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Adoption--Effect of Informal Adoption in Equity

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RECENT CASE COMMENTS

ADOPTION — EFFECT OF INFORMAL ADOPTION IN EQUITY. — By a written contract between plaintiffs' father and defendant's mother the former agreed to adopt defendant as his own child and give him the "same attention, care, educational, and religious training as if he were his own flesh and blood." Plaintiffs, because the statute of adoption was not followed, sue to determine what interest, if any, defendant has in the property left by the father who died intestate. *Held*: The lower court's decree declaring the defendant "to have status of and to be entitled to the right of a lawful child" in the intestate's property was reversed. *Hatchell v. Norton.*[1]

In the United States adoption exists only by statute,[2] and apparently the general rule is that the statute must be strictly construed and followed.[3] But because of the hardships which may flow from such a rule courts have in some instances liberalized, if not, substantially altered its effect. Substantial compliance is held sufficient.[4] Adoption made under an unconstitutional act is not considered invalid.[5] Where the adoption is evidenced only by a contract with a specific agreement to leave property, or to treat one as an heir,[6] a suit in equity for specific performance is

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[1] 170 S. E. 341 (S. C. 1933).

[2] Morrison v. Sessions Estate, 70 Mich. 297, 38 N. W. 249 (1888); Ross v. Ross, 129 Mass. 243, 262 (1880); Smith v. Allen, 161 N. Y. 478, 55 N. E. 1056 (1900); Ballard v. Ward, 89 Pa. 358 (1879). For a brief study of the history of adoption see Brosnan, *The Law of Adoption* (1916) 22 COL. L. REV. 332.

[3] Appeal of Goshkarian, 110 Conn. 463, 148 Atl. 379, 380 (1930), the court said: "The adoption of a minor child, ... is a procedure, and creates a status, unknown to the common law. Being of purely statutory origin, a legal adoption results if the statutory procedure is followed, but fails if any essential requirement of the statute is not complied with." To the same effect see Helm v. Goin, 227 Ky. 773, 14 S. W. (2d) 183 (1929); *In re* Estate of Williamson, 205 Iowa 772, 218 N. W. 469 (1928); Zimmerman v. Thomas, 152 Md. 263, 136 Atl. 637 (1927); *In re* Nelms, 153 Wash. 242, 279 Pac. 748 (1929).

[4] Rockford v. Bailey, 322 Mo. 1155, 17 S. W. (2d) 941 (1929).

A *nunc pro tunc* judgment is used to cure defects or irregularities in the adopting proceedings. Benton v. King, 199 Ky. 307, 250 S. W. 1002 (1923) (Where everything has been done but entry of final judgment); Ward v. Magness, 75 Ark. 12, 86 S. W. 822 (1905) (Where the record did not show that the child was a resident of the county in which the proceeding was held).

[5] Wright v. Wright, 99 Mich. 170, 58 N. W. 54 (1894); but see Albring v. Ward, 137 Mich. 352, 100 N. W. 609 (1904).

[6] Anderson v. Anderson, 75 Kan. 117, 88 Pac. 743 (1907); Burns v. Smith, 21 Mont. 251, 53 Pac. 742 (1898); Sharkey v. McDermott, 91 Mo. 647, 4 S. W. 107 (1887); Jordan v. Abney, 97 Tex. 296, 78 S. W. 486 (1904).

allowed; but such a right is based on contract law distinct from any status created.[7] And even where the contract speaks only of adoption it is held that an implied promise of inheritance may be shown and enforced in equity.[8]

It is obvious that no legal adoption exists,[9] and the plain intent is merely to get around the statute. Most courts simply take the conclusion as granted; some, however, attempt an explanation. It is said that adoption, being recoginzed by statute, is no longer unlawful and contrary to public policy as at common law, and that if an express promise of inheritance is enforceable, it necessarily results that an implied promise, assumed from the acts and intention of the parties, can also be enforced.[10] It is true that the legal remedy is inadequate but the notion of an implied promise to make the child an heir is not entirely acceptable. We can fairly imply no more than a promise to make the child an heir in a particular way, — by legal adoption. A contract to adopt is not specifically enforceable in the life time of the adopting parent[11] and legal adoption is impossible where the promisor is dead or after the party to be adopted has come of age. An implied promise, based on conduct and intention, moreover, could be easily shown in practically every case. It is undesirable to have

[7] "But, over and beyond this consideration, the cases were not turned upon a contract to adopt, for, in the final analysis, specific performance was decreed upon the ground that the child had rendered services under a contract the consideration for which was the bequeathing of the property of the other contracting party." Wall v. Estate of McEnnery, 105 Wash. 445, 453, 178 Pac. 631 (1919).

[8] Carlin v. Bacon, 322 Mo. 435, 16 S. W. (2d) 46 (1929); Hickox v. Johnston, 113 Kan. 99, 213 Pac. 1060 (1923); Roberts v. Roberts, 223 Fed. 775 (C. C. A. 8th, 1915); Crawford v. Wilson, 139 Ga. 654, 78 S. E. 30 (1913). See Note (1928) 13 IOWA L. REV. 84.

Some courts have gone so far to hold that the right to inherit flows as an incident of the contract, as in Thomas v. Maloney, 142 Mo. App. 193, 126 S. W. 522, 524 (1910), where the court said; ". . . . a contract to adopt carries the incidental right of heirship which, as in the case of a natural child, may be cut off only by the will of the adoptive parent in which the adopted child is mentioned."

[9] In Hickox v. Johnston, *supra* n. 8, at 102, the court said: "The claim of plaintiff cannot be sustained, of course, on the ground of a legal adoption, since it was not proven that the necessary legal steps were taken . . . ; but while plaintiff cannot claim a right of inheritance under such a relation, she is entitled to have an established contract for an adoption and the rights of a child enforced against the estate of the foster parents."

[10] See Crawford v. Wilson, *supra* n. 8.

[11] Most of the cases present the situation where the child is suing for property after the death of the foster parent, but in Erlanger v. Erlanger, 102 Misc. Rep. 236, 168 N. Y. Supp. 928 (1917), there was a suit for specific performance against the promisor in his life time, and it was squarely decided that the suit would not lie. It is common learning that equity is very reluctant to enforce contracts between parties in a fiduciary relationship.

an indefinite rule, based on varying facts and circumstances, which would impair the certainty and security of land titles.[12]

Finally, social interest in family relations dictates a strict adherence to the statute. One of the essential purposes of adoption laws is the protection of the child's welfare in securing a proper home, suitable environment, and responsible parents.[13] It is submitted that equity, especially, has been too free to exercise a dispensing power in the teeth of an express statute such as the Statute of Frauds.[14] It is submitted that the decision in the principal case is sound.

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ATTORNEY AND CLIENT — MISDEMEANOR OF WITHHOLDING CLIENT'S FUNDS — DISBARMENT. — In a civil action by notice of motion to recover money wrongfully withheld by an attorney, a verdict was returned for the plaintiff. The trial court upon its own motion ordered and adjudged that the defendant be deemed guilty of a misdemeanor and fined, and further ordered that the defendant be disbarred, to which the defendant brings error.

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[12] See Carroll's Estate, 219 Pa. 440, 446, 68 Atl. 1038 (1908), where it was said: "The personal attitude of the inmates of a family towards an adopted child, as regards the family relation, is a matter entirely for the parties. But the matter of inheritance is entirely under the regulation of the law. The right to take property by devise or descent is the creation of the law, and not a natural right."

[13] The West Virginia statute, W. VA. REV. CODE (1931), c. 48, art. 4, §§ 1-6, provides that it shall be necessary that a discreet and suitable person be appointed to act as next friend of the child sought to be adopted, and that he shall satisfy the court that the child's welfare would be promoted by the adoption.

Apparently no case has come before the West Virginia Supreme Court of Appeals, but the court has referred to the statute. In Riley v. Riley, 38 W. Va. 283, 287, 18 S. E. 569 (1893), there was an action for work and labor by a nephew who has made his home with an uncle but never legally adopted, and the court said: "he could have adopted his nephew, in which case he (nephew) . . . . would have been invested with every legal right, privilege, obligation and relation in respect to education, maintenance and the right of inheritance in the estate of the adopting parent . . . ." See also Burdette v. Insurance Co., 80 W. Va. 384, 93 S. E. 366 (1917).

[14] In most of the states the adoption laws apply only to a child or minor but in some the adoption of adults is provided for, as for instance in New York, N. Y. DOM. REL. LAW, art. 7, § 110. It is suggested that such provisions are inimical to the public interest. The West Virginia statute refers only to minors, however, it might be advisable to make an exception in behalf of a person taken into the family when a child and continuously a member of the household but never legally adopted. This sort of a provision would eliminate many of the hardship cases.