Rights of Illegitimate Children in Missouri

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Comment

RIGHTS OF ILLEGITIMATE CHILDREN IN MISSOURI

I. INTRODUCTION

This comment will examine several actions which are available in Missouri against the father of an illegitimate child. The actions are arbitrarily divided into two categories: those which accrue during the father's lifetime and those which arise upon his death against his estate. Each cause of action will be examined separately so that the requirements of and obstacles to the use of the action may be examined in depth. The area of illegitimate children's rights is a rapidly evolving one. The attitude of the courts toward such children has undergone a rather drastic change in favor of increased rights and equal treatment for illegitimate children. This comment, however, is limited to a consideration of actions which are presently available against an illegitimate father in Missouri.

II. ACTIONS ACCRUING DURING THE FATHER'S LIFETIME

A. Actions for Support

1. Duty of Support

Traditionally in Missouri, the father of an illegitimate child had no legal obligation to provide support for the child.¹ In Easley v. Gordon² the mother of an illegitimate child brought suit to enforce the father's express promise to pay for the support of the child. The court denied relief, reasoning that since the primary duty of support was on the mother of an illegitimate child, her performance of that duty was not sufficient consideration to support the father's promise to pay. The finding that the duty of support of an illegitimate child fell on the mother, and not on the father, was based on the court's interpretation of the common law as adopted by Missouri.³ The court found that, in the absence of a statute to the contrary, the duty of support fell on the mother.⁴

² 51 Mo. App. 637 (St. L. Ct. App. 1892).
³ § 6561, RSMo 1889 (now § 1.010, RSMo 1969).
Subsequent cases held that a father had no statutory duty to support his illegitimate child. In *James — v. Hutton*, the minor illegitimate children brought suit for support, arguing that the criminal non-support statute demonstrated a legislative intent to impose a duty of support on the father. The court, however, held that criminal statutes should be strictly construed and no duty of support should be imposed on the father in the absence of an express declaration to that effect. In *State ex rel. Canfield v. Porterfield*, the mother of an illegitimate child argued that the 1919 versions of sections 452.150 and 452.160, RSMo 1969, gave the mother of an illegitimate child a cause of action against the father for support. The court held that the statutes only applied when the father was seeking custody or control of the child, or the child's services, earnings, or property. Thus, where the putative father avoided all relationship with the child, the common law rule remained unchanged.

The Kansas City Court of Appeals, in *James — v. Hutton*, declared that the failure of the Missouri legislature to enact a statute authorizing a cause of action for support of an illegitimate child against the father was a declaration of the public policy of Missouri against such a cause of action. The court noted the unsuccessful attempts to enact legislation which would change the common law rule, and concluded:

By such action the General Assembly has said that the public policy of the State of Missouri is the law under the decisions of the

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5. 373 S.W.2d 167 (K.C. Mo. App. 1963).
8. §§ 1813, 1814, 1814a, RSMo 1919 (now §§ 452.150, .160, RSMo 1969). Section 451.150, RSMo 1969, states:
   The father and mother living apart are entitled to an adjudication of the circuit court as to their powers, rights and duties in respect to the custody and control and the services and earnings and management of the property of their unmarried minor children without any preference as between the said father and mother, and neither the father nor the mother has any right paramount to that of the other in respect to the custody and control or the services and earnings or of the management of the property of said unmarried minor children; pending such adjudication the father or mother who actually has the custody and control of said unmarried minor children shall have the sole right to the custody and control and to the services and earnings and to the management of the property of said unmarried minor children.
Section 452.160, RSMo 1969, states:
   The terms of section 452.150 shall apply to children born out of wedlock and to children born in wedlock, and the terms "father and mother," "parent," "child," shall apply without reference to whether a child was born in lawful wedlock.
Supreme Court and Courts of Appeal which have held that there is no civil obligation for the support of illegitimate children as far as the father—either alleged or admitted—is concerned. 10

Just five years later, however, this public policy and the case law following the rule of Easley v. Gordon 11 was swept aside by the Missouri Supreme Court in R ____ v. R ____. 12 In the case, the court stated that recent decisions of the United States Supreme Court 13 compel the conclusion that the proper construction of our statutory provisions relating to the obligations and rights of parents affords illegitimate children a right equal with that of legitimate children to require support by their fathers. Prior cases to the contrary are no longer to be followed. 14

The basis for the decision in R ____ v. R ____ was that discrimination between legitimate and illegitimate children for the purpose of determining the right to compel support by a father was a violation of the equal protection clause of the fourteenth amendment, 15 as well as a violation of article I, sections 2 and 14 of the Missouri constitution. Thus, in Missouri, the father of an illegitimate child, after R ____ v. R ____, has a legal duty of support coextensive with his duty to provide support for a legitimate child.

Missouri has recognized the duty of support as a legal obligation. 16 According to the Missouri Supreme Court: 17

The father owes a duty to nurture, support, educate and protect his child, and the child has the right to call on him for the discharge of this duty. These obligations and rights are imposed and conferred by the laws of nature; and public policy, for the good of society, will not permit or allow the father to irrevocably divest himself of or to abandon them at his mere will or pleasure. 18

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10. Id. at 169.
11. 51 Mo. App. 637 (St. L. Ct. App. 1892).
12. 431 S.W.2d 152 (Mo. 1968).
14. R ____ v. R ____ , 431 S.W.2d 152, 154 (Mo. 1968) (citations omitted).
15. See Gomez v. Perez, 409 U.S. 535 (1973), in which the United States Supreme Court held that it is a denial of equal protection to deny illegitimate children the right to compel support from their father if the state allows legitimate children such a right.
17. In re Scarritt, 76 Mo. 565 (1882).
18. Id. at 584.
This obligation exists between father and child, the father having a duty to provide support and the child having the right to receive support from his father. Traditionally in Missouri, however, the right to enforce the father's duty of support does not lie with the child. In *Worthington v. Worthington*, a guardian acting on behalf of seven minor children attempted to enforce the children's right to support against their father. It was held that the children had no right to maintain a direct action against the father for their support. The rationale for the decision was that permitting children to bring such an action would encourage suits between children and their parents, thereby undermining parental discipline and eventually the family structure itself. The Missouri Supreme Court in *In re L* may have changed the *Worthington* rule and given children the right to enforce the father's duty of support. Suit was brought by plaintiff, a minor, by her next friend, the mother and natural guardian, to compel the father to provide support for the child. The court did not mention the *Worthington* decision, but focused on whether the child's mother was a proper next friend to represent the child in such a proceeding. Thus, it is at least arguable that the court overruled *Worthington* by implication, thereby allowing the child to maintain an action to enforce the father's duty of support. Because *Worthington* was not discussed, however, it is still uncertain how the court would rule if directly presented with the question of whether a child has a cause of action for support. Even though *In re L* was somewhat unclear whether a cause of action for future support would lie with the child, the court clearly held that the mother is a proper party to a cause of action against the father for future support.

2. The Child's Right to Support

The father's duty to support the child arises at birth and continues until the father's death or the emancipation of the child, whichever occurs first. A father's duty of support clearly ends at his death. With emancipation, however, it is not so easy to pinpoint when the duty of support terminates. Emancipation is defined as the voluntary termination of the parent-child relationship. The

20. 499 S.W.2d 490 (Mo. En Banc 1973).
termination of the relationship is a question of fact to be determined by the jury.\textsuperscript{24} The parent’s intention to emancipate the child may be shown either by express agreement or it may be implied from the actions of the parties.\textsuperscript{25}

Several factual situations raise presumptions as to the existence of an emancipation. First, it is presumed that a child is emancipated when he attains the age of legal majority.\textsuperscript{26} Furthermore, if a child below the age of majority marries, he is presumed emancipated because he has assumed obligations inconsistent with those of the parent-child relationship.\textsuperscript{27} Likewise, if a child under the age of majority joins the military, he will be presumed to be emancipated because he has put himself under the control of the government, a relationship inconsistent with the parent’s right of care and control.\textsuperscript{28} The underlying theory of emancipation in these situations is that the child is no longer in the care and custody of his father; some other person or organization has assumed the responsibility to care for the welfare of the child, and the father is relieved of his corresponding duty of support.\textsuperscript{29}

3. Methods of Obtaining Support

In Missouri, a third party who wishes to enforce the father’s duty to support his illegitimate children has two alternatives. The third party may provide support and seek reimbursement in a “common law suit,” or seek an order for continuing support in connection with a filiation proceeding. The ruling in \textit{R \ldots v. R} \textsuperscript{30} seems to dictate that cases involving support of legitimate children be precedent in actions for the support of illegitimate children.

a. Common Law Suit

Traditionally in Missouri, a mother who has expended her own money in supporting her child can recover the amount expended

\begin{itemize}
  \item \textsuperscript{24} Spurgeon v. Mission State Bank, 151 F.2d 702 (8th Cir. 1945), \textit{cert. denied}, 327 U.S. 782 (1946).
  \item \textsuperscript{25} Wurth v. Wurth, 322 S.W.2d 745 (Mo. En Banc 1959).
  \item \textsuperscript{26} Green v. Green, 234 S.W.2d 350 (St. L. Mo. App. 1950).
  \item \textsuperscript{27} Steckler v. Steckler, 293 S.W.2d 129 (Spr. Mo. App. 1956).
  \item \textsuperscript{28} Green v. Green, 234 S.W.2d 350 (St. L. Mo. App. 1950); Swenson v. Swenson, 241 Mo. App. 21, 227 S.W.2d 103 (K.C. Ct. App. 1950).
  \item \textsuperscript{29} See cases cited note 28 supra.
  \item \textsuperscript{30} 431 S.W.2d 152 (Mo. 1968).
\end{itemize}
from the father.\textsuperscript{31} In order for the mother to recover, she must show
that she had lawful custody of the child\textsuperscript{32} and that her expenditures
were for "necessaries" for the child.\textsuperscript{33}

The requirement of showing that the mother had lawful custody
is minimal and is met unless the mother's custody has been wrong-
ful. Only two Missouri cases have allowed the father to defeat the
mother's claim for reimbursement. In \textit{Assman v. Assman},\textsuperscript{34} the St.
Louis Court of Appeals denied recovery where the mother had spir-
it the children away from the custody of the father. Similarly, the
Kansas City Court of Appeals, in \textit{Wills v. Baker},\textsuperscript{35} denied reim-
bursement to the mother for amounts expended while her four chil-
dren lived with her. The father had been given custody of the chil-
dren by court order, but the children, without the father's consent,
left his home and resided with their mother. The underlying ration-
ale in each of these cases was that the mother had obtained custody
wrongfully; thus, any expenses incurred by her could not be reim-
bursed since the she was acting merely as a volunteer in supporting
the children. Certainly, in the case of illegitimate children it will be
even more infrequent that the mother does not have actual and
lawful custody of the child. Accordingly, the question of proper
custody should arise only in those instances where the father has
custody of the child because of a court order or the mother’s consent.

After a showing that she has proper custody of the child, the
mother must prove the amounts expended in providing for the
child's necessaries.\textsuperscript{36} In producing evidence of the amount expended
the mother need not prove each item with the particularity which
would be required of a creditor suing on a debt.\textsuperscript{37} The amount of
recovery is determined by the cost of the necessaries provided. The
father's duty is to support his child, and to do this he must provide
for the reasonable needs of his child.\textsuperscript{38} What constitutes reasonable

\begin{itemize}
    21, 227 S.W.2d 103, 106 (K.C. Ct. App. 1950); Broemmer v. Broemer, 219 S.W.2d 300 (St.
    L. Mo. App. 1949).
\item 32. Hunter v. Schwertfeger, 407 S.W.2d 606 (Spr. Mo. App. 1966); Broemmer v. Broem-
    mer, 219 S.W.2d 300 (St. L. Mo. App. 1949).
\item 33. Anderson v. Anderson, 437 S.W.2d 704 (K.C. Mo. App. 1969); Berkley v. Berkley,
    246 S.W.2d 804 (Mo. 1952).
\item 34. 192 Mo. App. 678, 179 S.W. 957 (St. L. Ct. App. 1915).
\item 35. 240 Mo. App. 705, 214 S.W.2d 748 (K.C. Ct. App. 1948).
\item 36. Hunter v. Schwertfeger, 407 S.W.2d 606 (Spr. Mo. App. 1966); Broemmer v. Broem-
    mer, 219 S.W.2d 300 (St. L. Mo. App. 1949).
\item 37. Josey v. Ford, 338 S.W.2d 14 (Mo. 1960).
\end{itemize}
needs, or necessaries, has never been conclusively decided, but in *Josey v. Forde* the Missouri Supreme Court stated:

"[N]ecessaries" include food, drink, clothing, washing, medicine, instruction, a suitable place of residence, and in nearly every family some comforts in excess of the strict necessities of life are enjoyed and treated as necessaries... And it is a matter of common knowledge that food, clothing and expenses in sending a child to school are necessaries.

The mother of a child is not the only party who may bring a "common law suit" to recover amounts expended for the benefit of the child. Other parties who furnish necessaries to a child may also bring suit for reimbursement. In order for a third party to recover, he must show that the father has not provided for the child. Furthermore, the right of any third party to recover is said to rest upon an actual agreement or one implied by law for the fulfillment of the father's duty to support his child. If the third party does not rely upon the father for reimbursement for the necessaries furnished, then no agreement will be implied and no recovery allowed since the goods and services were furnished as a gratuity.

The common law suit for necessaries provided is a relatively inexpensive method to enforce a child's right to support when the defendant father is subject to jurisdiction and has the means to satisfy a lump sum judgment. The main disadvantage to such a suit is that the plaintiff must first furnish the necessaries with his own funds and then suits must be brought periodically to recover amounts expended. The primary importance of the common law suit is to recover amounts expended before an order of support is obtained.

b. Filiation Proceeding

While the Missouri Supreme Court, in *R v. R*, clearly held that an illegitimate child has the right to support equal to that of a legitimate child, the type of proceeding to be used to obtain such support was not decided. The preferred method, how-

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39. 338 S.W.2d 14 (Mo. 1960).
40. *Id.* at 15 (citations omitted).
42. Schwieter v. Heathman's Estate, 264 S.W.2d 932 (St. L. Mo. App. 1954).
43. *Id.*
44. 431 S.W.2d 152 (Mo. 1968).
ever, soon became apparent.45 First, the child by a next friend should bring an action for a declaratory judgment that the defendant is, in fact, the child's father. Then, the mother or other guardian of the child may bring suit for the benefit of the child in order to obtain support payments. In addition, *In re L* apparently allows the child by a next friend to bring such a suit.

Two situations must be distinguished in bringing a suit for declaratory judgment. The first situation is where the mother is married to a man other than the actual father of the child at the time the child is born. In *In re L*, a married woman brought suit as an individual and as next friend for her child, seeking a judgment declaring the defendant to be the father of the child. The defendant argued that Lord Mansfield's Rule, which states that the declaration of a husband or wife cannot be admitted into evidence in order to bastardize any issue born during the marriage, would prevent the mother of the child from testifying that her child was illegitimate. The court, however, allowed the mother to testify, stating that Lord Mansfield's Rule was not part of the Missouri common law.46 Next, the court was confronted with the common law presumption that a child born in wedlock was a legitimate offspring of the marriage. The court noted that today the presumption is a rebuttable, evidentiary presumption which is overcome by clear, cogent, and convincing evidence to the contrary.48 Accordingly, the court held that the recorded admissions of the defendant were sufficient to overcome the presumption of legitimacy. Finally, the court held that the mother could act as next friend for the child even though there may exist a conflict of interest between the mother and child.49

The second important situation arises where the mother is not married at the time the child is born. Here, as in the first situation, the burden of proof as to the issue of paternity rests upon the plaintiff.50 There are no presumptions involved which help or hinder the plaintiff.52 Furthermore, there appears to be no conflict of interest

46. 499 S.W.2d 490 (Mo. En Banc 1973).
49. *Id.* at 492.
50. *Id.* at 494.
51. L M v. S, 504 S.W.2d 233 (Mo. App., D.K.C. 1973); LD v. JD, 481 S.W.2d 17 (Mo. App., D. Spr. 1972).
52. *Id.*
between mother and child which would prevent the mother from functioning as next friend in the child's suit for a declaratory judgment.

In both of the above situations, if the declaratory judgment action is successful, the mother should ask the court to award her child support. The mother, as natural guardian, is obligated to support her illegitimate child. Thus, she has a direct interest in the outcome of this litigation and is a proper party to maintain the action. Because an illegitimate child now has a right to support equal to that of a legitimate child, cases dealing with support of legitimate children should be precedent in an action for support of an illegitimate child. The common law rule was that the father has the primary duty to support his child. An order for continuing payments of child support is a prior judicial determination of the magnitude of this duty of support. The father and the mother cannot alter or determine the extent of the father's obligation by agreement between themselves. The rationale for this rule is that the mother is merely acting as trustee for the purpose of enforcing the child's right to support. Thus, the court has the final authority to determine the monetary value of the right of support, and the mother is unable to substitute her judgment for that of the court by contracting to accept less.

The amount of the support order is determined by the needs of the child and the father's station in life and financial condition. Missouri courts have held that the father has a duty of support regardless of the fact that the mother or the child has independent means or property of their own. Furthermore, a child is entitled to more than the bare necessities of life if the circumstances so warrant. Obviously the court, in deciding the amount of support, will define the child's "needs" to include food, clothing, shelter, medical care, school expenses, and recreational expenses. The court, in

54. In re L____, 499 S.W.2d 490 (Mo. En Banc 1973).
55. R____ v. R____, 431 S.W.2d 152 (Mo. 1968).
58. Robinson v. Robinson, 258 Mo. 703, 185 S.W. 1032 (1916); Messmer v. Messmer, 222 S.W.2d 521 (St. L. Mo. App. 1949).
62. Bagley v. Bagley, 469 S.W.2d 736 (St. L. Mo. App. 1970); Anderson v. Anderson,
addition, will consider the father's ability to provide support, viewing his assets as well as his income. Nevertheless, courts will not order an award so large as to stifle the father's incentive to work.

The judicial determination of the amount of the father's duty of support is a final decree for purposes of execution. Since the relationship of parent and child is a continuing one, however, the order should be subject to modification if there is a change of circumstances, as is true with respect to an order for support of a legitimate child. Facts justifying such a modification include a change in the child's needs, a change in the costs of the child's needs, and a change in the father's ability to provide support.

An order of support for an illegitimate child should be enforceable by execution and garnishment, as are other orders of support. Missouri courts have, in the past, refused to use the contempt power to enforce any type of order for support of a wife. Support for the wife was deemed to be damages for the husband's breach of the marriage contract. Accordingly, use of the contempt power to imprison the husband for failure to pay support was held to violate the Missouri constitutional prohibition of imprisonment for debt. With little logical support, the same prohibition on the use of the court's contempt power was applied to obligations for child support. Missouri's new Dissolution of Marriage Act gives courts the right to use the contempt power to enforce support obligations, with respect to both the wife and the child. Since the new dissolution law cannot alter the constitutional prohibition of imprisonment for debt, the basis for the change must be that the new law has changed the rationale upon which support to the wife is awarded; support is no longer awarded as damages for breach of contract, but solely on

70. Partney v. Partney, 442 S.W.2d 117 (St. L. Mo. App. 1969); Steckler v. Steckler, 293 S.W.2d 129 (Spr. Mo. App. 1956).
72. Id.
73. Mo. Const. art. I, § 11.
75. §§ 452.325.5, .345.4, RSMo 1973 Supp.
the basis of need and the husband's continuing obligation to support his wife and child. Thus, the use of the contempt power should not violate the prohibition of imprisonment for debt, because the court would be using it to enforce the husband's continuing obligation of support rather than a contractual debt. If the Missouri courts so hold, then under *R v. R* and *Gomez v. Perez*, the duty to support illegitimates could be enforced by the use of the contempt power. The impact of Missouri's Dissolution of Marriage Act on the attitude of the courts toward parental responsibility for child support is unknown. One section of the Act seems to indicate that the Missouri legislature intended for both parents to have an obligation to support their children and that the financial resources of each parent are to be considered in determining what portion of support each parent is to provide. Although the Act does not apply to an action for support of an illegitimate child, it can be argued that the Act represents the state's child support policy. Therefore, the factors which a court must consider in awarding support for a legitimate child should also be considered in awarding support for an illegitimate child.

The Missouri Supreme Court in *Williams v. Williams* indicated that its attitude toward the father's duty of support may be changing. The defendant and his wife were divorced in 1969. There were four children of the marriage. Defendant and his wife were each awarded custody of two children. Defendant later remarried. The former wife brought suit to force the defendant to support fully the children in her custody. The court noted that traditionally in Missouri, the father had the primary duty of support for his children. Nevertheless, because the plaintiff and defendant had nearly identical incomes and because the principal object of a child support order is to provide for the welfare of all the children involved, the court stated that it was unreasonable to take money from the father (and thereby the children in his custody) in order to award support for his children in the custody of his former wife. The court's reasoning should be particularly applicable to actions for support of illegitimate children, because the father of an illegitimate child will often have other children to support. In such situations, the

77. 431 S.W.2d 152 (Mo. 1968).
80. 510 S.W.2d 452 (Mo. En Banc 1974).
mother's financial resources, as well as the additional support obligation of the father, should be considered by the court in determining the amount of child support to be awarded.

B. Breach of Promise to Marry

Although Missouri courts traditionally have refused to give illegitimate children the right to support from their fathers, the harshness of that result has sometimes been avoided by use of the well-established action for breach of a promise to marry. This has allowed mothers to obtain indirect support for their illegitimate children.

The action for breach of promise to marry is one in contract, although it has some characteristics of a tort action as far as damages are concerned. The basis of the suit is that the parties entered into a contract, each promising to marry the other. Like any other contract, both parties at the time of the promise must have had the capacity to enter into a valid marriage. Thus, any promise of marriage made by or to a person who, to the knowledge of the parties, has a living spouse is absolutely void and will not give rise to an action for breach of promise, even though the promise is not to be performed until after the death or divorce of the spouse. The court, however, will presume that the plaintiff had the capacity to enter into a contract to marry, and incapacity to contract marriage is an affirmative defense which the defendant must plead and prove. The plaintiff-mother's most difficult burden is, of course, to show that the defendant, in fact, promised to marry her. If such a promise can be shown, then the mother is entitled to recover unless the defendant can prove that the plaintiff lacked the capacity to contract to marry, or that the plaintiff does not love the defendant. The latter is said to be a complete and substantive defense to such

82. Liese v. Meyer, 143 Mo. 547, 45 S.W. 282 (1898); Rehg v. Giancola, 391 S.W.2d 934 (St. L. Mo. App. 1965); Erwin v. Jones, 192 Mo. App. 326, 180 S.W. 428 (Spr. Ct. App. 1915).
84. Fitch v. Coats, 167 S.W.2d 478 (St. L. Mo. App. 1943).
85. Id. at 485.
88. Id.
89. Parks v. Marshall, 14 S.W.2d 590 (Mo. 1929).
an action. The rationale is that one of the implied conditions of a marriage is that the parties love, cherish, and respect each other. Accordingly, if the plaintiff does not tell the defendant that she does not love him, then her conduct is tantamount to fraud on the defendant. The mere fact that the parties had intercourse or even cohabited before marriage is not a defense to an action for breach of promise to marry. The fact that the plaintiff was unchaste, however, is a defense if it is specially pleaded. Finally, the general rule is that a breach of the promise to marry gives an instant right of action and an offer by the defendant to fulfill his promise after suit is brought is no defense.

In a few Missouri cases, the mother was able to convince the court to include, or at least consider, child support, in assessing damages for breach of the promise to marry. As early as 1898, the Missouri Supreme Court, in Liese v. Meyer, stated:

The sum allowed the plaintiff, $10,000, is not, under the circumstances of this case [plaintiff had borne the defendant's child], so excessive as to indicate passion, prejudice, or misconduct of the jury. It is a sum, capitalized at 6% per annum, sufficient to yield her $50 per month, which can scarcely be looked upon as an extravagant amount for the support of herself and her child.

A few years later the Springfield Court of Appeals approved a damage instruction which allowed the plaintiff-mother to recover for "the support and maintenance of said child." In 1965, the St. Louis Court of Appeals allowed a woman to recover maintenance for the defendant's illegitimate child as well as any medical expenses due to the pregnancy and birth of the child. The primary advantage of the cause of action for breach of promise to marry is that the plaintiff-mother may recover as damages, not only support for her child, but also for injury to her reputation, feelings, affection, and pride, for the loss of employment during and after the pregnancy,

90. Id.
91. Id. at 595.
95. 143 Mo. 547, 45 S.W. 282 (1898).
96. Id. at 562, 45 S.W. at 285-86 (emphasis added).
98. Rehg v. Giancola, 391 S.W.2d 934 (St. L. Mo. App. 1965).
100. Trammell v. Vaughan, 158 Mo. 214, 59 S.W. 79 (1900).
and for any increased burden she may have in gaining employment because she is a single woman with a child. Furthermore, the fact that the plaintiff was seduced (i.e., a woman of previous chaste character was induced to consent to unlawful sexual relations by persuasion and the promise to marry) may be shown to aggravate the plaintiff's damages. On the other hand, if the parties lived together and there was no seduction, then this fact may be considered in mitigation of damages. It should be noted that Missouri does not allow the plaintiff to recover exemplary or punitive damages in this action. One final point should be considered in deciding whether to bring suit for breach of promise to marry in order to gain indirect support for an illegitimate child. As previously stated, the action is one for breach of contract. Because the damages are, therefore, in the nature of a contractual debt, the Missouri constitutional prohibition of imprisonment for debt may preclude use of the court's contempt power to enforce the judgment.

C. Seduction and Debauchment

Seduction and debauchment are ancient causes of action in Missouri. Nevertheless, these tort actions may still serve useful functions in a suit against the father of an illegitimate child by allowing a parent of the mother of an illegitimate child to recover any medical expenses connected with the pregnancy and birth. Debauchment is an action brought by a parent against a defendant who has had intercourse with the parent's previously chaste daughter. Seduction is similar, but the parent must show not only intercourse with the daughter, but also that the sexual acts were accomplished by either force and violence or artifice and blandishment on the part of the defendant. The basis for the two actions is that the

103. Trammell v. Vaughn, 158 Mo. 214, 59 S.W. 79 (1900); Rehg v. Giancola, 391 S.W.2d 934 (St. L. Mo. App. 1965).
107. Comer v. Taylor, 82 Mo. 341 (1884); Heinrichs v. Kerchner, 35 Mo. 378 (1865); Vassel v. Cole, 10 Mo. 634 (1847).
108. Comer v. Taylor, 82 Mo. 341 (1884); Smith v. Young, 26 Mo. App. 575 (St. L. Ct. App. 1887).
109. Owens v. Fanning, 205 S.W. 69 (St. L. Mo. App. 1918); Smith v. Young, 26 Mo. App. 575 (St. L. Ct. App. 1887).
parent should be able to recover for the loss of the daughter's services during the pregnancy.\textsuperscript{110} The actions for seduction or debauchment are based upon the supposed loss of services and therefore traditionally can be maintained only by the person to whom the services were due—\textit{i.e.}, the father, who as head of the family was entitled to his daughter's services.\textsuperscript{111} It is clear that the daughter-mother cannot maintain either action herself.\textsuperscript{112} In an action for debauchment, damages are limited to those resulting from the loss of services and expenses incurred due to the childbirth. The damages in an action for seduction, in addition, include disgrace and dishonor cast upon the plaintiff and family;\textsuperscript{113} exemplary or punitive damages are also recoverable.\textsuperscript{114} The amount of damages in either action is within the province of the jury. One case held that it was reversible error to allow the plaintiff to testify as to a set dollar amount of damages.\textsuperscript{115}

\textit{Boedges v. Dinges}\textsuperscript{116} should serve as a reminder to Missouri attorneys that the causes of action for seduction and debauchment are still very much alive and serve as a useful method of recovering from the natural father medical expenses incurred during the pregnancy and birth of an illegitimate child.

III. ACTIONS AGAINST THE FATHER'S ESTATE

A. \textit{Equitable Adoption}

In Missouri, a legitimate child has the right to a share of his father's intestate estate\textsuperscript{117} or, if the father has a will, the child has rights as a pretermitted heir if he is not mentioned in the will.\textsuperscript{118} On the other hand, an illegitimate child shares only in his mother's intestate estate\textsuperscript{119} and an illegitimate child is not within the protection of the pretermitted heir statute if the child is not mentioned in the natural father's will.\textsuperscript{120} These different standards, based upon a

\begin{itemize}
\item \textsuperscript{110} Comer v. Taylor, 82 Mo. 341 (1884); Boedges v. Dinges, 428 S.W.2d 930 (St. L. Mo. App. 1968); Koenke v. Bauer, 162 Mo. App. 718, 145 S.W. 506 (K. C. Ct. App. 1912).
\item \textsuperscript{111} Heinrichs v. Kerchner, 35 Mo. 378 (1865); Vassel v. Cole, 10 Mo. 634 (1847).
\item \textsuperscript{112} Jordan v. Hovey, 72 Mo. 574 (1880).
\item \textsuperscript{113} Comer v. Taylor, 82 Mo. 341 (1884); Morgan v. Ross, 74 Mo. 318 (1881); Smith v. Young, 26 Mo. App. 575 (St. L. Ct. App. 1887).
\item \textsuperscript{114} Comer v. Taylor, 82 Mo. 341 (1884); Smith v. Young, 26 Mo. App. 575 (St. L. Ct. App. 1887).
\item \textsuperscript{115} Smith v. Young, 26 Mo. App. 575 (St. L. Ct. App. 1887).
\item \textsuperscript{116} 428 S.W.2d 930 (St. L. Mo. App. 1968).
\item \textsuperscript{117} § 474.010, RSMo 1969.
\item \textsuperscript{118} § 474.240, RSMo 1969.
\item \textsuperscript{119} § 474.060, RSMo 1969.
\item \textsuperscript{120} Banks v. Galbraith, 149 Mo. 529, 51 S.W. 105 (1899).
\end{itemize}
legitimacy-illegitimacy distinction, would not appear to be subject to a constitutional attack based on the equal protection clause of the fourteenth amendment. The United States Supreme Court, in *Labine v. Vincent*, held that a state could deny inheritance rights from the father to an illegitimate child who had not been legitimimized by the father or provided for in the father's will. The harshness of this treatment of illegitimate children can be substantially lessened by the use of the action of equitable adoption if the child has been an actual member of his father's family. Equitable adoption is an action in equity to enforce a contract to adopt. The child seeks a judgment declaring him to be the adopted child of a named decedent. Obviously, such an action is necessary only where there has been no formal, legal adoption. The decree of equitable adoption will not place the adopted child in the same status as one legally adopted, but it does allow the equitably adopted child to inherit from the estate of the adoptive parent.

The first hurdle which a petitioner for a decree of equitable adoption must overcome is whether such an action is barred by either the adoption statute or the Statute of Frauds. Typically the contract to adopt upon which the action is based is an oral one. The power of an equity court to issue a decree based on an oral contract is clearly established in Missouri, notwithstanding the Statute of Frauds. In *Holloway v. Jones*, the court said that the Statute of Frauds did not preclude enforcement of an oral contract to adopt where the child had been given to the adoptive parents when she was a small child with the understanding that they adopt her. The child occupied the place of an only child in the adoptive family, with her natural parents giving up all control over her. The court said the child had become in equity the daughter of the adoptive parents, without regard to the Statute of Frauds. It is also clear that Missouri courts will enforce a contract to adopt despite failure to comply with the statutory requirements for a valid adoption. In *Menes v. Cowgill*, the Missouri Supreme Court said:

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121. 401 U.S. 532 (1971).
122. McCary v. McCary, 239 S.W. 848 (Mo. 1922).
123. Hegger v. Kausler, 303 S.W.2d 81 (Mo. 1957); Caps v. Adamson, 362 Mo. 539, 242 S.W.2d 556 (Mo. 1951); Drake v. Drake, 328 Mo. 966, 43 S.W.2d 556 (En Banc 1931).
125. §§ 453.010-.170, RSMo 1969.
126. 246 S.W. 587 (Mo. 1922).
127. 359 Mo. 697, 223 S.W.2d 412 (1949), cert. denied, 338 U.S. 949 (1950); Drake v.
The present and prior statutory enactments, however, did not oust a court of equity of jurisdiction to decree an adoption in a proper case, where the facts warrant it, although the statutory methods of adoption were not complied with . . . .\textsuperscript{128}

The petitioner has the burden of proving the adoption contract.\textsuperscript{129} In order to prove an oral contract of adoption there must be substantial evidence. The courts have usually said that they will view the evidence with “especial strictness”\textsuperscript{130} and that it must be so clear, cogent, and convincing as to leave no reasonable doubt as to the existence of a contract to adopt.\textsuperscript{131} The rationale for these requirements is that the policy of the Statute of Frauds demands that verbal evidence, when it is sought to be used in lieu of writing, be closely scrutinized.\textsuperscript{132} In order for the petitioner to obtain a decree of equitable adoption he must also prove that there existed a parent-child relationship—i.e., that the petitioner fulfilled the role of a child\textsuperscript{133} and that the petitioner was treated as a child of the adoptive parent.\textsuperscript{134} Furthermore, the contract itself must be one which the court is willing to enforce upon equitable principles. This gives a court discretion to determine whether to issue a decree of equitable adoption. The Missouri Supreme Court, in \textit{Hegger v. Kausler},\textsuperscript{135} phrased the proposition as follows:

If one takes a child into his home as his own, assumes and performs the duties and burdens incident to parenthood and, in turn, exacts of and receives from the child the obedience, services, love and duties of a natural child, the courts may, \textit{if justice and good faith require it}, hold such person estopped to deny that he voluntarily assumed the status of a parent and that the child thereby has become the equitably adopted child of such person.\textsuperscript{136}

Behind the courts’ refusal to decree an equitable adoption except where justice and good faith so require is a fear that if equitable

\textsuperscript{128} Drake, 328 Mo. 966, 43 S.W.2d 556 (En Banc 1931); McCary v. McCary, 299 S.W. 848 (Mo. 1922); McCormick v. Johnson, 441 S.W.2d 724 (St. L. Mo. App. 1969).

\textsuperscript{129} 359 Mo. at 705, 223 S.W.2d at 416.

\textsuperscript{130} Capps v. Adamson, 362 Mo. 539, 242 S.W.2d 556 (1951).

\textsuperscript{131} Hogane v. Ottersbach, 269 S.W.2d 9 (Mo. 1954).

\textsuperscript{132} Lukas v. Hays, 283 S.W.2d 561 (Mo. 1955); Bland v. Buoy, 335 Mo. 967, 74 S.W.2d 612 (1934).

\textsuperscript{133} Capps v. Adamson, 362 Mo. 539, 242 S.W.2d 556 (1951).

\textsuperscript{134} Hegger v. Kausler, 303 S.W.2d 81 (Mo. 1957).

\textsuperscript{135} \textit{Id.}

\textsuperscript{136} \textit{Id.} at 88-89.
adoptions were liberally decreed, it would invite fraud and make people reluctant to take children into their homes.\textsuperscript{137}

While the Missouri adoption statute allows legally adopted children to inherit from collateral relatives, it is clear that an equitably adopted child may not inherit from collateral relatives.\textsuperscript{138} Finally, it is also clear that, in Missouri, a court of equity will go no further than a declaration of the child as heir of the adoptive parent.\textsuperscript{139}

In summary, if an illegitimate child has lived with his father pursuant to an express or implied contract to adopt and a parent-child relationship has existed, then the action of equitable adoption makes it possible for the child to become an heir of his father. It should be remembered, however, that the courts view the evidence with special strictness and the petitioner must prove adoption by clear, cogent, and convincing evidence. If that burden of proof is met, then the illegitimate child may share equally with any legitimate children in his father's estate.

B. Suit to Establish Heirship

Missouri statutes do not define “child” or “children” when used in a will. Section 474.430, RSMo 1969, merely provides:

All courts and others concerned in the execution of last wills shall have due regard to the directions of the will, and the true intent and meaning of the testator, in all matters brought before them.

Nor have Missouri courts judicially defined the words “child” or “children” when used in a will. Apparently only one Missouri appellate decision has considered the problem. In Gates v. Seibert,\textsuperscript{140} John Gates bequeathed property to his son, Jacob, and Jacob's wife, if he should marry, and after the son's death, to the son's children. Jacob had one child born out of wedlock. Subsequently, Jacob married the mother of this child and recognized the child as his own. Jacob's marriage also produced two legitimate children. The Missouri Supreme Court held that the illegitimate child was legitimized by the marriage and subsequent recognition and could therefore share in the class gift to Jacob's children. The court, in dictum, stated:

\textsuperscript{137} Id. Benjamin v. Cronan, 338 Mo. 1177, 93 S.W.2d 975 (1936).
\textsuperscript{138} Menes v. Cowgill, 359 Mo. 697, 707-08, 223 S.W.2d 412, 418 (1949).
\textsuperscript{139} Long v. Willey, 391 S.W.2d 301, 304 (Mo. 1965).
\textsuperscript{140} 157 Mo. 254, 57 S.W. 1065 (En Banc 1900).
When the law uses the word "children," it means legitimate children; and, when that word is used in a will or deed, it is to be understood as used in that sense, unless something else appears to indicate that a different meaning was intended.\textsuperscript{141}

The dictum in Gates v. Seibert seems to represent the common law rule that the word "children" when used in a will is presumed to mean legitimate children in the absence of language expressing a contrary intent.\textsuperscript{142} Originally the common law rule precluded the use of extrinsic evidence to ascertain the intention of the testator.\textsuperscript{143} Some courts have modified the common law rule by holding that, although the testator is presumed to mean legitimate children when the word "children" is used in a will, this presumption can be rebutted by the use of extrinsic evidence to the contrary.\textsuperscript{144} Iowa has rejected the common law rule and held that where terms such as "children," "grandchildren," or "nephews" are used in a will and there are both legitimate and illegitimate descendants and the testator's intention is not clearly expressed in the will, then the use of the words creates no presumption; the words are ambiguous so that the testator's intention may be determined from both the provisions of the will and the circumstances surrounding the execution of the will.\textsuperscript{145} Recent cases in both Wisconsin and Georgia have stated that the circumstances surrounding the execution of the will may be introduced to show the testator's intent in using the word "children" in his will.\textsuperscript{146} The Wisconsin court held that by using the word "children" the testator is presumed to have meant legitimate children. The presumption can be rebutted by special circumstances. These special circumstances exist: (1) where the only children in existence were illegitimate children and the testator knew that the children were illegitimate; or (2) where the illegitimate child was part of "the family circle."\textsuperscript{147}

\begin{footnotes}
\item[141] Id. at 272, 57 S.W. at 1068.
\item[142] Old Colony Trust Co. v. Attorney General, 326 Mass. 532, 95 N.E.2d 649 (1950); In re Trust of Parsons, 56 Wis. 2d 613, 203 N.W.2d 40 (1973).
\item[144] Cooper v. Melvin, 154 S.E.2d 373 (Ga. 1967); In re Estate of Ellis, 225 Ia. 1279, 282 N.W. 758 (1938); In re Trust of Parsons, 56 Wis. 2d 613, 203 N.W.2d 40 (1973).
\item[145] In re Estate of Ellis, 225 Ia. 1279, 282 N.W. 758 (1938).
\item[146] Cooper v. Melvin, 154 S.E.2d 373 (Ga. 1967); In re Trust of Parsons, 56 Wis. 2d 613, 203 N.W.2d 40 (1973).
\item[147] In re Trust of Parsons, 56 Wis. 2d 613, 203 N.W.2d 40 (1973).
\end{footnotes}
Although there is no certainty that Missouri appellate courts will accept the dictum in *Gates v. Seibert*, there is a strong argument that the court should follow either the Iowa or Wisconsin approach. The underlying policy of will interpretation in Missouri is to discover the intention of the testator. In order to determine the testator's intent, Missouri courts have used, among others, two rules of construction. First, the testator's intent must be gleaned solely from the four corners of the will if the language used in the will is clear and well-defined. Accordingly, extrinsic evidence of the testator's intent cannot be adduced to qualify, explain, enlarge, or contradict the language. Second, if the language used in the will is ambiguous and the testator's intent is not clear, Missouri courts will admit extrinsic evidence of the circumstances surrounding the execution of the will to explain what the testator has written. The word "children" as used in a will should fall within the second rule of construction if the testator does not, in the will, explain the meaning of the term; otherwise, the testator's true intention is not clear from the four corners of the will. This is because, as noted earlier, there is no definitive case law interpreting the word "children" when used in a will. Thus, unless the testator's intent is clear from the will itself, extrinsic evidence as to the circumstances surrounding the execution of the will should be admissible to prove whether by use of the term "children" the testator intended to include an illegitimate child within the class gift. Next, it can be argued that *R... v. R...* stands for the proposition that illegitimate children in Missouri should be treated equally with legitimate children. This policy should not be thwarted by the use of a conclusive common law presumption that the word "children" means legitimate children; rather, this policy of equal treatment is best served if the testator's true intent is discovered through the use of all possible evidence, including extrinsic evidence. Thus, a neutral rule of construction should be applied, favoring neither legitimate nor illegitimate children. Accordingly, the Missouri courts should disregard the *Gates* dicta and permit the use of extrinsic evidence to ascertain the testator's true intent in using the word "children" in his will.

148. 159 Mo. 254, 57 S.W. 1065 (En Banc 1900).
149. § 474.430, RSMo 1969.
152. 431 S.W.2d 152 (Mo. 1968).
IV. CONCLUSION

The causes of action discussed in this comment obviously do not provide an illegitimate child in Missouri true equality with a legitimate child. Nevertheless, the mere existence of these actions means that the father can no longer treat the illegitimate child as a filius nullius, a son of nobody. The father may be forced to provide support to his illegitimate child, either directly or indirectly, and, under the proper circumstances, the child may receive a share of his father's estate. The trend in Missouri, and also in other states and on the federal level, is toward requiring the father of an illegitimate child to be more responsible for the necessities of the child. This trend appears to be based upon the social policy that, because the father played an equal role with the mother in creating the child, they both should be responsible for the child's support.

In Missouri, the illegitimate child has not fared well with respect to the right to share in his father's estate. The illegitimate child is deemed to be an heir only of his mother's estate. If he has been equitably adopted by his father, however, the child becomes an heir of his father's estate. Equitable adoption, though not granted without substantial supportive evidence, has provided relief in a number of cases. The concept should continue to provide a method for an illegitimate child, raised by his father, to obtain a share of his father's estate. Obviously, an illegitimate child may be specifically provided for in his father's will. If, however, the father merely bequeaths property to his "children," then a problem may arise. Nevertheless, the illegitimate child should be allowed to prove that he was intended to be included within the term "children," and thereby receive a share of the estate.

Although the illegitimate child in Missouri is not treated equally with a legitimate child, the causes of action discussed in this comment may serve as a basis for establishing the father's responsibility for his illegitimate child.

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