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ADOPTION - RIGHT OF INHERITANCE IN ABSENCE OF LEGAL ADOPTION-SPECIFIC PERFORMANCE OF CONTRACT TO ADOPT AND OTHER REMEDIES

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COMMENTS

ADOPTION — RIGHT OF INHERITANCE IN ABSENCE OF LEGAL ADOPTION—SPECIFIC PERFORMANCE OF CONTRACT TO ADOPT AND OTHER REMEDIES—Adoption was unknown at common law. Modern statutes permitting adoption are largely derived from Roman ideas, which were introduced into this country first through the civil law of Louisiana and later by statutes, beginning with Massachusetts in 1851.[1]

Under the English common law, the only persons capable of inheriting property were blood relations of the deceased. On the other hand, most modern adoption statutes permit inheritance by adopted children equally with natural children.[2] Adoption being purely statutory, the early cases denied the right of inheritance by supposedly adopted children when the statute was not strictly followed.[3] Though still purporting to require strict compliance with the adoption statutes, equity has evolved a remedy during the last sixty years which, in effect, allows a supposedly adopted child to claim the property of the deceased. This remedy is a decree of specific performance of a contract to adopt.

A. The Remedy of Specific Performance

To understand the development of the specific performance remedy, two analogous situations must be examined. Contracts between adults to convey realty or transfer personal property have long been enforced against a deceased promisor's estate.[4] This is also true of contracts to devise property,[5] even where the subject matter is "all the property owned by the promisor at the time of his death."[6] Such contracts are not enforceable, however, where the result would be inequitable,[7] or where there is insufficient evidence of the agreement.[8]

[1] Brosnan, "The Law of Adoption," 22 COL. L. REV. 332 (1922); In re Sessions Estate, 70 Mich. 297, 38 N.W. 249 (1888). Before passage of general statutes permitting adoption, special legislation in several states provided for adoption of specifically named children. See Davis v. Hendricks, 99 Mo. 478, 12 S.W. 887 (1890); Power v. Hafley, 85 Ky. 671, 4 S.W. 683 (1887).

[2] 4 VERNIER, AMERICAN FAMILY LAWS, §§262, 263 (1931).

[3] Shearer v. Weaver, 56 Iowa 578, 9 N.W. 907 (1881); Woods v. Evans, 113 Ill. 186 (1885); Renz v. Drury, 57 Kan. 84 (1896).

[4] Haines v. Haines, 6 Md. 435, (1854); Twiss v. George, 33 Mich. 253 (1876); West v. Bundy, 78 Mo. 407 (1883).

[5] Gupton v. Gupton, 47 Mo. 37 (1870); Parsell v. Stryker, 41 N.Y. 480 (1870); Sword v. Keith, 31 Mich. 247 (1875); Spencer v. Spencer, 25 R.I. 239, 55 A. 637 (1903).

[6] Rhodes v. Rhodes, 3 Sandf. Ch. (N.Y.) 279 (1846); Bird v. Pope, 73 Mich. 483, 41 N.W. 514 (1889); Brinton v. Van Cott, 8 Utah 480, 33 P. 218 (1893).

[7] Johnson v. Hubbell, 10 N.J.Eq. 332 (1855).

[8] Mundy v. Foster, 31 Mich. 313 (1875); Spencer v. Spencer, 26 R.I. 237, 58 A. 766 (1904); Roberge v. Bonner, 185 N.Y. 265, 77 N.E. 1023 (1906).

On the basis of these analogies, equity next enforced contracts to adopt and devise property to the child, and contracts to adopt and make the child an heir. The remedy spread rapidly from four early cases[9] and has been universally accepted.[10]

Probably the leading case illustrating the application of the remedy is *Chehak v. Battles*.[11] An agreement was signed in which the natural mother (probably unable to support the child) agreed to give up custody to a couple in return for their promise to adopt the child and give him all the rights of a natural child, including "all the rights of inheritance by law." An actual, statutory adoption was never made. Upon the death of the adopting couple, the court held the quasi-adopted child was entitled to share equally with the three natural children, taking his share by virtue of a decree of specific performance of the contract against the estate.

Although agreeing with this general rule, the courts, consistent with their treatment of contracts to transfer or devise as between adults, have denied specific performance where the result would be inequitable[12] or where there is insufficient evidence of a contract to devise or make the child an heir.[13] The rule is often stated that the evidence will be scrutinized, and the contract must be established beyond a reasonable doubt.[14]

1. *Comparison of the Theoretical Bases of the Remedy*

Cases where there has been no direct evidence of a contract to devise or make the child an heir have created the most difficulty. The first case to grant a right of inheritance in the absence of an express property agreement was *Wright v. Wright*.[15] The Michigan adoption statute of 1861, under which the child was adopted, had been declared unconsti-

[9] Van Dyne v. Vreeland, 11 N.J.Eq. 370 (1857); Sutton v. Hayden, 62 Mo. 101 (1876); Sharkey v. McDermott, 91 Mo. 647, 4 S.W. 107 (1887); Van Tine v. Van Tine, (N.J.Eq.) 15 A. 249 (1888).

[10] For cases enforcing contracts to adopt and leave property, see Godine v. Kidd, 64 Hun. 585, 19 N.Y.S. 335 (1892); Burns v. Smith, 21 Mont. 251, 53 P. 742 (1898); Anderson v. Anderson, 75 Kan. 117, 88 P. 743 (1907). For cases enforcing contracts to adopt and make the child an heir, see Winne v. Winne, 166 N.Y. 263, 59 N.E. 832 (1901); Tuttle v. Winchell, 104 Neb. 750, 178 N.W. 755 (1920); Gravning v. Olson, 62 S.D. 139, 252 N.W. 13 (1933); Chambers v. Byers, 214 N.C. 373, 199 S.E. 398 (1938). Contra, Carter v. Capshaw, 249 Ky. 483, 60 S.W. (2d) 959 (1933).

[11] 133 Iowa 107, 110 N.W. 330 (1907).

[12] As where the adopting parent remarries; Gall v. Gall, 64 Hun. 600, 19 N.Y.S. 332 (1892); Owens v. McNally, 113 Cal. 444, 45 P. 710 (1896).

[13] Shakespeare v. Markham, 72 N.Y. 400, (1878); Gall v. Gall, 64 Hun. 600, 19 N.Y.S. 332 (1892); McTague v. Finnegan, 54 N.J.Eq. 454, 35 A. 542 (1896).

[14] Hamlin v. Stevens, 177 N.Y. 39, 69 N.E. 118 (1903); Holt v. Tuite, 188 N.Y. 17, 80 N.E. 364 (1907); Gamache v. Doering, 354 Mo. 544, 189 S.W. (2d) 999 (1945).

[15] 99 Mich. 170, 58 N.W. 54 (1894).

tutional.[16] After the death of the adoptive father, the child claimed against the heirs-at-law, a sister and a deceased brother's children. The child had worked without pay on the adoptive father's farm after reaching majority and never knew that he was not a natural child. The three opinions of members of the court represent substantially the three views taken by subsequent cases in other courts.

Justice Long found an implied contract that the child was to inherit the property. His theory was that from the agreement to adopt, plus other facts and circumstances, an inference should be drawn of a contract to make the child an heir.[17]

Justice Grant's view was that "equity should declare that to be done which the parties clearly intended." He believed that the early New Jersey cases[18] were not based solely on the existence of a promise to leave property, and that a contract to adopt could be enforced without showing a promise to devise or make an heir. Under this theory the rights of inheritance "naturally flow" from enforcement of the contract to adopt—the so-called "equitable adoption" theory.[19]

Justice Hooker dissented on the ground that a child not legally adopted could claim only by virtue of specific performance of a contract to leave property to him, and that the testimony conclusively showed the adoptive father had never made any such promise.[20]

It is much easier to support the implied promise theory than the equitable adoption theory. Once the initial hurdle of finding the implied promise is crossed, the granting of specific performance rests upon

[16] People v. Congdon, 77 Mich. 351, 43 N.W. 986 (1889).

[17] Subsequent cases following the implied promise theory are: Crawford v. Wilson, 139 Ga. 654, 78 S.E. 30 (1913); Prince v. Prince, 188 Ala. 559, 66 S. 27 (1914); Hickox v. Johnston, 113 Kan. 99, 213 P. 1060 (1923); Soelzer v. Soelzer, 382 Ill. 393, 47 N.E. (2d) 458 (1943). See 171 A.L.R. 1315 (1947).

[18] Van Dyne v. Vreeland, 11 N.J.Eq. 370 (1857); Van Tine v. Van Tine, (N.J.Eq.) 15 A. 249 (1888). See note 9, supra.

[19] Subsequent cases following an equitable adoption theory are: In re Estate of Firle, 197 Minn. 1, 265 N.W. 818 (1936); Sheffield v. Barry, 153 Fla. 144, 14 S.(2d) 417 (1943); Roberts v. Sutton, 317 Mich. 458, 27 N.W.(2d) 54 (1947). Prior to 1917 the adoption statute of Missouri required only a deed in writing. Mo. Rev. Stat. (1909) §1671. Just as performance removes the similar bar of the statute of frauds for conveyances of land, the court in Lynn v. Hockaday, 162 Mo. 111, 61 S.W. 885 (1901), granted specific performance of an oral contract to adopt. The decree declared the child *"duly adopted* and an heir at law." (Italics added.) Many later Missouri cases so enforce a mere contract to adopt. These cases are often cited in other jurisdictions without due notice of their distinctive basis. See 17 Wash. Univ. L. Q. 362 (1932).

[20] Subsequent cases denying recovery on the basis of either a promise implied from an agreement to adopt, or the equitable adoption theory are Monson v. Monson, 174 Cal. 97, 162 P. 90 (1916); Wall v. Estate of McEnnery, 105 Wash. 445, 178 P. 631 (1919); Morris v. Trotter, 202 Iowa 232, 210 N.W. 131 (1926); St. Vincent's Asylum v. Cent. Wisc. Trust Co., 189 Wis. 483, 206 N.W. 921 (1926); Hatchell v. Norton, 170 S.C. 272, 170 S.E. 341 (1933); Clarkson v. Bliley, 185 Va. 82, 38 S.E.(2d) 22 (1946).

the same reasoning as that used where there is an express promise to leave property. There is some doubt as to whether the court can properly assume that the adopting parent intended to leave his property to the child in the absence of any statements or other evidence of his intention. Also, it is more difficult to justify a judicial decree which violates the literal provisions of the adoption statutes and the statutes of descent and distribution, when based merely on a status created by the agreement to adopt, rather than an express or implied agreement to devise or make the child an heir.

Still, there are hard cases where the contesting heirs are remote relatives of the deceased and it seems a hardship on the supposedly adopted child not to carry out the decedent's probable intent. Usually such a child has grown up as a member of deceased's family, and everyone concerned has thought the child would inherit, before discovery of the failure of legal adoption. Since recovery is granted at the discretion of the equity court, perhaps the remedy should be available in these cases, even though used sparingly.

Several additional arguments make the equitable adoption theory more difficult to support. Were the deceased living, the adoptee could not specifically enforce the contract to adopt because of the personal nature of the contract.[21] The heirs or administrator cannot be made to adopt the child and the courts admit that they are merely giving the child property rights.[22] Without the aid of the implied promise to devise or make an heir, it is almost impossible to find the source of equity's power to contradict the statutes of adoption and of descent and distribution. Merely to say upon proof of a contract to adopt equity will regard the child as adopted for purposes of inheritance seems to overrule the early cases which said that specific performance of a mere contract to adopt will not be granted.[23]

2. *Trends in Michigan*

In *Albring v. Ward*,[24] the Michigan court refused to grant specific performance of a contract to adopt where there was no evidence except the articles of adoption, which were void under the unconstitutional statute of 1861. Although purporting to distinguish *Wright v. Wright*,

[21] Erlanger v. Erlanger, 102 Misc. 236, 168 N.Y.S. 928 (1917).

[22] In Wooley v. Shell Petroleum Co., 39 N.M. 256, 45 P.(2d) 927 (1935), the court admitted specific performance of a contract to adopt to be impossible after the death of the promisor, but said the fiction of equitable adoption was impelled by the child's strong equity and by desire to prevent fraud.

[23] See cases cited supra, note 3.

[24] 137 Mich. 352, 100 N.W. 609 (1904).

the case may overrule the implied promise theory of that case. In each case there was a written contract to adopt, though ineffective as a legal adoption, from which a promise to leave property could have been implied. On an equitable adoption theory, however, it is possible to reconcile the two cases; in *Albring v. Ward* the claimant knew she was not a natural child, and the decedent had a natural son. So in the latter case equity simply refused the claimant's right to share in the estate, regarding only "that as done which ought to be done."

The possibility of a different result, depending on which theory is used, is again illustrated in a recent Michigan case, *Perry v. Boyce.*[25] The deceased, MacGregor, met Perry, a fourteen-year-old boy, while travelling in the South. Apparently with the consent of his father, Perry returned to Michigan with MacGregor, where he helped the older man earn a livelihood. There was some testimony that MacGregor had intended to adopt Perry, and he was accepted in the community as MacGregor's son. MacGregor had signed certain papers leaving property to Perry, but these did not comply with the necessary formalities for a will. The court admitted that these papers could not be held to be a contract to convey property.

The trial court held that Perry could not be treated as if he had been adopted, but found the existence of a partnership. The Michigan Supreme Court denied the partnership, but found sufficient evidence of a contract to adopt. From this inference of an agreement to adopt, the court held that Perry was equitably entitled to all the property of the deceased.

The court relied chiefly upon *Roberts v. Sutton,*[26] a prior Michigan case. That decision, like many others, contained language to the effect that the court will grant specific performance of a contract to adopt. This seems usually to be an abbreviated statement of the principle that equity will grant specific performance of a contract to adopt insofar as inheritance rights of the child are concerned, where the facts support recovery by the implied promise theory.[27] In *Perry v. Boyce,* however, there is no direct evidence of a contract to adopt, and it is doubtful whether the evidence would support recovery by the child if it were to be granted only on proof of an agreement to leave property.[28] To support recovery by the implied promise theory, an agreement to leave

[25] 323 Mich. 95, 34 N.W.(2d) 570 (1948). See also the two opinions in Walsh v. Fitzgerald, 67 S.D. 623, 297 N.W. 675 (1941).

[26] 317 Mich. 458, 27 N.W.(2d) 54 (1947).

[27] See cases cited in note 17, supra.

[28] Cf. Clemons v. Clemons, 193 Okla. 412, 145 P.(2d) 928 (1943); Stanley v. Wacaster, 206 Ark. 872, 178 S.W.(2d) 50 (1944); Holland v. Martin, 355 Mo. 767, 198 S.W.(2d) 16 (1946); Johnson v. Olson, (S.D. 1947) 26 N.W.(2d) 132.

property would have to be implied from a mere implied contract to adopt. Such a double inference is questionable.

Taken together, the cases seem to show an extension of the specific performance remedy from the firmer ground of the implied promise theory to a recovery supported only by the equitable adoption theory expressed by Justice Grant in *Wright v. Wright*. If not that, the Michigan court now seems prepared at least to imply a contract to leave property on the somewhat tenuous basis of a double inference from facts implying an agreement to adopt.

3. *Factors Which May Defeat Recovery*

Even in a case where the supposedly adopted child has recognized rights in a decedent's estate, other factors may prevent recovery. If there is an agreement to leave specific property or the property owned by the promisor at his death, the promisor cannot defeat the contract by a will or conveyance.[29] If the agreement is only to make the child an heir, however, the promisor may divest himself of his property by inter vivos[30] or testamentary transfer.[31] Where the court uses the equitable adoption theory, it would seem that the child should get only the rights of an heir.

When the property left by the deceased is real estate, and the agreement was oral, there is some conflict as to the operation of the statute of frauds. The majority of cases hold that performance of the contract to adopt by the natural parent or guardian, and by the child, removes the bar of the statute.[32] However, some cases require that the transferee must go into possession to defeat the operation of the statute, so that the child likewise must have gone into possession.[33]

Since the consideration passing to the promisor is twofold—the surrender of custody by the natural parent or guardian and the performance

[29] Bichel v. Oliver, 77 Kan. 696, 95 P. 396 (1908); Peterson v. Bauer, 83 Neb. 405, 119 N.W. 764 (1909); Rogers v. Schlotterbach, 167 Cal. 35, 138 P. 728 (1914). Contra, Austin v. Davis, 128 Ind. 472, 26 N.E. 890 (1891); Mahaney v. Carr, 175 N.Y. 454, 67 N.E. 903 (1903) (dicta).

[30] Malaney v. Cameron, 98 Kan. 620, 161 P. 1180 (1916); Mahaney v. Carr, 175 N.Y. 454, 67 N.E. 903 (1903).

[31] Davis v. Hendricks, 99 Mo. 478, 12 S.W. 887 (1890); Mahaney v. Carr, 175 N.Y. 454, 67 N.E. 903 (1903); Minetree v. Minetree, 181 Ark. 111, 26 S.W.(2d) 101 (1930); In re Bamber's Estate, 147 Misc. 712, 265 N.Y.S. 798 (1933).

[32] Kofka v. Rosicky, 41 Neb. 328, 59 N.W. 788 (1894); Bedel v. Johnson, 37 Idaho 359, 218 P. 641 (1923); Levenson v. Mayerowitz, 181 Misc. 526, 41 N.Y.S.(2d) 835 (1943); Winkelmann v. Winkelmann, 345 Ill. 566, 178 N.E. 118 (1931); 16 MINN. L. REV. 578 (1932).

[33] Wallace v. Long, 105 Ind. 522, 5 N.E. 666 (1886); Grant v. Grant, 63 Conn. 530, 29 A. 15 (1893); Hooks v. Bridgewater, 111 Tex. 122, 229 S.W. 1114 (1921). In 1933 New York amended its statute of frauds to require expressly a contract bequeathing property to be in writing. N.Y. Personal Property Law (McKinney 1938) § 31 (7).

of the duties of a natural child by the adoptee—some courts have held that misbehavior by the child constitutes a failure of consideration.[34] In such cases the promisor is not bound by his contract. Although a few cases have refused relief on the ground that the necessary consideration was not present,[35] the great majority of cases have found consideration in the love and affection to be received by the adopting parents from the child, care during old age, and perpetuation of the family name.[36]

A few early courts were troubled because the child was not a party to the original contract between the adopting parent and the natural parent.[37] Since the widespread approval of actions by third party beneficiaries, this objection has not been raised in recent cases.

Some confusion also existed in early cases with regard to illegalitiy of a contract to adopt. Where the natural parent sought to regain custody of the child, it was sometimes held that a contract to adopt was illegal, since it was against public policy for a parent to barter away his child.[38] The better considered cases have regarded the welfare of the child as the determining factor, however.[39] Any illegality would seem to make the contract only voidable, so that the child could elect to affirm. No recent case has been troubled by this factor.

B. Other Remedies Available in Absence of Legal Adoption

A number of cases have granted the right of inheritance to a quasi-adopted child on the basis of an estoppel.[40] The theory is that since the adopting parents would have been estopped from denying the validity of the adoption, heirs claiming through them are also estopped. However, it is hard to see how the child could have relied on a contract to

[34] As where the child leaves home, fails to visit parents, or fails to meet family obligations after maturity. Ball v. Brooks, 173 N.Y.S. 746 (1918); Gamache v. Doering, 354 Mo. 544, 189 S.W.(2d) 999 (1945). Cf. Tuttle v. Winchell, 104 Neb. 750, 178 N.W. 755 (1920). See 11 A.L.R. 819 (1921).

[35] As where the child is an orphan and his status in life is improved; Dusenberry v. Ibach, 99 N.J.Eq. 39, 133 A. 186 (1926); or the adopting parent is the child's stepfather to whom the child owes services anyway; Taylor v. Boles, 191 Ga. 591, 13 S.E.(2d) 252 (1941).

[36] Healey v. Simpson, 113 Mo. 340, 20 S.W. 881 (1892); Soelzer v. Soelzer, 382 Ill. 393, 47 N.E.(2d) 458 (1943); Hendershot v. Hendershot, 135 N.J.Eq. 232, 37 A.(2d) 770 (1944).

[37] Chehak v. Battles, 133 Iowa 107, 110 N.W. 330 (1907); Crawford v. Wilson, 139 Ga. 654, 78 S.E. 30 (1913); Bassett v. Am. Baptist Publ. Soc., 215 Mich. 126, 183 N.W. 747 (1921). See 2 A.L.R. 1197 (1919); 73 A.L.R. 1396 (1931).

[38] Hernandez v. Thomas, 50 Fla. 522, 39 S. 641 (1905); Hooks v. Bridgewater, 111 Tex. 122, 229 S.W. 1114 (1921).

[39] Stickles v. Reichardt, 203 Wis. 579, 234 N.W. 728 (1931).

[40] Cubley v. Barbee, 123 Tex. 411, 73 S.W.(2d) 72 (1934); Shaw v. Scott, 217 Iowa 1259, 252 N.W. 237 (1934); Jones v. Guy, 135 Tex. 398, 143 S.W.(2d) 906 (1940). Contra, Carter v. Capshaw, 249 Ky. 483, 60 S.W.(2d) 959 (1933). See 27 A.L.R. 1365 (1923).

make him an heir, if at any time the deceased could have disinherited him by will or conveyance.[41] It would seem that inheritance by estoppel is not inconsistent with the specific performance theory, so that both doctrines can be followed in the same jurisdiction.[42] Thus, estoppel may be a direct basis for recovery or it may be used to support the specific performance theory.[43]

Where the statutory procedure requires the probate court to enter a decree of adoption upon a showing of certain facts, and the decree omits a technical requirement, several cases have decided that the child can secure a *nunc pro tunc* decree to amend the faulty adoption decree.[44]

Restitution of the value of the services rendered is usually an alternative remedy for the supposedly adopted child. In fact, two courts have stated that this is the only remedy available to the child where no agreement to devise or make an heir accompanies the contract to adopt.[45] However, restitution is often a less desirable remedy; not only is the amount of recovery likely to be less, but also the statute of limitations may have run as to the major portion of such services.

C. Conclusion

Although there is no common-law adoption analogous to the common-law marriage, a child may claim rights of inheritance upon contract or estoppel principles in the absence of a valid statutory adoption. When based on an express contract to devise or to make the child an heir, recovery seems well founded. However, many logical difficulties are presented in the absence of an agreement with respect to property. Generally, the majority of cases have allowed recovery, either on an implied promise or equitable adoption theory. These cases, however, together with the digests and encyclopediae,[46] have largely overlooked a substantial minority of cases which deny recovery unless the statutory adoption practice has been followed or a contract with respect to property can be shown.[47]

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[41] See supra, notes 30 and 31.

[42] See 17 TEX. L. REV. 339 (1939).

[43] Both theories were used in Barney v. Hutchinson, 25 N.M. 82, 177 P. 890 (1918); 32 HARV. L. REV. 854 (1919).

[44] Ward v. Magness, 75 Ark. 12, 86 S.W. 822 (1905); Re Reichel, 148 Minn. 433, 182 N.W. 517 (1921); Benton v. King, 199 Ky. 307, 250 S.W. 1002 (1923).

[45] Taylor v. Thieman, 132 Wis. 38, 111 N.W. 229 (1907); Carroll's Estate, 219 Pa. 440, 68 A. 1038 (1908); Davies' Estate, 289 Pa. 579, 137 A. 728 (1927). Dicta to the same effect is found in Grant v. Grant, 63 Conn. 530, 29 A. 15 (1893); Riley v. Riley, 38 W.Va. 283, 18 S.E. 569 (1893).

[46] See 27 A.L.R. 1327 (1923); 142 A.L.R. 84 (1943); 171 A.L.R. 1315 (1947); 1 AM. JUR., Adoption of Children, §§ 16, 20; 2 C.J.S. Adoption of Children, §§ 26-29.

[47] See note 20, supra.