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VIRTUAL ADOPTION AND RIGHTS OF INHERITANCE

Since adoption is entirely statutory,¹ equity courts in many jurisdictions have developed the doctrine of virtual adoption to cover certain situations where, for some reason, the statutory procedures have not been completed so as to result in a legal adoption.² Under this doctrine mere foster children are granted such rights of inheritance from their foster parents as they would have enjoyed had they been legally adopted. A few cases have raised an additional question concerning virtual adoption.³ That is, whether the heirs of the foster parents can use an adoption as a basis for a right to inherit from the foster child when he dies intestate and remains legally unadopted.

In a recent Texas case of first impression,⁴ *Heien v. Crabtree*,⁵ the Supreme Court of Texas reviewed an inheritance claim based upon a virtual adoption. Anna Heien was the heir of Rosa and Frank Frei who, it was claimed, in about 1886, had taken custody of an infant, later known as R. F. Frei, under an agreement to carry out a statutory adoption. The child lived with the Freis for about twenty years, during which time a normal parent-child relationship existed. The Freis failed to carry out their agreement to adopt the child during their lives. R. F. Frei, who never married, died intestate. The plaintiff brought this suit to establish herself, through Rosa and Frank Frei, as the heir of R. F. Frei, on the theory of a virtual adoption. The petitioner in making the claim was contesting the escheat of R. F. Frei's estate to the State of Texas. The county court and the

¹Massachusetts is generally attributed with having introduced the first adoption statute in 1851. See, Atkinson, *Wills* § 23 (2d ed 1953); 59 *Yale L.J.* 715 (1950); but see Brosnan, *The Law of Adoption*, 22 *Colum. L. Rev.* 332, at 335 (1922). Adoption was not authorized by statute in Great Britain until 1926. See 16 & 17 *Geo. 5*, c. 29 (1926). The phenomenon of adoption was not foreign to most early-developed civilizations, including the Romans, Hebrews, Babylonians, and Egyptians. *Hockaday v. Lynn*, 200 *Mo.* 456, 98 *S.W.* 585 (1906); *Fairley, Inheritance Rights Consequent to Adoption*, 29 *N.C.L. Rev.* 227 (1951).

²Some jurisdictions refuse to recognize the doctrine and so deny any rights of inheritance unless the adoption statute has been strictly complied with. E.g., *Schultz v. First Nat'l Bank*, 220 *Ore.* 350, 348 *P.2d* 22 (1959); *Clarkson v. Bliley*, 185 *Va.* 82, 38 *S.E.2d* 22 (1946); *St. Vincent's Infant Asylum v. Central Wis. Trust Co.*, 189 *Wis.* 483, 206 *N.W.* 921 (1926).

³See, e.g., *Rumans v. Lighthizer*, 363 *Mo.* 125, 249 *S.W.2d* 397 (1952); *Moorman v. Hunnicutt*, 325 *S.W.2d* 941 (*Tex Civ. App.* 1959).

⁴In *Moorman v. Hunnicutt*, 325 *S.W.2d* 941 (*Tex Civ. App.* 1959), a case raising the same issue as the principal case, writ was refused, *N.R.E.*, to the Supreme Court of Texas.

⁵369 *S.W.2d* 28 (*Tex.* 1963).

Court of Civil Appeals denied the claim,⁶ and the Supreme Court of Texas affirmed in a 7 to 2 decision.⁷

The majority of the Supreme Court of Texas rested its denial of the petitioner's claim upon the prior holdings of the courts which had determined that virtual adoptions do not create the legal status of an adopted child.⁸ Therefore, Anna Heien could not establish any legal relationship between herself and R. F. Frei upon which the claimed right of inheritance could be based. The court in the principal case also qualified two sections of the Texas Probate Code, which had provided a strong basis for the plaintiff's claim.⁹ Section 3(b) of the Texas Probate Code defines a child as follows:

"(b) 'Child' includes an adopted child, whether adopted by an existing or former statutory procedure or by acts of estoppel, but, unless expressly so stated herein, does not include an unrecognized, illegitimate child of the father."¹⁰

Section 40 of the Probate Code treats an adopted child for the purposes of inheritance as a natural child, born in wedlock to the adoptive parents.¹¹ The majority opinion in the principal case, in affirming the decision of the Court of Civil Appeals, disposed of the statutory provisions of the Texas Probate Code by candidly stating that the legislature in providing that a child could be fully adopted by acts of estoppel,¹² had misconstrued the holding of the courts.¹³

The two dissenting judges in the principal case were of the opinion that the words of the statute were unambiguous and therefore the

⁶364 S.W.2d 271 (Tex. Civ. App. 1963). The opinion of the Court of Civil Appeals does not deal directly with the statutory provisions of the Texas Probate Code.

⁷369 S.W. 2d 28 (Tex. 1963).

⁸Cavanaugh v. Davis, 149 Tex. 573, 235 S.W.2d 972 (1951); Jones v. Guy, 135 Tex. 398, 143 S.W.2d 906 (1940); Cubley v. Barbee, 123 Tex. 411, 73 S.W.2d 72 (1934).

⁹Tex. Prob. Code §§ 3(b), 40 (1956).

¹⁰Tex. Prob. Code § 3(b) (1956).

¹¹"For the purpose of inheritance under the laws of descent and distribution, an adopted child shall be regarded as the child of the parent or parents by adoption and their kin the same as if such child were the natural legitimate child of such parent or parents by adoption, and such parent or parents by adoption and their kin inheriting from and through such adopted child the same as if such child were the natural legitimate child of such parent or parents by adoption . . . Nothing herein shall prevent any parents by adoption from disposing of his property by will according to law. The presence of this Section specifically relating to the rights of adopted children shall in no way diminish the rights of such children, under the laws of descent and distribution or otherwise, which they acquire by virtue of their inclusion in the definition of 'child' which is contained in this Code." Tex. Prob. Code § 40 (1956).

¹²See note 10 supra.

¹³See note 8 supra.

property of the intestate should have been allowed to pass to the petitioner rather than escheat to the State. Further, the dissenting opinion regarded the law prior to the passage of the Probate Code as inconsequential because it had been superseded by the statute.¹⁴

The doctrine of virtual adoption is also called *de facto* adoption,¹⁵ adoption by estoppel,¹⁶ specific performance of a contract to adopt,¹⁷ and equitable adoption.¹⁸ In virtual adoptions which are established by means of an estoppel, as in the principal case, the foster parents are said to be estopped to deny that, due to their failure to carry out the stipulations of the contract to adopt, a legally constituted adoption has taken place. The equitable remedy was developed to alleviate the effect of adoption statutes which were strictly construed because they abrogated the common law and therefore resulted in foster children being denied the right to inherit from their foster parents.

Virtual adoptions benefit only the foster child because they do not form a permanent legal relationship. For this reason such adoptions are inapplicable for the purpose of inheriting from the foster child *through* the virtual adoption. The equitable remedy does, however, create the status of an adopted child to the extent that it permits unadopted foster children to inherit from their foster parents the intestate share of a legally adopted child in accordance with the applicable state statute.¹⁹ While no jurisdiction has gone so far as to deem

¹⁴The Texas Probate Code was approved on April 4, 1955. Tex. Prob. Code (1956).

¹⁵E.g., *Schultz v. First Nat'l Bank*, 220 Ore. 350, 348 P.2d 22 (1959).

¹⁶Adoption by estoppel forecloses the foster parent or parents and their privies from denying that a statutory adoption was consummated. A statutory adoption does not arise from the application of the doctrine. The doctrine cannot be utilized by the child to estop the heirs of the foster parents because they have failed in no duty to the child. E.g., *Hegger v. Kausler*, 303 S.W.2d 81 (Mo. 1967); *Rubiolo v. McNees*, 301 S.W.2d 483 (Tex. Civ. App. 1957).

¹⁷Specific performance of a contract to adopt is decreed only to the extent that the child is permitted to inherit from his foster parents as if he were adopted in compliance with the statute. E.g., *Sheffield v. Barry*, 153 Fla. 144, 14 So. 2d 417 (1943); *Hollis v. Maxwell*, 215 Ga. 483, 111 S.E.2d 72 (1959); *Chambers v. Byers*, 214 N.C. 373, 199 S.E. 398 (1938).

¹⁸The terms "equitable adoption," "de facto adoption," and "virtual adoption" are used interchangeably with reference to adoption by estoppel and specific performance of a contract to adopt. E.g., in *Foster v. Cheek*, 212 Ga. 821, 96 S.E.2d 545 (1957) the opinion uses the term equitable adoption when referring to specific performance of a contract to adopt.

¹⁹The following state statutes define, either impliedly or expressly, the inheritance rights of adopted children. There is a definite trend in the direction of granting adopted children the same rights of inheritance as those enjoyed by a natural child born in wedlock.

Ala. Code tit. 27, § 5, 9 (1958).

Alaska Comp. Laws Ann. § 20.10.110 (Supp. 1962).

- Ariz. Rev. Stat. Ann. § 8-108 (1956).
 Ark. Stat. Ann. § 56-109 (1947).
 Cal. Prob. Code § 257.
 Colo. Rev. Stat. Ann. § 152-2-4 (1953).
 Conn. Gen. Stat. Rev. § 45-65 (1958).
 Del. Code Ann. tit. 13, § 920 (1953).
 D.C. Code Ann. § 16-222 (1961).
 Fla. Stat. Ann. §§ 72.22, 731.30 (1962).
 Ga. Code Ann. § 74-404 (1935).
 Hawaii Rev. Laws § 331-16 (1955).
 Idaho Code Ann. §§ 16-1507, 1508 (1948).
 Ill. Ann. Stat. ch. 3, § 14 (Smith-Hurd 1961).
 Ind. Ann. Stat. § 3-121 (1946).
 Iowa Code Ann. § 600.6 (1950).
 Kan. Gen. Stat. Ann. § 59-507 (1949).
 Ky. Rev. Stat. Ann. § 199-520 (1963).
 La. Rev. Stat. §§ 9:421, 462 (1950).
 Me. Rev. Stat. Ann. ch. 158, § 40 (1954).
 Md. Ann. Code art. 16, § 78 (1957).
 Mass. Ann. Laws ch. 210, §7 (1955).
 Mich. Comp. Laws § 710.9 (1948).
 Minn. Stat. Ann. § 259.29 (1948).
 Mo. Rev. Stat. § 453.090 (1959).
 Mont. Rev. Codes Ann. § .1-212 (1947).
 Neb. Rev. Stat. §§ 43-110, 111 (1943).
 Nev. Rev. Stat. § 127.160 (1961).
 N.H. Rev. Stat. Ann. § 461:6 (1955).
 N.J. Rev. Stat. § 9:3-30 (1937).
 N.M. Stat. Ann. § 22-2-19 (1953).
 N.Y. Dom. Rel. Laws § 115.
 N.C. Gen. Stat. § 48-23 (1962).
 N.D. Cent. Code §§ 14-11-13, 14 (1960).
 Ohio Rev. Code Ann. § 107.13 (Baldwin 1963).
 Okla. Stat. Ann. tit. 10, §§52, 53, 56 (1936).
 Ore. Rev. Stat. § 111.210 (1953).
 Pa. Stat. Ann. tit. 1, § 4 (1963).
 R.I. Gen. Laws Ann. §§ 15-7-16, 17 (1956).
 S.C. Code § 19-52.1 (1952).
 S.D. Code § 14.0407 (Supp. 1960).
 Tenn. Code Ann § 36-126 (1955).
 Tex. Prob. Code §§ 3, 40 (1956).
 Utah Code Ann. § 78-30-10 (1953).
 Vt. Stat. Ann. tit. 15 § 448 (Supp. 1963).
 Wash. Rev. Code § 26.32.140 (1951).
 W. Va. Code Ann. § 4759 (1961).
 Wis. Stat. § 48.92 (1959).
 Wyo. Stat. Ann. § 1-721 (1957).

The Model Probate Code suggests the following statute: "For the purpose of inheritance to, through and from a legally adopted child, such child shall be treated the same as if he were the natural child of his adopting parents, and he shall cease to be treated as the child of his natural parents for the purposes of intestate succession." Model Probate Code § 27 (Simes 1946).

the equitably adopted child an adopted child *per se*, some courts have conceded additional privileges belonging to legally adopted children, to those virtually adopted.²⁰

Courts presented with the question of whether a claim of inheritance can be established *through* a virtual adoption need not resolve that inquiry unless a virtual adoption has been established by the evidence.²¹ Five elements are necessary to establish a virtual adoption: (1) the foster parents must have died intestate;²² (2) there must have been a contract or agreement to adopt;²³ (3) the foster parents represented to the child that he was adopted, thereby inducing him to perform the duties expected of a child;²⁴ (4) the child carried out his filial obligations in the belief that he was an adopted child;²⁵ and (5) the foster parents have never undertaken any of the steps that lead to a legal adoption or, if they did, the adoption was not perfected.²⁶

While there is no suggestion from either the unanimous opinion of the Court of Civil Appeals of Texas²⁷ or from the opinion of the Supreme Court of Texas that the claimants expressly relied upon the pro-

²⁰See, e.g., *In re Radovich*, 48 Cal. 2d 116, 308 P.2d 14 (1957) in which a child not legally adopted was held to be entitled to an adopted child's inheritance tax exemption.

²¹E.g., *Moorman v. Honnicut*, 325 S.W.2d 941 (Tex. Civ. App. 1959) held that there was insufficient evidence of a contract to raise an estoppel where the heirs of the foster parents had brought suit to establish their right to inherit from the foster child.

²²E.g., Tex. Prob. Code § 40 (1956) reads in part "Nothing shall prevent any parent by adoption from disposing of his property by will according to law." See note 15 *supra*.

²³Bailey, Adoption "By Estoppel," 36 Texas L. Rev. 30 (1957) is an article cited in the principal case in which the author demonstrates that the contract is not only significant because it reflects the intentions of the foster parents to adopt the child, but it also supplies a tenable basis for the child's reliance upon the foster parents' representation that he has been or will be legally adopted so as to raise an estoppel in favor of the child. Many jurisdictions allow parol contracts or agreements to be the basis of the equitable remedy which they provide. See, e.g., *Hicks v. Simons*, 271 F.2d 875 (10th Cir. 1959); *Monahan v. Monahan*, 14 Ill. 2d 449, 153 N.E.2d 1 (1958); *In re Firlle's Estate*, 197 Minn. 1, 265 N.W. 818 (1956); *Calvert v. Johnston*, 304 S.W.2d 394 (Tex. Civ. App. 1957); *Jones v. Guy*, 135 Tex. 398, 143 S.W.2d 906 (1940).

²⁴E.g., *In Clevenger v. Clevenger*, 11 Cal. Rptr. 707 (Dist. Ct. 1961) a husband was not estopped to deny the legitimacy of his wife's child because he had not represented to the child that he was his father.

²⁵*Hegger v. Kausler*, 303 S.W.2d 81 (Mo. 1957); *Barney v. Hutchinson*, 25 N.M. 82, 177 Pac. 890 (1918).

²⁶E.g., *Monahan v. Monahan*, 14 Ill. 2d 449, 153 N.E.2d 1 (1958). In that case the foster parents failed to accomplish an adoption because they erroneously believed that the consent of both natural parents was necessary, and they were unsuccessful in attempting to locate the father of the child.

²⁷See note 6 *supra*.

visions of the Probate Code as a basis for their claim, the Supreme Court appears to have been disposed to pass upon the provisions of the statute because the case was one of first impression.²⁸ The limitations put on sections 3(b) and 40 of the Texas Probate Code by the principal case appear to have been essential in order to retain the integrity of the doctrine of virtual adoption in Texas.

In order to allow the heirs of the foster parents to inherit from the foster child by acts of estoppel, it would be necessary to conceive of a virtual adoption as creating an adoptive status equivalent to that achieved by a statutory adoption. The doctrine was created, however, only to give to the unadopted child the rights of inheritance which would normally follow from a statutory adoption, but it was not intended to act as a substitute for the statutory requirements. Since the child, and not the heirs, has suffered as a result of the foster parents' shortcomings in not complying with their contract to adopt, equity would be adverse to extending the principles of virtual adoption to benefit parties other than the child.²⁹ Therefore, if the court in the principal case had followed the literal wording of the statute and allowed an heir of Rosa and Frank Frei to inherit from R. F. Frei, it would have laid down a precedent inconsistent with the equitable principles from which the doctrine was derived, as well as dissonant with the scheme of the laws of descent and distribution, which are based upon the legal relationships existing at the time of an intestate's death.

Virtual adoptions appear to serve a useful purpose. The intention of the foster parents to include the unadopted child as an heir may be safely implied from contracts and agreements to adopt. However, because the equitable remedy creates an exception to existing adoption statutes, it should be used only to allow unadopted foster children to inherit from their foster parents, and then only when there is evidence sufficient to show the particular facts required to raise an estoppel in favor of the unadopted child.

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²⁸See note 4 *supra*.

²⁹*McLemore v. Memphis & C.R.R.*, 111 Tenn. 639, 69 S.W. 338, 344 (1902). In that case the court said in discussing the use of estoppel affirmatively by a party himself estopped. "Estoppel can never be invoked to establish facts, but may only be used to prevent parties from relying upon facts which do exist."