Indiana Law Journal

Volume 9 | Issue 2 Article 5

11-1933

Bastardy-Stillborn Child-Judgment

BASTARDY—STILLBORN CHILD—JUDGMENT—This is a prosecution filed February 20, 1930, in which the appellant was charged in the complaint with being the father of an unborn child of the relatrix. The jury found as facts; that at the time of the filing of the complaint, as provided by the statute,[1] the relatrix, Pauline Pavey, was pregnant with a bastard child, and that, on August 9, 1930, relatrix was delivered of a stillborn child, and that Burton Brown was the father of the child. Verdict for the plaintiff and judgment was had for $400.00. The defendant appealed assigning as errors, the overruling of his motions for a new trial and modification of the judgment. The principal question was whether or not under the Indiana statute,[2] a judgment in a bastardy proceeding could be rendered for any amount in excess of the costs, when the complaint had been filed during pregnancy and the child was still-born. Held, no judgment other than for costs can be sustained, since the money, recovered in bastardy proceedings, is recovered only for the maintenance and education of the child.[3]

At common law, the father is under no legal obligation to support his illegitimate children, for in the eyes of the common law, an illegitimate child has no father, but is regarded as filius nullius or sometimes as filius populi.[4] It was even held in State v. Tieman[5] that at the common law, neither the father nor the mother was under any legal obligation to support an illegitimate child. However the weight of authority holds that even in the absence of a statute, a mother is bound to support her illegitimate children.[6] Yet some jurisdictions[7] recognize a natural and moral duty on the part of the father to support his illegitimate children, and one jurisdiction[8] has gone even farther to impose a legal duty upon the father to support his illegitimate children, even in the absence of any statute, and held that the child may sue to enforce that duty.

Although the common law did not recognize any duty of the father to support his illegitimate child, England and most of our states have enacted statutes, making a father chargeable with the maintenance of his illegitimate children, and in most of the states, the statutes have provided the

---

A. L. R. 126; Northwest Lumber Co. v. Scandinavian-American Bank (1924), 130 Wash. 33, 225 Pac. 825, 39 A. L. R. 922; Shopert v. Indiana Nat. Bank (1907), 41 Ind. App. 474, 83 N. E. 515; Kimmel v. Dickson (1894), 5 S. D. 221, 58 N. W. 561, 49 Am. St. Rep. 869, 25 L. R. A. 385; Minn. Mut. Life Ins. Co. v. Tagus (1916), 34 N. D. 556, 158 N. W. 1063, L. R. A. 1917A, 519; Pacific Bldg. & Loan Assoc. v. Central Bank & Trust Co. (1923), 127 Wash. 524, 221 Pac. 313; Northern Sugar Corp. v. Thompson (1926), 13 Fed. (2nd) 829.

[1] Burns' Revised Statutes, 1926, Section 1049.

[2] Burns' Revised Statutes, 1926, Sections 1049-1070.

[3] Brown v. State ex rel. Pavey, Appellate Court of Indiana, July 27, 1932, 182 N. E. 263.

[4] Bl. Comm. P. 459 (1907); Kent Comm. P. 221 (13th Ed.); Commw. v. Dornes (1921), 239 Mass. 592, 132 N. E. 363; Hayworth v. Williams (1909), 102 Texas 308, 116 S. W. 43; Jackson v. Hocke (1908), 171 Ind. 371, 84 N. E. 830; Bissell v. Morton (1915), 145 N. Y. S. 591, 108 N. E. 1089.

[5] 32 Wash. 240, 73 Pac. 375 (1903).

[6] Wright v. Wright (1806), 2 Mass. 109; In re Vieweger (1922), 93 N. J. Eq. 527, 117 A. 291; Carpenter v. Whitman (1818), 15 Johns (N. Y.) 208.

[7] Best v. House (1908) (Ky.), 113 S. W. 849; Sanders v. Sanders (1914), 167 N. C. 319, 83 S. E. 490; State v. Rucker (1910), 86 S. C. 66, 68 S. E. 133.

[8] Dougherty v. Engler (1923), 112 Kans. 593, 211 Pac. 619; Miller v. Miller (1924), 116 Kans. 726, 229 Pac. 361.

mother with a compulsory remedy, generally known as "bastardy proceedings," to compel the father to support the child.[9]

The preceding discussion clearly shows that the law, relative to the duties of a father to his illegitimate child, is purely statutory. Such conclusion is supported by the authority, which holds that an illegitimate child could not inherit from its father at the common law,[10] so that unless given by the statute, no such right exists.[11] This right is granted by statutes in many jurisdictions, where there is a proper acknowledgment by the father.[12] This conclusion is also supported by the court's interpretation of the term "children" in the statutes that give an action for causing the death of the deceased's administrator for the benefit of the deceased's children, as meaning legitimate children unless otherwise stated.[13] There is, however, considerable authority for the doctrine that under this statute the mother can recover for the death of the illegitimate child.[14] This is usually true, where the statute expressly allows inheritance by and from bastards through their maternal line.[15] Such statutes allowing illegitimate children to inherit, or otherwise clothing them with the status and rights of legitimate children, are perfectly valid, for the legislature has the right to change the common law in this respect.[16]

Since the so-called "bastardy proceeding" is purely statutory[17] and the instant case[18] is tried under an Indiana statute,[19] the only remaining question is to determine whether or not the court placed the proper interpretation upon the statutes, relative to the amount of the judgment in the "bastardy proceeding."[20] It has been held that such statutes, being in derogation of the common law, should be strictly construed,[21] but the court can-

[9] Burns' Rev. Statutes, 1926, Section 1049; State v. Evans (1862), 19 Ind. 92; Bailey v. Chesley (1852), 10 Cush. (Mass.) 284; People v. Harty (1882), 49 Mich. 490, 13 N. W. 829; State v. Nichols (1882), 29 Minn. 357, 13 N. W. 153; Price v. State ex rel Gordon (1918), 87 Ind. App. 1, 118 N. E. 690; Note, 16 Col. L. Rev. 698 (1916).

[10] Houghton v. Dickinson (1917), 196 Mass. 389, 92 N. E. 481; Pair v. Pair (1918), 147 Ga. 754, 95 S. E. 295.

[11] Mansfield v. Neff (1913), 43 Utah 258, 134 Pac. 1160; Wolf v. Gall (1917), 32 Cal. App. 286, 163 Pac. 346-350; Bell v. Terry, Trench & Co. (1917), 163 N. Y. S. 733.

[12] McKellar v. Harkins (1918), 183 Iowa 1030, 166 N. W. 1061; Pederson v. Christofferson (1906), 97 Minn. 491, 106 N. W. 958; Lind v. Burke (1898), 56 Neb. 785, 77 N. W. 444; Moore v. Flack (1906), 77 Neb. 52, 108 N. W. 143; Wilson v. Bass (1918), 70 Ind. App. 116, 118 N. E. 379.

[13] State for the use of Smith v. Hagerstown and Frederick R. R. Co. (1921), 139 Md. 78, 114 Atl. 729, noted, 31 Yale L. J. 332; 21 Col. L. Rev. 826; 19 Mich. L. R. 562; Youchican v. Tex. & Pac. Ry. Co. (1920) (La.), 86 So. 551; McDonald v. Southern R. R. Co. (1905), 71 S. C. 352, 51 S. E. 138.

[14] McDonald v. Pittsburgh, etc. R. R. Co. (1895), 144 Ind. 409, 43 N. E. 447; Galveston, H. & L. A. Ry. Co. v. Walker (1908), 48 Tex. Civ. App. 52, 106 S. W. 705; Marshall v. Wabash R. R. Co. (1891), 120 Mo. 275, 46 S. W. 269; Kennedy v. Seaboard Air Lines R. R. Co. (1916), 167 N. C. 14.

[15] L. J. Dickinson Coal Co. v. Liddil (1911), 49 Ind. App. 40, 94 N. E. 411; Hadley v. City of Tallahassee (1914), 67 Fla. 436, 65 So. 545; Galveston H. & L. & A. Ry. Co. v. Walker (1908), 48 Tex. Civ. App. 52, 106 S. W. 705.

[16] Cope v. Cope (1890), 137 U. S. 682; Miller v. Miller (1883), 91 N. Y. S. 315, 43 Am. Rep. 669.

[17] Supra, note 9.

[18] Supra, note 3.

[19] Supra, note 1.

[20] Supra, note 2.

[21] In Re Wallace's Estate (1929), 197 N. C. 334, 148 S. E. 456.

not refuse to give full effect to the clear intention of the legislature, as evidenced by the language of the statute.[22]

An analysis of the Indiana Statutes[23] supports the decision of the upper court in holding that the statutes provide that the money recovered in a "bastardy proceeding" should be solely for the benefit of maintenance and education of the child. This holding is supported not only by a majority of Indiana decisions, but by other jurisdictions.[24] And this restriction, that the money recovered in a "bastardy proceeding" is for the maintenance of the child, has been further emphasized by Allen v. State ex rel Harrell,[25] which held that damages for seduction of the mother and the laying-in expenses of the mother are not recoverable in this kind of prosecution, and by Price v. State ex rel Gordon[26] which held that, in view of the statutory origin of the "bastardy proceedings," a judgment, which is plainly unauthorized by, and contrary to the statute, is void; therefore no judgment could be allowed for the expense of a surgical operation, since the statute provided only for the maintenance and education of the child.

The upper court, in the instant case,[27] followed the Indiana decisions,[28] in the strict interpretation of the statute, which allows only for the maintenance and education of the bastard child, and held the two cases,[29] cited by the complainant, out of harmony with the majority of the Indiana decisions. The upper court also held that section 1058[30] of the bastardy act, relied upon by the complainant, when interpreted as a part of the whole act,[31] harmonizes with all the sections[32] of the act in indicating that its sole purpose is for the maintenance and education of the bastard child.

It is submitted that the upper court has correctly followed the decisions in this state, when it sanctioned the interpretation of previous Indiana cases in holding the Indiana statute to provide only for the maintenance and education of the bastard child in the "bastardy proceeding," since such decision supports the rule, that such statutes, as the bastardy act, are in derogation of the common law and should be strictly interpreted[33] and in view of the fact that the language of the Indiana statute did not answer the clear intention of statutory expression as set forth in Cope v. Cope.[34]

Such strict interpretation of the statute, as given in the instant case, seems highly desirable to that group of scholars, who believe that there should be a very strong curb upon the action of "bastardy proceedings," since they believe it to be an instrument of blackmail.

---

[22] Supra, note 16.

[23] Supra, note 2.

[24] Canfield v. State (1877), 56 Ind. 168; Lewis v. Hershey, Admr. (1910), 45 Ind. App. 104, 90 N. E. 332; Heritage v. Hedges (1880), 72 Ind. 247; Harmon v. Merill (1841), 18 Me. 150; Hale v. Turner (1857), 29 Vt. 350; Barber v. State (1865), 24 Md. 383.

[25] 4 Blackf. (Ind.) 122 (1835).

[26] 67 Ind. App. 1, 118 N. E. 690 (1918).

[27] Supra, note 3.

[28] Supra, notes 24, 25, 26.

[29] Evans v. State (1877), 58 Ind. 587; Robinson v. State (1891), 128 Ind. 397, 27 N. E. 750.

[30] Burns' Rev. Statutes, 1926, Section 1068.

[31] Huff v. Fetch (1924), 195 Ind. 570, 143 N. E. 705; Keener v. Ochesenrider (1925), 85 Ind. App. 156, 149 N. E. 101.

[32] Supra, note 2.

[33] Supra, note 21.

[34] Supra, note 16.

Although this strict interpretation may be the only logical and legal conclusion to be drawn from the Indiana statutes and a correct statement of the law in this state, yet it supports the contention that the common law countries are not so liberal in their statutes concerning illegitimate children, as the civil law countries. And even the civil law countries have been slow to adopt liberal legislation to improve the status of the illegitimate children. Norway took the lead in enacting such a statute,[35] which provided that a child, whose parents were not wedded, has a right to the family name of both the father and the mother, a right to inherit from either, and the right to maintenance and education in the same manner as if it were legitimately born.

American courts and legislatures have hinted at such reforms in the almost universal tendency to give illegitimate children the right of inheritance from the mother and from the father in the case of legitimation,[36] and the prevalent tendency to charge the father with the maintenance and education of his illegitimate child in the "bastardy proceedings" instituted by the mother or the overseer of the poor.[37] And there has been some definite action in following Norway's statute. Illinois made an attempt in 1915[38] but it remained for North Dakota to actually pass such a law in 1917, which declared every child to be the legitimate child of its natural parents, and made such child heir of such parents. California followed by an amendment to the penal code in 1925,[40] which made it a criminal offense for a father of an unborn child to fail to furnish it with the necessaries of life. While these efforts have been made by statute to liberalize the status of the illegitimate child, and to remove what is otherwise a severe penalty upon an innocent child, the courts, in some jurisdictions, have followed this liberal tendency in their interpretation of statutes, by allowing for the lying-in expenses of the mother.[41] Thus it was held in Judson v. Blanchford,[42] that an allowance, as part of the maintenance of the child, for the board of the mother for seven weeks, and the board and wages of the nurse and sundry articles of clothing for the mother, was found to be necessarily incurred for the child at its birth and for the nursing of the same and thereby authorized by statute. It was held in a similar case,[43] that a father of a bastard child must pay for the support of the mother and the expense at child-birth or stand committed to jail and that such judgment was constitutional. And the court in People v. Yates[44] went even farther under the California statute and held that the clause, which required the father to furnish the necessities for his unborn child, included

[35] Journal of the Society of Comparative Legislation, New Series, xxvi, pp. 284, 296, July, 1916.

[36] Supra, note 12; Burns' Rev. Statutes, 1926, Section 3334; Comp. Laws of Michigan (1929), Section 13443; Rentie v. Rentie (1918) (Okla.), 172 Pac. 1983.

[37] Supra, note 9.

[38] Legislative Digest of 49th Assembly (1915), State of Ill. H. B. 454, 455, 602.

[39] Laws of North Dakota, 1917, p. 80.

[40] Penal Code, Calif., Sec. 270, (Amendments) 1925, p. 55.

[41] Peck, Domestic Relations (3rd Ed.), pp. 144, 145 (1930); Speiger v. State (1873), 32 Wis. 400; Andrew v. Catherine (1878), 16 Fla. 830.

[42] 4 Conn. 557 (1823).

[43] Belding v. State (1929), 121 Oh. St. 393, 169 N. E. 301.

[44] (Calif.) 298 Pac. 961.

necessities furnished to the mother, since mere proof of an unborn child's existence shows necessity for food, clothing and shelter. Accordingly the failure of the father to furnish such necessities to the mother is a direct violation of the above statute, since it is manifest that, if the mother were without food, clothing or shelter, her health would be impaired and if carried to the extreme, death would result and such impairment of the health of the mother would also impair the health of the child. Therefore it can be only concluded that necessities furnished to the mother are also furnished the unborn child. Chandler v. State[45] graphically states the liberal viewpoint in saying that a child is a helpless infant, deriving its sustenance from its mother's breast, and if the baby procures its food from its mother's breast, then the duty devolves upon the father to furnish sustenance for the support of the mother, that she may in turn in the course of nature, be able to furnish the child with its nourishment. If we are to follow precedent and the strict construction of the bastardy statutes, then the decision in the instant case is the desired one, but if the welfare of the child is to be considered, the liberal tendency, as set forth in the foregoing statutes and cases, should be followed. J. H. H.

CONSTITUTIONAL LAW — DECLARATORY JUDGMENTS — FEDERAL RULE— Tennessee placed a tax on gasoline purchased by Appellant outside the State and stored within it pending use in Appellant's business as an interstate rail carrier. Appellant brought suit in a Tennessee Chancery Court, under the Uniform Declaratory Judgments Act, to have the tax act declared unconstitutional under the commerce clause and the Fourteenth Amendment. The Tennessee court upheld the act; Appellant appealed to the United States Supreme Court, which pointed out that before it cauld have jurisdiction, under Article III, Sec. 2, of the Federal Constitution, a case or controversy must be presented. Held, in determining this question, the court looks to the nature of the proceeding which the statute authorizes, and the effect of the judgment rendered upon the rights which Appellant asserts. That Appellant, whose duty to pay the tax would be determined by this decision, was "not attempting to secure an abstract determination by the court of the validity of a statute, or a decision advising what the law would be on an uncertain or hypothetical state of facts," but that so long as its rights arising under the Constitution and laws of the United States are protected by invoking the judicial power to review a judgment of a State court, a case or controversy is presented, and it is immaterial that no decree of execution is necessary under the judgment.[1]

The controversy here was termed "real and substantial," and the court, thus having jurisdiction, proceeded to a finding against Appellant affirming judgment below, on the constitutional questions. This is a complete reversal of opinion by the United States Supreme Court. Although the question of the validity of declaratory judgments has never before been squarely presented to the court, there have been a number of cases in the past in which the court used dicta that a declaratory judgment is one which constitutes an abstract determination as to what the law would be on an uncertain or

[45] (Ga.) 144 S. E. 51 (1928).

[1] Nashville, C. & St. L. Ry. v. Wallace (Feb. 6, 1933), 53 Sp. Ct. 345.