Cornell Law Review

Volume 54
Issue 4 *April 1969*

Article 4

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Walter Wadlington

ADOPTION OF ADULTS: A FAMILY LAW ANOMALY

Walter Wadlington†

The virtues of adoption have been widely acknowledged in recent years. This device for artificially establishing a parent-child relationship has been hailed as an effective tool in alleviating a key problem of illegitimacy: assuring adequate parental care for the child unwanted by his natural parents. In addition, families have been provided for many children whose parents were lost through the ravages of war.[1] Because of these and similar humanitarian results,[2] adoption today is the institution in our family law scheme which, after marriage, probably commands the greatest popular respect.

Of course, the preceding observations are directed wholly toward adoptions in which the adoptee is a minor. This should not be surprising; the layman (if not the lawyer) usually thinks of adoption as extending only to minors. That a great majority of our states permit adoption of adults—frequently with minimal judicial or administrative intervention or supervision—too often is unknown or ignored. Fortunately, there are some indications of change in this regard. Publicity attending cases involving weird legal machinations such as the adoption of one spouse by the other[3] has prompted a growing awareness that adults can be adopted, and sometimes all too freely. These cases, as well as the dangerous potential which increased use of the practice of adult adoption may hold for adoption of minors and

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† Professor of Law, University of Virginia. A.B. 1951, Duke University; LL.B. 1954, Tulane University.

1 Not only the child orphaned by war but the abandoned child and the illegitimate child left as a memento of a foreign army's presence have sometimes benefited through adoption. *See* R. ISAAC, ADOPTING A CHILD TODAY 137-47 (1965).

2 For a highly perceptive account of what can be done through adoption, and what still remains to be done, see P. BUCK, CHILDREN FOR ADOPTION (1965).

3 Kentucky has been the locus of most such maneuvers. *See, e.g.*, Minary v. Minary, 395 S.W.2d 588 (Ky. 1965), and Bedinger v. Graybill's Ex'r & Trustee, 302 S.W.2d 594 (Ky. 1957) (both involving adoption of a wife by a husband); Pennington v. Citizens Fidelity Bank & Trust Co., 390 S.W.2d 671 (Ky. 1965) (71-year-old wife had adopted her 74-year-old husband).

Another adult adoption case which has achieved considerable popular recognition is *Ex parte* Libertini, 244 Md. 542, 224 A.2d 443 (1966), in which the Maryland Court of Appeals reversed a trial court decision dismissing an unmarried 56-year-old W.A.C. sergeant's petition to adopt a 35-year-old W.A.C. captain. This case prompted an annotation in 21 A.L.R.3d 1012 (1968).

even family law in general, make it appropriate to question whether its further existence without substantial modification is justified.

I

THE HISTORICAL BACKGROUND

Adoption is a venerable legal institution.[4] As practiced by some primitive groups it was little more than a death planning device concerned with both religious needs and transmission of property. Under Roman law, adoption became a well established practice which on some occasions even determined imperial succession.[5] As reinstated in relatively modern times in the laws of some European states, the institution carried a clearly civil law imprint; the concern was not so much for finding parents for homeless minors as for satisfying desires of potential adopters, such as perpetuating family lines.[6] On the other hand, adoption was not recognized by the English common law,[7] and in the United States it bears certain indigenous characteristics which make it more than merely a revival of the ancient models.

Although state adoption legislation in this country began to appear with some frequency after 1860, the widespread acceptance and practice of adoption is generally considered to be a twentieth century phenomenon.[8] In becoming a highly utilized and regulated social tool,

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4 For the history of adoption generally, see Brosnan, *The Law of Adoption*, 22 COLUM. L. REV. 332 (1922), and Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743 (1956).

5 For a discussion of the Roman law of adoption, see W. BUCKLAND, A TEXTBOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN 121-28 (3d rev. ed. P. Stein 1963), and Wadlington, *Minimum Age Difference as a Requisite for Adoption*, 1966 DUKE L.J. 392, 394-96. Specific instances of determination of imperial succession through adoption are detailed in H. WOLFF, ROMAN LAW 17, 45 (1951).

6 Under the French law of adoption as it was revived at the turn of the 19th century, adoption was not permitted unless the adopter was over 50 years of age and the adoptee had reached majority. C. Civ. arts. 343, 346 (Fr. 1804). French law now permits adoption of minors but the relationship created still falls short of that of the natural parent and child. The new institution of "adoptive legitimation," added in 1939, corresponds more closely to our adoption of minors. *See* Wadlington, *supra* note 5, at 396-97.

7 The first English adoption statute was the Adoption of Children Act, 16 & 17 Geo. 5, c. 29 (1926). For further background on this law and the conditions before it was passed see P. BROMLEY, FAMILY LAW 401 (3d ed. 1966), and James, *The Illegitimate and Deprived Child: Legitimation and Adoption*, in A CENTURY OF FAMILY LAW 39, 45-55 (R. Graveson & F. Crane eds. 1957).

8 The major influences on the development of American adoption law are outlined in Wadlington, *supra* note 5, at 400-04.

our own institution of adoption has taken on characteristics which distinguish it from adoption practices elsewhere, both ancient and modern. Key among these is our insistence that an adoption should not be permitted unless it serves the best interests of the adoptee. Coupled with this is the idea that the adoptee should sever all ties with his natural family and should be fully integrated into his adoptive family. In short, the goal is to make the adopted child's position within his adoptive family correspond as closely as possible to that of the unadopted, legitimate child within his natural family.[9] The extent to which these concepts are ingrained in our adoption law and practice is illustrated by the refusal of some state courts to recognize adoptions validly effected in certain other countries. These courts point out that the particular foreigu adoption process is so alien to ours in both purpose and procedure that it creates a significantly different relationship which falls far short of the normal parent-child situation.[10]

Once again we must note that the previous observations about adoption in this country are directed toward adoption of minors. But comparisons with other jurisdictions usually are made without noting that the institution elsewhere is more frequently concerned with adoption of either adults or minors who are well along toward majority.[11] Our failure to make this distinction may well be the reason for much of the confusion over the place of adult adoption in our own system. The motive for adopting an adult frequently differs substantially from that for adopting a minor. Although this usually is recognized by our courts, which acknowledge that a broader range of motives is expected and deemed permissible in adult adoptions,[12] the legislatures have made little attempt to reflect this in their regulation of the practice.

Because adoption is a wholly legislative creation[13] the various state

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9 *See* CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, LEGISLATIVE GUIDES FOR THE TERMINATION OF PARENTAL RIGHTS AND RESPONSIBILITIES AND THE ADOPTION OF CHILDREN 28-29 (1961).

10 *See, e.g., In re* Gillies' Estate, 8 N.J. 88, 83 A.2d 889 (1951); Doulgeris v. Bambacus, 203 Va. 670, 127 S.E.2d 145 (1962). *But cf.* Baade, *Interstate and Foreign Adoptions in North Carolina*, 40 N.C.L. REV. 691, 709-15 (1962).

11 For example, the adoptee whose rights were at issue in Doulgeris v. Bambacus, 203 Va. 670, 127 S.E.2d 145 (1962), was 14 years of age when the foreign adoption took place.

12 As was stated in *Bedinger v. Graybill's Ex'r & Trustee*:

> [T]he fact that the adoption statute as it is written opens the door to an incongruous use is no reason why or authority for the court interposing an exception or qualification which the legislature did not put into it.

302 S.W.2d 594, 599 (Ky. 1957).

13 Because adoption usually is considered to be in abrogation of the common law, there has often been a judicial attitude favoring strict construction of the statutes that have created it. *See, e.g.*, Doby v. Carroll, 274 Ala. 273, 147 So. 2d 803 (1962); *In re*

statutes must be examined to determine whether adults can be adopted in any given jurisdiction. Many of these provide that "any person" can be adopted. Some make specific provision for adoption of minors (or persons below some established age level which does not necessarily coincide with majority). Jurisdictions in this second category also may provide an additional (and usually simpler) method for adoption of adults; if they do not, it is generally accepted that only minors can be adopted.[14] Some state legislatures regrettably have failed to use such unequivocal language in their statutes, which are couched instead in terms of adoption of "children." Although "children" is synonymous with "minors" in the minds of many persons, the former term obviously can include adults when we are speaking in terms of relationship.[15] *X*, the adult son of *Y* and *Z*, is also the "child" of *Y* and *Z*. Such an illustration may seem facile, but the failure to recognize this broader significance of the word "child" occasionally has required judicial interpretation to resolve the question of the intended legislative meaning.[16]

Initial legislative provision for adoption of minors in the United States did not significantly antedate similar provisions for adopting adults. Massachusetts is generally credited with being the first common law state to enact an adoption statute.[17] This 1851 act provided for adoption of "children" without defining that term, but its import seemed to be that only minor adoptees were intended.[18] This was clarified within two decades when the law was amended to permit the

Taggart's Estate, 190 Cal. 493, 213 P. 504 (1923); *In re* Holibaugh's Will, 33 N.J. Super. 232, 109 A.2d 706 (County Ct. 1954), *aff'd* 18 N.J. 229, 113 A.2d 654 (1955).

14 *See* Doby v. Carroll, 274 Ala. 273, 147 So. 2d 803 (1962); Appeal of Ritchie, 155 Neb. 824, 53 N.W.2d 753 (1952); Grant v. Marshall, 154 Tex. 531, 280 S.W.2d 559 (1955).

15 MERRIAM-WEBSTER NEW INTERNATIONAL DICTIONARY 388 (3d ed. 1961) defines the term "child" to include "a young person of either sex esp. between infancy and youth" and also "a son or a daughter: a male or female descendant in the first degree." Although a legislature might intend only the former meaning, a statute speaking only in terms of adoption of "children" is equivocal in the absence of some additional explanation or of some mandatory provisions which would seem absurd if applied to adult adoptions. But since the prospective adoptee is not the adopter's "child" (in terms of relationship) until after the adoption has taken place, it is logically arguable that a legislature intends only the first definition (based on age restriction) when it refers to adoption "of a child" rather than "as a child."

16 In Alabama, for example, the question of interpretation has produced recurring problems for some 80 years. *See* Doby v. Carroll, 274 Ala. 273, 147 So. 2d 803 (1962), *noted in* 15 ALA. L. REV. 545 (1963).

17 MASS. GEN. LAWS 1836-1853, ch. 324, at 752 (1954). For a discussion of the Massachusetts law and others enacted before 1876, see W. WHITMORE, THE LAW OF ADOPTION IN THE UNITED STATES, AND ESPECIALLY MASSACHUSETTS (1876).

18 WHITMORE, *supra* note 17, at 74.

adoption of an adult upon his own consent.[19] Vermont, however, provided for adoption of adults as early as 1853.[20]

Despite its early recognition, provision for adult adoption was not as rapid, nor has it ever progressed as far, as that for adoption of minors. As late as 1952 only thirty-four jurisdictions permitted an adult to be adopted.[21] By 1958 this number had increased to thirty-seven, plus two additional states which allowed such adoptions in very limited instances.[22] The Uniform Adoption Act, approved in 1953, specifically included a provision for adoption of adults which was not designated as optional.[23]

II

THE PRESENT SCOPE OF THE LEGISLATION

Today forty-three states[24] and the District of Columbia[25] either specifically authorize adoption of adults or have statutes which are

19 Mass. Acts 1871, ch. 310, § 6, at 654, contained the proviso that: "A person of adult age may be adopted in like manner upon his own consent, without other consent or notice."

20 Vt. Acts 1853, No. 50, § 1, at 42-43.

21 *See* 38 VA. L. REV. 544, 552-53 (1952). One additional state permitted adult adoption in limited circumstances. *Id.* at 553. Because of the previously discussed equivocal language of some of the statutes, it is difficult to take a clear head count of the positions of the states at any given date, though this is becoming less of a problem.

In 1935, about 30 states seemed to permit adoption of adults. 4 C. VERNIER, AMERICAN FAMILY LAWS 284 (1936).

22 *See* 1958 WASH. U.L.Q. 97, 106-10.

23 Section 18 of the Uniform Adoption Act provides:

> An adult person may be adopted by any other adult person [at least ten years older than the person adopted] with the consent of the person to be adopted or his guardian, and with the consent of the spouse, if any, of a sole adoptive parent, filed in writing with the court.

As to the criteria for granting such an adoption, the section adds that:

> After a hearing on the petition and after such investigation as the court deems advisable, if the court finds that it is to the best interests of the persons involved, a decree of adoption may be entered . . . .

Id. Under this Act, adoption of an adult produces the same civil effects between adopter and adoptee as does the adoption of a minor. Many of the procedural requirements for effecting adoption of a minor are suspended, however, if the adoptee is an adult. *Id.*

Although the Uniform Adoption Act has been enacted by only 2 states, it unquestionably has had a significant impact on the comparable legislative provisions in many states.

24 ALASKA STAT. § 20.10.140 (1962); ARK. STAT. ANN. § 56-121 (Supp. 1967); CAL. CIV. CODE § 227p (West 1954); COLO. REV. STAT. ANN. § 4-1-4 (1963); CONN. GEN. STAT. ANN. § 45-67 (Supp. 1968); DEL. CODE ANN. tit. 13, §§ 951-56 (1953); FLA. STAT. ANN. §§ 63.231 to -.281 (Supp. 1968); GA. CODE ANN. § 74-420 (Supp. 1967); IDAHO CODE ANN. § 16-1501 (Supp. 1967); ILL. ANN. STAT. ch. 4, § 9.1-3 (Smith-Hurd 1966); IND. ANN. STAT. § 3-124 (Repl. Vol. 1968); IOWA CODE ANN. § 600.1 (Supp. 1968); KAN. STAT. ANN. § 59-2101 (1964); KY. REV. STAT. § 405.390 (Supp. 1966); LA. REV. STAT. ANN. § 9:461 (1965);

worded so broadly that they would seem to permit adoptions regardless of age. Although the general approach has been to de-emphasize the benefits to the parties and the motive for adoption when the adoptee is an adult, three of these states permit adult adoptions only in narrowly circumscribed instances.[26] The seven states in which adults cannot be adopted are characterized by their provision only for minor adoptions rather than by explicit proscriptions against adult adoptions.[27]

Among those states which permit adoptions of adults it is increasingly common to find simplified procedures for their accomplishment.[28] Typical changes which are made to facilitate the adoption of adults are: (*1*) Abolition of the requirement of consent from the

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ME. REV. STAT. ANN. tit. 19, § 531 (Supp. 1968); MD. ANN. CODE art. 16, § 71 (Repl. Vol. 1966); MASS. ANN. LAWS ch. 210, § 1 (Supp. 1967); MINN. STAT. ANN. § 259.22 (1959); MISS. CODE ANN. § 1269-02 (Recomp. Vol. 1956); MO. ANN. STAT. § 453.010 (1952); MONT. REV. CODES ANN. §§ 61-139, -140 (Repl. Vol. 1962); NEV. REV. STAT. § 127.190 (1967); N.H. REV. STAT. ANN. § 461:9 (Repl. Vol. 1968); N.J. STAT. ANN. §§ 2A:22-1 to -3 (1952); N.M. STAT. ANN. § 22-2-13 (1953); N.Y. DOM. REL. LAW §§ 109-111 (McKinney 1964); N.C. GEN. STAT. § 48-36 (Supp. 1967); N.D. CENT. CODE § 14-11-01 (1960); OKLA. STAT. ANN. tit. 10, § 60.21 (1966); ORE. REV. STAT. § 109.329 (1967); PA. STAT. ANN. tit. 1, §§ 1(d), 2.1 (1963); R.I. GEN. LAWS ANN. § 15-7-4 (1956); S.C. CODE ANN. § 10-2587.18 (Supp. 1967); TENN. CODE ANN. § 36-138 (Supp. 1968); TEX. REV. CIV. STAT. ANN. art. 46b-1 (1959); UTAH CODE ANN. § 67-30-1 (Supp. 1967); VT. STAT. ANN. tit. 15, § 431 (1958); VA. CODE ANN. § 63.1-222 (Repl. Vol. 1968); WASH. REV. CODE ANN. § 26.32.020 (1961); W. VA. CODE ANN. § 48-4-7 (1966); WIS. STAT. ANN. § 322.01 (1958); WYO. STAT. ANN. § 1-726 (1957).

25 D.C. CODE ANN. §§ 16-301, -303, -304 (1967).

26 Idaho provides for adoption of adults only

> in cases where such adoption did not occur during the minority of such adopted person by reason of inadvertence, mistake or neglect and the person adopting has sustained the relation of parent to such adopted person for a continuing period of more than fifteen years.

IDAHO CODE ANN. § 16-1501 (Supp. 1967).

Virginia permits adoption of an adult if: (*1*) The adopter is the adoptee's stepparent and has stood in loco parentis for at least one year; or (*2*) the adoptee is a niece or nephew of the adopter, has no living parents, and has lived in the adopter's home at least one year; or (*3*) the adoptee resided in the home of the adopter for at least five years before reaching age twenty-one. VA. CODE. ANN. § 63.1-222 (Repl. Vol. 1968).

New Mexico provides only for adoption of a childless, unmarried adult who is twenty years younger than the adopter. N.M. STAT. ANN. § 22-2-13 (1953).

Until 1967 Utah provided that an adult could not be adopted unless both his parents were dead. This was amended to permit adoption of any adult. UTAH CODE ANN. § 78-30-1 (Supp. 1967).

27 ALA. CODE tit. 27, §§ 1-9 (Supp. 1967); ARIZ. REV. STAT. ANN. §§ 8-101 to -110 (Supp. 1967); HAWAII REV. LAWS § 331-1 to -16 (1955); MICH. STAT. ANN. §§ 27.3178(541) to -(554) (Supp. 1968); NEB. REV. STAT. §§ 43-101 to -116 (Supp. 1967); OHIO REV. CODE ANN. §§ 3107.01 to -.14 (Supp. 1967); S.D. CODE § 14.0401 to -.0408 (Supp. 1960).

28 *See, e.g.*, LA. REV. STAT. ANN. § 9:461 (1965); NEV. REV. STAT. §§ 127.190 to -.210 (1965); WIS. STAT. ANN. §§ 322.01 to -.04 (1958).

adoptee's parents;[29] (2) elimination of provisions for investigation of the home of the adopter for a specified period before the adoption can take place;[30] (3) elimination of the requirement that the potential adoptee must have lived in the home of the adopter for a specified length of time before the adoption can take place;[31] (4) changing of the provisions for confidentiality of the proceedings;[32] and (5) de-emphasis of the mandate that adoption should be granted only when it will serve the best interests of the adoptee.[33] Usually a final decree can be obtained after a single (and perhaps pro forma) hearing[34] when the

29 The need for parental consent has not been totally eliminated. *See, e.g.*, FLA. STAT. ANN. § 63.261 (Supp. 1968); ILL. ANN. STAT. STAT. ch. 4, § 9.1-8 (Smith-Hurd Supp. 1967). But in the largest group of statutes permitting adult adoption, only the consent of the adoptee and perhaps the adopter's spouse is required. At least one state permits consent to be given by the guardian of the proposed adoptee who is incompetent. *See* WYO. STAT. ANN. § 1-726 (1957). Usually the statutory requirements as to who must be given notice are the same as those for consent.

30 Most frequently the statutes either dispense with an investigation or provide that it will be discretionary with the court. *But see* VT. STAT. ANN. tit. 15, § 439 (1958).

31 This requirement still remains for some or all adult adoptions in a few states, including Illinois, Pennsylvania, and Virginia. For a judicial discussion of what amounts to such a "residing with," see *In re* Adoption of Russell, 170 Pa. Super. 358, 364-68, 85 A.2d 878, 881-83 (1952).

32 Some of the statutes leave it unclear whether confidentiality requirements for minor adoptions apply to adult adoptions. The use of "child" in such provisions again can be the source of the confusion. In some jurisdictions, however, confidentiality provisions clearly differ according to the adoptee's age at the time of adoption. *See, e.g.*, LA. REV. STAT. ANN. § 9:461 (1965).

33 It is not unusual for adult adoption statutes to provide no particular standards for the courts to apply. In some instances, however, the "best-interests" standard has been specifically applied to adult adoptions:

> If the court is satisfied that the adoption will be for the best interests of the parties and in the public interest, and that there is no reason why the petition should not be granted, the court shall approve the agreement of adoption . . . .

CAL. CIV. CODE § 227p (West 1954). For a discussion of the possible exercise of judicial discretion under this statute, see tenBroek, *California's Adoption Law and Programs*, 6 HASTINGS L.J. 261, 264-65 (1955).

> The court shall consider the petition with evidence about the character, habits, capacity, and qualifications of the adopters and if satisfied that the adoption of the adoptee will be for his or her permanent interest or benefit, the court shall adjudge the adoption . . . .

FLA. STAT. ANN. § 63.271 (Supp. 1968). "[T]he court, if satisfied that there is no reason why said adoption should not be granted, shall enter a final order of adoption . . . ." GA. CODE ANN. § 74-420 (Supp. 1967). "[I]f the court finds that it is to the best interests of the persons involved, a decree of adoption may be entered . . . ." S.C. CODE ANN. § 10-2587.18 (Supp. 1968). Provisions almost identical to South Carolina's are found in OKLA. STAT. ANN. tit. 10, § 60.21 (1966), and WIS. STAT. ANN. § 322.04 (1958).

34 In Louisiana the adult adoptiou is accomplished by a notarial act signed by the adopter and adopted party. LA. REV. STAT. ANN. § 9:461 (1965); Wadlington, *Adoption of Adults in Louisiana*, 40 TUL. L. REV. 1, 6-10 (1965). Nevada requires only a written agreement which is approved by the district court in the county where either the adopter

adoptee is an adult; this contrasts sharply with the typical procedure for adoption of a minor, under which (except when the adopter is a stepparent or close blood relative) a final hearing often will not take place until six months or more after entry of an interlocutory decree.[35]

The civil effects of adult adoption frequently are governed by the same provisions which apply to adoption of minors. The most notable exception is found in Colorado, where the legislature has indicated that the purpose of adult adoption is simply to make the adoptee the legal heir of the adopter.[36] Although the statutes governing civil effects of adoption vary considerably from one jurisdiction to another,[37] fairly common provisions are: (*1*) The adoptee is entitled to inherit from (and by the modern view through) the adopter just as would the latter's legitimate child by birth; (*2*) the adoptee leaves his natural family for most, if not all, purposes including inheritance; and (*3*) the adoptee can and most often does take the family name of the adopter.[38]

In summary, there are two generalized distinctions between the statutory treatments of adoption of adults and of minors in this country today. First, adoption of a minor usually is more elaborately supervised

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or adoptee resides. NEV. REV. STAT. § 127.190 (1965). In Connecticut such an adoption is effected by a written agreement approved by the court of probate after a judicial hearing. CONN. GEN. STAT. ANN. § 45-67 (Supp. 1968).

35 A good illustration of this contrast is seen in the Uniform Adoption Act. In the case of adoption of a minor, § 11 specifically requires both an interlocutory and a final decree, with a suggested time lapse of 6 months between the granting of the former and the application for the latter. For adult adoptions, § 18 replaces this requirement with a single hearing.

36 COLO. REV. STAT. ANN. § 4-1-13 (1963). (The court that grants the adoption may change the adoptee's name, however. *Id.*) The judicial interpretation of this section has been restrictive. In Martin v. Cuellar, 131 Colo. 117, 279 P.2d 843 (1955), an adoptive parent was not permitted to maintain a wrongful death action for loss of a son adopted as an adult.

37 Some statutes specifically state that the effects of adult and minor adoption shall be the same. *See, e.g.*, W. VA. CODE ANN. § 48-4-7 (1966) and WIS. STAT. ANN. § 322.04 (1958). Others provide certain exceptions in the case of adult adoptions. In Georgia, for example, the adopter is limited as to inheritance from the adoptee of property which came to the latter from his blood relatives. GA. CODE ANN. § 74-420 (Supp. 1967). North Carolina provides that adult adoption does not relieve the adoptee from pre-existing duties of support, including those to his natural parents. N.C. GEN. STAT. §§ 14-326.1, 48-36 (Supp. 1967). Some states provide wholly separate statements as to civil effects of minor and adult adoption. *See* N.J. STAT. ANN. § 2A:22-3 (1952).

For a general discussion of the effect of adoption on inheritance see Binavince, *Adoption and the Law of Descent and Distribution: A Comparative Study and a Proposal for Model Legislation*, 51 CORNELL L.Q. 152 (1966).

38 A number of adult adoption statutes give the courts discretion as to whether to effect a name change but provide no guidelines for its exercise. *See, e.g.*, COLO. REV. STAT. ANN. § 4-1-13 (1963) and N.J. STAT. ANN. § 2A:22-1 (1952).

and its purpose is more carefully examined from a standpoint of social interests, fewer purposes being considered acceptable. A second distinction is that adoption of a minor is based almost universally on the consent of the natural parent or of the state or some other agent acting in the parent's stead, while adoption of an adult typically requires the consent of only the adopter and the adoptee (and perhaps the spouse of a married adopter). Despite these major distinctions in the ease with which adoption may be accomplished and the relative safeguards for protection of the parties, their immediate natural kin, and the state, the legal effects of the adult adoption are in most instances almost the same as those created by adoption of a minor.

III

Adult Adoption and the Courts

Mention has been made already of the occasional need for judicial construction to determine whether equivocally worded statutes were intended to permit adoption of adults. This, however, has not been the only situation in which courts have been called upon to consider substantial problems concerning adult adoption.

Despite the fact that in most jurisdictions the same statutory provisions control the civil effects of both minor and adult adoptions, courts occasionally have distinguished these effects on the basis of the age of the adoptee at the time of his adoption. For example, the Kentucky Supreme Court recently rejected the argument that a testator intended the word "children" to include persons adopted as adults.[39] The court pointed out that

> when a testator uses the classification "children," he is thinking of and intends to use the word in its commonly accepted meaning. He is thinking of those persons who were actually born of the parents, or, if adopted, were adopted as children.[40]

Recent cases drawing this type of distinction seem to be confined mostly

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39 Wilson v. Johnson, 389 S.W.2d 634 (Ky. 1965).

40 *Id.* at 636. Earlier in the opinion, the court stated:

> By our statutes an adult may be adopted in the same manner as a child. But by virtue of such fact he does not ipso facto become a child. True, the legal effect of adoption is that he shall be considered for all legal considerations the natural child of the adopting parents. But, except for strict legal considerations, an adopted adult is not ordinarily considered a child of the adopting parents. On the other hand, a child adopted before he becomes an adult is considered for all purposes a child of the adopting parents. He ordinarily moves into the household and becomes one of the children in fact as well as by law.

Id.

to instances in which the courts were called upon to construe the intention of a testator or settlor other than the adoptive parent.[41]

Whether an adult was (or could have been) "equitably adopted" is an issue which has reached the appellate courts of several states. These situations involve promises to adopt made to either the potential adoptee or his natural parent. Often the facts turn on the theme of "come live with or take care of me and you will be my child." Equitable adoption does not establish a legal relationship of parent-child as would a statutory adoption, but the result of constituting the adoptee as heir is nevertheless effected.[42] Since this is often the single motive for adoption of an adult, equitable adoption usually is as significant as statutory adoption from the viewpoint of the adult adoptee. Where this problem has arisen in a jurisdiction with no statutory mechanism for adopting adults, the judicial answer has been that equitable adoption will not be permitted.[43] Even where adoption of adults is permitted by statute, there has been some judicial hesitation to recognize equitable adoption of adults, despite that fact that the doctrine might be applicable in cases involving minors.[44] One reason given for this distinction is that the adult has sufficient understanding to fend for himself and to see that the statutory process is carried out. Such a stance no doubt minimizes the possibility of fraudulent attempts at splitting an estate after the alleged equitable adopter's death.

Other litigation concerning adult adoptions has involved attempts to have such decrees set aside. For the most part these cases have been based on alleged fraud or overreaching on the part of the adoptee; usually they are brought by third parties after the adopter's death. These situations have ranged from a man's adoption of his mistress-secretary to a young adoptee's advantage-taking of an older adopter verging on senility.[45] The right of an heir (or one who stands to gain

41 The construction may variously involve terms such as "children," "heirs," "heirs at law," or "heirs of the body." *See, e.g.*, Minary v. Citizens Fidelity Bank & Trust Co., 419 S.W.2d 340 (Ky. 1967); Wilson v. Johnson, 389 S.W.2d 634 (Ky. 1965); Bedinger v. Graybill's Ex'r & Trustee, 302 S.W.2d 594 (Ky. 1957); *In re* Estate of Comly, 90 N.J. Super. 498, 218 A.2d 175 (County Ct. 1966); Merson v. Wood, 202 Va. 485, 117 S.E.2d 661 (1961).

42 Equitable adoption is sometimes called adoption by estoppel. For a general discussion of the doctrine, see H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 653-58 (1968).

43 *See In re* Taggart's Estate, 190 Cal. 493, 213 P. 504 (1923); Appeal of Ritchie, 155 Neb. 824, 53 N.W.2d 753 (1952); Grant v. Marshall, 154 Tex. 531, 280 S.W.2d 559 (1955).

44 *See* Gamache v. Doering, 354 Mo. 544, 189 S.W.2d 999 (1945), and Thompson v. Moseley, 344 Mo. 240, 125 S.W.2d 860 (1939). *But cf.* Crawford v. Wilson, 139 Ga. 654, 78 S.E. 30 (1913) (dictum).

45 *See, e.g.*, Stevens v. Halstead, 181 App. Div. 198, 168 N.Y.S. 142 (2d Dep't 1917)

by inheritance from a deceased adoptee) to attack an adoption decree obtained by fraud, duress or improper influence by an adult adoptee on the adoptive parent has been recognized in several states.[46] It is generally considered, however, that such an action will be available only if the adoptive parent himself could have attacked the decree during his lifetime.[47] This obviously could lead to difficult questions concerning when any applicable time limitation on bringing such an action begins to run.[48]

One potential problem is the extent to which certain emerging concepts of due process protection in the adoption of minors might apply to adult adoptions. The best illustration of such a possible case is provided by *Armstrong v. Manzo*,[49] which held that a noncustodial natural parent was entitled to notice of a hearing on the adoption of his minor child by his former wife's new husband. In adult adoptions, as already pointed out, there is usually no requirement of consent by anyone except adopter and adoptee and little provision for notice (or sense of need for it) to anyone except possibly the adopter's or adoptee's spouse. But in some states a natural parent may be financially as well as socially affected through the loss of such incidents as the child's duty of aliment, and a case could be made for urging that greater notice should be required.[50]

(man, 70, had adopted his paramour, 47, who was married but living separate from her husband); Greene v. Fitzpatrick, 220 Ky. 590, 295 S.W. 896 (1927) (wealthy bachelor adopted his married stenographer); Vasconi Adoption, 73 Pa. D. & C. 119 (Orphans' Ct. 1950) (adoptee was adult daughter of woman with whom adopter allegedly was living).

In addition to allegations of undue influence by a 32-year-old male adoptee on his substantially older female adopter, evidence was offered to show that the adoptee was a homosexual in *In re* Adoption of Russell, 170 Pa. Super. 358, 85 A.2d 878 (1952). Not finding satisfactory support for the allegation of undue influence, the court held that it would not be considered fraud "for a proposed adult adoptee not to disclose to the court the various derelictions of his lifetime." *Id.* at 363, 85 A.2d at 881.

46 *See, e.g., In re* Adoption of Sewall, 242 Cal. App. 2d 208, 218, 51 Cal. Rptr. 367, 375 (Ct. App. 1966), and cases cited in note 45 *supra*.

47 *See In re* Adoption of Sewall, 242 Cal. App. 2d 208, 219, 51 Cal. Rptr. 367, 376 (Ct. App. 1966), and cases cited therein.

48 *See, e.g., In re* Adoption of Sewall, 242 Cal. App. 2d 208, 222-27, 51 Cal. Rptr. 367, 378-81 (Ct. App. 1966). Here the court held that the time limitation begins to run when the fraud is or reasonably should be discovered, rather than from the date of the decree. *Id.* at 226, 51 Cal. Rptr. at 381.

49 380 U.S. 545 (1965).

50 It is quite possible that the financial effects of adoption would be irrelevant in the determination whether notice should be required. *Armstrong v. Manzo, id.*, was based on the parent-child relationship without further elaboration. Since such a relationship is not changed merely by the child's reaching majority, it is arguable that notice to natural parents in the adult adoption also is required to meet due process standards.

IV

AN INSTITUTIONAL APPRAISAL

A. *The Pros and Cons of Adult Adoption*

The usual argument favoring adoption of adults is that it can be valuable as a flexible estate planning device.[51] Such a rationalization seemingly requires an acknowledgment that our legal provisions for gratuitous property transfers are so confused or so ineffective that we should return to the primitive practices of ancient times. Even assuming, for the sake of argument, that substantial inequities and inadequacies can be found in our rules governing testamentary and *inter vivos* donations, it would seem far more logical to remedy them directly rather than through ridiculous fictions such as declaring that a man's wife is also his daughter or that his father is also his son.[52] And before we assume that the "flexibility" gained through free adoption of adults is desirable, we must determine whether the provisions being circumvented may in fact be carefully considered limitations on property disposition.

There are clearly some instances in which availability of adult adoption has served to avoid undesirable hardship. One such instance involved a disabled child who had been raised by his grandparent since being orphaned at age two.[53] The child was administratively denied childhood disability benefits under the Social Security Act because he was not the legal child of the grandparent. To qualify him for such benefits the grandfather decided to adopt the grandchild, who by this time had reached majority. A Tennessee decree of adoption was granted, but this was not considered acceptable evidence of parentage by the agency's appeals council, which contended that Tennessee law did not provide for adoption of adults. A federal court ultimately held the new legal relationship valid under Tennessee law and ordered the

51 For an example of this position, see H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 652-53 (1968).

52 The combined wife-daughter (and husband-son) relationship has been considered non-objectionable in several cases already. It should be noted, however, that even though the adoption decree itself be considered valid, the intended civil effects of the decree are sometimes denied to the adoptee. Thus, he may or may not be allowed to inherit through the adopter; the particular result seems to turn on the specific terms used in the will or trust instrument. *See* cases cited in note 3 *supra*.

Although no appellate cases were discovered in which a father has been adopted by his son, there seem to be no absolute barriers against this in those numerous states which have neither minimum age difference requirements nor restrictions on adoption of close blood relatives.

53 Coker v. Celebrezze, 241 F. Supp. 783 (E.D. Tenn. 1965).

payments to be made.[54] This particular result seems desirable, but again, just as with the inadequacies of our property transfer laws, the problem should have been dealt with directly, through revision of existing legislation or administrative regulations to permit such a result generally. In short, forced creation of a parent-child relationship should not be necessary to achieve such an approved result under our broad scheme of social legislation.

Appealing arguments for permitting adult adoption might be made in several other cases of apparent need, including the following: (*1*) A person wanted to adopt another during the latter's minority but for some reason he was legally unadoptable during minority, either in general or to the would-be adopter specifically;[55] (*2*) the childless individual or couple wish to perpetuate a family name; (*3*) a strong filial affection develops only after both parties reach majority; and (*4*) a stepparent desires to adopt his wife's adult children.

In evaluating each of these situations we must ask whether a legal parent-child relationship actually is necessary to effectuate the goals of the parties. Such need no doubt exists in case (*2*). Yet this seems to be the ground of least importance in a society which increasingly stresses individual achievement above family heritage and which has abolished positions of royalty and hereditary titles. In the three remaining situations there seems to be little need of establishing a legal parent-child relationship in order to effect the parties' desires. This follows from today's great freedom of alienation of property and from the freedom of adults to live together if they desire.

A situation in which adoption of an adult seems quite justifiable is where his adoption as a minor is subsequently invalidated after he has reached majority. The infrequency of standing to attack the adoption, estoppel, and the common curative statutes dealing with defective procedures in past adoptions[56] minimize the number of instances requiring subsequent adult adoption. But these few cases present a strong appeal for providing a remedy, chiefly because the parties usually have

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54 In 1965 the Tennessee legislature amended the adoption statute to make it clear that adults could be adopted. TENN. CODE ANN. § 36-138 (Supp. 1968).

55 The most common reasons for such unadoptability would be the natural parent's refusal to consent or a judicial refusal to allow adoption across religious or color lines. For an illustration of a de facto parent-child relationship without legal adoption because of lack of the natural parent's consent, see *In re* Taggart's Estate, 190 Cal. 493, 213 P. 504 (1923) (denying the child's right to inherit from the de facto parent).

56 For example, see IND. ANN. STAT. § 3-126 (Repl. Vol. 1968); ORE. REV. STAT. § 109.381(3) (1967); TENN. CODE ANN. § 36-138 (Supp. 1968) (covers prior adult adoptions specifically).

lived together in a parent-child relationship for a sustained period. This group of cases could easily be designated as a special category in which adult adoption will always be permitted, regardless of a general provision on the subject.

There remains the question of what harm can be done by continuing to permit free adoption of adults in the manner now possible in the majority of our states. It is suggested that one reason why there has been little concern over restricting adult adoption is that much of what little public attitude exists follows a "We know it's strange, but does it hurt anybody?" pattern.

One justification for concern over the present approach is its possible detrimental effect on existing family structure and institutions. The husband-wife adoption is a prime illustration of a twisted family structure. Moreover, it is not too difficult to envision some future general scrambling to choose and win new parents and children, perhaps followed by further family swapping at later intervals. Aside from the problems created for future genealogists, existing legal rights and duties based on family relationship (such as intra-family support requirements)[57] might easily be frustrated or evaded. One can imagine the temptation for an individual to both abdicate his family responsibilities[58] and at the same time financially "upgrade" by ingratiating himself with some wealthy person without natural descendants who wishes to perpetuate his name.

Aside from the problems of circumventing restrictions on inheritance and abrogating existing family obligations, there are other possible instances in which adult adoption might be put to undesirable social uses. Classic examples include a man's adoption of his mistress or a homosexual's adoption of his similarly-inclined mate. In this regard it is significant that state statutes usually permit adoption whether the adopter is single or married. Although the sexual activities of the parties to such adoptions are not licensed in any way, the adoption would be valuable for "security" reasons because it is not irregular for

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57 One writer recently indicated that at least 33 states require a child to support his parent in certain instances. *See* Rosenbaum, *Are Family Responsibility Laws Constitutional?*, 1 FAM. L.Q. 55, 58 (1967).

58 Except for North Carolina (which specifically mandates continuation of pre-adoption support duties) and Virginia (which eliminates them), the statutes generally are silent on the effect of adult adoption on child-parent support duties. *Compare* N.C. GEN. STAT. § 48-36(b) (Supp. 1967) *with* VA. CODE ANN. § 63.1-222 to -233 (Repl. Vol. 1968). Some states, however, permit the adoptee to inherit from his natural family and it is probable that in these jurisdictions judicial construction would be necessary to determine whether pre-existing support duties are also continued.

parent and child to live together regardless of age. And even though it might seem to further compound the illegality if a parent and child have intercourse together, sexual relations between adoptive parent and child probably are not incestuous under the bulk of our state laws.[59]

Still another concern is the possible impact which distorted or bizarre uses of the adult adoption ultimately might have on adoption generally. At this time, the standard of the child's best interests is thoroughly entrenched in our decision-making process for adoption of minors. Such an amorphous standard probably could be changed in practice without a change in labels. If we are going to permit adoption of a person at age twenty-one without regard for his best interests, why should we continue to apply the test at age fifteen or ten or five? And if we recognize that the desire to upgrade financially is justifiable for adults, are we not prone to equate this with the best interests of the minor as well? Most important, however, the use of adoption as a shield for the protection of sexual promiscuity or homosexuality, or as a means for frustrating the desires of testators and settlors, almost inevitably will lead to a stigma on adoption as an institution. Although we have two kinds of adoption in terms of purpose and practical effect, they are nevertheless both adoptions to the public, and this is bound to create confusion.

B. *Alternatives to the Present System*

There are several alternatives for avoiding or minimizing the possible ill effects of adult adoption as we know it today. One would be to completely abolish the practice.[60] Even if this were considered desirable, such a peremptory step probably would not be politically feasible in most jurisdictions which presently permit adult adoptions. It simply is not such a burning issue as to call for immediate, radical departure from the status quo. A less drastic and thus more acceptable step would be to restrict adoption of adults to certain narrowly cir-

59 For a general discussion on this point, see Wadlington, *The Adopted Child and Intra-Family Marriage Prohibitions*, 49 VA. L. REV. 478 (1963).

60 As mentioned earlier, 7 states have managed to live without the institution. *See* note 27 *supra*. The trend in recent years, however, clearly has been to add rather than eliminate such provisions. Whether elimination of the process in a handful of states would accomplish anything more than the development of adoption forum shopping is uncertain. Difficult questions of recognition and full faith and credit might be presented if a state's abolition of adult adoption were based on strong public policy against them. *Cf.* Delaney v. First Nat'l Bank, 73 N.M. 192, 386 P.2d 711 (1963).

cumscribed categories.[61] Examples of permitted adult adoptions could include the curative situation involving the adoption of a minor invalidated after he has reached majority, and the adoption by a stepparent of his wife's adult children after their noncustodial parent is dead.

It might be suggested that most of the potential evils of adult adoption could be averted by excluding certain relationships from the practice[62] and by requiring a minimum age difference between adopter and adoptee.[63] Although such restrictions seem desirable in most instances whether the adoptee is an adult or a minor, they nevertheless would not deal effectively with the broader problems raised by unlimited adult adoption. For example, they might frustrate the husband's proposed adoption of his wife but they would not reach the businessman's adoption of his secretary-mistress unless she happened to be roughly his age; nor would they deal with the problem of the younger gigolo and the elder, senile, would-be jetsetter.

A step which would be more responsive to reasonable social needs ostensibly satisfied by the present system but yet not denigrate our system for adoption of minors, is the creation of a wholly new institution. Ideally this should be separated from adoption of minors as much as possible, even to the extent of having a separate label. For present purposes (and for lack of anything more imaginative), we will tag the new device "adult filiation."[64]

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61 This is the approach presently followed in Idaho, Virginia and New Mexico, discussed in note 26 *supra*.

62 Varying restrictions of this sort now exist in a few states. *See, e.g.*, CAL. CIV. CODE § 227p (West 1954); CONN. GEN. STAT. ANN. § 45-67 (Supp. 1968); MASS. ANN. LAWS ch. 210, § 1 (Supp. 1967); NEV. REV. STAT. § 127.190 (1967); N.H. REV. STAT. ANN. § 461:9 (Repl. Vol. 1968).

63 Minimum age difference requirements for adult adoption presently are found in CAL. CIV. CODE § 227p (West 1954) (adoptee younger); CONN. GEN. STAT. ANN. § 45-67 (Supp. 1968) (younger); FLA. STAT. ANN. § 63.241 (Supp. 1968) (10 years younger); NEV. REV. STAT. § 127.190 (1967) (younger); N.J. STAT. ANN. § 2A:22-2 (1952) (15 years younger); N.M. STAT. ANN. § 22-2-13 (1953) (20 years younger); N.D. CENT. CODE § 14-11-02 (1960) (10 years younger); UTAH CODE ANN. §§ 78-30-2 (1953), 78-30-1 (Supp. 1967) (10 years younger). The Uniform Adoption Law, discussed in note 23 *supra*, contains an optional 10-year required age difference for adult adoptions. For further discussion of such provisions *see* Wadlington, *Minimum Age Difference as a Requisite for Adoption*, 1966 DUKE L.J. 392, 408-10.

64 The most obvious weaknesses of this particular tag are (*1*) it is likely to be confused with acknowledgment of an illegitimate child, and (*2*) the word "filiation" generally denotes parentage and the relationship to be established here is something less than a parent-child relationship. It should be sufficient for present purposes, however, and we

It would not be necessary that the adult filiation process be identical in all states either in procedure or effects. Just as in the case of adoption, individual jurisdictions could limit or expand (or abolish) the institution in terms of their individual public policy concerns. But there should be some common characteristics to distinguish it from adoption, which henceforth would include only the creation of a parent-child relationship with a minor. Key among these characteristics might be a simplified procedure clearly directed toward dealing with adults, and a clear limitation on the civil effects produced by the adult filiation. Also included should be some safeguards against using filiation to circumvent existing gratuitous transfer provisions when such a result would clearly be contrary to the legislative intent, and safeguards against creation of relationships contrary to good morals or to the best interests of society.[65]

A point on which there might be variance in the adoptive filiation procedure would be whether either consent or notice should be required for anyone other than the parties.[66] It is suggested that although formal consent except from the immediate parties should be unnecessary, a requirement of notice to certain relatives would be desirable. This would protect persons of advanced age or lessened capacity who would be most likely to fall prey to the fortune hunter. Of course, this assumes that the courts will have some discretion in permitting or denying an adult filiation. Clearly they should have some such discretion, though the standards for its application could vary. One state might wish to permit the filiation unless there were a showing that it would be contrary to good morals or nothing more than a prohibited estate planning device. Another might seek to impose on the parties to a proposed filiation the burden of establishing that it would serve some acceptable social purpose. The danger in either approach is that such amorphous standards might provide no safeguards except in the most flagrant cases, if then—a situation directly analogous to the doctrine of collusion in divorce. This could be remedied to a considerable degree by requiring some form of investigation by the court (or the state's attorney) in each case, an approach somewhat similar to the use of the Queen's Proctor in English divorce cases. This would be the

might note similar problems in the French use of "adoption" and "adoptive legitimation." *See* note 6 *supra*. A somewhat similar distinction was found in Roman law: *adrogatio* brought a person completely into his new family while *adoptio* established a more limited relationship. *See* BUCKLAND, *supra* note 5, at 121-28.

65 This test should be more stringent than any of those discussed in note 33 *supra*.

66 This presumes that it is constitutionally possible to omit requirements of consent or notice in the case of an adult's parent. *See* discussion at note 50 *supra*.

counterpart of the investigation required in adoption, which at present is a virtually meaningless operation when the adoptee is an adult. Such a requirement should not be an excessive burden on the judicial structure: there probably would be relatively few filiation cases, an investigation would not be very time consuming, and time spent in this fashion should lessen the deliberation necessary at the subsequent judicial hearing.

An obvious key to the frequency of use of adult filiation would be the civil effects which it would accomplish. It has been urged already that these should be less than the effects created by adoption; this would create a relationship without all the normal incidents of parent and child, which is consistent with the idea that filiation is designed to meet needs different from adoption. Ties with the natural family should remain substantially the same for both parties to the filiation at least insofar as rights to aliment or duties of support are concerned. Whether descent and distribution statutes should be modified to reflect the possibility of adult filiation probably is a question which the various jurisdictions should answer individually.

At this point one might ask whether providing such a separate limited institution is any better than eliminating or narrowly restricting the adoption of adults. The answer is that an institution such as adult filiation would provide a means for achieving the legitimate goals presently sought in many adult adoptions while also providing safeguards against the misuse of the latter process. A separate institution is desirable because in most adoptions of adults there are substantially different goals and social interests at stake than in adoptions of minors. The present adoption process has not adequately taken this into consideration and it is doubtful that it can ever be fitted into the indigenous American adoption scheme without serious inconsistencies, both conceptual and practical. But while the justifications for society's recognition of adult adoption are much less powerful than those for minor adoption, the need for permitting the artificial establishment of at least a quasi-parental relationship between adults in many cases cannot be denied.[67] The problem is to assure that the advantages to be gained through such a process are not outweighed by the dangers to society inherent in its misuse. The potential for abuse of the present system of adult adoption is too great. A safer balance would be struck through the creation of a new institution such as adoptive filiation.

[67] For some of the reasons which prompted the Commission on Uniform Adoption Act, see Merrill & Merrill, *Toward Uniformity in Adoption Law*, 40 IOWA L. REV. 299, 323-24 (1955).

The present article is intended less as an attempt to present a refined scheme than to suggest the urgent need for more imaginative thought and development to improve one of our key family law institutions. Adoption has been most successful in the past several decades and we should seek to protect it. At the same time, we should be sufficiently heartened by the success of this institutionalized legal fiction to try new variations of it when they seem appropriate.