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# THE ADOPTION OF CHILDREN IN MISSOURI

RUSH H. LIMBAUGH\*

## I. NATURE, HISTORY AND METHODS OF PROCEEDING

### 1. *Meaning and Consequence*

Adoption is the act or proceeding by which relations of paternity and affiliation are recognized as legally existing between persons not so related by nature. It is the taking of a stranger in the blood as one's own child. By it there is established a relation that is personal to the foster parent and the child.<sup>1</sup> As a consequence of adoption, the legal relationship and the rights and duties between the adopted child and its natural parents cease and a similar relationship with the accompanying rights and responsibilities arises between such child and its adopting parents.<sup>2</sup> Although the statutes of descent and distribution make no distinction between an adopted child and a child by birth, the courts of Missouri have always held that an adopted child stands in the same relations to its adoptive parents as a child actually born to them and is entitled to receive their property by descent the same as children of their own blood.<sup>3</sup>

### 2. *History*

While the custom of adopting children is one that has prevailed from ancient times among the people of many nations,<sup>4</sup> it was wholly unknown

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1. 1 AM. JUR., ADOPTION OF CHILDREN § 2; 1 R. C. L. 592; 1 C. J. 1370.

2. MO. REV. STAT. (1929) § 14079. This section provides that the consequence of adoption is to substitute the adopting parents for the natural parents with regard to all legal rights, duties and responsibilities, except that neither the child nor parents "shall be capable of inheriting from or taking through each other property expressly limited to heirs of the body of such child or parent by adoption."

3. Brock v. Dorman, 98 S. W. (2d) 672, 674 (Mo. Sup. 1936); St. Louis Union Trust Co. v. Hill, 336 Mo. 17, 76 S. W. (2d) 685, 688 (1934); Shepherd v. Murphy, 332 Mo. 1176, 61 S. W. (2d) 746 (1933); Rauch v. Metz, 212 S. W. 357, 366-367 (Mo. Sup. 1919); In re Cupples' Estate, 272 Mo. 465, 199 S. W. 556 (1917); Lindsley v. Patterson, 177 S. W. 826 (Mo. Sup. 1915); Fosburgh v. Rogers, 114 Mo. 122, 21 S. W. 82 (1893); In the matter of Charles B. Clements, 78 Mo. 352, 354-355 (1883); Reinders v. Koppelman, 68 Mo. 482, 497 (1878); Horton v. Troll, 183 Mo. App. 677, 167 S. W. 1081 (1914); Thomas v. Maloney, 142 Mo. App. 193, 126 S. W. 522 (1910); Fugate v. Allen, 119 Mo. App. 183, 95 S. W. 980 (1906).

4. In an historical summary of the rise and growth of the habit of adopting children by the nations in ancient and modern times and the extent to which

to the common law of England.<sup>5</sup> Among ancient peoples, and particularly during the decadence of the Roman Empire, there was an extensive practice of transplanting or grafting from one blood to another by the method of adoption. Among Anglo-Saxon peoples, blood ties were far more sacred, and it has been suggested that, because of such sentimental reasons and the peculiarities of feudal tenures, the habit of adoption was not recognized by the common law or practiced by Anglo-Saxon peoples.<sup>6</sup> In fact, adoption was repugnant to the principles of the common law and the institutions upon which it was builded.<sup>7</sup> In states where the common law was made the basis for the present system of jurisprudence, the proceedings for adoption are governed solely by statute.<sup>8</sup> Such statutes were first adopted in Missouri in 1857.<sup>9</sup> Prior to that time, adoption may have been consummated by act of the Legislature,<sup>10</sup> but since 1865 the Constitution of Missouri has prohibited adoption by this method.<sup>11</sup> From 1857 to 1917, the statutes

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the practice has been exercised, Lamm, J., in *Hockaday v. Lynn* 200 Mo. 456, 98 S. W. 585 (1906), said: "Adoption . . . was known to the Roman law, was attended by ceremonial dignity, and was of deep meaning and far reaching results . . . Adoption . . . was known to the Athenians and Spartans, as well as the Romans and ancient Germans, and was familiar to the writers of the New, if not the Old Testament. . . . It seems to have taken root in Egypt (Exodus 2:10). Paul, himself a lawyer profoundly instructed in Hebrew jurisprudence, assumed the doctrine of adoption to be well known to his readers, and borrows the use of that doctrine as a hammer to clinch nails driven by him on matters of faith. Rom. 8:16, 17, q. v. The doctrine was not unknown to the Babylonians—witness the Code of Hammurabi, compiled from 2285 to 2242 B. C.

"Adoption was also an incident of Spanish law, was incorporated into the Code Napoleon, and from that code (or the Spanish law) found its way through Louisiana and Texas into the statutes of their sister States."

5. 1 AM. JUR., ADOPTION OF CHILDREN, § 2; *Humphrys v. Polak* [1901] L. R. 2 K. B. 385; *Lamb v. Feehan*, 276 S. W. 71 (Mo. Sup. 1925); *Hockaday v. Lynn*, 200 Mo. 456, 98 S. W. 585 (1906); *Reinders v. Koppelmann*, 68 Mo. 482 (1878); *Fienup v. Stamer*, 28 S. W. (2d) 437 (Mo. App. 1930); *Beach v. Bryan*, 155 Mo. App. 33, 133 S. W. 635, 640 (1911). The first English adoption statute was passed in 1926. It expressly provides that the adopted child inherits from his natural and not from his adoptive parents. 16 and 17 Geo. V, c. 29, § 5 (1). See *Atkinson on Wills* (1937) 39, 45.

6. *Hockaday v. Lynn*, 200 Mo. 456, 98 S. W. 585 (1906).

7. *Clarkson v. Hatton*, 143 Mo. 47, 44 S. W. 761 (1898).

8. 1 AM. JUR., ADOPTION OF CHILDREN § 25; *Hockaday v. Lynn*, 200 Mo. 456, 98 S. W. 585 (1906); *Steele v. Steele*, 161 Mo. 566, 61 S. W. 815 (1901); *Sarazin v. Union R. Co.*, 153 Mo. 479, 55 S. W. 92 (1900); *Clarkson v. Hatton*, 143 Mo. 47, 44 S. W. 761 (1898).

9. Mo. Laws. 1857, 59; 1 Wag. Stat., 256, § 1.

10. Adoptions of this kind must have been rare because of the cumbersomeness of the proceeding, but we know that at least one adoption took place by that method. *Davis v. Hendricks*, 99 Mo. 478, 12 S. W. 887 (1889).

11. Mo. CONST. (1875) art. IV, § 53 (9).

authorized adoption by deed,<sup>12</sup> but since 1917 adoptions are authorized only by decree of courts exercising juvenile jurisdiction.<sup>13</sup>

### 3. *Methods of Adoption*

Under the Roman Law, adoption was by ceremony. The event was a very solemn occasion in which all of the parties, the adoptor, the adopted, and the natural parents, were required to be present. The ceremony was of a public character and required the sanction of the *curiae*. As a result of the ceremony, the adopted person entered into the family and came under the power of the person adopting him, so that the adopted child and his children became respectively the child and grandchildren of the adoptor.<sup>14</sup>

#### (b) *By Deed*

The law of Justinian dispensed with the necessity of a ceremony and provided for adoption by a more simple proceeding of executing, in the presence of a magistrate, a deed declaring the fact of adoption. For that proceeding the person giving, the person given, and the person receiving, were required to be present and give their consent.<sup>15</sup> Legislation authorizing adoption in Missouri followed the chief features of the Justinian procedure. Under the statutes authorizing adoption by deed, the act of adoption was consummated by the person desiring to adopt a child making a deed for that purpose, executing and acknowledging same, and recording the deed of adoption in the county of the residence of the adopting parent, as in cases of conveyance of real estate.<sup>16</sup> Such deed could properly contain whatever conditions the parties desire to insert.<sup>17</sup> Under the statutes authorizing adoption by deed, a married woman could execute such deed by joining with her husband. Such statutes were held in derogation of the common law and have been strictly complied with.<sup>18</sup>

#### (c) *By Special Legislative Act*

Although children could be adopted by special act of the Legislature in Missouri prior to the adoption of the Constitution of 1865, that method was not frequently resorted to, and ordinarily was too cumbersome and

12. Mo. Laws. 1856-1857, 59; Mo. REV. STAT. (1909) §§ 1671-1673.

13. Mo. REV. STAT. (1929) §§ 14073-14081; Mo. Laws. 1917, 193-195.

14. *Reinders v. Koppelman*, 68 Mo. 482 (1878).

15. *Ibid.*; *Beach v. Bryan*, 155 Mo. App. 33, 133 S. W. 635, 641 (1911).

16. 1 WAG. STAT. 256, § 1; Mo. REV. STAT. (1909) § 1671.

17. *Gipson v. Owens*, 286 Mo. 33 226 S. W. 856 (1920).

18. *Ibid.*

## ADOPTION OF CHILDREN IN MISSOURI

303

expensive to be used. Since 1865, the Legislature of Missouri has been specifically prohibited from authorizing adoptions.

(d) *By Oral Contract*

Statutes which require adoptions through formalities of ceremonies, deeds or court proceedings are not exclusive.<sup>19</sup> Even when such statutes prevail, there may be contracts to adopt between the parties, and such contracts will be enforced as to property rights by courts of equity upon the death of the adoptors, even though they are not in writing. The general rule is that a court of equity has jurisdiction to so enforce a parol contract for adoption where the contract has been fully performed by the child and it would be inequitable to deny adoption.<sup>20</sup> Not only do courts of equity enforce oral contracts of adoption in this manner, but they also require fulfillment of a collateral agreement of the adopting parent to leave the adopted child his estate at his death.<sup>21</sup> In order to sustain oral contracts to adopt, courts of equity require that proof thereof must be clear, cogent and convincing, and of such a character as to leave no reasonable doubt in the mind of the chancellor that the particular contract alleged was made.<sup>22</sup> The courts do not even require such parol contracts of adoption to be established by direct evidence, the general rule being that such contracts may be shown by the acts, conduct and admissions of the adopting parties.<sup>23</sup> So vigilant are courts of equity in enforcing oral contracts to adopt, that it is generally held that where one takes a child into his home as his own, thereby volun-

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19. *Lindsley v. Patterson*, 177 S. W. 826 (Mo. Sup. 1915).

20. *Bland v. Buoy*, 335 Mo. 967, 74 S. W. (2d) 612 (1934); *Drake v. Drake*, 328 Mo. 966, 43 S. W. (2d) 556 (1931); *Taylor v. Coberly*, 327 Mo. 940, 38 S. W. (2d) 1055 (1931); *Carlin v. Becon*, 322 Mo. 435, 16 S. W. (2d) 46 (1929); *Fishback v. Prock*, 311 Mo. 494, 279 S. W. 38 (1925); *Barnett v. Clark*, 252 S. W. 625 (Mo. Sup. 1923); *Remmers v. Remmers*, 239 S. W. 509 (Mo. Sup. 1922); *Dillman v. Davison*, 239 S. W. 505 (Mo. Sup. 1922); *Kerr v. Smiley*, 239 S. W. 501 (Mo. Sup. 1922); *Craddock v. Jackson*, 223 S. W. 924 (Mo. Sup. 1920); *Signaigo v. Signaigo*, 205 S. W. 23 (Mo. Sup. 1918); *Grantham v. Gossett*, 182 Mo. 651, 81 S. W. 895 (1904); *Lynn v. Hockaday*, 162 Mo. 111, 61 S. W. 885 (1901).

21. *Lynn v. Hockaday*, 162 Mo. 111, 61 S. W. 885 (1901).

22. *Benjamin v. Cronan*, 93 S. W. (2d) 975, 979 (Mo. Sup. 1936); *Ahern v. Matthews*, 337 Mo. 362, 85 S. W. (2d) 377, 383 (1935); *Bland v. Buoy*, 335 Mo. 967, 74 S. W. (2d) 612 (1934); *Lamb v. Feehan*, 276 S. W. 71 (Mo. Sup. 1925); *Kay v. Niehaus*, 298 Mo. 201, 249 S. W. 625 (1923); *Wales v. Holden*, 209 Mo. 552, 108 S. W. 89 (1908); *Grantham v. Gossett*, 182 Mo. 651, 81 S. W. 895 (1904); *Eldred v. Glenn*, 52 S. W. (2d) 35, 38 (Mo. App. 1932).

23. *Ahern v. Matthews*, 337 Mo. 362, 85 S. W. (2d) 377, 383 (1932); *Bland v. Buoy*, 335 Mo. 967, 74 S. W. (2d) 612 (1934); *Drake v. Drake*, 328 Mo. 966, 43 S. W. 556 (1932); *Taylor v. Coberly*, 327 Mo. 940, 38 S. W. (2d) 1055 (1931); *Kay v. Niehaus*, 298 Mo. 201, 249 S. W. 625 (1923); *Fisher v. Davidson*, 271 Mo. 195 S. W. 1024 (1915); *Martin v. Martin*, 250 Mo. 539, 157 S. W. 575 (1913); *Horton v. Troll*, 183 Mo. App. 677, 690, 167 S. W. 1081 (1914).

tarily assuming the status of parent, and by reason thereof obtains from the child the love, affection, compensation and services which ordinarily accrue to a parent, he or those claiming through him will thereafter be estopped to assert that he did not adopt the child in the manner provided by law.<sup>24</sup> And if the evidence does not establish an express contract, the courts may infer, from the acts, conduct and admissions of the adopting parties, that an oral contract existed and that it was on the faith of such contract that the child was given to and taken by them.<sup>25</sup>

(e) *By Judicial Proceeding*

The statute authorizing adoptions by deed<sup>26</sup> was repealed in 1917,<sup>27</sup> when the present method of adoption by judicial proceeding was authorized. Since that time, the statutory method of adoption has been by a proceeding in the juvenile division of the circuit court of the county in which the person sought to be adopted resides.<sup>28</sup> Such proceeding is in the nature of a civil suit, and the parties have the right to demand a change of venue.<sup>29</sup> This method of adoption does not oust an equity court of jurisdiction to determine whether a person was adopted by another.<sup>30</sup>

## II. PARTIES

### 1. *Who May Adopt*

The statute authorizes any reputable person to adopt another person as his child.<sup>31</sup> And any person with contractual capacity could adopt under the common law in the same way he could enter into any other contract.<sup>32</sup> In petitions to adopt, husbands may join their wives, and vice versa, and if the petition is by both of them the adoption shall be by them jointly.<sup>33</sup> But a husband or wife may adopt without the other's joining or consenting.<sup>34</sup>

24. 1 AM. JUR., ADOPTION OF CHILDREN § 79; Taylor v. Coberly, 327 Mo. 940, 38 S. W. (2d) 1055 (1931); Shelp v. Mercantile Trust Co., 322 Mo. 682, 15 S. W. (2d) 818 (1929); Holloway v. Jones, 246 S. W. 587 (Mo. Sup. 1922); Eldred v. Glenn, 52 S. W. (2d) 35, 37 (Mo. App. 1932).

25. Taylor v. Coberly, 327 Mo. 940, 38 S. W. (2d) 1055 (1931); Kay v. Niehaus, 298 Mo. 201, 249 S. W. 625 (1923).

26. MO. REV. STAT. (1909) § 1671.

27. Mo. Laws 1917, 193.

28. MO. REV. STAT. (1929) c. 125, §§ 14073-14081.

29. In re McFarland, 12 S. W. (2d) 523 (Mo. App. 1928).

30. Eldred v. Glenn, 52 S. W. (2d) 35 (Mo. App. 1932).

31. MO. REV. STAT. (1929) § 14073.

32. Lindsley v. Patterson, 177 S. W. 826 (Mo. Sup. 1915).

33. MO. REV. STAT. (1929) § 14073; Shepherd v. Murphy, 332 Mo. 1176, 61 S. W. (2d) 746 (1933).

34. MO. REV. STAT. (1929) § 14073; Clarkson v. Hatton, 143 Mo. 47, 44 S. W. 761 (1898); Moran v. Stewart, 122 Mo. 295, 26 S. W. 962 (1894).

Those persons who can properly rear and educate children who have lost their parents or whose parents are unable to rear and educate them properly, are usually considered the best qualified as adopting parents. Adoption statutes have in view the welfare of the children, and that consideration is paramount in such proceeding.<sup>35</sup>

## 2. *Persons Who May Be Adopted*

### (a) *Minor Children*

Adoption statutes were meant primarily for children, and the statutes in some states are applicable only to minor children.<sup>36</sup>

### (b) *Adults*

But the Missouri adoption statutes have always authorized adoption of persons as children of the adopting parties.<sup>37</sup> And the courts have held that under these statutes, adults could be adopted.<sup>38</sup> The adoption of a man 22 years of age by a deed of adoption was held good under the old statute;<sup>39</sup> and under adoption statutes now in effect, it has been held that a woman 43 years of age,<sup>40</sup> a man 24 years of age,<sup>41</sup> men 22 and 28 years of age,<sup>42</sup> and a married woman 31 years of age,<sup>43</sup> could be legally adopted.

## III. JUDICIAL PROCEEDINGS UNDER ADOPTION STATUTES

### 1. *Jurisdiction*

Exclusive, original jurisdiction to hear petitions for adoption is lodged in the juvenile division of circuit court of the county in which the person sought to be adopted resides.<sup>44</sup> Jurisdiction of the juvenile division of the Circuit Court of St. Louis has been held coextensive with the provisions of the adoption statute, and mandamus lies to compel a circuit court to consider a petition for adoption on its merits where such court has jurisdiction both of the parties and the subject matter.<sup>45</sup> But statutory provisions for adoption

35. *Drake v. Drake*, 328 Mo. 966, 43 S. W. (2d) 556 (1931); *In re Snow's Adoption*, 226 Mo. App. 340, 41 S. W. (2d) 627 (1931); *In re McFarland*, 12 S. W. (2d) 523 (Mo. App. 1928).

36. 1 C. J. 1376.

37. MO. REV. STAT. (1929) § 14079; 1 WAG. STAT. 256, § 1.

38. *St. Louis Union Trust Co. v. Hill*, 336 Mo. 17, 76 S. W. (2d) 685 (1934); *State ex rel. Buerk v. Calhoun*, 330 Mo. 1172, 52 S. W. (2d) 742 (1932); *In re Moran's Estate*, 151 Mo. 555, 52 S. W. 377 (1899).

39. *In re Moran's Estate*, 151 Mo. 555, 52 S. W. 377 (1899).

40. *Brock v. Dorman*, 98 S. W. (2d) 672 (Mo. Sup. 1936).

41. *Wilson v. Caulfield*, 228 Mo. App. 1206, 67 S. W. 761 (1934).

42. *St. Louis Union Trust Co. v. Hill*, 336 Mo. 17, 76 S. W. (2d) 685 (1934).

43. *State ex rel. Buerk v. Calhoun*, 330 Mo. 1172, 52 S. W. (2d) 742 (1932).

44. MO. REV. STAT. (1929) § 14073.

45. *State ex rel. Buerk v. Calhoun*, 330 Mo. 1172, 52 S. W. (2d) 742 (1932).

do not oust equity courts of jurisdiction to award children their rights incident to adoption where the facts warrant such action, although the statutory method of adoption has not been observed.<sup>46</sup>

## 2. *A Civil Suit*

An adoption proceeding involves civil rights and is a civil suit, and the parties thereto are entitled to a change of venue.<sup>47</sup>

## 3. *Petition For*

The proceeding is instituted by the filing of a petition by the person desiring to adopt.<sup>48</sup> The petition must state the name, sex and age of the child sought to be adopted, and, if it is desired to change the name, the new name, and the name and residence of the parents of the child, if known to the petitioner, and facts setting forth the petitioner's ability to care for, maintain and educate said child properly.<sup>49</sup> The sufficiency or insufficiency of the petition is determined by the general rules applicable to pleading, so that an adoption petition may be attacked for the first time in the appellate court.<sup>50</sup>

## 4. *Guardian Ad Litem for Child*

Before acting on the petition, the court is required to appoint a guardian *ad litem* to represent the child.<sup>51</sup> This is mandatory.

## 5. *Consent of Parties*

### (a) *The Child and His Parents or Guardian*

Where the proceeding is agreeable with all the parties, that is, the adopting person or persons, the person to be adopted, and the parents of the child, written consent of such parties may be filed with the petition,<sup>52</sup> and a hearing held immediately thereon.<sup>53</sup>

Where the child is twelve years of age or over, he may consent in writing to the adoption. If the person to be adopted is under the age of twenty-one years, the parents or surviving parent and guardian, if any, may consent in writing to the adoption. This differs from the old method of adoption by deed, under which neither the consent of the parents nor of

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46. *Drake v. Drake*, 328 Mo. 966, 43 S. W. (2d) 556 (1931); *Eldred v. Glenn*, 52 S. W. (2d) 35 (Mo. App. 1932).

47. *In re McFarland*, 12 S. W. (2d) 523 (Mo. App. 1928).

48. MO. REV. STAT. (1929) § 14073.

49. MO. REV. STAT. (1929) § 14077.

50. *State v. Schilb*, 285 S. W. 748 (Mo. App. 1926).

51. MO. REV. STAT. (1929) § 14077.

52. MO. REV. STAT. (1929) § 14074.

53. MO. REV. STAT. (1929) § 14078.

ADOPTION OF CHILDREN IN MISSOURI

the child was required.<sup>54</sup> Consent is not required of those persons who are insane, who are imprisoned under a sentence which will not expire until two years after the date of the filing of the petition, or who have wilfully abandoned the child or neglected to provide proper care and maintenance for the two years last preceding the date of the filing of the petition.<sup>55</sup> Nor is written consent of the father necessary in the adoption of a person more than twenty-one years of age.<sup>56</sup>

(b) *An Institution Having Custody of Child*

Where a legally incorporated institution of the State for the care and custody of minor children has the custody of a minor who has been abandoned by its parents for a period of two years, such institution may consent to the adoption in place of the parents of such child.<sup>57</sup>

6. *Notice and Service*

If written consent of the parties required to consent is not filed in court, such persons must be personally served with summons and a copy of the petition. If any such parties cannot be found within the State, service may be had as to them by publication according to Sections 739 and 747 in the Missouri Revised Statutes of 1929. If, after such notice, the parties do not appear, the court may proceed to hear the case.<sup>58</sup> The notice prescribed by statute must be given to all the parties specified and in the manner designated, and if it is not so given, a decree authorizing the adoption is void.<sup>59</sup> The fact that a child is in an institution does not dispense with the necessity of notice. If the institute is authorized to consent and does not do so,<sup>60</sup> a child under twelve need not be served with summons or by publication, nor is his consent necessary.<sup>61</sup> For substituted service by publication to confer jurisdiction, all the statutory requirements must be successively and accurately met, and an order of publication made upon the filing of an unverified petition alleging that the child's parents have absconded and absented themselves from their place of abode in this State, and without a finding by the court that such persons cannot be found in the State, is void.<sup>62</sup>

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54. *Holloway v. Jones*, 246 S. W. 587 (Mo. Sup. 1922).

55. MO. REV. STAT. (1929) § 14074.

56. *St. Louis Union Trust Co. v. Hill*, 336 Mo. 17, 76 S. W. (2d) 685 (1934).

57. MO. REV. STAT. (1929) § 14075.

58. MO. REV. STAT. (1929) § 14076.

59. 1 AM. JUR., ADOPTION OF CHILDREN § 40; *Rochford v. Bailey*, 323 Mo. 1155, 17 S. W. (2d) 941 (1929).

60. *Child Saving Institute v. Knobel*, 327 Mo. 609, 37 S. W. (2d) 920 (1931).

61. MO. REV. STAT. (1929) §§ 14074, 14077; *Rochford v. Bailey*, 322 Mo. 1155, 17 S. W. (2d) 941 (1929).

62. *Rochford v. Bailey*, 322 Mo. 1155, 17 S. W. (2d) 941 (1929).

### 7. *Hearing*

If, after notice is given as required, a person whose consent is necessary does not appear, the court may proceed with a hearing as though such party were present and render a decree binding upon all persons so served.<sup>63</sup> When the court has acquired jurisdiction, either by consent of or service of notice on all parties required, it may proceed with the hearing.<sup>64</sup> The hearing is before the court, no jury being provided for by the adoption statutes,<sup>65</sup> and such statutes being a code within themselves.<sup>66</sup> At the hearing the welfare of the child is the chief consideration.<sup>67</sup> Before a decree is entered, the court must be satisfied that the adoptors are of good character and of sufficient ability to care for, maintain and educate said child properly, and that the child's welfare will be promoted by the adoption and that it is fit and proper for such adoption to be made.<sup>68</sup> Evidence to aid the court in reaching such conclusions should be offered by the petitioners at such hearing.

### 8. *Decree*

If the court is satisfied that the adoption should be authorized, a decree shall be entered setting forth the facts and ordering that from the date of the decree the child shall, to all legal intents and purposes, be the child of the petitioner or petitioners, and the court may decree that the name of the child be changed according to the prayer of the petition.<sup>69</sup> The decree is insufficient if it does not contain a finding that petitioners are of good character and able to care for, maintain and educate the child, and that the child's welfare will be promoted by sustaining the petition.<sup>70</sup> Where a decree was rendered without written consent of, or notice to, the legal custodian of the child, it was binding on the parties to the proceeding and their privies, but was not binding on the legal custodian of the child served with notice.<sup>71</sup>

### 9. *Decree May Be Set Aside*

When a child is adopted in the manner prescribed by the statutes, and later develops feeblemindedness or epilepsy or venereal infection as a result

63. MO. REV. STAT. (1929) § 14076.

64. MO. REV. STAT. (1929) § 14078.

65. MO. REV. STAT. (1929) §§ 14073-14081.

66. *Rochford v. Bailey*, 322 Mo. 1155, 17 S. W. (2d) 941 (1929).

67. 1 AM. JUR., ADOPTION OF CHILDREN, § 46; *In re Snow's Adoption*, 226 Mo. App. 340, 41 S. W. (2d) 627 (1931); *In re McFarland*, 223 Mo. App. 826, 12 S. W. (2d) 523 (1928).

68. MO. REV. STAT. (1929) § 14078.

69. MO. REV. STAT. (1929) § 14078.

70. *State v. Schilb*, 285 S. W. 748 (Mo. App. 1926).

71. *Child Saving Institute v. Knobel*, 327 Mo. 609, 37 S. W. (2d) 920 (1931).

of conditions existing prior to the time such child was adopted, a petition setting forth such facts may be filed at any time within five years after such adoption with the court which decreed the adoption, and if, on the hearing, the facts set forth in such petition are established, said court may enter a decree annulling the adoption and setting aside any and all rights and obligations that may have accrued by reason of said adoption.<sup>72</sup> This statutory authority for setting aside a decree of adoption has been held merely to enlarge the common law grounds for setting aside such decree.<sup>73</sup> The collateral heirs and next of kin of a deceased adopting parent were held proper parties to bring suit to set aside adoption of adults on the ground of fraud in procurement thereof.<sup>74</sup> For a court, on its own motion, on information received *ex parte* from an undisclosed source, to set aside adoption decree without notice to the adopting parent, was held error.<sup>75</sup>

#### 10. *Transfer of Custody of Adopted Child Prohibited*

The surrender of control or custody of a child, the transfer of such control or custody to another, and the taking possession of a child so transferred, without an order of the juvenile court approving same, are prohibited by statute,<sup>76</sup> which provides that persons who violate terms of same shall be guilty of a misdemeanor and subject to a jail sentence or fine, or both. Any person desiring to change or transfer the custody of a child should file a petition for that purpose in the juvenile court having jurisdiction.

#### 11. *Adoption Statutes Must Be Strictly Complied With*

Adoption statutes are in derogation of the common law, and, since adoption is of purely statutory origin, the statutory procedure must be strictly complied with.<sup>77</sup> Such statutes should be construed most favorably to the child<sup>78</sup> and, if possible, without doing violence to the terms of the statute, so as to encourage adoption.<sup>79</sup>

72. MO. REV. STAT. (1929) § 14080.

73. *In re Zartman's Adoption*, 334 Mo. 237, 65 S. W. (2d) 951 (1933).

74. *Wilson v. Caulfield*, 228 Mo. App. 1206, 67 S. W. (2d) 761 (1934).

75. *In re Zartman's Adoption*, 334 Mo. 237, 65 S. W. (2d) 951 (1933).

76. MO. REV. STAT. (1929) § 14081.

77. *Rochford v. Bailey*, 322 Mo. 1155, 17 S. W. (2d) 941 (1929); *Fienup v. Stamer*, 28 S. W. (2d) 437 (Mo. App. 1930); *Beach v. Bryan*, 155 Mo. App. 33, 133 S. W. 635, 640 (1911).

78. *Drake v. Drake*, 328 Mo. 966, 43 S. W. (2d) 556 (1931).

79. *Shepherd v. Murphy*, 332 Mo. 1176, 61 S. W. (2d) 746 (1933).

## IV. JUDICIAL PROCEEDINGS IN EQUITY TO ENFORCE ADOPTION BY AGREEMENT

1. *Jurisdiction of Equity to Enforce Specific Performance of Contract of Adoption*

Where oral contract to adopt has been partially or fully performed by the child, such child or his heirs may file a suit in equity for vindication of property rights arising out of the agreement to adopt where the contract did not amount to a legal adoption. And a court of equity has jurisdiction to so enforce the contract of adoption.<sup>80</sup> The statute of frauds is no defense to such action.<sup>81</sup>

2. *Nature of Proof Necessary*

To sustain the alleged oral contract, the proof thereof must be so clear, cogent and convincing as to leave no reasonable doubt in the mind of the chancellor,<sup>82</sup> or such agreement must be established by the clearest and most incontrovertible evidence.<sup>83</sup> It is not indispensable that the contract to adopt be shown by direct evidence, but it may be shown by the acts, conduct and admissions of the adopting party. If the statements, admissions and conduct of the adopting parent are such as to furnish clear and satisfactory proof that an agreement of adoption must have existed, then the agreement may be found as an inference from that evidence.<sup>84</sup> In determining whether an agreement to adopt is established, the surroundings and motive must be considered.<sup>85</sup> The sufficiency or insufficiency of the evidence to support the action depends upon the facts in each case.<sup>86</sup>

80. *Bland v. Buoy*, 335 Mo. 967, 74 S. W. (2d) 612 (1934); *Drake v. Drake*, 328 Mo. 966, 43 S. W. (2d) 556 (1931); *Taylor v. Coberly*, 327 Mo. 940, 38 S. W. (2d) 1055 (1931), and the cases cited therein.

81. *Taylor v. Coberly*, 327 Mo. 940, 38 S. W. (2d) 1055 (1931; *Johnson v. Antry*, 5 S. W. (2d) 405 (Mo. Sup. 1928); *Lynn v. Hockaday*, 162 Mo. 111, 61 S. W. 885 (1901).

82. *Bland v. Buoy*, 335 Mo. 967, 74 S. W. (2d) 612 (1934); *Drake v. Drake*, 328 Mo. 966, 43 S. W. (2d) 556 (1931); *Taylor v. Coberly* 327 Mo. 940, 38 S. W. (2d) 1055 (1931); *Lamb v. Feehan*, 276 S. W. 71 (Mo. Sup. 1925); *Kay v. Niehaus*, 298 Mo. 201, 249 S. W. 625 (1923).

83. *Beach v. Bryan*, 155 Mo. App. 33, 133 S. W. 635 (1911).

84. *Ahern v. Matthews*, 337 Mo. 362, 85 S. W. (2d) 377, 383 (1935); *Bland v. Buoy*, 335 Mo. 967, 75 S. W. (2d) 612 (1934); *Drake v. Drake*, 328 Mo. 966, 43 S. W. (2d) 556 (1931); *Kay v. Niehaus*, 298 Mo. 201, 249 S. W. 625 (1923), and cases there cited.

85. *Fishback v. Prock*, 311 Mo. 494, 279 S. W. 38 (1925).

86. In the following cases the evidence was held sufficient to support the contract of adoption; *Bland v. Buoy*, 335 Mo. 967, 74 S. W. (2d) 612 (1934); *Drake v. Drake*, 328 Mo. 966, 43 S. W. (2d) 556 (1931); *Taylor v. Coberly*, 327 Mo. 940, 38 S. W. (2d) 1055 (1931); *Kay v. Niehaus*, 298 Mo. 201, 249 S. W. 625 (1923); *Martin v. Martin*, 250 Mo. 539, 157 S. W. 575 (1913); *Holloway v. Jones*, 246 S. W.

## ADOPTION OF CHILDREN IN MISSOURI

311

## V. RIGHT OF INHERITANCE

1. *After Adoption by Deed*

Under the law authorizing adoption by deed,<sup>87</sup> it was held that an adopted child became an heir of the adoptive parent by the process of adoption, and as such automatically took his place in the descending line, and he and his descendants inherited in that line from the adopting ancestor the same as if he had been a natural child of the ancestor.<sup>88</sup> The court said that the statute authorizing adoption by deed did not have the effect of impliedly amending the statute of descents, for the latter statute only lays down general rules of inheritance but does not completely and accurately define how the status is to be created which gives the capacity to inherit, and that the statute authorizing adoption properly defined how, by the process of adoption, a person could become a child and heir of an intestate so as to inherit rights in his property.<sup>89</sup> Under the statute of adoption by deed, it was held that, while the adopted child and its descendants inherited from the adoptive parent, on the death of the adopted child his estate descended to his relations by blood, and not to those by adoption, even where his estate which so descends has been derived from the adoptive parent.<sup>90</sup>

2. *After Adoption by Court Decree*

By the existing statutes passed in 1917,<sup>90a</sup> the Legislature sought to establish and seal completely and fully the relationship of parent and child

587 (Mo. Sup. 1922); *Remmers v. Remmers*, 239 S. W. 509 (Mo. Sup. 1922); *Dillmann v. Davison*, 239 S. W. 505 (Mo. Sup. 1922); *Kerr v. Smiley*, 239 S. W. 501 (Mo. Sup. 1922); *Craddock v. Jackson*, 223 S. W. 924 (Mo. Sup. 1920); *Rauch v. Metz*, 212 S. W. 357 (Mo. Sup. 1919); *Signaigo v. Signaigo*, 205 S. W. 23 (Mo. Sup. 1918); *Eldred v. Glenn*, 52 S. W. (2d) 35 (Mo. App. 1932); *Jenkins v. Gordon*, 256 S. W. 136 (Mo. App. 1923). In the following cases the evidence was found insufficient: *Shelp v. Mercantile Trust Co.*, 322 Mo. 682, 15 S. W. (2d) 818 (1929); *Arfstrum v. Baker*, 214 S. W. 859 (Mo. Sup. 1919); *Wales v. Holden*, 209 Mo. 552, 108 S. W. 89 (1908).

87. MO. REV. STAT. (1909) § 1671-1673. Section 1671 provided: "If any person in this state shall desire to adopt any child or children as his or her heir, it shall be lawful for such person to do the same by deed, which deed shall be executed acknowledged by the person adopting such child or children and recorded in the county of the residence of the person executing the same, as in the case of conveyance of real estate."

88. *In re Cupples' Estate*, 272 Mo. 465, 199 S. W. 556 (1917); *Williams v. Rollins*, 271 Mo. 150, 195 S. W. 1009 (1917); *Bernero v. Goodwin*, 267 Mo. 427, 184 S. W. 74 (1916); *Moran v. Stewart*, 122 Mo. 295, 26 S. W. 962 (1894); *Fosburgh v. Rogers*, 114 Mo. 122, 21 S. W. 82 (1893); *Davis v. Hendricks*, 99 Mo. 478, 12 S. W. 887 (1890); *Sharkey v. McDermott*, 91 Mo. 647, 4 S. W. 107 (1887).

89. *Fosburgh v. Rogers*, 114 Mo. 122, 21 S. W. 82 (1893).

90. *Reinders v. Koppelman*, 68 Mo. 482 (1878).

90a. MO. REV. STAT. (1929) §§ 14073, 14081.

between the adopting parents and the adopted child, and it has been held that when an adoption by that method is consummated, all legal relationship and all rights and duties between such child and its natural parents thereupon cease and determine, and thereafter such child is held to be for every purpose the child of its parents by adoption as fully as though born to them in lawful wedlock.<sup>91</sup> It has been held further that the principal effect of the change upon the right of inheritance by the existing adoption statutes was to broaden that right so as to include ancestors and collaterals,<sup>92</sup> so that upon the death of a child adopted under the existing adopting statutes without descendants, his property descends to the heirs of the adopting parents, to the exclusion of the natural parents of the adopted child.<sup>93</sup> Thus, whether an adoption was by deed or by the present method of statutory adoption, children of an adopted child who died before his adopting parents are entitled to the share their father would have taken had he outlived his parents by adoption.<sup>94</sup> Under the present statute, an adopted child may undoubtedly inherit from the ancestors or collateral kindred of the adopting parent as well as from the adopting parent directly.<sup>95</sup>

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91. Brock v. Dorman, 98 S. W. (2d) 672 (Mo. Sup. 1936); Shepherd v. Murphy, 332 Mo. 1176, 61 S. W. (2d) 746 (1933).

92. Brock v. Dorman, 98 S. W. (2d) 672, 676 (Mo. Sup. 1936).

93. Shepherd v. Murphy, 332 Mo. 1176, 61 S. W. (2d) 746 (1933).

94. In re Cupples' Estate, 272 Mo. 465, 199 S. W. 556 (1917); Bernero v. Goodwin, 267 Mo. 427, 184 S. W. 74 (1916); Williams v. Rollins, 271 Mo. 150, 195 S. W. 1009 (1917).

95. See Shepherd v. Murphy, 332 Mo. 1176, 61 S. W. (2d) 746. See also Brock v. Dorman, 98 S. W. (2d) 672 (Mo. Sup. 1936); St. Louis Union Trust Co. v. Hill, 336 Mo. 17, 76 S. W. (2d) 85 (1934), with which compare Melek v. The Curators of University of Missouri, 213 Mo. App. 572, 250 S. W. 614 (1923).