

No. 468

BASTARD CHILD, Duty of Father to Support—ILLEGITIMATE CHILD—Duty of Father to Support—PARENT AND CHILD—CHILDREN—MINORS—CRIMINAL LAW

Held: Father of an illegitimate child, found guilty of bastardy under the provisions of the Revised Codes of Montana, 1935, may be prosecuted—under Section 11017, Revised Codes of Montana, 1935, for failure to support such illegitimate child.

August 20, 1942.

Mr. Denzil R. Young
County Attorney
Fallon County
Baker, Montana

Dear Mr. Young:

You have requested my opinion on the following question:

“Can a man who has been adjudged to be the father of a minor illegitimate child in a bastardy proceeding—but who has failed to carry out the order of the court for supporting such child—be prosecuted under the provisions of Section 11020, Revised Codes of Montana, 1935, making desertion or abandonment of children a felony?”

“Or, can such a man be prosecuted only under Section 11017, Revised Codes of Montana, 1935, making failure to support a child a misdemeanor?”

Under the common law the father of an illegitimate child was under no legal duty to support it (*Doughty v. Engler*, 112 Kan. 583, 211 Pac. 619, 30 A. L. R. 1065), and an illegitimate child had no inheritable blood and was kin to no one (*Marshall v. Industrial Commission (Ill.)*, 174 N. E. 534.)

Since the rule of the common law came into existence, the manner of looking at such things has greatly changed—even where no statutory requirement for support of an illegitimate child exists. Consonant with a finer sense of justice and right statutes in many jurisdictions require that a man found guilty of bastardy must be charged with the maintenance of the child. (See Section 12273, Revised Codes of Montana, 1935.)

The Supreme Court of Kansas, which had no such statute on which to rely in the case of *Doughty v. Engler*, *supra*, nevertheless used this language:

“A sufficient reason for holding parents to be under a legal obligation, apart from any statute, to support their legitimate child while it is too young to care for itself, is that the liability ought to attach as a part of their responsibility for having brought it into being. If

that reason is not found convincing it would be useless to seek others; and it does not in the least depend for its force upon the fact that the parents were married to each other, but is equally persuasive where that is not the case."

Section 11020, Revised Codes of Montana, 1935, provides as follows:

"Every **parent** or **guardian** of any child or children under fifteen years of age who **deserts** or **abandons** such child or children without providing necessary and proper shelter, food, care, and clothing for such child or children, shall, upon conviction, be deemed guilty of a felony, and punished by imprisonment . . ."

Please note the above-quoted section speaks of every "parent or guardian." The father of a child not born in wedlock has been held to stand in the relation of "parent." (In re Hardenbergh's Will, 248 N. Y. S. 651; People v. Rupp, 219 Ill. App. 269.) Although the ordinary meaning of "parent" is one who begets or brings forth offspring (Webster's International Dictionary, Second Edition, 1941), the courts have qualified the word to a great extent.

"While by common acceptance the word 'parent,' without limiting, defining, or qualifying language, is ordinarily used to designate a legitimate relationship between a mother or father and their issue, yet the trend of modern legislation and court decisions has been toward a more liberal use of the term as regards the mother of an illegitimate child. The harsh doctrines of the common law, which gave an unwedded mother and her illegitimate offspring little standing or protection, have been modified by the Legislature and court decisions of this state . . . In 1845 the Legislature of this state abrogated the common-law rule and provided that an illegitimate might inherit from its mother. Subsequent Legislatures further extended the rights of illegitimates until 1872, when the present statute of descent was passed. The natural or unwedded mother is made a legitimate mother, or a 'parent,' under the statute of descent, and she and her illegitimate issue may inherit one from the other . . ."

". . . There is nothing in the statute that will allow an illegitimate to inherit from the father of such person, but the object of the framers of such act seems to have been to remove the common law disability of inheritance by illegitimates through the maternal line, and in that regard place such persons upon the same footing as legitimate persons. . . ."

Marshall v. Industrial Commission (1930), 342 Ill. 400, 174 N. E. 534, 535.

Likewise, under Montana's succession laws, there appears an intent to make the mother of an illegitimate child a "parent" under the law. By Section 7074, Revised Codes of Montana, 1935, it is provided every illegitimate child is in all cases an heir of his mother. Section 7075 provides that, if an illegitimate child, who has not been acknowledged or adopted by his father, dies intestate, without lawful issue, his estate goes to the mother or to her heirs at law.

But Montana law specifically limits the right of an illegitimate to inherit from his father. Section 7074, Revised Codes of Montana, 1935, provides in part:

"Every illegitimate child is an heir of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child . . ."

Hence, I am of the opinion the father of an illegitimate child is not a "parent" within the contemplation of Section 11020, Revised Codes of Montana, 1935. Neither is he a "guardian" since he is not a person appointed to take care of the person or property of the child. (Section 5868, Revised Codes of Montana, 1935.)

It should also be noted Section 11020 uses the words "deserts or abandons." "Desert" means to relinquish or forsake and "abandon" means to relinquish or give up with the intent of never again resuming or claiming one's rights or interest in. (Webster's International Dictionary, Second Edition, 1941.) The use of such words in the statute indicates the legislature had in mind the act of a person who had control or custody or care of a child entrusted to him.

Section 11017, however, provides as follows:

"Every person who:

1. Having any child under the age of sixteen years, dependent upon him or her for care, education or support, wilfully omits, without lawful excuse, to furnish necessary food, clothing, shelter or medical attention for his or her child or children, or ward or wards . . . shall be guilty of a misdemeanor."

The above statute does not in express terms apply to illegitimate offspring; but it would appear the Legislative Assembly intended to remove further the restrictions of the common law by making the duty of any person to support a child dependent upon him enforceably by criminal process. If such were not the case, then why the broad and general language—"Every person . . . who wilfully omits . . . to furnish necessary food, clothing, shelter or medical attention for his or her child . . . shall be guilty of a misdemeanor."—instead of a specific, limited reference to every "parent or guardian?"

It should be borne in mind that another remedy exists besides the resort to the criminal law. Sections 12273 and 12274, Revised Codes of Montana, 1935, read:

"12273. Judgment and liability where accused found guilty. If the accused is found guilty (of bastardy) he must be charged with the maintenance of the child in such sum, and in such manner as the court directs, with the costs of suit; and the clerk may issue execution for any sum ordered, to be paid immediately, and afterwards, from time to time, as may be required to compel compliance with the order of the court, and the defendant may be committed to the county jail until he complies with the order or judgment."

"12274. Power of court over judgment and orders. The court may at any time enlarge, diminish, or vacate any order or judgment rendered in the proceedings, on such notice to the defendant as the court or judge may prescribe."

Though embraced in the Penal Code of Montana, our bastardly statutes are civil in nature. (State ex rel. Glasgow v. Hedrick, 88 Mont. 551, 294 Pac. 375.) Hence, the duty to support an illegitimate child is enforceable on the father by both criminal and civil process.

It is my opinion that criminal prosecution for failure by a father to support his illegitimate child, after such person has been adjudged guilty in a bastardly proceeding, should be brought under Section 11017, Revised Codes of Montana, 1935, and that a proceeding to enforce the judgment of support in its civil nature should be brought under Section 12273, Revised Codes of Montana, 1935.

Sincerely yours,

R. V. BOTTOMLY
Attorney General