BENDING THE BOW OF EQUITY: THREE WAYS FLORIDA CAN IMPROVE ITS EQUITABLE ADOPTION POLICY

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> *Equity follows the law except in those matters which entitle the party to equitable relief, although the strict rule of law may be to the contrary. It is at this point that their paths diverge. As the archer bends his bow that he may send the arrow straight to the mark, so equity bends the letter of the law to accomplish the object of its enactment.*[1]

I. INTRODUCTION

Equitable adoption affects children every year,[2] but most people are not even aware of it. When a person dies without a will, that person dies intestate,[3] and the probate code dictates

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 Articles & Symposia Editor, *Stetson Law Review*. B.S., *cum laude*, University of Florida, 2004; J.D., *cum laude*, Stetson University College of Law, 2008. This Article was written with hopes of alleviating the inequities associated with equitable adoption, so that children who are never formally adopted get the just result they deserve. With that in mind, the Author would like to thank Professor David T. Smith for his suggestion to explore this topic; Professor Emeritus Thomas E. Allison, her faculty advisor, and Brandie Tindall, her editor, who provided invaluable advice and greatly assisted in the development of this Article; and Michael R. Sepe, Ryan Joseph McGee, Theresa Ann Payne Lazar and the staff of the *Stetson Law Review* for their inspiration, assiduousness, and support. The Author wishes to extend her appreciation to the panel members of her *Scholarship Series* Presentation—The Honorable Lauren C. Laughlin, Professor Joan Catherine Bohl, Susan L. Stockham, and Jeffrey S. Goethe—for their time and input. Finally, the Author expresses her sincere gratitude to her parents for their unyielding patience, love, and support.

1. *Holloway v. Jones*, 246 S.W. 587, 591 (Mo. 1922).

2. For example, in November 2006, a Missouri court decided a case of equitable adoption and held in favor of the child. Bridget Heos, *Missouri Jury Awards $3M in Wrongful Death Suit*, Mo. Law. Wkly. (Nov. 13, 2006). In August 2007, a Florida court also dealt with the issue of equitable adoption, but it reversed the lower court's finding that the child was equitably adopted. *In re Est. of Musil*, 965 So. 2d 1157, 1161 (Fla. 2d Dist. App. 2007).

3. *Black's Law Dictionary* 840 (Bryan A. Garner ed., 8th ed., West 2004). Alterna-

how to distribute the person's estate.[4] When a child is the legally adopted child of an intestate decedent, rather than the natural, biological child, the code treats that legally adopted child as the decedent's biological child for purposes of intestate succession.[5] However, there is a complication when the deceased parent never formally adopted the child. Before examining the legal ramifications of equitable adoption, one must understand the situation in which equitable adoption arises—the situation in which the law must bend. Equitable adoption can take many forms,[6] but in order to put them into practice, one must understand the basic concept.

Alyn and Bill went out one night with some friends. They engaged in a conversation with another couple, Diane and Ed, who were only acquaintances. Diane had just given birth to a baby boy, Charlie, but Diane and Ed could not afford to care for him. They had looked into adoption agencies and foster care programs for the baby, but their emotions prevented them from allowing their child to become a product of "the system." Alyn and Bill tried to have a baby for many years, but these attempts were unsuccessful. They expressed interest to Diane and Ed about the possibility of adopting Charlie; however, Alyn and Bill wanted to discuss it first. The couples exchanged phone numbers and departed.

Over the next week, Alyn and Bill discussed the possibility of adopting Charlie and finally decided they were ready to have a child of their own. They called Diane and Ed to inform them of their decision. When the couples next met, Alyn and Bill agreed to adopt Charlie, and Diane and Ed agreed (1) to relinquish all of their parental and legal rights to Charlie and (2) to never contact Charlie again.[7] From that day forward, Alyn and Bill raised Charlie as their own. Charlie had no contact with Diane and Ed again, and he always believed Alyn and Bill were his natural parents. When Charlie was older, Alyn and Bill explained to Charlie that

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tively, if a person dies having executed a will, that person is said to die "testate." *Id.* at 1514.

4. Fla. Stat. §§ 732.102, 732.103 (2008).

5. *Id.* at § 732.108.

6. This paper will introduce hypotheticals to illustrate circumstances. This first hypothetical describes a simple incident in which the doctrine arises.

7. In a perfect world, the couples would have executed a contract enumerating the terms of their agreement. However, they made only an oral agreement.

he was adopted; however, Alyn and Bill had never formally adopted him.[8] Notwithstanding, Alyn and Bill always held Charlie out to the world as their own son. Alyn died when Charlie was twenty-three years old. She executed a will, which left her estate to Bill. Alyn left nothing to Charlie because she expected Bill to continue caring for Charlie. Unfortunately, when Charlie was twenty-seven, Bill died intestate. Therefore, the question arises: Can Charlie, who is neither the biological nor legally adopted child of Alyn and Bill, collect under the intestate statutes? Under Florida's statutory code, Charlie may not inherit.[9] However, the common law doctrine of equitable adoption may step in to bend the law—just as the archer bends his bow to hit his target.

Equitable adoption allows a child who was never formally adopted to inherit from his or her adoptive parents in the event they die intestate.[10] For a child to successfully claim equitable adoption and thereby inherit an intestate share of his or her adoptive parents' estate, he or she must prove five elements.[11] These elements are as follows: (1) an agreement[12] must have existed between the natural parents and adoptive parents; (2) the natural parents must have performed by giving up the child; (3) the child must have performed by living in the adoptive parents' home; (4) the adoptive parents must have partially performed by raising the child as their own; and (5) the adoptive parents must have died intestate.[13] By proving these five elements

8. One reason adoptive parents do not formally adopt a child is because they simply do not get around to it. *See McGarvey v. State*, 533 A.2d. 690, 691 (Md. 1987) (explaining that Aunt never got around to adopting her nephew before she died, despite her intentions and promises to do so).

9. *See* Fla. Stat. §§ 732.103, 732.108 (stating only biological or legally adopted children may inherit an intestate share).

10. For a more in-depth discussion of equitable adoption, see *infra* section II and accompanying text. This paragraph will provide a brief overview of the principle, but it will be discussed further below.

11. *Musil*, 965 So. 2d at 1160. The *Musil* court used the term "virtual" as a substitute for "equitable." *Id.* For more information about the various terms used to label the equitable adoption doctrine, see *infra* note 27 and accompanying text.

12. This Article uses the terms "agreement," "agreement to adopt," and "adoption agreement" interchangeably to represent the informal verbal or written agreement made between the natural parents and the adoptive parents. It does not refer to a formal adoption through the State. Note, however, that the parties need not use the words "adopt" or "adoption" when "forming the 'contract' later enforced by a court of equity." *Habecker v. Young*, 474 F.2d 1229, 1230 (5th Cir. 1973). For more information, see *infra* note 117.

13. *Musil*, 965 So. 2d at 1160.

with clear and convincing evidence, a child may inherit an intestate share of the adoptive parents' estate—a share to which that child would not otherwise be entitled.[14]

However, Florida's equitable adoption doctrine is not always equitable as it stands. To provide children—those who are essentially disinherited because of the inadequacies of the equitable adoption doctrine—with the remedy they deserve, Florida should expand its equitable adoption doctrine in three specific ways. First, in certain circumstances, a child should be able to prove the agreement element of equitable adoption by a preponderance of the evidence, rather than through clear and convincing evidence. Second, the doctrine should apply to children informally adopted by homosexual individuals. And third, equitably adopted children who are also pretermitted[15] should be permitted to collect under the doctrine of equitable adoption.

The standard used to prove the first element of equitable adoption, the adoption agreement between a child's natural parents and the adoptive parents, gives rise to the first problem.[16] Currently, the child must prove an agreement existed by clear and convincing evidence.[17] However, there are times when this is not possible, such as when there is no one to testify that the agreement was made. In some cases, the only evidence of the agreement may be the representations made to the child by the adoptive parents who passed away. In such situations, the standard of proof required should be lowered from clear and convincing to a preponderance of the evidence.

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14. *Id.* Courts generally treat equitable adoption either as a contract principle or as an estoppel principle. Jan Ellen Rein, *Relatives by Blood, Adoption, and Association: Who Should Get What and Why*, 37 Vand. L. Rev. 711, 770 (1984). When a court treats the doctrine as contractual, the court requires proof of consideration in addition to the other elements. Homer H. Clark, Jr., *The Law of Domestic Relations in the United States* § 20.09, 927 (2d ed., West 1987). This consideration usually entails proof of the natural parents' surrender of the child to the adoptive parents, as well as the child's "performance of his [or her] filial obligations." *Id.* For more on the contract and estoppel theories of equitable adoption, see *infra* section II(B) and accompanying text.

15. A pretermitted child is one born or adopted after the testator executes his or her will. Fla. Stat. § 732.302. For a more detailed explanation of the pretermitted child, see *infra* notes 204–215 and accompanying text.

16. *Musil*, 965 So. 2d at 1160.

17. *Id.* Florida requires proof of all five elements by clear and convincing evidence. *Id.* Most states likewise require a child prove he or she was equitably adopted by clear and convincing evidence; however, some states, including Texas, have lowered this standard and require only a preponderance of the evidence. Clark, *supra* n. 14, at § 21.11, 679.

The second problem presents when the adoptive parents are homosexuals. Because Florida law prohibits homosexual individuals from adopting,[18] homosexual parents have no way to complete a formal adoption through the State. If a homosexual individual verbally and informally adopts a child through an agreement with the child's natural parents, and the homosexual individual later dies intestate, the child will be unable to collect under the intestacy statutes because he or she is not the "legally adopted" child of the decedent. The second proposal for Florida is to treat this child as equitably adopted.

The final problem arises when an equitably adopted child is left out of his or her adoptive parents' wills, or pretermitted. This child is technically equitably adopted, but because a will exists, some courts may ignore this situation and treat the will as all-inclusive, thus precluding the child from inheriting his or her fair portion of the estate. In such cases, as long as the elements of equitable adoption are satisfactorily met, and no evidence exists to prove the child was intentionally omitted, the child should be considered equitably adopted and thus entitled to his or her share of the estate.

Section II of this Article discusses equitable adoption in more detail, including its history, underlying theories, and Florida's application of the doctrine. Section III discusses three proposals for extending Florida's equitable adoption policy to make the doctrine more equitable. First, Part A proposes lowering the standard used to prove the equitable adoption agreement requirement from clear and convincing to a preponderance of the evidence in certain situations. Next, Part B discusses and recommends applying Florida's equitable adoption policy to children informally adopted by homosexual parents. Finally, Part C proposes that Florida's equitable adoption doctrine should apply to equitably adopted children who have been pretermitted. As long as the elements of equitable adoption are satisfactorily met, the child should be considered equitably adopted and thus entitled to his or

18. Fla. Stat. § 63.042(3). However, this statute was recently held unconstitutional on its face in two circuit court cases. *In re Adoption of Doe*, 2008 WL 5006172 (Fla. 11th Cir. Nov. 25, 2008); *In re Adoption of Doe*, 2008 WL 5070056 (Fla. 16th Cir. Aug. 29, 2008). As a result, in January 2009, the Florida Legislature proposed legislation to repeal this statute. Fla. H. 413, 111th Reg. Sess. (Jan. 16, 2009). However, in May 2009, it was "[i]ndefinitely postponed and withdrawn from consideration." *Id.*

her share. Section IV summarizes the proposals for extending Florida's equitable adoption policy. Ultimately, Florida can make its equitable adoption policy more equitable by changing the doctrine in these three ways.

II. HISTORY OF EQUITABLE ADOPTION

A. The Development of Equitable Adoption

Adoption is a purely statutory phenomenon.[19] In fact, the common law did not recognize adopted children at all.[20] The legal process of adoption has a long history,[21] and the current adoption procedure is a myriad of steps.[22] The adoption statutes are strictly

19. David T. Smith, *Florida Probate Code Manual* vol. 1, § 5.04, 5-5 (Lexis 2008).

20. *Id.*

21. The theoretical underpinnings of adoption have changed since its inception in Rome. Joan Heifetz Hollinger, *Adoption Law and Practice* vol. 1, § 1.02, 1-19 (Joan Heifetz Hollinger ed., Lexis 2006). At that time, it was used as a way to perpetuate family lines, and the purpose was to serve the adoptor, not the adoptee. *Id.* America recognized adoption in the nineteenth century, and the first adoption statutes were enacted in the 1850s and 1860s. *Id.* at vol. 1, § 1.02, 1-19–1-20. The reasons for adopting a child were not limited to just providing a home to the child, but also included reasons that benefitted the adoptive parents, such as having more children work on the adoptive parents' farm. *Id.* at vol. 1, § 1.02, 1-20. In order to lawfully adopt a child today, the laws require strict statutory compliance. *Id.* at vol. 1, § 1.02, 1-18. For more on the history of adoption and how adoption has changed and expanded over the years from a simple and casual concept to its current status, see *id.* at vol. 1, § 1.02, 1-18–1-24.

22. Adoption has many elements, and each must be completed before an adoption is legal. *See* Smith, *supra* n. 19, at vol. 1, § 5.04, 5-5 (explaining that the adoption statutes require strict compliance). First, the court granting the adoption must have jurisdiction and venue must be proper. Fla. Stat. § 63.102(2). Any person, whether a minor or an adult, may be adopted by a husband and wife jointly, by an unmarried adult, or by a married individual, without his or her spouse joining in the adoption. *Id.* at § 63.042(1), (2). However, in Florida, any individual who is a homosexual may not adopt. *Id.* at § 63.042(3); *but see In re Adoption of Doe*, 2008 WL 5006172 (Fla. 11th Cir. Nov. 25, 2008) (finding Fla. Stat. § 63.042(3) unconstitutional because it violates equal protection); *In re Adoption of Doe*, 2008 WL 5070056 (Fla. 16th Cir. Aug. 29, 2008) (finding Fla. Stat. § 63.042(3) unconstitutional as a special law, bill of attainder, and violation of separation of powers). Then, a petition must be filed in the circuit court with jurisdiction. *Id.* at § 63.102(3). Other documents must also be filed with the court at this time, including consent forms, unless they are excused, and a favorable preliminary home study. *Id.* at § 63.112. Normally, the mother must give consent, as well as the father in some circumstances, and perhaps other parties, pursuant to the statute. *Id.* at § 63.062. However, there are situations in which consent may be excused. *Id.* at § 63.062. There are also situations in which given consent may be withdrawn, as in instances where consent was acquired by fraud or duress or where consent was withdrawn within three business days of when it was given. *Id.* at § 63.082(7)(a), (f). After the court receives either consent or excusals from consent, a specified licensed agency or professional must conduct a preliminary home study. *Id.* at

construed because they change the common law.[23] The intent of Florida's adoption statute is to serve the best interest of the child[24] and to protect and promote the adoptee's well-being.[25] Equitable adoption applies when the statutory requirements of a formal and legal adoption have not been satisfied.[26]

Equitable adoption, also known as virtual adoption or adoption by estoppel,[27] is a judicially created equitable principle that applies to a child who was never formally adopted by his or her adoptive parents.[28] The doctrine permits such a child to inherit when the adoptive parents die intestate.[29] The landmark 1943 case *Sheffield v. Barry*[30] established equitable adoption in Florida.[31] In *Sheffield*, a three-month-old child was taken in by a couple who had asked the natural mother to allow them to adopt the baby.[32] The natural mother approved of the adoption and agreed to surrender all her parental rights, while the couple promised to

§ 63.092(3). As per Florida's Rules of Civil Procedure, notice of a hearing and service of process must then be given. *Id.* at § 63.122(2). A final home investigation is conducted before the adoption is deemed final. *Id.* at § 63.125. A hearing is held in order to ascertain whether it is in the child's best interests to be adopted; if so, the judgment is entered. *Id.* at § 63.142. After the final judgment, the file is sealed to protect the minor's interests. *Id.* at § 63.162. The last step in the formal adoption process is for the court to issue a new birth certificate for the child. *Id.* at § 63.022.

23. Smith, *supra* n. 19, at vol. 1, § 5.04, 5-5.

24. Fla. Stat. § 63.022(2).

25. *Id.* at § 63.022(3). The Legislature further expresses that the State "has a compelling interest in providing stable and permanent homes for adoptive children in a prompt manner, in preventing the disruption of adoptive placements, and in holding parents accountable for meeting the needs of children." *Id.* at § 63.022(1)(a).

26. Lawrence P. Hampton, *Adoption Law and Practice* vol. 3, § 12.08, 12-92.1 (Joan Heifetz Hollinger ed., Lexis Nexis 2006).

27. *Tarver v. Evergreen Sod Farms, Inc.*, 533 So. 2d 765, 766 (Fla. 1988); *Laney v. Roberts*, 409 So. 2d 201, 202 n. 1 (Fla. 3d Dist. App. 1982). The terms are used interchangeably. Additionally, the terms "adoptive parents" and "foster parents" are used interchangeably. However, in the context of this Article, the reader should assume these terms are referring to the parents of a child who was not formally adopted but who may have been equitably adopted.

28. *Urick v. McFarland*, 625 So. 2d 1253, 1254 (Fla. 2d Dist. App. 1993). Florida courts explain that equitable adoption "is not recognized by the Florida Probate Code, but has been judicially created to assure that an agreement to adopt may be enforced against the estate of an 'adoptive' parent who fails to legally adopt the child." *Id.*

29. *Tarver*, 533 So. 2d at 766; *Laney*, 409 So. 2d at 202 n. 1.

30. 14 So. 2d 417 (Fla. 1943).

31. *Id.* at 419. For an explanation of why this case is an excellent example of the importance of executing a will, see *infra* note 36.

32. *Id.* at 418. The adoptive parents were childless, and the natural mother was poverty-stricken. *Id.* So the adoptive parents requested that the natural mother allow them to adopt the child. *Id.*

adopt the child.[33] The adoptive parents raised the child and held her out to the world as their own.[34] As an adult, the adoptee's adoptive father died intestate.[35] When she learned she was never formally adopted, though she always believed she was adopted, she asked that specific performance be applied to the contract created between her natural mother and her adoptive parents.[36] She argued the contract was fully performed by her and her natural mother, which would therefore allow her to inherit from the intestate estate of her adoptive father.[37] Thus, the doctrine of equitable adoption came to life. The court agreed with the child's logic, explaining that if the child could "substantiate[ ] by evidence the allegations with reference to the execution of the contract, the performance on the part of her mother and herself, the partial performance by her foster parents and the intestacy of her foster father she should be awarded a decree."[38]

Over the years, Florida courts have refined the doctrine of equitable adoption. Today, a child must prove five elements by clear and convincing evidence in order to establish an equitable adoption.[39] First, the natural parents and the adoptive parents must have formed an adoption agreement.[40] Second, there must

33. *Id.*

34. *Id.*

35. *Id.* at 419. The mother predeceased the father. *Id.* There is no indication of whether she died testate or intestate. *Id.*

36. *Id.* The adoptee brought the case against the defendant, who was the adoptive father's wife and the plaintiff's stepmother. *Id.* at 418. The defendant married the adoptive father shortly before his death. *Id.* Under current Florida law, if the plaintiff had not been equitably adopted, the stepmother, as the surviving spouse, would be entitled to the entire intestate estate because the decedent had no lineal descendants. *See* Fla. Stat. § 732.102(1) (stating that without a surviving descendent the entire estate would pass to the surviving spouse). Without a will, the child is left out of the estate distribution. However, if the plaintiff was considered the equitably adopted child of the decedent, she would be entitled to a share of the estate as a descendant. *See id.* at § 732.108(1) (dictating that "[f]or the purpose of intestate succession by or from an adopted person, the adopted person is a descendant of the adopting parent"). Under the probate code, the stepmother would receive one-half of the estate, while the plaintiff would receive the other half. *See id.* at § 732.102(3) (explaining the distribution of a decedent's estate when the decedent is survived by both a spouse and a descendant who is not a lineal descendant of the surviving spouse).

37. *Sheffield*, 14 So. 2d at 419.

38. *Id.* at 420.

39. *Musil*, 965 So. 2d at 1160. The child must prove each element separately. *Id.* If any one of the elements is not established by clear and convincing evidence, the doctrine, as it currently stands, will fail.

40. *Id.*; *In re Hodge*, 470 So. 2d 740, 741 (Fla. 5th Dist. App. 1985).

be "performance by the natural parents" in giving up custody of the child.[41] Third, the child must have performed by living in the adoptive parents' home.[42] Fourth, the adoptive parents must have partially performed by raising the child in their home as their own.[43] Finally, the adoptive parents must have died intestate.[44]

The law does not intend to treat an informally adopted child as a legally adopted child,[45] but rather the equitable adoption principle is applied to render a more equitable outcome on the "theory that equity regards that as done which ought to have been done."[46] Equitable adoption "protect[s] the interests of a minor child who," through no fault of his or her own, was never formally and legally adopted by his or her adoptive parents.[47] Equitable adoption is an important concept because of the limitations of the intestate statutes.

Florida's intestate succession laws treat a legally adopted child as the biological child of the decedent.[48] If the decedent dies

41. *Musil*, 965 So. 2d at 1160; *Hodge*, 470 So. 2d at 741.

42. *Musil*, 965 So. 2d at 1160; *Hodge*, 470 So. 2d at 741.

43. *Musil*, 965 So. 2d at 1160; *Hodge*, 470 So. 2d at 741. In most cases, the establishment of equitable adoption fails due to a lack of clear and convincing evidence of the first element, the agreement. Elias Clark, Louis Lusky, Arthur W. Murphy, Mark L. Ascher & Grayson M.P. McCouch, *Cases and Materials on Gratuitous Transfers* 83 (4th ed., West 1999). However, in *Musil*, the court explained that the first three elements were sufficiently proven by clear and convincing evidence, while the fourth prong was not. *Musil*, 965 So. 2d at 1160–1161. No evidence existed in this case that established the decedent and the child had a typical father-son relationship, except for the child's assertions that the relationship was that of a typical father and son. *Id.* at 1161. The court rejected this characterization and rejected the probate court's finding that the child was equitably adopted. *Id.*

44. *Musil*, 965 So. 2d at 1160; *Hodge*, 470 So. 2d at 741.

45. *In re Adoption of R.A.B.*, 426 So. 2d 1203, 1206 (Fla. 4th Dist. App. 1983) (citing *Grant v. Sedco Corp.*, 364 So. 2d 774, 775 (Fla. 2d Dist. App. 1978)). *Grant* involved the application of equitable adoption in a wrongful death action. 364 So. 2d at 774. The court explained the rationale for not treating an equitably adopted child as a legally adopted child as follows:

> Although the limitations upon recovery by an equitably adopted child might seem harsh, the Florida Wrongful Death Act does not compensate *all* those aggrieved by the death of another. . . . The nature of equitable adoption is a remedy in equity to enforce a contract right, not to create the relationship of parent and child.

Id. at 775 (emphasis in original).

46. *In re Est. of Wall*, 502 So. 2d 531, 532 (Fla. 4th Dist. App. 1987) (citing *e.g. Roberts v. Caughell*, 65 So. 2d 547, 548 (Fla. 1953)).

47. Smith, *supra* n. 19, at vol. 1, § 1.08, 1-11; *accord Gamache v. Doering*, 189 S.W.2d 999, 1001 (Mo. 1945) (explaining that equitable adoption applies only to protect minor children).

48. Fla. Stat. § 732.108.

leaving a surviving spouse and lineal descendants, including adopted children, the spouse inherits slightly more than one-half of the estate, with the remainder distributed to the lineal descendants.[49] However, if there is no surviving spouse, the decedent's entire estate is distributed to all the decedent's lineal children, including those who were adopted.[50] Thus, if a court finds a child is not equitably adopted, then the child has no recourse in the event of the intestate death of his or her adoptive parents.

Although equitable adoption is recognized in Florida and some other states,[51] some states refuse to apply the doctrine.[52] Equitable adoption is further limited in its application in those states that do recognize it. One limitation is the application of the

49. Fla. Stat. § 732.102. If there is a surviving spouse, as well as lineal descendants who are also the lineal descendants of the surviving spouse, the surviving spouse receives the first $60,000 of the estate (assuming the estate is worth more than $60,000) and one-half of the remainder, while the other half of the remainder is divided equally between the lineal descendants. *Id*.

50. Fla. Stat. § 732.103; *see id*. at § 732.108 (stating that adopted persons are considered descendants of their adoptive parents).

51. Other states that recognize equitable adoption include Alabama, *e.g. Samek v. Sanders*, 788 So. 2d 872 (Ala. 2000); Alaska, *e.g. Calista Corp. v. Mann*, 564 P.2d 53 (Alaska 1977); California, *e.g. In re Est. of Ford*, 82 P.3d 747 (Cal. 2004); and Texas, *e.g. Luna v. Est. of Rodriguez*, 906 S.W.2d 576 (Tex. 1995).

52. *E.g. Wilks v. Langley*, 451 S.W.2d 209, 213 (Ark. 1970) (quoting *O'Connor v. Patton*, 286 S.W. 822, 826 (Ark. 1926)) (explaining that "'[t]he mere contract to adopt is not sufficient of itself to make a child a legal heir of the promisor, because the right to take as [an] heir exists only by operation of law'"); *Maui Land & Pineapple Co. v. Naiapaakai Heirs of Makeelani*, 751 P.2d 1020, 1022 (Haw. 1988) (stating that "[a]ppellants also urge that we engraft a doctrine of equitable adoption on the law of Hawaii. We explicitly refuse to do so. . . . [W]e have a well developed law of adoption in this State and to depart from the statutes by creating a doctrine of equitable adoption would *import mischief and uncertainty into the law*") (emphasis added)); *In re Marriage of Seger*, 780 N.E.2d 855, 858 (Ind. 1st Dist. App. 2002) (citing *Lindsey v. Wilcox*, 479 N.E.2d 1330, 1333 (Ind. 1st Dist. App. 1985)) (noting that equitable adoption was nonexistent in the state); *In re Est. of Robbins*, 738 P.2d 458, 462 (Kan. 1987) (stating that "[r]ather than open our courts to the various claims available under 'equitable adoption,' we again decline to recognize this doctrine. The right to take as an heir exists only by grant of the legislature"); *Bank of Maryville v. Topping*, 393 S.W.2d 280, 282 (Tenn. 1965). The court in *Bank of Maryville* noted the following:

> It is our considered opinion that an adoption by estoppel is not recognized by the courts of Tennessee. Adoption is a creature of statute and not of the common law, and to create the contemplated relation the defined statutory procedures must be substantially followed.

Bank of Maryville, 393 S.W.2d at 282. *Bank of Maryville* also discussed the holding in *Couch v. Couch*, where the *Couch* court found that "an adoption could not be created under the doctrine of estoppels, as *estoppel is available only to protect a right, but never to create one*." *Id.* (citing *Couch v. Couch*, 248 S.W.2d 327, 334 (Tenn. App. 1952)) (emphasis added).

doctrine to the adoptive parents' relatives.[53] The main limitation, especially in Florida, is that the doctrine should apply only to those cases in which the decedent died intestate.[54] Although equitable adoption is a doctrine grounded in probate law, parties have consistently attempted to apply it in other legal situations. One such example is in the area of child custody.[55] Some courts refuse to apply the doctrine to child custody, while others take the opposite position and use it to estop a parent from denying any obligation to support a child who was equitably adopted.[56]

Another situation where equitable adoption may be inappropriately applied is with regard to social security benefits.[57] Flor-

53. *See Holt v. Burlington N. R.R. Co.*, 685 S.W.2d 851, 853 (W.D. Mo. 1984) (citing *Goldberg v. Robertson*, 615 S.W.2d 59, 62 (Mo. 1981)) (discussing that equitably adopted children may inherit from their adoptive parents, but these same privileges are not transferred to allow the equitably adopted children to receive the same inheritance status as legally adopted children with regard to collateral kin).

54. *E.g. Miller v. Paczier*, 591 So. 2d 321, 323 (Fla. 3d Dist. App. 1991).

55. In *Titchendal v. Dexter*, one partner in a lesbian couple adopted a newborn baby girl. 693 A.2d 682, 683 (Vt. 1997). When the child was about three-and-a-half years old, the couple separated, and the partner who did not have parental rights over the child sought the right to have contact with the child. *Id.* at 683. The dissent suggested the court use equitable adoption as an adequate remedy to allow for visitation, saying it should be applied when a close parent-child relationship exists. *Id.* at 690–691 (Morse, J., dissenting). The dissent justified this application by explaining the purpose of the doctrine "is to allow a court to find, in retrospect, an intent to adopt by a person who had never formally done so, for the purpose of achieving a just result." *Id.* at 691. The dissent suggested the court should have applied the doctrine of equitable adoption since the partner contended she would have adopted the child had it appeared she was statutorily able. *Id.* The majority, however, rejected this view and held that equitable adoption should only apply to cases of intestate succession, and that the dissent confused equitable adoption with equitable parentage, an entirely different legal concept. *Id.* at 688–689 (majority).

56. Rein, *supra* n. 14, at 792–794. Professor Rein discussed cases from New York and California that used the equitable adoption doctrine following divorce proceedings to prevent an adoptive parent from denying the obligation to support the child after the divorce. *Id.* at 792–793. Courts consistently hold that parents who hold themselves out to the children as their natural parents cannot later abandon the children and fail to support them. *Id.* Alternatively, Montana and Georgia take the position that equitable adoption does not apply to these situations regarding child support and custody. *Id.* at 794.

57. In *Broussard v. Weinberger*, a woman gave birth to a son and then turned him over to her parents (his maternal grandparents), with no intention of raising him. 499 F.2d 969, 970 (5th Cir. 1974). His grandparents raised him until the grandfather died, at which time the grandmother applied for social security benefits. *Id.* at 970. The lower court refused to reverse the denial of the benefits, as the grandchild did not meet the definition of "child" under the Social Security Act because the grandchild was never legally adopted. *Id.* The court of appeals reversed and held that the grandmother proved the existence of an agreement to adopt, though not in so many words, and that she and her husband intended to provide a permanent home for the child and intended to raise him as their own. *Id.* at 970–971. In this instance, the court applied equitable adoption in a different context than intes-

ida also refuses to apply the equitable adoption doctrine to workers' compensation claims,[58] wrongful death actions,[59] and in cases of "equitably adopted" adults[60] and stepchildren.[61] Florida limits the application of equitable adoption to cases dealing with the child's right to inherit from his or her adoptive parents; the concept has not been applied to these other situations.[62]

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tate proceedings. Whether this is a legitimate argument in Florida is beyond the scope of this Article.

58. *See Tarver*, 533 So. 2d at 767 (holding that the doctrine of equitable adoption should not apply to workers' compensation because the doctrine "was not intended to create the legal relationship of parent and child"). Thus, it is not possible for an equitably adopted child to meet the "legal adoption" portion of the workers' compensation statute. *Id.* (quoting *Evergreen Sod Farms, Inc. v. McClendon*, 513 So. 2d 1311, 1313 (Fla. 1st Dist. App. 1987).

59. In *Grant v. Sedco Corp.*, the court refused to apply equitable adoption to a minor who was never legally adopted by the decedent, denying him recovery under the Wrongful Death Act. 364 So. 2d at 774. The court applied reasoning similar to that used in *Tarver*, and explained that the terms "survivors" and "child" as used in the Act do not include those who were never formally adopted, as it was not intended to create the parent-child relationship. *Id.* at 774–775. The court in *Jolley v. Seamco Laboratories, Inc.* affirmed the holding in *Grant*. 828 So. 2d 1050, 1051 (Fla. 1st Dist. App. 2002). The court explained that "[t]he Florida Legislature was aware of the *Grant* opinion and yet found no need to amend the definition of survivors to include equitably adopted children when it amended the statute." *Id.*

60. *See Miller*, 591 So. 2d at 322 (holding that the doctrine of virtual adoption is not applicable to a promise to adopt an adult). In *Miller*, a nephew claimed to have become extremely close to his aunt and uncle during his adult life and that they regarded him as a son. *Id.* The nephew attempted to use equitable adoption to collect a portion of the aunt's intestate share as a son, rather than as a nephew. *Id.* This was a case of first impression in Florida. *Id.* However, the Florida court joined previous precedent and refused to recognize equitable adoption as applied to a person who was already an adult upon being "equitably adopted." *Id.* The court held that applying equitable adoption to an adult would open the door to fraudulent claims by those who became close with elderly persons. *Id.* at 323. The purpose of the doctrine was to protect children who were unable to fend for themselves. *Id.* (citing *Thompson v. Moseley*, 125 S.W.2d 860, 862 (Mo. 1939)).

61. Rein, *supra* n. 14, at 781–782. Equitable adoption does not apply to stepchildren for a very important reason. A child's stepparent should not have to worry that his or her love for the stepchild, love which normally would flow from the consummation of the marriage to the child's parent, could change from love that essentially comes with the territory to a fictional love that would change the status of the stepchild to that of an adopted child. *See id.* (discussing that courts usually find insufficient proof of contract to adopt when the purported adopter is a stepparent because the party's conduct could be equated with either the usual stepparent-stepchild relationship or with a contract to adopt).

62. *See Evergreen*, 513 So. 2d at 1313 (explaining that equitable adoption in Florida is intended to render an equitable outcome when the intestacy statutes are unfairly applied).

B. Two Underlying Theories of Equitable Adoption

There are two underlying theories of equitable adoption, and courts generally focus on one of the two—the theory of contract and the theory of estoppel.[63]

Courts that base equitable adoption on contract theory do so under the notion of enforcing a contract through specific performance.[64] The idea is that the adoptive parent acts as a promisor who contracts to raise and legally adopt the child; thus, the court is merely enforcing the contract.[65] Florida is one of the states that bases equitable adoption upon this theory.[66] The contract must be proven by clear and convincing evidence.[67] Unfortunately, in today's society, numerous equitable adoption cases come before the courts, yet many are turned away because this equitable principle is applied so narrowly that the children are often unable to prove their cases by clear and convincing evidence.[68] The contract theory of equitable adoption raises other concerns, particularly the effect of the Statute of Frauds.[69] However, the Statute of Frauds does not affect the oral agreement to adopt when there has been partial performance by the parties, as required by the doctrine.[70]

It has also been argued that the contract analysis is artificial, especially considering that the contract is between the natural and adoptive parents, but the child—who contributes at least half of the consideration—seems to act only as a third-party beneficiary.[71] Because of such problems, other courts argue that equitable adoption is more appropriately based on estoppel principles.[72]

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63. Rein, *supra* n. 14, at 770; Clark et al., *supra* n. 43, at 83.

64. *See Hodge*, 470 So. 2d at 741 (explaining that the child has an enforceable contract right due to the agreement between the natural parents and the adoptive parents).

65. Rein, *supra* n. 14, at 770.

66. *See Laney*, 409 So. 2d at 203 (quoting *Habecker*, 474 F.2d at 1230) (stating that "[equitable adoption's] underlying theories are drawn from the realm of contract law").

67. *Musil*, 965 So. 2d at 1160.

68. *See e.g. Urick*, 625 So. 2d at 1254 (holding that virtual adoption would not be applied in this case because of lack of proof of an agreement between his natural parents, who were divorced, and his stepfather).

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

70. *Id*. at 910–911; *Sheffield*, 14 So. 2d at 420.

71. Rein, *supra* n. 14, at 772. Courts seem to appreciate the limitations of the contract analysis. *Id.* A decedent cannot fulfill a contract after his or her death. *Id.* at 774 (citing *Laney*, 409 So. 2d at 202). Another argument is that specific performance is impossible to fulfill during the lifetime of the parties for two reasons. *Id.* First, it can be argued that the contract cannot be breached until the adoptive parent dies intestate and without having

The estoppel theory argues that equitable adoption is based on traditional estoppel, and the real reason for applying the doctrine is that "equity estops the foster parent and his privies from denying the relationship they represented to the child."[73] For example, in *Jones v. Guy*,[74] the court explained that the child performed, the adoptive parents received the benefits and privileges from the child's performance, and therefore, estoppel should apply to prevent the adoptive parents from denying their parental obligation and denying that the child was presumably adopted.[75] But the estoppel theory presents problems of its own.[76] The main concern is detrimental reliance, an element inherent in estoppel claims.[77] The child will no doubt suffer distress upon learning he or she is not legally considered the child of the adoptive parents when that child was raised by those parents only.[78] This detriment, however, is psychological and thus not easily proven.[79]

As previously stated, Florida disregards the estoppel theory and instead follows the contract theory, which is expressly stated in the language of the elements required to prove equitable adoption.[80]

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legally adopted the child. *Id.* Second, equity will not demand specific performance if the contract involves "personal services or the assumption of an intimate relationship." *Id.* For a more in-depth discussion about this and other arguments relating to the shortcomings of the contract analysis, see *id.* at 772–775.

72. *Id.* at 775.

73. *Id.*

74. 143 S.W.2d 906 (Tex. 1940).

75. *Id.* at 909 (citing *Holloway v. Jones*, 246 S.W. 587, 591 (Mo. 1922)). The Texas Supreme Court brought to light a misconception with the application of equitable adoption. *Id.* Some might allege that in order for the relief inherent in equitable adoption to be granted, it must be "shown that the adoptive parent has executed and acknowledged a deed of adoption, but has failed to record it." *Id.* The Court clarified this mistake and explained that equitable adoption grants relief to a child who has given his adoptive parents the benefits of a child's love and affection. *Id.*

76. Rein, *supra* n. 14, at 778.

77. *Id.*

78. *Id.*

79. *Id.* Rein explains that "one suspects that the theoretical impediments to the use of estoppel in equitable adoption cases are more semantic than real." *Id.* at 779.

80. *E.g. Grant*, 364 So. 2d at 775 (explaining that "[t]he nature of equitable adoption is a remedy in equity to enforce a contract right"); *Laney*, 409 So. 2d at 203 (stating that "[equitable adoption's] underlying theories are drawn from the realm of contract law").

III. IMPROVEMENT OF FLORIDA'S EQUITABLE ADOPTION POLICY

Today, traditional families are much less common than they were in the past.[81] In 1970, married couples constituted 71% of all households.[82] According to the 2000 United States Census, households comprised of married couples dropped dramatically to 53%.[83] Nontraditional families—including those consisting of adults who raise children not biologically related to them—are becoming more prevalent, increasing the need for equitable adoption.[84]

Florida's equitable adoption policy is a strict one, requiring the child to prove all five elements of the doctrine[85] with clear and convincing evidence.[86] At least one Florida court has commented that it is an unfortunate event when the court is unable to rule in favor of a child using equitable adoption simply because one element was not proven with clear and convincing evidence, although the other four elements were proved.[87] Thus, there is a great need for parents of informally adopted children to execute wills to guarantee the fulfillment of their wishes.[88]

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81. Juan C. Antunez, The Florida Probate and Trust Litigation Blog, *Of Lost Wills and "Virtually" Adopted Heirs*, http://www.flprobatelitigation.com/2007/08/articles/new-probate-cases/will-and-trust-contests/of-lost-wills-and-virtually-adopted-heirs/ (Aug. 16, 2007).

82. *Id.*

83. *Id*. For 2000 U.S. census data, see U.S. Census Bureau, *DP-2 Profile of Selected Social Characteristics: 2000*, http://factfinder.census.gov/servlet/QTTable?_bm=y&-geo_id=04000US12&-qr_name=DEC_2000_SF3_U_DP2&-ds_name=DEC_2000_SF3_U&-redoLog=false (accessed July 28, 2009) (listing various numbers and percentages related to Marital Status in Florida).

84. Antunez, *supra* n. 81.

85. For a list of the five required elements of equitable adoption, see *supra* notes 39–44 and accompanying text.

86. *Musil*, 965 So. 2d at 1160.

87. *Urick*, 625 So. 2d at 1253. The child in this case was the stepson of the decedent, but not the adopted son. *Id*. His parents divorced when he was a child, and he lived with his natural father until his father's death when he was a teenager. *Id*. At that point, the child moved in with his mother and her husband, the decedent in this case. *Id*. The child referred to his stepfather as "Dad," and they maintained a typical father-son relationship until the stepfather's death. *Id*. at 1253–1254. However, the stepfather never actually adopted the child. *Id*. at 1253. Thus, the child's equitable adoption claim failed because there was no evidence of an agreement to adopt. *Id*. at 1254.

88. *Id.*

Unfortunately, this does not always happen—many people die each year without executing a will.[89] Because of this trend, children who were not formally adopted may not be entitled to inherit. For this reason, Florida's equitable adoption doctrine should be altered in three ways. First, the clear and convincing standard for the agreement requirement should be lowered to a preponderance of the evidence, in certain situations. Second, the doctrine should be expanded to incorporate those children equitably adopted by homosexual individuals who cannot statutorily adopt in Florida. And finally, the doctrine should apply to equitably adopted children who have been pretermitted. Each of these proposed changes will be discussed in turn.

A. Lowering the Standard of the Agreement Requirement

The clear and convincing standard for the agreement requirement in equitable adoption should be lowered to a preponderance of the evidence standard in situations where no witnesses are available to testify regarding the formation of the agreement. By permitting children in such situations to prove the adoption agreement by a preponderance, equity will more often be served. Additionally, there are other areas in the law in which a seemingly high standard is reduced, namely in common-law marriage.[90] The following Section will discuss the reasons why Florida should lower the agreement standard from clear and convincing to a preponderance, using the doctrine of common-law marriage as a guide.

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89. There is no definite statistic that shows how many people actually die without a will; the statistics documented about how many people die intestate range from about 40% to over 80%. *See e.g.* Robert J. Bruss, *Major Real Estate Advantages of Living Trusts*, http://livingtrusts.bobbruss.com/livingtrusts/ (accessed July 28, 2009) (stating that less than 20% of the U.S. population has executed a will); LegalZoom.com, Inc., *Wills Education Center*, http://www.legalzoom.com/wills-guide/importance-of-wills.html (accessed July 28, 2009) (explaining that over 70% of Americans have not made a will); Soulforce, Inc., *Estate Giving to Soulforce*, http://www.soulforce.org/article/727 (accessed July 28, 2009) (declaring that 30% of Americans die with a will, meaning 70% die without one); Law Offices of Jeremy J. Ofseyer, *August 2006 Newsletter: Intestacy*, http://www.ofseyerlaw.com/lawyer-attorney-1136108.html (accessed July 28, 2009) (explaining that about 40% of Americans die without a will).

90. *See Staudenmayer v. Staudenmayer*, 714 A.2d 1016, 1021 (Pa. 1998) (showing that when no one is available to testify to the agreement to be married, the burden of proof on the party asserting the existence of the common-law marriage drops from clear and convincing to a rebuttable presumption, which is a lower standard).

To adequately understand the problem associated with the clear and convincing standard of proof, one must again understand the situation in which it arises. Imagine, for example, the following scenario:[91] Mary, a young widow, was the mother of Ben, an infant. After the sudden and tragic death of her husband, Mary no longer wanted to care for Ben because he was a constant reminder of her lost husband. Mary took Ben to her parents and said, "Here, you raise him! I don't want him." Ben's grandparents could not believe their only child could give up her baby, and they tried to help Mary. Mary refused the help and left.[92] Being the loving people they were, Ben's grandparents raised Ben as their own son. Ben always believed his grandparents were actually his parents and called them "Mom" and "Dad."[93] Although his grandparents intended to adopt Ben, they never did, but they held him out as their own, and Ben never knew differently. Ben's grandmother died testate when Ben was eighteen, leaving most of the estate to her husband and a small portion to Ben. His grandfather died a few years later, but died intestate. It was only then that Ben discovered he was not their son, but rather, their grandson.

Under Florida's intestacy laws, Ben's mother, Mary, was set to inherit the entire estate.[94] Ben argued he was the equitably

91. This scenario is partly based on *Broussard v. Weinberger*, 499 F.2d 969 (5th Cir. 1974). This case revolved around whether social security benefits should be granted to a grandmother and grandchild. *Id.* at 970. The court found that the child was equitably adopted and granted the grandmother and child social security benefits. *Id.* at 971.

92. This is an example of an abandonment scenario. Abandonment is defined as when a "parent . . . having legal custody of a child, while being able, makes no provision for the child's support and makes little or no effort to communicate with the child, which situation is sufficient to evince an intent to reject parental responsibilities." Fla. Stat. § 63.032(1).

93. It may be difficult to believe that a child could grow up believing his grandparents were actually his parents, but this does occasionally occur. Actor Jack Nicholson is a prime example. Nicholson was in his late thirties before he discovered that his "sister" was actually his mother, and his "parents" were his grandparents. Erik Hedegaard, *Jack Nicholson: A Singular Guy*, http://www.rollingstone.com/news/story/11735688/cover_story__jack_nicholson_secrets_of_the_great_seducer/print (Sept. 20, 2006).

94. *See* Fla. Stat. § 732.103 (discussing the succession when a decedent dies and leaves no spouse). When the decedent dies and leaves no spouse, the decedent's estate passes directly to the lineal descendants. *Id.* at § 732.103(1). Assuming that Mary is an only child, she is the only one set to inherit under this statute. Ben would not be entitled to receive anything. However, imagine that Ben's grandparents had two children, Mary and Sam. After Mary leaves Ben with her parents, Mary dies. Then assume the rest of the story progresses as above, and Ben's grandfather dies, leaving Ben and Sam. In Florida, Ben would actually be able to inherit part of his grandfather's estate because of the per stirpes doctrine. Florida is a pure per stirpes state. *Id.* at § 732.104. This means that Ben would "step into the shoes" of Mary and be entitled to inherit her half of the estate, which is what

adopted son of his grandparents, so he should inherit at least half of the estate. Unfortunately for Ben, there is no clear and convincing evidence of the agreement because his mother abandoned him.[95] Therefore, under Florida's present equitable adoption doctrine, he cannot inherit.

Insufficient evidence of an adoption agreement between the biological and adoptive parents is the most common reason for courts' refusal to apply equitable adoption.[96] Florida requires the agreement be proven by clear and convincing evidence.[97] The purpose of requiring this high standard is to protect against fraudulent claims.[98] Even though some agreements may be in writing, most are made orally, and the standard of proof is generally high because these contracts are enforced after the death of the adoptive parents.[99]

Recognizing that children are often refused relief due to their inability to prove the agreement standard existed with clear and convincing evidence, courts in some states have a lower standard of proof than clear and convincing. For example, Texas requires the child to prove the existence of an agreement by only a preponderance of the evidence.[100] Additionally, West Virginia has abandoned the agreement requirement entirely.[101] The West Virginia Supreme Court explained that "[w]hile the existence of an express contract of adoption is very convincing evidence, an *implied con-*

she would have inherited if she had been alive. *See* Smith, *supra* n. 19, at vol. 1, § 1.04, 1-5–1-6 (explaining the progression of per stirpes distribution).

95. Rather, there is a preponderance of the evidence that shows there was an agreement based on Mary's statement, "You raise him! I don't want him." Thus, as the law currently stands, Ben could not inherit as the equitably adopted child of his grandfather because there is no clear and convincing evidence of the agreement, such as an explicit conversation between his mother and grandparents in which his grandparents agreed to raise him and Mary agreed to give up her parental rights.

96. Clark et al., *supra* n. 43, at 82.

97. *Musil*, 965 So. 2d at 1160; *Williams v. Est. of Pender*, 738 So. 2d 453, 456 (Fla. 1st Dist. App. 1999).

98. *Wheeling Dollar Sav. & Trust Co. v. Singer*, 250 S.E.2d 369, 374 (W.Va. 1978). Unfortunately, courts may vary the strictness of the standard used in order to find the existence of a contract or not, depending on the desired outcome. Rein, *supra* n. 14, at 783.

99. *Id.* at 780.

100. *Johnson v. Chandler*, 2004 Tex. App. LEXIS 8095 at *9 (14th Dist. Sept. 2, 2004). Texas follows the estoppel theory of equitable adoption. *Id.* This Texas court placed a lot of emphasis on the existence of the agreement to adopt, and because the child in this case could not prove the existence of the agreement by even a preponderance, the court denied her relief under equitable adoption. *Id.* at **9–10.

101. *Wheeling Dollar Sav. & Trust Co.*, 250 S.E.2d at 374.

tract of adoption is an unnecessary fiction created by courts as a protection from fraudulent claims."[102] Instead of proving an agreement existed, a child is considered equitably adopted if he or she can "prove sufficient facts to convince the trier of fact that his [or her] status is identical to that of a formally adopted child" and lacks only the formal adoption papers.[103] West Virginia put great emphasis on the adoptive parents holding the child "out to all the world as a natural or adopted child."[104]

Throughout the history of equitable adoption, Florida courts have also vacillated between the two standards of clear and convincing proof and a preponderance of the evidence. In *Sheffield v. Barry*,[105] the Florida Supreme Court did not specify a standard to be used.[106] Then, in 1982, in *Laney v. Roberts*,[107] the Third District Court of Appeal found that the child proved every element of equitable adoption with clear and convincing evidence.[108] However, in a footnote, the majority noted that the child need only have proved the elements by a preponderance of the evidence.[109] A

102. *Id.* (emphasis added). The court further explained the status of an equitably adopted child as follows:

> An equitably adopted child in practical terms is as much a family member as a formally adopted child and should not be the subject of discrimination. He will be as loyal to his adoptive parents, take as faithful care of them in their old age, and provide them with as much financial and emotional support in their vicissitudes, as any natural or formally adopted child.

Id. at 373.

103. *Id.* at 374.

104. *Id.* The court also emphasized the following factors that tend to indicate the child was equitably adopted: the love and affection that the adopting party received; the child's performance of services; the natural parents' relinquishment of all ties with the child; the child's "society, companionship[,] and filial obedience"; an unsuccessful adoption; the child's reliance on the adoptive status; and the adoptive parents raising the child from an age of tender years. *Id.* at 373–374. The court also explained that evidence tending to show an equitable adoption can be negatively impacted, such as if the child does not perform the duties of an adopted child or if the child misbehaves or abandons his or her adoptive parents. *Id.* at 374. But the court recognized that if the child is simply being a child and is merely mischievous, as most children are, the doctrine will not be disproved. *Id.*

105. 14 So. 2d 417 (Fla. 1943).

106. *See id.* at 420 (stating the child only "substantiate[ ] by evidence," with no explanation of which standard should apply).

107. 409 So. 2d 201 (Fla. 3d Dist. App. 1982).

108. *Id.* at 203.

109. *Id.* at 203 n. 3. The court supported this statement, that the burden of proof was only a preponderance of the evidence, by citing to two Texas court cases. *Id.* As mentioned above, Texas is one of the few states that allows the equitable adoption elements to be proved by something other than clear and convincing evidence. *Supra* n. 100 and accompanying text.

few years later, the Fifth District Court of Appeal in *In re Hodge*[110] found sufficient evidence to declare the child the equitably adopted child of the decedent.[111] Although no one was available to testify directly concerning the informal adoption agreement, the court looked at the circumstantial evidence surrounding the life of the child and affirmed the lower court's conclusion that an agreement to adopt did in fact exist.[112] Finally, after these seemingly alternating standards, the court in *Williams v. Estate of Pender*[113] set the standard for proving equitable adoption in Florida at clear and convincing.[114] The *Williams* court explained that the footnote in *Laney*, which held the standard to be only a preponderance,[115] was dictum,[116] and the correct standard was clear and convincing.[117]

To provide relief to those children who are unable to prove the existence of a contract to adopt in Florida by clear and convincing evidence, the standard of evidence for proving the existence of the agreement should be lowered to a preponderance of the evidence when no witnesses are available to testify about the formation of the agreement. There are other situations in which courts will lessen the standard of proof to provide greater equity to those parties who are unfairly affected—particularly in cases of common-law marriage.[118] Florida abrogated the doctrine of common-law marriages entered into after January 1, 1968.[119] How-

110. 470 So. 2d 740 (Fla. 5th Dist. App. 1985).

111. *Id.* at 741.

112. *Id.* The court looked at the following factors: the Hodges told the child she was their adopted child when she was nine years old; the child lived with the Hodges until she was married; the child's last name was always "Hodge"; the Hodges loved the child as a daughter, and she loved them as her parents; Mr. Hodge served as the P.T.A. president at her school; Mr. Hodge signed her report cards; and the child paid for and attended Mr. Hodge's funeral. *Id.*

113. 738 So. 2d 453 (Fla. 1st Dist. App. 1999).

114. *Id.* at 456.

115. *Laney*, 409 So. 2d at 203 n. 3.

116. *Williams*, 738 So. 2d at 455.

117. *Id.* at 456. It is important to note that some version of the word "adoption" need not be used in order to establish the agreement to adopt; other language may be used and will not be detrimental to the finding of equitable adoption. *Habecker v. Young*, 474 F.2d 1229, 1230 (5th Cir. 1973).

118. *See generally Staudenmayer*, 714 A.2d 1016 (showing that when it is impossible for a party to prove the existence of a common-law marriage with clear and convincing evidence due to the death of the common-law spouse, the law will allow for the lesser standard of a preponderance of the evidence).

119. Fla. Stat. § 741.211.

ever, the concept behind the application of common-law marriage as applied in other states[120] and in Florida, before Florida abrogated the doctrine,[121] will give the appropriate analysis for this situation.[122] To understand the rationale behind the ultimate proposal, one must first understand the details of common-law marriage.

A common-law marriage is defined as one "that takes legal effect, without license or ceremony, when two people capable of marrying live together as husband and wife, intend to be married, and hold themselves out to others as a married couple."[123] To prove the existence of a common-law marriage, one must prove *verba in praesenti*—words spoken in the present tense that have the present intent to establish the relationship of husband and wife.[124] These words essentially equate to a marriage contract.[125] In *Staudenmayer v. Staudenmayer*,[126] the Pennsylvania court ex-

120. These states include Alabama, Iowa, Pennsylvania, and South Carolina. *See generally Etheridge v. Yeager*, 465 So. 2d 378 (Ala. 1985) (explaining that the party must show the mutual intention to enter into a common-law marriage); *In re Marriage of Gebhardt*, 426 N.W.2d 651 (Iowa App. 1988) (discussing that common-law marriage must be proven by intent, agreement, cohabitation, and declaration of the marriage); *Staudenmayer*, 714 A.2d 1016 (holding that if it is impossible to prove the existence of the common-law marriage with clear and convincing evidence due to the death of the other party, the surviving party is entitled to a rebuttable presumption that such a marriage existed); *Barker v. Baker*, 499 S.E.2d 503 (S.C. App. 1998) (requiring proof of the intention to enter into the common-law marriage).

121. *E.g. McBride v. McBride*, 130 So. 2d 302 (Fla. 2d Dist. App. 1961).

122. Although it appears that common-law marriage is a dying concept, with more and more states abrogating the doctrine, the rationale behind it will likely prove useful in relation to equitable adoption. Common-law marriage was essentially created because of the demographics before the twentieth century. Judith Areen & Milton C. Regan, Jr., *Family Law: Cases and Materials* 144 (Robert C. Clark ed., 5th ed., West 2006). A dispersed population and the scarcity of ministers or justices of the peace resulted in the necessity of these marriages because it was so difficult to obtain a marriage license. *Id.* Today, it is much easier to obtain a marriage license with the technology that exists and the increased density of the United States population. However, adoptions are still extremely complicated. *See supra* n. 22 (giving a general overview of the many steps required to accomplish a legal adoption). Therefore, the abrogation of common-law marriage in most states, including Florida, is inconsequential to this discussion.

123. *Black's Law Dictionary*, *supra* n. 3, at 992.

124. *Staudenmayer*, 714 A.2d at 1020. Although Pennsylvania similarly abolished common-law marriage contracted after January 1, 2005, *Perrotti v. Meredith*, 868 A.2d 1240, 1242 (Pa. 2005), the concepts are still applicable and are reflected in other cases in states that continue to allow for common-law marriage. *See generally Etheridge*, 465 So. 2d 378 (holding that common-law marriage still exists in this state); *Gebhardt*, 426 N.W.2d 651 (same); *Barker*, 499 S.E.2d 503 (same).

125. *Staudenmayer*, 714 A.2d at 1021.

126. 714 A.2d 1016 (Pa. 1998).

plained that these words must be proven by clear and convincing evidence.[127] This heavy burden arises because of the belief that common-law marriage is "a fruitful source of perjury and fraud."[128] However, specific words are unnecessary to prove this intention.[129] When one of the parties is unable to testify about the exchange of the *verba in praesenti*, a rebuttable presumption in favor of common-law marriage exists.[130] The party claiming the validity of the common-law marriage bears the burden of proving both (1) constant cohabitation and (2) a broad and general reputation of marriage.[131] The burden then shifts to the party challenging the legality of the common-law marriage.[132] Nevertheless, this presumption does not arise if both parties are available to testify.[133]

Florida used similar rationale and rules before abrogating the doctrine of common-law marriage. In *McBride v. McBride*,[134] the court explained that the testimony of the parties to the common-law marriage or of witnesses to the agreement would be the "best evidence" to prove the existence of a common-law marriage.[135] The court went on to explain that the Florida Supreme Court recognized that best evidence, though preferred, would not always be available, and thus, proof of "general repute and cohabitation" was sufficient to support a presumption of common-law marriage.[136]

127. *Id.* at 1021.

128. *Renshaw v. Heckler*, 787 F.2d 50, 52 (2d Cir. 1986).

129. *Staudenmayer*, 714 A.2d at 1020. This is much like equitable adoption, which does not require the word "adoption" to be used to establish it. *Habecker*, 474 F.2d at 1230.

130. *Staudenmayer*, 714 A.2d at 1020. This problem arose because of the Dead Man's Statutes, which prevented testimony about what a decedent said during his or her lifetime. *Id.* at 1020 n. 7.

131. *Id.* at 1020–1021.

132. *Carter v. Carter*, 309 So. 2d 625, 628 (Fla. 3d Dist. App. 1975).

133. *Staudenmayer*, 714 A.2d at 1021. The court stated that although it required the *verba in praesenti* when both parties were able to testify, it was not disregarding the significance of the evidence of cohabitation and reputation. *Id.* Rather, the purpose is to force the party alleging a common-law marriage to meet its heavy burden. *Id.* If the person cannot prove these words, then that person "does not enjoy any presumption." *Id.*

134. 130 So. 2d 302 (Fla. 2d Dist. App. 1961).

135. *Id.* at 303 (citing *LeBlanc v. Yawn*, 126 So. 789, 790 (Fla. 1930)).

136. *Id.* The court described that the rationale for requiring that cohabitation and reputation be established by positive proof, when these two elements are the only ones relied upon, was to essentially avoid accusations of a meretricious relationship. *Id.*

Similar principles also exist in other states that continue to recognize common-law marriage today. In Alabama, a common-law marriage exists when a present agreement, which may be proved by circumstantial evidence, was made to begin a permanent and exclusive marital relationship.[137] The couple must also prove reputation and cohabitation relating to marital duties.[138] In Iowa, a couple must prove the following three elements by a preponderance of the evidence to establish a common-law marriage: (1) constant cohabitation; (2) declaration to be husband and wife; and (3) present intention and agreement to be married.[139] In South Carolina, a common-law marriage exists when the parties intend and agree to live as husband and wife, similar to Pennsylvania's requirements.[140] The marriage may be proved by circumstantial evidence, including proof of reputation and cohabitation, if testimony is otherwise unavailable.[141]

Accordingly, based on the concepts found in common-law marriage,[142] Florida should implement the following proposal to improve the doctrine of equitable adoption: When people are available who can testify about the agreement made between the natural parents and the adoptive parents (parties from either set of parents or witnesses to the agreement), then the standard for proving the agreement should remain clear and convincing. However, if no one is available to testify as to the agreement,[143] then the court should require the child to prove the agreement by only a preponderance of the evidence.

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137. *Skipworth v. Skipworth*, 360 So. 2d 975, 976 (Ala. 1978).

138. *Id.* at 975.

139. *Gebhardt*, 426 N.W.2d at 652. This case also explains that "[i]ntroduction of one party by the other as a wife or husband is in and of itself acknowledgement of marital relation." *Id.* This idea is analogous to adoptive parents introducing a child to others as the adoptive parent's own child, like the adoptive parent saying, "This is my son, Ben." *See Lynn v. Hockaday*, 61 S.W. 885, 886 (Mo. 1901) (showing that the adoptive parents introducing the child to the community as "our little girl" went towards proving her status as an equitably adopted child).

140. *Barker*, 499 S.E.2d at 506.

141. *Id.* at 507.

142. *See supra* nn. 123–141 and accompanying text (discussing common-law marriage principles).

143. This relates to the event when (1) the natural parents are unknown, deceased, or nowhere to be found, (2) both adoptive parents are dead, and (3) there are no persons who witnessed the making of the agreement.

In *Staudenmayer* and *Renshaw*, both courts explained that where a party asserts a claim of common-law marriage, he or she must prove present-tense words that carry the intent to establish a common-law marriage—the *verba in praesenti*.[144] Like the words of agreement necessary to establish a common-law marriage, when a party wants to claim equitable adoption, he or she must prove an adoption agreement—whether express or implied, oral or written.[145]

However, in common-law marriage, Pennsylvania realized there were situations in which proving the existence of present-tense words of a marital agreement would be impossible, such as when testimony was barred under the Dead Man's Statute.[146] In light of this dilemma, Pennsylvania courts created a rebuttable presumption that favored common-law marriage, requiring only a showing of constant cohabitation and a reputation of marriage "where the parties are otherwise disabled from testifying."[147] This parallels the new proposal for equitable adoption to an extent. When the child attempts to claim a share of the adoptive parent's estate through equitable adoption, the child should only have to prove the agreement by a preponderance of the evidence, such as the adoptive parent holding the child out to the community as his or her own natural or adopted child, which is similar to the common-law-marriage reputation requirement.[148] This would occur only when no one is available to testify to the agreement made between the natural parents and adoptive parents because all parties are missing or deceased, and there are no witnesses.

However, where the parties or witnesses to a common-law marriage agreement were available to testify, Pennsylvania ad-

144. *Staudenmayer*, 714 A.2d at 1021; *Renshaw*, 787 F.2d at 52.

145. *See* Rein, *supra* n. 14, at 780–781 (discussing the ways the agreement may be proven).

146. *Staudenmayer*, 714 A.2d at 1020 n. 7. Florida repealed the Dead Man's Statute (previously found in Florida Statute Section 90.602), "which pertained to testimony of interested persons regarding oral communication with a deceased . . . person." *In re Amends. to the Fla. Evid. Code*, 960 So. 2d 762, 762 (Fla. 2007).

147. *Staudenmayer*, 714 A.2d at 1021.

148. In *Johnson v. Chandler*, for example, ten witnesses, including the decedent's sister, testified that they did not believe the child to have been the adopted daughter of the decedent. 2004 Tex. App. LEXIS 8095 at **9–10. Additionally, in *Gebhardt*, where introducing a person as one's husband or wife acknowledged the marital relationship, 426 N.W.2d at 652, so too could the introduction of a not-yet-formally-adopted child as one's own son or daughter be an acknowledgement of the adoptive relationship.

hered to the clear and convincing standard.[149] Similarly, in equitable adoption cases, this proposal suggests that when (1) there are witnesses to testify to the existence or nonexistence of an agreement; (2) one of the adoptive parents is alive to testify; or (3) the natural parents can be found to testify, then the agreement standard must be proven by clear and convincing evidence.

To prevent a child from fraudulently claiming that there is no one to testify about the adoption agreement in an attempt to reduce the standard from clear and convincing down to a preponderance of the evidence, there must be an established system for providing such evidence.[150] One way to effectuate this plan is to apply the standard used with regard to giving notice to creditors in estate administration.[151] When searching for creditors, the personal representative should make a reasonable and diligent search for all creditors and file an affidavit alleging such.[152] To qualify as a diligent search, one is required to prove more than a few attempts to find these creditors.[153] A diligent search is one that is adequate, where the person must "reasonably employ[ ] the knowledge at his command, [make] diligent inquiry, and exert[ ] an honest and conscientious effort appropriate to the circumstance[s] to acquire the information necessary."[154]

Additionally, the shift of the burden of proof is important. In Florida, when a person claimed the rebuttable presumption of common-law marriage and satisfied the burden of proof regarding reputation and cohabitation, the burden then shifted to the challenger to prove the illegality of the common-law marriage.[155]

149. *Staudenmayer*, 714 A.2d at 1021.

150. This is extremely important, as one of the concerns surrounding a lower standard is the propensity for fraudulent claims. *See Wheeling Dollar Sav. & Trust Co.*, 250 S.E.2d at 374 (discussing the fear of courts related to fraudulent claims).

151. Every creditor must be given notice of an administration of an estate, unless otherwise barred. Fla. Stat. § 733.701.

152. *Cone v. Benjamin*, 27 So. 2d 90, 92 (Fla. 1946).

153. *Shepheard v. Deutsche Bank Trust Co. Americas*, 922 So. 2d 340, 344 (Fla. 5th Dist. App. 2006) (citing *Demars v. Village of Sandalwood Lakes Homeowners Assn., Inc.*, 625 So. 2d 1219 (Fla. 4th Dist. App. 1993)) (discussing diligent search and service of process). Although service of process is not necessarily at issue here, the test for a diligent search is the same.

154. *Id.* at 343–344.

155. *Carter*, 309 So. 2d at 628.

Applying concepts of diligent search[156] and burden shifting[157] to equitable adoption, the process would be as follows: The burden lies first with the child claiming equitable adoption. If the child claims that there is no one to testify as to the adoption agreement, the court must require the child to provide proof of a reasonable and diligent search for the natural parents or another who may have been a witness to the agreement.[158] Upon receipt of a good-faith affidavit of the child's unsuccessful yet diligent search, the child may then claim that there is no one to testify. The burden of proof then shifts to the estate (or other challenging party), which has the opportunity to conduct its own diligent search to find someone to testify as to the creation of the agreement. If the estate's search yields a bona fide witness to testify, the standard remains clear and convincing. However, if the estate's search is also fruitless, the standard falls to a preponderance.

The possible fraud issue should not pose any real concern. The presumption in this proposal is only to lower the standard of the *agreement requirement*, not that of the entire doctrine.[159] The four remaining elements must still be proven by clear and convincing evidence.[160] Additionally, if the adverse party can show someone is available to testify, then the standard remains at clear and convincing.[161]

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156. *Supra* nn. 151–154 and accompanying text.

157. *Supra* n. 155 and accompanying text.

158. *See Sudhoff*, 942 So. 2d at 432 (citing *Shepheard*, 922 So. 2d at 343–344) (discussing the diligent search in relation to creditors of an estate).

159. Perhaps Florida should consider changing from a state that bases equitable adoption on contract theory to a state that bases it on the estoppel theory. Under the estoppel theory, the court would look at the relationship represented to the child, rather than part performance. Rein, *supra* n. 14, at 775. Thus, it might not be quite as important to have such a high standard of proof, and this change of theories would justify lowering the standard.

160. The other four elements are as follows: (1) performance by the natural parents of the child in giving up custody; (2) performance by the child by living in the home of the adoptive parents; (3) partial performance by the adoptive parents in taking the child into the home and treating the child as their child; and (4) intestacy of adoptive parents. *Hodge*, 470 So. 2d at 741.

161. *Supra* nn. 142–149 and accompanying text. Another possible concern about lowering the agreement standard is in the context of homestead. Equitable adoption does apply to homestead, and the fact that a child was equitably adopted will not preclude the child from taking the homestead under the statutes. *Williams v. Dorrell*, 714 So. 2d 574, 576 (Fla. 3d Dist. App. 1998). In *Williams*, the court found the child proved the elements of equitable adoption. *Id.* at 575–576. The issue then turned to whether she was entitled to

B. Equitable Adoption and Homosexual Parents

Although Florida does not permit homosexuals to adopt, children informally adopted by homosexual parents should not be precluded from inheriting under Florida's equitable adoption doctrine. Once again, the archer must bend the bow to hit the target.

There are at least two different scenarios in which a homosexual individual may come to informally adopt a child. Before discussing the ramifications of applying the doctrine to homosexuals, one must understand the scenario, accomplished through the use of hypotheticals.

The first situation arises as follows: Ken and Linda were married for ten years. They had a child, Maggie. When Maggie was six years old, Ken and Linda divorced. Linda was an alcoholic, so Ken gained full custody of Maggie. Over the next two years, Ken realized he was homosexual and eventually fell in love with Ned. He and Maggie moved in with Ned. In Florida, Ken and Ned could not marry.[162] The three lived together as one happy

take the homestead, the decedent's sole asset. *Id.* The court explained the purpose of Florida's Homestead Provision, found in Article X, Section 4 of the Florida Constitution, is "to protect and preserve the interest of the family in the family home." *Id.* at 576 (citing *Snyder v. Davis*, 699 So. 2d 999, 1002 (Fla. 1997)). The court further articulated that the homestead provision was applicable to the heirs of the owner, defined under the intestacy statutes as "those persons . . . who are entitled under the statutes of intestate succession to the property of a decedent." *Id.* at 1001 (citing Fla. Stat. § 731.201(18) (1997)). Therefore, the court held the equitably adopted child could inherit the homestead as she qualified as an "heir" under both the intestacy statutes and homestead provision. *Id.* at 576. With the lowering of the agreement standard, the court must first find all the elements are still met before declaring a child is equitably adopted. Once the court makes this determination, the child would still be considered an "heir" for intestacy and homestead purposes. *See id.* (discussing how equitable adoption applies to homestead). Thus, it will not be any easier for a child to fraudulently make a claim under the homestead provision using the avenue of equitable adoption, because it is not guaranteed that the standard would be lowered to a preponderance from clear and convincing. In any event, the child must still make an argument to the court, which will make the final determination of whether the child is truly equitably adopted.

162. Although some states have allowed same-sex marriage, *see Goodridge v. Dept. of Public Health*, 798 N.E. 2d 942, 970 (Mass. 2003) (allowing for homosexual marriage because a refusal to allow a person to marry another of the same sex violates the Massachusetts Constitution), Florida refuses to follow suit, *see Kantaras v. Kantaras*, 884 So. 2d 155, 157 (Fla. 2d Dist. App. 2004) (declaring the "Florida Legislature has expressly banned same-sex marriage"). In 1997, Florida's Legislature enacted the Defense of Marriage Act, found in Florida Statute Section 741.212. *Id.* The Defense of Marriage Act states that Florida will not recognize a same-sex marriage, wherever entered. Fla. Stat. § 741.212(1). Further, Florida recognizes marriage as "the legal union of only one man and one woman as husband and wife." Fla. Const. art. 1, § 27; *accord* Fla. Stat. § 741.212(3) (defining mar-

family for the next ten years. Ken and Ned raised Maggie as their own.[163] While Maggie was in college, Ken died testate and left the bulk of his estate to Ned, with a small portion to Maggie.[164] Soon after Maggie graduated, Ned was killed in a car accident. He had never executed a will. Because Ned was not biologically related to Maggie, and Maggie was not his legally adopted daughter, Maggie could not inherit from Ned through Florida's intestacy statutes.[165] Therefore, Maggie sued under the doctrine of equitable adoption to claim her share as Ned's child. Can she inherit?

A second situation may also arise: Grace and Pam, a lesbian couple, made an agreement with a new mother, Sara, to adopt her child, Greg, because Sara was unable to care for Greg. Florida law does not allow Grace and Pam to legally adopt Greg,[166] but Sara did not know this and made an agreement with Grace and Pam to "adopt" Greg. After placing Greg in the custody of Grace and Pam, Sara severed all contact with Greg and the couple. Grace and Pam cared for Greg and raised him as their own child. Grace died when Greg was older and left everything to Pam in a will, expecting Pam to care for and provide for Greg.[167] Soon thereafter, Pam died unexpectedly before executing a will. Because Greg was not

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riage as the same).

163. *The Birdcage*, with Robin Williams and Nathan Lane, presented a similar scenario. *The Birdcage* (MGM 1996) (motion picture). In the movie, Williams' character, Armand, fathered a child, Val, with a female co-worker. *Id.* She was not the "maternal" type, so Armand raised the child with his partner, Albert. *Id.* If Armand predeceased both Val and Albert and left everything to Albert in a will, and then Albert predeceased Val but died intestate, Val would not receive any part of Albert's intestate estate, which would likely include part of Armand's testate estate.

164. At this point, Maggie is an adult and thus no longer needs a guardian.

165. *See* Fla. Stat. §§ 732.103, 732.108 (dictating how a person's estate is distributed if the person dies without a spouse but with lineal descendants, whether biological or adopted).

166. Grace and Pam, under Florida Statute Section 63.042(3), cannot adopt Greg, either alone or jointly. However, there is a possibility for them to foster a child. Foster care and adoption are two very separate ideas. Foster care, and even guardianship, "have neither the permanence nor the societal, cultural, and legal significance as does adoptive parenthood[.]" *Lofton v. Sec. of Dept. of Children & Fam. Servs.*, 358 F.3d 804, 824 (11th Cir. 2004). Rather, adoption is the "legal equivalent of natural parenthood." *Id.* (citing Fla. Stat. § 63.032(2)). The realm of foster care programs is beyond the scope of this Article, which will address only adoptions.

167. The fact that a person is a homosexual is "not determinative of [his or] her fitness" to act as a child's guardian. *In re Guardianship of Astonn H.*, 635 N.Y. Fam. Ct. 418, 422 (1995). Rather, the determining factor is whether or not that sexual lifestyle would be detrimental to the child's well-being. *Id.*

Pam's biological child, he cannot inherit from Pam unless equitable adoption applies.

Unlike most states, Florida continues to prohibit homosexual adoption.[168] Florida Statute Section 63.042(3) dictates that "[n]o person eligible to adopt under this statute may adopt if that person is a homosexual." Florida courts limit this provision, however, to only those homosexuals who are "engage[d] in current, voluntary homosexual activity," making a distinction between those who are *practicing* homosexuals and those who are simply homosexually oriented.[169]

The courts have not yet had an opportunity to determine if equitable adoption would apply in the context of homosexual individuals and intestacy.[170] Although Florida prohibits homosexual adoption, the State should allow a child who has been equitably adopted by a homosexual individual to collect through the intestacy statutes as the person's child. This approach provides greater equity to those children raised by homosexual individuals who knew only them as their parents.[171] In order for equitable adoption to apply, a formal adoption must not have been completed.[172] In the case of homosexual parents, formal adoption cannot be

168. Fla. Stat. § 63.042(3).

169. *Lofton*, 358 F.3d at 807 (citing *Fla. Dept. of Health & Rehab. Servs. v. Cox*, 627 So. 2d 1210, 1215 (Fla. 2d Dist. App. 1993), *aff'd in relevant part*, 656 So. 2d 902, 903 (Fla. 1995)). This section is limited to the application of equitable adoption to state agency adoptions. The possibility of a private adoption through an adoption agency is beyond the scope of this Article. *See Lofton*, 358 F.3d at 824–825 (stating "[a]ppellants also point to the policies and practices of numerous adoption agencies that permit homosexual persons to adopt").

170. There have been cases in which one party has argued equitable adoption to allow for visitation rights for his or her partner's natural or adopted child, but these arguments have been rejected, partly because they are not being used in intestacy cases. *See e.g. Titchenal*, 693 A.2d at 688 (rejecting the application of equitable adoption to grant visitation rights to the non-adopting lesbian parent because equitable adoption is a doctrine that "confers a right of inheritance" and should only be used in intestacy cases).

171. This Article does not examine implementing homosexual adoption in Florida. Rather, it argues that equitable adoption should apply in Florida for homosexual parents, even though homosexual adoption is not allowed.

172. *E.g. Sheffield*, 14 So. 2d at 419 (stating "the foster parents partially performed the agreement, but failed in their promise to effectuate the adoption by statutory proceedings"). If, however, the Legislature finally allows for homosexual adoption, equitable adoption in this area should apply just as it does in adoption and equitable adoption by heterosexual individuals.

completed because it is statutorily prohibited.[173] Therefore, equitable adoption may be applicable in such cases.

Florida, as aforementioned, does not allow homosexuals to adopt.[174] The Florida Legislature declares one of the State's overriding interests, and its first consideration, is to provide for the best interest of the child when placing a child in an adoptive environment.[175] Additionally, the Legislature indicates it intends to "protect and promote the well-being of persons being adopted."[176] However, Florida refuses to allow children to be adopted and placed in the homes of homosexual individuals because it rationalizes that it is not within the child's best interests to be raised in this type of an environment.[177] In *Lofton v. Department of Children and Family Services*,[178] the court explained that adoption is not a right but a privilege guided by statute,[179] and it is a public, not a private, act.[180] Because the State is acting *in loco parentis* for these children, it bears the high burden to determine which adoptive family environments will meet the statutory requirements and "serve all aspects of the child's growth and development."[181]

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173. *See* Fla. Stat. § 63.042(3) (refusing to allow homosexuals to adopt).

174. *Id.*

175. *Id.* at § 63.022(2).

176. *Id.* at § 63.022(3).

177. *Lofton*, 358 F.3d at 819–820. This attitude by Florida's legislature has been criticized. *In the Adoption of Child by J.M.G.*, 632 A.2d 550, 554 (N.J. Super. Ch. Div. 1993) [hereinafter *J.M.G.*]. In *J.M.G.*, the court discussed studies, albeit limited, that have proved children raised by gay and lesbian parents do not have problems with gender identity because of the sexual orientation of their parents. *Id.* at 553–554. The court pointed to Florida and New Hampshire as the only two states that statutorily prohibited homosexuals from adopting at the time the case was decided. *Id.* at 554. As if to prove it disagreed with Florida and New Hampshire, the court then concluded there is no statutory reason for precluding a lesbian from adopting a child. *Id.* at 554. However, since then, New Hampshire has changed its laws and now allows homosexual individuals to adopt. Rex W. Huppke, *Despite Some Protests, Gay Adoption Increasing*, L.A. Times 8 (Apr. 9, 2000); *see* N.H. Rev. Stat. Ann. § 170-B:4 (West 2009) (listing those individuals who may adopt, which no longer precludes homosexuals). Florida has yet to make this change. *See* Fla. Stat. § 63.042(3) (prohibiting homosexuals from adopting).

178. 358 F.3d 804 (11th Cir. 2004).

179. *Id.* at 809 (citing *Cox*, 627 So. 2d at 1216).

180. *Id.* at 810.

181. *Id.* at 809–810. It is important to note this information is provided only as background on Florida's rationale for precluding homosexual adoption. The information is not included to persuade the Legislature to implement homosexual adoption in Florida.

Studies indicate that most Americans die intestate.[182] Therefore, the issue of equitable adoption may still arise when a person dies unexpectedly while caring for a child he or she could not statutorily adopt, as in the case of homosexual individuals, but raised as his or her own. Equitable adoption was created to *protect* the child's interests[183] rather than punish the child. In *Hogane v. Ottersbach*,[184] the court explained that when "justice, equity, and good faith require it," the court should grant an equitable adoption "to protect the interest of a child in a case where one has expressly agreed to adopt such child, or by his acts and conduct has placed himself in a position where it would be inequitable to permit it to be asserted that the child was not adopted."[185] Not allowing a child who was taken in and raised by a homosexual individual to inherit under the intestacy statutes as the person's equitably adopted child, simply because homosexual adoption is prohibited, does not serve the best interests of the child.

Other states have adoption statutes similar to Florida's, where the state's intention is to provide for the best interest of the child,[186] yet these other states provide for homosexual adoption while Florida does not.[187] As one state court noted, "[t]he focus is on how the child shall best thrive, not on what the particular family format should look like."[188]

If the Florida court does not find the child who is raised by a homosexual to be equitably adopted, but it would consider the same child to be equitably adopted had the adoptive parent been heterosexual, that child's best interests will not be served, because the child will essentially be disinherited and may become a financial burden on the State. Equitable adoption in cases where

182. Clark et al., *supra* n. 43, at 49; *see supra* n. 89 and accompanying text (stating the percentage of people who die intestate may range between forty percent and eighty percent).

183. *Hogane v. Ottersbach*, 269 S.W.2d 9, 11 (Mo. 1954).

184. 269 S.W.2d 9 (Mo. 1954).

185. *Id.* at 11.

186. *E.g.* N.J. Stat. Ann. § 9:3-37 (West 2002) (stating that the statute should be construed to promote the child's best interests); D.C. Code § 16-309 (2001) (stating the adoption will be in the best interests of the adoptee).

187. *E.g. J.M.G.*, 632 A.2d at 554 (stating "[n]o statute or discernible public policy prevents this court from granting this [homosexual parent] adoption"); *In re M.M.D. & B.H.M.*, 662 A.2d 837, 859 (D.C. App. 1995) [hereinafter *M.M.D.*] (declaring the best interests of the child will be served by allowing homosexual individuals to adopt).

188. *M.M.D.*, 662 A.2d at 859.

the adoptive parent is a homosexual would "provide additional economic security" and will assure "the right to inherit by intestacy."[189]

In *In the Adoption of Child by J.M.G.*,[190] the question before the New Jersey court was whether to allow a lesbian to adopt the child of her partner, the biological mother.[191] The court held the adoption would not affect the child's lifestyle but would provide the child with future security, both financially and emotionally, from the partner.[192] This concept is important in cases like the previous hypotheticals, where the partner died without a will and without any legal parental connection to the child. Because statutory adoption is not allowed, equitable adoption should apply in such cases, which would allow the child to inherit and would provide the child with financial security.

In addition to the lack of future financial security,[193] the child raised by homosexual parents who is not considered equitably adopted may become a financial burden on the State.[194] In *Elisa B. v. Superior Court of El Dorado County*,[195] one lesbian partner tried to escape her duties to the children she helped her partner conceive and raise, but the California Supreme Court would not

189. *J.M.G.*, 632 A.2d at 551–552.

190. 632 A.2d 550 (N.J. Super. Ch. Div. 1993).

191. *Id.* at 551. In *J.M.G.*, the partner and the biological mother were involved in a homosexual relationship for about ten years. *Id.* at 551. They wanted a child, so they artificially inseminated the mother with sperm from an anonymous donor and agreed to share equal responsibility for raising of the resulting child. *Id.* After the child's birth, the partner became the primary caretaker. *Id.* at 551, 554. The fact that the child's parents were lesbians did not affect the child's development. *Id.* Rather, the women provided the child with a loving environment. *Id.* at 554.

192. *Id.* This court criticized other courts which "have allowed the stereotypes and public disapproval . . . (which they feel may exist and may negatively impact . . . the child) to affect their decisions" in these types of cases. *Id.* at 552. It further stated that "community disapproval will not necessarily adversely affect children." *Id.* The court also explained this "adoption can serve as a step . . . towards the respect which strong, loving families of all varieties deserve." *Id.*

193. *Supra* n. 189 and accompanying text.

194. *See Elisa B. v. Super. Ct. of El Dorado Co.*, 117 P.3d 660, 669 (Cal. 2005) (examining the financial burden problem in the context of homosexual adoption by a lesbian partner). The Court compared this case to a paternity case. *Id.* It emphasized the importance of establishing paternity, stating that the certainty of paternity is the first step to a multitude of financial benefits, including as follows: (1) an award of child support; (2) health insurance; (3) social security benefits; (4) survivor's and inheritance rights; and (5) military benefits. *Id.* The Court reiterated that the California legislature "implicitly recognized the value of having two parents, rather than one." *Id.*

195. 117 P.3d 660 (Cal. 2005).

allow it.[196] The Court explained that by allowing her to escape her duties to support the children, their biological mother, who was financially unable to support the family, would have to turn to the county for financial assistance.[197] The Court concluded the partner was the "presumed mother" of her former partner's children "because she received [them] into her home and openly held them out as her natural children."[198] The Court continued, stating the woman took an active role in the children's conception and "voluntarily accepted the rights and obligations of parenthood after the children were born."[199] Thus, the Court held her responsible for the children's support.[200] Similarly, a Florida court should apply equitable adoption to a situation where a homosexual person has raised a child as his or her own, and the child has always believed that person to be his or her parent.[201]

Equitable adoption should be applied in Florida to achieve the most just and equitable result, regardless of the sexual orientation of the parent.[202] Holding a child to be equitably adopted will afford the child the same rights for inheritance from the adoptive parents as if the child had been legally adopted in Florida. If the child is not considered equitably adopted, he or she will essentially be disinherited from the adoptive parent's intestate

196. *Id.* at 668–669. The partners, Elisa and Emily, went to a sperm bank, got sperm from the same donor (so the children would be partially related), and were both artificially inseminated. *Id.* at 663. They further decided that, because Elisa made almost twice as much as Emily, Elisa would be the breadwinner, while Emily the homemaker. *Id.* Elisa gave birth to a boy; Emily gave birth to twins, who were premature and had medical problems. *Id.* They separated about two years after the children were born. *Id.* Elisa then tried to claim she had no duty to support Emily because the twins were not legally hers. *Id.* at 663–664.

197. *Id.* at 669.

198. *Id.* at 670. Elisa gave both her own child and the twins born to Emily the same surname, which was a combination of both partners' surnames. *Id.* at 669. Elisa also "breast-fed all three children, claimed all three children as her dependents on her tax returns, and told a prospective employer that she had triplets." *Id.* In court, she also testified she was the mother of all three children. *Id.*

199. *Id.* at 670.

200. *Id.*

201. If there is no one related to the decedent to collect the intestate share, the estate may escheat to the State. Fla. Stat. § 732.107(1). In that case, the child will essentially be disinherited, whereas the child could have collected the property that escheated.

202. *See Titchendal*, 693 A.2d at 691 (Morse, J., dissenting) (exclaiming "[t]he purpose of the doctrine . . . is to allow a court to find, in retrospect, an intent to adopt by a person who had never formally done so, for the purpose of achieving a just result").

estate; the child will become a burden on the State and on the taxpayers; and the child's best interests will ultimately suffer.

C. Pretermitted Equitably Adopted Children

Equitable adoption should apply to children who were pretermitted by a previously executed will, even though equitable adoption does not normally apply when and if the decedent dies testate.

Once again, a hypothetical situation allows for an easier understanding of the problem presented. Imagine the following: Ron and Tara were married for many years and had twins, Luke and Lena. When Luke and Lena were fifteen years old, Ron died intestate, and his estate passed as per Florida's intestacy laws.[203] After Ron's death, Tara realized she needed to execute a will, and she did so, leaving everything to Luke and Lena. When Luke and Lena went off to college, Tara found herself lonely with the twins gone, so she decided to adopt another child. Tara met a couple with a three-year-old son, Max. Max's parents could no longer afford to care for him. The couple agreed to give up all of their parental rights and allow Tara to adopt Max. Tara began the adoption process to formally adopt Max, but due to a technicality, the adoption was never formally completed. They all believed Max was formally adopted, and Tara always held him out as her own. Ten years later, when Luke and Lena were twenty-eight and Max was thirteen, Tara died unexpectedly from heart failure. Under the will as it was previously executed, the entire estate was set to go only to Luke and Lena. But what about Max?

A pretermitted heir is one who has been omitted from a will.[204] Previously in Florida, a child was only considered pretermitted if that child was *born* after the will was made; adopted children were not included.[205] However, in *In re Estate of*

203. Because there is a surviving spouse and surviving lineal descendants, who are also the lineal descendants of the deceased spouse, the estate would pass as directed under Florida Statute Section 732.102(2). Under this statute, assuming Ron's estate is worth more than $60,000, Tara would receive the first $60,000 of the estate, plus one-half of the remainder of the estate. *See* Fla. Stat. § 732.102(2) (explaining this distribution for an intestate estate). Luke and Lena would then split the remaining half of the estate, each entitled to one-fourth (after the $60,000 deduction). *Id.*

204. *Black's Law Dictionary*, *supra* n. 3, at 742.

205. *In re Est. of Frizzell*, 156 So. 2d 558, 559 (Fla. 2d Dist. App. 1963) (discussing the

Frizzell,[206] the Florida court decided a case of first impression involving a child who was not born after the making of the will, but rather *adopted* after the will's execution.[207] The court looked to the statute concerning an adopted child and his or her status as an heir, which said that an adopted child is considered an heir and a lineal descendant of the child's adoptive parents.[208] Further, the child shall be considered a part of the family as if the child had been born to his or her adoptive parents.[209] To render a proper decision regarding the status of an adopted child who has been pretermitted,[210] the Florida court looked to courts of surrounding states, as well as works written on the subject.[211] The court ultimately held that an adopted child could be pretermitted and should be treated as such.[212]

The Florida Legislature then changed the pretermitted heir statutes to reflect the *Frizzell* court's holding.[213] Florida Statute Section 732.507(1) now dictates that a subsequent adoption shall not revoke a previously executed will, but the pretermitted child will inherit as outlined in Florida Statute Section 732.302,[214] which designates that a pretermitted adopted child should receive

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then-current Florida Statute Section 731.11, which did not include an adopted child).

206. 156 So. 2d 558 (Fla. 2d Dist. App. 1963).

207. *Id.* at 558–559.

208. *Id.* at 559 (citing the 1963 version of Florida Statute Section 731.30).

209. *Id.* (citing the 1963 version of Florida Statute Section 72.22).

210. *Id.* at 560.

211. *E.g.* Thomas E. Atkinson, *Law of Wills* 430 (2d ed., West 1953) (declaring that adoptive children have the same rights as natural-born children, and "the majority view is no doubt influenced by a judicial policy favoring the institution of adoption"); Daniel H. Redfearn, *Wills and Administration of Estates in Florida* vol. 1, 147 (3d ed., Harrison Co. 1957) (explaining that it was not the original intention of the Florida Legislature to give an adopted child the same rights as a pretermitted child, but that all changed and became immaterial when the Legislature, in 1943, changed the statute to "provide[ ] that an adopted child shall be entitled to all the rights and privileges and subject to all the obligations of a child born in lawful wedlock"); Sara L. Johnson, *Adopted Child as Subject to Protection of Statute Regarding Rights of Children Pretermitted by Will, or Statute Preventing Disinheritance of Child*, 43 A.L.R.4th 947, 950–951 (stating that statutes regarding pretermitted children have historically been applied in favor of adopted children, and the children should be included if pretermitted unless the omission was intentional and intended to disinherit the children).

212. *Frizzell*, 156 So. 2d at 566. The court concluded that "the adoption statute and the section of the probate law concerning pretermitted children should be construed together." *Id.*

213. *See* Fla. Stat. § 732.507(1) (indicating an adopted child may be considered a pretermitted heir and is thus treated as an equal with respect to a natural-born heir).

214. *Id.*

a share of the estate equal to what the child would have received had the decedent died intestate.[215] With the disappearance of the traditional family,[216] the question becomes what should happen to a child who was pretermitted, but never formally adopted?

Two Florida cases have discussed applying both the doctrine of equitable adoption and the pretermitted heir statutes; however, the facts in these cases were inadequate to determine Florida's relevant law.[217] In *J.E.W. v. Estate of John Doe*,[218] the child claimed he was the pretermitted child of the decedent, entitled to claim an intestate share of the estate.[219] The child was the illegitimate son of the decedent, who acknowledged he was the child's father, frequently provided the child with financial support throughout his life, and even promised to adopt the child.[220] The decedent executed a will and a codicil[221] shortly before his death, but after acknowledging the child was his son.[222] Neither the will nor the codicil mentioned the child, and the court found the decedent had taken no steps to adopt the child, formally or equitably.[223] Thus, the child was not pretermitted as set forth in Florida Statute Section 732.302.[224]

A few years later, in *In re Estate of Wall*,[225] the decedent, a grandmother, provided for her grandchild[226] in her will, but the

215. Florida Statute Section 732.302 further explains that there are situations where the child would not receive any part of the intestate estate, such as if the child received his or her portion through an advancement, if the child was intentionally omitted, or if the decedent left everything to the other spouse and nothing to any of the children, with the expectation that the other spouse would survive the testator.

216. Antunez, *supra* n. 81.

217. *See infra* nn. 218–230 and accompanying text (discussing these Florida cases in detail).

218. 443 So. 2d 249 (Fla. 1st Dist. App. 1983).

219. *Id*. at 250.

220. *Id*. The father had an affair with a woman while he was married to his former wife, and as a result, the illegitimate child at issue was born. *Id*.

221. A codicil is an addition or amendment to a will. *Black's Law Dictionary*, *supra* n. 3, at 275. If a codicil refers to a previously executed will, it republishes the will and amends it as set forth by the codicil. Fla. Stat. § 732.5105.

222. *J.E.W.*, 443 So. 2d at 250.

223. *Id*. at 250–251 n. 1 (stating there were not enough facts plead to establish a claim of equitable adoption).

224. *Id*. at 251. The court explained that the purpose of Section 732.302 is "to avoid an unintentional or inadvertent disinheritance of a child." *Id*. Here, the father seemed to intentionally disinherit the child rather than unintentionally forget him. *Id*.

225. 502 So. 2d 531 (Fla. 4th Dist. App. 1987).

226. The decedent was also her grandchild's guardian and had custody of him at her

grandchild also attempted to claim the homestead under the doctrine of equitable adoption.[227] The court rejected this argument, stating the doctrine is "inapplicable where the decedent dies testate."[228] The court mentioned there might be instances in which a child may be equitably adopted, and thus, pretermitted;[229] however, that was not the case presented, so the court expressed no opinion on the issue.[230]

A solution to the problem of equitable adoption and pretermission would be for the adoptive parents to promise to include the child in their will.[231] By proving this contract existed between the adoptive parents and the child, the child would have a regular contract action against the parents' estate, and equitable adoption would not be an issue.[232] However, this is not a well-known option and therefore not likely to occur often.

Florida courts have not had the opportunity to fully examine the issue of a pretermitted equitably adopted child.[233] Florida Statute Section 732.302 states that when a parent dies testate but leaves a pretermitted child, that child is entitled to inherit a share of the estate he or she would have received had the parent died intestate. Thus, there is no reason Florida courts should not apply equitable adoption to a child who is also pretermitted. In the event that a Florida court finally has the opportunity to de-

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death. *Id*. at 531.

227. *Id*. Florida's homestead statute, Section 732.401, indicates that the homestead descends as any other intestate property if that property is "not devised as permitted by law and the Florida Constitution." Fla. Stat. § 732.401(1). In conjunction with the Florida Constitution, if the owner of the homestead property is survived by either a spouse, a minor child (or children), or both, the property is not subject to devise. *Id*. at § 732.4015(1).

228. *Wall*, 502 So. 2d at 531.

229. *Id*. at 532. (citing *e.g*. *Thomas v. Malone*, 126 S.W. 522 (1910)). For a more in-depth discussion of *Thomas*, see *infra* notes 236–247 and accompanying text.

230. *Wall*, 502 So. 2d at 532.

231. Clark, *supra* n. 14, at § 21.11, 676.

232. *Id*. The contract to include the child in the will, in order to be enforceable, must meet all the normal contract requirements. *Id*. Upon the adoptive parents' deaths, the child would likely assert himself or herself as a creditor of the adoptive parents' estates in order to make a claim.

233. A formally adopted child is only pretermitted when the decedent executes a will *prior* to formally adopting the child. Fla. Stat. § 732.302. The same is true for an equitably adopted child: the child is only pretermitted if the agreement was made and part performance was done based on the agreement after the execution of the decedent's will. A child taken in by foster parents without the parents' agreement to adopt would not be considered equitably adopted and pretermitted if the parents executed wills that did not include the child, but then later agreed to adopt the child.

termine whether a child has been both equitably adopted and pretermitted, Florida should allow for equitable adoption to find the child is pretermitted, as is explained under Florida Statute Section 732.302, to ensure that which ought to have been done is done in equity.[234]

A number of other states have examined situations in which a child was both equitably adopted and pretermitted.[235] In Missouri, a child who meets the requirements of equitable adoption will be considered a pretermitted heir if negligently left out of the adoptive parent's will.[236] In *Thomas v. Malone*,[237] the child was taken in by her aunt and uncle, but never formally adopted.[238] She believed she was their natural child until she was twelve years old, at which time she learned they were not her biological parents; however, she still believed she had been formally adopted.[239] Her adoptive mother died and left her estate to her husband.[240] Her adoptive father remarried twice, died without any natural children, and left the entire estate to his third wife, but neglected to mention the child.[241] The court explained the child had performed on the contract made between her mother

234. *See Wall*, 502 So. 2d at 531–532 (stating that "[t]he doctrine is usually applied in an intestate estate to give effect to the intent of the parties on the theory that equity regards that as done which ought to have been done"). However, if that Florida court is apprehensive of possible consequences of such a ruling, that court may look to other states' courts to aid in its determination. *See infra* nn. 235–259 and accompanying text (discussing other states' rulings).

235. Missouri is the prime example, with a number of cases on point from the state. However, Wyoming has also dealt with the situation. In *In re Estate of Seader*, the majority held that "equitable adoption should not be applied to testate estates." 76 P.3d 1236, 1245 (Wyo. 2003). The court explained that the purpose of equitable adoption is essentially to fill a gap where a child would otherwise be disinherited. *Id*. But when the decedent dies testate, there is no gap to fill, and equitable adoption should not apply. *Id.*

236. *Thomas*, 126 S.W. at 524.

237. 126 S.W. 522 (Mo. App. 1910).

238. *Id.* at 523. The child was born into a large but poor family. *Id.* The mother, after the child's birth, sensed that she was dying and sought out her brother, who had been married for a few years but had no children of his own. *Id.* They made an agreement that the child's uncle and aunt would adopt the child, and the child's natural father would relinquish his parental rights. *Id.*

239. *Id*. After her aunt and uncle revealed that she was adopted, they assured the child that she was adopted and that "they would always consider and treat her as their own daughter." *Id.*

240. *Id.*

241. *Id*. The father remarried after his first wife's death, and his second wife died childless a few years later. *Id.* The father remarried once again, and he and his third wife did not have children. *Id.*

and her adoptive parents.[242] The court continued, stating "a contract to adopt carries the incidental right of heirship which . . . may be cut off only by the will of the adoptive parent in which the adopted child is mentioned."[243] The court also discussed *Lynn v. Hockaday*,[244] which held that even though the oral contract to adopt did not articulate the child's rights as an heir, the contract as to those rights was enforceable.[245] The *Thomas* court reasoned the contract in this case should likewise be enforced.[246] The court explained that because the child was "forgotten in her adoptive father's will," she was a pretermitted heir entitled to her reward.[247]

However, one must remember that all the elements of equitable adoption must still be met in order to find the child pretermitted.[248] This requirement protects against fraudulent claims. In *Hegger v. Kausler*,[249] a child was taken in by her aunt and uncle, who promised to legally adopt her, yet they always referred to each other as "Aunt," "Uncle," and "Niece."[250] The aunt and niece were very close but eventually had a falling out.[251] The aunt executed a will apparently after the falling out in which she specified

242. *Id*. The court further articulated that the adoptive parents received a benefit from her performance as an adopted child, and, upon receiving this benefit, she became their adopted child in equity. *Id.*

243. *Id*. at 524.

244. 61 S.W. 885 (Mo. 1901).

245. *Thomas*, 126 S.W. at 524 (citing *Lynn*, 61 S.W. at 888–889). In *Lynn*, the child's natural parents died when she was only three or four years old. 61 S.W. at 885. Her grandmother took her in but was older and in poor health. *Id.* The child's soon-to-be adopted parents (who had no children together but the father had a son from a previous marriage) expressed an interest in raising the child, and after several visits and some consideration, they took the child from the grandmother to their home to raise her as their own child. *Id*. The child was held out to the community as the natural child of her adoptive parents, and she did not learn otherwise until she was almost an adult. *Id.* The court ultimately held that the parents equitably adopted the child by performing all the requirements of equitable adoption. *Id*. at 889.

246. *Thomas*, 126 S.W. at 524.

247. *Id.*

248. For a list of the requirements of equitable adoption, see *supra* notes 39–44 and accompanying text.

249. 303 S.W.2d 81 (Mo. 1957).

250. *Id*. at 82–84. Examples of these references include the following: the niece never retained the surname of her aunt and uncle; the niece's school records show her uncle signed documents as her "Uncle"; and the niece sent postcards to her aunt and uncle and referenced them as such. *Id.*

251. *Id*. at 84–85.

the niece was to receive a life estate in her house.[252] However, at some point, the aunt changed her will, and upon her death, the will admitted to probate completely excluded her niece.[253] The niece argued she was equitably adopted and thus pretermitted by the will.[254] The court, however, found there was no evidence that the aunt intended to adopt the niece, nor that the niece considered herself adopted; therefore, the niece could not inherit as the aunt's equitably adopted daughter and sole heir.[255] Likewise, in *Gamache v. Doering*,[256] the court also found the plaintiff was not a pretermitted heir because she was not equitably adopted.[257] Further, in *Hogane v. Ottersbach*,[258] the court held the child could not be a pretermitted heir because there was no oral agreement to adopt, thus destroying any argument for equitable adoption.[259] Florida should follow these cases when the Florida courts are finally presented with a situation like that of *Thomas v. Maloney*,[260] where all the elements of equitable adoption are met and the child is also pretermitted from his or her adoptive parent's will.[261]

IV. CONCLUSION

Situations where children were not formally adopted and consequently are disinherited by those who showed them love and

252. *Id.* at 85, 90. The first will, as mentioned, devised only a life estate in the house to the niece, and "the title in the remainder, together with full title to the bonds," was to pass to the aunt's nephews upon the niece's death. *Id.* at 90.

253. *Id.* at 90. The aunt's final will named her closest kin but omitted the niece, thus proving that the aunt did not consider the niece as close to her as other relatives. *Id.*

254. *Id.* at 82.

255. *Id.* at 90.

256. 189 S.W.2d 999 (Mo. 1945).

257. *Id.* at 1002. In this case, the plaintiff claimed she was "orally adopted" by the decedent when she was twenty-two years old and was also promised that she would be made an heir. *Id.* at 1000. However, the court explained she could not be equitably adopted because the doctrine does not apply to adults. *Id.* at 1001. Rather, the doctrine is meant to protect a child who "had no choice or will with respect to the establishment of so vital a relationship." *Id.*

258. 269 S.W.2d 9 (Mo. 1954).

259. *Id.* at 11–12. The court found that even though the decedent said, "I will raise them as my own," that was not enough to establish equitable adoption. *Id.* at 10–11.

260. 126 S.W. 522 (Mo. App. 1910).

261. *Supra* nn. 235–247 and accompanying text (discussing case law on equitable adoption and pretermitted children).

affection are very real. These circumstances must be contemplated and the law must be bent in order to provide greater equity to those children. To give these children the remedy they deserve, Florida should expand the doctrine of equitable adoption in three ways to alleviate inequities when the elements are not strictly satisfied under the current policy.

First, Florida should lower the evidentiary standard necessary to prove the agreement requirement of equitable adoption from clear and convincing to a preponderance of the evidence if there is no one to testify as to the creation of the agreement.[262] This technique is used in other situations like common-law marriage. To prove a common-law marriage existed, the spouse must normally prove the existence of the marriage by clear and convincing evidence, unless the lower standard of proof applies.[263] Similarly, in the case of an equitably adopted child, that child must prove, by clear and convincing evidence, the existence of the adoption agreement between the natural parents and the adoptive parents. However, if no one is available to testify as to the agreement, the child should only have to prove its existence by a preponderance of the evidence. To guard against fraud, the burden to prove no one is available to testify should first rest with the child claiming equitable adoption, who should file an affidavit asserting that no one is available, and the burden should then shift to the opposing party to rebut that statement.

Second, Florida should expand its equitable adoption principle to apply to homosexual individuals who agree to informally adopt a child but are statutorily prohibited from formally adopting in Florida.[264] Because homosexuals are not allowed to adopt under Florida law, any child taken in by a homosexual individual and made to believe he or she was adopted cannot inherit if that adoptive parent later dies intestate. Because a formal adoption through the State may never be completed, as is required by the adoption and intestacy statutes,[265] a child raised by a homosexual

262. *Supra* section III(A) and accompanying text (discussing lowering the evidentiary standard of the agreement requirement).

263. *Staudenmayer*, 714 A.2d at 1020–1021.

264. *Supra* section III(B) and accompanying text (discussing equitable adoption and homosexual parents).

265. If Florida changes its laws and allows for homosexuals to adopt, then a formal adoption will be possible. But as the law currently stands, it is impossible for a homosex-

individual should be considered equitably adopted if all the elements are satisfied. Failure to consider these children equitably adopted does not serve the best interests of the child.

Finally, Florida should find an equitably adopted child may be a pretermitted heir of his or her adoptive parents, so long as he or she can prove all elements of the equitable adoption.[266] A child who is equitably adopted after the execution of his or her adoptive parents' wills should be considered pretermitted. Other states have applied equitable adoption to these situations, and Florida should follow suit. Allowing a child equitably adopted after the execution of the parents' wills to inherit his or her appropriate portion of the estate will remedy an otherwise inequitable situation to the fullest extent.

Sometimes the path is straight; other times, the path is curved. When the archer bends his bow, he utilizes his skills to counter the effects of a curved path and any other obstacles—the wind, the trees. He shoots with his eye, his mind, and his heart.[267] The outcome is the target; the law is the bow. Equity is the archer, bending the law to hit the target—the right outcome, the fair outcome. The paths diverge. The aim is true.

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ual to adopt.

266. *Supra* section III(C) and accompanying text (advocating that equitable adoption should apply to children who were pretermitted by a previously executed will).

267. *See* Stephen King, *The Dark Tower V: Wolves of the Calla* 155–156 (Donald M. Grant Publisher Inc. 2003) (reciting the lesson for gunslingers in this tale: "I do not aim with my hand; he who aims with his hand has forgotten the face of his father. I aim with my eye. I do not shoot with my hand. . . . He who shoots with his hand has forgotten the face of his father. I shoot with my mind. I do not kill with my gun; he who kills with his gun has forgotten the face of his father. . . . I kill with my heart.").