Nova Law Review

Volume 35, *Issue* 2 2011 *Article* 11

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VIRTUAL ADOPTION: THE INEQUITIES OF THE EQUITABLE DOCTRINE

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I. INTRODUCTION

American society has long recognized the importance and value of an individual's right to acquire, control, and transfer private property.[1] As a general rule, an individual not only has the ultimate control over such property with regard to gifts made during the person's lifetime, but also in the case of disposition of the individual's property upon his or her death.[2]

When a person dies, there are generally three ways with which to distribute the decedent's remaining personal property.[3] First, the decedent can die testate, that is, with a will.[4] When a person dies testate, he or she is free to devise property to, or disinherit, whomever he or she sees fit, without being bound by stringent rules mandating who can, and who cannot, inherit from the decedent.[5] This testamentary freedom allows the decedent to determine exactly who the intended beneficiaries of his or her will should be, including individuals or classes of people who are not related to the decedent by marriage, blood, or otherwise.[6] Second, the decedent can die with a will substitute, such as a revocable inter vivos trust, or life insurance.[7] Lastly, the decedent can die intestate, that is, without a valid will.[8] When a decedent dies intestate, there is neither a testamentary inheritance nor disinheritance, so it is difficult to ascertain the proper method of distributing his or her property.[9] As a result, an intestate decedent's property will be distributed according to the governing state's intestacy statutes.[10]

Intestacy statutes may vary from state to state, but as a general rule, intestacy statutes attempt to fill the intent gap and distribute property "in accordance with the probable intent of the average intestate decedent."[11] Thus,

1. Lee-ford Tritt, *Sperms and Estates: An Unadulterated Functionally Based Approach to Parent-Child Property Succession*, 62 SMU L. REV. 367, 374–75 (2009).
2. *Id.*
3. *Id.* at 375.
4. BLACK'S LAW DICTIONARY 706 (9th ed. 2009).
5. Michael J. Higdon, *When Informal Adoption Meets Intestate Succession: The Cultural Myopia of the Equitable Adoption Doctrine*, 43 WAKE FOREST L. REV. 223, 253 (2008). A testator is a person who dies leaving a will. BLACK'S LAW DICTIONARY 1268 (9th ed. 2009).
6. *See* Tritt, *supra* note 1, at 374.
7. *Id.* at 375. An inter vivos trust is "[a] trust that is created and takes effect during the settlor's lifetime." BLACK'S LAW DICTIONARY 1301 (9th ed. 2009).
8. BLACK'S LAW DICTIONARY 706 (9th ed. 2009).
9. Sanderson v. Bathrick (*In re* Estate of Seader), 76 P.3d 1236, 1245 (Wyo. 2003).
10. Higdon, *supra* note 5, at 253.
11. Tritt, *supra* note 1, at 380.

most intestacy statutes provide a default distributive scheme that decedents would be likely to follow if they had provided for the distribution of their own estates.[12] Typically, such statutes distribute the decedent's property first to the decedent's surviving spouse, and then to the decedent's surviving children, if any, and then to more remote descendants.[13] That being said, because intestate succession is primarily a creation of statutory law, it is important to recognize the difference in treatment between persons authorized to inherit under the laws of intestate succession and those who are not recognized whatsoever.

Generally, intestacy statutes are explicit in providing children with the right to inherit from an intestate parent.[14] What is not clear, however, is the meaning of "child" according to the statutory language and the bounds of the parent-child relationship necessary to establish the right to intestate succession. For example, while "child" is generally understood to refer to the "natural relationship based upon biological reproduction," a child could also be someone who was legally adopted by the decedent[15] or even someone who was not legally adopted by the decedent, but nonetheless maintained a parent-child relationship with the decedent.[16] Accordingly, differentiating between the proper meaning of "child" within intestacy statutes will always be the determining factor in deciding whether a child is entitled to a share of an intestate decedent's estate.

A biological child will always be entitled to inherit from an intestate decedent, as will a child who was formally legally adopted by the decedent.[17] As to the third scenario, however, in which the child was cared for, supported by, and educated by the decedent, and maintained a parent-child relationship with the decedent, it is unclear whether the child will be entitled to inherit from the intestate decedent when no formal adoption proceedings have been completed. Such is the case in a virtual adoption.

A virtual adoption occurs when a child was supposed to be legally adopted but his or her adoptive parents failed to satisfy the legal requirements of a formal adoption.[18] It is an equitable doctrine which generally arises when the would-be adoptive parent dies intestate, and it operates to

12. *Id.* at 380–81.
13. *Id.* at 381.
14. *See* FLA. STAT. § 732.103(1) (2010).
15. Tritt, *supra* note 1, at 381.
16. *E.g.*, Johnson v. Johnson, 617 N.W.2d 97, 107 (N.D. 2000).
17. *See* FLA. STAT. §§ 732.102(1), .108(1).
18. *E.g.*, Miller v. Paczier, 591 So. 2d 321, 322 (Fla. 3d Dist. Ct. App. 1991) (per curiam). Virtual adoption is also sometimes called "equitable adoption," "adoption by estoppel," or "de facto adoption." McGarvey v. State, 533 A.2d 690, 690 (Md. 1987).

allow the virtually adopted child to inherit from the intestate decedent.[19] Thus, while the Uniform Probate Code is the ultimate authority on inheritance in the case of an intestacy proceeding, virtual adoption is the well-recognized exception to the statutory scheme.[20] Be that as it may, the enforcement of the doctrine of virtual adoption has yet to be applied consistently throughout the courts in this country.[21]

Employing principles of equity and public policy, probate courts have come to recognize the necessity, legitimacy, and application of virtual adoption in intestacy proceedings.[22] However, with the steady increase in the divorce rate[23] and the rapid changes in "traditional" family life,[24] the doctrine is quickly spreading to other areas of law and is no longer limited to probate matters.[25] Nonetheless, there remain inconsistencies in its application and the appropriate circumstances in which courts can invoke the doctrine to provide relief for virtually adopted children.[26] As a result, virtual adoption should no longer be looked at under limited, narrow circumstances, but should instead be broadened to prevent unfair results for virtually adopted children, just as the doctrine was intended to do.

This article will discuss the equitable doctrine of virtual adoption and the need for, and implications of, expanding the doctrine outside of probate

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19. *E.g.*, *Miller*, 591 So. 2d at 322.

20. *See Johnson*, 617 N.W.2d at 111.

21. *See generally* Tarver v. Evergreen Sod Farms, Inc., 533 So. 2d 765 (Fla. 1988) (holding that a virtual adoption is not sufficient where the decedent is killed in an industrial accident and the virtually adopted child seeks compensation under the Workers' Compensation Act); Grant v. Sedco Corp., 364 So. 2d 774 (Fla. 2d Dist. Ct. App. 1978) (holding that virtual adoption does not apply to a minor child, who is neither the biological child nor legally adopted child of the decedent, in the case of wrongful death). *But see Johnson*, 617 N.W.2d at 111 (holding that virtual adoption does apply to child support obligations).

22. *See generally* Calista Corp. v. Mann, 564 P.2d 53 (Alaska 1977).

23. U.S. DEP'T OF COMMERCE, U.S. CENSUS BUREAU, ADOPTED CHILDREN AND STEPCHILDREN: 2000, 14 (2003), *available at* http://www.census.gov/prod/2003pubs/censr-6.pdf.

24. Rebecca C. Bell, Comment, *Virtual Adoption: The Difficulty of Creating an Exception to the Statutory Scheme*, 29 STETSON L. REV. 415, 418 (1999).

25. *See Johnson*, 617 N.W.2d at 108 (holding that public policy protects the welfare and best interests of children, and that "child support guidelines do not preclude the imposition of a child support obligation on one who has equitably adopted a child"). The court held:

> Applying the doctrine of equitable adoption to impose a child support obligation, when the circumstances of the case require it, fully comports with this public policy. . . . [N]othing in the law of [North Dakota] bars application of the doctrine in the context of a child support obligation. First, the existence of statutory adoption procedures does not forbid the proposed application of the doctrine. . . . Rather, our adoption statutes and the doctrine of equitable adoption coexist, operating side by side to promote the best interests of the child.

Id. at 105.

26. *See Tarver*, 533 So. 2d at 765. *But see Johnson*, 617 N.W.2d at 97.

court. The first section will outline the evolution from formal legal adoptions to the equitable virtual adoption, as well as highlighting the differences in the rights and responsibilities of the respective parties. The second section of the article will begin by discussing the history and reasoning behind the doctrine, including the two theories upon which virtual adoption is based. The third section will analyze each of the theories through a discussion of the application of virtual adoption in other United States jurisdictions, with careful attention to the specific facts of each case in which the doctrine was invoked or struck down. The fourth section will analyze virtual adoption through a discussion of the application of the doctrine in Florida, specifically focusing on the differences between Florida and the aforementioned jurisdictions. The fifth section will discuss the major flaws in the application of virtual adoption thus far and why virtual adoption is not just a probate issue anymore. Throughout this article's entirety, it should become clear why the doctrine should be expanded to areas of the law outside of probate court, should be recognized by state legislatures, and should be given more weight in today's society in order to afford virtually adopted children the protection and justice they deserve.

II. ADOPTION: FROM LEGAL ADOPTION TO VIRTUAL ADOPTION

More than 2.1 million adopted children live in the United States.[27] According to the 2000 U.S. Census Bureau, more than 100,000 adopted children live in Florida alone.[28] With such a vast number of children being adopted yearly, it is no surprise that the legal rights of adopted children have become exceedingly uncertain.[29]

Adoption is purely statutory in origin, as it was not recognized at common law.[30] Being purely statutory, the state has a "compelling interest" in finding stable, permanent homes for adoptive children.[31] Moreover, courts consider the adoptive child's best interest to be of utmost importance with regard to specific findings in adoption proceedings.[32] Thus, the statutes

27. U.S. DEP'T OF COMMERCE, *supra* note 23, at 1.

28. *Id.* at 4.

29. *See, e.g.*, Tarver, 533 So. 2d at 767 (holding that virtual adoption would not warrant relief in a worker's compensation proceeding). *But see Johnson*, 617 N.W.2d at 105 (holding that virtual adoption would warrant relief in a divorce proceeding, obliging the adoptive father to continue paying child support).

30. *E.g.*, Samek v. Sanders, 788 So. 2d 872, 875 (Alaska 2000).

31. FLA. STAT. § 63.022(1)(a) (2009).

32. *Id.* § 63.022(2).

which govern adoption are designed to ensure certainty[33] and to protect adoptive children from being adopted by "unsuitable persons."[34]

Adoption is defined as the "establishment or creation of a legal relationship of parent and child between persons who were not so related by nature or law."[35] When a child has been legally adopted, the child's relationship with his or her natural parents is deemed terminated, and the child becomes the legal equivalent of the biological child of his or her adoptive parents.[36] As such, the adoptive child is also entitled to the legal rights otherwise conferred upon biological children, including acquiring the status of being the adoptive parent's "legal heir."[37] Thus, the adopted child has all the rights and responsibilities that a biological child would have, as an adopted child and biological child are often regarded as one in the same. It therefore follows that the adopted child is entitled under the statutes of intestate succession to the property of his or her adoptive parents.[38] Thus, in theory and in practice, the adopted child is considered both a descendant of the adopting parent and one of the natural kindred of the adopting parent's family.[39]

Although adoption has become more commonplace in today's society than in decades past, the necessary steps to "legally" adopt a child have become more extensive and demanding. The dynamic of the "typical" American family is rapidly evolving as well.[40] Many Americans have differing views of what an "adoptive" or "step" parent-child relationship entails, as well as differing views on whether a formal adoption is deemed acceptable within a particular cultural group.[41] As a result, virtual adoptions are "more common among some cultural groups than others, as people differ widely in the way they view family relationships and the process of adoption."[42]

Virtual adoption is an equitable remedy that is most often invoked to protect someone "who was supposed to have been adopted as a child" but who was not legally adopted because his or her parents failed to complete the

33. Sanderson v. Bathrick (*In re* Estate of Seader), 76 P.3d 1236, 1248 (Wyo. 2003).

34. Otero v. City of Albuquerque, 965 P.2d 354, 360 (N.M. Ct. App. 1998).

35. *In re Estate of Seader*, 76 P.3d at 1239. Similarly, Florida defines adoption as "the act of creating the legal relationship between parent and child where it did not exist." FLA. STAT. § 63.032(2) (2010).

36. *See In re Estate of Seader*, 76 P.3d at 1239.

37. *Id.*

38. FLA. STAT. § 731.201(20). Property is defined as "both real and personal property or any interest in it and anything that may be the subject of ownership." *Id.* § 731.201(32).

39. *Id.* § 732.108(1).

40. *See* Bell, *supra* note 24, at 418 ("The issues involved in virtual adoption become increasingly complex as family structures evolve to encompass relationships forming from divorce, remarriage, and extended households . . . .").

41. U.S. DEP'T OF COMMERCE, *supra* note 23, at 2.

42. *Id.*

steps necessary to establish a formal adoption.[43] The doctrine was not created as a means to supplement the legal relationship between a parent and child.[44] Nor does the application of the doctrine change the status of a virtually adopted child to that of a legally adopted child.[45] Instead, the primary function of virtual adoption is limited to allow a virtually adopted child to inherit from an adoptive parent who dies intestate.[46] Courts reason that when an adoptive parent dies without a will, "there was neither a testamentary inheritance nor a testamentary disinheritance."[47] Accordingly, courts view the doctrine as the appropriate means with which to fill the "intent 'gap' by allowing the child to inherit as if he or she had been adopted."[48] Further, although the majority of states recognize virtual adoption, the doctrine remains narrowly tailored[49] and is often invoked exclusively in courts of equity in order to prevent "inequitable and unjust" results stemming from intestacy statutes.[50]

In its most basic form, virtual adoption can be established when a decedent has expressly agreed to adopt a child, there was reliance on the agreement by the child or the child's natural parents, and the decedent treated the child as his or her own.[51] Thus, when an intestate decedent's intent to raise the child was unambiguous, a court of equity would invoke the doctrine of virtual adoption so as to carry out the intent of the decedent to adopt and provide for the child.[52]

Where a decedent's intent is ambiguous, however, courts face difficult challenges in invoking the doctrine.[53] As a result, a fundamental prerequisite of virtual adoption is that there is some type of agreement between the natural and adoptive parents, be it oral or written.[54] When an express agreement has been made and relied upon, a court is more likely to treat a child as though he or she was virtually adopted, thus allowing the child to inherit

43. Sanderson v. Bathrick (*In re* Estate of Seader), 76 P.3d 1236, 1240 (Wyo. 2003).

44. *See* Williams v. Dorrell, 714 So. 2d 574, 575 (Fla. 3d Dist. Ct. App. 1998).

45. Kelley v. Flagship Nat'l Bank of Boynton Beach (*In re* Estate of Wall), 502 So. 2d 531, 532 (Fla. 4th Dist. Ct. App. 1987).

46. *In re Estate of Seader*, 76 P.3d at 1240.

47. *Id.* at 1245.

48. *Id.*

49. *See id.* at 1241.

50. Bd. of Educ. v. Browning, 635 A.2d 373, 377 (Md. 1994).

51. *E.g.*, Kelley v. Flagship Nat'l Bank of Boynton Beach (*In re* Estate of Wall), 502 So. 2d 531, 531 (Fla. 4th Dist. Ct. App. 1987).

52. *E.g.*, Lankford v. Wright, 489 S.E.2d 604, 606 (N.C. 1997).

53. Bean v. Ford (Estate of Ford), 82 P.3d 747, 753 (Cal. 2004).

54. Bell, *supra* note 24, at 419; *Estate of Ford*, 82 P.3d at 754; Johnson v. Johnson, 617 N.W.2d 97, 108 (N.D. 2000).

from the decedent's estate.[55] However, while an agreement is necessary to establish virtual adoption, it is not sufficient.[56] Courts weigh several factors in order to determine if a virtual adoption has taken place.[57]

To establish virtual adoption, a court of equity will employ one of two theories.[58] Under the contract theory, a court will order specific performance of an agreement to adopt when the child can prove that there has been reliance on the agreement to adopt and partial performance by the decedent in parenting the adoptive child.[59] Under the estoppel theory, the decedent's estate will be precluded from denying that a child was adopted, effectively prohibiting the party from preventing the child from inheriting under intestacy statutes.[60] Whichever theory a court applies, however, the authorities concur that the application of the doctrine of virtual adoption will invariably produce the same results.[61]

A. *Specific Performance of an Agreement to Adopt: The Contract Theory*

When a court grants equitable relief to a child based on the contract theory, the court is merely enforcing an agreement to adopt between a child's natural and adoptive parents.[62] The object is that when an adoptive parent acts as a promisor who agrees to raise and legally adopt a child, and there has been part performance by the parties, courts will order specific performance of the prior agreement to adopt.[63]

By its definition, specific performance calls for "[t]he rendering, as nearly as practicable, of a promised performance through a judgment or decree."[64] Thus, when a court orders specific performance of an agreement to adopt, it appears as though the court is ordering an adoptive parent to complete the necessary steps to legally adopt the child.[65] However, because a claim of virtual adoption does not come to fruition until *after* an adoptive parent has died intestate, requiring the decedent to complete a formal adop-

55. *E.g.*, *Browning*, 635 A.2d at 376–77.

56. *See, e.g.*, Poole v. Burnett (*In re* Heirs of Hodge), 470 So. 2d 740, 741 (Fla. 5th Dist. Ct. App. 1985).

57. *E.g.*, *id.*

58. *E.g.*, *Browning*, 635 A.2d at 377.

59. *See* Habecker v. Young, 474 F.2d 1229, 1230 (5th Cir. 1973).

60. Sanderson v. Bathrick (*In re* Estate of Seader), 76 P.3d 1236, 1240 (Wyo. 2003).

61. *Browning*, 635 A.2d at 377.

62. Lindsay Ayn Warner, Note, *Bending the Bow of Equity: Three Ways Florida Can Improve Its Equitable Adoption Policy*, 38 STETSON L. REV. 577, 589 (2009).

63. *Id.*

64. BLACK'S LAW DICTIONARY 1200 (9th ed. 2009).

65. Bell, *supra* note 24, at 425.

tion is impossible.[66] As a result, virtual adoption cases that rely on the contract theory often enforce specific performance based on the parties' part performance of the agreement to adopt.[67] Thus, although problems often arise when a court orders specific performance, the ultimate goal of the contract theory is to alleviate these problems and provide justice and equity for the child.[68]

The contract theory is founded on the idea that because adoptive parents have entered into an oral or written contract to adopt the child, granting a claim of virtual adoption is best achieved through specific performance.[69] However, while the majority of states recognize virtual adoption, the standards of proof are vague, and the requirements differ between the jurisdictions which have invoked the doctrine.[70] Nonetheless, although these elements may vary slightly across state lines,[71] courts in every jurisdiction have consistently held that in order to enforce specific performance of a contract, the claimant must first establish an express agreement to adopt.[72]

In *Poole v. Burnett (In re Heirs of Hodge)*,[73] Florida's Fifth District Court of Appeal held that a claim of virtual adoption would grant a child an enforceable contract right, pursuant to the satisfaction of five elements.[74] The court determined that the five elements required to establish virtual adoption include:

> 1. an agreement between the natural and adoptive parents;
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> 2. performance by the natural parents of the child in giving up custody;
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> 3. performance by the child by living in the home of the adoptive parents;

66. *Id.*
67. *See id.*
68. *See id.*
69. James R. Robinson, Comment, *Untangling the "Loose Threads": Equitable Adoption, Equitable Legitimation, and Inheritance in Extralegal Family Arrangements*, 48 EMORY L.J. 943, 956 (1999).
70. Bell, *supra* note 24, at 418.
71. *Id.*
72. *Id.* at 425. A rule calling for the analysis of the parties' overall relationship would be vague and subjective. Bean v. Ford (Estate of Ford) 82 P.3d 747, 753 (Cal. 2004). Instead, courts look to the "particular expressions of intent to adopt," *id.*, and generally require the existence of the parties' "mutual intent to create a legal relationship." Johnson v. Johnson, 617 N.W.2d 97, 108 (N.D. 2000).
73. 470 So. 2d 740 (Fla. 5th Dist. Ct. App. 1985).
74. *Id.* at 741.

> 4. partial performance by the foster parents in taking the child into the home and treating the child as their child; and
>
> 5. intestacy of the foster parents.[75]

"Sufficient evidence" was the governing standard to prove an agreement to adopt,[76] but the majority of courts now require that the claimant prove the aforementioned elements by "clear and convincing evidence."[77] However, because virtual adoption is meant to carry out the decedent's intent to adopt a child, a mutually affectionate relationship, absent any *direct* agreement to adopt the child, is inherently insufficient to determine the decedent's intent.[78] Thus, courts generally permit the decedent's intent to enter into a contract and adopt the claimant to be shown by a bevy of expressions, including:

> [P]roof of an unperformed express agreement or promise to adopt . . . other acts or statements directly showing that the decedent intended the child to be, or to be treated as, a legally adopted child . . . the decedent's statement of his or her intent to adopt the child, or the decedent's representation to the claimant or to the community at large that the claimant was the decedent's natural or legally adopted child.[79]

In determining whether there is evidence of an agreement to adopt, be it direct or indirect, courts look at the parties' objective manifestations, reasoning that the secret intentions of the parties are irrelevant.[80] Further, while an agreement is necessary to create and enforce a contract, contracts also require consideration to be valid and binding.[81] That being said, however, consideration is difficult to ascertain in a claim for virtual adoption:[82]

> [T]he status of the child is unclear. Is the child a third-party beneficiary of the contract, or is the child a party to the agreement? . . . [T]he notion that the child is a third-party beneficiary of the con-

75. *Id.*
76. *Id.*
77. Douglas v. Frazier (*In re* Estate of Musil), 965 So. 2d 1157, 1160 (Fla. 2d Dist. Ct. App. 2007); Williams v. Estate of Pender, 738 So. 2d 453, 456 (Fla. 1st Dist. Ct. App. 1999); Wheeling Dollar Sav. & Trust Co. v. Singer, 250 S.E.2d 369, 374 (W. Va. 1978).
78. Bean v. Ford (Estate of Ford), 82 P.3d 747, 753 (Cal. 2004).
79. *Id.* at 754.
80. Johnson v. Johnson, 617 N.W.2d 97, 108 (N.D. 2000); *Estate of Ford*, 82 P.3d at 754.
81. *Johnson*, 617 N.W.2d at 101.
82. Robinson, *supra* note 69, at 956.

> tract is belied by the fact that he or she provides part of the "consideration" that makes the contract enforceable, that is, living with the equitably adoptive parents as their child.[83]

For this reason, upon proof of an unambiguous agreement, courts will then look at the parties' performance of the contract in order to determine whether it should be enforced in equity.[84] Thus, where an unambiguous contract is proven, both to adopt the child and to allow the child to inherit,[85] and the contract is supported by valid and adequate consideration, the contract will be enforced and the child will be treated as though he or she were legally adopted for certain limited purposes.[86]

B. *Detrimental Reliance on an Agreement to Adopt: The Estoppel Theory*

Like the contract theory, virtual adoption based on the estoppel theory is also an equitable remedy that grants relief to the claimant when a statutory adoption is incomplete, notwithstanding a prior agreement to adopt.[87] Also like the contract theory, some proof of an agreement to adopt is required.[88] However, unlike the contract theory, the estoppel theory rests on the notion that a court will uphold a child's adoptive status when the child and the decedent maintained "a relationship consistent with that of [a biological] parent and child."[89] Thus, when the claimant can prove "1) an agreement to adopt, 2) performance by the child, and 3) the child's reliance on the agreement or belief in [his or her] adoptive status," then the claimant will be entitled to equitable relief based on adoption by estoppel.[90]

With the estoppel theory, what you see is what you get: as the name implies, the theory places less emphasis on specific, delineated requirements, and instead focuses on equity and justice.[91] Therefore, when a child has relied upon representations by the decedent as to the child's adoptive status, the estoppel theory will grant the child the right to inherit from the dece-

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83. *Id.*
84. *See, e.g.*, *Johnson*, 617 N.W.2d at 101.
85. Samek v. Sanders, 788 So. 2d 872, 875 (Alaska 2000).
86. *Johnson*, 617 N.W.2d at 101.
87. *See, e.g.*, Luna v. Estate of Rodriguez, 906 S.W.2d 576, 579 (Tex. App. 1995).
88. *Id.*
89. *Id.* at 580 (citing Cavanaugh v. Davis, 235 S.W.2d 972, 974 (Tex. 1951) (emphasis omitted)).
90. *Id.* at 579 (citing Defoeldvar v. Defoeldvar 666 S.W.2d 668, 671 (Tex. App. 1984) (emphasis omitted)).
91. Bell, *supra* note 24, at 425–26.

dent's estate, despite the child's adoptive status.[92] In *Calista Corp. v. Mann*,[93] the court held:

> Where one takes a child into his home as his own, thereby voluntarily assuming the status of parent, and by reason thereof obtains from the child the love, affection, companionship, and services which ordinarily accrue to a parent, he is thereafter estopped to assert that he did not adopt the child in the manner provided by law . . . .[94]

Equity rests on the notion that "equity regards as done what ought to have been done."[95] In granting relief under the estoppel theory, courts generally focus on the nature of the relationship between the decedent and the child.[96] When the statements, admissions, and conduct of the decedent are such that they provide ample proof of an agreement to adopt, it is within the court's discretion to infer such an agreement from that evidence.[97] Thus, while a court *may* insist on proof of an express agreement to adopt, it is not necessary because "equity [will nonetheless] estop[] the foster parent and his privies from denying the relationship they represented to the child."[98] Therefore, with or without an express agreement to adopt, where the parties acted in good faith under the impression that the child was adopted, the decedent's estate will be estopped from preventing the child from inheriting from the intestate decedent.[99]

92. *See, e.g., id.* at 426 ("Reliance provides the grounds for promissory estoppel, which is applied as an equitable remedy when justice requires.").

93. 564 P.2d 53 (Alaska 1977).

94. *Id.* at 61 (quoting Mize v. Sims, 516 S.W.2d 561, 564 (Mo. Ct. App. 1974)).

95. Bell, *supra* note 24, at 425–26.

96. *E.g., id.* at 426.

97. *Calista Corp.*, 564 P.2d at 61.

98. Jan Ellen Rein, *Relatives by Blood, Adoption, and Association: Who Should Get What and Why (The Impact of Adoptions, Adult Adoptions, and Equitable Adoptions on Intestate Succession and Class Gifts)*, 37 VAND. L. REV. 711, 775 (1984).

99. *See id. But see* Otero v. City of Albuquerque, 965 P.2d 354, 361 (N.M. Ct. App. 1998) ("[T]he equitably adopted child should not be treated as the legal child of the equitable parent for all purposes. Only one who has detrimentally relied can claim an estoppel, and only one who has caused the reliance can be estopped.") (citations omitted).

III. OTHER STATES AND VIRTUAL ADOPTION

The majority of states will grant equitable relief for a virtually adopted child in one form or another.[100] Of at least thirty-eight jurisdictions that have considered the doctrine, no less than twenty-seven have recognized and upheld a claim of virtual adoption in intestate proceedings.[101] However, although the doctrine is generally invoked in limited circumstances, several courts have broadened the doctrine and applied it in unique situations in order to avoid the unjust results of strict adherence to the law.[102] Likewise, a handful of jurisdictions have upheld claims of virtual adoption in legal proceedings outside the realm of probate court.[103]

A. *Uniquely Divergent Cultures Necessitate Virtual Adoption:* Calista Corp. v. Mann

In 1977, the Supreme Court of Alaska held that the doctrine of virtual adoption is an appropriate remedy in intestate proceedings.[104] In *Calista Corp.*, a case of first impression in Alaska, the claimants were the adoptive daughters of shareholders of Calista Corp., and each sought the shares of the corporation that they claimed to be entitled to under the Alaskan laws of intestate succession.[105] In order to inherit through the intestacy statutes, Alaska required that the claimants qualified as "issue" of the decedents, meaning "lineal descendants of all generations, with the relationship of parent and child at each generation."[106] However, neither of the claimants were the biological children of the decedents; instead, the girls claimed that they were "culturally" or "traditionally" adopted by the deceased shareholders.[107]

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100. Sanderson v. Bathrick (*In re* Estate of Seader), 76 P.3d 1236, 1241 (Wyo. 2003) (stating that "[t]he majority of states recognize equitable adoption").

101. Lankford v. Wright, 489 S.E.2d 604, 606 (N.C. 1997).

102. *See, e.g.*, *Calista Corp.*, 564 P.2d at 61 (holding that the unique cultural mosaic of the Alaskan community justified the recognition of a virtual adoption claim); Luna v. Estate of Rodriguez, 906 S.W.2d 576, 579 (Tex. App. 1995) (applying a less stringent standard with which to find that the claimant was the virtually adopted son of the decedent).

103. *See, e.g.*, Johnson v. Johnson, 617 N.W.2d 97, 104 (N.D. 2000) (holding that virtual adoption applies to child support obligations).

104. *Calista Corp.*, 564 P.2d at 61.

105. *Id.* at 54–55. In *Calista Corp.*, there were two claimants: Katie Mann, who was seeking shares of Calista Corporation and Sea Lion Corporation stock, and Catherine Peters, who was seeking shares of Calista Corporation and Bethel Native Corporation stock. *Id.* at 55.

106. *Id.* at 59 (emphasis omitted).

107. *Id.*

The appellant took the position that adoption, unknown at common law, is purely statutory and that it must be "affirmatively proved by the person claiming its existence."[108] The appellant argued that the laws of Alaska "provide[d] the exclusive method for adoption" and, therefore, that the claimants were not the children of the decedents for purposes of intestate property distribution.[109] Despite this argument, however, the appellant's reasoning was flawed because he ignored the holdings from the twenty-six states that had recognized virtual adoption and instead relied on the decisions from the eight states that refused to recognize the doctrine.[110]

Nonetheless, the court agreed with the claimants and held that equity would be employed to avoid hardship to the child of an intestate decedent, even if there was no valid legal adoption.[111] The court analyzed the diversity of cultures in Alaska and reasoned that the "cultural mosaic" of the Alaskan community made it difficult to achieve "a unified justice system sensitive to the needs of the various cultures."[112] Accordingly, the court held that the unique makeup of the native Alaskan community called for the implementation of the doctrine of virtual adoption in order to avoid unjust and intolerable results to the adoptive children of intestate decedents.[113]

B. *Adoption by Estoppel at Work:* Luna v. Estate of Rodriguez

In *Luna v. Estate of Rodriguez*,[114] the appellate court in Texas held that equity requires a decree of adoption by estoppel when there is convincing evidence of the necessary elements to establish a cause of action for a virtual adoption by estoppel.[115] In *Luna*, Christopher Luna, the claimant, was the biological son of Mary Helen Luna and the alleged adoptive son of the decedent, Henry Rodriquez.[116] When the decedent died intestate, Christopher attempted to determine his heirship, alleging his status to be that of the dece-

108. *Calista Corp.*, 564 P.2d at 60 (quoting *In re* Bradley, 6 Alaska 89, 91 (1918)).
109. *Id.* at 59–60.
110. *See id.* at 60.
111. *See id.* at 61–62.
112. *Id.* at 61.
113. *Calista Corp.*, 564 P.2d at 61–62.
114. 906 S.W.2d 576 (Tex. App. 1995).
115. *Id.* at 581.
116. *Id.* at 578. Mary Helen had been awarded custody of Christopher when she divorced Christopher's biological father, Alfred Luna. *Id.* Although Alfred's parental rights were never terminated, Christopher alleged that he had a distant relationship with his biological father and that his natural father had abandoned him. *Id.* Christopher also claimed that he was "reared, cared for, and clothed" by the decedent, that he referred to the decedent as "dad," and that he was known in the community as the decedent's son. *Luna*, 906 S.W.2d at 578.

dent's equitably adopted son.[117] However, when Christopher filed his application for declaration of heirship, he was met with opposition from the decedent's brother and second wife.[118] The trial court agreed with the defendants, holding that Christopher failed to allege certain required elements of virtual adoption, but the court of appeals ultimately reversed that decision.[119]

To establish adoption by estoppel, there must be "clear, unequivocal, and convincing evidence" of an agreement to adopt, coupled with performance by the child in reliance on that agreement.[120] However, in *Luna*, the appellate court reassessed the requisite elements to establish adoption by estoppel and reversed the trial court, holding that proof of an agreement can be shown by "circumstantial evidence."[121] The court also held that the agreement can be made "with the child, the child's parents, or someone in loco parentis."[122] Thus, where the child's natural parent has abandoned the child, an agreement with the other natural parent is satisfactory to prove that an agreement to adopt has taken place.[123] Looking at the record, the court determined that an agreement to adopt did take place between the decedent and the claimant's mother, and that the claimant relied on that agreement "by conferring love, affection, companionship, and other benefits" to the decedent.[124] In the end, the court employed a lower standard to prove adoption by estoppel, determined that Christopher's application for heirship did allege the essential elements of virtual adoption by estoppel, and reversed the decision of the trial court.[125]

C. *Virtual Adoption Compels the Imposition of Child Support Obligations:* Johnson v. Johnson

When a child is the center of a legal proceeding, the court will look to fulfill the best interests of the child and make decisions which both reflect and enhance the child's well-being.[126] In *Johnson v. Johnson*,[127] the Supreme

117. *Id.*
118. *Id.*
119. *Id.* at 578, 583.
120. *Id.* at 581. A child who acts in reliance on an agreement does not necessarily act in reliance "on an agreement to adopt or on representations about adoptive status," but rather he acts in reliance on his belief in his "status" as an adopted child. *Luna*, 906 S.W.2d at 581.
121. *Id.*
122. *Id.* Loco parentis is defined as "[s]upervision of a young adult by an administrative body such as a university." BLACK'S LAW DICTIONARY 858 (9th ed. 2009).
123. *Luna*, 906 S.W.2d at 581.
124. *Id.* at 582.
125. *See id.*
126. *See* Johnson v. Johnson, 617 N.W.2d 97, 105 (N.D. 2000).

Court of North Dakota employed this line of reasoning and refused to restrict the application of virtual adoption, holding that the facts and circumstances of the case warranted the imposition of child support on the virtually adopted child's father.[128]

In *Johnson*, Madonna and Antonyio Johnson acted as Jessica's natural parents since she was three months old, and they led her to believe that she was their child for all intents and purposes.[129] For example,

> Antonyio listed Jessica as his dependent on his federal tax returns. The Air Force listed Jessica as Antonyio's dependent daughter on his transfer orders and for medical benefits, placing her under his social security number. . . . [T]he Johnsons consistently called her Jessica Johnson. Jessica was baptized in Antonyio's family's church in Georgia . . . .[130]

Thus, although they never formally adopted her, the Johnsons instituted adoption proceedings in two different states and regularly maintained that Jessica was their daughter.[131] However, when the Johnsons later divorced, there was some debate as to Jessica's adoptive status and, accordingly, Madonna's right to child support from Antonyio.[132] The trial court ruled in favor of Antonyio, determining that he was not obligated to pay child support; however, when Madonna later appealed the decision, the court looked at the relationship of Jessica and Antonyio and reversed that decision.[133]

The Supreme Court of North Dakota noted that a contract to adopt is necessary to establish virtual adoption in inheritance proceedings, but it is not sufficient in the domestic context.[134] Courts generally require more direct evidence supporting the notion that there is a true parent-child relationship between the parties.[135] Here, the court likened Jessica and Antonyio's relationship to that of a stepparent and stepchild, but determined that the contract to adopt Jessica took the case outside the realm of normal stepparent-stepchild obligations.[136] The court reasoned that in a normal stepparent-stepchild relationship,

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127. 617 N.W.2d 97 (N.D. 2000).
128. *Id.* at 105.
129. *Id.* at 100.
130. *Id.*
131. *Id.* at 100.
132. *Johnson*, 617 N.W.2d at 101.
133. *Id.*
134. *Id.* at 108–09.
135. *See id.* at 109.
136. *Id.* at 107–08.

> the child is aware that the stepparent is just that, the spouse of the child's natural parent. . . . [But] [i]n the case at bar, Antonyio and Madonna led Jessica to believe she was their natural child . . . . [T]he parties engaged in an elaborate fiction, which is not a part of the normal stepparent-stepchild relationship. . . .[137]

Thus, although there was a contract to adopt Jessica, the court also looked at the nature of the relationship between Jessica and Antonyio.[138]

The court ultimately determined that Jessica and Antonyio's relationship was comparable with that of a true parent and child, and therefore justified the imposition of Antonyio's child support obligations as Jessica's adoptive father.[139] The court reasoned that statutory adoption and virtual adoption coexist and that North Dakota's public policy required the "protection of the welfare and best interests of children."[140] Moreover, looking at the "increased prevalence of blended families in [today's] society," the court held that constraining the application of virtual adoption to inheritance proceedings would be "detrimental" to virtually adopted children.[141]

D. *The Inequities of a Testate Estate:* In re Estate of Seader

It is well settled that virtual adoption is an equitable doctrine that is generally limited to intestacy proceedings.[142] However, *Sanderson v. Bathrick (In re Estate of Seader)*[143] challenged this long-standing principle when the decedent's grandsons sought to inherit their mother's share of the decedent's estate, as it was devised to their mother in the decedent's will.[144]

The claimants, Kim and Kirk Olive, were the biological children of Julie, the virtually adopted daughter of the decedent.[145] In his will, the decedent left one-third of his estate to Julie and the remaining interest to his two biological sons.[146] However, Julie died before the decedent, and the other

137. *Johnson*, 617 N.W.2d at 107–08.

138. *See id.* at 109.

139. *Id.* In its decision, the court noted that North Dakota precedent justified the recognition of virtual adoption in the context of child support and child custody. *Id.* at 105. Further, although virtual adoption had previously been applied primarily to inheritance proceedings, the court found that the State's child support guidelines did not prohibit the imposition of child support obligations on a parent who has virtually adopted a child. *See id.* at 108.

140. *Johnson*, 617 N.W.2d at 105.

141. *Id.* at 107.

142. Sanderson v. Bathrick (*In re* Estate of Seader), 76 P.3d 1236, 1241 (Wyo. 2003).

143. 76 P.3d 1236 (Wyo. 2003).

144. *Id.* at 1237–38.

145. *Id.* at 1238.

146. *Id.*

beneficiaries of the estate challenged Kim and Kirk's ability to inherit their mother's share of her adoptive father's estate.[147]

The decedent's biological sons argued that Julie's share had lapsed, prohibiting her sons from inheriting her share, and that Julie's share therefore was to be divided between her brothers.[148] However, according to Wyoming statutes, whether or not Julie's share had lapsed would be contingent upon the court finding Julie to be a "lineal descendent" of the decedent's grandparent.[149] The court ultimately determined that Julie was not the collateral relative or lineal descendent of the decedent, either biologically or through legal adoption, and therefore did not qualify as a lineal descendent under the statute.[150]

When a decedent dies testate, the court is to fulfill the decedent's intent as it is laid out in the terms of the will.[151] Thus, although Julie was not legally adopted by the decedent, she was nonetheless entitled to a portion of his estate as per the terms of his will.[152] Notwithstanding Julie's right to inheritance, however, the court ultimately concluded that the statute was unambiguous and could not be applied to an equitable doctrine in order to "broaden the class of persons identified by the statute."[153] Accordingly, because Julie was not a lineal descendent of the decedent, her biological children could not invoke the doctrine of virtual adoption to a *testate* estate in order to inherit their mother's share of the estate.[154]

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147. *Id.*

148. *See In re Estate of Seader*, 76 P.3d at 1245.

149. *Id.* The court held:

> The phrase "lineal descendent" is not defined in the statute. The word "lineal" connotes "a direct blood relative," and "lineal descent" indicates "[d]escent in a direct or straight line, as from father or grandfather to son or grandson." "Lineal descent" is contrasted with "collateral descent," which refers to "descent in a collateral or oblique line, from brother to brother or cousin to cousin. With collateral descent, the donor and donee are related through a common ancestor.

Id. (citations omitted).

150. *Id.*

151. *See id.*

152. *See In re Estate of Seader*, 76 P.3d at 1245 (holding that equitable adoption is the judicial remedy for an intent "gap" when the decedent dies intestate, but that a decedent who dies testate avoids judicial intervention since "there is no gap to be filled. We know the decedent's intent from the terms of the will.").

153. *Id.* "This case serves as a good example of why the doctrine of equitable adoption should not be applied to testate estates—the result may negate both legislative and testamentary intent." *Id.* at 1245–46.

154. *See id.* at 1245.

IV. FLORIDA AND VIRTUAL ADOPTION

Every court that considers a claim for virtual adoption adheres closely to the equitable maxim "equity regards that as done which ought to have been done."[155] In theory, the doctrine serves to promote fairness and justice and seeks to protect children who were not formally or legally adopted according to statutory requirements.[156] The doctrine was originally intended to allow children of intestate decedents to inherit as though the children were legally adopted.[157] However, because virtual adoption is an equitable remedy, many courts have broadened the doctrine and applied it in other areas of the law as well.[158] These courts reason that despite a child's adoptive status, the child should nonetheless be put in the same position as though he or she were naturally born or formally adopted.[159]

The state of Florida first recognized the doctrine of virtual adoption in 1943, but the Supreme Court of Florida stopped short of setting forth any definitive requirements to establish the doctrine or circumstances that would render the application of the doctrine appropriate.[160] Instead, the court relied on case law from other jurisdictions and applied a broad standard with which to determine that the claimant was entitled to equitable relief.[161]

Although Florida did not set the precedent for virtual adoption cases, the doctrine has evolved in the almost seventy years that it has been recognized in Florida.[162] Be that as it may, Florida courts have yet to follow their out-of-state counterparts in granting equitable relief to virtually adopted children outside of probate court.[163] Thus, while other jurisdictions have

155. Sheffield v. Barry, 14 So. 2d 417, 419 (Fla. 1943); Lankford v. Wright, 489 S.E.2d 604, 606 (N.C. 1997); Kelley v. Flagship Nat'l Bank of Boynton Beach (*In re* Estate of Wall), 502 So. 2d 531, 532 (Fla. 4th Dist. Ct. App. 1987).

156. Warner, *supra* note 62, at 583. For a discussion of the statutory elements, see pages 557–59, *supra*.

157. *E.g.*, *Sheffield*, 14 So. 2d at 419–20.

158. *See, e.g.*, Williams v. Dorrell, 714 So. 2d 574, 576 (Fla. 3d Dist. Ct. App. 1998) (holding that the virtually adopted child of the decedent was considered an "heir" and therefore entitled to the decedent's property as per Florida's homestead provision); Johnson v. Johnson, 617 N.W.2d 97, 109 (N.D. 2000) (holding that virtual adoption applies to child support obligations).

159. *See, e.g.*, *Johnson*, 617 N.W.2d. at 108.

160. *See Sheffield*, 14 So. 2d at 419–20.

161. *See* Part IV(A), *infra*.

162. Warner, *supra* note 62, at 584.

163. *See* Miller v. Paczier, 591 So. 2d 321, 322 (Fla. 3d Dist. Ct. App. 1991) (per curiam) (holding that virtual adoption does not warrant compensation in the case of a virtually adopted adult); Grant v. Sedco Corp., 364 So. 2d 774, 774–5 (Fla. 2d Dist. Ct. App. 1978) (holding that virtual adoption does not warrant compensation in the case of a wrongful death); Tarver

recognized the rights of virtually adopted children in cases regarding child support obligations and child custody, Florida courts consistently limit the doctrine to intestacy proceedings.[164] As a result, many children in Florida continue to suffer from the injustice that the equitable doctrine of virtual adoption was intended to counteract.[165]

A. *Florida Invokes the Doctrine of Virtual Adoption: The Case of* Sheffield v. Barry

In the landmark case *Sheffield v. Barry*,[166] the Supreme Court of Florida held that an oral contract to adopt would be an enforceable contract right where there was "performance on the one part and partial performance on the other."[167] In *Sheffield*, the child's natural mother and adoptive parents agreed that the latter would assume all parental rights of the child, but the adoptive father died intestate before finalizing the child's formal adoption.[168] Thus, although the child had no adequate remedy at law, the court relied upon precedent from other jurisdictions and held that the child was nonetheless entitled to equitable relief.[169]

In *Sheffield*, it was unclear whether the agreement to adopt was oral or written, but the court held that such a distinction would be negligible in a case of virtual adoption.[170] Instead, the court focused on the relationship between the child and the decedent in order to determine the child's rights to the decedent's estate.[171] The court reasoned that although the decedent failed to legally adopt the child, the partial performance of his parental obligations

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v. Evergreen Sod Farms, Inc., 533 So. 2d 765, 767 (Fla. 1988) (holding that virtual adoption does not warrant compensation in the case of a worker's compensation proceeding).

164. *See* Warner, *supra* note 62, at 587–88.

165. *See Miller*, 591 So. 2d at 322; *Grant*, 364 So. 2d at 775; *Tarver*, 533 So. 2d at 767.

166. 14 So. 2d 417 (Fla. 1943) (en banc).

167. *Id.* at 420.

168. *Id.* at 418–19. The adoptive mother died in 1934 and the adoptive father died intestate in 1942. *Id.* at 419. However, throughout the adoptive parents' lives, the child was told, and believed, that she had been legally adopted. *Id.* at 418. It was not until her adoptive father died in 1942 that she learned that she was not legally adopted. *Sheffield*, 14 So. 2d at 418–19.

169. *Id.* at 419–20. Prior to *Sheffield*, a child who was not legally adopted had no inheritance rights under Florida's intestacy statutes. *See id.* at 419. However, it was the plaintiff's contention that the Court "should invoke in her behalf the equitable maxim: equity regards that as done which ought to have been done," and the Court agreed, stating: "We have the view that this relief was justified and that the equitable maxim is appropriate to the condition reflected in the pleading." *Id.*

170. *Id.* at 420.

171. *See Sheffield*, 14 So. 2d at 419.

gave the child an enforceable contract right, ultimately allowing her to inherit from his estate.[172] In the end, the court applied basic theories of contract law, holding that the child was entitled to specific performance of the agreement to adopt between the child's natural mother and adoptive parents.[173]

B. *The Doctrine Begins to Take Shape:* Laney v. Roberts

In 1982, Florida's Third District Court of Appeal held that a virtual adoption had taken place, despite the fact that the claimant knew she was not legally adopted.[174] In *Laney v. Roberts*,[175] the claimant's biological parents entered into an agreement with the Merickels, the child's aunt and uncle, which stipulated that the Merickels were to adopt, raise, and educate the child to the best of their ability.[176] Accordingly, when Mary Irene (Irene) began living with the Merickels in 1932, she renounced all ties with her biological parents and referred to her aunt and uncle as "mother and dad."[177] Moreover, Irene considered the Merickels to be her parents and lived with them until she got married.[178]

When Mrs. Merickel died, however, Irene was prevented from inheriting from her estate.[179] The trial court held that Irene was not the legally or virtually adopted daughter of the decedent, as evidenced by the fact that she signed her marriage certificate with her birth name, and not the decedent's last name.[180] Nonetheless, taking this isolated incident into consideration, the court determined that "[s]uch paltry evidence" was insufficient to overcome the breadth of evidence establishing Irene's adoptive status.[181]

On appeal, the court applied the reasoning employed in *Sheffield* and held that specific performance of an agreement to adopt would be granted when the last surviving foster parent dies intestate.[182] Thus, in spite of the fact that Irene did not learn of the agreement between her parents and the

172. *Id.*

173. *See id.* (holding that the child should be entitled to the rights of the estate that she would have had, had her adoption been legalized).

174. *See* Laney v. Roberts, 409 So. 2d 201, 203 (Fla. 3d Dist. Ct. App. 1982).

175. 409 So. 2d 201 (Fla. 3d Dist. Ct. App. 1982).

176. *Id.* at 202.

177. *Id.* at 201–02.

178. *See id.* at 202.

179. *Id.* at 202–03. Mr. Merickel died intestate in 1979 and Mrs. Merickel died intestate later that year. *Laney*, 409 So. 2d at 202. Irene later brought an action against the co-personal representatives of Mrs. Merickel's estate claiming that she had been virtually adopted by the Merickels, but the trial court disagreed. *Id.* at 202–03.

180. *See id.* at 203.

181. *Id.*

182. *See id.* at 203.

Merickels until Mrs. Merickel's death, the court determined that she had established the elements of virtual adoption by clear and convincing evidence.[183] The court reasoned that Irene's performance was "satisfied by living in the home of the [Merickels]" and that her lack of knowledge of the agreement was therefore irrelevant.[184]

C. *Virtual Adoption and Florida's Homestead Provision:* Williams v. Dorrell

Florida's homestead provision provides, in pertinent part, that a decedent's property is exempt from a court-ordered sale of the property and that the exemption "'shall inure to the surviving spouse or heirs of the owner.'"[185] Under Florida law, the term "heirs" is defined as "those persons . . . who are entitled under the statutes of intestate succession to the property of a decedent."[186] However, in order to determine legal heirs for the purpose of intestate succession of real or personal property, Florida's homestead provision applies a loose interpretation of Florida's intestacy statutes.[187]

In *Williams v. Dorrell*,[188] Florida's Third District Court of Appeal held that a virtually adopted child constituted an "heir" for the purpose of Florida's homestead provision.[189] The court determined that the claimant satisfied the requisite elements necessary to establish that she was the virtually adopted daughter of the decedent.[190] As such, the court held that Florida's homestead provision extended to include a virtually adopted child, and the claimant was therefore entitled to an interest in the decedent's property.[191]

D. *The Inequities of the Equitable Doctrine*

1. A Contract to Adopt Is Insufficient

A claim of virtual adoption invariably begins with an agreement to adopt.[192] Thus, when a claimant can establish that there is direct evidence of

183. *Laney*, 409 So. 2d at 203.
184. *Id.*
185. Williams v. Dorrell, 714 So. 2d 574, 576 (Fla. 3d Dist. Ct. App. 1998) (quoting FLA. CONST. art X, § 4(b)).
186. FLA. STAT. § 731.201(20) (2010).
187. *Williams*, 714 So. 2d at 576.
188. 714 So. 2d 574 (Fla. 3d Dist. Ct. App. 1998).
189. *Id.* at 576.
190. *Id.* at 575.
191. *Id.* at 576.
192. Miller v. Paczier, 591 So. 2d 321, 322 (Fla. 3d Dist. Ct. App. 1991) (per curiam).

an oral or written contract providing for the child's adoption, courts are more inclined to continue with a virtual adoption analysis.[193] Nevertheless, even if a claimant can prove the elements of virtual adoption by clear and convincing evidence, courts are still reluctant to expand the doctrine beyond its conventional reach.[194]

In *Grant v. Sedco*,[195] Mikel Marks was raised by the decedent pursuant to an agreement between the decedent and Marks' biological mother.[196] Although he was never legally adopted, Marks was the decedent's child in the traditional sense.[197] However, when the decedent died in an automobile accident, Marks was denied compensation for his adoptive mother's death.[198]

The court recognized that Marks was the virtually adopted son of the decedent for all intents and purposes, but nonetheless held that virtual adoption would not warrant relief in the case of wrongful death.[199] The court reasoned that a virtual adoption provides an equitable remedy through the enforcement of a contract right but that it does not create the relationship of a parent and child.[200] Accordingly, the court concluded that the Florida Wrongful Death Act would not grant relief to a minor child that is neither the natural or legally adopted child of the decedent.[201]

Ten years later, the Supreme Court of Florida relied on the arguments set forth in *Grant* and ruled that a virtual adoption would not warrant relief in the case of a worker's compensation proceeding.[202] In *Tarver v. Evergreen Sod Farms, Inc.*,[203] the court ultimately held that a virtual adoption was not akin to a legal adoption, despite the fact that the elements of virtual adoption

193. *See, e.g., id.*

194. *See generally* Tarver v. Evergreen Sod Farms, Inc., 533 So. 2d 765, 767 (Fla. 1988) (holding that a virtual adoption is not sufficient where the decedent is killed in an industrial accident and the virtually adopted child seeks compensation under the Workers' Compensation Act); Grant v. Sedco Corp., 364 So. 2d 774, 775 (Fla. 2d Dist. Ct. App. 1978) (holding that virtual adoption does not apply to a minor child, who is neither the biological child nor legally adopted child of the decedent, in the case of wrongful death). *But see* Johnson v. Johnson, 617 N.W.2d 97, 105 (N.D. 2000) (holding that virtual adoption applies to child support obligations).

195. 364 So. 2d 774 (Fla. 2d Dist. Ct. App. 1978).

196. *Id.* at 774.

197. *See id.*

198. *Id.*

199. *See id.* at 775 ("Although the limitations upon recovery by an equitably adopted child might seem harsh, the Florida Wrongful Death Act does not compensate *all* those aggrieved by the death of another. It only compensates some and in certain ways.").

200. *Grant*, 364 So. 2d at 775.

201. *Id.*

202. Tarver v. Evergreen Sod Farms, Inc., 533 So. 2d 765, 766–67 (Fla. 1988).

203. 533 So. 2d 765 (Fla. 1988).

had been satisfied.[204] The court reasoned that the doctrine of virtual adoption is intended to avoid unfair results stemming from intestacy statutes, and it is not to be utilized before the death of an adoptive parent.[205] The court concluded that the worker's compensation statute was unambiguous and, accordingly, refused to extend the doctrine of virtual adoption to a worker's compensation claim.[206]

In 1991, Florida's Third District Court of Appeal again denied the petitioner, the virtually adopted son of the decedent, the relief that he sought.[207] In *Miller v. Paczier*,[208] Florida's Third District Court of Appeal held that a claim of virtual adoption, while a valid and well-recognized exception to the Florida Probate Code, is not applicable when the claimant is an adult.[209] In *Miller*, the claimant was the decedent's adult nephew who asserted that he was entitled to the decedent's estate as the decedent's adopted son and not as the decedent's nephew.[210] Focusing on the nature of the relationship between the claimant and the decedent, it was evident that the two had developed a stronger bond than that of a typical nephew and aunt or uncle.[211] Notwithstanding his adoptive status, however, the court declined to extend the doctrine to virtually adopted adults.[212] The court reasoned that expanding the doctrine "beyond the purpose for which it was conceived [would] open the door of the probate courts to fraudulent and frivolous claims."[213]

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204. *Id.* at 767.

205. *Id.*

206. *Id.* Under the worker's compensation statute, "'Child' includes a posthumous child, a child legally adopted prior to the injury of the employee, and a stepchild or acknowledged illegitimate child dependent upon the deceased." *Id.* at 766 (quoting FLA. STAT. § 440.02(5) (1988)). The court held that a virtual adoption "[did] not create the legal relationship of parent and child within the meaning of 'legal adoption' as required in the workers' compensation statute." *Tarver*, 533 So. 2d at 767.

207. Miller v. Paczier, 591 So. 2d 321, 323 (Fla. 3d Dist. Ct. App. 1991) (per curiam).

208. 591 So. 2d 321 (Fla. 3d Dist. Ct. App. 1991) (per curiam).

209. *Id.* at 323.

210. *Id.* at 322 The court proffered:

> [The claimant] alleges that during his adulthood, he developed a close relationship with his aunt and uncle, to the point that they regarded him as a son. He contends that this close relationship gave rise to an implied contract to adopt him and that he should take an intestate share as a son, rather than the smaller share he would receive as a nephew.

Id.

211. *Id.*

212. *Miller*, 591 So. 2d at 322–23.

213. *Id.* at 323.

2. "Enough" Is Not Enough

Since 1943, Florida courts have honored and enforced an oral or written agreement to adopt when a virtually adopted child's parent dies intestate.[214] In *Sheffield*, Florida's seminal virtual adoption case, the court recognized a claim for virtual adoption,[215] but the court's decision did little to develop the doctrine.[216] It was not until 1985 that Florida's Fifth District Court of Appeal set forth the essential elements required to establish virtual adoption.[217]

In order to determine that a claimant has been virtually adopted, he or she must prove the necessary elements to establish that an adoption has taken place.[218] When a claimant cannot establish all five elements by clear and convincing evidence, however, a court will not grant the claimant the relief that he or she seeks.[219]

In *Urick v. McFarland*,[220] Florida's Second District Court of Appeal held that without an agreement to adopt, satisfaction of the remaining elements of virtual adoption would not suffice.[221] In *Urick*, George Urick lived with his mother and the decedent in the same capacity as that of a traditional family, and Urick maintained a true parent-child relationship with the decedent.[222] Further, although the decedent never adopted him, "Mr. Urick accepted [the decedent] as his 'dad,' and [the decedent] treated Mr. Urick like a

214. Poole v. Burnett (*In re* Heirs of Hodge), 470 So. 2d 740, 741 (Fla. 5th Dist. Ct. App. 1985).

215. Sheffield v. Barry, 14 So. 2d 417 (Fla. 1943) (en banc).

216. *See, e.g.*, Williams v. Estate of Pender, 738 So. 2d 453, 454 (Fla. 1st Dist. Ct. App. 1999).

217. *In re Heirs of Hodge*, 470 So. 2d at 741. Before *Hodge*, Florida courts deciding virtual adoption claims often adopted the reasoning set forth by other jurisdictions, noting that virtual adoption was a "rarity" in Florida. *See id.* Be that as it may, probate courts throughout the state have long required that a claim for virtual adoption be proved by clear and convincing evidence. *See* Laney v. Roberts, 409 So. 2d 201, 203 (Fla. 3d Dist. Ct. App. 1982).

218. *See, e.g.*, Williams v. Dorrel, 714 So. 2d 574, 575–76 (Fla. 3d Dist. Ct. App. 1998).

219. *See, e.g.*, Douglass v. Frazier (*In re* Estate of Musil), 965 So. 2d 1157, 1161 (Fla. 2d Dist. Ct. App. 2007) ("Despite the failure of proof on the fourth element, the probate court found—based on equitable principles—that a virtual adoption had occurred. Here, the probate court fell into error."); Urick v. McFarland, 625 So. 2d 1253, 1254 (Fla. 2d Dist. Ct. App. 1993) ("Although [the claimant] proved all remaining elements of [virtual adoption], without proof of the agreement he cannot prevail.").

220. 625 So. 2d at 1253 (Fla. 2d Dist. Ct. App. 1993).

221. *Id.* at 1254.

222. *Id.* at 1253–54. George Urick's biological parents got divorced when he was three years old, but Urick continued to live with his father until he was fifteen. *Id.* at 1253. When Urick's biological father died, however, Urick began living with his mother and the decedent. *Id.* at 1253. Although the decedent never adopted Urick, they maintained the relationship of a father and son. *Urick*, 625 So. 2d at 1254.

son."[223] When the decedent died, however, Urick was not entitled to any of the decedent's estate.[224] The court reasoned that although Urick had "fulfilled the responsibilities that usually befall a son," Urick had nonetheless failed to prove an agreement to adopt between the decedent and Urick's natural parents.[225] Consequently, despite Urick's proof of all of the remaining elements of virtual adoption, the court held that "without proof of the agreement, he cannot prevail."[226] As such, Urick was not the virtually adopted son of the decedent and, accordingly, the court denied George Urick's claim to inherit from the decedent's estate.[227]

Nearly fifteen years after its decision in *Urick*, Florida's Second District Court of Appeal again determined that failure to prove all five elements would not be sufficient to prevail on a claim of virtual adoption.[228] In *Douglass v. Frazier (In re Estate of Musil)*,[229] the court reiterated its previous holding that the elements of virtual adoption must all be shown by clear and convincing evidence.[230] Thus, while there may be evidence supporting some of the required elements, anything short of "clear and convincing" is not enough.[231]

V. VIRTUAL ADOPTION OUTSIDE OF PROBATE COURT

A legally adopted child is afforded all the rights and privileges that biological children enjoy.[232] Thus, regardless of the nature of the relationship between an adoptive parent and child, the child will nonetheless be treated as the lineal descendent of that parent.[233] That being said, when an adoptive

223. *Id.* at 1253.

224. *Id.* Both Urick's mother and the decedent died intestate. *Id.* at 1254. Urick's mother died before the decedent, and upon her death the decedent received the majority of his wife's property. *Id.* Thus, in order for Urick to inherit from the decedent, he would have to be a "lineal descendent." *Urick*, 625 So. 2d at 1254.

225. *Id.*

226. *Id.*

227. *See id.* at 1253.

228. Douglass v. Frazier (*In re* Estate of Musil), 965 So. 2d 1157, 1161 (Fla. 2d Dist. Ct. App. 2007).

229. 965 So. 2d 1157 (Fla. 2d Dist. Ct. App. 2007).

230. *Id.* at 1160.

231. *See id.* at 1161 ("[T]he probate court's findings establish without question that [the claimant] did not prove the fourth element of virtual adoption by clear and convincing evidence. Accordingly, we reverse the portion of the probate court's final order . . . [that the claimant] was the virtually adopted son of the decedent.").

232. Sanderson v. Bathrick (*In re* Estate of Seader), 76 P.3d 1236, 1239 (Wyo. 2003).

233. FLA. STAT. § 732.108(1) (2010).

parent dies intestate, his or her biological children and legally adopted children will be considered equally under Florida's intestacy statutes.[234]

On the contrary, however, when an agreement or promise to adopt a child has not come to fruition in the eyes of the law, that child may not be recognized at all.[235] Accordingly, regardless of the nature of the relationship between the alleged adoptive parent and child, the child may nonetheless be treated as though he or she has no ties whatsoever to the parent.[236] Consequently, when an alleged adoptive parent dies intestate, his or her alleged adopted children may have no remedy at all, legal or equitable.[237]

Virtual adoption is the judicially created doctrine intended to resolve this ethical quandary.[238] Being an equitable remedy, it is most often employed in order to avoid the injustice that flows from intestacy statutes.[239] To date, virtual adoption has been recognized in a number of cases in which the decedent died intestate, and but for this equitable remedy, the claimants would otherwise be without any recourse.[240] Be that as it may, virtual adoption is an extremely limited doctrine and, needless to say, so too are the rights of those who are virtually adopted.

Virtual adoption is founded on the notion that when a parent dies intestate, the child should not be precluded from inheriting from the decedent's estate, despite the parent's failure to procure a legal adoption.[241] Hence, the doctrine has traditionally been limited to intestacy proceedings and has found little merit outside of probate court.[242] Further, although virtual adoption has made extensive progress since its inception in Florida in 1943, the doctrine still remains unpredictable. Unlike other jurisdictions which have already exhibited their willingness to progress at the same rate as today's population, Florida has yet to see the correlation between strong public policy in favor of the family unit and applying this policy in virtual adoption proceedings outside of probate court. As a result, Florida is falling by the wayside as it shockingly seeks to inhibit the rights of its citizens both in law and in equity.

234. *Id.*
235. *See* Warner, *supra* note 62, at 586.
236. *See, e.g.*, Grant v. Sedco Corp., 364 So. 2d 774, 775 (Fla. 2d Dist. Ct. App. 1978).
237. *See id.*
238. Warner, *supra* note 62, at 583.
239. Bd. of Educ. v. Browning, 635 A.2d 373, 377 (Md. 1994).
240. *See* Calista Corp. v. Mann, 564 P.2d 53, 61–62 (Alaska 1977); Sheffield v. Barry, 14 So. 2d 417, 419–20 (Fla. 1943) (en banc); Laney v. Roberts, 409 So. 2d 201, 203 (Fla. 3d Dist. Ct. App. 1982); Luna v. Estate of Rodriguez, 906 S.W.2d 576, 581 (Tex. App. 1995).
241. Warner, *supra* note 62, at 583.
242. *See, e.g.*, *Grant*, 364 So. 2d at 775.

A. *Florida Fails to Follow Suit: Inconsistencies Lead to an Inequitable Doctrine*

Florida courts have many a time granted and denied atypical claims of virtually adopted children, often leading to ambiguous and inconsistent results.[243] For example, Florida's Second District Court of Appeal has previously held that virtual adoption would warrant relief in an intestacy proceeding, but not in the case of a wrongful death.[244] Similarly, Florida's Third District Court of Appeal explicitly denied the claims of virtually adopted adults, reasoning that expanding the doctrine would propel it beyond its intended purpose.[245] Notwithstanding these decisions, however, the court had no qualms about extending the doctrine to consider a virtually adopted child an "heir" under Florida's homestead provision.[246] The court also willingly held that a virtually adopted child is entitled to inherit from an intestate decedent's estate, despite the fact that the child is unaware of the agreement to adopt her.[247]

Virtual adoption is to be invoked where "justice, equity and good faith require it,"[248] but conflicting decisions from various jurisdictions have certainly contributed to the discrepancies among the courts.[249] For instance, the Supreme Court of Florida has said that the doctrine is not to be applied prior to the death of an adoptive parent,[250] while the Supreme Court of North Dakota held that the child's welfare and best interests should be protected.[251] Accordingly, the Florida court held that virtual adoption would not apply to a worker's compensation proceeding,[252] whereas the North Dakota court used the doctrine to compel child support obligations.[253] Florida courts adhere to a strict interpretation of virtual adoption, arguing that equitable remedies do

243. *See, e.g.*, Williams v. Dorrell, 714 So. 2d 574, 576 (Fla. 3d Dist. Ct. App. 1998); Miller v. Paczier, 591 So. 2d 321, 323 (Fla. 3d Dist. Ct. App. 1991) (per curiam); *Laney*, 409 So. 2d at 203; *Grant*, 364 So. 2d at 775.

244. *Grant*, 364 So. 2d at 775; *see supra* p. 571.

245. *Miller*, 591 So. 2d at 323; *see supra* p. 572.

246. *Williams*, 714 So. 2d at 576; *see supra* p. 570.

247. *Laney*, 409 So. 2d at 203; *see supra* pp. 569–70.

248. Lankford v. Wright, 489 S.E.2d 604, 607 (N.C. 1997).

249. *See, e.g.*, Tarver v. Evergreen Sod Farms, Inc., 533 So. 2d 765, 767 (Fla. 1988) (holding that virtual adoption would not warrant relief in a worker's compensation proceeding). *But see* Johnson v. Johnson, 617 N.W.2d 97, 105–06 (N.D. 2000) (holding that virtual adoption would warrant relief in a divorce proceeding, obliging the adoptive father to continue paying child support).

250. *Tarver*, 533 So. 2d at 767.

251. *Johnson*, 617 N.W.2d at 105.

252. *Tarver*, 533 So. 2d at 767.

253. *Johnson*, 617 N.W.2d at 105.

not comport to the statutory scheme.[254] Thus, regardless of the negative consequences of limiting the doctrine, Florida consistently maintains that it is to be invoked exclusively upon the intestate death of an adoptive parent and solely to provide recourse for virtually adopted children.[255]

Nevertheless, when the unique circumstances of a case require it, equity should resolve what the law cannot. As early as 1977, the Supreme Court of Alaska followed this logic and determined that the application of virtual adoption was necessitated by the state's vast cultural landscape.[256] The Alaska court reasoned that, where a legal remedy is unavailable, virtual adoption is an appropriate vehicle with which to avoid hardship to virtually adopted children.[257] Despite this long-standing principle, however, Florida has yet to follow suit with regard to granting appropriate remedies and equitable relief.[258] Likewise, Florida's Second District Court of Appeal has often denied claims of virtually adopted children, arguing that the alleged adoption was not established by clear and convincing evidence.[259] This Florida court injudiciously ignored the relationship between the claimant and decedent in spite of the fact that it would be unjust and inequitable to do so.

In each of the aforementioned cases, Florida courts have failed to provide justice and equity to the virtually adopted children of intestate decedents.[260] The courts recognize that the doctrine was intended as a means to supplement the lack of a legal remedy, but nonetheless refuse to concede to the reasoning of courts in other jurisdictions. Further, although the doctrine should be used in good faith to provide relief to virtually adopted children, Florida courts maintain that applying it to extraordinary circumstances would inescapably lead to an influx of fraudulent claims.[261] Thus, while courts in other jurisdictions increasingly apply the doctrine outside of probate court, Florida continues to rely on its own precedent and has thus far declined to extend the doctrine beyond its conventional reach.[262] As a result, virtually

254. *See Tarver*, 533 So. 2d at 767.

255. *See id.*

256. Calista Corp v. Mann, 564 P.2d 53, 61–62 (Alaska 1977).

257. *Id.* at 61.

258. *See* Douglass v. Frazier (*In re* Estate of Musil), 965 So. 2d 1157, 1161 (Fla. 2d Dist. Ct. App. 2007); Urick v. McFarland, 625 So. 2d 1253, 1254 (Fla. 2d Dist. Ct. App. 1993).

259. *In re Estate of Musil*, 965 So. 2d at 1161; *see Urick*, 625 So. 2d at 1254.

260. *See, e.g.*, Tarver v. Evergreen Sod Farms, Inc., 533 So. 2d 765, 767 (Fla. 1988); *In re Estate of Musil*, 965 So. 2d at 1161; *Urick*, 625 So. 2d at 1254; Miller v. Paczier, 591 So. 2d 321, 323 (Fla. 3d Dist. Ct. App. 1991) (per curiam); Grant v. Sedco Corp., 364 So. 2d 774, 775 (Fla. 2d Dist. Ct. App. 1978).

261. *Miller*, 591 So. 2d at 323.

262. *Compare, e.g.*, *Tarver*, 533 So. 2d at 767 *with Johnson*, 617 N.W.2d 97, 107 (N.D. 2000).

adopted children are not getting the recognition they deserve, and they continue to suffer the harsh consequences of Florida's strict adherence to the law.

B. *Expanding the Doctrine*

In theory, virtual adoption is employed "to render a more equitable outcome," but in practice, the results are quite conflicting.[263] If, as the authorities contend, the doctrine truly rests on the theory that "equity regards that as done that which ought to have been done,"[264] then these same authorities should also contend that limiting the application of the doctrine to intestacy proceedings is inherently inequitable. Instead, however, courts consistently deny claims of virtually adopted children, arguing that a virtual adoption does not supplement or create the relationship of a true parent and child.[265] These same courts also argue that virtual adoption is not akin to a legal adoption[266] and that virtual adoption merely provides an equitable remedy through the enforcement of a contract right.[267]

In Florida, when the last surviving parent dies intestate, the decedent's entire estate is to pass to the descendants of the decedent.[268] However, Florida statutes strictly define "descendant,"[269] and when read in conjunction with the definition of "child," Florida law expressly excludes stepchildren, foster children, and remote descendants.[270] Thus, although adopted children are considered descendents of the adopting parent, Florida statutes solely refer to *legally* adopted children and do not make reference to those who were merely virtually or equitably adopted.[271]

It may be so that virtual adoption is not wholly analogous to legal adoption, but courts often lose sight of the fact that the doctrine originated as a means to provide equitable relief in cases where legal relief was not availa-

263. *See* Warner, *supra* note 62, at 585.

264. Sheffield v. Barry, 14 So. 2d 417, 419 (Fla. 1943) (en banc); *see also* Kelley v. Flagship Nat'l Bank of Boynton Beach (*In re* Estate of Wall), 502 So. 2d 531, 532 (Fla. 4th Dist. Ct. App. 1987); Lankford v. Wright, 489 S.E.2d 604, 606 (N.C. 1997).

265. *See, e.g.*, Grant v. Sedco Corp., 364 So. 2d 774, 774 (Fla. 2d Dist. Ct. App. 1978).

266. Tarver v. Evergreen Sod Farms, Inc., 533 So. 2d 765, 767 (Fla. 1988).

267. *Grant*, 364 So. 2d at 775.

268. FLA. STAT. § 732.103(1) (2010).

269. *See id.* § 731.201(9) (defining descendants as "a person in any generational level down the applicable individual's descending line and includes children, grandchildren, and more remote descendents.").

270. *See id.* § 731.201(3).

271. *See id.* § 732.108(1).

ble.[272] When a decedent dies intestate, virtual adoption is designed to allow the decedent's virtually adopted child to inherit from the decedent's estate as if the child were legally adopted.[273] Virtual adoption has been utilized in divorce proceedings as well, compelling the parents of virtually adopted children to continue with their child support obligations.[274] Courts have also applied the doctrine in cases with unusual fact patterns,[275] in cases with state-specific homestead provisions,[276] and in cases where the elements of virtual adoption were not entirely complied with.[277]

Case law undoubtedly supports the idea that a virtually adopted child can inherit from an intestate decedent's estate.[278] Even so, there are many cases in which the court confirmed that a virtual adoption had taken place, but nonetheless denied the petitioner's claims.[279] Thus, it seems wholly contradictory that Florida courts grant equitable remedies to virtually adopted children in some circumstances, but continually refuse to provide them in others.

What's more, probate courts generally focus on the testator or decedent's intent in distributing or administering the decedent's estate, while family law courts generally focus on what is in the best interests of the child.[280] This, too, is inherently contradictory. How is one court supposed to put the best interest of the child first, while another court will not even recognize that same child as being legitimate? It is impossible for a virtually adopted child to ever be granted relief if courts are continually skirting the line between decisions which may be equitable and decisions which are plainly unjust. In order to avoid this anomaly, probate courts and family law courts need to align and, where appropriate, *always* focus on what is in the best interests of the child. Likewise, as virtual adoption is sure to become an issue of increasing prevalence, courts need to be more steadfast in adopting principles of equity and public policy in order to more accurately assess individual cases.

Further, while the criteria may be the same in evaluating claims of virtual adoption, no two courts employ the same reasoning when applying the

272. *See* Warner, *supra* note 62, at 585.

273. *E.g.*, Miller v. Paczier, 591 So. 2d 321, 322 (Fla. 3d Dist. Ct. App. 1991) (per curiam).

274. Johnson v. Johnson, 617 N.W.2d 97, 105 (N.D. 2000).

275. *See* Calista Corp. v. Mann, 564 P.2d 53, 61–62 (Alaska 1977).

276. Williams v. Dorrell, 714 So. 2d 574, 576 (Fla. 3d Dist. Ct. App. 1998).

277. *See* Habecker v. Young, 474 F.2d 1229, 1230 (5th Cir. 1973) (holding that although the word "adopt" was never used, it would not bar a remedy through virtual adoption).

278. *See* Warner, *supra* note 62, at 587.

279. *See id.*

280. Tritt, *supra* note 1, at 376.

requisite elements. Some courts focus too much on the applicable statutes, while others put too much emphasis on the specific, delineated requirements of both the contract theory and adoption by estoppel. Additionally, while some decisions indicate a trend toward more equitable outcomes for virtually adopted children, there is still a great weight of authority that has prevented the doctrine from reaching its true potential. Looking at the substantial amount of case law, there is direct evidence supporting a more comprehensive, cohesive remedy for virtually adopted children. And, comparing the decisions of the various states that have upheld claims of virtual adoption inside and outside of probate court, it seems evident that it is time for state legislatures to formally recognize these informally adopted children.

Similarly, because today's typical family is not the "typical" American family that once was, Florida's laws are quickly falling behind other jurisdictions which have begun to move in a more appropriate direction. Florida's sluggish response to support the expansion of virtual adoption is a shortcoming, at best. The longer Florida courts wait to apply the doctrine in all cases in which equity requires avoiding an unjust outcome, the farther Florida will be departing from its strong public policy in favor of the cohesive family unit and doing what is in the best interests of the children. And, while there is validity to the argument that expanding the doctrine will lead to an influx of frivolous claims, there are other avenues which are better suited to deal with these concerns.

VI. CONCLUSION

Florida was not the first state to recognize the equitable doctrine of virtual adoption, and it certainly will not be the last.[281] Further, although the doctrine has progressed significantly in recent years, there still remain a number of ambiguities and inconsistencies in its application.[282] Virtual adoption was originally intended to be applied to children who were supposed to be legally adopted, but whose adoptive parents failed to complete a formal adoption prior to dying intestate.[283] The doctrine relies on equitable principles, and it operates to allow the virtually adopted child to take an in-

281. *See* Miller v. Paczier, 591 So. 2d 321, 323 (Fla. 3d Dist. Ct. App. 1991) (per curiam); *see also Habecker*, 474 F.2d at 1229; Douglass v. Frazier (*In re* Estate of Musil), 965 So. 2d 1157, 1159 (Fla. 2d Dist. Ct. App. 2007); Williams v. Estate of Pender, 783 So. 2d 453, 454 (Fla. 1st Dist. Ct. App. 1999).

282. *Compare* Williams v. Dorrell, 714 So. 2d 574, 576 (Fla. 3d Dist. Ct. App. 1998), *with Miller*, 591 So. 2d at 323, *and* Laney v. Roberts, 409 So. 2d 201, 203 (Fla. 3d Dist. Ct. App. 1982), *and* Grant v. Sedco Corp., 364 So. 2d 774, 775 (Fla. 2d Dist. Ct. App. 1978).

283. *E.g.*, *Miller*, 591 So. 2d at 322.

testate share from the decedent equal to that of a legally adopted or biological child.[284] However, in light of recent decisions, it appears the doctrine is growing ever more popular, and courts are more frequently called upon to expand the scope of its applicability.[285]

What's more, as the dynamic of the typical American family continues to evolve, so too do the applicable statutes which dictate the rights of inheritance in both testate and intestate proceedings.[286] Further, with the steady increase in the number of children adopted each year, Florida courts will likewise see a steady increase in the number of adopted children contesting their inheritance rights. Nonetheless, Florida has yet to align with other jurisdictions and apply the doctrine to provide a wide range of equitable remedies.[287] Accordingly, it is unlikely that the claims of virtually adopted children will withstand even minimal judicial scrutiny in the near future.

In order for virtually adopted children to be granted the relief they seek, Florida courts need to expand the scope of virtual adoption and apply it outside of probate court, and in situations other than intestacy proceedings. The only way that the doctrine will, *in good faith*, provide justice and equity is if Florida accepts the reasoning set forth by other jurisdictions and allows virtual adoption to be recognized both in probate court and in other areas of the law.

284. *Id.*

285. *See, e.g.*, Johnson v. Johnson, 617 N.W.2d 97, 105 (N.D. 2000).

286. Bell, *supra* note 24, at 418.

287. *See, e.g.*, Tarver v. Evergreen Sod Farms, Inc., 533 So. 2d 765, 767 (Fla. 1988) (holding that virtual adoption would not warrant relief in a worker's compensation proceeding). *But see Johnson*, 617 N.W.2d at 105 (holding that virtual adoption would warrant relief in a divorce proceeding, obliging the adoptive father to continue paying child support).