View metadata, citation and similar papers at core.ac.uk

brought to you by CORE

provided by University of Miami School of Law

University of Miami Law School
Institutional Repository

University of Miami Law Review

7-1-1970

The Florida Bastardy Act -- A Law in Need of Change

Michelle Holtzman Garbis

Follow this and additional works at: http://repository.law.miami.edu/umlr

Recommended Citation

Michelle Holtzman Garbis, *The Florida Bastardy Act -- A Law in Need of Change*, 24 U. Miami L. Rev. 713 (1970)
Available at: http://repository.law.miami.edu/umlr/vol24/iss4/2

This Leading Article is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized administrator of Institutional Repository. For more information, please contact library@law.miami.edu.

university of miami law review

VOLUME 24 SUMMER 1970 NUMBER 4

THE FLORIDA BASTARDY ACT—A LAW IN NEED OF CHANGE

MICHELLE HOLTZMAN GARBIS*

I. INTRODUCTION

Four decades ago 89,500 illegitimate children were born in the United States.[1] In startling contrast, over 318,000 illegitimate children were conceived in 1967,[2] despite the existence of I.U.D.'s, diaphragms, and the "Pill". The new morality has given birth to an illegitimacy rate which has grown 16.9 percent between 1940 and 1967.[3]

Of course, as the illegitimacy rate soars, so do the associated costs. The economic burden alone[4] that is borne by the public cannot be estimated accurately because of the diverse sources of assistance;[5] how-

*Member, Editorial Board, *University of Miami Law Review;* Student Instructor, Freshman Research and Writing.

1. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, table 59, at 50 (1969).

2. *Id.* In 1967, 318,100 illegitimate children were born, 142,300 being white, and 175,800 being nonwhite. It should be noted that this figure represents only those reported out-of-wedlock births, and reflects neither the number of children born to parents who entered into "shotgun" weddings, nor the number of children born to parents who had invalid common law marriages, nor the number of children born to adulterous wives.

3. *Id.* In 1940, the illegitimacy rate (number of illegitimate births per 1,000 unmarried women) was 7.1, rising to 24.0 in 1967.

4. In addition to the economic cost, the illegitimate child constitutes an increasing physiological and socio-psychological burden to society. *See* text, *infra*, p. 718, *et seq.*

5. There are currently some 200 maternity homes in the United States, most of which

ever, recent statistics indicate that the federal government and the various state governments contribute well over $3,384,059,000 annually to children under the Aid to Families with Dependent Children Program.[6]

For centuries, bastardy or paternity laws[7] have existed to ease the burdens of illegitimacy. The prima facie purpose of such acts is to determine paternity in order to compel parents to support their children. The law thus seeks to convert a moral obligation into a legal duty.[8]

However, in view of the above statistics, one cannot help but wonder: "Whither hast the law gone?" The answer is unequivocal—nowhere. A new morality has bred increased illegitimacy and living costs have spiraled, but the law has remained static and unresponsive to both changing prices and changing sexual attitudes.

Unfortunately, the Paternity Act of Florida[9] is subject to the same criticism directed at such laws in general. True, the Florida Statutes have attempted to compensate for the increased costs-of-living through recent revisions in the amount of the paternity award,[10] but to say that the Act is responsive to the current concept of morality, would be to ignore its inherent deficiencies.[11]

This paper will examine the question of whether paternity laws can reduce the problems of illegitimacy, and, if so, the ways in which such laws can best be made responsive to the changing moral and economic conditions of society. Particular emphasis will be placed on the Florida Bastardy Act,[12] with a view towards revising the existing substantive and procedural law governing paternity actions in Florida.[13]

---

can accommodate forty girls for approximately a three-month stay. Interview with Mary Hallock, Director of the Florence Crittenton Home, in Miami, Florida, Mar. 18, 1969.

In 1968, expenditures by the federal government, state governments, and local programs totaled $128,561,000 for maternal and child health services. STATISTICAL ABSTRACT OF THE UNITED STATES, *supra* note 1, table 439 at 300.

6. STATISTICAL ABSTRACT OF THE UNITED STATES, note 1 *supra*, table 436 at 298.

7. *See* text *infra*, p. 715 *et seq.*

8. As stated by the court in de Moya v. de Pena, 148 So.2d 735, 736 (Fla. 3d Dist. 1963):

> [T]he purpose of this type of statute [FLA. STAT. § 742.011] is to convert a natural and moral obligation of a father to support his illegitimate offspring into a legal obligation. . . .

9. FLA. STAT. ch. 742 (1967). The Act, though titled the Florida Bastardy Act, is referred to preferably as a paternity law in that it is civil, not criminal, in nature. Williams v. State, 80 Fla. 286, 85 So. 917 (1920).

10. FLA. STAT. § 742.031 (1951), repealed FLA. STAT. § 742.03 (1949), to provide for scheduled payments ranging from $40 monthly to $110 monthly, depending on the age of the child. See text *infra*, p. 728 *et seq.*

The former statute required the father to pay an amount "not exceeding fifty dollars . . . yearly, for ten years . . . ." FLA. STAT. § 742.03 (1949).

11. *See* text *infra*, p. 719 *et seq.*

12. FLA. STAT. § 742 (1967).

13. This paper is limited to a discussion of the substantive and procedural aspects of paternity actions. A discussion of the evidentiary aspects of such proceedings is an extensive topic in itself and is beyond the scope of this article.

II. BACKGROUND

Under English common law, neither the father nor the mother were under any duty to support their children.[14] However, the problem of supporting pauper children forced Parliament to enact the Poor Law of 1576.[15] This law was designed to punish and deter promiscuous behavior, while shifting the financial burden from the parish to the parents of the illegitimate child,[16] and achieved this result by imposing a statutory duty of support on both parents.

This English Statute became the basis for subsequent legislation in the colonies. Indeed, according to Vernier, bastardy proceedings in the United States still maintain their close connection with poor relief.

> [P]roceedings may generally be instigated by the mother, but frequently the poor authorities are given power to bring the action concurrently with the mother or in case the mother fails to act. The low maximum limits to the sum which may be ordered to be paid for the child's support, and the smallness of the sums actually awarded . . . also indicate that the statutes still retain considerable flavor of the poor law.[17]

Today, all states except Idaho,[18] Missouri,[19] and Texas,[20] have enacted statutes requiring the putative father to support his illegitimate child. Though the remaining states have statutes similar to the English Bastardy Act,[21] legislation varies among them. For example, California imposes on both parents a duty to support their illegitimate children,[22] while Louisiana provides that fathers and mothers owe their illegitimate

14. C. VERNIER, IV AMERICAN FAMILY LAWS 206 (1936) [hereinafter cited as VERNIER].

15. Poor Law Act, 18 Eliz. I, c. 3 (1576):

> Concerning bastards begotten and born out of lawful matrimony, . . . the said bastards being now left to be kept at the charges of the parish where they be born, to the great burden of the same parish, and in defrauding of the relief of the impotent and aged true poor of the same parish, and to the evil example and encouragement of lewd life: (2) it is ordained . . . [t]hat two justices of the peace . . . , as well for the punishment of the mother and reputed father of such bastard child, as also for the better relief of every such parish . . . , shall . . . take order for the keeping of every such bastard child, by charging such mother or reputed father, with the payment of money weekly, or other sustentation for the relief of such child, in such wise as they shall think meet and convenient. . . .

16. A similar purpose is expressed in Schaschlo v. Taishoff, 2 N.Y.2d 408, 411, 141 N.E.2d 562, 563, 161 N.Y.S.2d 48, 50 (1957); Allen v. Hunnicutt, 230 N.C. 49, 52 S.E.2d 18 (1949).

17. VERNIER, *supra* note 14, at 207.

18. *See* 30 MO. L. REV. 154, 155 (1965).

19. Since Easley v. Gordon, 51 Mo. App. 637 (1892), Missouri has held that the father of an illegitimate child is not legally responsible for the child's support. *See generally* Comment, *Support of Illegitimate Children in Missouri*, 13 ST. LOUIS U.L.J. 311 (1968). *But see* text *infra*, p. 724 *et seq.*

20. *See* 30 MO. L. REV. 154, 155 (1965).

21. *Id.* For tabular summaries and comparisons of the illegitimacy laws of each American jurisdiction, *see* Schatkin, *Disputed Paternity Proceedings* app. IV at 619-88 (3d ed. 1953); *Vernier, supra*, note 14 at 220-62.

22. CAL. CIV. CODE § 196a (Deering Supp. 1970).

children "alimony."[23] Massachusetts and Pennsylvania make it a misdemeanor for a man, not being the husband of a woman, to impregnate her.[24]

A. *The Attempt at Uniform Legislation*

Although the paternity laws have remained relatively static over the years, this past decade can boast of one important and progressive development: In 1960 the American Bar Association approved the Uniform Act on Paternity.[25] Since its approval, it has been adopted in only four states—Kentucky,[26] Mississippi,[27] Montana,[28] and Utah[29]—and restricted, in one way or another, by three of these states.[30]

As indicated in the notes of the chairman of the drafting committee, the Uniform Act on Paternity was originally drafted to revise the Uniform Illegitimacy Act; the latter having been promulgated in 1922, and adopted (with numerous amendments) by seven states.[31] However, the committee found it necessary to disregard the old "pattern" in its attempt to "furnish an acceptable modernized procedure for handling . . . a troublesome social problem. . . ."[32]

B. *The Legislation in Florida*

Unfortunately, Florida, despite the fact that its number of illegitimate births ranked in the top 10 percent of the nation in 1964,[33] is

23. LA. CIV. CODE art. 240 (West 1952): "Fathers and mothers owe alimony to their illegitimate children, when they are in need."

24. MASS. GEN. LAWS ANN. ch. 273, § 11 (1959); PA. STAT. ANN. ch. 2, tit. 18, § 4506 (Purdon 1963).

25. 9 B UNIFORM LAWS ANN. 522 (1966).

26. KY. REV. STAT. § 406.011 *et seq.* (1964).

27. MISS. CODE ANN. § 383-01 *et seq.* (1962).

28. MONT. REV. CODES ANN. § 93-2901-1 *et seq.* (1963).

29. UTAH CODE ANN. § 78-45a-1 *et seq.* (1965).

30. Utah appears to be the only state to give the Act its intended effect. For example, section 1 of the Act provides that "a child born out of wedlock includes a child born to a married woman by a man other than her husband." Kentucky omits this provision, while Montana makes it subject to the presumption of legitimacy of a child born in lawful wedlock.

The Act, as adopted by Kentucky and Mississippi varies with respect to section 2 (enforcement), section 5 (remedies), section 7 (authority for blood tests), and section 10 (effect of test results).

31. Iowa, Nevada, New Mexico, New York, North Dakota, South Dakota, and Wyoming adopted the Uniform Illegitimacy Act; although New Mexico and New York made "considerable changes." *See* VERNIER, *supra* note 14, at 207-08.

32. 9 B UNIFORM LAWS ANN. 522, Commentator's Prefatory Note (1966).

33. In 1964, thirty-four states and the District of Columbia reported the number of illegitimate children born in their respective states. That year, Florida boasted 12,384 illegitimate births, trailing only Illinois (17,096), Texas (14,906), Pennsylvania (12,966), and Ohio (12,780). California, Massachusetts, and New York were among the non-reporting states, and it was estimated that together they accounted for some 26,000 illegitimate births. WORLD ALMANAC AND BOOK OF FACTS 764 (1969).

Florida no longer requires the birth certificate of a child to indicate whether or not he is legitimate; however, a recent television program indicated that in Dade County there was a 40 percent increase in white illegitimate births between 1964 (732 births) and 1967 (1034

not among those states which have adopted the Uniform Act on Paternity. The Florida Bastardy Act dates back to 1828.[34] At that time, proceedings were initiated by a complaint before a justice of the peace or magistrate, who, upon a finding of sufficient grounds, ordered the defendant to appear before the circuit court. Consequently, the proceedings were quasi-criminal in their inception but became civil once they reached the circuit court.[35] Today, the entire proceeding is a civil one.[36]

As in most states, the action is initiated by a complaint filed by the mother or expectant mother[37] alleging that she is an unmarried woman,[38] that she is either pregnant or has delivered a child in the jurisdiction where the complaint is made, which child would by law be deemed a bastard,[39] and that she accuses a named person of being the father of the child.

Hearings upon the complaint are held in chambers; although, upon the request of either party, the issue of paternity may be tried by a jury.[40] Having determined the issue of paternity and the ability of the parents to support the child, the court then orders the defendant to pay the complainant, her guardian, or such other person assuming responsibility for the child as the judge may direct, a sum sufficient to pay reasonable attorney's fees, hospital and medical expenses, and other costs

births). "For Your Information: Susan is Pregnant," channel 4, Miami, Fla., June 4, 1969. In addition, a news article revealed that Florida ranked sixth in the nation in children born to unwed mothers and that the yearly cost of such births is $14 million. Miami Herald, Dec. 21, 1969, § B, at 1, col. 1.

34. Act of Jan. 5, 1828 § 1.

35. State v. Rowe, 99 Fla. 972, 128 So. 7 (1930).

36. FLA. STAT. § 742.011 (1967).

37. *Id. See also* Pelak v. Karpa, 146 Conn. 370, 151 A.2d 333 (1959); Clarke v. Blackburn, 151 So.2d 325 (Fla. 2d Dist. 1963). *But see* Leonard v. Werger, 21 N.J. 539, 122 A.2d 777 (1956) (bastardy proceeding maintainable by duly authorized representative of State Board of Child Welfare or by appropriate municipal director of welfare).

38. Under an earlier statute, a bastardy action could be initiated only by a single woman. *See e.g.*, Bishop v. State, 136 Fla. 268, 186 So. 413 (1939). However, changing the provision to say "unmarried woman," did not change the meaning of the statute. [1951-1952] FLA. ATT'Y GEN. BIENNIAL REP. 717.

Compare Ventresco v. Bushey, 159 Me. 241, 191 A.2d 104 (1963) (woman, whose child was born after her divorce, could maintain bastardy proceeding) *with* State v. Hunt, 13 Utah 2d 32, 368 P.2d 261 (1962) (information charging bastardy was not subject to motion to quash merely because when child was conceived of adulterous intercourse with defendant, mother was married to another man) *and* State *ex rel* Crouser v. Mercer, 141 W. Va. 691, 92 S.E.2d 745 (1956) ("unmarried" refers to the woman's status at the time of the birth of her child, not at the time she makes the complaint).

See also 9 B UNIFORM LAWS ANN. 522 § 1 (1965).

39. It should be noted that Florida indulges in the widely held, though rebuttable, presumption that a child conceived or born during marriage is legitimate. *See, e.g.*, Kennelly v. Davis, 221 So.2d 415 (Fla. 1969); B.S.B. v. B.S.F., 217 So.2d 599 (Fla. 2d Dist. 1969), *accord, In re* Ho Chang Shee, 48 Hawaii 391, 402 P.2d 678 (1965); Lucas v. Williams, 218 Md. 322, 146 A.2d 764 (1958); *In re* Thomas' Estate, 228 Ark. 658, 310 S.W.2d 248 (1958); Woodum v. American Mut. Liab. Ins. Co., 212 Ga. 386, 93 S.E.2d 12 (1956).

40. FLA. STAT. § 742.031 (1967).

incident to the birth of the child.[41] In addition, the defendant is ordered to pay periodically, for the support of the child, such sums as the court may direct.[42] This periodic payment is in the nature of a penalty and is not affected by the actual pecuniary expenses which the mother may incur.[43]

Incident to the enforcement of its judgment, the court may require bond of the defendant.[44] Upon default in payment of any moneys ordered by the court to be paid, the court may enter a judgment for the amount in default.[45] In addition, the defendant's wilful failure to comply with a court order is punishable through contempt proceedings.[46]

It should be noted that the court retains jurisdiction for the purpose of entering such other orders as the changing circumstances of the parties may require.[47] Furthermore, the liability of the father for the support of the child terminates upon the adoption of the latter by some person other than the father.[48]

III. The Problems of Illegitimacy

The problem confronting us is a twofold one. On the one hand, it is necessary to understand the social problems associated with illegitimacy, while on the other hand, it is necessary to determine the specific areas wherein the law, specifically the Florida Paternity Act, is deficient in coping with the problems of the illegitimate child.

A. *The Social Dilemma*

The effects of illegitimacy have been characterized as being of three types: physiological, economic, and socio-psychological. The physiological effects are due mainly to the substandard medical attention given the pregnant mother and later, her child.[49] The economic consequences are less direct. Often, pregnancy forces the school-age mother[50] to drop out of school, to which she seldom returns.[51] As a result, her earning capacity is diminished, and the cost of supporting her child is

41. *Id.*

42. Fla. Stat. § 742.041 (1967).

43. Indeed the main fault with this statute is its failure to concern itself with the "best interests of the child." *See* text *infra*, p. 719 *et seq.*

44. Fla. Stat. § 742.08 (1967).

45. *Id.*

46. *Id.*

47. Fla. Stat. § 742.06 (1967). *See, e.g.*, Crosby v. Calhoun, 76 So.2d 297 (Fla. 1955); Murray v. Murray, 117 So.2d 425 (Fla. 2d Dist. 1960).

48. Fla. Stat. § 742.07 (1967).

49. Anderson, Jenss & Richter, *The Medical, Social, and Educational Implications of the Increase in Out-of-Wedlock Births*, 56 Am. J. Pub. Health & the Nation's Health 1866 (1966); Bernstein, *Gaps in Services to Unmarried Mothers*, 10 Children 49 (1963).

50. Some 350,000 teenage illegitimate births are predicted for 1970. *See* Vincent, *Illegitimacy in the Next Decade*, Child Welfare 514 (Dec. 1964).

51. Kelley, *The School and Unmarried Mothers*, 10 Children 60 (1963).

shifted to society.[52] The situation tends to be self-perpetrating in that it fosters a situation conducive to even more illegitimate births.[53]

More important, though, are the social and psychological implications for the individual which spring from society's contradictory attitude toward sex and unmarried mothers. After the birth of the child, society points its finger of condemnation, not only at the mother, but also at the child.[54] Unfortunately, this disapproval has found expression in various areas of the law. Frequently, the amount of support which an illegitimate child receives is less than would be received by a legitimate child.[55] In addition, the illegitimate child must first prove his paternity in order to be entitled to any support from his father.[56]

B. *The Statutory Dilemma*

The deficiencies in the present Florida law become apparent when one realizes the confusion existing in the court as to its proper function under the law. That is, the courts have not resolved the issue of whether the aim of the statute is to punish the father or to give the unwed mother support, and they consequently miss the essence of the problem—namely, the best interests of the child.

1. MARRIED WOMEN AND THE PRESUMPTION OF LEGITIMACY

One of the main devices that the statutes use to avoid concern for the child's welfare is a provision which allows only an unmarried woman to bring a paternity action.[57] A married woman whose husband is not the child's father is precluded from seeking support for her child even though the child itself may be born out of lawful wedlock due to an intervening divorce or annulment.[58]

The inequities in this presumption were readily apparent in the case of *B.S.B. v. B.S.F.*[59] In *B.S.B.*, a woman whose marriage was annulled, subsequently sought to bring a paternity action against the child's real father. The trial court granted the defendant's motion for summary judgment on the basis of the presumed legitimacy of a child born to a married woman.[60]

---

52. *See* note 6 *supra*.

53. Anderson, *supra* note 49, at 1871. *See also* Sarrel and Davis, *The Unwed Primipara*, 95 AM. J. OBSTET. GYNEC. 722 (1966) wherein the authors discuss a study in which 340 illegitimate babies were born to 100 teenage girls over a five-year period, all but five girls having more than one child.

54. Davis, *Illegitimacy and the Social Structure*, 45 AM. J. SOC. 215, 227-28 (1939).

55. *See* Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477, 478 (1967).

56. FLA. STAT. § 742.031 (1967).

57. FLA. STAT. § 742.011 (1967).

58. *See, e.g.*, Kennelly v. Davis, 221 So.2d 415 (Fla. 1969); Gossett v. Ullendorff, 114 Fla. 159, 154 So. 177 (1934); Sanders v. Yancey, 122 So.2d 202 (Fla. 2d Dist. 1960).

59. 217 So.2d 599 (Fla. 2d Dist. 1969); *See also* Note, *The Presumption of Legitimacy—as affected by Standing, Antenuptial Conception, and the Lord Mansfield Rule*, 24 U. MIAMI L. REV. 414 (1970).

60. The presumption of legitimacy was rebuttable even at common law when the

In order to achieve an equitable result and remove the child from the state welfare rolls, the appellate court reversed and remanded for a determination of the paternity issue. However, the means used by the court to achieve this result were appalling. Firmly convinced that the only way the woman could bring the paternity action was if she were unmarried, the court set out to prove that the annulment of the first marriage voided it *ab initio*, so that at no time was she ever married; therefore, any child born to her during the period of her alleged marriage would be illegitimate. Normally, in order to preserve the legitimacy of children born during such marriages, a Florida annulment is effective as of the date the decree is entered.[61] This statute was apparently overlooked by the judges in *B.S.B.*; either that, or they distinguished the case on the basis that the marriage was not merely voidable, but void. Surely, the circuitous means used in this case to achieve a fair result illustrates the inability of the current law to cope with the needs of today's society.

In addition to the irrationality of denying a married woman the right to bring a paternity proceeding on the basis of the presumed legitimacy of a child conceived or born during lawful wedlock, such denial may well constitute a denial of equal protection.[62]

The United States Supreme Court pointed out in *McLaughlin v. Florida*,[63] that in order for a statutory classification not to deny equal protection, it must rest on some difference that bears a just and reasonable relation to that statute in respect to which the classification is proposed. Regardless of whether the purpose of Florida Statute section 742.011 (1967), is to legislate morality or to relieve the public of support obligations, the distinction in the statute between a married woman and an unmarried woman who concieves or gives birth to a child out of wedlock bears no reasonable relation to such purposes.

Certainly, if the intent of the statute is to convert a father's moral obligation to support his child into a legal one,[64] that obligation arises from the father's relation to the child, not from the mother's marital status. By allowing the putative father to circumvent his responsibility, the statute is, in effect, encouraging immorality.

Alternatively, if the intent of the statute is to relieve the public of its obligation to support the child, while making sure that the child is

husband was out of the country or beyond the four seas for nine months so that no access to his wife could be presumed. 1 W. BLACKSTONE, COMMENTARIES 457 (1787).

This was subsequently changed and only proof of nonaccess of the husband was required. Pendrell v. Pendrell, 93 Eng. Rep. 945 (K.B. 1732).

61. FLA. STAT. § 61.051 (1967), *construed in In re* Ruff's Estate, 159 Fla. 777, 32 So.2d 840 (1947).

62. *See generally* Brief of Petitioner at 12-18, Kennelly v. Davis, 221 So.2d 415 (Fla. 1969).

63. 379 U.S. 184, *on remand* 172 So.2d 460 (Fla. 1965).

64. de Moya v. de Pena, 148 So.2d 735 (Fla. 3d Dist. 1963).

properly provided for,[65] it seems incongruous that the child who is conceived during, but born out of, wedlock would have different support needs than a child born to a woman who has never been married. By precluding the once-married mother from seeking support from the child's putative father, the state is only saddling itself with another support obligation and is thwarting the very purpose of the Act.

If society is really concerned with the best interests of the child, it is about time that all children are granted the equal protection of the law. To grant child "A" support, while denying it to child "B" merely because "A" was conceived after his mother's marriage was dissolved, while "B" was conceived during the marriage, is to penalize society and child "B" for his parents' indiscretion.

The equal protection argument has gained impetus recently by virtue of two Supreme Court decisions. In *Levy v. Louisiana*,[66] the United States Supreme Court reversed a decision of the Louisiana courts which rejected a wrongful death action brought by five illegitimates on the grounds that the wrongful death statute authorized only actions by legitimate children. The Court held that since the children's illegitimacy was in no way related to the wrong inflicted on their mother, it was a denial of the equal protection clause of the fourteenth amendment to deny their right to a remedy solely because of the circumstances of their births.

The same reasoning was applied in *Glona v. American Guarantee & Liability Insurance Co.*,[67] where the Court reversed a Fifth Circuit Court of Appeals decision[68] which held that the mother of an illegitimate son could not maintain an action for his wrongful death. In support of their reversal, the Court held that the equal protection clause was violated when the state withheld relief from the plaintiff on the sole basis that the son was born out-of-wedlock.

The social philosophy of *Kowalski v. Wojtkowski*,[69] which also pervades the law of Florida can no longer be justified. The majority in *Kowalski* believed that evidence (as to nonaccess) given by a married woman should be inadmissible since it would invade the sanctity of the conjugal relationship. Such reasoning is almost facetious. In a bastardy proceeding brought by a married woman, the issue is not what did occur between the married couple, but what did not occur between them.[70]

---

65. B.S.B. v. B.S.F., 217 So.2d 599 (Fla. 2d Dist 1969); Kowalski v. Wojtkowski, 19 N.J. 247, 116 A.2d 6 (1955) (Dissent).

66. 391 U.S. 68 (1968).

67. 391 U.S. 73 (1968).

68. 379 F.2d 545 (5th Cir. 1967).

69. 19 N.J. 247, 116 A.2d 6 (1955).

70. As noted by the court in Moore v. Smith, 178 Miss. 383, 172 So. 317 (1937), bastardy proceedings of this type do not in fact invade the sanctity of married intercourse and matrimonial relations.

The modern view is perhaps best expressed in the recent case of R—— v. R———:[71]

> The principles applied by the United States Supreme Court would render invalid state action which produces discrimination between legitimate and illegitimate children insofar as the right of the child to compel support by his father is concerned. Under the guise of discouraging illegitimacy, states may no longer cast the burden upon the innocent child.
>
> The decisions of the United States Supreme Court compel the conclusion that the proper construction of our statutory provisions relating to the obligations and rights of parents . . . affords illegitimate children (the right) to require support by their fathers.

2. THE HEARING: JURY TRIALS, THE FIFTH AMENDMENT, AND "EXCEPTIO"

For the woman "fortunate" enough to be unmarried when she conceived her bastard child, Florida Statutes section 742.031 (1967), provides for a hearing at which the best interests of the child are again overlooked, or rather, ignored. The most glaring defect in the statute is the provision for a jury trial on the issue of paternity. The fact that this morsel of sensationalism remains in a paternity proceeding in this decade is appalling. It is illogical that the circuit court continues to have jury trials in bastardy cases which are on the chancery side of the court.[72] Again, the court has abetted the legislature in denying children equal protection under the law. The legitimate child whose parents are getting divorced may secure support without enduring a jury trial, while the illegitimate's very right to support may be contingent on a jury verdict.[73]

To aggravate an already battered condition, the courts have allowed the defendant the right to claim the privilege against self-incrimination.[74] At this point, the hearing becomes most entertaining. The protagonists in a paternity proceeding are the mother, the putative father, and their friends (the witnesses). Assuming the defendant father requests a jury trial, the jury is instructed to remember that in weighing the evidence, the testimony of the mother is that of an interested party.[75]

---

71. 431 S.W.2d 152, 154 (Mo. 1968).

72. Even though the Supreme Court of Florida has adopted the Rules of Civil Procedure, 187 So.2d 598 (Fla. 1966) which provide for a procedural merger of law and equity, FLA. STAT. § 742.011 (1967) continues to refer to bastardy proceedings as being in chancery.

73. *Compare* FLA. STAT. ch. 61 (1967) *with* FLA. STAT. ch. 742 (1967).

74. Jones v. Stoutenburgh, 91 So.2d 299 (Fla. 1956) (filing of counter-affidavits in a paternity proceeding was not inconsistent with claiming the privilege of self-incrimination, because the affidavits didn't cover the entire area of proof).

75. John D.C. v. State, 16 Fla. 554 (1878).

Should the putative father then invoke his right against self-incrimination, the jury is left to consider the testimony of the friends.

However, assuming the defendant does not claim his fifth amendment privilege, and instead asserts the defense of *Exceptio Plurium Concubentium*,[76] some more scandal is added to the proceedings. The *Exceptio* defense provides that if the mother had relations with a man other than the defendant at or about the time of conception, the defendant cannot be found to be the father.[77] As the court stated in *Yarmark v. Strickland*:[78]

> [U]nless identification of the father is otherwise made possible through some tests or means afforded by advancing medical knowledge, establishment of the fact of intercourse with another at or about the time for conception precludes determination of which man is the father.

If the best interests of the child are to be served, it is difficult to understand why the putative father should be relieved of all liability when he can establish an *Exceptio* defense. It would seem that a better result would obtain if the court, though unable to decide the issue of paternity, would shift the burden to the defendant to prove that he was not the father,[79] if it could be established that he had intercourse with the mother within such a time that he might be the father of the child.[80] If the defendant were unable to sustain his burden of proof, then he should be held liable for the support of the child.[81]

Further, if it could be established that any one of two or more persons who had intercourse with the woman might be the father, then a presumption should arise that each person is a possible father.[82] The burden of exculpation would be on the possible fathers, and those fathers unable to affirmatively disprove the allegations that they were the putative father, should be held jointly and severally liable for the support of the child.[83]

76. Roughly translated, *Exceptio Plurium Concubentium* means the "exception of several lovers."

77. H. CLARKE, DOMESTIC RELATIONS § 5.3 (1968).

78. 193 So.2d 212, 215 (Fla. 3d Dist. 1966).

79. The defendant could resort to those defenses normally available in such proceedings. For example, he could take a blood test, or attempt to prove sterility, impotency, or non-access.

80. Comment, *Liability of Possible Fathers: A Support Remedy for Illegitimate Children*, 18 STAN. L. REV. 859 (1966).

81. Castberg, *The Children's Rights, Laws and Maternity Insurance in Norway*, 16 J. COMP. LEG. & INT'L L. 283 (new series 1916).

82. 1 N.S. REV. STAT. c. 31, § I(f) (1954). *See also* Child Welfare Act, 3 SASK. REV. STAT. c. 239, § 88(2) (1953).

83. This idea of requiring the defendant to prove a negative is similar to the situation in Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948), where two defendants were hunting and fired their guns simultaneously, each failing to notice the plaintiff in his line of fire. The plaintiff was injured; however, it was not possible to determine from whose gun the bullet came. Since the court could not establish the cause-in-fact, both defendants were held liable for the injury.

3. RELIEF AFFORDED THE MOTHER: THE AWARD AND ITS ENFORCEMENT

Should the court resolve the issue of paternity in favor of the mother, Florida Statutes section 742.031 (1967), provides that the court shall determine the amount to be paid the mother for medical care, costs of confinement, and other expenses incident to the birth of the child, after considering the "ability of the parents to pay." An alimony award is based on the wife's needs and the husband's ability to pay.[84] Apparently, the legislature did not intend the court to consider the child's needs in a paternity action, but rather the court should determine the whole matter of payment from the "ability to pay" aspect.

As heretofore stated,[85] the Paternity Act sets forth scheduled monthly payments to be made by the putative father, ranging from $40 per month to $110 per month, depending upon the age of the child.[86] Although this statute has been praised for providing payments "as high as $1320 per annum,"[87] it is still subject to the criticism that it focuses on the ability of the defendant to pay rather than on the needs of the child. Furthermore, it is curious to note that support orders for legitimate children, entered pursuant to a divorce judgment, often provide for significantly higher payment. One wonders if the scheduled payments can even be justified on the basis that they at least provide a "floor"[88] in view of the fact that the scheduled payments have remained static since 1951,[89] even though the cost of living index has risen since then.

Perhaps, the main defect in the payment plan provided for by statute is in the nature of an error of omission. That is, some states such as Minnesota[90] and North Dakota[91] have administrative boards to assist mothers in the enforcement of their rights under the illegitimacy laws; Florida lacks such an agency. Instead, a Florida mother is forced to return to her attorney and attempt to collect any periodic payments in arrears by petitioning for a rule to show cause.[92] More often than not, the putative father lacks the funds to pay the accumulated arrearages, and the court's only recourse is to give the mother a judgment or confine the father to jail for contempt.[93]

---

84. FLA. STAT. ANN. § 61.08, and accompanying notes (1968).

85. *See* p. 714 *supra.*

86. *See* p. 720 *supra.*

87. Comment, *Liability of Possible Fathers: A Support Remedy for Illegitimate Children*, 18 STAN. L. REV. 859, 866 (1966).

88. Interview with Quentin Eldred, Director of the Dade County Legal Aid Society, in Miami, Florida, Mar. 5, 1969.

89. *See* note 10 *supra.*

90. MINN. STAT. ANN. §§ 256.72-.87 (1959).

91. N.D. CENT. CODE § 32-36-22 (1960).

92. FLA. STAT. § 742.08 (1967). This same problem also exists in the collection of periodic payments on behalf of a legitimate child.

93. This is an anomaly because a bastardy proceeding is civil in nature. FLA. CONST. DECL. OF RIGHTS § 16 provides that "No person shall be imprisoned for debt, except in cases of fraud." Although such imprisonment might be justified on the theory that maintenance

While it is true that a far-sighted court might prevent this inequity by requiring the defendant to post bond,[94] in actual practice, such a result rarely obtains. Consequently, the father spends three days in jail, the attorney's fees increase, and the mother and child are back on the welfare rolls.

IV. The Solutions Available

A. *Abortion Reform*

Certainly, the most obvious way to curb the problems of illegitimacy is to reduce the number of illegitimate births, and the most direct means to accomplish this result is through liberalized abortion laws. Although it is not within the scope of this article to include a full discussion on the advisability of allowing complete freedom in the procurement of abortions, no one can doubt the validity of the argument that if it were easier to procure abortions, fewer illegitimate children would be born.[95]

The Florida Legislature once again introduced an abortion bill this year,[96] and once again it died with that body. Nevertheless, the bill, should it have passed, was not so liberal that it allowed abortion "on demand," and, hence, its value in reducing illegitimate births would have been limited indeed.

B. *Birth Control*

If necessary, resort must be had to more indirect means of limiting illegitimate births. It may be desirable to prevent the conception of the illegitimate child in the first place through a fuller and more widespread understanding and distribution of birth control methods and materials.

Presently, birth control information is not available to those who need it most. In fact, it has been estimated that only one-half of all unwed mothers have any access to birth control information.[97] It follows that more attention must be given to the distribution of information about, and materials for, birth control. Although this goal is not the peculiar responsibility of the law, the legal system, being an instrument of social policy, does have a duty in this area.

A recent article in the *American Bar Association Journal* has gone so far as to suggest that in the event a minor child has already conceived one illegitimate child, a court should order compulsory contracep-

payments, like alimony, are not debts, but moral obligations, and that the defendant is free to choose between incarceration and compliance with the order, the defendant is still being involuntarily incarcerated in the event of noncompliance. *See In re* Nevitt, 117 F. 448 (8th Cir. 1902); Acker v. Adamson, 67 S. D. 341, 293 N.W. 83 (1940).

94. Fla. Stat. § 742.08 (1967).

95. *See* Davis, *Illegitimacy and the Social Structure*, 45 Am. J. Soc. 215, 221, 231 (1939).

96. S. B. 208, 1969 Leg., 1st Sess. (1969).

97. Furie, *Birth Control & The Lower-Class Unmarried Mother*, 11 Soc. Work 42, 49 (1966).

tion by means of an I.U.D.[98] The authors contend that the authority for such action may be derived from the statutes of most states[99] which subject a child whose behavior is injurious to his own or others' welfare to the jurisdiction of the juvenile court.[100]

The objections to this form of court-ordered contraception are many. First, there are medical defects in the I.U.D.—expulsion is expected in 10 percent of insertions in the first year; another 10 percent suffer abnormal bleeding and pain; and the pregnancy rate, even with the device, is 5.3 percent.[101] Another objection is that the I.U.D. operates by expelling an already fertilized egg through a coil; consequently, it may be illegal since it is a type of abortion device.

Finally, there may be some issue as to the constitutionality of a law which provides for court-ordered contraception. Although such a law might be analogized to compulsory sterilization statutes, which were held to be constitutional by the United States Supreme Court in *Buck v. Bell*,[102] it is necessary to remember the date of that decision. It is also necessary to consider that infringement of a woman's right to bear children might infringe on her right to privacy, and that in recent years the right to privacy has gained the protection of first amendment rights.[103] As a first amendment right, a state would have to show a compelling reason for infringing thereon, and it is unlikely that the possibility of saving welfare money would be considered a compelling reason.

Thus, although contraception can reduce the number of illegitimate births, it appears likely that medical, religious, and constitutional considerations will keep contraception on a voluntary basis.

C. *Adoption Without Consent*

Since in Florida, an adopted child is considered legitimate as to his adopting parents,[104] the law should facilitate adoption as much as possible. To this end, consent of the mother of the child to adoption should no longer be required.[105] Where the facts of the case do not warrant a finding that the mother has abandoned her child, yet seem to indicate that she has waived her presumptive right to custody by her failure to properly support the child, or by her failure to care for the child's welfare,[106] the lack of the mother's consent to adoption should

98. Alverson, Young & Young, *Court-Ordered Contraception*, 55 A.B.A.J. 223 (Mar. 1969).

99. *Id. See, e.g.*, FLA. STAT. § 39.01(11) (1967).

100. *Id.* at 223, 224.

101. *Id.* at 226.

102. 274 U.S. 200 (1927).

103. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965).

104. FLA. STAT. § 63.151 (1967).

105. FLA. STAT. § 63.081(1) (1967).

106. The failure to care for the child must be such that it would indicate that the child is a "dependent child" within the meaning of FLA. STAT. § 39.01(10) (1967).

not be a bar if adoption would otherwise be in the best interests of the child.

However, this solution is not likely to meet with much success. There are those who believe that the mere fact of parenthood alone is an important factor in determining the best interests of the child, and that the adopted child faces great psycho-sociological problems in searching for his identity.[107] A more tangible problem arises in the fact that the greatest number of illegitimate children are born to nonwhite mothers,[108] and consequently, the number of adoptees would far exceed the number of adopting parents.

D. *Revision of the Existing Paternity Act*

If the law is to be a realistic instrument of social policy, then it is time that it be revised to conform to the needs of society. The following bill is proposed as a remedy for some of the existing problems.

THE FLORIDA PATERNITY ACT—A PROPOSAL
Chapter 70-00

An Act relating to paternity proceedings; amending Chapter 72, Florida Statutes, by amending Sections 742.011; 742.021; 742.031; 742.041; 742.07; 742.08 and 742.091; and by adding thereto Section 742.071, to provide that this Chapter be entitled Paternity; to provide that a married woman or the State of Florida or a public agency thereof may institute paternity proceedings; and to provide for the liability of one or more putative fathers for the maintenance of their illegitimate child; to repeal the provision for a jury trial; to provide that the amount of periodic payments be determined by judicial discretion; to provide for the enforcement of maintenance awards; and to provide an effective date.

Be it Enacted by the Legislature of the State of Florida:

Section 1. Section 742.011, Florida Statutes, is amended to read:

742.011 Paternity proceedings: circuit court jurisdiction

Paternity proceedings may be brought in the circuit court by any woman who shall be pregnant or delivered of a bastard child, or by the State of Florida, or a public agency thereof, on her behalf.

A bastard child includes a child born to a married woman by a man other than her husband.

Comment:

This section is patterned after sections 1 and 2 of the Uniform Act

107. Interview with Quentin Eldred, Director of the Dade County Legal Aid Society, in Miami, Florida, Mar. 5, 1969.

108. *See* note 2 *supra.*

on Paternity.[109] Inherent in this revision is the abolition of the presumption of legitimacy of a child conceived or born during marriage.

Section 2. Section 742.021, Florida Statutes, is amended to read:

742.021 Same; venue, process, complaint

The proceedings shall be by verified complaint filed in the circuit court of the county in which the woman resides or of the county in which any one of the alleged fathers reside. The complaint shall aver sufficient facts charging the paternity of the child, and shall set forth with specificity the names of those persons alleged to be the father of the child. Process directed to the defendant(s) shall issue forthwith requiring the defendant(s) to file his (their) written defenses to the complaint. Upon application and proof under oath, the court may issue a writ of ne exeat against the defendants, or any one of them, on such terms and conditions and conditioned upon bond in such amount(s) as the court may determine.

Section 3. Section 742.031, Florida Statutes, is amended to read:

742.031 Same; hearings, court orders, support, hospital expenses, etc.

(1) Hearings for the purpose of establishing or refuting the allegations of the complaint and answer(s) shall be held in the chambers and may be restricted to such persons, in addition to the parties involved and their counsel, as the judge in his discretion may direct.

(2)The court shall determine the issues of paternity of the child, the needs of the child, and the ability of the parents to support the child; and if the court shall find the sole defendant to be the father of the child, he shall so order and shall further order the defendant to pay the complainant, her guardian or such other person assuming responsibility for the child as the judge may direct, such sum or sums as shall be sufficient to pay reasonable attorney's fees, hospital or medical expenses, cost of confinement and any other expenses incident to the birth of such child.

(3) If the court is unable to determine the issue of paternity of the child because of the existence of multiple defendants, the defendants shall nevertheless be held liable for such costs and expenses as specified in subsection (2) herein, and for the performance of such other duties as the court shall in its discretion direct, provided that the defendants have had intercourse with the mother within such a time that in the ordinary course of nature, they, or any one of them, might be the father of the child.

(4) In addition, the court shall order the defendant(s) to

109. 9 B UNIFORM LAWS ANN. 522, 524 (1966).

pay periodically for the support of such child such sums as shall be fixed by the court in accordance with the provisions of this act, and also all taxable costs of the proceedings.

Comment:

Sections 2 and 3 of this act are designed to provide for the liability of "possible fathers."[110] In effect, each man who has had relations with the mother during the period in which the child might have been conceived is declared a possible father, and, in the absence of exculpatory evidence, is jointly and severally liable with the other possible fathers for the support of the child.[111]

Additionally, subsection (4) of section 3 of this act omits the provision for a jury trial on the issue of paternity.

Section 4. Section 742.041, Florida Statutes, is amended to read:

742.041 Same; monthly contributions

The court shall order the defendant(s) to pay monthly for the care and support of such child an amount which in the discretion of the judge seems fair and equitable, depending on the needs of the child and the circumstances and ability of the defendant(s).

Section 5. Chapter 72, Florida Statutes, is amended by adding Section 742.071, to read:

742.071 Same; enforcement

The liability of the defendant(s) for the payment of any sums ordered by the court to be paid may be enforced in accordance with the provisions of this act (1) by the mother, child, or the public agency which has furnished or may furnish the reasonable expenses of pregnancy, confinement, education, necessary support, or funeral expenses, and (2) by other persons including private agencies to the extent that they have furnished the reasonable expenses of pregnancy, confinement, education, necessary support, or funeral expenses.

Comment:

This provision is substantially the same as section 2 of the Uniform Act on Paternity.[112]

Section 6. Section 742.07, Florida Statutes, is amended to read:

---

110. *See* discussion in text *supra*, p. 721.

111. The rationale for the imposition of liability on a possible father is analogous to the situation of joint tortfeasors. In both situations there is an innocent victim (here, the child), there are culpable defendants, and the cause-in-fact cannot be proved. Hence, the better rule, as stated in Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948), is to let the wrongdoers fight it out instead of letting the innocent victim suffer.

112. 9 B UNIFORM LAWS ANN. 522, 524 (1966).

742.07 Effect of adoption

Upon the adoption of a child, for whom support has been ordered, by some person other than (one of) the father(s), the liability of the father(s) so ordered to pay for the support of the child shall be terminated. In the event the child is adopted by one of the fathers ordered by the court to pay for the support of such child, the liability of the other fathers ordered to pay for the support of the child shall be terminated.

Comment:

This section is structured so as to apply in two situations. In the first situation, where the child is adopted by a person who was not named as a defendant in the paternity action, the effect of the adoption is to relieve those defendants ordered to pay for the child's support of their obligation. In the second situation, where the child is adopted by a person who had been named as a defendant in the paternity action, and who had been found to be a "possible father" as a result of the action, the effect of the adoption is to relieve the other "possible fathers," who had been ordered to pay for the child's support, of their obligation. In other words, the support obligation is shifted to the adopting parent.

Section 7. Section 742.08, Florida Statutes, is amended to read:

742.08 Default of support payments

Upon default in payment of any moneys ordered by the court to be paid, the court may enter a judgment for the amount in default which shall be a lien upon all property of the defendant, both real and personal. Willful failure to comply with an order of the court shall be deemed a contempt of the court entering the order and shall be punished as such. The court may require bond of the defendant(s) for the faithful performance of his (their) obligation(s) under the order of the court in such amount(s) and upon such conditions as the court shall direct.

Section 8. Section 742.091, Florida Statutes, is amended to read:

742.091 Marriage of parents

If the mother of any bastard child and (any one of) the reputed father(s) shall at any time after its birth intermarry, the child shall in all respects be deemed and held legitimate, and upon the payment of all costs and attorney's fees as determined by the court, the cause shall be dismissed and the bond provided for in section 742.021 shall be void. The record of the proceedings in such cases shall be sealed against public inspection in the interests of the child.

Section 9. *This Act shall take effect immediately upon becoming a law, and shall apply to all cases of birth out of wed-*

lock as defined in this Act where birth occurs after this Act takes effect.

V. Conclusion

It should be apparent that this statutory reform is merely a compromise. It eases the economic burden facing the mother, the child, and the public. By imposing more stringent liability on the father, or possible father, it attempts to discourage immorality. The reform, however, is at best an attempt to reduce the difficulties that the illegitimate child will encounter. By no means does the proposal claim to solve the problem of illegitimacy for that of course can only be achieved through the prevention of births out-of-wedlock.