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In Celebration of National Adoption Awareness Month, We Focus on the Estate Planning Effects of Adoption

By Richard M. Morgan & Loraine M. DiSalvo

November is Adoption Awareness Month. In celebration, this issue of the *Passionate Estate Planner* will focus on adoption, and the estate planning effects adoptions can have.

Two of our attorneys are adoptive parents, and adoption is a loving and beautiful way to build a family. However, while adoption legally creates new family ties, it also legally destroys old ones. The legal ties between family members create a host of rights and interests, especially in the estate planning context. If these legal ties are severed, these rights and interests will be affected. In addition, when new legal ties are created through adoption, the legal rights and interests that come with those ties can affect many people besides the parties who are actually involved in the adoption. In any family where there has been an adoption, either into or out of the family, the family members need to carefully consider the legal effects of the adoption and ensure that their estate planning will produce the desired result in light of those legal effects.

Adoption creates a legal parent-child relationship. The adoption may involve only one adopting parent or two adopting parents. In many cases, the adopted child (the “adoptee”) is a person who has no biological relationship to the adopting parent (or parents), as is common in many adoptions involving an adoption agency. In many other cases, the adoptee may be a person who is biologically related to the adopting parent(s), but who is not biologically their child. This often occurs in situations where grandparents are raising their grandchildren because the child who is the biological parent is deceased or suffers from addiction or a disabling condition. The adoption may also involve a situation where a stepparent is adopting a stepchild while married to the child’s biological parent.

In most cases, if a person adopts a child, the intent is for that child to be treated as the child and the descendant of the adopting parent for all purposes of the adopting parent’s estate planning documents. Many, but not all, existing estate planning documents will automatically include an adopted child if the person who made the document is the adopting parent. However, the adopting parent should still carefully review his existing estate planning documents to ensure that the effect of the adoption is as intended, and should make any changes that may be needed. In some cases, if the adopting parent has engaged in extensive estate-tax-reduction-type planning, the overall plan may need to be adjusted to account for documents that do not automatically adjust and cannot be changed. For example, a client who believes that he is past the point of adding children to his family may create an irrevocable trust that does not provide for children who are born to or adopted by him after the creation of the trust. If this client enters a new relationship after the trust is created, however, his intent with regard to new children may change, and he may find himself adopting stepchildren or adopting children with his new spouse. In that case, if the existing irrevocable trust



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cannot be modified to provide for the new children, the client may need to make other provisions for the new children if he wants to equalize the benefits received by all of his children through the overall estate plan.

In general, the legal effects of adoption do not stop at the creation of a new parent-child relationship. Instead, many relationships are affected. If the adoptee was a minor at the time of the adoption, and if the adoption involves two parents, the general rule is that the adoptee not only becomes the legal child of the new parents, but also becomes the legal sibling of the parents' other children, the legal grandchild of the parents' parents, the legal niece or nephew of the parents' siblings, and so on.¹ In addition, the adoptee generally ceases to be the legal child of his previous parents. Depending on the situation, this can also mean that all legal relationships with the extended family members of his previous parents are also terminated.² The changes in the adoptee's legal family relationships can affect a large number of rights and interests, including the right to inherit from others, the right of others to inherit from the adoptee, and interests the adoptee might have in bequests made to a group of beneficiaries defined by their status, such as a bequest "to my children," "to my grandchildren," or "to the descendants of X."

As an example of the effect that an adoption can have: suppose a child's biological parents are killed in an accident, and the child is adopted by family friends who were appointed as her guardians. The child becomes the legal child of the adopting parents, and all legal relationship to the child's biological family ends. If one of the child's biological grandparents later dies and leaves a bequest "to my grandchildren," without specifically stating that the adopted child should be considered to be a grandchild even though legally she isn't one, then the child will not receive any share of that bequest. In addition, the adopted child would not be one of the heirs of her biological grandparent. If the biological grandparent died without any Will, the adopted child would not receive any share of the grandparent's probate assets. In this kind of situation, the adoption is usually intended to provide the children with a loving, stable home. Unfortunately, without adequate planning, the adoption could cause the child to lose economic benefits she would have otherwise received from her biological family. *This is not a reason to avoid adoption in this kind of tragic situation.* But, if a biological family member has been adopted away from the family, the biological family members who want to ensure that the adopted child is still treated as part of the family need to be aware of the legal effects of the adoption, and take appropriate measures to ensure that intended benefits are received by the adopted person.

If a client has extended family members who became family through adoption, as in a case where the client's child adopted a child or stepchild, then that client needs to know what legal rights that adopted family member may have with regard to the client's estate. The client also needs to consider the effect of the adoption on the client's estate planning, and decide whether to take steps to either include or exclude the adopted person. Our standard estate planning documents, like many others, generally take the position that a person who is adopted by a client's intended beneficiary is



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considered to be the legal child and the legal descendant of that beneficiary for all purposes, as long as the adoptee was adopted while under the age of 18, while persons who are adopted after they turn 18 are generally not treated as the child or the descendant of the adopting parent. This kind of provision would mean that, for example, if a client's child adopted a minor child, that adopted child will be treated as the client's grandchild, as one of the client's descendants, as the child of the client's child, and as one of the client's child's descendants for all purposes of the client's Will. This treatment would be the same whether the adopted child was an unrelated infant found through an agency or a 15-year-old stepchild from the client's child's new spouse. If the client does not want to include an adopted 15-year-old stepchild as a family member and beneficiary, then we will need to modify the standard Will provisions to exclude the stepchild. But if the client's child adopted an adult, such as a situation where a stepchild's other parent would not consent to adoption while the stepchild was under 18 or where the client's child adopted a significant other in an attempt to bring the significant other into the client's estate plan as a beneficiary, the adopted adult child would not be considered to be related to the client under the provisions of the client's Will. (Please note: the adopted adult child would still potentially be the client's heir, if the adopting child of the client predeceased the client, but heirs and beneficiaries are not necessarily the same if you have a Will in place at your death). In this situation, if the client wants to benefit the person who was adopted after turning 18, the standard Will provisions will normally need to be modified.

Like any adoption, the increasingly common situation where a child is adopted by a member of her existing extended family creates estate planning issues. However, some of the estate planning issues created are unique to these inter-family adoption situations because the new legal relationships created by the adoption do not always line up with the family's intent with regard to the family structure. One common situation where an intra-family adoption occurs is where a biological grandparent ends up raising a biological grandchild following the death of the grandchild's parent. The adopted grandchild becomes the child of the adopting grandparent, and the new sibling of persons who were originally her aunts and uncles, for legal purposes, including inheritance rights.³ However, in many cases the family does not intend for the grandchild's relationship to the rest of the family to change, and the adopting grandparent may intend to continue treating the grandchild as a grandchild for estate planning purposes. In other cases, the grandparent may decide to treat the adopted grandchild in a different manner than other children or grandchildren are treated, reflecting the fact that the adopted grandchild may depend on the grandparent for economic and emotional support more than other grandchildren, but that the adopted grandchild is still viewed by the family as a grandchild, rather than a child, of the grandparent. And in still other cases, the adopting grandparent may want to treat the adopted grandchild as a child for all estate planning purposes. The adopting grandparent needs to carefully consider her intent and ensure that she has appropriate estate planning documents in place.



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In intra-family adoptions, other family members may also need to take their new relationships to the adopted grandchild into account as part of their estate planning. For example, if the grandchild's biological parent is still living, and the adopting grandparent is also the parent of the biological parent, the adopted grandchild becomes the legal sibling of her biological parent. Consider the case of actor Jack Nicholson, who discovered that his older sister was actually his biological parent, and that his parents were actually his biological grandparents. If the biological parent makes an estate plan that provides for her "children," but she wants to include the adopted sibling/biological child as one of those beneficiaries, she will need her Will to be very clear that the adopted sibling should be included. If the biological parent/legal sibling wants the Will to also include the adopted sibling/biological child's children as if they were her grandchildren, she will also need to make that clear in the Will.

Estate planning documents should always clearly spell out the client's intent regarding the effect of an adoption by a client's family member. If the documents are unclear, expensive litigation can result. For example, in the last two years, Florida courts addressed the ability of an adopted adult child to inherit under a trust created by her adoptive grandfather, Thomas.⁴ Thomas's trust was both sizable and complex, with assets worth more than \$10 million and multiple sub-trusts. Each of Thomas's five children had two subtrusts. Under one of the subtrusts, the child-beneficiary could elect to have the remaining trust assets pass to that child's lineal descendants (defined as the child's "issue"). If the child was not survived by any issue, that child's share would be divided among the child's remaining siblings.

When Thomas first created the trust, he explicitly excluded adopted children as possible beneficiaries, because he wanted his assets to stay in his bloodline. However, after one of his children adopted an infant, his heart softened, and he modified the trust so that the term "issue" would include "adopted persons." He did not specify whether persons adopted after reaching adulthood would be included as "adopted persons."

Later, Thomas's daughter Diana, a childhood cancer survivor who could not have biological children, adopted her godchild after the godchild became a legal adult. Diana wanted to have her subtrust benefit her newly adopted adult child, but it was not clear whether the trust would allow her to do so. Thomas clearly intended to include the child adopted as an infant as a potential trust beneficiary, because he modified the trust after that child's adoption specifically to ensure that the child would be included. He never discussed the idea of adult adoption, however, and had clearly expressed a preference for "bloodlines" in the original trust. This case still has not been finally decided, as it was sent back to the lower court for a determination on this issue.

The reason many estate planning documents specifically exclude persons adopted as adults from being included as children or other family members is that adult adoption has sometimes been used as a way for beneficiaries to add new, unintended beneficiaries to a family member's estate plan. Heiress Doris Duke, who legally adopted the much-younger Chandi Gail Heffner when Miss Duke was



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75 years old, may have intended to make Ms. Heffner not only Miss Duke's legal heir but also to make her a beneficiary under a trust created by Miss Duke's late father. Before same-sex marriage became legal, it was also often used as a way for same-sex couples who could not get married to at least create some kind of legally-recognized relationship for other reasons, such as inheriting from each other, being able to make health care decisions for each other, or becoming eligible for health insurance or other employer-provided benefits.⁵ Some couples who used adoption for these purposes are now faced with having to undo the adoptions so that they can get married. If the adult adoption was entered to try and force a new beneficiary into someone else's estate plan, or if the adoption wasn't really intended to actually create a parent-child relationship, but simply to substitute for a spousal relationship that was desired but unavailable, then having the adult adoption ignored in the estate plan of a person not involved directly in the adoption may be the right result. However, in a situation where there really was an intent to create a parent-child relationship, but the adoption was not available before the adoptee turned 18 because a biological parent refused to consent, then the blanket exclusion of persons adopted as adults may not produce the desired result.

One final example of why it is so important to consider the estate planning effects of adoption involves situations where a parent-child-like relationship exists between persons who are not biologically or legally parent and child. This could include a situation where a stepchild has effectively been raised by a stepparent, a situation where an aunt and uncle take in an orphaned or abandoned niece or nephew, or even a situation where an older person has had a long and close relationship with a younger person and there are no other legal or biological ties. In these situations, if the "parent" wants the "child" to benefit under the parent's estate planning, they should carefully consider whether adoption is a good option. If not, the parent will generally need to ensure that his estate planning specifically provides for the "child," because otherwise the "child" will likely not be a beneficiary.⁶

If you have a situation where you or a family member has adopted a child, or if a family member has been adopted out of your family, you should be extra careful when considering your estate planning desires. In addition, even if adoption is not a part of your family situation now, you should carefully consider the possibility that adoption may affect your family in the future, and ensure that your estate planning documents reflect your wishes if it does. At Morgan & DiSalvo, our attorneys have a great deal of experience in addressing the issues presented by adoption, and we are happy to help our clients address these issues for themselves. If you would like to discuss adoption-related issues in connection with your own estate planning, please contact our office at 678-720-0750 or email info@morgandisalvo.com to schedule a consultation.



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1. In some states, a person who is adopted after becoming a legal adult may be treated differently under the inheritance laws than a person who was adopted as a minor. See Antunez, Juan C., "4th DCA: Is adult adoption for inheritance purposes against Florida public policy?" Florida Probate & Trust Litigation Blog (6/25/13) (<http://www.flprobatelitigation.com/2013/06/articles/new-probate-cases/will-and-trust-contests/4th-dca-is-adult-adoption-for-inheritance-purposes-against-florida-public-policy/>) (viewed on 11/12/15). In Georgia, by contrast, the age of the adoptee at the time of the adoption does not affect his or her legal status with regard to the family member of the adopting parent(s):

O.C.G. A. § 19-8-19 Decree of adoption

- (a) A decree of adoption, whether issued by a court of this state or by a court of any other jurisdiction, shall have the following effect as to matters within the jurisdiction of or before a court in this state:
 - (1) Except with respect to a spouse of the petitioner and relatives of the spouse, a decree of adoption terminates all legal relationships between the adopted individual and his relatives, including his parent, so that the adopted individual thereafter is a stranger to his former relatives for all purposes, including inheritance and the interpretation or construction of documents, statutes, and instruments, whether executed before or after the adoption is decreed, which do not expressly include the individual by name or by some designation not based on a parent and child or blood relationship; and
 - (2) A decree of adoption creates the relationship of parent and child between each petitioner and the adopted individual, as if the adopted individual were a child or biological issue of that petitioner. The adopted individual shall enjoy every right and privilege of a biological child of that petitioner; shall be deemed a biological child of that petitioner, to inherit under the laws of descent and distribution in the absence of a will, and to take under the provisions of any instrument of testamentary gift, bequest, devise, or legacy, whether executed before or after the adoption is decreed, unless expressly excluded therefrom; shall take by inheritance from relatives of that petitioner; and shall also take as a "child" of that petitioner under a class gift made by the will of a third person.



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- (b) Notwithstanding the provisions of subsection (a) of this Code section, if a parent of a child dies without the relationship of parent and child having been previously terminated by court order or unrevoked surrender of parental rights to the child, the child's right of inheritance from or through the deceased parent shall not be affected by the adoption.

O.C.G.A. § 19-8-21 Adult adoption

- (c) Adult persons may be adopted on giving written consent to the adoption. In such cases, adoption shall be by a petition duly verified and filed, together with two conformed copies, in the superior court in the county in which either any petitioner or the adult to be adopted resides, setting forth the name, age, and residence of each petitioner and of the adult to be adopted, the name by which the adult is to be known, and his written consent to the adoption. The court may assign the petition for hearing at any time. After examining each petitioner and the adult sought to be adopted, the court, if satisfied that there is no reason why the adoption should not be granted, shall enter a decree of adoption and, if requested, shall change the name of the adopted adult. Thereafter, the relation between each petitioner and the adopted adult shall be, as to their legal rights and liabilities, the relation of parent and child.
- (d) Code Section 19-8-19, relating to the effect of a decree of adoption, and Code Section 19-8-20, relating to notice of adoption, shall also apply to the adoption of adults.
2. In a stepparent (sometimes called a "second parent") adoption, the adoption usually only changes the relationship the child has to the family of the biological parent who is being replaced by the stepparent. For example, when Loraine DiSalvo adopted her husband's daughter from his prior marriage, the relationship between her husband, his daughter, and his side of his daughter's family was not affected. However, the daughter's legal relationship with her biological mother, and the biological mother's parents, siblings, and other children, were terminated. Loraine's parents, aunts, uncles, and cousins became the daughter's legal maternal family.
3. Under the federal generation-skipping transfer ("GST") tax, a grandparent who makes a bequest to a grandchild has made a generation-skipping transfer that is potentially subject to the GST tax. If the beneficiary is biologically a grandchild but has been legally adopted by the grandparent, however, the answer appears to be that the legal parent-child relationship will override the original grandparent-child relationship and keep the bequest from being a



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generation-skipping transfer.

4. *Dennis, as Co-Trustee of the Thomas Gordon Dennis Revocable Trust of 1989 as amended and Haws v. Kline and Deutsche Bank Trust Company, N.A., as Co-Trustee of the Thomas Gordon Dennis Revocable Trust of 1989 as amended, Case Nos. 4D12-1881 and 4D12-2589 (DCA 4th Dist. 6/19/2013).*
5. We do not recommend that anyone ever adopt a romantic partner. Adoption creates a legal parent-child relationship between the adoptee and the adopting parent for all purposes. This includes incest laws, and the adoption can result in making a legal romantic or sexual relationship into an illegal one.
6. In some cases, a court may find that an adoption-like situation existed even though there was no legal adoption, and that the situation effectively created the right to inherit in the child. For example, Georgia has recognized the concept of “virtual adoption” for over a century. “Virtual adoption” is a concept that allows a court to determine that there has been an “agreement between the natural and adoptive parents, a severance of the actual relationship of parent and child as between the child and the natural parents, [and] the establishment of such a relationship between the child and the adoptive parents,” so that it would be unfair to prevent the virtually adopted child from inheriting from the adoptive parent where the adoptive parent died without a Will. *Johnson v. Rogers*, Case no. S15A0395 (Ga. 6/29/2015). While this doctrine appears to be a remnant from a previous historical time during which a single mother or an impoverished couple might simply give another family their child to raise, the doctrine is still alive and well in Georgia, and Georgia courts do sometimes still find that a virtual adoption has taken place, allowing a virtually adopted child to inherit from a legally-unrelated “virtual” parent. See, e.g., *Sanders v. Riley*, Case No. S14A1314 (GA. 3-16-2015)..