

EQUITABLE ADOPTION: THE IMPLICATIONS OF COMMON LAW CHILDREN ON ESTATE PLANNING AND THE NEED FOR STATUTORY REGULATION IN TEXAS

Comment

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I. THE CURRENT LEGAL STATUS OF EQUITABLE ADOPTION—AN INTRODUCTION

Occasionally, hard times fall upon parents, so much so that they can no longer raise their own children.¹ Other times, parents no longer wish to have the responsibility of their children.² When these instances occur, parents turn to family and friends to care for and raise their children.³ Even though parents typically intend to place their children in the care of others on a temporary basis, these placements often become permanent.⁴ Therefore, a problem arises in regards to inheritance: what happens when a child is raised by someone other than his biological parent, and then the adoptive parent dies without formally adopting the child and without a will? Is the child capable of inheriting from his adoptive parent's estate even though he is neither a biological child nor a formally adopted child? For instance, suppose an uncle raised his nephew. The uncle agreed to adopt the boy but never entered into a formal agreement with the boy's natural parents indicating the adoption. However, the uncle provided financially for his nephew and referred to his nephew as his own son. When the uncle dies intestate, is the nephew legally considered a natural child of his uncle's estate and capable of inheriting a portion of the estate as if he were one of the uncle's biological children? Should the nephew be considered his uncle's natural child for purposes of inheritance?

Unfortunately, there is currently no straight-forward answer to this scenario.⁵ The Texas Supreme Court as well as federal courts vary on how

1. See Michael J. Higdon, *When Informal Adoption Meets Intestate Succession: The Cultural Myopia of the Equitable Adoption Doctrine*, 43 WAKE FOREST L. REV. 223, 226–31 (2008).

2. See *id.*

3. See *id.* at 238–39.

4. See *id.* at 239.

5. Compare *Cavanaugh v. Davis*, 235 S.W.2d 972 (Tex. 1951) (holding an equitable adoption requires a written agreement between the biological and adoptive parents), with *Cubley v. Barbee*, 73 S.W.2d 72 (Tex. 1934) (holding adoptive parents' conduct implies an adoption), and *Broussard v.*

to rule on this particular situation.⁶ Sometimes courts require that an actual, written agreement exist to indicate the equitable adoption of a child, while other times courts have held that an adoption may be inferred based on the adoptive parents' conduct towards the child.⁷ Even then, other times courts have held that the child's conduct towards his adoptive parents should be the indicative factor of whether an equitable adoption existed.⁸ To make matters worse, the Texas Estates Code does not distinguish a formal adoption from an equitable adoption, yet the Texas Supreme Court has failed to consistently abide by this canon in its case rulings—typically holding that an equitable adoption does not establish a legal parent-child relationship whereas a formal adoption does.⁹ Even then, federal courts have refused to follow the equitable adoption rules established by the Texas Supreme Court.¹⁰ Hence, the area of equitable adoption is incredibly imprecise and highly confusing for practicing attorneys who need to know which rules to follow in order to prove that an equitable adoption existed.¹¹ In order to clear up the disparity among courts, state legislatures should recognize the doctrine of equitable adoption.¹² Thus, the Texas Legislature should enact a statute that clearly imposes equitable adoption as an equivalent to formal adoption and establishes the necessary elements to prove an equitable adoption.¹³

This comment focuses on the need for an equitable adoption statute in Texas.¹⁴ First, this comment will explain the concept of equitable adoption and the problem that has arisen through the Texas Supreme Court's application of the doctrine.¹⁵ Second, this comment will discuss the disparity

Weinberger, 499 F.2d 969 (5th Cir. 1974) (holding no agreement in writing is necessary for an equitable adoption). *See also* Edward W. Bailey, *Adoption "By Estoppel"*, 36 TEX. L. REV. 30, 30 (1957) (explaining the difficulty courts have in clearly spelling out an analysis of the reasoning from previous cases).

6. *Compare Cavanaugh*, 235 S.W.2d 972, with *Broussard*, 499 F.2d 969, and *Cubley*, 73 S.W.2d 72.

7. *See Cavanaugh*, 235 S.W.2d 972 (finding that the lack of an adoption contract disqualified the niece from inheriting from her aunt's estate as if she were her aunt's daughter); *Broussard*, 499 F.2d 969 (finding that the grandparents' conduct indicated their intent to treat their grandson as their own child when they housed, fed, clothed the boy, and paid for his health insurance and school expenses).

8. *See Jones v. Guy*, 143 S.W.2d 906, 910 (Tex. 1940).

9. *See* TEX. EST. CODE ANN. §§ 22.004, 201.054 (West 2014); *Cubley*, 73 S.W.2d 72; *Jones*, 143 S.W.2d 906; *Cavanaugh*, 235 S.W.2d 972; *Heien v. Crabtree*, 369 S.W.2d 28 (Tex. 1963). Section 22.004 of the Texas Estates Code was previously section 3(b) of the Texas Probate Code, but the Texas Probate Code was recently replaced by the Texas Estates Code in 2014. EST. § 22.004. Thus, the Texas Supreme Court would have looked to the Texas Probate Code instead of the Texas Estates Code when the court decided the cases referred to above. *Id.*

10. *See Cubley*, 73 S.W.2d 72; *Jones*, 143 S.W.2d 906; *Cavanaugh*, 235 S.W.2d 972; *Broussard*, 499 F.2d 969.

11. *See Cubley*, 73 S.W.2d 72; *Jones*, 143 S.W.2d 906; *Cavanaugh*, 235 S.W.2d 972; *Broussard*, 499 F.2d 969.

12. Jaime P. Weissner, *Virtual Adoption: The Inequities of the Equitable Doctrine*, 35 NOVA L. REV. 549, 553 (2011).

13. *See id.*

14. *See infra* Part III.

15. *See infra* Part I.A.

between the Texas Supreme Court and the federal courts' rulings regarding equitable adoption, and will propose the need for legislation as a solution to clear up the inconsistency of court rulings on the matter.¹⁶ Third, this comment will discuss the necessary elements for an equitable adoption statute and provide an explanation of the importance of each element.¹⁷ The elements will correlate with current Texas statutes regarding informal marriage, also known as common law marriage.¹⁸ The concepts of informal marriage and equitable adoption are very similar, making informal marriage a great basis for drafting equitable adoption legislation.¹⁹ Fourth, this comment will propose a draft of the legislation and discuss the proposed statute's potential impact on estate planning.²⁰ Lastly, this comment will also explore three rights of inheritance that an equitable adoption will create based upon the enactment of the proposed statute.²¹

A. Equitable Adoption and the Problem Surrounding the Doctrine

"Claims of equitable adoption . . . frequently arise in the context of intestate decedents who are survived by someone who, although raised by the decedent and treated as the decedent's child, was never formally adopted" by the decedent.²² However, according to case law, equitable adoption does not create the legal relationship between a parent and child.²³ This is an important distinction to understand. Currently, courts only allow equitable adoption to establish the right for a child to inherit from his adoptive parents' estate.²⁴ Even though the Texas Estates Code does not express a distinction between a formal adoption and an equitable adoption for purposes of inheritance, Texas courts have not enforced the concept of equitable adoption as an equivalent to formal adoption.²⁵

A formal adoption establishes a legal parent-child relationship, which indicates that the adoptive parents are legally responsible for the child, and not only is the child capable of inheriting from the adoptive parents' estate, but the parents are capable of inheriting from the child's estate if the child

16. See *infra* Part II.

17. See *infra* Part III.B.

18. See *infra* Part III.A. Because "informal marriage" is the term used by the Texas Family Code to refer to a common law marriage, this comment will use the term informal marriage when referencing the concept of common law marriage. TEX. FAM. CODE ANN. § 2.401 (West 2013).

19. See FAM. § 2.401.

20. See *infra* Part III.C.

21. See *infra* Part III.D. These three rights of inheritance are synonymous with the rights of inheritance that a formal adoption bestows upon a formally adopted child. TEX. EST. CODE ANN. § 201.054 (West 2014); TEX. FAM. CODE ANN. § 162.017 (West 2013).

22. Higdon, *supra* note 1, at 225.

23. See T.W.E. v. K.M.E., 828 S.W.2d 806, 810 (Tex. App.—San Antonio 1992, no writ); Heien v. Crabtree, 369 S.W.2d 28, 30 (Tex. 1963).

24. See Heien, 369 S.W.2d at 31.

25. See *id.*; TEX. EST. CODE ANN. §§ 22.004, 201.054 (West 2014).

predeceases the adoptive parents.²⁶ Also, the law permits the formally adopted child's descendants to inherit from the adoptive parents' estates if the adopted child has children and predeceases the adoptive parents.²⁷ However, because the Texas Supreme Court has clearly ruled that a distinction between a formal adoption and an equitable adoption exists, Texas courts have set the precedent that an equitable adoption does not create a legal parent-child relationship even though the Texas Estates Code establishes otherwise.²⁸

Texas law bestows certain rights and duties upon parents regarding their children through their legally recognized parent-child relationship.²⁹ These rights and duties include: "the right to have physical possession . . . of the child; the duty of care . . . [for] the child; . . . the duty to support the child; . . . [and] the right to inherit from and through the child[.]"³⁰ Adoptive parents assume these rights and duties when they adopt a child.³¹ Once parents adopt a child, the child and his descendants become a part of the bloodline of the adopted parents, and thus "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."³² Not only does the legal parent-child relationship create responsibilities for parents, but the relationship also creates certain intestacy rights.³³ Because the law recognizes an adoptive parent as a child's legal parent, it binds the adoptive parent to honor the rights and duties that the parent-child relationship creates through an adoption.³⁴

Texas courts, however, have distinguished the idea of an equitable adoption from a formal adoption in that parents who equitably adopt a child do not assume the legal rights and duties towards the child like a formal adoptive parent does.³⁵ According to the Texas Supreme Court, equitable adoption simply means "that because of the promises, acts and conduct of an intestate deceased, those claiming under and through him are estopped to assert that a child was not legally adopted or did not occupy the status of an adopted child" for the purposes of inheritance.³⁶ Therefore, the Texas Supreme Court has set precedent that indicates equitable adoption, also known as adoption by estoppel, only estops the decedent's heirs from

26. EST. §§ 22.004, 201.054; TEX. FAM. CODE ANN. § 151.001 (West 2013).

27. EST. §§ 22.004, 201.054; FAM. § 151.001.

28. See *T.W.E.*, 828 S.W.2d at 809; EST. § 22.004; *Heien*, 369 S.W.2d at 30.

29. FAM. § 151.001.

30. *Id.*

31. *Id.* § 162.017(a).

32. EST. § 201.054(a); see also FAM. § 162.017(a) ("An order of adoption creates the parent-child relationship between the adoptive parent and the child for all purposes." *Id.*).

33. FAM. §§ 101.024(a), 151.001.

34. *Id.* §§ 101.024(a), 151.001.

35. See *Heien v. Crabtree*, 369 S.W.2d 28, 30 (Tex. 1963); see also *Cavanaugh v. Davis*, 235 S.W.2d 972, 973–74 (Tex. 1951) (distinguishing equitable adoption from formal adoption); *K.B. v. N.B.*, 811 S.W.2d 634, 639 (Tex. App.—San Antonio 1991, writ denied) (discussing the same distinction).

36. See *Heien*, 369 S.W.2d at 30; *Cavanaugh*, 235 S.W.2d at 973–74; *K.B.*, 811 S.W.2d at 639.

denying an informally adopted child his inheritance and does not actually create a legally recognizable parent-child relationship between the decedent and the child—meaning that the parent is not legally responsible for the child, the parent may not inherit from the child's estate in the event that the child predeceases the parent, and the child's descendants cannot inherit from the adoptive parent's estate.³⁷

Unfortunately, the Texas Supreme Court does not abide by the Texas Estates Code or the Texas Family Code when it interprets and applies the concept of equitable adoption.³⁸ Neither the Texas Estates Code nor the Texas Family Code distinguishes the parent-child relationship created by an equitable adoption from the relationship that a formal adoption creates.³⁹ In fact, the Texas Estates Code states that adopted children are afforded the same inheritance rights as biological children, and the definition of "child" includes a child who was adopted regardless of whether the adoption occurred through the formal adoption process or through equitable adoption.⁴⁰

In essence, the major problem associated with equitable adoption is the fact that the Texas Supreme Court has ventured wayward with its interpretations of the doctrine.⁴¹ The Texas Supreme Court has held that equitable adoption does not form the same legal parent-child relationship that a formal adoption creates, even though the Texas statute proclaims otherwise.⁴² Not only does the Texas Supreme Court not follow the doctrine according to the statute, but it also cannot agree on a uniform set of elements that someone must prove in order to claim an inheritance through equitable adoption.⁴³ Therefore, in order to solve this problem, the Texas Legislature needs to implement a statute that will expressly define the elements of equitable adoption and amend section 201.054 of the Texas Estates Code, regarding adopted children, to expressly include equitable adoption as a form of adoption.⁴⁴

37. See *In re M.L.P.J.*, 16 S.W.3d 45 (Tex. App.—Eastland 2000, pet. denied); 39A TEX. JUR. 3D FAMILY LAW § 1098 (citing *Heien*, 369 S.W.2d 28).

38. See *Heien*, 369 S.W.2d at 30.

39. See TEX. EST. CODE ANN. §§ 22.004, 201.054(d) (West 2014); TEX. FAM. CODE ANN. § 162.017 (West 2013).

40. See EST. §§ 22.004, 201.054(a).

41. See *Cubley v. Barbee*, 73 S.W.2d 72 (Tex. 1934); *Jones v. Guy*, 143 S.W.2d 906 (Tex. 1940); *Cavanaugh*, 235 S.W.2d 972; *Broussard v. Weinberger*, 499 F.2d 969 (5th Cir. 1974).

42. See *Heien*, 369 S.W.2d at 30.

43. See *Cubley*, 73 S.W.2d 72; *Jones*, 143 S.W.2d 906; *Cavanaugh*, 235 S.W.2d 972; *Broussard*, 499 F.2d 969.

44. See *Weisser*, *supra* note 12, at 553.

II. PAST COURT RULINGS ON EQUITABLE ADOPTION

The problem with adoption by estoppel arises when an equitably adoptive parent dies intestate.⁴⁵ This creates a problem because there is currently no statute in Texas that lays out exactly what a child must prove in order to establish that the decedent equitably adopted the child.⁴⁶ Because Texas lacks a statute that provides clear requirements for establishing an adoption by estoppel, the Texas Supreme Court varies on its rulings when this situation arises.⁴⁷ Even with the Texas courts' decisions in mind, federal courts do not abide by the rules the Texas Supreme Court has tried to establish.⁴⁸ This disparity among courts confuses those who were raised by individuals other than their biological parents; consequently, these individuals find themselves in the situation where one, or both, adoptive parents die intestate and they cannot inherit from the decedents' estates, even though the decedents raised them as natural or formally adopted children.⁴⁹

A. Disparity Among Courts

1. *Cubley v. Barbee: Adoptive Parents' Conduct Implies an Adoption*

In 1934, the Texas Supreme Court decided *Cubley v. Barbee*, making it one of the earliest and most prominent cases in Texas regarding equitable adoption.⁵⁰ In this case, a young girl's father died and her mother was unable to care for her properly, so the mother sent the girl, Jessie, to live with her grandparents in Texas.⁵¹ Jessie remained in her grandparents' care for a short while before returning to her mother.⁵² Meanwhile, her mother obtained employment at a boarding house in Fort Worth, Texas, where she worked and lived with Jessie for four months.⁵³ Then, Jessie's mother returned to Michigan for a short period of time and left Jessie in the care of her employer,

45. See Higdon, *supra* note 1, at 261–66.

46. See *id.*

47. Compare *Cavanaugh*, 235 S.W.2d at 972 (holding that evidence introduced at trial could cause reasonable minds to differ on whether decedent agreed to adopt the claimant), with *Broussard*, 499 F.2d at 971 (ruling that although there were no formal adoption proceedings, the party's conduct evidenced an intention to adopt), and *Cubley*, 73 S.W.2d at 432 (finding that although formal adoption papers were not filed, defendants were estopped from asserting the invalidity of the adoption).

48. See *Broussard*, 499 F.2d at 971.

49. Compare *Cavanaugh*, 235 S.W.2d 972, with *Broussard*, 499 F.2d 969, and *Cubley*, 73 S.W.2d 72. These cases all contradict one another; each subsequent case is capable of proving the rule established by the preceding case and yet the courts establish a different set of rules that the parties must meet. *Cubley*, 73 S.W.2d 72; *Jones v. Guy*, 143 S.W.2d 906 (Tex. 1940); *Cavanaugh*, 235 S.W.2d 972; *Broussard*, 499 F.2d 969.

50. See *Cubley*, 73 S.W.2d 72.

51. *Id.* at 73.

52. *Id.*

53. *Id.*

Mrs. Brown, in Fort Worth.⁵⁴ Mrs. Brown subsequently placed Jessie in the care of the Thyngs, during which time Jessie became ill and was given a short life expectancy.⁵⁵ Jessie's mother returned to Texas to find that Jessie's health had improved while in the care of the Thyngs and that the Thyngs wanted to continue caring for her.⁵⁶ The Thyngs had no children of their own, and they wanted Jessie to remain in their care and to be raised as their own child.⁵⁷ Jessie's mother was hesitant at first, but she eventually signed an agreement acknowledging the Thyngs' adoption of Jessie.⁵⁸ The Thyngs then hired an attorney to file the adoption agreement in 1888.⁵⁹

Unfortunately, Mr. Thyng died shortly after signing the adoption agreement; however, Mrs. Thyng continued to support and care for Jessie as her own daughter, even after Jessie married.⁶⁰ When Jessie was a child, Mrs. Thyng educated her and even toured with her as Jessie performed her musical talents across the country.⁶¹ Due to Jessie's musical career, Mrs. Thyng accumulated approximately \$200,000 in cash and property by the time of her death in 1927.⁶² Naturally, Jessie anticipated inheriting this estate, not only due to her contribution of earnings to the estate, but also because she was the sole heir of Mrs. Thyng—or so she thought.⁶³ However, the attorney whom the Thyngs had hired to file the adoption agreement failed to actually file the documents.⁶⁴ Thus, legally, Jessie was never formally adopted by the Thyngs and was not allowed to inherit from Mrs. Thyng's estate because she was not a legal heir.⁶⁵ Jessie sued Mrs. Thyng's estate for her right to inherit from the estate under an equitable adoption theory.⁶⁶

The Texas Supreme Court ruled that even though the attorney never filed Jessie's adoption papers, the Thyngs' conduct, as well as Jessie's, was consistent with a formal adoption.⁶⁷ Mrs. Thyng repeatedly held Jessie out to be her daughter to others and maintained a relationship with Jessie that resembled one of a mother and her daughter until Mrs. Thyng's death nearly forty years after the Thyngs' attempt to file the adoption papers.⁶⁸ Mrs. Thyng's conduct towards Jessie, combined with her intent to adopt Jessie through the formal adoption process, was overwhelming evidence to the

54. *Id.*

55. *Id.* at 74.

56. *Id.*

57. *Id.*

58. *Id.*

59. *See id.* at 75.

60. *Id.* at 75–76.

61. *Id.*

62. *Id.* at 76.

63. *See id.*

64. *See id.*

65. *See id.*

66. *See id.*

67. *See id.* at 78.

68. *See id.*

court that an adoption had in fact taken place.⁶⁹ Therefore, the court ruled that the Thyngs had actually adopted Jessie in lieu of a formal adoption, and Jessie had the right to inherit from Mrs. Thyng's estate under the theory of adoption by estoppel.⁷⁰

Thus, from 1934 onward, the rule in Texas for establishing an equitable adoption was that the courts may view the conduct of the adoptive parents as implied evidence that an adoption occurred, despite the lack of a written agreement.⁷¹ Additionally, the court ruled that the adoptive parents must die intestate, otherwise the court would not find any discrepancy about the child as a beneficiary of the estate.⁷²

2. *Jones v. Guy: Adoptive Child's Conduct Implies an Adoption*

Six years later, in 1940, an equitable adoption case arose in which the Texas Supreme Court's ruling would create a different rule from that established by *Cubley* regarding the elements of an equitable adoption.⁷³ In *Jones v. Guy*, the father of a three-year-old girl approached a couple about raising his daughter, and the couple agreed to take the girl into their care.⁷⁴ The couple and the child's father agreed that the couple would raise the girl as their own, and the couple adhered to this agreement for the remainder of their lives.⁷⁵ The couple referred to her as their daughter, introduced her to others as their daughter, paid for her education and living expenses, and held her out in the community as their daughter.⁷⁶ Once the girl was grown and married, she kept in touch with the couple, as any child would after leaving home, and took care of the couple as they aged.⁷⁷ The girl and her husband even raised their children to refer to the adoptive couple as their grandparents and, in return, the couple referred to the girl's children as their own grandchildren.⁷⁸ Even though the conduct between the couple and the girl resembled that of parents and child, no record existed indicating a formal adoption of the girl; therefore, when the couple died intestate, the girl did not inherit from their estate.⁷⁹ The girl subsequently sued her adoptive parents'

69. *See id.* at 78–79.

70. *See id.*

71. *See generally id.* (holding that evidence of adoptive parent and adopted child relationships can be convincing enough to warrant an adoption by law).

72. *See generally id.* at 82–83 (applying case law from other states to explain the significance of adoptive parents dying intestate for beneficiary purposes).

73. *See Jones v. Guy*, 143 S.W.2d 906, 907 (Tex. 1940).

74. *Id.*

75. *Id.* at 907–08.

76. *Id.*

77. *See id.* at 908.

78. *Id.*

79. *See id.* at 907–08.

estate under the equitable adoption theory for what would have been her inheritance had the couple formally adopted her.⁸⁰

Ultimately, the Texas Supreme Court held that when a biological parent places her child in “the custody of others, under an agreement between the parent and the custodians that the child would be adopted, and the custodians and the child thereafter [maintained] . . . a relationship wholly consistent with that of parent and child, . . . the adoptive status of the child would be upheld” as an adoption by estoppel.⁸¹ The court recognized that an adoption by estoppel is established when there is an agreement in place to adopt the child, the child has performed as if she were the natural child of the decedent, and the decedent “received all the benefits and privileges accruing from such performance under the belief of the existence of a status of an adopted child.”⁸²

Only six years after the *Cubley* decision, the Texas Supreme Court diverged from what it previously held.⁸³ As stated before, when determining whether an adoption by estoppel occurred, the *Cubley* court looked to the adoptive parents’ conduct towards the nonbiological child.⁸⁴ In 1940, the court in *Jones* ruled that in determining whether an equitable adoption was established, the adopted child’s conduct towards the adoptive parents was the controlling factor.⁸⁵ Consequently, the courts created different factors required for someone to prove that an equitable adoption took place, making the requirements for an adoption by estoppel unclear.⁸⁶

3. *Cavanaugh v. Davis: An Equitable Adoption Requires an Agreement in Writing Between a Biological Parent and the Adoptive Parent(s)*

In 1951, the Texas Supreme Court contradicted itself and diverged from the rules previously established in *Jones* and *Cubley*—making the requirements for someone to prove an equitable adoption more unclear.⁸⁷ In *Cavanaugh v. Davis*, Annie Laurie attempted to establish that her aunt and uncle equitably adopted her.⁸⁸ George Ann and William Barrow took Annie Laurie into their care as an infant, and entered into an agreement with the child’s mother declaring that they would raise the girl as their own.⁸⁹ The Barrows took it upon themselves to feed, clothe, and educate the girl as if she

80. *See id.* at 908.

81. *Cavanaugh v. Davis*, 235 S.W.2d 972, 974 (Tex. 1951) (citing *Jones*, 143 S.W.2d 906).

82. *See Jones*, 143 S.W.2d at 910.

83. *Compare Cubley v. Barbee*, 73 S.W.2d 72 (Tex. 1934) (using the parents’ conduct toward the child), *with Jones*, 143 S.W.2d 906 (using the child’s conduct toward the parent).

84. *See Cubley*, 73 S.W.2d at 75.

85. *See Jones*, 143 S.W.2d at 908.

86. *See id.*; *Cubley*, 73 S.W.2d 72.

87. *See Cavanaugh v. Davis*, 235 S.W.2d 972, 978 (Tex. 1951).

88. *See id.* at 973.

89. *Id.* at 977.

were their natural daughter.⁹⁰ In turn, Annie Laurie performed household duties and referred to the Barrows as her parents, calling them mother and father.⁹¹ Annie Laurie even took on the surname of Barrow when she attended school and remained known throughout the community as Annie Laurie Barrow until she married her husband and assumed his surname.⁹²

When the Barrows died intestate, issues arose as to whether the Barrows actually adopted Annie Laurie and whether Annie Laurie could inherit from the Barrows' estate.⁹³ The Barrows failed to obtain a written agreement with the child's natural mother.⁹⁴ The two parties orally agreed that the Barrows would raise Annie Laurie, but she could not produce any evidence of a written agreement.⁹⁵ However, according to previous case law, the court should have considered the Barrows' conduct as sufficient evidence to establish that they had, in fact, equitably adopted Annie Laurie.⁹⁶

Thus, relying on precedent, Annie Laurie testified that the Barrows treated her as their natural child and that she referred to them as her biological parents.⁹⁷ When registering for school, she indicated her name as Annie Laurie Barrow and continued to go by that name until she married her husband.⁹⁸ When filling out paperwork, she indicated William Barrow as her father and George Ann Barrow as her mother.⁹⁹ Annie Laurie listed George Ann Barrow as her mother and beneficiary on her insurance policy, and the Barrows even listed Annie Laurie as their daughter on their own insurance policy.¹⁰⁰

However, the Texas Supreme Court required a written agreement between the child's natural parent and adoptive parents as a necessary element to establish an equitable adoption.¹⁰¹ Thus, the court ruled that the Barrows and Annie Laurie had an aunt/uncle-niece relationship rather than a parents-child relationship.¹⁰² The discrepancy between *Cubley, Jones*, and *Cavanaugh* is that, in *Cavanaugh*, the court refused to declare the relationship between the Barrows and Annie Laurie as one between parents and daughter solely because the Barrows lacked a written agreement indicating the adoption, even though the Barrows' and Annie Laurie's conduct towards one another indicated otherwise—which would have

90. *Id.*

91. *Id.* at 975.

92. *Id.*

93. *Id.* at 973.

94. *Id.* at 974.

95. *See id.*

96. *See Cubley v. Barbee*, 73 S.W.2d 72, 75 (Tex. 1934); *Jones v. Guy*, 143 S.W.2d 906, 908 (Tex. 1940).

97. *See Cavanaugh*, 235 S.W.2d at 976–77.

98. *See id.* at 976.

99. *Id.*

100. *See id.* at 977.

101. *See id.* at 974.

102. *See id.* at 973, 978.

satisfied the rules established in *Cubley* and *Jones*.¹⁰³ Remember, *Cubley* established that the court could infer that adoptive parents' conduct towards the child could form an adoption by estoppel, and *Jones* established that the court could infer that the child's conduct towards the parents could create an equitable adoption.¹⁰⁴ By looking at the conduct between the Barrows and Annie Laurie, it is hard to understand why the court in *Cavanaugh* would not deem their relationship one of parents and daughter through equitable adoption, considering the previous case law.¹⁰⁵ The court found that an equitable adoption was not formed between the Barrows and Annie Laurie because the agreement between the Barrows and Annie Laurie's biological mother could not be validated, even though the conduct between the Barrows and Annie Laurie would likely have satisfied both rulings in *Cubley* and *Jones*.¹⁰⁶ Once again, the Texas Supreme Court diverged from its prior rulings that established the requirements to prove an adoption by estoppel.¹⁰⁷

4. Broussard v. Weinberger: No Agreement in Writing Necessary

Yet again, in 1971, another court would shy away from the rulings established in the three cases previously discussed; in this case the tribunal was a federal court.¹⁰⁸ In *Broussard v. Weinberger*, a woman dropped her infant son off at his maternal grandparents' house for his grandparents to raise him.¹⁰⁹ The grandparents, the Broussards, did not obtain a written agreement with the child's mother indicating that they would raise him because they hoped and anticipated that the child's mother would come back for him.¹¹⁰ The mother, however, did not return for her son.¹¹¹ Still, the Broussards cared for the boy as if he were their own son.¹¹² Six years later, Mr. Broussard died intestate.¹¹³ Mrs. Broussard then filed an application for Social Security benefits for herself and the boy, but the state denied her application because the couple never formally adopted the child.¹¹⁴ Subsequently, Mrs. Broussard sued her husband's estate in an effort to establish the child's adoption on the theory of adoption by estoppel so the boy could inherit a portion of his grandfather's Social Security benefits.¹¹⁵

103. See *id.* at 973.

104. See *Cubley v. Barbee*, 73 S.W.2d 72 (Tex. 1934); *Jones v. Guy*, 143 S.W.2d 906 (Tex. 1940).

105. Compare *Cavanaugh*, 235 S.W.2d 972, with *Cubley*, 73 S.W.2d 72, and *Jones*, 143 S.W.2d 906.

106. See *Cavanaugh*, 235 S.W.2d at 974 (citing *Cubley*, 73 S.W.2d 72; *Jones*, 143 S.W.2d 906).

107. See *id.*

108. See *Broussard v. Weinberger*, 499 F.2d 969 (5th Cir. 1974).

109. *Id.* at 970.

110. See *id.*

111. *Id.*

112. See *id.*

113. *Id.*

114. *Id.*

115. See *id.*

Ultimately, the United States Fifth Circuit Court of Appeals ruled in favor of the Broussards despite the lack of a written agreement between the boy's mother and the Broussards that indicated the couple's intention of adopting their grandson.¹¹⁶ The court believed that the overwhelming "evidence clearly show[ed] that [Mrs. Broussard] and her deceased husband had every intention of providing a permanent home for the child."¹¹⁷ The couple paid for hospitalization and life insurance for the boy, and made efforts to indicate that they would fund the boy's education and provide a home for him.¹¹⁸ Therefore, the court recognized that the Broussards equitably adopted their grandson for inheritance purposes and allowed the boy to inherit Social Security benefits from the grandfather's estate even though precedent, established by *Cavanaugh*, indicated that an agreement to adopt was necessary to prove an adoption by estoppel.¹¹⁹ Thus, the court in *Broussard* recognized that in the absence of a formal agreement, an adoptive parents' intent to adopt may be inferred by the parents' conduct.¹²⁰

B. Need for Legislation

The cases described above show that the elements necessary to prove an equitable adoption remain highly uncertain.¹²¹ Obviously, case law has not set a solid foundation for families to rely on when they face the situation in which they must prove an adoption by estoppel, since each subsequent case ruling contradicts earlier decisions.¹²² Even federal courts have refused to follow rulings set forth by the Texas Supreme Court.¹²³ The best way for Texas to clarify the confusion surrounding the doctrine of equitable adoption is for the state to adopt legislation governing the matter.¹²⁴ There are no set requirements indicating what someone must prove in court to show with absolute certainty that an adoption by estoppel existed between that person and his adoptive parents.¹²⁵ Because "there remain inconsistencies in its application and the appropriate circumstances in which courts can invoke the doctrine to provide relief for [equitably] adopted children," Texas should adopt legislation to define the elements of equitable adoption.¹²⁶

116. *See id.*

117. *Id.* at 971.

118. *Id.*

119. *Compare id.*, with *Cavanaugh v. Davis*, 235 S.W.2d 972 (Tex. 1951).

120. *See Broussard*, 499 F.2d at 970.

121. *See supra* Part II.A.

122. *See supra* Part II.A; Bailey, *supra* note 5, at 36–43.

123. *See Broussard*, 499 F.2d 969.

124. *See infra* Part III.A.

125. *See Cavanaugh v. Davis*, 235 S.W.2d 972, 974 (Tex. 1951); *Broussard*, 499 F.2d at 970; *Cubley v. Barbee*, 73 S.W.2d 72, 74 (Tex. 1934).

126. *Weisser, supra* note 12, at 552.

III. PROPOSED LEGISLATION

A. Informal Marriage Used as a Basis for Constructing Equitable Adoption Legislation

Due to the conceptual similarities of adoption by estoppel and informal marriage, the proposed legislation should govern the doctrine of equitable adoption primarily based upon the same idea behind informal marriage.¹²⁷ Informal marriage, more widely known as common law marriage, and the doctrine of equitable adoption are analogous in nature.¹²⁸ Both concepts are nontraditional ways of achieving a societal goal without following the formal, customary processes accepted by society.¹²⁹ An informal marriage allows a man and a woman to legally marry without obtaining a marriage certificate or satisfying a state's statutory marriage laws.¹³⁰ All that Texas requires for an informal marriage to exist is that the two parties must agree to be married, live together in Texas as husband and wife, represent to others that they are married, and be at least 18 years old.¹³¹ Similarly, equitable adoption allows someone who is not the biological parent of a child to adopt that child without filing for a formal adoption.¹³²

So far, case law has provided different factors, such as those discussed above, for courts to consider when faced with an equitable adoption claim.¹³³ As a refresher, those factors include: a written agreement between the adoptive parents and the biological parents; conduct on behalf of the adoptive parents indicating an adoption; and conduct on behalf of the child toward the adoptive parents indicating a parent-child relationship.¹³⁴

The elements in the proposed legislation determine whether an equitable adoption exists and are very similar in nature to the elements required for a couple to establish an informal marriage in Texas.¹³⁵ Informal marriage requires that the two parties claiming such a marriage must agree to marry one another.¹³⁶ Similarly, in an equitable adoption, the adoptive parents and

127. See TEX. FAM. CODE ANN. § 2.401(a)(2)–(c) (West 2013); *Cavanaugh*, 235 S.W.2d at 974; *Broussard*, 499 F.2d at 970; *Jones v. Guy*, 143 S.W.2d 906, 910 (Tex. 1940).

128. Compare FAM. § 2.401(a)(2)–(c), and Mary S. Yamin-Garone, *Fact or Fiction: Five Myths About Common Law Marriage*, LEGALZOOM (Dec. 2009), <https://www.legalzoom.com/articles/fact-or-fiction-five-myths-about-common-law-marriage>, with *Cavanaugh*, 235 S.W.2d at 974, *Broussard*, 499 F.2d at 970, and *Jones*, 143 S.W.2d at 906.

129. See Yamin-Garone, *supra* note 128; *Cavanaugh*, 235 S.W.2d at 974; *Broussard*, 499 F.2d at 970; *Jones*, 143 S.W.2d at 906; FAM. § 2.401.

130. FAM. § 2.401(a)(2)–(c); Yamin-Garone, *supra* note 128.

131. FAM. § 2.401(a)(2)–(c).

132. See *T.W.E. v. K.M.E.*, 828 S.W.2d 806, 809 (Tex. App.—San Antonio 1992, no writ).

133. See *Cavanaugh*, 235 S.W.2d at 974; *Broussard*, 499 F.2d at 970; *Jones*, 143 S.W.2d at 906.

134. See *Cavanaugh*, 235 S.W.2d at 974; *Broussard*, 499 F.2d at 970; *Jones*, 143 S.W.2d at 906.

135. Compare FAM. § 2.401(a)(2)–(c), and Yamin-Garone, *supra* note 128, with *Cavanaugh*, 235 S.W.2d at 974, *Broussard*, 499 F.2d at 970, and *Jones*, 143 S.W.2d at 906.

136. See FAM. § 2.401(a)(2).

at least one of the child's biological parents must agree that the adoptive parents will take the child into their care and treat the child as their own.¹³⁷ Informal marriage also requires that the couple live together as would a husband and wife.¹³⁸ The couple must also represent to others that they are married.¹³⁹ Likewise, the equitable adoption legislation will require the adoptive parents to treat the adoptive child as if the child were their natural child.¹⁴⁰ These similarities indicate how the two concepts of informal marriage and equitable adoption are analogous in nature.¹⁴¹

Just as the concept of informal marriage creates a legally binding marriage, the doctrine of equitable adoption would also create a legally binding parent-child relationship, thus allowing an equitably adopted child to inherit from and through the adoptive parent's estate.¹⁴² Because the two concepts are so similar, the legislature should use the concept of informal marriage as the basis for creating the legislation needed for the doctrine of equitable adoption.¹⁴³

B. Elements Necessary for the Equitable Adoption Statute

The proposed legislation that will establish an equitable adoption will include the following elements: (1) the adoptive parents and at least one of the child's biological parents must mutually agree that the adoptive parents will raise the child as their own; (2) the adoptive parents' conduct towards the child must reflect their intent to treat the child as their biological child; (3) the adoptive parents' conduct towards the child must continue for a minimum number of months after the child is first brought into their care; and (4) there must be a statute of limitations period during which the child must bring a claim of equitable adoption.¹⁴⁴ The legislation will also include a provision that enforces the creation of the legal parent-child relationship through equitable adoption.¹⁴⁵ These aspects of the legislation will provide a sturdy foundation for the doctrine of equitable adoption and will clarify the inconsistencies of case law precedent for establishing an adoption by estoppel.¹⁴⁶

137. See *Cavanaugh*, 235 S.W.2d at 974.

138. See FAM. § 2.401(a)(2).

139. See *id.*

140. See *Cubley v. Barbee*, 73 S.W.2d 72, 78 (Tex. 1934).

141. See FAM. § 2.401(a)(2); *Cavanaugh*, 235 S.W.2d at 974.

142. See TEX. FAM. CODE ANN. §§ 2.401, 162.017 (West 2013); TEX. EST. CODE ANN. § 201.054 (West 2014).

143. See FAM. § 2.401(a)(2); *Cavanaugh*, 235 S.W.2d at 974.

144. See *infra* Parts III.B.1–4.

145. See *infra* Parts III.B.5, D.

146. See *infra* Parts III.B–D.

1. A Mutual Agreement Between the Adoptive Parents and at Least One Natural Parent

The first element of the proposed legislation is that the adoptive parents and at least one of the child's natural parents must mutually agree that the adoptive parent or parents will raise the child as their own.¹⁴⁷ This element mirrors the informal marriage requirement that a man and woman must agree to marry.¹⁴⁸ Just like "[p]roof of an agreement to be [informally] married may be [inferred] by circumstantial evidence or [the] conduct of the parties," the proposed legislation will allow circumstantial evidence of an agreement as proof that an agreement existed between the adoptive parents and at least one of the child's natural parents.¹⁴⁹ The circumstantial evidence must be clear and convincing.¹⁵⁰ All of the parties must agree in good faith that the adoptive parents will care for the child as their own.¹⁵¹ Therefore, the adoptive parents must prove their agreement with the child's biological parent by either a written agreement or by, clear and convincing, circumstantial evidence that an agreement existed.¹⁵²

While the proposed legislation will require an agreement of some kind as an element in proving adoption by estoppel, the legislation will provide an exception to the agreement requirement if the adoptive parents cannot contact the natural parents.¹⁵³ The adoptive parents must be capable of proving to a court that they took reasonable steps to attempt to contact the child's natural parents, unless the child's natural parents are deceased.¹⁵⁴ If the natural parents are deceased, then the adoptive parents must provide evidence of the natural parent's death with "a certified copy of a death certificate or a judgment or order of a court in a proceeding in which the death of a person is proved to the satisfaction of the court by circumstantial evidence."¹⁵⁵ If only one of the child's natural parents is deceased, or the adoptive parent can only find the records to prove one of the natural parent's death, then the adoptive parents must prove to the court that they took reasonable steps to either contact the other natural parent or prove the other natural parent's death.¹⁵⁶

147. See *infra* Part III.C.

148. See FAM. § 2.401(a)(2), (c).

149. Russell v. Russell, 865 S.W.2d 929, 933 (Tex. 1993).

150. See Williams *ex rel.* Z.D. v. Colvin, 581 F. App'x 386, 387 (5th Cir. 2014).

151. See Cubley v. Barbee, 73 S.W.2d 72, 81 (Tex. 1934).

152. See Williams, 581 F. App'x at 387.

153. See TEX. EST. CODE ANN. § 113.001 (West 2014).

154. *Id.*

155. *Id.*

156. See *id.*

2. Conduct Must Reflect That the Adoptive Parents Intended to Treat the Child as a Biological Child by Assuming the Rights and Duties of a Legal Parent

The second element of the proposed legislation is that the adoptive parents' conduct must reflect the parents' intent to care for the child as if the child were their biological child.¹⁵⁷ The adoptive parents' conduct must indicate that they assumed the rights and duties that Texas imposes upon legal parents in regards to their children.¹⁵⁸ This element coincides with the informal marriage requirement that a couple, who lacks a state issued marriage license, must refer to one another as husband and wife and live together as spouses in order for Texas to legally recognize their marriage.¹⁵⁹ Furthermore, the Texas Family Code bestows certain rights and duties upon parents in regards to their children.¹⁶⁰ The adoptive parents' conduct must reflect the right of a legal parent to have physical possession of their child, as well as the duties of a legal parent to care for and support the child.¹⁶¹ The conduct necessary to satisfy this element of equitable adoption includes factors that indicate that the adoptive parents considered the child to be, and held the child out in society as, their biological child.¹⁶² The factors a court may consider include, but are not limited to, whether the parents: paid for the child's education; clothed, fed, and housed the child; included the child on their insurance policies; paid for the child's medical expenses; and introduced the child to others as their own son or daughter.¹⁶³ Thus, when "the [adoptive parents] and the child thereafter assumed and lived in a relationship wholly consistent with that of parent and child, . . . the [equitable] adoptive status of the child [will] be upheld" as a formal adoption by the courts.¹⁶⁴ Similar to the informal marriage requirement that a couple must act as husband and wife by living together and referring to one another as spouses, the adoptive parents' conduct towards the adoptive child must mirror the rights and duties bestowed upon a legal parent as set out in the Texas Family Code.¹⁶⁵

157. See *infra* Part III.C.

158. See TEX. FAM. CODE ANN. § 151.001 (West 2013).

159. See *id.* § 2.401(a)(2).

160. See *id.* § 151.001. These rights and duties include: "the right to have physical possession . . . of the child; the duty of care . . . [for] the child; the duty to support the child . . . ; [and] the right to inherit from and through the child." *Id.*

161. See *id.*

162. See *id.* § 2.401(a)(2).

163. See *Broussard v. Weinberger*, 499 F.2d 969, 970 (5th Cir. 1974); *Cavanaugh v. Davis*, 235 S.W.2d 972 (Tex. 1951).

164. *Cavanaugh*, 235 S.W.2d at 974 (citing *Jones v. Guy*, 143 S.W.2d 906 (Tex. 1940)).

165. See FAM. § 151.001.

3. *Minimum Term for Conduct to Occur*

The third element that the proposed legislation will include is the requirement that after the adoptive parents and at least one natural parent enter into the agreement, the adoptive parents continue to treat the child as their own for a minimum of six months while living in Texas.¹⁶⁶ Similar to the informal marriage requirement that the couple must live together as husband and wife in Texas, the adoptive parents and the child must live together as a family.¹⁶⁷ While the informal marriage statute does not have a minimum time period for the couple to have lived together in order for the state to recognize their informal marriage, the equitable adoption statute will include a minimum time period to establish to the fact finder that the adoptive parents intended to care for the child as if he were their natural child.¹⁶⁸

This minimum period of time is loosely based on section 152.201 of the Texas Family Code, which determines the jurisdiction of a child custody case based on the child's domicile.¹⁶⁹ The Code states that Texas will have jurisdiction of a child custody case if the child lived in the state at any point within the six months prior to the commencement of the custody proceeding.¹⁷⁰ However, the equitable adoption element differs from the jurisdiction determination.¹⁷¹ The jurisdiction of a child custody case is based on whether the child lived in Texas at any point within six months of the custody proceedings, whereas the equitable adoption element will require the child to actually live in Texas for a minimum of six months with his adoptive parents.¹⁷² While this element for the proposed equitable adoption legislation slightly varies from the Code's jurisdiction determination, the idea is generally similar—the legislation will include a six-month timeframe.¹⁷³ Thus, the adoptive parents and the child must live in Texas for a minimum of six months, as a family, in order for the child to claim equitable adoption.¹⁷⁴

4. *Statute of Limitations*

The fourth element that the legislation will include is a statute of limitations period of two years during which the child must bring an equitable

166. *See infra* Part III.C.

167. *See* FAM. § 2.401(a)(2).

168. *See id.* § 2.401; *see also* Yamin-Garone, *supra* note 128.

169. *See* TEX. FAM. CODE ANN. § 152.201(a)(1) (West 2013).

170. *See id.*

171. *See id.*

172. *See id.* In *T.W.E. v. K.M.E.*, the Texas Court of Appeals ruled that a father had standing to sue for appointment of a managing conservator because “he had actual possession and control of the child for six months immediately before the suit was filed.” *T.W.E. v. K.M.E.*, 828 S.W.2d 806, 808 (Tex. App.—San Antonio 1992, no writ).

173. *See* FAM. § 152.201(a)(1).

174. *See id.*

adoption claim against the decedent's estate.¹⁷⁵ Statutes of limitation provide for "diligent prosecution of known claims, thereby providing finality and predictability in legal affairs and ensuring that claims will be resolved while evidence is reasonably available and fresh."¹⁷⁶ Like many statutes of limitation, the proposed legislation will be tolled if a child is a minor when one or both of his adoptive parents die intestate.¹⁷⁷ Even though equitable adoption arises when a decedent dies intestate, the same general statute of limitations imposed upon an applicant admitting a will to probate will apply to the equitable adoption statute.¹⁷⁸

By implementing a statute of limitations, the child will have to assert his claim of an adoption by estoppel within a reasonable time following the decedent's death.¹⁷⁹

This conclusion is . . . compelled by the decided need for finality of estate matters The prospect that suits by adoptees may be filed many years or even decades after the death of the natural parent or other biological relative further weighs in favor of requiring adopted children to assert any rights of inheritance or derivative claims within the same timeframe as other heirs or claimants without benefit of the discovery rule.¹⁸⁰

Case law has long established that the discovery rule does not apply to equitable adoption claims.¹⁸¹ Although adopted children do not always have the benefit of knowing the identities of their biological parents, "Texas courts have refused to apply the discovery rule to claims arising out of probate proceedings Such claims are barred by limitations because the claimant has constructive notice of the probate proceedings."¹⁸² This means that the statute will not allow adoptive children who attempt to bring equitable adoption claims against an estate to delay their causes of action due to the fact that the children did not discover who their biological parents were until after the statute of limitations has run.¹⁸³ The Texas Supreme Court "recognized that there should be a definite time limit for presenting a claim against an estate . . . [because] statutes of limitations 'provide stability and security to personal affairs and protect property rights.'"¹⁸⁴ Therefore, the proposed legislation will include a statute of limitations period of two years for an individual to bring forth an equitable adoption claim against an

175. See *infra* Part III.C; TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (West 2013).

176. BLACK'S LAW DICTIONARY 1546 (9th ed. 2009); see *Little v. Smith*, 943 S.W.2d 414, 422 (Tex. 1997).

177. See BLACK'S LAW DICTIONARY, *supra* note 176, at 1625.

178. See *Little*, 943 S.W.2d at 425.

179. See *id.* at 422.

180. *Id.*

181. See *id.*; *Mooney v. Harlin*, 622 S.W.2d 83, 84 (Tex. 1981).

182. *Little*, 943 S.W.2d at 420.

183. See *id.* at 416–22.

184. *Id.* at 417 (quoting *Mooney*, 622 S.W.2d at 85).

intestate's estate, and will not allow the individual to apply the discovery rule to delay the statute of limitations period.¹⁸⁵

5. *Equitable Adoption as an Equivalent to Formal Adoption*

The legislation will also contain of a provision enforcing the idea that an equitable adoption forms the same legal parent-child relationship that a formal adoption creates.¹⁸⁶ Currently, the Texas Estates Code does not differentiate between a formal adoption and an equitable adoption.¹⁸⁷ However, the Texas Supreme Court has often ruled otherwise.¹⁸⁸ In numerous cases, the Texas Supreme Court has ruled that an equitable adoption only establishes inheritance rights for the adoptive child to inherit from his adoptive parents, which in essence means that equitable adoption does not create the legal parent-child relationship.¹⁸⁹ The legal parent-child relationship allows for adopted children to inherit from and through the adoptive parents.¹⁹⁰

6. *Amendment to Texas Estates Code § 201.054*

In addition to implementing a statute to govern equitable adoption, the Texas Legislature should amend section 201.054 of the Texas Estate Code to expressly recognize equitable adoption as an equivalent to formal adoption for the purposes of inheritance.¹⁹¹ Currently, section 201.054 does not distinguish equitable adoption from a formal adoption.¹⁹² Instead, the section actually states that the Code “does not diminish the rights of an adopted child under the laws of descent and distribution or otherwise that the adopted child acquired by virtue of inclusion in the definition of ‘child’ under Section 22.004.”¹⁹³ Under section 22.004, the Texas Estates Code’s definition of the term “child” does not differentiate a formal adoption from an equitable adoption.¹⁹⁴ In fact, the definition states that Texas considers a child “adopted” for purposes of inheritance regardless of whether the child was formally or equitably adopted.¹⁹⁵

185. *See id.*

186. *See infra* Part III.C.

187. *See* TEX. EST. CODE ANN. §§ 22.004, 201.054 (West 2014).

188. *See* Heien v. Crabtree, 369 S.W.2d 28 (Tex. 1963).

189. *See id.*; Cubley v. Barbee, 73 S.W.2d 72 (Tex. 1934); Jones v. Guy, 143 S.W.2d 906 (Tex. 1940); Cavanaugh v. Davis, 235 S.W.2d 972 (Tex. 1951).

190. *See* EST. § 201.054; TEX. FAM. CODE ANN. § 162.017 (West 2013).

191. *See* EST. § 201.054.

192. *See id.*

193. *Id.* § 201.054(d).

194. *See id.* § 22.004. “‘Child’ includes an adopted child, regardless of whether the adoption occurred through: (1) an existing or former statutory procedure; or (2) acts of estoppel.” *Id.* § 22.004(a)(1)–(2).

195. *See id.* § 22.004(a)(1)–(2).

The drafters of the Texas Estates Code clearly intended equitable adoption to be equivalent to a formal adoption when they wrote the Code, otherwise they would have expressly stated that the two concepts are different, and they would not have included equitable adoption as a form of adoption when defining the status of a child.¹⁹⁶ Thus, the Texas Legislature will need to amend section 201.054 to expressly include equitable adoption as an equivalent to formal adoption in order to clarify to the courts that the two adoption concepts will create the same legal parent-child relationship.¹⁹⁷

C. Proposed Draft of Legislation

Using the elements discussed above, the following is a draft of the proposed legislation that the Texas Legislature could implement to govern the doctrine of equitable adoption:

Texas Estates Code § 201.0545. Equitable Adoption

(a) A person claiming an inheritance as or through an equitably adopted individual must prove that status as follows:

(1) The adoptive parent or parents and at least one of the child's biological parents must mutually agree that the adoptive parent or parents will raise the child as their own;¹⁹⁸

(i) Except when Subsection (a)(1)(ii) applies, an agreement must be proved by either:

(A) An agreement in writing signed by the adoptive parent or parents and at least one of the child's biological parents;¹⁹⁹ or

(B) In the absence of a written agreement, clear and convincing evidence of such agreement.²⁰⁰

(ii) If the adoptive parent or parents cannot reasonably contact the child's natural parent(s), then the adoptive parent or parents must prove that they took reasonable steps to attempt to contact the natural parent(s). If one or both of the adoptive child's natural parents are deceased, the adoptive parent or parents must submit evidence to the court of the natural parent's death.²⁰¹

196. *See* Heien v. Crabtree, 369 S.W.2d 28, 32 (Tex. 1963) (Greenhill, J., dissenting); EST. §§ 22.004, 201.054.

197. *See* EST. §§ 22.004, 201.054.

198. *See* Cubley v. Barbee, 73 S.W.2d 72, 81–82 (Tex. 1934).

199. *See* Cavanaugh v. Davis, 235 S.W.2d 972, 973–74 (Tex. 1951).

200. *See* Williams *ex rel.* Z.D. v. Colvin, 581 F. App'x 386, 387 (5th Cir. 2014). Remember, this element is based on the informal marriage concept that “[p]roof of an agreement to be married may be made by circumstantial evidence or [the] conduct of the parties.” Russell v. Russell, 865 S.W.2d 929, 933 (Tex. 1993).

201. *See* TEX. EST. CODE ANN. § 113.001 (West 2014).

- (2) The adoptive child resided in the adoptive parent or parents' household as a minor and the adoptive parent or parents represented to others that the child was their own;²⁰²
- (3) The adoptive parent or parents must treat the adoptive child as their own for a minimum of 6 months after the child is first brought into their care.²⁰³ If the adoptive parent or parents die before the 6 months accrues, then the child cannot claim equitable adoption;²⁰⁴ and
- (4) The child must bring a claim of equitable adoption within 2 years of the adoptive parent or parents' death, unless the child is a minor, in which case the statute of limitations will be tolled until the child reaches the age of majority.²⁰⁵
- (b) The term "parent" refers to the definition of parent as stated in section 101.024(a), Family Code;²⁰⁶
- (c) An equitably adopted child is regarded as an "adopted child" for purposes of inheritance under the laws of descent and distribution under section 201.054.²⁰⁷

D. Impact of the Legislation on Estate Planning: Enforcement of the Legal Parent-Child Relationship Established Through Equitable Adoption

The proposed legislation and the amendment to section 201.054 of the Texas Estates Code will expressly allow equitable adoption to create the same legal parent-child relationship that a formal adoption creates.²⁰⁸ Analogous to how an informal marriage in Texas creates a legally binding, formal marriage, equitable adoption should create the same legal parent-child relationship that a formal adoption creates between the adoptive parents and

202. E-mail from Gerry W. Beyer, Governor Preston E. Smith Regents Professor at Law, Texas Tech University School of Law (Jan. 27, 2015, 7:00 CST) (on file with author); *see also Cavanaugh*, 235 S.W.2d at 974 (citing *Jones v. Guy*, 143 S.W.2d 906 (Tex. 1940)). The adoptive parents' conduct towards the adoptive child must reflect that they assumed the paternal rights and duties that are bestowed upon legal parents under the Texas Family Code. TEX. FAM. CODE ANN. § 151.001 (West 2013).

203. FAM. §§ 151.001, 152.201(a)(1). The state bestows certain duties upon parents in regards to their children. *See id.* §§ 151.001, 152.201(a)(1). The adoptive parents' conduct must reflect these rights and duties in order for the court to infer that the adoptive parents intended to adopt the child. *See Broussard v. Weinberger*, 499 F.2d 969, 970 (5th Cir. 1974); *Cavanaugh*, 235 S.W.2d 972.

204. BLACK'S LAW DICTIONARY, *supra* note 176, at 356. This element should be strictly construed. *See id.* The adoptive parents' conduct must be established for the entirety of the minimum time period for the fact finder to establish that an equitable adoption existed. *See id.*

205. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (West 2013); *Little v. Smith*, 943 S.W.2d 414, 422 (Tex. 1997).

206. *See* FAM. § 101.024(a). The Texas Family Code defines a "parent" as "the mother, a man presumed to be the father, a man legally determined to be the father, a man who has been adjudicated to be the father by a court of competent jurisdiction, a man who has acknowledged his paternity under applicable law, or an adoptive mother or father." *Id.*

207. *See* TEX. EST. CODE ANN. § 201.054(a) (West 2014).

208. *See supra* Part III.C.

the equitably adopted child.²⁰⁹ If an informal marriage can create a formal marriage relationship, then why should equitable adoption not form the same legal parent-child relationship that a formal adoption creates because the idea behind the two concepts is so similar?²¹⁰

If the Texas Legislature enacts legislation to enforce the doctrine's ability to form the legal parent-child relationship between the adoptive parents and the adoptive child, then equitable adoption will create the same three rights of inheritance that a formal adoption creates.²¹¹ First, the adoptive child will have the right to inherit from his adoptive parents' estates.²¹² Second, the adoptive parents will gain the right to inherit from the adoptive child's estate, assuming the child has no descendants of his own.²¹³ Third, the adoptive child's descendants will gain the right to inherit from the adoptive parents' estate per the state's intestacy distribution scheme.²¹⁴

1. The Right of an Adoptive Child to Inherit from an Adoptive Parent

Currently, the doctrine of equitable adoption allows for an equitably adopted child to inherit from his adoptive parents' estate, and the proposed legislation will not change this right of inheritance that the doctrine already allows.²¹⁵ An equitably adopted child has the capability of inheriting from his adoptive parents' estate, so long as he can prove the elements established in the proposed legislation.²¹⁶

2. The Right of an Adoptive Parent to Inherit from an Adoptive Child

Because the proposed legislation will expressly establish equitable adoption as an equivalent to a formal adoption, the adoptive parents will have the right to inherit from their equitably adopted child in the event that the child predeceases the adoptive parents.²¹⁷ The Texas Family Code establishes that, under a formal adoption, the adoptive parents may inherit from their adoptive child's estate in the event that the child dies intestate.²¹⁸ Because the proposed legislation will eliminate any distinction between an equitable adoption and a formal adoption, the adoptive parents of an

209. See TEX. FAM. CODE ANN. § 151.001 (West 2013).

210. See *id.* § 2.401.

211. See GERRY W. BEYER, TEXAS ESTATE PLANNING STATUTES WITH COMMENTARY 177 (2013–2015 ed. 2013); see also *infra* Part III.D.1–3.

212. See BEYER, *supra* note 211, at 177; see also *infra* Part III.D.1.

213. See BEYER, *supra* note 211, at 177; see also *infra* Part III.D.2.

214. See BEYER, *supra* note 211, at 177; see also *infra* Part III.D.3.

215. Heien v. Crabtree, 369 S.W.2d 28, 30–31 (Tex. 1963).

216. See *supra* Part III.C.

217. See TEX. EST. CODE ANN. § 201.054 (West 2014).

218. See TEX. FAM. CODE ANN. § 162.017 (West 2013).

equitably adopted child may follow the intestacy distribution scheme that formally adoptive parents would follow if their adopted child predeceases them.²¹⁹

3. *The Right of an Adoptive Child's Descendants to Inherit from the Adoptive Parents' Estate*

Because the proposed legislation will eliminate any distinction between an equitable adoption and a formal adoption for the purposes of inheritance, an equitably adopted child's descendants will be allowed to inherit from the adoptive parents' estate in the event that the adoptive parents die intestate and the equitably adopted child predeceases both his adoptive parents and his descendants.²²⁰ The Texas Estates Code establishes that an adopted child has the right to inherit from and through his adoptive parents' estate as if he was his adoptive parents' biological child.²²¹ Therefore, the proposed legislation will allow the equitably adopted child's own descendants to have the right to inherit from their adoptive grandparents.²²²

With the enactment of an equitable adoption statute, the doctrine of adoption by estoppel will create the same three inheritance rights that a formal adoption creates.²²³ The statute will thus enforce the idea that the Texas Estates Code creates the same legal parent-child relationship between the adoptive parent or parents and the adopted child regardless of whether the parents formally or equitably adopted the child.²²⁴

IV. CONCLUSION

The doctrine of equitable adoption needs legislation to establish the elements required for proof of equitable adoption for the purposes of inheritance.²²⁵ Currently, the Texas Estates Code does not recognize a distinction between a formal adoption and an adoption by estoppel, yet the Texas Supreme Court continuously rules that a distinction between the two concepts exists.²²⁶ Even then, the Texas Supreme Court's rulings regarding equitable adoption and the necessary elements required to prove an equitable adoption are inconsistent and contradictory.²²⁷ All of the confusion sur-

219. See EST. § 201.054; FAM. § 162.017.

220. See EST. § 201.054; FAM. § 162.017.

221. See EST. § 201.054(a).

222. See *id.* § 201.054; FAM. § 162.017.

223. See EST. § 201.054; FAM. § 162.017.

224. See EST. §§ 22.004, 201.054.

225. See Weisser, *supra* note 12, at 553.

226. See EST. §§ 22.004, 201.054; *Cubley v. Barbee*, 73 S.W.2d 72 (Tex. 1934); *Jones v. Guy*, 143 S.W.2d 906 (Tex. 1940); *Cavanaugh v. Davis*, 235 S.W.2d 972 (Tex. 1951); *Heien v. Crabtree*, 369 S.W.2d 28 (Tex. 1963).

227. See *Cubley*, 73 S.W.2d 72; *Jones*, 143 S.W.2d 906; *Cavanaugh*, 235 S.W.2d 972.

rounding equitable adoption will be eliminated if the Texas Legislature enacts legislation to govern the doctrine of equitable adoption.²²⁸ Because the idea of equitable adoption is analogous to the concept of informal marriage, the legislature should use the informal marriage statute as a basis for drafting the equitable adoption statute.²²⁹ In addition to enacting equitable adoption legislation, the legislature will need to amend section 201.054 of the Texas Estates Code to expressly state that formal adoption and equitable adoption are one and the same.²³⁰ Amending the current adoption statute in the Texas Estates Code will allow equitably adopted children and their biological descendants to inherit from and through their adoptive parents as lineal descendants—just like formally adopted children.²³¹ It is reasonable for people raised by individuals other than their biological parents to expect to inherit from those individuals' estates if those individuals die intestate. The Texas Estates Code already regards a child as adopted for inheritance purposes regardless of whether the adoptive parents adopted the child by the formal adoption process or by estoppel.²³² Therefore, the legislature should enact a statute establishing equitable adoption as an equivalent to formal adoption.²³³

228. See Weisser, *supra* note 12, at 553.

229. Compare TEX. FAM. CODE ANN. § 2.401(a)(2)–(c) (West 2013), and Yamin-Garone, *supra* note 128, with Cavanaugh, 235 S.W.2d 972, Broussard v. Weinberger, 499 F.2d 969 (5th Cir. 1974), and Jones, 143 S.W.2d 906.

230. See EST. §§ 22.004, 201.054.

231. See EST. §§ 22.004, 201.054.

232. See EST. §§ 22.004, 201.054.

233. See *supra* Parts I–III.