

1947

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Edith Dailey Wright

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Recommended Citation

Edith Dailey Wright, *Paternity, Guardianship and Non-Support*, 12 Mo. L. REV. (1947)
Available at: <https://scholarship.law.missouri.edu/mlr/vol12/iss3/4>

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PATERNITY, GUARDIANSHIP AND NON-SUPPORT

EDITH DAILEY WRIGHT*

A. PATERNITY

Historically a child born out of wedlock had few rights and the fight for protection and recognition of such children has been a long one. Under the common law such a child was the "child of no one"¹ so far as inheritance rights were concerned. Later, by statute, he was allowed to inherit from his mother and Missouri, as most other states, has a statute permitting this.² The ability to inherit from his father, however, has been long in coming. The difficulties of proof and the dangers involved have been thought too great. Likewise, the forcing of a father to support his illegitimate child has been slow in coming for the same reasons. Modern methods of establishing paternity by blood tests have, however, eliminated much of the hazard involved and many states have paternity laws in effect at the present time.

Missouri attempted in 1921 to give natural children the right to inherit from the father under a statute.³ The statute provided that a child born out of wedlock could inherit from both parents, provided paternity of the child was established by an action at law during the lifetime of the alleged father. The mother was authorized to institute a suit for this purpose in the circuit court. The mistake made by the legislature was in placing the new law in the section on "Descents and Distributions" under a title which read: "An Act to repeal sections 311, 312, and 314 . . . entitled 'Descents and Distributions' and to enact four new sections in lieu thereof, all relating to descents and distributions of estates."⁴

When the constitutionality of the statute was challenged as violating the constitutional directive that all bills shall contain but one subject which shall be clearly expressed in its title,⁵ the supreme court properly

*Staff member, Missouri Children's Code Commission. A.B. University of Missouri, 1942, LL.B. 1944.

1. Orthwein v. Thomas, 127 Ill. 544, 21 N.E. 430, 4 L.R.A. 434 (1889).

2. MO. REV. STAT. (1939) § 314, originally enacted in different form in Act. Jan. 11, 1822, 1 Terr. Laws, p. 858, § 7.

3. Mo. Laws 1921, p. 118.

4. *Id.* at 117.

5. Mo. CONST., (1875), Art. IV, § 28.

held in *Southard v. Short*⁶ that a statute providing for the institution of a suit by the mother of a child born out of wedlock against the reputed father to obtain a decree establishing paternity does not come under the subject of "Descents and Distributions of Estates." As a result the statute was repealed in 1931.⁷

No attempt has since been made by the legislature to set up a procedure for the establishment of paternity either for the purpose of inheritance or support until the present session. The Children's Code Commission, as a part of its recommendations on improving the laws of the state with regard to children, recommended that a paternity law be enacted and accompanied its recommendation with a proposed law based on the Uniform Illegitimacy Law.

The proposed paternity law is now pending in the legislature as House Bill No. 119. It is broader than the 1921 law in that it imposes the duty of support on the father and sets up in more detail how and when suit may be instituted and support allowed and enforced. Its basic premise is that "the parents of a child born out of wedlock . . . are liable for the support and education of the child."⁸ This premise becomes effective, of course, only after a man has been proved under the law to be the father of such child. The proposed law sets up a procedure for the determination of paternity in the juvenile court, said court to have exclusive jurisdiction in such cases.⁹ The proceedings may be initiated in the county where the father resides or may be found or in which the mother or child resides. Thus a mother need not be a resident of Missouri to bring action here.¹⁰ Proceedings must be filed within two years after the birth of a child or within two years after the termination of payments made pursuant to any voluntary agreement to support the child.¹¹ The hearing is to be by court without jury, the court to exclude the general public. The proposed act allows the court, whenever it is relevant to the proceedings, on motion of the defense, to order the petitioner, the child, and the alleged father to submit to blood-grouping tests, evidence of which shall be deemed competent in the proceedings.¹²

6. 320 Mo. 932, 8 S.W. (2d) 903 (1928).

7. Mo. Laws 1931, p. 130.

8. H.B. 119, § 1.

9. *Id.* § 2.

10. *Ibid.*

11. *Id.* § 5.

12. *Id.* § 8.

If the court so finds, it shall issue an order declaring the man to be the father and liable for the support and education of the child until it reaches the age of sixteen or is legally adopted. The order shall specify the amount to be paid for support. In order to allow for strict enforcement of the order, the court is given continuing jurisdiction over proceedings brought to compel support or to increase or decrease the amount of support until the judgment of the court is completely satisfied.¹³

Obviously the main purpose of this law is to obtain support for the child from its father. It may be observed that the Uniform Illegitimacy Law provides for imprisonment in the event that the father fails to pay the support allowance ordered by the court. Decisions in Missouri,¹⁴ however, indicate that such a law would be unconstitutional as imprisonment for debt. For this reason provision therefor was omitted from the proposed law. No mention is made in the law of inheritance rights but it is specified that a judgment for support thereunder shall be enforceable against the father's estate.¹⁵

B. GUARDIANSHIP OF MINORS

1. *Defects of the present law.*

The present law on guardians and curators of minors was enacted in the first half of the 19th century, most of the sections being enacted around 1835. Historically a guardian's duties relate to the person of a child while a curator's relate to the property of a child.¹⁶ This did not mean, however, that the same person could not be appointed both guardian and curator. Clear distinctions between the duties and even definitions of the two terms have never been set forth in this state, although distinctions between the functions of persons acting as guardian and curator of the same minor was made in *Larned v. Renshaw*.¹⁷ In the examination of the guardianship and curatorship laws by the Children's Code Commission it was noted that the terms were used interchangeably and usually were used together, indicating they are synonymous. As a result the same qualifications, duties, responsibilities, and surety are required of guardians and curators

13. *Id.* §§ 9, 10.

14. *Roberts v. Stoner*, 18 Mo. 481 (1853); *Harrington v. Harrington*, 121 S.W. (2d) 291 (Mo. App. 1938).

15. H.B. 119, § 1.

16. 1 BLACKSTONE 460.

17. 37 Mo. 459, 460 (1886). See 2 Limbaugh, *Missouri Practice* (1939), § 1192, p. 793, n. 79.

despite the fact that their duties are different. The commission therefore, recommended the clarification and separation of provisions relating to guardianship from those relating to curatorship.

Following the pattern of most laws enacted prior to the turn of the century, the tenor of this law is one of emphasis on protection of the property of the child rather than of his person. The most rigid safeguards are present in the law to insure the proper care, investment and preservation of the child's property until he reaches majority. On the other hand, only the bare minimum of protection of the child himself is insured. This defect in the law is traceable, not to any lack of so-called "social conscience" in the legislators who enacted it, but to a difference in conditions and needs of that time in comparison to the present. The commission, therefore, recommended that more adequate protection of a child be guaranteed by the law pertaining to guardians. On the other hand, they recommended that the part of the law pertaining to curatorship be left as it stands at the present time. Adequate protection being given thereby, it was felt that the long use and many court interpretations of the present law had made it familiar to lawyers using it and that the disadvantages of a substantial change would, therefore, overbalance any improvement effected through mere change in wording. The only exception to this is that an attempt was made to eliminate the use of the words "guardian" and "curator" interchangeably and in each place where the words were used, investigation was made as to which one was intended and that one word substituted for the two.

2. METHOD OF EFFECTING RECOMMENDED CHANGES

The commission felt that a re-drafting of the first twenty sections of the present law¹⁸ was necessary to effect the needed changes but that the remaining sections could be left exactly as they stand with changes only to clarify the use of the words "guardian" and "curator." These changes were made and the suggested law has been introduced into the legislature as House Bill No. 118.

The first section of the proposed law¹⁹ contains definitions of the terms "minor," "guardian," and "curator." The definition of a minor is identical with that under the present law.²⁰ The definitions of guardian and curator

18. MO. REV. STAT. (1939), §§ 374-438.

19. H.B. 118, § 374.

20. MO. REV. STAT. (1939), § 374.

are new. Guardian is defined as "a person, corporation, association, or public agency appointed by a court of competent jurisdiction to protect and control the person of the minor, and to provide for the minor's suitable maintenance, care, treatment, education, and welfare." His rights are set forth following the definition: "A guardian shall have the same rights and powers over the person of his ward as a parent. A guardian who provides support of a minor shall be entitled to be reimbursed therefor from the estate of such minor, if any." Curator is defined as "a person, corporation or public agency appointed by the court to have the care and management of the estate of a minor, subject to the superintending control of the court."

The only substantial change from the present law that these definitions bring about is to allow the appointment of public agencies, corporations, or associations as guardians and curators, whereas under the present law only "persons" may be appointed. In actual practice under the law, however, agencies are appointed guardian in effect by appointing the head of such agency as guardian. This change merely brings the law into harmony with present practice.

Section 375²¹ is almost identical with Section 375 of the present law. Section 376²² gives jurisdiction for appointment of guardians to either the probate court or the juvenile court. This and all sections up to Section 388 pertain only to guardianship and have no relation to curatorship. It was thought by the commission that the program for protection of children could be made more effective if matters of guardianship could be handled in the juvenile court, especially when a child has been brought into juvenile court previously for other reasons. The Constitution gives the probate court jurisdiction over the appointment of guardians and curators of minors²³ but this was not interpreted by the commission to mean *exclusive* jurisdiction. Hence the proposed law allows either court to appoint guardians, but whichever court obtains jurisdiction for the purpose of determining guardianship has exclusive jurisdiction, and notice of appointment of guardian must be filed with the other court in order to prevent any conflict in appointments.²⁴ Section 378²⁵ pertains to minors over fourteen and is

21. H.B. 118.

22. *Id.*

23. Mo. CONST. (1945), Art. V, § 16.

24. H.B. 118, § 377.

25. H.B. 118.

taken from Section 383 of the present law with no change, except one in present Section 384 made necessary by a procedure to be discussed later. Proposed section 381 is taken from old section 382. These rearrangements of placing of the sections was a part of the policy of clarification.

Section 381²⁶ sets forth the contents of the application for appointment with several additions not in the present law.²⁷ The purpose of these are all to give the judge more adequate information on which to base his approval or disapproval of the applicant and are part of the policy of the commission to aim at getting a guardian who is competent and suitable to the particular child.

Section 382²⁸ presents the principal departure from the present law and practice and is the embodiment of the commission's thoughts regarding need for more adequate insurance that the guardian appointed be a fit person and one to whom a child might well be entrusted. It provides for the investigation of the qualifications of the applicant and a report thereof to the court. If the court is the juvenile court, the juvenile officer is empowered to perform this duty. When the proceeding is in the probate court which has no such officer or staff to make the investigation, the law puts the burden on the State Department of Public Health and Welfare, Division of Welfare.

Section 383²⁹ makes an added requirement which is a change from the present law by limiting the number of persons over whom one person may be appointed guardian. That section reads: "Except when the court finds a family unit will be disturbed, no individual who is the guardian of as many as three persons, other than his relatives to the third degree by blood or marriage, shall be appointed as guardian of any minor." This applies only to guardianship, not to curatorship.

Sections 384 to 394 are taken from the present law and any changes therein are only those made necessary by the fact that they applied to curatorship but were mixed in with the sections applying to guardianship. As re-drafted they embody the present law with regard to how and when a curator shall be appointed.

Sections 395 to 438 of the proposed law are the old law unchanged except for the proper use of the words "guardian" and "curator."

26. *Id.*

27. MO. REV. STAT. (1939), § 377.

28. H.B. 118.

29. *Id.*

C. NON-SUPPORT

Section 4420³⁰ relates to abandonment of wife or children and states:

"If any man, shall, without good cause, abandon or desert his wife or shall fail, neglect or refuse to maintain and provide for such wife; or if any man or woman shall, without good cause, abandon or desert or shall, without good cause, fail, neglect or refuse to provide the necessary good, clothing or lodging for his or her child or children 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 the necessary food, clothing or lodging for such child, or if any man shall leave the state of Missouri and shall take up his abode in some other state, and shall leave his wife, child or children, in the state of Missouri, and shall, without just cause or excuse, fail, neglect, or refuse to provide said wife, child or children, with proper food, clothing or shelter, then such person shall be deemed to have abandoned said wife, child or children, within the state of Missouri, he or she shall, upon conviction, be punished by imprisonment in the county jail not more than one year, or by fine not exceeding one thousand dollars (\$1,000) or by both such fine and imprisonment. No other evidence shall be required to prove that such man was married to such wife than would be necessary to prove such fact in a civil action."

The Supreme Court of Missouri, in *State v. Vogel*³¹ held that the charge and proof under this statute must show the child actually in need of the "necessary" food, clothing and lodging in order to sustain a conviction and that the accused can not be punished if the child is receiving food, clothing, and lodging from others. This construction made it practically impossible to punish a father thereunder due to the fact that when he abandons his child it is seldom that *someone* does not see that it is fed and clothed. Under this tortuous construction of the word "necessary" a father is absolved from guilt by the generosity and natural pity of a neighbor or relative. The commission, believing that abandonment convictions should depend on the acts of the abandoning father and the intent with which those acts was accompanied recommended a re-drafting of Section 4420 and sent with that recommendation a proposed law now pending in the legislature as House Bill No. 117. The proposed law reads:

30. MO. REV. STAT. (1939).

31. 51 S.W. (2d) 123 (Mo. 1932).

"If any man shall, without good cause, fail, neglect or refuse to provide adequate food, clothing, lodging, medical or surgical attention for such wife; or if any man or woman shall without good cause, abandon or desert or shall without good cause fail, neglect or refuse to provide adequate food, clothing, lodging, medical or surgical attention for his or her child or children 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, lodging, medical or surgical attention for such child, *whether or not, in either such case such child or children, by reason of such failure, neglect or refusal, shall actually suffer physical or material want or destitution;*³² or if any man shall leave the State of Missouri and shall take up his abode in some other state, and shall leave his wife, child or children, in the State of Missouri, and shall, without just cause or excuse, fail, neglect or refuse to provide said wife, child or children, with adequate food, clothing, lodging, medical or surgical attention, then such person shall be deemed guilty of a misdemeanor; and he or she shall, upon conviction, be punished by imprisonment in the county jail not more than one year, or by fine not exceeding one thousand dollars (\$1,000) or by both such fine and imprisonment. No other evidence shall be required to prove that such man was married to such wife than would be necessary to prove such fact in a civil action."

The only other change from the present law, outside of the one mentioned, is the addition of medical or surgical attention to the list of those "necessaries" which a father must provide and the provision that failure to provide such care may also constitute abandonment.

32. Italics mine.