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WISCONSIN ADOPTION LAW AND PROCEDURE

EUGENE M. HAERTLE*

DEFINITION AND HISTORY

Adoption is the legal establishment of the relationship of parent and child between persons not so related.¹ Adoption is a humane proceeding looking primarily to the interest of the child,² and the controlling consideration always is the welfare and best interest of the child.³ Proceedings for adoption are entirely statutory.⁴ In England there was no adoption, either at Common Law or under statutes, until the year 1926.⁵ In the United States adoption exists only by statute based to some extent in certain states on the civil law, particularly where the state's jurisprudence is derived from the civil law. Such statutes were first enacted about the middle of the nineteenth century and they now have been enacted in practically all of the states.⁶

The first of the states whose jurisprudence is based exclusively upon the Common Law to introduce a statute on adoption was the State of Massachusetts. The statute was passed in that state in 1851.⁷ Wisconsin followed Massachusetts and passed its first adoption law in 1853, a re-enactment substantially of the Massachusetts statute of 1851.⁸ That act was amended by succeeding legislatures⁹ but no great change was made until 1929 when the law was revised by the Children's Code.¹⁰ The latest revision of the entire Act became effective on June 12, 1947.¹¹

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¹ 2 C.J.S. 367.

² *Parsons v. Parsons*, 101 Wis. 76, 77 N.W. 147 (1898).

³ *Adoption of Jackson*, 201 Wis. 642, 231 N.W. 158 (1930).

⁴ *In re Will of Bresnehan*, 221 Wis. 51, 265 N.W. 93 (1936); *St. Vincent Infant Asylum v. Central Wisconsin Trust Company*, 189 Wis. 483, 206 N.W. 921 (1926); *Petition of Rice*, 179 Wis. 531, 192 N.W. 56 (1923).

⁵ *Adoption of Children Act*, 1926 (16 & 17 Geo. 5, c. 29) s. 8.

⁶ 2 C.J.S. 370.

⁷ Laws 1851 c. 324.

⁸ Laws 1853 c. 85; 1 C.J. 1372; Note 22, *infra*.

⁹ Laws 1864 c. 278; Laws 1865 c. 132; Laws 1882 c. 222; Laws 1885 c. 377 s. 19; Laws 1887 c. 45 s. 2; Laws 1889 c. 287 s. 2; Laws 1893 c. 62; Laws 1895 c. 18, c. 206 s. 1; Laws 1897 c. 220; Laws 1901 c. 106 s. 1, c. 117; Laws 1905 c. 108 s. 2; Laws 1907 c. 660; Laws 1921 c. 429; Laws 1923 c. 49, c. 150; Laws 1925 c. 4, c. 107; Laws 1929 c. 29; Laws 1931 c. 352; Laws 1935 c. 170, c. 228; Laws 1939 c. 524 s. 2, 3; Laws 1941 c. 259 s. 8, 9, 10; Laws 1943 c. 284, c. 503 s. 61; Laws 1945 c. 117, c. 196, c. 253, c. 300, c. 328, c. 378, c. 502; Laws 1947 c. 184 s. 2, 4, c. 298.

¹⁰ Laws 1929 c. 439 s. 1, 7, 11.

¹¹ Laws 1947 c. 218.

CONSTRUCTION OF STATUTES

The general rule is that statutory law is to be strictly construed as it is in derogation of the Common Law. The courts, however, have generally held that the construction of adoption laws should not be narrowed so closely as to defeat the legislative intent and therefore should be given such a construction, without doing violence to the terms of the statute, as will sustain rather than defeat the promotion of the welfare of children, which is always the first consideration.¹² In Wisconsin the Supreme Court has held for a liberal construction,¹³ a substantial compliance with the statutes,¹⁴ and a strict construction.¹⁵ The statute provides that failure to comply with the essential requirements of the statute shall be ground for annulment within two years after the date of the order of adoption.¹⁶ Since adoption proceedings are wholly statutory, equitable principles should not be resorted to when the validity of an adoption is in issue.¹⁷

CONSTITUTIONALITY

Where statutes of adoption do not violate specific constitutional requirements and restrictions, they have been uniformly held constitutional.¹⁸ The scope and extent of substitution of parents, the incidents and consequences including rights of inheritance and succession, are all matters for legislative consideration and reasonable regulation.¹⁹

JURISDICTION

The county court of residence of petitioners only has jurisdiction; however, if the petitioners are non-residents who are related to the child to be adopted, they may adopt such child in the county court of the county in which such child resides.²⁰

WHO MAY ADOPT

The petitioners must be adults, but no petition by a married person shall be granted unless the other spouse joins therein.²¹ However, if

¹² 2 C.J.S. 375.

¹³ *Parsons v. Parsons*, 101 Wis. 76, 77 N.W. 147 (1898); *Estate of Bradley*, 185 Wis. 393, 201 N.W. 973 (1925); *In re Marchant's Estate*, 121 Wis. 526, 99 N.W. 320 (1904).

¹⁴ *Lacher v. Venus*, 177 Wis. 558, 188 N.W. 613 (1922).

¹⁵ *St. Vincent Infant Asylum v. Central Wisconsin Trust Company*, 189 Wis. 483, 206 N.W. 921 (1926); *Will of Mathews*, 198 Wis. 128, 223 N.W. 434 (1929).

¹⁶ Wis. Stat. 322.09(1).

¹⁷ *St. Vincent Infant Asylum v. Central Wisconsin Trust Company*, 189 Wis. 483, 206 N.W. 483 (1926).

¹⁸ *Lacher v. Venus*, 177 Wis. 558, 188 N.W. 613 (1922); 2 C.J.S. 372.

¹⁹ *In re Estate of Hood*, 206 Wis. 227, 239 N.W. 448 (1931).

²⁰ Wis. Stat. 322.01(1); 32 Atty. Gen. 393; 33 Atty. Gen. 571.

²¹ *In re Will of Bresnehan*, 221 Wis. 51, 265 N.W. 93 (1936); *Adoption of Bearby*, 185 Wis. 33, 200 N.W. 686 (1924).

the spouse is the natural father or mother of such person, then he or she must consent to such adoption.²² The petitioner may be an unmarried person.

WHO MAY BE ADOPTED

A person of any age may be adopted.²³ A child, if 14 years of age or over, must consent in writing before the county judge.²⁴ If the person to be adopted is an adult, his consent alone is required.²⁵ However, some county courts insist upon the consent of the spouse of such adult who is being adopted. An adopted person may be subsequently adopted again by other persons.²⁶

THE PETITION

Good practice requires that the petitioners should set forth all the material facts; the names, residences, and the relationship of the petitioners; the name, date and place of birth of the child; the names of the parents of the child, and whether living or deceased; the name of the mother only if the child is illegitimate; if the parental rights of either or both of the parents have been terminated, that fact should be alleged, and a certified copy of the judgment of termination should be attached. The fact that the petitioners are of sufficient ability to bring up, and furnish suitable nurture and education to the child, should be stated. If it is desired to change the name of the child to that of petitioners, the prayer of the petition should include such request. If the parent of the child to be adopted is a minor, a guardian ad litem should be appointed for such parent, and an order appointing guardian ad item should be filed with the petition.

The Supreme Court has held that a petition may be sufficient to give the county court jurisdiction of the proceedings although it fails to state all the facts essential to authorize such adoption and even fails to state the name or residence of either parent.²⁷ The Supreme Court has also held that on the filing of a petition the county judge acquires jurisdiction to determine all questions requisite to a valid judgment of adoption, and a determination wrong or on insufficient evidence, or illegal evidence, or without any evidence will not affect the jurisdiction to render such judgment.²⁸

²² Wis. Stat. 322.01, 322.04(1).

²³ Wis. Stat. 322.01.

²⁴ Wis. Stat. 322.04 1).

²⁵ Wis. Stat. 322.04(7).

²⁶ Wis. Stat. 322.08.

²⁷ *In re McCormick's Estate*, 108 Wis. 234, 84 N.W. 148 (1900).

²⁸ *Parsons v. Parsons*, 101 Wis. 76, 206 N.W. 921 (1898).

CONSENT OR RECOMMENDATION

The statutes require the following consents or recommendations:

1) The consent of the living parents of a child.²⁹ Specific performance will not be enforced to compel the adoptive parents to comply with their contract to let the father visit the child, although the contract was made in consideration of consent of adoption, such contract being invalid.³⁰

2) If the parental rights of both parents or of the surviving parent are terminated, then the report and recommendation of the State Department of Public Welfare.³¹

3) If the child to be adopted be of the age of 18 years but less than 21 years and shall have been abandoned by the parents, termination of their parental rights must be had in the county court wherein the adoption proceedings are pending,³² and the same procedure is followed as in the termination of parental rights in Juvenile Court.³³ With reference to notice in termination of parental right proceeding, what is said in an early Wisconsin adoption case is important.³⁴

4) If the parental rights of one parent are terminated, the consent of the remaining parent is sufficient.³⁵

5) If no living parent, then the report and recommendation of the State Department of Public Welfare.³⁶

6) If a non-resident parent has executed a written release, valid at the time of its execution, of the custody of the minor, adoption may be granted on receipt of a report and recommendation of the Department of Public Welfare.³⁷

7) If the child is illegitimate, the consent of the mother and the report and recommendation of the State Department; do not need consent of putative father.³⁸

8) If the child is 14 years of age or over, the written consent of the child, in the presence of the county judge at the time of hearing, is required. However, the court may for cause waive this requirement.³⁹

9) If the person to be adopted is an adult, the consent of such person alone is required.⁴⁰ However, some county court judges insist upon the consent of the spouse.

10) If the parent of the child to be adopted is a minor or an incompetent, the consent of such minor or incompetent is effective only if concurred in by the guardian ad litem.⁴¹

²⁹ Wis. Stat. 322.04(1).

³⁰ *Stickles v. Reichardt*, 203 Wis. 579, 234 N.W. 728 (1931).

³¹ Wis. Stat. 322.04(2).

³² Wis. Stat. 322.04(8).

³³ Wis. Stat. 48.07(7).

³⁴ *Schlitz v. Roenitz*, 86 Wis. 31, 56 N.W. 194, 21 A.L.R. 483 (1893).

³⁵ Wis. Stat. 322.04(2).

³⁶ Wis. Stat. 322.04(3).

³⁷ Wis. Stat. 322.04(3).

³⁸ Wis. Stat. 322.04(1); 322.04(6).

³⁹ Wis. Stat. 322.04(1).

⁴⁰ Wis. Stat. 322.04(7).

⁴¹ Wis. Stat. 322.04(9).

11) If a parent of a child to be adopted has been committed as a mentally ill, mentally infirm, or a mentally deficient person, but is on conditional release from the institution, said parent while on conditional release may consent to the adoption. However, such consent shall not be effective unless concurred in by the guardian ad litem of such person.⁴²

12) If the child has a legal guardian, the consent of said guardian must be given.⁴³

13) A detailed report, recommendation, and consent of an agency or county home must be given if the parental rights of the parents of the child have been terminated and child given to guardianship of agency or county home, and consent of State Department of Public Welfare if child has been committed to Wisconsin Child Center.⁴⁴

14) The consent by a parent must be signed before the county judge or the juvenile judge of the county where the parent resides or is living or where the child was born, and after the judge has explained to the parent the effect of the consent and has examined the parent and is satisfied that the consent is voluntarily and freely given.⁴⁵

The custody of a child given by a divorce judgment to one parent does not terminate the parental rights of the other parent. The written consent to the adoption of a child by a mother without her knowing the identity of the persons adopting the child satisfies the requirements of the statutes.⁴⁶ The consent of the husband of the mother of a child must be secured even though he is not the natural father of the child.⁴⁷ The Attorney General has also held that a bigamous marriage does not constitute lawful wedlock,⁴⁸ although a provision of the statute states that the issue of all marriages declared null in law shall nevertheless be declared legitimate.⁴⁹

REVOKING OF CONSENT

There is no direct statutory provision in Wisconsin with reference to the revoking of the consent of a parent when once given; however, the Attorney General has held that the county court cannot proceed with an adoption where the mother of the child has withdrawn her previously given written consent.⁵⁰ The statute provides, however, that the minority of a parent is not ground for revoking consent.⁵¹ The

⁴² Wis. Stat. 322.04(9); 51.13.

⁴³ Wis. Stat. 322.04(1).

⁴⁴ Wis. Stat. 322.04(2) (5).

⁴⁵ Wis. Stat. 322.04(4).

⁴⁶ 23 Atty. Gen. 156.

⁴⁷ 25 Atty. Gen. 597.

⁴⁸ 27 Atty. Gen. 369.

⁴⁹ Wis. Stat. 245.36.

⁵⁰ 35 Atty. Gen. 155.

⁵¹ Wis. Stat. 322.04(4).

majority view of the courts is that consent once given cannot be withdrawn without the consent of the court.⁵²

NOTICE OF HEARING

Upon filing the petition, an "Order and Notice of Hearing" should also be filed setting the time for hearing not exceeding thirty days for an investigation of the petitioners, and of the former environments and the antecedents of the child. If the report is not ready on the date set, the matter shall stand adjourned.⁵³

INVESTIGATION

The court may appoint as an investigator any person or agency it wishes. Investigation must be made of the former environment and antecedents of the child to be adopted for the purpose of ascertaining whether it is a proper subject for adoption, and of the home of the petitioner to determine whether it is a suitable home for the child, and of the petitioners themselves to see whether they are satisfactory and proper persons. Inquiry is made of at least two responsible citizens and of the pastor of the church to which petitioners may belong.⁵⁴

Attorneys should furnish the investigator with copies of all papers filed in court and also of the marriage certificate of the petitioners, and in proper cases a certified copy of death certificate of previous spouse, certified copy of judgment of divorce, certified copies of orders terminating parental rights, certified copies of change of name, and any other document of public record.

HEARING

The child should live in the home of the petitioners at least six months before the court will grant the adoption. However, the court may in its discretion, upon good cause shown, waive such time when the court is satisfied that the minor and the home of petitioners are suited to each other.⁵⁵ The petitioners and the child to be adopted, if fourteen years of age or over, must attend the hearing, but a younger child need not unless the court so orders, which it very infrequently does.⁵⁶ The hearing may be in chambers.⁵⁷ Where there is a divorce and a remarriage and a step-parent petitions to adopt the child of a spouse, the courts usually insist that the marriage be at least one year old before granting the adoption.

⁵² 156 A.L.R. 1001; 138 A.L.R. 1034.

⁵³ Wis. Stat. 322.03(1).

⁵⁴ Wis. Stat. 322.02(1)(2).

⁵⁵ Wis. Stat. 322.02(3).

⁵⁶ Wis. Stat. 322.03(2).

⁵⁷ Wis. Stat. 322.03(4).

RECORDS CLOSED

The files and records are not open to inspection or copy by any person except upon the order of the court for good cause shown and are kept in separate locked files, and the person in charge of the records may not disclose the names of the natural or adoptive parents of a child unless ordered to do so by the court.⁵⁸

BIRTH RECORDS CHANGED

In the Order of Adoption the name of the child adopted may be changed to that of the parents by adoption.⁵⁹ Usually the given name is also changed although the statute does not so specifically provide. If the adopted child was born in Wisconsin, a new birth record is issued showing the change of name and the adoptive parents as the real parents. If the child adopted was born elsewhere in the United States and that state does not change the birth record, the State of Wisconsin will issue a birth certificate showing the place and date of birth, upon compliance with the conditions set forth in the statute.⁶⁰ It is the duty of the Clerk of Court, after the entry of the Order of Adoption, to mail to the Bureau of Vital Statistics the necessary data needed to change the birth record. This can be done on the Bureau of Vital Statistics form #196.⁶¹

EFFECT OF ADOPTION

The effect of the Order of Adoption is to completely change the legal status of the adopted person from that of a child of the natural parents to that of a child of the adoptive parents and to free the adopted person from all legal obligations to or on account of the natural parents, and vice versa,⁶² and to create a new relationship between the child and the adoptive parents which has all the incidents of a status.⁶³ It is a civil or contractual status.⁶⁴ If the adopted person is not survived by a spouse or by issue or by an adoptive parent and there is no heir or next of kin of the adoptive parents, the property of the adopted person shall descend and be distributed as though there had been no adoption.⁶⁵ If a parent of the person adopted is married to the adoptive parent, the relation of the child to the natural parent is not altered by the adoption.⁶⁶ The adopted person does not lose the right to inherit from his

⁵⁸ Wis. Stat. 322.06.

⁵⁹ Wis. Stat. 322.05.

⁶⁰ Wis. Stat. 69.33.

⁶¹ Wis. Stat. 322.05.

⁶² Wis. Stat. 322.07(1).

⁶³ *Stickles v. Reichardt*, 203 Wis. 579, 234 N.W. 728 (1931); *In re Estate of Hood*, 206 Wis. 227, 239 N.W. 448 (1931).

⁶⁴ *Estate of Bradley*, 185 Wis. 393, 201 N.W. 973 (1925).

⁶⁵ Wis. Stat. 322.07(2).

⁶⁶ Wis. Stat. 322.07(3).

natural parents⁶⁷ and may inherit property from his natural as well as from his adoptive parents.⁶⁸ It was within the legislative power to change the line of descent of property of an adopted child from his natural parents and their heirs to his adoptive parents and their heirs.⁶⁹ However, any statute interfering with the common law principle that the property of intestate deceased persons should descend to kindred of the blood should be strictly construed.⁷⁰ An adopted child of a predeceased child of an intestate does not have the right to inherit from such intestate.⁷¹ Marriage and adoption of a child revokes a will previously made by an adoptive parent.⁷² A child adopted after the making of a will has the same right to a share of the estate as an afterborn child.⁷³ An adopted person does not become an heir of his brother or sister by adoption.⁷⁴ A foreign adoption, to be recognized in Wisconsin, must be validly made pursuant to the existing laws of the sister state.⁷⁵

ANNULMENT AND LIMITATIONS

Failure to comply with the essential requirements of the statute shall be ground for annulment of the order of adoption within two years after date of entry thereof.⁷⁶ This section of the statute is ineffective to validate an order of adoption which in the first instance was void for lack of jurisdiction.⁷⁷ An order of adoption in a proceeding in which all parties appeared and were heard and acted in good faith is a final and conclusive determination unless vitiated by fraud.⁷⁸ Except as provided in the next paragraph, an order of adoption made by a court of this state which had jurisdiction of the parties and of the subject matter shall be conclusive and binding on all persons and in all proceedings after two years from the date of entry thereof.⁷⁹

If the adopted person develops mental illness, mental deficiency, epilepsy, or venereal disease before he is fourteen years of age, and from conditions existing prior to adoption, of which conditions the parents by adoption had no knowledge or information, they may petition the county court of the county in which they reside, before the

⁶⁷ Wis. Stat. 322.07(4); *In re Estate of Sauer*, 216 Wis. 289, 257 N.W. 28 (1934).
⁶⁸ 20 Atty. Gen. 977.

⁶⁹ *Estate of Hood*, 206 Wis. 227, 239 N.W. 448 (1931).

⁷⁰ *Estate of Bradley*, 185 Wis. 393, 201 N.W. 973 (1925).

⁷¹ *Estate of Matzke*, 250 Wis. 204, 26 N.W.(2d) 659 (1947); *Estate of Bradley*, 185 Wis. 393, 201 N.W. 973 (1925).

⁷² *Glascott v. Brag*, 111 Wis. 605, 87 N.W. 853 (1901).

⁷³ *Sandon v. Sandon*, 123 Wis. 603, 101 N.W. 1089 (1905).

⁷⁴ *Lichter v. Thiers*, 139 Wis. 481, 121 N.W. 153 (1909); *Hole v. Robbins*, 53 Wis. 514, 10 N.W. 617 (1881).

⁷⁵ *Genz v. Riddle*, 199 Wis. 545, 226 N.W. 957 (1929).

⁷⁶ Wis. Stat. 322.09(1).

⁷⁷ *Will of Bresnehan*, 221 Wis. 51, 265 N.W. 93 (1936).

⁷⁸ *Carlson v. McCormick*, 178 Wis. 408, 190 N.W. 108 (1922).

⁷⁹ Wis. Stat. 322.09(1).

adopted person is fifteen years of age, for the annulment of the adoption and make the State Department of Public Welfare a party thereto, and if the court finds that the facts bring the petitioners within this subsection, it shall revoke the adoption, and make the State Department of Public Welfare the legal guardian of such child.⁸⁰

COLLATERAL ATTACK

A void adoption order may be attacked by any interested person, and the power to collaterally attack a void order of adoption has been granted to the adoptive parent.⁸¹

APPEAL

The appeal of any minor from an order of adoption may be taken by any person on his behalf. In an appeal from an order of adoption, if the child is a minor, the State Department of Public Welfare is a party and shall be served with notice of appeal.⁸² No bond shall be required of nor costs awarded against any child, or person acting on behalf of a child, on an appeal from an order of adoption.⁸³

CONTRACTS FOR ADOPTION

Specific performance of a contract for adoption should not be decreed unless the contract in its terms and meaning is clearly established so as to show without room for fair doubt, that the parties to it intended the child to have the right of heirship the same as if born to those taking it into their family.⁸⁴

In such cases the facts must not only be consistent with performance of such a contract, but must also be such that they cannot reasonably be harmonized with any other theory.⁸⁵ The Supreme Court of Wisconsin has stated:

"Assuming that a contract to adopt may be specifically enforced, upon which we express no opinion, it is clear that it cannot be where the proposed foster-parents are dead * * *. Assuming that a contract for adoption existed, no action for specific performance will lie where both the prospective foster-parents are dead."⁸⁶

⁸⁰ Wis. Stat. 322.09(2) (3).

⁸¹ 2 C.J.S. 440; *In re Mathews' Will*, 198 Wis. 158, 223 N.W. 434 (1929).

⁸² Wis. Stat. 324.01 (3).

⁸³ Wis. Stat. 324.02.

⁸⁴ *Winke v. Olsen*, 164 Wis. 424, 160 N.W. 164 (1916).

⁸⁵ *Heath v. Cuppel*, 163 Wis. 62, 157 N.W. 527 (1916).

⁸⁶ *St. Vincent Infant Asylum v. Central Wisconsin Trust Company*, 189 Wis. 483, 206 N.W. 921 (1926).

CHILD PLACEMENT

In closing, attention is called to the following little known statutes:

"No person, other than the parent or legal guardian, and no firm, association, or corporation, and no private institution shall place, assist, or arrange for the placement of any child in the control and care of any person, with or without contract or agreement, or place such child for adoption, other than a licensed child welfare agency."⁸⁷

* * * * *

"No person shall bring, or cause to be brought, or send, or cause to be sent, into this state or take, or cause to be taken, or send, or cause to be sent, out of this state any child for the purpose of placing such child in a foster-home or of procuring his adoption, without first obtaining the consent of the State Department of Public Welfare; but this section shall not apply to a resident who brings a child into the state for adoption in his own family, nor to a parent or guardian who takes or sends a child outside of the state for placement in a foster-home."⁸⁸

BILLS BEFORE LEGISLATURE

At the time of writing this article there are two bills before the Senate of the State of Wisconsin. One bill⁸⁹ clarifies a few sections of the Statutes with reference to corrected birth certificates and the length of time before an investigation report shall be filed with the court, amends the section on consent so that a parent may give consent before a judge of any court of record, unless the court otherwise orders, and makes other minor changes. The other bill⁹⁰ would grant to the lineal issue and lineal ancestors of an adopted child the same inheritance tax exemption and rate as the adopted child has.

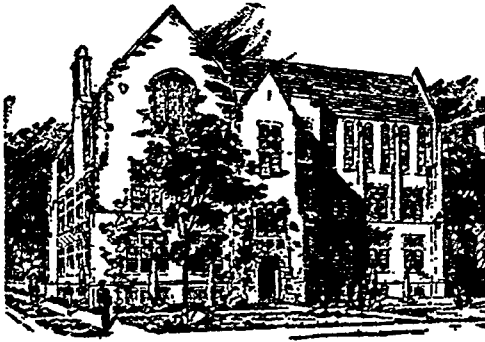
⁸⁷ Wis. Stat. 48.37(1).

⁸⁸ Wis. Stat. 48.42(1).

⁸⁹ Bill No. 97, S.

⁹⁰ Bill No. 456, S.

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