THE OHIO DESIGNATED HEIR STATUTE

by

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Under a unique Ohio statute, commonly referred to as the "Designated Heir Statute," a special legal relationship may be created. A person designated pursuant to the provisions of this statute is given the status of "a child born in lawful wedlock." Unfortunately, this status is not fully defined and, as a result, there are unanswered questions and gray areas. The primary purpose of this article is to discuss the meaning of this status and to explore some of the unanswered questions and gray areas.

The following example will give the reader an introduction to the meaning of the designated heir status: Suppose that A has never married and has never had any children. His relatives are his father, a brother, and a sister. A's sister has taken care of A during the last several years, whereas his father and brother have hardly kept in contact with him. A has executed a will in which he has devised and bequeathed all of his property to his sister. A dies survived by his father, brother, and sister. If A's will is established as valid, then his intent of providing for his sister will be satisfied. But what if A's will is not established as valid; for example, it is not probated, or if probated, is set aside by a will contest? A's intent will now be defeated because all of his property will be distributed to his father under the statute of descent and distribution. A's sister will not take any part of his property unless she has been provided for under a non-probate arrangement. But if the sister had been designated as an heir, then she would have been protected if A had died intestate because she would have inherited the same share as a child born in lawful wedlock. In this example, A's sister would take the entire estate of A since there was no surviving spouse or lineal descendants.

The above example illustrates just how powerful and practically significant the designated heir statute is. By designating the sister as an heir, A was able to write her into the intestate statute. Since the procedure for the designation is rather simple and there is no requirement of notice, significant legal

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2Id.
4Property that is placed in non-probate form will not be a part of the probate estate of the decedent. Trusts and joint and survivorship bank accounts are examples of non-probate property.
5Cochrel v. Robinson, 113 Ohio St. 526, 149 N.E. 871 (1925).
results can be accomplished with little effort.

The designated heir statute, Section 2105.15 of the Ohio Revised Code, reads:

A person of sound mind and memory may appear before the probate judge of his county and in the presence of such judge and two disinterested persons of such person’s acquaintance, file a written declaration declaring that, as his free and voluntary act, he did designate and appoint another, stating the name and place of residence of such person specifically, to stand toward him in the relation of an heir at law in the event of his death. Such declaration must be attested by the two disinterested persons and subscribed by the declarant. If satisfied that such declarant is of sound mind and memory and free from restraint, the judge thereupon shall enter that fact upon his journal and make a complete record of such proceedings. Thenceforward the person designated will stand in the same relation, for all purposes, to such declarant as he could if a child born in lawful wedlock. The rules of inheritance will be the same between him and the relations by blood of the declarant, as if so born. A certified copy of such record will be prima-facie evidence of the fact stated therein, and conclusive evidence, unless impeached for actual fraud or undue influence. After a lapse of one year from the date of such designation, such declarant may have such designation vacated or changed by filing in said probate court an application to vacate or change such designation of heir; provided, that there is compliance with the procedure, conditions, and prerequisites required in the making of the original declaration.7

This statute was first enacted in 1854,8 five years prior to the enactment of the adoption statute.9 Since 1854, the only substantial change was the addition of the last sentence relating to vacation of, or change in, the designation.10 Arkansas is the only other state where a similar statute has been found.11

This article will discuss the procedure for the designation of an heir, its vacation or revocation, and the effect of such a designation. The status of the designated heir, examples of unanswered questions and gray areas, and the practical significance of the statute will be included in this discussion. The

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9 56 Ohio Laws 82 (1859): Sylvester, supra note 8.
10 Blackwell v. Bowman, 150 Ohio St. 34, 80 N.E. 2d 493 (1948).

In all cases hereafter, when any person may desire to make a person or persons his or her heirs at law, it shall be lawful to [do] so by a declaration in writing in favor of such person or persons, to be acknowledged before any judge, justice of the peace, clerk of any court, or before any court of record in this State.

Section 61-302 provides for recording and reads as follows: “Before said declaration shall be of any force or effect, it shall be recorded in the county where the said declarant may reside, or in the county where the person in whose favor such declaration is made, may reside.

conclusion will further illustrate just how powerful and practically significant a designation can be.

PROCEDURE IN DESIGNATING AN HEIR

Who can designate an heir? Any person of sound mind and memory and free from restraint. Is there an age requirement? Unlike one of the will statutes which requires the maker of a will to be eighteen years of age or older, the designated heir statute does not mention any age requirement. This will statute, which is very similar, provides that "[a] person of the age of eighteen years, or over, of sound mind and memory, and not under restraint, may make a will." Was the omission of an age requirement an oversight on the part of the legislature, or may any person, regardless of age, designate an heir? No reported Ohio cases have been found where the age of the designator has been an issue.

What statutory procedures must the designator follow in order to make an effective designation? The statute prescribes that the designator may "appear before the probate judge of his county and in the presence of such judge and two disinterested persons of such person's acquaintance, file a written declaration declaring that, as his free and voluntary act, he did designate and appoint another, stating the name and place of residence of such person specifically, to stand toward him in the relation of an heir at law in the event of his death." The written declaration must be attested by the two disinterested persons and subscribed by the designator.

Does "appear before the probate judge of his county" require that the designation be made in open court? In Bird v. Young, the designation was made at the residence of the designator. On that same day, the probate judge journalized the designation in the journal of the probate court. Upon the death of the designator, the plaintiffs (his natural next of kin) filed a motion in the probate court to vacate and set aside the designation. The plaintiffs claimed that the record and entry of the designation must be a judgment in order to be valid. They further claimed that since the designation was not made in open court, it was not a judgment. The court rejected the claim of the plaintiffs and held that the designation need not be a judgment because there is no final

14 Id.
17 Id.
19 The plaintiffs also claimed that the designated heir statute was unconstitutional. Although this claim was not argued, the Court upheld the constitutionality of the statute and reasoned that expectant heirs of the designator have no vested rights at the time of the designation. 56 Ohio St. at 222-23, 46 N.E. 819 at 822.
determination of the rights of parties in action, it is non-adversarial, and the elements of notice and hearing are lacking. The court said that this is essentially a proceeding ex parte, and there is nothing in the statute that requires that it be transacted in open court.

Can the designation of heirs be accomplished in a Last Will and Testament? The statute only provides for an inter vivos proceeding and the courts have held that the designation can only be accomplished under the provisions of the statute and not by a will. The issue that usually arises in this type of case is whether or not a testamentary gift will be implied in favor of the putative designee. In Moon v. Stewart, one of the provisions of the testatrix's will read as follows: "I hereby make my two granddaughters, Lulu . . . and Ella . . ., each equal heirs with my own children." Based upon this language and the direction to her executor to "settle up all property, both personal and real," the court implied a gift to the two granddaughters and her children in equal shares.

Who can be designated as an heir? The statute places no limitations, it simply provides that the designator "designate and appoint another, stating the name and place of residence of such person. . . ." The statute imposes no restrictions on who may be designated. Therefore, the designated heir can be anyone. He or she can be of any age, a minor or an adult. "[T]he designated heir need never know of or consent to the designation and could be older and richer and a perfect stranger to the declarant. . . ."

Is any type of notice required in designating an heir? The statute does not specifically require notice, and the Ohio cases have stated that it is not a requirement. The Ohio Supreme Court has stated: "There is no notification of any kind to the designee, to the relatives of the declarant, or to any one else, except as a public record may constitute notice."

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20 Bird v. Young, 56 Ohio St. 210, 218-19, 46 N.E. 819, 821 (1897).
21 Id. at 219-20, 46 N.E. at 821-22. There is dictum in a probate court case that the designation of an heir must be made in open court. In re Williamson, 5 Ohio N.P. 1 (P.Ct. 1897), rev'd on another ground, 6 Ohio N.P. 79 (C.P. Ct. 1898).
22 Moon v. Stewart, 87 Ohio St. 349, 101 N.E. 344 (1913); In re Will of Williamson, 5 Ohio N.P. 1 (P. Ct. 1897), rev'd on another ground, 6 Ohio N.P. 79 (C.P.Ct. 1898).
23 87 Ohio St. 349, 101 N.E. 344 (1913).
24 Id. at 350, 101 N.E. at 345.
25 Id. at 351, 361, 101 N.E. at 345, 347.
28 Blackwell v. Bowman, 150 Ohio St. 34, 80 N.E.2d 493 (1948).
29 Id. at 44, 80 N.E.2d at 498.
30 Blackwell v. Bowman, 150 Ohio St. 34, 80 N.E.2d 493 (1948); Bird v. Young, 56 Ohio St. 210, 46 N.E. 819 (1897).
31 Blackwell v. Bowman, 150 Ohio St. 34, 41, 80 N.E.2d 493, 497 (1948).
The designated heir statute specifically provides that the designation may be vacated or changed after a lapse of one year from the date of such designation. The requirements are the same as those involved in the making of the original declaration.

The designation may be set aside for unsoundness of mind, undue influence, or actual fraud. In Horine v. Horine, an application was filed to set aside a designation on the grounds that the designator was not of sound mind and was subject to undue influence. The Probate Court vacated the designation by finding the designator was under undue influence at the time of the designation. The Court of Appeals affirmed because no bill of exceptions was filed containing the evidence heard at the hearing in the Probate Court. The Court of Appeals stated that the Probate Court may act sua sponte because the action of the Court is quasi judicial and the proceeding is not adversarial.

The status of a designated heir is not clearly defined in the designated heir statute. The applicable parts of the statute provide as follows:

[The designated heir shall] stand toward him [the declarant] in the relation of an heir at law in the event of his death. Thenceforward the person designated will stand in the same relation, for all purposes, to such declarant as he could if a child born in lawful wedlock. The rules of inheritance will be the same between him and the relations by blood of the declarant, as if so born.

Since the above statutory provisions provide that the person designated is to stand in the same relation to the declarant as "a child born in lawful wedlock," a channel of inheritance from the declarant to the designee has been created. The following examples will illustrate this channel of inheritance.

Suppose that A has no wife or lineal descendants. A dies intestate survived by his parents, brothers, sisters, nephews, and nieces. The parents of A will inherit all of his property under the statute of descent and distribution. But what if A wants one of his nieces to inherit his entire estate and thus designates her as an heir (DH)? If A dies intestate, the parents will now be

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33 Id.
34 Id.
36 16 Ohio L. Abs. at 157.
disinherited. DH will take the entire estate of A since the above statutory provisions have given DH the status of "a child born in lawful wedlock." Thus, a designated heir will take the entire intestate estate if the designator is not survived by a spouse or any one or more lineal descendants.

What if A is survived by one or more lineal descendants? Suppose that A is a widower and has three children named C1, C2, and C3. A dies intestate survived by all of his three children. Under the statute of descent and distribution, the three children will each inherit an equal one-third share. But what if A designates a friend as a designated heir (DH)? A wants DH to share in his estate because DH has provided A with care. If A dies intestate, DH will be treated as "a child born in lawful wedlock" and, as a result, the three children and DH will inherit equal shares (one-fourth each).

What if A is also survived by a surviving spouse? Suppose that A is married to B and they have a child named C. If A dies intestate, B will take the first $60,000 and the balance of the estate will be distributed in equal shares to B and C. Under the statute of descent and distribution, the surviving spouse takes the first $60,000 if he or she is the natural or adoptive parent of at least one child, or $20,000 if he or she is not. The spouse will also take one-half or one-third of the balance of the estate: One-half if there is one child or his or her lineal descendants surviving, or one-third if there are at least two children or their lineal descendants surviving. The children or their lineal descendants will take the remaining fraction.

But what if A wants his friend to share in his estate and designates his friend as a designated heir (DH). After the designation, A dies intestate survived by B, C, and DH. Since B is the natural parent of C, B will receive $60,000 and the balance of the estate will be distributed as follows: One-third to B and two-thirds in equal shares to C and DH (one-third each). DH takes one-third, which is a child's intestate share in this example, because the designated heir statute gives DH the status of a natural born child.

43 If an intestate is survived by a surviving spouse and no surviving lineal descendants, the spouse will take the entire estate of the intestate. Ohio Rev. Code Ann. § 2105.06 (D) (Page's Supp. 1987).
45 Ohio Rev. Code Ann. § 2105.06 (B) & (C) (Page's Supp. 1987).
46 Id.
47 Id.
48 A surviving spouse could contend that a designated heir could only assert his or her right of inheritance against blood relatives of the intestate and not against the surviving spouse because of the following language in the designated heir statute: "The rules of inheritance will be the same between him and the relations by blood of the declarant, as if so born." However, the Supreme Court of Ohio in an analogous case has stated that it does not regard this language as a limitation upon the designated heir's right to inherit as a child born in lawful wedlock, but rather as "an emphasis and repetition thereof." Cochrel v. Robinson.
Does the designation of an heir create any problems with respect to the specific dollar amount, the $60,000 or $20,000? Suppose that A is married to B, that A has never had any children but B has a daughter by a prior marriage (a stepdaughter of A). A designates said stepdaughter as an heir (DH), and A dies intestate survived by B and DH. After the specific dollar amount is set aside, B and DH will share the balance of the estate in equal shares. What specific dollar amount, $60,000 or $20,000, will B inherit? The statute of descent and distribution provides that if there is a spouse and one child surviving, then the spouse is to take "the first sixty thousand dollars if the spouse is the natural or adoptive parent of the child, or the first twenty thousand dollars if the spouse is not the natural or adoptive parent of the child." The designated heir statute provides that "the person designated will stand in the same relation, for all purposes, to such declarant as he could if a child born in lawful wedlock." Therefore, since DH is given the status of a natural child of A and since B is the natural mother of DH, B will take the first $60,000. A literal reading of the two aforementioned statutes gives this result. This seems reasonable because A was not survived by a natural or adopted child and, if there had been no designation, B would have inherited the entire estate.

But suppose that A and B have never had any children; that A designates a friend as an heir (DH); and that A dies intestate survived by B and DH. A literal reading of the two aforementioned statutes would now result in B taking $20,000. B is not the natural or adoptive parent of DH. This result seems inconsistent with the result in the preceding example. In this example, like the immediately preceding example, DH is not the natural or adoptive child of A and, if there had been no designation, B would have inherited the entire estate. There is no reason then for B to receive the smaller share of $20,000.

In the above examples, the channel of inheritance from the designator to the designated heir has been discussed. Do the above statutory provisions provide for any other channels of inheritance? For example, could the designated heir inherit through the designator, could the heirs and next of kin of a designated heir who predeceases his or her designator inherit from the designator, or could the designator inherit from and through the designated heir? These issues are not defined by the above statutory provisions. The following two Ohio Supreme Court cases address these issues.

Can a designated heir inherit through his or her designator? In *Blackwell v. Bowman*, the designator named his illegitimate son as a designated heir...
(DH). The designator died testate leaving the residue of his property to DH. The designator’s brother died testate two years after the designator. DH was not one of the beneficiaries in the brother’s will. Plaintiff, who is the natural mother and guardian of the person and estate of DH, filed an action to contest the will of the brother. If DH can inherit through the designator, then DH would be an interested person to contest the will because he would take an intestate share of the estate of the brother as opposed to nothing under the brother’s will.52

The trial court held that DH can inherit as a blood nephew and therefore had a right to contest the will.53 The Court of Appeals affirmed the judgment of the trial court but on a different ground.54 The Court of Appeals decided that DH could not inherit as a blood nephew, but because of his status as a designated heir, he could inherit not only from but also through his designator.55 The Supreme Court reversed the judgments of the trial court and the Court of Appeals and held that DH is not an interested person to contest because he cannot inherit as a blood nephew nor can he inherit through his designator under the provisions of the designated heir statute.

The Supreme Court first decided that DH cannot inherit as a blood nephew because there was never any marriage between his father and mother. The Court stated that an illegitimate child can be legitimated if his parents marry and his father acknowledges paternity.56 The Court then addressed the issue of whether a designated heir can inherit through his designator. In addressing this issue, the Court compared the status of an adopted child with that of a designated heir and also construed the language of the designated heir statute.

The Court’s comparison between the adoption of a child and the designation of an heir is summarized as follows: All that is necessary for a designation is that the designator make his written declaration in the presence of the probate judge and two disinterested persons of the designator’s acquaintance.57 No notice is required and there is no limitation as to age.58 On the other hand,

52 Only a person interested in a will may contest its validity. Ohio Rev Code Ann. § 2107.71 (A) (Page’s Supp. 1987). The definition of a person interested is “one who, at the time of the commencement of an action to contest a will, has a direct, pecuniary interest in the estate of the putative testator, that would be impaired or defeated if the instrument admitted to probate is a valid will.” Steinberg v. Central Trust Co., 18 Ohio St. 2d 33, 247 N.E.2d 303, 305 (1969).
53 Blackwell v. Bowman, 150 Ohio St. 34, 80 N.E. 2d 493, 494 (1948).Id. at 36, 80 N.E. 2d at 494.
54 Id.
57 Id. at 41-42, 80 N.E.2d at 497.
the procedure for adoption is much more detailed and formal, and there is a limitation as to age. A petition must be filed, there must be an investigation, certain consents must be obtained, there must be notice, and there must be a hearing. The objective of the adoption statute is to establish a genuine parent-child relationship which involves parental responsibilities and child obedience. A designation does not establish a parent-child relationship.

The Blackwell Court construed the following language contained in the designated heir statute: "Thenceforward the person designated will stand in the same relation, for all purposes, to such declarant as he could if a child born in lawful wedlock. The rules of inheritance will be the same, between him and the relations by blood of the declarant, as if so born." The first sentence was construed to mean that the designee will stand only to the declarant and not to the declarant's family, relatives, or anyone else. The second sentence was construed to mean that the rules of inheritance between the designee and the blood relatives of the declarant are the same, but only with respect to the property of the declarant and not the property of anyone else.

Can the heirs and next of kin of a designated heir who predeceases his or her designator inherit from the designator? In Kirsheman v. Paulin, the designator died testate survived by three children of a predeceased designated heir (DH). The three children of DH contested the will of the designator. The Supreme Court of Ohio held that the children were not interested persons to contest the will because they were not heirs of the decedent under the intestate statutes. The Court reasoned that the adoption statute gives the adoptee the status of a child at the moment of adoption, whereas the designated heir statute gives a designated heir the status of a child as to inheritance only upon the

59 In Blackwell, the Court stated that no one under the age of 21 can be adopted. Id. at 42, 80 N.E. 2d at 497. Under present law, it is possible to adopt an adult, but only under very limited circumstances. See Ohio Rev. Code Ann. § 3107.02 (Page's Supp. 1987).
60 Id. at 42, 80 N.E. 2d at 497.
61 Id. at 42-43, 80 N.E. 2d at 497.
63 Blackwell v. Bowman, 150 Ohio St. 34, 43-44, 80 N.E.2d 493, 497-98 (1948).
64 Id. at 43, 80 N.E. 2d at 497.
65 Id. at 44, 80 N.E.2d at 498. In the case of In re Estate of Gompf, 175 Ohio St. 400, 403, 195 N.E.2d 806, 809 (1964), the Supreme Court stated that the language in the two sentences "certainly amounts to a legislative statement that the designated heir shall have the attributes of an adopted child." However, the issue in this case was whether the designated heir came within the meaning of a former Ohio death tax statute which provided an exemption for a "person recognized by the decedent as an adopted child and designated by such decedent as an heir. . . ." Id. at 402, 195 N.E. 2d at 808. The Court held that the designated heir came within the meaning of this provision, "whether or not anything besides such designation was done by the designator to recognize the designee as an adopted child. Id. at 404, 195 N.E. 2d at 810.
66 155 Ohio St. 137, 98 N.E.2d 26 (1951).
death of the designator. The Court explained that the designation is revocable and does not become effective until the designator dies; therefore, if the designated heir predeceases the designator, the status of a designated heir is never attained. Since there is no status of designated heir when the designator dies, children or any other heirs and next of kin of DH cannot inherit.

In *Kirsheman*, it was argued that the legislature intended to include issue of a designated heir who predeceases the designator. This argument was based upon the pretermitted heir statute which allows the issue of a designated heir under certain circumstances to take an intestate share in the event that the designated heir predeceases the designator. One set of circumstances can be illustrated by the following example. Suppose that A is a widow and has one child named C, and the following events take place: A executes a will in which she leaves all of her property to C; two years later, A designates a friend as an heir (DH); DH dies three years after the designation leaving three children; and then some time later A dies survived by C and the three children of DH. The three children of DH will take an intestate share, which is one-half of the property, if no provision has been made in the will of A or by settlement for DH, or for his or her issue, and it does not appear by the will that it was the intention of A to disinherit DH.

The Court reasoned that the pretermitted heir statute is not applicable since DH was designated before the will. The Court further reasoned that since the legislature limited the operation of the pretermitted heir statute to a specific situation, that it was not the legislative intention to apply the rule established by the statute to any other situations.

The above two Ohio Supreme Court cases have limited the scope of the designated heir statute to inheritance from the designator to the designated heir. These cases have decided that there is no other channel of inheritance provided for in the statute. For example, in *Blackwell v. Bowman*, the Court held that the designated heir could not inherit through his designator and in *Kirsheman v. Paulin*, the court held that the children of a predeceased designated heir could not inherit from the designator. It also follows from the reasoning in these two cases that a designator could not inherit from or through his or her designated heir. To hold otherwise would be unreasonable because the designated heir does not have to consent; in fact, he need not even receive notice.

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67 Id. at 142, 98 N.E.2d at 29-30.
68 Id. at 143, 98 N.E.2d at 30.
70 Id.
72 Id. at 146, 98 N.E. 2d at 31.
73 150 Ohio St. 34, 80 N.E.2d 493 (1948).
74 155 Ohio St. 137, 98 N.E.2d 26 (1951).
Can a designated heir inherit in a dual capacity? Suppose that A, a widow, dies intestate survived by two sons named C1 and C2. Under the statute of descent and distribution,75 C1 and C2 will each inherit equal shares. Can C1 also inherit as a designated heir if A had designated him as an heir during her lifetime? If C1 can also inherit as a designated heir, then C1 will take two shares of A's estate, one share as a child and another share as a designated heir. This would give C1 two-thirds of the estate and C2 one-third.

One can easily imagine other cases. Suppose that A and B are married and have one child named C. If A dies intestate, B will take the first $60,000 and the balance of the estate will be distributed in equal shares to B and C.76 However, if B is designated as an heir and is permitted to inherit in a dual capacity, B's share in the balance of the estate will be two-thirds and C's share will be one-third.

The dual capacity issue is not addressed by the Ohio intestate statutes, and no Ohio reported cases have been found where it has been an issue. However, there are cases in cognate areas which can be reasoned from by analogy, namely the adoption area. In the following two adoption cases, the courts reached opposite results.

In Billings v. Head,77 the intestate adopted his grandson, the child of a deceased son. The intestate was survived by his wife, four children, and the adopted child (his grandson). The adopted child claimed two shares of the estate, one as a child of his deceased father and the other as an adopted child of the intestate (his grandfather). The Indiana statute then in effect provided that an adopted child was entitled to receive "all the rights and interest in the estate of such adopting father and mother, by descent or otherwise, that such child would if the natural heir of such adopting father or mother."78 The Court, in deciding that the adopted child could only inherit one share, reasoned that the legislature never intended that an adopted child should inherit more than a natural child.79 The Court did not need to decide in what capacity the adopted child inherited because his share would be the same. However, in In re Benner's Estate,80 the Utah Court held that an adopted child could inherit two shares. The Court reasoned that unless the adoption statute severs the right of inheritance between the natural parents and the adopted child, the adopted child can still inherit from his or her natural parents; thus the adopted child can take from

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75OHIO REV. CODE ANN. § 2105.06 (A) (Page's Supp. 1987).
76OHIO REV. CODE ANN. § 2105.06 (B) (Page's Supp. 1987).
77184 Ind. 361, 111 N.E. 177 (1916).
78Id. at 362, 111 N.E. at 177.
79Id. at 363, 111 N.E. at 177. The Billings decision has been codified in IND. CODE ANN. §§ 29-1-2-8, 29-1-2-9 (West 1979 and Supp. 1987).
80109 Utah 172, 166 P.2d 257 (1946).
his natural parents and also from his adoptive parents. 81

It is unlikely that an adopted child could inherit in a dual capacity in Ohio. The Ohio adoption statute terminates "all legal relationships between the adopted person and his relatives, including his biological or other legal parents, so that the adopted person thereafter is a stranger to his former relatives for all purposes including inheritance. . . ." 82 Therefore, under this statute, an adopted child would only be able to inherit from his or her adoptive parents and not from his or her natural parents because the right of inheritance from natural parents is severed. 83

It does not follow that an Ohio Court would reason by analogy from Billings rather than Benner if it was construing the designated heir statute, as that statute does not contain the limiting language of the Ohio adoption statute. Indeed, the use of such limiting language in the Ohio adoption statute and its absence in the designated heir statute suggests that the legislature did not intend a limitation in the latter statute. On the other hand, the Ohio cases have stated that the right of inheritance of a designated heir is certainly no greater than that of an adopted child. 84 Therefore, the courts might well limit a designated heir to one share.

But in what capacity would the designated heir take? Suppose that A, a widower, has two children named C1 and C2. C2 dies survived by two children named GC1 and GC2 (grandchildren of A). Subsequently, A designates GC1 as an heir. A dies intestate survived by C1, GC1, and GC2. If GC1 can take only one share, would it be a grandchild's share of one-fourth or would it be a designated heir's share of one-third? A literal reading of the designated heir statute would give GC1 a designated heir's share of one-third 85 and this seems reasonable.

The Uniform Probate Code has specifically addressed the above issue of inheriting in a dual capacity. Section 2-114 provides as follows: "A person who is related to the decedent through two lines of relationship is entitled to only a single share based on the relationship which would entitle him to the larger

81 Id. at __, 166 P.2d at 258-59. Under the present legislation in Utah, an adopted child would be able to take only one share. UTAH CODE ANN. §§ 75-2-109, 75-2-114 (1978 and Supp. 1987).

82 The right of inheritance is severed between the adopted child and his or her natural parent except when the natural parent is the spouse of the adopter or when the natural parent dies without the relationship of parent and child having been previously terminated. OHIO REV. CODE ANN. § 3107.15 (Page 1980).

83 Id. The following Ohio cases have reached conflicting results under a prior statute: Smith v. Carver, 55 Ohio St. 642, 48 N.E. 1118 (1896) (decided without report), noted in 36 Weekly Law Bulletin 189 (1896) (an adopted child can take only one share, a child's share); Paul v. Paul, 31 Ohio L. Abs. 453 (P.Ct. 1940) (an adopted child can take only one share, a child's share); Hollister v. Witherbee, 24 Ohio L. Abs. 312 (C.P.Ct. 1937) (an adopted child can take two shares).


85 The Ohio Designated Heir Statute prescribes that the designated heir is to stand in the same relationship to the designator as "a child born in lawful wedlock." OHIO REV. CODE ANN. § 2105.15 (Page 1976).
If such a statute were to be adopted in Ohio, it would eliminate the potential for a designated heir to inherit in two capacities and would also define the share which he or she would receive. In the immediately preceding illustration, GC1 would take the larger share which would be the designated heir's share of one-third.

The designated heir statute presents problems of will construction. Do the terms "heirs," "heirs at law," "legal heirs" or words of similar import in a will include designated heirs? In Witten v. Landrum, the testator in his will devised real property to his two daughters, Julia and Grace, "jointly during the life time of each of them, then to their legal heirs." The testator died in 1922; in 1968 his daughter, Grace, pursuant to the designated heir statute, designated an heir (DH). Grace, having survived Julia, died in 1973. The Ohio Court of Appeals held that a designated heir comes within the meaning of "legal heirs," and decreed the remainder interest to DH. The Court reasoned that the term "legal heirs" means those persons who inherit under the statute of descent and distribution. The Court went on to reason that since the designated heir statute places a designated heir in the position of a child born in lawful wedlock, then the designated heir would be a person who takes under the statute of descent and distribution. If the above construction problem should arise in any other document such as a trust or deed, the result should be the same based upon the above rationale.

What if a statute requires that notice be given to heirs or next of kin? Would that include designated heirs? For example, under Ohio Revised Code § 2107.13, before a will is admitted to probate, there must be notice "to the surviving spouse known to the applicant, and to the persons known to the applicant to be residents of the state who would be entitled to inherit from the testator under sections 2105.01 to 2105.21 of the Revised Code [Ohio Chapter of Descent and Distribution], if he had died intestate." Would this include notice to a known designated heir who resides in the state of Ohio? Since the designated heir statute and the statute of descent and distribution are in pari materia, then they should

86 UNIF. PROBATE CODE § 2-114 (1975).
87 The term "heirs" in a will includes designated heirs. Denly v. Wheeler, 2 Ohio L. Abs. 600 (Ct. App. 1924).
88 The term "heirs at law" in a will includes designated heirs. Laws v. Davis, 34 Ohio App. 157, 170 N.E. 601 (1929).
89 The term "legal heirs" in a will includes designated heirs. Witten v. Landrum, 41 Ohio App. 2d 65, 322 N.E.2d 146 (1974).
90 Id. at 65, 322 N.E.2d at 147.
91 Id. at 67, 322 N.E.2d at 147.
92 Id. at 68, 322 N.E.2d at 148.
be construed together.\textsuperscript{96} If this is done, then the designated heir must receive notice. This would seem to be true for any other statute that requires notice to an heir or next of kin after the death of the designator.

But what if the statute provides for notice during the lifetime of the designator? In \textit{Jones v. Jones},\textsuperscript{97} the designator designated two heirs in 1935 under the designated heir statute. In 1936 his wife was appointed Guardian of his person and estate. Notice was required to be given to the "known next of kin of such person for whom appointment is sought, known to reside in the County in which application is made."\textsuperscript{98} An application was filed to terminate the guardianship because no notice was given to the designated heirs. The Court held that the designated heirs were not entitled to notice because the status of designated heir is not attained until the death of the designator.\textsuperscript{99} The Court differentiated this from adoption where the status of an adopted child is created as soon as the adoption takes place.\textsuperscript{100} Would the \textit{Jones} rationale apply to cases where similar statutory wording is used? For example, the ante-mortem probate provisions\textsuperscript{101} in Ohio provide that all of the persons named in the will as beneficiaries and "all of the persons who would be entitled to inherit from the testator under . . . [the Ohio Chapter of Descent and Distribution] had the testator died intestate on the date the petition was filed" must be made parties defendant and must receive notice.\textsuperscript{102} Would these provisions include a designated heir? A designated heir would seem to be included since he or she would inherit under the intestate statutes if the designator died intestate. But, according to \textit{Jones}, no status is created until the designator dies.

Would statutes that use the term "issue" include designated heirs? Only two Ohio reported cases have been found where this question has been decided. In the first case, \textit{Theobald v. Fugnan},\textsuperscript{103} the testatrix executed her will within one year of her death in which she provided gifts for charitable purposes. At the time of the execution of the will and the death of the testatrix the mortmain statute in Ohio provided that if a person dies within one year from the time he executes his will and leaves "issue of his body, or an adopted child," then the gifts to the charities are void.\textsuperscript{104} Testatrix designated two heirs during her lifetime. The designated heirs contested the gifts under the will arguing that

\textsuperscript{96}Cockrel v. Robinson, 113 Ohio St. 526, 149 N.E. 871 (1925).
\textsuperscript{97} 30 Ohio L. Abs. 499 (Ct. App. 1939).
\textsuperscript{98} Id. at 500.
\textsuperscript{99} Id. at 501.
\textsuperscript{100} Id. at 501.
\textsuperscript{101} OHIO REV. CODE ANN. §§ 2107.081-085 (Page's Supp. 1987). These statutory provisions set forth the procedure for establishing a will as valid during the lifetime of the testator.
\textsuperscript{102} OHIO REV. CODE ANN. §§ 2107.081, 2107.082 (Page's Supp. 1987).
\textsuperscript{103} 64 Ohio St. 473, 60 N.E. 606 (1901).
\textsuperscript{104} Id. at 479, 60 N.E. at 608. The Ohio Mortmain Statute, OHIO REV. CODE § 2107.06, was repealed, effective 8-1-85. It was also declared unconstitutional. Shriner's Hosp. v. Hester, 23 Ohio St. 3d 198, 492 N.E.2d 153 (1986).
the mortmain statute was applicable and that the gifts were void. The Court held that the term “issue of his body” does not include designated heirs. This decision was based upon a former case, Phillips v. McConica,\(^{105}\) where the court held that an adopted child cannot inherit through his adopter\(^{106}\) and therefore does not take as issue under the lapse statute.\(^{107}\) The Court also reasoned that the adoption and designated heir statutes were in force when the mortmain statute was enacted and since the legislature expressly included adopted children, it must have intended to exclude designated heirs (expressio unius est exclusio alterius).\(^{108}\)

In the second case, Cochrel v. Robinson,\(^ {109}\) the decedent had designated an heir during her lifetime. She died intestate survived by the designated heir, her brothers and sisters and their legal representatives, and also by the legal representatives of deceased brothers and sisters of her deceased husband. At the time of her death, she still owned all of the real property that she had inherited from her deceased husband. The Ohio Half and Half Statute was in effect at this time and it provided in part that if the decedent died intestate without issue and still owned property that had been acquired from a former deceased spouse by way of inheritance, then that property was to be distributed as follows: One-half to the brothers and sisters of the former deceased spouse or their legal representatives and one-half to the brothers and sisters of the intestate or their legal representatives.\(^{110}\) The Court held that the designated heir comes within the meaning of “issue” under the half and half statute; therefore the said statute was inapplicable and the designated heir took all of the aforementioned property. The Court stated that it was the intention of the legislature to place a designated heir “upon an absolute equality and in the same class with the ‘issue’ of, or ‘child born in,’ lawful wedlock . . .”\(^ {111}\) Theobald and Phillips were distinguished from this case. The Court reasoned that Theobald was based upon the maxim of expressio unius est exclusio alterius,\(^ {112}\) and the issue in Phillips was whether or not an adopted child takes through and not from an adopter.\(^ {113}\)

The above cases and examples have certainly illustrated that the status of a designated heir has not been clearly defined by the designated heir statute. The statute, in providing that the designee is to stand in the same relation to

\(^{105}\) 59 Ohio St. 1, 51 N.E. 445 (1898).

\(^{106}\) Under present law, an adopted child can inherit from and through his or her adoptive parents. OHIO REV. CODE ANN. § 3107.15 (Page 1980).

\(^{107}\) The present lapse statute is OHIO REV. CODE ANN. § 2107.52 (Page 1976).

\(^{108}\) Theobald v. Fugman, 64 Ohio St. 473, 483, 60 N.E. 606, 609 (1901).

\(^{109}\) 113 Ohio St. 526, 149 N.E. 871 (1925).

\(^{110}\) The Half and Half Statute is former OHIO REV. CODE ANN. § 2105.10 which was repealed, effective 1-1-76.

\(^{111}\) Cochrel v. Robinson, 113 Ohio St. 526, 534, 149 N.E. 871, 874 (1925).

\(^{112}\) Id. at 537-38, 149 N.E. at 875.

\(^{113}\) Id. at 535-37, 149 N.E. at 874-75.
the designator as "a child born in lawful wedlock," has not expressly defined the right of inheritance or how this status affects other statutes, wills, and inter vivos documents. The above cases and examples have illustrated some of these problems. There can certainly be others.14

CONCLUSION

Hopefully, the above discussion, cases and examples have demonstrated to the reader just how powerful and practically significant the designation of an heir can be. One more example will illustrate this. Suppose that A is married to B; they have a son named C; and B has a daughter by a prior marriage named D (a stepdaughter of A). The stepdaughter has lived with A, B, and C ever since she was three years old, and has been treated by A as his own child. A wants to provide for his son and also for his stepdaughter in the event that his wife predeceases him. He executes a will leaving all of his property to his wife, but if she does not survive him, then in equal shares to C and D. B dies first. Three years later, A dies with the above will in effect or with a later will in which he has left out his predeceased wife and has given all of his property to C and D in equal shares. If the will is probated and established as valid, then C and D will share equally in the probate estate of A. A's objective has been accomplished by the above will.

But what if C decides to contest the above will and is successful in having it set aside? Now A has died intestate and C will be entitled to the entire probate estate of A under the intestate statutes. D will not receive any share of A's probate estate. The successful will contest has nullified the estate plan of A.

How could the above result have been avoided? A could have designated D as a designated heir during his lifetime. This would have provided a child's intestate share for D in the event the will was not established as valid, and it also would have insulated the will from a will contest by C. For example, if the will had not been established as valid, then D would have shared equally in the probate estate with C. The will would be protected against a will contest by C because he would not be an interested person to contest; C would take as much under the intestate statute as he would under the will. The designation of D in this case has given to D an equal share in the probate estate of A.

There is some risk involved, but it is minimal when one considers the benefits that are bestowed by the statute. Suppose that A changes his mind and no longer wants to provide for D. A can immediately change his will by executing

14 Under the Ohio Elective Share Statute, a surviving spouse can elect to take "under the will or under section 2105.06 [statute of descent and distribution] of the Revised Code." OHIO REV. CODE ANN. § 2107.39 (Page's Supp. 1987). If the surviving spouse elects to take under section 2105.06, then he or she "shall take not to exceed one half of the net estate unless two or more of the decedent's children or their lineal descendants survive, in which case the spouse shall take not to exceed one-third of the net estate." Id. Could a testator reduce the elective share from one-half to one-third by designating one heir if he has one child or two heirs if he has no children?
a codicil, or preferably by executing a new will in which he does not provide for D. A can also revoke the designation after one year. Suppose that A does execute a new will which revokes the prior will and provides for all of his property to go to C, but then A dies before the one year period for revocation of the designation has expired. If A's new will is established as valid, then the provisions therein will be carried out and D will not succeed to any of A's probate property. But if D contests the will and is successful, then A's probate property will be distributed in equal shares to C and D in accordance with the prior will or the intestate statutes if the prior will is invalid. However, this risk can be minimized if A provides an explanation in his will for not providing for D. The explanation may discourage a will contest and, if the will is challenged, it may help in upholding the will.

A could also have protected his stepdaughter by adopting her. However, adoption involves complex statutory procedures and establishes a true parent-child relationship. A may not intend to establish such a relationship, or he may not wish to get involved in the lengthy and complex procedures. Even if A may wish to adopt, he may not be able to do so for some reason or another. For example, the person that A wishes to adopt may be an adult and, in Ohio, adults cannot be adopted except under very limited circumstances. Anyone, regardless of age, can be designated as an heir, and the procedures are simple.

A could also provide for his stepdaughter by a non-probate arrangement such as a trust or a joint and survivorship bank account. But non-probate arrangements can also be set aside as invalid. A may not wish to make an inter vivos arrangement for his stepdaughter, or perhaps A's financial situation is such that an inter vivos arrangement would be impractical.

The designation of an heir should at least be considered in cases where a person wishes to provide for someone who is not an heir or next of kin. In the above example, A used it to protect his stepdaughter. It could also be used to protect other persons such as a foster child, an illegitimate child, a friend, or any one else. Its use is practically unlimited.
