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Adoption Laws Of Ohio: A Critical And Comparative Study

*William K. Yost**

ADOPTION HAS BEEN DEFINED as "The act by which the relations of paternity and affiliation are recognized as legally existing between persons not so related."¹ However, the result of adoption is the creation of a status, that of parent and child, and not of a contractual obligation. In this respect it is similar to marriage.²

A study of adoption perforce requires an examination of the practice and the law involved in the placement of children for adoption, the termination of the rights and obligation of the natural parents, the procedures of adoption in the courts and the legal effect of the adoptive status as it affects the child and the adopting parents.

Each of these facets will be developed in this sequence.

Adoption was not known in the common law. As a partial and very limited substitute for the care and training of children by persons other than their parents there developed the concepts of the apprentice and the indentured servant which survived well into the 19th century. Massachusetts in 1851 was the first common law state to enact a general adoption statute. In some states the adoptive status was created by private contract between the natural parents and the adoptive parents and this procedure survived in Louisiana and Texas until recently. This concept has its vestigial remainder in the laws of several of our states which provide for an adoptive contract which must now, however, be submitted to the court for approval. Adoption was well known in the early Roman and Greek law and the practice has been followed and prescribed by the Hindus for centuries.

The absence of a common law background for adoption has been reflected in the rule of strict construction which many courts have applied to the proceedings. This judicial insistence upon a literal compliance with the statutory provisions has resulted in some instances in the setting aside of an adoption with tragic consequences to all the parties involved.³

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¹ Miller, *The Lawyers Place in Adoption*, 21 TENN. L. REV. 630 (1951).

² Note, *Review Hack's Estate*, 35 YALE L. J. 890 (1926); *In re Estate of Gompf*, 175 Ohio St. 400, 195 N.E. 2d 806 (1962).

³ *In re Adoption of Morrison*, 260 Wis. 50, 49 N.W. 2d 759 (1951); *In re Adoption of Morrison*, 267 Wis. 625, 66 N.W. 2d 732 (1954) (Surrender of illegitimate child for adoption was executed by minor mother in the presence of her mother and her attorney and before a circuit judge. Adoption was decreed without the approval of her guardian *ad litem* as required by Wisconsin law. Natural mother then married natural father and filed action to withdraw her consent and revoke adoption. In first action the Supreme Court of Wisconsin held that the law must be strictly construed and complied with and revoked adoption. Adoptive parents then had state legislature pass an act changing law and establishing conditions under which adoption could be approved. In the subsequent decision the Supreme Court of Wisconsin approved the adoption. The matter was in continual litigation from 1947 until 1954.).

The first statute of adoption in Ohio was enacted in 1859. It provided a limited procedure in the probate court for the judicial recognition of the adoptive status and of the rights of inheritance which issued from it.⁴ The statute was the framework which was revised and amplified by subsequent amendments until there evolved the adoptive procedure which we know today.

Previously, in 1854, there had been enacted a statute providing for the designation of an heir who would thereupon have the status of a child of the designator, but only as to the rights of inheritance.⁵ The other cross rights and obligations of natural parents and children were not encompassed in this legislation. There exists today a similar statute.⁶ While its provisions are sufficiently broad to cover minor children, its use is for the most part limited to adults who are not otherwise eligible to be adopted in Ohio.⁷

Adoption involves not only legal problems, but social problems as well.⁸ The welfare of the child is, of course, of prime importance. The child must be protected from unwise separation from its natural parents, from placement with and adoption by persons who are unfit to have the responsibility of his care, and from interference by natural parents after he has become adjusted to his adoptive home.⁹ He must further be protected in his rights of inheritance from and through his adoptive parents.

These problems are laced with overtones of emotion, of religion and of race. The natural instincts of parenthood, love, affection and devotion to family ties cannot be underestimated or negated. Religious dogmas in many cases strongly influence the adoptive placement of children. The Roman Catholic Church, in particular, is known to take a firm position in opposition to the adoption of children born to parents of that denomination by persons of any other religious background.¹⁰ Racial origin presents practical if not legal problems of assimilation into the family and community life of the adoptive parents. In some states statutory prohibitions of interracial adoptions still exist.¹¹ Whether such statutes can now survive an attack on constitutional grounds is doubtful.

The Ohio statute provides that the racial, religious and cultural backgrounds of the child and the adoptive parents must be taken into account and included in the report made to the court by the agency

⁴ 56 Ohio Laws 32 (1859).

⁵ 52 Ohio Laws 73 (1854); *Lathrop v. Young*, 25 Ohio St. 451 (1874).

⁶ OHIO REV. CODE ANN. § 2105.15 (Page 1971).

⁷ *Id.* § 3107.01 (Page 1971).

⁸ Katz, *Judicial & Statutory Trends in the Law of Adoption*, 51 GEORGETOWN L. J. 64 (1962).

⁹ Comment, *The Inadequacy of Domicile as a Jurisdictional Base in Adoptive Proceedings*, 17 RUTGERS L. REV. 761 (1963) [hereinafter cited as *Inadequacy*].

¹⁰ Katz, *supra* note 8, at 70.

¹¹ LA. REV. STAT. § 9:422 (1959).

which conducts the investigation to determined the suitability of the adoption.¹² The best interest of the child is, however, the overriding factor to be considered by the court of either granting or refusing the adoption.¹³

Adoptive Placement of Children

Children are not like a commodity that can be stored on a shelf awaiting a proper adoptive home. From the date of birth they have the human needs of love and care and learning, and they are acquiring the elements of human personality and emotion. Unnecessary delay in placement of the child can result in adjustment problems when a home is found. Where the placement is made in an unsuitable home, the whole life of the child may be blighted through no fault of his own. Where an attempt is made to remove and replace a child, serious problems of emotional adjustment are encountered both as to the child and the prospective adoptive parents.

In the past all placements were private, that is, they were the result of the delivery of the person of the child and of his property, if any, by his natural parents or parent to a third person who would raise the child as his own and would apply to the proper court for adoption of the child. The arrangements were often made by physicians who delivered the child or lawyers who knew of the birth, but many were just the result of happenstance. Orphanages served as clearing houses for persons seeking adoptive children.

While a child is not a commodity in the sense that it can be stored on a shelf, it is a commodity in the sense that there has been a steady demand for white, healthy, adoptable children by childless couples who are willing to pay for the opportunity to thus acquire a family. Unscrupulous persons and organizations have taken advantage of the profit opportunities in such a situation and have acted as brokers at substantial fees in arranging for the placement of children for adoption. This so called "Black Market in Babies" has been the subject of an investigation by the United States Senate.¹⁴ What "Black Market" now exists serves for the most part to provide children for those people who, for some reason such as advanced age or instability, have been unable to obtain a child from an authorized agency.

To protect the helpless child against the abuses of these practices and the tragedies of an improper placement, most states now require that adoptive placements be made by authorized agencies and make placements by any other person or organization a criminal offense.

¹² OHIO REV. CODE ANN. § 3107.05 (E) (Page 1970).

¹³ *In re Adoption of Baker*, 117 Ohio App. 26, 185 N.E. 2d 5 (1962).

¹⁴ *Hearings Before a Subcommittee of the Senate Committee on the Judiciary*, 84th Congress, 1st Session 2-5, 192-199 (1955); *Moppets on the Market, The Problem of Unregulated Adoptions*, 59 YALE LAW JOURNAL 715 (1950).

In Ohio a legal adoptive placement must be made either by an authorized agency, public or private, or by an order of the probate division of the Common Pleas Court made after an investigation and hearing.¹⁵ Criminal penalties are imposed against anyone making a placement in violation of these provisions.¹⁶

The manner in which agencies obtain permanent custody of children will be discussed under the heading "Termination of Parental Rights" which follows.

The agencies which have placement authority are under the control and supervision of the Division of Social Administration in the Ohio Department of Public Welfare, either as county child welfare departments or boards or as private organizations such as Family Service Societies and Catholic Service Leagues, licensed for this purpose by the Division. Custodians in a foreign state or country may be authorized by the Division to place children in this state, if they have similar authority in their own jurisdictions and the children are guaranteed free of physical, mental and character defects.¹⁷

The parents of a child who is not in the permanent custody of the Division of Social Administration or of anyone of its agencies, public or licensed, may legally place the child for adoption by first obtaining an order of the probate court of the county where either the natural parents or the prospective adoptive parents reside approving such placement.

Similarly a person seeking to adopt a related child or an agency having custody of a child, (but without authority for adoptive placement) in situations where the natural parents are dead or have abandoned the child, may apply to the probate court where the child or the relative resides or the agency is located for an approval of the placement of the child for adoption. The Ohio statute which authorizes such court approved placements unfortunately appears to have been carelessly drafted and contains serious omissions and contradictions.¹⁸

The proceedings, although requiring an investigation by qualified persons or agencies, do not terminate the right of the natural parents to consent to the subsequent adoption of the child in situations where such consent is required. If the parents refuse to give such consent, the adoption will fail and the child will be subject to the dangerous emotional problems involved in its removal and replacement which the statute was presumably enacted to prevent.

Only the natural parents are required to appear before the court in a placement proceedings and the prospective adoptive parents are not, at this crucial point, subject to the scrutiny of the court except

¹⁵ OHIO REV. CODE ANN. §§ 5103.16, 5103.17. (Page 1971).

¹⁶ *Id.* § 5103.99 (Page 1971).

¹⁷ *Id.* § 2151.39 (Page 1968).

¹⁸ *Id.* § 5103.16 (Page 1971).

through the eyes of the investigator. As the only issue is that of the proper placement of the child, it would seem logical that the persons with whom the child is to be placed should also appear before the court. If it is the purpose of the statute to avoid the mutual identification of the natural parents and the prospective adoptive parents, it is difficult to see how this result can be accomplished as the application filed by the natural parents must specify the proposed placement.

Natural parents or the guardian of the person of the child who do not themselves apply for the court approved adoptive placement or otherwise appear before the court and approve the same, must be served with notice of the placement hearing. The statute does not provide for the possibility that the natural parent or guardian of the person of the child may appear and object to the placement where the proceedings are brought by an agency or a relative. It would appear that the court would have no jurisdiction to approve a placement over such objection.

Minor parents can consent to the placement of their child by signing a consent before a probate judge or authorized court officer either in or out of court or before an employee of a licensed child agency after the birth of the child. The employee must make an affidavit that the legal rights of the natural mother were explained to her before the consent was signed. This statutory provision also encompasses the consent to the surrender or adoption of a child and the provisions of the act will be discussed in more detail under the heading "Termination of Rights of Natural Parents" which follows:

Where a child has been placed in violation of the laws relating to the placement of children in foster homes, the probate court in a subsequent adoption proceedings may, in its discretion, refer the matter of the placement to the juvenile court or may itself approve or disapprove the same. Either court must decide the question by determining whether the placement is for the best interests of the child. If the placement is approved, the probate court may then proceed with the adoption. If it is not approved, the question of the custody of the child is a matter for determination by the juvenile court.¹⁹ The fact that the probate court has authority to approve a placement before it is made does not deprive the court of the authority in a subsequent adoption proceedings to approve or disapprove a placement made in violation of the law.

The statute does not make the placement of the child conditioned upon the filing of an adoption proceeding within a reasonable time. Presumably after approving the placement the court loses jurisdiction over the child and the placement may continue indefinitely leaving the child in a limbo, without the benefit of a formal adoption, to its great prejudice.

¹⁹ *Id.* § 3107.08 (Page 1970).

The statutory restrictions and prohibitions relating to the placement of children do not apply when the adoption is by a stepparent.²⁰

Where parents, guardians or custodians attempt to place or have placed a child for adoption contrary to law, the juvenile court may declare the child a neglected child and place it in the temporary or permanent custody of a proper agency.²¹

Termination of Rights of Natural Parents

Under the common law and the statutes of Ohio, parents are charged with the responsibility generally for the support, care and education of their minor children. On the other hand, they are entitled to the companionship and obedience of their children, to their earnings under certain circumstances, and to their support if they be in need of the same.

At some point in the adoptive process, except in the case of adoption by stepparents, these rights and obligations of the natural parents must be legally severed and the rights and obligations of the adoptive parents in the same respects must be established. The termination of the rights of the natural parent, whether voluntary or involuntary, involve the parent and his child. The proceedings for the adoption involve the child and the adoptive parents. The state is involved in both portions of the proceedings on behalf of the child. No issues should, however, arise between the natural parents and the adoptive parents. In fact, mutual identification by these parties should be avoided, if possible, in the best interests of the child. There should be no possibility of a contest directly between natural parents and prospective adoptive parents as to which is better able to raise the child.

The issues to be held in a controversy over the termination of parental rights, i.e., the degree of unfitness of the parent are quite different than in the inquiry before the Adoption Court. The two should not be mixed. The trial of controversial issues over parental rights should not cause an influence in the adoptive proceedings where the sole inquiry should be the future best interests of the child.²²

Contrary to these principles, Ohio laws mix termination of parental rights, adoptive placement and the adoption process itself in an almost indigestible hodge-podge of statutory provisions. The pertinent statutes are spread among the code sections dealing with the Department of Public Welfare, the juvenile court and the probate court. In an effort to provide some order to the discussion of the termination of parental rights, a division will be made between voluntary and involuntary termination.

²⁰ *Id.* § 5103.16 (Page 1971).

²¹ *Id.* § 2151.03 (Page 1971).

²² CHILDRENS BUREAU PUBLICATION No. 394, U.S. Dept. of Health, Education and Welfare (1961); UNIFORM ADOPTION ACT DRAFTED BY THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS (approved by the American Bar Association; August 28, 1953).

A. Voluntary Termination

Any natural parent, or the guardian or person having the custody of a child may surrender the permanent custody of the child to an agency, either public or private, authorized or licensed for this purpose by the State of Ohio. The surrender must be in writing and may authorize the agency to consent to the adoption of the child.²³ In a subsequent adoption proceeding only the agency having such authority is a proper party and need consent to the adoption. The natural parents who have so acted are not proper parties, and their further consent to the adoption is not required. This form of voluntary surrender, therefore, effectively terminates the rights of the natural parents as to the child involved,²⁴ except as to the rights of inheritance which are not terminated until an adoption is decreed.²⁵

As in the case of the placement of a child, a minor parent may execute a surrender and consent to an adoption to the same effect as if an adult, if the consent is executed before a probate judge or an authorized court official in or out of court or before an employee of a licensed child welfare agency. If the latter, the consent must be accompanied by an affidavit of the employee that the "legal rights" of the mother have been fully explained to her prior to the execution of the consent and that all of this was accomplished after the birth of the child.²⁶

Evidently the legislature in its wisdom did not consider that it is necessary that a minor natural father have an explanation of his "legal rights" before consenting to the placement, surrender or adoption of his child. The statute specifically provides that it does not apply to adoption by a stepparent thereby casting doubt upon the validity of a consent or surrender signed by a minor natural parent in a stepparent adoption. No court appearance or judicial approval of a surrender is required and, except in the case of a minor, no provision is made for the same. A surrender in the absence of fraud or misrepresentation cannot be withdrawn or revoked without the consent of the agency involved even though the signer is a minor.²⁷ Where a minor unmarried mother surrenders her child for the purposes of adoption to an authorized agency and later married the natural father of the child, such marriage does not invalidate the surrender or give the natural father the right to revoke or disaffirm it.²⁸

²³ OHIO REV. CODE ANN. § 5103.15 (Page 1971).

²⁴ *In re Bolling*, 83 Ohio App. 1, 82 N.E. 2d 135 (1948).

²⁵ *Maurer v. Becker*, 26 Ohio St. 2d 254, 271 N.E. 2d 255 (1971).

²⁶ OHIO REV. CODE ANN. § 5103.16 (Page 1971).

²⁷ *Kozak v. Lutheran Children's Aid Society*, 164 Ohio St. 335, 130 N.E. 2d 796 (1955); *In re Zelrick*, 74 Ohio L. Abs. 525, 129 N.E. 2d 661 (1955); *French v. Catholic Community League*, 69 Ohio App. 442, 44 N.E. 2d 113 (1942) (Withdrawal of surrender contrasted with withdrawal of consent for adoption).

²⁸ *Ex Parte Combs*, 77 Ohio L. Abs. 458, 150 N.E. 2d 1505 (1958).

A natural parent who has not surrendered his child to an agency may voluntarily terminate his parental rights by consenting to the adoption in the adoption proceedings in the probate court. The consent must be given by both parents even though there has been a divorce and one of the parents has been given sole custody of the child. Prior to January 1, 1944, the Ohio law permitted a consent solely by the parent having custody. This position was in accordance with the rule generally followed in other jurisdictions.²⁹ The change in the Ohio rule requiring the consent of both parents properly gives recognition to the fact that custody is temporary and can be changed. In addition the noncustodial parent in the divorce proceedings still retains the legal obligation to support and maintain the child and the rights of a parent as to visitation, inheritance and support, except as they may be modified in the divorce decree.

The mother is considered to be the sole parent of an illegitimate child and the consent of the natural father in such a situation is not required.³⁰

The consent may be obtained prior to the time the petition to adopt is filed.³¹ The consent must be in writing and be verified or acknowledged and cannot be withdrawn after the court has granted an interlocutory order or final decree of adoption.³²

B. Involuntary Termination

The rights and obligations of natural parents in and to their children may be terminated without their consent prior to adoption by proceedings in the juvenile court and, as part of the adoption proceedings, by the probate court.

The juvenile court, if it finds that a child is neglected or dependent, may terminate the rights and obligations of the natural parents of the child by committing it to the permanent custody of a public or certified agency.³³ The court must find that there has been a willful or indifferent disregard of the duty owed by a parent to his child, based upon evidence existing at the time of the hearing.³⁴ Upon such a determination and certification, the jurisdiction of the juvenile court over the child ceases.³⁵ The agency is authorized to consent to the adoption, and the consent of the natural parents is no longer required.³⁶

In a situation where a child is not so committed by the juvenile court, but has been abandoned by its parents either willfully, or in-

²⁹ OHIO GEN. CODE § 8025 (1910).

³⁰ OHIO REV. CODE ANN. § 3107.06(B)(1) (Page 1970).

³¹ *In re Adoption of Burdette*, 83 Ohio App. 368, 83 N.E. 2d 813 (1948).

³² OHIO REV. CODE ANN. § 3107.06 (Page 1970).

³³ *Id.* §§ 2151.35, 2151.353 (D) (Page 1971).

³⁴ *In re Masters*, 165 Ohio St. 503, 137 N.E. 2d 752 (1956); *In re Kronjaeger*, 166 Ohio St. 172, 140 N.E. 2d 773 (1957).

³⁵ OHIO REV. CODE ANN. § 2151.38 (Page 1965).

³⁶ *Conti v. Shriner*, 30 Ohio L. Abs. 193 (Ct. App. 1939).

voluntarily by reason of their adjudication for mental disability, and the child is not in the permanent custody of an authorized agency, it must be placed in a prospective adoptive home, and a proceeding for adoption must be filed before the probate court may consider whether the rights of the natural parents to the child can be terminated and the adoption decreed without their consent. The probate court may decree the adoption of a child without the consent of the parents in such a situation if it finds that the natural parents of the child have willfully failed to properly support and maintain the child for more than two years prior to the filing of the petition or if the parents have been adjudged incompetent by reason of mental disability.³⁷

If the probate court determines that the consent of the natural parents to the adoption cannot be dispensed with and they refuse to give such consent, the adoption cannot be completed. The child may have to be removed from the adoptive home regardless of its best interests and to its prejudice and to the prejudice of the prospective adoptive parents.

The major problems in the matter of involuntary termination have arisen under the provision which makes the consent of the natural parents unnecessary if he or she is found to have willfully failed to properly support and maintain the child for more than two years. Prior to the amendment of the statute in 1963, the burden of proof of willful failure to support and maintain was upon the petitioner for the adoption.³⁸ Mere failure to support without proof of willfulness on the part of the natural parent was not sufficient.³⁹ The statute now provides that

Proof of failure to properly support and maintain the child for a period of more than two years immediately preceding the filing of the petition shall be prima facie evidence of willful failure to properly support and maintain the child.⁴⁰

No cases have been reported which construe this language. The words "properly support and maintain" remain as a source of trouble especially in situations where there has been some support and attention by natural parents,⁴¹ or where it is established that the natural parents could not furnish support and had not been requested or expected to do so.⁴²

The Supreme Court has held, in cases decided before the amendment of the statute, that the words "properly support and maintain" imply personal care and attention by the natural parents as well as financial support,⁴³ and that such obligations extend to a mother who

³⁷ *In re Ramsey*, 164 Ohio St. 567, 132 N.E. 2d 469 (1956).

³⁸ *In re Adoption of Baker*, 100 Ohio App. 146, 136 N.E. 2d 147 (1955).

³⁹ *In re Adoption of Earhart*, 117 Ohio App. 73, 136 N.E. 2d 147 (1961).

⁴⁰ OHIO REV. CODE ANN. § 3107.06(B)(4) (Page 1970).

⁴¹ *In re Adoption of Devore*, 111 Ohio App. 1, 190 N.E. 2d 468 (1959).

⁴² *In re Adoption of Peters*, 113 Ohio App. 173, 177 N.E. 2d 541 (1961).

⁴³ *In re Adoption of Biddle*, 168 Ohio St. 209, 152 N.E. 2d 105 (1958).

does not have custody of a child which is being supported by its father.⁴⁴ These cases were approved and followed in a case decided after the amendment to the statute to which the court refers in the opinion as indicating a legislative intent to approve the prior holding of the court.⁴⁵

It does not appear that the amendment will solve the problems involved in the burden of proof and make less likely the failure to terminate the rights of the allegedly neglectful parent. In any event, this provision of the adoption statute creates issues directly between the natural parents and the adoptive parents as to the future welfare of the involved child. As has been pointed out, the natural parents should be resolved in a termination proceeding held prior to and separate from the adoption.

When the natural parents have been adjudged incompetent by reason of mental disability, the probate court is required to appoint a guardian *ad litem*, for the incompetent parent or parents, who is charged with the duty of investigating the existing situation.⁴⁶ If the guardian *ad litem* is satisfied that the adoption should be completed, he is authorized to consent to the same. The decision as to whether or not the consent shall be forthcoming appears to be with the guardian *ad litem*. If the consent is given the court can, of course, pass upon its propriety in deciding whether the adoption should be decreed. If, however, the guardian *ad litem* should refuse to consent to the adoption there appears to be no authorization for the court to act further in the matter even though it might be of the opinion that the adoption would be to the best interest of all concerned.

Serious problems can arise for the parents and the child in situations where an adoption decree is closely followed by a complete recovery by the parents of their disability. Such a recovery is not improbable under modern medical practices. These possible problems have, however, given rise to little or no litigation. No reported cases on the subject have been found in Ohio.

The statute should require that the court, after an investigation and report by the guardian *ad litem*, make a finding that the mental disability of the parents will be permanent or of such lengthy duration that the best interests of the child will be served by approving the adoption. The finding should be supported by competent medical evidence updating and amplifying the evidence supporting the original adjudication of mental disability. The statute should further provide that upon such a determination, the consent of the parent to the adoption of his child would not be necessary. The requirement of a consent by the guardian *ad litem* should be eliminated, as it would not then serve any useful purpose.

⁴⁴ *Johnson v. Varney*, 2 Ohio St. 2d 161, 207 N.E. 2d 558 (1965).

⁴⁵ *In re Lewis*, 8 Ohio St. 2d 25, 222 N.E. 2d 628 (1966).

⁴⁶ OHIO REV. CODE ANN. § 3107.06(B)(3) (Page 1970).

There is a possibility that the Ohio provision as now constituted could be held to be a denial of due process of law under the 14th Amendment to the United States Constitution.⁴⁷

Adoption Proceedings

In Ohio any person under the age of 21 years may be adopted.⁴⁸ There is no provision for the adoption of an adult person. A limited form of adoption for adults, insofar as the rights of inheritance are affected, is possible under designation of heirship proceedings.⁴⁹

The adoption proceedings must be filed in the probate court of the county where the petitioner resides or the county where the child was born, has a legal settlement or has become a public charge. Where a child is brought from the foreign state or country of its birth into Ohio for the purposes of adoption by Ohio residents, the proceeding for adoption must, by elimination, be brought into the county where the petitioners reside. Whether the mere presence of the child, under such circumstances, within the jurisdiction of the court is sufficient to give the court authority to enter a decree which terminates the rights of the natural parents who reside in the foreign state or country, is a troublesome question.⁵⁰

The petitioners for adoption may be a husband and wife jointly, a stepparent married to one of the natural or "legal" parents (evidently meaning an adoptive parent) of the child to be adopted, or any other proper person.⁵¹ Hence, in Ohio, if a minor is considered a proper person, he can adopt another minor and there is no age difference requirement as prevails in many states. There is no requirement that the petitioners be citizens of the United States or residents of Ohio, but a mother of a child born out of wedlock cannot adopt the child.⁵² The Ohio statute is more broad in respect to who may adopt than is the Model Act, which would prohibit an unmarried father who is a minor from adopting his child after the death of its mother.⁵³

The contents of the petition for adoption are spelled out in detail in the statute and will not be set forth herein.⁵⁴ There is one defect, however, which deserves comment. The statute requires that the proposed adoptive name be used in the caption of the petition and that the original name be set forth in the allegations of the petition, where, of course, it is subject to the scrutiny of the adoptive parents. Thus, the barrier of nonidentification between the adoptive parents and

⁴⁷ *People ex rel Nabstedt v. Berger*, 3 Ill. 2d 511, 121 N.E. 2d 781 (1954).

⁴⁸ OHIO REV. CODE ANN. §§ 3107.01(A), 3107.02 (Page 1970).

⁴⁹ *Id.* § 2105.15, (Page 1970).

⁵⁰ Comment, *Inadequacy*, *supra* note 9.

⁵¹ OHIO REV. CODE ANN. § 3107.02 (Page 1970).

⁵² *Sommers v. Doersam*, 115 Ohio St. 139, 152 N.E. 387 (1926).

⁵³ UNIFORM ADOPTION ACT § 3 (4).

⁵⁴ OHIO REV. CODE ANN. § 3107.03 (Page 1970).

the natural parents so zealously guarded in other respects, is broken to the possible detriment of all parties concerned, including the child.

Most lawyers as a matter of practice fill in the original name of the child after the petition has been signed by the adopting parents to preserve this secrecy. It would seem that the identity of the child in the proceedings could be established by the papers filed by the next friend or by reference to the birth certificate, which must be filed with the petition, if available.

The statute contemplates that a petition for adoption may be filed before the child is placed in the home of the petitioners as provision is made for the filing of a supplemental petition if the child entered the home after the filing of the petition.⁵⁵ The child must, however, reside in the home of the petitioners at the time of the decree, or the proceeding is void.⁵⁶

The hearing date must be fixed not less than thirty nor more than sixty days after the filing of the petition or the supplemental petition. The court must appoint a next friend to the child and cause notice to be given to the guardian of the person of the child and to its parents, if their consent to the adoption is required. The notice required is not by way of issuance and service of summons, but is the notice prescribed by Section 2101.26 of the Ohio Revised Code, particularly pertaining to the probate court.⁵⁷

The next friend is charged with the duty to make an investigation into the suitability of the adoption. The court has no discretion in the matter of the appointment of a next friend, as is the case in some other states. If the child is in the permanent custody of a public or certified private agency, it must be appointed the next friend. If not in such custody, the appointee may be some qualified person.

The probate court may prescribe the scope of the investigation, but it must include inquiry into the matters set forth in particular in the statute, including the background and identification of the natural parents, the reasons for and circumstances surrounding the placement of the child for adoption,⁵⁸ and the suitability of the adoption considering the racial, religious and cultural backgrounds of the petitioners.

The report must include a recommendation of the next friend either approving or disapproving the adoption. The report, except for the portion which pertains to the petitioners, is not to be filed with the rest of the adoption papers, but must be filed separately and is not open for inspection except upon the personal direction of the probate judge. The report as to the petitioners should be available to the petitioners and to their counsel and, if unfavorable, open to

⁵⁵ *Id.* § 3107.04 (Page 1970).

⁵⁶ *McLain v. Lyon*, 24 Ohio App. 279, 156 N.E. 529 (1926).

⁵⁷ *In re Adoption of Burdette*, 83 Ohio App. 368, 83 N.E. 2d 813 (1948).

⁵⁸ OHIO REV. CODE ANN. § 3107.04 (Page 1970).

rebuttal on their behalf. It further should be available for the purposes of anyone opposing the adoption. The mandatory appointment of a next friend to make a report to the court in writing does not prevent one opposing the adoption from having a fair trial.⁵⁹ The next friend's report is not part of the record on appeal.⁶⁰

The court cannot proceed with the hearing on the petition unless there is filed with the court written consents by the persons named in the statute, to wit, the child, if he is over 12 years of age, and he has resided in the home of the petitioners for over eight years prior to the filing of the petition (in other areas of the law the age of 14 is considered the age of discretion) and by each of the living parents, adult or minor, except that the mother of an illegitimate child is considered the sole parent.⁶¹ The mother of an illegitimate child must execute her consent in open court, if she is able; if not, in the presence of the next friend. There appears to be no such provision for the signing of a consent by the mother of a legitimate child.⁶²

If a child has been previously adopted, the written consent of the preceding adoptive parents is required as if they were the natural parents. Presumably the natural parents' consent is not then required, although the statute does not so state.

The statute specifically provides that the consent of a parent is not required if the child is in the permanent custody of a certified agency, or if the parent has been adjudicated incompetent by reason of mental disability or has been determined to have willfully failed to properly support and maintain the child for two years prior to the filing of the petition. These provisions have been previously discussed under the heading of "Termination of Rights of Natural Parents."

The consents must be filed separately from the adoption proceedings and are not to be available to anyone, which would include the petitioner and the child, except upon the personal discretion of the judge. The purpose of this restriction being, of course, to avoid identification of the natural parents by the adoptive parents. The consents must pertain to the particular petition. A blanket consent is invalid, although there is no requirement that the consent be executed subsequent to the execution or filing of the petition.

As has been previously stated, a consent may not be withdrawn after the court has entered a decree, either interlocutory or final. However, the probate court has no jurisdiction to make a final or interlocutory order of adoption, if written consents to the adoption are not filed with the court in situations where such consents are required by the statute.⁶³

⁵⁹ *In re Adoption of Todhunter*, 33 Ohio L. Abs. 567, 35 N.E. 2d 992 (1941).

⁶⁰ *In re Adoption of Kane*, 91 Ohio App. 327, 108 N.E. 2d 176 (1952).

⁶¹ OHIO REV. CODE ANN. § 3107.06 (Page 1960).

⁶² *Id.* § 3107.07 (Page 1960).

⁶³ *In re Ramsey*, 164 Ohio St. 567, 132 N.E. 2d 469 (1956).

Where the child is in the permanent custody of an agency clothed with the authority to give or withhold the required consent, a question can arise as to who actually controls the adoption process, the agency or the court.

There are an increasing number of cases arising in states with a statute similar to that of Ohio wherein the agency has placed a child for adoption and then subsequently refuses to consent to the adoption for reasons that could well be determined to be arbitrary and not based upon a bona fide belief that the refusal is for the best interests of the child.⁶⁴ These cases are arising under factual situations where there is not much area for dispute that the adoption would be for the best interests of the child, but the agency bases its refusal to give its consent upon some rule or policy of its organization which is not a statutory requirement.

The following are examples of specific situations in which the problems have arisen:

- (a) A church affiliated agency places a child with persons of same faith as that of the natural parents, but who subsequently undergo a bona fide change of religious conviction.
- (b) A child is placed, by mistake of the agency, in a home of prospective adoptive parents who are at the time slightly overage by the rules of the agency.
- (c) When one of the prospective adoptive parents dies following placement and the rules of the agency prevent consent to a single parent adoption.

An agency as next friend or custodian of the child should, of course, have considerable discretion in approving or disapproving an adoption by granting or withholding its consent. However, it would appear important that the adoption court should have some authority to approve an adoption when it finds that the agency has acted arbitrarily and not in the best interests of the child. In some states the statutes have been amended to give the court such authority.⁶⁵

In Ohio it is reasonably clear that in situations where an agency has the permanent custody of a child and its consent to the adoption is, therefore, required, the probate court cannot approve the adoption where the consent is withheld, even though the court may be of the opinion that such refusal is arbitrary, capricious, and not based on substantial evidence and contrary to the best interests of the child. If, however, the position of the agency is that of next friend only, and not of custodian, its consent to the adoption is not required, and the court could approve the adoption despite a disapproval of the agency based on an arbitrary position.

⁶⁴ *In re Remius Adoption*, 55 Wash. 2d 117, 346 P. 2d 672 (1959); *In re Adoption of Tschody*, 267 Wis. 272, 65 N.W. 2d 17 (1954); *In re Shields Adoption*, 4 Wis. 2d 219, 89 N.W. 2d 827 (1958).

⁶⁵ WIS. STAT. § 48.85 (1957); WASH. REV. CODE § 26.32.010 (1961).

The probate court has no jurisdiction to order an adoption, either final or interlocutory, if the child is in the custody of the juvenile court, or if there is pending in such court, custody or disposition, proceedings involving the child until such proceedings are terminated by such court.⁶⁶ There appears to be no such restriction upon the right of the probate court to approve a placement of a child for adoption.⁶⁷

Prior to the hearing on the merits of the adoption, the placement of the child must be considered by the court. The statute provides that if the court finds (evidently from the allegations of the petition, for at this point there has not yet been a hearing) that the child was placed in the adoptive home in violation of the laws relating to the placement of children in "foster" homes, the court may in its discretion certify the matter to the juvenile court, or the court may after notice to the natural parents, the petitioners, and the person who placed the child, hold a hearing to determine whether the placement was for the best interest of the child.⁶⁸ The prescribed procedure has been more fully discussed under the heading of "Adoptive Placement of Children" *supra*.

If the illegal placement is made "legal" by the approval of either the juvenile court or the probate court, the latter court may go forward with the adoption proceedings.

At the hearing upon the adoption, the court must examine, under oath, the child, if over 21 years of age and his consent to the adoption is required, the petitioners, the next friend and all other persons in interest who are present and to whom lawful notice has been given.⁶⁹ This provision would appear to exclude the natural parents who have permanently surrendered the child to a licensed agency as they would not be proper parties to the proceedings or entitled to notice thereof.⁷⁰ The court may, however, in its discretion, examine any other person having knowledge or information pertinent to the adoption. Married adoptive couples must be examined separate and apart from each other, and the court must be satisfied that both are in favor of the adoption.

The court must further be satisfied and find that the requirements of the adoptive code have been complied with, that the petitioners are suitably qualified to take care of and raise the child, and that the best interests of the child will be served by the adoption before granting the decree of adoption.⁷¹

There are two types of adoptive decrees, interlocutory and final. The interlocutory decree is for a period of six months, and for this

⁶⁶ OHIO REV. CODE ANN. § 3107.06 (Page 1960).

⁶⁷ *Id.* § 5103.16 (Page 1970).

⁶⁸ *Id.* § 3107.08 (Page 1960).

⁶⁹ *Id.* § 3107.09 (Page 1960).

⁷⁰ *In re Boling*, 83 Ohio App. 1, 82 N.E. 2d 135 (1948).

⁷¹ *In re Adoption of Baker*, 117 Ohio App. 26, 185 N.E. 2d 51 (1962).

period, subject to the final decree of the court, the child has the status of an adopted child, except as to "property rights" which presumably would include rights of inheritance.

The interlocutory decree must be entered unless the court finds that the child in question is the child, natural or adopted, of one of the petitioners and is living in the home of the petitioner and his spouse, or that the child was legally placed in the home of the adoptive parents and has resided there continuously six months prior to the date of hearing. It would appear that if the child was illegally placed, the court could not waive the interlocutory period even though the court found the placement beneficial to the child. If the child is placed by an authorized agency, it must visit the child at reasonable intervals during the six months period and recommend the adoption. No such procedure is required if the child was otherwise "legally placed". It is difficult to see how a child can be legally placed, except through an authorized agency or by prior approval of a court.

The granting of either a final or interlocutory decree of adoption terminates the jurisdiction of a divorce court over a child whose parents are divorced.

The petitioners for adoption can, by the timing of the filing of the petition, determine whether they will be eligible for a final decree at the time of the hearing. If they wait to file the petition until the child has been in their home for five months, at the time of the hearing (which must be held at more than thirty and not more than sixty days after the petition is filed) the child will have been in the home for six months and they will be eligible for a final decree. Most agencies favor this procedure as they feel that the case work they have done prior to the time the child is placed and during the six months period is sufficiently exhaustive to protect both the child and adoptive parents, and the interlocutory period is unnecessary. However, in the usual case of agency placement, there is no court adjudication of the rights of the adoptive parents as to the child for the six months period until the final decree is rendered. Upon the rendering of the final decree, the obligations of the adoptive parents are permanently fixed and cannot be annulled or revoked even though the child may develop the most hopeless mental or physical problems which were unknown to anyone prior to the entry of the decree. It is the opinion of the writer that the interlocutory period should not be waived by the adopting parents, except in extraordinary circumstances. As has been pointed out, this opinion is not shared by most social agencies.

Recognized authorities in the field of adoption now feel that most mental testing done with children under the age of one year is inconclusive. They also are of the opinion that it is important to place a child for adoption as soon as possible after birth so that the emo-

tional problems for the child in changing from one "mother image" to another can be avoided.⁷²

It would seem that at least from the adoptive parents' standpoint, it would be better practice to place the child with them as soon after birth as is physically possible, and that they should then be advised that as soon as they feel that they can entirely accept the child and have no reservations about the adoption, they should file the adoption proceedings with the expectation that they will obtain an interlocutory decree. During the interlocutory period, the child will have the status of their child except for property rights. If they wish to protect the child in this respect, they can do so by the execution of a will which can be revoked if the adoption is not completed.

However, if, during the interlocutory period, the child develops problems which will prevent the adoption from being to the best interests of the child and the adoptive parents, the interlocutory decree can be revoked and the petition dismissed at any time upon motion of the petitioners.

Prior to the entry of the final decree, the court may upon its own motion or upon the motion of any interested party, upon notice to the petitioners, the next friend and any other person or organization who has consented to the adoption, revoke the interlocutory decree, if it finds that the adoption will not be for the best interest of the child or for any other good cause.

If the interlocutory decree is not revoked within the six months period, the court, without further hearing or proceedings, must enter a final decree of adoption, unless the court expressly finds that it would be to the best interests of the child to extend the period of the interlocutory order.⁷³

If for any reason the adoption proceedings are dismissed, the adoption is denied or the interlocutory decree is revoked, the child must be returned to the custody of the authorized agency having its permanent custody, if any. If the child has not been in such custody, the court must certify the matter to the juvenile court of the county where the child is then residing, and that court must decide who should have its custody.⁷⁴ Such certification does not constitute a complaint against the natural parents that the child is dependent, delinquent or neglected, but authorizes and requires the juvenile court to make proper investigation to determine who has the responsibility for its care.⁷⁵

Upon entry of the final decree of adoption, the probate court is required to forward to the Department of Health a certificate of

⁷² E. Smith, READINGS IN ADOPTION (1963).

⁷³ OHIO REV. CODE ANN. § 3107.11 (Page 1960).

⁷⁴ *Id.* § 3107.12 (Page 1960).

⁷⁵ *Clark v. Allaman*, 154 Ohio St. 296, 95 N.E. 2d 753 (1950); *In re McTaggart*, 2 Ohio App. 2d 214, 207 N.E. 2d 562 (1965).

adoption for the purpose of supplying the necessary information for a new birth certificate.⁷⁶

The Department of Health, "unless otherwise requested by the adoptive parents," is required to issue a new birth certificate which is to contain the same information and is to have the same overall appearance as if the certificate had been issued for a child born to the adoptive parents.⁷⁷ In what is rather startling statutory authority to justify forgery, the Department of Health is authorized to supply handwriting on the birth certificate where it may be required to effect such appearance. The new certificate, which necessarily includes essentially untrue information, upon being issued by the Department, becomes the official record of the birth of the adopted child, and the original certificate of birth ceases to be a public record. It is sealed in an envelope which is not to be opened except by order of the probate court which decreed the adoption.

The new certificate is to be forwarded to the local registrar of vital statistics of the district where the birth actually occurred, and is substituted for the original and true certificate. Any index references to the latter must be then destroyed by the registrar and by the probate court having possession of the same. The probate court must, however, retain permanently in the file of the adoption proceedings such information as will enable the court to identify both the original and new certificate of the birth of the child.

The statute is effective as to certificates of birth pertaining to adoptions which have been completed prior to the effective date of the statute, but birth certificates for children adopted in Ohio, but born in other states, must be processed by the state of birth.

As has been pointed out, the provisions for the falsified certificate must be complied with "unless otherwise requested by the adoptive parents." What kind of certificate will be issued if the adoptive parents otherwise request is not stated. Presumably it would be a certificate showing the birth and date of the child with no reference to the natural parents or parent, and describing the adoptive parents in their true relationship. It is the opinion of the writer that the status of an adopted child is one in which both the child and the adoptive parents can and should take pride, and the attempt to hide the relationship by the use of false records and writings can be considered as a poor reflection on a fine, healthy, and usually unselfish relationship between the parties. Such legislation is ill conceived and ill advised.⁷⁸

The adoption proceedings and papers pertaining to the proposed placement of a child⁷⁹ must be recorded in a separate book kept by

⁷⁶ OHIO REV. CODE ANN. § 3107.11 (Page 1960).

⁷⁷ *Id.* § 3705.18 (Page 1971).

⁷⁸ *New Birth Certificate Law Discussed*, 38 OHIO BAR 110 (1965).

⁷⁹ 1962 OHIO ATT'Y GEN. OP., at 2742.

the probate court for this purpose. They must be separately indexed,⁸⁰ and are not to be journalized or generally recorded.⁸¹ The papers and records are available for inspection only upon the personal direction of the probate judge.

Revocation of Adoption

Many of the states provide some machinery for the revocation of an adoption under certain specified circumstances such as feeble mindedness, epilepsy or insanity. Some of the states condition the revocation upon the fact that these conditions existed prior to the adoption, and that the adopting parents had no knowledge of the same. Other states permit revocation upon the divorce of the adoptive parents or the abandonment of the adopted child.⁸² In at least one jurisdiction, a person who has been adopted as a minor can revoke the adoption within one year after coming of age by filing with the probate court a dissent from the adoption. The court is thereupon required to issue an order voiding the adoption.⁸³

Ohio previously had a statute providing for the revocation of an adoption for specified causes resulting from conditions existing prior to the adoption which were unknown at the time to the adopting parents.⁸⁴ The present law makes no provision for annulment or revocation of an adoption after the entry of a final decree, but, as has been pointed out, does provide for the revocation of an interlocutory decree, if the court finds that the adoption will not be in the best interest of the child or upon request of the adoptive parents.⁸⁵

Under the contemplation of the Ohio statute that an adopted child attains the status of a natural child, there appears to be no reason to assume that a revocation of the adoption, at a time beyond the interlocutory period, will be to the best interest of the adopting parents or of the child. Natural parents of children assume the risks of the unfortunate development of their children, and there appears to be no valid reason to except adoptive parents from the same risks.

In a case decided by the Court of Appeals of Franklin County, Ohio, the court held that where it was alleged that an agency placed a child for adoption which was at birth afflicted with mongolism, which fact was unknown to the adopting parents at the time the adoptive decree was rendered, but was known to the agency, the parents were entitled to have the court determine whether fraud has been perpetrated to such extent that the adoptive parents would be entitled to equitable relief from the order of adoption.⁸⁶

⁸⁰ OHIO REV. CODE ANN. § 3107.14 (Page 1960); § 2101.12 (Page 1968).

⁸¹ 1959 OHIO ATT'Y GEN. OP., at 652.

⁸² N.Y. DOM. REL. LAW § 113a (McKinney 1964), GA. CODE ANN. § 74-76 (1935).

⁸³ VT. STAT. ANN. tit. 15 § 454 (1959).

⁸⁴ OHIO GEN. CODE § 8030-2 (1910).

⁸⁵ OHIO REV. CODE ANN. § 3107.11 (Page 1960).

⁸⁶ *In re Adoption of Sladky*, 109 Ohio App. 120, 161 N.E. 2d 554 (1958).

Legal Status of Adoption

The intended legal effect of adoption is to create between the adoptive parents and the adoptive child the same status, with limited exceptions, as exists between natural parents and their child. The natural parent or parents are divested of all rights and obligations due from them to the child and from the child to them, except in the case of a natural parent married to an adopting parent.⁸⁷

Rights to the custody of adopted children are determined in the event of separation or divorce of the adoptive parents in exactly the same manner as with children who were born naturally to the parties.⁸⁸ In the case of the death of both the adoptive parents, it has been held that there is no person entitled to the custody of the adopted child as a matter of right by reason of the adoption decree of another state, that neither a sister by adoption nor the natural mother, who had relinquished her right, succeeded to the rights of the adoptive parents, but the matter of its custody should be determined by the court upon consideration of the best interests of the child.⁸⁹

The status of an adopted child in Ohio is a permanent, continuing concept of law which is not limited in time to the minority of the adopted child or, when rights of inheritance are considered, to the lives of the parties.⁹⁰

Ohio recognizes the status of a person adopted in a state which at the time was the domicile of the adoptive parents, even though such adopted person had attained his majority at the time of the adoption and could, therefore, not be adopted in Ohio.⁹¹ The status of adoption which was incurred in a foreign state will be given effect in Ohio, upon evidence being offered that there was compliance with the laws of the state where the decree was rendered.⁹²

Rights of Inheritance

The rights of inheritance of an adopted child are broadly defined in the statute as being the same as if the child had been born to the adopting parents in lawful wedlock and not born to the natural parents, except that such child shall not be capable of inheriting or succeeding to property expressly limited to the heirs of the body of the adoptive parents, and further excepting that the status of a natural parent married to the adopting parent shall not in any way

⁸⁷ OHIO REV. CODE ANN. § 3107.13 (Page 1960).

⁸⁸ *Martin v. Fisher*, 25 Ohio App. 372, 158 N.E. 287 (1927).

⁸⁹ *In re Griffin*, 30 Ohio Op. 367, 150 Sup. & C.P. Dec. 101 (C.P. 1945).

⁹⁰ *Barrett v. Delmore*, 143 Ohio St. 203, 54 N.E. 2d 789 (1944).

⁹¹ *Id.*

⁹² *Belden v. Armstrong*, 93 Ohio App. 358 (1951); *Blaustein v. Blaustein*, 77 Ohio App. 281, 66 N.E. 2d 156 (1946).

be effected. An adopted child can take under a will of a natural parent which identifies such child clearly by the name given him by his natural parents, by his adoptive name or by any other means.⁹³

As has been previously stated, adoption statutes are held in derogation of the common law and must, therefore, be strictly construed.⁹⁴ However, it has also been held that the statutes of inheritance, including those pertaining to adoption, are excluded by Section 1.11 of the Ohio Revised Code from such rule of strict construction.⁹⁵

The statutes in effect at the time of the death of the decedent, and not those in effect at the time of the adoption, govern the adopted child's rights of inheritance.⁹⁶ These statutes, and the changes made in them from time to time, are matters of legislative policy. They do not deal with vested rights, and are not violative of the constitutions of either the United States or of the State of Ohio.⁹⁷

An adopted child is entitled to the rights of a pretermitted heir as to a will made prior to the adoption.⁹⁸

A. Inheritance From Natural Parents

An adopted child cannot take under the laws of intestate succession from the child's natural parents. The statutory provision to this effect⁹⁹ does not violate the state or federal constitution.¹⁰⁰ As has been pointed out, the statute does not prohibit the child from taking under a will of a natural parent when the child is clearly identified. Where a child is adopted by a grandparent, he loses his rights as an heir of a natural parent who is the child of the decedent grandparent, as it is not contemplated that an adopted child should receive a larger share than a natural child.¹⁰¹

A child who is readopted by his natural parent or parents is restored to his status as a natural child of such parent or parents to the same extent as if there had been no adoption.¹⁰²

In a recent case it was held that the words "lineal descendants of my blood" clearly identifies grandchildren of a testator who have been adopted by nonrelatives.¹⁰³

⁹³ OHIO REV. CODE ANN. § 3107.13 (Page 1960).

⁹⁴ *In re Todhunter*, 33 Ohio L. Abs. 567, 35 N.E. 2d 1011 (Ct. App. 1943).

⁹⁵ *Frame v. Schaffer*, 39 Ohio L. Abs. 617, 27 Ohio Op. 346 (C.P. 1943).

⁹⁶ *Staley v. Honeyman*, 157 Ohio St. 61, 104 N.E. 2d 172 (1952); *Flynn v. Bradbeck*, 147 Ohio St. 49, 68 N.E. 2d 75 (1952).

⁹⁷ *In re Estate of Millward*, 166 Ohio St. 243, 141 N.E. 2d 462 (1957).

⁹⁸ *Surman v. Surman*, 114 Ohio St. 579, 151 N.E. 708 (1926).

⁹⁹ OHIO REV. CODE ANN. § 3107.13 (Page 1960).

¹⁰⁰ *In re Estate of Millward*, 166 Ohio St. 243, 141 N.E. 2d 462 (1957).

¹⁰¹ *Smith v. Carver*, 55 Ohio St. 642, 48 N.E. 1118 (1896); *Paul v. Paul*, 31 Ohio L. Abs. 453, 17 Ohio Op. 392 (P. Ct. 1940).

¹⁰² OHIO REV. CODE ANN. § 3107.07 (Page 1960).

¹⁰³ *Saintignon v. Saintignon*, 5 Ohio App. 2d 133, (1966).

B. Collateral Inheritance

The right of inheritance of an adopted child being the same as a natural child, it can inherit from or through collateral kin such as the cousin or a sister of a deceased adoptive parent.¹⁰⁴

Upon the death of an adopted child intestate leaving no spouse, issue or adoptive parents surviving, the estate of such deceased child passes to the next of kin of the adoptive parents, and not to the natural next of kin of the child.¹⁰⁵ The former statute in point provided that the natural next of kin would inherit under such circumstances,¹⁰⁶ and required that adoptive parents carefully provide for such a contingency in their wills to prevent their estate from eventually passing to natural next of kin of the adopted child to their unjust enrichment under the usual circumstances.

Will Construction

The question of the interpretation of the words "issue," "heir," "descendant," and "child" when applied to wills, contracts or instruments of conveyance involving adopted children is troublesome in Ohio. Other than the general statutory fiat that an adopted child is to be considered in all respects, save in connection with a fee tail estate, as the natural child of the adoptive parents,¹⁰⁷ there is no clear statutory authority to aid in construing these words to include adopted children.

While it is recognized that generally the words in question should be given the meaning which is intended by the user, in light of the obvious statutory intention to make an adopted child in all respects, save one, of equal status with a natural child, it would seem not unreasonable for the legislature to implement the adoption statute by specifically providing that the words in question, whenever and wherever used, shall be construed to include adopted children, excepting, of course, where the intention is to create a fee tail estate. The case law in Ohio generally supports this position.

An adopted child is included within the meaning of the word "issue" as used in Ohio Rev. Code § 2105.10, which defines the descent of property of which the relict of a deceased husband or wife dies possessed, intestate and without issue.¹⁰⁸

There is a holding that the word "issue" may mean adopted children or heirs at law, and that where a donor used the words "child or children", referring to his children, the presumption would be that he intended to include adopted children whether or not adopted at the time of the execution of the instrument, but where a stranger uses the same term in connection with children not his own,

¹⁰⁴ *Staley v. Honeyman*, 157 Ohio St. 61, 104 N.E. 2d 172 (1952).

¹⁰⁵ OHIO REV. CODE ANN. § 3107.13 (Page 1960).

¹⁰⁶ OHIO GEN. CODE § 10512.19 (Page 1910).

¹⁰⁷ OHIO REV. CODE ANN. § 3107.13 (Page 1960).

¹⁰⁸ *Id.* § 2105.10 (Page 1968).

the presumption would be that he does not intend to include adopted children.¹⁰⁹ A devise of a remainder "to the heirs at law" of a beneficiary includes an adopted child.¹¹⁰

The general rule in states other than Ohio appears to be in favor of the inclusion of adopted children within the classes designated as issue, descendants, children and heirs.¹¹¹

Defective Adoption and Contracts

As adoption is purely statutory in Ohio, there can be no rights which accrue by reason of a [de]facto adoption when there has not been substantial compliance with the provisions of the statute.¹¹² There is, however, a presumption that all the provisions of law were fully complied within a decree of adoption which persists until overcome by proof to the contrary.¹¹³ A defect which defeats the proceedings must be jurisdictional.

While the law in Ohio is not entirely clear on the point, there is some authority that a contract to adopt entered into between the parents of a child and persons who agree to the adoption and to make the child an heir, will be specifically enforced when it does not violate the statutes of frauds, and where it has been fully performed by the child.¹¹⁴

Collateral Attack

The Supreme Court of Ohio has held that a decree or order of adoption made by a court which had no jurisdiction can be attacked by a habeas corpus proceeding brought by the natural mother.¹¹⁵ Where the court had jurisdiction, no collateral attack will be permitted, and there exists a presumption that all the required procedural steps have been complied with.¹¹⁶

The Probate Court of Cuyahoga County, Ohio, has held that children who wished to inherit from their natural father could set aside a decree which made them the adopted children of third persons, where the natural father had not been properly served with notice of the adoption proceedings. The opinion does not indicate that the adoptive parents were made a party to the proceedings to set aside the decree or otherwise identify the defendant who is indicated in the opinion to have acted as his own attorney.¹¹⁷

¹⁰⁹ *Rodgers v. Miller*, 43 Ohio App. 198, 182 N.E. 654 (1932).

¹¹⁰ *Smith v. Hunter*, 86 Ohio St. 106, 99 N.E. 91 (1912).

¹¹¹ *Annot.*, 133 A.L.R. 597 (1941); 166 A.L.R. 150 (1946).

¹¹² *Glass v. Glass*, 69 Ohio L. Abs. 33, 125 N.E. 2d 375 (Ct. App. 1952); *Kendall v. Kendall*, 8 Ohio Dec. Reprint 428, (C.P. 1882).

¹¹³ *In re Martin*, 76 Ohio L. Abs. 219, 140 N.E. 2d 623 (Ct. App. 1957).

¹¹⁴ *Snyder v. Shuttleworth*, 5 Ohio App. 137, 25 Ohio C.C.R. (n.s.) 545 (1916).

¹¹⁵ *In re Ramsey*, 164 Ohio St. 567, 132 N.E. 469 (1956).

¹¹⁶ *Marlin v. Fisher*, 25 Ohio App. 372, 158 N.E. (1927); *In re Adoption of McLean*, 65 Ohio App. 106, 29 N.E. 2d 425 (1940); *Lawson v. Thomas*, 48 Ohio App. 311, 193 N.E. 655 (1934).

¹¹⁷ *Balint v. Horvath*, 5 Ohio Misc. 242 (P. Ct. 1965).

Conclusion

The adoption statutes in Ohio operate effectively in situations where there has been a voluntary permanent surrender of the custody of the child to an authorized agency by a natural parent, followed by a prompt placement of the child by the agency in an adoptive home and consent by the agency to the subsequent adoption. Problems do arise, however, when the natural parents wish to rescind a surrender or consent which they have already given to an agency.

Where there has been no voluntary surrender to an agency, the statutes of Ohio are cumbersome, confusing and ineffective in providing machinery for the placement of the child and the termination of the rights and obligations of the natural parents.

These rights should in every case, except in stepparent adoptions, be terminated prior to the adoptive placement, and the child thereupon placed in the permanent custody of an agency, either public or private. The proceedings should include both voluntary and involuntary terminations of parental rights and obligations. Persons who desire to voluntarily surrender their child to an authorized agency, whether they be minors or adults, should appear before the court or an officer of the court for this purpose, and such surrender should not thereafter be subject to revocation by them in the absence of fraud.

This procedure would eliminate any confrontation or issues between the natural parents and the adoptive parents, and would further eliminate the risk that the child would have to be removed from the adoptive home after placement because of failure to obtain the consent of the natural parents, or the inability to obtain a determination that such consent is not necessary. The child should be placed under the umbrella of responsibility of an authorized agency which could not only make sure that it was being properly cared for, but also that its right to be adopted properly was being fulfilled promptly and without prejudice to it.

The termination proceedings could well be handled exclusively by the juvenile court, thereby eliminating any consideration of the natural parents from the proceedings of adoption, which could remain to be the province of the probate court.

The adoption proceedings should provide for a court review of the position of an agency which refuses to consent to an adoption. The identification of the child should be by reference to its birth certificate or by the report of the next friend, and not by an allegation in the petition.

The interlocutory decree should be required in every case, except in stepparent adoptions, and should not be subject to waiver by the court. The adoptive parents would thereby be required to take the full protection provided by law, and they would not be subject

both to emotional pressures and, pressures originating from the agency to complete the adoption as soon as possible after placement of the child.

The adoptive birth certificates should be in a form that properly reflects the adoptive status without, of course, identifying the natural parents.

Finally, there should be statutory recognition of the fact that some doubt exists that the words "heirs," "issue," "descendants" etc. may be construed to exclude adopted children, and provision should be made that such words, whenever and however used, include adopted children within their meaning.