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July 18th, 1974

ILLEGITIMACY
DRAFT RESEARCH PAPER

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.

I. HISTORY OF LAW AND ATTITUDES

(The main source of the historical account which follows is a book by Wilfrid Hooper entitled The Law of Illegitimacy and published in London by Sweet & Maxwell, Limited, 1911.)

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 illegitimate'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 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."
>
> (Hooper, p. 4)

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 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 (p. 77).

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.

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 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 (2 Strange 925; Nic. 127). Under canon law, the adulterine bastard was illegitimate (p. 77).

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. (p. 12)

Although the common law rejected legitimation by marriage of the parents subsequent to a child's birth, it countenanced something akin to legitimation by acknowledgment 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" (p. 20), 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 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.
>
> (p. 28)

Apart from his inability to inherit, the illegitimate was "a worthy and law-worthy man" (p. 25).

Occasionally illegitimacy gave positive advantage. For example, status as the son of no one gained release from vileinage for the illegitimate. Then, too, "the owner of hereditary land could alienate a reasonable part to any stranger he chose, including a bastard son," whereas he could not alienate to a younger legitimate son without consent of his heir (p. 30).

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.

Hooper says,

> 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.
> (pp. 33-34)

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), 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 following 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.

Hooper says,

> 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 of the actual possessor.
>
> (pp. 65-66)

Bastardy was also pleadable in most personal actions.

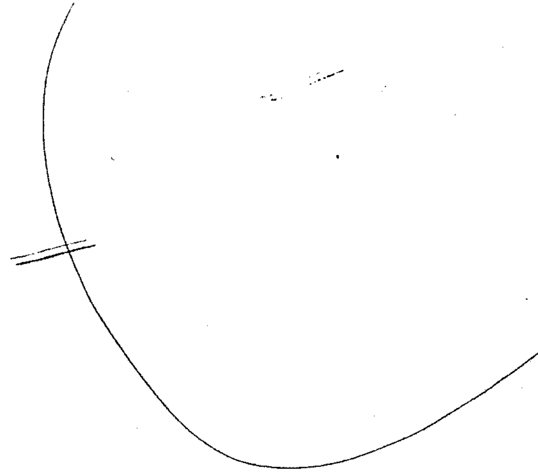
The plea of bastardy gave rise to a practical difficulty. The King's justices usually remitted a cause of bastardy to the bishop for his certificate of bastardy or mulierty. The bishop's certificate was based on canon, not common, law. This meant important differences. In the case of a child whose parents subsequently married, the Statute of Merton in 1236 established that the issue of legitimacy was for common law (according to canon law children born 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). (pp. 54-81)

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 relationship of a father against whom paternity had been made out. (See, for example, Clarke v. Carfin Coal Company, [1891] A.C. 412 at 420-421, *per* Lord Watson.) 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.
>
> (p. 105)

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 (Haines v. Jeffel, (1695) 1 Ld. Raym. 68). Today, the law takes note of blood relationships for purposes of incest, too (Criminal Code, R.S.C. 1970, c. C-34, s. 150(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" (Hooper p. 108). That is to say, *prima facie* any reference in a statute to relationship means legitimate relationship. The Supreme Court of Canada has recognized the rule as well established in English law (Town of Montreal West v. Hough, [1931] S.C.R. 113). That case concerned the interpretation of an article of the Quebec Civil Code, but Anglin C.J.C. says (at 120):

> 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 [1973] 3 W.W.R. 293, 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 (as stated in 36 Hals. (3d) 392):

> 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 and 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 with two main exceptions described by Lord Cairns in Hill v. Crook (1873), L.R. 6 H.L. 265 at 282 and 283. 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 (p. 116) 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 Cairn says:

> 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 "[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." here is a third departure in Alberta today. Section 35 of The Wills Act, R.S.A. 1970, c. 393, 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.

(This exception is mentioned again on page 43 of this paper.)

A word about equity

Equity followed the law in its treatment of the bastard as *filius nullius*. Hooper (pp. 112-114) 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 . . . .
>
> 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 . . . .

> 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 (The Queen v. Nash, 10 Q.B.D. 454).

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, R.S.A. 1970, c. 193. Section 32 of this Act provides that where a claim is made in equity the Court shall treat the claim in the 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 (The District Courts Act, R.S.A. 1970, c. 111, ss. 12, 13 and 15). As a constitutional matter, it is questionable whether a province can bestow equitable jurisdiction on a provincial court. Neither The Provincial Court Act, S.A. 1971, c. 86, nor The Family Court Act, R.S.A. 1970, c. 133, attempts to do so.

II. 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 (second edition by Julien D. Payne, Toronto: The Carswell Company Limited, 1964) 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.
>
> (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, R.S.C. 1970, c. M-5. (For further discussion, see Power, pages 340-362; see also, Joseph Jackson, The Formation and Annulment of Marriage, London: Sweet & Maxwell Limited, 1951.)

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 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 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 (Russell v. Russell, [1924] A.C. 687), but the rule has been reversed by statute in Alberta (The Evidence Act, R.S.A. 1970, c. 127, s. 6). 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, The Evidence Act, R.S.A. 1970, c. 127, s. 8(1)).

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 voidable marriages on legitimacy has been altered by legislation. The Legitimacy Act (R.S.A. 1970, c. 205) provides that a child of a voidable marriage continues to be legitimate notwithstanding annulment of the marriage (section 3). A child of a marriage void because a spouse presumed dead is alive, is legitimate from birth (section 4); 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 (section 5). In an article entitled "Forgotten Fathers: The Rights of the Putative Father in Canada" (7 R.F.L. 1 a 8), 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 (section 2). 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 (section 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 (section 7). 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, S.A. 1972, c. 121. 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 (subsection (4)).

An illegitimate child may also attain a status equal to that of a legitimate child through adoption. Adoption is provided for in Part 3 of The Child Welfare Act (R.S.A. 1970, c. 45). 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" (section 49). Consent of the guardians of the child to the adoption is necessary unless dispensed with by the court (section 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 (section 59). 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 (section 60).

(For a discussion of the law of adoption throughout Canada, see Cruickshank, pp. 46-60.)

(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" (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). 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.

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. (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. 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, and in an article by A. L. Foote entitled "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.) The legislation covered is grouped into these subjects: (i) guardianship, custody and access; (ii) wardship; (iii) maintenance; (iv) succession; and (v) other matters related to parentage.

(i) Guardianship, custody and access

(The historical summary is based on H. K. Bevan, The Law Relating to Children (London: Butterworths, 1973), ch. 9. The Ontario Law Commission give a fuller historical account in Part III of their Report on Family Law at pp. 88-90.)

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" (Bromley, Family Law, 4th edn., p. 268). 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.
> (Bevan, p. 256)

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 empowered the Court of Chancery to give the mother custody of her legitimate child until the child reached the age of 7. 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. (Bevan, p. 258)

The power to order access can also be traced back to Talfourd's Act (Bevan, pp. 299-301). It is well established today--if not by legislation, then by application of the principles of equity. (For a more extensive exposition of the law of access, particularly as it affects the father of an illegitimate child, see Cruickshank, pp. 29-39, on "Visitation".)

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 (1841), 3 Man. & G. 547, 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. (R. v. Nash, Re Carey (1883), 10 Q.B.D. 454.)

> But in Barnardo v. McHugh ([1891] A.C. 388) 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.
> (Bevan, p. 302)

According to Cruickshank (fn. 74 and pp. 18-23) a line of cases culminating in Re Logue and Burrell (1970) 15 D.L.R. (3d) 129 (Ont. C.A.) has confirmed the principle. The Supreme Court of Canada took this view of the law in Re Baby Duffell: Martin v. Duffell, [1950] S.C.R. 737 (at 744, *per* Cartwright J.):

> 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. Russell traces the history of the English and Alberta law on guardianship and custody in her paper on Guardianship (pp. 25-33). Cruickshank treats the law of guardianship at pp. 27-28.

Guardianship is now dealt with in Part 7 of The Domestic Relations Act (R.S.A. 1970, c. 113). 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 (section 39). 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 (section 40). "Parent" is not defined. It is questionable whether it includes the father of an illegitimate child. If it does, Mrs. Russell (Guardianship, p. 56) sees this incongruous result: the father, during his lifetime, is not a guardian of his illegitimate infant (section 39), but nevertheless he may appoint a person to be guardian upon his death (section 40).

Section 39 may be limited to guardianship of the person because on a literal reading of section 7 of the Public Trustee Act, R.S.A. 1970, c. 301, the Public Trustee is guardian of the estate of an infant if letters of guardianship have not been issued. Section 7 says:

> (1) Notwithstanding anything contained in any other Act, any money other than 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 (pp. 118-123).

Custody is also dealt with in Part 7. Unless his authority is otherwise limited, the guardian "shall have the custody of the person of the infant and the care of his education" (section 52(2)(d)). Under section 46, 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 (Guardianship, pp. 90.91) says:

> 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 (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 [1974] 4 W.W.R. 272. McDonald J. found jurisdiction. Referring to the majority judgment in White v. Barrett (cited below in connection with the Family Court) delivered by McDermid J.A., he says (at 274):

> 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 Act to permit the father of an illegitimate child to apply for access (Re Alderman, 32 D.L.R. 71; Infants Act, R.S.S. 1953, c. 306, s. 2). The Ontario Court of Appeal has also construed a similar section to permit application for access (Re Cresby (1970), 21 D.L.R. (3d) 166; Infants Act, R.S.O. 1960, c. 187, s. 1(1)). (Jurisdiction in Ontario is in the Surrogate Court. The case of Re Baby Duffell 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 (at pp. 91-93 of her paper on Guardianship prepared for the Institute) 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 (Vandenberg v. Guimond (1968), 66 W.W.R. 408 (Man. C.A.)); the Saskatchewan Infants Act was silent. Then, too, in Saskatchewan the rules of equity prevailed in all questions relating to the custody of infants (Queen's Bench Act, 1960 (Sask.), c. 35, s. 44), whereas in Alberta they prevail when they do not conflict with the Domestic Relations Act (section 51). 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. 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 (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).

(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 and Gerritt Clements.)

Section 47 and 49 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 (section 47). An order for delivery of the infant to the applicant must be for the welfare of the infant (section 49). (Two lines of judicial interpretation concerning the effect of section 47 on the equitable jurisdiction of the Court of Chancery are discussed in Mrs. Russell's paper on Guardianship, pp. 100-106.) 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.

Section 50 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, "Court" means the Supreme Court of Alberta, or a judge of the Surrogate Court sitting in chambers (section 37).

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. (The Family Court Act, R.S.A. 1970, c. 133, s. 10.)

In White v. Barrett [1973] 3 W.W.R. 293, the Appellate Division of the Supreme Court of Alberta held that the Family Court has jurisdiction under section 10 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 facie* right of the mother of an illegitimate child to its custody can only be overridden by the application of equitable principles (memorandum dated June 12th, 1972, by R. J. Poole, Solicitor, Department of the Attorney General, pp. 26 *et seq.*). This was the position taken by Judge Hewitt in Wensley v. Orchard (Edmonton Family Court, 24 July 1970, unreported).

Cruickshank (p. 15) 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.

(ii) Wardship

In England, the establishment of a civil jurisdiction to deal with children living in undesirable conditions began 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." (Bevan, pages 4 and 19)

Care jurisdiction in Alberta today is contained in Part 2 of The Child Welfare Act, R.S.A. 1970, c. 45. 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 (section 14(e)), and includes:

> (xiv) a child who is not under proper guardianship or who has no parent
>
> (A) capable of exercising, or
>
> (B) willing to exercise, or
>
> (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 (section 14(f)).

"Judge" means (section 14(d)):

(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 (section 15). Following apprehension, a hearing shall be held to determine whether the child is in fact a neglected child (section 18). 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 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.
>
> (section 19(1))

Notwithstanding subsection (1), the judge may authorize a form of substituted service, and accept less than the ten days' notice prescribed, or dispense with service of notice (section 19(2)). Persons unconnected with the case are excluded from the hearing (section 20). If the child is not neglected, the judge may direct his return to the person

from whose care he was apprehended (section 22(1)). 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 (section 23). 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 (section 24). On review of an order of temporary wardship, section 22 or 23 may be applied, or the judge may make a further order under section 24 (section 25). 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:

> . . . 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.
> (section 26(2))

The judge also has the option of making one of the orders described above (section 26(3)). 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 (section 26.1). Any order made by a judge of the district court or the juvenile court may be appealed to the judge of the Supreme Court (section 27). Extra-provincial orders and evidence have force and effect in Alberta (section 29).

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 (section 30) and this surrender binds the father of an illegitimate child who subsequently marries the mother (subsection (3)).

The Director of Child Welfare is the guardian of a ward of the Crown, and this is notwithstanding The Domestic Relations Act (section 31). An order of wardship takes precedence over any other order for custody (section 32). 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" (section 34). "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 (section 43).

The recent case of Regina v. Gingell (Gingel) [1973] 6 W.W.R. 678 (Alta. C.A.) 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 section 19(1). He may nevertheless have a right of appeal under section 27(1) 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 issue. White v. Barrett is distinguished, as is Re Lyttle (1973) S.C.R. 568 (Ont.), 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 (reported as Re K.R.G. and A.J.M. [1973] 4 W.W.R. 732), 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.

While Gingell was on appeal, Legg D.C.J. gave judgment in Re N.V.C. [1973] 5 W.W.R. 257. He, too, concludes that the father of an illegitimate child is not entitled to notice of wardship proceedings under section 19(1). 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.
> (p. 262)

(iii) 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 given the child authority to incur it or had contracted to pay for it" (Bevan, p. 453). 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. (Bevan, p. 454)

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" (Bevan, p. 175). Once the duty to protect was established, wilful neglect to provide adequate food, clothing, medical aid or lodging gave rise to criminal liability (Bevan, p. 455).

"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" (Poor Relief Act 1601) (Bevan, p. 455). This duty has been carried forward to the present day. Section 3 of The Maintenance Order Act, R.S.A. 1970, c. 222, provides in subsection (2):

> The 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 (subsections (1) and (3) of section 3). "Child" includes the child of a husband or wife by a former marriage, but excludes an illegitimate child (section 2(a)). 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, R.S.A. 1970, c. 223. 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" (at pp. 53-54), 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:

(1) designated public officials [in Alberta, the Director of Maintenance and Recovery] may initiate the action; (section 13(1)(c))

(2) appropriate public officials [the Director of Maintenance and Recovery] may be called upon to provide aid and advice to unmarried mothers; (section 9)

(3) there is control over out-of-court arrangements for a child's support; and (section 10)

(4) identification of the actual father is not necessary to succeed in an action. (section 18(2))

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. (section 13(3) and (4))

Apart from the Director, a complaint may be made by the mother, or by the next friend or guardian of the child (section 13(1)(a) and (b)). "Mother" is defined in section 7(c) to mean:

> (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 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 acknowledgment by the putative father, or his return to Alberta (section 14(1)). 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 issue for non-appearance without just excuse (section 15). 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 (section 16). "Judge" means a judge of the district court (section 7(b)). Section 19 contains special evidentiary provisions.

These proceedings may result in an order declaring the putative father or fathers (where the judge is satisfield 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 (section 18).

A person declared to be father may be ordered to pay expenses related to the pregnancy and the illegitimate child. Likewise, the mother may be ordered to contribute toward the expenses, whether or not there is a declaration as to paternity (section 20). 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 (section 21(1)). 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 (section 21(2)); and to the probable standard of living the child would have enjoyed had he been legitimate (section 21(3)). Liability may be satisfied by payment of a specified sum, even though that sum is payable in periodic instalments (section 21(4)). An order or agreement made pursuant to the Act may be varied under section

22, or terminated under section 23. 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 (section 23(1)). However, when the mother retains custody the order or agreement may be reinstated by a judge (section 23(2)). Section 23 does not affect a provision for satisfaction of liability by payment of a specified sum (subsection (7)). A judge may require security for future performance of an order or variation, and commit to jail for failure to furnish the security (section 24). Payments are to be made to the Director or to such person as the Director directs (section 25). 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 (section 26). An order or agreement binds the estate of the declared or putative father after his death (section 27). There is no abridgment of other remedies against the father of a child born out of wedlock (section 32).

Collection of monies payable under an order or agreement is covered in Part 4. The Director is responsible for enforcement (section 60). Jurisdiction is in the district court (section 59(a)). Sections 61 to 70 lay down the procedure and penalties.

Foote points out (pp. 55-56) 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 (at pp. 35-36), Mrs. Russell names three ways that the mother of an illegitimate child under The Maintenance and Recovery Act is in a better position than 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 retro-active 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

Section 27 of The Domestic Relations Act provides a summary procedure for obtaining a "protection order" from a magistrate. ("Magistrate" is defined in The Interpretation Act, R.S.A. 1970, c. 189, section 21(1).16 (am. S.A. 1971, c. 86, s. 19), 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" (subsections (1) to (4)). The court may restrict its order to the maintenance of the children (subsection (6)). A married woman who has not been deserted may apply for maintenance of "their children in her care" (subsection (5)). 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 (subsection (7)).

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

Section 48 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 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, R.S.A. 1970, c. 345, 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" (section 2(f) and (g), and sections 6 and 7). 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 (section 11(2)). "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 unemployability (section 2(bl)). 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" (section 8(1)). 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 (section 35) or pursuant to court order (section 42), of an overpayment of a social allowance. Section 56 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.

(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, R.S.A. 1970, c. 313 (application by a dependant resident in Alberta for a maintenance order against a person resident in a rèciprocating 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, R.S.A. 1970, c. 134, "child" includes an illegitimate child of the deceased person. The tests for paternity are acknowledgment by the deceased man and declaration by an order under The Maintenance and Recovery Act or a predecessor (section 2(b)). 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 (section 3). An illegitimate child may thereforequalify as a dependant for proper maintenance and support out of the estate of his deceased mother or father (sections 2(d) and 4).

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

The Criminal Injuries Compensation Act, R.S.A. 1970, c. 75, defines "child" to include an illegitimate child and a child with respect to whom a victim stands *in loco parentis* (section 2(1)(b)); "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 (section 2(1)(c)). 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 a victim (section 7(1)(d) and (e)). 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 (section 13(1)(c)). So, too, is "maintenance of a child born as a result of rape" (section 13(1)(d)), giving a child illegitimate for this reason a source of maintenance unavailable to any other child.

The Fatal Accidents Act, R.S.A. 1970, c. 138, 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 tortfeasor would have been liable to the injured party if he had lived (sections 3 and 4). A child of the

injured party is one of the persons who may be benefitted, and "child" includes an illegitimate child (section 2(a)). A parent may be benefitted, too, but it is not clear from the definition whether "parent" includes the father of an illegitimate child (section 2(b)).

The Workers' Compensation Act, S.A. 1973, c. 87, 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" (section 16). "Child" includes an illegitimate child (section 1.5); "'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 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" (section 1.9); 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" (section 1.19). The Workers' Compensation Board has exclusive jurisdiction to determine all matters arising under the Act (section 12(1)). The Workmen's Compensation Act, R.S.A. 1970, c. 397, 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 (section 10(9)(g) and (h)), but these subsections are not reenacted in the 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, R.S.A. 1970, c. 299, names "a dependent child under the age of 18 years" as a person who may be "the beneficiary of a deceased employee or a deceased former employee who had elected to receive a deferred pension" (section 28(3)(b). The employee may designate a beneficiary or beneficiaries (section 27). 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, S.A. 1972, c. 81, contains comparable sections (sections 28 and 29(3)(b)).

There is no mention of children in The Local Authorities Pension Act, R.S.A. 1970, c. 219. The Lieutenant Governor in Council may by regulation "prescribe the alternative types of pension payments that may be made under the pension plan (section 9(e)). In addition, he may "declare that any provision of the Public Service Pension Act is, with such modifications as he considers necessary, applicable" (section 9(g)).

The Teachers' Retirement Fund Act, R.S.A. 1970, c. 361, makes no reference to children. The Board of Administrators of the Fund may, by by-law, "provide for . . . pensions payable jointly to a teacher and his nominee" (section 42(b)); "determine to whom shall be made payment of amounts which may become payable . . . following the death of a pensioner or teacher" (section 42(e)); and "generally regulate all payments out of the Fund and all matters related thereto" (section 42(j)). A by-law must be approved by the Lieutenant Governor in Council to have effect (section 43(1)).

Insurance legislation may also affect the illegitimate:

Part 6 of the Alberta Insurance Act, R.S.A. 1970, c. 187, 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" (section 228.7). 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 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 (section 236(a), (c) and (e)). "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, similar provisions for accident and sickness insurance are related to "life and well-being" (sections 322(h) and 335).

Under the Alberta Health Care Insurance Act, R.S.A. 1970, c. 166 (section 2(j)), and The Health Insurance Premiums Act, R.S.A. 1970, c. 167 (section 2(e)), the definition of "dependant" is left to the regulations.

(iv) 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 changed by the Inheritance Act, 1833 (3 & 4 Will. IV., c. 106). If the bastard left no heirs of his body, his estate escheated to the Crown or mesne lord. (Escheat was subject to a surviving widow's dower rights.) (Hooper, p. 107)

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 (Hill v. Crook (1873), L.R. 6 H.L. 265). Bevan says, ". . . although it [this rule of construction] was a presumptive and not an absolute rule, it was not easily disturbed" (p. 254).

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 assued by statute. The Intestate Succession Act, R.S.A. 1970, c. 190, establishes that "an illegitimate child shall be treated as if he were the legitimate child of his mother" (section 15).*

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*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 descendants of the ancestor" (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.

The Wills Act, R.S.A. 1970, c. 393, applies the same provision in the construction of a will, except when a contrary intention appears (section 35).

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 (section 16):

> (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 any Child Welfare Act or The [stet] Maintenance and Recovery Act,
>
> the illegitimate children and their issue shall inherit from the person so dying the 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 (section 9(1)). 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, R.S.A. 1970, c. 1. This section requires a person applying for a grant of probate or administration to send a copy of the application and a notice pertaining to the rights of dependants under The Family Relief Act 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.

(v) 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.

<u>Name</u>. At common law the bastard, like the legitimate child, has the right to use the christian names 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 (<u>Sullivan</u> v. <u>Sullivan</u> (1818) 2 Hagg Con. 238, 161 E.R. 728, <u>per</u> Sir William Scott; quoted in <u>Power</u>, p. 359, fn. (j)).

Today, the Vital Statistics Act, R.S.A. 1970, c. 384, requires the registration of the birth of every child born in Alberta (section 4, subsection (1)). The primary responsibility for registration is on the mother, and following her the father (subsection (2)), but the father of an illegitimate child is excused (subsection (3)). 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 (subsections (5) and (6)). ("'Married women" includes a woman who, within the period of gestation prior to the birth of the child . . . was lawfully married" (section 2.14)). 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 (subsections (7) and (8)). Particulars of a person acknowledging himself to be the father may be given without

of registration of the birth of a child to a married woman whose husband is not the father, or to an unmarried woman, the register may be amended by request made after registration (subsections (6) and (8)). 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 (section 6);

(2) there is provision for registration of the birth of a foundling--who may or may not be illegitimate (section 7);

(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 (section 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 (section 10), any birth certificate

issued thereafter shall conform to the new registration (section 12), and the original registration of birth is kept in a special register (section 11);

(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" (section 21).

The Change of Name Act, 1973, S.A. 1973, c. 63, deals specifically with "a child born out of wedlock" (section 8):

> (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
>
> (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 (section 1(c)), but a child who is 12 years of age or older must consent to the change (section 4).

Three features of section 8 are notable:

(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 (section 9));

(2) an illegitimate child may acquire the name of a man with whom the mother is cohabiting (although the mother may not (section 10)), and that man need not be the child's father; 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 (Mrs. Russell, Illegitimacy, p. 43).

An illegitimate adult may apply to change his own name (section 3).

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" (Bevan, p. 432).

Now The School Act, R.S.A. 1970, c. 329, 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 (section 133). "Parent" is defined in section 2(i). 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 Act in several contexts: the school the child attends (sections 135 and 142); the payment of fees, including tuition and transportation fees (sections 142, 143, 144 and 156); provision of transportation (sections 156 and 157); suspension or expulsion of a pupil

(section 146); instruction of a pupil in French or any other language (section 150); exclusion of a pupil from religious or patriotic exercises or instruction (section 154); attendance of a pupil on a work experience program (section 161); and contravention of school attendance provisions (section 171). 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.

<u>Marriage</u>. 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 (<u>Jackson</u>, pp. 19-20).

Today, the Marriage Act, R.S.A. 1970, c. 226, 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" (section 16). The exception of a pregnant female enables the birth in wedlock of a child who would otherwise be born illegitimate. The 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 (section 18). In most cases, the consents of the mother and the father are required (subsection (1)). 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 (subsection (2)). 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 (subsection (3)). 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 (section 19). "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.

Property. The Ontario Law Reform Commission give an historical account of the law of guardianship of an infant's property (Report on Family Law, Part III, pp. 88-89):

> In Anglo-Saxon times the law of guardianship of the property . . . of a minor closely 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 (p. 107):

> The common law regarded the child born outside marriage as *fillius 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, R.S.A. 1970, c. 185, has provisions governing an infant's property. This Act makes confused use of the terms "next friend", "guardian", "other person" 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

(sections 2 and 3). 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 (section 8) or in personal property (section 8.1). 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" (section 10). 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 (section 16). 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. (These sections must be read in conjunction with section 7 of The Public Trustee Act, quoted above.)

Religion. Bevan states (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 (DeLaurier v. Jackson [1934] S.C.R. 149, at 153). 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 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.

III. PUBLIC ATTITUDES

Is the existing law relating to illegitimacy appropriate? A survey of "Public Attitudes Towards Illegitimacy in Alberta" conducted 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 full equality for the illegitimate child, not because he is "illegitimate" but because he is a child. 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 (Part III: Children, p. 10):

> We have taken as our major premise the view that the status of "illegitimacy" ought 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 and Nelson v. Findlay and Findlay in which words denoting the relationship of parent and child are construed to include the illegitimate child and his father. McDermid J.A. says, in White v. Barrett (at pp. 295-296):

> I accept that, when the rule of construction was first enunciated ih 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.

IV. APPROACHES FOR REFORM

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

(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 (The Bobbs-Merrill Company, Inc., 1971) calls this the "family protection argument" (pp. 73-78). 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" (Ontario Law Reform Commission, Report on Family Law, Part III, "Children", p. 11); (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.
>
> (p. 75)

He also finds it hard to justify making distinctions between the rights of the extramarital and premarital illegitimate (p. 77). 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 (pp. 78-80).

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" (Ontario Law Reform Commission, p. 11). The Commission "consider that children born outside marriage have as much moral entitlement to share in an intestate's estate as other children" (p. 12).

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 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.
> (Cruickshank, pp. 5-6)

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 engages in a more extensive examination of foreign approaches to illegitimacy (ch. 6, pp. 175-234). 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 (Status of Children Act 1969, No. 18, s. 3(1)):

> 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.

Oregon has done the same (Ore. Rev. Stat. § 109.060 (1969), quoted in Krause, p. 298):

> "[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 recommend it (p. 12); as does the Law Reform Division of the Department of Justice in New Brunswick (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). It is preferred by the Law Reform Committee of South Australia (Eighteenth

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Report, Relating to Illegitimate Children, 1972), 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), introduced to the Alberta Legislature May 1, 1974. This method eliminates the need for legitimation provisions.

Examples of the second method come from North Dakota and Arizona. North Dakota provides (N. D. Cent. Code § 56-01-05 (Supp. 1969), quoted in Krause, 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 reservation (Ariz. Rev. Stat. Ann. § 14-206 (1956), quoted in Krause, p. 297):

> 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." [Emphasis added.]

The approach of abolishing the status of illegitimacy is further modified in Alaska where equality is conditioned on the ascertainment of paternity (Alaska Stat. § 25.20.050(a) (1962), quoted in Krause, p. 298):

"(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 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 (Status of Children Act 1969, section 3(2)):

> 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 (P. 13).

The Ontario Commissioners (P. 16) 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.

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" (Project No. 3) and "Affiliation Proceedings" (Project No. 13).

As in the exposition of the present law, it will be convenient to look at legitimation; adoption; guardianship, custody and access; wardship; maintenance; succession; and other matters having to do with parentage.

Legitimation. As the concept of legitimation is widened, so the problem of illegitimacy diminishes. The Legitimacy Act 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 made clear that section 5 of The Legitimacy Act applies to all void marriages which either of the parties reasonably believed to be valid, and does not, as Cruickshank (p. 8) suggests, exclude a marriage void by reason of consanguinity or affinity.

(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).)

Adoption. Cruickshank (pp. 46-60) 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 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 appearance in the adoption proceedings. "Sufficient interest" might also be demonstrated by the father's acknowledgment in writing of the child as his, for example, for purposes of registration under The Vital Statistics, or by a court order of paternity.

The Ontario Association of Children's Aid Societies uses the following criteria (Cruickshank, p. 50):

(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 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 (section 50). 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 seek out the father (Cruickshank, 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 (Cruickshank, pp. 53-54).

The sanction for failure to notify a father who meets the test for notification may be invalidation of the adoption proceedings (Cruickshank, pp. 52-53).

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 (Cruickshank, p. 54).

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 (p. 54). 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 (pp. 55-56).

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 (The Child Welfare Act, s. 49). Adoption 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 (Cruickshank, p. 59).

<u>Guardianship</u>, <u>custody</u> <u>and</u> <u>access</u>. In her paper on <u>Guardianship</u>, Mrs. Russell 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 under section 6 of the Guardianship Act 1968, No. 63. Ordinarily, "the father and the mother of a child shall each be a guardian of the child" (subsection (1)). 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. (subsection (2))

However, the father

> ... 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. (subsection (3))

The Guardianship Amendment Act 1969, No. 80, adds section 6A. Subsection (1) says:

> 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 1968 Act,

> "Guardianship" means the custody of a child ... and the right of control over the up-bringing 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 enables the mother or father of an illegitimate child to apply for custody and the court may (sections 14(1) and 9(1))

> ... 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 (section 3), the power of the father and mother to appoint testamentary guardians (section 4), the power of the court to appoint a guardian for a minor having no parent (section 5), and orders for custody and maintenance where a person is guardian to the exclusion of the surviving parent (section 10), 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 (pp. 23-24), the English legislation is, of limited effectiveness.

Part IV of the British Columbia Family Relations Act, S.B.C. 1972, c. 20, 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" (section 17(a)), a judge may "order that the custody of a child be committed to one parent" (section 25(1)(d)); 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" (section 25(1)(e)). "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 (section 15(c)(v)).

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. (Details are included below in the discussion of maintenance.)

Cruickshank (pp. 17-18) 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 recommends (p. 28) 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 discusses this (pp. 29-39). 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" (pp. 37-38).

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 (pp. 39-46), Cruickshank advocates (p. 45) "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. In summation, he claims that:

> . . . 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:

> 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."

On the issue of notice , identification of the father for service is of primary importance. The suggestions made 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. 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 (an Act to amend The Child Welfare Act, 1972, c. 109, s. 2; Cruickshank, p. 16). 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" (Regina v. Gingell (Gingel), per Prowse J.A. at 683).

Maintenance. In most jurisdictions, maintenance from his father for 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 declares in Part IV on "Family Maintenance" that "every parent is liable to support and maintain his children" (section 16(1)). "Child" and "parent" are defined in section 15:

> (a) "child" means a child, whether legitimate, 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;

( ) 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;

( ) 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 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, R.S.B.C. 1960, c. 52.

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, R.S.M., c. W170 (section 6). The order may provide for maintenance (sections 13 and 17); it may also award legal custody of the child and access for the purpose of visiting the child (section 13). Filiation is possible under Part III of The Child Welfare Act, R.S.M. 1970, c. C-80.

The Deserted Wives' and Children's Maintenance Act in Saskatchewan, R.S.S. 1965, c. 341, enables the court to make an order for maintenance (section 5). "Child" is defined to include (section 2(1)(b)):

(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 marriage 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, 1973, S.S. 1973, c. 12.

In England, The Guardianship of Minors Act 1971 specifically excludes the maintenance of an illegitimate child (section 14, subsections (2) and (4)). Maintenance may be obtained by application for an affiliation order under The Affiliation Proceedings Act 1957.

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 (section 38(1)):

(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.

Succession. The trend in reform of the law of succession as it affects the illegitimate is twofold: it consists of 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 contains the intestacy provisions:

> (1) 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.
>
> (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 (subsection (4)). 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 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" (subsection (8)).

Mrs. Russell examines the law of intestacy in her paper on Illegitimacy, (pp. 3-13). She quotes the provision in the "Uniform Probate Code" approved at the National Conference of Commissioners on Uniform State Laws held in 1969 (p. 6), and the legislation in New York (p. 7) and California (p. 8). 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,
>
> (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 Decedent Estate Law (para. 83A inserted by New York Sess. Laws 1965, c. 958. Inheritance by and from Illegitimate Persons) 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.

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 (§ 255):

> 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 (Part III, Report on Family Law, 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.

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

> 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 recognised 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 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 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 (para. 2, p. 5). They propose using a section similar to the one below (taken from the Administration and Probate Ordinance, 1929-1967, of the Australian Capital Territory, section 49E):

(1) Where an intestate is survived by an illegitimate child, the child is entitled to take the interest in the 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 (Illegitimate Succession, p. 15):

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.

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" (p. 16).

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 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 Children 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 (para. 6, p. 11) 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.

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 "does not affect any rights under the intestacy of a person dying before the coming into force of this section" (subsection (9)). The opening words of section 15 limit its application to a disposition "made after the coming into force of this section" (subsection (1)). 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 (p. 5) recommend 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 (section 15(7)):

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.

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, 1973 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 (subsection (4)); and (c) require the consent of a man registered under The Vital Statistics Act as father to a change of the child's name.

V. Establishing Paternity

To serve the advantage of any one child, changes in the law of illegitimacy must be combined with effective measures for determining paternity. Indeed, Krause (p. 106) blames much of the remaining discrimination against the illegitimate child on the facile phrase, "maternity is a matter of fact whereas paternity is a matter of opinion."

The issue of paternity may come before the court in an affiliation proceeding. It might also arise, in an action brought for another purpose, as a subsidiary matter which must be resolved before there can be a determination of immediate rights, for example, a distribution on an intestacy. Alternatively, a proceeding could be brought for the sole purpose of obtaining a declaration as to paternity. A declaratory judgment is possible now under the general jurisdiction of the superior courts. The Judicature Act is explicit on this point (section 32):

> In every civil cause or matter commenced in the Supreme Court, law and equity shall be administered by the Court according to the following rules:
>
> (p) no action or proceeding is open to objection on the ground that a judgment or order sought is declaratory only, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.

(The subject is discussed further in a paper entitled Declarations of Status, prepared for the Institute by Tom Matkin in the summer of 1973.)

(1) Effect of an adjudication

What should be the effect of an adjudication on paternity? Should the judgment bind only the parties to the proceeding, and then only for the purpose for which the proceeding is brought, or should it settle the issue once and for all? The Ontario Law Commission (p. 20) propose that

> ... whenever a judicial decree of paternity is made, whether it is made in proceedings in which an immediate right involving the issue of paternity is being asserted, or whether the decree is purely declaratory, obtained for the purpose of securing a future right, then this decree will operate as a presumption that the man named in the decree is the father for all other purposes. Since the decree would be only a presumption it would be open to rebuttal ...

The Commissioners take this position because they doubt that all the evidence on paternity can be made available at any given time, even in proceedings brought specifically for a declaration as to paternity. They antificate that the issue will be raised by different parties with different interests at different times, and believe that it would be unfair to fix any person with a declaration made in proceedings in which he did not participate, or in which all the evidence was not before the court. They reject a single form of proceeding which would lead to an *in rem* judgment notwithstanding their view that this would be the "ideal solution to the problem of multiple litigation over paternity" (p. 19). An affiliation order would not be regarded as a judicial decree of paternity (p. 23):

> [The Commissioners] do not . . . think it constitutionally proper to accord a decree made by a judge appointed under section 92 of the British North America Act the status of a declaration which may alter inheritance rights.

Nevertheless an application for a declaration of paternity might be founded upon it even after the death of the father or child through whom the applicant is claiming. (This objection does not arise in Alberta because jurisdiction over affiliation proceedings is exercised by a judge of the district court.)

New Zealand is less cautious. The Status of Children Act 1969 (section 8(4)) provides that a declaration of paternity under section 10 of the Act "shall, for all purposes, be conclusive proof of the matters contained in it," although paternity must have been admitted or established during the lifetime of a deceased father or child before it will be recognised for purposes of distribution of his estate (section 7(1)). Subsection (1) of section 10 says:

> Any person who--
>
> (a) Being a woman, alleges that any named person is the father of her child; or
>
> (b) Alleges that the relationship of father and child exists between himself and any other named person; or
>
> (c) Being a person having a proper interest in the result, wishes to have it determined whether the relationship of father and child exists between two named persons,
>
> may apply to the Supreme Court for a declaration of paternity, and if it is proved to the satisfaction of the Court that the relationship exists the Court may make a declaration of paternity whether or not the father or the child or both of them are living or dead.

On the other hand, a paternity order made in a proceeding for affiliation under the Domestic Proceedings Act 1968 "shall be *prima facie* evidence of paternity in any subsequent proceedings, whether or not between the same parties" (section 8(3)). No presumption is raised by other adjudications in a domestic forum.

In England, The Family Law Reform Act 1969 is silent as to the mode of proof of paternity.

(2) Factors raising a presumption

The preceding paragraphs show that a judicial pronouncement of paternity may be used to raise a presumption of paternity in subsequent proceedings. This could be true of a declaratory judgment, or of a finding which is essential to the determination of immediate rights. It could be true as well of a decision made by a foreign tribunal as of a decision made by a domestic one.

The Status of Children Act 1969 in New Zealand provides for use in evidence of a foreign judgment (section 8):

> (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 public authority in any such country. ...

Apart from judicial decree, presumptions of paternity might be based on marriage or cohabitation, or on other acts voluntary in nature. Examples of presumptions based on marriage or cohabitation are:

(i) a child born to a validly married woman is the child of her husband;

(ii) a child born of a void or voidable marriage is the child of the "husband";

(iii) a child born to a woman who lives with a man as his wife is the child of that man; and

(iv) a child born to a woman who subsequently marries is the child of the man who becomes her husband.

The first example is the common law presumption of legitimacy. It is applicable in Alberta today. The Ontario Law Reform Commission recommend its extension to void and voidable marriages (p. 18). This is not a great departure from sections 3 to 6 of The Legitimacy Act in Alberta, although section 5 of that Act only applies where "either of the parties reasonably believed that the marriage was valid." The Ontario Commission would limit the operation of the presumptions in the first two situations to a child born during the marriage or within eleven months after the marriage has been terminated by death or by judicial decree. The same time period is specified in section 6 of our Legitimacy Act. New Zealand legislation lays down the following presumption as to parenthood where the mother is married (Status of Children Act 1969, section 5):

> A child born to a woman during her marriage, or within ten months after the marriage has been dissolved by death or otherwise, shall, in the absence of evidence to the contrary, be presumed to be the child of its mother and her husband, or former husband, as the case may be.

In the third example, the presumption could be related to cohabitation for a state period of time such as one year. To establish the relationship of persons as spouses, The Criminal Injuries Compensation Act specifies that the parties be known as man and wife in the community where they live, and that the relationship is of some permanence, and a legal impediment exists to their marriage (section 2(2)). This test could be adapted to raise a presumption of paternity.

The fourth example is a modification of the presumption of legitimacy now contained in section 2 of The Legitimacy Act. The third and fourth examples describe situations of acknowledgment implied by conduct.

Formal, in contrast to conduct, acknowledgments provide examples of presumptions of paternity based on other voluntary acts. There are two sorts:

(i) acknowledgment of paternity for purposes of birth registration under The Vital Statistics Act; and

(ii) acknowledgment of paternity by written agreement signed by the mother and the father. Both are referred to in section 8 of the New Zealand Status of Children Act 1969, and "shall be prima facie evidence that the person named as the father is the father of the child" (subsections (1) and (2)). An acknowledgment by signed instrument must be executed as a deed or in the presence of a solicitor (subsection (2)). The Ontario Law commission would treat both as purely evidentiary and capable of rebuttal by any person, including the putative father, at any later time (pp. 8 and 18). This is the position at common law. Krause (p. 158) warns

against placing reliance on voluntary acknowledgments of this sort. He indicates that often the person who admits paternity is not in fact the father, and advocates the employment of safeguards such as compulsory blood typing tests to reduce the likelihood of mistaken acknowledgments.

(3) Creation of a register

A public register of cases where the relationship of father and child is proven or presumed to exist could serve to notify others of the interests of the persons named in the record. Registration as father might entitle a man to notice of proceedings affecting the child. The register could also be used by trustees, executors and administrators in the ascertainment of possible beneficiaries to property. New Zealand legislation provides for the filing of a declaratory judgment of paternity, an affiliation order, or an instrument acknowledging paternity properly executed by the mother and the person acknowledging himself to be the father of the child (Status of Children Act 1969, section 9). The Registrar of the Court is required to forward declarations and orders for filing (subsection (3)); whereas an instrument of acknowledgment may, but need not, be filed (subsection (1)). The Ontario Law Reform Commission envisage the recording of judicial decrees at a central location, and the implementation of a convenient indexing system (p. 22).

The Law Reform Committee of South Australia questions whether registered information should be freely accessible to the public. In New Zealand, the Registrar General shall permit any person who, in his opinion, has a proper interest in the matter, to inspect any instrument or duplicate or copy filed with him (Status of Children Act 1969, section 9(1)). The South Australia body would be more restrictive. The Committee thinks (p. 9):

... that records of proceedings to determine paternity and documents relating to it should not be open to public inspection except by direction of a court.

(4) Paternity before the court

The Ontario Law Commission considered abolishing affiliation proceedings and relying instead on declaration proceedings (pp. 22-23). The Commissioners concluded that affiliation proceedins should be retained because, among other reasons:

> ... it is likely that declaration proceedings will be more lengthy, complicated and costly than the present affiliation proceedinsg, and we are reluctant to adopt a position which would force applicants to sacrifice what is now a relatively simple procedure in favour of a more complex one.

New Zealand, it will be remembered, has both proceedings.

The Ontario Commissioners (p. 19) also considered one form of proceeding leading to a declaration of paternity, but rejected it for reasons stated earlier in this paper. If it were adopted, it would be a proceeding

> ... to which a person alleging or disavowing paternity would have resort whenever it became an issue. For instance, where an unmarried mother wished to obtain maintenance for her child she would ask for it as ancillary relief to an *in rem* ruling on the paternity of her child. Similarly, wherever the question of paternity arose as a collateral matter--for example in an action against the executors of a will--it would be decided by way of reference to a hearing on the paternity question and the resulting judgment would declare the status of the child and be binding in all future situations.

What should be the standard of proof of paternity in civil proceedings? The common law presumption that a child born to a married woman is legitimate can be disproved only by evidence showing beyond a reasonable doubt that the husband is not the father. England has substituted the ordinary civil standard (The Family Law Reform Act, section 26):

> Any presumption of law as to the legitimacy or illegitimacy of any person may in any civil proceedings be rebutted by evidence which shows that it is more probable than not that that person is illegitimate or legitimate, as the case may be, and it shall not be necessary to prove that fact beyond reasonable doubt in order to rebut the presumption.

The Ontario Commissioners think it inappropriate to apply criminal standards of proof in civil proceedings (pp. 24-25), as does Krause (pp. 109-112). The New Zealand legislation is silent on this point.

Should there be any limitation of the time for bringing proceedings to establish paternity? A limitation period is ordinarily found in affiliation legislation. In Alberta, the time for lodging a complaint under Part 2 of The Maintenance and Recovery Act is governed by section 14(1):

> An order may not be made against a putative father unless the complaint is made within his lifetime and
>
> (a) not later than 24 months after the birth of the child or the termination of the pregnancy, or
>
> (b) within the 12 months next after the doing of an act, on the part of the putative father, that could reasonably be regarded as an acknowledgment that he caused or possibly caused the pregnancy, or
>
> (c) within 12 months after the return to Alberta of the putative father where he was absent from Alberta at the expiration of the period of 24 months from the birth of the child or the termination of the pregnancy.

On the other hand, the issue of paternity might arise at any time as a collateral matter in other proceedings. As the birth becomes more remote, proof may be more difficult. Nevertheless, the Ontario Law Reform Commission recommend against a limitation period (Rec. #14(vi), p. 32):

> There should be no limitation period on the establishing of paternal relationships, although interests which have vested before a finding of paternity should not be disturbed.

The New Zealand legislation does not impose a time limit, and the Law Reform Committee of South Australia are in favour of the New Zealand system (p. 11).

Who may raise the issue of paternity? In Alberta the following persons may make a complaint under The Maintenance and Recovery Act: the mother, the next friend or guardian of a child born out of wedlock, or the Director of Maintenance and Recovery (section 13(1)). This is, of course, in the context of affiliation. As to proceedings for a court declaration of paternity, New Zealand allows application to be made by the mother, or by any person alleging himself to be the father, or by any person having a proper interest in the result (Status of Children Act, 1969, section 10(1) quoted above). In cases where the issue of paternity is collateral to the main purpose of the action, it is no doubt open to "any person having a proper interest in the result" to raise the issue. Krause believes that a child "must have a right to have his paternity ascertained in a fair and efficient manner" (p. 113):

> Specifically, this means that legislation must recognize that the interest primarily at stake in the paternity action is that of the child. ... At the minimum, it will be necessary that the child, by his representative, be a party to an action involving his paternity, regardless of other parties (such as the mother) who may assert their own interests in the same action. It is important that the mother not be allowed to represent the child in this matter, as her short-term interests ... may conflict with the long-term interests of the child in having his paternity established for support, inheritance and other purposes.

How is paternity to be proved? Two points have been dealt with already. They are the standard of proof to be applied, and the use of presumptions. Other evidentiary matters to be looked include admissibility and corroboration of evidence, compellability of witnesses (for example, an uncooperative mother), and the introduction of blood typing and other genetic tests.

Admissibility of evidence. At one time the rule in Russell v. Russell [1924] A.C. 687 (H.L.) prevented a husband and wife from testifying as to non-access in rebuttal of the presumption that a child born to a married woman is legitimate. This rule is no longer an obstacle in Alberta. Section 6 of The Evidence Act, R.S.A. 1970, c. 127, states:

> . . . a husband or wife may in an action give evidence that he or she did or did not have sexual intercourse with the other party to the marriage at any time or within any period of time before or during the marriage.

Corroboration of evidence. Part 2 of The Maintenance and Recovery Act deals with evidentiary matters in section 19. Subsection (1) provides:

> An order shall not be made upon the evidence of the mother unless her evidence as to the paternity of the child is corroborated by some other material evidence implicating the putative father.

The Ontario Law Reform Commission "believe it to be important that any assertion of paternity, . . . which may lead to a judicial declaration, be supported by corroborative evidence" (p. 24). They note that "corroboration involves evidence which tends to show more than possibiliy, in other words, evidence which tends to show probability" (Burbury v. Jackson, [1917] 1 K.B. 16, per Lord Reading, C.J.).

Compellability of witnesses. Section 19 of The Maintenance and Recovery Act makes the following provisions:

> (2) Notwithstanding any other law to the contrary, in all proceedings under this Part a married woman is a competent and compellable witness to testify as to the paternity of her child in respect of whom the proceedings are taken.
>
> (3) Notwithstanding any other Act, a putative father is a competent and compellable witness in all proceedings under this Part, and if called as a witness by the complainant he may, without prior notice or payment of conduct money, be cross-examined by or on behalf of the complainant but the complainant is not, by reason only of his being so called, bound by his testimony.

Krause is in favour of enforcing the mother's cooperation (p. 120):

> ... there is no reason why the uncooperative mother should not be subject to all the usual remedies applied to reluctant witnesses. Insofar as the interests of her child are concerned, the uncooperative mother would be neither more nor less than a hostile witness holding the key to the child's case. In short, the mother should be subject to a statutory duty to name the father, if that information is necessary to allow the decision whether a paternity action should be brought. If a case actually is brought, the mother should be required to testify.

Subsection (4) of section 19 lays down a prohibition against the use in a matrimonial cuase of evidence given in affiliation proceedings, and subsection (5) dispenses with the

need for proof of a signature in an agreement acknowledging paternity. These subsections are reproduced below:

> (4) Any testimony given by the complainant or a putative father in proceedings under this Part and which tends to show that the person giving the testimony had sexual intercourse with anyone is not admissible in evidence against the person giving the testimony in any matrimonial cause to which that person is a party.
>
> (5) A form of agreement [to pay maintenance] as mentioned in section 10, subsection (1),
>
> (a) purportedly signed by the putative father, and
>
> (b) whether or not it is signed by the Director and the mother, or either of them,
>
> shall be admitted in evidence in any proceedings under this Part as proof of the admissions contained therein, without proof of the signature.

Blood typing and other genetic tests. In the mid-sixties, developments in English case law made apparent the need for legislation on the use of blood tests to prove paternity in civil proceedings. The Law Commission reported on the subject in 1968 (<u>Blood Tests and the Proof of Paternity in Civil Proceeding</u> Law Com. No. 16), and its recommendations are implemented in Part III of The Family Law Reform Act 1969, which is appendixed to this paper (Appendix A). The Alberta law on the use of blood tests has not received the same judicial attention. Nevertheless, as the usefulness of blood tests in relation to proof of paternity becomes more widely known, it may be anticipated that Alberta will experience the same need for legislation. The Ontario Law Commission came to this conclusion (<u>Report on Family Law</u>, Part III, p. 25):

> We are of the view that the evidence provided by blood tests ought to be a more significant factor in paternity proceedings in the future, . . . In company with the English Law Commission we think it . . . desirable to encourage the use of blood tests by a system of drawing inferences against a person who unreasonably withholds his consent to a test.

Blood tests, in common with other genetic tests, have two evidentiary uses. First, they can show conclusively that a particular man could not be the father of a particular child. The results of blood tests voluntarily taken were held admissible for this exclusionary purpose in Welstead v. Brown, [1952] 1 S.C.R. 3 (Ont.). Secondly, they can show the statistical probability that a man may be the father of a given child. (A summary of information received by The Law Commission regarding the scientific basis of blood group evidence and the possibility of errors in blood grouping is reproduced in an appendix to this paper (Appendix B); also reproduced are two interviews with medical experts conducted by the Law Reform Committee of South Australia (Appendix C and Appendix D).

The Law Reform Committee of South Australia considered whether to recommend that legislation "impose a comprehensive scheme setting out which kinds of [genetic] tests may be admissible or inadmissible as evidence in a case in which paternity is in issue" (p. 8). With the exception of blood tests, they decided against such a course:

> In a field in which science is still developing any section which is too rigid or drawn with too much particularity may in the future prevent the admission of evidence obtained from tests which are today either unknown or too unreliable to be acceptable as evidence. Legislation should therefore be drafted in general terms and should generally permit the use of blood and genetic tests where in the opinion of the Court the evidence so obtained is relevant to the issue before it and the Court is satisfied of its reliability.

Like The Law Commission, the Committee were satisfied of the reliability of blood tests and, following the English lead, proposed special provisions in this case.

Before examining the issues in connection with blood tests, it will be convenient to set out section 50 of The Domestic Proceedings Act 1968 in New Zealand. This section is applicable in proceedings to determine paternity with a view to the provision of maintenance for an illegitimate child, akin to the affiliation proceedings provided for in our Maintenance and Recovery Act. It covers genetic tests (this would include blood tests), and gives an indication of the issues for legislation in this area:

> (1) In any proceedings on an application for a paternity order, the Court, on the application of the applicant for the paternity order or of the defendant or of its own motion, may direct that the mother, the child, the defendant, and any other person who has given evidence that he is or may be the father of the child undergo genetic tests. The Court may adjourn the proceedings for such period as is necessary to enable those tests to be carried out:
>
> Provided that the Court shall not give such a direction in respect of any person if it is of the opinion that the tests could adversely affect the health of that person.
>
> (2) If the mother does not comply with the direction on her behalf or on behalf of the child if she has custody of it, the application may be dismissed.
>
> (3) If the defendant does not comply with the direction, the Court may treat the failure as evidence corroborating the evidence of the mother.
>
> (4) If any person whom the defendant has called as a witness and who has given evidence that he is or may be the father of the child does not comply with the direction, the Court may disregard his evidence.

(5) The results of the genetic tests shall be stated in a certificate in the prescribed form, and the certificate shall be evidence of the facts and conclusions stated therein.

(6) The Court may, if it thinks fit, on the request of any party call the person giving the certificate as a witness.

(7) In any case where the tests fail to show that the defendant could not be the father of the child, any conclusion in the certificate, as to the degree of probability that the defendant is the father shall not be regarded as corroboration of any evidence given by the mother.

(8) The Governor-General may, by Order in Council, prescribe the nature of the tests to be made for the purposes of this section, the manner in which and the classes of persons by whom they shall be made, and the mode of identification of the persons in respect of whom the tests are made.

(9) This section shall come into force on a date to be appointed for its commencement by the Governor-General by Order in Council.

It should be noted that, in recommendations confined to blood tests, The Law Commission in England found reason to distinguish affiliation proceedings from other proceedings in which paternity is in issue.

Turning now to blood tests, and accepting that the results of blood tests voluntarily undertaken should be admissible in evidence, the first question to consider is whether the court should be able to direct their use. Prior to the enactment in England of The Family Law Reform Act 1969, the Court of Appeal had decided that the High Court, in the exercise of a parental jurisdiction (that is, in proceedings such as wardship or custody), could order a child to be blood tested (Re L. [1968] P. 119); and further

that this order was not limited to custodial jurisdiction and could be made where the issue was whether or not the wife had committed adultery (B.R.B. v. J.B. [1968] 2 All E.R. 1023). The courts could not order an adult to be blood tested (W. v. W. (No. 4) [1964] P. 67). The power in respect of children was limited to the High Court because the lower courts do not exercise *parens patriae* jurisdiction. (Law Com. No. 16, pp. 10-12)

As to the position in Canada, the Ontario Law Reform Commission concluded that "without statutory authority a court can neither order a party to submit to a blood test nor draw any inference from a party's failure to take such a test voluntarily" (Report on Family Law, Part III, p. 25). They cite in authority section 78 of The Judicature Act, R.S.O. 1970, c. 228, which allows the court to order a medical examination in a personal injury action. This section is similar to Rule 217 of the Alberta Rules of Court and, apart from this difference, the conclusion applies in Alberta.

Should the court have power to direct the use of blood tests? The Law Commission answered this question affirmatively. The power should be exercisable in "all civil cases in which the court has to determine the paternity of any child as a question of fact" (Law Com. No. 16, p. 14). Ontario (p. 26) and South Australia (p. 8) agree.

Who may apply for such a direction? The Law Commission said "any party to the proceedings" (p. 31, s. 1(1)), and Ontario endorses this recommendation (p. 26). The Law Commission added a further refinement: generally "the court should have a discretion whether or not to direct the use of blood tests at the request of any part
affiliation proceedings a man accused of paternity "should have the right to the help of blood tests to establish that he is not the father of the child concerned" (p. 23). In the New Zealand section, the court may act on its own motion.

Who may be directed to submit to blood tests? The Law Commission thought the power "should be confined to persons (apart from the mother and the child concerned) who are parties to the action"; and "anyone who is to be blood tested as a possible father should have the general protection of being made a party to the action" (p. 14). Once again, Ontario agrees (p. 26). In New Zealand, the power extends to "any other person who has given evidence that he is or may be the father of the child" (ubsection (1)).

Should a sample of blood be taken pursuant to a direction, but without the person's consent? The Law Commission concluded 'no' (p. 17):

> No sample of blood should be taken from a person under a direction of the court unless that person consents to its being taken or, if he is incapable of consenting, unless consent is given in accordance with [the proposals of the Law Commission].
> (p. 29)

Ontario makes the same recommendation (p. 26).

What should be the effect of a refusal to comply with the direction of the court? The Law Commission recommended that "the court should be entitled to draw whatever inferences it thinks appropriate from the refusal" (pp. 17 and 29). It should be open to a person to justify his refusal on religious or health grounds or for any other reason (pp. 17-18). Ontario adopts the same position (pp. 26-27). Where a party to the proceedings who is entitled to rely on the presumption of legitimacy in claiming relief refuses to be tested, The Law Commission felt that "the court should have power to dismiss the application notwithstanding the presumption" (pp. 18-20 and 29). The Law Reform Committee of South Australia takes the following position (p. 9):

> The Committee thinks it proper to recommend that if the mother refuses to supply the blood sample her application shall stand dismissed and if she refuses to give that consent in relation to a blood sample from the child the complaint may stand as dismissed, but no such dismissal shall operate as *res judicata* or as an issue *estoppel* in any later application by or on behalf of the child. If the putative father refuses to supply a blood sample, this will amount to *prima facie* (but not conclusive) evidence of paternity against him. A majority of the Committee consider that this should operate by way of *res judicata* or issue *estoppel* against the father in subsequent proceedings raising this issue.

This is along the lines of the New Zealand provision (subsections (2) and (3)).

Who may consent for a minor? The Law Commission decided that a child "aged 16 or over should be capable of giving a valid consent to giving a sample of blood unless, if of full age, he would not have the capacity to consent" (pp. 20 and 29). For the sake of clarity, Ontario agrees with this arbitrary age (p. 27). As to a child under 16 years of age, "the consent of the person having care and control of him should be required" (Law Com. No. 16, p. 29). Where that person is a party to the proceedings, the court should be entitled to draw such inferences as it sees fit against that party, but no inference ought to be drawn against the child (Law Com. No. 16, pp. 20 and 29; Ontario, p. 27).

Who may consent for a mentally incompetent person? The Law Commission's recommendation was this (pp. 21 and 29):

> If a person is mentally incapable of giving a valid consent it should be in order to take a blood sample from him if the person in whose care and control he is consents and the medical practitioner under whose care he is certifies that giving a sample will not be prejudicial to his proper care or treatment.

As in the case of children, Ontario adds (p. 27):

> If the person having the care and control of the incompetent is also a party to the action . . . a court should also be able to draw such inference as it thinks fit against that person. It goes without saying, however, that no inference at all ought to be drawn against the incompetent himself where the consent of his custodian is withheld.

The Law Commission made it clear that both exclusion and non-exclusion results should be admissible in evidence (pp. 21-22, 24 and 29). They also made the following recommendations (pp. 25-27 and 29-30):

(1) initially the cost of blood tests should be borne by the party applying for them, but ultimately the cost should be allocated in the discretion of the court:

(2) there should be regulations governing the procedures for carrying out blood tests;

(3) the results "should be capable of proof by a certificate from the serologist responsible for the tests

(4) the serologist may be called as a witness and cross-examined by any party; and

(5) it should be an offence to impersonate a person who has been directed to give a blood sample, or to proffer a child in place of the child named in a direction.

Ontario believes that rules regarding the nature of the tests, the procedure for taking them, and the form of the results should be devised by a joint committee of doctors and lawyers. As a matter of drafting significance, South Australia thinks "it might also be proper to specify the form of report of the result of the blood test, and to provide for regulations as to persons who may make the tests, methods of ensuring that the right person is tested and so on" (p. 9).

(5) Two proposals for an investigatory process

(i) An inquistorial system

The Ontario Law Commission express concern about the problem of multiple litigation over paternity. They consider the effect of adopting an inquisitorial system in place of adversary proceedings, but decide against it (pp. 19-20):

> An inquisitorial system of decision-making would change the whole nature of a paternity proceedings. Instead of deciding whether one man is or is not, on the balance of probabilities, the father of a child, a court itself would be charged with the responsibility of investigating all the circumstances surrounding a birth. Quite apart from the difficulty of engrafting a complex investigatory process on the present system, it is doubtful whether any additional certainty would result. The investigation might reveal facts which would involve calling a number of men into a court and asking them to rebut evidence that any one of them might be the father. The sciences of haematology and genetics have not yet reached a stage where it can be proven conclusively that any one man is the father of a child, and so the theoretical possibility exists of having several men before a court, no one of whom on the evidence could be said to be more probably the father than any other. Leaving this aside, the investigatory process could not guarantee that all available evidence would be before the court at the appropriate time. It would, therefore, still be possible for a credible assertion of paternity to be made later by an interested person who had not been summoned as a result of the investigation. By the same token, evidence which would serve to disprove paternity might also come to light long after the investigation, hearing and conclusion of the matter.

(ii) Investigation by the state

Krause (pp. 114-115) advocates the implementation of an "official" paternity action which would function within the adversary system:

> ... it will not be enough to recognize only the rights of the child on whose behalf an action is actually brought. Since the child cannot act for himself in the short time after his birth when there is hope of finding its father, a mechanism must be provided to ascertain the child's paternity whenever circumstances indicate a likelihood that the establishment of paternity would not only be possible but also desirable in the child's best interest. Minnesota now has a law charging the
>
> > "... commissioner of public welfare when notified of a woman who is delivered of an illegitimate child, or pregnant with child likely to be illegitimate when born, to take care that the interests of the child are safeguarded, that appropriate steps are taken to establish his paternity, and that there is secured for him the nearest possible approximation to the care, support, and education that he would be entitled to if born of lawful marriage. For the better accomplishment of these purposes the commissioner of public welfare may initiate such legal or other action as is deemed necessary; may make such provision for the care, maintenance, and education of the child as the best interests of the child may from time to time require, and may offer his aid and protection in such ways as are found wise and expedient to the unmarried woman approaching motherhood.
>
> A similar statute should be adopted and implemented everywhere. Notification could be arranged through the registrar of births . . . .

> Even if no support is sought or if the putative father is unable to pay support, a proceeding to declare the child's paternity may be indicated to safeguard its potential support rights, as well as its right of inheritance from the father or paternal relatives. On the other hand, the caveat relating to the best interests of the child will avoid having the "official" paternity action turned into a detrimental nuisance. For example, the best interests of the child will usually require that the hopeless "deadbeat" not be pursued. A paternity action also would not be productive if it would interfere with the child's adoption by outsiders. Another obvious exception would be the case of the illegitimate child born to a married woman--at least until the mother's husband has legally disclaimed the child.

Leaving aside the question of the merit of the proposal, one might quarrel with Krause's examples of situations where it would not be in the child's best interests to pursue paternity. Better examples could be the cases of a child born as a result of rape or incest.

In conjunction with this scheme, consideration might be given to the provision of counselling for the father, mother and child. Krause would use counselling in a pre-trail procedure. Another possibility is supervision of the child's upbringing.

VI. CONFLICT OF LAWS

This paper does not attempt to deal with the conflict with the laws of other jurisdictions which may result from the improvement in Alberta of the legal position of the illegitimate child. This is a complex area and deserves separate study.

There may also be a question as to provincial competence to alter a person's status and thereby affect the application of federal laws. Such a limitation is suggested by the restriction of the provisions of The Legitimacy Act to "for all purposes of the law of the Province".

APPENDIX A

THE FAMILY LAW REFORM ACT 1969 (ENGLAND)

PART III

PROVISIONS FOR USE OF BLOOD TESTS IN DETERMINING PATERNITY

20. Power of court to require use of blood tests

(1) In any civil proceedings in which the paternity of any person falls to be determined by the court hearing the proceedings, the court may, on an application by any party to the proceedings, give a direction for the use of blood tests to ascertain whether such tests show that a party to the proceedings is or is not thereby excluded from being the father of that person and for the taking, within a period to be specified in the direction, of blood samples from that person, the mother of that person and any party alleged to be the father of that person or from any, or any two, of those persons.

A court may at any time revoke or vary a direction previously given by it under this section.

(2) The person responsible for carrying out blood tests taken for the purpose of giving effect to a direction under this section shall make to the court by which the direction was given a report in which he shall state—

(a) the results of the tests;
(b) whether the party to whom the report relates is or is not excluded by the results from being the father of the person whose paternity is to be determined; and
(c) if that party is not so excluded, the value, if any, of the results in determining whether that party is that person's father;

and the report shall be received by the court as evidence in the proceedings of the matters stated therein.

(3) A report under subsection (2) of this section shall be in the form prescribed by regulations made under section 22 of this Act.

(4) Where a report has been made to a court under subsection (2) of this section, any party may, with the leave of the court, or shall, if the court so directs, obtain from the person who made the report a written statement explaining or amplifying any statement made in the report, and that statement shall be deemed for the purposes of this section (except subsection (3) thereof) to form part of the report made to the court.

(5) Where a direction is given under this section in any proceedings, a party to the proceedings, unless the court otherwise directs, shall not be entitled to call as a witness the person responsible for carrying out the tests taken for the purpose of giving effect to the direction, or any person by whom any thing necessary for the purpose of enabling those tests to be carried out was done, unless within fourteen days after receiving a copy of the report he serves notice on the other parties to the proceedings, or on such of them as the court may direct, of his intention to call that person; and where any such person is called as a witness the party who called him shall be entitled to cross-examine him.

(6) Where a direction is given under this section the party on whose application the direction is given shall pay the cost of taking and testing blood samples for the purpose of giving effect to the direction (including any expenses reasonably incurred by any person in taking any steps required of him for the purpose), and of making a report to the court under this section, but the amount paid shall be treated as costs incurred by him in the proceedings.

NOTES

Commencement. See s. 28 (3), *post*, and the note "Orders under this section" thereto.

On an application by any party to the proceedings. The court does not itself take the initiative. The initiative must come from a party to the proceedings.

Direction. As to the power to provide for the manner of giving effect to a direction for the use of blood tests, see s. 22, *post*.

As to failure to comply with a direction for taking blood tests, see s. 23, *post*.

Blood tests. For meaning, see s. 25, *post*. As to the consents, etc., required for the taking of blood samples, see s. 21, *post*. As to the penalty for personating another for the purpose of providing blood samples, see s. 24, *post*.

Person responsible. See s. 22 (1), *post*.

Within fourteen days. The day of the receipt of the report is not to be reckoned in calculating the period of fourteen days; see, in particular, *Goldsmiths' Co.* v. *West Metropolitan Rail. Co.*, [1904] 1 K.B. 1; [1900–3] All E.R. Rep. 667, C.A.; *Stewart* v. *Chapman*, [1951] 2 K.B. 792; [1951] 2 All E.R. 613; and *Cartwright* v. *MacCormack* (*Trafalgar Insurance Co., Ltd., Third Parties*), [1963] 1 All E.R. 11, C.A.

Definitions. For "blood samples" and "excluded", see s. 25, *post*.

21. Consents, etc., required for taking of blood samples

(1) Subject to the provisions of subsections (3) and (4) of this section, a blood sample which is required to be taken from any person for the purpose of giving effect to a direction under section 20 of this Act shall not be taken from that person except with his consent.

(2) The consent of a minor who has attained the age of sixteen years to the taking from himself of a blood sample shall be as effective as it would be if he were of full age; and where a minor has by virtue of this subsection given an effective consent to the taking of a blood sample it shall not be necessary to obtain any consent for it from any other person.

(3) A blood sample may be taken from a person under the age of sixteen years, not being such a person as is referred to in subsection (4) of this section, if the person who has the care and control of him consents.

(4) A blood sample may be taken from a person who is suffering from mental disorder within the meaning of the Mental Health Act 1959 and is incapable of understanding the nature and purpose of blood tests if the person who has the care and control of him consents and the medical practitioner in whose care he is has certified that the taking of a blood sample from him will not be prejudicial to his proper care and treatment.

(5) The foregoing provisions of this section are without prejudice to the provisions of section 23 of this Act.

NOTES

Commencement. See s. 28 (3), *post*, and the note "Orders under this section" thereto.

Blood sample. For meaning, see s. 25, *post*. As to the penalty for personating another for the purpose of providing a blood sample, see s. 24, *post*.

Age of sixteen. As to the time when a person attains a particular age, see s. 9, *ante*.

Full age. *I.e.*, on attaining the age of eighteen; see s. 1, *ante*.

Medical practitioner. For the construction of this expression, see the Medical Act 1956, s. 52 (1), 2nd Edn. Vol. 36, p. 614.

Definition. For "minor", see s. 12, *ante*.

Mental Health Act 1959. See 2nd Edn. Vol. 39, p. 961. For the meaning of "mental disorder" in that Act, see s. 4, *ibid.*, p. 967.

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22. Power to provide for manner of giving effect to direction for use of blood tests

(1) The Secretary of State may by regulations make provision as to the manner of giving effect to directions under section 20 of this Act and, in particular, any such regulations may—

(a) provide that blood samples shall not be taken except by such medical practitioners as may be appointed by the Secretary of State;

(b) regulate the taking, identification and transport of blood samples;

(c) require the production at the time when a blood sample is to be taken of such evidence of the identity of the person from whom it is to be taken as may be prescribed by the regulations;

(*d*) require any person from whom a blood sample is to be taken, or, in such cases as may be prescribed by the regulations, such other person as may be so prescribed, to state in writing whether he or the person from whom the sample is to be taken, as the case may be, has during such period as may be specified in the regulations suffered from any such illness as may be so specified or received a transfusion of blood;

(*e*) provide that blood tests shall not be carried out except by such persons, and at such places, as may be appointed by the Secretary of State;

(*f*) prescribe the blood tests to be carried out and the manner in which they are to be carried out;

(*g*) regulate the charges that may be made for the taking and testing of blood samples and for the making of a report to a court under section 20 of this Act;

(*h*) make provision for securing that so far as practicable the blood samples to be tested for the purpose of giving effect to a direction under section 20 of this Act are tested by the same person;

(*i*) prescribe the form of the report to be made to a court under section 20 of this Act.

(2) The power to make regulations under this section shall be exercisable by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

NOTES

Commencement. See s. 28 (3), *post*, and the note "Orders under this section" thereto.

Blood samples. For meaning, see s. 25, *post*. As to the consents required, see s. 21, *ante*.

Medical practitioners. See the note to s. 21, *ante*.

Writing. See the note to s. 2, *ante*.

Statutory instrument; subject to annulment. See the note to s. 1, *ante*.

Regulations under this section. No regulations had been made under this section up to 18th August 1969.

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23. Failure to comply with direction for taking blood tests

(1) Where a court gives a direction under section 20 of this Act and any person fails to take any step required of him for the purpose of giving effect to the direction, the court may draw such inferences, if any, from that fact as appear proper in the circumstances.

(2) Where in any proceedings in which the paternity of any person falls to be determined by the court hearing the proceedings there is a presumption of law that that person is legitimate, then if—

(*a*) a direction is given under section 20 of this Act in those proceedings, and

(*b*) any party who is claiming any relief in the proceedings and who for the purpose of obtaining that relief is entitled to rely on the presumption fails to take any step required of him for the purpose of giving effect to the direction,

the court may adjourn the hearing for such period as it thinks fit to enable that party to take that step, and if at the end of that period he has failed without reasonable cause to take it the court may, without prejudice to subsection (1) of this section, dismiss his claim for relief notwithstanding the absence of evidence to rebut the presumption.

(3) Where any person named in a direction under section 20 of this Act fails to consent to the taking of a blood sample from himself or from any person named in the direction of whom he has the care and control, he shall be deemed for the purposes of this section to have failed to take a step required of him for the purpose of giving effect to the direction.

NOTES

Commencement. See s. 28 (3), *post*, and the note "Orders under this section" thereto.

Giving effect to the direction. As to the manner of giving effect to a direction under s. 20 of this Act, see s. 22, *ante*.

Presumption of law . . . evidence to rebut the presumption. See s. 26, *post*, which enacts that the standard of proof required to rebut any presumption of law as to the legitimacy or illegitimacy of a person is to be the ordinary standard for civil proceedings, namely a balance of probabilities.

Blood sample. For meaning, see s. 25, *post*. As to the consents required for the taking of blood samples, see s. 21, *ante*.

Person named in the direction. As to the penalty for personating another, etc., for the purpose of providing a blood sample, see s. 24, *post*.

24. Penalty for personating another, etc., for purpose of providing blood sample

If for the purpose of providing a blood sample for a test required to give effect to a direction under section 20 of this Act any person personates another, or proffers a child knowing that it is not the child named in the direction, he shall be liable—

(*a*) on conviction on indictment, to imprisonment for a term not exceeding two years, or

(*b*) on summary conviction, to a fine not exceeding £400.

NOTES

Commencement. See s. 28 (3), *post*, and the note "Orders under this section" thereto.

Knowing. There is authority for saying that, where a person deliberately refrains from making inquiries the results of which he might not care to have, this constitutes in law actual knowledge of the facts in question; see *Knox* v. *Boyd*, 1941 S.C. (J.) 82, at p. 86, and *Taylor's Central Garages (Exeter), Ltd.* v. *Roper* (1951), 115 J.P. 445, at pp. 449, 450, *per* Devlin, J.; and see also, in particular, *Mallon* v. *Allon*, [1963] 3 All E.R. 843; [1964] 1 Q.B. 385, at p. 847 and p. 394, respectively. However, mere neglect to ascertain what would have been found out by making reasonable enquiries is not tantamount to knowledge; see *Taylor's Central Garages (Exeter), Ltd.* v. *Roper*, *ubi supra*, *per* Devlin, J.; and cf. *London Computator, Ltd.* v. *Seymour*, [1944] 2 All E.R. 11; but see also *Mallon* v. *Allon*, *ubi supra*, and *Wallworth* v. *Balmer*, [1965] 3 All E.R. 721.

Indictment. The offence is triable in England and Wales by courts of quarter sessions; see the Criminal Law Act 1967, s. 8 (2), 2nd Edn. Vol. 47, p. 978.

Summary conviction. Summary jurisdiction and procedure in England and Wales are now mainly governed by the Magistrates' Courts Act 1952, 2nd Edn. Vol. 32, p. 416, and the Magistrates' Courts Act 1957, 2nd Edn. Vol. 37, p. 626, and provisions in the Criminal Justice Act 1967, 2nd Edn. Vol. 47, p. 987.

Definition. For "blood sample", see s. 25, *post*.

25. Interpretation of Part III

In this Part of this Act the following expressions have the meanings hereby respectively assigned to them, that is to say—

"blood samples" means blood taken for the purpose of blood tests;

"blood tests" means blood tests carried out under this Part of this Act and includes any test made with the object of ascertaining the inheritable characteristics of blood;

"excluded" means excluded subject to the occurrence of mutation.

NOTE

Commencement. See s. 28 (3), *post*, and the note "Orders under this section" thereto.

APPENDIX B

THE LAW COMMISSION, BLOOD TESTS AND THE PROOF OF PATERNITY IN CIVIL PROCEEDINGS

(Law Com. No. 16)

1. The existence of blood groups, first demonstrated at the beginning of this century by Landsteiner, explained the hitherto unintelligible disasters (such as death or severe illness) which occurred frequently when blood transfusions were given to patients. Landsteiner found that when blood serum from one individual was added to samples of red blood cells from other individuals, in some cases, but not others, the red blood cells formed dense clusters—a phenomenon known as agglutination. He deduced from this that the red blood cells of some individuals contained different chemical substances from the red blood cells of others and that agglutination occurred only when the cells contained a chemical which was "incompatible" with the particular serum being used in the experiment. He found that he could classify all blood into four specific groups, termed O, A, B and AB, and that red blood cells from one group were either compatible or incompatible with the serum from the other groups according to a predictable pattern. Since Landsteiner's original discovery several other systems of blood groups have been found, including the MN and Rhesus systems. The substances which differentiate these groups cannot, as yet, be identified in terms of their chemical constitution but their presence or absence can be shown by the technique of agglutination which we have mentioned.

2. Subsequently other types of tests such as the Hp and Gc tests have been evolved. With these the technique is entirely different, for complex proteins in the blood are separated out and identified by a process called electrophoresis. This process depends upon the fact that an electric field can cause the chemicals concerned to move through a medium such as starch gel and that they move at different rates, dependent on their molecular size and charge. Thus Hp.1 takes up a characteristic position in the gel some distance from Hp.2 and the two substances can be separated from each other.

3. The value of our knowledge of blood groups for the determination of paternity lies in the fact that the different factors present in each group are transmitted from one generation to another by the recognised principles of heredity. The mode of inheritance of blood groups has been established with a high degree of certainty by an enormous mass of research in many countries, involving many thousands of families, and the results of these experiments are completely in accord with the accepted rules of genetics. Without embarking on a detailed discussion of the mechanism of heredity a brief description can be given of how this mechanism applies to the inheritance of blood groups. In the nucleus of every normal human body cell there are 46 visually identifiable bodies known as chromosomes, arranged in 23 pairs. Apart from the chromosomes which determine sex, each chromosome of the pair is the same shape as the other. These chromosomes each carry a number of smaller bodies called genes and, put very simply, the transmission of every inherited characteristic from one generation to another depends upon the transmission of the corresponding gene or groups of genes. The human germ cells (i.e. ova and spermatozoa as opposed to normal body cells) contain only 23 chromosomes, only one of each pair of chromosomes from the normal 46-chromosome nucleus being used in the formation of the germ cell nucleus. Let us take, by way of illustration, a father who has the O factor in each of the relevant pair of chromosomes and a mother who has the A factor in one chromosome of the relevant pair and the O factor in the other chromosome of that pair. When the paired chromosomes divide in the formation of germ cells the father will produce germ cells which can only contain the O factor. The mother can, however, produce germ cells with either the A factor or the O factor, depending on which chromosome of the pair the germ cells take. The diagram below shows the possible combination of factors which the child of this mother and father can have, depending on which germ cell from the father fertilizes which germ cell from the mother. (It should be borne in mind that when a germ cell is fertilized by another germ cell the 23 chromosomes in each germ cell pair to give an embryo with the normal 46 chromosomes.)

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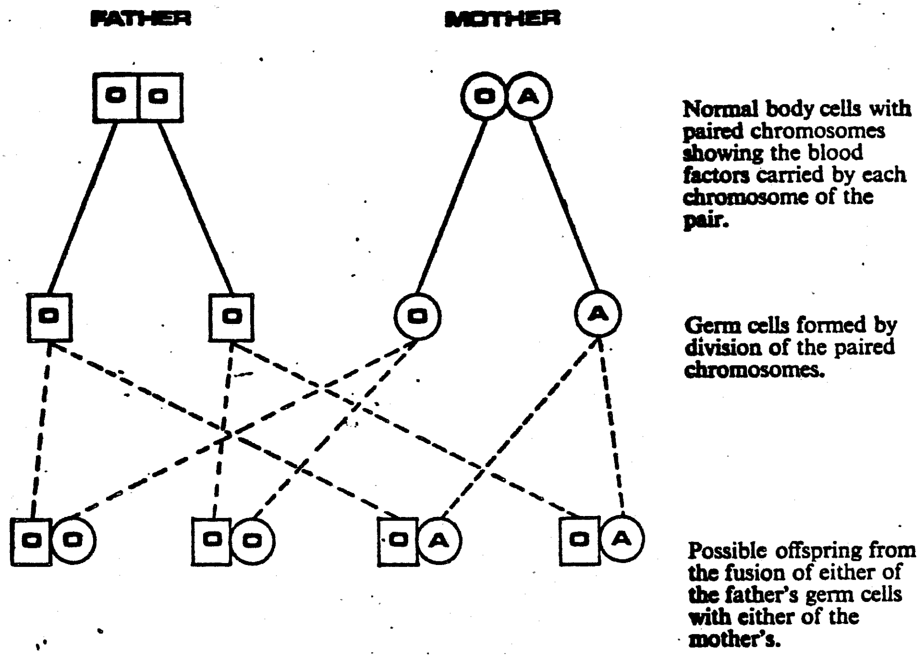
[180] We are greatly indebted to the doctors and other experts who have helped us in the preparation of the material in this Appendix (see n.4 *supra*).



Normal body cells with paired chromosomes showing the blood factors carried by each chromosome of the pair.

Germ cells formed by division of the paired chromosomes.

Possible offspring from the fusion of either of the father's germ cells with either of the mother's.

It can be seen that a child of these two parents cannot possess the B factor. If the mother has a child which possesses the B factor then its father must be a man whose chromosomes contain the B factor and cannot be the man in our illustration. In Part II we set out tables (dealing only with the ABO and MN systems) showing possible and impossible combinations of factors in children of parents whose ABO or MN groups are known.

4. There is, theoretically, a possibility that in dividing to form germ cells the chromosomes may undergo a change in chemical composition so that, for example, a chromosome containing the O factor could change to possess the B factor instead. Clearly if this change, termed a mutation, were to occur it would invalidate the reasoning behind the diagram in the preceding paragraph. However, mutations in nature are known to be extremely rare and so far as blood factors are concerned only one possible example has been demonstrated in all the millions of cases investigated. Even that one is not regarded by the leading authorities in this country as more than fairly convincing.[1]

5. A second fact which bears on the reliability of blood tests is that in any laboratory test there is the possibility of human observer-error. However, a vast experience of the techniques of blood grouping has been acquired in connection with the blood transfusion services in many countries. While observer-error is always a possibility, this can be virtually eliminated by repeating the tests on several samples of blood and the risk of observer-error is probably less than that involved in the identification of finger-prints.

6. It is particularly important that the serologists conducting blood tests for the purposes of determining paternity are specially trained. Routine training in pathology and/or haematology and clinical pathology does not necessarily qualify one to do this

[1] Race and Sanger, *Blood Groups in Man*, 4th edition (1962), and see *F.* v. *F.* [1968] 2 W.L.R. 190 at 197 where Rees J. refers to the evidence given by a serologist as to the possibility of mutation.

type of blood testing. It cannot be overstressed that only properly qualified and experienced serologists should be appointed to carry out this work. In America, for example, serious errors have been found to occur because the person carrying out the tests was not sufficiently experienced.[2] It is also important that the standard of the materials used in testing should be carefully controlled. These considerations make it essential that testing should be carried out only at specified centres which employ expert serologists and use standard materials.

7. A further source of possible error must be mentioned. Where, for example, the alleged father is of group MM (his blood reacting only for the M and not for the N factor) and the mother is MN, it is assumed that the child must be of group M or MN and cannot be N. This assumption depends, of course, upon a further assumption that there does not exist a third allelic gene, for the product of which gene no specific reagent or other means of recognition has yet been discovered. This assumption may, on occasions, be proved false. The discovery of a third allelic gene, now known as Mg, which gives rise to an antigen Mg not reacting either with anti-M or anti-N serum is a case in point.[3] Since errors of this type depend upon the existence of rare undiscovered factors, the errors themselves are bound to be rare. Furthermore they will usually tend to occur where exclusion of paternity is based on testing only the child and putative father, and not the mother.

8. We have seen how blood groups can be determined and how the transmission of factors from one generation to another works in principle. Additional valuable evidence, so far as paternity findings are concerned, is provided by a statistical analysis of the distribution of factors in the population of any country. In Great Britain the distribution of the ABO groups is approximately:—

O — 46 per cent
A — 42 per cent
B — 9 per cent
AB — 3 per cent

Statistical calculations show that using these groups alone the chances of being able positively to exclude a given man average about 17 per cent although if the child is group B or AB a greater proportion of men would be excluded as so few Englishmen have B to give.

9. Since Landsteiner's original discovery and particularly since 1940, a considerable number of other blood groups have been discovered, i.e. a considerable number of other chemical substances have been shown to exist on the red cells. These substances are inherited independently of one another and so are described as different blood group systems. The relevant ones for determining parentage are set out below,[4] together with the cumulative chances of excluding a given person by determining the group of the child and of the mother and putative father, if all the available tests are employed.

	Exclusion by each system (per cent)	*Cumulative Exclusion (per cent)*
1. ABO	17·6	17·6
2. MNS	23·9	37·2
3. Rh. (D, C, c, E) ...	25·2	53·0
4. Kell (K)	3·7	54·8
5. Lutheran (Lua) ...	3·3	56·3
6. Duffy (Fya) ...	4·7	58·4
7. Kidd (Jka)	2·0	59·6

These tests alone offer, on average, a 60 per cent chance of exclusion. It must be remembered that this table applies only to inhabitants of Great Britain though its application to other Western Europeans produces broadly similar results.

[2] See e.g. "Medicolegal Application of Blood Grouping Tests. A Report of the Committee on Medicolegal Problems of the American Medical Association", (1957) 164 *J. Amer. Med. Assoc.* 2036 and A. S. Wiener, "Blood Grouping Tests in Disputed Parentage", (1956) 3 *Jo. Forensic Med.* 139.

[3] See "Mg, A New Blood Group Antigen of the MNS System", (1958) 3 *Vox Sanguinis* 81-91.

[4] Modified from Race and Sanger, *op. cit.* (n.1 *supra*).

10. In individual cases the prospects of exclusion may be considerably higher than the figures in the table, if either the child or the putative father is found to have an uncommon blood group or a combination of uncommon groups. In extreme cases the chance of two unrelated men having the same combination of uncommon groups may be as low as 1·6 in one hundred million. In other cases the chance may be of the order of 1 in ten thousand or 1 in fifty thousand. In such cases proof that both child and putative father have the same rare or very rare combination is valuable positive evidence that the putative father is in fact the father.

11. The blood groups mentioned in the table above are all based on chemicals found on the red cells of the blood. There are, in addition, other chemical substances which can be identified in the blood serum, i.e. the liquid component of the blood. These substances have also been shown to be transmissible from one generation to another in accordance with the rules of heredity and can therefore assist us in the determination of parentage. As we have already briefly stated, the techniques involved are quite different from those used in the identification of blood groups, but they are equally reliable in skilled hands. Two such substances are now being used in paternity cases and have been approved by the medico-legal authorities of Denmark and other Scandinavian countries. These are the haptoglobin[5] groups and Gc groups. It is possible to classify all samples of sera into three haptoglobin groups and three Gc groups described as Hp.1-1, Hp.1-2 and Hp.2-2 and Gc.1-1, Gc.1-2 and Gc.2-2. Approximately 15 per cent of the population of Western Europe are Hp.1-1, 47 per cent are Hp.1-2 and 36 per cent are Hp.2-2. The haptoglobins alone exclude 18 per cent of men erroneously alleged to be the father of the child and the Gc groups exclude 15 per cent. Since the Hp and Gc groups are inherited independently of one another and of the groups mentioned before, the combined exclusion rate if those tests are used also is raised from 59·6 per cent (see table above) to approximately 72 per cent. The haptoglobin and Gc tests have to be used carefully, for haptoglobins are not definitely developed in a child under three months old and ill health may sometimes make it difficult to identify these substances.

12. Another system of blood grouping is by identification of inherited variants of the Gamma-globulin, discovered by Grubb in 1956. He showed that the blood sera of normal persons could be divided into two groups, Gm (a+) and Gm (a—) according to whether or not their serum prevented agglutination of anti-D coated rhesus positive cells by an antibody present in the serum of a proportion of rheumatoid arthritis sufferers and occasional normal individuals, ability to inhibit agglutination being inherited as a Mendelian dominant character. Other Gm groups have since been discovered. Gm(a) and Gm(b) have been used in evidence in paternity cases in Norway since 1962 and a third factor, Gm(x) has been employed in some countries. Most of the Gamma-globulin present in the newborn child is of maternal origin and it is not until the child is some months old that its Gm groups can be determined.

13. We understand that phosphoglucomutase grouping is likely to be employed in paternity testing before very long. Here the lead is in this country.[6] This is an inherited system of blood-tissue enzymes which is already being used in anthropological studies and forensic identification tests. Grouping is by starch gel electrophoresis (like the haptoglobin grouping) followed by a special enzyme staining technique.

14. Another group of substances present in blood serum, the lipo proteins, are at present under intensive study and it is possible that in the near future these will be valuable in the determination of parentage.

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[5] See *Stocker* v. *Stocker* [1966] 1 W.L.R. 190 where evidence of haptoglobin grouping was used.

[6] See (1964) 204. *Nature*, 742.

INHERITANCE OF THE OAB AND MN FACTORS

Parents' Blood Groups	*Their Children's Blood Groups*	
	Possible	*Impossible*
O–O	**O**	**A, B, AB**
O–A	**O, A**	**B, AB**
O–B	**O, B**	**A, AB**
O–AB	**A, B**	**O, AB**
A–A	**A, O**	**B, AB**
B–B	**B, O**	**A, AB**
A–B	**O, A, B, AB**	**None**
A–AB	**A, B, AB**	**O**
B–AB	**B, A, AB**	**O**
AB–AB	**A, B, AB**	**O**

INHERITANCE OF THE MN FACTORS

M–M	**M**	**N, MN**
N–N	**N**	**M, MN**
M–N	**MN**	**M, N**
M–MN	**M, MN**	**N**
N–MN	**N, MN**	**M**
MN–MN	**M, N, MN**	**None**

IMPOSSIBLE FATHER/CHILD COMBINATIONS

Man	*Child*
O	**AB**
AB	**O**
M	**N**
N	**M**

APPENDIX C

EIGHTEENTH REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA RELATING TO ILLEGITIMATE CHILDREN

Interview with Dr. Manock

Mr. Cox, Q.C., S.G.: Will you tell us your full name, address and occupation?

Dr. Manock: Colin Henry Manock, 54 Cavendish Avenue, Devon Park; Director of Forensic Pathology.

Mr. C.: What are your qualifications?

Dr. M.: M.B., Ch.B., Leeds, 1962.

Mr. C.: I think you have read Dr. Hay's evidence before the Committee on the 8th March last.

Dr. M.: Yes, I have.

Mr. C.: On the aspect of blood grouping and a determination of paternity is there anything which you would like to add?

Dr. M.: I think that from the evidence that Dr. Hay submitted there is very little for me to add or detract. I can find nothing which I would like to add or detract.

Mr. C.: Is there any other field which you see as a useful determinate of paternity?

Dr. M.: There are numerous other characteristics which are inherited from the parents which should be considered, and I feel that little weight is given to, say, the colour of the child's eyes. If a child has brown eyes, the mother has blue eyes and the putative father has blue eyes, then obviously the putative father has been falsely accused. One of the difficulties is that the colour of a child's eyes does not develop immediately at birth and therefore one has to state a time after which the colour is properly formed. In the case of the colouration of the eyes, three years would be a reasonable time. You probably know that all white babies are born with blue eyes: the colour eventually changes within three years.

Dr. M.: Finger prints can be used at the time of birth. There are patterns on the fingers which derive from the patterns of father and mother and this could be tested from birth. The finger prints remain constant throughout life.

Mr. C.: Could we discuss those two?

Dr. M.: Blood grouping is a genetic characteristic in this kind of exercise. It is of the same sort of standing and recognition. No one challenges it.

Mr. C.: Can one say the same of these characteristics such as eye colour and finger prints?

Dr. M.: I think the genetics of finger prints and colouration of eyes are well accepted throughout the world and have been investigated. It is just that it has rarely been applied in this particular field.

Mr. C.: Is this likely to enter the field of certainty or reasonably possible or strong possibility?

Dr. M.: Again, results from genetic characteristics which are inherited are mainly on an exclusionary basis. With finger prints there is a possibility of positive identification of the father but this is most uncommon. It would have to be very infrequent collection of characteristics, but it is an instrument which can be used to widen the search I feel should be applied.

Mr. C.: You say it has been used in Denmark?

Dr. M.: Yes.

Mr. C.: What about bone structure?

Dr. M.: Bone structure. The genetic characteristics determine the underlying bone structure but unfortunately these are not fully formed until after the age of puberty. Age of 15 or 16 years.

Mr. C.: Can you give us some indication of how it works?

Dr. M.: The width of a person's eye, the length of the jaw, the distribution of the teeth. In fact, there is research going on in Adelaide at the moment as to the structure of the jaw arch. (The Dental Hospital.) So that by a computerized assessment of the shape of person's jaw it would be possible to say whether or not this is a probable result of a union between A and B. The criteria which are used are similar. The same ones as are used by anthropologists.

Mr. C.: That touches on something which is relevant to blood grouping. Are race characteristics different in the case of finger prints or eye colouration or are they universal?

Dr. M.: Eye Colouration is certainly distributed on a racial basis. You never get a person of pure Jewish blood with blue eyes. They all have brown eyes. There are variations about the world which would assist—as information for the serologist. You would be able to say from the colour of the eyes. The proposition that a brown-eyed child cannot be the child of a blue-eyed father. There are not pitfalls with the finger print characteristics, except perhaps finding your expert to do the investigations the person with experience in genetics. I know three people: one in Denmark and two in the United Kingdom who are currently working in this field. They have to be more than tolerably adept at examining finger prints and that is the area in which the Police are expert and doctors generally are not.

Mr. C.: What about eye colour?

Dr. M.: There are some genetically determined features which can only be transmitted through certain parents and subject to qualifications, *e.g.*, a putative father does or does not suffer from a congential disease.

Mr. C.: On all these questions on bone structure or on the eyes, who in Adelaide could give evidence on such a matter?

Dr. M.: A member of the Department of Genetics.

Mr. C.: And you don't know anyone in South Australia or even Australia who is qualified to give evidence as to the finger prints?

Dr. M.: No.

Mr. Matheson: How do the genetic tests compare with the blood group tests on the need to exclude a defendant from being the father of a child?—I'll change the question: Do any of the genetic tests enable a geneticist to include possibly a comparison as to who is the father of a child?

Dr. M.: Yes they do. We have the example of a brown-eyed child who could not possibly be the result of a union of two blue-eyed parents.

Mr. M.: Is that the only example, of the eye colour tests, that could be used in that way?

Dr. M.: There are various shades of brown through hazel and grey which too would be incompatible with the union of two blue-eyed parents.

Mr. M.: And what about the finger print tests?

Dr. M.: The finger printing is more of a statistical test where the probability of a particular feature being noted in a child is the result of a union with parents with different finger print characteristics and then multiply by 20 for each of the digits. More often than not this is exclusionary and you will never get the finger print investigator to say that this putative father is definitely the father of the child, but you will get exclusionary evidence.

I think that the whole picture should be correlated so that instead of having a figure of one in five hundred possibility from blood grouping and considering this as a test for decision one should also take into consideration this child and these possible parents. Even then the odds are normally against that man being the true father. The difficulty from the Court's point of view would be that you really need to be some sort of mathematician to weigh both tests of serologists and the tests of genetics.

You need somebody to look at them, somebody outside the Court to be able to weigh opinions on percentages taking both sets of tests into account.

Mr. C.: Do you know where we can get a copy of the Danish legislation which incorporates genetic tests?

Dr. M.: I would suggest you try Professor Harald Gormsen of the University of Copenhagen (Professor of Forensic Medicine) Frederick 5 Vej. 9 Copenhagen, Denmark.

Mr. M.: The English legislation provides in the case of blood tests that the medical man making the test shall state in his report firstly the result of a test, secondly whether the party to whom the report relates is or is not excluded by the results from being the father of the person whose paternity is to be determined and thirdly if that party is not so excluded the value, if any, of the results in determining whether that party is that person's father.

One of the reasons why we are discussing the blood test is that obviously blood test evidence is already used in the Court. Our basic problem is whether or not we should direct that blood samples be given.

Mr. K.: Even assuming that there were in South Australia genetic experts to deal with these problems of bone structure and finger prints and genetic test of diseases, we would have an enormous problem from our privacy aspect in directing that these tests be taken.

Dr. M.: I don't think it is much of a breach of privacy to have one's finger prints taken, certainly hardly akin to assault. One is not taking any risk with the health of a person; least of all the child.

Mr. Keeler: It does seem from what you have said that it would be an advantage if we merely mentioned genetic tests in the legislation as something which the Court should be able to take into account and this would direct people to think about these things.

Dr. M.: I think this would be the easiest way to cover the situation in South Australia because we just do not have the experts at the moment. It is hoped that we will acquire experts in this field eventually and if the way is laid open now I think that is possibly all that can be done.

Mr. M.: As I understand the English provision contained in the Family Law Reform Act and the provisions contained in the South Australian Social Welfare Act, a Court cannot compel the putative father to enable a sample of his blood to be tested.

Dr. M.: If you want genetic tests to be in the legislation the consent of the putative father should always be obtained likewise. In so far as any touching of the putative father is involved, as far as I remember the situation is that a putative father need not necessarily undergo tests but if he does not do so then the opinions of the Court might be influenced by his refusal and if this is the case then I don't see any real need for forcing him to undergo tests.

Mr. K.: The words of the English Act are all drawn as if he does not consent.

Dr. M.: As far as genetic tests are concerned, there are some practical problems in that the geneticist really needs to see not only the three—the mother, the putative father and the child, but people such as the parents of either or both of the mother and the putative father. A much more full report could be produced in this manner and this would allow a greater number of factors to be considered which, from the parents alone, would be excluded because the possibility of further characteristics being common in both of them. It could even be said that the medical history widens the field even to a much greater extent but this is a problem for the geneticist to face in each individual case providing there is co-operation, and I feel this work is well worth carrying out.

Mr. M.: In this article that we have been given on the English Family Law Reform Act, 1969 by Stephen Cretney published in the New Law Journal appears this statement—if the defendant is not the father there will now be at least a 70% chance that his innocence will be conclusively established by a blood test. Do you know how the author fixed that percentage?

Dr. M.: I think this is from the distribution of the various blood groups in the United Kingdom. This would be quite different for a different community but I think that with genetic assessments being carried out it is possible to increase that figure to even 90%.

Mr. M.: In estimating possibilities does the geneticist or the serologist choose the followed method in talking about percentages?

Dr. M.: The mathematics used would be a statistical method. There are so many different methods of applied statistics that even with the same figures people could arrive at different percentages. I think it would be wise in each State to standardize the method by which the figures are processed to arrive at a percentage, but I doubt whether that would be possible.

Mr. C.: Could you tell us more about finger prints?

Dr. M.: As I understand it, the use of finger prints as a means of identification is established. No two finger prints are identical. It is a general form of characteristics that is transmitted from parent to child. One does not transmit a complete duplicate print from, say, mother to child. One transmits a print which is a composite of the mother and father's prints from that particular finger so that one would consider in turn the mother's left little finger, the child's left little finger and the putative father's left little finger. There are characteristics which could occur in the mother and putative father but they may also be characteristics present in one only so that the chances of finding some characteristic of value is quite enormous when you have twenty fingers. The patterns also from the palms of the hands are also genetically determinant so that the presence or absence of a particular palm print feature may also be considered so that the number of factors to be considered is increased.

If we take a practical case of a child who is the subject of this investigation and the blood test merely indicates that the child may be the child of the putative father, then you turn to your eye test and again such is negative—the putative father may be the father of the child—then you come to the finger print and palm print so the cumulative effect shows that the child could not be the child of the putative father. Finger print material may give such a result.

Mr. C.: That means that the whole benefit of the test has been established?

Dr. M.: Yes, it assumes that the finger print evidence simply establishes that the child could be the child of the putative father.

Mr. C.: Is it a question of having firstly imposed on those three a judgment which goes beyond the assessment of any one of them achieved?

Dr. M.: I think when considering three different kinds of evidence that one says that the possibility of the putative father is, in fact, the true father becomes much nearer to unity as the chances of all these characteristics being present becomes more and more high so that the probability that the man is the father becomes more likely to be established to the Court's satisfaction.

Mr. C.: I think you agree, Doctor Manock, that the third test that we postulated, finger prints, but still returning a negative result, told you more than you had learnt when you simply had done one test of blood grouping and got a similarly negative result. There was a cumulative value from those three negative results which took the result of the test beyond one negative result alone?

Dr. M.: Yes.

Mr. C.: And I think I put it to you that it would require a skilled and experienced geneticist, I suppose, to make that evaluation and express it in terms of a possibility, probability or a proportion?

Dr. M.: Yes.

Mr. C.: Is there anyone in Adelaide who would be competent to make such an evaluation?

Dr. M.: The University Department of Genetics would be able to furnish such evidence.

Mr. M.: This is a question which troubled me when I was asking you questions before: One expert who is qualified to express an opinion about the result of all those tests would assess the percentage chance of X being the putative father as say 70%, but another expert who is also qualified would assess them all differently and perhaps might say 85%, is that not so?

Dr. M.: I think a lot depends on the parameters one takes in arriving at the percentage. When one considers blood groups alone then one is considering the possibility of this combination of the factors arising from the population at large, but when one is considering genetic factors which are present or not present then one can only take into consideration the factors that have been tested and then express this as a factor of the total number of factors which could have been considered. This would give a more truly pure mathematical expression than one which depends on the type of blood group present in the man in the street and it would be much more useful in assessing the possibility or probability of X being the father of the child.

Mr. M.: Are you really saying that my difficulties are theoretical or are you saying that you assume that two expert witnesses would not be called before the Court that had to decide the question?

Dr. M.: I don't think that one would require two expert witnesses to give you the possibility or probability statistic because the geneticist would be able to incorporate the results of the serologist in his calculations.

Mr. M.: I can see the utility of a geneticist combining all these tests but supposing in a paternity suit the mother called this expert to say that he had done all these tests and express an opinion on the percentage chance that the defendant was the putative father, and supposing that the father called another expert who looked at the same material, is he likely to reach the same percentage on the same material or might things differ?

Dr. M.: No, because the way in which geneticist works are considered results are pretty standard throughout the world so that one geneticist should give you the same answer as another geneticist provided they considered the same factors. However, I feel that it is possible for the Court to ask for an opinion rather than either the defendant or the plaintiff, in which case there can be no colouration of one's opinion, or the expert's opinion.

Mr. Justice Zelling: I don't suppose the percentage difference would matter so much provided they were both on the same side of the probability which the Court had to find. It would only be if they were on different sides of the probability line and that you would think, Doctor Manock, unlikely?

Dr. M.: Most unlikely.

Mr. M.: Much less unlikely where there is more than one genetic test?

Dr. M.: Much less likely where there is more than one genetic test—Yes.

Mr. Power: There is just one thing which I do not quite understand: Did you say the finger print tests were not exclusionary but only suggestive? Can they be absolutely exclusionary?

Dr. M.: In very unusual circumstances—Yes. There is no black and white in these matters at all but I can envisage one set of finger prints on a child being quite impossible to have been produced by one particular father. When one comes to practical considerations and one has actual cases before one, you do not come up against these theoretical possibilities.

Mr. C.: Can you suggest anyone to us at the Genetics Department who could give us a practical run through on this kind of work?

Dr. M.: I am afraid I am not familiar with the members of the staff there.

The Committee thanked Dr. Manock for his attendance and he then retired.

APPENDIX D

EIGHTEENTH REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA RELATING TO ILLEGITIMATE CHILDREN

Interview with Dr. Hay

Mr. Justice Zelling: Your full name, address and occupation are?

Dr. Hay: Dr. Judith Alison Hay living at Mount Osmond. I am a legally qualified medical practitioner, registered pathologist in the State of South Australia, Director of Serology to the S.A. Red Cross Blood Transfusion Service, Honorary Serologist to the Queen Elizabeth Hospital, Honorary Consultant Serologist to the Royal Adelaide Hospital.

H. H.: With regard to blood groupings for the determination of paternity what is the current practice in this State?

Dr. H.: Might I ask, is this aimed to establish that a man is perhaps not the father of a child or aimed to establish that a child is the child of the father.

H. H.: Basically the second of those, but on the other hand if the evidence excluded him well then it would equally do its work.

Dr. H.: The angle is somewhat different and to the best of my knowledge this second aspect has not been looked at here. All the work that we have done has been in an attempt to exonerate a man from an accusation of paternity. Here to the best of my knowledge it is all done in the Red Cross blood bank in the blood group reference laboratory and we are testing red cell types of the mother and putative father and child in parallel and reporting on these. There is more work which can be done but which we do not happen to do which we could do if this were required.

H. H.: Well, may I take this in two parts. Firstly, with regard to the work which is being done, could you give me a concrete example of how this works in practice. Assume that X, the putative father, is charged and blood tests are taken, what is the way in which the thing is done?

Dr. H.: The three bloods are tested with the same sera, the bloods being of the same age and everything as comparable as possible. We then go through the various blood group systems. There are over a dozen fairly complicated blood group systems applying to red cells and it is only red cells that we are working but this is not all that can be worked. We first go through what we call the ABO system and if the mother and father have different types here the child may show these up. We then go through the Rhesus system in which we get half a dozen cracks. We have say four reagents we can use on ABO; half a dozen to eight or ten depending on how the cards fall for the Rhesus system. Then the MN system which has four factors available to us and with this we have rather better than a fifty per cent chance of excluding a man of English background from being falsely charged with fathering a child whose actual father had also an English background. It is real tiger country once you come to change racial groups.

H. H.: Well, you say that there are further tests which can be applied. Are they ever applied in practice in Australia to your knowledge in this type of work?

Dr. H.: Certainly not in South Australia, and I cannot speak for the other States. I do not think the blood transfusion services in the other States will touch the law and I do not know what is done outside their jurisdiction.

H. H.: Would there be publications, doctor, to which we could be referred if necessary to take this aspect of it further in case the Attorney so wished?

Dr. H.: The practice in other States?

H. H.: Yes.

Dr. H.: I do not know. I could quickly write around and ask.

H. H.: Well, I wasn't really wanting to put you to that trouble.

H. H.: I wondered whether from your correspondence, I assumed there was a certain amount of correspondence going on between States as seems to happen in most disciplines, I just wondered if you could tell us where we could get the information. I don't want to put you to the trouble. We could no doubt arrange for it to be done.

Dr. H.: Oh, how kind. I wouldn't even know whom to ask. All I can say is the people whom I know don't do it and I am allowed work in cohouts with the Courts with a strict understanding that it is never mentioned that I am in fact paid by the Red Cross Society.

H. H.: Well now, coming to the other aspect which you say is rather better than a 50% chance of the coming to a correct answer where they are both English or I take it by English it means European as well, or only English?

Dr. H.: Not necessarily, because all the statistics are based on the frequency of the blood groups in various ethnic groups and as you go through Europe you get pockets with enormously different frequencies. And so the statistics are different. One is still going to find the same difference. The statistics don't affect our work here in so much as you must take your background figures from the background group which is still fortunately predominately a British-English type descent and therefore this does not affect the maths but it can throw the individual case out.

H. H.: Is it likely to be much the same for some as against other European countries? I can't help from my own experience in divorce knowing that quite a number of these contests arise with migrants disproportionately to their present proportion in the community. For example, if the putative father was German would that be likely to follow the English percentage rules or not?

Dr. H.: Very closely, but if you come to, may I take the Lithuanians or Latvians, who would seem to have come from India very long ago and whose blood groups bear this out, you get different proportions. You will not make a mistake but the probability that this man is or is not the father becomes different. You will never say he is not if he is. Bear in mind that with rare exceptions this work can never establish that any man is the father of any child. At best it can only establish that he is not. Very occasionally you can prove fairly conclusively to the probability of one in a couple of million that he is, provided his brothers have got good alibis because this is the instance of this particular blood group in this community, or this combination of blood groups.

H. H.: And is there any age limit below which or above which this varies in relation to the child? In other words does the child's own blood typing alter at all during life or is it the same at any age group?

Dr. H.: No, very much. This is a problem which we solve by simply not testing for those systems in which the blood type is not expressed at birth. This would be a problem if someone came in and just worked through a handful of systems without knowing which ones were not applicable.

H. H.: Well, in drafting legislation, would it be of importance then to say that the tests should not be made under an age of say twelve months or some other period?

Dr. H.: That I imagine would certainly be safe. I don't think it would be necessary to go so far because not infrequently you can exclude a man from fathering on some system which is fairly developed at birth.

H. H.: Out of my ignorance no doubt, I understood that this was not invariable, and that there were some systems which you could not be certain of until some time after birth.

Dr. H.: You are absolutely right but no one knowing this field would use those systems.

H. H.: So that from a point of view of evidentiary fact if one was in a disputed case of this kind you would simply exclude those systems in those cases?

Dr. H.: Yes. You might then like to say that this is perhaps suggestive of a difference and you will have to wait X years before you get the answer.

H. H.: Yes. If we are dealing, as I say we quite often are dealing, with non-English descended people, are there sufficient statistics available, if not here, elsewhere, to provide an adequate answer for either Southern European groups or Poles both of whom would be groups to my knowledge where this argument—by Southern Europeans I mean largely Italians and Greeks because there aren't very many Spanish migrants here, or on the other hand Poles.

Dr. H.: Yes, these proportionate percentages of various blood factors are all obtainable some of them are quite different too and this would be readily available.

H. H.: In the case of Italians would it matter if the man was from North Italy or from Southern Italy or Sicily?

Dr. H.: The percentage presence of various factors is quite different from North and South. Then you take the Southern Italian figures and you drop them into Country Durham up in the north of England, of course that was a County Palatinate for so long, and there you find the Italian groups again. But I don't think that is a practical problem. I think it would only come in if you were deciding what were the odds and they were borderline. You would know whether to push them as being more probable or less.

H. H.: The odds may be different and this is one of our problems between the answer you are giving if you are trying to compel a man to contribute to the child's support and cases where whilst he does not admit or deny the issue is raised aliunde and this is not infrequently

the case. Do you have other fairly substantial evidence which may be of some importance in say workmen's compensation or claims of other kinds in which illegitimates do have rights? Incidentally do such claims come to you for work or is it only in cases where a man is being charged with non-support of an illegitimate child?

Dr. H.: I have never struck the Workmen's Compensation Act to do with this. No nearly all of the work that I personally do comes in from doctors on the old boy basis, who say "Look there is trouble in this family. Can you settle it down". All the work, which is quite a lot, which comes from the Children's Welfare Department, comes straight through into our reference laboratories where it is done by the Senior staff there and goes straight out but I have not struck the Workmen's Compensation Act.

H. H.: This is perhaps a difficult one, Doctor. If you were yourself drafting legislation which had to deal with the ascertainment of paternity, are there any caveats that you would put in it, any special protections that you would think it necessary to write into the use of blood grouping when used by legislation?

Dr. H.: Well from my years in the Courts the thing that seems most important to me is that you get a witness who is secure enough to say "I don't know" instead of always pretending to know. So I think in this respect you would go towards the grey hairs who have given up trying to be clever. I would think that for this State if you wanted this work done to my satisfaction wou would have to confine it to senior people working in the blood group reference laboratory in the Red Cross Blood Bank because to my knowledge there is no one else working in South Australia who has had sufficient use of these reagents to give the answers. I don't think there is any one.

Mr. Cox, Q.C., S-G.: Dr. Hay, I am not quite clear on the relation between the odds you spoke of, something better than 50%, and the tests. The only result that you can reach with tolerable certainty, I gather, for practical certainty, is that a suspect is not the father of the child in question.

Dr. H.: Yes.

Mr. C.: And you achieve that with certainty for practical purposes anyway?

Dr. H.: Yes.

Mr. C.: There is no question of odds in that exercise. The odds come in where the question is: is he possibly in fact the father of the child?

Dr. H.: Yes. The odds that he could be the father of the child.

Mr. C.: Well, that he could be, you can always establish for certainty.

H. H.: That he could not be.

Dr. H.: No, not us. We can only say that he is not.

Mr. C: Well, let's put it not that he is. I am distinguishing "is" from "could be". That he could be the father. You can always establish quite certainly I presume. That he is one of a large number who may be. You establish that general proposition. When you come to the

next question "Well, in fact is he", do I take it that there are cases in which you can establish that with a likelihood of fifty more per cent or so of accuracy?

Dr. H.: No, this figure which I give you of 50+%—for us 60% if we go all the way and do more tests which we don't usually do—is the probability that a man who is falsely accused of paternity will be established not to be so. When you want probabilities from the man being the father you then have to have your background figures for the incidence of these blood groups in the racial groups.

Suppose that we have a group A child and a group O mother. If you take a Southern Italian who is more likely to be a strong group A than anything else and if perhaps there is another man who is a Swede or a Scot or something like that, it is much less probable that the Northern man with his O group is going to be the father than the Southern man with the group A. You haven't proven anything but your probabilities are going to differ.

Mr. C.: Well, that is simply to say isn't it that any group O man may be the father of the child?

Dr. H.: Yes.

Mr. C.: And a Swede is more likely statistically to be group A than an Italian man?

Dr. H.: Group O.

Mr. C.: Yes, group O, I'm sorry.

Dr. H.: This sort of maths doesn't come into this simple thing that we are discussing now in one system, but once you start compounding systems and you are reporting on say twenty blood factors, then your odds (a mathematical answer) is the only one with meaning.

Mr. C.: I am not very good on scientific things. What I want to get clear is where we are dealing with certainty and where we are dealing with probabilities. We are dealing with certainties when we are excluding a particular person whose blood you have along with the blood of the child.

Dr. H.: Yes.

Mr. C.: You need the mother's blood?

Dr. H.: Definitely.

Mr. C.: So that when you have the blood of the mother and the child you are dealing with certainties when you exclude a suspect whose blood you have got. When the suspect shows up as a person who may have been the father of the child then you get into probabilities of the order of 50% or more on your present tests when you come to determine whether in fact he was. Is that it?

Dr. H.: No, the 50% is applying only to the probability that you will be able to exclude him if he is falsely charged. When you come to probabilities of man having fathered a particular child, you can go out into the one in five hundred thousand, a million, two million, five million. These to me become real probabilities so it is possible that this sort of information can be helpful but it all depends on the luck of the toss and the particular blood factors the man happens to have—if he has uncommon ones, or if he has common ones.

Mr. C.: If it is common he is pretty safe?

Dr. H.: Yes.

Mr. C.: You mentioned other tests that you don't use here, and they can raise the probability of the order of 50% to 60%?

Dr. H.: Yes, if you run the whole gamut you can get up, it is claimed, to about 80%. Now this involves a tremendous amount of work which has a high chance of going wrong but anyone who is doing this will control it and quite often he will simply say "I'm sorry, no answer; the work wasn't clean enough". But you come out then to describe all of the groups of blood serum. We in the blood bank confine ourselves very much to the groups of cells. Now when you are coming down to the biochemistry of your proteins in your blood this is a good field. I don't personally think it is good enough for this sort of work yet because not enough is known about it. When we started off with red cells it was thought they were fairly simple. We thought we knew what we had and the more we worked with them the more we realized we didn't know what we had and this is why there are a number of red cells systems which we drop out because there are some which will mask the expression of others. When you come to the serum groups this type of fact is known about a number of them. There is no evidence one way or the other which has come to me about some of them. I think it probably will come up. I don't want to decry them absolutely. I think relatively speaking they are still tiger country.

Mr. C.: You wouldn't recommend pushing the current testing factors in South Australia?

Dr. H.: I think this depends on the person. If I was to do this I would take about a year off just running all of these tests to see how frequently, feeding in known factors, I got different answers because I think this will happen with any novice but we might be fortunate—the man might come to this State who has experience in these things and he will have access to good reagents and then yes, this is a different story. I am sure this will come and if you want literature on this most of it is coming from Germany where so many people are trying to prove that they are bastards so that they can succeed to property and those who do the tests are mostly millionaires now.

Mr. Keeler: There are two problems, just to check that I do have them correct. If you come up with a result that says this person could not be a father in ninety-nine per cent of the cases that would be right, but there are odd cases where it would not be right and your chances of coming up with that answer are better than 50/50?

Dr. H.: Yes, it should be right in 99.99% of cases.

Mr. K: You said, I think, that you do have sufficient evidence of the relative frequency of various things, like ABO groups and RH groups and so on, to be able to produce a certificate which shows that a person has this particular combination of factors. You may have a combination of very rare groups which you could say the probability that he is the father is quite strong. You do have the statistics?

Dr. H.: Yes. One would do the individual probability each time. We have the background information to do it.

Mr. K.: In Britain and New Zealand there is legislation which covers this sort of area and the basis of it is that where the evidence is not exclusionary the serum laboratory is asked to furnish a certificate saying that if the evidence is not exclusionary could you please give us some idea of how useful these certainties are and the Court can then act on that certificate. You have the statistics to be able to do this?

Dr. H.: Oh, yes. They are going to be exactly the same ones.

Mr. K.: The other point is a practical one. You said that any where this new legislation comes in—in fact in Germany people want to prove who their father is in order to inherit—if we were to introduce legislation which would produce a similar sociological factor and if at the same time we were to give a Court power to direct a blood test rather than make it voluntary as they are at the moment, do you have the resources to cope with any extra demand?

Dr. H.: Well, this is always relative and if you snowed us under we would be in trouble. You wouldn't get a person doing this type of work without at least ten years' solid going experience. There are a number of men working in the blood group reference laboratory who would do this very well (only we would prefer someone else) but once you start to enormously increase their rate of work we run out of reagents. This you might say is our problem, and reagents are gained by barter—you just can't go to the shop and buy them.

Mr. K.: It is part of the problem which we want to concern ourselves since you are the only body in the State which does these tests.

Dr. H.: I can't imagine this getting worse than being a darned nuisance. I think we can cope.

Mr. K.: If Courts direct tests to be made somebody has to pay for them. What is the practice in this respect?

Dr. H.: Well, the present practice is that is something is going to be done for nothing, I do it, and if it can be done for a fee someone else does it and the fee is $50. I know they don't enforce this. They don't insist on having to get it. They ask the solicitor to get it if he can.

Mr. K.: How great is the value of making people pay $50 who have a 50% chance from excluding themselves from paternity for a certificate which may or may not do that?

Dr. H.: Well, I understand from the men who do it that they asked Children's Welfare to approach it this way and they have cut down the number of tests they are doing at the moment from three a week to one a week where the chap is told it will cost him $50 if the social workers consider he has it. If they don't consider he has it, this is not even asked of him. If you wanted these other serum factors you are up for $200 if I have to do it.

Mr. K.: We can scarcely ask you to increase the work load just because we want to bring a piece of legislation.

Dr. H.: We are not as unco-operative as all that. If someone were going to be able to use the information we would be happy to tool up and provide it. It is going to take us quite a while to satisfy ourselves that this information is worth having. This is our technical problem but we would do it. Bear in mind the State pays 60% of our running costs and the Commonwealth 30%.

Mr. K.: I take it this would increase your chances of getting extra results to 60% and that after any such work, the certificate as evidence would be 8% more useful.

Dr. H.: Well, it would go up from 50-60% to 70-80%. There is not much return for an enormous amount more work but if you are the man and you want to be excluded I guess it is worth it.

Mr. Hackett-Jones: Doctor, you mentioned that the blood grouping of people have different characteristics. When you are attempting to establish that a person is the father of a child rather than excluding the possibility that he is the father does this mean that you have to take evidence or have to discover what his ethnic background is or is that already apparent in his blood?

Dr. H.: No, if you are wanting to establish categorically that he is, you simply find every factor you can in his blood and then look at which ones you know he must transmit and here again it is the luck of the toss because most of these factors are paired and there are two alternatives, but a reasonable percentage of people have two of the same and you are looking for these where the factors are paired and they have both factors the same and they have to pass this factor on and the child lacks it. So you say that he cannot belong to that man. There again there are systems where this does not work so we don't use those systems. The man and child must share a rare character to make paternity highly probable.

Mr. H.-J.: So you don't look beyond the particular subjects: you don't look to their ethnic background?

Dr. H.: No, this is only if you want to show what the odds that he could be the father.

Mr. Power: When using the word "systems" are you referring to a method of testing or to something else?

Dr. H.: No. By "system" I mean all of the factors which together make up one particular blood group. In simplest form ABO. It may be A, B, AB or O. Rhesus could be a tremendous variation on six factors.

Mr. Cox: We are contemplating the wisdom of making blood tests for paternity reasons compulsory or at least giving somebody the opportunity of having blood taken and perhaps drawing their own conclusion. Have you come across any cases with people who have what appears to be a genuine conscientious objection to have a blood test for paternity—that is disengaged from apprehensions of guilt?

Dr. H.: This is not mandatory is it?

Mr. C.: No, it is not, but there are provisions for it I think with the opportunity for adverse conclusion.

Dr. H.: I have no personal experience with this but I read many articles in the British Medical Journals about the difference between Scottish and English law: the question of whether or not you may take the blood from the child is hotly debated but I cannot recall anyone bothering particularly about the adults.

The Chairman thanked Dr. Hay in the name of the Committee and Dr. Hay retired.

23 July 1974

ILLEGITIMACY

Agenda of Issues

Key: RP = Research Paper

1. Is there any need for reform of the existing law relating to illegitimacy? (RP: pp. 53-54a; L. W. Downey Research Associates Ltd., Survey of Public Attitudes Towards Illegitimacy in Alberta; Family Law Reform Sub-Committee of the Society of Public Teachers of Law, The Illegitimate Child in English Law, #1-18, on the rationale for improving the lot of the illegitimate)

2. If yes, then is it preferable to abolish the status of illegitimacy altogether (RP: pp. 58-61 and questions #3-9 below) or merely to reduce distinctions based on illegitimacy (RP: pp. 62-87 and questions #10-45 below)?

(In addition to the issues framed below, please note the suggestions for the amendment of existing statutes on the accompanying chart.)

Abolishing the status of illegitimacy

3. How should this be achieved--by removing all references to legitimacy and illegitimacy (RP: pp. 58-58a) or by declaring every child to be the legitimate child of his natural parents (RP: pp. 59-60)?

4. Should there be any exceptions for a child born out of wedlock, for example, a restriction on his right to reside with his father if his father is married but not to his mother (RP: p. 59), or abrogation of his right to

succeed to property if paternity has not been adequately established during the father's lifetime (RP: pp. 78-83)?

5. Should a child's status depend on the ascertainment of paternity (RP: pp. 59-60)?

6. Should the common law rule of construction of instruments and statutes which says that words of relationship signify legitimate relationship be abolished (RP: p. 60)?

7. Should instruments already executed and intestacies which have already occurred be excepted from the new provisions (RP: pp. 60 and 85-86)?

8. Should special protection be given to trustees, administrators and executors in the case of claims based on the illegitimate relationship (RP: pp. 61 and 83-85)?

9. Should any other special provisions or exceptions be made?

<u>Reducing distinctions based on illegitimacy</u>

Legitimation (RP: p. 63)

10. Should there be an expansion of the ways in which legitimation may take place, e.g. 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?

Adoption (RP: pp. 64-66)

11. Should the father of an illegitimate child be entitled to notice of adoption proceedings?

12. If yes, should Cruickshank's "sufficient interest" test be adopted, or the criteria for notice used by the Ontario Association of Children's Aid Societies, or something else?

13. Who should be required to give the notice, and when?

14. Should the adoption proceedings be invalidated for failure to notify a father who meets the test for notification?

15. Should the father have an opportunity to be heard in the adoption proceedings? What about a man who does not qualify for notice, but indicates his interest during the proceedings?

16. Should the father's consent to the adoption of his illegitimate child be required? Only in some circumstances, e.g. where the father lives with and maintains the child?

Guardianship, custody and access (RP: pp. 67-70)

17. Should the father of an illegitimate child be a guardian of the child, either by statutory prescription or by court order on the father's application?

18. Should the father of an illegitimate child be entitled to apply for the custody of and access to the child?

19. Should additional rights in the father flow from an order giving him custody, e.g. the right to appoint a testamentary guardian for the child?

20. Should the father's right to apply for custody be conditioned on his having contributed toward the maintenance of the child, or having cohabited with the child or the child's mother for a specified period of time, or on anything else?

21. Should the father be entitled to notice of proceedings to determine legal custody of the child?

22. Should he be entitled to notice of de facto changes in the custody of the child?

23. Should the father's right to the custody of his illegitimate child be equal to the right of the mother?

Wardship (RP: pp. 70-70b)

24. Should the father of an illegitimate child be entitled to notice of wardship proceedings?

25. If yes, how is he to be identified?

26. Who should give the notice, and when?

27. Should the wardship proceedings be invalidated for failure to notify a father who meets the test for notification?

28. Should the father have an opportunity to be heard in the wardship proceedings? Should this opportunity be extended to a man who is not entitled to notice but who makes himself known to the tribunal and expresses his wish to be heard?

29. Should the father's consent to the voluntary surrender of his illegitimate child for adoption be required?

Maintenance (RP: pp. 71-75)

30. Should an illegitimate child be entitled to maintenance under the provisions which apply to legitimate children, or should he be obliged to rely on affiliation proceedings?

31. If the former, how is the illegitimate's relationship to his father to be established?

Succession (RP: pp. 76-86)

32. Should the illegitimate child be entitled to greater rights of succession on his father's intestacy?

33. If yes, should he be entitled to succeed both to and through his father as a legitimate child may?

34. Should his rights depend on a court having declared the paternity of the deceased father before his death, or on the father's having formally acknowledged paternity before his death, or admitted it, or on an affiliation order having been made against the father during his lifetime?

35. Should the father of an illegitimate child be entitled to succeed to and through his illegitimate child?

36. If yes, should this right depend on the father's paternity having been established during the child's lifetime?

37. Should an illegitimate child be presumed not to have been survived by his father unless the contrary is shown?

38. Should the common law rule of construction of words denoting relationship where they appear in wills and other instruments be reversed completely?

39. Should an illegitimate child be entitled to receive a copy of an application for probate or administration and notice of his rights under The Family Relief Act as required by section 8 of The Administration of Estates Act?

40. Should special protection be given to trustees, administrators and executors in the case of claims based on the illegitimate relationship?

41. If yes, should property already distributed be traceable?

42. Should instruments already executed and intestacies which have already occurred be excepted from the new provisions?

43. Should "the somewhat uncertain rule of public policy prohibiting gifts to future born illegitimate children" be reversed?

Other matters related to parentage (RP: p. 87)

44. Should section 8 of The Change of Name Act, 1973 be amended 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 (subsection (4))?

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

45. Should the words "parent", or "father", or "child" be read to include the illegitimate child in his relationship to his father where they appear in The Vital Statistics Act, The School Act, The Marriage Act, The Infants Act, and section 50 of The Domestic Relations Act?

<u>Establishing Paternity</u> (RP: pp. 88-114)

Effect of an adjudication (RP: pp. 89-91)

46. What should be the effect of an adjudication on paternity? Should it operate <u>in rem</u> or <u>in personam</u>?

47. Should an affiliation order have the same effect?

Factors raising a presumption (RP: pp. 92-95)

48. Should a judicial pronouncement of paternity raise a presumption of paternity in subsequent proceedings?

49. Should there be any other presumptions of paternity, e.g. based on marriage or cohabitation, or formal acknowledgment?

Creation of a register (RP: pp. 96-97)

50. Should a public register of cases where the relationship of father and child is proven or presumed to exist be created?

51. If yes, should registered information be freely accessible to the public, or open to public inspection only by direction of a court?

Paternity before the court (RP: pp. 98-111)

52. If paternity declaration proceedings are recommended, should affiliation proceedings be retained?

53. Should there be one form of paternity declaration proceeding which should be pursued whenever the issue of paternity arises?

54. Should the standard of proof of paternity in civil proceedings be on a balance of probabilities or beyond a reasonable doubt?

55. Should there be any limitation of the time for bringing proceedings to establish paternity?

56. Who may raise the issue of paternity?

57. Should corroboration of any assertion of paternity be required?

58. Should the mother and alleged father of an illegitimate child be compellable witnesses?

59. Should the evidence of sexual intercourse given in paternity proceedings be used in a subsequent matrimonial cause?

60. Should formal proof of a signature in an agreement acknowledging paternity be required?

61. Should the results of blood tests voluntarily taken be admissible to show that a man could not possibly be the father of a given child?

62. Should they be admissible to show the degree of probability that a man is the father of a given child?

63. Should there be a comprehensive scheme setting out the admissibility or inadmissibility as evidence of genetic tests generally?

64. If not, should there be such a scheme for blood tests?

65. If there is to be a comprehensive scheme for blood tests, should the court be able to direct their use?

66. Who may apply for such a direction?

67. Who may be directed to submit to blood tests?

68. Should a sample of blood be taken pursuant to a direction, but without the person's consent?

69. What should be the effect of a refusal to comply with the direction of the court?

70. Who may consent for a minor?

71. Who may consent for a mentally incompetent person?

72. What should be the effect of a refusal by the person authorized to consent for a minor or a mentally incompetent person?

73. Should both exclusion and non-exclusion results directed to be taken by the court be admissible in evidence?

74. Who should bear the cost of blood tests?

75. Should there be regulations governing the procedures for carrying out blood tests?

76. Should the results be capable of proof by a certificate from the serologist responsible for the tests?

77. May the serologist be called as a witness and cross-examined?

78. Should it be made an offence to impersonate a person who has been directed to give a blood sample, or to proffer a child in place of a child named in a direction?

Two proposals for an investigatory process (RP: pp. 112-114)

79. Should consideration be given to substituting an inquisitorial system of ascertaining paternity for the adversarial one?

80. Alternatively, should increased responsibility be imposed on the state to investigate illegitimate births and to take steps to have a court determine paternity?

81. Should counselling services for the father, mother and illegitimate child be developed in place of the present facilities available in connection with affiliation proceedings?

82. Should there be official supervision of the child's upbringing?

ILLEGITIMACY

CHART suggesting AMENDMENTS TO EXISTING STATUTES which may be indicated by reform of the law of illegitimacy.

(This chart supplements the Agenda of Issues dated 23 July 1974.)

	Abolition	Reduction
Legitimation		
The Legitimacy Act (RP: p. 16)	repeal	expand? make it clear that s. 5 applies to all void marriages.
The Child Welfare Act, Part 3 (adoption) (RP: pp 16-17)	require consent of a known father to the adoption of a child born out of wedlock; once consent procedure has been complied with, forbid the consent issue to be reopened.	
Guardianship, custody and access		
The Domestic Relations Act, Part 7 (guardianship) (RP: pp. 21-22)	remove reference to mother as the sole guardian of an illegitimate child (s. 39)	make father of illegitimate a guardian (s. 39). clarify meaning of "parent" (s. 40)
(custody and access) (RP: pp. 22-24)		clarify meaning of "father" and "parent" (ss. 46, 47 and 49)
The Family Court Act s. 10 (custody and access) (RP: p. 25)		clarify meaning of "parent" in custody disputes
Wardship		
The Child Welfare Act, Part 2 (RP: pp. 27-27d)		entitle father of illegitimate to notice of proceedings (s. 19), give him an opportunity to be heard

	Abolition	Reduction
		and require his consent to a voluntary surrender of the child for adoption (s. 30). clarify meaning of "parent" throughout this Part.
Maintenance		
The Maintenance Order Act, s. 3 (parent-child obligation of support) (RP: pp. 28-29).	remove reference to illegitimate child (s. 2(a))	apply to illegitimate child where paternity known
The Maintenance and Recovery Act, Part 2 (affiliation Proceedings) (RP: 29-34)	repeal? retain as an expedient procedure? rewrite for "official" paternity actions? expand provisions for counselling and supervision?	give declared father rights to go with his liability for maintenance remove possibility of declaring more than one person father (The Law Com. No. 16, 35-37, attached) expand provisions for counselling and supervision? convert to a paternity declaration proceeding?
The Domestic Relations Act, s. 27 (protection orders) (RP: p. 34)	rewrite in terms of parent and child?	
ss. 46(5) and 48 (RP: p. 35)		clarify meaning of "parent"
The Infants Act (see Property under <u>Other matters related to parentage</u>) (RP: p. 52)		

	Abolition	Reduction
The Social Development Act (social allowances (RP: pp. 35-36)	clarify meaning of "dependant" (s. 2(bl))	clarify meaning of "parent" and "child" (s. 8(1))
The Maintenance and Recovery Act, Part 3 (recovery of overpayment of a social allowance) (RP: pp. 36-37)		clarify meaning of "parent" and "child" as used in s. 56 of this Act and in the three Acts referred to in this section: The Social Development Act, The Domestic Relations Act (protection orders) and The Reciprocal Enforcement of Maintenance Act
The Family Relief Act (RP: p. 37)	remove reference to illegitimate child (s. 2(b)) and the special provision for children of a void marriage (s. 3)	alter tests for paternity? (s. 2(b))
The Criminal Injuries Compensation Act (RP: p. 38)	remove reference to illegitimate child (s. 2(1)(b))	
The Fatal Accidents Act (RP: pp. 38-39)	remove reference to illegitimate child (s. 2(a))	clarify meaning of "parent" (s. 2(b))
The Workers' Compensation Act (RP: p. 39)	remove references to illegitimate child (s. 1.5 and 1.19)	
The Public Service Pension Act (RP: p. 40)		clarify position of the illegitimate
The Public Service Management Pension Act (RP: p. 40)		clarify position of the illegitimate
The Local Authorities Pension Act (RP: p. 40)		clarify position of the illegitimate

	Abolition	Reduction
The Teachers' Retirement Fund Act (RP: p. 40)		clarify position of the illegitimate
The Alberta Insurance Act, Parts 6 and 8 (RP: p. 41)		clarify position of the illegitimate
The Alberta Health Care Insurance Act (RP: p. 41)		clarify position of the illegitimate
Succession		
The Intestate Succession Act (RP: pp. 42-44)	remove reference to illegitimate child (ss. 15 and 16)	entitle illegitimate to inherit from and through his father
The Wills Act (RP: pp. 43 and 44)	remove reference to illegitimate child (s. 35)	reverse the common law rule of construction of words signifying relationship (s. 35)
The Administration of Estates Act (RP: p. 44)		entitle a known illegitimate child to a copy of an application for probate or administration and notice of family relief rights (s. 8)
Other matters related to parentage		
Name:		
The Vital Statistics Act (RP: pp. 46-48)	remove reference to illegitimate child (s. 4(3))	clarify meaning of "parent" (s. 8)
The Change of Name Act, 1973 (RP: pp. 48-50)	repeal s. 8 rewrite other sections in terms of parent and child	entitle father to apply to change his illegitimate child's name (s. 8) apply s. 8(4) where the man with whom the mother is cohabiting is the child's father

	Abolition	Reduction
		require consent of man registered as father to a change of the child's name
Education:		
The School Act (RP: p. 50)		clarify position of father of an illegitimate child
Marriage:		
The Marriage Act (RP: p. 51)	remove the exception from s. 16?	clarify meaning of "father" (s. 18)
Property:		
The Infants Act (RP: p. 52)		clarify meaning of "parent" (s. 16)
Religion:		
The Domestic Relations Act, s. 50 (RP: p. 52)		clarify meaning of "parent"

LAW COM. No. 16, pp. 14-16:

(d) Joint defendants

35. In paragraph 29 of our Working Paper we said:

"If the court is not given the power to order blood tests on persons other than the child concerned and the parties to the action, then we suggest that the present procedure in affiliation proceedings should be given careful consideration. We are concerned with the position of the woman who, for example, knows that the father of her child must be one of two men but does not know (and has no means of herself discovering) which of the two it is. We suggest that the difficulties facing a complainant in cases such as *Sinclair* v. *Rankin* and *Robertson* v. *Hutchinson*, which we have already mentioned,[78] could be largely overcome if a complainant could take affiliation proceedings against more than one defendant, relying on blood-group evidence to indicate (if possible) which of them is the child's father. We have already suggested the possible value of blood tests in such a case. Similarly a man against whom an affiliation claim is made who has reasonable cause to believe that there may have been another man or men should have the right to join the other or others. Our proposals would involve a fairly radical change in the present character of affiliation proceedings and we foresee that a number of difficult problems may have to be solved. These matters, however, are of some importance and we think that the attempt should be made."

36. Much as we were attracted, initially, to the idea that a complainant should be able to take affiliation proceedings against joint defendants and that a defendant should be able to join other men as joint defendants, we do not now recommend these changes in the law. Both proposals would involve radical changes in the nature of affiliation proceedings which would present many practical difficulties. If a complainant were to take proceedings against joint defendants she would be admitting having had intercourse with more than one man and the court's task would be to determine from which act of intercourse conception resulted. If it proved impossible to serve process on one of the defendants or if one defendant failed to attend the hearing the court would be unable to determine the issue of paternity. Moreover, a non-exclusion result in respect of more than one defendant would almost always defeat the complainant's case. There is one other practical difficulty with joint defendant proceedings which would, on its own, persuade us not to recommend their introduction. This is the possibility of defeating the purpose of the proceedings by a tactical refusal to be blood tested on the part of two or more of the joint defendants concerned. We think that it would be so easy to defeat the purpose of joint defendant proceedings in this way that their introduction would not achieve anything in practice. Two hypothetical cases will illustrate what we have in mind: A complainant issues an affiliation summons against A and B, as joint defendants. The court directs A and B to submit to blood tests but both refuse to be tested. We recommend later in this Report [79] that no one should be

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[78] See n. 6 *supra*.
[79] See paras. 39-47 *infra*.

physically compelled to give a sample of blood for testing but that the court should be able to draw whatever inferences it thinks right from the refusal of a person to comply with a direction for blood tests to be made. But in the example we are using what inference can the court draw from the refusal of both A and B? The most that could be inferred is that A and B both think that they might be the father of the child concerned, but that will not help the court to decide which of them is in fact the father. Similarly, if a complainant issues an affiliation summons against A, who joins B as a second defendant, and both A and B refuse to be tested, no inferences as to the child's paternity could be drawn from their refusal. We therefore recommend that no change should be made in affiliation proceedings in this respect; joint defendant proceedings should not be introduced.

37. One particular suggestion which has been made to us is that if it can be proved that more than one man had sexual intercourse with the mother, within the possible period of conception, but it cannot be proved which of the men is the father of her child, then all the men concerned should be made to contribute towards the maintenance of the child. This system of duty of support without the establishment of paternity operated in Norway for many years but was abolished by legislation in 1956 for reasons discussed by Professor Arnholm in an article entitled "The New Norwegian Legislation relating to Parents and Children."[80] The following passage from this article gives in our view, compelling reasons why we should not introduce a similar provision into our law:—

> "The part of the Act (of 1915) which caused most criticism as time went by was that containing the rules providing for the establishment of a duty of support unconnected with paternity . . . The 1915 Act—much against the intention of the legislature—came to depress the social position of those children whose right of support was granted without the establishment of paternity. Such a decision involved an assumption of the sexual promiscuity of the mother during the period of conception and the scheme of support served to remind the child of this very fact during the whole of its adolescence. This means placing a severe psychological strain on the child. Experienced social workers affirm that children settle down more easily where no duty of support is imposed at all. The child can then find refuge in the thought that the mother has only had sexual relations with one man, who has deserted her and cannot be found. Against the scheme of imposing on several men the duty of supporting the same child particularly sharp criticism was forthcoming. From an economic point of view, of course, it might be advantageous to hold several persons jointly liable. But the advantage was dearly bought. It involved a particularly brutal reminder of the mother's lapse."

For very much the same reasons, Denmark, in 1960, also abolished the "duty of support unconnected with paternity".

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[80] *Scandinavian Studies in Law*, 1959 (published by Almqvist & Wiksell, Stockholm) at p. 16.

STATISTICAL REVIEW AND COMPARISON FOR 1973

ption Placements	1972	1973
ber of children placed in non-Catholic homes (Prot., Jewish, etc.)	729	682
ber of children placed in Catholic homes	241	145
ber of children placed for adoption outside of Alberta	33	13
al number of children placed for adoption	1003	840
ldren returned to care when adoption did not work out	30	18
number of children placed for adoption	973	822

cement of Mixed-Race Children for Adoption

	Indian, Part-Indian, or Eskimo		Oriental and Part-Oriental		Negro, Part-Negro, Mexican, etc.	
	1972	1973	1972	1973	1972	1973
2 years	87	76	5	4	18	11
ears & over	92	96	-	-	4	8
	179	172	5	4	22	19

al number of mixed-race children placed for adoption: 206 (1972) 195 (1973)

er Children Placed for Adoption in 1972 compared with 1973

	White		Mixed Race			
	1972	1973	1972	1973		
12 years	94	77	96	103		
- 18 years	-	2	-	1		
	94	79	96	104	190	183

al Number of Adoption Applications Received*

	1972	1973
Protestant	1037	844
Catholic	251	197
Jewish	8	9
Total Applications Received:	1296	1050

position of Applications

	Approved		Not Approved		Deferred or Cancelled+	
	1972	1973	1972	1973	1972	1973
otestant	814	660	29	18	254	223

Catholic	295	230	14	2	47	35
Jewish	5	9	-	-	7	1
	1114	899	43	20	308	259

(These figures do not balance because of the carry-over from the previous year and the number of applications in various stages of preparation for placement.)

+The majority of these are caused by adopting mothers becoming pregnant and cancelling their applications before a child is placed.

er of Adoptions Finalized and Adoption Orders Granted by District Courts	1972	1973
Ward Adoptions	2181	1018
Non-Ward Adoptions	1137	1204
Totals	3318	1222

ıkdown of Finalized Non-Ward Adoptions		
ldren born out of wedlock adopted by step-father	401	441
ldren born of a previous marriage adopted by step-parent	633	632
ldren placed by natural parent or parents	102	131
ls of another province adopted in this province	1	2
	1137	1206

ldren Surrendered for Adoption by Surrender and Indenture		
Preference No. 1	527	400
Preference No. 2	148	132
Preference No. 3	42	57
Totals	717	589

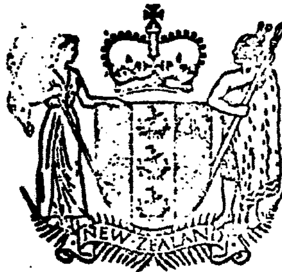
ldren Made Wards Through the Court for the First Time (Juvenile Court)		
Protestant	706	676
Catholic	744	969
Others (including undetermined)	21	58
Totals	1643	1703

ɔrary Wardship Extended for an Additional Period of Wardship

Protestant	531	456
Catholic	715	858
Others (including undetermined)	1	13
Totals	1247	1327

dren Made Permanent Wards Through District Court

Protestant	154	165
Catholic	197	129
Others (including undetermined)	3	2
Totals	354	296



ANALYSIS

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1969, No. 18

An Act to remove the legal disabilities of children born out of wedlock [*22 August 1969*

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:

1. Short Title and commencement—(1) This Act may be cited as the Status of Children Act 1969.

(2) This Act shall come into force on the first day of January, nineteen hundred and seventy.

2. Interpretation—For the purposes of this Act (except the Schedule) "marriage" includes a void marriage; and "married" has a corresponding meaning.

3. All children of equal status—(1) For all 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.

(2) The rule of construction whereby in any instrument words of relationship signify only legitimate relationship in the absence of a contrary expression of intention is abolished.

(3) For the purpose of construing any instrument, the use, with reference to a relationship, of the words legitimate or lawful shall not of itself prevent the relationship from being determined in accordance with subsection (1) of this section.

(4) This section shall apply in respect of every person, whether born before or after the commencement of this Act, and whether born in New Zealand or not, and whether or not his father or mother has ever been domiciled in New Zealand.

4. Instruments executed and intestacies which take place before the commencement of this Act—(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.

5. Presumptions as to parenthood—A child born to a woman during her marriage, or within ten months after the marriage has been dissolved by death or otherwise, shall, in the absence of evidence to the contrary, be presumed to be the child of its mother and her husband, or former husband, as the case may be.

6. Protection of executors, administrators, and trustees—(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.

7. Recognition of paternity—(1) 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 recognised 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.

(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.

9. Instruments of acknowledgment may be filed with Registrar-General—(1) Any instrument of the kind described in subsection (2) of section 8 of this Act, or a duplicate or attested copy of any such instrument, may in the prescribed manner and on payment of the prescribed fee (if any) be filed in the office of the Registrar-General, but it shall not be necessary to file any such instrument.

(2) The Registrar-General shall cause indexes of all instruments and duplicates and copies of instruments filed with him under subsection (1) of this section to be made and kept in his office, and shall, upon the request of any person who, in the opinion of the Registrar-General, has a proper interest in the matter, cause a search of any index to be made, and shall permit any such person to inspect any such instrument or any

such duplicate or copy. In any case of dispute as to a person's interest in the matter, the Registrar-General shall, upon that person's request, submit the matter to a Magistrate, whose decision shall be final.

(3) Where the Supreme Court makes a declaration of paternity under section 10 of this Act or where a Magistrate's Court makes a paternity order within the meaning of the Domestic Proceedings Act 1968, the Registrar of the Court shall forward a copy of the declaration or order, as the case may require, to the Registrar-General for filing in his office under this section, and on receipt of any such copy the Registrar-General shall file it accordingly as if it were an instrument of the kind described in subsection (2) of section 8 of this Act.

(4) For the purposes of this section "Registrar-General" means the person for the time being holding office as Registrar-General under the Births and Deaths Registration Act 1951; and includes any person for the time being discharging the duties of that office.

10. Declaration as to paternity—(1) Any person who—

(a) Being a woman, alleges that any named person is the father of her child; or

(b) Alleges that the relationship of father and child exists between himself and any other named person; or

(c) Being a person having a proper interest in the result, wishes to have it determined whether the relationship of father and child exists between two named persons,

may apply to the Supreme Court for a declaration of paternity, and if it is proved to the satisfaction of the Court that the relationship exists the Court may make a declaration of paternity whether or not the father or the child or both of them are living or dead.

(2) Where a declaration of paternity under subsection (1) of this section is made after the death of the father or of the child, the Court may at the same or any subsequent time make a declaration determining, for the purposes of paragraph (b) of subsection (1) of section 7 of this Act, whether any of the requirements of that paragraph have been satisfied.

(3) The provisions of the Declaratory Judgments Act 1908 shall extend and apply to every application under subsection (1) of this section.

Cf. Matrimonial Causes Act 1950 (U.K.), s. 17 (1); 1963, No. 71, s. 8 (4)

11. Regulations—(1) The Governor-General may from time to time, by Order in Council, make regulations for all or any of the following purposes:

(a) Prescribing fees and forms for the purposes of this Act:

(b) Providing for such matters as are contemplated by or necessary for giving full effect to this Act and for its due administration.

(2) Where the Registrar-General (as defined in subsection (4) of section 9 of this Act) is empowered to do any act for which a fee is payable, he may refuse to do the act until the fee is paid.

(3) Notwithstanding the provisions of any regulations under this Act, the Registrar-General (as so defined) may dispense with the payment of any fee payable under this Act.

12. Repeals and consequential amendments—(1) The Legitimation Act 1939 and the Deaths by Accidents Compensation Amendment Act 1956 are hereby repealed.

(2) The enactments specified in the Schedule to this Act are hereby consequentially amended in the manner indicated in that Schedule.

(3) Except as provided in subsections (1) and (2) of this section, nothing in this Act shall—

(a) Limit or affect any enactment or rule of law relating to the domicile of any person and every such enactment or rule of law shall continue to apply as if this Act had not been passed:

(b) Limit or affect any of the provisions of the Adoption Act 1955 which determine the relationship to any other person of a person who has been adopted.

The Unmarried Mother

248. In Canada there are an increasing number of children being born out of wedlock, particularly during the last decade. For the period 1921-25, children born of parents who were not married to each other constituted 2.2 per cent of all live births; this percentage was approximately twice as large in 1960 (4.3 per cent) and almost doubled again during the following seven years to 8.3 per cent in 1967. Roughly one third of the mothers of children born out of wedlock are under 20 years of age. One third are between 20 and 25 years. During the five-year period 1962-67, when the total number of these births increased from 21,818 to 30,057 (an increase of 38 per cent), the increase was greater for younger mothers than for those in the older age groups: the percentage increase was 53 per cent for women under 20; 47 per cent for those aged 20-24; and 23 per cent for those aged 25-29. There was no increase for women over 30 years of age.[95]

249. The unmarried mother is still often judged harshly and may find that expressions of tolerance from society are not translated into the practical matters of child care, employment and housing. Nevertheless, attitudes are becoming more realistic. For example, in some places, an unmarried pregnant girl is encouraged to continue her education. Some school boards provide tutoring services at home and others provide special classes during late pregnancy and until the girl is able to return to school.

250. In Canada, as in other countries, there is a growing tendency for unmarried mothers to keep their children. Child-care agencies report a marked increase in the number of their clients who make this decision. We have no information as to what arrangements other women are making. The decision to keep the child may be influenced by a shift in the pattern of adoptions. The supply of parents wishing to adopt is proportionately less than it was 10 or 15 years ago. It may take longer to place children than formerly. Temporary foster home arrangements for infants are not always available.

251. The single woman who keeps her child may feel isolated and rejected. She may have some difficulty in making social contacts. Landlords, who question her dependability as a tenant, may make housing a problem

95 Dominion Bureau of Statistics. *Vital Statistics. Annual Reports.* Ottawa, Queen's Printer.

for her. When several unmarried mothers attempt to form a co-operative household to share their financial resources and the care of their children, they sometimes meet opposition from neighbours.

252. Although an unwed mother may be concerned about the welfare of her child, she may be ill-prepared emotionally or financially to look after it. The necessity of trying to be both mother and father puts pressure on her and may create confusion and ambiguity in the mind of the child.

253. Other countries have dealt with these problems in various ways. For example, in Britain co-operative bed-sitting rooms are provided for the unmarried mother and her child for a limited time. In the Scandinavian countries,[96] the mother has the right to use the title Mrs.[97] A child born out of wedlock has the legal right to the father's name and is entitled to share in his father's estate to the same extent as if he were born in wedlock. The word "illegitimate" has not been used in their legislation since 1917. In these countries, counselling services offer the unmarried mother a wide range of help from practical baby-care and housekeeping suggestions to help with her emotional conflicts. Household assistance is provided when necessary and day nurseries are available after the child is six months old. Maternity homes provide care for the mother after her baby is born. Collective homes and apartment buildings are available until her child is three years of age, after which transitional period she is expected to manage for herself. Grants for housing and furniture help her to set up her own household. Further education and job training are supplied free of charge, plus a living allowance for the mother and her baby, until she is self-supporting.

254. In our opinion, every effort should be made to integrate unmarried mothers with children into the main stream of the life of the community. We have recommended a guaranteed annual income for them as for other sole-support parents, which would give them a degree of financial independence. More social services are needed to help them with difficult adjustments. **Therefore, we recommend that the governments of the provinces, territories and municipalities make every effort to integrate the unmarried mother, who keeps her child, into the life of the community, by making sure that she (a) is not discriminated against in respect of employment and housing, (b) receives help with child care if necessary, and (c) has access to counselling to help her with emotional, social and economic problems.**

255. Traditionally, the unmarried father has been regarded as a stranger to the situation. Where an adjudication of paternity is obtained it imposes

96 Schlesinger, Benjamin. "Unmarried Mothers Who Keep Their Children." Background paper prepared for RCSWC, 1970, Appendix A.
97 In Canada, no law prohibits any woman from using the title of Mrs.

on him a duty to contribute to the support of the child, and possibly the mother as well, and absolves him from any further obligations of fatherhood. The child, as a result, may be denied his father's name, inheritance, custody and care. Some efforts are now being made by social agencies to involve the unmarried father in the planning and care for the child.

256. It is the practice in some parts of Canada for the authorities to require, before public assistance is given, that an unmarried mother initiate a paternity suit, when the father is known, in order to establish support for herself and her child. We believe that such pressures should not be placed on an unmarried mother, if she is reluctant to take this action.

257. Therefore, we recommend that provinces and territories amend where necessary the regulations relating to welfare programmes so as to prohibit the exertion of any influence on the unmarried mother to press for an order of affiliation.

PART II

PROPERTY RIGHTS OF ILLEGITIMATE CHILDREN

14. Right of illegitimate child to succeed on intestacy of parents, and of parents to succeed on intestacy of illegitimate child

(1) 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.

(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.

(3) In accordance with the foregoing provisions of this section, Part IV of the Administration of Estates Act 1925 (which deals with the distribution of the estate of an intestate) shall have effect as if—

(*a*) any reference to the issue of the intestate included a reference to any illegitimate child of his and to the issue of any such child;

(*b*) any reference to the child or children of the intestate included a reference to any illegitimate child or children of his; and

(*c*) in relation to an intestate who is an illegitimate child, any reference to the parent, parents, father or mother of the intestate were a reference to his natural parent, parents, father or mother.

(4) For the purposes of subsection (2) of this section and of the provisions amended by subsection (3) (*c*) thereof, an illegitimate child shall be presumed not to have been survived by his father unless the contrary is shown.

(5) This section does not apply to or affect the right of any person to take any entailed interest in real or personal property.

(6) The reference in section 50 (1) of the said Act of 1925 (which relates to the construction of documents) to Part IV of that Act, or to the foregoing provisions of that Part, shall in relation to an instrument inter vivos made, or a will or codicil coming into operation, after the coming into force of this section (but not in relation to instruments inter vivos made or wills or codicils coming into operation earlier) be construed as including references to this section.

(7) Section 9 of the Legitimacy Act 1926 (under which an illegitimate child and his issue are entitled to succeed on the intestacy of his mother if she leaves no legitimate issue, and the mother of an illegitimate child is entitled to succeed on his intestacy as if she were the only surviving parent) is hereby repealed.

(8) In this section "illegitimate child" does not include an illegitimate child who is—

(*a*) a legitimated person within the meaning of the said Act of 1926 or a person recognised by virtue of that Act or at common law as having been legitimated; or

(*b*) an adopted person under an adoption order made in any part of the United Kingdom, the Isle of Man or the Channel Islands or under an overseas adoption as defined in section 4 (3) of the Adoption Act 1968.

(9) This section does not affect any rights under the intestacy of a person dying before the coming into force of this section.

NOTES

Commencement. See s. 28 (3), *post*, and the note "Orders under this section" thereto.

Either parent of an illegitimate child dies intestate. Hitherto, in all cases, except where a mother died intestate leaving an illegitimate child but no legitimate child, an illegitimate child had no claim in the distribution of the estate on intestacy.

This section implements the recommendations of the Report of the Committee on the Law of Succession in Relation to Illegitimate Persons (Cmnd. 3051: 1966).

Legitimated. As to legitimation generally, see 3 Halsbury's Laws (3rd Edn.) 92 *et seq.*

United Kingdom. *I.e.*, Great Britain and Northern Ireland; see the Royal and Parliamentary Titles Act 1927, s. 2 (2), 3rd Edn. Vol. 6, p. 520. "Great Britain" means England, Wales and Scotland by virtue of the Union with Scotland Act 1706, preamble, art. I, 3rd Edn. Vol. 6, p. 502, and the Wales and Berwick Act 1746, s. 3, 2nd Edn. Vol. 24, p. 183.

Isle of Man. As to the constitutional position of the Isle of Man, see 5 Halsbury's Laws (3rd Edn.) 650.

Channel Islands. As to the constitutional position of the Channel Islands, see 5 Halsbury's Laws (3rd Edn.) 647.

Administration of Estates Act 1925, Part IV, s. 50 (1). See 2nd Edn. Vol. 9, pp. 750 *et seq.*, 757.

Legitimacy Act 1926. See 3rd Edn. Vol. 1, p. 62. For s. 9 of that Act, see *ibid.*, p. 67.

Adoption Act 1968, s. 4 (3). See 1968 Volume, p. 1044.

15. Presumption that in dispositions of property references to children and other relatives include references to, and to persons related through, illegitimate children

(1) 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 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.

(2) The foregoing subsection applies only where the reference in question is to a person who is to benefit or to be capable of benefiting under the disposition or, for the purpose of designating such a person, to someone else to or through whom that person is related; but that subsection does not affect the construction of the word "heir" or "heirs" or of any expression which is used to create an entailed interest in real or personal property.

(3) In relation to any disposition made after the coming into force of this section, section 33 of the Trustee Act 1925 (which specifies the trusts implied by a direction that income is to be held on protective trusts for the benefit of any person) shall have effect as if—

(*a*) the reference to the children or more remote issue of the principal beneficiary included a reference to any illegitimate child of the principal beneficiary and to anyone who would rank as such issue if he, or some other person through whom he is descended from the principal beneficiary, had been born legitimate; and

(*b*) the reference to the issue of the principal beneficiary included a reference to anyone who would rank as such issue if he, or some other person through whom he is descended from the principal beneficiary, had been born legitimate.

(4) In this section references to an illegitimate child include references to an illegitimate child who is or becomes a legitimated person within the meaning of the Legitimacy Act 1926 or a person recognised by virtue of that Act or at common law as having been legitimated; and in section 3 of that Act—

(*a*) subsection (1) (*b*) (which relates to the effect of dispositions where a person has been legitimated) shall not apply to a disposition made after the coming into force of this section except as respects any interest in relation to which the disposition refers only to persons who are, or whose relationship is deduced through, legitimate persons; and

(*b*) subsection (2) (which provides that, where the right to any property depends on the relative seniority of the children of any person, legitimated persons shall rank as if born on the date of legitimation) shall not apply in relation to any right conferred by a disposition made after the coming into force of this section unless the terms of the disposition are such that the children whose relative seniority is in question cannot include any illegitimate children who are not either legitimated persons within the meaning of that Act or persons recognised by virtue of that Act as having been legitimated.

(5) Where under any disposition any real or personal property or any interest in such property is limited (whether subject to any preceding limitation or charge or not) in such a way that it would, apart from this section, devolve (as nearly as the law permits) along with a dignity or title of honour, then, whether or not the disposition contains an express reference to the dignity or title of honour, and whether or not the property or some interest in the property may in some event become severed therefrom, nothing in this section shall operate to sever the property or any interest therein from the dignity or title, but the property or interest shall devolve in all respects as if this section had not been enacted.

(6) This section is without prejudice to sections 16 and 17 of the Adoption Act 1958 (which relate to the construction of dispositions in cases of adoption).

(7) 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.

(8) In this section "disposition" means a disposition, including an oral disposition, of real or personal property whether inter vivos or by will or codicil; and, notwithstanding any rule of law, a disposition made by will or codicil executed before the date on which this section comes into force shall not be treated for the purposes of this section as made on or after that date by reason only that the will or codicil is confirmed by a codicil executed on or after that date.

NOTES

Commencement. See s. 28 (3), *post*, and the note "Orders under this section" thereto.

General note. This section is a departure from the recommendations of the Committee on the Law of Succession in Relation to Illegitimate Persons (Cmnd. 3051: 1966), which thought that the rule of construction in relation to wills should remain as it was—an expression connoting relationship *prima facie* meaning such a relationship traced exclusively through legitimate links. The Scottish Law Commission were of the opposite opinion and the rule of construction incorporated in this section has already been incorporated in the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 (c. 70) (not printed in this work).

Legitimated. As to legitimation generally, see 3 Halsbury's Laws (3rd Edn.) 92 *et seq.*

Dignity or title of honour. Legitimation by virtue of the Legitimacy Act 1926, 3rd Edn. Vol. 1, p. 62, does not affect the succession to any dignity or title of honour or render any person capable of succeeding to or transmitting a right to succeed to any such dignity or title; see *ibid.*, s. 10 (1), *ibid.*, p. 67.

Trustee Act 1925, s. 33. See 2nd Edn. Vol. 26, p. 102.

Legitimacy Act 1926. See 3rd Edn. Vol. 1, p. 62. For s. 3 of that Act, see *ibid.*, p. 64.

Adoption Act 1958, ss. 16, 17. See 2nd Edn. Vol. 38, pp. 553, 554.

16. Meaning of "child" and "issue" in s. 33 of Wills Act 1837

(1) In relation to a testator who dies after the coming into force of this section, section 33 of the Wills Act 1837 (gift to children or other issue of testator not to lapse if they predecease him but themselves leave issue) shall have effect as if—

(*a*) the reference to a child or other issue of the testator (that is, the intended beneficiary) included a reference to any illegitimate child of the testator and to anyone who would rank as such issue if he, or some other person through whom he is descended from the testator, had been born legitimate; and

(*b*) the reference to the issue of the intended beneficiary included a reference to anyone who would rank as such issue if he, or some other

person through whom he is descended from the intended beneficiary, had been born legitimate.

(2) In this section "illegitimate child" includes an illegitimate child who is a legitimated person within the meaning of the Legitimacy Act 1926 or a person recognised by virtue of that Act or at common law as having been legitimated.

NOTES

Commencement. See s. 28 (3), *post*, and the note "Orders under this section" thereto.
Legitimated. As to legitimation, see generally, 3 Halsbury's Laws (3rd Edn.) 92 *et seq.*
Wills Act 1837, s. 33. See 2nd Edn. Vol. 26, p. 1352.
Legitimacy Act 1926. See 3rd Edn. Vol. 1, p. 62.

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17. Protection of trustees and personal representatives

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

NOTE

Commencement. See s. 28 (3), *post*, and the note "Orders under this section" thereto.

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18. Illegitimate children to count as dependants under Inheritance (Family Provision) Act 1938

(1) For the purposes of the Inheritance (Family Provision) Act 1938, a person's illegitimate son or daughter shall be treated as his dependant in any case in which a legitimate son or daughter of that person would be so treated, and accordingly in the definition of the expressions "son" and "daughter" in section 5 (1) of that Act, as amended by the Family Provision Act 1966, after the words "respectively include" there shall be inserted the words "an illegitimate son or daughter of the deceased".

(2) In section 26 (6) of the Matrimonial Causes Act 1965 (which provides, among other things, for the word "dependant" to have the same meaning as in the said Act of 1938 as amended by the said Act of 1966), after the words "as amended by the Family Provision Act 1966" there shall be inserted the words "and the Family Law Reform Act 1969".

(3) This section does not affect the operation of the said Acts of 1938 and 1965 in relation to a person dying before the coming into force of this section.

NOTES

Commencement. See s. 28 (3), *post*, and the note "Orders under this section" thereto.
Inheritance (Family Provision) Act 1938. For that Act as amended and reproduced in Sch. 3 to the Family Provision Act 1966, see 2nd Edn. Vol. 46, pp. 207 *et seq.*
Matrimonial Causes Act 1965, s. 26 (6). See 2nd Edn. Vol. 45, p. 484.

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19. Policies of assurance and property in industrial and provident societies

(1) In section 11 of the Married Women's Property Act 1882 and section 2 of the Married Women's Policies of Assurance (Scotland) Act 1880 (policies of assurance effected for the benefit of children) the expression "children" shall include illegitimate children.

(2) In section 25 (2) of the Industrial and Provident Societies Act 1965 (application of property in registered society where member was illegitimate and is not survived by certain specified relatives) for the words "and leaves no widow, widower or issue, and his mother does not survive him" there shall be substituted the words "and leaves no widow, widower or issue (including any illegitimate child of the member) and neither of his parents survives him".

(3) Subsection (1) of this section does not affect the operation of the said Acts of 1882 and 1880 in relation to a policy effected before the coming into force of that subsection; and subsection (2) of this section does not affect the operation of the said Act of 1965 in relation to a member of a registered society who dies before the coming into force of the said subsection (2).

NOTES

Commencement. See s. 28 (3), *post*, and the note "Orders under this section" thereto.
Extent. See s. 28 (4), *post*.
Married Women's Property Act 1882, s. 11. See 2nd Edn. Vol. 11, p. 801.
Married Women's Policies of Assurance (Scotland) Act 1880. 43 & 44 Vict. c. 26; not printed in this work.
Industrial and Provident Societies Act 1965, s. 25 (2). See 2nd Edn. Vol. 45, p. 778.

THE ILLEGITIMATE CHILD IN ENGLISH LAW

This paper has been prepared by the Family Law Reform Sub-Committee of the Society of Public Teachers of Law on the suggestion of the Law Commission. The members of the Sub-Committee are :

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At the end of our deliberations we were joined by Professor J.D. Payne of the University of Western Ontario, at present Simon Research Fellow of the University of Manchester.

Needless to say, not every member of the Sub-Committee agrees with every recommendation put forward. In fairness to Dr. Olive Stone we should also add that she was unable to take part in the final discussions or to read the final draft before it was approved by the other members.

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THE ILLEGITIMATE CHILD IN ENGLISH LAW

INTRODUCTION

1. The family, whether or not centred on the legal institution of marriage, exists to satisfy certain human needs. It provides an outlet for sexual instincts; it offers a haven for the infant homo sapiens during its many years of dependence; it forms an economic unit within which the man can support the woman whilst she is occupied with the birth and upbringing of their children; it brings emotional fulfilment by the sharing together of life's joys and sorrow.

2. Marriage buttresses these functions of the family by lending both legal and moral approval to the sexual relationship and by requiring (at least in our monogamous society) this relationship to be an exclusive one. It also ensures certain advantages - legal, social and economic - for the wife and children. By this system of advantages and corresponding penalties, conformity with the legal norm is encouraged and the adoption of extra-legal relationships discouraged.

3. Nevertheless, people remain free to have sexual relations and to live together outside marriage. From this freedom stem the problems of prostitution, concubinage and illegitimacy.

4. The problem of illegitimacy has both a quantitative and a qualitative aspect. As to the first, the Registrar General's Statistics show that 7.9% of live births in 1966 were illegitimate. This compares with 4.2% in 1939. But to see the true significance of these statistics, we need much more information. For instance, how do they compare with those elsewhere (e.g. in the Irish Republic, France, Denmark or the U.S.A.)? And for a proper historial perspective we should need to ask (no doubt in vain) what was the corresponding percentage in, say, 1866, 1766, 1666 and 1566. Or, to look forward in time, we should ask how changes in the divorce laws may reduce the incidence of illegitimacy by permitting stable illicit unions to become marriages, and how far illegitimacy will remain a serious problem in the wake of the "pill" and its successors. Again, the raw figure for live births does not tell us how many of those born illegitimate later attain legitimate status either by adoption or by the subsequent marriage of their parents.

5. By the qualitative aspect of the problem we are referring to the sum of attitudes, conventions and rules which add up to the condition (social, economic and legal) of illegitimacy. Even if the incidence of illegitimacy were greatly reduced, it would still remain a matter of concern if this condition were felt to be in any way unjust. This prompts several related questions. How far does the present state of the law correspond with current social attitudes to the unmarried mother and her child? To what extent should (or could) legislative reform march ahead and help reshape public opinion in this field? What precise reforms are needed?

6. Current Social Attitudes. Whatever the reasons (mainly feudal) for the development of the common law doctrine that a bastard was "no-one's child", this certainly no longer reflects the views of most members of our society. The community accepted its responsibility towards the bastard from the earliest days of the poor law, but the present century has seen an increasing recognition of the child's claims upon both its parents. Disapproval of bastardy, while muted, persists, as must be expected in a society based upon marriage, but the sins of the parents are no longer visited upon their illegitimate children to the extent that they were even twenty five years ago. A more permissive society, with its relaxed attitude towards extra-marital intercourse, looks less askance at pre-marital conception and illegitimate birth, whilst our current concern for all classes of underprivileged persons has led us to give positive aid to the unmarried mother and her fatherless child. Given this climate of opinion, it is fitting to re-examine rules of law which are still largely based upon principles laid down in a byegone age when the rich were left to make such provision for their mistresses and children as they saw fit, whilst the illegitimate children of the poor were regarded as the problem of the parish.

7. The Attitude of the Legislature. - The past decade has witnessed a remarkable sequence of legislative reforms raising fundamental moral and social issues. Parliament, which has not baulked at the suspension of capital punishment and the legalisation of homosexuality and abortion within certain limits, will no doubt be as ready to lead public opinion in undertaking the reform of the law of illegitimacy.

8. Reform : The Field of Choice. The English Law Commission, in its paper on the grounds for divorce, chose to set out the field of choice for legislative reform rather than to assemble arguments for one particular solution. We propose to adopt the same approach in this report, although we shall not hesitate to indicate our preference where we have one. By examining the existing law, evaluating the criticisms that have been levelled against it and suggesting the possible lines of reform, we hope that this may indicate also the lines of social research that so badly need to be pursued.

9. A Point of Nomenclature. Despite the reluctance of one of our members we have chosen to retain the generally accepted term "illegitimate child" rather than adopt the periphrasis "child born out of wedlock" or coin some new term, such as "the extra-marital child". We all recognise however the force of Baroness Summerskill's remark that "there is no such thing as the illegitimate child: there are only illegitimate parents".[1]

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1. H.L. Debates, vol. 280, p.710; compare the comment of a Californian judge, Schauer J. : "so-called illegitimate children (who in truth could be more accurately referred to as the natural children of illegitimate parents)" - Estate of Lund, 26 Cal. 2d 472, 159 P. 2d 643 (1945).

10. Principles underlying the Present Law. Today five distinct and sometimes conflicting principles can be discerned in the law. First, there is that underlying the law of affiliation, which remains the only way in which a mother can obtain maintenance in respect of her illegitimate child from the father in the absence of a private agreement. Affiliation proceedings have never completely shaken off their quasi-criminal origins in the Elizabethan poor law. The preamble to 18 Eliz. 1, c. 3 reads as follows :

> "Concerning bastards begotten and born out of lawful matrimony (an offence against God's and Man's laws) the said bastards being now left to be kept at the charges of the Parish where they be born, to the great burden of the same Parish and in defrauding of the relief of the impotent and aged true poor of the same Parish and to the evil example and encouragement of the lewd life ..."

The Act empowered justices to charge the maintenance of an illegitimate child to the mother or putative father and to impose a sentence of imprisonment in default of payment. It was not until the passing of the Poor Law Amendment Act in 1844 that the mother herself was able to make an application against the father. The mother is still required to give evidence in all cases, so that if she refuses to do so or is dead, no order can be made at all even though the father's paternity can be established aliunde. Gross injustice can also be caused by the limitation (traceable to the fact that the jurisdiction to make affiliation orders was originally designed to reduce the poor rate) imposed by the requirement that the mother must be a "single woman".[2]

11. The second principle, which cuts right across the historical concept of the bastard as filius nullius, is manifested in the trend since the end of the nineteenth century for the courts to accord to the mother the same personal rights with respect to her illegitimate child as are now vested in both parents of a legitimate child. These rights have been extended by statute, so that now the mother prima facie has the right to the child's custody and to determine its religious and secular education and the power to appoint a testamentary guardian and to consent to the child's adoption or marriage.

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2. See post, paras. 57 and 63.

12. Thirdly, the father has been given very limited rights by statute so that he may now, for example, apply for the custody of the child and thereby obtain a hearing if he wishes to prevent the child from being adopted. This principle of conferring rights upon the father was recently the subject of intense public debate when brought into prominence by the "blood-tie" case.[3]

13. Fourthly, legislation passed during the last ten years to protect the children on the breakdown of a marriage has been so worded as to enable the court to make an order with respect to the illegitimate child of one spouse who has been accepted as a member of the family by the other.

14. Finally, a fifth principle can be found in public law to the effect that an illegitimate child is to be treated equally with a legitimate child. Thus, there can be no discrimination in such matters as the rights of citizenship, the protection of the criminal law, the benefits of social security, eligibility for public office, etc.

15. Not only are these principles at times irreconcilable, but the law also fails to take into account the fact that illegitimate births can result from quite different social situations. The two extremes can be easily described. At one end is the unwanted result of a casual affair with a man whom the mother may not be able to identify and who will certainly wish neither to admit his paternity nor to accept the responsibilities of it. In some cases, indeed, the mother may well not know which of two or more men the father is. At the other end is the planned birth of a child to a couple living in a stable extra-marital union. Such a union will usually have come about because one party at least is already married and cannot obtain a divorce, and in many cases the parents seek to pass themselves off as married and try to conceal the true state of affairs even from their children. Between these extremes may be found a wide range of different situations : for example, the child may be the result of an unmarried woman's relationship with a married man who is not prepared to leave his wife and

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3. Re C. (M.A.) (An Infant), [1966] 1 W.L.R. 646.

family, or of a serious relationship between two unmarried people which, for some reason, does not lead to marriage. It is arguable that the parents' duties ought to be the same in all cases; it is obvious, however, that the legal position of the father whose unmarried partner leaves him taking the children with her should be quite different from those of the man whose only concern is to rid himself of the legal consequences of his promiscuity.

16. Bearing these points in mind, few can doubt that some change in the legal position of illegitimate children (and their parents) is urgently required. A number of suggestions have been put to us : to extend parental duties and perhaps parental rights, to differentiate between different categories of illegitimate children (for example the issue of stable extra-marital unions and others), to extend the category of legitimate children, and to abolish the concept of legitimacy altogether and to let all the legal consequences flow from the physical relationship of parent and child. In formulating our own proposals, however, we have subscribed to one "article of faith" : our existing society, and that of the foreseeable future, rests upon the family as the fundamental unit and it is therefore very much in the public interest that children should be born into a stable family. Sociologists agree that one of our gravest social problems is that of the fatherless child - and it may not make a great deal of difference for this purpose whether this state of affairs is the result of the father's death, the separation or divorce of the parents, or the unmarried mother's living alone with her illegitimate child. If, therefore, society wishes to discourage the extra-marital conception and birth of a child, it is perfectly proper for it to shape its legal rules so that a sanction is imposed when this occurs, although it is another question where the sanction should fall. In the words of the Belgian Catholic legal philosopher Jean Dabin :[4]

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4. Le statut juridique de l'enfant naturel. Travaux de la première journée d'études juridiques, 1965, p.93. Much the same point was made by the Royal Commission on Marriage and Divorce: "If children born in adultery may subsequently acquire the status of legitimate children, an essential distinction between lawful marriages and illicit unions disappears" (1956, Cmd. 9678, para. 1180); but this argument did not deter Parliament from passing Section 1 of the Legitimacy Act 1959.

"Du moment que la loi a pris parti pour le marriage - et socialement, elle a eu raison, car le mariage est au fondement de la famille, fondement elle-même de la société, - elle doit éviter de se contredire en soumettant à un traitement indentique, et aussi favorable, les situations qu'elle déclare regulières et celles qu'elle déclare irregulières. Certaines règles essentielles de vie sociale sont en jeu, devant lesquelles doit s'effacer l'intérêt des particuliers qui, sans démérite de leur part, pourraient avoir à souffrir préjudice de leur application."

Furthermore, although legal change is usually the result of changes in economic and social conditions, legal change may itself produce changes in the thinking and behaviour of society. The present law is believed to be unjust because it penalises the child of the extra-marital union. But we do not know what effect ameliorating the position of the child might have on the number of extra-marital births. On the one hand, as was said in the House of Commons, "There is still, and there should be, some restraint on people giving way to their passions, and one restraint is the consequence on other people".[5] On the other hand, adding to the responsibilities of the father might make some men more prudent.

17. It therefore seems essential to try to steer a course which goes as far as possible towards improving the lot of the child without unduly increasing the risk of mere extra-marital births. This we have sought to do within the limits of the information available to us. This brings us to a final and vital point. Those finally responsible for recommending changes in the law need to have much more information than we possess. In particular more must be learnt about the incidence of illegitimate births. How many occur as the result of casual affairs and how many as the result of other relationships? How

5. H.C. debates, vol. 605 p.760 (1959).

many are due to ignorance of contraceptive techniques? How many apparently unwanted children are conceived because of the mother's subconscious desire to have a child? We also need to know more about what happens to the children. What happens to the large number who are neither adopted nor legitimated? Why do so few women obtain affiliation orders? How many private agreements are made with regard to maintenance? Why do so many men default when orders are made against them? Could any new system be devised to make the orders more effective? Furthermore we need the views of sociologists upon the probable effect of any changes proposed.

18. In view of the provisions of Part II of the Family Law Reform Bill which seek to implement the majority recommendations of the Report of the Russell Committee on the Law of Succession in Relation to Illegitimate Children (1966, Cmnd. 3051), we do not propose to consider in this paper the subjects dealt with by that Committee. We confine our attention to the concept of legitimacy and the related problem of paternity (which we deal with in Part I) and the personal rights and duties of parents and children (including maintenance) (which we deal with in Part II). We merely note in passing that some of the suggestions we make would obviously have an effect on property rights.