nat’l Bank & Tr. Co. (In re Trust of Miller), 323 P.2d 885, 885 (Mont. 1958) (no description of how suit started; adopted grandson appealed. Testamentary trust gave half of income to one son and other half to other son; if either died before age fifty leaving issue and wife then that son’s share to issue and wife; otherwise to other son).

Moore v. McAlester, 428 P.2d 266, 268 (Okla. 1967) (trustee filed an accounting; heirs contended that property could not go to adoptee because not “issue of her body.” Testamentary trust for testator’s daughter, then to the issue of her body, but if none, to testator’s sons. Daughter survived by her adopted daughter).

In re Trust of Pennington, 219 A.2d 353, 353 (Penn. 1966) (in trust accounting, issue arose whether son’s adopted daughter was “issue;” court awarded balance of trust to settlor’s brother).

In re Puterbaugh's Estate, 104 A. 601 (Pa. 1918) (will left estate to testator's son for life, then to his children, with gift over to residuary legatees. Son died leaving only adopted daughter; no indication residuary legatees were related to testator).

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Trueax v. Black, 335 P.2d 52, 52 (Wash. 1959) (testator's natural children and two grandchildren and adopted grandchild had contesting claims for ownership of farmland in decedent's will. Will gave farmland to daughter for life, then to her children; if none, to testator's other children and two named grandchildren. Daughter adopted her niece, testator's grandchild not named in will, and died survived only by adoptee).

Turner v. Turner, 196 S.E.2d 498, 498 (S.C. 1973) (legatee under son's will sued adopted grandson; legatee appealed).

Hutton v. Ribsamen (In re Washburn's Will), 264 N.Y.S.2d 33, 33 (N.Y. App. Div. 1965) (trustee brought account for testamentary trust, with payment to testator's adopted granddaughter's child; testator's son's widow appealed).

Sec. Nat'l Bank & Tr. Co. v. Willim, 153 S.E.2d 114, 114 (W. Va. 1967) (Trustee petitioned for construction of will; trustee and natural nieces and nephews of testator alleged that testator's adopted grandchild could not take as "issue."), *overruled by* *Wheeling Dollar Sav. & Tr. Co. v. Hanes*, 237 S.E.2d 499 (W. Va. 1977).