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# INHERITANCE RIGHTS CONSEQUENT TO ADOPTIONS

FRANCIS H. FAIRLEY\*

The importance of inheritance rights consequent to adoptions as well as the incompleteness of present statutory provisions relating thereto is emphasized anew by the recent North Carolina case of *Wilson v. Anderson*.<sup>1</sup> There the question was whether plaintiff, adopted in North Carolina in 1919, was an heir at law and/or next of kin of the intestate brother (who died October 3, 1949) of her predeceased adoptive father (who died March 23, 1943) along with the natural blood heirs and next of kin of said decedent. The North Carolina Supreme Court held that the new rules of descent<sup>2</sup> and distribution<sup>3</sup> were not available to the plaintiff adopted child, who was adopted in 1919 under the then effective adoption statute<sup>4</sup> and that therefore the plaintiff adoptee was not an heir nor a next of kin of the intestate decedent.

## PREFATORY COMMENTS

The adoption of children has become an increasingly frequent occurrence on the contemporary American scene. Each year more and more childless couples are adopting children.<sup>5</sup> In addition to many other sources of supply such as children of relatives and of financially unfortunate friends, there is an abundant supply of children to be adopted from the numerous ranks of those of illegitimate birth. Other than the obvious and tremendously important human, social, economic and religious aspects of adoptions, the changes in and creation of new legal rights and duties consequent to adoptions are of far-reaching legal significance. This is particularly true as to inheritance rights consequent to adoptions.

There has been a great deal of loose talk and writing in recent years about all phases of adoptions by uninformed persons. Many laymen (unfortunately including some adoptive parents) fail to understand properly the real nature and historical background of adoption. Particularly alarming is the frequent contemporary oversight of the fact

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<sup>1</sup> 232 N. C. 213, 59 S. E. 2d 836, *petition for rehearing dismissed*, 232 N. C. 521, 61 S. E. 2d 447 (1950).

<sup>2</sup> N. C. GEN. STAT. §29-1(14) (1950).

<sup>3</sup> N. C. GEN. STAT. §28-149(10) (1950).

<sup>4</sup> N. C. CONS. STAT. c. 2, §185 (1905).

<sup>5</sup> In Mecklenburg County, N. C., for example, the records of the Clerk of the Superior Court show over 100 petitions for adoptions filed in the first 11 months of 1950.

that every adoption is made possible, and its validity and effects for all purposes determined solely and exclusively, by adoption statutes. Hence it is of the utmost practical importance to the practicing attorney and others dealing frequently with adoptions that the statutory basis and historical background of adoptions always be kept in the mental forefront.

#### HISTORY AND PURPOSE

The history of adoptions stretches back to a distant age.<sup>6</sup> Adoptions had a place in the law of many early civilized peoples. The ancient Babylonians recognized adoptions over four thousand years ago.<sup>7</sup> Adoption was also recognized by the Romans, the Athenians, the Spartans, and the Egyptians.<sup>8</sup> It was recognized by the Hebrews in the New Testament<sup>9</sup> and by the ancient Germanic people. From the Spanish law it was incorporated into the French Code Napoleon and from that code into the laws of Texas and Louisiana.<sup>10</sup>

Adoption in early civilizations seems to have been based primarily on either religious considerations or on the desire to provide an heir for a childless father.<sup>11</sup> On the other hand the modern English and most of the American statutes seem to have as their dominant purpose the providing of a home, loving care, and proper upbringing by new legal adoptive parents, for an unfortunate child. The English and American statutes have grown and developed primarily out of legislative concern for the interests of the unfortunate child. This legislative concern in turn reflected the growing social consciousness of the nineteenth and twentieth centuries and recognition of the commonwealth's responsibility to provide for unfortunate children in the most effective manner by allowing them to gain a permanent status in a real home with new legal parents. For example, the 1949 Adoption Act in North Carolina declares as a matter of legislative policy with respect to adoption that:

"(1) The primary purpose of this Chapter is to protect children from unnecessary separation from parents who might give them good homes and loving care, to protect them from adoption by persons unfit to have the responsibility of their care and rearing, and to protect them from interference, long after they have become properly adjusted in their adoptive homes, by natural parents who may have some legal claim because of a defect in the adoption procedure.

<sup>6</sup> *Hockaday v. Lynn*, 200 Mo. 456, 98 S. W. 585 (1906) (extensive historical summary of adoptions contained herein).

<sup>7</sup> Code of Hammurabi §§185-193 (compiled from 2285 to 2242 B.C.).

<sup>8</sup> Exodus 2:10; Hanft, *Thwarting Adoptions*, 19 N. C. L. REV. 127, 128 (1941).

<sup>9</sup> *Hockaday v. Lynn*, 200 Mo. 456, 98 S. W. 585 (1906).

<sup>10</sup> *Ibid.*

<sup>11</sup> Kuhlman, *Intestate Succession by and from the Adopted Child*, 28 WASH. U. L. Q. 221, 222 (1943).

(2) The secondary purpose of this Chapter is to protect the natural parents from hurried decisions, made under strain and anxiety, to give up a child, and to protect foster parents from assuming responsibility for a child about whose heredity or mental or physical condition they know nothing, and to prevent later disturbance of their relationship to the child by natural parents whose legal rights have not been fully protected.

(3) When the interests of a child and those of an adult are in conflict, such conflict should be resolved in favor of the child; and to that end this Chapter should be liberally construed."<sup>12</sup>

In the applicable North Carolina statutes, as in most adoption statutes of other states, determination of inheritance rights is not stated directly or impliedly as being one of the principal purposes of the statute. Rather, consideration of inheritance rights appears in most of the statutes as a legislative after-thought only partially completed, and spelled out in the statutes as a by-product of providing the unfortunate child a new home and loving care from new legal adoptive parents.

It is axiomatic that adoption was unknown to or not recognized by the English common law. Perhaps it is historically more accurate to say that adoption was non-existent under the English common law. Not until as recently as the Adoption Act of 1926 was adoption at long last legalized in our mother country.<sup>13</sup> Under this Act the adoption order did not create, change or destroy any rights of inheritance.<sup>14</sup> By this Act an adopted child did not inherit from its adoptive parents and it was made necessary, if they desired the adoptive child to receive their property, to make provision by will or settlement.<sup>15</sup> On the other hand, the first adoption statute in the United States, enacted in 1851 by Massachusetts,<sup>16</sup> permitted the adopted child to inherit from the adoptive parent.

#### THE NORTH CAROLINA ADOPTION STATUTES AND DECISIONS

The original adoption statute in North Carolina was passed in 1873.<sup>17</sup> It contained basically the same provision as to inheritance rights as the Massachusetts statute.<sup>18</sup> The statutory language in this respect continued in effect substantially unchanged through the North Carolina Code of 1883, Section 3, and into the Revisal of 1905,<sup>19</sup> the pertinent portion of which reads:

"Such order, [granting letters of adoption] when made, shall have the effect forthwith to establish the relation of parent and child

<sup>12</sup> N. C. GEN. STAT. §48-1 (1950).

<sup>13</sup> 16 and 17 GEO. 5, c. 29 (1926).

<sup>14</sup> *Ibid.*, §5(2).

<sup>15</sup> 92 THE SOLICITOR'S JOURNAL 400, 401 (1948).

<sup>16</sup> MASS. ACTS AND RESOLVES, c. 324 (1851).

<sup>17</sup> N. C. PUB. LAWS c. 155 (1872-3).

<sup>18</sup> *Ibid.*, §3.

<sup>19</sup> N. C. REVISAL c. 2, §176 (1905).

between the petitioner and the child during the minority or for the life of such child, according to the prayer of the petition, with all the duties, powers and rights belonging to the relationship of parent and child, and in case the adoption be for the life of the child, and the petitioner die intestate, such order shall have the further effect to enable such child to inherit the real estate and entitle it to the personal estate of *the petitioner* in the same manner and to the same extent such child would have been entitled to if such child had been the actual child of the person adopting it: Provided, such child shall not so inherit and be so entitled to the personal estate, if the petitioner specifically set forth in his petition such to be his desire and intention. . . ." (Italics added.)

Practically the same language was carried forward into the Consolidated Statutes of 1919 as c. 2, §185. The North Carolina adoption statute was rewritten in 1933 but the quoted language was retained virtually unchanged.<sup>20</sup> In 1935 upon revision the quoted language was again retained.<sup>21</sup>

In *Edwards v. Yearby*<sup>22</sup> the question of construction of this language was presented with regard to whether the natural or the adoptive parent of the minor child inherited from the deceased minor adopted child. It was held that the natural parent inherited to the exclusion of the adoptive parent.

Later in *Sorrell v. Sorrell*<sup>23</sup> an adopted child was held not entitled to take under the after-born child provision of the wills statute. In 1935 came the case of *Grimes v. Grimes*.<sup>24</sup> In construing the above quoted language, the court held that a child adopted for life in 1924 did not inherit that portion of the estate of his natural grandfather, who died in 1933, which his adoptive father, who died intestate in 1931, would have inherited as a son had he not predeceased said grandfather. This was a clear-cut holding in effect that an adopted child did not inherit from lineal relatives of the adoptive parent. The court emphasized: (1) the contractual nature of adoption; (2) the importance of the principle of consanguinity; and (3) the rule of strict construction of statutes in derogation of the common law and the statutes of descent and distribution.

<sup>20</sup> N. C. PUB. LAWS c. 207, §1(5) (1933).

<sup>21</sup> N. C. PUB. LAWS c. 243, §1(5) (1935).

<sup>22</sup> 168 N. C. 663, 85 S. E. 19 (1915).

<sup>23</sup> 193 N. C. 439, 137 S. E. 356 (1927) (testator made will at time when he had no children, leaving all to wife. Thereafter he adopted one child and another was born to his marriage. No change was made in his will before death, *held*: natural child entitled to take under after born provision of wills statute; but adoptee though adopted for life was not entitled to inherit from the adoptive parent unless the adoptive parent died intestate). See Note, 29 N. C. L. Rev. 218 (1951).

<sup>24</sup> 207 N. C. 778, 178 S. E. 574 (1935).

It is significant to note that *Ward v. Howard*<sup>25</sup> held an adopted child not entitled to inherit from its intestate father as the adoption was invalid because the natural mother's consent had not been obtained. It should be noted in passing (and by way of caveat to attorneys and others concerned most with adoption statutes) that the decisions amply show the invalidity of adoptions not strictly complying with the statutes.

In 1941 the North Carolina adoption statute was once again rewritten. The provision with respect to inheritance rights was now changed for the first time since its original enactment in 1873. The new section read as follows:

48-6. "Such order granting letters of adoption shall be made upon a standard form supplied by the state board of charities and public welfare, and shall state whether for the minority or for the lifetime of such child and shall have the effect forthwith to establish the relation of parent and child between the petitioner and the child. A child adopted for its minority shall not be deemed a relative of its adopted parents when determining succession of property to, through or from it. But where adoptions are for life succession by, through, and from adopted children and their adoptive parents shall be the same as if the adopted children were the natural, legitimate children of the adoptive parents. Succession by children adopted for life and their lineal descendants from or through their natural parents or by or through the natural parents from such adopted children or their lineal descendants shall take place only when but for such succession the state of North Carolina would succeed to the intestate's property. Further, for all other purposes whatsoever a child adopted for life and his adoptive parents shall be in the same legal position as they would be if he had been born to his adoptive parents. No defect or irregularity, jurisdictional or otherwise, in an adoption proceedings shall prevent inheritance by a child, adopted for life, who has after the adoption continuously lived as the adopted child of the adoptive parents."<sup>26</sup>

However, the 1941 adoption statute added a new section which, in applicable part, provided that:

"The provisions of §48-6 except for the last sentence shall apply only to adoptions made after March 15, 1941. . . ."<sup>27</sup>

The construction of the above-quoted sections of the 1941 statute was presented in *Phillips v. Phillips*.<sup>28</sup> In this case the plaintiff had

<sup>25</sup> 217 N. C. 291, 7 S. E. 2d 625 (1940). See also *Truelove v. Parker*, 191 N. C. 430, 132 S. E. 295 (1926).

<sup>26</sup> N. C. PUB. LAWS c. 281, §4 (1941); see *A Survey of Statutory Changes in N. C. in 1941*, 19 N. C. L. REV. 435, 449 (1941).

<sup>27</sup> N. C. PUB. LAWS c. 281, §8 (1941).

<sup>28</sup> 227 N. C. 438, 43 S. E. 2d 604 (1947). Although decided after passage of 1947 amendments to the statutes of descent and distribution the 1941 act was applicable because decided prior to effective date of 1947 amendments.

been adopted by testatrix's son on February 2, 1924. Testatrix's will was dated March 1, 1943, the plaintiff's adoptive father died November 17, 1943, and the testatrix died in 1945. It was held that plaintiff, adopted daughter of testatrix's son, took nothing under the residual clause of the testatrix's will giving, devising and bequeathing the remainder of the estate to the testatrix's three children, share and share alike. Thus the court held that the rights of plaintiff were to be determined by the statutes in effect prior to the 1941 Adoption Act since that act expressly provided it should apply only to adoptions thereafter made.

Another case arising under the 1941 statute was *Smyth v. McKissick*.<sup>29</sup> The testator had died in 1942 leaving a will which created a trust for the benefit of his son and three daughters. There was a proviso that the "child" of any deceased child should take the part his parent would have been entitled to if living. The son had predeceased the testator father leaving an adopted son surviving. The testator for four years before his death had known of, approved of, and recognized the adoption. The court distinguished the earlier *Grimes* case on its facts holding the word "child" in the will to be broad enough to include the adopted child and that the meaning of the word "child" was not limited to those related by blood.

In 1947 the General Assembly revised completely the adoption statute.<sup>30</sup> The new provision with respect to inheritance rights reads as follows:

48-23. "The final order forthwith shall establish the relationship of parent and child between the petitioners and the child, and, from the date of the signing of the final order of adoption, the child shall be entitled to inherit real and personal property in accordance with the statutes of descent and distribution." (N. C. Pub. Laws 1947 c. 300.)

The 1947 Adoption Act was ratified April 4, 1947, to become effective July 1, 1947, but in an advisory opinion it was held inoperative and void in toto for omission of the enacting clause.<sup>31</sup>

The 1947 General Assembly also amended the statutes of descent and distribution by adding the following sections (ratified April 4, 1947, and effective July 1, 1947):

"Rule 14, Succession and inheritance rights of adopted child. An adopted child shall be entitled by succession or inheritance to any real property by, through, and from its adoptive parents the same as if it were the natural, legitimate child of the adoptive parents.

<sup>29</sup> 222 N. C. 664, 24 S. E. 2d 621 (1943).

<sup>30</sup> N. C. PUB. LAWS c. 300 (1947); see *A Survey of Statutory Changes in N. C. in 1947*, 25 N. C. L. REV. 376, 408-412, 443-445 (1947).

<sup>31</sup> *In re Advisory Opinion*, 227 N. C. 708, 43 S. E. 2d 73 (1947).

Rule 15, Succession and inheritance rights of adoptive parents. The adoptive parents shall be entitled by succession or inheritance to any real property by, through, and from an adopted child the same as if the adopted child were the natural, legitimate child of the adoptive parents.

Rule 16, Succession and inheritance rights of legitimate children. When any child born out of wedlock shall have been legitimated in accordance with the provisions of G. S. 49-10 or G. S. 49-12 such child shall be entitled to all the rights of succession or inheritance to any real property of its father and mother as it would have had had it been born their issue in lawful wedlock."<sup>32</sup>

"10. An adopted child shall be entitled by succession, inheritance, or distribution of personal property, including, without limiting the generality of the foregoing, any recovery of damages for the wrongful death of such adopted parent by, through and from its adoptive parents the same as if it were the natural, legitimate child of the adoptive parents.

11. The adoptive parents shall be entitled by succession, inheritance, or distribution of personal property including, without limiting the generality of the foregoing, any recovery of damages for the wrongful death of such adopted child by, through, and from an adopted child the same as if the adopted child were the natural, legitimate child of the adoptive parents.

12. When any child born out of wedlock shall have been legitimated in accordance with the provisions of G. S. 49-10 or G. S. 49-12 such child shall be entitled to all the rights of succession, inheritance, or distribution of personal property of its father and mother as it would have had had it been born their issue in lawful wedlock."<sup>33</sup>

When the 1947 Adoption Act was held inoperative and void the amendments to the statutes of descent and distribution just quoted were left unaccompanied by the new adoption provisions with which they were intended to take effect simultaneously.

In 1949 a completely new adoption statute was enacted<sup>34</sup> (effective March 11, 1949). It was a revision of the 1947 Act. The new section now reads:

48-23. "Effect of Final Order. The *final order forthwith* shall establish the relationship of parent and child between the petitioners and the child, and, *from the date of the signing of the final*

<sup>32</sup> N. C. GEN. STAT. §29-1(14)(15)(16) (1950). The comparison of the language of Rule 16 and the comparable section *infra*, dealing with personalty, with the inheritance provisions may be of some aid.

<sup>33</sup> N. C. GEN. STAT. §28-149(10)(11)(12) (1950); N. C. PUB. LAWS c. 879 (1947).

<sup>34</sup> N. C. GEN. STAT. c. 48 (1950); N. C. PUB. LAWS c. 300 (1949); see *A Survey of Statutory Changes in N. C. in 1949*, 27 N. C. L. REV. 405, 418 (1949).



order of adoption, the child shall be entitled to inherit real and personal property *from the adoptive parents* in accordance with the statutes of descent and distribution." (Italics added.)

The 1949 Act, like all the earlier revisions of the adoption statute, contained a section validating and confirming all past adoption proceedings.<sup>35</sup>

With enactment of the 1949 Act the statutory setting for *Wilson v. Anderson* was complete. The court stated the question before it and the answer thus: "Do the Statutes of Descent and Distribution, as amended by 1947 Session Laws, Chapter 832 (G. S. 29-1(14)) and Chapter 879 (G. S. 28-149(10)), apply to an adoption made in the year 1919 under the statute pertaining to adoptions, Chapter 2 of Revisal of 1905, as it then existed? In the light of pertinent statutes, and of decisions of this Court, and of rules for interpreting legislative acts, we are of opinion and hold that this question merits a negative answer."<sup>36</sup>

The court stated the general rule that all adoption laws and statutes *in pari materia* therewith in force in a state should be read together, as constituting one law, and the general rule that a statute should be considered in connection with other statutes affecting the same subject matter.<sup>37</sup> In accordance with the general rule that statutes are presumed to operate prospectively only,<sup>38</sup> and in accordance with the expressly declared respect manifested by the General Assembly in each successive adoption act for all prior adoption proceedings and judgments therein, the court held, in effect, that the 1949 adoption act and the 1947 amendments to the statutes of descent and distribution should have a prospective effect only; i.e., would apply only to adoptions made after these acts. In the second opinion in this case, upon dismissing a petition to rehear, the court pointed out that:

"... Whatever rights of succession she acquired by her adoption became vested upon the death of her adoptive parent. [March 23,

<sup>35</sup> N. C. GEN. STAT. §48-34 (1950): "All proceedings for the adoption of minors in courts of this state are hereby validated and confirmed and the orders and judgments heretofore entered therein are declared to be binding upon all parties to said proceedings and their privies and all other persons, until such orders or judgments shall be vacated as provided by law; provided that this section shall not apply to litigation pending on the effective date of this chapter in which the validity of a prior adoption proceeding is involved."

<sup>36</sup> 232 N. C. 213, 215, 59 S. E. 2d 836, 842 (1950).

<sup>37</sup> *Wilson v. Anderson*, 232 N. C. 213, 220, 59 S. E. 2d 836, 843 (1950); 26 C. J. S. 1003, 1005.

<sup>38</sup> *Weber v. Griffiths*, 349 Mo. 145, 159 S. W. 2d 670 (1941); *McIntyre v. Hardesty*, 347 Mo. 805, 149 S. W. 2d 334 (1941); *Sutton v. Davis*, 205 N. C. 464, 171 S. E. 738 (1933); *Comm'rs v. Blue*, 190 N. C. 638, 130 S. E. 743 (1925); *Hicks v. Kearney*, 189 N. C. 316, 127 S. E. 205 (1925); *Rodgers v. Miller*, 43 Ohio App. 198, 182 N. E. 654 (1932); *Jacobs v. Duncan*, 75 Okla. 71, 181 Pac. 936 (1919); *Combs v. Cook*, 35 Okla. 326, 129 Pac. 698 (1913).

1943.] And, at that time the statute pertaining to adoption of minors, P. L. 1941, Chapter 241, giving to an adopted child the right to succession through the adoptive parent, applied only to adoption made after 15 March, 1941. . . ."<sup>39</sup>

Thus the North Carolina court in effect in these two opinions reaffirms adherence to all the various bases for strict construction relied on formerly and relied on at various times by some other courts in the United States, namely:

1. The right to inherit property by reason of blood kinship is a natural one while the right to inherit property created by adoption is an artificial one.<sup>40</sup>

2. Adoption creates a contractual status between the adoptee and the adoptors but not as to other parties and the inheritance rights are determined by the contract and the statutes under which the contract was made.<sup>41</sup>

3. An order of adoption is a final judgment not to be interfered with by retroactive construction of statutes passed after the judgment.<sup>42</sup>

4. Statutes in derogation of the established principle of consanguinity in the law of intestate succession should be strictly construed.<sup>43</sup>

5. A statute will not be given retroactive effect to interfere with rights already vested or crystallized.<sup>44</sup>

In addition to these rules of construction deducible, from the case law, this chronological survey of the North Carolina law points up several questions for decision facing the North Carolina court. Among these are the following:

1. Are the inheritance rights of a child adopted after March 15, 1941, but prior to July 1, 1947, determined under the 1941 Adoption Act or under the 1949 Adoption Act and the 1947 amendments to the statutes of descent and distribution?

2. Are the rights of a child adopted between July 1, 1947, and March 11, 1949, determined under the 1941 Adoption Act or under the

<sup>39</sup> *Wilson v. Anderson*, 232 N. C. 521, 61 S. E. 2d 447 (1950).

<sup>40</sup> *Phillips v. Phillips*, 227 N. C. 438, 43 S. E. 2d 604 (1947); *Grimes v. Grimes*, 207 N. C. 778, 178 S. E. 574 (1935); *In re Matzhe's Estate*, 250 Wis. 204, 26 N. W. 2d 659 (1947); *In re Bradley's Estate*, 185 Wis. 393, 201 N. W. 973 (1925); *Nunnemacher v. State*, 129 Wis. 190, 108 N. W. 627 (1906).

<sup>41</sup> *Merritt v. Morton*, 143 Ky. 133, 136 S. W. 133 (1911); *Weber v. Griffiths*, 349 Mo. 145, 159 S. W. 2d 670 (1942); *Hockaday v. Lynn*, 200 Mo. 456, 98 S. W. 585 (1906); *In re Bradley's Estate*, 185 Wis. 393, 201 N. W. 973 (1925).

<sup>42</sup> *McIntyre v. Hardesty*, 347 Mo. 805, 149 S. W. 2d 334 (1941); *Rodgers v. Miller*, 43 Ohio App. 198, 182 N. E. 654 (1932); *Jacobs v. Duncan*, 75 Okla. 71, 181 Pac. 936 (1919); *Combs v. Cook*, 35 Okla. 326, 129 Pac. 698 (1913).

<sup>43</sup> *Kerr v. Goldsborough*, 150 Fed. 289 (4th Cir.), *cert. denied*, 204 U. S. 672 (1906); *In re Captain's Estate*, 191 Okla. 463, 130 P. 2d 1002 (1942).

<sup>44</sup> *Eck v. Eck*, 145 S. W. 2d 231 (Tex. Civ. App. 1940).

1949 Adoption Act and the 1947 amendments to the statutes of descent and distribution?

3. What are the effects as to inheritance rights provided by the 1949 Adoption Act and the 1947 amendments to the statutes of descent and distribution, on adoptions occurring after March 11, 1949 (the effective date of the 1949 Adoption Act) as to: (a) an adoptee; (b) an adoptor; (c) lineal relatives of an adoptor; (d) collateral relatives of an adoptor; (e) natural parents of an adoptee; (f) lineal relatives of natural parents of an adoptee; (g) and collateral relatives of natural parents of an adoptee?

4. What are the inheritance rights of a child adopted prior to July 1, 1947, but whose adoptive parent dies subsequent to that date or subsequent to March 11, 1949?

5. Under the new statutes does an adopted child still inherit from (a) its natural parents, and/or (b) their lineal relatives, and/or their collateral relatives?

6. What are the effects of the new statutes in construction of wills, trust instruments and deeds as to such words as child, children, issue, heirs, and heirs of the body?

7. What is the legal effect of the insertion of the words "from the adoptive parents" in G. S. §48-23 in the Adoption Act of 1949?

8. What are the inheritance rights consequent to re-adoption of an adopted child?

9. What are the effects of the 1949 Adoption Act and the 1947 amendments to the statutes of distribution with regard to personal property in view of the long line of cases in North Carolina holding that personal property is taken per capita and directly by virtue of the blood relation of the distributee to the decedent and not per stirpes?

These questions (and doubtless others) will, of course, remain unanswered until decided by cases which properly present them. The author is bold enough to speculate on the answer to only a part of the fifth of these questions. In *Edwards v. Yearby*<sup>45</sup> it was held that the natural rather than the adoptive parent inherited from the adopted child. This case construed the inheritance rights provisions of the North Carolina adoption statutes as contained in the Revisal of 1905 and which provisions remained substantially the same from 1873 to March 15, 1941. In view of that case and since nothing is contained in the 1949 Adoption Act to cut off the right of an adopted child to inherit from its natural parents, it would seem that a child adopted before March 15, 1941 (effective date of the 1941 Adoption Act) or after March 11, 1949 (effective date of the 1949 Adoption Act) could inherit

<sup>45</sup> 168 N. C. 663, 85 S. E. 19 (1915).

from both its adoptive parents and its natural parents. During the eight year period that the 1941 Adoption Act was in force, that act expressly provided that succession by or through the natural parents from an adopted child should take place only to prevent escheat to the state.

In considering the questions of inheritance rights yet to confront the Supreme Court the following statutory changes are especially important:

1. The 1949 act omitted the provision in the 1941 act "that for all other purposes whatsoever the child and the adoptive parents, shall be in the same position as they would be if the child had been born to his adoptive parents."

2. The 1949 act omitted the provision in the 1941 act that adopted children and their natural parents would succeed by, from and through each other only to prevent escheat to the state.

3. The 1949 act provides for rights of inheritance being created upon entry of the *final order* of adoption rather than upon entry of the *interlocutory order* as in the 1941 and earlier adoption acts.

These changes in particular as well as the complete overhauling of the adoption act by the 1947 and 1949 General Assemblies indicate in the writer's opinion either (a) a legislative intent that the 1949 Adoption Act and the 1947 amendments to the statutes of descent and distribution were to be prospective in operation in the sense that they apply only to adoptions under (and after) the 1949 act and hence of course only to deaths after the operative date of the 1949 act; or (b) a lack of any real legislative intent with regard to prospective or retroactive effect on inheritance rights consequent to adoptions.

It is noted that the 1949 Adoption Act (as well as the ill-fated 1947 Adoption Act) was materially different from the earlier acts in many important respects. No longer is there provision for adoption for minority of the child. The joinder of both husband and wife as petitioners is required for an adoption (except in the case of a step-parent where joinder of the natural parent is obviously unnecessary). The consent of the child is required if the child is over 12 years old. The contents of the petition for adoption, of the interlocutory decree and of the final order are all specified in detail. The provisions relating to consent of natural parents are greatly changed, as is the entire procedure for adoptions.

#### PERSONAL PROPERTY—PER CAPITA DISTRIBUTION

With regard to the ninth question raised above it should be noted that North Carolina for nearly one hundred years since the case of *Skinner v. Wynne*<sup>46</sup> has unbrokenly followed the general rule that per-

<sup>46</sup> 55 N. C. 41 (1854).

sonal property is taken per capita and directly while real estate is inherited per stirpes or by right of representation. Thus there is considerable authority,<sup>47</sup> as discussed briefly below, that personal property is taken per capita and directly and by virtue of the blood relation of the taker to the intestate decedent. It is also a general rule of construction of wills where a devise or bequest is to a class collectively that distribution is to be per capita unless the entire will discloses a contrary intent.

In *Skinner v. Wynne* the intestate died leaving as distributees three grandchildren. Two were the children of one daughter who predeceased him and the other was the child of another daughter who also predeceased him. It was held that each grandchild took one-third part of the personalty per capita and not per stirpes. The court said, "taking per capita, in their own right, they do not account for advancements made to their respective parents." *Nelson v. Blue*<sup>48</sup> reaffirmed this doctrine in holding that under the will of a testatrix who gave "the balance of my estate to be divided among all my lawful heirs" her numerous nieces and nephews shared equally per capita, being in equal degree, and under the then applicable statutes of distribution great-nieces and great-nephews took nothing. The later case of *Burton v. Cahill*<sup>49</sup> applied the principle of per capita distribution to children of joint tenants of realty for life, who took by deed conveying to A and B for life and then to their children, following the general rule that distribution is per capita unless the entire will or conveyance discloses a contrary intent.<sup>50</sup>

Thus the statutes of distribution (with the single exception of the wife-husband relationship) prior to the 1947 amendments have been uniformly construed in North Carolina as at common law, i.e., providing for per capita distribution based on taking directly by virtue of blood relationship. The General Assembly as yet has made no express change in this rule of law. The question arises then, whether an adoptee must establish his right to take personalty on the basis of blood relationship to the decedent, i.e., in his own right, per capita, in which case he would not take from a relative of the adoptive parent; or whether the 1947 Act makes distribution to the adoptee per stirpes, in the right of the predeceased adoptive parent ("by, through, and from"). The

<sup>47</sup> *In re Mizzelle's Estate*, 213 N. C. 367, 196 S. E. 364 (1938); *Ellis v. Harrison*, 140 N. C. 444; 53 S. E. 299 (1906). See also 2 BL. COMM. 517; 2 MINOR, REAL PROPERTY §985 (1908); TIFFANY, REAL PROPERTY 1913 (2d ed. 1920).

<sup>48</sup> 63 N. C. 659 (1869).

<sup>49</sup> 192 N. C. 505, 135 S. E. 332 (1926).

<sup>50</sup> But see *Walsh v. Friedman*, 219 N. C. 151, 13 S. E. 2d 250 (1941) and *Knox v. Knox*, 208 N. C. 141, 179 S. E. 610 (1935) as representative of will construction cases holding that the testator had expressly shown a per stirpes intent while recognizing the general rule that distribution is per capita unless the entire will discloses a contrary intent.

trial court in *Wilson v. Anderson* had held that the 1947 amendments to the statutes of descent and distribution controlled, and that the adoptee inherited real estate, but did not take personal property as she was not blood kin to the intestate decedent. But since the Supreme Court held that the 1947 amendments applied prospectively only and based its decision on this broader ground it is an open question what the holding on this point will be when properly raised in a later case. When this question is raised it should be remembered that the 1949 Adoption Act does not expressly make the adoptee the relative of any one other than the adoptive parents, and that this act omitted the provision of the 1941 Adoption Act making the adoptee the child of the adoptive parents for all other purposes as though born to the adoptive parents.

Further, it is the writer's unoriginal observation<sup>51</sup> that adoptive parents (particularly those having no natural children) are generally as much or more devoted to the adopted child than natural parents to a natural child, but that this affection is not always shared by relatives of the adoptive parents.

While it is true that one's blood relatives have no more control over one's adopting a child than over one's marriage or one's having natural children it is also true that natural children are blood kin to the natural relatives of the natural parents and adopted children are not. If the General Assembly, in its wisdom and as a part of its social policy for adoptions, intends to substitute the adoptive relation for the natural relation completely and for all purposes it is submitted that the applicable statutes should expressly so provide. This result cannot be accomplished where, as under existing law, an adopted child still inherits from its natural parents and possibly from relatives of the natural parents.

The *Wilson v. Anderson* opinions appear to be based soundly upon accepted rules of statutory construction. All the courts can do is apply generally accepted rules of statutory construction until the millennium is reached, if ever, when the statutes will give full and unambiguous coverage.

While only the most unstinted praise can be given to the Domestic Relations Commission and the 1947 and 1949 General Assemblies for their fine work and substantial accomplishment in modernizing and improving the Adoption Act it is clear that the courts are being and will be called on to decide many knotty questions as to inheritance rights consequent to adoptions unless and until some future General Assembly fully and completely expresses its intentions by adequate statutory coverage.

<sup>51</sup> Being a bachelor, the writer is ex officio an authority on children, natural and adopted, and on their proper rearing.

Until the General Assembly speaks further it behooves those desiring to leave property, real or personal, to adopted children to make such provision by will or inter vivos gift. And it equally behooves lawyers drafting wills and trust instruments and special conveyances to ascertain and effectuate by careful draftsmanship the testator's or trustor's or grantor's specific intention as to inclusion or exclusion of adopted children, distinguishing between those now and those thereafter adopted. Also care should be exercised in the use of such terms as "issue," "child" or "children," "heirs," "heirs of the body," and "next of kin."

#### GENERAL LAW

With regard to the general law as to inheritance rights consequent to adoptions any statements must be considered in the light of the fundamental fact that each state in the United States has its own distinctive adoption statutes, and that the court decisions are interpreting particular adoption statutes of one state entirely different in wording and in statutory evolution from those in other states. In few substantive fields of the law are there now such differences from state to state as in adoption statutes.

There has been a gradual legislative trend in enactment of adoption statutes to throw additional safeguards around the original taking of a child from its natural parents, and then around the adopted child and its adoptive parents. Also inheritance rights consequent to adoptions are gradually being spelled out by statutes to cover some of the many possible situations. Most state legislatures seem to make whatever provisions are made as to inheritance rights a part of the adoption statutes, while some attempt to cover the subject by amending the statutes of descent and distribution.

The laws of foreign countries also show great variance. For example, adoption is now provided for even in Communist Russia which has seen the light of our capitalist ways to the small extent of providing inheritance rights limited in amount. There, in the absence of a will, the children, including the adopted children of a decedent, along with his spouse, his parents if unable to work, and other persons unable to work who have been dependent upon the decedent for at least a year prior to his death, are made heirs by operation of law.<sup>52</sup>

The 1926 Adoption Act of England, previously mentioned, has since been replaced by the 1949 Adoption of Children Act. Section 9(1) of this act expresses the aim of that and the succeeding section as "securing that adopted persons are treated as children of the adoptive for the purposes of the devolution or disposal of real and personal property."

<sup>52</sup> Gsovski, *Soviet Law of Inheritance*, 45 MICH. L. REV. 291 (1947).

The effect of the new English Act has been described as making adopted children heirs and next of kin of the adoptive parents but not of any other persons.<sup>53</sup>

Some states in our own country, like North Carolina, in the immediate past have been attempting to modernize their adoption acts. Tennessee, for example, revised its adoption act completely in 1949.<sup>54</sup> Section 7 of this new act provides: ". . . such adoption shall confer upon the child adopted . . . capacity to inherit and succeed to the real and personal estate of such petitioner or petitioners, as heirs and next of kin." Under the present Tennessee law apparently an adoptee would still inherit from his natural parents but would not inherit from lineal or collateral relatives of the adoptive parents; and a re-adoption does not deprive the adoptee of the right to inherit from his first adoptive parents.<sup>55</sup>

The majority rule in the United States is that an adopted child inherits from his adoptive parents but not through them from their lineal or collateral relatives,<sup>56</sup> although the majority of jurisdictions as yet have no express statutory provisions on these questions. One summary as of 1939 shows that twenty-three states denied the right of adopted children to inherit from lineal or collateral relatives of the adoptive parents while eleven states granted such right.<sup>57</sup>

A 1943 survey of the statutes of all forty-eight states and the District of Columbia demonstrates with forcefulness the differences existing in statutory coverage of inheritance rights pursuant to adoption.<sup>58</sup> In case of the adoptor dying intestate thirty-six states permitted the adoptee to inherit from its adoptor. In five states the right of the adoptee to inherit depended upon the adoption decree, while in eight states the statutes were not explicit. In nineteen states the adoptor could inherit from the adoptee, and in fifteen the adoption rights were determined by the source of the adoptee's estate. In North Carolina and ten other states the statutes were deemed not explicit. Three states had no provision and two states denied the adoptor the right to inherit.

With regard to inheritance rights between adoptee and natural

<sup>53</sup> 94 THE SOLICITOR'S JOURNAL 173 (1950).

<sup>54</sup> TENN. PUB. ACTS c. 127 (1949).

<sup>55</sup> Merlin, *The Tennessee Law of Adoption*, 3 VAND. L. J. 627 (1950). See also *Taylor v. Taylor*, 162 Tenn. 482, 40 S. W. 2d 393 (1931) and earlier Tennessee cases cited therein.

<sup>56</sup> RUGGLES AND REDMOND, *ADOPTION AND ABANDONMENT OF CHILDREN* (1946). See also 20 CALIF. L. REV. 327 (1932) discussing *Estate of Pence*, 67 Cal. App. 204, 4 P. 2d 202 (1931) as representative of majority view. Also see 18 VA. L. REV. 677 (1932).

<sup>57</sup> Note, 38 A. L. R. 8 (1925) and supplement in 120 A. L. R. 837 (1939).

<sup>58</sup> Kuhlman, *Intestate Succession by and from the Adopted Child*, 28 WASH. UNIV. L. Q. 221, 227 (1943).



parents twelve states allowed an adoptee to inherit from natural parents. Five states denied this right, whereas thirty-two states had no explicit provisions. On the other hand eight states refused the rights of natural persons to inherit from adoptee while fifteen permitted the natural parents to inherit all that the adoptee's adoptive parents or relatives could not inherit. Three states allowed natural parents to inherit only in the absence of adoptive relatives. Twenty-three states had no explicit provisions.

In cases of inheritance between adoptee and adoptive lineal and collateral relatives thirty-five states had no provision on the right of the adoptee to inherit. Only two granted the right as to lineal and collateral relatives. Six states allowed the adoptee to inherit from natural children of the adoptor, but made no express provision in regard to collateral or ascendant relatives. Nine states granted lineal and collateral adoptive relatives the right to inherit from the adoptee. While twenty-two states had no explicit provision on the subject, fourteen let the source of the adoptee's estate determine the adoptive relatives rights. Four states permitted natural children of the adoptor to inherit from the adoptee, but made no express provision for ascendant or collateral relatives.

Most state statutes contain no provisions concerning inheritance rights existing between relatives of natural parents and an adoptee in cases of intestacy. An analysis of the foregoing summary reveals the absence of uniformity as well as the lack in nearly all jurisdictions of complete statutory coverage of the various possible inheritance questions.

In addition to general problems of construction and interpretation the task of the courts is made more difficult by the necessity of construing and reconciling contradictory and varying provisions in amendments to adoption statutes and statutes of descent and distribution. In other words, the courts not only have to determine the meaning of a new statute, but also have to determine its effect in relation to earlier statutes, and adoptions and deaths occurring prior to the latest amendment. Additional problems are presented to the courts by construction of wills, trust instruments and deeds. Moreover, the work of the courts is made more difficult since most state courts must construe legislative acts from their own language as there ordinarily is no recognized legislative history which properly can be considered as an aid to interpretation. Indeed in construing an adoption act, a recent Wisconsin case<sup>59</sup> held that legislative acts must be construed from their own language, uninfluenced by what the persons introducing or preparing the bill actually intended to accomplish by it.

<sup>59</sup> *In re Matzhe's Estate*, 250 Wis. 204, 26 N. W. 2d 659 (1947).

The majority of courts have taken a strict view, construing adoption statutes as not broadening inheritance rights consequent to adoptions except as expressly covered by statutory language. Most of these courts base such strict construction on the general rule that statutes in derogation of the common law should be strictly construed, and on one or more of the bases previously enumerated.<sup>60</sup> On the other hand a growing minority of courts tend to a liberal construction thereby broadening inheritance rights consequent to adoptions, especially as to rights of the adoptee.<sup>61</sup> Yet, a study of the cases reveals that by and large the liberal construction courts have a broader statutory basis for liberal construction than do the strict construction courts. There is, however, a definite current legislative trend to modernize and improve adoption statutes and to clarify and generally enlarge inheritance rights consequent to adoption.

Many of the statutes do not expressly clarify the effect of amendments relating to inheritance rights upon pre-existing adoptions. Since in most of the states inheritance rights consequent to adoption are provided for in the adoption act rather than in the statutes of descent and distribution it is difficult for courts to determine whether amendments relating to inheritance rights were intended to be prospective or retroactive in effect. This in turn raises the question whether the law in effect at date of adoption or at date of death of a decedent should govern. While the general rule is that inheritance rights are determined by the law in effect at the time of death, this rule is subject to modification by the rule of construction that as to adoptions the adoption act and all statutes *in pari materia* therewith must be construed together. When so applied and with the application of other well accepted rules of statutory construction, courts very logically can and do reach decisions, as in *Wilson v. Anderson*, that amendments broadening or changing inheritance rights consequent to adoptions are prospective only in operation and do not apply to adoptions occurring prior to the amendments.

Furthermore a number of problems of conflict of laws are raised by the differences from state to state in adoption statutes and inheritance consequent to adoptions but these problems are outside the scope of this article.

<sup>60</sup> See p. 235.

<sup>61</sup> *E.g.*, *In re Rieman's Estate*, 124 Kan. 539, 262 Pac. 16 (1927); *Kolb v. Ruhl's Adm'r.*, 303 Ky. 604, 198 S. W. 2d 326 (1946) (child adopted under 1930 act entitled to inherit through adoptive parents under 1940 adoption act); *In re Cave's Estate*, 326 Pa. 358, 192 Atl. 460 (1937); *Fulcher v. Carter*, 212 S. W. 2d 503 (Tex. Civ. App. 1948); *In re Waddell's Estate*, 131 Wash. 566, 230 Pac. 822 (1924).

## SUMMARY AND CONCLUSION

Those who seek to extend the scope of the statutes beyond their express language, under the guise of liberal construction, are in reality pursuing the dangerous gospel of judicial legislation. Those who favor liberalization (as well as those who oppose liberalization but desire clarity and certainty), rather than being critical of the courts for applying well settled rules of statutory construction should give constructive help to state legislatures by way of suggestion, study and drafting of statutes which effectuate whatever (liberal or strict) the legislative policy may be.

There is a decided national trend to modernize adoption statutes. It is to be hoped that the various legislatures as a part of this movement can enact legislation adequately covering, in unambiguous language, the various possibilities. The legislatures and not the courts should determine to what extent and in what manner these inheritance rights should be changed or broadened. Such statutes should also state in unequivocal language the precise coverage of the statutes with regard to (1) parties affected and (2) whether or not prospective or retroactive application is intended.

Perhaps there is a need for general legislative revision, modernization and clarification of statutes of descent and distribution to meet present changed social and economic conditions. Indubitably there is at least a need in every state for more adequate statutory coverage of inheritance rights consequent to adoptions. This does not imply a need for uniformity. Until the legislatures of the nation respond to this need by appropriate legislation clearly and fully showing their intent the courts will be compelled to decide difficult questions. For the immediate future differences in decisions reasonably can be expected, because of the great diversity and the incompleteness of the statutes being construed.