Washington University Law Review

Volume 1953 | Issue 1

January 1953

Domestic Relations—No Penal Liability of Father for Non-Support of Illegitimate Child

Follow this and additional works at: http://openscholarship.wustl.edu/law_lawreview

Part of the Family Law Commons

Recommended Citation

Domestic Relations—No Penal Liability of Father for Non-Support of Illegitimate Child, 1953 Wash. U. L. Q. 94 (1953).
Available at: http://openscholarship.wustl.edu/law_lawreview/vol1953/iss1/9

This Case Comment is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Law Review by an authorized administrator of Washington University Open Scholarship. For more information, please contact digital@wumail.wustl.edu.

posite mind."[16] Pollock, as quoted by Mechem, states that the principal should be liable either in an action for deceit or, as he says, in a somewhat similar action on the case.[17] The *Restatement of Agency*[18] would also impose liability on the principal, but it is not made clear whether the liability should be in deceit or in negligence.

It is submitted that a jurisdiction strictly adhering to the requirement of "scienter" as defined by *Derry v. Peek* would arrive at the same conclusion as the English Court of Appeal on the facts of the principal case. On the other hand, in the American jurisdictions which have rejected *Derry v. Peek* and which find fraud on the basis of negligence or warranty, it is very likely that the principal would have been held liable in an action of deceit or, in a few jurisdictions, in an action for negligence.[19]

DOMESTIC RELATIONS—NO PENAL LIABILITY OF FATHER FOR NON-SUPPORT OF ILLEGITIMATE CHILD

Defendant was charged with being the father of prosecutrix's illegitimate child. Evidence as to the time of the alleged illicit relations was conflicting, and defendant disclaimed paternity. The state failed to establish that defendant ever had had legal care or custody of the child. In the trial court defendant was convicted of non-support of said illegitimate child under section 559.350 of the Missouri Revised Statutes of 1949.[1] On appeal[2]

---

16. *Ibid.*, citing Mayer v. Dean, 115 N.Y. 556, 22 N.E. 261 (1889).
17. 2 MECHEM, AGENCY § 1996 (2d ed. 1914).
18. RESTATEMENT, AGENCY § 256(1) (1933):

A principal who authorizes an agent to conduct a transaction for him, intending that the agent shall make representations to another in the course of it which the principal knows to be untrue, is liable for such misrepresentations as if he himself had made them intentionally; if, although he does not intend that the agent shall make misrepresentations, he should know that the agent will do so, the principal is liable as if he himself had made them negligently.

19. See text supported by note 12 *supra.*

1. MO. REV. STAT. § 559.350 (1949) provides as follows:

If any man or woman shall without good cause, fail, neglect, or refuse to provide adequate food, clothing, lodging, medical or surgical attention for his or her child born in or out of wedlock, under the age of sixteen years, or if any other person having the legal care or custody of such minor child, shall without good cause, fail, refuse, or neglect to provide adequate food, clothing, medical or surgical attention for such child . . . he or she shall, upon conviction be punished by imprisonment in the county jail for not more than one year, or by fine not exceeding one thousand dollars or by both such fine and imprisonment.

2. State v. White, 243 S.W.2d 818 (Mo. App. 1951).

Washington University Open Scholarship

the judgment was reversed, defendant discharged, and the cause transferred to the Missouri Supreme Court. Held: decision of intermediate appellate court affirmed. Section 559.350 does not subject defendant to penal liability for non-support of his illegitimate child unless defendant has undertaken legal care and custody of the child.[3]

The action of the court is an example of the operation of the generally accepted common law rule that, in absence of a contract[4] to the contrary or a statute specifically concerning the factual situation in question, the putative father of an illegitimate child is under no obligation to contribute to its support and maintenance.[5] To mitigate the harsh effect of this rule, a majority of the states have passed legislation to compel the putative father, after he is adjudged the father, to provide some support for his illegitimate offspring.[6] These statutes

3. State v. White, 248 S.W.2d 841 (Mo. 1952); *accord*, State v. Barcikowski, 143 S.W.2d 341 (Mo. 1940). *Contra:* State v. Williams, 224 S.W.2d 844 (Mo. 1949) (specifically overruled in the comment case).

4. A putative father may legally contract to support his illegitimate child. Doty v. Doty, 118 Ky. 204, 80 S.W. 803 (1904); Thayer v. Thayer, 189 N.C. 502, 127 S.E. 553 (1925). In a jurisdiction that has a statutory requirement that the father support his illegitimate child, the mother's forbearance in availing herself of this remedy is sufficient consideration. Thayer v. Thayer, *supra.* For collection of cases prior to 1925, see Note, 39 A.L.R. 434, 441 (1925). But where there is no statute and it would be necessary to base consideration upon moral obligation, the majority of the courts would probably not enforce such a promise. Davis v. Herrington, 53 Ark. 5, 13 S.W. 215 (1890); Mercer v. Mercer, 87 Ky. 30, 7 S.W. 401 (1899); Sponable v. Owen, 92 Mo.App. 174 (1901). See, however, Note 39 A.L.R. 434, 440 (1925) for a collection of a few earlier cases containing dicta contrary to the above cases.

5. Albanese v. Richter, 67 F. Supp. 771 (S.D.N.J. 1946); Law v. State, 238 Ala. 428, 191 So. 803 (1939); Myers v. Harrington, 70 Cal. App. 680, 234 Pac. 412 (1925); Washington v. Martin, 75 Ga. App. 466, 43 S.E.2d 590 (1947); Commonwealth v. Dornes, 239 Mass. 592, 132 N.E. 363 (1921); State v. Lindskog, 175 Minn. 533, 221 N.W. 911 (1928); State *ex rel.* Canfield v. Porterfield, 222 Mo. App. 553, 292 S.W. 85 (1927); Carlson v. Bartels, 143 Neb. 680, 10 N.W.2d 671 (1943); Wynder v. Daniels, 72 N.Y.S.2d 314 (N.Y. City Ct. 1947); Allen v. Hunnicutt, 230 N.C. 49, 52 S.E.2d 18 (1949); State v. Zimmerman, 67 Ohio App. 272, 36 N.E.2d 808 (1941); State v. Boston, 69 Okla. Crim. 307, 102 P.2d 889 (1940); Kordoski v. Belanger, 52 R.I. 268, 160 Atl. 205 (1932); Brown v. Brown, 183 Va. 353, 32 S.E.2d 79 (1944). For collection of cases in accord with the above-cited decisions, see Note, 30 A.L.R. 1069 (1924).

6. ALA. CODE ANN. tit. 6, § 1 *et seq.* (1940); ARIZ. CODE ANN. § 27-401 *et seq.* (1939); ARK. STAT. ANN. § 34-701 *et seq.* (1947); CAL. CIV. CODE § 196a (1949); COLO. STAT. ANN. c. 20, § 1 *et seq.* (1935); CONN. GEN. STAT. § 8178 *et seq.* (1949); CONN. GEN. STAT. § 1375 b (Supp. 1951); DEL. REV. CODE c.88, § 3558 *et seq.* (1935); FLA. STAT. § 742.011 *et seq.* (1951); GA. CODE § 74.301 *et seq.* (1933); ILL. REV. STAT. c. 17, § 1 *et seq.* (1951); IND. ANN. STAT. § 3-623 *et seq.* (Burns 1946); IOWA CODE c.675, § 675.1 *et seq.* (1950); KAN. GEN. STAT. § 62-2301 *et seq.* (1949); KY. REV. STAT. § 406.010

http://openscholarship.wustl.edu/law_lawreview/vol1953/iss1/9

remain the exclusive basis for recovery[7] and are strictly construed to deny recovery unles the statute specifically refers to illegitimate children.[8] Although in 1947 a paternity statute based on the Uniform Illegitimate Law[9] was introduced in the Missouri House of Representatives,[10] it has never been enacted into law, and consequently Missouri does not at present have a so-called "bastardy statute."

---

et seq. (1948); LA. CIV. CODE ANN. art. 202 *et seq.* (West 1952); ME. REV. STAT. c.153, § 23 *et seq.* (1944); MD. ANN. CODE GEN. LAWS art. 12, § 1 *et seq.* (1939); MD. ANN. CODE GEN. LAWS art. 12, § 15 and § 17 (Cum. Supp. 1947); MASS. GEN. LAWS c. 273, § 11 *et seq.* (1932); MICH. COMP. LAWS § 722.601 *et seq.* (1948); MINN. STAT. § 257.18 *et seq.* (1949); MISS. CODE ANN. § 383 *et seq.* (1942); MONT. REV. CODES ANN. § 94-9901 *et seq.* (1947); NEB. REV. STAT. § 13-101 *et seq.* (1943); NEB. REV. STAT. § 13-113 (Supp. 1951); NEV. COMP. LAWS § 3405 *et seq.* (1929); NEV. COMP. LAWS § 3410 (Supp. 1941); N. H. REV. LAWS c.128, § 1 *et seq.* (1942); N. J. STAT. ANN. § 9:16-1 *et seq.* (1939); N.M. STAT. ANN. § 25-401 *et seq.* (1941); N.Y. DOM. REL. LAW § 119 *et seq.* (1941); N.C. GEN. STAT. § 49-1 *et seq.* (1943); N.C. GEN. STAT. §§ 49-2 and 49-4 (Cum Supp. 1951); N.D. REV. CODE § 32-3601 *et seq.* (1943); OHIO CODE ANN. § 8006-1 *et seq.* (Supp. 1952); OKLA. STAT. ANN. tit. 10, § 71 *et seq.* (1941); OKLA. STAT. ANN. tit. 10, § 78 (Cum. Supp. 1951); ORE. COMP. LAWS ANN. § 28-901 *et seq.* (1940); PA. STAT. ANN. tit. 18, § 4732 (1945); R.I. GEN. LAWS c. 424, § 1 *et seq.* (1938); S.C. CODE § 1726 *et seq.* (1942); S.C. CODE §§ 1726 and 1729 (Supp. 1948); S.D. CODE § 37.2101 *et seq.* (1939); TENN. CODE ANN. § 11936 *et seq.* (Williams 1934); UTAH CODE ANN. § 14-2-1 *et seq.* (1943); UTAH CODE ANN. § 14-2-7 (Cum. Supp. 1951); VT. REV. STAT. § 3265 *et seq.* (1947); WASH. REV. STAT. ANN. § 1970 *et seq.* (1931); W.VA. CODE ANN. 4770 *et seq.* (1949); WIS. STAT. § 166-01 *et seq.* (1951); WYO. COMP. STAT. ANN. § 58-401 *et seq.* (1945).

7. Albanese v. Richter, 67 F. Supp. 771 (S.D.N.J. 1946); Law v. State, 238 Ala. 428, 191 So. 803 (1939); Washington v. Martin, 75 Ga. App. 466, 43 S.E.2d 590 (1947); State v. Lindskog, 175 Minn. 533, 221 N.W. 911 (1928); Wynder v. Daniels, 72 N.Y.S.2d 314 (N.Y. City Ct. 1947); State v. Boston, 69 Okla. Crim. 307, 102 P.2d 889 (1940); Kordoski v. Belanger, 52 R.I. 268, 160 Atl. 205 (1932); Brown v. Brown, 183 Va. 353, 32 S.E.2d 79 (1944). For collection of cases prior to 1923, see Note, 30 A.L.R. 1069, 1071 (1924).

8. Beaver v. State, 96 Tex. Cr. R. 179, 256 S.W. 929 (1923). For collection of cases prior to 1923, see Note, 30 A.L.R. 1075 (1924).

9. Eight states now have various versions of the Uniform Illegitimate Act, which imposes the duty to support illegitimate children on both parents, allows the mother or some third person to maintain civil action to force the putative father to contribute to the support or to recover for past support, allows action against the father's estate in some situations, and provides for effective means of enforcement. IND. ANN. STAT. § 3-623 *et seq.* (Burns 1946); IOWA CODE c.675, § 675.1 *et seq.* (1950); NEV. COMP. LAWS § 3405 *et seq.* (1929); N.M. STAT. ANN. § 25-401 *et seq.* (1941); N.Y. DOM. REL. LAW § 119 *et seq.* (1941); N.D. REV. CODE § 32-3601 *et seq.* (1943); S.D. CODE § 37.2101 *et seq.* (1939); WYO. COMP. STAT. ANN. § 58-401 *et seq.* (1945).

10. H.R. 119, 64th Gen. Ass., 1st Sess. 210, 241, 254, 339, 486, 518, 581 (1947). This law would have imposed the duty of support of an illegitimate child upon who had been adjudged the father in a procedure to be handled by the juvenile court.

Washington University Open Scholarship

The purpose of these filiation statutes is to assure adequate support and maintenance for the child and to protect society so that the child does not become a public charge.[11] Courts have generally considered such statutes to be police regulations,[12] and, though the action is usually instituted by the mother or by public authorities in the name of the state,[13] the majority of the courts construe the suit as civil in nature[14] rather than criminal.[15]

Many of the statutes prescribe a prison sentence for failure to comply with the judgment imposing the duty of support, but provision is often made for release from prison after taking the pauper's oath.[16] In addition, in those jurisdictions that consider these proceedings civil in nature, the imprisonment provision has been the source of a constitutional proglem under the usual prohibition against imprisonment for debt. Such imprisonment, however, has generally been held not to be imprisonment for debt within the meaning of this constitutional prohibition.[17] Two main reasons have been advanced in support of this view. One is that such an obligation to support is not based upon a contract and that only contract obligations were intended to be encompassed by this constitutional provision.[18] The other reason is that the state has authority to impose the duty of support upon a parent, and the manner of enforcing this obligation is for the legislature to decide.[19]

---

11. Coan v. State, 224 Ala. 584, 141 So. 263 (1932); Land v. State, 84 Ark. 199, 105 S.W. 90 (1907); Flores v. State, 72 Fla. 302, 73 So. 234 (1916); Emmons v. Commonwealth, 197 Ky. 674, 247 S.W. 956 (1923).
12. See note 11 *supra*.
13. State v. Sax, 231 Minn. 1, 42 N.W.2d 680 (1950). For a collection of cases supporting this proposition see 7 AM. JUR., BASTARDS, § 82.
14. Commonwealth *ex rel.* Powell v. Ross, 277 Ky. 212, 126 S.W.2d 150 (1939); State v. Sax, 231 Minn. 1, 42 N.W.2d 680 (1950); State v. Tetreault, 97 N.H. 260, 85 A.2d 386 (1952); State v. Taylor, 39 Wash. 2d 751, 238 P.2d 1189 (1951). For collection of cases prior to 1936, see 7 AM. JUR., BASTARDS, § 81, n.15.
15. State v. Sax, 231 Minn. 1, 4 n.3, 42 N.W.2d 680, 682 n.2 (1950); Sheay v. State, 74 Md. 52 (1891); Commonwealth v. Kekelburg, 235 Mass. 383, 126 N.E. 790 (1920); Brewer v. State, 38 S.C. 263, 16 S.E. 1001 (1893).
16. Commonwealth *ex rel.* Powell v. Ross, 227 Ky. 212, 126 S.W.2d 150 (1939); State *ex rel.* Cottrill v. Jarvis, 121 W.Va. 496, 5 S.E.2d 115 (1939).
17. State v. Hollinger, 69 N.D. 363, 287 N.W. 225 (1939); Acker v. Adamson, 67 S.D. 341, 293 N.W. 83 (1940). For a collection of cases prior to 1939, see Note, 118 A.L.R. 1109 (1939). *Contra:* State *ex rel.* Bissel v. Devore, 225 Iowa 815, 281 N.W. 740 (1938); *see* Harrington v. Harrington, 233 Mo. App. 390, 394, 121 S.W.2d 291, 292 (1938).
18. Acker v. Adamson, 67 S.D. 341, 293 N.W. 83 (1940).
19. State v. Hollinger, 69 N.D. 363, 287 N.W. 225 (1939).

http://openscholarship.wustl.edu/law_lawreview/vol1953/iss1/9

Determination of the amount of support awarded is generally left to the discretion of the court to be predicated upon the defendant's wealth and earning capacity, his health, and various other considerations.[20] In some states, however, the statute prescribes the maximum amount that a person may be compelled to pay.[21] In either situation the amounts of the awards are generally on a low level.[22]

The law in the United States concerning illegitimacy is not uniform because the various courts have found it necessary to supplement the particular statute with common law doctrine in considering issues not covered by the statute. It is clear, nevertheless, that the law concerning the parent's duty to support an illegitimate child has made great progress from the early English view which recognized no connection between an illegitimate child and its parents and which imposed no duty of support on either parent.[23] In most American jurisdictions the mother now has a non-statutory duty to provide support for the child;[24] some courts declare that this duty is closely associated with the right to custody[25] and other courts expressly repudiate that doctrine.[26] Only one state, however, has held that the father owes a non-statutory duty to support his illegitimate child,[27] although legislation in several states has imposed broad duties of support,[28] and one state has gone so far as to consider every child as the legitimate issue of its natural parents.[29]

---

20. DeSylva v. Balentine, 96 Cal. 2d 503, 518, 215 P.2d 780, 790 (1950). For collection of cases prior to 1931, see Note, 74 A.L.R. 764, 765 (1931).

21. PLOSCOWE, SEX AND THE LAW 127 (1st ed. 1951).

22. The New York average award for support is about four or five dollars a week, whereas the Welfare Department pays twelve dollars a week to aid dependent children in foster homes. *Id.* at 128.

23. Doughty v. Engler, 112 Kan. 583, 211 Pac. 619 (1923); State v. Tieman, 32 Wash. 294, 73 Pac. 375 (1903).

24. Davis v. Herrington, 53 Ark. 5, 13 S.W. 215 (1890); State *ex rel.* Canfield v. Porterfield, 222 Mo. App. 553, 292 S.W. 85 (1927).

25. Benge v. Hiatt, 82 Ky. 666 (1885); Ramsay v. Thompson, 71 Md. 315, 18 Atl. 592, (1889); Ill. Cent. R.R. v. Sanders, 104 Miss. 257, 61 So. 309 (1913); Todd v. Weber, 95 N.Y. 181 (1884).

26. Doughty v. Engler, 112 Kan. 583, 211 Pac. 619 (1923); *cf.* Barrett v. Barrett, 44 Ariz. 509, 39 P.2d 621 (1934).

27. Doughty v. Engler, 112 Kan. 583, 211 Pac. 619 (1923). The court there said that the common law rule was no longer suited to the needs of the people. *Accord,* Myers v. Anderson, 145 Kan. 775, 67 P.2d 542 (1937).

28. CAL. CIV. CODE § 196a (1941); N.J. REV. STAT. ANN. tit. 9, § 16-1 *et seq.;* NEB. REV. STAT. § 13-101 *et seq.* (1943).

29. ARIZ. CODE. ANN. § 27-401 (1939).

Washington University Open Scholarship

The question of support for the illegitimate child remains a pressing problem.[30] Though many jurisdictions have not yet accepted the practically uncontested medical accuracy of the blood test,[31] this test has greatly decreased the possibitity of an incorrect finding of parentage. Thus, states such as Missouri would be well-advised to require the same assurance of support for illegitimate children as is provided for legitimate offspring.[32] Therefore it is to be hoped that more states will follow Kansas[33] and Arizona[34] in taking progressive steps to place the burden on the proper persons, rather than on the taxpayer or the illegitimate child himself.

PLEADING—DEFAULT JUDGMENT—AMENDED PETITION AS ASSERTING NEW OR ADDITIONAL "CLAIM FOR RELIEF"

Plaintiff brought an action against two defendants to recover damages for personal injuries sustained in a fall on a metal freight door embedded in the sidewalk in front of defendants' premises. A third defendant was later joined by an amended petition, and a default judgment for $3,000 was entered against all three defendants on the amended petition, although the amended petition (with summons) had only been served on the last defendant joined. Defendants' motion to set aside the default judgment was denied, and on appeal directly to the Missouri Supreme Court, the cause was transferred to the St. Louis Court of Appeals.[1] Held: affirmed. The new summons

30. In 1946 the United States Public Health Service reported 95,395 illegitimate births in thirty-four states. PLOSCOWE, *op. cit. supra* note 21, at 101.

31. That the test is accepted by medical authorities, see PLOSCOWE, *op. cit. supra* note 21, at 124. For articles discussing failure of the courts to accept the tests, see Britt, *Blood-Grouping Tests and More "Cultural Lag,"* 22 MINN. L. REV. 836 (1938); Schatkin, *Paternity Blood Grouping Tests: Recent Setbacks*, 32 J. CRIM. L. 458 (1941).

32. Kelly v. Kelly, 329 Mo. 992, 47 S.W.2d 762 (1932); Viertel v. Viertel, 212 Mo. 562, 111 S.W. 579 (1908); Winer v. Schucart, 202 Mo.App. 176, 215 S.W. 905 (1919); Bennett v. Robinson, 180 Mo.App. 56, 165 S.W. 856 (1914); Lukowski v. Lukowski, 108 Mo.App. 204, 83 S.W. 274 (1904); *cf.* Thomas v. Thomas, 238 S.W.2d 454 (Mo. 1951) (father relieved of the duty of support because the nineteen year old son was earning more than the father).

33. See note 27 *supra.*

34. See note 29 *supra.*

1. Miltenberger v. Center West Enterprise, Inc., 245 S.W.2d 855 (Mo. 1952). The court held that here they had no original, appellate jurisdiction.

http://openscholarship.wustl.edu/law_lawreview/vol1953/iss1/9