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Wrongful Death-"Child" as Used in Wrongful Death Statutes Includes Unacknowledged Posthumous Illegitimate

Wrongful Death—"CHILD" AS USED IN WRONGFUL DEATH STATUTE INCLUDES UNACKNOWLEDGED POSTHUMOUS ILLEGITIMATE—*Weaks v. Mounter*, — Nev. —, 493 P.2d 1307 (1972).

"With liberty and justice for all" is a familiar phrase upon which the American system of jurisprudence is founded. Yet society has been slow to allow a large number[1] of its citizens[2] to enjoy the benefits of such equal justice. Exemplifying this inconsistency is the stigma that envelops illegitimacy. "Illegitimacy is a way of life—a second-class way of life, imposed not only by the fact of birth outside a family, but *by law* as well." [3] The fact that society has accepted and continues to accept this legislatively enforced discrimination against illegitimate children, while favoring legitimate children, may rest on the same ground as the inferior position of other classes throughout history—prejudice.[4]

In the recent case of *Weaks v. Mounter*,[5] a posthumous illegitimate child brought an action for the wrongful death of her putative father. Although the undisputed facts demonstrated that the child was the natural child of the deceased, the opposition argued that because the deceased had never signed a declaration acknowledging the child, as required by statute,[6] the child was not an heir within the contemplation of the Nevada Wrongful Death Statute,[7] and therefore could not bring a suit for the wrongful death

[1] An estimated 96.9 out of every 1,000 children born in 1968 were illegitimate. THE WORLD ALMANAC & BOOK OF FACTS 73 (L. Long ed. 1971).

[2] Illegitimates are subject to the same obligations as other citizens. For example, they must pay identical taxes and face military induction just as their legitimate contemporaries. Levy v. Louisiana, 391 U.S. 68, 71 (1968).

[3] Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477 (1967) [hereinafter cited as Krause].

[4] *Id.* at 498.

[5] — Nev. —, 493 P.2d 1307 (1972).

[6] NEV. REV. STAT. § 134.170 (1967 replacement page) provides:

> Every illegitimate child shall be considered as an heir of the person who shall acknowledge himself to be the father of such child by signing in writing a declaration to that effect in the presence of one credible witness, who shall sign the declaration also as a witness, and shall in all cases be considered as heir of the mother and shall inherit in whole or in part, as the case may be, in the same manner as if born in lawful wedlock. Illegitimate children shall be legitimatized by the intermarriage of the parents with each other. Children, so acknowledged or so legitimatized, shall have all the rights of inheritance of legitimate children.

[7] NEV. REV. STAT. § 41.080 (1969 replacement page) provides:

> Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the persons who or the corporation which would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death of the person injured and although the

of her putative father. The Nevada Supreme Court ruled that a posthumous[8] illegitimate child could sue for the wrongful death of her putative father, even though the father had not acknowledged paternity in accordance with the statute.

Because there is no common law right of recovery for wrongful death,[9] the courts have generally strictly construed[10] the applicable wrongful death statute,[11] limiting recovery to the beneficiary or class of beneficiaries enumerated therein.[12] Since the purpose of the wrongful death statute is to compensate members of the family who might have received support or assistance from the deceased had he lived, the beneficiaries are selected

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death shall have been caused under such circumstances as amount in law to a felony.

NEV. REV. STAT. § 12.090 (1971 replacement page) provides that in such cases "the action may be brought by the heirs of the deceased or by his personal representative or guardian for the benefit of his heirs."

[8] NEV. REV. STAT. § 134.140 (1967 replacement page) provides that for inheritance or succession purposes "posthumous children are considered as living at the death of their parents."

[9] Krantz v. Harris, 40 Wis. 2d 709, 162 N.W.2d 628 (1968).

In order to prevent family feuds and to encourage peaceful coexistence among the subjects of the realm, early Anglo-Saxon law regarded homicide as a private wrong. Damages for the wrongful killing of a kinsman were payable to the relatives of the deceased. Medieval Anglo-Saxon law termed such payment "bot," "wer," or "wergild" meaning "mans-price" or "man-payment." Later, after social and legal attitudes towards homicide changed, homicide was viewed as a wrong not merely against the decedent's survivors, but also against the state. By the late thirteenth century, every homicide had become a criminal offense. Because the offender forfeited his goods to the crown, it was useless for the family of the deceased to attempt to obtain them. S. SPEISER, RECOVERY FOR WRONGFUL DEATH, § 1:2, at 4 (1966) [hereinafter cited as SPEISER].

The common law rule denying a right of recovery for wrongful death arose in the case of Baker v. Bolton, 170 Eng. Rep. 1033 (K.B. 1808), when Lord Ellenborough, in a dictum, stated that in "a civil Court the death of a human being could not be complained of as an injury." *Id.* § 1:1, at 2.

Although Lord Ellenborough's dictum was accepted in the United States, Hawaii rejected *Baker v. Bolton* at an early date, and therefore still retains a common law right of recovery for wrongful death. *Id.* § 1:3, at 8.

[10] SPEISER, *supra* note 9, § 10:4, at 588.

[11] Lord Ellenborough's dictum was widely accepted by the courts and as a result, it was more beneficial to the defendant to have killed his victim than to have merely injured him. Because this construction could not be tolerated, the Fatal Accidents Act (better known as Lord Campbell's Act) of 1846, 9 & 10 Vict. c. 93, was enacted. This statute provided a basis for the remedy for wrongful death that is currently in force in nearly every state. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 127, at 902 (4th. ed. 1971) [hereinafter cited as PROSSER]; SPEISER, *supra* note 9, § 1:8, at 13.

[12] SPEISER, *supra* note 9, § 10:1, at 580; Annot., 72 A.L.R.2d 1235 (1960).

For example, Lord Campbell's Act specified the beneficiaries as being the husband, wife, parent, or child of the deceased. Many American wrongful death statutes have limited recovery to a similar exclusive group. PROSSER, *supra* note 11, § 127, at 904.

according to these expectations.[13] Generally, the courts have not construed such statutes to include illegitimate children within the class of "children" designated as beneficiaries.[14]

Recovery has been allowed more often for the wrongful death of a mother than for the wrongful death of a father.[15] Statutes in at least four states[16] provide that an illegitimate child may recover for the wrongful death of his mother. Indeed, the United States Supreme Court in *Levy v. Louisiana*[17] held that the meaning of surviving "child" under a wrongful death statute includes an illegitimate child.[18] The Supreme Court based its decision on

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[13] PROSSER, *supra* note 11, § 127, at 904. *Cf.* Wolfe v. Lockhart, 195 Va. 479, 78 S.E.2d 654 (1953):

> The purpose of the wrongful death statute is not to allow damages solely to those who might look to decedent for support. Statutory beneficiaries who may have had no reasonable expectance of support from the decedent may recover for loss of care, attention and society, as well as for suffering and mental anguish caused them by his death (headnote of case).

[14] *E.g.*, Walker v. Hall, 122 Ga. App. 11, 176 S.E.2d 246 (1970); Brinkley v. Dixie Constr. Co., 205 Ga. 415, 54 S.E.2d 267 (1949); Stieve v. H.R.H. Constr. Corp., 63 Misc. 2d 409, 312 N.Y.S.2d 464 (1970).

"A bastard is not a 'child' within Lord Campbell's Act." TIFFANY, DEATH BY WRONGFUL ACT § 85, at 203 (2d ed. 1913).

> This is merely an application of the principal that statutes patterned under Lord Campbell's Act which use the word 'kin' mean legitimate kin, and that where statutes say 'father' or 'mother,' 'children,' 'brothers' or 'sisters,' they mean only legitimate father, mother, children, brothers, or sisters. SPEISER, *supra* note 9, § 10:4, at 587.

But see Armijo v. Wesselius, 73 Wash. 2d 716, 440 P.2d 471 (1968) ("child" or "children" in wrongful death statute includes legitimate as well as illegitimate children of deceased parents).

[15] Di Medio v. Port Norris Express Co., 71 N.J. Super. 190, 176 A.2d 550 (1961); Sneed v. Henderson, 211 Tenn. 572, 366 S.W.2d 758 (1963); Krantz v. Harris, 40 Wis. 2d 709, 162 N.W.2d 628 (1968); Krause, *supra* note 3, at 478; SPEISER, *supra* note 9, § 10:4, at 588-89. *See also* Sanders v. Tillman, 245 So. 2d 198 (Miss. 1971), where the court recognized a right of recovery for the wrongful death of an illegitimate's mother but held that denial of a right of recovery for the wrongful death of an unacknowledged illegitimate's putative father was not a denial of equal protection.

[16] Krause, *Bringing the Bastard into the Great Society—A Proposed Uniform Act on Legitimacy*, 44 TEXAS L. REV. 829, 856 (1966), enumerates the following jurisdictions: MD. ANN. CODE art. 67, § 4 (Cum. Supp. 1971); MISS. CODE ANN. § 11-7-13 (1972); MO. REV. STAT. § 537.070 (1959); S.C. CODE ANN. § 10-1953 (1962).

[17] 391 U.S. 68 (1968).

[18] The United States Supreme Court, in *Levy*, overturned a decision of the Louisiana Court of Appeal that had affirmed the trial court in holding that a surviving "child" under the wrongful death statute did not include an illegitimate child. Both the trial court and the Court of Appeal used as its reasoning the principle that denial of such a right of recovery was "based on morals and general welfare because it discourages bringing children into the world out of wedlock." Krause, *supra* note 3, at 492, suggests that this principle and similar rationale "raises the question whether a law may properly punish one in order to evoke guilt feelings in another whose conduct is to be affected."

the premise that because the circumstances surrounding the child's birth have no relation to the nature of the injuries resulting in the wrongful death of the mother, the equal protection clause of the fourteenth amendment precludes denial of the right of illegitimate children to maintain an action for the wrongful death of their mother.[19]

In cases involving the wrongful death of the putative father, however, courts have generally agreed that no recovery for the illegitimate child lies[20] unless the putative father has either legitimated the child by subsequent marriage to its mother,[21] stood in loco parentis to the child (the child actually being dependent upon the father),[22] or formally acknowledged the child in accordance with the applicable statute.[23] The descriptive title,

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[19] Levy v. Louisiana, 391 U.S. 68, 70-72 (1968).

[20] *E.g.*, Bullock v. Sinclair Ref. Co., 160 F. Supp. 300 (E.D. Pa. 1958); Young v. Viruet de Garcia, 172 So. 2d 243 (Fla. 1965); Walker v. Hall, 122 Ga. App. 11, 176 S.E.2d 246 (1970); Whatley v. Dupuy, 178 So. 2d 438 (La. 1965); Finn v. Employers Liab. Assurance Corp., 141 So. 2d 852 (La. 1962); State v. Try, Inc., 220 Md. 270, 152 A.2d 126 (1959); Bonewit v. Weber, 95 Ohio App. 428, 54 Ohio Ops. 20, 120 N.E.2d 738 (1952). *But cf.* Juarez v. System Leasing Corp., 15 Cal. App. 3d 730, 93 Cal. Rptr. 411 (1971) and Schmoll v. Creecy, 54 N.J. 194, 254 A.2d 525 (1969), whereby statute the father was obligated to support the minor child whether legitimate or illegitimate and therefore, the illegitimate child was allowed recovery for wrongful death of the father.

[21] *See, e.g.*, Krantz v. Harris, 40 Wis. 2d 709, 162 N.W.2d 628 (1968).

[22] "Thus the illegitimate children here involved were dependents of their natural father both in fact and in law . . . It would be a denial of equal protection to refuse them a remedy available to a legitimate child." Schmoll v. Creecy, 54 N.J. 194, 202, 254 A.2d 525, 529 (1969).

[23] Sanders v. Tillman, 245 So. 2d 198 (Miss. 1971), held that denial of recovery to an unacknowledged illegitimate child is not denial of equal protection; In re Consolazio's Estate, 54 Misc. 2d 398, 282 N.Y.S.2d 905 (1967), where paternity not established in court proceedings, denied recovery; in Carroll v. Sneed, 211 Va. 640, 179 S.E.2d 620 (1971), decedent's acknowledged illegitimate child, being decedent's only beneficiary of the first class, was entitled to amount recovered by decedent's administrator in wrongful death action; Krantz v. Harris, 40 Wis. 2d 709, 162 N.W.2d 628 (1968), allowed recovery only if paternity is established pursuant to the statute relating to heirship of children born out of wedlock, or if legitimization is accomplished by subsequent marriage; Krause, *supra* note 3, at 478, states that an illegitimate child cannot inherit from his father unless his father has formally recognized or acknowledged him.

VA. CODE ANN. § 20-61.1 (Cum. Supp. 1972) provides that:

> Whenever in proceedings . . . concerning a child whose parents are not married, a man admits before any court having jurisdiction to try and dispose of the same, that he is the father of the child or the court finds that the man has voluntarily admitted paternity in writing, under oath, or if it be shown by other evidence beyond reasonable doubt that he is the father of the child and that he should be responsible for the support of the child, the court may then enter and enforce judgment for the support, maintenance and education of such child as if the child were born in lawful wedlock.
>
> Such other evidence that the man should be responsible for the support of the child shall be limited to evidence of the following:

"posthumous illegitimate child," itself shows that the father had failed to legitimate the child by marriage, and had not lived long enough to qualify the illegitimate child as a dependent.[24] In *Weaks*, although no question of his fatherhood arose, the decedent had failed to formally acknowledge paternity in accordance with the statute. The undisputed facts further revealed that the expectant parents had planned to marry, and that the culmination of these plans was prevented only by the death of the father.[25] Because the marriage ceremony would have provided the legitimization of his child, the future father conceivably could have decided to forego the "unnecessary" acknowledgment proceedings, which required the "signing in writing [of] a declaration . . . in the presence of one credible witness." [26] This would seem to be a normal reaction—one that has possibly occurred in previous cases where marriage plans were left unexecuted, usually to the detriment of the later born child.[27]

Clearly, the courts must protect themselves against dishonest impostors who would fraudulently allege the paternity of one wrongfully killed. However, the courts should recognize that those individuals who contend they are illegitimate children of a decedent bear a heavy burden of proof that should (as it does in other cases) provide ample protection.[28] It would

(1) That he cohabited openly with the mother during all of the ten months immediately prior to the time the child was born; or
(2) That he gave consent to a physician or other person, not including the mother, charged with the responsibility of securing information for the preparation of a birth record that his name be used as the father of the child upon the birth records of the child; or
(3) That he allowed by a general course of conduct the common use of his surname by the child; or
(4) That he claimed the child as his child on any statement, tax return or other document filed and signed by him with any local, state or federal government, or any agency thereof.

Contra Bonewit v. Weber, 95 Ohio App. 428, 54 Ohio Ops. 20, 120 N.E.2d 738 (1952); Dilworth v. Tisdale Transfer & Storage Co., 209 Tenn. 449, 354 S.W.2d 261 (1962) held that in an action for wrongful death, an illegitimate child can not recover even though his father has acknowledged the child. *But see* Armijo v. Wesselius, 73 Wash. 2d 716, 440 P.2d 471 (1968), which held that the wrongful death statutes do not provide for legitimization, and the written acknowledgment provision in the descent and distribution statutes applies only for purposes of intestate succession.

[24] It would be difficult to establish, in this case and in similar cases, any degree of dependency of the unborn child on the father, especially where the parents are neither living together nor is the mother receiving support from the father.

[25] — Nev. —, 493 P.2d 1307, 1309 (1972).

[26] Nev. Rev. Stat. § 134.170 (1967 replacement page). See note *6 supra*.

[27] Krantz v. Harris, 40 Wis. 2d 709, 162 N.W.2d 628, 629 (1968).

[28] Armijo v. Wesselius, 73 Wash. 2d 716, 440 P.2d 471 (1968). "We should not assume that finders of fact will not intelligently and justly resolve issues of paternity based upon the evidence before them and guided by the law." Carroll v. Sneed, 211 Va. 640, 643, 179 S.E.2d 620, 622 (1971).

indeed be an admission of the failure of the legal system to say that in order to prevent fraudulent claims from being successful, all claims must be prevented, including those that are genuine.

While acknowledgment in accordance with the statute is evidence that the decedent believed he was to become a father, certainly such a formality does not conclusively prove his paternity. In the case of a child born within a marriage, there is no similar acknowledgment requirement, but rather a presumption that the husband is in fact the father of the child.[29] Furthermore, it is neither logical nor just that the law should discriminate against a person not yet born for the nonfeasance of another. It is equally unjust that when a child's claim of damages for the loss of his father is in issue, the tortfeasor should escape liability merely because the child's father failed to comply with the acknowledgment statute.[30]

"[I]llegitimate children are not 'nonpersons.' . . . They are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment." [31] It is submitted that "[t]o grant the right to sue for the wrongful death of the natural father of a legitimate minor child, to such child, and at the same time, solely by reason of status created by legislative enactment, to deny such right to an illegitimate minor child appears to be an artificial, discriminatory barrier which should not be recognized or tolerated in the law." [32] "Humane consideration and the realization that children are such, no matter what their origin, alone might compel us to the construction that, under present day conditions, our social attitude warrants a construction different from that of the early English view." [33]

In a society in which the family is the basic social structure, the law can never fully prevent the illegitimate child from being socially inferior to his legitimate contemporary.[34] Even though social discrimination is likely to continue, the law should not falter in allowing equality to the extent it can

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[29] Such a presumption has often been upheld *ad absurdum* as exemplified in Whitman v. Whitman, 140 Ind. App. 289, 215 N.E.2d 689 (1966), where the court held that a child born in 1962 to the wife of a man who had undergone a vasectomy in 1946, and had been found sterile by medical examination prior to the trial, was legitimate.

See also A. KINSEY, SEXUAL BEHAVIOR IN THE HUMAN FEMALE 416 (1953) which states that among married women an estimated 26 percent have experienced extra-marital coitus by age forty.

[30] *See also* Levy v. Louisiana, 391 U.S. 68, 71 (1968).

[31] *Id.* at 70.

[32] Juarez v. System Leasing Corp., 15 Cal. App. 3d 730, 93 Cal. Rptr. 411, 415 (1971).

[33] Carroll v. Sneed, 211 Va. 640, 643, 179 S.E.2d 620, 622 (1971) quoting Middleton v. Luckenbach S.S. Co., 70 F.2d 326, 330 (2d Cir. 1934). "The burden of illegitimacy in purely social relationships should be enough, without society adding unnecessarily to the burden with legal implications having to do with the care, health, and welfare of children." Armijo v. Wesselius, 73 Wash. 2d 716, 721, 440 P.2d 471, 473 (1968).

[34] Krause, *supra* note 3, at 505.

afford.[35] Only after the law has recognized the illegitimate child as the equal of the legitimate will society begin to ease the burden of discrimination placed upon such children. Although much legislative progress has been made in elevating the position of the illegitimate child,[36] there is no valid excuse, moral or legal, for the continuation of legislatively and judicially enforced discrimination. Both *Weaks* and *Levy* are demonstrative of a current progressive trend in our law that is directed at eliminating the unnecessary discrimination against illegitimate children. This trend will prove beneficial, not only to the unfortunate illegitimate child, but to the whole of society as well.

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[35] *Id.* emphasizes that "the argument that the law cannot make blacks white nor whites black provided no reason against legislating racial equality."

[36] "Indeed, fortune appears to smile upon the lot of the illegitimate who in times past was saddled with life's infirmities but could not always reap its benefits." Weaks v. Mounter, — Nev. —, 493 P.2d 1307, 1309 (1972).