Washington Law Review

Volume 28 | Number 1

2-1-1953

Domestic Relations—Rights of Putative Father

Robert H. Peterson

Statutes, 45 HARVARD L. REV. 233, 234-237 (1931). Such an interpretation changes the appraisal and sale statute from a provision of protection for dissenting minority stockholders, and allows the use of merger to freeze them out, thus providing an instrument for their destruction.

GORDON L. JAYNES

Domestic Relations—Rights of Putative Father. *P* (a putative father) obtained possession of his infant illegitimate child in 1947. In 1950 the mother took the child from the father and gave it to *H* and *W,* a married couple. *H* and *W* filed a petition for adoption in the juvenile court. *P* filed an intervening petition asking that custody of the child be awarded to him by virtue of his rights as a putative father. Trial court held against *P* on the grounds that (1) the putative father has no rights in the bastard child, and (2) even if he does, this father is not a fit person to have custody of the child. On Appeal, *Held:* dismissed on procedural grounds. (See 27 WASH. L. REV. 228). As to the rights of the putative father, the Washington court for the first time indicated that the putative father, if fit, would have a right to custody of the child superior to that of everyone but the mother. *Wade* v. *State,* 39 Wn. 2d 744, 238 P. 2d 915 (1951).

It would seem that any discussion of the rights of the putative father would be merely academic since he would rarely desire to assert such rights; however, such rights have been claimed in the Washington Supreme Court on three different occasions during the last eight years. In re *Blake,* 21 Wn. 2d 547, 151 P. 2d 825 (1944); *State* ex rel *Smith v. Superior Court,* 23 Wn. 2d 357, 161 P. 2d 188 (1945); *Wade v. State, supra.* This note will explore the origin of these rights and, further, will discuss the unusual relationship which exists between the putative father and the child *after* the father has obtained custody.

At common law the bastard child was *nullius fillius*—a child of no one. See *State v. Tieman,* 32 Wash. 294, 73 Pac. 375 (1903). The child had no parents, the putative father being treated as a complete stranger. "He (the putative father) is at most a putative father in reputation only, but not in law." *Appeal of Gibson,* 154 Mass. 378, 28 N.E. 296 (1891).

In spite of this early common law conception, the courts of the United States have generally honored the father's right to custody of the child as against everyone but the mother. *French v. Catholic Community League,* 69 Ohio App. 442, 44 N.E. 2d 113 (1942); *Commonwealth* ex rel *Human v. Hyman,* 164 Pa. Super. Ct. 64, 63 A. 2d 447 (1949). Perhaps the best explanation for this departure from the theory of the common law may be found in *Moritz v. Garnhart,* 7 Watts 302, 32 Am. Dec. 762 (Penn. 1838): "Though a bastard be not looked upon as a child for any civil purpose, the ties of nature are respected in regard to its maintenance. The putative father, though not legally related to it (the child) is so far considered its natural guardian as to be entitled to the custody of it. . . ." The Ohio Court, in *French v. Catholic Community League, supra,* in giving custody to the putative father stated: "We perceive little profit to be gained in a dissertation upon what would have been the rights of the parties under the common law. . . ."

With the principal case, Washington has definitely committed itself to honor the putative father's right to custody in accordance with the majority of jurisdictions. The putative father then will apparently be given custody when: (1) the mother is dead and the father is a fit person, see *State* ex rel *Smith v. Superior Court, supra;* (2) the mother is "unfit" or does not want the child, see *People* ex rel *Meredith v. Meredith,* 272 App. Div. 79, 69 N.Y.S. 2d 462 (1947), cited in the principal case; (3) someone *other* than the mother is demanding the child. *Wade v. State, supra.*

Recognition of the right of custody in a putative father poses problems of the legal relationship, and the correlative rights and duties, between the father and his child. As to whether our court will treat the father as a natural guardian, or as a statutory guardian or as neither is a subject which it has yet to consider. For instance, will the putative father have a right to the earnings and services of the bastard child? The Washington court has held, "It is the law of this state, as elsewhere, that during the minority of a child the parents are legally entitled to his earnings. . . ." *American Products Co. v. Villwock,* 7 Wn. 2d 246 at 267, 109 P. 2d 570 at 579 (1941). Yet the word "parent" generally does not contemplate the putative father. Ex parte *Newsome,* 212 Ala. 168, 102 So. 216 (1924); In re *Hardenbergh's Will,* 144 Misc. 248, 258 N.Y.S. 651 (1932). If the relationship be one closer to that of guardian and ward, the putative father would not be entitled to his ward's earnings and services. Madden, *Domestic Relations* § 158 (1931). Perhaps this problem could be solved by calling the putative father *in loco parentis* to the child, and ". . . generally a person who has definitely assumed to stand *in loco parentis* to a child is entitled to his services. . . ." Madden, *supra,* § 120.

If the putative father takes the child out of the State of Washington to live, will the domicile of the child change with that of the putative father, or will the domicile remain in Washington until the court authorizes such change? If the father of the bastard be the natural guardian of the child (as is the mother of a bastard) the domicile of the child will change automatically with that of the father. Madden, *supra,* §§ 145, 164. However, if the relationship be closer to that of guardian and ward, the domicile of the child would not change without the authorization of the court. *Mathieu v. U. S. Fidelity and Guaranty Company,* 158 Wash. 396, 290 Pac. 1003 (1930).

Should the child desire to marry under the legal age, from whom must consent be obtained? Where the child is under age, the license may issue ". . . if the consent in writing of the father, mother, or legal guardian is obtained. . . ." RCW 26.04.210. [RRS § 8451]. Clearly the putative father is not the legal guardian unless the court has appointed him as such. In re *Teeters,* 173 Wash. 138, 21 P. 2d 1032 (1933). And generally the word "father" in a statute does not contemplate putative father. In re *Derheimers Estate,* 197 Wis. 145, 221 N.W. 737 (1928); *Howard v. United States,* 2 F. 2d 170 (E.D. Ky. 1924). If the child were once under the custody of the juvenile court, the juvenile court might be regarded as the "legal guardian" to give the consent necessary for the child's marriage. See *State v. Speer,* 36 Wn. 2d 15, 216 P. 203 (1950).

It is submitted that the recognition in the principal case of the father's right of custody will make it necessary for our court to determine in the near future the exact relationship between the putative father and his child.

ROBERT H. PETERSON

Evidence-Impeachment of Witnesses—Showing of General Reputation for Unchastity. *D,* charged with carnal knowledge of a 17-year-old girl, attempted to impeach the credibility of the prosecutrix by offering testimony of two witnesses to the effect that her general reputation in the community for morality was bad. The trial court excluded this evidence, and *D* was convicted. On appeal, *Held:* Affirmed. Evidence of general reputation for immorality is totally inadmissible for the purpose of impeaching the credibility of a witness. *State v. Wolf,* 40 Wn. 2d 648, 245 P. 2d 1009 (1952).

Historically, the Washington Supreme Court has followed two different rules as to the admissibility of evidence of general reputation for unchastity as affecting the credibility of a witness: (1) admissibility as a matter of right; and (2) discretionary admissibility. Admissibilty as a matter of rght was predicated on the policy announced in *State v. Coella,* 3 Wash. 99, 28 Pac. 28 (1891), where the court, in holding that the