

1959

# In the Matter of the Estates of William Robert Williams and Sarah Corless Williams, Gladys Williams aka Tania Karol : Brief of Respondent

Utah Supreme Court

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Rich, Elton & Mangum; H. A. Rich; Attorneys for Respondent;

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**IN THE SUPREME COURT  
OF THE STATE OF UTAH**

**FILED**

ET 14 1959

In the Matter of the Estates

of

**WILLIAM ROBERT WILLIAMS,**

also known as

**WILLIAM R. WILLIAMS, and**

**SARAH CORLESS WILLIAMS,**

*Deceased.*

**GLADYS WILLIAMS, also known as**

**TANIA KAROL,**

*Petitioner and Appellant.*

Clerk, Supreme Court, Utah

Case

No. 9093

**BRIEF OF RESPONDENT**

**RICH, ELTON & MANGUM**

**By H. A. RICH**

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**307 Utah Oil Building**

**Salt Lake City 1, Utah**

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# IN THE SUPREME COURT OF THE STATE OF UTAH

In the Matter of the Estates  
of

WILLIAM ROBERT WILLIAMS,  
also known as  
WILLIAM R. WILLIAMS, and  
SARAH CORLESS WILLIAMS,  
*Deceased.*

GLADYS WILLIAMS, also known as  
TANIA KAROL,  
*Petitioner and Appellant.*

Case  
No. 9093

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## BRIEF OF RESPONDENT

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### STATEMENT OF FACTS

Respondent feels that a better understanding of the case and its issues can be had by restating the case history, and the nature of evidence which appellant stated she *could* produce, and the evidence which appellant stated *could not* be produced, which resulted in the summary judgment.

Decedents are the natural parents of respondent, Inez Williams Warshaw, who was appointed administratrix of their estates (R. 1-9). Before the time for distribution of the estates, petitioner, Gladys Williams, also known as Tania Karol, filed her petition (R. 31-33) claiming the right to inherit upon one or the other of two alternative grounds:

(a) Under the laws of succession as the legally adopted daughter of decedents; or

(b) Under the laws of testacy by the terms of an holographic will executed in September, 1956, by decedent William Robert Williams, giving to petitioner all of the real property of decedent.

Respondent filed her answer denying both allegations (R. 23) and propounded interrogatories to petitioner (R. 21, 22, 23) by way of discovery, to which petitioner made answer (R. 24, 25).

Petitioner, also by way of discovery, took the deposition of respondent (R. 67).

Upon the basis of the answers by petitioner to those interrogatories showing lack of evidence of facts necessary to establish either of the allegations in the petition, respondent made a motion for summary judgment of dismissal (R. 35). This was heard before the court, but before the court rendered its judgment petitioner obtained permission to amend her petition so as to allege that, instead of being actually adopted by decedents, decedents made a contract of adoption with the natural mother of petitioner, which was fully performed and

which should be specifically enforced for the benefit of petitioner to the extent of an equal share of the estates of decedent. The amendment was as follows:

“Petitioner is entitled to inherit from decedents William Robert Williams and Sarah Corless Williams on an equal basis with said Inez Williams Warshaw, by virtue of a contract under which the decedents, for good and valuable consideration, severally promised to adopt the petitioner.”

Thereupon respondent again utilized the processes of discovery to ascertain what *facts* petitioner claimed to be able to establish upon the basis of which petitioner could prove the existence and nature of any such purported contract of adoption; and the nature of the evidence that petitioner claimed to be able to present to establish those facts. The interrogatories (R. 27-28) and the answers (R. 42-47) by petitioner, together with the prior interrogatories and answers, with the deposition of respondent, were again made the basis for a motion for summary judgment. Inasmuch as petitioner, in answer to Interrogatory 10 (R. 46) claimed that the court record in a divorce proceeding between her father and mother, *Carrol v. Carroll*, file No. 16060 in the Third District Court, would establish, or tend to establish the existence of such a contract of adoption, the said court file was offered and received for consideration by the court as a part of the offer of proof by petitioner in opposition to the motion for summary judgment. (R. 91-120)

The court thereafter granted the motion for summary judgment upon the ground that, assuming that petitioner could and would produce all of the evidence that

she claimed to be able to produce, and assuming it were uncontradicted, it nevertheless would not be sufficient to make a case for consideration of a court or jury (R. 53-54), and did not show the existence of any such contract of adoption as claimed by petitioner. (R. 53-54)

We shall assume, as appellant has assumed, that appellant has abandoned the original allegation of actual adoption and is relying on the amended petition alleging an agreement to adopt.

Since petitioner makes no further reference to or argument in support of the holographic will allegations, we shall also assume that that phase of the case is also abandoned.

The following basic facts are admitted by petitioner in her answers to interrogatories:

1. Petitioner does not know of any adoption proceedings in any court (R. 21, 24).

2. Petitioner has no records showing that there were any such court proceedings (R. 21, 24).

3. Petitioner has in her possession no written document of any kind to substantiate the fact of adoption by either of decedents (R. 22-24).

4. Petitioner believes that there was an agreement for adoption; that it was in writing; and that it was signed by decedents and by *Cora Carroll*, the natural mother of petitioner (R. 27, 42). Petitioner has never seen such a document (R. 27, 43). In answer to interrogatory 4, petitioner made the following answer (R. 43):

“At the present time I know of no individuals who could testify that they had seen a written contract of adoption, that they knew its contents, or that they had observed anyone sign such a document. I have been informed that the attorney, Ben Johnson, is now deceased. However, the custodian of the records and files of his practice, if such records are still in existence, may be able to furnish information concerning such a document.”

We also quote the following answer (R. 43) to interrogatory 5 (R. 27) :

“As stated in my answer to Interrogatory No. 1, I do not know whether a written contract was signed by the parties. If the contract was oral, I do not know the exact time, place, or parties present. However, the evidence available to me indicates that the parties present would have included Mr. and Mrs. Williams, Mrs. Cora Carroll and, possibly, the attorney, Ben Johnson. The conversation referred to in my answer to Interrogatory No. 1, if deemed to constitute an oral contract, would show that there were present Mrs. Cora Carroll, Mr. and Mrs. Williams, and William Turner. The substance of the agreement was that my natural mother would permit Mr. and Mrs. Williams to raise me as their daughter, that my natural mother would abandon all claim to me, and that Mr. and Mrs. Williams would adopt me and raise me as their own.”

Petitioner stated in answer to interrogatory 9 (R. 28) that she has a document signed by decedents purporting to substantiate or establish an agreement for adoption (R. 46). When requested in interrogatory 10 to state what the document is and where it may be seen

(R. 28), she refers to an L. D. S. Church baptismal record (R. 46, 41) which is not signed by either of decedents; also some letters signed "Your loving parents"; and she refers to the divorce proceedings between her natural parents (R. 46), to which reference will hereafter be made.

The natural mother of petitioner was living in Salt Lake City, Utah, and the natural father of petitioner was living in Canada when the purported agreement for adoption was made (R. 47).

The natural mother of petitioner was the sole participant of her parents in the purported agreement (R. 28, 47).

Decedents were living at 844 Washington Street, Salt Lake City, Utah (R. 28, 47).

The purported agreement was made when petitioner was *nine months old* (R. 28, 47).

The balance of the evidence which petitioner claimed to be able to produce (R. 42-47) related to conduct and correspondence consistent with any one or more of the following relationships: (a) Natural parent and child, which it admittedly was not; (b) actually adopted child in accordance with the statutes of Utah, of which there was no evidence; and (c) the relationship of loco parentis, which it obviously was.

The only *court* record which petitioner claimed to be able to produce to establish her relationship to decedent, and which petitioner claimed would establish, or tend to establish the existence of a contract of adoption, was the case referred to in answer to interrogatory 10 (R. 46), which court record was produced and received for consideration of the court at the hearing of the motion for summary judgment. The entire file in that case has been certified to this court as part of the record on appeal in this case. By judicial allegation, admission and decree it established exactly the opposite of what petitioner said it would prove. The relationship of petitioner to decedents was one of the issues in the case. We quote the following from the counterclaim of the father (R. 103):

“That the said plaintiff who gave birth to a child after she came to Utah, gave the child away to one W. R. Williams who now has the child, without the knowledge or consent of defendant, and that plaintiff told said defendant and others that the said defendant was not the father of said child.”

and the following from the reply, under oath, of the mother (R. 106):

“She admits that she gave birth to a child shortly after she reached Salt Lake City, Utah, but denies that she gave it away to one W. R. Williams or any other person, but alleges the fact to be that at that time, on account of her then poverty and sickness she was unable to give the child a proper home, and the said W. R. Williams offered to take the child and properly rear it *until such time as she could give it a proper home and rearing.*”  
(Emphasis supplied)

The last word that we have, therefore, from the mother, who petitioner claims made the purported contract of adoption with decedents when petitioner was *nine months* old, is the mother's statement under oath when petitioner was three years old that there was only a *temporary* placing of petitioner with decedents, for financial reasons, and that when things improve she (the mother) has the right to and will take petitioner back.

The decree of divorce was not entered until December 15, 1917 (seven years after the purported agreement of adoption). The court awarded petitioner to her mother, which was, under the law, subject at all times to the rights and duties of the father under the laws of Utah relating to parent and child.

In the presence of this record as to the full extent of the evidence which petitioner claimed she could and would be able to produce at a trial of the issues, the motion of administratrix for summary judgment (R. 35) was granted by the trial court (R. 53-54); from which order of dismissal this appeal is taken.

## STATEMENT OF POINTS

Assuming that petitioner could present evidence to the full extent claimed by her in her answers to interrogatories and as presented at the pre-trial conference, it was not sufficient to warrant recovery by petitioner for the following reasons:

I. Petitioner did not offer to produce any evidence

of any contract made and signed in the presence of the court as required by the statutes of Utah; and

II. There was no evidence offered that the father of petitioner ever at any time consented to any such purported agreement of adoption; and

III. There was no evidence that there was any agreement of adoption between the mother of petitioner and decedents. The evidence which petitioner would have offered, namely, the sworn statement of the mother, one of the parties to the purported agreement of adoption, was to the effect that there *was no such agreement*. This sworn statement was conclusive on the subject. There was no such purported agreement.

IV. In the absence of a legal adoption under the statutes of Utah, an individual who is not the natural child of decedent is not entitled to inherit under the laws of succession in this State.

## ARGUMENT

### POINT I.

PETITIONER DID NOT OFFER TO PRODUCE ANY EVIDENCE OF ANY CONTRACT MADE AND SIGNED IN THE PRESENCE OF THE COURT AS REQUIRED BY THE STATUTES OF UTAH.

The brief of petitioner, in substance and effect, requests this court to ignore, repeal or disregard the statutes of this State relating to contracts for the adoption of minor children; and to pay no attention to the many cases decided by this court relating to that subject.

The transaction, out of which petitioner claims her rights to inherit as an adopted daughter, had its inception shortly after the birth of petitioner when she was taken into the home of decedents. She claims and alleges that there was a contract between her natural mother and decedents, entered into when petitioner was nine (9) months old, by which decedents agreed to adopt petitioner. She believes it was in writing, but she has no one to so testify or to give evidence as to its contents, and if it was oral she has no one who was present to testify as to what was said. There were no court proceedings in conformity with the statute.

Petitioner was approximately three years old when her mother filed her suit for divorce in 1913, so the purported contract upon which petitioner must rely was made in late 1910 or early 1911. It makes no difference. The law in both years was the same, and is substantially the same today. In 1910 and 1911 it was as follows:

Compiled Laws of Utah 1917.

“13. (4.) CONSENT OF CHILD'S PARENTS NECESSARY, WHEN. A legitimate child cannot be adopted without the consent of its parents, if living, nor an illegitimate child without the consent of its mother, if living, except that consent is not necessary from a father or mother deprived of civil rights, or adjudged guilty of adultery, cruelty, or desertion, and for either cause divorced, or adjudged to be a habitual drunkard, or who has been judicially deprived of the custody of the child on account of cruelty, neglect, or desertion.”

“15. (6.) HEARING. PROCEEDINGS. The person adopting a child and the child adopted

and the other persons whose consent is necessary, *must* appear before the judge of the district court of the county where the person adopting resides, and the necessary consent *must* thereupon be *signed and an agreement be executed by the person adopting to the effect that the child shall be adopted and treated in all respects as his own lawful child; provided*, that if the persons whose consent is necessary are not within the county, then their written consent, duly acknowledged in the manner provided for the acknowledgment of deeds, shall be filed in said district court at the time of the application for adoption." (Emphasis added)

"16. (7.) DECREE. The judge must examine all persons appearing before him pursuant to the preceding section, each separately, and, if satisfied that the interests of the child will be promoted by the adoption, he must make out an order declaring that the child shall thenceforth be regarded and treated in all respects as the child of the person adopting."

"17. (8.) CHILD TAKES FAMILY NAME. STATUS. A child, when adopted, may take the family name of the person adopting. After adoption, the two shall sustain the legal relation of parent and child, and have all the rights and be subject to all the duties of that relation."

"18. (9.) RIGHTS AND DUTIES OF PARENTS. The parents of an adopted child are, from the time of the adoption, relieved of all parental duties towards and all responsibility for the child so adopted, and shall have no rights over it."

No such proceeding was had, and petitioner knows of no one living today who can or would testify that they ever saw any such written agreement, what its contents were, or who signed it.

The following cases from this court have determined the necessity of compliance with our statutory requirements in order to produce a binding and valid contract establishing the relationship of parent and child by adoption.

*Taylor v. Waddoups*

121 Utah 257, 241 Pac. 2d 157

In this case the mother of a child actually signed the contract, but changed her mind before the Court had approved it. It was signed before a Notary Public, which could have been done before 1941 by persons absent from the State. This Court held the contract, not in conformity with the statute no good.

\* \* \* "It is obvious that the so-called consent to adoption was not made in conformity with the governing statutes, which require that it be signed before the district court of the county where the person adopting resides."

\* \* \*

"1. Upon the revision of the adoption laws by the 1941 Legislature, this last quoted portion of the statute was deleted. The statute no longer sanctions the relinquishment of a child for adoption before a notary public. Such relinquishment is required to be done before a court. The adoptive parents, the child adopted, and the natural parents or persons whose consent is necessary, must appear before the district court where the consent must be signed, and the agreement executed that the child shall be treated as the lawful child of the adoptive parents:"

\* \* \*

"2. The purpose of this requirement is that the court, representing the public, can see that the

parents when they consent to the adoption of their children are informed and fully understand the effect of the act which they are performing. The court shall endeavor to protect the parents from fraud, misrepresentation or undue influence in the obtaining of their consent. Ofttimes, consents of adoption are signed by parents while under great emotional strain, and, as in this case, they may be signed while the parent is suffering from discouragement and despair. To conduce the welfare of all concerned, this safeguard is established as an assurance that the parents have duly considered the consequences of their act. The Legislature has deemed this contract to be of too great importance to permit it to be signed before a notary public without the benefit of consultation with, and supervision by, a court."

The law was the same when this purported contract was alleged to have been made without Court approval.

*In Re Adoption of D.....*

122 Utah 525, 252 Pac. 2d 223

"2, 3. \* \* \* When the purported relinquishment was signed, the mother was up against an impossible situation, both economically and on account of her health; but the most important and controlling fact was that the purported consent was not executed before the court as required by statute, but was an attempt to execute a consent in a manner not authorized by law. \* \* \*"

*In Re Adoption of Walton*

123 Utah 380, 259 Pac. 2d 881

Natural father of child had not given consent to adoption. Here is what this Court said on this point. It is right in point and determinative of this case.

“1-4. \* \* \* Courts have not hesitated to build a strong fortress around the parent-child relation, and have stocked it with ammunition in the form of established rules that add to its impregnability. To sever the relationship successfully, one must have abandoned the child, and such abandonment must be specific intent so to do, — an intent to sever all correlative rights and duties incident to the relationship. Such intent must be proved by him who asserts it, by proof that not only preponderates, but which must be clear and satisfactory, — something akin to that degree of proof necessary to establish an offense beyond a reasonable doubt, or, as one authority puts it ‘by clear and indubitable evidence.’ The relationship has been considered a bundle of human rights of such fundamental importance as to lead courts frequently to say that consent is at the foundation of adoption statutes, that evidence pertaining to it must be appraised in a light most favorable to him whose parental right is assaulted, that adoption statutes being in derogation of the common law are to be construed strictly in favor of the parent and the preservation of the relationship, (although not the rule in Utah) and that all doubts are resolved against its destruction. The authorities have gone so far in their protection of these kinship rights as to hold that an abandonment, even though a fait accompli, can be the subject of repentance, absent vested rights in others. Ofttimes it is pointed out that abandonment, within the meaning of adoption statutes, must be conduct evincing ‘a settled purpose to forego all parental duties and relinquish all parental claims to the child.’ \* \* \* The importance of preserving the relationship clearly is pointed up when one considers the well-established concept that custody may be awarded in a proper case, while the courts may have no power to sever the relationship, — accounting for the principle

that the welfare of the child is of great importance in custody cases, but quite immaterial in adoption cases until an effective abandonment of parental rights is shown. Were the rule otherwise, and an indiscriminate sanction of the dispossession of parental rights without consent were attempted, serious constitutional impedimenta no doubt would loom large under the due process clause." \* \* \*

Mr. Carroll never consented to any contract of adoption. Appellant's proffered evidence not only proved that there was no such contract, but if there was one by the mother it was a nullity because the father did not join.

*Devoreaux' Adoption v. Brown*

2 Utah 2d 30, 268 Pac. 2d 995

This Court, in this most recent case, left no doubt as to the necessity of consent and Court approval to any contract of adoption.

"1, 2. The Juvenile Court having placed the children with the State Department of Public Welfare for 'foster home care, treatment, and supervision' while requiring the father to pay for such care, the question to be determined is whether such action is a judicial deprivation of the custody of such children an account of cruelty, neglect or desertion within the meaning of the above section, so that the consent of the natural parents is not necessary in adoption proceedings. We think not. Once a child is adopted its ties to its natural parents, unlike in cases involving mere custody, is permanently severed. Such a result, without the consent of the legitimate, natural parents, has not been favored by courts, it being considered that the natural relationship between parents and child

is of an enduring and sacred character. Adoption proceedings are statutory and based on consent. So where statutes dispense with the consent of a legitimate natural parent who for some misconduct has been deprived of the custody of his child, a strict construction is given such statutes in cases in which the natural parent contests the adoption." \* \* \*

See also *Petition of Thompson*, 100 Utah 59, 110 Pac. 2d 370; and *Application of Morse*, 7 Utah 2nd 312, 324 Pac. 2d 773.

There are many cases from other jurisdictions. We give but a few to show that Utah is not peculiar in this regard.

Many of the arguments presented in this case about "equitable adoption" etc., were presented to the Supreme Court of California, in Banc, in *Re Taggart's Estate*, 190 Cal. 493, 213 Pac. Rep. 504. By unanimous decision the Court refused to adopt the program that would destroy the legal safeguards that surround this relationship.

*Vaughan v. Hubbard* (Idaho), 221 Pac. Rep. 1107.

*In Re Reimer's Estate* (Wash.), 259 Pac. Rep. 32.

*In Re Meyers' Estate* (Ore.), 254 Pac. 2d 227.

*Fackrell v. District Court* (Colo.), 295 Pac. 2d 682.

*In Re Smith's Estate* (Wash.), 299 Pac. 2d 550.

*Brassiell v. Brassiell* (Miss.), 87 So. 2d 699.

*Cooper v. Bradford* (Ark.), 117 S.W. 2d 719.

*In Re Garlow's Estate* (Mich.), 21 N. W. 2d 178.

*In Re Olson's Estate* (Minn.), 70 N. W. 2d 107.

*Killen v. Klebanoff*, *In Re Sherman's Estate* (Conn.), 98 Atl. 2d 520.

*Glass, Administratrix v. Glass* (Ohio), 125 N. E. 2d 375.

*Couch v. Couch, et al.* (Tenn.), 248 S. W. 2d 327.

*Marietta v. Faulkner* (Ala.), 126 So. 635.

We would be less than frank with this court if we did not admit that there are some jurisdictions where the law is less strict on these matters than in Utah. There are some states that have permitted adoptions to be established by contract only, and the existence of a contract of adoption to be established by circumstantial evidence, which is what petitioner is seeking to establish in this case, and there are still at this late date, some States where common law adoptions, common law marriages and other types of relationships, producing rights of inheritance, may be loosely and informally created, which are recognized by the courts. Utah has never been, and is not now, one of those jurisdictions; and is not alone in that policy. A great majority of the States have adhered to the policy that adoptions, and the making of agreements of adoption should be more and more strictly supervised; and are throwing the protecting arm of the court, as the third party to the contract, and the Welfare Agencies, around this most hazardous and important transaction.

The cases cited by appellant are fairly representative of the minority group. Most of the cases can be distinguished, and the California case cited by appellant, *Rad-*

*ovich's Estate*, 48 Cal. 2d 116, 308 Pac. 2d 14, is not in point at all. The case turned on the doctrine of *stare decisis* and was not decided on the merits. We submit that the law in this State has already been established by statute and decisions, and that there is no purpose in seeing what other states think of this.

Throughout appellant's brief the relationship between individuals who are raised in the households of others and the persons thus bestowing parental affection on children not their own is referred to as "quasi" adopted and "de facto" adopted. There may be some types of relationships where something less than the real thing acquires a status which the law recognizes as of sufficient legal significance to be substantially equal to the real thing. In corporate and some types of contractual relationships this is true in Utah. However, in Utah both the right of inheritance and the relationship of adoptive parent and child, which carries with it the right of inheritance, is purely statutory. Family ties, as such, are closely guarded in Utah. Utah was one of the earliest States to adopt laws establishing vital statistics so that there will be certainty on this subject, and to safeguard the family relationship against unauthorized expansion through "de facto" and "quasi" relationships in favor of individuals who are granted home and affection by members of the family of another.

Utah has never felt that it should make the extension of brotherly love or the mandate of the Redeemer to love thy neighbor as thyself and to look after and protect the orphan and the fatherless a hazardous enterprise simi-

lar to the dangers of permitting your neighbor to traverse unimpeded across your land. To this date, in this State of Utah, we have been able to open our doors to the homeless and extend aid to the friendless without fear that some "vested" rights will be initiated or established which may arise to "bite the hand that fed" after those who could speak are no longer here to testify.

We have, by statute, prescribed the method, *and the only method*, by which such a relationship may be established.

This was not a case of ignorance or of faulty execution or performance. According to the testimony which petitioner would adduce, Mrs. Carroll went to her lawyer, Mr. Ben Johnson, who was her attorney in her divorce case, to find out about the law of adoption in Utah, and she was fully informed on the subject. They never went ahead with the legal adoption, because it would have required the consent of the father, and right at that time the mother was primarily interested in getting a divorce from her husband; and in order to do so she was denying the very thing that petitioner says she did.

So, in the absence of some proof or offer of proof of a contract of adoption, with the consent of the father (Mr. Carroll) in compliance — or even attempted compliance — with the above quoted sections of our statutes, the trial court very properly found that there was no genuine issue to be tried.

No end of confusion and litigation could result if these basic barriers to orderly and established relation-

ships can be thus destroyed through acts of humanity and kindness.

Appellant states that we are concerned with a matter of property rights, not right to custody, and that our courts have not hesitated to specifically enforce contracts under which property is to be disposed of in a certain way upon death. Counsel fails to distinguish between contracts to devise property in a certain way, as illustrated by the Utah cases cited in appellant's brief, and contracts to create a status, such as marriage and adoption, which require State approval. The contract to devise is enforceable regardless of any will that may be made, whereas a contract for status is subject to the right of testamentary disposition.

However, our courts have steadfastly refused to grant the right to inherit to individuals occupying a "de facto" or "quasi" status where the necessary steps to create that status in accordance with the statute have not been complied with.

The contract which appellant claims to have been made between her mother and decedents, and upon which she is relying in this case, was a purported contract *for status of* appellant as adopted daughter; which status would have carried with it the right of inheritance, but would have also carried with it all of the responsibilities.

The right of "de facto" and "quasi" wives to inherit under our laws has been before this court many times; and each time the right was denied, regardless of the most humane and equitable reasons for breaking the

law. The same arguments for lowering the barriers to embrace "de facto" and "quasi" members of the family unit into the definition of "children," as defined in our laws of succession, would certainly apply to common law wives, plural wives and step-children.

There are some rights, of property, that are dependent entirely upon status. In order to attain that status, there are certain things that, in law or ritual, must be complied with. The right to inherit as a child of decedent is one of those things. If not a natural child, one must be adopted; and in order to be adopted the statute relating thereto must be complied with. It is not sufficient for the status to be "de facto" or "quasi" or "equitable" to qualify.

Many individuals may be "de facto" or "quasi" citizens, but until they have qualified and taken the oath they have no such rights to that status. The same is true of membership in most churches and, in Utah, the official family circle. It is not sufficient that an individual be worthy of the status. It must be an accomplished fact in accordance with the law.

There is, therefore, that difference between a contract for property or a property right and a contract for a status which has a right of inheritance as an incident of the status.

While it is not necessary to justify or explain these conflicts in judicial decisions, the editor of American Jurisprudence has undertaken to do so, and we give his explanation, as his research has found it to be, as follows :

1. Am. Juris., 629, Sec. 13, *Adoption of Children*.

“The distinction should be carefully noted between an executory contract to adopt and an executed contract or agreement of adoption. The latter constitutes an act of adoption, *in some jurisdictions*, the result of which is equivalent to that of judicial proceedings prescribed in the majority of the states, and by it the child who is the subject of the agreement becomes, in legal effect, the child of the contracting party.” \* \* \* (Emphasis added)

See also Sec. 26 as follows:

“ADOPTION BY AGREEMENT OR DEED. *Some statutes authorize an adoption by deed or contract.* The question of the validity of such an adoption is quite a different one from that of the enforceability of a contract to adopt, so far as the right of the child to acquire property rights under it; and the contract to adopt may be enforceable even though the adoption may be void for want of compliance with the statute.” (Emphasis added)

Utah has *never* authorized an adoption by agreement or deed, and has *never* authorized any contract *for adoption*, as distinguished from a *contract to devise*, excepting, (1) under judicial control, (2) when in writing, (3) signed by the *father and mother*, and (4) if the Court approves.

The factual situation described by appellant in answer to interrogatory No. 1 (R. 42) was not, in legal effect, different from that which was described in *Harrison v. Horner*, 44 Utah 541, 142 Pac. 716. True, it was a custody case, not one involving adoption, but this court

established some very basic principles, which have been adhered to to this date, and which actuated the strengthening of adoption laws to make the State, acting through the Court, a necessary party to any contract involving the custody or adoption of children. Here is what the court said on the subject of contracts affecting human beings :

“We need not at this time devote much time or space to the question of gift. The people of this country sacrificed hundreds of thousands of lives and thousands of millions of treasure to destroy the theory that there can be such a thing as a property right in a human being, even though such being be of the lowest type, and by the same token the question that any one may claim any rights to a child by virtue of a gift alone is forever settled. That a human being cannot be made the subject of a gift has always been the rule at common law. The law upon that subject is well stated by Mr. Justice Brewer in *Chapsky v. Wood*, 26 Kan. 652, 40 Am. Rep. 321, where in speaking to a question similar to the one involved here, the justice says :

“ ‘A child is not in any sense, like a horse or any other chattel, subject-matter for absolute and irrevocable gift *or contract*. The father cannot, by merely giving away his child, release himself from the obligation to support it, nor be deprived of the right to its custody. In this it differs from the gift of any article which is only property.’ ”

Counsel says that contracts for adoption of children, not in conformity with the statute, are not against public policy. Ordinarily, the statute expresses the public policy of the State. Certainly this pronouncement by this court, so many years ago, on the subject of “child bartering” together with the statute will serve the purpose of a public

policy until something better shows up by legislative enactment.

## POINT II.

THERE WAS NO EVIDENCE OFFERED THAT THE FATHER OF PETITIONER EVER AT ANY TIME CONSENTED TO ANY SUCH PURPORTED AGREEMENT OF ADOPTION.

One of the first principles of law is that it is not only essential to show that the contract existed, but also that the party purporting to make the contract is competent and qualified to make it.

Appellant alleges and states that this purported contract was made by her natural mother with decedents when she was nine months old. Appellant was born March 18, 1910 (R. 41) so the time of the contract was approximately December, 1910.

At that time, according to appellant's offered evidence, the natural mother was married to appellant's father, then residing in Canada. This was two years before the divorce action between her natural parents was filed (R. 91), and seven years before the final decree of divorce was entered (R. 120).

Under the statutes of Utah then on the books, Sec. 13 Comp. Laws of Utah 1917, "*a legitimate child cannot be adopted without the consent of its parents, if living.*" Appellant's father was not only very much alive but he and his wife had only just separated, and he was *even then*, protesting the *temporary* placing of appellant in

decedent's home. No divorce action was instituted until two years after the time alleged for the making of the purported contract, and seven years before the final decree of divorce.

Our statute is explicit on the subject. Any purported contract, assuming that it were made, would be and was a nullity. The natural mother was not competent to make any such contract, and the decedents could not have enforced any such contract. Both the mother and the father could have taken appellant from decedents at any time — and there never was a time when decedents could have claimed from appellant the legal rights of an adoptive parent from appellant.

We shall submit this phase of the brief on the Utah cases cited under Point I, the pertinent Utah statute, Sec. 13, Comp. Laws of Utah 1917, *supra*, and the general statements contained in 2 C. J. S. 383, Section 21, relating to the necessity of consent of natural parents to adoption of legitimate children; and Am. Juris. 642, Sec. 40, Adoption of Children, relating to the effect of lack of consent or notice to the natural parents.

### POINT III.

THERE WAS NO EVIDENCE THAT THERE WAS ANY AGREEMENT OF ADOPTION BETWEEN THE MOTHER OF PETITIONER AND DECEDENTS. THE EVIDENCE WHICH PETITIONER WOULD HAVE OFFERED, NAMELY, THE SWORN STATEMENT OF THE MOTHER, ONE OF THE PARTIES TO THE PURPORTED AGREEMENT OF ADOPTION WAS TO THE EFFECT THAT THERE WAS NO

*SUCH AGREEMENT. THIS SWORN STATEMENT WAS CONCLUSIVE ON THE SUBJECT. THERE WAS NO SUCH PURPORTED AGREEMENT.*

Assuming, without admitting, that a private contract for adoption, without approval of the court, were legal and enforceable, appellant's proffered testimony would not establish the existence of a contract.

All of the parties to the purported contract are dead.

Appellant knows of no one who can testify that they ever saw a contract or as to its contents (R. 43 answer to interrogatory 4).

Appellant knows of no one who could testify as to any oral contract (R. 43, answer to interrogatory 5).

William Turner, a half brother of appellant, would testify that he was present when decedents came to the home of appellant's mother, when appellant was an infant; that Mrs. Carroll did not want to sign any papers, but decedents were insisting on a legal adoption (R. 43-44).

This is the only direct evidence that appellant promised to produce as to the existence of any such purported contract. She offers much hearsay evidence and some circumstantial evidence, which, as stated, is natural and normal to any loco-parentis relationship as well as to the relationship of natural daughter or adoptive daughter, neither of which was the real relationship.

As against these facts which appellant stated she could show, she also produced the sworn statement of her natural mother. It was in reply of her mother to the

counterclaim of her father, charging, among other things, that the mother had given appellant to decedents without his knowledge or consent (R. 103). This the mother denied (R. 106), but on the other hand she alleged that the decedents were giving appellant a home "*until such time as she (the mother) could give it a proper home and rearing.*" This was under oath under date of February 10, 1913 (R. 108). This was approximately three years after the date of appellant's birth (R. 41) and at least two years after the date of the purported contract.

Therefore, the only party to the purported contract, who left a writing to be considered by the court, spoke under oath, and denied the existence of any such contract as appellant alleges.

And, strangely enough, that sworn testimony, the only positive evidence on the subject, was produced by appellant as a part of her offer of proof (R. 46, 106).

In the face of that sworn evidence by the individual through whom appellant claims to derive her purported contractual right, if such a thing were possible in Utah, the hearsay and inferential evidence that appellant says she could produce, disappears completely.

#### POINT IV.

IN THE ABSENCE OF A LEGAL ADOPTION UNDER THE STATUTES OF UTAH, AN INDIVIDUAL WHO IS NOT THE NATURAL CHILD OF DECEDENT IS NOT ENTITLED TO INHERIT UNDER THE LAWS OF SUCCESSION IN THIS STATE.

The right to inherit is purely statutory. Our law of succession is Section 74-4-5, Utah Code Annotated 1953, and the applicable portion is paragraph 2 as follows:

“(2) If the decedent leaves no surviving husband or wife, but leaves issue, the whole estate goes to such issue, and if such issue consists of more than one child living, or one child living and the issue of one or more deceased children, then the estate goes in equal shares to the children living, or to the child living and the issue of the deceased child or children by right of representation.”

It will be noted that the right of inheritance is limited to “issue.”

This statute, however, is modified by Section 78-30-10 extending the right of inheritance to “adopted children.”

In order to claim a right of inheritance as an adopted child, the adoption must be established in accordance with the statute.

*Morris v. Trotter*, 202 Iowa 232, 210 N. W. 131.

This court in the recent case of *In Re Smith's Estate*, ..... Utah ....., 326 Pac. 2d 400, again refused to extend the statute beyond its express wording, stating that any such action is for the legislature — not the court.

Appellant's argument in this case goes even beyond the law contended for in the Smith Estate appeal. Here, appellant in substance and effect is asking the court to establish by judicial fiat the law of common law adoptions. This would be even more dangerous than opening

up the laws of inheritance to common law wives "de facto" wives, "De Jure" wives and other types of domestic relationship. This court has, so far, refused to open the door to that type of judicial legislation, and we respectfully urge that such matters should continue to be handled by the legislature.

*Raleigh v. Wells*

29 Utah 217, 81 Pac. 908

Speaking of the applicability of equitable considerations to the right of inheritance, as applied to wives, this Court said:

\* \* \* "No doubt, if she had been a lawful wife, she might have renounced rights under the will of the testator, and then have appealed with much force to the conscience of the chancellor to so administer equity and justice as to save her home to her; but, when she consented to become a plural wife, she did so at her peril, in so far as the law of inheritance is concerned, and, thereby failing to acquire the status of a lawful wife, she at that time placed it beyond the power of the chancellor to grant her relief of the kind she now seeks, for thenceforth she was without the pale of the law of inheritance as to any property which her husband had acquired or might thereafter acquire. As to all such property she could but depend for justice upon the will of him in whom she had thus confided. Respecting his property, which he then had or might in the future acquire, she was, under the law which she invokes, after such marriage, as before, but a stranger, notwithstanding she had assumed and discharged the duties and respon-

sibilities which usually result from marriage relations.” \* \* \*

By reason of strict statutory construction of laws of adoption and laws of inheritance, an adopted child inherits from both natural parents and from adoptive parents. These matters are purely statutory. Sometimes they work to advantage and sometimes the other way.

*In Re Madsen's Estate*

123 Utah 327, 259 Pac. 2d 595

\* \* \* “Dower is not a part of the marriage contract, although marriage is a prerequisite. It is a right arising, existing and passing by the operation of law.” \* \* \*

So, too, adoption is a contract, with legal approval, which produces a status, one of the rights of which is the right of inheritance under the laws of succession. In order to have dower or inherit as a wife, or to have the right of inheritance as an adopted child, legal marriage and legal *adoption* are a prerequisite.

See also *In Re Veta's Estate*, 100 Utah 187, 170 Pac. 2d 183.

## CONCLUSION

The very purpose of our new Rules relating to discovery, pre-trial conferences and motions for Summary Judgment, is to avoid trials where no useful purpose can, in the long run, be served. The admission on the part of appellant as to lack of evidence to present a genuine

issue to be tried, justified and required the action of the trial court in stopping the case by motion.

We respectfully submit that the case should be affirmed.

Respectfully submitted,

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