

1947

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Recommended Citation

A. M. Clark, *Adoption of Children*, 12 MO. L. REV. (1947)

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PROPOSED CHANGES IN MISSOURI LAWS AFFECTING CHILDREN: RECOMMENDATIONS OF THE CHILDREN'S CODE COMMISSION

ADOPTION OF CHILDREN

A. M. CLARK*

HISTORY

The adoption of children, taking the child of another as one's own child, has been authorized and regulated by law in many nations from ancient times, but was unknown to the common law of England.¹ In Missouri the right, method and consequences of adoption depend upon statute. The first statute was enacted in this state in 1857.² It provided that if any person in this state should desire to adopt any child or children, "as his heir or devisee," he could do so by executing and recording a deed as in the conveyance of real estate; that the child or children so adopted would have the same rights and privileges against the person or persons executing the deed as against lawful parents; but this provision "shall not extend to other parties, but is wholly confined to the parties executing the deed." The county court, in its discretion, was authorized to change the name of the child.

Until 1865 the general assembly, by special act, exercised the power of declaring one person the heir of another.³ Since 1865 such special laws have been forbidden by our constitutions.⁴

In 1909 the law was expanded, still retaining adoption by deed, vesting the county court with power to award custody of children under specified conditions and the probate court with power to approve deeds for the adoption of orphan children.⁵

In 1917, effective June 18, 1917, the general assembly repealed former laws on the subject and provided for adoption of children by proceedings in the juvenile division of the circuit court. That act, with amendments in

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1. *Hockaday v. Lynn*, 200 Mo. 456, S.W. 585 (1906); 1 AM. JUR., p. 622, § 3.

2. Mo. Laws 1856-7, p. 59.

3. Mo. Laws 1858-9, p. 348.

4. MO. CONST. (1865) Art. 4, § 27; (1875) Art. 4, § 53; (1945) Art. 3, § 40.

5. MO. REV. STAT. (1909) §§ 1671-1678.

1941, 1943 and 1945, constitutes the existing statutory law of adoptions in Missouri.⁶

PROPOSAL OF CHILDREN'S CODE COMMISSION

Under authority of House Bill 152, enacted by the 63rd General Assembly in July, 1945, Governor Donnelly appointed the Children's Code Commission of Missouri, charged with the duty of investigating and reporting on the laws affecting children. In December, 1946, the commission filed its report with the governor and general assembly. The recommendations of the report as to adoptions are contained in House Bill 120 now pending in the 64th general assembly. The main differences between the bill and the existing law and some reasons for suggested changes follow:

WHO MAY ADOPT OR BE ADOPTED

Present Law: Permits "any reputable person to adopt another person" and says the husband or wife of the petitioner *may* join in the adoption.⁷ That would permit the adoption of either an adult or a minor.

Proposed Bill: Says "any adult persons" may adopt and, if the petitioner has a spouse competent to join, such spouse *shall* join in the petition.⁸ A separate section provides for the adoption of an adult.⁹

The commission feels that a child should not be adopted by one spouse without the full consent and active co-operation of the other spouse. To permit that might tend to destroy family harmony and impair the welfare of the child.

JURISDICTION AND VENUE

Present Law: Jurisdiction is vested in the juvenile division of the circuit court and the venue is in "the county where the person sought to be adopted resides, or if such person has no place of abode in this state, of the county in which the person seeking to adopt resides."¹⁰

The statute does not require residence for any particular time and temporary residence will suffice.¹¹ A decree of the circuit court of Crawford

6. Mo. Laws 1917, p. 193; Mo. Laws 1941, p. 319; Mo. Laws 1943, p. 353; S.B. 78, 1945 Session; Mo. REV. STAT. (1939) §§ 9608, 9816; Mo. REV. STAT. Ann. §§ 9608, 9619.

7. Mo. REV. STAT. (1939) § 9608; *Thompson v. Mosely*, 344 Mo. 240, 125 S.W. (2d) 860 (1939); *St. Louis Union Tr. Co. v. Hill*, 336 Mo. 17, 76 S.W. (2d) 685 (1934); *Wilson v. Caulfield*, 228 Mo. App. 1206, 67 S.W. (2d) 761 (1934); *Brock v. Dorman* 339 Mo. 611, 98 S.W. (2d) 672 (1936).

8. H.B. 120, § 1.

9. H.B. 120, § 13.

10. Mo. REV. STAT. (1939) § 9608.

11. 1 AM. JUR. p. 636, § 32.

County was held valid although the written consent filed by the unmarried mother of the adopted boy recited that she was a resident of St. Louis, where the decree found that both the mother and the boy were in Crawford County at the date of the decree and the boy was then in the custody of the petitioners in that county with the mother's consent.¹²

In a recent case, not yet reported, the supreme court affirmed a decree of the juvenile court of Jackson County for the adoption of an eight year old boy. His mother died several years ago in Douglas County and the boy stayed in that county with relatives until shortly before the adoption petition was filed in Jackson County. After the mother's death, the father maintained his legal residence in Douglas County, but maintained no place of abode in that county and spent little time there. He died in St. Louis in August, 1944. About six weeks before his death he placed the boy with the relatives in Jackson County who later adopted him. The terms of the arrangement between the father and the adopting relatives were not definitely shown. The circuit court of Jackson County held that, for the purpose of adoption, the boy was a resident of Jackson County and the supreme court sustained that holding.¹³

Proposed Bill: Jurisdiction is unchanged. Venue is "in the county where the petitioner resides, or in the county in which the child may be found."¹⁴ Also it is provided that the court may, on its own motion, or on the application of a party, change the venue "to any other county in the state where it shall appear to the court that the best interests of the child would be served thereby."¹⁵

An important feature of the proposed bill is the requirement for thorough investigation of the adopting parents before a final decree of adoption may be entered. Such investigation can best be made under the direction of a court in the county of the petitioner's residence, but if the petitioner has lived longer, or is better known, in some other county, the court may send the case there. For any other good reason, the court may change the venue.

The bill would also permit the proceeding to be brought in the county where the child may be found. This would authorize a non-resident of the state to institute the suit.

12. *Ex parte Fitchel*, 229 Mo. App. 847, 84 S.W. (2d) 977 (1935).

13. *In re Adoption of Stanley Duren*, (Mo.) No. 40055, opinion adopted March, 1947.

14. H.B. 120, § 1.

15. H.B. 120, § 3.

PETITION

Present Law: The petition shall 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 residence of the parents of the child, if known to the petitioner, and facts setting forth petitioner's ability properly to care for, maintain and educate the child.¹⁶ These requirements must be substantially complied with.¹⁷

Proposed Bill: The bill would require some additional allegations in the petition and omits the requirement that a guardian ad litem be appointed for the child.¹⁸

Probably the court would have inherent power to appoint a guardian ad litem if deemed advisable.

PARTIES

Present Law: If the petitioner has a husband or wife living and competent to join in the petition, such husband or wife may join and, if so, the adoption shall be by them jointly.¹⁹

The child, if over the age of twelve years, is a necessary party;²⁰ also the parents or other persons or institution whose consent is necessary and has not been given.²¹ A child under twelve years of age need not be made a party,²² but a guardian ad litem must be appointed for a minor child of any age.²³

By leave of court, interested persons may be permitted to intervene.²⁴

Proposed Bill: The bill expressly provides that the court shall have discretion to permit interested persons or institutions to intervene and become parties.²⁵

This does not seem to change the present law as construed by the courts.²⁶

16. MO. REV. STAT. (1939) § 9612.

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

18. MO. REV. STAT. (1939) § 9612; H.B. 120, § 2.

19. MO. REV. STAT. (1939) § 9608.

20. *Id.* § 9609; *State v. Schilb*, 285 S.W. 748 (Mo. App. 1926).

21. MO. REV. STAT. (1939) §§ 9609, 9610; *Child Savings Institute v. Knobel*, 327 Mo. 609, 37 S.W. (2d) 920, 76 A.L.R. 1068 (1931).

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

23. MO. REV. STAT. (1939) § 9612; *State v. Schilb*, 285 S.W. 748 (Mo. App. 1926).

24. *Thelen v. Eckberg*, 237 Mo. App. 258, 167 S.W. (2d) 645 (1942).

25. H.B. 120, § 5 as amended.

26. *Thelen v. Eckberg*, 237 Mo. App. 258, 169 S.W. (2d) 645 (1942).

NOTICE AND SERVICE

Present Law: If the written consent required is not filed, the court shall order notice by personal service on the parties, or, if any such party be found within this state, by publication.²⁷ Notice is required in all cases where the legal custodian of the child does not consent in writing to the adoption, and notice by publication cannot be given unless the court first finds that the person to be notified cannot be found within this state.²⁸

Proposed Bill: Both the present law and the proposed bill authorize service, personal or substituted, as in civil suits, but the bill would shorten the time to not less than ten days.²⁹

CONSENT REQUIRED

Present Law: Written consent of a child to be adopted who is twelve years old or over is required, as is the consent of the parents or surviving parent of a minor child of any age, unless such parent is insane, or is imprisoned under a sentence which will not expire until two years after the filing of the petition, or has wilfully abandoned the child or neglected to provide proper care and maintenance for the two years last preceding such date.³⁰

Different sections of the statutes are conflicting, or at least confusing, as to the necessity of the consent of a guardian,³¹ but the courts have held that the consent of such persons is not a jurisdictional necessity.³²

If a person, whose consent is called for by the statute, fails to appear after being duly served, the court may act upon the petition without his consent and the judgment will be binding on such person.³³

While a court cannot decree adoption without the consent of parents [who have not forfeited their rights] and of a child over twelve years of age, if such persons appear in court in response to notice, the court may *refuse* a decree even though the consent of such persons is obtained.³⁴

27. MO. REV. STAT. (1939) § 9611.

28. Child Savings Institute v. Knobel, 327 Mo. 609, 37 S.W. (2d) 920, 76 A.L.R. 1068 (1931).

29. MO. REV. STAT. (1939) § 9611; H.B. 120, § 5 as amended.

30. MO. REV. STAT. (1939) § 9609.

31. *Id.* § § 9609, 9610.

32. *In re* adoption of Stanley Duren, (Mo.) No. 40055, opinion adopted March, 1947; *In re* McFarland, 223 Mo. App. 826, 12 S.W. (2d) 523 (1928).

33. MO. REV. STAT. (1939) § 9611; S.B. 78, 63d General Assembly, approved July 25, 1945; *In re* McFarland 223 Mo. App. 826, 12 S.W. (2d) 523 (1928); *In re* adoption of Stanley Duren, (Mo.) No. 40055, opinion adopted March, 1947.

34. State *ex rel* Children's Aid Society v. Hughes, 352 Mo. 384, 177 S.W. (2d) 474 (1944).

This law also provides that an institution having legal custody of the child *may*, under specified circumstances, give consent.³⁵

Proposed Bill: Under the bill consent to the adoption would be required only of the child, if over fourteen, and by the natural parents unless their rights have been previously terminated or shall be terminated in the adoption proceeding.³⁶

As previously stated the requirement of consent by the natural parents *and* the guardian has caused some difficulty; and the courts have held that although a guardian is entitled to notice adoption may be decreed without, or against, his consent.³⁷

It is universally recognized that the right of parents to the custody and society of their children is one of the highest natural rights, and that parents usually have greater interest in the welfare of their children than others, even relatives, can have. Accordingly, the laws of most states provide that, before a child can be taken from its parents and adopted by another, the consent of the parents, if their rights have not been forfeited, and the consent of the child, if old enough to make an intelligent choice, are essential. The commission saw no good reason why the power to prevent a decree of adoption, by withholding consent, should be accorded to others than the child and its natural parents. A guardian and other interested persons should be given opportunity to be heard, but the final decision should rest with the court.

HEARING AND DECREE

Present Law: The hearing is before the court without a jury.³⁸ The files and records are not open to inspection or copy except upon express order of the court.³⁹

The law requires the appointment of a guardian ad litem for the child,⁴⁰ but does not expressly require a preliminary investigation of the child or the adopting parents (although many courts cause such investigations to be made), and a final decree may be entered at the hearing.⁴¹

35. MO. REV. STAT. (1939) § 9610.

36. H.B. 120, § 6 as amended.

37. *In re* adoption of Stanley Duren (Mo.) No. 40055, opinion adopted March, 1947; *In re* McFarland, 223 Mo. App. 826, 12 S.W. (2d) 523 (1928).

38. MO. REV. STAT. (1939) §§ 9611, 9613.

39. Mo. Laws 1941, p. 319, § 1; MO. REV. STAT. ANN., § 9611 B.

40. MO. REV. STAT. (1939) § 9612.

41. *Id.* § 9613.

If the court, after due hearing, is satisfied that the petitioner [or petitioners] is of good character, and of sufficient ability properly to care for, maintain and educate the child, and that the welfare of the child would be promoted by the adoption, and that it is fit and proper that such adoption be made, a decree shall be made 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 the name of the child changed according to the prayer of the petition.⁴²

The decree must recite all statutory requirements.⁴³

The decree may be set aside on petition filed at any time within five years if the child develops feeble mindedness or epilepsy or venereal infection as the result of conditions existing prior to the time of adoption.⁴⁴ The decree may also be set aside for other reasons, but not without notice to the parties.⁴⁵

An adoption proceeding is a civil suit.⁴⁶ Any party aggrieved by the decree may appeal.⁴⁷

Proposed Bill: Both the present law and the bill provide for a hearing by the court without a jury, the prime purpose being to determine the best interest and welfare of the child;⁴⁸ and provide that the record shall be sealed and not opened except upon court order;⁴⁹ and provide for appeals.⁵⁰

The bill provides for an investigation of the child and the adopting parents before an interlocutory decree of adoption is entered;⁵¹ and for a trial period for the child in the home of the adopting parents for at least nine months before a final decree is entered.⁵²

The commission feels that investigation and supervision before the final decree is in line with the best modern thought on the subject and a strong feature of the proposed bill.

42. *Id.* § 9613.

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

44. Mo. REV. STAT. (1939) § 9615.

45. *In re* adoption of Zartman v. Alford, 334 Mo. 237, 65 S.W. (2d) 951 (1933); *Nealon v. Farris*, 131 S.W. (2d) 858 (Mo. App. 1934).

46. *In re* McFarland, 223 Mo. App. 826, 12 S.W. (2d) 523 (1928).

47. Mo. CIVIL CODE § 126; Mo. Laws 1943, p. 390.

48. Mo. REV. STAT. (1939) § 9613; H.B. 120, § 7.

49. Mo. REV. STAT. ANN., § 9611B; H.B. 120, § 11.

50. Mo. REV. STAT. (1939) § 9611; H.B. 120, § 9 as amended.

51. H.B. 120, § 4 as amended.

52. H.B. 120, § 7.

The bill provides that the decree shall be impervious to attack, collateral or direct, after two years from the date of the entry.⁵³

ADOPTION BY DEED OR CONTRACT

As previously indicated in this article, from 1857 to 1917 the statutory method of adoption in Missouri was by deed executed by the adopter and recorded as in the conveyance of real estate.⁵⁴ By the plain terms of the statute then in force,⁵⁵ such an adoption was binding only on the person or persons who executed the deed and the consent of neither the person adopted nor his parents was required.⁵⁶ Such adoption did not affect the right to custody of the person adopted unless consent to the adoption was given.

In 1897 the county court was vested with power to deprive unfit parents of the custody of their children and to transfer such custody to another person or institution.⁵⁷

In 1909 the adoption statutes were amended to provide that where the parents of a child consented to and signed the deed of adoption they should not thereafter have any claim on the services, custody, etc., of the child; also, the probate court, under specified circumstances, was authorized to approve deeds adopting orphan children.⁵⁸

Neither present nor prior statutes nor the proposed bill oust a court of equity of jurisdiction to decree specific performance of a contract to adopt, oral or written, if based upon a sufficient consideration and established by clear, cogent and convincing proof,⁵⁹ but an oral contract to adopt an adult will not be so enforced.⁶⁰

CONSEQUENCE OF ADOPTION

Present Law: The statute provides that when a child is adopted in accordance with the provisions of *this article*, all legal relationship, rights

53. H.B. 120, § 12.

54. H.B. 120, § 12.

55. Mo. Laws 1856, p. 59.

56. *Beach v. Bryan*, 155 Mo. App. 33, 52, 133 S.W. 635 (1911).

57. Mo. Laws 1897, p. 75.

58. Mo. Laws 1909, p. 134.

59. *Lynn v. Hockaday*, 162 Mo. 111, 61 S.W. 885 (1901); *McElwain v. McElwain*, 171 Mo. 244, 71 S.W. 142 (1902); *Johnson v. Antry*, 5 S.W. (2d) 405 (Mo. 1928); *Buck v. Meyer*, 195 Mo. App. 287, 190 S.W. 997 (1916); *Drake v. Drake*, 328 Mo. 966, 43 S.W. (2d) 556 (1931); *Niehaus v. Madden*, 348 Mo. 770, 155 S.W. (2d) 141 (1941); *Foster v. Petree*, 235 Mo. App. 414, 141 S.W. (2d) 131 (1940) transferred to 347 Mo. 992, 149 S.W. (2d) 851 (1941).

60. *Thompson v. Mosely*, 344 Mo. 240, 125 S.W. (2d) 860 (1939).

and duties, between the child and its natural parents, shall cease. The child shall thereafter be deemed and held to be, for every purpose, the child of its parent or parents by adoption, as fully as though born to them in lawful wedlock. The child shall be entitled to support, nurture and care from the adopting parents, and shall be capable of inheriting from, and as the child of, the adopting parents as though born to them in lawful wedlock. The adopting parents shall be entitled to the service, wages, control, custody and company of the child, and shall be capable of inheriting from, and as the parents of, the child as fully as though it had been born to them in lawful wedlock, but neither the child nor the adopting parents shall be capable of inheriting from or taking through each other property expressly limited to heirs of the body of such child or adopting parents.⁶¹

In 1943, section 9616A was enacted providing that any person adopted by deed or written agreement filed for record prior to July 1, 1917, shall hereafter be deemed and held for every purpose to be the child of its adopting parents as fully as though born to them in lawful wedlock, and such adoption shall have the same force and effect as an adoption under the provisions of this chapter, including all inheritance rights.⁶²

Section 9616A has not been construed by an appellate court. It was cited in a motion to modify the opinion in the case of *Crawford v. Arends*,⁶³ but was not construed because the section was enacted after the case was tried and was not and could not have been a matter for adjudication by the trial court, and the supreme court, on appeal, was confined to the issues made in the trial court.⁶⁴

When judicial construction of this section arises the question may be raised as to whether it violates the constitutional prohibition against retrospective laws and impairment of contracts.⁶⁵ The section says that any person adopted by deed or written agreement filed prior to July 1, 1917 shall *hereafter* be deemed and held, etc. "Hereafter," as used, means after July 15, 1943, the effective date of the section, but the section does not refer to deeds or agreements made after that date. It says that a deed or agreement made and filed for record prior to July 1, 1917, shall mean

61. Mo. REV. STAT. (1939) 9614, first enacted in 1917, Mo. Laws 1917, p. 194.

62. Mo. Laws 1943, p. 353.

63. 351 Mo. 1100, 1109, 176 S.W. (2d) 1 (1943).

64. *Id.* at 1110, 176 S.W. (2d) 7.

65. Mo. CONST. (1875) Art. 2, § 15; (1945) Art. 1, § 13.

something different, confer different rights and impose different obligations, than such deed or agreement did when it was made.

Prior to 1917 any competent person, by executing and recording a deed, could adopt any child as his heir without its consent or that of its parents,⁶⁶ but the adopter was not entitled to the custody of the child without the consent of its parents or legal custodian.⁶⁷ The child could inherit from the adopter, but not from the collateral kindred of the adopter,⁶⁸ nor from adopter's descendants.⁶⁹

The Act of 1917 "sought to radically change the rights of adopted children from that which existed prior to 1917."⁷⁰ It did not purport to affect the rights of a child adopted by deed prior to the effective date of the Act, but provided that "from the date of the decree" all rights of the natural parents shall cease, and the child shall become the child of the adopting parents, with full rights of inheritance by one from the other [except as to property limited to bodily heirs].⁷¹ Adoption under the 1917 Act destroys the right of inheritance by the child from its natural parents.⁷²

The supreme court, speaking on the question of whether the rights of a child, adopted before the enactment of the 1917 Act, are enlarged by that Act, said: "Our statutes covering adoption fix the status of the adopted child. It is a civil or contractual—an artificial—as distinguished from a natural status. To that status the adopting parent or parents consent by the act of adoption. One might adopt a child under laws conferring certain rights upon the child but withhold the requisite consent if the law confer different or additional rights on the child. Would not a statutory change conferring upon the child rights against the adopting parent's kindred at least require a new consent on the part of the adopter to be legally binding? We think so."⁷³

66. *In re Clements*, 78 Mo. 352 (1883); *Clarkson v. Hatton*, 143 Mo. 47, 44 S.W. 761, 39 L.R.A. 748 (1898); *Rauch v. Metz*, 212 S.W. 357 (Mo. 1919); *Holloway v. Jones* 246 S.W. 587 (Mo. 1922).

67. *Torwegge v. O'Reilly*, 239 S.W. 116 (Mo. 1922).

68. *Hockaday v. Lynn*, 200 Mo. 456, 98 S.W. 585, 8 L.R.A. (N.S.) 117 (1906); *Rauch v. Metz*, 212 S.W. 357 (Mo. 1919).

69. *Weber v. Griffiths*, 349 Mo. 145, 159 S.W. (2d) 670 (1942).

70. *St. Louis Union Trust Co. v. Hill*, 336 Mo. 17, 76 S.W. (2d) 685, 688 (1934).

71. Mo. REV. STAT. (1939) §§ 9613, 9614.

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

73. *Weber v. Griffiths*, 349 Mo. 145, 159 S.W. (2d) 670 (1942).

The Act of 1917, when enacted, did not purport to affect adoptions made under prior law, while the amendment of 1943 [9616A] purports to give all prior adoptions the same effect as those made in accordance with the Act of 1917. There is authority that such can legally be done,⁷⁴ but the question has not been answered by the appellate courts of this state.

Proposed Bill: The consequences of adoption under the bill would be substantially the same as under the present law, except that the bill expressly provides that the adopted child shall not lose its rights to inherit from its natural parents.⁷⁵ Also the bill omits the provision of the present law which prohibits the child or adopting parents from inheriting property limited to the heirs of the body of the other.⁷⁶ Whether this will permit inheritance of property so limited is a question for the courts. Section 9616A would not be repealed by the proposed bill.

The bill provides that its enactment shall not affect the legality of adoptions consummated or pending in this state;⁷⁷ and that faith and credit shall be given to adoptions made pursuant to the laws of other states.⁷⁸

TRANSFER OF CUSTODY OF CHILDREN

Present Law: Makes it a misdemeanor for any person to transfer or accept the custody of a child without the approval of the juvenile division of the circuit court.⁷⁹

Proposed Bill: Would repeal the above provision, but a similar provision is contained in another bill recommended by the commission.⁸⁰

74. 2 C.J.S., p. 453, § 63 b; 1 AM. JUR., p. 659, § 59; 35 L.R.A. (N.S.) 216.

75. H.B. 120, § 10.

76. MO. REV. STAT. (1939) § 9614.

77. H.B. 120, § 15.

78. H.B. 120, § 16.

79. MO. REV. STAT. (1939) § 9616.

80. H.B. 115, 64th General Assembly.