Throwing the Baby Out with the Bath: Florida's Flawed Approach to Post-Adoption Inheritance

CYNTHIA G. HAWKINS[†] AND BRIEN V. SQUIRES[‡]

I. INTRODUCTION

This paper recommends that Florida adopt an intestacy statute that does not sever an adopted child's ability to inherit from her birth parents. Kansas, Louisiana, Rhode Island, and Texas currently have intestacy statutes that do not terminate an adopted child's ability to inherit intestate.[1] Florida should follow the position taken by Kansas because Florida's approach to intestacy and adoption is flawed. First, Florida's intestacy statute does not meet the goals of uniformity and simplicity sought in legislation.[2] If Florida and other states allowed adopted children to inherit intestate from their birth parents, uniformity among the states could be achieved. Uniformity is especially desirable among probate codes because real and personal property can be governed by different laws depending on whether the property is located in different states at the time of the transferor's death.[3] At the same time, simplicity in the administration and interpretation of laws aids in judicial economy.[4] Probate courts will expend less time and resources applying laws that do not require complicated factual analyses.

Regrettably, the application of Florida's statute can lead to outcomes that are not beneficial to adopted children.[5] One of these

---

[†] Cynthia Hawkins: Professor of Law, Stetson University College of Law. BA, Wellesley College; JD, Harvard Law School.

[‡] Associate, Shook, Hardy & Bacon, LLP. BA, University of South Florida, 2013; JD, Stetson University College of Law, 2017.

[1] *Intestate Inheritance Rights for Adopted Persons*, CHILDWELFARE.GOV, https://childwelfare.gov/pubPDFs/inheritance.pdf. (last visited Oct. 22, 2018).

[2] *See In re* Polygraphex Sys., Inc., 275 B.R. 408, 415 (Bankr. M.D. Fla. 2002) (finding that a goal of the Florida Legislature is uniformity in tax collection); *see also* Bohlke v. Shearer's Foods, LLC, No. 9:14-CV-80727, 2015 WL 249218, at *5 (S.D. Fla. Jan. 20, 2015) (finding that an express goal of the Florida Legislature is uniform legislation).

[3] *See* FLA. STAT. § 731.1055 (2017).

[4] *See* Redford v. Dept. of Revenue, 478 So. 2d 808, 811 (Fla. 1985) (remarking that judicial economy is served when the Government is efficient).

[5] *See* FLA. STAT. § 732.108(1) (2017).

outcomes is that the adopted child is prevented from receiving a "double inheritance."[6] Such an inheritance occurs if a child inherits from her birth parent and adoptive parent.[7] However, Florida's Legislature has not stepped in to stop the less fair and more likely occurrence of individuals winning multiple lottery jackpots.[8]

Second, Florida's statute does not properly balance the interests at stake in an adoption, in part, because it severs an adopted child's ability to inherit although there has been no fault, indeed no action, by the child.[9] The child is effectively punished for the acts of her birth parents. Additionally, Florida's approach does not encourage testacy by birth parents. This is contrary to how the law, which prefers testacy so courts do not have to guess as to the intent of the decedent.[10]

Florida's approach takes into account the donor's likely intent;[11] however, that consideration should not be dispositive when adoption is involved. Florida's statute is most in line with the donor's intent in connection with the three exceptions that do not terminate an adopted child's ability to inherit from her birth parents.[12] It has been suggested that the exceptions recognized by Florida should be recognized in all jurisdictions.[13] We propose that it is time for the exceptions to swallow the rule so that adopted children may inherit intestate from their birth parents regardless of the circumstances of the adoption.

Part II of this Article introduces the history of both disinheritance and adoption. We will then examine the Uniform Probate Code and its influence on the probate codes in several states in Part III. In Parts IV through VI, the relevant statutes of Florida, North Carolina, and

---

[6] *In re* Cregar's Estate, 333 N.E.2d 540, 542 (Ill. App. Ct. 1975).

[7] *Id*.

[8] *See* Ishita Singh, *Richard Lustig, Seven-Time Lottery Winner, Shares His Secrets to Success*, HUFFINGTON POST (Nov. 8, 2013 01:12 PM), http://www.huffingtonpost.com/2013/11/08/richard-lustig-lottery-wi_n_4241376.html.

[9] *See* FLA. STAT. § 732.108(1).

[10] *In re* Estate of Baer, 446 So. 2d 1128, 1128 (Fla. 4th Dist. Ct. App. 1984).

[11] *See* FLA. STAT. § 732.108.

[12] These exceptions are:

> (a) Adoption of a child by the spouse of a natural parent has no effect on the relationship between the child and the natural parent or the natural parent's family.(b) Adoption of a child by a natural parent's spouse who married the natural parent after the death of the other natural parent has no effect on the relationship between the child and the family of the deceased natural parent.(c) Adoption of a child by a close relative, as defined in s. 63.172(2), has no effect on the relationship between the child and the families of the deceased natural parents.

Id.

[13] Lisa A. Fuller, *Intestate Succession Rights of Adopted Children: Should the Stepparent Exception Be Extended*, 77 CORNELL L. REV. 1188, 1191 (1992).

Kansas are discussed. The policy considerations underlying each approach are analyzed and we will show that Kansas has taken the most effective position regarding intestate inheritance after adoption in Part VII. Finally, in Part VIII, we relate our approach to the reformations endorsed by other scholars in connection with inheritance after open adoptions.

II. THE HISTORY OF DISINHERITANCE AND ADOPTION

The history of inheritance and disinheritance is as old as time itself. In many cultures, the first-born son was entitled to receive the lion's share of his father's property when the father died.[14] The Mosaic Law, which governed the Israelites, required that the first-born son receive a double-portion of his father's property, even if the father favored one of his other sons more.[15] In early Western culture, people believed that "God alone makes the heir, not man."[16] Traditionally, inheritance was thought to be based on two factors, family relationship and conduct.[17] Family ties were extremely important throughout time; and when humanity entered the Middle Ages, Western culture developed rules concerning when a person could lose their inheritance.[18]

An individual could lose their ability to inherit through four distinct courses of conduct.[19] First, a child conceived outside of wedlock was not considered a part of the birth family and therefore could not inherit property from her father.[20] Second, the punishment for certain felonies required forfeiture of land and property to the felon's Lord or the King, meaning said property could not pass to others at death.[21] This harsh rule was later addressed in the United States Constitution.[22] The Constitution provides that, while an individual's property can be forfeited as a result of a criminal

---

[14] Leo Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743, 745 (1955).

[15] *Deuteronomy* 21:17 (New World Translation).

[16] E. Gary Spitko, *Open Adoption, Inheritance, and the Uncleing Principle*, 48 SANTA CLARA L. REV. 765, 771 (2008).

[17] Anne-Marie Rhodes, *On Inheritance and Disinheritance*, 43 REAL PROP. TR. & EST. L.J. 433, 434 (2008).

[18] *Id*. at 435.

[19] *Id*.

[20] *Id*. Today, children born outside of marriage are no longer considered *filius nullius*—a child of no one. *Id*.

[21] *Id*. The punishment for such felonies was usually death. *Id*.

[22] *See* U.S. CONST. art. III, § 3, cl. 2.

conviction, the forfeiture only lasts for the lifetime of the criminal.[23] On the other hand, the third manner in which an individual could lose their inheritance was based on good conduct.[24] When a person devoted their life to becoming a monk or a nun, they would give up their right to own and inherit property.[25] Finally, an alien could not inherit land in a foreign country.[26] Theoretically, an alien could purchase or receive foreign land as a gift, but the monarch who ruled over that domain retained the right to reclaim the property at any time without warning or compensation.[27]

The controversies surrounding inheritance and adoption are somewhat new to the United States, but the two concepts have been intertwined for millennia.[28] One of the most well-known and ancient adoptions was that of baby Moses by Pharaoh's daughter.[29] Although Moses was adopted, he was entitled to inherit great wealth from his adoptive family under ancient Egyptian law.[30] The Byzantine Empire, under Emperor Justinian I, had laws providing that if a stranger adopted a child, the adopted child still inherited through her birth parents.[31] In previous eras, adoption was used as a tool primarily to avoid the destruction of a family line.[32] There was little to no concern for the adoptee; indeed, the adoptee was often an adult male.[33] His purpose was to help the adoptive family and carry on its name and traditions.[34] This is contrasted with the way we think of adoptions today where the adoptive family is viewed as rescuing the adopted child.

---

[23] *Id*. Criminal forfeiture was prohibited in the United States from 1790 to 1970 when the Racketeering Influenced Corrupt Organizations Act (RICO) was passed. *See* 18 U.S.C. § 1963 (1970). However, there was an exception. During the Civil War, Congress authorized the President to forfeit the property of Confederate sympathizers in the Confiscation Act. Wallach v. Van Riswick, 92 U.S. 202, 209 (1875). While the Constitution prohibits forfeiture of an estate because of a treason conviction, the Confiscation Act was upheld because the estate was only forfeited for the lifetime of the traitor. *Id.*

[24] Rhodes, *supra* note 17, at 437.

[25] *Id*.

[26] *Id*.

[27] *Id*.

[28] Huard, *supra* note 14, at 743 ("[A]doption is one of the oldest and most widely employed legal fictions.").

[29] *Exodus* 2:5-10 (New World Translation).

[30] *Id*. Going back even further, Abraham, who had no sons, was concerned that his property would pass to his eldest male servant if he did not produce a son. *Genesis* 15:2-4 (New World Translation).

[31] Huard, *supra* note 14, at 745.

[32] *Id*. at 743.

[33] *Id*.

[34] *Id*.

In the United States, adoption law statutes came about in the middle of the nineteenth century.[35] Adoption did not exist at common law, but with the rise of orphanages, potential adoptive parents needed certainty about their rights over the adopted child.[36] Originally, prospective adoptive families would have to apply for a private adoption decree.[37] The decree typically required the adoptive parents to change the child's name.[38] In addition, the decree could delineate whether the adopted child was entitled to inherit from the adoptive family.[39] But with each family seeking its own private adoption decree with varying terms, it soon became clear that three issues needed resolution.[40] First, whether the adopted child could inherit from her birth parents; second, whether the adopted child could inherit from members of her birth family; and finally, whether the adopted or birth parents could inherit from the adopted child.[41] These questions were especially meaningful at that time because great wealth was being accumulated at a rate previously unseen.[42] In response, states enacted a variety of statutes that created a patchwork for inheritance and adoption across America.[43] The states aimed to "secur[e] to adopted children a proper share in the estate of adopting parents who should die intestate."[44]

One may wonder why the United States did not resolve the issues between adoption and inheritance sooner than the nineteenth century when the two concepts have existed since time immemorial. The most plausible reason is that the early settlers brought the laws of England with them to the New World.[45] Although adoption was practiced informally in England, adoption was not recognized under English common law.[46] The English held blood lineage so sacred that the practice was not legitimized until modern times.[47] In fact, adoption

---

[35] Stephen B. Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443, 461 (1971).

[36] *Id*.

[37] *Id*. at 464.

[38] *Id*.

[39] Fuller, *supra* note 13, at 1192.

[40] Rhodes, *supra* note 17, at 440.

[41] *Id*.

[42] Presser, *supra* note 35, at 469.

[43] *See* U.S. DEPT. OF HEALTH & HUMAN SERVS., *supra* note 1, at 1.

[44] Presser, *supra* note 35, at 465.

[45] Huard, *supra* note 14, at 745.

[46] Fuller, *supra* note 13, at 1191.

[47] Huard, *supra* note 14, at 745; Fuller, *supra* note 13, at 1192.

was not formally recognized in England until 1926.[48] Accordingly, early Americans did not have the luxury of hundreds of years of legal development on the intersection of adoption and inheritance.

III. THE UNIFORM PROBATE CODE

The Uniform Probate Code (UPC) serves as a model for states to follow. Indeed, states such as Florida adopt the portions of the UPC that suit their purposes and reject other provisions that do not. Florida's intestacy statute on adoption is taken mostly from UPC Section 2-119, with some subtle but meaningful changes. In some respects, the Florida statute is both more broad and more narrow than the UPC.

One of the first important differences between the UPC and Florida's statute is the "close relative" exception. As discussed below, Florida's close relative exception allows an adopted child to maintain her ability to inherit if she is adopted by a close relative.[49] Florida went a step further than the UPC to define a close relative as a sibling, grandparent, aunt, or uncle.[50] Under the UPC, an exception exists when the child is adopted by "a relative of a genetic parent."[51] The UPC does not require that the relative be a close relative of the birth parents nor does the UPC define relative. It is in this sense that the UPC is broader than the Florida statute. While the Florida statute is limited to a defined set of family members, under the UPC, presumably any relative of the birth parents could adopt the child without terminating the child's ability to inherit intestate.

In regard to who may inherit after adoption, the Florida statute is more liberal than the UPC. The UPC exceptions only allow an adopted child (or the child's descendant) to inherit from her birth parent.[52] The adopted child or her descendants are foreclosed from inheriting intestate through other family members of her birth parent. Florida chose not to go as far as the UPC. In Florida when an exception applies, the adoption "has no effect on the relationship between the child and the family of the deceased natural parent."[53] Thus, the child may still inherit through other relatives after adoption

---

[48] Fuller, *supra* note 13, at 1192.
[49] FLA. STAT. § 732.108(c) (2017).
[50] *Id*. § 63.172(2).
[51] UNIF. PROBATE CODE § 2-119 (amended 2010).
[52] *Id*.
[53] FLA. STAT. § 732.108(1).

and is not limited to inheriting from a birth parent. Further, the UPC does not allow anyone in the adopted child's birth family to inherit from, or through, the adopted child. In essence, the inheritance can only flow one way—from the birth parent to the adopted child or her descendants. In Florida, a member of the adopted child's birth family can still inherit from or through the adopted child. So if an adopted child leaves a large enough estate without any descendants or a spouse, her estate could pass back to her birth parents or members of her birth family.

Under the UPC, a birth parent can also have their ability to inherit from their birth child severed by adoption.[54] If a couple gets divorced after having children and one of the parents remarries someone who adopts the children, the other birth parent will no longer be entitled to inherit from or through her own birth child.[55] While this result may seem harsh, the parent whose ability to inherit is severed will most likely have consented to the adoption or had her parental rights terminated before the adoption can be finalized.

The UPC follows the general principle that the parent-child relationship between the adopted child and her birth parents ceases to exist after adoption.[56] The adopted child is given a "fresh start" in a replacement family that completely severs all legal ties and obligations with the birth family.[57] This is also the approach taken by the Restatement (Third) of Property.[58] Under the Restatement, a child is no longer considered a child of her birth parents when the adoption removes her from the families of both the genetic parents.[59] The child becomes an exclusive member of the adoptive family.[60]

The UPC also contains the stepparent exception.[61] The exception allows for a child adopted by a stepparent to inherit from her birth parents. The UPC originally provided for this exception in 1969.[62] As discussed elsewhere, scholars have argued that all states should adopt this provision.[63]

---

[54] UNIF. PROBATE CODE § 2-119 cmt., subsec. (b).

[55] *Id*.

[56] *Id*. § 2-119 cmt., subsec. (a).

[57] *Id*.

[58] RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 2.5(2)(A) (AM. LAW INST. 1999).

[59] *Id*.

[60] *Id*. § 2.5 cmt. e.

[61] UNIF. PROBATE CODE § 2-119(b).

[62] *Id*. § 2-119 cmt., subsec. (b).

[63] Fuller, *supra* note 13, at 1190.

The UPC recognizes the additional scenario where a child is adopted after the death of both birth parents.[64] In such a situation, the adopted child is entitled to inherit even if adopted by someone outside of the birth family.[65] The authors of the UPC chose to include this exception because, similar to the other exceptions, the adopted child is usually not removed from her birth family when both birth parents die.[66] The adoptive family is likely approved by the birth family or appointed as a guardian in a testamentary document executed by a birth parent.[67] Here, there is not a complete replacement of the adopted child's family. Even though the author's carved out this additional exception, it still only applies to a child's ability to inherit from or through her birth parent.[68] The adopted child's birth family is not allowed to inherit from or through the child.[69]

Where the UPC is broad, it is favorable to adopted children and their descendants. Unlike the Florida statute, the UPC expressly accounts for the descendants of an adopted child and allows them to inherit if the adopted child meets the exceptions.[70] The UPC accounts for more circumstances leading to adoption, and its "relative" exception allows the child to maintain her ability to inherit despite being adopted by a cousin or great-grandparent.[71] Where the UPC is narrow, it is less favorable to the birth family of the adopted child. Members of the adopted child's birth family are excluded from inheriting from or through the adopted child.[72]

IV. FLORIDA'S APPROACH

Florida's statute governing the ability of adopted children to inherit is found in the state's probate code.[73] Essentially, the statute severs an adopted child's ability to inherit intestate by or through any member of her birth family.[74] If the child is adopted by the spouse of

---

[64] UNIF. PROBATE CODE § 2-119(d).

[65] *Id*. § 2-119 cmt., subsec. (d).

[66] *Id*.

[67] *Id*. Of course, if there is a testamentary document which also provides for distribution of all the decedent's estate, then transfers from the deceased parent who executed the document would not pass intestate.

[68] *Id*.

[69] *Id*. § 2-119 cmt., subsec. (b).

[70] *See* UNIF. PROBATE CODE § 2-119.

[71] *See id*. § 2-119(c), (d).

[72] *See id*. § 2-119.

[73] FLA. STAT. § 732.108 (2017).

[74] *Id*.

a birth parent or by a close relative, though, her ability to inherit intestate from her birth family will not be severed.[75] Admittedly, the Florida statute is grounded in sound policy considerations. However, as will be discussed elsewhere, those policy considerations are outweighed by those supporting the Kansas approach.

The first consideration supporting Florida's statute, and one of the most compelling considerations for testamentary transfers, is the donor's probable intent.[76] It is arguable that an individual would intend that their child no longer be able to inherit from them after undergoing the adoption process. When a birth parent signs legal paper work, giving up their parental rights, it is likely that the parent believes all legal ties are severed including the child's ability to inherit. Further, in a traditional adoption, the birth parent will likely never communicate with the adopted child again so it seems unlikely that the birth parent would intend for the adopted child to inherit from them. On the other hand, open adoptions are becoming more prevalent in this country and the Florida statute simply does not account for the connection that birth parents retain with their children in these non-traditional adoptions.

The adoption process is also meant to end at some point, bringing finality to both families. Finality and assimilation are critical goals of the adoption process, and are recognized by courts and legislatures.[77] When these goals are achieved, the adopted child can have a fresh start with her new family. However, in the case of open adoption, these concerns are still present but lessened. At any rate, because adoption can affect the right to receive state benefits, the state has an interest in the finality of the adoption process.[78] The argument for finality, though, is stronger in a closed or traditional adoption. Under those circumstances, it would be burdensome for the adoptive family to reintroduce the adopted child to her birth family. The child might not know that they were adopted and would have to confront that reality unexpectedly if they were permitted to inherit from their birth parents. Yet, under our approach, the same would be true if the adopted child's birth parents provided for her in a will rather than dying intestate.

When parents give up their rights to one child but retain their rights over their other children, Florida's statute protects the

---

[75] *Id*. § 732.108(1).

[76] *See* Reiner v. Reiner, 400 So. 2d 1292, 1293 (Fla. Dist. Ct. App. 1981).

[77] Kemp & Assocs.', Inc. v. Chisolm, 162 So. 3d 172, 177 (Fla. Dist. Ct. App. 2015).

[78] *Id*. at 178.

expectancies of the children who remain with their birth parents. The children who remain with their birth parents would have a strong argument that they should not have to share their inheritance with a sibling who was adopted out and raised with another family. But their ability to inherit is merely an *expectancy* until the property owner dies.[79] The property owner could create a will or modify the terms of an existing will at any point up until death. Therefore no one has a *right* to inherit through a will or through intestate succession until the donor has died. This point relates closely to the donor's intent. The donor would likely want to provide for the children living and being raised in his own household rather than for a child who is presumably being cared for in another household. Thus, the statute is meant to prevent the adopted child from receiving an inheritance from her adoptive family and from her birth family—a double inheritance.[80]

Florida's probate code provides for exceptions that limit the harsh effects of the rule that an adopted child can no longer inherit from her birth parents.[81] As noted elsewhere, one of the statute's exceptions allows an adopted child to inherit from her birth family if she is adopted by the surviving parent's spouse.[82] Prior to amendment, the Florida Adoption Act contained a similar provision.[83] However, the Adoption Act allowed inheritance through the adopted child's "natural" parent while the probate code made no distinction.

Florida's Third District Court of Appeals took up the issue in *In re Estate of Kanevsky*.[84] In that case, the decedent's niece, Zena, adopted Perry.[85] Zena divorced Perry's father, and Perry's father married another woman who subsequently adopted Perry.[86] On the decedent's passing, his nephew Paul, appealed a judgment finding that Perry was entitled to inherit with Paul from the decedent's estate.[87] Paul argued that Perry was adopted into the family by Zena, but Zena's divorce, coupled with Perry's subsequent adoption by a new woman, meant that Perry was no longer entitled to inherit intestate

---

[79] 17 FL. JUR. 2d § 191 (2018).

[80] Interestingly, the statute allows for a double inheritance under the step-parent exception. *See* FLA. STAT. § 732.108(a). Under that exception, the adopted child inherits from both her birth family and from her adoptive parent's family. *See id*.

[81] *See id.* § 732.108.

[82] *Id*. § 732.108(a), (b).

[83] *In re* Estate of Kanevsky, 506 So. 2d 1101, 1102 (Fla. Dist. Ct. App. 1987).

[84] *Id*.

[85] *Id*. at 1102.

[86] *Id*.

[87] *Id*. at 1101.

through Zena.[88] At the time of the case, the exception in Florida's probate code stated that the adopted child could only inherit through his "natural" parents while the Adoption Act did not have such a limitation.[89] The court determined that the Legislature intended to "put children by adoption on an equal footing with children by blood for inheritance purposes."[90] Rather than assuming that the Legislature intended to create a conflict between the probate code and the Adoption Act, the court ruled that the word "natural" should not be used to differentiate adopted children and birth children.[91] Thus, Perry was allowed to inherit although he was originally adopted into the family and that familial connection no longer existed due to divorce.[92]

In comparison, North Carolina and Kansas provide preferable results.

V. NORTH CAROLINA'S APPROACH

North Carolina's adoption statute seems incomplete on its face. The statute provides that, "[f]rom the date of the signing of the decree, the adoptee is entitled to inherit real and personal property by, through, and from the adoptive parents in accordance with the statutes on intestate succession."[93] Noticeably, the statute does not account for the adopted child's ability to inherit from her birth parents.

The Supreme Court of North Carolina took up the question in 1976.[94] In the landmark case of *Crumpton v. Crumpton*, Ruth Crumpton received a tract of land in a deed. The deed provided that the land would go to Ruth and then to Ruth's "issue then living per stirpes."[95] At the time, Ruth had five living children; however, two of her children had been adopted by another family. The two adopted children contended that since they are the living issue of Ruth, they

---

[88] *Id*.

[89] *In re* Estate of Kanevsky, 506 So. 2d 1101, 1102 (Fla. Dist. Ct. App. 1987).

[90] *Id*.

[91] *Id*.

[92] *Id.* In an unreported decision, the Surrogate's Court of Westchester County, New York, applying Florida, law took up the same question in 2004. Matter of Zoochi, No. 262/2004, 2004 WL 3118692 (N.Y. Surr. Ct. Dec. 14, 2004). In *Zoochi*, the decedent's son adopted a daughter. *Id*. at *1. The son died and his daughter was adopted again by her step-father. *Id*. The granddaughter argued that she was entitled to her father's share of trust proceeds left by the decedent—her grandfather. *Id*. The New York court followed *Kanevsky* and allowed the granddaughter to inherit, finding that she fell within the stepparent exception despite her subsequent adoption. *Id*. at *3.

[93] N.C. GEN. STAT. § 48-1-106(b) (2017).

[94] Crumpton v. Crumpton, 221 S.E.2d 390, 393 (N.C. Ct. App. 1976).

[95] *Id*.

should be entitled to proceeds from the sale of the land.[96] The court looked at the statute in its entirety and noted that the spirit of the law indicated a legislative intent to make the adopted child a stranger to the bloodline of her birth parents.[97] More than four decades ago, the court stated that "[t]he prevalence of adoptions in today's society points to the absolute necessity that adoption effect a complete substitution of families."[98] The North Carolina approach therefore disfavors inheritance by an adopted child from her birth parents.

Although North Carolina's method seems harsh, it has positive attributes. First, the approach is simple to understand. A judge can quickly dispatch of a case, or cases will not be filed because parties know that adoption severs the ties to the birth family. Further, there are no exceptions for a judge to wade through. The probate judge in North Carolina can neatly dodge the complicated factual analysis required under Florida's "close relative" exception. Thus, judicial resources can be expended elsewhere.

Second, North Carolina's approach is simple to administer. If a parent dies intestate, there is no need to track down the parent's children that have been adopted. The adoptive family will not have to reveal that the child comes from a different family nor will the adoptive family have to face unwanted communications from the birth family. In the case of traditional adoptions, the task of locating an adopted child to notify her that she stands to inherit can be quite burdensome.[99] Despite its simplicity in interpretation and administration, the North Carolina approach seems to be the least equitable. The statute's lack of exceptions makes the state's approach even less favorable than Florida's.

VI. KANSAS'[100] APPROACH

Kansas also took a simple approach to adoption and intestate succession. In Kansas, "[a]n adoption shall not terminate the right of

---

[96] *Id*.

[97] *Id*. at 393.

[98] *Id*. at 395.

[99] *See* Administration for Children & Families, *How Can I Find My Birth Parents or Birth Relatives*?, U.S. DEP'T OF HEALTH & HUMAN SERVS., https://www.acf.hhs.gov/cb/faq/adoption7 (last visited April 17, 2017).

[100] The differing views on whether an "s" should follow the apostrophe to form the singular possessive of "Kansas" are borne out in *Kansas v. Marsh*. Kansas v. Marsh, 548 U.S. 163 (2006) (Justices Souter and Scalia use an "s" after the apostrophe while Justice Thomas does not).

the child to inherit from or through the birth parent."[101] In 1993, the state took affirmative steps to modify its intestacy statute. The courts recognized that unless there was a statute to the contrary, a child should inherit from both her birth and adoptive family.[102] The Kansas Legislature amended the statute to include the provision that allows adopted children to inherit by and through their birth family. Prior to that amendment, in a case where a birth parent's rights were terminated, the adopted child could not be an heir at law for the purposes of wrongful death statutes.[103] In those instances, if both the birth parents' rights are terminated and the child is never adopted, the child would be in a limbo, unable to inherit from either set of parents.[104]

For close to one hundred years, the Kansas Supreme Court has taken a liberal approach towards an adopted child's ability to inherit. In 1919, the court ruled that a child who is adopted by one family and then adopted again by a new family is entitled to inherit from both families.[105] Just two years later, the court ruled that a child who is adopted by a grandparent is entitled to inherit as both a child and a grandchild.[106]

VII. THE POLICIES UNDERLYING KANSAS' APPROACH

Florida and other states should implement Kansas' approach to inheritance after adoption. The Kansas approach accounts for the donor's intent, the adopted child's interests, simplicity, and uniformity. Kansas' statute is also preferable because it encourages testacy.

Although the Florida approach was credited above with aligning with the donor's likely intent, the same could be said about the Kansas statute. Individuals that have children who are subsequently adopted may not necessarily know that those children will not inherit from them through intestacy statutes. As reflected in American Jurisprudence, some jurisdictions recognize that an adopted child *is* entitled to inherit from her birth parents unless there is a statute to the contrary.[107] Thus, a significant segment of Americans may think that

---

[101] KAN. STAT. ANN. § 59-2118 (2017).
[102] *In re* Estate of Van Der Veen, 935 P.2d 1042, 1044 (Kan. 1997).
[103] *In re* Estate of Hinderliter, 882 P.2d 1001, 1003 (Kan. Ct. App. 1994).
[104] *Id*.
[105] Dreyer v. Schrick, 185 P. 30, 33 (Kan. 1919).
[106] *In re* Estate of Bartram, 198 P. 192, 194 (Kan. 1921).
[107] 2 AM. JUR. 2D *Adoption* § 191 (2018).

an adopted child may still inherit from the birth parents, especially if that person has no other living relatives. Further, the language used in testamentary and contractual documents may lead people to believe that their birth children will still inherit from them despite being adopted. Terms like "heirs of the body," "descendant," and "offspring" make people think of the natural consequences of reproduction and do not seem to be limited by legal fictions. After all, "God alone makes the heir, not man."[108]

The goals of simplicity and uniformity are advanced in adopting the Kansas statute. Simple statutes are better for judicial economy. Under the Florida statute, a judge would have to determine whether any of the three exceptions apply.[109] Subsection (c) allows an adopted child to inherit from her birth family if she is adopted by a "close relative." This term is defined in section 63.172(2) as the child's "brother, sister, grandparent, aunt, or uncle."[110] At a minimum, the adoptive parent would have to present evidence of her relationship to the biological child in order for the child to inherit from her birth family. The statute does not delineate whether half-bloods, aunts or uncles by marriage, or great-grandparents are "close relatives." Under the current statute, the judge is faced with a difficult decision when a cousin adopts, who is arguably closer to the child than the individuals listed in the statute, and the adoptive child would inherit otherwise.

Probate administration is plagued with inherent problems created by a lack of uniformity. Not only is there a need for uniformity among states in their approach to intestacy, but probate rules also change depending on whether the property is personal or real.[111] Uniformity is desirable so people know what to expect about the distribution of their property at death. Currently, real property is transferred according to the laws of the state where the property is located.[112] Personal property, on the other hand, passes in accordance with the laws of the state where the decedent was domiciled.[113]

The problem with a lack of uniformity is illustrated best with a hypothetical. A father has real property in Kansas. He only has two living relatives, a son and a daughter. The daughter was adopted as a child by another family. The father dies intestate in Florida where he

---

[108] Spitko, *supra* note 16, at 771.
[109] *See* FLA. STAT. § 732.108 (2017).
[110] FLA. STAT. § 63.172(2) (1987).
[111] *See* FLA. STAT. § 731.1055 (2016).
[112] *See id.*
[113] *See* FLA. STAT. § 731.106(2) (1987).

was domiciled. The son is entitled to inherit all the father's personal property, no matter where it is located, but the son and the daughter must share the real property in Kansas.

Florida's current statute does not properly balance the competing interests at stake in an adoption. On one side, children who have a sibling who was adopted would consider it unfair to have to share their inheritance when that child was not raised in their family.[114] However, in the scenario where there are no other living relatives to share the estate with, the law should not prevent the adopted child from inheriting from her birth parents.[115] In that instance, the decedent's estate would escheat to the state instead of going to the decedent's natural offspring.

Unfortunately, the Legislature intruded into the private and solemn affairs of citizens to sever the ability to inherit but has done nothing to prevent an individual from receiving a much greater windfall—seven Florida lottery jackpots. In Florida, a man won the lottery grand prize seven times, receiving a total of over one million dollars.[116] Surely the law should more likely prevent the same person from winning multiple state-run lottery jackpots than it should to prevent an adopted child from inheriting from her birth and adoptive family.

As will be discussed below, the argument that an adopted child's contact with her birth family should be completely severed for the child's benefit has proven to be unfounded.[117] Having a connection with the child's birth family does not undermine the adoptive family's role.[118] Research suggests that, in fact, the opposite is true.[119] Remaining in contact with the child's birth family can help to fortify the child's relationship with her adoptive family.[120] When the child

---

[114] Although children of the birth parents who were not adopted may find it unfair to share their inheritance with a child that was adopted into another family, that unfairness is potentially outweighed by the emotional effects felt by an adopted child. Rather than punishing the siblings who remained with their birth parents, having a share in her birth parent's estate could be a form of compensation for the potentially more difficult life led by the adopted child.

[115] The Florida Legislature has undertaken to fix something that is not broken. *See* Filanto v. Chilewich Int'l. Corp., 789 F. Supp. 1229, 1238 (S.D.N.Y. 1992). Unfortunately, the United States government, along with the individual States have caused more harm than good with some of the laws they pass. A couple additional examples include the Civilization Fund Act and the Indian Child Welfare Act.

[116] Singh, *supra* note 8.

[117] Fuller, *supra* note 13, at 1197.

[118] *Id*.

[119] *Id*.

[120] *Id*.

sees that the adoptive family accepts her, her past, and people who belong to her, the adoptive family is seen as accepting more of the child and demonstrating a deeper level of that acceptance.[121] Thus, allowing an adopted to child to inherit from her birth parents is likely to have positive emotional effects. Older children who still have memories and an emotional connection to their birth family would be especially benefited.[122]

An often over-looked aspect of adoption is that the child's consent is not required. Judges make determinations in a child's "best interest," but the child cannot stop an adoption by withholding her consent.[123] In 1970, the Supreme Court of Mississippi articulated that this public policy concern should weigh in the favor of allowing adopted children to inherit from their birth parents.[124] The court was concerned that children would have expectations of inheriting through their birth parents, but without or against the child's consent, the child would be adopted "during the tender years of minority and thus be deprived of benefits."[125] The court relied on the equitable principle that "when parties are disabled equity will act for them."[126] Minors are disabled because they cannot act for themselves in the legal sense so courts of equity will step in to defend them.[127] When the court steps in to protect a minor, the law is actually being advanced. Preventing a minor from inheriting because of conduct out of the minor's control is a step back to the Middle Ages.[128] Recall that hundreds of years ago a child could be totally blocked from any inheritance if she were born out of wedlock.[129] The law's treatment of minors and the disposition of property after death has surely evolved since a time when the sun was thought to be the center of the universe.[130]

Finally, if all the states adopted the Kansas statute,[131] individuals would be encouraged to execute testamentary documents. "[T]he law

---

[121] *Id*.

[122] *Id*. at 1196.

[123] *See* Alack v. Phelps, 230 So. 2d 789, 792 (Miss. 1970).

[124] *Id.*

[125] *Id*. at 792.

[126] *Id*. at 792–793.

[127] *Id*. at 790.

[128] *See* Rhodes, *supra* note 17, at 435.

[129] *Id*. at 434.

[130] *See* John McCabe, *DNA Fingerprinting: The Failings of Frye*, 16 N. ILL. U.L. REV. 455, 476 (1996) (discussing how evidence of Copernicus' findings about the solar system would not have been admitted in court under the *Frye* standard).

[131] An admittedly ambitious goal.

abhors intestacy."[132] If the law is uniform and clear—that a person may inherit through both her birth and adoptive parents, then individuals will be prompted to take action to ensure their intentions are carried out if they do not want the adopted child to inherit.

There are several ways to accomplish this goal. First, the ability to inherit can be provided for in the adoption decree. The adoption decree may be the most logical and convenient vehicle for birth parents to indicate their intent with respect to inheritance because the adoption cannot occur without the adoption decree. If the adoption has already taken place without the birth parent making their intent known, the birth parent can still memorialize that intent in a will or trust. The properly executed document can record the birth parent's intent to either exclude or provide for the adopted child. The issue may arise where the birth parent indicated an intent to allow the child to inherit in the adoption decree, but then executed a will or other testamentary document that does not account for the adopted child. In that case, the adopted child should only be prohibited from inheriting if the testator expressed that intent clearly in the testamentary document and was of sound mind at the time of execution.[133]

VIII. EXCEPTIONS FOR OPEN ADOPTIONS

Expectations are different in an "open adoption" as compared to a traditional adoption. In an open adoption, the birth mother will stay in contact with the adoptive family and her child after the adoption process is complete.[134] Because the birth family retains a connection with the adoptive family, the grounds for allowing the adopted child to inherit are even stronger. In light of the rise of open adoptions, scholars have advanced reformations to states' intestacy laws.[135]

One scholar, Spitko, proposes that the adopted child should be allowed to inherit from her birth parent when the birth parent maintains a "qualifying functional relationship" with the child after the adoption.[136] Spitko recommends that the test used to determine

---

[132] *In re* Estate of Baer, 446 So. 2d 1128, 1128 (Fla. Dist. Ct. App. 1984).

[133] This is similar to the requirement for disinheritance in Florida. *See* Hamilton v. Morgan, 112 So. 80, 82 (Fla. 1927) (holding that a testator of sound mind may make an unfair will disinheriting children or others with a claim to his estate).

[134] Spitko, *supra* note 16, at 775.

[135] *See id*. at 767.

[136] *See* Spitko, *supra* note 16, at 788; Spitko suggests that the qualifying functional relationship test be used as an alternative to both the birth and adoptive parents opting in to the uncleing principle at the time of the adoption decree. *Id*. at 797.

whether a qualifying functional relationship exists, should avoid focusing on whether the birth parent exercised authority or responsibility in connection with the adopted child.[137] Instead, the test should focus on "whether the birth parent provided emotional support to the child during their mutual lives."[138] If the birth parent and the child retained that relationship, such an inheritance would reflect the way an aunt or niece would inherit because the adopted child and her birth parents would still be heirs of each other; however, the distance between them on the family tree would be extended.[139]

This is known as the "uncleing principle."[140] The rationale is that an uncle does not typically exert authority or take responsibility for a child, but rather provides emotional support.[141] Thus, the birth parent that did not take parental control of the adopted child does not inherit the way a birth parent normally would.[142] States can adopt the Kansas approach and utilize the uncleing principle if necessary to ease the unfairness that could occur when the adopted child shares the estate with her birth siblings who were not adopted out of the birth family.

In regard to open adoptions, the idea has been posited that all states should include a stepparent exception in their intestacy statutes.[143] Currently, Florida, eight other states,[144] and Guam have some sort of

---

[137] Spitko, *supra* note 16, at 798.

[138] *Id*. Spitko recommends that the qualifying functional relationship test weigh several factors. *Id.* at 798–99. (Those factors include: "duration and constancy of the functional relationship between the birth parent and the adopted-out child; whether the birth parent regularly visited the adopted-out child; whether the birth parent regularly communicated with the adopted-out child via telephone calls, letters, emails, cards, etc.; whether the birth parent shared in or otherwise acknowledged major life events of the adopted-out child such as birthdays, major holidays, religious milestones, graduations, and the child's wedding; and whether the birth parent provided for the adopted-out child by means of will substitutes. Neither the presence nor the absence of any of these factors alone should be dispositive. Rather, the court should consider the totality of the circumstances.").

[139] *Id*. Spitko advocates that there should be one line of inheritance and two degrees of kinship added between the adopted child and the decedent. *Id.* To make this calculation, we begin with the lines of inheritance. The first "line" is simply going up one generation on your family tree to your parents. Spitko, *supra* note 16, at 791. The second "line" is calculated by going two generations up on your family tree—to your grandparents. To calculate the degree of kinship between two people, we count how many generations up the family tree we must go to get to the other person or to a common ancestor of the two people. *Id*. To calculate the degrees of kinship, Spitko uses the example of siblings A and B. *Id*. at 792. We go up one generation to get to the ancestor each sibling shares—their common parent. Then we go down one generation to get to the other sibling. *Id.* We went up one generation and down one, so that makes two degrees of kinship. *Id*.

[140] *Id*.

[141] Spitko, *supra* note 16, at 791.

[142] *Id*.

[143] Fuller, *supra* note 13, at 1196.

[144] Minnesota, Nevada, New Hampshire, New York, North Carolina, Oregon, Vermont, and Wisconsin. *See Intestate Inheritance Rights for Adopted Persons*, *supra* note 1, at 17–34.

stepparent adoption exception in their adoption or intestacy statutes.[145] The Guam statute is notable for its simplicity as well. It states that, "[a]ll the legal rights, privileges, duties, obligations, and other legal consequences of the relationship cease to exist, including the right of inheritance, except that where the adoption is by a spouse of the child's parent."[146] The stepparent exception should apply not only to open adoptions but to relative adoptions as well.[147] In that case, when the child is adopted by a relative, the child's ability to inherit intestate will not be severed.[148] This is similar to the provisions in the UPC and Florida's probate code.[149]

IX. CONCLUSION

Florida's flawed approach to intestate inheritance after adoption should give way to the position taken by Kansas. Kansas' position is superior because it accounts for the growing trend of open adoptions.[150] In an open adoption, the child's contact with her birth parents is not completely severed[151] so there is no need to terminate the adopted child's ability to inherit. More importantly, the approach taken by Kansas reflects a greater concern for the adopted child.[152] Research tends to show that an adopted child's emotional stability is not diminished by contact with her birth family; instead, her bond with her adoptive family can grow deeper.[153]

Although the Florida statute appears to reflect the donor's probable intent—that the adopted child's ties with her birth family are completely and finally severed—this is typically not the intent in an open adoption and it should not always be presumed to be the donor's intent. The best way to determine the intent of the birth parent is to have it recorded in the adoption decree.[154] The birth parent can indicate as to whether they wish the adopted child to inherit from them should they die intestate. Florida's concern for the fact that the birth

---

[145] Kansas does not have an exception because the statute allows inheritance by the adopted child from her birth family under any circumstances. *See* KAN. STAT. ANN. § 59-2118 (2005).

[146] 19 GUAM CODE ANN. § 4214 (2017).

[147] Fuller, *supra* note 13 at 1196.

[148] *Id*.

[149] *See* UNIF. PROB. CODE § 2-119 (2010); *see also* FLA. STAT. § 732.108(a), (b) (2017).

[150] Fuller, *supra* note 13, at 1190.

[151] *Id*. at 1198.

[152] *See id*. at 1197.

[153] *Id*.

[154] *See* Spitko, *supra* note 16, at 795.

parent does not always intend to sever ties with the adopted child is demonstrated by the multiple exceptions in the intestacy statute.[155]

Florida's statute would be simpler if the exceptions swallowed the rule. If adopted children are always allowed to inherit from their birth parents, the court will not have to undertake the difficult factual question of whether the child was adopted by a "close relative" or whether the stepparent exception applies.[156] Indeed, the uncleing principle suffers from the same problem in that it requires a deep analysis into whether the adopted child and birth parent maintained ties strong enough to pass the test for a qualifying functional relationship.[157] However, the multi-factor test can be eliminated if all adopted children are entitled to inherit intestate or if the uncleing principle applies to all adopted families.[158] Of course, the goal of uniformity would be achieved if all states followed this approach.

A positive effect of uniformity is that more people are likely to be aware of the law when it is the same across the country. If the law allows for inheritance after adoption, people can make informed decisions about their testamentary gifts. The birth parent would be on notice that the adopted child could still inherit from her, and could take the appropriate action to prevent that from happening by recording her intent in a will or other testamentary document.

Lastly, we reach the issue of fairness. It may seem unfair to follow the Kansas approach, which allows siblings of an adopted child to share their inheritance with someone who was not raised in their family. However, the adopted child did not consent to the adoption and she may have been adopted against her will.[159] Therefore, the adopted child should not be punished for acts over which she had no control. If the Florida Legislature was willing to step in to prevent an adopted child from receiving a double inheritance, it should step in to prevent an even more unfair windfall—the same man winning the Florida Lottery jackpot seven times.[160]

---

[155] *See* FLA. STAT. § 732.108 (2017).
[156] *See* FLA. STAT. § 732.108(c).
[157] *See* Spitko, *supra* note 16, at 795.
[158] *See id.*
[159] *See* Alack v. Phelps, 230 So. 2d 789, 792 (Miss. 1970).
[160] *See* Singh, *supra* note 8.