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Joanna L. Grossman

Maurice A. Deane School of Law at Hofstra University

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Verdict

October 20, 2011

[Joanna L. Grossman](#)

The Potential Consequences of Adult Adoption for Inheritance: A Recent Virginia Supreme Court Ruling



Justine Critzer, a Virginia woman, died in 2006. She died intestate—without a will—and had no close surviving relatives: No spouse, no children, and no living parents. Her closest biological relatives were two nephews and a niece—the children of Critzer’s biological sister, Mary Frances Kummer. This situation raises an interesting question: Who should inherit Ms. Critzer’s estate?

According to the recent ruling of the Virginia Supreme Court in *[Kummer v. Donak](#)* (<http://law.justia.com/cases/virginia/supreme-court/2011/101232.html>), Critzer’s niece and nephews are not her legal heirs, despite their being her closest surviving biological relatives. Their legal tie to Critzer—and the right to inherit from her estate—was severed when their mother was adopted out of the family at the age of 53.

In this column, I will explain this ruling and the sometimes-strange implications of an adult adoption.

The Basic Law of Adult Adoption

Adult adoption is an unfamiliar concept to most people. Yet, it is not uncommon. Almost every state has a statute providing for the adoption of adults.

Unlike with the adoption of minor children, an adult adoption proceeding is generally uncomplicated. The consent of the adoptee is typically the only prerequisite. States have expressly or impliedly dispensed with any requirement that the adoption be in the adoptee’s best interest or that there be evidence of a pre-existing parent–child relationship. And because the adoptive parent of an adult incurs no legal obligations—such as a duty to provide child support or to care for the “child,” there is little if any inquiry into the parent’s fitness or motive for adoption.

Two-thirds of the states permit any adult to adopt any other adult. About one-third permit adult adoption, but require that the adoptee be younger than the adopter—sometimes by as much as 15 years—or require that the two parties have some relationship that resembles that of a parent–child or older relative–younger relative duo.

Although the statutes dictate no such restriction, a few courts have refused to permit gay lovers to adopt one another. The most well known case reading such a restriction into the law is one from New York, *Matter of Adoption of Robert Paul P.*, which held in 1984 that a man could not adopt his gay lover because the presence of

a sexual relationship was so incompatible with the idea of a parent–child relationship.

The Supreme Court of Delaware, in contrast, approved the adoption of a 51-year-old man by his 66-year-old partner in *In re Adoption of Swanson* (1993). And, most courts to consider the issue have taken the same approach as Delaware, rather than following New York’s approach.

One Effect of Adult Adoption: Creating an Inheritance Relationship

Perhaps the most common motivation for adult adoptions is a wish to affect inheritance rights. And, whether or not that is the motivation, inheritance rights are inevitably affected.

First, adoption gives the adoptee the right to inherit from the adopter as a legal child under the laws of intestacy, and vice-versa. When a person dies without a will (intestate), state law dictates who can inherit, and in what order of preference. As a general rule, only blood relatives inherit. The only exceptions to that rule are legal spouses and adopted children. Spouses and surviving children—adopted or biological—are preferred over parents, siblings, and all more distant relatives. Thus, the adopted, adult child of an unmarried, intestate decedent will take from the estate to the exclusion of all other relatives.

Second, for the decedent-adopter who leaves property to the adoptee by will, the adoption relationship gives some protection against a will contest. Wills that bequeath assets in an unnatural way are vulnerable to challenge on the grounds of undue influence, fraud, or lack of capacity. Wills leaving money to a gay lover, for example, could be particularly at risk. But only someone with standing can bring such a challenge. And, to have standing, a litigant must have a pecuniary interest in seeing the will invalidated. In most cases, it is the intestate heirs—those who stand to inherit if the will is overturned—who have standing.

By adopting someone who will automatically go to the front of the line for inheritance purposes, the testator can deprive other angry relatives of standing to contest the will. Thus, an individual who bequeaths assets to a lover (gay or otherwise) can protect that estate plan by adopting the person who will be the beneficiary.

Thus, where an adopted child has been interposed between a decedent’s other relatives and his money, their only recourse is to challenge the validity of the adoption. If they can successfully challenge the adoptive relationship, they can nullify its effect on inheritance.

The Effect of Adult Adoption on Third-Party Estate Plans

Adult adoption can also have the purpose or effect of altering estate plans created by third parties. Does a will provision leaving money to “X’s children” include X’s adopted children? Does it only include children adopted as minors? Does it only include persons whom the decedent knew that X had adopted?

Before the first adoption laws were passed in the late nineteenth century, under the law the word “children” only referred to biological children. Then, after legislatures began to authorize the creation of legal parent–child relationships via adoption, courts developed a “stranger to the adoption” rule. That rule provided that an adoption changed inheritance rights only vis-à-vis the adoptive parent and the adopted child. Under this rule, the adopted child thus gained no inheritance rights with respect to the adoptive parent’s relatives.

As legal and social views evolved to embrace parent–child adoptive relationships as more or less equivalent to biological parent–child relationships, the impact of adoption on inheritance rights expanded. Courts were more willing to include adopted children in gifts made via a will or another instrument to “children” or “issue,” although some crafted special rules that did not recognize adopted children’s fully equivalent status.

But adult adoptees were not always treated as child adoptees were. Cases are split on whether adult adoption can be used to affect a class gift (that is, a gift to a class of persons). The Uniform Probate Code excludes adult adoptees from third-party gifts to “children” or “issue” unless a de facto parent–child relationship existed prior to the adoption.

In *Minary v. Citizens Fidelity Bank & Trust Co.* (1967), an appellate court in Kentucky refused to allow a woman

who had been adopted by her own husband to take from the decedent's estate as an "heir" of his mother. Although the statute that was then in force provided that adult adoption was to be given the "same legal effect" as the adoption of a minor, the court refused to allow the adoption to change the path of inheritance under the decedent-mother's will.

There, the court refused to treat the adopted wife as the heir of her husband—and thus of his mother—because the adoption of the wife was undertaken for the "sole purpose of making . . . her an heir and claimant to the estate of an ancestor under the terms of a testamentary instrument known and in existence at the time of the adoption."

Allowing the adoption to have this effect, the court reasoned, would "thwart[] the intent of the ancestor whose property is being distributed and cheat[] the rightful heirs."

What Is the Effect of Adult Adoption on the Adoptee's Relatives? The Problem Raised in *Kummer v. Donak*

There are other consequences of the modern view of adoption, as well. The law today views adoption as a complete, substitute parent-child relationship. When a child is adopted by anyone other than a stepparent, the adoption decree severs the legal relationship between the child and her biological parents, and creates in its place a legal parent-child relationship with her adoptive parents. The adopted child is treated in all respects as if she had been born to her adoptive parents.

As discussed above, the adoption creates a new adoptive relationship—not only between the adopter and the adoptee, but also, now that the stranger-to-the-adoption rule has gone by the wayside, between the adoptee and the adopter's relatives. If the adopter predeceases the adoptee, then the adoptee can inherit through the adopter from the adopter's parents, siblings, or other relatives. (For instance, the adoptee can take not only from a parent's estate, but also from a grandparent's.)

By the same token, however, there is a cost to the creation of this new relationship. When adopted, the adoptee ceases to be a legal member of his or her birth family. So when the adoptee's biological mother dies, she does not inherit, because she is no longer her biological mother's legal child.

In *Kummer*, the decedent's closest relatives were the children of her biological sister. But her sister, for reasons that are not elucidated in the opinion, was adopted at the age of 53 by an aunt via marriage.

Recall that the decedent in this case, Justine Critzer, died intestate. Under Virginia's rules of intestate succession, the potential heirs in order of priority are a surviving spouse, children and their descendants, parents, and then siblings and their descendants. Because Critzer had no survivors in the first three categories, it was clear that her estate would go in its entirety to her sister's children, if they were eligible to inherit.

The Virginia code also provides that whenever it is necessary for inheritance purposes to establish "a relationship of parent and child," an "adopted person is the child of the adopting parent and not of the biological parents." Under these provisions, when Critzer's sister, Mary Frances Kummer, was adopted, she became the legal child of her adoptive mother, even though she was 53 at the time the adoption took place. Furthermore, by virtue of the adoption, she ceased being the legal child of her biological parents.

The question for Kummer's children is what effect their mother's adoption (which meant she legally left her biological family) has on their inheritance rights. The answer to this question turns on how intestate succession occurs. The fourth category of heirs under the Virginia intestacy scheme is "siblings and their descendants." If Kummer's children were to inherit, they would be doing so "through" their mother—Critzer's sister. They would be taking a share in her place, since she had predeceased the decedent. But if she is no longer related to her biological sister because of the adoption, can the nephews and nieces still take "through" her?

The Virginia Supreme Court said no, reasoning as follows:

To inherit as descendants of Critzer's sister, they must first establish that Mrs. Kummer was Critzer's sister for purposes of the statutory scheme. That cannot be done unless a relationship of parent and child is established to show a common parent of Mrs. Kummer and Critzer. Applying the

unambiguous [statutory language], Mrs. Kummer became the child of her adopting parent and no longer was the child of her biological parents. Consequently, Critzer and Mrs. Kummer, while biologically sisters, were not legally sisters for purposes of intestate succession.

Although the result may have been harsh for Mrs. Kummer's children, the court noted that the law clearly intends for adoption to divest the birth family of all rights and obligations vis-à-vis the adoptee. Such "divestiture extends to the collateral relatives whose interest derives through the parents," the court held.

The nephews and niece argued that public policy requires that intestate-succession rules send property to the decedent's closest living relatives, but the court was not convinced. "[C]onsanguinity ceases to be paramount where the legislature has expressed an intention to the contrary," the court explained.

Notably, the fact that the case turned on adoption of an adult, rather than a minor, had no effect on the outcome. Thus, if their mother had been alive, the Kummer children could have inherited from her directly—their legal tie to her was still viable—but they could not inherit through her from any collateral relatives.

It may well be that public policy is ill-served by a rule that allows an adult to unilaterally sever the family ties not only of herself, but of her children, who may have had longstanding and close relationship with their relatives. This consequence may be one reason that states should think twice about treating adult adoption exactly the same as minor adoption. But in this case, the applicable statutes left the court with no discretion to consider the wisdom of the outcome or other alternatives.

Potential Adult Adoptees, and Adopters of Adults, Should Carefully Research the Legal Effects of Their Decisions, Especially When It Comes to Trusts and Estates

It may be that Mrs. Kummer was aware of the potentially serious cost to her family of her being adopted as an adult. But, hypothetically, if she did not know, or understand, the consequences of her choice, then her mistake would have been a costly one: Her children lost the right to inherit an estate worth several hundred thousand dollars, if not more.

In sum, adult adoption has some potential downsides. It is irrevocable, for one thing, and for another, as the cases above demonstrate, it may raise complex trusts and estates issues. Thus, the potential cost of divesting inheritance ties is certainly something to think about before one consents to leave his or her family, and join another as an adult adoptee. A mercenary person might be careful to make sure her new family is better off financially than her old family.



Joanna L. Grossman, a Justia columnist, is the Sidney and Walter Siben Distinguished Professor of Family law at Hofstra University. She is the coauthor of [Inside the Castle: Law and the Family in 20th Century America](#) (Princeton University Press 2011), co-winner of the 2011 David J. Langum, Sr. Prize for Best Book in American Legal History, and the coeditor of [Gender Equality: Dimensions of Women's Equal Citizenship](#) (Cambridge University Press 2009). Her columns focus on family law, trusts and estates, and sex discrimination.

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