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Social Implications of Laws Pertaining to Paternity Proceedings in the Southern States

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SOCIAL IMPLICATIONS OF LAWS PERTAINING TO PATERNITY PROCEEDINGS IN THE SOUTHERN STATES

by

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CHAPTER I

INTRODUCTION

This study was undertaken with three particular objectives in mind. The first was to analyse the illegitimacy statutes of a group of states in a particular geographic area to determine the degree of punitiveness or protectiveness of the paternity proceedings. The second was to determine the effectiveness of these laws in terms of the needs of the three parties to the action, the unmarried mother, the illegitimate child, and the putative father. The third was to determine what changes might be considered which would be in keeping with the current needs and the welfare of the parties to every paternity proceeding and still be consistent with justice and proper legal process.

While the early writings of Sophonsiba P. Breckinridge[1] and Grace Abbott[2] contain documents and accounts of early paternity proceedings, no social analysis of the statutes has been found by this writer. Social Work publications are replete with papers on illegitimacy, such as are found in Social Casework, yet no examination of the statutes in light of social work thinking has been done. Evidence that such a study properly falls within the interests of the social work field is seen by the recorded efforts of the

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1 Sophonsiba P. Breckinridge, The Family and the State, Chicago, 1934.

2 Grace Abbott, The Child and the State, Chicago, 1938, II, 493-608.

United States Children's Bureau after the 1919 meetings which set minimum standards for the protection of illegitimate children. As a result of the Regional Child Welfare Conferences held the following year, the National Commissioners on Uniform State Laws were asked to formulate a law which could be presented to all of the states for their consideration.[3] The Uniform Illegitimacy Act, finally formulated in 1922, was substantially adopted by seven states and acted as a basis for subsequent revisions in the existing statutes.[4]

One of the practical considerations in planning this study was the lack of previous studies. The particular geographic area was chosen to point sectional similarities and differences. The peculiarities of a given geographic area probably would be of greater significance than a random selection of states for study. It has also been noted that statistic-wise, the southern and gulf states have a higher incidence of illegitimacy than the average.[5] While these statistics are not necessarily representative, they indicate that the matter of provision for illegitimate children is or should be a consideration in the states covered in this study. Ultimately, the area chosen was determined by reason of this study being a part of a total study of paternity proceedings in all of the United States.

In formulating the study it was found that there were such variations in the statutes of the individual states that it was necessary to consider the

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3 U. S. Social Security Board, Children's Bureau, Children of Illegitimate Birth Whose Mothers Have Kept Their Custody, Washington,No.190,1928, 3.

4 Chester G. Vernier, American Family Laws, California,1936, IV,260.

5 Abbott, Child and State, 496.

laws in the light of the three parties to the paternity proceedings, the child, the mother, and the father. The sections arbitrarily assigned to each party for clarity were so interrelated from the point of social values, that the division was difficult.

The states chosen were Mississippi, Louisiana, Tennessee, Alabama, Texas, Arkansas, Florida, and Kentucky. Substitute legislation, such as the support and responsibility statutes in Texas and Louisiana, complicated the gathering of the material. The statutes of some of the other states were examined and cited as a means of pointing out omissions in some of the laws of the states covered in this study.

This study is essentially a social analysis to determine the extent to which these eight statutes fulfill the intent of all law, namely, the promotion and protection of the welfare of the individual. The analysis was made from the point of current social work thinking rather than legal adequacy. A very fine legal comparison of the statutes including tabular summaries has already been made.[6] Such a legal study has verified this writer's assumption that the problem situation toward which paternity proceedings are directed is of considerable magnitude and essentially of a social nature. It is said that while the courts have tried to allow many rights to the illegitimate child, these must be "consistent with the preservation of the legitimate family as a superior institution."[7]

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6 Vernier, Family Laws, IV.

7 Sidney B. Schatkin, Disputed Paternity Proceedings, New York, 1917, 41.

The method employed in gathering the information was close examination of the statutes. Background information was gleaned from books and pamplets already discussed. Beyond the use of verbatim transfers from the laws, the judicial decisions of the courts in the covered states were also considered to reduce the possibility of subjectivity. These judicial decisions appeared to reflect some of the social factors considered in past proceedings. Conferences of the group and correspondence with the states also contributed to the study.

In this study, terms varied as they referred to the parties involved in the proceedings. The mother of the child was referred to as "the unwed mother", "the complainant", "the prosecutrix", and "the unmarried mother." The child was referred to as "the bastard", "the illegitimate child", "the child born out-of-wedlock", and "the natural child." The father was called "the alleged father", "the plaintiff," and "the putative father." The terms, as they applied to each of the parties, were used synonmously.

CHAPTER II

THE LAWS AS THEY RELATE TO THE MOTHER

Several aspects of the paternity proceedings as they relate to the mother will be discussed here. These points include the complaint procedure, the admissibility of the mother's verbal and written statements as evidence, the support provisions, and custody of the child.

In all of the six states with paternity proceedings, the mother and others may initiate the action by a complaint. This complaint may be an oral oath or a written affidavit, dependent on the particular statute. Either type is acceptable under the provisions of the Uniform Act. The complaints vary from the simple oral oath acceptable in Tennessee to the formal written affidavit stipulated for use in Florida. In the latter instance, the form is well-defined:

> The proceedings shall be by verified complaint filed in the circuit court of the county in which the mother resides or of the county in which the alleged father resides. The complaint shall aver sufficent facts charging the paternity of the child. Process directed to the defendant shall issue forthwith requiring the defendant to file his written defenses in the manner as suits in chancery.[1]

The extent of the complaint, oral or written, is in relation to the authority vested in the person or court receiving the complaint. For example, in the states of Mississippi, Alabama, and Tennessee, the complaint is received by the county judge or court as compared with Florida where the circuit court

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1 Laws of Florida 1951, Chapter 26949, Section 1.

has jurisdiction.

The statutes whose purpose is indemnification of the county, permit some county official to bring the action, if there is a likelihood that the child will become a public charge. This, as well as the matter of preliminary hearings, will be discussed in some detail in a later chapter.

Three of the states, Mississippi, Alabama, and Tennessee, designate the complainant as any single woman, while Kentucky and Florida refer to her as any unmarried woman. The judicial decisions of all of the states show that the widow is included in these classifications.

In the matter of evidence, the statements and testimony of the woman usually do not require corroboration and she need only "establish her case by a preponderance of evidence."[2] Again, the intent of the law, whether to indemnify the county or establish the child's rights, has bearing on the admissibility of such statements and testimony. In instances where indemnification is the purpose of the law, the mother can often be made to testify against herself.

The efforts of the courts to render just decisions are shown in their decisions often reflecting an individual approach despite the statements of the statutes on acceptable evidence. In these judicial conclusions, there are frequent references to the need to establish the creditability of the mother's story, and, the limitation on questions concerning her behavior and reputation. In Tennessee, for example, the focus is to fix financial responsibility, and

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2 Mississippi Digest 1942:Welford v. Harvard,89 So.812, 127 Miss.88.

while both parties are considered competent witnesses with their statements and affidavits admissible, the woman need not even testify in open court. Where the woman has testified, her statements taken under oath, are "taken as true until proved false by any of those means by which the evidence of a party in other cases may be impeached."[3] The courts' conclusions also indicate that the trial testimony regarding the mother's behavior and reputation must be confined to the period during which the child could have been conceived. This same is true in Alabama where the mother is considered a competent witness. A recent Alabama decision indicates the efforts of the court toward a just decisions despite the statutory designation of the mother as a competent witness. It reads:

> The evidence of the state consists alone of the testimony of the prosecutrix. This testimony is thoroughly impeached by the improbability of the story itself and the contradictory statements made by her to other parties near the beginning of her pregnancy. In addition to this, the prosecutrix first charged the paternity of her child to another, and went before an officer and by affidavit, etc., brought bastardy proceedings against him. When the party left the county, presumably on account of the charge, she dropped those proceedings and started this one against a man able to pay and who was at enmity with her father, with whom she was living.[4]

In Kentucky and Mississippi, all affidavits and statements under oath are received in evidence by the court, provided the mother is not otherwise incompetent. Unusual are three sections of the Mississippi statute. These sections concern the mother's dying statements as acceptable evidence,

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3 William's Code of Tennessee Annotated 1934: Goddard v. State, 2 Yerg. (10 Tenn.) 96; State v. Coatney, 8 Yerg. (16 Tenn.) 210.

4 Code of Alabama Annotated 1940: Reynolds v. State, 27 Ala. App. 106, 107, 166 So. 436.

as well as provision for the appointment of a guardian ad litem, and, the provision for the child to bring the action in his own name "anytime before it is five years of age."[5] No judicial decisions were found in Mississippi on the extent of questioning permitted regarding the mother's behavior and reputation. However, one old Kentucky decision, entered in 1890, states: " A mother is a competent witness to prove legitimacy of her child, but where she is proven unchaste, her testimony should be received with great caution."[6] Presumably then, testimony concerning the mother's reputation is permitted in the Kentucky courts.

The Arkansas law states: "The mother shall be a competent witness in all cases of bastardy, unless she be legally incompetent in any case; and if she be dead at the time of the trial, her declarations, made in her travail, and proved to be her dying declarations, shall be evidence."[7] Numerous decisions dating from 1835 to the present, provide that the jury may decide on the testimony of the mother alone, provided the testimony is creditable.[8] The questioning on the mother's reputation and behavior must be confined to the period when the child would have been begotten.

Florida's statute, passed in 1951, designates the mother as a

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5 Mississippi Code Annotated 1942, Title 4, Chapter 1, Section 390.

6 Kentucky Digest 1944: Goss v. Froman, 12 S. W. 387, 89 Ky. 318, 11 Ky. Law Rep. 631, 8 L.R.A. 102.

7 Arkansas Statutes Annotated 1947, Book 3, Section 34-712.

8 Arkansas Digest 1937: Qualls v. State, 122 S.W. 498, 92 Ark. 200, Belford v. State, 96 Ark. 274, 131 S. W.953; Kennedy v. State, 117 Ark. 113.

competent witness unless otherwise incompetent, but, recent decisions fail to report the extent of the questioning on the mother's behavior permitted in the private hearing.

In the matter of the admissibility of the mother's statements as evidence, the Louisiana law on the illegitimate child is exceptional in its detail. This law provides:

> The oath of the mother, supported by proof of cohabitation of the reputed father with her, out of his house, is not sufficient to establish natural paternal consent, if the mother be known as a woman of dissolute manners, or as having had an unlawful connection with one or more men (other than the man whom she declares to be the father of the child) either before or since the birth of the child.[9]

It should be noted that many of the laws and decisions borrow from the criminal procedure in the matter of evidence. This is reflected in the hearsay evidence given in the event of the mother's death. The Uniform Act provides that such evidence may be read, if demanded by the father.

The support provisions of the laws were examined as they related to amounts ordered and the duration of payments. Four of the eight states covered in this study have designated the amounts, maximum or minimum, to be paid for the child's care. Of these, the Arkansas statute provides for monthly payments of not less than ten dollars from birth until the time the child attains the age of fourteen years, while Florida law provides the following graduated scale:

> From date of birth to 6th birthday - $40. per month
> From 6th birthday to the 12th birthday - $60. per month
> From 12th birthday to the 15th birthday - $90. per month

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9 West's Louisiana Civil Code 1932, Section 2, Article 210.

> From 15th birthday to the 18th birthday - $110. per month
> Such amounts may be increased or reduced by the judge in his discretion depending upon the circumstances and ability of the defendant.[10]

The Tennessee law fixes the maximum payment as follows: "The allowance for the support of an illegitimate child shall not exceed sixty dollars per year, which support shall continue until the child is twelve years of age, unless the custody of the child is otherwise disposed of by the court."[11] However, the Tennessee law does provide for lying-in expenses as do the statutes of Florida and Arkansas. Florida allows for the actual costs of the birth, while the Arkansas law sets a minimum of twenty-five dollars on the claim. Alabama sets a yearly maximum of one hundred dollars on support for a period of ten years, but makes no allowance for confinement costs.[12] In Alabama the father may also be called to account under the desertion and non-support statutes as well as through paternity proceedings.

Despite the amount of the support payments and the duration of the payments stipulated in the statutes of the four states just discussed, the judicial decisions reflect an individual approach in the disposition of cases. An Arkansas court detailed one decision as follows:

> By common-law the mother and not the father of a bastard child is bound to support it, but this section confers on the mother of such child the right to compel the father to contribute to its support; and a promise on his part to contribute his support,

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10 Laws of Florida 1951, Chapter 26949, Section 4.

11 William's Code of Tennessee 1934, Section 11950-7346 (5368).

12 Code of Alabama Annotated 1940: Coan v. State, 25 Ala. App. 62, 141 So. 262.

> being based on a moral obligation and upon a legal liability which she may cast on him is valid, and is enforceable against him, or, after his death, against his estate.[13]

In one of the few decisions since the passage of the 1951 law, a Florida court ordered a fifty dollar a year payment for a period of ten years rather than use the graduated scale provided by statute.

Texas has no provision for the support of an illegitimate child through paternity proceedings, and, Louisiana allows "mere alimony."[14] The two remaining state statutes covered in this study, those of Kentucky and Mississippi, are more permissive in nature and leave the amount of the support to be ordered to the discretion of the judge. The Kentucky law states:

> If the jury finds against the defendant, it shall fix what sum he shall pay per year and for what number of years, and the court in rendering judgment, shall make an order for the payment in installments (monthly, quarterly, or semiannually), and shall make proper order for the custody, support and education of the child.[15]

While Mississippi law provides for annual payments to be determined by the judge, it states that these payments are not to exceed eighteen years in duration. In a recent Mississippi decision, the jury fixed the monthly payment at fifteen dollars for a period of fifteen years. The Kentucky and Mississippi statutes reflect the Uniform Law with respect to support. The Uniform Law provides for regular payments determined by the court, and

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13 Arkansas Statutes Annotated 1947: Davis v. Herrington, 53 Ark. 5, 13 S. W. 215.

14 Vernier, Family Laws, 207

15 Kentucky Revised Statutes 1944, Section 406.090 (174).

provides for such payments until the child attains sixteen years of age.

Of all of the state statutes covered in this study, only that of the state of Kentucky makes reference to custody as a matter to be included in the court's order. The law does not specify in whom custody is to be fixed. All of the states regard the mother as natural custodian with a primary right. This is best reflected in an early Arkansas decision:

> The mere illegitimacy of a child will not preclude her mother otherwise competent to care for her, and attached to her by a natural mutual affection, from retaining possession of the child as against another, equally competent, who claimed to be the child's putative father, and who became attached to her through caring for her in her early years.[16]

In a later decision, an Arkansas court stated that: "the mother's right to the custody and control of her illegitimate child is superior to that of anyone else."[17] In all of the states this pattern is evident, with the exception of Louisiana where the illegitimacy statute is focused on acknowledgement of the child. The provisions for custody and control are unique as contained in the guardianship law of that state. This law states:

> The mother is of right the tutrix of her natural child not acknowledged by the father, or acknowledged by him without her concurrence. After the death of the mother, the father is of right the tutor of his natural child acknowledged by him alone. The natural child, acknowledged by both, has for tutor, first the father, and in default of him, the mother.[18]

Acknowledgement will be discussed later under the legitimation processes.

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16 Arkansas Digest 1937: Lipsey v. Battle, 97 S. W. 49, 80 Ark.287.

17 Arkansas Digest 1937: Waldron v. Childers, 148 S. W. 1030, 104 Ark. 206.

18 West's Louisiana Civil Code 1932, Title 7, Chap. 3, Art. 256.

In all of the states, the father has the right to seek custody upon the death of the mother. While such a request is left to the discretion of the court, the father is usually given consideration if he seeks custody of the child. In all of the decisions studied, the mother retains custody unless proved unfit, in which case, the child may become a ward of the court.

Unlike the laws examined in this study, the Uniform Illegitimacy Act provides for continuing jurisdiction to determine custody in accordance with the interests of the child.

The statutes and judicial decisions have been examined here to determine the usual complaint procedure, and what provisions the states usually make in the matters of support and custody. Also considered were, the statements and testimony of the mother and their bearing as evidence in a paternity action.

CHAPTER III

THE LAWS AS THEY RELATE TO THE FATHER

The basis of the legal system in the state, as well as the nature of the proceedings, are important in any study of a state statute. These areas will be discussed here as they seem to account for many of the attitudes seen in the decisions and the statutes themselves. Also considered here, will be the court hearings, and, the scientific and counter-statement evidence that is acceptable as the father's defense in a paternity proceeding.

The common-law is the basis of the legal systems in six of the states covered in this study. The two remaining states, Texas and Louisiana, have code law derived from foreign codes. Texas law derives from the old Spanish Code, and, the Louisiana Civil Code comes from the Napoleonic Code.

Only those children born or conceived in lawful marriage are found legitimate under the common-law. The subsequent marriage of the parents before the birth is enough to render the child legitimate. In instances where conception occurs during a legal marriage, the dissolution of the marriage by death or divorce, before the birth, does not affect the child's legitimate status. However, in instances where the birth occurs before the marriage, the subsequent marriage does not legitimate the child. In the event the marriage is annulled or void under the law, the child of the marriage is illegitimate, since in contemplation of the law, there has been no marriage.

Other considerations of the common-law as it relates to illegitimacy are given in Vernier's study. It reads:

> At early common-law the bastard was considered "filius nullius" and was given none of the rights ordinarily accompanying the parent-child relationship. Modern decisions have modified this rule to the extent of giving the mother the right to custody of the child, and imposing on her the duty of supporting the child. In other respects the rule remains the same. The father has no right to the custody of the child and owes it no duty of support.[1]

Vernier appraises the common-law with respect to the child as follows:

> The extreme harshness of the common-law is apparent. The child is forever labeled and stigmatized by the errors of his parents. Supposedly the rule is based upon a policy to discourage illicit intercourse. To impose the penalty upon the faultless child is a means of doubtful efficacy in discouraging such relations. Certainly it cannot be advanced in extenuation of the rule bastardizing the issue of void or voidable marriages attempted in good faith, or of the rule refusing to denominate the children legitimate when the parents have subsequently intermarried.[2]

The common-law, as a basis for the legal systems of most of the states, not only accounts for many decisions in conflict with later decisions following the passage of the statutes relating to paternity proceedings, but also prevails or takes precedence, in instances not covered by statute.

All paternity proceedings are regarded as being quasi-criminal in nature. They are so designated because, while civil procedure governs, the action can, in many instances, be initiated by some person in authority. In this respect the proceedings take on some of the aspects of criminal procedure. In some states the action is brought in the name of the state rather than in the name of the mother or child, an action reflective of criminal procedure.

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1 Vernier, Family Laws, 149.

2 Ibid.

Closely allied to this is the question of constitutionality because of the imprisonment of the father on failure to support the child as ordered by the court. This question will be discussed in a later chapter. Indemnification, as the purpose of many of the statutes, also lends to the criminal aspects of the action because of the states' wish to fix financial responsibility. Reference will be had to this later.

In Alabama, for example, one decision states: "...a prosecution for bastardy is neither strictly civil nor strictly criminal, but partakes of the nature of both and is rather of a quasi-criminal nature."[3] Despite this dual nature, the rules of civil procedure govern here as in other states.[4] In a similar way an early Florida decision defined the proceedings as quasi-criminal in an action brought in the name of the child.[5] In Kentucky too, the action is brought in the name of the state. One Tennessee decision reflects a somewhat different attitude when it states: "Bastardy contests are in their nature, under our law, between the mother and reputed father of the unfortunate bastard, for the support of their mutual crime."[6] Despite this, in Tennessee too, a paternity proceeding is brought in the name of the state, and perhaps unusual and lending to the criminal aspects of the procedure, is one decision indicating that appeals lie to the criminal court because the

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3 Alabama Code Annotated 1940: Dorgan v. State, 72 Ala. 173.

4 Arkansas Statutes Annotated 1947: Land v. State, 105 S. W. 90, 84 Ark. 199, 120 Am. St. Rep. 25.

5 Florida Digest 1951: Edmond N.E. v. State, 6 So. 58, 25 Fla. 268.

6 William's Code of Tennessee Annotated 1934: Oneal v. State, 2 Sneed (34 Tenn.) 215; Stovall v. State, 9 Baxt. (66 Tenn.) 597.

circuit court has only civil jurisdiction.[7]

In a 1921 case between Welford and Howard, the Mississippi court held the cause of the action and the procedure to be civil. This is also true in Arkansas where the proceeding has been defined as of a civil nature even though the action is brought in the name of the state. There the appeal lies to the circuit court rather than the criminal court.

Three states covered in this study, namely, Arkansas, Tennessee, and Mississippi, have rulings on the constitutionality of the proceedings. The imprisonment of the father for failure to render support was not in violation of the constitution. Imprisonment was interpreted as not in violation of the constitution because the father was imprisoned for contempt of the court ordering the payment, rather than for the debt itself. In each of the states having such decisions, the appeals on this basis were numerous. The Uniform Act specifically provides for imprisonment for contempt of court.

Five of the states with paternity proceedings have trial by jury under certain circumstances. In Kentucky, the trial is by jury as a regular procedure, while in Arkansas and Alabama, the trial by jury is occasioned by demand of the alleged father. Florida permits trial by jury upon the demand of either the mother or the alleged father and further provides: "Hearings for the purpose of establishing or refuting the allegations of the complaint and answer shall be held in the chambers and may be restricted to such persons, in addition to the parties involved and their counsel, as the judge in his

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7 William's Code of Tennessee Annotated 1934: Crawford v. State, 7 Baxt. (66 Tenn.) 41.

discretion may direct."[8] This is also stipulated in the Mississippi statute which states: "... and the justice in his discretion may exclude all persons from the court room during the inquiry except the parties and their counsel and the constable, or other officer, and the witnesses being examined."[9] Unlike the Florida and Mississippi statutes, the Uniform Act does not make provision for a private hearing, but, it does provide for trial by jury if demanded by either party to the action.

One Tennessee decision maintains that the trial by jury in paternity proceedings cannot be demanded "... as a matter of right, but a jury to try the issues may not constitute a reversible error as the court may have the aid of a jury."[10] An Alabama decision cites the importance of the jury as follows:

> In all cases of bastardy, where the woman has been guilty of promiscuity at times other than the period fixed by her in her testimony in fastening the paternity of the child upon some one individual, there is always more or less uncertainty. This emphasizes the importance of having the questions passed upon by a jury of twelve men, who have before them all of the parties, and to observe the manner of their testimony and the conditions surrounding the transaction.[11]

Five of the states reflect the Uniform Law in that they provide for a preliminary hearing to determine if the proceedings will be cause for trial by jury or a higher court. In the four states of Mississippi, Alabama, Arkansas, and Tennessee, a justice of the peace presides at this hearing. In

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8 Florida Code 1951, Chapter 26949, Section 3.

9 Mississippi Code Annotated 1942, Chapter 1, Title 1, Section 383.

10 William's Code of Tennessee Annotated 1934: Kirkpatrick v. State, Meigs (19 Tenn.) 124.

11 Alabama Code Annotated 1940: Harris v. State, 28 Ala. App. 23, 24, 177 So. 311.

Tennessee, the justice may find the accused to be the father "... unless he file his affidavit clearly setting forth that justice requires an issue be made to try the truth of such charge, in which case it is the duty of the court to hear proof and determine the matter as right and justice may apertain."[12] Only in Florida is the original hearing held in the court of final jurisdiction, the circuit court.

A warrant is issued for the father's arrest and a bond required for his appearance in five states. None of these statutes borrow from the Uniform Law which provides for a summons in lieu of a warrant. The states having the warrant and bond are Kentucky, Alabama, Arkansas, Mississippi, and Tennessee. In each of these states, the right of appeal is either stated in the statute or noted in the decisions.

In relation to the court hearings, some provisions of the Kentucky and Florida statutes are unique. The Kentucky law provides for a "... discreet and competent interpreter for the mother."[13] The Florida law prohibits any publicity by a provision which reads:

> It shall be unlawful for the owner, publisher, manager, or operator of any newspaper, magazine, radio station, or other publication of any kind whatsoever, or any person responsible thereof, or any radio broadcaster, to publish the name of any of the parties to any court proceeding instituted or prosecuted under this act; and any person violating this provision shall be guilty of a misdemeanor and be punished by imprisonment in the county jail not exceeding 12 months or by fine not exceeding $1,000 or both.[14]

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12 William's Code of Tennessee Annotated 1934, Chap. 29, Section 1.

13 Kentucky Revised Statutes 1944, 406.160 (181).

14 Laws of Florida 1951, Chapter 26949, No. 170, Section 8.

In those states where the mother's testimony and statements are acceptable in evidence, the statements and testimony of the father are equally acceptable in defense. This is true in Kentucky, Arkansas, Alabama, and Tennessee, provided the father is not otherwise incompetent. Under the Uniform Law, both the mother and the alleged father are competent , but they may not be compelled to give testimony and thereby subject themselves to cross-examination.

It has already been noted that Louisiana does not have a statute covering paternity proceedings as such, but, the Louisiana Civil Code does define the methods of proving paternity which are acceptable to the court. The law reads as follows:

> In the case where the proof of paternal descent is authorized by the preceding article, the proof may be in either of the following ways:
>
> 1. By all kinds of private writings, in which the father may have acknowledged the bastard as his child, or may have called him so;
>
> 2. When the father, either in public or private, has acknowledged him as his child, or has caused him to be educated as such;
>
> 3. When the mother of the child was known as living in a state of concubinage with the father, and resided as such in his house at the time the child was conceived.[15]

Most of the Louisiana decisions studied showed that this provision is most frequently used by grown children in efforts to legitimate themselves and to establish certain inheritance rights.

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15 Louisiana Civil Code 1951, Section 2, Article 209.

None of the statutes covered in this study made provision for blood grouping tests as a negative proof in paternity proceedings, nor were any decisions found which indicated that such tests were a factor in the decisions. The fact that blood grouping tests were announced more than fifty years ago, in 1900, and have been generally accepted as valid for more than twenty-five years, has not resulted in statutory changes in the area of this study. Several reasons have been offered concerning the hesitancy of legislatures and courts to accept these medical discoveries. These reasons revolve around social factors and the questions of privilege and inherent judicial power.

In the area of social factors, both courts and legislatures are hesitant about taking measures which might cast doubt on the legitimacy of children born to married persons. Traditionally, paternity is assumed where a marriage exists and contrary proof rests on proving non-access of the husband.

In the matter of privilege and inherent power, the questions are many. There is the question of invasion of privacy in compelling physical examinations, which would necessitate empowering legislation. There are the questions of self-incrimination, as well as the privilege of protection against search and seizures. These questions seem extreme since enabling legislation, together with close cooperation between scientists and the court, could overcome them. In this way, blood grouping tests could become a final and complete defense in paternity actions.[16]

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16 Selected Essays on Family Law, A Compilation of a Committee of the American Bar Association, New York, 1950, 727.

The common-law as the basis of the legal systems of most of the states, and, the nature of paternity proceedings have been discussed here to give partial understanding of the current laws. Also discussed here was the counter-statement evidence and the scientific evidence available as the father's defense in a paternity proceeding.

CHAPTER IV

THE LAWS AS THEY RELATE TO THE CHILD

The provisions in the statutes which particularly relate to the child will be discussed here. The terminology used, resemblance of the child, legitimation processes, indemnification, and the availability of social services will be considered.

The six states having paternity proceedings referred to the child as bastard in the law, with Alabama and Kentucky defining the term. The court decisions in these states usually referred to the child as "the child," "the illegitimate child", and more commonly, to the "child born out-of-wedlock." The single exception is Tennessee where the child is always alluded to as the bastard in the court decisions. Despite not having a paternity statute, Louisiana has distinguished the natural child or acknowledged child from the legitimate child, and, in the court decisions, that state usually refers to the child as the child born out-of-wedlock. None of the states covered in this study have followed the pattern established in New York in 1925, in prohibiting the use of the term bastard in filiation proceedings.

The decisions in seven states indicate that display of the child in the court hearing is not an uncommon practice, and, that the resemblance of the child to the alleged father is often a consideration. While Florida and

Texas decisions note this procedure as improper and in error,[1] profert of the child to determine resemblance has frequently been cited as an acceptable practice in the other five states. For example, a 1943 decision in Kentucky states: "On issue of relationship between parent and child, evidence of resemblance of the child to parent is competent to show relationship, especially when the child has arrived at an age when resemblance can be determined."[2]

Legitimation of the child by the subsequent marriage of the parents is a creature of statute since the common-law expressly designates such a child as illegitimate. Sometimes legitimation is a part of the law on paternity proceedings even though that law is meant to fix responsibility for the maintenance of the child. However, in the states covered in this study, the provision is found in a separate legitimation statute or as a part of another law. Legitimation by subsequent marriage is recognized in all eight states considered here. The questions of acknowledgement, and of incestuous, null and void marriages condition the legitimation and make it necessary to report the procedure of each state separately.

In the two code states, Louisiana and Texas, provision is made for legitimation despite the fact that they have no specific law on paternity proceedings. In the Louisiana Civil Code, legitimation is covered in that section pertaining to legitimate and illegitimate children, while in Texas the provisions are found under the descent and distribution statute.

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1 Texas Code Annotated 1948: Adams v. State; Laws of Florida 1951, Flores v. State, 73 So. 234, 72 Fla. 302.

2 Kentucky Digest 1944: Hilliker v. Thorndale, 173 S. W. 2d 977, 295 Ky. 148.

According to the Louisiana Code, natural children are those legitimated by acknowledgement and by the subsequent marriage of the parents. Legitimation through acknowledgement is effected by notarial act, but the law specifically prohibits legitimation where any legal impediment to the marriage exists. Where the parties are incapable of marriage at the time of conception because of the impediment, the child is designated as illegitimate and cannot be ligitimated.[3] Unlike Louisiana, the Texas law states that subsequent marriage legitimates all illegitimate children, even those of null and void marriages.[4]

In Kentucky there is no condition to legitimation except that the father recognize the child before or after the marriage. Legitimation without marriage can be effected by the father's recognition of the child as his by support or reference. Proof of the marriage, either ceremonial or common-law must be presented.

Alabama has a separate legitimation statute which provides for legitimation through marriage and recognition. Recognition has been shown where the father treats the child as his either before or after the marriage.[5] A declaration in writing directed to the court and subsequently recorded, will also effect legitimation.

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3 West's Louisiana Civil Code 1932, Section 2, Article, 202.

4 Vernon's Annotated Revised Civil Statutes of Texas 1948, Vol. 8, Title 48, Article 2581.

5 Code of Alabama Annotated 1940: Moore v. Terry, 220 Ala. 47, 124 So. 80.

While Mississippi does not have a separate legitimation statute, provision is made for a petition to the Chancery Court to effect legitimation. This provision is found in the statute titled "Chancery Court."[6]

No separate statute on legitimation was found in the Florida laws. Under the section on estates of decedents, the legitimation can be accomplished by a written acknowledgement witnessed by two persons.[7]

Legitimation is covered in a separate statute in Tennessee and is accomplished by a process similar to Florida procedure. A written petition, setting forth all of the facts, is submitted to the court.[8]

Under its descent and distribution statute, Arkansas has all bastard children legitimate by reason of their parents' marriages. This even applies to the children of null marriages and those dissolved by divorce. No other provision is made for legitimation by petition or affidavit.

The focus of paternity proceedings is often indemnification of the county or state. This is natural because of the historical connection between illegitimacy and poor relief. Of this Vernier has written:

> The English statute of 18 Elizabeth which became the pattern for subsequent colonial legislation, was primarily intended to relieve the parish from the burden of supporting bastard children; under it the institution of proceedings was confined to the action of public authorities and the liability was placed

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6 Mississippi Code Annotated 1942, Chapter 2, Section 1269.

7 Florida Statutes Annotated 1951, Title 41, Chapter 731.

8 William's Code of Tennessee Annotated 1934, Chapter 15, Section 9565 5406 (3640).

> upon the mother and reputed father alike. Under the prevailing type of statute, proceedings may generally be instigated by the mother, but frequently the poor authorities are given power to bring the action concurrently with the mother or in case the mother fails to act. The low maximum limits to the sum which may be ordered to be paid for the child's support, and the smallness of the sums actually awarded when no limit is specified, also indicate that the statutes still retain considerable flavor of the poor law.[9]

In one half or three of the states with paternity proceedings, the statutes themselves state that their purpose is indemnification of the county. These states are Arkansas, Tennessee, and Mississippi.

The Arkansas law states:

> Every county judge in this state, upon his personal knowledge or upon information that a woman has been delivered of a bastard child, shall issue his warrant, or cause it to be done, and bring such woman before the county court, and require her to disclose or discover to the court, under oath, the father of such child, or give security, in like manner and sum as hereinbefore required in the case of the father, to indemnify each county of this state from all costs and expenses for maintenance, or otherwise, on account of such child while under the age of seven years; and if she will not discover the father of such child, or give security, the court shall commit her to the county jail until she discovers the father or gives security.[10]

The purpose is further defined in an Arkansas decision which reads: "Indemnity and protection of the counties against the burden of supporting the bastard, and not the punishment of the father, are the objects contemplated by the statute."[11]

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9 Vernier, Family Laws, 207.

10 Arkansas Statutes Annotated 1947, Section 34-713.

11 Arkansas Statutes Annotated 1947: Chambers v. State, 45 Ark. 56.

The Tennessee statute is even more explicit in an effort to fix financial responsibility and states: "The proceedings in bastardy are conducted in the name of the state as plaintiff and the accused as defendant, and are intended for the indemnity of counties against the charge of supporting bastards."[12] In order to further protect the counties, the support moneys are controlled by the court in this state.

The Mississippi statute states that sureties will be required so that the child will not become a public charge. It further provides that it is the duty of the board of supervisors to initiate paternity proceedings in the event the child becomes a burden to the county.[13] This provision is similar to the Uniform Act which permits the action to be brought by the authorities in the event the child becomes a public charge.

While the statute and decisions of Florida make no mention of indemnification, decisions in the two remaining states, Kentucky and Alabama, note other purposes in the proceedings. One Kentucky decision states: "Bastardy proceedings are not for the relief of the county from support of the child, but are for the benefit of the mother, and to enforce a natural duty."[14] Another purpose is cited in an Alabama decision: "Maintenance and education of illegitimate offspring born or to be born is the object of this section."[15]

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12 Williams's Code of Tennessee Annotated 1934, Sec. 11948 7344.

13 Mississippi Code Annotated 1942, Section 394.

14 Kentucky Digest 1944: Schooler v. Commonwealth, 16 Ky. 88.

15 Code of Alabama Annotated 1940: Shows v. Solomon, 91 Ala. 390, 8 So. 713.

Six of the eight states considered in this study replied to an inquiry about social services available to the parties in a paternity action, and, the initiating of proceedings as an eligibility requirement for Aid to Dependent Children benefits. These states were Louisiana, Florida, Arkansas, Alabama, Kentucky, and Mississippi. The agencies contacted were the local public units administering the Aid to Dependent Children program in one of the larger cities of each state, excluding the state capitals.

None of the responses reported a social service department within the court system which would benefit the parties to a paternity action, excepting where the unmarried mother might be a minor. In these instances, she would benefit by the social service department of the juvenile court. Only one of the six areas, Alabama, reported services automatically available, while the others indicated their willingness to provide such services on request. The Mississippi source reported aiding the court by providing some confidential information if requested to do so.

In two of the states, Florida and Kentucky, filing a complaint for a paternity action is a requirement for the unmarried mother applying for Aid to Dependent Children benefits for her illegitimate child. In Florida, the eligibility requirement is considered satisfied if the mother states her willingness to file the complaint. Kentucky's procedure is well-defined:

> If a child was born out-of-wedlock before June 15, 1950, but is less than three years of age, bastardy proceedings can be brought against the alleged father. However, these proceedings are not a requirement for eligibility.
>
> If a child was born out-of-wedlock after June 15, 1950, it

cannot be eligible for ADC until a bastardy proceeding has been initiated or waived.[16]

In Louisiana, where no paternity law exists, the mother usually files a non-support charge against the alleged father, although she is not required to do so to receive Aid to Dependent Children benefits.

Several sections of the laws as they relate to the child have been discussed here. These areas included the terminology of the statutes and decisions, resemblance of the child as a factor in the decisions, the legitimation processes, indemnification as a purpose, the available social services, and the filing of a complaint as an eligibility requirement for Aid to Dependent Children benefits.

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16 Manual of Operations, Department of Economic Security, Kentucky Division of Public Assistance, Section 2272, Article B.

CHAPTER V

CONCLUSION

This study of the paternity proceedings of eight southern and gulf states was undertaken in an effort to assess the social implications of the statutes as they relate to the three parties to the action, the unmarried mother, the illegitimate child, and the alleged father. The study included the examination of the laws from the view of the social and emotional factors so important in paternity proceedings. For purposes of clarity sections of the law were arbitrarily assigned to one of the three parties involved. Such division, especially in relation to the social implications, could not be carried over to the conclusions. The social implications will be considered generally, or as they relate to all three parties.

Under the common-law which served as the basis for the legal systems of six states, the child and the parents had little protection and comfort. The states, in an effort to overcome the harshness of the common-law, passed statutes, to provide a remedy. It has already been pointed out that the statutes are strictly construed in common-law states and that the common-law applies in instances not covered by the statute. This, in a measure, accounts for some of the unique and seemingly inconsistent decisions cited in this study.

The statutes on paternity proceedings have retained much of the flavor of the old poor laws because of their historical development. The

earliest laws were intended for the indemnifaction of the counties and parishes from support of destitute and unattached persons. It was natural then for this element to remain in the first laws on paternity and even to persist to the present day. Even the Uniform Illegitimacy Act which was recommended to the states as a standard retained some elements of indemnification although placing safeguards and limitations on it.

Indemnification has been shown as the stated purpose of the law in three states, and is implied in all of the others with the exception of Florida. Because of the desire to fix responsibility, the laws have, in substance and enforcement, taken on a quasi-criminal nature. Perhaps this is best reflected in the states' efforts to join the mother in the complaint against the alleged father. It has been seen that at the point of filing the complaint, the matter is taken out of the hands of the mother and pursued by the state in a manner similar to criminal action. At this point it would seem advisable to consider the compromise or agreement provisions of the Uniform Act which would be a safeguard for all of the parties. At point of filing the complaint some effort toward compromise would seem worthwhile in order to save all three parties in as much as possible from the damaging effects of an open hearing. Such a compromise approved by the court would seem desirable since it would satisfy the indemnification objectives of the statute. Seemingly this might also protect the legitimate family of the alleged father and protect it from the notoriety growing out of paternity proceedings. Under the existing statutes, no extra considerations are shown the alleged father who is married and has the responsibility of a legitimate

family. In two of the states, a local authority such as the county attorney or justice, may initiate the proceedings on knowledge of the illegitimate pregnancy or on the liklihood that the child may become a public charge. In one state, the mother may be confined to jail until she divulges the name of the alleged father. While the Uniform Act makes provision for a county authority to bring the charge, it limits this procedure in that the mother must concur in the action.

The implication of punitiveness also carries over to the court hearing. While the mother and father are usually both considered competent in giving evidence, some confusion results because of the difficulty of obtaining proof concerning an unwitnessed act. The mother is usually subjected to very personal questions about her conduct and behavior, but in most instances, the courts have limited this questioning to conduct around the time during which the child could have been conceived. Such questioning would seem proper and necessary, but more appropriate in a private hearing. Only two states make provision for private hearings, and, only one state, Florida, specifically forbids publicity on the proceedings. Both private hearings and the ban on publicity would seem desirable features in a law because of the protection they afford the parties, and, because of the probability that the court could be freer in obtaining the information and evidence essential to a just decision.

In the hearing, profert or display of the child has been common. While such procedure is the area studied might well derive from actions involving mulatto children, the practice would seem to have great social significance. Profert of an infant or small child whose facial features are

changing would seem of little value in proving resemblance; exhibition of an older child where resemblance might be possible, would probably be traumatic for the child.

The efforts of the courts to arrive at just decisions in paternity proceedings have been obvious. By way of preliminary hearing, the courts have tried to assess the creditibility of the mother's story to protect the alleged father from an irresponsible accusation and from the notoriety contingent on such a court action. Also, by use of a jury, the court has tried to effect a balance and provide an opportunity for a fair hearing. It has been shown that most states permit trial by jury as a matter of course or upon the demand of either the mother or the alleged father. While none of the states has utilized the blood grouping tests as a negative proof for the father, such procedure is understandable. As negative but conclusive proof, such evidence might well serve to reflect unfavorably in actions between married persons concerning the paternity of a child born to them.

The terminology used in the statutes and decisions has varied some. In most instances, paternity proceedings have been called "bastardy proceedings," with the child consistently referred to as "the bastard." Despite the legal implications of these terms, they have unsavory popular connotations, and the terms "child born out of wedlock", "filiation proceedings", or "paternity proceedings", would seem preferable.

Due to the unique limitations of the common-law, legitimation by subsequent marriages requires statutory definition. For this reason, the legitimation processes of the various states were examined. It was shown that

legitimation by subsequent marriage was provided for in all of the states. However, null, void, incestuous, or dissolved marriages conditioned or limited the legitimation process in many states. For example, Louisiana recongnized subsequent marriage as a method of legitimation but specified that a child could not be legitimated by marriage if an impediment to the marriage existed at the time the child was conceived.

Concerning support, the positions of the states again varied. Four of the states fixed minimum or maximum support payments and stipulated the duration of the payments. The decisions examined and cited showed that the amounts ordered were usually low. Only two of the states left the amounts largely to the discretion of the court. Since the small payments were common and because proceedings could be brought against a married man with a legitimate family, this might be indicative of the courts' efforts to protect the legitimate family. With the difficulty of obtaining legislative revisions and because of the need for individual consideration, an enabling clause to permit the judge discretion in this matter would seem desirable.

It is generally accepted that whenever possible an infant or small child should be with his mother. Under the laws examined in this study, the mother is usually permitted to retain custody of her illegitimate child. In some instances the father could request custody because the mother was found unfit or deceased. Such a procedure would seem proper in that it preserves family ties, and, because such a request by the father would seem indicative of interest in the child's welfare.

The availability of social services was considered in this study

because of the emotional flux of a woman illegitimately pregnant, the possibility of compromise, and the need for the child's protection. The effort was largely exploratory and while reflective of the types and degrees of available service, the information was hardly conclusive. Generally, the reports showed that casework services are not automatically available in the proceedings over the area covered by the study. They are available, in some instances, if specifically requested by one of the parties or the court. In the same vein, inquiries showed that in only two of the states was the filing of a complaint by the mother an eligibility requirement for Aid to Dependent Children benefits. It should be noted that these benefits are usually available for the maintenance of an illegitimate child, and such application would necessarily make two of the parties to an action, the mother and the child, known to a social agency.

More than thirty years have passed since the Uniform Illegitimacy Act was recommended to the states as a standard for legislation relating to paternity proceedings. The efforts made under this act to consider the peculiarities of the states' existing laws are apparent. Though comprehensive and detailed, it attempted to satisfy these individual differencesand to make both parents share the responsibility of the child's support. Perhaps indicative of the limitations of the Act was the fact that only seven states in the country used it as a basis for subsequent paternity legislation or legislative revisions. If written now, the Commissioners on Uniform Legislation might well have considered including provisions on blood grouping tests, mandatory private hearings, jurisdiction in chancery, prohibition of publicity, and other socially desirable factors.

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