

CHAPTER 257

CHILDREN; CUSTODY OF; ILLEGITIMATE

CUSTODY OF CHILDREN

257.01 PLACING CHILDREN OUT; RECORDS.

NOTE: Sections 257.01 and 257.03 should be read along with sections 313.05, 313.09, and 313.11.

Ex. L. 1919, c. 51, does not apply to institutions maintained by state, county, village, or any institution which under the statute are under the supervision of the director of social welfare or county welfare board. OAG Feb. 15, 1943 (835).

Laws for Minnesota children. 1 MLR 48.

257.02 SURRENDER OF PARENTAL RIGHTS.

When the controversy is as to the custody of a minor the best interests of the child are the controlling consideration. *Gauthier v Walter*, 110 M 103, 124 NW 634; *State ex rel v Armstrong*, 141 M 47, 169 NW 249; *State ex rel v Petrowski*, 145 M 383, 177 NW 628; *State ex rel v Bienek*, 155 M 313, 193 NW 452; *State ex rel v Price*, 211 M 565, 2 NW(2d) 39; *Re Adoption of Pratt*, 219 M 414, 18 NW(2d) 147.

The presumption is that the parents are fit and suitable persons to be entrusted with the care of their child, and the burden is upon the one who asserts to the contrary to prove his contention by satisfactory evidence. The natural parents have the first right to the care and custody of a child, unless the best interests of the child require that it be given to someone else. *State ex rel v Armstrong*, 141 M 48, 169 NW 250; *State ex rel v Petrowski*, 145 M 383, 177 NW 627; *State ex rel v Peterson*, 156 M 178, 194 NW 326; *State ex rel v Phelps*, 166 M 423, 208 NW 131; *State ex rel v Mason*, 179 M 472, 229 NW 582; *State ex rel v Miller*, 187 M 152, 244 NW 685; *State ex rel v Sorenson*, 208 M 226, 293 NW 241; *State ex rel v Price*, 211 M 565, 2 NW(2d) 39.

Since a proceeding to determine custody of a minor child partakes of the nature of an action in rem, the res being the status of the minor, only the court of that state in which the minor is domiciled can fix or change that status. *State ex rel v Larson*, 190 M 489, 252 NW 330.

Where the evidence sustains a finding that all contestants are well fitted for the duties and responsibilities of guardianship involving custody, the appellate court will not disturb the award of custody by the trial court. *State ex rel v Hedburg*, 192 M 193, 256 NW 92.

Right of parent as against third parties for custody of child. 22 MLR 899.

ILLEGITIMATE CHILDREN

257.18 COMPLAINT, WHEN TAKEN; PROCEDURE; WARRANT.

Though quasi-criminal in nature, filiation or illegitimacy proceedings are not criminal actions. The proceedings are in substance civil suits. The civil practice is followed. *State v Longwell*, 135 M 65, 160 NW 190; *State v Hanson*, 187 M 235, 244 NW 809; *State v Jeffrey*, 188 M 476, 247 NW 692; *State v Riegel*, 194 M 308, 260 NW 293.

At common law the father was not charged with support of his illegitimate child; but by statute the father is charged with such support and a statutory remedy is provided. *State v Lindskog*, 175 M 533, 211 NW 912.

The question of the alleged father's guilt was for the jury. The defendant was not prejudiced by the fact that the county attorney first filed an information in the instant matter. *State v Tofteland*, 216 M 128, 11 NW(2d) 826.

The domicile of an illegitimate child is that of the mother. The court sustained the adoption of the child in the instant case notwithstanding there was (1) no notice to the director of social welfare, (2) no investigation or report by that individual, (3) the adopted child had not resided in the home of the adoptive parents for a period of six months prior to the hearing as required by section 259.02, on the ground that the court had a right to waive, and did waive those requirements upon finding that the proposed home and child were suited to each other. *In re Adoption of Pratt*, 219 M 419, 18 NW(2d) 147.

Illegitimacy proceedings may be instituted after death of illegitimate child. OAG Nov. 5, 1946 (840-C-2).

Legitimation of illegitimate child in foreign state; issue of common law marriage; as affecting descent and distribution of decedent's estate. 31 MLR 94.

257.19 COMPLAINT BY MOTHER.

In filiation proceedings the justice of the peace denied the defendant's motion to dismiss and defendant appealed. As the effect of the order was merely to retain the case in the district court for trial and determination and did not involve the merits, it is not an appealable order. *State v Riebel*, 166 M 497, 207 NW 631.

At common law the father was not charged with support of his illegitimate child. Any liability rests on applicable statutes. In the instant case there has been no marriage ceremony, no filiation proceedings, and insufficient evidence to establish a common law marriage, and the prosecution under section 617.56 should have been dismissed. *State v Lindskog*, 175 M 533, 221 NW 911.

A filiation proceeding is civil in character. Even if rules of criminal practice and procedure could apply, defendant, because of his own conduct contributing to the delay, was not entitled to a dismissal for lack of speedy trial. *State v Hansen*, 187 M 235, 244 NW 809.

Silence and delay in disclosing her condition and accusing defendant may be considered by the jury in judging the truth of her charge against defendant. *State v Aherns*, 173 M 294, 217 NW 118; *State v Thompson*, 193 M 364, 258 NW 527.

Only when proceedings are fully justified is it incumbent upon the county attorney to prosecute in illegitimacy cases. OAG Oct. 30, 1945 (121-B-11).

257.21 BOND; MAY PLEAD GUILTY; COMMITMENT.

If a prisoner is lawfully confined in jail, the sheriff is not required to permit him to marry. OAG March 22, 1943 (127-A).

257.23 TRIAL; PRELIMINARY EXAMINATION; JUDGMENT OF PATERNITY; DEFAULT; DUTIES OF DIVISION OF SOCIAL WELFARE; BOND FOR SUPPORT OF CHILD.

Where the illegitimate child was found in the county where its mother, then being, filed the complaint, and where the child, as a matter of law was likely to be a charge on the county, the fact that the child was begotten and born in Montana was immaterial. *State v Rudolph*, 203 M 101, 280 NW 1.

The question of the alleged father's guilt was for the jury; and defendant was not prejudiced by the fact the county attorney first filed an information. *State v Tofteland*, 216 M 128, 11 NW(2d) 826.

At common law the father of an illegitimate child was not liable for its care, maintenance, and support. The present obligation is a liability created by statute. An illegitimacy proceeding is not barred by the statute of limitations, so that it be brought during the minority of the child and while the father is under a continuing obligation to provide for its care, maintenance, and education. *State v Johnson*, 216 M 427, 13 NW(2d) 26.

Absent a situation where all possibility or at least all reasonable probability of husband's parenthood of wife's child is excluded by proof of miscegenation, or his impotency, or of negative results of reliable blood tests, the presumption of legitimacy of a child conceived during period in which husband and wife were occupying the same dwelling house, and were alone except for presence of minor children, is conclusive, notwithstanding divorce proceedings are pending. *Hansen v Swanson*, 219 M 123, 16 NW(2d) 900.

In proceeding to determine paternity while the exact date of intercourse between the parties is immaterial, under the peculiar circumstances in this case as testified to by the complaining witness, the occasion is material. *State v Nelson*, 221 M 569, 22 NW(2d) 681.

In filiation proceedings it is primarily for the trial courts and juries to make the determination. *State v Drescher*, 222 M 120, 23 NW(2d) 533.

Sections 257.23 and 257.28 are alternative remedies and determinations. OAG April 12, 1946 (840-c-11).

Still birth, or death of child, does not preclude institution of filiation proceedings and parentage being established, the mother may bring civil action to recover expenses, including cost of burial of child. OAG Nov. 5, 1946 (840-c-2).

In the absence of an order of the court so providing, amounts received for the benefit of a child under the federal servicemen's dependents allowance act should not be credited against the amount ordered by the court to be paid by the putative father of an illegitimate child. OAG March 25, 1947 (840-c-11).

A minor may be proceeded against in an illegitimacy proceeding. While there is no statute requiring the appointment of a guardian ad litem, it is good practice to do so. OAG April 14, 1947 (840-c-2):

257.26 HEARING; JUDGMENT.

Where the court orders the father to pay \$10.00 per month for support of his illegitimate child, and upon the father's induction into the army, the welfare board obtains an allowance under 37 USCA, ss. 201 et seq. military paternity proceedings of \$38.00 per month; upon adoption of the child by another, and return of the father from military service, the \$733 in the hands of the welfare board cannot be refunded to the father but inures to the benefit of the child OAG May 29, 1947 (310).

Blood-grouping tests and the law; problem of "Cultural Lag." 21 MLR 671.

257.27 COMPROMISE BY BOARD.

Compromise and release by the county commissioners, to which the mother did not consent, does not preclude her from asserting her rights, nor does a release by the mother prevent the county from instituting proceedings to protect the county from loss in the way of expenses incurred or for which they may be liable in the future. *State v Dongher*, 47 M 436, 50 NW 475; *State v Housewedell*, 94 M 177, 102 NW 204.

257.31 Publication of taxation of costs and disbursements in filiation proceedings, for statistical purposes is not in violation of this section. OAG Feb. 9, 1943 (121-B-17).

257.32 DIRECTOR OF SOCIAL WELFARE SHALL BE LEGAL GUARDIANS.

Where a child is placed with a private charity, in the absence of contract, or if the facilities are inadequate, it may be placed elsewhere where its needs are taken care of; and if committed to the director, no matter where the child is placed, the director may provide for specialized needs of the child which must be paid by the county of commitment. OAG April 18, 1946 (840-A-2).

Domicile of illegitimate child; appointment of guardian and adoption in jurisdiction other than that of domicile of deceased mother. 30 MLR 397.