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deny to any man, either justice or right."³⁹ Any procedure which perpetuates inequities and discriminates because of poverty, has no place in the American system. The imprisonment for nonpayment of a fine ". . . is no more or no less than the imprisonment for being poor, a doctrine which I trust this Nation has long since outgrown."⁴⁰

William F. McQuillen

SOCIAL SECURITY—CHILD BENEFITS ACQUIRED UNDER "ADOPTION BY ESTOPPEL"—CHILDREN NOT LEGALLY ADOPTED ACCORDING TO STATUTE ARE NEVERTHELESS ADOPTED BY ADOPTIVE PARENTS UNDER THE DOCTRINE OF "ADOPTION BY ESTOPPEL" AND ENTITLED TO CHILD BENEFITS UNDER THE SOCIAL SECURITY ACT. *Annie M. Smith v. Secretary of Health, Education and Welfare*, 431 F.2d 1241 (5th Cir. 1970).

The appellants, Annie M. Smith and her husband, William Smith, the wage earner, are domiciled in the State of Texas. Appellants' daughter had three children whom she subsequently abandoned starting with the oldest in 1957, and ending with the youngest in September, 1961. Appellants took each child into their home and supported them. In 1961, the wage earner lost both of his legs. In 1962, the Social Security Administration determined that appellant wage earner was disabled and entitled to disability insurance benefits effective September, 1961, the same month that the youngest child was left with appellants. In 1965, appellants commenced formal proceedings to adopt the children legally, and a year later the final judgment of adoption was granted. In 1967, appellant filed an application for child insurance benefits. The Secretary of Health, Education and Welfare denied the benefits.

The circuit court of appeals agreed with the Secretary that the children had not satisfied the requirement of a legal adoption. *Held—Reversed on other grounds.* Children not legally adopted according to statute are nevertheless adopted by adoptive parents under the doctrine of "adoption by estoppel" and entitled to child benefits under the Social Security Act.

Adoption was unknown to the common law of England.¹ Since Texas adopted the common law of England, this right of adoption in Texas

³⁹ McKECHNIE, *MAGNA CARTA* 395 (2d ed. 1958). As originally stated in Chapter 40 of the *MAGNA CARTA*: "*Nulli Vendemus, nulli Negabimus, aut differemus, rectum aut justiciam.*"

⁴⁰ Goldberg, *Equality and Governmental Action*, 39 N.Y.U.L. REV. 205, 221 (1964).

¹ *Reeves v. Ellis*, 257 S.W.2d 876 (Tex. Civ. App.—Amarillo 1953, writ ref'd n.r.e.); *Sims, Adoption by Estoppel: History and Effect*, 15 BAYLOR L. REV. 162 (1963).

exists only by statute.² Texas courts by way of dicta originally refused to recognize adoption by estoppel on an oral agreement as being contrary to public policy.³ Later the courts seeing the inequity of an adopted child's reliance and belief that he had been adopted, began to develop the doctrine of "adoption by estoppel."⁴ The doctrine was originally applied only when every requirement of the adoption statute was met, except the actual recording of the adoption instrument.⁵ Subsequently the doctrine developed to where a child could be adopted on the sole basis of an oral agreement, and even in the complete absence of a statutory adoption.⁶ Adoption by estoppel is now recognized by statute in Texas.⁷ Under this equitable doctrine, the adoptive parents are estopped to assert that the child has not been legally adopted.⁸ The doctrine applied only when there was an oral or written agreement to adopt.⁹

In the 1951 case of *Cavanaugh v. Davis*, the Supreme Court of Texas first set forth the requirement which a party asserting adoption by estoppel must plead and prove.¹⁰ Judge Barrow, in a later case, reiterated the elements needed for an adoption by estoppel as presented in *Cavanaugh*:¹¹

1. that the adoptive parent execute, acknowledge, and file a statutory instrument of adoption in the office of the County Clerk; or
2. that such party undertook to effect a statutory adoption but failed to do so because of some defect in the instrument or acknowledgment, or because of failure to record it; or
3. that such adoptive parent agreed with the child or with the child's parents or with some other person in loco parentis that such party could adopt the child.¹²

One claiming the benefits of an adoption by estoppel bears the burden of establishing such by "clear, unequivocal, and convincing"

² *Id.* at 878; see TEX. REV. CIV. STAT. ANN. art. 46a, b (1969).

³ *Garcia v. Saenz*, 242 S.W.2d 230, 231 (Tex. Civ. App.—San Antonio 1951, no writ), citing, *Hooks v. Bridgewater*, 111 Tex. 122, 229 S.W. 1114 (1921); *Mulkey v. Allen*, 36 S.W.2d 198 (Tex. Comm'n App. 1931, jdgmt adopted); *Bailey, Adoption "By Estoppel"*, 36 TEX. L. REV. 30 (1957).

⁴ *Cubley v. Barbee*, 123 Tex. 411, 73 S.W.2d 72 (1934); *Sims, Adoption By Estoppel: History and Effect*, 15 BAYLOR L. REV. 162 (1963).

⁵ *Barney v. Hutchinson*, 177 P. 890 (N.M. 1918); cited in *Cubley v. Barbee*, 123 Tex. 411, 428, 73 S.W.2d 72, 81 (1934); *Sims, Adoption by Estoppel: History and Effect*, 15 BAYLOR L. REV. 162 (1963).

⁶ *Jones v. Guy*, 135 Tex. 398, 143 S.W.2d 906 (1940).

⁷ TEX. PROB. CODE ANN. § 33(b) (1956).

⁸ *Price v. Price*, 217 S.W.2d 905, 906 (Tex. Civ. App.—Amarillo 1949, writ ref'd n.r.e.); 1 TEX. JUR. 2d *Adoptions* § 77 (1959).

⁹ *Cavanaugh v. Davis*, 149 Tex. 573, 577, 235 S.W.2d 972, 974 (1951); *Servantez v. Aguirre*, 456 S.W.2d 467, 469 (Tex. Civ. App.—San Antonio 1970, no writ); *House v. House*, 222 S.W.2d 337, 339 (Tex. Civ. App.—Texarkana 1949, no writ).

¹⁰ *Cavanaugh v. Davis*, 149 Tex. 573, 576, 235 S.W.2d 972, 974 (1951).

¹¹ *Servantes v. Aguirre*, 456 S.W.2d 467 (Tex. Civ. App.—San Antonio 1970, no writ).

¹² *Id.* at 469.

evidence.¹³ The Texas Supreme Court has decided that equity cases seemingly call for a higher quality of proof than a preponderance of the evidence.¹⁴

Under the Social Security Act, a child can receive child insurance benefits if the applicant can establish his *status as a child* of an individual entitled to Social Security benefits,¹⁵ and his *dependency* upon the entitled individual at the time the application for child's insurance was filed.¹⁶ A child satisfies his *status as a child* if he is a natural child, a legally adopted child, a stepchild of an entitled individual,¹⁷ or a child as would be determined in the devolution of intestate personal property.¹⁸ The *dependency requirement*¹⁹ is basically satisfied if, at the time the application was filed, the adoptive parent was living with and contributing to the support of the child.²⁰

¹³ Cavanaugh v. Davis, 149 Tex. 573, 583, 235 S.W.2d 972, 978 (1951); accord, Garcia v. Saenz, 242 S.W.2d 230, 232 (Tex. Civ. App.—San Antonio 1951, no writ).

¹⁴ Sanders v. Harder, 148 Tex. 593, 598, 227 S.W.2d 206, 209 (1950), used in Bigleben v. Stevens, 262 S.W.2d 785, 789 (Tex. Civ. App.—San Antonio 1953, writ ref'd n.r.e.).

¹⁵ 42 U.S.C. § 402(d)(1) (1969):

Every child (as defined in section 416(e) of this title) of an individual entitled to old-age or disability insurance benefits or of an individual who dies a fully or currently insured individual, if such child—

(A) has filed application for child's insurance benefits,

(B) at the time such application was filed was unmarried and (i) either had not attained the age of 18 or was a full-time student and had not attained the age of 22, or (ii) is under a disability (as defined in section 423(d) of this title) which began before he attained the age of 18.

¹⁶ 42 U.S.C. § 402(d)(1)(C) (1969):

(C) was dependent upon such individual—

(i) if such individual is living, at the time such application was filed,

(ii) if such individual has died, at the time of such death, or

(iii) if such individual had a period of disability which continued until he became entitled to old-age or disability insurance benefits, or (if he has died) until the month of his death, at the beginning of such period of disability or at the time he became entitled to such benefits,

shall be entitled to a child's insurance benefit for each month, beginning with the first month after August 1950 in which such child becomes so entitled to such insurance benefits and ending with the month preceding whichever of the following first occurs—

¹⁷ 42 U.S.C. § 416(e) (1969):

The term "child" means (1) the child or legally adopted child of an individual, and (2) a stepchild. . . .

¹⁸ 42 U.S.C. § 416(h)(2)(A) (1965):

In determining whether an applicant is the child or parent of a fully or currently insured individual for purposes of this subchapter, the Secretary shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual is domiciled at the time such applicant files application, or, if such insured individual is dead, by the courts of the State in which he was domiciled at the time of his death, or if such insured individual is or was not so domiciled in any State, by the courts of the District of Columbia. Applicants who according to such law would have the same status relative to taking intestate personal property as a child or parent shall be deemed such.

Semmel, *Social Security Benefits for Illegitimate Children*, 19 BUFFALO L. REV. 289, 295 (1970). See 60 A.L.R.2d 1070 (1958).

¹⁹ 42 U.S.C. § 402(d)(1)(C) (1969).

²⁰ 42 U.S.C. § 402(d)(3) (1969).

A child shall be deemed dependent upon his father or adopting father or his mother or adopting mother at the time specified in paragraph (1)(C) of this subsection unless,

The child is entitled to Social Security benefits under the doctrine of equitable adoption if he is equitably adopted *before* the adoptive individual himself becomes entitled to Social Security disability benefits.²¹ All the prerequisites of an adoption by estoppel as determined by state law must be accordingly satisfied under Social Security law. The essential requirements are: there must be sufficient evidence of an adoption agreement either oral or written;²² there must be an agreement²³ or consent²⁴ to adopt; there must be a complete surrendering of the child to the adoptive parents' care;²⁵ and there must be a legal adoption of the child within a reasonable time after the adoptive parents intend to treat the child as their own.²⁶

If a child is adopted *after* an adoptive parent becomes entitled to benefits, the child must be "legally" adopted to obtain benefits.²⁷ The child has to be legally adopted within a twenty-four month adoption period before he can receive child insurance benefits.²⁸ This child status will not be satisfied by adoption by estoppel.²⁹

Federal courts apply the doctrine of adoption by estoppel under the Social Security Act only in states that recognize the doctrine, but even in these states its application has been cautious.³⁰ In states not recognizing adoption by estoppel, a child is denied benefits under the doctrine, but even some of these states allow benefits to a child on different grounds.³¹ In Pennsylvania a child was entitled to benefits where the adoptive parents had entered into a contract to adopt.³² In another jurisdiction the Secretary of Health, Education and Welfare conceded that the concept of equitable adoption would be warranted by the facts and found adoption by estoppel even though there were no state cases

at such time, such individual was not living with or contributing to the support of such child and—

(A) such child is neither the legitimate nor adopted child of such individual, or

(B) such child has been adopted by some other individual. For purposes of this paragraph, a child is deemed to be a child of a fully or currently insured individual pursuant to section 416(h)(2)(B) or section 416(h)(3) of this title shall be deemed to be the legitimate child of such individual.

²¹ *Annie M. Smith v. Secretary of Health, Education and Welfare*, 431 F.2d 1241 (5th Cir. 1970).

²² *Minefield v. Railroad Retirement Board*, 217 F.2d 786 (5th Cir. 1954).

²³ *Id.*; see also *Miller v. Ribicoff*, 209 F. Supp. 460 (E.D. Penn. 1962).

²⁴ *Hays v. Secretary of Health, Education and Welfare*, 413 F.2d 997 (5th Cir. 1969).

²⁵ *Kilby v. Folson*, 238 F.2d 699 (3d Cir. 1956) cited in *Spiegel v. Flemming*, 181 F. Supp. 185 (N.D., Ohio 1960).

²⁶ *Davis v. Celebrezze*, 239 F. Supp. 608, 612 (S.D. W.Va. 1965).

²⁷ *Craig v. Finch*, 425 F.2d 1005 (5th Cir. 1970).

²⁸ 42 U.S.C. § 402(d)(8)(D), (d)(9) (1969). See also *Craig v. Finch*, 425 F.2d 1005 (5th Cir. 1970).

²⁹ *Craig v. Finch*, 425 F.2d 1005 (5th Cir. 1970).

³⁰ *Minefield v. Railroad Retirement Board*, 217 F.2d 786 (5th Cir. 1954).

³¹ *Kilby v. Folson*, 238 F.2d 699 (3d Cir. 1956), 60 A.L.R.2d 1065 (1965). See also *Davis v. Celebrezze*, 239 F. Supp. 608 (S.D. W.Va. 1965).

³² *Kilby v. Folson*, 238 F.2d 699 (3d Cir. 1956), 60 A.L.R.2d 1065 (1956).

on the doctrine.³³ Even if a state does not recognize adoption by estoppel under its own law, if the status was acquired in another state where the doctrine was applicable, the federal court will recognize this prior status.³⁴

In the instant case the court of appeals agreed with the Secretary of Health, Education and Welfare that the children had not satisfied the requirement of a legal adoption necessary to qualify for benefits under the Social Security Act. Under 42 U.S.C. 402(d)(8)(D) if a child is adopted *after* the disabled individual becomes entitled to benefits, the child, to be eligible for benefits, must be legally adopted by such individual before the end of a twenty-four month period. This time begins with the month following the month in which such individual becomes entitled to disability insurance benefits. The court cited *Craig v. Finch*,³⁵ which considered 42 U.S.C. 402(d)(9) a provision of the Act similar to 42 U.S.C. 402(d)(8)(D), of the instant case to hold that only a legal adoption would satisfy the child status requirement. Thus, since the appellant wage earner in the present case became entitled to disability benefits in September, 1961, and the children were not legally adopted until April, 1966, the twenty-four month period allowed by the statute had lapsed, and appellants were properly denied benefits under this section.

The court, however, disagreed with the Secretary's second ground for denying application finding that the facts did establish an equitable adoption under Texas law. There was clear, unequivocal, and convincing evidence of a contract to adopt prior to September 1961, the effective date of the wage earner's entitlement to disability. The court found the children to be entitled to benefits under 42 U.S.C. 416(h)(2)(A).

The Secretary relied on several cases for his denial of benefits. In *Minefield*, the denial was because the claimed adoptive parent was deceased.³⁶ In *Hays*,³⁷ there was evidence that the deceased adoptive parents had refused to consent to adoption.

The court agreed that *Cavanaugh v. Davis*³⁸ was the most recent Texas Supreme Court authority on adoption by estoppel. In *Cavanaugh*, the Texas Supreme Court found an insufficiency of evidence to support

³³ *Davis v. Celebrezze*, 239 F.Supp. 608, 610 (S.D. W.Va. 1965).

³⁴ *Pyle v. Fischer*, 128 S.W.2d 726 (Ky. Civ. App. 1939), cited in *Rader v. Celebrezze*, 253 F.Supp. 325 (E.D. Ky. 1966). RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 143 (1934) provides:

"The status of adoption, created by the law of a state having jurisdiction to create it, will be given the same effect in another state as is given by the latter state to the status of adoption when created by its own law."

³⁵ 425 F.2d 1005 (5th Cir. 1970).

³⁶ *Annie M. Smith v. Secretary of Health, Education and Welfare*, 431 F.2d 1241 (5th Cir. 1970); *Cavanaugh v. Davis*, 149 Tex. 573, 235 S.W.2d 972 (1951).

³⁷ 413 F.2d 997 (5th Cir. 1969).

³⁸ 149 Tex. 573, 235 S.W.2d 972 (1951).