

CHAPTER 166.

ILLEGITIMACY.

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166.01 Proceedings on complaint. On complaint being made to any justice of the peace by any female who shall have been delivered of an illegitimate child or who shall be pregnant with a child which, when born, may be illegitimate, accusing any person of being the father of such child, the justice shall take such complaint in writing, under oath of such female, and shall thereupon issue his warrant against the person accused, directed to the sheriff or any constable of his county, commanding him forthwith to bring such accused person before the justice to answer such complaint. With the consent of the complainant, a summons may be issued in the first instance, as in civil cases, instead of a warrant, which summons shall be personally served.

Note: Filiation action may be brought in defendant was born and lives in Minnesota. Wisconsin although illegitimate child of 25 Atty. Gen. 504.

166.02 Proceedings on return of warrant or summons. On the return of such warrant, if the accused be in custody or shall appear, or upon return of the summons, showing personal service on the defendant, the justice shall examine the complainant under oath respecting the cause of complaint, and the accused may cross-examine her and put any questions necessary for his defense. Witnesses may be examined on behalf of either party. If the action is commenced by service of summons, and the defendant does not appear, the justice shall proceed in the same manner as though he were present, and shall make such orders as if the defendant were in court. The justice may at his discretion exclude the general public from attendance at such examination. All testimony taken and proceedings had shall be reduced to writing; the proceedings for cause shown may be adjourned from time to time and on such adjournment the accused may be recognized for his appearance for such examination in a sum not less than one hundred dollars nor more than one thousand dollars, and with sureties to the satisfaction of the justice, or the defendant may deposit money in lieu of sureties, and in default thereof he shall be committed, pending such examination, to the county jail. The accused shall be entitled to a removal of such action as in criminal examination before justices of the peace.

166.03 Discharge of the accused. If the accused person shall enter into agreement with the complainant as provided in section 166.07, the justice shall make a memorandum of said agreement on his docket, and upon entry of judgment on such agreement shall discharge such accused person.

Note: Notwithstanding 166.03, it is advisable that filiation agreements be made pursuant to 166.07 for proper protection of all parties. Justice court has inherent control of filiation proceedings before it rather than district attorney, who is limited to such powers and duties as are prescribed by statute or which arise therefrom by necessary implication. 29 Atty. Gen. 108.

166.04 Recognizance and commitment. (1) In case any person accused as aforesaid shall not comply with the provisions of the preceding section and there is probable cause to believe the accused person guilty the justice shall bind such person in a recognizance with one or more sureties, to be approved by the justice, in a sum of not less than two hundred dollars nor more than two thousand dollars, to appear at the next term of the circuit court for the proper county, and from time to time thereafter until final judgment, to answer the said complaint and to abide the order of said court thereon. The defendant may deposit money with his recognizance in lieu of sureties and such sureties may deposit money in lieu of justification. On the neglect or refusal of such defendant to furnish such security, the justice shall cause him to be committed to the county jail, there to be held to answer to such complaint.

(2) Such justice shall thereupon certify and return the examination and all testimony so taken before him with all process and papers in the case to the clerk of said circuit court.

In case any examination has been had as provided by law, and the person complained of has been discharged for want of sufficient evidence to raise a probability of his guilt, and the district attorney shall afterwards discover admissible evidence sufficient, in his judgment, to convict the person discharged, he may, notwithstanding such discharge, cause another complaint to be made before any officer authorized by law to make such examination, and thereupon another proceeding shall be had.

166.05 Change of venue. All cases begun under the provisions of this chapter shall be tried in the county where the action is properly commenced unless it shall appear to the satisfaction of the court by affidavit that a fair and impartial trial cannot be had in such county, in which case the court may direct that the accused be tried in some adjoining county where a fair and impartial trial can be had; the accused shall be entitled to a change of venue but once and no more.

166.06 Jurisdiction of illegitimacy actions. Any judge of a court of record, in vacation as well as in open court, and all court commissioners, except in counties containing cities having a population of one hundred fifty thousand or more, shall have concurrent jurisdiction with justices of the peace in all complaints and proceedings arising under this chapter. [1933 c. 428 s. 1; 1933 c. 432 s. 4; Spt. S. 1933 c. 9]

166.07 Settlement agreements. A female who has been delivered of an illegitimate child or who shall be pregnant with a child which, when born, may be illegitimate, may enter into an agreement with the person claimed by her to be the father of the child. Such agreement may be entered into at any time prior to final judgment, either before or after issuance of process. No agreement shall be entered into before the birth of the child unless the court finds that there are special circumstances making it advisable to do so. The agreement shall include a determination of all facts and orders set forth in section 166.11 to be included by the court in its order for judgment, except that where the parties are unable to agree as to the paternity of the child, the alleged father may deny paternity in the agreement. By the terms of the agreement the defendant must submit personally to the jurisdiction of the court, and consent to entry of judgment in accordance with the terms of the agreement. Upon motion of the district attorney, the judge of the court of record having power to enter final judgment in illegitimacy proceedings, being satisfied with the terms of the agreement, shall order judgment in accordance therewith if paternity of the child is admitted. Where the paternity of the child is not admitted, after said agreement is approved by the court, it shall be filed but judgment shall not be rendered until there is a default of the payments agreed upon, when, upon motion of the district attorney, judgment shall be rendered and entered forthwith. All agreements referred to in chapter 166 shall be drawn by the district attorney. No other agreement or settlement of any illegitimacy proceedings shall be valid. [1939 c. 524]

Note: Under statute providing for entry of judgment on agreement in settlement of bastardy action when there is a default of payment, judgment was authorized where defendant had been in default for several months. Gardner v. State, 224 W 549, 272 NW 478. Where settlement is proposed it is not necessary to issue summons or quasi criminal warrant in order to bring agreement in to court for approval; parties may appear voluntarily. Rules governing civil procedure apply. 25 Atty. Gen. 349. A minor male entering into a settlement in illegitimacy proceedings under ch. 166 must appear by guardian ad litem as provided in 260.22 and 260.23, since this is a civil action. 34 Atty. Gen. 169.

166.08 Prosecution by district attorney; private counsel. The district attorney shall appear and prosecute all illegitimacy proceedings including both the preliminary examination in justice court and the proceedings in the trial court and all subsequent proceedings brought to modify the original judgment or agreement. Private counsel in behalf of the complainant may appear with the district attorney, and reasonable attorneys' fees may be allowed and taxed against the defendant. The district attorney shall draft all agreements referred to in section 166.07. After July 10, 1945, in counties having a population of 500,000 or more the corporation counsel of such county or an assistant corporation counsel shall have all the powers and perform all the duties conferred or imposed upon the district attorney by this chapter exclusively and in lieu of such district attorney. [1941 c. 259; 1945 c. 408]

166.09 Continuance; bail. If at the next term of the court to which the accused is recognized or to which the venue has been changed the complainant shall not have been delivered or shall not be able to attend, or if at any time there shall be any other sufficient reason therefor the court may order a continuance of the cause from term to term as shall be judged necessary. If the sureties in the recognizance shall at any term of court object to being any longer held liable or if the court shall for any cause deem it proper such court may order a new recognizance to be taken and the defendant shall be committed until he gives such new recognizance.

166.10 Trial; evidence. Upon the trial of the proceedings the issue shall be whether the accused is guilty or not guilty. The trial shall be by jury, if either party de-

mands a jury, otherwise by the court. If the mother be dead or become insane or cannot be found within the jurisdiction, the proceeding does not abate, but the child shall be substituted as complainant. The testimony of the mother taken at the preliminary hearing may in any such case be read in evidence, and in all cases it shall be read in evidence if demanded by the defendant upon the trial. The judge may at his discretion exclude the general public from attendance at such trial.

Note: Instruction, in bastardy proceeding, that defendant was to be presumed innocent "until" evidence convinced jury of contrary beyond reasonable doubt held prejudicial error, in view of inconclusiveness of evidence. Instruction on presumption of innocence must be given in every case involving charge of unlawful parentage. *Nelson v. State*, 210 W 441, 245 NW 676.

A child conceived and born during wedlock is presumed to be legitimate, and the most clear and conclusive proof is required to overcome such presumption. Husband and wife are alike incompetent witnesses to prove the fact of nonaccess while they lived to-

gether. *Koenig v. State*, 215 W 658, 255 NW 727.

In an action to establish the paternity of an illegitimate child, the use of the word "until" in an instruction stating that the defendant is presumed innocent until the contrary is proved constitutes error, which will be considered so prejudicial as to necessitate a reversal if the proof that the defendant was the father of the child is not persuasively established. *Vogel v. State*, 220 W 677, 265 NW 567.

While an illegitimacy proceeding is a civil action, the law requires proof of guilt beyond a reasonable doubt. *Schuh v. State*, 221 W 180, 266 NW 234.

166.105 Evidence; blood tests. Whenever it shall be relevant to the prosecution or the defense in an illegitimacy action, the trial court, by order, may direct that the complainant, her child and the defendant submit to one or more blood tests to determine whether or not the defendant can be excluded as being the father of the child. The result of the test shall be receivable in evidence but only in cases where definite exclusion is established. The tests shall be made by a duly qualified physician, or physicians, or by another duly qualified person, or persons, not to exceed three, to be appointed by the court and to be paid by the county. Such experts shall be subject to cross-examination by both parties after the court has caused them to disclose their findings to the court or to the court and jury. Whenever the court orders such blood tests to be taken and one of the parties shall refuse to submit to such test, such fact shall be disclosed upon the trial unless good cause is shown to the contrary. [1935 c. 351; 1939 c. 524]

Note: In view of the several unsatisfactory and improbable aspects of the testimony and in view of the policy of exclusion of the defendant by the blood test, however irregularly offered, the court in the interest of

justice in this bastardy case ordered a new trial to give the defendant an opportunity to present in proper form medical conclusion based upon blood tests. *Euclide v. State*, 231 W 616, 286 NW 3.

166.11 Judgment. (1) If the accused is found guilty, or admits the truth of the allegation, or enters into a settlement agreement, he shall be adjudged to be the father of such child, unless paternity is denied in such settlement agreement, and shall be ordered to pay all expenses incurred for lying-in and attendance of the mother during the last six months of pregnancy, and also for the past care and support of the child, from the time of its birth until the date of the approval of the agreement or the entry of judgment. If the child is dead at time of trial he shall pay the expenses of the funeral and the expenses of the last illness. All payments and expenses stated herein shall be paid by the accused to a trustee, and the settlement agreement or judgment shall specifically provide for the amount of disbursement and indicate the person to whom the trustee shall make such disbursement.

(1m) The accused shall also pay to the county the costs of the action and is chargeable for the future support of the child until it attains the age of eighteen years. Payments for such future support shall be directed to be made in either of the two following methods:

- (a) Payment of a specified monthly sum until the child is eighteen years of age;
- (b) Payment of a specified lump sum to be paid upon the approval of an agreement or entry of judgment, or in specified monthly instalments within two years of the date of such approval or entry of judgment, subject to the condition that upon default in any monthly instalment, the court reserves the right to require the defendant to pay monthly support money for the child until it attains the age of eighteen years. All payments for the future support of the child shall be paid to a trustee and shall be held by him for the benefit of the child, subject to the order of the court, and shall be paid by him to the person, agency or institution having legal custody of the child in such manner and amounts as the court directs.

(2) All of the foregoing matters shall be ascertained and fixed by the court and, together with such attorneys' fees as have been allowed, shall be inserted in the judgment, with an order directed to the clerk of the court to file with the state registrar of vital statistics a certified copy of all judgments determining the paternity of the child, and a report showing the name, date and place of birth of the child and the name, color, residence, age, birthplace and occupation of the father of the child. Judgments entered upon agreement of the parties shall conform to the above unless the

parties are unable to agree as to the paternity of the child, when such adjudication may be omitted.

(3) All such judgments shall be satisfied of record by the clerk on payment to him of the costs and the filing of satisfaction of judgment executed and acknowledged by the complainant and trustee, if a trustee be appointed, and whenever ordered so to do by a written order of the court. [1931 c. 352 s. 2; 1939 c. 524; 1941 c. 259]

Note: Where parties to bastardy action entered into settlement agreement containing unequivocal admission by defendant of his paternity of child, defendant could not refute the fact stated in the contract on motion for judgment in the absence of a timely impeachment of the contract for duress, coercion, fraud or mistake. Gardner v. State, 224 W 549, 272 NW 478.

Illegitimacy actions are purely statutory, and courts have only such jurisdiction therein as is conferred by statutes. Sec. 166.12, Stats. 1939, confers no continuing jurisdiction over such proceedings except where the judgment provides for the payment of a lump sum, as authorized by 166.11. State ex rel. Wall v. Sovinski, 234 W 336, 291 NW 344.

Trustee in illegitimacy agreement and judgment under chapter 166, should make payment to person having legal custody of child, pursuant to order of court. It is immaterial whether such child is within or without state or whether he is in custody of his mother or some other person. 27 Atty. Gen. 364.

166.12 Continuing jurisdiction; revision of judgment or agreement. (1) Whenever settlement has been made pursuant to section 166.11 and the defendant fails to comply with the terms of such settlement, or whenever the judgment or agreement providing for the monthly support of an illegitimate child has been docketed or filed, the court shall have continuing jurisdiction and may, on the petition of the district attorney, the trustee, the mother, the named or adjudicated father, or any other person, agency or institution having legal custody of the child or upon stipulation signed by the defendant and the person, agency or institution having legal custody of the child and approved by the district attorney, revise and alter such judgment or agreement respecting the amount of support and the payment thereof and in its discretion may provide for or increase or decrease the amount of future support, and may make such further judgment or order as the circumstances of the parties require.

(2) Whenever a petition is brought to the court as hereinabove set forth, the district attorney, the defendant, and the person, agency or institution having legal custody of the child, must be served with a copy of the petition at least 10 days before the date set for the hearing.

(3) Nothing in this section shall in any way be considered a derogation of section 351.30. [1941 c. 259]

Note: Judgment providing for weekly payment of lump sum in satisfaction of judgments for support of illegitimate child may at any time be modified to provide for

166.13 Bond or commitment. If the person so adjudged to be the father of such child shall cause to be paid the cost of the prosecution, and any lump or total sum adjudged to be paid, he shall be discharged and the judgment satisfied of record; or if he shall give a bond to the proper town or county in such sum and with such surety as shall be approved by the court, conditioned for the performance of such judgment and the payment of all sums ordered thereby to be paid as therein directed, he shall be discharged; otherwise he shall be committed to the county jail until he shall comply with and perform such judgment or shall be otherwise discharged according to law, unless the court shall stay execution of such commitment. Any execution of commitment so stayed shall issue at any time when it shall appear to the court that the defendant has defaulted on any of the provisions of the judgment.

166.14 When and how discharged; liability thereafter. Any person who shall have been so imprisoned ninety days may apply for his discharge from imprisonment in the manner provided by law for the discharge from imprisonment of persons confined in jail upon executions against the person; but notice of the application for such discharge shall be given to the complainant, if living within the state, and also to the district attorney at least fifteen days before such application for discharge is made. Upon defendant's release, if the defendant shall at any time fail to comply with the judgment of the court with reference to the continued support of the child, he may be summarily dealt with as for contempt of court, and shall likewise be subject to all the penalties for failure to care for and support such child which are imposed by law upon the father of a legitimate child of like age and capacity, and in case of such failure to abide by any order of the court, the defendant shall be fully liable for the support of such child without reference to such order.

166.15 Execution. The court, upon motion by the mother of such child, or the trustee named in the judgment, or of the district attorney, may, from time to time, order execution to issue against the defendant and his sureties in any bond given as aforesaid to secure the performance of any such judgments, or against a defendant who shall have been discharged under the preceding section for such sum as may at any time become due thereon and remain unpaid.

166.16 Absence of defendant at trial. If the defendant fails to appear, the security for his appearance shall be forfeited and shall be applied on account of the payment of the judgment, but the trial shall proceed as if he were present.

166.17 Records; private. All records of court proceedings in cases under this chapter shall be withheld from inspection by, and copies shall not be furnished to persons other than the parties in interest and their attorneys except upon order of the court.

166.18 Trustee. (1) The trustee to whom payment for the future support of the child shall be made pursuant to the judgment or agreement shall be the county official in charge of the relief of the poor, the clerk of the court, or such other person, corporation or state board or officer authorized so to act as may be designated by the court. Such trustee shall furnish such bond as the court may require, except that whenever a county officer shall be designated as trustee he shall not be required to furnish bond other than that furnished in his official capacity. The trustee shall administer such funds under the direction of the court and shall report to the court annually or oftener, as directed by the court, the amounts received and paid over.

(2) Whenever such child dies, any unexpended funds remaining in the hands of the trustee after payment of lying-in expenses, past support payments to the date of the death of the child, expenses of last illness and funeral expenses, shall be paid to the mother of the child.

(3) Upon filing a final account with the court showing satisfactory evidence of compliance with all orders of the court and compliance with all provisions of chapter 166, relating to the trustee, the trustee shall be relieved of all further obligations and discharged. [1931 c. 352 s. 2; 1939 c. 524]

Note: In case of death of illegitimate child after judgment against father and while monthly payments are still to be made, only instalments not for future support of child need be paid. In case of death of illegitimate child pending payment of settlement agreement with paternity denied and without judgment, all portions of judgment should be paid except those attributable to future support of child and burden should be upon defendant to show that any portion of settlement is so attributable. 20 Atty. Gen. 704.

166.185 Adoption. (1) Upon the adoption of an illegitimate child, subsequent to approval of an agreement or entry of judgment, the trustee therein appointed shall promptly file with the court an accounting of his trust, together with an affidavit advising the court of all circumstances and asking the court for an order as to the disposition of any and all funds in the hands of the trustee; the court shall thereupon make and enter an order for the disposition of said funds, if any, by the trustee.

(2) At such time as the court makes the order, provided for in subsection (1) of this section the court may, in its discretion, refund to the defendant any payments made pursuant to agreement or judgment for the period, pending final adoption, during which the child was living in the home of the adopting parents. [1939 c. 524]

166.19 Prosecution by district attorney. When the mother of an illegitimate child commences any such proceeding and fails to prosecute the same, the district attorney, whenever he shall determine it to be to the best interest of the child, shall prosecute the proceedings commenced by the mother to final judgment.

166.20 Inquiry by district attorney. If any female shall be delivered of an illegitimate child which is or is likely to become a public charge, or shall be pregnant with a child likely to be born an illegitimate child, and to become a public charge, the district attorney, if he believes it to be to the best interest of the child, shall apply to any justice of the peace of the county, who shall thereupon examine such female on oath respecting the father of such child, the time when and the place where such child was begotten and as to such other circumstances as he may deem necessary; and such justice shall reduce such examination to writing and shall thereupon issue his warrant, without further or formal complaint, to apprehend the reputed father, and the same proceeding shall be had thereon and with the like effects as are hereinbefore provided in cases of complaint made by such female.

Note: After bastardy action commenced on complain of mother, unapproved settlement with mother does not bar prosecution. Settlement does not bar action on initiative of district attorney to prevent child from becoming public charge, and probably does not bar action on complaint of mother, for all relief except that designed for her individual benefit. 20 Atty. Gen. 364.

166.21 Warrant; attendance of female. Any warrant issued under this chapter may be executed in any part of this state; and in all cases the justice may compel the said female to attend and testify the same as witnesses in other cases.

166.22 Agreement by district attorney. In all cases where the mother commences any proceedings under this chapter and fails to prosecute the same, or where she has been delivered of an illegitimate child which is likely to become a public charge or shall be pregnant with a child likely to be born an illegitimate child and to become a public charge, the district attorney of the county in which she resides shall have power to make an agreement

with the putative father in the same manner and with the same force and effect as might be made by the mother.

166.23 Construction of chapter 166. This chapter shall be so interpreted and construed as to effectuate the protection and welfare of the child involved in any proceedings hereunder.