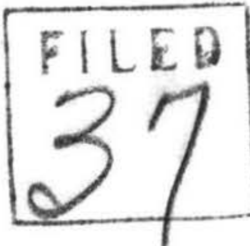
BUREAU OF VITAL STATISTICS: Upon the offer of satisfactory proof a registrar of vital statistics may issue a new birth certificate in the new name of a legitimated child; the registrar of vital statistics may not refuse to accept a birth certificate simply because it shows upon its face that the father of the child is not the husband of the mother.



May 1, 1958

Dr. H. M. Hardwicke
Acting Director
Division of Health
Jefferson City, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"This office respectfully requests an opinion upon the following questions relating to the vital statistics program of the state of Missouri:

"My first question is: Are the powers of the registrar of vital statistics strictly administrative or is the registrar also vested with the authority to exercise discretionary powers, that is to say, may the registrar exercise his independent judgment and, if so, to what extent?

"My second question is: Assuming that the Bureau of Vital Statistics has a birth record on file showing the legal husband of the mother at the time of birth as the father of the child, does the registrar of vital statistics have the discretion to amend that record by removing the name of the aforesaid husband and substituting the name of another man who claims to be the father of the child; whereas, prior to this substitution, on the face of the record, the child was legitimate?

"My third question is: Does the registrar of vital statistics have the authority to remove the name of the father of a child when this child appears, on the face of the certificate, to be legitimate, and not add the name of another man, thus, rendering a child illegitimate who prior to the amendment, on the face of the record, appeared to be legitimate.

"My fourth question is: When a birth certificate is received in the Bureau of Vital Statistics, which contains the name of the father of a child, but because of other inconsistent statements, it can be assumed that the father is not the husband of the mother, can the registrar ask that this record be replaced and a new record filed which does not contain facts relating to the father of the child.

"Enclosed you will find a letter from Mr. Gilbert Carter, dated February 28, 1958. Mr. Carter asked that if an attorney general's opinion relating to my second question was requested, I also submit his letter to you. He feels that your office would appreciate having the benefit of the research that he has done relating to this matter."

Your first question is, in substance, whether the powers of the registrar of vital statistics are strictly administrative, or whether the registrar has authority to exercise discretionary power, and if so, to what extent.

The general nature of this question makes it impossible for us to give an answer which would be sufficiently definite to be of any assistance to you. Perhaps our discussion of your following three questions will shed some light upon the first.

Your second question, set forth above, is, as you indicate, predicated upon the following fact situation: A married woman has a child by a man not her husband. Subsequently, she divorces her husband and marries the man who is the natural father

of her child. The child's birth certificate was filed in the office of the registrar of vital statistics giving the child the surname of the mother's husband at the time of the birth of the child, and showing that the mother was married to the man who was her husband at the time the child was born. Now the mother and her present husband, the natural father of the child, request the registrar of vital statistics to amend the birth certificate of the child by removing the name of the husband of the mother at the time the child was born and substituting therefor the name of the man who is the natural father of the child and who is now married to the mother. The question is whether this can be done.

Section 193.260 RSMo 1949, reads:

> "In cases of legitimation the state registrar upon receipt of proof thereof shall prepare a new certificate of birth in the new name of the legitimated child. The evidence upon which the new certificate is made and the original certificate shall be sealed and filed and may be opened only upon order of court."

We will begin our discussion of this matter by observing that the strong presumption is that a child who is born to a husband and wife is presumed to be the child of such husband and wife. In the case of Ash v. Modern Sand and Gravel Company, 122 S.W. 2d 45, at l.c. 50, the St. Louis Court of Appeals stated:

> "* * * 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.
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> "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. Pahlen, 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. * * *"

However, as will be noted by the above case, this presumption can be overcome and one of the means by which it can be done is a showing that the husband, by reason of absence, could not have had sexual intercourse with the wife at the beginning of any reasonable period of gestation. In the situation stated the wife alleges that her husband had been absent for several years before the child in question was born.

Our second proposition is that a child born during wedlock may be illegitimate if it be shown that the husband of the mother prior to and during the period of gestation and at the time of the birth of the child was not the natural father of the child. In the case of State v. Coliton, 17 N.W. 2d 546, at l.c. 548, et seq., the Supreme Court of North Dakota stated:

> "For the purposes of the demurrer, the defendant admits the complainant is a married woman and that he is the father of her child, begotten and born while she was married to another. It becomes necessary therefore to determine the scope of the phrase, 'a child born out of wedlock.' Under the statute cited, may a child, born as stated, be said to be 'born out of wedlock'?
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> "The gist of appellant's argument is that owing to the existing marriage relations a child born to the wife during that time can not be said to be 'born out of wedlock.'

"Such contention unduly extends the meaning of the term 'wedlock.' Much of the confusion arises because of the presumption of legitimacy where the mother is married and the difficulty in obtaining proof to dispute this presumption as well as the statutory limitations as to who may raise the question. So far as the child is concerned, it is immaterial whether it is designated as illegitimate, or bastard, or born out of wedlock. In all such cases, it is illegitimate.

"The extreme difficulty of rebutting this presumption and its transition from that of a practical conclusiveness to the modern trend toward a sane and reasonable ascertainment of facts is clearly set forth in the opinion of the New York Court of Appeals --In re Findlay, 253 N.Y. 1, 170 N.E. 471-- written by Judge Cardozo. Therein, the court reviewed the history of the application of this presumption and in a rather exhaustive opinion traced the history of the change in the quantum of proof necessary to rebut it. Throughout the decision runs the undisputed theory the presumption never was or is conclusive.

"In harmony with American jurisprudence, this state has always held that 'all children born in wedlock are presumed to be legitimate' (Sec. 4420, C.L., and 14-0901, Revised Code 1943) as is also a child born to a married woman within ten months of the dissolution of the marriage (Sec. 4421, C.L., 14-0902, Revised Code 1943). This is a presumption which may be rebutted, but this 'presumption of legitimacy can be disputed only by the husband or wife or the descendant of one or both of them. Illegitimacy in such case may be proved like any other fact.' Section 4422, C.L. 14-0903, Revised Code 1943. The status of wedlock exists between them. The presumption is that it is their child and therefore born in wedlock. See State v. Fury, 53 N.D. 333, 205 N.W. 877, 878. But it may be shown

that the child was not born to them in the status of wedlock that existed between them and is therefore illegitimate.

"To protect society, this limitation on the attack of presumption is made:

"'If neither the husband nor the wife to an existing marriage desires to raise any question of the legitimacy of a child born during its existence, the best interests and welfare of society will be promoted if the state likewise declines to intervene in raising that question.' Ex parte Madalina, 174 Cal. 693, 164 P. 348, 350, 1 A.L.R. 1629.

"In the case at bar, the legitimacy is disputed by the wife, the mother of the child. While under the common law, neither husband nor wife could bastardize a child born during wedlock, the statute removes this difficulty. As said in Vincent v. Koehler, 284 N.Y. 260, 30 N.E. 2d 587, in the absence of statute, neither husband nor wife was a competent witness in such case, whatever would be the form of the legal proceedings or whoever would be the parties. Our statute already quoted changes this, but limits this power to husband, wife, or any descendant of either. Such was our statute when the Uniform Illegitimacy Act, Comp. Laws Supp. 1925, § 10500a1 et seq., was adopted and the term 'born out of wedlock' used.

"There has never been any question but what a married woman may give birth to an illegitimate child which is therefore termed bastard. People v. Gleason, 211 Ill. App. 380; Stripe v. Meffert et al., 287 Mo. 366, 229 S.W. 762. This applies also to cases where the parents of the child have living spouses. Lewis v. Crowell, 210 Ala. 199, 97 So. 691; McLoud v. State, 122 Ga. 393, 50 S.E. 145. * * *"

In the case of Stripe v. Meffert, 229 S.W. 2d 762, a case referred to in the Coliton case, the Missouri Supreme Court, at l.c. 770 stated:

> "We are all the more persuaded that there must be a bona fide marriage by at least one of the parents under said section 342 of our statutes by reason of the provisions of the immediately preceding section 341, R.S. 1909, which is as follows:
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> "'If a man, having by a woman a child or children, shall afterward intermarry with her, and shall recognize such child or children to be his, they shall thereby be legitimated.'
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> "This section covers the case of an adulterine bastard, or a child born of a married woman and a man not her husband, with whom she has committed adultery. In such case, the question of good faith in the relations of the parents at the time the child was conceived or born is not regarded--though their sins be as scarlet--yet, if they afterwards contract a legal marriage and recognize their children, such children shall stand legitimate before all the world. Busby v. Self, 223 S.W. 729.* * *"

The same holding is made in the case of Neuchiller v. Neuchiller, 114 N.E. 2d 900; Nevins v. Gilliland, 234 S.W. 818, and numerous other cases which could be cited. Therefore, it would clearly appear that a child born in wedlock may be illegitimate.

Section 474.070 RSMo Cum. Supp. 1957 reads:

> "If a man, having by a woman a child or children, afterward intermarries with her and recognizes the child or children to be his they are thereby legitimated."

That is what happened in the situation which we are considering, i.e., the natural father of the child has married the mother of the child subsequent to her divorce and has recognized the child to be his, which, according to Section 474.070, supra, legitimates the child. Such is the construction put upon this section by Nevins v. Gilliland, cited above; Drake v. Milton Hospital Association, 178 S.W. 476; Lowtrip v. Green, 252 S.W. 2d 524; Canfield v. Porterfield, 292 S.W. 2d 85; Busby v. Self, cited above and numerous others.

We now have a situation in which the child, in the situation under consideration, was illegitimate, although born to a woman during the time of her marriage; but which child has been legitimated by the marriage of the natural father with the mother subsequent to her divorce and the recognition by the current husband that the child is his. Our question then is whether under such a fact situation Section 193.260 applies. That section holds that "in case of legitimation ....," which we here have, "the state registrar upon receipt of proof thereof ...." shall prepare a new certificate of birth in the new name of the legitimated child. The section goes on to state that the evidence upon which the new certificate is made, together with the original certificate "shall be sealed and signed and may be opened only upon order of court."

Therefore, our answer to your second question is that where proof is adduced which satisfies the registrar of vital statistics that a child born in wedlock was in reality not the child of the husband of the mother, but was the child of another man and was, therefore, illegitimate, and that subsequent to the birth of the child the mother divorced her husband and married the natural father of the child, who acknowledges his paternity, that the registrar may prepare a new certificate of birth in the new name of the legitimated child. This does not, as your question assumes, render the child illegitimate, but is rather simply a process in its true legitimation.

In respect to your third question we enclose a copy of an opinion rendered April 21, 1953, to Honorable James R. Amos, Director, Division of Health, which we believe answers your third question.

Your fourth question is whether or not when a birth certificate is received in the bureau of vital statistics, which contains the name of the father of the child, but because of other inconsistent statements, it can be assumed that the father is not the husband of the mother, whether the registrar can ask that this record be replaced, and a new record filed which does not contain facts relating to the father of the child.

We do not believe that the registrar may do so because we do not find in the statutes any authority for him to refuse to accept a birth certificate simply because it lists as the father of the child a man who is not the husband of the mother, and to require that a new certificate be filed in which no father is named. This would amount to the refusal to accept a complete and presumably correct certificate and the requirement that a new certificate be filed in lieu thereof.

In this connection we note Section 193.170 RSMo 1949 which reads:

> "Certificates filed within six months after the time prescribed therefor shall be prima facie evidence of the facts therein stated. Data therein pertaining to the father of a child are prima facie evidence only if the alleged father is the husband of the mother; if not, the data pertaining to the father of a child are not evidence in any proceeding adverse to the interests of the alleged father, or of his heirs, next of kin, devisees, legatees or other successors in interest, if the paternity is controverted."

It would seem that this section clearly contemplates that certificates may be filed in which a man who is not the husband of the mother is listed as the father of the child.

CONCLUSION

It is the opinion of this department that upon the offer of satisfactory proof a registrar of vital statistics may issue a new birth certificate in the new name of a legitimated child; that the registrar of vital statistics may not refuse to accept a birth certificate simply because it shows upon its face that the father of the child is not the husband of the mother.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Yours very truly,

John M. Dalton
Attorney General

Enclosure - James F. Amos, M.D.
April 21, 1953

HPW:vlw