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The Laws of Adoption

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T H E S I S

The Laws of Adoption.

-by-

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1893.

CONTENTS.

Introduction.

History.

Who can Adopt.

Who may be adopted

Legal Effect of Adoption.

Inheritance.

Relation of an Adopted Child to its natural Kin.

Conflict in the Laws of Adoption.

Specific Performance of a Contract to Adopt.

Quasi Perental Relation.

Laws of Adoption.

Implanted in the heart of man are certain affections. One of the truest and purest of these is that which exists between parent and child. In all quarters of the earth, among the different races of men and through all eras of the world's history, the character of this relation has been an index to the existing stages of civilization. The literature of all lands redounds with tributes to parental affection and filial love. The sunshine of child life comes alike to the palace and to the peasant's cottage.-- Who can number the hearths that have been gladdened by the laughter of children? But it often happens that the marital relation is not productive of issue, so that lands and titles are lost and broken in their line of descent, lives become drear and blank, and cheerless

old age is unaccompanied by youthful love and affection. These misfortunes are diminished and overcome by adoption or the legal relation created by a person taking a child of another into his own family, by which he assumes all the rights and liabilities of the natural parent and the child for all purposes is deemed his own.

Adoption with its legal consequences was well known to the ancients, and the civil law expressly sanctioned it, while on the other hand it was totally unknown if not repugnant to the common law.

During the time of Justinian the law of adoption suffered considerable change. Before that time the effect of adoption was to place the person adopted in the same position as he would have held, had he been born a son of the person adopting him. He bore the name of his adoptive father, and was his heir at law. The changes made by Justinian, however, completely altered its character. It had sometimes happened under the old

law, that a son lost his succession to his own father by being adopted and to his adopted father, by a subsequent emancipation. To remedy this, Justinian provided that the son given in adoption to a stranger, should be in the same position to his own father as before, but gain by adoption the succession to his adopted father if the adopted father die intestate.

The adoptive person, however, was not bound like the natural father to leave him a share of his property if he made a will. The adopted son still remained in the family of his natural father and the only change which adoption caused was, that he acquired a right of succession to his adoptive father if intestate. (Cooper's Justinian 29) This doctrine was transmitted to the modern nations of Europe.

Adoption was, also, recognized by the Code Napoleon, though it contained the very stringent provisions that the adopter must be fifty years of age and without living children or legitimate

descendants, fifteen years older than the person adopted and a probationary period of six years being required before the adoption takes effect. The law as laid down by Napoleon was adopted by Louisana. From the Spanish law it was transmitted to Mexico, thence to Texas, and thus into the U.S.

Adoption being unknown under the common law is of purely statutory origin in this country. Mass. was the first state to enact laws governing this subject. In 1857, a law was passed in that state which conferred this right. Subsequently, this statute came before the courts in the case Sewall v. Roberts, 115 Mass., 262, where it was found to be to general and comprehensive. The notice of the legislature was brought to these defects, and after having appointed a commission to investigate and report the matter, a statute was passed in 1876, which because of its conciseness and completeness over previous legislation, has been accepted as a model by other states. Since 1857, following the example of Mass., nearly every state in the

Union has passed statutesupon this subject. These statutesvary much in their details, but have a common intent and purpose. Most of the statuteshave been found defective or to narrow, necessitating amendments or a revision, so that the law as a whole has been in a transitory state. Little litigation, however,has arisen over the subject, as the adopting parents do not prefer to die intestate, and all controversies over the property being removed, their is nothing left in regard to the statutes over which men would naturally quarrel.

<u>Who can adopt?</u> All the statutes

Who can Adopt?

All the statutes agree that the adopter must be an adult. Following closely the Code Napoleon, the original statute of Louisana, had the provisions that the person adopting shall be at least forty years of age, and at least fifteen years older than the person adopted. This was repeated in 1872, by Act No. 31., which provided that any person above the age of twenty-one years shall have the right to adopt any one under that age. Succession of Vollmer, 40 La.Annual, 593; Sec.222 Civil Code Cal provides that the person adopting a child must be at least ten years older than the person adopted.

By the law of New York and by the law of nearly every state a married man or woman cannot adopt a child without the consent of the other.

This however, is not an universal rule, in Indiana a married man may adopt a child without his wife's joining in the petition and the child may have an adopting father without an adopting mother. (Barnhizel v. Finell, 47 Ind., 335) But in those states where the adoption is not invalidated because of non-consent by one spouse, the other is not bound by the decree. Thus it was held in Stanley v. Chandler, 53 Vt., 619, that an adoption, under an act of the legislature, by a husband without the consent of his wife did not prevent the wife from taking one-half of the estate the same as if no heirs.

Who may be Adopted.

The language used in most statutes is a "child", this undoubtedly means as it has been worded in the N.Y, statute, and construed in R.I. (In re. More, 14 R.I. 38) to be " any minor child". Adults can be adopted in Vermont, by joining in the deed of adoption; and the only restriction in Mass., is that the person adopting be at least twenty-one years of age and older than the person adopted, who cannot be his or her wife, husband, brother, sister, uncle, aunt, either of the whole or half blood.

In all cases except when the adoption consists merely in declaring the person adopted an heir, the adoption must be founded on consent. The reason is that no person is supposed to object to having his financial condition bettered, but to

take a child away from his kin, and friends and subject him to the control of a stanger, is such an interference with the rights of his parents, that it will not be permitted without their free consent. Hence all the statutes require the consent of the parents, parent, guardian, next friend, next of kin, corporation or other institution having the la lawful custody of the child affirmativoly, or that notice be given to them so that they may appear and be heard upon the question of adoption before the court. Also, the consent of the child if over I4, and in N.Y. if over twelve, and finally the sanction of the court

It is provided in N.Y. and the same statute exists in most of the states, in substance: " That the consent is not necessary from a father or mother deprived of civil rights, or adjudged guilty of adultery or cruelty, and who is, for either cause, divorced; or is adjudged to be an insane person or an habitual drunkard, or is judicially deprived of the custody of the child on account of cruelty or neglect."

It has been adjudged in New Jersey, that a parent is deemed to have abandoned his child so as to render his written consent unnecessary, when his conduct has evinced a settled purpose to forego all parental duties, and relinquished all parental claims to the child and that such an abandonment is irrevocable. (Winans v. Luppie, 20 At., 969)

Legal Effect.

The legal effect of adoption as provided in N.Y. statute, L. 1873, ch. 830 as amended L. 1887 ch. 703 is as follows: " A child when adopted shall take the name of the person adopting, and the two thenceforth shall sustain toward each other the legal relation of parent and child and have all the rights and be subject to all the duties of that relation, including the right of inheritance,"and etc. It is generally provided that the adopted child shall take the name of the adopting parent. This is accomplished by several methods, principally by statute as in N.Y., Pa., and etc., but in Col. the power is conferred upon the County Courts, and in Mo., upon the probate courts.

By adoption the adopting parent assumes all the rights, liabilities and duties of the

natural parent, even as against the natural parent or lawful guardian. The adopting parent is entitled to the services of the child, but is not entitled to support even though the child have property of its own. (Brown v. Walsh 27 N.J.E.,429. The adopting parent must provide protection, maintenance and education for all purposes the same as if it was his own legitimate child. On the other hand the adopting parent has exclusive control over the child, and derives the same benefit from its custody and services as if it was his own. This is not the rule in Texas, however, under a modified system of Spanish law existing in that state the adopted heir has the rights of a natural child only with reference to the estate, and does not become a member.of the family of his adopter, invested with the privileges and duties peculiar to the relation of parent and child. (Eckford v. Knox, 67 Texas, 200) When there is a conflict between two parties as to who is the adopted parent the court always seeks the best interest of the child and awards its custody accordingly.Fouts v.Pierce 60 Ia.71

Inheritance.

The most important feature of the law of adoption is the right of inheritance and succession to real and personal property. One of the primary, motives, which lead people to take another's child as their own, is their desire for an heir and thus keep the bulk of their fortunes in the family name. As a general rule there is no difference in the extent of the inheritance between adopted and natural legitimate children. The former take under the statute of descent and distribution the same as the latter with few limitations which will be noticed later. The right of inheritance is made mutual between the adopting parent and the child, so that where the adopted child dies intestate without lawful issue, seized of real estate or owning personal property, which may have come to him from his

adopted parents xx his property shall descend to the adopted parents or their heirs at law to the entire exclusion of his natural heirs at law.(Davis v. King, 95 Ind., 1) So under Mass. statute ch.124 sec. 3, providing that when a husband dies intestate, and " leaves no'issue living" his widow shall receive a certain portion of the land and an adopted child is " issue" under such statute (Buckley v. Frazier, 27 N.E.,768) But by a descision of an inferior court in Penn. it was held that an adopting parent could not inherit from the adopted child. The judge holding that adopted children inherit equally with natural children because the statute expressly so declares, and in the absence of a declaration giving the adopting parent power to inherit that a strict construction of the statute should be taken. This undoubtedly is carrying the rule to far and is not good law. But an adopted child cannot inherit from his adopted parents ancestors nor if he happened to be a grand-son of the adopting father can he inherit the property of his grandfather in a two-

fold capacity, as a son and grandson.(Delano v. Brewster, 148 Mass.,619) In Iowa however, it was decreed that when a father adopted two children of his daughter, and afterwards died, leaving no will that the children so adopted would inherit from him as his own children and would also inherit the share of their deceased mother. (Wagner v. Varner, 50 Iowa, 532) These two cases are in direct conflict. The Mass. case is based upon the point that the provision in the statute providing that " " no person shall, by being adopted, lose his right to inherit from his natural parents or kindred" does not include the adopting parent, While in the Iowa case the judge thought that the act of adoption did not take away any existing rights,or such as may accrue, but gave him certain additional rights. This latter view seems to be the more logical, and would undoubtedly be supported by the New York courts if the question should arise in this state. There being no statute in this state like the one in Mass., and our statute being silent

as to the exact relationship of an adopted child and its natural parents, the reasoning of the Iowa case would apply.

In Texas if the party adopting have at the time or thereafter a child begotten in lawful wedlock, the adopted heir cannot inherit more than one-fourth of the estate of the party adopting him. (Eckford v. Knox, 67 Texas, 200)

It is provided in several states that the deed of adoption shall state the terms which the adopter and adopted shall bear to each other. Thus in Nebraska the terms must be stated in the petition, so in Mississippi, the petition must state what gifts and grants it is proposed to bestow upon the adopted child.

There are two great limitations to the adopted child's right of inheritance, namely, a stranger cannot be introduced into the right of succession to property limited to a man and " the heirs of his body". Nor can an adoption so disturb the descent or distribution of the property as

to enable an adopted child to inherit from the lineal or collateral kindred of his adopting parent by right of representation. These are substantially the limitations imposed in the Mass. statute, and " heirs of the body" in this connection has been interpretated to have its technical meaning (2 Redfield on Wills, 398-9) The reason for the first is obvious. Property limited to a man and " his heirs" would be entirely within the control of the devisee, he being able to adopt an heir at any time and thus destroy the intention of the testator.

But as to the latter limitation the cases do not agree. In Indiana the rights of the lawful children of the adopting parent and the adopted child are not changed or affected by the adoption. No right is given them to inherit from or through each other, they are not only not brothers and sisters but they have no rights as such.(Barnhezel v. Ferrel 47 Ind.,335) In direct conflict with this case is the statute of Penn., providing that " if

such adopting parent shall have other children, he she or they shall respectively inherit from and through each other as if all had been lawful children of the same parent." Yet it has been held that such adopted child cannot take under a devise to the"children" of the parent by adoption; for it is not a child by nature. (Shafer v. Enue, 54 Pa.St. 304)

Our New York statute provides that the child adopted and its adopted father shall bear to each other the relation of parent and child "except that as respects the passing and limitation over of real and personal property, under and by deed, conveyances, wills, devises and trusts dependent upon the person adopting, dying without heirs, said child adopted shall not be deemed to sustain the legal relation of child to'the person so adopting so as to defeat the rights of remaindermen." No case has ever arisen in which this provision has been construed,but the same reasoning would apply as to the"heirs"of his body" found in the statutes

of the other states. As to inheriting from the lineal or collateral kindred of its adopting parent by right of representation the statute is silent, but construing the statute as a whole it would seem that such right existed.

The Relation of an Adopted Child to its Natural Kin.

By adoption a child may have a status in two families. While he may be a member of one family, he will loose none of the rights which existed between him and his natural parents. The statutes of the states vary much in defining the relation of an adopted child and his natural kin, and some of the statutes are silent all together, so that complications often arise as to the right of inheritance between the natural kin and those of adoption. Let us look at some of the statutes of the various states. The New York statute is clear upon this subject. It provides:- "That the parents of an

adopted child are, ffom the time of adoptinn, relieved from all parental duties toward and of all responsibility for, the child so adopted and have no rights over it."   As we have already seen in Pennsylvania,-and the same statute also exists in West Virginia,--the natural children, if any, and the adopted children inherit from and through each other.   In Iowa, adopted children inherit from both their natural and adopting parents; but in Conn. and Ill., they inherit only from their adopting parents.   The adopting parents cannot inherit from their adopted children in Georgia, Iowa, Maine, and North Carolina.

In New Mexico an adopted child may be disinherited.

The New York Statute provides that "the heirs and next of kin of the child so adopted shall be the same as if the said child was the legitimate child of the person so adopting" and in case of the death of the person so adopted the person so adopting as above provided shall for the purpose of inheritance sustain the relation of parent to the per-

son so adopted." Thus it would seem that the child is entirely cut off from his heirs and next of kin except in the case where property is limited to his adopting parents; and the adopting parents wo would inherit from the adopted child to the exclusion of the natural parents.

It has been held in Ind., that where a child adopted by a husband and his wife, jointly, dies without children or their descendants; the owner of land inherited from the adopting mother, the surviving husband and adopting father inherits such land, and it does not descend to the natural mother. Humpheries vs. Davis, 100 Ind., 274. This is a very important and instructive case, reviewing a large number of authorities, and clearly shows the position of the courts on this subject. The judge in rendering the decision said,- "It is not to be presumed that the legislature meant to violate logical rules by creating the legal relation of child without the corresponding one of parent nor that they meant to thrust out the surviving husband and father for

the benefit of a person that was a stranger to the ancestor who was the source of title. It is a principle of American and Roman law, that in case of failure of descendants capable of taking, the inheritance shall go back to the kinsman of the blood from which it came. To produce uniformity and harmony it must be held , as we now hold, that the death of the adopted child casts the inheritance which came to him through the joint adoption back to his adoptive father, and not upon the natural mother who was an utter stranger to the person from whom t the title flowed. It may be that this would require that what the adopted child inherits from its natural kinsmen should go back to them, but if so, it is a good result, for this is no more than right."

In Wagner vs. Barner, Supra, it was said: "because of the adoption the child requires certain additional rights,but there is nothing in the act of adoption which in and of itself takes away other existing rights, or such as subsequently accrue. The reason which supports this rule does not apply to

the mother. She in legal effect, severs all legal rights to the property which the child may acquire by virtue of its status to the adoptive parents for, as to that property, she permits the correlative relation of parent and child to exist between the child and the adoptive parent. It does her no injustice to have her with her right to such property as her child may acquire otherwise than through the adoptive parent, but it would do great injustice to permit her to secure the property acquired by her child in virtue of both its natural and adoptive rights." I think the reasoning in this case is sound and would apply in construing the New York statute. It would seem that it would supply and speak where our statute is silent and there can be no doubt that if a like case should arise in this state the result would be the same. This case, in many respects, is the most important found in the reports as it clearly defines the legal status of all the parties interested in the act of adoption.

Conflict in the Laws of Adoption.

In view of the diversity of the statutes it becomes important to enquire what is the law determining a particular case of adoption. So far as concers the statut of the person adopted this is to be determined by the law of his domicil though there is authority holding that where the act is based upon contract the law relative to contracts prevails.

The law of the nationality of the adopted person is to decide in all that concerns his relations to the adopting person; the law of the nationality of the adopting person is to decide in all that concerns the relations of the latter to his own family. And the law of the domicil and not the law of the

nationality is to determine the status. In the United States where the legislation of particular states differs so widely in this connection to take the test of nationality would be impracticable. Each of the states is a part of one nationality; no state is a distinct nation. Each state however has its special rlegislation as to civil status; and domicil, therefore, must determine what particular legislation is to apply. In this country therefore the law of the domicil of the parties must determine the validity of the adoption. If both parties are domiciled in the state of adoption, then the adoption should be held extra-territorially valid, at least in all states which accept the policy of adoption, or to whose jurisprudence adoption is not repugnant. But no state can declare that a person not its domiciled subject shall be the adopted child of another person. Both the adopter and the adopted must be personally subject to the laws of the state by whom the adoption is enacted. Thus a child adopted, wi with the consent of its father and the sanction of

a judicial decree in Penn., where the parties are domiciled at the time, under a statute by which a child so adopted has the same rights of inheritance as the legitimate offspring in the estate of the adopting father, is entitled, after the adopting father and the adopted child have removed their domicile into Mass., to inherit there the real estate of such father as against his collateral heirs; although his wife has given no formal consent to the adoption as is required under the statutes of Mass. Ross vs. Ross, 129 Mass., 243. This case was distinguished in part by Keegan vs. Geraghty, 101 Ill., 26. This was a case in which a child was adopted in Wis., and subsequently moved with its parents into Ill. After the death of the adopting parents litigation arose between its natural parents and the heirs of the adopting parents, and the court held that the rights of inheritance acquired by an adopted child under the laws of another state, where he was adopted, will be recognized and upheld in this state only so far as they be not inconsistent with

our laws of descent, so that if such child cannot take by descent by our statute, cannot take at all no matter what may be the law of the state where the adoption was made. The distinguishing point in the two case is that the Mass. court decided that the status is determined by the law of the domicil and that this status is to be recognized and upheld in every other state, so far as it is not inconsistent with its own laws and policy. In that particular case the laws of Mass. and Penn., were not so inconsistent but what effect could be given to the Penn statute in Mass., but in the Ill. case the judge acknowledging the rule as laid down in Mass., yet thought that the laws of Wis., were inconsistent with those of Ill. so no effect could be given them.

Specific Performance of a Contract to Adopt.

It sometimes happens that persons agree to adopt a child and leave it their property and actually take the child into their families, but fail to fulfil any of the statutory requirments for adoption. In such cases it is not the law or statute regulating adoption that is to prevail but the law relative to contracts. So that where a certain and definite contract is clearly established, even though it involves an agreement to leave property on the part of the promisee, equity, in a case free from all objections on account of the adequacy of the consideration, or other circumstances rendering the claim inequitable, will compel specific performance. Shakesphere vs. Markham, 10 Hun, 322.

The fact of a child entering the family of another and living with it for a number of years, fully performing its part of the contract is a sufficient performance of the contract to take it out of the operation of the statute of frauds. Sharkey vs. McDermott, 91 Mo., 647.

Perhaps the best that I can do is to quote from Judge Barretts opinion in Gall vs. Gall, 19 N.Y.Supp., 332, which sums up the whole matter and gives the rules governing the subject. The Judge said:- "It is certain that in this class of cases the ordinary rules which govern in actions to compel the specific performance of contracts, and which furnish reasonable safeguards against fraud, should not be extended, but should be regidly applied. These rules require that the contract be certain and definite in all its parts, that it be mutual and founded upon an adequate consideration, and that it be established by the clearest and most convincing evidence. That the remedy is a matter of judicial discretion, and that relief should be withheld when

a decree for specific performance would work injustice to innocent third persons or where it would be contrary to public policy." The important cases on this topic are:-

Gofine v. Kidd, 19 N.Y., Supp., 335;

VanTine vs. VanTine, 15 At., 249;

Van Dyne vs. Vreeland, 12 N.J.Eq., 142;

Anderson vs. Shockley, 82 Mo., 250.

Quasi Parental Relation.

When, without express contract, an infant is indefinitely taken into a family not akin to it the surrounding circumstances must give construction to the act, and determine whether the infant is so taken as a visitor, or as a servant for wages to earned by it, or as a boarder or pupil for nurture or tuition for compensation to the head of the family, or as a child adopted by the family in the relation of a child by blood or in some other peculiar relation. In the absence of proof of surrounding circumstances from which a contract can be implied the law will not impose one upon the parties.

Where an adult child remains with his parent after reaching the age of majority, it is in-

cumbent upon him, to show that the ordinary relation of parent and child did not exist between him and his parent, that is an express contract, between them that the son should be compensated for his services. Kaye v. Crawford, 22 Wis., 320; Pillage v. Pillage, 32 Wis., 136. And the rule relating to natural children appears to apply equally to children by adoption. Mountain vs. Fisher, 22 Wis., 93. When an infant is taken into a family, it is always the presumption that neither its support nor its services are to be compensated except as the one compensates the other. Thorp vs. Bateman, 37 Mich., 68. There being no reason why a child by adoption sharing the advantages, should not share the disabilities of a child by blood;or why a child received into a family from benevoleance should have a larger rule of right in it than a child in its charge by order of nature. The adoption of an infant into a family as a child implies no contract to pay for its services to the family; and an infant so adopted can recover for such services against the head of the family only

upon express contract.

The rule of evidence by which such express contract between parent and child, by blood or by adoption, must be established, is laid down in Pellage vs. Pellage, 32 Wis., 136. The Judge says:- "The rule, is that the evidence of a contract to compensate the services of a child must be positive and direct, and the contract cannot be inferred from circumstances and probability." And Dixon C.J., adds by way of explanation "It may perhaps be going too far to say that, in every case of this kind there must be positive proof of express contract for the payment of wages or the making of pecuniary compensation for the services performed. There may undoubtedly exist other facts and circumstances clear and unequivocal proof of which according to the rule of evidence held in such cases, will be equivalent to direct and positive proof of an express contract. An express contract to pay, or the relation of master and servant may be as fairly and incontrovertibly established by circumstancial evidence as by that which is direct."