# The Law Commission

## Working Paper No. 74

## Family Law
## Illegitimacy

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It does not represent the final views of the Law Commission.

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N.B. Neither the Domestic Proceedings and Magistrates' Courts Act 1978 nor Part II of the Children Act 1975 are yet relevantly in force; but we anticipate that they may be so before consultation on this paper is concluded.

## INTRODUCTION

1. Under our Second Programme of Law Reform[1] we are undertaking a comprehensive examination of family law. This working paper examines the legal position of those children who have the misfortune to be "illegitimate", and suggests reforms. As will emerge, an important part of this work is directly concerned with the rights and duties not only of the child born outside marriage but also of both his parents.[2] In view of the social as well as the legal importance of the subject-matter of this paper, we hope that the provisional proposals which we put forward will be commented on as widely as possible.

2. The present law in this field contains a number of anomalies and we have no doubt that reform is necessary. We have noted the considerable volume of material published

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1 Item XIX: Family Law.

2 In this working paper we generally refer to a child in the masculine gender for ease of style.

during the last decade or so[3] and parliamentary concern about this issue.[4] Furthermore, the United Kingdom has signed (but not yet ratified) the Council of Europe Convention on the Legal Status of Children Born out of Wedlock (1975) which aims to assimilate the legal status of children born out of wedlock with the status of those born in wedlock.[5]

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3 See, e.g.:

(a) "Fatherless by Law?", a study by the Board for Social Responsibility of the National Assembly of the Church of England, 1966.

(b) "The Human Rights of Those Born Out of Wedlock", a report of the Golden Jubilee Conference of the National Council for the Unmarried Mother and Her Child, 1968.

(c) "Improving the lot of children born outside marriage", a monograph by J. Neville Turner, Visiting Lecturer in Law, Institute of Judicial Administration, University of Birmingham, published in 1973 by the National Council for One-Parent Families.

(d) "Abolishing illegitimacy", a study paper by J. Levin, Senior Lecturer in Laws, Queen Mary College, University of London, published in 1977 by the National Council for One-Parent Families.

(e) "Reforming the illegitimacy laws" by J. Levin (1978) 8 Fam. Law 35.

4 See particularly the statement by the Lord Chancellor, Lord Gardiner, on 22 February 1967 during the debate on Baroness Summerskill's motion on the welfare of illegitimate children: Hansard (H.L.), vol. 280, cols. 761-774; the written answer given on 7 November 1968 by the Attorney General: Hansard (H.C.), vol. 772, col. 156 (Written Answers); and the Children Bill introduced by James White, M.P., which was debated in the House of Commons on 23 February 1979: Hansard (H.C.), vol. 963, cols. 807-845.

5 The adoption of the proposals contained in this working paper would enable the Convention to be ratified on behalf of the U.K. without reservations so far as the law of England and Wales is concerned.

3. In 1967 we accepted an offer by the Family Law Sub-Committee of the Society of Public Teachers of Law to conduct an enquiry on our behalf into the status of illegitimate children. In March 1969 the S.P.T.L. submitted to us their study paper entitled "The illegitimate child in English law". We should like to record the special debt which we owe to the S.P.T.L. for this study paper and for the help we have received from them since.

4. In October 1976 we set up a Working Party to consider, in particular, the law relating to affiliation proceedings, and to help prepare this paper. The members of the Working Party are named in the Appendix and we are very grateful to them and to the other bodies there listed for the help which they have given us. We should however emphasise that the provisional views expressed in this paper are those of the Law Commission and not necessarily those of every member of the Working Party.

## PART I

### (A) ILLEGITIMACY - THE FACTUAL BACKGROUND

1.1 The Report of the Finer Committee on One-Parent Families[6] contains a great deal of statistical and other information relating to illegitimate children because, as one would expect, the "one-parent" in such a family is often an unmarried mother. It would be inappropriate for us to go again over the whole of the ground so exhaustively examined by that Committee; but in order to put the size of the subject in perspective, and to set the scene, we consider that we should give some of the most relevant statistics.

1.2 The birth rate in England and Wales has declined since 1965. In that year, 862,725 live births were recorded as against 569,259 in 1977. This decline may be accounted for, in part, by increasing use of birth control methods and by legal abortion; but those factors have not had a corresponding effect on the illegitimacy rate which has, on the contrary, been increasing.[7] Between the end of the Second World War in 1945 and 1960 approximately 5 per cent. of the total number of births each year were recorded as illegitimate; in 1965 the proportion was 7.7 per cent.; in 1970 it was 8.3 per cent.; in 1975, 9.1 per cent.; and in 1977 (the last year for which figures are available), 9.7 per cent., which represents 55,379 children. About 1½ million children have been recorded as born illegitimate since the end of the Second World War.

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6 (1974) Cmnd. 5629, particularly paras. 3.60-3.63.

7 The number of illegitimate births (as distinct from the illegitimacy rate) has however declined in recent years. For example, in 1966 67,056 illegitimate births were recorded, representing 7.9 per cent. of all live births; in 1977 the number of such births was only 55,379 but the rate was 9.7 per cent. However, provisional figures for the first three quarters of 1978 suggest that there was an increase in the number of illegitimate births in that year: O.P.C.S. Monitor VS 79/5.

1.3 By no means every child born illegitimate remains so, or remains subject to the disabilities attached to illegitimacy; it has been calculated that only 53.3 per cent. of children born illegitimate in 1961 remained so sixteen years later.[8] This is because some children born illegitimate are legitimated, and some are adopted. Thus, every year about 10,000 births are re-registered[9] when the child is legitimated by the marriage of his parents. Although it is impossible to relate that figure directly to the number of recorded illegitimate births in any particular year,[10] it is fair to assume that one illegitimate child in five or six will subsequently be legitimated by the marriage of his parents. As to adoption,[11] nearly 16,000 illegitimate children were adopted in 1970 and it is likely that about 20 per cent. of the children born illegitimate since the end of the Second World War have effectively escaped most of the legal consequences of illegitimacy through adoption. It seems, however, that this will not remain true; the number of adoptions of illegitimate children has declined steadily since 1970 and the 1977 figure was only 7,329. It is perhaps worth observing that in a substantial proportion of these cases (44 per cent.)[12] one of the joint adopting parents was a natural parent, so that although the child's legal status was altered by the making of the adoption order, his domestic environment was not.[13]

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8 Population Trends 14 (H.M.S.O.), Table 8.

9 Births and Deaths Registration Act 1953, s. 14.

10 The parents' marriage may take place at any time during the child's life; accordingly re-registration could occur many years after the birth.

11 See "Adoption trends and illegitimate births" by Richard Leete, Population Trends 14 (H.M.S.O.) p. 9.

12 Population Trends 14 (H.M.S.O.), Table 1.

13 Once the relevant provision of the Children Act 1975 (s. 37(1)) has been brought into force fewer parental adoptions are to be expected, since orders dealing with custody are usually to be preferred.

1.4 It may be helpful in understanding the background to this paper to give some figures about affiliation proceedings, the only legal procedure whereby the father can be ordered directly to support his illegitimate child. Many illegitimate children (perhaps about one-half[14]) are the product of stable unions outside marriage, and in such cases the mother has no need to apply to the magistrates' court for an order against the father to make payments towards the child's maintenance. Indeed, the Finer Committee took the view that the number of illegitimate children who remain dependent solely on an unmarried mother constitutes only a small proportion of the total.[15] This result is largely due to the existence of these stable unions and to the factors mentioned in the previous paragraph; but a contribution is made by successful affiliation proceedings. That contribution was however never a large one, and in recent years it has dwindled considerably, as the following figures show:

| Year | Applications | Granted |
|---|---|---|
| 1970 | 8230 | 7131 |
| 1971 | 7283 | 6386 |
| 1972 | 6647 | 5678 |
| 1973 | 5016 | 4331 |
| 1974 | 3854 | 3407 |
| 1975 | 3254 | 2959 |
| 1976 | 2536 | 2314 |
| 1977 | 2199 | 1990 |

14 See para. 3.3, below.

15 (1974) Cmnd. 5629, para. 3.72.

These figures suggest that affiliation proceedings are in practical terms ineffective in securing financial support for illegitimate children. The figure of 1,990 orders obtained in 1977 should be contrasted with the total number of illegitimate births in that year (55,379).[16] Whatever allowance is made for the stable unions, and other factors which may make proceedings inappropriate, such as voluntary payments, it seems likely that there is some failure to use the affiliation procedure where it could be used. The fact that supplementary benefit will be available to support the mother and her child has been seen as a powerful factor in deterring mothers from using the affiliation procedure.[17] This tendency is reinforced by the low level of financial orders usually made by the courts (so that the mother and child usually remain dependent on supplementary benefit, which is simply reduced to take account of any payments made under the order) and by the distinctive nature of the procedure (which is often thought to involve unpleasantness and humiliation).[18]

1.5 One-parent families remain a major social problem. The law can only make a limited contribution towards solving such problems; but it should at least not exacerbate them. In the case of illegitimacy the law may have precisely this effect since it adds a legal disadvantage to the child's social and economic handicaps. Even if an illegitimate child has parents who are living together in a stable union and can provide him with a secure home, the law discriminates against him. One of the main topics discussed in this paper is whether such discrimination can be justified.

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16 The comparison is not statistically accurate since applications in respect of children born in a year may not be made until later.

17 See O.R. McGregor, L. Blom-Cooper and C. Gibson, Separated Spouses (1970) p. 187.

18 See D. Marsden, Mothers Alone (1969) pp. 152-3.

## (B) SCHEME OF THE WORKING PAPER

1.6 In this paper we first outline the present law of legitimacy and legitimation together with the significant legal differences associated with illegitimacy;[19] then we set out what we believe to be the field of choice in relation to reform of the law of illegitimacy.[20] Finally we deal in detail with the legal consequences flowing from the solution which we provisionally favour;[21] and the special question of paternity in cases of artificial insemination.[22] At the end of the paper we append a Summary of Provisional Conclusions, many of which would follow automatically if that solution were adopted. Readers with particular views or interests may find it helpful to refer to this Summary in order to identify the particular parts in the body of the paper in which they are especially interested.

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19 See Part II, below.

20 See Part III, below.

21 See Parts IV to IX, below.

22 See Part X, below.

## PART II

### (A) LEGITIMACY AND LEGITIMATION: THE PRESENT LAW

#### The position at common law

2.1 At common law a person is legitimate if, and only if, his parents were validly married to each other

(i) when he was born, or

(ii) when he was conceived. (This alternative covers the case where he was born posthumously, or where he was born to parents who were divorced between his conception and his birth).[1]

On general principles, it seems likely that a person would also be held to be legitimate if his parents married between his conception and his birth, even if his father died before his birth. The intervening death of his father should not affect his status.[2]

#### Statutory modifications

2.2 The rigour of the common law has been mitigated by three developments which have extended "legitimate" status to some categories of children illegitimate at common law. These developments, which we shall discuss in turn, are

(i) the legitimacy of children of certain void and voidable marriages;

(ii) legitimation;

(iii) adoption.

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1 Knowles v. Knowles [1962] P. 161.

2 See P.M. Bromley, Family Law, (5th ed., 1976), p.280.

(i) Children of void and voidable marriages

2.3 The common law rule necessarily rendered illegitimate any child of a void marriage. However, by reason of the Legitimacy Act 1959 (now re-enacted in section 1 of the Legitimacy Act 1976) such a child is to be treated as the legitimate child of his parents if

(a) at the time of the act of intercourse resulting in the birth (or at the time of the celebration of the marriage if later) both or either of the parents reasonably believed that the marriage was valid;[3] and

(b) the father of the child was domiciled in England and Wales at the time of the birth or, if he died before the birth, was so domiciled immediately before his death.

A child treated as legitimate under these provisions can, unlike legitimated or adopted children, succeed to a title of honour.[4]

2.4 At common law the child of a voidable marriage was legitimate so long as steps were not taken to avoid the marriage; but annulment of the marriage rendered the child illegitimate because the annulment operated retrospectively. A decree annulling a voidable marriage now operates only as

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3 There are some difficulties in the interpretation of this provision, e.g. as to whether a mistake in law can ever be "reasonable": see generally O. Kahn-Freund (1960) 23 M.L.R. 56.

4 Legitimacy Act 1976, Sch. 1, para. 4; however, succession to the Throne is not affected: ibid., para. 5.

from decree absolute.[5] Such a decree no longer affects the couple's legal status up to that date, and the status of their children accordingly remains unchanged.

(ii) Legitimation

2.5 As we have seen, the marriage of the parents before the birth of the child was, at common law, a prerequisite to the child's legitimacy. Unlike many foreign jurisdictions, English law did not recognise the less strict doctrine of the canon law[6] under which marriage had the effect of legitimating children already born to the couple ('legitimatio per subsequens matrimonium'). This doctrine was, however, introduced into English domestic law[7] by the Legitimacy Act 1926.

2.6 The legislation requires the father to have an English domicile[8] at the date of the marriage. The 1926 Act applied to children born before as well as after the Act came into force; if the relevant marriage had already taken place, the couple's illegitimate children were legitimated on 1 January 1927 (when the Act came into force); in any other case the children would be legitimated on the date of their parents' marriage. That Act, however, did not legitimate a child whose parents were not free to marry when the child was born by reason of one (or both) of them being, at that time, married to a third person. That restriction was removed in 1959.

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5 See Matrimonial Causes Act 1973, s.16; and Re Roberts dec'd. [1978] 1 W.L.R. 653.

6 i.e. the ecclesiastical law which, in the Middle Ages, applied throughout Western Europe.

7 The application of rules of private international law permitted recognition in England of foreign legitimations in appropriate cases: Re Hurll [1952] Ch. 722.

8 But English law recognises foreign legitimation if the law of the father's domicile at the date of the subsequent marriage does so: Legitimacy Act 1976, s.3.

2.7 Broadly speaking, a legitimated child is now in the same position as one born legitimate. He has the same rights to maintenance and support, and legislation relating to claims for damages, compensation, allowances and benefits apply fully to him.[9] He becomes legitimate so as to enable him to inherit U.K. citizenship from his father under the British Nationality Act 1948.[10] He can also inherit property destined for "legitimate" children.[11] Only in one respect is he different as a matter of principle: he cannot succeed to a title of honour.[12]

(iii) Adoption

2.8 Although many adopted children are legitimate by birth, adoption has the effect of legitimating a significant number of illegitimate children, as we have pointed out.[13] A child adopted today is treated as the legitimate child of the adopting parents save for the purpose of succession to a title of honour.[14]

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9 Legitimacy Act 1976, s.8.

10 British Nationality Act 1948, s.23.

11 Legitimacy Act 1976, ss.5 and 10.

12 ibid., Sch. 1, para. 4(2).

13 See para.1.3, above.

14 Children Act 1975, Sch. 1, paras. 3 and 10.

## (B) ILLEGITIMACY AND ITS LEGAL CONSEQUENCES

2.9 Despite the statutory modifications summarised above, a substantial number of children born out of wedlock remain "illegitimate" all their lives and are treated in law differently from persons born, or treated as, "legitimate". To a large extent the legal effects of illegitimacy are relevant only while the person is still a child; but in matters of succession to property the effects may be permanent. It is true that certain improvements have been made (again by statute) in recent years, particularly in relation to rights of inheritance,[15] maintenance,[16] and the right to claim as a dependant under the Fatal Accidents legislation.[17] Nevertheless there remain areas where the child born out of wedlock, and his father, are discriminated against as a matter of substantive law. There are also some procedural distinctions which do not appear to us to be desirable. For example, the father of a child may be ordered to make payments for the child's maintenance; but the form (and to some extent the substance) of the proceedings differ according to whether the child is legitimate or not. To these matters we now turn.

### Discrimination directly affecting the illegitimate child

2.10 It may be that the biggest discrimination suffered by a person born out of wedlock is the legal characterisation of him as "illegitimate": we deal with the perpetuation of this label in Part III of this paper. The main practical areas in which there is legal discrimination are:

(i) the maintenance of an illegitimate child is subject to the restrictions affecting the jurisdiction of the magistrates' courts: no lump sum exceeding £500 can

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15 Family Law Reform Act 1969.

16 Domestic Proceedings and Magistrates' Courts Act 1978.

17 Fatal Accidents Act 1976, s.1(4)(b).

be awarded[18] and financial provision cannot be secured;[19]

(ii) although an illegitimate child can now inherit on the intestacy of either of his parents, he cannot take on the death intestate of any remoter ascendant or any collateral relation.[20] In effect, therefore, he is treated as having no grandparents, brothers or sisters;

(iii) despite recent reforms, an illegitimate child cannot succeed as heir to an entailed interest[21] or succeed to a title of honour;[22] and

(iv) an illegitimate child if born outside the United Kingdom is not entitled as of right to United Kingdom citizenship even if both his parents are United Kingdom citizens.[23]

Discrimination affecting the father of an illegitimate child

2.11 From a strictly legal point of view, the father of an illegitimate child is today probably at a greater disadvantage than the child himself; and while many fathers

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18 Domestic Proceedings and Magistrates' Courts Act 1978, s.50(5).

19 Secured financial provision features only in the Matrimonial Causes Act 1973, which applies exclusively to the children of the family of a married couple: see paras. 4.50-4.51, below.

20 Family Law Reform Act 1969, s.14. Previously, under the Legitimacy Act 1926, an illegitimate person could take only on the death intestate of his mother - and not even then if she had legitimate issue.

21 See Family Law Reform Act 1969, s.15(2).

22 See Legitimacy Act 1976, Sch. 1, para. 4(2); The Ampthill Peerage [1977] A.C. 547.

23 There are certain discretionary administrative changes as regards citizenship acquired from the child's mother: see para.7.4, below.

may take little or no interest in their children born out of wedlock, other fathers who have lived with the mothers for perhaps many years are clearly affected by the discrimination. This discrimination takes a number of different forms:

(i) the father has no automatic rights of guardianship,[24] custody or access, even where an affiliation order has been made against him. Any such rights are obtainable by him only by court order or, if the mother has died, under the mother's will. The basic principle is set out in section 85(7) of the Children Act 1975: "Except as otherwise provided by or under any enactment,[25] while the mother of an illegitimate child is living she has the parental rights and duties exclusively".

(ii) Even if the father is awarded custody, he (unlike the father of a legitimate child) cannot obtain maintenance for the child from the mother, whatever her means.[26]

(iii) The father's agreement to the child's adoption is not required unless he has already been granted custody or has become the child's guardian by court order or by

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24 He does not therefore count as a "parent" or "guardian" of a child received into the care of a local authority under s.1 of the Children Act 1948; accordingly the local authority has no duty under s.1(3) of that Act to give the child into the father's care if he so desires: cf. Johns v. Jones [1978] 3 W.L.R. 792 (C.A.).

25 e.g. Guardianship of Minors Act 1971, ss.9 and 14 which provide for custody and access orders in favour of fathers.

26 ibid., s.14(2). The mother is however a "liable relative" for Supplementary Benefits purposes and may be ordered to pay maintenance for the child on the application of the Supplementary Benefits Commission.

appointment under the mother's will.[27] His position is therefore different from that of the mother, and of both parents of a legitimate child, whose agreement is required.[28]

(iv) The father's consent to a change of the child's name is not required unless he has become the legal guardian of the child by court order or under the mother's will.[29]

(v) The father's consent to the marriage of the child during the child's minority is not required unless he has been granted custody of the child or has become the child's guardian under the mother's will.[30]

(vi) There is no legal procedure by which the father can establish his paternity without the consent of the child's mother.

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27 Children Act 1975, ss. 12(1)(b) and 107(1). In certain circumstances he will however have a right to be heard: see para.6.4, below.

28 ibid., s.12(1)(b). The requirement that agreement be obtained is subject to the court's power to dispense with agreement in certain circumstances: ibid.

29 We understand in practice that if the mother of an illegitimate child seeks to enrol a deed poll evidencing the child's change of name, the Central Office of the Royal Courts of Justice requires the consent of the father to be obtained.

30 Marriage Act 1949, s.3(1) and Sch. 2.

Procedural discrimination

2.12 There are, in addition, a number of procedural matters which point to the illegitimate child as "different":

(i) Maintenance for an illegitimate child involves the institution by the mother of a special form of proceedings (affiliation proceedings) which many people regard as involving a stigma.

(ii) The mother cannot obtain maintenance for the child unless she is a "single woman" at the date of the application for maintenance, or was so at the date of the child's birth.[31] The phrase "single woman" includes not only an unmarried woman (spinster, widow or divorcee) but also a married woman who is living apart from her husband and who has lost the right at common law to be maintained by him.[32]

(iii) Only the magistrates' court has jurisdiction in affiliation proceedings, whereas the High Court, the county court and the magistrates' court all have jurisdiction in cases where maintenance is sought for legitimate children.

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31 Affiliation Proceedings Act 1957, s.1; Legitimacy Act 1959, s.4.

32 Jones v. Evans [1944] K.B. 582.

(iv) Subject to certain exceptions, an application for maintenance by way of affiliation proceedings must be made within three years of the child's birth.[33] There is no such time limit as respects legitimate children.

(v) There is a special rule of evidence applicable to affiliation proceedings: if the mother gives evidence, her evidence must be corroborated.[34]

(vi) There is a special form of appeal from a magistrates' court in affiliation proceedings.[35]

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33 Affiliation Proceedings Act 1957, s.2(1)(a), as amended by the Affiliation Proceedings (Amendment) Act 1972, s.1.

34 ibid., s.4(1), as amended.

35 See paras. 4.35 to 4.37, below.

## PART III

## REFORM OF THE LAW: THE FIELD OF CHOICE

3.1 In Part II(B) above, the consequences of illegitimacy have been expressed in terms of "discrimination": that is, the principal ways in which a child or his father (and sometimes his mother) may in law be placed in a special and disadvantageous position through the existence of the distinction between the "legitimate" and the "illegitimate" child. There may be three reactions to this situation:

(a) that continued discrimination against the illegitimate child is justified and should be preserved;

(b) that such discrimination is not justified and that the existing legal disadvantages so far as the child is concerned should be removed;

(c) that reform should not merely remove the legal disadvantages attaching to illegitimacy, but should abolish that status[1] altogether.

We consider these three approaches in turn:

### (a) Continued discrimination against the illegitimate child

3.2 The force of any argument justifying the preservation of discrimination against children born out of wedlock has been much diminished as a result of the major improvements already made to the common law position of the illegitimate child to which we have referred above.[2] It is

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1 It may not be accurate to refer to illegitimacy as a status; technically speaking, only legitimacy is a status. However the use of the word is convenient.

2 See paras. 2.2 to 2.8, above.

not now easy to put convincing arguments in favour of discrimination, because such arguments would logically justify a return to the strict common law position, and it is difficult to believe that there would be any substantial support for turning the clock back in this way. Nevertheless, arguments in favour of preserving the principle of discrimination may still be used by those who are prepared reluctantly to accept, as an accomplished fact, the changes which have already been made towards improving the legal status of the illegitimate child, but think that no further reform should be made. We therefore briefly summarise the arguments in favour of discrimination. They are three in number though they are perhaps not altogether distinct.

3.3 First, it is said that the legal distinction between "legitimacy" and "illegitimacy" reflects social realities. This was certainly true at one time. The birth of an illegitimate child was regarded as bringing disgrace not only on the mother but also on her immediate family. The child could no more expect to be recognised as a member of the family and be received into the family home than he could expect to inherit family property. He was not a real member of the family group. However, although there may still be cases where the illegitimate child is in this position, the evidence suggests that a significant and increasing proportion of all illegitimate children born each year are recognised by both their parents, at least if the parents have a relationship of some stability. It is noteworthy that of the 53,766 illegitimate births registered in 1976, no fewer than 27,407 (50.9 per cent.)[3] were registered on the joint application of both parents, and that around one-quarter of illegitimate births recorded in the census years of 1961 and 1971 occurred to mothers who nevertheless described themselves on their census returns as "married".[4]

3 Social Trends (1979) Table 2.24 (Central Statistical Office). This proportion shows a marked increase in recent years: in 1966 only 38.3 per cent. of illegitimate births were so registered: ibid.

4 Population Trends 14 (H.M.S.O.), p. 15.

3.4 Secondly, it is said that the distinction serves to uphold moral standards and also to support the institution of marriage. In relation to the preservation of moral standards, it is difficult to say how far the fear of producing illegitimate children influenced sexual behaviour in the past; since the risk of an unwanted pregnancy can now usually be avoided by contraceptive measures it seems improbable that such fears still influence sexual behaviour to any substantial extent. Support for the institution of marriage is of course of great importance, especially in the present context, because a married relationship between parents should in principle be more stable than an unmarried one, so creating a better environment for the child's upbringing. However, many marriages are not stable, and statistically it seems that marriages entered into primarily for the purpose of ensuring that an expected child is not born illegitimate[5] are especially at risk. In a large proportion of marriages where the girl is under 20 she is also pregnant;[6] and the failure rate of marriages where the girl married young is statistically high.[7] We therefore find it difficult to accept that the institution of marriage is truly supported by a state of the law in which the conception of a child may encourage young couples to enter precipitately into marriages which may have little chance of success.

3.5 The third argument in favour of preserving discriminatory treatment asserts that the legal relationship between the child's parents should be relevant in determining the child's legal status: that as the legal relationship of marriage results in legitimate status for the child, so a

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5 The proportion of such marriages seems to be falling: in 1966 52.1 per cent. of live births resulting from extra-marital conceptions were legitimate because of the parents' marriage, whilst in 1977 the proportion was only 38.6 per cent.: Social Trends (1979) Table 1.9.

6 In 1976 50.6 per cent. of all legitimate live births to women under 20 were conceived extra-maritally: Social Trends (1977) Table 1.10.

7 In 1977 the marriages of 19 per cent. of women who had married under the age of 20 ten years previously had been dissolved. The comparable figure for women of all ages married in the same year was 12 per cent.: Social Trends (1979) p. 51.

relationship which does not accord with the norm should not result in normal status for the child. On this view it is regarded as significant not only that a legitimate child is the issue of a legally recognised union, the incidents of which are fixed by law and which can only be dissolved by formal proceedings but also that marriage, at least in its inception, is intended to be permanent. The relationship of an illegitimate child's parents, on the other hand, is not in general legally recognised and may never have been intended to be more than transient. However this argument is based on the premise that a child's status ought to be affected by that of his parents. This is the proposition which we do not accept; it is, after all, the child's status, and the nature of the relationship between his parents need not and should not affect this.

3.6 In general, where a child is involved, the law is that his welfare is the first and paramount consideration,[8] transcending even the consideration of doing justice between his parents[9] or between his parents and outsiders.[10] We do not think that the arguments mentioned above in favour of discrimination are sufficiently strong to justify a refusal, as a matter of law, to apply the same welfare principle to children simply on the ground that they have been born out of wedlock. In particular, we see no justification for preserving the status quo. Even if there were a valid case in favour of discriminating against children born out of wedlock, it would be difficult to justify the anomalies in the present law, such as the rule which gives the father of an illegitimate child the right to succeed on his intestacy even though he has had no contact with him, whereas the child's brother, with whom he may well have had a close relationship, has no such right. We have a statutory duty[11] to pay particular attention to the

8 Guardianship of Minors Act 1971, s. 1.

9 Re K. (Minors) (Children: Care and Control) [1977] Fam. 179.

10 J. v. C. [1970] A.C. 668.

11 Law Commissions Act 1965, s. 3(1).

elimination of anomalies, and we think that we would be failing in this duty if we suggested leaving the law in its present state.

3.7 We accordingly turn to consider two models for reform: one which abolishes the adverse legal consequences of illegitimacy; and the other which abolishes the status of illegitimacy and all its consequences.

(b) First model for reform: abolition of adverse legal consequences of illegitimacy

3.8 In this model the concepts of legitimacy and illegitimacy are preserved, but further steps are taken to remove by statute certain of the practical and procedural consequences of illegitimacy: in particular, all consequences which are adverse to the child. Thus, affiliation proceedings would be abolished and the illegitimate child would be given a legal right, under the Guardianship of Minors Acts 1971 and 1973, to support from both his parents; he would be capable of succeeding on the intestacy of ascendant and collateral relatives as if he had been born legitimate, and so on.

3.9 The particular reforms for inclusion within such a scheme could be selective; and the model has what some may regard as the advantage of not necessarily involving the automatic removal of all discrimination against the father of an illegitimate child. We have summarised, at paragraph 2.11 above, the forms which this discrimination now takes - basically, the father has neither rights[12] nor duties unless and until the court so orders. It may be argued that it is

12 Exceptionally, the father of an illegitimate child has the same right to succeed on the child's intestacy as he would have if the child were legitimate: Family Law Reform Act 1969, s. 14(2). Also the father of an illegitimate child may be classed as a dependant under the Fatal Accidents Act 1976: ss. 1(3)(b) and 1(4)(b).

right that this should be so, because of the very wide range of possible factual relationships between the father on the one hand and the mother and the child on the other. If the father wishes to participate in the child's upbringing and can make a substantial contribution to his welfare, the court can make appropriate orders even if the mother wishes to exclude him.[13] If, on the other hand, he has nothing to offer it would, on this view, be wrong to give him rights (albeit rights of which the court would be able to divest him if the child's welfare so required). One can think of extreme and no doubt unrealistic examples. For instance, should a rapist, even in theory, be entitled to rights equal to those of the mother in relation to a child conceived as the result of the rape? If so, the rapist would in theory be entitled to be asked whether he agreed to the child being adopted, and would have equal rights to the child's custody unless and until proceedings were taken formally to divest him of such rights. If such an issue were brought before a court it would of course be resolved by reference to the child's welfare, but, unless and until this were done, the rapist father would as a matter of law have the right to exercise full parental rights over the child, and might in theory do so.

3.10 We have used the case of the rapist because it provides the most dramatic example of the consequences of abolishing discrimination not only against the child but also against his genetic father. There will, however, be other cases in which the father's relationship with the mother and her child is such that it might seem wrong to give him any, even prima facie, legal recognition, as where a child has been conceived as the result of a casual encounter.

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13 There are indications that the courts are, for example, already adopting a more liberal approach than they once did to access between a father and his illegitimate child: see S. v. O. (1978) 8 Fam. Law 11 and M. v. J. ibid., p. 12. Contrast Re G. (An Infant) [1956] 1 W.L.R. 911.

3.11 It may be questioned whether this problem is of any real importance since in practice such a father would not seek to exercise rights. Even if he did, the court would be bound to override his rights if to do so would be in the child's interests. Looking at the position pragmatically, this may well be the right approach, but there are two reasons why it may be thought not to be an entirely satisfactory answer. First, the necessity to take legal proceedings to divest the father of his rights may in itself be distressing to the mother - so much so that it could, for example, affect her decision about placing the child for adoption if the result were that the father had to be made a party to the proceedings. Secondly, it would be necessary for the mother to take legal proceedings if she wanted to secure herself and the child against the risk of intervention by the father. Unless and until she did so, the father could (on the hypothesis that he had the same rights as the father of a legitimate child)[14] properly exercise any of the parental rights over the child.[15] This would mean that, for example, the father would be legally entitled to intercept the child on its way home from school (and he might thereafter remove the child from the jurisdiction). Hence, to avoid this risk, mothers would no doubt often be advised to take steps to remove the father's rights, thus increasing not only the amount of litigation but also the mother's distress. These consequences must therefore be weighed in the balance in deciding whether or not the law should cease to discriminate against the genetic father.

3.12 We have considered whether it would be possible to deal with this problem by statutory definition of a class of fathers who would automatically be debarred from the

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14 Guardianship Act 1973, s. 1(1).

15 The rights of parents are exercisable by either without the other: ibid., unless that other has signified disapproval of the action in question: Children Act 1975, s. 85(3).

exercise of parental rights. For convenience we refer to them from time to time as "unmeritorious" fathers. New Zealand seeks to deal with the problem by giving both parents of a child born out of wedlock equal parental rights only if they were living together at the date of the child's birth. If they were not, the mother is the child's sole guardian, but the father can apply to be appointed as guardian.[16] We do not favour the adoption of this distinction, since it would involve the difficult task of adequately defining "living together". Furthermore, whatever the definition of the class of excluded fathers the rule would be arbitrary, and likely to produce unsatisfactory results in particular cases. Our tentative view is therefore that there should be no statutory class of fathers who do not have parental rights. Comments and suggestions are invited.

3.13 The only exceptional areas in which we think it might perhaps be practicable to make some special provision for the "unmeritorious" father are in relation to adoption, birth registration and A.I.D.. In our discussion of adoption[17] we consider the possibility of expedited, and possibly ex parte, applications to dispense with the agreement of a father in certain cases. This would still involve the necessity for legal proceedings to remove the father's "rights"; and even if it were acceptable in relation to adoption, we doubt whether it would be possible to extend such a procedure to other situations. In relation to birth registration, our provisional recommendations[18] would allow an unmarried father to be registered as the child's father against the mother's wishes only if a court order conferring recognition of his paternity had been made on his application or if he had been ordered to pay maintenance. This would have the indirect

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16 Guardianship Act 1968 (N.Z.), s. 6.

17 See Part VI(A), below.

18 See paras. 9.18 to 9.20, below.

effect of excluding the father who has no real link with the child. In relation to A.I.D. we consider proposals[19] designed to exclude the genetic father (that is the donor) in favour of the mother's husband.

(c) Second model for reform: abolition of the status of illegitimacy

3.14 This model involves the total disappearance of the concept of "legitimacy" as well as of "illegitimacy", for the one cannot exist without the other. It goes beyond the mere assimilation of the legal positions of children born in and out of wedlock, since that solution, which has been considered above, would still preserve the caste labels which help artificially to preserve the social stigma now attached to illegitimacy.

3.15 The case for abolishing illegitimacy as a status is in our view supported by the fact that such a change in the law would help to improve the position of children born out of wedlock in a way in which the mere removal of the remaining legal disabilities attaching to illegitimacy[20] would not. No change in the law relating to legitimacy would help to improve the economic position of a child born out of wedlock in so far as he suffers from being the child of a "one-parent family"; but an illegitimate child suffers a special disadvantage which does not affect the child of a widow or divorcee. He has a different status, even if the incidents of that status do not differ greatly from those attached to the status of a legitimate child; attention is thus focussed on the irrelevant fact of the parents' marital status. We believe that the law

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19 See Part X, below.

20 If there is a stable relationship between the child's unmarried parents the more obvious disadvantages can be overcome even as the law now stands by the parents using the same surname and having the child registered in that name; and by their families making appropriate wills.

can help to lessen social prejudices by setting an example clearly based upon the principle that the parents' marital relationship is irrelevant to the child's legal position. Changes in the law cannot give the illegitimate child the benefits of a secure, caring, family background. They cannot even ensure that he does not suffer financially, since his father may not be in a position to support him. But they can at least remove the additional hardship of attaching an opprobrious description to him. Mere tinkering with the law would disguise the fact that a new principle has been established: indeed, it would tend to suggest that there is still some justification for the old discriminatory attitudes. That is an impression which we are anxious the law should not give.

3.16 If the law were changed so that there was no longer a legal distinction between the illegitimate child and the legitimate child, it would also follow that in principle there would be no distinction between parents: both parents would have equal parental rights and duties unless and until a court otherwise ordered. It may be asked whether it is safe to rely on court procedures to divest an unsuitable father of his rights, bearing in mind the possibility that a father might even remove his child from the jurisdiction before the mother could apply to the court. We doubt whether the existence of this risk should be allowed to govern the issue. The problem is of course not one which arises only in connection with children born out of wedlock - "legal kidnapping" by other fathers is a well-known phenomenon.[21]

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21 This is sufficiently important to be under current consideration by the Council of Europe, the Commonwealth Secretariat and the Hague Conference on Private International Law. We are continuing to examine it jointly with the Scottish Law Commission following our Working Paper on Custody of Children - Enforcement and Jurisdiction within the United Kingdom (Working Paper No. 68) (1976).

We have tentatively concluded that the advantages of removing the status of illegitimacy altogether from the law outweigh the disadvantages of giving all fathers parental rights. The case for adopting this approach is strengthened by the fact that in many, perhaps most, cases the father's position should be recognised, because he will be making a contribution to the child's upbringing either compulsorily or voluntarily. Equality of parental rights and duties in such cases is likely to benefit the child by giving legal recognition to factual family ties where these exist, and by normalising the child's legal status in relation to his parents. There will of course be many cases where mothers of children born out of wedlock are unwilling to allow the fathers to play, or to continue to play, any part in the children's lives. In taking that attitude they will no doubt believe that they are acting in the child's best interests. But we think that the decision to exclude a father from all parental rights and duties is so important that it should not be the mother's alone; the final decision should lie with the courts, which are bound to regard the welfare of the child as paramount. However, this is clearly a difficult question of policy, on which we would particularly welcome comments.

Our provisional view on the field of choice

3.17 Our provisional conclusion is therefore that the law should be reformed not merely by removing the legal disadvantages attaching to illegitimacy, but by abolition of the concepts of legitimacy and illegitimacy, with the consequence that thenceforth there would be no legal distinction between the child born to parents who are married, and the child born to parents who are not. The term "illegitimate" would cease to have any meaning as a term of art. Illegitimate children would not be "legitimated", but the law hitherto only applicable to legitimate children would become applicable to all children without distinction. We are

fortified in our view that it is right to adopt this radical approach by the fact that several other common law jurisdictions have already taken a similar line. For example, New Zealand's Status of Children Act 1969 provides that:

> "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."[22]

3.18 The abolition of the status of illegitimacy would of course not preclude parents, relations and others from making special provisions for particular classes of children. Grantors and testators would remain free[23] to define their beneficiaries as they wish, either by inclusion or by exclusion: and so could expressly exclude children born out of wedlock from a class gift to children.[24]

3.19 In the remainder of this paper we examine the practical consequences which would flow from the abolition of the status of illegitimacy. Some of those consequences are matters of legislative detail, but we believe that the overall effect, which is a matter of general concern, would be greatly to simplify the law relating to the guardianship, custody and maintenance of children; and, to a lesser extent, the law of inheritance. One incidental advantage in radical reform along the lines which we tentatively favour would be that much of the law about "legitimacy" and "legitimation" summarised in Part II(A) above would be rendered obsolete, and the many complications which have developed in that area of the law would in due course disappear.

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22 Sect. 3(1). The precise wording of the legislation which would be needed to implement our proposed reform is a matter for consideration in our report.

23 Subject to applications under the Inheritance (Provision for Family and Dependants) Act 1975.

24 Thus by appropriate words of limitation in a grant the present scheme of devolution of titles of honour and entailed interests could be preserved.

3.20 However, before we deal with the practical consequences in detail it may be helpful if we summarise the more notable effects of treating all children on an equal footing. It must be emphasised that for these effects to operate fully, the paternity of the child must have been established,[25] and that in the case of a child born out of wedlock the establishment of paternity may often form a preliminary issue.

3.21 These consequences would be as follows:

(i) There would no longer be any special procedure for obtaining financial support for a child born out of wedlock. Affiliation proceedings would be abolished; the child whose parents have never been married would have the same rights of financial support from each parent (enforceable under the Guardianship of Minors Acts 1971 to 1973) as the child of a married couple.

(ii) The father would, subject to a court order to the contrary, have rights of custody and guardianship jointly with the mother.

(iii) The father would be liable to maintain the child as a matter of law (and not merely in consequence of a court order).

(iv) A child born out of wedlock would become a full member of the family both of his father and of his mother so that he would be able to inherit under the intestate succession laws from other relations as well as his father and mother; and they from him.

25 In relation to A.I.D. this would raise difficult problems with which we deal in Part X, below.

(v) A child born out of wedlock would acquire his father's nationality by birth.

(vi) Just as a husband (relying on the presumption arising from marriage) has the right to have his name entered as the father of his wife's child in the register of births, so a natural father would have the right to have his name so entered either if the mother consented or if his paternity had been established by court order.

3.22 We are conscious that the detailed analysis of the legislative changes which would follow from acceptance of our proposal may be somewhat daunting in its technicality and extent. However, we feel that it is essential for us to consider these matters in detail since we are concerned that, so far as possible, all the legal consequences of the proposed reform should be drawn to the attention of interested persons. We are mindful of the fact that points of detail may affect the reader's conclusion whether or not he agrees with our radical (albeit tentative) proposal, or whether he would prefer more limited reform. We hope, as we have already suggested,[26] that readers will find the Summary of Provisional Conclusions in Part XI helpful in identifying areas of particular interest. We should again stress that, although in the following pages we proceed on the assumption that the decision has been taken to do away with the distinction between legitimacy and illegitimacy, this is only for the purpose of expounding all the consequential changes in the law. We shall be particularly grateful if those who do not agree with this approach would let us know what more limited reforms (if any) they believe to be desirable.

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26 See para. 1.6, above.

## PART IV

## GUARDIANSHIP, CUSTODY AND MAINTENANCE

### (A) INTRODUCTORY

4.1 In this part of the paper we shall examine the questions of the guardianship, custody and maintenance of children born out of wedlock in the light of our proposal to abolish the status of illegitimacy. It may be helpful to list the principal statutes which now govern these matters and to give a brief account of their inter-relationship. We shall then offer a short explanation of the rather confusing terminology used in the legislation and case-law.

#### The Statutory Framework

4.2 The relevant statutes are:

(i) The Guardianship of Minors Act 1971

This Act consolidated the provisions dealing with guardianship and custody in a large number of Acts of Parliament, ranging from the Guardianship of Infants Act 1886 to the Administration of Justice Act 1970. The result is that provisions formerly contained in a large number of different statutes are now to be found - substantially unchanged in language and effect - in a single statute. The Act regulates the appointment of guardians, and establishes a procedure by which a child's parents can apply to the court for custody, access and maintenance orders.

(ii) The Guardianship Act 1973

This Act was primarily intended to change the rule of the common law under which all parental rights over a legitimate child were vested in the father to the exclusion of the mother. It confers equal rights on both parents (so that, for example, either is entitled to agree to medical treatment for the child, or to consent to a passport being issued for him). The Act also provides a procedure under which the court can, if need be, resolve a particular difference between the parents about the exercise of the parental rights.

(iii) The Matrimonial Causes Act 1973

This Act consolidates the law relating to divorce, nullity and judicial separation proceedings. It contains important provisions relating to child custody; but not many of these are directly relevant in the context of this working paper because they only arise in litigation about marriage.

(iv) The Children Act 1975

This Act implements most of the recommendations of the Departmental Committee on the Adoption of Children.[1] For present purposes it is chiefly important for instituting custodianship orders, which are intended to give foster parents, step-parents and relatives caring for children a legally recognised position in relation to the children, who nevertheless preserve their legal links with their natural parents. The Act also seeks to clarify for the future the terminology used in statutes dealing with the custody of children, a topic considered below.[2]

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1 (1972) Cmnd. 5107.

2 See para. 4.3, below.

(v) The Legitimacy Act 1976

This Act consolidates earlier legislation relating to legitimacy and legitimation.

(vi) The Domestic Proceedings and Magistrates' Courts Act 1978

This Act, which implements the recommendations made in our Report on Matrimonial Proceedings in Magistrates' Courts,[3] was primarily concerned to reform the law applied by magistrates in matrimonial proceedings, which are necessarily between husband and wife. However, the Act also makes a large number of changes in the law applied by magistrates in other domestic cases, including those arising under the Guardianship of Minors Acts 1971 and 1973.

For the sake of completeness we should also mention the Affiliation Proceedings Act 1957 which (as amended)[4] contains the legislation relating to the enforcement of maintenance obligations against the putative father of an illegitimate child. Our proposals envisage the repeal of this Act.

Terminology

4.3 The technical concepts which are most often used in this paper are guardianship and custody (which since the Children Act 1975 is sometimes divided into "legal custody" and "actual custody".)

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3 Law Com. No. 77 (1976).

4 By the Affiliation Proceedings (Amendment) Act 1972.

(i) Guardianship

In the context of this paper, the word "guardian" means a person who by virtue of either a court order or a parent's will is placed in the fullest sense in loco parentis to a child. Broadly speaking, he has the same rights in relation to a child and to his property as have the natural parents.[5] Historically, there were different types of guardian, such as guardians of a child's person and guardians of his estate, but these usages are now uncommon; in this paper the word "guardian" has its ordinary wide meaning.

(ii) Custody

The word "custody" is used in different senses.[6] Sometimes it means all the rights and duties which a parent has by law in respect of his child. Sometimes it means simply the right to physical possession of the child. The Children Act 1975 sought to rationalise the terminology by introducing newly defined key concepts, legal custody and actual custody. "Legal custody" means "so much of the parental rights and duties as relate to the person of the child".[7] The expression "parental rights and duties" for this purpose means[8] "all the rights and duties which by law the mother and father have in relation to a legitimate child and his property". It therefore follows that an order under the Guardianship of Minors Act 1971 (as amended) or under the Domestic Proceedings and Magistrates' Courts Act 1978 giving

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5 Strictly speaking, the word "guardian" includes a child's parent or parents. However, in this paper we follow the more common usage explained in the text.

6 See Hewer v. Bryant [1970] 1 Q.B. 357.

7 Children Act 1975, s.86.

8 ibid., s.85(1).

> "legal custody" of a child to an individual effectively transfers (for so long as the order is in force, and subject to any orders the court may make for access) all parental rights except rights which do not relate to the child's person. Thus, the person with legal custody under such an order has, for example, a right to consent to surgery on the child; but he has no rights over the child's property because such rights do not relate to the child's person.

"Actual custody" is a more limited concept. A person has actual custody of a child if he has actual possession of his person, whether or not that possession is shared with one or more other persons.[9]

4.4 These two key concepts are now used in the Guardianship of Minors Acts 1971 to 1973 because of amendments made thereto by the Domestic Proceedings and Magistrates' Courts Act 1978. The divorce legislation remains unamended, and the effect of an order for "custody" made by the divorce court must be determined without reference to the definitions in the Children Act 1975.

The policy

4.5 Put broadly, the consequence of our proposal to abolish the status of illegitimacy is that affiliation proceedings in their present form would disappear and that the Guardianship of Minors Acts,[10] which do not at present deal with the maintenance of illegitimate children, would apply to all children without distinction.

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9 ibid., s.87(1).

10 Guardianship of Minors Act 1971 and Guardianship Act 1973.

4.6 However, in some respects we shall suggest going further than merely ensuring that the child born out of wedlock fits into the existing structure of the Guardianship of Minors Acts. Certain anomalies which we noted in our Report on Domestic Proceedings in Magistrates' Courts[11] require consideration so that, so far as practicable and desirable, the rules as to the custody and maintenance of children under the Guardianship of Minors Acts are effectively the same as those applying in divorce, matrimonial and custodianship[12] proceedings under different legislation.

4.7 One crucial difference between children born in wedlock and those not so born would, however, remain. The fathers of the former are identified (presumptively at least) by marriage, while for the latter an issue as to paternity would frequently have to be resolved. We shall deal in detail with the ways of showing or establishing paternity in Part IX of this paper; here we seek to rationalise the law on the assumption that paternity has been established.

## (B) GUARDIANSHIP AND CUSTODY

### Equality between parents

4.8 As we have already stated,[13] an important consequence of abolishing legal distinctions between children born in wedlock and those born out of wedlock is that the parents of the latter, like those of the former, would prima facie have equal rights and duties. The starting-point would be section 1(1) of the Guardianship Act 1973:

> "In relation to the custody or upbringing of a minor, and in relation to the administration of any property belonging to or held in trust for a

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11 Law Com. No. 77, para. 8.1.

12 See Part II of the Children Act 1975.

13 See para. 3.21(ii), above.

minor or the application of income of any such property, a mother shall have the same rights and authority as the law allows to a father, and the rights and authority of mother and father shall be equal and be exercisable by either without the other".

4.9 If the proposal which we have tentatively made is accepted certain consequential amendments would have to be made. In particular it would be necessary to repeal section 85(7) of the Children Act 1975[14] and that part of section 1(7) of the Guardianship Act 1973 which makes an exception as regards illegitimate children from the principle of equality of parental rights.

Application to the court on a question affecting the child's welfare

4.10 Under section 1(3) of the Guardianship Act 1973 either parent may apply for the court's direction on a question affecting the child's welfare where the parents cannot agree.[15] If illegitimacy were abolished, this is another procedure which would also apply to children born out of wedlock.

Guardianship: generally

4.11 Unlike the mother, the father of an illegitimate child has at present no rights of guardianship simply by virtue of his fatherhood. He may however acquire such rights on or after the mother's death. If the father had a custody order in his favour immediately before the mother's death,[16] he would then become the guardian (or one of the guardians) by virtue of section 3(2) of the Guardianship of Minors Act 1971. If that provision did not apply, he might become a guardian by express appointment - either by the mother, under her will[17]

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14 See para. 2.11(i), above.

15 There is no power to make custody or access orders on this kind of application: s.1(4).

16 See Guardianship of Minors Act 1971, s.14(3).

17 Or by deed which takes effect on death: ibid., s.4(2).

or (in the absence of any other guardian or person having parental rights) by the court.[18]

4.12 In the circumstances, it is perhaps not surprising that as the law now stands an illegitimate child frequently finds himself without any guardian if his mother dies. The removal of the status of illegitimacy under our proposals would mean that the father would (unless the court had deprived him of his rights) be the child's guardian jointly with the mother and, if he survived the mother, would continue to be the child's guardian (either solely, or jointly with another guardian appointed by the mother). This would obviously be convenient where the child's parents formed a stable union. In other cases it might be necessary for a third party to be appointed guardian.

4.13 A further result of abolishing illegitimacy, and of repealing section 14(3) of the Guardianship of Minors Act 1971,[19] would be that the father of a child born out of wedlock would have power, after the commencement of any Act abolishing illegitimacy, to appoint a testamentary guardian of the child.[20] A father of a child born out of wedlock who had de facto and unchallenged custody of the child would not therefore (as now) have to obtain a custody order for the purpose of enabling him to make a valid testamentary appointment of a guardian for the child.

Disputes between parents and between guardians

4.14 It also follows that the child's father would, as father, be able to take advantage of the procedure referred to above[21] to resolve any disagreement between himself and the child's mother on a question affecting the child's welfare.

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18 ibid., s.5.

19 This is the sub-section which permits the "natural father" to "be treated as if he were the lawful father" only if he has a custody order under s.9 of the 1971 Act.

20 Under s.4(1) of the 1971 Act.

21 See para. 4.10, above.

Furthermore, if the mother died having appointed a guardian to act with the father, the father would, as a guardian, be able to resort to sections 7 and 11 of the Guardianship of Minors Act 1971 in the event of a dispute between himself and his co-guardian.

Removal of guardian

4.15 In some cases the child's welfare may require that a parent should be deprived of guardianship rights. This matter may attain greater importance if the fathers of children born out of wedlock are in future to have rights of guardianship automatically once their paternity is established.

4.16 The law on this subject is at present in a somewhat unsatisfactory state. The High Court may, under section 6 of the Guardianship of Minors Act 1971, remove a testamentary guardian, or a guardian appointed or acting under the Act; and under section 4 of that Act, any court may, among other things, remove a surviving parent from the guardianship.[22] A surviving parent may also be removed if the testamentary guardian satisfies the court that the surviving parent is unfit to act. But it seems that no court has statutory[23] authority to deprive one parent of guardianship while the other is living, and that a surviving parent cannot be displaced under section 4 in the event of disputes between that parent and a co-guardian appointed by the court (in lieu of a testamentary guardian). Furthermore, there is no power to reinstate the guardianship rights of a parent once those rights have been removed.

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22 This power only arises when a surviving parent objects to the testamentary guardian appointed by the deceased parent.

23 The guardianship rights of a parent could, it seems, be removed at common law when only the father had guardianship rights automatically: Wellesley v. Wellesley (1828) 2 Bligh N.S. 124, H.L.

4.17 As we shall see when we turn to custody, the court's control over the custody of children is general, and we incline to the view that its statutory control over guardianship should also be general. Although for nearly all purposes it is custody rather than guardianship which is of significance, we think that it should be clear that a court may remove one parent from the co-guardianship of a child on the application of the other. We appreciate that this would be a potentially far-reaching power, since it would enable a court in effect to deprive a parent of all his parental rights without any specified ground having to be established. But the power would only be exercised if it were clearly in the child's interest to do so. We accordingly suggest that the High Court's jurisdiction under section 6 of the 1971 Act should be extended to allow for this, and also that section 4 should be amended so that it covers the case where a co-guardian has been appointed by the court. Finally, we suggest that there should be power to reinstate a parent as guardian where appropriate.

Custody orders under section 9(1) of the Guardianship of Minors Act 1971

4.18 The court can make custody and access orders for a minor (whether born in or out of wedlock) as it thinks fit "having regard to the welfare of the minor and the conduct and wishes of the mother and father". The conferring of ordinary custody rights on the father of a child born out of wedlock would mean that it would be necessary for the mother of such a child (like other mothers) to apply to the court if the father's rights were to be modified or removed.

4.19 Section 9 of the 1971 Act would, in our view, continue to operate satisfactorily as a means of enabling the court to deal with custody issues even though, in relation to children born out of wedlock, it would in future as a result of our proposals be used to regulate or remove the father's rights instead of granting rights to him. There

is however one point on the wording of the legislation which, we consider, needs attention. The reference in the section to the "conduct and wishes of the mother and father" is unique in legislation affecting children; these words do not appear in corresponding places in the divorce[24] or other matrimonial[25] legislation; nor even elsewhere in the 1971 Act.[26] The words appear to derive from the Guardianship of Infants Act 1886. Although the emphasis placed on parental conduct and wishes may count for little in practice, this phrase could derogate from the principle (enshrined in section 1 of the 1971 Act) that the welfare of the child is paramount. We therefore think that it should be made clear that the child's welfare governs the issue and that section 1 of the Guardianship of Minors Act 1971 applies.[27]

Care and supervision orders

4.20 In a custody application made under section 9 of the 1971 Act the court may in exceptional circumstances consider it right to give custody to one parent subject to the supervision of a local authority or probation officer; or it may decide that custody should be given to neither parent and that the child should be committed to the local authority's care.[28] These powers to make supervision and care orders do not apply to children born out of wedlock (except in the less usual case of a father applying for custody) because no custody issue arises in affiliation proceedings, and the

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24 See Matrimonial Causes Act 1973, s.42.

25 See Domestic Proceedings and Magistrates' Courts Act 1978, s.8(2); nor did the words appear in the Matrimonial Proceedings (Magistrates' Courts) Act 1960.

26 Cf. ss.10(1) and 11.

27 A similar approach was adopted in s.15 of the Domestic Proceedings and Magistrates' Courts Act 1978.

28 Guardianship Act 1973, s.2(2) as amended by the Domestic Proceedings and Magistrates' Courts Act 1978, s.38(2).

mother does not need to apply for custody.[29] We consider that it would be an advantage if these powers were applicable to such children, as they would be if our proposals are accepted.

Out of court agreements

4.21 The right of a parent to make an enforceable agreement relating to his parental rights is restricted by section 1(2) of the Guardianship Act 1973 and section 85(2) of the Children Act 1975. Section 1(2) of the Guardianship Act 1973 provides that a parent cannot enforce any agreement to give up parental rights made between himself and the other parent unless the agreement is in contemplation of their separation while married; in this exceptional case the agreement is "enforceable" but the court can refuse to enforce the agreement if it is not for the benefit of the child to do so. Section 85(2) of the Children Act 1975 provides that "subject to section 1(2) of the Guardianship Act 1973 ... a person cannot surrender or transfer to another any parental right or duty he has as respects a child."

4.22 Thus, while a husband and wife may make an enforceable agreement about their parental rights, subject to the court's power in the interest of the child not to enforce it, unmarried parents cannot make such an agreement; and when parents are divorced they cannot thereafter make such an agreement. The question accordingly arises whether this exception permitting spouses to make "enforceable" agreements should be extended to all parents. This result might be thought a logical consequence of the proposed abolition of the status of illegitimacy. At present however we favour a more radical approach than extending this exception. The provision in section 1(2) of the 1973 Act dates back to 1873; at that

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29 The local authority may however obtain a care or supervision order under s.1 of the Children and Young Persons Act 1969 if the grounds set out in that Act are established.

time it was no doubt necessary so that a separated wife could obtain parental rights by agreement, since these were then vested exclusively in her husband. The law has now changed in that parental rights and duties are shared equally, and it now seems odd, in view of the court's powers in relation to children, that any agreement about parental rights should be "enforceable" even in a limited sense. We appreciate that parents can (and should be encouraged to) agree between themselves about the exercise of those rights. But if they disagree, they should be able to apply to the court, which would make whatever order best served the child's interests, no doubt giving proper weight to any agreement which the parents may have come to, but not acting on what appears to be a presumption in favour of enforcing it.

4.23 It would follow from this argument that the exception contained in section 1(2) of the 1973 Act serves no useful purpose, and we accordingly suggest that the sub-section should be repealed. The effect of such a change would be that there would no longer be any power (such as we have described) to enter into "enforceable" agreements about parental rights.

4.24 In relation to section 85(2) of the 1975 Act our present view is that it should still be the law that a person cannot by private act surrender or transfer a parental right or duty to another, so that it would be necessary simply to remove from section 85(2) the saving reference to the Guardianship Act 1973.

4.25 If this approach is not acceptable, abolition of the distinction between legitimate and illegitimate children would presumably involve extending to all separated parents (whether married or not) the power to make "enforceable" agreements relating to parental rights and duties. Such a change would mean that divorced parents would also have such rights. But since the court's power, if either party chose to invoke it, to do whatever best served the child's interests would remain unaltered, this would not be objectionable in practice.

## (C) MAINTENANCE

### General

4.26 The abolition of the status of illegitimacy would involve, as we have seen, the granting of new rights in the fields of guardianship and custody to fathers of children born outside marriage. The liability of fathers to contribute towards the maintenance of such children would not be new, but would become enforceable in a new way.

4.27 At present, none of the provisions under which the fathers of legitimate children may be ordered to contribute to their maintenance apply to the maintenance of illegitimate children by their fathers.[30] The latter is governed by a distinct régime: affiliation proceedings. The abolition of the status of illegitimacy would necessarily require the abolition of this separate class of proceedings; cases involving children born out of wedlock would be brought within a form of proceedings equally applicable to cases involving children born in wedlock.

4.28 There are three relevant statutory sources of maintenance[31] for children born in wedlock:

(i) Guardianship of Minors Act 1971 (section 9(2) as amended);

(ii) Matrimonial Causes Act 1973 (section 27);[32] and

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30 The husband of a woman who has an illegitimate child (or a legitimate child by a previous husband) may become liable to make financial provision for that child if he treats him as a "child of the family": Matrimonial Causes Act 1973, s.25(3).

31 i.e. other than in divorce proceedings.

32 As substituted by s.63 of the Domestic Proceedings and Magistrates' Courts Act 1978.

(iii) Domestic Proceedings and Magistrates' Courts Act 1978 (section 2).

The two latter sources give rise to a special difficulty for present purposes. Those Acts are concerned only with married couples and their families, and the provisions relating to the maintenance of the children are inextricably bound up with the maintenance of the wife by the husband (and, in appropriate cases, vice versa). It would therefore be technically impossible for children born out of wedlock to be beneficiaries of the maintenance provisions in those Acts.

4.29 No such difficulty arises in relation to the Guardianship of Minors Act 1971: indeed, section 9 (as amended) would taken by itself, as a matter of language, apply equally to children born in and out of wedlock as it stands; but section 14(2) of the Act prevents the court from making maintenance orders in favour of illegitimate children. We propose that section 14 should disappear, and that the legislation should make it clear that the references in section 9 to "father" are references to the child's natural father, notwithstanding that he may not be, and may never have been, married to the child's mother.

4.30 In this section of the working paper we shall accordingly consider various aspects of financial provision with a view primarily to seeing how the procedure under the 1971 Act would operate in the context of children born out of wedlock, and to what extent provisions parallel to those in the Matrimonial Causes Act 1973 and the Domestic Proceedings and Magistrates' Courts Act 1978 would have to be added to the Guardianship of Minors Acts, so that remedies available now for children born in wedlock would be equally available in the future to children born out of wedlock. We recognise that such additions to the Guardianship of Minors Acts would result in some duplication of remedies for children born in wedlock, but this would be unavoidable.

Jurisdiction

4.31 Affiliation proceedings - the only proceedings in which a mother can now obtain an order for financial provision against the father of her illegitimate child - can only be instituted in a magistrates' court. The general rule is that jurisdiction lies with the court for the area where the mother lives,[33] but it is normally necessary that the alleged father be also living in England or Wales, so that the complaint can be served on him. By special provision, however, that court also has jurisdiction to entertain proceedings against an alleged father living in Scotland or Northern Ireland, if the relevant act of intercourse took place in England or Wales;[34] and it may also entertain (and make a provisional order in) cases where the alleged father lives in the Republic of Ireland,[35] or in one of certain Commonwealth countries (or South Africa).[36] Exceptionally, jurisdiction may also lie with the magistrates' court for the area in which the father lives: namely, in cases where the mother is living in Scotland or Northern Ireland.[37] For the purpose of confirming a provisional order, the court in the area where the father lives will also have jurisdiction if the mother lives in Ireland, South Africa or a reciprocating Commonwealth country.[38]

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33 See Affiliation Proceedings Act 1957, s.3 as amended by the Domestic Proceedings and Magistrates' Courts Act 1978, s.49.

34 Maintenance Orders Act 1950, s.3(1).

35 Maintenance Orders (Reciprocal Enforcement) Act 1972, s.40; Reciprocal Enforcement of Maintenance Orders (Republic of Ireland) Order 1974 (S.I. 1974 No. 2140).

36 Maintenance Orders (Reciprocal Enforcement) Act 1972, s.3 and the Orders in Council made thereunder.

37 Maintenance Orders Act 1950, s.3(2).

38 Jurisdiction also lies under s.27 of the Maintenance Orders (Reciprocal Enforcement) Act 1972 if the mother lives in a country to which the United Nations Convention on the Recovery Abroad of Maintenance extends and the alleged father lives in England, Wales or Northern Ireland.

In no case is the child's residence a ground of jurisdiction in affiliation proceedings.[39]

4.32 The jurisdiction to make orders in respect of legitimate children under the guardianship legislation is governed by section 15 of the Guardianship of Minors Act 1971 (as amended by the Guardianship Act 1973) and is much less circumscribed. It is exercised by:

(a) the High Court

(b) the county court of the district where the respondent or the applicant or the minor lives (with the gloss that if the respondent lives in Scotland or Northern Ireland the originating process must be served on him or her in England or Wales)

(c) a magistrates' court having jurisdiction for the area where the respondent or the applicant or the minor lives. (In this case, if the respondent lives in Scotland or Northern Ireland it must be shown either that the complaint has been served on the respondent in England or Wales, or that both the applicant parent and the child live in England or Wales). If the respondent lives in a reciprocating Commonwealth country, the magistrates' order here will initially be a provisional one.

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39 Nor is his place of birth: R. v. Bow Road Justices (Domestic Proceedings Court) ex parte Adedigba [1968] 2 Q.B. 572.

4.33 From the summary of the present law contained in the two previous paragraphs it is clear that jurisdiction to make a maintenance order is wider under the Guardianship of Minors Acts than in affiliation proceedings. The effect of bringing children born out of wedlock within the Guardianship of Minors Acts for maintenance purposes would therefore be to extend the jurisdiction to make orders for them, and this seems satisfactory.

4.34 There are other features of the Guardianship of Minors Acts relating to jurisdiction which would extend to children born out of wedlock as a result of bringing them within those Acts:

(a) there would be power to transfer proceedings from one magistrates' court to another if the other appeared to be a more convenient forum;[40]

(b) if it appeared to the High Court that a particular case would be better dealt with in that court than by the county court in which the application had been made it could order the case to be transferred to it;[41]

(c) if a magistrates' court should consider that an application before it was one which would more conveniently be dealt with by the High Court it would have to decline to make an order.[42]

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40 By rules envisaged in Law Com. No. 77 (1976) para. 6.43(b).

41 Guardianship of Minors Act 1971, s.16(1) as amended by the Children Act 1975, Sch. 3, para. 75(3)(a).

42 Guardianship of Minors Act 1971, s.16(4) as amended by the Children Act 1975, Sch. 3, para. 75(3)(b).

Appeals

4.35 At present, either party to affiliation proceedings may appeal (a) on a point of law, by way of case stated to a Divisional Court of the Family Division of the High Court, and (b) on either law or fact, to the Crown Court. This latter avenue of appeal (which takes the form of a complete rehearing of the case) does not apply to any other class of domestic case heard by magistrates. The explanation for this unique feature is historical. The Crown Court is the successor to Quarter Sessions, where magistrates once played a large part in local administration, including the operation of the Poor Law and parish relief. Their jurisdiction over the maintenance of bastards was connected with this side of their functions.[43] Most of this work has long since passed to others, but there is a certain residue still to be found in the hands of the magistrates and in the Crown Court.[44] Affiliation proceedings are now regarded not as a facet of administrative law but primarily as a private issue between the parties. The fact that magistrates still have original jurisdiction in connection with children born out of wedlock is not in any way anomalous, because they now have wide civil jurisdiction in family matters. But the appeal to the Crown Court in such a purely civil matter is an anomaly. It is furthermore a particularly unfortunate one because that court is largely (and, in many people's minds, exclusively) concerned with crime.

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43 See, e.g. the Statute 18 Eliz. (1575-6), c.3.

44 Notably the jurisdiction of the licensing magistrates.

4.36 A necessary consequence of bringing the maintenance of children born out of wedlock within the Guardianship of Minors Acts would be that the appeal to the Crown Court from magistrates would no longer exist; the only appeal would be on a point of law to the Divisional Court. The loss of a right of appeal on issues of fact from a magistrates' court is regrettable, but this disadvantage has to be weighed against the advantages flowing from the abolition of the status of illegitimacy, and, in particular, the abolition of the distinctive affiliation procedure with its criminal overtones. Furthermore the hardship caused by the loss of this avenue of appeal should not be exaggerated. Scope for controversy over the issue of paternity, which was at one time often disputed in affiliation cases, has been drastically curtailed by the widespread use of more comprehensive and reliable blood tests;[45] and in any event, if a party to domestic proceedings in the magistrates' court wishes to question the court's decision on liability or quantum it is in practice often found that the case raises a point of law on which there is a right of appeal to a Divisional Court by way of case stated. The point of law will usually be that the magistrates reached conclusions of fact which were unsupported by the evidence before them, or that they must have applied incorrect principles of law in assessing the amount of the order. In addition, where the magistrates have exceeded their jurisdiction, or where there is some legal defect apparent in their order, the order may be removed to the High Court and quashed by means of certiorari.

4.37 We are aware that there has been much criticism of the restricted right of appeal from magistrates' courts in domestic cases, and that the view has been expressed that a reformed procedure for appeals (including appeals on issues

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45 See paras. 9.2-9.4, below.

of fact) is needed. Recommendations on this issue are however outside the scope of this working paper.[46]

Maintenance and its relation to custody

4.38 It is to be noted that an award of maintenance under section 9(2) of the Guardianship of Minors Act 1971 is conditional on there having been a decision as to the child's custody under section 9(1): the right to receive the financial contribution is attached to the responsibilities connected with custody. Since only the mother has custody under the present law, the point does not arise in the context of illegitimate children. Under the Domestic Proceedings and Magistrates' Courts Act 1978 the rule is not so strict: the magistrates are obliged to consider whether or not to make a custody order before disposing finally of a maintenance application,[47] but no such order is required. Nor is custody necessarily in issue in connection with an application for maintenance under section 27 of the Matrimonial Causes Act 1973. The relationship between unmarried parents may be factually identical with that between husband and wife and it may therefore be equally appropriate to permit an application for financial provision for the child without necessarily putting the question of the child's custody in issue. This change would involve amending section 9 of the Guardianship of Minors Act 1971.

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46 We note in this connection the continued support for restructuring the court system in family law matters: see most recently "A Better Way Out" (1979), a discussion paper by the Family Law Sub-Committee of The Law Society.

47 Sect. 8(1).

Time limits

4.39 The Guardianship of Minors Acts contain no conditions relating to the institution of maintenance proceedings, such as that they may only be brought within a limited period after the child's birth or after the separation of its parents. Broadly speaking, such proceedings may be instituted at any time.

4.40 Affiliation proceedings present a different picture, for time limits apply in many cases.[48] The reason for this lies in the fact that maintenance for an illegitimate child is dependent on a finding of paternity and it was thought that proceedings should be barred in cases where the evidence had become stale. There is no time limit if the alleged father has paid money for the child's maintenance at any time within three years after its birth;[49] nor is there any in the rare case where the child has been born to a "married" couple whose marriage is void because one (or both) of them was under age.[50] In such cases there is some evidence pointing at the alleged father which will not be materially affected by the passage of time. But if these conditions are not satisfied the mother has to institute proceedings

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48 There are special time limits (e.g. under the Supplementary Benefits Act 1976, s.19(2)) where certain public bodies institute proceedings.

49 Affiliation Proceedings Act 1957, s.2(1)(b) as amended by the Affiliation Proceedings (Amendment) Act 1972. This takes care of cases where the man, mother and child have lived together as a single household, because then it will be readily inferred that the condition is satisfied: Roberts v. Roberts [1962] P.212.

50 ibid., s.2(2).

while she is pregnant[51] or within three years after the child's birth[52] or, if the father has left the country before the three years have expired, within a year of his return.[53]

4.41 These provisions of the Affiliation Proceedings Act 1957 may sometimes be inappropriate. A man may be obliged to defend himself when the child is eleven or twelve years old simply because the mother had falsely led him to believe that he was the child's father and had thereby induced him to make occasional payments towards the child's maintenance while it was a baby. Conversely, a mother may be caught by the time limits, notwithstanding that the man's paternity is admitted, if she does not take action at an early date, even if her failure to take action was on the reasonable ground that, during the whole of the period allowed, the father was an unemployed adolescent against whom an effective order might not be obtainable.

4.42 In view of the overriding importance of securing the child's welfare, we see no reason why there should be any time limits so far as applications for maintenance are concerned. Bringing children born out of wedlock within the Guardianship of Minors Acts for maintenance purposes should not present difficulties, assuming that paternity is established. The establishment of paternity is a preliminary

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51 ibid., s.1.

52 ibid., s.2(1)(a) (as amended).

53 ibid., s.2(1)(c) (as amended). It seems that the existence of this provision does not prevent the mother from making the complaint within the three year period, even if the alleged father is then out of England; the proceedings will be heard if and when he returns and can be served: see R. v. Evans [1896] 1 Q.B. 228.

and separate question; we defer to a later part of this paper[54] our discussion of that matter, including the question whether any time limits should be imposed.

Parties to the application

(i) Parents

4.43 The father of an illegitimate child cannot, as the law now stands, institute proceedings for financial provision against the child's mother even if she is well-to-do and he has actual custody. Under the Guardianship of Minors Acts, however, either parent may apply for an order. A consequence of the application of those Acts to children born out of wedlock would be that it would become possible for a father to apply for maintenance for the child from the mother.[55] In our view there should be legal equality of parental rights and duties, even if in practice it might rarely happen that an order would be made in favour of a father.

4.44 Subject to the intervention of adoption, the persons primarily liable for the maintenance of a child are his natural parents. This primary liability should not in our view be affected by the marriage of either of the parents to a third party,[56] even though the third party may be under a secondary liability to maintain the child as a result of

54 Para. 9.48, below.

55 This position was achieved (as regards children born in wedlock) by the Guardianship Act 1973.

56 Cf. Hardy v. Atherton (1881) 7 Q.B.D. 264.

treating him as a "child of the family".[57] Under the present law, however, some mothers may not be able to take affiliation proceedings against the natural fathers of their children because of their failure to satisfy the "single woman" requirement.[58] In such cases, the mother's husband (if liable at all on the basis of having treated the child as a "child of the family") may find himself bearing the whole burden of the child's maintenance.

4.45 The disappearance of affiliation proceedings, and their replacement by proceedings under the Guardianship of Minors Acts, would dispose of the "single woman" requirement. The child's financial protection would certainly be enhanced thereby: if he had been treated by his mother's husband as a child of the family he would have two male sources of support, and even if he had not been so treated he could at least look to his own father. His position would thus be analogous to that of a child of divorced parents, one of whom remarries; such a child may well acquire a right of support against his step-father in addition to the right of support against his natural father.

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57 It is intended to be a secondary liability because in determining its extent the court is required to take into account (inter alia) the liability of any other person (e.g. the child's actual father) to maintain the child: Matrimonial Causes Act 1973, s.25(3)(c) (and s.27(4)); Domestic Proceedings and Magistrates' Courts Act 1978, s.3(3)(c); and see Roberts v. Roberts [1962] P.212.

58 See para. 2.12(ii), above for the special meaning of this term.

(ii) Children

4.46 It has sometimes been suggested that, since the maintenance is for the child, it would be logical to allow proceedings to be instituted by the child (or rather, by a next friend on the child's behalf).[59] Neither in guardianship nor affiliation proceedings is this now possible in respect of a child under 16 years of age; and such proceedings are allowed only for limited purposes where the child is 16 or 17.[60] Our present inclination is to leave the law in this matter unchanged. The point raises an issue of principle of wide general application affecting children born in and out of wedlock and goes beyond the scope of this paper.

(iii) Public bodies

4.47 At present the Supplementary Benefits Commission may apply under section 19 of the Supplementary Benefits Act 1976 for an affiliation order, under which it may recover from the father sums in reimbursement of benefits paid for the child. The Commission's position would be effectively

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59 We understand that in some Scandinavian countries (and some states of the U.S.A.) a welfare guardian must be appointed for every child born out of wedlock. This guardian must ensure that paternity and maintenance orders are, so far as practicable, made for every such child (see C.M.V. Clarkson: "Illegitimacy: the Road to Equality" (1975) 5 Kingston Law Review 24). Such a scheme, apart from being administratively cumbersome and expensive, involves discrimination in relation to the child born out of wedlock and draws attention to his origins.

60 Guardianship of Minors Act 1971, s.12 C(4), added by s.43 of the Domestic Proceedings and Magistrates' Courts Act 1978; Affiliation Proceedings Act 1957, s.6 A(3), added by s.53 of the 1978 Act. The purposes are for applications to vary or revive orders made before the child became 16.

preserved by extending the duty of maintenance imposed by section 17 of the 1976 Act so that it would apply to cover all fathers of children born out of wedlock; the definition of the "liable relative" (from whom recovery may be made by the Commission) under section 18 of the 1976 Act, would be correspondingly extended.[61]

4.48 A local authority's right under section 44 of the National Assistance Act 1948 (as amended) to apply for an affiliation order would, as a result of the extension of the duty to maintain, cease to be necessary, because similar rights would be exercisable, under sections 42 and 43 of that Act, against the "person liable to maintain". Likewise the power of a local authority under section 26 of the Children Act 1948 to apply for an affiliation order for a child in its care would be unnecessary and inappropriate,[62] because it would be able to apply for contributions[63] from the father once paternity had been established.

(iv) Custodians

4.49 The custodianship provisions of the Children Act 1975 (when in force) would not be affected by the abolition of illegitimacy, save for the repeal of section 34(3) of that Act (which exempts the father of an illegitimate child from liability to make payments in the ordinary way to the

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61 This would involve repealing s.18(2) of the 1976 Act which excepts the father of an illegitimate child from being a "liable relative" unless and until an affiliation order has been made against him.

62 The procedure for having payments under an affiliation order diverted to the authority entitled to receive contributions (s.88 of the Children and Young Persons Act 1933) would also become unnecessary.

63 Under s.86 of the Children and Young Persons Act 1933 and s.24 of the Children Act 1948.

custodian under that section) and the corresponding repeal of section 45 of that Act (which deals with affiliation proceedings by a custodian). In any case in which the child's paternity is in issue, this would have to be proved by the custodian as a preliminary matter (just as the mother would have to prove it in maintenance proceedings under the Guardianship of Minors Acts). We recognise that repeal of section 45 would entail allowing a custodian who is married to the child's mother to apply for maintenance for the child against the father,[64] but we do not see why such a custodian should not be allowed to do so.

Nature of order

(i) Secured periodical payments

4.50 As a result of the passing of the Domestic Proceedings and Magistrates' Courts Act 1978 the court now has power to award periodical payments (and not merely weekly maintenance) in affiliation proceedings,[65] as in proceedings under the Guardianship of Minors Acts, with statutory guidelines similar to those applicable in divorce proceedings. But there is no power either in guardianship or in affiliation proceedings to order the respondent to provide security for the making of those periodical payments. Such an order can be very useful as an aid to the enforcement of the payment of maintenance; but (as we said in our Report on Matrimonial Proceedings in Magistrates' Courts)[66] it is inappropriate to confer powers on magistrates to make orders for secured provision because there is no suitable organisation in those courts for seeing that security is provided.

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64 Sect. 45(3)(a) of the Children Act 1975 prevents this.

65 Sect. 50(1).

66 Law Com. No. 77 (1976), para. 2.31.

4.51 The High Court and divorce county courts do however have power to award secured periodical payments for a child if proceedings for maintenance are founded on section 27 of the Matrimonial Causes Act 1973 rather than on the Guardianship of Minors Acts. As we pointed out in the introduction to this section of the paper,[67] that section, and indeed that Act, are framed to cover only parties to a marriage and "children of the family".[68] We do not think that an attempt should be made to expand the scope of that Act; but we do suggest that a power to order secured periodical payments should be given to the High Court and to the county court (but not to a magistrates' court) by way of additional remedy under section 9(2) of the Guardianship of Minors Act 1971. The provision would be available for children born in wedlock and children born out of wedlock alike; it is not necessary for the former (because of section 27 of the 1973 Act) but it is necessary for the latter. Without such an addition to the Guardianship of Minors Acts an important distinction would remain between the treatment of these two classes of children, which in our view would be undesirable.

(ii) Lump sums

4.52 It is not now necessary to suggest any special alteration in the law relating to the availability of lump sum orders (in lieu of, or in addition to, orders for periodical payments). Until recently, lump sum orders could not be made under the guardianship legislation (or, subject to what we say in the next paragraph, in affiliation proceedings) although, as in the case of secured provision, such an order has been available for a "child of the family" under section 27 of the Matrimonial Causes Act 1973. However, by the

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67 See para. 4.28, above.

68 See para. 4.44, above in relation to this phrase.

Domestic Proceedings and Magistrates' Courts Act 1978[69] this gap has been substantially filled. The High Court and county courts may now, under the Guardianship of Minors Acts, award lump sums (unlimited in amount) and magistrates may also award lump sums both in guardianship and affiliation cases (though in their case there is a £500 limit).[70] Lump sum provision would accordingly be available for all children when, in consequence of the abolition of the status of illegitimacy, children born out of wedlock were brought fully within the Guardianship of Minors Acts, and these children would for the first time be able to benefit from the jurisdiction of the High Court and county court to make an award which is not limited in amount in this way.

4.53 The power to award a lump sum in affiliation proceedings now differs in one respect from the power to award a lump sum in guardianship proceedings. Under section 12B of the Guardianship of Minors Act 1971[71] the power to award a lump sum includes power to order the making of a payment in respect of expenses incurred in maintaining a minor before the making of the order. Under section 4(4) of the Affiliation Proceedings Act 1957,[72] the power to order a lump sum in respect of expenses incurred before the making of the order includes not only expenses incurred in maintaining the child, but also expenses incurred in connection with the

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69 Sect. 41(2), amending s.9(2) of the Guardianship of Minors Act 1971; and s.50(1), amending s.4(2) of the Affiliation Proceedings Act 1957.

70 This limit is variable by statutory instrument.

71 As substituted by the Domestic Proceedings and Magistrates' Courts Act 1978, s.43.

72 As substituted by the 1978 Act, s.50(2).

birth of the child and, if the child has died, the funeral expenses. The power to award a sum for funeral expenses was originally designed to relieve the mother's parish of the expenses; it does not seem necessary to preserve it. So far as expenses incidental to the birth are concerned,[73] section 12B of the 1971 Act[74] would need to be amended so that these expenses could be treated in the same way as expenses incurred in maintaining the child.

(iii) Property adjustment orders

4.54 It has been suggested[75] that the court should have power to make financial and property orders in favour of all children similar to those exercisable by a court on a decree of divorce, nullity or judicial separation under sections 23 and 24 of the Matrimonial Causes Act 1973. This would mean extending the higher courts' power to include the making of property adjustment orders[76] for the benefit of children whether or not any matrimonial dispute existed between the parents. It is argued that where unmarried parents separate the court should be able to make a property adjustment order in favour of a child of theirs, just as it could make an order if the child's parents were in the process of divorce or

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73 See Foy v. Brooks [1977] 1 W.L.R. 160, where it was held that expenditure on a layette, incurred before the birth, was covered by this expression.

74 As substituted by the 1978 Act, s.43.

75 e.g. in the study paper by J. Levin: "Abolishing Illegitimacy" (1977) published by the National Council for One-Parent Families.

76 Transfer of property, settlement of property and variation of settlement: s.24 of the Matrimonial Causes Act 1973.

judicial separation. The absence of a marriage between the parents may have no bearing on the needs of the child. We accept that there is much truth in that. On the other hand, it may be objected that the suggestion is tantamount to giving the mother a right of support for her own benefit against a man to whom she is not married because, in practice, the property in question would often be the common home. We do not think that this is a valid objection, particularly since under the existing law a mother may indirectly benefit under an affiliation order.[77] In any case, it may sometimes be desirable, where the father intends to have no future relationship with the child, to make a once-for-all settlement. Just as courts lean against making substantial capital orders in favour of children of a marriage,[78] so we would not expect this power to be frequently exercised; but it could be useful in special circumstances. There is no adequate reason for drawing a distinction here between children of married and unmarried parents; we therefore suggest that the Guardianship of Minors Acts should be amended so as to include these powers. We appreciate that this would mean that such powers could be exercised in favour of the children of a married couple even in the absence of a matrimonial dispute. However, we think it unlikely that a court would often consider it appropriate to make an order of this kind in such a case.

Orders for children over 18

4.55 Maintenance orders made in guardianship[79] or affiliation[80] proceedings can now continue beyond the age of 16 (the compulsory school-leaving age) or even 18 for children

77 See, e.g. Haroutunian v. Jennings (1977) 121 S.J. 663.

78 See Chamberlain v. Chamberlain [1973] 1 W.L.R. 1557; Lilford (Lord) v. Glynn [1979] 1 W.L.R. 78.

79 Guardianship of Minors Act 1971, s.12 as amended by s.42 of the Domestic Proceedings and Magistrates' Courts Act 1978.

80 Affiliation Proceedings Act 1957, s.6 as amended by s.52 of the Domestic Proceedings and Magistrates' Courts Act 1978.

who are undergoing further education or training, or in other special circumstances. But no order can be made where a child has already reached the age of 18 unless an order has been made during his minority. There is no such limitation in divorce proceedings[81] or in matrimonial proceedings in a magistrates' court.[82] In our Report on Matrimonial Proceedings in Magistrates' Courts[83] we expressed the view that in this respect no amendment of the Guardianship of Minors Acts was called for; this was because all the children for whom maintenance could be obtained under the guardianship legislation could (if over 18) get new orders in their favour in the magistrates' court. But the proposals which we are making in this paper would, if implemented, result in that being no longer so. Children born out of wedlock would be within the Guardianship of Minors Acts, but they would not be within the Domestic Proceedings and Magistrates' Courts Act 1978 because the substantive provisions of that Act (like the Matrimonial Causes Act 1973) relate only to families within marriage. In order that there should be no difference between the relief available for children who are "children of the family" and children who are not, we consider that it would be necessary to make provision under the Guardianship of Minors Acts to enable maintenance orders to be made even though the child has attained the age of 18, if the child is still undergoing further education or training, or if special circumstances exist.

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81 Matrimonial Causes Act 1973, s.29(3); and see Downing v. Downing (Downing intervening) [1976] Fam. 288.

82 Domestic Proceedings and Magistrates' Courts Act 1978 s.5(3).

83 Law Com. No. 77 (1976), para. 6.25.

Discharge of maintenance orders

(i) By death

4.56 A periodical payments order for the maintenance of a child ceases to be effective on the death either of the child or the payer.[84] This is true both of affiliation orders and of orders under the Guardianship of Minors Acts; and the application of the latter legislation to children born out of wedlock would accordingly effect no change in the law in this respect.

(ii) By cohabitation

4.57 Periodical payments orders made under the Guardianship of Minors Acts in favour of one of the child's parents cease to have effect after six months' continuous cohabitation between the parents.[85] No such provision exists in the Affiliation Proceedings Act 1957 and it seems that an order made under that Act will (formally at least) not be affected by the cohabitation or even by the marriage of the child's parents. However, if the mother and father get married to one another, the magistrates' court would, we imagine, readily accede to an application by the father to discharge an existing affiliation order on the grounds not only that it had become unnecessary, but also that its continued existence was wrong in principle, the child having become a legitimate child of the family.

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84 A contractual obligation under a maintenance agreement may however survive the payer's death, in accordance with the terms of the contract. It seems formerly to have been the law that the payer's death discharged his liability for accrued arrears under an order (Re Harrington [1908] 2 Ch. 687; Re Hedderwick [1933] Ch. 669) but this proposition is no longer sustainable in view of s.1 of the Law Reform (Miscellaneous Provisions) Act 1934: see Sugden v. Sugden [1957] P.120, per Denning L.J. at pp.134-5.

85 Guardianship Act 1973, s.5A, added by the Domestic Proceedings and Magistrates' Courts Act 1978, s.46. The cohabitation will also bring the associated custody order to an end (but, unless the court otherwise orders, will not affect any supervision order added thereto).

4.58 We see no reason why the rule that cohabitation for a period of six months or more terminates an order, which now applies in guardianship cases, should not equally apply to orders for children born out of wedlock. Accordingly we do not consider its existence an obstacle to bringing such children within the ambit of the Guardianship of Minors Acts as they stand.

Alteration of written maintenance agreements

4.59 Nothing that we propose would prevent the making of out of court agreements which may, if necessary, be enforced in contract.[86] Such agreements may well be common. However, we feel that it would be advantageous if the court could alter such an agreement if it does not contain proper financial arrangements for the child (or if circumstances subsequently change) so that the right to maintenance would derive from a single source and not partly from an inadequate agreement and partly from a supplementary order. No such power to vary agreements exists at present under the Guardianship of Minors Acts or the Affiliation Proceedings Act 1957.

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86 The consideration for the father's promise to pay sums towards the child's maintenance is normally expressed as the mother's agreement not to institute affiliation proceedings. In Ward v. Byham [1956] 1 W.L.R. 496 Denning L.J. said (at p.498) that the mother's promise to perform her existing legal obligation towards the child provided sufficient consideration; but that view may be too wide. The facts of the case were somewhat unusual and the agreement contained other features.

4.60 There is such a power in section 35 of the Matrimonial Causes Act 1973, but, because a "maintenance agreement" within that section is defined as one between parties to a marriage,[87] an agreement relating to the maintenance of a child of unmarried parents is necessarily outside its scope. We suggest that a power similar to that in section 35 of the 1973 Act be added to the Guardianship of Minors Act 1971. In that context it would operate to affect agreed financial provision for children only, and would not enable an unmarried mother or father to obtain a variation of any covenant contained in the agreement for that parent's own benefit. We propose that (like section 35) it should apply to existing agreements; the court would no doubt take into account, in exercising its discretion whether to vary an existing agreement, any special circumstances, such as the fact that the agreement had been a compromise of a disputed claim.

4.61 A magistrates' court exercising this new power should in our view be permitted to deal only with agreements under which unsecured periodical payments are made (or agreements containing no provision for periodical payments in relation to which it is desired to insert a clause to provide for such payments).[88] In particular, if any question relating to secured periodical payments arose under an agreement, it should be dealt with by the appropriate county court (or the High Court), and not by the magistrates' court.

4.62 We further suggest - again in order to ensure that any material provision relating to "children of the family" should apply to all children equally - that a provision

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87 Matrimonial Causes Act 1973, s.34(2).

88 As under the Matrimonial Causes Act 1973: see s.35(3)(a) and (b).

parallel to section 36 of the Matrimonial Causes Act 1973 should be introduced into the guardianship legislation. Under that section a maintenance agreement providing for the continuation of payments after the death of one of the parties may (if the deceased died domiciled in England and Wales) be varied by the High Court or a county court on an application, made either by the surviving party or by the personal representatives of the deceased, within six months of the grant of representation to the deceased's estate.[89]

4.63 If such a power were added to the Guardianship of Minors Act 1971 we suggest that the jurisdiction of the county court, as under section 36 of the 1973 Act, should be dependent on the size of the deceased's estate,[90] because otherwise an anomaly would be created. For the same reason we suggest that the power should not be extended to the magistrates' court, which cannot now entertain applications under section 36.

Wardship

4.64 Finally, we note that there is at present a distinction between the treatment of legitimate and illegitimate children in wardship proceedings.[91] Under section 6 of the Family Law Reform Act 1969 the court may order either parent of a ward of court to pay to the other

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89 The court may extend this time limit: s.36(2).

90 Not exceeding £15,000 (which may be increased by Order): s.36(3) - and County Courts Jurisdiction (Inheritance - Provision for Family and Dependants) Order 1978 (S.I. 1978 No. 176), r.2.

91 Wardship applications are becoming more frequent. In 1977 1,491 originating summonses were issued (involving 2,230 children) (Judicial Statistics (1977) Cmnd. 7254 Table C.13(a) and (f)). The number of originating summonses was 959 in 1974, 1,203 in 1975 and 1,369 in 1976 (Judicial Statistics (1975) Cmnd. 6634 and (1976) Cmnd. 6875).

parent periodical sums for the maintenance and education of the ward; or it may order either parent (or both parents) to make periodical payments to a third party who has care and control of the ward. But this provision applies to legitimate wards only, because subsection (6) of the section expressly excludes its application to illegitimate wards of court.[92]

4.65 If the status of illegitimacy were abolished, section 6(6) of the Family Law Reform Act 1969 would need to be repealed, on the ground that it would have become contrary to principle. The High Court, in wardship as in other proceedings, could direct the trial of a separate paternity issue in any case in which it was a necessary preliminary to a maintenance order under section 6.

4.66 In this connection we note that section 6(5) of the Family Law Reform Act 1969 provides for a maintenance order against a parent to cease after three months' cohabitation. The corresponding rule under the guardianship legislation[93] attaches, as we have seen,[94] to six months' cohabitation. Though this provision is not one which differentiates between different classes of children, the three-month period is now an anomaly which we think it is opportune to cure. We therefore propose that in wardship cases (as elsewhere) the three-month period of cohabitation, after which maintenance orders lapse, should be extended to six months.

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92 At common law there was no power to award maintenance in wardship at all unless some fund existed out of which sums could be paid.

93 And under divorce and magistrates' court matrimonial legislation.

94 See para. 4.57, above.

## PART V

## INHERITANCE (INCLUDING TITLES OF HONOUR)

### (A) GENERAL LAW OF INHERITANCE

#### The position at common law

5.1 An illegitimate person was treated by the common law as nobody's child. He was accordingly not entitled to succeed on the intestacy of any ascendant or collateral relations; and only his wife and issue could succeed on his intestacy.

5.2 An illegitimate person has, however, always been able to benefit under a will (or other disposition); but the application of a strict rule of construction[1] resulted in words denoting a family relationship being presumed to refer only to legitimate relations unless the contrary construction was unavoidable.[2]

5.3 Two other rules, in practice often related, served to restrict the right of illegitimate children to benefit under wills and other dispositions. The first was a rule of evidence: the court would not allow an enquiry into the fact of an illegitimate child's paternity.[3] The second was a rule

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1 Hill v. Crook (1873) L.R. 6 H.L. 265.

2 Dorin v. Dorin (1875) L.R. 7 H.L. 568; cf. Re Jebb, dec'd. [1966] Ch. 666, and see the comments thereon by J.H.C. Morris in (1966) 82 L.Q.R. 196.

3 Thus, in Re Homer (1916) 115 L.T. 703 the testator (who had for many years been living with a woman, M) made provision for their named children by will. Shortly before his death, knowing that M was pregnant, he made a codicil providing for any other child by her that he might leave. The child was born shortly after the testator's death. He could only benefit if it could be shown that he was in fact T's child; but the rule prevented any enquiry being made into this issue, with the consequence that the child's claim failed.

of public policy. An illegitimate child who was conceived after the date when a disposition took effect was not permitted to take any benefit, however clear it may have been that illegitimate children were intended to be included in the class of beneficiary.[4] This rule was justified on the basis that to permit gifts to such children to take effect would encourage immorality.

Statutory changes

5.4 Under the Legitimacy Act 1926 an illegitimate child became entitled to succeed on the intestacy of his mother if she left no legitimate issue surviving;[5] and a mother could succeed on the intestacy of her illegitimate child.[6] As we have seen,[7] this Act also introduced legitimation into English law and permitted legitimated children to succeed to property (other than titles of honour and property devolving with a title) as if born legitimate.

5.5 Part II of the Family Law Reform Act 1969 achieved a substantial degree of improvement for the succession rights of illegitimate children, both under the law of intestacy and by will. The recommendations of the Committee on the Law of Succession in relation to Illegitimate Persons[8] were generally followed, and in one major respect[9] the Act went further than the Committee's recommendations.

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4 See Crook v. Hill (1876) 3 Ch.D.773; Re Hyde [1932] 1 Ch. 95; cf. Sydall v. Castings Ltd. [1967] 1 Q.B. 302, per Lord Denning M.R. (dissenting).

5 Sect. 9(1).

6 Sect. 9(2).

7 See paras. 2.5 to 2.7, above.

8 (1966) Cmnd. 3051: the Russell Committee.

9 The construction of the word "child" in a disposition.

The Act's main reforms were as follows:

(a) An illegitimate child (or if dead his issue) has, in relation to deaths occurring on or after 1 January 1970, the same rights of succession on the intestacy either of his mother[10] or of his father as has a legitimate child;[11] and the father of an illegitimate child, if surviving, can inherit on the child's intestacy on equal terms with the child's mother.[12] (As a rule of convenience, however, the statute provides that an illegitimate child is presumed not to have been survived by his father unless the contrary is shown).[13]

(b) In any disposition made on or after 1 January 1970 any class of beneficiaries identified by family relationship to any person includes persons illegitimately so related unless the contrary intention appears.[14] Prima facie, therefore, "my children" now means all my children, legitimate or not; and "X's nephews" will include the illegitimate son of a brother or sister of X and any son of an illegitimate brother or sister of X.

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10 The condition that the mother must have left no surviving legitimate issue (contained in the 1926 Act) was removed.

11 Family Law Reform Act 1969, s. 14(1).

12 ibid., s. 14(2).

13 ibid., s. 14(4).

14 ibid., s. 15(1) and (2). It should be noted that relationship for the purpose of the provision does not include relationship as "heir".

(c) The rule of public policy to which we have referred in paragraph 5.3 above was expressly abolished by the Act.[15] The rule of evidence discussed in that paragraph was not expressly abolished, but was presumably abrogated by necessary implication, since the Act[16] assumes that the court will do precisely what the rule forbade, namely investigate the fact of paternity.

Effect of the abolition of illegitimacy

(i) Intestate succession

5.6 The abolition of the status of illegitimacy would result in the acquisition by a child born out of wedlock of full relationship (in law) with all his natural relatives; and he would accordingly be able to inherit on the intestacy of, for example, his grandparents, his brothers and sisters (of the whole or half blood)[17] and his uncles and aunts, whether or not any of these relations were themselves born in wedlock. Conversely, these relations (whether or not born in wedlock) would be able to inherit on the intestacy of the child born out of wedlock.

5.7 This result is logical and seems right in principle. We recognise however that there may be some feeling that it goes too far, and that it cannot be supposed that a grandparent, for example, would wish an unknown (and possibly concealed)

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15 Sect. 15(7).

16 Sect. 15(1).

17 A child born out of wedlock is perhaps more likely than usual to be related by the half blood only to his siblings. A half-brother does not take under an intestacy if the intestate had a surviving brother of the whole blood.

illegitimate grandchild to benefit on his or her death intestate. It might even be said that a grandparent could in fact choose to die intestate on the assumption that his or her estate would go to the grandchildren born in wedlock, and that it would be wrong in such circumstances partially to frustrate the grandparent's positive intentions by allowing other grandchildren to share.

5.8 For four reasons, however, we do not consider that this argument should prevail. First, the argument assumes that the grandparent in question would have taken steps to exclude any grandchildren born out of wedlock if he or she had known of their existence. This seems to us to be speculation, for the possibility that there might be such grandchildren would probably not be a matter to which the grandparent's mind had been applied. If the grandparent had considered the possibility and had definitely decided that any grandchild born out of wedlock should not benefit, that result could always be ensured by making a will. Secondly, the argument assumes the existence of grandchildren not known to the grandparent. Although we accept that grandparents may well not know about their son's extra-marital children, it is perhaps less common for them not to know of their daughter's. Thirdly, it seems to us that the argument should be treated as of significant weight only if it is true that deliberate intestacy is reasonably common in cases where the existing next-of-kin are other than the spouse and/or children. We have no evidence that this is so. Finally, we think that the point of principle was really decided in the Family Law Reform Act 1969, which gave to illegitimate children the extended, but still incomplete, succession rights which we have outlined above. The result is now somewhat illogical. A child and his father have mutual rights of intestate succession, even if they may have had no real contact but there are no such rights in respect of the mother's relatives, with whom the child may have had close personal links.

5.9 We accept that such an extension of rights on intestacy would, in the absence of special provision, increase the burden on personal representatives. The paternal relatives of a person born out of wedlock may not be known; and, in the case of the death intestate of a person born in wedlock, it may not be known whether his father or grandfather had children born out of wedlock (so that the deceased may have a surviving, but unknown, half-brother or half-uncle, for example). The Family Law Reform Act 1969 had to face the same problem, and (as we have already noted)[18] it found the solution in a presumption of non-survivorship. We suggest that a similar approach should be adopted, though as the qualifying relationships are more extensive the presumption would have to be drawn in appropriately wider terms. As under the 1969 Act,[19] trustees or personal representatives would be authorised to distribute the estate without enquiry into the possible existence of relatives covered by the presumption; that provision would not however prejudice the right of any such relative to put forward his claim (if necessary by tracing property already distributed to other relations).[20] We think that this solution would be preferable to imposing extended, and possibly onerous, duties of enquiry on trustees and personal representatives and correspondingly limiting the beneficiaries' right to trace.[21] So far as we are aware, the corresponding provisions of the Family Law Reform Act 1969 have not given rise to difficulties in practice.

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18 Para. 5.5, above.

19 See s. 17.

20 Needless to say, such a claimant would have to prove the relevant relationship, which burden would, in practice, result in few claims being made.

21 Cf. New Zealand's Status of Children Act 1969, ss. 6 and 7 as amended by the Status of Children Amendment Act 1978, ss. 2 and 3.

5.10 In the course of considering the question of intestate succession rights we have not overlooked the possibility of imposing, in addition to the presumption already referred to, some special limit on claims: for example, that a relative whose connection with the deceased contained an "illegitimate" element should have to present his claim within a fairly short period after the deceased's death. In New Zealand and Tasmania there is an even stricter rule, for the relationship is not recognised for succession purposes unless paternity has been established before the deceased's death. We note however that the reforming legislation in New South Wales did not include any such limitation; and in company with the majority of the members of the Russell Committee[22] we think that this is the better course. If a claim is a valid one (and can be satisfactorily proved to be so)[23] we are unable to see any ground on which it should be artificially shut out. An "illegitimate" half-brother is as much a half-brother as a "legitimate" one: and there never has been any special rule restricting the presentation of claims by long-lost "legitimate" relatives. A provision of the type under consideration would be contrary to the principle of non-discrimination and could, in our view, only be justified by clear evidence of necessity. Such evidence might have been provided by experience of the working of the Family Law Reform Act 1969, but that experience points in the opposite direction: there appears to have been no great number of claims by persons hoping to share in class gifts under wills by virtue of section 15 of that Act, nor by persons seeking to claim as children under the changed rules on intestacy in section 14.

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22 Cmnd. 3051, para. 44.

23 The longer the delay the more difficult this is likely to be - and in some cases death will in practice make it impossible.

5.11 As a final point in favour of giving a person born out of wedlock an undifferentiated right to inherit on the intestacy of his remoter relations we would add that it has the merit of making for consistency between intestate succession and succession by will. At present, if a grandparent leaves property by will either to "my son's children" or to "my grandchildren" any illegitimate child of the son or (as the case may be) any grandchild will in the absence of a contrary intention have a right to share in the bequest, whether the grandparent was aware of the child's existence or not - in the first case because of the rule of construction now applicable to "children"[24] and in the second case because of the rule of construction now applicable to other relationships.[25]

(ii) Succession under a will (or trust)

5.12 The abolition of the status of illegitimacy would not require substantive changes in the law so far as testate succession or entitlement under trusts is concerned, because the essential step - the reversal of the presumption that words of relationship refer only to legitimate relationship - was taken in section 15(1) of the Family Law Reform Act 1969. This does not mean that any legislation giving effect to the abolition of the status of illegitimacy suggested in this paper would not call for amendment of the relevant part of that Act. Indeed, such abolition would render section 15(1) of the 1969 Act, which deals with the construction of words of relationship, meaningless as it stands, because the subsection assumes the existence of two classes of children, the legitimate and the illegitimate. Since, upon the abolition of the concept of illegitimacy, words like "children" or "nephews" in an instrument would (unless qualified) mean all such relations whether born in wedlock or not, section 15(1) of the 1969 Act might perhaps simply be repealed. On the other hand, it may be desirable, as a

24 Family Law Reform Act 1969, s. 15(1)(a).

25 ibid., s. 15(1)(b).

matter of drafting, to include in any new legislation a provision[26] of a declaratory nature, emphasising that the legislation has the effect of preserving the presumption that a gift to children and other relations is to be construed as including the children and relatives whether or not born in wedlock, but that a testator or settlor may negative that presumption if he so wishes.

5.13 Abolition of the distinction between legitimate and illegitimate children would also necessitate repeal or amendment of the provision[27] of the 1969 Act by which the extended construction of words of relationship, to which we have referred in the preceding paragraph, applies only in situations where the illegitimate person is a potential beneficiary (or where the beneficiary's relationship depends on an intermediate illegitimate link). Thus the appointment of "my eldest surviving son" as an executor is presumably still governed by the law as it stood before the 1969 Act so that the eldest surviving legitimate son alone qualifies. This provision can also affect beneficial limitations: for example, if property is settled on A for life, with remainder to A's estate if he dies leaving any child surviving him

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26 In drafting such a provision care would have to be taken not to perpetuate some of the doubts which arise in construing s. 15. Thus, s. 15(1)(b) applies to, e.g., a "nephew" who "would be so related if he, or some other person through whom the relationship is deduced, had been born legitimate. As E.C. Ryder pointed out in (1971) 24 Current Legal Problems at pp. 163-164, it is far from clear whether the provision would apply to an illegitimate son of the testator's illegitimate brother: in such a case the strict uncle-nephew relationship is dependent on the double hypothesis that both the beneficiary and the person through whom the relationship is deduced had been born legitimate. It may also be open to question whether the provision operates in a case where the potential beneficiary and the testator are both illegitimate, because if the testator is illegitimate no hypotheses as to the birth of collateral relatives would suffice to establish a relationship at common law.

27 Sect. 15(2).

(with a gift over), the gift over will take effect if A leaves illegitimate, but not legitimate, issue.[28] In our view, the property should in such a case pass to A's estate absolutely if there is any child surviving, whether born in wedlock or not.

(iii) Family provision on death

5.14 There would, we think, be no need to make any changes in family provision law, now contained in the Inheritance (Provision for Family and Dependants) Act 1975. This Act specifically includes an illegitimate child as a "child"[29] and the abolition of illegitimacy would accordingly not affect the right of a child born out of wedlock to make an application under it. As in other statutes it would however be necessary to remove the reference to "illegitimate" children, because the word would henceforward be a word without legal meaning in the context of family relationships. (It would normally be sufficient to use the word "child" alone; but if special emphasis were desired, "child, whether or not born in wedlock" would seem to be an acceptable form).[30]

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28 Re Paine [1940] Ch. 46.

29 Inheritance (Provision for Family and Dependants) Act 1975, s. 25(1).

30 If for any special reason there were need for a statutory provision dealing only with children born out of wedlock (or for an even narrower class - children born out of wedlock whose parents have not since married each other), the provision could be so expressed.

## (B) SUCCESSION TO ENTAILED INTERESTS AND TO HEREDITARY TITLES

5.15 We now deal with two connected topics which although statistically insignificant require consideration. The connection between them lies in the fact that property may be, and hereditary titles are, limited by the grant to pass by succession to the "heirs of the body" of a named person, or named persons. The word "heir" has in the past carried a connotation of legitimacy and its use by a settlor or testator, or by the Crown, may therefore be taken to be the expression of an intention to exclude from the class of inheritors persons born out of wedlock. This operated in a straightforward manner while legitimacy was defined by the common law only; but some complications (and, perhaps, inconsistencies) have arisen through statutory provisions relating to legitimacy, legitimation and adoption.

5.16 Under the present law, an entailed interest may pass to (or through) a child[31] who is legitimate at common law;[32] treated as legitimate under section 1(1) of the Legitimacy Act 1976;[33] or legitimated, either by the subsequent marriage of his parents[34] or by formal adoption.[35] The inclusion of an adopted child within the class of inheritors may seem somewhat surprising, in that such a child is usually not a blood relation of the first taker under the entail, and so is not, in a literal sense, an "heir of the body" at all: but it is a consequence of making the child not only "legitimate" but a legitimate child of the adopting parent or parents (and not of any other person).

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31 The succession is usually, but not necessarily, restricted to the male line.

32 Or whose legitimate status under a foreign legal system is recognised at common law.

33 This relates to the children of void marriages where at least one of the parents reasonably believed that the marriage was valid - a common situation in cases of bigamy.

34 Legitimacy Act 1976, ss. 5(3) and 10(4). Legitimation by foreign law is included: ibid., s. 3.

35 Children Act 1975, Sch. 1, paras. 3 and 17.

5.17 The existing law in relation to titles and to associated property is more restrictive since there is no right of succession by or through legitimated persons.[36] Paradoxically a child of a "marriage" which is void may (if born after 28 October 1959) succeed to a title if the conditions set out in section 1(1) of the Legitimacy Act 1976 are satisfied.[37] However, the child of a union subsequently regularised by a valid marriage cannot so succeed. Nor can an adopted child succeed to a title held in his adoptive family: the rule which enables such a child to succeed to an ordinary entailed estate is negatived by express provision.[38]

5.18 The reason why entailed estates and titles of honour have in the past not descended to illegitimate children is because the relevant grants have made them capable of descent only to "heirs of the body", and that phrase excludes, as a matter of legal definition, issue not born in wedlock. Illegitimate issue are excluded by the words of the grant.

5.19 We think that it would be proper, after the abolition of the status of illegitimacy, to discard for the future the special meaning hitherto attached, as a matter of law, to the word "heir". Although this may not be a word commonly used by laymen, we are not satisfied that if a layman does use it he invariably realises that it has a restricted meaning in law and intends that meaning to be given to it. The result of our proposal would be that if the word "heir" were to be used in a disposition taking effect after the proposed reform, it would be a question of

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36 See Legitimacy Act 1976, Sch. 1, para. 4(2) and (3).

37 ibid., Sch. 1, para. 4(1). See para. 2.3, above.

38 Children Act 1975, Sch. 1, paras. 10 and 16. However a child born legitimate who is adopted remains capable of succeeding to a title held in his natural family.

construction whether or not it was to be understood in its narrow common law sense or not. The draftsman could remove any doubt by an express provision that the term should be construed as it would have been before the implementation of our proposals.

5.20 It is not suggested that the change should affect the construction of existing grants.[39] By using the word "heirs", past grantors expressed an intention that the estate or title (as the case may be) should be capable of passing only to a class of persons thereby defined, and that that limitation would continue in force.

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39 Or statutes: hence the succession to the Throne, which is governed by the Act of Settlement 1701, would not be affected by the proposals in this paper.

## PART VI

## PARENTAL CONSENT TO ADOPTION, MARRIAGE and CHANGE OF NAME

6.1 We now outline the effect of the abolition of the status of illegitimacy on three miscellaneous parental rights in which the common factor is that they involve the giving of consent. Of these, the agreement to adoption is by far the most important, for an adoption completely extinguishes the parent-child relationship,[1] and an adoption order will not be made in the absence of agreements which are required by law and have not been dispensed with. The consent to marriage is simply one aspect of parental control over children and is often of limited practical importance, especially as it is a form of control which can be exercised for two years only, between the child's sixteenth and eighteenth birthdays. The third matter, which relates to the child's name, is one which gives rise to disputes between the parents, and the law on this subject is not altogether clear.

### (A) ADOPTION

6.2 By virtue of section 12(1) of the Children Act 1975, an adoption order will not be made unless the "parents" and "guardians" of the child have agreed to it being made. The court however has power (on one or more of the grounds specified in the Act) to dispense with the need to obtain any particular agreement. In the case of a legitimate child, the fact that one of his parents may already have been deprived by the court of custody does not cause that parent to lose his or her rights under this section. He or she still counts as a "parent"; but the facts which led to the decision in

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1 This does not mean, however, that the natural parents always lose all contact with the child. In special circumstances an adoption order may include provisions as to access: see Re J. (Adoption Order: Conditions) [1973] Fam. 106; Re S. (A Minor) (Adoption Order: Access) [1976] Fam. 1 (C.A.).

the custody case may enable the court to hold that, in withholding agreement, that parent was acting unreasonably.[2]

6.3 By contrast, the father of an illegitimate child is not a "parent"[3] for these purposes; nor is he a "guardian" at common law. He can however become a guardian within the meaning of section 12(1) of the 1975 Act in consequence of an order made in his favour under section 9(1) of the Guardianship of Minors Act 1971.[4] This is the only way in which, under the present law, the father of an illegitimate child can acquire a right to insist on his agreement being obtained before the child is adopted.

6.4 Custody is not often granted to the father of an illegitimate child and such a father is therefore seldom in a position to exercise formal rights under section 12(1) of the Children Act 1975. More commonly he contributes to the maintenance of the child (either under an affiliation order or an agreement), and if this be the case he is entitled to be heard by the court when the adoption application is being considered.[5] His position before the court is usually a weak one, primarily because in the past it has been felt that the advantage to an illegitimate child of losing the status and stigma of bastardy outweighs any disadvantage of losing all legal links with his natural father.[6]

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2 This is one of the grounds on which a court may dispense with parental agreement: see Children Act 1975, s. 12(2).

3 Re M. (An Infant) [1955] 2 Q.B. 479; Re Adoption Application 41/61 [1963] Ch. 315.

4 Children Act 1975, s. 107(1) (definition of "guardian").

5 Adoption (High Court) Rules 1976 (S.I. 1976 No. 1645), r. 18; Adoption (County Court) Rules 1976 (S.I. 1976 No. 1644), r. 4(2); Magistrates' Courts (Adoption) Rules 1976 (S.I. 1976 No. 1768), r. 4(2). The court may give a hearing to a father even if he is not contributing to the child's maintenance; and the duties of the guardian ad litem include that of drawing the existence of such a father to the attention of the court.

6 See, e.g. Re E. (P.) (An Infant) [1968] 1 W.L.R. 1913 (C.A.); and Re O., O. v. B. (1973) 3 Fam. Law 179 (C.A.).

6.5 The abolition of the status of illegitimacy would mean that the father of a child born out of wedlock would be a "parent" (and one of the child's natural guardians); accordingly he would be a person whose agreement is required, unless the court dispenses with it, for example because he is withholding his agreement unreasonably[7] or has persistently failed without reasonable cause to discharge the parental duties in relation to the child.[8]

6.6 It is sometimes suggested, however, that the necessity to involve the child's father in the proceedings may deter some mothers from even placing a child for adoption. Once the relevant provisions of the Children Act 1975[9] have been brought into force it will be possible for the court to resolve all issues of parental agreement before the placement is made,[10] but it will still be necessary to trace the father if possible and serve him. It might therefore in rare cases be thought desirable to go further, and make available a procedure under which an application to dispense with a father's agreement could be made ex parte without any attempt to serve him. This procedure would only be appropriate in extreme cases where the natural father has clearly no claim to be considered (for example where he has been convicted of raping the mother). Such a procedure would obviously be a considerable departure from the principle that a man should not be deprived of his rights without being given the chance to be heard. We do not therefore at present favour such a proposal but we would particularly welcome comments on this issue.

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7 Children Act 1975, s. 12(2)(b).

8 ibid., s. 12(2)(c).

9 Sections 14-16.

10 Under the "freeing for adoption" procedure: Children Act 1975, s. 14.

(B) MARRIAGE

6.7 The rules relating to consent to marriage are contained in section 3 of the Marriage Act 1949 and its Second Schedule. There is some difference in their operation between cases where the marriage is intended to be celebrated in the Church of England (or in the Church in Wales) after banns, and other cases; but the principles are the same. The rules are somewhat complicated,[11] but broadly speaking the consent function is vested in the person or persons having custody of the child.[12] In the case of a legitimate child this means that both parents' consent is required to the marriage of a child under the age of 18 if the parents are living together; in the case of an illegitimate child, only the child's mother's consent is required. As the law now stands the father, in the latter case, does not generally have any right of custody, and thus he normally has no standing under the Marriage Act 1949. Under Schedule 2 to the 1949 Act there are only two circumstances in which the consent of the father of an illegitimate child is now required: first where (the mother being alive) he has been given custody by the court, to the exclusion of the mother; and secondly where (the mother having died) he has been appointed guardian by the mother. The Schedule does not refer to the case where after the mother's death the father has successfully applied to the court under the Guardianship of Minors Act 1971 for his illegitimate child's custody and it accordingly appears that such an order will not carry the consent-to-marriage function with it.

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11 In our Report on Solemnisation of Marriage in England and Wales (Law Com. No. 53) (1973) we suggested major reforms in this area of the law. We regret that our recommendations have not as yet been implemented.

12 The function may even be vested in a local authority if the child is in its care and a resolution vesting parental rights and duties in the authority has been passed: Children Act 1948, s. 2 (as substituted by the Children Act 1975, s. 57). It is a moot point whether the parents' consent is also needed in such a case.

6.8 The effect of the abolition of the status of illegitimacy would be to place the father of a child born out of wedlock in the position now occupied by the father of a legitimate child. There exist procedures whereby difficulties arising from the absence or inaccessibility of a parent, or from his unreasonable refusal of consent, may be overcome.[13] We consider that both parents should be concerned in the matter of consent if their union has proved a stable one throughout the child's minority, and the procedures referred to above can be used in other cases. We therefore propose that the position of the father of a child born out of wedlock be equated to that of other fathers, with the result that if the parents were living together both would have to consent; if they were living apart only the consent of the parent with custody would be required.[14]

(C) CHANGE OF NAME

6.9 This is a subject which has received some recent publicity through reported decisions in the courts, to which we refer in paragraph 6.12 below. Unfortunately the law is in a somewhat confused state, largely because there are no clear and detailed rules in English law laying down what a person's surname shall be and how it may be changed.

6.10 The basic principle of the law is simply that a person's surname is that by which he is known. It is customary for a legitimate child to be known by his father's

13 Marriage Act 1949, s. 3(1), proviso. The Registrar-General (or, if more than one person's consent is required and the consent of only one has been obtained, a superintendent registrar) can dispense with the consent of a person who is absent, inaccessible or under a disability; and the court (which usually means the magistrates' court) has an overriding power to give consent on behalf of any person whose consent is required, including those who refuse to consent.

14 Amendment of the Marriage Act 1949, Sch. 2 would be required to clarify the position where, although the parents are separated, custody has not formally been dealt with.

surname, and for that name to be retained, in the case of a boy, for life; and in the case of a girl until her marriage, when she will adopt her husband's surname. In contrast an illegitimate child often starts with his mother's surname. But surnames may be changed at will, simply by usage. The change may (but need not) be reinforced by the execution of a deed poll, which has the effect of providing formal evidence of the change. Such a deed may be enrolled in the Central Office of the Royal Courts of Justice.

6.11 For present purposes we are concerned only with the change of a child's name, and in particular with such a change effected for the child by his parents or (and this is where disputes arise) one of them. The case of Y. v. Y. (Child: Surname)[15] appeared to establish that one of two parents of a legitimate child was not entitled to cause the child to be known by another name without the consent of the other. That proposition is supported, first, by rule 92(8) of the Matrimonial Causes Rules 1977[16] which provides that custody orders shall normally contain a term inhibiting unilateral action in relation to the child's name on the part of the party granted custody; and secondly by the Enrolment of Deeds (Change of Name) Regulations,[17] which indicate that a deed poll executed by one parent only will not be acceptable to the Central Office unless a satisfactory explanation is forthcoming.

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15 [1973] Fam. 147. The earlier case of Re T. (orse. H.) (An Infant) [1963] Ch. 238 was to the same effect but must now be read in the light of subsequent changes in the law relating to guardianship; the father is not now the sole natural guardian.

16 S.I. 1977 No. 344.

17 S.I. 1949 No. 316 (especially reg. 8) amended by S.I. 1969 No. 1432. See also Practice Direction (Minor: Change of Surname: Deed Poll) [1977] 3 All E.R. 451.

6.12 Although one parent seems to have no legal right to change the child's name, it is nevertheless something which can very easily be done - usually by registering the child in the new name when he first goes to school, or when he goes to a new school. If this occurs and a parent objects, it is for the court to decide what is in the child's interests. Opinions on this matter differ.[18]

6.13 As the law now stands there is less practical difficulty about the matter of the child's name if the child is illegitimate because his mother is usually the only person qualifying as "parent" or "guardian", and the question of the father's consent does not arise. The effect of our proposed change in the law would be to put the natural father in the same position as the father of a child born in wedlock, in which case he would have greater legal control over the choice of the child's surname. But we do not believe that the change would prove to be of great significance in practice.[19] If the parents are living together, the mother may herself be using the father's name and the child would, in those circumstances, have the same name. If the parents are not living together, the child would, as at present, probably bear the name of the parent with whom he is living.

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18 Cf. Re W.G. 31/1975 (Bar Library No. 282) (1976) 6 Fam. Law 210; R. v. R. (Child: Surname) [1977] 1 W.L.R. 1256 (C.A.); Crick v. Crick (1977) 7 Fam. Law 239 (C.A.); D. v. B. (orse. D.) (Surname: Birth Registration) [1978] 3 W.L.R. 573 (C.A.); and L. v. F. The Times 1 August 1978.

19 As we have already said, if the mother of a child born out of wedlock seeks to enrol a deed poll recording the change in the child's name the consent of the father appears to be required by the Central Office: see para. 2.11, n. 29, above.

## PART VII

## NATIONALITY and CITIZENSHIP

### "Subject" and "Citizen"

7.1 It is necessary at the outset to make the distinction (drawn by the British Nationality Act 1948) between "British subjects" and "citizens of the United Kingdom and Colonies".[1] The former expression covers not only U.K. citizens but also citizens of other Commonwealth countries[2] (and also a considerable number of Irish citizens born before 1949).[3] In this paper we are concerned only with U.K. citizenship, because Parliament cannot in practice affect the citizenship laws of other Commonwealth countries, and its control over British nationality in the wider sense is restricted. A British subject can be made a U.K. citizen; but under the present law he cannot be prevented from being a British subject simply by the withholding of such citizenship.

### Acquisition of U.K. citizenship: general

7.2 U.K. citizenship is acquired under the 1948 Act in the following ways:

(a) by birth in the U.K. (or in a colony) since 1948;[4]

(b) by adoption by a U.K. citizen;[5]

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1 For convenience we will refer to the latter as "U.K. citizens" throughout this Part.

2 British Nationality Act 1948, s. 1.

3 ibid., s. 2.

4 ibid., s. 4. The children of foreign diplomats are excepted (unless s. 2(1) of the British Nationality (No. 2) Act 1964 applies).

5 Adoption Act 1958, s. 19.

(c) by descent, the child's father being a U.K. citizen at the date of the child's birth;[6]

(d) by registration (the means whereby, for example, the foreign wife of a U.K. citizen herself acquires U.K. citizenship);[7]

(e) by naturalisation.[8]

Many people who were British subjects before the 1948 Act came into force[9] (and therefore before the concept of "U.K. citizenship" existed) automatically became U.K. citizens on 1 January 1949, under section 12 of the Act. In particular, that provision covered all those who (or whose fathers) had been born in the U.K., and their wives.

Relevance of illegitimacy

7.3 The legitimacy (or otherwise) of a person is relevant only to head (c) above - citizenship by descent. Any person born in the U.K. is a U.K. citizen, irrespective of the marital status of his parents (or, indeed, of their nationality, unless his father is a diplomat). But a claim to U.K. citizenship by descent depends on the father's citizenship, and in the 1948 Act "father" means the father of a legitimate (or legitimated) child.[10] There is at present no citizenship by descent through the mother; and although this rule affects legitimate and illegitimate children alike, it bears harder on the latter because it may result in their being stateless.[11]

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6 British Nationality Act 1948, s. 5. One of certain further conditions has also to be satisfied if the father's U.K. citizenship is also by descent only.

7 ibid., s. 6(2).

8 ibid., s. 10.

9 i.e. British subjects under the British Nationality and Status of Aliens Act 1914.

10 British Nationality Act 1948, ss. 32(2) and 23.

11 This would be the result where an unmarried mother who was a U.K. citizen gave birth to a child in a foreign country which, as is quite common, does not grant its own citizenship or nationality (as we do) on a "country of birth" basis.

Citizenship by registration

7.4 Although an illegitimate child born abroad to a British mother cannot claim U.K. citizenship as of right by descent, he may acquire such citizenship by registration. First, section 7(2) of the 1948 Act permits the Home Secretary, at his discretion, to register any minor as a U.K. citizen "in special circumstances". We understand that the illegitimacy of a child (which deprives him of a paternal nationality) is treated as a factor in assessing the presence of "special circumstances" and that it is now the Home Secretary's normal practice to register such a child if the mother is a U.K. citizen by birth (or by adoption) in this country.[12] But if the mother is a U.K. citizen by descent or by registration or naturalisation, the power to register is seldom exercised unless it is shown that the child's future lies in the U.K. This provision, it will be noted, works only for minors: if the child has passed 18 he must have resort to naturalisation.

7.5 There is also a second way whereby some illegitimate children born abroad to mothers who are U.K. citizens may acquire U.K. citizenship by registration. In compliance with obligations under the United Nations Convention on the Reduction of Statelessness, section 1 of the British Nationality (No. 2) Act 1964 provides that application for registration as a U.K. citizen may be made by or on behalf of any such child who is and always has been stateless.[13] Registrations under this section are not common but (unlike those under section 7(2) of the 1948 Act) they are not dependent on the exercise of the Home Secretary's discretion; and application may be made by the child after attaining his majority.

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12 See the Home Secretary's statement in the House of Commons on 7 February 1979: Hansard (H.C.), vol. 962, cols. 203-204.

13 In addition to proving statelessness, the applicant has to prove that his mother was a U.K. citizen at the date of his birth: 1964 Act, s. 1(1)(a) and (2).

Possible reforms

7.6 The U.K. citizenship law set up by the British Nationality Act 1948 was never simple and it has tended to become more complicated following the attainment of independence by former British dependent territories. It is also a potentially sensitive part of the law because of its association with the rules regulating the right to enter the United Kingdom. Nevertheless, it seems to us that the basic structure of the law in this field is open to the criticism that in two respects it follows old-fashioned lines of thought which have in other contexts been largely discarded during the thirty years since the Act was passed.

7.7 The first point of criticism relates to the fact that U.K. citizenship as of right, by descent, can only be acquired through the father. This offends against the principle, now generally accepted, of sexual non-discrimination; there is accordingly, in our view, a strong argument in favour of allowing a child born abroad to a mother who is a U.K. citizen to acquire that citizenship from her (even if he also acquires his father's nationality from him, or the nationality of the country of his birth). The Home Office recognises this argument and a Green Paper issued in April 1977 for the purpose of eliciting views on a number of possible changes in nationality law indicated that the Government wishes to discard this discriminatory element.[14] Such a change would have our support.

7.8 This criticism is, as the law now stands, not strictly applicable to cases where the child is illegitimate, because such a child is unable to inherit U.K. citizenship from either of his parents. It is however to be noted that the application of the principle of the Green Paper to the

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14 "British Nationality Law: discussion of possible changes": Cmnd. 6795, para. 39. See also para. 7.4, above.

children of unmarried mothers,[15] without more, would actually create an element of sexual discrimination in that some children would be able to inherit U.K. citizenship from their mothers but not from their fathers.

7.9 The second out-dated aspect of the 1948 law is the discrimination, in the matter of the transmission of citizenship, between those born in wedlock (or subsequently legitimated) on the one hand and illegitimate children on the other.[16] Consistently with the general arguments contained in this paper we think that steps should be taken to remove that discrimination; and it seems to us that the argument for so doing is considerably fortified by the fact that such a change in the law would simultaneously solve the sexual discrimination problem which would arise if an illegitimate child could inherit citizenship from his mother only.

7.10 A change in the law which would allow a child born out of wedlock to be a U.K. citizen by descent either from his mother or from his father would not, we understand, in practice result in a substantial increase in the number of persons of foreign birth who would acquire such citizenship.[17] A number of those who would thus acquire U.K. citizenship in law would probably never avail themselves of it, preferring to use their foreign nationality. So far as acquisition through

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15 Although the Green Paper does not refer in terms to unmarried mothers we understand that no differentiation is intended.

16 Cf. New Zealand law, which now permits citizenship to be acquired by descent from fathers and does not discriminate between those born in and out of wedlock: Citizenship Act 1977, ss. 3 and 7. Citizenship can also be acquired from putative fathers under the laws of France, Italy, the Netherlands and other countries.

17 In the case of such persons already living when the changes were made, the acquisition would, we think, have to depend on specific application being made for the purpose: citizenship should not retrospectively be imposed on anybody.

the mother is concerned, we suspect that a high proportion of those who would acquire effective citizenship in this way could have acquired it in any event by registration under section 7(2) of the 1948 Act; and acquisition through the father would be restricted by the necessity to prove paternity. A person born abroad to unmarried parents may well find it less easy to produce to the Home Office acceptable proof of paternity, because the ordinary presumption arising from marriage will not be applicable; nevertheless, we consider it reasonable that such a person should be expected to establish his paternity before asking the U.K. authorities to accept his status.

7.11 The "numbers argument" can of course be used to point the other way. If relatively few people are actually affected, is there any real need to change the law? We recognise the force of this reasoning but our present view is that it ought not to prevail. The adoption of the rule that any child could inherit U.K. citizenship from either of his parents would simplify the law; it would, for example, no longer be necessary to enquire whether a child born out of wedlock had subsequently been legitimated and thus entitled as of right to his father's U.K. citizenship. We cannot see any compelling argument for preserving, in this area of the law, what would look like a relic of the legitimacy/illegitimacy distinction after that distinction had been expunged from the law as a whole.

7.12 We do not see any reason why the law on this matter should not be governed by the general principle of not discriminating between children born in and out of wedlock. However, any change in citizenship law is necessarily a change of United Kingdom law and we accept that any such changes would have to be considered in the context of the U.K. as a whole, and not only of England and Wales.

## PART VIII

## DOMICILE AND CONNECTED MATTERS

8.1 We turn now to the effect which the abolition, in English domestic law, of the status of illegitimacy would have on private international law rules, as applied in English courts: and, in particular, on the effect which it would have on the ascertainment of a person's domicile of origin.

8.2 The 'domicile' of a person may be described as his legal home, and the law of that domicile is the law which governs, for instance, his capacity to marry and the devolution of his movable property if he dies intestate. For such purposes everybody must have a domicile (and only one) at all times; and although an adult[1] can decide for himself what his domicile shall be, and take appropriate steps to change his domicile, a young child obviously cannot. The common law accordingly ascribes to every legitimate child at birth a domicile of origin derived from that of his father; and to every illegitimate child, a domicile of origin derived from his mother.[2] Until the child is of an age to have an independent domicile, his domicile will follow that of his father or mother, as the case may be. If a legitimate child's father dies the child's domicile will thereafter usually[3] follow that of his mother; and by recent legislation that

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1 As the law now stands, anyone aged 16 or over (or married): Domicile and Matrimonial Proceedings Act 1973, s.3.

2 Udny v. Udny (1869) L.R. 1 Sc. and Div. 441, per Lord Westbury L.C. at p.457.

3 This will not be so if the mother changes her domicile for no reason other than to enhance her chances of succeeding to the child's property: Potinger v. Wightman (1817) 3 Mer. 67. The child's domicile may also not change with that of the mother if he is left behind when the mother goes abroad: see Re Beaumont [1893] 3 Ch. 490.

principle has been extended to cases where the parents are separated and the child lives with the mother.[4]

8.3 It would clearly be right, if the distinction between legitimacy and illegitimacy were abolished, that there should be a single set of rules for ascertaining the domicile of origin (and any subsequent dependent domicile) of a child. It seems to us that there is an open choice between

(a) applying to all children the principles which now operate in relation to legitimate children; and

(b) introducing in relation to all children a new rule, namely that a child's domicile should be governed by that of the mother.

8.4 If the first option is adopted the position in terms of a child born out of wedlock would, we suggest, be as follows. The child's domicile of origin would in principle be derived from his father; and the child would continue to have a domicile dependent on his father if he remained with his father when his parents separated. If paternity were never established, or if he never had a home with his father, his domicile of origin would be derived from his mother; and in any event his domicile would follow that of his mother if

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4 Domicile and Matrimonial Proceedings Act 1973, s.4. Sub-ss.(1) and (2) provide:
"(1) Subsection (2) of this section shall have effect with respect to the dependent domicile of a child as at any time after the coming into force of this section when his father and mother are alive but living apart.
(2) The child's domicile as at that time shall be that of his mother if -
(a) he then has his home with her and has no home with his father; or
(b) he has at any time had her domicile by virtue of paragraph (a) above and has not since had a home with his father."
If the section applies so as to cause the child to have a domicile different from that of his father he retains his new domicile on his mother's death unless he returns to live with his father (sub-s.(3)).

he lived with her after his parents had separated.[5]

8.5 The alternative solution is that every child's domicile of origin would be that of his mother; thereafter her domicile would control the child's domicile of dependence. This solution has the advantage of absolute simplicity. On the other hand, it may lead to an increase in the number of artificial domiciles of origin, for the mother may, for personal or fiscal reasons, have retained her pre-marriage foreign domicile although the child is brought up in the country of his father's domicile; and it may enhance the risk of a person being held to be domiciled in different countries in our courts and those in other jurisdictions which share the common law concept of domicile. Despite these objections we are inclined to favour the adoption of this second and more radical alternative. If it were adopted it would seem desirable to amend section 4 of the Domicile and Matrimonial Proceedings Act 1973[6] to make it operate so that, where the parents are separated, the child's dependent domicile would be governed by that of the father if the child had his home with him and not with the mother. Section 4 as so amended would apply, as at present, only in those cases where the child has his home solely with the parent other than the one upon whose domicile his domicile would normally be dependent.

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5 There is a difference of opinion between textbook-writers as to the present law where a legitimate child is born to parents separated at the date of his birth. Cheshire's Private International Law, (9th ed.) p.185 suggests that the child acquires his father's domicile as his domicile of origin, but that by virtue of s.4(2) of the Domicile and Matrimonial Proceedings Act 1973 he immediately thereafter acquires a domicile of dependence on his mother, since he has his home with her and has no home with his father. P.M. Bromley, Family Law (5th ed.) p.10, considers that since a person's domicile of origin is his domicile of dependence at birth, s.4(2) of the Act operates to give the child his mother's domicile as a domicile of origin, rather than merely as a domicile of dependence. Legislation will in any case be necessary to amend the Domicile and Matrimonial Proceedings Act 1973, since it does not purport to deal with the case where a child's paternity is not established.

6 See n.4, above.

Having "a home with" a person seems to be a somewhat uncertain concept, and it may accordingly not be at all clear in some cases whether the separation of the parents has affected the child's domicile. The amendment of section 4 would afford an opportunity to attempt an improvement upon this statutory definition. We would particularly welcome comments on the major change in the law suggested in this paragraph, but we would also be glad to receive suggestions for the improvement of section 4 of the Domicile and Matrimonial Proceedings Act 1973, which would appear to be a matter for consideration whether the major change were effected or not.

8.6 We now turn to another related problem. As the law stands, a child's domicile of origin may play a part in deciding whether, for the purposes of English law, he is legitimate or not. This is because English law accepts as "legitimate" not only a person who is born to parents who are validly married, but also a person who is legitimate (or has been legitimated) according to the law of his domicile of origin. The latter limb gives rise to difficulties in cases where the child's parents have different domiciles because whether the child takes as his domicile of origin the domicile of his father or that of his mother depends on his legitimacy. A circular argument develops: legitimacy depends on domicile which depends on legitimacy.[7] The occasions on which it is necessary to have resort to a foreign law for the purpose of determining the legitimacy (or otherwise) of a person are rare, and might be eliminated for the future by our present proposals under which the status of "legitimacy" would no longer be relevant. But should it ever be necessary to look to the domicile of origin it would plainly simplify matters if that domicile were ascertainable by reference to one or other of the rules discussed in the previous paragraphs which (since they do not contain any reference to legitimacy) do not involve circularity of argument.

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7 This problem is discussed at some length in Cheshire's Private International Law (9th ed.) pp. 448-450 and Dicey and Morris The Conflict of Laws (9th ed.) pp. 432-439.

8.7 For the sake of completeness there are two further points which we should mention. First, the proposed change in the law would have no effect in cases in which English law never allowed legitimacy by the law of a foreign domicile to govern the outcome - namely, cases relating to the succession to land in England (or titles of honour) where the successor takes as "heir". Heirship has always been a matter to be determined by English domestic law alone.[8] Further, although we have suggested that the word "heir" should no longer be restricted to its traditional meaning, any future creation of an entail or title of honour could by express words restrict the class of persons capable of inheritance in the traditional manner.

8.8 Secondly, English judges would have to continue to determine issues on the basis of the legitimacy (or otherwise) of parties whenever cases have to be decided in accordance with some foreign law which still recognises the distinction. The situation may arise on a question relating to the destination of movable property in England forming part of the estate of a person who has died domiciled abroad, a matter governed by the law of the domicile; or in connection with the devolution of foreign land forming part of the estate of an Englishman, a matter governed by the law of the country where the land is. The only problem which might then arise is where the foreign law itself refers the question of legitimacy to English law; as, for example, where a testator dies domiciled in France leaving movable property situate in this country to "my legitimate children" and a claimant is domiciled here. French law would govern the succession, but it may refer the question of the claimant's status to the law of his domicile (that is to English law). The English courts would then be faced with the problem of deciding, for the

8 Doe d. Birtwhistle v. Vardill (1835) 2 Cl. & F. 571; (1840) 7 Cl. & F. 895; see also Re Goodman's Trusts (1881) 17 Ch.D. 266.

purposes of a French succession, whether the child is "legitimate" by English law. However, a similar problem may arise whenever a foreign law seeks an answer to a question which may be meaningful in the context of the foreign law but is not so in English law. One solution would be to provide by statute that if the "legitimacy" of any person according to English law arose in applying a foreign law, the English answer should invariably be that he is legitimate. Alternatively the problem could be left to judicial decision as and when it arose. However the statutory solution has the advantage of laying down a clear and ascertainable rule.

## PART IX

## THE ESTABLISHMENT OF PATERNITY

### Introduction

9.1 This part of the paper is essentially about evidence; though it also deals with procedure in that it discusses the questions:

(i) should the issue of paternity be capable of being raised as an independent issue, and not simply as a preliminary issue in proceedings aimed at getting some other order?

(ii) if so, who should be entitled to seek a finding, or declaration, of paternity as such?

(iii) should findings of paternity made in the course of determining some other question be made plain on the face of the order made by the court? and

(iv) to what extent should the court be able to make express findings, or declarations, of non-paternity, as distinct from dismissing proceedings on the ground that the applicant had not proved his case?

### Blood tests

9.2 A great deal of the law about establishing paternity has been influenced by the difficulty of doing so. This difficulty has been much reduced by the availability of blood test evidence. We considered this topic at length in our Report on Blood Tests and the Proof of Paternity in Civil Proceedings,[1] but it may be helpful if we outline the way in which such evidence can be used.

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1 Law Com. No. 16 (1968).

9.3 It has been known since the beginning of this century that human blood exhibits certain characteristics which can be classified into groups. These characteristics are transmitted from one generation to another in accordance with recognised principles of genetics. A comparison of the characteristics of a child's blood with that of his mother and a man may show that the man cannot be the father. It cannot show directly that he is the father, but simply that he could be the father. A test may, however, indirectly establish paternity. If, for instance, it is known that at the material times the mother had had intercourse only with H (her husband) and X,[2] and the blood test excludes H but not X, X must be the father. Tests may also provide some evidence of paternity even if they do not exclude all possible fathers but one. They will show what blood group genes the child must have inherited from his father; it will then be possible to calculate the proportion of men in the population with the necessary combination of such genes. Hence, if the characteristics displayed by the child's blood are so uncommon[3]

> "that if they were not derived from the husband they could only have been derived from one man in a thousand then the result of the test would go a long way towards proving (in the sense of making it more probable than not) that the husband was in fact the father because it would be very unlikely that the wife had happened to commit adultery with the one man in a thousand who could have supplied this uncommon characteristic. And if it appeared that only one man in a hundred or one man in ten could have been the father, if the husband was not, that might go some way towards making it probable that the husband was the father. Such an inference might not be lightly drawn, but it should not be ruled out."[4]

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2 See, e.g. Sinclair v. Rankin 1921 S.C. 933; Robertson v. Hutchison 1935 S.C. 708.

3 In an extreme case where uncommon blood characteristics are present, the incidence of possible fathers could be as low as one in fifty million: Law Com. No. 16 (1968), para. 5.

4 S v. S; W v. Official Solicitor [1972] A.C. 24, per Lord Reid at p. 42. For an application of the principles, see T. (H.H.) v. T.(E.) [1971] 1 W.L.R. 429.

9.4 Under the Family Law Reform Act 1969,[5] the court has power to direct the taking of blood tests in any civil proceedings, and it is the general practice to use them when paternity is in issue.[6] The court cannot compel a person to submit himself to tests, but may draw adverse inferences from a refusal to do so.[7]

Evidence of primary fact and its consequences

9.5 Primary evidence of paternity is to be sought in facts from which the inference of paternity can be drawn. It is a matter which cannot be directly proved. Any relevant fact may be adduced; but some types of evidence - blood tests, for example - are distinctly more reliable than others.[8] Traditionally, one fact - that of a marriage between the mother and the alleged father subsisting at the date of the child's birth[9] - has been placed in a special position, in that it is by itself sufficient (though not conclusive) evidence of the husband's paternity of the child. We deal below with the question whether there is any other fact which should be so treated, such as a period of cohabitation.[10]

9.6 From the primary evidence as to paternity there will or may follow

(a) the registration of a named man as the child's father in the register of births, or

(b) a finding by a court that a particular man is the father.

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5 Part III.

6 Practice Direction (Paternity: Guardian Ad Litem) [1975] 1 W.L.R.81.

7 See Family Law Reform Act 1969, s.23(1).

8 Other scientific tests of an anthropological (or, to be more accurate, anthropometric/anthroposcopic) variety are available, but we understand that in practice they are little relied on, having regard to the accurate results now obtainable by blood testing.

9 This is not a wholly accurate statement of the rule: see para. 9.9, below.

10 See paras. 9.12 to 9.13.

Such registration, or such a finding, is itself prima facie evidence of paternity.[11] A court finding may indeed often have conclusive effect in subsequent proceedings, for the parties to the earlier proceedings in which the finding was made will be bound by it. An unmarried mother who succeeds in obtaining an order against a particular man for the maintenance of the child on the footing that he is the child's father will be estopped from subsequently denying his paternity if the man later seeks an order for custody.

9.7 There may also follow, on the strength of the primary evidence (supported perhaps by evidence provided by an entry in the births register or by a finding in other proceedings) a declaration of legitimacy, in proceedings under section 45 of the Matrimonial Causes Act 1973.[12] A decree under that section constitutes evidence and, unless obtained by fraud or collusion, or without notifying the persons required by rules of court to be notified, it is binding on "Her Majesty and all other persons whatsoever."[13] Because of the wide-reaching effect of such a declaration the procedure is somewhat elaborate and notice must be given to (among others) the Attorney-General. This provision, in so far as it deals with declarations of legitimacy, will be rendered ineffective if legitimacy as such ceases to be a concept known to the law; and one question which arises is whether there need be a provision for a declaration of parentage with similar effect in its place.[14]

9.8 We now deal with a number of facts from which the court may presume or infer paternity.

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11 Civil Evidence Act 1968, s.12; Brierley v. Brierley and Williams [1918] P.257.

12 This section also enables declarations to be made in respect of other matters: legitimation, validity of marriage and nationality.

13 Including the Committee for Privileges of the House of Lords: The Ampthill Peerage [1977] A.C. 547.

14 We deal with this at paras. 9.32-9.34, below.

The marriage "presumption"[15]

9.9 Strictly speaking, this presumption (as it is generally called) relates not to the paternity of the child, but to his legitimacy; and it is referred to as such in section 26 of the Family Law Reform Act 1969. But the question of legitimacy necessarily involves that of paternity. A child born to a married woman, or within an acceptable period after the termination[16] of her marriage, is taken to be the child of her husband (or, as the case may be, her late or ex-husband),[17] unless a decree of judicial separation was in force at the date of conception.[18] The existence of a separation agreement is not by itself sufficient to rebut the presumption, although it would doubtless be easy enough for the husband to rebut it in such cases by giving direct evidence of non-access.

9.10 Until comparatively recently the existence of a marriage was held to raise a very strong presumption of the child's legitimacy (and so of the husband's paternity), rebuttable only by proof to the contrary beyond reasonable doubt. Indeed, it was reinforced by a rule prohibiting husbands and wives from giving evidence that intercourse had not taken place between them if the effect of such evidence was to bastardise a child.[19] This rule was abolished by

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15 The reason for putting the word "presumption" in inverted commas appears in para. 9.10.

16 i.e. (where there has been a divorce) after decree absolute, not decree nisi: Knowles v. Knowles [1962] P. 161.

17 A child born within due time after the termination of a marriage and after the mother has remarried is taken to be the child of the first husband: Re Overbury, dec'd. [1955] Ch. 122.

18 See Ettenfield v. Ettenfield [1940] P.96.

19 Russell v. Russell [1924] A.C. 687.

the Law Reform (Miscellaneous Provisions) Act 1949;[20] and the weight of the presumption was reduced by the Family Law Reform Act 1969 which provides in section 26 that the presumption may 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." The status of the "presumption" is now that of prima facie evidence only, like the evidence provided by the entry of a particular man's name as that of the father in the register of births. The paternity issue is, in the absence of other evidence, governed by the presumption, but "once evidence has been led it must be weighed without using the presumption as a make-weight in the scale for legitimacy."[21]

9.11 In our view the marriage presumption is a valuable one which should be preserved, after the abolition of illegitimacy, in the form of a presumption of paternity. However there is one point which needs to be added. At present there can by definition be no presumption of legitimacy arising out of a void marriage; but we think that it would be sensible for the law to provide that such a marriage should constitute prima facie evidence of paternity. The invalidity of the marriage does not cast doubt on the validity of the assumption that the parties' actual cohabitation is "as husband and wife", and it is accordingly perfectly proper to draw the same inference as to the paternity of any children as would be drawn if the marriage were valid.

Other facts which might be treated in the same way as marriage

9.12 In some Commonwealth jurisdictions - for example Tasmania, New South Wales and Ontario, but not New Zealand or Queensland - cohabitation is treated in the same way as

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20 Sect. 7 (1).

21 Per Lord Reid in S. v. S.; W. v. Official Solicitor [1972] A.C.24, at p. 41.

marriage, as prima facie evidence of paternity. Needless to say, only cohabitation as defined by statute counts for this purpose, the definitions ranging from the arbitrary (for example twelve months, as in Tasmania) to the vague ("a relationship of some permanence", as in Ontario). We incline to the view that this complication should not be introduced into the law. The value of a "prima facie evidence rule" lies in its general applicability without further evidence. This condition is satisfied by the marriage presumption, because one starts with a fact about which there is no dispute (that a marriage ceremony has taken place) and then draws the natural inferences from that fact. But cohabitation (or, rather, cohabitation "as husband and wife", for only such cohabitation can be relevant) is by no means self-proving,[22] especially if there are further statutory definitions going to the durability of the relationship. It also seems to us that once any relevant cohabitation has been proved or admitted, the natural inferences as to the paternity of children would, in the absence of other evidence to the contrary, invariably be drawn. The formal promotion of cohabitation into "prima facie evidence" of paternity, as a matter of law, adds virtually nothing.

9.13 We think that these considerations apply with even greater force to other classes of fact, such as the payment to the mother of money for the child's support. Such facts may, and often will, be relevant; but their probative value varies from case to case.[23] Real weight attaches only if there is no other reasonable explanation for the man's act; and if

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22 As is evident from the controversy over the application of the "cohabitation rule" by the Supplementary Benefits Commission.

23 Under the present law the payment by a man of money for the support of a child removes the time limit for affiliation proceedings against him: and may well tell against him on the paternity issue. But we do not think that it is prima facie evidence in the sense that by proving it the mother transfers the burden of proof. This lies on her throughout.

there is no such explanation the tribunal of fact will draw the inference of paternity without further assistance from the law. A general proposition such as "the payment by a man of money for the support of a child is prima facie evidence of his paternity" is much too wide; but if it is narrowed to the point where it becomes likely to be true, it becomes a statement of the obvious and it would play no useful part in a statute. Accordingly we do not suggest that facts other than the ceremony of marriage should be formally recognised as affording prima facie evidence of paternity.

Birth registration

9.14 Entry in the register of births of the name of a particular man as the child's father is, as we have said earlier,[24] recognised as prima facie evidence of that fact and so transfers the burden of proof to any party disputing it.[25] It is important to bear in mind that registration is essentially an administrative, and not a judicial, function, and that the registrar can accordingly act only on the basis of unchallenged evidence of paternity. We understand that on the registration of a birth the informant is asked to state the name of the child's father: the answer to that question is accepted unless it appears from the form of the answer itself or from the answers to other questions that the man named is not the mother's husband. If the informant cannot or will not state who the father is, the part of the register relating to the father will be left blank. It will also be left blank if the man is not the mother's husband, unless the registration or re-registration[26] is made at the joint request of the mother and the man in question, or the

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24 See para. 9.6, above.

25 A birth certificate is simply a certified copy of the entries in the register. Only the "long form" of certificate will in fact disclose parentage.

26 If no entry relating to the father is made when the birth is first registered, it can be made later (when the necessary evidence is available) by re-registration: see s.10A of the Births and Deaths Registration Act 1953, added by s.93(2) of the Children Act 1975.

mother declares that the man is the father and produces a statutory declaration made by him admitting his paternity.[27] The birth registration system has therefore a built-in procedure for acknowledging paternity in cases where no presumption can be derived from the mother's married status; and, as we have already said,[28] this opportunity to register the father's name is taken in over half of all the cases in which illegitimate births are registered. Under the same provision a mother is entitled to require that a man's name be entered in the births register as the child's father if she produces an affiliation order made against him. The birth registration system thus permits a mother to insist on such an entry even against the man's will, and even if he disputes paternity.

9.15 It has been suggested that the registrar should not enter the name of a married mother's husband as that of the father without some confirmatory evidence (or at least a statement of acquiescence) on his part: in other words, that the procedure should be similar whether the mother is married or not.[29] Although the reform advocated in this paper would have the effect of removing some procedural distinctions between the two cases, we suggest that it would be both wrong in principle and unhelpful in practice to follow this line here. In the first place it would seem to deny the validity of the marriage presumption. For ordinary purposes the main function of this presumption is that it authorises the entry of the husband's name in the birth register; and the resulting birth certificate is what everybody looks to. In practice, the usefulness of the presumption is largely exhausted once its effect has become reflected in the birth certificate. If the

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27 Births and Deaths Registration Act 1953, s.10, as amended by the Children Act 1975, s.93(1).

28 Para. 3.3, above.

29 See, e.g., J. Levin: "Abolishing Illegitimacy" (1977) (National Council for One-Parent Families).

presumption is to be regarded as providing inadequate evidence for birth registration purposes its force has effectively gone. Indeed, it seems to us that a rule requiring the husband's agreement to his name being entered in the register is, in principle, inconsistent with the retention of the marriage presumption, for it is clear that no useful purpose would be served by leaving the register neutral as to paternity if the fact of marriage still provides prima facie evidence.[30] Registration neither adds to nor subtracts from the presumption, and the register should be consistent with it, unless and until the presumption has been rebutted. Requiring the husband's express agreement would, moreover, often add significantly to the paperwork connected with birth registrations; and it would give rise to difficulties if the husband were abroad (or otherwise unable to take part in the application) throughout the six weeks within which the birth has to be registered.

9.16 We now turn to consider briefly the relationship between the births register and court orders. Although originally the register was simply a record of the information provided at the date of registration by the appropriate informant, it seems to us that it ought to be readily amendable in order to reflect subsequent substantive decisions of the court. As we have already seen,[31] the existing legislation provides for such amendment by re-registration (on the mother's application) following the making of an affiliation order, and there should be no difficulty in applying the same principle in future to maintenance orders obtained under the Guardianship of Minors Acts. No corresponding procedure, however, appears to be available at present to enable a father to have his name entered on the

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30 It is worth observing that if the husband entertains doubts as to his paternity it is not sufficient for him simply to refuse to cooperate in the registration of the birth if he wishes to avoid all liability for the child, since if he treats the child as a "child of the family" he will generally be liable for its maintenance.

31 See para. 9.14, above.

register without the mother's co-operation on the strength of, for example, a custody or access order in his favour made under section 9(1) of the Guardianship of Minors Act 1971.

9.17 The existing law thus discriminates against fathers. Even if an affiliation order has been made (or an order giving him custody or access under section 9(1) of the Guardianship of Minors Act 1971) the father of an illegitimate child can never have his paternity recorded without the agreement of the mother (and in certain cases the child),[32] although, as we have explained,[33] the mother can insist on the father's paternity being recorded. We do not believe that such discrimination is justifiable in principle.

9.18 The following proposition now emerges. For birth registration purposes the registrar should be entitled to accept a paternity statement from either parent without the explicit consent of the other parent -

(i) where the registration reflects the application of the presumption of paternity based on marriage; or

(ii) where paternity has been established by a court order.

This would constitute a change in the law only to the extent that it would allow a father to insist on his fatherhood appearing on the register (if necessary, by re-registration), where he has either obtained a declaration of parentage under the procedure dealt with below,[34] or where an order giving

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32 Children Act 1975, s.93(1).

33 See para. 9.14, above.

34 Paras. 9.31 to 9.43, below.

him custody or access, or ordering him to pay maintenance, has been made.

9.19 We are aware that some will think it inappropriate to allow a father who has no real link with the child to insist on his paternity being recorded, and our tentative view is that there may indeed be cases where it would be inconsistent with the child's welfare to allow such registration (as, for instance, where the child has been conceived as a result of rape on the mother). The proposal made above is therefore intended indirectly to ensure that a father with a wholly unmeritorious case will not be able to compel registration. A successful applicant would either have an actual link with the child by court order, or he would have demonstrated to the court that it was appropriate to make a declaration of parentage on his application.[35] It is not suggested that any man merely claiming to be the father should be entitled to use the register as a method of unilateral recognition of paternity:[36] but it seems to us wrong that the mother should be entitled to resist the entry of the name of the father unilaterally in cases where his paternity has been formally established. Once the court has made its order, the substance of the matter will have been settled, and it seems unsatisfactory that the child's birth certificate should thereafter be defective.

9.20 We would particularly welcome views on whether or not this is the right approach to registration of paternity. Some mothers may be deterred from applying for maintenance for the child if an indirect consequence is that the father

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35 See paras. 9.32 to 9.45 below, where such declarations are considered.

36 We agree with the view expressed by O.M. Stone in Family Law (1977) p.19 that a putative father should not be entitled to be registered as the father simply because he has formally recognised the child, thereby obtaining parental rights through the register. But the situation is quite different where such rights are derived from a court order.

may then compel registration of his paternity. However, in an appropriate case the Supplementary Benefits Commission or a local authority would be able to take proceedings in her place. It seems to us that if a man is obliged to accept the financial obligations of paternity it is reasonable that he should be entitled, if he wishes, to have the fact of his fatherhood recorded.

9.21 We would add that the abolition of illegitimacy and the consequent disappearance of the concept of legitimation would mean that the subsequent marriage of a child's parents would have no effect on the child's status. In such circumstances it is perhaps debatable whether any useful purpose would be served by retaining except for transitional cases the existing re-registration procedure.[37] However, such re-registration does allow the child's birth certificate to give the impression that he was born within marriage, and since this may be in accordance with the parties' wishes, our provisional conclusion is that the procedure should continue to be available, but that it should no longer be compulsory (as it is at present.)

9.22 There is one further point to be made before leaving this topic. Although, as we have seen, the register of births at present performs the useful purpose of providing prima facie evidence of paternity in the majority of cases, it can be argued that this is not the essential function of such a register, which is to record that a particular individual has been born at a particular place on a specified date.[38] Naming the mother suffices effectively to identify the child, and there will normally be no dispute about her identity.

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37 Births and Deaths Registration Act 1953, s.14.

38 In practice, information given at the time a birth is registered is essential for the compilation of demographic statistics and forecasts. Information about both parents, which is necessary for these purposes, can still be obtained by suitable amendments to the Population (Statistics) Act 1960, which would in any event need amendment on the basis of our proposals to remove the distinction between legitimate and illegitimate children.

But is there a need to name the father? Not to do so would greatly simplify the law relating to birth registration and would eliminate many of the difficulties which we shall discuss in Part X in connection with children conceived by A.I.D. It would also make the register more reliable, if less ambitious. Nevertheless, we consider that such an approach to the registration system would cause inconvenience and practical problems. It is, we understand, often necessary for a person to provide documentary evidence about his parentage, and in practice a birth certificate in the long form now used is normally sufficient. If the birth certificate did not give any information about paternity, a child born in marriage would have to produce his mother's marriage certificate and evidence that the marriage was subsisting at the date of his birth (or, if that was not so, at the probable date of his conception) as well as his birth certificate. That difficulty could perhaps be avoided by providing that, although the entry in the register would not state explicitly who the father was, it would show the mother's marital status; and that if she was at a material time a married woman her husband would be named as such. The paternity of the child would be left to be inferred from an application of the marriage presumption. But on that footing the birth certificate would be deceptive if the presumption were rebutted by a court finding, because such a finding would not falsify the statement in the register that the husband was married to the mother; thus no amendment of the register (or of the birth certificate based on it) could properly be made. In the case of a child born to an unmarried mother there would be worse than inconvenience, since there would be no means whereby the father could, by registration, record his paternity. It therefore seems probable that one result of removing paternity from the birth register would be a demand for some other form of register to replace the facility which had been lost. Accordingly we do not propose any change in the law on this point.

Formal methods of acknowledging paternity other than by court order

9.23 A considerable number of other jurisdictions, including New Zealand, most of the Australian states, Ontario, parts of the United States, and many civil law countries, have provided for acknowledgement of paternity otherwise than through the register of births. In New Zealand, for instance, an instrument of acknowledgement executed by the father and mother either as a deed or in the presence of a solicitor constitutes prima facie evidence of paternity.[39] Such an instrument may be filed with the Registrar General.[40]

9.24 We entirely agree that voluntary acceptance of paternal responsibilities is to be encouraged, but we suggest that the formal adoption of any such procedures here, by legislation, would be superfluous. The best solution, we think, would be to ensure that our registration system is sufficiently flexible to enable the evidence of paternity to be derived from the register. It would clearly not be helpful if the register and other instruments recognised by statute told different stories. An instrument recording an agreement between parties as to a child's paternity would still have evidential value; but in our view it should not be given any special status.

Court orders

9.25 As we have already stated[41] a finding of paternity by a court is also at least prima facie evidence of that fact. This topic raises two distinct issues. First, the distinction

39 Status of Children Act 1969 (N.Z.), s.8(2).

40 ibid., s. 9(1).

41 See para. 9.6, above.

between cases in which the finding is incidental to the relief sought and cases in which it is itself the only object of the litigation.[42] Secondly, cases in which the finding binds only the parties to the litigation (which we will call 'findings in personam'), and cases in which the finding binds all the world ('findings in rem'). However, these distinctions do not overlap for incidental findings always operate in personam, whereas in those cases in which the finding is the object of the litigation the finding will appear in the court's order in the form of a declaration which for all practical purposes operates in rem.

9.26 The paternity of a child may be an incidental issue in a wide range of applications to the court. In particular we may instance proceedings for a financial order for the child's maintenance (whether the mother is married or not and, if she is married, whether in the course of proceedings for the dissolution of marriage or not); proceedings by a man for custody of or access to a child; proceedings to determine whether or not a particular man's consent to some step is required; and proceedings to determine rights of succession. All these are instances of proceedings in relation to which the substantive law has been discussed earlier in this paper.

9.27 The relevant finding in such cases will be arrived at by the court on the strength of the evidence (some of which may constitute prima facie evidence affecting the burden of proof) and we have no proposals to make in respect of this. But there is a point to be made in respect of the form of the court's subsequent order. In the discussion of birth registration, we have already suggested[43] that the register should be readily amendable in order to reflect

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42 Strictly speaking, the object of the litigation at present is a finding of legitimacy, rather than paternity, but for the present purposes this is a distinction without a difference.

43 Para. 9.16, above.

subsequent substantive decisions of the court. Our suggestion is that whenever a maintenance, custody, access or other similar order is made in proceedings in which the paternity of the child has been found or admitted, such finding or admission should, if either of the parties so wishes,[44] appear on the face of the order. An affiliation order is at present an order which states on its face the finding of paternity and this fact may account for its acceptability for registration purposes. If the practice of using court orders as the basis for registration is to be extended, as we suggest it should be, it would be more satisfactory to have the finding of paternity, on which the registrar is to be asked to act, set out in terms on the face of the order than to expect the registrar to infer it simply from the grant of the relief sought.

9.28 It should be repeated here that an incidental finding of paternity would only be recorded in the manner indicated above where the court goes on to make an order for maintenance, custody, access or the like. For example, if a man applies to the court for access to a child, and an order is refused on the merits despite the court being satisfied that he is the child's father, his application should simply be dismissed. It is only the existence of immediate rights or obligations in relation to a child[45] which would justify the proposition that an application to the registrar of births may be made unilaterally. Furthermore, any reference to a finding of paternity in a case where no substantive order is made would be tantamount to the making of a declaration of paternity, and (as we argue later)[46] we do not think that persons other than the child in question should have unrestricted access to the courts for such a purpose.

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44 In many cases no party would be interested in making the request, paternity not being in issue at all and there being no question of the birth register being in any way defective.

45 Or the obtaining of a declaration of parentage: see paras. 9.32 to 9.45, below.

46 Para. 9.40, below.

9.29 Discussion of the circumstances in which it would be proper to record an incidental finding of paternity leads to an associated question, namely whether, and if so in what circumstances, a decision favourable to a male respondent should be treated as an express finding of non-paternity, entitling him to an order containing a declaration to that effect. Such an order would seldom serve as a basis for an application to amend the "father" entry in the register of births, because in these circumstances the only possible amendment would be by way of deletion, and in the ordinary case there would be no existing entry to delete. But this might not always be so: a man may successfully resist an application for a maintenance order notwithstanding that he is named in the register as the child's father.

9.30 Our provisional view is that successful resistance to a claim for maintenance should not normally entitle a man to an order of the court declaring him not to be the father of the child in question. This is primarily because the ground on which he succeeded may not be conclusive as to that point: the claim may have failed simply because the mother's evidence fell short of satisfying the court that the man was the child's father. It is true in some cases that the man may have succeeded not because the mother's evidence was too weak but because the evidence he tendered in his own defence was particularly strong - an invincible alibi, for example, or the conclusive result of a blood test. It might be thought that in such cases a declaration of non-paternity would be appropriat Nevertheless we incline to the view that even in such a case the court should, as at present, merely dismiss the application. If the right to a declaration of non-paternity did not attach to every case in which the mother's application failed it would be necessary for the court to evaluate the evidence on each side and to assign a particular reason for its decision in every case. Sometimes this might be easy, but often it would not. We do not think that the court (which would usually be the magistrates' court) should be expected to decide whether

or not, on its evaluation of the evidence, a declaration of non-paternity could properly be made. We would add that if the man's evidence were conclusive there would, in practice, be no real risk of his having to face a renewed application.

9.31 We do however suggest that the court should, exceptionally, have jurisdiction to make a declaration of non-paternity in favour of a man who has successfully overturned a presumption of paternity based either on marriage or on his being registered as the father of the child.[47] In such a case the result would necessarily mean that the court had made a positive finding of non-paternity, notwithstanding the presumption to the contrary. Where this exception applies the man's name would almost invariably have been entered on the births register, and it is our view that, following such a court decision, steps should be taken to delete that entry. A declaration of non-paternity should suffice to authorise amendment of the register.

Declarations of Parentage

9.32 We turn now to the other type of court order which is obtained in proceedings in which no relief is sought beyond a declaration establishing parentage.[48] At present the only relevant procedure is that under section 45 of the Matrimonial Causes Act 1973, which takes the form of an application for a declaration of legitimacy. Since we are envisaging the abolition of that status, section 45 would no longer be sufficient, and

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47 By far the most common case would be that where the respondent is the mother's husband - as in T.(H.H.) v. T.(E.) [1971] 1 W.L.R. 429; and C. v. C. and C. (Legitimacy: Photographic Evidence) [1972] 1 W.L.R. 1335. But it could happen that a man who had initially accepted paternity of an unmarried woman's child (and who had accordingly joined in the registration of the child's birth) might subsequently discover that the was not the father.

48 Such an order should give rise to no difficulties in relation to rectification of the births register, since it would specifically state the relevant facts as found by the court.

consideration would have to be given to two issues previously raised in a different context, in our Working Paper Declarations in Family Matters:[49]

(i) Should it be possible, without applying for any other remedy, to obtain a declaration as to the parentage of a child?

(ii) If so, should that declaration operate in rem or only in personam?

9.33 We think that there is a strong case for introducing a procedure for obtaining a declaration of parentage. There may be cases where it is important to establish parentage, but inappropriate to apply for any other relief, such as maintenance, custody or access under the Guardianship of Minors Acts or otherwise. We have two particular instances in mind. First, future entitlement to property may turn on the issue. It is, we think, insufficient to say that the question could always be determined at the date of distribution, since by then the best evidence may no longer be available. It has to be remembered that blood test evidence is most satisfactory only when the child, his mother, and all likely fathers can be tested. Hence the sooner a test is carried out the better, in order to minimise the risk of the evidence becoming unobtainable by reason of the death or disappearance of relevant persons. In any event, questions of parentage cannot in all cases be determined solely by blood testing, and it may be important to have those concerned available to give evidence. Secondly the child, or indeed those claiming to be his parents, may think it emotionally important to have the issue judicially determined. The right to know the facts about one's origins

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49 Working Paper No. 48 (1973). That working paper deals with a wide range of declarations in family matters. As we said in our 13th Annual Report (Law Com. No. 92, (1978), para. 2.27) we have resumed work on these topics, and hope to publish our report thereon at the same time as our report on illegitimacy.

is increasingly recognised,[50] and it would be unsatisfactory if the law provided only artificial means (such as an application for a nominal award of maintenance) for doing so. Thirdly, there may be cases in which a declaration of parentage by an English court will be of use in proceedings in a foreign court, for example to assert a right of succession.

9.34 Some commentators on our Working Paper Declarations in Family Matters[51] were opposed to giving the court a power to declare parentage, on the ground either (a) that it was not necessary to do so, since the question of paternity could be determined as and when a dispute arose, or (b) that it was undesirable that such declarations should operate in rem. Those comments, however, were based on the supposition that declarations of legitimacy would still be available. If, as is a necessary consequence of abolishing the distinction between legitimate and illegitimate children, declarations of legitimacy were no longer available[52] an existing procedure for determining parentage would cease to exist. We therefore consider if declarations of legitimacy cease to be available, that there would be a strong case for retaining some procedure for the declaration of parentage, but we would again welcome comments.

9.35 If it is agreed that the court should have power to grant declarations as to paternity, the next question is whether these should operate in rem (that is, bind everyone, whether or not they know of the proceedings) or merely in personam (in which case the declaration only binds the parties to the suit and those claiming through them).

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50 Cf. the right conferred on an adopted child to ascertain the facts about his original birth registration: Children Act 1975, s.26.

51 Working Paper No. 48 (1973).

52 Except perhaps in respect of existing dispositions of property, and succession to titles of honour.

9.36 Before we turn to the substance of this issue we should point out that under the existing law a declaration of legitimacy made under section 45 of the Matrimonial Causes Act 1973[53] is not technically in rem, since that section provides that such a declaration should not "prejudice" any person unless that person had notice of the application (or claims through a person who had such notice) or where the declaration itself is obtained by "fraud or collusion". Subject to those exceptions, however, the declaration is "binding on Her Majesty and all other persons whatsoever."[54] In practice, it has much the same effect as a declaration in rem, since care is taken that all persons whose interests could be affected are before the court,[55] whilst the exception of "fraud or collusion" is of limited significance.[56]

9.37 In our Working Paper Declarations in Family Matters we suggested that declarations should operate in rem in the fullest sense, that is, they should bind all persons, whether or not they had notice of the proceedings and whether or not the declaration had been obtained by fraud or collusion. We suggested that procedural safeguards and jurisdictional

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53 There is some difference of opinion as to whether declarations made under R.S.C. O.15, r.16 operate in rem or not, but the view that they do so is supported by Kunstler v. Kunstler [1969] 1 W.L.R. 1506, 1509 B-C; declarations of legitimacy cannot however be made under that procedure: Knowles v. A.G. [1951] P.54; Aldrich v. A.G. [1968] P.281.

54 Matrimonial Causes Act 1973, s.45(5).

55 ibid., s.45(6), (7); Matrimonial Causes Rules 1977 (S.I.1977 No. 344) r.110; C.C.R. O.39.

56 The Ampthill Peerage [1977] A.C. 547.

criteria should be framed accordingly.[57] We also suggested that unless the declaration was in rem it would largely fail in its purpose; one might as well deny the possibility of obtaining a declaration and allow the question to be determined, if and when it became relevant, in an action in personam. We said that the purpose of a declaration regarding status was to still doubts once and for all.

9.38 Since there would be other procedures available to resolve issues of parentage when they arose for determination, for example on the distribution of an estate, it seems questionable whether there is any case for allowing the proposed special procedure for determining parentage to be invoked when its effect would be to bind only the parties to the action (and there would, indeed, be some difficulty in deciding who should be the necessary parties to such an action). On the other hand, if the declaration operated in rem, the matter would be concluded for all time, even though it may subsequently have become clear beyond doubt that it was incorrect. Is there any sufficient reason to accept such a result? On balance, we tentatively favour the compromise now found in section 45(5) of the Matrimonial Causes Act 1973 under which a declaration[58] is binding on everyone except those who have not been made a party to, or given notice of, the proceedings. We therefore suggest that the proposed declaration of parentage should operate in this way, but we would particularly welcome views on this topic.

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57 Working Paper No. 48, para. 37. We also pointed out that decrees of divorce and nullity operate in rem and that it would be anomalous and inconvenient if a distinction were drawn between two types of declaration both of which determine the status of a marriage. If a declaration that a marriage was void operates in rem, so, surely, should a declaration that it was valid. We do not, however, think this argument is relevant in the present context, since paternity is an issue of fact, not of status.

58 Unless obtained by fraud or collusion.

Declarations of Parentage - subsidiary issues

9.39 If it is accepted that there should be power for the court to grant a declaration of parentage, a number of subsidiary issues have to be resolved:

(a) Who should be able to apply for such a declaration?

(b) Should the relief be available as of right or only if the court, in the exercise of its discretion, thinks fit?

(c) What should be the rules governing the English court's jurisdiction to hear such applications, and which courts should have jurisdiction?

(d) Are any special procedural rules necessary?

(a) Who should be eligible to apply?

9.40 It is clear that a child should be able to obtain a declaration that a named person is his father (or mother). Should the alleged parent, or any other person, be able to obtain a declaration of parentage? We think that there are cases in which it would be right to allow such applications. First, those claiming to be parents may have a proprietary or emotional claim to have the matter resolved just as much as the child himself. Secondly, a grandparent or other person may think it important in the child's interest that the matter be cleared up, even though the child's mother, for example, is unwilling to permit it. However, we have to accept that applications by parents and others might not be in the child's interests - for instance, where there is real doubt about parentage which the court is unlikely to be able to resolve, and the trial of the issue could only disturb a settled relationship. Hence we suggest that, in addition to the child, any other person should be able to seek a declaration that the

child is the child of a named person or persons if, but only if, he can satisfy the court that it is appropriate, having regard to the welfare of the child, that the issue be tried.

(b) Relief as of right?

9.41 We think that the child, once he comes of age, should be entitled in principle to a declaration as of right, since he can determine whether it is in his interests to seek it. If, however, at the date of the application the child is a minor the application would have to be made by his next friend. We suggest that in such cases the court should decide as a preliminary point whether the application is in the child's interest, to meet the risk that the next friend may not have impartially and dispassionately considered this question. Such a preliminary procedure should also be used for applications by persons other than the child, as mentioned in the previous paragraph, such as a man claiming to be the father. If on such an application the court decided that the making of the application was in the child's interests, the hearing should proceed, and if parentage were established the appropriate order would be made. The court would not have a discretion at that stage to withhold relief.

(c) Jurisdiction

9.42 Two matters in relation to jurisdiction to hear applications for parentage declarations would need to be decided. First, what should be the rules governing the question whether an applicant's connection with this country is sufficiently close to justify his being allowed to apply for a declaration in our courts? Secondly, given that the applicant can establish such a connection, which of the English courts (High Court, county court or magistrates' court) should exercise jurisdiction?

9.43 In relation to the first question, we consider that there are strong arguments for adopting somewhat restrictive rules in cases where status is in issue. For example, if the English courts decide cases where the applicant's connection with this country is only tenuous, it is probable that the courts in other countries would refuse to recognise the decision and might then arrive at a different result. In consequence a man might, for example, be held to be married in one country and yet held not to be so in another. The procedure which we envisage for determining paternity is not, technically, a procedure for determining status, but for many purposes it would nevertheless have a similar effect. In Working Paper No. 48 on Declarations in Family Matters we suggested that the court should have jurisdiction to make declarations in cases where the applicant was either domiciled in England and Wales at the date of the application or had been habitually resident there throughout the period of one year ending with that date. This test seems to us in principle to be satisfactory for defining applicants whose connection with this country is sufficiently close to justify their having access to the courts, and we therefore provisionally propose that these should be the conditions which an applicant for a declaration of parentage should have to satisfy if the English courts are to have jurisdiction. Comments are invited.

9.44 We also have to deal with the question which of the different courts in this country should be empowered to hear such cases. We consider that the High Court and county court, but not the magistrates' court, should have jurisdiction. Our reason for excluding magistrates' courts is that those courts lack the procedural machinery necessary to determine who should be made parties to the application.

(d) Procedural rules

9.45 Similar procedural safeguards will be required in relation to declarations of parentage as in relation to other declarations in family matters and we shall consider this matter when we publish our reports on both topics.[59]

Two special features of paternity proceedings

9.46 To conclude this part of the paper we discuss two special features of existing affiliation law and consider whether they should be reproduced if (as we have suggested) applications by mothers for maintenance of their children born out of wedlock come to be dealt with under section 9 of the Guardianship of Minors Act 1971.

9.47 Corroboration. Under the present law, if the mother gives evidence herself in affiliation proceedings, her evidence has to be corroborated "in some material particular by other evidence to the court's satisfaction."[60] In the nature of things the corroborative evidence is likely to be somewhat indirect, unless it is extracted from the respondent under cross-examination - for which reason respondents often decline to give evidence at all, relying on the mother's inability to produce any other evidence likely to satisfy the magistrates. The introduction of a formal requirement of corroboration into the guardianship legislation would mean that in all cases where paternity is at issue under the Guardianship of Minors Acts (including those heard in the

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59 In the Appendix to Working Paper No. 48 on Declarations in Family Matters we indicated the type of safeguards likely to be required.

60 Affiliation Proceedings Act 1957, s.4(1) as amended. The mother will not normally be able to avoid giving evidence herself, if she is to succeed, unless paternity is not in dispute and the issue relates to quantum only.

High Court and county court) corroboration would be mandatory. There are three reasons why we do not at present favour a formal requirement of corroboration. First, such a requirement can easily lead to a waste of time and money. Under the affiliation procedure, if the mother fails for lack of corroboration in the first instance, she is entitled to try again with better evidence: the first hearing is treated as having ended by her being non-suited, and the res judicata rule accordingly does not apply.[61] Secondly, we do not think that a formal requirement is necessary in order to avoid injustice. A court will be aware of the risks attached to the acceptance of uncorroborated evidence, and this will affect the weight of evidence which is in practice required to discharge the burden of proof. Although civil cases are proved by preponderance of probability, the degree of probability depends on the subject matter,[62] and we would expect courts to require paternity to be convincingly established. Thirdly, the formal requirement of corroboration may well have been justified in former times when it might have been difficult for the respondent to produce positive evidence to the contrary; but blood testing has changed the position. We therefore conclude that corroboration should be a relevant factor in evaluating the evidence to which it relates, but not a formal prerequisite. We appreciate, however, that this would involve a major change of emphasis, particularly since in guardianship proceedings there is now always a marriage to provide a presumption of paternity, and this would no longer be so under the new scheme. We would therefore particularly welcome views on this point.

9.48 Time limits. Broadly speaking, a mother must have brought affiliation proceedings within three years of the

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61 R. v. Sunderland Justices, ex parte Hodgkinson [1945] K.B. 502.

62 Blyth v. Blyth [1966] A.C. 643; cf. Hornal v. Neuberger Products Ltd. [1957] 1 Q.B. 247.

child's birth unless it appears that the respondent paid money for the support of the child within that period.[63] This exception exists solely for the protection of potential respondents (there is no corresponding time limit on putative fathers claiming custody or access rights under the guardianship legislation), but in many - perhaps the majority - of cases there will in fact be no formal time limit because this exception will be applicable. We agree that it is in general undesirable that potential claims should hang over anyone's head for a long period,[64] but we doubt whether removal of the time limit would lead to a spate of "stale" applications. If serious delay were not reasonably explicable, the chances of success would be slim; and, if it were explicable, we see no reason why the matter should not be investigated on its merits.[65] The application is primarily for the benefit of the child, not for that of the mother. If one thing is clear, it is that the ordinary principles of limitation of actions between adult parties should not be applicable in family matters of this nature. For these reasons we suggest that no time-limit distinction should be drawn in the guardianship legislation between children born in and children born out of wedlock in relation to claims for their maintenance.

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63 Affiliation Proceedings Act 1957, s.2(1) as amended.

64 The risk ends when the child becomes self-supporting.

65 The same reasoning lies behind our recommendation that there should be no time limit on bringing claims to succession: see para. 5.10, above.

## PART X

## PATERNITY OF CHILDREN CONCEIVED BY ARTIFICIAL INSEMINATION

### The relevance of artificial insemination to this paper

10.1 A child conceived as a result of artificial insemination of the mother with sperm provided by a third party donor (A.I.D.)[1] is, as the law now stands, illegitimate. It is immaterial that the mother's husband has consented to the insemination; the status of the child is in law the same as that of a child conceived in adultery at which the husband has connived.[2]

10.2 Under the present law an illegitimate child is in principle fatherless. This would no longer be so if the proposal in Part III of this paper were adopted. All children would then have legal fathers who would be invested with the full range of parental rights and duties. The identity of a child's father would accordingly become a matter of increased significance.

10.3 For legal purposes, paternity is essentially a question of genetic fact, so that it is the donor who is the legal father of an A.I.D. child. Unless some special provision is made by law, it would thus be he (rather than the mother's husband) who, on the abolition of the status of

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1 When a married woman is artificially inseminated with sperm provided by her husband (A.I.H.) the husband is the child's father for all purposes; the child is born in wedlock and no legal problems relevant to this paper arise. Problems may arise if the husband's sperm is preserved in a sperm bank and the wife is inseminated after the husband's death or after a divorce. Since at the time of the insemination the donor will no longer be the mother's husband, the case would in theory be one of A.I.D. However, we understand that in practice, if the mother declares that her former husband is the father of a child conceived in these circumstances, he will be registered as such without further enquiry.

2 This is not to say that A.I.D. is adultery: Maclennan v. Maclennan 1958 S.L.T. 12.

illegitimacy, would have the parental rights and duties in respect of the child. The question therefore arises whether the law should be so framed that, in proper cases, it gives effect to the social reality (that is, that the child is the offspring of the husband and wife) rather than the genetic truth (that is, that he is the offspring of the wife and donor).

10.4 Our discussion of A.I.D. is confined to those limited aspects of the topic which are directly relevant to the subject matter of this working paper. We do not regard it as part of our task to go over all the ground covered by the Feversham Committee (the Departmental Committee on Human Artificial Insemination)[3] in 1960, or to discuss the social, ethical and medical questions to which A.I.D. may give rise. In particular we do not think that this is the appropriate place to consider whether the practice of A.I.D. should be subject to official scrutiny and control.

The present practice of A.I.D.

10.5 In order to put the matter in perspective, we first summarise the conditions under which A.I.D. is now performed with the approval of the Royal College of Obstetricians and Gynaecologists.[4] The Royal College's guidelines provide that A.I.D. will only be performed on a married woman whose husband has given his consent in writing. The identity of the donor is not revealed to the patient or to her husband, and the

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3 Cmnd. 1105.

4 See the Proceedings of the Fourth Study Group of the R.C.O.G. (October 1976). The facts stated in this paragraph have recently been confirmed to us by the President of the Royal College.

donor is not told anything about the patient.[5] Although as a matter of legal theory the donor may be made liable as the child's father[6] to maintain the child (and could indeed apply for access or custody)[7] the practical reality, if these guidelines are followed, is wholly different. Neither the child nor his mother will be able to trace the donor; hence they will not be able to enforce any liability to maintain. The donor will know nothing about the child and will not be in a position to seek access or custody. For the same reason it is unlikely that any intestate succession rights existing between donor and child will in practice take effect.

10.6 A doctor carrying out A.I.D. treatment in accordance with the Royal College's guidelines will seek to satisfy himself about the stability and maturity of the patient's relationship with her husband. Even if the relationship should subsequently break up, the husband would usually have nothing to gain in legal terms by putting the child's paternity in issue: he would have treated him as a child of the family[8] and would thus effectively be under the same financial obligations to him as if the child were the husband's legitimate child.

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5 The doctor will usually know the identity of the donor, because care is taken to provide a reasonable physical match with the patient's husband in order to minimise the risk of producing a child evidently not that of the husband.

6 But only if the mother were a "single woman" (in the special sense explained at para. 2.12(ii), above) at the date of conception or birth. In practice this is most unlikely.

7 As in A v. C (1978) 8 Fam. Law 170.

8 Matrimonial Causes Act 1973, s.52(1).

10.7 However, the present law does cause one practical difficulty in connection with the registration of the child's birth. The wilful making of a false statement to the registrar in order to procure the making of an erroneous entry in the register is an offence under section 4 of the Perjury Act 1911. Where, therefore, the mother knows that the child has been conceived as a result of A.I.D. she should not state that her husband is the father, with the consequence that the part of the register relating to the father would be left blank. In practice, however, the mother and her husband will want the husband's name to appear in the register as the father. The fact of their marriage, together with the confidentiality of the A.I.D. operation, offers a temptation to a married couple not to disclose the operation, and we think that it would be unrealistic to suppose that, at least in cases where the husband is not totally infertile, this temptation is usually resisted.

Should the law make special provision to deal with A.I.D.?

10.8 On one view, there is no need to make any special provision to deal with A.I.D. conceptions: the fact that an anonymous and untraceable donor would, in consequence of the proposed change in the law, have "rights" which he would never be able to enforce does not (it may be said) justify interfering with the law, since this gives rise to no difficulty in practice. However, we do not find this argument convincing. Couples should not be put into a position, as they now are, where they are strongly tempted (and perhaps even advised) to make a false declaration on registering the birth; it brings the law into disrepute if it is believed that it can safely be defied. We therefore consider that there is a need for change in the law. Our provisional view is that A.I.D. cases exhibit features which enable them to be distinguished from natural extra-marital conceptions, and that these distinctions justify reform of the law so that, in proper cases, it gives effect to the social truth by making

the child legally the offspring of the husband and wife. There are, we suggest, four grounds for making such a distinction:

(i) We think that most people would recognise that there is an ethical distinction between A.I.D. and adultery (whether connived at or not), in that the former, being a clinical operation, involves no personal relationship between the mother and donor.

(ii) In most cases it can be assumed that the mother's husband is willing from the start to treat any resulting child as his own and not merely as an accepted "child of the family".

(iii) The identity of the true father of an A.I.D. child will normally be unknown to the mother and wholly unascertainable by her. In these circumstances there will never be any question in practice of his maintaining the child or showing any interest in him; or of the child being able to find out anything about him in later years.

(iv) It may often be true that an A.I.D. operation with the husband's consent is a mark of stability in a marriage (this being one of the considerations which the doctor will have in mind when advising the couple) while an act of adultery may well be the opposite.

The policy of the law

10.9 The policy of the legislation, we are at present inclined to think, should therefore be that where a married woman has received A.I.D. treatment with her husband's consent, the husband rather than the donor should, for all legal purposes, be regarded as the father of a child conceived as the result.[9]

10.10 It will be noted that this proposal only relates to the legal position of an A.I.D. child born to a married couple. This limitation may be criticised as being inconsistent with the general policy which we have proposed whereby the marital status of a child's parents would become irrelevant. But we think that this is inescapable. Where the woman undergoing A.I.D. is living in a stable union with a man who is not her husband (whether she is herself married or not), the question whether that man should be permitted to become the father of the A.I.D. child by consenting to the treatment raises complex issues relating to the rights of unmarried cohabiting couples, which are outside the scope of this paper. There is also a practical argument against any extension of the suggested new legal régime to persons who are not married to each other. A woman can only have one husband,[10] but there is no legal restriction on the number of men with whom a woman may cohabit. Hence the limited

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9 The practice of embryo transfer (that is, the transplant of a fertilised ovum into the womb of the intended mother) is still uncommon, and is not dealt with in this paper. A transplant operation of this type would give rise to legal problems relevant to this part of the paper only if the ovum were donated by a third party. There seems to us to be no relevant distinction between such a case and that of A.I.D., so that similar legal consequences should follow.

10 It may be necessary to make special legislative provision to cover the rare case where a woman has contracted a subsequent marriage during the period of gestation; and the extremely rare case where a woman's personal law permits her to have several husbands (polyandry).

reform proposed would permit the parental rights and duties to be transferred from the genetic father to one identifiable man, but to no one else; if the reform were extended so as to apply to unmarried parents this would no longer be the case.

Implementation of the policy

10.11 The simplest way of implementing the policy which we have suggested would be a statutory provision deeming the husband to be the father of an A.I.D. child born to his wife; the only ground on which the husband could challenge the operation of this deeming provision would be that he had not consented to his wife receiving A.I.D. treatment. This approach seems to us to have the merit not only of simplicity, but also of giving effect to the likely feelings and wishes of the wife and husband. We note that statutory provision of the type we envisage has been made in several States of the U.S.A.[11]

The husband's consent

10.12 Since it is a fundamental requirement of the proposed law that the husband's consent should have been obtained to the A.I.D. treatment (for it is his consent which effectively and irrevocably transfers the parental rights and duties from the donor to the husband), the question arises whether the law should impose requirements as to the form in which this consent is to be given. We think that there are two main approaches to this question.

10.13 On the first approach, the legal consequences of the husband's consent would be regarded as the most significant factor. A procedure would accordingly be required which would ensure both that the consent was genuine, and that, if

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11 See H.D. Krause: Illegitimacy: Law and Social Policy (1971) pp. 18-19, 243; California Civil Code s.216, New York Domestic Relations Law s.73; 30 Brooklyn L.R. 302, 322; M. Mayo "Legitimacy for the A.I.D. Child" (1976) 6 Fam. Law 19.

the matter were ever questioned, there would be acceptable and incontrovertible evidence that the consent had been properly given. On this view, the husband's consent, if it were to be effective, would have to be in writing, in a prescribed form, and perhaps formally attested. The consent document could be preserved, presumably by the Registrar-General, to whom it would be produced on the occasion of the registration of the birth.

10.14 However, a scheme which requires the consent to be formally given and evidenced in writing involves a further problem which relates to timing. There would be three possibilities:

(i) the consent would be effective whenever given (even if after the child's birth);

(ii) the consent would only be effective if given before the birth;

(iii) the consent would be effective only if given before the start of the course of treatment resulting in conception.

The practice recommended by the Royal College is that consent should be obtained before the treatment starts. This is clearly desirable in the interests of fairness to the husband, but whether it is sufficiently important in the interests of society as a whole to justify elevating it into a positive rule of law is a difficult question on which we would welcome views.

10.15 The second approach, whilst accepting that there would be advantages in having formal evidence of the husband's consent, would regard these advantages as outweighed by other factors, such as the attendant complexity of the scheme and the possibility that it might cause hardship to the child where the husband had in fact consented to the treatment but had for some reason not complied with the required formalities. On this view, the statutory provision would

operate by way of rebuttable presumption. It would be presumed that the husband had consented[12] unless he (or anyone else with a sufficient interest) satisfied the court that he had not done so.

10.16 We are at present inclined to the view that the second, simpler solution (that is, that consent be presumed) is preferable. We consider that the practice of the Royal College, of requiring that consent be obtained before treatment is started, is a desirable rule of practice; but for the reasons set out above, we are not convinced that it should be made into a rule of law. We do, however, find this issue one of great difficulty and would therefore particularly welcome views on it.

Objections to a statutory deeming provision

10.17 Although there are many advantages to such a statutory deeming provision, there are two main objections to it. The first involves a major point of policy: it could be said that the proposal involves a deliberate falsification of the birth register. The second objection is more theoretical: that the proposal would involve a transfer of legal rights from the donor to the husband, and that the law should accurately mirror that transfer.

An alternative approach: adoption

10.18 Both these objections could be met by abandoning the simple solution to which we have referred, using instead the concept of adoption, possibly in a simplified form. The donor would initially have, in legal theory, the full range of paternal parental rights and duties, but those rights and duties would be transferred to the mother's husband by an adoption order.

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12 In practice a written consent no doubt would usually be obtained, but it would not be legally necessary to do so, nor would it be necessary that the consent be in any particular form.

10.19 We doubt whether simply using the existing adoption procedure would be satisfactory, not least because no adoption order could be made before the child was some $4\frac{1}{2}$ months old.[13] We therefore consider two possible variants:

(i) Accelerated adoption
Under this proposal, a court would be obliged to make an adoption order if (a) the applicants were a married couple, (b) the child's conception followed A.I.D. treatment, and, (c) the husband had given his consent to the treatment. Under this proposal the court could make an order immediately after the birth, but not before.

(ii) Adoption before and contingent upon birth
Under this proposal,[14] the court would (subject to the same conditions as in (i) above) make an adoption order during the pregnancy to take effect immediately on the birth of the child alive.

Objections to adoption solutions

10.20 However, proposals based on adoption seem to us to have serious disadvantages:

(a) The use of an adoption procedure would inevitably seem cumbrous and unreal to the husband and wife, who would no doubt see themselves, not as adopting someone else's child, but rather as legalizing the status of their own. Spouses do not use adoption to deal with the problem of A.I.D. at the moment, and we see no reason to suppose that they would wish to do so in the future.

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13 Adoption Act 1958, s.3(1), as amended.

14 Made by O.M. Stone: see Law and Ethics of A.I.D. and Embryo Transfer, (Ciba Foundation Symposium 17) (1972) p.72.

(b) Not every child born in due time after an A.I.D. operation can be said with certainty not to be the husband's. A.I.D. treatment is not restricted to cases where the patient's husband is totally infertile; it is often regarded as appropriate if the husband is markedly sub-fertile. It would be absurd if a couple were to "adopt" their own child; but it would be unsatisfactory if the child had to be blood tested in order to ascertain whether or not the husband was the father, the more so if a blood test failed to exclude the husband and left it doubtful whether he or the donor was the genetic father.

(c) There would be difficulties in adapting the principle that the agreement of the father (in this case, the donor) is a prerequisite to adoption.

(d) There would be a problem relating to succession, namely that the child would have no rights of succession as the child of the mother's husband if the latter were to die before the adoption order was made.[15]

(e) It would be inappropriate to use the courts for what in this context would primarily be an administrative act; and the procedure would involve the parents in some expense.

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15 If the contingent adoption procedure to which we have referred were to be implemented, it should we think be provided that if the child is duly born alive its adoption should, for succession purposes, be retrospective to the date of the order.

For these reasons we are not inclined to favour any solution based on adoption.

A second alternative - annotation of the birth register

10.21 An alternative solution designed to meet the argument that it is necessary to preserve the integrity of the birth register is that a husband should be deemed to be the father of an A.I.D. child if, but only if, a stipulated procedure for recording the A.I.D. conception were followed. This procedure would be similar to the statutory deeming procedure accompanied by formal giving of consent by the husband discussed above,[16] but there would be an additional element. The husband's consent in the prescribed form would have to be produced to the registrar who would then make a special note in the register to indicate that the entry of the husband's name as that of the father was by virtue of the suggested new law. The consent form would then be preserved by the Registrar-General.

Objections to the annotation solution

10.22 The solution has one major disadvantage. This is that, as we have already said,[17] there would be cases where the husband of a woman who has received A.I.D. treatment might in fact be the father of the child. It would plainly be wrong to assume that the husband was not the father if there was a reasonable chance that he was: therefore the special note in the register should appear only in those cases in which there was medical evidence establishing the husband's non-paternity. We suspect that the need to obtain such evidence might deter many mothers of A.I.D. children from using such a scheme, preferring to say nothing to the registrar about the fact that A.I.D. treatment has taken place.

16 See para. 10.14, above.

17 See para. 10.20(b), above.

10.23 It is not easy to solve this and other problems which are involved in any proposal that the register be annotated to record the fact of an A.I.D. conception. We would therefore particularly welcome views on how far it is regarded as essential that the birth register be a record of biological fact, admitting (as a matter of principle, at least) of no exception. We see the virtue of the principle: and we recognise that there is a strong argument for resisting any breach of it. However, we suspect that the risk of falsification in A.I.D. cases is already very substantial. We are concerned that the introduction of a necessarily somewhat complex procedure designed to preserve the integrity of the register might be largely self-defeating since, as we have said, the temptation for the mother to ignore the procedures by simply stating that her husband is the father, would be strong.

10.24 Apart from the argument of general principle about the integrity of the register, it may be argued that to allow the principle to be compromised would cause difficulties in connection with the succession to existing titles of honour, because there would be nothing on the register to show that a child was conceived by A.I.D. and accordingly not entitled to succeed to a title. We think that there are three answers to this. First, as we have already said, there is a substantial risk that any complex procedure would be evaded, so that the introduction of an annotation procedure might not in practice solve the problem. Secondly, if a deeming system without annotation were enacted, it would be open to a claimant to rebut the presumption of parentage. There would no doubt be many cases in which it was known within the family that A.I.D. treatment had taken place, or even simply that the husband was infertile. Thirdly, the problem is one which is likely to be small in practical terms, and a sense of proportion should be maintained. It is improbable that noble families have all remained wholly immune from

"interruptions of lineage".[18] If presumptions of legitimacy have concealed such interruptions in the past, society may perhaps be prepared to accept the registration of a child conceived by A.I.D. with the husband's consent, as the husband's child in all cases and for all purposes, including that of succeeding to a title.

The problem of the child's identity

10.25 A problem which would arise whichever method were used for dealing with A.I.D. is whether or not legal provision should be made so that the child would be entitled to ascertain the facts about his parentage. Under the present law and practice the truth about the child's genetic identity may well be concealed from him if he has been registered as the legitimate child of the mother and her husband; in any event it is up to his mother and her husband to decide whether or not to disclose the fact that he is an A.I.D. child. Even if they do decide to tell him what they know, they will not usually be able to tell him who the donor was.

10.26 The argument in favour of a procedure giving the child the right to know the facts about his conception is essentially that a person has the right to know the truth about his origins. This principle is now accepted in adoption law, and an adopted child is entitled to discover the recorded facts about his natural parentage on attaining his majority.[19] It therefore seems logical that an A.I.D. child should have the same right. On the other hand, if the only fact which the child is able to discover is that he is not genetically the offspring of his mother's husband, but of a donor wholly unknown not only to him but to his mother and

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18 If Lemuel Gulliver's discoveries on the island of Glubbdubdrib are to be believed, they certainly have not.

19 Adoption Act 1958, s.20A, inserted by the Children Act 1975, s.26.

her husband, it is difficult to see that this would be of any real advantage to him.[20] To go further, by giving the child the right to know the identity of the donor would involve a major, and probably unacceptable, change of policy and practice. Our present inclination is therefore to recommend that the law should provide no special procedure to give the child a legal right to ascertain his A.I.D. origin, but we would particularly welcome views on this point. There would be no legal difficulty in providing such a right if either the adoption or birth register annotation scheme were implemented, but it would be difficult to adapt the suggested statutory deeming provision so as to give a right which would be enforceable in practice.

Transitional provisions

10.27 The usual policy of the law is that legislation should not operate retrospectively, and also that any change in the law should not affect rights under existing wills and settlements. If these policies were followed in legislation establishing a deeming principle of the type under discussion, the effect would be that, as under the present law, (a) the legal status of existing A.I.D. children would be unaffected; and (b) A.I.D. children born after the legislation came into

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20 In adoption cases, the adoptive parents are given written information about the child's parentage and a memorandum advising the adopters of the need to tell the child about his adoption and origins: Adoption Agencies Regulations 1976, r.14. If the child seeks to exercise his right to information about his parentage he must be advised of the availability of counselling (Adoption Act 1958, s.20A(4)), and if he takes advantage of this, the counsellor will be able to give him information from the records of the placing agency about his natural parents. It is then usually possible to satisfy the adopted child's psychological need to know about his natural parents' personalities and their motives for placing him for adoption. It would not be possible to give any such satisfaction to an A.I.D. child if the present practice were followed.

force would not[21] be entitled to benefit as the child of the mother's husband under settlements made, or under wills taking effect, before the birth. We doubt whether there is any sufficient ground to justify a departure from either of these principles, but we would welcome views as to whether there is anything in the nature of A.I.D. which justifies exceptional treatment.

Our provisional conclusion on paternity in A.I.D. cases

10.28 We appreciate that there are objections, of greater or lesser weight, to all the methods discussed in this paper for implementing the suggested policy that the law should recognise social reality at the expense of genetic truth and treat the mother's husband (provided that he has consented) as the legal father of an A.I.D. child. Our provisional conclusion is that there are fewer objections to the solution of a statutory deeming provision than to either of the alternatives we have discussed. We also think that it would be best that the husband's consent be presumed without the requirement of any formal proof, unless and until the contrary is established.[22] We are however particularly concerned to receive views on the questions:

(a) whether any special provision should be made to deal with the problem of the A.I.D. child's legal paternity;

if so (b) whether our proposal is acceptable that there should be a statutory provision deeming the mother's husband to be the father of her A.I.D. child unless it is established that he had not consented to the A.I.D. treatment which resulted in the child's conception;

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21 In the absence of an expressed or implied contrary intention.

22 See paras. 10.15 and 10.16, above.

and (c) whether there is any better solution to the problem than those which we have discussed.

We are, however, concerned that the legal problems of A.I.D., and the conflicting views which may be expressed on these, should not impede consideration of what seems to us to be the larger problem of illegitimacy, which is the central issue of this paper.

## PART XI

## SUMMARY OF PROVISIONAL CONCLUSIONS

We now set out a summary of the questions raised and of our provisional conclusions in the working paper. Comments and criticisms are invited.

### THE PRINCIPLE FOR REFORM OF THE LAW

(1) We tentatively favour the principle that the status of illegitimacy should be abolished and that the law hitherto applicable to legitimate children should apply to all children without distinction. No attempt should be made by statute to exclude any class of father from automatic entitlement to parental rights. We seek views on whether this is the correct approach. (paragraphs 3.1 to 3.20)

### CONSEQUENTIAL REFORMS AND CONNECTED MATTERS

#### Guardianship and custody of children born out of wedlock

(2) The parents of children born out of wedlock would, subject to the court's control, have equal parental rights and duties; we propose the repeal of section 85(7) of the Children Act 1975, and of so much of section 1(7) of the Guardianship Act 1973 as excepts illegitimate children from the principle of equality of parental rights. (paragraphs 4.8 to 4.9)

(3) Either parent of such a child would be able to apply for the court's direction on a question affecting that child's welfare. (paragraph 4.10)

(4) The father of such a child would be a joint guardian of the child, unless and until he is removed by the court. (paragraph 4.12)

(5) The father of a child born out of wedlock would have power to appoint a guardian for the child by deed or will, without having first to obtain a custody order. (paragraph 4.13)

(6) The father of such a child would be able to apply to the court under sections 7 and 11 of the Guardianship of Minors Act 1971 to resolve any differences between himself and a co-guardian appointed by the mother. (paragraph 4.14)

(7) The High Court's statutory power to remove a guardian, contained in section 6 of the Guardianship of Minors Act 1971, should be enlarged to enable either parent to be removed, whether the other parent is living or not. (paragraphs 4.15 to 4.17)

(8) Section 4 of the Guardianship of Minors Act 1971 should be amended to cover the case of a dispute between a surviving parent and a court-appointed guardian. (paragraphs 4.16 and 4.17)

(9) If a parent's guardianship rights have been removed by the court, the court should have power in an appropriate case to reinstate him or her. (paragraph 4.17)

(10) The words in section 9 of the Guardianship of Minors Act 1971 requiring a court to consider the conduct and wishes of the parents in applications for a child's custody or for access should be removed as being contrary to modern principle; and also the words "having regard to the welfare of the minor" (which are now superfluous). (paragraph 4.19)

(11) Amendments would be required to the Guardianship of Minors Acts and to the Children Act 1948 to ensure that the powers of the courts (and the duties of local authorities) as regards care and supervision orders are the same whether the child's parents are married or not. (paragraph 4.20)

(12) No special provision should be made for agreements about parental rights between parents not married to each other. The law relating to agreements between married parents should be brought in line by the repeal of section 1(2) of the Guardianship Act 1973. (paragraphs 4.21 to 4.25)

Maintenance of children born out of wedlock

(13) Affiliation proceedings would disappear in their present form (paragraphs 4.5 and 4.27) as well as the special form of appeal to the Crown Court (paragraphs 4.35 to 4.37) and certain other features of such proceedings. (see paragraphs (17), (19), (24) and (57) below)

(14) Section 14 of the Guardianship of Minors Act 1971 should be repealed so that the maintenance provisions in that Act would apply to children born out of wedlock. (paragraph 4.29)

(15) The wider rules as to jurisdiction which now govern the maintenance of legitimate children under the Guardianship of Minors Acts would apply to all children. (paragraphs 4.32 to 4.34)

(16) Section 9 of the Guardianship of Minors Act 1971 should be amended to enable the court to make a maintenance order for the child without determining the child's custody at the same time. (paragraph 4.38)

(17) There would be no time limit on the bringing of proceedings for the maintenance of children born out of wedlock. (paragraphs 4.39 to 4.42)

(18) The father of such a child would be able to apply to the court for an order against the mother for the child's maintenance. (paragraph 4.43)

(19) The mother would be able to apply for a maintenance order notwithstanding that she is not (and was not at the time of the child's birth) a "single woman". (paragraphs 4.44 and 4.45)

(20) The Supplementary Benefits Act 1976, the National Assistance Act 1948, the Children Act 1948 and the Children and Young Persons Act 1933 would be amended, removing the special provisions relating to children born out of wedlock. (paragraphs 4.47 and 4.48)

(21) Sections 34(3) and 45 of the Children Act 1975 should be repealed, so that any custodian (including one married to the child's mother) could bring proceedings for maintenance under section 34 of that Act against the child's father instead of affiliation proceedings under section 45. (paragraph 4.49)

(22) The High Court and county court should have power to order secured periodical payments under the Guardianship of Minors Acts. (paragraphs 4.50 and 4.51)

(23) The High Court's and county court's existing power to award lump sums for legitimate children under the guardianship legislation would extend to children born out of wedlock. (paragraphs 4.52 and 4.53)

(24) Such lump sums should be capable of covering expenses incurred in connection with the birth even if incurred before birth; but there should be no special provision for funeral expenses of the child. (paragraph 4.53)

(25) Property adjustment orders should be available in the High Court or county court under the Guardianship of Minors Acts. (paragraph 4.54)

(26) A maintenance order should be available for a child over 18 who is undergoing further education or training or if there are other special circumstances, notwithstanding the fact that no order has been made before he attained 18. (paragraph 4.55)

(27) The rule that a periodical payments order for a child made in favour of one of his parents lapses after six months' cohabitation by his parents would apply to children born out of wedlock. (paragraphs 4.57 and 4.58)

(28) Courts should have power under the Guardianship of Minors Acts similar to that under sections 35 and 36 of the Matrimonial Causes Act 1973 to vary written agreements for the maintenance of children. (paragraphs 4.59 to 4.63)

(29) Section 6(6) of the Family Law Reform Act 1969, which prevents an award of maintenance from being made to an illegitimate ward of court, should be repealed. (paragraph 4.65)

(30) In order that the High Court in wardship proceedings should not be prevented from making a maintenance order in appropriate circumstances, that court should, where necessary, direct the issue of paternity to be tried. (paragraph 4.65)

(31) The provision that a maintenance order in wardship made in favour of a parent lapses after three months' cohabitation by the parents should be amended to provide for lapse after six months' cohabitation. (paragraph 4.66)

Inheritance

(32) A child born out of wedlock would be able to inherit on the intestacy of his relatives, as if he had been born legitimate; and his relatives would likewise be able to inherit on his intestacy. (paragraphs 5.6 to 5.8)

(33) A presumption of non-survivorship on the lines of section 14(4) of the Family Law Reform Act 1969 should be enacted for the case of any paternal relations of a person born out of wedlock who dies intestate. (paragraph 5.9)

(34) As under section 17 of the Family Law Reform Act 1969, trustees and personal representatives should be authorised to distribute an estate without enquiry into the possible existence of relatives who may be entitled to benefit as a result of the change proposed in the law of succession; but those relatives should be permitted to trace property as under the present law. (paragraph 5.9)

(35) Succession claims brought by, or against the estate of, a person born out of wedlock, should not be made subject to any special conditions. (paragraph 5.10)

(36) The limitation in section 15(2) of the Family Law Reform Act 1969, by which the word "child" is construed as including an illegitimate child only where he is a potential beneficiary, should be abolished. (paragraph 5.13)

(37) Although testators and grantors may continue to use restrictive words of limitation, the word "heir" (whether in connection with a title or not) should not, in the case of future grants, necessarily be construed as meaning only a child born in wedlock. (paragraphs 5.19 and 5.20)

Parental agreement to adoption

(38) Unless the court dispenses with his agreement, the father of a child born out of wedlock would have to agree to the child's adoption. (paragraph 6.5)

(39) Consideration might be given to allowing the mother of such a child to apply ex parte in special circumstances for an order dispensing with the father's agreement. (paragraph 6.6)

Parental consent to marriage

(40) The consent of the father of a child born out of wedlock to the child's marriage would be required in the same circumstances and subject to the same dispensing powers as that of the father of a child born in wedlock. (paragraphs 6.7 and 6.8)

Parental powers in relation to the change of a child's name

(41) The position of the father of a child born out of wedlock in relation to a proposed change in the child's name would be the same as that of the father of a child born in wedlock. (paragraphs 6.9 to 6.13)

Nationality and citizenship

(42) On the abolition of illegitimacy, a child born abroad out of wedlock should acquire U.K. citizenship from his father as of right. (paragraphs 7.6 to 7.12)

Domicile and connected matters

(43) We suggest that the domicile of origin of any child should be that of his mother and that thereafter her domicile should control the child's domicile of dependence. If the parents live apart the child's domicile of dependence should be that of his father if he lives with him. (paragraphs 8.3 to 8.5)

The establishment of paternity

(44) A presumption of paternity arising from the fact of marriage should replace the present presumption of legitimacy; and it should also apply where the marriage was void. (paragraphs 9.9 to 9.11)

(45) There should be no presumption of paternity arising from facts other than marriage (such as cohabitation or the payment of money for the support of the child). (paragraphs 9.12 and 9.13)

(46) No change should be made to the practice whereby a married woman may register a child as her husband's without evidence of paternity from the husband himself. (paragraph 9.15)

(47) There should be a procedure whereby a father would be entitled to have his name entered in the births register of the child following the making of a custody or access order in his favour, a maintenance order against him, or a declaration of parentage. (paragraphs 9.18 to 9.20)

(48) The existing procedure for re-registration of a child's birth following the marriage of his parents should be retained but it should no longer be compulsory. (paragraph 9.21)

(49) No system of voluntary acknowledgement of paternity other than by means of the births register should be introduced. (paragraphs 9.23 and 9.24)

(50) Where, in court proceedings, it is found or admitted that a man is the father of a child, and an order in his favour for custody or access or against him for maintenance is made, the finding or admission should appear on the face of the order if either party so requests. (paragraphs 9.27 and 9.28)

(51) Where, in proceedings against him for maintenance, a man successfully rebuts a presumption of paternity and the application for maintenance is accordingly dismissed, the man should be entitled to an order recording the finding of non-paternity but where an application against him merely fails, without involving the successful overturning of a presumption against him, there should be no such entitlement. (paragraphs 9.29 to 9.31)

(52) There should be a procedure for obtaining a declaration of parentage without seeking any other order. (paragraphs 9.33 and 9.34)

(53) The effect of a declaration of parentage should be the same as that of a declaration now made under section 45 of the Matrimonial Causes Act 1973. (paragraph 9.38)

(54) Only the child himself should have an unqualified right to apply for a declaration of parentage; any other person should be entitled to apply only if the court is satisfied that it is appropriate having regard to the welfare of the child that the issue be tried. (paragraphs 9.40 and 9.41)

(55) The High Court and county court should have jurisdiction to make a declaration of parentage. The grounds for assuming jurisdiction should be the applicant's domicile or habitual residence in England and Wales for at least 12 months preceding the application. (paragraphs 9.42 to 9.44)

(56) There should, in proceedings for declarations of parentage, be procedural safeguards designed to ensure that all relevant persons are before the court. (paragraph 9.45)

(57) There should be no rule of law requiring corroboration in any proceedings in which paternity is in issue. Nor should the bringing of such proceedings be subject to any time limit. (paragraphs 9.46 to 9.48)

Paternity of children conceived by artificial insemination

(58) Views are invited on whether there should be a rule of law whereby a child conceived by A.I.D. with the consent of his mother's husband should for all purposes be deemed to be the child of his mother's husband and not that of the donor. (paragraphs 10.8 to 10.28)

(59) If a deeming provision is thought right, views are invited as to the means by which this may be implemented. (paragraphs 10.11 to 10.28)

(60) Views are invited as to whether there is any better solution to the problem of the paternity of A.I.D. children than those discussed in the paper. (paragraph 10.28)

## APPENDIX

### I Members of the Working Party

The composition of the Working Party has changed from time to time. The following list includes all those who have served on it.

| | |
|---|---|
| Chairman: | The Hon. Mr. Justice Cooke (until his death in April 1978) |
| | Mr. S.M. Cretney |
| Other Members: | Mr. A. Akbar (Law Commission) |
| | Professor H.K. Bevan (University of Hull) |
| | Mr. M.C. Blair (Lord Chancellor's Office) |
| | Mr. J.S. Campbell-Dick (Supplementary Benefits Commission) |
| | Mr. C.J.K. Churchill (Law Commission) |
| | Mr. F. Gonning (Home Office) |
| | Mr. D.S. Gordon (Lord Chancellor's Office) |
| | Mr. P.G. Harris (Lord Chancellor's Office) |
| | Lady Johnston (Law Commission) |
| | Mr. R.L. Jones (Home Office) |
| | Mr. B.M.F. O'Brien (Law Commission) |
| | Mrs. J. Reisz (Home Office) |
| | Mr. F.A. Rooke-Matthews (Registrar-General's Office) |
| | Mr. C.C. Snow (Supplementary Benefits Commission) |
| | Mr. J.A.C. Watherston (Lord Chancellor's Office) |
| | Mr. J. White (Supplementary Benefits Commission) |
| Secretary: | Mrs. P.J. Manfield (until April 1977) |
| | Mr. T.L. Rees |

### II Other bodies who have given us assistance

Department of Justice, New Zealand
Department of the Attorney General and of Justice, New South Wales
Law Reform Commission, Tasmania
Ministry of the Attorney-General, Ontario
National Council for One-Parent Families
Office of Population Censuses and Surveys
Royal Anthropological Institute of Great Britain and Ireland
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