

THE BENEFITS AND PITFALLS OF ADULT ADOPTION IN ESTATE PLANNING AND
ITS LIKELY FUTURE IN MISSOURI

Russell E. Utter Jr.

Table of Contents

| | | |
|------|--|-------|
| I. | Introduction..... | 3-4 |
| II. | The Birth of Adult Adoption..... | 4-6 |
| III. | The Possible Benefits of Adult Adoption | 6-14 |
| | a. Common Parties to Adult Adoption | 7-11 |
| | i. Adult Step-child Adoption..... | 7-8 |
| | ii. Spousal Adoption..... | 8-9 |
| | iii. Gay and Lesbian Partner Adoption..... | 9-10 |
| | iv. Non-married Heterosexual Partner Adoption | 10 |
| | v. Adoption of Non-lineal Descendant Relatives or Friends With No Intimate Relationship | 10-11 |
| | b. Common Reasons to Utilize Adult Adoption | 11-14 |
| | i. Formalize an Existing Parent-Child Relationship..... | 11-12 |
| | ii. Obtain legal Rights That are not Afforded to Non-married Couples..... | 12 |
| | iii. Prevent Will Contests | 12-13 |
| | iv. Beneficiary Status From Adopter | 13 |
| | v. Beneficiary Status Through Adopter | 13-14 |
| IV. | The Possible Pitfalls of Adult Adoption | 14-18 |

| | | |
|-----|--|-------|
| a. | Finality of Adoption..... | 15-16 |
| b. | Replaces Natural Bloodline | 16 |
| c. | Incestuous Overtones/Against Public Policy | 16-17 |
| d. | Tortious Interference..... | 17-18 |
| e. | Legal Malpractice Potential | 18 |
| V. | Missouri’s Current Law and Its Likely Future | 18-23 |
| a. | Valid Parties to Adoption in Missouri | 19-21 |
| b. | Who Inherits From Whom? | 21-23 |
| c. | A Possible Solution..... | 23 |
| VI. | Conclusion | 23-24 |

I. INTRODUCTION

Most laypersons and perhaps a majority of lawyers who never took advantage of the opportunity to take an Estates class are likely unfamiliar with the term “adult adoption”. The idea may appear ludicrous and outlandish to many, but to a knowledgeable estate planner the concept *may* have some practical values. Although in most instances an adoption will be intended more for family purposes such as formalizing an existing relationship between a step-parent and an adult step-child, many times adoptions are used to secure inheritance rights for the adoptee.¹ Adult adoption certainly brings a potentially valuable tool to an estate planner’s toolbox, albeit one that should be used with care.²

Part II of this note examines the beginning stages of adult adoption and traces some of the major transformations of this device. Though centered on Missouri Law, this note examines leading cases from other jurisdictions. Part III addresses some of the benefits that can arise from adult adoption if used correctly and depending on the factual circumstances, focusing on the common types of adult adoption, as well as the common purposes for their use. Part IV discusses some of the pitfalls of adult adoption, including the finality of adoption, public policy limitations imposed by courts, and possible malpractice suits against ill-prepared attorneys. Part V addresses Missouri’s current law on this issue and explores how Missouri courts might react to different adult adoption scenarios that have yet to come before them.

This paper concludes that adult adoptions work best and fulfill their intended goals when used for the traditional purposes that general adoption serves – to formalize a family relationship. It finds that adoptions with a primary purpose of formalizing an already existing parent-child relationship also have the most success when it comes to securing the inheritance rights intended.

¹ Michael T. Flannery, *Flannery on Adult Adoption*, 2009 EMERGING ISSUES 3980, July 6, 2009, at 1.

² *Id.* at 6.

On the other hand, adoptions based solely on gaining inheritance rights can create significant obstacles in fulfilling their purposes. Although Missouri has no published opinion pertaining to the adoption of a lover, either homosexual or heterosexual, it appears unlikely that they will allow one. Missouri law is clearly against sham adoptions set up merely to defeat others' expected inheritances. Finally, this paper suggests a way to circumvent some common problems that have arisen with adult adoptions, offering a safer, less risky alternative that may ensure inheritance rights.

II. The Birth of Adult Adoption

To understand the origin of adult adoption one must first examine the history behind traditional adoption (i.e., that of a minor). Adoption is rooted in antiquity and was practiced by the ancient Egyptians and Hebrews.³ Many are familiar with the adoption of Moses or the adoptions of Manasseh and Ephraim from the Old Testament.⁴ Adoption law was also available in the legal systems of ancient Rome and Greece.⁵ Although it was originally used primarily as a means of establishing social relationships, there are instances where it was used solely for inheritance reasons.⁶ Adoption was codified in Rome under Justinian and was adopted in Roman civil law countries such as France and Spain.⁷ Unknown to the English Common Law, it came

³ *Bedinger v. Graybill's Ex'r & Tr.*, 302 S.W.2d 594, 597 (Ky. 1957).

⁴ *Id.* ("When Joseph went up out of Egypt to the land of Goshen to visit his sick father, Jacob, he took with him his two sons, born of an Egyptian mother, and presented them to his father. Jacob adopted them, and Manasseh and Ephraim took their stations and heritage as Jacob's heirs in the place of Joseph, and their descendants became two of the twelve tribes of Israel. (citation omitted) Years after Moses, the Hebrew child, was adopted by the Egyptian Pharaoh's daughter as her own son." (citation Omitted)).

⁵ *Emmons v. Dinelli*, 235 Ind. 249, 263 (Ind. 1956).

⁶ *Bedinger*, 302 S.W.2d at 598.

⁷ *Emmons*, 235 Ind. at 263-64.

into existence in the United States purely through legislative action.⁸ Though exclusively statutory, American adoption laws may vary greatly from jurisdiction to jurisdiction.⁹

It is unclear exactly when adult adoption was first recognized, but one source suggests that its existence dates back to ancient times as a tool for childless people to pass property to a younger friend.¹⁰ What is clear, however, is that it was recognized in ancient Rome.¹¹ Cases dealing with the issue of adult adoption appear in the United States as early as the late 1800s.¹² In 1892, the Supreme Court of Indiana refused to accept the argument that an adult does not qualify as a child within the meaning of the adoption statute.¹³ The court allowed the adoption of an adult, reasoning:

It is true that the word “child,” as commonly used, carries with it the idea of tender years and of minority. It is, however, also true that one’s child does not cease to be his child when it attains its majority. . . . We see no reason why [the adoption statute] may not apply to adults equally with infants.¹⁴

Missouri passed its first adoption statute in 1857,¹⁵ less than 40 years after being admitted as the twenty-fourth state of the United States.¹⁶ It provided for adoptions to take effect by

⁸ *Bedinger*, 302 S.W.2d at 597.

⁹ Brynne E. McCabe, *Adult Adoption: The Varying Motives, Potential Consequences, and Ethical Considerations*, 22 QUINNIPIAC PROB. L.J. 300, 302 (2009).

¹⁰ Arthur S. Leonard, *Lesbian and Gay Families and the Law: A Progress Report*, 21 FORDHAM URB. L.J. 927, 22 QUINNIPIAC PROB. L.J. 300, 302 (2009).950 (1994).

¹¹ *Abney v. De Loach*, 84 Ala. 393, 398 (Ala. 1887) (distinguished on other grounds).

¹² *Markover v. Krauss*, 132 Ind. 294, 297 (Ind. 1892)(finding a child can still be a child of a parent once they reach majority and refusing to accept that the statute intended child to mean minority); *Abney v. De Loach*, 84 Ala. 393, 399-400 (Ala. 1887)(recognizing the possibility of adopting adults under the state statute); *Collamore v Learned*, 171 Mass. 99 (Mass. 1898)(allowing the adoption of adults ages 43, 39, and 25); See also EDWARD P. ALLISON, THE DISTRICT REPORTS OF CASES DECIDED IN ALL THE JUDICIAL DISTRICTS OF THE STATE OF PENNSYLVANIA DURING THE YEAR OF 1895 716 (1895) (Court in *Pine Tp. Overseers v. Franklin Tp. Overseers* finding “adoption of both minors and adults is governed by Acts of General Assembly”).

¹³ *Markover*, 132 Ind. at 297.

¹⁴ *Id.*

¹⁵ *Goldberg v. Robertson*, 615 S.W.2d 59, 61 (Mo. 1981).

¹⁶ Library of Cong., *America’s Story from America’s Library* (Feb. 14, 2011), http://www.americaslibrary.gov/jb/nation/jb_nation_missouri_1.html.

deed,¹⁷ and by 1917 the juvenile court was given exclusive jurisdiction over all Missouri adoptions,¹⁸ although courts of equity still possessed jurisdiction over equitable adoption.¹⁹ Equitable adoption is irrelevant in adult adoption, since only children can be equitably adopted.²⁰

Near the end of the nineteenth century, the Supreme Court of Missouri found the word “child,” when used within the context of an adoption statute, to mean adult as well as child.²¹ Further, during this same time frame, Missouri had begun to recognize adults as being capable of taking as heirs from their adopted parents.²² Today, all states including Missouri allow adults to be adopted, whether it is implicitly or explicitly included in the adoption statute.²³

III. The Possible Benefits of Adult Adoption

The specific needs of a client are the main sources for guidance in determining whether adult adoption will be beneficial in an estate planning context. If adoption is used simply to strengthen an already existing familial bond between the adopter and adoptee, courts are generally willing to allow them, reasoning that adoption also will be beneficial to the adopting parent.²⁴ A common example of mutually beneficial adoption is adoption of an adult step-child, although the question of how valuable this device is becomes murkier when the purpose is due to

¹⁷ *Goldberg*, 615 S.W.2d at 61.

¹⁸ *Id.* at 62.

¹⁹ *Id.*

²⁰ *Id.* at 62 (“it is so inequitable and unjust to allow one to fail to comply with an agreement made with the parent or custodian of a child to adopt it, when he has taken the child at such an age that it had no will or choice of its own in the matter, that, after the child has performed everything contemplated by the relation provided for, the intended adoptive parent or his heirs will be estopped to deny an adoption” citing *Thomas v. Moseley*, 344 Mo. 240, 245 (Mo. 1939)).

²¹ *In re Estate David Moran*, 151 Mo. 555, 557 (Mo. 1899)(finding that the statute uses the word child in its relationship to the word parent, not in relation to minority).

²² *Davis*, 871 S.W.2d at 38(distinguished on other grounds)(recognizing that adopted adults have been considered heirs for about 100 years in Missouri).

²³ Joan Heifetz Hollinger, *1-1 Adoption Law and Practice § 1.05*, ADOPTION LAW AND PRACTICE, § 1.05[2][f].

²⁴ Ralph C. Brashier, *Children and Inheritance in the Nontraditional Family*, 1996 UTAH L. REV. 93, 164-65 (1996).

ulterior motives such as for beneficiary status or to circumvent the lack of same-sex marriage laws.²⁵

In most cases the primary purpose of adoption is to gain the legal rights that accompany being related as parent and child; i.e. inheritance rights.²⁶ Even if adoption of an adult itself is recognized, the main goal of the adoption, such as gaining beneficiary status, might be impermissible and therefore not very beneficial (and perhaps even detrimental) for the parties involved.²⁷ In such cases, whether adoption is beneficial to the clients depends heavily on the laws of the particular jurisdiction and the peculiar facts of each adoption.²⁸ It is important to look at the preexisting relationship of the parties of adoption and the reasons for adoption.

COMMON PARTIES TO ADULT ADOPTION

To understand the purposes behind adult adoption and determine whether it is beneficial to both parties, it is helpful to first look at the common parties to adult adoptions, several of which are involved in a majority of adult adoption cases. Depending on this relationship, the same court may decide similar cases differently.²⁹ Common parties to adult adoption include: step-parent and adult step-child; husband and wife; gay/lesbian partners; non-married heterosexual partners; non-lineal descendant relatives; and friends with no romantic relationship.³⁰

A. Adult Step-child Adoption

²⁵ See, Flannery, *supra* note 1 at 6; Leonard, *supra* note 10 at 950.

²⁶ See Flannery, *supra* note 1 at 1.

²⁷ See *Minary v. Citizens Fidelity Bank & Trust Co.*, 419 S.W.2d 340 (Ky. 1967)(Wife was adopted by husband in another court, but this court would not let wife inherit through her husband to take from a trust already in place).

²⁸ See Flannery, *supra* note 1 at 9-10.

²⁹ *Id.*

³⁰ *Id.* at 1-2.

An adoption of a step-child is perhaps the most common form of adult adoption because it is typically used to formalize an already existing parent-child relationship. In such cases the step-parent may or may not have known the step-child for all of the step-child's life.³¹ Courts are generally "more likely to permit the adoption and recognize reciprocal inheritance rights" when there is a familial connection like step-parent/step-child.³² It is important to check the beneficiary status of adult adoptees in the controlling jurisdiction before advising clients even for these sorts of adoptions, because state laws differ significantly on beneficiary status, especially when determining if the adult step-child can inherit *through* the step-parent.³³

B. Spousal Adoption

The adoption of one's husband or wife is unlike step-child adoption in that the family tie already exists through marriage and the purpose is likely therefore to be solely for beneficiary status.³⁴ Although most statutes allow a surviving spouse to take intestate from her deceased husband, she will not inherit *through* the widower's parents or other relatives since she is not a lineal descendant.³⁵ To get around this obstacle, a husband who believes he will not survive his wife and his wealthy relative might try and adopt his wife to put her in line to take as a lineal descendant from the husband's relative.³⁶ Adoption of a spouse may also be used to vest a spouse with beneficiary status of a trust; however recently courts have not been very accepting of this reason.³⁷

³¹ See Brashier, *supra* note 24 at 168.

³² *Id.* at 160.

³³ See Flannery, *supra* note 1 at 2-3.

³⁴ See Brashier, *supra* note 24 at 168.

³⁵ *Id.*

³⁶ *Id.* at 166.

³⁷ *Id.*; See *Bedinger*, 302 S.W.2d 594 (finding adoption of wife is found to be ok to take as beneficiary of husband's mother's trust) (overruled); *But See Minary*, 419 S.W.2d 340 (finding adoption of wife to bring her within a

Another factor to be considered is the incestuous overtones that attend sexual relations between a parent and child.³⁸ “To recognize a parent-child relationship between husband and wife is instinctively disturbing and confusing because the presumed sexual relationship between the couple is anathema when we view the individuals as mother-son or father-daughter.”³⁹ In fact some state statutes expressly prevent adopting between spouses.⁴⁰ The Uniform Adoption Act (“UAA”) does not allow adoption of one’s spouse; however, a very few states have enacted the UAA.⁴¹

C. Gay and Lesbian Partners Adoption

In the homosexual community, adoption of one’s partner has been seen as a way to create a “pseudo-marriage” in order to provide legal rights where they have otherwise been lacking.⁴² Since homosexual lovers in most states are not afforded the legal rights of married couples, they cannot take as heirs of their partners. According to one source, “In a majority of states that recognize adult adoption, homosexuals who cannot legally marry may nevertheless create a legitimate family relationship by adopting their adult lovers.”⁴³ These adoptions face many of the problems that spousal adoptions faced, such as incestuous overtones with many courts not recognizing inheritance rights *through* the homosexual partner.⁴⁴ Some courts have completely refused to allow homosexual adoption finding that “[a]doption is not a means of obtaining a legal

beneficiary status to be a subterfuge that thwarts the testator’s intent and prevents the property from vesting in the natural objects of testator’s bounty).

³⁸ Terry L. Turnipseed, *Scalia’s Ship of Revulsion has Sailed: Will Lawrence Protect Adults who Adopt Lovers to Help Ensure Their Inheritance From Incest Prosecution?*, 32 HAMLINE L. REV. 95, 97 (2009).

³⁹ See Brashier, *supra* note 24 at 168.

⁴⁰ Mandi Rae Urban, *The History of Adult Adoption in California*, 11 J. CONTEMP. LEGAL ISSUES 612, 613-14 (2000)(California prohibits adults from adopting spouse by statute).

⁴¹ See McCabe, *supra* note 9 at 303.

⁴² See Urban, *supra* note 40 at 612.

⁴³ *Id.* at 615.

⁴⁴ See Brashier, *supra* note 24 at 168(quoting *Matter of Adult Anonymous II*, 88 AD2d 30, 38(Sullivan, J.P., dissenting)).

status for a non-marital sexual relationship . . . Such would be a ‘cynical distortion of the function of adoption.’”⁴⁵ However, other jurisdictions such as Delaware have found that homosexual “companions” looking to create inheritance rights are not foreclosed from using adult adoption as a tool to obtain the same rights others have achieved using this device.⁴⁶ Nonetheless, many homosexuals refuse to accept adoption of their partner as a substitute for marriage, and are still trying to push for legal recognition through marriages.⁴⁷

D. Non-married Heterosexual Partner Adoption

Just as courts are forced to deal with same-sex partner adoption and spousal adoption, they are forced to decide the rights of unmarried cohabitants in intimate relationships.⁴⁸ Courts have been more willing to allow heterosexual adult adoption than that of homosexual lovers.⁴⁹ Kentucky allowed an adoption by a man of woman who was his stenographer who “had for years prior thereto lived in a state of concubinage.”⁵⁰ However, some courts have been unwilling to allow a couple living in adultery to utilize adult adoption.⁵¹ Some courts might treat any sexual relationship between heterosexual couples similar to that of married couples in that after adoption, it echoes in incest;⁵² e.g. New York.⁵³

E. Adoption of Non-lineal Descendant Relatives or Friends With No Intimate Relationship

⁴⁵ *In re Adoption of Robert Paul P.*, 471 N.E 2d 424, 427 (N.Y. 1984).

⁴⁶ *In re Adoption of Swanson*, 623 A.2d 1095, 1097-98 (Del. 1993).

⁴⁷ See Brashier, *supra* note 24 at 171-72.

⁴⁸ See Flannery, *supra* note 1 at 4.

⁴⁹ Calvin Massey, *Designation of Heirs: A Modest Proposal to Diminish Will Contests*, 37 Real Prop. Prob. & Tr. J. 577, 586 (2003).

⁵⁰ *Greene v. Fitzpatrick*, 295 S.W. 896, 897 (Ky. 1927).

⁵¹ See McCabe, *supra* note 9 at 305-06.

⁵² *Id.* at 306.

⁵³ *In re Adoption of Robert Paul P.*, 471 N.E 2d at 427 (“Adoption is not a means of obtaining a legal status for a nonmarital sexual relationship – whether homosexual or heterosexual.”).

This final category consists of people who are non-lineal relatives and friends or mentors who would like to utilize adoption either to formalize the relationship already existing or to insure that inheritance rights pass.⁵⁴ The issue of non-lineal descendants may arise where perhaps the adopter is an older sibling and has basically raised the younger sibling, but for some reason never adopted him or her until after the adoptee had reached the age of majority.⁵⁵ This issue may also arise in the context of an adopter who adopts several friends and acquaintances in order for them to take as beneficiaries under another trust instrument.⁵⁶ In some states, such as Missouri, courts may look to whether a “familial bond of love and duty” is present to determine whether adoption will even be allowed or, even if allowed, whether the adoptee will be able to take as beneficiary.⁵⁷ Some courts will allow adoptions or the beneficiary status that comes along with adoption to exist only if a parent-child relationship or other close family relationship existed prior to the adoption.⁵⁸

COMMON REASONS TO UTILIZE ADULT ADOPTION

With all the different types of relationships between parties to adult adoption comes a number of different reasons why one might adopt an adult. Such reasons include: formalizing an existing parent-child relationship, obtaining legal rights that are not afforded to non-married couples, preventing will contests, obtaining beneficiary status *from* adopters, and obtaining beneficiary status *through* adopters.

A. Formalize an Existing Parent-Child Relationship

⁵⁴ See Flannery, *supra* note 1 at 2.

⁵⁵ *Id.*

⁵⁶ Davis, 871 S.W.2d at 37.

⁵⁷ *Id.* at 38 (case limited by *Commerce Bank, N.A. v. Blasdel*, 141 S.W.3d 434, (Mo. Ct. App. 2004)).

⁵⁸ See McCabe, *supra* note 9, at 303; See also Davis, 871 S.W. 2d at 38.

As discussed above, one reason why a person may want to adopt an adult is to formalize a preexisting parent-child-like relationship,⁵⁹ whether it existed during the adoptee's childhood, or started after the child reached the age of majority.⁶⁰ Some courts will not allow adoptions if the parent-child relationship did not originate during the adoptee's childhood.⁶¹

B. Obtain Legal Rights That are not Afforded to Non-married Couples

This idea was briefly discussed above.⁶² Homosexual couples who are not afforded the legal right of marriages may try to utilize adult adoption to make a "legitimate family relationship."⁶³ However, non-married heterosexual partners may also try and take advantage of adult adoption for the accompanying legal rights. The advantages of such an adoption would be rights such as "inheritance, survivorship, and next-of-kin rights."⁶⁴ Additionally, other possible advantages include the extension of employee benefits and health care insurance that may be available to the adoptee.⁶⁵ Also, an adopted child has a possibility of recovering in tort cases, such as wrongful death, where a homosexual lover ordinarily would not be able to sue.⁶⁶

C. Prevent Will Contests

Although a person can provide for another to take as a beneficiary in a will, because a will is subject to contest on grounds such as undue influence,⁶⁷ many states allow adult adoption simply to prevent such will contests.⁶⁸ "The only persons who have standing to challenge the

⁵⁹ See Flannery, *supra* note 1 at 1.

⁶⁰ See McCabe, *supra* note 9, at 303.

⁶¹ *Id.*

⁶² See Urban, *supra* note 40, at 612.

⁶³ *Id.* at 615.

⁶⁴ *Id.* at 614.

⁶⁵ *Id.*

⁶⁶ *Id.* at 612.

⁶⁷ See Massey, *supra* note 49, at 583-85.

⁶⁸ *Id.* at 586.

validity of a will are those persons who would take if the will were denied probate.⁶⁹ If the testator adopts a child, the testator's collateral relatives cannot contest the will on the ground that they would inherit by intestacy."⁷⁰ So in cases where a will contest would be likely, such as in homosexual relationships or other relationships that do not align with cultural norms, adult adoption may provide a way to effectuate the testator's intent.⁷¹

D. Beneficiary Status From Adopter

Since most states treat adopted adults as if they are born into the blood line of their adopted parent, adult adoptees can inherit as a natural born child if the parent dies intestate.⁷² Missouri explicitly allows an adult adoptee to inherit from his or her adopted parents as "fully as though born to him or them in lawful wedlock."⁷³ This allows for the adopted child to take equally with all other children in case a will is contested or never made. This may also affect how much unmarried minor children of a decedent would receive from the homestead allowance in states such as Missouri which take the total number of children into the equation.⁷⁴ Parties to adoption should be cautious to determine if the state's statute is comparable to Missouri's where adoption of a person takes the adoptee from the bloodline of her natural parents and prevents her from inheriting from her natural parents.⁷⁵

E. Beneficiary Status Through Adopter

⁶⁹ DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES, 88 (7th Ed.) 2005.

⁷⁰ *Id.*

⁷¹ See Massey, *supra* note 49, at 584-85.

⁷² See Flannery, *supra* note 1 at 1.

⁷³ MO. REV. STAT. § 453.090 (2010).

⁷⁴ *Id.* at § 474.290.

⁷⁵ *Id.* at § 453.090.

Although most state statutes allow the adopted adult to inherit *from* the adoptive parent, some states go even further to allow the adoptive child to inherit *through* the adoptive parent.⁷⁶ Missouri is among the states that allow an adopted adult to take *through* her parent,⁷⁷ but only in certain instances.⁷⁸ Adult adoption may be used to put the adoptee in a position to take intestate from a rich relative of the adopter⁷⁹ or may be used to put the adoptee in a certain class for a testamentary gift or trust.⁸⁰ In trust situations, the settlor's intent is often the polestar to determine whether adopted adults are included in the beneficial class.⁸¹ In situations where the intent of the settlor is contrary to including adopted adults, the adoption may still be recognized, thus cutting off the adopted adult from her natural bloodline, but still preventing the adopted adult from inheriting through the trust.⁸² Courts have taken into account when the adoption had occurred in relation to the settlor's death and whether she made the disposition with the intent to include the adoptee within the beneficial class.⁸³ The Uniform Probate Code (UPC) provides that, in order for adoptee's to take *through* the adopting parent in the form of trusts or other third-party instruments, the adoptee must be "appropriate to the class" and the ". . . adopted individual lived while a minor, either before or after the adoption, as a regular member of the household of the adopting parent."⁸⁴

IV. The Possible Pitfalls of Adult Adoption

⁷⁶ See Flannery, *supra* note 1, at 1.

⁷⁷ § 353.090.

⁷⁸ Compare *Davis*, 871 S.W.2d at 38; and *Blasdel*, 141 S.W.3d 434 (Missouri does not allow adopted adults to take *through* his adoptive parent in cases of sham adoptions or when doing so would be contrary to the intent of the settlor).

⁷⁹ See Brashier, *supra* note 24, at 166.

⁸⁰ See Flannery, *supra* note 1 at 2.

⁸¹ *Id.* at 7.

⁸² See *Hall v. Vallandingham*, 75 Md. App. 187 (Md. Ct. Spec. App. 1988).

⁸³ See Flannery, *supra* note 1 at 7-9.

⁸⁴ UNIF. PROBATE CODE § 2-705 (amended 2006).

Just as there are numerous benefits that can arise from using adult adoption, there are also a number of drawbacks to using this estate planning tool in the wrong context or for misguided reasons. When used for grounds such as strengthening an already existing familial bond, as used commonly in adult step-child relationships, the purposes of the adoption can more easily be satisfied.⁸⁵ On the other hand, when motivation for adoption comes in the form of securing inheritance rights, and especially when it is used to subterfuge the testator's intent and to interfere with the expectancy of one's inheritance, courts are less likely to allow the adoptee to take the inheritance and thus the adoption's purpose is unfulfilled.⁸⁶ Such a situation can lead to a number of other harmful results to both parties to adoption and may also have detrimental consequences to any lawyers involved.

To more easily see the abundant downfalls that may present themselves if adult adoption is not used carefully, assume the following hypothetical that will be referred to throughout the remainder of Part IV⁸⁷: *A man is a beneficiary to a trust set up by his grandmother. The trust instrument provides that upon his fortieth birthday the trust will be distributed to his issue. The man has two children with his wife at the time the trust was created, but later divorces and has not seen the children for over eight years. The man remarries when he is thirty-five years old. A month before his fortieth birthday he tries to adopt his second wife, his secretary, and his secretary's son, who is of the age of majority, and who he has never met before.*

A. Finality of Adoption

⁸⁵ See Brashier, *supra* note 24 at 165.

⁸⁶ See *Davis*, 871 S.W. 2d 35.

⁸⁷ Roughly based upon the facts of *Davis*, 871 S.W.2d 35.

Perhaps the biggest pitfall of adoption is that adoption is permanent, “[o]nce the bell is rung, it sounds forever. . . .”⁸⁸ Unlike marriage where parties can terminate the relationship and many of the rights and obligations associated with it simply by getting an annulment or divorce, with adoption there is no going back and undoing the relationship.⁸⁹ One might argue that the adult could be readopted by his natural parents to cut off the adopted parents and to place the adopted adult back into her natural bloodline. In the above hypothetical, if all the adult adoptions of the man’s second wife, secretary, and the secretary’s son were allowed, they would be final and could not be undone.⁹⁰ Thus if the man and his second wife later got a divorce, she would still be his child and although she could not assert a spousal election or inherit intestate as a spouse, in some jurisdictions she could still inherit as a child intestate..

B. Replaces Natural Bloodline

In some jurisdictions such as Missouri, when a child (minor or adult) is adopted she is cut out of her natural parent’s bloodline and are placed into her adopted parent’s bloodline as if she were a natural born consanguineous child.⁹¹ *In the above hypothetical assume the adoptions of all three individuals were allowed. Now assume that the court did not allow the adoptee’s to take through the trust instrument.* This would have an adverse effect to the parties to adoption. Not only would the adoptees be cut off from taking through the trust instrument (the reason for being adopted), in some jurisdictions they would be prevented from inheriting intestate through their natural bloodline.

C. Incestuous Overtones/Against Public Policy

⁸⁸ See Flannery, *supra* note 1, at 6.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ MO. REV. STAT. § 453.090 (2010).

The incestuous overtones that are apparent in certain adult adoptions, such as spousal adoptions, homosexual partner adoption, and unmarried heterosexual lover adoption, have been discussed in detail in the previous section titled “Common Parties to Adult Adoption.”⁹² Many courts have been unwilling to allow an adoption that is incestuous in nature since it would be against public policy to do so, however others have argued that adoption is statutory and if the statute does not strictly prohibit adoption between sexual partners then it should be allowed.⁹³ In the above hypothetical, depending on the jurisdiction, the man’s second wife may not be able to be adopted because of the couple’s inherent sexual relationship as husband and wife.

D. Tortious Interference

Another pitfall of adult adoption is the possibility that a claim of tortious interference with one’s expectancy can be brought against the parties to adoption. The Restatement (Second) of Torts describes the tort of intentional interference with inheritance or gift as “[o]ne who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift.”⁹⁴ Missouri recognizes this cause of action, although it is just beginning to come out of its infancy stages.⁹⁵ The Court of Appeals of Missouri, Western District, in *Commerce Bank v. Blasdel* held that tortious interference with expectancy of inheritance did not apply to the facts of that case before the court; however, in dictum, the court suggested that the cause of action would have been a viable remedy in *Davis v. Neilson*.⁹⁶ *Davis* involved the sham adoptions of several people, who had no familial bond with the adopter,

⁹² See Brashier, *supra* note 24, at 168.

⁹³ See Turnipseed, *Supra* note 38, at 111.

⁹⁴ RESTATEMENT (SECOND) OF TORTS §774B (1979).

⁹⁵ *Blasdel*, 141 S.W.3d at 452-53.

⁹⁶ *Id.*

simply to reduce the gift to his natural children.⁹⁷ In the above hypothetical if all three adoptions were allowed by a court and the adoptees then claimed as beneficiaries under the trust, a cause of action for tortious interference with expectancy of inheritance would likely be successful against them in a jurisdiction such as Missouri that recognizes that cause of action.⁹⁸

E. Legal Malpractice Potential

Due to the finality of adoption and the other pitfalls of adult adoption, lawyers who are advising clients about estate planning and using adult adoption as a tool should be careful before going forward with the irrevocable process. Since the laws vary greatly between the different states, lawyers should make sure they research the law fully in their jurisdiction before going forward to avoid from unwanted results.⁹⁹ *In the above hypothetical, suppose that a lawyer was involved and had advised the parties to adoption to go forth with the process.* The lawyer would want to make sure to counsel the parties of the seriousness of adopting, due to its irrevocability. In addition parties should be advised of the possibility of cutting the adoptees from their bloodline in some jurisdictions. The attorney would want to proceed with great caution and care to make sure that if the adoption was done for inheritance reasons, state law would recognize the adoptee as a beneficiary that could inherit. In the above hypothetical, the lawyer would likely expose her clients and possibly herself to claims of tortious interference with expectancy of inheritance. Malpractice suits and disciplinary actions are other hindrances that reckless lawyers are likely to face.

V. Missouri's Current Law and Its Likely Future

⁹⁷ *Davis*, 871 S.W.2d 35.

⁹⁸ *Compare Blasdel*, 141 S.W.3d 434 and *Davis*, 871. S.W.2d 35.

⁹⁹ *See Flannery*, *supra* note 1 at 9.

Missouri, like a majority of other states permit adult adoption.¹⁰⁰ Missouri does not have a separate adult adoption statute; the general adoption statute applies to both minors and adults.¹⁰¹ Missouri's adoption statute is codified at Section 474.090.¹⁰² The statute cuts the adoptee out of her natural bloodline and places the adoptee into the bloodline of the adoptive parent or parents.¹⁰³ It allows for the adoptee to inherit from her adoptive parents as though she was a natural born child¹⁰⁴ and allows the adoptive parents to inherit from the adoptive child as though they were the natural parents.¹⁰⁵ The statute also allows the adoptee to inherit through her adoptive parents by adoption "property limited expressly to heirs of the body of such parent by adoption."¹⁰⁶ "Property limited expressly to heirs of the body" has yet to be construed by a Missouri court.¹⁰⁷ To be adopted as an adult the formalities of the statute must be complied with; equitable adoption does not apply to adults.¹⁰⁸

A. Valid Parties to Adoption in Missouri

Missouri recognizes adult adoption between numerous different types of parties; however just because the adoption is recognized does not mean that the adoptee will be capable of inheriting as though she were a natural born child.¹⁰⁹ For example, in *Davis*, although the court recognized the adoption of six individuals the adopter barely knew including his secretary, his secretary's son, three acquaintances, and his nephew, the court would not allow the individuals to inherit from a trust that was to be paid out to the adopter's issue since the adoptions were

¹⁰⁰ *Id.* at 2.

¹⁰¹ MO. REV. STAT. § 474.090.5 (2010).

¹⁰² *Id.* at § 474.090.

¹⁰³ *Id.* at § 474.090.1.

¹⁰⁴ *Id.* at § 474.090.2.

¹⁰⁵ *Id.* at § 474.090.3.

¹⁰⁶ *Id.* at § 474.090.4.

¹⁰⁷ John A. Borron Jr., § 359. *Adopted Children as Heirs, Children, Etc.*, 5 MOPRAC § 359, ¶ 9 (2010).

¹⁰⁸ *Gamache v. Doering*, 354 Mo. 544, 550 (Mo. 1945).

¹⁰⁹ *See Davis*, 871 S.W.2d 35.

found to be shams.¹¹⁰ To deal with the sham adoptions, the court presumed that the settlor of the trust intended the remainder to go to the children of the adopter with whom he shared a “familial bond,” and thus the court read in a requirement of a “prior family relationship” in order for adoptees to take through the adopter.¹¹¹

In *Blasdel*, a case involving several trusts and two sets of adopted adult step-children, the court recognized the adoptions as being valid and allowed the adoptees to inherit from and through their adoptive parents.¹¹² The court declined to follow the *Davis* requirement of a “prior family relationship” in order to inherit through an adopter; however, the court suggested if the *Davis* requirement had been used the adoptees would have met the requirement.¹¹³ The court suggested that the cause of action of tortious interference with expectancy of inheritance should instead be used in factual situations similar to *Davis* to prevent “bounty hunters” from depleting the expected inheritance of others through sham adoptions.¹¹⁴

Missouri has yet to encounter the issues of spousal adoption, homosexual adoption of one’s partner, or heterosexual adoption between unmarried lovers, nor is there a statute directly on point declaring if such types of adoptions are prohibited. It is likely that Missouri would not allow a spousal adoption because it would cause any sexual intercourse between the husband and wife to be in violation of the Missouri incest statute, which explicitly includes adopted descendants among the class subject to incest laws.¹¹⁵ In addition, a marriage between parents and children are presumptively void in Missouri.¹¹⁶ The homosexual adoption of one’s partner

¹¹⁰ *Id.* at 36-37.

¹¹¹ *Id.* at 38.

¹¹² *Blasdel*, 141 S.W.3d at 439-49.

¹¹³ *Id.* at 449-50.

¹¹⁴ *Id.* at 452.

¹¹⁵ MO. REV. STAT. § 568.020 (2010).

¹¹⁶ *Id.* at § 451.020.

would also likely not be allowed in Missouri because of the incest statute. Missouri's strong stance against homosexual rights suggests the unlikelihood of a court allowing an adoption between lovers to circumvent the laws currently in place.¹¹⁷ Likewise, heterosexual adoption between unmarried lovers would not likely be allowed due to the incest statute as well.¹¹⁸ Even if an adoption was allowed in Missouri or allowed in another state and recognized through the Full Faith and Credit Clause, a court still may not let the adoptee inherit *through* the adoptive parent.¹¹⁹ Such a result could frustrate the entire purpose behind the adoption.

B. Who Inherits From Whom?

As mentioned previously, the Missouri adoption statute provides that the adoptive adult is taken out of their previous bloodline and placed into the bloodline of the adoptive parent.¹²⁰ The adoptee is then, by statute, capable of inheriting *from* and *through* his adoptive parent as if she were a natural born child.¹²¹ The subject of inheriting *from* the adoptive parent is not heavily litigated, perhaps that is because the statute allows it and the adoptive parents did so intending their estate to pass to their adoptive child as if she were a natural child. The issue of whether an adoptive child can inherit *through* a relative of her adoptive parent who had died intestate is not heavily litigated since that too is provided for in the statute.¹²² Much litigation comes from whether the adoptive child will be able to take *through* the adoptive parent from third party instruments.¹²³

¹¹⁷ *Id.* at § 451.022; *See also* ROBIN CARNAHAN, CONSTITUTION STATE OF MO, Art. 1 Bill of Rights § 33 (adopted Aug. 3, 2004) http://www.sos.mo.gov/pubs/missouri_constitution.pdf.

¹¹⁸ § 568.020.

¹¹⁹ *See* Flannery, *supra* note 1 at 7; *See also* § 453.170.1.

¹²⁰ § 453.090.

¹²¹ *Id.*

¹²² *Id.* at § 453.090.4.

¹²³ *See generally* Davis, 871 S.W.2d 35; *Blasdel*, 141 S.W.3d 434.

Even though the adoption statute provides for inheritance rights, they do not directly control whether the adoptee will inherit in third party instrument situations.¹²⁴ To determine whether an adoptive child can take *through* her adoptive parent from a third party instrument the settlor's intent controls in a trust¹²⁵ and the testator's intent controls in a will.¹²⁶ The intent of the settlor is established at the time the trust is created and her intent is ascertained from the four corners of the trust instrument.¹²⁷ In Missouri the same rules are used to construe trusts and wills alike.¹²⁸ In determining whether a described class of beneficiaries includes adoptees, the law in existence at the time the instrument was executed prevails absent a clearly expressed contrary intent.¹²⁹ This is because settlors are "presumed to have known and intended the legal meaning and effect of the language they employed in the trust instruments at the time they were executed."¹³⁰ Thus, under the current laws, the adoptee would qualify as a lineal descendant of both her adoptive parents and of her "ascendants."¹³¹ It is important to determine when the instrument was executed so that one will know which laws to employ in construing the testator's intent.¹³² In general, if a settlor ascendant knows of the adoptee or the adoption was done prior to the death of the settlor, it is more likely that intent to include the adoptee will be found;¹³³ however in *Robertson* the Court found that "a child adopted by the testator's natural born son

¹²⁴ *Davis*, 871 S.W.2d at 38.

¹²⁵ *Blasdel*, 141 S.W.3d at 443.

¹²⁶ *Davis*, 871 S.W.2d at 38.

¹²⁷ *Blasdel*, 141 S.W.3d at 443.

¹²⁸ *Id.* at FN 9.

¹²⁹ *Id.* at 443 - FN 10.

¹³⁰ *Id.* at 444.

¹³¹ *Id.* at 446.

¹³² John A. Borron Jr., § 359. *Adopted Children as Heirs, Children, Etc.*, 5 MOPRAC § 359, ¶ 4 (2010).

¹³³ *Id.* at ¶ 2.

was not only a lineal heir of his adoptive father, but also a pretermitted lineal heir of his adoptive [grandfather], the testator himself.”¹³⁴

C. A Possible Solution

A solution to the problems that have developed due to adoption statutes being used for solely inheritance purposes, could be for Missouri to adopt a statute paralleling Ohio’s “Designation of heir at law” statute that allows a person to designate another as an heir at law without having to formally adopt them.¹³⁵ This would allow homosexual partners or heterosexual non-married couples to be able to pass their estates to their lovers without the fear of blood relatives contesting the will.¹³⁶ If such a devise was implemented, then the likelihood of *Davis* like sham adoptions would be virtually eliminated and courts would not have to decide the difficult issues concerning incest and homosexuality. Adoption statutes could still be used in situations such as adult step-child adoption where a family bond exists and the purpose of the adoption would be the formalization of the relationship. To deal with third party instruments, courts would look to the settlor’s intent as they do already, to determine if such person was intended to be included in the class.¹³⁷ To show intent, the settlor should be required to explicitly state that she wishes to include designated heirs in the class of intended beneficiaries to reduce the amount of ambiguity and litigation that later arises on the subject of settlor’s intent.

VI. CONCLUSION

¹³⁴ *Blasdel*, 141 S.W.3d at 446(citing *Robertson v. Cornett*, 359 Mo. 1156, 1168 (Mo. 1950)).

¹³⁵ See Peter N. Fowler, Comment, *Adult Adoption: A “New” Legal Tool for Lesbians and Gay Men*, 14 Golden Gate U.L. Rev. 667, 703 (1984)(referring to Ohio Rev. Code Ann. Sec. 2105.15); see also *See Turnipseed*, *Supra* note 38, at 108.

¹³⁶ See Fowler, *Supra* note 135, at 703.

¹³⁷ *Boatmen’s Trust Co. v. Conklin*, 888 S.W2d 347, 351 (Mo. Ct. App. 1994).

Adult adoption can be a valuable tool depending upon the intended task to be accomplished. Adult adoption laws vary greatly from state to state, so the usefulness of the tool differs depending on the various purposes for which one seeks to elicit adoption and depending where one is seeking to adopt. One thing that appears to be universal among the states that allow adult adoptions, are that they are generally accepting of adult adoptions used to strengthen already existing family relationships such as adult step-children. As purposes tend to shift towards financial reasons, such as inheritance rights, then courts are less likely to allow adoptions or the inheritance rights that were the primary goals behind the adoption.

Adult adoptions in Missouri have proven to be useful, but typically only when a previous family bond exists between the parties to adoption. Courts have not yet taken a stance on the difficult situations of the various partner adoptions, although it is likely courts would not allow them. Missouri courts have been unwilling to allow adult adoptions as a way to manipulate expected inheritances. Parties, before going ahead with an adult adoption, should make sure that the primary goals for doing so are going to be fulfilled because of the finality of adult adoptions. Lawyers should not advise clients to go forward with the adoption unless they make sure the clients are fully aware of all the implications. Adult adoptions should be avoided when the purposes are solely inheritance and other alternatives carrying fewer risks should be pursued. Such options may include having an additional disinterested witness attest the will, utilizing a self-proving affidavit, and ensuring the channeling function is followed to help prevent a will from being contested. Adopting a statute such as the Ohio “Designation of heir at law” statute

would also be a favorable option.¹³⁸ It would give people an alternative to manipulating the adoption statute to achieve their estate planning needs.

¹³⁸ See Fowler, *Supra* note 135, at 703.