Marquette Law Review

Volume 14
Issue 1 *December 1929*

Article 7

Illegitimacy Under the Children's Code

J. J. Kenney

ILLEGITIMACY UNDER THE CHILDREN'S CODE*

THE 1929 session of the Wisconsin legislature has seen the necessity for the more adequate protection of illegitimate children. This advantageous step was taken to increase the humanness of the law already enacted on this subject. These laws are embodied in Chapter 166 R. S.

A study of the amendments to Chapter 166 R. S. included in Chapter 439, Laws of 1929, commonly known as the Children's Code manifests an effort to more effectually secure the purposes above indicated. Although much study and thought has been given in the last decade to the social problem herein treated there have been no substantial changes in the law since the enactment of the original statutes as it appears in the statutes of 1849.

The belief that the purposes of Chapter 166 were merely disguised poor relief and that the sole intent of the law was to "keep the child off the county" was firmly entrenched in the minds of most attorneys. That the primary purposes of the law were never fully realized by many of the legal profession, including those upon whom the responsibility for its administration fell is plainly evident. There can be no misunderstanding of its present intent.

The new law materially increases the responsibilities of the district attorneys of the state, giving them broad powers and exacting duties. Its proper administration necessitates not only legal knowledge but also an understanding of the exceedingly complicated social problem of illegitimacy.

That these matters will take more of their time than ever before is apparent. That Sec. 48.45 (2) compelling all maternity hospitals to report illegitimate births to the state board of control within twenty-four hours and the additional duty of the state board of control; subsection 12 of Sec. 8, to see that appropriate steps are taken to establish paternity and secure for the child the nearest possible approximation to the care, support, and education that the child would be entitled to had it been born in lawful wedlock, will materially increase the number of cases, is to be expected. The necessity for the appearance of the district attorney at preliminary hearings,[1] the drafting of settlement agree-

---

* By J. J. Kenney; past district attorney and divorce counsel of Milwaukee County, present probation officer.

[1] Wis. Statutes, Sec. 166.08.

ments and the presentation of the same to the court for approval,[2] will cause more of his time to be devoted to this class of cases.

That larger settlements will be received, and fewer agreements containing denials of paternity made, is but a natural consequence of the district attorneys' realization that in illegitimacy proceedings they are appearing primarily in the interests of the child rather than as attorneys for the county seeking settlements sufficient only to keep the child "off the county" until it could be placed by either the mother or the county. Attempts by mothers of illegitimate children to release them through the juvenile courts[3] of the larger counties will result in the matters being referred back to the district attorney of the mother's county in order that he may take proper proceedings in the interest of the child.

To justify this increased labor and to reassure district attorneys that it will result in actual benefit to the child let us look at Sec. 166.11 and 166.18. There we find the child protected from the misuse of funds supposedly set aside for its benefit. This section also prevents blackmailing by limiting the rights of the mothers solely to that part of the proceeds paid for the lying-in expenses and the support of the child up to the time of the entry of judgment or agreement, the money paid for the future support of the child being distributed by a trustee under direction of the court.

The intent of any law may be the highest and the results sought desirable and still entirely fail unless the procedure therein provided be practicable. Excepting in the matter of agreements there has been no substantial change in the procedure; slight modifications being made so that the new law agrees in substance with the Uniform Illegitimacy Act, drafted by the National Conference of Commissioners of Uniform State Laws and still retaining the satisfactory features of the earlier Wisconsin law.

Some of the new provisions are: the issuance of summons instead of a warrant upon consent of the complainant.[4] This calls for the use of discretion upon the part of the district attorney. There are many instances where the initial proceeding by warrant with its subsequent arrest and confinement has had a bad psychological effect upon the putative father, preventing, or making it difficult to arrive at an amicable settlement, arousing the hate and animosity of the father toward the child and bringing about ill-advised unsocial marriages which soon arrived in our already overcrowded divorce courts.

---

[2] Sec. 166.07.
[3] Sec. 48.07, and 48.08.
[4] Wis. Statutes, Sec. 166.01.

At both the preliminary hearing before the magistrate,[5] and at the time of trial[6] the general public may be excluded.

The right of trial by jury belongs to either party, but unless it is demanded, trial shall be before the court.[7]

Judgments determining paternity shall be filed by the clerk of courts with the state registrar of vital statistics.[8]

Provision is made for the judgment to include funeral expense in the event of the child's death before trial.[9] Authority is also given to commence the action even though the child is dead at the time of birth.[10] Under either circumstances the judgment would be the same as in other cases except that no provision would be made for the future support of the child.

The failure of the defendant to give satisfactory bond after entry of judgment will not necessarily result in his confinement,[11] it being discretionary with the court to stay execution of the commitment until there has been a default. This enables the court to place the defendant upon a probationary basis and makes unnecessary the acceptance of the "defendant's own bond." The apparent leniency of this provision toward the defendant is more than offset by the additional security given the interests of the child and the mother by Sec. 166.12 and Sec. 166.14. Criminal action under Sec. 151.30 still remains.

When the child is liable to become a county charge and the mother fails to complain, if the district attorney believes it to be to the best interests of the child, he shall institute proceedings under 166.20, and where the mother commences a proceeding and fails to prosecute the same the district attorney has the power to make an agrement with the putative father in the same manner as might be made by the mother.[12] While the district attorney must prepare all agreements under this law,[13] he, himself, is one of the contracting parties under Sec. 166.22.

Believing that opportunity should be given for the parties to voluntarily assume their obligations toward the unfortunate child in a manner that will fully protect its interests, settlement agreements are provided for and encouraged.[14] The agreement may be made at any time before final judgment. It must be approved by the trial court. The parties

[5] Sec. 166.02.
[6] Sec. 166.10.
[7] Wis. Statutes, Sec. 166.10.
[8] Sec. 166.11.
[9] Sec. 166.11.
[10] Sec. 166.01.
[11] Sec. 166.13.
[12] Sec. 166.22.
[13] Sec. 166.08.
[14] Wis. Statutes, Sec. 166.07.

must submit personally to the jurisdiction of the court. The parties must be in agreement upon all matters upon which the court is to pass judgment except that of the paternity of the child. If the court approves of an agreement between the parties without an admission of paternity it shall be ordered filed, and upon a default of any of the terms the court will order judgment. Where the defendant has admitted paternity judgment shall be ordered at once upon approval by the court of the other terms of the agreement. These records, together with all other records of court proceedings in these matters shall not be open to the inspection of anyone but the parties.[15]

The amendments to Chapter 166 of the statutes apply to proceedings commenced after the act took effect.

The purpose of these statutes can best be outlined by quoting the Wisconsin Supreme Court in *Franken* v. *State,* 190 Wis. 424, in which the question of the purpose of similar statutes was considered. It said:

What then, did the legislature have in mind when it enacted these statutes? What purpose did it intend to serve in the interests of the public; and what protection did it contemplate for those involved in such a proceeding; and upon whom did it design the placing of any burdens? In the first place, it singled out from the children of the state, who are its wards, illegitimate children, and placed them in a separate class, for it needs no argument to realize that such children, owing to the peculiar situation surrounding them, must be afforded special protection, not only that the child may be afforded nurture, education, and support, but that it may be raised under such circumstances as will constitute it at maturity a useful citizen of the state. It is therefore the prospective birth of an illegitimate child, and its welfare after birth, that have been instrumental in moving the legislature to action, and a careful examination of these statutes will reveal that the primary object of the legislature was to secure the protection and welfare of the child. When it comes to protective legislation of this kind, it is meet and proper that the innocent should receive primary attention.

[15] Sec. 166.17.