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ILLEGITIMACY

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This paper was prepared in 1974 for the internal use of the Institute of Law Research and Reform by Margaret A. Shone, Counsel to the Institute. Other demands on the Institute's resources preclude bringing the paper up to date or revising it for publication. The Institute, however, thinks that the research material contained in it will be of value to those interested in the important field of law which it describes, and in the reforms which it surveys, and has therefore decided to issue the paper in its present form.

The original paper included a section on establishing paternity which is not included here. In 1974 Rajiv Malhotra of the Institute's legal staff prepared for the Institute's use a paper on declarations of paternity and legitimacy and in 1975 Ingolf Grape, a law student on the Institute's staff, prepared a paper entitled "Proof of Paternity in Affiliation Proceedings in Recent Canadian Case Law." Subject to supply, this additional material can be made available to those doing research in the field.

For the Institute's opinions and recommendations the reader is referred to the Institute's Report No. 20, Status of Children.

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ILLEGITIMACY
BACKGROUND PAPER

I.
INTRODUCTION

Be it for economic or moral reasons, societies through the ages and about the world have favoured children born of stable unions over children whose parentage is less certain. The offspring of stable unions are known as legitimate; other offspring are illegitimate (or bastards). This paper describes illegitimacy at common law and under the law of Alberta today; it considers the current law in relation to prevailing social attitudes; and, finally, it investigates modes of reform.

II.
HISTORY[1] OF LAW AND ATTITUDES

Blood relationships formed the basis of the societal group among early Aryan nations. Monogamy won favour because it meant near certainty of parentage. From this beginning grew the demarcation between legitimate and illegitimate offspring. The Catholic Church later sanctified the monogomous union, thereby contributing to the degeneration of the illegtimate's position within the family.

The nations of the British Isles were slow to give up their more primitive customs and succumb to the influence of

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[1]The main source of the historical account is a book by Wilfrid Hooper entitled The Law of Illegitimacy and published in London by Sweet & Maxwell, Limited, 1911.

Christian doctrine. In Ireland, illegitimate issue continued to belong to the family and to succeed by inheritance until the early seventeenth century. In Wales, custom prevailed until 1284 when the Statute of Wales restricted heirship to legitimate sons. In the Highlands of Scotland, as late as the seventeenth century, children of concubinage shared equally in succession with children born in marriage.

Anglo-Saxon law was less generous to illegitimate offspring:

> The bastard under Anglo-Saxon law did not belong to the *maegth* or family connected by the tie of blood relationship, although down to the eighth century at least the father had the same unqualified right to do as he chose with his illicit as with his licit children. Children born out of lawful wedlock had no right of inheritance, nor, in fact, any right whatever save that of protection. "If slain their wergeld was paid to the paternal kindred and the king."[2]

It is noteworthy that when William the Conqueror (William the Bastard) of Normandy succeeded to the English Crown in 1066, and for some centuries afterwards, social disgrace did not accompany the illegitimate's inferior legal status.

Who was an illegitimate at common law and what were his legal disabilities? Although Roman law distinguished other classes, at common law the only important division of children was into legitimate and illegitimate, that is to say, those who were begotten or born, or presumed to be

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[2] Ibid., p. 4.

begotten or born, in lawful wedlock and those who were not. In contrast, the Church regarded as illegitimate a child born to a woman grossly *enceinte* at marriage.[3]

The common law presumption that a child born during marriage is legitimate was very strong. In the words of a then popular saying, "Whoso bulls my cow the calf is mine." The presumption could be rebutted in only two ways:

(1) by proof of the husband's impotence, or
(2) by proof of the impossibility of access by the husband for two years or more prior to discovery of his wife's pregnancy.

Until 1732, the doctrine of the four seas applied to the second method of rebuttal. As Coke stated this fiction,

> By the Common Law, if the husband be within the four seas, that is, within the jurisdiction of the King of England, if the wife hath issue, no proof is to be admitted to prove the child a bastard (for in that case, *filiatio non potest probari*), unless the husband hath an apparent impossibility of procreation; as if the husband be but eight years old, or under the age of procreation, such issue is a bastard, albeit he be born in marriage.[4]

The rule was so inflexible that in the sixteenth century bastard was defined as the child of an unmarried woman, with no reference to the adulterine bastard. Indeed, in 1654 (during the Commonwealth) a husband was ordered to provide

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[3] Ibid., p. 77.

[4] Ibid., p. 14.

for the offspring of an adulterous union after his wife had been executed for her adultery. The rule was finally abandoned in Pendrell v. Pendrell.[5] Under canon law, the adulterine bastard was illegitimate.[6]

As to a child born after the husband's death, the common law refused to fix a term within which the child must be born to be legitimate. The fathering of a child born to a widow who remarried shortly after her husband's death depended on the advancement of the pregnancy at the time of marriage: if the pregnancy was indisputable, the child was fathered on to the second husband; if it was not noticeable, then it was fathered on to the first husband.[7]

Although the common law rejected legitimation by marriage of the parents subsequent to a child's birth, it countenanced something akin to legitimation by acknowledgement during the father's lifetime of a child as son. This is evidenced by the reluctance of the common law to bastardize a person reared and recognized as son and heir, especially "if after the death of the putative father the reputed son entered upon his land as heir",[8] and more especially if the apparent heir died seised. This is the rule against bastardizing the dead.

The phrase *heres nullius* (no one's heir) better describes the condition of the illegitimate under mediaeval

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[5] 2 Strange 925; Nic. 127.

[6] Supra, footnote 1, at p. 77.

[7] Ibid., at p. 72.

[8] Ibid., at p. 20.

law than the more common *filius nullius* (no one's son). Incapacity to inherit was the prime disability faced by the illegitimate. Next to birth in wedlock, legitimacy was proven almost conclusively by posing successfully (being "in") as heir. This disability was more significant in mediaeval times than now, because of the then wider scope of inheritance and greater restraint on alienation.

The illegitimate knew other restrictions, too. The church censured irregular intercourse, and the illegitimate as a person of unlawful birth could not be admitted to the ministry without special dispensation. He was also excluded from most trade guilds and municipal corporations, admission to the former commonly being related to inheritance and to the latter, to membership in a guild.

On the other hand,

> Illegitimacy was not penalized by loss of freedom or of personal rights. The bastard cannot inherit and so far is in like case with the monster and alien, but, unlike the alien, he is not debarred from acquiring property by purchase.[9]

Apart from his inability to inherit, the illegitimate was "a worthy and law-worthy man".[10]

Occasionally illegitimacy gave positive advantage. For example, status as the son of no one gained release from villeinage for the illegitimate. Then, too, "the

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[9] Ibid., at p. 28

[10] Ibid., at p. 25.

owner of hereditary land could alienate a reasonable part to any stranger he chose, including a hastard son," whereas he could not alienate to a younger legitimate son without consent of his heir.[11]

The legitimacy of the offspring of persons who had gone through a form of marriage depended on two factors:

(1) the kind of marriage;
(2) whether canon law or common law was applied.

According to Hooper:

> Marriage in the Middle Ages was of two kinds:--
>
> 1. Marriage celebrated *in facie ecclesiae* according to the rites of the Church and after due publication of the banns.
>
> 2. Clandestine marriage, which might be (a) contracted by words of present consent exchanged by the parties (*per verba de praesenti tempore*) with or without witnesses or *per verba de futuro* followed by coition; (b) celebrated by a priest out of church; (c) celebrated in church but without publication of banns.[12]

The Church held both kinds valid and binding on the parties. Under canon law, there were two advantages to a public marriage *in facie ecclesiae*: the children were legitimate even though a canonical impediment (such as a prohibited degree of relationship by consanguinity or affinity),

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[11] Ibid., at p. 30.

[12] Ibid., at pp. 33-34.

unknown to the parties but later discovered, rendered the marriage void (that is to say, a putative marriage); and children born before the marriage were legitimated. It will be remembered that the common law did not recognize legitimation by subsequent marriage.

The effect of a clandestine marriage on legitimacy was less certain. Unlike the Church, in the thirteenth century common law juries regarded as illegitimate children of a marriage by words of present consent or of future consent followed by coition. The status accorded the offspring may have been a function of the secretiveness of the marriage: was it witnessed by third parties and thereby provable? By the late fifteenth century such offspring seem to have been legitimate at common law. The Marriage Acts, 1836 and 1837, put an end to these problems.

Clandestine marriages gave rise to illegitimacy. The incidence of these marriages was enhanced by increasing efforts of the Church to enforce sacerdotal celibacy. Canon and common law differed over the status of the children of a married priest, the common law favoring their legitimacy. Another factor affecting legitimacy was the ease of annulment of marriage by divorce for diriment impediment. The canonical doctrine of *bona fides* rendered legitimate children of such unions. For a time the common law also recognized their legitimacy, although authority for some impediments runs both ways. By the middle of the fourteenth century, however, illegitimacy was the common law rule. A marriage was void *ab initio* where a civil disability existed, that is to say, an undissolved prior marriage or nonage at marriage followed by repudiation after the age of consent.

The issue of legitimacy was further confused by ecclesiastical court pronouncements of divorce for canonical impediment after death of the spouses or one of them. The common law was clear that the offspring of a voidable marriage could not be bastardized by divorce after the death of either parent. Nevertheless, a marriage could be challenged for voidness at any time. It was also possible for the ecclesiastical court, after death of the spouses, to reverse a divorce granted during their lifetime, even if this bastardized children of a subsequent marriage.

According to Hooper

> The . . . exception . . . of bastardy is very common in the early history of real actions in England. . . . Bastardy might be excepted either by the person claiming as rightful heir, or by the tenant, or by the lord who had seized by way of escheat on the death of the last owner. The onus of proof lay on the person out of seisin. . . . 'The beatitude of seisin' gave the advantage to the actual possessor.[13]

Bastardy was also pleadable in most personal actions.

The plea of bastardy gave rise to a practical difficulty. The King's justices usually remitted a cause of bastardy to the bishop for his certificate of bastardy or mulierty. The bishop's certificate was based on canon, not common, law. This meant important differences. In the case of a child whose parents subsequently married, the Statute of Merton in 1236 established that the issue of legitimacy was for common law (according to canon law children born

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[13] Ibid., at pp. 65-66.

before marriage were legitimate, according to common law they were illegitimate). This problem thereafter became one of pleading--general bastardy was sent to the bishop; special bastardy was tried *per pais*. If pleading was lax, special bastardy might be treated as general bastardy. the Canon law would then take effect through the intervention of the bishop's certificate. Once entered in judgment, the certificate became a conclusive declaration of status binding *in rem* (although fifteenth century evidence casts some doubt on the effect of the certificate outside the proceedings in which it was given).[14]

The maxim *filius nullius* grew into a rule of construction, so that in both statutes and instruments the word "children" without more was interpreted to mean "legitimate children". This was true as well for other terms denoting family relationship. Equity followed the law and applied the doctrine of *filius nullius* to equitable principles. At the same time, the Poor Law Acts, from 1576 and on, began to recognize the relationship of parent and "natural" child, more to relieve the parish of the cost of maintenance than to benefit the child. As the duty of parents to maintain became established, the courts gave parents a corresponding right of custody. The primary obligation to maintain an illegitimate child fell upon the mother, although an order for maintenance might be made against the father in affiliation proceedings. Notwithstanding the legal status of the illegitimate as *filius nullius* and the convenience of statutory references to the mother, the courts took cognizance both of the mother's natural relationship to child and of the natural

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[14] Ibid., pp. 54-81.

relationship of a father against whom paternity had been made out.[15] Hooper, writing in 1911, suggests that

> . . . modern law . . . is, to an increasing extent, taking advantage of the recognition of the natural relationship, which started with the poor law, to ameliorate the condition of the bastard.[16]

Although the common law recognized no inherent legal relationship between a bastard and his father, the law did take note of the bastard's blood relationships for purposes of the prohibited degrees of marriage.[17] Today, the law takes note of blood relationships for purposes of incest, too.[18]

1. *Filius nullius* as a Rule of Construction

As mentioned above, a rule of construction of statutes and written instruments developed from the common law concept of *filius nullius*. In statutes the rule is that "words denoting blood relationship, such as child, father, next of kin, are interpreted to mean persons lawfully related and to exclude natural relations, unless they are expressly or impliedly included."[19] That is to say, *prima facie* any reference in a statute to relationship means legitimate relationship.

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[15] See, for example, Clarke v. Carfin Coal Company, [1891] A.C. 412 at 420-421, per Lord Watson.

[16] Supra, footnote 1 at p. 105.

[17] Haines v. Jeffel (1695), 1 Ld. Raym. 68.

[18] Criminal Code, R.S.C. 1970, c. C-34, s. 150(1).

[19] Supra, footnote 1 at p. 108.

The Supreme Court of Canada has recognized the rule as well established in English law.[20] The case concerned the interpretation of an article of the Quebec Civil Code, but Anglin C.J.C. says:[21]

> We can conceive of no reason why a different intention should be imputed to the legislature of Quebec. It would be a libel on that province to suggest that . . . illegitimacy is there less disfavoured by law than it is in England, or in any province of Canada whose legal system is based on the English common law.

However, more recently there has been an erosion of the rule in its application to modern statutes. In White v. Barrett[22] the Appellate Division of the Supreme Court of Alberta interpreted the word "parent" in a statute passed in 1967 to include the father of an illegitimate child. In disposing of *filius nullius* as the prima facie rule, the court relied on another principle of construction:[23]

> Words are primarily to be construed in their ordinary meaning or common or popular sense, and as they would have been generally understood the day after the statute was passed, unless such a construction would lead to manifest any gross absurdity, or unless the context requires some special or particular meaning to be given to the words.

The presumption that words denoting relationship refer to legitimate relationship extends to the interpretation of such words in wills, deeds, and other legal documents, but

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[20] Town of Montreal West v. Hough, [1931] S.C.R. 113.

[21] Ibid., at p. 120.

[22] [1973] 3 W.W.R. 293.

[23] As stated in 36 Hals. (3d) 192.

with two main exceptions described by Lord Cairns in Hill v. Crook.[24] The first departure from the prima facie interpretation is in cases "where it is impossible from the circumstances of the parties that any legitimate children could take under the bequest." Hooper[25] adds "or grant". He gives the example of a gift to children born at the date of the will or deed, and the only children who fulfil that description are illegitimate and are known to the testator or grantor. As to the second departure, Lord Cairns says:[26]

> The other class of cases is of this kind. Where there is upon the face of the will itself, and upon a just and proper construction and interpretation of the words used in it, an expression of the intention of the testator to use the term "children" not merely according to its prima facie meaning of legitimate children, but according to a meaning which will apply to, and will include, illegitimate children.

Hooper goes on to explain that[27] "[t]he maker of a will, as of any other instrument, is entitled to use words in any sense he pleases, provided he makes his meaning clear." There is a third departure in Alberta today. Section 15 of the Wills Act,[28] says:

> In the construction of a will, except when a contrary intention appears by the will, an illegitimate child shall be treated as if he were the legitimate child of his mother.

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[24](1873), L.R. 6 H.L. 265 at 282, and 283.

[25]Supra, footnote 1 at p. 116.

[26]Supra, footnote 24 at p. 283.

[27]Supra, footnote 1 at p. 116.

[28]R.S.A. 1970, c. 393. This exception is mentioned again on page 58 of this paper.

2. A Word about Equity

Equity followed the common law in its treatment of the bastard as *filius nullius*. Hooper[29] gives some examples of the application of this maxim:

> . . . equity would not enforce a use declared in favour of a bastard by a covenant to stand seised. A use raised without the consideration of marriage or lawful relationship was regarded as purely voluntary and was not capable of being executed under the Statute of Uses. . . .
>
> So a gift or settlement in favour of an illegitimate child was not regarded as within the valuable consideration of marriage, but as a purely voluntary transaction liable to be defeated by a subsequent purchaser for value . . . or by creditors . . . Limitations in marriage settlements in favour of illegitimate issue cannot stand if assailed under these statutes, unless failure to give effect to them would mean the defeat of other limitations which are supported by valuable consideration. . . . .
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> So, too, equity has always refused to extend to natural children the aid it gives to legitimate issue in making good formal defects in deeds executed for their benefit. Thus defects in the execution of powers of appointment are not supplied on behalf of natural issue of the donee of the power . . . ; nor will the Court intervene to make good a defective conveyance, or surrender of copyhold, in favour of a bastard child. . . .
>
> Contrary to the general rule that a pecuniary legacy by a testator to his infant child bears interest by way of maintenance from the date of his death, a natural child is not allowed this benefit . . . unless the will expressly directs that interest shall be applied for the child's maintenance or shows a clear intention of treating it as if legitimate. . . .

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[29] Supra, footnote 1 at pp. 112-114.

> The application of the doctrine to the presumptions of advancement and satisfaction leads to results sometimes adverse and sometimes favourable to the bastard. Where property is purchased or placed in the name of a natural child the presumption of a resulting trust which arises in favour of the parent is not rebutted by the mere tie of natural relationship subsisting between them. If, however, the parent has placed himself *in loco parentis* and has treated the child on the footing of a lawful child, then no doubt the presumption of resulting trust gives way to the stronger presumption of advancement for the donee's benefit. . . . On the same principle the presumption in favour of satisfaction and against double portions does not attach in the case of a gift to a stranger or natural child unless the donor has acted *in loco parentis*, or the subsequent advance be given for the express purpose of satisfying a previous obligation. . . . The bastard in this respect gets an undesigned advantage over legitimate issue, who are not as a rule allowed to take double benefits.

There was some relaxation of the rule in custody cases. In 1883, Jessel M.R. took cognizance of the natural relationship of the illegitimate child to the mother, the putative father, and the relations on the mother's side in upholding the mother's claim to custody against strangers.[30]

The principle that equity follows the law remains intact, although the law has undergone change. Our Supreme Court has equitable jurisdiction by virtue of the Judicature Act.[31] Section 32 of this Act provides that where a claim is made in equity the court shall treat the claim in the

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[30] The Queen v. Nash (1883), 10 Q.B.D. 454.

[31] R.S.A. 1970, c. 193.

same manner as would the High Court of Justice in England. The language of the section is current; it may therefore be necessary to look at what the Higher Court is doing today. Within the limits of their jurisdictions, the District and Surrogate Courts have the same equitable jurisdiction as the Supreme Court.[32] As a constitutional matter, it is questionable whether a province can bestow equitable jurisdiction on a provincial court. Neither the Provincial Court Act[33] nor the Family Court Act[34] attempts to do so.

III.
THE LAW TODAY

1. Legitimacy and Legitimation

Simply put, a child born or conceived in lawful wedlock is legitimate. Legitimacy is therefore a function of validity of marriage.

Power on Divorce[35] lists four prerequisites of a valid marriage:

> (1) Legal capacity to enter into the relationship; (2) Capacity to perform the sexual duties of marriage; (3) Freedom of consent; and (4) Compliance with the ceremonial or evidentiary requirements imposed by law as conditions precedent to the existence of the matrimonial status.

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[32]The District Court Act, R.S.A. 1970, c. 111, ss. 12, 13 and 15.

[33]S.A. 1971, c. 86.

[34]R.S.A. 1970, c. 133.

[35]By Julien D. Payne, 2nd Ed. Carswell Co. Ltd., Toronto, 1964, at p. 341.

The first three have to do with essential validity; the fourth, with formal validity. If the second prerequisite is missing, the marriage is voidable. Otherwise, except for the impediment of nonage, it is void *ab initio* (e.g., a bigamous marriage, or a marriage within the prohibited degrees of relationship by consanguinity or affinity as altered by the Marriage Act.[36]

The fact that a child is born or conceived of a lawfully married woman does not foreclose the question of legitimacy, although the child is *prima facie* legitimate if the husband has had opportunity for access. Rebuttal of this presumption of legitimacy, a presumption of fact, is difficult--so much so that the adulterine bastard was almost unknown at common law.

To raise the presumption, it must be possible for a child born after dissolution of the marriage to have been conceived prior to dissolution. A decree of judicial separation reverses the presumption provided the child is born outside the "possible period" measured from the date of the decree. The possible period, that is, the normal period of gestation, is taken to be 270 to 280 days unless there is evidence of the actual gestation period. A separation agreement does not upset the presumption.

The presumption can be rebutted by evidence, which excludes all doubt, that the husband could not be the father. It may be (1) factual evidence showing that sexual intercourse did not take place between the husband and wife during

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[36]R.S.C. 1970, c. M-5. For further discussion see Power, pp. 340-362; see also, Joseph Jackson, The Formation and Annulment of Marriage, London: Sweet & Maxwell Limited, 1951.

the possible period (non-access), or (2) scientific evidence proving that in spite of access the child could not have been fathered by the husband (e.g., blood tests).

The doctrine of the four seas applied until 1811. In that year, the Banbury Peerage case[37] ruled as admissible in proof of non-access evidence satisfying the court that sexual intercourse did not take place. At common law neither husband nor wife could give evidence of non-access to bastardize the child,[38] but the rule has been reversed by statute in Alberta.[39] Every kind of evidence is now admissible including evidence of, for example, the conduct of husband and wife, the husband's impotence at the time of conception, admissions of husband and wife prior to the action, and testimony by the wife's paramour (although he is not a compellable witness).[40]

The onus of disproving the presumption of legitimacy is on the person calling the legitimacy into question. A decree of legitimacy rendered by a court of competent jurisdiction is binding *in rem*; however, a finding necessary to a personal order (e.g., in a custody dispute) is merely binding *inter partes*.

At common law, children of a marriage void *ab initio* are illegitimate. So, too, are children of a voidable marriage which has been avoided. The effect of void and

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[37](1811) Nic. 183.

[38]Russell v. Russell, [1924] A.C. 687.

[39]The Evidence Act, R.S.A. 1970, c. 127, s. 6.

[40]Ibid., s. 8(1).

voidable marriages on legitimacy has been altered by legislation.[41] The Act provides that a child of a voidable marriage continues to be legitimate notwithstanding annulment of the marriage.[42] A child of a marriage void because a spouse presumed dead is alive, is legitimate from birth;[43] so, too, is a child of a marriage void for any other reason if the marriage "was registered or recorded in substantial compliance with the law" of the place of celebration and if either party reasonably believed it to be valid.[44] In an article entitled "Forgotten Fathers: The Rights of the Putative Father in Canada,[45] D. A. Cruickshank says of such a provision: "Legitimation is apparently not possible if the marriage is void by reason of consanguinity or affinity; this is another inexcusable example of misplaced punishment for a victimless offence." It is arguable that section 5 contemplates compliance with formal requirements and does not exclude a marriage void for lack of capacity.

The Legitimacy Act also makes legitimate from birth a child whose parents subsequently marry.[46] Sections 3, 4 and 5 apply to a child born before or after the marriage ceremony, but not to a child born eleven months after the marriage has been annulled or declared to be void.[47]

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[41] The Legitimacy Act, R.S.A. 1970, c. 205.

[42] Ibid., s. 3.

[43] Ibid., s. 4.

[44] Ibid., s. 5.

[45] (1972), 7 R.F.L. 1 at p. 8.

[46] Supra, footnote 41, s. 2

[47] Ibid., s. 6

The legislation acts retrospectively, but does not affect an interest in property vested before enactment or, in the case of marriages after the birth of the child, before the inter-marriage of the parents.[48] Legitimation under sections 2, 4 and 5 is "for all purposes of the law of the Province". This suggests that the province may not be competent to legitimate for all purposes, whether provincial or federal, an otherwise illegitimate person.

Statutory references to legitimation include the Perpetuities Act.[49] Section 9 lays down presumptions about the ability of a person to have a child at some future time. The possibility that a person may have a child by adoption or legitimation shall not be considered.[50]

An illegitimate child may also attain a status equal to that of a legitimate child through adoption.[51] Adoption is provided for in Part 3 of the Child Welfare Act.[52] Application to adopt may be made by an unmarried adult, or by a husband and wife together if at least one of them is an adult, or "if the child is the child of either of them, whether legitimate or illegitimate."[53] Consent of the guardians of the

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[48] Ibid., s. 7.

[49] S.A. 1972, c. 121.

[50] Ibid., s. 9(4).

[51] For a discussion of the Law of Adoption throughout Canada see D. A. Cruickshank, "Forgotten Fathers: The Rights of the Putative Father in Canada" (1972), 7 R.F.L. 1 at pp. 46-60.

[52] R.S.A. 1970, c. 45.

[53] Ibid., s. 49.

child to the adoption is necessary unless dispensed with by the court.[54] The mother is the sole guardian of an illegitimate child; therefore, her consent alone is required under this section. Normally the child assumes the name of the adopting parent.[55] Upon adoption, the child becomes the child of the adopting parent for all purposes, and his relationship with his existing parents ceases. The kinfolk of the adopting parent become the kinfolk of the adopted child (but, for purposes of the laws relating to incest and the prohibited degrees of marriage, not so as to remove any persons from a relationship in consanguinity). Unless the contrary is expressed in the instrument, the words "child", "children" or "issue" are deemed to include an adopted child. The adoption does not affect a property interest vested before the adoption.[56]

2. Incidents of Illegitimacy in Alberta

Legitimacy is a status, that is, "a creature of the law . . . it rests upon a factual basis of character in relation . . . it is created . . . to enable us to deal with and attach rights to certain facts of social importance."[57] Illegitimacy is also a status. It involves a deprivation of some of the rights which attach to the status of legitimacy. In either case, attributes flow from the status independently of the volition of the persons concerned.

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[54] Ibid., s. 54.

[55] Ibid., s. 59.

[56] Ibid., s. 60.

[57] Beale and Others, Marriage and the Domicil (1931), 44 Harv. L. Rev. 501 at 502, quoted in J.-G. Castel, Conflict of Laws (2nd ed.) at 528.

The basic difference between legitimacy and illegitimacy today is this: a legitimate child is the child of his mother and father and legal benefits accrue from his relation to each parent whereas, with rare exception, an illegitimate child has no legal relationship with his father and benefits only from his relation to his mother. Some of the disadvantages of illegitimacy are linked with infancy or other dependency while other disadvantages endure for the lifetime of the illegitimate.

At common law, illegitimacy had the effect of precluding inheritance from lineal ascendants and from collaterals. Modern law indulges in greater regulation of familial relationships and the attendant obligations. Many legislative provisions, explicitly or implicitly, distinguish between the legitimate and the illegitimate.

The discussion below canvasses in Alberta the type of legislation commonly affecting the illegitimate. It does not exhaust the Alberta legislation on children, nor does it include federal legislation.[58] Robert Curtis put together a useful compilation of Alberta legislation on children in the summer of 1972; many of Mr. Curtis' provisions do not vary with legitimacy. Legislation in other provinces is described in the Cruickshank article,[59] and in an article by A. L. Foote.[60] The legislation covered is grouped into

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[58]There are references to relevant federal provisions in the Ontario Law Reform Commission's Report on Family Law, Part III: Children, ch. 1: "Children Born Outside Marriage" (1973), pp. 1-32.

[59]"Forgotten Fathers: The Rights of the Putative Father in Canada" (1972), 7 R.F.L. 1.

[60]"Family Organization and the Illegitimate Child," found in Studies in Canadian Family Law edited by D. Mendes da Costa, vol. 1, ch. 2, p. 45.

these subjects: (i) guardianship, custody and access; (ii) wardship; (iii) maintenance; (iv) succession; and (v) other matters related to parentage.

(1) Guardianship, Custody and Access[61]

At common law, the father was the natural guardian of his legitimate infant child and, as such, was entitled to his custody. Custody in its wide meaning represents "the whole bundle of rights and powers vested in a parent or guardian."[62] In England, it embraces

> . . . the rights to the services of the child to exercise disciplinary powers over him, including that of administering reasonable corporal punishment, and to determine his upbringing, especially the kind of education, religious and secular, that he should receive.[63]

The father's common law right to custody was almost absolute, although toward the end of the nineteenth century the Court of Chancery, in the exercise of its jurisdiction on behalf of the Crown as *parens patriae*, relaxed it somewhat.

In 1839, Talfourd's Act[64] empowered the Court of Chancery

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[61]See H. K. Bevan, The Law Relating to Children London: Butterworths, 1973, ch. 9. The Ontario Law Reform Commission gives a fuller historical account in its Report on Family Law, Part III: Children, at pp. 88-90.

[62]Bromley, Family Law, Butterworth, London, 4th ed., 1971 at p. 268.

[63]H. K. Bevan, The Law Relating to Children, London, Butterworth, 1973, at p. 256.

[64]2 & 3 Vict., c. 54.

to give the mother custody of her legitimate child until the child reached the age of seven. This right was extended in subsequent legislation. Before Talfourd's Act the decision of the court (either in a proceeding at common law instituted by writ of *habeas corpus* or in a proceeding in equity instituted by petition to the Court of Chancery) might allow the mother custody. Eventually, paramount consideration in custody disputes came to be given to the welfare of the child.[65]

The power to order access can also be traced back to Talfourd's Act.[66] It is well established today--if not by legislation, then by application of the principles of equity.[67]

The common law did not accord to either parent the right to custody of an illegitimate child. Guardianship was in the Crown as *parens patriae*. In Re Lloyd[68] Maule J., doubted whether the mother was "anything but a stranger" to her child. The English Court of Appeal was still denying any legal relationship between her and her child in 1883, although in exercising its discretion to award custody, equity looked to the natural relationship with a view to benefit the child. It considered in this order: the mother, the putative father, the mother's relatives, and the guardians nominated by the father.[69]

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[65] Supra, footnote 63, at p. 258.

[66] Ibid., at pp. 299-301.

[67] For a more extensive exposition of the law of access, particularly as it affects the father of an illegitimate child, see Cruickshank, supra, footnote 59, at pp. 29-39, on "Visitation".

[68] (1841), 3 Man. & G. 547.

[69] R. v. Nash, Re Carey (1883), 10 Q.B.D. 454 (C.A.).

> But in Barnardo v. McHugh[70] the House of Lords eventually recognized that, in view of her duty to maintain her illegitimate child up to the age of 16 (under the Poor Law Act 1834, s. 71), it was impossible to deny her a legal right in relation to custody.[71]

According to Cruickshank[72] a line of cases culminating in Re Logue and Burrell[73] has confirmed the principle. The Supreme Court of Canada took this view of the law in Re Baby Duffell: Martin v. Duffell:[74]

> It is . . . well settled that the mother of an illegitimate child has a right to its custody, and that, apart from statute, she can lose such right only by abandoning the child or so misconducting herself that in the opinion of the Court her character is such as to make it improper that the child should remain with her.

Mrs. Anne Russell traces the history of the English and Alberta law on guardianship and custody in her paper on Guardianship written for the Institute.[75] Cruickshank also treats the law of guardianship.[76]

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[70] [1891] A.C. 388.

[71] Supra, footnote 63, at p. 302.

[72] Supra, footnote 59, at pp. 18-23 and also see fn. 74 of the same.

[73] (1971), 15 D.L.R. (3d) 129 (Ont. C.A.).

[74] [1950] S.C.R. 737 at 744, per Cartwright J.

[75] Anne H. Russell, "Guardianship" 1973 at pp. 25-33.

[76] Supra, footnote 59, at pp. 27-28.

Guardianship is now dealt with in Part 7 of the Domestic Relations Act.[77] Subject to the power of the court to appoint guardians, the mother is the sole guardian of an illegitimate infant; the father and mother are the joint guardians of their infant.[78] A parent may appoint a person to be guardian of an infant after the parent's death and the testamentary guardian so appointed acts in the place of that parent as guardian.[79] "Parent" is not defined. It is questionable whether it includes the father of an illegitimate child. If it does, Mrs. Russell[80] sees this incongruous result: the father, during his lifetime, is not a guardian of his illegitimate infant,[81] but nevertheless he may appoint a person to be guardian upon his death.[82]

Section 39 of the Domestic Relations Act may be limited to guardianship of the person because on a literal reading of section 7 of the Public Trustee Act,[83] the Public Trustee is guardian of the estate of an infant if letters of guardianship have not been issued. Section 7 of the Public Trustee Act says:

> (1) Notwithstanding anything contained in any other Act, any money other than

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[77] R.S.A. 1970, c. 113.

[78] Ibid., s. 39.

[79] Ibid., s. 40.

[80] Supra, footnote 75, at p. 56.

[81] Domestic Relations Act, R.S.A. 1970, c. 113, s. 39.

[82] Ibid., s. 40.

[83] R.S.A. 1970, c. 301.

> wages or salary and any property to which an infant is entitled under an intestacy or under a will, settlement, trust deed, or in any other manner whatsoever, and for whose estate no person has been appointed guardian by the issue of letters of guardianship, shall be paid or transferred to the Public Trustee.
>
> (2) The Public Trustee shall account to the infant according to the provisions of the law, will or trust instrument, as the case may be.

Mrs. Russell examines this question in her paper on Guardianship.[84]

Custody is also dealt with in Part 7 of the Domestic Relations Act. Unless his authority is otherwise limited, the guardian "shall have the custody of the person of the infant and the care of his education."[85] Under section 46 of the Domestic Relations Act application may be made by the father or mother of an infant, or by the infant himself, for an order as to the custody of the infant and the right of access of either parent. In making an order, the court must look at the welfare of the infant, and the conduct and wishes of the parents. Mrs. Russell says:[86]

> Under the common law an infant has long been able to make application for its own guardianship (*ex parte* Edwards (1747) 3 Atk. 519; Re Brown's Will, Re Brown's Settlement

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[84] Supra, footnote 75, pp. 118-123.

[85] Supra, footnote 83, s. 52(2)(d).

[86] Supra, footnote 75, pp. 90-91.

> (1881) 18 Ch.D. 61 (C.A.)) but Halsbury states that even this power is ill defined and very narrowly exercised.

The question of the jurisdiction of the court under section 46 of the Domestic Relations Act to entertain an application by the father for custody of his illegitimate child was raised in the recent case of Nelson v. Findlay and Findlay.[87] McDonald J. found jurisdiction. Referring to the majority judgment in White v. Barrett[88] delivered by McDermid J.A., he says:[89]

> I adapt the reasoning of Clement J.A. [stet] to the interpretation of s. 46 of The Domestic Relations Act. In my opinion the ordinary meaning of "father" in that section, both when the section was first enacted in 1927, c. 5, s. 68, and today, includes "natural father", and prima facie that is the meaning to be ascribed to "father". The mere fact that The Domestic Relations Act is principally concerned with matters arising between married persons does not displace that prima facie meaning. The immediate context of the section is Pt. 7 of the statute. Part 7 is entitled "Guardianship". One of the sections in that Part is s. 39, which expressly deals with the guardianship of an illegitimate child. Clearly the Legislature did not intend Pt. 7 to be concerned only with children produced by marital relationships.

In 1962, the Saskatchewan Queen's Bench construed a section akin to section 46 of the Alberta Domestic Relations

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[87] [1974] 4 W.W.R. 272.

[88] [1973] 3 W.W.R. 298.

[89] Supra, footnote 87, p. 274.

Act to permit the father of an illegitimate child to apply for access.[90] The Ontario Court of Appeal has also construed a similar section to permit application for access.[91] Jurisdiction in Ontario is in the Surrogate Court. The case of Re Baby Duffell[92] established the jurisdiction of this court to hear the mother's application in respect of her illegitimate child.

Writing before Nelson v. Findlay was decided, Mrs. Russell argues[93] that Re Alderman is inapplicable in Alberta because our Domestic Relations Act is specific that the mother of an illegitimate child is its sole guardian;[94] the Saskatchewan Infants Act was silent. Then, too, in Saskatchewan the rules of equity prevailed in all questions relating to the custody of infants,[95] whereas in Alberta they prevail when they do not conflict with the Domestic Relations Act.[96] The Act does not appear to contemplate the father of an illegitimate child since it is specific that guardianship is in the mother alone. This being so, the Act takes precedence over any rule of equity which otherwise may permit a putative father to apply. Neither of Mrs.

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[90] Re Alderman (1962), 32 D.L.R. (2d) 71; Infants Act, R.S.S. 1953, c. 306, s. 2.

[91] Re Cresby (1970), 21 D.L.R. (3d) 166; Infants Act, R.S.O. 1960, c. 187, s. 1(1).

[92] [1950] S.C.R. 737.

[93] Supra, footnote 75, pp. 91-93.

[94] Vandenberg v. Guimond (1968), 66 W.W.R. 408 (Man.C.A.).

[95] Queen's Bench Act, R.S.S. 1965, c. 73, s. 44(11).

[96] Supra, footnote 77, s. 51.

Russell's arguments appears to have been made before McDonald J., and the case of Vandenberg v. Guimond is not cited.

Equitable jurisdiction may require the court, as *parens patriae*, to decide what is best for the infant irrespective of how the matter comes before the court.[97]

The status of the father of an illegitimate child to apply for custody or access was examined closely in the 1972 work of the Director of the Institute and Gerritt Clements.

Sections 47 and 49 of the Domestic Relations Act are concerned with custody disputes between a parent or other responsible person and a third party. "Other responsible person" means "a person legally liable to maintain an infant or entitled to the custody of an infant." The court is given wide discretion to refuse an application by a parent or other responsible person for custody.[98] An order for delivery of the infant to the applicant must be for the welfare of the infant.[99] Once again, it is doubtful that the father of an illegitimate child qualifies as "parent". His standing as an "other responsible person" will depend on his ability to fit within the definition.

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[97] Sara v. Sara (No. 2) (1964), 46 W.W.R. 125 (B.C.C.A.) referring to De Manneville v. De Manneville (1804), 10 Ves. J. 52; 32 E.R. 762.

[98] Supra, footnote 77, s. 47. Two lines of judicial interpretation concerning the effect of section 47 of the Domestic Relations Act on the equitable jurisdiction of the Court of Chancery are discussed in Mrs. Russell's paper on Guardianship, supra, footnote 75, pp. 100-106.

[99] Supra, footnote 77, s. 49.

Section 50 of the Domestic Relations Act allows the court, in awarding custody, to consider the religion in which a child ought to be brought up. It is dealt with under "other matters related to parentage".

Throughout Part 7 of the Domestic Relations Act "court" means the Supreme Court of Alberta, or a judge of the Surrogate Court sitting in chambers.[100]

The Family Court also has jurisdiction in custody disputes. A judge of the Family Court has discretion to make an order regarding the custody of and the right of access to a child whose parents are in fact living apart. Application may be made by either parent or the child himself. In making the order, the judge must have regard to the best interests of the child. The order is void to the extent that it is in variance with an order of a superior court.[101]

In White v. Barrett[102] the Appellate Division of the Supreme Court of Alberta held that the Family Court has jurisdiction under section 10 of the Family Court Act to entertain an application by the father of an illegitimate child for access, but had doubts as to the Family Court's jurisdiction over custody. The issue whether a judge of the Family Court has competence to exercise equitable jurisdiction is not raised. The Family Court Act does not purport to confer this jurisdiction. On one view, the *prima*

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[100] Supra, footnote 77, s. 37.

[101] The Family Court Act, R.S.A. 1970, c. 133, s. 10.

[102] [1973] 3 W.W.R. 293.

facie right of the mother of an illegitimate child to its custody can only be overridden by the application of equitable principles .[103] This was the position taken by Judge Hewitt in Wensley v. Orchard.[104]

Cruickshank[105] identifies five situations where the father of an illegitimate child may want to bring a custody action:

> (1) Against the mother who wants to keep her child.
>
> (2) To assert parental rights upon the death of the mother.
>
> (3) Against a third party with *de facto* custody (usually the mother's relatives).
>
> (4) To prevent a child welfare agency from completing protection proceedings.
>
> (5) To prevent the mother, an agency, and adoptive parents from completing an adoption.

This breakdown is helpful.

(2) Wardship

In England, the establishment of a civil jurisdiction to deal with children living in undesirable conditions began

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[103]Memorandum dated June 12th, 1972, by R. J. Poole, Solicitor, Department of the Attorney General, pp. 26 et seq.

[104]Edmonton Family Court, 24 July 1970, unreported.

[105]Supra, footnote 59, p. 15.

with the Industrial Schools Act 1857 (replaced by an Act of the same name in 1866). This care jurisdiction, together with that granted under the Elementary Education Act 1876 to deal with failure to comply with a school attendance order, was re-enacted and extended in the Children Act 1908. The Industrial Schools Acts embraced "children who were vagrants or were found begging or destitute or who, being inmates in a poor law institution, were refractory or whose parents were unable to control them" and "such children could be sent to an Industrial School for care, education and training."[106]

Care jurisdiction in Alberta today is contained in Part 2 of the Child Welfare Act.[107] This Part is concerned with neglected and dependent children. The procedure whereby such children may become wards of the Crown is described below. It is important to an examination of the legal relationship existing between an illegitimate child and his father.

The definition of "neglected child" is wide. It means a child in need of protection,[108] and includes:

> (xiv) a child who is not under proper guardianship or who has no parent
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> (A) capable of exercising, or
>
> (B) willing to exercise, or

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[106] Supra, footnote 63, at pp. 4 and 19.

[107] R.S.A. 1970, c. 45.

[108] Ibid., s. 14(e).

> (C) capable of exercising and willing to exercise,
>
> proper parental control over the child;
>
> (xv) a child whose parent wishes to divest himself of his parental responsibilities toward the child.

"Parent" includes a step-parent.[109] "Judge" means[110]

> (i) a judge of a district court, or
>
> (ii) a judge of the juvenile court, except in connection with permanent wardship orders, or
>
> (iii) a judge of the Supreme Court acting under section 27 [appeal from an order of a district or juvenile court judge] or upon a further hearing where he has directed a continuation of temporary wardship.

A child may be apprehended without a warrant where there are reasonable and probable grounds for believing that he is a neglected child.[111] Following apprehension, a hearing shall be held to determine whether the child is in fact a neglected child.[112] Notice "shall be served personally upon a parent or guardian of the child" and

> . . . the judge shall not proceed to hear and dispose of the matter until he is

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[109] Ibid., s. 14(f).

[110] Ibid., s. 14(d).

[111] Ibid., s. 15.

[112] Ibid., s. 18.

> satisfied that the parents or guardian and the Director [of Child Welfare] have been notified of the hearing, or that every reasonable effort has been made to give the notifications.[113]

Notwithstanding the above, the judge may authorize a form of substituted service, and accept less than the ten days' notice prescribed, or dispense with service of notice.[114] Persons unconnected with the case are excluded from the hearing.[115] If the child is not neglected, the judge may direct his return to the person from whose care he was apprehended.[116] If the child is neglected, the judge may adjourn the case for not longer than twelve months at a time and order the child returned home subject to inspection and supervision by a child welfare worker.[117] As a second alternative, the judge "may commit the child to the custody of the Director as a temporary ward of the Crown" for not more than twelve months.[118] On review of an order of temporary wardship, section 22 or 23 of the Child Welfare Act[119] may be applied, or the judge may make a further order under section 24. The third alternative is an order of permanent wardship. Where the Director is of the opinion that a child should be made a permanent ward of the Crown:

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[113] Ibid., s. 19(1).

[114] Ibid., s. 19(2).

[115] Ibid., s. 20.

[116] Ibid., s. 22(1).

[117] Ibid., s. 23.

[118] Ibid., s. 24.

[119] Ibid.

> . . . if the judge finds that the child is a neglected child and if it appears to the judge that the public interest and the interest of the child may best be served thereby, the judge may, by order, commit the child permanently to the custody of the Director as a permanent ward of the Crown.[120]

The judge also has the option of making one of the orders described above.[121] Persons liable under the law may be ordered to contribute to the support and maintenance of a child who has been made a temporary or permanent ward.[122] Any order made by a judge of the District Court or the Juvenile Court may be appealed to the judge of the Supreme Court.[123] Extra-provincial orders and evidence have force and effect in Alberta.[124]

A child may also become a permanent ward of the Crown by voluntary surrender of custody to the Director by a parent for the purpose of adoption[125] and this surrender binds the father of an illegitimate child who subsequently marries the mother.[126]

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[120] Ibid., s. 26(2).

[121] Ibid., s. 26(3).

[122] Ibid., s. 26(1).

[123] Ibid., s. 27.

[124] Ibid., s. 29.

[125] Ibid., s. 30.

[126] Ibid., s. 30(3).

The Director of Child Welfare is the guardian of a ward of the Crown, and this is notwithstanding the Domestic Relations Act.[127] An order of wardship takes precedence over any other order for custody.[128] Efforts must be made to bring a ward up in his own religious denomination or faith, but the Minister has power to certify "that he is satisfied that the best interests of the child require that the placement of the child no longer be governed by religious denomination or faith".[129] "A parent or person who is guilty of an act or omission contributing to a child being or becoming a neglected child or likely to make him a neglected child is guilty of an offence" and liable to fine or imprisonment or both.[130]

The recent case of Regina v. Gingell (Gingel)[131] establishes that the father of an illegitimate child is not a parent within Part 2 of the Child Welfare Act, and therefore is not entitled to notice of wardship proceedings under the Child Welfare Act.[132] He may nevertheless have a right of appeal as a person in whose care the child may have been at the time of its apprehension; and if he can show this right, he may adduce evidence and be heard on the question in

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[127] Supra, footnote 77, s. 31.

[128] Ibid., s. 32.

[129] Ibid., s. 34.

[130] Ibid., s. 43.

[131] [1973] 6 W.W.R. 678 (Alta. C.A.).

[132] Supra, footnote 107, s. 19(1).

issue.[133] White v. Barrett[134] is distinguished, as is Re Lyttle,[135] a case in which adoption proceedings were stayed pending hearing of the application of a father for custody of his illegitimate son who had been surrendered to the Children's Aid Society by the mother and made a ward of the Crown without notice to the father.

Cullen J., who heard the appeal from the Juvenile Court,[136] had said;

> . . . my interpretation of the definition of the word "parent" in The Child Welfare Act is that it should be a person identifiable as a parent, and in that context should be confined to mean and include:
>
> 1. The mother of a child (whether legitimate or illegitimate).
>
> 2. The father of a legitimate or legitimated child.
>
> 3. The step parent, being the person married, by a subsequent marriage, to the lawful parent of the child.
>
> 4. Those persons who by a paternity order of the court or by a paternity agreement have acknowledged and identified their parenthood.

The judgment of the Appellate Division does not endorse his interpretation.

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[133] Under s. 27(1) of the Child Welfare Act.

[134] Supra, footnote 102.

[135] (1973), S.C.R. 568 (Ont.).

[136] Reported as Re K.R.G. and A.J.M., [1973] 4 W.W.R. 732.

While Gingell[137] was on appeal, Legg D.C.J. gave judgment in Re N.V.C.[138] He, too, concludes that the father of an illegitimate child is not entitled to notice of wardship proceedings under the Child Welfare Act.[139] He goes on to find that the father does not have any status of any nature before the court; nevertheless, the court may hear him:

> I can visualize cases in which it would be in the best interests of the child to have the putative father represented by counsel. I am of the opinion that a discretion lies in the court to allow the putative father or any other person to be represented and take part in the proceedings. The courts have exercised this discretion in other branches of the law, particularly in probate matters. However, the onus rests with the putative father to make application to the court to be heard and to be represented, and demonstrate to the court reasons why it should exercise its discretion in his favour. Failing this, the putative father has no status before the court in wardship proceedings.[140]

(3) Maintenance

The common law "imposed no direct civil liability on the father to maintain his legitimate child. Consequently, he was not liable for any debt incurred by the child, even a debt arising from the supply of necessaries, unless he had

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[137] Supra, footnote 131.

[138] [1973] 5 W.W.R. 257.

[139] Supra, footnote 107, s. 19(1).

[140] Supra, footnote 138, at p. 262.

given the child authority to incur it or had contracted to pay it."[141] As right to custody became recognized in the mother, she, too, was exempt from liability to maintain.

The same was true for an illegitimate child. The father could accept liability for the support of the child by contracting with the mother. However, the agreement could not bar affiliation proceedings.[142]

The common law did lay down a duty to protect "whenever anyone old enough to be held legally responsible assumes the care of someone who, because of immaturity or disability, is unable to look after himself." This duty is "a natural incident of parenthood."[143] Once the duty to protect was established, wilful neglect to provide adequate food, clothing, medical aid or lodging gave rise to criminal liability.[144]

"The inadequacy of the common law led to the creation of a statutory duty on the parent to maintain the child as part of the Poor Law of Elizabeth I."[145] This duty has been carried forward to the present day. Section 3 of the Maintenance Order Act[146] provides in subsection (2): "The

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[141] Supra, footnote 63, at p. 453.

[142] Ibid., p. 454.

[143] Ibid., p. 175.

[144] Ibid., p. 455.

[145] Ibid. See also Poor Relief Act 1601.

[146] R.S.A. 1970, c. 222.

father of, and mother of, a child under the age of sixteen years shall provide maintenance, including adequate food, clothing, medical aid and lodging, for such child." This Act also places an obligation on family members (husband, wife, father, mother, grandfather, grandmother, children, grandchildren), who are able, to provide maintenance for a disabled or destitute person.[147] "Child" includes the child of a husband or wife by a former marriage, but excludes an illegitimate child.[148] The illegitimate, therefore, does not benefit from the duty to support imposed by this legislation. In turn, he is not obliged to maintain his parents and grandparents when they are ailing or destitute.

The main provisions for maintenance of the illegitimate child are in Part 2 of the Maintenance and Recovery Act.[149] The obligation to maintain is determined in conjunction with affiliation proceedings. Under this Part, the putative father may be identified and rendered civilly liable for the support of his illegitimate child. Yet he acquires no rights in relation to the child.

In his article on "Family Organization and the Illegitimate Child"[150] A. L. Foote says "the legislation in Canada indicates that the obligation to maintain an illegitimate child is also a matter of substantial public interest." He supports his statement by pointing out the following:

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[147] Supra, footnote 146, s. 3(1) and (3).

[148] Ibid., s. 2(a).

[149] R.S.A. 1970, c. 223.

[150] Supra, footnote 60, pp. 53-54.

(1) designated public officials [in Alberta, the Director of Maintenance and Recovery] may initiate the action;[151]

(2) appropriate public officials [the Director of Maintenance and Recovery] may be called upon to provide aid and advice to unmarried mothers;[152]

(3) there is control over out-of-court arrangements for a child's support; and[153]

(4) identification of the actual father is not necessary to succeed in an action.[154]

There is a fifth factor in Alberta:

(5) the Director of Maintenance and Recovery must be notified of proceedings, and may retain counsel for a complainant, or appear and intervene in the action.[155]

Apart from the Director, a complaint may be made by the mother, or by the next friend or guardian of the child.[156] "Mother" is defined to mean:[157]

(i) a single woman who has been delivered of a child or who is pregnant and likely

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[151] Supra, footnote 149, s. 13(1)(c).

[152] Ibid., s. 9.

[153] Ibid., s. 10.

[154] Ibid., s. 18(2).

[155] Ibid., s. 13(3) and (4).

[156] Ibid., s. 13(1)(a) and (b).

[157] Ibid., s. 7(c).

to be delivered of a child or who was pregnant and the pregnancy terminated without the birth of a child, or

(ii) a widow who

(A) has been delivered of a child, or

(B) is pregnant and likely to be delivered of a child,

12 months or more after the death of her husband, or

(iii) a married woman living apart from her husband who

(A) has been delivered of a child, or

(B) is pregnant and likely to be delivered of a child,

12 months or more after she ceased cohabiting with her husband, or

(iv) a woman mentioned in subclause (i), (ii) or (iii) who has married or resumed cohabitation with her husband, and

(A) who may make a complaint or continue proceedings pursuant to section 14, subsection (3), or

(B) who incurred the expenses mentioned in section 21, subsection (1), clause (a) and who married or resumed cohabitation with her husband before the making of an order or the entering into of an agreement,

or

(v) a married woman who has been delivered of a child,

(A) where a person other than her husband admits that he is the father of the child, or

(B) where a court has found that the woman's husband is not the father of the child.

The complaint must be made within the lifetime of the putative father (the person alleged to have caused the pregnancy) and not later than 24 months after the birth of the child, or within 12 months after an act of acknowledgement by the putative father, or his return to Alberta.[158] Ordinarily, the putative father is served with a summons, although a judge may issue a warrant for his arrest. A warrant for arrest may also be issued for non-appearance without just excuse.[159] There is another consequence of non-appearance: if the complainant wants, the judge may hear the evidence and make any order he could have made had the putative father appeared; however, the declared father has 30 days from the date of the order to apply for a rehearing which may be directed in the discretion of the judge.[160] "Judge" means a judge of the District Court.[161] Special evidentiary provisions are contained in section 19 of the Maintenance and Recovery Act.

These proceedings may result in an order declaring the putative father or fathers (where the judge is satisfied that any one of a number of persons named in a complaint caused the pregnancy) to be the father for the purposes of Part 2 of the Maintenance and Recovery Act.[162]

A person declared to be father may be ordered to pay expenses related to the pregnancy and the illegitimate child.

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[158] Ibid., s. 14(1).

[159] Ibid., s. 15.

[160] Ibid., s. 16.

[161] Ibid., s. 7(b).

[162] Ibid., s. 18.

Likewise, the mother may be ordered to contribute toward the expenses, whether or not there is a declaration as to paternity.[163] This includes the reasonable expenses for the maintenance and care of the mother for a time before and after delivery, a monthly sum for the maintenance and education of the child until he attains the age of 16, or 18, if he is attending school or incapable of earning his own living, burial expenses for mother or child, and the costs of proceedings.[164] Consideration shall be given to the ability of the mother and of the declared (or, in the case of an agreement, the putative) father to pay;[165] and to the probable standard of living the child would have enjoyed had he been legitimate.[166] Liability may be satisfied by payment of a specified sum, even though that sum is payable in periodic instalments.[167] An order or agreement made pursuant to the Maintenance and Recovery Act may be varied under section 22, or terminated under section 23 of the Act. Liability for payment of a monthly sum towards the maintenance and education of a child terminates automatically on death or adoption of the child, or when the mother marries, or resumes cohabitation with her husband, and retains custody of the child.[168] However, when the mother retains custody

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[163] Ibid., s. 20.

[164] Ibid., s. 21(1).

[165] Ibid., s. 21(2).

[166] Ibid., s. 21(3).

[167] Ibid., s. 21(4).

[168] Ibid., s. 23(1).

the order or agreement may be reinstated by a judge.[169] Section 23 of the Maintenance and Recovery Act does not affect a provision for satisfaction of liability by payment of a specified sum.[170] A judge may require security for future performance of an order or variation, and commit to jail for failure to furnish the security.[171] Payments are to be made to the Director or to such person as the Director directs.[172] The lands of a person in default may be bound by registration in the land titles office of the order or agreement; registration takes effect like a charge of a life annuity on the land.[173] An order or agreement binds the estate of the declared or putative father after his death.[174] There is no abridgment of other remedies against the father of a child born out of wedlock.[175]

Collection of monies payable under an order or agreement is covered in Part 4 of the Minatenance and Recovery Act. The Director is responsible for enforcement.[176] Jurisdiction is in the District Court.[177] Sections 61 to 70 of

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[169] Ibid., s. 23(2).

[170] Ibid., s. 23(7).

[171] Ibid., s. 24.

[172] Ibid., s. 25.

[173] Ibid., s. 26.

[174] Ibid., s. 27.

[175] Ibid., s. 32.

[176] Ibid., s. 60.

[177] Ibid., s. 59(a).

the Act lay down the procedure and penalties.

A. L. Foote[178] points out that all children, illegitimate in fact, are not protected by this legislation: the child of a widow must be born 12 months or more after the death of her husband; and the child of a married woman living apart from her husband, 12 months or more after the cessation of cohabitation.

In her paper on Illegitimacy[179] Mrs. Russell names three ways that the mother of an illegitimate child under the Maintenance and Recovery Act is in a better position that the mother of a legitimate child under section 27 of the Domestic Relations Act:

> (1) the father may be required to pay for her maintenance and care for a time before and after delivery;
>
> (2) the father may be required to pay a reasonable sum for the care and maintenance of the child before the date of the order or agreement, that is, the order may provide for a retroactive payment; and
>
> (3) the father's estate may be bound by registration of the order or agreement in the land titles office.

The question of maintenance for the illegitimate child may be raised in the context of legislation unconnected with affiliation under the Maintenance and Recovery Act. Such legislation is canvassed in the paragraphs.

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[178] Supra, footnote 60, pp. 55-56.

[179] Supra, footnote 75, pp. 35-36.

Section 27 of the Domestic Relations Act[180] provides a summary procedure for obtaining a "protection order" from a magistrate. ("Magistrate" is defined in the Interpretation Act,[181] and means "a provincial judge appointed under the Provincial Court Act".) It appears to be confined to legitimate children. Application may be brought by a married woman deserted by her husband for maintenance for "his wife and children".[182] The court may restrict its order to the maintenance of the children.[183] A married woman who has not been deserted may apply for maintenance of "their children in her care".[184] A divorced woman may apply for maintenance of "legitimate children of herself and her divorced husband" in her care or custody where there is no other order for their maintenance.[185]

In contrast, section 46(5) of the Domestic Relations Act may embrace the illegitimate child. Section 46 is discussed above in connection with custody. Subsection (5) of section 46 of the Domestic Relations Act enables the court, on an application for custody, to make an order for the maintenance of the infant "by the father or by the mother, or out of an estate to which the infant is entitled."

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[180] Supra, footnote 77.

[181] R.S.A. 1970, c. 189, s. 21(1).16 (am. S.A. 1971, c. 86, s. 19).

[182] Supra, footnote 77, s. 27(1) to (4).

[183] Ibid., s. 27(6).

[184] Ibid., s. 27(5).

[185] Ibid., s. 27(7).

This subsection will include the father of an illegitimate child if the custody provisions are so construed.

Section 48 of the Domestic Relations Act provides that the court may order a successful applicant (parent or other responsible person) for custody to pay the cost incurred by another person, or a school or institution in bringing up the infant. The position in respect of an illegitimate child is open for construction.

The Infants Act[186] protects the property of an infant, but permits applications for the maintenance, education or other benefit of the infant from his estate. Its significance for the illegitimate, particularly with respect to the position of his father, is dealt with later.

The Social Development Act,[187] provides for the payment of a social allowance to "a person who is unable to provide the basic necessities for himself and his dependants, if any."[188] The social allowance is to be " in an amount that will be adequate to enable the person to obtain the basic necessities for himself and his dependants.[189] "Dependant" means "a child who is dependent for support" by reason of age (under 16), attendance at an educational institution, mental or physical incapacity, or

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[186] R.S.A. 1970, c. 185.

[187] R.S.A. 1970, c. 345.

[188] Ibid., s. 2(f) and (g) and ss. 6 and 7.

[189] Ibid., s. 11(2).

unemployability.[190] A social allowance may also be issued on behalf of a child whose "parents are unable or unwilling to properly care for their child" and who is being "properly cared for in the home of another person or in an institution."[191] The words "child" and "parent" are not defined. It may be asked whether they take in the relationship between an illegitimate child and his father.

Part 3 of the Maintenance and Recovery Act provides for recovery, either by agreement to repay or pursuant to court order, of an overpayment of a social allowance.[192] Section 56 of the Act deals with recovery of the payment of a social allowance for maintenance of a dependent child:

> (1) Where the parents of a child fail to provide adequate maintenance for their dependent child for whom a social allowance is being or has been paid under The Social Development Act, either or both parents may enter into an agreement with the Director to pay maintenance for the child in a manner agreed upon.
>
> (2) If no agreement to pay is entered into by a parent or upon the failure of a parent to comply with the terms of an agreement, the Director may make an application to a magistrate for an order for maintenance and sections 27 to 30 of The Domestic Relations Act apply *mutatis mutandis* and all proceedings shall be conducted in the same manner and to the same effect as if the application in respect of maintenance were made by a wife where the application is restricted to the maintenance of a child.

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[190] Ibid., s. 2(bl).

[191] Ibid., s. 8(1).

[192] Supra, footnote 149, ss. 35 and 42.

> (3) Where no agreement to pay is entered into by a parent and the parent is resident outside Alberta, the Director may, on behalf of the dependent child apply under section 5 of The Reciprocal Enforcement of Maintenance Orders Act for a provisional maintenance order against that parent.

The cross references in the Maintenance and Recovery Act (Part 3) to the Social Development Act, the Domestic Relations Act (protection order sections) and the Reciprocal Enforcement of Maintenance Orders Act[193] (application by a dependant resident in Alberta for a maintenance order against a person resident in a reciprocating state) suggest that the words "parent" and "child" have the same meaning in all of these provisions. If section 27 of the Domestic Relations Act applies only to legitimate children, a view which the language of the section supports, the other legislation may be similarly interpreted.

Under the Family Relief Act,[194] "child includes an illegitimate child of the deceased person. The tests for paternity are acknowledgement by the deceased man and declaration by an order under the Maintenance and Recovery Act or a predecessor.[195] Children of a marriage void because a spouse presumed dead was in fact alive have rights under the Family Relief Act as if the void marriage had been valid.[196] An illegitimate child may therefore

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[193] R.S.A. 1970, c. 313.

[194] R.S.A. 1970, c. 134.

[195] Ibid., s. 2(b).

[196] Ibid., s. 3

qualify as a dependant for proper maintenance and support out of the estate of his deceased mother or father.[197]

Three Alberta statutes which provide for compensation to family members in cases of mishap cover illegitimate offspring.

The Criminal Injuries Compensation Act[198] defines "child" to include an illegitimate child and a child with respect to whom a victim stands *in loco parentis*;[199] "dependant" means a spouse, child or other relative of a deceased victim who was, in whole or in part, dependent upon the income of the victim at the time of his death and includes a child of the victim born after his death.[200] The Crimes Compensation Board may order the payment of compensation to a person who is responsible for the maintenance of a victim for that person's expenses related to the injury, or to any one or more of the dependants of the victim.[201] The father of an illegitimate child could be a person responsible for the maintenance of a victim; an illegitimate child could be his dependant. "Pecuniary loss to dependants as a result of the victim's death" is specifically listed as a matter in respect of which compensation may be awarded. So, too, is "maintenance

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[197] Ibid., ss. 2(d) and 4.

[198] R.S.A. 1970, c. 75.

[199] Ibid., s. 2(1)(b).

[200] Ibid., s. 2(1)(c).

[201] Ibid., s. 7(1)(d) and (e).

of a child born as a result of rape,[202] giving a child illegitimate for this reason a source of maintenance unavailable to any other child.

The Fatal Accidents Act[203] gives a cause of action for damages for the benefit of members of the family of a person whose death was caused by wrongful act, neglect or default. The action lies in each case where the tort-feasor would have been liable to the injured party if he had lived.[204] A child of the injured party is one of the persons who may be benefited, and "child" includes an illegitimate child.[205] A parent may be benefited, too, but it is not clear from the definition whether "parent" includes the father of an illegitimate child.[206]

The Workers' Compensation Act[207] gives a right to compensation for personal injury or death to a worker caused "by accident arising out of and during the course of employment". "Child" includes an illegitimate child;[208] "'dependants' means such of the members of the family of a worker as were wholly or partially dependent upon his earnings at the time of his death or who, but for the

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[202] Ibid., s. 13(1)(c) and (d).

[203] R.S.A. 1970, c. 138.

[204] Ibid., ss. 3 and 4.

[205] Ibid., s. 2(a).

[206] Ibid., s. 2(b).

[207] S.A. 1973, c. 87, s. 16.

[208] Ibid., s. 1.5.

incapacity due to the accident, would have been so dependent" --although a partial dependant must have been dependent partially on contributions from a worker "for the provision of the ordinary necessaries of life";[209] and "'member of a family' . . . where the worker is the parent or grandparent of an illegitimate child, includes such child and where the worker is an illegitimate child includes each of his parents and grandparents."[210] The Workers' Compensation Board has exclusive jurisdiction to determine all matters arising under the Act.[211] The old Workmen's Compensation Act[212] declared the jurisdiction to extend to determining the existence of the relationship of any member of the family of an employer or of a workman and the existence of dependency,[213] but these subsections are not reenacted in the new 1973 Act.

Pension legislation may affect children. None of the pension statutes in Alberta is explicit on the position of the illegitimate:

The Public Service Pension Act[214] names "a dependent child under the age of 18 years" as a person who may be "the

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[209] Ibid., s. 1.9.

[210] Ibid., s. 1.19.

[211] Ibid., s. 12(1).

[212] R.S.A. 1970, c. 397.

[213] Ibid., s. 10(9)(g) and (h).

[214] R.S.A. 1970, c. 299.

beneficiary of a deceased employee or a deceased former employee who had elected to receive a deferred pension."[215] The employee may designate a beneficiary or beneficiaries.[216] If he designates an individual, the matter is one of identification. If he designates by class, for example "my children", legitimacy or illegitimacy might come into dispute. "Child" is not defined in the Act, nor is "dependant".

The Public Service Management Pension Act[217] contains comparable sections.[218]

There is no mention of children in the Local Authorities Pension Act.[219] The Lieutenant Governor in Council may by regulation "prescribe the alternative types of pension payments that may be made under the pension plan.[220] In addition, he may "declare that any provision of the Public Service Pension Act is, with such modifications as he considers necessary, applicable."[221]

The Teachers' Retirement Fund Act[222] makes no reference

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[215] Ibid., s. 28(3)(b).

[216] Ibid., s. 27.

[217] S. A. 1972, c. 81.

[218] Ibid., ss. 28 and 29(3)(b).

[219] R.S.A. 1970, c. 219.

[220] Ibid., s. 9(e).

[221] Ibid., s. 9(g).

[222] R.S.A. 1970, c. 361.

to children. The Board of Administrators of the Fund may, by by-law, "provide for . . . pensions payable jointly to a teacher and his nominee";[223] "determine to whom shall be made payment of amounts which may become payable . . . following the death of a pensioner or teacher";[224] and, "generally regulate all payments out of the Fund and all matters related thereto".[225] A by-law must be approved by the Lieutenant Governor in Council to have effect.[226]

Insurance legislation may also affect the illegitimate:

Part 6 of the Alberta Insurance Act[227] deals with life insurance. In this Part, "family insurance" is defined as "insurance whereby the lives of the insured and one or more persons related to him by blood, marriage or adoption are insured under a single contract between an insurer and the insured."[228] Relationship by blood may contemplate the illegitimate in his relationship with his father, but there is room for doubt.

The meaning of the expression "insurable interest" is relevant, too. Without restricting the meaning, a

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[223] Ibid., s. 42(b).

[224] Ibid., s. 42(e).

[225] Ibid., s. 42(j).

[226] Ibid., s. 43(1).

[227] R.S.A. 1970, c. 187.

[228] Ibid., s. 228.7.

person has an insurable interest in the life of his child or grandchild; any person upon whom he is wholly or in part dependent for, or from whom he is receiving support or education; and any person in the duration of whose life he has a pecuniary interest.[229] "Child" is not defined, and it is not clear whether a father has an insurable interest in his illegitimate child's life. The illegitimate child will have an insurable interest in the life of his father if the father is contributing to his support. Either father or child may have a pecuniary interest in the life of the other in some circumstances.

In Part 8 of the Alberta Insurance Act similar provisions for accident and sickness insurance are related to "life and well-being".[230]

Under the Alberta Health Care Insurance Act[231] and the Health Insurance Premiums Act[232] the definition of "dependant" is left to the regulations.

(4) Succession

At common law, the bastard had no right to inherit. He was *filius nullius* and therefore had no lineal ancestors or collateral relations. Before 1834, he could not even inherit realty from his own legitimate issue, but this was

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[229] Ibid., s. 236(a), (c) and (e).

[230] Ibid., s. 322(h) and s. 335.

[231] R.S.A. 1970, c. 166, s. 2(j).

[232] R.S.A. 1970, c. 167, s. 2(e).

changed by the Inheritance Act, 1833.[233] If the bastard left no heirs of his body, his estate escheated to the Crown or mesne lord.[234]

The doctrine of *filius nullius* influenced the construction, in wills and other instruments, placed on words like "children" and "issue". Such words refer *prima facie* to legitimate relationships.[235] Bevan says,[236] ". . . although it [this rule of construction] was a presumptive and not an absolute rule, it was not easily disturbed."

Today, the illegitimate may succeed to and through either parent, although succession to property due to the paternal connection is limited severely.

The illegitimate's relationship with his mother, for purposes of succession, is assured by statute. The Intestate Succession Act[237] establishes that "an illegitimate child shall be treated as if he were the legitimate child of his mother."[238]

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[233] 3 & 4 Will. IV., c. 106.

[234] Escheat was subject to a surviving widow's dower rights. Supra, footnote 1, p. 107.

[235] Hill v. Crook (1873), L.R. 6 H.L. 265.

[236] Supra, footnote 63, p. 254.

[237] R.S.A. 1970, c. 190, s. 15.

[238] Mrs. Russell (Illegitimacy, p. 4) suggests that this section does not always allow succession to the estate of remoter kindred of the mother. She argues that, because "'issue' includes all lawful lineal discendants of the ancestor" [Continued on next page.]

The Wills Act[239] applies the same provision in the construction of a will, except when a contrary intention appears.

In limited circumstances, there is statutory recognition of the illegitimate's relationship with his father. The Intestate Succession Act permits the illegitimate to inherit when his father is not survived by a widow or lawful issue:[240]

> (1) Where a male person who is survived by illegitimate children dies intestate with respect to the whole or any part of his estate, and leaves no widow or lawful issue, if the Supreme Court of Alberta or a judge thereof, on an application made by the executor, administrator or trustee or by a person claiming to be an illegitimate child, declares after due inquiry that
>
> (a) the intestate has acknowledged the paternity of the illegitimate children, or
>
> (b) the person has been declared to be the father by order made under any of the provisions of The Children of Unmarried Parents Act and Child Welfare Act or The [stet] Maintenance and Recovery Act,
>
> the illegitimate children and their issue shall inherit from the person so dying the

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[Continued from p. 56.]
(section 2(b)), the illegitimate child of an illegitimate daughter does not qualify as "issue" of the maternal grandmother and could not inherit from her.

[239] R.S.A. 1970, c. 393, s. 35.

[240] Supra, footnote 237, s. 16.

> estate in respect of which there is an intestacy as if they were his legitimate children.
>
> (2) For the purposes of this section, an intestate male person shall be deemed to have left no widow if she has left him and was at the time of his death living in adultery.

The ordinary rule of construction governs a legacy in a will to the "children" or "issue" of a male person. However, the position of the illegitimate may be improved by the Wills Act. An example is section 27 which provides, "except when a contrary intention appears by the will, . . . 'heir' means the person to whom the beneficial interest in the property would go under the law of the province if the testator or the other person died intestate." The person entitled on intestacy could be illegitimate.

There is another noteworthy section in the Wills Act. Ordinarily, the will of an unmarried infant is not valid.[241] An exception is created by subsection (2.1) which provides that an unmarried infant with children "may make a valid will to the extent that [he] makes a bequest, devise or other disposition to or for the benefit of any or all of [his] children." The children of an unmarried person are, of course, illegitimate.

A question arises as to entitlement to notice under section 8 of the Administration of Estates Act.[242] This section requires a person applying for a grant of probate

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[241] Supra, footnote 239, s. 9(1).

[242] R.S.A. 1970, c. 1.

or administration to send a copy of the application and a notice pertaining to the rights of dependants under the Family Relief Act[243] to the spouse and each dependent child (or person specified in the Act on the child's behalf) of the deceased. It is likely that "child" includes an illegitimate child because, it will be recalled, an illegitimate child may claim under the Family Relief Act. On the other hand, the Act does not say how the applicant is to know of the existence of an illegitimate child.

Provision for the illegitimate out of the estate of his deceased parent under the Family Relief Act is dealt with in the discussion of maintenance.

(5) Other Matters Related to Parentage

The bond between a child and his parents is recognized in law for other purposes. Some of these flow from the status of parent as guardian, and exist at common law. Others have been added by statute. The provisions discussed below have importance for an illegitimate child.

(a) Name

At common law the bastard, like the legitimate child, has the right to use the christian name in which he is baptized. The legitimate child takes his father's surname. The bastard, however, has no proper surname, and acquires one only by repute. Ordinarily, he would be called by the surname of his mother.[244]

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[243] R.S.A. 1970, c. 134.

[244] Sullivan v. Sullivan (1818) 2 Hagg Con. 238, 161 E.R. 728, per Sir William Scott; quoted in Power on Divorce, p. 359, fn. (j).

Today the Vital Statistics Act[245] requires the registration of the birth of every child born in Alberta.[246] The primary responsibility for registration is on the mother, and following her the father,[247] but the father of an illegitimate child is excused.[248] A child born to a married woman is registered in her husband's surname unless the mother declares that she was not living with her husband when the child was conceived and her husband is not the father. In these circumstances, the mother together with a person acknowledging himself to be the father may request in writing that the child be registered in the acknowledged father's surname.[249] "'Married women' includes a woman who, within the period of gestation prior to the birth of the child . . . was lawfully married.[250] A child born to an unmarried woman is registered in the mother's surname, unless a joint request in writing is made, as described above.[251] Particulars of a person acknowledging himself to be the father may be given without use of his surname.[252] In the case of registration of the birth of a child to a married woman whose husband is not the father, or to an unmarried woman, the

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[245] R.S.A. 1970, c. 384.

[246] Ibid., s. 4(1).

[247] Ibid., s. 4(2).

[248] Ibid., s. 4(3).

[249] Ibid., s. 4(5).

[250] Ibid., s. 2.14.

[251] Ibid., s. 4(7) and (8).

[252] Ibid., s. 4(6) and (8).

register may be amended by request made after registration.[253] It is evident from section 4 that the provisions for registration of the birth of an illegitimate child differ from those for a legitimate child.

Other relevant contents of the Act are summarized below:

(1) the birth of a child legitimated by the subsequent marriage of his parents shall be registered as if the parents had been married to each other at the time of the birth;[254]

(2) there is provision for registration of the birth of a foundling--who may or may not be illegitimate;[255]

(3) a given name may be changed or added on application by "both parents, the surviving parent, the guardian of the child, the person procuring the name to be changed or given, or the child after he has attained the age of 18 years," but the change or addition must have occurred within ten years after the child's birth.[256]

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[253] Ibid., s. 4(6) and (8).

[254] Ibid., s. 6

[255] Ibid., s. 7.

[256] Ibid., s. 8.

(4) an order of adoption is the basis for the substitution of a new registration of birth in accordance with the facts contained in the order,[257] any birth certificate issued thereafter shall conform to the new registration,[258] and the original registration of birth is kept in a special register;[259]

(5) a change in registration may also be effected in accordance with a change of name under the Change of Name Act, 1973, and every birth certificate issued thereafter "shall be issued as if the registration had been made in the name as changed."[260]

The Change of Name Act[261] deals specifically with "a child born out of wedlock":[262]

(1) The mother of a child born out of wedlock may apply to change a given name of her child of whom she has lawful custody.

(2) Subject to this section, the mother of a child born out of wedlock may apply to change the surname of her child of whom she has lawful custody

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[257] Ibid., s. 10.

[258] Ibid., s. 12.

[259] Ibid., s. 11.

[260] Ibid., s. 21.

[261] S.A. 1973, c. 63.

[262] Ibid., s. 8.

(a) to her surname at the time of the application, or

(b) if she is also applying to change her own surname, to her proposed surname.

(3) The mother of a child born out of wedlock who marries may apply to change the surname of the child to the surname of her husband but only with the consent of her husband, if living.

(4) The mother of a child born out of wedlock who is not married to but is cohabiting with a man as wife and husband may apply to change the surname of the child to the surname of that man but only with the consent of that man.

(5) Subject to subsection (4) the mother of a child born out of wedlock may not apply to change the surname of her child to the surname of the putative father of the child unless

(a) he has been declared by a court to be the father of the child, or

(b) he has acknowledged during his lifetime that he was the father of the child.

"Child" means an unmarried minor child,[263] but a child who is 12 years of age or older must consent to the change.[264]

Three features of section 8 of the Change of Name Act are notable:

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[263] Ibid., s. 1(c).

[264] Ibid., s. 4.

(1) the father of an illegitimate child may not apply to change the child's name (there is provision for a guardian to apply together with or in place of a parent);[265]

(2) An illegitimate child may acquire the name of a man with whom the mother is cohabiting (although the mother may not), and that man need not be the child's father;[266] and

(3) the consent of the father of an illegitimate child is not required to change the child's name even where the child is registered in the father's surname pursuant to a written application made jointly by the father and the mother.[267]

An illegitimate adult may apply to change his own name.[268]

(b) Education

The common law imposed no duty on a parent to educate his child. Education "depended upon the whim of parents who could afford to pay for it."[269]

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[265] Ibid., s. 9.

[266] Ibid., s. 10.

[267] Supra, footnote 75, p. 43.

[268] Change of Name Act, Supra, footnote 261, s. 3.

[269] Supra, footnote 63, p. 432.

Now the School Act[270] requires the attendance at school of "every child who has attained the age of six years at school opening date and who has not attained the age of 16 years" unless excused for any of the reasons mentioned in the Act; and permits attendance up to the age of 18 years.[271] "Parent" is defined in section 2(i) of the School Act. It includes:

> (i) a person appointed as guardian under Part 7 of the Domestic Relations Act,
>
> (ii) the Director of Child Welfare, with respect to a child who is a ward of the Crown within the meaning of the Child Welfare Act, and
>
> (iii) any other person who completely maintains, supports and controls a child as a parent would.

Parents are mentioned in the School Act in several contexts: the school the child attends;[272] the payment of fees, including tuition and transportation fees;[273] provision of transportation;[274] suspension or expulsion of a pupil;[275] instruction of a pupil in French or any other language;[276] exclusion of a pupil from religious or patriotic exercises or instruction;[277]

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[270] R.S.A. 1970, c. 329.

[271] Ibid., s. 133.

[272] Ibid., ss. 135 and 142.

[273] Ibid., ss. 142, 143, 144 and 156.

[274] Ibid., ss. 156 and 157.

[275] Ibid., s. 146.

[276] Ibid., s. 150.

[277] Ibid., s. 154.

attendance of a pupil on a work experience program;[278] and contravention of school attendance provisions.[279] The standing of the father of an illegitimate child in respect of these provisions will depend upon his ability to bring himself, or to be brought, within the definition of parent.

(c) Marriage

At common law, a marriage contracted by a person below the age of rational consent was void. The age of rational consent was the age at which a party was capable of understanding the nature of the marriage union, and the minimum age was fixed at seven years. The marriage remained voidable until the parties became capable of consummating it. Consummation was presumed to be possible for boys at the age of fourteen, and for girls at the age of twelve, but the presumption could be rebutted.

Today, the Marriage Act[280] does not permit the marriage of a person under the age of 16 years, but this restriction does not apply "with respect to a female who is shown by the certificate of a duly qualified medical practitioner to be either pregnant or the mother of a living child."[281] The exception of a pregnant female enables the birth in wedlock of a child who would otherwise be born illegitimate. The

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[278] Ibid., s. 161.

[279] Ibid., s. 171.

[280] R.S.A. 1970, c. 226.

[281] Ibid., s. 16 .

exception of a mother, at least in some cases, will facilitate the legitimation of a living child.

Certain consents must be given to the marriage of a person under 18 years of age.[282] In most cases, the consents of the mother and the father are required. However, where the parents are divorced or separated, the person having legal custody may give the consent; where one parent is dead or mentally incompetent, the other may give the consent; or where both parents are dead or mentally incompetent, a guardian may give the consent. The Director of Child Welfare may give the consent for a ward of the Crown. No consent is required where both parents are dead or mentally incompetent and there is no guardian, or where the person to be married is divorced or widowed. The court may dispense with a required consent, but not in respect of a person under 16 years of age unless that person is a pregnant female or a mother.[283] "Parent" is not defined. The need for the consent of the father of an illegitimate child is therefore a matter for construction of the Act.

(d) Property

The Ontario Law Reform Commission[284] gives an historical account of the law of guardianship of an infant's property.

> In Anglo-Saxon times the law of guardianship of the property . . . of a minor closely

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[282] Ibid., s. 18.

[283] Ibid., s. 19.

[284] Supra, footnote 61, pp. 88-89.

> followed the law of succession. During his lifetime a father had the right to control . . . the property . . . of his minor child, but on the father's death control of the child's . . . property passed to its male parental relatives.
>
> After the Norman Conquest the common law maintained the father's position as natural guardian of . . . the property . . . of a minor . . . . When a father died leaving a minor child surviving, different guardians would be appointed for the heir by the Court of Wards, depending on the type of real property comprised in his inheritance. . . .
>
> The Tenures Abolition Act, 1660 abolished the Court of Wards and provided that a father might make a testamentary appointment of a guardian for his minor children after his death.

The Ontario Report later looks at children born outside marriage:[285]

> The common law regarded the child born outside marriage as *filius nullius* and therefore the child [did not have] a right to a guardian of his property. . . . The common law rule which prevented the construction of the word "child" in statutes as including a child born outside marriage maintained the isolated position of such a child even when legislation relating to guardianship was enacted.

Now, in Alberta, the Infants Act[286] has provisions governing an infant's property. This Act makes confused use of the terms "next friend", "guardian", "other person"

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[285] Ibid., p. 107.

[286] Supra, footnote 186.

and "parent". The next friend or guardian of an infant may apply in the infant's name for the sale, lease or other disposition of an infant's property for his maintenance or education or other cause in his interest.[287] The guardian of an infant may with the approbation of a judge consent to any assignment or transfer of an infant's leasehold interest in land[288] or in personal property.[289] The court may order dividends from stock owned by an infant to be paid to the infant's guardian "or to any other person for the maintenance and education, or otherwise for the benefit, of the infant.[290] The guardian, parent or next friend of an infant may apply for an order confirming a settlement of a claim or action maintainable on behalf of the infant.[291] The mother of an illegitimate child will be able to act on her infant's behalf in all of these cases because she is the child's guardian. The father of an illegitimate may qualify as "next friend" under section 3, "other person" under section 10, or "parent or next friend" under section 16 of the Infants Act.[292]

(e) Religion

Bevan states:[293]

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[287] Ibid., ss. 2 and 3.

[288] Ibid., s. 8.

[289] Ibid., s. 8.1.

[290] Ibid., s. 10.

[291] Ibid., s. 16.

[292] These sections must be read in conjunction with section 7 of the Public Trustee Act, supra, footnote 83, quoted above.

[293] Supra, footnote 63, pp. 424-425.

> At common law . . . the right of the father concerning the religious education of his legitimate child was even stronger than his right to custody. Only rarely, where there was grave misconduct on his part, did he forfeit his right, and it prevailed even in those cases where the child was living with the mother. . . .

The law has been tempered by equity in Canada, and the courts in the exercise of their equitable jurisdiction will suspend or supersede the father's rights where his wishes conflict with the best interests and general welfare of the child.[294] As to the illegitimate child, once a right to custody became recognized in the mother her right to determine the child's religion followed.

Turning to the existing law, section 50 of the Domestic Relations Act[295] is mentioned above in connection with custody. Where the custody application is unsuccessful, the court may make an order "to ensure that the infant is brought up in the religion in which the parent or other responsible person has a legal right to require that the infant be brought up." With regard to the position of the father of an illegitimate child, this section will be interpreted in the same manner as the related sections of the Domestic Relations Act.

IV.
PUBLIC ATTITUDES

Is the existing law relating to illegitimacy appropriate? A survey of "Public Attitudes Towards Illegitimacy

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[294] DeLaurier v. Jackson, [1934] S.C.R. 149, at 153.

[295] Supra, footnote 77.

in Alberta" conduced by L. W. Downey Research Associates Ltd. for the Alberta Department of Health and Social Development in 1973 reached these conclusions (pp. 41-42):

> The attitudes of Albertans towards illegitimacy seem to be more moderate than extreme, more liberal than conservative, more preventive than punitive. Overall, respondents favouring a more liberal attitude towards the illegitimate child tend to be younger, with higher incomes and more education. Conversely, respondents favouring a more conservative approach tend to be older, with lower incomes and less education.
>
> What is particularly remarkable is the extent to which there appears to be a common, province-wide, set of attitudes favouring liberalization of the law regarding illegitimacy. Albertans consistently affirm, in their responses, the principle of equality for illegitimate children vis-a-vis legitimate children--equality expressed in terms of maternal and paternal relationships, paternal inheritance and familial ties, ancestral and ethnic background. They affirm a <u>full</u> equality for the illegitimate child, not because he is "illegitimate" but because he is a <u>child</u>. In effect, Albertans say that it is the mother and father who are and should be responsible for their actions in conceiving and bearing an illegitimate child; the child should not be stigmatized, discriminated against or treated as a "non-person" as a consequence. It is not his fault he was born, so he should not suffer the consequences of his parents' actions. Thus Albertans question the acceptability and utility of the very concept of "illegitimacy".

The Ontario Law Reform Commission have this to say in their Report on Family Law:[296]

> We have taken as our major premise the view that the status of "illegitimacy" ought

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[296] <u>Supra</u>, footnote 61, p. 10.

> to be abolished in Ontario, and that so far as it is consistent with the interests of the child born outside marriage, his position under the law ought to be equated with that of other children. Whatever the original reasons were for setting apart the child born outside marriage, be they economic [an offshoot of the feudal system of landholding] or moral [dictated by the church], we cannot perceive any factor in modern society which justifies laws which perpetuate this discrimination.

They note in support of this position:

> In January, 1967, a sub-commission of the Commission on Human Rights of the United Nations adopted a statement on "General Principles of Equality and Non-Discrimination in Respect of Persons Born out of Wedlock" which requires that "every person, once his filiation has been established, shall have the same legal status as a person born in wedlock." Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights, United Nations Economic and Social Council, "Study of Discrimination Against Persons Born Out of Wedlock: General Principles on Equality and Non-Discrimination in Respect of Persons Born out of Wedlock", U.N. Doc. E/CN. 4 Sub. 2/L. 453 (Jan. 13, 1967).

Recent judicial pronouncements bespeak the current trend in favour of improving the legal position of the illegitimate child. In Alberta, we have the examples of White v. Barrett[297] and Nelson v. Findlay and Findlay[298] in which words denoting the relationship of parent and child

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[297] Supra, footnote 102.

[298] Supra, footnote 87.

are construed to include the illegitimate child and his father. McDermid J.A. says in White v. Barrett:[299]

> I accept that, when the rule of construction was first enunciated in England, children meant "legitimate children". . . . However [this] is not the ordinary meaning of the word when used in legislation today. In Hutchinson v. Official Administrator (1963), 44 W.W.R. 55 at 57, Aikens J. of the Supreme Court of British Columbia said, "Treating the word 'child' as having its ordinary meaning I think it beyond dispute that the word includes an illegitimate child." The correlative of child is parent, and Denning L.J. in Re M., [1955] 2 Q.B. 479 at 487, [1955] 2 All E.R. 911, said, "I must say that if the word 'parent' is to be read in its ordinary meaning, I should have thought that the natural father was a parent just as much as the natural mother is." I have been unable to find in any dictionary I have consulted that the word "child" or "parent" should exclude an illegitimate child. With deference I agree with Aikens J. and Lord Denning M.R. that the ordinary meaning of the words is as they have stated.

The trend is evident as well from the legislation and proposals referred to in the next section of this paper. In addition to Ontario, jurisdictions mentioned there include New Brunswick, England, New Zealand, South Australia, Western Australia and some American states.

V

APPROACHES FOR REFORM

There are two major approaches to reform of the law of illegitimacy. They are:

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[299] Supra, footnote 102, pp. 295-296.

(1) abolishing the status of illegitimacy; and

(2) modifying the law to reduce distinctions based on illegitimacy.

Both approaches involve a shift of emphasis from the relationship of the man and woman who conceive a child to the relationship of parent and child. Neither is effective unless paternity is known. The discussion here assumes that paternity can be established. The next section of this paper examines how.

The argument is sometimes made that an expansion of the rights and obligations which exist between a father and his illegitimate child will prompt procreation outside marriage. Harry D. Krause, in a book entitled Illegitimacy: Law and Social Policy[300] calls this the "family protection argument." It has three facets: (i) improving the lot of the illegitimate will undermine the institution of marriage by removing "respect for legitimacy and therefore for marriage and family life;[301] (ii) it will lead to greater promiscuity; and (iii) in the case of the extramarital child, it will produce discord in the father's legitimate family. Krause dismisses all three facets of the argument. He thinks it

> . . . most doubtful that there is an effective connection between the legislated stigma of illegitimacy and the state's purpose of encouraging marriage and discouraging promiscuity.[302]

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[300]The Bobbs-Merrill Company, Inc., 1971, pp. 73-78.

[301]Supra, footnote 61, p. 11.

[302]Supra, footnote 300, p. 75.

He also finds it hard to justify making distinctions between the rights of the extramarital and premarital illegitimate.[303] The Ontario Law Reform Commission reject the first two facets of the argument; they do not raise the third.

Another point against reform is based on the notion that marriage implies consent to be obligated to the children of the union; there is no consent to be obligated to an illegitimate child. Krause believes this argument lacks plausibility.[304]

An extension of this point is that "an intestacy is a voluntary act by which parents consciously decide to benefit children born to them in marriage and to exclude their other children." The Commission "consider that children born outside marriage have as much moral entitlement to share in an intestate's estate as other children."[305]

On the side of reform it can be said that strengthening the legal relationship between a father and his illegitimate child will encourage responsible fathering. This is so because the father will be publicly identified with the child, and will have increased duties toward the child.

Then, too,

> The increasing acceptability of non-marital unions, communal life-styles, and the

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[303] Ibid., at p. 77.

[304] Ibid., pp. 78-80.

[305] Supra, footnote 61, pp. 11 and 12.

> role-consciousness of women are all contributing to an expanded concept of the unwed father as a child-rearing figure. Casework studies in the United States show that the father and mother of an illegitimate child often have a meaningful relationship. The father's interest and concern for his child is substantial and his participation in decision-making is worthy of consideration.[306]

The following pages draw upon the laws of other common law jurisdictions, and upon recommendations for reform being made in some of those jurisdictions. Krause[307] engages in a more extensive examination of foreign approaches to illegitimacy. He concentrates on Norway, France and West Germany.

1. Abolishing the Status of Illegitimacy

Abolition of the status of illegitimacy is the more far-reaching of the two approaches. This may be achieved (i) by removing all references to legitimacy and illegitimacy, or (ii) by declaring every child to be the legitimate child of his natural parents. New Zealand has adopted the first method:[308]

> For all purposes of the law of New Zealand the relationship between every person and his father and mother shall be determined irrespective of whether the father and mother are or have been married to each other, and all other relationships shall be determined accordingly.

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[306] Supra, footnote 59, pp. 5-6.

[307] Supra, footnote 300, ch. 6, pp. 175-234.

[308] Status of Children Act 1969, No. 18, s. 3(1).

Oregon has done the same:[309]

> . . . [t]he legal status and legal relationships and the rights and obligations between a person and his descendants, and between a person and his parents, their descendants and kindred, are the same for all persons, whether or not the parents have been married.

The Ontario Law Reform Commission recommends;[310] as does the Law Reform Division of the Department of Justice in New Brunswick.[311] It is preferred by the Law Reform Committee of South Australia,[312] following the New Zealand model but with modifications. It also appears to be the intention of Bill 221, "An Act to Amend the Individual's Rights Protection Act", No. 2.[313] This method eliminates the need for legitimation provisions.

Examples of the second method come from North Dakota and Arizona. North Dakota provides:[314]

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[309]Ore. Rev. Stat.§109.060 (1969), quoted in Krause, supra, footnote 300, p. 298.

[310]Supra, footnote 61, p. 12.

[311]In a Confidential Working Report on the Status of Children Born Outside Marriage; their Rights and Obligations and the Rights and Obligations of their Parents, containing tentative proposals, pp. 29-30.

[312]Eighteenth Report, Relating to Illegitimate Children, 1972.

[313]Introduced to the Alberta Legislature May 1, 1974.

[314]N.D. Cent. Code § 56-01-05 (Supp. 1969), quoted in Krause, supra, footnote 300, p. 297.

> Every child is hereby declared to be the legitimate child of his natural parents, and is entitled to support and education, to the same extent as if he had been born in lawful wedlock. He shall inherit from his natural parents, and from their kindred heir, lineal and collateral. The issue of all marriages null in law or dissolved by divorce are deemed to have been born in wedlock.

The Arizona section makes one reservation typed in italics below:[315]

> Every child is the legitimate child of its natural parents and is entitled to support and education as if born in lawful wedlock, *except that he is not entitled to the right to dwell or reside with the family of his father, if the father is married* and "[e]very child shall inherit from its natural parents and from their kindred heir, lineal and collateral, in the same manner as children born in lawful wedlock," even when ". . . the natural father of such child is married to a woman other than the mother of the child, as well as when he is single.

The approach of abolishing the status of illegitimacy is further modified in Alaska where equality is conditioned on the ascertainment of paternity:[316]

> (a) A child born out of wedlock heretofore or hereafter shall be legitimated and considered the heir of the father who (1) shall subsequently intermarry with

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[315] Ariz. Rev. Stat. Ann. § 14-206 (1956), quoted in Krause, supra, footnote 300, p. 297.

[316] Alaska Stat. § 25.20.050(a) (1962), quoted in Krause, supra, footnote 300, p. 298.

> the mother of the child; (2) shall in writing acknowledge his paternity of the child; or (3) shall be adjudged to be the father by a superior court, upon sufficient evidence. Acceptable evidence includes, but is not limited to, evidence that the alleged father so conducts and bears himself toward the child, either by word or act so as to indicate that the child is his, and such conduct may be construed by the court to constitute evidence of paternity. Extrinsic evidence may be employed by the court to show intent when indefinite, ambiguous, or uncertain terms are used.

New Zealand has seen fit to supplement the declaration that all children have equal status with a subsection abolishing the common law rule of construction of words denoting relationship:[317] "The rule of construction whereby in any instrument words of relationship signify only legitimate relationship in the absence a contrary expression of intention is abolished." The Ontario Law Commission would abolish the common law rule as it applies to statutes as well.[318]

The Ontario Commissioners[319] see a need for two saving provisions to their recommendations for abolition of the status of illegitimacy. The first would give the recommendations prospective application:

> . . . all instruments executed and all intestacies taking place before any Act arising out of our Report became law, ought to be expressly said to be subject to the present law.

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[317] Status of Children Act 1969, s. 3(2).

[318] Supra, footnote 61, p. 13.

[319] Ibid., p. 16.

The second has to do with the burden on persons administering trusts and estates:

> The duty to seek out beneficiaries imposed on a trustee, an administrator or executor ought not, therefore, to go beyond the duty to search for those children born outside marriage whose paternity is positively established or presumed, when the time for the ascertainment of possible beneficiaries arrives, by the means which we recommend.

Legislation in other jurisdictions which makes these provisions is reproduced below in the discussion of the ways in which distinctions based on illegitimacy may be reduced in the laws of succession.

2. Reducing Distinctions Based on Illegitimacy

The second approach to reform of the law of illegitimacy consists of improving the position of the illegitimate under the present law. This is the traditional approach--the present law has come to improve upon the common law in this way. Although Alberta has done more for the illegitimate than have other Canadian provinces, some jurisdictions elsewhere have moved closer still toward equating illegitimacy with legitimacy. England is one such jurisdiction. A significant change has been made there in the laws of intestate succession. This approach is also being pursued in Western Australia where the Law Reform Committee has reported separately on "Illegitimate Succession"[320] and "Affiliation Proceedings".[321]

As in the exposition of the present law, it will be

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[320]Project No. 3.

[321]Project No. 13.

convenient to look at legitimation; adoption; guardianship, custody and access; wardship; maintenance; succession; and other matters having to do with parentage.

(1) Legitimation[322]

As the concept of legitimation is widened, so the problem of illegitimacy diminishes. The Legitimacy Act[323] now covers children whose parents subsequently marry or who are the offspring of a void or voidable marriage. The provisions for legitimation could be expanded in terms of paternity to include the child of a man who acknowledges paternity in some satisfactory way, either in writing or by his conduct, and the child of a man whom a court declares to be the father. (It will be recalled that illegitimacy signifies the lack of a legal relationship between father and child; it does not greatly affect the relationship between mother and child.) This is closely related to establishing paternity and is discussed more fully in that section.

Whatever else is done, it should be made clear that section 5 of the Legitimacy Act[324] applies to all void marriages which either of the parties reasonably believed to be valid, and does not, as Cruickshank[325] suggests, exclude a marriage void by reason of consanguinity or affinity.

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[322] A good comparative law article on this topic has been written by D. Lasok, "Legitimation, Recognition and Affiliation Proceedings", 10 I.C.L.Q. 123 (1961).

[323] Supra, footnote 41.

[324] Ibid.

[325] Supra, footnote 59, p. 8.

(2) Adoption

Cruickshank[320] has a good discussion of reforms which would take account of the father of an illegitimate child in adoption proceedings. He identifies these issues: father's entitlement to notice; his opportunity to be heard; his right to withhold his consent to adoption; and his ability to adopt his own child.

There are two situations to be considered--where the child is a ward of the Crown and where he is not. In the first situation, the father's position might better be dealt with in wardship proceedings. It is discussed under that heading in this paper. In the second situation, the father's interests must be taken care of during the adoption proceedings. The factors to be examined are similar.

Cruickshank[327] recommends notice to a father who has shown "sufficient interest" in his child (in contrast to a father against whom paternity has been established). "Sufficient interest" might be demonstrated by the father's conduct. This test could include a father who lives with and maintains his child, or one who has voluntarily supported his child, or shown a sincere concern by his voluntary appearnace in the adoption proceedings. "Sufficient interest" might also be demonstrated by the father's acknowledgement in writing of the child as his, for example, for purposes of registration under the Vital Statistics Act,[328] or by a court order of paternity.

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[326] Supra, footnote 59, pp. 46-60.

[327] Ibid.

[328] Supra, footnote 245.

The Ontario Association of Children's Aid Societies uses the following criteria:[329]

(1) Where the child is living with the father.

(2) Where the putative father is living with or has a continuing relationship with the mother.

(3) Where the child is being voluntarily supported by the putative father.

(4) Where the putative father has signed an agreement to support the child.

(5) Where the putative father has been declared to be the father and has been ordered to contribute to the child's maintenance.

(6) Where the child is registered in the putative father's name, provided he has acknowledged paternity in writing at the time of the registration of the child's birth

Notice should be given early in the adoption proceedings. The Child Welfare Act[330] requires that the petition for adoption be submitted to the Director of Child Welfare, who conducts an investigation and prepares a report for presentation to the judge.[331] Notice to the father could be made a prerequisite to submission of the petition to the Director. Alternatively, it could be made the responsibility of the Director after receipt of the petition. In England the guardian *ad litem* serves notice, but he is not obliged to see out the father.[332]

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[329] Supra, footnote 59, p. 50.

[330] Supra, footnote 107.

[331] Ibid., s. 50.

[332] Supra, footnote 59, p. 53.

Another possibility is registration by a father of notice of his interest. Registration would entitle a father to notice of all proceedings affecting his child, but should not be relied upon to reach putative fathers.[333]

The sanction for failure to notify a father who meets the test for notification may be invalidation of the adoption proceedings.[334]

The opportunity to be heard should follow from notice. The father might be given a short time to indicate his desire to be heard. If he does not respond, then he may lose his opportunity.[335]

A third issue is the need for the father's consent to an adoption. Cruickshank fears that the right to consent would operate as a veto.[336] He does not believe the power of the judge to dispense with consent allays this fear, and recommends that the right be available only to a father who lives with and maintains his child.[337]

At the present time the father of an illegitimate child may apply to adopt his own child. He has standing as an unmarried person, or together with his wife.[338] Adoption

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[333] Ibid., pp. 53-54.

[334] Ibid., pp. 52-53.

[335] Ibid., p. 54.

[336] Ibid.

[337] Ibid., pp. 55-56.

[338] The Child Welfare Act, supra, footnote 107, s. 49.

removes the stigma of illegitimacy and is therefore in the child's best interests. This should be encouraged only as an interim means of settling the father and child relationship.[339]

(3) Guardianship, Custody and Access

In her paper on Guardianship, Mrs. Russell[340] argues for development of the concept of guardianship. In the context of her proposal, the father of an illegitimate child might apply to be named as a natural guardian either alone or jointly with the mother. This is the situation in New Zealand.[341] Ordinarily "the father and the mother of a child shall each be a guardian of the child."[342] The mother shall be the sole guardian if

> (a) She is not married to the father of the child, and either:
>
> (i) has never been married to the father; or
>
> (ii) her marriage to the father of the child was dissolved before the child was conceived; and
>
> (b) She and the father of the child were not living together as husband and wife at the time the child was born.[343]

However, the father

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[339] Supra, footnote 59, p. 59.

[340] Supra, footnote 75.

[341] Guardianship Act 1968, No. 63.

[342] Ibid., s. 6(1).

[343] Ibid., s. 6(2).

> . . . may apply to the court to be appointed as guardian of the child, either in addition to or instead of the mother or any guardian appointed by her, and the court may in its discretion make such order on the application as it thinks proper.[344]

The Guardianship Amendment Act 1969, No. 80, adds:[345]

> Any man who alleges that he is a guardian of a child by virtue of the provisions of section 6 of this Act (other than by virtue of an order under subsection (3) of that section) may apply to the court for an order declaring that he is a guardian of the child, and, if it is proved to the satisfaction of the court that the allegation is true and that the man has not been deprived of his guardianship, the court may make the order.

By section 3 of the Guardianship Act 1968, No. 63:

> "Guardianship" means the custody of a child . . . and the right of control over the upbringing of a child, and includes all rights, powers, and duties in respect of the person and upbringing of a child that were at the commencement of this Act vested by any enactment or rule of law in the sole guardian of a child; and "guardian" has a corresponding meaning.

The need for application could be eliminated in some cases by a statutory definition of circumstances which render the father a guardian.

In England, the Guardianship of Minors Act 1971

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[344] Ibid., s. 6(3).

[345] Section 6A(1).

enables the mother or father of an illegitimate child to apply for custody and the court may.[346]

> . . . make such order regarding--
>
> (a) the custody of the minor; and
>
> (b) the right of access to the minor of his mother or father
>
> as the court thinks fit having regard to the welfare of the minor and to the conduct and wishes of the mother and father.

By section 14(3), where custody is awarded to the father, he "shall be treated as if he were the lawful father of the minor" for the purposes of the sections dealing with the rights of the surviving parent as to guardianship,[347] the power of the father and mother to appoint testamentary guardians,[348] the power of the court to appoint a guardian for a minor having no parent,[349] and orders for custody and maintenance where a person is guardian to the exclusion of the surviving parent,[349a] but any appointment of a testamentary guardian is ineffectual "unless the appointor is entitled to the custody of the minor . . . immediately before his death". In Cruickshank's opinion,[350] the English legislation is of limited effectiveness.

Part IV of the British Columbia Family Relations

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[346]English Guardianship of Minors Act 1971, ss. 14(1) and 9(1).

[347]Ibid., s. 3.

[348]Ibid., s. 4.

[349]Ibid., s. 5.

[349a]Ibid., s. 10.

[350]Supra, footnote 59, pp. 23-24.

Act[351] deals with family maintenance. Under this Part, which includes the case of failure by a parent "to provide reasonable support and maintenance to his child,"[352] a judge may "order that the custody of a child be committed to one parent";[353] he may also "order that a parent have reasonable access to a child, or access at such times and subject to such conditions as the judge considers just and reasonable."[354] "Parent" includes a man who has lived together with a woman as her husband for a period of not less than two years and, for a period of not less than one year during that two year period, contributed to the support and maintenance of a child born of that woman before or during the period they lived together.[355]

Custody of and access to an illegitimate child whose parents have cohabited for one year or more may be awarded under Manitoba's Wives' and Children's Maintenance Act.[356] (Details are included below in the discussion of maintenance.)

Cruickshank[357] advocates notice to the father of an illegitimate child of *de facto* changes in custody as well as of proceedings to determine legal custody. He also

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[351] S.B.C. 1972, c. 20.

[352] Ibid., s. 17(a).

[353] Ibid., s. 25(1)(d).

[354] Ibid., s. 25(1)(e).

[355] Ibid., s. 15(c)(v).

[356] R.S.M., c. W-170.

[357] Supra, footnote 59, pp. 17-18.

recommends[358] that the father's right to apply for custody be clearly legislated. He goes even further to suggest that "the notion of a mother's *prima facie* right to custody should be rejected in favour of an equally balanced adjudication of the child's best interests."

The father's right of access to his child should be clarified too. Cruickshank[359] discusses this. He lists seven arguments against extending this right to the father of an illegitimate child, but concludes that "the legal policy should be to award access rights if the father's visits are in the best interests of the child."[360]

(4) Wardship

The major issues for wardship of an illegitimate child are: father's entitlement to notice of proceedings, his opportunity to be heard, and the need for his consent to the voluntary surrender of custody of the child for purposes of adoption.

At the close of his discussion of protection Cruickshank[361] advocates "a statutory scheme which involves interested putative fathers at all stages of protection proceedings before terminating their parental rights." He opposes the "maternal preference" which prevails in wardship and adoption legislation.

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[358] Ibid., p. 28.

[359] Ibid., pp. 29-39.

[360] Ibid., pp. 37-38.

[361] Ibid., p. 45.

In summation, he claims that:[362]

> . . . the concerned putative father represents a viable alternative to a Crown wardship. The father's plan for custody may in some cases remove the grounds for a neglect holding, thus opening the way for his custody application, which should be heard on the paramount standard of the child's best interests.

One could go further where permanent wardship is at stake by opening the way for the father's application to adopt his illegitimate child.

Cruickshank makes another noteworthy assertion:[363]

> The fact that the father can always apply for custody in an action separated from the protection proceedings does not mean that he should be denied notice and a hearing on the protection issues. . . . custody does not have the legal security of parenthood or adoption. Also, the standard of proof is different than in custody disputes. The putative father, like any other natural parent, should be recognized in new legislation as having an equal opportunity to be notified and to be heard in a protection proceeding.

He concludes: "Wider grounds of legitimation will promote equal opportunity adjudication of the father's claims."[364]

On the issue of notice, identification of the father for service is of primary importance. The suggestions made

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[362] Ibid.

[363] Ibid.

[364] Ibid., p. 46.

above in the context of adoption are helpful. The fourth category of "parent" described by Cullen J. in Re K.R.G. and A.J.M.[365] is also relevant, that is, "those persons who by a paternity order of the court or by a paternity agreement have acknowledged and identified their parenthood.

As in adoption proceedings, the opportunity to be heard should follow from notice. It might also be considered where the father is not entitled to notice but makes himself known to the tribunal and expresses his wish to be heard.

The third issue is whether to require the consent of the father to the voluntary surrender of his illegitimate child for adoption. Once again, identification poses problems which must be resolved.

A final point is this. In Ontario the definition of a "parent" in protection proceedings now includes a father of a child born out of wedlock who is under a legal duty to support the child or has acknowledged paternity and cared for the child.[366] Alberta moved away in 1966 from a definition of parent which included "every person who is by law or in fact liable to maintain a child."[367]

(5) Maintenance

In most jurisdictions, maintenance from his father for

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[365] Supra, footnote 136.

[366] An Act to amend the Child Welfare Act, supra, footnote 107, s. 2; cruickshank, supra, footnote 59, p. 16.

[367] Regina v. Gingell (Gingel), supra, footnote 131, per Prowse J.A. at p. 683,

an illegitimate child is achieved through affiliation legislation. In addition, some provinces include certain cases of illegitimacy in their family maintenance legislation. British Columbia, Manitoba and Saskatchewan are examples. The British Columbia Family Relations Act[368] declares in Part IV on "Family Maintenance" that "every parent is liable to support and maintain his children."[369] "Child" and "parent" are defined in section 15 of the Act:

> For the purpose of this part, unless the context otherwise requires,
>
> (a) "child" means a child, whether legitimate or illegitimate, under the age of nineteen years, and includes
>
> (i) a child of a woman who becomes the wife of a man who, for a period of not less than one year during the marriage, contributes to the support and maintenance of the child;
>
> (ii) a child of a man who becomes the husband of a woman who, for a period of not less than one year during the marriage, contributes to the support and maintenance of the child;
>
> (iii) a child who is, during wedlock,
>
> (A) born to a wife, but not fathered by her husband; or
>
> (B) fathered by a husband, but not born to his wife,
>
> where the husband referred to in subparagraph (A), or the wife referred to

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[368] Supra, footnote 351.

[369] Ibid., s. 16(1).

in sub-paragraph (B), as the case may be, contributes to the support and maintenance of the child for a period of not less than one year during the marriage;

(iv) a child of a man and a woman who, not being married to each other, lived together as husband and wife for a period of not less than two years, where an application under this part is made on behalf of the child not more than one year from the date the man and woman ceased living together as husband and wife;

(v) where a man and woman, not being married to each other, live together as husband and wife for a period of not less than two years and, for a period of not less than one year during that two year period,

(A) the man contributes to the support and maintenance of a child born of a woman before or during the period they lived together; or

(B) the woman contributes to the support and maintenance of a child of a man born before or during the period they lived together,

that child, where an application under this part is made on behalf of the child not more than one year from the date

(C) the man and woman ceased living together as husband and wife; or

(D) the man referred to in sub-paragraph (A) or the woman referred to in sub-paragraph (B), as the case may be, last contributed to the support and maintenance of the child,

whichever last occurs;

. . . . . .

> (c) "parent" means a parent or guardian of a child, but includes
>
> (i) the man referred to in paragraph (i) of clause (a);
>
> (ii) the woman referred to in paragraph (ii) of clause (a);
>
> (iii) the husband referred to in sub-paragraph (A) of paragraph (iii) of clause (a);
>
> (iv) the wife referred to in sub-paragraph (B) of paragraph (iii) of clause (a);
>
> (v) the man referred to in sub-paragraph (A) of paragraph (v) of clause (a);
>
> (vi) the woman referred to in sub-paragraph (B) of paragraph (v) of clause (A);

This legislation coexists with the Children of Unmarried Parents Act.[370]

In Manitoba, a woman who has lived and cohabited for one year or more with the father of any child born to her may apply for an order under the Wives' and Children's Maintenance Act.[371] The order may provide for maintenance;[372] it may also award legal custody of the child and access for the purpose of visiting the child.[373] Filiation is possible under Part III of the Child Welfare Act.[374]

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[370] R.S.B.C. 1970, c. 52.

[371] Supra, footnote 356, s. 6.

[372] Ibid., ss. 13 and 17.

[373] Ibid., s. 13.

[374] R.S.M. 1970, c. C-80.

The Deserted Wives' and Children's Maintenance Act in Saskatchewan,[375] enables the court to make an order for maintenance.[376] "Child" is defined to include:[377]

> (ii) a child under sixteen years of age, whether legitimate or born out of wedlock, of a woman who became the wife of a man who at the time of the marriave was aware of the existence of the child;
>
> (iii) a child, under sixteen years of age, of a man and woman who, not being married to one another, have lived together and cohabited for a period of at least one year, where proceedings under this Act are commenced within two years from the time the parties ceased living together and cohabiting or from the time the parent last gave support or maintenance for the child.

Filiation proceedings may be brought under the Children of Unmarried Parents Act.[378]

In England, The Guardianship of Minors Act 1971, specifically excludes the maintenance of an illegitimate child.[379] Maintenance may be obtained by application for an affiliation order under the Affiliation Proceedings Act 1957.

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[375] R.S.S. 1973, c. 12.

[376] Ibid., s. 5.

[377] Ibid., s. 2(1)(b).

[378] S.S. 1973, c. 12.

[379] s. 14(2) and (4).

Maintenance may be ordered against the father of an illegitimate child in New Zealand under the general provisions for maintenance of a child contained in the Domestic Proceedings Act 1968, No. 62, if[380]

> (a) before or at the time of making the maintenance order the Court has made a paternity order against him; or
>
> (b) the Supreme Court has declared him to be the father of the child, or a Court has appointed him a guardian of the child, or declared him to be a guardian of the child, by reason of his being the father of the child; or
>
> (c) he has been declared to be the father of the child by an order made in any country outside New Zealand . . . ; or
>
> (ca) Pursuant to section 18 of the Births and Deaths Registration Act 1951, his name has at any time (whether before or after the commencement of this paragraph) been entered in the Register of Births as the father of the child; or
>
> (d) he has in the proceedings before the Court or in writing signed by him admitted that he is the father of the child.

The question is whether an illegitimate child should be entitled to claim under the maintenance provisions applicable to other children, or whether his claim should be the subject of special legislation.

(6) Succession

The trend in reform of the law of succession as it affects the illegitimate is twofold: it consists of

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[380] section 38(1).

recognizing the relationship of the illegitimate to his parents for purposes of the law of intestacy, and of reversing the presumption applicable to wills and other instruments that words denoting family relationships refer *prima facie* to lawful relationships. England has taken both steps. Section 14 of the Family Law Reform Act 1969[381] contains the intestacy provisions:

> (1) Where either parent of an illegitimate child dies intestate as respects all or any of him or her real or personal property, the illegitimate child or, if he is dead, his issue, shall be entitled to take any interest therein to which he or such issue would have been entitled if he had been born legitimate.
>
> (2) Where an illegitimate child dies intestate in respect of all or any of his real or personal property, each of his parents, if surviving, shall be entitled to take any interest therein to which that parent would have been entitled if the child had been born legitimate.

An illegitimate child is presumed not to have been survived by his father unless the contrary is shown.[382] Sections 15 and 16 set out the meanings of "child" and "issue". The main paragraph is subsection (1) of section 15:

> In any disposition made after the coming into force of this section--
>
> (a) any reference (whether express or implied) to the child or children of any person shall, unless the contrary intention

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[381] 17 Stats. 11.

[382] Ibid., s. 14(4).

> appears, be construed as, or as including, a reference to any illegitimate child of that person; and
>
> (b) any reference (whether express or implied) to a person or persons related in some other manner to any person shall, unless the contrary intention appears, be construed as, or as including, a reference to anyone who would be so related if he, or some other person through whom the relationship is deduced, had been born legitimate.

"Disposition" means "a disposition . . . of real or personal property whether *inter vivos* or by will or codicil."[383]

Mrs. Russell examines the law of intestacy in her paper on Illegitimacy.[384] She quotes the provision in the "Uniform Probate Code" approved at the National Conference of Commissioners on Uniform State Laws held in 1969,[385] and the legislation in New York[386] and California.[387] The Uniform Probate Code § 2-109 says:

> If, for purposes of intestate succession, a relationship of parent and child must be established to determine succession by, through or from a person,

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[383] Section 15(8).

[384] Supra, footnote 75, pp. 3-13.

[385] Ibid., p. 6.

[386] Ibid., p. 7.

[387] Ibid., p. 8.

(b) . . . a person born out of wedlock is a child of the mother. That person is also a child of the father, provided;

(1) the natural parents participated in a marriage ceremony before or after the birth of the child, even though the attempted marriage is void; or

(2) The paternity is established by an adjudication before the death of the father or is established thereafter by clear and convincing proof, except that the paternity established under this sub-paragraph (2) is ineffective to qualify the father or his kindred to inherit from or through the child unless the father has openly treated the child as his, and has not refused to support the child.

The New York Descendant Estate Law[388] provides:

(i) An illegitimate child is always regarded as the legitimate child of his mother, and is entitled on her death to succeed to her property and the property of her kindred accordingly.

(ii) Provided that a court of competent jurisdiction has found that the deceased person was the father of the child and has declared accordingly and made an order of filiation in a proceeding instituted during the pregnancy of the mother or within two years of the birth of the child, the child is entitled after the father's death to succeed in his property and to the property of his kindred. It is specifically declared that this result may not be achieved by an agreement between the parents or by the compromise of a suit, or even by approval of an agreement or compromise unless this is accompanied by the making of a filiation order.

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[388]Para. 83A inserted by New York Sess. Laws 1965, c. 958. Inheritance by and from Illegitimate Persons.

In other words, a court must have declared the paternity of the deceased father before his death if his illegitimate child is to succeed on intestacy.

The California Probate Code contains this section:[389]

> Every illegitimate child, whether born or conceived but unborn, in the event of his subsequent birth, is an heir of his mother, and also of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father, and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock; but he does not represent his father by inheriting any part of the estate of the father's kindred, either lineal or collateral, unless, before his death, his parents shall have intermarried, and his father, after such marriage, acknowledges him as his child, or adopts him into his family; in which case such child is deemed legitimate for all purposes of succession. An illegitimate child may represent his mother and may inherit any part of the estate of the mother's kindred, either lineal or collateral.

The points to be noted are these: the illegitimate may succeed to but not through his father, and then only where the father has formally acknowledged paternity.

The Ontario Law Reform Commission recommends a modification of the New York position, notwithstanding the Commission's basic stand favouring equality for all children for all purposes of the law of Ontario. The recommendations are summarized as follows:[390]

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[389] § 255.

[390] Supra, footnote 61, pp. 31-32.

9. It should be possible for any interested person to obtain a judicial decree of a declaratory nature that a given man is the father of a given child. Such a decree should operate as a presumption that the man is the father of the child for all purposes unless and until the decree is vacated by the making of another decree.

10. Neither the paternal relationship in the case of a child born outside marriage or any other relationship traced through the paternal relationship should be recognized for any purpose relating to the disposition of property by will or by way of trust unless:

    (i) the relationship has been established by or against the father in his lifetime; or

    (ii) if the purpose is for the benefit of the father, paternity has been established by or against him during the life of the child.

11. Exceptions to the last stated rules should be made where:

    (i) an affiliation order has been made between the father and the child during their respective lifetimes; or

    (ii) a court thinks it just, in its discretion, to allow the relationship between father and child to be established and recognized after the death of either of them.

Section 7(1) of the New Zealand Status of Children Act 1968 also deals specifically with succession:

> The relationship of father and child, and any other relationship traced in any degree through that relationship shall, for any purpose related to succession to property or to the construction

> of any will or other testamentary disposition or of any instrument creating a trust, or for the purpose of any claim under the Family Protection Act 1955 be recognized only if--
>
> (a) the father and the mother of the child were married to each other at the time of its conception or at some subsequent time; or
>
> (b) paternity has been admitted (expressly or by implication) by or established against the father in his lifetime (whether by one or more of the types of evidence specified by section 8 of this Act or otherwise) and, if that purpose is for the benefit of the father, paternity has been so admitted or established while the child was living.

Section 8 of the Act has to do with evidence and proof of paternity and is reproduced in the next section of this paper.

The Law Reform Committee of South Australia[391] think the illegitimate child should succeed to and have rights against his mother and natural father, and should also be allowed to inherit from his maternal and paternal grandparents and collateral kinsmen as in New Zealand. They propose using a section similar to the one below:[392]

> (1) Where an intestate is survived by an illegitimate child, the child is entitled to take the interest in the

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[391] 18th Report, Relating to Illegitimate Children 1972, para. 2, p. 5.

[392] Taken from the Administration and Probate Ordinance, 1929-1967, of the Australian Capital Territory, s. 49E.

> intestate estate that the child would be entitled to take if the child were the legitimate child of an intestate.
>
> (2) Where an illegitimate child of an intestate has died before the intestate leaving issue (being issue who are the legitimate issue of the child) who survive the intestate, the issue are entitled to take the interest in the intestate estate that they would have been entitled to take if the child had been the legitimate child of the intestate.
>
> (3) Where an intestate (being an illegitimate person) is survived by a parent or both parents, the parent is or parents are, as the case may be, entitled to take the interest in the intestate estate that the parent or parents would have been entitled to take if the intestate had been the legitimate child of the parent or parents.
>
> (4) . . . relationship may, to such extent as is necessary to enable effect to be given to the preceding subsections of this section, be traced through or to an illegitimate person as if the person were the legitimate child of his mother and, subject to [sufficient proof of paternity], of his father.

The Law Reform Committee of Western Australia make this recommendation:[393]

> The relationship of the illegitimate child to its parents to be deemed legitimate for all purposes relating to intestate succession, so as not only to give the illegitimate the right to succeed to the property of either parent and vice versa but also to establish the usual and corresponding rights of succession between the child and all other lineal and collateral kindred.

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[393] In its report on "Illegitimate Succession", Project No. 3 at p. 15.

The Committee would also reverse the common law rule of construction of terms such as "children" and "issue" where they appear in a will or other disposition by deeming words of relationship to include illegitimates and persons claiming through illegitimates, unless a contrary intention appears. The Council of the Law Society of that state disagree in part: they feel that succession by the illegitimate to his father's estate "should be dependent on paternity being acknowledged or established against the father in his lifetime."[394]

Where the laws of succession are expanded to include the illegitimate, it is common to give special protection to personal representatives and trustees in the case of claims based on the illegitimate relationship. One example is section 17 of England's Family Law Reform Act 1969:

> Notwithstanding the foregoing provisions of this Part of this Act, trustees or personal representatives may convey or distribute any real or personal property to or among the persons entitled thereto without having ascertained that there is no person who is or may be entitled to any interest therein by virtue of--
>
> (a) section 14 of this Act so far as it confers any interest on illegitimate children or their issue or on the father of an illegitimate child; or
>
> (b) section 15 or 16 of this Act,
>
> and shall not be liable to any such person of whose claim they have not had notice at the time of the conveyance or distribution; but nothing in this section shall prejudice the right of any such person to follow the property, or any property representing it, into

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[394] Ibid., at p. 16.

> the hands of any person, other than a purchaser, who may have received it.

Another example is section 6 of the New Zealand Status of Chilrden Act 1969:

> (1) For the purposes of the administration or distribution of any estate or of any property held upon trust, or of any application under the Family Protection Act 1955, or for any other purposes, no executor, administrator, or trustee shall be under any obligation to inquire as to the existence of any person who could claim an interest in the estate or the property by reason only of any of the provisions of this Act.
>
> (2) No action shall lie against any executor of the will or administrator or trustee of the estate of any person, or the trustee under any instrument, by any person who could claim an interest in the estate or property by reason only of any of the provisions of this Act, to enforce any claim arising by reason of the executor or administrator or trustee having made any distribution of the estate or of property held upon trust or otherwise acted in the administration of the estate or property held on trust disregarding the claims of that person where at the time of making the distribution or otherwise so acting the executor, administrator, or trustee had no notice of the relationship on which the claim is based.

South Australia[395] recommend the New Zealand section but altered from the second last line of (2) onward to read, "acted in good faith and without notice of the relationship on which the claim is based." They would also give the trustee a power of tracing as does England.

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[395] Supra, footnote 391, para. 6, p. 11.

It is also common to provide that instruments executed and intestacies which take place before the new legislation commences shall not be disturbed. New Zealand has done so in section 4 of the Status of Children Act 1969:

> (1) All instruments executed before the commencement of this Act shall be governed by the enactments and the rules of construction and law which would have applied to them if this Act had not been passed.
>
> (2) Where any instrument to which subsection (1) of this section applies creates a special power of appointment, nothing in this Act shall extend the class of persons in whose favour the appointment may be made, or cause the exercise of the power to be construed so as to include any person who is not a member of that class.
>
> (3) The estates of all persons who have died intestate as to the whole or any part thereof before the commencement of this Act shall be distributed in accordance with the enactments and rules of law which would have applied to them if this Act had not been passed.

In England the Family Law Reform Act achieves this position. Section 14(9) "does not affect any rights under the intestacy of a person dying before the coming into force of this section." The opening words of section 15(1) limit its application to a disposition "made after the coming into force of this section." The Ontario Law Commission include this as a saving provision along with the protection of trustees, administrators and executors in their duty to search for possible beneficiaries. The Ontario saving provisions are mentioned above in connection with abolishing the status of illegitimacy.

A final point is this. South Australia[396] recommend

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[396] Ibid., at p. 5.

the reversal of "the somewhat uncertain rule of public policy prohibiting gifts to future born illegitimate children." England has done so in the Family Law Reform Act 1969:[397]

> There is hereby abolished, as respects dispositions made after the coming into force of this section, any rule of law that a disposition in favour of illegitimate children not in being when the disposition takes effect is void as contrary to public policy.

(7) Other Matters Related to Parentage

There is need for clarification of the meaning of words denoting relationship ("parent", "father", "child") in the existing legislation having to do with name, education, marriage, property and religion. In addition to this, The Change of Name Act[397] might be improved by amending section 8 to:

(a) entitle the father of an illegitimate child to apply to change the child's name;

(b) allow a child to take the surname of a man with whom the child's mother is cohabiting as wife and husband provided that the man is the child's father;[398] and

(c) require the consent of a man registered under The Vital Statistics Act as father to a change of the child's name.

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[397] Supra, footnote 261.

[398] Ibid., s. 8(4).