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THE ILLEGITIMATE CHILD IN ALBERTA

The Domestic Relations Act, R.S.A. 1970, c. 113, provides in section 39 that the matter of the illegitimate infant is the sole legal guardian (see further discussion of the question of the guardianship of the illegitimate child in the paper entitled *Guardianship*).

The effect of that provision has wide implications for the illegitimate child in Alberta. Following is an examination of the relevant legislation.

Administration of Estates Act

Under the Administration of Estates Act, R.S.A. 1970, c. 1, the legal representative of the infant can only be its mother or other guardian. That Act requires notification of an application for a grant to be given to each "child of the deceased" together with a notice pertaining to the rights of dependants under the Family Relief Act. Since the latter Act contains a definition of "dependant" which is dependent upon the definition of "child" which in turn is defined as including an illegitimate child, it is apparent that the Administration of Estates Act could be interpreted as applying to the illegitimate child notwithstanding that the word "child" has not always been interpreted as including the illegitimate.[1] Indeed to

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[1] *Wojcik* v. *Anthes Foundry Co.* [1925] 2 D.L.R. 840 and *Hutchinson* v. *Official Administrator* (1963) 44 W.W.R. 55 and *Dickinson* v. *N.E.Ry.* (1883) 2 H. & C. 735; 159 E.R. 304 and *Gibson* v. *Midland Railway* (1883) 2 O.R. 658 and *Montreal West* v. *Hough* (1931) S.C.R. 113.

conclude that the Administration of Estates Act requires that notice be sent to the legitimate children only and that the notice must be accompanied by a notice of dependant's rights which includes the rights of the illegitimate would seem highly irrational.

Infants' Act

The Infants' Act, R.S.A. 1970, c. 175, provides that an application may be made by either the infant's next friend or his guardian. The Act also provides that the guardian of an infant may with the consent of a judge of the Supreme Court or a judge of the Surrogate Court consent on the behalf of the infant to an assignment or transfer of the infant's leasehold interest. Thus a putative father who has an order of custody of an infant would be obliged to apply for guardianship of the infant to act on the infant's behalf.

However, section 10 of the Act recognizes that the infant may reside with someone other than his guardian and thus an order of maintenance out of stocks belonging to an infant can be made to some other person. Presumably therefore a putative father with an order of custody can obtain an order of maintenance out of the infant's stocks notwithstanding that he cannot apply for an assignment of the infant's leasehold interest.

Section 16 of the Infants' Act creates further ambiguity by providing that either the guardian, parent or next friend of the infant may apply for an order confirming a settlement for an action which has been brought on behalf of the infant. It is difficult to

comprehend why in one Act three different sections apply to three different categories or persons who may potentially act on the infant's behalf. It is also difficult to comprehend why there should be a distinction in section 16 between the parent and guardian when in Alberta, unless otherwise ordered, the parent is a guardian with the exception, of course, of the putative father. Can we presume that it was actually the intention of the Legislature to extend to the putative father the right to apply for an order confirming settlement but in the same Act to deny him the right to assign or transfer a lease. It is most likely the result of careless drafting, but nevertheless it is the present status of the law in Alberta with regard to an illegitimate infant.

Intestate Succession Act

The Intestate Succession Act, R.S.A. 1970, c. 190, defines "issue" as including all lawful lineal descendants of the ancestors. However section 15 provides:

> For the purpose of this Act an illegitimate child shall be treated as if he were the legitimate child of his mother.

Section 16 provides:

> (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
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> (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 any Child Welfare Act or the Maintenance and Recovery Act,
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> the illegitimate children and their issue shall inherit from the person so dying the estate of which there is an intestacy as if they were his legitimate children.

While this provision is a commendable attempt to extend equal right to the illegitimate it is nevertheless only a piecemeal attempt.

The definition of "issue" being confined to lawful lineal descendants, results in the fact that although the illegitimate child of a woman will inherit from its mother, the illegitimate's own illegitimate children being "issue" of the grandmother would not stand to benefit.

The provisions of section 16 are very restrictive with regard to the child's right to inherit from a putative father in that the section applies only if the intestate male leaves no widow or lawful issue.

The English Family Law Reform Act, 1969, provides in section 14 that:

> Where either parent of an illegitimate child dies intestate as respects all or any of his 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.
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> (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.

Thus the British statute attempts to completely eradicate any distinction between the legitimate and illegitimate on intestacy.

Section 15 of that Act also creates a presumption that in disposition of property references to children and other relatives include references to, and to persons related through illegitimate children. The English position is a far removal from the days of Blackstone when he states:

> At common law the incapacity of a bastard consists principally in this, that he cannot be heir to any one, neither can he have heirs, but of his own body; for being *nullius filius*, he is therefore kin to nobody, and has no ancestor from whom any inheritable blood can be derived.
> (Blackstone, *Commentaries on the Laws of England*, 485)

Krause in his text, *Illegitimacy: Law and Social Policy*, 1971, p. 93, Babbs Merrill Company, Inc., concludes:

> Under the intestacy laws, the illegitimate child should inherit and pass inheritance as if legitimate, from and to his mother,

> his father and his mother's and father's families. Prospectively, a reasonable regulation of procedures to ascertain paternity should determine potential claimants at an early time. With regard to illegitimates born under earlier law, the constitutional mandate suggests that any proof of descent be accepted. Legislatively it would be simple to provide that estates that are closed will remain closed, with a similar rule being applied to trusts that have been distributed. It seems likely however, that the decision for equality will first be made by the judiciary via the equal protection route.

Krause refers to a meeting in 1969 of the National Conference of Commissioners on Uniform State Laws which approved the "Uniform Probate Code" which on the question of the illegitimate child's inheritance rights provides that

> . . . for the purposes of intestate succession, a relationship of parent and child must be established to determine succession by, through or from a person, . . .
>
> (b) . . . a person born out of wedlock is a child of the mother. That person is also a child of the father, provided;
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> (1) the natural parents participate 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, except that the paternity established under subparagraph (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 State of New York has achieved a position in its legislation comparable to the English situation. The New York Act provides:[2]

> (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 on compromise unless this is accompanied by the making of a filiation order.

The New York legislation is far more restrictive than the English in that it requires a court to have declared the deceased to have been the father whereas the English Act is silent as to how the relationship of biological fatherhood is to be established. The English Act does provide in section 14(4) that for the purposes of an intestacy of the illegitimate child himself he will

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[2]New York Decedent Estate Law, para. 83A inserted by New York Sess. Laws 1965, c. 958. Inheritance by and from Illegitimate Persons.

be presumed not to have been survived by his father unless the contrary is shown thus placing the onus on the putative father to prove biological fatherhood in order to inherit. Part III of that Act does establish provisions for the use of blood tests in determining paternity and provides that the court may give a direction for the use of blood tests in any proceedings in which the paternity of a person fails to be determined.

However, the English Act does not provide for any presumptions of paternity to arise which would enable the illegitimate to succeed from his father on the basis of a simple acknowledgement, nor does it require a court inquiry to determine paternity before allowing the succession. The New York legislation does provide for this protection.

The California statute provides for succession to the illegitimate from his father if the father has acknowledged his paternity.

> Every illegitimate child, whether born or conceived but unborn, in the event of his subsequent birth, is an heir of 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 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 the child is deemed legitimate for all purposes of succession.
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> California Probate Code, s. 255.

Thus in California the father still has the right to choose whether to acknowledge the illegitimate child or not, and if he chooses not to acknowledge the illegitimate child, the child is apparently without any remedy.

The New Zealand Status of Children Act, 1969, which attempts to abolish the status of illegitimacy provides in section 3:

> (1) For the 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.

Sections 7 and 8 provide:

> 7. Recognition of paternity
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> (1) The relationship of father and child, and any other relationship traced in any degree through that relationship shall, for any purpose related to sucession 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--
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> (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
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> (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.

(2) In any case where by reason of subsection (1) of this section the relationship of father and child is not recognised for certain purposes at the time the child is born, the occurrence of any act, event, or conduct which enables that relationship, and any other relationship traced in any degree through it, to be recognised shall not affect any estate, right, or interest in any real or personal property to which any person has become absolutely entitled, whether beneficially or otherwise, before the act, event, or conduct occurred.

8. Evidence and proof of paternity

(1) If, pursuant to subsection (1) of section 18 of the Births and Deaths Registration Act 1951 or to the corresponding provision of any former enactment, the name of the father of the child to whom the entry relates has been entered in the Register of Births (whether before or after the commencement of this Act), a certified copy of the entry made or given and purporting to be signed or sealed in accordance with section 42 of that Act shall be *prima facie* evidence that the person named as the father is the father of the child.

(2) Any instrument signed by the mother of a child and by any person acknowledging that he is the father of the child shall, if executed as a deed or by each of those persons in the presence of a solicitor, be *prima facie* evidence that the person named as the father is the father of the child.

(3) A paternity order within the meaning of the Domestic Proceedings Act 1968 shall be *prima facie* evidence of paternity in any subsequent proceedings, whether or not between the same parties.

(4) Subject to subsection (1) of section 7 of this Act, a declaration made under section 10 of this Act shall, for all purposes, be conclusive proof of the matters contained in it.

(5) An order made in any country outside New Zealand declaring a person to be the father of a child, being an order to which this subsection applies pursuant to subsection (6) of this section, shall be *prima facie* evidence that the person declared the father is the father of the child.

(6) The Governor-General may from time to time, by Order in Council, declare that subsection (5) of this section applies with respect to orders made by any Court or public authority in any specified country outside New Zealand or by any specified Court or public authority in any such country. For the purposes of this subsection, the Cook Islands, Niue, and the Tokelau Islands shall be deemed to be countries outside New Zealand.

The New Zealand Act provides in section 4 that intestacies occurring before the commencement of the Act shall be distributed in accordance with the law which would have applied if the Act had not been passed.

The position of the New Zealand legislation therefore is that the child's relationship to its father can be determined either by an admission of the father or established by a court and thus combines the effect of both the New York and the California statutes.

The study prepared by the Family Law Project of Ontario concluded that the New York legislation offered

the preferrable solution which requires a judicial finding of paternity. However, the report does draw attention to the provisions by which a child may be acknowledged by his parents which is a development of the civil law which has spread to the common law states. Arizona and Oregon which have attempted to completely eradicate the status of illegitimacy still confront the difficulties of proof of paternity (Study prepared by the Family Law Project, Ontario Law Reform Commission, Vol. IX, p. 113).

The State of Arizona provides:

> Every child is the legitimate child of its parents and is entitled to support and education as if born in lawful wedlock except the right to dwelling in a residence with the family of its father, if such father be married. It shall inherit from its natural parents and from their kindred heirs, lineal and collateral, in the same manner as children born in lawful wedlock.
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> Ariz. Rev. Stats. s. 14-206.

Thus the Arizona position is very similar to the English in that it is not dependent upon either the admission of nor the declaration of paternity. However, as with the English statute, the problem of determining the relationship between father and child must ultimately be considered. In this context, the New Zealand position would be preferable in that it allows for the presumption of paternity to arise in several different ways, including the act of marriage itself.

An article on the Law of Succession in Manitoba in Relation to Illegitimate Children (Sherrill Levine--Law Reform Reconnaissance Program, Legal Research Institute of the University of Manitoba) in reviewing the Manitoba legislation concludes that the Devolution of Estates Act of that province represents a narrow approach which results in certain uniquities. The Manitoba Act provides that the illegitimate and his issues shall inherit from the mother as if legitimate but makes no provision for the illegitimate to inherit from his father. Ms. Levine refers to the case of *Re Carlson, Petterson* v. *Nordin et al and Montreal Trust Co.* (1957) 11 D.L.R. (2d) 485, as an example of inequities which can occur as a result of legislation which while attempting to alleviate some of the inequities which apply to the illegitimate only creates further equities. Ms. Levine presents persuasive arguments for eradicating any distinction between the legitimate and the illegitimate.

In the face of convincing arguments to eradicate this distinction the only problem is to devise a means whereby the identify of the putative father can be presumed on the same basis that the identity of the father of the legitimate child is presumed. It is this writer's opinion that the approach of the New Zealand legislation in its Status of Children Act is the preferable solution, notwithstanding Profess Inglis' reservations (Family Law, vol. 2, p. 398, Inglis).

Wills Act

The Wills Act, R.S.A. 1970, c. 393, represents another attempt to extend the recognition of the rights

of the illegitimate in that section 35 of that Act provides that in the construction of a will, except when a contrary intention appears, an illegitimate child shall be treated as if he were the legitimate child of his mother.

A new amendment to this Act (S.A. 1973, c. 13) provides that an unmarried infant person may make a will to provide for a property disposition to his child.

However with regard to his father, an illegitimate may still benefit only by specific bequest. The case of *Hill* v. *Crook* (1873) L.R. 6 H.L. 265, which reflects the position established under the common law, held that the presumption that the word "children" in a will referred only to legitimate children could be rebutted where upon the face of the will an intention of the testator that the word "children" include illegitimate children, could be established. In the absence of a specific devise, or the establishment of this intention by either the minor or adult father the illegitimate child will not be deemed to be included in any devise to a "child" or "children".[3]

The British Columbia courts have taken a more enlightened approach to the interpretation of wills.

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[3]In a will the word "children" *prima facie* means legitimate children--*Hargraft* v. *Keegan* (1885) 10 O.R. 272; in *Re Millar Estate* [1936] O.R. 554; affirmed on this point [1938] S.C.R. 1 at p. 3; *Dover* v. *Alexander* (1843) 2 Hare 275, 67 E.R. 114; in *Re Bolton; Brown* v. *Bolton* (1886) 31 Ch.D. 542; *Dorin* v. *Dorin* (1875) L.R. 7 H.L. 568, 45 L.J. Ch. 652; in *Re Hall; Hall* v. *Hall* [1932] 1 Ch. 262, 101 L.J.Ch. 129.

Manson J. in the case in *Re Hogbin Estate* [1950] 2 W.W.R. 264 expressed the view that the rule as enunciated in the *Hill* v. *Crook* case that without more the term "children" in a will *prima facie* means legitimate children, had been stated too broadly. Manson J. states at page 268:

> As it seems to me, the test must be, what did the testator say in his will and, if question arises as to what he intended, what were the surrounding circumstances? . . . The word "child" in its ordinary meaning includes a "natural" child. The courts of England restricted the *prima facie* meaning so as to exclude a natural child. Whether there were in this province local circumstances which rendered this bit of the law of England inapplicable does not appear. Certainly the social conditions in British Columbia were in 1858 far different from those in England and one cannot think of any reason why this harsh interpretation of the word "child" should form part of our law.

However that case involved an interpretation of the B.C. Administration Act, R.S.B.C. 1948, c. 6, s. 123, which provides:

> Illegitimate children and their issues shall inherit from the mother as if the children were legitimate, and shall inherit through the mother, if dead, any real or personal property which they would have taken if the children had been legitimate.

The court was asked to consider whether those provisions applied in construing wills as well as in cases of intestacy.

A subsequent B.C. decision *Re Hervey Estate* (1961) 38 W.W.R. 12 went further and held that the rule approved by the Supreme Court of Canada in *Re Millar* [1937] 3 D.L.R. 234; aff'd [1938] S.C.R. 1, was established in deference to public policy and that at the present time should be an opposite rule of construction, public policy of the present day being evident by statutory enactment which is exactly the opposite to that which prevailed when the old rule was first laid down. The court held that notwithstanding that the Wills Act did not contain a parallel clause to the Administration Act which gave illegitimate children the same status as legitimate children until 1960, nevertheless testators in interim periods, between 1927 and 1960, were aware of the change of public policy and subscribed to it, and when they used the words "child" or "issue" they intended unless the contrary appeared, that the illegitimate would be treated as if he were the legitimate child of his mother.

In *Re Dunsmuir Will* (1968) 63 W.W.R. 321 followed the decision of *Re Hogbin Estate* and *Re Hervey Estate*. *Re Simpson Estate* (1968) 70 W.W.R. 626 which relied on this line of cases held that a testator's specific appointment of "my son Robert George Simpson" as executor and a bequest to "my six children share and share alike" was broad enough to include Robert George Simpson in the term "children" notwithstanding that he was the illegitimate son of the testator's wife.

However none of these cases makes reference to any interpretation the courts might place on interpreting the word "child" in the will of the putative father. Supposing Robert George Simpson's father was known and that his will

provided for a bequest to his "children", could it be said that Robert George would stand to benefit from the putative father's bequest as well? One wonders whether the interpretation of the court in the *Simpson* case of the word "children" is laudable or whether this would not lead us into even greater confusion. The case could have been determined on the basis of a specific bequest because of the fact that the will indicated that the testator considered Robert George as a son, without any reference to an interpretation of the word "children" in the same context as the line of cases extending that word to include the illegitimate.

Alberta's position with respect to the illegitimate under the Wills Act is among the most enlightened in Canada. And yet neither the legislation nor our case law indicates any progress towards the New Zealand or New York or English position in which the illegitimate would benefit to the same extent under the will of his father. The New Zealand position as evidenced in section 7 of the Status of Children Act 1969 is that the child is a potential beneficiary by reason of his relationship with his father if paternity was established during the father's lifetime. The New York legislation requires a judicial finding of paternity within two years of child's death before an illegitimate child can succeed to his father's property. It is suggested that a similar provision in our Alberta legislation, even in legislation quite independent of the Wills Act or the Intestate Succession Act, could achieve a similar enlightened position.

Family Relief Act

The Family Relief Act, R.S.A. 1970, c. 134, defines the word "child" as including an

2. (ii) an illegitimate child of a deceased man who

(A) has acknowledged the paternity of the child, or

(B) has been declared to be the father of the child by an order under the Maintenance and Recovery Act or any prior Act providing for affiliation or paternity orders, and

(iii) an illegitimate child of a deceased woman;

This definition is similar to the position taken by the New Zealand legislation. The effect of this section on both the Intestate Succession Act and the Wills Act is substantial in that section 4 of the Family Relief Act enables any dependent child to make application for provision out of the estate of his deceased parent for maintenance and support. This section apparently is in conflict with the Intestate Succession Act which provides for inheritance by illegitimate children of their putative father's estate but only in cases in which the father has left no widow or lawful issue surviving him. Since section 4(b) refers only to the inadequacy of the amount left to a dependant and not to the complete failure of the illegitimate to benefit under the intestacy, this section does not create any new right of action for the illegitimate child who would be excluded from benefitting because of the existence of a widow or other lawful issue.

However, with regard to section 4(1)(a) it is arguable that a new cause of action is created for the illegitimate who is excluded from his father's will.

Since an illegitimate child (and in this Act we are limited to the *infant* illegitimate) whose father has either acknowledged him or has been declared to be his father by a court, is a dependant within the meaning of this Act, and since section 4(1)(a) refers to a failure on the part of the father to make adequate provision for his dependant, it follows that notwithstanding the *Hill* v. *Crook* case and the line of cases following, that the illegitimate child would have a right to make application against his father's estate. This section is not limited by the reasoning of *Hill* v. *Crook* to a determination of the intent of the testator. This provision was more progressive than other provincial statutes.[4] In *Re Kolbu Estate* (see footnote 4) the court established that without a specific bequest a dependant does not include an illegitimate.

Since the *Kolbu* case the Saskatchewan Act (Dependants' Relief Act, R.S.S. 1965, c. 128) has been amended to provide that the Act does apply to illegitimate children if the male testator has been adjudged to be the father of the child or if the court hearing the application is satisfied that the testator acknowledged he was the father or was living with the mother at the time of the birth.

The Ontario Act (Dependants' Relief Act, R.S.O., c. 126) makes no provision for the illegitimate child nor does the Manitoba Act (Testators' Family Maintenance Act, R.S.M. 1970, c. 264). The British Columbia Act

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[4]In *Re La Fleur Estate* [1948] 1 W.W.R. 801, and in *Re Kolbu Estate* (1951) 1 W.W.R. 20.

provides that an illegitimate child shall be treated as the legitimate child of his mother (Testators' Family Maintenance Act, R.S.B.C. 1960, c. 378) although it is likely that the line of authorities in B.C. on the interpretation of the word "children" or "child" might be construed as applying to this Act as well.

Child Welfare Act

The Child Welfare Act (R.S.A. 1970, c. 45), defines "guardian" as a person who under Part 7 of the Domestic Relations Act is or is appointed as guardian of a child. Therefore, without more, the Act in referring to "guardian" as to the mother only of the illegitimate child. However the Act is inconsistent in that Part 2 of the Act refers to the "parent" and that word is defined to include a step parent. Thus, although the Act directs its attention to the concept of "guardianship" and relates it to the mother of the illegitimate child, the subsequent use of the word "parent" requires judicial interpretation. A recent decision before the Alberta Supreme Court (*Re K.R.G. and A.J.M.* [1973] 4 W.W.R. 732) in dealing with the definition of "parent" in the Child Welfare Act held that in the content of that Act the word includes:

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 latter category may represent an important departure in Alberta from the traditional position that an affiliation order did not extend any rights to a declared or acknowledged father. It is suggested that affiliation proceedings under the Maintenance and Recovery Act R.S.A. 1970, c. 223, do not provide any rights to the father of the illegitimate, in that the declaration of paternity pursuant to section 18 provides that the judge may make an order declaring him to be the father for the purposes of that part only.

Section 16 of the Act provides that after apprehension a child may be returned to his parents or his guardian or other person in whose care he might have been at the time of apprehension. That section is vague as to whether the words "in whose care he was at the time of apprehension" were meant to apply only to the "other person" or whether they also refer to the words "parents" and "guardian" as well. If they do not refer to the word "parents" then it is conceivable that the court could apprehend an illegitimate child from its mother, his guardian, and return it to his putative father, his parent.

Section 19 of the Act requires notification be served on "a parent or guardian" the result of which may be that the person having legal authority over the child such as the mother of the illegitimate child may not be notified of any proceedings under this Act if a decision is made to notify the putative father as the parent of the child.

In an unreported decision involving a permanent wardship application Judge Legg in interpreting the

provisions of the Child Welfare Act states that because the legislators had used the word "parent" in section 19, subsection (1), of the Act consideration must be given as to whether it was intended to extend this section to include the father of the illegitimate child. Judge Legg concluded that the reference to parent was meant to include the father and mother of a child born in wedlock only or else there would have been no reason to refer to the guardian as defined in the Domestic Relations Act, which limits the guardian to the mother of the illegitimate child. He states that with respect to section 19, subsection (1)

> . . . it is perfectly rational if the section is read to mean that if the child was born in wedlock then the lawful parents must be served with notice of the proceedings, but if the child was born out of wedlock only the mother must be served.[5]

Judge Legg in referring to the decision of *White* v. *Barrett* (1973) 10 R.F.L. 90, acknowledges that the father of the illegitimate child has been given status before the courts by the application of the rules of equity. He states, however,

> These recent cases recognize the status of a putative father where it is possible to do so without offending the statute under which the proceedings are taken. I am of the opinion that Part 2 of The Child Welfare Act does not allow this court any latitude.

The American decision of *Stanley* v. *Illinois*, 405 U.S. 645, 92 Sup. Ct. 1208, is cited (Royal Society of

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[5] In the matter of _____, an alleged neglected child, District Court Action No. 162425, Judicial District of Edmonton.

Health Journal, Vol. 93, No. 1, Feb. 1973) as authority for the proposition that the United States Supreme Court held that an unmarried father is entitled to the same rights as a father of children born in a legal marriage, in proceedings which would result in the guardianship of the children being transferred to some other person.

The Illinois law provides unique proceedings to circumvent neglect proceedings, which enable the State to remove the children from the putative father without the need of proving unfitness in law, because it is presumed at law that upon the death of the unmarried mother there is no fit parent to assume custody. The court held that the Due Process Clause of the Constitution required that the father be given a hearing to determine his unfitness, rather than presuming it, as did the Illinois statute.

Although that case is cited for the proposition that equal rights were thereby extended to the putative father, it is questioned whether the court intended to achieve this result and whether the court, in fact, did so. It is questioned whether the court did not intend to simply restrict the presumption in the Illinois statute, which permitted an indiscriminate removal of the children from the putative father in this situation without a hearing to inquire whether or not the fitness of the putative father and the best interests of the children might warrant their being left where they were.

It is suggested that although the provisions of our Child Welfare Act permit the Director of Child Welfare to remove a child from the putative father or any other

person caring for the child because the child is not under proper guardianship (The Child Welfare Act, R.S.A. 1970, c. 45, s. 14(e)(xiv)), if the child were indiscriminately removed from some unrelated person the hearing would still have to be conducted under section 18 of The Child Welfare Act to determine whether the child is a neglected child. It is suggested that the relationship of the putative father to his children was not the criteria for the decision in the *Stanely* v. *Illinois* case but, rather, it was the fact that a hearing had not been conducted to determine his fitness as a parent.

A further ambiguity is created by section 30 of the Act which enables a "parent" to surrender custody of the child for the purpose of adoption. It is implicit in this section that the putative father who is a "parent" (*White* v. *Barrett, supra*) has the right of surrender as does a step-parent, notwithstanding that neither one of them are, without more, legal guardians of the child.

These ambiguities are even more perplexing in the light of section 31 which clearly grasps the concept of guardianship and the fact that upon an order of wardship, it is not the "parenthood" that is being suspended, but the "guardianship" that is suspended and transferred to the Director of Child Welfare.

Part 3 of the Act restricts the right to consent to an adoption to the "guardians" of the child. The unfortunate result so far as the putative father is concerned is that it is unlikely he will be notified of adoption proceedings, his consent being unnecessary. However to require otherwise, that is to enable the putative father to consent to an adoption in the same

way that he can now voluntarily surrender the child would be a serious abrogation of the mother's rights. It is suggested that if the putative father has acknowledged the child, or has been declared the father by a court of competent jurisdiction, either on his own application or on that of some other person, that his consent to adoption should be a prerequisite as he should be in the same position as any other guardian *vis-a-vis* his child.

The decision of the Ontario Court of Appeal in the case *Re Lyttle*, 5 R.F.L. 6, held that the father was entitled to notification of all proceedings respecting the adoption. It should be noted however that the Ontario Act, R.S.O. 1970, c. 645, s. 73, requires that the consent of the father of the illegitimate child to its adoption where the child lives with and is maintained by the father, and thus not withstanding that the father was not presently living with and maintaining the child the fact that he had done so for thirteen months was undoubtedly most persuasive.

The case also depended on the definition of the word "parent" which is defined in the Ontario Act in s. 20(1)(e) as ". . . a person who is under a legal duty to provide for a child, or a guardian or a person standing *in loco parentis* to a child." The Act also requires that a judge in a wardship hearing shall be satisfied that the "parent" shall have had reasonable notice of a hearing. In an appeal to the Supreme Court of Canada, Laskin J. held that the putative father was entitled to notice of the wardship proceedings in the first instance either because he fell within the definition of "parent" or a "matter of

common law entitlement". With all due respect it is suggested that the putative father had absolutely no common law entitlement. Presumably he does fall within the definition of parent as Laskin J. suggested. Since our Act contains no similar definition of "parent" and if Laskin J. was indeed incorrect in referring to the putative father's "common law entitlement" it follows that the *Lyttle* case has little applicability to the law of Alberta.

If, however, the *Lyttle* case can be interpreted as interpreting the word "parent" to include an interested putative father even without reference to the statutory definition (which was probably broad enough to include him under the Ontario Act) than it would follow that section 19 of our Child Welfare Act will require that notice of wardship proceedings will have to be served on the putative father.

The Family Court Act, R.S.A. 1970, c. 133

The Family Court Act is relevant to a consideration of the position of the illegitimate child. This Act prescribes the jurisdiction of a Family Court judge to make maintenance orders for deserted wives and families under section 27 of the Domestic Relations Act, which does not lend itself to any interpretation to include an order for maintenance of the illegitimate child (section 4(1)(a)).

The Family Court judge does have jurisdiction to entertain maintenance orders made in a reciprocating state under the Reciprocal Enforcement of Maintenance Orders Act, which can include maintenance orders for illegitimate children (section 4(1)(b), *Ross* v. *Polak* (1971) 2 W.W.R. 241.

Jurisdiction respecting charges against adult persons under the School Act for failure to cause the child to attend school may also extend to the parent of the illegitimate child in view of the broad interpretation of the word "parent" which, under the School Act, includes a person standing *in loco parentis*.

Jurisdiction is also conferred with regard to Part 2 of the Child Welfare Act, which may also include for some purposes the parents and illegitimate children; and jurisdiction is conferred with respect to the provisions of section 197 of the Criminal Code, which imposes liability on a person as head of a family to provide necessaries of life for a child under the age of sixteen, which section can be interpreted as extending to the illegimate child.

The jurisdiction which is conferred with respect to charges of common assault where a "parent assaults a child" (section 4(1)(f)) may not, however, include assaults on the illegitimate child because of the questionable interpretation of the words "parent" and "child".

Section 10 of the Family Court Act which deals with the jurisdiction of the court over an application of custody respecting an illegitimate child has been the subject of recent litigation.

In an unreported Family Court decision *Wensley* v. *Orchard* in the Edmonton Family Court, Hewitt, J. held that section 10 was limited to applications for custody between lawful parents of a child. He stated:

> Section 10 states that where parents of a child are in fact living apart from one another and where there is a dispute of custody or access to the child, an application and order may be made regarding the custody or access to the child. It goes without saying that The Family Court Act must be interpreted in the light of other legislation and, in particular, to The Domestic Relations Act. The Family Court Act is clearly designed to offer protection of some sort to children. It is a matter beyond dispute that too often where parents are married and living apart, they begin to feud and fight over the children. To offer either parent or child some solution to the squabble involving custody or access to the child, the provisions of section 10 were implemented. It offered a relatively inexpensive solution to such a problem. The fact that section 10 refers to parents living apart clearly indicates the need for parents to live together for a substantial period.

In *Holdsworth* v. *Holdsworth*, Bowker J. again held that the provisions of section 10 are limited to "the lawful parent" and that the mother as sole legal guardian of the child is solely entitled to its custody.

In *White* v. *Barrett* in the Calgary Family Court, Litsky J. held that the lack of definition of "child or parent" would enable the court to apply a broader definition based in equity. Litsky J. reasoned that the Family Court can apply equitable jurisdiction. This judgment was upheld by Sinclair J. (9 R.F.L. 14) on appeal and on appeal to the Appellate Division of the Supreme Court Clement J. in a dissenting judgment held that a putative father is in Alberta destitute of legal rights at common law with respect to his illegitimate child, although the mother's common law right to custody is preserved in section 39 of The Domestic Relations Act which names her as the sole legal

guardian. Clement J. was unable to understand how an application for custody could arise between the mother who is solely entitled to custody and the father who has no rights to custody whatsoever. Thus, he rejected the putative father's claim because of his lack of status.

The reasoning of McDermid J. which was concurred in by Allen J. accepted the argument that the word "child" in legislative enactments includes an "illegitimate child". However, although the majority opinion upheld the decision of Litsky J. with respect to his jurisdiction to entertain an application for access on the basis of the interpretation of the word "child", the court expresses some doubt as to the jurisdiction of the Family Court to entertain an application for custody, in view of the provisions of section 39 of The Domestic Relations Act.

Neither the Trial Division judgment nor that of the Appellate Division made any determination as to the exercise of equitable jurisdiction in the Family Court. It should be remembered that Milvain J. in *McGee* v. *Waldern & Cunningham* 4 R.F.L. 17 at page 24, stated that all courts now enjoy equitable jurisdiction, which has yet gone unchallenged.

It should also be noted that the decision of the Court of Appeal in the *White* v. *Barrett* case can perhaps be justified on the argument that the provisions of section 10(1)(a) appear to give the court the right to make an order of access "to any other person", so that even apart from the efforts of the courts to extend the definition of "parent" to the putative father, the court's jurisdiction to grant him access as "any other person" is quite clear.

The *White* v. *Barrett* case is disappointing in this light because it has decided only that the putative father may be classified as a "parent" but nevertheless this classification does not confer any rights upon him, as the provisions of section 79 of The Domestic Relations Act remains to be considered, and it would appear that the mother may still be considered as being entitled to the sole legal custody of the illegitimate child.

It is submitted that the common law right of the mother to custody of the illegitimate child is given the same protection as that of the father of the legitimate child under the common law and, thus, the principle of *Re Agar-Ell* (1883) 24 Ch.D. 317. However, it is also submitted that the illegitimate child is equally entitled to the protection of the equitable jurisdiction of the Supreme Court to the same extent as a legitimate child and that in the exercise of that equitable jurisdiction, the Supreme Court has the right to remove the custody from the mother if the best interests of the child demand it and place the child with whomever the court pleases. This may be the grandmother[6] or it may be the putative father[7] but in either case it is not because of a particular legal status of either the grandmother or the putative father--it is because in the exercise of equitable jurisdiction the court can award custody or access, as the best interests of the child may require, and there are no restraints upon the court's jurisdiction in this regard. Thus, it is submitted that the recent line of cases, which it has been

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[6] *Hogue* v. *Burrell* [1971] 15 D.L.R. (3d) 129 (C.A.O.

[7] *Misfeldt* v. *Chowen* (1973) 2 W.W.R. 551.

suggested accord a new status to the father of the illegitimate child, are not, in fact, creating a new status for him but are simply exercising the equitable jurisdiction that permits the court to award custody to him, in the same manner that the court might have awarded the custody to the grandmother or to a foster parent if it was satisfied that the mother had so conducted herself to warrant the court's interference with her common law rights. It is suggested that if the mother in the case of *Misfeldt* v. *Chowen*, *supra*, had not compromised her position by living with a man accused of sexual relations with her daughter, the court would not have interfered with her custody. If the mother had not so conducted herself to warrant the court's interference, it is suggested that the putative father would have been given no recognition and it is questionable whether the court would have held that he had any status to make an application in that case, unless the putative father had by some other means been given equal status with the mother.

At common law the rights of a putative father who is in lawful custody of the child will be protected by the court (*R.* v. *Cornforth* (1742) 2 Stra. 1162), but it does not follow that he has a right to the custody of the child (Halsbury, *Bastardy*m Vol. 3, p. 109 at p. 192).

It is this writer's opinion that the court in the *White* v. *Barrett* case did not consider whether the Family Court could exercise equitable jurisdiction and it is suggested that until that matter has been considered that the Family Court is bound by the limitations imposed upon it by the legislation and is not at liberty to make awards

of custody in the best interests of the child, which might be sufficient to enable the court to make an award of custody or access to a putative father.

School Act

The School Act, R.S.A. 1970, c. 329, defines "parent" in section (2)(i) as including "a guardian of a child or person standing *in locus parentis*". Thus the father of the illegitimate may be deemed to be a parent under that Act if he is living with and supporting the child and as such may be responsible for ensuring the child's compliance with school attendance requirements (School Act, R.S.A. 1970, c. 329, s. 171).

The Criminal Injuries Compensation Act, R.S.A. 1970, c. 75, defines child:

> 2(1)(b) . . . includes an illegitimate child . . .

"Dependant" is defined as

> . . . 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.

The Fatal Accidents Act, R.S.A. 1970, c. 138, also defines child as including an illegitimate child. The Act requires neither an acknowledgement of the child nor a declaration of paternity to establish the relationship of the illegitimate child with its father.

Maintenance of the Illegitimate Child

The Maintenance and Recovery Act, R.S. 1970, c. 233, prescribes the procedure to be followed by either the mother of the illegitimate child or someone on her behalf to obtain a court declaration of paternity. The application for this order to be made by any of the following:

7.(c) "mother" means

(i) a single woman who has been delivered of a child or who is pregnant and likely 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 Act is concerned primarily to establish the identity of the putative father for the purpose of obtaining a maintenance order against him. The order under this Act creates responsibilities on the putative father but provides no corresponding rights. These proceedings are viewed as civil proceedings;[8] the alleged father is served with a summons (section 15) and he may be arrested for failure to appear; the application may be directed to the Director of Maintenance and Recovery who takes such action as seems fit to him (section 9); although the complaint may be made by the mother or next friend or guardian of the child (*O'Rourke* v. *Campbell* (1887) 13 O.R. 563), the Director must be notified (section 13(4)); and the Director has the right

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[8] *Davis* v. *Feinstein* (1915) 8 W.W.R. 1003; *Pacholko* v. *Kishko* [1939] 3 W.W.R. 317; *Doyle* v. *Nevers* (1965) 55 D.L.R. (2d) 383.

to intervene and appear. These rights on the part of the Director are presumably based on the premise that the illegitimate child is likely to become a public charge (*Overseers of Poor* v. *Davidson* (1882) 16 N.S.R. 58); a time limit is prescribed for making the complaint (section 14(1)); after hearing the complaint the court may make an order declaring the father to be the putative father, or declaring that a number of persons who could have caused the pregnancy to be the father for the purposes of that part; the Act enables a father to sign an agreement to pay the mother's expenses and child's maintenance if he admits that he caused or possibly caused the pregnancy of the mother (section 10(11)).

The order of maintenance varies from that against the father of a legitimate child in that the order terminates upon the marriage of the mother where the child is in her custody, or upon the mother's resumption of cohabitation with her husband, although application can be made to reinstate the order after either event. It varies as well in the fact that the order may provide for expenses for the maintenance of the mother during the period just prior to and at the time of and shortly after the delivery of the child (in this respect the mother of the illegitimate child stands in a better position than the mother of the legitimate child)--under the provisions of section 27 of the Domestic Relations Act. The Act also clearly provides that the order extends until the child attains the age of 16 or 18 if attending school or unable to earn a living; the order may provide for a retroactive payment (again placing the mother of an illegitimate child in a better position than the mother of a legitimate child under the provision of the Domestic Relations Act). The

order or the agreement may be registered in the Land Titles Office to bind the estate of the putative father, which again is a right denied to the mother of the legitimate child.

The enforcement of the order or the agreement is restricted to the District Court (section 59(a)) and the application for enforcement is restricted to the Director of Child Welfare.

The distinction between the procedure which must be followed in Alberta to obtain a filiation order and some of the other provinces is as follows: The British Columbia Family Relations Act, S.B.C. 1972, c. 20, provides in section 16 that every parent is liable to support and maintain his children. "Child" is defined as follows:

> (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 sub-paragraph (A), or the wife referred to 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,

Notwithstanding this enlightened approach to the maintenance of an illegitimate child whose parents have resided together, the Children of Unmarried Parents Act, R.S.B.C. 1960, c. 52, still provides for affiliation orders.

The Manitoba Wives and Children's Maintenance Act, R.S.M. 1970, c. W-170, provides in section 6 that a woman who has cohabitated with a man for a year and he has fathered the child may apply for a maintenance order in the same manner as the mother of the legitimate child. The Child Welfare Act, R.S.M. 1970, c. C-80, provides for filiation orders in Part III.

Similar provisions are found in the Saskatchewan legislation in that Deserted Wive's and Children's Maintenance Act, R.S.S. 1965, c. 341, which defines "child" as including the child of a man and woman who have cohabitated for at least one year, notwithstanding that filiation proceedings may be undertaken under the Child Welfare Act, R.S.S. 1965, c. 268.

In New Zealand three different Acts deal with the putative father's relationship to his child for different purposes. The Guardianship Act deems the putative father to be guardian of the child if he and the mother were living together at the time of the child's birth which would create equal rights in the father, which would otherwise be exercised only by the mother. The Status of Children's Act deems that the putative father to be the father of the child for all purposes of the law of New Zealand (although his authority over the child will be determined by the question of the guardianship). The Domestic Proceedings Act 1968 which refers to both legitimate and illegitimate

children prescribes to circumstances in which a putative father can be made subject to a maintenance order:

(1) Where the court has made a paternity order against that person, either before or at the time of making the maintenance order;

(2) Where the Supreme Court has declared that person to be the father of the child;

(3) Where that person has been declared to be the father of the child by an order made in a country outside New Zealand;

(4) Where that person has in proceedings before the court or in writing being signed by him admitting that he is the father of the child.

Since the Status of Children Act 1969, No. 18, provides that the relationship of father and child shall be recognized if a paternity order has been made under the Domestic Proceedings Act 1968, it is evident that once a filiation order has been made the relationship of father and child is established for all purposes of the law of New Zealand. The only matter which would remain to be determined would be the guardianship of the child; since the father can apply for guardianship (Statutes Amendment Act, 1969, s. 35, s. 6A) once the relationship of paternity is established, it follows that the act of applying for a filiation order against the putative father could place him in the same position as a legitimate father.

In England the Guardianship of Minors Act 1971 while enabling the father of the illegitimate to apply for custody, specifically exempts the illegitimate child from maintenance proceedings under that Act (section 14). Thus in England the correct procedure for a maintenance application respecting the illegitimate child is still prescribed by the Affiliation Proceedings Act, 1957.

It is questionable whether we can or should continue to distinguish between the procedure to be taken for maintenance applications for the legitimate and the illegitimate child. It is questionable whether we should continue to view the filiation proceedings as "punitive" proceedings (notwithstanding that they are civil proceedings) which result in responsibility, but which creates no rights. It is suggested that the fair remedy adopted by the New Zealand legislation should be adopted in this province with the result that a declaration of paternity should proceed an application for maintenance and that declaration should be construed as establishing the father-child relationship for all purposes of the law of Alberta.

It is suggested that thereafter the maintenance proceedings should be the same for both legitimate and illegitimate children.

The Domestic Relations Act

The provisions of the Domestic Relations Act, R.S.A. 1970, c. 113, are critical to any study of the position of the illegitimate child in Alberta and reference is made in this context to the paper on guardianship which did examine the provisions of Part 7 of that Act as they relate to the guardianship of the illegitimate child.

Part 4 of the Act dealing with the protection orders excludes maintenance orders which may relate to illegitimate children, in that section 27 of the Act provides that "a married woman" can make application for maintenance for herself, and provides that if the court is satisfied that the husband has neglected to provide maintenance for "his wife or his wife and children", the court may order the husband to appear. Section 27(5) refers to a situation in which a woman is not deserted by a husband but has in her care "their children", and provides that she may apply for maintenance for those children. Section 27(7) refers to the situation of a divorced woman having in her care "legitimate children of herself and her divorced husband", and provides that she may in that situation apply for a maintenance order if the divorce court made no order of maintenance for the children.

The implication throughout that part of the Act is that it is restricted to the application for maintenance as they may relate to the legitimate children.

The Maintenance Order Act

The Maintenance Order Act, R.S.A. 1970, c. 222, which introduces the old poor laws of England to provincial legislation, by definition excludes the illegitimate child (The Maintenance Order Act, *supra*, section 2(a)). Thus, although the putative father might be held criminally liable for failure to provide necessaries of life to his child under the age of sixteen years (Criminal Code 1953-54, c. 51, s. 197), in Alberta, the putative father is not under any provincial responsibility to support his illegitimate

child unless he is the subject of an order or agreement under the Maintenance and Recovery Act (R.S.A. 1970, c. 223).

The Change of Name Act

The Change of Name Act, R.S.A. 1970, c. 41, restricts applications to change either the surname or given name of the illegitimate child to the mother but restricts her right to change the surname of a child to that of her maiden surname, with the result that in the event that the unmarried mother marries and wishes to change the name of her child to that of her married name, she is unable to do so under this Act but must proceed to institute adoption proceedings with her husband to enable the child to adopt the husband's name. Recommendation for amendments to this Act are being made to the 1973 Fall Legislature.

The Vital Statistics Act

The Vital Statistics Act, R.S.A. 1970, c. 384, provides that the registration of the birth of the illegitimate child shall show the surname of the mother as the surname of the child and no particulars as to the father shall be given. However, section 4(8) provides that the child may be registered in the name of the father, if a person acknowledging himself to be the father jointly so requests with the mother. Thus, the child can acquire the name of the father but only with his consent and cannot apparently obtain the name of the father even if the court has declared him to be the father for the purposes of the Maintenance and Recovery Act. Unless the father appears with the mother to consent to this registration, either at the time of birth or at a date subsequent thereto, the provisions

of the Change of Name Act, section 11(2), would prohibit the child from acquiring the name of the putative father by way of a change of surname. However, although the Vital Statistics Act requires the father's consent to the registration in his name in the first instance, the Change of Name Act would apparently permit the mother to apply to change the child's name to her maiden surname, even without the putative father's consent.

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