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VIRGINIA COMMENTS

SUPPORT OF CHILDREN BORN OUT OF WEDLOCK:
VIRGINIA AT THE CROSSROADS

"The problem of illegitimacy is as old as the institution of Marriage and its causes are deeply imbedded in human nature and in cultural patterns."¹

During its 1958 session the Virginia General Assembly created the *Commission to Study Problems Relating to Children Born out of Wedlock*.² With this action the legislators recognized that "there has been an increase in both the number of children born out of wedlock and the ratio of such births to total births in Virginia during the past several years; and . . . illegitimacy constitutes a problem that is of great concern to the public generally as well as to specific agencies, both public and private. . . ."³ After one full year of study, with the aid of the research facilities of the Virginia Department of Welfare and Institutions, the commission issued its report embodying the results of its investigations and consisting of six specific recommendations.⁴

The six recommendations were outlined as follows: 1) the legalization of voluntary sterilization; 2) the enactment of a paternity law; 3) the addition of special case workers in the public welfare departments; 4) the establishment of field counselors and maternity homes; 5) public education in respect to the problems of illegitimacy; and 6) the study of the advisability of compulsory sterilization laws.⁵ Three of the nine members of the commission dissented from the bulk of the recommendations made. The only proposal upon which there was a *unanimity of opinion* was that dealing with the enactment of a paternity law.⁶ The major portion of this comment will deal with this particular commission proposal.

¹W. L. Painter, Director of the Division of General Welfare, Virginia Department of Welfare and Institutions, Va. Welfare Bull., Nov., 1959, p. 8.

²Va. S.J. Res. No. 36, Va. S. Jour. 878-79 (Reg. Sess. 1958).

³Id. at 879.

⁴Report to the Governor and General Assembly of Virginia by Commission to Study Problems Relating to Children Born out of Wedlock, S. Doc. No. 5 (1959) [hereinafter cited as Study Commission Report].

⁵Id. at 16.

⁶Id. at 17, 23.

The social and legal problems of illegitimacy have been conspicuous from the earliest periods of modern civilization.⁷ The first legislation dealing with illegitimate children in our Anglo-American legal system was the Poor Law Act of 1576,⁸ passed during the reign of Elizabeth I of England and which was primarily concerned with the indemnification of the public, rather than the welfare of the child.⁹ This Act was essentially criminal in nature and it was not until 1844 when the Poor Law Amendment Act¹⁰ was passed that the law recognized a civil remedy for the support of the unfortunate child.

The development of the law of "bastardy"¹¹ (a word carrying an unfortunately distasteful connotation in itself) in Virginia closely parallels the English law upon the subject. The first statute in Virginia was passed in 1657 and dealt exclusively with the begetting of illegitimate children by indentured servants.¹² It provided that security be given to the Parish and to the master so that these parties would be relieved from the burden of support. Except for slight variations, this law remained substantially unchanged until 1769 when the putative father could be charged by the Churchwardens of the Parish, upon the complaint of the mother, for the necessary expenses of support.¹³ In 1785 this power was transferred from the Churchwardens to the Overseers of the Poor of the Parish.¹⁴

It was not until the nineteenth century that the mother was given the right of action, but the recovery was still for the benefit of the county.¹⁵ This provision remained the law of Virginia until 1875

⁷See generally Baber, *Marriage and the Family* 606 (2d ed. 1953); Nimkoff, *Marriage and the Family* 550 (1947); Schatkin, *Disputed Paternity Proceedings* (3d ed. 1953); 4 Vernier, *American Family Laws* § 250 (1936). For an excellent discussion of illegitimacy under Roman law see 5 Tul. L. Rev. 256 (1931).

⁸Poor Law Act, 1576, 18 Eliz. 1, c. 3.

⁹Schatkin, *Disputed Paternity Proceedings* 33 (3d ed. 1953).

¹⁰Poor Law Amendment Act, 1844, 7 & 8 Vict. c. 101. For a discussion of the early English law see 1 Blackstone, *Commentaries* *428. A good discussion of later English law may be found in Chislett, *Affiliation Proceedings* (1958).

¹¹"He is one born out of wedlock, lawful or unlawful, or not within a competent time after the coverture is determined; or, if born out of wedlock, whose parents do not afterwards intermarry, and the father acknowledge the child; or who is born in wedlock when procreation by the husband is for any cause impossible." *Smith v. Perry*, 80 Va. 563, 570 (1885).

¹²Act of Mar., 1657, 1 Laws of Va. 438 (Hening 1823).

¹³Act of Nov., 1769, 8 Laws of Va. 374 (Hening 1823).

¹⁴Act of Oct., 1785, 12 Laws of Va. 28 (Hening 1823).

¹⁵1 Tucker, *Commentaries* 130 (1836). For cases decided under the Virginia statutes during this early period see *Stegall v. Stegall*, 22 Fed. Cas. 1,226 (No. 13,351) (C.C. Va. 1825); *Willard v. Overseers of the Poor*, 50 Va. (9 Gratt.) 139 (1852); *Lyle v. Overseers of the Poor*, 49 Va. (8 Gratt.) 20 (1851); *Howard v. Overseers of the Poor*, 22 Va. (1 Rand.) 464 (1823); *Mann v. Commonwealth*, 20 Va. (6 Munf.) 452 (1819); *Fall v. Overseers of the Poor*, 17 Va. (3 Munf.) 495 (1811).

when the paternity statute was repealed by the General Assembly.¹⁶ Minor states that this action took place because of the mistaken belief that the statute was in contravention of the federal Civil Rights Act of 1866 and the fourteenth amendment to the United States Constitution since the statute had been limited to white persons.¹⁷ However, the suit was primarily for the benefit of the state, rather than the individual, and these apprehensions proved quite groundless.

In 1944 the Virginia Supreme Court of Appeals decided the case of *Brown v. Brown*¹⁸ pointing out that there was no duty to support an illegitimate child under the common law and, absent statutory authority, an action could not be maintained against the putative father.¹⁹ Subsequent to this decision the General Assembly, in 1952, passed section 20-61.1 of the Code of Virginia which provides for the support of illegitimate children by the father if he has admitted paternity before a court of record.²⁰ This Act was expanded in 1954 to include admissions of paternity in writing under oath.²¹ Its provisions have been interpreted quite explicitly, as in *Distefano v. Commonwealth*²² where it was held that federal income tax returns upon which the putative father claimed the child as an exemption were not sufficient to constitute a "voluntarily admitted paternity in writing, under oath."²³

Illegitimacy has become a social problem of some severity in the United States. In 1958 there were approximately 208,700 illegitimate births in this country—a rate of 21 per 1,000 unmarried women between the ages of fifteen and forty-four.²⁴ In Virginia from 1955 through 1958 approximately 29,100 illegitimate children were born²⁵ or almost 8 per cent of all births in Virginia.²⁶ In Richmond alone from 1940 through 1955 approximately 8,800 children were born out of wedlock.²⁷ In September, 1958 payments totaling \$184,482 were made through the Aid to Dependent Children program of the De-

¹⁶Va. Acts of Assembly c. 112, p. 94 (1875) repealing Va. Code §§ 35-1-8 (1873).

¹⁷1 Minor, Institutes 148 (4th ed. 1892).

¹⁸183 Va. 353, 32 S.E.2d 79 (1944).

¹⁹Ibid.

²⁰Va. Acts of Assembly c. 584, p. 1016 (1952). The code section numbers referred to in the text were subsequently assigned.

²¹Va. Acts of Assembly c. 577, p. 722 (1954). Also see Va. Code Ann. § 20-61.1 (Repl. Vol. 1960).

²²201 Va. 23, 109 S.E. 2d 497 (1959).

²³See note 21 supra.

²⁴Statistical Abstract of the United States 56 (1960).

²⁵Study Commission Report, app. B.

²⁶Based on figures in Study Commission Report, app. B.

²⁷Illegitimacy in Richmond, Virginia: 1910-1955 27 (1957).

partment of Welfare and Institutions for the support of illegitimate children.²⁸ Through the Foster Care programs administered by the local welfare departments an additional sum of \$64,822 was expended.²⁹ Thus, for one month alone the total welfare expenditures for the support of illegitimate children in Virginia added up to around \$250,000, and this is in spite of the fact that only *one-tenth* of the illegitimate children in the state are on the welfare rolls and that each child receives only \$12.80 a month in welfare assistance.³⁰

It is not to be assumed from the figures cited above that illegitimacy is purely an economic problem for there are very grave legal, social and moral problems involved also.³¹ As the study commission pointed out,

"Civil legislation which would make the father of an illegitimate child financially responsible for its care has been the subject of debate in the General Assembly in almost every regular session for the past thirty years. The chief stumbling block appears to have been the fear that the proposed bills would not have sufficient safeguards to protect the innocent man from being falsely accused. There is also a more basic reluctance to place too much responsibility on the man in such a situation because of the conflicts that it presents in our patrilineal (father as head of the family) society."³²

To meet these basic objections the commission prepared a proposed bill which would satisfy most of these criticisms. The bill does not constitute a panacea (as very little legislation does) but it would be a long step down the road towards resolving some of the problems.³³

The bill proposed is based largely upon the New York paternity statute³⁴ which is based upon the *Uniform Illegitimacy Act*³⁵ promulgated by the *National Conference of Commissioners on Uniform State*

²⁸Report on Illegitimacy in the Aid to Dependent Children and Foster Care Programs 1 (Sept., 1958).

²⁹Ibid.

³⁰Va. Welfare Bull., Sept., 1960, pp. 1, 2.

³¹See generally Davis, *Illegitimacy and the Social Structure*, 45 *Am. J. Sociology* 215 (1939); Schatkin, *Paternity Proceedings—A Changing Concept*, 42 *J. Crim. L., C. & P.S.* 821 (1952).

³²Study Commission Report 17.

³³Id. at 26.

³⁴N.Y. Dom. Rel. Laws §§ 119-39. For excellent analyses of the statute see generally 23 *Brooklyn L. Rev.* 80 (1956); 26 *Col. L. Rev.* 94 (1956).

³⁵9 U.L.A. 390 (1942). Seven states have passed the Act in its entirety or in substantially the same form: Iowa, Nev., N.M., N.Y., N.D., S.D., and Wyo. Vernier, *American Family Laws* § 250. (1936).

Laws in 1922.³⁶ The purpose behind the proposed legislation is expressed in section 20-126: "The parents of a child are liable for its necessary support, education and funeral expenses. The father is liable for the reasonable expenses of the mother's confinement and recovery, and such expenses in connection with her pregnancy as the court may deem proper."³⁷ The proceeding may be brought by the mother, her personal representative or by the public welfare officials of the locality in which the mother resides.³⁸ The complaint must be under oath³⁹ and an additional safeguard is provided because the mother may be subject to prosecution for perjury if she makes a false complaint.⁴⁰ The statute of limitations on the action is one year after the birth of the child⁴¹ and the putative father, if adjudged to be the actual father by the court or by a jury, is liable to support the child until it reaches sixteen. The maximum recovery is \$100 per month.⁴² The procedural safeguards are thorough and completely adequate, and further provision is made for a blood grouping test to be administered on the parties at the motion of the defendant.⁴³

The blood test provision is identical to the New York provision on the subject⁴⁴ and provides that the results shall be admitted in evidence only to establish non-paternity. This section, however, does not make the results of the test *conclusive evidence* and this is one criticism of the section. The New York courts have generally interpreted the section to make the results of the test as to non-paternity conclusive,⁴⁵ but a more complete safeguard could be established through the inclusion in the Act of provisions similar to the *Uniform Act on Blood Tests to Determine Paternity*.⁴⁶ The uniform act takes

³⁶Handbook of the National Conference of Commissioners on Uniform State Laws 103 (1922). The vote was: yes—24, no—6, divided—3, with Virginia being one of the divided states.

³⁷Study Commission Report 26.

³⁸Id., § 20-128(1), p. 26.

³⁹Id., § 20-128(4), p. 27.

⁴⁰Id., § 20-140, p. 30.

⁴¹Id., § 20-128(2), p. 27. New York has a statutory limit of two years. N.Y. Dom. Rel. Laws § 122(2).

⁴²Id., § 20-134(2), p. 28. New York does not have a limit on recovery.

⁴³Id., § 20-133, p. 28.

⁴⁴N.Y. Dom. Rel. Laws § 126a.

⁴⁵See generally Gellhorn, Children and Families in the Courts of New York City (1954); Sussman and Schatkin, Survey of Paternity Disputes in New York City, 6 Crim. L. Rev. (N.Y.) 65 (1959). Also see C. v. C., 200 Misc. 631, 109 N.Y.S.2d 276 (Kings County Ct. 1951); Saks v. Saks, 71 N.Y.S.2d 797 (Dom. Rel. Ct. 1947).

⁴⁶9 U.L.A. 102 (1957). A total of six states have passed this Act: Cal., Ill., Mich., N.H., Ore., and Utah. Twenty-five jurisdictions in all allow the use of blood tests in paternity suits. See Handbook of the National Conference of Commissioners on Uniform State Laws 207 (1960).

advantage of the progress of medical science by making the findings of exclusion conclusive. This act was promulgated in 1952,⁴⁷ approved by the American Bar Association in the same year⁴⁸ and was later approved by the House of Delegates of the American Medical Association.⁴⁹

Although a blood test cannot be used affirmatively to prove paternity, it can conclusively show that the falsely accused man is not the father in over 50 per cent of the cases.⁵⁰ Sidney B. Schatkin, Assistant Corporation Counsel of New York City,⁵¹ has shown the accuracy of these tests by showing that over a ten year period in New York City there were 656 blood tests carried out in affiliation cases, 65 exclusions resulted from these tests and *in all 65 cases the mother admitted later, for the first time, that the accused man was not the father.*⁵² As medical technology advances, it may become possible to show conclusively in all cases, through blood tests, that a falsely accused man is not the father.⁵³ It would seem advisable even at this stage of development, however, to make the results of the test conclusive *as to non-paternity* in order to provide the accused man with the most effective safeguard yet developed. Blood tests are no longer theory but "an accomplished fact of science and an immutable law of nature."⁵⁴

⁴⁷Handbook of the National Conference of Commissioners on Uniform State Laws 185-86 (1952). The vote was: yes-39, no-1, with Virginia casting the only dissenting vote.

⁴⁸77 A.B.A. Rep. 127 (1952).

⁴⁹Blasingame, 1846-1958, Digest of Official Actions, American Medical Association 73 (1959).

⁵⁰Davidson, Levine and Wiener, *Medicolegal Application of Blood Grouping Tests*, 149 A.M.A.J. 699 (1952); Sussman, *Blood Grouping Tests in Disputed Paternity Proceedings*, 155 A.M.A.J. 1143 (1954). Also see generally 1 Wigmore, *Evidence* §§ 165a-b (3d ed. 1940). Of course, mutations in blood genes are possible but the chances of a mutation are perhaps 1 in 50,000. Scheinfeld, *The New You and Heredity* 276 (1950).

⁵¹Mr. Schatkin has been trying paternity cases since 1931 in New York City. His book, *Disputed Paternity Proceedings* is considered the standard work in this field.

⁵²Schatkin, *Disputed Paternity Proceedings* 289 (3d ed. 1953).

⁵³Unger, *Blood Grouping Tests for Exclusion of Paternity*, 152 A.M.A.J. 1006 (1953).

⁵⁴Schatkin, *Law and Science in Collision: Use of Blood Tests in Paternity Suits*, 32 Va. L. Rev. 886, 901 (1946). For general discussion of the field of blood grouping tests see generally Andersen, *The Human Blood Groups—Utilized in Disputed Paternity Cases and Criminal Proceedings* (1952); Scheinfeld, *The New You and Heredity* 262 (1950); Stern, *Human Genetics* 192 (1949). An excellent modern discussion of the subject is found in Ross, *The Value of Blood Tests as Evidence in Paternity Cases*, 71 Harv. L. Rev. 466 (1958). See also Annot., 163 A.L.R. 939 (1946); Britt, *Blood-Grouping Tests and the Law: The Problem of "Cultural Lag,"*

Certainly the law of paternity is a difficult field in which the orthodox methods of proof utilized in normal legal proceedings may prove inadequate, but this seems to be the case in many fields of law which have been developed to meet the changing needs of a dynamic society. Many of the criticisms leveled at paternity actions may be valid, but where there is a readily ascertainable need for the statute these criticisms seem to be outweighed in the balance of justice. As the minority report of the Virginia study commission pointed out: "It seems only just that a man who shares the responsibility of procreating an illegitimate child should also be charged with joint responsibility for providing for it, rather than sloughing his responsibility off on the state."⁵⁵ The Supreme Court of Wisconsin at an early stage in the development of modern attitudes in the field of paternity demonstrated that there are two innocent parties in a paternity action, the child and the public, "and as between the two, it being apparent that the subject of the legislation is the child the principal object is the welfare of the child, and the secondary one that of the public."⁵⁶

The stigma of illegitimacy is a difficult burden to be borne by the child who unfortunately has to bear many of the other encumbrances created by the iniquities of his parents.⁵⁷ The parents should certainly bear the financial burden of support not only for its punitive value,⁵⁸ but also because in a large number of cases the father could provide a more satisfactory degree of support than the state is able to do through its welfare agencies. Also, to cast the burden on the transgressing parties would allow the money now expended by the state to go to those persons who are actually unable to bear the financial demands of support. The commission bill was introduced in the 1960 regular session of the General Assembly but it was killed in committee.⁵⁹ It is hoped that in its 1962 session the Assembly will

²¹ Minn. L. Rev. 671 (1937); Davidson; The Medicolegal Application of Blood Tests, 31 J. Crim. L., C & P.S. 643 (1941); Flacks, Evidential Value of Blood Tests to Prove Non-Paternity, 21 A.B.A.J. 680 (1935).

⁵⁵ Study Commission Report 23.

⁵⁶ *Franken v. State ex rel Fuerst*, 190 Wis. 424, 209 N.W. 766 (1926).

⁵⁷ *Hardy v. Atherton*, 7 Q.B.D. 264 (1881). Also see Schatkin, *Disputed Paternity Proceedings* 43 (3d ed. 1953).

⁵⁸ The New York statute upon which the commission bill is modeled has been generally termed a quasi-criminal proceeding. *Vincent v. Koehler*, 284 N.Y. 260, 30 N.E.2d 587 (1940); *People ex rel. Lawton v. Snell*, 216 N.Y. 527, 111 N.E. 50 (1916). But see *People v. Bowers*, 9 Misc. 2d 873, 170 N.Y.S.2d 546 (Child. Ct., Broome County 1958) which held that actions outside of New York City were purely civil in nature.

⁵⁹ Senate Bill No. 159, Va. S. Jour. 146 (Reg. Sess. 1960).