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CIVIL PROCEDURE—JURISDICTION—COUNTY COURT HAS JURISDICTION IN BASTARDY CASES. *Jarmon v. Brown*, 286 Ark. 455, 692 S.W.2d 618 (1985).

Bridget Akin, an illegitimate child, lived with her mother. When Bridget's mother died, Velma Brown, a maternal aunt, assumed responsibility for her. Bridget's father, Alexander Jarmon, commenced an action in the County Court of Chicot County Arkansas, seeking custody of his illegitimate child. The court awarded custody to Jarmon after determining that he was the child's father and that he was a fit and proper person to have custody. Brown, who wanted continued custody of the child, obtained an *ex parte* order from the Chancery Court of Chicot County enjoining Jarmon from removing the child from her until the matter could be heard in the chancery court. The chancery court awarded custody to Brown for nine months and to Jarmon for three months. The Arkansas Supreme Court reversed the chancellor's order, holding that the Arkansas Constitution gives exclusive jurisdiction in bastardy cases to the county courts. Thus, the chancery court, although usually the proper forum for determining custody, did not have jurisdiction to award custody of an illegitimate child. *Jarmon v. Brown*, 286 Ark. 455, 692 S.W.2d 618 (1985).

Persons born out of wedlock have long been the object of indifferent and sometimes unfavorable treatment by society and by the justice system. At common law, an illegitimate was considered *nullius filius*, or the "child of no one,"¹ and had no rights of inheritance.² Illegitimate children were not even considered to be the children of their natural parents, who therefore had no legal obligation to support them. Unless the natural parents felt a moral obligation to support their illegitimate children, "the child was at the mercy of charity, first of the Church, later of the parish under the poor law system."³

The English Poor Law Act of 1573⁴ authorized the justices of the peace of the county to order the mother or father to provide support

1. Comment, *Bastardy Law in Arkansas—The Need for Revision*, 33 ARK. L. REV. 178 (1979).

2. Adams, *Nullius Filius—A Study of the Exception of Bastardy in the Law Courts of Medieval England*, 6 U. TORONTO L.J. 361 (1946).

3. Lasok, *Virginia Bastardy Laws: A Burdensome Heritage*, 9 WM. & MARY L. REV. 402, 407 (1967).

4. 18 Eliz. I, ch. 3 (1573).

payments for the child. Failure to pay could result in imprisonment.⁵ Further changes in the English laws placed the support obligation totally on the shoulders of the putative father.⁶

The English statutes became the model for the bastardy laws in the United States, including Arkansas'.⁷ Jurisdiction in Arkansas bastardy cases, as in England, was vested in the justices of the peace, who were elected by the voters in each township for two-year terms.⁸

Bastardy proceedings were conducted by the justices of the peace on the local level during most of the 1800's in Arkansas for two reasons. First, restricted modes of travel and long distances to county seats made local jurisdiction more practical.⁹ Second, it was easier to establish paternity on the local level when the primary evidence consisted of reputation testimony.¹⁰

The present constitution, the Arkansas Constitution of 1874, vests exclusive jurisdiction for all bastardy-related matters in the county court.¹¹ The county judge, who presides over the county court, must be at least twenty-five years old and a United States citizen of upright character, but is not required to be a lawyer or familiar with bastardy matters.¹² The legislature, in 1977, gave the county judge power to appoint a referee to hear bastardy proceedings.¹³ However, that statute does not require that the referee be a lawyer. In contrast, a referee appointed by the county judge to hear juvenile cases must be a

5. *Id.*

6. 6 Geo. 2, ch. 31 (1733).

7. Comment, *supra* note 1, at 179.

8. ARK. CONST. of 1836, art. VI, § 10.

9. Comment, *supra* note 1, at 183.

10. *Id.*

11. ARK. CONST. art. VII, § 28 provides: "The county courts shall have exclusive original jurisdiction in all matters relating to . . . bastardy The county court shall be held by one judge, except in cases otherwise herein provided." ARK. STAT. ANN. § 34-701 (1962) provides: "The county courts in the several counties in this State shall have exclusive jurisdiction in all cases and matters relating to bastardy."

12. ARK. CONST. art. VII, § 29 provides:

The judge of the county court shall be elected by the qualified electors of the county for the term of two years. He shall be at least twenty-five years of age, a citizen of the United States, a man of upright character, of good business education and a resident of the State for two years before his election, and a resident of the county at the time of his election and during his continuance in office.

ARK. STAT. ANN. § 17-3601(1) (1980) provides in part: "The county Judge shall be at least twenty-five (25) years of age, a citizen of the United States, a person of upright character, of good business education, and a resident of the county at the time of his election and during his continuance in office."

13. ARK. STAT. ANN. § 34-701.1 (Supp. 1985).

lawyer.¹⁴

In 1957, the Arkansas Supreme Court, in *Higgs v. Higgs*,¹⁵ held that the constitution's broad grant of jurisdiction to the county court included the authority to order child support. Although the father had admitted paternity, the chancery court's support order was held void for lack of jurisdiction.¹⁶ The court labeled an action for support of an illegitimate child a "bastardy proceeding" under the constitution and under section 34-701 of the Arkansas Statutes Annotated and held that only the county court had jurisdiction to hear a bastardy action.¹⁷

However, in 1978 the court limited the county court's continuing jurisdiction over child support matters in bastardy cases. The Arkansas Supreme Court, in *Carter v. Clausen*,¹⁸ agreed that the county court had jurisdiction to issue a support order in a bastardy case, but held that the county court did not have authority under any existing statute to modify the amount at a later date.¹⁹ This problem was later remedied by a statute²⁰ giving county courts the authority to modify support amounts. The statute was amended in 1985 to give county courts in bastardy proceedings authority to follow the same guidelines and procedures used by chancery courts in setting support amounts for legitimate children.²¹

Original jurisdiction of the county court is not limited to proceedings to establish paternity but extends to all matters relating to bastardy, including visitation rights. In *Rapp v. Kizer*,²² the admitted father of an illegitimate, born eleven months after the divorce of the parents, filed a complaint in chancery court to determine child support and visitation rights. The mother challenged the chancery court's jurisdiction on the ground that the county court was the usual forum for bastardy proceedings. The Arkansas Supreme Court maintained its prior stand, stating: "Our Constitution, Art. 7, § 28, . . . does not limit the original jurisdiction of the county court to 'bastardy proceedings' but specifically gives the county court 'exclusive original jurisdiction in

14. ARK. STAT. ANN. § 45-409 (1977).

15. 227 Ark. 572, 299 S.W.2d 837 (1957).

16. *Id.* at 573, 299 S.W.2d at 838.

17. *Id.* at 574, 299 S.W.2d at 838.

18. 263 Ark. 344, 565 S.W.2d 17 (1978).

19. *Id.* at 345-47, 565 S.W.2d at 18.

20. ARK. STAT. ANN. § 34-706.1 (Supp. 1981). "County courts may at any time, enlarge, diminish or vacate any order or judgment awarding an allowance for child support in bastardy cases." See *Wilkins v. Ford*, 275 Ark. 469, 631 S.W.2d 298 (1982) (applying the statute).

21. ARK. STAT. ANN. § 34-706.1 (Supp. 1985).

22. 260 Ark. 656, 543 S.W.2d 458 (1976).

all matters relating to . . . bastardy'²³

The court noted its prior holding in *Higgs v. Higgs*²⁴ that the admission of paternity by the putative father does not give the chancery court jurisdiction in a bastardy proceeding.²⁵ The court devised the following test to determine when the county court will hear a bastardy case. Jurisdiction exists when the "issues presented for determination obviously flow from and are involved only with the procreation of a bastard or illegitimate child."²⁶ The court expressed its doubt that the county court was the best forum for determining child support and visitation rights: "the reason²⁷ for placing jurisdiction of bastardy matters in the county court may no longer exist but, nevertheless, the Constitution has not been changed and the county court still has exclusive original jurisdiction in such matters."²⁸

The court in 1980 clarified its position in *Lee v. Grubbs*.²⁹ The court held that the county court had exclusive jurisdiction in bastardy matters, but that jurisdiction did not encompass the guardianship of an illegitimate. Since the probate court had exclusive jurisdiction over matters involving guardianships,³⁰ the probate court was the proper forum for determining the guardian for an illegitimate. The court also stated, in dictum, that the paternity of an illegitimate involved in a guardianship proceeding could also be determined by the probate court.³¹

The court, once again, in *Stain v. Stain*,³² admitted that the reasons³³ for the constitutional restraints in bastardy jurisdiction no longer existed but that "[u]ntil and unless [the constitution] is changed, we have to live within its confines."³⁴ In *Stain* the putative father challenged the authority of the chancery court to decide a paternity issue in a divorce action. The child was born to the parties before they were married. The divorce was granted and the chancellor, in a separate pro-

23. *Id.* at 658, 543 S.W.2d at 459.

24. 227 Ark. 572, 299 S.W.2d 837 (1957).

25. *Rapp v. Kizer*, 260 Ark. 656, 543 S.W.2d 458 (1976).

26. *Id.* at 657, 543 S.W.2d at 459.

27. Comment, *supra* note 1, at 183, 185.

28. 260 Ark. at 658, 543 S.W.2d at 459 (citing *Higgs v. Higgs*, 227 Ark. 572, 299 S.W.2d 837 (1957)); see also ARK. STAT. ANN. § 34-715 (Supp. 1985) (county court has power to award visitation rights in bastardy proceedings).

29. 269 Ark. 205, 599 S.W.2d 715 (1980).

30. *Id.* at 206, 599 S.W.2d at 716. See ARK. CONST. amend. XXIV.

31. *Lee v. Grubbs*, 269 Ark. 205, 206, 599 S.W.2d 715, 716 (1980).

32. 286 Ark. 140, 689 S.W.2d 566 (1985).

33. See *supra* text accompanying notes 9 and 10.

34. 286 Ark. at 143, 689 S.W.2d at 567.

ceeding, held that the chancery court had jurisdiction, found the husband to be the father of the child, and ordered him to pay \$12.50 per week as child support.³⁵ On appeal, the Arkansas Supreme Court held that, since the paternity action was a matter relating to bastardy, only the county court had jurisdiction.³⁶

In *Jarmon v. Brown*³⁷ the court relied on the express language of the Arkansas Constitution³⁸ and section 34-718 of the Arkansas Statutes Annotated,³⁹ which give the county court exclusive jurisdiction in all matters relating to bastardy.⁴⁰ The court upheld the county court's custody decision, noting that the county court "tracked the . . . statute exactly."⁴¹ The county court had fulfilled the requirements of the statute⁴² when it determined that Jarmon was the father, that he was a fit person to raise the child, that he had assumed responsibility toward the child, and that it was in the best interest of the child to be with Jarmon.⁴³

Justice Newbern, in his concurring opinion,⁴⁴ argued that the constitution only requires the county court to decide cases in which the paternity of an illegitimate child is in question. Custody disputes should, according to Justice Newbern, be decided in chancery court, which has expertise in that area, until Arkansas can formulate a family court to hear all cases involving "family" issues.⁴⁵

Jarmon v. Brown exposes the unnecessary and impractical overlapping of jurisdiction in the Arkansas judicial system. The problem is illustrated by the following example. Assume a husband and wife live together for several years before their child is born. After the child's

35. *Id.* at 141, 689 S.W.2d at 567.

36. *Id.* at 143, 689 S.W.2d at 567.

37. 286 Ark. 455, 692 S.W.2d 618 (1985).

38. ARK. CONST. art. VII, § 28.

39. ARK. STAT. ANN. § 34-718 (Supp. 1985) provides:

(a) A father, provided he has established paternity in a court of competent jurisdiction, or a mother of an illegitimate child . . . may petition the county court wherein the child resides for custody of the child.

(b) The court may award custody to the petitioner upon a showing that:

(1) The petitioner is a fit parent to raise the child; and

(2) The petitioner has assumed his or her responsibilities toward the child by providing care, supervision, protection and financial support for the child; and

(3) It is in the best interest of the child to award custody to the petitioner.

40. 286 Ark. at 456, 692 S.W.2d at 619.

41. *Id.*

42. ARK. STAT. ANN. 34-718 (Supp. 1985); *see supra* note 40.

43. 286 Ark. at 456, 692 S.W.2d at 619.

44. *Id.* at 457, 692 S.W.2d at 620 (Newbern, J., concurring).

45. *Id.*

birth, the husband and wife are legally married. Several years later, the wife files for divorce and asks for custody of the child, alimony, and child support from her husband. The husband denies the child is his. Under current Arkansas law, the related issues of divorce, paternity, support, and custody cannot be decided by the same court if the child is illegitimate. If the child had been legitimate, the chancery court would determine all these issues. But because the child is illegitimate, the divorce proceeding would be held in chancery court while the other issues would be determined by the county judge, or a referee appointed by the county judge, neither of whom must be a lawyer.⁴⁶

Arkansas should modernize its judicial treatment of illegitimates to avoid the unreasonable overlap in jurisdictions that now exists. This could be done by removing the "bastardy proceeding" from the jurisdiction of the county court and placing it in the chancery court. The chancellor, who must be a lawyer, would have the necessary expertise in this area and could determine the related issues of paternity, support, custody, and visitation in one proceeding, even when a divorce was involved.

Another solution would be to form a family court, as New York did in 1962 with its Family Court Act.⁴⁷ Before 1962, "jurisdiction [in New York] over family problems was shared by the Children's Court, the Domestic Relations Court, the Girls' Term Court, the Home Term of the Magistrate's Court, the Court of Special Sessions, and the Surrogate Court."⁴⁸ The Family Court Act unified jurisdiction over family legal problems into one statewide court, with jurisdiction "over all aspects of family life except divorce, separation, and annulment."⁴⁹

Although the Family Court in New York is burdened by a heavy caseload and insufficient support services (i.e., municipal and private social agencies),⁵⁰ it is providing a more unified and consistent method of handling family matters. Arkansas could follow New York's lead by combining the jurisdictions of the probate court (guardianships and

46. The proposed Arkansas Constitution of 1970 would have limited the county judge's duties to those necessary for running the county government. *Proposed Arkansas Constitution of 1970, With Comments*, Art. 6, § 5. Bastardy proceedings would be conducted in a new district court, which would include the chancery, probate, and circuit courts. *Id.* at Schedule III, Sec. 4(b). The proposed constitution of 1980 contained similar reforms. *Proposed Arkansas Constitution of 1980, With Comments*, Art. 6, §§ 6-9.

47. N.Y. FAM. CT. ACT § 111 (McKinney 1983). *See also* C v. M, 77 Misc.2d 534, 354 N.Y.S.2d 348 (1974) (family court had jurisdiction to determine paternity in bastardy action).

48. N.Y. FAM. CT. ACT § 111 (McKinney 1983) (practice commentary at 6).

49. *Id.* at 6.

50. *Id.* at 7.

adoptions of minors), juvenile court, chancery court (support, visitation, and custody), and county court (illegitimates) into its own Family Court.

A simpler solution would be to carry out Justice Newbern's suggestion by allowing the county judge to determine paternity only. The other issues could be transferred to the chancery court.

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