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Social Implications of Laws Pertaining to Paternity Proceedings in the Near Western States

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SOCIAL IMPLICATIONS OF LAWS PERTAINING TO PATERNITY PROCEEDINGS IN THE NEAR WESTERN STATES

by

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TABLE OF CONTENTS

CHAPTER I

INTRODUCTION

The social problem of the child born out of wedlock and the impact which the child's status has on the community as well as on the parents has raised many and varied problems. Over the centuries attitudes have been modified and attempts have been made to cope with the situation in which the child, mother, and the father found themselves. In view of the time involved relatively little progress has been made. The incidence of its occurance has not decreased. "The annual number of illegitimate live births in the United States increased from 87,900 in 1938 to 131,000 in 1947, a rise of 50 percent."[1]

Objectives:

This study is an attempt to assess the law in terms of its social implications as these impinge on the three parties to a paternity proceeding; the mother, the putative father, and the child.

Through research and review of the law itself this study attempts to evaluate and to consider the effectiveness of the law

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1 Federal Security Agency, "Illegitimate Births-1938 to 1947", Vol. 33, No. 5, February 15, 1950, 71.

and to compare them to the Uniform Illegitimacy Act, taken as a standard. This model act was proposed to the states in 1923 by the National Conference on Uniform State Laws.[2]

Need:

The White House Conference of 1919 stimulated thinking related to the inadequacies of laws concerning children.[3] In turn this led to regional meetings of the Children's Bureau and the drafting of the model act, the Uniform Illegitimacy Act.

The books of Grace Abbott[4] and Sophonsiba P. Breckenridge[5] were attempts at codification and compilation of existing laws and tended to point up their inadequacies. Studies done by Ernst Freund[6], Chester G. Vernier[7], and the Children's Bureau also emphasized the deficiencies of these laws and brought summaries of them up to date.

Recently, literature has come from the Federal Security Agency, such as the writings of Maud Marlock, which attempts an

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2 Emma O. Lundberg, Unto the Least of These, New York, 1947, 368.

3 Children's Bureau, "Standards of Child Welfare", United States Department of Labor, Washington, D.C., 1919.

4 Grace Abbott, The Child and the State, II, Chicago, 1938, 493-606.

5 Sophonsiba P. Breckenridge, The Family and the State, Chicago, 1934, 415-476.

6 Ernst Freund, "Illegitimacy Laws of the United States", Children's Bureau, United States Department of Labor, Washington, D.C., 1923. (Out of print.)

7 Chester G. Vernier, American Family Laws, IV, Stanford, 1936.

interpretation of the law and tends to point up some of their socio-legal aspects.[6] An investigation of the literature makes clear the fact that there is comparatively little material covering this phase of the laws of paternity proceedings.

Focus:

The focus of this study is on a social analysis of the laws relating to paternity proceedings to determine if they are discriminatory and to ascertain the social effect they might have on the parties in the proceeding.

Also, consideration shall be given to the model act as it might be reflected in the legislation of the states included in this study.

Scope:

This study encompasses the laws on paternity proceedings in the states of Colorado, Kansas, Nebraska, New Mexico, North Dakota, Oklahoma, South Dakota, and Wyoming. For the purpose of this study this area is designated and referred to as the Near Western States.

Nature:

This study will attempt to evaluate the paternity proceedings in the light of what is generally considered to be the

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[6] "Wanted a Square Deal for the Baby Born out of Wedlock", Children's Bureau, United States Department of Labor, Washington, D.C., 1949.

fulfillment of the positive and primary or the negative and secondary function of all law, namely, the promotion or protection of the common and individual good.

Specifically, this study is seeking to determine how each state in this area approaches the problem and to ascertain what attempts are made to meet the needs of the three parties to the proceeding.

Method:

The method employed in this study was to examine the laws of paternity proceedings as they are found in the statute books of the respective states.

In addition, court decisions and related literature and materials were reviewed to determine trends.

For this the libraries of the Chicago Bar Association and the Law School of Loyola University were heavily drawn upon.

Correspondence was also carried on with persons in the offices of the Attorney General and the Directors of the Welfare Departments in these states in an attempt to learn, if possible, their attitudes with respect to the adequacies or inadequacies of the laws in their respective states.

CHAPTER II

THE LAWS AS THEY RELATE TO THE MOTHER

The problem of illegitimacy is a grave one for the mother to face. It has been said that, "If the child born out of wedlock is to have a chance at normal growth and development and if the experience is to be made as nondestructive as possible for the mother, the needs of both parents and child must be understood and met."[1]

The laws of paternity proceedings shall be reviewed to ascertain the State's stand regarding; the complaint procedure, the use made of statements by the mother as evidence, the support phases of the law, and the matter of domicile and custody of the child.

South Dakota, Wyoming and New Mexico law is quite detailed concerning the matter of the complaint procedure. In fact, South Dakota and Wyoming have laws which are similar in word and organization to the model act, the Uniform Illegitimacy Act. New Mexico and North Dakota law is next in order of similarity.

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1 Children's Bureau, "Services for Unmarried Mothers and their Children", United States Department of Labor, Washington, D.C., 1945, 2.

Regarding the complaint procedure, the law of South Dakota reads as follows:

> The proceedings to compel support may be brought by the mother, or if the child is or is likely to be a public charge, by the authorities charged with support. After the death of the mother or in case of her disability, it may be brought by the child acting through its guardian or next friend.
> If the proceeding is brought by the public authorities the mother, if living, shall be made a party defendant.[2]

North Dakota and New Mexico law differs from that cited above in form only.

Nebraska has legislation which also is somewhat similar to the model act. The exception being that the attorney general is charged with initiating proceedings for illegitmates born in, "...the Nebraska Maternity Home, or in other state institutions."[3]

The law in Oklahoma, Colorado and Kansas treats the complaint in varying ways. Oklahoma, for example, states that the, "...complaint may be made in writing duly verified, by any person, to the county court...."[4] Contrariwise, the law in Colorado takes the stand that, "The action must be brought by the woman, and no one else, not even the district attorney."[5] Kansas law states that, "When any unmarried woman who has been delivered of

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2 South Dakota Code of 1939, II, Chapter 37, Article 2107, 600.
3 Revised Statutes of Nebraska-1943, I, Chapter 13, Section 113, 415.
4 Oklahoma Statutes-1941, Title 5-10, Section 71, 379.
5 1935 Colorado Statutes Annotated, II, Chapter 20, Section 2, 234.

or is pregnant with a bastard child shall make a complaint thereof in writing under oath,...(it shall)cause such person to be arrested...."[6]

The other feature in the complaint procedure which is of importance and on which the states have definite views is the period of limitation within which the complaint may be instituted. In every one of these states, as well as in the Uniform Illegitimacy Act, this period of time extends from the time of conception up to a specified number of years after the birth of the child.

Oklahoma law prescribes no limit within which the complaint may be filed to initiate action to determine paternity or support for the child. Twelve months, is the period of limitation permitted under Colorado law, and four years is the period of limitation set out under Nebraska law. The other states follow the proposal outlined in the model act which defines the limitation as being fixed at two years after the birth of the child.

New Mexico and Oklahoma law, although similar in spirit, has other unique features. New Mexico law states that the complaint shall, "contain such facts relating to the property of the defendant as are within the knowledge of the complainant."[7]

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6 General Statutes of Kansas Annotated 1949, Article 23, Section 62-2301, 1895.

7 New Mexico Statutes 1941, II, Article 4, Section 25-410, 611-612.

While Oklahoma law reads that, "The judge may also issue an attachment on such complainant without bond, which attachment shall specify that the value of property to be siezed under the attachment."[8]

States vary in legal structure and therefore different persons are designated to receive the complaint. The law for North Dakota and South Dakota is similar. North Dakota law, for example, reads that, "The complaint...(shall be) reduced to writing in the presence of the complainant by the magistrate."[9]

Generally, the person who issues the complaint is the Justice of the Peace in Wyoming, Colorado, Kansas and Nebraska; and a magistrate, judge, or county judge in South Dakota, North Dakota, New Mexico and Oklahoma. Nebraska law also adds that a municipal, county or district judge may issue such complaints.

Two methods may be employed to bring the charged person to answer the complaint. These are, the summons or warrant, or both, in some states. The summons is considered to be more in keeping with the nature of the proceedings and it summons, as the word indicates, the putative father to the hearing to answer the charge. The summons, is also, considered to be more the instrument of a Court of Chancery such as a Juvenile or Family Court.

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8 Oklahoma Statutes 1941, Title 5-10, Section 74, 384.
9 North Dakota-Revised Code of 1943, III, Chapter 32, Section 2110, 600.

As such it is considered to be less threatening in nature.

The warrant is used by the criminal law courts and is served by an officer of the court or law. It carries with it the feature of arrest or apprehension and the possibility that the defendant may be jailed until the hearing. As such it is considered to be more threatening of the two methods.

New Mexico and Nebraska are the only states which provide that the summons only be used in paternity proceedings. While South Dakota, North Dakota and Wyoming provide that the warrant be used, but it is interesting to note that the summons may be used if the complainant so wishes, in the first instance. The remaining states rely on the use of the warrant only under their proceedings.

From the state's point of view the material which is usually considered to be acceptable and admissible as evidence in a paternity proceeding are; the complaint, verified by oath or affirmation, the statements of the parties, and the statements of witnesses. One state, Kansas, requires that the complaint be read to the complainant and signed after being reduced to writing. On the other hand, North Dakota, South Dakota and Wyoming have legislated against the use of such material as evidence at paternity hearing.

The law in Oklahoma is silent on this matter; but, as

can be observed from its court decisions, paternity proceedings are held to be in the nature of civil suits and need to be proven one way or the other by a preponderence of the evidence.[10] Similar court decisions in the other states define the testimony which is either admissible or excluded as evidence in their paternity proceedings.

Support provisions and methods of exacting support, and education, and maintence for the child are detailed and comprehensive features in the paternity proceedings of all of these states. Typically, fourteen out of thirty-five sections of the law of South Dakota bears directly on the matter of support for the child or mother.[11]

The law of South Dakota, North Dakota, Wyoming and Nebraska is similar and is prefaced by sections dealing with the obligation of the parents to support their children. New Mexico, for example, in the first section of its law, provides that the mother has obligation to support her child, and apparently, it intends to place initial responsibility for such obligation on her.[12]

None of the states of this study specify the maximum amount to be payed for the support of the child. Oklahoma courts

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10 Oklahoma Statutes; Boston vs State, ex rel, Mayberry, 182 Okl. 181, 77 p 2d. 13, 380.
11 South Dakota Code, Chapter 37, 599-604.
12 New Mexico Statutes, Article 4, Section 25-401, 609.

ruled, in one instance, that a judgment of one thousand dollars, for example, was excessive[13] and later ruled that a payment of thirty-five dollars per month for fourteen years was not excessive where the defendant earned two hundred dollars per month.[14] In another case, a Wyoming court ruled that a payment of three hundred dollars annually until the child reached his sixteenth birthdate was not excessive.[15] The decisions of the courts are undoubtedly based on the times and the father's ability to pay for support and maintenance.

Another way of satisfying the courts on the point of support for the child and the mother is through the use of the settlement or compromise by the father. Such is permitted by law in some states, with or without court approval and supervision, and bars the complainant from further action so long as the father complies withthe terms of the agreement.

In Kansas, an exceptional arrangement is found in that the settlement or compromise may halt the proceedings at any time prior to the final judgment by the statement of the mother that such an agreement has been reached to the mother's satisfaction.[16] Colorado and Oklahoma law is silent concerning the matter of the

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13 Oklahoma Statutes; Cummins vs State, 46 Okl. 51, 148 p 137, 388.

14 Ibid; Lowhead vs State, 99 Okl. 197, 226 p 376, 388.

15 Wyoming Complied Statutes-1945, IV; Kyuskovick vs State, ex rel, Osborn, 59 Wyo. 406, 141 Pac.(2d.) 540, 182.

16 Statutes of Kansas, Article 23, Section 62-2316, 1897.

settlement and compromise. The remaining states require that such an agreement have the court's approval to be binding.

The period of time during which the father is liable for the support and maintenance of the child, as set down in the Uniform Illegitimacy Act, is until the child reaches his sixteenth birth date. Five of these states; Wyoming, South Dakota, New Mexico, North Dakota and Kansas adopted the model act's proposal and set the liability at sixteen years of age. In New Mexico this may be extended, "...to the time when the child shall reach full age if mentally or physically incapacitated."[17] Whereas, Nebraska extends the period of responsibility until the child is eighteen.[18] Kansas and Oklahoma do not limit the period of liability in any way; and, the law of Nebraska is most vague and states only that the father is liable for the support of the child.

North Dakota, South Dakota, Wyoming, New Mexico and Kansas also provide that such monies, the judgment or settlement, be payed to the mother. If she be an improper person such amounts are to be paid to a trustee or court representative. Colorado, Kansas and Oklahoma provide that such monies be recieved and paid out by a guardian or trustee. In all instances where such sums are recieved and paid out by a court appointed trustee, guardian, corporation, or court representative the law provides that there

17 New Mexico Statutes, Section 25-402, 610.
18 Nebraska Statutes, Section 13-101, 411.

shall be an accounting or reporting to the courts of the amounts recieved and payed out.

In the matter of judgments, North Dakota, South Dakota, Wyoming and New Mexico take the stand that any judgment, ordered in any part of the state or in any other state, which is not contrary to the general practice within the state is binding on the parties. Such a provision is not found in the laws of the other four states.

The laws of these states were also reviewed to determine the position they take concerning the father's responsibility for the expenses of the mother's pregnancy and confinement, the funeral expenses for the child should he die, and the possibility for a third party to collect, from the father, for the usual expenses incurred in caring for the mother and child.

South Dakota, North Dakota, Wyoming, New Mexico and Nebraska provide, within their legislation relating to the paternity proceeding, that the father is responsible for the expenses incurred during the mother's pregnancy and confinement. The law in Kansas, Oklahoma and Colorado is silent concerning this.

Funeral expenses are the responsibility of either or both parents in North Dakota, South Dakota, New Mexico and Wyoming; while the other states make no provision for such and obligation by the parent or parents of the child.

If a third person has met any of the usual expenses for

which the parents could be considered to be liable he may collect from the parents for such expenditures, under the law pertaining to the paternity proceedings, in North Dakota, South Dakota, New Mexico and Wyoming. The other four states are silent in this matter.

Some States have also provided that in the event that the father die the child may participate in the estate of the father. North Dakota, in referring to such a right has this to say:

> The obligation of the father of the child born out of wedlock, where paternity has been judically established in the lifetime of the father or has been acknowledged by him in writing, is enforceable against his estate in such an amount as the court may determine, having regard for the following:
> 1. The age of the child;
> 2. The liability of the mother to support the child;
> 3. The amount of property left by the father;
> 4. The number, age, and financial condition of the lawful issue of the father if any;
> 5. The rights of the widow of the father, if any.
>
> The court may direct the discharge of the obligation by periodical payments or by a payment of a lump sum.[19]

All states do not directly or indirectly allude to such a possibility within their respective law on paternity proceedings.

Only Wyoming, New Mexico, North Dakota and South Dakota make specific provisions concerning custody for the child born out of wedlock. Wyoming, for example, states that the court, "...has continuing jurisdiction to determine custody in accord-

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19 North Dakota Code, Section 32-3606, 2349.

ance with the interests of the child."[20] The law in the remaining four states contains nothing concerning the matter of who shall have custody of the child, but nevertheless seem to take the stand that as the natural guardian of the child such custody be invested in the mother. Such a stand can be traced to the old English common law which historically linked the mother and the child in the matter of relationship.

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20 Wyoming Compiled Statutes, Section 427, 187.

CHAPTER III

THE LAWS AS THEY RELATE TO THE FATHER

Ideally, as stated by Elisabeth W. Deuel, the laws of paternity proceedings should be written so that, "The father is increasingly being given opportunity to fulfill his responsibility and share in the experience without fear of punitive measures."[1]

To ascertain how the laws of the Near Western States actually do meet the needs of the father in the proceeding these laws were reviewed concerning; the basis of the legal system in this geographic area, the nature of the proceeding, the court hearing, and the father's recourse to scientific and counter-statements as evidence.

The law in this area has different origins due in part to the fact that this area was under French, Spanish and Mexican rule during different periods in its history. As a result it is not uncommon to find that reference is made to the Civil Law and to the old English common law as well. Colorado law typifies this by commenting that, "The Civil Law is not in force now in Colorado, by prevailing here when the state was part of the Territory

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1 "Children of Unmarried Parents", Social Work Year Book 1951, New York, 1951, 95.

of Spain, France and Mexico."[2]

Under English common law, the child born out of wedlock was considered to be filius nullius, or the child of no one. Under American law, early in our history, the child did not fare much better except that American law, "...does not affect his civil status."[3]

A decision which was handed down in the Oklahoma courts defines the American usage of the common law as well as any one has stated it. A statement contained in this decision alluded to the derivation of Oklahoma law and has this to say:

> The opinion (in McKennon v Winn, 1 Okl. 327, 33 P. 582, 22 L.R.A. 501) defined the common law of America as that part of the English common law and general statutes, suited to American conditions, which was brought to America by the Colonists making the first settlements.[4]

Brief consideration of the distinction between civil and criminal law and procedure is important in view of the bearing it has on the paternity proceedings as they are found in the various states.

A suit brought under civil law is one dealing with the commission of private wrongs or torts between two persons. The

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2 Colorado Annotations-Conflict of Laws, ed. Colorado and Denver Bar Association, St. Paul, 1936, 5.

3 H.H.Robbins and F. Deak, "The Property Rights of Illegitimate Children; A Comparative Study", Selected Essays on Family Law, Brooklyn, 1950, 746.

4 Oklahoma Annotations-Conflict of Laws, ed. Oklahoma State Bar Association, St. Paul, 1937, 4.

Civil Courts have jurisdiction and the plaintiff need only show by a preponderance of evidence that an injury has been committed against him.

An action brought under criminal law involves the commission of a wrong against the State by an individual or a group though the injury may have been directly caused to another individual. Such actions are brought in the Criminal Courts and the State in prosecuting must prove its case against the defendant beyond a reasonable doubt.

The foregoing distinction becomes a consideration of importance since frequently paternity proceedings take on the aspects of both types of procedure. As can be seen in the following:

> From an early date, however, Legislatures have seen fit to impose upon both parents a duty to support their bastard children. The provisions are found in four types of statutes: (a) those requiring the support of poor relations; (b) those penalizing the desertion or nonsupport of children; (c) those providing for a civil suit by the mother or a third person in which the father may be forced to support the child or to pay for past support; and (d) those providing for the proceedings in which filiation of the child may be established and a statutory duty of support enforced against the person found to be the father of the child.[5]

From such a grouping of laws it is easy to see how aspects of the criminal law become involved in paternity proceedings which lead to the comment made by Elizabeth W. Deuel that,

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5 Chester G. Vernier, American Family Laws, IV, Stanford, 1936, 206-207.

"Establishment of paternity, unfortunately, is still a criminal or quasi-criminal procedure in many states."[6]

For example, in North Dakota, South Dakota and Wyoming the warrant or summons may be used. The former is a feature of criminal law and the latter a feature of civil law. Oklahoma, by court decision has ruled that, "...a bastardy proceeding is in the nature of a civil action...."[7] yet, provides that, "The proceedings shall be entitled in the name of the State against the accused as defendant."[8] Kansas states that, "The prosecution shall be in the name of the State...but the rules of evidence...shall be the same as in civil cases."[9] New Mexico and Nebraska, seemingly are the only states which view the proceedings as being more in the nature of civil suits and provide that the summons only be used. Colorado law is mute on this point, though it too uses the warrant in its proceedings and places the matter in the civil courts.

An interesting and indicative point in these laws is the terminology which is used in the various statutes. Oklahoma and Kansas employ the terms of arrest, apprehension, accused, and probation which are a part of criminal law terminology.

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6 "Children of Unmarried Parents", Social Work Year Book 1951, 95.

7 Oklahoma Statutes; Boston vs State, ex rel, Mayberry, 182 Okl. 181, 77 p 2d. 13, 380.

8 Ibid, Section 71, 379.

9 General Statutes of Kansas, Section 62-2303, 232.

The matter of the court hearing and how this is handled presents a problem. The way in which the putative father is brought before the court is a matter of great significance and would be expected to have considerable effect on him. Nowhere in the paternity proceedings of these states is there specific mention made of the father's position should he voluntarily come before the court to acknowledge and establish support for the child.

Not all of these states make provision for the putative father to be heard before the matter is formally presented to the court for trial. Wyoming, North Dakota and South Dakota provide for preliminary hearing to determine if there are grounds for the complaint. If the trial is held it is held in the circuit court in North Dakota and Wyoming and in the district court in South Dakota. The Justice of the Peace is designated to hear the complaint in Kansas and the district court for trial. Nebraska provides that the complaint be filed in the county court and the entire matter handled by the county judge. Oklahoma does not provide for a preliminary hearing and the complaint and trial take place in the county court. Jurisdiction rests with the county court in New Mexico and again there is no provision made for a preliminary hearing. Worthy of note is the fact that, whereas, North Dakota law provides for a preliminary hearing and Nebraska does not; North Dakota states that the hearing be private and Nebraska states that the trial be closed to the public.

All of the states provide that the trial may be by jury if this is requested by either of the parties.

In the matter of evidence some feel that the reliability of blood tests to determine paternity is questionable. All other evidence which the father may choose to present must conform to the rules of the court or civil law in all of the states of this study.

Blood tests, as scientific evidence to determine paternity has been questioned, as previously stated; yet, others feel, "...that the reliability of the blood test is definitely, and indeed unanimously, established as a matter of scientific opinion... and the results of such tests, when made by competent persons... should be deemed admissible."[10] Only South Dakota has accepted blood testing and grouping as admissible evidence.[11]

Such evidence is important at present only in a negative sense, because it can be admitted as good evidence only to exclude the defendant as the possible father. It will not cause the court to find against the defendant where the test is positive. Only lately have the courts been willing to accept such evidence.[12] There is the feeling that:

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10 John M. Maguire, "A Survey of Blood Group Decisions and Legislation in the American Law of Evidence", Selected Essays on Family Law, Brooklyn, 1950, 713.

11 South Dakota Code, Section 36-0602, 594.

12 John M. Maguire, "A Survey of Blood Group Decisions and Legislation in the American Law of Evidence", Selected Essays on Family Law, Brooklyn, 1950, 727.

> The psychological effect on the putative father may also be valuable. Obviously, since blood grouping can only be used for excluding paternity, the man has nothing to lose by submitting to the test. Should (he) refuse the test, this would tend to indicate his fear that it would prove the woman's claims are true.[13]

Such an interpretation probably indicates why the courts have been slow to admit such evidence since the law is notoriously conservative.

As stated previously, the use of counter-statements and witnesses for the putative fater are considered to be admissible and acceptable if they follow the rules of evidence. In all states, too, the father may testify in his own behalf, but this then exposes him to cross examination.

North Dakota, South Dakota, Wyoming and Colorado accept the evidence, as outlined here. In addition to the above named states, Nebraska, New Mexico, Colorado and Kansas consider the father to be as competent a witness as is the mother.

Sidney B. Schatkin, makes this observation on the matter of evidence which factors apply in some or all instances:

> Rules of evidence which are identified closely with affiliation proceedings:
> 1. Mother's testimony needs no corroboration;
> 2. If married, she and husband may testify to nonaccess;
> 3. Testimony establishing access need be corroborated;
> 4. Proof of paternity must be clear, convincing, and satisfactory;

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13 Alexander S. Wiener, Blood Groups and Blood Transfusions, Menasha, Wisconsin, 1935, 193.

5. Evidence of resemblance may be used; and,
6. Blood tests may be used.[14]

14 Disputed Paternity Proceedings, New York, 1947, 55.

CHAPTER IV

THE LAWS AS THEY RELATE TO THE CHILD

Grace Abbott indicates the trend in modern thought regarding the welfare of the child born out of wedlock when she says that, "...it is the duty of the state to provide equality of opportunity instead of making success in life more difficult for these children by legal handicaps."[1]

With this in mind this chapter shall review the laws, in regard; to the connotation implied in the laws terminology, the exhibition of the child to determine paternity through resemblance of child and father, legitimation for the child, indemnification, and the availability of social services for the persons in the paternity proceeding.

The terminology employed within the law gives some indication as to the vintage of the Law and the attitude of the state to the problem. The model act, the Uniform Illegitimacy Act, was a step intended to reduce the harshness of the law. At best it is only a compromise proposal, and only seven of all of the states in this country have adopted it in either its entirety

1 The Child and the State, II, 506.

or in part though it was proposed over thirty years ago.

The model act, in trying to satisfy all factions proposed features which appear to negate one another. Such seems to be the case when it provides for the use of either the summons or warrant, for example, which is a mixture of civil and criminal law. This can be seen through out much of the model act.

Of the states in the Near Western area, two, have adopted the model act, these are Wyoming and South Dakota. New Mexico and North Dakota have revised and enlarged on it to meet their own individual needs. The other four states have retained their laws or have amended them by incorporating certain proposals of the model act.

Wyoming, South Dakota, New Mexico and North Dakota have modeled their law after the Uniform Illegitimacy Act and have replaced such terms as; bastard child or illegitimate child, with such terms as; the child born out of wedlock or natural child. Nebraska law has also made provision for the elimination of such questionable terminology.

Wyoming and South Dakota refer to their paternity proceedings as the, Uniform Illegitimacy Law; whereas, Nebraska law is designated as, Children Born Out of Wedlock. The other states include the terms, Bastardy or Illegitimacy, in the titles of their laws.

In order to assist in the establishment of paternity,

resemblance of the child to the father might become a factor. To introduce this as evidence, it is necessary that the child and the father be presented and exhibited in the court. This has caused repurcussions legally as well as socially. Historically, and legally, such a procedure can be traced to the common law which, for some time, held this out as an accepted practice in the courts. In this country generally, some controversy has arisen. Some states have taken the stand that this is admissible and acceptable practice. Oklahoma and Nebraska courts have ruled concerning this at one time or another. Schatkin reports that Kansas permits the court to decide if such exhibition is valid and acceptable[2]; Nebraska has ruled for[3] and against the practice[4]; Oklahoma takes the stand for the practice[5]; and, South Dakota seems to favor the practice but has not decided expressly.[6] The other states have not taken a stand nor were there any court decisions found concerning this.

Since the turn of the century the trend has been toward holding that the welfare of the child born out of wedlock should not be placed in jeopardy because of the actions of his parents. Nevertheless, not one of these states' laws concerning paternity

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2 Disputed Paternity Proceedings; State vs Browning, 96 K. 540, 152 P 672, 122.
3 Ibid; Ingram vs. State, 24 Neb. 33, 123.
4 Ibid; Miller vs State, 103 Neb. 591, 123.
5 Ibid; Lowhead vs State, 99 Okl. 197, 124.
6 Ibid; State vs Patterson, 18 S.D. 251, 125.

proceedings provides for the legitimation of the child once paternity has been established under these proceedings. Each of these states does have other legislation by which legitimation can be accomplished.

Four of these states, North Dakota, South Dakota, New Mexico and Wyoming, within their laws in regard to paternity proceedings do provide for the establishment of the relationship of mother to child and also eliminate the legal taint of illegitimacy. For instance, South Dakota law states that, "In all records and certificates, oe other papers...requiring reference to the relation of a mother to such a child...no explict reference shall be made to illegitimacy...."[7] Such provisions can also be found in the laws of the other four states.

Indemnification; or the attempt to forstall an anticipated loss, damage, or liability to the state or local community by reason of the dependency of such child seems to be the intention of the law in these states. It is not uncommon to find in the laws of these states such a condition as typified by South Dakota law in that fourteen out of thirty-five sections bear directly on the matter of liability for support of the child and mother.[8] With the exception of Colorado, all other states included in this study provide that the authorities may take action in the name of

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7 South Dakota Code, Section 37.2134, 604.
8 Ibid. Chapter 37.21 to 37.2135, 599-604.

the child if it appears likely that the child will become a public charge. Kansas, for example, ruled that, "The purpose of the act, is to place the burden upon the guilty parties."[9] Colorado is the exception because under its law the mother, and she alone, may initiate action. But, at the same time, Colorado law states that should the putative father be cleared of the charge the mother is responsible for the support of her child.[10] Oklahoma and New Mexico also provide that a lien, attachment of property, or garnishment, may accompany the complaint and so the state seems to want to insure indemnification in this way.[11]

Another method commonly used by these states to insure indemnification is to permit the parties, with or without court approval, to agree to a lump sum or compromised settlement. This can be graphically shown by the law in Nebraska which reads that such a settlement, if approved, saves, "...the county from charges for support of (the) child."[12]

One means in assisting toward the establishment of paternity would seem to be through the use of social services. Yet provision for this is entirely lacking in the laws of the states examined.

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9 General Statutes of Kansas; Wheeler vs State, 34 K. 96, 8 p 276, 1895.

10 Colorado Statutes, Section 5, 314.

11 Oklahoma Statutes, Section 73, 383; New Mexico Statutes, Section 25-418, 613.

12 Nebraska Statutes, Section 13-113, 415.

Inquires were directed to the Departments of Public Welfare and the Attorney General Offices in these states. All of the states replied to the questions asked.

One of the questions asked, sought to determine whether or not it was necessary for the mother to file a complaint against the putative father in order to obtain finaacial aid under the Aid to Dependant Children program. All of the states replied that it was not necessary that she file such complaint. Wyoming commented that the needs of the child are paramount and so no pressure is brought to bear on the mother. Colorado added that this is only necessary when the mother identifies the man. South Dakota pointed out that to force such a step upon the mother w would not necessarily be to the best interests of those concerned and it is therefore not mandatory.

The other question concerned the use which the courts might make of the social service departments. It was found not to be mandatory that the mother call upon the social service departments when the matter comes to the attention of the court. Should the request be made, though, it is the responsibility of the Child Welfare Departments in these states to work with the mother and the courts. Much of what use is made of social service seems to be dependent upon the reputation the various departments and the attitude of the judge toward the use of such a service.

The social problem as it impinges on the child is affected seriously in one of three ways and would seem to merit the assistance of some agency. "Most unmarried mothers place their children in adoptive homes, although some take their children home with them; others place their children in foster homes. But whatever the decision, it is a difficult one for the mother to make."[13]

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13 H.H.Stroup, Social Work-An Introduction to the Field, Brooklyn, 1948, 100.

CHAPTER V

CONCLUSIONS

In the body of this study the paternity proceedings of the Near Western States were reported on with respect to their individual approach to the social problem of illegitimacy. This was done by arbitrarily selecting significant provisions within the legislation dealing with paternity proceedings in order to better handle what otherwise might have been too disperse a topic.

This chapter shall focus its attention on the social implications inherent in these laws and to see how they compare to the Uniform Illegitimacy Act, taken as a standard.

It would seem logical to conclude on the laws in these states by beginning with the complaint procedure and to follow this through to the results of the action; at all times, keeping in mind that this is not a legal study of these laws per se.

Beginning with the complaint, in these states, it is found that most of them follow or parallel the Uniform Illegitimacy Act and its proposals.

The Uniform Illegitimacy Act proposed that the complaint may be filed by the mother, the authorities, if the child is likely to become a public charge, or some third person acting for

the child. All that is needed is an oral or written statement, affirmed or verified by oath, charging the putative father with paternity and seeking support for the child.

Some consideration might be given here to the motives of the parties who would file a complaint. In most cases the complainant is the mother, and hopefully she is seeking to establish paternity for the child. But, it is common knowledge that in many instances the motive might be more punitive. The State, on the other hand, with its seemingly strong indemnification motive, apparently is more interested in establishing liability. Should a third person, acting for the child, file the complaint it might be that greater consideration is felt for the welfare of the child.

Regardless of who files the complaint, such action has great social implication for it connotes a public report of illegitimacy and as such carries with it much in the way of social stigma. Although illegitimacy does not seem to have the strong social ostracism it once had, this in itself might deter the mother from taking action. Contact by the court might be the first knowledge the putative father has of the situation and how this is handled may determine his reaction as to what follows. From the view point of the child's welfare no matter what the circumstances it is a social stigma not easily overcome.

Generally, the mother has prior right to initiate the

complaint. This is the only procedure recognized in Colorado. In Nebraska it is mandatory that the attorney general initiate paternity proceedings in the case of an illegitimate live birth in a state institution. It would seem that the criminal law aspects of paternity proceedings in some of these states might tend to reduce the number of cases coming before the courts because of the possible feelins existing between the parties. The complaint would have its origin in the community or county where the putative father is to be found. This might conceivably have a further tendency to alienate him from the mother.

The period of time during which the action may be started varies in these states. Only Oklahoma law is silent on this point. In all of the other states this period of time ranges from one to four years after the birth of the child with most of the states following the proposal of the Uniform Illegitimacy Act of up to two years after the birth of the child.

A period of limitation for a reasonable time is desireable because many mothers, emotionally or physically, are not ready to file a complaint during pregnancy or soon after birth. In addition such a period of time offers the parents the possibility for subsequent marriage or to seek a settlement or compromise out of court. It also acts as a safeguard for the putative father in that he is not forced to live in constant jeopardy. The the mother should have a right of action against the

father cannot be denied. Therefore, it would seem that a very short period of limitation, such as something less than two years, would be definitely detrimental to the mother frequently not emotionally capable to face such action. It would also work harm to the child in denying him the one small hope of establishing his paternity.

How the putative father is brought to answer the charge is important for this could tend to promote or negate his participation in the proceedings. The Uniform Illegitimacy Act proposed the use of the warrant and permits, at the request of the complainant, the optional use of the summons if so desired.

It seems that in New Mexico and Nebraska, which use only the summons to accomplish this, that there is far greater adherence to procedure under the chancery theory as we find it in the Juvenile Court for instance. Oklahoma, Kansas and Colorado, on the other hand, use only the warrant and they tend to take the criminal law approach. The remaing states follow precisely the proposal of the model act and permit the use of the summons at first instance if this is so desired.

In all of the states it is seen that the putative father is brought before the authorities to answer the charge through the use of the summons or warrant issued by law officers. It is felt that the use of the summons to accomplish this is a more desireable method for it leaves the father with the feeling of

being invited to controvert the charge rather than to be ordered to appear by warrant and may promote a conciliatory atmosphere. The use of the summons may be more acceptable from the mother's point of view in that she might have some feelings about bringing the man to task through the use of the warrant with its criminal law aspects of arrest and apprehension by law officers.

The preliminary hearing, as proposed in the Uniform Illegitimacy Act, and followed in six of these states, has many implications. The most desireable being that such a hearing may be a private one as is the case in North Dakota and Nebraska. Such a provision goes beyond the model act and helps to eliminate an undesireable feature, that of notority. It would seem to prompt the putative father to compromise or settle the matter while at the same time retaing affectional ties and possibly make for better feelings on the part of the participants.

The matter of the trial itself is more fitted to a legal study and so shall not be commented on here except to mention that as proposed in the Uniform Illegitimacy Act and followed in most of these states it is quasi-criminal in nature, and so may be a further deterent to the mother. North Dakota, which provides for the private trial, as well, would seem to reduce this probability.

Briefly, one feature of the trial as it operates in four of the states needs to be commented upon here. This concerns the

practice, though not a common one, in which the child is brought before the court to determine paternity based upon the possible resemblance of child and father. This may be done at the court's descretion. This practice seems to have some possible deleterious effects in that the child if of sufficient age might be subjected to a very traumatic experience. Further it tends to emphasize the much to be avoided public aspects of the trial. Then, too, in those states which do not have provisions for such evidence as blood tests it is not authentic proof.

Moving to the next point, in the paternity proceedings which would seem to have some bearing on the matter of social implications within the law, is that provision which deals with the matter of judgment and support.

The Uniform Illegitimacy Act proposed no specific maximum amount to be paid by the father and takes the attitude that this should be based on the needs of the mother and child and the ability of the father to pay. As a result, with the exception of Colorado and Kansas, the other six states have left this to the court's descretion.

Such a stand seems to be most desireable for it gives the father a chance to present his position before the court. Obviously, too, the child's needs will fluxuate with age and his station in life beyond the basic needs of all children, and where a child of age one year could be adequately cared for by a judg-

ment of six hundred dollars annually such a sum might not suffice for the child at age sixteen years.

Continuing jurisdiction as it appears in the Uniform Illegitimacy Act permits the courts to increase, diminish, or terminate the father's liability based on new evidence as to need or ability to pay. This is a forward looking provision and if it is justly handled tends to operate for the benefit of all.

The matter of who shall receive and pay out such monies could have social implications as this bears on the welfare of the mother and child. The model act proposed that the courts decide who shall receive and pay out such sums based on the character of the recipient of such funds.

Only Colorado, Kansas, North Dakota seem to feel that this should be handled by a corporation or agency appointed by the court. Such a plan provides for better control and there is less liklihood that arrearages will accumulate with the ensuing possibility that there will be a settlement for a smaller compromised figure as is the case in such situations.

In those states which provide that the mother shall be the recipient there is little or no control possible and the possibility that the father might not pay as ordered or that the mother would hesitate to take action against him is likely. So, it would seem that the plan which offers safeguard, as does the model act, would tend to promote the child's welfare.

The period of time for which the father might be held liable for the support of the child seems an important consideration in that there be no limit for liability the father could be held liable indefinitely where need existed. It would appear that his liability at least continue through the minority of the child. The Uniform Illegitimacy Act states that such liability should extend until the child is sixteen years of age. New Mexico and Nebraska extend this period. In New Mexico the period of responsibility for care extends to the time when the child reaches full age if he is mentally or physically incapacitated. Nebraska law seems to be more in line with present day practice in that the extention is until the child reaches his eighteenth birth date which is about the time he will leave school and be physically ready to work in present day society. The other states follow the model act's proposal.

Another common method which may be used by the father to terminate his obligation is through the payment of a lump sum or a compromised settlement with the mother. Except in Kansas this cannot be done without the court's approval.

It can be readily seen that though this is a way to keep the matter out of the courts it is not always the best plan. For example, a settlement of five thousand dollars seems like a great deal of money; yet, a judgment of fifty dollars per month for sixteen years would amount to nine thousand and six hundred dollars.

The fact also remains there is the possibility that lump sum settlement might be squandered leaving the mother and child with little or no money when the child is older.

All that might be said for the lump sum type of settlement is that usually some money is collected , whereas, the father might not live up to his obligation. In the long run such a plan is not usually adequate in meeting the financing for support and maintenance of the child.

The matter of the child's domicile and custody in the matter of paternity proceedings is important and one which can seriously affect the welfare of the child. The proposal of the Uniform Illegitimacy Act, and as it is generally followed in the laws of these states, is that this be left for the courts to decide. This attitude can be traced back to the common law precept that the mother is the natural guardian of the child and that the natural ties which exist between mother and child should not be tampered with unless there are strong indications that a change of custody is desireable. As a result many states have taken the stand and are slow to acknowledge that the father might have equally important rights and as a result have placed custody in the mother who may be unfit to rear her children.

Six of theses states follow the Uniform Illegitimacy Act proposal in that the matter is left for the courts to settle and to decide who is a fit and proper person to have custody of the

child. Such a provision would seem to be benefical for the child.

At the same time all of these states make some reference to the matter of relationship and state that in all cases, except in legal documents such as birth certificates, the child be identified with the mother and be called the natural child of the mother. Such legislation would seem to be directly concerned with the child's welfare.

The one point which all of the states, as well as the Uniform Illegitimacy Act, seem to ignore in connection with paternity proceedings relates to legitimation. Although the paternity proceedings do provide for the adjudication or acknowledgment of paternity this in no way affects the status of the child. Five of theses states, in one way or another, provide for the elimination of socially questionable terminology, such as bastard child, and strike such from their law but go no further.

This study of the laws relating to paternity proceedings as found in the Near Western States and in the Uniform Illegitimacy Act seems to indicate that although public opinion exemplified in the law has come a long way from the common law concept that the child born out of wedlock is the child of no one; yet, there is still much which could be done to ease the consequencies of unmarried parenthood and illegitmate birth.

The modern concept that the child is the most innocent party in the proceedings and is not to be held responsible for the

actions of its parents is not universally accepted. Nor is the casework process, in this area of social problems, accepted in the majority of these states, and only in North Dakota is there a counseling service open to the unmarried mother to help her to reach a decision concerning her child.

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