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Sidney M. Norton

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LEGAL ASPECTS OF ILLEGITIMACY FOR THE REGISTRAR

By SIDNEY M. NORTON*

There has been published in recent years a succession of articles on protecting the child born out of wedlock by adequate birth registration, and on safeguarding the social interests of the illegitimate child. There is a need for a review of the many legal problems, as they affect the illegitimate child's birth certificate, to serve the registrar of vital records as the basis for the proper adjudication of those problems.

The question of illegitimacy in the field of birth registration is a challenge to the registrar; he should recognize the social implications of this problem and should adopt constructive and objective criteria for formulating appropriate administrative policies and procedures in his registration functions. The registrar is as much charged with the duty to protect the reputation and welfare of the child as is a court.

It should be emphasized that the birth certificate itself does not establish either the legitimacy or the illegitimacy of the child; the record may only inferentially indicate legitimacy. It is for this reason that the birth certificates of several states contain no item relative either to the legitimacy of the child or to the marital status of the parents. The more extensive use of the short form of birth certification or birth card which shows only the registrant's name, sex, place and date of birth would greatly

* Director, Bureau of Vital Records, Baltimore City Health Department. Formerly, Chief, Division of Records, Bureau of Records and Statistics, New York City Department of Health.

protect the child born out of wedlock from unnecessary disclosure of illegitimacy.[1]

It has been stated that the general purpose of all law is the advancement of the welfare and happiness of those made subject to it. It should not be an instrument of mischief designed to expose its subjects to public scorn, humiliation and disgrace by reason of its ill-considered application.

In this connection, Justice Frederick L. Hackenburg of the Court of Special Sessions of the City of New York, stated:

> "We are confronted with a multitude of intricate human problems, each of them personal, each demanding individual treatment, each crying out for a sympathetic solution. We are confronted with a social, economic, moral and psychological jungle, through which an uncharted path must be found. A further complication arises from the fact that the statutory law under which we operate limits the extent of our jurisdiction. It is obsolete, antiquated and out of accord with the new, constantly changing conditions of modern life."[2]

The registrar is not expected to be a disciple of Blackstone nor is it intended that he be a legal expert in the field of illegitimacy, but it is essential that he be familiar with the legal aspects of this problem. This is important because he is frequently called upon to decide involved issues which demand a thorough working knowledge of basic laws and principles as they affect legitimacy.

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[1] The Confidential Nature of Birth Records. Children's Bureau Publication No. 332-1949. (Policy recommended by American Association of Registration Executives and the Council on Vital Records and Vital Statistics, and endorsed by the Children's Bureau and the National Office of Vital Statistics of the Federal Security Agency.)

In Maryland the vital records offices make available, in addition to the full exemplification of the original birth certificate, two variants of the short form, one of them a library card size abridged record verifying the essential facts of birth (name, date, and place), and the other an engraved birth registration notice of the fact that a birth certificate has been registered, which is routinely furnished parents shortly after the original record has been filed. In controverted court proceedings, only the full certification is usable, but the other two types are used for numerous purposes, other than for formal court proceedings.

[2] Hackenburg, Frederick L. (Justice)—Report of a Survey of Enforcement of Pending Paternity Orders in the County of New York Conducted During the Year 1944 in the Court of Special Sessions of the City of New York.

The registrar must bear in mind that the authority to make corrections on vital records is usually an administrative function and never carries with it judicial authority necessary to decide any legal question, which by its very nature, should be decided by a court of competent jurisdiction. Where authority to make corrections involving legal issues is specifically granted to a State Board of Health, any rules and regulations of such Board have the same effect as law.

Definitions

While the "illegitimate child" or the "child born out of wedlock" has frequently been called "bastard", "natural child", "child born out of lawful wedlock", and "child born out of legal wedlock", it could also be remarked that illegitimacy is that different status which obtains for a child who is born to a woman who either has no lawful husband at the moment or, if she does, it is provable that the father of the child is another than such husband.

Presumption of Legitimacy and its Effect

It is the policy of the law to favor the legitimacy of children and to declare them legitimate if it can be fairly done and a child is presumed to be legitimate until the contrary is shown. In general, the presumption of legitimacy is rebuttable; it is one of the strongest presumptions known to the law and is conclusive in the absence of any evidence in rebuttal. In case of conflicting presumptions, that in favor of legitimacy will in general prevail.

The policy of the law is to confer legitimacy upon children born in wedlock where access of the husband at the time of conception was not impossible, and there is a presumption that a child so born is the child of the husband and is legitimate, even though the wife was guilty of infidelity during the possible period of conception. This presumption may be so strong that it will preclude a child, born to a married woman and her paramour, from asserting initial illegitimacy in order to assert, further, legitimation by the natural father through marriage to the mother

after the death or the divorce of the first husband.[3] This is because the presumption precludes establishment of the fact, basic for legitimation, of actual paternity in the second husband.

The modern view of the presumption of legitimacy was enunciated in a clear and thoughtful opinion by Judge Cardozo of the New York Court of Appeals in *Matter of Findlay.*[4] The following is taken from that decision:

> "Potent, indeed, the presumption is one of the strongest and most persuasive known to the law and yet subject to the sway of reason. Time was, the books tell us, when its rank was even higher. If a husband, not physically incapable, was within the four seas of England during the period of gestation, the court would not listen to evidence casting doubt on his paternity. The presumption in such circumstances was said to be conclusive. The rule of the four seas was exploded by the judgment in Pendrell v. Pendrell, 2 Strange, 925, decided in 1732. It was exploded as Grose, J., observed in a later case (Rex. v. Luffe, 8 East, 193, 208; Nicolas, supra, pp. 164, 172) 'on account of its absolute nonsense'. Since then the presumption of legitimacy, like other presumptions, such as those of regularity and innocence, has been subject to be rebutted, though there have been varying statements of the cogency of the evidence sufficient to repel it.
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> "By and large, none the less, the courts are generally agreed that countervailing evidence may shatter the presumption though the possibility of access is not susceptible of exclusion to the point of utter demonstration. Issue will not be bastardized as the outcome of a choice between nicely balanced probabilities. They will not be held legitimate by a sacrifice of probabilities in a futile quest for certainty.
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> "Some of the books tell us that, to overcome the presumption, the evidence of non-access must be 'clear and convincing'; others that it must lead to a conclusion that is 'strong and irresistable'; others that it must be proof 'beyond all reasonable doubt'. What is meant by these pronouncements, however differently phrased, is this, and nothing more, that the presumption will not

[3] Scanlon v. Walshe, 81 Md. 118, 31 A. 498 (1895).
[4] 253 N. Y. 1, 170 N. E. 471 (1930).

fail unless common sense and reason are outraged by a holding that it abides.

"We have no thought to weaken the presumption of legitimacy by allowing its overthrow at the call of rumor or suspicion, or through inferences nicely poised. What we are now holding is in line with historical development which has shorn the presumption of some of its follies and vagaries. We have abandoned the 'nonsense' of the rule of the four seas. Extravagances hardly less violent there have been at other times in insisting upon the negation of every shadowy possibility. These and nothing more we are pruning from the law."

In his book, "Disputed Paternity Proceedings", Schatkin[5] has analyzed the Cardozo opinion as follows:

"The net effect of *Matter of Findlay* is to approve and to continue the rule that evidence of the subsequent conduct of all the parties involved may be compelling enough to shatter the presumption of legitimacy. The characteristic features of such shattering evidence are:

1. Separation of husband and wife.
2. Cohabitation with the paramour at the time of the birth of the child.
3. Orderly rearing of the child in the paramour's household and recognition by the paramour that the child is his offspring.
4. The child being known by the name of the paramour.
5. Avowal by the mother and paramour that the child is their offspring.
6. Disavowal by the mother's first husband that the child is his."

The Lord Mansfield Rule which came into being in the 18th century in England, and which is still being applied in twelve states, is one of the oldest guides in adjudicating the problem of illegitimacy. Although Lord Mansfield's statement was mere dictum and not necessary to the case

[5] SCHATKIN, DISPUTED PATERNITY PROCEEDINGS (2nd Ed. 1947) Ch. XI, 300.

at point, it is still technically the law of England today. Lord Mansfield said:

> "The law of England is clear that a declaration of a father or mother cannot be admitted to bastardize the issue born after the marriage. It is a rule founded on decency, morality and policy that they shall not be permitted to say after marriage that they have had no connection and therefore the offspring is spurious."[6]

For the registrar, the question of presumption of legitimacy concerns itself for the most part with the following types of circumstances, and involvements such as these are usually the bases for requests for corrections to be made on birth certificates of children born out of wedlock:

1. The mother is a married woman who gave birth to a child by a man not her husband and her husband is recorded as the father on the child's birth certificate.
2. The mother is a married woman who gave birth to a child by a man not her husband and the name of the putative father is stated on the birth certificate. The child is recorded either under the surname of the putative father or under the legal name of the mother of the child.

In those states where a registrar is not limited or precluded by existing statutes or Board rules and regulations from effecting changes in the birth certificates of children born out of wedlock, he may usually approve such requests for correction on the basis of affidavits from persons having knowledge of the facts, or from other facts and circumstances, that (a) the child, whose birth certificate is sought to be corrected, was conceived during a separation of its mother from her husband; and (b) that a person other than the mother's husband at the time of the child's conception and birth is the true father of the child; and (c) that the true father's name does not appear on the birth certificate nor does the child bear its true father's surname thereon.

[6] On this, see (Note) The "Lord Mansfield Rule" as to "Bastardizing the Issue" noting Harward v. Harward, and Hale v. Hale, 3 Md. L. Rev. 79 (1939).

Under such circumstances, the registrar may prepare and file a new birth certificate on which the child will bear its true father's surname and the true father's name will be inserted as the father on the new record. The original birth certificate is placed under seal together with all accompanying evidence for the correction.

In Maryland, the presumption of legitimacy will frustrate legitimation in situations involving the subsequent marriage of the actual parents where the mother had been married to another man at the time of the birth of the child. Because the child is still presumed to be the child of the first husband, and because the mother, the first husband and the paramour are all disqualified from testifying to the actual truth of the matter, it may be practically impossible to rebut this presumption of legitimacy and thus it will not be possible to show actual birth to the would-be legitimating father, which is itself a condition precedent to the legitimation by the combination of marriage to the mother and recognition of the child. These are ineffectual unless it can be legally shown that there was actual paternity and the presumption of legitimacy, to wit, of paternity of the first husband frequently frustrates showing that to be so.

Where existing statutes restrain the registrar from doing otherwise, he has no alternative but to recommend adoption of the child by the natural parents. Some registrars will approve an application for correction of the birth certificate of a child born to a married woman by a man not her husband whom she may later marry, provided a divorce had taken place and the divorce decree definitely establishes the non-paternity of the first husband. In other states the decree may contain a statement that either there are no issue of the marriage or give the names of children born to the union, and omit mention of the child who was the fruit of the adulterous relationship. In these cases, the natural father is usually required to submit an affidavit wherein he either acknowledges paternity of the child or recognizes the child as his own, together with a certified copy of his marriage record to the mother of the child and

a copy of the divorce decree or a bill of particulars relating thereto.

BIRTH AFTER DIVORCE OR SEPARATION

The separation or divorce of husband and wife prior to the birth of a child does not destroy the presumption of its legitimacy if it was begotten before such separation took place or before the suit for divorce was commenced.

If the husband and wife voluntarily separate and live apart, the legitimacy of children subsequently born nevertheless will be presumed until the contrary is shown.

In connection with divorce actions, it is interesting to note the following New York Supreme Court practices quoted by Clevenger:[7]

> "Where the action (for divorce) is brought by the wife, the legitimacy of any child of the marriage, born or begotten before the commencement of the action, is not affected by the judgment dissolving the marriage."

and

> "Where the action (for divorce) is brought by the husband, the legitimacy of a child born or begotten before the commission of the offense charged, is not affected by a judgment dissolving the marriage; but the legitimacy of any child of the wife may be determined as one of the issues in the action. In the absence of proof to the contrary, the legitimacy of all the children begotten before the commencement of the action must be presumed."

EFFECT OF ANTENUPTIAL CONCEPTION

Conception during wedlock is not essential to the presumption of legitimacy which arises from birth in wedlock. The presumption exists although the birth occurs so soon after marriage as to render it certain that it was the result of coition prior thereto. The legitimacy of a child born in wedlock, though begotten before marriage, is founded upon the supposition that such child was begotten by the man who subsequently became the mother's husband.

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[7] CLEVENGER'S ANNUAL PRACTICE OF NEW YORK, New York 1951. Art. 68, Civil Practice Act, Secs. 1154 and 1157.

Effect of Void Marriages on the Legitimacy of Children

At common law the children of marriages which were void or annulled were held to be illegitimate. Since the law of the United States on this question is primarily based on the common law, marriages within the prohibited degrees are generally declared to be void. In the absence of saving legislation,[8] the issue of these marriages must therefore be held illegitimate, as well as the issue of voidable marriages annulled by judicial decree.

The various grounds upon which the marriage is prohibited are the result of no logical or clearly defined policy. From the earliest times, several differing considerations have prompted the imposition of prohibitions against marriage.

The grounds of prohibited marriages are based on: (1) consanguinity; (2) age; (3) insanity or other mental deficiencies; (4) physical incapacity; (5) epilepsy and other diseases; (6) race differences (miscegenation); (7) marriages out of the state to evade local laws; (8) bigamous marriage; (9) force, duress or fraud.[9]

The registrar should be familiar with the following types of void marriages and with their effect on the issue thereof:

1. *Annulled Marriage*

Corpus Juris Secundum quotes the following relating to the effect and necessity of annulment:[10]

> "It has been held or recognized that the power of the court to declare legitimate the issue of a void or voidable marriage, given by statute, may be exercised only in an action to annul a marriage and by a court which has jurisdiction of such an action and that a

[8] In this connection, consider Md. Code Supp. (1947), Art. 16, Sec. 41B, as enacted by Md. Laws (1949), Ch. 29 and amended by Md. Laws (1950), Ch. 33, a statute which attempts to preserve the legitimacy of the children of void, voidable or annulled marriages, and which presents considerable in the way of problems as to how far that result is accomplished.

[9] On this, in general, see Strahorn, *Void and Voidable Marriages in Maryland and Their Annulment*, 2 Md. L. Rev. 211 (1938).

[10] 10 C. J. S., Bastards, Sec. 2.

statutory provision that no decree annulling a marriage shall affect the legitimacy of a child born of such marriage and that such child shall be deemed the legitimate child of both parents refers only to cases in which an annulment proceeding is brought." (This refers only to these states which have provision for specifically preserving the legitimacy of the children of voidable marriages where the marriage has been annulled.)[11]

"Under a statute which provides that the marriages of persons who are unable to contract shall be void but that the issue of such marriages, before they are annulled and declared void by a competent court, shall be legitimate, where a marriage has not been annulled and declared void, a child of the marriage is not rendered illegitimate by the fact that the marriage is void because the husband was under age, or because one of the parties to the marriage was the lawful spouse of another person when the marriage occurred."

"Under some statutes, the annulment of a marriage does not necessarily render the issue of such marriage void, and a decree of annulment may include a provision saving or declaring the legitimacy of the child."

2. *Bigamous Marriage*

The issue of a bigamous marriage are usually deemed illegitimate in those jurisdictions where no statute or case law to the contrary is in effect.

3. *Common-Law Marriage*

A common-law marriage may be briefly described as a marriage without formal solemnization or without formalities.

In those states where common-law marriage is valid, children of such marriages are deemed legitimate; where state law does not recognize common-law marriage, children of such union are illegitimate.

4. *Incestuous Marriage*

Some of the statutes which make the issue of void marriages legitimate exclude the issue of an incestuous mar-

[11] *Supra*, n. 8.

riage. The same result would follow if the rule were adopted that statutes legitimating the issue of marriages null at law do not apply to marriages which by statute are declared criminal and absolutely null and void. In general, however, statutes which merely provide, in effect, that the issue of all marriages null in law or dissolved by divorce are legitimate apply to the issue of incestuous marriages, at least where they were contracted in good faith.

Where a doctrine may be in effect[12] that the milder forms or incest (uncle and niece, aunt and nephew), as an impediment to marriage, only furnishes an impediment which makes marriages voidable, the result is for that reason that the issue are legitimate, so long as there never was an annulment proceeding to declare the defect in marriage.

Problems Faced by the Registrar

Despite determined efforts by registration officials to secure complete and accurate birth registration, it is recognized that a small percentage of physicians and midwives make it a practice deliberately to neglect to file birth certificates of children born out of wedlock. This action is based on the mistaken assumption that disclosure of such information on the birth record will cause the mother and the child to be held up to public scorn and abuse. These facts have come to light when registrars have been requested to correct the birth certificates of very young children on the basis of legal adoption.

In recording out of wedlock births, the registrar usually has two alternatives, depending on the procedures established for his guidance. He has the choice of either (1) recording all birth certificates of illegitimate children under the surnames of their mothers or (2) recording these births under the surnames given on the certificates by the persons reporting the births. Where permitted, the name of the putative father may be stated on the birth certificate; inclusion of the personal particulars relating to the putative father is optional.

[12] As is so in Maryland, Harrison v. State, use of Harrison, 22 Md. 468 (1864).

NAME TO BE GIVEN THE ILLEGITIMATE CHILD

Anciently in England there was but one name, for surnames did not come into use until the middle of the 14th century and even down to the reign of Elizabeth they were not considered of controlling importance.

Under the common law, a child not conceived or born in lawful wedlock was called "filius nullius" (nobody's child) or "filius populi" (the child of the people) and according to the dictum established by early English law, such illegitimate child took the name or designation it had gained by reputation.

Hooper, in "The Law of Illegitimacy" (1911), states:[13]

> "A bastard acquires no name at birth. It enters the world 'a nameless piece of babyhood', and has no right to the surname either of its father or its mother. The practice in England is to call the child by the surname of its mother and to baptize and register it under that name; indeed, registration cannot be effected in the father's name or in the name of any person as father, 'unless at the joint request of the mother and of the person acknowledging himself to be the father of such child . . . and such person shall in such cases sign the register, together with the mother'. It seems that a bastard, like a legitimate child, acquires a right to use the Christian names in which he is baptized but seeing that a bastard can acquire a surname only by reputation which involves continuous user it would appear that the baptismal naming of the child would at most amount to little more than evidence of an intention to call it by the surname then bestowed, and that to sustain a claim by reputation it would be necessary to produce evidence that it was subsequently called and known by that name. Christening, at any rate, is not conclusive evidence of a person's surname, since he may subsequently change it and acquire a different name by reputation. A person who has consistently gone by one name may no doubt be held after a comparatively short interval to have gained a title by reputation. Grants are sometimes made to bastards by royal license to use the surname of their mother or reputed father. But a license to use the father's name will not be granted without his consent, or without strict proof

[13] HOOPER, LAW OF ILLEGITIMACY (1911), 122-3.

of paternity. A license is nothing more than permission to take the name, and does not give it. A name taken that way is by voluntary assumption."[14]

Specific authority governing the surname of a child to appear on the birth certificate is provided in the statute law of some states. In such states the illegitimate child is legally precluded from taking his father's name. This is a carry-over of the common-law under which the illegitimate child was without the right to the name of the natural father. For hundreds of years both here and in England the illegitimate child has taken the surname of the mother.

The prevailing practice in most of the states is that the name of the putative father of an illegitimate child may not be entered on the birth certificate without his consent.

Where no statutory provision relating to the surname to appear on the birth certificate is in effect, the medical attendant usually reports the information given him by the mother of the child. In the states where such a situation exists, the child may bear the surname of the putative father because the mother is permitted to give the child whatever surname she chooses and this fact is recorded on the birth certificate.

Correction of Records[15]

The circumstances under which registration executives are requested to correct birth records of out of wedlock children can be summarized as follows:

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[14] Consider, in this connection, three customs about naming children:

1. The custom of naming "foundlings" after the locality in which they are found. Thus, a baby abandoned in the gutter at the corner of Redwood and Greene Streets would probably be named Joseph Redwood Greene and develop that dynasty of descendants.
2. The alleged custom of certain tribes of the American Indians to have the papoose named by the proud father after something that his eye first lights upon when being informed that he has become a father. Thus, we can understand such names as Sitting Bull, Crazy Horse, Sunbeam, and some of the similar Indian names that we have experienced.
3. Consider also that, as of the abolition of Negro slavery in America, many of the former slaves took as their family names the names of the families they had once belonged to and their descendants are still known by those same names.

[15] Consider, in this connection the correction, amending, and late filing of birth certificates, under the Maryland Statute, Md. Code Supp., Art. 43, Secs. 22, 23, as amended Md. Laws (1951), Ch. 76.

(Specific authority governing corrections to be made on vital records is contained in the states' Vital Statistics (or Public Health) laws, or in the

1. The mother is a single woman and the child is recorded in her surname; the father's name as stated, is either true or fictitious, or is entirely omitted from the birth certificate.
2. The mother is a single woman who represented herself as married and assumed a fictitious marriage name to conceal the illegitimacy of her child.
3. The unmarried mother of a child whose birth record appears legitimate requests a change in the surname of the child to her own maiden name from that of the putative father's name, either on the allegation that no marriage had taken place or because she wants all information concerning the father deleted from the record.
4. A woman who has a living and undivorced husband gives birth to a child as a result of illicit relations with a man other than the husband. The medical attendant at birth fills out and files a birth certificate showing the husband's (and the woman's married) name as the child's surname. Later, either she and her husband are divorced or the husband dies and she marries the natural father of her child. The natural parents formally request the registrar to have a new certificate made so that the child will have the second husband's name and the new certificate will also conceal the fact of original illegitimate birth.

Where the mother is single or free to marry, written consent by the putative father for the child to have his surname or for his name to be stated on the birth record as the

general laws relating to public records. In areas where such authority is not indicated, registrars have been making corrections on vital records in conformance with established legal precedents and rulings by their respective courts and attorneys general; in some jurisdictions, alterations on vital records are adjudicated only by court order. Where specific authority to make corrections on birth certificates is indicated, rules and regulations relating to administrative procedures in connection therewith are promulgated either by boards of health or by officials empowered by statute to do so. In general, registration officials have been following the "Best Evidence Rule" whereby the highest degree of accessible proof, of which each case from its nature is susceptible, must be produced in support of the application for the desired correction.)

"father of child" is usually accepted. In those jurisdictions where open court proceedings are not required to remove a fictitious father's name from the birth record, a supplementary statement is usually requested to explain the circumstances.

Schatkin[16] has referred to the putative father's consent as an "indispensable prerequisite to the correction of an illegitimate child's birth certificate". If, however, the putative father should refuse to consent to such amendment of the child's record, the mother may commence a bastardy proceeding against the father to accomplish the same effect. (It must be remembered that a judgment of paternity or order of filiation determines the paternity of the child but still does not legitimate him.)[17]

The mother, as the child's legal guardian, may institute a proceeding to change the child's name legally.[18] A certified copy of such court order is usually sufficient to authorize the change of the child's name (but not any other) on the birth certificate. While there are certain legal procedures for accomplishing the so-called "change of name", they have only the juridical significance that they merely provide a record of the fact that a person is known variously by two names. (There is no law against any one changing his name and calling himself any other name he wants without taking the trouble to go to court in the matter.)

In several states, a formal request to the registrar by the unmarried mother of a child whose birth record shows legitimate birth, to change the child's surname to her maiden name, is usually sufficient to warrant approval provided that existing statute or case law deems the natural mother the child's sole legal guardian and that there is no official legal opinion or statutory provision to preclude such action. In this type of alteration, a change is effected only

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[16] SCHATKIN, *op. cit., supra*, n. 5.

[17] In Maryland, legitimation is accomplished only by the combination of the lawful marriage of the father of the child to the mother, and his recognition of the child as his own; in addition as is indicated in the text above, there must be adequate proof of the paternity of the husband who marries the wife in the situation involved.

[18] Consider the Maryland Statute on Change of Name, Md. Code 1939, Art. 16, Sec. 118.

in the surname of the child and does not affect the information entered on the original record relating to the paternity of the child.

With reference to the situation discussed above in Item 4, Professor Strahorn has remarked[19] that "my conclusion has always been that for better or for worse a legal adoption is the only solution to the difficult problem, to wit, the child born to a married woman who is apart from her husband and who is living with her paramour, who later after divorce or death lawfully marries her. The urge is, of course, to give the child a new name and to get a certificate in that name. But, of course, the Lord Mansfield Rule and the presumption of legitimacy provide the obstacles to doing so."

A formal request by the putative father of a child born out of wedlock to have his name and other information relating to him deleted from the birth certificate is, as a rule, not approved without an order to that effect from a court of competent jurisdiction. A certified copy of this order is usually presented to the registrar and serves as his authority to effect such change.

LEGITIMATION

Legitimation is the act of changing the status of an illegitimate child to that of a lawfully born child.

Legitimation may usually be effected by:

1. *Intermarriage of The Parents*

The prevailing type of statute permits the child to become legitimate if the previously unwed parents intermarry subsequent to the birth of the child. Some states require oral or written acknowledgment or recognition by the father, in addition to the marriage to complete the legitimation.[20]

[19] In an exchange of correspondence with the author, and also later mentioned in the article, Strahorn, *Adoption in Maryland*, 7 Md. L. Rev. 275, 277, n. 10 (1943).

[20] *E.g.*, Maryland requires both marriage to the mother and recognition of paternity, but will recognize legitimation under the laws of other states by less formal means, as in Holloway v. Safe Deposit and Trust Co., 151 Md. 321, 134 A. 497 (1926).

The State of Louisiana[21] still adheres to the provision of the Code Napoleon relating to legitimation and has included the following article in its Civil Code: "Children born out of marriage, except those who are born from an incestuous or adulterous connection, are legitimated by the subsequent marriage of their father and mother, whenever the latter have formally or informally acknowledged them for their children, either before or after the marriage."

2. *Court Action*

In some southern states, proceedings may be instituted upon petition by the father to obtain a judicial declaration of legitimacy. These should be distinguished from bastardy proceedings, which do not legitimate but merely order support.

3. *Adoption*

In many cases, legitimation has been effected by the process of formal adoption such as Professor Strahorn mentions in his article on "Adoption in Maryland":[22]

> "The situation has been known to arise where a woman, separated from her husband, gives birth to a child by another man, but the husband's name is recorded on the birth certificate as the father. If the wife should be divorced from the first husband and later marry the father of her child, adoption by them jointly would be the preferable route to 'legitimate' the child, for the reason that the presumption of legitimacy, difficult to rebut, would be a barrier to establishing the necessary foundation fact for normal legitimation, to wit, that the woman's child is that of the subsequent marrying husband."

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[21] Civil Code of the State of Louisiana, Chap. 3, Sec. 1, Art. 198 [217] (N 331) — Subsequent Marriage. [As amended, Acts 1944, No. 50, Sec. 1.] The original and official edition of the Code Napoleon, or French Civil Code (Paris, 1804), translated into English by George Spence (London, 1824), quotes Law 331 relating to the legitimation of natural children:

> "Children born out of wedlock, other than such as are the fruit of an incestuous or adulterous intercourse, may be legitimated by the subsequent marriage of their father and mother, whenever the latter shall have legally acknowledged them before their marriage, or shall have recognized them in the act itself of celebration."

[22] *Supra*, n. 19.

It is usually a simple routine matter to correct the original birth certificate of a child born out of wedlock where the natural parents have intermarried subsequent to the birth of the child and where the mother was single or free to marry at the time of conception and birth.[23]

A legal impediment arises, however, in those cases where a child is born out of wedlock during the mother's first marriage but prior to her subsequent marriage to the true father of her child. This applies specifically to those situations where the mother marries the natural father of the child subsequent either to the death of the first husband or to her divorce from the latter.

Most states have the statutory provision that their respective registrars may make and file a new certificate of birth whenever proof is submitted to them that the previously unwed parents have intermarried subsequent to the birth of the child. Unless there is a sharply-defined distinction of the expression "previously unwed parents", the insurmountable presumption of legitimacy from the fact of marriage will arise as a difficult obstacle to the request for the correction; the registrar will then be faced with a perplexing problem as to whether the phrase implies only that the mother should have been free to marry at the time of the birth or whether it also includes a woman married to another man at the time of the birth of the child. Legal interpretation of the expression "previously unwed parents" by departmental counsel or by a State's Attorney General may ultimately be necessary for adjudication of this problem.

BASTARDY (OR PATERNITY OR FILIATION) PROCEEDINGS

Depending on where tried, these proceedings are either criminal[24] or civil. Their purpose is to secure the support and education of the child and to protect society by preventing the child from becoming a public charge. The paternity of an illegitimate child is also established by such

[23] *Supra*, n. 15.

[24] In Maryland, bastardy proceedings are tried at the level of criminal prosecutions under the special provisions of Art. 12 of the Md. Code (1939), as amended.

proceedings. (There is no statutory provision for the establishment of paternity in Alaska, Idaho, Missouri, Texas and Virginia.)[25]

The proceeding is usually instituted on the basis of a written complaint by the mother in which she (1) alleges that a child was born to her on a certain date and (2) petitions that the defendant, the putative father, be compelled to appear before the court to contest such charge.

In correcting the birth certificate of a child where paternity has been established by court action, the registrar obtains the judgment of paternity either directly from the court or it may be submitted by the mother of the child who has secured such decree from the court in which the proceeding was held.

The facts as recorded on the original birth certificate have no bearing on the filing of the new certificate. The fact that the original birth certificate gives as the father the name of a person other than the one who has been adjudged to be the father of the child is usually immaterial when a supplemental birth certificate is filed.

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[25] SCHATKIN, *supra*, n. 5, App. IV, 439-508.