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ADOPTION IN INDIANA

JULIAN BAMBERGER*

Adoption is the establishment of the relation of parent and child between persons not so related by nature.¹ The purpose of adoption is to fix the status of an adopted child as near as possible to that of a natural child, and to give it the same position in the family, together with all the rights and privileges of a child of the adoptive parents. The name of the child is changed, its identity is merged into that of the adoptive parents, and it becomes their child in all but blood.²

Origin and Development of Law of Adoption.

The right of adoption was unknown to the common law. It was taken from the Roman law, which made provision for adopting children, and the provisions of that law, as revised and changed by Justinian, formed a complete system.³

While Justinian revised, and in many respects changed the law relating to the adoption of heirs, it will be found that the changes made by him were in the nature of an enlargement instead of a diminution of the rights of the adopted child. For instance, originally, the adopted child on adoption lost all rights in the family of his natural parents. He was no longer in any legal sense related to them, and had no interest whatever in their estate. If thereafter his adoptive father emancipated him, he was without a family, having no legal right in either the family of his natural or his adoptive father. One of the changes made by Justinian was to remedy this injustice. After his revision, the adopted child, while held in the bonds of adoption, was still in the position of a natural child, or a child born to the adopting father.⁴

It was that law from which modern legislation upon the subject has derived its chief features, adapting them to our

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¹ *In re Knotts*, 138 Tenn. 349, 197 S.W. 1096 (1917); *Bray v. Miles*, 23 Ind. App. 432, 54 N.E. 446 (1899).

² *Dunn v. Means*, 48 Ind. App. 383, 95 N.E. 1015 (1911); *Leonard v. Honisfager*, 43 Ind. App. 607, 88 N.E. 91 (1909); *Bray v. Miles*, 23 Ind. App. 432, 54 N.E. 446 (1899).

³ *Humphries v. Davis*, 100 Ind. 274 (1884).

⁴ *Markover v. Krauss*, 132 Ind. 294, 31 N.E. 1047 (1892).

wants. It was introduced as a part of the civil law in this country from France and Spain, respectively, to Louisiana and Texas.⁵

The adopted child was, as that law declared, "assimilated in many points to a son born in lawful matrimony." That law preserved to the child all the family rights resulting from his birth, and secured to him all the family rights produced by the adoption.⁶

The subject of the adoption of children is governed exclusively by statute, and the statutory provisions of the different states on the subject are so widely at variance that the decisions of courts of other states, construing their statutes on the subject, can afford little or no light on the proper construction to be given statutes of Indiana.⁷

While the present Indiana statute concerning the adoption of persons was just enacted in 1941, cases construing those parts of the old law which have not been substantially changed by the enactment of the new law, are cited herein; other Indiana cases are cited as well to point out and distinguish the status, rights, duties and liabilities of persons adopted prior to the enactment of the present statute, as well as subsequent thereto.

Nature of the Proceeding.

Proceedings for the adoption of children are purely *ex parte* in character. The statute contemplates no adversary proceeding, and whether the order of adoption shall be made upon the petition is a matter the statute exclusively vests in the discretion of the court. The court, in making the order of adoption, looks alone to the welfare of the child, and the law presumes that in making, or refusing the order, the court will act with wisdom, and be guided solely by this consideration.⁸

Persons Who May Adopt Others.

The statute provides that any resident adult of the state, desirous of adopting a person, may file his petition

⁵ *Bray v. Miles*, 23 Ind. App. 432, 54 N.E. 446 (1899).

⁶ *Humphries v. Davis*, 100 Ind. 274 (1884).

⁷ *Leonard v. Homsfager*, 43 Ind. App. 607, 88 N.E. 91 (1909), *Markover v. Krauss*, 132 Ind. 294, 31 N.E. 1047 (1892).

⁸ *Leonard v. Homsfager*, 43 Ind. App. 607, 88 N.E. 91 (1909); *Johnson v. Smith*, 203 Ind. 214, 176 N.E. 705 (1931)

therefore.⁹ If petitioner is a married person the husband and wife shall join therein unless the petitioner is married to the natural father or mother of the child, then the joinder by the father or mother shall be deemed unnecessary.¹⁰

Under the law as it existed prior to the 1941 act, either spouse could adopt a child without the other joining in the petition. Thus, the child might have only one adopted parent.¹¹

No statutory authority can be found, express or implied, either under the old or the new law, that would enable two or more persons, representing different families, to jointly or concurrently adopt the same child.¹²

A person may adopt his grandchild as his own child as well as a stranger to his blood.¹³

Persons Who May Be Adopted.

Any person either under 21 years of age¹⁴ or over¹⁵ may be adopted. Although prior to 1941 act, the law did not expressly authorize the adoption of adults the courts construed the statute to authorize by implication the adoption of adults as well as infants.¹⁶

A person already married may be adopted.¹⁷

Consent of Parties.

If the child to be adopted has parents living, they must consent in writing to the adoption. The minority of a parent is not a bar to consent; but if either parent is a minor, consent must be accompanied by the written approval of the local investigating agency and if none, of the state department of public welfare. The consent of the parents may be dispensed with if the child is adjudged to have been aban-

⁹ Ind. Acts 1941, c. 146, §1.

¹⁰ But the duly acknowledged consent of the natural parent must be filed with the petition. *Supra* n. 9.

¹¹ *Barnhizel v. Ferrell*, 47 Ind. 335 (1874).

¹² *Krug v. Davis*, 87 Ind. 590 (1882).

¹³ *Billings v. Head*, 184 Ind. 361, 111 N.E. 177 (1916).

¹⁴ Ind. Acts 1941, c. 146, §1.

¹⁵ *Id.* §10.

¹⁶ *Markover v. Krauss*, 132 Ind. 294, 31 N.E. 1047 (1892); *Scott v. Peters*, 87 Ind. App. 1, 158 N.E. 490 (1927); *Nickerson v. Hoover*, 70 Ind. App. 343, 115 N.E. 588 (1917).

¹⁷ *Scott v. Peters*, 87 Ind. App. 1, 158 N.E. 490 (1927).

doned or deserted for six months or more immediately preceding the date of the filing of the petition.¹⁸

If either or both parents are non-residents or their residence after diligent inquiry is unknown, then they shall be notified of the pendency of the action by publication as provided by law in civil cases.¹⁹

If the parents have been legally deprived of their parental rights over the child for other than economic reasons, the written consent of the court, agency, or county department of public welfare of which the child may be a ward shall be filed with the court hearing the adoption. No further notice to the parents is necessary.²⁰

In every case where the child has been born out of wedlock the consent of the mother is sufficient, except where the paternity of the child has been established by law and the father is adequately supporting the child, or where for any reason the court deems it advisable that the father be heard. In that case the father shall have such notice as the court deems necessary and an opportunity to file any objection.²¹

If the child is fourteen years of age or over, his consent is necessary before adoption.²²

In all cases where parents' consent is required such consent must be signed in the presence of a duly authorized agent of the state department of public welfare or of an approved investigating agency and attested by an agent or notary public. Copies of the consent shall be filed with the investigating agency and with the clerk of the court in which the petition for adoption is pending.²³

Where the father of a child has failed to pay any support money for a period of one year immediately prior to the filing of adoption proceedings for the adoption of his child, the court may in its discretion waive the filing of consent of the father.²⁴

¹⁸ Ind. Acts 1941, c. 146, §6.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.* Such attestations are not necessary to consents signed before the taking effect of this act.

²⁴ *Ibid.*

Where the Petition Is Filed.

The petition may be filed in the county where the petitioner resides, or in which is located any duly licensed child placing agency or governmental agency having custody over the child or in the county where the child may be found.²⁵

Allegations of the Petition.

The statute provides that the petitioner shall verify and set out in his petition (1) the name if known, the sex, color, and age if known, or if unknown the approximate age and place of birth of the child sought to be adopted; (2) the new name to be given the child if change of name is desired; (3) whether or not the child possesses real or personal property and if so, the value and full description of same; (4) the name, age and place of residence of the adopting parent or parents, and if married, the place and date of their marriage; (5) the name and place of residence, if known to the adopting parents, of (a) the parent or parents of the child, or (b) if the child is an orphan, the name and place of residence of the guardian, or (c) if there be no guardian, the name of the child's nearest of kin, or (d) the name of the court or agency of which the child is a ward if he is a ward, or (e) of the agency sponsoring the adoption; (6) the period of time during which the child has lived in the home of the persons petitioning if there is such period; (7) such additional information consistent with the purpose and provisions of the act as are relevant to the proceedings.²⁶

The petition is judicial in its character and the facts required by the statute to give the court jurisdiction must appear upon the face of the petition.²⁷

Reference to Agency.

If upon examination by the court the petition is found to be improper in form, it shall be returned to the petitioner for correction. In the event of the death, disability or absence of the judge, the petition shall be examined by the clerk

²⁵ *Id.* §1.

²⁶ *Id.* §2.

²⁷ *In re Perry*, 83 Ind. App. 456, 148 N.E. 163 (1925).

and acted upon accordingly.²⁸ When the petition is in proper form the clerk must forward one copy to the state department of public welfare and one copy to a qualified agency. Preference is given to the agency sponsoring the adoption.²⁹

Within sixty days after the reference of the petition, the agency must submit to the court a written report of its investigation and a recommendation on the advisability of the adoption. The former environment and antecedents of the child, the fitness of the child for adoption, and the suitability of the proposed home shall be included in the report.³⁰

If the court upon consideration of the report finds that additional investigation is desirable it may continue the cause for further action by the agency. If after one year's supervision the agency fails to approve the adoption of the child, the court may continue the cause for further investigation and dismiss the petition, or it may proceed to hear and determine the cause without the intervention of the agency. In no event may the petition pend for more than two years.³¹

Supervision.

No adoption may be granted unless the court has heard the evidence and after a period of supervision by a duly licensed child-placing agency or a county department of public welfare, approved by the state department. The period of supervision may be prior to or following the filing of the adoption petition, or both. No final decree of adoption may be made unless the child has lived for one year immediately preceding the final decree, in the home of the petitioner. However, this requirement may be waived or lessened by the court in its discretion.³²

Hearing on Petition.

After the period of supervision has been completed, the court must hear and determine the petition. The petition, the reports of the investigation, the record of evidence of

²⁸ Ind. Acts 1941, c. 146, §4.

²⁹ *Ibid.* To facilitate such proceedings the State Department of Public Welfare is required to furnish clerks of the various courts a list of approved supervising agencies.

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Id.* §8.

the hearing, the court's decree, and all files and records bearing upon the proceedings in the county and state departments of public welfare or in any of the authorized agencies are confidential and open to inspection only upon order of court and for good cause shown.³³

Order of Adoption.

Whenever the court finds that the adoption prayed for is for the best interest of the child; that the adopting parent or parents are of sufficient ability to rear the child and furnish suitable support and education; that the report of the investigation and recommendation has been filed and that proper consent to the adoption has been given, the court shall grant the petition and enter a decree of adoption.³⁴

An order of adoption, and the power of the court over it, are governed by the general rules applicable to other judgments and decrees.³⁵

A judgment of adoption is the conclusion of a special statutory proceeding, frequently referred to as a proceeding *in rem*.³⁶ Omissions from the strict statutory requirements and defects in the procedure will not invalidate an order of adoption. The order is not void for want of jurisdiction, even though the petition is not properly signed or verified.³⁷ Nor is it void because the adopted child retained its own name.³⁸

Setting Aside or Revoking Adoption.

A judgment of adoption, where the court has jurisdiction, is conclusive as against collateral attack by parties or their privies.³⁹ The most frequent attack is founded on the charge that the adoptive parent was insane at the time of the adoption.⁴⁰ The remedy is in equity. The judgment is

³³ *Id.* §5.

³⁴ *Id.* §7.

³⁵ *In re Perry*, 83 Ind. App. 456, 148 N.E. 163 (1925).

³⁶ *Glansman v. Ledbetter*, 190 Ind. 505, 130 N.E. 230 (1921).

³⁷ *Jones v. Leeds*, 41 Ind. 164, 83 N.E. 526 (1908).

³⁸ *Scott v. Peters*, 87 Ind. App. 1, 158 N.E. 490 (1927).

³⁹ *Harwick v. Smith*, 102 Ind. App. 581, 2 N.E. (2d) 233 (1936); *Jones v. Leeds*, 41 Ind. App. 164, 83 N.E. 526 (1908); *Brown v. Brown*, 101 Ind. 340 (1884).

⁴⁰ *Harwick v. Smith*, 102 Ind. App. 581, 2 N.E. (2d) 233 (1936); *Hunter v. Bradshaw*, 209 Ind. 71, 198 N.E. 73 (1935); *Brown v. Brown*, 101 Ind. 340 (1884).

not void or voidable solely because the adoptive parent was of unsound mind.⁴¹ An order of adoption will be set aside only where it is affirmatively alleged and shown that there was fraud, actual or implied, affecting the action of the adopting parent or the decision of the court.⁴²

An attack upon a judgment for fraud is regarded not as a collateral attack, but as a direct attack, which is permitted, notwithstanding that the decree or judgment appears in all respects regular and valid.⁴³

Fraud sufficient to set aside adoption proceedings is affirmatively shown when it appeared that the petitioners at the time they filed their verified petition attested that the whereabouts of the child's parents was unknown, when they in fact knew where the parent could be found.⁴⁴

One granted leave to appear as *amicus curiae* is a stranger to the record, and has no right to object to the order of adoption.⁴⁵

Status, Rights, Duties and Liabilities of Adopting Parent and Adopted Child.

After the adoption of the child, the adopting father and mother occupy the same position toward the child, as natural parents and are liable for the maintenance and education of the child.⁴⁶ The adopted child is an heir, a lineal descendant, the same as if he had been born in lawful wedlock, not because of any natural relationship, but because he has been given that status by the statute.⁴⁷

Although the legislature cannot constitute a child a natural child of a person other than his natural father and mother, it may declare of inheriting status of an adopted child, and make him capable of inheriting from his adopting parents. The legislature may place a child by adoption in the direct line of descent.⁴⁸

⁴¹ *Hunter v. Bradshaw*, 209 Ind. 71, 198 N.E. 73 (1935); *Brown v. Brown*, 101 Ind. 340 (1884).

⁴² *Hunter v. Bradshaw*, 209 Ind. 71, 198 N.E. 73 (1935).

⁴³ *Glansman v. Ledbetter*, 190 Ind. 505, 130 N.E. 230 (1921).

⁴⁴ *Ibid.*

⁴⁵ *In re Perry*, 83 Ind. App. 456, 148 N.E. 163 (1925).

⁴⁶ Ind. Acts 1941, c. 146, §8.

⁴⁷ *Cooley v. Powers*, 63 Ind. App. 59, 113 N.E. 382 (1916).

⁴⁸ *Ibid.*

The 1941 act does not provide that the child shall be the child of the adopting parent, but he shall take the name, and be entitled to take his property by descent or otherwise, the same as he would if he was his child or natural heir, and the adopting parent shall occupy the position toward the child of a father or mother, and be liable in every way as such.⁴⁹

The relation between an adoptive parent and the child adopted is a reciprocal relation of the same nature as that between a natural parent and the child. Each has duties to perform in favor of the other.⁵⁰

An adopted child is a legitimate child, within the meaning of the statute which provides that the illegitimate child of a man dying intestate, and having acknowledged the child during his lifetime, as his own, shall inherit the estate, both real and personal, and shall be the heir in the same manner and to the same extent as if the child had been legitimate.⁵¹

Inheritance by Adopted Child.

An adopted child is entitled to all the rights and interest in the estate of the adopting father and mother by descent or otherwise, that the child would be entitled to if he had been the natural heir of the adopting father or mother.⁵²

The statute provides that nothing in the act shall be construed to prevent a legally adopted person from inheriting property from his natural parent or other kin.⁵³ Although this provision was new, the courts in construing the old law held that the adopted child did not lose existing rights of inheritance, and thus might inherit from its natural relatives, as well as from its adoptive parents.⁵⁴

Where a child has been adopted twice, it may inherit from both its first and second adopting parents.⁵⁵

Where a person adopts a child already related to him, such as a grandfather adopting his own grandchild, at the

⁴⁹ *Barnhizel v. Ferrell*, 47 Ind. 335 (1874).

⁵⁰ *Scott v. Peters*, 87 Ind. App. 1, 158 N.E. 490 (1927).

⁵¹ *Cooley v. Powers*, 63 Ind. App. 59, 113 N.E. 382 (1916).

⁵² Ind. Acts 1941, c. 146, §7.

⁵³ *Ibid.*

⁵⁴ *Head v. Leak*, 61 Ind. App. 253, 111 N.E. 952 (1916); *Patterson v. Browning*, 146 Ind. 160, 44 N.E. 993 (1896); *Humphries v. Davis*, 100 Ind. 274 (1884).

⁵⁵ *Patterson v. Browning*, 146 Ind. 160, 44 N.E. 993 (1896).

death of the adoptive parent, the child may not inherit both as a grandchild and as an adopted child, but should receive the greatest amount it would be entitled to receive in either capacity.⁵⁶

Prior to the 1941 act, a child could be adopted by one spouse without the other joining in the petition, and when this occurred the child inherited only from its adopting parent and did not inherit from the spouse not joining in the petition.⁵⁷

An adopted child inherits from the adopting parents the same as their own child.⁵⁸ If a husband dies intestate, leaving a second childless wife, and a child adopted by both the husband and his first wife, then the adopted child receives the entire fee of the lands left by the husband, subject only to the life estate in one-third of the lands in favor of the second childless wife. The court said that the adopted child was a "child by a previous wife," within the meaning of the statute.⁵⁹ Under the same facts, except that the child was adopted only by the husband, his first wife not joining in the petition, it was held that the child was not a "child by a previous wife" within the meaning of the statute, and it received one-half of the fee along with the second wife.⁶⁰

Where prior to 1941, a child was adopted by a husband only, his wife not joining in the petition, and the wife remarried following her husband's death, it was held that the child was not a "child by her previous marriage" within the meaning of the statute. The child was entitled only to one-half of the fee of the land left by the husband and the wife had the power to alienate her one-half interest. The court suggested, however, that it would probably have arrived at a different conclusion had the child been adopted by both the husband and the wife.⁶¹

The adoption of a child does not revoke an antecedent will of the adopting father. The statute, which provides that if, after the making of a will, the testator has a legitimate issue, who survives him then the will is deemed re-

⁵⁶ *Billings v. Head*, 184 Ind. 361, 111 N.E. 177 (1916).

⁵⁷ *Barnhizel v. Ferrell*, 47 Ind. 335 (1874).

⁵⁸ *Adams v. Merrill*, 45 Ind. App. 315, 87 N.E. 36 (1909).

⁵⁹ *Markover v. Krauss*, 132 Ind. 294, 31 N.E. 1047 (1892).

⁶⁰ *Isenhour v. Isenhour*, 52 Ind. 328 (1876); *Barnes v. Allen*, 25 Ind. 222 (1865).

⁶¹ *Keith v. Ault*, 144 Ind. 626, 43 N.E. 924 (1896).

voked, unless provision has been made in the will for such issue, does not apply.⁶²

In deciding whether the terms "heirs" or "children," as used in wills, include adopted children, force is given to certain extraneous circumstances, as whether the testator knew that his devisee had adopted a child; whether the adoption preceded his death; and whether the adopted child was a stranger to the blood of the testator.⁶³

Inheritance From and Through Adopted Children.

If the adopted child without leaving wife or husband or issue or other descendants surviving died intestate, seized of real estate or personal property which came to him by gift, devise or descent from the adopting father or mother, the property descends to the heirs of the adopting father or mother the same as if the person had never been adopted.⁶⁴

Where a child adopted by a husband and wife jointly, dies unmarried, property inherited by the child from the adoptive mother, goes to the adoptive father to the exclusion of the natural mother of the child.⁶⁵

The property of an adopted daughter, leaving a natural father and mother and adopting father, a husband, but no children, descends three-fourths to the husband and one-fourth to the adopting father, where such property had been received by the adopted daughter by inheritance from her adopting mother.⁶⁶

Person Adopted in Another State.

Whenever a person is properly adopted outside the state, the decree of adoption, when filed with the clerk of the court of any county in Indiana and entered upon the order book of the court in open session, has the same force and effect as if it were made in accordance with the provision of the Indiana law. The adopted person has the same rights

⁶² *Davis v. Fogle*, 124 Ind. 41, 23 N.E. 860 (1890).

⁶³ *Nickerson v. Hoover*, 70 Ind. App. 343, 115 N.E. 588 (1917).

⁶⁴ Ind. Acts 1941, c. 146, §7.

⁶⁵ *Humphries v. Davis*, 100 Ind. 274 (1884); *Paul v. Davis*, 100 Ind. 422 (1884); *Davis v. Krug*, 95 Ind. 1 (1883).

⁶⁶ *Dunn v. Means*, 48 Ind. App. 383, 95 N.E. 1015 (1911).

and is capable of taking property situated in this state by inheritance upon the death of the adopting parent.⁶⁷

Compliance with the statute enables the adopted child to enforce such rights as arise out of the original adoption. Until there has been compliance the courts of this State will not recognize or enforce those rights. The act of compliance is not a re-adoption of the child, and it is not necessary that either the adoptive parents, or the adopted child appear in person in the court where the record is filed.⁶⁸ Nor is it necessary that the record be filed during the lifetime of the adoptive parents or during the minority of the adopted child.⁶⁹

⁶⁷ Ind. Acts 1941, c. 146, §9.

⁶⁸ *Markover v. Krauss*, 132 Ind. 294, 31 N.E. 1047 (1892).

⁶⁹ *Ibid.*