

CHILDREN) A child born in wedlock is presumed to be legitimate; the
) father of an illegitimate child can be made to support such
) child.

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Honorable William Lee Dodd
Prosecuting Attorney
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Doniphan, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your request:

"I have a juvenile case involving a neglected child. The mother was pregnant when she married a Mr. Tune. Tune knew she was pregnant but he married her anyway. This child was then born after wedlock. Since then the mother claims the child does not belong to Mr. Tune but belongs to a Mr. Bessent. The mother was in contact with both men and either could have been the father. I do not have a Missouri Digest to look up the law and I would like answers to some questions of law.

1. What are Bessent's right to claim parenthood of the child?
2. Could he be made to support the child?
3. What presumptions are there that Mr. Tune is the father?
4. What proof is necessary to show Mr. Bessent is the father and must support the child?"

Your first question is: What are Bessent's rights to claim parenthood of the child? It seems obvious that any man can claim the parenthood of any child. Proving parenthood is, of course, altogether another matter. Claiming parenthood is not a matter of right but is simply a matter of doing it.

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We believe that in framing this question you may have meant to ask: How could Bessent prove his parenthood of this child? He could do this by showing, first, that Mr. Tune could not, either because of absence during the period of conception, or physical incapacity, have been the father. And second, by proving that no man other than himself (Bessent) had had intercourse with the mother of the child during the period of its conception. In view of the circumstances which you relate, we deem that proof of this second matter would be difficult to the point of impossibility.

Your second question is; could he (Bessent) be made to support the child?

Your third question is; what presumptions are there that Mr. Tune is the father of the child? For reasons which we hope will presently appear, we shall answer your third question before we answer the second, and in answering it we direct your attention to the case of *Ash v. Modern Sand & Gravel Co.*, 122 S.W. (2d) 45, l.c. 50. In that part of the opinion in the *Ash* case which is pertinent to the issue before us the court said:

"The strenuous effort made to bastardize the boy claimant, we think signally failed as it deserved to fail. The commission failed to make a finding on this issue. Every child born in wedlock is presumed to be legitimate. Public policy sanctions this view. *Bower v. Graham*, 285 Mo. 151, 225 S.W. 978; *Gates v. Seibert*, 157 Mo. 254, loc. cit. 272, 57 S.W. 1065, 80 Am. St. Rep. 625; *Busby v. Self*, 284 Mo. 206, 223 S.W. 729.

"Such presumption in favor of the legitimacy of children born in wedlock is the strongest known to the law, and the courts in their righteous zeal to protect the innocent offspring will not permit this presumption to be overthrown unless there is no judicial escape from such a malign conclusion. *Nelson v. Jones*, 245 Mo. 579, 151 S.W. 80; *Maier v. Brock*, 222 Mo. 74, loc. cit. 100, 120 S.W. 1167, 133 Am. St. Rep. 513, 17 Ann. Cas. 673; *Jackson v. Phalen*, 237 Mo. 142, 140 S.W. 879; *Stripe v. Meffert*, 287 Mo. 366, 229 S.W. 762; 7 C. J., Par. 6, p. 940.

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"To overthrow this presumption the evidence must show conclusively that the husband, by reason of absence or otherwise, could not have had sexual intercourse with the wife at the beginning of any reasonable period of gestation. Drake v. Milton Hospital Ass'n, 266 Mo. 1, 178 S.W. 462. * * *"

In the case of Boudinier v. Boudinier, 203 S.W. (2d) 89, 1.c. 97, the court said:

"Pronouncements of the Supreme Court of our state have clearly demonstrated that the modern and prevailing rule is that the presumption that a child born during the period of lawful wedlock is legitimate may be rebutted and overthrown by proof of facts to the contrary. In the case of Bower v. Graham, 285 Mo. 151, loc. cit. 162, 225 S.W. 978, 980, in the course of the opinion the court states: 'We do not, however, think it improper to consider this record from the standpoint that the presumption arising from the birth of the child in lawful wedlock may be disputed by showing the fact to be otherwise.' In the case of Drake v. Milton Hospital Ass'n, 266 Mo. 1, on page 11, 178 S.W. 462, on page 464, the court said: 'The presumption that a child born in wedlock is legitimate is not an absolute one, but is rebuttable.' The foregoing pronouncements apparently have never been overruled or criticized. In Needham v. Needham, Mo. App. 299 S.W. 832, 834, the St. Louis Court of Appeals, after reference to the presumption that prevailed at common law states: 'The modern doctrine undoubtedly is that the presumption may be overthrown by any competent and relevant evidence, disclosing that the husband could not have been the father of the child.' Citing the Drake case, supra. Cf. Morrison v. Nicks, Ark. 200 S.W. (2d) 100."

The Boudinier case and the Ash case are in complete agreement that a child born in wedlock is presumed to be legitimate, that is, that it is presumed to have been born as a result of sexual intercourse between its mother and the man to whom she was married at

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the time the child was born. Both cases agree that this presumption may be overcome by sufficient evidence to the contrary. Therefore, the answer to the third question is that Tune is presumed to be the father of this child, and that, in the words of the Ash case, this presumption is one of the strongest known to the law.

In answering your second question we direct your attention to the case of State v. Williams, 224 S.W. (2d) 844, 1. c. 848. In this case one Williams was charged with non-support of a child born out of wedlock, of which child he did not have the care or custody, of which child he was alleged to be the father. The lower court made a finding that Williams was the father, and the appellate court sustained his conviction in the lower court on the charge of non-support. In the course of its opinion the appellate court stated:

"Reduced to its simplest terms, we, therefore, have before us a case which is governed by the 1947 statute, supra, wherein it is made a crime for any man or woman who shall without good cause fail, neglect or refuse to provide adequate food, clothing, lodging, etc., for his or her child or children born in or out of wedlock under the age of sixteen years. There was substantial evidence adduced by the State at the trial to show that defendant herein is the parent of the child in question. The prosecuting witness, the mother of the child, so testified. The Associate Prosecuting Attorney testified that the defendant admitted that he was the father of the child. The defendant did not deny or contradict the State's evidence. Furthermore, there was substantial evidence showing that defendant failed to support the child during certain periods and finally refused to do so, although he was able to and did earn substantial wages during that time. Therefore, all the elements necessary to be proved under the statute as it now stands were shown by substantial evidence.

"The fact that the State did not prove that the defendant had the legal care or custody of such minor child is immaterial because it is not necessary in a case of this kind to prove that defendant had such care and custody where, as here, there is substantial evidence showing that the defendant is the parent of the illegitimate child. It is only where the charge of non-support of a child is made against one who is not a parent that the element of having

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the legal care or custody of such child must be shown in addition to the failure or neglect to provide adequate food, clothing, etc., for such child. This is true because the statute plainly makes it so for it says in a separate statement of such offense: 'or if any other person having the legal care or custody of such minor child, shall without good cause, fail * * * to provide adequate food, clothing, * * * then such person shall be deemed guilty of a misdemeanor.' (Emphasis ours.) It is well known that persons who are not the parents of children are frequently awarded the care and custody of children by the courts and it was the clear intention of the Legislature to make them as well as parents answerable to the law for neglect of their duty."

The answer to your second question, therefore, is that if Bessent acknowledged the child to be his, or if the court made a finding that he was the father, that then he could be made to support the child.

Your final question is: What proof is necessary to show that Bessent is the father and must support the child? We believe that our answer to your questions above fully answer your final question.

CONCLUSION

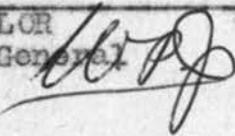
It is the opinion of this department that a child born in wedlock is presumed to be legitimate; that the father of an illegitimate child can be forced to support such child if he acknowledges that he is the father of the child or if the proper court so finds.

Respectfully submitted,

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APPROVED:

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