NOTE

EQUITABLE ADOPTION: THEY TOOK HIM INTO THEIR HOME AND CALLED HIM FRED*

Though not legally adopted, a foster child may in some cases participate in the estate of an intestate foster parent. Courts reach this result under a number of different labels: equitable[1] or virtual[2] adoption, or adoption by estoppel.[3] Generally, "equitable adoption" describes the provision of some judicial remedy for an unperformed contract for legal adoption. Although this doctrine arises in a variety of factual contexts,[4] it most commonly involves a child's effort to share in the intestate estate of someone who has agreed to adopt him but has not done so. Typically the foster parents contract for legal adoption with the child, his natural parents, or someone *in loco parentis*. The child lives with his foster parents, takes their name, loves and obeys them as would a natural child. Upon the death of the foster parents, the child asks a court to treat him as if he were a legally adopted child for purposes of intestate succession.[5]

Whatever remedy is provided,[6] the result is startling: A child's share of the estate goes to one who, in the eyes of the law, stands as a stranger to the deceased. Eight states refuse to allow any such recovery on an unperformed adoption contract.[7] These courts note that adoption is everywhere a crea-

* Kuchenig v. California Co., 410 F.2d 222, 224 (5th Cir. 1969).

1 *See, e.g.*, Barlow v. Barlow, 170 Colo. 465, 463 P.2d 305 (1969).

2 *See, e.g.*, Baker v. Henderson, 208 Ga. 698, 69 S.E.2d 278 (1952).

3 *See, e.g.*, Jones v. Guy, 135 Tex. 398, 143 S.W.2d 906 (1940).

4 See text accompanying notes 66-92 *infra*.

5 *See, e.g.*, Monahan v. Monahan, 14 Ill. 2d 449, 153 N.E.2d 1 (1958).

6 *See, e.g.*, Handley v. Limbaugh, 224 Ga. 408, 162 S.E.2d 400 (1968) (equitable decree of adoption); Signaigo v. Signaigo, 205 S.W. 23 (Mo. 1918) (constructive trust); Martin v. Martin, 250 Mo. 539, 157 S.W. 575 (1913) (partition of estate on equitable grounds); Jones v. Guy, 135 Tex. 398, 143 S.W.2d 906 (1940) (estopping heirs from denying the validity of the adoption).

7 Brassiell v. Brassiell, 228 Miss. 243, 87 So. 2d 699 (1956); Deckard v. Newberg, 476 P.2d 808 (Ore. Ct. App. 1970); *In re* Carroll's Estate, 219 Pa. 440, 68 A. 1038 (1908); Wright v. Alexander, 230 S.C. 286, 95 S.E.2d 500 (1956); Bank of Maryville v. Topping, 216 Tenn. 597, 393 S.W.2d 280 (1965); Clarkson v. Bliley, 185 Va. 82, 38 S.E.2d 22 (1946); *In re* Reimer's Estate, 145 Wash. 172, 259 P. 32 (1927); *In re* Cheaney's Estate, 266 Wis. 620, 64 N.W.2d 408 (1954). Alone among the states, Pennsylvania has denied the right of a child to participate in his foster parent's estate but has allowed him to recover damages on a *quantum meruit* basis for services rendered.

In addition to the eight states squarely rejecting this doctrine, recent decisions in Louisiana imply the same result. Kuchenig v. California Co., 410 F.2d 222 (5th Cir.), *cert. denied*, 396 U.S. 887 (1969); Succession of Hilton, 175 So. 2d 366 (La. Ct. App. 1965).

ture of statute and insist on strict construction of statutes in derogation of common law. In these jurisdictions the statutory scheme provides the exclusive method of adoption, and no private agreement will suffice to bring the child within the statutes of descent and distribution.

One may ask why any court would consider a claim of equitable adoption in the face of an unambiguous statutory scheme. The answer lies in the extraordinarily persuasive factual situations which may arise. For example, in *Wooley v. Shell Petroleum Corporation*[8] Mr. and Mrs. Fowler agreed with a widower to adopt his twin infant daughters. Three years later the father and the foster parents apprenticed the girls to the Fowlers, apparently thinking that this proceeding constituted a legal adoption. The Fowlers took the children into their home and raised them as their own. In return, the girls helped and cared for the Fowlers during the apparent poverty of their declining years:

> Evidence could not show more loyal or faithful performance of duty than these girls rendered to the Fowlers. Hardships and privations which they endured in their faithfulness to Mr. and Mrs. Fowler evoke sympathy and consideration, as well as admiration, from all acquainted with the facts.[9]

Courts of some twenty-five other jurisdictions have similarly demonstrated their willingness to go beyond the statutory scheme to meet the demands of conscience.[10] In doing so, these courts address questions that may con-

[8] 39 N.M. 256, 45 P.2d 927 (1935).

[9] *Id.* at 261, 45 P.2d at 930.

[10] Rader v. Celebrezze, 253 F. Supp. 325 (E.D. Ky. 1966) (Kentucky law); Spiegel v. Flemming, 181 F. Supp. 185 (N.D. Ohio 1960) (Ohio law); Benefield v. Faulkner, 248 Ala. 615, 29 So. 2d 1 (1947); *In re* Lamfrom's Estate, 90 Ariz. 363, 368 P.2d 318 (1962); *In re* Rivolo's Estate, 194 Cal. App. 2d 773, 15 Cal. Rptr. 268 (Dist. Ct. App. 1961); Barlow v. Barlow, 170 Colo. 465, 463 P.2d 305 (1969); Sheffield v. Barry, 153 Fla. 144, 14 So. 2d 417 (1943); Baker v. Henderson, 208 Ga. 698, 69 S.E.2d 278 (1952); Soelzer v. Soelzer, 382 Ill. 393 47 N.E.2d 458 (1943); *In re* Painter's Estate, 246 Iowa 307, 67 N.W.2d 617 (1954); Hickox v. Johnston, 113 Kan. 99, 213 P. 1060 (1923); Clayton v. Supreme Conclave, Improved Order of Heptasophs, 130 Md. 31, 99 A. 949 (1917); Perry v. Boyce, 323 Mich. 95, 34 N.W.2d 570 (1948); *In re* Patrick's Will, 259 Minn. 193, 106 N.W.2d 888 (1960); Long v. Willey, 391 S.W.2d 301 (Mo. 1965); Gravelin v. Porier, 77 Mont. 260, 250 P. 823 (1926); Tuttle v. Winchell, 104 Neb. 750, 178 N.W. 755 (1920); Bower v. Landa, 78 Nev. 246, 371 P.2d 657 (1962); Barney v. Hutchinson, 25 N.M. 82, 177 P. 890 (1918); Fish v. Berzel, 101 N.W.2d 548 (N.D. 1960); Zimmerson v. Kitzan, 79 N.D. 365, 65 N.W.2d 462 (1954); Clemons v. Clemons, 193 Okla. 412, 145 P.2d 928 (1943); Crilly v. Morris, 70 S.D. 584, 19 N.W.2d 836 (1945); Jones v. Guy, 135 Tex. 398, 143 S.W.2d 906 (1940); *In re* Williams' Estates, 10 Utah 2d 83, 348 P.2d 683 (1960); Nichols v. Pangarova, 443 P.2d 756 (Wyo. 1968); Pangarova v. Nichols, 419 P.2d 688 (Wyo. 1966).

Several jurisdictions require special comment. In Rader v. Celebrezze, 253 F. Supp. 325 (E.D. Ky. 1966), the court need only have decided that Kentucky would recognize

veniently be grouped under three general headings: the theory of recovery, the status obtained by an equitable adoption, and the conflicts of laws problems that arise in this area.

Theory of Recovery

At the outset one must distinguish a contract to adopt from a contract to make a will. The latter agreement necessarily involves the disposition of property and may come within the Statute of Frauds,[11] but if written or removed from the Statute by part performance, such a contract will be enforced quite apart from any purported adoption.[12] An agreement to adopt stands on a different footing. Although frequently discussed in relation

the status of a child equitably adopted in Ohio. Since the court did not limit its discussion to this proposition and did not expressly decide whether an adoption agreement would be given effect under Ohio law, this decision should be taken to reflect Kentucky law.

Similarly, Spiegel v. Flemming, 181 F. Supp. 185 (N.D. Ohio 1960), does not squarely endorse this doctrine but interprets rather broadly some earlier Ohio decisions.

Lastly, a recent Alabama case left the position of its courts somewhat uncertain. In Robinson v. Robinson, 283 Ala. 257, 215 So. 2d 585 (1967), the court adopted language that might be read as a refusal to enforce an adoption agreement not joined with a contract to make a will. Read in light of earlier decisions, however, this language seems more plausibly to be addressed to the question of the status attained under an adoption agreement, not the validity of such an agreement for purposes of intestate succession. *Id.* at 262, 215 So. 2d at 590.

In addition to the twenty-six states noted above, courts in three jurisdictions have addressed the issue but have failed to resolve it. In its most recent effort, the Supreme Court of Arkansas apparently rejected equitable adoption altogether, but the court then proceeded to discuss the sufficiency of evidence proving an adoption contract, thereby implying that such an agreement could be enforced if proved. In any event, strict adherence to a very high standard of proof has effectively precluded recovery in this state. *See* Wilks v. Langley, 248 Ark. 227, 451 S.W.2d 209 (1970) (and the decisions discussed therein).

In the single case in that jurisdiction, the Court of Appeals of the District of Columbia denied relief. This court dealt with a somewhat unpersuasive fact situation and announced its decision in terms that at once appear categorical but seem to envision possible recovery on different facts. Fuller v. Fuller, 247 A.2d 767 (D.C. App. 1968).

New York courts allowed recovery in several older cases involving both a contract to adopt and a contract to make a will. *See, e.g.*, Winne v. Winne, 166 N.Y. 263, 59 N.E. 832 (1901). To date, however, no reported decision in that state deals with an adoption agreement standing alone.

Lastly, courts of some thirteen states have apparently reported no cases on point: Alaska, Connecticut, Delaware, Hawaii, Idaho, Indiana, Maine, Massachusetts, New Hampshire, North Carolina, Rhode Island, Vermont, and West Virginia.

11 Hooks v. Bridgewater, 111 Tex. 122, 229 S.W. 1114 (1921).

12 Prince v. Prince, 194 Ala. 455, 69 So. 906 (1915). Texas courts, however, refuse to enforce contracts to make a will in this context on the ground that custody of a child as consideration for such a promise violates public policy. Hooks v. Bridgewater, 111 Tex. 122, 229 S.W. 1114 (1921).

to an adoption agreement, the Statute of Frauds does not invalidate such a contract.[13] It can be performed within one year and within the lifetime of the promisor, and it need not involve the disposition of property since the promisor remains free to disinherit a child by will. Of course, a single case may involve both a contract to make a will and a contract to adopt, and courts sometimes fail to distinguish between them;[14] but the essence of equitable adoption is the provision of a judicial remedy for an unperformed adoption agreement.

Courts that endorse the doctrine of equitable adoption recognize no right in law; they merely agree to provide an equitable and discretionary remedy in a proper case: "Equity, abhorring injustice, and having its origin in the inadequacy of legal remedies, and possessing powers all its own, has developed the remedy . . . the granting or denial of which rests in sound discretion." [15] Some courts rest their decisions solely and squarely on the principles of equity.[16] More commonly, courts employ one of several more sophisticated techniques to reach the desired result.

Specific Performance

The most popular theory of recovery is specific performance of the contract to adopt. Courts grant this remedy only against the estate of a deceased promisor; a child cannot enforce an adoption agreement during the lifetime of his adoptive parent:

> The [adoption] statute involves action by the court, looking always to the best interest of the child. Such action could not have been compelled in a suit for specific performance. . . . [A]doption is not a contract alone between the parties. It requires judicial determination of the advisability of permitting such action, and if a court decrees otherwise, it is not within the power of one person to adopt another. The relationship of parent and child is of the most intimate, personal nature. Equity will not ordinarily enforce a contract to create such relationship.[17]

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13 *In re* Rivolo's Estate, 194 Cal. App. 2d 773, 15 Cal. Rptr. 268 (Dist. Ct. App. 1961); Jones v. Guy, 135 Tex. 398, 143 S.W.2d 906 (1940).

14 *See, e.g.*, Fish v. Berzel, 101 N.W.2d 548 (N.D. 1960). The distinction between these two contracts may, however, become blurred. One court, for example, purporting to enforce a contract to leave property, required no direct proof of the contract and in effect assumed its existence from a proven adoption agreement. Benefield v. Faulkner, 248 Ala. 615, 29 So. 2d 1 (1947).

15 Wooley v. Shell Petroleum Corp., 39 N.M. 256, 264, 45 P.2d 927, 932 (1935).

16 *See, e.g., id.* at 265-66, 45 P.2d at 933: "[A]ll we need is an equity to invoke the court's power to treat as done what should have been done."

17 Besche v. Murphy, 190 Md. 539, 544, 59 A.2d 499, 501-02 (1948).

As against the defaulting promisor's estate, courts characteristically require an adoption agreement and valid consideration for the promise of adoption.[18] This conceptual framework leads to discussions of the authority of the contracting parties[19] and the sufficiency of consideration. Generally, custody of the child, filial companionship and obedience, or change in the child's domestic status will support the promise of the adoptive parent.[20] Transfer of custody to the prospective spouse of the child's natural parent may suffice,[21] but some courts hold that neither the marriage nor the benefits of association consequently enjoyed by the stepparent constitute consideration.[22] Misconduct of the child, including abandonment of the adoptive family, may amount to a failure of consideration, but only where the conduct is flagrant.[23]

Despite its currency, the theory of specific performance of the adoption agreement fits the facts of these cases only passing well. For one thing, courts will grant relief only against the estate of a deceased promisor. Furthermore, a proven contract to adopt will fail to determine custody in a contest between the natural and foster parents.[24] Most importantly, courts that follow this theory do not order specific performance. A deceased promisor cannot adopt the child,[25] and no court has held that the equitably adopted child attains the status of legal adoption.[26] In allowing participation in the estate of a foster parent, the courts do not specifically enforce the contract but merely provide an equitable remedy, limited in application and result.

Specific performance has not been applied exclusively to the express bilateral contract to adopt. Some courts have found in the adoption agreement an implied contract to leave a child's share of the estate. The implied contract is then subject to specific performance.[27] Furthermore, one com-

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18 *In re* Lamfrom's Estate, 90 Ariz. 363, 367, 368 P.2d 318, 321 (1962).

19 *See, e.g.*, Barlow v. Barlow, 170 Colo. 465, 463 P.2d 305 (1969); Boles v. Eddleman, 189 Ga. 551, 6 S.E.2d 589 (1939) (petition dismissed for failure to state either that the child was illegitimate, or that the natural father had joined in or ratified the contract, or that he was dead or had abandoned the child at the time of the agreement).

20 *In re* Lamfrom's Estate, 90 Ariz. 363, 368 P.2d 318 (1962); Tuttle v. Winchell, 104 Neb. 750, 178 N.W. 755 (1920).

21 Roberts v. Sutton, 317 Mich. 458, 27 N.W.2d 54 (1947).

22 *See, e.g.*, Lee v. Green, 217 Ga. 860, 126 S.E.2d 417 (1962).

23 Tuttle v. Winchell, 104 Neb. 750, 178 N.W. 753 (1920).

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

25 Wooley v. Shell Petroleum Corp., 39 N.M. 256, 263, 45 P.2d 927, 931-32 (1935):

> A specific performance of a contract to adopt is impossible after the death of the parties who gave the promise. Equity was driven to the fiction that there had been an adoption. That fiction being indulged, the case was not one of specific performance. It remained merely to apply the statutes of descent and to decree the succession.

26 See notes 66-92 and accompanying text *infra*.

27 Odenbreit v. Utheim, 131 Minn. 56, 154 N.W. 71 (1915); Burdick v. Grimshaw, 113 N.J. Eq. 591, 168 A. 186 (Ct. Ch. 1933).

mentator, disturbed by the failure of courts to articulate offer and acceptance in factual terms, has suggested that agreements to adopt be treated as unilateral offers.[28] Companionship, obedience, and affection would presumably constitute acceptance, and, upon acceptance, the court could then specifically enforce the completed contract.

Estoppel

Estoppel theory affords a conceptually distinct basis for equitable adoption. Texas provides the vast majority of the cases employing estoppel doctrine, and courts of that state have frequently approved the following statement of the theory:

> [An estoppel operates] to preclude adoptive parents and their privies from asserting the invalidity of adoption proceedings, or, at least, the status of the adopted child, when, by performance upon the part of the child, the adoptive parents have received all the benefits and privileges accruing from such performance and they by their representations induced such performance under the belief of the existence of the status of the adopted child.[29]

Estoppel theory, however, fits these cases no better than the theory of specific performance.

Generally, promissory estoppel or estoppel in pais requires three elements: 1) a promise or representation of fact, 2) reasonable reliance thereon, and 3) resulting harm. At first blush, the third element appears to present the greatest obstacle to recovery by the equitably adopted child, since he typically has little hope of showing actual net detriment. The adoptive parents normally take the child from an orphanage or from natural parents who do not want or cannot afford him. Although they do receive "the benefits and privileges" of association with the child, they also provide him with a family, a name, a position in the community, and years of care and affection.[30] In any real sense no actual harm is likely to exist. One Texas court accordingly dispensed with any need to show detriment,[31] but a later court seemed to regard a lack of evidence on this point as a factor leading to dismissal.[32] As a practical matter, whatever detriment Texas law requires is largely fictitious, and discussion of the question is conspicuously absent from its case law.[33]

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[28] Comment, *Equitable Adoption: A Necessary Doctrine?*, 35 S. CAL. L. REV. 491 (1962).

[29] *See, e.g.*, Jones v. Guy, 135 Tex. 398, 402, 143 S.W.2d 906, 908 (1940).

[30] *See, e.g., In re* Painter's Estate, 246 Iowa 307, 67 N.W.2d 617 (1954).

[31] Treme v. Thomas, 161 S.W.2d 124, 133 (Tex. Civ. App. 1942).

[32] Price v. Price, 217 S.W.2d 905 (Tex. Civ. App. 1949).

[33] *See, e.g.*, Cavanaugh v. Davis, 149 Tex. 573, 235 S.W.2d 972 (1951); Jones v. Guy, 135 Tex. 398, 143 S.W.2d 906 (1940).

Even if no showing of detriment is required, one can scarcely see how a child could rely on a promise or representation of fact relevant to the recovery allowed. The child or his natural parents may well rely on promises or representations relating to care and support. But such reliance cannot encompass the expectation of inheritance, for the adoptive parents remain free to exclude the child by will.[34]

The most important question under estoppel theory concerns the kind of representation required to effect an adoption by estoppel. A dispute has revolved around the issue of whether failure to prove a contract—in this case, an adoption contract legally insufficient under state law—precludes recovery under estoppel theory. In *Holloway v. Jones*[35] the Missouri Supreme Court affirmed a decision granting equitable adoption without any finding of a contract. This court stopped short of affirmatively dispensing with this requirement but clearly based its decision on the outward indicia of a parent-child relationship rather than on the existence of an adoption contract. Succeeding cases in that jurisdiction retreated from the position of *Holloway*. In *Benjamin v. Cronan*[36] the court did not rule out recovery without proof of a contract, but it did choose to emphasize the quantum and character of proof required to sustain recovery. The opinion implies that the proof required must have some relation to an adoption agreement. And in *Keller v. Lewis County*[37] the court clearly implied the necessity of a proven contract by denying relief in spite of the ample evidence of a parent-child relationship.

Although Missouri courts quickly limited the impact of *Holloway* and returned to the contract requirement, the remarkably sweeping opinion in *Jones v. Guy*[38] injected this line of reasoning into Texas law. Here the court relied on *Holloway* and allowed recovery with no explicit finding of an adoption agreement. The movement toward eliminating the requirement of a contract as the kind of representation necessary to support an estoppel continued in *Treme v. Thomas*.[39] Here plaintiff had to prove an equitable adoption to establish his standing to challenge a will for lack of testamentary capacity. Without referring to the necessity for a proven adoption agreement, the court decided that the evidence warranted submission of plain-

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[34] Banes v. Derricotte, 215 Ga. 892, 114 S.E.2d 12 (1960).

[35] 246 S.W. 587 (Mo. 1922).

[36] 338 Mo. 1177, 93 S.W.2d 975 (1936).

[37] 345 Mo. 536, 539, 134 S.W.2d 48, 49 (1940):

> The Pattersons treated plaintiff as their daughter and she treated them as her father and mother; addressed them as 'ma' and 'pa,' and when speaking of them so designated them. There was that affection that usually obtains between parent and child. The Pattersons, both at home and abroad, held plaintiff out as their daughter; fed her; clothed her; schooled her; loved her.

[38] 135 Tex. 398, 143 S.W.2d 906 (1940).

[39] 161 S.W.2d 124 (Tex. Civ. App. 1942)

tiff's claim to the jury. In a confusing and ambiguous opinion the court did not expressly state whether a contract was essential to recovery, but one may doubt whether any contract could have been found on the evidence before the court. In a letter to the orphange that had custody of the child, the adoptive parents promised to "educate and care for" the child, but specifically negatived any present intent to adopt.[40] The court apparently placed primary reliance on the evidence of a parent-child relationship: "There is nothing in the record to show that George R. Thomas ever recognized or treated Mark other than he would have treated a son born to him, and there is nothing in the record to show that Mark ever treated George R. Thomas other than as a dutiful and obedient child would have treated his father." [41] The record appeared unambiguous, however, precisely because the court excluded letters by the adoptive parents revealing their lack of intent to adopt. The court reasoned that the evidence offered was too remote in time: the child's status in the adoptive family had been fixed long before by the terms of the adoption contract.[42] But this conclusion assumed the answer to the very question under contention—whether the evidence supported a finding of a contract to adopt. Ordinarily such a finding would rest on solid and convincing evidence of a prior agreement. Indeed, were the issue doubtful, the court would have no justification for excluding evidence plainly relevant to the question at hand. Yet the *Treme* court failed to articulate facts constituting the contract of adoption and made no explicit finding that the evidence proved the existence of such a contract. The court further clouded this issue by dealing with it in terms of the appropriate standard of proof and the sufficiency of the evidence, but the decision clearly stands for the proposition that proof of a parent-child relationship between deceased and plaintiff will support a claim for equitable adoption, even where the court cannot find clear and convincing evidence of a contract to adopt. In effect, the *Treme* court took proof of the relationship as very substantial evidence—perhaps sufficient evidence—of the existence of the contract.

Cavanaugh v. Davis[43] marked the turning point in this line of development. The lower court had found that the evidence compelled a conclusion that plaintiff had been equitably adopted by deceased.[44] The court made this decision on the basis of ample evidence showing a parent-child relationship, but there was virtually no proof of an agreement. In reaching this result the court verbalized the broad reading of *Jones v. Guy* relied on by the *Treme* court:

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[40] *Id.* at 129.
[41] *Id.* at 130.
[42] *Id.* at 130-31.
[43] 149 Tex. 573, 235 S.W.2d 972 (1951).
[44] 231 S.W.2d 959 (Tex. Civ. App. 1950).

> [W]e do not understand the law to require that there need be any direct proof of specific agreement to adopt when adoption by estoppel is relied upon. The contract is evidenced by the acts and conduct of the parties or stated another way, the acts and conduct of the parties estop them from denying the existence of a contract.[45]

This statement goes far beyond anything found in *Jones v. Guy* and explains some of the ambiguities of the *Treme* opinion. That court excluded evidence negativing an intent to adopt because the acts and conduct of the parties obviated any consideration of the question. If proof of an apparent parent-child relationship operated as a conclusive presumption of the existence of an adoption agreement, plaintiff could recover without any proof of an actual contract.

On appeal the Texas Supreme Court recoiled at this prospect and interpreted prior decisions in a more restrictive fashion than did the lower court. The supreme court reversed on the merits. This second *Cavanaugh* opinion dispenses with the requirement of an adoption agreement only where the foster parents "undertook to effect a statutory adoption but failed to do so because of some defect in the instrument of adoption or in its execution or acknowledgment. . . ." [46] In all other circumstances plaintiff must prove a contract of adoption.[47] The court's insistence on proof of an agreement reflects a justifiable fear of penalizing foster parents for their charitable impulses.[48] A person might well support and care for a homeless child without any intention of placing him in the position of a legally adopted child for purposes of intestate succession.

The requirement of a contract as the kind of representation needed to invoke an estoppel in pais imposes a litmus test for the use of equitable power. The requirement of a contract presumes that the child for whose benefit an adoption contract has been concluded deserves to share in his foster parent's estate, while the child who was raised and educated by one who has made no agreement to do more has no equitable basis for a further claim against his benefactor. Yet the requirement of an adoption agreement will not always distinguish the deserving plaintiff from the undeserving one. Where, for example, someone takes a child off the street or takes custody immediately following the death of his parents, no one may have authority to contract with him for legal adoption. The foster parent may have every

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[45] *Id.* at 962.

[46] Cavanaugh v. Davis, 149 Tex. 573, 576, 235 S.W.2d 972, 974 (1951).

[47] *Id.*

[48] *See, e.g.*, Benjamin v. Cronan, 338 Mo. 1177, 1188, 93 S.W.2d 975, 981 (1936):

> We might again call attention to the wisdom of the rule as to the character and quantum of proof required. . . . If this rule is relaxed, then couples, childless or not, will be reluctant to take into their homes orphan children, and for the welfare of such children, as well as for other reasons, the rule should be kept and observed.

intention of completing the statutory formalities but may have no one to whom he can make that promise if the child is too young to contract in his own behalf and his natural parents are dead, unknown, or unavailable. In such cases the child will be denied recovery because of the contract reqnirement, even though the equities may weigh as heavily in his favor as in the case of the successful plaintiff. In fact, the contract requirement has resulted in denying relief to an illegitimate child who tried to participate in her natural father's estate.[49] The father acknowledged paternity, supported the girl, and gave her his name, but the court refused recovery because of the absence of a proven intent to accord adoptive status. The biological connection, however, renders this case at least as strong on the equities as others in which Texas courts have granted relief. The requirement of an adoption agreement operates, then, as a blunt and sometimes undiscriminating instrument for limiting the application of estoppel doctrine.

Common Aspects of Estoppel and Specific Performance

Given the focus of both theories of the adoption contract, specific performance and equitable estoppel amount to virtually the same thing; the application of one, as opposed to the other, will not significantly affect the result in a particular case. Missouri courts, for example, employ the two theories without substantive differentiation,[50] sometimes using both in a single case.[51] While the choice of theory may determine the terms in which a court casts its decision,[52] the broad outlines of the doctrine of equitable adoption remain constant.

All courts impose a high standard for proving the adoption contract. Plaintiff must produce "clear, cogent, and convincing" [53] evidence—evidence which "must not only be consistent with the existence of the contract of adoption but must be inconsistent with any other rational theory." [54] Parol and circumstantial evidence may suffice, but such evidence will be weighed "scrupulously and with caution." [55] No single element of the factual circumstance will be conclusive, nor will the absence of any such element preclude recovery.[56]

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49 Guidry v. Denkins, 460 S.W.2d 943 (Tex. Civ. App. 1970).

50 Hegger v. Kausler, 303 S.W.2d 81 (Mo. 1957) (estoppel); Niehaus v. Madden, 348 Mo. 770, 155 S.W.2d 141 (1941) (specific performance).

51 Menees v. Cowgill, 359 Mo. 679, 223 S.W.2d 412 (1949).

52 See note 50 *supra*.

53 Hogane v. Ottersbach, 269 S.W.2d 9, 11 (Mo. 1954).

54 Crilly v. Morris, 70 S.D. 584, 600, 19 N.W.2d 836, 844 (1945).

55 Monahan v. Monahan, 14 Ill. 2d 449, 452, 153 N.E.2d 1, 3 (1958).

56 For example, evidence that the child took his foster parent's name does not compel recovery, nor does proof to the contrary foreclose the issue. Guidry v. Denkins, 460 S.W.2d 943 (Tex. Civ. App. 1970); Malone v. Dixon, 410 S.W.2d 278 (Tex. Civ. App. 1966).

While all courts purport to adhere to this strict proof standard, two caveats should be noted. First, the question of proof provides a convenient tool for disposing of a case on the equities. Courts sometimes strain to find sufficient evidence to support recovery,[57] and at other times they emphasize the high standard of proof in order to deny relief.[58] Second, while an ineffectual attempt at statutory adoption may be regarded merely as evidence of a prior parol agreement to adopt,[59] such facts may be specially treated. Texas courts apparently allow such an attempt to substitute for a proven contract as a basis for estoppel,[60] and Pennsylvania has denied recovery in all cases except those involving a minor deviation from the statutory formula.[61]

Despite the convergence of specific performance and estoppel theories on the necessity of a contract and the appropriate standard of proof, the conceptual terms in which a court casts its decision may not be entirely devoid of practical consequence. For example, most courts show considerable reluctance to allow participation in the estate of a stepparent on the basis of equitable adoption.[62] Characteristically, in cases of this kind a child tries to share in the estate of his mother's second husband and alleges an adoption agreement concluded by the mother and her prospective spouse. Georgia courts follow the theory of specific performance of the adoption contract and consequently deal with this question as a problem of good consideration to support the promise of adoption. In *Taylor v. Boles*[63] plaintiff alleged two considerations for his stepfather's promise: marriage to plaintiff's mother and the domestic status assumed by plaintiff following that marriage. The court ruled that contracts in consideration of marriage fall within the Statute of Frauds and cannot be removed by part performance. The court also found the second alleged consideration insufficient at law. Plaintiff's mother did not surrender custody of her child, so the domestic status assumed by plaintiff after the marriage would ordinarily have arisen without an adoption agreement. Furthermore, the facts indicating a father-son relationship seemed equally consistent with a stepfather-stepson relationship and therefore did not prove sufficient part performance to remove the contract from the Statute of Frauds. A later decision simply states that a mother's consent that her prospective husband enjoy a father-child relationship with

[57] *See, e.g.*, Malone v. Dixon, 410 S.W.2d 278 (Tex. Civ. App. 1966) .

[58] *See, e.g.*, Thomas, Adm'x v. Costello, 226 Ark. 669, 292 S.W.2d 267 (1956).

[59] Kerr v. Smiley, 239 S.W. 501 (Mo. App. 1922).

[60] Cavanaugh v. Davis, 149 Tex. 573, 235 S.W.2d 972 (1951).

[61] *In re* Sulewski, Pa. Super. 301, 173 A. 747 (1934).

[62] *See, e.g.*, Fuller v. Fuller, 247 A.2d 767 (D.C. App. 1968); Wasserman v. Weisner, 36 Misc. 2d 916, 234 N.Y.S.2d 128 (Sup. Ct. 1962).

[63] 191 Ga. 591, 13 S.E.2d 352 (1941).

her offspring constitutes no consideration for a promise to adopt where the mother does not relinquish custody.[64]

This question has also arisen in Missouri, whose courts choose freely between specific performance and estoppel theories. In *Capps v. Adamson*[65] the court found the evidence insufficient to prove an adoption contract. This finding rested in large part on the fact that evidence of a father-daughter relationship could also be taken as evidence of a stepfather-stepdaughter relationship and therefore contributed nothing toward proving an adoption agreement. This court, however, in no way intimated that if a contract were proved, the claim would nevertheless fail because the mother did not relinquish custody of her child. By dealing with this issue as a proof problem rather than as a question of valid legal consideration, the *Capps* court rendered a decision less sweeping in its impact than did the Georgia courts.

Status of an Equitably Adopted Child

The discussion has focused on equitable adoption doctrine in its usual context—participation by a child in the estate of his intestate foster parent. Courts are asked to place plaintiff in the position of a legally adopted child of the deceased. A handful of reported cases, however, present this issue in a variety of other contexts. These cases concern the doctrine's scope: the range of legal circumstances in which courts of equity will treat someone as that which he in fact is not—a legally adopted child. In other words, these cases raise the question of status. If plaintiff succeeds or could succeed in an action for equitable adoption, what status does he attain thereby?

Courts consistently disclaim any power to effect a legal adoption after the death of the foster parent.[66] Therefore, whether the court grants specific performance of the adoption contract or an estoppel, the equitably adopted child cannot obtain the status accorded by statutory adoption.

> [W]here there is a contract to adopt . . . an equity court may decree specific performance of the contract to allow inheritance of property owned by the foster parents; however, the equity court may not construe the contract as making the child a legally adopted child of the foster parent;[67]

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[64] Lee v. Green, 217 Ga. 860, 861, 126 S.E.2d 417, 418 (1962). *But see* Foster v. Cheek, 212 Ga. 821, 96 S.E.2d 545 (1957), where after the death of her husband, the child's mother relinquished her control of the child to his grandparents. The court held that the domestic status assumed by the child following the mother's second marriage did support the stepfather's promise of adoption because he contracted with the grandparents to obtain custody.

[65] 362 Mo. 539, 242 S.W.2d 556 (1951).

[66] Korbin v. Ginsberg, 232 So. 2d 417 (Fla. 1970).

[67] Robinson v. Robinson, 283 Ala. 257, 262, 215 So. 2d 585, 590 (1967).

And, in an estoppel jurisdiction:

> The descriptive phrases, 'equitable adoption,' 'adoption by estoppel,' and 'adoptive status,' are used in decided cases strictly as a shorthand method of saying that . . . those claiming under and through [an intestate deceased] are estopped to assert that a child was not legally adopted. . . . Analysis of the cited cases makes clear that we did not intend to hold, and did not hold, that 'equitable adoption' or 'adoption by estoppel' is the same as legal adoption or that it has all of the legal consequences of a statutory adoption.[68]

This distinction has impact even in the most common factual setting, for the child who takes by equitable adoption does not enjoy the inheritance tax advantages accorded a legally adopted child.[69] He is treated as if he were a child for the one purpose but not for the other.

Courts commonly define the position of the equitably adopted child in negative terms. Unlike his legally adopted counterpart, he may not inherit from his adoptive parents' relatives.[70] In *Continental Illinois National Bank & Trust Co. v. Clancy*[71] the court excluded plaintiff from a trust of his adoptive parent's father. The trust provided equal shares *per stirpes* to the lawful issue of the settlor and distribution of the principal to his grandchildren. The court concluded that a contract to adopt did not suffice to make a child a legal heir of the adoptive parent, but the court unfortunately did not feel it necessary to publish anything more than an abstract of the opinion.

A Texas court reached the same result through an elaborate technical analysis of estoppel theory and "privies." In *Asbeck v. Asbeck*[72] plaintiff was the natural grandnephew of both Ben Asbeck, whose estate was at issue, and his brother Eddie. Eddie predeceased Ben, who in turn was survived by one brother and the descendants of three other siblings. Plaintiff claimed a one-fifth share *per stirpes* as Eddie's equitably adopted son and sole heir. The court noted that an adoption by estoppel binds only the adoptive parent and his privies; the court denied relief on the basis of the following description of privity: "And 'Privity' as here used, is the legal relationship between parties incident to succession on the part of one party to an estate or interest formerly held by the other."[73] As against plaintiff, an estoppel could not bind Ben's heirs because none claimed an interest in

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[68] Heien v. Crabtree, 369 S.W.2d 28, 30 (Tex. 1963).

[69] *In re* Clark's Estate, 105 Mont. 401, 74 P.2d 401 (1937).

[70] *See, e.g.*, Kuchenig v. California Co., 410 F.2d 222, 227 (5th Cir.), *cert. denied*, 396 U.S. 887 (1969). All reported decisions concur.

[71] 20 Ill. App. 2d 307, 155 N.E.2d 838, *aff'd on other grounds*, 18 Ill. 2d 124, 163 N.E.2d 523 (1959).

[72] 362 S.W.2d 891 (Tex. Civ. App. 1962).

[73] *Id.* at 893.

Ben's estate as successors to Eddie's interest. While the result may be sound, the opinion seems incomplete and only partially convincing. This court decided on highly technical grounds a question which arose in the first instance only as a consequence of a general judicial willingness to bend the letter of the law to achieve an equitable outcome.

In *Menees v. Cowgill*[74] the Missouri Supreme Court barred plaintiff's attempt to share in the estate of the sister of his deceased adoptive father:

> While it is in effect admitted that the appellant would have been entitled to a decree of equitable adoption against Guy M. Cowgill . . . she is not entitled to such a decree as against the collateral kin of his sister, who were not parties to the adoption contract and who are not bound thereby. No equities exist in her favor as against them authorizing a decree of equitable adoption by him as against them.[75]

By joining a doctrinal rationale with some explanation of the policy involved, this court analyzed the issue in a more appropriate way than did the *Asbeck* court. Equitable adoption, after all, depends not on rules of law but on the power of equity, and elaborate theories rationalizing this use of equitable power remain equivocal and conceptually unpersuasive. It seems odd, therefore, to demark the limits of equitable adoption in the technical and largely theoretical language of *Asbeck*. The scope of equitable adoption may best be defined in terms of the general principles that justify its existence—equity and common sense.

Despite the differences in approach, *Menees* and *Asbeck* do converge at one point: both opinions focus on the status of the parties opposing the claim of equitable adoption. Their position, however, has only a doubtful bearing on the policy reasons for granting or withholding relief. Moreover, the cases cannot be explained by examining the status of the legal heirs, either with reference to the equitably adopted child or to the intestate deceased. Plaintiffs commonly recover against natural children of the deceased, but in *Asbeck* and *Menees* they lose to more remote collaterals. The determinative factor, of course, is the relation of the child to the deceased in whose estate he seeks to participate. While he may recover against the estate of a defaulting promisor, the equities in his favor do not extend so far as to allow recovery against the estate of a foster parent's relative, one who has made no promise and—having done no wrong—has equities in his favor as well.

Courts have also held that the adoptive parents or their heirs cannot recover from the estate of an equitably adopted child who dies intestate. In In re *Jarboe's Estate* the court contented itself with stating the legal conse-

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[74] 359 Mo. 697, 223 S.W.2d 412 (1949).

[75] *Id.* at 707-08, 223 S.W.2d at 418.

quences of its decision: " '[E]quitable adoption' does not give the child the status of being legally adopted, and hence the heirs of the child's foster parents have no claim against his estate should the child die intestate." [76] But in *Heien v. Crabtree*[77] the Texas Court of Civil Appeals addressed the equities involved, although somewhat obliquely. An estoppel may be invoked only against one who has failed in his duty or against his successors in interest. Since an equitably adopted child has no duty to effect a statutory adoption, no estoppel will lie against him or his heirs. By implication the foster parent who fails to perform the adoption contract is in some sense a wrongdoer who will not be allowed to plead his own default as a basis for recovery.

In a remarkable opinion, the Texas Supreme Court affirmed.[78] The *Texas Probate Code* provided for inheritance by parents from an intestate child[79] and defined "child" as including "an adopted child, whether adopted by any existing or former statutory procedure, or by acts of estoppel." [80] The court gave this provision no effect and in essence read it out of the statute altogether. Legal adoption, said the court, could not be accomplished by estoppel; thus a statutory provision concerning a child adopted "by acts of estoppel" meant nothing: the language merely reflected an improper assumption on the part of the legislators that the status of adoption could be obtained by private acts. It would be more reasonable to read this statute as according some incident of the very status which the court here denied.

Although foster parents cannot inherit from their equitably adopted child, the child's natural parents can. The law of intestate succession follows biology rather than sentiment, and the legal relationship between an equitably adopted child and his natural parents remains intact unless extinguished by a statutory adoption. This statement illumines the whole range of policy considerations posed by the situation in *Heien*. If the intestate had a spouse and children, they would take all, and the adoptive and natural parents would have nothing left to fight over. If, however, the child died unmarried and without issue, those opposing the claim of the foster parents would be either the very people who contracted for the adoption in the first place or their successors in interest. They may have contributed nothing to the child's welfare; support, education, care and affection may all have come from the foster parents. But the natural parents may have given up their child for reasons no one would condemn, and the adoptive parents would have inher-

[76] 235 F. Supp. 505, 508-09 (D.D.C. 1964).

[77] 364 S.W.2d 271 (Tex. Civ. App. 1962).

[78] 369 S.W.2d 28 (Tex. 1963).

[79] VERNON'S TEXAS CIV. STAT. ANN., Probate Code § 40:

> [A]nd 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 and legitimate child of such parent or parents by adoption.

[80] VERNON'S TEXAS CIV. STAT. ANN., Probate Code § 3(b).

ited without dispute, had they completed the statutory formalities as agreed. Perhaps the reluctance of courts to countenance any possibilty of inheritance by a foster parent reflects an understandable desire to avoid making this kind of value choice in the face of the unambiguous language of the statutes of descent and distribution.

A less difficult question arises when a natural parent claims his deceased child's interest in the estate of a foster parent. In *Wooley v. Shell Petroleum Corp.*[81] the Supreme Court of New Mexico allowed recovery in just such a case. Here a successful cross-claim was pressed by two defendants: the younger of two sisters who had been equitably adopted by deceased, and her natural father in his capacity as sole heir of the deceased elder daughter. The court assumed without discussion that the father would recover his deceased daughter's interest. Indeed, no one seems to have contested his claim on that basis; this fact may well explain the court's decision.

A Georgia court, however, reached the opposite result. In *Alexander v. Lamar*[82] a mother relinquished control of her illegitimate child under an adoption agreement with the natural father's parents. The mother claimed the interest of her predeceased natural son in the estate of a foster parent. Had the child instituted the action in her own behalf, the court would clearly have allowed recovery, but it decided against the mother. The court found that statutory adoption in Georgia effected a complete substitution of parents. Plaintiff, therefore, had to plead an unperformed contract to adopt, which, if performed, would have divested her of all rights of inheritance from her child. The fatal defect in plaintiff's case was the glaring absence of any equitable factors in her favor. Unlike the *Wooley* court, this court did not restrict its vision to the equities favoring the child's claim but looked as well to the position of the plaintiff. Regardless of the merit of a hypothetical claim by the deceased child, this plaintiff could show no reason for invoking the power of equity to circumvent the normal operation of the inheritance statutes. The *Alexander* case demonstrates the power of a court of equity to deny relief to an undeserving plaintiff and thereby prevent the anomaly of participation by a natural parent in the estate of his child's foster parent. Of course, if the child takes in his own right and then dies intestate, the outcome may be the same; but a court of equity need not effect that result where the child predeceases the adoptive parent.

Inheritance through, rather than from, adoptive parents and inheritance by them from the child are fairly radical departures from the classic equitable adoption situation, but courts have also declined to apply the doctrine in situations much closer to the usual factual context. In *Besche v. Murphy*[83] the court refused to give this doctrine any place in the construction of a

[81] 39 N.M. 256, 45 P.2d 927 (1935).
[82] 188 Ga. 273, 3 S.E.2d 656 (1939).
[83] 190 Md. 539, 59 A.2d 499 (1948).

will leaving property to those who would take under the intestacy statutes. The court explained its decision in terms of limitations on the use of equity power:

> The testatrix . . . has given the remainder of her estate to those persons who . . . would take in case of her intestacy. Such persons take as legatees, and not under the statute, and as the appellant is not one of those named, we cannot change the will of the testatrix to put her in that class. The entire estate of the testatrix is disposed of, and there is nothing for an equity court to act upon.[84]

This statement assumes that the testatrix intended to include only those within the letter of the intestacy statute. One may argue, however, that her intent was not so clear. Plaintiff did not come within the class of those named or described in the statute, but he clearly was among those who "would take in case of her intestacy." The court's failure to resolve this ambiguity reveals its reluctance to extend the doctrine of equitable adoption beyond the narrow factual setting of its origin. While the court undoubtedly had reason to limit the application of this doctrine, one may wonder why a child who would take in case of intestacy cannot take under a will defining the legatees in those terms.

In an analogous situation a Missouri court allowed a plaintiff to recover under a pretermitted heir statute: "[A] contract to adopt carries the incidental right of heirship which, as in the case of a natural child, may be cut off ouly by the will of the adoptive parent in which the adopted child is mentioned."[85] This court recognized the status of an equitably adopted child with regard to a will, thus contradicting the result of *Besche*. On policy grounds this result seems unobjectionable.

Finally, courts have disagreed over the status of an equitably adopted child under wrongful death statutes. A Texas court resolved the issue simply by disclaiming authority to grant relief: "[T]he right of recovery is purely statutory and the courts are without authority to enlarge the provisions of the statute so as to make them extend beyond the reasonably necessary intendments of the Act."[86] A Georgia court reached the same conclusion in *Limbaugh v. Woodall*.[87] In an intestacy proceeding plaintiff had secured an adoption decree issued by a court of equity and stated in the broadest terms. The court held, however, that equity power could not accord full adoptive status and that nothing less would suffice to sustain plaintiff's claim.

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84 *Id.* at 552, 59 A.2d at 505.

85 Thomas v. Maloney, 142 Mo. App. 193, 198, 126 S.W. 522, 524 (1910).

86 Deatherage v. Fort Worth & D.C. Ry., 154 S.W.2d 918, 919 (Tex. Civ. App. 1941). *See also* Perez v. Central Power & Light Co., 27 S.W.2d 641 (Tex. Civ. App. 1930).

87 121 Ga. App. 638, 175 S.E.2d 135 (1970). *See also* Weems v. Saul, 52 Ga. App. 470, 183 S.E. 661 (1936).

This conclusion followed from the court's finding that the word 'child' in the wrongful death statute did not include an equitably adopted child. The court failed even to discuss the efficacy of an equitable decree limited to this purpose or the alternative of imposing a constructive trust on those who would take under the statute. Nothing appears to compel the conclusion that the wrongful death statute is any more conclusive than the intestacy statute or that the former precludes plaintiff's claim while the latter does not.

In *Bower v. Landa*[88] the court achieved the opposite result by interpreting the word 'heirs' in the wrongful death statute to include any person entitled to participate in the estate of deceased. This conclusion enabled plaintiff to recover on the basis of a functional analysis of his status and the purpose behind the statute involved: "[W]e see no justification for refusing to extend the principles of equitable adoption so as to entitle the subject thereof to maintain an action for the wrongful death of his adoptive parents." [89] In both intestacy and wrongful death proceedings the claim of an equitably adopted child will be opposed by the deceased's legal heirs. The defendant in a wrongful death action will pay the same amount regardless of who profits thereby; he cares little who receives the money. More to the point, he has had no occasion to consider the status of those who may claim against him or to govern his actions on the basis of their legal relationship to the deceased. A claim for wrongful death should be viewed as part of deceased's estate, and no consideration of equitable factors or of the practical consequences of allowing recovery dictates that a plaintiff should share in one part of that estate but not in the other.

In general, courts have held tenaciously to the proposition that equitable adoption does not accord the status of legal adoption and have refused to recognize that doctrine outside the traditional factual context. Only two exceptions have been noted: one case of a wrongful death statute and the single reported decision under a pretermitted heir statute. In both cases the court construed the word "heir" in the relevant statutory provision to include an equitably adopted child. This interpretation opens the door to the possibility rejected in *Besche v. Murphy* and *Continental Illinois National Bank & Trust Co. v. Clancy*—inheritance by an equitably adopted child under a trust or will provision defining a class of "heirs" or "children." [90] One can easily imagine a case in which a legal stranger could take under such a provision. If, for example, A had a natural child, B, who in turn had an equitably adopted child, C, A might leave property to B's "heirs" or "children" under the mistaken belief that C had been legally adopted. C could plead a latent ambiguity and introduce extrinsic evidence to show that he came within the class A intended to describe. Assuming that his proofs sufficed, C would

88 78 Nev. 246, 371 P.2d 657 (1962).

89 *Id.* at 253, 371 P.2d at 661.

90 *See* notes 71, 83-84 and accompanying text *supra*.

then take under A's will: This result depends on A's intent and does not require that C be equitably adopted, although the facts constituting an equitable adoption would also evidence A's intent to include C. Obviously, if C cannot carry the burden of proof, he will not recover. Indeed, in some states a legally adopted child cannot take as an "heir" or "child" unless he can prove the testator's intent to include him.[91] But in many states the opposite result obtains—a legally adopted child will be presumed to come within the class of "heirs" or "children." [92] In such jurisdictions the doctrine of equitable adoption may yet play a role. Under the interpretation of "heir" in the wrongful death and pretermitted heir statutes—an interpretation including an equitably adopted child—a court could treat the child by equitable adoption as if he were legally adopted in the construction of wills. The plaintiff who could show equitable adoption would then be presumed to come within the class described as "heirs" or "children." The doctrine would be used to reverse the usual presumption in such cases and shift the burden of proof from the equitably adopted child to those opposing his claim.

In the traditional equitable adoption case courts use equity power to avoid the normal operation of the intestacy statutes upon the death of a foster parent. No persuasive reason precludes a similar use of this power in the analogous cases of wrongful death and pretermitted heir statutes and in the case of the construction of wills. The same result might be accomplished through statutory interpretation or through the devices of constructive trust or equitable decree. In any event, implications drawn from a conceptual framework of recovery should not be controlling. The theories of specific performance and estoppel fit even the paradigm case only roughly; they merely serve as vehicles for effecting results consistent with the demands of conscience. The courts should consider extending equitable adoption to these related areas and should evaluate such actions in light of the reasons for the existence of that doctrine in the first instance. Analysis of the impact of equitable considerations in each particular case and of the functional consequences of granting the relief requested lead to sounder results than do the theoretical frameworks used in the various jurisdictions.

Conflict of Laws

An increasingly mobile society and the diversity of laws in some fifty-one jurisdictions give rise to thorny conflict of laws problems involving equitable adoption. The cases dealing with this subject present many of the questions treated above, but here they appear in a different context. A single case may involve all three inquiries discussed in this Note: (1) Was the child equi-

[91] *See generally* Oler, *Construction of Private Instruments Where Adopted Children are Concerned*, 43 Mich. L. Rev. 705, 901 (1945).

[92] *Id.*

tably adopted? (2) What status did he attain thereby? (3) What law controls each of these questions? Furthermore, some courts have used conflicts questions to break new territory and expand the impact of the doctrine of equitable adoption.

As a general rule, the law of the state of adoption governs the creation of adoptive status, and local law controls the incidents flowing from that status. Courts will refuse to give any effect to the status created if doing so will violate some public policy of the forum.[93] When plaintiff pleads equitable rather than statutory adoption, determining the state of adoption can pose an extremely complicated problem, which is only infrequently discussed. Courts have usually phrased their resolution of the problem in terms of contract law: the validity of a contract is determined by the law of the place of contracting[94] or by the law of the place of performance.[95] Of course, conflicts problems do not assume any real importance when foreign and local law agree. And when an adoption agreement made in one state is partially performed in another jurisdiction, courts can avoid conflicts questions simply by finding the law of the forum controlling.[96]

On one conflict question the reported decisions agree: a forum that does not recognize equitable adoption will nevertheless enforce an adoption contract which was valid under the law of the state of execution.[97] Allowing inheritance under such an agreement when not recognized by the local forum will not violate public policy.[98] In *Kuchenig v. California Co.*[99] plaintiff claimed mineral-rich land in Louisiana on the basis of an equitable adoption in Missouri. The court rejected as irrelevant the defendants' argument that Missouri law did not accord the full status of legal adoption. The distinction between this status and that obtained by an equitably adopted child had no impact on the situation at hand; in this setting the same result followed in both cases. The court concluded that it "should give effect to the decree of adoption, unless it is clearly repugnant to our laws." [100]

Few appellate courts have had occasion to consider the effect of an equitable adoption which was valid where made but would not have been valid under the law of the forum. The result in *Kuchenig*, however, does accord with the conflicts rule usually followed in two analogous areas of family law: miscegenation and common law marriage. In fact, the *Kuchenig* court

93 Tsilidis v. Pedakis, 132 So. 2d 9 (Fla. Dist. Ct. App. 1961); Martinez v. Gutierrez, 66 S.W.2d 678 (Tex. App. Comm'n 1933) (dicta).

94 Wooley v. Shell Petroleum Corp., 39 N.M. 256, 45 P.2d 927 (1935).

95 Mutual Life Ins. Co. v. Benton, 34 F. Supp. 859 (W.D. Mo. 1940).

96 Fisher v. Davidson, 271 Mo. 195, 195 S.W. 1024 (1917).

97 Brewer v. Browning, 115 Miss. 358, 76 So. 267 (1917); Schultz v. First Nat'l Bank, 220 Ore. 350, 348 P.2d 22 (1959).

98 *Id.*

99 410 F.2d 222 (5th Cir.), *cert. denied*, 396 U.S. 887 (1969) (Louisiana law).

100 *Id.* at 228.

relied on a Louisiana miscegenation case—*Succession of Caballero v. Executor*.[101] This court recognized a child's legitimation by the subsequent foreign marriage of his racially mixed parents despite the strong local policy against miscegenation. Courts of other Southern states reached the same conclusion despite local hostility to mixed marriages.[102] Similarly, states that do not recognize common law marriage have generally agreed to give effect to such marriages if established in a jurisdiction which does allow them.[103] Both miscegenation and common law marriage, of course, differ from equitable adoption in a respect that is relevant to the problem of conflict of laws: in both cases the full status of marriage is attained. Equitable adoption, however, does not accord the status of legal adoption. One can, nevertheless, anticipate that a state such as Virginia, which recognizes neither common law marriage nor equitable adoption, would follow in the latter area the same conflicts rule adopted in the former.[104]

Since courts follow the law of the state of adoption when that jurisdiction allows recovery under equitable adoption doctrine, one might expect that the obverse would also be true: that courts recognizing the doctrine would deny recovery on a contract which was invalid where made. In fact, two decisions support this proposition. In *Westbrook v. Elder* a Michigan court concluded that it could not "give to the contract here involved, an effect different than it had in the place where it was executed and performed." [105] And in *Hemphill v. Jackson*[106] a Missouri court reached the same result despite the established policy in that state of allowing such actions.

Other courts, however, have recognized an equitable adoption that had no effect in the state of adoption. In *Wooley v. Shell Petroleum Corp.*[107] plaintiffs claimed New Mexico land on the basis of an adoption agreement executed and performed in Texas. A Texas court had held that custody of a child was not proper consideration for a promise to adopt and that adoption contracts supported by custody were void.[108] The estoppel rationale later used by Texas courts to circumvent this decision had not yet been developed, and Texas law therefore gave no effect to partially performed adoption agreements. At the time of the agreement statutory adoption under Texas law merely made the child an heir of his foster parent; it did not give

101 24 La. Ann. 573 (1872), *cited at* 410 F.2d at 229.

102 Whittington v. McCaskill, 65 Fla. 162, 61 So. 236 (1913); Walker v. Matthews, 191 Miss. 489, 3 So. 2d 820 (1941).

103 *See, e.g.*, Gallegos v. Wilkerson, 79 N.M. 549, 445 P.2d 970 (1968); Shea v. Shea, 294 N.Y. 909, 63 N.E.2d 113 (1945).

104 Metropolitan Life Ins. Co. v. Holding, 293 F. Supp. 854 (E.D. Va. 1968) (Virginia law).

105 264 Mich. 138, 143, 249 N.W. 617, 618 (1933).

106 306 S.W.2d 610 (Mo. App. 1957).

107 39 N.M. 256, 45 P.2d 927 (1935).

108 Hooks v. Bridgewater, 111 Tex. 122, 229 S.W. 1114 (1921).

rise to any obligation to educate or support and did not create a parent-child relationship in the eyes of the law. No procedure available in Texas created the status accorded by statutory adoption in New Mexico. The Texas decision therefore stood as a denunciation of the policy behind New Mexico's scheme of statutory adoption. The *Wooley* court felt no obligation to defer to that position: "This invalidity might be fatal if we must have a performed consideration to support specific performance. We do not deem it so when all we need is an equity to invoke the court's power to treat as done what should have been done." [109]

In another case arising from the peculiar form of adoption then available in Texas, In re *Grace's Estate*,[110] the California court relied on *Wooley*. Appellant claimed her mother's interest in the estate of deceased. The court rejected the mother's claim under the Texas statute and then turned to her claim arising from an unperformed contract of adoption. Since statutory adoption in Texas made the child an heir of his foster parent but did not allow the child's descendants to inherit from that parent, Texas law would accord no greater effect to an equitable adoption. The California court, however, regarded the policy of the forum as controlling and therefore allowed plaintiff's action.[111]

A number of intriguing questions that have not yet been confronted by appellate courts merit a few speculative remarks. If the forum state had an established position and the state of adoption had not decided the question, the court might feel free to follow local law. Conversely, if the court of the forum had not resolved the issue, it might be more than usually willing to dispose of the case according to foreign law. At least one court, however, has seized such an opportunity to decide the question for itself and announce a policy on behalf of the forum. In *Rader v. Celebrezze*[112] a federal district court held that a social security appeals council had erred in concluding that "the doctrine of equitable estoppel is not generally recognized in Kentucky." [113] In this factual situation the court need only have ruled that Kentucky would recognize a valid equitable adoption in Ohio, and the court did indeed cite cases supporting that proposition. Ohio's position, however, was far from clear, and the *Rader* court entirely avoided a discussion of the effect given unperformed adoption contracts under Ohio law. Taken at face value, this opinion both recognizes equitable adoption on behalf of Kentucky and requires that position to prevail over the potentially conflicting law of the undisputed state of adoption.

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[109] 39 N.M. at 265-66, 45 P.2d at 933.

[110] 88 Cal. App. 2d 956, 200 P.2d 189 (Dist. Ct. App. 1948).

[111] *Accord, In re* Lamfrom's Estate, 90 Ariz. 363, 368 P.2d 318 (1962); Fisher v. Davidson, 271 Mo. 195, 195 S.W. 1024 (1917).

[112] 253 F. Supp. 325 (E.D. Ky. 1966).

[113] *Id.* at 330.

In *Bower v. Landa*[114] a Nevada court reached a similar result in a different context. In a wrongful death action under Nevada law the court recognized the adoptive status created by equitable adoption in Utah. This court did not address itself to any conflicts problem; it purported merely to acknowledge the status created in Utah and then turned its attention to the wrongful death statute. The court, however, made no inquiry into the precise nature of the status accorded in Utah and did not question whether recovery under a wrongful death statute would have been allowed in that state. The *Bower* decision may therefore stand for two distinct propositions: (1) the stated conclusion that the status attained by equitable adoption includes recovery in a wrongful death action, and (2) the unstated decision that Nevada law determines that question regardless of Utah's position. This second result may seem a commonplace manifestation of the general rule that local law governs the incidents of adoptive status created under foreign law. No court, however, has held that equitable adoption accords the full status of statutory adoption, and the weight of authority denies to the equitably adopted child the right to recover for wrongful death. The question therefore remains: Did the *Bower* court merely determine the incidents of a status attained elsewhere, or did it create a new status under Nevada law? Similar questions may arise if, for example, neither the forum state nor the state of adoption has taken a position on equitable adoption.[115]

The conflicts problem and the question of status have not combined in any reported decision except *Bower*. Quite apart from such complexities, the choice of law in a *Wooley* situation remains at issue in most jurisdictions, and the resolution of this question depends in turn on developing criteria for determining the state of adoption. These questions await resolution by the courts, but one may predict that, in line with the modern trend, the courts will be ready to decide such issues under local law.

J.C.J., Jr.

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[114] 78 Nev. 246, 371 P.2d 657 (1962).

[115] Indeed, one can construct hypotheticals in which the conflicts problems are enormously complex. (All states discussed herein are included in notes 8 and 10 *supra*.) For example, a couple contract to adopt a child in Virginia, which gives no effect to such agreements. A year later the father gets tuberculosis and moves with his family to New Mexico (the home of *Wooley*), where they reside until the child reaches maturity. When her husband dies, the mother goes to live with her sister in North Carolina, which has never taken a position on equitable adoption. The contract was made in Virginia but performed largely in New Mexico. What law controls? For interesting parallels in the law of conflicts see Note, *New York-Approved Mexican Divorces: Are They Valid in Other States?*, 114 U. PA. L. REV. 771 (1966).