STATE BOARD OF HEALTH: Adoption subsequent to 1917 must be by court decree.

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Honorable R. M. James
State Health Commissioner
Jefferson City, Missouri

Dear Sir:

This Department is in receipt of your request for an official opinion, which reads as follows:

> "We have received several requests to record the birth of persons who state they were adopted under the 'Common Law Adoption Custom of the State of Missouri, which prevailed until 1917.'
>
> "We should like an opinion from your office as to whether an adoption executed previous to 1917 under the Common Law Adoption Custom would be legally recognized."

In order to fully answer your request it is necessary to review the history of adoption in this State.

At the outset, it must be noted that adoption was unknown to the old common law of England. Hockaday vs. Lynn, 200 Mo. 456. It appears to have been known to and recognized by the ancient Egyptians, Babylonians and Greeks, and was popular in early Roman times, and is included in the Code of Napoleon. Lamb vs. Feehan, 276 S.W. 71. Therefore, when you speak of the "Common Law Adoption Custom of the State of Missouri" in your request such a statement is a misnomer, because there is no such thing as adoption at common law, adopted by this State in 1816.

Adoption exists solely as a creature of statute. Niehaus vs. Madden, 348 Mo. 770, 155 S.W. (2d) 141. The first time our Legislature recognized such procedure was in 1857 when they provided for what is commonly known as "adoption by deed" (Laws of Missouri, 1857, page 59). Under this act a person may adopt a child as his heir "by deed, which deed shall be executed, acknowledged and recorded in the county of the residence of the person executing the same, as in the case of conveyances of real estate." Such a method continued in force in this State until 1917, when the Legislature repealed what was then Article 1 of Chapter 20, of the Revised Statutes of Missouri, 1909, which article was in substance the same as that enacted in 1857, and enacted in lieu thereof a law providing that any person could adopt another person as his child by a decree of the juvenile division of the Circuit Court (Laws of Missouri, 1917, page 193), which act is now Article 1, Chapter 56, R.S. Mo. 1939.

As was succinctly said in Niehaus vs. Madden, 155 S.W. (2d) 141, l.c. 144:

> "* * * Prior to 1917 the law of this state permitted adoption by means of a deed executed, acknowledged and recorded in the same manner as a deed to real estate by the adopter. R.S. Mo. 1909, Sec. 1671. Since 1917 adoption must be effected by a decree of the proper juvenile court. Laws of 1917, pp. 193-195, Rev. St. 1939, Sec. 9608, et seq."

The status of the adopted child prior to 1917 under "adoption by deed" is given in Holloway vs. Jones, 246 S.W. 587, l.c. 590, as follows:

> "* ** The act of adoption gave the child no right of inheritance not subject to the right of testamentary disposition. It simply constituted him an heir and gave him the same right to support and maintenance and proper treatment as is enjoyed by natural children against their

> parents. In so far as the instrument possessed any of the elements of contract, it was a contract between the state and the adopting parent for the use and benefit of the child. Even the word 'child' was not used in its ordinary sense of juvenility, but simply to represent the relation of parent and offspring which it authorized. * * * ".

After 1917 "Adoption is a juridical act which creates between two persons a relation of purely civil nature, similar to that existing between a natural parent and his child. In other words, it is an act by which one person who is not the natural parent of another creates between himself and that other a complex or aggregate of legal relationships, rights, privileges, powers, immunities, etc., which are identical with those which the law creates between a natural parent and his child." (Niehaus v. Madden, 155 S.W. (2d) 141, l.c. 144).

The only difference between the two types of adoption other than the manner in which said adoption comes into existence is, that under the adoption by deed the child inherited only from his adopting parent or parents, while under the later law said child could inherit from the adopter's kindred. McIntyre vs. Hardesty, 149 S.W. (2d) 334.

It has been ruled in this State that since adoption is a creature of statute that the statute must be strictly, or at least substantially, complied with, in order to effect a valid adoption. Rochford vs. Bailey, 17 S.W. (2d) 941, 322 Mo. 1155; Fienup vs. Stamer, 28 S.W. (2d) 437.

As was said in Rochford vs. Bailey, 17 S.W. (2d) 941, l.c. 944:

> "The statute (sections 1095-1103, R.S. 1919) comprehends within itself a complete scheme for the adoption of children; it is a code within itself. Provisions of two sections of the general code (sections 1196, 1203, R.S. 1919)

> are incorporated therein by specific reference; aside from these the general code is without application. The validity of the proceeding which culminated in the purported decree of adoption involved in this case must therefore be gauged by the adoption statute standing alone."

Therefore, any statutory adoption previous to 1917, may only be by a decree of the proper juvenile court. However, adoptions prior to 1917 which complied with the statutes then in effect are legal.

The above is a history of the statutory enactments relating to adoption, and the interpretation of such statutes by our courts. It must be pointed out, however, that Missouri recognizes another form of adoption, this State being the only State in the Union which does recognize an adoption other than by statute. 2 C.J.S. page 372.

Our Supreme Court in the case of Sharkey vs. McDermott, 91 Mo. 647, decided in 1887, for the first time enforced an agreement to adopt, which agreement had never been recorded as required by statute. Since that time the court in numerous cases has held that a court of equity will enforce a parol contract of adoption, and decree that the child is an adopted child and an heir of the adopting parents where the contract has been fully performed by the child, and it would be inequitable to deny adoption. Lynn v. Hockaday, supra; Grantham v. Gossett, 182 Mo. 651, 81 S.W. 895; Signaigo v. Signaigo (Mo. Sup.) 205 S.W. 23; Barnett v. Clark, (Mo. Sup.) 252 S.W. 625; Kerr v. Smiley (Mo. Sup.) 239 S.W. 501; Dillmann v. Davison (Mo. Sup.) 239 S.W. 505; Remmers v. Remmers (Mo. Sup.) 239 S.W. 509, 514; Craddock v. Jackson (Mo. Sup.) 223 S.W. 924; Fishback v. Prock, 311 Mo. 494, 279 S.W. 38; Johnson v. Antry, (Mo. Sup.) 5 S.W. (2d) 405; Carlin v. Bacon, 322 Mo. 435, 16 S.W. (2d) 46, 69 A.L.R. 1.

This rule as laid down by our Missouri courts, is given in 2 C.J.S., page 377, as follows:

> "* * * Accordingly, the statutory method of adoption is considered as merely permissive and does not prevent persons from adopting children in any lawful manner, and under the doctrine that two or more parties who are competent to contract may enter into any agreement or contract they see fit, if it is not in violation of morality and good conscience, an adoption may be accomplished by a fully executed, in the sense that the child was taken into the family and reared, contract of adoption, irrespective of the fact that the statutory procedure for adoption was not followed. Accordingly, in this jurisdiction, irrespective of the fact that the statutory provisions are specific, such statutory provisions do not oust a court of equity of jurisdiction to determine the relation existing between the parties."

The reason why such "equitable adoption" is recognized is because: "where one takes a child into his home as his own, receives the love, affection, companionship, and service of the child to aid and cheer him along the pathway of life, and to comfort him in the declining years of his childless old age, after his death, it would be inequitable and unfair to permit his kindred, who stand in his shoes, to say to the child, you have no right incident to the status of parent and child because deceased violated the law in entering into such a status without the approval of the juvenile court. To so hold would be to permit guilty parties to take advantage of their own wrong." (Drake v. Drake, 43 S.W. (2d) 556, l.c. 559).

There seems to be no doubt that a person whom a court of equity has decreed to be entitled to have an agreement of adoption enforced is, for all intents and purposes, an adopted child. In Taylor vs. Coberly, 327 Mo. 940, 38 S.W. (2d) 1055, l.c. 1060, the court said: "It is well settled in the jurisprudence of this state that a court of equity has jurisdiction to enforce a parol contract of adoption and decree the child <u>to be an adopted child</u> * * * ". (Emphasis ours.)

In Rauch vs. Metz, 212 S.W. 357, l.c. 362, our Supreme Court said:

> "* * * There is, however, no principle of law more firmly settled in this state than that that relation (adoption) may be created by the acts and undertakings of the parties fully executed on behalf of the child. * * * ". (insertion ours.)

In Holloway vs. Jones, 246 S.W. 587, the court held that whether the adoption of the child was by statute or by contract the child's "rights, obligations and duties are the same." Therefore, it will be seen that when a court of equity decrees that a child has been adopted by a person under an agreement, either oral or written, that such child is an adopted child even though the adopting parent has not complied with the statutory requirements.

CONCLUSION.

It is, therefore, the opinion of this Department that since 1917 the only statutory method of adoption in Missouri is by a decree of the juvenile division of a circuit court while prior to 1917 the only statutory method was by a deed of adoption filed with the recorder of deeds. However, a person may be declared an adopted child by decree of a court of equity in enforcing an agreement to adopt.

Respectfully submitted,

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