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## Equitable Adoption and the Contract to Adopt

David R. Bossart

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# EQUITABLE ADOPTION AND THE CONTRACT TO ADOPT

## I. INTRODUCTION

The right of adoption was known to ancient Greece and Rome,<sup>1</sup> but was not recognized by the common law of England.<sup>2</sup> In the United States, adoption exists only by statute<sup>3</sup> with every jurisdiction having some statutory law on adoption.<sup>4</sup> In addition to maintaining such statutes, a number of jurisdictions agree that all statutory requirements must be substantially complied with before one will be given the rights of an adopted child.<sup>5</sup> In spite of this demand for substantial compliance, a number of courts have given persons the rights of an adopted child although none of the statutory requirements have been met.<sup>6</sup> The courts refer to this as an "equitable adoption." This doctrine is usually applied when a contract to adopt has been entered into between the natural parents and the adoptive parents or an adoption agency.<sup>7</sup> The contract usually provides that the adoptive parents take the child into their home, rear the child as their own, and take the necessary legal steps required for adoption.<sup>8</sup> The child, having lived with the adoptive parents throughout his childhood, believes that he has been legally adopted. When these parents die intestate, the child brings action on the contract to be given the rights of an adopted child. If the child is given these rights, he will be able to inherit from the adoptive parents' estate by the law of intestate succession. It should be noted

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1. *In Re Session's Estate*, 70 Mich. 297, 38 N.W. 249 (1888).

2. *Ibid.*

3. *In Re Johnson's Estate*, 98 Cal. 531, 33 Pac. 460 (1893).

4. For a list of state statutes on adoption see LEAVY, *LAW OF ADOPTION* 93 (2d Ed. 1954).

5. *Willis v. Bell*, 86 Ark. 473, 111 S.W. 808, 810 (1908). *In Re Taggart's Estate*, 190 Cal. 493, 213 Pac. 504 (1923). *Nugent v. Powell*, 4 Wyo. 173, 33 Pac. 23, 25 (1893).

6. *Benefield v. Faulkner*, 248 Ala. 615, 29 So. 2d 1 (1947). *Prince v. Prince*, 194 Ala. 455, 69 So. 906 (1915). *Snuffer v. Westbrook*, 134 Kan. 793, 8 P.2d 950 (1932). *Kay v. Niehaus*, 298 Mo. 201, 249 S.W. 625 (1923).

7. *Kay v. Niehaus*, *supra* note 6, at 626. *Fish v. Berzel*, 101 N.W.2d 548 (N.D. 1960).

8. *Kay v. Niehaus*, *supra* note 6.

that the child is not actually declared to be a legal heir of the adoptive parents, but is only given his rights under the contract. The status decreed exists only in equity.<sup>9</sup> The courts seem to feel that it would be inequitable to allow the adoptive parents, or those in privity with them, to deny that the child has been adopted merely because of the adoptive parents' failure to perform their duty under the contract.<sup>10</sup> It therefore appears that the purpose of the doctrine is simply for the protection of the child. This article is written to consider both theoretical and practical aspects of equitable adoption and the contract to adopt.

## II. THE CONTRACT TO ADOPT AND ITS ENFORCEMENT

The action to enforce a contract to adopt is usually brought in the name of the adopted child since the contract is for his benefit.<sup>11</sup> The child claiming under the contract must show adequate proof of the contract. If the agreement was written and can be brought into evidence, proof is no problem. If, however, the contract was oral the child must establish it by clear and convincing evidence.<sup>12</sup> A voluntary change in custody may be a factor in establishing an agreement to adopt.<sup>13</sup> The adoptive parents' conduct towards the child may also be a factor to consider.<sup>14</sup> If the parents have given the child an education,<sup>15</sup> changed the child's name to their own, and represented to their relatives that the child is their own, the child may introduce these facts in attempting to prove the agreement.<sup>16</sup> *Burdick v Grimshaw*,<sup>17</sup> a New Jersey case, made this statement on the proof needed to establish an oral contract to adopt:

Oral adoption agreements are to be regarded with grave suspicion when sought to be enforced after the death of the adoptive parent, and are to be subjected to close scrutiny and permitted to stand only when

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9. *Menees v. Cowgill*, 359 Mo. 697, 223 S.W.2d 412, 418 (1949).

10. *Drake v. Drake*, 328 Mo. 966, 43 S.W.2d 556, 559 (1931)

11. *Winne v. Winne*, 166 N.Y. 263, 59 N.E. 832 (1901).

12. *Taylor v. Coberly*, 327 Mo. 940, 38 S.W.2d 1055, 1060 (1931). For cases holding evidence insufficient to establish an oral contract to adopt, see *Kramer v. Cooper*, 347 Ill. 293, 179 N.E. 862 (1932) and *Johnston v. Eriksson*, 71 S.D. 268, 23 N.W.2d 799 (1946).

13. *Burdick v. Grimshaw*, 113 N.J. 591, 168 Atl. 186 (1933).

14. *Ibid.*

15. *Burdick v. Grimshaw*, *supra* note 13, at 190.

16. *Fisher v. Davidson*, 271 Mo. 195, 195 S.W. 1024 (1917).

17. *Supra* note 13, at 186.

established by evidence that is clear, cogent, and convincing, leaving no doubt as to their actual making or existence.

Assuming that the natural parents and the adoptive parents were proper parties to contract, the consideration must be shown.<sup>18</sup> The surrender of the child to the adoptive parents may be adequate consideration.<sup>19</sup> If the child has lived with the adoptive parents and has given them the natural love and affection which flows from a parent-child relationship, the court may view this action as part performance and valid consideration.<sup>20</sup>

Once these facts have been proven to the court's satisfaction, the court may enforce the contract on two principles of equity: specific performance or estoppel.<sup>21</sup> Specific performance is generally not granted until after the death of the adoptive parents.<sup>22</sup> The intimate and personal relationship of parent and child would ordinarily prevent a court from granting specific performance during the lifetime of the adoptive parents.<sup>23</sup> If the child does commence his action before the death of the adoptive parents, his action would be for damages for breach of contract and not specific performance.<sup>24</sup> The measure of damages would be the value of the services performed by the child.<sup>25</sup> In actions for specific performance, some courts apply the equitable maxim: "that done which ought to have been done."<sup>26</sup> By this means the court views the adoption of the child as though completed and grants the child his rights as a legally adopted child.<sup>27</sup> The foregoing maxim has been used by courts which seem compelled by public policy to order that an adoption has occurred without any compliance with the statutory requirements.<sup>28</sup>

In addition to applying specific performance, the courts

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18. *Ray v. Kinchen*, 166 Ga. 788, 144 S.E. 317 (1928).

19. *In Re Biehn's Estate*, 41 Ariz. 403, 18 P.2d 1112, 1115 (1933) *contra*, *Hooks v. Bridgewater*, 111 Tex. 122, 229 S.W. 1114, 1118 (1921).

20. *In Re Biehn's Estate*, *supra* note 15, at 1115.

21. *Holloway v. Jones*, 246 S.W. 587 (Mo. 1922) *Taylor v. Coberly*, 327 Mo. 940, 38 S.W.2d 1055, 1060 (1931).

22. *Besche v. Murphy*, 190 Md. 539, 59 A.2d 499 (1948).

23. *Id.* at 501.

24. *In Re Carroll's Estate*, 219 Pa. 440, 68 Atl. 1038, 1039 (1908).

25. *Ibid.*

26. *In Re Schultz' Estate*, 22 Ore. 350, 348 P.2d 22, 25 (1959).

27. *Ibid.*

28. *In Re Lamfrom's Estate*, 90 Ariz. 363, 368 P.2d 318 (1962).

use the doctrine of estoppel. The estoppel arises from the change of position of the child resulting from his reliance on the representations made by the adoptive parents.<sup>29</sup> That is, by treating the child as their own, the adoptive parents represent that the child has been legally adopted.<sup>30</sup> The Missouri Supreme Court in *Holloway v Jones*<sup>31</sup> vividly brought out the function of estoppel in the following statement:

In all these cases it is held, in substance, that one who takes a child into his home as his own, receiving the benefits accruing to him on account of that relation, assumes the duties and burdens incident thereto, and that where justice and good faith require it the court will enforce the rights incident to the statutory relation of adoption. The child having performed all the duties pertaining to that relation, the adopting parent will be estopped in equity from denying that he assumed the corresponding obligation.

A recent Texas case<sup>32</sup> presented an interesting approach to the enforcement of a contract by estoppel. In that case, the heirs at law of the alleged adoptive parents contended that the intestate had been equitably adopted and, there being no other living heirs of the intestate, they were entitled to share in the estate by the law of intestate succession. The court, not being persuaded by this argument, made this statement concerning their right to share in the estate:

the right of inheritance from the child is a different right from that of the child to enforce the agreement to adopt. That a legal or statutory adoption, binding on all persons in accord with the statutory provisions, differs from an equitable adoption, which is based upon contract for the protection of the child and binding on the parties or those in privity with them, is the effect of *Menees v Cowgill*.<sup>33</sup>

The *Hein*<sup>34</sup> case clearly illustrates that the doctrine of equitable adoption is only applied for the protection of the child

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29. *Cubely v. Barbee*, 123 Tex. 411, 73 S.W.2d 72, 80 (1934).

30. *Ibid.*

31. *Holloway v. Jones*, *supra* note 21, at 591.

32. *Hein v. Crabtree*, 369 S.W.2d 28 (Tex. 1963).

33. *Id.* at page 31.

34. *Supra* note 32.

and his heirs. A *fortiori*, it is likely that the courts would not allow the adoptive parents to assert that a child had been equitably adopted in order to inherit from his estate. To hold otherwise would allow the adoptive parents to profit from their own breach of the contract.

### III. CASES REJECTING THE DOCTRINE OF EQUITABLE ADOPTION

While many courts recognize and enforce contracts to adopt,<sup>35</sup> there have been cases in which the courts have refused to do so thereby ignoring the doctrine of equitable adoption.<sup>36</sup> In 1956, the Supreme Court of Mississippi held that their court would not specifically enforce an oral contract to adopt.<sup>37</sup> The court reasoned that the action was in derogation of the common law and was unknown to the legal jurisprudence of Mississippi. The court went on to say:

The question of the right of any person to base his claim of inheritance upon an oral agreement of adoption is a legislative matter, and in the absence of legislation authorizing the enforcement of an oral contract alleged to have been made many years prior to the death of a property owner, the court should not lend sanction to such a doctrine.<sup>38</sup>

In an expression of similar sentiments, the Supreme Court of Wisconsin in *St. Vincent's Infant Asylum v Central Wisconsin Trust Co.*<sup>39</sup> made this statement concerning adoption on equitable principles:

It is admitted by the trial court and the respondent that the law relative to adoption has not been complied with; but it is sought to cure the defect by the application of an equitable principle. Could that be done, statutes prescribing a procedure for adoption would have but a shadowy force, and we could have adoption by consent, by private agreement, by estop-

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35. *Benefield v. Faulkner*, 248 Ala. 615, 29 So. 2d 1 (1947) *Prince v. Prince*, 194 Ala. 455, 69 So. 906 (1915) *Snuffer v. Westbrook*, 134 Kan. 793, 8 P.2d 950 (1932) *Kay v. Niehaus*, 298 Mo. 201, 249 S.W. 625 (1923).

36. *Brassiell v. Brassiell*, 228 Miss. 243, 87 So. 2d 699 (1956) *St. Vincent's Infant Asylum v. Central Wis. Trust Co.*, 139 Wis. 483, 206 N.W. 921 (1926).

37. *Brassiell v. Brassiell*, 228 Miss. 243, 87 So. 2d 699, 702 (1956).

38. *Ibid.*

39. *St. Vincent's Infant Asylum v. Central Wis. Trust Co.*, *supra* note 36, at 922.

pel, or by any of the hundred and one cases in which equity intervenes in private transactions. But we have only one way of making an adoption, and that is to follow the statute. Clear mandatory statutory proceedings do not permit of equitable repeal.

The two foregoing decisions represent the view taken in cases which refuse to enforce the contract to adopt. The rationale is basically the same in both cases. The courts simply refuse to give one adoption status unless the statutory requirements have been met.

#### IV NORTH DAKOTA'S POSITION ON EQUITABLE ADOPTION AND THE ADOPTION CONTRACT

North Dakota courts first mentioned a child's rights under an agreement to adopt in 1940.<sup>40</sup> In that case, two persons alleged that they were the legally adopted children of the intestate. The terms of an agreement were shown, but no written contract was produced in evidence. The court considered the evidence insufficient to show the terms of any contract. The court did, however, make this statement at the end of the opinion:

Our holding that the court was in error in determining the respondents were the adopted children does not determine that the respondents have no interest in the estate under the alleged executed contract for adoption. The question of the right to administer an estate and the question of an interest or share in an estate are, in this case, two separate and distinct matters. This decision in no way determines that the respondents have no interest in the estate, and therefore, this matter is left undetermined. If proof of the executed contract to adopt is forthcoming, then the rights of the respondents thereunder will be determined at the time of the settlement and distribution of the estate.<sup>41</sup>

In the probate of the estate the respondents had proven the execution of the contract and had been declared the sole heirs of the decedent and entitled to letters of administration. This action was later overruled in a case which held that the court granting the distribution of the estate had

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40. *Borner v. Larson*, 70 N.D. 313, 293 N.W. 836, 840 (1940).

41. *Ibid.*

no jurisdiction over matters concerning equity, and therefore could not enforce the contract.<sup>42</sup> The most recent case concerning equitable adoption in North Dakota is a 1960 case.<sup>43</sup> In that case the decedent and his wife entered into an adoption contract with an adoption agency. The agreement provided that the adoptive parents take an infant into their custody and rear the child as their own. The agreement also provided that the adoptive parents must legally adopt the child before she had reached eighteen years of age or they would be deemed to have elected to keep the child as their own. If they elected to keep the child, they were bound to provide for her in their will to the amount which the child would receive had the parents died intestate, and she had been a natural child of the adoptive parents. The parents did not legally adopt the child before she reached eighteen and thus, by the terms of the agreement, elected to keep her and provide for her in their will. The adoptive father died testate and in his will left the residue of the estate to the child. The child then brought an action for specific performance of the contract to get her intestate share, the intestate share being of more value than the residuary. The court enforced the contract by holding that the retention of the child without legally adopting her amounted to an election to keep her and be bound by the contract, thereby entitling her to her intestate share.<sup>44</sup>

Although the North Dakota Supreme Court has not dealt with a great number of cases concerning contracts to adopt, from the foregoing decision it would seem that this court could be categorized with the jurisdictions that do recognize and enforce such agreements.

## V CONCLUSION

Equitable adoption is a theory which arose to protect a child's interest under a contract to adopt. The cases indicate that the courts are not willing to grant the child

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42. *Mulhauser v. Becker*, 70 N.D. 103, 20 N.W.2d 353 (1945).

43. *Fish v. Berzel*, 101 N.W.2d 548 (N.D. 1960).

44. *Ibid.*



his rights under the contract unless the agreement is shown by clear and convincing evidence.<sup>45</sup>

It is submitted that in the final analysis the doctrine of equitable adoption is becoming, or has already become, the single exception to the rule that all statutory requirements must be substantially complied with before one is declared to have the rights of an adopted child. The cases not following the equitable adoption doctrine, simply do not recognize this exception.

DAVID R. BOSSART

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45. *Taylor v. Coberly*, 327 Mo. 940, 38 S.W.2d 1055, 1060 (1931). For cases holding evidence insufficient to establish an oral contract to adopt, see *Kramer v. Cooper*, 347 Ill. 293, 179 N.E. 862 (1932) and *Johnston v. Eriksson*, 71 S.D. 268, 23 N.W.2d 799 (1946).