THE STRANGER-TO-THE-MARRIAGE DOCTRINE: JUDICIAL CONSTRUCTION ISSUES POST-OBERGEFELL

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The recent Supreme Court decision in *Obergefell v. Hodges* changed the legal understanding of marriage in the United States. By making same-sex marriage legal in all fifty states and requiring all states to recognize same-sex marriages from other states, the Court in *Obergefell* recognized evolving social attitudes toward same-sex marriage and expanded the legal definition of "marriage" to include spouses of the same sex. In so doing, the Court necessarily altered the implication of terms like "spouse," "husband," and "wife"—post-*Obergefell*, courts will need to construe these words in a way that acknowledges an evolving understanding of marriage. Courts have faced similar construction issues before. When the notion of the American family shifted in the mid-nineteenth century to include adopted children as "natural" children, courts struggled to ascertain donative intent behind language like "child," "children," and "descendants" that had traditionally excluded adoptees. The legalization and growing popularity of adoption made presumptive exclusion of adoptees for inheritance purposes socially obsolete, but neither society nor the law can move directly from presumptive exclusion to presumptive inclusion. In the adoption context, courts used several construction approaches to ascertain and effectuate donative intent in a period of definitional transition when words with once-plain meaning were inherently ambiguous. The construction approaches used by courts to navigate social and legal change in the context of adoption provide insight by analogy into the circumstances that courts face today, as they must construe language that no longer presumptively excludes same-sex spouses.

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INTRODUCTION

Obergefell v. Hodges[1] has forever altered American jurisprudence. Not only did this decision make same-sex marriage legal in all fifty states,[2] it required all states to recognize same-sex marriages from other states in accordance with the Fourteenth Amendment.[3] In so doing, the Court in *Obergefell* took a critical construct and redefined it—post-*Obergefell*, "marriage" includes marriage between spouses of the same sex. Prior to the 2015 decision, the social definition of marriage expanded to include same-sex spouses and some states legally recognized same-sex marriages: society's understanding of the martial relationship changed.[4] *Obergefell* reflects legal recognition of that change in its official redefinition of "marriage" and, by implication, of the attendant terms that denote a martial relationship; words like "spouse," "husband," and "wife" now carry meaning that can indicate marital status between members of the same sex.[5] *Obergefell* also

1. 135 S. Ct. 2584 (2015). *Obergefell* was a consolidation of six cases from Michigan, Kentucky, Ohio, and Tennessee that involved fourteen same-sex couples and two widowers from same-sex marriages who were either denied marriage licenses or recognition of their out-of-state marriages. *Id.* at 2593.

2. *Id.* at 2604–05 (holding state laws "exclud[ing] same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples" to be unconstitutional).

3. *Id.* at 2607–08 ("[T]here is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.").

4. For a detailed account of the historical evolution of legal status of same-sex marriage in the United States, see Lee-ford Tritt & Patrick J. Duffey, Windsor*'s Wake: Non-Traditional Estate Planning Issues for Non-Traditional Families*, 48 U. MIAMI HECKERLING INST. ON EST. PLAN. ¶¶ 1100, 1101–02 (2014).

5. Despite having the opportunity to adjust critical language from "wife" and "husband" to the gender neutral "spouse," the Internal Revenue Service (IRS) has declined to do so. *See* Lee-ford Tritt, *Moving Forward by Looking Back: The Retroactive Application of* Obergefell, 2016 WIS. L. REV. 873, 913–14.

> The Treasury Department recently issued final regulations that reflect the holdings of *Windsor*, *Obergefell*, and *Revenue Ruling* 2013-17. The regulations define terms in the Code describing the marital status of taxpayers for federal tax purposes. As in the earlier proposed regulations

illustrates the co-evolutionary nature of American society and American jurisprudence: where social definitions of concepts change, legal definitions of the words that denote those concepts must also evolve. Post-*Obergefell*, courts will need to construe terms like "spouse," "husband," and "wife" in way that acknowledges an evolving understanding of marriage. Therefore, this Article will address real-world construction issues in the estate planning context, where recognition of marital status is particularly important in determining distributions for testacy and intestacy purposes.[6]

Evolution is never instantaneous. Thus, courts struggle to resolve the ambiguity that exists in the period when the same word may be intended to convey either its traditional social and legal meaning or its evolved social and legal meaning. Definitive clarity—symmetry between a word's connotation and its denotation—is particularly important in estates law, where courts regularly rely on a donor's words to determine what meaning should be attributed to a donative document.[7] Problems arise when courts, faced with changes in social understanding and in law, must construe a donor's intent during a period of conceptual and legal transition—when critical terms may be inherently ambiguous because their legal and social definitions are not yet aligned.

It has been said that a concrete example is a helpful tool to grasp the abstract intricacies of this subject in a meaningful way.[8] Toward that end, imagine a will executed pre-*Obergefell,* in a state where same-sex marriage was illegal at the time of execution. The will creates a trust for the benefit of the testator's "daughter, Lavergne and her husband." Shirley is Lavergne's legal spouse now, but at the time the testator drafted the will, the state—and perhaps the testator—did not recognize the marriage. Moreover, the will could have been executed before the concept of same-sex marriage had even become part of the American social construct.[9] Should the court assume that the testator

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> (NPRM REG-148998-13), the final regulations provide that the terms "spouse," "husband," and "wife" mean an individual lawfully married to another individual, and the term "husband and wife" means two individuals lawfully married to each other.

Id. at n.259 (citing T.D. 9785, 2016-38 C.B. 38, at 361).

6. This Article is based on actual cases percolating in the court system on which the author has been asked to advise.

7. *See* RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 11.3, cmt. b (AM. LAW INST. 2003).

8. *See* Tritt, *supra* note 5, at 876 n.7 (citing Tritt & Duffey, *supra* note 4, ¶ 1101.2).

9. The modern history of same-sex marriage in the United States is a relatively brief narrative that began less than thirty years ago when the Hawaii Supreme Court decided *Baehr v. Lewin. See* 852 P.2d 44 (Haw. 1993), *abrogated by Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

did not intend to include a same-sex spouse and apply the "traditional" definition of "husband" that was legally effective at the time the will was executed?[10] Depending on how long ago the will executed, same-sex marriage may not have been part of the social consciousness at all. Would attempting to discern the testator's intent regarding same-sex marriage then be a fruitless venture? Should the court simply interpret the provision on its face—as granting to Lavergne's now-legal spouse, Shirley? This Article suggests that in answering such a question, absent explicit contrary *ex ante* instructions from the testator, a court that does not account for definitional evolution runs the risk of applying an exclusionary principle that tends to defeat donors' intent. Simply, assuming that the testator meant to exclude Shirley, without any concession to the evolving recognition of same-sex marriage, gives unnecessary deference to an archaic understanding of the marital relationship that is no longer prevalent enough to demand such a presumption.

The redefinition of the marital relationship is not the first legal adjustment to the American understanding of family structure and inheritance law.[11] Until the late nineteenth century, law and public policy considered adopted children—much like same-sex spouses, until very recently—artificial relatives created by "unnatural" relationships.[12] Even when formal adoption was legalized in the mid-nineteenth century,[13] courts curtailed adoption's legal and economic implications under the so-called "stranger-to-the-adoption doctrine."[14] This doctrine, based on social aversion, presumed that a person not directly involved in the adoption itself (a stranger to the adoption), who did not explicitly include an adoptee in a class gift, did not indicate intent for the adoptee to take by using language like "child," "issue," or "descendant."[15] Courts reasoned that, like a pre-*Obergefell* testator in a state that did not recognize same-sex marriage, this stranger to the adoption used a particular word to signal its traditional meaning, not its expanded legal

10. Perhaps it is not unreasonable to assume that a testator in this situation did not intend to include a same-sex spouse. When a bakery owner refused to bake a cake for a same-sex couple and thought his refusal was lawful because it took place before *Obergefell*, the Supreme Court characterized his thinking as "not unreasonable." *See Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1721 (2018).

11. For an examination of the changing face of the parent-child relationship in light of illegitimate children gaining legal recognition, see Tritt, *supra* note 5, at 906.

12. *See infra* Part III.

13. Massachusetts enacted the first modern adoption statute in 1851. *See* Naomi Cahn, *Perfect Substitutes or the Real Thing?*, 52 DUKE L.J. 1077, 1102 (2003).

14. *See infra* Section III.A.

15. *See infra* Section III.A.

definition.[16] Under the stranger-to-the-adoption doctrine, therefore, a class gift to "descendants" excluded adopted descendants.[17] As social acceptance of adoption increased, however, courts that failed to recognize adopted children as "children" under class gifts ran the risk of defeating donors' intent. To reconcile the gap between society's increasingly inclusionary definition of the parent-child relationship and inheritance law's presumptively exclusionary treatment of adopted children, three key exceptions emerged[18] that allowed the court to govern the definition of "child" while preserving testamentary freedom. Ultimately, the exceptions became superfluous when the stranger-to-the-adoption doctrine was abolished,[19] but until the parent-child relationship was both legally and socially understood to encompass the relationship between adoptive parents and adopted children, those exceptions allowed courts to navigate the ambiguity inherent in definitional change.

Similar to adoption, public policy once did not favor same-sex marriage. However, as with adoption, there has been a shift in public policy that has led to a shift in the law concerning same-sex marriage. Much like the old stranger-to-adoption doctrine, to the extent that it is not inconsistent with the explicit *ex ante* instructions of the testator, if a court determined a same-sex spouse should not take under the testator's will, the court would be treating the testator like a stranger-to-the-marriage of the same-sex couple.

Therefore, this Article tracks the evolution of inheritance law for adopted children and suggests that courts use construction approaches that worked in the context of a new understanding of the parent-child relationship as a guide to construing wills in the context of changing social and legal definitions of the martial relationship. In this regard, Part II offers a brief overview of pertinent construction doctrines. Next, Part III summarizes the history of inheritance law for adopted children. Finally, Part IV draws an analogy between the stranger-to-the-adoption doctrine and an approach to inheritance law for same-sex spouses that this Essay calls the "stranger-to-the-marriage" doctrine[20] and posits that

16. *See infra* Section III.A.

17. *See infra* Section III.B.

18. *See infra* Section III.B.

19. Today, most states have abandoned the stranger-to-the-adoption doctrine. *See* Ralph C. Brashier, *Children and Inheritance in the Nontraditional Family*, 1996 UTAH L. REV. 93, 154 ("The old 'stranger-to-the-adoption' rule—by which an adopted child generally could not inherit through the adoptive parent from relatives who were not themselves parties to the adoption—has largely, and properly, gone out of fashion.").

20. The author has spoken about this issue on many occasions since 2012 and coined this phrase for a series of speeches. *See, e.g.*, Lee-ford Tritt, Professor of Law, Univ. of Fla. Coll. of Law, Address at the 48th Annual Philip E. Heckerling Institute

the stranger-to-the-adoption doctrine provides insight by this analogy. Finally, Part V concludes.

I. PERTINENT CONSTRUCTION DOCTRINES[21]

When a valid testamentary document comes before a court, the fiduciary must manage and distribute the assets according to the terms of the governing instrument.[22] This implicates *construction* procedures, the process of determining the meaning that should be attributed to the wills and trusts. As one court noted, testamentary document construction is governed by "two overriding rules: … to avoid doing any violence to the words employed in the instrument…[and] to effectuate the testator's intent."[23] Rules of construction, as well as constructional preferences, set out the process by which the meaning of terms and provisions in testamentary documents are to be resolved. While rules of construction offer "particular results for particular recurring situations,"[24] constructional preferences are more general principles upon which the specific rules are based.[25]

Although the rules of construction address a multitude of specific issues, each rule is premised on the overarching common goal of

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on Estate Planning: Because it Wasn't Complicated Enough—Estate Planning Issues for Same-Sex Couples in the Wake of the Supreme Court's Recent Decisions (Jan. 2014); *see also* Tritt & Duffey, *supra* note 4, ¶¶ 1100, 1101.2.

21. For convenience, this Article discusses construction issues in terms of wills, but these approaches apply equally to trusts.

22. American society has long recognized the value in protecting an individual's ability to acquire and transfer property. The principle of donative freedom, the governing principle underlying American succession law, provides that individuals have the freedom to control the disposition of their property at death. Any succession law disputes that arise from *Obergefell* should be viewed through this lens. For a discussion concerning the importance of the principle, see Lee-ford Tritt, *Sperms and Estates: An Unadulterated Functionally Based Approach to Parent-Child Property Succession*, 62 SMU L. REV. 367, 374–79 (2009). *See also* Lee-ford Tritt, *Dispatches from the Trenches of America's Great Gun Trust Wars*, 108 NW. U. L. REV. 743, 752–54 (2014); Lee-ford Tritt, *The Limitations of An Economic Agency Cost Theory of Trust Law*, 32 CARDOZO L. REV. 2579, 2587–88, 2598–601 (2011).

23. *In re Estate of Cole*, 621 N.W.2d 816, 818 (Minn. Ct. App. 2001).

24. Edward C. Halbach, Jr., *Stare Decisis and Rules of Construction in Wills and Trusts*, 52 CALIF. L. REV. 921, 923 (1964).

25. Rules of construction are derived from one or more constructional preferences. For example, the rule of construction embodied in the antilapse statutes is derived from the constructional preference for avoiding disinheritance of a line of descent. The rule of construction that presumes an intent to include adopted children in class gifts is derived from the constructional preferences for the construction that carries out common intention and for the construction that accords with public policy.

RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 11.3, cmt. b (AM. LAW INST. 2003).

effectuating the testator's intent above all else. In general, American succession law embraces freedom of disposition,[26] which dictates that "[t]he controlling consideration in determining the meaning of a donative document is the donor's intention."[27] Therefore, when a testamentary instrument is construed under these rules, the donor's intentions are given effect to the maximum extent allowed under the law.[28] When applying a rule of construction, the applicable rule will be considered together with available proof of the individual testator's actual intent. Since the rules aim to carry out testamentary intent by presuming what the average, similarly-situated donor would desire, any party claiming that the donor's actual intent differs from that prescribed by a rule of construction will bear the burden of proof.

Although effectuating intent is the primary objective of the construction process, the adherence to testamentary intent is sometimes difficult to achieve, hence why courts dealing with trust and estate law are so often compelled to analyze individual facets of the constructions in question to derive their ultimate meaning. Simply, intent is not always clear. If donors' wishes cannot be clearly ascertained, these rules and preferences "*attribute* intention to *individual* donors in particular circumstances on the basis of *common* intention."[29] In other words, courts apply rules of construction in an attempt to implement the typical testator's *probable* intent.[30] Since the rules of construction and constructional preferences only presume intent, they can be rebutted where proof of an alternative testamentary intention is found.[31]

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26. *See, e.g.*, Gerald L. Greene & Michael J. Schmitt, Note, *The Dilemma of Adoptees in the Class Gift Structure—The Kentucky Approach: A Rule without Reason*, 59 KY. L.J. 921, 925 (1971) ("In attempting to determine the meaning of language in private instruments the intent of the transferor is of primary importance.").

27. RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 (AM. LAW INST. 2003).

28. *Id.*

29. § 11.3, cmt. a.

30. Robert H. Sitkoff, *Trusts and Estates: Implementing Freedom of Disposition*, 58 ST. LOUIS U. L.J. 643, 646 (2014).

31. Testamentary documents may, at times, present issues to which no specific rule of construction applies. In such cases, more general constructional preferences will be used in clarifying the ambiguity. Unlike a specific rule of construction which applies only to a particular type of ambiguity, constructional preferences provide broader guidelines which can be used to resolve various ambiguities. Significant constructional preferences include the following: the preference for construction that accords with common intention, which is a foundational preference from which other subsidiary preferences are derived; the preference for construction that accords with the testator's general dispositive plan; the preference for construction that renders the document as effective as possible; the preference for construction that favors family over non-family, favors close family members over more remote family members, and does not disinherit a line of descent; and the preference for construction that is more in accord with public policy than other potential constructions.

Where ambiguous or mistaken language obscures the testator's actual intent, courts have traditionally applied two interrelated rules of construction—the plain meaning rule and the no reformation rule—but modern courts increasingly repudiate these approaches and tend to allow both reformation and the introduction of extrinsic evidence.

A. The Traditional Plain Meaning and No Reformation Rules

The practice of applying testamentary intent begins, as with many areas of law, with the plain meaning of the testator's words.[32] Under the "plain meaning" or "no-extrinsic-evidence"[33] rule, the plain meaning of a will cannot be disturbed by the introduction of extrinsic evidence to prove that another meaning was intended.[34] In essence, the plain meaning of a testator's expressions usually controls, and courts are sometimes reluctant to look outside of a testamentary instrument to divine actual intent—put simply, a testator's words are exactly that.[35] However, this doctrine involves some subjectivity—what is "plain" to one judge may not be plain to another—and the admissibility of extrinsic evidence hinges on a particular judge's understanding of a term's "plain meaning." Under the closely related no reformation rule, courts may not reform a will to reflect what the testator intended to, but did not say; a court must in interpret the words the testator actually used and cannot provide its own words to correct the testator's mistakes.[36]

RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 11.3 (AM. LAW INST. 2003).

32. *In re Clark*, 417 S.E.2d 856, 857 (S.C. 1992) ("A will must be read in the ordinary and grammatical sense of the words employed, unless some obvious absurdity, repugnancy or inconsistency with the declared intention of the testator, as abstracted from the whole will, should follow from such construction.").

33. John H. Langbein & Lawrence W. Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. PA. L. REV. 521, 521 (1982). The plain meaning rule is sometimes called the no-extrinsic-evidence rule since it "prescribes that courts not receive evidence about the testator's intent 'apart from, in addition to, or in opposition to the legal effect of the language which is used by him in the will itself.'" *Id.* (quoting WILLIAM J. BOWE & DOUGLAS H. PARKER, PAGE ON THE LAW OF WILLS, § 32.9, at 332–33 (1960)).

34. *See id.*; Sitkoff, *supra* note 30, at 651.

35. *In re Stephens' Will*, 238 N.W. 900, 903 (Wis. 1931) (Fairchild, J., dissenting) ("[N]o rule of construction is more effective to discover the testator's intention than that which requires that words shall be given their plain and ordinary meaning. The words used by the testator in this instance are final and comprehensive."); *see also May v. Riley*, 305 S.E.2d 77, 78 (S.C. 1983).

36. Sitkoff, *supra* note 30, at 651; *Sanderson v. Norcross*, 136 N.E. 170, 172 (Mass. 1922) ("Courts have no power to reform wills. . . . [M]istakes of testators cannot be corrected. Omissions cannot be supplied. Language cannot be modified to meet unforeseen changes in conditions. The only means for ascertaining the intent of the testator are the words written and the acts done by him.").

B. Exceptions to the Bar on Extrinsic Evidence: Ambiguities

Traditionally, extrinsic evidence was admissible only if the evidence went to the validity of the will or if the will itself was ambiguous.[37] An ambiguity implies at least two meaning of one word or phrase. Courts further limited the availability of extrinsic evidence by distinguishing between patent and latent ambiguities: courts admitted extrinsic evidence to help construe latent ambiguities (which exist when the terms in the will are applied to the facts) but not to help construe patent ambiguities (which are evident on the face of the will).[38] Patent ambiguities, arising as they do from within the document, are generally resolved through examining the language of the document itself, as used to be, and in some ways still is, the guiding philosophy of trust and estates issues to this day.[39] For example, a testator's bequest giving "a quarter of my estate to each of these three people" is patently ambiguous—it is clearly unclear. Because the bequest is ambiguous on its face, no extrinsic evidence is permissible and the bequest fails. With patent ambiguities, courts rarely permit the inclusion of extrinsic evidence[40] and often resolve to give words "their generally accepted literal and grammatical meaning," a reversion to plain meaning.[41] Latent ambiguities, by contrast, may arise when the terms used in the will insufficiently clarify what the testator was intending to.[42] Latent ambiguities are characterized by the fact that the ambiguity only arises when other sources besides the testamentary document are before the court.[43] For example, a testator's bequest giving "my entire estate to my cousin Benny" does not initially appear ambiguous. However, if the testator has two cousins, both named Benny, there is a latent ambiguity. While extrinsic evidence may be "generally inadmissible to add to, vary, or contradict language used in a will," it may be admitted by courts in order to "explain a latent ambiguity."[44] Importantly, extrinsic evidence may also be used to raise the issue of latent ambiguity, not

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37. Sitkoff, *supra* note 30, at 651.

38. *Breckner v. Prestwood*, 600 S.W.2d 52, 55 (Mo. Ct. App. 1980).

39. *See, e.g.*, *Lord Cheyney's Case*, 77 Eng. Rep. 158, 158 (1591) ("[T]he constructions of wills ought to be collected from the . . . words of the will in writing, and not by any averment out of it.").

40. *In re Estate of Matthews*, 702 N.W.2d 821, 825 (Neb. Ct. App. 2005) (patent ambiguities are "resolved from within the four corners of the will and without consideration of extrinsic evidence").

41. *In re Estate of Tiedeman*, 912 N.W.2d 816, 827 (Neb. Ct. App. 2018).

42. *Weatherhead v. Sewell*, 28 Tenn. 272, 295 (1848).

43. *Higgins v. Tennessee Coal, Iron & R.R. Co.*, 62 So. 774 (Ala. 1913).

44. *Stickley v. Carmichael*, 850 S.W.2d 127, 132 (Tenn. 1992).

just resolve the ambiguity once the court recognizes its existence.[45] Latent ambiguities typically take one of three forms: (1) *equivocation*, where two or more persons or things fit the description exactly (like cousin Benny), (2) *personal usage*, where the testator habitually used a term in an idiosyncratic manner, or (3) *misdescription*, where a description in the will does not exactly fit any person or thing.[46]

C. Modern Construction Trends

The modern trend repudiates distinguishing between patent and latent ambiguities, the plain meaning rule, and the no reformation rule.[47] As early as 1898, some scholars criticized the distinction between patent ambiguities, for which extrinsic evidence was not admissible, and latent ambiguities, for which it was, as "an unprofitable subtlety."[48] Today, the distinction carries little weight and is often ignored or expressly rejected.[49] Distinguishing between types of ambiguities that allow or preclude the introduction of extrinsic evidence is perhaps a moot point under modern estates law, because the modern trend generally rejects the no reformation rule, rendering ambiguity superfluous where mistake exists. The no reformation rule establishes a conclusive presumption of correctness for the words used in a duly executed will and thus protects against the finding of a contrived "mistake."[50] However, the rule also denies relief when there is an actual mistake, even where there is evidence of mistake and the testator's actual intent.[51] More forgiving courts began to correct wills under the pretense of allowing extrinsic evidence to construe supposedly ambiguous terms, which has been characterized as "expressly disclaim[ing]"[52] the plain meaning rule[53] and as well as

45. *In re Estate of Bernstrauch*, 313 N.W.2d 264, 267 (Neb. 1981) ("[E]xtrinsic evidence is admissible both to disclose and to remove the latent ambiguity of the will.").

46. ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 333–34 (10th ed. 2017).

47. Edward C. Halbach, Jr., *Uniform Acts, Restatements, and Trends in American Trust Law at Century's End*, 88 CALIF. L. REV.1877, 1885–86 (2000).

48. *See* Langbein & Waggoner, *supra* note 33, 530 n.28 (quoting J.B. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 424 (1898)).

49. *See* Halbach, *supra* note 47, at 1885.

50. Sitkoff, *supra* note 30, at 651.

51. *Id.*

52. Langbein & Waggoner, *supra* note 33, at 521.

53. *See, e.g.*, *Arnheiter v. Arnheiter*, 125 A.2d 914 (N.J. Super. Ct. Ch. Div. 1956) (construing "No. 304 Harrison Avenue" to mean "No. 317 Harrison Avenue"); *Estate of Gibbs v. Krause*, 111 N.W. 2d 413 (Wis. 1961) (construing "Robert J. Krause" to mean "Robert W. Krause"); *In re Estate of Taff*, 133 Cal. Rptr. 737 (1976); *Engle v. Siegel*, 377 A.2d 892 (N.J. 1977).

moving away from the no-reformation rule. Today, the Uniform Probate Code, the Restatement Third of Property, and several courts allow the introduction of extrinsic evidence to both clarify and reform the terms of a will.[54]

II. HISTORY OF INHERITANCE LAW FOR ADOPTED CHILDREN

Initially, common law succession was based solely on blood relationships.[55] The idea that anyone outside bloodlines would inherit family property was thus fairly foreign until the mid-nineteenth century.[56] Neither was it common to formally add members to the family—and thus add potential donees—other than through the traditional means of marriage and subsequent children.[57] When "adding" children through adoption became a legal possibility, inheritance laws still favored blood relationships—initial statutes that gave legitimacy to the formal idea of adoption "disfavored adoptees and barred them from inheriting from third-party donors" under the stranger-to-the-adoption doctrine.[58] Based on the theory "that the personal relationship created between the adoptive parents and the child [did] not automatically create the same legal status between the child and the relatives of the adoptive parents,"[59] the stranger-to-the-adoption doctrine created the presumption that an adoptee was not within a class gift made by a donor other than the adoptor.[60] However, even at the peak of the doctrine's popularity, the presumption against the adoptee could be overcome by evidence of the donor's intent to include the adoptee.[61]

A. Stranger-to-the-Adoption Doctrine

To fully understand the evolution of the stranger-to-the-adoption doctrine, it is necessary to address changes in the general perception of

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54. *See* UNIF. PROBATE CODE § 2-805 (2008); RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 12.1 (AM. LAW INST. 2003).

55. *See* Lee-ford Tritt, *Sperms and Estates: An Unadulterated Functionally Based Approach to Parent-Child Property Succession*, 62 SMU L. REV. 367, 374–79 (2009).

56. Jackie Messler, *The Inconsistent Inheritance Rights of Adult Adoptees and a Proposal for Uniformity,* 95 MARQ. L. REV. 1043, 1046 (2012).

57. *See* Greene & Schmitt, *supra* note 26, at 921.

58. Messler, *supra* note 56, at 1046.

59. Greene & Schmitt, *supra* note 26, at 922.

60. Edward C. Halbach, Jr., *Issues about Issue: Some Recurrent Class Gift Problems*, 48 MO. L. REV. 333, 337 (1983).

61. Jan Ellen Rein, *Relatives by Blood, Adoption, and Association: Who Should Get What and Why (the Impact of Adoptions, Adult Adoptions, and Equitable Adoptions on Intestate Succession and Class Gifts)*, 37 VAND. L. REV. 711, 733 (1984).

adoption which have occurred over time. Massachusetts enacted the first modern adoption statute in 1851.[62] This statute called for the adoptee to be treated as the child of his adoptive parents, except that he would "not be capable of taking property expressly limited to the heirs of the body or bodies of the parents by adoption, nor property from the lineal or collateral kindred of such parents by right of representation."[63] Legislators, clearly unsure of how to handle the legal ramifications of adoption, created a version of the parent-child relationship that ceased to exist in the context of inheritance. An unfamiliar concept, adoption was met with significant hesitation by legislators as well as by society. For example, as early as 1873, New York legislation included provisions on the inheritance rights of adopted children, but attitudes toward adoption remained uncertain and those provisions were ultimately removed.[64] Unanswered questions—and the attendant social suspicion—surrounding the adoptive process led to significant inconsistency within early statutes concerning adoption. These statutes often did not address the issue of adoption completely; early legislation focused on the adoption procedures rather than on the legal status of adoptees, leaving courts to determine whether an adoption created a true parent-child relationship.[65] This history of inconsistent and incomplete adoption legislation reflects the general distrust, uncertainty, and hesitation that characterized attitudes toward adoption at the time; societal aversion to recognizing "artificial" children perhaps explains the traditional lack of legal inheritance rights for adoptees.

Even when courts determined that a parent-child relationship did exist between an adopted child and her adoptive parents, they generally rejected the presumption of any relationship between the adopted child and her adoptive parents' relatives.[66] Although highly inconsistent with today's trend of complete transplantation, the stranger-to-the-adoption-doctrine—which precluded adoptees from taking under class gifts made by third-party donors, who were "strangers" to the adoption—was standard when these early adoption statutes were being enacted. The doctrine was not questioned by courts. Rather, it received significant support from judicial bodies, which viewed the relatively new process of adoption as something foreign and unnatural. For example, in the 1881 decision of *Keegan v. Geraghty*,[67] the Supreme Court of Illinois recognized that "[t]he proceeding of adoption is one entirely between .

62. Cahn, *supra* note 13, at 1102.

63. *Id.* at 1113.

64. *Id.* at 1101–02.

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

66. *See* Greene & Schmitt, *supra* note 26, at 922.

67. 101 Ill. 25 (1881).

. . parents and the child, at the instance, by the consent, and upon the petition of the . . . parents."[68] The court noted that "the artificial relation from adoption is established between these parties" was not meant to extend to those who were not a party to the adoption process.[69] According to the court, it would be reasonable for an adoptive parent's property to go to an adopted child.[70] However, the court questioned whether someone who was not a party to the adoption, "who has never desired or requested to have such artificial relation established as to himself," should have his property distributed "to such an unnatural course of descent."[71] Given no express language that would offer an adopted child the right to inherit from a party not involved in the adoption proceeding, the court in *Keegan* found no reason for property to pass from those related to the adoptive parents and "into the hands of an alien in blood."[72] The court thus stood behind the stranger-to-the-adoption rule.[73] Early cases such as *Keegan* held blood relationships in the highest regard and therefore held that third parties not involved in the adoptive process who made bequests to 'children' or 'issue' would not have intended for an adopted child to take.

Moving into the early twentieth century, courts emphasized the contractual nature of adoption proceedings and generally continued to exclude adoptees. For example, the court in *Merritt v. Morton*[74] acknowledged that an adopted child would be considered an heir-at-law of the adoptive parents but concluded that adoption was contractual: it only bound the parties to the adoption contract.[75] The Merritt family contracted with the Louisville Baptist Orphans' Home to adopt a child, and the family raised the child as their own.[76] Carrie Merritt, the adoptive mother, died shortly before 1910—the year in which her own mother, Sarah Morton, died.[77] In deciding whether the adoptee could take a portion of Morton's intestate estate through his adoptive mother, the court ruled that "while [the adoptive parents] have a perfect right to bind or obligate themselves to make the child their heir, they are powerless to extend this right on [the child's] part to inherit from others."[78] The Kentucky court noted that "inheritance laws are based . .

68. *Id.* at 35.
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. 136 S.W. 133 (Ky. 1911).
75. Greene & Schmitt, *supra* note 26, 933.
76. *Merritt*, 136 S.W. at 133.
77. *Id.*
78. *Id.* at 134.

. upon natural ties of blood relationship, whereas an adopted child's right to inherit rests upon a contract."[79] Therefore the court concluded that only the parties to the adoption contract were bound by the adoption and found that the adoptee could not take any portion of Morton's intestate estate.[80]

B. Exceptions

Over time, adoption became less of a social anomaly,[81] and judicial support for more inclusionary policies surfaced in the middle of the twentieth century. In an attempt to reflect increasing social acceptance of adoption, several courts created exceptions to the stranger-to-the-adoption doctrine under which adopted children might be treated as "natural" children in certain circumstances. Three such exceptions surfaced: (1) where adoption occurred before the testator's death; (2) where a document included differentiation of terms; and (3) in the case of an infertile parent.

1. ADOPTION OCCURRED BEFORE THE TESTATOR'S DEATH

In cases where the child in question was adopted before the testator executed his will, courts generally recognized an exception to the stranger-to-the-adoption doctrine.[82] The exact terms of this exception varied between states, and in certain states the terms were inherently unclear.[83] Where the testator was a stranger to the adoption, some courts inferred an intention to include the adoptee "from mere knowledge of the adoption, absent some evidence of the transferor's intention to exclude."[84] For example, in the 1950 case of *Mesecher v. Leir*,[85] the Supreme Court of Iowa was faced with the issue of whether the adopted child of the testator's aunt would receive an equal share of the gift to the aunt's children, along with the aunt's two natural children.[86] The court noted that the testator in question "had known of the adoption" and had associated with both the adoptee and the adoptor

79. *Id.*

80. *Id.* at 133–34.

81. By the early twentieth century, "formal adoption ha[d] evolved from a relative rarity to become a truly popular means of ushering newcomers into a family." Rein, *supra* note 61, at 734.

82. Halbach, *supra* note 65, at 982.

83. *Id.* at 982.

84. *Id.* at 983.

85. 43 N.W.2d 149 (Iowa 1950).

86. *Id.* at 150.

for thirty-seven years.[87] Because of this, the court ruled that the adopted child was entitled to an equal share.[88]

Other courts, however, chose to require explicit signs of approval of the adoption before allowing an adoptee to take under a class gift. In *In re Dudley's Will*,[89] the court established that an adopted child could be included in a class gift if there was evidence that the testator so intended.[90] In *Dudley*, the testator was himself a practicing lawyer in New York City.[91] He created his own holographic will, which called for the residuary gift to be "erected into a trust for the life benefit of testator's sister . . . and upon her death to pay over the principal sum to my nieces . . . and my nephews" with "the descendants of any deceased niece or nephew taking by representation."[92] One of these nieces never had any biological children, but she had adopted two children before the testator executed his holographic will.[93] The testator knew about these adopted children at the time he created the testamentary instrument and he was "not on unfriendly terms" with them.[94] The *Dudley* court found that this fell "far short of the demonstration which would be required to establish an affirmative desire to include [the adopted children]."[95]

Questions also arose when the adoption occurred after a will's execution but prior to the testator's death. Some courts found it sufficient that the "facts essential to the exception, whatever they may be in the particular state" were in place when the testator died, even if they were not in place at the time of will execution.[96] However, other courts disagreed.[97] These courts reasoned that when construing a will, it is the testator's intent *at the time the will is executed* controls.[98] This would render any occurrences after will execution irrelevant, "except insofar as a reaction, or failure to react, can be deemed a reflection of [the testator's] earlier state of mind."[99] Realistically, where courts included children adopted between will execution and the testator's death in class gifts, they revealed judicial resistance to the stranger-to-

87. *Id.* at 154.
88. *Id.*
89. 6 N.Y.S.2d 489 (Sur. Ct. 1938).
90. *Id.* at 492–93.
91. *Id.* at 490.
92. *Id.* at 490–91.
93. *Id.*
94. *Id.* at 491–92.
95. *Id.* at 492.
96. Halbach, *supra* note 65, at 983.
97. *Id.*
98. *Id.* at 984.
99. *Id.*

the-adoption rule and a tendency to favor inclusion over a presumption that could easily run counter to the testator's intent.[100]

2. DIFFERENTIATION OF TERMS

Courts also applied an exception to the stranger-to-the-adoption rule by differentiating between a gift to "A's children" and a gift to "A's descendants" or "the heirs of A's body."[101] A gift to "A's children" automatically included A's adoptive child, whether or not the child was adopted before the testator's death.[102] On the other hand, courts interpreted "A's descendants" or "the heirs of A's body" as referring to the natural lineal descendants, a biological connotation; therefore, A's adoptive children were excluded.[103] By using the newly-developed social understanding of "child" in a way that expanded the traditional legal meaning of the term, courts formalized a social trend in favor of normalizing adoption and demonstrated growing reluctance to apply the traditional presumption against including adopted children in class gifts.

3. AN INFERTILE PARENT

Courts applied a third exception less often: when the parent of the adopted child was infertile.[104] In these situations, "the facts [were] said to support an inference that the transferor must have had the possibility of adopted children in mind."[105] This explanation seems especially odd when one considers lawyer-created wills—if a client truly had the possibility of adopted children in mind, the lawyer should have explicitly provided for that possibility in the will—and some courts refused to recognize the infertile parent exception.[106] It has been noted that courts may have applied this exception simply because they were unwilling to apply the stranger-to-the-adoption doctrine,[107] much like the courts that allowed an adoptee to take even when the adoption took place after the will execution.

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100. *Id.*

101. *See, e.g.*, *Holter v. First Nat'l Bank & Trust Co.*, 336 P.2d 701, 702–03 (Mont. 1959); *Poertner v. Burkdoll*, 439 P.2d 393 (Kan. 1938)

102. Victoria Mikesell Mather, *The Magic Circle: Inclusion of Adopted Children in Testamentary Class Gifts*, 31 S. TEX. L. REV. 223, 227–28 (1990); Rein, *supra* note 61, at 734.

103. Mather, *supra* note 102, at 226–28; Rein, *supra* note 61, at 734.

104. Halbach, *supra* note 65, at 984.

105. *Id.*

106. *Id.*

107. *Id.*

C. The Current State of Inheritance Law for Adopted Children

Today, the main focus of modern adoption cases "is to achieve complete severance of the child from his biological family and a total transplantation of the child into his adoptive family."[108] Current policy tends to "promote the well-being of the adoptee by making him a full-fledged member of his new family."[109] As a result, most states have replaced the stranger-to-the-adoption doctrine with the presumption that the donor intends to include adoptees in a class gift unless the instrument expressly states that adopted children are excluded from the gift.[110] Some states have enacted legislation to this effect.[111] Other states left the resolution of this issue up to the courts, which created a body of case law rejecting the stranger-to-the-adoption doctrine.[112] In the majority of states, an adopted child will take under a class gift created by someone other than the adoptive parent if the adoption took place while the child was a minor, if the adoptive parent "was the child's stepparent or foster parent" or "functioned as a parent of the child before the child reached the age of majority."[113] Additionally, forty-four states have adopted statutes allowing the adoptee to inherit under the laws of intestacy.[114]

There is significant inconsistency among courts concerning whether the abolition of the stranger-to-the-adoption doctrine should apply retroactively. The issue of retroactivity is especially pronounced when a court must interpret a will several years after it was executed.[115]

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108. Rein, *supra* note 61, at 720.

109. *Id.* at 722.

110. Brashier, *supra* note 19, at 154; Mather, *supra* note 102, at 227; Rein, *supra* note 61, at 734.

111. Mather, *supra* note 102, at 227; *see, e.g.*, CONN. GEN. STAT. ANN. § 45a-731 (West 2014); OR. REV. STAT. § 112.195 (2014); R.I. GEN. LAWS § 15-7-16 (2014); TEX. FAM. CODE ANN. § 162.017(c) (West 2013).

112. Mather, *supra* note 102, at 227; *see, e.g.*, *Elliott v. Hiddelson*, 303 N.W.2d 140, 144 (Iowa 1981); *In re Tafel's Estate*, 296 A.2d 797, 802–03 (Pa. 1973); *In re Estate of Coe*, 201 A.2d 571, 574–76 (N.J. 1964).

113. RESTATEMENT (THIRD) OF PROPERTY: WILLS & OTHER DONATIVE TRANSFERS § 14.5 (AM. LAW INST. 2011).

114. Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin. INTESTATE CHILD WELFARE INFO. GATEWAY, INHERITANCE RIGHTS FOR ADOPTED PERSONS 2 n.3 (2016), https://www.childwelfare.gov/pubPDFs/inheritance.pdf [https://perma.cc/AF2V-Z9DA].

115. Messler, *supra* note 56, at 1050.

Some courts elect to apply the law that was in place at the time of the testator's death, assuming that when the testator created the testamentary document, he had current law and current social conventions in mind.[116] In a 1971 case,[117] the U.S. Court of Appeals for the District of Columbia, construing a will executed in 1929, declined to retroactively apply the statute that abolished the stranger-to-the-adoption doctrine.[118] As justification for its decision against retroactive application, the court pointed to the assumption that an average testator of the time would not have wished for a non-blood individual to take under his will.[119]

Such an assumption against inclusion, however, has been questioned. In the 1977 case of *Wheeling Dollar Savings & Trust Co. v. Hanes*,[120] the Supreme Court of Appeals of West Virginia noted:

> While there may be testators and trustors who are so concerned with medieval concepts of 'bloodline' and 'heirs of the body' that they would be truly upset at the thought that their hard-won assets would one day pass into the hands of persons not of their blood, we cannot formulate general rules of law for the benefit of such eccentrics.[121]

In line with this theory, other states allow retroactive application so that adoptees are able to inherit from third-party donors even if the donor created the testamentary instrument when the stranger-to-the-adoption doctrine was in effect.[122] The state of Indiana, for example, abolished the stranger-to-the-adoption-doctrine in 2003 and specifically allowed for retroactive application of the new provision.[123]

III. FROM STRANGER-TO-THE-ADOPTION TO STRANGER–TO-THE-MARRIAGE

The stranger-to-the-adoption doctrine provides insight by analogy into how courts should construe a will that was executed before

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116. *Id.*

117. *Riggs Nat'l Bank of Washington, D.C. v. Summerlin*, 445 F.2d 201, 204 (D.C. Cir. 1971).

118. Messler, *supra* note 56, at 1050.

119. *Id.* (quoting Jan Ellen Rein, *Relatives by Blood, Adoption, and Association: Who Should Get What and Why (The Impact of Adoptions, Adult Adoptions, and Equitable Adoptions on Intestate Succession and Class Gifts)*, 37 VAND. L. REV. 711, 738 (1984)).

120. 237 S.E.2d 499 (W. Va. 1977).

121. *Id.* at 503.

122. *See* Messler, *supra* note 56, at 1050.

123. *Id.*

Obergefell, absent any explicit *ex ante* instructions from the testator. Under the stranger-to-the-adoption regime, courts presumed that someone not directly involved in an adoption would not see himself as related to the adoptee, at least for inheritance purposes. Because adoption was not yet widely socially accepted, courts presumed that a stranger to the adoption would not consider such an "artificial relation" to be an actual "child" or "issue."[124] Rather, a third-party donor's intent to include an adopted child in a class gift generally had to be explicit enough that the social presumption against leaving property to an "artificial relation" was clearly overcome.[125] Thus, under this doctrine, courts could bar an adopted child from taking under a will that stated the gift was "to A and A's children." Before *Obergefell*, when some states still banned same-sex marriage, probate courts could ostensibly bar a same-sex spouse from taking under a will that stated the gift was "to A and A's spouse." Based on reasoning similar to that applied under the stranger-to-the-adoption regime, such courts could determine that where the general definition of "spouse" did not include same-sex spouses—in states that did not recognize same-sex marriage—a testator would not intend to include a same-sex spouse by using the term "spouse." These courts would effectively deem the testator a stranger to the (same-sex) marriage.

Post-*Obergefell*, it is difficult to imagine a court would rule in this way, at least if the will was executed after *Obergefell*.[126] But what if the will had been executed before *Obergefell* in a state where same-sex marriage was illegal at the time of will execution?[127] Such a scenario implicates a retroactivity issue similar to the one triggered by the stranger-to-the-adoption doctrine's abolition. A court could choose to construe the will according to the law at the time the will was executed, which would bar a same-sex spouse from taking under a gift "to A and A's spouse"; such a court could presume that someone living in a state in which same-sex marriage was illegal would have relied on that law

124. Halbach, *supra* note 60, at 337; Messler, *supra* note 56, at 1046.

125. *See Keegan v. Geraghty*, 101 Ill. 26, 35 (1881).

126. There would be no constitutional issues if a court did rule in this way, however, because probate is not considered state action. *See* George B. Fraser, Jr., *Action in Rem*, 34 CORNELL L.Q. 29, 36 (1948) (stating that probate proceedings are actions in rem).

127. In *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n,* a bakery owner refused to bake a wedding cake for a same-sex couple. 138 S. Ct. 1719, 1723 (2018). The Supreme Court stated that the bakery owner was not unreasonable in believing his actions were lawful because this occurred before *Obergefell*. *Id.* at 1742. There was a law in Colorado that did not allow business owners to discriminate based on sexual orientation, however. *Id.* at 1725. Even so, the Court was lenient towards the bakery owner because *Obergefell* had not yet been decided when he refused to bake the cake. In a situation in which a testator drafted a will before *Obergefell*, courts may be similarly lenient, especially because no anti-discrimination laws would be implicated.

when drafting the will. As some courts reasoned in the adoption context, the older the will, the more likely it is that the average testator at the time intended to reference the older meaning of a term; a much older will makes it more likely that the testator contemplated "spouse" only in terms of an opposite-sex spouse.[128] However, a court could find itself unable to "formulate general rules of law for the benefit of . . . eccentrics"[129] who do not consider "spouse" to encompass spouses of the same sex, and could instead apply the more inclusive redefinition of the term as the new normal. Like the court in *Wheeling Dollar Savings & Trust Co. v. Hanes*, a court could discount the concerns of testators who would be upset by their property going to a same-sex spouse as the concerns of adherents to an archaic, and implicitly irrelevant, way of thinking.

A. Stranger-to-the-Marriage Exceptions

To avoid a presumption that a testator who executed a will pre-*Obergefell* intended to exclude a same-sex spouse, a court could apply exceptions similar to the stranger-to-the-adoption exceptions. In the context of same-sex marriage, a court could apply an exception if the marriage occurred before the testator's death.[130] If the marriage occurred before the execution of the will, the court could presume that the testator intended to include the spouse. If a court required evidence that the testator approved of the marriage, as some courts did under the adoption exception, the court could look to extrinsic evidence of approval, such as wedding photographs that include the testator.

If the marriage occurred before death but after the will was executed, courts could be split, as they were under the adoption exception. Some courts may determine that the testator's intent at the time the will was executed controls, in which case the fact that the same-sex couple got married before the testator died would be irrelevant because the marriage occurred after the will was executed. Those courts may even consider the testator's failure to change the will to specifically include the same-sex spouse to be evidence of the testator's intent to exclude the same-sex spouse. Those courts would consider the "failure to react" to be "a reflection of [the testator's] earlier state of mind."[131] However, other courts may find it enough that

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128. *See, e.g.*, *Riggs Nat'l Bank of Washington, D.C. v. Summerlin*, 445 F.2d 201, 208 (D.C. Cir. 1971) (reasoning that a drafter of a will must have drafted the will with the laws at the time of drafting in mind).

129. *Wheeling Dollar Sav. & Trust Co. v. Hanes*, 237 S.E.2d 499, 503 (W. Va. 1977).

130. Under the stranger-to-the-adoption doctrine, there was an exception for when the adoption occurred before the testator's death. Halbach, *supra* note 65, at 983.

131. *Id.* at 984.

the "facts essential to the exception,"[132] in this case the marriage of the same-sex couple, existed when the testator died, whether or not they existed at the time the will was executed.

Additionally, a court could apply exceptions similar to the differentiation of terms and the infertile parent exceptions to the stranger-to-the-adoption doctrine. For example, under the differentiation of terms exception, "to A and A's partner" could be treated differently than "to A and A's spouse," or to "A and A's husband" (but female A is actually married to another female). The infertile parent exception can be analogized to a LGBT person's unwillingness to marry someone of the opposite-sex. In the infertile parent context, "[t]he facts are said to support an inference that the transferor must have had the possibility of adopted children in mind."[133] Similarly, if a testator knew the relative was LGBT, the testator must have had the possibility of a same-sex marriage in mind.

B. Stranger-to-the-Marriage Applied to a Non-Class Gift

The development of the stranger-to-the-adoption doctrine can also provide direction to states for how to deal with a gift that uses narrower language, such a "to A and A's wife," when A is married to a man. While a gift "to A and A's wife" does not fit neatly into the stranger-to-the-adoption framework since it is not a broad class gift, such as 'children' or 'issue,' the stranger-to-the-adoption doctrine still provides insight by analogy. Like it did with adoption, the law and public policy has shifted and now accepts same-sex marriage. When adoption became widely accepted, the law in the majority of states changed to include adopted children in class gifts.[134] Because same-sex marriage is now accepted in every state,[135] states should adopt laws allowing courts to presume 'wife' means 'husband' or 'husband' means 'wife' if there is a gift to a same-sex spouse who would otherwise be precluded from taking under the will. Like the modern presumptions in the adoption context, this presumption for same-sex marriage could be rebutted by evidence of the testator's contrary intent.

Alternatively, some states could view the legalization of same-sex marriage more like the legalization of adoption in 1851. Soon after adoption was legalized, courts created the stranger-to-the-adoption

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132. *Id.* at 983.

133. *Id.* at 984.

134. Mather, *supra* note 102, at 227; *see, e.g.*, CONN. GEN. STAT. ANN. § 45a-731 (2017); OR. REV. STAT. § 112.195 (2014); R.I. GEN. LAWS § 15-7-16 (2014); TEX. FAM. CODE ANN. § 162.017(c) (West 2013).

135. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015) (holding that state laws "excluding[ing] same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples" were unconstitutional).

doctrine. Even though adoption was legal, it was still met with hesitation. Today, we still have legal battles over wedding cakes for same-sex couples.[136] This is just one example of the resistance to same-sex marriage, despite the Supreme Court's decision in *Obergefell*. Unlike adoption, same-sex marriage is still not universally accepted by American citizens, even though all states are required to accept it. States in which same-sex marriage was illegal until *Obergefell* forced them to legalize it[137] may view probate as one of the few areas in which they can still resist acceptance of same-sex marriage. These states may be unlikely to adopt legislation that would interpret 'husband' or 'wife' differently because a same-sex spouse would otherwise be barred from taking under the will.

Several of the last states to legalize same-sex marriage were also slow in abolishing the stranger-to-the-adoption doctrine. California was the first state to abolish the stranger-to-the-adoption doctrine in 1957.[138] North Dakota did not adopt its statute abolishing the stranger-to-the-adoption doctrine until 1993.[139] South Dakota was even slower, adopting its statute abolishing the doctrine in 1995.[140] Alabama, Florida, Georgia, Mississippi, and Tennessee abolished the doctrine sooner than North Dakota and South Dakota, but still over a decade after California.[141] This further supports the theory that these states may

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136. *See, e.g.*, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).

137. Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Nebraska, North Dakota, Ohio, South Dakota, Tennessee, and Texas. *Same-Sex Marriage, State by State*, PEW RES. CTR. (June 26, 2015), http://www.pewforum.org/2015/06/26/same-sex-marriage-state-by-state/ [https://perma.cc/292G-78HR].

138. *In re Heard's Estate*, 319 P.2d 637, 642–43 (Cal. 1957); Halbach, *supra* note 65, at 993. California legalized same-sex marriage in 2013. *Same-Sex Marriage, State by State*, PEW RES. CTR. (June 26, 2015), http://www.pewforum.org/2015/06/26/same-sex-marriage-state-by-state/. While this is much later than the first state to legalize same-sex marriage in 2003, *id.*, California was not forced by the Supreme Court into legalizing same-sex marriage like the states listed *supra* note 137. One can only speculate how many years it would have taken those states to legalize same-sex marriage if not for *Obergefell*. One state that did not legalize same-sex marriage until *Obergefell* did not delay in abolishing the stranger-to-the-adoption doctrine. Michigan abolished the doctrine in 1966. See *Wallin v. Torson*, 279 N.W.2d 310, 312 (Mich. Ct. App. 1979), making it one of the earliest states to abolish the doctrine. *See* Halbach, *supra* note 65, 993 (discussing only two states that had abolished the doctrine by 1965).

139. 1993 N.D. Laws 1179.

140. 1995 S.D. Sess. Laws ch. 167 § 2–705.

141. *Gotlieb v. Klotzman*, 369 So. 2d 798, 801 (Ala. 1979) ("[A]dopted children are treated the same as natural children, unless a desire to exclude them is clearly indicated by the testator."); *Warner v. First Nat'l Bank of Atlanta*, 251 S.E.2d 511, 513 (Ga. 1978) ("[A]n adopted child is to be treated in all respects the same as a natural born child and would be entitled to take by bequest under the will of an ancestor

be reluctant to change legislation to allow 'husband' or 'wife' to be interpreted differently to prevent a same-sex spouse from being excluded. If they do, they may be slow to change, like they were with the stranger-to-the-adoption doctrine. However, the trajectory of adoption as a social construct—where changing family structure influenced the definition of children in society and in law—suggests that states will ultimately reach a greater degree of uniformity in their approaches to handling the ramifications of same-sex marriage.

CONCLUSION

In periods of transition, prevailing cultural norms highlight the dual nature of normative constructs. These constructs embody both descriptive and prescriptive elements which are usually inextricably intertwined. In social stasis, the general understanding of how things *are* and the understanding of how things *should be* exist in approximate symmetry. When a descriptive norm shifts, however, and the understanding of what is familiar evolves, the prescriptive norm also shifts—the understanding of how things should be also changes. In a very basic sense, the law offers one manifestation of society's prescriptive norms. Thus, as the understanding of family structure and critical familiar relationships expands to encompass new notions of family—of children, of spouses—the law must adjust to accommodate this descriptive definition. The law changes both to affirm the evolving understanding—that, for example, an adopted child is a child or that a same-sex marriage is a marriage—and to prescribe legal treatment of social constructs according to this new understanding, to offer a new approach to how things *should* be. It is in this period of transition, between the acceptance and legal recognition of a "new normal" and as-yet unaddressed ramifications of change, that ambiguity arises.

A practical approach to implementing a new approach to marriage is necessary, particularly in estates law, where recognition of the marital relationship can govern dispositions for both testacy and intestacy purposes.

Just as the parent-child relationship is no longer defined solely according to the presence or presumption of a genetic link between two individuals, the marital relationship is no longer limited to marriage between one man and one woman. These developments, viewed analogously, can provide insight into emerging construction issues as

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by adoption."); *Dodds v. Deposit Guar. Nat'l Bank*, 371 So. 2d 878, 880–81 (Miss. 1979) (construing a Mississippi statute to include adopted children in a class gift); 1976 Tenn. Pub. Acts 948–49 (enacting legislation that included adopted children in class gifts); 1974 Fla. Laws 228 (enacting legislation that included adopted children in class gifts).

states struggle to reconcile *Obergefell* with terms used in older instruments. Where the stranger-to-the-adoption doctrine reflected social aversion to an unfamiliar, "unnatural" parent-child relationship, the presumptive exclusion of same-sex spouses for inheritance purposes reflects social suspicion of a once-foreign form of a marital relationship—it embodies a stranger-to-the-marriage approach. Paralleling the path of the presumption against adoptees, the presumption against same-sex spouses no longer reflects either prevailing social attitudes or the current state of the law. The construct of marriage has shifted in both a descriptive and prescriptive normative sense—same-sex spouses are more familiar, usual embodiments of the martial relationship, and since *Obergefell*, the law prescribes treating them as such. Now, perhaps, it is up to courts to weave the descriptive and prescriptive elements of the martial relationship back together in a new pattern—to create symmetry connotation and denotation and between what is and what should be. If an adopted child can be a child, so too can a same-sex spouse be a spouse.