

**BLOOD & MONEY: A CONFLICT IN TEXAS STATUTES  
REGARDING ADOPTEES’ INHERITANCE RIGHTS  
FROM AND THROUGH BIOLOGICAL PARENTS**

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I. INTRODUCTION

I go down to Whittington Hospital in Highgate and wait, walking up and down in the corridors, until I am told that the baby is born, that it’s a girl, and that the mother is well. But I don’t see the baby. I want to see her, but at the same time I don’t want to because I am afraid of what I might feel. I sign the adoption papers. And then I walk out into the cold street and go home, assuming that this passage of my life is closed and expecting never to hear anything more.<sup>1</sup>

Years before Rod Stewart would become a Grammy Award winner, he was an 18-year-old kid with a pregnant girlfriend.<sup>2</sup> He was poor and scared: he had gotten a girl pregnant out of wedlock<sup>3</sup> and he knew his parents would not approve. Wanting to avoid bringing shame upon his family for his scandalous act, he decided, with his girlfriend, to give the child up for adoption.<sup>4</sup>

In 1982, his daughter, Sarah Streeter, showed up on Stewart’s doorstep with her adoptive mother and a reporter ready to meet her father.<sup>5</sup> Stewart was not home, but they did meet the next day, which ended up being just that—a meeting that was awkward.<sup>6</sup> However, Stewart and Streeter reconnected in 1985 and began a relationship. After the death of Streeter’s adoptive mother in 2007, the bond continued to grow into something special.<sup>7</sup>

Another musical talent that gave her child up for adoption was Joni Mitchell. Like Stewart, Mitchell became pregnant out of wedlock and in order to protect her family, she went to a home to give birth to Kelly Anderson in 1965.<sup>8</sup> Destitute and homeless, Mitchell placed her baby in a foster home with the hopes of getting her baby back after finding a job.<sup>9</sup> Sadly Mitchell could not get back on her feet, and Kelly

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1. ROD STEWART, *ROD: THE AUTOBIOGRAPHY* 42–43 (2012).  
 2. *Id.* at 41; Biography.com Editors, *Rod Stewart Biography*, BIOGRAPHY.COM, <http://www.biography.com/people/rod-stewart-9494977> (last visited March 1, 2016).  
 3. STEWART, *supra* note 1, at 41–42.  
 4. *Id.* at 41–42.  
 5. *Id.* at 240.  
 6. *Id.* at 241.  
 7. *Id.* at 280–81.  
 8. Q on CBC, *Joni Mitchell, on Giving up Her Child for Adoption*, YOUTUBE (Jun. 12, 2013), <https://www.youtube.com/watch?v=U7TgqBYByUc>.  
 9. *Id.*

Anderson was adopted and named Kilauren Gibb.<sup>10</sup> Giving up her baby weighed heavily on Mitchell as mirrored in her song *Little Green*, and in 1996, Mitchell publicly began to seek her daughter.<sup>11</sup> In 1997, Mitchell and Gibb were reunited.<sup>12</sup>

Emmy-nominated actress, Kate Mulgrew, who has starred in *Orange is the New Black* and *Star Trek: Voyager*, gave her baby up for adoption when she was twenty-two years old.<sup>13</sup> Although Mulgrew was single when she became pregnant, her first thought was to have her mother help raise the baby while she continued working.<sup>14</sup> Her mother would not help and told Mulgrew that adoption was the only option.<sup>15</sup> Mulgrew used Catholic Charities to place her baby for adoption and had the ability to choose the new family she wanted for her baby.<sup>16</sup>

Shortly after the placement of Mulgrew's baby, she began to search for her daughter.<sup>17</sup> It was not until 1998 that Mulgrew ran into the nun who supervised the adoption and released the adoption registry forms to both Mulgrew and her daughter, Danielle Gaudette.<sup>18</sup> Since then, Mulgrew and Gaudette have grown very close and see each other as often as possible.<sup>19</sup>

Stewart, Mitchell, and Mulgrew dispel a notion that is prevalent in the minds of people when they think of adoption: the biological parent who gave their child up will never amount to anything. However, as seen in the above examples, biological parents often give their child up because they cannot take care of the baby, but do indeed end up changing their life trajectory and making something out of themselves. In adoptions, the biological parent and child lose all of their legal rights to each other; however, in a few states the child retains one specific right—inheriting through intestate succession. Suppose the three parental superstars lived in Texas when they made the heart-wrenching decision to give their baby a better home and subsequently died intestate in Texas. Would their biological child be able to inherit from their estate? Additionally, the adoptees' biological relatives may accrue an estate worth something. Could the adoptee inherit through

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10. *Id.*; Brian D. Johnson, *Joni's Secret: Mother and Child Reunion*, JONIMITCHELL (Apr. 22, 1997), <http://www.jonimitchell.com/library/view.cfm?id=91>.

11. Johnson, *supra* note 10; Tom Arnold, *The Reunion of Joni Mitchell and Her Daughter Kilauren Gibb*, PARENTS HELPING PARENTS (Mar. 3, 2001), [http://father-for-life.org/php/Joni\\_Mitchell.htm](http://father-for-life.org/php/Joni_Mitchell.htm).

12. Arnold, *supra* note 11.

13. Kate Mulgrew, *Kate Mulgrew: The Child I Gave Up*, AARP (April/May 2015), <http://www.aarp.org/entertainment/style-trends/info-2015/celebrity-kate-mulgrew-adoption.html>.

14. KATE MULGREW, *BORN WITH TEETH* 75 (Little, Brown and Co., 2015).

15. *Id.*

16. *Id.* at 80.

17. Mulgrew, *supra* note 13.

18. *Id.*

19. *Id.*

their biological birth parents if a grandparent or sibling were to pass away intestate?

In Texas, the statutes are in conflict as to whether an adopted person is emphatically given the right to inherit intestate through and from their biological parents. This Note will delve into the history of adoption law, the adoption law process, differences in the statutes, and suggest how the Texas Legislature can mend these statutes to be in harmony with each other. For the purposes of this Note, when adoptee is mentioned it only refers to a child who was adopted as a minor.

## II. HISTORY OF ADOPTION LAW

Adoptions originate back to the Egyptians, Babylonians, Assyrians, Greeks, and tribal Germans, but it was not until Roman Civil Law that adoption reached its widest acceptance and achieved its most thorough early development.<sup>20</sup> The main purpose for adoption during that time was to provide a family heir in order to further a family line and “perpetuate the rights of family religious worship.”<sup>21</sup> The primary concern for the adopted child was to inherit all the legal rights that a natural child would have inherited in order for the continuance of the family name.<sup>22</sup> Today’s standard regarding the best interest of the child was not a concept during that time period.<sup>23</sup>

However, English common law was not a proponent for adoption until the enactment of an adoption statute in 1926.<sup>24</sup> With opposing viewpoints to the Romans, the English held the blood relationship in high regard believing that an adopted child with familial and inheritance rights would threaten the sanctity of blood relations.<sup>25</sup> Therefore, during the early years of United States history, there were no adoption statutes.<sup>26</sup>

The first adoption law statute recognized in the United States was passed by Massachusetts in 1851.<sup>27</sup> However, before the passing of the 1851 statute, adoptions occurred through wills that made bequests to and provisions for adopted persons.<sup>28</sup> Specifically in Texas, civil laws provided for adoption by deed.<sup>29</sup>

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20. R.S. Erikson, Note, *Intestate Succession and Adoption in Utah: A Need for Legislation*, 1969 UTAH L. REV. 56, 57 (1969).

21. *Id.*

22. *Id.* at 57–58.

23. *Id.* at 58.

24. *Id.*

25. *Id.*

26. Fred L. Kuhlmann, *Intestate Succession by and from the Adopted Child*, 28 WASH. U. L. REV. 221, 222 (1943).

27. Alice Bussiere, *The Development of Adoption Law*, 1 ADOPTION Q., no. 3, 1998, at 1, 2.

28. *Id.*

29. *Id.*

Under the Massachusetts 1851 enactment, the primary purpose was to protect children and consider the welfare of the child.<sup>30</sup> This was a novel idea at the time because prior adoptions did not consider adoption as a benefit of the child as much as it was a benefit to adoptive parents for the purposes of creating an heir or to protect family property.<sup>31</sup> By 1929, all states had enacted adoption statutes and most made the best interest of the child the standard for adoption.<sup>32</sup>

#### A. *Adoptee Inheritance Rights Development in the United States*

While the Massachusetts 1851 enactment was not primarily concerned with inheritance rights, it did contain an express provision to permit the adoptee to inherit from the adoptive parents' estate.<sup>33</sup> However, there was no provision with respect to the adopted child's right to inherit from the biological parents.<sup>34</sup>

The Massachusetts statute was used as a model for most other jurisdictions throughout the country.<sup>35</sup> "It was substantially copied by Wisconsin in 1853, Maine in 1855, New Hampshire in 1862, Oregon in 1864, Rhode Island in 1866, and Minnesota in 1876."<sup>36</sup> These states reflected the original statute by not including inheritance rights from an adoptee to the natural parents.<sup>37</sup>

When express provisions were put into effect regarding intestacy rights, "they were, with few exceptions, conciliatory and conservative – designed to make certain that the time-honored course of intestate succession among blood relatives would not be disrupted by the innovation."<sup>38</sup> One of the earliest states to include an express provision regarding intestacy rights occurred 1887 in New York, which "permitted the adopter and the adoptee to inherit from each other but expressly declared that the child's rights of inheritance and succession from natural parents should remain unaffected by the adoption."<sup>39</sup> However, New York's statute was fast moving compared to most of the country. Just like the original Massachusetts statute, other state's statutes did not include provisions related to inheritance from the adoptive parents; nonetheless, inheritance related to natural parents.

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30. *Id.*

31. *Id.*

32. *Id.*

33. Kuhlmann, *supra* note 26, at 224.

34. *Id.* at 225.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

B. *Texas Adoption Law History and Intestacy Development*

There are currently two Texas statutes that touch on the issue of adoptees' right to inherit from and through their biological parents should they die intestate. However, the Estates Code gives the person an absolute right to inherit from their biological parents, while the Family Code leaves it to the discretion of the judge. Furthermore, the Estates Code does provide an exception; however, the exception does not resolve the discrepancy between the Family and Estates code.

At the time that the United States was establishing itself as a nation, Texas residents, under Spanish-Mexican rule, were allowed to adopt.<sup>40</sup> Under the Spanish-Mexican system, if an adopted child had siblings that were natural children of the adoptive parents, the adopted child could not inherit from the parents.<sup>41</sup> After the Spanish-Mexican laws were repealed in 1840, Texas enacted legislation with the influence of French and Spanish law.<sup>42</sup>

For a period of ten years, "the only method of effecting a legal adoption creating rights of inheritance in the adopted child was by special legislative act."<sup>43</sup> The first adoption law statute passed in Texas was the Adoption Act of 1850, which predated the Massachusetts act.<sup>44</sup> Under This Act, an adopted child could inherit no more than one-fourth of the adoptive parents' estate if the adoptive parents had natural children from their marriage; however, if there were no natural children then the adopted child was considered the full "legal heir."<sup>45</sup> There was no mention of an adopted child inheriting through or from a natural parent.<sup>46</sup>

The Revised Civil Statutes of 1879 and 1895 mirror each other as they immediately dive into adoption matters with Title I.<sup>47</sup> Both of these statutes reflect the 1850 Adoption Act as the inheritance rights for adoptees were limited to one-fourth of their adoptive parents and silent on the issue of inheritance from or through the natural parents.<sup>48</sup>

The 1911 Revised Civil Statutes expanded the arena of adoption.<sup>49</sup> Increasing from two articles to eight articles within Title I, the revision elaborated on how a child should be adopted and how the adoptive

40. 39 ALOYSIUS A. LEOPOLD & GERRY W. BEYER, TEXAS PRACTICE SERIES: MARITAL PROPERTY AND HOMESTEADS § 22.6 (2015).

41. *Id.*

42. *Id.*; 9 GERRY W. BEYER, TEXAS PRACTICE SERIES: TEXAS LAW OF WILLS § 5.1 (3d ed. 2014) [hereinafter BEYER WILLS].

43. BEYER WILLS, *supra* note 42, § 5.2.

44. LEOPOLD & BEYER, *supra* note 40.

45. *Id.*

46. *See* BEYER WILLS, *supra* note 42, § 5.3.

47. TEX. REV. CIV. STAT. ANN. arts. 1, 2 (West 1879); TEX. REV. CIV. STAT. ANN. arts. 1, 2 (West 1895).

48. *Id.*

49. *See* TEX. REV. CIV. STAT. ANN. arts. 1–8 (West 1911).

parents should treat the adopted child. Article 4 barred natural parents from “exercising any authority, control or custody over such child as against the party so adopting him,” but neither this article, nor any other, expressly state inheritance rights regarding adopted children and natural parents. Additionally, an adoptee’s inheritance right from their adoptive parents was still limited to the one-fourth rule, if applicable.<sup>50</sup> Following the 1911 revisions were the 1925 Revised Civil Statutes; however, other than formatting changes, the 1925 statutes substantively reflected the 1911 statutes.<sup>51</sup>

In 1931, the Texas Legislature repealed the 1850 Act and established a new Act that emphasized the welfare of the child involved in the adoption proceeding and granted more rights under intestate succession.<sup>52</sup> Under the 1931 Revised Civil Statutes, two notable provisions expanded an adopted child’s right to inherit: (1) the adopted child was considered a natural child of the adoptive parents, therefore allowing the adopted child to inherit as a natural child; and (2) it preserved the right of the adopted child to inherit from their natural parents.<sup>53</sup>

With regards to the first provision, the one-fourth rule was eliminated, and the adopted child was considered as a natural child of the adopted parents and could fully inherit.<sup>54</sup> With regards to the second provision, there was still some confusion. “The language was not clear if the adopted child should continue to inherit through its natural parents, as well as from, its natural parents.”<sup>55</sup> If the adopted child could inherit both through and from the natural parents, the adopted child could inherit in a dual capacity.<sup>56</sup> For example, “if a child is adopted by its grandparents, the child may be entitled to inherit as a child of the adopting parents and also as a representative of its deceased natural parent.”<sup>57</sup>

Subsequent to the 1931 Legislative Act, Texas made major changes in adoption law in 1951.<sup>58</sup> Specifically, the language included a sentence that clarified the confusion whether a child inherits from and through the natural parent by adding, “the natural parent or parents and their kind shall not inherit from or through said child, but *said child shall inherit from and through its natural parent or parents.*”<sup>59</sup>

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50. *Id.*

51. Compare TEX. REV. CIV. STAT. ANN. arts. 41–46 (West 1925) with TEX. REV. CIV. STAT. ANN. arts. 1–8 (West 1911).

52. See TEX. REV. CIV. STAT. ANN. arts. 41–46 (West 1925); see also BEYER WILLS, *supra* note 42, § 5.7.

53. BEYER WILLS, *supra* note 42, § 5.11.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. BEYER WILLS, *supra* note 42, § 5.7.

59. *Id.* at § 5.14.

This made it clear that an adopted child can inherit “through its natural parents from the kindred of its natural parents.”<sup>60</sup>

Shortly after the 1951 clarification, the Legislature enacted the Probate Code in 1955.<sup>61</sup> The 1955 Probate Code incorporated an adoptee’s intestacy rights in section 40 titled *Inheritance By and From an Adopted Child*.<sup>62</sup> However, the Probate Code was not a true code because it was enacted in 1955, before the 1963 Legislature began the process of codifying laws.<sup>63</sup>

In 1969, the Legislature continued codifying laws with the Family Code. The Legislature passed Title 1 of the Family Code, which only contained laws relating to the husband and wife, record keeping of the Bureau of Vital Statistics, and providing an effective date.<sup>64</sup> It was not until 1973 that the Legislature passed Title II of the Family Code relating to parents and children, which included a chapter regarding adoption.<sup>65</sup> The provision regarding adoptees inheritance rights from their natural parents was moved to the Family Code’s *General Provisions* section.<sup>66</sup> This is also when the Legislature added the language “unless the court otherwise provides.”<sup>67</sup>

The current reading of Section 161.206(b) from the Family Code states, “an order terminating the parent-child relationship divests the parent and child of all legal rights and duties with respect to each other, *except that the child retains the right to inherit from and through the parent unless the court otherwise provides.*”<sup>68</sup> The statute clearly states that an adopted person can inherit from their biological parents per a judge’s discretion. The current language reflects that 1973 inclusion of Title II.

A change in law occurred to both the Probate Code and the Family Code in 2005.<sup>69</sup> The Legislature severed the right of adult adoptees to inherit from and through their biological parent.<sup>70</sup> This change in the Family Code led to the Estates Code carving an exception that cross-references Family Code Section 162.507(c); however, it only leads to the adult exception and not to a judge’s discretion.<sup>71</sup> Section

60. *Id.*

61. See GERRY W. BEYER, TEXAS ESTATE PLANNING STATUTES WITH COMMENTARY 105 (AuthorHouse ed., 2015–2017 ed. 2015) [hereinafter BEYER COMMENTARY].

62. GERRY W. BEYER, TEXAS PROBATE CODE WITH COMMENTARY 28 (Aug. 19, 2013), [http://www.professorbeyet.com/Estates\\_Code/Texas\\_Probate\\_Code\\_\(08-19-2013\).pdf](http://www.professorbeyet.com/Estates_Code/Texas_Probate_Code_(08-19-2013).pdf).

63. BEYER COMMENTARY, *supra* note 61.

64. H.B. 53, 61st Leg., Reg. Sess. (Tex. 1969).

65. S.B. 168, 63rd Leg., Reg. Sess. (Tex. 1973).

66. See TEX. FAM. CODE ANN. § 15.07 (West 1973).

67. *Id.*

68. TEX. FAM. CODE ANN. § 161.206(b) (West 2007) (emphasis added).

69. See generally BEYER COMMENTARY, *supra* note 61, at 187.

70. *Id.*

71. *Id.*



201.054(b) of the Estates Code states, “the adopted child inherits from and through the child’s natural parent or parents, except as provided by Section 162.057(c), Family Code.”<sup>72</sup>

When discussing the 2005 amendment during the Committee hearing, a witness for the bill made a point to say that he was fine with adult adoptees losing their inheritance rights from and through his or her biological parents but will not support it if the bill changed minor adoptees’ rights.<sup>73</sup>

In 2009, the Texas Legislature began codifying the Probate Code into today’s Estates Code.<sup>74</sup> While the current statute for adoption inheritance rights is now found in section 201.054(b), the substance of the language is the same as Probate Code Section 40.<sup>75</sup> However, even during the codification, the Legislature included the adult exception but did not include the judge’s discretion exception.

### III. THE ADOPTION OF A CHILD

Adoption in Texas involves a two-step process: (1) the termination of the parent-child relationship between the child and the biological parents and (2) the adoption itself.<sup>76</sup>

#### A. *Termination of The Parent-Child Relationship*

Chapter 161 of the Family Code controls the termination of the parent-child relationship. In order for an adoption to take place, there must be a pre-existing order terminating the parent-child relationship between the adoptee and the biological parents.<sup>77</sup> A court will grant an order terminating the parent-child relationship if the court finds clear and convincing evidence grounds to do so.<sup>78</sup> Once the parent-child relationship is terminated, the child and parents are divested of all legal rights, “except that the child retains the right to inherit from and through the parent unless the court otherwise provides.”<sup>79</sup>

In the case where there is not a previously executed parent-child relationship termination, the suit for termination can be joined with the suit for adoption.<sup>80</sup> If the adoption is a stepparent adoption, the biological parent who is the stepparent’s spouse does not have to ter-

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72. TEX. EST. CODE ANN. § 201.054(b) (West 2014).

73. Hearings on Tex. H.B. 204 Before the House Comm. on Judiciary, 79th Leg., R.S. (Feb. 14, 2005) [hereinafter Hearings] (statement of Glenn Karisch) [http://tlchouse.granicus.com/MediaPlayer.php?view\\_id=23&clip\\_id=6154](http://tlchouse.granicus.com/MediaPlayer.php?view_id=23&clip_id=6154).

74. BEYER COMMENTARY, *supra* note 61.

75. EST. § 201.054(b).

76. Dan Tilly, Note, *Confidentiality of Adoption Records in Texas: A Good Case for Defining Good Cause*, 57 BAYLOR L. REV. 531, 534 (2005).

77. TEX. FAM. CODE ANN. § 161.206(b) (West 2007).

78. FAM. § 161.206(a).

79. FAM. § 161.206(b).

80. TEX. FAM. CODE ANN. § 162.001(b)(1) (West 2015).

minate his or her rights.<sup>81</sup> Once the decree terminating the parent-child relationship is complete, the court considers it “final, irrevocable, and forever divests the parent of his or her natural and legal rights to the child.”<sup>82</sup>

Most parent-child relationship terminations are done voluntarily by the biological parents.<sup>83</sup> The birth parents must sign an affidavit of voluntary relinquishment of parental rights to ensure the termination.<sup>84</sup> The birth mother must wait 48 hours after the birth of her child to sign the affidavit<sup>85</sup> and it must be made “voluntarily, knowingly, intelligently, and with full awareness of the legal consequences.”<sup>86</sup> The court will only set aside an irrevocable affidavit of relinquishment if proof “by a preponderance of evidence, that the affidavit was executed as a result of coercion, duress, fraud, deception, undue influence or overreaching” is present.<sup>87</sup>

Involuntary termination of the parent-child relationship is governed by Section 161.001 of the Texas Family Code.<sup>88</sup> A court must find clear and convincing evidence that the biological parent has committed an act listed in the section and it’s in the best interest of the child for an involuntary termination to take place.<sup>89</sup> However, “courts construe the proceedings and the statutes strictly in favor of the parent” as “parental rights involve an essential and basic civil right, far more precious than property rights, which is fundamentally constitutional in nature.”<sup>90</sup>

### B. *The Effect of the Adoption Order*

An adoption order “creates the parent-child relationship between the adoptive parent and the child for all purposes.”<sup>91</sup> The adoption order creates a legal relationship between the child and adoptive parents with all of the “rights, powers, and responsibilities . . . who prior to the adoption were generally legal strangers.”<sup>92</sup> Additionally, the

81. FAM. § 162.001(b)(2).

82. Tilly, *supra* note 76, at 534–35.

83. *Id.* at 535.

84. *See* TEX. FAM. CODE ANN. § 161.103 (West 2015).

85. FAM. § 161.103(a)(1).

86. Tilley, *supra* note 76, at 535.

87. *Id.*

88. *Id.* at 536.

89. TEX. FAM. CODE ANN. § 161.001(b) (West, Westlaw through 2015 Reg. Sess. of 84th Leg.); *Interest of V.K.S.*, NO. 14-15-00729-CV, 2016 WL 55248, at \*2 (Tex. App.—Houston [14th Dist.] Feb. 11, 2016).

90. Tilly, *supra* note 76, at 536.

91. *Id.* at 538; TEX. FAM. CODE ANN. § 162.017(a) (West, Westlaw through 2015 Reg. Sess. of 84th Leg.).

92. Tilly, *supra* note 76, at 538; *In the Interest of an Unnamed Child*, 584 S.W.2d 476, 478 (Tex. Civ. App.—Fort Worth 1979, writ ref’d n.r.e.).

adoption effectively severs the legal relationship between the adoptee and the biological parent except for the adoptee's inheritance rights.<sup>93</sup>

### C. *Sealing the Records*

The court may require—on the motion of a party or the court's own motion—the file, minutes, or both be sealed in a suit terminating the parent-child relationship<sup>94</sup> and a suit requesting an adoption.<sup>95</sup> The records following an adoption are confidential and cannot be opened “except for good cause under an order of the court that issued the order.”<sup>96</sup> Neither the statute nor case law defines what good cause is, but there are cases that determine what is not considered good cause.<sup>97</sup>

The Texas Supreme Court held in *Little v. Smith* that asking the court to open adoption records “to see if any inheritance claims existed” might not qualify as good cause.<sup>98</sup> The *Little* court did oblige to opening the adoption records; however, the Supreme Court did not set a precedence obligating courts to accept seeking inheritance claims as good cause.<sup>99</sup> In fact, the overall tone of the opinion suggests that courts should not accept potential inheritance claims as good cause since the Court noted that, “confidentiality is given a high priority in the legislative scheme.”<sup>100</sup>

## IV. TRENDING TOWARD OPENNESS IN ADOPTION

The United States as a whole, including Texas, is in the process of coming full circle regarding the open-close-open adoption scheme.<sup>101</sup> Although open adoption is not yet fully embraced, there is an increasing movement towards acceptance and understanding of open adoptions.<sup>102</sup> Through the fight towards open adoption, inheritance rights have stayed intact in Texas. Texas has followed the nation's guiding way in the closed-to-open adoption scheme, yet become the outlier regarding inheritance rights.

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93. Tilly, *supra* note 76, at 538.

94. *Id.* at 539–40; TEX. FAM. CODE ANN. § 161.210 (West, Westlaw through 2015 Reg. Sess. of 84th Leg.).

95. Tilly, *supra* note 76, at 539; TEX. FAM. CODE ANN. § 162.021 (West, Westlaw through 2015 Reg. Sess. of 84th Leg.).

96. TEX. FAM. CODE ANN. § 162.022 (West, Westlaw through 2015 Reg. Sess. of 84th Leg.).

97. Tilly, *supra* note 76, at 539.

98. *Little v. Smith*, 943 S.W.2d 414, 418 (Tex. 1997).

99. *Id.*

100. *Id.* at 419.

101. See Malinda L. Seymore, *Openness in International Adoption*, 46 COLUM. HUM. RTS. L. REV. 163, 164–70 (2015).

102. *Id.* at 164–65.

A. *History of Closed Adoptions*

As previously mentioned, the beginnings of adoption for Texas occurred in 1850<sup>103</sup> and gained national notoriety in 1852 with the Massachusetts Adoption Act of 1851.<sup>104</sup> During these times, adoptions were generally open because adoptions were informal, adopted children were older thus they knew of their birth parents, and were generally “arranged between the biological and adoptive parents who knew the identity and whereabouts of the other.”<sup>105</sup>

However, adoptees and adoptive parents would develop secrecy against the birth parents because of the notion that birth parents should not know the location of their biological children.<sup>106</sup> Eventually, when the birth parents would sign the relinquishment forms, social workers would include a clause requiring the birth parents to agree not to “seek out the child, learn the child’s location, or interfere in any way with the child or adoptive parents.”<sup>107</sup> The mindset behind moving towards a more secretive adoption had to do with the reformers who felt they were “saving” the children and reunions with the birth parents would “ruin” the children.<sup>108</sup> This notion that birth parents reconnecting and “ruining” their biological child manifested into another fear that biological parents would intercept the children and their affections from the adoptive family, thus dissuading people from adopting as a whole.<sup>109</sup>

Before World War II, it was recommended that secrecy remain in adoption proceedings; however, there were hardly any laws requiring closed adoptions.<sup>110</sup> Although there were scarce laws regarding secrecy, a step was taken toward confidentiality when states began providing “amended birth certificates” to adoptees that listed only the adoptive parents.<sup>111</sup> Still though, the original birth certificate with the names of the birth parents was not sealed and available to the adoptive parents and the adoptee.<sup>112</sup> The purpose of amended birth certificates was to keep the adoption proceedings between the adoption triad—the adoptee, adoptive parents, and birth parents—and to prevent the public from exploiting the “stigma of shame and scandal that surrounded the adoption and illegitimacy.”<sup>113</sup>

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103. LEOPOLD & BEYER, *supra* note 40.

104. Seymore, *supra* note 101, at 168.

105. *Id.* at 168–69.

106. *Id.* at 169.

107. *Id.* at 169–70.

108. *Id.* at 169.

109. *Id.* at 170.

110. *See id.* at 170.

111. *Id.* at 171.

112. *Id.*

113. *Id.*

Ultimately, the scheme of secrecy transitioned into legislative acts of confidentiality after World War II.<sup>114</sup> Before the war, adoptees were often relinquished by married or divorced couples simply because they could not financially support the children.<sup>115</sup> After the war, the nation viewed biological parents differently as they were often young, unwed mothers stigmatized as mentally sick.<sup>116</sup> The notion of “saving” children and the fear of biological reunions transpired into birth mothers being “very disturbed” and “sick youths” that should not have any contact or information about the adoption for the protection of the child or the adoptive parents.<sup>117</sup> The laws of confidentiality evolved over time: by 1948, most states sealed court records of adoption; by 1960, adoptees’ access to birth certificates were sealed in twenty-nine states; by the mid-1960s, the adoption records and original birth certificate were sealed to all.<sup>118</sup>

The 1980s and 1990s are when the concept of open adoption took hold in the United States.<sup>119</sup> Since then, supporters of the open adoption movement have identified many benefits involved with open adoption.<sup>120</sup>

### B. *Texas Moving Forward*

By 1931, the files and court records in adoption proceedings could only be opened by the parties and their attorneys unless the court deemed otherwise.<sup>121</sup> Interestingly enough, this is also when the Legislature included that adopted children could still inherit from their natural parents.<sup>122</sup> It can be concluded that Texas was on board with keeping the adoption information privy to only the adoption triad; thereby, permitting ease of access of adoptees to inherit from their natural parents.

When the Legislature incorporated Article II, the parent-child relationship, into the Family Code in 1973, the Legislature moved the records file to General Provisions section 11.<sup>123</sup> During this time is when the language changed to maintain confidentiality after the adoption proceeding.<sup>124</sup> What was once open to the adoption triad, changed to complete confidentiality as the language stated: “no per-

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114. *See id.* at 172–73.

115. *Id.* at 172.

116. *Id.* at 172–73.

117. *Id.* at 169, 173.

118. *Id.* at 172–73.

119. DEBORAH H. SIEGEL & SUSAN LIVINGSTON SMITH, EVAN B. DONALDSON ADOPTION INST., *OPENNESS IN ADOPTION: FROM SECRECY AND STIGMA TO KNOWLEDGE AND CONNECTIONS* 6 (2012), [http://www.adoptioninstitute.org/old/publications/2012\\_03\\_OpennessInAdoption.pdf](http://www.adoptioninstitute.org/old/publications/2012_03_OpennessInAdoption.pdf).

120. *Id.*

121. TEX. REV. CIV. STAT. ANN. art. 46a, § 10 (West Supp. 1931).

122. TEX. REV. CIV. STAT. ANN. art. 46a, § 9 (West Supp. 1931).

123. TEX. FAM. CODE ANN. § 11.17 (West 1973).

124. *Id.*

son is entitled to access to or information from these records except as provided by this section or an order of a district court . . . for good cause.”<sup>125</sup> The timing of the Legislature falls in line with the rest of the country’s timeline in maintaining confidentiality.

Interestingly though, even in this shift towards closed adoptions, the Legislature still kept adoptees inheritance rights intact.<sup>126</sup> However, this is where the language “unless the court otherwise provides” was added.<sup>127</sup> It seems that Texas had one foot in and one foot out of the confidentiality craze. Texas did not want to strictly take away adoptees’ inheritance rights, but valued confidentiality enough to accept the birth parents’ or adoptive parents’ wishes should either of the parental units want the adoptee’s rights terminated.

### 1. Open Adoption

Open adoption can be defined as an “adoption where the birth family and adoptive family meet before the adoption and have some form of continuing contact after the adoption.”<sup>128</sup> Open adoption ranges on a continuum as not all adoptions and circumstances are the same.<sup>129</sup> Adoptions can be semi-open or mediated where the birth family and adoptive family have contact through a mediator leaving some privacy for the respective families.<sup>130</sup> Disclosed adoption is where the identities of the parties are known and there is direct communication.<sup>131</sup> There are even adoptions that fall along the continuum of semi-open to disclosed and have different structures or arrangements.<sup>132</sup>

Upbring, formerly Lutheran Social Services of Texas, led the way towards open adoption in 1977.<sup>133</sup> Upbring mediated between the two families by exchanging letters and photos before evolving into face-to-face meetings in 1981.<sup>134</sup> Along with Texans gaining confidence with open adoption, scholars and adoptees urged the Texas Legislature to make advancements towards open adoption policies.<sup>135</sup>

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125. *Id.*

126. TEX. FAM. CODE ANN. § 15.07 (West 1973).

127. *Id.*

128. Seymore, *supra* note 101, at 175.

129. CHILD WELFARE INFORMATION GATEWAY, WORKING WITH BIRTH AND ADOPTIVE FAMILIES TO SUPPORT OPEN ADOPTION 2 (Jan. 2013) [https://www.childwelfare.gov/pubPDFs/f\\_openadoptbulletin.pdf](https://www.childwelfare.gov/pubPDFs/f_openadoptbulletin.pdf).

130. *Id.*

131. *Id.*

132. *Id.*

133. B. Lee Phillips, *Open Adoption: A New Look at Adoption Practice and Policy in Texas*, 43 BAYLOR L. REV. 407, 410 (1991).

134. *Id.*

135. Tilly, *supra* note 76, at 543.

## 2. Non-Identifying Information

In 1984, the Texas Legislature permitted the Texas Department of State Health Services Vital Statistics to collect medical and social information on birth families.<sup>136</sup> This non-identifying information can be updated years after the adoption should the birth family want to.<sup>137</sup> The Vital Statistics Unit will attempt to locate the adoptive parents or agency with the updated information.<sup>138</sup> Access to an adoptee's biological history is a step in the direction towards open adoption; however, non-identifying information severely limits actual contact with the biological family and limits a good-cause reasoning for opening original birth certificates.

## 3. Texas's Mutual Consent Voluntary Adoption Registry

Concurrent with collecting non-identifying information, the Texas Legislature also set up a voluntary adoption registry.<sup>139</sup> The purpose of the registry is to "provide for the establishment of mutual consent voluntary adoption registries through which adoptees, birth parents, and biological siblings may voluntarily locate each other."<sup>140</sup> The registry is also a step in the right direction towards open adoption, and while it does not expressly persuade adoptees and biological family members to seek each other out, it does give opportunity to those who would otherwise not have it.

## 4. Limited Post-Termination Contact

In 2003, the Texas Legislature took another step in the direction towards open adoption when it permitted courts to allow limited post-termination contact within termination orders.<sup>141</sup> In order for the court to allow post-termination contact, the termination has to be voluntary and has to be in the best interest of the child.<sup>142</sup> The contact may include: (1) receiving specified information regarding the child; (2) written communication to the child; and (3) limited access to the child.<sup>143</sup> Additionally, post-termination contact "does not affect the finality of a termination order or grant standing to a parent whose

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136. TEX. DEP'T OF STATE HEALTH SERVS. VITAL STAT., *Texas Adoption Information & The Central Adoption Registry*, (Jul. 2009) [https://www.dshs.state.tx.us/vs/req-proc/forms/adoption\\_broch.pdf](https://www.dshs.state.tx.us/vs/req-proc/forms/adoption_broch.pdf).

137. *Id.*

138. *Id.*

139. Tilly, *supra* note 76, at 544.

140. TEX. FAM. CODE ANN. § 162.401 (West, Westlaw through 2015 Reg. Sess. of 84th Leg.).

141. Tilly, *supra* note 76, at 545–46.

142. TEX. FAM. CODE ANN. § 161.2061(a) (West, Westlaw through 2015 Reg. Sess. of 84th Leg.).

143. FAM. § 161.2061(b).

parental rights have been terminated to file any action” seeking post-termination contact.<sup>144</sup>

Texas is trending toward an increased acceptance of open adoption, which in turn could lead to an increase in judicial preservation of inheritance rights or legislative action to emphatically give adoptees the inheritance rights across the board. Returning to an open adoption scheme in Texas could be the push the Legislature needs to mend the statutes to be in conformity with one another.

## V. CURRENT PRACTICES

Across the United States, and within Texas, there are various practices concerning an adoptee’s right to inherit intestate through and from the natural parents. As previously discussed and seen in the Texas statutes, the court decree that finalizes the adoption ends the legal relationship between the birth parent and the adopted child.<sup>145</sup> However, we know that Texas allows an exception—the right to inherit through and from the natural parent.<sup>146</sup> This section will look at other states that provide exceptions similar to Texas and how judges in Texas tackle this matter.

### A. *Other State Codes*

Currently, along with Texas, there are three other states that allow an adopted child to inherit from the birth parents: Kansas, Louisiana, and Rhode Island.<sup>147</sup> A bit different from the Texas code, Alaska, Idaho, Illinois, and Maine allow for a continuation of inheritance rights if so stated in the adoption decree.<sup>148</sup> Approximately fourteen states allow an adopted person to inherit from their deceased natural parent as long as the adoptive parent is a stepparent and the natural parent’s right was not terminated prior to death.<sup>149</sup> Continuing the varying degree of inheriting through the natural parents, Pennsylvania provides that an adopted person may inherit from the estate of a birth relative, other than a birth parent, who has maintained a familial relationship with the adopted person.<sup>150</sup>

There has, however, been a declining trend amongst states in allowing inheritance rights between an adoptee and natural parents. As the history above reveals, inheritance from natural parents was not on

144. FAM. § 161.2061(f).

145. CHILD WELFARE INFORMATION GATEWAY, *INTESTATE INHERITANCE RIGHTS FOR ADOPTED PERSONS 2* (2012), <https://www.childwelfare.gov/pubPDFs/inheritance.pdf>.

146. TEX. FAM. CODE ANN. § 161.206(b) (West 2007).

147. *See* *INTESTATE INHERITANCE RIGHTS FOR ADOPTED PERSONS*, *supra* note 145, at 2. A 2015 check of current state law reveals one state, Wyoming, has amended their statute and cut off inheritance rights from natural parents. *See id.*

148. *Id.* at 4, 12, 15.

149. *Id.* at 2.

150. *Id.*



the forefront of legislative minds when adoption laws were first enacted. It was not until 1887 for the first state, New York, and 1931 for Texas to amend the statute including intestacy rights between adoptee and natural parents.<sup>151</sup>

A 1943 law review article revealed that twelve states expressly permitted for an adoptee to inherit from their natural parents, but out of those twelve only one remains true today—Texas.<sup>152</sup> In 1943, five states expressly denied the right.<sup>153</sup> Out of those five, Louisiana currently expressly permits the right, and Pennsylvania has somewhat modified the right.<sup>154</sup> The law review article also revealed that thirty-two states had no explicit provision, but of those thirty-two, Kansas and Rhode Island currently permit intestacy succession from natural parents; Idaho, Illinois, and Maine currently provide the possibility for intestacy succession. At the time of this article, Alaska was not yet a state; therefore, only forty-nine states were taken into account. However, a later law review article published in 1969 reveals that Alaska did allow inheritance rights from the bloodline.<sup>155</sup> But even by the late 1960s, the number of states honoring inheritance rights from the natural parents decreased to only nine.<sup>156</sup>

The decline in states awarding inheritance rights to adoptees occurred around the same time that the nation was gearing toward closed adoption. Thus, if an adoption is closed, the bloodline inheritance is likely to be severed by the impossibility of an adoptee finding his or her biological parents. Other state legislatures must have realized the closed adoption repercussions on inheritance rights and excluded the right altogether, but Texas held on to inheritance rights even in the face of closed adoptions.

## B. *Current Practices in Texas*

### 1. Inheriting Through the Natural Parents

In *B.C.S. v. D.A.E.*, the Texas Court of Appeals held that B.C.S. and M.M.E. could inherit from their half-sibling through their natural mother after the natural mother gave B.C.S. and M.M.E. up for adoption.<sup>157</sup> Peggy Schmeltz had two children during her first marriage, B.C.S. and D.A.E.<sup>158</sup> The parental rights of both natural parents were terminated in the adoption decree.<sup>159</sup> Schmeltz remarried and had two

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151. BEYER WILLS, *supra* note 42; Kuhlmann, *supra* note 26, at 225.

152. Kuhlmann, *supra* note 26, at 229.

153. *Id.*

154. LA. CHILD. CODE ANN. art. 1218 (2003); 20 PA. CONS. STAT. ANN. § 2514(7) (West 1999).

155. *See* Erikson, *supra* note 20, at 78.

156. *See id.* at 78, 80.

157. *B.C.S. v. D.A.E.*, 818 S.W.2d 929 (Tex. App.—Beaumont 1991, writ denied).

158. *Id.*

159. *Id.*

other children, S.R.M. and B.N.M.<sup>160</sup> The second marriage also failed resulting in a third marriage and another child, B.C.S.<sup>161</sup> B.N.M., a child of the second marriage, died intestate during an automobile accident.<sup>162</sup>

The court held that “had the Legislature intended to prevent an adopted child from inheriting from other children of the natural parent, it would have said so.”<sup>163</sup> Adoption is a statutory proceeding, as it did not exist at common law.<sup>164</sup> Before the enactment of the Family Code, an adopted child’s status as to all persons other than the adoptive parents was the same as it would have been had no adoption occurred.<sup>165</sup> Thus, “if a statute deprives a person of a common-law right, the statute will be strictly construed in the sense that it will not be extended beyond its plain meaning or applied to cases not clearly within its purview.”<sup>166</sup> Therefore, “the Family Code increases the rights of the adopted rather than restricts them.”<sup>167</sup>

## 2. Limitations Inheriting Through and From Natural Parents

In *Patton v. Shamburger*, the Supreme Court of Texas held that an adopted person was not allowed to inherit workmen’s compensation death benefits from their natural father.<sup>168</sup> Jack Patton had two children during his first marriage.<sup>169</sup> Patton and his first wife divorced, and subsequently his first wife’s second husband adopted the two children in 1963.<sup>170</sup> In 1965, Patton was killed during the course of his employment.<sup>171</sup>

The statute in 1963 was under Section 9 of Article 46a of Vernon’s Annotated Texas Civil Statutes; however, the substance is the same as the current Estates Code, which allows an adopted child to inherit from their natural parents.<sup>172</sup> The Court found that the rights to workmen’s compensation benefits are not obtained through inheritance but are conferred by statute, thus the adoption statutes relating to inheritance were not applicable in this case.<sup>173</sup> The Court held that adopted children are no long the natural father’s “minor children” under the

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160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* at 930.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Patton v. Shamburger*, 431 S.W.2d 506, 508 (Tex. 1968).

169. *Id.* at 506.

170. *Id.* at 506–07.

171. *Id.* at 507.

172. *Id.*

173. *Id.*

workmen's compensation statute but are minor children of the adoptive parents.<sup>174</sup>

A similar case, *Go Intern., Inc. v. Lewis*, held *Patton* controlling and denied the adopted children of their natural, deceased parents' wrongful death damages.<sup>175</sup> The deceased, natural parents, Ray and Dovie Wampler, died in an automobile accident because an employee of Go International turned onto the path of the Wampler's motorcycle, killing them instantly.<sup>176</sup> The Wampplers left five minor children; however, the two oldest had been adopted by an aunt at a young age because the Wampplers were sick and unemployed.<sup>177</sup> The two children took their aunt's last name, Mills.<sup>178</sup> The trial court awarded actual and exemplary damages to the Mills children.<sup>179</sup>

The court of appeals reversed because the wrongful death action is "purely statutory and does not inure to the benefit of the children of a deceased by reason of inheritance."<sup>180</sup> The court followed *Patton* and held that the adoption statute clearly divests the natural parents of "all legal rights, privileges, duties, and powers" of the child.<sup>181</sup> Like the *Patton* court, the court of appeals held, "if the Legislature had intended to make an exception with regard to those rights which accrue under the wrongful death statute, it could easily have said so."<sup>182</sup>

The two mentioned cases show that while the adopted child does have the right to inherit from the natural parents, the limit exists to inheritance only and not possible statutory awards. Notable about the *Go, Intern.* case is that the only statute referenced regarding adoption law was solely the Family Code, which creates the exception of a judge's discretion.<sup>183</sup> The *Patton* case was decided before the Family Code was enacted, thus the Civil Code only had one place to turn to for adoption.<sup>184</sup>

## VI. POLICY CONSIDERATIONS

Through the years of adoption history, the view on the purpose of adoption has changed. As discussed above, the first use of adoption was for purposes of intestate and carrying on the family name,<sup>185</sup> then

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174. *Id.* at 508.

175. *Go Intern, Inc. v. Lewis*, 601 S.W.2d 495, 499 (Tex. App.—El Paso 1980, writ ref'd n.r.e.).

176. *Id.* at 497.

177. *Id.* at 497–98.

178. *Id.* at 497.

179. *Id.*

180. *Id.* at 498.

181. *Id.* at 499.

182. *Id.*

183. *Id.* at 498.

184. *Compare Patton v. Shamburger*, 431 S.W.2d 506 (Tex. 1968) with H.B. 53, 61st Leg., Reg. Sess. (Tex. 1969). (showing *Patton* decided before the Family Code was enacted).

185. *See Erickson, supra* note 20, at 58.

it was considered a threat to the bloodlines and only used as a practical matter to protect land,<sup>186</sup> but then Americans encompassed the best interest of the child moral and enacted statutes to protect the adopted child and his or her family. Additionally, the policy considerations for inheritance purposes have also changed throughout time and continue to do so.

All fifty states consider adopted children as the adoptive parents' blood-child with full inheritance rights.<sup>187</sup> Texas, and three other states, allow children to inherit from their natural parents.<sup>188</sup> The difference in the statutes leads to different, more modern, policy considerations.

#### A. *Policy For Inheritance Through and From Natural Parents*

Policy considerations for allowing adopted children to inherit from and through their natural parents fall into two camps: (1) the adopted child did not consent to losing their inheritance rights,<sup>189</sup> and (2) the old adage that "blood is thicker than water."<sup>190</sup>

Courts have pointed out that while the natural parents have consented to the adoption, thus giving up their right to inherit from their natural child, the adopted child has not given any consent to losing natural inheritance rights.<sup>191</sup> Adopted children are the foremost people affected by the matter, have no one to consent for them, do not consent on their own, and therefore should not lose the right to inherit from their natural parents.<sup>192</sup>

This policy consideration is weighted heavily and even reflected in the 2005 amendment severing adult adoptee inheritance rights.<sup>193</sup> The main reason behind severing an adult adoptee's inheritance rights from the birth parents is that an adult consents to terminating the birth parents as their legally recognized parents.<sup>194</sup> Additionally, in an adult adoption, the birth parents may not have consented to terminating the parent-child relationship.<sup>195</sup> Notice to the parents is not necessary since the adult adoptee does not need parental consent.<sup>196</sup> Therefore, it would not be fair to the birth parents because, unlike in

186. *See id.*

187. INTESTATE INHERITANCE RIGHTS FOR ADOPTED PERSONS, *supra* note 145, at 3.

188. *Id.* at 2.

189. Emilio S. Binavince, *Adoption and the Law of Descent and Distribution: A Comparative Study and a Proposal for Model Legislation*, 51 CORNELL L. Q. 152, 166 (1965).

190. *See* Naomi Cahn, *Perfect Substitutes or the Real Thing?*, 52 DUKE L.J. 1077, 1131 (2003).

191. Binavince, *supra* note 189, at 166.

192. *Id.*

193. *See generally* S.B. 168, 63rd Leg., Reg. Sess. (Tex. 1973).

194. *See* Hearings, *supra* note 73 (statement of Rep. Goodman).

195. *See id.*

196. *See id.*

minor adoptee cases, birth parents may not have any control over the legal termination and should not be subjected to their estate passing to a child who terminated the relationship.

The second policy reason, and likely the lesser-weighted and more antiquated one, is the “importance of passing property through the bloodline.”<sup>197</sup> This policy reason bolsters the idea that even though adoption can physically separate the child and birth parents, they will always share blood with each other and the child maintains the blood right to the estate. The natural parents are cut off in all parental and legal respects; however, the child is still able to take property as if the adoption never happened.

### B. *Policy Against Inheritance Through and From Natural Parents*

There are more policy considerations against adopted children inheriting through and from their natural parents that include complete assimilation into the adoptive family, best interest of the child, dual inheritance, the prolonging of settling estates, and the matter of it being practical.

The policy reason that proves most weighted upon is that complete assimilation into the adoptive family should be the first priority. The statutory right that keeps adopted children connected to their natural parents does not advance the philosophy of strengthening and preserving the new family unit.<sup>198</sup> Adoption is a way to sever the relationship between the natural family, and by having a statutory right that effectively keeps an adopted child linked to their natural family defeats the purpose of keeping the natural parents confidential or completely severing the ties to the natural parents.<sup>199</sup>

Along with assimilation into the new family unit, the partner policy consideration is the best interest of the child.<sup>200</sup> It is traditionally assumed that the best interest of the child is to have and be a part of one family.<sup>201</sup> Thus as discussed above, the best way to ensure a fresh start with a new family is to sever all ties relating back to the natural family, including inheritance rights.<sup>202</sup>

Another policy reason against inheritance from the natural parents is the result of dual inheritance.<sup>203</sup> Dual inheritance is the result of inheriting from both the adoptive and natural families.<sup>204</sup> A consequence of allowing dual inheritance could also work against the child’s

197. Cahn, *supra* note 190, at 1131.

198. Erikson, *supra* note 20, at 68.

199. *See generally id.*

200. Peter Wendel, *Inheritance Rights and the Step-Partner Adoption Paradigm: Shades of the Discrimination Against Illegitimate Children*, 34 HOFSTRA L. REV. 351, 362–63 (2005).

201. *Id.* at 363.

202. *Id.* at 363–64.

203. Erikson, *supra* note 20, at 68.

204. *Id.*

best interest.<sup>205</sup> If the adopted child is granted the same rights as biological children in the adoptive family plus one more, that could undermine the cohesive new family unit.<sup>206</sup> For the best interest of the child and to further the full integration of the adopted child into the new family, the adopted child and the natural child of the adoptive family should be afforded the same rights—not more or less.<sup>207</sup>

Additionally, dual inheritance can create inequity inheritance problems when a natural relative adopts the child.<sup>208</sup> An instance could arise in a situation where a grandmother adopts her grandchild as her own child.<sup>209</sup> Thus under the statutory laws, the adopted child could inherit from the grandmother as a child and through the natural parent as their child, therefore inheriting in a dual capacity.<sup>210</sup> In the past, courts have looked at this inequity as an exceptional and occasional consequence conferred by a statutory right because heirship is not natural. However, other courts deny the right of dual inheritance when the adoption alters natural familial relationships, such as a grandchild becoming a child, by merging the former classification with the latter.<sup>211</sup>

Another policy consideration against inheritance from the natural bloodline is the prolonging of settling estates.<sup>212</sup> Before an estate can be settled, heirs of the deceased must be located or be given adequate notice; therefore, the estate must remain open for a period of time that might be longer than necessary.<sup>213</sup> The twin pillar of the settling estates policy is the practicality policy.<sup>214</sup> It might not be practical for the adopted child to be located after the adoption proceedings are over.<sup>215</sup> Moreover, if the adoptee is located, there could be emotional consequences to the adoptee, adoptive parents, and natural family.<sup>216</sup> The adoptee might face hardship in coming face to face with his biological family or may feel dividing loyalties between his adoptive family and biological family's inheritance.<sup>217</sup> The post adoption disruption can weaken the adoptive family ties, and if the adoptee is still a young

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205. *Id.* at 69.

206. *Id.*

207. *Id.*

208. *Id.* at 68.

209. *Id.*

210. *Id.* at 68–69.

211. *Id.* at 69.

212. Timothy Hughes, Comment, *Intestate Succession and Stepparent Adoptions: Should Inheritance Rights of an Adopted Child be Determined by Blood or by Law?*, 1988 WIS. L. REV. 321, 339 (1988).

213. *Id.*

214. *See id.*

215. 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, 724 (1984).

216. *Id.*

217. *Id.*

child the disruption can surely be seen as working against the child's best interest.<sup>218</sup>

## VII. THE CALL FOR LEGISLATIVE ACTION

The Legislature could take various steps towards making the Estates and Family Code cohesive with each other. At the very least, the Legislature can add language to the Estates Code that directs to the Family Code's judicial discretion exception for purposes of conformity. At most, the Legislature can change the Estates and Family Code either for or against an emphatic right for adoptees to inherit through and from their biological parents.

### A. *Add Another Exception to the Estates Code*

The first, and probably most simple act the Legislature can do is to add another exception to the Estates Code. The Legislature did this in 2005 when the Family Code changed adopted-adults inheritance rights.<sup>219</sup>

The proposed statute in regards to Estates Code section 201.054(b) could state:

(b) The natural parent or parents of an adopted child and the kindred of another natural parent or parents may not inherit from or through the adopted child, but the adopted child inherits from and through the child's natural parent or parents, except as provided by Section 162.507(c) and Section 161.206(b), Family Code.

Another way to add the exception would be to explicitly state it in the Estates Code:

(b) The natural parent or parents of an adopted child and the kindred of another natural parents or parents may not inherit from or through the adopted child, but the adopted child inherits from and through the child's natural parent or parents unless the court where the parent-child termination occurred otherwise provides, except as provided by Section 162.507(c), Family Code.

The Legislature would likely do this if they are unwavering as to why the Family Code makes the exception in the first place. The added wording to the Estate Code would help practitioners cross-reference directly to the Family Code.

### B. *Expand on the Judge's Discretion*

The statute leaves it unclear as to why or how a judge has discretion over the matter. In *Little v. Smith*, the court says, "if the biological parents want to foreclose the right of inheritance, they may petition to have such a provision included in the order terminating parental

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218. *Id.*

219. H.B. 204, 79th Leg., Reg. Sess. (Tex. 2005).

rights.”<sup>220</sup> However, this seems unfair for a biological or adoptive parent to request the child’s right to be terminated. Returning to policy reasons supporting inheritance rights for adoptees, the child did not choose or consent to lose their natural family for a new one. It seems at odds with policy considerations that by a parent merely asking the court for termination of inheritance washes away the child’s lack of consent.

Without further explanation as to why a judge should sever the inheritance rights, the statute seems contrary to the legislative intent. The Legislature clearly intends for adoptees to inherit when it is known to them who their biological parents are. The Legislature could possibly come up with limitations on when the judge could discriminate. If the Legislature believes an adoptee should still be able to inherit from and through the birth parents and cannot come up with any limitations, then maybe the judicial discretion should be eliminated for being out of line with the purpose of allowing adoptee inheritance rights in the first place.

### C. *Eliminate the Judge’s Discretion*

Another option would be to eliminate the judicial discretion in the Family Code altogether. Policy reasons point to the adopted child having a right to inherit from their natural parents because they did not ask to be given up and forfeit their right. Although there are a number of more policy reasons to consider against adoptee inheritance rights, that does not necessarily guarantee the scale to be tipped in favor of eliminating inheritance rights. If the Legislature so values an adoptees inheritance rights, they could consider eliminating the judge’s discretion all together.

### D. *Appoint a Guardian Ad Litem for Every Adoption Proceeding*

If the Legislature were to keep the judge’s discretion and not make the statutes synonymous, then a guardian ad litem should be appointed to the minor. A guardian ad litem can be a licensed attorney, charitable volunteer, or professional who advocates for the child.<sup>221</sup> The guardian ad litem is not bound by the same standards as an attorney, as the guiding light for the guardian ad litem is the child’s best interest.<sup>222</sup> Therefore, the adopted child has someone representing his or her best interests during the proceedings.

If the natural parents or adoptive parents petition the court to cut off the adoptee’s inheritance rights from the biological parents after

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220. *Little v. Smith*, 943 S.W.2d 414, 422 (Tex. 1997).

221. TEX. FAM. CODE ANN. § 107.001(5) (West, Westlaw through 2015 Reg. Sess. of 84th Leg.).

222. Malinda L. Seymore, *Sixteen and Pregnant: Minors’ Consent in Abortion and Adoption*, 25 *Yale J.L. & Feminism* 99, 147 (2013).



the adoption, a guardian ad litem would be there to advocate for the adopted child. A guardian ad litem could determine if it would be in the best interest of the child for all strings to be cut in respect to the natural parents, or if the child's right should remain intact as the Estates Code so expressly provides for. The guardian ad litem would serve as a filter to meritless petitions to deny the child of his or her statutorily given right.

E. *Eliminate Inheritance Rights From and Through Natural Parents*

Another solution could be to cut off inheritance rights from and through the natural parents altogether. There are forty-six other states that do not allow adoptees to inherit from their natural parents, so if the Texas Legislature feels that the policy considerations against adoptees inheritance rights outweigh considerations for inheritance rights it may be time to change the statute completely. However, this seems unlikely to happen since a statutory revision that repealed an adopted adult's inheritance rights took place in 2005, and it was made a point to keep minor's inheritance rights intact.

## VIII. CONCLUSION

Returning to the hypothetical provided in the introduction, if Rod Stewart, Joni Mitchell, and Kate Mulgrew did place their child for adoption in Texas and did pass away intestate, could their biological child have claim to inheritance rights? With the current structure of the Family and Estates Code, it would all depend whether the adoptive or natural parents petitioned the court to sever those rights and if a judge granted that petition.

The adopted children could have different outcomes based on what happened in the adoption proceeding. However, Texas (has consistently decided) that a child adoptee should keep their inheritance rights through and from the natural parent since 1931.<sup>223</sup> If Texas strongly believes in adoptee's inheritance rights and has withstood the test of time when forty-six other states decided to take away Adoptee's inheritance rights, why does it make sense for different adopted children to have different inheritance rights?

The above examples may be the extreme in the story from rags to riches regarding natural parents, but it is possible for natural parents, who may not have been able to once take care of their biological child, to end up having a normal, comfortable life. It is also just as possible for the biological family members to have an estate that would have been passed on to the adoptee had they legally remained part of the family. The Texas Legislature should consider keeping in

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223. See TEX. REV. CIV. STAT. ANN. § 9 (1931).

line with legislative history and policy and make a child adoptee's inheritance right an absolute right for them to have forever.