WHAT'S EQUITABLE ADOPTION GOT TO DO WITH IT?: AN EXAMINATION OF TEXAS' 2017 AMENDMENT AND ITS IMPACT ON INHERITANCE RIGHTS

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I. INTRODUCTION

The practice of adoption dates back to ancient times, as biological parents have transferred their children to other adults who wanted the children for "love, labor, and property."[1] Many historians have traced adoption in the United States to Massachusetts' passage of the first "modern" adoption law in the 1850s.[2] Specifically, the Massachusetts Adoption of Children Act promoted the notion that adoption should benefit the welfare of children, rather than adult interests.[3] Since Massachusetts' initial law, all other states continue to implement and reform legislation governing adoptions. As times change and family dynamics evolve, many states have evolved as well, allowing for adoption outside of the statutory, legal process under certain facts and circumstances. The right facts and circumstances often result in a posthumous adoption out of equity, also known as equitable adoption.

Texas has recognized the concept of equitable adoption since the 1930s.[4] While the plain language of the relevant statute has long suggested that equitably adopted children should be treated the same as legally adopted children and natural children for inheritance purposes, the Texas Supreme

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[1] Ellen Herman, *The Adoption History Project*, DEPARTMENT OF HISTORY, UNIVERSITY OF OREGON (Feb. 24, 2012), http://pages.uoregon.edu/adoption/topics/adoptionhistbrief.htm.

[2] Child Welfare Information Gateway, *History of Adoption Practices in the United States*, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, https://www.childwelfare.gov/topics/adoption/intro/history/ (last visited Dec. 6, 2018). Texas also passed an adoption law in 1850. *See infra* Section II.

[3] Herman, *supra* note 1.

[4] Cubley v. Barbee, 73 S.W.2d 72, 83 (Tex. 1934).

Court has refused to interpret the statute this way.[5] In response, Texas lawmakers in the 85th Legislative Session of 2017 proposed and passed House Bill 2271 (H.B. 2271), which amended the definition of "child" in Section 22.004 of the Estates Code to include equitable adoption.[6] H.B. 2271 also added a subsection to Section 201.054 to define "adopted child."[7] With these changes, Texas lawmakers have expressed their intent to finally provide the same inheritance rights to both legally adopted children and equitably adopted children.[8]

This Comment will briefly provide some background on the history of adoption in Texas;[9] the history and evolution of equitable adoption in Texas;[10] insight into the 85th Texas Legislature's 2017 amendment, as it could impact intestate succession—and by relation, testate succession and other inheritance rights—in the future;[11] predictions regarding Texas courts' likely response to this amendment;[12] and finally, a peek into the shortcomings of this amendment.[13]

II. HISTORY OF ADOPTION IN TEXAS

While Massachusetts has been credited with paving the way for modern adoption through the passing of its child-focused adoption law in 1851, Texas first acted to formalize its adoption procedure—more for purposes of creating heirs—in 1850.[14] On January 16, 1850, the Texas Legislature passed "An Act to prescribe the mode of Adoption."[15] This initial procedure, different from the current statutory procedure, required adoptive parents to record their adoption in a manner similar to that by which one would record a deed—by

[5] *See* Heien v. Crabtree, 369 S.W.2d 28, 29–30 (Tex. 1963). The Texas Supreme Court relied on the fact that equitable adoption does not create a "parent-child relationship" the way a legal, statutory adoption does in justifying its holding that the inheritance rights associated with the two concepts are different. *Id*. *See infra* Section III.C.

[6] Tex. Est. Code Ann. § 22.004(a) (Supp.).

[7] *Id*. § 201.054(e).

[8] *See infra* Section IV.

[9] *See infra* Section II.

[10] *See infra* Section III.

[11] *See infra* Section IV.

[12] *See infra* Section V.

[13] *See infra* Section VI.

[14] Act approved Jan. 16, 1850, 3d Leg., R.S., ch. 39, § 1, 1849 Tex. Gen. Laws 36, 36, *reprinted in* 3 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 474 (Austin, Gammel Book Co. 1898).

[15] *Id*.

filing a written statement of adoption with the county clerk.[16] By filing this deed, the adoptive parents created a legal heir. If the parents also had biological children, the adopted child's potential inheritance was limited to one-fourth of the parent's estate.[17] In 1931, the 42nd Texas Legislature repealed the 1850 Act, and enacted a statute requiring adoption of children by court order.[18] Today, Chapter 162 of the Texas Family Code governs legal adoption while certain sections of the Texas Estates Code dictate the effect that adoption has on intestate succession.[19]

The Texas Family Code specifies that parents can establish a legal parent-child relationship through adoption.[20] Section 101.025 of the Texas Family Code defines "parent-child relationship" as the legal relationship between a child and the child's parents as provided by Chapter 160.[21] Legally adopted children are treated the same as natural born children for all purposes. For intestate succession and inheritance purposes, a legally adopted child occupies the same position as a natural child. In Texas, legally adopted children can inherit from and through their adoptive parents and through their biological parents.[22] Adoptive parents can inherit from and through the adopted child, but the biological parents cannot inherit from or through the child they legally terminated their rights to through the adoption process.[23] The Texas Family Code also allows a legally adopted adult to inherit from and through the adoptive parents, but does not allow an adopted adult to inherit from or through his or her biological parents, nor may the biological parents inherit from or through the adopted adult.[24]

Section 3(b) of the Texas Probate Code, adopted in 1955, was the first legislative recognition of "equitable adoption" in Texas.[25] Prior to this

[16] *Id.*

[17] *Id.* § 2.

[18] Dan Tilly, *Confidentiality of Adoption Records in Texas: A Good Case for Defining Good Cause*, 57 BAYLOR L. REV. 531, 533 (2005).

[19] *Id.*; *see, e.g.*, Tex. Est. Code Ann. §§ 201.001–.003.

[20] Tex. Fam. Code Ann. § 160.201(a)–(b).

[21] *Id.* § 101.025.

[22] Gerry W. Beyer, *The Basics of Texas Intestate Succession Law*, http://www.supres.net/files/intestatetx.pdf (last visited Dec. 6, 2018).

[23] *Id.*

[24] Tex. Fam. Code Ann. § 162.507(b)–(c).

[25] Heien v. Crabtree, 369 S.W.2d 28, 29–30 (Tex. 1963). Today, Section 3(b) of the Probate Code is Section 22.004 of the Estates Code, and Section 40 of the Probate Code is Section 201.054 of the Estates Code. In 2009, the Texas Legislature began the process of codifying the Probate Code into the Estates Code, which took effect on January 1, 2014. This recodification of these sections

enactment, the Texas Supreme Court recognized equitable adoption—also known as adoption by estoppel—when granting relief through the form of intestate succession to children whose "parents" had failed to legally adopt them.[26] By recognizing the theory of equitable adoption, Texas allows an equitably adopted child to share in his or her adoptive parent's estate just as if a legitimate statutory adoption had occurred. In 1963, however, the Texas Supreme Court held that this right to inherit does not go both ways between the parent and the child despite statutory language to the contrary.[27] In so holding, the court criticized the language used by the Legislature as being "presumptuous," for it assumed that Texas courts had held that acts of estoppel also created the legal status of parent and child the way a statutory adoption does.[28] While Texas recognized equitable adoption as a means for a child to inherit from his or her equitably adoptive parents, the Texas Supreme Court provided that this equitable concept does not include all of the inheritance rights and other consequences that would result from a formal statutory adoption.[29]

Since examining the impact of equitable adoption, Texas courts have confirmed that this theory does not result in the creation of a legal-parent child relationship.[30] However, in relying on this distinction in legal status as a reason to deny inheritance rights to someone claiming such right in the context of equitable adoption, the Texas Supreme Court seemed to confuse the Legislature's grant of inheritance rights in the Texas Estates Code as an attempted grant of such a legal status. By choosing to equate adoption by estoppel and statutory adoption for inheritance purposes in the Texas Estates Code, the Texas Legislature was simply deciding who inherits a decedent's estate by way of intestate succession; the Legislature never attempted to create a legal status, as this is a task of the Legislature in the Family Code, not the Estates Code. Nonetheless, for over fifty years, Texas courts have

was non-substantive. *See* Gerry W. Beyer, *Estates Code*, THE WEBSITE OF PROFESSOR GERRY W. BEYER 103 (Nov. 12, 2013), http://www.professorbeyer.com/Estates_Code/Beyer_Texas_Estates_Code_11-12-2013.pdf.

[26] *See, e.g.*, Cubley v. Barbee, 73 S.W.2d 72, 83 (Tex. 1934); Jones v. Guy, 143 S.W.2d 906, 910 (Tex. 1940).

[27] *Heien*, 369 S.W.2d at 29–30.

[28] *Id.* at 30.

[29] *See id.*

[30] Asbeck v. Asbeck, 369 S.W.2d 915, 916 (Tex. 1963) ("We have only recently held in Heien v. Crabtree, Tex. Sup., S.W.2d 28, that 'equitable adoption' and 'adoption by estoppel' does not create and establish a status of parent and child *as does a legal adoption*.") (emphasis added); Hamilton v. Butler, 397 S.W.2d 932, 935 (Tex. App.—Eastland 1965, writ ref'd n.r.e.).

rejected the plain statutory language of the relevant Estates Code sections and refused to treat equitably adopted children the same as legally adopted children for inheritance purposes.

III. HISTORY OF EQUITABLE ADOPTION: PRIOR COURT RULINGS

Texas courts, politicians, and scholars often use the terms "equitable adoption" and "adoption by estoppel" synonymously and interchangeably.[31] However, others argue that these are technically two distinct concepts.[32] Under this theoretical distinction, adoption by estoppel occurs when the adoptive parents take in the child through an agreement to adopt with the biological parents, but fail to comply or follow through with the statutory requirements.[33] Arguably, an equitable adoption is harder to prove than adoption by estoppel, because there is no contract or agreement to adopt. By definition, an equitably adopted child merely acts in reliance on his or her belief in the child's status as child of the adoptive parents.[34] However, Texas does not appear to recognize such a distinction between these two terms. As early as 1934, when looking to the law of similar jurisdictions as an aid in applying equitable adoption, the Texas Supreme Court described this process as "equitable estoppel."[35] Further, the court noted that while other jurisdictions deemed such relief as "decrees of specific performance," the better classification of the remedy "is that of estoppel."[36] Decades later, Texas courts still reject the specific performance theory and adhere to the classification of equitable adoption as an estoppel-based theory.[37] Regardless, the 85th Legislature's recent amendment obviates the need to distinguish between these concepts, as it includes both terms.[38]

More impactful than the synonymous use of these terms has been the evolution in determining whose conduct implies adoption, what sort of

[31] *See, e.g.*, *Adoption by Estoppel*, BLACK'S LAW DICTIONARY (10th ed. 2014); *Heien*, 369 S.W.2d at 29.

[32] Virginia Hammerle, *A New Kind of Kin – Equitable Adoption Comes of Age*, HAMMERLE FINLEY LAW FIRM (July 4, 2017), https://hammerle.com/blog/new-kind-kin-equitable-adoption-comes-age/.

[33] *Id.*

[34] *Id.*

[35] Cubley v. Barbee, 73 S.W.2d 72, 80–81 (Tex. 1934).

[36] *Id.* at 83.

[37] Luna v. Estate of Rodriguez, 906 S.W.2d 576, 579 n.1 (Tex. App.—Austin 1995, no writ).

[38] *See infra* Section V.A.

agreement, if any, is required to prove adoption, and what kind of relationship, if any, results from equitable adoption.

A. Whose conduct implies adoption?

In discussing the elements associated with equitable adoption, the Texas Supreme Court has rendered different opinions regarding whose conduct implies an equitable adoption.[39] First, in *Cubley v. Barbee*, the Texas Supreme Court looked to the conduct of the adoptive parents as evidence that an equitable adoption had occurred.[40] Upon the death of the woman whom she viewed as her mother figure, Mrs. Thyng, Jessie Cubley brought suit to inherit from Mrs. Thyng as an adopted child.[41] When Jessie was a child, Jessie's biological mother, Mrs. Partridge, agreed to relinquish her parental rights to Jessie, and later testified that she signed a relinquishment paper and the Thyngs signed an adoption paper.[42] Because Jessie was just six years old when this exchange occurred, she did not know that Mrs. Partridge was in fact her biological mother.[43] Testimony revealed that Mrs. Thyng paid a lawyer to record the adoption papers.[44] However, unbeknownst to Mrs. Thyng, this lawyer never filed the papers as required by law.[45]

Mrs. Thyng "reared and educated [Jessie] . . . and loved her to the time of [Mrs. Thyng's] death."[46] From the day of Jessie's purported adoption to Mrs. Thyng's death, Jessie faithfully performed the duties of a daughter.[47] Prior to marriage, Jessie went by the surname "Leonard," Mrs. Thyng's maiden name.[48] Unfortunately, the deed of adoption and relinquishment agreement could not be found, and were only a part of the record by testimony.[49] Considering the ample testimonial evidence regarding Mrs. Thyng's conduct as Jessie's mother and guiding precedent of other jurisdictions, the Texas Supreme Court declared that the legal heirs of Mrs. Thyng must be estopped

[39] *See Cubley*, 73 S.W.2d at 78; Jones v. Guy, 143 S.W.2d 906, 909 (Tex. 1940).

[40] *Cubley*, 73 S.W.2d at 78.

[41] *Id.* at 73.

[42] *Id.* at 74.

[43] *Id.* at 75.

[44] *Id.*

[45] *Id.* at 76.

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.* at 78.

from asserting the invalidity of the deed of adoption, and from asserting that such deed was not in fact filed as required by statute[50]—"[t]o permit them to do so would be a fraud upon the rights of Jessie Cubley, which a court of equity will not permit."[51] *Cubley v. Barbee* provided guidance for Texas courts going forward: the conduct of the adoptive parents may imply that an adoption has occurred, despite the failure to record the adoption or the lack of a written agreement.[52]

Six years later, in *Jones v. Guy*, the Texas Supreme Court revisited the concept of equitable adoption, focusing more on the conduct of the adopted child, and less on any formal agreement, as a controlling factor establishing an adoption.[53] Mrs. Beulah Guy and her husband brought suit to recover an undivided one-half interest in thirty-three tracts of land and for conversion of personal property against the executors and legatees named in Mrs. Susan Belle Pierce's will.[54] Based on a theory of equitable estoppel, Beulah alleged that Mrs. Pierce and her husband took Beulah from her biological father when she was about three years old, with the understanding and agreement that the Pierces would adopt Beulah.[55] Pursuant to this informal agreement, Beulah lived with the Pierces until she married, took their last name, and referred to them as "Mammy" and "Pappy."[56] The Pierces held Beulah out as their daughter and their adopted daughter, and they fed, clothed, and educated her.[57] Beulah was kind and affectionate to the Pierces when she lived with them, taking care of them when they were sick, and performing the ordinary kind of work that is required of children by their parents.[58] Until their death, the Pierces' relationship to Beulah was that of a mother and father, referring to Beulah's children as their grandchildren.[59]

[50] *Id.* at 83.

[51] *Id.*

[52] Tara Kern, Comment, *Equitable Adoption: The Implications of Common Law Children on Estate Planning and the Need for Statutory Regulation in Texas*, 7 EST. PLAN. & CMTY. PROP. L.J. 557, 565 (2015).

[53] 143 S.W.2d 906, 908 (Tex. 1940).

[54] *Id.* at 907.

[55] *Id.*

[56] *Id.*

[57] *Id.* at 907–08.

[58] *Id.* at 908.

[59] *Id.*

The Texas Supreme Court found that these facts "clearly fall" within the rule set forth in *Cubley*.[60] Specifically, equitable adoption:

> [P]reclude[s] adoptive parents and their privies from asserting the invalidity of . . . the status of the adopted child, when, by *performance upon the part of the child*, the adoptive parents receive all the benefits and privileges accruing from such performance, and they by their representations induce such performance under the belief of the existence of the status of adopted child.[61]

The executors and legatees named in Mrs. Pierce's will argued that this rule has no application to the facts in Beulah's case because Beulah could not show that the Pierces executed and acknowledged a deed of adoption yet failed to record it, as in *Cubley*.[62] The Texas Supreme Court rejected this interpretation of *Cubley*, clarifying that the "doctrine of equity" upon which the holding in *Cubley* was based does not turn on execution of the adoption deed.[63] According to the court, it depends instead on "the adoptive parent having received the benefits of the relation fully *performed by the child*," and when the child has performed all the duties associated with that relation, the adoptive parent shall be estopped in equity from denying that he or she assumed the corresponding obligation.[64] While testimony appeared to show that an informal agreement to adopt existed between the Pierces and Beulah's biological father, the court, in its opinion, focused more on Beulah's conduct toward her adoptive parents in holding that the Pierces equitably adopted Beulah.[65]

While the court in *Cubley* focused heavily on the conduct of the adoptive parents and the court in *Jones* focused heavily on the conduct of the adopted child, it is clear from Texas' initial recognition of equitable adoption that the primary focus was more on the conduct and relationships between the adopted child and adoptive parents and less on the existence or formality of an agreement to adopt. However, as important as the conduct of the parents and child may be, this factor alone may not be sufficient to establish an equitable adoption.

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[60] *Id*.

[61] *Id*. (emphasis added).

[62] *Id*. at 909.

[63] *Id*.

[64] *Id*. (emphasis added).

[65] *Id*. at 907–09.

B. What kind of agreement, if any, is required?

About a decade later, in *Cavanaugh v. Davis*, the Texas Supreme Court revisited equitable adoption, slightly departing from the rules previously recognized in *Cubley* and *Jones*.[66] Annie Laurie Barrow Davis sought to inherit an undivided one-half interest in real property located in Austin as the adopted daughter and only heir at law of George Ann Barrow.[67] Biologically, Annie was George's niece, and the trial court found that this was the extent of their relationship.[68] The Court of Civil Appeals, however, reversed, holding that the evidence conclusively established an adoption by estoppel as a matter of law.[69] The Texas Supreme Court articulated that under *Cubley* and *Jones*, an equitably adopted child must prove either that the adoptive parents attempted yet failed to effectuate a statutory adoption or agreed to adopt the child.[70] While the Barrows failed to execute any written agreement to adopt, the record suggested that the agreement was oral.[71]

The record also consisted of substantial evidence suggesting that Annie lived with George as George's daughter. For example, several witnesses testified that after her mother passed away, Annie went to live with the Barrows, taking their name.[72] The Barrows reared, cared for, clothed, and educated Annie, and in return, Annie performed household duties and referred to the Barrows as her mother and father.[73] While interested witnesses may have testified to the contrary, a disinterested witness and employer of George's testified that George had told her that George's sister died, gave Annie to George, and asked George to raise Annie as her child.[74] George told

[66] 235 S.W.2d 972 (Tex. 1951).

[67] *Id.* at 973.

[68] *Id.*

[69] *Id.*

[70] *Id.* at 973–74 ("Under the statutes and the cases referred to it was incumbent upon respondent to plead and prove according to recognized rules of law and evidence that: (1) George Ann Barrow executed, acknowledged and filed a statutory instrument of adoption in the office of the County Clerk; or (2) George Ann Barrow undertook to effect a statutory adoption but failed to do so because of some defect in the instrument of adoption or in its execution or acknowledgment, or because of failure to record it; or (3) George Ann Barrow agreed with respondent, or with respondent's parents or with some other person in loco parentis that she would adopt respondent.").

[71] *Id.* at 975.

[72] *Id.* at 975–96.

[73] *Id.* at 975.

[74] *Id.* at 976.

her employer that she had taken over to rear or adopted Annie as her own child.[75]

Annie herself produced compelling evidence: when George died, Annie collected the proceeds of three insurance policies in which the relationship of the insured to the beneficiary was designated as that of mother.[76] Annie also provided school census cards in which Annie Laurie Barrow was listed as the pupil, William Barrow was listed as the father, and George Ann Barrow was listed as the mother.[77] Considering all of the testimony heard before the trial court, the Texas Supreme Court conceded that the evidence in *Jones*—where the court found an equitable adoption—was every bit as strong and compelling as the evidence here.[78] And while "the acts and conduct of George Ann Barrow are strong circumstantial evidence of the agreement" Annie sought to establish, the court could not hold that "there are no facts and circumstances of probative value supporting a contrary inference."[79] Therefore, the court reversed the Court of Civil Appeals, denying Annie status as an equitably adopted child of the Barrows.[80]

While the allegedly equitably adopted child in *Cavanaugh* produced ample evidence to the trial court, like the equitably adopted child in *Jones*, to establish an equitable adoption, the Texas Supreme Court reached different outcomes in each case. Understandably, the supreme court could not replace its own opinion of the facts for that of the trial court, but the supreme court's focus in *Cavanaugh* turned more heavily on the existence of an actual agreement than it did in *Cubley* or *Jones*.

C. Does equitable adoption establish a legal relationship?

As times change and the concept of equitable adoption continues to evolve, questions regarding the effects of equitable adoption have come before the Texas Supreme Court. In response, in the significant cases of *Heien v. Crabtree* and *Asbeck v. Asbeck*, the Texas Supreme Court considered not whether an equitable adoption occurred, but what the impact of such an adoption in equity pursuant to an unperformed agreement to adopt

[75] *Id*.
[76] *Id*.
[77] *Id*.
[78] *Id*. at 978.
[79] *Id*. at 977.
[80] *Id*. at 978.

has on the legal relationship between parent and child.[81] In *Heien*, the allegedly equitably adopted decedent's adoptive siblings attempted to inherit through the decedent, while in *Asbeck*, the allegedly equitably adopted son of the decedent's brother attempted to inherit through his adoptive father, from the decedent.[82] The Texas Supreme Court announced that equitable adoption does not form a legal parent-child relationship for inheritance purposes as does legal adoption.[83] Under both circumstances, the court held that an equitably adopted child may inherit from his or her adoptive parents, but not vice versa.[84]

In *Heien*, the alleged heirs relied on the provisions of Section 3(b) and Section 40 of the Texas Probate Code to support their argument that as adoptive siblings of their equitably adopted brother, they have inheritance rights through intestate succession.[85] While the plain statutory language suggested that the alleged heirs were correct, the Texas Supreme Court did not interpret it this way. In the court's opinion, this statutory language, instead, indicated a "legislative assumption that [the] courts had held that a child may be adopted by acts of estoppel, and thus that a legal status of parent and child is created by estoppel."[86] According to the Texas Supreme Court, this is not so.

While the court in its earlier opinions recognized a right of intestate succession in children who had been equitably adopted or adopted by estoppel under certain facts and circumstances, the court held that these forms of adoption are not equivalent to legal adoption, in that they do not have all the legal consequences of a legal adoption.[87] Under these facts, if proven true and asserted by the equitably adopted child, this child would succeed on his claim to inherit by way of intestate succession, but the adoptive parents cannot assert such a right, and neither can the adoptive siblings. According to the court, the parents breached their agreement to adopt and should not be

[81] Heien v. Crabtree, 369 S.W.2d 28, 29 (Tex. 1963); Asbeck v. Asbeck, 369 S.W.2d 915, 915 (Tex. 1963).

[82] *Heien*, 369 S.W.2d at 29; *Asbeck*, 369 S.W.2d at 915. *Asbeck* was before the court at the same time as *Heien*. They were argued to the court on the same day, but the opinion in *Heien* was handed down first. *Asbeck*, 369 S.W.2d at 916.

[83] *Heien*, 369 S.W.2d at 30.

[84] *Id.* at 29; *see also Asbeck*, 369 S.W.2d at 916.

[85] *Heien*, 369 S.W.2d at 29. Again, Sections 3(b) and 40 of the Probate Code are the current Sections 22.004 and 201.054 of today's Estates Code. *See supra* text accompanying note 26.

[86] *Heien*, 369 S.W.2d at 30.

[87] *Id.*

allowed to claim the aid of equity.[88] Specifically, "the enforcement in equity of the agreement to adopt should not confer additional rights upon the adoptive parent. The right of inheritance from the child is a different right from that of the child to enforce the agreement to adopt."[89] Therefore, the court reasoned, equitable adoption only serves to permit the equitably adopted child to inherit directly from the adoptive parents in intestacy.

To the contrary, the dissenting opinion in *Heien* foreshadows the Texas Legislature's 2017 amendment. While the majority opinion attributes the alleged heirs' argument to "legislative assumption," ignoring the statutory language, and rejecting the intended rights of inheritance, the dissent points out that "whatever the law was before the adoption of the Probate Code, it is clear that the Legislature has provided an adoptive status whereby there shall be inheritance *by* the child, and *from* the child, rather than an escheat of the property to the State."[90]

As previously discussed, the majority in *Heien* correctly reasons that the relevant statutory language does not work to equate equitable adoption and statutory adoption for all purposes, as the Legislature has not created a legal parent-child relationship through equitable adoption; but with this reasoning, the court seems to be the one assuming that the creation of such legal relationship for all purposes is what the Legislature intended. The plain language of Sections 3(b) and 40 of the Probate Code provided that a "child" includes an adopted child, adopted by acts of estoppel, and that the *inheritance rights by and from* this child are the same as if the child were the "natural legitimate child of such parent or parents by adoption."[91] This language does not provide anything more than rights of inheritance by, from, and through an adopted child, which was defined, at the time, to include a child adopted by acts of estoppel. Because these specific inheritance rights existed by statute, the court did not need to look to a parent-child relationship to provide such rights. In holding that no inheritance rights existed because no legal status existed as a result of equitable adoption, it seems that the Texas Supreme Court confused the purpose of the relevant statute—to provide rights of inheritance—and ignored its plain language.

[88] *Id.*

[89] *Id.* at 31.

[90] *Id.* at 32 (Greenhill, J., dissenting). Because the principles announced in *Heien v. Crabtree* became controlling, the dissenting justice in *Asbeck* concurred in the result reached by the Court in this case. Asbeck v. Asbeck, 369 S.W.2d 915, 916 (Tex. 1963).

[91] *Heien*, 369 S.W.2d at 29.

D. What role has equitable adoption played outside the context of intestate succession?

In more modern circumstances, Texas courts have relied on the rule set forth in *Heien* and *Asbeck* to examine the relationship—or lack thereof—created by equitable adoption in determining inheritance rights in contexts other than intestate succession. For example, in *Carpenter v. Carpenter*, two potential beneficiaries of an irrevocable inter vivos trust, Pam and Scott, attempted to establish their status as "descendants" through equitable adoption.[92] The original trust agreement divided the net income from the trust into two equal halves, one half benefitting the settlor's brother-in-law and the other half benefitting the settlor's nephew.[93] Upon the death of the survivor, the remaining trust corpus and any undistributed income would be distributed to seven beneficiaries.[94] If any of the seven beneficiaries did not survive the termination of the trust, that person's share would vest in that person's descendants.[95] If that person had no descendants, his or her share would vest in the remaining beneficiaries or their descendants.[96]

When the trust terminated by its terms, only one of the seven named beneficiaries was still alive; therefore, the trustee was required to determine the identity of any descendants of the six deceased beneficiaries.[97] One of the deceased beneficiaries, Jess, had a son named Charles who was also deceased.[98] Charles had two step-children, Pam and Scott, whom Charles sometimes referred to as his "children," including in his will.[99] Pam and Scott contended that they should be designated as Jess's descendants, entitling them to Jess's share of the trust assets as his grandchildren, because Charles had equitably adopted them.[100]

Under the law, if Pam and Scott were Jess's biological grandchildren, then they would be entitled to Jess's share as his descendants under the terms

[92] No. 02-10-00243-CV, 2011 WL 5118802, at *1 (Tex. App.—Fort Worth Oct. 27, 2011, no pet.) (mem. op.).

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.* at *3.

of the trust.[101] Further, if Pam and Scott had been legally adopted, at the time the trust became effective, they would have been included as "descendants."[102] However, equitable adoption does not establish the same status as legal adoption,[103] and the Legislature has not acted in any way to create such a status through equitable adoption.[104] Since the Texas Supreme Court's statement of the law in *Heien* and *Asbeck*, lower courts have followed the court's law as it stood: "If equitable adoption does not create the legal status of parent and child, then even if Charles (and those claiming through him) would have been estopped from denying that he had adopted Pam and Scott, this does not cause Pam and Scott to be Charles's children under the law."[105] Therefore, the court concluded that the term "descendant" did not include equitably adopted children and that Maggie, the settlor, did not intend to include equitably adopted children.[106] Even if Pam and Scott had been equitably adopted by their step-father, they could not inherit through him with this status.[107]

Further, even if the court sought to apply the plain statutory language that the Texas Supreme Court once ignored, this language governed inheritance by and from adopted children in the context of intestate succession, while *Carpenter* involved beneficiaries, termed as "descendants," of a trust. Presented with ambiguous language and instead the term "child," absent clear settlor intent within the four corners of the document, perhaps the beneficiaries could have urged the court to look to the statutory language as a rule of construction.[108] But by focusing on the *Heien* rule that an equitably adopted child, who lacks legal status, does not have all the rights under the laws of descent and distribution as would a biological child, the *Carpenter* court denied the alleged beneficiaries any inheritance rights under an equitable adoption theory.[109]

[101] *Id*.

[102] *Id*. at *4.

[103] *Id*.

[104] *See id.*

[105] *Id*.

[106] *Id*.

[107] *See id.*

[108] *See infra* Section V, E.

[109] *Carpenter*, 2011 WL 5118802, at *4.

E. How does one plead and prove an equitable adoption today?

Today, the elements necessary to establish an equitable adoption reflect the rules

from *Cubley*, *Jones*, and *Cavanaugh*. A claimant seeking to prove that an equitable adoption has occurred must prove: (1) the existence of an agreement to adopt and (2) performance by the child.[110] "Performance" means that "the child must show 'love and affection' to the parent and render 'services' such as a child would render to a parent."[111] In performing as a child, an equitably adopted child does not have to rely on the existence of an agreement to adopt: "A child subject to an equitable adoption acts in reliance on its belief in its 'status' as a child, not necessarily in reliance on an agreement to adopt or on representations about adoptive status."[112]

A child can prove the existence of this required agreement through evidence that the parent: (1) executed "a statutory instrument of adoption in the office of the county clerk"—today, successfully completed a statutory adoption; (2) attempted, but failed to complete, a statutory adoption; or (3) agreed with the child, the child's biological parents, or some other person in "loco parentis" to adopt the child.[113] The agreement to adopt may be written or oral.[114] Proof of the agreement does not require direct evidence;[115] such proof simply must satisfy a "preponderance of the evidence" standard.[116]

Without any legislative action to codify these elements, those seeking to establish an equitable adoption through the right facts and circumstances are left only with court precedent.

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[110] Luna v. Estate of Rodriguez, 906 S.W.2d 576, 581 (Tex. App.—Austin 1995, no writ).

[111] Dampier v. Williams, 493 S.W.3d 118, 122 (Tex. App.—Houston [1st Dist.] 2016, no pet.).

[112] *Luna*, 906 S.W.2d at 581.

[113] Cavanaugh v. Davis, 235 S.W.2d 972, 974 (Tex. 1951); *Dampier*, 493 S.W.3d at 122 (citing Lowrey v. Botello, 473 S.W.2d 239, 240–42 (Tex. Civ. App.—San Antonio 1971, no writ)).

[114] *Luna*, 906 S.W.2d at 579–80 n.3.

[115] *Id.* at 580.

[116] Moran v. Adler, 570 S.W.2d 883, 885 (Tex. 1978) ("While there are statements in some opinions which require proof in equitable adoption cases to be 'clear, unequivocal and convincing,' it has now been settled that the right standard is that the evidence must be factually sufficient to constitute proof by a preponderance of the evidence.").

IV. H.B. 2271: AMENDING THE DEFINITION OF "CHILD" AND ADDING "ADOPTED CHILD"

While Texas courts have been bound to the supreme court's interpretation of the relevant statutes and the effects of equitable adoption, the Texas Legislature has finally stepped in and attempted to change the court's interpretation.

More specifically, with their recent legislation, Texas lawmakers have amended the Texas Estates Code in an effort to clarify existing definitions, in essence altering the effects of equitable adoption on inheritance rights. According to the legislative history, the Legislature is communicating to the courts that it intends to equate equitable adoption to legal adoption for purposes of inheritance; however, lawmakers have not taken advantage of the opportunity to provide clear elements demonstrating how an equitable adoption can be established.[117] Instead, the Texas Legislature has made a seemingly simple change to the Texas Estates Code.

Specifically, H.B. 2271 amended the definition of "child" under Texas Estates Code Section 22.004(a) to expressly include a child adopted through equitable adoption.[118] H.B. 2271 also amended Texas Estates Code Section 201.054 with the addition of subsection (e), which reads, "For purposes of this section, 'adopted child' means a child: (1) adopted through an existing or former statutory procedure; or (2) considered by a court to be equitably adopted or adopted by acts of estoppel."[119] These amendments went into effect on September 1, 2017. According to the author/sponsor of the bill's Statement of Intent, the purpose of these amendments is to provide updates and clarification to the law regarding decedents' estates, specifically "that a child adopted by estoppel is treated the same as any other child and is a decedent's child."[120]

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[117] *See infra* Section VI; Kern, *supra* note 52, at 577 ("[T]he Texas Legislature will need to amend section 201.054 to expressly include equitable adoption as an equivalent to formal adoption."). Kern specifically proposed a lengthy addition to Texas Estates Code § 201.054, as § 201.0545, in which the Legislature could provide elements and clarification that "An equitably adopted child is regarded as an "adopted child" for purposes of inheritance under the laws of descent and distribution under section 201.054." *Id*. at 577–78.

[118] Tex. Est. Code Ann. § 22.004(a) ("Child" includes an adopted child, regardless of whether the adoption occurred through: (1) an existing or former statutory procedure; or (2) an equitable adoption or acts of estoppel.).

[119] *Id*. § 201.054(e) (Supp.).

[120] S. Comm. on State Affairs, Bill Analysis, Tex. H.B. 2271, 85th Leg., R.S. (2017) ("H.B. 2271 provides several updates to the law regarding decedents' estates. H.B. 2271 clarifies

Even though the Texas Legislature did not supply elements or factors for determining how and when a child is equitably adopted, the lawmakers involved made clear their intent with this amendment. On April 4, 2017, Representative Wray presented H.B. 2271 to the House of Representatives Committee on Judiciary & Civil Jurisprudence.[121] Melissa Willms of the State Bar of Texas Real Estate, Probate, and Trust Law Section spoke on behalf of the bill.[122] Specifically, Willms stated that this bill is "dealing with consistency."[123] Some of the appellate courts, she explained, do not want to follow the statute as it stood, as they resist treating an equitably adopted child as any other child of the decedent.[124] Willms further explained that "some of the appellate courts have invited legislative action, so that is what we're doing, so that all children are treated the same."[125]

When asked by a committee member what equitable adoption is, if it's a "common law adoption," Willms responded that it is the "same as adoption by estoppel," and that they "are interchangeable terms."[126] Willms was also asked who determines if a child has been equitably adopted, to which she responded that it is "something the court has to determine."[127] Willms concluded that with these amendments to Sections 22.004 and 201.054, the Legislature "really, really means it": courts are to treat equitably adopted children, for inheritance purposes, the same as legally adopted and natural born children, and the Legislature attempts to make this clear by adding that "equitable adoption" language.[128]

Finally, it is important to keep in mind the somewhat limited scope of this 2017 amendment, as it only changes the Texas Estates Code. Despite apparent earlier confusion, legislative intent to equate equitable adoption and legal adoption for intestate inheritance purposes within the Estates Code does

definitions that currently exist in the Estates Code, specifically: that a child adopted by estoppel is treated the same as any other child and is a decedent's child.").

[121] *Decedent's Estates and Certain Posthumous Gifts: Hearings on Tex. H.B. 2271 Before the House Comm. on Judiciary & Civil Jurisprudence*, 85th Leg., R.S. (Apr. 4, 2017) (statement of Melissa Willms) (tape available from the House Video/Audio Archives), http://tlchouse.granicus.com/MediaPlayer.php?view_id=40&clip_id=13390.

[122] *Id*.

[123] *Id*.

[124] *Id*.

[125] *Id*.

[126] *Id*.

[127] *Id*.

[128] *Id*.

not change the Family Code or attempt to create any legal parent-child relationship; this change simply provides inheritance rights that are the same as if the child was legally adopted or natural born, regardless of legal status.

V. WHAT IMPACT WILL THIS 2017 AMENDMENT HAVE?

Looking at the statutory language, legislative history, and intent expressed by H.B. 2271's sponsor and supporters, the Texas Legislature expressly equates equitable adoption and formal adoption for inheritance purposes.[129] Texas courts, however, consistently and adamantly hold that equitable adoption is not equivalent to legal adoption nor does it carry "all of the legal consequences of a statutory adoption."[130] Despite this precedent, there should not be any doubt going forward that this amendment will impact the old law.

A. Is there any need to differentiate between equitable adoption and adoption by estoppel?

Courts have been using equitable adoption and adoption by estoppel interchangeably for decades, and with this amendment, any need to distinguish these concepts is officially gone. Prior to H.B. 2271, when Section 22.004(a) defined "child" to include "an adopted child, regardless of whether the adoption occurred through: (1) an existing or former statutory procedure; or (2) acts of estoppel,"[131] perhaps there was room to argue that equitable adoption and adoption by estoppel are two different things, and the statutory language only allowed for adoption by estoppel. Regardless of whether a technical or common law distinction between these two concepts exists, Texas courts have not appeared to ever recognize this distinction, and the Texas Legislature avoided any need to establish such a distinction, providing for both equitable adoption and adoption by estoppel as means for establishing adoption.

B. Will this amendment impact the legal relationship going forward?

Simply put, this 2017 amendment does not attempt to create any legal relationship between the equitably adopted child and his or her adoptive

[129] *See supra* Section IV.

[130] Dampier v. Yearnd, 493 S.W.3d 118, 121 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (citing *In re* Marriage of Eilers, 205 S.W.3d 637, 641 (Tex. App.—Waco 2006, pet. denied)).

[131] Tex. Est. Code Ann. § 22.004(a).

parents; as previously discussed, a legal parent-child relationship is a distinct, statutory concept addressed in the Texas Family Code.[132] Texas courts have also been clear, since recognizing equitable adoption, that this theory does not create a parent-child relationship like statutory adoption does, and many, if not all, other states have reached similar conclusions.[133] With this 2017 amendment, the Legislature does not intend to equate equitable and legal adoption for all purposes—nor was this ever the intent.

On the other hand, Texas, and other states, have also expressed that equitable adoption serves its purpose as it steps in through equity on behalf of the child: "The doctrine exists to prevent 'a situation where it would be inequitable and grossly unfair to the adopted child, who has performed services and rendered affection, for the adoptive parent or his privies to deny the adoption.'"[134] This concern for the equitably adopted child is consistent with the motivation behind the Texas Legislature's amendment to the Estates Code—the desire to treat these children the same "as any other child" for inheritance purposes. The legislative history also expresses intent to treat the child "as the decedent's child." Considering this intent, the ever-clear statutory language, and the history of Texas courts' motivation to protect the equitably adopted child, this amendment's goal of fully equating equitable adoption and legal adoption for inheritance purposes should take effect. Any court that relies on prior case law is getting hung up on the old law and ignoring the legislative intent, and nothing suggests that courts should not follow this intent.

Heien and *Asbeck*, two cases in which the Texas Supreme Court determined that the alleged heirs had no right to inherit from and through the decedent on the premise that equitable adoption does not create a legal relationship, present good factual scenarios to examine what impact this amendment would have on similar scenarios.[135] Because Texas courts have

[132] *See supra* Section II.

[133] *See, e.g.*, *In re* Estate of Furia, 103 Cal. App. 1, 5, 126 Cal. Rptr. 2d 384, 387 (2002) ("[E]quity does not grant the equitably adopted child a right to inherit and does not change her status as an heir. Instead, it supports the fiction that an adoption has transpired and grants the equitable child a portion of the intestate decedent's estate . . . ."); *see also* Johnson v. Johnson, 2000 ND 170, ¶ 9, 617 N.W.2d 97, 101. New Mexico, like Texas, also bases the application of equitable adoption on an estoppel rationale. Poncho v. Bowdoin, 2006-NMCA-013, ¶¶ 27–28, 138 N.M. 857, 864, 126 P.3d 1221, 1228.

[134] *Dampier*, 493 S.W.3d at 122 (citing Rubiolo v. McNees, 301 S.W.2d 483, 484–85 (Tex. Civ. App.—El Paso 1957, writ ref'd n.r.e.)); *see also* Halterman v. Halterman, 867 S.W.2d 559, 560 (Mo. Ct. App. 1993) ("[E]quitable adoption was developed solely to benefit the child.").

[135] *See supra* Section III.C.

stood firm in holding that equitable adoption does not work to benefit the adoptive parents, one might think they would remain hesitant to allow the adoptive parents and their relatives to inherit from or through the equitably adopted child. However, the statutory language of the amended Section 201.054 demonstrates that the Texas Legislature clearly intends otherwise.

Section 201.054(a) specifically provides that for inheritance purposes, "[t]he adoptive parent or parents *and their kindred* inherit *from and through* the adopted child as if the adopted child were the natural child of the adoptive parent or parents."[136] The newly-added Section 201.054(e) specifies that "adopted child" includes a child that is "considered by a court to be equitably adopted or adopted by acts of estoppel."[137] Thus, a case like *Heien*, in which the adoptive parents' biological children (their kindred) attempt to inherit from the equitably adopted child (the children's equitably adopted brother), should be decided the opposite way today (assuming the facts and circumstances supported a finding that the child had been equitably adopted).

In a case like *Asbeck*, where the equitably adopted child sought to inherit from his adoptive father's brother, courts seem more open to treating this child "like any other child" in allowing the child to inherit under these circumstances, for the child's benefit—but Texas precedent has not allowed this. Now, so holding would be consistent with the plain statutory language, the legislative intent, and the oft-mentioned motivation of protecting and benefitting the equitably adopted child. Specifically, Sections 201.054(a) and (e) together now provide for such an outcome. For inheritance purposes, Section 201.054(a) also provides that "an adopted child is regarded as the child of the adoptive parent or parents, and the adopted child and the adopted child's descendants inherit from and through the adoptive parent or parents *and their kindred* as if the adopted child were the natural child of the adoptive parent or parents."[138]

Because the newly-defined term "adopted child" within this section includes equitably adopted children, an equitably adopted child should inherit through his adoptive parents, from his adoptive uncle, by way of intestate succession. Therefore, a case like *Asbeck*, in which an equitably adopted child attempts to inherit through his adoptive parent, from his parent's kindred, should produce the opposite outcome today (again, assuming the facts and circumstances first support a finding that the child has been

[136] Tex. Est. Code Ann. § 201.054(a) (Supp.) (emphasis added).

[137] *Id.* § 201.054(e)(2).

[138] *Id.* § 201.054(a) (emphasis added).

equitably adopted). Overall, it seems inevitable that the Texas courts, when the issue comes before them, will have to alter their stance, disregard old precedent, and allow both an equitably adopted child to inherit from and through the adoptive parents and the kindred of the adoptive parents to inherit from the equitably adopted child.

Finally, because this 2017 amendment alters the Estates Code, not the Family Code nor the existence of a legal parent-child relationship, these changes will not create any parental duties during life. For example, if a married couple takes in a child as their own, without formally adopting this child, it is unlikely that a third party could utilize equitable adoption to establish any parental duty to support the child and pursue the parents pursuant to such a duty. If the child accrued large amounts of medical bills, the medical provider could not use equitable adoption as a means to establish the parents' duty to support the child—and pay these bills—under the Family Code. Equitable adoption serves as a mechanism to aid in equity at death under the Estates Code, as the facts giving rise to an equitable adoption theory arise after the adoptive parent has died. This concept does not create rights and duties that parties can properly and formally create during life, as this is not an issue of a parent-child relationship: this is an issue of inheritance.

C. Does this amendment terminate an equitably adopted child's biological parents' rights to inherit from and through the child?

As discussed previously, the rights of a legally adopted child's biological parents to

inherit from and through the child are cut off when the child is adopted.[139] Because Texas courts held, prior to this amendment, that equitable adoption had no impact on the parent-child relationship nor inheritance rights except to allow the child to inherit from the adoptive parents, the child's biological parents maintained their rights to inherit from and through the child. In examining the Texas Legislature's intent to treat equitably adopted children the same as the adoptive parents' biological children or legally adopted children for inheritance purposes, courts may face the question of whether this amendment cuts off the biological parents' right to inherit and gives this right to the adoptive parents, as does legal adoption.

Considering the legislative history, the Texas Legislature seems most concerned with the rights of the child.[140] Also, in applying equitable adoption

[139] *See supra* Section II.

[140] *See supra* Section IV.

for the benefit of the child, courts have noted that equitable adoption is necessary when "a [parent's efforts] to adopt [the child] are ineffective because of failure to strictly comply with statutory procedures or because, out of neglect or design, agreements to adopt are not performed."[141] Not always, but often, the parent's negligence or failure to comply with the statutory adoption requirements results in the child's need to prove an equitable adoption. However, while equitable adoption was originally solely intended to protect the child, this sole intention is now moot considering the plain language of the amended statutes.

Section 201.054 equates equitable adoption with statutory adoption for inheritance purposes.[142] If an equitably adopted child shall be treated the same as a legally adopted child under intestate succession, it follows that the equitably adopted child's biological parents' rights to inherit from and through the equitably adopted child will be cut off, as if a legal adoption had occurred. Now that "adopted child" expressly includes an equitably adopted child, and the adoptive parents and their kindred inherit from and through the adopted child, the plain language suggests that the biological parents' rights to inherit from their biological child are cut off in favor of the adoptive parents.

D. What else within the Texas Estates Code does this amendment affect?

In addition to its impact on intestate succession in Section 201.054, this amendment to

the definition of "Child" in Section 22.004 affects other sections of the Estates Code where this newly-defined term appears. For example, Chapter 353 deals with homestead, exempt property, and family allowance.[143] Section 353.001 states that "a child is a child of his or her mother and a child of his or her father, as provided by Sections 201.051, 201.052, and 201.053."[144] Sections 201.051 and 201.052 specify that a child is a child of his or her adoptive mother and adoptive father.[145] In administering a decedent's estate, the court by order shall set aside "the homestead for the use and benefit of

[141] Dampier v. Yearnd, 493 S.W.3d 118, 121 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (citing Spiners v. Maples, 970 S.W.2d 166, 170 (Tex. App.—Fort Worth 1998, no pet.)).

[142] *See* Tex. Est. Code Ann. § 201.054(e) (Supp.).

[143] *See id.* § 353.

[144] *Id.* § 353.001.

[145] *Id.* §§ 201.051–.052.

the decedent's surviving spouse and minor children and all other exempt property . . . for the use and benefit of the decedent's surviving spouse and minor children."[146] If all or any of the specific articles of exempt property are not among the decedent's effects, the court shall instead make a reasonable allowance to be paid to the decedent's surviving spouse and children.[147] Therefore, a child who proves to the court that he or she has been equitably adopted by the decedent will not only inherit from and through the decedent, but will also share in the decedent's homestead and other exempt property.[148]

From a creditor's perspective, a successful claim as an equitably adopted child for a right to homestead or an allowance in lieu of could result in a lot of money taken from the creditor, to the creditor's surprise. For example, the creditor might believe that the decedent has no minor children and no spouse to assert any right to homestead, other exempt property, or allowance in lieu of, so the creditor's claims against the decedent will be paid during the administration process. However, if a child, who is unbeknownst to the creditor, successfully proves to the court that he or she was equitably adopted by the decedent, this child will be entitled, by order of the court, to the decedent's homestead, other exempt assets, or an allowance in lieu of. With the homestead specifically, the exemption from certain creditors would now continue, plus the child's right of occupancy. Even worse for the creditor, the homestead and other exempt property could make up the majority, if not all, of the decedent's estate, leaving the creditor empty-handed. Or, if the equitably adopted child receives an allowance in lieu of homestead or other exempt property, the court will set aside money for the child, taking this money out of the hands of unsuspecting creditors. All of this could come as quite a shock to a creditor who believed he would finally receive his rightful payment from the decedent's estate.

Additionally, even in the context of testate succession, the newly-defined term "Child" may provide for an equitably adopted child to inherit from a decedent as a pretermitted child.[149] For example, Section 255.053(a) specifies that, "If no provision is made in the testator's last will for any child of the testator who is living when the testator executes the will, a pretermitted child succeeds to the portion of the testator's separate and community property . . . to which the pretermitted child would have been entitled . . . if the testator

[146] *Id.* § 353.051(a)(1)–(2).

[147] *Id.* § 353.053(a).

[148] *See id.*

[149] *Id.* §§ 255.053–.055.

had died intestate without a surviving spouse."[150] If a person can prove that he or she is an equitably adopted child of the decedent, this person would come within the definition of "Child" as defined by Section 22.004, and could inherit from the decedent as a pretermitted child.

This could come as a big surprise to someone who believes he has avoided intestate succession by providing for who he describes as his children in his will. Absent a clear definitional provision in the will avoiding the application of the pretermission statute, this statute might come in and provide a share of the decedent's estate for the equitably adopted child as a pretermitted child. From the perspective of the decedent's natural born or legally adopted children, a successful claim as an equitably adopted child for a right to share in the decedent's estate could result in diminished shares to the testator's other children. For example, if the testator devises all of his property to his children in his will, and he had two natural born children plus an equitably adopted child "adopted" after execution of the will but considered as a pretermitted child after the testator's death, those two natural born children who expected to split their father's estate half-and-half will now be sharing the estate with their equitably adopted sibling, each receiving one-third. Here, the impact of equitable adoption could come as a surprise to both the beneficiaries of a will and in hindsight, the testator.

Further, an equitably adopted child may have standing to contest a will as a "person interested" in the decedent's estate.[151] In the process of probating the decedent's will, for example, Section 55.001 provides that "a person interested in an estate may, at any time before the court decides an issue in a proceeding, file written opposition regarding the issue."[152] Section 22.018 defines "person interested" as "an heir, devisee, spouse, creditor, or any other having a property right in or claim against an estate being administered."[153] An equitably adopted child, now considered a child of the decedent's for inheritance purposes, likely constitutes a person having a property right in or claim against the decedent's estate. Therefore, if a person successfully proves he was equitably adopted by the decedent, it follows that he would have standing to contest the decedent's will as a "person interested" under Section 55.001.

[150] *Id.* § 255.053(a).

[151] *Id.* § 22.018.

[152] *Id.* § 55.001.

[153] *Id.* § 22.018(1).

During life, testators often seek to prevent will contests by including a no contest clause in their wills.[154] A no contest clause—also known as a forfeiture or *in terrorem* clause—provides that a beneficiary who unsuccessfully contests the will shall not receive property under the will.[155] However, an equitably adopted child who is not a named beneficiary under the will does not feel the threat the of the no contest clause, and therefore has less, if anything, at stake in contesting the decedent's will. Yet again, an equitably adopted child's potential status as a "person interested" to contest a will demonstrates the less-anticipated effect this 2017 amendment could have, and how this effect may come as a surprise to a testator who believes he has properly drafted to avoid such results.

E. Could this amendment affect will or trust interpretation?

Section 201.054 of the Texas Estates Code deals with intestate succession, while Section 22.004 defines "Child" for purposes of the entire Estates Code—and perhaps creates a presumption in favor of equitably adopted children—absent clear intent by the testator. With a well-drafted will and the right language, testators can avoid equitable adoption altogether. When the terms of a will or trust are unambiguous and clearly express the testator's or settlor's intent, a court looks to the four corners of the document, and those terms within the four corners control.[156] Interpretation of wills and trusts is essentially a question of testator or settlor intent; however, if the terms of a will or trust are ambiguous as a matter of law, and intent is unclear, the interpretation of the document becomes a question of fact.[157]

If a testator's actual intent cannot be determined by looking within the four corners of the document itself, could a person produce sufficient evidence to prove that he or she is a beneficiary of such will or trust through equitable adoption? Facts similar to the *Carpenter* case could be a good example of this.[158] Or similarly, if in his will, a testator creates a testamentary trust that leaves certain property in trust for his wife for life, then to his children for life, and finally the remainder is to be distributed to his children's

[154] *Id.* § 254.005; Beyer, *supra* note 25, at 204.

[155] Beyer, *supra* note 25, at 204.

[156] *See* Tex. Prop. Code Ann. § 111.0035(b); *see also* Woodham v. Wallace, No. 05-11-01121-CV, 2013 WL 23304, at *3 (Tex. App.—Dallas Jan. 2, 2013, no pet.).

[157] Coker v. Coker, 650 S.W.2d 391, 394 (Tex. 1983); *see also Woodham*, 2013 WL 23304, at *3.

[158] *See supra* Section III.C.

children per stirpes, can a future equitably adopted grandchild, who possibly does not exist at the execution of this will, share in the distribution of this trust when it terminates? While the terms of the trust instrument itself will ultimately control,[159] settlors may not contemplate possible equitably adopted grandchildren when creating the trust. The language of the trust may not provide with enough specificity who the intended beneficiaries are, creating an ambiguity to be resolved by the surrounding facts and circumstances and rules of construction. Potentially, this statutory acknowledgement of equitable adoption for inheritance purposes could come in as a rule of construction in interpreting the will or testamentary trust.

Additionally, in determining whether an equitably adopted child is entitled to share in trust assets, the law in effect at the time the trust became effective controls.[160] Because this amendment treats equitably adopted children the same as legally adopted and natural born children for inheritance purposes, trusts that go into effect from September 1, 2017 forward would seemingly allow for equitably adopted children to share in the trust assets under the right terms and circumstances, in conjunction with this 2017 amendment working as a rule of construction absent clear settlor intent as to the definition of "child." While this 2017 amendment does not directly affect will or trust interpretation, it could evolve into a rule of construction.

Finally, once establishing his or her status as an equitably adopted child, this adopted child may seek to inherit under a will through application of Section 255.153 of the Estates Code, Texas' "anti-lapse statute." Under the specified circumstances, the anti-lapse statute provides a "substituted taker" to inherit under a will where the named devisee predeceases the testator, for example.[161] The devisee, however, must be a descendant of the testator or a descendant of the testator's parent, while the substituted taker or takers are descendants of the devisee.[162] Now that an equitably adopted child is considered a child under the Estates Code for inheritance purposes, Texas courts could very well face arguments that an equitably adopted child of a deceased devisee constitutes a proper substituted taker as a descendant of his or her adoptive parents. Natural born and legally adopted children are considered descendants under the anti-lapse statute; therefore, to treat

[159] *See* Carpenter v. Carpenter, No. 02-10-00243-CV, 2011 WL 5118802, at *3 (Tex. App.—Fort Worth Oct. 27, 2011, no pet.).

[160] *Id*.

[161] *See* Tex. Est. Code Ann. § 255.153(a).

[162] *Id*.

equitably adopted children the same as natural born and legally adopted children for inheritance purposes, it seems an equitably adopted child has an argument that he or she too should be considered a descendant for inheritance purposes under the anti-lapse statute.[163] If this argument is successful, the testator's remaining heirs might be quite surprised by the effect of the anti-lapse statute together with this 2017 amendment.

VI. WHAT DOES THIS 2017 AMENDMENT FAIL TO ADDRESS?

Lastly, while the 85th Texas Legislature provided that equitably adopted children shall be treated the same as legally adopted and natural born children for inheritance purposes, particularly in the context of intestate succession, the Legislature did not take advantage of the opportunity it had to clarify or codify exactly what is required to prove an equitable adoption. Others have previously called for such clarification, proposing draft legislation with clear elements, and comparing equitable adoption to common law marriage as a basis for codifying these elements.[164]

Both equitable adoption and common law marriage "are nontraditional ways of achieving a societal goal without following the formal, customary processes accepted by society."[165] Common law marriage allows a man and a woman to legally marry without satisfying the statutory requirements, if they satisfy certain elements provided by the Texas Family Code.[166] Similarly, the Texas Legislature could have codified the necessary elements for establishing an equitable adoption when the requirements for a statutory adoption have not been met. Instead, lawmakers clarified the impact on inheritance rights that equitable adoption has, while failing to clarify exactly what is necessary to establish an equitable adoption the way the common law marriage requirements have been provided by statute. For now, those seeking to prove that an equitable adoption occurred are left with court precedent and the elements that these decisions have provided.

[163] Bear in mind that no legal relationship is created here. The relevant Estates Code provisions are dealing with inheritance rights, not legal status.

[164] Kern, *supra* note 52, at 570, 577.

[165] *Id.* at 570.

[166] *See id.*; *see also* Tex. Fam. Code Ann. § 2.401.

VII. CONCLUSION

Considering the history and evolution of equitable adoption in Texas, the intent of the Texas Legislature, and the clear statutory language, Texas courts should apply this plain language of the amended Sections 22.004 and 201.054 to allow equitably adopted children to inherit from and through their adoptive parents and adoptive parents and their kindred to inherit from and through the equitably adoptive child. Plainly stated, courts should finally treat equitably adopted children the same as legally adopted and natural born children for inheritance purposes. This 2017 amendment does not fully equate equitable adoption and statutory adoption for all purposes, it simply provides inheritance rights. If the original statutory language was not clear enough to provide for such inheritance rights, the amended language, together with the legislative intent, certainly is.