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Domestic Relations--Constitutionality of the West Virginia Nonsupport Statute

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with the *Workman* rationale to conclude that a juvenile cannot be waived to an adult court any time such waiver will subject the juvenile to adult punishment. If this is so, the extent of the waiver concept is impliedly limited to this extent.

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Domestic Relations—Constitutionality Of The West Virginia Nonsupport Statute

Dewey Bragg was indicted for failure to support two children born in 1950 and 1952. He was convicted on the theory that the children were legitimate because they were born as a consequence of what would have been a common-law marriage if such marriages were recognized in West Virginia.[1] Bragg stipulated the existence of the essential of a common law marriage but appealed on the ground that the statute which declares that the issue of marriages null in law are legitimate[2] is ambiguous and is not applicable to a nonsupport action. *Held,* judgment affirmed. The provisions of the statute in question are clear and unambiguous, and no limitations or qualifications may be read into it. *State v. Bragg,* 163 S.E.2d 685 (W. Va. 1968).

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[1] Common-law marriages contracted in West Virginia are null and of no effect so far as the husband and wife are concerned. *Cf.* W. VA. CODE ch. 48, art. 1, § 5 (Michie 1966); Kester v. Kester, 106 W. Va. 615, 618, 146 S.E. 625, 626 (1929); Beverlin v. Beverlin, 29 W. Va. 732, 736, 3 S.E. 36, 38 (1887). However, common-law marriages contracted in a state which recognizes the validity of such marriages will be given recognition in West Virginia. Meade v. Compensation Comm'r, 147 W. Va. 72, 82, 125 S.E.2d 771, 777 (1962); Jackson v. Compensation Comm'r, 106 W. Va. 374, 375, 145 S.E. 753, 754 (1928). There has been much controversy as to what elements are requisite to a common-law marriage. In one West Virginia case the elements were stated to be "lawful capacity to contract a marriage, and matrimonial intent, *bona fides,* on the side of at least one of the parties." Luther v. Luther, 119 W. Va. 619, 621, 195 S.E. 594, 595 (1938). In the same case, the court stated the requirements to be "an understanding in the present tense that the parties are husband and wife, and they must . . . in good faith assume such relation . . . and believe in good faith that they are husband and wife." *Id.* at 621-22, 195 S.E. 595.

[2] W. VA. CODE ch. 42, art. 1, § 7 (Michie 1966), which reads, "The issue of marriages deemed null in law, or dissolved by a court, shall nevertheless be legitimate." This Code section will be referred to hereinafter as the "legitimation" statute for brevity. It should be kept in mind that legitimation may also take place by virtue of intermarriage of the parents subsequent to the birth of their children. W. VA. CODE ch. 42, art. 1, § 6 (Michie 1966).

The nonsupport statute[3] under which the defendant was convicted provides in part that "any parent who shall . . . desert or wilfully neglect or refuse to provide for the support and maintenance of his or her legitimate or illegitimate child or children, under the age of eighteen years, is destitute and necessitous circumstances, shall be guilty of a misdemeanor. . . ."[4] However, the West Virginia Supreme Court of Appeals has held that the nonsupport statute, insofar as it pertains to illegitimate children, is *in pari materia*[5] with the bastardy statute, which provides that a proceeding under the bastardy statute can not be instituted if the child is three years of age or older.[6]

The result of construing the nonsupport and bastardy statutes together is that a prosecution for nonsupport of an illegitimate child can not be maintained unless: 1) The child is under three years of age; or (2) the paternity is admitted; or (3) the defendant admitted the paternity before the child reached three years of age; or (4) the paternity has been judicially determined in a bastardy proceeding or nonsupport prosecution commenced within three years after the birth of the child.[7] In the *Bragg* case, both of the children were over the age of three years and none of the other criteria noted above had been met. Therefore, action could be maintained only if the children were found to be legitimate.

There has been no prior case in West Virginia construing the "legitimation" statute in conjunction with the nonsupport statute. Therefore, the defendant's contention that the "legitimation" statute had the effect of legitimating the children of null marriages for the purpose of descent only,[8] and not for all purposes, presented a case of first impression.

This issue was, however, before the Virginia Supreme Court of Appeals in the case of *McClaugherty v. McClaugherty*.[9] In that case the court held a father had a duty to support his child which had been legitimated by virtue of a "legitimation" statute,[10] identical to

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[3] W. VA. CODE ch. 48, art. 8, § 1 (Michie 1966).

[4] *Id.*

[5] State v. Richmond, 124 W. Va. 777, 780, 22 S.E.2d 537, 538 (1942); State v. Hoult, 113 W. Va. 587, 588-89, 169 S.E. 241, 242 (1933); State v. Reed, 107 W. Va. 563, 565, 149 S.E. 669, 670 (1929).

[6] W. VA. CODE ch. 48, art. 7, § 1 (Michie 1966).

[7] Holmes v. Clegg, 131 W. Va. 449, 453, 48 S.E.2d 438, 441 (1948); State v. Mills, 121 W. Va. 205, 207, 2 S.E.2d 278, 279 (1939); State v. Hoult, 113 W. Va. 587, 588-89, 169 S.E. 241, 242 (1933).

[8] Brief for Appellant at 9, State v. Bragg, 163 S.E.2d 685 (W. Va. 1968).

[9] 180 Va. 51, 21 S.E.2d 761 (1942).

[10] VA. CODE ANN. § 64 1-7 (Repl. 1968).

the one in West Virginia. In construing the "legitimation" statute in a later case, the same court stated:

> The language of our statute is clear, sweeping and direct. There are no words of limitation or qualification. The issue of marriages decreed null in law . . . are legitimated. They are consequently endowed with *all* the rights of legitimate issue *for all purposes. . . .* "[11] (Emphasis added).

Legitimacy is a status, and to confer this status upon a child for some purposes but not for others would indeed seem to reflect a degree of legislative inconsistency not apparent from the wording of the statute. In the *Bragg* case, the court did no more than hold that no such incongruity was intended by the Legislature in the absence of express language so indicating. While this decision is not novel, it is important in that it clarifies the scope of the "legitimation" statute in West Virginia.

A point of equal or possibly greater significance was raised by the court's reference to the nonsupport statute being *in pari materia* with the bastardy statute with respect to illegitimate children. While this statement was dictum in the *Bragg* case because the children were found to be legitimate, such an approach has been the basis for holdings in prior decisions.[12] As noted earlier, the effect of construing the two statutes together is the establishment of a three year statute of limitations for nonsupport actions with respect to illegitimate children, while no such limitation exists if the child is legitimate. This differentiation may pose a constitutional issue under the equal protection clause of the fourteenth amendment.

States have wide latitude in making classifications,[13] but they may not draw a line which constitutes invidious discrimination against a particular class.[14] The test is whether the statutory discrimination is based on differences that are reasonably related to the purpose of the statute.[15] It is therefore necessary to analyze the

[11] Henderson v. Henderson, 187 Va. 121, 129, 46 S.E.2d 10, 14 (1948).

[12] State v. Richmond, 124 W. Va. 777, 780, 22 S.E.2d 537, 538 (1942); State v. Mills, 121 W. Va. 205, 207, 2 S.E.2d 278, 279 (1939); State v. Hoult, 113 W. Va. 587, 588-89, 169 S.E. 241, 242 (1933).

[13] Ferguson v. Skrupa, 372 U.S. 726, 732 (1963); Williamson v. Lee Optical Co., 348 U.S. 483, 488-89 (1955); Day-Brite Lighting Inc. v. Missouri, 342 U.S. 421, 423 (1952).

[14] Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942); Gaines v. Canada, 305 U.S. 337, 350 (1938); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

[15] Morey v. Doud, 354 U.S. 457, 465 (1957); Smith v. Cahoon, 283 U.S. 553, 567 (1931); Louisville Gas Co. v. Coleman, 277 U.S. 32, 37 (1928).

purpose of the bastardy and nonsupport statutes and the rationale upon which the limitation in the former statute has been applied to the latter.

The main purpose of the bastardy statute is to prevent the child from becoming a charge upon the public. This end is accomplished by compelling the father to bear the burden of its support.[16] The purpose of the nonsupport statute is "to prevent deserted and abandoned persons from becoming a charge upon the public."[17] Thus, although the former statute is criminal in form but civil in substance and the latter is criminal, it is apparent that both were enacted primarily for the benefit of the public.[18]

The three year limitation in the bastardy statute was imposed to prevent the danger of fraud that would exist if the question of paternity of illegitimate children were left open for an indefinite period.[19] Since the paternity of an illegitimate child may be determined in a non-support action,[20] the limitation in the bastardy statute was logically extended to the nonsupport statute.[21]

If the sole purpose of these statutes is the protection of the public, it is difficult to see how illegitimate children would be injured by the three year limitation. In the absence of injury, they would have no basic upon which to claim that the statutes in question constitute an invidious discrimination.

It is arguable, however, that the bastardy and nonsupport statutes establish a duty of support. The West Virginia Supreme Court of Appeals took this view in *Criukshank v. Duffield.*[22] In that case, the court talked of the right of a wife and minor children to support as arising from the husband's or father's duty to support them.[23] On

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[16] State v. Easley, 129 W. Va. 410, 415, 40 S.E.2d 827, 830 (1946).
[17] Davis v. Prunty, 114 W. Va. 285, 286, 171 S.E. 644 (1933).
[18] Holmes v. Clegg, 131 W. Va. 449, 453, 48 S.E.2d 438, 441 (1948).
[19] State v. Hoult 113 W. Va. 587, 589, 169 S.E. 241, 242 (1933).
[20] State *ex. rel.* Wright v. Bennett, 90 W. Va. 477, 480, 111 S.E. 146, 147 (1922).
[21] State v. Hoult, 113 W. Va. 587, 589, 169 S.E. 241, 242 (1933).
[22] 138 W. Va. 726, 77 S.E.2d 600 (1953).
[23] *Id.* at 733-34, 77 S.E.2d at 604, where the court stated:
"[T]he nonsupport statute not only provides for criminal prosecution of a defendant who has violated the provisions thereof, but also provides civil procedure for the enforcement of the *right of a wife, or minor children to support.* The court, in its discretion, may enforce either the criminal or civil liability, or both, as to a defendant convicted thereunder." (Emphasis added).
The civil procedure for enforcement is that the court may:
(1) direct that the husband or parent work on the public highways of this

this theory, it can be seen that an illegitimate child for whom a nonsupport action has not been commenced before the statutory period has elapsed[24] can, through no fault of his own, be denied a civil right solely because of his illegitimacy.

In *Levy v. Louisiana*[25] the United States Supreme Court held that the equal protection clause of the fourteenth amendment prohibited discrimination by the states between legitimate and illegitimate children, with respect to the right of illegitimate children to recover for the wrongful death of their mother. In a companion case, the court reached the same decision in an action by a mother for the wrongful death of her illegitimate child.[26] The Supreme Court of Washington had only a few weeks earlier reached the same decision in a case in which an action was brought on behalf of a illegitimate child for the wrongful death or her father.[27]

Subsequent to the *Levy* and *Glona* cases, the Supreme Court of Missouri held that those decisions required that state statutes relating to the obligations and rights of parents[28] be construed to afford illegitimate children a right equal with that of legitimate children in compelling support by their fathers.[29] In this decision the highest court of Missouri specifically overruled prior cases which had imposed no civil liability on the father for nonsupport of his illegitimate child or children.[30]

In principle, the prior Missouri law denying minor illegitimate children a civil remedy for nonsupport is difficult to differentiate

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State or where he can obtain employment, and order such payments to be made to the wife, guardian, custodian, or trustee of such minor child or children as may be necessary for their maintenance under the circumstances; or (2) if the husband or parent be regularly employed or obtain regular employment, the court may order that such employment be continued, that the husband or parent be confined in jail between hours of employment, and that the sheriff collect the earnings, deduct reasonable expenses of the husband or parent, and pay the balance to the wife, guardian, custodian or trustee of such minor child or children. W. VA. CODE ch. 48, art. 8 § 1 (Michie 1966).

[24] The rationale and purpose of the three-year statute of limitations may be valid, but the question remains as to whether they are of sufficient importance to override a constitutionally guaranteed right.

[25] 391 U.S. 68 (1968). *See* 71 W. VA. L. REV. 52 (1968).

[26] Glona v. American Guarantee and Liab. Ins. Co., 391 U.S. 73 (1968).

[27] Armijo v. Wesselius, 73 Wash. Dec.2d 721, 440 P.2d 471 (1968).

[28] MO. REV. STAT. §§ 452.150, 452.160 (1952); MO. REV. STAT. § 559.353 (Supp. 1968).

[29] R_____ v. R_____, 431 S.W.2d 152, 154 (Mo. 1968).

[30] Heembrock v. Stevenson, 387 S.W.2d 263 (Mo. 1965); State v. White, 363 Mo. 83, 248 S.W.2d 841 (1952).

from the present three year statute of limitations for nonsupport actions with respect to minor illegitimate children in West Virginia. It might therefore be reasonably argued in the future that the nonsupport statute and bastardy statute, when read together, deny certain illegitimate children equal protection of the laws.

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Elections—The Use of Certificates of Nomination

Prior to the 1968 West Virginia primary election, the American Independent Party circulated a certificate of nomination, as prescribed by the West Virginia Code in an attempt to have the name of its presidential candidate appear on the ballot in the general election. Pursuant to the statutory provisions, the party filed these certificates with the Secretary of State of West Virginia. The Daily Gazette Company requested a list of these names in order to publish them in its newspaper. Apparently, its purpose in so doing was to discourage other voters from signing similar certificates circulated by the party. Upon the refusal of the Secretary of State to comply with this request, the Daily Gazette Company sought a writ of mandamus from the West Virginia Supreme Court of Appeals. *Held,* writ refused. The Legislature has provided by statute that those voters who sign a certificate of nomination shall not be allowed to vote in the next primary election to be held where a candidate for the same office is to be nominated. Even if the certificate is not a vote in its usual sense, it is so analogous to voting as to be entitled to the same consideration. The act of signing the certificate did not constitute a change of party registration. Even if it did, the Daily Gazette Company would still be denied the privilege of inspection because the object of their inspection was for an improper purpose. *State ex rel. Daily Gazette Co. v. Bailey,* 164 S.E.2d 414 (W. Va. 1968).

Normally, candidates for public office are nominated by primary election or party convention. However, as an alternate method of nomination, the certificate of nomination has been provided by statute in West Virginia.[1] In the *Daily Gazette* case the certificate was used to nominate a candidate for president. In subsequent litigation involving the certificate the West Virginia Supreme Court of Appeals

[1] W. VA. CODE ch. 3, art. 5, § 23 (Michie 1966).