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Bastard—Requirements for Acknowledgment in Nebraska

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BASTARDS—REQUIREMENTS FOR ACKNOWLEDGMENT IN NEBRASKA

A truck driver, in the presence of a competent witness, signed an application for employment in Nebraska in which he stated that he had two sons dependent upon him for support, and named the sons. The driver was later killed in an auto accident, and in a wrongful death action the question arose as to whether the

application was a sufficient acknowledgment under the Nebraska statutes[1] to legitimate the sons who were concededly born out of wedlock. *Held*:[2] reversing on rehearing a prior opinion[3] on the same facts, that the writing was sufficient to meet the tests of the statute. The result is at last a definitive statement of the Nebraska court's attitude concerning the problem of legitimation, and is in accord with the prevailing liberal view of treatment of children born out of wedlock.

Section 30-109 has been construed to require proof of three facts: (1) that the child was born out of wedlock; (2) that the alleged father was in fact the real father; and (3) that the father has acknowledged the child in the terms of the statute.[4] In the instant case, it was conceded that facts (1) and (2) had been proved,[5] but it was asserted that the application did not constitute sufficient acknowledgment.

In two early Nebraska cases it was decided that the statutory provision established two requirements for the acknowledgment: (1) it must be one in which the paternity is directly, unequivocally, and unquestionably acknowledged; and (2) the writing must be in and of itself sufficient, unaided by extrinsic evidence, to establish the paternity.[6] In light of this statement, it would seem that the *writing* must show on its face that the child was born out of wedlock; that the alleged father actually was the real father, and that the father acknowledged the child. In the first hearing on the instant case, the Supreme Court of Nebraska held that the application form was not an express, unequivocal and unquestionable acknowledgment of the paternity of

[1] Neb. Rev. Stat. § 30-109 (Reissue 1948), insofar as it is pertinent, provides: "Every child born out of wedlock shall be considered as an heir of the person who shall, in writing, signed in the presence of a competent witness, have acknowledged himself to be the father of the child. . . ." This statute has remained virtually the same since Nebraska became a state in 1867, the only change being that before 1943 the first phrase read "Every illegitimate child," instead of "Every child born out of wedlock." See Neb. Comp. Stat. § 30-109 (1929); Neb. Comp. Stat. § 1228 (1922); Neb. Comp. Stat. §1273 (1913); Neb. Rev. Stat. c. 14, § 31, p. 62 (1867).

[2] Peetz v. Masek Auto Supply Co., 161 Neb. 588, 74 N.W.2d 474 (1956).

[3] Peetz v. Masek Auto Supply Co., 160 Neb. 410, 70 N.W.2d 482 (1955).

[4] In Re Estate of Oakley, 149 Neb. 556, 31 N.W.2d 557 (1948).

[5] Brief of Appellant, p. 27, Peetz v. Masek Auto Supply Co., 161 Neb. 588, 74 N.W.2d 474 (1956).

[6] Moore v. Flack, 77 Neb. 52, 108 N.W. 143 (1906); Lind v. Burke, 56 Neb. 785, 77 N.W. 444 (1898).

the children.[7] On rehearing, however, the court held that the application *was* one in which the paternity was directly, unequivocally and unquestionably acknowledged. The court also overruled the requirement that the writing must be in and of itself sufficient, without extrinsic evidence, to establish paternity.

Whether one believes the court's latest interpretation of section 30-109, setting a liberal standard for acknowledgment, was progressive depends in large part upon one's values; but it is submitted, as will be explained later, that the court was correct in holding that this application for employment was a sufficient acknowledgment. The decision is equally as noteworthy in that the

[7] The construction of the Nebraska statute could have been avoided in the instant case. The truck driver, his wife and the illegitimate children were all domiciled in Iowa at the time of the accident and had been for some time prior to the driver's death. There is a wide split of authority as to which law governs the attainment of the status of legitimacy. See, e.g., Goodrich, Conflict of Laws § 137 (2d ed. 1938); 2 Beale, Conflict of Laws §§ 139.1-140.1 (1935); 1 Wharton. Conflict of Laws §§ 240-248 (1905); Story, Conflict of Laws § 93 (1834); Annot., 162 A.L.R. 626 (1946); Lund's Estate, 26 Cal. 2d 472, 159 P.2d 643 (1945); Wolf v. Gall, 32 Cal. App. 286, 163 Pac. 346 (1916); Hall v. Gabbert, 213 Ill. 208, 72 N.E. 806 (1904); Franklin v. Lee, 30 Ind. App. 31, 62 N.E. 78 (1901). The better rule would appear to apply Iowa law to determine whether the children were legitimate. Restatement, Conflict of Laws §§ 137-140 (1934); McNamara v. McNamara, 303 Ill. 191, 135 N.E. 410 (1922), cert. denied, 260 U.S. 734 (1922). Under the Nebraska Uniform Judicial Notice of Foreign Law Act, Neb. Rev. Stat. §§ 25-12,101 to 25-12,107 (Reissue 1948), the Nebraska courts will take judicial notice of the laws of all other jurisdictions in the United States, but the court has the right to require that such law be pleaded, even though it need not be proved. The Nebraska Supreme Court does require foreign law to be pleaded. Smith v. Brooks, 154 Neb. 93, 47 N.W.2d 389 (1951); Scott v. Scott, 153 Neb. 906, 46 N.W.2d 627 (1951). In the instant case, it appears that counsel for the illegitimates did not plead the Iowa law but sought to amend the pleadings at the trial to do so. The trial court agreed on the condition that counsel submit to a continuance to allow the defendant to prepare on the matter. This offer was rejected by the plaintiff's counsel, and the court would not allow Iowa law to be pleaded. See Brief for Appellee in Support of Motion for Rehearing, p. 7, and Supplemental Brief for Appellant, p. 10, Peetz v. Masek Auto Supply Co., 161 Neb. 588, 74 N.W.2d 474 (1956). The Iowa legitimation statute, so far as pertinent, provides: "They [illegitimates] shall inherit from the father when . . . they have been recognized by him as his children; but such recognition must have been general and notorious, or else in writing." Iowa Code § 646.46 (1950). The application for employment in the instant case, coupled with other evidence of recognition brought out at the trial. would seem clearly to have legitimated the children under Iowa law. See Re Estate of Wulf, 242 Iowa 1012, 48 N.W.2d 890 (1951); Trier v. Singmaster, 184 Iowa 307, 167 N.W. 538 (1918); Luce v. Tompkins, 177 Iowa 168, 158 N.W. 535 (1916).

rejection of the "no extrinsic evidence" test should serve to eliminate a great deal of confusion in Nebraska law governing legitimation.

The "no extrinsic evidence" rule was first advanced in *Lind v. Burke*,[8] but since no writing was introduced to prove acknowledgment in that case, the statement was dictum.[9] Nonetheless, in *Moore v. Flack*,[10] another case in which no writing was introduced to prove acknowledgment, the rule was reiterated. The test was not explained in either case. *Thomas v. Estate of Thomas*,[11] decided in the interim period between the *Lind* and *Moore* cases, appears to have destroyed any reasoning which might have supported the rule, and this fact was recognized by the court at the rehearing in the instant case. The *Thomas* case, depending heavily on *Blythe v. Ayres*,[12] a California case construing a statute quite similar to Nebraska's,[13] held that no intent to make the child an heir was required by the statute. It further held that the writing need not mention the illegitimacy of the child or that it had been witnessed, and the witness did not have to attest the writing. As

[8] 56 Neb. 785, 77 N.W. 444 (1898).

[9] In the *Lind* case, the evidence adduced was the statement of a railroad agent that he wrote a letter for Lind, in English. which would assist Lind's alleged child in getting from New York to Central City. The writing was not introduced at the trial, and only the statement of the agent showed the paternity. The court stated in the syllabus that the evidence was insufficient to permit a claim of heirship.

[10] 77 Neb. 582, 108 N.W. 143 (1906). No writing was introduced in the *Moore* case, but the deposition of a county judge who had presided at a paternity action in which Moore was found to be the father of the plaintiff stated that the judge thought that Moore had acknowledged the plaintiff during the course of that action. Another party testified by deposition that he had delivered a note from Moore to the mother of the child, and the note had said, "Take good care of our boy and call him Thomas Moore, and I will give him a good start some day." The court held that such testimony was not conclusive in the absence of any writing in court.

[11] 64 Neb. 581, 90 N.W. 630 ,1902). No writing was produced in the *Thomas* case, but a witness testified that the father and mother had drawn an agreement stating "That John D. Thomas, the party of the first part, hereby acknowledges himself to be the father of Frank P. Thomas, the child born to Martha Haight," and that the witness had seen Thomas sign the writing. The trial court had held that this was not a sufficient acknowledgment, but the supreme court reversed, holding that it was a question of fact for the jury.

[12] 96 Cal. 532, 31 Pac. 915 (1892). In the *Blythe* case, letters written by Blythe to his child and to her grandfather, signed in the presence of a witness, actually were introduced in evidence.

[13] "Every illegitimate child is an heir of any person who. in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child." Cal. Civ. Code § 1387 (1872).

a necessary concomitant of this holding, extrinsic evidence would have to be introduced to show illegitimacy, and to prove that the writing was witnessed. Thus the "no extrinsic evidence" rule seems to have been neatly emasculated, but the *Moore* case, although accepting the statement in *Thomas* that no intent to make the child an heir was necessary, adhered to the rule.

Van Hove v. Van Hove,[14] the next case, in point of time, to construe the statute, stated that since it was not proved that the alleged father was the father of the illegitimate child, a writing which failed to state that the father was the actual father of the child and which was not shown to have been signed in the presence of a witness did not satisfy the terms of the statute. This case appears to have revived the "no extrinsic evidence" rule, but *In Re Estate of Winslow*,[15] upon which the instant decision is based, held that once paternity is clearly established, a letter with only a modicum of evidence showing the paternal relationship was sufficient acknowledgment. Until the decision in the instant case the law on this point has been most confused, as the apparent inconsistencies in their various holdings had not been given any explanation by the court. The instant case, by eliminating the rule, should also eliminate the confusion.

From the dross of these conflicting decisions, the essence of the rule in the instant case can be refined; that when illegitimacy and proof of paternity are established, almost any writing which indicates that the father recognizes the child as his, no matter what its form, content, or the intent behind it, will be held to be sufficient acknowledgment. Following the lead of the *Blythe, Thomas,* and *Winslow* cases, the court seems to have accepted the policy that the only strictness involved should be in proof of paternity, and once that is satisfactorily established, courts "should lean strongly in favor of a finding that the father of an illegitimate child has done what every honest and humane man should be not only willing, but eager to do, and what a just law would compel the unwilling to do."[16]

[14] 94 Neb. 575, 143 N.W. 815 (1913), aff'd on rehearing, 96 Neb. 484, 148 N.W. 152 (1915). The writing in the *Van Hove* case was a statement contained in a record of marriage contracted in Belgium, and stated "The above named husband and wife agreed taking as their lawful children, and to recognize them as such (naming plaintiff and other childen). . . ." This was introduced in evidence.

[15] 115 Neb. 553, 213 N.W. 819(1927). The writings were letters written by Winslow to his daughter, and were addressed in the saluation as "Dear Daughter," or "Dear Daughter and Children," and were signed "Your loving father." These were introduced in evidence.

[16] Blythe v. Ayres, 96 Cal. 532, 589, 31 Pac. 915, 926 (1892).

It is often stated that legitimation statutes should be strictly construed,[17] in order that a stranger to an intestate's blood would be unable to gain any part of the intestate's property. But if strict proof of paternity is required, this concern is obviated, and under the rule set out in the instant case, the father is aided in carrying out what he recognizes as a moral duty to the child and to society. The present rule seems in accord both with prevailing judicial policy and other Nebraska policy in regard to illegitimate children.

In most states one of two kinds of statutes is usually enacted to provide for legitimation.[18] One type provides that the acknowledgment must be in writing, and the other type requires only that the recognition be open and notorious. In those states which require recognition in writing, the statutes generally are liberally construed,[19] and it is usually held that there need be no intent shown by the writing to make the child an heir.

Both those states which require writing and those which do not would seem to require that there must be proof of paternity and proof of illegitimacy.[20] The writing and the open and notorious recognition are merely two different means to achieve the same end the requirement of a writing being the more rigid standard. Since the policy behind both types of statutes is the same, the mere fact of a writing should suffice, without the requirement of a formal document.

Especially in wrongful death actions,[21] such as was involved in the instant case, where no question of the inheritance of property is involved, but rather where the negligent actor is sought to be held accountable for his wrong doing, the present rule is a wise one. Society benefits from having the negligent actor, rather than the public as a whole, bear the burden of supporting the children if they are dependent.

[17] Pfeifer v. Wright, 41 F2d 464 (10th Cir. 1930); Estate of Paterson. 34 Cal. App.2d 305, 93 P.2d 825 (1939); In re Riemann's Estate, 124 Kan. 539, 262 Pac. 16 (1927).

[18] See Annot., 33 A.L.R.2d 705 (1954).

[19] See Wall v. Altobello, 49 So.2d 532 (Fla. 1950); Barber v. Barber, 198 Okla. 520, 180 P.2d 658 (1947); In re Winslow's Estate, 115 Neb. 553, 213 N.W. 319 (1927); Erickson v. Erickson's Estate, 191 Iowa 1393, 180 N.W. 664 (1920); In re Loyd's Estate, 170 Cal. 85, 148 Pac. 522 (1915); Thomas v. Thomas' Estate, 64 Neb. 581, 90 N.W. 630 (1902); Blythe v. Ayres, 96 Cal. 532, 31 Pac. 915 (1892).

[20] Ibid.

[21] See Middleton v. Luckenbach S.S. Co., 70 F.2d 326 (2d Cir. 1934); Withrow v. Edwards, 181 Va. 344, 25 S.E.2d 343 (1943), cert. denied, 320 U.S. 761 (1943).

Nebraska has shown itself to favor legitimacy in several instances. In all marriages which terminate in annulment or divorce, save only those where consanguinity or miscegenation are involved, the termination of the marital relationship has no effect upon the legitimacy of the children.[22] And children born of a marriage relationship are to be treated as legitimate even though born so soon after marriage that it is a certainty that conception occurred before marriage.[23] Thus Nebraska, by both legislative and judicial decision, and again in the instant case, has demonstrated an awareness of the humane concept that the onus for the act of the parent cannot justly be placed upon the child, and that the policy of visiting the sins of fathers upon helpless children no longer expresses our prevailing views of justice.

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[22] Neb. Rev. Stat. §§ 42-325 through 42-328 (Reissue 1952).
[23] Hudson v. Hudson, 151 Neb. 210, 36 N.W.2d 851 (1949).