

Adoption by Estoppel

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It is well known that people who are not formally married to each other may still be in a legally recognized common law marriage. Not as well known is that a person who is neither a biological nor a formally adopted child of a decedent can be considered a child and legal heir under an adoption by estoppel theory that involves proof similar to that needed for a common law marriage.

1. Required Proof

The evidence must show two things for an adoption by estoppel, also called an equitable adoption: (1) the existence of an agreement to adopt and (2) performance by the child. The proponent of the adoption has the burden to prove these elements by a preponderance of the evidence, and circumstantial proof will suffice.

2. Child's Performance

The child's performance element is generally the easier one to prove. One court said that "performance by the child is nothing more than (the child) conferring love, affection, and other benefits on the adoptive parent." The same court held that it is not necessary that the child know about the agreement to adopt or act in reliance on it.

3. Agreement to Adopt

The agreement to adopt element is more difficult to prove and is more fact specific, with the fact finding at trial ordinarily being upheld on appeal. Key evidence includes tax returns, insurance forms, and school records, since those usually show whether the decedent represented that the child was his or her child.

4. Legal Effect

Texas Probate Code § 3 (b) defines a "child" to include a child adopted "by acts of estoppel," and § 40 allows for inheritance through an adoptive parent.



5. Client Advice

Clients should be cautioned about potential equitable adoption claims, and estate plans should be drafted with those potential claims in mind.

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