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THE LAW IN ILLINOIS PERTAINING TO THE ADOPTION OF CHILDREN

ANN GOGGIN LUTTERBECK

INTRODUCTION

The family is the bulwark of a democratic society, and this aspect of our social philosophy probably has a greater influence on our practices of adoption than any other single factor. Those family units, otherwise incomplete for the lack of children, by the practice of adoption are able to form complete family units by substituting adoptive parents for the natural parents. The relationship comes to us from the Roman law, being wholly unknown to the common law. The English Parliament did not recognize it until 1926 when a statute was passed providing for "The Adoption of Children."1

Because originally the statutes passed in the United States were in derogation of the common law, they were strictly construed; but with the increased interest in adoption and the advancement of social agencies restricted to placing children for adoption, a more liberal construction of the statutes has resulted. Today in Illinois, by statutory provision, the adoption statute is to be liberally construed.2

Some questions about adoption are best answered by a social agency, and there is no attempt in this paper to explore the functions of such agencies nor their interrelationship with lawyers handling adoption matters. The paper is limited to legal aspects of adoption, and more particularly the law of Illinois.

From the date of the first statute in Illinois in 1867,3 there has been a constant improvement in the statute to further protect all three parties to an adoption proceeding; the child, the adopting parents and the natural parents.

There are today approximately 900,000 childless families seeking to adopt an estimated 90,000 children available for adoption.4 Unfortu-
nately, as frequently occurs when there is a shortage of a highly desirable commodity, a black market has developed whereby persons are willing and able to violate the law regarding the placement of children for adoption by the payment of high fees to persons having custody of adoptable children.\(^5\)

It is the intention to show in this paper the status of the law pertaining to adoption in the state of Illinois today. The law results from various social factors, and changes will inevitably result from the combined effort of social service agencies, specializing in the placing of children for adoption, and our legislators.

**HISTORICAL SKETCH OF THE LAW OF ADOPTION**

The first statute regarding adoption in Illinois was passed in 1867, entitled “An act to provide for the adoption of minors.”\(^6\) In 1874, the law was revised and included as new provisions that if the person who intended to adopt a child was married, then his spouse had to join in the petition, and also the requirement of consent, of either the parents or guardians.\(^7\)

In 1955, a provision was added that in the absence of consent of the parents, the reason for the failure to present such consent must be given at the hearings.\(^8\)

In 1933, amendments to the act pertaining to the appointment of a guardian ad litem omitted all references to the legitimacy or illegitimacy of the child sought to be adopted.\(^9\)

In 1953, a provision was added for the appointment of a guardian ad litem for mentally ill parents with authority to consent to the adoption of the child of such parent.\(^10\)

The law in Illinois today does much to safeguard the rights of the adopted child, the adoptive parents, and the natural parents. The malpractices arising in adoption practices are primarily a matter of enforcing the present law rather than of legislative change.

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\(^5\) Hearings before Senate Committee on S. Res. 62 (Subcommittee to Investigate Juvenile Delinquency of the Committee of the Judiciary), 84th Cong., 1st Session (1955), p. 10.

\(^6\) Laws of 1867, p. 133.

\(^7\) Ibid., at 128.

\(^8\) Ill. Rev. Stat. (1955) c. 4, § 1, par. 1.


\(^10\) Laws of 1953, p. 1061.
CONDITIONS AND GROUNDS FOR ADOPTION

CONSENT

A child may be adopted as provided by the statute, where the parents give consent to such adoption. In this event, the grounds having been obtained, the procedure becomes routine and, by decree, the adoptive parents become the parents of the child the same as if such child was born to them.

In the case of Thompson v. Burns, consent was construed to be revocable any time before the decree of adoption had been entered. The court indicated that the natural mother had the right to withdraw her consent at any time before the court had actually acted upon the petition.

Following this case, in In re Petition of Dickholtz, the appellate court narrowed the interpretation of the Burns case to say that the consent could be withdrawn by the natural mother any time before the entry of the decree at the discretion of the trial court. They affirmed this stand in Weisbart v. Berezin where it said that the right to withdraw consent is not absolute, but within the sound discretion of the trial court and depended on the circumstances in each case.

The interpretation of the provision in these cases, along with a recognition that adoptive parents also acquire rights in the child, led the Legislature to make the provision of consent irrevocable in the absence of a showing of fraud or duress.

In the cases following this amendment, and construing it, the natural mothers were not allowed to revoke their consents, even before the petition to adopt was allowed because they could not show fraud or duress.

In the case of a legitimate child, the consent of both parents is necessary, even though the mother represents the child to be illegitimate. In the case of Lewis v. Lo Chirco, the natural mother was divorced

from her husband at the time of the birth of her child, although later the child was deemed to have been legitimate, having been conceived during the period of lawful cohabitation with her husband. She used a fictitious name on the birth certificate and on her consent for the adoption. She represented the child to be illegitimate. Later, she remarried her husband, revoked her consent and sought return of the child. The court found there was a valid presumption of legitimacy, that the father came within the description of “parent” as provided in the statute, his consent was not obtained, and the adoption was not allowed.

If the consent to adopt an illegitimate child of the natural mother is valid, and the child is subsequently legitimatized by the marriage of the natural mother and the putative father, his consent is not necessary. In the case of *In re Simaner’s Petition*, the natural mother gave her consent to have her child adopted, later married the putative father. She failed to prove duress at the time the consent was given. The subsequent legitimation of the child by the marriage of the parents did not make the father’s consent necessary because at the time the consent of the mother was given, he had no rights.

If the natural mother gives a valid consent to the adoption of a presumably illegitimate child, and later the court finds that at the time her consent was given the child was actually legitimate, then the consent of the father is necessary. In *In Re Petition of Jambrone* the natural mother and father of the child in question lived together as husband and wife in Iowa, which recognizes common law marriages. The mother left the father shortly before the baby’s birth, and came to Chicago, where the baby was born and at which time she consented to its adoption. Later, the father came to Chicago, a religious ceremony solemnized the marriage, and they sought return of the child. The court allowed the return, because although it considered the consent of the mother valid, it recognized the validity of the common law marriage in Iowa, and therefore held the father a legitimate father of the child. Since his consent had not been obtained, the child could not be adopted.

The *Jambrone* case can be distinguished from the *Simaner* case in that here the child was considered legitimate at the time the mother’s consent was given, and the father’s consent was also necessary at that

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18 16 Ill. App.2d 48, 147 N.E.2d 419 (1957).
time. In the *Simaner* case, the child was illegitimate at the time the consent was given, and only the consent of the mother was needed.

It has also been held that the consent of a god-mother, who did not actually support the child financially, was not necessary.\(^{20}\)

Another aspect of affecting a revocation of consent is by contesting the adoption on the basis of a dissimilarity of religion between the natural mother and the adopting parents.

The question of whether the "shall, whenever possible" clause of the Illinois statute was directory or mandatory was brought before the supreme court for the first time in 1957 in the case of *Cooper v. Hinrichs*.\(^{22}\) In this case, twins were born to a mother who gave her consent to their adoption before their birth. After their birth, she had them baptized Roman Catholics, declared them dependent and placed them in a Catholic orphanage. Then they were placed in the home of a Presbyterian family, who sought adoption. The trial court allowed the mother to withdraw her consent to the adoption on the basis of difference of religion, although the father of the children, her Lutheran ex-husband, had consented to their adoption. The appellate court affirmed the trial court's opinion, and also allowed the Catholic Charities to intervene as defendants. The supreme court reversed the appellate court, saying the "shall, whenever possible" clause indicated a legislative intent that identity of religion between adopting parents and children would not always be followed. The court said it did not consider religion unimportant, but that the child's best interest was the main concern of the court in exercising its discretion, and there was not a legislative intention "to create an irrebuttable presumption that it is always to the child's best interest to be trained in the religion of the natural parents, irrespective of other factors."\(^{23}\)

The court also held that the Catholic Charities had no legal right or claim and therefore had improperly been allowed to intervene.

The consensus of the comments following this case was that the best interests of the child should be considered, and that religion is a factor to be considered with others in the sound discretion of the court.\(^{24}\)

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\(^{22}\) 10 Ill.2d 269, 140 N.E.2d 293, rev'g 8 Ill. App.2d 144, 130 N.E.2d 678 (1957).

\(^{23}\) Ibid., at 275, 295.

\(^{24}\) Construction of Religious Identity Provision in Adoption Proceedings and Practice Act Requirement for Intervention Therein, 45 Ill. Bar J. 658 (1957); Religious Faith of
Once the consent has been given, in writing, and acknowledged in open court, or before the clerk of the court in which the petition is filed, it becomes irrevocable.25

The petition to adopt must state the other requirements specified in the statute, which are: (1) the name, sex and place and date of birth of the child; (2) the name of person or organization having legal custody of the child; (3) the name of the parent or guardian of the child, if known; (4) that the child has resided in the home of the petitioner for at least six consecutive months immediately preceding the filing of the petition, or reason for waiver; (5) the new name of the child.26

This is probably the simplest form of adoption, for it involves no contest. Illinois is reputed to be one of the States in which it is easiest to obtain a decree of adoption and this is probably due to the ease with which our courts have waived the six months statutory residence requirement.27

The Hon. Otto Kerner, Judge of the County Court of Cook County states that he has always enforced the above residence provision and would waive the requirement only when presented with a good and sufficient reason, and not merely as a convenience to the petitioners.28

**ONE PARENT CONSENTS, OTHER UNFIT**

An adoption decree will also be granted when one natural parent consents and the other is proved to be unfit, or where both parents are proved unfit. The grounds for such unfitness of a natural parent are as follows:

Proof that the natural parent is guilty of (a) depravity; (b) open and notorious adultery or fornication; (c) habitual drunkenness for the space of one year prior to filing of the petition for adoption; (d) extreme and repeated cruelty to the child sought to be adopted; and (e) abandonment of such child for more than six months next preceding the filing of the adoption petition.29

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Adopting Parents As a Bar to Adoption, 18 Ohio St. L. J. 434 (1957); Whether Court Abuses Discretion Conferred on it by Statute in Denying Petition for Adoption Because of Conflict in Religious Beliefs, 34 Chi.-Kent Rev. 248 (1956); Religion As a Factor in Proceedings for Adoption and Custody of Children, [1957] U. Ill. L. Forum 114; Legislation Governing the Religious Factor in Adoption Proceedings, 5 De Paul L. Rev. 89 (1955).

26 Ibid., at 42.
27 Authority cited note 5, supra, at p. 33.
Thus, so long as a natural parent is a fit person, he cannot be deprived of the custody and control of his child by an adoption proceeding, without his consent. If he is charged with unfitness on any of the grounds above set forth, he must first be served with written notice thereof and be allowed to defend and refute the charge against him.30

a) Depravity.—The charge of depravity of a parent has not often been alleged or considered in adoption cases; thus we have no clear cut judicial definition. The nearest we come to a definition is a definition of what it is not, where the Illinois Supreme Court held that the mere bearing of a child out of wedlock did not constitute depravity.31 In this case, the charge of depravity was coupled with the charge of abandonment and desertion. It was alleged that the natural mother was leading a sexually promiscuous life, and her written correspondence in which she described her efforts to procure an abortion was introduced in evidence. Further, it was charged she had not contributed to the support of her child, and that even though she lived within 200 miles of the child, she had not visited him in more than two years. During this entire period, she did, however, keep in touch with the foster parents by correspondence. The appellate court held that no statutory grounds were proved, sufficient to warrant an adoption. The Illinois Supreme Court found that the acts of the natural mother did substantiate a charge of depravity, but preferred to sustain the decree of adoption on other grounds.

In the subsequent case of Oeth v. Erwin,32 the negative definition of depravity in the Stalder case was quoted with approval, but again the court sustained the adoption on other grounds.

b) Open and notorious adultery or fornication.—The charge of adultery on the part of the natural parent as a ground for adoption of his child likewise has been little used in Illinois. There is no clear-cut definition of misconduct in the decided cases.

In the case of Meyers v. Meyers,33 the grandfather, in his petition for adoption of his grandchild, charged the mother with desertion and also alleged that she was leading a life of prostitution. The court based its decision granting an adoption on the fact that the mother deserted

33 32 Ill. App. 189 (1889).
her child rather than on the mother's alleged misconduct as a prostitute.

It is difficult to ascertain any real basis for the apparent reluctance of courts to grant adoptions to petitioners charging depravity or adultery on the part of the natural parent, unless it be the laudable reluctance of the courts to hurt an innocent child.

There is no doubt that an adoption decree based on proof of such grounds might seriously reflect on the child in an adverse way in its later life. Rather than allow the child to live under such a cloud, the courts prefer to grant the adoption on another less lurid ground.

It may very well be that the courts, considering the dearth of precedent covering such grounds, prefer to grant adoptions to petitioners who set forth the more accepted and less embarrassing grounds for depriving parents of the custody of their natural children.

c) Habitual drunkenness.

d) Extreme and repeated cruelty to the child.—There are no Illinois cases wherein petitioners have been granted an adoption due to proof of either the charge of drunkenness or cruelty on the part of the natural parent, and there are no decided cases where either of such charges has been coupled with another charge.

The reluctance by our courts to risk besmirching an innocent child by entertaining or considering such unusual charges may account for this dearth of decided cases. This could possibly be explained if it is recalled that in most cases of gross misconduct by the natural parents a court probation officer or a licensed child welfare agency has been previously granted custody of the child where such misconduct occurred and was brought to the attention of the courts. In such cases the natural parent is, by a dependent child case, deprived of the child's custody and at the same time the court grants the new guardian, whether it be the welfare agency or the probation officer, the right to consent to the child's adoption without any further interference by the natural parent.

Since most such cases actually originate as "dependent child" problems, and as the custody of the child having once been taken from the natural parent and granted to such probation officer or licensed child welfare agency, there is no longer the same necessity to put such questions in issue in an adoption proceeding, for the natural parent has been taken out of the picture by a previous legal proceeding in which the welfare agency or the probation officer has been given the sole
right to consent to an adoption. In such a case the natural parent's consent is not necessary.

It should be noted that the source of most adoptions is from children who have been declared a dependent child by a County Court decree and from children of unmarried mothers. In the latter instance most of these unwed mothers grant custody of their child to a welfare agency which cared for them during pregnancy and delivery, with the mother's full knowledge and consent to a later adoption of her child by applicants investigated by such welfare agency. Naturally in these cases there is no need to charge the parent with anything since the latter has been removed from the picture by legal means and need no longer give her consent to adopt.

It is felt that the reasons above set forth will likewise explain why there are so few decided cases wherein depravity or adultery are set forth as charges against a natural parent on which an adoption decree is sought.

c) Abandonment of child, or desertion of the child for more than six (6) months next preceding the filing of the petition.—The question of abandonment or desertion has presented the courts with considerable difficulty in arriving at a definition. No clear-cut definition can be found from a reading of the decisions; each case turns on its particular set of facts. Sustaining a charge of abandonment or of desertion did not seem to be so difficult in the early cases; our courts were then not at all reluctant to presume abandonment or desertion. In 1886, in the case of Barnard v. Barnard,34 the court said that in the absence of alleging the death of the father, there was a presumption that he was dead or had abandoned the child. Courts would not indulge such a presumption today; in fact, now any allegation of death, abandonment or desertion would have to be proved.

By 1906, the courts were moving more cautiously, and decided that where a natural parent is charged with desertion of a child as a ground for depriving him of its custody and granting an adoption, he still must be served with written notice of such intended adoption. If an order or decree were entered without such notice, it would be void for want of jurisdiction.35 However, where desertion is alleged and proved, and the court orders a decree of adoption based upon such

34 119 Ill. 92, 8 N.E. 320 (1886).
charge, the fact that the length of desertion is not specified will not open the decree to a collateral attack.\textsuperscript{36}

The fact that a natural parent charged with desertion answers and denies that he deserted the child does not necessarily mean the court could not find him guilty of desertion,\textsuperscript{37} and a mere averment of abandonment without proof cannot support the charge.\textsuperscript{38}

In the early Illinois cases, there seemed to be some question as to whether the terms abandonment and desertion could be used interchangeably. More recent cases have carefully distinguished between the two words, desertion seeming to be a question of time, and abandonment a question of intent.

Where there is a charge of child abandonment, time is not an element of abandonment, except as it may be evidence of intent to abandon, and abandonment, unlike desertion, need not be continuing "for more than six months next preceding filing of petition" for adoption.\textsuperscript{39}

Where there is a finding of desertion by the natural father for more than six months next preceding the filing of the petition for adoption, and the mother consents, the petitioning stepfather may adopt.\textsuperscript{40}

In the case of \textit{Ekendahl v. Svolo},\textsuperscript{41} the mother became ill soon after the birth of her child. She left Chicago to go west for her health, and her child was left in the care of foster parents. The paternal grandfather paid for its support, and payments were deducted from his employee son's (the child's father) pay check. The mother divorced her husband and was awarded exclusive custody of her child. She returned to Chicago as soon as she was well, and planned to take her child back with her, but because the child was frail, the foster parents prevailed upon her to leave him where he was. The child remained in Chicago for six years. His mother sent gifts to him and corresponded regularly with his foster parents, but did not contribute to his support. The foster parents sought to adopt the child, charging abandonment by the mother, and a decree of adoption was granted to them.

The case of \textit{Hill v. Allabaugh}\textsuperscript{42} presents an interesting contrast to

\textsuperscript{36} In re Bohn's Estate, 308 Ill. 214, 139 N.E. 64 (1923).
\textsuperscript{38} Check v. White, 340 Ill. App. 277, 91 N.E.2d 640 (1950); Frentz v. Frentz, 256 Ill. App. 259 (1930).
\textsuperscript{39} Bowdry v. Bowdry, 324 Ill. App. 52, 57 N.E.2d 287 (1944).
\textsuperscript{40} McConnell v. McConnell, 345 Ill. 70, 177 N.E. 692 (1931).
\textsuperscript{42} 333 Ill. App. 602, 78 N.E.2d 127 (1948).
the Ekendahl case. In the Hill case, the parents were divorced, and the mother was granted the custody of their child. The father went to California, but continued to fulfill his obligations to support the child. The father had periods of illness during which he failed to make any support money payments; but when he was again financially able, he attempted to pay up the arrearage. The stepmother attempted to adopt the child, charging the natural father with abandonment and desertion, but the court held there was no abandonment nor desertion.

In this case, the point that there was no proof of abandonment is well taken. It is clear from the evidence that the father at no time had any intention to abandon the child.

However, the dicta of the court, indicating a reluctance to allow adoption because it changes the course of inheritance would now be a poor reason for disallowing adoption under the present law of our State. As the law stands today in Illinois, an adopted child inherits from his adoptive parents, but such right of inheritance from them does not deprive him from taking and inheriting from his natural parents. Such a child has a twofold advantage. The question as to whether or not this is a good solution is open to grave doubt. Inasmuch as it is now our law, the change of course of inheritance is no longer a good basis for refusing to allow adoption.

In the case of Smith v. Crivello, the Illinois Appellate Court defined abandonment as

[a] question of intention to be determined from the evidence. It imports any conduct on the part of a parent which evidences a settled purpose of foregoing of parental duties and relinquishment of parental claims to the child.

This is the definition, but the intention is still to be determined from the evidence, and thus each case must turn on its particular facts.

The case of Jackson v. Russell indicates the reluctance of the courts to grant an adoption, even where the welfare of the child is severely impeded by living with the natural parents.

In this case, the father was confined to the State penitentiary at the time the petition was filed, and he consented to the adoption. The mother protested the adoption. She had given her children intermittent care, but had not settled down in any one place to make a home for them.

43 In re Estate of Tilliski, 390 Ill. 273, 61 N.E.2d 24 (1945).
The court found that although the parents were not desirable, there were not sufficient facts presented to establish such abandonment as would constitute grounds for adoption by petitioners without the consent of both parents. The court, instead, awarded the custody of the child to the petitioners, but declined to grant an adoption because to do so would affect the legal status of the child. Since the child's legal status, especially with respect to inheritance, would be affected, the court requested a strict compliance with the letter of the law.

Although the facts in that case do not support a charge of abandonment, the dicta of the court again expresses the seriousness of changing the child's legal status. The decision does not go into the possibility that the change in legal status could be beneficial to the child. The reasoning employed would seem to indicate that a change in status ipso facto was detrimental.

The most recent case involving a question of abandonment is In Re Adoption of Walpole where the parents were divorced and the mother was awarded custody of their child, but no support money was requested by the mother or awarded by the Court. Subsequently, the mother remarried, and her new husband sought to adopt the child. The father did not contribute to the child's support, but he was never requested or ordered to do so. The father attempted to see his child, but the mother told him neither she nor the child wanted to see him, and the stepfather warned him to stay away.

The court found that the natural father did not abandon the child, and on the facts as presented, it seems obvious that he did not abandon his child, but rather, that he was prevented from seeing her.

Here, the court, in defining abandonment, said:

[T]hat only clear and convincing proof of such conduct on the part of a parent, that shows unmistakably that the parent is relinquishing his parental duties and claims, or is wilfully throwing the child upon the world, without regard or consideration to his or her own responsibilities, will justify a court in holding that parent unfit as set forth in the adoption statute.

The court went on to say that since the custody of the child had been awarded to the mother, the father could not be said to have abandoned her.

Somewhat later, the court took a more liberal attitude toward allowing adoption on the ground of abandonment in the case of In Re Miller, and seemed once more to consider the welfare of the child

47 Ibid., at 369, 648.
the primary concern. In that case, the boy to be adopted lived with his father and stepmother. His mother had left the jurisdiction after she lost custody of the boy through divorce proceedings, and had only intermittent contact with him. She contributed nothing to his support. The court not only mentioned the change of status in allowing the adoption, but also mentioned that the rights of the mother in regard to support were affected by the decree as well as the duties and obligations of the minor.

This interpretation seems to have closed up a possible loophole left by the *Walpole* case, namely, that once a parent is deprived of custody of a child through a divorce proceedings, he cannot be said to abandon the child.

**WHERE PARENT HAS BEEN DEPRIVED OF CUSTODY**

The earlier cases did not hesitate to deprive a parent of the custody of his child if the court found it would be for the best interest of the child. Upon the failure of a parent to meet his parental obligations, his child could be taken from his custody, and the adoption of his child by others was allowed.

Today, our courts make every effort to avoid a permanent denial to the parent of the child's custody, and profess unfailing optimism over the possibility of parental reform. Whether or not this is a real sociological improvement is outside the scope of this paper.

In an early case, *Baker v. Straborn* in 1889, a divorce was granted, and the custody of the child of the couple was awarded to the wife. The ground for this divorce was desertion. The father failed to support the child. The maternal grandparents were desirous of adopting the child, and the mother, being in ill health, consented to the adoption by them. The father then protested the action, but the court overruled his protest and found that he had deserted the child.

By way of dicta, the court suggested that the granting of a divorce to a wife on the ground of desertion, together with the custody of her child, and the lack of assistance from the child's father, amounted to a continuance as to the desertion of the mother and child.

The court also said the welfare of the child is of prime importance and opposition of the non-consenting parent, prompted by unworthy motives, should not be regarded.

The case of *Burr v. Fabey* strengthened this attitude of the courts. In that case, the parents were divorced and the mother gained absolute

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49 33 Ill. App. 59 (1889).
50 230 Ill. App. 143 (1923).
custody of their child, based on the father's unfitness. The mother
died, and the people with whom she had been living petitioned for the
adoption of the child.

The father protested the action, but the court found that he was an
unfit person and furthermore had abandoned the child. The decision
held that the proper way for the child to be restored to the custody of
the father was for him to petition the court which had granted the
divorce to show that he was now a fit person to have custody of the
child. Failing to do that, he could not claim now to be a fit parent.
Thus, in effect, the court having jurisdiction of the adoption matter,
took judicial notice of the decree of the divorce court finding the
father unfit.

A parent may be found by court order to be unfit, and his children
will be removed from his custody. In such a case, a guardian is usually
appointed, with the power to consent to the adoption of the children
by a reputable person without the consent of the natural parent. How-
ever, if such parent corrects the faults that have made him unfit, and a
final adoption of the children has not been granted, the parent may
then petition to re-open the guardianship, and where the court finds
such parent to be then fit, it may restore the children to the parent's
custody, based on the change in circumstances.51

PARENTS MENTALLY ILL

In 1953, the legislature added a provision to the Adoption Act52
providing that where one parent was dead and the other was mentally
ill and had been mentally ill for a period of three years, and in the
opinion of two doctors appointed by the court, could not recover in
the foreseeable future, then a guardian could be appointed by the
court with authority to consent to the adoption of such child.

The case of Nabstedt v. Barger53 involved an adoption of a child
whose father had died and whose mother was committed to an insti-
tution for the insane. The child was declared a dependent child and
legal custody was given to a guardian, with authority to consent to the
adoption of the child. An adoption proceeding was instituted. Two
doctors examined the natural mother and found that she had been in-
sane for three years and was not likely to recovery in the foreseeable

51 In re Ramelow, 3 Ill. App.2d 190, 121 N.E.2d 41 (1954).
52 Ill. Rev. Stat. (1953) c. 4, § 3, par. 44.
53 3 Ill.2d 511, 121 N.E.2d 781 (1954).
future. The adoption decree was granted. In this case, the section of the Family Court Act above cited was challenged as being unconstitutional in that it deprives the natural mother of the eventual care, custody and control of her child without due process of law.

The Supreme Court of Illinois found the law to be constitutional, stating that the court exercised jurisdiction through the appointment of a guardian. It stated further that “of course notice and an opportunity to be heard are essential conditions precedent to a judgment which cuts off the rights of the natural parent to the custody of the child” but that such requirements are properly fulfilled through the appointment of the guardian.

It has been thought that this provision might some day give rise to the question as to what should be done should the unfortunate parent, upon restoration to reason, seek custody of the child so adopted. However, it is felt that the Illinois statute has sufficient precautions to prevent such a happening.

This enlightened interpretation of the law not only protects the rights of the adopted child, but also gives stability and security to the adoption by adoptive parents. It also works to prevent the type of disaster that occurred in the case of Burstein v. Millikin Trust Co.

In the Burstein case, the child in question was purportedly adopted by the Bursteins, based upon the written consent of his natural father. The child’s natural mother was insane and no attempt was made to secure consent from her or from her guardian.

Subsequently, after the death of the adoptive father, the validity of the adoption proceedings was put in issue. The adoption was found to be void because the county court which granted the original decree, did not have jurisdiction over the natural mother, and since jurisdiction over her was required by the statute, the requirements of a good adoption were not met and the decree was void.

Where the guardian is given authority to consent to the adoption of a child, and fails, without good reason, to consent, the court will remove him as guardian and appoint another in his place as in the case of Holman v. Brown, where after the death of the natural parents of the child sought to be adopted, the court appointed his grandparent

54 Extent to Which Statute may Obviate Necessity for Parental Consent to Adoption, 33 Chi.-Kent Rev. 249 (1955); Adoption-Consent of Mentally Ill Parent Unnecessary, 3 St. Louis U.L.J. 195 (1954).
as guardian. When the petitioner sought to adopt the child, he pro-
tested on the ground that it was not to the best interests of the child. 
The court removed him as guardian, and appointed a substitute who 
duly consented to the adoption, finding the adoptive parents to be fit 
and proper persons.

**CONSENT OF CHILD TO BE ADOPTED**

The Illinois statute provides that any child of the age of fourteen 
years and upwards sought to be adopted must consent to such adoption 
in writing, and such consent must be filed with the petition to adopt.⁵⁷

However, the failure of a child over fourteen years of age to file his 
consent according to the requirements of the statute, is not such a 
defect as to open up the adoption decree to collateral attack; this was 
the holding in *In re Estate of Harris.*⁵⁸

In 1953, a strict interpretation was placed on this aspect of the 
statute in the case of *Noel v. Olszewski*⁵⁹ where an American tried 
to adopt three displaced children who lived in Poland and whose cons-
sents were acknowledged before the American vice-consul in Poland. 
The children did not appear in court. In denying the petition to adopt, 
the court emphasized the mandatory nature of the statutory require-
ment that a child over fourteen years of age who is to be adopted in 
an Illinois proceeding must appear in open court and acknowledge his 
written consent if the court is to have jurisdiction.⁶⁰

The *Harris* case can probably be distinguished from the *Olszewski* 
case because in the former case, the child was present in court at the 
time the decree of adoption was entered, and the failure to get a writ-
ten consent was more of a technical defect than a substantive one. 
The court had in personam jurisdiction of the child to be adopted and 
could ascertain her consent to the adoption.

In the *Olszewski* case, the court did not actually acquire jurisdic-
tion of the child in question, and the waiver of the requirement would 
allow a proceeding not contemplated within the language of the 
statute.

⁵⁷ Ill. Rev. Stat. (1945) c. 4, § 3, par. 3.
⁶⁰ Whether or Not Court May Waive Statutory Requirement that Child to be 
Adopted Must Acknowledge his Consent Thereto in Open Court, 31 Chi.-Kent Rev. 
372 (1953).
ADOPTION WITHOUT CONSENT OF NATURAL PARENTS

We have seen that in Illinois, an adoption over the protest of a fit, natural parent will not be allowed. But in at least two other jurisdictions, the District of Columbia and Maryland, it is possible to adopt a child without the consent of the natural parent.

One may ask, why, if children can be removed from the custody of their natural parents without the consent of the parents, they should not be allowed to be adopted without the consent of the natural parents?

EFFECT OF ADOPTION

EFFECT AS TO THE CHILD

The statute declares that an adopted child is deemed a natural child for the purpose of inheritance unless the contrary intent plainly appears.61 This helps to correct the situation of the “forgotten boys and girls.”

Earlier, the adopted child could inherit only from the adopting parents, and was precluded from taking from collateral ancestors. In 1881, the Illinois Supreme Court63 expressed the prevailing view that the adopted child could inherit from its adoptive parent, as the desire to make him an heir was apparent from the act of adoption. The court further held that collateral relatives, not parties to the adoption proceeding, naturally would want their property to go to blood relatives.

In a subsequent case,64 the court took a more liberal attitude, allowing an adopted child to inherit property left to his adoptive mother for life, “then to her child or children,” even though the Adoption Act was not in existence at the time the deed was made.

A short two years later, the court found that a child adopted after the making of a will should inherit as a lawful heir. The case was decided on the basis of the Statute of Descent which provided that if a child is born to a testator after his will is made, and there is no intent to disinherit the child, the legacies and devises will be abated to raise an amount equal to that which the child would have received had the parent died intestate.65

63 Keegan v. Geraghty, 101 Ill. 26 (1881).
64 Butterfield v. Sawyer, 187 Ill. 598, 58 N.E. 602 (1900).
Section 48 of the Probate Act has also been construed to make the same provision for a child adopted by the testator after the execution of his will.\(^66\)

In the case of Swick v. Coleman in 1905,\(^67\) the court held that the provision of the Adoption Act providing adoptive parents shall inherit from the adopted child or its descendants or husband or wife, only such property as taken by the adopted child from its adoptive parents, does not restrict the adoptive parents to take only the identical property the adopted child inherited, but includes proceeds thereof.

In the case of Wallace v. Noland,\(^68\) the heir of the original testator had five adopted children. The will in question devised the land to the testator’s son, but should he die without “heirs,” then the property to go to named persons. The son (heir) contended that he had a fee simple title, but the court held otherwise, saying that adopted children are not within the meaning of the word “heirs,” where the supreme court has previously construed the word “heirs” to mean children, and where, at the time the will was made and at the time the testator died, there was no law in the state giving adopted children the right to inherit.

In 1912, the Illinois Appellate Court said that where real property was located in Illinois, our laws of descent and distribution applied, and where a child was adopted in Wisconsin, according to the Wisconsin law, and the wife did not join in the petition, the right to inherit land situated in Illinois would be determined by the law of Illinois. Since, under the Illinois law, the wife’s right could not be infringed without her consent to the adoption, she could renounce the will and take her statutory share just as if there were no children.\(^69\)

The McCann case seems to contradict the theory that if a court has jurisdiction of the persons, and an adoption is decreed according to the laws of the state, it is valid everywhere. Compare this case with McNamara v. McNamara below.

In Ryan v. Foreman,\(^70\) the court held that an adopted child was entitled to benefits under the “Policemen’s Pension Fund” the same as a natural child would be.

\(^{67}\) 120 Ill. App. 381 (1905), aff’d 218 Ill. 33, 75 N.E. 807 (1905).
\(^{68}\) 246 Ill. 535, 92 N.E. 956 (1910).
\(^{69}\) McCann v. Daly, 168 Ill. App. 287 (1912).
\(^{70}\) 262 Ill. 175, 104 N.E. 189 (1914).
In the case of *Warner v. King*, the property was devised to "my adopted daughter," though no adoption proceedings were ever had. The court held that even though the deed was made after the passage of the Adoption Act, it still applied and was therefore valid.

Section 7 of the Adoption Act, providing that the preceding section, which gives to the adoptive parents and their heirs the right to inherit from the adopted child, shall apply "where a child has heretofore been declared by any court to have been adopted or where such adoption has been declared or assumed in any deed or last will," applies to deeds or wills made after the passage of the Adoption Act, as the word "heretofore" will not be construed as limiting the application to deeds and wills made before the passage of the act.

In 1957, an adopted child was not allowed to inherit as descendant of her grandfather under his will made in 1921 because the statute in existence at that time did not make her a descendant.

Where a child is lawfully adopted, and one adoptive parent dies, and the other marries again, the second spouse is bound by the original adoption agreement.

In *Munie v. Gruenewald*, the word "children" used in a will was held to include an adopted child as an heir within the terms of the will.

In *McNamara v. McNamara*, certain real property in Illinois descended to plaintiffs (sisters) and their brother John, who resided in California. John died, never having married. Subsequently, a claim was made by Rosalie McNamara, who represented herself to be John's widow and the mother of his child. John. She had never married John, not having ever been divorced from her husband. However, John had acknowledged the child as his own, a fact which under California law legitimatizes a child. Rosalie had sought dower in John's estate, a family award of money, and in a suit against the plaintiffs, had established her son as John's heir. Under Illinois law, the plaintiffs then sought to dis-establish the child's right to inherit because under Illinois law a child cannot be legitimatized in such a way, and the situs of the property is in Illinois. The court held for the child, allowing him to take his father's share in the estate.

The right of the child to inherit the property was based on comity.

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71 267 Ill. 82, 107 N.E. 837 (1915).
72 Stewart v. Lafferty, 12 Ill.2d 224, 145 N.E.2d 640 (1957).
74 289 Ill. 468, 124 N.E. 605 (1919).
75 303 Ill. 191, 135 N.E. 410 (1922).
and the full faith and credit clause in acknowledging the status of the child as determined by the highest court in California. A strong dissent was registered by Justice Farmer, stating that the law of the state in which the land is situated governs descent. The rationale in this case does not conform with that expressed in *McCann v. Daly* which invoked the law of the situs of the real estate to determine the right to inherit.

Perhaps the greatest differentiation between the two cases is that in the *McCann* case, the court was determining the right of an adopted child to inherit property. In the *McNamara* case, the court determined the right of a natural child, legitimated under the law of another state in a manner not allowed in Illinois, to inherit from his natural parent, and the courts seem reluctant to disinherit a natural child.

The case of *Hopkins v. Gifford*, held that an adopted child has the same rights as a natural child under Section 10 of the Statute of Descent.

In *Hale v. Hale*, the court said that the word "descendants" was used by the testator advisedly, with an intention to exclude those who were not descendants of a deceased beneficiary, even though such deceased beneficiary might leave surviving heirs who had the legal status of children.

In *Miller v. Wick*, the testator devised income of certain property to his nephew "until such time in his life as he shall have a child, his lawful issue, who shall attain unto the age of three years." The nephew adopted a child, when the child reached the age of three years, the child having been taken into his home at the age of six months. The court held that such a child did not fulfill the requirement, because the testator meant a child of his own body.

In 1906, it was held an adopted child is not included in the term "child" unless there is language in the will or circumstances surrounding the testator at the time he made the will which made it clear that the adopted child was intended to be included.

Where the testator left property to his children with a life tenancy, and remainder over to their children, specifying as to the children of daughters "children of her body" but as to sons, merely "children,"

317 Ill. 150, 147 N.E. 788 (1924).
the court held that an adopted son of a son could not take his father's share.81 The dissenting opinion said that the plain meaning of this language in the will excluded adopted children as to the daughters of the testator, and refused to exclude them as to the sons.

In Continental Illinois National Bank and Trust Company v. Hardeen,82 the appellant Peter Fahrney was the natural grandson of the testator, being the son of Merry Fahrney Pickering, and was adopted as a son by the testator, Emery H. Fahrney. The decedent's will provided certain distribution of income "be paid to my then surviving lawful issue per stirpes." When the adoption of Peter was completed, the testator made a codicil to his will, giving him a share in a certain trust, and prefaced the codicil with the words "Having adopted Peter Fahrney Pickering . . . as my legal child. . . ." The question arose whether Peter should share in the residuary estate with his mother and aunt (the only other children of the testator) or whether he took only as provided in the codicil to the will. The court said he took only as specifically provided, interpreting the testator's intention as being only to so provide because of the addition of the codicil, with the express provision that the rest of the will remain. If he intended for Peter to so share, he could have said so in the will.

In the case of Carter Oil Company v. Norman,83 the adopted child was actually the grandchild of the adoptive parents. He was born out of wedlock to their daughter, and adopted by the grandparents. The adopting father died and left most of his property to his widow. She conveyed the property to her adopted son, reserving a life estate for herself. He predeceased his adoptive mother, and died intestate. She took the property, and later left it to another child. The natural mother sought title to the property, claiming the adoption proceeding was invalid.

The court said that she (the natural mother) was not in a position to seek to set aside the adoption to which she had been a party. The court further said that the provision of the Illinois Adoption Act that an adopted child should be deemed the child of the parents by adoption for the purpose of inheritance, was intended to make an adopted child the lawful child of the adoptive parents for all purposes of inheritance as much as though he had been born to them in wedlock.

81 Moffet v. Cash, 346 Ill. 287, 179 N.E. 186 (1931).
83 131 F.2d 451 (C.A. 7th, 1942).
The provision of the Illinois Adoption Act that parents by adoption shall take by descent only such property as the adoptive child has taken from the adoptive parents by gift, and shall not inherit any property which the child may take by gift "from his kindred by blood" is intended to give the adoptive parents a right to inherit such property as they have given to the adopted child, and not to preclude the adoptive parents from inheriting property given by them to the adopted child merely because they happened to be related by blood to the child.

In the case of Belfield v. Findlay the court did not allow an adopted child to take property from his grandmother by representation, holding that a testator is presumed to know the law and to make his will in conformity with it and that the Adoption Act expressly forbids an adopted child from taking property from the lineal kindred of his adoptive parents by right of representation, there being nothing in the will to indicate that an adopted child was within the contemplation of the testatrix when she executed her will. There was a strong dissent in this case by Justice Stone, which dissent has now become the basis of our statutory law. He felt that the Adoption Act means an adopted child "for the purposes of inheritance" shall be considered the same as though he were born in lawful wedlock, except "he shall not be capable of taking property expressly limited to the body or bodies of the parents by adoption." It is the law in Illinois that the testator is presumed to have known the law and to have made his will in conformity therewith. (Since this was the law when the will was made, it readily assists in arriving at a solution for what would be an otherwise unclear intention of the testator.)

An adopted child can inherit in a dual capacity. She can inherit from her adoptive parents, and such taking does not preclude her from inheriting from her natural parents.

There has been some criticisms of this attitude, particularly as exemplified in the Utah case of In re Benner's Estate, where a child adopted by her natural grandmother was allowed to inherit both as an adopted child and as a natural grandchild. The court quoted the Illinois case In re Estate of Tilliski, and also mentioned the Indiana

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84 389 Ill. 526, 60 N.E.2d 403 (1945).
85 In re Estate of Tilliski, 390 Ill. 273, 61 N.E.2d 24 (1945).
86 109 Utah 172, 166 P.2d 257 (1946).
87 390 Ill. 273, 61 N.E.2d 24 (1945).
rule allowing a child to take as an adopted or as a natural child, but not as both.

It should be noted that in the *Benner* case, the child in question took two shares from the same estate because of this rule. In the *Tilliski* case, the adopted child was adopted by strangers and inherited both from them and from her own natural parents. The Indiana rule seems to be the better one.

A person adopted in another jurisdiction, which adoption would not be allowed in Illinois, is not prohibited from taking property the same as a natural child in Illinois. Illinois does not allow the adoption of adults, but if such adoption is valid in another jurisdiction, then such adopted child can inherit property which is situated in Illinois the same as a natural child.\(^8\)

The court said in the *McLaughlin* case, that the taxing statute gives to all legally adopted persons, without exception, the lowest rate of tax and the highest exemption prescribed by the act, and makes no restriction or condition whatsoever as to their age when adopted or the laws under which the adoption was had. Nothing can be found in any part of the statute indicating that any condition or qualification is required other than legal adoption. The Inheritance Tax Act imposes a special tax and in cases of doubt, the language used in naming the persons in the class to which the lowest rates of taxation apply should be construed strictly in favor of the taxpayer.

The Illinois Inheritance Tax Act has been amended to allow the favorable deduction to any person lawfully adopted in another jurisdiction even though such adoption would not be allowed under our Illinois Adoption law.\(^9\) The words, "a child legally adopted" refers to the relational status and not a condition of minority.

By 1949, the courts had come to the point of view of allowing adopted children to inherit their father’s share of an estate as descendants of deceased adopting parents under Section 49 of the Probate Act. Under this section, they are excluded from taking property from the lineal or collateral kindred of the adopting parent *per stirpes* or property expressly limited to the body of the adopting parent. This does not change the rule that an adopted child cannot inherit from his adopting parent’s ancestors; the children do not take by inheritance

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\(^8\) *McLaughlin v. People*, 403 Ill. 493, 87 N.E.2d 637 (1949).

or by representation, but by virtue of a statute creating in them an original right as descendants of their adoptive father.\textsuperscript{90}

In 1951, the rights of an adopted child were expanded to give him the right to bring a Wrongful Death Action as a next of kin. The court said that Section 14 of the Probate Act, making an adopted child a descendant for the purposes of inheritance, and expansion of his position as an adopted child properly made him a "next of kin" in a Wrongful Death Action.\textsuperscript{91}

This decision did not pass unnoticed nor uncriticized. In a law review article,\textsuperscript{92} it was pointed out that this was a matter of construing the word "next of kin," not "children," and since this statute is in derogation of the common law, it should be strictly construed. The author does not quarrel with the result of the decision, which he feels is a good one, but feels it was predicated upon unsubstantial grounds, and that the outmoded maxim of strict construction of the statute should be eliminated.

In 1955, a new section was added to the Adoption Statute stating that this rule of strict construction shall not apply to the Adoption Statute.\textsuperscript{93}

If a child is adopted, then subsequently is re-adopted by his natural parents, he is not entitled to inherit from his former adopting parents.\textsuperscript{94}

Draftsmen of wills are still cautioned to express clearly the intention of the testator as to adopted children in order to avoid costly construction suits,\textsuperscript{95} and to define words such as "children," "descendants," "issue," and "heirs" denoting whether such words include adopted persons.\textsuperscript{96}

It has also been suggested that specific clauses including or excluding adopted children be used in a will, because distribution under the will may not take place under Illinois law.\textsuperscript{97}

The obligation of support and education of a child cannot be re-

\textsuperscript{90} In re Estate of Harmount, 336 Ill. App. 322, 83 N.E.2d 756 (1949).
\textsuperscript{91} McDavid v. Fiscar, 342 Ill. App. 673, 97 N.E.2d 587 (1951).
\textsuperscript{92} 47 Nw. U.L. Rev. 122 (1952).
\textsuperscript{93} III. Rev. Stat. (1945) c. 4, § 7, par. 3.
\textsuperscript{94} In re Estate of Leichtenberg, 5 Ill. App.2d 336, 125 N.E.2d 277 (1955), aff'd 7 Ill.2d 545, 131 N.E.2d 487 (1956).
\textsuperscript{95} 42 Ill. Bar J. 44 (1953).
\textsuperscript{96} Phemister, Adopted Children as Beneficiaries Under a Testamentary or Inter Vivos Trust, 31 Chi. Bar Record 249 (1949).
\textsuperscript{97} Hardin, Will Clauses to Cover Adopted Children, 45 Ill. Bar J. 360 (1957).
lieved by a contract of adoption for which valuable consideration is given. The welfare of the child is still the paramount factor.\textsuperscript{98}

**EFFECT AS TO NATURAL PARENTS**

The natural parents of a child so adopted shall be deprived, by the decree, of all legal rights, as respects the child, and the child shall be freed from all obligations of maintenance and obedience as respects such parents.\textsuperscript{99}

It is interesting to note that the statute merely deprives the natural parent of the "rights, as respects the child," but does not expressly relieve him of the obligations and/or duties toward the child.

This brings up the question of the meaning of considering an adopted child the same as a natural child for the purpose of inheritance. If the adopted child is to be treated as a natural child of his adoptive parents, what is his relationship to his adoptive parents when he is subsequently adopted by others? A need for legislation spelling out his status in detail has been suggested.\textsuperscript{100}

It has also been pointed out that there are divergent philosophies toward eliminating the right of an adopted child to inherit from his natural parents. Social agencies and adoptive parents of infants are usually in favor of blotting out all blood lines between the natural parents and adopted child. Natural parents of children of a first marriage, where a second spouse is adopting, wish to preserve the child's rights of inheritance from the natural parents. There are also those who oppose any legislation purporting to deal with the construction of private instruments and the presumed intent of their makers.\textsuperscript{101}

The Adoption Act does not specifically set forth or define the obligations of the adoptive parents to support his child. However, as far as property rights are concerned, an adopted child is deemed a natural child,\textsuperscript{102} so, by inference, the adoptive parent could be held to be responsible for his child's support.

One of the earliest cases touching upon this question was that of *McNemar v. McNemar*\textsuperscript{103} in 1907. In this case, the child was even-

\textsuperscript{98} Willey v. Lawton, 8 Ill. App.2d 344, 132 N.E.2d 34 (1956); Whether Promise to Adopt Child and Relieve Parent of Burden of Support is Valid Consideration for Parent's Promissory Note, 35 Chi.-Kent Rev. 161 (1957).


\textsuperscript{101} Fleming, Inheritance Rights of Adopted Children, 35 Chi. Bar Record 221 (1953).

\textsuperscript{102} Ill. Rev. Stat. (1955) c. 4, § 11, par. 2. \textsuperscript{103} 137 Ill. App. 504 (1907).
tually adopted by his paternal grandfather. Later, the natural father asked the grandfather to return the boy to him. This was done. The child's father later went to the grandfather and asked him to resume the care and education of the child, which the grandfather refused to do.

The father then brought suit against his own father to recover the cost of maintenance and education of the child from the grandfather (adoptive father). The court said he was not entitled to recover, and by way of dicta, hinted that in the event of default of the adoptive parent, the burden of support reverted to the natural parent. This case was to have important bearing on a case subsequently decided, about thirty years later.

The right of visitation of a child is one that does not survive the decree of adoption, all rights of the natural parents being terminated. In the case of *Witton v. Hariss* 104 the natural mother contended that the adoptive parents promised her the right of visitation of the child after the adoption. The appellate court said that she had no right to visit the child, and any such promise would not be enforced. It was pointed out that the adoption decree cut off all such rights.

In 1937, a unique case developed in the Illinois courts. This was the case of *Dwyer v. Dwyer*. 105 The Dwyers were divorced, but a week prior to the divorce decree, their son was adopted with the consent of both of the parents, by the parents of Mrs. Dwyer and his name was changed. The divorce decree made no provision for support, and recited the decree of adoption. This arrangement continued for several years, and then the adoptive father died. Subsequently, the adoptive mother married again, and moved away from Chicago, whereupon Mrs. Dwyer petitioned the court to adopt her own son. The court allowed the adoption, and the child's name was again changed to Dwyer. Then Mrs. Dwyer petitioned the court for support payments for the child from the boy's natural father.

The trial court awarded her support money, which Mr. Dwyer refused to pay. On appeal the Illinois Appellate Court held that the father was not liable for the support of the child, for the original adoption decree cut off all his liabilities, and the readoption was made without his consent.

There was a strong dissent here saying re-adoption revoked absolutely the prior adoption, and restored the minor child to the natural

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parents. Also, as a matter of public policy, the natural parents should be made to support the child rather than let him become a public charge.

The decision was appealed to the Illinois Supreme Court, which reversed the Appellate Court, saying that while Section 8 of the Adoption Act deprives the natural parents of all legal rights in respect to the child, and frees the child from any obligation to maintain or obey the natural parents, the statute does not provide that an adoption relieves the natural parents of their duty to support their offspring, which duty arises out of the natural relationship, and while such duty may be also imposed upon the adoptive parents, the natural parent may, if necessity arises, be required to perform the duty, the primary duty of the adoptive parents being in derogation of the general law. The case also reviewed Ryan v. Foreman and Sayles v. Christie.

This case aroused comment. One writer pointed out that the statute leaves open the question whether the parent is relieved of obligations to the child and pointed out that the dictum in two other Illinois cases indicated an answer—McNemar v. McNemar and Ryan v. Foreman. Except for the McNemar case, there are no others which support the Dwyer decision. Statutes of eight other states contain provisions similar to that of Illinois in the respect that the parent is deprived of rights over the child and the child is relieved of obligations to the parent.

The holding places an adopted child in the preferred position of twofold security for support. It opens the door to attempts by adoptive parents to force natural parents to contribute toward the child's support when the obligation assumed by the adoption becomes difficult and burdensome.

Some writers, in discussing this case, agreed with the decision of the appellate court, pointing out that the death of the adoptive parent in no way affects the natural parent; and also that the divorce decree of the parties in the case destroyed the marital relation, so by re-adoption, the natural father was still a stranger.

A New York case, Betz v. Horr, held that the adoption statute of

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106 262 Ill. 175, 104 N.E. 189 (1914).
107 187 Ill. 420, 58 N.E. 480 (1900).
109 137 Ill. App. 504 (1907).
110 262 Ill. 175, 104 N.E. 189 (1914).
111 32 Ill. L. Rev. 477 (1937).
112 15 Chi.-Kent Rev. 70 (1937).
that state expressly ended all parental duties owed by the natural parent up to the time of adoption.

The language of the Illinois statute which expressly relieves the child of the duties owed by it to the natural parents presumably transfers the same to the adoptive parents, and likewise presumably imposes certain obligations, such as the duty to support, on the adoptive parents. This would seem to be the intention of the legislature, though the language used is not precise. Such a view has been asserted by the Supreme Court of Illinois in the case of Ryan v. Foreman, where it was said that the child is entitled to support, education and care from the parent by adoption.

The Illinois Adoption Act does not expressly release the natural parent of duties attaching at the time of birth, but these duties have come into existence only recently, since at one time they were considered mere moral obligations. Illinois law is silent on this point:

But it is suggested that the same result could readily have been attained by the Illinois Supreme Court had it given thought to the facts which underlie the duty of support; thus, the court could have preserved uniformity in the law.

In 1943, the Illinois Appellate Court followed the Dwyer case by way of dicta, in the case of Anderson v. Anderson.

Since the Anderson case, this question has not come up in the Illinois Courts. There may have been an element of social necessity, which surely existed during the 1930's, leading the courts to impress anyone who was financially able to do so to support his child. During that era, it was a reasonable possibility that a child would become a public charge in the absence of private support. This, in our present era of prosperity, does not seem as likely a danger.

There is another facet to the question of the desirability of the adoptive parents seeking support from the natural parents. Most adoptive parents are reluctant to have any contact with the natural parents after the adoption has once taken place, so the probability of this type of case becoming common is remote. Nevertheless, having twice come up before the courts, and having been decided as it has, it brings to light an important aspect of the adoption law which should be more clearly defined.

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115 Ibid.  
116 Ibid.  
117 262 Ill. 175, 104 N.E. 189 (1914).  
118 16 Chi.-Kent Rev. 198, 201 (1938).  
119 320 Ill. App. 75, 49 N.E.2d 841 (1943).
LEGAL PROCEDURE

The summons in adoption cases is the same as in other civil cases. Consent of the parents is specifically provided for, except in the case where a parent has been deprived of custody by a court of competent jurisdiction and a guardian has been appointed with authority to consent to adoption without notice to the parents. Unknown or absent parents are summoned under the caption "All whom it may concern."

The statute also specifically provides for a State licensed welfare agency to give consent to an adoption, where it has acquired custody by legal means and allows such agency to be substituted as defendant for the natural parents.

The statute also specifically provides that where the consent of both parents is not presented with the petition that the court shall require proof of the reason for the failure to present such consent.

The Illinois Adoption statute makes special provision that the Civil Practice Act shall apply to all proceedings except as specifically provided in the Adoption Act; and it also specifically provides for appeal.

In 1955, a paragraph was added to the act stating that the act should be liberally construed, and the rule that statutes in derogation of the common law must be strictly construed shall not apply to this Act.

JURISDICTION

The adoption act specifically provides that if the court had jurisdiction over certain parties to an adoption, and another person over whom the court did not have jurisdiction, attacks the decree, such attack shall have no basis against those over whom the court did have jurisdiction. If the adoption decree is set aside on the basis of such attack, it will be set aside only in so far as it affects such person.

All defects in pleadings, either in form or substance, not objected to prior to the entry of final decree, shall be deemed to be waived.

The Supreme Court gave a wide latitude to presumptions in some of the early adoption cases. In 1886, a collateral attack against an adoption was attempted on the ground that the petition for adoption did not indicate a sound motive.

\[120 \text{ Ill. Rev. Stat. (1955) c. 4, § 2, par. 1.} \]
\[121 \text{ Ibid.} \]
\[122 \text{ Ibid.} \]
\[123 \text{ Ill. Rev. Stat. (1945) c. 4, § 7, par. 1.} \]
\[124 \text{ Ill. Rev. Stat. (1955) c. 4, § 7, par. 3.} \]
\[125 \text{ Ibid., at par. 5.} \]
\[126 \text{ Ibid., at par. 4.} \]
not state that the natural father consented or that he deserted the child, although the natural mother gave her consent to the adoption. The court said that the mother's consent was sufficient, and failure to allege the father's death or desertion would give rise to a presumption that he was dead or had abandoned the child. There was also a presumption in favor of the jurisdiction of the court.127

The dissenting justice objected that the petition did not state the jurisdictional fact, which was a requirement, or of the father's consent, his death, or his abandonment of his family, and the adoption should therefore be set aside. This dissent later became the law.

A few years later, the Supreme Court was very careful to define which court had jurisdiction to enter an order of adoption. In Weinhard v. Tynan,128 it was held that a city court had no jurisdiction to enter an order of adoption of a child where none of the parties to be affected by such proceeding resided within the city limits, even though such parties appeared before the court in person and submitted their persons to its jurisdiction. The court said further that the statute providing for adoption of children conferred exclusive original jurisdiction in a proceeding for such adoption upon the Circuit and County Courts.

Two years after the Weinhard case, the court said that proceedings to adopt a child do not belong to the general jurisdiction of the County Court, but are under a special statute, and are to be exercised in a special and summary manner. In such proceedings the record must show upon its face everything that is necessary to sustain the jurisdiction of the court.129

In 1900, the Illinois Supreme Court was supporting a theory of strict construction of the adoption statute. It held that the act must be strictly construed because it was in derogation of the common law, and there was no presumption in favor of jurisdiction. It said to sustain the proceedings thereunder, the jurisdiction would have to be affirmatively approved.130 Further, the court said that the facts required by the statute must appear on the face of the petition itself, and must be found by the court to be true in entering its decree.

127 Barnard v. Barnard, 119 Ill. 92, 8 N.E. 320 (1886).
129 Foley v. Foley, 61 Ill. App. 577 (1895).
130 Watts v. Dull, 184 Ill. 86, 56 N.E. 303 (1900).
Although jurisdiction is still the basis today for a collateral attack, strict construction of the adoption statute is no longer enforced. A special exception to the construction of the adoption statute is provided in the statute itself.\textsuperscript{131}

Nothing is presumed in favor of jurisdiction. One who claims as an adopted child must prove the petition had the requisites giving the court jurisdiction; but proof of substantial compliance is sufficient in extreme cases, such as where the record were destroyed by fire. In such a case, oral proof, after a lapse of forty years was held sufficient, even though oral proof of the age of the child was not given.\textsuperscript{132}

In another case, substantial compliance was accepted where an adoption was had forty years previous and an attack was made on jurisdictional grounds. The attack was not allowed because the decree showed a compliance with the statute except that the written consent of the father was not obtained, it being alleged in the petition that his given name and whereabouts were unknown to the petitioners and that he had deserted the child's mother, whose written consent to the adoption was filed with the petition.\textsuperscript{133}

If the averments of an adoption petition are sufficient to give the County Court jurisdiction, the order of adoption is not open to collateral attack.\textsuperscript{134} The fact that the petition does not allege that the parents are dead but merely that they are supposed to be dead does not affect the jurisdiction of the court, as only the parents, if living, have the right to complain.\textsuperscript{135}

Where an adoption is allowed by a court not having jurisdiction, it is void and subject to attack by anyone at any time.\textsuperscript{136}

It is the jurisdictional facts which give a court jurisdiction, and not the manner in which they are stated.\textsuperscript{137}

The courts will generally hold a substantial compliance with the statute to validate an adoption if a strict construction would defeat an adoption. In \textit{Hopkins v. Gifford}\textsuperscript{138} where a wife, after her husband's

\textsuperscript{131} Ill. Rev. Stat. (1955) c. 4, § 7, par. 3.
\textsuperscript{132} Kennedy v. Borah, 226 Ill. 243, 80 N.E. 767 (1907).
\textsuperscript{133} In re Bohn's Estate, 308 Ill. 214, 139 N.E. 64 (1923).
\textsuperscript{134} Flannigan v. Howard, 200 Ill. 396, 65 N.E. 782 (1902); Munger v. Munger, 134 Ill. App. 512 (1907).
\textsuperscript{135} Yockey v. Marion, 269 Ill. 342, 110 N.E. 34 (1915).
\textsuperscript{136} Bartholow v. Davies, 276 Ill. 505, 114 N.E. 1017 (1916).
\textsuperscript{137} Warner v. Wethel, 202 Ill. App. 77 (1916).
\textsuperscript{138} 309 Ill. 363, 141 N.E. 178 (1923).
decease, sought to set aside the adoption of their two children, stating one child had been a resident of Massachusetts and the other of South Dakota, in order to quiet title of certain property left to her by her husband in his will; the court said that where there is a substantial compliance with the requirements for jurisdiction, the adoption statutes will not be strictly construed to defeat an adoption.

The court further pointed out that the statute says that any reputable person may petition the Circuit Court or County Court of the county in which he resides, or where the child may be found. There is no statutory prohibition of adoption by residents of Illinois of a child not a legal resident, where the guardian has been appointed by another state. Further, a party cannot challenge the jurisdiction which he has successfully invoked in a former proceeding.

In 1925, the statutory interpretation regarding strict construction swung away from the rather lenient holding of the Hopkins case, and swung toward a strict construction. In the landmark case of Keal v. Rhydderck, the court allowed a collateral attack of an adoption decree for the first time. The basis of the attack was jurisdiction, and this is still today the only ground allowed for a collateral attack. In the principal case, the defendant was adopted by the Keals. His natural mother had been committed to an institution for the insane, and his father was allegedly in default on his appearance. There was an error because of the time allowed after the service of the papers, and the defendant’s father was not actually in default at the time the adoption decree was granted, the decree being based on his default. When Mr. Keal died, his brothers and sisters attacked the adoption, seeking to gain his property for themselves and to take it away from the adopted son. The court ignored former cases refusing to grant a collateral attack on an adoption decree, and in effect overruled them by allowing a collateral attack here.

There was a very strong dissent by three judges. They felt that stability in repeated decisions of the court was of great importance, and only an extreme case, if any, would justify departure from a rule of forty years standing, refusing to allow collateral attack.

The case of Musselman v. Paragnik closely following the Keal

130 317 Ill. 231, 148 N.E. 53 (1925).
141 317 Ill. 597, 148 N.E. 312 (1925).
case in point of time, also followed it in its view on strict construction, saying that a proceeding for adoption, being unknown to the common law, and affecting important changes in the rights and relations of the parties must strictly conform to the statute. The petition must show all the facts necessary to authorize the court to act, as nothing will be presumed to be within the jurisdiction of the court which does not distinctly appear to be so.

The same holding was followed in the case of Hook v. Wright\textsuperscript{142} wherein the court said the petition for adoption, in order to put the court in motion and give it jurisdiction, must be in conformity with the statute granting the right and must show all the facts necessary to authorize it to act, and if the petition fails to contain all the essential elements, the court is without jurisdiction.

In 1929, the appellate court moved toward a more liberal interpretation when it said that a substantial compliance with the statute should be observed in a proceeding for the adoption of a child, rather than to follow a narrow and technical construction of the statute.\textsuperscript{143}

The case of McConnell v. McConnell\textsuperscript{144} clarified to a greater extent the question of jurisdiction. There, the court said that an adoption proceeding cannot be collaterally attacked in a partition suit except as to the jurisdiction of the court, and where the parties to the adoption proceeding are not complaining, the inquiry is further limited to jurisdiction of the subject matter.

There is no presumption in aid of jurisdiction in adoption proceedings, but it is necessary that the proceedings show substantial compliance with the statute conferring jurisdiction of the subject matter. So far as the rights of the parents of the child are concerned, it should also show jurisdiction of their persons.

Jurisdiction of the subject matter and of the person are prerequisites to the validity of a decree of adoption. This does not mean merely jurisdiction of the particular case before the court, but jurisdiction of the class of cases over which the county court has jurisdiction.\textsuperscript{145}

Where the court is exercising special statutory jurisdiction, the record must show on its face that the particular proceeding is one upon which the court has authority to act, and if not, the judgment is void and subject to collateral attack.

\textsuperscript{142} 329 Ill. 299, 160 N.E. 579 (1928).
\textsuperscript{143} Baumgarten v. Krueger, 253 Ill. App. 372 (1929).
\textsuperscript{144} 343 Ill. 70, 177 N.E. 692 (1931).
Where the natural mother of an adopted child selected the forum to have the question of jurisdiction and the validity of her consent determined, she could not, after an adverse determination, bring a habeas corpus proceeding to attack the decision.\textsuperscript{146}

In \textit{Bowdry v. Bowdry}\textsuperscript{147} it was held that the mother, who allegedly was not properly served with summons in the proceedings for the adoption of her minor child who allegedly was abandoned by her, waived the county court's alleged want of jurisdiction of her person by filing her general appearance in the proceedings, and submitting to the court the question of her abandonment of the child.

A court cannot have jurisdiction over persons who are not bona fide residents, for the purpose of granting a decree of adoption, particularly if they submit themselves to the jurisdiction to circumvent the law of their domiciliary state.\textsuperscript{148}

In an early case, where the adoption of a child was allowed on the basis of consent of his natural father, but where the consent of the mother was not obtained because she was insane, it was later found that the court had no jurisdiction over the mother. There was no consent obtained from the natural mother's guardian. The mother, being insane, could not consent, nor could she be guilty of abandonment or some other dereliction. Therefore, the court having no jurisdiction, could not grant an adoption.\textsuperscript{149} This situation has been remedied today by the adoption statute.\textsuperscript{150}

In 1953, the appellate court swung back to a strict compliance rule in the case of \textit{Noel v. Olszewski}.\textsuperscript{151} In that case, a resident of Chicago tried to adopt three war orphans living in Poland. Permission for waiver of the provision that a child reside with the petitioner for six months before adoption, and also a waiver of consent of the two children over fourteen to be written and acknowledged before the court was obtained. Because of political difficulties, the children were not able to be brought to this country from Poland at the time of the attempted adoption.

The petitioner died, and the court invoked the strict compliance

\begin{enumerate}
\item \textsuperscript{146} \textit{Witton v. Harriss}, 307 Ill. App. 283, 30 N.E.2d 169 (1940).
\item \textsuperscript{147} 324 Ill. App. 52, 57 N.E.2d 287 (1944).
\item \textsuperscript{148} \textit{Brown v. Hall}, 385 Ill. 260, 52 N.E.2d 781 (1944).
\item \textsuperscript{149} \textit{Burstein v. Millikin Trust Co.}, 350 Ill. App. 462, 113 N.E.2d 339 (1953), rev'd 2 Ill.2d 243, 118 N.E.2d 293 (1954).
\item \textsuperscript{150} Ill. Rev. Stat. (1953) c. 4, § 3, par. 44.
\item \textsuperscript{151} 350 Ill. App. 264 (1953).
\end{enumerate}
rule, saying that there could be no excusing of a strict compliance where the party who sought the adoption was dead. Further, if the children should be brought to Illinois there would be no individual interested in, or legally responsible for them.

Where a natural mother sought to void the adoption of her child on the ground that the court granting the decree had no jurisdiction over her, and that the consent had her forged signature, the court said it was a collateral attack. Where the record in an adoption proceeding shows at least a substantial compliance with the provisions of the Adoption Act, an adoption decree is secure from collateral attack. The court said it had no jurisdiction to decide a question of fact with respect to the alleged forgery.\(^5\)

When a court is exercising special statutory jurisdiction, there is no presumption of jurisdiction, but the record must show on its face that the case is one where the court has authority to act, and if it does not, the judgment is void and subject to collateral attack, whether the court is one of limited or general jurisdiction.\(^5\)

In that case, the county court lacked jurisdiction to authorize the guardian appointed in the proceedings to have the child declared to be a dependent and neglected child and to consent to the adoption of such child without the mother’s consent. The court failed to find and place on record the statutory ground or test of unfitness of the mother when she withheld her consent, and the mother’s motion to dismiss the petition for the adoption of the child, to which adoption the child’s guardian had consented, was properly allowed.

HABEAS CORPUS

In *Sullivan v. People*,\(^5\) the natural father of a child sought, by writ of habeas corpus, to regain the custody of his child after she had been adopted by others. The petition of the adopting parents alleged that he had abandoned the child, and no notice was given to him, even though he was living in the jurisdiction of the court.

On appeal, the court said that the final order in a habeas corpus proceeding for the custody of a child may be reviewed upon writ of error but not by appeal. An order determining the rights of the parties in a habeas corpus proceeding for the custody of a child is final, for


\(^5\)In *126 Ill. App. 389* (1906), modified 224 Ill. 468, 79 N.E. 695 (1906).
the purpose of a writ of error, only in the sense that the parties are concluded under the particular circumstances existing when the order was entered; but if there is a change in the circumstances, the order is not final and the issue may be tried again on a second application.

Where the only question tried in a habeas corpus proceeding by a father for the custody of his child is whether a certain decree of adoption is valid, the fact that the Appellate Court finds such decree was void as to the parent and reverses the order of the lower court does not necessarily establish the father's right to custody of the child. The cause should be remanded to permit that question to be adjudicated according to the best interests of the child.

Where a proceeding by habeas corpus puts in issue the question of the custody of a child, the prevailing consideration is the best interests of the child.\textsuperscript{155}

In \textit{Burr v. Fahey},\textsuperscript{156} the natural mother of the child in question divorced the natural father, and gained absolute custody over the child on the ground of the father's unfitness. She lived with the Faheys for several years and then died. The Faheys petitioned to adopt the child. The father protested the adoption, but prior to that time, did not make any attempt to have the custody of the child restored to him. The adoption was allowed, and the father sought by writ of habeas corpus to recover custody of the child. It was denied.

A decree of the county court in an adoption proceeding, allowing

\textsuperscript{155} Barclay v. Bleakley, 132 Ill. App. 338 (1907). This is the famous "Incubator Baby Case" wherein Mrs. Bleakley, the alleged natural mother of the child left her husband went to a lying-in home and gave birth to a child. She wrote to her husband, telling him the baby had died, and asking him to contribute to the funeral expenses. Subsequently, the mid-wife who had delivered the child turned over to exhibitors of baby incubators at a world's fair a baby represented to be Mrs. Bleakley's child. The Barclays became attached to the child and sought to ascertain the parentage. Mrs. Barclay corresponded with Mrs. Bleakley in order to arrange for adoption. Mrs. Bleakley gave her consent, believing the child was not hers but rather an unknown orphan. The Barclays adopted the child by deed in Kansas, Mrs. Bleakley was granted a writ of habeas corpus in Kansas and the child was returned to her. Her petition was based on fraud; Mrs. Bleakley claimed she did not know it was her child when she consented to have it adopted, but believed it to be another. The Barclays filed suit in Illinois, and the case reached the Illinois Supreme Court about a year and a half after Mrs. Bleakley had taken custody of the child. The court held that since Mrs. Bleakley had custody for such a long period, there was a question of whether the best interests of the child would preclude taking it from Mrs. Bleakley and returning it to the Barclays. The case was reversed because the custody was then being litigated in Kansas on appeal from the original habeas corpus proceeding. When the custody case finally came to trial in Kansas, Mrs. Bleakley had custody for over two years and the court allowed her to retain custody in the best interests of the child.

\textsuperscript{156} 230 Ill. App. 143 (1923).
the adoption, cannot be collaterally attacked by a habeas corpus proceeding by the father of the child, where the proceedings of the county court were regular in all respects and based upon a petition containing all the jurisdictional facts.

In a proceeding for a writ of habeas corpus by a father to obtain the custody of his child, upon service of the writ, the court acquires jurisdiction not only of the cause but of the parties thereto. The writ thereupon takes precedence over a petition for the adoption of the child, so that the court in the habeas corpus proceeding has no right to defer the hearing to await the result of the decree in the adoption proceeding.157

Where the natural mother of an adopted child raised in the county court, by motion to vacate the decree of adoption, the question of jurisdiction of that court over the adoption proceedings and the validity of her consent to the adoption, and the adoption was upheld, she tried to attack the decision by a writ of habeas corpus. The court said that she selected the forum in which to determine the issue, and could not, after an adverse determination, bring a writ of habeas corpus to attack the decision.158

**SPECIFIC PERFORMANCE OF A CONTRACT TO ADOPT**

In the case of *Jones v. Bean*,159 the Joneses made an attempt to adopt a child, but the petition of adoption was defective in that the wife’s name was not joined with the husband’s. The natural father of the child, before his death, had made arrangements with another person who was going to care for the child, but in view of the attempted adoption by the Joneses, he surrendered custody to them. The Joneses promised to make plaintiff their heir, to leave him valuable farm property etc. He lived with them as their son and contributed substantially to their support. The Joneses’ promises were put in the form of a contract. Mrs. Jones survived her husband, and left the estate to other relatives. The plaintiff now seeks to recover as an adopted son.

The court did not allow him to recover as an adopted son because the petition of adoption was defective, but allowed him to recover on the basis of contract, having given up good and valuable opportunities to become their adopted son, and having rendered valuable services.

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157 Frentz v. Frentz, 256 Ill. App. 259 (1930).
159 136 Ill. App. 545 (1907).
In *Lee v. Benningbom*, the court gave a very generous enforcement to a contract of adoption saying that such a contract need be proved only by a preponderance of the evidence. In that case, a husband and wife agreed to adopt a niece of the husband. She lived with them in accordance with the agreement and then the wife died. The husband married again and died intestate. The second wife tried to claim as the sole heir, but the court allowed the child to inherit a lawful child's share, because of the contract to adopt.

Where the evidence establishes that there has been an agreement to adopt a child and to make said child the heir of the foster parents, then its construction, legal purport and effect are matters of law for the determination of the chancellor.

It is sufficient consideration for a contract of adoption to be binding that the foster child left her parents and resided with her foster parents in accordance with the terms of the contract.

In 1927, the Illinois Supreme Court took a more strict approach to contracts to adopt, and did not allow the conveyance of real estate pursuant to such contract, finding the evidence did not warrant such a conclusion.

Apparently the Illinois Supreme Court distinguished between oral contracts to adopt and written contracts, or alleged adoptions, giving greater latitude to the former than to the latter.

In *Winkelmann v. Winkelmann*, the court allowed specific performance of an oral contract to adopt. The court stated that specific performance of oral agreements to adopt depended on the particular facts in each situation, and so long as it did not violate the Statute of Frauds, and the facts showed specific performance, it should be allowed.

In *Soelzer v. Soelzer*, the Illinois Supreme Court again allowed a specific performance of an oral contract to adopt, but one in which a written contract was drawn up, but which was not signed by the adopting parents.

In 1950, in the case of *Franzen v. Hallner*, the court felt there was not enough evidence to warrant a specific contract of adoption.

The court said the existence of an oral contract of adoption must be

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100 199 Ill. App. 497 (1916).
102 345 Ill. 566, 178 N.E. 118 (1931).
103 382 Ill. 393, 47 N.E.2d 458 (1943).
104 404 Ill. 596, 89 N.E.2d 818 (1950).
alleged and proved by evidence that is clear, explicit and convincing, and if the evidence fails to establish the existence of a contract by that degree of proof, a decree refusing to establish the contract will not be disturbed. Here, there was no such evidence.

In Weiss v. Beck\textsuperscript{106} the court found there was not enough evidence to warrant specific performance of a contract of adoption. In that case, the boy was taken into the home of the Stockes when he was six years old and lived with them as a son. There was conflicting testimony as to whether the Stockes intended to adopt him, or whether they represented him to be their adopted son. No proceedings of adoption were ever had, and no contract to adopt was presented.

The court refused to grant specific performance, saying that to be entitled to a contract for specific performance for adoption, it is necessary that the contract be clearly proved as alleged, and according to the standard of proof required. The proof must be clear and conclusive, leaving no room for reasonable doubt, and the courts of equity accept with caution evidence offered in support of a contract to make disposition of property of a deceased person different from that provided by law, and will weigh such evidence scrupulously. Circumstances here were not enough to warrant specific performance of an oral contract to adopt. (This case arose over the plaintiff's right to inherit property, and that right was put in issue, thus the case went directly to the Supreme Court.)

In Dixon National Bank of Dixon v. Neal\textsuperscript{106} the appellee claimed interest in the land of the decedent as an adopted son. Evidence showed he was the illegitimate child of one Mary Cole, who had instituted bastardy proceedings against one Frank Barr, the son of the decedent. By agreement, the decedent (and later joined by her second husband) petitioned the Wisconsin court to adopt the child, which was done. The bastardy proceedings were dropped, and the child's name was changed to Neal (decedent's) and he was raised as a son of the decedent and her husband. The guardian of another heir protested the validity of the adoption on (1) grounds of jurisdiction; (2) lack of consideration for the contract; and (3) that the contract was void because the mother of the child was a minor at the time it was entered into.

The court did not consider the validity of the adoption proceeding, finding it unnecessary to their decision of the case. The question was

\textsuperscript{105} 1 Ill.2d 420, 115 N.E.2d 768 (1953).  
\textsuperscript{106} 5 Ill.2d 328, 125 N.E.2d 463 (1955).
only one of sufficiency and quality of proof to meet the burden of an oral contract to adopt, and the validity of such a contract.

**Appeal**

The lack of appeal in adoption decrees was defined as early as 1889 in the case of *Meyers v. Meyers*\(^{167}\) by the Illinois Appellate Court.

In that case the grandfather petitioned the County Court for leave to adopt his grandchild, alleging she was then about seven years old, that he had had the care and control of her since her birth, that her mother had deserted her when she was two years old, that the father of the child was unknown to the petitioner, that the mother did not consent to the adoption, and that she was leading a life of prostitution in St. Louis.

The County Court granted the order of adoption, whereupon the mother of the child obtained an appeal to the Circuit Court, where her appeal was dismissed. She brought the record to the Appellate Court for review. The court held that an appeal does not lie to the Circuit Court from an order of the County Court in such cases; no provision is made in the adoption law for an appeal.

In 1915, the appellate court affirmed this position in the case of *In re Warner's Petition* where, after the decree of adoption was entered, the natural father sought an appeal. The court said:

The adoption of children is unknown to the common law. The principle of adoption is taken from the Roman law, and is solely, the creation of statutory enactment. The proceeding does not belong to the general jurisdiction of County Courts, nor is it in accordance with the usual form of common law or chancery proceedings; but it is under the special statute and to be exercised in a special and summary manner.\(^{168}\)

In *Holman v. Brown*\(^{169}\) grandparent guardians objected to the adoption of their grandchild by others, so the court substituted others for guardians and the adoption was allowed. The grandparents sought to set aside the adoption by appeal, and sued out a writ of error, which was denied.

In *Dixon v. Haslett*,\(^{170}\) the Hasletts filed a petition for the adoption of their grandchildren. The other grandparents also petitioned, but the court allowed the Hasletts to adopt them. The Dixons sued out a writ of error to review that order. The Hasletts filed a motion to dismiss the writ on the ground that proceedings for adoption of children are

\(^{167}\) 32 Ill. App. 189 (1889).
\(^{168}\) 193 Ill. App. 382 (1915).
\(^{170}\) 232 Ill. App. 152 (1924).
purely statutory and no writ of error will lie to review judgment. They were upheld.

A proceeding in the county court for the adoption of children does not involve property rights so as to make the judgment therein reviewable on writ of error, on the theory that rights of inheritance between the respective adoptive parents and children are involved, where, under the provisions of the Adoption Act restricting inheritance between adoptive children and parents, no property rights can be disturbed, especially in view of the impossibility of presently determining future rights of inheritance of an heir apparent.

In *Moore v. Brandt*\(^\text{171}\) the Brandts petitioned for the adoption of a child. The appellants filed a petition to vacate the decree of adoption. The appellees entered a special and limited appearance and made a motion to strike the petition to vacate the decree of adoption from the files, which was granted. An appeal was attempted but denied. The court said since no appeal will lie from a decree of adoption, none will lie from an order striking a petition to vacate a decree of adoption.

A case denying an appeal, which aroused a great deal of controversy was that of *Ekendahl v. Svolos*\(^\text{172}\) which was decided in 1944. In that case an adoption petition was filed in the county court, and the petition named the natural parents as defendants. The natural mother answered and protested the charge of abandonment, but the adoption decree was duly entered despite her protests. Then, the natural mother appealed on a writ of error to the appellate court, and that court reversed the judgment of the County Court. On appeal, the Supreme Court reversed, because the appellate court was without jurisdiction to review the cause.

The court said that an adoption proceeding is not reviewable by a writ of error. Adoption proceedings, involving no question of descent, do not involve property rights or personal liberties so as to make them reviewable by writ of error, as parents have no property rights in their children.

**CONCLUSION**

Under the Illinois statute, any reputable person may adopt a child. This is the only legal requirement, and it places an affirmative burden on the adopting parent to show that he is a fit and proper person to have the custody of the child.

\(^{171}\)234 Ill. App. 306 (1924).

If, after a child has been adopted, he is re-adopted by his natural parent or parents, the effect of the re-adopton is to void the first adoption, even if only one natural parent petitions for the adoption. No rights accruing under the first adoption survive the re-adopton, and all obligations of the natural parents are resuscitated by the re-adopton. A natural parent who is not a party to the re-adopton still is subjected to all of the duties and obligations of a parent, even though he may not consent to the adopton.

Many other specifications for adoptive parents such as age limitations, personal and family status, nationality, etc. are set up by childplacing agencies. This works out very satisfactorily in their personal placement, because they can exercise discretion in waiving any requirements, if they find it desirable to do so.

It is interesting to note that the law does not require that the adopton parent be married; however, if he is married, then it is necessary that the spouse join in the petition.

The statute recommends that children be placed with families of the same religious belief, and it has been held that although similarity of religion is important, it is not the controlling factor.

The Illinois statute specifically provides for the adopton of minors, and by interpretation in the courts, it has been held to exclude the adopton of adults. If an adult is adopted in another state, and that state has proper jurisdiction, such adopton will be recognized as valid in Illinois.

There is a requirement that the person to be adopted must reside the six months preceding the filing of the petition with the petitioner, so by inference we assume the person to be adopted must have reached a minimum age of six months. The statute is otherwise silent as to any age requirements.

Social service agencies specializing in child placement set certain standards of health and intelligence on children who are to be placed in adoptive homes. This is completely separate from the requirements set up in the statute; to extend such requirements to legal specifications would work undue hardships in individual cases, for instance where orphaned children are adopted by grandparents.

The specific grounds for adopton are set forth in the statute and are as follows: consent of both parents; one parent consents, and the other is unfit by reason of depravity, open and notorious adultery or fornication; drunkenness; cruelty; abandonment or desertion.
The first case construing the finality of the natural mother’s consent held that her consent was revocable any time before the decree of adoption had been entered, and indicated that this was a right of the natural mother. Later cases narrowed the meaning to say that the consent of the parents could be withdrawn any time before the final decree of adoption, at the discretion of the court.

The Legislature recognized that adoptive parents also acquire rights in a child, and as a matter of public policy, made the provision of consent irrevocable in the absence of a showing of fraud or duress.

In the case of a legitimate child, the consent of both parents is necessary, even though the mother represents the child to be illegitimate. If the child is illegitimate at the time the natural mother gives her consent, subsequent marriage of the parents and consequent legitimation of the child do not make it necessary for the father to give his consent. However, if the natural mother of a presumed illegitimate child gives her consent to its adoption, but the court finds later that the child was actually legitimate at the time she gave her consent, then the consent of the father is also necessary.

If the natural mother misrepresents the status of her child as illegitimate, but later proves its legitimacy, the child cannot be adopted without the father’s consent. The law attempts to protect the natural mother from the fraud or duress of others in consenting to the adoption of her child, but in a case like this, the adoptive parents can be the victims of the fraud of the natural mother.

There has been no interpretation by the courts of what constitutes depravity, open and notorious adultery or fornication, drunkenness or cruelty, so as to constitute grounds for adoption. There has been a negative definition of what did not constitute adultery, and there have been cases where the parent so charged was found guilty of adultery, but the adoption was granted on other grounds.

Abandonment and desertion are grounds for adoption only where the evidence is clear cut and unmistakable.

The grounds for finding a parent unfit for the purpose of depriving him of the custody of his child are the same as those enumerated above. If a proceeding to so deprive a parent of custody is successful, and the person or agency gaining custody of the child is allowed by the court the right to consent to its adoption, then the parent’s consent is not necessary in the adoption proceeding.

The absence of cases finding depravity, adultery, drunkenness and
cruelty as grounds for adoption might be explained by the fact that
parents guilty of such conduct have first been deprived of the custody
of their children, and the basis of the subsequent adoption of the chil-
dren has been consent, granted by the person or agency thus gaining
custody of them.

If any of the grounds specified for unfitness of the parent has been
the grounds for a prior divorce action, the court will not take judicial
notice of that fact, but requires proof of such charge *ab initio*.

Where one parent is dead, and the other is mentally ill, and has been
mentally ill for three years, and in the opinion of two physicians ap-
pointed by the court, is not likely to recover in the foreseeable future,
then a guardian of the parent who is mentally ill can consent to the
adoption of his child. The constitutionality of this section of the law
was recently tested in the courts, and it was found to be constitutional,
since the ill person was protected in his parental rights by the appoint-
ment of a guardian.

Where a child is over fourteen years of age, he must consent in
writing to his adoption and acknowledge the writing in open court. If
the child is present at the time of the proceeding, and the court there-
by has in personam jurisdiction over him, it is considered a mere tech-
nicality which can be waived. However, if the child does not ac-
knowledge such consent in open court by reason of his absence at the
time of the proceeding, and the court does not have in personam juris-
diction, there is a failure of compliance with the statute, and the adop-
tion cannot take place.

The effect of adoption is to take a child from the position in which
he was placed by nature and transferring him to a new one created by
law. The adoption cuts off all rights of the natural parent to the child,
but it does not completely relieve him of his obligations to the child.
If the adoptive parents become unable to support the child, the natural
parent can be obligated to resume his support of the child. The only
cases dealing with such a situation is where one natural parent has
either maintained or re-acquired the status of a parent, and has sought
support from the other parent who has been deprived of the status of
parent by an adoption decree. This is not really a serious matter, be-
cause most adoptive parents wish to cut off all connection with the
natural parents and are not likely to seek their support.

The adopted child has no obligation to his natural parents. When
the adoption takes place, his obligations as a child attach to his adop-
tive parents. However, he does retain certain rights from his natural parents; he retains the right to support and the right to inherit from them. In effect, he has a right without a correlative duty.

The adoptive parents become, for all legal purposes, the natural parents. There is not a specific statutory obligation to support the child, but it follows that if he has the legal status of a natural parent, he has the obligation to support the child.

Today, by interpretation, the adopted child can bring a Wrongful Death Action as the next of kin, and he is entitled to a child’s benefits under the Policemen’s Pension Fund.

Originally, the adoption statute, being in derogation of the common law, was strictly construed; today, by specification within the statute itself it is to be liberally construed.

A re-adoption by natural parents after the child has been adopted by others, voids the first adoption, and no rights accruing under the first adoption survive the re-adoption.

The adopted child has the right to inherit property fully as if he were a natural child, unless the property is expressly limited to “heirs of the body.” In some instances, where the adopted child is also related to the adoptive parents by blood, he has been allowed to inherit both as a child and in the capacity of his other relational status. It would seem to be more equitable if he were allowed to inherit in either capacity rather than receive a windfall by inheriting in both capacities.

The summons in an adoption case is the same as in other civil cases. The natural parents of the child to be adopted must be notified unless a social service agency has been substituted for the natural parents. This is accomplished when the natural parents release all their rights to such an agency for the purpose of placing the child for adoption.

If the court has jurisdiction over the subject matter and the parties, a decree of adoption awarded by it cannot be attacked. The only time a collateral attack of an adoption decree is allowed is when it goes to the jurisdiction of the court.

The doctrine of strict construction no longer applies to the adoption statute. A liberal construction is expressly provided within the statute itself. However, there must be a strict compliance with the statutory requirements, unless the court has in personam jurisdiction at the time the decree is awarded, in which case the strict compliance may be waived.
A writ of habeas corpus takes precedence over a petition for adoption; after the determination of the writ, no appeal is allowed. If in the meantime, there has been a change in circumstances of the petitioner, a review of the writ of habeas corpus is allowed by a writ of error. If a decree of adoption is found to be void under the writ of habeas corpus, such a determination does not automatically establish the petitioner as the rightful guardian of the child.

In trying to establish a contract to adopt, the proof offered must be clear and conclusive. Today, the requirements for such an alleged contract are strict, and there must be no doubt as to the existence of the alleged contract. However, an oral contract to adopt, substantiated by clear and conclusive evidence is more likely to be enforced than a written agreement purporting to be a contract to adopt. It is the general feeling that if the parties reduced such an agreement to writing, they would make sure that it expressed their real intentions.

There is no statutory provision for appeal from an adoption decree on its merits. If there is a question of jurisdiction, it can be investigated under a writ of habeas corpus. It is the rule that a purely statutory proceeding, unknown to the common law, can be appealed from only if expressly allowed by the statute itself or where a property right or personal liberty is involved.

This excludes an appeal from an adoption decree, and the only change that could come would have to be by way of statutory amendment.

One very interesting practice in black market adoptions was brought out in the Senate Investigation Hearings. One method used was to have the prospective natural mother register at the hospital where her baby was to be born, under the name of the adoptive parents. The birth certificate then registered the child as legitimate, and as the natural child of the adoptive parents. Of course, the person who brought the adoptive parents together with the natural mother collected a fee for the services rendered. The child, not being the natural child of its adoptive parents, and not having been legally adopted by them, has no legal status. In the event of the parents' death, the child could be left with nothing.

It is a frequent practice to allow unmarried mothers to enter a hospital for delivery of their babies under an assumed name and to register the birth of the child as legitimate. This is done under the guise of protection for the unfortunate unmarried mothers, but should this
protection be carried to the extent of allowing a misrepresentation on a legal document such as a birth certificate? As the situation now stands, the hospital attendant seeking the necessary information for the birth record interrogates the mother as to her name, place of birth, name and place of birth of the child’s father, etc., and the mother signs the completed form declaring the information to be true and correct. At no time is the mother asked to prove her identity or to offer proof of marriage. The child’s birth is registered pursuant to the information she chooses to give the attendant, and she can thereby make the question of legitimacy a fiction.

The above mentioned black market operation, and situations arising out of a misrepresentation of a child’s legitimacy could be avoided by requiring proof of identity of the mother and proof of marriage at the time of registration of her child’s birth. This would most likely have to be done outside the adoption statute, but would certainly affect it.

There seems to be a common belief that outside financial assistance to the unmarried mother is evil per se. Probably the two most attractive things the black market operator offers the prospective, unwed natural mother is financial support during her pregnancy, and anonymity at the time of adoption of the child.

If such help could be given to the natural mother by the licensed child placement agencies, it would seem that it would be a big help toward eliminating at least this aspect of black market adoption practice.

The status of the adopted child today is one of almost perfect legal acceptance, and practically perfect social acceptance.

The biggest area for statutory improvement lies in the realm of procedure in allowing an attack on the merits of an adoption decree, which improvement must come by way of statutory amendment. There is also a need to clarify the status of an adopted child in relation to his natural parents, whether he is completely separated from them by the adoption or whether he retains a right of an heir, though he has no obligations to the parents.

There is also a need to clarify his status when he has been the subject of more than one adoption. Does a subsequent adoption void a former one, or would an adoptee retain rights under a former adoption as a natural child retains them from his natural parents?

At this writing, the Adoption Committee of the Illinois State Bar
Association, working with the Adoption Committee of the Chicago Bar Association, is preparing a draft of a revised adoption statute. They hope to prevent some of the black market practices by eliminating non-resident adoption petitions, except in agency and related cases. They also desire to permit filing of a petition for adoption at the time the child is placed in the home of the adopted parents, giving the court greater control to protect the interests of all. There is also a provision for appeals in the same manner as in other civil cases in courts of record.

The matter of clearing up black market practices lies as much in the realm of law enforcement as in change of statute. The practices occurring in black market adoptions cannot be prevented only by changes in the adoption statute, but further changes will have to be made regarding registrations of births, marriages and divorces.