

# Some Problems Under The Adoption Laws Of Ohio \*

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Adoption, which goes undefined in the statutes of Ohio, has been defined elsewhere as "The legal process of establishing a relationship of parent and child between a proper person or persons and a child toward whom he, she, or they did not formerly sustain that relationship." Except in the case of a natural parent married to a step-parent, it also has been given the effect of terminating the legal relationship between the natural parent and the child.<sup>1</sup> Its importance may be traced directly to sound public policy in providing a home for the homeless child and a child for the childless couple, as well as relieving natural parents of responsibilities they are unable to meet and the community of the burden of caring for the child. Recent and rapid growth of the institution traceable to a greatly increased demand for children on the part of childless couples, has led to problems that require reexamination of the field by the courts and the bar.

While the right of adoption has been known for many centuries under the civil law dating from Greek and Roman civilization, it was never recognized as a part of English Common Law and has grown in the United States and England only under specific statutory authority.<sup>2</sup> The power of the Legislature to deal with the field has long been recognized as existing under our Ohio Constitution.<sup>3</sup> The first statute on the subject in Ohio, passed in 1859, was basically very similar to the present law, although it has been supplemented considerably.<sup>4</sup> Prior to the 1859 Statute there had been passed in 1854 a Statute permitting designation of heirship of one other than a natural child.<sup>5</sup> The procedural problems under both statutes remain troublesome.

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<sup>1</sup> OHIO GEN. CODE, §8004-13; *Warden v. Warden*, 35 Ohio Op. 374, 77 N.E. 2d 365; *Byrd v. Byrd*, 78 Ohio App. 73, 69 N.E. 2d 75.

<sup>2</sup> *Somers v. Doersam*, 115 Ohio St. 139, 152 N.E. 387; *In re Adoption of Francis*, 82 Ohio App. 193, 77 N.E. 2d 289.

<sup>3</sup> *Cochrel v. Robinson*, 113 Ohio St. 526, 149 N.E. 371.

<sup>4</sup> 56 OHIO LAWS 82; *Swan and Critchfield*, page 506.

<sup>5</sup> 52 OHIO LAWS 78.

## PROCEDURE UNDER THE PRESENT LAW

*Filing the Petition*

The first formal step taken in any adoption proceeding is the filing of the petition for adoption. While it is true that in most cases the first significant legal step is placement of the child with the prospective adoptive parents, this step is not formally recognized by the Adoption Code as a part of the adoptive process. For this reason, and perhaps because the most important adoption law problems facing us today relate to this matter of placement, it will be discussed in considerable detail in a later section. The statutory provisions relating to the contents and filing of a petition for adoption are to be found in Sections 2 and 3 of the Adoption Code. Ohio General Code, Sections 8004-1 through 8004-14 constitute the Adoption Code. The numbers of these Sections have been changed from 10512-9 through 10512-23 by the last session of the Legislature as a part of a recodification of all Domestic Relations laws of the state.

The petition for adoption must be filed in the Probate Court by a husband and wife jointly, by a step-parent married to one of the natural or legal parents of the child sought to be adopted, or by any other proper person. The petition must be filed in the Probate Court where the petitioner resides, or where the child was born, has a legal settlement or residence, or has become a public charge. Any one of these factors is sufficient to give the Probate Court jurisdiction.<sup>6</sup> A practical consideration not specifically covered by the law, but which certainly would appear to be entitled to consideration by a court in which a petition is filed is whether the child, if a minor, is available within the county, or at least within the state, in order that the decree of adoption, if issued, may be carried out, since the purpose of adoption is to provide for the child's welfare, not merely to affect property rights.

Under the provisions of Section 3 of the Adoption Code,<sup>7</sup> the petition for adoption is required to be verified by each of the petitioners, and is required to contain the following information:

- (A) The name, date, place of birth and place of residence of each petitioner.
- (B) The name, date, place of birth and place of residence of the child sought to be adopted.
- (C) The relationship of the child to the petitioner.
- (D) The name by which the child is to be known when adopted.

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<sup>6</sup> OHIO GEN. CODE, §8004-2.

<sup>7</sup> OHIO GEN. CODE, §8004-3.

- (E) A description of the property of the child.
- (F) The names of the parents of the child and the address of each living parent, unless the child has been committed to the permanent custody of the Division of Social Administration of the State, a county welfare department, a county child welfare board, or a child care organization certified by the Board of State Charities.<sup>8</sup>
- (G) The name and address of the legal guardian, if any, of the person of the child.
- (H) Any further facts necessary for the determination of the persons whose consent to the adoption is required. This matter of consents will be discussed in some detail below.
- (I) If the child is living in the home of the petitioner, the name of the person, county, department, board, organization, or division which placed the child in the home, and date of placement.

It is also required that a certified copy of the child's birth certificate, *if available*, shall be filed with the petition. This condition of availability of the birth certificate has recently been inserted in the law in order to make it clear that adoption is possible in the case where no such certificate is available, a need which has arisen recently due to frequent application for the adoption of war orphans.

#### *Setting the Hearing and Next Friend's Report*

After the petition has been filed, the court is required to fix the day for hearing, not less than 30 and not more than 60 days thereafter, except in cases where the child is not in the adoptive home at the time of filing the adoption petition. If the child is not in the home of the petitioners at the time of filing of the petition, no hearing is set until a supplemental petition is filed containing the information as to placement of the child, which would otherwise have been included in the original petition.<sup>9</sup>

At the time of setting the hearing, the court also appoints a next friend to the child and causes notice to be given to the guardian of the person of the child, if there is one, and to the parents or parent of the child, if parents' consent is required. The requirements as to service of this notice are set out in detail in Section 10501-21 of the General Code and are discussed further below. The next friend is required to

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<sup>8</sup> OHIO GEN. CODE, §1352-1.

<sup>9</sup> OHIO GEN. CODE, §8004-4.

be a county welfare department, the county child welfare board, a certified organization, the division of social administration, or some other person qualified by training and experience to make the report prescribed. In several counties of Ohio, the probate judges have taken the position that the next friend must in all cases be either one of the public bodies named or a certified organization.<sup>10</sup> The investigation and the report of the next friend is required to include any information the court may desire in the particular case, as well as certain specific data as follows:

The physical and mental health, emotional stability, and personal integrity of the petitioners, and the ability of the petitioners to promote the welfare of the child (which is statutory recognition of the uniformly recognized principle of adoptions, *the welfare of the child shall be the primary consideration*, as opposed to the interests of the natural parents or of the prospective adoptive parents); physical and mental condition of the child; family background of the child; the reasons for the child's placement away from his parents, their attitude toward the proposed adoption, and the *circumstances under which the child came into the home of the petitioner* (this appears to require a thorough investigation and report by the next friend on the details of the placement and anyone involved in making it); the suitability of adoption of the child by the petitioner, taking into account racial, religious, and cultural background, and the child's attitude toward the adoption, if the child is old enough to make this feasible.

When completed, the report of the next friend must be submitted to the court three days before the date set for the hearing, with a written statement of the next friend approving or disapproving the proposed adoption, and any other information which the court may require.

### *Consents Required*

At the hearing, before entering any final decree or interlocutory order of adoption, the court must require that verified and acknowledged consents to the adoption are presented, signed by the child, if over twelve years of age (unless the child has resided in the home of the petitioner for a period of over eight years), by each of the living parents, adult or minor, except under certain conditions which will be discussed, by the guardian of the person of the child, if there is one, and by any division, county department or board, or certified organization having permanent custody of the child, including out-of-state custodians as well as those within the state. Such a consent may have

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<sup>10</sup> OHIO GEN. CODE, §8004-5; Hamilton County and Summit County are examples.

been executed before the adoption proceeding was begun.<sup>11</sup> Qualifications with regard to the required consents of the living parents, adult or minor, are that the mother of an illegitimate child shall be considered the sole parent, for consent purposes, and if the mother is physically unable to appear in court to execute the consent, she may execute the same in the presence of the next friend. The consent of the parents is not required if the child is in the permanent custody of the Division of Social Administration, a county welfare department, a county child welfare board, or a certified organization, or if the parent has been declared incompetent by reason of mental disability, in which case, the Probate Court is required to appoint a guardian ad litem to investigate the situation and, if satisfied, to execute the consent. The consent of the parent may also be waived if the petition alleges that one or both of the parents have wilfully failed properly to support and maintain the child for a period of more than two years immediately preceding the filing of the petition, and the court finds the allegations well taken.<sup>12</sup> It is also provided that if the parents of the child are dead, or their place of residence is unknown or cannot be ascertained, and there is no guardian of the person of the child, the consent may be given by the next friend, who has been appointed by the court. It must also be remembered that consents are applicable only to the specific adoption proposed by the petition,<sup>13</sup> and they may not be withdrawn after the entry of an interlocutory order or after the final decree of adoption.<sup>14</sup> However, there seems little doubt that they can be withdrawn up to such times.<sup>15</sup> There is a statutory prohibition against any final decree or interlocutory order of adoption with respect to any child in the custody of a juvenile court, or concerning whose custody proceedings are pending in the juvenile court.

### *The Hearing*

If, as a result of the next friend's investigation or other information coming to the attention of the court, the Probate Court finds that a child sought to be adopted was illegally placed in the foster home, the Probate Court *may* certify this fact to the Juvenile Court of the county where the child is living and suspend further action on the adoption petition, but this action is wholly discretionary with the Probate Court. In cases so certified, the Juvenile Court proceeds, after notice to the parents of the child, the petitioners, the person who placed the child in the adoptive home, and all other persons in in-

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<sup>11</sup> *In re Burdette*, 83 Ohio App. 368, 83 N.E. 2d 813.

<sup>12</sup> *In re Gates Adoption*, 84 Ohio App. 269, 85 N. E. 2d 597; *cf. In re Sparto's Adoption*, 52 Ohio L. Abs. 189, 82 N.E. 2d 328.

<sup>13</sup> OHIO GEN. CODE, §8004-6.

<sup>14</sup> *In re Burdette*, 83 Ohio App. 368, 83 N.E. 2d 813.

<sup>15</sup> *State ex. rel. Scholder v. Scholder*, 22 Ohio L. R. 608, 2 Ohio L. Abs. 471.

terest, to determine whether the placement is in *the best interest of the child*, and either approves or disapproves of the placement and certifies a copy of its findings to the Probate Court where the petition is filed. If the placement is disapproved, the statute states that the Juvenile Court shall retain jurisdiction, order the child removed from the home of the petitioners, and determine its custody and disposition.

When the Probate Court does not certify a finding of illegal placement to the Juvenile Court, the Probate Court itself, after proper notices, approves or disapproves of the placement and, if the placement is approved, proceeds with the adoption proceedings. If the placement is disapproved by the Probate Court under these conditions, that finding is then required by the statute to be certified to the Juvenile Court of the county where the child is living for appropriate action in accordance with this section. With regard to these provisions, it should be noted, however, that it has been held recently that in the absence of a formal neglect or dependency proceeding, the Juvenile Court is without jurisdiction to proceed further, and logically this might apply whether the disapproval was by the Juvenile or the Probate Court.<sup>16</sup>

At the hearing on the adoption petition, the court is required to examine the petitioner under oath, the child, if it is over twelve years of age, the next friend, and all other persons in interest who are present and to whom lawful notice has been given.<sup>17</sup> It may also examine any other person having information or knowledge pertinent to the adoption. Where the petition is filed by a husband and wife, the court is required to examine each separately and apart from the other, and refuse the adoption unless satisfied that each of the petitioners desires it of his own free will. If, at the hearing, the court is satisfied that there is jurisdiction, that the petition for adoption is properly prepared, that the proper notices have been given and investigations made, that the proper consents have been given, that the petitioner is suitably qualified to care for and rear the child, and that the *best interests of the child* will be promoted by the adoption, an interlocutory order of adoption is entered declaring that, subject to final decree of the court, the child shall have the status of the adopted child of the petitioner. Property rights are not affected by such interlocutory orders.

Under some circumstances, the interlocutory order may be dispensed with and a final decree of adoption entered at the time of the hearing. This is true when the child is legally, by birth or adoption, the child of the spouse of the petitioner and is living in the home of the petitioner. This permits ordinary step-parent adoptions without a further waiting period. The waiting period may also be waived if the child was placed in the home of the petitioner by the division of social

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<sup>16</sup> OHIO GEN. CODE, §8004-8; State *ex rel.* Park v. Allaman, 154 Ohio St. 296, 95 N.E. 2d 753.

<sup>17</sup> OHIO GEN. CODE, §8004-9.

administration, county welfare department, child welfare board, or certified organization, has lived in the home for six months preceding the date of the hearing, and has been visited regularly by a representative of the division, department, board, or organization at reasonable intervals during such period, and the division, department, board, or organization recommends the adoption. The waiting period may also be dispensed with if the child was legally placed in the home of the petitioner, "and its placement therein has been found by the court to be beneficial to the child and it has resided continuously therein for a period of six months."<sup>18</sup> The italicised word "and" emphasizes a recent statutory change by the last Legislature in substituting the word "and" for the word "or," formerly in this provision. Up to the time of this amendment, it is believed to have been the position of several probate courts in the state that the six-month waiting period might be waived in any case in which the child had been in the petitioner's home for a period of six months. It should be noted that the recent amendment of this Statute is intended to make it clear that unless there is a finding by the court that the placement in the home of the petitioner was legal, the six-month waiting period may *not* be waived.

### *Report and Final Decree*

After entry of an interlocutory order of adoption, the law requires that the next friend appointed by the probate court visit the child in the home of the petitioner at reasonable intervals, and within the six months following the interlocutory order, submit to the Probate Court a further written report of its findings relative to the suitability of the adoption.<sup>19</sup> If, at any time before the final decree, the court at a hearing finds that the adoption will not be *in the best interests of the child*, or for any other good cause, it may revoke the interlocutory order.

If, at the end of six months after the interlocutory order has been entered, the interlocutory order has not been revoked, the court enters the final decree of adoption unless it finds that it would be to the *best interest of the child* to extend the period of the interlocutory order. When the final decree is entered, the court forwards to the Department of Health, Division of Vital Statistics, the certified copy of the final decree of adoption, together with the copy of the child's birth certificate filed with the petition, if such birth certificate has been filed. If, for any reason, the court dismisses the petition, revokes the interlocutory order, or denies a final decree, the child is certified to the Juvenile Court of the county where the child has been residing for appropriate action, and disposition, unless the child is, or was prior to

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<sup>18</sup> OHIO GEN. CODE, §8004-9 (c).

<sup>19</sup> OHIO GEN. CODE, §8004-10.

the interlocutory order, in the permanent custody of the division of social administration, a county welfare department, or certified organization, in which case it shall be returned to such body. As has been commented on above under Ohio General Code Section 8004-8, the recent holding by the Ohio Supreme Court probably applies here so that such certification does not give the Juvenile Court jurisdiction over the child for the purposes of disposition in the absence of a dependency or neglected child proceeding.<sup>20</sup>

Upon the entry of a final decree of adoption, the child becomes the legally adopted child of the petitioners with every legal right, privilege, obligation, and relation with respect to education, maintenance, as if it were the petitioners' natural child.<sup>21</sup> Except in the case of adoption by a step-parent, by the entry of the final decree<sup>22</sup> the natural parents are, if living, divested of all legal rights and obligations due from them to the child or from the child to them.

#### THE LAW AND POLICIES RELATING TO PLACEMENT

##### *Statutes*

As commented above, the first important step which takes place in any adoption is placement of the child in the home of the petitioner. While the petition for adoption may be filed prior to that time, except in certain specified cases, no action on the petition may be taken until the child has been placed in the home. It is strange, therefore, that the adoption code itself makes no provision respecting the placement of the child, although it formally recognizes in Ohio General Code Section 8004-8 that adoptions may proceed even though the original placement may have been illegal. Perhaps the explanation of the absence of a placement provision in the adoption code is best explained by the fact that in many cases of child placement which eventually lead to adoption, there was no intent to adopt at the time the placement was made. Also, admittedly the placement of children away from their natural parents is a field which should be regulated broadly and not merely in cases which may lead to adoption. Even so, in recent years the great preponderance of persons desiring to adopt children as compared to the number of children available for adoption has created a situation which should be recognized by the Legislature as creating special problems relating to placement of children for adoption. Out of this unsuppliable demand for children to adopt has

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<sup>20</sup> OHIO GEN. CODE, §8004-12; State *ex rel.* Park v. Allaman, 154 Ohio St. 296, 95 N.E. 2d 753.

<sup>21</sup> OHIO GEN. CODE, §8004-13; Blackwell v. Bowman, 150 Ohio St. 34, 80 N.E. 2d 493.

<sup>22</sup> Byrd v. Byrd, 78 Ohio App. 73, 69 N.E. 2d 75.



arisen the substantial increase of illegal placements for adoption purposes; and the black or gray market conditions which exist in some areas call for study of laws relating to placement of children for adoption.

Ohio General Code, Section 1352-12 provides that parents may enter into an agreement with any public, semi-public, or private association or institution in Ohio established for the purpose of placing children in homes, and which has been approved and certified by the Division of Charities, placing such child in the temporary custody of such institution or association. It also provides that parents, having custody of the child, may make an agreement surrendering the child into the permanent custody of such an association or institution, to be taken care of by such association or institution, or to be placed in a family home. Agreements of these natures must be in writing on forms prescribed by the Division of Charities, and by statute are specifically authorized, if they are for permanent care and custody of the child, to contain provisions authorizing the association or institution to appear at any proceeding for the legal adoption of the child and consent to its adoption.<sup>23</sup> It is further provided that the adoption order of the judge made upon such a consent shall be binding upon the child and its parents, guardian, or other person, as if such persons were personally in the court and consented to the adoption, whether or not they are made parties to the proceeding.<sup>24</sup>

Particular attention is called, however, to the definitions of the words "institution" and "association" in Ohio General Code, Section 1352-6, which specifically states that for the purposes of Ohio General Code Sections 1352-4 through 1352-16, the words include:

any individual who, for hire, gain, or reward, receives or cares for children, unless he is related to them by blood or marriage; and also any individual not in the regular employ of a court or of an institution or association certified in accordance with section 1352-1, who in any manner becomes a party to placing of children in foster homes, unless he is related to such children by blood or marriage, or is the duly appointed guardian thereof.

Section 1352-13 specifically prohibits the placing of children under two years of age into the temporary or permanent custody of any person or association or institution not certified by the Division of Charities without the written consent of the Division of Charities or a commitment of a Juvenile Court. Exceptions to this rule are made in the cases of temporary placements or court commitments with persons related by blood or marriage or in legally licensed boarding homes not established for the purpose of placing children in foster homes or for

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<sup>23</sup> OHIO GEN. CODE, §1352-12.

<sup>24</sup> *Id.*

legal adoption. This part of the Section was therefore apparently enacted by the Legislature in the present form solely for the purpose of making illegal the placement of babies for adoption by other than certified agencies. Yet there have been no reported cases and almost no general or local practice of enforcing this provision in order to prevent gray or black markets from arising.

Section 1352-14 states that it is unlawful for any persons, organizations, hospitals, or associations not certified by the Division of Charities to advertise that they will adopt children or place them in foster homes or hold out inducements to parents to part with their offspring, or in any manner knowingly become a party to the separation of a child from its parent, parents, or guardian, except through a Juvenile Court commitment. It should be noted that this Section, in contrast to Section 1352-13 discussed above, is not limited to the children under the age of two years.

The enforcing and penalty provision relating to the Sections 1352-13 and 1352-14 discussed above is Section 12789-1, which states that whoever violates any of the provisions of Sections 1352-12, 1352-13, or 1352-14, shall be fined not more than \$300.00 or imprisoned not more than three months, or both fined and imprisoned. Each act or violation under that provision is to be considered a separate offense and the Statute further states that "it shall be the duty of the Division of Charities, Department of Public Welfare, to enforce the provisions of this Act." In 1933 Attorney-General Opinion No. 600, the duty imposed upon the Division of Charities was held not to preclude others from taking necessary steps to prosecute violations of the Sections in question, and stated specifically that the Prosecuting Attorneys of the counties and the Solicitors of the municipal corporations where the offense occurs are required by law to prosecute such violations in the local courts. However, the reported cases in Ohio disclose no cases of enforcement, the Prosecuting Attorneys are often found to be loth to bring enforcement proceedings in the absence of clear evidence of a continued and organized violation of the law for profit. A policy of warning by the Prosecuting Attorney in cases of impending or past violations has been practiced with some effect in some counties.

No summary of the statutes relating to placement of children would be complete without at least a cross reference to the provisions of Ohio General Code, Section 1639-23 and Section 1639-24. Under these provisions, a delinquent, neglected, dependent, or physically handicapped child may on application of any person in the Juvenile Court in the county of residence of the child, be transferred to the custody of the court if the child lives in such conditions or surroundings that his welfare requires it. The conditions under which the Juvenile Court may find a child to be neglected or dependent are defined in Sections 1639-3 and 1639-4, of the Ohio General Code and ap-

parently must be conditions relating to the time of the proceeding, not merely to past conduct of the parents.<sup>25</sup>

These Sections are important insofar as the matter of placement for adoption is concerned in that the court by such a proceeding may obtain permanent custody of the child and thereafter either consent itself, or transfer permanent custody to some certified agency which may thereafter consent, to the adoption of the child. An example of how such a proceeding was used to make possible an adoption which might not otherwise have been feasible because of lack of consent of the mother is the case of *In re Spinninger*.<sup>26</sup> Such a proceeding might also be used in the case of minor parents who have surrendered permanent custody to a certified agency, but who have disappeared and have not consented to adoption. (This may be necessary under 1948 Attorney General's Opinion No. 4211).

#### *Cases and Policies Relating to Placement.*

The cases interpreting the Sections relating to placement which have been discussed above have not been numerous, but from them certain principles may be drawn. A leading case is *French v. Catholic Community League*.<sup>27</sup> In that case, it was held that the mother of an illegitimate child, having surrendered permanent custody of the child under Section 1352-12 to a certified agency, may withdraw her consent to adoption before the certified agency has moved to place the care and custody of the child in the hands of another by adoption. The case does not, however, make clear at just what point the right to withdraw the consent to adoption given under Section 1352-12 is cut off, and so far as we have been able to find, there is no definite ruling on this point in the cases, although the Statute itself does seem clear that once the interlocutory order is entered, the consent may not be withdrawn. Even this might not be true in the case where the consent was found to have been given under considerable duress.<sup>28</sup> However, Sections 1352-12 and 1352-13 have recently been interpreted in the case of *In re Bolling's Adoption*,<sup>29</sup> where it was held that in the case of the surrender to a certified agency under Section 1352-12, only the consent of the child care agency is required in a proceeding for an adoption. Clearly this is not true in the case of surrender by the parent to other than a certified agency.<sup>30</sup> Likewise, it has been held that the surrender of permanent custody under Section 1352-12 by both parents is necessary unless

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<sup>25</sup> *In re Hock*, 55 Ohio L. Abs. 73, 88 N.E. 2d 597.

<sup>26</sup> 26 Ohio Op. 4, 11 Ohio Supp. 60.

<sup>27</sup> 69 Ohio App. 442, 44 N.E. 2d 113 (1942).

<sup>28</sup> *In re Rubin*, 19 Ohio Op. 463.

<sup>29</sup> 83 Ohio App. 1, 82 N.E. 2d 135 (1948).

<sup>30</sup> *In re Swentosky*, 10 Ohio Op. 150 (P. Ct. 1937).

custody is in one parent only.<sup>31</sup> This may cause trouble where the father of an illegitimate child later marries the mother.<sup>32</sup> Two Attorney-General's Opinions have also attempted to interpret the statutory sections involved in recent years. The first of these is 1944 A. G. Op. No. 6716 (LVIII Dept. Reports 399). In that opinion, the Attorney-General noted that while parents of a child under the age of two may surrender the child to the certified agency, giving it permanent custody and consent to place the child for adoption, the mother may not place the child in the custody of any person, association, or institution not so certified. However, the Attorney-General goes on to note that there is no penalty for a violation of this section, and that the only remedy would seem to be a neglect or dependent child proceeding under the Juvenile Code. This is questioned, inasmuch as the Attorney-General failed to comment on Section 12789-1, which imposes penalties, albeit not very severe ones, on violations of Sections 1352-13 and 1352-14.\*

The other Attorney-General's Opinion is 1948 A. G. Op. No. 411 (LXVIII Dept. Reports 197). In that opinion, it is stated that the minor mother of an illegitimate child cannot surrender it to a certified agency and give the agency permanent custody and right to place for adoption, even though the Attorney-General admits that a minor may legally give consent to adoption under the Adoption Code.<sup>33</sup> Inasmuch as this Opinion rules only on the first point mentioned above, and merely commented on the second point, the Opinion notes its disagreement with 1930 A. G. Op., Vol. 1, Page 356, which says that a minor may consent to a surrender of permanent custody under Sections 1352-12 and 1352-13, but it fails to overrule that opinion.

Before leaving the subject of placement of children for adoption, it would seem appropriate to comment on what appears to be the policy reasons of the Legislature and of the courts in regulating placements for adoption and in requiring, with appropriate exceptions, that placements for adoption in order to be legal, be made through public or certified agencies. These reasons themselves, we believe, if properly understood by the Bar and by the medical profession, would probably greatly minimize the very considerable volume of well-intentioned but illegal placements still being made in this state and throughout the country.

First, as we have commented above, the primary consideration in any placement for adoption must be the welfare of the child.<sup>34</sup> Nor-

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<sup>31</sup> *In re* Howell, 7 Ohio Supp. 4, 21 Ohio Op. 380.

<sup>32</sup> See *In re* Hock, 55 Ohio L. Abs. 73, 88 N.E. 2d 597.

<sup>33</sup> OHIO GEN. CODE, §8004-6 (B).

<sup>34</sup> *In re* Griffin, 30 Ohio Op. 367, 15 Ohio Supp. 101.

\*See 1952 Ops. Atty. Gen. (Ohio) No. 1199. This opinion, handed down after completion of this article, is also important on other questions relating to the legality of placements.

mally, the public or private certified agency, with no question of financial gain involved, would seem to be the more appropriate guardian of the welfare of the child than a professional man, in most cases retained by and sometimes to be paid by prospective adoptive parents who wish to obtain a child for adoption. Unfortunately, regardless of whether any payment is actually made, or of the size of such a payment, the point of view of the lawyer or doctor must inevitably be that he should serve his clients or patients, and those clients or patients are the adoptive parents.

Another important factor is that a certified agency, in making the placement, holds permanent custody of the child, either by surrender by the natural parents or by a permanent commitment order of the Juvenile Court, and thereby may give consent to the adoption at the appropriate time. Under a recent Attorney General's opinion,<sup>35</sup> there may be a question whether, even after placement of the child in the family for adoption, the consent may still be withdrawn if there is a minor parent involved. Whether this safeguard is necessary in order to protect minor parents when the placement is made by a certified agency might well be considered by the Courts and the Legislature. In spite of this possibility, the likelihood of attack on placement by a certified agency is far less than in the event of so-called illegal placement. This is true because the public or certified agency only accept children surrendered for adoption after proper counselling with the natural parents, making less likely a decision under strain which they may wish to revoke at a later date.

Other important advantages more likely to be found in placement through a certified agency than in other placements are: proper investigation of the background of the child; protection of the child in the selection of the parents who can properly provide for the child; a trial period for the child in the home with responsibility in the agency to care for the child in the event that the trial period is unsuccessful; safe-guarding of the rights of the child to see that adoption materializes; and confidentiality of information with regard to the child and all others involved.

It is no answer to say that the protective feature of the next friend report suffices to legalize the illegal placement.

The uniform reaction of next friend agencies consulted is that they must, except in the most extreme circumstances, approve for adoption placements already made some months or years previously. Their reason for this position has been in part because of possible disturbance to the child if removed from the home at a later date and also the requirement of probate courts in such cases that the reasons for disapproval and removal of the child be urgent.

In spite of these advantages of placement through regular chan-

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<sup>35</sup> 1948 A.G. Op. 4211.

nels, and in spite of educational programs being carried on in several communities with respect to them, the flow of illegal placements for adoption through irregular channels, whether black market or with best intentions, continues at an alarming pace. Suggestions for corrective measures on the problem have been numerous. At least two were offered in bills introduced in the last session of the legislature, one being *mandatory* reference of all cases of illegal placement to the Juvenile Court under Section 8004-8 of the Adoption Code, and another being a system whereby any placement of children later sought to be adopted must be through registration and investigation of the placement at the time that it is made. On the first suggestion, the permissive feature of the present law has remained unchanged, and a bill incorporating the latter provision introduced by Representative Burton failed to be enacted.<sup>36</sup> Other possible corrective measures which have been discussed have been formal warnings by the Probate Court Judges at the time of the adoption to anyone concerned in the original illegal placement and mandatory reporting by the next friend to the Probate Court of the names of any lawyers, doctors, or others taking any part in the original illegal placements. Another remedy might be to increase the penalty and clarify the mandate to enforce the provisions of General Code Section 12789-1. Although the reluctance to discipline or prosecute respected members of the professions for engaging in unethical and illegal practices often with the best of intention, nevertheless the writer is of the opinion that in this field stricter penalties, or a few exemplary enforcements or both would lead to much more general knowledge of the provisions of the law, which are neither generally known nor observed. In such a policy, it is believed, lies the best chance of solution to the problem.

#### SPECIAL PROBLEMS

##### *Birth Certificates*

A specific provision with regard to birth certificates of adopted children has been on the books since 1941, and in the last session of the Legislature, this Section was expanded considerably to insure further confidentiality.<sup>37</sup> Under the amended provision, a court entering a decree of adoption is required to send a certified copy of the decree to the Department of Health, and such decree, with the certified copy of the original birth certificate, is required to be properly indexed and filed by the Department and to be open to inspection only upon request of the adopting parents, the adopted child, or upon order of the court. The Department of Health is then required to

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<sup>36</sup> H.B. 580.

<sup>37</sup> OHIO GEN. CODE, §1261-55 (124 OHIO LAWS 152 §1).

certify to the local health district where the original birth certificate was filed, that the child has been adopted, that the record should be marked to indicate the adoption, and that thereafter no certified copy of the original birth certificate is to be issued except upon request of the Department of Health or of the court decreeing the adoption. Also the same form of birth certificate used in the case of a child born in wedlock is required to be issued by the local Department of Health upon request, using the name of the child by adoption, the names of the adopting parents as the mother and father of the child, together with pertinent information concerning them. Thus, no longer will the birth certificate of adopted children be issued by the State Department of Health and be in a different form from that used in the case of children born in wedlock.

### *Notices*

As has been commented upon above, under the provisions of Section 8004-4 of the Adoption Code, at the time of filing of the petition for adoption or, if the child has entered the home of the petitioner after the filing of the petition, then upon the filing of the supplemental petition, the court is required to cause notice to be given of a hearing set not less than thirty nor more than sixty days thereafter to the guardian, if any, of the person of the child, and to the parents of the child if parents' consent is required. These notices are required to be given as provided in Section 10501-21 of the General Code, which is the standard provision for service of notice for any proceeding in the Probate Court not otherwise provided for by law. In general, such notice may be made by delivery to the person to be served, by leaving the notice at the place of residence of the person to be served, by mailing by registered mail to the usual place of residence if in the United States, if not returned by the postal authorities as undelivered, or by publication once each week for three consecutive weeks in some newspaper in general circulation in the county in the case of persons whose name, usual place of residence or existence is unknown, and cannot be ascertained with reasonable diligence. In the event of notice by publication, the person causing the service to be made is required also to mail a copy to each person named in the publication, directed to his usual place of residence named in the notice, and make proof of such mailing by affidavit.

There are also provisions relating to the service of notice upon persons under disability which provide that for minors over 14, service shall be made upon the minor and also upon his guardian, father, mother, or the person having care of such minor or the person with whom he lives, and in the case of minors under 14 years of age, for service upon the guardian, father, mother, person having care of such minor, or person with whom such minor lives. In the case of adults

under disability, service is required to be made upon the adult and also upon the guardian or custodian.

In addition to the notice required by Section 8004-4 with regard to the first hearing in the matter, the provisions of Section 8004-11 also require notice by registered mail or otherwise, as the court may direct or approve, to the petitioner, next friend, and any other person, organization, or public agency which has consented to the adoption, in the event that the court decides to hold a hearing on the question of revoking an interlocutory order of adoption prior to the entry of a final decree. We do not, however, find in the law any similar provision requiring notice to be given of the intention of the court to make an interlocutory order of adoption final; and presumably this may be done without a hearing of any sort.

While these provisions with regard to notice of adoption proceedings are relatively explicit and would seem to provide adequate safeguards for all involved, it should be noted that even under these provisions, if there has been a commitment of permanent custody by the parents to a certified agency under Section 1352-12 with agreement by them to placement of the child for adoption by the certified agency, no notice of any sort is required to be given to the natural parents.<sup>38</sup> Therefore, other provisions with regard to notice which can affect the validity of adoption proceedings consented to only by a certified agency or other person receiving permanent commitment of a child from the Juvenile Court are to be found in the provisions of Section 1639-24, which provide that before any temporary commitment shall be made permanent, the court shall fix a time and place for hearing and shall cause notice thereof to be served upon the parent or guardian of the child, or published as provided in Section 1639-25. This latter Section expands upon the provisions of the preceding one by stating that services of notices shall be made by delivering a copy to the person notified or by leaving a copy at his usual place of residence, but that if the judge is satisfied that such service is impractical, he may order service by registered mail. This Section also provides generally that when it appears by affidavit that a parent, guardian, or other person having custody of the child, resides or has gone out of the state, or that his or her place of residence is unknown, the Clerk shall cause a citation to be published once in a newspaper in general circulation throughout the county and published in the county, if there be one so published. Copy of this citation is required to be sent by mail to the last known address of the parent, guardian, or other person having custody of the child, unless an affidavit shows that a reasonable effort has been made without success to ascertain such address.

How important it is that these notice provisions be strictly complied with can easily be seen when it is realized that the validity of

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<sup>38</sup> *In re Spinninger*, 26 Ohio Op. 4, 11 Ohio Supp. 60.



the permanent custody commitment may well depend upon their close observance, and if the permanent custody is subject to attack, presumably the consent to adoption given by a public or certified agency or other person having received such custody would likewise be subject to attack, even after the entry of a final decree of adoption. One unsatisfactory provision of Section 1639-24 and 1639-25 with regard to notice would appear to be that no specific mention has been made of the subject of service upon minor parents. This would seem to be particularly important in adoption cases, since in many cases the mothers of children being placed for adoption were minors at the time that they surrendered the children. Several recent cases deal with this entire subject of notice under these provisions of the Juvenile Code.<sup>39</sup>

A recent amendment by the Legislature in the notice provisions under the Adoption Code is the elimination from the consent Section<sup>40</sup> of the requirement that if the mother or the father of the child sought to be adopted is a married person, notice of the adoption proceeding is required to be given to the spouse of such person, even though the the consent of such spouse shall not be required. This provision, first passed in 1945, has been subject to considerable criticism, and its repeal was not generally unwelcome.

### *Inheritance*

While it is not the purpose of this article to deal comprehensively with the questions of inheritance arising out of adoptions, attention is called to a recent radical change in the Ohio law in this respect. Effective August 28, 1951, Section 8004-13 superseded former Section 10512-23, and henceforth in the case of the death of a legally adopted child, the inheritance laws will treat intestate property in exactly the same manner as if the child has been the natural child of the adoptive parents. Up to that time, under repealed Section 10512-23, while the adopted child might inherit from adoptive parents and kin, the adoptive parents and kin did not inherit intestate property from the adopted child. Likewise, under the amended law, an adopted child may no longer inherit property from its natural parents or other natural kin who die intestate, as was formerly the case. Exception is made to these generalizations in the case of a natural parent married to an adopting parent, and in such a case the natural parent retains the same legal relationship to the child as prior to the adoption. Under the amended law, for all purposes under the laws of Ohio, including laws governing inheritance of and succession to real or personal property and the taxation of such inheritance and succession, a legally

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<sup>39</sup> *In re Corey*, 145 Ohio St. 413; 61 N.E. 2d 892; *In re McLean*, 65 Ohio App. 106, 29 N.E. 2d 425; *In re Franz*, 152 Ohio St. 164, 87 N.E. 2d 583; *In re Flickinger*, 40 Ohio Op. 224.

<sup>40</sup> OHIO GEN. CODE, §8004-6.

adopted child has the same rights and status as if born in lawful wedlock to the adopting parents. This new wording would seem to overrule the holding to the contrary in the recent case of *In re Friedman's Estate*,<sup>41</sup> on the matter of succession taxes. The law does, however, retain the exceptions to the effect that an adopted child shall not be capable of inheriting by succeeding to property expressly limited to heirs of the body of the adopting parent or parents. Otherwise, as amended, apparently the law is effective as to any problem of succession arising after its effective date, regardless of the date of the adoption.<sup>42</sup> It should also be noted that nothing in the amended law is intended to prevent a legally adopted child from inheriting under a will the property of its natural parent or parents or other next of kin, and the converse is true, so that an adopted child may will property to its natural parent, or parents, or next of kin should he desire to do so.

An interesting question of conflicts of laws may arise under the provisions of Section 8004-13 as recently enacted with regard to Ohio real estate passing by intestate succession where the decedent is an adopted child residing outside of Ohio in a state having an adoption law which provides for intestate succession from an adopted child to the natural parent. Apparently the descent of intestate property in such a case must be governed by the laws of Ohio<sup>43</sup>

#### CONCLUSION

In conclusion, there is more with which to be satisfied than dissatisfied in the present adoption laws of the state, together with their recent amendments by the Legislature and interpretations and administration by the courts. Certainly there is a very general awareness of the validity of the institution and of the necessity for its further growth and development, although there may still remain much ignorance of details of the law and of the proper guiding principles on the part of the public and of the Bar. As has been indicated, it is believed that there is a great need for further examination and perhaps regulation of the matter of placements for adoption. Great improvement in administration in this field can be expected if the courts, the Legislature, the lawyers, doctors, and social workers will attempt to understand better, not only the principles behind the laws already upon the books, but each other. Perhaps that would be the millennium.

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<sup>41</sup> 154 Ohio St. 1, 93 N.E. 2d 273.

<sup>42</sup> National Bank of Lima v. Hancock, 85 Ohio App. 1, 88 N.E. 2d 67.

<sup>43</sup> Hollencamp v. Greulich, 27 Ohio N.P. (N.S.) 344, motion to certify overruled, 7 Ohio L. Abs. 256; Hollister v. Witherbee, 9 Ohio Op. 37, 24 Ohio L. Abs. 312; Barrett v. Delmore, 143 Ohio St. 203, 54 N.E. 2d 789; For general comments on conflicts of law questions see 73 A.L.R. 964 and 153 A.L.R. 199.