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Immigration--Illegitimate Child of Naturalized Citizen Deemed Stepchild for Immigration Purposes (Nation v. Esperdy, 239 F. Supp. 531 (S.D.N.Y. 1965))

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the children are an "outrage upon nature in its dearest and tenderest relations." [31] However, this is a use of the term "crime" in its generic sense. Could the courts of Colorado charge a husband with a crime arising from the single act of injuring his child, and additionally, charge him with a distinct and "personal" crime against his wife? The answer would appear to be in the negative.

Although the result in the instant decision coincides with a concept of justice in the case of injury to a close blood relation, the Colorado courts would be hard pressed to extend it to cases of violence perpetrated by one spouse upon a total stranger, and witnessed by the other. Because of the construction of the Colorado statute, the courts there may be committed to expanding the realm of admissible testimony by a spouse in reference to "crimes committed by one against the other." It would appear that a statute is needed whereby the courts of Colorado could allow the wife to testify, and, at the same time, could preserve the concept of marital confidence.

To this end, the statute could be modeled upon those presently in force in New York and Illinois.

New York has approached the problem by declaring that spouses are competent to testify except as to confidential communications.[32] Illinois, on the other hand, does not recognize confidential communications as privileged when there is injury to the person or property of one spouse, or when the children are directly injured by a spouse.[33] Statutes such as these attempt to balance the values of marital confidence with the practical realization that an injured spouse should be allowed the same opportunity to testify as any other injured person. In so doing they obviate the difficulties inherent in strained judicial expansions, which are necessitated by the restricted scope of statutes such as that construed in *Balltrip*.

IMMIGRATION — ILLEGITIMATE CHILD OF NATURALIZED CITIZEN DEEMED STEPCHILD FOR IMMIGRATION PURPOSES. — The plaintiff, who married subsequent to becoming a naturalized United States citizen, petitioned for a declaratory judgment classifying her alien husband's illegitimate child as a nonquota immigrant. The Board of Immigration Appeals sustained the District Director's

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[31] O'Loughlin v. People, 90 Colo. 368, 378, 10 P.2d 543, 547 (1932).

[32] N.Y. PEN. LAW § 2445. See People v. Harris, 39 Misc. 2d 193, 240 N.Y.S.2d 503 (Sup. Ct. 1963) wherein a spouse's letter, containing a confession of guilt of the murder of the child, was held a confidential communication when mailed only to the other spouse.

[33] ILL. ANN. STAT. ch. 38, § 155-1 (Smith-Hurd 1964).

denial of the petition because the father's illegitimate son is not his "child," nor his spouse's, as defined in the Immigration and Nationality Act. The District Court overruled the Board's determination, *holding* that such an illegitimate is a "child" within the meaning of Sections 101(a)(27)(A) and 101(b)(1)(B) of the Immigration and Nationality Act. *Nation v. Esperdy,* 239 F. Supp. 531 (S.D.N.Y. 1965).

Under Section 101(a)(27)(A), a nonquota immigrant is, *inter alia,* a "child of a citizen of the United States." [1] The 1952 act defined "child" of a United States citizen in Section 101(b)(1):

> an unmarried person under twenty-one years of age who is
> (A) a legitimate child; or
> (B) a stepchild, provided the child has not reached the age of eighteen years at the time the marriage creating the status of stepchild occurred; or
> (C) a child legitimatized under the law of the child's residence or domicile, or under the law of the father's residence or domicile. . . .[2]

In 1953, subparagraph (B) was construed in *Matter of M.*[3] There, an illegitimate child was denied nonquota immigrant status notwithstanding the fact that his mother, an alien, subsequently married a United States citizen. The denial was based upon an interpretation of the statute which would not allow even a natural father who was a citizen, to bring his own child into the country unless it was legitimate or properly legitimatized. The Attorney General sanctioned this determination. However, a request was made for congressional clarification of the term "stepchild." [4]

Since Congress, in subparagraph (C), referred only to the residence of the *child* or the *father,* the Board of Immigration Appeals in *Matter of A,* considered the omission of the residence of the *mother* as a "tacit acknowledgment and recognition of the fact that it was not intended to include the child born out of wedlock to a *mother.*" [5] Consequently, the Board held that children born out of wedlock to a mother who subsequently became a citizen, would be permitted nonquota status.[6] However, the illegitimate children of a father, who later attained citizenship status, would be bound to the legitimatizing requirement of subparagraph (C) before qualifying as nonquota immigrants.[7] The Attorney General rejected this distinction and ruled that, since the mother's child

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[1] 66 Stat. 169 (1952), 8 U.S.C. § 1101(a)(27)(A) (1964).
[2] 66 Stat. 171 (1952), 8 U.S.C. § 1101(b)(1) (1964).
[3] 5 I. & N. Dec. 120 (1953).
[4] *Id.* at 126.
[5] Matter of A, 5 I. & N. Dec. 272, 280 (1953).
[6] Matter of A, 5 I. & N. Dec. 272 (1953).
[7] *Id.* at 283.

was neither legitimate nor properly legitimatized, it was not entitled to nonquota status under the statute.

In 1955, the House Committee on the Judiciary conducted a special study of certain administrative operations under the Immigration and Nationality Act. The report viewed with disfavor the ultimate decisions in *Matter of M* and *Matter of A*. The Committee felt that:

> the inability to bring about a change in the administrative interpretation of the law dealing with "stepchildren" and "children" causes the need for an amendment to section 101(b) which will leave no loophole for a strained construction.[8]

In 1957, as a result of this study, Section 101(b)(1) was amended, extending the definition of "child" in subparagraph (B) to all stepchildren, "whether or not born out of wedlock," [9] and adding subparagraph (D) to include as a citizen's "child"

> an illegitimate child, by, through whom, or on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child to its natural *mother*.[10]

The Committee report accompanying the original House version indicated the need for this amendment:

> in order to alleviate hardship and provide for a fair and humanitarian adjudication of immigration cases involving children born out of wedlock. . . . The legislative history . . . clearly indicates that the Congress intended to provide for a liberal treatment of children and was concerned with the problem of keeping families of . . . immigrants united. . . . [This concept of family unity] would include the illegitimate child of the spouse as the stepchild of the person who has married the parent of that child.[11]

Although indicating congressional disapproval of the disruption of immigrant families, the amendment provided a ground upon which the status of a mother's illegitimate child could be distinguished. This was clearly reflected in *Matter of W*,[12] a case which held that "the phrase 'a child, whether or not born out of wedlock' is recognized as a child for immigration purposes only where the *mother* of the illegitimate child marries a citizen. . . ." [13] This dis-

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[8] H.R. REP. No. 1570, 84th Cong., 1st Sess. 111 (1955).

[9] Immigration and Nationality Act § 101(b)(1)(B), 71 Stat. 639 (1957), 8 U.S.C. § 1101(b)(1)(B) (1964).

[10] Immigration and Nationality Act § 101(b)(1)(D), 71 Stat. 639 (1957), 8 U.S.C. § 1101(b)(1)(D) (1964). (Emphasis added.)

[11] H.R. REP. No. 1199, 85th Cong., 1st Sess. 7-8 (1957).

[12] 7 I. & N. Dec. 685 (1958).

[13] *Id.* at 686-87.

tinction was based on a reading of the amended statute which accorded controlling import to subparagraph (D) as a limitation on subparagraph (B).[14]

The instant case was one of first impression in this jurisdiction. After a recital of Section 101(b)(1)(B), the Court eliminated the possibility of a literal interpretation because of its apparent conflict with Section 101(b)(1)(D). Noting that the congressional reports were by no means controlling, the Court concluded that subparagraphs (B) and (D) were independent reactions to the unpopular, factually distinguishable administrative decisions rendered in *Matter of M* and *Matter of A*.[15] The Court reasoned that, had Congress intended to benefit only a *mother's* illegitimate child, it would have clearly enunciated that fact. However, the use of neutral language throughout the Committee report, which did not specifically limit the legislative exception to a mother's illegitimate, persuaded the Court that a father's illegitimate child was not excluded from the statute's protection.[16]

Such an interpretation of "stepchild" under subparagraph (B), the Court maintained, did not render subparagraph (D) meaningless. The latter subparagraph was intended to confirm the proposition that a child born out of wedlock would be treated as legitimate to its natural mother. Its purpose was limited to an affirmation that no one who otherwise qualified as a "child" would be precluded from receiving immigrant privileges through its natural mother because of illegitimate birth. Thus, subparagraph (D) did not minimize the significance of subparagraph (B).[17] Considering the history "along with the obviously broad language of subsection (B)," the Court concluded that, on the facts of this case, the illegitimate child was the plaintiff's "stepchild."

Prior to the instant case, spouses could avoid the effect of Sections 101(b)(1)(B) and (D) on a father's illegitimate by adopting the child.[18] However, this course of action was unavail-

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[14] See *ibid.*

[15] Nation v. Esperdy, 239 F. Supp. 531, 535 (S.D.N.Y. 1965).

[16] *Id.* at 536-37.

[17] *Id.* at 537. The Court noted, however, that the report of the Senate Judiciary Committee, S. REP. No. 1057, 85th Cong., 1st Sess. 4 (1957), was less favorable to the petitioner. The report made no reference to the father-child relationship. The Court reconciled this report with its decision on the basis that the amendment to subparagraph (B) is a broad provision and, as such, militates against the narrow interpretation urged by the government.

[18] The statutory definition of "child" includes: "a child adopted while under the age of fourteen years if the child has thereafter been in the legal custody of, and has resided with, the adopting parent or parents for at least two years. . . ." (Immigration and Nationality Act § 101(b)(1)(E), 71 Stat. 639 (1957), 8 U.S.C. § 1101(b)(1)(E) (1964)), and "a child who is an eligible orphan, adopted abroad by a United States citizen and spouse or coming to the United States for adoption by a United States citizen

able in the principal case, since the child was over the age limit prescribed by the adoption sections. The import of the case, then, consists in providing an alternative solution to those in petitioner's position, who would otherwise be unable to gain admission for their children under nonquota status.

It is not likely that the decision will "offer attractive possibilities for fraud," as the government contended. The holding here was limited to situations of pre-existing family units formed outside the United States. Therefore, its use as a precedent for the general importation of illegitimate children would be precluded.[19]

In view of the congressional expression of a policy favoring an easing of immigration restrictions[20] with reference to separated families, the instant decision is long overdue. This case is representative of the humanitarian approach being applied to the problem of immigrant family unity. The 1965 amendment of the Immigration and Nationality Act prescribes a new "series of preference categories that give priority to minor children . . . of persons who have become citizens . . . under the old law."[21] Significantly, the statute does not affect Section 101(b)(1)(B) or (D).[22] Since it is to be assumed that Congress was aware of the instant case, its silence in this matter would seem to indicate agreement with the Court's interpretation.

The Court, by its decision, has taken the most reasonable avenue available, striking down an arbitrary barrier established by a literal statutory interpretation which was clearly inconsistent with the basic policy underlying the law's enactment.

LABOR LAW — BARGAINING ORDER INAPPROPRIATE TO REMEDY BORDERLINE EMPLOYER UNFAIR LABOR PRACTICE. — On the day of a scheduled election to determine whether twenty-eight employees of respondent, a New York corporation, desired unionization, the employer distributed a letter to the employees which contained promises of future benefits, in addition to an invitation to deal directly with the respondent. Subsequent to losing the election, the union petitioned the National Labor Relations Board for a "bargaining order" which was issued by the Board upon a finding that the employer's letter constituted an unfair labor practice. The United States Court of Appeals for the Second Circuit reversed the decision of

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and spouse. . . ." (Immigration and Nationality Act § 101(b)(1)(F), 75 Stat. 650 (1961), 8 U.S.C. § 1101(b)(1)(F) (1964)).

[19] *Supra* note 15, at 538-39.

[20] See, *e.g.*, S. REP. No. 1515, 81st Cong., 2d Sess. 468 (1952).

[21] N.Y. Times, Aug. 26, 1965, p. 1, col. 1.

[22] Pub. L. No. 236, 89th Cong., 1st Sess. (Oct. 3, 1965).