Florida Law Review

Volume 24 | Issue 4 Article 1

June 1972

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University of Florida Law Review

VOLUME XXIV SUMMER 1972 NUMBER 4

FLORIDA ADOPTION AND INTESTATE SUCCESSION LAWS: A LEGAL PARALOGISM

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Florida law governing adoption[1] affords the adoptee, whether infant or adult,[2] all the rights of a person born to the adoptive parents in lawful wedlock. The law of intestate succession, however, ensures distinctions between adopted and natural issue contrary to legislative intent regarding adoption.[3] By adhering to the traditional view that consanguinity governs intestate succession, Florida courts have interpreted Florida statutes to restrict the inheritance right of adoptees to inherit from the *adoptive* family, yet have maintained the full right of inheritance from the *natural* family.[4] This means that the adoptee has no right to inherit from any kindred of the adopter unless the statutory language is clearly to that effect. However, inheritance by adopted persons within the natural family is discriminatorily curtailed by statute in accordance with the circumstances of birth. For

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1. "Adoption" has been defined as: "The act of one who takes another's child into his own family, treating him as his own, and giving him all the rights and duties of his own child. . . . A juridical act creating between two persons certain relations, purely civil, of paternity and filiation." BLACK'S LAW DICTIONARY 70 (rev. 4th ed. 1968).

2. Under Florida law a single or married adult may adopt another adult, provided the adopter is more than ten years older than the adoptee. FLA. STAT. §63.241 (1969). However, it was held in First Nat'l Bank v. Mott, 101 Fla. 1124, 133 So. 78 (1931), that under Florida statutes an adult married woman could not be adopted in order to make her the heir of the adopters. While this case did not involve wife- or husband-adoption, a problem is present in this area, since adults can now be adopted. Interplay would be involved among FLA. STAT. §§63.241, .061, 741.21, .22 (1969). In this respect *compare* Bedinger v. Graybill's Executor, 302 S.W.2d (Ky. 1957), *with* Pennington v. Citizens Fidelity Bank & Trust Co., 390 S.W.2d 671 (Ky. 1965). *See* Note, *Ability of Legatee-Husband to Adopt Wife To Bring Her Within Terms of Will*, 1958 WASH. U.L.Q. 97.

3. The Florida situation is not unique, however. "Although legitimate natural children are preferred takers in all states, adopted children and illegitimate children create additional problems for the inheritance system. Adoption in the sense of creating a legal relationship of parent and child was not part of the English common law. The first American adoption statute was passed in Massachusetts in 1851. Its purpose was to provide the needy child with parents and a home, rather than to furnish the adopter with an heir. Today all states have adoption statutes. However, provisions related to inheritance are secondary, varied, and in many instances inadequate." M. SUSSMAN, J. CATES & D. SMITH, THE FAMILY AND INHERITANCE 20 (1970) (footnotes omitted).

4. *See, e.g., In re* Hewett's Estate, 153 Fla. 137, 141-43, 13 So. 2d 904, 905-06 (1943).

instance, inheritance rights of the legitimate person[5] differ from those of the illegitimate,[6] while the status of the artificial insemination issue is unresolved. These varied succession rights raise questions of equal protection of the laws as applied to the adoptee. Further, succession by adoptees within the natural family is hindered by the requirement that a court order be obtained before adoption records may be unsealed.[7] Additional statutory problems are: adoption and inheritance of dual portions,[8] succession rights after successive adoptions, inheritance rights of natural parents who intermarry with adoptive parents, and the adoptee as a pretermitted heir. Since Florida case law is limited and Florida statutes are silent or ambiguous in certain areas of crucial importance, a pragmatic legislative solution is a necessary and immediate priority.

BACKGROUND

Although adoption was well known in Egyptian, Greek, Roman, and other ancient cultures[9] it did not gain legal recognition in England and the United States until relatively recent times,[10] being first recognized in the latter. The common law of England did not recognize adoption[11] and confined intestate transmission to blood relatives of the decedent.[12] Absent a unifying common law background, American law developed different approaches to adoption and the adoptee's succession rights.[13] Until recently, however, case decisions were in agreement on one point—the adoptee's intestate inheritance rights within the adoptive family should be severely restricted, if allowed at all. This view stemmed from the common law rule that required consanguinity for intestate succession.[14]

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5. *See* FLA. STAT. §731.23 (1969).

6. *See* FLA. STAT. §731.29 (1969).

7. FLA. STAT. §63.181 (1969).

8. Inheritance of dual portions refers to the ability of an adoptee to inherit in more than one capacity from the same decedent. *See In re* Benner's Estate, 109 Utah 172, 166 P.2d 257 (1946).

9. Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743, 743-49 (1956); Note, *The Law of Adoption*, 22 COLUM. L. REV. 332, 332-33 (1922).

10. "The earliest adoption statute in the United States is variously reported to be that of Mississippi in 1846 and Massachusetts in 1851." *See* Huard, *supra* note 9, at 748.

11. Hockaday v. Lynn, 200 Mo. 456, 461, 98 S.W. 585, 585 (1906); T. ATKINSON, WILLS §23, at 86 (2d ed. 1953).

12. Note, *Property Rights as Affected by Adoption*, 25 BROOKLYN L. REV. 231 (1959). A statute legalizing adoptions was passed in England in 1926. The Adoption of Children Act, 16 & 17 Geo. v, c. 29 (1926). For an earlier English view toward adoption *see* 17 HALSBURY'S LAWS OF ENGLAND §260 (1st ed. 1911).

13. The variety of jurisdictional approaches to the inheritance rights of an adoptee is collected in Note, *supra* note 12.

14. "From time immemorial it has been held by English-speaking peoples that the property of intestate deceased persons should descend to kindred of the blood. This is not a conclusion arrived at by application of principles of logic, but it is a tenet of justice, intuitively and generally recognized, and crystallized into forms of law by common consent." *In re* Bradley's Estate, 185 Wis. 393, 395, 201 N.W. 973, 974 (1925). *See In re* Hewett's Estate, 153 Fla. 137, 142, 13 So. 2d 904, 907 (1943).

The many arguments supporting this "traditional" approach are in essence variations of the English "blood of blood—bone of bone" view of intestate succession transposed into the modern concept of adoption.[15] For example, many courts articulate the "imposing an heir" theory to allow the adoptee to inherit from no adoptive family members other than the parents. Inheritance from other members of the adopting family is prohibited, for "[b]y adoption, the adopters can make for themselves an heir, but they cannot thus make one for their kindred."[16] The "imposing an heir" tenet is basically the "blood of blood—bone of bone" archetype of intestate succession and is used to maintain the adoptee's link with his natural (blood) kindred. The Supreme Court of Florida has indicated approval of the policy underlying this concept:[17]

> The ancestors of the adopter are presumed to know their relatives by blood, and to have them in mind in the distribution of their estates, either by will or descent, but they cannot be expected to keep informed as to adoption proceedings in the probate courts of the counties of this state; and to allow an adopted child to inherit from the ancestors of the adopter would often put property into the hands of unheard of adopted children, contrary to the wishes and expectations of such ancestors.

States following the traditional approach strictly construe adoption statutes that are in derogation of inheritance rights based on blood relationships,[18] and often justify the results by impressing the adoption proceedings with aspects of a contractual relationship.[19] The main premise of this theory is that the adoption "agreement" binds only the "parties," the natural and adoptive parents.[20] Since the adoptee is not a party to the contract, its terms may not be extended to abrogate the adoptee's natural rights of inheritance.[21] The reasoning of the traditionalists is also given impetus by the argument

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15. *See* Huard, *supra* note 9, at 745-46; Note, *supra* note 12, at 231-32.

16. *See In re* Hewett's Estate, 153 Fla. 137, 13 So. 2d 904 (1943); Warren v. Prescott, 84 Me. 483, 487, 24 A. 948, 949 (1892).

17. *In re* Hewett's Estate, 153 Fla. 137, 143, 13 So. 2d 904, 907 (1943), *quoting* Phillips v. McConica, 59 Ohio St. 1, 9, 51 N.E. 445, 447 (1898).

18. *See In re* Hewett's Estate, 153 Fla. 137, 143, 13 So. 2d 904, 907 (1943); *In re* Levy's Estate, 141 So. 2d 803, 805 (2d D.C.A. Fla. 1962); *In re* Bradley's Estate, 185 Wis. 393, 396, 201 N.W. 973, 974 (1925).

19. *See, e.g.*, Merritt v. Morton, 143 Ky. 133, 135, 136 S.W. 133, 134 (1911).

20. *Id.*

21. "The act of the foster parents in adopting the child is a contract into which they entered with those having the lawful custody of the child, an agreement personal to themselves, and, while they have a perfect right to bind or obligate themselves to make the child their heir, they are powerless to extend this right on his part to inherit from others. All inheritance laws are based or built upon natural ties of blood relationship, whereas an adopted child's right to inherit rests upon a contract, and hence only those parties to the contract are bound by it." *Id. See* Fiduciary Trust Co. v. Brown, 152 Me. 360, 131 A.2d 191, 196 (1957).

that the adoptee's right to inherit from his blood kindred should be preserved, since he has "lost the benefit of living with his blood parents, a benefit widely recognized as a very real advantage."[22]

The modern trend, now followed by the majority of American jurisdictions, has rejected intestate succession rights based upon blood kinship with the adoptee.[23] The growing tendency is to consummate a new family relationship by legally withdrawing the adoptee from the natural family and placing him for all purposes, including inheritance, as a child born in lawful wedlock within the adoptive family.[24] The modernists point out that early American decisions upholding the "blood of blood—bone of bone" tenet were based on intuition and not on logic, which, therefore, casts doubt on the inviolability of this mode of succession.[25] As there was no common law of adoption in England, American courts have misapplied the precedential value of succession rights cast in terms of blood relationships in the adoptee situation. The proponents of the new trend contend that statutes inter-

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22. Comment, *Adoption: Twice Adopted Child as Heir of First Adopter,* 3 U. Fla. L. Rev. 237, 238 (1950). "An additional right on the purely material side helps in some measure to offset this loss." *Id.* This view may be compared with numerous cases upholding the adoption of a child as being in the adoptee's best interest although contested by one or both of the natural parents. *See* Hamilton v. Rose, 99 So. 2d 234 (Fla. 1957); *In re* Adoption of Long, 56 So. 2d 450 (Fla. 1952); *In re* Adoption By Cooper, 242 So. 2d 196 (1st D.C.A. Fla. 1970); *In re* Adoption of Vincent, 219 So. 2d 454 (1st D.C.A. Fla. 1969).

23. Until recently, the majority of American jurisdictions adhered to the traditional view of adoption and intestate succession. *See* T. ATKINSON, *supra* note 11, §23, at 86-92. However, at least thirty-one jurisdictions have enacted statutes to completely sever the adoptee from his natural blood kindred, for all purposes including intestate succession, and to place the adoptee within the adoptive family as a natural child of his adoptive parent(s). Such statutes generally make exceptions if a natural and adoptive parent intermarry or if there is a will or written contractual agreement to the contrary. These jurisdictions are ALASKA STAT. §20.10.120 (1971); ARIZ. REV. STAT. ANN. §8-117 (Supp. 1971); CAL. PROBATE CODE §257 (West 1957); COLO. REV. STAT. ANN. §153-2-4 (1964); CONN. GEN. STAT. ANN. §45-65 (1960); DEL. CODE ANN. tit. 13, §920 (1953); D.C. CODE ENCYCL. ANN. §16-312 (1966); HAWAII REV. LAWS §578-16 (1968); IND. ANN. STAT. §§3-120a(3), -122 (1968), *as amended,* (Supp. 1971); KY. REV. STAT. ANN. §199.520 (1971); LA. CIV. CODE ANN. art. 214 (West Supp. 1972); MD. ANN. CODE art. 16, §78 (1966), *as amended,* (Supp. 1971), art. 93, §1-207 (1969); MASS. ANN. LAWS ch. 210, §§7-9 (Supp. 1971); MINN. STAT. §259.29 (1971); MISS. CODE ANN. §1269.06 (1971); MO. ANN. STAT. §453.090 (1969); MONT. REV. CODE ANN. §61-212 (1970); NEB. REV. STAT. §§43-110 to 111.01 (1968); NEV. REV. STAT. §127.160 (1957); N.J. REV. STAT. §9:3-30 (Supp. 1971); N.M. STAT. ANN. §22-2-33 (Supp. 1971); N.Y. DOM. REL. LAW §117 (McKinney Supp. 1971); N.C. GEN. STAT. §§29-17, 48-23 (Supp. 1971); OHIO REV. CODE ANN. §3107.13 (Supp. 1971); OKLA. STAT. ANN. tit. 10, §60.16 (Supp. 1971); PA. STAT. tit. 1, §321 (Supp. 1971); S.C. CODE §10-2587.13 (Supp. 1971); TENN. CODE ANN. §36-126 (Supp. 1971); VA. CODE ANN. §§63.1-233 to 244 (Supp. 1971); W. VA. CODE ANN. §48-4-5 (Supp. 1971); WIS. STAT. §851.51 (1971). Georgia follows the modern majority except that the adoptive family does not inherit from the adoptee the property that he received from his natural family. GA. CODE ANN. §74-414 (Supp. 1971).

24. For jurisdictions in the Fifth Circuit adhering to the majority view *see* GA. CODE ANN. §74-414 (Supp. 1971); LA. CIV. CODE ANN. art. 214 (Supp. 1972); MISS. CODE ANN. §1269.06 (1971).

25. That intuition, not logic, was the foundation for the adoptee's intestate succession rights was conceded in an early American case upholding the traditional view. *See In re* Bradley's Estate, 185 Wis. 393, 201 N.W. 973, 974 (1925). *See also* note 14 *supra.*

rupting the flow of inheritance rights based on blood relationships, such as intestate inheritance from and by one's spouse or the kindred of one's spouse, are not novel and are commonly accepted throughout the United States.[26] Furthermore, the reasoning that one may not impose an heir by adoption on one's kindred is impaired by the fact that heirs may be created by biological means as easily, if not more so, than by adoption.[27] Moreover, the material benefits derived from the adoptee's natural parents are in most instances negligible, since the majority of adopted children, other than those adopted by blood relatives, are illegitimate or come from poor families.[28] Additionally, the argument that adoptees' intestate rights should remain anchored in consanguinity to compensate for deprivation of natural parentage is of limited merit.[29] Many states still, however, restrict intestate succession rights of illegitimates to inheritance from the mother.[30]

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26. *See, eg.*, FLA. STAT. §731.23 (1969). Florida, while adhering to the "blood of blood" concept of intestate succession, gives a novel twist to this approach. Although Florida allows the spouse (non-blood relation) to take by intestacy, FLA. STAT. §731.30 (1969) abrogates inheritance by blood parents from their natural child who has been adopted. Since the parent-child relationship is one of the most fundamental, it has been held that a statute extinguishing the right of natural parents to inherit from the adoptee severs the entire foundation connecting blood relatives with the adoptee. *In re* Fodor, 202 Misc. 11-3, 117 N.Y.S.2d 331, 334 (Sur. Ct. 1952).

27. Although dealing with the anti-lapse statute and its effect on the adoptee, the court in *In re* Baker's Estate, 172 So. 2d 268 (2d D.C.A. Fla. 1965), noted a simple expedient to this problem. If a family member wants only blood kindred to share in his estate he may make a will to that effect. *Id.* at 271; *see In re* Cave's Estate, 326 Pa. 358, 366, 192 A. 460, 464 (1937). Yet, under the traditional approach the natural child has an advantage over the adopted child. If a successor under intestacy legislation, he stands to inherit through his parents unless expressly excluded by virtue of the fact that the deceased family member died with a will. The adopted child, on the other hand, generally has no more right than a stranger to be included by will. An unfair burden is placed on the adoptee, for not everyone makes a will even though able to do so. People are great procrastinators when it comes to will making. Reasons may vary from the idiosyncratic, for example, a belief that making a will brings bad luck, to an honest but mistaken belief that none was needed due to insufficient property ownership. *See* M. SUSSMAN, J. CATES & D. SMITH, *supra* note 3, at 203.

28. Note, *A Re-evaluation of Inheritance and Testamentary Rights with Respect to Adopted Children in Wisconsin*, 1956 WIS. L. REV. 504, 506. According to the FLORIDA DEP'T OF HEALTH & REHABILITATIVE SERVICES, DIVISION OF FAMILY SERVICES ADOPTION STATISTICAL REPORT 1 (1970), 324 adoptees were born in wedlock, 114 were of unknown origin, and 2858 (87%) were born out of wedlock in 1970.

29. Of the adoptions occurring in 1970, 87% of the adoptees were placed with families having an income of $6,000 and above. FLORIDA DEP'T OF HEALTH & REHABILITATIVE SERVICES, *supra* note 28. It could be argued that a "station in life" rule is applicable and once an adoption is finalized the adoptee's tastes and standard of living are molded according to the economic situation of the adoptive family. Thus, his inheritance rights should be related to this "station in life" to which he has become accustomed.

30. For example, FLA. STAT. §731.29 (1969) allows the illegitimate to inherit from his mother and, if recognized in a witnessed writing by the father, he is the heir of such father. However, unless the parents have intermarried the illegitimate does not represent his father or mother by inheriting any part of the estate of his natural parents' kindred.

A final theory of the modernists is that descent and distribution statutes are designed to achieve an orderly, fair, and just disposition of property in accordance with the surmised dispositive wishes of the decedent.[31] The adoptee often lives from earliest memory in the adoptive family's environment, and the circumstances of his origin often remain secret.[32] The adoptee normally assumes the interests and personality of his adoptive family and is considered a natural part of the adoptive family. Thus, the purposes of descent and distribution statutes are best served by treating the child as a natural member of the adoptive family.[33] Since it is state policy to foster adoptions,[34] any compromise that leaves the adopted child tied to two families and precludes inheritance as a natural child within the adoptive family prevents the existence of the true family relationship sought by the family, the adoption agency, and the state.

The authors submit that the modernists' approach is the correct one. The thesis of this article is that upon adoption, the adoptee, for inheritance purposes, should be completely transplanted into the family of his adopting parents and there should be succession by, from, and through the adoptee and the adopting parents.

It is the authors' purpose to analyze existing Florida law in order to indicate whether the adoptee is a "second class citizen" for inheritance purposes. Constructive criticism of defective legislation will be made with the hope and expectation that reform of deficiencies will result in the future.

Judicial Construction of Florida Adoption and Intestate Succession Laws

There are several statutes governing adoption in Florida.[35] The most important, with respect to intestate inheritance rights of adoptees, are Florida Statutes, section 731.30, which begins:[36]

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31. For discussion of this modern view *see In re* Smith's Estate, 7 Utah 2d 405, 326 P.2d 400 (1958).

32. Under a prefiled bill in the Florida Legislature not only are the records of all adoption proceedings to be kept confidential, but a new birth certificate for an adoptee under 12 years of age may be issued to the adopting parents. Fla. H.R. 2856 (Feb. 2, 1972).

33. Note, *supra* note 28, at 510-11.

34. Fla. Stat. §63.011 (1969); Note, *The Effect of Common Law Rights of Parents on Adoption in Florida*, 16 U. Fla. L. Rev. 452, 462 (1963).

35. Fla. Stat. §§63.011-.291, 409.145-.165, 731.10-.11, .20 (1969). Florida's first adoption statute was passed in 1885 although adoption was allowed prior to this time by special legislative enactment. *See* Fla. Laws 1885, ch. 3594, 1883, chs. 3543-3555.

36. The full text of Fla. Stat. §731.30 (1969) is: "*Adopted child.* An adopted child, whether adopted under the laws of Florida or of any other state or country, shall be an heir at law, and for the purpose of inheritance, shall be regarded as a lineal descendant of his adopting parents and the adopting parents shall inherit from the adopted child. The adopted child shall be regarded as the natural brother or sister of the natural children and other adopted children of the adopting parents for the purpose of inheritance from or by them. The adopted child shall inherit from the estate of his blood parents, but his blood parents shall not inherit from the adopted child."

> An adopted child, whether adopted under the laws of Florida or of any other state or county, shall be an heir at law, and for the purpose of inheritance shall be regarded as a lineal descendant of his adopting parents . . . ."

and Florida Statutes, section 63.151, which begins:[37]

> By any judgment or decree of adoption the child shall be the child and legal heir of the adopting parent or parents, entitled to all rights and privileges, and subject to all obligations, of a child born to such parent or parents in lawful wedlock."

The statutory language seems to place the adoptee within the foster family as a natural child of his adopting parents. A reasonable extension would apply Florida Statutes, section 731.23, specifying the mode of intestate succession for relatives by blood or marriage, to allow inheritance between the adoptee and the full range of his adoptive kindred. These statutes through judicial construction, however, have been determined to mean:

> (1) the adoptee inherits *from* all his natural (blood) kindred including his natural parents;[38]
>
> (2) all the natural (blood) kindred *except* the natural parents inherit from the adoptee;[39]
>
> (3) within the adoptive family, intestate succession is strictly limited to inheritance by and from the adoptee, his adoptive parents, and the natural and adopted children of the adoptive parents. The adoptee may *not* inherit by intestacy from any other adoptive kindred.[40]

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37. The full text of FLA. STAT. §63.151 (1969) is: *"Effect of adoption.* By any judgment or decree of adoption the child shall be the child and legal heir of the adopting parent or parents, entitled to all rights and privileges, and subject to all obligations, of a child born to such parent or parents in lawful wedlock. After the adoption the natural parents, if living, are relieved of all legal duties and obligations due from them to the child and are divested of all rights with respect to the child, but when the adopting parent is married to one of the natural parents of the child or thereafter intermarries with one of the natural parents, the relation of the child toward the natural parents is not altered by the adoption. When an adopted child has been subsequently adopted by some third party or readopted by his natural parents or one of them, the adopted child shall not inherit from an adopted parent when he has been subsequently adopted by another or by his natural parents or one of them in the absence of some evidence in writing that the adopting parent considered the child his child for the purposes of inheritance notwithstanding the subsequent adoption. Nothing in this law shall prevent a legally adopted child from inheriting from the natural parents under the laws of this state or any state." Florida Statutes, §63.281, is a separate provision relating to adult adoptees, which incorporates much of §§63.151 and 731.30.

38. *See* FLA. STAT. §§63.151, .281, 731.30 (1969). *See also In re* Levy's Estate, 141 So. 2d 803, 805-06 (2d D.C.A. Fla. 1962).

39. *See* FLA. STAT. §§63.151, 731.30 (1969). *See also In re* Levy's Estate, 141 So. 2d 803, 804-05 (2d D.C.A. Fla. 1962).

40. *In re* Poole's Estate, 152 Fla. 610, 611, 15 So. 2d 323, 324 (1943); *In re* Hewett's

Thus, despite statutory language to the contrary, the Florida judiciary has adhered to the traditional "blood of blood—bone of bone" view of succession, thereby generating a hybrid complex of inheritance rights that stigmatize the adoptee as a second-class citizen.

The effect of present Florida adoption laws on intestate succession may be understood by analyzing three prominent decisions.[41] In 1943 the supreme court, in *In re Hewett's Estate*,[42] held that an adopted child of a deceased first cousin of the intestate was unable to participate with collateral blood kindred in the intestate's property. The court construed the applicable statute[43] to allow the adoptee to inherit within the adoptive family from the adoptive parents only.[44] Therefore, the adoptee is not an heir at law or lineal descendant of the adopting parents for purposes of inheriting from lineal or collateral kindred of the adopting parents.[45] The lower court had construed the statute to mean the adoptee was placed for inheritance purposes in the same position as a natural child of the adoptive parents.[46] The supreme court, however, declined to allow the adoptee to inherit from other than those adoptive relatives specifically enumerated in the statute, and held that "descendants" was a word connoting only those persons who were in the blood stream of the ancestors.[47] Since the statute did not *expressly* make the adoptee the heir at law or lineal descendant of anyone other than the adopting parents, the supreme court stated: "[W]e cannot add anything to the statute which is not expressly stated therein or which is not necessarily implied by the language used."[48]

This tenacious adherence to the traditional view basing intestate succession on blood ties produced a curious result in another 1943 supreme court decision. In *In re Poole's Estate*[49] the issue was whether the estate of an adoptee dying intestate would devolve to his adoptive first cousins or to the next of kin of his previously deceased wife. Under Florida intestate

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Estate, 153 Fla. 137, 141-43, 13 So. 2d 904, 906-07 (1943); FLA. STAT. §731.30 (1969).

41. The first Florida supreme court case in the area of adoption was not decided until 1937. *In re* Palmer's Adoption, 129 Fla. 630, 176 So. 537 (1937). Since there is a paucity of case law on this subject, legislative change in the adoptee's rights of intestate succession may be accomplished without the abridgment of long-standing vested rights.

42. 153 Fla. 137, 13 So. 2d 904 (1943).

43. FLA. STAT. §731.30 (1969), *formerly* Fla. Probate Act of 1933, §31: "An adopted child . . . shall be an heir at law, and for the purpose of inheritance, shall be regarded as a lineal descendant of his adopting parents, and the adopting parents shall inherit from the adopted child." *Id.*

44. 153 Fla. at 141, 13 So. 2d at 906. Although not under consideration by the *Hewett* court, the adoptee may also inherit from the natural and adoptive brothers and sisters of his adopting parents. FLA. STAT. §731.30 (1969).

45. 153 Fla. at 142, 13 So. 2d at 907.

46. *Id.* at 140, 13 So. 2d at 906. The lower court also noted the statutory phrase "for the purpose of inheritance" was not qualified by words such as "from its adopting parents alone," and therefore the term "inheritance" should be used in its unrestricted sense. *Id.*

47. 153 Fla. at 142, 13 So. 2d at 907.

48. *Id.* at 140, 13 So. 2d at 906.

49. 153 Fla. 610, 15 So. 2d 323 (1943).

succession law, the next of kin of a predeceased spouse inherit only when all maternal and paternal kindred of the intestate are non-existent.[50] The court, however, held the deceased wife's kindred inherited to the exclusion of the intestate's adoptive first cousins.[51] Thus, the hybrid character of the adoptee's status was further accentuated by excluding adoptive family members from participation in the adoptee's estate in favor of those who had *neither* a blood nor an adoptive relationship with the adoptee. In fact, the rationale of the *Poole's Estate* case can be logically carried to the extreme. If an adoptee died survived by no blood kin (other than parents), spouse or in-laws, and no adoptive kin closer in relationship than brothers and sisters his estate would pass to the state of Florida by escheat.[52]

The third important decision is *In re Levy's Estate*.[53] In issue was whether a child adopted out of his natural family could nevertheless inherit from his natural brothers and sisters. Although Florida Statutes, section 731.30, is silent on the subject,[54] the court upheld the right of adoptees to inherit from natural siblings and stated:[55]

> The adoption statutes give new rights to adoptees. They do not, however, attempt to limit or take away rights already in existence with the exception that the natural parent may not inherit from his natural child who has been adopted.

In contrast to the *Hewett* court, which refused to add anything not expressly stated or necessarily implied by the statute,[56] the *Levy* court interpreted the statute's silence on the adoptee's right to inherit from his natural kindred to mean that the adoptee inherits from the full range of his blood relatives.[57] One interesting observation should be emphasized here. It is submitted that there is the legal right of dual inheritance vis-a-vis all of the brothers and sisters of the adoptee. Florida Statutes, section 731.30, states in part: "The adopted child shall be regarded as the natural brother or sister of the natural children and other adopted children of the adopting parents for the purpose of inheritance from or by them." *Levy* indicates that there may be inheritance from or by siblings in the natural family. Hypothetically, an adoptee could die survived by five brothers in the adoptive family and five sisters in the natural family. Under intestacy all would share the estate equally, one-tenth each.

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50. FLA. STAT. §731.23 (7) (1969).
51. 153 Fla. at 611, 15 So. 2d at 324.
52. *See* FLA. STAT. §731.33 (1969).
53. 141 So. 2d 803 (2d D.C.A. Fla. 1962).
54. FLA. STAT. §731.30 covers only inheritance from adopting parents, natural parents, and children of the adopting parents.
55. 141 So. 2d at 804.
56. *See In re* Hewett's Estate, 153 Fla. 137, 140, 13 So. 2d 904, 906 (1943).
57. 141 So. 2d at 806. The court did not determine if under the statutory language the brothers and sisters in the adoptive family inherit to the exclusion of or equally with the adoptee's natural brothers and sisters. *See* FLA. STAT. §731.30 (1969).

In summary, although Florida Statutes, section 731.30, states that an adoptee shall be regarded as a lineal descendant of his adoptive parents for the purpose of inheritance, and Florida Statutes, section 63.151,[58] states that an adoptee shall be entitled to all the rights of a child born to the adoptive parents, Florida courts have adhered to the traditional view of intestacy, holding blood ties supreme over de facto ties of family relation, unless specified to the contrary by statute. In view of the decisions it appears that Florida law will continue to be construed to preclude inheritance between the adoptee and the full range of his adoptive relatives, in spite of contrary statutory language.[59] It is, therefore, time for the Florida Legislature to make clear its intent with an explicit, comprehensive statute.

FLORIDA ADOPTION LAW INCONSISTENCIES

Confidentiality of Records

Florida decisions evince the belief that Florida Statutes, section 731.30, is extremely generous to adoptees by augmenting their inheritance rights beyond those of persons nurtured in the natural family.[60] However, when viewed realistically in conjunction with other Florida adoption statutes, the so-called "liberality" inherent in Florida Statutes, section 731.30, is nonexistent. While the courts maintain that the adoptee inherits from the full range of his blood relatives, a statute requires all adoptive records to be kept confidential.[61] To foster successful adoption relationships, the real name and place of birth of the adoptee may not be given to the adopting parents if the adoptee has been committed to a child placement agency.[62] After entry of the adoption decree by the circuit court, the files and adoption records are sealed.[63] Such records may not be reopened unless a court order is obtained.[64] Furthermore, under the procedures employed by the State Department of Public Welfare, which must supervise all Florida adoptions,[65]

58. This statute was enacted as Fla. Laws 1943, ch. 41759, at 181-87. The supreme court in both *In re Hewett's Estate* and *In re Poole's Estate* ignored this currently enacted legislation that had been approved by the Governor on May 17, 1943, and filed with the secretary of state the next day. Although under the 1885 Florida constitution (art. III, §18) it did not become law until sixty days after the legislature adjourned, this bill provided insight as to the legislative meaning and intent concerning inheritance rights of the adopted child. *In re Hewett's Estate* (June 8, 1943) and *In re Poole's Estate* (Oct. 22, 1943) were both decided subsequent to this enactment.

59. *See* Korbin v. Ginsberg, 232 So. 2d 417, 418 (4th D.C.A. Fla. 1970), for statement inferring that the adoptee has the same rights as a natural child of his adopting parents. *See also* Gessner v. Powell, 238 So. 2d 101, 102 (Fla. 1970).

60. *See, e.g., In re* Hewett's Estate, 153 Fla. 137, 141-42, 13 So. 2d 904, 906-07 (1943). "This statute is very liberal in its provisions in behalf of the adopted child. Such child inherits from its adopting parents as if it were their own natural child, and likewise inherits from its natural parents." *Id.*

61. FLA. STAT. §63.181 (1969).

62. FLA. STAT. §63.071 (1) (1969).

63. FLA. STAT. §63.181 (1969).

64. *Id.*

65. FLA. STAT. §63.011 (1969). The Department of Public Welfare is also charged with

a new birth certificate may be issued to the adopting parents and their names substituted for those of the natural parent(s).[66] Thus, the Florida statutes and the State Department of Public Welfare policies are designed to prevent the adoptee or his natural kindred from identifying each other. The Florida adoption laws both promote litigation by requiring a court order before the names of the natural parents will be divulged,[67] and effectively limit the adoptee's intestate succession rights to the estate of his adoptive parents and his adoptive siblings because of the difficulty of ascertaining natural relatives.[68] Contrary to the views expressed in *Hewett* and *Levy*,[69] the bond between the adoptee and his natural family for inheritance purposes is in most instances little more than an empty legal right.

The Legitimate Adoptee

The statutory veil of secrecy surrounding adoption is only the first obstacle the adoptee must surmount in order to obtain the inheritance rights Florida courts have maintained are his by law. Although by statute the adoptee is the legitimate issue of his adoptive parents,[70] his succession rights within the blood family are tied to the circumstances of his birth before the adoption. These inheritance rights vary greatly according to the circumstances of the adoptee's origin.[71] For instance, if the adoptee is born in lawful wedlock, he is the legitimate issue of the blood parents.[72] As a "legitimate" adopted child he may inherit from all maternal and paternal blood kindred, his adoptive parents, and his adoptive brothers and sisters.[73] The adoptive siblings, adoptive parents, and blood kindred, except for the blood parents, are eligible to inherit from the adoptee.[74] Thus, statutory intestate succession

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licensing all child placement agencies in the state. FLA. STAT. §§63.031, .041, 409.175 (1969).

66. This provision is also a part of the proposed adoption bill. Fla. H.R. 2856 (Feb. 2, 1972).

67. FLA. STAT. §63.181 (1969). According to the FLORIDA DEP'T OF HEALTH & REHABILITATIVE SERVICES, DIVISION OF FAMILY SERVICES ADOPTION STATISTICAL REPORT (1970) there were 3,296 adoptions in the state in 1970. This evinces the yearly number of court orders necessary to reopen adoption files to effect the adoptee's succession rights within the natural family.

68. After obtaining a court order and locating the natural family, the adoptee may be precluded from participating in the estate of a deceased blood relative if he has not asserted his heirship within the statute of limitations. *See* FLA. STAT. §§732.30, 733.211, .42, 734.03, 735.09-.11 (1969).

69. *See* note 60 *supra*. "The adoption statutes give new rights to adoptees. They do not, however, attempt to limit or take away rights already in existence . . . ." *In re* Levy's Estate, 141 So. 2d 803, 804 (2d D.C.A. Fla. 1962). "The statute does not attempt to take away an adoptee's preexisting right of inheritance from his natural parents or from his natural kindred." *Id.* at 805-06.

70. FLA. STAT. §63.151 (1969).

71. *See* Appendix.

72. Sanders v. Yancey, 122 So. 2d 202, 205 (2d D.C.A. Fla. 1960).

73. FLA. STAT. §§731.23, .30 (1969). *See In re* Hewett's Estate, 153 Fla. 137, 13 So. 2d 904 (1943).

74. FLA. STAT. §731.30 (1969). *See In re* Hewett's Estate, 153 Fla. 137, 13 So. 2d 904 (1943).

rights are indeed liberal for the legitimate adoptee who successfully obtains knowledge of his natural parents.[75] However, in 1970 fewer than ten per cent of the adoptees in Florida were of legitimate origin.[76] While three per cent of the adoptees in 1970 were of unknown origin, the overwhelming number were illegitimate.[77]

The Illegitimate Adoptee

Although the adoption statutes are noticeably silent on the adoptee's right to inherit from blood kindred other than the natural parents, the statute defining the inheritance rights of an illegitimate child is explicit. The illegitimate may inherit only from his mother and, if paternity is properly acknowledged in writing, his father.[78] He cannot inherit by intestate succession from other paternal or maternal blood kindred.[79] Therefore, the inheritance rights of an illegitimate adoptee are vastly different from those of the legitimate adoptee.[80] While the adopted illegitimate may inherit only from his natural mother; his adopting parents; his adoptive brothers and sisters; and, if acknowledged, from his natural father, those who may inherit from such adoptee are his adoptive parents, his adoptive brothers and sisters, and the heirs at law of his *natural mother*.[81] Neither the acknowledging father nor his kindred can inherit.[82] Thus, although the adoptee's status has ostensibly been "legitimized" by the adoption decree, the adopted illegitimate remains tainted by his origin and inherits in a manner different from the adopted legitimate, even though both are classified as adopted persons.[83]

The determination of the adoptee's legitimate-illegitimate status is fraught with complexity augmented by state imposed shrouds of secrecy.[84] Although issue conceived and born out of wedlock are traditionally deemed illegitimate,[85] the incidents of this status may also attach to the issue of an invalid marriage,[86] a marriage contracted in a foreign jurisdiction to evade domi-

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75. *See* FLA. STAT. §§731.23, .30 (1969). *See also In re* Hewett's Estate, 153 Fla. 137, 141, 13 So. 2d 904, 906 (1943); *In re* Levy's Estate, 141 So. 2d 803, 804-06 (2d D.C.A. Fla. 1962).

76. FLORIDA DEP'T OF HEALTH & REHABILITATIVE SERVICES, DIVISION OF FAMILY SERVICES ADOPTION STATISTICAL REPORT 1 (1970).

77. *Id.*; 87% of the adoptees in 1970 were illegitimate.

78. FLA. STAT. §731.29 (1969).

79. *Id.* The constitutionality of this statute was recently upheld in *In re* Caldwell's Estate, 247 So. 2d 1 (Fla. 1971).

80. *See* Appendix.

81. FLA. STAT. §§731.29, .30 (1969).

82. *See* FLA. STAT. §731.29 (2) (1969).

83. For a discussion of the constitutionality of such classification, *see* text accompanying notes 122-26 *infra*.

84. *See* FLA. STAT. §63.181 (1969).

85. *See* Kennelly v. Davis, 221 So. 2d 415, 416 (Fla.), *cert. denied*, 396 U.S. 916 (1969).

86. *See* Warrenberger v. Folsom, 140 F. Supp. 610, 613 (M.D. Pa. 1956) (void common law marriage).

ciliary laws[87] or a bigamous marriage.[88] The legitimacy of a child born in wedlock may be repudiated by the father.[89] In addition, the law of the father's domicile is given full faith and credit in determining the legitimacy of his issue,[90] so that the status of an adoptee in Florida may be determined by the laws of foreign jurisdictions.

The status of the adoptee may be further confused by annulment of the natural mother's marriage. Traditionally, to protect the status of a conceived child, an annulment decree is effective as of the time entered, not *ab initio*.[91] At least one Florida court, however, has held rebuttable the presumption that a child born in wedlock is legitimate and has decided that an annulment prior to the birth of the child gives the mother standing to sue to declare the child a bastard.[92]

An additional problem concerns the sufficiency of the evidence required to prove paternity.[93] Florida Statutes, section 731.29, requires that the father acknowledge his paternity in writing in the presence of a competent witness as a condition to the right of the illegitimate child to inherit from such natural father.[94] Florida courts have held an informal writing,[95] a hotel registration,[96] and a letter to a college registrar[97] as sufficient indicia of paternity. However, the inheritance rights accompanying such tenuous examples of acknowledgment may be more accessible to the unadopted illegitimate than to the adopted illegitimate who must contend with the state policy of confidentiality concerning adoption records.[98] This secrecy barrier may also prevent the adoptee from proving intermarriage of his

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87. Peerless Pac. Co. v. Burckhard, 90 Wash. 221, 223, 155 P. 1037, 1038 (1916).

88. *See* FLA. STAT. §§61.041-.051 (1969). *See also* Irving v. Irving, 152 Ga. 174, 108 S.E. 540 (1921). The element of good faith of the parents entering into the marriage may have a bearing on the status of their issue. Connor v. Rainwater, 200 Ga. 866, 38 S.E.2d 805 (1946). *See* Worman v. Worman, 113 Fla. 233, 152 So. 435, 436 (1934) (Davis, C.J., concurring). Florida lacks such legislation as found, for example, in Ohio. OHIO REV. CODE ANN. §2105.18 (Page 1968). "The issue of parents whose marriage is null in law shall nevertheless be legitimate." *Id.* The word "marriage" in the phrase "whose marriage is null in law" in §2105.18 of the Ohio Code has been interpreted to mean a de facto marriage, a purported marriage, a marital status, or an informal marriage and when such a marriage is entered into in good faith by at least one of the parties and children are afterwards born of that marriage, such children are legitimate regardless of the reasons for the nullity of the marriage. Santilli v. Rosetti, 87 Ohio L. Abs. 400, 411-12, 178 N.E.2d 633, 640 (C.P. Ashtabula County (1961)).

89. Gossett v. Ullendorff, 114 Fla. 159, 169, 154 So. 177, 181 (Fla. 1934).

90. Peterson v. Paoli, 44 So. 2d 639, 640 (Fla. 1950); Young v. Garcia, 172 So. 2d 243, 244 (3d D.C.A. Fla. 1965).

91. *In re* Rugg's Estate, 159 Fla. 777, 781, 32 So. 2d 840, 842 (1947).

92. *See* B.S.B. v. B.S.F., 217 So. 2d 599, 600 (2d D.C.A. Fla. 1969).

93. *See* FLA. STAT. §731.29 (1969). Proof of paternity, however, does not enable the illegitimate adoptee to inherit from any other paternal blood kindred. *See* Appendix.

94. FLA. STAT. §731.29 (1) (1969).

95. *In re* McCollum's Estate, 88 So. 2d 537, 540 (Fla. 1956).

96. Wall v. Altobello, 49 So. 2d 532, 534 (Fla. 1950).

97. *In re* Horne's Estate, 149 Fla. 710, 713-14, 719-20, 7 So. 2d 13, 14, 16 (1942).

98. *See* text accompanying notes 59-69 *supra*.

natural parents, which by statute has the effect of "instant legitimization" of his status.[99]

Artificial Insemination Adoptee

The problems inherent in utilizing the legitimate-illegitimate criterion to determine adoptee intestate succession rights become more complex upon consideration of the impact of artificial insemination on standards of legitimacy and illegitimacy.[100] Here the facts of conception as well as birth are determinative. The desire for secrecy precludes precise data on the current use of artificial insemination. However, its growing popularity is indicated by estimates that up to 250,000 humans living today are the product of this process.[101] In spite of growing public acceptance and the novel legal questions raised,[102] there have been very few successful attempts to deal with the problem through legislative means.[103] Florida presently has no legislation defining the rights and status of issue conceived through the process of artificial insemination. If the inheritance rights of an adoptee continue to be tied to the circumstances of birth, such status must be legislatively determined.[104]

Although Florida has not defined the status of artificial insemination issue, there are sufficient decisions from other jurisdictions to formulate the probable legal consequences of this process on the intestate succession rights of the Florida adoptee. There are three types of artificial insemination: (1) artificial insemination husband (AIH), (2) artificial insemination donor (AID), and (3) combined artificial insemination (CAI).[105] Because the AIH

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99. *See* FLA. STAT. §731.29 (1) (1969).

100. Artificial insemination appears to have occurred as early as 1322 when used by Arabs to selectively breed their horses and impregnate the horses of their enemies with an inferior strain. Smith, *Through a Test Tube Darkly: Artificial Insemination and the Law*, 67 MICH. L. REV. 127, 128 (1968).

101. *Id.* at 133. It has been estimated that one out of every ten couples in the United States cannot conceive offspring in the usual manner. Of the reported cases of infertility, approximately 40% is due to the husband's sterility. Note, *Human Artificial Insemination: An Analysis and Proposal for Florida*, 22 U. MIAMI L. REV. 952, 954 (1968).

102. Legal questions such as the effect of artificial insemination on the legitimacy of the child; the problem of incest and intermarriage, since the donor is kept secret; and the effect of this process on paternity actions are as yet unanswered. Further, since sperm may be stored safely for eight to eighteen years before being used in this process, the Rule Against Perpetuities may have to be renovated. *See generally* The St. Petersburg (Fla.) Times, Oct. 31, 1971, §A at 16, col. 3.

103. For a brief summary of legislative bills *see* Smith, *supra* note 100, at 143 n.86. Although the Oklahoma Legislature was the first to pass a statute on this subject, OKLA. STAT. ANN. tit. 10, §§551-53 (Supp. 1971), two other states have followed suit. *See* CAL. CIV. CODE §216 (West 1970); KAN. STAT. §23.128-.130 (1969).

104. Since Genetics Laboratories, Inc., a sperm bank laboratory chain, is opening an office in Miami, Florida, this problem must be faced in the near future. *See* The St. Petersburg (Fla.) Times, Oct. 31, 1971, §A at 16, col. 1.

105. Artificial Insemination Husband or homologous insemination (AIH), the husband is donor of the semen; semen from a donor other than the husband is used in Artificial Insemination Donor or heterologous insemination (AID); and Combined Artificial In-

(husband donor) child is produced through the union of the sperm and egg of the natural (married) parents, such child would probably be deemed "legitimate,"[106] and if subsequently adopted by a third person would have the inheritance rights of a legitimate adoptee.[107] On the other hand, the AID (non-husband donor) child has generally been held to be illegitimate, even if impregnation of the mother was made with the consent of her husband.[108]

The foundation for the American approach to artificial insemination was established by a Canadian case, *Orford v. Orford.*[109] In this decision the court held that AID (non-husband donor) without the husband's consent is adultery and therefore a sufficient basis for divorce.[110] Nearly thirty years later in *Strnad v. Strnad,*[111] an American court held that a child resulting from AID (non-husband donor), with the consent of the husband, was not illegitimate but pointedly refused to determine the property rights of such child.[112] In *Strnad* the child's status was further confused by the court's holding that the child had been "semi-adopted" by the consenting husband.[113] While the basis for the *Strnad* holding is unclear, it is an ex-

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semination (CAI) involves the mixing of the semen of the husband and donor. Note, *supra* note 101, at 952-53.

106. Plowscowe, *The Place of Law in Medico-Moral Problems: A Legal View II,* 31 N.Y.U.L. REV. 1238, 1242 (1956).

107. *See* Appendix. However, there is at least one English decision to the contrary. L. v. L., 1 All. E.R. 141 (1949). In this case, a couple whose marriage was never consummated agreed to undergo the AIH process for one year. The couple later separated without knowing of the wife's pregnancy. The English court held the child was not the result of a normal sexual consummation and was therefore illegitimate. *Id.* at 143-44, 146. *See* Smith, *supra* note 100, at 135; Note, *Artificial Insemination,* 30 BROOKLYN L. REV. 302, 315 (1964).

108. Smith, *supra* note 100, at 136; Note, *supra* note 101, at 958. However, the three states with legislation on this subject have made legitimate the issue by artificial insemination if the spouse consents in writing to such impregnation. *See* CAL. CIV. CODE §216 (West 1970); KAN. STAT. §§23.128-.130 (1969); OKLA. STAT. ANN. tit. 10, §§551-53 (Supp. 1971). California not only requires consent in writing by the spouse but also requires that the issue be born during the marriage or within 300 days after dissolution of the marriage before such issue shall be deemed legitimate. CAL. CIV. CODE §216 (West 1970).

109. 49 Ont. L.R. 15, 58 D.L.R. 251 (1921).

110. *Id.* at 22-23, 58 D.L.R. at 258-59. "In the *Orford* case . . . AID was declared to be an act of adultery, and it is almost certain that if such was the basis of the decision, the court would have declared the child illegitimate." Note, *supra* note 107, at 313. However, in a 1945 case, *Hoch v. Hoch,* AID without the husband's consent was held not to be adultery. TIME, Feb. 26, 1945, at 58, col. 1. Although *Hoch* appears to be the first American (Cook County, Ill.) case on the subject, it was not officially reported and has not been precedential in the United States. Smith, *supra* note 100, at 135-36.

111. 190 Misc. 786, 78 N.Y.S.2d 390 (Sup. Ct. 1948).

112. *Id.* at 787, 78 N.Y.S.2d at 392.

113. *Id.* The court stated: "The situation is no different than that pertaining in the case of a child born out of wedlock who by law is made legitimate upon the marriage of the interested parties." *Id.* Under Florida law, such child would be legitimated only by intermarriage of the mother and the *natural* father. *See* FLA. STAT. §731.29 (1969). For the inheritance right of the adoptee if Florida adhered to the *Strnad* semi-adoption theory *see* Appendix.

ception to the general American approach that the absence of a statute classifies the AID (non-husband donor) child, whether conceived with or without the husband's consent, as illegitimate.[114]

In the area of artificial insemination the presumption that a child born in wedlock is legitimate appears to be inapplicable,[115] and the law generally looks upon the donor of the semen as the natural father.[116] This view is upheld even though the donor's identity is usually unknown.[117] Finally, while statutes on human artificial insemination make such issue legitimate *only* if the spouse consents *in writing*,[118] in the absence of statutes such issue are generally deemed illegitimate, regardless of the spouse's consent.[119]

The present Florida intestate succession rights of the adoptee are completely inadequate in the case of artificial insemination. Since there is no Florida statute in this area, the courts must answer the following questions:

(1) Is the issue of artificial insemination illegitimate: (a) regardless of the spouse's consent, or (b) if such consent is not in writing?

(2) Is the issue of artificial insemination legitimate: (a) on the basis of the *Strnad* "semi-adoption" theory[120] or (b) on the basis of the spouse's consent or acknowledgment?[121]

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114. *E.g.*, Gurskey v. Gurskey, 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (Sup. Ct. 1963); *see* Comment, *Domestic Relations — Heterologous Artificial Insemination, With or Without the Consent of the Husband, Constitutes Adultery on the Part of the Mother, and the Child so Conceived Is Illegitimate*, 43 GEO. L.J. 517 (1955).

115. Smith, *supra* note 100, at 136. In a recent criminal case, People v. Sorensen, 68 Cal. 2d 280, 437 P.2d 495, 66 Cal. Rptr. 7 (1968), the court recognized the impossibility of locating the "natural father" of an AID child and charged the "lawful father" who had consented to AID with child support. To support this holding the court used a combination of contract theory, public policy, presumption of legitimacy, and a California statute requiring the parent to support both legitimate and illegitimate offspring. Although, in dicta, the court emphasized the lack of logic in stigmatizing an artificially inseminated child as illegitimate, it called upon the legislature to make this determination. *Id.* at 284-89, 437 P.2d at 498-502, 66 Cal. Rptr. at 10-14. *See also* CAL. CIV. CODE §216 (WEST 1970).

The parties to the suit may of course stipulate the child was artificially conceived. Strnad v. Strnad, 190 Misc. 786, 78 N.Y.S.2d 390 (Sup. Ct. 1948). In the absence of legislation, however, the paternity of the child appearing on the birth certificate poses a dilemma for the attending physician. If he enters the name of the husband as father, the physician subjects himself to penalties for perjury and falsifying a public record. However, stating the name of the real donor is disapproved by the medical profession. *Symposium on Artificial Insemination*, 7 SYRACUSE L. REV. 96, 113 (1955). Some courts merely require competent evidence to rebut the presumption of legitimacy. *See* People v. Sorensen, 68 Cal. 2d 280, 286, 289, 437 P.2d 495, 499-500, 66 Cal. Rptr. 7, 10-11 (1968) (burden on defendant); B.S.B. v. B.S.F., 217 So. 2d 599 (2d D.C.A. Fla. 1969) (burden on plaintiff).

116. Smith, *supra* note 100 at 132; *Symposium, supra* note 115, at 111; *Contra*, People v. Sorensen, 68 Cal. 2d 280, 284, 437 P.2d 495, 498, 66 Cal. Rptr. 7, 10 (1968).

117. Note, *supra* note 101, at 956-58.

118. *See* note 108 *supra*.

119. *See* text accompanying notes 112-116 *supra*.

120. *See* Strnad v. Strnad, 190 Misc. 786, 78 N.Y.S.2d 390 (Sup. Ct. 1948).

121. This would be a form of contract theory. Since a child is not legitimated pursuant to Florida Statutes, §731.29, unless the husband acknowledges himself to be the

Until the legislature reevaluates adoptee status and intestate succession rights, the adoptee must bear an inordinate burden of proof of such facts of conception as consent of mother's spouse to artificial insemination, consent in writing, and type of artificial insemination employed. The adoptee will also bear the burden to prove intermarriage of his parents, validity of the marriage, acknowledgment of the father, sufficiency of acknowledgment, effective date of annulment decree or effective law of the father's domicile. Such fine lines between legitimacy and illegitimacy become gossamer threads when adoption proceedings are impressed with secrecy. The complexities inherent in this approach are illogical and inequitable. Further, since it is a basic constitutional proposition that all persons similarly situated shall be treated equally by the law,[122] the Florida approach may violate the equal protection clause.[123] Creating a legal classification based on adoption and limiting some members within that class to the inheritance rights of illegitimates, while affording others similarly situated the inheritance rights of legitimates, appears to be an arbitrary and unnecessary discriminatory practice.[124]

For these reasons limitations on intestate inheritance based on blood relationships should have no application in the area of adoption. The adoptee should not be penalized for his origin, and Florida should join the ranks of the enlightened majority. In summary, the present adoption and succession laws should be legislatively revised to expressly make the status of the adoptee legitimate, to place him within the adoptive family for all purposes including inheritance, as a child born in wedlock to his adoptive parents,[125] and to sever forever his relationship through inheritance with his blood kindred.[126]

Related Problems

The judicial approach in Florida to adoption and intestate succession has left unresolved various important legal issues. For instance, because the

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father, a new statute would be required to employ the *Strnad* reasoning in Florida.

122. Truax v. Corrigan, 257 U.S. 312, 333 (1921); Atlantic Coast Line R.R. v. Coachman, 59 Fla. 130, 137, 52 So. 377, 380 (1910).

123. U.S. CONST. amend. XIV, §1. *See also* FLA. CONST. art. I, §2.

124. *See* Cunningham v. United States, 256 F.2d 467, 473 (5th Cir. 1958); Battaglia v. Adams, 164 So. 2d 195, 198-99 (Fla. 1964); Davis v. Florida Power Co., 64 Fla. 246, 266-67, 60 So. 759, 766 (1913); Seaboard Air Line Ry. v. Simon, 56 Fla. 545, 552-53, 47 So. 1001, 1003 (1908). The constitutionality of inheritance rights of unadopted illegitimates is beyond the scope of this note. *See In re* Caldwell's Estate, 247 So. 2d 1 (Fla. 1971) (statute constitutional); *In re* Jensen's Estate, 162 N.W.2d 861 (N.D. 1968) (statute unconstitutional).

125. *See* Schick v. Howe, 137 Iowa 249, 114 N.W. 916 (1908); Vreeland v. Vreeland, 296 S.W.2d 55 (Mo. 1956).

126. In *Gessner v. Powell* the court held that an adopted child may not maintain a wrongful death action for his natural father. The court distinguished *In re* Levy's Estate, 141 So. 2d 803 (2d D.C.A. Fla. 1962), as applying only to the inheritance rights of an adoptee. The court also stated that in all other respects the relation between the natural parents and the adopted child is severed. Gessner v. Powell, 238 So. 2d 101, 102 (Fla. 1970).

succession rights between the adoptee and the natural family are not severed, the adoptee, if adopted by a blood relative, may inherit dual portions from a deceased relative.[127] As an example, assume a grandmother, after adopting *X*, one of the children of her deceased daughter, died intestate. The adopted child is the lineal descendant of the adopting parent[128] and inherits the estate of his blood parent.[129] The child also represents the latter parent in taking from the estate of a lineal ancestor.[130] Therefore, under Florida law it could be argued that *X* would receive ½ of the decedent's estate as her adopted child and also receive ¼ of the decedent's estate as representative of his natural mother. Thus, *X* would inherit ¾ of the estate while the other child would inherit ¼.[131] Such dual inheritance would be precluded by making the adoptee the child of the adopting parent(s) for all purposes, including inheritance from adoptive lineal and collateral kindred, and completely severing the adoptee's ties within the natural family as issue of his blood parents.

Second, the adoption statutes are vague as to inheritance rights when the adoptee is readopted. For instance, suppose *C* is adopted by *A* and *B*. Subsequent to this proceeding, these adoptive parents die or become incapacitated and *C* is readopted by *X* and *Y*. According to Florida Statutes, section 731.30, "the adopting parents shall inherit from the adopted child."[132] But according to Florida Statutes, section 63.151:[133]

> When an adopted child has been subsequently adopted by some third party . . . the adopted child shall not inherit from an adopted parent when he has been subsequently adopted . . . in the absence of some evidence in writing that the adopting parent considered the child his child for the purposes of inheritance notwithstanding the subsequent adoption.

Thus, the statutes do not terminate the prior adopting parents' right to participate in the estate of their adopted child who is subsequently adopted by others, although the adoptee may not be able to share in the estate of his prior adopting parents.

Further, Florida law is unclear as to the relation of the child to his natural parents when an adopting parent intermarries with one of the natural parents. For instance, suppose *A* and *B* had a child, *C*. Later *A* and *B* were divorced and their natural child *C* was adopted by *X* and *Y*. After

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127. *See In re* Hewett's Estate, 153 Fla. 137, 140-42, 13 So. 2d 904, 906-07 (1943); FLA. STAT. §731.30 (1969).

128. FLA. STAT. §731.30 (1969).

129. *Id. See* FLA. STAT. §63.151 (1969).

130. FLA. STAT. §731.23 (1969).

131. *See* Wagner v. Varner, 50 Iowa 532 (1879); *In re* Benner's Estate, 109 Utah 172, 166 P.2d 257 (1946). *Contra*, Delano v. Bruerton, 148 Mass. 619, 20 N.E. 308 (1889); Mississippi Valley Trust Co. v. Palms, 360 Mo. 610, 229 S.W.2d 675 (1950).

132. FLA. STAT. §731.30 (1969).

133. FLA. STAT. §63.151 (1969).

several years *X* dies and *Y* marries *A*, the natural mother of *C*. According to section 731.30: "The adopted child shall inherit the estate of his blood parents, but his blood parents shall not inherit from the adopted child."[134] However, section 63.151 provides: "[W]hen the adopting parent is married to one of the natural parents of the child or thereafter intermarries with one of the natural parents, *the relation of the child toward the natural parents is not altered by the adoption.*"[135] Does this mean that *B*, the natural father, as well as *A* may now participate in the estate of *C*? While this is unlikely, the statute is uncertain in its language.

Finally, the present Florida adoption laws in conjunction with the pretermitted child statute[136] may have the effect of disrupting descent and distribution of the natural parent's estate. For instance, suppose *A*, an unmarried female adult, made a valid will in 1950 leaving her entire estate to her mother without providing for after-born children. In 1955, *A* had an illegitimate child that at birth was placed with an adoption agency and adopted by *X* and *Y*, both of whom had formerly made wills leaving their respective estates to each other. Fifteen years later *A* dies, and *X* and *Y* die simultaneously. Pursuant to Florida Statutes, section 731.11:[137]

> When a testator omits to provide in his will for any of his children born after the making of the will . . . such child shall receive a share in the estate of the testator equal in value to that which he would have received if the testator had died intestate.

Unless such omission appears from the will to be intentional,[138] the child born to or subsequently adopted by the testator[139] has the right to participate in the testator's estate as an intestate successor despite the provisions of the will.[140] Thus, under present law *C* would inherit both *A's* entire estate and the entire estates of *X* and *Y*. The mother of *A* would receive nothing, despite being the sole beneficiary under *A*'s will.[141] Therefore, the adoptee may be the pretermitted child of both the natural and adopting

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134. FLA. STAT. §731.30 (1969).

135. FLA. STAT. §63.151 (1969) (emphasis added).

136. FLA. STAT. §731.11 (1969).

137. *Id.*; *see* FLA. STAT. §731.23 (1969).

138. FLA. STAT. §731.11 (1969).

139. *Id.*; *In re* Frizzell's Estate, 156 So. 2d 558 (2d D.C.A. Fla. 1963).

140. *In re* Frizell's Estate, 156 So. 2d 558 (2d D.C.A. Fla. 1963); FLA. STAT. §731.11 (1969).

141. A fifth problem does not pertain to Florida alone. This is the need for a national Uniform Adoption Act delineating the status and intestate succession rights of the adoptee. Although there is incongruity among state adoption statutes, the status conferred by a foreign state is recognized under the rules of comity and full faith and credit. However, a foreign power may not attach incidents to this status, which differ from the laws or policy of the local forum. Mott v. First Nat'l Bank, 98 Fla. 444, 447-48, 124 So. 2d 36, 37 (1929), *rev'd on other grounds*, 101 Fla. 1224, 133 So. 78 (1931); Tsilidis v. Pedakis, 132 So. 2d 9, 12 (1st D.C.A. Fla. 1961). Thus, a child adopted in a state such as California or Ohio, in which the adoptee's status is that of a natural child born within the adoptive family, would be deprived in Florida of the full range of inheritance rights incident to this

parents. This disruptment of testate succession would be alleviated by severing the adoptee's relationship with the natural parents.

Conclusion and Recommendations

The present Florida adoption and intestate succession laws are unfair, unnecessarily complex, and contrary to legislative intent. By tying the adoptee to his natural family and the circumstances of his origin, Florida law places the burden on the adoptee to prove his former legitimate or illegitimate status in order to perfect statutory inheritance rights. Concomitantly this information has been placed under a statutory lock.[142] Not only does this secrecy lead to increased litigation, but it may also prevent the adoptee from asserting his inheritance rights within the statutes of limitations. Since there is no Florida law on artificial insemination, the inheritance rights of an adoptee may fall into one of three classifications: those of a legitimate, an illegitimate, or a hybrid legitimate-illegitimate. The complexities inherent in such treatment of members similarly situated within the same classification are unreasonable and may violate the principle of equal protection of the law. In addition, the present Florida laws do not clearly delineate the procedures for dual inheritance or the aspects of subsequent adoptions or inheritance rights following intermarriage of the adopting and natural parents. Finally, by maintaining the adoptee's ties with the natural family, there is danger of disrupting the testamentary succession pattern of the natural parent's estate.

Therefore, the Florida Legislature should act to remove any doubt that the adoptee is "the child and legal heir of the adopting parent or parents, entitled to all rights and privileges, and subject to all obligations of a child born to such parent or parents in lawful wedlock."[143] Since it is state policy to promote adoptions,[144] Florida should join the ranks of the majority of jurisdictions by placing the adoptee within the adoptive family for all purposes including inheritance by, from, and through his adoptive lineal and collateral kindred.[145] The status of the adoptee should be that of a legitimate person, and his intestate succession rights should be limited to those inheritance rights of his adoptive parents' natural issue in order to preclude dual succession. Not only should the intestate inheritance relationship with the natural parents and their kindred be severed, but there should be no intestate rights by virtue of adoption between the adoptee and a prior adoptive family when such adoptee has subsequently been adopted by a third party.[146]

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foreign status. *See In re* Hewett's Estate, 153 Fla. 137, 13 So. 2d. 904 (1943). *See also* Okla. Stat. Ann. tit. 10, §60.1-.23 (1966), *as amended*, (Supp. 1971).

142. *See* Fla. Stat. §63.181 (1969).

143. Fla. Stat. §63.151 (1969).

144. Fla. Stat. §63.011 (1969); Note, *The Effect of Common Law Rights of Parents on Adoption in Florida*, 16 U. Fla. L. Rev. 452, 462 (1963).

145. "It is as competent for the legislature to place a child by adoption in the direct line of descent as for the common law to place a child by birth there." Warren v. Prescott, 84 Me. 483, 487, 24 A. 948, 949 (1892).

146. If any member of the adoptee's natural family or prior adopted family wishes to

To achieve this result, the authors recommend that Florida Statutes, sections 63.151, 63.281, and 731.30, be repealed and the following statute be enacted:

> *Effect of Adoption.* Upon entry of the adoption decree, the adoptee shall be the legitimate child and heir of the adopting parent or parents, subject to all the rights, privileges, duties, and obligations of a child born to such parent or parents in lawful wedlock. Inheritance shall be by, from and through the adoptee and the lineal and collateral kindred of the adoptive family. Upon adoption, the relationship between the adoptee and any natural parent against whom the adoption decree operates, and kindred thereof, shall be severed. Neither the natural parent nor kindred of the natural parent shall succeed to the estate of the adoptee. The adoptee shall not succeed to the estate of the natural parent or kindred of the natural parent. However, if an adopting parent subsequently intermarries with a natural parent against whom the adoption decree operated, and said natural parent adopts the adoptee, there shall be inheritance by, from and through said natural parent, the kindred of said natural parent and the adoptee. Any subsequent adoption alters legal rights with respect to the former adoptive family to the same extent that an initial adoption alters legal rights with respect to the adoptee's natural family. Nothing contained herein shall be construed to limit the right of any person to make a will.[147]

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make the adoptee an heir, a will to this effect may be made. *See In re* Dolan's Estate, 169 Cal. App. 2d 628, 337 P.2d 498 (3d Dist. Ct. App. 1959); Wailes v. Curators of Central College, 363 Mo. 932, 254 S.W.2d 645 (1953); Nickell v. Gall, 49 N.J. 186, 229 A.2d 511 (1967).

147. The bill that had been prefiled in the Florida House of Representatives proposed to amend FLA. STAT. §731.30 (1969) as follows: "731.30 *Adopted Child.* An adopted child, whether adopted under the laws of Florida or of any other state or country, shall be an heir at law, and for the purpose of inheritance, shall be regarded as a lineal descendant of his adopting parents, and the adopting parents shall inherit from the adopted child. The adopted child shall be regarded as the natural brother or sister of the natural children of the adopting parents for the purpose of inheritance from or by them." Fla. H.R. 2856 (Feb. 2, 1972). This amendment would leave inheritance between the adoptee and the adoptive family restricted to only inheritance by and from the adoptee, the adoptive siblings, and the adoptive parents. Florida thus would continue to adhere to the minority view. *See* text accompanying notes 36-57 *supra.*

However, a committee (on Health and Rehabilitative Services) substitute for Fla. H.R. 2856 died on the House calendar during the 1972 legislative session.

(a) Unless acknowledged by the natural father or the natural parents intermarry, the illegitimate adoptee does not inherit from the natural father. FLA. STAT. §731.29 (1969).

(b) Pursuant to FLA. STAT. §63.151 (1969), an adoptee who is subsequently re-adopted does not inherit from the first adopting parent unless specified otherwise in writing. Thus, under *Strnad*, the spouse of the child's natural mother would be deemed the first adoptive parent. *See* Strnad v. Strnad, 190 Misc. 786, 78 N.Y.S.2d 390 (Sup. Ct. 1948).

(c) Inheritance from the natural kindred of the child's mother would depend on whether the child was deemed "legitimate" under the *Strnad* theory. While the *Strnad* court stressed the child was not illegitimate, it clearly refused to clarify the child's status. Strnad v. Strnad, 190 Misc. 786, 787, 78 N.Y.S.2d 390, 392 (Sup. Ct. 1948).

APPENDIX

FLORIDA ADOPTION AND INTESTATE SUCCESSION RIGHTS

Chart I

Florida Adoptee's Succession to Estate of:	Legitimate Adoptee	Illegitimate Adoptee	AIH	*Artificial Insemination* AID Legitimate	*Orford* Illegitimate	*Strnad* Semi-adoption	CAI
Natural Mother	yes	yes	yes	yes	yes	yes	yes
Natural Father	yes	no[a]	yes	*	no	no[b]	*
Maternal Blood Kindred	yes	no	yes	yes	no	*[c]	*
Paternal Blood Kindred	yes	no	yes	*	no	*	*
Adoptive Parents	yes	yes	yes	yes	yes	yes	yes
Adoptive Siblings	yes	yes	yes	yes	yes	yes	yes
Adoptive Collateral Kindred	no	no	no	no	no	no	no

Chart II

Florida Succession to Estate of Adoptee Who is:	Natural Mother	Natural Father	Maternal Blood Kindred	Paternal Blood Kindred	Adoptive Parents	Adoptive Siblings	Adoptive Kindred
Legitimate Adoptee	no	no	yes	yes	yes	yes	no
Illegitimate Adoptee	no	no	yes	no	yes	yes	no
AIH Adoptee	no	no	yes	yes	yes	yes	no
AID Legitimate Adoptee	no	no	yes	*	yes	yes	no
AID (*Orford*) Illegitimate	no	no	yes	no	yes	yes	no
AID (*Strnad*) Semi-adopted	no	no	yes	no	yes	yes	no
CAI	no	no	yes	*	yes	yes	no

* No information available. a, b, and c are explained after footnote 147 on page 623.