The Law Commission

(LAW COM. No. 118)

FAMILY LAW

ILLEGITIMACY

Laid before Parliament by the Lord High Chancellor pursuant to section 3(2) of the Law Commissions Act 1965

Ordered by The House of Commons *to be printed 20 December 1982*

LONDON
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£12.15 net

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Mr. Stephen M. Cretney.

Mr. Brian J. Davenport.

Mr. Stephen Edell.

Dr. Peter North.

The Secretary of the Law Commission (as from 1st November 1982) is Mr. J. G. H. Gasson and its offices are at Conquest House, 37–38 John Street, Theobald's Road, London WC1N 2BQ.

ILLEGITIMACY

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THE LAW COMMISSION

FAMILY LAW

(Item XIX of the Second Programme)

ILLEGITIMACY

To the Right Honourable the Lord Hailsham of St. Marylebone, C.H., Lord High Chancellor of Great Britain

PART I

INTRODUCTION

Background

1.1 In July 1979, as part of our family law programme,[1] we published a Working Paper[2] examining the legal position of non-marital children[3] and making proposals for reform.[4]

1.2 The Working Paper was intended to serve as a focus for comment and criticism on the provisional conclusions expressed therein, and considerable publicity was given to it in the press and on radio and television. To assist the process of consultation we also held a seminar on the Working Paper's proposals at All Souls College, Oxford on 23-24 March 1979.[5] In the result, we received an impressive amount of cogently argued evidence from bodies and persons with a wide range of knowledge and experience of the problems facing non-marital children. This evidence has been particularly helpful in enabling us to come to a conclusion on the central and difficult question (which we examine in detail below)[6] of whether reform should seek merely to remove the legal disadvantages of illegitimacy or whether (as we provisionally proposed)[7] it should go further and remove the concepts of "legitimacy" and "illegitimacy"

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[1]Second Programme of Law Reform (1968) Law Com. No. 14, Item XIX: Family Law: "a comprehensive examination of family law ... with a view to its systematic reform and eventual codification."

[2]Working Paper No. 74. The Paper was prepared with the assistance of a Working Party set up by us in 1976. The members of the Working Party are named in the Appendix to Working Paper No. 74 and we are very grateful to them for the help which they gave us. Our preliminary work in this area was also much assisted by a study paper entitled "*The Illegitimate Child in English Law*" prepared for us by the Family Law Sub-Committee of the Society of Public Teachers of Law.

[3]We use these words, where appropriate, in the Report for the reasons given in para. 4.51 below. The Working Paper proposals and the proposals made in this Report are designed substantially to assimilate the legal position of marital and non-marital children and have necessarily involved our making recommendations that affect marital children. These constitute a necessary part of the "comprehensive examination of family law ... with a view to its systematic reform and eventual codification" to which we are committed by our Second Programme: see n. 1 above.

[4]Both the Working Paper and this Report are only concerned with the law of England and Wales. The Scottish Law Commission is reviewing Scots law regarding illegitimacy: see Scottish Law Commission Consultative Memorandum No. 53, published in February 1982.

[5]The names of those who took part in the seminar are given in Appendix C below.

[6]In Part IV.

[7]Working Paper No. 74, paras. 3.14–3.22; see also paras. 4.14 and 4.25 below.

from the law of family relations. The names of those who commented on the Working Paper are given in Appendix B;[8] we are most grateful to all of them.

1.3 In preparing our Report we have not only been influenced by the comments which we have received directly on the Working Paper, we have also been impressed by the significant movement, both in this country and abroad, against discrimination based on birth outside marriage.[9] Judicial statements in this country have supported the view that the policy of modern legislation is to eliminate the differences between legitimate and illegitimate children;[10] and there is also a considerable volume of published material[11] urging reform of the English law. Anxiety has also been voiced in Parliament on a number of occasions about illegitimacy.[12] On a wider international plane the United Kingdom has signed and ratified the Council of Europe Convention on the Legal Status of Children Born Out of Wedlock (1975)[13] which provides common rules designed to assimilate the legal status of children born outside marriage with the status of those born to a married couple.[14] The United Kingdom has also signed and ratified[15] the European Convention on Human Rights;[16] and it is noteworthy that the European Court of Human Rights has

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[8]We were also much assisted by a number of published comments on the Working Paper: Levin, "*Reforming the Illegitimacy Laws*", (1978) 8 Fam. Law 35; Hoggett, "*The Sins of the Fathers*", (1979) J.S.W.L. 385; Clarkson, "*All Children Equal at Last*?", [1979] 9 Kingston L.R. 369; Hayes (1980) 43 M.L.R. 299; Eekelaar, "*Reforming the English Law Concerning Illegitimate Persons*", (1980) XIV Fam. Law Quarterly 41.

[9]See e.g. Krause, *International Encyclopedia of Comparative Law*, (1976) Vol. IV, ch. 6, pp. 10–11.

[10]See e.g. *Re Evers' Trust* [1980] 1 W.L.R. 1327, 1333 *per* Ormrod L.J.

[11]E.g. *Fatherless by Law*?, (1966), a study by the Board for Social Responsibility of the National Assembly of the Church of England; *The Human Rights of Those Born Out of Wedlock*, (1968), a report of the Golden Jubilee Conference of the National Council for the Unmarried Mother and her Child; Neville Turner, *Improving the Lot of Children Born Outside Marriage*, (1973), published by the National Council for One Parent Families; Levin, *Abolishing Illegitimacy*, (1977), also published by the National Council for One Parent Families.

[12]See e.g. the debate on 22 February 1967 on Baroness Summerskill's motion on the welfare of illegitimate children: *Hansard* (H.L.), vol. 280, cols. 707–774; the Second Reading debate in the House of Commons on the Family Law Reform Bill: *Hansard* (H.C.), 17 February 1969, vol. 778, especially at cols. 46, 58–62, 70, 74, 97 and 99; and the Second Reading debate in the House of Lords on the Guardianship Bill; *Hansard* (H.L.), 20 February 1973, vol. 339, cols. 36–38. See also the debates on the Children Bill introduced by James White, M.P. which sought to abolish legal discrimination against illegitimate children: *Hansard* (H.C.) 23 February 1979, vol. 963, cols. 807–845.

[13]This Convention has to date been signed by 12 countries and ratified by 7 (*viz.* the U.K., Denmark, Norway, Sweden, Austria, Cyprus and Switzerland). The text of the Convention is set out in Appendix D below and we examine its significance in para. 4.12 below. The United Kingdom's ratification, which was subject to specific reservations in relation to succession and the parental obligation to maintain, took effect on 25th May 1981.

[14]It is perhaps also worth noting that as long ago as January 1967 a subcommission of the Commission on Human Rights of the United Nations adopted a statement on "General Principles of Equality and Non-Discrimination in Respect of Persons Born Out of Wedlock", which demanded that "every person once his filiation has been established, shall have the same legal status as a person born in wedlock": Saario, *Study of Discrimination Against Persons Born Out of Wedlock*, (1967), p. 226.

[15]The Convention has not been incorporated into English domestic law, but individuals have a right of petition to the European Commission of Human Rights (Article 25) provided that this right is recognised by the Contracting State concerned. (The Commission may then, if no settlement is reached, bring the case before the European Court of Human Rights.) See further para. 4.11 below.

Rights;[16] and it is noteworthy that the European Court of Human Rights has held that laws discriminating against those born outside marriage are, unless justifiable on some special ground, inconsistent with the guarantees provided by the Convention.[17] In addition we have noted the fact that in recent years steps have been taken in many countries (New Zealand, most of the Australian States and Switzerland to mention but a few) to abolish the legal aspects of discrimination against non-marital children.[18] In most cases this has been achieved by specific legislation. However in the United States, a number of decisions[19] striking down legislation which treats illegitimate children differently from others as inconsistent[20] with the constitutional guarantee of equal protection,[21] have also had this result.[22]

Arrangement of the Report

1.4 We appreciate that this Report is a lengthy and to some extent daunting document. For this reason we think that it might be helpful to readers to have some indication of where the matters in which they may be particularly interested are to be found. The remainder of this Report is divided into thirteen further Parts, as follows—

PART II—THE FACTUAL BACKGROUND

In this Part we examine the changing pattern of births, adoption and legitimation in this country and give some indication of the number of people now living who might suffer through being born outside marriage.

PART III—THE PRESENT LAW

In this Part of the Report we examine the circumstances in which a person

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[16]Article 8 guarantees the right to respect for private and family life. See further para. 4.11 below.

[17]*Marckx* v. *Belgium* (1979–80) 2 E.H.R.R. 330. For an assessment of the significance of this case for English law, see Maidment, "The Marckx case", (1979) 9 Fam. Law 228. See also para. 4.11 below.

[18]Section 3(1) of the New Zealand Status of Children Act 1969 declares 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". Legislation in all but one of the Australian States (i.e. Victoria: Status of Children Act 1974; Tasmania: Status of Children Act 1974; South Australia: Family Relationship Act 1975; Queensland: Status of Children Act 1978; New South Wales: Children (Equality of Status) Act 1976) has very largely followed this model. In Western Australia the same effect has been achieved by piecemeal amendment of existing laws. Reform in Switzerland was effected by the Loi du 25 Juin 1976, which became effective from 1st January 1978, modifying Articles 252, 259–263 and 270–327 of the Code Civil Suisse. Reforms also took place in the Netherlands and West Germany in 1969, in Austria in 1970 and 1977 and in France in 1972. For a general comparative review of the reforms prior to 1976 see Krause, *International Encyclopedia of Comparative Law*, (1976) Vol. IV, ch. 6.

[19]Notably *Levy* v. *Louisiana* 391 U.S. 68 (1968); *Glona* v. *American Guarantee & Liability Insurance* 391 U.S. 73 (1968); *Trimble* v. *Gordon* 430 U.S. 762 (1977); see also the cases cited by Binchy in "The American Revolution in Family Law", (1976) 27 N.I.L.Q. 371, 405, n. 2. Cf. *Labine* v. *Vincent* 401 U.S. 532 (1971); *Mathews* v. *Lucas* 427 U.S. 495 (1976). See generally Krause, *International Encyclopedia of Comparative Law*, (1976) Vol. IV, ch. 6, p. 9 and Polyviou, *The Equal Protection of the Laws*, (1980), pp. 253–60.

[20]In 1979 it was estimated that since 1968 the United States Supreme Court had struck down laws which treated illegitimate persons less favourably in 10 out of 13 cases in which equal protection challenges were made: Perry, "Modern Equal Protection: A Conceptualisation and Appraisal", (1979) 79 Col. L.R. 1023, 1056–60.

[21]Contained in the Fourteenth Amendment to the Constitution of the United States.

[22]See also Uniform Parentage Act 1973 which has been adopted in a number of states.

is legally regarded as illegitimate and the legal consequences of this classification.

PART IV—THE FIELD OF CHOICE

In this Part we examine in some detail the main proposal that we made in the Working Paper, namely to abolish the status of illegitimacy, in the light of the comments that were made to us on consultation. In particular we deal with the difficult question of whether the father of a non-marital child ought automatically to have "parental rights" over the child and we discuss some of the different approaches to the solution of this problem. We conclude this Part by making a general recommendation for reform of the law applicable to non-marital children, upon which the remaining Parts of the Report are based.

PART V

Before discussing the detailed implications of the main change in the law that we recommend, we discuss briefly the extent and the means by which parentage may now be scientifically established.

PARTS VI–X

In these Parts, we analyse in detail the impact of our main proposal on each area of the law which presently discriminates against those born outside marriage and we make recommendations which are reflected in the draft Bill attached to this Report. The particular areas which we examine are—

PART VI—FINANCIAL PROVISION FOR NON-MARITAL CHILDREN

PART VII—GUARDIANSHIP AND CUSTODY

PART VIII—INHERITANCE

PART IX—PARENTAL CONSENT TO ADOPTION, MARRIAGE AND CHANGE OF NAME

PART X—THE ESTABLISHMENT OF PARENTAGE

PART XI—CITIZENSHIP

In this Part we examine the reforms which we think are desirable but, for the reasons given in this Part, we are not including clauses on citizenship in the draft Bill.

PART XII—STATUS AND PATERNITY OF CHILDREN CONCEIVED BY ARTIFICIAL INSEMINATION

In this Part we examine the special position of the child conceived by artificial insemination, whom the law now regards as illegitimate; and we make recommendations.

PART XIII—DOMICILE

PART XIV—SUMMARY OF RECOMMENDATIONS

There are also four appendices attached to the Report: Appendix A which contains the draft Bill to implement our recommendations together with notes on each clause; Appendix B which contains the names of those who commented on the Working Paper; Appendix C which names the participants in the seminar at All Souls; and Appendix D which sets out the text of the European Convention on the Legal Status of Children Born Out of Wedlock and the declarations and reservations entered by the United Kingdom.

PART II

THE FACTUAL BACKGROUND[1]

2.1 In the course of the Second Reading debate on the Children Bill in 1979, it was suggested that as many as three million people now living in Britain had been born illegitimate, some 1½ million of them having been born since the end of the Second World War.[2] In 1980 alone 77,400 children were born illegitimate in England and Wales.[3] Notwithstanding the fact that the annual number of births in England and Wales is now lower than it was in the 1960s,[4] no doubt in part as a result of the increased availability of reliable forms of contraception,[5] legal abortion,[6] and sterilisation,[7] the number of *illegitimate* births has been rising over recent years,[8] and the 1980 figure of 77,400 represented some 11.8 per cent of the total number of births in that year. In numerical terms the 1980 figure was also the highest number of illegitimate births for any one year on record, and as a proportion of the total number of births in that year, it was roughly double the comparable proportions over the 15 years between 1945 and 1960.

2.2 A person who is born outside marriage does not, of course, necessarily remain illegitimate. He may be legitimated by the subsequent marriage of his parents, or he may be adopted (in which case he is in law no longer to be regarded as illegitimate but as a legitimate child of his adoptive parents).[9] However, recent research[10] indicates that a growing proportion of those who are born illegitimate remain so all their lives.[11] In 1968 12,185 births were re-registered[12] in consequence of the legitimation of children by the marriage of

[1]See generally the Report of the Committee on One-Parent Families (the Finer Committee) (1974) Cmnd. 5629, Part 3, Section 4.

[2]*Hansard* (H.C.) 23 February 1979, vol. 963, col. 809.

[3]Office of Population Censuses and Surveys: *Population Trends 27*, (1982), Table 11. The illegitimacy rate is highest amongst women under 25. In 1980 20 per cent of the births to mothers under that age were illegitimate: *ibid.*

[4]In 1980 there were 656,200 live births in England and Wales as compared with 849,800 in 1966 (Office of Population Censuses and Surveys: *Population Trends 27*, (1982), Table 9). The number fell to 569,300 in 1977 but has been rising again since that date.

[5]See e.g. Cartwright, *Recent Trends in Family Building and Contraception*, (1978), pp. 3–4.

[6]In 1980 there were 128,927 legal abortions performed on residents in England and Wales (OPCS Monitor, Ref. AB 82/1) as compared with 49,829 in 1969: Office of Population Censuses and Surveys Abortion Statistics 1979 (1981) Table 1:3; Registrar General's Statistical Review for 1969, Abortion Supplement, Table 2a.

[7]There are no regularly produced official figures regarding the incidence of sterilisation but such figures as there are suggest its increasing use amongst both men and women: Cartwright, *Recent Trends in Family Building and Contraception*, (1978), pp. 3–4.

[8]In 1976 there were in the region of 53,800 illegitimate births; in 1977 there were 55,400, in 1978 60,600 and in 1979 69,500: *Population Trends 27*, (1982), Table 9. Before 1976, however, the annual number of illegitimate births had, like legitimate births, been in decline for about 10 years, although the proportion which they represented of the total number of live births for any one year had been rising steadily: Working Paper No. 74, para. 1.2.

[9]Children Act 1975, Sched. 1, para. 3; see further paras. 3.17–3.19 below.

[10]E.g. Leete, "Adoption Trends and Illegitimate Births 1951–77", *Population Trends 14*, (1978), 9.

[11]E.g. of those born in 1967, 71.8 per cent were still illegitimate at their first birthday and 59.7 per cent at their fourth birthday. The corresponding figures for those born in 1972 are 80.8 per cent and 71 per cent respectively: Leete, "Adoption Trends and Illegitimate Births 1951–77", *Population Trends 14*, (1978), Table 5.

[12]Pursuant to Births and Deaths Registration Act 1953, s. 14.

the parents,[13] and nearly 19,000 illegitimate children were adopted.[14] The 1970s, however, witnessed a sharp decline in both the number of legitimations and adoptions[15] and in 1980 fewer than 10,000 births were re-registered,[16] and only 6,074 illegitimate children were adopted.[17] Whilst some of this decline might be explained by a drop in the number of illegitimate births in the early 1970s it has been suggested[18] that the more important explanation, particularly as regards adoption, is likely to be that a greater number of mothers than in the past now accept their illegitimate children and bring them up themselves. The availability of family planning services and, in certain cases, abortion have increased the prospects that a child born to an unmarried mother will be a "wanted" child.

2.3 The evidence which we have outlined above clearly suggests that illegitimacy is a common feature of our society; and that a significant number of people are affected by the present law which still discriminates against them in certain respects. In the paragraphs that follow we therefore examine the legal problems encountered by the illegitimate person in consequence of his status. We are, of course, well aware that the illegitimate may suffer from handicaps other than those directly attributable to the discriminatory provisions of the law. It may be that illegitimacy still carries in some circles a social stigma.[19] It has also been suggested that the illegitimate suffer from special economic and social handicaps because society regards their families as

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[13]Registrar General's Statistical Review 1973, Part II, Table T3(*b*).

[14]Leete, "Adoption Trends and Illegitimate Births 1951–77", *Population Trends 14*, (1978), 9, Table 1.

[15]*Ibid.*

[16]Figures for re-registration following legitimation are no longer published. In 1980, however, authority was issued for re-registration in 9,659 cases but in not all of these would re-registration actually take place (figures supplied by the General Register Office).

[17]OPCS Monitor, Ref. FM3 81/1, 26 May 1981.

[18]Leete, "Adoption Trends and Illegitimate Births 1951–77", *Population Trends 14*, (1978), 9, 13 and 15.

[19]It has been said that the legal status of illegitimacy still carries with it difficulties "be they referred to as a stigma or as an embarrassment". *Re G. (A Minor) (Adoption and Access Applications)* (1979) 1 F.L.R. 109, 112 *per* Balcombe J. For a recent assertion of the significance of illegitimacy, see *The Ampthill Peerage* [1977] A.C. 547, 568 *per* Lord Wilberforce: "There can hardly be anything of greater concern to a person than his status as the legitimate child of his parents; denial of it, or doubts as to it, may affect his reputation, his standing in the world, his admission into a vocation, or a profession, or into social organisations, his succession to property, his succession to a title." But see also *S.* v. *S.* [1972] A.C. 24, 42–3: "In former times it was plainly in the child's interest to have a finding of legitimacy even where the presumption of legitimacy had been used to overcome evidence which without it would have pointed the other way. An illegitimate child was not only deprived of the financial advantage of legitimacy but in most circles of society, other than those considered disreputable, it carried throughout its life a stigma which made it a second class citizen. But now modern legislation has removed almost all the financial disadvantages of illegitimacy and it has become difficult to foretell how grave a handicap the stigma of illegitimacy will prove to be in later life. There are two aspects to this: how far will its neighbours look down on the child by reason of its illegitimacy and how far will the child itself feel a sense of inferiority. Doubtless there are still many circles where an illegitimate person is not well received. But there are many others, particularly in large towns, where nobody knows and nobody cares whether a newcomer is legitimate or illegitimate, and one hopes that prejudice against a person unfortunate enough to be illegitimate is decreasing", *per* Lord Reid. It is also interesting to note that in a survey carried out in 1970 by N.O.P. Market Research Ltd. into attitudes to crime, violence and permissiveness, it was found that 85 per cent of those questioned agreed that illegitimate children were not "social outcasts these days".

"anomalous" and makes inadequate provision for them.[20] Reform of the law can make only a limited contribution toward resolving these wider problems; but the law should not and need not exacerbate them. We therefore turn first to consider the present law, and then to examine possible reforms.

PART III

THE PRESENT LAW

Introduction

3.1 In this Part of the Report we examine the circumstances in which a person is regarded in law as illegitimate and the legal consequences of this classification. The statutory provisions concerning children are, however, exceedingly complex and we think it might be helpful at the outset to give a brief synopsis of this statutory framework, pointing to those provisions which are particularly relevant to illegitimacy.

The Statutory Framework

(a) The Affiliation Proceedings Act 1957

3.2 This Act[1] provides the only statutory procedure by which the father of an illegitimate child can be ordered to make financial provision for the child. The Act is characterised, as we shall see,[2] by a number of special procedural requirements which do not apply to applications for financial provision for a legitimate child, including the fact that such proceedings can only be brought in the magistrates' courts.

(b) The Family Law Reform Act 1969

3.3 This Act made important changes in the rules of succession which formerly applied to illegitimate children, by granting to them and their parents reciprocal rights to share on each other's intestacy as if the child had been born legitimate,[3] and by reversing the old rule of construction[4] whereby a gift by will or settlement to children or other relations was construed as referring only to legitimate persons or those tracing their relationship through such persons.[5] However, the Act does not fully equate the position of the illegitimate and legitimate child for succession purposes: in particular the illegitimate child still cannot succeed on the intestacy of his grandparents, or of his brothers and sisters or of any remoter relation, nor can such relations inherit on the intestacy of an illegitimate child.

(c) The Guardianship of Minors Act 1971

3.4 This Act consolidated the provisions dealing with guardianship and custody previously to be found in a number of Acts of Parliament, ranging

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[20]Lambert and Streather, *Children in Changing Families*, (1980) (a study, forming part of the National Child Development Study of the 640 children born illegitimate in the first week of March 1958), pp. 27 and 141–2.

[1]Which has been extensively amended by the Affiliation Proceedings (Amendment) Act 1972 and the Domestic Proceedings and Magistrates' Courts Act 1978.

[2]See paras. 6.12–6.24 below.

[3]Sect. 4. See further para. 8.5 below.

[4]*Hill* v. *Crook* (1873) L.R. 6 H.L. 265.

[5]Sect. 15.

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 in a single statute. The Act regulates the appointment of guardians of both legitimate and illegitimate children and contains a procedure whereby a child's parents, including the father of an illegitimate child,[6] can apply to the court for custody or access.[7] It is specifically provided, however, that the provisions of the Act dealing with maintenance orders do not apply where the child in question is illegitimate;[8] as we have seen, financial provision for the illegitimate child is governed exclusively by the Affiliation Proceedings Act 1957.[9]

(*d*) *The Guardianship Act 1973*

3.5 At common law, all parental rights over a *legitimate* child were vested solely in the child's father[10] until the child attained the age of majority.[11] In effect, the father's rights were exercisable to the exclusion of the mother[12] and, if the parents disagreed, the father's views were entitled to prevail unless and until the mother obtained a court order.[13] For many years the illegitimate child, on the other hand, was regarded by the common law as "*filius nullius*", nobody's child, but case law gradually accorded the illegitimate child's mother rights of custody similar to those of the father of a legitimate child and, by the end of the last century, it had been established that she had the legal right to the child's custody unless and until her rights were displaced by court order.[14] The 1973 Act reformed the law governing parental rights over legitimate children by providing that in relation to the custody or upbringing of a minor and in relation to his property or the application of income therefrom, a mother was to have the same rights and authority as the law had previously allowed to a father.[15] The Act also provided that the rights and authority of mother and father should be equal and exercisable by either without the other[16] and that if they were in dispute over the exercise of a specific right they should be able to apply to the court for directions.[17] However, these provisions do not

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[6]Guardianship of Minors Act 1971, s. 14(1).

[7]*Ibid.*, s. 9(1).

[8]*Ibid.*, s. 14(2).

[9]In particular, there is no power in wardship proceedings to order a man to make payments to his illegitimate child: Family Law Reform Act 1969, s. 6(6).

[10]*R.* v. *de Manneville* (1804) 5 East 221; *R.* v. *Greenhill* (1836) 4 Ad. & E. 624; *Re Agar-Ellis* (1883) 24 Ch. D. 317; *Thomasset* v. *Thomasset* [1894] P. 295.

[11]This was formerly 21, but is now 18: Family Law Reform Act 1969, s. 1.

[12]*R.* v. *de Manneville* (1804) 5 East 221.

[13]The mother might, for example, have made the child a ward of court, with the result that the court would then resolve all questions affecting the child's upbringing by reference to the welfare principle: cf. *Re D. (A Minor) (Wardship: Sterilisation)* [1976] Fam. 185 (where the court, at the instance of a third party, overruled a mother's decision that her child be sterilised: see paras. 4.20–4.21 below). The mother might also have applied for custody under the Guardianship of Minors Act 1971, but any custody order which she obtained was not enforceable so long as she lived with the father: Guardianship of Minors Act, 1971, s. 9(3). (But see now s. 5(A)(1) of the 1973 Act, as inserted by Domestic Proceedings and Magistrates' Courts Act 1978, s. 46, which modifies the effect of s. 9(3) where the parents cohabit or resume cohabitation for less than six months).

[14]*Barnardo* v. *McHugh* [1891] A.C. 388.

[15]Sect. 1(1).

[16]*Ibid*: see also Children Act 1975, s. 85(3).

[17]*Ibid.*, s. 1(3): see further para. 7.17 below.

apply to illegitimate children,[18] in relation to whom the common law rule still applies.[19]

(e) The Matrimonial Causes Act 1973

3.6 This Act consolidates the law relating to divorce, nullity and judicial separation proceedings. It contains important provisions relating to child custody and applies to any child, illegitimate or legitimate, who has been treated as a "child of the family" by the parties to a marriage.[20] It is because this Act may only be invoked in litigation about marriage that it is not primarily relevant in the present context.

(f) The Children Act 1975

3.7 This Act implements many of the recommendations of the Departmental Committee on the Adoption of Children.[21] For present purposes it is chiefly notable because it seeks to clarify for the future the terminology used in statutes dealing with the custody of children, a topic considered in more detail elsewhere in this Report.[22] Additionally the Act is of some importance in the present context because it seeks to restrict the use of legal adoption by a relative of a child (including the natural parents of an illegitimate child). The Act[23] also creates the institution of "custodianship", which is intended to give foster parents, step-parents and relatives caring for children a legally recognised position in relation to the chilren, who nevertheless preserve their legal links with the natural parents.

(g) The Inheritance (Provision for Family and Dependants) Act 1975

3.8 Under this Act specified dependants can apply to the court for relief on the grounds that reasonable financial provision has not been made for them out of a deceased person's estate. The relevant categories of dependant include the deceased's children, whether legitimate or illegitimate;[24] and it has been held that illegitimate children are in principle to be treated on the same basis as legitimate children.[25]

(h) The Supplementary Benefits Act 1976 (as amended)[26]

3.9 This Act imposes an obligation on parents to maintain their children[27] and, if the obligation is broken with the result that supplementary benefit is paid to meet a child's requirements, the sum so paid may be recovered by the Secretary of State from the defaulting parent.[28] However, where the child is

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[18]*Ibid.*, s. 1(7).

[19]Statutory recognition is now given to the common law rule by the Children Act 1975, s. 85(7) which provides that except as otherwise provided in any legislation the mother of an illegitimate child has, during her lifetime, the parental rights and duties exclusively.

[20]Sect. 52(1).

[21](1972) Cmnd. 5107 (The Houghton Committee).

[22]See paras. 4.17 and 7.12–7.14 below.

[23]Part II. These provisions are not yet in force.

[24]Sect. 25(1). Until 1969 an illegitimate child had no right to apply for reasonable provision out of the deceased's estate: see para. 8.5(d) below.

[25]*McC.* v. *A.* (1979) 9 Fam. Law 26.

[26]The Act as amended is set out in Schedule 2, Part II, to the Social Security Act 1980.

[27]Sect. 17.

[28]Sect. 18.

illegitimate no liability arises against the child's father unless he has been adjudged to be the putative father.[29]

(*i*) *The Legitimacy Act 1976*

3.10 This Act consolidates earlier legislation relating to legitimacy and legitimation.

(*j*) *The Domestic Proceedings and Magistrates' Courts Act 1978*

3.11 This Act, which implements recommendations made in the Law Commission's Report on Matrimonial Proceedings in Magistrates' Courts,[30] is primarily concerned to reform the law applied by magistrates in matrimonial proceedings between husband and wife. Like the Matrimonial Causes Act 1973, it applies in this context to any child, legitimate or illegitimate, who has been treated as a "child of the family".[31] 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 Act 1971 and 1973. In particular, it applies the conceptual framework introduced by the Children Act 1975[32] to such proceedings, as well as to matrimonial proceedings in the magistrates' courts.

The statute law and this Report

3.12 We have already noted the complexity of the existing statutory framework, and this has indeed been the subject of much adverse comment.[33] In preparing the draft legislation to give effect to the proposals for reform of the law contained in this Report we have had to work within the existing statutory framework; and we are conscious that implementation of our proposals will increase the already daunting complexity of the legislation. We have attempted to reduce the difficulty facing users of the statute law by including in the draft Family Law Reform Bill annexed to this Report a Schedule (a "Keeling" Schedule) setting out the text of the Act most affected (the Guardianship of Minors Act 1971) as it would be after the implementation of our proposals; the Schedule will also make it easier for readers of the Report to understand the effect of our legislative proposals.[34] We also envisage, when a suitable occasion presents itself, the consolidation of the legislation dealing with custody and guardianship, on which a substantial amount of work has already been done.[35] Consolidation will, we believe, significantly reduce the difficulty of ascertaining the state of the statute law in this field.

Legitimacy and legitimation: The present law in outline

(*a*) *The position at common law*

3.13 At common law a person is legitimate if, and only if,[36] his parents were validly married to each other

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[29]Sects. 17(2), 18(2), 19. See also para. 6.50 below.

[30]Law Com. No. 77 (1976).

[31]Sect. 88(1).

[32]See paras. 4.17 and 7.12–7.14 below.

[33]See e.g. the preface to Clarke Hall and Morrison, *Law Relating to Children and Young Persons* 9th ed., (1977), pp. vii–viii.

[34]See Sched. 4 to the draft Bill in Appendix A, and the explanatory note to clauses 2–11.

[35]See our Fifteenth Annual Report 1979–1980, Law Com. No. 107, para. 2.47.

[36]In practice however the strictness of the common law is modified by the presumption that a child born to a married woman is her husband's legitimate child. See further para. 10.48 below.

(i) when he was born, or

(ii) when he was conceived. (This alternative covers the case where he was born after his father's death, or where he was born to parents who were divorced between his conception and his birth).[37]

(*b*) *Statutory modifications*

3.14 The rigour of the common law has been mitigated by three developments which have extended "legitimate" status to some categories of person who would have been illegitimate at common law. These developments, which we discuss in turn, are—

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

(ii) legitimation;

(iii) adoption.

(*i*) *Children of void and voidable marriages*

3.15 One result of the common law rule outlined above was that any child of a void (as opposed to a voidable) marriage was necessarily illegitimate, since his parents had never in law been married. However, the Legitimacy Act 1959 (now re-enacted in section 1 of the Legitimacy Act 1976) provides that such a child shall 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;[38] 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 person treated as legitimate under these provisions is, unlike legitimated or adopted persons, entitled to succeed to a title of honour.[39]

3.16 At common law the child of a *voidable* marriage was legitimate but only so long as the marriage was not annulled; if the marriage were annulled, the decree operated retrospectively with the result that the parties' children were bastardised. In 1937,[40] however, the law was changed to preserve the legitimacy of children whose parents' marriage was annulled; it is now provided that where a voidable marriage is annulled, any child who would have been the legitimate child of the parties to the marriage if it had been dissolved instead of being annulled should be deemed to be their legitimate child.[41]

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[37]*Knowles* v. *Knowles* [1962] P. 161. 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 then died before his birth. The intervening death of the child's father should not affect his status: see Bromley, *Family Law* 6th ed., (1981), p. 256.

[38]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 Kahn-Freund, (1960) 23 M.L.R. 56; and para. 10.52 below.

[39]Legitimacy Act 1976, Sched. 1, para. 4; however, succession to the throne is not affected: *ibid.*, para. 5.

[40]Matrimonial Causes Act 1937. This Act originally only applied where the marriage was annulled on two specified grounds; it was extended to all voidable marriages by the Law Reform (Miscellaneous Provisions) Act 1949, s. 4.

[41]Matrimonial Causes Act 1973, Sched. 1, para. 12, reproducing the effect of s. 7(2) of the Matrimonial Causes Act 1937, as subsequently amended. Decrees of nullity granted after 31 July 1971 in respect of voidable marriages no longer operate retroactively: Matrimonial Causes Act 1973, s. 16, and see *Re Roberts dec'd.*[1978] 1 W.L.R. 653.

(ii) Legitimation

3.17 As we have seen,[42] the marriage of a child's parents before his birth was, at common law, a prerequisite to his legitimacy. Unlike many foreign juridictions, English law did not recognise the less strict doctrine of the canon law[43] 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 municipal law[44] by the Legitimacy Act 1926;[45] where the parents of an illegitimate person marry, the marriage renders him legitimate, provided that his father is domiciled[46] in England and Wales at the date of the marriage. The 1926 Act did not, however, legitimate a child whose parents were not free to marry when he 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.[47]

3.18 Broadly speaking, a legitimated person is now in the same position as one who is 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.[48] He also becomes legitimate so as to enable him to claim British citizenship through his father under the British Nationality Act 1981[49] and he is in principle entitled to inherit property as if he had been born legitimate.[50] In two respects, however, his legal position is still different from that of a legitimate child. First, he is not entitled to succeed to a dignity or title of honour.[51] Secondly, his domicile of origin will probably remain that of his mother, even though on legitimation he takes from his father a domicile of dependence.[52]

(iii) Adoption

3.19 An adopted child is today treated as the legitimate child of the adoptive parents save for the purpose of succession to any peerage or dignity or title of honour.[53] The adoption of an illegitimate child removes virtually all the legal disabilities still attaching to illegitimacy.

Illegitimacy and its legal consequences

3.20 Despite the statutory modifications of the common law concept of illegitimacy, which we have described in the previous paragraphs, the statistical

[42]At para. 3.13 above.

[43]Which before the Reformation was applied throughout Western Europe by the ecclesiastical courts.

[44]The application of rules of private international law permitted recognition in England of foreign legitimations in appropriate cases: *Re Goodman's Trusts* (1881) 17 Ch. D. 266.

[45]Sect. 1(1); see now Legitimacy Act 1976, s. 2.

[46]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.

[47]Legitimacy Act 1959, s. 1.

[48]Legitimacy Act 1976, s. 8.

[49]British Nationality Act 1981, s. 47(1): see Part XI below.

[50]Legitimacy Act 1976, ss. 5 and 10.

[51]*Ibid.*, Sched. 1, para. 4(2).

[52]On this point see Dicey and Morris, *The Conflict of Laws* 10th ed., (1980), p. 109, but cf. Wolff, *Private International Law* 2nd ed., (1950), pp. 118–9. Consequently, if the child acquires a domicile of choice and then abandons it without acquiring another, the domicile which will revive will be that taken from his mother at birth and not the domicile of dependence imposed as a result of legitimation: *Henderson* v. *Henderson* [1967] P. 77.

[53]Children Act 1975, Sched. 1, para. 10.

evidence points clearly to the fact that an increasing number of children are being born outside marriage,[54] and that a declining proportion of them cease to be illegitimate in consequence of legitimation or adoption.[55] There have in recent years been a number of improvements in the legal position of the illegitimate[56] (particularly in relation to their rights of inheritance[57] and maintenance[58] and their rights to claim under the Fatal Accidents legislation[59]). Nevertheless, there are still important areas (notably maintenance, citizenship and inheritance) where the illegitimate are treated differently from, and usually less favourably than, the legitimate. There are also a number of ways in which the position of an illegitimate child's father differs from that of the father of a legitimate child. It is convenient at this stage to summarise the ways in which an illegitimate person is still treated "differently" by the law.

(*a*) *Succession rights*

3.21 In two respects an illegitimate person's inheritance rights differ from those of a legitimate person. First, although an illegitimate person 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.[60] In effect, therefore, he is treated for this purpose as having no grandparents, brothers or sisters. Secondly, he cannot succeed as heir to an entailed interest[61] or to a title of honour.[62]

(*b*) *Citizenship*

3.22 A legitimate, legitimated, or adopted person can derive British citizenship under the new British Nationality Act 1981 from his mother or from his father. An illegitimate person can only derive citizenship from his mother because for the purposes of the Act "father" means only the father of a legitimate or a legitimated person.[63]

(*c*) *Maintenance*

3.23 It is perhaps in this area that the illegitimate child encounters the most serious discrimination. We discuss this matter in some detail later in this Report.[64] For the present it suffices to note the main features of the law. Maintenance for an illegitimate child can, as we have seen, only be obtained

[54]See para. 2.1 above.

[55]See para. 2.2 above.

[56]Significantly, for instance, the new right of grandparents to apply for access to their grandchildren includes their illegitimate grandchildren: Domestic Proceedings and Magistrates' Courts Act 1978, ss. 14 and 40.

[57]Family Law Reform Act 1969.

[58]Domestic Proceedings and Magistrates' Courts Act 1978, ss. 49–53.

[59]Fatal Accidents Act 1976, s. 1(5)(b) as substituted by clause 3(1) of the current Administration of Justice Bill.

[60]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.

[61]Family Law Reform Act 1969, s. 15(2).

[62]Legitimacy Act 1976, Sched. 1, para. 4(2). See generally Part VIII below.

[63]British Nationality Act 1981, s. 50(9). See generally Part XI below.

[64]In Part VI. It is interesting also to note the United States Supreme Court decision in *Gomez* v. *Perez* 409 U.S.535 (1973) where it was held that a state law denying illegitimate children a right of support given to legitimate children violated the equal protection guarantee of the United States Constitution.

by special proceedings known as affiliation proceedings.[65] Unlike applications for financial provision for legitimate children, an affiliation application can only be made by the child's mother;[66] it can only be made in the magistrates' court;[67] and it can only be pursued if certain special requirements are satisfied.[68] Moreover, because the magistrates' general powers to award financial provision are limited both in the amount that can be ordered and the range of orders that can be made an illegitimate child, unlike a legitimate child, can never benefit from any order for secured provision or property adjustment, or from a lump sum order exceeding £500.[69] Further, unlike the procedure by which financial provision may be secured for legitimate children affiliation proceedings may be seen as tainted with an aura of "criminality"[70] because they, and most appeals,[71] are heard in the courts most commonly associated in the public mind with the criminal law. Additionally the police play a significant role in serving the papers and in keeping the statistics.

3.24 It has also been said[72] that affiliation proceedings are not a particularly effective way of obtaining financial provision for the illegitimate; and comparatively few applications for orders seem to be made.[73] This may be partly because many mothers of illegitimate children are already receiving adequate

[65]See Part VI below.

[66]Or the child's custodian within three years of the making of a custodianship order: Children Act 1975, s. 45 (this provison is not yet in force).

[67]Cf. orders in respect of legitimate children where the High Court, the county court and the magistrates' court all have jurisdication.

[68]E.g. that the child's mother must be a "single woman" within tbe meaning of the Act; that proceedings must, subject to certain exceptions, be brought within 3 years of the child's birth; and that the mother's evidence must be corroborated. See further paras. 6.12–6.24 below.

[69]Domestic Proceedings and Magistrates' Courts Act 1978, s. 50(5). Secured financial provision and property adjustment orders feature only in the Matrimonial Causes Act 1973, which applies exclusively to the "children of the family" of a married couple. See further paras. 6.5–6.11 below.

[70]See Report of the Committee on Statutory Maintenance Limits (1968) Cmnd. 3587; Report of the Committee on One-Parent Families (1974) Cmnd. 5629, paras. 4.13–4–18; McGregor, Blom-Cooper and Gibson, *Separated Spouses*, (1970), pp. 120–122 and Table 92: see also Marsden, *Mothers Alone*, (1973), pp. 193–4.

[71]Appeal is to the Crown Court on law or fact and from either the magistrates' court or the Crown Court on a point of law by case stated to the Family Division of the High Court: Affiliation Proceedings Act 1957, s. 8; Magistrates' Courts Act 1980, s. 111. See further paras. 6.47–6.49 below.

[72]See e.g. Report of the Committee on One-Parent Families (1974) Cmnd. 5629, vol. II, Appendix 5, para. 70; Marsden, *Mothers Alone*, (1973), p. 189.

[73]The published figures show a decline in the number of applications from 3,854 in 1974 to 1,923 in 1978. See the Judicial Statistics 1979 (1980) Cmnd. 7977, Table J. 7(a). However, we understand that recent investigations by the Home Office have confirmed that there are deficiencies in the reporting of such statistics and it seems that there may well be significantly more applications and orders than the published figures would suggest. (This view is also supported by the legal aid statistics which show that in the year 1 April 1979 to 31 March 1980 there were 7,493 legal aid certificates granted to complainants for affiliation orders: see 30th legal Aid Annual Reports [1979–80] Appendix 8). Concern about the adequacy of the statistics for domestic proceedings in the magistrates' courts has been apparent for a number of years: see for instance the letter written by the Chairman of the Committee on Statutory Maintenance Limits to the Chairman of the Committee on Civil Judicial Statistics set out in (1968) Cmnd. 3684, Appendix M, and the further comments in the Report of the Committee on One-Parent Families (1974) Cmnd. 5629, paras. 4.413–4.417.

support from the child's father,[74] or from some other source;[75] but it has been claimed that there is a significant number of mothers who "cannot or will not complain to the court".[76] Hence, affiliation proceedings do not play as important a role in securing financial provision for non-marital children as they might. Explanations for this may include the nature of the proceedings themselves,[77] and the low level of orders that are actually made. There is now no formal limit[78] on the amount of periodical payments orders made in affiliation proceedings, but in practice orders rarely exceed the level of the mother's supplementary benefit entitlement in respect of herself and her child. The result is that because in many cases the mother is receiving supplementary benefit any sum that is awarded by the court will often merely go towards reducing the amount of that benefit. The supplementary benefits authority will "advise" the mother of her right to take proceedings, but it is official policy not to put pressure on her to do so.[79] For many mothers, therefore, the prospect of being involved in perhaps unpleasant proceedings outweighs any advantage which may be derived from obtaining an affiliation order.

(*d*) *The illegitimate child's father*

3.25 In the Working Paper we pointed out that from a strictly legal point of view the father of an illegitimate child was also at a considerable disadvantage. The position of the natural father[80] is different from that of the father of a legitimate child in the following respects—

(*a*) He has no automatic rights of guardianship, 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,[81] while the mother of an illegitimate child is living she has the parental rights and duties exclusively".

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[74]Particularly if the parents are cohabiting. It is very difficult to estimate how many illegitimate children are the product of stable unions outside marriage. However, in a survey of illegitimate children born in the first week of March 1958 it was found that 41 per cent were living with both their natural parents at the age of 11: Lambert and Streather, *Children in Changing Families*, (1980), pp. 55–57.

[75]For example, if the mother has married, or is cohabiting with a man other than the child's father and he assumes responsibility for the child. For the position with regard to supplementary benefit, see para. 3.9 above and n. 82 below. The Finer Committee concluded that only a very small proportion of illegitimate children remained solely dependent on their mothers for support: Report of the Committee on One-Parent Families (1974) Cmnd. 5629, para. 3.72.

[76]McGregor, Blom-Cooper and Gibson, *Separated Spouses*, (1970), p. 187.

[77]If the mother "dislikes the prospect of subjecting herself and her lover to unpleasant proceedings in a criminal atmosphere, she can easily decline to complain": *ibid.*

[78]Maintenance Orders Act 1968, s. 1 and Schedule. Before 1968 the maximum sum that could be awarded was limited; see para. 6.25, n. 67 below.

[79]See Supplementary Benefits Commission, Annual Report 1975 (1976) Cmnd. 6615, Appendix I; see also *Supplementary Benefits Handbook* 1977, Appendix 4.

[80]Cf. *Paton* v. *British Pregnancy Advisory Service Trustees and Another* [1979] Q.B. 276, 279: "I prefer to refer to the illegitimate father", *per* Sir George Baker P. In this Report, however, we follow the conventional usage.

[81]E.g. Guardianship of Minors Act 1971, ss. 9 and 14, which provide for custody and access orders in favour of fathers. See further paras. 7.19–7.21 below.

(*b*) Even if he is awarded custody, he cannot obtain maintenance for the child from the mother, whatever her means.[82]

(*c*) His 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 appointment under the mother's will.[83]

(*d*) Unless he is the child's guardian he does not have the rights normally possessed by a parent,[84] to remove a child who has been received into voluntary care by a local authority, and he has no *locus standi* to resist the assumption by the authority of parental rights and duties under section 3(1) of the Child Care Act 1980.[85]

(*e*) His 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.[86]

(*f*) His consent to the marriage of the child during the child's minority is not required unless he has been granted custody of the child by court order or has become the child's guardian under the mother's will.[87]

(*g*) There is no legal procedure by which he can establish his paternity without the consent of the child's mother.[88]

3.26 Against this background, we now turn to examine the field of choice for reform.

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[82]*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 authority. See further para. 6.50 below.

[83]Children Act 1975, ss. 12(1)(*b*) and 107(1). In certain circumstances he will however have a right to be heard: see paras. 9.3–9.4 below. In contrast the mother's agreement is required although it is, as with the adoption of legitimate children, subject to the court's power to dispense with agreement in certain circumstances: s. 12(1)(*b*).

[84]Child Care Act 1980, s. 2(3).

[85]Nor would he appear to have any *locus standi* under the Children and Young Persons Act 1969 to be served with notice of care proceedings or make various applications on behalf of the child under that Act. "Parent" is not specially defined for the purposes of the Act, but on the authority of *Re M. (An Infant)* [1955] 2 Q.B. 479 it is generally assumed that "parent" for the purposes of the Act does not include a putative father. See further paras. 7.48–7.53 below.

[86]We understand that in practice 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 Supreme Court requires the consent of the father to be obtained. See further para. 9.23 below.

[87]Marriage Act 1949, s. 3(1) and Sched. 2. See further para. 9.16 below.

[88]See *Re J. S. (A Minor)* [1981] Fam. 22. See further Part V and para. 10.2 below.

PART IV

REFORM OF THE LAW: THE FIELD OF CHOICE

The Working Paper's approach

4.1 In the Working Paper,[1] we suggested that there were three possible reactions to the fact that the law, by distinguishing as it does[2] between the "legitimate" and the "illegitimate" person, places the illegitimate person (and sometimes his mother or father) in a special and disadvantageous position. These three reactions can be summarised as follows—

(*a*) That continued discrimination against the illegitimate is in principle justified; consequently no further attempt should be made to remove the discriminatory elements from the law.

(*b*) That discrimination cannot in principle be justified and that accordingly the legal disadvantages of illegitimacy in so far as they affect the illegitimate person himself should be removed.

(*c*) That the belief that discrimination cannot in principle be justified logically requires not only the removal of the legal disadvantages of illegitimacy so far as they affect the illegitimate person, but also the abandonment of the legal distinction on which such discrimination is based. Accordingly, in this view, the status[3] of illegitimacy should be removed from the English law of domestic relations, with the result that there would no longer be any legal distinction between people on the basis of whether or not their parents were married.

We now consider these three approaches in turn.

The case for preserving discrimination against those born outside marriage

4.2 In the Working Paper[4] we said that the force of any argument justifying the preservation of discrimination against non-marital children had been much diminished as a result of the major changes already made to the common law position of the illegitimate person.[5] Carried to its logical conclusion, the argument in favour of continued discrimination against those born outside marriage might indicate a return to the strict common law position. It was, we thought—and this was indeed confirmed by the response to the Working Paper—difficult to believe that there would be any substantial support for turning the clock back in this way. There were, however, a few

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[1]Para. 3.1.

[2]See paras. 3.20–3.24 above.

[3]"Status means the condition of belonging to a class in society to which the law ascribes peculiar rights and duties, capacities and incapacities . . . Legitimacy is a status; it is the condition of belonging to a class in society, the members of which are regarded as having been begotten in lawful matrimony by the men whom the law regards as their fathers": *The Ampthill Peerage* [1977] A.C. 547, 577 *per* Lord Simon of Glaisdale. On the other hand it has been said that illegitimacy cannot properly be called a status: see Pollock and Maitland, *History of English Law* 2nd ed., (1898), vol. 2, p. 396. For convenience, however, we continue to refer to the "status of illegitimacy" in the text.

[4]At para. 3.2.

[5]See Part III above.

commentators who were prepared to accept the changes already made towards improving the legal status of the illegitimate child, but who thought that no further reform should be made. We think, therefore, that we should now summarise and consider the two main arguments advanced in favour of retaining discrimination.

(*a*) *The argument that the distinction between legitimacy and illegitimacy reflects social reality*

4.3 The first argument which is used to justify the preservation of legal discrimination against illegitimate people is that the distinction between "legitimacy" and "illegitimacy" is a useful one in social terms and reflects social reality. In the Working Paper we suggested[6] that although this might have been true at some periods of history,[7] it was difficult now to reconcile the traditional image of the illegitimate child as one who necessarily stands outside the family with the evidence, for instance, that over 50 per cent of illegitimate births are jointly registered and therefore publicly recognised by both parents,[8] and with recent estimates that over a third of illegitimate children are born into relatively stable unions.[9] Increasingly in fact and in law the illegitimate child has both a mother and an identified father.

4.4 Not all those who commented on the Working Paper were convinced by this reasoning. Some pointed out that increased readiness to recognise the fact of paternity did not necessarily enable any inferences to be drawn about the stability or otherwise of the relationship between the parents. There could, it was said, be all kinds of reasons which might lead to a man agreeing that his paternity be recorded even though he had never cohabited with the child's mother, and had no intention of doing so (not least the simple fact that the truth about paternity is now often more easily ascertainable than in the past). Moreover, commentators pointed out that although there might well be evidence of some, perhaps a substantial, increase in the numbers of persons cohabiting outside marriage, yet the evidence still seemed to establish that, in this country at least, for most couples child-bearing takes place within marriage.[10]

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[6]At para. 3.3.

[7]See generally Pinchbeck and Hewitt, *Children in English Society*, (1973), vol. 2, ch. 19 for an account of changing social attitudes. See also Laslett, Oosterveen and Smith (eds). *Barstardy and its Comparative History*, (1980), chs. 1 and 2.

[8]In 1979, of the 69,467 illegitimate births that were registered in England and Wales, no fewer than 38,349 (55.2 per cent) were registered on the joint application of both parents: Office of Population Censuses and Surveys, *Birth Statistics* 1979, (1981), Table 3.10. There has been a steady increase in this proportion in recent years, from 38.3 per cent in 1966 to 50.9 per cent in 1976 and 52.9 per cent in 1977: Central Statistical Office, *Social Trends*, (1979), Table 2.24.

[9]See e.g. Lambert and Streather, *Children in Changing Families*, (1980), pp. 55–56; Leete, "Adoption Trends and Illegitimate Births 1951–77", *Population Trends 14*, (1978), p. 9.

[10]See also Leete, *Changing Patterns in Family Formation and Dissolution in England and Wales*, (1979), p. 8. Cf. the position in Sweden, for instance, where amongst those aged 18 to 24 there are currently more cohabiting than married couples and it has been said that "many cohabiting couples . . . appear to function just like married couples as far as family formation is concerned": Leete, *op. cit.*, p. 7.

4.5 There is obviously some substance in these views. However we are still not persuaded by the argument which they are said to support—which is that discrimination against those born outside marriage is justified because it reflects what society as a whole expects and does. Changes in social attitudes are obviously difficult to measure and we certainly would not suggest that there is no longer any disapproval of child-bearing outside marriage; equally it has to be admitted that it does not follow from the fact that an illegitimate child's parents are ready and willing to acknowledge him and to bring him up that he will be accepted by their parents and others in their respective families. Nevertheless it does seem to us to be true—and this view was endorsed by most of the commentators on the Working Paper—that there has in recent years[11] been a significant modification, not only in attitudes to the distinction between legitimacy and illegitimacy, but also in the distinctions which could once be clearly drawn between the family environments of legitimate and illegitimate children.[12] On the one hand, increased divorce[13] has meant that a growing number of legitimate children are now being brought up by only one parent;[14] on the other, improved contraception and the availability of legal abortion[15] have contributed towards an apparent decline in the number of unwanted illegitimate births. Thus, in a recent survey[16] it was estimated that as many as 41 per cent of illegitimate children were being brought up by both their natural parents at the age of 11 and, in all, 65 per cent were living in some kind of two parent family. The General Household Survey for 1979 found that about 1 per cent of *all* children aged 0–15 (about one in seven of all illegitimate children) were living with both their natural parents in a household based on cohabitation rather than legal marriage. In the light of such facts, we in common with the overwhelming majority of commentators on the Working

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[11]Cf. the Victorian attitude described in *Hewer* v. *Bryant* [1970] 1 Q.B. 357, 369 *per* Lord Denning M.R. "[In 1883] if a daughter had an illegitimate child [her father] would turn her out of the house". In *The Ampthill Peerage* [1977] A.C. 547 it appears that, as a result of the third Baron continuing to allege in 1924–1925 that Geoffrey was illegitimate, there were difficulties in entering Geoffrey for any school of his mother's and grandmother's choice: see *ibid.*, at p. 580 *per* Lord Simon of Glaisdale.

[12]See e.g. Rapoport, Rapoport & Strelitz, *Fathers, Mothers and Others*, (1977), p. 109, "There is a sense in which variation, either by chance or by choice, is now the norm. Attempts to isolate any single 'normal' or even 'mainstream' type of family are thwarted by a host of variables which cut across every apparent 'type' ".

[13]In 1980 there were 148,301 decrees absolute of divorce, involving 163,221 children: O.P.C.S. Monitor Ref. FM2 82/1 11 May 1982. These figures may be contrasted with those for 1971, the first year in which the Divorce Reform Act 1969 was in operation. In that year there were 74,437 divorces involving 82,304 children.

[14]The total number of one-parent families is estimated to have increased from 570,000 in 1971 to 750,000 in 1976, a rise of 32 per cent: *Population Trends 13*, (1978), p. 4. A recent estimate for 1978 suggested that there were then as many as 920,000 one-parent families, representing one in eight of all families: Press Release, One Parent Families, 1 July 1980. The bulk of the increase is attributable to the rise in the number of broken marriages: Leete, "One Parent Families: Numbers and Characteristics", *Population Trends 13*, (1978), pp. 4–9.

[15]See para. 2.1 above: see also Leete, "Adoption Trends and Illegitimate Births 1951–77", *Population Trends 14*, (1978), pp. 9, 13 and 15.

[16]Lambert and Streather, *Children in Changing Families*, (1980), pp. 54–5.

Paper, can no longer accept that discrimination against those born outside marriage reflects "social reality".

(*b*) *The argument that the distinction between legitimacy and illegitimacy serves to uphold moral standards and support the institution of marriage*

4.6 The second argument which was used in favour of retaining a measure of legal discrimination against the illegitimate is that the distinction between legitimacy and illegitimacy served to buttress the institution of marriage.[17] In the Working Paper, we acknowledged that the provision of such support was a matter of great importance; and all the more so in the present context precisely 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, we also pointed out that many marriages were not stable, and that statistically it seemed that marriages entered into primarily for the purpose of ensuring that an expected child would not be born illegitimate[18] were especially at risk.[19] We therefore concluded that it was difficult to accept that the institution of marriage was truly supported by a state of the law in which the conception of a child might encourage young couples to enter precipitately into marriages which perhaps had little chance of success.[20]

4.7 Some commentators, however, considered that this line of argument rather missed the point. They thought that the essential factor was that to make any further change in the law would yet further blur the distinction between marriage (which, as we have seen, still seems to be widely accepted as a pre-requisite to procreation)[21] and relationships outside marriage. Those who took this view were perturbed by what was seen as an increasing tendency to regard the celebration of marriage as no more than "paper work";[22] they saw a danger that this tendency might receive more support if the law were to be

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[17]See Working Paper No. 74, para. 3.4.

[18]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 2.24.

[19]The failure rate of marriages where the wife marries young is statistically high and in a large proportion of marriages where the bride is under 20, she is also pregnant. (In 1976 for instance 50.6 per cent of all legitimate live births to women under 20 were conceived extra-maritally: *Social Trends*, (1977), Table 1.10). See further Dunnell, *Family Formation 1976*, (O.P.C.S.) (1979), para. 7.3; Thornes and Collard, *Who Divorces?*, (1979), particularly at pp. 71–80.

[20]See also Krause, *International Encyclopedia of Comparative Law*, vol. IV, ch. 6, p.8 who suggests that "empirical evidence makes it seem unlikely that there is a cause and effect relationship between liberal laws on illegitimacy and the incidence of illegitimacy". The author contrasts the illegitimacy rates in Scandinavia and draws attention to the fact that in Norway in 1960, where for two generations there had been complete equality between the legitimate and the illegitimate, the rate of illegitimacy was under 5 per cent as compared with 11.2 per cent in Sweden which at the time of writing had much more discriminatory laws. See also Saario, *Study of Discrimination Against Persons Born Out of Wedlock*, (1967), Annex VI.

[21]See also para. 4.4 and n. 10 above.

[22]Cf. *Campbell* v. *Campbell* [1976] Fam. 347, 352 *per* Sir George Baker P. See also *Foley* v. *Foley* (1981) 2 F.L.R. 215.

changed so as further to erode the legal distinction betwen marriage and other relationships.

(*c*) *Our views*

4.8 It is difficult to make any objective judgment about the validity of arguments of the kind considered in the above paragraphs, since to do so necessarily involves speculating on the indirect influence of changes in the law on people's behaviour. We certainly cannot with any confidence deny the possibility that a change in the law might indirectly foster a trend away from formal marriage towards other less formal relationships, and we share the widely[23] felt anxiety lest the institution of marriage be further eroded by blurring the legal distinction between marriage and other relationships. In the end, however, these possibilities, disturbing though they are, must be balanced against the certainty that if the law is not changed those who have the misfortune to be born illegitimate will continue to suffer from legal handicaps[24] which are now widely regarded as anomalous and unjustified. In our view, the scales tip decisively in favour of remedying the injustice of the present law.[25] We are fortified in this view by the fact that, although many of those who commented on the Working Paper were committed morally (and sometimes professionally) to upholding the institution of marriage,[26] an overwhelming majority of them agreed with our analysis of the right balance to be struck between the possible impact of a change in the law and the certain effects that would follow if no change were made.

(*d*) *Further considerations regarding continued discrimination*

4.9 There are a number of further arguments which weigh with us in reaching this conclusion. First, even if we were to accept in principle the arguments in favour of discriminating against children by reason of their parents' marital status, it would in our view still be impossible to justify the anomalies in the present law. Possibly one could accept a situation in which the law adopted a consistent policy of denying an illegitimate child rights of intestate succession, but it seems to us to be impossible to justify the present

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[23]But not universally. It has been said for instance by an American author that "the significance of marriage was once comprehensive . . . Today, under the impact of the postulate of equality the concept of status is being abandoned; and with the increasing importance of jobs and pensions rather than inherited wealth, the significance of the legitimate family in property matters is reduced. This trend is at once symbolised and advanced by the recent reforms assimilating the legal status of children born outside marriage with that of legitimate children. In addition, as the groups to which we belong become more and more heterogeneous, it becomes impossible to define, much less punish, the deviant. Marriage becomes primarily a concern of the individuals involved and is governed by their individual sense of ethics or utility, as the case may be...": Glendon, *State, Law and Family*, (1977), pp. 322–3.

[24]See Part III above.

[25]Cf. the remarks made by the European Court of Human Rights in the case of *Marckx* v. *Belgium* (1979–80) 2 E.H.R.R. 330, 346: "The Court recognises that support and encouragement of the traditional family is in itself legitimate or even praiseworthy. However, in the achievement of this end recourse must not be had to measures whose object or result is, as in the present case, to prejudice the 'illegitimate' family: the members of the 'illegitimate' family enjoy the guarantees of [Article 8 of the European Convention of Human Rights] on an equal footing with the members of the traditional family". See further para. 4.11 below.

[26]See Appendix B below.

rules under which, for example, the law 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[27] to pay particular attention to the elimination of anomalies, and we think that we would be failing in this duty if we suggested leaving the law in its present state.

4.10 Morever, there is a more profound anomaly in the policy of the law. In cases involving the custody or upbringing of children the settled and clear policy of the law is that the child's welfare is to be regarded as the "first and paramount" consideration[28] transcending even the consideration of doing justice between a child's parents[29] or between his parents and outsiders.[30] There will, of course, be circumstances in which it would be inappropriate to allow the child's welfare to be the governing factor,[31] but as a general principle we can see no reason of principle why the marital status of a child's parents should result in his being treated as a matter of general legal policy according to different legal rules. So to do would be inconsistent with the basic policy of the law relating to children stated above.

4.11 Another point which we think ought to be mentioned is the question of how far the principle of discrimination is consistent with this country's international obligations. We have already mentioned[32] the fact that the United Kingdom has signed and ratified the European Convention on Human Rights, and that, although the Convention has not been incorporated into English domestic law, individuals have the right to petition the European Commission of Human Rights.[33] Article 8 of the Convention provides that "Everyone has the right to respect for his private and family life, his home and his

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[27]Law Commissions Act 1965, s. 3(1).

[28]Guardianships of Minors Act 1971, s. 1 (which also applies to proceedings in which the administration of any property belonging to or held on trust for a minor, or the application of the income thereof, in in question) provides that in deciding such questions, the court "shall regard the welfare of the minor as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father".

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

[30]*J.* v. *C.* [1970] A.C. 668.

[31]For example, where the child has committed a criminal offence; see also *Re X. (A Minor) (Wardship: Jurisdiction)* [1975] Fam. 47 (where the interest of a child is not being put at risk of psychological damage by reading a book containing descriptions of her dead father's sexual behaviour was held not to be sufficient to prevail over the wider interests of freedom of expression); and *Re Mohamed Arif (An Infant)* [1968] Ch. 643 (where it was held that, even if there were jurisdiction to do so, the court would not use its powers to act in the child's welfare to question decisions taken under the Commonwealth Immigrants Act 1962).

[32]See para. 1.3 above.

[33]See para. 1.3 and n. 15 above. This right only exists if contracting states recognise it; the U.K. has renewed its recognition on a temporary basis at five yearly intervals since 1966, most recently in January 1981: *Hansard* (H.L.) 24 November 1980, vol. 415, col. 18.

correspondence",[34] and in a recent complaint from Belgium, the *Marckx Case*,[35] the European Court of Human Rights held that the rights declared by Article 8 were violated by the then Belgian law because it unjustifiably discriminated against those of illegitimate birth.[36] Although the European Court is not strictly bound by its own decisions, and its judgments are efective only as regards the parties to the case,[36] the importance of this case for English law is obvious and should not be underrated.[37] Implicit in the Court's judgment is the view that a distinction between "legitimate" and "illegitimate" cannot *of itself* justify differences in the enjoyment of the rights and freedoms guaranteed by the Convention.[38] Such distinctions, if they exist, instead require "special argument",[39] and will be upheld only if they are found to have an objective and reasonable justification. For the reasons which we have outlined above we do not believe that such a justification for the present English law is possible. Unless and until that law is changed there must therefore be a risk that a complaint from this country would be upheld.

4.12 We have also referred[40] to the European Convention on the Legal Status of Children Born Out of Wedlock which the United Kingdom has signed and ratified. The preamble to the Convention notes[41] the efforts being made to improve the legal status of children born outside marriage by reducing those differences betwen their legal status and that of other children which are to their disadvantage. The individual articles of the Convention record the agreement of the member states of the Council of Europe on matters such as maternal and paternal affiliation, scientific evidence, maintenance, parental authority, access, succession and legitimation. The United Kingdom, in ratifying the Convention, entered reservations (so far as the law of England and Wales[42] is concerned) in relation to Article 6, paragraph 1 (the obligation of the father and mother to maintain the child born out of wedlock as if it were born in wedlock) and in relation to Article 9 (the right of succession by a child born out of wedlock to the estate of the families of its father and mother as if it had been born in wedlock).[43] English law is at present at

[34]Article 14, which has no independent existence, but which forms an integral part of each of the other Articles laying-down rights and freedoms goes on to provide that "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

[35]*Marckx* v. *Belgium* (1979–80) 2 E.H.R.R. 330.

[36]Article 53.

[37]See e.g. Maidment, "The Marckx Case", (1979) 9 Fam. Law 228, in which the author concludes, "should the Law Commission delay or encounter difficulties in bringing its new proposals before Parliament for enactment, who knows whether an English Paula Marckx may not decide to make a similar application to the European Court of Human Rights, and receive a similar judgment." As the author points out, however, the Belgian law that was adjudicated upon in the case was more discriminatory than the corresponding English law. See also Meulders-Klein, *"Cohabitation and Children in Europe"*, (1981) 29 Am. Jo. Comp. Law 359, 390–1.

[38](1979–80) 2 E.H.R.R. 330, 341–3.

[39]*Ibid.*, at p. 351.

[40]See para. 1.3 above.

[41]The text of the Convention is set out in Appendix D below.

[42]And Northern Ireland. A further reservation was entered as regards the law of Scotland.

[43]For the United Kingdom's position regarding entailed interests and titles of honour in the light of the Convention see para. 8.12 below.

variance with the aim of the Convention in so far as the Convention seeks to reduce discrimination which operates to the disadvantage of the child born outside marriage. In order to comply fully and without reservation with the Convention it would be necessary to reform English law in relation to maintenance and succession so as to remove the discrimination which exists in those areas.[44]

4.13 A final point which we have already mentioned but which might be worth repeating here, is that increasing numbers of children are now being born illegitimate and are remaining illegitimate all their lives.[45] It accordingly seems to us to be over-complacent to assume that the problems of illegitimacy are diminishing ones. Reform is not an exercise of merely academic interests; on the contrary it affects the legal rights of a great many people. We therefore turn now to consider alternative policies which might be adopted in removing this discrimination from our law.

Reform of the law: models involving the abolition of legal discrimination against those born outside marriage

(a) Introduction

4.14 In the Working Paper we posed a choice between two alternative models for reform, each of which was designed to remove the legal discrimination against a person born outside marriage. In the first of these models, it was proposed that statute should remove certain[46] of the legal consequences of illegitimacy and, in particular, all consequences which were adverse to the child. This model would involve, for example, abolishing affiliation proceedings and giving the illegitimate child the same rights under the Guardianship of Minors Acts 1971 and 1973 to seek orders for financial support from both of his parents as are now enjoyed by legitimate children; it would also give him the same right to succeed on the intestacy of ascendant and collateral relatives as if he had been born legitimate. This model would not, however, involve the complete assimilation of the legal position of a person born outside marriage to that of other persons. In particular it would still allow a distinction to be drawn between children born within and outside marriage in relation to their parents' entitlement to "parental rights". In contrast, the second model, which was the one we provisionally favoured,[47] was more radical and would have involved the total disappearance of the concepts of both "illegitimacy" and "legitimacy" from the English law of domestic relations. It followed, in our view, as a necessary corollary,[48] that, under this second model, both parents

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[44]See Part VI below in relation to maintenance; and Part VIII below in relation to succession.

[45]See Leete, "Adoption Trends and Illegitimate Births 1951–77", in *Population Trends 14*, (1978). See also paras. 2.1–2.3 above.

[46]In the Working Paper we also pointed out (at para. 3.9) that it would be possible under this model to be selective about the particular reforms to be effected. There was virtually no support on consultation for any reform which preserved even limited discrimination as against the child.

[47]For the reasons set out at para. 4.25 below and paras. 3.14 to 3.22 of the Working Paper.

[48]Some of our commentators disputed the validity of this assumption: we refer to these criticisms in greater detail at para. 4.44 below.

would be entitled to "parental rights" over a child born outside marriage in the same way, and to the same extent, as they are now entitled to such rights over a child born within marriage.

4.15 We received many thoughtful and cogently argued comments on the choice between these two models. In the light of these comments it is clear that the fundamental difference between the two was seen to lie not so much in the question of abolishing the concept of illegitimacy, but in whether both parents of a child born outside marriage should automatically be entitled to exercise "parental rights" over him or her (subject, of course, to the courts' overriding power to divest parents of such rights or to control their exercise).[49] The fundamental issue in making a choice between the alternative models therefore involves weighing up, on the one hand, any disadvantages which might flow from the automatic attribution of such rights to all parents against, on the other hand, the further advantages which might be expected to result from the total disappearance from the English law of domestic relations of the legal concepts of "legitimacy" and "illegitimacy". Consequently we turn to analyse this difficult problem at somewhat greater length than we did in the Working Paper. We first examine the legal definition and significance of "parental rights" in English law.[50] We then look at the arguments for and against extending these rights so that they automatically vest in both parents of a child born outside marriage,[51] and we consider some of the methods by which these arguments might be met.[52] We conclude this Part of the Report by outlining our basic recommendation for reform of the law.[53]

(*b*) *The definition and significance of "parental rights" in English law*

4.16 Under the present law both the mother and father of a legitimate child have, in the first instance,[54] certain rights and authority in relation to the legal custody and upbringing of their child and in relation to the administration of his property.[55] In contrast, where the child is illegitimate, the mother has, during her lifetime, all such rights exclusively;[56] and the child's father merely has a right to apply to the court for an order granting him custody or access.[57]

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[49]See also paras. 7.22–7.24 below.

[50]See paras. 4.16–4.23 below.

[51]See paras. 4.24–4-27 below.

[52]See paras. 4.28–4.42 below.

[53]See paras. 4.43–4.51 below.

[54]Subject to the courts' powers to resolve disputes between parents under s. 1(3) of the Guardianship Act 1973, and to make orders relating to guardianship, custody and access under the Guardianship of Minors Act 1971 and the Matrimonial Causes Act 1973. For the courts' powers to deprive a parent of guardianship rights, see paras. 7.8–7.9 below.

[55]Guardianship Act 1973, s. 1(1), as amended by the Domestic Proceedings and Magistrates' Courts Act 1978, s. 36(2). Until 1973, however, such rights were vested solely in the father of the child to the exclusion of the child's mother. See further paras. 7.16–7.17 below.

[56]Guardianship Act 1973, s. 1(7); Children Act 1975, s. 85(7).

[57]Under the Guardianship of Minors Act 1971, s. 14.

4.17 What, then, are these "parental rights"? Unfortunately the law is confusing and unclear.[58] In particular, statute law does not provide any helpful explanation. The Interpretation Act 1978 provides[59] that the expression "the parental rights and duties" is to be construed[60] in accordance with Part IV of the Children Act 1975; that Act in turn provides[61] that—

> "unless the context otherwise requires, 'the parental rights and duties' means as respects a particular child (whether legitimate or not), all the rights and duties which by law the mother and father have in relation to a legitimate child and his property; and references to a parental right or duty shall be construed accordingly and shall include a right of access and any other element included in a right or duty".[62]

It is clear, therefore, that in the absence of guidance derived directly or indirectly[63] from the Children Act 1975 it is necessary to turn, as that Act requires, to the common law to determine what is to be understood by the expression "parental rights".

4.18 For two closely related reasons, however, elucidation by reference to the common law is a matter of considerable difficulty.[64] First, there is little or no modern judicial discussion of the rights which a parent has.[65] Indeed there is, we believe, no case decided this century in which any extended consideration has been given to the scope of the common law rights of a parent. Secondly, parental rights have become largely irrelevant in legal proceedings: the court does not usually need to ask what a parent is *entitled* to do at common law, since it will concern itself solely with the question of what course of action will

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[58]See e.g. Eekelaar, "What are Parental Rights?", (1973) 89 L.Q.R. 210; Hall, "The Waning of Parental Rights", [1972 B] C.L.J. 248; Freeman, "What rights and duties do parents have?", (1980) 144 J.P. 380.

[59]Sched. 1.

[60]In relation to Acts passed on or after 12 November 1975: Interpretation Act 1978, Sched. 2, para. 4(1)(a).

[61]Sect. 85(1).

[62]It is not clear why the Act singles out for specific mention a parent's right of access: see Bevan and Parry, *Children Act 1975*, (1979), para. 211.

[63]The existence of certain rights might be inferred indirectly from the words of the Act itself. For example, because Parliament in section 86 specifically provided that a "person shall not by virtue of having legal custody of a child be entitled to effect or arrange for his emigration from the United Kingdom unless he is a parent or guardian of the child", it might be argued that a person with "parental rights" does have the right to arrange such emigration.

[64]"If one were asked to define what are the rights of a parent apropos his child or her child I for one would find it very difficult": *Re N. (Minors) (Parental Rights)* [1974] Fam. 40, 46 *per* Ormrod L.J.

[65]There are, however, valuable discussions in textbooks and law review articles: see e.g. Bromley, *Family Law* 6th ed., (1981), ch. 9; Bevan and Parry, *Children Act 1975*, (1979), paras. 209–230; Craffe, *La Puissance Paternelle en Droit Anglais*, (1971); Hall, "The Waning of Parental Rights", [1972 B] C.L.J. 248; Eekelaar, "What are Parental Rights?" (1973) 89 L.Q.R. 210; Freeman, "What rights and duties do parents have?", (1980) 144 J.P.380; Maidment, "The Fragmentation of Parental Rights", (1981) 40 C.L.J. 135 (and see also Maidment, "The Fragmentation of Parental Rights and Children in Care", (1981) J.S.W.L. 21); Dickens, "The Modern Function and Limits of Parental Rights", (1981) 97 L.Q.R. 462.

best promote the welfare of the child.[66] So far has this trend been carried that it can be cogently argued that to talk of parental "rights" is not only inaccurate as a matter of juristic analysis[67] but also a misleading use of ordinary language. In this view, the concept of parental rights, in the sense of conferring on a parent control over the person, education and conduct of his children throughout their minority[68] reflects an outdated view of family life[69] which has no part to play in a modern system of law—the more so since the court will never enforce such rights against the interests of the child.

4.19 We agree that the connotations of the word "rights" are in this context unfortunate; and that it might well be more appropriate to talk of parental *powers*,[70] parental *authority*, or even parental *responsibilities*, rather than of *rights*.[71] Nevertheless, we cannot agree that the question of whether both parents of a child born outside marriage should automatically be endowed with such powers, authority, or responsibility is unimportant. On the contrary it seems to us to be of vital significance: under our law, unless and until a court order is obtained, a person with parental rights is legally empowered to take action in respect of a child in exercise of those rights.[72] It is true that if appropriate procedures are initiated he or she may be restrained from exercising those rights if it is not in the child's interest that he or she should do so; but unless and until such action is taken the person with parental rights would be legally entitled to act. It is self-evident that the court cannot intervene until its powers have been invoked, and in many cases this

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[66]Guardianship of Minors Act 1971, s.1; *J.* v. *C.* [1970] A.C. 668; *Re B. (A Minor) (Wardship: Medical Treatment)* [1981] 1 W.L.R. 1421.

[67]See Eekelaar, "What are parental rights?", (1973) 89 L.Q.R. 210.

[68]*Re Agar—Ellis, Agar—Ellis* v. *Lascelles* (1883) 24 Ch. D.317 326 *per* Sir Baliol Brett, M.R.

[69]"I would get rid of the rule in *Re Agar-Ellis* and of the suggested exceptions to it. That case was decided in the year 1883. It reflects the attitude of a Victorian parent towards his children. He expected unquestioning obedience to his commands. If a son disobeyed, his father would cut him off with a shilling. If a daughter had an illegitimate child, he would turn her out of the house. His power only ceased when the child became 21. I decline to accept a view so much out of date. The common law can, and should, keep pace with the times. It should declare, in conformity with the recent report on the Age of Majority, that the legal right of a parent to the custody of a child ends at the eighteenth birthday; and even up till then, it is a dwindling right which the courts will hesitate to enforce against the wishes of the child, the older he is. It starts with a right of control and ends with little more than advice". *per* Lord Denning M.R. in *Hewer* v. *Bryant* [1970] 1 Q.B. 357, 369.

[70]It should also be noted that academic writers are increasingly urging that greater attention be given to the question of children's rights as against parental rights: see e.g. Freeman, "The Rights of Children in the International Year of the Child", [1980] C.L.P.1; Dickens, "The Modern Functions and Limits of Parental Rights", (1981) 97 L.Q.R. 462, 471. In the United States the constitutional guarantee of equal protection has been a fertile source of development in this area: see the materials collected in "Developments in the Law, The Constitution and the Family", (1980) 93 Harv. L.R. 1156.

[71] See e.g. Bromley, *Family Law* 6th ed., (1981), p. 280.

[72]Although, as we have said above, it is often difficult to ascertain just what rights a parent does have over his or her child, it seems certain that rights such as the right to authorise medical treatment, the right to consent to the child's marriage between the ages of 16 and 18, and the right to determine where the child should live etc. would be included. See e.g. Eekelaar, "What are Parental Rights?", (1973) 89 L.Q.R. 210; Hall, "The Waning of Parental Rights", [1972 B] C.L.J. 248; Freeman, "What rights and duties do parents have?", (1980) 144 J.P.380.

intervention might well come too late to be effective.[73] It should in this context also be noted that statute (i) specifically provides[74] that where two persons have joint parental authority[75] *either* of them may exercise their powers in any manner without the concurrence of the other, provided only that the other has not "signified disapproval of its exercise or performance in that manner", but (ii) does not impose any obligation on either of the persons having "parental rights" to inform the other of any proposed exercise of authority.[76]

4.20 The legal significance of entitlement to parental rights (and the potential limitations on the exercise of these rights) is we think well illustrated by reference to the decision in *Re D. (A Minor) (Wardship: Sterilisation).*[77] In that case, the mother of an 11 year old handicapped girl was concerned about the possibility that her daughter might be seduced and, as a result, herself give birth to an abnormal baby. Consequently, acting on the advice of a consultant paediatrician and a consultant gynaecologist, she made arrangements for the child to be sterilised. Before the operation could be carried out, a social worker who had become concerned about the case issued proceedings to make the child a ward of court. The court thus had to determine, by reference to the fundamental principle that the welfare of the child is considered "first, last and all the time",[78] whether or not the operation should be permitted. Applying that test, the court held that it was not in the child's interests that she should be irrevocably deprived of a woman's "basic human right" to bear children.[79] Accordingly, the operation was not to be performed.

4.21 What is significant about this case in the present context is not only what actually happened, but what would have happened had not a concerned individual[80] both come to know about what was proposed, and also been prepared to institute legal proceedings before irreversible action had been taken, notwithstanding her potential liability in legal costs. Had it not been for those fortuitous events the operation could have been carried out and neither

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[73]See further paras. 4.20–4.21 below.

[74]Children Act 1975, s. 85(3).

[75]As is now the case in relation to the parents of a legitimate child: Guardianship Act 1973, s. 1.

[76]Bromley, *Family Law*, 6th ed., (1981) p. 281.

[77][1976] Fam. 185. The significance of this case in relation to parental rights is examined in Dickens, "The Modern Function and Limits of Parental Rights" (1981) 97 L.Q.R. 462, 473 *et seq.* Cf. also *Re B. (A Minor) (Wardship: Medical Treatment)* [1981] 1 W.L.R. 1421 where, after the parents had refused their consent, the Court of Appeal authorised an operation to save the life of a child born with Down's syndrome on the ground that on the available evidence it was in the best interests of the child that it should be allowed to live.

[78]*Re D. (A Minor) (Justices' Decision: Review)* [1977] Fam. 158, 163 *per* Dunn J.

[79]*Re D. (A Minor) (Wardship, Sterilisation)* [1976] Fam. 185, 193 *per* Heilbron J.

[80]Local authorities may in some cases bring a child before a juvenile court, for example, if his proper development is being avoidably prevented, and he is in need of care or control which he is unlikely to receive unless the court makes a care order (or other order under the Act): Children and Young Persons Act 1969, s. 1(1); see also *Re S. (A Minor) (Care Order: Education)* [1978] Q.B. 120, 139. However, these powers and duties are somewhat circumscribed, and the law imposes no duty on any official or authority to initiate wardship proceedings even if it is aware of the facts; an argument that the Official Solicitor had a duty to take such proceedings was rejected by the court in *Re D. (A Minor) (Wardship: Sterilisation)* [1976] Fam. 185.

the child nor any other person would subsequently have had any clear right to legal redress.

4.22 Cases as dramatic as this are unlikely often to arise; but there are significant areas in which a parent's decision unilaterally to exercise his or her authority over a child, to the latter's possible detriment, is likely to be of crucial importance. Probably the most obvious arises in relation to the physical custody of the child. Here again, a clear distinction has to be drawn between the situation where legal proceedings to resolve a dispute have been started and the situation which will exist in the absence of such proceedings. If proceedings have been started, the court will decide the questions of how and where the child spends his time and of who should have access to him by reference to the child's welfare.[81] Furthermore, the courts have extensive power by the grant of injunctions to prevent "kidnapping" of children.[82] In the absence of a court order, however, a person who is entitled to the parental rights may, for example, lawfully[83] intercept the child on its way to or from school, and he could then, if he were so minded, remove the child outside this country and effectively[84] defy any subsequent court order to return him.

4.23 We think that it emerges from the discussion in the previous paragraphs that the question of who in the first instance has "parental rights" is still, despite the courts' powers of intervention, a matter of importance. In the Working Paper we expressed the view that if the concept of illegitimacy were to be removed from family law it would be a *necessary* corollary that the distinction which the law now draws in relation to parental rights between, on

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[81]*B.* v. *B.* [1971] 1 W.L.R. 1486; *M.* v. *M. (Child: Access)* [1973] 2 All E.R. 81; see also *Re W. (Minors) (Wardship: Jurisdiction)* [1980] Fam. 60.

[82]See also Matrimonial Causes Rules 1977 (S.I. 1977 No. 344), r. 94, and *Practice Direction (Ward: Removal from Jurisdiction)* [1977] 1 W.L.R. 1018. For an outline of the law and practice see Matrimonial Proceedings in Magistrates' Courts (1976) Law Com. No. 77, paras. 10.2–10.5; similar powers to enable the domestic court to prohibit the removal of a child in respect of whom an order has been made are conferred by the Domestic Proceedings and Magistrates' Courts Act 1978, s. 34(1).

[83]I.e. without committing any criminal offence or civil wrong. Child-stealing is an offence under s. 56 of the Offences Against the Person Act 1861. That Act also specifically excepts any person who "shall have claimed to be the father" of an illegitimate child from prosecution for getting possession or taking the child. It should however be noted that a parent who uses violence to remove the child may well be guilty of the offence: *R.* v. *Austin and Others* [1981] 1 A11 E.R. 374, 378 *per* Watkins L.J. It would also appear that the defence is not available in respect of a charge of detaining a child under section 56: see Smith & Hogan, *Criminal Law* 4th ed., (1978), pp. 386–7. In practice prosecutions are not brought in cases of domestic dispute; the only practical utility of the offence in this context would appear to be that a person reasonably suspected of having committed the offence could be arrested since it is an "arrestable offence" under Criminal Law Act 1967, s. 2. The Fourteenth Report of the Criminal Law Revision Committee, Offences against the Person (1980) Cmnd. 7844, pp. 98–107 makes proposals for reform in this area of the law but suggests the retention of special defences to unlawful detention for those who have, or believe that they have "lawful control" (as defined) over a child under 14, and to abduction for those who are in fact the mother or father of the child (except where the intention is to take the child out of the country).

[84]The implementation of the Council of Europe Convention on the Recognition and Enforcement of Child Custody Decisions (which the U.K. has signed but not yet ratified) might provide redress in some cases.

the one hand, those children now "legitimate", and on the other, those now "illegitimate" would disappear along with all other distinctions based on legitimacy or illegitimacy. Thus our recommendation that fathers of illegitimate children should have parental rights was not intended to be an end in itself; it was merely a necessary incident of the abolition of all legal distinctions between children founded solely on their parents' marital status. We nevertheless thought it necessary to draw attention to the significance of parental rights in this context and to the consequences of such rights being automatically vested in all fathers. Our tentative conclusion was that any adverse consequences did not outweigh the benefits to be derived from abolition of the status of illegitimacy, but many commentators disagreed with this view. This issue is clearly of fundamental importance; and we must accordingly now reconsider, in the light of the anxiety expressed by many of those who commented on the Working Paper about this aspect of the matter, the arguments for and against a reform of the law which would involve an automatic extension of parental rights.

(c) The arguments for and against a reform involving the vesting of parental rights in the father of an illegitimate child: our present view

4.24 In the Working Paper we summarised the case against automatically extending parental rights to the father of an illegitimate child in the following words—

> "3.9 ... It may be argued that [it is right that the father of a child born out of wedlock should have neither rights nor duties unless and until the court so orders] 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. 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 was 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.
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> 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.

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) properly exercise any of the parental rights over the child .... 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."

4.25 As against these disadvantages, we suggested in the Working Paper that wholly abolishing illegitimacy as a status would improve the position of children born outside marriage in a way in which the mere removal of the remaining legal disadvantages attached to illegitimacy would not. We suggested that the law could help to lessen social prejudices by setting an example clearly based on the principle that the parents' marital relationship was irrelevant to the child's legal position. Changes in the law (we said)[85] could not 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."

We considered that the risk that an "unmeritorious" father would exercise his "parental rights" contrary to the child's interests and contrary to the wishes of his mother should "not be allowed to govern the issue", and concluded that the case for root-and-branch reform was 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

[85]See para. 3.15.

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."[86]

4.26 In the course of consultation however it became clear that there was a widely held feeling that the Working Paper analysis considerably underestimated the problems inherent in any proposal which would involve automatically conferring "parental rights" on the father of those born outside marriage. There were five particular areas of anxiety—

(*a*) It was said that automatically to confer "parental rights" on fathers could well result in a significant growth in the number of mothers who would refuse to identify the father of their child. Mothers would be tempted to conceal the father's identity in order to ensure that in practice[87] he could not exercise any parental rights.[88] If this were to happen, it would detract from the desirable objective of establishing, recognising and fostering genuine familial links.

(*b*) It was said that to confer rights on the father might well be productive of particular distress and disturbance where the mother had subsequently married a third party, who had put himself *in loco parentis* to the child.[89] The possibility—however unlikely in reality—of interference by the child's father could well engender a damaging sense of insecurity in the family; matters would be all the worse if the father did intervene. Some commentators argued that the result in such a case might be that the mother and her new partner would seek, for instance by an application for custody or adoption, to forestall any possible intervention by the natural father with the result that the child would be prematurely denied the possibility of establishing a genuine link with him.

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[86]See para. 3.16.

[87]In theory under the Working Paper's second model, parental rights would be vested in the father whoever he might be. However in practice it would only be a father who could provide evidence of his paternity who would be able to establish his rights to exercise them.

[88]Cf. Stone, *Family Law*, (1977), p. 19 where the author, in commenting upon the fact that in some civil law jurisdictions the father has the right to recognise and thereby acquire parental rights over non-marital children, observes that the mother's only alternative to being subjected to having her child kept against her will under the father's influence is to deny the true paternity.

[89]From a follow-up study of those children born in the week 3–9 March 1958 it can be calculated that almost a quarter of those who had remained illegitimate were living with a step-parent by the time that they were 11: Lambert and Streather, *Children in Changing Families*, (1980), p. 57.

(*c*) It was said that automatically to confer "rights" on the father of a child born outside marriage could put him in a position where he might be tempted to harass or possibly even to blackmail the mother at a time when she might well be exceptionally vulnerable to pressure. In this context a number of commentators[90] made what seems to us to be the valid point that what is in issue is not so much how the law is perceived by the professional lawyer or the experienced social worker, but how it might be perceived by a fearful and perhaps ill-informed mother.[91] Sometimes what the law is thought to be may be almost as important as what it in fact is. Thus the parents of a child might well attach more significance to the fact that the law had given the father "rights" than would a lawyer who is accustomed to the forensic process and able dispassionately to consider the likelihood of a court in fact permitting a father to exercise those rights, given its overriding concern to promote the child's welfare.

(*d*) It was also suggested that the experience of countries which have sought to abolish the discrimination affecting those born outside marriage is generally against automatically conferring "parental rights" on the father of an illegitimate child.[92] In most of those

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[90]See e.g. Hayes, (1980) 43 M.L.R. 299.

[91]In their response to the Working Paper, the National Council for One Parent Families observed that their Advice and Rights Department "receives hundreds of enquiries each year from unmarried mothers and single pregnant women seeking to be reassured about their rights over their children, and to know whether these rights can be challenged, particularly by the father". The knowledge that at present a father of an illegitimate child has no rights apart from a right to apply to the courts for custody and access "offers a great deal of protection and assurance to the unmarried mother and her child. It would be difficult to be able to explain to an unmarried mother the concept of *'prima facie'* rights—that the mother would normally have actual custody of the child and that although the father would have automatic rights, it may be impossible for him to exercise those rights without having actual physical care of the child, and [he] would, in any case, have to apply to the court if the mother refuses him custody or access and so on. It is our experience that most parents would not be happy with this unsettled, complex and insecure state of affairs, but would prefer the matter to be straightforward and legally determined": *An Accident of Birth*, (1980), pp. 4–5.

[92]In West Germany the Federal Constitutional Court recently held, in denying access by two fathers of children born outside marriage, that there was a "special need" to protect such children because their parents could, unlike the parents of children born in marriage, always terminate their relationship without the State's intervention; a separate legal regime for parental authority for such children vesting parental authority entirely in the mother was accordingly justifiable: Cases 1 *B.* v. *R.* 1516/78 and 1 *B.* v. *R.* 964/80: 24th March 1981. The court also denied, for similar reasons, the right of an unmarried father to share parental rights with the mother with whom he was cohabiting: 1 *B.* v. *R.* 1337/80. For a general examination of the position in Europe, see Meulders-Klein, "*Cohabitation and Children in Europe*", (1981) 29 Am. Jo. Comp. Law, 359, 378–83. See also para. 7.29 below.

countries[93] the father does not have the full range of parental rights unless he has obtained a court order[94] or he falls within a delimited category of fathers in whom the law automatically recognises parental rights.[95]

(*e*) Finally it was suggested that if all fathers automatically possessed parental authority over their illegitimate children, practical difficulties would be encountered where the child was in the care of a local authority under section 2 of the Child Care Act 1980.[96] These would arise because a local authority is not entitled to keep a child in its care if a person having parental rights[97] expresses a desire to take over the child's care. The result might therefore be either that the father would, contrary to its best interests, take the child out of care, or alternatively that long-term planning for the child's future would be delayed until the father's rights had been terminated.[98] In such cases the child might well suffer.

4.27 In the light of these particular areas of anxiety, a significant number of those who commented on the Working Paper suggested that parental rights should not vest automatically in all fathers of children born outside marriage, but only in a class of fathers defined so as to exclude the "unmeritorious". We have therefore anxiously reconsidered whether there is any acceptable way in which this could be done.

(*d*) *Possible limitations on the automatic conferment of "parental rights" on the parents*[99] *of an illegitimate child*

4.28 Three main proposals were made to us for limiting the automatic

[93]South Australia is a notable exception. Under that State's Guardianship of Infants Acts 1940–75 it is provided that "the mother and father of an infant shall jointly have the guardianship and custody of the infant, and each parent shall have equal powers, authority, rights and responsibilities with regard to the infant": s. 4. Under s. 3 "infant" is defined as including an infant born outside marriage. Whether or not this position has also been reached in effect in other states in Australia is doubtful; see e.g. the conflict between *G.* v. *P.* [1977] V.R. 44 and *W.* v. *H.* [1978] V.R. 1 on the effect of the Victoria: Status of Children Act 1974. Some of the Eastern bloc countries (e.g. the USSR, Czechoslovakia and Poland) and also Jamaica, make no differentiation between the fathers of legitimate and illegitimate children once paternity is established: Krause, *International Encyclopedia of Comparative Law*, Vol. IV, ch. 6, p. 69.

[94]See e.g. Article 298 of the Swiss Civil Code (as amended in June 1976).

[95]For example New Zealand, where parental rights vest automatically in those fathers who are cohabiting with the mother of the child at the time of its birth: Guardianship Act 1968 (as amended), s. 6. See also n. 104 below.

[96]See e.g. Hayes, (1980) 43 M.L.R. 299, 304–5. The author also suggests that giving fathers automatic parental rights might have harmful effects on the child, because its adoption would be delayed until the natural father's rights were surrendered voluntarily or his agreement dispensed with.

[97]Child Care Act 1980, ss. 2(3) and 13(2), subject to giving 28 days notice if the child has been in care for six months: *Lewisham London Borough Council* v. *Lewisham Juvenile Court Justices* [1980] A.C. 273.

[98]The Children Act 1975 partly mitigated this situation by providing that a local authority can by resolution assume parental rights over a child who has been in care for three years: see now Child Care Act 1980, s. 3(1)(d).

[99]In all of the possibilities except one (restricting the rights of *all* parents, paras. 4.41–4.42 below) these limitations apply only to the father of a non-marital child.

conferment of parental rights on the fathers of non-marital children. They were—

(i) to define a category of "unmeritorious" fathers in whom parental rights would not vest automatically;

(ii) to confer parental rights only on those fathers who had acknowledged their paternity;

(iii) to restrict, in certain circumstances, the parental rights of all parents, whether married or unmarried.

We examine each of these possibilities in turn.

(i) No automatic vesting of "parental rights" in "unmeritorious" fathers

4.29 One way of meeting the arguments mentioned above against indiscriminately conferring "parental rights" on all fathers of non-marital children might be to isolate, by statute, a class of "unmeritorious" fathers in whom it would be inappropriate to allow parental rights to vest automatically.[100] This objective could perhaps be achieved in one of two ways, of which the first is the mirror image of the second. Legislation could either—

1. define a class of "unmeritorious" fathers who would in the first instance be excluded from exercising parental authority;

or 2. define a limited class of "meritorious" fathers who would be automatically entitled, subject to the courts' powers to divest them, to exercise parental authority.

(1) Defining a class of "unmeritorious" father who would be excluded

4.30 The object of this alternative would be to ensure that a father whose intervention in his child's life was likely to be detrimental to the child's welfare should not be entitled to parental rights *unless* a court had specifically considered his case and conferred such rights upon him. The main problem is therefore satisfactorily to define the relevant category of "unmeritorious" father. A few commentators took the dramatic but "extreme and no doubt unrealistic" example of the rapist father mentioned in the Working Paper,[101] and suggested that a conviction for rape could serve as the criterion for distinguishing the "unmeritorious" father from others. We do not think that it would be satisfactory to make special provision limited to such cases. The number of such fathers is likely to be statistically insignificant;[102] and to disqualify the rapist but not to disqualify a father guilty of, say, incest[103] or

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[100]The court could, of course, on an application by the father give him some (or all) of the parental rights.

[101]Para. 3.9.

[102]Particularly in view of the availability of abortion in cases where a child has been conceived as a result of rape.

[103]Where a man is convicted of incest or attempted incest against a girl under the age of 21 the court is already empowered by order to divest him of all authority over her: Sexual Offences Act 1956, s. 38.

indecent assault would seem unsatisfactory. It was also suggested that a father convicted of any criminal offence related to the child's conception should be debarred from automatic rights, but there would be formidable procedural problems in a proposal of this kind. The strongest objection to such solutions, however, seems to us to be that they do not really deal with the mischief in question: unmeritorious fathers are not confined to those who have been convicted of a criminal offence. Moreover, the entitlement of the father of a child born as the result of a casual encounter would, for example, be unaffected; yet it might well be thought that it is in precisely such cases that the dangers outlined above of automatic attribution of parental rights would be most acute. However, to seek to exclude such fathers by a sufficiently clearly drawn statutory formula would be virtually impossible. We therefore reject this proposal and turn to the alternative technique that has been suggested under which parental rights would be vested only in a defined class of *meritorious* father.

(2) *Defining a class of "meritorious" father who would automatically be entitled to "parental rights"*

4.31 Under this alternative it is necessary to isolate a class of fathers who would automatically qualify as persons in whom it would be appropriate that "parental rights" should vest at least in the first instance. In cases of dispute, such rights would of course be subject to the court's discretion exercised in the interests of the child's welfare. Moreover, it would remain the case that fathers who fell outside this specified category could apply to the court to have rights vested in them.

4.32 One method of isolating the class of "meritorious fathers" is to provide (as has been done in New Zealand[104]) that both parents of a non-marital child share "natural guardianship" rights if, *but only if,* the father and the mother were living together as husband and wife at the time of the child's birth. If the father does not fall into this category he may still apply to the court for guardianship rights to be vested in him.[105] In the Working Paper we rejected solutions of this type for two main reasons.[106] First we suggested that it would be difficult to define "living together" satisfactorily, and secondly we thought that even if a suitable definition were possible the rule would be arbitrary, and likely to produce unsatisfactory results in particular cases.

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[104]See Guardianship Act 1968 (as amended), s. 6, which provides: "(1) Subject to the provisions of this Act, the father and the mother of a child shall each be a guardian of the child. (2) Subject to the provisions of this Act the mother of a child shall be the sole guardian of the child if—(a) She is not married to the father of the child, and either: (i) Has never been married to the father; or (ii) Her marriage to the father of the child was dissolved before the child was conceived; and (b) She and the father of the child were not living together as husband and wife at the time the child was born. (3) Where the mother of a child is, or was at the time of her death, its sole guardian by virtue of subsection (2) of this section the father of the child may apply to the Court to be appointed as guardian, either in addition to or instead of the mother or any guardian appointed by her, and the Court may in its discretion make such an order on the application as it thinks proper." For an example of how this provision works in practice, see *F.* v. *G.* [1971] N.Z.L.R. 956.

[105]Sect. 6 (3).

[106]Para. 3.12.

4.33 We must first re-examine the problem of definition, since some commentators thought we had exaggerated these difficulties and pointed out that English law already distinguishes for some purposes[107] between those who are "living together" and those who are not. We accept, of course, that English law does on occasion attach legal consequences to extra-marital cohabitation, but it will be noted that in the majority of such cases it is envisaged that there will or may be legal proceedings to determine whether or not that state of affairs did in truth exist—so that for example the question whether a couple were living together as husband and wife for the purpose of the Domestic Violence and Matrimonial Proceedings Act 1976 only becomes relevant if an application is made under that Act. In contrast, the purpose of linking "parental rights" to cohabitation would be that the entitlement thereto could demonstrably be shown to exist without there being any need for an application to the court. It would not be the courts, but those such as social workers and school teachers, who would in the first instance have to decide whether a particular individual who claimed to be entitled to authority over the child did or did not fall within the statutory definition.[108]

4.34 Moreover, a further important difference between the existing precedents and what is proposed relates to the *date* at which cohabitation is to be established. In the case of most current legislation the date which is relevant is the date of proceedings or a date just before then.[109] Under the New Zealand guardianship legislation,[110] however, the relevant date is the date of the child's birth. Whilst the child is still very young it will probably not be too difficult for the father or others to establish that he and the mother were living together as husband and wife at the time of the child's birth. However, as the child grows older we anticipate that there might be considerable practical difficulties[111] in this country not only for the courts but also for local and education authorities who would be required to make decisions on the basis of events which had taken place perhaps many years previously. In our view, these considerations amply justify our concern that any definition should be specific and clear-cut; but we have not found it possible to formulate a definition which would satisfy these criteria.

4.35 We attach even more importance to the second reason which we gave in the Working Paper for not being attracted to a solution under which

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[107]See e.g. the cohabitation rule under which the requirements and resources of an "unmarried couple" (i.e. a man and a woman who are not married to each other but who are living together as husband and wife) are in principle aggregated: Supplementary Benefits Act 1976, Sched. 1, para. 3 (as amended by Social Security Act 1980). See also the Domestic Violence and Matrimonial Proceedings Act 1976 (whose provisions apply "to a man and woman who are living with each other in the same household as husband and wife" as they apply to parties to a marriage: s. 1(2)).

[108]As to the diversity of cohabitation arrangements, see generally Parry, *Cohabitation*, (1981), ch. 1 and Brown and Kiernan, "Cohabitation in Great Britain", *Population Trends 25*, (1981).

[109]E.g. Domestic Violence and Matrimonial Proceedings Act 1976, ss. 1(2) and 2(2); Supplementary Benefits Act 1976, Sched. 1, para. 3(1)(*b*) (as amended by Social Security Act 1980).

[110]Sect. 6. See n. 104 above.

[111]For instance if the father dies when the child is 15, having purported to appoint a testamentary guardian, it would be necessary to examine a state of affairs 15 years previously in order to determine whether the appointment is valid.

parental rights would automatically vest in the father of a non-marital child simply because, at the time of the child's birth, he was living with the mother. We believed that whatever might be "the definition of the class of excluded fathers the rule would be arbitrary, and likely to produce unsatisfactory results in particular cases." By this we meant that the question whether or not a man had, at some time in the past, been living with the mother seemed largely irrelevant in determining whether or not it would *at some later date* be in the interests of the particular child that the father should have rights which he could then exercise or threaten to exercise. Such a test would inevitably exclude some "meritorious" fathers. Moreover, because "meritorious" fathers can always apply to the court, such a test would necessarily confer rights on some wholly unmeritorious fathers merely because they had lived with the mother, perhaps only for a short time.

4.36 Finally, there is one further general reason why we do not consider that automatically conferring parental rights on a defined class of "meritorious" father would necessarily promote the welfare of children born outside marriage. If statute were to define a class of "meritorious" fathers in whom parental authority would, in the first instance, be vested, the effect might well be to exacerbate, rather than to diminish, the problem of "stigmatising" some children. The result would inevitably be that there would remain children who would be legally "different" by reason, and by reason only, of their parents' legal relationship. The distinction would no longer be between those whose parents had been married and others, but between those whose parents had had a "stable" and legally recognised relationship and others. We consider that for a child to be identified by law not simply (as now) as the offspring of a couple who may perhaps have chosen not to marry, but as the child of an unworthy father, would be unsatisfactory.

(ii) *"Parental rights" to be based on voluntary acknowledgement of paternity*

4.37 Another proposal which we have considered is that "parental rights" should vest automatically only in those fathers who had voluntarily acknowledged their paternity. Such acknowledgement might be in the form of a statutory declaration (or some other written instrument) made jointly with the child's mother. Alternatively, an entry of the father's name on the births register could be regarded as sufficient if it were made at the joint request of the father and the mother.[112]

4.38 These proposals seem initially attractive. A voluntary acknowledgement would provide an indication of the father's interest in the child; both the methods outlined above would be relatively simple to operate, and would provide clear identification of those entitled to parental rights. However, for one fundamental reason we have rejected a solution based on voluntary acknowledgement: we believe that the fact that a father has acknowledged his

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[112]Births and Deaths Registration Act 1953, s. 10, as amended by the Family Law Reform Act 1969, s. 27. It would not be appropriate for an entry of the father's name on the births register otherwise than at the joint request of the parents to have any effect on the father's parental rights.

parentage gives no indication that it would be *in the child's* interests that the father should be entitled to parental rights. This seems to us to be a major objection to the proposal.

4.39 It may, however, be argued that the father should be entitled to parental rights in cases where *both* parents of the child agree that he should. After all (it might be argued) the law already accords parental rights to all married parents without any prior scrutiny of what is in the child's best interests. Why should it not equally accord such rights to unmarried parents who are in agreement? We see force in this argument, but have nevertheless rejected it. The most powerful factor influencing our decision was the strong body of evidence from those best acquainted with the problems of the single parent family about the vulnerable position of the unmarried mother in many cases.[113] Such mothers may well be exposed to pressure, and even harassment, on the part of the natural father; and it would, in our view, give unscrupulous natural fathers undesirable bargaining power if they were to be placed in a position where they might more easily extort from the mother a joint "voluntary" acknowledgement, having the effect of vesting parental rights in the father, perhaps as the price of an agreement to provide for the mother or her child, or even as the price of continuing a relationship with the mother. For this reason, we think it appropriate for the court to investigate and sanction even a joint request that parental rights vest in the father. In reaching this conclusion we have, as we have said, been particularly impressed by the need to protect single mothers from the risk of pressure. But we should make it plain that we do not, in any event, accept the argument that since a couple can acquire parental rights over their child by marriage they should be able to do so by some other formal act. Apart from the consideration (to which some will attach considerable importance) that to do so would debase the institution of marriage, it must be borne in mind that marriage is still, in principle, a permanent relationship. In contrast, there is no such unifying factor in the case of unmarried relationships, which are infinitely variable in their nature and in the intentions of the partners to them. This diversity suggests to us that scrutiny by a court is a not unreasonable protection for the interests of the child of unmarried parents.[114]

4.40 There are two additional reasons why we would reject the suggestion that parental rights should flow from the fact that the father's name is entered on the births register. First, under the existing law the register is no more than

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[113]See para. 4.26(c) above.

[114]It is also relevant to point out that under s. 41 of the Matrimonial Causes Act 1973 the court investigates arrangements made for children involved in divorce and other matrimonial proceedings; the decree cannot be made absolute until the court has declared itself satisfied about these arrangements. This procedure was introduced because children involved in divorce proceedings were thought to be peculiarly at risk; it was intended to ensure that the parents gave full consideration to the question of their children's future welfare, and to make the control of the court over the welfare of the children more effective: see Report of the Royal Commission on Marriage and Divorce (1956) Cmd. 9678, paras. 366–77. In view of the diversity of extra-marital relationships, similar considerations would seem to apply in the present context in justifying the view that parental consent by itself should not be regarded as conclusive.

a record of fact. If its character were changed, so that registration gave rise to parental rights, it is at least possible that some mothers would not be prepared to agree to the registration of the father's name. Concealment of the facts of a child's paternity would be contrary to the general modern policy of legislation that it is a the child's interest to know the facts of his parentage.[115] Secondly, the mere fact of registration—which might be effected for any of a large number of reasons—gives no indication at all that the father even wishes to be involved in his child's upbringing. It seems to us manifestly unsatisfactory that a man who simply agrees to registration, but intends to play no further part in the child's life, should necessarily have a legal relationship with the child: this would enable him at any time in the future to threaten intervention in the child's upbringing, with considerable disruptive potential.

(iii) *Restricting parental rights of all parents*

4.41 One or two commentators suggested that the rights of *all* parents, whether married or unmarried, should be restricted because there are obviously unsuitable parents of marital children as well as of non-marital children. For example, one suggestion was the if a parent (whether married to the other parent or not) had been without any contact with the child for a given period of time he should have to obtain either the consent of the other parent or a court order before exercising any parental rights. This would be the reverse of the present law as it applies to legitimate children under which, as we have seen, parental rights are exercisable by either parent without the other unless that other has signified disapproval of the action in question.[116] Another alternative put forward was that it should be made unlawful for any person not having a court order empowering him to remove a child from the care of another person who is providing the child with a home, to do so without that person's consent.[117]

4.42 For a number of reasons we are not attracted to this kind of solution. In the first place it would affect many more married than unmarried couples and would thus go far beyond the scope of this Report. Moreover it would involve a fundamental change in legal philosophy for which we have not found any great support or real justification. Our law (in common with that of other common law countries) is firmly based on the principle that the family is a unit in which there exists a broad parental authority. Whilst we are aware that there will be occasions on which even married parents abuse that authority, we believe that the law already follows the right course in relation to them by providing machinery for intervention when necessary, rather than by imposing

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[115]See e.g. the provisions permitting adopted children to have access to their original birth records: Adoption Act 1958, s. 20A, as inserted by Children Act 1975, s. 26.

[116]Children Act 1975, s. 85(3).

[117]It has been said that it is "astonishing" that a father can thus take advantage of his wife's temporary absence to consent to a major surgical operation where there is no need of an immediate decision; and that "the old legal exercise of powers by the father is in danger of being replaced by an arbitrary exercise by either parent, and one must question whether the new law is basically any more just than the old": Bromley, *Family Law* 6th ed., (1981), p. 281.

rigid and artificial limitations when not strictly necessary. A further objection to this type of solution is, we think, that it would raise very considerable problems in defining the parental rights which might be restricted or the circumstances in which they would not be exercisable. We have already pointed out that it is not easy, as the law stands at present, to make an exhaustive catalogue of "parental rights". In view of this fact, we do not think that it would, in the absence of a comprehensive codification of the law on this topic, be possible to define satisfactorily those rights to which parents would or would not be entitled or the circumstances in which all or any parental rights could not be exercised.

Conclusion on possible limitations on automatic conferment of "parental rights"

4.43 It will thus be apparent that we do not consider any of these proposals designed to ensure that parental rights should vest automatically only in "meritorious" fathers to be satisfactory. We must therefore now address the fundamental question of policy raised in the Working Paper. Should reform be designed to abolish the legal status of illegitimacy altogether, or should it merely abolish such of the legal consequences of illegitimacy as are adverse to the child?

Conclusion on the field of choice

4.44 Before we examine the arguments on either side we think it important to clarify one particular issue arising from our tentative Working Paper proposals on which there was some misunderstanding. Some commentators expressed the view (contrary to that which we had taken) that it would be perfectly possible to abolish the status of illegitimacy whilst preserving the existing rules whereby parental rights vest automatically only in married parents. We do not accept this view. The argument for "abolishing illegitimacy" (rather than merely removing such legal consequences of that status as are adverse to the child) is essentially that the abolition of any legal distinction based on the parents' marital status would itself have an influence on opinion. The marital status of the child's parents would cease to be *legally* relevant, and thus the need to refer to the child's distinctive legal status would (in this view) disappear. This consequence could not follow if a distinction—albeit relating only to entitlement to parental rights—were to be preserved between children which would be based solely on their parent's status. There would thus remain two classes of children: first, those whose parents were married and thereby enjoyed parental rights; secondly, those whose parents were unmarried and whose fathers did not enjoy such rights. In effect, therefore, the distinction between "legitimate" and "illegimate" would be preserved.

4.45 We believe, therefore, that it is impossible to avoid the stark choice between abolition of the status of illegitimacy, and its retention (albeit coupled with a removal of the legal disadvantages of illegitimacy so far as they adversely affect the child).

4.46 We have already indicated[118] that the conferment of parental rights on all fathers was a source of serious anxiety to a significant body of well-

[118]See para. 4.26 above.

informed and experienced commentators. We do not think it possible to demonstrate that this anxiety is without foundation. Against this background, we now turn to re-examine the advantages which in the Working Paper we suggested might be expected to flow from abolition of the status of illegitimacy.

4.47 The first of these advantages was (we thought)[119] that the child born outside marriage would no longer be branded by law as "different". Such a change in the law would (we suggested) have some part to play in lessening the social prejudice to which such children may still be subjected. It must, however, be admitted that the extent of this advantage is somewhat speculative. There is little clear or reliable evidence about the extent to which the civil law does in fact exercise any appreciable influence over behaviour and attitudes. Moreover, it is at least arguable that the social stigma attached to illegitimacy is residual[120] and of comparatively minor effect when compared with the economic deprivation that effects many of those born outside marriage. It has been said[121] that "poverty and illegitimacy often coincide, and it is the poverty, not illegitimacy that matters."

4.48 The second advantage which we thought might follow from removing the status of illegitimacy altogether from the law was that this would be likely to benefit the child by giving legal recognition to factual family ties where these existed, and by normalising the child's legal status in relation to his parents.[122] However, a number of commentators pointed out that this advantage could only be obtained at the cost of creating, in some cases, a wholly artificial family unit. This is because in those cases the law would impose on the child a father whose influence would be at best negative and in some cases even harmful. In this view, reform ought to be concentrated on those areas where those of non-marital birth are specifically disadvantaged and on strengthening family ties where this would clearly be in the interests of the child. We accept the force of these arguments.

4.49 In the result, we have come to the conclusion that the advantages of abolishing the status of the illegitimacy are not sufficient to compensate for the possible dangers involved in an automatic extention of parental rights to fathers of non-marital children. In this context, we think it right to say that one of the main purposes of our consultation process is to ascertain whether or not there is a broad consensus on the reforms provisionally put forward in working papers. As we have said, there was almost unanimous support for removing the legal discrimination that presently exists against the illegitimate child: but there was a profound division of opinion amongst both legal and non-legal commentators on the parental rights question.[123] We do not think

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[119]See para. 3.16 of the Working Paper.

[120]Cf. however the views of Lord Reid in *S.* v. *S.* [1972] A.C. 24, 42–3 and of Lord Wilberforce in *The Ampthill Peerage* [1977] A.C. 547, 568, quoted in Part II, n. 19 above.

[121]New Society, 4th September 1980, pp. 457–458, commenting on Lambert and Streather, *Children in Changing Families*, (1980).

[122]See para. 3.16 of the Working Paper.

[123]This became even more apparent in the number of organisations who told us that their members could not form a unanimous view on whether fathers should automatically have parental rights.

that it would be right for us to ignore such anxieties where we cannot show them to be without foundation,[124] and where the countervailing advantages of the reform are not clearly demonstrable.

4.50 Accordingly, we have come to the conclusion that we can no longer adhere to the provisional proposal made in the Working Paper, that the status of illegitimacy be abolished. We are in no doubt that the law should be reformed so as to remove all the legal disadvantages of illegitimacy so far as they discriminate against the illegitimate child, but we do not think that parental rights should vest in the fathers of non-marital children without prior scrutiny of the child's interests by the courts. The proposals that we make in the remainder of this Report are designed to give effect to these objectives.

4.51 For almost all purposes the effect of the changes which we recommend will be that all children—irrespective of their parents' marital status—will be treated alike by the law. However, in a few areas (the most important of which is obviously the question of entitlement to parental rights) there will continue to be a difference between those children whose parents have married and those whose parents have not. To this extent it will be necessary to preserve the concepts of "legitimacy", "illegitimacy" and "legitimation".[125] On the question of terminology, however, we would at this stage make one small, but we think important, recommendation: namely, that whenever possible[126] the terms "legitimate" and "illegitimate" should cease to be used as legal terms of art. The expressions that we favour in their stead, and that we use generally in this Report and in the draft legislation attached hereto, are "marital" and "non-marital", which avoid the connotations of unlawfulness and illegality which are implicit in the term "illegitimate".[127]

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[124]In this context we think that it is significant that the National Council for One Parent Families (the most specifically concerned body) opposed the Working Paper's tentative proposal in so far as it involved conferring parental rights on fathers of non-marital children.

[125]And accordingly the procedures presently available under section 45 of the Matrimonial Causes Act 1973 for obtaining declarations of legitimacy and legitimation: see further para. 10.3 below.

[126]In some places we accept that this will not be possible, for example in relation to inheritance: see the draft Bill in Appendix A below.

[127]Cf. the replacement of the term "lunatic" in the Mental Health Act 1959, which instead referred to "patients" suffering from "mental disorder".

PART V

BLOOD TESTING AND PROOF OF PARENTAGE

5.1 Before we come to discuss detailed recommendations for reform we should stress one matter. The court must be satisfied, before making any order in proceedings where parentage is in issue, that a particular person is indeed the father (or mother) of the child. In practice of course, most disputes about parentage relate to paternity; and advances in forensic science have in many cases made it easier to resolve such disputes than in the past. So important is the impact of these developments that we think it would be helpful at this stage[1] to give an outline of the part played by blood test evidence in resolving issues of paternity.[2]

5.2 A great deal of the law about establishing paternity has been influenced by the difficulty of doing so; but this difficulty has now been much reduced by the availability of blood test evidence.[3] (Such evidence is most likely to be used in affiliation cases but is also used to a lesser extent in other proceedings, such as divorce[4] and succession.[5]) It has been known since the beginning of this century that human blood exhibits certain characteristics which can be classified into groups.[6] 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 particular man may show that the man *cannot* be the father. It cannot show strictly that he *is* the father but merely that he *could* be the father.[7] However, if, for instance, it is known that at the material times the mother had had

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[1]We deal with the question of proof of parentage generally in Part X below.

[2]We refer generally in this Report to establishing parentage rather than paternity so as to cover the rare case where maternity may be in issue. Normally of course maternity can be directly and easily proved, but there may occasionally be a dispute, as in the case of Mrs. Anwar Ditta (*The Times*, 20 March 1981) and see *Slingsby* v. *A.-G.* (1916) 33 T.L.R. 120.

[3]We considered this topic in Blood Tests and the Proof of Paternity in Civil Proceedings (1968) Law Com. No. 16; the recommendations made in that Report were implemented by the Family Law Reform Act 1969.

[4]In 1980 12 orders for blood testing were made in divorce county courts as compared with only 3 in 1979: Judicial Statistics 1980 (1981) Cmnd. 8436, Table D. 7(b). There are no similar figures available for the High Court but we understand that the number is not a large one.

[5]See, e.g. *B.* v. *A.-G. (N.E.B. and others intervening)* [1967] 1 W.L.R. 776 where the petitioner sought a declaration that he was the legitimate child of N.E.B. in order to prove his entitlement to a share in a trust fund. Blood tests showed that he could not be the child of N.E.B. and the petition was dismissed, the petitioner offering no evidence.

[6]For some of the methods adopted in analysing blood groups, see the presidential address of Professor B. E. Dodd to the British Academy of Forensic Sciences, "When Blood is their Argument" (1980) 20 Med. Sci. Law 231. In relation to methods in other countries see Krause, *International Encyclopedia of Comparative Law*, Vol. IV, ch. 6, paras. 92–97; and the guidelines of the American Bar Association and American Medical Association: see "The Present Status of Serologic Testing in Problems of Disputed Parentage" (1976) 10 Fam. Law Quarterly 247. See also Samuels, "Blood Test Law and Practice" (1981) 11 Fam. Law 124.

[7]Thus under s. 20(1) of the Family Law Reform Act 1969 blood tests are ordered "to ascertain whether such tests show that a party to the proceedings is or is not thereby *excluded* from being the father".

intercourse only with H (her husband)[8] and X, and the blood test excludes H but not X, then X must be the father. Tests may also provide some evidence of paternity even if they do not exclude all possible fathers but one.[9] They will show what genetic characteristics the child must have inherited from his father; it will then be possible to relate this to the proportion of men in the population with the necessary combination of such genes. Hence if a large number of individual characteristics are found to be common to the child and the man alleged to be the father, this may point to the man's paternity. Moreover, if the characteristics displayed by the child's blood are so uncommon[10]

> "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".[11]

The value of blood tests for establishing, and not merely eliminating, the paternity of a particular man is increasing: it has been estimated that by using a combination of blood group systems there is already at least a 93 per cent chance of excluding a man wrongly alleged to be the father of a child.[12]

5.3 Under section 20(1) of the Family Law Reform Act 1969 the court has power in any civil proceedings to direct the taking of blood samples from the child, the mother and the person alleged to be the father (or from any of these parties); and when paternity is in issue the court usually does direct blood tests.[13] If a person fails to comply with the direction (for example by refusing to submit to blood tests) the court may draw such inferences if any

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[8]See e.g. *Sinclair* v. *Rankin* 1921 S.C. 933; *Robertson* v. *Hutchinson* 1935 S.C. 708.

[9]The report of the blood test must state "the value if any of the results in determining whether that party *is* that person's father": *ibid.*, s. 20(2).

[10]In an extreme case where uncommon blood characteristics are present, the incidence of possible fathers could be as low as one in 50 million: see Blood Tests and the Proof of Paternity in Civil Proceedings (1968) Law Com. No. 16, para. 5.

[11]*S.* v. *S.*; *W.* v. *Official Solicitor* [1972] A.C. 24, *per* Lord Reid at p. 42. The application of the principles is well illustrated in T. *(H. H.)* v. *T. (E.)* [1971] 1 W.L.R. 429, where the husband denied that he was the father of a child born to his wife. Blood tests did not exclude the possibility of his paternity; they also indicated that 1 in 9 or 10 West European males could be the father. He thus failed to discharge the onus of proof laid on him. Cf. *B.* v. *A.-G.* [1967] 1 W.L.R. 776; *R.* v. *R.* [1968[P. 414; and *Re J. S. (A Minor)* [1981] Fam. 22.

[12]See especially Dodd, "When Blood is their Argument" (1982) 20 Med. Sci. Law 231: n. 6 above. Professor Dodd suggests that the continuing development of new systems of dealing with blood groups may mean that "we are approaching the point where almost every man wrongly named as father will be excluded by the blood group evidence": *ibid.*, at p. 233.

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

from that fact as appear proper:[14] but a person cannot be compelled to submit to blood tests.

5.4 As we have seen, blood tests have a value both in disproving and in tending to prove that a particular man is the father of a child. Blood test evidence can thus have considerable weight in determining paternity and it has been generally accepted that it is desirable to ascertain the truth about a child's paternity.[15]

5.5 As we have said, blood tests may be carried out pursuant to a direction by the court. However, they may also be carried out informally, in which case the safeguards which are intended to guarantee security and controlled testing[16] in cases where a direction is made by the court may be lacking. We understand that blood tests are frequently carried out in this informal way and it has been suggested[17] that the practice of blood testing other than under the procedures governed by legislation should be discouraged. It should also be noted that the fact that the statutory safeguards were not complied with when blood samples were taken from the third Baron Ampthill was the subject of adverse comment in *The Ampthill Peerage*.[18]

5.6 We agree that parties should be encouraged to use the procedure under the 1969 Act rather than a more informal (and possibly cheaper) method. Apart from other considerations, it may be that a court would attach greater weight to blood test evidence obtained under the Act than to evidence not so obtained and it would thus be in the interests of parties to have evidence that is likely to be accepted as the best evidence. We are not, however, minded to make any specific recommendation on this point. There seems to be no real evidence that the reliability of blood testing is frequently impaired by failure to use the statutory procedure; and it is, of course, always the case that the court can take into account the absence of the statutory safeguards in assessing the probative weight of the evidence. Moreover, any recommendation that we could make would necessarily go towards making inadmissible the evidence of informal blood tests however clear their probative value might be, and this we would regard as undesirable. It is worth mentioning that parties in agreement about the obtaining of a blood test can seek a direction of the court; this

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[14]Sect. 23(1).

[15]See particularly the speeches in the House of Lords in *S.* v. *S.*; *W.* v. *Official Solicitor* [1972] A.C. 24. Cf. *Re J. S. (A Minor)* [1981] Fam. 22, 28 where Ormrod L.J. emphasised that (on the facts of that case) "to make an order declaring that A is the father of B, largely on serological evidence, is to transmute a mathematical probability into a forensic certainty when there is no necessity to do so". As to that case see Part X, n. 21 below.

[16]The Blood Tests (Evidence of Paternity) Regulations 1971 (S.I. 1971 No. 1861) which are incorporated in R.S.C. Ord. 112 (and see *Practice Note* [1972] 1 W.L.R. 353) provide, *inter alia*, that the tester should be appointed by the Home Secretary and may charge prescribed fees; and there are prescribed forms. Under s. 24 of the Family Law Reform Act 1969 there is a penalty for personation in relation to tests carried out under the Act.

[17]By Dodd, "When Blood is their Argument", *op. cit.* (n. 6 above) at p. 232.

[18][1977] A.C. 547, 574–5, *per* Lord Wilberforce. The regulations came into force on 1 March 1972 and blood samples might have been obtained from Lord Ampthill after that date in a way which conformed to the regulations.

practice seems to be contemplated by the Practice Note to which we have referred.[19] Accordingly, we make no recommendation for a change in the law on this point.

5.7 We return elsewhere[20] in this Report to the procedures which we envisage being used for determining contested issues of parentage. For the moment we think that it suffices to point out that the developments outlined above should make such contests less common than in the past. Nevertheless, their impact should not be exaggerated; there will inevitably be cases in which satisfactory and cogent scientific evidence about paternity will not be available, and even more cases in which blood test evidence is only of value in conjunction with other evidence (for example as to whether or not the mother had had intercourse at the relevant time with men other than those excluded by the blood test evidence). The burden of satisfying the court about paternity will of course remain on the applicant, often the mother; and there will thus necessarily be some cases in which she will be exposed to hostile and embarrassing cross-examination about matters which she will regard as private. We believe, however, that this is unavoidable.

PART VI

FINANCIAL PROVISION

Introduction

6.1 In Part III of this Report we pointed out[1] that at present none of the provisions under which the parents of legitimate children may be ordered to contribute financially to their upkeep apply to the maintenance of illegitimate children by their fathers. The only way in which the father of an illegitimate child can be ordered to provide for his child is by the institution of affiliation proceedings, which are heard exclusively in the lowest court in the judicial hierarchy. We have also noted the restricted powers of the court to make financial orders, and drawn attention to the fact that many people regard affiliation proceedings as humiliating and distressing,[2] not least because the courts in which they are heard are associated in the public mind with the trial of criminal offences. Perhaps the most striking factor of all is that only a

[19][1972] 1 W.L.R. 353: see n. 16 above. In *R.* v. *R. (Blood Test: Jurisdiction)* [1973] 1 W.L.R. 1115 it was held that *unopposed* applications for a direction might be made to a registrar, but that a judge should deal with contested applications.

[20]At Part X below.

[1]See paras. 3.2 and 3.23 above.

[2]See paras. 3.23–3.24 above.

comparatively small and apparently decreasing number of applications seem to be made.[3]

6.2 We see no justification for retaining this distinctive procedure. We propose that it be abolished and that orders for financial provision for a child should be obtainable (whatever the marital status of the parents) in proceedings under the Guardianship of Minors Act 1971. So far as the law is concerned, all children will have equal rights to financial provision from both their parents. This is not, of course, to suggest that claims for financial provision in respect of a non-marital child will in practice come to be indistinguishable from claims for other children. This is because the paternity of a non-marital child will often be a contested issue, whereas paternity will rarely, if ever, be disputed in claims brought in respect of a marital child. The law can do nothing to remove this factual distinction between those cases where the court has to resolve the issue of parentage and those where it does not; and it has to be accepted that resolving that issue may sometimes involve distress and embarrassment for those concerned. What the law can and, in our view should, do is to remove the wholly distinct procedure relating to illegitimate children, tainted as it is by its historical association with the Poor Law and its overtones of criminality.[4]

Proposals for reform

6.3 In the following paragraphs we examine in detail the consequences of this central recommendation. Our primary concern is, of course, to eradicate discrimination against the non-marital child from this part of the legal system. The changes necessary to achieve this objective involve much amendment of those parts of the Guardianship of Minors Act 1971 dealing with financial and custody matters and we have taken the opportunity to propose rationalisation and simplification of that Act in a number of respects. The effect of our proposals is accordingly not always confined to non-marital children.

(a) Jurisdiction no longer confined to magistrates' courts

6.4 Under the Affiliation Proceedings Act 1957 the only court with jurisdiction to hear an application for an affiliation order is the magistrates' court. Under the Guardianship of Minors Act 1971 (which at present only relates, so far as financial matters are concerned, to legitimate children) the High Court, the county court and the magistrates' court all have jurisdiction. The result of our proposed change would be to open all courts in the judicial hierarchy to applications for financial provision, whether the child be marital or non-marital. It will be for the applicant and her advisers to decide on the most suitable court: no longer will the decision depend solely on the marital status of the child's parents.

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[3]It is difficult to make confident statements in this respect because of the unreliability of the published statistics: see para. 3.24 above.

[4]For an account of the early history of the bastardy legislation see Finer and McGregor, *The History of the Obligation to Maintain*, paras. 50–66, printed as Appendix 5 to the Report of the Committee on One-Parent Families (1974) Cmnd. 5629. See also Pinchbeck and Hewitt, *Children in English Society*, (1973), Vol. 2, ch. 19.

(*b*) *Availability of a wide range of orders*

6.5 Under the Affiliation Proceedings Act 1957[5] the court may order the putative father of an illegitimate child to make periodical payments[6] for the child's maintenance and education, and to make a lump sum payment. It has, however, no power to make orders for secured periodical payments[7] or property adjustment[8] and it may not order a lump sum payment exceeding £500.[9]

6.6 The court's powers under the Guardianship of Minors Act 1971 are somewhat wider, in that the High Court and the county court (but not the magistrates' court) can order payment of an unlimited lump sum.[10] However, the range of financial orders available under the guardianship legislation is, as we pointed out in the Working Paper,[11] still in some respects limited by comparison with the powers of the divorce court. For example, the court has no power under the guardianship legislation to make orders for *secured* periodical payments,[12] or to make property adjustment orders (that is to say, orders for the transfer or settlement of property, and orders varying[13] marriage settlements).[14] It seems to us, however, that if unmarried parents separate it is only right that the court should be able to make any appropriate 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 judicial separation. The parents' relationship may well have lasted as long as many marriages which end in divorce, and the child's financial position may equally need to be secured. Moreover, it could well be particularly desirable to give the court power to make what would often be intended to be a once-and-for-all settlement in those cases where the father intends to have no further relationship with the child. Just as courts lean against making substantial capital orders in favour of the children of a marriage,[15] so we would not expect these additional powers to be frequently exercised; but they could be useful in some circumstances.

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[5]Sect. 4(2) as amended by Domestic Proceedings and Magistrates' Courts Act 1978, s. 50(1).

[6]Which may be backdated to the date of the making of the application: Affiliation Proceedings Act 1957, s. 6(2) as inserted by Domestic Proceedings and Magistrates' Courts Act 1978, s. 52(1).

[7]Cf. Matrimonial Causes Act 1973, ss. 23 and 27. See further n. 12 below.

[8]Cf. Matrimonial Causes Act 1973, s. 24.

[9]Or such larger amounts as the Secretary of State may from time to time fix: Affiliation Proceedings Act 1957, s. 4(5) as inserted by Domestic Proceedings and Magistrates' Courts Act 1978, s. 50(2).

[10]Guardianship of Minors Act 1971, s. 9(2)(*b*), inserted by Domestic Proceedings and Magistrates' Courts Act 1978, s. 41. If the order is made by a magistrates' court the lump sum must not exceed £500 or such larger sum as the Secretary of State may from time to time fix: Guardianship of Minors Act 1971, s. 12B(2), inserted by Domestic Proceedings and Magistrates' Courts Act 1978, s. 43.

[11]Paras. 4.50–4.55.

[12]The High Court and county court have power to make such orders not only in nullity, divorce, and judicial separation proceedings (see Matrimonial Causes Act 1973, s. 23(1)(*b*)) but also in proceedings under the Matrimonial Causes Act 1973, s. 27 based on neglect to maintain: see s. 27(6)(*b*) and (*e*).

[13]There is also a specific power to extinguish or reduce the interest under a settlement of either of the parties to a marriage: Matrimonial Causes Act 1973, s. 24(1)(*d*).

[14]Matrimonial Causes Act 1973, s. 24(1)(*c*).

[15]See *Chamberlain* v. *Chamberlain* [1973] 1 W.L.R. 1557; *Lilford* v. *Glynn* [1979] 1 W.L.R. 78; *Draskovic* v. *Draskovic* (1981) 11 Fam. Law 87.

6.7 Our tentative proposal in the Working Paper[16] for widening the courts' powers on these lines was widely supported on consultation, and very few commentators thought it to be a valid objection[17] that the suggestion would be tantamount to giving the mother of a child born outside marriage a right to support for her own benefit merely because in practice the property which would be the subject of an order would often be the common home. It was pointed out that it is difficult to draw a rigid line between providing for the child and for his mother, since the needs of the two are interrelated.[18] Even under the old law a mother might for this reason indirectly benefit under an affiliation order;[19] and as Ormrod L. J. has recently pointed out,[20] the fact that the court in exercising its affiliation jurisdiction[21] is now statutorily directed[22] to take account of the needs of the mother must already have affected the old principle that a man is under no obligation to provide for the mother of his illegitimate child.

6.8 Our proposal that the court should be empowered to make secured periodical payments orders and property adjustment orders under the guardianship legislation must entail the court also having the extended range of powers in cases where the child's parents are married, as well as in cases where they are unmarried. It is sometimes objected that the courts should not be given such wide powers in cases where there is no matrimonial dispute between the parents; but we do not believe this argument to be of much weight. The courts can be trusted not to exercise the powers save in cases where it is clearly appropriate to do so, and we do not think the courts would normally regard it as appropriate to make property adjustment orders save in cases where the relationship between the parents had clearly broken down, and it was for some reason appropriate to do so. (We have already drawn attention[23] to the cautious approach of the divorce court to the making of property adjustment orders in favour of children.) We therefore propose that the Guardianship of Minors Act should be amended so as to give the High Court and the county court power to make appropriate property adjustment orders in all suitable cases, whether the child was born within marriage or outside marriage.

6.9 There is, however, one property adjustment order which, on balance, we do not think should be available to the court in the exercise of its guardianship jurisdiction. This is the power to vary for the benefit of the parties to the marriage and of the children of the family or either of them any ante-nuptial or post-nuptial settlement made on the parties to the marriage[24]

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[16]Paras. 4.50–4.55.

[17]Cf. *ibid.*, para. 4.54.

[18]*Northrop* v. *Northrop* [1968] P. 74, particularly *per* Diplock L. J. at pp. 117–8.

[19]*Haroutunian* v. *Jennings* (1977) 1 F.L.R. 62; *Osborn* v. *Sparks* (1981) 3 F.L.R. 90.

[20]*Re Evers' Trust* [1980] 1 W.L.R. 1327, 1333.

[21]Affiliation Proceedings Act 1957, s. 4(3), as substituted by Domestic Proceedings and Magistrates' Courts Act 1978, s. 50(2).

[22]See also Guardianship of Minors Act 1971, s. 12A (as inserted by Domestic Proceedings and Magistrates' Courts Act 1978, s. 43) which is expressed in similar terms.

[23]Para. 6.6 above.

[24]Matrimonial Causes Act 1973, s. 24(1)(*c*).

and to extinguish or reduce the interest of either of the parties to the marriage under such a settlement.[25] Although the words "ante-nuptial" and "post-nuptial" have been broadly interpreted,[26] it is still essential that the settlement should be a "marriage" settlement in the broad sense that the settlement had been made on the parties *qua* husband and wife.[27] We consider that it would be inappropriate to give power to vary such settlements to a court which is not concerned with the parents' marriage, but only with making provision for children. We are reinforced in this view by the fact that the courts gave a broad interpretation to the terms "ante-nuptial or post-nuptial settlement" so that they could redistribute family assets on the breakdown of a marriage[28] at a time when their statutory powers over capital were limited; now that the courts have such extensive and flexible powers over property, the power to vary a settlement will usually only be appropriately exercised in relation to marriage settlements of the traditional kind. In most cases where the court is, for example, simply concerned to deal with the ownership and occupation of the matrimonial home it will be possible to do so by exercise of its other property adjustment powers.

6.10 The question then has to be asked whether *all* the courts with jurisdiction under the guardianship legislation should have the extensive power that we propose. At the moment, magistrates' courts have in their matrimonial jurisdiction only a limited power[29] to award a lump sum, and have no power to order secured provision, or to make property adjustment orders. This is because[30] lay justices are not equipped to determine the complicated legal questions which can arise when property rights are in dispute; and there is no suitable organisation in the magistrates' courts for seeing that security is provided. We think, for these reasons, that magistrates' courts should have no wider powers than they do under the present guardianship legislation; the full range of powers will be available in the county court and High Court.

6.11 In summary we propose, in relation to all children, whether marital or non-marital—

(i) that all courts exercising the guardianship jurisdiction should have power to order a parent to make *periodical payments* for the benefit of the child, and that the High Court and county court should have jurisdiction to make *secured periodical payments orders*;
(ii) that all courts should have power to order one parent to pay a *lump*

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[25]Matrimonial Causes Act 1973, s. 24(1)(*d*).

[26]See e.g. *Cook* v. *Cook* [1962] P. 235 (purchase of dwelling house in name of one party to the marriage—other party had proprietary interest therein—*held* to be a nuptial settlement).

[27]Financial Provision in Matrimonial Proceedings (1969) Law Com. No. 25, para. 66.

[28]*Ibid.*

[29]Domestic Proceedings and Magistrates' Courts Act 1978, s. 2(3).

[30]See Matrimonial Proceedings in Magistrates' Courts (1976) Law Com. No. 77, paras. 2.30–2.39.

sum[31] for the benefit of the child; but that the magistrates' court's powers should be limited to awards not exceeding £500;[32]

(iii) that the High Court and county court should have power to require a parent to *transfer or settle property* to which he or she is entitled for the benefit of the child.

(*c*) *Abolition of special features of the affiliation procedure*

(i) *Statutory time limits*

6.12 Applications under the Affiliation Proceedings Act 1957 are usually subject to time limits.[33] 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 might have become stale. However, 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;[34] nor in certain other circumstances.[35] The reason for not applying the time limits in those cases is that there will be some evidence pointing at the alleged father which will not be materially affected by the passage of time. But if the case does not fall within these exceptions the mother has to institute proceedings while she is pregnant[36] or within three years after the child's birth[37] (or, if the father has left the country before the three years have expired, within a year of his return).[38]

6.13 We do not think that the present law is satisfactory, not least because it can give rise to serious anomalies. For example, a man may be obliged to defend himself when the child is 11 or 12 years old simply because the mother had falsely led him to believe that he was the child's father and had thereby

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[31]Including a lump sum payable by instalments: Guardianship of Minors Act 1971, s. 12B(5), as inserted by Domestic Proceedings and Magistrates' Courts Act 1978, s. 43. A lump sum order can be made "for the purpose of enabling any liabilities or expenses reasonably incurred in maintaining the minor before the making of the order to be met": *ibid.*, s. 12B(1). We also propose a minor amendment (see Schedule 2 para. 22(*a*) of the draft Bill in Appendix A) of this section to preserve the court's powers to make an order in respect of expenses incidental to the birth (such as the provision of a layette: *Foy* v. *Brooks* [1977] 1 W.L.R. 160). Under s. 4(4) of the Affiliation Proceedings Act 1957, the power to order a lump sum in respect of expenses incurred before the making of the order includes, if the child has died, power to award a sum for funeral expenses. This power was originally designed to relieve the mother's parish of the expenses; it does not seem necessary to preserve it.

[32]Or such larger amount as may be fixed by order.

[33]Sect. 2.

[34]Affiliation Proceedings Act 1957, s. 2(1)(*b*), as amended by Affiliation Proceedings (Amendment) Act 1972. This will cover 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.

[35]For example, in the rare case where the child has been born to a "married" couple whose "marriage" is void because one or both of the parties was under age: *ibid.*, s. 2(2).

[36]*Ibid.*, s. 1.

[37]*Ibid.*, s. 2(1)(*a*) (as amended).

[38]*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: *R.* v. *Evans* [1896] 1 Q.B. 228.

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 limit, 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 teenager against whom an order would not in practice be effective.

6.14 Accordingly, we suggested in the Working Paper that the bringing of proceedings in which paternity was in issue should not be subject to any time limit and, specifically, that proceedings for the maintenance of illegitimate children should not be subject to such a limit. This proposal was supported by the great majority of commentators who referred to the matter but there were some who viewed the abolition of any time limit with unease. It was pointed out that outright abolition might result in distress and hardship to men who could find themselves brought before a court and ordered to make substantial payments in respect of a child of whose very existence they had been for many years unaware. In particular the potential for vindictive actions against men who had built up a happy and secure family life weighed heavily with some of those who expressed concern about the consequences of abolishing any time limit.

6.15 We do not think it is possible to dismiss such fears as being altogether ill-founded; and we have therefore reconsidered the proposal for outright abolition which we made in the Working Paper. It remains clearly our view that retention of the existing law, with all its anomalies,[39] could not be justified; but we have given careful consideration to a proposal that there should be some alternative form of time limit on the institution of proceedings claiming financial provision for a non-marital child from a man alleged to be the child's father.

6.16 We have found this a difficult issue. On the one hand, there is the potential hardship to the father and to the man against whom paternity is alleged but not proved; on the other, it has to be remembered that to bar a claim may cause hardship to the child. The difficulty is to our mind increased by the unsatisfactory consequences of any compromise solution, for example, that there should be a time limit of say three or five years on the institution of proceedings, but that the court should be empowered to give leave to start proceedings out of time if it would not have been reasonable to apply earlier or if the application of the limitation rule would cause exceptional hardship to the child. Clearly, a straightforward limitation period could operate in an arbitrary and harsh way (most clearly in those cases where the child's parents had in fact been cohabiting), yet to vest a discretion in the court to extend the period does not seem to us to be a wholly satisfactory solution. It would be difficult for a court to exercise such a discretion according to any consistent or easily

[39]See para. 6.13 above.

predictable principle;[40] and the existence of such a procedure could not eradicate hardship to some defendants (who might, because of a change in the circumstances of the child or its mother, still be successfully sued many years after the birth), or indeed the possibility of blackmailing applications (since the harm might well be caused by the threat to start proceedings, rather than by any calculation of the prospects of success in an application for leave to do so out of time). Moreover, the existence of any such rule[41] would preserve a statutory distinction between the marital and non-marital child, operating to the latter's disadvantage. This should, in our view, only be tolerated if the interests of justice clearly so require.

6.17 On balance, we remain of the view that there should be no time limit. We accept that this may sometimes result in hardship to the defendant; but it has to be remembered that liability is only imposed on him because he is in fact the child's father. It is, of course, true that the child's father may have acquired obligations to a wife and to other children; but any hardship to them will be mitigated by reason of the fact that the court, in determining the amount of any order, will be required to have regard to all the circumstances of the case, including the financial resources, obligations and responsibilities of those concerned.[42] Moreover the possibility of a man being harassed by unjustified stale claims is significantly less than would have been the case before reliable blood testing became available to the courts.[43] We doubt if the removal of the existing time limits will in fact lead to a flood of stale claims, if only because it will usually be in the interests of the mother to bring a claim as soon as she can: delay will cause financial loss and may mean that it will become difficult to produce the necessary evidence of paternity.

(*ii*) *Abolition of specific requirement for corroborative evidence*

6.18 Where evidence is given in affiliation proceedings by the mother, it is provided[44] that the court may not adjudge the defendant to be the putative father unless the mother's evidence is corroborated in some material particular by other evidence to the court's satisfaction.[45] This distinctive requirement dates back to the Poor Law Amendment Act of 1834, under which the overseers of the poor could recover from the putative father the cost to the

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[40]See the criticism of the rule which prohibits the presentation of a petition for divorce within three years of marriage unless a case of exceptional hardship or depravity is made out (Matrimonial Causes Act 1973, s. 3) analysed in Time Restrictions on Presentation of Divorce and Nullity Petitions (1980) Working Paper No. 76, pp. 37–46.

[41]We have also considered a number of other possible restrictions—for example, that notice of the intended proceedings should have to be given to the defendant within a specified time from the birth—but none seems satisfactory.

[42]Guardianship of Minors Act 1971, s. 12A.

[43]See Part V above.

[44]Affiliation Proceedings Act 1957, s. 4(1), as substituted by Affiliation Proceedings (Amendment) Act 1972, s. 1(1).

[45]As to what will meet this statutory requirement, see *Cross on Evidence* 5th ed., (1979), pp. 194–6.

parish of supporting the illegitimate child; the mother could not benefit from the proceedings.[46]

6.19 In the Working Paper[47] we proposed that corroboration should be a relevant factor in evaluating evidence, but should no longer be a formal prerequisite. We noted that this would involve a major change of emphasis, particularly since in guardianship proceedings under the existing law there is always a marriage to provide a presumption of parentage[48] whereas this would no longer be so under the new scheme. We accordingly particularly sought views on this provisional recommendation.

6.20 The majority of commentators did not dissent from the proposal to abolish the formal requirement of corroborative evidence; but there was some influential support for retaining it. For example, the Justices' Clerks' Society saw merit, particularly in an area where false allegations are not unknown, in having a clear guide for the courts to follow. Concern was also expressed to the effect that it would be anomalous if some courts appeared usually to accept uncorroborated evidence while others seemed in practice to require corroboration.

6.21 We see the force of these arguments, and are well aware that a charge of paternity remains "easy to make and difficult to refute",[49] notwithstanding the availability of blood test evidence.[50] Nevertheless, there is one argument which seems to us to tell strongly against the retention of a specific statutory requirement of corroboration. This is that, without exception, those few other cases in which there is such a requirement are concerned with criminal offences.[51] It seems to us that a very strong case would have to be made out for retaining the statutory requirement in one particular class of civil proceedings. Indeed, it should be remembered that the requirement of corroboration does not exist in all cases where paternity is in issue, but only in affiliation proceedings. The court may, for instance, make a declaration of legitimacy, or a finding of parentage in other civil proceedings, whether or not the evidence is corroborated.

6.22 In our view, therefore, the formal statutory requirement of corroboration should be abolished. This is not, of course, to say that the courts would, in practice, necessarily or in all cases act on uncorroborated evidence. The ease

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[46]The Poor Law Amendment Act 1844 took bastardy proceedings out of the hands of the poor law authorities and converted them to a civil matter between the parents. However, the evidential requirements of the 1834 Act were retained and survived the vicissitudes of legislative policy over the years: see Finer and McGregor, *The History of the Obligation to Maintain*, printed as Appendix 5 to the Report of the Committee on One-Parent Families (1974) Cmnd. 5629, vol. II, pp. 115–21.

[47]Para. 9.47.

[48]See para. 10.48 below.

[49]*Cross on Evidence* 5th ed., (1979), p. 194; see also *Alli* v. *Alli* [1965] 3 All E.R. 480, 484, *per Sir Jocelyn Simon P.*

[50]See Part V above.

[51]*Cross on Evidence* 5th ed., (1979), pp. 190–6. It should also be noted that the 11th Report of the Criminal Law Revision Committee recommended the repeal of some of these provisions.

with which a charge of paternity may be made would no doubt often influence the court in assessing the weight of the evidence; but we believe that this is a matter to be left to the general law of evidence in civil cases. As in other such cases where there is obviously a serious risk of acting on uncorroborated evidence the court should nevertheless be free to do so if it is in no doubt where the truth lies. The balance in our view lies against a specific requirement of corroboration with overtones of criminal rather than civil procedures.

(*iii*) *Abolition of requirement that applicant be a "single woman"*

6.23 Under the existing law, it is only a "single woman" who can apply for an affiliation order.[52] This requirement does not in fact exclude the possibility of an application being successfully made by a married woman, for two reasons. First, it is now provided[53] that an application may be made if the applicant was a single woman at the time of the birth, even if she was no longer a single woman at the time of the application. A woman who marries after the birth of the child is thus no longer disqualified by the "single woman" requirement from seeking maintenance for the child from the natural father. Secondly, the courts have given a special meaning to the expression "single woman": it has been held that a married woman is nevertheless entitled to apply as a "single woman" if she is in fact separated[54] from her husband, and has lost the common law right to be maintained by him.[55] Nevertheless there are, we think, good reasons why the provision that only a "single woman" may apply should be removed. First, the requirement is relevant, if at all, to the financial rights of the mother, rather than to the needs of her child; the fact that a mother does not have an enforceable right to maintenance for herself against the child's father should not affect what is essentially the child's claim for support from his father. Secondly, the requirement is capable of causing injustice. If the mother's husband treats the child as a child of their family[56] he will come under a potential liability to maintain him.[57] However, in deciding whether, and if so how, to exercise its powers to order the husband to make

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[52]Affiliation Proceedings Act 1957, s. 1.

[53]Legitimacy Act 1959, s. 4.

[54]It seems that the test of factual separation is the same as that applied in desertion: thus if husband and wife are living under the same roof, evidence will be required to rebut the *prima facie* inference that they are living together, but it is basically a question of fact whether they are doing so: *Whitton* v. *Garner* [1965] 1 W.L.R. 313; *Watson* v. *Tuckwell* (1947) 63 T.L.R. 634. The separation must not merely be colourable: *Jones* v. *Davies* [1910] 1 Q.B. 118.

[55]For example, by having committed uncondoned adultery, or by deserting him: *Jones* v. *Evans* [1944] 1 K.B. 582; *Mooney* v. *Mooney* [1953] 1 Q.B. 38. See generally Bromley, *Family Law* 6th ed., (1981), pp. 483–4. It has however been argued that an adulterous wife is no longer within the definition of a "single woman" since she may now, in consequence of the Domestic Proceedings and Magistrates' Courts Act 1978, s. 1, nevertheless claim maintenance from her husband: see Douglas, (1979) 95 L.Q.R. 197.

[56]See *W. (R. J.)* v. *W. (S. J.)* [1972] Fam. 152.

[57]In proceedings based on his failure to provide maintenance under Domestic Proceedings and Magistrates' Courts Act 1978, s. 1, or Matrimonial Causes Act 1973, s. 27. Financial provision and property adjustment orders may also be made for the child's benefit in nullity, divorce, and judicial separation proceedings.

provision for such a child, the court is specifically directed[58] to have regard to a number of specified matters, including the liability of any other person (such as the child's natural father) to maintain the child.[59] A husband who, knowing of his wife's adultery, nevertheless continues to live with her and her child, may thereby be obliged to bear the whole burden of the child's support—something which is not only unfair to him but may not be in the child's interests. In our view it is right that a child born outside marriage should have two potential male sources of support if he has been treated as a member of the husband's family; his position will then be directly analogous to that of a child of divorced parents, one of whom remarries, since such a child will often acquire a right of support against his step-father in addition to his right of support against his natural father.[60]

6.24 There is a third and more important reason why, in our view, the requirement that only a single woman[61] can apply for financial provision to be made for her child by the natural father is unsatisfactory. This requirement means that the father of an illegitimate child cannot, as the law now stands, institute proceedings for financial provision for the child against the child's mother even if she is well-to-do and he has the care of the child. Under the Guardianship of Minors Acts *either* parent may apply for an order;[62] and the application of those Acts to children born outside marriage will mean that a father will be entitled to apply for financial orders for the child's benefit from the mother.[63] No doubt in practice it would rarely happen that an order would be made in favour of a father,[64] but we think it important for legislation to establish the principle that parents should "come to the judgment seat . . . upon a basis of complete equality" in matters relating to financial responsibility for

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[58]Matrimonial Causes Act 1973, ss. 25(3) and 27(3A) (inserted by Domestic Proceedings and Magistrates' Courts Act 1978, s. 63); Domestic Proceedings and Magistrates' Courts Act 1978, s. 3(3).

[59]The court is also directed under the provisions cited in n. 58 above, to have regard (among the circumstances of the case) to "(a) whether [the husband] had assumed any responsibility for the child's maintenance and, if so, the extent to which, and the basis upon which, [the husband] assumed such responsibility and to the length of time during which [the husband] discharged that responsibility"; and (*b*) whether "in assuming and discharging that responsibility [the husband] did so knowing that the child was not his . . . own".

[60]Clause 14 of the annexed Family Law Reform Bill is also of some importance in this connection. At present s. 45(3) of the Children Act 1975 (which is not yet in force) precludes an application for an affiliation order by a custodian who is also married to the child's mother. There is no such absolute prohibition on obtaining financial provision in the case of a step-parent of a legitimate child. Clause 14 of the Bill repeals both s. 45 of the 1975 Act and s. 34(3) with the result that when Part II of the Act comes into force the court will on an application by a custodian, whether or not he is married to the child's mother, be able to order the father of a non-marital child to make periodical payments for the child.

[61]And certain public bodies who may seek reimbursement of expenditure from the father: see para. 6.50 below.

[62]Guardianship of Minors Act 1971, s. 9(1).

[63]This position was achieved (as regards legitimate children) by the Guardianship Act 1973.

[64]*Calderbank* v. *Calderbank* [1976] Fam. 93, 103, *per* Scarman L.J.; *P.* v *P. (Financial Provision: Lump Sum)* [1978] 1 W.L.R. 483, 490, *per* Ormrod L.J.

the upbringing of their children just as do husbands and wives in relation to their own affairs.[65]

(d) Guidelines for the exercise of the courts' discretion

6.25 The Affiliation Proceedings Act 1957, as it was first enacted, contained no guidelines as to how the court should exercise its powers. No doubt it was unnecessary to give any guidance since the courts' powers under that Act were originally limited to ordering the putative father to make weekly payments[66] not exceeding £1.50.[67] The Domestic Proceedings and Magistrates' Courts Act 1978 extended the courts' powers in affiliation proceedings and also laid down specific guidelines to assist the court in the exercise of those powers. These guidelines are in substance identical to those now contained in section 12A of the Guardianship of Minors Act 1971.[68] This section provides—

> "In deciding whether to exercise its powers under section 9(2), 10(1)(*b*), 11(1)(*b*) of this Act, and if so, in what manner the court shall have regard to all the circumstances of the case including the following matters, that is to say—
>
> (*a*) the income, earning capacity, property and other financial resources which each parent of the minor has or is likely to have in the foreseeable future;
>
> (*b*) the financial needs, obligations and responsibilities which each parent of the minor has or is likely to have in the foreseeable future;
>
> (*c*) the financial needs of the minor;
>
> (*d*) the income, earning capacity (if any), property and other financial resources of the minor;
>
> (*e*) any physical or mental disability of the minor."

These guidelines were introduced into the guardianship legislation as recently as 1978 and we see no reason to recommend any change in them. They have the advantage of flexibility, and the direction of the court to have regard to "all the circumstances" including the "financial obligations" of the parents would seem to be particularly appropriate in the case of late claims against fathers of non-marital children.[69] Under our proposals, therefore, the guidelines

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[65]*Calderbank* v. *Calderbank* [1976] Fam. 93, 103, *per* Scarman L.J.

[66]Payments of birth and funeral expenses could also be ordered.

[67]Affiliation Proceedings Act 1957, s. 4(2). The maximum amount payable under an affiliation order was initially set at five shillings for six weeks after birth and two shillings and sixpence thereafter by the Poor Law Amendment Act 1844, s. 3. In 1872, the courts were empowered to make orders of up to five shillings weekly. This limit remained until the end of the First World War when it was raised to 10 shillings. It went up to £1 in 1925, and remained at that level until 1952 when it was raised to £1.10s: Report of the Committee on One-Parent Families, (1974) Cmnd. 5629, Vol. 2, Appendix 5, para. 63. The Matrimonial Proceedings (Magistrates' Courts) Act 1960, s. 15(*a*) raised this amount to £2.10s, and the limit on the courts' powers was removed by the Maintenance Orders Act 1968, implementing the recommendation of the Committee on Statutory Maintenance Limits (the Graham Hall Committee) (1968) Cmnd. 3587.

[68]Also inserted by Domestic Proceedings and Magistrates' Courts Act 1978, s. 43. See also Matrimonial Proceedings in Magistrates' Courts (1976) Law Com. No. 77, paras. 6.22 and 8.8.

[69]See para. 6.17 above.

presently contained in the 1971 Act will be equally applicable to marital and non-marital children.

(*e*) *No requirement to put custody in issue on an application for financial provision*

6.26 Under the Guardianship of Minors Act 1971 the court has no power[70] to make financial orders unless it also makes an order dealing with the actual custody of the child, and orders are in principle only to be made against a parent who has been excluded from having actual custody.[71] A parent cannot, therefore, under the guardianship legislation obtain an order for financial relief in respect of a child without putting the question of the child's custody in issue. In contrast, the mother of an illegitimate child can under the present law seek a financial order against the putative father without raising the question of custody because already she alone has all the "parental rights and duties".[72] Indeed the court has no power to make custody or access orders in affiliation proceedings[73] and if the father wants such an order, he must start separate proceedings.[74]

6.27 The policy of this Report is to eliminate, wherever possible, the difference in legal treatment between marital and non-marital children; we should be very reluctant to recommend the retention of these contrasting rules unless there were some compelling reason for doing so. It is, therefore, necessary to decide whether to follow the strict rule of section 9 of the Guardianship of Minors Act 1971 and to prevent the court from making a financial order in relation to any child, whether of marital or non-marital birth, unless it first makes a custody order; or to adopt the precedent of the Affiliation Proceedings Act and enable the court to make a financial order without necessarily having to consider the question of custody. It has been forcefully represented to us that in the case of the unmarried mother it might often be quite wrong to require her to seek an order for custody as a condition of obtaining a financial order. In many cases to do so would be unnecessary because the child's father would not himself want custody. In other cases the prospect of "provoking" the father by specifically seeking his exclusion from custody might, it is suggested, deter the mother from even seeking a financial order.[75] We think that these are important considerations. In practice, of course, questions of custody and financial need will be closely related, and it would no doubt be unusual for the court to wish to make a financial order save

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[70]Guardianship of Minors Act 1971, s. 9(2) as substituted by Domestic Proceedings and Magistrates' Courts Act 1978, s. 41(2). The same principle that financial provision is attached to the legal responsibility for the child is applied to cases where the court is empowered to order a parent to make payments to a guardian: Guardianship of Minors Act 1971, ss. 10(1)(*b*) and 11(*b*), as substituted by Domestic Proceedings and Magistrates' Courts Act 1978, s. 41(3), (4).

[71]Guardianship of Minors Act 1971, s. 9(2) as amended.

[72]Children Act 1975, s. 85(7); see para. 7.19 below.

[73]Subject to limited exceptions listed in s. 5(4) of the 1957 Act. These are not however relevant to the present argument.

[74]Under the Guardianship of Minors Act 1971, s. 9; see para. 7.19 below.

[75]Cf. Part IV, n. 91 above.

in favour of a parent with actual custody of the child. In our view, however, this should be essentially a matter of judicial discretion. Accordingly we propose that the court should have power in all applications under the Guardianship of Minors Act 1971 to make financial orders whether or not any other order is sought or made, and whether the parents are married or not.

6.28 We also recommend a minor consequential amendment of two sections of the Guardianship of Minors Act 1971. Section 10 of that Act enables the court to make a financial order where it has ordered that a testamentary guardian be sole guardian of a child to the exclusion of a surviving parent.[76] Section 11 of the Act enables the court to make a financial order where it has made custody or access orders in resolving matters of difference between joint guardians, one of whom is a parent of the child.[77] We think that the court should have power on applications under both sections to order either parent to make financial provision for the child's benefit, whether or not that parent is excluded from custody rights.

(f) Court to have power to make financial provision orders in favour of an adult child in certain circumstances

6.29 It is now possible for maintenance orders made in matrimonial,[78] guardianship[79] and affiliation proceedings[80] to continue beyond the compulsory school leaving age of 16, and indeed after a child is 18 if he is undergoing further education or training, or if there are special circumstances (such as disability). However, whether or not a child can be the beneficiary of a financial provision order when he is already over 18 at the time that the first application is made will depend upon the legislation under which the application is made. Thus if the application is made in divorce proceedings,[81] or in matrimonial proceedings in the magistrates' court,[82] a new order can be made for a child over 18. In contrast if the application is made under the guardianship legislation no such order can at present be made. Neither is such an order possible under the Affiliation Proceedings Act 1957.[83] Hitherto the difference between the matrimonial and guardianship legislation has not been important because the financial provision sections of the Guardianship of

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[76]Guardianship of Minors Act 1971, s. 10(1)(*b*) as substituted by Domestic Proceedings and Magistrates' Courts Act 1978, s. 41(3).

[77]Guardianship of Minors Act 1971, s. 11(*b*) as substituted by Domestic Proceedings and Magistrates' Courts Act 1978, s. 41(4).

[78]I.e. in cases of divorce, nullity, judicial separation or neglect to maintain: Matrimonial Causes Act 1973, s. 29(3); see also Domestic Proceedings and Magistrates' Courts Act 1978, s. 5(3) for an equivalent provision for magistrates' court domestic proceedings.

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

[80]Affiliation Proceedings Act 1957, s. 6 as substituted by Domestic Proceedings and Magistrates' Courts Act 1978, s. 52.

[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]Affiliation Proceedings Act 1957, s. 6(1) as substituted by Domestic Proceedings and Magistrates' Courts Act 1978, s. 52.

Minors Act 1971 only apply to legitimate children[84] and a legitimate child over the age of 18 who requires financial provision can still benefit from an order either (where there has been a divorce) under the Matrimonial Causes Act 1973 or (where there have been matrimonial proceedings between his parents) under the Domestic Proceedings and Magistrates' Courts Act 1978.[85] In neither of these cases is there an age limit on child applicants. However the effect of our proposal to bring children born outside marriage within the financial provision sections of the guardianship legislation would, in the absence of any further recommendation, result in there being an important difference in the maintenance rights of marital and non-marital children over 18 in respect of whom no previous financial order has been made.[86] This is because the non-marital child's only means of obtaining a financial provision order will be under the guardianship legislation from which he cannot benefit if he is already over 18 when application is first made. This distinction may best be shown in the form of a chart showing the provisions for the continuation of orders over the age of 18, new orders over that age, and the variation or revival of earlier orders. (Orders made in wardship cases under section 6 of the Family Law Reform Act 1969 are not included)—

	A	B	C	D
	Divorce, etc. proceedings (including cases of neglect to maintain)	**Magistrates' court domestic proceedings**	**Guardianship proceedings**	**Affiliation proceedings**
	Matrimonial Causes Act 1973	Domestic Proceedings and Magistrates' Courts Act 1978	Guardianship of Minors Act 1971 (as amended)	Affiliation Proceedings Act 1957 (as amended)
1. Child under 16	Order may be made for "child of family": s. 24(1)	As under A: s. 2(1)	Order may be made for legitimate child of parties: s. 9(2) as substituted	Order may be made for illegitimate child: ss. 4(2) and 5(2) as substituted
2. Child aged 16–18	(*a*) Order made before 16 may extend to a specified date: s. 29(2)(*a*)	(*a*) As under A: s. 5(2)(*a*)	(*a*) As above, 1, while child is a minor: s. 9(2)	(*a*) As under A: s. 6(2)(*a*)
	(*b*) New order may be made to extend to a specified date: s. 29(2)(*a*)	(*b*) As under A: s. 5(2)(*a*)	(*b*) As above, 1, while child is a minor: s. 9(2)	(*b*) As under A: s. 6(2)(*a*)

[84]Sect. 14.

[85]In this case a "ground" under that Act has to be established; and only a party to the marriage can apply.

[86]If a previous periodical payments order has been made the child himself will be able to apply for its revival and variation: Guardianship of Minors Act 1971, s. 12C(5) as inserted by Domestic Proceedings and Magistrates' Courts Act 1978, s. 43. This section applies where a periodical payments order has ceased to have effect on or after the date on which the child becomes 16 but before (or on) the date that he becomes 18. Application may be made by the child himself after he attains the age of 16, but before he becomes 21.

	A **Divorce, etc. proceedings (including cases of neglect to maintain)**	B **Magistrates' court domestic proceedings**	C **Guardianship proceedings**	D **Affiliation proceedings**
	(*c*) Order whenever made may be varied: s. 31	(*c*) Order whenever made may be varied on application of child over 16: s. 20(12)	(*c*) As under B: s. 12C(4)	(*c*) As under B: s. 6A
	(*d*) No power to revive as orders do not lapse	(*d*) Power to revive earlier order on application of other child up to 21 where order has ceased to have effect: s. 20(10)	(*d*) As under B: s. 12C(5)	(*d*) As under B: s. 6A
3. Child aged over 18	(*a*) Order made before 18 may be extended if child undergoing further education or in special circumstances: s. 29(3)	(*a*) As under A: s. 5(3)(*b*)	(*a*) None	(*a*) None
	(*b*) New order may be made in case of further education or special circumstances: s. 29(3)(*a*). Child may apply: *Downing* v. *Downing* [1976] Fam. 288	(*b*) New order may be made as under A: s. 5(3)(*a*). Child cannot apply	(*b*) None	(*b*) None
	(*c*) Order whenever made may be varied: s. 31	(*c*) Order whenever made may be varied on application of child over 16: s. 20(12)	(*c*) As under B: s. 12C(4)	(*c*) As under B: s. 6A
	(*d*) No power to revive	(*d*) Power to revive earlier order on application of child up to 21 where order has ceased to have effect: s. 20(10)	(*d*) As under B: s. 12C(5)	(*d*) As under B: s. 6A

6.30 We think that the inability of a non-marital child (and only a non-marital child) to obtain a new financial provision order in any circumstances once he has attained the age of 18 would conflict with the basic policy of assimilating the legal position of marital and non-marital children. Although the precise method for application varies, the principle of the present law so far as marital children are concerned is reasonably clear, namely that a child of 18 and over should be able, in specified circumstances, to obtain financial provision from his parents where their relationship has manifestly broken down. We therefore recommend that the Guardianship of Minors Act 1971 should be amended to allow a child who has attained the age of 18 to apply to the court in certain circumstances for an order for periodical payments or a

lump sum. The result will be to confer on all children of 18 and over, not just those born outside marriage, a new right to apply *at their own instance*[87] for financial provision if they are undergoing education or training or if there are special circumstances. The children of divorced or divorcing parents already in effect have rights to apply for financial orders by virtue of the decision in *Downing* v. *Downing (Downing intervening)*[88] and we can see no sufficient reason why this right should not be shared by other children whose parents' relationship has broken down.

6.31 We have said that the powers to make orders on the application of an adult child should only be available if the parents' relationship has broken down. This seems to be the policy of the present law; and we do not think it would be right, in the context of reforms primarily concerned to remove the legal disadvantages of illegitimacy, to seek to introduce a fundamental change. What method is to be adopted to achieve this result? One technique would be to make the right to apply contingent on there having already been other proceedings affecting the child or his parents;[89] but we do not think this would be satisfactory. This is because the breakdown of the relationship between *married* parents will very often be evidenced by court proceedings; the breakdown of the relationship between *unmarried* parents is less likely to be so evidenced, because no formal legal proceedings are necessary to terminate the relationship or to enable the mother to obtain custody of any children. It seems to us that the best evidence of the breakdown of both married and unmarried relationships is provided by the parties separating;[90] and we accordingly recommend that an adult child should only have a right to apply to the court for financial relief if at the time of the application his parents are not living with each other. Moreover, the court should not be empowered to make orders at a time when the parents of the applicant are living with each other.

6.32 We recognise that to provide children of 18 and over with an independent right to apply to the court for financial orders against their parents might seem to be a far-reaching step. We have, however, seen that the limited proposals which we are now making follow closely the existing policy of the law; and it will be appreciated that giving a child the right to apply does not, of course, mean that the court will, on examining the merits of the case, think it appropriate to make an order.[91] Nevertheless, it seems to us to be evident that the discretion to make such orders needs to be carefully controlled and sparingly exercised. Accordingly, we recommend that, exceptionally in this

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[87]Cf. Domestic Proceedings and Magistrates' Courts Act 1978, s. 1 where the original application for an order can only be made by "either party to a marriage".

[88][1976] Fam. 288.

[89]As under the present law where the child of divorced parents may apply to the court: see *Downing* v. *Downing (Downing intervening)* [1976] Fam. 288. See also Guardianship of Minors Act 1971, s. 12(2) which allowed a person between the ages of 18 and 21 who had whilst a minor been the subject of any order under the Act to apply himself for financial provision. This section was repealed and replaced by a new section 12 contained in Domestic Proceedings and Magistrates' Courts Act 1978, s. 42. The chart set out after para. 6.29 above gives a schematic account of the present law.

[90]See *Pheasant* v. *Pheasant* [1972] Fam. 202, 207, *per* Ormrod J.

[91]See *Downing* v. *Downing (Downing intervening)* [1976] Fam. 288, 293.

part of the guardianship legislation, jurisdiction to make orders for children who have attained the age of 18 should be limited to the High Court and county court. We also propose that the powers exercisable by the court should be limited to those currently available under the guardianship legislation—i.e. to make orders for periodical payments and lump sum payments.[92] We can see that there might well be cases (particularly, perhaps, where a child is disabled) in which it might be appropriate for the court hearing an application by an adult child to have the full range of property adjustment powers at its disposal; but we have come to the conclusion that it would not be appropriate to bring forward legislation with such far-reaching implications in this present Report.

6.33 So far we have been discussing the case where either no order has been made before the child reached 16 (the minimum school-leaving age to which orders generally run in the first instance)[93] or where any order made before the child reached 16 lapsed before that date.[94] We now have to consider the case where an order was in force when the child attained 16, either lapsing at that date or at some time thereafter. Under the present law, as we have seen, the child can himself apply, up to the age of 21, for a revival of that order.[95] In line with our recommendation that a child over 18 should be able to apply for a new financial provision order, we propose that the age limit of 21 should be removed from the provision allowing for revival of an earlier order. The fact that the child's parents may be living together will not prevent the child over 18 from applying to revive an earlier order: this is in contrast, as we have seen,[96] to our recommendation that only where the parents are not living together should the child have a right to apply for the first time for an order. However, in the case where the child seeks to revive an earlier order there will at some time have been domestic instability of such a kind as to necessitate a financial provision order for the child and this, we feel, justifies conferring on a child in an appropriate case the right to apply for support after the age of 18. It is arguable in such cases that the child is most likely to be financially vulnerable. We recognise that allowing a child of any age to apply to revive an earlier order, like allowing him to apply for the first time for an order, is a considerable step to take. The age limit of 21, however, as a notional date for the likely end of education or training is in our view somewhat outdated and in any case we think an indefinite age limit (in principle) is justified in the case of the disabled or handicapped child whose "special circumstances" will obviously have to be catered for beyond the age of 21. Nevertheless, as with our recommendation in relation to new financial provision orders on the application of a child over 18, we recommend that the power to revive, on the application of the child, an earlier order should be restricted to the High Court and county

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[92]See paras. 6.5–6.6 above.

[93]Matrimonial Causes Act 1973, s. 29(3)(*a*); Domestic Proceedings and Magistrates' Courts Act 1978, s. 5(3)(*a*).

[94]As where the order was made payable to a parent and the parents subsequently resumed cohabitation thus causing the order to lapse after six months: Guardianship Act 1973, s. 5A(1), added by Domestic Proceedings and Magistrates' Courts Act 1978, s. 46.

[95]Under Guardianship of Minors Act 1971, s. 12C(5). See n. 86 above.

[96]See paras. 6.30–6.31 above.

court even if the original order was made by the magistrates' court. Any subsequent variation would also have to be dealt with in the High Court or county court.[97]

6.34 We should also add that we propose to retain the present provision[98] which permits a child aged over 16 to apply for a variation of an order made before he attained that age. In the case of such a variation there will not, we think, be the new situation faced by a court where a new order or the revival of an earlier order is contemplated and there is no need therefore to restrict the courts which may hear the application; variation will, as now, be dealt with by the court which made the original order.

(g) Power to vary orders

6.35 Legislation now provides that *periodical payments orders* made under the Affiliation Proceedings Act 1957[99] and the Guardianship of Minors Act 1971[100] may be varied,[101] suspended, discharged or revived. There are differences in detail between the two codes, but we do not consider that there is any necessity to make special provision in this context to deal with cases of children born outside marriage; the rules now contained in the Guardianship of Minors Act can be applied satisfactorily to all cases, whatever the child's parentage.

6.36 The proposal that we make at paragraph 6.11 above that the court in guardianship proceedings should have the power to make an order for secured periodical payments does however raise a special problem in relation to variation. As was pointed out in our Report on Financial Provision in Matrimonial Proceedings[102] a new situation may well arise on the death of the payer. His estate may have increased (by the payment of sums due under life policies, for example) so that it might be reasonable for the payments and/or the security to be correspondingly increased. On the other hand, the burden of capital taxation, and the need to make provision for other dependants, may make it appropriate for the payments, and/or the security, to be reduced. We

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[97]The draft Bill annexed to this Report provides that if the earlier order was made by a magistrates' court the order is to be treated as that of the High Court or county court for purposes of variation or discharge but as that of the magistrates' court for purposes of enforcement. It will therefore not be necessary to take any specific steps to enforce such an order in the magistrates' court: there will be no jurisdiction in those courts to vary it. See Guardianship of Minors Act 1971, s. 12C(7), as prospectively amended in Appendix A, Sched. 4 below.

[98]Guardianship of Minors Act 1971, s. 12C(4). In para. 6.11 above we recommended that the courts should be able to order secured periodical payments under that Act. Consequently, the right of a child aged over 16 to apply to vary orders will extend to secured periodical payments orders.

[99]Affiliation Proceedings Act 1957, s. 6A (inserted by Domestic Proceedings and Magistrates' Courts Act 1978, s. 53).

[100]Guardianship of Minors Act 1971, ss. 9, 10, 11 and 12C (inserted by Domestic Proceedings and Magistrates' Courts Act 1978, s. 43).

[101]On varying an order the court has power to make a lump sum order: Guardianship of Minors Act 1971, s. 12B(3) (inserted by Domestic Proceedings and Magistrates' Courts Act 1978, s. 43); Affiliation Proceedings Act 1957, s. 6A(1) (inserted by Domestic Proceedings and Magistrates' Courts Act 1978, s. 53).

[102](1969) Law Com. No. 25, para. 91.

think therefore that provisions analogous to those now to be found in the Matrimonial Causes Act 1973[103] should be introduced into the guardianship legislation so that the court will have power to entertain variation applications, whether by the person entitled to the payments or by the personal representatives, provided that such applications are made within six months of the payer's death.[104]

6.37 The guardianship provisions, like those in affiliation proceedings, do not provide for the variation of lump sums (except that if a lump sum is ordered to be paid by instalments the court may vary the order by varying the number of instalments, the amount of any instalment, and the date on which any instalment becomes payable).[105] However, there is power to make a lump sum order for the child on an application to vary or discharge a financial provision order.[106] The only change of any substance which we propose is that non-marital children (like marital children under the present law) will benefit from the more extensive powers of the High Court and the county court under the Guardianship of Minors Act 1971 to make a lump sum order on an application to vary a periodical payments order.[107]

(*h*) *Discharge of orders*

(i) *By death*

6.38 A periodical payments order for the maintenance of a child ceases to be effective on the death of either the child or the payer. This is true both of affiliation orders and of orders under the Guardianship of Minors Act; and the application of the latter legislation to children born outside marriage will accordingly effect no change in the law in this respect.

6.39 In the case of a *secured* order for periodical payments the reasons which justify the automatic termination of an order on the death of the payer do not apply. Such orders do not depend for their effectiveness on the continued existence of the payer; he may die, but the fund on which the payment is secured will remain in being. The fact that his estate would remain charged with periodical payments need not cause any substantial inconvenience in the administration of the estate. All the deceased payer's property (with the exception of the security fund) can be distributed in the normal way; only the security fund need be retained so long as the order remains in force. For these reasons we do not think that an order for secured periodical payments should

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[103]Sect. 31(6)–(9).

[104]More accurately, within six months of the grant of representation to the payer's estate (subject to the court's power to extend the period): Matrimonial Causes Act 1973, s. 31(6).

[105]Guardianship of Minors Act 1971, s. 12B(5) (inserted by Domestic Proceedings and Magistrates' Courts Act 1978, s. 43); Affiliation Proceedings Act 1957, s. 6A(5) (inserted by Domestic Proceedings and Magistrates' Courts Act 1978, s. 53).

[106]Guardianship of Minors Act 1971, s. 12B(3) and (4); Affiliation Proceedings Act 1957, s. 6A(1). In magistrates' courts where lump sums are limited to £500, a second lump sum order may be made in this way but in the High Court and county court a lump sum order can only be made in a variation case where no lump sum was previously awarded.

[107]See para. 6.11(ii) above.

automatically determine on the payer's death; we have already proposed[108] that the personal representative and the person entitled to the payment should be entitled to apply to the court within six months of the death to *vary* such an order. On such an application the court could, if appropriate, vary the security required so as to facilitate distribution of the estate.

(ii) *By the parents living together*

6.40 Periodical payments orders made under the Guardianship of Minors Acts[109] in favour of *one of the child's parents* cease to have effect if, after the date of the order, they continue to live with each other, or resume living with each other, for a continuous period exceeding six months.[110] Such cohabitation will also bring an associated custody order to an end.[111] No similar provision exists in the Affiliation Proceedings Act 1957, and it would seem that an order made under that Act will, formally at least, not be affected by the child's parents living together (or even marrying).[112] We see no reason why the rule that cohabitation for a period of more than six months terminates an order, which now applies in guardianship cases, should not equally apply to children born outside marriage.[113]

6.41 The principle which lies behind the rule that orders in favour of a parent for the benefit of a child cease to be enforceable if the parents cohabit for longer than six months is that cohabitation over such a period is strong evidence of the parents' reconciliation which in turn indicates that a court order is no longer appropriate or necessary. It follows, we think, from this principle that if a child's parents marry one another there is even more reason for discharging an order previously made against one parent in favour of the other. As we have seen, the position under the Affiliation Proceedings Act 1957 would appear at present to be that an order is unaffected by the parents' marriage.[114] We think that this is wrong in principle in view of the commitment to a permanent relationship evidenced by the marriage. We therefore recommend that custody and financial orders in favour of a parent under the Guardianship of Minors Act 1971 should, if the parents of the child concerned subsequently marry one another, cease to have effect as from the date of the marriage.

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[108]At para. 6.36 above.

[109]And indeed the Domestic Proceedings and Magistrates' Courts Act 1978; see s. 25.

[110]Guardianship Act 1973, s. 5A(1) (as inserted by the Domestic Proceedings and Magistrates' Courts Act 1978, s. 46). When, however, an order under the 1971 Act is expressed to be in favour of the minor himself it is, unless the court otherwise directs, still enforceable notwithstanding the parents' continued or resumed cohabitation irrespective of the duration of such cohabitation.

[111]But will not, unless the court otherwise orders, affect any supervision order added thereto.

[112]See further para. 6.41 below.

[113]Periodical payments orders under our recommendations (see para. 6.11 above) may in the future be either secured or unsecured. Our view as to the effect of cohabitation where the order is payable to one or other of the child's parents relates to both types of periodical payments order.

[114]In practice a magistrates' court would no doubt readily accede to an application by the father to discharge an order made under the Act.

(*i*) *Alteration of written maintenance agreements*

6.42 Nothing that we propose would prevent the making of out of court agreements which may, if necessary, be enforced in contract.[115] Such agreements may well be common[116] and indeed it is desirable in principle that parents should be encouraged themselves to agree on the proper provision which should be made for their child. However, we consider 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. The existence of an agreement would not of course deprive the court of jurisdiction to make an order for financial provision if this were appropriate; but it is better that the right to maintenance should derive from a single source, and not partly from an inadequate agreement and partly from a supplementary order.

6.43 No such power to vary agreements exists at present under the Guardianship of Minors Acts or the Affiliation Proceedings Act 1957. There is such a power in section 35 of the Matrimonial Causes Act 1973 but, because a "maintenance agreement" within the section is defined as one between parties to a marriage,[117] an agreement relating to the maintenance of a child of unmarried parents is necessarily outside its scope. We propose 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 will 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 in the agreement for that parent's own benefit. We propose that (like section 35) it should apply to existing agreements. However, in view of the fact that the paternity of a non-marital child may well be disputed, we recommend that this provision (which necessarily will apply only to non-marital children) should only cover cases where there has been an acknowledgement of paternity on the face of the agreement. Where there is no acknowledgement of paternity, as in the case of compromise of a disputed claim, it would be possible to direct the court to have regard to that fact in deciding what sum should be payable on variation of the agreement; but we do not think that such a discretion would be satisfactory.

6.44 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).[118] In particular, if any question relating to secured periodical

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[115]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.

[116]The National Council for One Parent Families provide a specimen form with notes for guidance.

[117]Matrimonial Causes Act 1973, s. 34(2).

[118]As under the Matrimonial Causes Act 1973: see s. 35(3)(*a*) and (*b*).

payments arose under an agreement it would be dealt with by the appropriate county court or the High Court, and not by the magistrates' court.

6.45 We further propose—again in order to ensure that any material provision relating to "children of the family" should apply to all children equally—that a provision 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.[119]

6.46 We also propose that the jurisdiction of the county court should, as under section 36 of the 1973 Act, be dependent on the size of the deceased's estate, 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.

(j) Appeals

6.47 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,[120] and (b) on either law or fact, to the Crown Court.[121] A consequence of bringing the financial provision procedures for marital and non-marital children alike within the Guardianship of Minors Acts would be that appeals to the Crown Court from the magistrates' court (which take the form of a rehearing with witnesses) would disappear. Instead an appeal would lie, in the case of applications made to the magistrates' court, by notice of motion to the Divisional Court[122] and thence to the Court of Appeal. In the case of applications made in the county court or the High Court an appeal would lie to the Court of Appeal.[123]

6.48 In no other sphere of domestic jurisdiction is there an appeal to the Crown Court from the magistrates' court and the explanation for this unique feature seems to be purely 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.[124] Affiliation proceedings are, of course, not now regarded as a facet of administrative law; and the retention of the distinctive appeal

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[119]The court may extend this time limit: s. 36(2).

[120]Under Magistrates' Courts Act 1980, s. 111.

[121]Affiliation Proceedings Act 1957, s. 8(1). This includes appeals as to quantum: *R.* v. *Hereford City Justices* [1982] 1 W.L.R. 1252.

[122]Guardianship of Minors Act 1971, s. 16(3).

[123]County Courts Act 1959, s. 108(1) as substituted by Supreme court Act 1981, Sched. 3, para. 14; Supreme Court Act 1981, s. 16(1).

[124]See Finer and McGregor, *The History of the Obligation to Maintain* (Appendix 5 to the Report of the Committee on One-Parent Families (1974) Cmnd. 5629), section 5.

procedure cannot be justified on that basis. The chief value of the present procedure is that there is an appeal on primary issues of fact, at which the witnesses are heard and their evidence tested.

6.49 It may be thought regrettable there should be a loss of this appeal on primary issues of fact from a magistrates' court, especially where there is a contested issue of paternity. We have therefore given careful consideration to the question whether the appeal to the Crown Court should be retained, but have concluded that the disadvantages of retaining such an appeal outweigh the advantages. The appeal in all other domestic cases tried by magistrates lies to the Family Division, and the retention of an appeal to the Crown Court in what is now essentially a civil matter would be a serious anomaly. It would moreover be an unfortunate one because that court is largely (and, in many people's minds, exclusively) concerned with the trial of criminal matters. Finally, any hardship which might be caused by the loss of the appeal from magistrates to the Crown Court and the substitution of an appeal to the High Court should not be exaggerated. What would be lost would not be all rights of appeal on questions of fact, but rather the distinctive feature whereby the appeal takes the form of a rehearing of all the evidence in the case. On appeal to the Divisional Court there is power in the court to draw all inferences of fact which might have been drawn in the magistrates' court and to give any judgment and make any order which ought to have been made.[125] The court has power to order a retrial by magistrates and to receive fresh evidence in support of an appeal. The Divisional Court has available the notes of evidence taken at the magistrates' court hearing but, where a finding of fact depends upon an assessment of the credibility of witnesses, the Divisional Court will normally respect it because it has not seen the witnesses.[126] Where a finding of fact depends upon inferences based upon primary facts the Divisional Court will interfere if satisfied that the finding is wrong.[127] Assessment of the credibility of witnesses, and in particular in the light of cross-examination, was, no doubt, once of great importance in determining disputed paternity cases, and it will continue to be of importance in some cases in future,[128] but the scope for controversy over paternity has been reduced by the widespread use of more comprehensive and reliable blood tests.[129] The loss of this distinctive avenue of appeal by rehearing of witnesses[130] in the Crown Court has to be balanced against the advantages of abolishing the affiliation procedure, with its

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[125]*Simm* v. *Simm* [1967] 1 W.L.R. 125.

[126]*Tickle* v. *Tickle* [1968] 1 W.L.R. 937.

[127]As to the proper role of the Divisional Court in this context see *D.* v. *M., The Times*, 14 July 1982.

[128]Issues as to quantum of maintenance will usually involve questions of law or at any rate inferences from primary findings of fact which the appellate court will be in as good a position to assess as the lower court will be; for discussion of the distinction between primary facts and inferences which may be drawn therefrom, see especially *Benmax* v. *Austin Motor Co. Ltd.* [1955] A.C. 370.

[129]See Part V above.

[130]It should be remembered that appeals from the county court and the High Court to the Court of Appeal in such cases will also not involve a rehearing with witnesses.

criminal overtones, and we consider that the balance lies in favour of abolition of the affiliation procedure.

(k) Recovery of welfare benefits

6.50 Although we have said that financial provision is primarily a civil matter between the parties, it remains the case that the state may have an interest in compelling a person to maintain his relations. Thus, for the purposes of the supplementary benefits legislation,[131] it is provided that a person is liable to maintain his or her children.[132] It is also provided that the reference to a woman's children includes a reference to her illegitimate children, but that the reference to a man's children includes only those illegitimate children of whom he has been adjudged to be the putative father in affiliation proceedings.[133] If benefit is paid in respect of an illegitimate child, the Secretary of State may seek to recover the amounts disbursed from the father in one of two ways: he may either apply to have an existing affiliation order varied so as to provide for the payments to be made to the Secretary of State or some other person,[134] or he may himself, in order to meet requirements which include those of an illegitimate child,[135] apply for an affiliation order within three years from the time when any payment of benefit was made. We propose that the substance[136] of these provisions should be preserved. A man will henceforth be liable to maintain his children, whether marital or non-marital, but it will be provided that the court should not make an order against a man in respect of a non-marital child if he does not admit paternity unless paternity is satisfactorily established. The court will have power to make an order in favour of the Secretary of State on his application.[137]

(l) Financial provision to be available in wardship proceedings

6.51 Finally, we note that there is at present unjustifiable discrimination against non-marital children in wardship proceedings. Under section 6 of the Family Law Reform Act 1969 the court may order either parent of a ward of

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[131]The Supplementary Benefits Act 1976 as amended is set out in Sched. 2 to the Social Security Act 1980. There are analogous provisions in the National Assistance Act 1948, s. 42.

[132]Supplementary Benefits Act 1976, s. 17(1)(*a*), (*b*).

[133]*Ibid.*, s. 17(2).

[134]*Ibid.*, s. 19(5) as amended by Social Security Act 1980.

[135]*Ibid.*, s. 19(2).

[136]We are however recommending the repeal of s. 19 of the Supplementary Benefits Act 1976 which relates specifically to the obtaining of affiliation orders and in consequence we recognise that certain provisions which are of advantage to the Department of Health and Social Security will disappear. These relate to the Secretary of State's power to obtain an affiliation order (s. 19(2)–(4)); the Secretary of State's power to have an order varied by payments being transferred to him (s. 19(5)); and a right by any person entitled to obtain an affiliation order to apply to have an order in favour of the Secretary of State varied to provide for payments to be made to him or her (s. 19(6)). (Similar considerations apply to analogous provisions affecting the local authority under National Assistance Act 1948, s. 44(4), (5) and (6) and Child Care Act 1980, ss. 49 and 50(5).) These provisions however relate only to illegitimate children and as such are, we feel, no longer appropriate in the light of the reforms which we are recommending in this Report.

[137]Comparable changes are proposed in relation to contributions ordered to be made to the maintenance of children in care under Part V of the Child Care Act 1980.

court to pay to the other 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 subsection (5) of the section expressly excludes its application to illegitimate wards of court.[138] We propose that this exclusion be removed.

6.52 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[139] attaches, as we have seen,[140] to six months' cohabitation. Though this provision is not one which differentiates between different classes of children, the three-month period is now out of line with the comparable period in other family legislation. 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.

Transitional provisions

6.53 The main effects of our proposals will be twofold: first, the court will be able to make a wider range of orders on applications for financial relief in respect of non-marital children than has been the case in the past; secondly, the removal of the statutory time limits which at present apply to affiliation proceedings[141] will enable actions successfully to be brought against men who could at the moment rely on the fact that, for example, three years had elapsed since the date of the birth as a conclusive bar against the institution of proceedings against them.

6.54 We have no doubt that the extended range of powers should be available in respect of all applications made after the coming into force of the new legislation.[142] This follows the pattern[143] of recent reforming legislation in this field including the extension of the courts' powers in affiliation proceedings effected by the Domestic Proceedings and Magistrates' Courts Act 1978.[144] It is, of course, true that a father may now for the first time find himself at risk of being ordered to make significant capital payments for the benefit of his non-marital child; but in deciding whether to make such orders the court will,

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[138]At common law there was no power to award maintenance in wardship at all unless the ward had an interest in property out of which sums could be paid.

[139]And under divorce and magistrates' court matrimonial legislation.

[140]See para. 6.40 above.

[141]See para. 6.12 above.

[142]Existing affiliation orders will continue to be governed by the Affiliation Proceedings Act 1957 (as amended). However, it will be possible for a fresh application to be made under the Guardianship of Minors Act 1971, and the court hearing that application will be able to direct that the affiliation order should cease to have effect: see Sched. 3, paras. 1–3 of the draft Bill in Appendix A below.

[143]In some cases this may make the legislation retrospective in effect: see, for the divorce legislation, the brief summary in our Report on The Financial Consequences of Divorce (1981) Law Com. No. 112, para. 44.

[144]See s. 50, giving effect to proposals in our Report on Matrimonial Proceedings in Magistrates' Courts (1976) Law Com. No. 77. However, it should be noted that the extension of the courts' powers was much less wide than will be effected by the present proposals.

as we have seen,[145] have regard to all the circumstances including the father's obligations, present or future. We believe the courts can be relied upon not to exercise the new powers oppressively.

6.55 The question whether it should be possible after the implementation of our proposals to start proceedings against a man who, at present, would be protected by one of the time limits is one of very considerable difficulty. It is a settled principle of our law that changes in the law governing limitation of actions do not enable actions to be brought which were barred under the existing law;[146] and it seems to us to require strong justification to depart from that practice. We have, however, all come to the conclusion—some with less conviction than others—that on this occasion an exception should be made, so that it will be possible to institute proceedings for financial provision in respect of a non-marital child irrespective of the time which has elapsed since the birth. The arguments which weigh most with some of us go to the balance to be struck between the interests of the child and the interests of the father. On this view, the interests of the child should be paramount and allowed to outweigh any concern for the interests of a father who may at the moment be able to shelter from his responsibilities by reason of time limits which, as we have seen,[147] are full of anomalies. Others of us find that an apparently more technical argument carries greater weight. This is that the existing time limits never provide a complete and conclusive assurance to a man that he will not be faced with affiliation proceedings founded on an alleged sexual relationship many years previously. The Supplementary Benefit authorities may institute such proceedings against a man within three years *from the time when any payment of benefit was made* to meet requirements which include those of an illegitimate child;[148] so that such proceedings may in theory be brought at any time before the child attains the age of 19. The draft Bill[149] annexed to this Report accordingly contains no provision to preserve any immunity from suit founded on the lapse of time.

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[145]Para. 6.25 above.

[146]See Limitation Act 1980, Sched. 2, para. 9(1)(a). It is noteworthy however that s. 2 of the Affiliation Proceedings (Amendment) Act 1972 which extended the limitation period in affiliation proceedings from 12 months to 3 years took immediate effect in all cases.

[147]Para. 6.13 above.

[148]Supplementary Benefits Act 1976, s. 19.

[149]Appendix A.

PART VII

GUARDIANSHIP AND CUSTODY

Introduction

7.1 We now turn to examine the questions of guardianship and custody in relation to non-marital children. Although these concepts are of fundamental importance, especially in relation to questions about parental rights, it is often difficult to understand the confusing terminology which is used in the legislation and case law, and which we have to use in making proposals for reform. We think it may be helpful if we begin by giving some account of "guardianship", "custody", and related concepts; and go on to consider the ways in which the position of the illegitimate child, and his father, differs from that of the legitimate.

Terminology and concepts

(*a*) *Guardianship*

(i) *The powers of a guardian*

7.2 The institution of guardianship is historically rooted in feudal land law; and the modern law still retains many traces of its complex historical development.[1] It is particularly noteworthy that no comprehensive statutory definition of the powers of a guardian is to be found. Statutes do deal with the ways in which a guardian can be appointed, but they define the powers attaching to the office of guardian, if at all, only by reference to the common law. This characteristic is seen in section 9 of the Tenures Abolition Act 1660, which governed the powers of testamentary guardians from 1660 until its repeal in 1973.[2] This section provided that a guardian or guardians appointed under that Act could "*take into his or their custody to the use of such childe or children the proffitts of all lande tenements & hereditaments of such childe or children, and alsoe the custody tuition and management of the goode chattells and personall estate of such childe or children till their respective age of twenty-one yeares or any lesser time . . . and may bring such action or actions in relation thereunto as by law a guardian in common soccage might doe*". The Guardianship of Infants Acts 1886 and 1925 continued this practice of legislation by reference: those Acts provided[3] that guardians thereunder should "have all such powers over the estate and the person, or over the estate (as the case may be), of an infant as any guardian appointed by will or otherwise" had under the Tenures Abolition Act 1660.

7.3 In 1971 the guardianship legislation was consolidated,[4] and the draftsman considered[5] that he had no alternative but to reproduce these

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[1]See generally Holdsworth, *History of English Law*, vol. iii, pp. 511–513; Simpson, *Infants* 4th ed., (1926), pp. 149–173.

[2]Guardianship Act 1973, s. 9 and Sched. III.

[3]Guardianship of Infants Act 1886, s. 4; Guardianship of Infants Act 1925, s. 11(2).

[4]In the Guardianship of Minors Act 1971.

[5]See the Minutes of Evidence, p. 14, annexed to the First Report of the Joint Committee on Consolidation Bills on the Attachment of Earnings Bill and the Guardianship of Minors Bill (1970) 11 November 1970 (H.L. 29, H.C. 161).

references to the 1660 Act in the consolidation. The Joint Committee on Consolidation Bills accepted this with regret, and in its Report formally drew attention to the undesirability of having a reference to an Act of 1660 in a modern consolidation.[6] In 1973 the opportunity was taken to act on the Joint Committee's view, and it is now provided[7] that "a guardian under the Guardianship of Minors Act 1971, besides being guardian of the person of the minor, shall have all the rights, powers and duties of a guardian of the minor's estate, including in particular the right to receive and recover in his own name for the benefit of the minor property of whatever description and wherever situated which the minor is entitled to receive or recover". The reference to the 1660 Act was thus removed, but it will be noted that the 1973 Act still provides no real definition of a guardian's powers.[8] Although the 1973 Act does, to some extent, deal with the guardian's extensive[9] powers over property, the powers of a guardian of the person are still governed entirely by the common law. It is difficult to give any adequate account of these powers, because there is virtually no modern case law dealing with this subject. For practical purposes, however, it can be said that such a guardian is, in the fullest sense, in *loco parentis*, and that he has all the powers of a parent[10] so long as the guardianship continues, save in cases where statute specifically requires an act by the child's *parent* (as distinct from his or her guardian).[11]

(ii) *Differences between legitimate and illegitimate children in relation to guardianship*

(1) *Introduction*

7.4 The law relating to the guardianship of the illegitimate child, and in particular the legal position of his natural father, differs in a number of respects from that relating to the legitimate child and his father. We think that it might be helpful if we first summarise these differences, before going on to discuss in detail their significance—

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[6]*Op. cit.*

[7]Guardianship Act 1973, s. 7(1); s. 9 of the Tenures Abolition Act 1660 was repealed: see Guardianship Act 1973, s. and Sched. III.

[8]See the explanation given by Viscount Colvill of Culross, *Hansard* (H.L.) 20 February 1973, vol. 339, cols. 24–25.

[9]The powers of a guardian may in this respect be more extensive than those of a parent. For example, a parent has no right to give a receipt for a legacy due to the child (*Dagley* v. *Tolferry* (1715) 1 P. Wms. 285; *Re Somech* [1957] Ch. 165; *Vestey* v. *I.R.C.* [1979] Ch. 177, 196 *per* Walton J.). In contrast it would seem that a guardian of a child's estate may have such a right (*McCreight* v. *McCreight* (1849) 13 I. Eq. R. 314).

[10]Including the power to bring legal proceedings to regain custody of the child: *R.* v. *Isley* (1836) 5 Ad. and E. 441. However in *Re N. (Minors) (Parental Rights)* [1974] Fam. 40, 46 Ormrod J. said that "to a lesser extent testamentary guardians may have parental rights". It would seem, however, that the testamentary guardian's rights are only less than those of a parent insofar as legislation sometimes requires the consent of a parent, irrespective of whether he has guardianship rights or not: see n. 11 below.

[11]This distinction is clearly drawn in relation to the consent required to the marriage of a child under 18: (see Marriage Act 1949, Sched. 2; paras. 9.15–9.16 below), and also in the adoption provisions of the Children Act 1975, s. 12(1)(*b*) which require the agreement of "each parent or guardian" of the child to the making of an adoption order. See further para. 9.2 below.

(*a*) The father of an illegitimate child, unlike the father of a legitimate child, is not entitled on the mother's death automatically to become the child's guardian.[12]

(*b*) The father of an illegitimate child has no right to appoint a testamentary guardian for the child unless a custody order in his favour was in force at the date of his death.[13] It is unlikely that such an order will be in force if the parents are then living together in a stable relationship.

(*c*) After the mother's death, any person may apply to the court to be appointed the guardian of an illegitimate child. The natural father is not, as such, a person having parental rights over the child, and therefore the existence of a natural father would not prevent the court from having jurisdiction to make an order on such an application.[14]

(*d*) The father of an illegitimate child, unlike the father of a legitimate child, has no standing under the statutory procedure for objecting to a testamentary guardian appointed by the mother.[15]

We now consider in the context of illegitimacy how guardianship arises and how a guardian may be removed.

(2) *The parental right of guardianship*[16]

7.5 The Guardianship of Minors Act 1971 provides[17] that on the death of one parent of a legitimate child, the other parent, if surviving, shall be

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[12]See para. 7.5 below.

[13]See para. 7.6 below and *Re D. (A Minor)* (1978) 76 L.G.R. 653, 658.

[14]See para. 7.7 below.

[15]See para. 7.8 below. The father might, however, seek effectively to question the testamentary guardian's exercise of the guardianship either by making the child a ward of court, or (if appropriate) by himself seeking an order for legal custody under s. 9 of the Guardianship of Minors Act 1971.

[16]The term "guardian" may, strictly speaking, include a parent, but as has been pointed out, "in common practice the concepts of parent and guardian are quite distinct, for the rights and duties of the former arise automatically and naturally on the birth of the child, whilst the latter voluntarily places himself in *loco parentis* to his ward and his rights and duties flow immediately from this act" (Bromley, *Family Law* 6th ed., (1981), p. 361). In this Report we follow the common usage. It should also be noted that there are various types of limited guardianship; see *Rimington* v. *Hartley* (1880) 14 Ch. D. 630, 632 *per* Jessel M.R. Of these, the most important today is the guardian *ad litem*, appointed to act for an infant in litigation: see e.g. R.S.C. Ord. 80, r. 2; Matrimonial Causes Rules 1977, r. 112(2). It is still possible, but now unusual, for a separate guardian of a child's estate to be appointed: the Guardianship Act 1973 expressly preserved the power of the High Court to appoint a person to be, or to act as, the guardian of a minor's estate, either generally or for a particular purpose: s. 7(2). These complexities are not further discussed in this Report. For a full account of the different types of guardianship, see Simpson, *Infants* 1st ed., (1875), pp. 191–234; and, for some useful comparative material, Fraser, "Guardianship of the Person", and Fratcher, "Powers and Duties of Guardians of Property" (1960) 45 Iowa L.R. 239, 264 respectively. It should also be noted that the word "guardian" may have a special meaning in statutes: see the authorities discussed in *Leeds City Council* v. *West Yorkshire Metropolitan Police* [1982] 1 W.L.R. 186.

[17]Sect. 3.

guardian of the child either alone or jointly with any guardian appointed[18] by the deceased parent. As we have seen, however, if the child is illegitimate, the natural father has on the mother's death no right to the child's guardianship[19] unless at that date there was in force an order[20] giving him legal custody[21] of the child.[22]

(3) *Testamentary guardians*

7.6 The father and mother of a legitimate child may by deed[23] or will appoint any person[24] to be guardian of the child after his or her death.[25] The mother of an illegitimate child also has the right to appoint a testamentary guardian;[26] but as we have seen[27] an appointment made by the natural father is of no effect unless immediately before his death the father was entitled to legal custody under a court order.[28] This rule may work harshly where a child's parents have had a stable relationship. However close the father's link with the child he has no right to appoint a guardian, and thus do something to secure the child's upbringing after his death, unless he has a custody order. In practice a custody order will only be obtained if the parents' relationship has broken down.

(4) *Guardians appointed by the court*

7.7 The High Court has an inherent power to appoint a guardian for a child.[29] In two cases the High Court, county court and magistrates' court[30] also

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[18]By deed or will: see the next para.

[19]Unless he has been appointed the child's testamentary guardian by the mother: see para. 7.6 below.

[20]Under Guardianship of Minors Act 1971, s. 9; see para. 7.21 below.

[21]As defined in Children Act 1975, s. 86.

[22]Guardianship of Minors Act 1971, s. 14(3), as amended by Domestic Proceedings and Magistrates' Courts Act 1978, s. 36(1)(*a*).

[23]Such a deed is a testamentary instrument: *Ex parte Ilchester* (1803) 7 Ves. Jun. 348, 367 *per* Lord Eldon. Consequently it will not take effect until the grantor's death and will be revoked by a subsequent appointment by will: *Shaftesbury* v. *Hannam* (1677) Cas. Temp. Finch 323.

[24]Although the singular is used in the relevant sections (ss. 4(1) and 4(2)) of the Guardianship of Minors Act 1971, the Act elsewhere refers to the "guardian or guardians" appointed by each parent: see ss. 3(1)(*b*) and 3(2)*b*). It is thus usually assumed that a parent may appoint two (or more) testamentary guardians.

[25]It is not clear whether the assumption by a local authority of parental rights in respect of a child by virtue of a resolution under s. 3 of the Child Care Act 1980 (which operates to vest in the authority all the parental rights and duties save for rights in relation to the making of an adoption order) or the making of a care order by a juvenile court under s. 24(2) of the Children and Young Persons Act 1969 (which confers on the authority "the same powers and duties . . . as his parent or guardian would have apart from the order") affects the parents' powers of appointing a guardian: see Thompson, (1974) 90 L.Q.R. 310 and (1975) 91 L.Q.R. 14.

[26]*Re A.* (1940) 164 L.T. 230.

[27]At para. 7.4(*b*) above.

[28]Guardianship of Minors Act 1971, s. 14(3).

[29]*Johnstone* v. *Beattie* (1843) 10 Cl. & F. 42.

[30]The powers of magistrates' courts are restricted; they cannot make orders involving the administration or application of the child's property or the income thereof: Guardianship of Minors Act 1971, s. 15(2)(*b*).

have *statutory* jurisdiction to appoint a guardian.[31] First, the court may appoint a guardian if a deceased parent[32] has appointed no testamentary guardian,[33] or the guardian or guardians so appointed die or refuse to act.[34] Secondly, the court may appoint an applicant to be the guardian of a child if the child "has no parent, no guardian of the person, and no other person having parental rights over him".[35] It should be noted that for this purpose "parental rights" can only be acquired by some formal legal process;[36] in the absence of a court order a step-parent has no such rights[37] and neither, it would seem, has the natural father of an illegitimate child.[38] Because of this, awkwardness could arise on the mother's death. On an application (for example by a relative of hers) the court is entitled to appoint the applicant without the father having any formal rights in the matter at all.[39] (In practice, of course, the court would be likely to have regard to the father's position in deciding whether it would be in the child's interests to make the order).

(iii) *Removal of guardians*[40]

7.8 The High Court (but not the county court or magistrates' court) has a statutory power[41] to remove from his office any testamentary guardian or any guardian appointed by the court under its statutory powers. The Act also empowers the court, in effect, to deprive a parent of his parental rights in the following circumstances—

(*a*) If the mother or father[42] of a child objects to a testamentary guardian appointed by the other parent so acting, the guardian[43] may apply to the court. In such a case the court's powers include the power to

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[31]The Affiliation Proceedings Act 1957 in addition empowers magistrates to appoint a person to have custody of an illegitimate child in respect of whom an affiliation order has been made if the mother has died, is of unsound mind, or is in prison; it is provided that "a person appointed as guardian (*sic*) under this subsection" shall be entitled to receive payments due under the order: s. 5(4).

[32]I.e. a parent who is entitled to appoint a testamentary guardian. A natural father who has no custody order in his favour at the date of his death is not for this purpose a "parent": see above.

[33]Guardianship of Minors Act 1971, ss. 3(1)(*a*), 3(2)(*a*).

[34]*Ibid.*, ss. 3(1)(*b*), 3(2)(*c*).

[35]*Ibid.*, s. 5(1).

[36]*Re N. (Minors) (Parental Rights)* [1974] Fam. 40, 46 *per* Ormrod J.

[37]*Re N. (Minors) (Parental Rights)*, above.

[38]See Guardianship of Minors Act 1971, s. 14(2).

[39]Unless he has a custody order, in which case he would presumably be a person having "parental rights" over the child.

[40]If joint guardians disagree on a question affecting the child's welfare it is not necessary for a guardian to be removed; any guardian may apply to the court for its direction and the court may make such order regarding the matters in difference as it may think proper: Guardianship of Minors Act 1971, s. 7. The court may make custody and access and financial orders: *ibid.*, s. 11 as amended by Domestic Proceedings and Magistrates' Courts Act 1978, s. 41 (4).

[41]Guardianship of Minors Act 1971, s. 6.

[42]The natural father of an illegitimate child falls within this description only if he has an order giving him legal custody of the child: Guardianship of Minors Act 1971, s. 14(3). See para. 7.4 (*d*) above.

[43]If the guardian does not apply to the court it would seem that the surviving parent remains in the position of sole guardian of the child: see Guardianship of Minors Act 1971, s. 4(3).

order that the guardian shall be the sole guardian of the child[44] and so, in effect, exclude the mother or father from his parental right to the child's guardianship.[45]

(*b*) If a testamentary guardian considers that the mother or father[46] of the child is unfit to have custody of the child, the guardian may apply to the court. Once again the court may, in effect, deprive the mother or father of his or her guardianship rights by ordering that the guardian shall be sole guardian of the child.[47]

7.9 In the Working Paper[48] we drew attention to the limited scope of the court's statutory[49] powers to deprive a parent of guardianship rights. For example, no court has statutory authority to deprive one parent of such rights while the other is living;[50] there is no power for the court to resolve a dispute between a guardian appointed by the court[51] and a surviving parent by removing guardianship rights from the parent; there is also no power to reinstate the guardianship rights of a parent once those rights have been removed. These gaps were of particular significance in the light of our tentative proposal that the natural father of an illegitimate child should have the same parental rights as the father of a legitimate child, because it would then have been of great importance that adequate powers should be available to remove the guardianship rights from an "unmeritorious" father invested with such rights in consequence of the proposed reform. The lacunae[52] are of much less

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[44]*Ibid.*, s. 4(4)(*b*)(ii).

[45]See para. 7.5 above.

[46]See n. 42 above.

[47]Guardianship of Minors Act 1971, s. 4(4)(*b*)(ii).

[48]Para. 4.16.

[49]The High Court may have an inherent power to deprive a parent of guardianship rights: see *Wellesley* v. *Wellesley* (1828) 2 Bligh N.S. 124.

[50]It should however be noted that the divorce court has power to include in decrees of divorce and judicial separation (but not decrees of nullity) a declaration that a party to the marriage is unfit to have the custody of the children of the family: Matrimonial Causes Act 1973, s. 42(3). The effect of such a declaration is that the parent to whom the declaration relates is no longer entitled as of right on the death of the other parent to the custody or guardianship of the child. As long ago as 1902 it was said that such a declaration should only be made if a very strong case were made out: *Woolnoth* v. *Woolnoth* (1902) 86 L.T. 598. But applications for such declarations are still made (see e.g. *Buckley* v. *Buckley* (Note) [1977] 3 All E.R. 544), sometimes successfully (as in *A.C.B.* v. *J.L.B.* (1979) 130 New L.J. 547, C.A., where the court thought that if the husband were to become his daughter's guardian, there would be a risk of a recurrence of sexual misbehaviour towards her).

[51]E.g. under the Guardianship of Minors Act 1971, ss. 3(1), (2) where no guardian has been appointed by the other parent, or such a guardian dies or refuses to act. There is power to remove guardianship rights from the parent where the guardian has been appointed by will: see Guardianship of Minors Act 1971, s. 4(4)(*b*)(ii): para. 7.8 above.

[52]There are other unsatisfactory features of the present law of guardianship. For example, if a testamentary guardian or a surviving parent objects to the other's position, the court may nevertheless make an order that the guardian shall act jointly with the surviving parent: s. 4(4)(*b*)(i). This seems unlikely to be satisfactory, even though the parties may apply to the court to resolve matters affecting the welfare of the child which are in difference between them: s. 7. However, it would be outside the scope of this Report to deal with matters which are not primarily relevant to the non-marital child.

significance in the context of our present proposals which do not involve automatically conferring any parental rights on the natural father.

7.10 Our proposals for eradicating these distinctions between those of marital and non-marital birth, insofar as we believe it to be desirable to do so in the interests of the children concerned, are to be found below.[53]

(*b*) *Custody*

(i) *The meaning of "custody"*

7.11 The word custody has many different meanings. At one extreme, the word is used almost as a synonym for guardianship,[54] thus embodying virtually all the rights of a parent.[55] At the other extreme it is used to mean only the power physically to control the movements,[56] and thus the right to have physical possession,[57] of a child. Difficulty was caused by the use of the word "custody" in different Acts of Parliament without definition.[58] It was often clear that "custody" was used in a special sense but not easy, in the absence of any definition, to interpret it. Failure to define "custody" was the subject of adverse judicial comment;[59] and the Children Act 1975[60] accordingly sought to rationalise the terminology in the context of family law by introducing[61] newly defined key concepts of "legal custody" and "actual custody". These definitions

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[53]Paras. 7.38–7.43.

[54]*Hewer* v. *Bryant* [1970] 1 Q.B. 357, 373 *per* Sachs L. J.

[55]Discussed at paras. 4.16–4.23 above.

[56]See *Hewer* v. *Bryant* [1970] 1 Q.B. 357, 372 *per* Sachs L. J.; *Todd* v. *Davison* [1972] A.C. 392 ("custody" in Limitation Act 1939 s. 22(2)(*b*) denoted a state of fact, not a legal right); *Robertson* v. *Walton* [1977] 1 W.L.R. 177 ("custody" in the Income and Corporation Taxes Act 1970, s. 10, meant *de facto* custody). See also *Aspden* v. *Baxi* (1981) 52 Tax Cases 586 and the cases in n. 58 below.

[57]But this right is a "dwindling right which the courts will hesitate to enforce against the wishes of the child and the more so the older he is". *Hewer* v. *Bryant* [1970] 1 Q.B. 357, 369 *per* Lord Denning M.R. Historically, the courts would not enforce an order for custody against the wishes of a child who had attained the age of discretion (probably 16 in the case of a girl and 14 in the case of a boy): see *R.* v. *Howes* (1860) 3 El. & El. 332; *Re Agar-Ellis* (1883) 24 Ch. D. 317, 326 *per* Sir Baliol Brett M.R.; *Thomassett* v. *Thomassett* [1894] P. 295, 298 *per* Lindley L.J.; *Hewer* v. *Bryant* [1970] 1 Q.B. 357, 372 *per* Sachs L.J.; *Mills* v. *I.R.C.* [1973] Ch. 225, 240 *per* Lord Denning M.R.

[58]See particularly the problems of interpretation of the expression "in the custody of a parent" in Limitation Act 1939, s. 22(2)(*b*): *Woodward* v. *Mayor of Hastings* [1944] K.B. 671; *Kirkby* v. *Leather* [1965] 2 Q.B. 367 ("such an extraordinary provision that at times it seemed that the draftsman must have been of unsound mind" *per* Danckwerts L.J. at p. 386); *Brook* v. *Hoar* [1967] 1 W.L.R. 1336; *Duncan* v. *London Borough of Lambeth* [1968] 1 Q.B. 747; *Hewer* v. *Bryant* [1970] 1 Q.B. 357; *Todd* v. *Davison* [1972] A.C. 392.

[59]See particularly *Hewer* v. *Bryant* [1970] 1 Q.B. 357, 370–371 *per* Sachs L.J.; *Todd* v. *Davison* [1972] A.C. 392, 408 *per* Viscount Dilhorne.

[60]Sects. 86, 87(1); the Children Act also amended the Interpretation Act 1889 so that in any future Act the expressions "the parental rights and duties" and "legal custody" will be construed in accordance with the definitions given in the Children Act 1975: see now Interpretation Act 1978, Sched. 1.

[61]The Guardianship of Infants Act 1925, s. 7(5) distinguished between "legal custody" and "actual custody": see *Todd* v. *Davison* [1972] A.C. 392, 404 *per* Lord Dilhorne. However the Children Act 1975 for the first time defined and extended these concepts.

have been introduced[62] into the legislation which is primarily relevant to the present Report,[63] namely the Guardianship of Minors Acts 1971 and 1973. We now turn to examine these definitions.

(ii) *Meaning of "legal custody" and "actual custody"*

7.12 It is provided[64] that, unless the context otherwise requires, *legal custody* "means, as respects a child, so much of the parental rights and duties as relate to the person of the child (including the place and manner in which his time is spent); but a person shall not by virtue of having legal custody of a child be entitled to effect or arrange for his emigration from the United Kingdom unless he is a parent or guardian of the child". It is also provided[65] that 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."[66]

7.13 It follows that to decide whether a person with legal custody is empowered to act in a certain way it is necessary to answer two questions. First, is the right in question within the definition of the term "parental rights" contained in the Children Act 1975, that is to say, is it a right which by law "the mother and father have in relation to a legitimate child and his property"?[67] Secondly, if so, does that right "relate to the person of the child . . ."?[68] We have already seen[69] that it may sometimes be difficult to answer the first of these questions, since there is no statutory codification of common law parental rights. Moreover, there are some cases[70] in which it may not be altogether clear whether a particular parental right does or does not "relate to the person of the child"—for example, the "right" to change a child's name,[71]

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[62]Domestic Proceedings and Magistrates' Courts Act 1978, s. 36.

[63]The definitions do not, however, apply to the Matrimonial Causes Act 1973, so that there remains some uncertainty as to the precise meaning of the word "custody" when used in an order of the Divorce Court: see Maidment, "The Fragmentation of Parental Rights", [1981] C.L.J. 135; Cretney, *Principles of Family Law* 3rd ed., (1979), pp. 439–440. Two contrary views have been expressed: in *Hewer* v. *Bryant* [1970] 1 Q.B. 357, 373 Sachs L.J. said that an unqualified order giving custody to one parent appears nowadays to be interpreted as having the wide meaning embracing the whole bundle of rights which a parent has over his child. However, in *Dipper* v. *Dipper* [1981] Fam. 31, 45 Ormrod L.J. said that it is "a misunderstanding" to think that a parent with "custody" has the right to control the child's education or religion: "neither parent has any pre-emptive right over the other. If there is no agreement as to the education of the children or their religious upbringing or any other major matter in their lives, that disagreement has to be decided by the court. In day-to-day matters the parent with custody is naturally in control. To suggest that a parent with custody dominates the situation so far as education or any other serious matter is concerned is quite wrong". See also *Benson* v. *Benson* (1978) 10 Fam. Law 56.

[64]Children Act 1975, s. 86.

[65]*Ibid.*, s. 87.

[66]A person who has actual, but not legal, custody of a child has "the like duties in relation to the child as a custodian would have by virtue of his legal custody". Children Act 1975, s. 87(2).

[67]*Ibid.*, s. 85(1); see paras. 4.16–4.23 above.

[68]Children Act 1975, s. 86.

[69]Para. 7.11 above.

[70]See Bevan and Parry, *The Children Act 1975*, paras. 231–236.

[71]*Ibid.*, para. 235.

or perhaps to change his religion. For most practical purposes, however, there will be no doubt. Thus it is quite clear that a person with legal custody of a child has the parental right to have possession of the child, to determine where he should go to school, to discipline him, and to consent to surgical treatment; it is equally clear that a person with legal custody does not, as such, have the parental powers of administering the child's property.

7.14 Similarly, it is possible in relation to the definition of "actual custody" to postulate moot cases where the question whether or not a person had "actual possession" of a child's person would not be easy to resolve;[72] in practice, however, it will normally be clear whether or not a person has such possession, the more so since the Act provides that possession may be "shared with one or more other persons".[73] In any event, the primary significance of a person having actual custody of a child is not that he thereby gains rights, but that he thereby becomes subject to duties.[74]

Entitlement to parental rights

7.15 Against this background, it is now possible to outline the rules which determine legal entitlement to parental rights in respect of a child.

(*a*) *Legitimate children*

7.16 At common law the parental rights (including the right to custody) over a legitimate child vested at birth in the child's father, to the exclusion of the mother. However the Guardianship Act 1973[75] provided that the mother should have the same rights and authority as the law allowed to the father, and that the rights and authority of mother and father should be equal and be exercisable by either without the other.[76]

7.17 These rights will remain in the parents during their joint lives unless and until a competent court orders otherwise, for example, by an order in divorce or other matrimonial proceedings between the parents. Moreover, either parent may apply to the court under the Guardianship of Minors Act 1971.[77] The court on such an application may make such order regarding the legal custody of the child, and the right of access to him of his mother, his father, or any grandparent,[78] as the court thinks fit.[79] Such applications do not

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[72]*Ibid.*, para. 237; Cretney, *Principles of Family Law* 3rd ed., (1979) p. 438.

[73]Children Act 1975, s. 87(2).

[74]See n. 66 above.

[75]Sect. 1(1); see also Children Act 1975, s. 85(3).

[76]If the parents disagree on any specific question affecting the child's welfare, either parent may apply to the court for its direction; the court may on such an application make such order regarding the matters in difference as it thinks proper: Guardianship Act 1973, s. 1(3).

[77]Sect. 9.

[78]Guardianship of Minors Act 1971, s. 14A, as inserted by Domestic Proceedings and Magistrates' Courts Act 1978, s. 40.

[79]"Having regard to the welfare of the child and to the conduct and wishes of the mother and father": Guardianship of Minors Act 1971, s. 9. See para. 7.22 below as to the relationship between this provision and s. 1 of the Act, which directs the court in determining issues relating to the custody or upbringing of a minor or the administration of his property to "regard the welfare of the minor as the first and paramount consideration".

require the parties to establish any particular fact in order to found jurisdiction. In particular, it is not necessary for the applicant to allege that the marriage has broken down, or that his spouse has been guilty of any matrimonial or other misconduct. Nevertheless, applications under this provision are in practice usually only made in situations of marital breakdown: the court cannot give legal custody to more than one person,[80] and the order will cease to have effect if the parents continue to live with each other[81] in the same household,[82] or resume living with each other, for a continuous period exceeding six months.

7.18 On the death of one parent, the parental rights accrue to the other, who will act jointly with any testamentary guardian appointed by the deceased.[83] On the death of both parents, testamentary guardians appointed by them will have the parental rights.[84] If there is no testamentary guardian, and no other person having parental rights, any person may apply to the court to be appointed the child's guardian.[85]

(*b*) *Illegitimate children*

7.19 The position of the parents of an illegitimate child in relation to custody is wholly different. The parental rights and duties are by law vested entirely in the mother to the exclusion of the father;[86] the natural father can as such have no rights whatsoever except those given to him by statute.[87] The father thus has no automatic entitlement to legal custody or access.[88] The father does, however, now have a statutory right to apply to the court under the Guardianship of Minors Act 1971[89] for legal custody of the child or access to him. It is provided that the court may make such order as it thinks fit, "having regard to the welfare of the child and to the conduct and wishes of the

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[80]Guardianship of Minors Act 1971, s. 11A (inserted by Domestic Proceedings and Magistrates' Courts Act 1978, s. 37). The court may however order that a parent who is not given legal custody of the child shall retain "all or such as the court may specify of the parental rights and duties comprised in legal custody (other than the right to actual custody . . .) and shall have those rights and duties jointly with the person who is given legal custody".

[81]Guardianship of Minors Act 1971, s. 5A(1), as inserted by Domestic Proceedings and Magistrates' Courts Act 1978, s. 46.

[82]*Ibid.*, s. 5A(3).

[83]Para. 7.6 above.

[84]*Ibid.*

[85]Para. 7.7 above.

[86]Children Act 1975, s. 85(7).

[87]*Paton* v. *British Pregnancy Advisory Service Trustees* [1979] Q.B. 276, 279–80 *per* Sir George Baker P.

[88]Since the father has, as such, no parental rights over the child it was not necessary to confer on him the statutory right which both parents of a legitimate child have to apply to the court for its direction on any matter affecting the child's welfare about which he and the mother disagree: Guardianship Act 1973, s. 1(3); see n. 76 above. If there is a disagreement the mother is entitled to act as she wishes, since she alone has the parental rights. The father could of course make the child a ward of court; the court would then resolve all matters relating to his upbringing by reference to his welfare.

[89]Sect. 9(1); see s. 14(1).

mother and father".[90] This is the same formulation as is used by the Act in relation to applications by a parent of a legitimate child. It is now usually assumed that the references to parental wishes and conduct are governed by the direction contained in section 1 of the Act to regard the welfare of the child as the "first and paramount consideration".[91]

7.20 There has been increasing recognition by the courts of the importance of the natural father's role in relation to the welfare of the illegitimate child. At one time it was held that any view that it was in a child's interests to know both its parents did not necessarily apply in the case of an illegitimate child;[92] and even after the passing of the Legitimacy Act 1959 (when for the first time the father of an illegitimate child could apply for custody or access in guardianship proceedings) the courts stressed that the position of such a father was not the same as that of a legitimate father particularly because of the fact that he had more limited rights than the legitimate father in adoption proceedings.[93] However the courts have stressed the value of the parental link in some cases[94] and have given favourable consideration to the father's wishes,[95] especially where there has been no mother able to look after the child.[96] More recently it has been held that where the father has built up a relationship with his illegitimate child access is normally desirable and that only if it is likely to be detrimental to the child will access be refused.[97]

7.21 As we have already seen,[98] if the mother of an illegitimate child dies, the father has no right by virtue of his paternity to succeed to the parental rights; and an outsider may[99] apply to the court for an order appointing the applicant to be guardian. The father's death can have no legal effect on the parental rights in respect of the child unless he had a custody order in his favour which was in force at the date of his death. If so, he may appoint a testamentary guardian.

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[90] *Ibid.*, s. 9(1).

[91] We consider the question of parental wishes and conduct further at paras. 7.22–7.23 below.

[92] See *Re G. (An Infant)* [1956] 1 W.L.R. 911. See also *Re M. (An Infant)* [1955] 2 Q.B. 479.

[93] See *Re Adoption Application 41/61* [1963] Ch. 315; *Re Adoption Application 41/61* (No. 2) [1964] Ch. 48; and *Re O. (An Infant)* [1965] Ch. 23, 28 *per* Lord Denning M.R. We consider adoption proceedings in Part IX below.

[94] See e.g. *Re H. (Infants)* (1965) 109 S.J. 575.

[95] *Re Aster (An Infant)* [1955] 1 W.L.R. 465.

[96] *Re C. (A.) (An Infant)* [1970] 1 W.L.R. 288 where the issue was whether the child's father or aunt or grandmother should have custody. See also *Re C. (A Minor) (Custody of Child)* (1980) 2 F.L.R. 163 where the father was given care and control against a claim by the mother.

[97] *M.* v. *M. (Child: Access)* [1973] 2 All E.R. 81, applied in *S.* v. *O.* (1977) 3 F.L.R. 15 and *M.* v. *J.* (1977) 3 F.L.R. 19. See also *B.* v. *A.* (1981) 3 F.L.R. 27.

[98] Para. 7.4(*a*) above.

[99] Assuming no guardian has been appointed by the mother, and that there is no other person entitled to parental rights over the child: Guardianship of Minors Act 1971, s. 5.

Recommendations relating to guardianship and custody

(a) Child's welfare to be the first and paramount consideration in custody and related applications

7.22 We have already drawn attention[100] to the wording, dating from 1886, of section 9 of the Guardianship of Minors Act 1971. This empowers the court to make such orders regarding custody and access as the court thinks fit "having regard to the welfare of the minor and to the conduct and wishes of the mother and father." Section 1 of the 1971 Act (embodying a provision dating from the Guardianship of Infants Act 1925) provides that in proceedings affecting the custody or upbringing of a child, the administration of his property, and the application of the income thereof the court "shall regard the welfare of the minor as the first and paramount consideration". In recent years the paramountcy of the welfare factor in resolving disputes about the custody and upbringing of children has been repeatedly emphasised.[101] We have already seen that the courts apply the welfare test to applications concerning illegitimate children,[102] and in practice the distinctive wording of section 9 of the Act is not regarded as eroding the paramountcy of the welfare principle. Nevertheless there would, we think, be some advantage in making it clear by means of a suitable declaratory provision[103] that the welfare principle applies to non-marital children in just the same way as it applies to marital children, and in establishing beyond any possibility of dispute that the legal relationship between a child's parents is, as such, irrelevant in determining what is in the child's interests. We are reinforced in our view that such a provision would be desirable by the views of commentators who said that there was in practice in some courts an observable tendency to attach excessive weight to the legal relationship between the parents, rather than to the factual question of what course of action would best promote the child's welfare.

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[100]Para. 7.19 above.

[101]Notably since the decision of the House of Lords in *J.* v. *C.* [1970] A.C. 668; see e.g. *S. (B.D.)* v. *S. (D.J.)* [1977] Fam. 109; *Re K. (Minors) (Children: Care and Control)* [1977] Fam. 179. See further n. 104 below.

[102]See para. 7.19 above.

[103]A declaratory provision was inserted by Parliament into the Domestic Proceedings and Magistrates' Courts Act 1978 (see now s. 15) to make it clear beyond any doubt that the provisions of s. 1 of the Guardianship of Minors Act 1971 applied in relation to the exercise by a magistrates' court of its powers under that Act in relation to children. The draft Bill annexed to our Report on Matrimonial Proceedings and Magistrates' Courts (1976) Law Com. No. 77 did not contain such a provision; it was added in the course of the Bill's passage through Parliament to still any doubts on the matter: see *Hansard* (H.L.) 14 February 1978, vol. 388, cols. 1281–2 and *ibid.*, 28 February 1978, vol. 389, cols. 417–8.

7.23 We therefore propose that a new paragraph should be added to section 1 of the Guardianship of Minors Act 1971 (which embodies the "welfare" principle[104]) to make it clear beyond doubt that the court must base its decision squarely upon the best interests of the child "without gloss or qualification,"[105] whatever the status of the child's parents. The paragraph we propose (in clause 2 of the draft Bill set out in Appendix A below) is as follows—

> "For the avoidance of doubt it is hereby declared that the provisions of this section apply to all children whether or not the mother and father of the child have at any time been married to each other."

7.24 It would, of course, be anomalous to leave the existing reference to the conduct and wishes of the parents which is now to be found in section 9 of the Guardianship of Minors Act 1971. The parents' conduct and wishes may well be relevant in determining what is in the child's best interests;[106] but there is no need, we think, to make any specific reference to them in this alone of all legislation dealing with custody matters. It will be necessary to substitute a new provision for the existing section 9 of the Guardianship of Minors Act 1971 in order to confer on the courts the more extensive powers which we propose they should have at their disposal; and in the new provisions (in clause 5 of the draft Bill set out in Appendix A below) the court is simply directed to do what it thinks fit. In exercising this discretion the court will, of course, apply the welfare principle set out above.

(*b*) *Recognition of familial links between a child and his father if in the child's interests*

7.25 The proposals made in the Working Paper envisaged that both parents of an illegitimate child would in the absence of any court order be jointly entitled to the parental rights and duties. For the reasons given earlier in this Report[107] we do not now think this proposal acceptable. We do however think that the law should provide machinery giving legal recognition to the familial links between a non-marital child and his father whenever it would be in the

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[104]" ... the court ... shall regard the welfare of the minor as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father is superior to that of the mother or the claim of the mother is superior to that of the father." It has been held that the requirement to treat the child's welfare as the first and paramount consideration means "more than that the child's welfare is to be treated as the top item in a list of items relevant to the matter in question. [The words] connote a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare as that term has now to be understood. That is the first consideration because it is of first importance and the paramount consideration because it rules upon or determines the course to be followed": *J.* v. *C.* [1970] A.C. 668, 710–11, *per* Lord MacDermott. For striking illustrations of the application of this principle, see *S. (B.D.)* v. *S. (D.J.)* [1977] Fam. 109 and *Re K. (Minors) (Children: Care and Control)* [1977] Fam. 179.

[105]*Re C. (Minors) (Wardship: Jurisdiction)* [1978] Fam. 105, 117 *per* Ormrod L.J.

[106]See *J.* v. *C.* [1970] A.C. 668, 697 *per* Lord Guest; see also *per* Lord MacDermott at p. 715, and *per* Lord Upjohn at p. 724.

[107]See Part IV above.

child's interests to do so; and in the following paragraphs of the Report we make proposals to this end in the context of rights of guardianship and custody. Elsewhere we deal with the implementation of this policy in facilitating proof of parentage in court proceedings[108] and in the context of birth registration.[109]

(i) *Father to be entitled to apply to court for the parental rights and duties*

7.26 Under the present law, as we have seen,[110] the father of an illegitimate child may apply to the court for legal custody of the child (that is to say, so much of the parental rights and duties as relate to the person of the child[111]), or access to him.[112] We now propose that the father of a non-marital child should, in addition, have the right to apply to the court for "the parental rights and duties"[113] in relation to the child. The effect of an order vesting all such rights and duties in the father would effectively be to put the father into the same legal position in relation to the child as he would have been in had the child been born in marriage.

7.27 The reason why we advocate conferring such extensive powers on the court is because we do not think it right that the court should (as it now does) lack powers to accord legal recognition to the father if such recognition is in the child's interests. In deciding whether to make such an order the court will apply the welfare test; and it may well be that successful applications by fathers under the proposed provision will be rare. Nevertheless, there may be occasions (for example, where the child's parents have been living in a stable relationship which is ended by the mother's death) on which it would be appropriate to make such an order, and we think it right that the court should have power to deal with such situations.

7.28 The effect of an order vesting all the parental rights and duties will, as we have seen, be far-reaching. Indeed, at first sight it might seem difficult to distinguish the effect of such an order under the legislation which we propose from the effect of an adoption order, since an adoption order is now defined[114] as "an order vesting the parental rights and duties relating to a child in the adopters." Nevertheless, there would remain important differences between adoption and parental rights orders made under the legislation which we

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[108]See paras. 10.2–10.39 below.

[109]See paras. 10.55–10.75 below.

[110]Para. 7.20 above.

[111]Including the place and manner in which his time is spent but not the right to effect or arrange for his emigration from the United Kingdom: Children Act 1975, s. 86.

[112]When the custodianship provisions of the Children Act 1975 come into force, the natural father of a child will also be qualified, as a "relative" under s. 33(3)(*a*) of the Act, to apply for an order under s. 33(1) vesting legal custody in him. "Relative" under the 1975 Act has the same meaning as under the Adoption Act 1958, where it includes the father of an illegitimate child: Adoption Act 1958, s. 57; Children Act 1975, s. 107.

[113]"... all the rights and duties which by law the mother and father have in relation to a legitimate child and his property": Children Act 1975, s. 85(1); see further paras. 7.16–7.18 above.

[114]Children Act 1975, s. 8(1).

propose. Of these, the most important in legal terms is that an adoption order is in principle[115] irrevocable whereas it will be possible for an order giving parental rights to the father to be varied or discharged. Moreover, adoption is now primarily intended to transfer the care of the child from one family to another;[116] and the legislation contains provisions which seek to discourage the use of adoption by relatives.[117] In contrast, a parental rights order of the type that we now propose is intended to confirm the child in his own natural family, and it is of the essence of the scheme that such an order can only be made on the application of the child's father.

7.29 We see the utility of applications for parental rights orders as being chiefly in three types of case: first, where the mother and father are living together and agree to the order being made; secondly, where the mother has died without appointing the father to act as the child's testamentary guardian; and thirdly where the parents have separated and the father seeks full parental rights rather than an order simply giving him legal custody (under section 9 of the Guardianship of Minors Act 1971). Accordingly in the draft Bill annexed to this Report we have provided that a court may make an order either (i) giving the father all the parental rights and duties; or (ii) giving him all or any specified parental rights and duties other than the right to actual custody[118] of the child. The clause also provides that parental rights and duties may be exercised either by the father exclusively or by him jointly with the mother (or any guardian appointed by the mother).

7.30 There are however two features of the proposed parental rights order to which we should particularly draw attention. The first is that such an order will remain effective while the parents are living together (the first case identified in the previous paragraph). One of the objects of the order will be to enable the not insignificant number of parents who are unmarried but live together on a stable basis to regulate their parental rights and duties, subject to the court's approval, as if they had been married. This is, we think, of some importance in view of the increasing incidence of non-marital cohabitation and of non-marital birth.[119] We therefore think that it is of the essence of the new procedure which we are recommending that it should be unaffected by the

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[115]An adoption order in favour of the child's mother or father may be revoked if their subsequent marriage legitimates the child: Adoption Act 1958, s. 26. Furthermore, the court may in exceptional circumstances allow an appeal against the making of an order to be heard out of time: *Re F. (R.) (An Infant)* [1970] 1 Q.B. 385. The effect of allowing such an appeal is tantamount to revoking the order.

[116]See e.g. Children Act 1975, Sched. 1, para. 3(1); and note the provisions whereby copies of the entries made in the Adopted Children's Register effectively replace the child's original birth certificate: Adoption Act 1958, s. 20. Note also the provision prohibiting marriage between an adopted person and his adoptive parents: Marriage Act 1949, Sched. 1 as amended by Children Act 1975, Sched. 3, para. 8.

[117]See Children Act 1975, ss. 10(3), 11(3) and 37, designed to implement the recommendations of the Departmental Committee on the Adoption of Children (1972) Cmnd. 5107, Ch. 5 ("Relatives—Adoption or Guardianship?")

[118]As to the meaning of this term see paras. 7.12–7.14 above.

[119]See paras. 2.1, 4.3, 4.5 and 4.13 above.

parents' cohabitation. In this respect the guardianship legislation (under which legal custody orders are affected by cohabitation[120]) is not a relevant precedent.

7.31 The function of a parental rights application is to enable the court to assimilate the position of the father of a non-marital child to that of the father of a marital child if it considers this to be in the child's interests. It is not conceived as a procedure for resolving custody, access, or financial disputes, for which purposes there are other available procedures. If a parental rights order is made, it is to be assumed that the court considered recognition of the father's position to be in the child's interests. Because of this, the draft Bill is structured on the basis that a father who obtains a parental rights order will thereby automatically be entitled to legal recognition as the child's father for a number of other purposes—such as the right to become the child's guardian on the mother's death, and the right to appoint a testamentary guardian.[121] It is because the making of an order under this provision automatically has such effects that the draft Bill provides that no financial order can be made on an application for a parental rights order.[122] This does not mean that a mother who opposes the father's application, and seeks financial relief in respect of the child will be unable to obtain it; she will simply apply to the same court in the same proceedings for an order under section 9 of the 1971 Act as amended. If it were not for this provision there would be some danger that a court hearing a parental rights application might decide that only a financial order would be appropriate, and thus make such an order under section 8 of the Act (which, if not restricted, might seem to permit the court to impose the parental duty to maintain on the father). The consequences, in terms of automatic guardianship rights and so on which would incidentally but automatically flow from the making of such an order would, however, be quite inappropriate. The Bill therefore prevents this situation arising.

7.32 It may be helpful if we give some illustration as to how parental rights applications might operate in the three cases which we identified above.[123] Where the mother and father are living together and agree to the order being made, the court (assuming that it considers that it is in the child's interests to make the order) will have the power to give all the parental rights to the father, including the right to actual custody, and direct that these be shared with the mother. Where the mother has died without appointing the father to act as the child's guardian, the court will be able to give all the

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[120]Any order giving *actual custody* under s. 9 of the Guardianship of Minors Act 1971 ceases to have effect if the child's parents live with each other for a continuous period exceeding six months following the making of the order: Guardianship Act 1973, s. 5A as inserted by the Domestic Proceedings and Magistrates' Courts Act 1978, s. 46. See further para. 7.35 below.

[121]See further paras. 7.38–7.43 below.

[122]See s. 8(5) of the Guardianship of Minors Act 1971 as it is proposed to be amended by clause 4 of the draft Family Law Reform Bill annexed as Appendix A to this Report.

[123]At para. 7.29. The drafting of the proposed new section 8 of the Guardianship of Minors Act 1971 (see clause 4 of the draft Bill in Appendix A) has been influenced by the need to achieve consistency with the existing structure of orders adopted in the Children Act 1975 and the Domestic Proceedings and Magistrates' Courts Act 1978: see further the Explanatory Notes to clause 4.

parental rights to the father exclusively; alternatively, it will be able to order them to be shared with any guardian who has been appointed by the mother. Where the parents have separated and the father seeks a parental rights order the court could, of course, give the father all the parental rights (including the right to actual custody) exclusively; or it could order that actual custody remain with the mother but that specified parental rights be held jointly by both parents. What order it makes will of course be determined by the principle of the paramountcy of the child's welfare.

7.33 Apart from the question of actual custody, there may well be cases where the court does not consider that the child's interests would be best served by vesting *all* the parental rights and duties in the father, but he should nevertheless be given some say in relation to the child's upbringing. This is why, as we have said above,[124] the draft Bill[125] empowers the court to order that the father should have only *some* of those rights and duties (for example, the right to participate in decisions on the child's schooling). Such rights would, unless the court otherwise orders, be exercisable jointly with the mother. The court will also be empowered to make an order for access in favour of the father, whether or not it also confers some of the other parental rights on him.

(ii) *Disagreements between parents*

7.34 It is, of course, possible that a mother may disagree with a father about the exercise of parental rights vested in them jointly as a result of a court order under the procedure considered above. We propose two procedures for resolving such disputes—

(i) if either party feels that the order is no longer satisfactory, he or she will be able to apply to the court to vary or discharge the order by virtue of which parental rights were vested in the father;

(ii) if, however, the disagreement is merely about the *way* in which a *particular* power is to be exercised, we propose that either party should be entitled to apply to the court for its directions on the specific issue, without needing to put more general questions about custody or access in issue. We accordingly propose that section 1(3) of the Guardianship Act 1973 (which gives the court appropriate powers to resolve disputes between parents of a legitimate child) be amended so that it may be invoked in such cases.

(iii) *Father to continue to be entitled to apply for custody or access*

7.35 Under the existing law, as we have seen,[126] the father of an illegitimate child may apply to the court under section 9 of the Guardianship of Minors Act 1971 for an order for legal custody or access to the child.[127] We have

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[124]See para. 7.29.

[125]Clause 8, in Appendix A.

[126]Para. 7.19 above.

[127]Guardianship of Minors Act 1971, ss. 9, 14(1). In *R.* v. *Oxford City Justices, ex parte H.* [1975] Q.B. 1, 5, Bagnall J. said "For the purposes of applications for custody under the 1971 Act the father of an illegitimate child has, in effect, all the rights of the father of a legitimate child."

already proposed[128] an amendment of this section to make it clear beyond doubt that the test to be applied in determining such applications should be whether or not the making of an order would promote the welfare of the child. We see no reason to make any further proposals for substantive amendment of this procedure.[129] This provision will, as at present, most usually be invoked after a relationship has broken down and a father seeks access to or (perhaps less frequently) the legal custody of his child. It will be borne in mind that this provision, unlike the new procedure for seeking the parental rights and duties which we have proposed above,[130] is primarily relevant in the situation where a couple have separated (or have never lived together), since it is provided that any order will cease to have effect if the parents live together after the order for a continuous period of six months.[131] It is accordingly unlikely that applications will be made under section 9 save in cases of actual or apprehended dispute between the parents.

(*c*) *Custody and access for third parties*

7.36 The existing guardianship legislation is not primarily designed to be used in cases where legal custody is to be given to a third party. Only a parent can *apply* for legal custody under the existing section 9 of the 1971 Act;[132] and only a father will be able to apply for a "parental rights and duties" order under the new procedure which we have proposed above.[133] We do not think that it is either necessary or desirable to change this fundamental structure. However, it is at present possible under the guardianship legislation for a court considering a child's custody to commit a child to the care of a local authority if there exist special circumstances making it impracticable or undesirable for the child to be entrusted to either parent or to any other individual.[134] The court may also make a supervision order if there are exceptional circumstances making it desirable that the child should be under the supervision of an independent person.[135] We propose that these powers should also be available where the father of a non-marital child applies for a parental rights order under the new section 8 of the 1971 Act recommended above,[136] although the circumstances in which it would be appropriate for the court to make such orders might well be rare. We do not however recommend that this power

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[128]Para. 7.23 above.

[129]The section will, however, be completely recast in consequence of our proposals to confer additional financial powers on the court: see para. 6.27 above.

[130]Para. 7.26 above.

[131]Guardianship Act 1973, s. 5A, inserted by Domestic Proceedings and Magistrates' Courts Act 1978, s. 46.

[132]An order can at present be *made* in favour of a third party. However, as and when the relevant provisions of the Children Act 1975 are brought into force, this power will no longer exist under the 1971 Act. Instead, where on an application under s. 9 of the 1971 Act the court is of the opinion that legal custody should be given to a person other than the mother or father, it may direct the application to be treated as if it were an application for custodianship made by the third party, and it may make a custodianship order accordingly: Children Act 1975, s. 37(3) and (4).

[133]See paras. 7.26–7.33.

[134]Guardianship Act 1973, s. 2(2)(*b*).

[135]*Ibid.*, s. 2(2)(*a*).

[136]See paras. 7.26–7.30.

should be exercisable if, as we have proposed should be possible,[137] either parent simply applies for financial provision for the child without also putting the question of its custody in issue. There is no power to make care or supervision orders at present in financial proceedings for non-marital children and to introduce one now would we think be unnecessary,[138] and might deter some mothers from seeking financial provision for their children.

7.37 It is also possible for a grandparent to apply for access to a child, whether legitimate or illegitimate, if either or both of the child's parents is dead or if an application has been made to the court under section 9(1) of the 1971 Act.[139] The legislation was introduced in 1978 and is based on the principle that a grandparent should not have an independent and unrestricted right to be able to seek an order for access but that if either parent *initiates* proceedings, or if the parents' relationship is ended by death, the grandparent should be entitled to have his case heard. We propose that this right should be extended and should be exercised not only where an application is made under section 9 (whether for custody or for financial provision) but also where the father of a non-marital child applies for the parental rights and duties under the new section 8 of the 1971 Act. In the latter case, however, we take the view that an application by grandparents should not be entertained where the parents are living together at the date of the order. This would seem to be consistent with the underlying principal that the autonomy of the mother/father family unit be recognised as long as it continues.

(*d*) *Improving the father's position in relation to guardianship of the non-marital child*

7.38 We have already set out the ways in which the law relating to guardianship at present distinguishes between marital and non-marital children.[140] We now propose certain amendments in this area of the law so as to reflect our basic recommendation that the father of a non-marital child should be able to obtain parental rights and duties in relation to the child if a court considers recognition of the father's position to be in the child's interest.

(i) *The rule that the father of a non-marital child is not entitled on the mother's death automatically to become the child's guardian*

7.39 It would be inconsistent with our basic policy that a perhaps wholly unmeritorious father should automatically be entitled to be the child's guardian on the mother's death; and we accordingly consider that the policy underlying the present law should be preserved. However, if the father has obtained an order giving him any parental rights (other than the right of access alone) it seems appropriate that he should be in the same position as the father of a marital child and should therefore automatically become the child's guardian,

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[137]See paras. 6.26–6.27 above.

[138]In appropriate cases it would be possible, if the child's welfare were at risk, for the local authority to take separate proceedings under the Child Care Act 1980, s. 2.

[139]Guardianship of Minors Act 1971, s. 14A, inserted by Domestic Proceedings and Magistrates' Courts Act 1978, s. 40.

[140]See para. 7.4 above.

either alone or jointly with any guardian appointed by the mother, on her death.

(ii) *The rule that the father has no right to appoint a testamentary guardian for his child unless there is an order for legal custody in his favour in force at his death*

7.40 We have pointed out[141] that this rule now effectively deprives the father of any power to appoint a testamentary guardian where he is living with the child's mother. If the mother and father are living together it is improbable that any order for legal custody will be obtained; even if such an order is obtained it will be ineffective if the mother and father have been living together for six months or more.[142]

7.41 We think that the right approach is to give the father of a non-marital child the right to appoint a testamentary guardian if there is, immediately before the father's death, an order in force conferring on him legal custody or any parental right other than a right to access alone. We consider that the fact that such an order has been made is sufficient *prima facie* evidence to support the view that recognition of the link between the father and his child is in the child's interests, since otherwise the order would not have been made. If the mother objects to the guardian appointed by the father, she may apply to the court which may, if appropriate, in effect remove the guardian appointed by the father.[143]

(iii) *The rule that the father has no standing to object to an application by an outsider to be appointed guardian of the child*

7.42 Under the present law, as we have seen,[144] the father of a non-marital child, who is not the child's guardian,[145] has no formal standing (being neither a "father" nor a person with "parental rights" for the purposes of the 1971 Act) to prevent an outsider from applying on the mother's death to become the child's guardian under the procedure which is available where there is no person with any parental rights over the child.[146] As a corollary of the recommendation that we make in paragraph 7.39 above (that the father of a non-marital child who has any parental right other than access alone should automatically be the child's guardian on the mother's death), the application of this provision will be restricted; and the court will have no jurisdiction to entertain an application by an outsider to be the child's guardian if the child's father has an order vesting in him any parental rights other than access alone.

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[141]See para. 7.4(*b*) above.

[142]Guardianship Act 1973, s. 5A, inserted by Domestic Proceedings and Magistrates' Courts Act 1978, s. 46: see n. 120 above.

[143]Guardianship of Minors Act 1971, s. 4(4)(*a*). The court may also order the mother to act jointly with the guardian (s. 4(4)(*b*)(i)) or order that the guardian be sole guardian of the child (s. 4(4)(*b*)(ii)). In this latter case the court will have extensive powers to make orders in relation to custody, access, and financial matters: see the substituted section 10 of the 1971 Act contained in the draft Bill in Appendix A below.

[144]See para. 7.7 above.

[145]Under either the mother's will or by virtue of an order made under s. 9 of the 1971 Act.

[146]Guardianship of Minors Act 1971, s. 5.

(iv) *The rule that the father has no standing to object to a testamentary guardian appointed by the mother*

7.43 Here again we think that the position should be governed by the existence or non-existence of an order vesting some at least of the parental rights (other than access only) in the father. If such an order is in force, we consider that it should be open to the father to object to the appointment. If he does so, the court will be able to resolve the matter, either by excluding the guardian or the father or by ordering that they act jointly. In any case the court will have power on application to vary the order vesting parental rights in the father.

(*e*) *Out of court agreements*

7.44 In the Working Paper[147] we had to discuss, as one of the consequences of our proposal to vest parental rights in both parents of a child, the question whether or not parents should be entitled to make enforceable agreements relating to the exercise of those rights.

7.45 Under the present law, 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." The result is that, while a husband and wife may make an enforceable separation agreement which includes provisions about their parental rights, subject to the court's power in the interest of the child not to enforce it, unmarried parents and divorced parents cannot make such an agreement.

7.46 In the Working Paper[148] we suggested that section 1(2) of the Guardianship Act 1973 serves no useful purpose; we noted that the provision dates back to 1873 when it was no doubt necessary so that a separated wife should be able to obtain parental rights (which were then vested exclusively in her husband)[149] by agreement; and we thought it odd that an agreement about parental rights should be "enforceable" even in a limited sense. We therefore proposed[150] that section 1(2) of the 1973 Act should be repealed and that there should no longer be any power to enter into "enforceable" agreements about parental rights.

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[147]At paras. 4.21–4.25.

[148]At para. 4.23.

[149]They are now shared equally between the (legitimate) mother and father: Guardianship Act 1973, s. 1(1).

[150]At para. 4.23.

7.47 Under our present proposals, the father of a non-marital child will only have parental rights and duties if the court has made an order vesting them in him. It is thus not strictly necessary for us to consider the question whether the exception which permits spouses to make "enforceable" agreements should be extended to parents of all children, whether marital or non-marital. However, it was suggested to us that the Working Paper did not give adequate weight to the advantages of encouraging parents to resolve matters such as access by agreement between themselves; it was said that there would be positive merit in encouraging unmarried couples to give serious thought to such matters, and in giving statutory recognition to formalisation of agreements. No such agreement could, of course, prevail over a decision by the court that it was not in the child's interests. We note that a solution along these lines has been adopted in New Zealand,[151] and we have come to the conclusion that it should be adopted. The draft legislation annexed to this Report[152] accordingly provides that an agreement may be made between a child's parents (whether married or unmarried) as to the exercise of any parental rights and duties during any period when the parents are not living with each other in the same household.[153] It is specifically provided that no such agreement shall be enforced by any court if the court is of the opinion that it would not be for the benefit of the child to give effect to it. This provision would leave intact the general principle that parental rights and duties cannot be surrendered or transferred; and it leaves wholly inviolate the duty of the court in determining matters of custody or access to regard the welfare of the child as the first and paramount consideration; it also leaves untouched the duty placed on the parents of a child to provide financially for him. Moreover, as we have said, the provision will only apply where the parties have separated or are contemplating separation. In the exceptional case where the parties wish to regulate parental rights and duties while living together, they should apply to the court.[154]

(*f*) *Children in care*

7.48 Finally in this section we have to consider the effect of our recommendations on parental rights and duties in relation to non-marital children who are in the care of a local authority.[155] We therefore have to consider the distinctions between legitimate and illegitimate children drawn in

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[151]Guardianship Act 1968, s. 18.

[152]See clause 12(1) of the draft Bill set out in Appendix A.

[153]It would thus (unlike s. 1(2) of the Guardianship Act 1973) apply equally to agreements between divorced parents. Such an agreement could of course be overridden by a divorce court order for custody or access; and (if made before the divorce) would have to be considered by the court in discharging the duty imposed on it by s. 41 of the Matrimonial Causes Act 1973 to consider the arrangements made for the welfare of children of the family.

[154]See paras. 7.26–7.33 above for the "parental rights" order.

[155]Non-marital children seem to be more likely to be received into care than are other children. The National Child Development Survey showed that 16 per cent of the illegitimate children in the sample had been in care before the age of 11 compared with 3 per cent of the legitimate: and the corresponding proportions were higher both in cases where the children were at the age of 11 living with both their own parents and where the children were with their mother alone. See Lambert and Streather, *Children in Changing Families*, (1980), pp. 60–62.

(i) the Child Care Act 1980 (which consolidates much of the legislation on child care)[156] and (ii) the Children and Young Persons Act 1969 (which deals with care orders amongst other matters).

(i) *Child Care Act 1980*

7.49 Under this Act the word "parent" in relation to a child who is illegitimate is defined as meaning his mother to the exclusion of his father.[157] Only if the father of such a child has obtained a "custody" order[158] (or if he has been appointed guardian)[159] is he treated as a parent for the purposes of the Act.[160] (He is however included in the definition of a "relative" so that, if it is consistent with the child's welfare to do so, the local authority is under a duty to secure that he take over the care of the child.)[161] The result is that the father has to have a custody order or be a guardian in order to be qualified (*inter alia*)[162] (i) to require the return of a child who has been received into "voluntary" care[163] or (ii) to contest the assumption of parental rights and duties by the local authority.[164]

7.50 In our view the provisions of the Child Care Act 1980 which relate to the (limited)[165] right to demand a child's return from voluntary care and the right to contest the assumption by the local authority[166] of parental rights and duties are satisfactory in principle. Hence the draft Bill annexed to the Report[167] gives effect to the policy by pointing out that references to a parent or guardian generally extend to a person entitled to actual custody by virtue of a court order.[168] The result will be that a father of a non-marital child (or for that matter any parent)[169] who has no entitlement to actual custody should not

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[156]But not the grounds for, or the making of, care *orders*, which are dealt with under the Children and Young Persons Act 1969: see below.

[157]Child Care Act 1980, s. 87(1).

[158]*Ibid.*, s. 8(2).

[159]By deed or will or by court order: *ibid.*, s. 87(1).

[160]See however para. 6.50 above in relation to his duty under Part III of the Act to contribute to the maintenance of the child in care.

[161]Sections 2(3) and 87(1).

[162]Being a parent or guardian is also relevant for the purposes of other provisions of the Act: (i) ss. 9 and 12 (duty to maintain contact with the local authority while child in care); (ii) s. 11 (appointment of a visitor if there is no communication between the child and his parents); (iii) s. 24 (right to be heard on the question of the child's emigration); (iv) s. 25 (payment of funeral expenses); (v) s. 26 (recoupment of certain visiting and funeral expenses); (vi) s. 64 (transfer of parental rights to voluntary organisation). See also para. 6.50 above in relation to maintenance.

[163]*Ibid.*, s. 2(1); see also s. 13(2) and *Lewisham London Borough Council* v. *Lewisham Juvenile Court Justices* [1980] A.C. 273.

[164]*Ibid.*, s. 3.

[165]See *Lewisham London Borough Council* v. *Lewisham Juvenile Court Justices* [1980] A.C. 273.

[166]Or voluntary organisation: s. 64.

[167]Appendix A, clause 20(1).

[168]See paras. 7.12–7.14 above.

[169]See Child Care Act 1980, s. 8(2) which for the purposes of that part of the Act substitutes for the "parents" or "guardian" any person given custody by any court—including, it would seem, the other parent (e.g. on divorce).

have, for example, a right to demand the return of a child from voluntary care. It would seem to be quite wrong that a father whose only entitlement was to access should be entitled to demand the return of the child. The father would, however, remain a "relative" whether or not he had any court order; and this, in our view, represents the right balance between parental rights and local authority duties, since, in any case where the welfare of the child demanded it, the local authority would, as we have seen,[170] be under an obligation to secure that the father take over the care of the child. He would also continue to be able to apply for legal custody in order to achieve this end.

7.51 There are, however, other parts of the Child Care Act 1980 (chiefly concerned with financial contributions) where we think that a wider definition of "parent" is appropriate in relation to the father of a non-marital child. We have already mentioned[171] contributions to the maintenance of children in care[172] where liability under the present law extends (and will do so under our recommendations) to any father of a non-marital child subject to his paternity being proved. We also recommend that the wider definition of "parent", (i.e. including any father of a non-marital child) should be applied to sections 25 and 26 of the Act, which concern certain rights and duties in relation to children while they are actually in care.[173]

(ii) *Children and Young Persons Act 1969*

7.52 We also have to consider the position of children who are subject to care orders under the Children and Young Persons Act 1969. Under the provisions of this Act there are a number of instances where being a "parent" (or guardian) is relevant: in particular,[174] the right to be notified[175] of care proceedings and the right to make various applications on behalf of the child.[176] Neither "parent" nor "guardian" is defined by the Children and Young

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[170]See para. 7.49 above.

[171]See para. 6.50 above.

[172]Sections 45–50.

[173]The sections deal with funeral and visiting expenses: see further note 2 to clause 20 of the draft Bill in Appendix A below.

[174]See also a number of other provisions under this Act where being a "parent" is relevant: s. 1(2)(*d*) (care order where a child is beyond parental control); s. 1(3)(*a*) (requirement to enter into recognisance on infant's behalf); s. 2(9) (notice of proceedings where infant is under 5); s. 3(6)(*b*) (payment of compensation on infant's behalf); s. 7(7)(*c*) (recognisances in cases where criminal offence proved); s. 18(3) (service of supervision order); s. 24(8) (duty to keep local authority informed as to his address); s. 25(1) and (2) (transfer to or from Northern Ireland dependent on parent's residence); s. 28(3) and (4) (right to be informed of child's detention or arrest); s. 29(2) (entry into recognisances); s. 32A (conflict of interest between parent and child).

[175]See Magistrates' Courts (Children and Young Persons) Rules 1970 (S.I. 1970 No. 1792) as amended, r. 14(1), (2) and (3).

[176]Under the Children and Young Persons Act 1969, ss. 2(12), 15(1), 16(8), 21(2) and (4), 22(4) and 28(5) which relate to appeals and applications for variations or discharge of orders. See s. 70(2) of the Act.

Persons Act 1969[177] but it would seem likely that the common law rule, which excludes the father of an illegitimate child,[178] would be applied to the construction of the Act.

7.53 We think that if, but only if, the father of a non-marital child obtains any order conferring a right to actual custody or an order giving him all the parental rights he should be regarded as a "parent" for the purposes of the Children and Young Persons Act 1969, which should be amended accordingly. Implementation of this policy would be consistent with our proposals[179] in relation to the Child Care Act 1980 and it would ensure that a father of a non-marital child who has, before the question of care arose, had the responsibility for the child's upbringing, would be in the same position as the mother (and of both parents had the child been of marital birth).

PART VIII

INHERITANCE

Introduction

8.1 In this Part of the Report we consider the reforms which we think desirable in the law of inheritance so as to give effect to our policy of eliminating discrimination against those of non-marital birth.

The position at common law

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

8.3 In contrast, an illegitimate person has never been disqualified from taking benefits under wills (or other dispositions of property). However, under

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[177]Cf. the Children and Young Persons Acts 1933 and 1963 where "guardian" includes any person who in the opinion of the court has for the time being the charge of or control over the child or young person. We are not dealing in this Report with the provisions of these Acts which deal, *inter alia*, with neglect or cruelty by a parent (Children and Young Persons Act 1933, s. 1) and children and young persons beyond control (Children and Young Persons Act 1963, s. 3). Although the ambit of parental responsibility seems to be wider under these Acts than under the 1969 Act it is outside the scope of this Report to impose uniform definitions of "parent" throughout the statute book and particularly in relation to areas of criminal law (where there is no evidence that the definition is unsatisfactory).

[178]See *Re M. (An Infant)* [1955] 2 Q.B. 479, 488 *per* Denning L.J.: "the word "parent" in an Act of Parliament does not include the father of an illegitimate child unless the context otherwise requires". See also para. 3.25 above.

[179]At para. 7.51 above.

a strict rule of construction,[1] words denoting a family relationship[2] were presumed to refer only to legitimate relations unless an intention to benefit illegitimate children was clearly shown.[3] Moreover, there were two other rules (in practice often related) which 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.[4] The second was a rule 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.[5] This rule was justified on the basis that to permit gifts to such children to take effect would encourage immorality.

Statutory changes

8.4 Under the Legitimacy Act 1926 an illegitimate child became entitled to succeed on the intestacy of his mother if (but only if) she left no surviving legitimate issue;[6] and a mother became entitled to succeed on the intestacy of her illegitimate child.[7] As we have seen,[8] 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 such titles) as if born legitimate.

8.5 Part II of the Family Law Reform Act 1969 brought about a substantial degree of improvement in the succession rights of illegitimate children, both under intestacies and under wills. The recommendations of the (Russell) Committee on the Law of Succession in relation to Illegitimate Persons[9] were generally followed, and in one important respect[10] the Act went

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

[2]Such as the word "descendant" embodied in a definition of "relations" in an employee's life assurance scheme: *Sydall* v. *Castings Ltd.* [1967] 1 Q.B. 302.

[3]*Dorin* v. *Dorin* (1875) L.R. 7 H.L. 568, where the testator, who had had two illegitimate children by a woman whom he afterwards married, made a will on the day after the marriage leaving property to his wife for life and "our children" thereafter: it was held that the illegitimate children could not take although there were no other children, legitimate or illegitimate, and although the testator always treated the illegitimate children as his own. Cf. *Re Jebb, dec.'d* [1966] Ch. 666, 672 *per* Lord Denning M.R. and see the comments on that case by Morris, (1966) 82 L.Q.R. 196.

[4]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, born shortly after the testator's death, could only benefit if it could be shown that he was in fact T's child; and the rule prevented any enquiry being made into this issue. The child was accordingly held to be not entitled to benefit.

[5]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, 310–13 *per* Lord Denning M.R. (dissenting).

[6]Sect. 9(1).

[7]Sect. 9(2).

[8]See paras. 3.17–3.18 above.

[9](1966) Cmnd. 3051.

[10]The construction of words such as "child" or "issue" in a disposition: see sub-para. (*b*) below.

further than the Committee had recommended. The main reforms brought about by the Act were as follows—

(*a*) an illegitimate child (or, if dead, his legitimate[11] issue) has, in relation to deaths occurring on or after 1 January 1970, the same rights of succession on the intestacy of either his mother[12] or of his father as has a legitimate child;[13] and the father of an illegitimate child, if surviving, is entitled to inherit on the child's intestacy on equal terms with the child's mother.[14] (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);[15]

(*b*) in any disposition made on or after 1 January 1970 any class of beneficiaries identified by family relationship to any person includes persons related through an illegitimate link unless the contrary intention appears.[16] *Prima facie*, therefore, if a testator gives property to "my children" all his children, legitimate or not, will be entitled to benefit; similarly a gift in favour of "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;

(*c*) the rule of public policy to which we have referred in paragraph 8.3 above was expressly abolished by the Act.[17] The rule of evidence discussed in that paragraph was not expressly abolished but was presumably abrogated by necessary implication since the Act[18] assumes that the court will do precisely what the rule forbade, that is, investigate the fact of paternity;

(*d*) the Inheritance (Family Provision) Act 1938 (under which specified categories of dependent relative were eligible to apply to the court for reasonable provision by way of maintenance to be made for them out of the deceased's estate) was amended[19] so that an illegitimate child

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[11]Although the Family Law Reform Act 1969 changed the rule whereby words such as "issue" used in a disposition of property were construed so as to limit the class to the legitimate (and persons claiming through the legitimate), it did not change this construction of that word in legislation: see e.g. *Woolwich Union* v. *Fulham Union* [1906] 2 K.B. 240, 246 *per* Vaughan Williams L.J.; *Re Makein* [1955] Ch. 194. In this respect the Act gave effect to the recommendation of the Russell Committee that only surviving legitimate issue should be entitled to stand in the illegitimate child's shoes: (1966) Cmnd. 3051, paras. 33, 46.

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

[13]Family Law Reform Act 1969, s. 14(1).

[14]*Ibid.*, s. 14(2): see para. 8.4 above for the mother's inheritance rights.

[15]*Ibid.*, s. 14(4). See para. 8.15 below.

[16]*Ibid.*, s. 15(1) and (2). The subsection does not however, affect the construction of the word "heir" or expressions used to create entailed interests: see para. 8.20 below.

[17]Sect. 15(7).

[18]Sect. 15(1).

[19]Sect. 18.

could apply for provision in any case in which a legitimate child could do so.[20]

8.6 Notwithstanding these substantial reforms, there remain a number of differences between marital and non-marital children in matters of inheritance. The most significant difference is that the child cannot inherit on the intestacy of his grandparents, brothers, sisters, uncles or aunts, whether or not any of these relations were themselves born in marriage. Conversely, these relations cannot inherit on the intestacy of the child born outside marriage. Moreover, as explained above,[21] on an intestacy it is only the legitimate descendants of a deceased non-marital child who are entitled to succeed to the share which he would have taken had he survived the intestate.[22]

Intestacy

(a) The approach of the Working Paper

8.7 The discrimination in matters of succession to which we have referred, though now much reduced in scope, remains a striking example of what we are suggesting should be removed from the law. In the Working Paper[23] we accordingly provisionally proposed that the non-marital child should have the same rights of inheritance on intestacy as the marital child. Although this conclusion was generally supported by those who commented on the Working Paper, one or two commentators thought that the law should remain as it now is. We therefore think it worth placing the arguments on record and giving our reasons for rejecting them.

(b) The argument of principle

8.8 The argument of principle against extending the rights of the non-marital child to inherit on intestacy may be stated thus: it is right that the non-marital child should be able to inherit on the intestacy of either of his parents, who have moral and may[24] have legal responsibilities for him, and who can be presumed to have wished to benefit him. However, this does not apply to remoter relations, since the deceased may not know of the illegitimate beneficiary, let alone wish to benefit him. It could even be said that a relation of this kind, such as a grandparent, might choose to die intestate on the assumption that his or her estate would go to the grandchildren of marital

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[20]Only a legitimate child could apply under the Inheritance (Family Provision) Act 1938: *Re Makein* [1955] Ch. 194. The 1938 Act was repealed, and the law comprehensively reformed, by the Inheritance (Provision for Family and Dependants) Act 1975: see in particular ss. 1(1)(c) and 25. It has been held that in exercising its discretion under the 1975 Act the question is simply whether reasonable financial provision has been made for the applicant; the Act draws no distinction between legitimate and illegitimate children: see *Re McC.* (1979) 9 Fam. Law 26, where the effect of the court's order was to give a share to the deceased's non-marital child equal to that given under the deceased's will to his marital child.

[21]Para. 8.5, n. 11 above.

[22]For other minor distinctions in relation to testamentary succession, see para. 8.16 below.

[23]At paras. 5.6–5.11.

[24]A father only has legal responsibilities if he has been found to be the father in court proceedings: see Part VI above.

birth and that it would be wrong in such circumstances partially to frustrate the grandparent's positive intentions by allowing other grandchildren to share.

8.9. There are four reasons why we do not consider that this argument should prevail. First, 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 have had no real contact; but there are no such rights in respect of the mother's relatives, or of the child's siblings, with any or all of whom the child may have had close personal links.

8.10 Secondly, a right on the part of a non-marital child to inherit on the intestacy of his remoter relations in the same way as a marital child would make for consistency between intestate and testamentary succession. At present, if a man leaves property by will to "my grandchildren" an illegitimate grandchild will, because of the changed rule of construction,[25] have a right to share in the bequest in the absence of any contrary intention in the will, whether the testator knows of that grandchild or not. If the man dies intestate, that grandchild will not benefit under the law as it stands.

8.11 Thirdly, the argument assumes that the grandparent in question would have wished to exclude any grandchildren of non-marital birth if he or she had known of their existence. This seems to us to be speculation. If the grandparent feels particularly strongly about the possibility of illegitimate descendants benefiting, he will be able to exclude that possibility by making a will in appropriate terms. Fourthly, it seems to us that the argument should be treated as of significant weight only if it is true that a substantial number of those who choose not to leave wills do so because they wish their property to devolve on those entitled under an intestacy and thus exclude those born outside marriage. Such evidence as there is[26] suggests that this is not the case.

8.12 Finally we should stress that the United Kingdom's signature and ratification of the European Convention on Human Rights and the European Convention on the Legal Status of Children Born Out of Wedlock to which we have referred above[27] strengthens the arguments for removing, wherever possible, legal discrimination against children born outside marriage. The United Kingdom has placed a reservation against Article 9 of the Legal Status Convention. This Article reads as follows—

> "A child born out of wedlock shall have the same right of succession in the estate of its father and its mother and of a member of its father's or mother's family, as if it had been born in wedlock."

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[25]Family Law Reform Act 1969, s. 15(1)(*b*).

[26]A deliberate decision not to leave a will so that certain relations will or will not thereby benefit implies some knowledge of intestacy laws: a survey carried out in 1972 by J. E. Todd and M. L. Jones (*Matrimonial Property* (Office of Population Censuses and Surveys)) revealed that detailed knowledge of the laws of intestacy is confined to a very few people; and that only one person in a thousand knew those parts of intestacy law which affect the family: see pp. 36–7 and 52–7.

[27]At paras. 1.3, 4.11 and 4.12. The full text of the Convention on the Legal Status of Children Born Out of Wedlock is reproduced in Appendix D below.

Under English law, at present, the non-marital child manifestly does not have the same right of succession in the estate of "a member of its father's or mother's family" as if it had been of marital birth. Extension of rights on intestacy such as we have discussed would, in our opinion, allow the United Kingdom to remove, so far as the law of England and Wales is concerned, the reservation against Article 9. The removal of discrimination against non-marital children in matters of succession would also bring English law into line with the provisions of the European Convention on Human Rights as laid down by the judgment of the European Court of Human Rights in the *Marckx* case.[28]

(*c*) *Our conclusion on the argument of principle in relation to intestate succession*

8.13 Accordingly we conclude that there is no sufficient argument of principle to justify retention of the existing rules discriminating against illegitimate persons in relation to intestate succession.

8.14 It must, however, be accepted that the extension of the class of potential beneficiary to some extent increases the risk that a claim will be made out by a relative whose existence was not known to the deceased's immediate circle (or indeed to the deceased himself) or to those undertaking the administration of his estate. These practical problems may also arise (although perhaps less frequently) where the deceased left a will; and we accordingly defer full consideration of the problems until we have dealt with our proposals on succession under wills and trusts. At this stage it suffices to say that these administrative problems do not affect the recommendation to which our examination of the arguments of principle has led us. It follows that, in our view, a non-marital child should have the same rights of inheritance on the intestacy of his relatives as a marital child; and his relatives should likewise be able to inherit on his intestacy.[29]

Succession under a will (or trust)

8.15 The essential step in improving the legal position of a person born outside marriage as regards testamentary succession and entitlement under trusts was taken in section 15(1) of the Family Law Reform Act 1969, which reversed the presumption that words denoting a relationship referred only to a legitimate relationship. The general principle of testamentary freedom is still, of course, preserved: a testator may, if he wishes, exclude illegitimate relations

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[28] *Marckx* v. *Belgium* (1979–80) 2 E.H.R.R. 330.

[29] As a result of this recommendation there will no longer be any discrimination in succession matters based on illegitimate status. It should however be noted that we do not propose any amendment of the rules of distribution contained in the Administration of Estates Act 1925 (as amended). Under these rules the half-brother of a deceased intestate does not take under an intestacy if the intestate left a surviving brother of the whole blood: Administration of Estates Act 1925, s. 46(1). It may well be, therefore, that in practice non-marital siblings will take less frequently than marital siblings, not because they are non-marital but because they are related to the deceased only by the half blood.

from any benefit under his will,[30] but there is no longer any presumption that he intends to do so.[31] We do not feel that it would be appropriate to prevent individuals making their own choice of beneficiary. Accordingly testators would remain free to exclude non-marital relations if they so wished. They could of course equally exclude marital relations.

8.16 There is, however, one minor matter[32] concerning section 15 of the Family Law Reform Act 1969, with which it is now opportune to deal.[33] Under section 15(2) of the Act words of relationship are only to be construed presumptively to include an illegitimate person where that person is a potential beneficiary, or where the beneficiary's relationship to the deceased depends on an intermediate illegitimate link. Thus the appointment of "my eldest surviving son" as an executor would appear to be governed by the law as it stood before the 1969 Act, so that the eldest surviving *legitimate* son would alone qualify as executor. Moreover, 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, followed by a gift over to X, the gift over to X will take effect if A leaves illegitimate, but not legitimate, issue.[34] This rule may therefore, albeit indirectly, discriminate against the beneficial succession rights of persons born outside marriage; and it seems to us undesirable to perpetuate such a distinction. Our tentative view that this restriction on the operation of section 15 should be removed was widely supported on consultation, and we believe that it is right.[35]

Heirs, entailed interests and titles of honour

8.17 It is now necessary to consider three (to some extent inter-related) topics which raise issues of principle relating to inheritance even though statistically the problems may not be significant. These are gifts to "heirs"; entailed interests;[36] and titles of honour.

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[30]However non-marital children can, like other dependants, apply for reasonable provision out of the deceased's estate under the Inheritance (Provision for Family and Dependants) Act 1975: see para. 8.5(*d*) above.

[31]This reform appears now to be uncontroversial. When the Act was first passed, concern was expressed in some quarters about the possible embarrassment when instructions for drawing up a will were being given: see Oerton, "Wills and the Family Law Reform Act 1969", (1970) 120 New L.J. 290, 291 and cf. Samuels, "Succession and the Family Law Reform Act 1969", (1970) 34 Conv. (N.S.) 247, 250–253.

[32]Discussed in the Working Paper at para. 5.13.

[33]It will be noted that section 15(1)(*b*) of the Family Law Reform Act 1969 provides that "any reference . . . to a person . . . related in some other manner to any person shall, unless the contrary intention appears, be construed as, or as including, a reference to anyone who would be so related if he, or some other person through whom the relationship is deduced, had been born legitimate". It has been doubted (Ryder, (1971) 24 Current Legal Problems pp. 163–4) whether an illegitimate son of the testator's illegitimate brother would take under a gift to a "nephew" because both the beneficiary *and* the person through whom the relationship is deduced would have been born illegitimate. It seems to us more probable, however, that a court construing this provision would consider separately each person making up the chain of relationship and that "double" illegitimacy would accordingly come within the provision.

[34]*Re Paine* [1940] Ch. 46.

[35]See para. 8.40 below as to grants of probate.

[36]I.e. interests which are confined so as to descend to issue rather than to collateral relatives.

8.18 The word "heir" may be used in an instrument either as a word of purchase in order to signify a beneficiary (as in a gift "to my heir"), or as a word of limitation, viz., a word which defines an interest given to a person already named (as in a grant "to A and the heirs of his body", which will confer on A an entailed interest).[37]

(a) "Heirs" as a word of purchase

8.19 Before 1926 it was a principle of construction that the word "heir" if unexplained and uncontrolled by the context was to be interpreted "according to its strict and technical import",[38] that is to say as designating the person entitled to a deceased intestate's real property under the common law rules of descent.[39] This was so, even if the gift in question in fact consisted entirely of personal property.[40] This was not, however, a rigid rule of law. If there was a sufficient indication[41] that the testator used the word in a sense other than, and different from, its technical sense effect would be given to that intention.[42]

8.20 An illegitimate person did not qualify under the old rules of descent to succeed to property as the heir.[43] Moreover, even if there were some evidence that a testator, using the word "heir" in a vague and inaccurate sense,[44] had intended an illegitimate person to benefit thereunder, the rule of construction known as the rule in *Hill* v. *Crook*[45] would usually lead the court to disregard it.[46] The Family Law Reform Act 1969[47] left this rule, in its application to the word "heir" or "heirs", intact.

8.21 Once it is accepted that the word "heir" may be used in a non-technical sense, it has also to be accepted that a testator may use it to refer to a person who is in fact born outside marriage. It would be quite inconsistent with the basic policy of this Report to perpetuate the strict rule of construction under which such a person might be held disqualified from taking, notwithstanding evidence that he was intended to take.

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[37]See Megarry and Wade, *Law of Real Property* 4th ed., (1975), pp. 50–2.

[38]*Jarman on Wills* 8th ed., (1951), p. 1544.

[39]As modified by the Inheritance Act 1833. For a concise account of these rules, see Megarry and Wade, *Law of Real Property* 4th ed., (1975), pp. 509–19.

[40]*Jarman on Wills* 8th ed., (1951), p. 1565.

[41]"The answer to that question can only be satisfactorily given after one has, as it is said, put oneself in the testator's chair, meaning thereby, has taken into consideration the kindred whose existence was known to him, the circumstances which he knew, or must be assumed to have known, surrounded him, and has read all the provisions of the will taken together; for it is by the will taken as a whole that his intention is revealed": *Lightfoot* v. *Maybery* [1914] A.C. 782, 794 *per* Lord Atkinson.

[42]Thus, in *Lightfoot* v. *Maybery* [1914] A.C. 782 the phrase "nearest male heir" was construed as "nearest male relative". Cf. *Re Bourke's Will Trusts* [1980] 1 W.L.R. 539 where no sufficient context to justify giving the word "heirs" other than its strict and technical import could be found.

[43]See *Re Cullum* [1924] 1 Ch. 540.

[44]*Jarman on Wills* 8th ed., (1951), p. 1544.

[45](1873) L.R. 6 H.L. 265; para. 8.3 above.

[46]Cf. *Re Jebb, dec'd.* [1966] Ch. 666, 672.

[47]Sect. 15(2).

8.22 There could, we think, be two possible ways of reforming the law. The first would be to declare that the meaning of the word "heir" or "heirs" is simply a matter of construction for the court and that there is no rule or presumption of law whereby a reference to a person's "heir" is necessarily to be interpreted as excluding a reference to an illegitimate person. The second would be to go somewhat further, and create a rebuttable presumption that the word "heir" (like the word "child")[48] when used in a disposition of property includes persons of non-marital birth. We think that the first course is preferable. The word "heir" is unlike words such as "child" and other words descriptive of a factual relationship; it goes beyond the purely descriptive and connotes a conclusion of law that the person so designated is to be entitled to receive the deceased's property. It is one thing to provide (as section 15 of the Family Law Reform Act provides) that if a man gives property to his "child" or "grandchild" he should, in the absence of evidence to the contrary, be presumed to be referring to anybody, who, as a matter of fact, falls within that description; it was only as a result of a special rule of construction that the normal meaning of terms such as "child" was displaced if the relationship were illegitimate. But we do not feel that this reasoning applies to justify a presumption that a testator who uses the word "heir"—necessarily in a non-technical sense—should be presumed to have intended to include persons of non-marital birth within that description. We believe that the question of identifying the person whom the testator did intend to succeed to his property should be one which the court will resolve on all the evidence; and we do not, therefore, think that it would be helpful to introduce a presumption in this case.

(b) "Heirs" as a word of limitation—entailed interests

8.23 The word "heir" is now generally of much less importance in this context than in the past. This is because of the erosion of the common law rule under which a freehold estate of inheritance could only be created in a conveyance[49] by the use of a formula which included the word "heirs". Under the common law rule[50] a conveyance to "A in fee simple", for example, would vest in A a mere life estate.

8.24 The word remains of some significance, however, in those cases, (which are probably rare) where entailed interests are created. If a fee tail were to be created by conveyance, the common law required that the word "heirs", followed by some words of procreation, be used (for example, "to X and the heirs of his body").[51] In the case of a gift by will, however, the common law rule was that any words showing an *intent* to create an entail sufficed; it was not necessary to use technical words. The policy of the 1925 legislation in

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[48]Family Law Reform Act 1969, s. 15(1).

[49]This rule did not at common law apply to testamentary gifts: see Megarry and Wade, *Law of Real Property* 4th ed., (1975), pp. 50–66.

[50]I.e. until the enactment of the Conveyancing Act 1881; the matter is now governed by Law of Property Act 1925, s. 60(1).

[51]In the case of deeds executed after 1881 the words "in tail" could be used, without the words "heirs of the body": see Law of Property Act 1925, s. 60(4).

relation to the creation of entails was, however, restrictive. Far from abolishing the necessity for the use of special formulae (as was done in relation to the creation of the fee simple),[52] the Law of Property Act 1925[53] retains the old law in its application to deeds, and provides that an entailed interest can only be created by will by the use of "the like expressions as those by which . . . a similar estate tail could have been created by deed . . . in freehold land".[54] Hence, it has been said,[55] the creation of an entail by will has been made "a matter of technical words rather than a matter of intention".

8.25 An illegitimate person is not entitled under the existing law to succeed to an entailed interest, since such a person could not qualify as an "heir". It seems to be the case that a testator (or other settlor) cannot create an entailed interest which descends to illegitimate persons, even if he wishes to do so. Although the matter is not one of any great practical importance we do not think we can justify the retention of such discrimination.[56] The law has been modified to allow legitimated[57] and adopted[58] persons to succeed to entailed interests; it seems reasonable that it should now be possible for others born outside marriage to do so if that is the settlor's intention.[59] We accordingly recommend that a person of non-marital birth should be entitled to take under an entailed interest unless a contrary intention appears from the disposition.

(c) Titles of honour

8.26 For the sake of completeness we should mention the law relating to titles of honour. As we have seen[60] hereditary titles (and property devolving therewith) cannot pass by descent to the illegitimate;[61] nor can such titles pass to legitimated[62] or adopted[63] persons. Hereditary peerages are [64] created by letters patent under the Great Seal in a form (prescribed by rules made under the Crown Office Act 1877) which limits succession to the "heirs . . . of his body lawfully begotten".[65] On the assumption that the prescribed wording

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[52]See para. 8.23 above.

[53]Sects. 60(4), 130(1).

[54]Law of Property Act 1925, s. 130(1).

[55]Megarry and Wade, *Law of Real Property* 4th ed., (1975), p. 60.

[56]Arguably the existing discrimination could conflict with Article 9 of the European Convention on the Legal Status of Children Born Out of Wedlock (see para. 8.12 above) in a case where the non-marital child was a member of the settlor's family. However the Government in its letter of declarations and reservations deposited with the instrument of ratification on 20 February 1981 "declared its understanding" that Article 9 did not affect titles of honour or entailed interests.

[57]Legitimacy Act 1926, s. 3(1)(*c*); see now Legitimacy Act 1976, ss. 5(3) and 10(4).

[58]Children Act 1975, Sch. 1 paras. 3, 5 and 17.

[59]It should be noted that our recommendations only apply to dispositions or statutes taking effect after the implementation of our proposals: hence the succession to the Throne will be unaffected.

[60]Para. 3.21 above.

[61]They can however pass to the children of void "putative" marriages: Legitimacy Act 1976, s. 1(1), and Sch. 1 para. 4(1).

[62]*Ibid.*, Sch. 1 para. 4(2) and (3).

[63]Children Act 1975, Sch. 1 paras. 10 and 16. However an adopted person who was born legitimate can succeed to a title in his natural family.

[64]None have in fact been created since 1965.

[65]The Crown Office Rules (No. 1) Order 1927 (S.R. and O. 1927 No. 425).

remained unchanged, succession to any future hereditary peerage created after the coming into force of legislation giving effect to our proposals would probably thus continue to be confined to issue legitimate in the strict common law sense. This is because the prescribed wording used in grants of such peerages would seem to demonstrate a sufficient "contrary intention" to exclude the proposed rule of contruction that would allow an illegitimate person to succeed as the "heir" of the first holder of the title.[66] We do not propose any change in the law specifically relating to hereditary titles.

The practical consequences of our recommendations in the administration of estates

8.27 We now turn to consider the practical consequences of our recommendations in the administration of estates.

8.28 In essence there appear to be two main questions. First, how far should personal representatives be obliged to make enquiries about the existence of relatives of non-marital birth (or tracing relationship through an "illegitimate" link) who would have a claim to share in the estate? Secondly, if such a relative makes a claim after the estate has been distributed without notice of his claim, how far should (*a*) the personal representatives, and (*b*) those to whom the estate has been erroneously distributed, be liable to that person?

(*a*) *Personal representatives*

8.29 Under the Family Law Reform Act 1969 trustees and personal representatives may convey or distribute property without having ascertained that there is no relative[67] who might benefit by reason of an "illegitimate" link[68] with the deceased; and they are under no liability to any such person of

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[66]See the recommendation made in para. 8.25 above. If the form of words currently prescribed were to be changed so as to allow illegitimate persons to qualify, it might be necessary to consider whether the change was consistent with the principle that the Crown cannot give to a grant of a dignity or honour a "quality of descent unknown to the law": *The Buckhurst Peerage Claim* (1876) 2 App. Cas. 1, 20–21 *per* Lord Cairns; see also *The Wiltes Peerage Claim* (1869) L.R. 4 H.L. 126, and generally Palmer, *Peerage Law in England*, (1907), pp. 85–93. Any power which the Crown lacks in this respect may, of course, be provided by an Act of Parliament (as with the Life Peerages Act 1958, which effectively reversed the *Wensleydale Peerage Case* (1856) 5 H.L.C. 958).

[67]Exceptionally, however, personal representatives are *not* protected in respect of claims by the *mother* of an illegitimate intestate, no doubt because it seemed to be not unreasonable that enquiries should be made in this one case: Family Law Reform Act 1969, s. 17(*a*).

[68]I.e. personal representatives are protected both in respect of claims *to* the estate of an illegitimate intestate and in respect of claims *by* an illegitimate claimant. They are also protected in respect of claims made by a person claiming to be related through an intermediate illegitimate link and thus to be entitled under the deceased's will under s. 15(1)(*b*) of the Family Law Reform Act 1969.

whose claim they did not have notice at the time of distribution.[69] This protection is necessary to avoid the onerous burden which might otherwise be placed on personal representatives to make difficult (and embarrassing) enquiries about the existence of possible illegitimate relatives in almost every case. The Family Law Reform Act 1969[70] only protects personal representatives against claims by the limited category of illegitimate persons on whom succession rights were conferred by that Act; we recommend that it should now be amended so as to afford similar protection against claims by persons who become entitled as a result of the extension of intestate succession recommended in this Report.

8.30 The Family Law Reform Act 1969,[71] as we have already mentioned,[72] also created, for the purposes of intestate succession, a rebuttable presumption that the father of an illegitimate intestate had not survived his child. This gave effect to the recommendation in the Report of the Russell Committee,[73] and was intended to overcome the difficulty often found in establishing the father's identity in such cases.[74] In effect, the presumption places the burden of proof upon a man claiming to be entitled to succeed as the intestate's father. In the Working Paper[75] we proposed that the presumption should be retained and extended to all the relatives on the paternal side who would in consequence of the removal of the legal effects of illegitimacy from the law of intestate succession, have a claim. On further reflection, however, we think that there are valid arguments both for abolishing and for retaining the presumption. We turn now to examine them.

8.31 In favour of not retaining any presumption it may be said, first, that it is discriminatory. Such a presumption would apply only in relation to those of non-marital birth (and indeed only to the paternal relatives); yet it might be as difficult to ascertain whether a deceased person of marital birth left, say, a surviving uncle. Secondly, it could be argued that such a presumption would be superfluous, given the wide protection[76] afforded to trustees and personal

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[69]Sect. 17. Trustees and personal representatives can of course protect themselves (but not those to whom they erroneously distribute property) from liability to those claiming an interest in the estate by advertising pursuant to s. 27 of the Trustee Act 1925: see *Re Aldhouse, Noble* v. *Treasury Solicitor* [1955] 1 W.L.R. 459. However, not all personal representatives do advertise (particularly since the expense may, in the case of small estates, be disproportionately heavy). One commentator on our Working Paper suggested that the provision under the Trustee Act 1925 should be extended so as to protect also those to whom property has been distributed. We are opposed to this for the reasons we give in para. 8.39.

[70]Sect. 17.

[71]Sect. 14(4).

[72]Para. 8.5(*a*).

[73](1966) Cmnd. 3051.

[74]*Ibid.*, at para. 47.

[75]At para. 5.9.

[76]See para. 8.29 above.

representatives by section 17 of the Family Law Reform Act 1969.[77] Thirdly, it may be argued that an extended presumption would be artificial. On this view, there may be something to be said for a presumption that a deceased person has not been survived by his father, since the father is necessarily older than his child; but a presumption applying to all parental relatives who might benefit on intestacy would necessarily involve the absurdity of presuming that the deceased had not been survived by his brothers or sisters or by cousins.[78] In both these cases the persons presumed to have predeceased might well have been younger than the deceased.

8.32 There are however powerful arguments for preserving (and extending) the presumption, and in our view these are convincing. First, it can be argued that the presumption serves a wholly different purpose from the protection of personal representatives; it also has a considerable bearing in defining the duties of personal representatives. In the absence of any presumption a conscientious personal representative might well feel obliged to make careful and extensive enquiries about the existence of illegitimate relatives. The fact that a personal representative would be protected if he did distribute to the wrong person should, on this view, only be regarded as a last line of defence. In the result, the cost of administering estates could be substantially increased. Secondly, a presumption would have the advantage of putting the onus of proof very clearly on to the claimant. Suppose for example that a person puts forward an unsupported claim, but does nothing further when asked by the personal representatives to substantiate the claim. No doubt in such a case the personal representatives would do everything they could to clarify the situation, but in the last resort they would be protected. They would not be concerned with whether or not they could have been held to have "notice" of the claim (so that they would fall outside the protection of section 17); they could distribute the estate in reliance on the presumption.

8.33 We accordingly recommend that for the purposes of intestate succession a non-marital child should be presumed not to have been survived by his father, or by other persons related to him through his father unless the contrary is shown.

(*b*) *Persons to whom the estate has been distributed*

8.34 There remains the difficulty that those to whom the estate has been distributed are not protected against claims made by persons entitled to share

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[77]This is perhaps borne out by the history of these provisions. The Report of the Russell Committee [(1966) Cmnd. 3051] recommended (at para. 47) a presumption of non-survivorship to apply to claims made to the estate of an illegitimate deceased; and also recommended (at para. 60) that personal representatives should be protected in respect of claims made by illegitimate claimants but not claims made to the illegitimate person's estate. The Family Law Reform Bill was, however, amended so as to extend the protection in both cases (H.C. Official Report Standing Committee B: 29th April 1969, cols. 133–8).

[78]I.e. the children of his father's brothers and sisters, representing the share of their parents: Administration of Estates Act 1925, ss. 46(v), 47(1)(i) and 47(3) as amended.

in the estate as relatives by reason of an "illegitimate" link with the deceased.[79] Those properly entitled may bring such a claim under three possible heads.[80] First, since the property will have been paid over under a mistake of fact,[81] it may be recoverable from the beneficiary in a common law action for money had and received brought by the personal representatives.[82] Secondly, those rightfully entitled may have a direct right of action *in personam* against the persons to whom the estate has been wrongly distributed.[83] Thirdly, there may be a right to trace the assets which have been wrongly paid over into the hands of third parties.[84]

8.35 There is no doubt that the innocent recipient of property could be seriously prejudiced by claims being made by previously unknown relatives with an illegitimate link with the deceased (especially on the paternal side). As Sir Robert Megarry V.-C. has recently put it, albeit in a different context,[85] there is a—

> "difference between the prospect of receiving in due course less than they had hoped, and on the other hand having something that they had already received and regarded as their own taken away from them. For most people, there is a real difference between the bird in the hand and the bird in the bush. In addition, of course, the beneficiaries are more likely to have changed their position in reliance on the benefaction if they have actually received it than if it lies merely in prospect. If it is always prejudicial to claimants not to receive money that they are entitled to receive at the earliest possible moment, it is likely to be even more prejudicial to have taken away from them money that they have actually received and have begun to enjoy. The point is strengthened if they have changed their position in reliance on what they have received, as by making purchases or gifts that they otherwise would not have made."

The potential hardship inevitably increases with the years.

8.36 We have therefore considered whether, in order to minimise the risk of hardship in such cases, a time limit should be imposed so that a relative whose claim depended on the proof of paternity outside marriage would have to present his claim within a specified, and perhaps short, period after the

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[79]Family Law Reform Act 1969, s. 17.

[80]The choice of which remedy to pursue may depend on the circumstances. For example, a claim which may be barred by the operation of the Limitation Act 1980 under one head may still be successfully asserted under another.

[81]I.e. as to the existence of persons qualified to take: cf. *Re Diplock* [1948] Ch. 465, affirmed *sub nom. Ministry of Health* v. *Simpson* [1951] A.C. 251 where the mistake was one of law (i.e. as to the proper construction of the residuary gift in the testator's will).

[82]See *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* 16th ed., (1982), p. 970.

[83]*Ministry of Health* v. *Simpson* [1951] A.C. 251. In such a case the deceased's personal representatives need not be joined: *Harris* v. *Harris (No. 2)* (1861) 29 Beav. 110.

[84]*Re Diplock* [1948] Ch. 465.

[85]*Re Salmon (deceased)* [1981] Ch. 167, 176 (a case under the Inheritance (Provision for Family and Dependants) Act 1975).

deceased's death[86] if his right to claim property which has been distributed were not to be barred. Indeed, we have considered whether to recommend the enactment of an even stricter rule, modelled on legislation in New Zealand[87] and Tasmania.[88] In those jurisdictions the relationship of father and child is not recognised[89] for succession purposes unless paternity has been established before the deceased's death.

8.37 The main objection in our view to the imposition of a limit in a case with an "illegitimate" link is, as we said in the Working Paper,[90] that it would operate capriciously. Valid claims would be shut out, but claims by long-lost relatives tracing their relationship through "legitimate" links could still be successfully made. For example, a claim by an "illegitimate" brother might be time-barred while a claim by a "legitimate" brother would not. Such a provision would constitute discrimination based solely[91] on the fact that there had been a non-marital birth. It would thus be wholly contrary to the basic policy of this Report which is that such discrimination should have no place in the law in the absence of clear evidence of necessity.

8.38 In this connection we believe the experience of the working of the Family Law Reform Act 1969 to be relevant. Since the coming into force of the provisions of that Act there has been a risk to beneficiaries from persons asserting a claim to benefit on intestacy (for example, as an illegitimate child of the deceased[92]) or under a class gift in a will or other disposition (for example, as a descendant of the deceased, the relationship being traced through an illegitimate person.[93]) Consultation on the Working Paper, however, failed to provide evidence of any great number of claims having been made.[94]

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[86]Cf. the six-month period prescribed under the Inheritance (Provision for Family and Dependants) Act 1975 (s. 4) for applications under the Act, some of which may depend upon proof of paternity.

[87]Status of Children Act 1969, s. 7 as amended by Status of Children Amendment Act 1978, s. 3.

[88]Status of Children Act 1974, s. 7. Other jurisdictions however (e.g. New South Wales and Ontario) have not imposed any comparable limitation in their illegitimacy reform legislation.

[89]Unless the father was married to the mother.

[90]At para. 5.10.

[91]It would, of course, be necessary for the claimant to provide satisfactory proof of the existence of the relationship, and this may be a difficult matter particularly if no steps to do so have been taken during the lifetime of those concerned: see further para. 8.39, below. (For a recent case where the relationship of father and daughter *was* satisfactorily established after the father's death, see *Re Trott (dec'd), Whitton* v. *Trott*, [1980] C.L.Y. 1259.)

[92]Family Law Reform Act 1969, s. 14; para. 8.5(*a*) above.

[93]*Ibid.*, s. 15; para. 8.5(*b*) above.

[94]It is, of course, true that the risk of such claims increases with the number of potential claimants. So far as succession under wills and other dispositions of property are concerned, our proposals do not significantly increase the numbers of potential claimants: see paras. 8.15–8.16 above. The proposals will, however, increase the number of potential claimants on intestacy (since illegitimacy will no longer be a bar to a claim by grandparents, or by brothers, sisters, and other collateral relatives). As was pointed out by one or two commentators on the Working Paper this may well to some extent increase the difficulty of tracing those entitled; the extent of the risk that a relative who has not been traced will subsequently appear and make a valid claim should, however, in our view, be kept in perspective.

8.39 Moreover, we believe that there is some danger of exaggerating the risks that a claim will be successfully asserted against a person to whom part of the fund has been distributed on the assumption that there are no illegitimate relatives with a better claim. First and most importantly, the illegitimate relative will of course have to prove his title to benefit. Secondly, the provisions of the Limitation Act 1980 provide some protection against a stale claim being successfully pursued. It is provided[95] that no action in respect of any claim to any share or interest in the personal estate of a deceased person shall be brought after the expiration of 12 years from the date on which the right to receive the share or interest accrued;[96] and in *Ministry of Health* v. *Simpson*[97] it was held that this provision was applicable to the equitable claim by a beneficiary to funds erroneously paid by the executors to a third party.[98] Thirdly, the recipient may be able to resist a claim to trace the assets which he has received in certain circumstances where to do so would be inequitable[99]—as for example where the recipient has spent the fund in improving his property,[100] or in paying his debts.[101] This is not to say that the threat to a beneficiary of a claim being successfully asserted is not real; all that is being said is that the threat should not be exaggerated. In this context it is significant that experience of the working of the Family Law Reform Act suggests that the problem is in practice unlikely to arise with any frequency. Moreover, it must be remembered that hardship is only caused because a person who is shown not to have been entitled to property is required to disgorge it. Such hardship has to be balanced against the interests of the claimant, who is after all rightly entitled to the property in question. Finally, it has to be remembered that cases where the recipient of a fund is subsequently found not to be entitled are not limited to cases involving a relationship outside

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[95]Limitation Act 1980, s. 22(*a*) (formerly Limitation Act 1939, s. 20).

[96]Semble, at the end of the executor's year: *Ministry of Health* v. *Simpson* [1951] A.C. 251, 277 *per* Lord Simonds; cf. Franks, *Limitation of Actions*, (1959), p. 51, where the view is expressed that time begins to run at the date of death.

[97][1951] A.C. 251, affirming the decision of the Court of Appeal in *Re Diplock* [1948] Ch. 465. Note, however, that if "the action is for relief from the consequences of a mistake" the period of limitation does not begin to run until the plaintiff has discovered the mistake or could with reasonable diligence have discovered it: Limitation Act 1980, s. 32(1) (re-enacting Limitation Act 1939, s. 26). It might be argued that the claim by a person beneficially entitled against the recipient of the fund is such a claim, and that accordingly time would only begin to run when the recipient discovered or ought with reasonable diligence to have discovered the mistake: see *Re Diplock* [1948] Ch. 465, 516. The House of Lords did not find it necessary to say anything about this aspect of the matter, save that the section "presents many problems": *Ministry of Health* v. *Simpson* [1951] A.C. 251, 277; see generally Preston and Newsom's *Limitation of Actions* 3rd ed., (1953), pp. 253–5.

[98]Insofar as the beneficiary's claim is founded on the common law action for money had and received, it is commonly accepted that the relevant period is that applicable to contracts, i.e. six years: *Re Diplock* [1948] Ch. 465, 514; *Chesworth* v. *Farrar* [1967] 1 Q.B. 407; Franks, *Limitation of Actions*, (1959), p. 80.

[99]Laches on the part of the plaintiff could also defeat his claim.

[100]*Re Diplock* [1948] Ch. 465, 546–8. See generally Goff and Jones, *The Law of Restitution* 2nd ed., (1978), pp. 53–63, particularly at p. 59.

[101]*Re Diplock* [1948] Ch. 465, 548. See also *Re J. Leslie Engineers Co. Ltd.* [1976] 1 W.L.R. 292.

marriage. If, therefore, it were thought desirable[102] to provide protection it might well be appropriate to provide it in respect of *all* claims based on mistaken distribution and not merely those where the mistake has been about the existence of illegitimate kindred. Such a reform of the general law would of course be outside the scope of this Report: and we are in any event not convinced that it would be desirable.[103]

(c) Entitlement to a grant of probate or administration

8.40 We should, finally, consider the consequences of our recommendations on the right to a grant of probate or administration. First, we deal with the grant of probate. We have already recommended[104] that section 15(2) of the Family Law Reform Act 1969 should be amended so as to remove the restriction whereby a person of non-marital birth is only included in the definition of "child" in the capacity of beneficiary and not, for example, in relation to the appointment of an executor. We recognise, however, that difficulties (and uncertainty) could be caused when the question of who is the testator's "eldest surviving son" came to be considered for the purposes of a grant of probate. It would in our view be unsatisfactory for there to be doubt because of the possibility that an "illegitimate" relative, of whom nobody knew, might be in existence. It is true that the court can pass over an executor who is missing or believed to be dead and grant administration (with the will annexed) in other "special circumstances"[105] but we consider that a statutory presumption that the deceased left no surviving relatives who traced their relationship through a non-marital birth would facilitate the task of ascertaining who is entitled to a grant of probate. Clearly if such a relative emerged and sought a grant of probate, the presumption would be rebutted.[106]

8.41 The same reasoning in our view justifies a similar presumption applicable to grants of administration. It is true that the court has a wide discretion in the appointment of an administrator[107] but the effect of a statutory presumption will, we think, make it simpler to enable grants of administration to be made without having regard to the possible existence of illegitimate relatives.[108] Again, an identified relative tracing his relationship through a non-marital birth could apply for a grant of administration and upon his proving the relationship the presumption would be rebutted.

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[102]This is not universally accepted. See *Ministry of Health* v. *Simpson* [1951] A.C. 251, 276 *per* Lord Simonds justifying the rule that an innocent legatee can be liable to the true owner, and adding: "it is a matter on which opinions may well differ."

[103]For similar reasons we do not accept the suggestion made by one commentator on the Working Paper that the right to trace property in cases with an "illegitimate" element should be limited to cases where there has been no advertisement under section 27 of the Trustee Act 1925.

[104]At para. 8.16 above.

[105]See Supreme Court Act 1981, s. 116, proviso and the cases in *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* 16th ed., (1982), pp. 318–24.

[106]As in *In the Goods of Ashton* [1892] P. 83 where the court admitted evidence to show that in appointing his "nephew" as executor the testator meant his illegitimate nephew.

[107]See Supreme Court Act 1981, s. 116.

[108]See Non-Contentious Probate Rules 1954 (S.I. 1954 No. 796), r. 21. These rules will require amendment to correspond with the statutory extension of entitlement to inherit on intestacy.

8.42 Accordingly we recommend that there should be a rebuttable presumption, for the purposes of obtaining a grant of probate or administration, that the deceased left no persons who would otherwise be entitled to a grant whose relationship is traced through non-marital birth. The Non-Contentious Probate Rules 1954[109] would require consequential amendment.

(d) Conclusion relating to the practical consequences in the administration of estates

8.43 We believe that the proposals we have made in the above paragraphs[110] should allay any concern that the extension of the class of potential beneficiary will cause significant problems in administering estates.[111]

PART IX

PARENTAL CONSENT TO ADOPTION, MARRIAGE AND CHANGE OF NAME

Introduction

9.1 In certain circumstances, the law requires that a child's "parent" consent to a legal act affecting him. As the law now stands, the father of an illegitimate child is not usually within the definition of a "parent" for such purposes. We now have to consider the requirement of parental consent in three particularly important areas in the light of our stated policy of eliminating, so far as possible, discrimination against those of non-marital birth, and accordingly of facilitating the recognition of a child's links with his father in those cases in which to do so would be in the child's interests. The three questions are these. First, should it still be the case that the agreement of the non-marital child's father to the child's adoption is not in principle required, although his agreement would be required if the child had been of marital birth? Secondly, should his consent be required to the marriage of his child, to the extent that the consent of the father of a child born in marriage would be essential? Thirdly, in what circumstances should his consent be required to a change of the child's name?

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[109]S.I. 1954 No. 796, r. 21.

[110]Paras. 8.27–8.42.

[111]We accept that the increase in the number of potential beneficiaries may create problems in determining whether the estate be administered as *bona vacantia*, particularly in cases where it is suspected that a relative may be entitled, but the person concerned fails to take any steps to administer the estate. The statutory presumption under section 14 of the Family Law Reform Act 1969, extended as we have suggested, may do something to alleviate these problems; but essentially the difficulty is a general one of how the proper administration of unclaimed property can be secured. That is outside the scope of this Report.

Adoption

(*a*) *The present law*

9.2 It is provided[1] that an adoption order must not be made unless the court is satisfied either that each "parent" and "guardian" of the child freely, and with full understanding of what is involved, agrees unconditionally to the making of the order or that his agreement should be dispensed with on one of the grounds specified in the Act.[2]

9.3 The father of an illegitimate child is not a "parent" for these purposes.[3] The Children Act 1975 did however provide that the term "guardian" should extend to a father who has custody of the child by virtue of an order under section 9 of the Guardianship of Minors Act 1971.[4] It is only by obtaining such an order[5] that the father of a non-marital child becomes a person whose agreement is required to his child's adoption. In contrast, the father of a legitimate child is a person whose agreement is always required;[6] even if he has been legally deprived of custody he does not thereby lose his right to withhold agreement to adoption.

9.4 The fact that the natural father's agreement is not a condition precedent to the making of an adoption order does not, however, mean that his views on the matter will be ignored. First, Rules of Court[7] provide that any person liable by virtue of any order or agreement to contribute to the maintenance of the child must be made a party to the proceedings. Hence, a father against whom an affiliation order has been made will be entitled under this provision to attend the hearing, and put forward his views so as to

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[1]Children Act 1975, s. 12(1). (The law relating to adoption is consolidated in the Adoption Act 1976, but the consolidating Act is not likely to be brought into force until all the relevant provisions of the Children Act 1975 are in force.)

[2]Sect. 12(2). Where the child is in the care of a local authority or voluntary organisation in whom the parental rights and duties have been vested it is specifically provided that they shall not have the right to agree or refuse to agree to the child's adoption: Child Care Act 1980, s. 3(10); Children Act 1975, s. 60(6).

[3]The term "parent" is not expressly defined by the Act, but the court would no doubt follow decisions to this effect on previous legislation: see *Re M. (An Infant)* [1955] 2 Q.B. 479; *Re Adoption Application 41/61* [1963] Ch. 315.

[4]Children Act 1975, s. 107(1). Orders under the 1971 Act are now framed in terms of "legal custody" and the draft Bill annexed to this Report makes an appropriate consequential amendment.

[5]In determining an application by a natural father for custody, the court will decide the question by reference to the child's welfare: *Re C. (M.A.) (An Infant)* [1966] 1 W.L.R. 646.

[6]It is of course true that the court may dispense with parental agreement on one of the grounds specified in the Act, notably that the parent is unreasonably withholding his agreement. In the past the courts adopted the view that it is *prima facie* reasonable for a parent to withhold agreement: see *Hitchcock* v. *W. B.* [1952] 2 Q.B. 561, 571 *per* Lord Goddard; *Re F. (An Infant)* [1957] 1 All E.R. 819; *Re W. (An Infant)* [1971] A.C. 682, 700 *per* Lord Hailsham; but the relative importance of the child's welfare in determining whether agreement should be dispensed with seems in recent years to have increased: *Re H. (Infants) (Adoption: Parental Consent)* [1977] 1 W.L.R. 471; *Re W. (Adoption Parental Agreement)* (1981) 3 F.L.R. 75, 79.

[7]Adoption (High Court) Rules 1976 (S.I. 1976 No. 1645), r. 18 and 19; 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). In the case of applications in the High Court the court may direct that notice be not given.

influence the court in the exercise of its discretion as to whether to make the order or not.[8] Moreover, the guardian *ad litem* (who under the law as it now stands[9] has to be appointed to safeguard the child's interests by carrying out a detailed investigation into all the relevant circumstances) is specifically required forthwith to inform the court if he learns[10] of any person claiming to be the father who wishes to be heard on the question whether an adoption order should be made.[11] It is then for the court to decide whether or not to direct that he be notified of the proceedings,[12] and given the right to make representations.

9.5 The position of the natural father may thus in practice be weak. First, in some circumstances he may not hear of the application in time effectively to make his views known. Secondly, even if he does seek a custody order or make representations against the making of the adoption order it seems to have been felt, certainly in the past,[13] that the advantages to an illegitimate child of losing the status and stigma of bastardy outweigh any disadvantage in losing all links with his natural father.[14] The natural father of an illegitimate child

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[8]The court is obliged in reaching its decision to give "first consideration" to the need to safeguard and promote the welfare of the child throughout his childhood: Chilren Act 1975, s. 3. The effect of this provision is in some respects unclear: see *Re P. (An Infant) (Adoption: Parental Consent)* [1977] Fam. 25, and the discussion in Bevan and Parry, *The Children Act 1975*, (1979), pp. 28–30. The D.H.S.S. has commissioned research into the ways in which courts and adoption agencies are interpreting their responsibilities under this section: see 1st Report to Parliament on the Working of the Children Act 1975, H.C. 268, 26th November 1979, para. 20.

[9]Adoption Act 1958, s. 9(7). When the relevant provisions of the Children Act 1975 are brought into force, appointment of a guardian *ad litem* will no longer be necessary in every case, but only in such cases as are prescribed by rules: Children Act 1975, s. 20(1).

[10]The guardian is under no duty to seek out the natural father, or (in the absence of special circumstances) to make any enquiries as to his existence, whereabouts or attitude: *In re Adoption Application No. 41/61 (No. 2)* [1964] Ch. 48, 58 *per* Wilberforce J. It has, however, been said that "courts interpret the need to involve the putative father differently. Some insist on every effort being made to seek him out": Working Paper prepared by the Departmental Committee on the Adoption of Children (1970) para. 181. A research summary on Step-Parent Adoption prepared by the British Agencies for Adoption and Fostering (1982) found that the whereabouts of the "other natural parent" were known in 51 per cent of the cases involving the adoption of an illegitimate child by the mother and another: *ibid.*, p. 8.

[11]Adoption (High Court) Rules 1976 (S.I. 1976 No. 1654), r. 18 and Sched. 2, para. 10; Adoption (County Court) Rules 1976 (S.I. 1976 No. 1644), Sched. 2, para. 10; Magistrates' Courts (Adoption) Rules 1976 (S.I. 1976 No. 1768), Sched. 2, para. 10.

[12]Adoption (High Court) Rules 1976 (S.I. 1976 No. 1645), r. 18(j); Adoption (County Court) Rules 1976 (S.I. 1976 No. 1644), r. 4(3); Magistrates' Courts (Adoption) Rules 1976 (S.I. 1976 No. 1768), r. 4(3).

[13]See *Re E. (P.) (An Infant)* [1968] 1 W.L.R. 1913, 1915 *per* Harman L. J.: "It does not seem to matter to [the father] that the child will remain a bastard. The effect of [adoption] is to remove that stigma, so far as it can be removed, and to give children in that unfortunate position a fresh start in life without the slur attaching to their origin".

[14]For a more recent approach, see *Re G. (A Minor) (Adoption and Access Applications)* (1979) 1 F.L.R. 109, where it was held that the court, faced with opposition to the making of an adoption order by the natural father, should balance the advantages to the child of his retaining contact with his natural father, as compared with the advantages of his being adopted.

thus has a heavy burden to bear in opposing the making of an adoption order.[15] In contrast the father of a legitimate child can prevent the making of an adoption unless his refusal to agree can be held to be "unreasonable".

9.6 In some respects, however, the position of a natural father who is anxious to retain a link with his child will be improved when the provisions of the Children Act 1975 relating to freeing for adoption[16] are brought into force. Under the law as it now stands, an adoption application will only be heard *after* the child has already been placed for adoption; the applicants will thus be in a strong position to resist a claim for custody of the child by the natural father since to award him custody would almost inevitably involve unsettling the child by destroying what may well be a secure and stable relationship formed in the adoptive family. In contrast, under the new provisions, it will be possible for the court on the application of an adoption agency before placement to declare a child "free for adoption". Thus, in effect, all questions of parental agreement will be resolved at a preliminary stage, and before the child has formed a relationship with prospective adopters. It is, of course, true that the agreement of the natural father as such will still not be required. However, the court will be required to satisfy itself in relation to any person claiming to be the father either that he has no intention of applying for custody of the child, or that if he did so the application would be likely to be refused.[17] This procedure will therefore ensure that the natural father's case is considered[18] at an early stage; the father is thus less likely than at present to be faced with the difficulty of having to oppose the making of an adoption order by seeking custody in the face of an evidently successful placement.

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[15]The natural father has "the right to put forward his plans on their objective merits: his position as putative father may enable him to urge recognition, in the child's interests, of the ties of blood and of natural affection but it does no more for him than that", *per* Wilberforce J.: *Re Adoption Application No. 41/46 (No. 2)* [1964] Ch. 48, 54. Exceptionally, the courts have made access by the putative father a condition of the adoption order: *Re J. (Adoption Order: Conditions)* [1973] Fam. 106; *Re S. (A Minor) (Adoption Order: Access)* [1976] Fam. 1. (In both of these cases the father already had a well established relationship with the child.)

[16]Children Act 1975, ss. 14–16. The provisions give effect to the recommendations of the Departmental Committee on the Adoption of Children (1972) Cmnd. 5107 ch. 8. It was envisaged by the Committee that the procedure would be used in the "great majority" of cases where the child's placement is arranged by an adoption agency: para. 187.

[17]Children Act 1975, s. 14(8).

[18]The Departmental Committee described how it envisaged that the procedure would work: "... it is important that the putative father should be notified of the proceedings where he is known and can be found. If the putative father does not appear, the court will need to be satisfied that he does not wish to, or that the agency has made reasonable efforts to trace him without success. If he is known and can be found, the reporting officer should ascertain whether he wishes to attend the court. If he does not, he should be invited to sign a statement to that effect, which the reporting officer would forward to the court. But if the father's identity is not established, or he cannot be found after genuine enquiry, or he fails to appear, this should not prevent the court from transferring parental rights with a view to adoption. Once this is done, the rights and obligations of the putative father should be terminated, in the same way that they are now terminated by an adoption order, ...": Report of the Departmental Committee on the Adoption of Children (1972) Cmnd. 5107, para. 196.

(b) The Working Paper's proposals

9.7 In the Working Paper we suggested that in consequence of our proposal to abolish the status of illegitimacy the father of a non-marital child should be regarded as a "parent", and that accordingly he would be a person whose agreement to the child's adoption would be required unless the court dispensed with it on one of the grounds specified in the Act[19] (for example because he was withholding his agreement unreasonably[20] or had persistently failed without reasonable cause to discharge the parental duties in relation to the child).[21]

9.8 We did however note that anxiety was sometimes expressed that the consequent necessity to involve the child's father in adoption proceedings could deter some mothers from placing a child for adoption. Even when the freeing for adoption provisions of the Children Act 1975[22] have been brought into force it would still be necessary to try to trace the father and if possible serve him; and this, we thought, might be unacceptable to the mother. In an attempt to meet this concern about the consequences of requiring the father's agreement in all cases, we put forward for consideration the possibility that in suitable cases an application to dispense with a father's agreement could be made *ex parte*, without any attempt being made to serve him. We envisaged that such a procedure might be used in those extreme cases where the natural father had clearly no claim to be considered (for example where he had been convicted of raping the mother). The overwhelming majority of those who commented on this point shared our provisional view that any advantages in the introduction of such an *ex parte* procedure were more than outweighed by the disadvantages, notably that any such procedure would conflict with the fundamental principle that no man should be deprived of his rights without being given the chance to be heard. Accordingly, we do not further consider this proposal.

9.9 It is now necessary to consider the major issue of policy, which is whether or not the agreement of the father should be a pre-requisite[23] to the making of an adoption order in respect of a non-marital child. We have already said that the necessity to make enquiries as to the whereabouts, and perhaps even the identity, of a man who had displayed no concern either for the child or for his or her mother was a matter of concern for many commentators. On the other hand, there was widespread agreement that the father who had established a genuine familial link with the child should not be put at risk of having that link irrevocably severed by the law without sufficient enquiry being made. The proposals to which we now turn are intended to ensure that in proper cases the agreement of the father will be a pre-requisite, but that the father who has not already established a link with the child should no more be entitled to interfere with the making of proper arrangements for his or her future than he is under the existing law.[24]

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[19]Children Act 1975, s. 12(2).

[20]*Ibid.*, s. 12(2)(*b*).

[21]*Ibid.*, s. 12(2)(*c*).

[22]Sects. 14–16; see para. 9.6 above.

[23]Subject to the courts' power to dispense with agreement: see n. 6 above.

[24]See para. 9.4 above.

(*c*) *Our recommendations*[25]

9.10 In Part VII of this Report we have proposed that the father of a non-marital child should be able to apply for an order vesting in him some or all of the parental rights and duties.[26] It seems to us clear that if an order is made vesting *all* the parental rights and duties in him he should thereby be entitled to refuse to agree to the adoption of his child. We have already seen that the agreement of a father who has legal custody of his illegitimate child is a pre-requisite to the making of an adoption order. Such a father has only some[27] of the rights comprised in the parental rights and duties and, in our view, it logically follows that a father who has more extensive rights should not be in a less favourable position. More generally, we are satisfied that such an extension would promote the policy that a father's agreement should be necessary wherever there is a genuine familial link between him and the child.

9.11 Orders vesting all the parental rights and duties in the father are, however, likely to be uncommon;[28] and we must now consider the situation in which an order has been made vesting only some of the parental rights in him or imposing only some of the parental duties on him. It might, of course, be the case that the court had specifically vested in the father the right to have his agreement obtained to the making of an adoption order; but what is to be the position if the order has given the father other specific rights—perhaps most commonly a right of access? On the one hand it might be argued that such a right does not necessarily involve any really significant relationship with the child; on the other hand, the existence of such an order clearly suggests that the court believed that a link between father and child should be recognised and fostered. On balance it seems to us that this factor suffices to establish the right of a father who has any parental rights vested in him to have his agreement obtained before all legal links between him and his child are irrevocably severed, and we so recommend. This would not, of course, give the father an absolute power of veto: the court would still be able to dispense with his agreement if satisfied that he was withholding his agreement unreasonably,[29] and we have drawn attention to the increasing readiness of the court to hold that agreement is being unreasonably withheld where the adoption would manifestly promote the child's welfare.[30]

9.12 If the father has only had duties imposed upon him (most commonly the duty to maintain) it does not seem to us that his agreement should be

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[25]Many of those who wrote to us on the Working Paper raised points of general adoption policy applicable equally to marital and non-marital children. Adoption has been the subject of recent legislation, following an extensive review. It would therefore not only be outside our terms of reference, but also inappropriate, to review aspects of adoption procedure (such as, for instance, the means of signifying or dispensing with consent) which fall outside the present context. We have however taken steps to bring these comments to the attention of the relevant government departments.

[26]See para. 7.26 above.

[27]I.e. those conferred by a custody order made under the Guardianship of Minors Act 1971: see para. 7.12 above.

[28]See para. 7.27 above.

[29]Or on any of the other grounds set out in the Children Act 1975, s. 12(2).

[30]See *Re H. (Infants) (Adoption: Parental Consent)* [1977] 1 W.L.R. 471.

required. The court, in ordering him to perform such duties is not necessarily suggesting that the link between father and child should be recognised; it is merely enforcing a contribution to the child's upbringing. Accordingly, we think that in such a case the father's position is adequately secured by the present rule[31] under which he has a right to be notified of the application, and to be made a party to the proceedings.

9.13 There may well be cases where the father has not obtained any order conferring parental rights on him, perhaps because his relationship with the mother has been a stable one, or because the mother does not object to his having access to the child. In such a case we see no alternative to retaining the present procedure under which the father would be able to institute proceedings under the Guardianship of Minors Act 1971 seeking custody or access, and it would then be for the court to balance the advantage to the child of adoption as against the advantage to the child of retaining a link with his father.[32]

9.14 Finally we should way that we see no reason for any change in the principle underlying the present rule requiring the guardian *ad litem* to notify the court if he hears of any person claiming to be the child's father;[33] it is then a matter for the court to decide whether such a person should be notified of the proceedings.

Marriage

(*a*) *The present law*

9.15 The general policy of the law is that parental consent is required to the marriage of an infant[34] (that is a person under 18 years of age)[35]. If, however, a marriage is solemnised without that consent the marriage is valid. The detailed rules relating to consent to marriage are contained in section 3 of the Marriage Act 1949 and its Second Schedule.[36] Broadly speaking, the consent function is vested in the person or persons having "custody" of the

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[31]See para. 9.4 above.

[32]*Re G. (A Minor) (Adoption and Access Applications)* (1979) 1 F.L.R. 109. The custody and adoption proceedings would be heard together: *Re Adoption Application 41/61* [1963] Ch. 315, 330; *Re G.* above.

[33]This principle will no doubt be preserved when the appointment of a guardian *ad litem* ceases to be mandatory in all cases: see n. 9 above. Details of the machinery required to give effect to it will be a matter for Rules.

[34]Marriage Act 1949, s. 3.

[35]The age of "free marriage" was reduced from 21 to 18 by the Family Law Reform Act 1969, implementing the recommendation to this effect of the (Latey) Committee on the Age of Majority (1967) Cmnd. 3342.

[36]There is some difference in the operation of the rules between cases where the marriage is intended to be celebrated in the Church of England after the publication of banns, and other cases. Parental consent is not as such required in the case of marriage after banns; but any person whose consent would have been required to any other form of marriage ceremony may prevent the marriage by publicly declaring his dissent when the banns are published: Marriage Act 1949, s. 3 (3).

child.[37] The Act however draws a clear distinction in this respect between cases where the infant is legitimate and those where he is illegitimate. In the case of a legitimate child, both parents' consent is required to the marriage of a child under the age of 18 if the parents are living together. If they are divorced or separated by court order or by agreement, then the consent of the parent to whom custody has been committed is required; if one parent has been deserted by the other, the consent of the parent who has been deserted is alone required. If either or both parents are dead, the consent of the child's surviving parent and of any guardian is required.

9.16 In the case of an illegitimate child, the mother's consent alone is required, unless she has been deprived by court order of the child's custody. In that case the consent of the person to whom custody has been committed is required. If the mother has died, the consent of the guardian appointed by the mother is required. There are therefore only two circumstances in which the consent of the father of an illegitimate child is 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 Act 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 does not carry the consent to marriage function with it.

(b) The Working Paper's proposals and our recommendation

9.17 The Working Paper's major proposal to abolish the status of illegitimacy would have placed the father of a non-marital child in the position now occupied by the father of a legitimate child. Accordingly, the Working Paper suggested that if the child's parents were living together (either in or outside marriage) the consent of both would be required to a projected marriage; if they were living apart only the consent of the parent with custody would be required. The Working Paper's view was that if the parents' relationship had proved a stable one during the child's minority it was right that both parents should be concerned in the matter of consent; and on consultation it was generally agreed that the parents' marital status as such should be irrelevant to the consent to marriage requirement of the Marriage Act. It was also widely agreed that the consent function should be linked with "custody" for all parents.

9.18 The problem which we now face is somewhat different from that considered in the Working Paper because we no longer propose that parental rights should vest automatically in all fathers. Instead, the father of a non-marital child will only have parental rights and duties if a court has so ordered. Entitlement to consent to a child's marriage is a parental right, and the most

[37] The Act establishes a procedure whereby difficulties arising from absence or inaccessibility of a parent may be overcome; the Registrar General (or in some cases a superintendent registrar) can dispense with the consent of a person who is absent, inaccessible or under a disability: Marriage Act 1949, s. 3(1), proviso (a). Moreover, if a person whose consent is required refuses to give it, the court (in practice the magistrates' court) may consent to the marriage: *ibid.*, proviso (b).

logical and immediately attractive solution would therefore seem to be to amend the relevant legislation so that it would identify those in whom this right would be vested, whether by operation of law, or in consequence of a court order. This solution would also have the advantage of removing from the legislation any distinction between marital and non-marital children as such. Unfortunately the need to formulate the rules in terms equally applicable to the conceptual framework introduced by the Children Act 1975[38] and to orders made by the divorce courts would have resulted in a revised schedule of such daunting complexity that it might well have been unintelligible to many of those affected by the law.

9.19 In view of these difficulties we have come to the conclusion that, unless and until a comprehensive reform of the consent to marriage function is undertaken,[39] the sensible solution is to make only such minor amendments to the second part of the Second Schedule to the Marriage Act 1949 (dealing with non-marital children) as are necessary to give appropriate recognition to the position of the father of a non-marital child. It seems to us that such a father who is *in loco parentis* or has been exercising day-to-day control over the child should be entitled to have his consent sought to the marriage of the child, as should a father on whom the consent to marriage function has been conferred by court order (whether specifically, or as a constituent of "all the parental rights and duties").[40] Moreover, in cases where the father has become the child's guardian he will have full parental rights[41] (albeit exercisable in some cases jointly with another person); it seems clear that in such cases the consent of the guardians should be required.

9.20 Accordingly our recommendation is that the consent to marriage function should be vested in the father of a non-marital child if he has all the parental rights and duties, or if he has the actual custody of the child by court order, or if he has had the consent to marry function vested in him by court order. We propose that the father's position should be the same whether or not the mother is alive but that where she is alive her consent should also be required. The making of a court order will have indicated that it is in the child's interests for the link with the father to be recognised; and we believe that such a reform will go some way towards recognising the position of the father of the non-marital child in a proper case. We do not however regard the result as wholly satisfactory, because we think that in principle it would be

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[38]See generally paras. 7.12 to 7.14 above. As a result of the Domestic Proceedings and Magistrates' Courts Act 1978 the Children Act terminology is now applicable in proceedings both under that Act and under the Guardianship of Minors Act 1971. As a result orders dealing with the custody of children will often be expressed in terms not found in the Marriage Act 1949.

[39]In 1973 the Law Commission reported on the Solemnisation of Marriage in England and Wales (Law Com. No. 53). The Report annexed a further report by a Joint Working Party of the Commission and the Registrar General. Amongst the proposals made by the Joint Working Party were a number relating to the requirement of consent (see paras. 47–56). None has yet been implemented. To a certain extent the problems of interpreting the Second Schedule have increased since the date of the Report: see n. 38 above.

[40]See paras. 7.26–7.33 above.

[41]See para. 7.3 above.

preferable that in all cases (whether the child is marital or non-marital) the person who has the actual day-to-day care of a child should be the person whose consent to the child's marriage is required. This would not only accord with the policy of the present law regarding legitimate children but would also be soundly based on the common sense assumption that the person with whom the child has his home is the person likely to be best qualified to decide whether or not the child is yet ready for marriage. However, it is not practicable, in the present state of the statute book, to draft such a provision save in language of unacceptable complexity. We regret this fact, all the more so since the result of the proposal which we have made will be that the Second Schedule to the Marriage Act 1949 will continue to differentiate in terms between the marital and the non-marital, but this seems inevitable unless and until a more comprehensive reform of the consent to marriage function is carried out.

Name and change of name

(a) The present law

9.21 English law concerning names[42] is, in contrast to the law in many other developed systems, extremely sparse. This is because in this country the question of a person's surname is almost entirely a matter of custom.[43] It is usual for a woman on marriage to adopt her husband's surname, and for a child of that marriage to be known by that surname, but these are not rules of law.[44] Again, it has been customary for a non-marital child to take his mother's surname. However, so long as a name is not used with fraudulent intent[45] there is no legal bar to a person using whatever surname he chooses,[46] and indeed from changing it from time to time. Equally there is no bar to a person causing his child to be known by any surname he may from time to time choose. Rules of law (rather than custom) are however relevant in a number of ways.

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[42]See *Halsbury's Laws of England* 4th ed., vol. 35, paras. 1175–6.

[43]*Du Boulay* v. *Du Boulay* (1869) L.R. 2 P.C. 430, 442; *D.* v. *B. (orse. D.) (Surname: Birth Registration)* [1979] Fam. 38, 40. See also Fortin, "The Nature of the Right to Select a Child's Surname", (1980) 10 Fam. Law 40.

[44]Cf. the law of most European states where complex rules are laid down in relation to the surnames of spouses and children: see e.g. the West German B.G.B. Art. 1616–18. See also Meulders-Klein, "Cohabitation and Children in Europe", (1981) 29 Am. Jo. Comp. Law 359, 374–7.

[45]*R.* v. *Whitmore* (1914) 10 Cr. App. R. 204; *R.* v. *Hassard* [1970] 1 W.L.R. 1109.

[46]"In this country we do not recognise the absolute right of a person to a particular name to the extent of entitling him to prevent the assumption of that name by a stranger. The right to the exclusive use of a name in connection with a trade or business is familiar to our law; and any person using that name, after a relative right of this description has been acquired by another, is considered to have been guilty of a fraud, or, at least, of an invasion of another's right, and renders himself liable to an action, or he may be restrained from the use of the name by injunction. But the mere assumption of a name, which is the patronymic of a family, by a stranger who had never before been called by that name, whatever cause of annoyance it may be to the family, is a grievance for which our law affords no redress": *Du Boulay* v. *Du Boulay* (1969) L.R. 2 P.C. 430, 441–2 *per* Lord Chelmsford.

(*i*) *A surname is recorded for a child when his birth is registered*

9.22 Although the conventions outlined above are normally followed—so that, for example, the surname recorded for a non-marital child will normally be that of his mother—the birth registration regulations[47] prescribe that—

> "the surname to be entered shall be the surname by which at the date of the registration of the birth it is intended that the child shall be known . . . ."

Strictly speaking, therefore, it is possible for the parent first registering the child's birth to give as its surname a name wholly unconnected with either his or her own name or that of the other parent.[48] Moreover, it would appear that unless the name in which the child's birth was originally registered is altered within 12 months of first registration,[49] or unless an error of fact or substance in the register is demonstrated,[50] there is no way in which the original registration can be altered. Furthermore, even in those cases where alteration or correction is possible, the original entry remains on the register, side by side with any alteration or correction.

(*ii*) *A surname may be changed at will, simply by usage. However, the change may (but need not) be reinforced by the execution of a deed poll*

9.23 It is a common, but mistaken, belief that it is necessary to execute a deed poll if a person wishes to change his name. This is not so. All that a deed poll does is to provide evidence of the renunciation of a former surname and the assumption of the new surname. If a deed evidencing a change of name is executed it may, subject to certain conditions, be enrolled in the Central Office of the Supreme Court. Enrolment provides proof of the execution of the deed; the deed is not however dependent for its effectiveness on enrolment.[51] A child's parent may thus in practice change the child's surname simply be ensuring that the new name is used; but the parent may well wish to execute and enrol a deed poll in order to give formal recognition to the change. Conditions

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[47]Registration of Births, Deaths and Marriages Regulations 1968 (S.I. No. 2049), reg. 18(2) and Form 1.

[48]Thus in *D.* v. *B. (Orse. D.) (Surname: Birth Registration)* [1979] Fam. 38 the child's mother, who had left her husband after she had become pregnant by him to live with B whose name she adopted, registered the child's surname as B. She declared at the time that the entry was made that her husband, D, was the child's father, and her own name was recorded as "DB otherwise DD".

[49]Under Births and Deaths Registration Act 1953, s. 13.(1). This section seems to be designed to apply to the child's forenames: see S.I. 1968 No. 2049, regs. 2 and 25. Before the 1968 Regulations were made there was no specific provision for entering the child's surname on the births register.

[50]Births and Deaths Registraton Act 1953, s. 29(3). Sect. 29(2) also provides for the correction of clerical errors.

[51]"There are no regulations governing the *execution* of deeds poll. The regulations only apply to the enrolment of such deeds poll, and the purpose of enrolment is only evidential and formal. A deed poll is just as effective or ineffective whether it is enrolled or not; the only point of enrolment is that it will provide unquestionable proof, if proof is required, of the execution of the deed, and no more": *D.* v. *B. (Orse. D.) (Surname: Birth Registration)* [1979] Fam. 38, 46 *per* Ormrod L.J.

governing the enrolment of deeds poll are laid down by regulations.[52] These now provide for special formalities which have to be complied with if it is sought to enrol a deed poll evidencing the change of name of a minor. If the minor has attained the age of 16, the deed poll must either be signed by the minor in both his old and new names, or be executed on his behalf "by a parent or legal guardian of his and be endorsed with the minor's signed and duly witnessed consent";[53] if he is under 16 it must be executed by a "parent or legal guardian."[54] In either case it must be supported[55] by an affidavit "showing that the change of name is for the benefit of the minor and—

(i) that the application is submitted by both of his parents; or

(ii) that it is submitted by one parent with the consent of the other; or

(iii) that it is submitted by one parent without the consent of the other, . . ., for reasons set out in the affidavit, . . ."

9.24 A Practice Direction[56] has been made to govern (*inter alia*) the procedure where an application is submitted without the consent of both parents.[57] This includes the following provisions—

"2.(a) . . . leave of the court to enrol such deed will be granted if . . . the other parent is dead or beyond the seas or despite the exercise of reasonable diligence it has not been possible to find him or her or for other good reason.

(b) In case of any doubt the Senior Master or in his absence the practice master, will refer the matter to the Master of the Rolls.

(c) In the absence of any of the conditions specified above, the Senior Master or the Master of the Rolls, as the case may be, may refer the matter to the Official Solicitor for investigation and report."

9.25 From the point of view of the non-marital child, the factor which is of most significance is that it is (we understand) the practice of the Central Office of the Supreme Court to require the consent of the father of an illegitimate child to the proposed change of name, notwithstanding the fact that he would not normally be regarded as a "parent" for most purposes,[58] and

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[52]The Enrolment of Deeds (Change of Name) Regulations 1949 (S.I. No. 316) as amended by the Enrolment of Deeds (Change of Name) (Amendment) Regulations 1969 (S.I. No. 1432) and 1974 (S.I. No. 1937).

[53]Reg. 8(3).

[54]Reg. 8(4). It is provided by reg. 8(6) that in "relation to a minor in respect of whom parental rights are vested in a local authority pursuant to section 3(1) of the Children Act 1948, any reference in this Regulation to the legal guardian of the minor shall be construed as a reference to that local authority."

[55]Reg. 8(5).

[56]*Practice Direction (Minor: Change of Surname: Deed Poll)* [1977] 1 W.L.R. 1065.

[57]In relation to cases where *no* custody order has been made by the High Court or county court. Where such an order has been made, the application will be adjourned generally unless the non-custodial parent also consents to the change, or the court in which the custody order was made gives leave for the change of name to be made.

[58]*Re M. (An Infant)* [1956] 2 Q.B. 479.

even though it might well be the case that at common law he has no *legal* right to interfere with the mother's exercise of the parental rights.

(iii) If a proposal to change a child's name comes before the court, it will seek to resolve the question by asking whether the proposed change would promote the child's welfare

9.26 It is in the context of divorce that the question of the name by which a child should be known most frequently arises. If the mother has custody of the children and remarries, she may well wish the children to be known by her new surname; the father may, on the other hand, want the children to retain his surname.

9.27 In order to prevent unilateral action by a parent who wishes to change the child's name in such cases, the Matrimonial Causes Rules 1977[59] now provide—

> "Unless otherwise directed, any order giving a parent custody or care and control of a child shall provide that no step (other than the institution of proceedings in any court) be taken by that parent which would result in the child being known by a new surname before he or she attains the age of 18 years or, being a female, marries below that age, except with the leave of a judge or the consent in writing of the other parent."

Moreover, we have seen that under the Enrolment of Deeds (Change of Name) Regulations,[60] a deed poll executed by one parent only will not be enrolled by the Central Office unless a satisfactory explanation is forthcoming for the absence of the other's agreement.

9.28 There have been a number of cases in which disputes between *divorced* parents have been resolved by the court.[61] Some difference of emphasis is to be found in the judgments, but it seems now to be clearly settled[62] that the question is one for the judge to decide, keeping in mind the "first and paramount consideration" of the need to promote the child's welfare. It has been said:[63]

> "It is a matter for the discretion of the individual judge hearing the case, seeing the witnesses, seeing the parents, possibly seeing the children, to decide whether or not it is in the interests of the child in the particular circumstances of the case that his surname should or should not be changed; and the judge will take into account all the circumstances of the case, including no doubt where appropriate any embarrassment which may be caused to the child by not changing his name and, on the other

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[59]S.I. 1977 No. 344, r. 92(8).

[60]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] I W.L.R. 1065.

[61]*Re W.G.* 31/1975 (Bar Library No. 282) (1976) 6 Fam. Law 210; *R.* v. *R. (Child: Surname)* [1977] I W.L.R. 1256; *Crick* v. *Crick* (1977) 7 Fam. Law 239; *D.* v. *B. (Orse. D.) (Surname: Birth Registration)* [1979] Fam. 38; *L.* v. *F. The Times*, 1 August 1978; *W.* v. *A. (Minor: Surname)* [1981] Fam. 14; *Meek* v. *Meek* (1981) 4 C.L. 21; *Salter* v. *Ashworth* (1981) 6 C.L. 19.

[62]*W.* v. *A. (Minor: Surname)* (above).

[63]*W.* v. *A. (Minor: Surname)* (above), at p. 21 *per* Dunn L.J.

hand, the long-term interests of the child, the importance of maintaining the child's links with his paternal family, and the stability or otherwise of the mother's remarriage. I only mention those as typical examples of the kinds of considerations which arise in these cases, but the judge will take into account all the relevant circumstances in the particular case before him."

(*b*) *Our conclusions relating to names*

9.29 In all the circumstances, we do not think it is necessary to make any specific recommendation about the law governing the name *given* to a non-marital child. 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. It would, we think, be inappropriate to seek to lay down specific rules governing the name of a non-marital child where there are no such rules governing the naming of a marital child.

9.30 We have, however, seen that the question of *changing* a child's name is one that has given rise to difficulty, particularly when the parents' marriage has broken down and the parent with day-to-day care of the child forms a new relationship, and wishes to adopt for the child the name of her partner. It has been necessary for the law to intervene so as to ensure that no formal step is taken unilaterally to change the name of a child of *divorced* parents without proper consideration being given to the effect that the change will have on the child's welfare. These procedures do not apply where the child is of non-marital birth since by definition his parents' relationship is not one which can be terminated by divorce. Nevertheless, we think that similar principles ought to apply to ensure so far as the law can that where a couple have had a relationship of some permanence, one parent should not be able to act without the other having an opportunity to be heard.

9.31 We think that this can be achieved by two relatively minor changes in the relevant rules, rather than by legislation. The first would be to extend to guardianship proceedings[64] the rule of practice under which orders dealing with custody or access normally contain a provision that no formal step be taken whereby the child's name might be changed without the written consent of both parents[65] or the leave of the court. We consider that such a provision should be inserted as a matter of routine in any order under which the father is granted any parental right (such as access). We do not think it would be appropriate to require such a provision to be inserted as a matter of routine in orders which merely require the father to make financial provision for the child, although it would, of course, be possible for the court to insert such a provision in a proper case.

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[64]Consideration might also be given to introducing a similar rule in relation to orders made by magistrates in the exercise of their jurisdiction under the Domestic Proceedings and Magistrates' Courts Act 1978.

[65]I.e. including the father of a child, whether the child be legitimate or illegitimate.

9.32 The second change would be applicable where no guardianship proceedings have been taken. As we have seen,[66] it is the practice of the Central Office of the Supreme Court to require the consent of the father of an illegitimate child to be given to the application when an application is made to enrol a deed poll. We think that this practice is desirable, and that consideration should be given to amending the terms of the regulations so as to state it in express terms. Where the father does not agree to the change, the *Practice Direction*[67] to which we have referred seems to provide a sufficient basis for the matter to be properly investigated in the context of the child's welfare.

PART X

ESTABLISHMENT OF PARENTAGE BY DECLARATION, BY OTHER COURT PROCEEDINGS, BY PRESUMPTION, AND BY BIRTH REGISTRATION

Introduction

10.1 The establishment of parentage (and, in particular, paternity) may be an important preliminary step in resolving questions concerning financial provision, custody, adoption, inheritance or citizenship; and it may of course be necessary to establish parentage in order to resolve the question whether in law the child is marital or non-marital. In this Part of the Report we consider, first, the difficult question of whether the court should have the power to make a declaration as to parentage where no other relief is sought; we then consider reforms in the law relating to proof of parentage in other court proceedings; finally, we deal with the part played by presumptions, birth registration and voluntary means of acknowledgement in helping to establish legal parentage.

Declarations of parentage

(*a*) *The present law*

10.2 The court has no jurisdiction to make declarations of paternity where no other relief is sought[1] (as opposed to making a finding of paternity in the course of other proceedings).[2] However, if a person's legitimacy is in issue he

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[66]Para. 9.25 above.

[67]*Practice Direction (Minor: Change of Surname: Deed Poll)* [1977] 1 W.L.R. 1065; see para. 9.24 above.

[1]*Re J. S. (A Minor)* [1981] Fam. 22; see n. 21 below.

[2]As to these, see paras. 10.40–10.45 below.

may be able to apply[3] for a declaration of legitimacy (or legitimation)[4] which is in effect also a declaration of his paternity. In this Report we are not considering the law generally as to declarations.[5] However, we shall be considering declarations of parentage on the assumption that, for the time being, the declarations available under section 45 of the Matrimonial Causes Act 1973 continue to exist. In particular it should be noted that since the legal status of legitimacy will remain (and may be of legal significance in some matters) the existing procedure governing declarations of legitimacy will remain unchanged for the time being.

10.3 In order to put the matter in context, it may be convenient at this stage to summarise the present law relating to declarations of legitimacy and legitimation which are obtainable under the Matrimonial Causes Act 1973. Petitions for declarations of legitimacy must be brought in the High Court, whereas those for declarations of legitimation may be brought in the High Court or county court.[6] For declarations of legitimacy, the applicant must be a British subject,[7] and must either be domiciled in England and Wales (or Northern Ireland) or have a claim to property in England or Wales.[8] The Attorney-General must be made a party in every case[9] and the applicant must apply for directions as to which other persons are to be given notice of the application so as to enable them to oppose it if they so wish;[10] care must be taken to have before the court everybody whose interests may be affected, such as the nearest blood relations.[11] The hearing may take place *in camera* and reporting restrictions[12] will in any event apply. The court makes "such decree as it thinks just"; and the decree is binding on the Crown and on all other persons, but so as not to prejudice any person—

(i) if the decree is obtained by "fraud or collusion"; or

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[3]Under the Matrimonial Causes Act 1973, s. 45.

[4]Provision is also made under s. 45 for declarations concerning the validity of marriage or that the applicant is a British subject. The term "British subject" is synonymous with "Commonwealth citizen": see British Nationality Act 1981, s. 51(1) and also s. 37(1) and Sched 3.

[5]For a discussion of declarations generally see our Working Paper on Declarations in Family Matters (1973) Working Paper No. 48.

[6]Matrimonial Causes Act 1973, s. 45(1) and (2). The case may be transferred to the High Court if the county court or the High Court so orders: *ibid.*, s. 45(3).

[7]Or a person whose "right to be deemed a British subject" depends on his legitimacy; see also n. 4 above.

[8]*Ibid.*, s. 45(1).

[9]*Ibid.*, s. 45(6); Matrimonial Causes Rules 1977 (S.I. 1977 No. 344), r. 110.

[10]Matrimonial Causes Act 1973, s. 45(7); Matrimonial Causes Rules 1977, r. 110.

[11]In *Vervaeke* v. *Smith (Messina and A.-G. Intervening)* [1981] Fam. 77, the existence of special safeguards imposed on applications for declarations by the 1973 Act and by the Matrimonial Causes Rules was held by the Court of Appeal to constitute a valid ground for not allowing an application for a declaration under the court's inherent jurisdiction under Ord. 15, r. 16: see [1981] Fam. 77, 122 *per* Sir John Arnold P. (The House of Lords has affirmed the Court of Appeal's decision on other grounds: [1982] 2 W.L.R. 855.) See also our Working Paper on Declarations in Family Matters (1973) Working Paper No. 48, paras. 15 and 16(2).

[12]See Domestic and Appellate Proceedings (Restriction of Publicity) Act 1968, s. 2(3) as amended.

(ii) unless that person has been given notice of, or was a party to, the proceedings or claims through such a person.[13]

10.4 There is no power to make a declaration as to paternity (or legitimacy) under the court's inherent jurisdiction[14] to make a declaratory judgment.[15] The only way to determine paternity in English law[16] where no other relief is sought is by proceedings for a declaration of legitimacy and such proceedings are of course not available to the non-marital child.[17]

(b) The Working Paper's proposals

10.5 In the Working Paper we proposed[18] that it should be possible to seek a declaration of parentage without applying for any other remedy. We argued that it would not be sufficient to enable paternity to be tried only as an incidental issue. Future entitlement to property might, we thought, turn on parentage being established, and the best evidence (such as that of blood tests on all relevant persons) might no longer be available if it were necessary to wait until the time when the property came to be distributed. Moreover, a child (or those claiming to be his parents) might simply have an emotional need to have the facts about his origins established.

(c) Problems relating to declarations

10.6 It is now necessary to record the anxiety which we have felt about the consequences of introducing a declaration procedure. First, there is the potential which proceedings for a declaration of parentage might have for disruption, not least by putting at risk the established relationships of the child whose parentage is at issue. Secondly, there is a problem relating to proof of parentage, in particular where entitlement to British citizenship may be a consequence of a declaration of parentage; the question whether such a declaration can be regarded as a satisfactory procedure for identifying the father of a non-marital child for purposes of citizenship is a difficult one but it is important to our proposals. The attitude of the Government has been stated

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[13]See Matrimonial Causes Act 1973, s. 45(5).

[14]R. S. C. Ord. 15, r. 16, which provides that "no action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether or not any consequential relief is or could be claimed". See also para. 11.18 below.

[15]*Re J. S. (A Minor)* [1981] Fam. 22, where a man sought a declaration that he was the father of the child of a woman with whom he had associated. The Court of Appeal held that there was no jurisdiction to make a "bare" declaration of paternity.

[16]Cf. the law of Scotland where it is possible to obtain a declarator of bastardy or a declarator of paternity: see *Brown* v. *Brown* 1972 S.L.T. 143; *Cumming* v. *Brewster's Trustees* 1972 S.L.T. (Notes) 76.

[17]In *Re J. S. (A Minor)* [1981] Fam. 22, 27 Ormrod L.J. observed "there is certainly no statutory power to grant such a declaration ... the lack of any comparable procedure to determine the paternity of an illegitimate child may considerably reduce the practical efficacy of the policy of eliminating so far as possible the differences between the rights of legitimate and illegitimate children enacted by Parliament in Part II of the Family Law Reform Act 1969": as to Part II of the 1969 Act (succession rights of illegitimate children), see Part VIII above.

[18]At paras. 9.32–9.35.

to be[19] that there is no objection in principle to an illegitimate child deriving citizenship from his father but that such an extension of the right to citizenship must depend upon devising a satisfactory procedure for identifying the father. We shall consider these two issues in turn.

(1) *Potential for disruption*

10.7 Although it is plainly essential that paternity should be determined where this is a necessary part of a claim for financial provision, custody or access, inheritance and so on, it is less clear that a "bare" declaration of paternity is necessarily desirable. The arguments which we put forward in the Working Paper and which we have repeated above[20] do not, it may be said, take account of the potential use of such proceedings by the deluded and obsessed,[21] or even for blackmailing and vindictive purposes. The distress and harm caused by the proceedings—perhaps merely the institution of proceedings—could greatly exceed any good which could be achieved for the claimant even if he succeeded. Where no relief is claimed, such as maintenance or a share of an estate, and the sole result will be a declaration of parentage, the question arises whether such utility or satisfaction as may be achieved by the declaration can justify the provision of a legal remedy.

10.8 The nature of the proceedings adds something to that anxiety. Disputes about non-marital parentage are, it would seem, normally resolved during the infancy of the child when a claim to maintenance is in issue. Not infrequently, where no dispute arises, a secure and contented childhood is provided for non-marital children by some family arrangement which ignores or conceals the true parentage. A claim to a declaration, pursued by a child when adult, could be intrusive and disturbing to the alleged parents and to their separate families. Any member of the family, or friend, would be in theory a compellable witness, both to produce documents such as letters or diaries, and to give evidence as to what the witness knew of the relationship between the alleged parents at the material time. Any alleged parent who disputed the claim would in almost all cases be forced to give evidence and to be cross-examined. Moreover the alleged parents themselves, who might be willing to ignore the proceedings and to leave an adult child to obtain whatever declaration he could get, would also be compellable witnesses; and if, for example, the claimant was relying on what his mother had told him, it is likely that she would be compelled to give evidence.

(2) *Difficulties associated with proof of parentage*

10.9 Apart from the question of the desirability of having a declaration procedure at all, we have to consider problems associated with proof. Parentage

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[19]See para. 11.8 below.

[20]At para. 10.5.

[21]In *Re J. S. (A Minor)* [1981] Fam. 22, the Court of Appeal held that it was not in the interests of the child that the applicant, a "stranger to the child", should have access; and since the child was securely based in a two parent family an inquiry as to the child's paternity would not serve the child's interests especially as the applicant was displaying an obsessive attitude and his visits had become increasingly embarrassing.

is a question of fact like many other issues which a court may have to determine and so at first sight it would appear that there should be no difficulty in introducing a new procedure for determining parentage. Nevertheless two particular problems arise. First, there are difficulties arising from the application of the standard of proof which obtains in civil proceedings. Secondly, the English legal procedure is based on the so-called adversarial principle which may not suit declaration proceedings satisfactorily. We shall deal with these two problems in turn.

(*i*) *Standard of proof*

10.10 Paternity proceedings are civil proceedings,[22] with the result that the court would normally regard a fact as being proved if the evidence enabled it to be said "we think it more probable than not".[23] It is true that the degree of probability which is required depends on the subject matter of the case;[24] and it might well be, given the importance of the issue of paternity in declaration proceedings and the serious consequences which would flow from the making of the declaration, that the court would require clear and convincing evidence in such cases. Indeed, in the Court of Appeal it has recently been suggested[25] that the court should hestitate to make a declaration of paternity unless the evidence was "conclusive or very nearly so".[26] There must nevertheless be some concern lest the court should regard itself as bound to grant a declaration merely because *some* evidence tending to establish paternity had been led, and was not contradicted. The establishment of paternity is plainly an important matter which may affect not only the parties to the proceedings but others who may, in practice, find difficulty in challenging the decision.

(*ii*) *Absence of proper contradictor*

10.11 The problem of finding a satisfactory standard of proof in declaration proceedings is exacerbated by the fact that, as we have said, the English court normally determines issues by adversarial means, that is on the basis of the evidence which the parties choose to put before it. In a paternity dispute where, for example, financial provision is sought for the child, the applicant's assertion as to paternity is likely to be challenged by the respondent if the assertion is

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[22]See (in relation to affiliation proceedings) *S.* v. *E.* [1967] 1 Q.B. 367.

[23]*Miller* v. *Minister of Pensions* [1947] 2 All E.R. 372, 374 *per* Denning J.

[24]*Bater* v. *Bater* [1951] P. 35, 36–7 *per* Denning L.J.; see also the remarks of Morris L. J. in *Hornal* v. *Neuberger Products Ltd.* [1957] 1 Q.B. 247, 266: "though no court ... would give less careful attention to issues lacking gravity than to those marked by it, the very elements of gravity become a part of the whole range of circumstances which have to be weighed in the scale when deciding as to the balance of probabilities"; and those of Lord Denning in *Blyth* v. *Blyth* [1966] A.C. 643, 669: "[the case] like any civil case may be proved by a preponderance of probability, but the degree of probability depends on the subject matter. In proportion as the offence is grave so ought the proof to be clear". Cf. *Bastable* v. *Bastable* [1968] 1 W.L.R. 1684, 1691–2 *per* Edmund Davies L.J.

[25]In *Re J. S. (A Minor)* [1981] Fam. 22, 29 *per* Ormrod L.J.

[26]*Ibid.*, where Ormrod L.J. said that the burden of proof might be formulated thus: "the plaintiff ... must satisfy the court that it is reasonably safe in all the circumstances of the case to act on the evidence before the court, bearing in mind the consequences which will follow".

false. There is in such a case a "proper contradictor",[27] to test the applicant's evidence. There would often be no such contradictor in proceedings for a declaration of parentage.[28]

10.12 These two problems taken together suggest a risk that a court will be obliged to make a finding of paternity in cases where a declaration is sought and some evidence has been produced by the applicant in support of the claim, without any admissible evidence in rebuttal.[29] This situation might, for example, occur where the relationship between the mother and father was brief and undocumented, where the father was dead or untraceable, or where the mother was married to another man at the time of the birth. The child might even have been registered as the child of another man. Moreover the claim might have been advanced many years after the relevant events. There might well be no individual other than the applicant who had any personal interest in the outcome of declaration proceedings. The risk of a false case being put forward and not contradicted is likely to be greater in cases where the successful applicant will gain a considerable advantage, at no cost to any other individual, than in cases in which there is a defendant with a real interest to defend (such as where the mother of a child seeks an order that the defendant pay maintenance or where a person seeks to share in an estate or trust fund). The risk is probably likely to be greatest in claims to British citizenship (with which we deal in Part XI below) where the risk of false or collusive applications being made and perhaps going undetected would be greatest but it could exist in any declaration proceedings.

(d) Our conclusion in principle

10.13 It will be seen that the introduction of a declaration procedure involves serious problems for which satisfactory solutions cannot easily be found. It is not possible to know whether, if declarations of parentage were introduced, there would be any claims advanced showing all or any of the unattractive and disturbing attributes or the problems of proof to which we have referred. We have to remember that the marital child may, under the existing law,[30] seek a bare declaration of legitimacy or legitimation and this proposal would, in accordance with our main policy of removing discrimination against the non-marital child, provide a similar right with reference to non-marital parentage. Accordingly, while the risk of unpleasant and valueless use

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[27]"... that is to say, someone presently existing who has a true interest to oppose the declaration sought": *Russian Commercial and Industrial Bank* v. *British Bank for Foreign Trade* [1921] 2 A.C. 438, 448 *per* Lord Dunedin.

[28]See *Aldrich* v. *Attorney-General* [1968] P. 281, 295 where Ormrod J. expressed misgivings about having to "make findings of fact in a potentially highly contentious situation on the evidence of one side alone. The death of ... the only other person who could have given evidence on the vital issues has, or may have, deprived the court of the material necessary to make an adjudication". Ormrod J. also said "where nothing can be claimed in this court but a bare declaration, the court ought not to entertain such a claim if the evidence in support cannot be properly investigated and verified" (*ibid*).

[29]Cf. *S.* v. *S.* [1972] A.C. 24, 41 *per* Lord Reid. See also *Miller* v. *Minister of Pensions* [1947] 2 All E.R. 372, 374 *per* Denning J.

[30]See para. 10.2 above.

of the proposed right to claim a bare declaration cannot be entirely ruled out, yet there is nothing to indicate that such use is likely to be frequent, and we have all reached the conclusion, some with less confidence than others, that the benefit to honestly motivated claimants of that right justifies such risk as there may be of undesirable or dishonest use of it.

10.14 Accordingly we recommend that the court should have power by statute to make declarations of parentage in certain cases. Reasonable safeguards are however essential; and we now turn to the different ways in which the problems we have identified, both as to the potential for disruption and as to the question of proof, may be minimised.

(e) Ways of mitigating the problems to which we have referred

(1) *A time or other restriction?*

10.15 It would be possible to impose a time limit for bare declarations: for example, three years from majority; alternatively there could be enacted a requirement that leave should be given before starting proceedings, or the court could have discretion to refuse a declaration. A time restriction could be supported both because it would reduce the difficulties of assessing evidence from the distant past and because the potential for disruption would be less and would exist for a finite period: thus it would meet some of the criticisms we have been relating. A general discretion to refuse a declaration could be supported on the ground that in this way the court could separate the meritorious case where no harm would be caused by the proceedings from those which were disruptive or based on a stale claim or unsatisfactory evidence.

10.16 On balance, however, we have not found these devices satisfactory. A time limit might cut out the honest and deserving claimant in a case where the need to make a claim arose, or the evidence came to light outside the limit; and it might cause some proceedings to be taken, which otherwise would not have been taken, in order to get proceedings started within the time limit. A discretion to refuse a declaration (or to refuse to hear the proceedings), perhaps on some notion of the balance of utility and disturbance, appears unacceptable because of the lack of any reasonably certain principles on which it could be exercised and because the investigation necessary to apply the discretion would not significantly differ from the investigation necessary to determine the issue of parentage. The same arguments apply to a requirement that the court's leave be obtained. The court's decision would necessarily be to some extent arbitrary in the absence of detailed guidelines; and guidelines would be extremely difficult to formulate. The emotional need to establish parentage, for example, is not something which lends itself to accurate assessment by the court. Accordingly we do not favour any special restriction of this kind.

(2) *Reducing the potential for disruption*

(*i*) *Declarations only as to applicant's parentage*

10.17 So far as the potential for disruption arising from declaration proceedings is concerned, we have concluded that on balance it is desirable to

allow a child to bring proceedings to establish his parentage. We should, however, distinguish the case of a person seeking a declaration in respect of his own parentage from that of a third party seeking a declaration as to another's parentage. Such a third party might be a person claiming to be the father (as in *Re J. S. (A Minor)*)[31] or the child's mother, brother or sister, or a grandparent, or even a stranger. In these cases the scope for disturbance might well be greater and the likely benefits to anyone less than in cases where a person sought a declaration in respect of his own parentage. It may well be in the interests of the child (whether a minor or of full age) not to have the truth foisted upon him at the expense of his family stability.[32] We have considered whether the dangers of allowing possibly vexatious or malicious proceedings, which are implicit in permitting applications for a declaration as to someone else's parentage, could satisfactorily be met by imposing a "filter", so that third parties intending to bring such proceedings would have to show a sufficient interest in the matter under consideration. However, we feel that it would be difficult to expect a court to operate such a filter in the present context since it is not clear what criterion would be applied. How, for example, would the court deal with a claim based on an alleged father's emotional need to establish the child's parentage?

10.18 We have therefore come to the conclusion that only the child himself should have a right to apply for a declaration of parentage. It seems to us that the difficulties inherent in allowing others to apply, coupled with the distress and invasion of privacy which could result simply from such litigation being started, are not counterbalanced by any significant advantages. A person—even a parent—who has a valid claim for custody, access, financial provision or inheritance will be able to have the question of paternity decided when it is relevant to that issue. It seems to us both unnecessary and undesirable to go further and allow applications for "bare" declarations in respect of other people's parentage.

(ii) Applications on behalf of minors

10.19 The applicant's own interest will particularly need consideration where the applicant is a minor child, who cannot adequately assess his or her own interests. It can reasonably be supposed that an adult will not bring proceedings to determine his parentage unless he perceives the proceedings to be in his own interests; but no such supposition can be made in the case of a minor. However, if an adult is to be permitted to apply for a declaration of parentage, we do not think the right should in all cases be denied to the minor child. In order to minimise the risk that in some cases proceedings to determine parentage will not be in the child's interests we propose that the court should be empowered to dismiss, at any stage, an application brought by a next friend[33] on behalf of a minor child if it considers the application to be against

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[31][1981] Fam. 22.

[32]See *Clark* v. *Clark* (1981) 2 F.L.R. 405.

[33]All proceedings on behalf of minors must be brought by a "next friend": R.S.C. Ord. 80, r. 2(i).

the child's interests. The draft Bill annexed to this Report so provides.[34] In addition the court will have the power, which it has in any civil proceedings, to remove the next friend if he is acting unreasonably[35] and adversely to the interests of the minor and substitute another.[36]

(3) *Minimising the problems associated with proof*

10.20 We now have to consider how the difficulties of evidence to which we have referred above[37] may be minimised. The ways in which we think such difficulties might be mitigated can be summarised as follows: (i) limiting the right to apply for a declaration to those born in this country; (ii) using a formula designed to indicate that a high standard of proof is required; (iii) prescribing a special role for the Attorney-General; (iv) imposing procedural requirements as to evidence and to the joining of interested parties; and (v) making greater use of procedures for blood testing. We deal with these in turn.

(*i*) *Limitation to persons born in this country*

10.21 Although any application for a declaration of parentage which is uncontradicted may pose problems of evidence for a court the problems are likely to be substantially reduced where an applicant is born in this country. His birth will have been registered here; he may well be able to produce evidence relating to birth here which is relevant to the issue of parentage, and there may have been an application for maintenance or evidence of payments by the father. The events from which paternity may be inferred are likely to be clearer where the applicant was born in this country than where the applicant was born abroad; in some cases falling into the latter category the difficulties of evaluating the evidence may be such as to prevent the court from properly fulfilling its function. We believe that birth in England or Wales as a pre-condition to taking proceedings in the English court for a "bare" declaration of parentage (coupled with other safeguards with which we deal below)[38] will go a long way to ensuring that the court is not faced with applications which it is unable satisfactorily to resolve.

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[34]Clause 27(2).

[35]This means improperly, e.g. in refusing to approve a compromise clearly beneficial for the minor: *Re Birchall* (1880) 16 Ch. D. 41, 42. See R.S.C. Ord. 80, r. 2.

[36]*Re Taylor's Application* [1972] 2 Q.B. 369. A parent is normally preferred as a next friend or guardian *ad litem*: see *Woolf* v. *Pemberton* (1877) 6 Ch. D. 19; *Re Taylor's Applications* [1972] 2 Q.B. 369, 380 *per* Lord Denning M.R. The next friend procedure applies to divorce and similar proceedings (including declaration proceedings under s. 45 of the Matrimonial Causes Act 1973): see Matrimonial Causes Act 1973, s. 50 and Matrimonial Causes Rules 1977 (S.I. 1977 No. 344), rr. 112 and 113 for proceedings started on behalf of, or to be served on, persons under disability. There is also power (*ibid.*, r. 115) to appoint a guardian *ad litem* for children who need separate representation.

[37]At paras. 10.9–10.12.

[38]Paras. 10.22–10.31.

(ii) Standard of proof

10.22 We have already voiced fears[39] that the court might consider itself bound to make declarations on a bare preponderance of probability; and we have seen the serious consequences which might follow, particularly in cases where there is no effective contradictor of the applicant's evidence. In order to give an indication that the standard of proof should be high, and that the court should only grant a declaration when the evidence is clear and convincing, the draft Bill annexed to this Report requires parentage to be proved "to the satisfaction of the court"[40] in declaration proceedings. We hope that this formulation, taken together with the jurisdictional limits and the further procedural provisions we discussed below, will make for a satisfactory declaration procedure.

(iii) The Attorney-General's role

10.23 Where declarations are sought under section 45 of the Matrimonial Causes Act 1973 the Attorney-General must, as we have seen,[41] be made a party in every case; a copy of any application for a declaration, and supporting affidavit, must be delivered to the Attorney-General at least one month before the application is made, and the Attorney-General[42] has to be made a respondent to the proceedings. In relation to such declarations (which for the most part seem in practice to consist of declarations of legitimation)[43] it was suggested in our Working Paper on Declarations in Family Matters[44] that it is not necessary for the Attorney-General automatically to be made a party to the proceedings because in most cases investigation shows that the declaration in question is properly sought.

10.24 We agree that there may be cases in which it is unnecessary to trouble the Attorney-General with the application. However, we are equally clear that in many cases he will have an important role to play, both in protecting the public interest, and in assisting the court. The draft Bill annexed to this Report[45] accordingly provides that the court may at any stage of the proceedings direct that all necessary papers be sent to the Attorney-General. The Attorney-General may, whether or not he has been sent papers pursuant to a direction of the court, either—

(*a*) be made a party to those proceedings at his request, or

(*b*) argue before the court any question in relation to the application which the court considers it necessary to have fully argued, or

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[39]At para. 10.10 above.

[40]See clause 27(6) of the draft Bill annexed to this Report. It is, however, clear that the standard of proof required in paternity cases is not the criminal standard of proof "beyond reasonable doubt"; see ***Blyth*** v. ***Blyth*** [1966] A.C. 643; ***Bastable*** v. ***Bastable*** [1968] 1 W.L.R. 1684.

[41]See para. 10.3 above.

[42]In practice the Treasury Solicitor acts on the Attorney-General's behalf.

[43]In 1980, 13 petitions for a declaration of legitimation were filed (12 of them in the county court) while there were no recorded petitions for a declaration of legitimacy (or any other relief available under s. 45 of the Matrimonial Causes Act 1973): Judicial Statistics 1980, (1981) Cmnd. 8436, Table D.6.

[44]Working Paper No. 48 (1973) Appendix para. 1.

[45]Clause 27(3).

(*c*) take such other steps as he thinks necessary or expedient.

10.25 The two latter provisions require little explanation. They will enable the Attorney-General to assist the court by addressing argument to it on the law or the facts.[46] The provision that the Attorney-General may request to be made a party to the proceedings requires somewhat more explanation, however; and must be seen in the context of the proposed provision[47] that if the Attorney-General is made a party to proceedings for a declaration, any declaration which is made should bind the Crown. It would thus have substantially the same effect as a declaration made under section 45 of the Matrimonial Causes Act 1973, and be in practice conclusive for all purposes, including a claim to British citizenship. We have already noted the risk that false claims might be made in such cases in circumstances in which it would be difficult for them to be tested. It is because of this factor that we believe the Attorney-General should have the option as to whether the Crown is to be bound or not. There may well be cases in which he is satisfied that the evidence can be properly tested; in such cases, no doubt, the Attorney-General may agree to be made a party to the proceedings and thus bind the Crown. There may be others where he is not so satisfied and will decline to be a party.

(*iv*) *Other procedural steps*

10.26 There are other procedural requirements in cases where declarations under section 45 of the Matrimonial Causes Act 1973 are sought, which could usefully apply to declarations of parentage. Under the Matrimonial Causes Rules 1977[48] a petition for a declaration of legitimacy has to state, among other matters, the grounds on which the petitioner relies, the date and place of birth of the petitioner and, if the petitioner is known by a name other than that which appears in his birth certificate, the petition must state the fact. Information must also be given as to any person whose interest may be affected by the proceedings and his relationship to the petitioner.[49] We recommend that the rule-making body consider (i) adapting the requirements of this rule to declarations of parentage; (ii) introducing a requirement that any previous proceedings relating to the parentage of the applicant should be recited in the application;[50] (iii) requiring the applicant to supply information as to the nationality or citizenship of himself and of any person named as his parent; and as to the effect which the establishment of his parentage may have on his citizenship status. In connection with the last proposal we should explain that

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[46]Cf. *Adams* v. *Adams* (*A.-G. intervening*) [1971] P. 188, 198 *per* Sir Jocelyn Simon P. who distinguished between the Attorney-General on the one hand intervening and on the other appearing as *amicus curiae*. See also Matrimonial Causes Act 1973, s. 8(1)(*a*).

[47]Clause 27(7) of the draft Bill (at Appendix A); and see para. 10.39 below.

[48]S.I. 1977 No. 344, r. 110(1).

[49]*Ibid.*, r. 110(2).

[50]Applications under s. 45 are by petition in the High Court; in the draft clauses annexed to this Report we have provided for the form of application to be determined by rules so that the most convenient form of proceedings—whether by petition or otherwise—is available. It will also be for consideration what, if any, information should be verified by affidavit: cf. Matrimonial Causes Rules 1977, r. 110.

although a declaration will not necessarily be conclusive for cases (including those concerning citizenship) which involve the Crown,[51] a declaration may obviously be relevant to the taking of decisions on citizenship matters, even if it is not technically binding. It seems to us important that the court should be put on notice that citizenship may turn on ascertainment of parentage, not least so that it can decide whether in such a case the papers should be served on the Attorney-General to enable him to take such steps as he considers necessary in the public interest.

10.27 We also propose that the existing rule in declaration cases which requires a summons for directions as to the persons who are to be made respondents[52] should apply to our proposed declaration cases, except that the persons alleged to be the parents of the child in question should be made respondents in any event. At the summons for directions those whose interests is disclosed in the application will no doubt be made respondents or given notice of the proceedings (so that they may apply to be so added); we also propose that any party to the proceedings should be able to apply for any other person to be joined as a party. This would ensure that, for example, a whole family could be made parties and therefore bound by any declaration made. Finally, we recommend that the court should be able to hear a case *in camera* and that the restrictions on publicity which govern applications under section 45 of the Matrimonial Causes Act 1973 should apply.

(*v*) *Blood tests*[53]

10.28 Although the purpose of a blood test direction under section 20(1) of the Family Law Reform Act 1969 is to ascertain whether tests show that a party to the proceedings is excluded from being the father,[54] the much more sophisticated methods of blood testing which have become available since 1969 may enable the likelihood of paternity to be established to a greater degree than was possible at that time. The draft Bill[55] annexed to this Report gives recognition to this fact by stating that a direction for the use of blood tests in declaration proceedings is "for the purpose of determining whether a person named in the application . . . is or is not a parent of the applicant."

10.29 Next, under the present law the court can only make a direction for the use of blood tests on the application of a party to the proceedings.[56] In the proposed declaration procedure, however, we do not think that it would be adequate to provide that a direction can only be made on the application of a party to the proceedings. This is because there is, as we have seen,[57] a risk of

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[51]Which will only be bound if the Attorney-General is a *party* to the suit: see para. 10.25 above.

[52]Matrimonial Causes Rules 1977 (S.I. 1977 No. 344) r. 110(4).

[53]See generally paras. 5.3–5.7 above.

[54]It will be remembered however that the tester is required to state in his report the value (where a party is not excluded) of the results in determining paternity: Family Law Reform Act 1969, s. 20(2)(*c*).

[55]Clause 29(1).

[56]Family Law Reform Act 1969, s. 20(1).

[57]Paras. 10.9–10.12 above.

collusive claims being presented which might well, in the absence of any proper contradictor, succeed. In such cases, there would be no incentive for any party to seek a blood test direction; indeed, the parties would have every incentive not to do so. We therefore propose that the court should also be empowered to give a blood test direction of its own motion. In deciding whether to give such a direction it would no doubt be influenced by the views of the Attorney-General if he appeared.

10.30 We also propose[58] that the court should be able to direct that blood samples be taken not only from the applicant and any person named in the application as a parent of the applicant, but also from any other person who is a party to the proceedings. This is because it may be necessary, if a satisfactory assessment of the probabilities is to be made, to take samples not only, for example, from the mother, the applicant, and the alleged father, but also from the mother's husband. The tests can only show a *probability* that a named man is the father of the applicant, and it may then be highly material to have available reliable evidence about the probability that another specified man might be the applicant's father. It will be necessary, first of all, for the court to direct that any person from whom it is proposed to take a sample should be made a party to the proceedings;[59] and we think this should be an adequate safeguard against any oppressive use of the power to direct the taking of samples.

10.31 Finally, the Family Law Reform Act 1969 provides that where a person fails to take any step required of him for the purpose of giving effect to a direction—such as where he refuses to give a sample of his own blood—the court may "draw such inferences, if any, from that fact as appear proper in the circumstances",[60] and if there is a presumption of legitimacy and a party claiming relief who is entitled to rely on the presumption fails to take a required step the court may dismiss his claim for relief.[61] These provisions provide reasonable safeguards in the context of adversary proceedings; but they may not be adequate in proceedings seeking a declaration. Suppose, for example, that the court gives a direction that the mother's husband provide a sample, but he fails to do so. That failure may leave the evidence in a very unsatisfactory state: there may be *some* evidence tending to establish the applicant's case, but the court may yet feel that it would be unsafe to make a declaration in the absence of other material blood test evidence. We therefore propose that the court should have power to dismiss the application if any person named in the declaration fails to take any steps required of him for the purpose of giving effect to the direction within the time specified.

(*f*) *Other features*

10.32 Subject to the limitations and safeguards which we have set out above, we consider that the proposed procedure for a declaration of parentage

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[58]See clause 29(1) of the draft Bill annexed.

[59]See clause 27(5).

[60]Sect. 23(1).

[61]Sect. 23(2).

should be a satisfactory means of determining the issue. We now turn to other features which are—

(1) rules as to jurisdiction
(2) should there be relief as of right?
(3) the effect of a declaration.

We consider these in turn.

(1) *Rules of jurisdiction*

10.33 We first consider what should be the rules to determine whether an applicant's connection with this country is sufficiently close to justify an application in our courts. Secondly, we deal with the question of which courts (High Court, county court or magistrates' court) should exercise jurisdiction.

(i) *Jurisdiction of the English court*

10.34 We have already proposed[62] that only applications brought by persons born in England or Wales should be entertained. This criterion is intended to minimise the difficulties of determining parentage which we have mentioned; and we regard it as necessary for this purpose. We also have to decide whether this criterion is sufficient, or whether it would be appropriate to impose further jurisdictional requirements. The requirement that the applicant should be domiciled or have been habitually resident in this country for at least a year at the start of proceedings, which applies in divorce and similar cases,[63] is an example of such a further requirement. In our view, however, such a criterion could operate unduly restrictively in some cases. For example, a person born in this country might emigrate and yet the English court would remain the most satisfactory forum for deciding the facts of his parentage notwithstanding that he was not resident here at the time of the application. It seems to us that birth in this country would be satisfactory as a sole criterion for jurisdiction; and we accordingly make no recommendation as to the jurisdiction of the English court except that the applicant should have been born in England or Wales.

(ii) *Which courts?*

10.35 We now consider which of our courts should hear applications for declarations of parentage. In the Working Paper[64] we provisionally proposed that the High Court and county court, but not the magistrates' court, should have jurisdiction. Some commentators suggested that magistrates' courts should also have jurisdiction since they had long experience in determining issues in affiliation proceedings. We remain, however, of the view that the magistrates' court would be an inappropriate forum; there would, for example, be difficulties in adapting for application in the magistrates' courts the necessary interlocutory procedures, such as determining the interests of a minor child or the suitability of a "next friend" or who should be made party

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[62]Para. 10.21 above.

[63]See Domicile and Matrimonial Proceedings Act 1973, s. 5(2) and (3).

[64]At para. 9.44.

to proceedings. We think that the most convenient course would be to give jurisdiction to make declarations of parentage to the High Court and the divorce county court; this would ensure that those county courts which are designated[65] as divorce county courts and thus have most experience in family cases will have jurisdiction in this field.

(2) *Relief as of right?*

10.36 We have recommended procedural safeguards designed to ensure that the evidence upon which the court is asked to adjudicate is properly tested and that all the parties affected have the opportunity to be heard. We have already said[66] that a general discretion to refuse to make a declaration would be unacceptable; and we think that if an adult[67] applicant's case is proved to the satisfaction of the court there should be a declaration as of right.[68] This was our proposal in the Working Paper[69] which was supported on consultation and we recommend accordingly.

(3) *Effect of declarations*

10.37 As we have seen,[70] a declaration of legitimacy is binding on "Her Majesty and all other persons whatsoever" but does not "prejudice" any person if it is proved to have been obtained by fraud or collusion: or unless that person has been given notice (or made a party) or claims through such a person.[71] We have to consider whether this test is appropriate for declarations of parentage, since it could be argued, on the one hand, that declarations should operate *in rem* and bind everyone without exception (including the Crown) and, on the other, that they should only bind those who are parties to the proceedings.

10.38 We recognise the attraction of a declaration which is fully binding.[72] On the other hand, the proposal we have made[73] for the joining of parties on

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[65]Under Matrimonial Causes Act 1967, s. 1 and S.I. 1978 No. 1759. We do not however propose that "undefended" cases should, as in divorce, have to start in the divorce county court. We also see no reason to designate applications for declarations of parentage as "matrimonial causes": accordingly there will be power to transfer proceedings from the High Court to a (divorce) county court: County Courts Act 1959, s. 75A added by Supreme Court Act 1981, Sched. 3 para. 8.

[66]Para. 10.16 above.

[67]See para. 10.19 above as to proceedings brought on behalf of minors.

[68]In exceptional circumstances the interests of public policy can lead a court to withhold relief, e.g. where an applicant is seeking to benefit from crime: see *R.* v. *Secretary of State for the Home Department ex parte Puttick* [1981] Q.B. 767, 775 *per* Donaldson L.J. and also *Puttick* v. *A.-G.* [1980] Fam. 1, 22 *per* Sir George Baker P.

[69]Para. 9.41.

[70]Para. 10.3 above.

[71]Matrimonial Causes Act 1973, s. 45(5).

[72]See, for example, the remarks of Lord Wilberforce in *The Ampthill Peerage* [1977] A.C. 547, 568: "It is vitally important that the law should provide a means for any doubts which may be raised to be resolved at a time when witnesses and records are available. It is vitally necessary that any such doubts once disposed of should be resolved once and for all and that they should not be capable of being reopened whenever, allegedly, some new material is brought to light which might have borne upon the question. How otherwise could a man's life be planned?" However it is worth noting that in that case the petitioners claimed through those who were parties to the original declaration proceedings so that they would have been bound by them in any event.

[73]Para. 10.27 above.

the application of any existing party to the proceedings should ensure that those interested are made parties to the proceedings; and if, as we propose, the normal rule applies that parties (and those who claim through them) are bound by the result there will be few persons who will not be so bound. Should someone who is not party to the proceedings wish to reopen what is after all an issue of fact it does not seem to us to be unjust that he should be allowed to do so given the obstacles of proof and the like which he would probably have to surmount.

10.39 We therefore propose that it should be expressly provided that a declaration should bind the parties and those who claim through them. Accordingly, where the Attorney-General has been joined in proceedings, the Crown will also be bound. Parties to the proceedings will, of course, have the usual remedy of appeal, if necessary out of time (where for example, fresh evidence is obtained).[74] Moreover, the well-established principle that judgments may be set aside if fraud is shown will remain, subject to the formidable difficulties of proving fraud.[75]

Court orders (other than bare declarations)

10.40 We now turn to orders made relating to paternity in proceedings other than those where a declaration is the only remedy sought.

(*a*) *Positive findings of paternity*

10.41 Findings as to paternity may be required in the course of various proceedings—for example in maintenance, custody or access, adoption or inheritance cases. In such proceedings the question of paternity may form an incidental or preliminary issue (even if it is the crucial one); the finding binds the parties to the litigation (and those who claim through them).[76] Affiliation proceedings are a special case; while a finding of paternity made in such proceedings is a finding *in personam* and does not bind the whole world, under the Civil Evidence Act 1968,[77] such a finding constitutes *prima facie* evidence of paternity so that the burden[78] will lie in future proceedings on any party seeking to disprove it. Upon the abolition of affiliation proceedings it will be

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[74]In *The Ampthill Peerage* [1977] A.C. 547, Lord Wilberforce said "the law exceptionally allows appeals out of time . . . [the exceptions] are reserved for rare and limited cases, where the facts justifying them can be strictly proved": *ibid.*, at p. 569. He suggested (at p. 573) that new blood test evidence might constitute "fresh evidence" but emphasised that there was no such evidence in that case. See also *Edwards* v. *Edwards* (1980) 2 F.L.R. 401 and *Clark* v. *Clark* (1981) 2 F.L.R. 405.

[75]See *The Ampthill Peerage* [1977] A.C. 547. It is normally necessary, in order to have a judgment set aside for fraud, to start a separate action with proper pleadings, giving particulars of fraud: *Jonesco* v. *Beard* [1930] A.C. 298; *de Lasala* v. *de Lasala* [1980] A.C.546,561.

[76]There is no procedure (as in declaration proceedings) available for joining or notifying all those who may be interested parties. However, the court may adjourn proceedings for this purpose: *Kunstler* v. *Kunstler* [1969] 1 W.L.R. 1506, 1509 where reliance was placed on R. S. C. Ord. 15 r. 6: "no cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party".

[77]Sect. 12(1)(*b*) and (2)(*b*).

[78]The standard of proof is on the balance of probabilities: *Sutton* v. *Sutton* [1969] 3 All E.R. 1348.

appropriate to re-enact the rule under the Civil Evidence Act 1968[79] so that it applies to a finding of paternity made in proceedings under the Guardianship of Minors Acts (thus including findings made in custody or access as well as maintenance cases) and to proceedings brought by public bodies.[80]

10.42 We now turn to deal with the form which a court order recording a finding of paternity should take. In affiliation proceedings the order "adjudging" a man to be the putative father contains in effect an express finding of paternity;[81] in other proceedings, however, a finding of paternity may have to be inferred from the nature of the order and the result of the proceedings. We shall be considering below[82] the use of birth registration to record paternity but we believe that it would be helpful in the interest of establishing paternity that whenever a maintenance, custody, access or similar order is made in which the paternity of the child has been found or admitted, such finding or admission should appear on the face of the order. In the Working Paper[83] we suggested that such a finding (or admission) should only appear on the face of the order if either party requested it; this proposal was not dissented from in consultation. There would, we said, be cases where the parties would not seek an express finding because there was no issue as to paternity. On further consideration, however, we think that that proposal was too narrow; wherever a custody or child maintenance order is made we think it desirable for the paternity of the child to be recorded.[84] Rules will be needed to provide for this.

(b) Findings of non-paternity

10.43 We now consider cases where paternity is not established. In some such cases the finding that a particular man is not the father would involve the overturning of the presumption of legitimacy,[85] as where a husband established in the course of divorce (or matrimonial or guardianship) proceedings that he was not the father of his wife's child. Alternatively such a finding could involve the rebuttal of the evidence of birth registration, as where a man not married to the child's mother had agreed to joint registration[86] of the birth of a non-marital child in the belief that he was the father; and in subsequent proceedings it was shown that he could not be the father. In other cases, such as affiliation proceedings, there will have been no presumption as to paternity. At present findings of non-paternity are not normally recorded expressly in court orders, with the possible exception of a paternity issue tried in the course of divorce

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[79]Cf. the provisional views of the Scottish Law Commission in their Consultative Memorandum No. 53, Family Law: Illegitimacy (1982) paras. 9.29–9.30.

[80]As to which see para. 6.50 above.

[81]So that the mother may re-register the birth of the child to show this: see para. 10.58 below.

[82]At paras. 10.55–10.75.

[83]At para. 9.27.

[84]We think it would be helpful if the order satisfactorily identified the child, if need be by reference to the entry in the births register where the birth had been registered before making the order. See para. 10.65 below as to the distinction in this context between declarations of parentage and findings of paternity in other proceedings.

[85]See para. 10.48 below.

[86]See paras. 10.56–10.58 below.

proceedings.[87] Where an allegation of paternity is made in affiliation proceedings the complaint is simply dismissed if the court is not satisfied that the paternity allegation has been proved. In the Working Paper[88] we proposed that a man[89] should be entitled to an order recording a finding that he was not the father of a particular child in any case where the finding in effect involved the overturning of a presumption of paternity. (This could occur in divorce proceedings[90] or in the joint registration case to which we have referred above.) Commentators were divided on this question.

10.44 We are not now inclined to make any recommendation on this point. It seems to us that the only purpose of a negative finding (which could not in itself be *prima facie* evidence of anything)[91] would be to facilitate the alteration of the father's name on the child's birth certificate. In practice, however, this advantage would not be very great since if the evidence rebutting paternity (including that furnished by a court order)[92] were sufficiently clear it would be possible to correct any error relating to paternity which appeared in the register by using the procedure described below.[93]

(*c*) *Compulsory paternity proceedings?*

10.45 We now turn to the question whether there should be compulsory paternity proceedings. We are aware that some countries, including in particular some of the Scandinavian countries[94] and Switzerland[95] have instituted a system of mandatory paternity actions in relation to children born outside marriage; and some commentators on the Working Paper thought that compulsory proceedings were a natural consequence of our tentative proposal to confer automatic parental rights on fathers of children born outside marriage. We see some force in the argument that if all children are to be treated alike one should ensure that as many as possible have ascertained

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[87]Appendix C to the *Practice Note (Matrimonial Causes: Issues)* [1975] 1 W.L.R. 1640, 1642 sets out the form of order in such proceedings, which follows the findings of the trial judge.

[88]Para. 9.30.

[89]A woman would not normally seek an express order recording a finding of non-paternity except, perhaps, where her husband applied for custody and she established that he was not the father. However, in many such cases the child would be a "child of the family" and a finding of non-paternity would not prevent the husband from obtaining custody or access: Matrimonial Causes Act 1973, s. 42; Domestic Proceedings and Magistrates' Courts Act 1978, s. 8(2).

[90]Or in other matrimonial or in guardianship proceedings.

[91]It would however constitute *res judicata* as between the parties to the proceedings.

[92]Such as a maintenance order made against another man on the basis of that man's paternity.

[93]At para. 10.67. See Births and Deaths Registration Act 1953, s. 29(3) and Registration of Births, Deaths and Marriages Regulations 1968 (S.I. 1968 No. 2049) reg. 75.

[94]E.g. Norway, where the welfare authorities must bring paternity proceedings "without undue delay"; the mother must give the welfare authorities relevant information. Moreover a system of establishing paternity by default exists: a man named by the mother is served with a writ and informed that he will be adjudged to be the father unless he applies for a judicial determination within a limited time: Law No. 10, Concerning Illegitimate Children (1956) quoted in Krause, *International Encyclopedia of Comparative Law*, Vol. IV, ch. 6, p. 41.

[95]Under section 309 of the Swiss Civil Code a curator must be appointed for each child born outside marriage who must see to it that an acknowledgement or, if necessary, a judicial declaration of paternity is made.

fathers and that the most effective way of achieving this is to have compulsory paternity proceedings;[96] such proceedings would, moreover, have the effect of shifting the responsibility for supporting non-marital children as far as possible from the taxpayer to the father. The latter point has, of course, an historical parallel with the Elizabethan Poor Law[97] which aimed to find the father of an illegitimate child and to relieve the parish from having to provide support for the child.[98] However, we think that a compulsory system would in some cases be harmful to the child and we doubt whether it would be of much benefit in most cases:[99] fathers revealed in this way would be likely to be those most reluctant to contribute financially or in any other way to the child's welfare. Moreover, to propose that a system of this kind be established, with the cost and administrative problems which would arise, seems to us unrealistic in present circumstances. Finally such a system would inevitably sometimes put pressure on the single mother. In some circumstances she might give unreliable information about the child's paternity, especially if she wished to avoid contact with the father; in others she might claim not to know the father's identity. On balance therefore we think that the disadvantages of introducing a compulsory paternity action outweigh its possible advantages.

Other means of establishing parentage

10.46 We now turn to the other ways in which proof of paternity may be facilitated, that is (1) by presumption, (2) by birth registration, and (3) by other possible methods of acknowledging paternity.

(1) *Presumptions*

10.47 A presumption as to paternity may provide a convenient way of establishing paternity for practical purposes without recourse to court proceedings and it may assist the court in determining a contested issue of paternity. We consider first the present presumption of legitimacy (which necessarily involves a presumption of paternity) and then the possibility of introducing other presumptions as a means of facilitating the proof of paternity.

(*a*) *The presumption of legitimacy*

(*i*) *The present law*

10.48 A child born to a woman during[100] her marriage[101] is presumed to be the legitimate child of herself and her husband (or, as the case may be, her

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[96]See particularly Clarkson, "All Children Equal At Last?", (1979) 9 Kingston L.R. 369.

[97]Statute 18 Eliz. 1 (1575–6), c. 3.

[98]See Laslett, Oosterveen and Smith, (eds.) *Bastardy and its Comparative History*, (1980), pp. 73–5.

[99]The Russell Committee in its Report on the Law of Succession in Relation to Illegitimate Persons (1966) Cmnd. 3051 considered the question of imposing on the state a responsibility to investigate paternity but rejected such a scheme both because of the impact on administrative resources and because the inevitable questioning of the mother would be unacceptable in this country: para. 41.

[100]Or within an acceptable time after the termination of her marriage (by death or decree absolute of divorce or nullity). The normal period of gestation was noted by the House of Lords in *Preston-Jones* v. *Preston-Jones* [1951] A.C. 391 as being between 270 and 280 days but longer periods were regarded as possible: see the remarks of Lord Simonds (*ibid.*, pp. 401–2) and Lord Normand (*ibid.*, p. 406) and the cases there cited.

[101]Including a child conceived before his mother's marriage.

late or ex-husband)[102] unless a decree of judicial separation[103] was in force at the date of conception.[104] A classic statement of the presumption of legitimacy, and the rebuttal of it, was made in 1811 by Sir James Mansfield C.J. in *The Banbury Peerage Case*.[105]

> "In every case where a child is born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce[106] sexual intercourse is presumed to have taken place between the husband and wife, until that presumption is encountered by such evidence as proves, to the satisfaction of those who are to decide the question, that such sexual intercourse did not take place at any time, when, by such intercourse, the husband could, according to the laws of nature, be the father of such child".

In most cases of course there is no dispute about the paternity of a child born to a married woman and in such cases the presumption has no part to play. Where there is a dispute, however, the presumption is of some importance.

10.49 Three comparatively recent developments have however served to reduce the significance of the presumption of legitimacy. First, the standard of proof required to rebut it has changed. No longer (as was the case at common law) need such proof be beyond reasonable doubt.[107] Under section 26 of the Family Law Reform Act 1969 any presumption of law as to the legitimacy[108] of any person may be rebutted "by evidence which shows that it is more probable than not that the person is illegitimate or legitimate, as the case may be". Thus,

> "The presumption of legitimacy now merely determines the onus of proof. Once evidence has been led it must be weighed without using the presumption as a make-weight in the scale for legitimacy. So even weak evidence against legitimacy must prevail if there is no other evidence to counter-balance it. The presumption will only come in at that stage in the very rare case of the evidence being so evenly balanced that the court is unable to reach a decision on it."[109]

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[102]A child born within due time after the termination of a marriage is presumed to be the child of that husband notwithstanding the mother's remarriage: *Re Overbury, dec'd.* [1955] Ch. 122.

[103]The presumption still technically applies where the wife and husband are separated by agreement, although it would doubtless be easy enough for the husband to rebut it in such cases by giving evidence of non-access. Since the passing of the Law Reform (Miscellaneous Provisions) Act 1949, s. 7, such evidence has been admissible.

[104]See *Ettenfield* v. *Ettenfield* [1940] P. 96.

[105](1811) 1 Sim and St. 153, 158.

[106]I.e. a decree of divorce *a mensa et thoro* (renamed judicial separation by the Matrimonial Causes Act 1857, s. 7).

[107]See e.g. *Watson* v. *Watson* [1954] P. 48; *Cotton* v. *Cotton* [1954] P. 305; on the facts in each case the trial judge would have found the presumption rebutted on a balance of probability but was not satisfied beyond reasonable doubt as to the illegitimacy of the child in qeustion.

[108]Or illegitimacy, as in a case where the child is conceived after the making of a judicial separation order.

[109]*S.* v. *S.*, *W.* v. *Official Solicitor* [1972] A.C. 24, 41 *per* Lord Reid. In those two cases it was held that it was in the best interests of the child in a legitimacy case for the truth to be ascertained and that the court should have the best evidence available, including that of blood tests. Cf. *Re J. S. (A Minor)* [1981] Fam. 22.

Secondly, the rule which prohibited spouses from giving evidence that intercourse had not taken place between them if the effect of such evidence would be to bastardise a child[110] was abolished by the Law Reform (Miscellaneous Provisions) Act 1949.[111] Thirdly, the increasing utility of blood test evidence to which we have referred above[112] has diminished the importance of the presumption because it is now easier than it was to discover the truth about paternity.

(ii) The Working Paper's proposals and our present view

10.50 In the Working Paper we provisionally proposed[113] that upon the abolition of illegitimacy the substance of the presumption of legitimacy should be preserved in the form of a presumption of paternity. On consultation the conclusion that there should be such a presumption was generally agreed. However, in the light of the policy adopted in this Report (which involves the retention of certain differences between marital and non-marital children, notably as regards parental rights, and thus the concept of legitimacy)[114] there is in our view no need for any change in the form of the present presumption. The presumption of legitimacy will of course also operate as a presumption of paternity.

(iii) Presumption of legitimacy of the child of a void marriage

10.51 As we have seen,[115] under the present law the child of a void marriage is treated as legitimate if, but only if, one or both of his parents reasonably believes in the validity of the marriage.[116] Two particular matters seem to us to arise. First, the issue of the child's legitimacy may only arise many years after the marriage ceremony and it might by then have become difficult to establish the existence of a reasonable belief.[117] Accordingly, we recommend that, in the case of a child born after the implementation of our proposals, there should be a presumption that at least one of the parties to the marriage reasonably believed in its validity. This would, we think, usually accord with the facts: cases where neither party to a marriage reasonably believes in its validity are likely to be few.

10.52 Secondly, doubts have been expressed[118] whether a mistake of law (for example, a belief that a divorce decree was valid or a mistake as to the

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[110] *Russell* v. *Russell* [1924] A.C. 687.

[111] Sect. 7(1). Courts are still reluctant to reopen a case so as to bastardise a child: see e.g. *Edwards* v. *Edwards* (1980) 2 F.L.R. 401, 403 *per* Heilbron J.; *Clark* v. *Clark* (1981) 2 F.L.R. 405, 410–11 *per* Balcombe J. and the cases there referred to.

[112] Paras. 5.2–5.4.

[113] At para. 9.11.

[114] See paras. 4.44–4.51 above for the reasons for this.

[115] Para. 3.15 above.

[116] Legitimacy Act 1976, s. 1(1). Reasonable belief at the time of the act of intercourse resulting in the birth (or at the time of the marriage if later) must be proved: *ibid.* Additionally the child's father must be domiciled in England and Wales at the time of the child's birth: *ibid.*, s. 1(2).

[117] Reasonable belief in the validity of a marriage is to be judged objectively: *Hawkins* v. *A.-G.* [1966] 1 W.L.R. 978.

[118] See Bromley, *Family Law* 6th ed., (1981), p. 267 and the materials referred to there.

law governing prohibited degrees of marriage)[119] can found a reasonable belief. We are of the view that the matter should be put beyond doubt and we accordingly recommend that statute should expressly provide that a mistake of law is capable of being a "reasonable belief" for the purposes of section 1 of the Legitimacy Act 1976.

(b) Presumptions of paternity based on facts akin to marriage

10.53 In some Commonwealth jurisdictions the fact of cohabitation at the time of the child's birth also gives rise to a presumption of paternity; the circumstances in which it does so are defined by statute in those countries.[120] In the Working Paper[121] we expressed opposition to the creation of such a presumption, or of a presumption which could arise from other facts such as the payment to the mother of money for the child's upkeep. This conclusion was generally supported on consultation.[122]

10.54 We think that the Working Paper's conclusion is right. The value of a presumption lies in its general applicability without further evidence. This condition is satisfied by the presumption of legitimacy, 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 a fact such as cohabitation as husband and wife is by no means self-proving,[123] especially if there are further statutory definitions going to the durability of the relationship. Moreover, while cohabitation in a marriage-like relationship, if established, may justifiy an inference as to the paternity of any children, we see no reason why any fact other than marriage [124] should be formally recognised as giving rise to a "presumption" of paternity.

(2) *Birth registration*

(a) The present law and practice

10.55 There are important differences between the way in which the births

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[119]Or a mistake as to whether a marriage would be regarded as polygamous and therefore possibly void by reason of s. 11(d) of the Matrimonial Causes Act 1973, where one of the parties was domiciled in this country at the time of the marriage (but see *Hussain* v. *Hussain* (C.A.) *The Times*, 28 June 1982): see the Joint Law Commission Working Paper and Scottish Law Commission Consultative Memorandum on Polygamous Marriages (1982) Working Paper No. 83, Memo. No. 56, Part III.

[120]I.e. Tasmania, New South Wales and Ontario. In Tasmania the presumption arises where a man and woman have cohabited for 12 months and a child is born during that period or within 10 months after cohabitation ceases (Status of Children Act 1974, s. 8(6)); in New South Wales cohabitation at any time between 20 and 44 weeks before the child's birth gives rise to the presumption (Children (Equality of Status) Act 1976, s. 10); and in Ontario the presumption arises where there is cohabitation "in a relationship of some permanence" during which the child was born or where the child is born within 300 days after such cohabitation ceases: Children's Law Reform Act 1977, s. 8(1).

[121]At para. 9.12.

[122]Cf. however Clarkson, "All Children Equal at Last?", (1979) 9 Kingston L.R. 369, 376.

[123]As is evident from the controversy over the application of the "cohabitation rule" by the Department of Health and Social Security. See also para. 4.33 above.

[124]As explained in para. 10.50 above, marriage gives rise indirectly to a presumption of paternity because of the presumption of legitimacy.

of marital and non-marital children are registered. These differences in part reflect the fact that many non-marital children do not have identifiable fathers; but they also constitute discrimination against the fathers of such children even where they are identified.

10.56 The Births and Deaths Registration Act 1953 provides[125] that the father and mother of every child (or, in the case of their death or inability, some other "qualified informant")[126] are under a duty to give to the registrar of births the required particulars of the child's birth within 42 days thereof.[127] However, the father of an illegitimate child is as such[128] expressly exempted from this duty to register the birth.[129] Nevertheless there are circumstances in which the name of the father of a non-marital child may be entered on the births register[130] and these circumstances have been extended over the years. Originally under the Births and Deaths Registration Act 1953, the name of such a father could be entered in only one case, that is at the joint request of the mother and the person acknowledging himself to be the father,[131] who had to sign the register with the mother.[132] (By contrast, the name of the father of a married woman's child may be entered either by the mother or by her husband.)[133]

10.57 Under the Family Law Reform Act 1969, it was provided[134] that, in addition, the name of an illegitimate child's father might be entered at the request of the mother on production of a statutory declaration made by the person acknowledging himself as father (and also a declaration made by her in the prescribed form stating that he was the father). In other words, the mother would still have to attend but the father was no longer required to do so provided that he made a statutory declaration.

10.58 The Children Act 1975 effected further changes in birth registration law. Under section 93 of that Act, the mother of an illegitimate child could for

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[125]Sect. 2.

[126]*Ibid.*, s. 2(*b*). The other "qualified informants" are the occupier of the house in which the child was, to the occupier's knowledge, born; any person present at the birth; and any person having charge of the child: *ibid.*, s. 1(2).

[127]Failure to comply with this duty is an offence: *ibid.*, s. 36.

[128]He may of course be otherwise qualified as an informant: n. 126 above.

[129]Births and Deaths Registration Act 1953, s. 10.

[130]The birth certificate is simply a certified copy of the entry made in the register and may be in the "long form" or the "short form": see para. 10.69 below.

[131]Henceforth in this section for ease of reference we refer to the person acknowledging himself to be the father as "the father".

[132]Births and Deaths Registration Act 1953, s. 10.

[133]The practice is that on the registration of a birth the informant is asked to state the name of the child's father; if it appears that the person so named is the mother's husband, his name is registered as the father. 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; and if the father named is not the mother's husband, the register will also be left blank unless there is supporting evidence (by the father or from a court order).

[134]Births and Deaths Registration Act 1953, s. 10(*b*), added by Family Law Reform Act 1969, s. 27.

the first time have the father's name entered on the births register on the strength not of his acknowledgment of paternity but of an affiliation order naming him as the putative father.[135] The Act also provided, for the first time, for the re-registration of the birth of an illegitimate child so as to enter the father's name in a case where no name had originally been entered. Re-registration of the birth of such a child may take place under the same conditions as registration, that is to say—

(i) at the joint request of the mother and father;[136]
(ii) at the request of the mother on production of a statutory declaration by the father;[137]
(iii) at the request of the mother on production of a certified copy of an affiliation order naming the man as putative father.[138]

10.59 The entry of a man's name as father in the register of births is *prima facie* evidence of paternity;[139] and, as we have seen,[140] over half of all illegitimate births are jointly registered by the mother and father. The births registration system is accordingly in statistical terms an important means of providing evidence of paternity.

(*b*) *Entry of father's name on birth certificate in the absence of mother's consent*

10.60 From the point of view of establishing paternity the present system has certain deficiencies. The most striking is that the father of a non-marital child cannot have his name entered in the births register without the mother's consent even in a case where he has been adjudged to be the father in affiliation proceedings[141] or even if he has obtained an order for legal custody or access.[142] This constitutes discrimination against the father and it may operate against the child's interests because his paternity has not been recorded and may subsequently be difficult to prove. In the Working Paper we

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[135]See Births and Deaths Registration Act 1953, s. 10(c) and 10A(1)(c), added by Children Act 1975, s. 93(1) and (2). Where the child has attained the age of 16 before registration his written consent is also required: 1953 Act, s. 10(c)(ii). First registration (as opposed to re-registration: see n. 138 below) following an affiliation order is rare because registration must take place within 42 days of the child's birth; see para. 10.56 above. In 1977 there was only one such case; *Children Act 1975: First Report to Parliament*, para. 108 (H.C. 268, 26 Nov. 1979).

[136]Births and Deaths Registration Act 1953, s. 10A(1)(*a*), added by Children Act 1975, s. 93(2).

[137]*Ibid.*, s. 10A(1)(*b*).

[138]*Ibid.*, s. 10A(1)(*c*); the written consent of the child if over 16 is also required in this case. In 1977. 53 births were re-registered in this way and in 1978 the number was 60: *Children Act 1975, First Report*, above, para. 108. In 1980 the number was 55 (figure supplied by Registrar General's Office).

[139]Births and Deaths Registration Act 1953, ss. 10 and 34; *Jackson* v. *Jackson and Pavan* [1964] P. 25. An entry of birth in a *foreign* register may constitute evidence under the Evidence (Foreign, Dominion and Colonial Documents) Act 1933, as substituted by the Oaths and Evidence (Overseas Authorities and Countries) Act 1963, s. 5; Orders in Council designate countries to which the Act applies. For service registers see n. 155 below.

[140]Para. 4.3, n. 8 above.

[141]Under Affiliation Proceedings Act 1957, s. 4: see Part VI above.

[142]Under Guardianship of Minors Act 1971, s. 9: see Part VII above.

proposed[143] that where paternity has been established by court order, the father so found should be able to insist if he wished on having his paternity recorded (by registration or re-registration as the case may be)[144] in the births register. In general, this view was accepted on consultation. There were, however, some misgivings expressed about allowing a father unilaterally to have his name entered on the births register following the making of a maintenance order where he might not have been regarded as a suitable person to have custody or access. Much of this anxiety seemed to be related to the proposal in the Working Paper that the father (identified in the births register) would automatically have parental rights. We are not adhering to that proposal and therefore the fact of registration would have no effect on parental rights.

10.61 We recognise the possibility that if a man adjudged to be the father can insist on having his name entered in the births register as a result of maintenance proceedings some mothers may be deterred from taking such proceedings. This would be contrary to the interests both of the child and of the community. We have no way of knowing whether this is likely to happen in any significant number of cases. However for three reasons we believe that a father *should* be able to have his name so entered. First, if a man is obliged to accept the financial obligations of paternity it is, we feel, reasonable that he should be entitled if he wishes to have the fact of his fatherhood recorded. Secondly, registration of paternity could well benefit the child, not only, for example, in a possible future inheritance claim, but more generally to satisfy the desire to discover his biological parentage. This desire is being increasingly recognised, as can be seen from the right now given to an adopted person to obtain details of his original birth registration (since the implementation of section 26 of the Children Act 1975) which seems so far to have proved successful.[145] Thirdly, there is some advantage in having court orders and birth register entries so far as possible consistent with one another rather than, as now, allowing one parent but not allowing the other to have the findings on a public document such as a court order reflected on another public document such as the births register.

10.62 Accordingly we recommend that where an order has been made giving the father of a non-marital child legal, custody or access, or an order giving him other parental rights[146] or requiring him to make financial provision for the child, the father should be able to register, or re-register, the birth.[147] In the case of first registration[148] it will be necessary to treat the father as a qualified informant because otherwise there would be no qualified informant (the mother being absent and, *ex hypothesi*, unwilling to have paternity

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[143]At para. 9.18.

[144]See paras. 10.56–10.58 above.

[145]See Day, "Access to birth records: General Register Office Study", (1979) 4 Adoption and Fostering pp. 17–28.

[146]See paras. 7.26–7.33 above and Appendix A, clause 4.

[147]As to declarations of parentage and the births register, see para. 10.65 below.

[148]This is likely to be rare since re-registration would be the usual course: see para. 10.58, n. 135 above.

recorded) and only a qualified informant can effect registration; the draft Bill annexed to this Report provides for this.[149] This will not affect the rule that the father of a non-marital child is not under any *duty* to register the birth of the child.[150] In the more common case where re-registration is sought after a court order, the authority of the Registrar-General will be required, as it is already for all cases of birth re-registration.[151]

10.63 One or two of those who commented on the Working Paper were of the view that the proposal to *allow* a father to have his paternity recorded did not go far enough. It was suggested that it should be compulsory for the mother to disclose paternity; and that a man who was alleged by the child's mother to be the father should on being notified of the allegation, have his paternity recorded unless he obtained a declaration that he was not the father. This suggestion is in substance the same as a suggestion that there should be compulsory paternity proceedings. This we have considered and rejected.[152]

(c) *Births register and court orders of paternity*

10.64 We have also considered whether findings of paternity made by a court should be automatically reflected on the births register or whether it should be up to the parties to register the finding if they wish to do so. We have said that, at present, only the mother can unilaterally have the paternity of a non-marital child recorded on the births register, and then only where there has been an affiliation order. Should the court direct the Registrar-General, in effect, to make the register conform with the court order or finding?

10.65 In the Working Paper[153] we envisaged that a father could insist on his paternity appearing on the register after the making of a court order but we did not specify whether such re-registration should simply be at his option or whether it should automatically follow from the order. We think that a distinction should be drawn in this instance between, on the one hand, declaration proceedings where the finding of paternity is the relief sought and steps are taken to notify all the interested parties and, on the other hand, proceedings where paternity is an incidental finding (in custody or maintenance cases, for example). In relation to the former we think that the court should, as with adoption,[154] notify the Registrar-General following a declaration of parentage, so that re-registration can be automatically effected. The declaration procedure is intended to provide a means whereby parentage claims can be authoritatively examined; and it seems right that the result of such an examination should be recorded in the register. Rules will be required for

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[149]Appendix A, clause 31 (s. 10(2) of Births and Deaths Registration Act 1953 as substituted).

[150]Under Births and Deaths Registration Act 1953, s. 2: see para. 10.56 above.

[151]Births and Deaths Registration Act 1953, s. 10(A)(1) added by Children Act 1975, s. 93(2).

[152]See para. 10.45 above.

[153]Para. 9.18.

[154]See n. 156 below.

notification to the Registrar-General by the court.[155] The rules will need to ensure that the child is sufficiently identified in the order.[156] In relation to incidental findings of paternity where there has been an order for financial relief, custody or the like[157] we think that either parent should have the right, as the mother has now,[158] to re-register the birth.

10.66 There is a further distinction we wish to draw between declarations and other paternity proceedings. This relates to the consent of the child if over 16 to the registration (or re-registration) of the birth so as to show his father's name. In declaration cases the interests of the minor child will have been considered by the court in deciding whether or not to grant the declaration; if the court thinks it right to grant a declaration, the child's paternity should, we think, be automatically recorded. By contrast, in affiliation proceedings the child's written consent to the registration is required under the present law if he is over 16.[159] This rule reflects the fact that affiliation proceedings are designed primarily for financial support and the child's interests are not considered in the context of the finding of paternity and subsequent birth re-registration; accordingly, where the child is of such an age that it is considered appropriate to take his views into account, his consent to registration is required. The draft Bill annexed to this Report[160] applies the same principle to the Guardianship of Minors Act 1971 so that the consent of the child, if over 16, will be required when it is sought to effect registration or re-registration following an order under that Act. On the other hand, where registration or re-registration of the birth is effected by the *agreement* of the parents[161] the child's consent is not required under the present law and we do not propose that such a requirement be introduced.

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[155]The rules will no doubt provide that re-registration should be delayed until the time for any appeal has expired. In certain exceptional cases where the birth has been registered in the service department register, the marine register or the air register book there is power to make alterations in the records: Registration of Births, Deaths and Marriages (Special Provisions) Act 1957, s. 3(3); Merchant Shipping Act 1970, s. 72(3); Civil Aviation Act 1949, s. 55(6).

[156]Cf. Adoption Act 1958, s. 21(4), under which the court has to be satisfied of the identity of the child in respect of whom the adoption order is to be made with a child to whom an entry in the births register relates before making a direction to the Registrar-General to mark the entry "Adopted"; see also *Re Stollery* [1926] Ch. 284. The surname to be entered for the child will have to be decided on: cf. Adoption (County Court) Rules 1976 (S.I. 1976 No. 1644) Sched. 1 Form 8.

[157]Findings of paternity may also be made incidentally in, e.g., divorce proceedings or a succession claim. The statutory provision which we propose will not extend to such cases , but they will be comparatively few in number.

[158]After an affiliation order: Births and Deaths Registration Act 1953, ss. 10(c) and 10A(1)(c): see para. 10.58 above.

[159]Births and Deaths Registration Act 1953, s. 10(*c*)(ii), added by Children Act 1975, s. 93(1); Births and Deaths Registration Act 1953, s. 10A(*c*)(ii), added by Children Act 1975, s. 93(2): see n. 135 and 138 above. The *child's* surname is not changed on re-registration.

[160]Appendix A, clauses 31 (s. 10(1)(d)(ii) of the 1953 Act as substituted) and 32 (s. 10A(1)(d)(ii) as substituted).

[161]See para. 10.58 (i) and (ii) above.

(d) Findings of non-paternity reflected on the births register

10.67 Under present procedures the effect of a court order where paternity is not proved (or is actually disproved)[162] may be reflected on the births register. The procedure to which we have referred[163] for correcting errors of fact or substance on the register can be used to alter the record of paternity in those cases where a court order clearly establishes that the man whose name was originally entered in the register is not the father. This would most commonly occur where the husband had been registered as the child's father and in the course of divorce proceedings he was found not to be the father of the child;[164] but it could occur after an unmarried couple had jointly registered[165] the birth of the child believing that the man was the father and it was later established that another man was actually the father.[166] This seems satisfactory and we do not recommend any change in the law in this area.

(e) Re-registration following marriage of the child's parents

10.68 When a child is legitimated by the subsequent marriage of his parents[167] the birth must be re-registered to show this.[168] In the Working Paper we took the provisional view[169] that in consequence of the abolition of illegitimacy which we proposed, no useful purpose would be served by retaining this procedure; but we suggested that it should be retained on a voluntary basis for those who wished to record on the register that the child's parents had subsequently married each other. Since however there may be cases where legitimacy (and therefore "legitimation") will still be of significance if the recommendations in this Report are implemented, the process of "legitimation" will continue to be relevant. Accordingly we are of the view that the procedure for re-registration should remain compulsory and not become voluntary, and we recommend no changes regarding this procedure.

(f) Form of birth certificate

10.69 One of the complaints sometimes made about illegitimacy is that the entry in the births register, and the "long" form of birth certificate which is based upon it, will continue in practice to reveal illegitimacy because the child's father will either not be named at all or will manifestly have a surname different from that of the child's mother. Two alternative suggestions have been made to mitigate any embarrassment which may thus be caused to persons of non-marital birth. First, it has been suggested by some (including

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[162]See para. 10.49 above.

[163]See para. 10.44 above.

[164]As in *R.* v. *R.* [1968] P. 414; see also para. 10.43 above.

[165]Under s. 10 of the Births and Deaths Registration Act 1953, amended by s. 27 of the Family Law Reform Act 1969: see para. 10.56 above.

[166]E.g. by an affiliation order adjudging the second man to be the putative father, in which case the birth could be re-registered: Births and Deaths Registration Act 1953, s. 10A(1)(*c*).

[167]See paras. 3.17–3.18 above.

[168]Births and Deaths Registration Act 1953, s. 14. If the information is not furnished within 3 months of the marriage the parents can be required to attend to give the relevant information: *ibid.*, s. 14(2). Failure to furnish the information within 3 months is an offence: Legitimacy Act 1976, s. 9.

[169]See para. 9.21.

one or two commentators on the Working Paper) that the short form of birth certificate, which contains only the name, surname, sex and place of birth of the child,[170] should be used to the exclusion of the full form unless the full form is required, for example in legal proceedings. Alternatively, and more radically, it is said that there is no need to name the father at all on the births register. The function of the register, it may be argued, is merely to record that a particular individual has been born at a particular place on a specified date; naming the mother suffices effectively to identify the child and there will normally be no dispute about the mother's identity.

10.70 Although there may be some attraction in these arguments, we do not think that either proposal is satisfactory. As to the short form birth certificate, this is we understand now so well established and widely used that it is not especially associated with illegitimacy;[171] there is no justification, in our view, for depriving people of information about themselves which is contained in the long form and to which they have always hitherto had access. It is noteworthy in this context that the right of an adopted person to have a copy of his original birth record has recently been established:[172] it would be strange to remove such rights from the rest of the population who may wish to see material disclosed in the "long form" certificates. Moreover if such a proposal were implemented there would be hardship if a person needed to prove his parentage to a foreign embassy or government department.[173]

10.71 As to the possibility of not having the father named at all, we consider this suggestion to be too drastic. A birth entry which did not name the father would not only cause practical problems in relation to demographic statistics and forecasts and to genealogical research but would also remove important evidence of paternity. This would be inconsistent with our policy of facilitating the establishment of paternity. We discussed the suggestion in the Working Paper[174] but rejected it, and it received no support on consultation. Accordingly we make no recommendation for change in the law on either of these points.

(*g*) *Statutory declarations*

10.72 Before we leave the topic of birth registration we should deal with two matters which relate to the statutory declaration by which, as we have seen,[175] the father of a non-marital child may acknowledge paternity. First, it

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[170]See Births and Deaths Registration Act 1953, s. 33 and the Birth Certificate (Shortened Form) Regulations 1968 (S.I. 1968 No. 2050).

[171]The short form is issued free on registration and is issued unless the long form (for which a fee of £4.60 is currently payable: S.I. 1982 No. 222) is specifically asked for.

[172]Adoption Act 1958, s. 20A: see para. 10.61 above.

[173]It was at one time apparently the policy of the Inland Revenue to require taxpayers from the Indian sub-continent who wished to claim tax relief for a child born in the United Kingdom to produce the child's full birth certificate: *Savjani* v. *I. R. C.* [1981] Q.B. 458.

[174]At para. 9.22.

[175]Paras. 10.57–10.58 above. The justification for requiring a statutory declaration (as opposed to any written statement) is that there is a danger that a person making an informal statement might be less aware of the importance and the implications of making it than if he made a statutory declaration; moreover the making of a false statutory declaration is an offence (Perjury Act 1911, s. 5(*a*)).

is not at present possible for the man who claims to be the child's father to register (or re-register) the birth by attending the register office with a statutory declaration by the mother confirming that he is the father. The mother must attend herself. It seems to us that this is unsatisfactory because there may be cases where it is difficult or inconvenient for the mother to register the birth herself (although registration facilities are often available at maternity hospitals). That this is so seems apparent from the number[176] of husbands who attend without the mothers to register the births of their children.

10.73 Secondly, the father of a non-marital child cannot make a statutory declaration of paternity before the child's birth: hence paternity can never be recorded on the register if the father dies before the child's birth. (By contrast a married woman whose husband died during pregnancy can register the child as his.)

10.74 As regards the first matter, we think that the law should provide for the case where the mother of a non-marital child cannot or does not wish to attend the register ofice to register the birth but the father can do so.[177] Accordingly we recommend that the father should be permitted to attend to register (or re-register) the birth provided that he produces both a statutory declaration as to his paternity made by the mother and a declaration made by himself; this is the converse of the existing provisions.[178]

10.75 As regards the case where the father dies before the child's birth, a declaration of parentage[179] will be available for the child (or someone on his behalf): doubtless any statement made by the man alleged to be father would be relevant as evidence for a future declaration of parentage. There is, in our view, no need to provide specially for this type of case because once a declaration of parentage has been made the birth could, as we have seen,[180] be re-registered so as to show the father's name.

(3) *Other formal methods of acknowledging paternity*

10.76 A 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

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[176]There is no precise figure available but we understand from the Registrar-General's Office that it is substantial.

[177]He would have to sign a "prescribed" form, similar to that which is now completed by the mother where she produces the father's statutory declaration: see Registration of Births, Deaths and Marriages (Amendment) Regulations 1976 (S.I. 1976 No. 2081), Form 31.

[178]I.e. Births and Deaths Registration Act 1953, s. 10(*b*) and s. 10A(1)(*b*). The father will be treated as a qualified informant: see clause 31 of the draft Bill in Appendix A, and the explanatory notes thereon.

[179]See paras. 10.2–10.39 above.

[180]Para. 10.65 above.

presence of a solicitor constitutes *prima facie* evidence of paternity;[181] such an instrument may be filed with the Registrar-General.[182]

10.77 We recognise that voluntary acceptance of paternal responsibilities is to be encouraged: and any instrument recording an agreement between parties as to a child's paternity, or even a unilateral statement claiming paternity, would have some evidential value. But we believe on balance that the formal adoption of any such procedure would usually be superfluous because of the evidence supplied by our birth registration system; in the unusual case where there was no existing birth entry, the procedure for applying for a declaration of parentage would be available. If, on the other hand, a legally recognised system of acknowledgement of paternity, made without the mother's consent or a court order, were introduced, it could prove mischievous, not least because the acknowledgement might well be false and might conflict with a court finding or with the entry in the births register. This, as we suggested in the Working Paper,[183] would be undesirable. There was little support among commentators on the Working Paper for an additional method of acknowledging paternity and we remain of the view that the best solution is to ensure that the registration system is sufficiently flexible to enable paternity to be recorded on the register where appropriate evidence is available.

PART XI

CITIZENSHIP

Introduction

11.1 British citizenship is a United Kingdom matter and thus not a subject on which we can make definitive proposals.[1] All that we can do is to discuss the relevant issues in the context of the law of England and Wales in order to provide a basis for consultation, discussion and, ultimately, decision taking by Parliament. For this reason, although we shall be making recommendations, we are not including any clauses on citizenship in the draft Bill annexed to this Report.

The existing law

11.2 The citizenship law contained in the British Nationality Act 1948 discriminated against the non-marital child in one important respect: an

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[181]Status of Children Act 1969 (N.Z.), s. 8(2).

[182]*Ibid.*, s. 9(1).

[183]At para. 9.24.

[1]Law Commissions Act 1965, s. 1(5).

illegitimate person born abroad could not acquire citizenship by descent.[2] This was because the relevant provisions of that Act[3] provided that a child could only acquire citizenship by descent if his father was at the time of the child's birth a United Kingdom citizen; and "father" was defined as the father of a legitimate (or legitimated) child.[4]

11.3 Since the Working Paper was published, the United Kingdom's citizenship laws have been[5] radically altered by the British Nationality Act 1981.[6] Moreover, the importance of citizenship has been increased, since the right to live in, and to enter and leave, this country will in future turn on entitlement to citizenship.[7] The 1981 Act makes a significant improvement in the citizenship rights of non-marital children, since it permits the transmission of citizenship through mothers as well as fathers.[8] However, it continues the old law's policy of differentiating between the legitimate and the illegitimate in one vital respect, *viz.* that the relationship of father and child is, for the purposes of the Act, taken to exist only between a man and any *legitimate* child born to him.[9] The result is that a non-marital child cannot acquire British citizenship through his father. In this respect, the Act merely retains the old rule:[10] but the significance of the restricted definition of "father" has now become potentially much greater than was formerly the case. This is because under the 1948 Act everyone born in the United Kingdom automatically became a British citizen by birth under the so-called *jus soli*.[11] Parentage (and thus, in effect, discrimination against non-marital children by reason of their

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[2]British Nationality Act 1948, s. 5.

[3]Discussed by us in the Working Paper: see paras. 7.7 and 7.9ff.

[4]Sects. 23, 32(2). This reproduced the rule established by the British Nationality Act 1730: see *Abraham* v. *A.-G.* [1934] P. 17. There was no citizenship by descent through a child's mother. However, under the 1948 Act it was possible for the child of a United Kingdom mother to become registered as a United Kingdom citizen, either in "special circumstances" under s. 7(2) of the 1948 Act (under which the Home Secretary would as a matter of practice register the illegitimate child of a mother who was a United Kingdom citizen by birth: *Hansard* (H.C.) 7 February 1979, vol. 962, cols. *203–4*), (Written Answers)); or alternatively, under s. 1 of the British Nationality (No. 2) Act 1964, if the child was and always had been stateless and its mother had been a United Kingdom citizen at the time of its birth.

[5]The provisions of the Act relevant to this Report have not yet been brought into force. These provisions will be brought into force on 1st January 1983: British Nationality Act 1981 (Commencement) Order 1982 (S.I. 1982 No. 933).

[6]The Act creates three separate citizenships: British citizenship, British Dependent Territories citizenship and British overseas citizenship; we are here concerned with the first of these concepts which is dealt with by Part I of the Act.

[7]British Nationality Act 1981, s. 39 and Sched. 4, para. 2 (amending the Immigration Act 1971 under which the relevant question had been whether a person was "patrial").

[8]See e.g. ss. 1, 2 and 3. It therefore enables a non-marital child who is born abroad to acquire British citizenship by descent through his mother.

[9]British Nationality Act 1981, s. 50(9)(b). However, a legitimated child is treated, as from the date of his parents' marriage, for the purposes of the Act, as if he had been born legitimate: s. 47(1). If a child is adopted by a British citizen he will acquire British citizenship in that way: s. 1(5) and see *Re R.* [1967] 1 W.L.R. 34, and *Re H.* (A Minor) (Adoption: Non-Patrial) [1982] 3 W.L.R. 501.

[10]British Nationality Act 1948, ss. 23 and 32(2). See n. 4 above.

[11]The children of foreign diplomats were generally excepted.

being "fatherless" for citizenship purposes) was therefore relevant only where the claimant had been born abroad. Under the new law, however, there is no automatic entitlement to British citizenship arising simply from birth in the United Kingdom. A child's claim to British citizenship will depend primarily[12] on his parents' citizenship status,[13] irrespective of whether he was born abroad or in the United Kingdom. Because the child born to unmarried parents has only one parent through whom he can claim citizenship he is still treated less favourably than other children where he is born abroad,[14] but he is now also treated less favourably where he is born in this country.[15] The new legislation not only perpetuates the principle that a non-marital child has for citizenship purposes no father; it also extends the relevance of that principle.

11.4 In practice, non-marital children may be at a disadvantage in relation to entitlement to British citizenship in two main factual situations. A child born in this country to a British father and a foreign mother[16] will not be entitled to British citizenship if the parents are not married. Equally, a child born abroad to a father who is a British citizen otherwise than by descent[17] and a mother who is either a foreigner or a British citizen by descent only[18] will not be entitled to British citizenship if the parents are not married. In both classes of case the child would have been entitled to British citizenship if his parents had been married.[19]

11.5 We do not know how many children born outside marriage to British fathers and foreign mothers will in practice fail to qualify for British citizenship as a result of the operation of these rules.[20] Moreover, a non-marital child who

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[12]Exceptionally, a person is, under s. 1(4) of the Act, entitled to registration as a British citizen even if neither of his parents is a British citizen (or settled in the United Kingdom) if he has attained the age of 10 and his residence here meets certain prescribed requirements: see para. 11.5 below.

[13]Parents who are themselves citizens by descent cannot transmit their citizenship unless they also qualify under one of the special categories specified under s. 2(1) (*b*) or (*c*) or s. 3(3) or (5). However, parents who are not themselves British citizens but who are or become "settled" (within the meaning of the Act) in the United Kingdom can "transmit" British citizenship to their children who are born in the United Kingdom: s. 1(1) and (3).

[14]Because, unlike a legitimate child, he will not be entitled to citizenship, if his mother is not a British citizen, even if his natural father is: ss. 2 and 3 and s. 50(9).

[15]Because, unlike a legitimate child, he will not be entitled to citizenship if his mother is neither a British citizen nor "settled" in this country within the special definition given by the Act to this expression, even if his natural father is a British citizen: ss. 1(1) and 50(9).

[16]I.e. a person who is neither a British citizen nor "settled" in the United Kingdom: British Nationality Act 1981, s. 1(1)(*b*). Broadly speaking, a person is regarded as being "settled" here if he is ordinarily resident here "without being subject under the immigration laws to any restriction on the period for which he may remain": see s. 50(2)–(4).

[17]The Act contains a complex definition of the expression "British citizen by descent": s. 14. Subject to a number of exceptions, a person is not within the definition if he was born in the United Kingdom. There are also special provisions applying to persons employed overseas in certain circumstances: see s. 2 and s. 14(2) and (3).

[18]And not a British citizen serving outside the United Kingdom in certain types of employment: s. 2(1)(*b*) or (*c*).

[19]This is because the relevant provisions confer British citizenship if *either* the child's father *or* his mother possess the relevant qualifications: ss. 1(1), 2(1).

[20]It should be remembered that children born in this country will be British citizens if their mothers are not themselves citizens but are "settled" here: ss. 1(1) and 50(2): see n. 16 above.

fails to qualify at birth may nevertheless subsequently acquire British citizenship: a child born here who spends the first ten years of his life here will be entitled to registration as a British citizen, whatever his parents' citizenship status, provided that he has not been absent from the United Kingdom for more than ninety days in any of the first ten years of his life.[21] Additionally, a non-marital child born outside the United Kingdom who fails to acquire citizenship at birth because his mother is a British citizen only by descent may in some circumstances also be entitled to registration as a British citizen.[22] Finally, the Secretary of State has a wide discretion to register any minor as a British citizen irrespective of the citizenship of his parents or his place of birth.[23]

The issue of principle

11.6 Whatever the size of the problem, the fact nevertheless remains that the law embodies a general and rigid rule requiring non-marital children to be treated differently for purposes of citizenship from children born to a married couple. In the Working Paper[24] we took the view that this special treatment effectively constituted discrimination against the non-marital child and that a continuance of such discrimination could not be justified. We accordingly suggested that, subject to proper proof of parentage, a non-marital child should acquire citizenship from his father in exactly the same way as a marital child.

11.7 It has, of course, to be accepted that such a change might secure British citizenship (and with it the right to live in, and to come and go into and from the United Kingdom)[25] for some non-marital children who had had no connection whatever with this country during their childhood. For example, a child born abroad as the result of a chance relationship (perhaps even that of prostitute and client) between a British father and a foreign mother[26] would be entitled to citizenship, and thereby to reside in this country, equally with a child born in this country of a stable non-marital union between a British father and a non-British mother. It would be irrelevant that the father of such a child had never played, or intended to play, any part in his upbringing. We do not, however, consider that such possibilities are sufficiently significant to be allowed to influence the outcome. It must be remembered that the right of citizenship which is secured to a child through a marital father is also not dependent upon that father having performed any of the duties normally discharged by fathers. There may be cases in which a marital child has had as little contact with his father, and as little true connection with this country in infancy, as the non-marital child born of a chance encounter.

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[21]Sect. 1(4).

[22]Sect. 3(2).

[23]Sect. 3(1).

[24]At para. 7.9.

[25]I.e. the "right of abode" (as defined by Immigration Act 1971, s. 1(1)) which is conferred on British citizens by Immigration Act 1971, s. 2(1)(*a*) as substituted by British Nationality Act 1981, s. 39(2).

[26]Or even as the result of the artificial insemination of an unmarried foreign woman with the semen of a British donor: see para. 12.10 below.

11.8 The provisional proposal made in the Working Paper for abolition of the rule discriminating against non-marital children in the citizenship context received general support from those who made comments to us on the Working Paper. A similar view was reflected in the concern expressed by a number of Members of Parliament during the passage of the 1981 Act through Parliament,[27] and there was (as we understand) no contention on behalf of the Government that any principle in the law relating to citizenship, as established by the 1981 Act, required any special treatment for non-marital children generally, or for particular classes of non-marital children, save insofar as any special treatment might be required by reason of difficulties of proof of the relationship of such children to their fathers. Only two reasons were specifically mentioned in Parliament for not providing in the 1981 Act that British citizenship should be transmitted by fathers to all children alike, whether legitimate or illegitimate. These reasons were—

(i) that the law at present provided no adequate procedures for determining the paternity of an illegitimate child.[28]

(ii) that it would be premature to attempt to formulate such procedures in the context of citizenship when it was expected that the Law Commission would be making comprehensive proposals for resolving issues of parentage in this Report.[29]

11.9 In the result, we see no reason of principle which would cause us to change the proposal made in the Working Paper that non-marital children should be enabled to acquire British citizenship from their fathers on the same terms as does a marital child under the existing law. Indeed, the strong support for the principle of non-discrimination expressed in consultation and in

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[27]See e.g. *Hansard* (H.C.), 28 January 1981, vol. 997, col. 1017; Official Report, (H.C.), Standing Committee F, cols. 59, 102, 107, 185, 187, 621–3, 625, 1469–70, 1472–4, 1722–4, 1974–1980; *Hansard* (H.C.) 4 June 1981, vol. 5, cols. 1135–7; *Hansard* (H.L.) 6 October 1981, vol. 424, cols. 74–8.

[28]See for example Official Report (H.C.), 17 March 1981 and 28 April 1981, Standing Committee F, cols. 623 and 1473. It was said by the Under Secretary of State for Foreign and Commonwealth Affairs that: "We could not simply take a man's word for it that he was the father of an illegitimate child. The scope for abuse would be considerable, so everything hangs on whether a reasonably foolproof method of recognising paternity in such cases could be devised"; and see also *Hansard* (H.C.) 4 June 1981, vol. 5, col. 1137 where it was said by the Minister of State for the Home Office that: "We cannot at present allow an illegitimate child to derive citizenship from his or her father, in the same way as any other child can. I say that not as a matter of principle, but because of the uncertainties about the identity of the father ... The Law Commission is considering the whole problem of recognising paternity. When it reports we shall be glad to reconsider the position of illegitimate children in relation to their fathers. If an acceptable solution can be found, the matter can be dealt with when any legislation recommended by the Law Commission is enacted.

We did not say that we would instantly implement the Law Commission's report. We said that we would consider it sympathetically. One crucial feature will be the extent to which the Law Commissions's proposals provide for a procedure that satisfactorily identifies the father. We must get it right. Almost certainly, the law on nationality will be changed if that is feasible at the same time as the law on illegitimacy is changed."

[29]See e.g. Official Report (H.C.), Standing Committee F, cols. 623 and 1980.

Parliament reinforces us in our view that the provisional recommendation was correct and should be adhered to. As appears from the following paragraphs it is also our view that adequate procedures can be made available for determining paternity of a non-marital child for the purposes of citizenship.

The practical problem: proof of parentage

11.10 If the British Nationality Act 1981 were amended so as to put the non-marital child on the same basis as the marital child for the purpose of acquiring citizenship from his father, we would expect that in most cases no difficulty with reference to proof of paternity would arise. The non-marital child would apply for a passport in the same way as a marital child, accompanied by the necessary documents. A British birth certificate, showing the father's name, would probably be sufficient evidence of his paternity, particularly if the father's name had been entered, say, within six months of the child's birth. Entry at some later date might raise a suspicion of collusion, in particular because if the child is no longer a minor the named father would no longer be under any obligation to maintain him. There would then be little disincentive to a man allowing his name to be entered in the births register as the father of a child solely in order to enable that child to obtain a British passport, perhaps in return for a payment or other favours for his services. But where there was a stable relationship between the parents, and the birth certificate identified the father, we would envisage no difficulties normally arising. However, there will be cases where difficulties do arise.[30] It suffices to repeat here that the problem which is particularly acute in citizenship cases is that there may well be no individual whose interest it is to act as an effective contradictor to the claim that the putative father is indeed the father. The right or status sought by the claimant will usually have no adverse consequences for any other person, with the result that ordinary adversarial civil proceedings may not be satisfactory for the establishment of the truth. Where there is no contradictor, there is an obvious risk of collusion between an applicant and the person alleged to be his father or any other person who supports his claim.

One method: the declaration of parentage

11.11 In Part X of this Report we have proposed that the court be empowered to make declarations of parentage and we have suggested a number of special rules and procedural safeguards designed to ensure that such a declaration is only made in cases in which it would be safe for the court to act. In such cases, it is our view that a declaration can safely be relied upon for the purpose of determining entitlement to British citizenship, provided that the Attorney-General has agreed to be a party.

Alternative methods: administrative procedures

11.12 There may, however, be many cases in which British citizenship may be claimed but the declaration procedure will not be available to the applicant. The most obvious is where the applicant was born outside this country. We

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[30]See paras. 10.9–10.12 above.

believe that the most satisfactory way of dealing with such cases is through administrative procedures, modelled on the existing administrative procedures which are available to determine British citizenship or the right to enter the United Kingdom for persons out of this country. These procedures (which we describe below) enable the claim to be made to officials or, on appeal, to special tribunals, which have unique experience in investigating this type of claim. The official or tribunal is permitted to rely upon knowledge or experience accumulated from the handling of other claims and, where the facts have occurred overseas, from direct knowledge of conditions in that country. Statements made in an application form, or first interview, may be capable of local investigation and subsequent checking by further interview. Enquiries can, unlike in court proceedings, be initiated and pursued by the person to whom the claim is made. Furthermore, if he is in this country, he can refer matters which require local investigation to his colleagues in the country in question.

11.13 For persons outside this country, acknowledgement of citizenship will be a necessary pre-condition to establishing a right of entry without leave.[31] It is therefore appropriate to consider whether the existing law and procedures relating to immigration controls provide a satisfactory basis which could be adapted to enable such claims to be asserted and adjudicated.[32]

11.14 The basic provision laid down by the Immigration Act 1971 (as amended) is that a British citizen is free to live in, and to enter and leave, this country "without let or hindrance".[33] A person who is not a British citizen, on the other hand, may not enter the United Kingdom unless given leave to do so.[34] All persons must, on arrival in the United Kingdom, produce on request a valid national passport or other document satisfactorily establishing identity and nationality.[35] In practice, in the past, many non-patrial citizens of the United Kingdom and Colonies had to obtain entry clearances from the entry clearance officer in the country in which they were living;[36] this procedure enabled any enquiries which were necessary to establish entitlement to enter to be carried out.[37] However, since the main reason for the enactment of the British Nationality Act was to reinstate the common law position[38] under which citizenship carried with it the right of abode,[39] it is reasonable to suppose that in the future the question of entitlement to enter will be resolved more

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[31]Immigration Act 1971, s. 2(1)(*a*), as substituted by British Nationality Act 1981, s. 39(2); see further para. 11.14 below.

[32]For a detailed analysis of the present law see Grant and Martin, *Immigration Law and Practice*, (1982).

[33]Immigration Act 1971, s. 1(1)(*a*) as amended.

[34]*Ibid.*, s. 3(1)(*a*) as amended by British Nationality Act 1981, Sched. 4, para. 2.

[35]Statement of Changes in Immigration Rules (H.C. 394, para. 3) 20 February 1980.

[36]Immigration Act 1971, s. 33(1).

[37]Statement of Changes in Immigration Rules (H.C. 394, para. 10).

[38]*D.P.P.* v. *Bhagwan* [1972] A.C. 60, 79–80, *per* Lord Diplock.

[39]See the statement by the Home Secretary in moving the Second Reading of the British Nationality Bill: *Hansard* (H.C.) 28 January 1981, vol. 997, col. 931.

frequently than in the past simply by reference to a passport which effectively constitutes proof of British citizenship.[40]

11.15 The present law and practice governing appeals relating to admission to this country (which might be adapted to enable relevant parentage issues to be resolved) may be summarised as follows: a person who is refused to leave to enter the United Kingdom under the 1971 Act may appeal to an adjudicator against the decision that he requires leave or against the refusal,[41] and appeal also lies against refusal of a certificate of entitlement.[42] An adjudicator on appeal to him is required to allow the appeal if he considers that the decision was not "in accordance with the law or with any immigration rules applicable to the case".[43] For these purposes the adjudicator may review "any determination of a question of fact on which the decision was based";[44] and rules[45] provide that a written statement of the facts relating to the decision or action in question, and the reasons therefore, should be made and given to the appellant and the adjudicator. Subject in certain cases to any requirement as to leave to appeal, the applicant or the immigration officer may appeal to the appeal tribunal and the tribunal may make any determination which could have been made by the adjudicator,[46] i.e. the tribunal can independently review any finding of fact. Finally, application can be made to the High Court for judicial review of the decisions of adjudicators and appeal tribunals.[47] Such applications are, of course, in no sense appeals and mere adverse conclusions of fact cannot be reviewed by the court by that procedure.[48]

11.16 Immigration officers, adjudicators, and the appeal tribunals have been required to make decision as to the validity of claims made by applicants to be the lawful children of persons already settled in this country.[49] Moreover,

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[40]The power to grant or withhold a passport is one of Her Majesty's Prerogatives, and the Foreign Secretary has a discretion to accede to or refuse an application for such a passport. Moreover, a refusal to grant a British passport is not (it is usually assumed) a matter upon which the courts will adjudicate: see *Home Secretary* v. *Lakdawalla* (1970) [1972] Imm. A.R. 26; *Going Abroad, A Report on Passports*, (Justice, 1974), discussed by Jaconelli, (1975) 38 M.L.R. 314; Evans, *de Smith's Judicial Review of Administrative Action* 4th ed., (1980), p. 177. Proof of British citizenship does not, therefore, give any entitlement to the grant of a passport. We should make it quite clear that in this Report we are not concerned with this rule; what we are concerned with is to determine whether or not there exist adequate means whereby a non-marital child can establish his claim to British citizenship. It is not within the ambit of this Report to examine the power of the executive to refuse to issue a passport (and thus effectively render it impossible for the applicant to rely on the citizenship to which he has been held to be entitled).

[41]Immigration Act 1971, s. 13(1).

[42]*Ibid.*, s. 13(2), as amended by British Nationality Act 1981, Sched. 4, para. 3(1).

[43]Immigration Act 1971, s. 19(1).

[44]*Ibid.*, s. 19(2).

[45]Immigration Appeals (Procedure) Rules 1972 (S.I. 1972 No. 1684) r. 8(1).

[46]Immigration Act 1971, s. 20.

[47]The jurisdiction of the court to entertain proceedings concerning the rights of persons under the Act is expressly preserved by British Nationality Act 1981, s. 44(3). See also Bates, "Judicial Review and Nationality Law", Public Law, Summer 1982, p. 179.

[48]See *R.* v. *Home Secretary, ex parte Zamir* [1980] A.C. 930, 949; *R.* v. *Home Secretary, ex parte Akhtar* [1981] Q.B. 46.

[49]See, e.g., *ex parte Akhtar* (above); *R.* v. *Immigration Appeal Tribunal, ex parte Bi and others, The Times*, 25 April 1980.

the immigration rules also require decisions to be made as to the truth of claims to blood relationship outside marriage. For example, it is provided[50] that children under 18 are to be admitted for settlement in various circumstances if a "parent" is settled in the United Kingdom; in those provisions the word "parent" includes not only a child's step-parent but also the father, as well as the mother, of an illegitimate child. Considerable experience must have been acquired over the years in determining the truth of claims to such blood relationship. Accordingly, it seems to us that where a person born abroad claims British citizenship by reason of his relationship to a non-marital father, or by reason of the relationship of his father (whether marital or non-marital) to a non-marital grandfather,[51] the validity of his claim should be tested and decided by administrative procedures. For reasons given above[52] we do not think that legal proceedings in this country for such a purpose would be satisfactory. Moreover, the cost of such proceedings to an applicant who would probably be resident outside this country would be very considerable. The present procedures will, no doubt, require suitable adaptation, in particular to cover the cases of a person born abroad who is resident in this country or of a person who for some reason cannot obtain a declaration binding on the Crown. We also envisage that a suitable system of appeals to an adjudicator and an appeal tribunal could be devised. Such a procedure might, perhaps, involve the use of blood test evidence but we see no reason why this should present any insuperable difficulties.

11.17 In conclusion, we would observe that the present procedure with reference to claims to British citizenship based upon a *marital* relationship provides no special statutory procedure or system of appeals to a tribunal to question the refusal to accept the parentage claim. We see no reason, therefore, why the present system, which serves claims to a right of abode based upon marital relationships, should not be adapted to serve alike claims to such a right based upon non-marital relationships.

The availability of declarations under the court's inherent jurisdiction

11.18 There is a final matter which will need to be considered when legislation is drafted to give effect to the principle that the non-marital child should, on proof of parentage, be entitled to British citizenship on the same terms as a marital child. This is the relationship between, on the one hand, the statutory provisions which we envisage under which the court will be empowered to make declarations of parentage,[53] and, on the other, the court's wide powers to make declarations under its inherent jurisdiction.[54] The problem arises because, although the court has no inherent power to make declarations

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[50]Statement of Immigration Rules (H.C. 394, para. 46.)

[51]By reason of British Nationality Act 1981, s. 3(2).

[52]See para. 10.21 above.

[53]See paras. 10.2–10.39 above.

[54]R. S. C. Ord. 15, r. 16 provides that "No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether or not any consequential relief is or could be claimed."

of parentage,[55] it does have an inherent power to make declarations that the applicant is a British citizen.[56] Would it be possible for a non-marital child to seek such a declaration under the inherent jurisdiction of the court, putting proof of his parentage in issue in these proceedings? If so, it might enable the applicant to circumvent the special procedures which we have thought it right to recommend[57] in relation to the statutory parentage declaration procedure.

11.19 It may be that no statutory provision would be necessary to avoid this result. The inherent jurisdiction to make declarations is a discretionary one,[58] and it might well be that the court would not allow it to be invoked in cases where what is primarily in issue is the applicant's right of abode in this country, particularly since other procedures[59] would in most cases be available and appropriate for determining that issue. Moreover, the grounds on which the court would assume jurisdiction to grant a declaration of citizenship have never been tested,[60] and it might be that the court would refuse to entertain an application by a person neither domiciled nor resident in this country.[61] Nevertheless, it might be thought to be inappropriate to leave the relationship between the procedures in any kind of doubt. If so statutory provision would have to be made to deal with the matter.

Conclusion

11.20 We consider that as a matter of policy the non-marital child should, on proof of parentage, be entitled to British citizenship on the same terms as a marital child. However, because the question of British citizenship is a United Kingdom matter we are not including clauses in the draft Bill annexed to this Report to amend the British Nationality Act 1981. Any such

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[55]*Re J. S. (A Minor)* [1981] Fam. 22; see para. 10.2 above.

[56]See e.g., *Bulmer* v. *A.-G.* [1955] Ch. 558; *A.-G.* v. *Prince Ernest Augustus of Hanover* [1957] A.C. 436.

[57]See paras. 10.20–10.31 above.

[58]The courts may exercise "the broadest judicial discretion" in determining whether a case is one in which declaratory relief ought to be awarded: Evans, *de Smith's Judicial Review of Administrative Action* 4th ed., (1980), p. 513; see also *Hanson* v. *Radcliffe U.D.C.* [1922] 2 Ch. 490, 507 *per* Lord Sterndale M.R.; *Reitzes de Marienwert (Baron)* v. *Administrator of Austrian Property* [1924] 2 Ch. 282; *Vervaeke* v. *Smith (Messina and Attorney-General intervening)* [1981] Fam. 77, 100–101, 121–2, 127 *per* Waterhouse J., Sir John Arnold P., and Eveleigh L.J.; and Evans, *op. cit.*, pp. 499–509.

[59]See paras. 11.12–11.17 above. The court will not grant relief under its inherent jurisdiction if another procedure (e.g. under s. 45 of the Matrimonial Causes Act 1973) is available: *Aldrich* v. *A.-G.* [1968] P. 281; *Collett* v. *Collett* [1968] P. 482. See also *Heywood* v. *Board of Visitors of Hull Prison* [1980] 1 W.L.R. 1386; and *O'Reilly* v. *Mackman and Others* [1982] 3 W.L.R. 604.

[60]The reports do not make clear upon what basis jurisdiction was assumed in *A.-G.* v. *Prince Ernest Augustus of Hanover* [1957] A.C. 436.

[61]The rules governing jurisdiction on such applications are far from clear: see (in relation to applications for declarations in family matters) the discussion in Declarations in Family Matters (1973) Working Paper No. 48, para. 14; see also *Vervaeke* v. *Smith (Messina and Attorney-General intervening)* [1981] Fam. 77, 92–96; Dicey and Morris, *The Conflict of Laws* 10th ed., (1980), p. 389, rule 49; Cheshire and North, *Private International Law* 10th ed., (1979) pp. 423–6.

amendment would have to await the outcome of consultation with those responsible for reform of the law in other parts of the United Kingdom.

11.21 So far as proof of parentage is concerned, we suggest that a declaration of parentage obtained[62] in proceedings to which the Attorney-General has consented to be a party should be regarded as sufficient for citizenship claims. We envisage that existing administrative procedures might be adapted to determine disputes as to parentage in those cases in which the court did not have jurisdiction to make a declaration. We also suggest that consideration might be given to accepting other evidence, such as the registration of a father's name on a births register in this country within a short period of the birth.

PART XII

STATUS AND PATERNITY OF CHILDREN CONCEIVED BY ARTIFICIAL INSEMINATION

The relevance of artificial insemination to this Report

12.1 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.[2] Likewise the donor, not the mother's husband, is the legal father of an A.I.D. child.

12.2 In the Working Paper we discussed[3] the question of who should be regarded as the legal father of a child who is conceived by A.I.D. with the consent of the mother's husband. Because of the tentative proposal in the Working Paper that the status of illegitimacy should be abolished and that all fathers should automatically have parental rights it was necessary to deal with the legal paternity of the A.I.D. child because otherwise the biological father (the donor) would have had the parental rights to the exclusion of the mother's

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[62]Under the statutory procedure recommended in Part X of this Report.

[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 marriage and no legal problems relevant to this Report 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 might in theory be regarded as 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 inquiry.

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

[3]Paras. 10.1–10.28.

husband. We accordingly proposed[4] that the child conceived by A.I.D. with the consent of the mother's husband should be deemed to be the child of the mother's husband. It is not in fact strictly necessary for us to consider A.I.D. because under the proposals we now make parental rights would not in any event vest in the donor. However since in consequence of the other recommendations in this Report the child conceived by A.I.D. would remain in law a non-marital child, and his "legal" father would be a different person from his "social" father, we think that the "legitimacy" and the legal paternity of the A.I.D. child should be considered.

12.3 We should emphasise however that, as we said in the Working Paper, we do not regard it as part of our task to consider the social, ethical and medical questions to which A.I.D. may give rise.[5] We are aware that there has been a considerable amount of discussion in the Press,[6] in articles and books,[7] and in Parliament[8] relating both to artificial insemination and to fertilisation in vitro,[9] embryo transfer[10] and related developments. We formed the view that there was much force in the suggestions[11] that an inquiry should be made into the social and ethical (as well as the legal) implications of these matters; and we were therefore pleased to learn (after this Report had been completed in draft) that a Departmental Inquiry chaired by Mrs. Mary Warnock had been established to consider these matters and to make recommendations.[12] In this

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[4]At para. 10.9.

[5]The last official consideration of these matters was by the Departmental Committee on Human Artificial Insemination (The Feversham Committee) (1960) Cmnd. 1105; but a new inquiry has been announced: see below.

[6]See e.g. *The Times* leading articles "A Matter of Origins", 10th February 1982 and "Where the Law is Silent", 19th April 1982; a letter by Snowden and Mitchell in *The Times*, 4th February 1982; Garner and Davis, "The proxy fathers: sowing the seeds of despair?" *Sunday Times*, 11th April 1982. See also n. 7 and 11 below.

[7]See Snowdon and Mitchell, *The Artificial Family, (1981)*; and a Report by a Working Party of the Free Church Federal Council and the British Council of Churches, *Choices in Childlessness* (1982).

[8]See *Hansard* (H.C.), 10 February 1982, vol. 17, Written Answers, cols *371–2* and col. *416*, *Hansard* (H.C.), 30 March 1982, vol. 21, cols. 279–286.

[9]I.e. "test tube babies"; the embryo is fertilised and transferred to the mother's uterus. It appears that, so far, such fertilisations have involved semen only from the mother's husband, not from a donor: see Rosettenstein, "Defining a Parent: The New Biology and the Rebirth of the Filius Nullius" (1981) 131 New L.J. 1095.

[10]I.e. the transfer of a fertilised ovum into the womb of a "host mother"; see Cusine, "Some Legal Implications of Embryo Transfer" (1979) 129 New L.J. 627; Rosettenstein *op.cit.*

[11]See e.g. Snowden and Mitchell, *The Artificial Family*, pp. 124ff.; Free Church Federal Council and British Council of Churches, *Choices in Childlessness (1982)*, p. 45; Garner and Davis,"The proxy fathers: sowing the seeds of despair?", *Sunday Times* 11 April 1982; *The Times* leading article "Where the Law is Silent" 19 April 1982. It has been announced that there are to be separate inquiries by the Royal College of Obstetricians and Gynaecologists, the British Medical Association and the Council for Science and Society into different aspects of the problem: see *The Times* 19 April 1982.

[12]The terms of reference are: "to consider recent and potential developments in medicine and science related to human fertilisation and embryology; to consider what policies and safeguards should be applied, including consideration of the social, ethical and legal implications of these developments and to make recommendations." *Hansard* (H.C.) 23 July 1982, vol. 28, Written Answers, col. *329*.

Report we are only concerned to make limited proposals to deal with the legal status of a child who, though conceived with the assistance of A.I.D., is in social reality the child of the mother and her husband.[13]

The present practice of A.I.D.

12.4 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.[14] The Royal College's guidelines provide that A.I.D. will only be performed where the husband[15] of the woman to be inseminated has given his consent in writing. The identity of the donor is revealed neither to the patient nor to her husband,[16] and the donor is not told anything about the patient.[17] Although as a matter of legal theory the donor may be liable as the child's father[18] to maintain the child (and could indeed apply for access or custody)[19] 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 indeed not even know of his existence). Hence he 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.

12.5 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[20] and would thus effectively be under the same financial obligations to him as if the child were the husband's legitimate child.

12.6 However, the present law does cause one practical difficulty in connection with the registration of the child's birth. The wilful making of a

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[13]As to unmarried couples, see n. 15 and para. 12.10 below.

[14]See the proceedings of the Fourth Study Group of the R.C.O.G. (October 1976). The facts stated in this paragraph have been recently confirmed to us by the President of the Royal College. For a general description of A.I.D. practice see also Cusine, "Artificial Insemination" in *Legal Issues in Medicine*, (1981), ed. Shelagh McLean, ch. 12; and Snowden and Mitchell, *The Artificial Family*, (1981).

[15]We understand that artificial insemination is not restricted to married couples; however our recommendations in this Part of the Report apply only to married couples.

[16]This would not however appear to rule out the possibility that in the course of subsequent litigation over the biological parentage of the child (or even in an action based on alleged negligence) the doctor might be required to disclose the fact of A.I.D. and even perhaps the identity of the donor.

[17]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.

[18]But only if the mother were a "single woman" (in the special sense explained at para. 6.23 above) at the date of conception or birth.

[19]As in *A. v. C.* (1978) 8 Fam. Law 170.

[20]Matrimonial Causes Act 1973, s. 52(1).

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,[21] 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 usually 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 to rely on the presumption of legitimacy and say nothing about the insemination; 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. In some cases, we have been told, the mother is inseminated with a mixture of sperm provided by the donor and by her husband, so that the presumption of legitimacy will be harder to challenge.

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

12.7 We do not feel it is satisfactory either that the child conceived by A.I.D. to which the husband has consented should be regarded as non-marital (even if as a result of the reforms recommended elsewhere in this Report non-marital birth will be legally of comparatively little significance) or that such a child should be in law the child of an outsider, that is the donor. It is also, we believe, unsatisfactory that married couples should be put into a position, as they are now, where they may be strongly tempted to make a false declaration on registering the birth. We therefore consider that there is a strong case for change in the law. We believe that A.I.D. cases exhibit features which enable them to be distinguished from natural extra-marital conceptions: these distinctions suffice to justify reform of the law so that, in proper cases, it will give effect to the social truth by making the child legally the offspring of the husband and wife. There are, we think, four grounds for making such a distinction—

(i) 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[22] 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;

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[21]Except, perhaps, where she has been inseminated both from the donor and her husband and believes that her husband may actually be the biological father: see below.

[22]We were told by one commentator that there are occasionally cases of "intra-familial" A.I.D. where the donor (such as the husband's brother) is known.

(iv) it may often be true that A.I.D. treatment carried out with the husband's consent is, unlike an act of adultery, a mark of stability in a marriage (such stability being one of the considerations which the doctor will have in mind when advising the couple).

12.8 Our view about A.I.D. cases is fortified by the results of consultation on the Working Paper. The clear majority of those who commented on A.I.D. approved of the general principle that the child conceived by A.I.D. with the consent of the mother's husband should be regarded as the child of the husband and that the child should not in such circumstances be illegitimate. We should also mention that there have been moves in Parliament[23] and in the Council of Europe[24] to legitimise the child conceived by A.I.D. with the consent of the mother's husband. The case for reforming this aspect of the law relating to A.I.D. is further strengthened by the fact that (as we have said) the sperm of the husband is sometimes mixed with that of the donor so that there is a possibility (in cases where the husband is not totally infertile) that the husband is actually the biological father. This may also be true where a subfertile husband continues to have intercourse with his wife after A.I.D. has taken place.

The policy of the law

12.9 We are satisfied, for the reasons given above, that the law should provide that where a married woman has received A.I.D. treatment with her husband's consent,[25] the husband rather than the donor should, for all legal purposes, be regarded as the father of a child conceived as the result; and that such a child should therefore not be "illegitimate".

12.10 It will be noted that his recommendation only relates to the legal position of an A.I.D. child born to a married couple. This limitation may be criticised for being inconsistent with the general tenor of the reforms we have proposed whereby the legal position of the non-marital child is equated with that of the marital child. But we think 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 Report.

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[23]See the amendment (which was withdrawn) put down by Lord Kilbrandon to the Bill leading to the the Children Act 1975: *Hansard* (H.L.) 20 February 1975, vol. 357, cols. 511–522; and the A.I.D. Children (Legal Status) Bill which was given a First Reading in the House of Commons on 28 June 1977: *Hansard* (H.C.) vol. 934, cols. 276–279. See also *Hansard* (H.C.) 29 July 1980, vol. 989, cols. 1279–80.

[24]See the Draft Recommendations of 1978 on Artificial Insemination of Human Beings (as amended by the European Committee on Legal Co-operation, Nov.–Dec. 1978 and the European Public Health Committee, November 1979) especially Article 7. Some European countries (France, Netherlands, Portugal and Switzerland) have reformed their law relating to A.I.D., as have many U.S. states. For reform proposals in Canada, see Law Reform Commission of Saskatchewan, *Tentative Proposals for a Human Artificial Insemination Act* (1981), paras. 3–5 to 3–8.

[25]As to consent, see paras. 12.13–12.17 below.

Implementation of the policy

12.11 The simplest way of implementing the policy which we have suggested would be a statutory provision whereby the husband would in law 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 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.[26]

Adoption as an alternative

12.12 Before we consider the consequential questions which arise from such a provision—namely how to establish or deal with consent and how to register the birth of the child—we should mention briefly an alternative way of dealing with A.I.D. which is to provide for a special form of adoption. This would be designed to meet the objection that a provision of the kind we have suggested would involve deliberate falsification of the births register, which aims at recording biological paternity.[27] In the Working Paper[28] we canvassed in detail the possibility of providing for a modified system of adoption to deal with A.I.D. cases. We were of the view that any system of adoption has serious disadvantages, the most formidable of which is that adoption would seem unreal[29] and cumbersome to the parents, who do not now use adoption to deal with the problem of A.I.D. and would be unlikely to do so in future. We provisionally rejected this solution and it received no support on consultation. We do not therefore recommend adoption as a means of dealing with A.I.D.

The husband's consent

12.13 Since it is fundamental to our recommendation on A.I.D. that the husband's consent should have been obtained to the A.I.D. treatment, the question arises whether the law should impose requirements as to the form in which this consent is to be given. In the Working Paper[30] we set out two approaches to this question which we now repeat here.

12.14 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 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

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[26]See 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; Mayo, "Legitimacy for the A.I.D. Child", (1976) 6 Fam. Law 19; and see n. 24 above.

[27]See paras. 12.18–12.22 below.

[28]At paras. 10.18–10.20.

[29]Especially in a case where the husband was subfertile, not infertile, and the couple might therefore be "adopting" their own biological child.

[30]At paras. 10.13–10.16.

document could be preserved, presumably by the Registrar-General, to whom it would be produced on the occasion of the registration of the birth.

12.15 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 we doubt if it is sufficiently important in the interests of society as a whole to justify elevating it into a positive rule of law.

12.16 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[31] unless he (or anyone else with a sufficient interest) satisfied the court that he had not done so.

12.17 In the Working Paper we provisionally preferred[32] the latter approach, that the husband's consent should be presumed. On consultation those who commented on A.I.D. were divided on this question. Some felt that consent was too important a matter not to be compulsorily recorded, while others considered that too much legal significance should not be placed on a document which could be lost. We have come to the conclusion that the Working Paper's provisional preference was right; although we believe that the practice of the Royal College, of requiring that consent be obtained before treatment is started, is a desirable rule of practice, we think it should not be mandatory. It would be hard on a child whose paternity and status has been settled for some years if, in the course of his parents' marriage breaking down, his legal paternity depended upon proof of consent to an operation years before or upon the existence of a particular document.[33] In our view the burden of proof should rest upon the husband to show that he did not consent.[34]

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

[32]Para. 10.16.

[33]We consider the question of the annotation of the births register as a possible answer to this problem in para. 12.18 below.

[34]As to the standard of proof see para. 12.24 below.

Annotation of the births register

12.18 We have considered (as we did in the Working Paper)[35] whether, in order to preserve the integrity of the births register, it should be provided 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 procedure discussed above[36] accompanied by formal giving of consent by the husband, 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

12.19 This solution has one major disadvantage: there may 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 possibility 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; they would prefer to say nothing to the registrar about the fact that A.I.D. treatment had taken place.

12.20 In the Working Paper we made no proposal as to the annotation of the births register because, as we said,[37] the introduction of a necessarily somewhat complex procedure designed to preserve the integrity of the register might be largely self-defeating since the mother would be tempted to ignore the procedures by simply stating that her husband was the father. Our reluctance to make such a proposal was supported by commentators, the majority of whom did not favour annotation of the births register.

12.21 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 had been conceived by A.I.D. and accordingly not entitled to succeed to a title.[38] We think that there are three answers to this. First, 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 system without annotation were enacted, it would be open to a claimant to rebut the presumption of consent (and therefore of paternity). There would no doubt be many cases in which it was known within the family that A.I.D.

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[35]At paras. 10.21–10.22.

[36]See para. 12.15 above.

[37]At para. 10.23.

[38]The draft Bill attached to this Report (clause 34) preserves the present position that a child conceived by A.I.D. will be unable to succeed to a title. In this respect his position will be similar to an adopted child.

treatment had taken place, or even simply that the husband was infertile. Thirdly, the situation might never arise and, if it did, would be so rare as not to justify special provisions being enacted to overcome it. On balance therefore we are of the view that a child conceived by A.I.D. with the mother's husband's consent should be registered as the husband's child without annotation of the register.

The problem of the child's identity

12.22 The question arises 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.

12.23 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 on attaining his majority to discover the facts recorded on his birth certificate about his natural parentage.[39] 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 genetically not the offspring of his mother's husband, but of a donor wholly unknown not only to him but to his mother and her husband, it is difficult to see that this would be of any real advantage to him.[40] To go further, by giving the child the right to know the identity of the donor would involve a major change of policy and practice because confidentiality is usually an important pre-condition for the administration of A.I.D.[41] The commentators on our Working Paper did not support the provision of a formal "right to know" but there have been some recent suggestions[42] that the A.I.D. child should have the same rights as the adopted child. It may be that in time, if and when A.I.D. practice is regulated by statute,[43] some right of disclosure may be thought appropriate,

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[39]Adoption Act 1958, s. 20A, inserted by Children Act 1975, s. 26.

[40]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 (S.I. 1976 No. 1796), r. 14. If the child seeks to exercise his rights 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.

[41]Except in a few cases, e.g. of intra-familial A.I.D.: see n. 22 above.

[42]See e.g. *The Times* leading article "A Matter of Origins", 10 February 1982; and letter by Dr. McWhinnie, 19 February 1982.

[43]See para. 12.3 above.

but we consider that it would be outside the scope of this Report to seek to confer on the A.I.D. child the right to know his biological paternity.

A.I.D.: other issues

(*a*) *Standard of proof to negative consent*

12.24 We have already said that the burden of proof on the question of consent should rest on the husband, or anyone else, who denies that he consented. We consider that the standard of proof should be stringent so that the A.I.D. child's status and paternity should not be disturbed in the absence of strong evidence to the contrary. We accordingly recommend that the A.I.D. child should be treated as a child of the marriage and of the mother's husband unless it is proved to the satisfaction of any court[44] which has to decide the issue that the husband did not consent to the A.I.D. (This is the standard of proof that we have suggested should apply elsewhere.[45])

(*b*) *Void marriages*

12.25 We have considered, in limiting our proposal on A.I.D. to married couples, whether cases of void marriages should be included. On balance we think that they should. The difficulties of proof in cases of cohabitation do not apply in cases of void marriages; moreover it is logical that, in relation to "putative" marriages (where at least one of the parents reasonably believed in its validity), an A.I.D. child should be legitimate in the same circumstances as a naturally conceived child.[46] Accordingly we recommend that a child conceived by A.I.D. during a void marriage should be treated as the mother's husband's (and therefore as legitimate) if either the mother or her husband reasonably believed in the validity of the marriage at the time of the insemination. The husband's consent to A.I.D. will be presumed[47] and, in line with our recommendation in relation to void marriages,[48] we recommend that in A.I.D. cases there should be a presumption that at least one of the parents did reasonably believe in the validity of the marriage.

(*c*) *Connection with this country*

12.26 We think that it is right to confine our proposals on A.I.D. to cases where there is some proper link between the A.I.D. child and this country. We considered making the mother's husband's domicile the relevant test (as it is under section 1 of the Legitimacy Act 1976) but we have concluded that it would be unsatisfactory if the child's status (and legal paternity) depended on the ascertainment of a domicile at any particular time. There would also be administrative problems in dealing with domicile when the child's birth was registered. It seems to us that the simplest and most satisfactory solution is

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[44]Such as the divorce court in the event of the marriage breakdown. The child would probably however be in law a "child of the family" whether or not consent to A.I.D. were found to have been lacking.

[45]See para. 10.22 above.

[46]Legitimacy Act 1976, s. 1.

[47]See paras. 12.13–12.17 and 12.24 above.

[48]Para. 10.51 above.

that the A.I.D. provision should apply only to children born in England or Wales; and we so recommend.

(d) Existing A.I.D. children

12.27 In accordance with the usual practice of not making legislation retrospective so as not to disturb existing rights under wills and settlements, we have provided in the draft clause for the changed law to apply only to A.I.D. children born after the legislation comes into effect. We do, however, recognise the argument in favour of "legalising" the position as regards existing A.I.D. children, though it is likely that in any event most such children will have been treated as children of their mother's husband for all purposes. If it were considered important for this provision to operate so as to affect A.I.D. children, whenever born, we would not be opposed to this.

PART XIII

DOMICILE

13.1 We should now mention the question of the domicile of origin of the non-marital child, upon which we made a provisional proposal in the Working Paper but with which we are not dealing in this Report.

13.2 In the Working Paper[1] we examined the effect which the abolition of illegitimacy in English domestic law would have on English rules of private international law and, in particular, on the ascertainment of a child's domicile of origin. We noted the present common law rule that, at birth, the legitimate child's domicile is that of his father[2] while the illegitimate child's is that of his mother; and we tentatively proposed[3] the introduction of a rule that all children should have their mother's domicile as their domicile of origin. Some commentators on the Working Paper argued that, for the sake of equating the rules for marital and non-marital children, we were suggesting an unwarranted change in the rules governing the domicile of the numerically much larger group of marital children; it was suggested that such a change might for example significantly affect the individual's tax position.

13.3 We should stress that we do not regard as satisfactory the perpetuating of rules as to domicile which differ according to whether or not a child is of marital birth. As we and the Scottish Law Commission said in our Joint Working Paper/Consultative Memorandum on Polygamous Marriages,[4] a

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[1]At paras. 8.1–8.8.

[2]His subsequent domicile will follow that of his mother in the circumstances set out in the Domicile and Matrimonial Proceedings Act 1973, s. 4.

[3]At paras. 8.3–8.5.

[4](1982) Working Paper No. 83, Memo. No. 56, para. 5.35. See also Scottish Law Commission's Consultative Memorandum on Illegitimacy (1982) Memo. No. 53, para. 10.8.

review is opportune but as part of a more general consideration of the whole question of the law of domicile in a United Kingdom context. We think that to recommend a reform in this area, which would affect a much greater number of marital than non-marital children, would be outside the scope of this Report.

PART XIV

SUMMARY OF RECOMMENDATIONS

Introduction

14.1 In this Part of the Report we summarise the conclusions and recommendations set out in the earlier Parts. Where appropriate we identify the relevant recommendations.

The principle for reform of the law

14.2 We recommend that the law be reformed so as to remove all the legal disadvantages of illegitimacy so far as they affect the illegitimate child.

(Paragraphs 4.1–4.51).

Nomenclature

14.3 (*a*) We recommend that the terms "legitimate" and "illegitimate" should, wherever possible, cease to be used as legal terms of art. Instead the expressions that are used so far as is possible in the draft clauses are "marital" and "non-marital".

(Paragraph 4.51 and clause 37).

(*b*) In accordance with the provisions of the Interpretation Act 1978, we use throughout the Report and draft clauses the expressions "parental rights and duties", "legal custody" and "actual custody" as defined in Part IV of the Children Act 1975.

(Paragraph 7.12 and Schedule 2 paragraph 29).

Financial Provision

14.4 (*a*) The present separate and distinct procedure for enforcing financial provision for a non-marital child by affiliation proceedings should be abolished. The Affiliation Proceedings Act 1957 (as amended) should be repealed and orders for financial provision for all children, irrespective of their parents' marital status, should be obtainable by proceedings under the Guardianship of Minors Act 1971, as amended.

(Paragraph 6.2 and clauses 1, 5, 6 and 7).

(*b*) It should be possible to apply for existing affiliation orders to be discharged whereupon Guardianship of Minors Act orders would be available.

(Paragraphs 6.53–6.55 and Schedule 3, paragraph 3).

14.5 In consequence of this primary recommendation—

(i) The High Court, the county court and the magistrates' court will have jurisdiction under the Guardianship of Minors Act 1971 to hear applications relating to all children.

(Paragraph 6.4 and clause 5).

(ii) The High Court, the county court and the magistrates' court will, in the exercise of their guardianship jurisdiction, have power to order a parent to make periodical payments and/or pay a lump sum for the benefit of any child, whether marital or non-marital (but the magistrates' courts' powers would be limited to such amounts as may be fixed by order—at present £500).

(Paragraph 6.11 and clauses 5, 6 and 7 (sections 9(3), 10(2) and 11(2) of the Guardianship of Minors Act 1971, as amended)).

14.6 Lump sum orders under the Guardianship of Minors Act 1971 should be capable of being made in respect of expenses incurred in connection with the birth of the child, even if incurred before birth; but there should be no special provision for funeral expenses of the child.

(Paragraph 6.11 and Schedule 2, paragraph 22(*a*)).

14.7 The Guardianship of Minors Act 1971 should be amended so as to give the High Court and the county court the power to make secured periodical payments orders.

(Paragraphs 6.6–6.7 and 6.11 and clauses 5, 6 and 7 (sections 9(3)(*b*), 10(2)(*b*) and 11(2)(*b*) of the Guardianship of Minors Act 1971, as amended)).

14.8 The Guardianship of Minors Act 1971 should be amended so as to give the High Court and the county court the power to require a parent to transfer or settle property for the benefit of the child.

(Paragraphs 6.8 and 6.11 and clauses 5, 6 and 7 (sections 9(3)(*d*) and (*e*), 10(2)(*d*) and (*e*) and 11(2)(*d*) and (*e*) of the Guardianship of Minors Act 1971, as amended)).

14.9 There should no longer be any time limit on the bringing of financial provision proceedings for non-marital children.

(Paragraphs 6.12–6.17).

14.10 There should no longer be any rule of law requiring corroborative evidence that the putative father is the natural father of a non-marital child.

(Paragraphs 6.18–6.22).

14.11 The child's mother should be able to apply for a financial provision order in respect of a non-marital child notwithstanding that she is not (and was not at the time of the child's birth) a "single woman".

(Paragraphs 6.23–6.24).

14.12 The father of a non-marital child should be able to apply to the court for an order against the mother for financial provision in respect of the child.

(Paragraph 6.24 and clause 5 (section 9(2) of the Guardianship of Minors Act 1971, as amended)).

14.13 Part II of the Children Act 1975 (dealing with custodianship) should be amended so as to enable an order to be made requiring the father of a non-marital child to make payments in respect of the child.

(Paragraph 6.23 and clause 14).

14.14 Sections 9, 10 and 11 of the Guardianship of Minors Act 1971 should be amended to enable the court to make a financial relief order for a child without it being necessary to put his legal custody in issue.

(Paragraphs 6.26–6.27 and clauses 5, 6 and 7).

14.15 (*a*) The Guardianship of Minors Act 1971 should be amended so as to allow a child over the age of 18, (i) who is (or if an order were made would be) undergoing further education or training or who has special needs, and (ii) in respect of whom no previous periodical payments order has been made, to apply to the High Court or a county court (but not the magistrates' court) for a periodical payments or lump sum order from his parents where, at the time of the application, the parents are not living with each other.

(Paragraphs 6.29–6.34 and clause 8 (section 11B of the Guardianship of Minors Act 1971, as amended)).

(*b*) The Act should also be amended so as to remove the age limit of 21 on applications by the child to revive an earlier order for periodical payments, thus enabling the child to apply to the High Court or county court for revival of such an order.

(Paragraph 6.33 and Schedule 2, paragraph 23(*c*) (section 12C(5) to (7) of the Guardianship of Minors Act 1971, as amended)).

14.16 Provisions analogous to those in the Matrimonial Causes Act 1973 should be introduced into the guardianship legislation so as to enable the court to vary a secured periodical payments order, after the death of the payer, on application by the payee or by the personal representatives of the payer within six months of his death.

(Paragraph 6.36 and clause 9 (section 12D of the Guardianship of Minors Act 1971, as amended)).

14.17 The rule presently applicable to legitimate children, that custody orders and periodical payments orders for children made in favour of one of their parents cease to have effect after six months' cohabitation by the parents, should also apply to non-marital children. Additionally such orders should cease to have effect on the marriage (or remarriage) of the parents.

(Paragraphs 6.40–6.41 and clause 10 (section 13B of the Guardianship of Minors Act 1971, as amended)).

14.18 The courts (including the magistrates' court) should have a power under the Guardianship of Minors Act 1971 (similar to that under sections 35 and 36 of the Matrimonial Causes Act 1973) to vary written maintenance agreements for children but only where such agreements contain an acknowledgement of paternity. The magistrates' court should only have the power to deal with agreements which concern unsecured periodical payments.

(Paragraphs 6.42–6.46 and clauses 15 and 16).

14.19 The rules now applicable to appeals under the guardianship legislation should apply to all children. The special avenue of appeal to the Crown Court by rehearing all the evidence would no longer be applicable.

(Paragraphs 6.47–6.49).

14.20 The Supplementary Benefits Act 1976, the National Assistance Act 1948 and the Child Care Act 1980 should be amended so as to remove the special provisions relating to affiliation proceedings and illegitimate children. They should instead provide that a man is liable to maintain his children, whether of marital or non-marital birth. Paternity must be proved if not admitted.

(Paragraph 6.50 and clauses 21, 22 and 23).

14.21 Section 6(6) of the Family Law Reform Act 1969, which prevents an award from being made for the maintenance or education of an illegitimate ward of court, should be repealed.

(Paragraph 6.51 and clause 13).

14.22 Section 6 (5) of the Family Law Reform Act 1969, which provides that a maintenance order made in favour of a parent in wardship proceedings ceases to have effect after three months' cohabitation by the parents, should be amended to provide, in line with other legislation, for its ceasing to have effect after six months' cohabitation.

(Paragraph 6.52 and clause 13).

Guardianship and custody

14.23 Section 1 of the Guardianship of Minors Act 1971 (which provides that in deciding questions relating to the custody and upbringing of minors the court shall regard the welfare of the minor as the first and paramount consideration) should be amended so as to declare, for the avoidance of doubt, that its provisions apply to all minors, whether or not the minor's parents have at any time been married to one another.

(Paragraphs 7.22–7.23 and clause 2).

14.24 The father of a non-marital child should, in addition to his present right to apply to the court for the legal custody of his child, have a right to apply to the court under the Guardianship of Minors Act 1971 for "the parental rights and duties" in relation to the child.

(Paragraphs 7.26–7.33 and clause 4 (section 8 of the Guardianship of Minors Act 1971, as amended)).

14.25 On an application for a "parental rights" order the court should have the power to order either that the father should have all the parental rights and duties or that he should have all, or specified, parental rights and duties other than the right to actual custody.

(Paragraphs 7.29 and 7.33 and clause 4 (sections 8(1) and (3) of the Guardianship of Minors Act 1971, as amended)).

14.26 A "parental rights" order should be capable of variation or discharge by subsequent order. It should not, however, (unlike a legal custody order made under the 1971 Act) cease on the parents' cohabitation.

(Paragraphs 7.28 and 7.30 and clause 4 (section 8(4) of the Guardianship of Minors Act 1971, as amended)).

14.27 Where the father of a non-marital child has parental rights and duties (other than a right of access only) by virtue of an order in force under either section 8(1) (as proposed in this Report) or section 9(1) of the Guardianship of Minors Act 1971, as amended, it should be possible for either of the child's parents to invoke section 1(3) of the Guardianship Act 1973 (which gives the court appropriate powers to resolve disputes between parents of a legitimate child).

(Paragraph 7.34 and clause 12(2)).

14.28 The father of a non-marital child should continue to have the right to apply to the court under section 9 of the Guardianship of Minors Act 1971 for an order for legal custody or access to the child. The court should however no longer be specifically directed on such applications to have regard to the conduct and wishes of the parents. Such orders should still (as at present) cease to have effect if the parents cohabit for more than six months.

(Paragraphs 7.23–7.24 and 7.35 and clause 5).

14.29 The provisions of the Guardianship of Minors Act 1971 dealing with access to minors by their grandparents should be amended so as to allow for such access applications in cases where there has been a custody, financial provision or parental rights application but in the latter case a grandparent's application should only be entertained if the parents are not living together when the principal (parental rights) order is made.

(Paragraph 7.37 and Schedule 2, paragraph 26).

14.30 The rule that the father of a non-marital child should not automatically be entitled to become the child's guardian on the mother's death should be preserved; but where there is in force an order made under section 8 or section 9(1) of the 1971 Act, as amended, conferring on him any parental rights and duties (other than access only) he should be the child's guardian either alone or jointly with any guardian appointed by the mother.

(Paragraph 7.39 and clause 3).

14.31 The father of a non-marital child should have the right to appoint a testamentary guardian if there is in force immediately before his death an order made under section 8 or section 9(1) of the 1971 Act, as amended, conferring on him any parental rights other than a right only of access.

(Paragraphs 7.40–7.41 and clause 3).

14.32 For the purposes of section 5(1) of the Guardianship of Minors Act 1971 (which enables the court to appoint an outsider to be the guardian of a child if he has no parent, guardian or other person having parental rights with respect to him) the father of a non-marital child who has obtained a court order made under section 8 or section 9(1) of the 1971 Act, as amended, conferring on him any parental rights (save the right of access only) should be treated as a "parent".

(Paragraph 7.42 and clause 3).

14.33 Where the father of a non-marital child has a court order made under section 8 or section 9(1) of the 1971 Act, as amended, conferring on him any parental rights (save the right of access only) it should be open to him to object to a testamentary guardian appointed by the mother.

(Paragraph 7.43 and clause 3).

14.34 Section 1 of the Guardianship Act 1973 should be amended so as to provide that an agreement may be made between the parents of a child, whether or not they have at any time been married to each other, as to the exercise by either of them of any of the parental rights and duties as respects the child, during any period when they are not living with each other in the same household. However, no such agreement should be enforced if the court is of the opinion that it will not benefit the child.

(Paragraphs 7.44–7.47 and clause 12(1)).

14.35 (*a*) The father of a non-marital child who has obtained a court order in respect of the child giving him the right to actual custody should be treated as a "parent" for the purposes of the provisions of the Child Care Act 1980 which relate to the right to demand a child's return from voluntary care and the right to contest the assumption by the local authority of parental rights and duties.

(Paragraphs 7.49–7.50 and clause 20(1)).

(*b*) For other purposes of the Act "parent" should include all fathers of non-marital children.

(Paragraph 7.51 and clause 20(5)).

14.36 The Children and Young Persons Act 1969 should be amended so as to provide that where a court order is in force giving the right to actual custody of a non-marital child to the father any reference in the Act to the "parent" of that child includes a reference to the father.

(Paragraphs 7.52–7.53 and clause 19).

Inheritance

14.37 A non-marital child should have the same rights of inheritance on the intestacy of his relatives as a marital child; and his relatives should likewise be able to inherit on his intestacy.

(Paragraphs 8.7–8.14 and clause 24).

14.38 The limitation contained in section 15(2) of the Family Law Reform Act 1969 whereby words of relationship are construed so as to include an illegitimate person only where that person is a potential beneficiary (or where the beneficiary's relationship depends on an intermediate illegitimate link) should be removed.

(Paragraph 8.16 and clause 25(1)).

14.39 The meaning of the word "heir" as a word of purchase should be a matter for construction by the court; there should be no rule or presumption of law whereby a reference to a person's "heir" is to be interpreted as excluding a reference to a person of non-marital birth.

(Paragraphs 8.19–8.22 and clause 25(2)).

14.40 It should be possible for a settlor to create an entailed interest which will descend to persons of non-marital birth but this recommendation should only apply to dispositions taking effect after the implementation of our proposals.

(Paragraphs 8.23–8.25 and clause 25(2)).

14.41 We do not propose any change of the law in relation to titles of honour.

(Paragraph 8.26).

14.42 The protection presently afforded by section 17 of the Family Law Reform Act 1969 to personal representatives should be extended to cover claims by persons who become entitled as a result of the extension of intestate succession which we recommend in this Report (see paragraph 14.37 above).

(Paragraph 8.29 and clause 24(3)).

14.43 The presumption presently contained in section 14(4) of the Family Law Reform Act 1969 should be extended so that, for the purposes of intestate succession, a non-marital child should be presumed not to have been survived by his father or by other persons tracing their relationship to him through the father.

(Paragraphs 8.30–8.33 and clause 24(1)).

14.44 Succession claims brought by, or against, the estate of a person of non-marital birth should not be made subject to any special conditions.

(Paragraphs 8.34–8.39).

14.45 For the purposes of obtaining a grant of probate or administration, there should be a rebuttable presumption that the deceased left no persons who would otherwise be entitled to a grant whose relationship is traced through a non-marital birth.

(Paragraphs 8.40–8.42 and clause 26).

Parental agreement to adoption

14.46 The agreement of the father of a non-marital child should be required to the child's adoption if he has any parental rights vested in him.

(Paragraphs 9.10–9.11 and clause 17).

14.47 Where the father of a non-marital child has had only parental duties imposed upon him, no change in the present law as regards the father's agreement to adoption is required.

Parental consent to marriage

14.48 (*a*) The person whose consent is required to the marriage of a non-marital child between the ages of 16 and 18 should be—

his mother, if she is alive

and his father, if he has under a court order either

(i) actual custody of the child,

or (ii) all the parental rights and duties

or (iii) the consent to marry function specifically vested in him.

(*b*) Provision should be made for the consent of a guardian to the marriage of the non-marital child in certain circumstances.

(Paragraphs 9.17–9.20 and clause 18 and Schedule 1).

Change of name

14.49 It would not be appropriate to lay down specific rules governing the acquisition of names by non-marital children, because there are no corresponding rules for children born to married parents.

(Paragraph 9.29).

14.50 Rules should be made to ensure that orders made under the Guardianship of Minors Act 1971, as amended, which confer any parental right on the applicant should contain a provision that the written consent of both parents or the court's leave should be obtained before any formal steps are taken to change the name of the child in question.

(Paragraphs 9.30–9.31).

14.51 Consideration should be given to amending the Enrolment of Deeds Regulations to ensure that the consent of the father of a non-marital child is obtained before a deed poll evidencing the change of his child's name is enrolled.

(Paragraphs 9.30 and 9.32).

The establishment of parentage by court proceedings, birth registration and presumption

(*a*) *Court proceedings*

(*i*) *Declarations*

14.52 There should be a procedure for obtaining a declaration as to the applicant's parentage.

(Paragraph 10.14 and clause 27).

14.53 Where a minor child applies by a next friend for a declaration of parentage the court should be empowered to refuse to hear, or refuse to continue to hear, the application if it considers that to do so would be against the child's interests.

(Paragraph 10.19 and clause 27(2)).

14.54 The court should make a declaration only if parentage is proved to its satisfaction.

(Paragraph 10.22 and clause 27(6)).

14.55 In proceedings for a declaration of parentage there should be procedural safeguards designed to ensure that all relevant persons are before the court.

(Paragraphs 10.26–10.27 and clause 27(5)).

14.56 The court should be empowered to direct, on the application of any party to the proceedings or of its own motion, that all necessary papers should be sent to the Attorney-General. The Attorney-General should be able to be made a party to the proceedings or take any other appropriate steps.

(Paragraph 10.23–10.25 and clause 27(3) and (4)).

14.57 The applicant should be required to state in the application his own nationality or citizenship and that of anyone named as his parent, and the effect which the establishment of his parentage may have on such citizenship.

(Paragraph 10.26 and clause 28(1)).

14.58 (*a*) It should be expressly provided that the purpose of a blood test direction is to determine whether or not a person is a parent, and not merely whether a person is excluded from being a parent.

(Paragraph 10.28 and clause 29(1)).

(*b*) The court should have power, on the application of a party or of its own motion, to direct the use of blood tests and the taking of samples from any party to the proceedings.

(Paragraphs 10.28–10.30 and clause 29(1)).

(*c*) The court should be empowered to dismiss the application if any person named in the direction fails to take a required step for the purpose of blood tests.

(Paragraph 10.31 and clause 29(4)).

14.59 The High Court and divorce county court should have jurisdiction to entertain an application for a declaration of parentage only where the applicant was born in England or Wales.

(Paragraphs 10.21 and 10.34–10.35 and clause 27(1)).

14.60 Except where the court refuses to hear an application in the circumstances referred to in paragraph 14.53 above, there should be no residual discretion to refuse to grant a declaration.

(Paragraphs 10.36 and clause 27(6)).

14.61 Declarations of parentage should be binding on the Crown in cases where the Attorney-General is a party to the proceedings. In other cases declarations will bind only the parties to the proceedings and those who claim through them.

(Paragraphs 10.25 and 10.37–10.39 and clause 27(7)).

(*ii*) *Court orders other than declarations*

14.62 The present rule under the Civil Evidence Act 1968 whereby an adjudication of paternity made in the course of affiliation proceedings constitutes *prima facie* evidence of paternity should be re-enacted so as to apply to all proceedings brought under the Guardianship of Minors Acts and to proceedings brought by public bodies.

(Paragraph 10.41 and clause 36).

14.63 Consideration should be given to providing by rules that wherever, in court proceedings, it is found or admitted that a man is the father of a child and a financial provision, custody, access or other similar order is made, the finding or admission should appear on the face of the order.

(Paragraph 10.42).

14.65 We do not recommend the introduction of compulsory paternity proceedings.

(Paragraph 10.45).

(*b*) *Presumptions*

14.66 The presumption of legitimacy (whereby a child born to a woman during her marriage is presumed to be the legitimate child of herself and her husband) should be retained.

(Paragraphs 10.48–10.50).

14.67 (*a*) If a marriage is void, there should be a presumption that at least one of the parties believed the marriage to be valid; in such cases the child will be treated as legitimate.

(Paragraph 10.51 and clause 35).

(*b*) It should also be made clear that a mistake of law as to the validity of the marriage will not prevent the belief from being reasonable so as to make the marriage legitimate.

(Paragraph 10.52 and clause 35).

14.68 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 10.53–10.54).

(*c*) *Birth registration*

14.69 Where an order has been made giving the father any parental rights and duties, or requiring him to make financial provision for a non-marital child, both parents should be entitled to register or re-register the birth (as the case may be) so as to have the father's name entered in the births register.

(Paragraphs 10.56–10.62 and clauses 31 and 32 (sections 10(1)(*d*) and 10A(1)(*d*) of the Births and Deaths Registration Act 1953, as amended)).

14.70 We do not recommend a system of compulsory disclosure of paternity.

(Paragraph 10.63).

14.71 (*a*) There should be a procedure whereby the court should notify the Registrar-General of Births, Deaths and Marriages following a declaration of parentage so that re-registration can be automatically effected: incidental findings of paternity in court orders conferring parental rights or imposing parental duties should not automatically be reflected in the births register but should entitle either parent to seek registration or re-registration if he or she so wishes.

(Paragraphs 10.64–10.65 and clauses 28(6) and 33).

(*b*) The consent of the child over 16 should continue to be required except where re-registration occurs following a declaration of parentage.

(Paragraph 10.66).

14.72 The existing procedure for re-registration of a child's birth following the marriage of his parents should be retained.

(Paragraph 10.68).

14.73 No change should be made with regard to the availability of the long and short forms of birth certificate.

(Paragraphs 10.69–10.71).

14.74 It should be possible (as it is already possible for the mother of a non-marital child) for the father to be able to register or re-register the child's birth on production of a declaration by him in the prescribed form acknowledging his paternity, together with a statutory declaration by the mother stating that he is the father.

(Paragraph 10.74 and clauses 31 (section 10(1)(*c*) of the Births and Deaths Registration Act 1953, as amended) and 32 (section 10A(1)(*c*) of the 1953 Act, as amended)).

Citizenship

14.75 In principle a non-marital child should be able to acquire citizenship through his father, in the same way as would a child born to married parents.

(Paragraph 11.9).

14.76 Citizenship law is a United Kingdom matter and should not be changed without adequate consultation with other parts of the United Kingdom.

(Paragraphs 11.1 and 11.20).

14.77 Satisfactory proof of parentage is required. Consideration should be given to satisfying this requirement by means of—

(*a*) a declaration of parentage made under the procedure recommended in Part X of the Report;

(*b*) entry of the father's name on a births register in this country within six months of the child's birth;

(Paragraphs 11.10–11.11 and 11.20–11.21);

and (*c*) a suitable system based on existing administrative procedures with a right of appeal to an appropriate body.

(Paragraphs 11.12–11.17).

Status and paternity of children conceived by artificial insemination

14.78 A child born in England or Wales who was conceived by A.I.D. with the consent of his mother's husband should be treated in law for all purposes as the legitimate child of his mother's husband, and of no person other than the parties to that marriage.

(Paragraphs 12.9, 12.11 and 12.26 and clause 34(1)).

14.79 It should be presumed that the child's mother's husband consented to A.I.D. unless the contrary is proved to the satisfaction of the court.

(Paragraphs 12.17 and 12.24 and clause 34).

14.80 There should be no annotation of the births register of the child to indicate that there has been A.I.D.

(Paragraph 12.21).

14.81 No formal procedure should at this stage be established to enable an A.I.D. child to discover his biological paternity.
(Paragraph 12.23).

14.82 The proposals as to the status and paternity of the A.I.D. child should extend to the child of a void marriage.
(Paragraph 12.25 and clause 34(2)).

Domicile and connected matters

14.83 We make no recommendation for reform at present; but we do not regard the present law as satisfactory and we suggest that in due course there should be a general review of the concept of domicile in the context of the United Kingdom as a whole.
(Paragraph 13.3).

(*Signed*) RALPH GIBSON, *Chairman.*
STEPHEN M. CRETNEY.
BRIAN DAVENPORT.
STEPHEN EDELL.
PETER NORTH.

R.H. STREETEN, *Secretary*

2 August 1982

APPENDIX A

Draft
Family Law Reform Bill

ARRANGEMENT OF CLAUSES

PART I

RIGHTS AND DUTIES OF PARENTS

Repeal of Affiliation Proceedings Act 1957

Amendments of Guardianship of Minors Acts 1971 and 1973

Provisions relating to wards of court

Provisions relating to custodianship orders

Alteration of maintenance agreements made in respect of non-marital children

Adoption of non-marital children

Consents to marriages of children under 18

Amendment of other enactments

PART II

PROPERTY RIGHTS

PART III

DECLARATIONS OF PARENTAGE

PART IV

REGISTRATION OF BIRTHS

PART V

MISCELLANEOUS AND SUPPLEMENTARY

SCHEDULES:

DRAFT

OF A

B I L L

TO

Make further provison with respect to the rights and duties of parents, the status and property of persons born out of wedlock and the establishment of parentage; and for connected purposes.

DRAFT FAMILY LAW REFORM BILL

EXPLANATORY NOTES

The Bill generally

1. The broad objectives of the Bill are to remove the adverse effects of illegitimacy as far as they affect the child; to equate, so far as is possible and desirable, the legal position of marital and non-marital children; and to this end to reform the law relating to guardianship of minors, wardship, custodianship, maintenance agreements, adoption, children in care, supplementary benefits, succession to property, evidence of parentage and A.I.D. These matters are discussed in general in Part IV of the Report and in detail in Parts VI to XII of the Report. In the course of pursuing this objective reforms have been made which, though not in themselves directly affecting non-marital children, avoid the creation of anomalies.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

PART I

RIGHTS AND DUTIES OF PARENTS

Repeal of Affiliation Proceedings Act 1957

Repeal of Affiliation Proceedings Act 1957. 1957 c. 55.

1. The Affiliation Proceedings Act 1957 is hereby repealed.

EXPLANATORY NOTES

Part I

1. Part I deals with parental rights and duties; it abolishes affiliation proceedings and reforms the law relating to guardianship, custody, financial relief, adoption, consent to marry and certain areas of public law such as child care and supplementary benefits.

2. The notes which refer to unimplemented provisions of the Children Act 1975 and amendments thereto are marked with an asterisk*.

Clause 1

1. This clause repeals the Affiliation Proceedings Act 1957 and thus abolishes the distinctive procedure by which financial provision orders are made for non-marital children. The clause implements the recommendation made in paragraph 14.4 of the Report.

2. For the reasons given in paragraph 4.51 of the Report the word "non-marital" is used in place of "illegitimate" and, for the sake of greater clarity, the more commonly used word "child" is used in place of "minor" throughout the Guardianship of Minors Acts as amended in this Bill: see the definitions of "child", "marital child" and "non-marital child" in the Guardianship of Minors Act 1971, s. 20(2) as amended in Schedule 4 to the Bill.

3. One of the consequences of abolishing affiliation proceedings is that certain orders will no longer be enforceable as "affiliation orders". Many orders are now expressed to be enforceable as affiliation orders. The abolition of affiliation proceedings means that this expression will no longer apply and such orders will henceforth be enforceable as "magistrates' court maintenance orders" (see paragraph 71 of Schedule 2 to the Bill); the substance of the present law is preserved.

Amendments of Guardianship of Minors Acts 1971 *and* 1973

Extension of s. 1 of Guardianship of Minors Act 1971.

1971 c. 3.

2. In section 1 of the Guardianship of Minors Act 1971 (which provides that, in deciding questions relating to the custody and upbringing etc. of children, a court shall regard the welfare of the child as the first and paramount consideration) there shall be added at the end of the section the following paragraph—

"For the avoidance of doubt it is hereby declared that the provisions of this section apply to all children whether or not the mother and father of a child have at any time been married to each other."

EXPLANATORY NOTES

Clauses 2 to 11

These clauses amend the Guardianship of Minors Act 1971 which, in its amended form, is set out as a "Keeling" Schedule and forms Schedule 4 to the Bill. The greater use of such Schedules was recommended by the House of Commons Select Committee on Procedure 1977/8 (H.C. 588) at paragraphs 2.39–2.47; for the origin and history of the Keeling Schedule see the Renton Committee's Report on the Preparation of Legislation (1975) Cmnd. 6053, paragraphs. 13.21–13.22.

Clause 2

1. This clause amends section 1 of the Guardianship of Minors Act 1971 by making it clear beyond any doubt that the principle stated in that provision that in custody and related proceedings the child's welfare is the first and paramount consideration applies to proceedings affecting non-marital as well as marital children, thus implementing the recommendation in paragraph 14.23 of the Report.

PART I

Guardians of non-marital children.

3. After section 5 of the Guardianship of Minors Act 1971 there shall be inserted the following section:—

"Guardians of non-marital children.

5A.—(1) Where the father of a non-marital child has any parental rights and duties in relation to the child by virtue of an order in force under section 8 or 9(1) of this Act, sections 3, 4, and 5 of this Act shall apply in relation to the child as if he were a marital child; but any appointment of a guardian made under section 4(1) of this Act by virtue of this section shall be of no effect unless the appointor has those parental rights and duties immediately before his death.

(2) Where on an application under section 8 or 9(1) of this Act in respect of a non-marital child the only right given to the father is a right of access, the father of the child shall not be regarded for the purposes of this section as having any parental rights and duties in relation to the child."

EXPLANTORY NOTES

Clause 3

1. This clause implements the recommendations made in paragraphs 14.30–14.33 of the Report: see generally paragraphs 7.38 to 7.43. It inserts a new section 5A into the Guardianship of Minors Act 1971 and provides for the father of a non-marital child who has, by court order, any parental rights and duties (other than a right only of access)—

(i) to be a guardian under section 3 of the Act on the death of the mother;

(ii) to appoint a guardian for the child by deed or will under section 4 of the Act—but only if he has parental rights and duties immediately before his death;

(iii) to have the right to object to a testamentary guardian appointed by the mother under section 4 of the Act;

(iv) to be treated as the child's "father" for the purpose of section 5 of the Act (which empowers the court to appoint a guardian for a child who has no parent or guardian).

2. In this clause and elsewhere in this Bill, the conceptual framework of sections 85 to 87 of the Children Act 1975 is used. Those sections give the following definitions—

(1) "the parental rights and duties" are defined as "all the rights and duties which by law the mother and father have in relation to a legitimate child and his property"; and a right of access is included as a parental right or duty (Children Act 1975, s. 85(1));

(2) "legal custody" is defined as "so much of the parental rights and duties as relate to the person of the child (including the place and manner in which his time is spent)" (*ibid.*, s. 86);

(3) "actual custody" is defined as "actual possession of [the child's] person, whether or not that possession is shared with one or more other persons" (*ibid.*, s. 87(1)).

"Parental rights and duties" and "legal custody" do not require definition in the Bill because they are now included in the Interpretation Act 1978.

New section 5A(1)

3. This subsection deals with the effects of an order giving the father parental rights (whether made under the new section 8 of the Act, as to which see clause 4 below, or under section 9(1) of the Act) on the guardianship rights of the father of a non-marital child, as explained in note 1 above.

New section 5A(2)

4. This subsection specifically excludes orders which give the father a right of access only from operating as orders giving any parental rights and duties in relation to the child. Accordingly, the father of a non-marital child who has a right of access only does not automatically become a guardian of the child following the mother's death nor can he validly appoint a testamentary guardian.

Orders for parental rights and duties for father of non-marital child.

4. After section 7 of the Guardianship of Minors Act 1971 there shall be inserted the following heading and section—

"Parental rights and duties in relation to non-marital children

Orders for parental rights and duties for father of non-marital child.

8.—(1) The father of a non-marital child may apply to the court for the parental rights and duties in relation to the child and, on such an application, the court may—

(*a*) order that the father shall have all the parental rights and duties, or

(*b*) order that the father shall have all or such as the court may specify of the parental rights and duties other than the right to the actual custody of the child.

(2) Where, on an application under subsection (1) of this section, the court makes an order under paragraph (*b*) or makes no order under that subsection, the court may make such order regarding access to the child by the father as the court thinks fit.

(3) Where the father of a child is given parental rights and duties by virtue of an order under subsection (1) of this section, the father shall, unless the court otherwise directs, have those rights and duties jointly with the mother of the child or, if the mother is dead, jointly with any guardian appointed by the mother or the court under this Act, except that where by virtue of an order under paragraph (*a*) of that subsection the father is given the right to the actual custody of the child, he shall, unless the court otherwise directs, have that right exclusively.

(4) An order under subsection (1) of this section may be varied or discharged by a subsequent order made on the application of either parent of the child or, if the mother is dead, on the application of any guardian under this Act.

(5) No such order as is mentioned in section 9(3), 10(2) or 11(2) of this Act shall be made on an application under this section.

(6) Any order made under this section shall cease to have effect when the child attains the age of eighteen."

EXPLANATORY NOTES

Clause 4

1. This clause inserts a new section 8 into the Guardianship of Minors Act 1971 and implements the recommendation made in paragraph 14.24 of the Report that the father of a non-marital child should be able to apply for all the parental rights and duties and so be in the same legal position regarding the child as if he had been married to the child's mother. Examples of situations where such an order might be sought are given in paragraph 7.29 of the Report.

New section 8(1)

2. This subsection, which implements the recommendation made in paragraph 14.25 of the Report, provides for the making of orders relating to parental rights and duties on the application of the father of a non-marital child. Paragraph (*a*) deals with orders which give the father all the parental rights and duties. Paragraph (*b*) deals with orders which give the father specific parental rights and duties other than the right to the actual custody of the child.

3. The classification of orders in this way, *viz.* on the one hand all the parental rights and duties and, on the other, parental rights and duties other than the right to actual custody, is done to achieve consistency with the policy of earlier legislation. Under the Children Act 1975 (and the Domestic Proceedings and Magistrates' Courts Act 1978) legal custody and actual custody go together and therefore legal custody necessarily includes actual custody: see section 11A(1) of the Guardianship of Minors Act 1971 (set out in Schedule 4 to this Bill) under which a person may be given *either* legal custody *or* parental rights and duties other than the right to actual custody. For a discussion of the policy behind this legislative framework see the Law Commission's Report on Matrimonial Proceedings in Magistrates' Courts (1976) Law Com. No. 77, paras. 5.28–5.34.

New section 8(2)

4. This subsection makes it clear that, on an application under this section, the court may grant access to the father of the child whenever actual custody is not granted to him, whether or not the court makes an order dealing with specified parental rights under the new section 8(1)(*b*).

New section 8(3)

5. This subsection allows the court to order that parental rights and duties be exercised either exclusively or jointly, whether it makes an order giving the father of the child all the parental rights and duties (including the right to actual custody) or an order which does not give the father the right to actual custody. The subsection is drafted in terms that, "unless the court otherwise directs", all the parental rights and duties (by virtue of an order under section 8(1)(*a*)) are to be exercised *exclusively*; while parental rights and duties which exclude the right to actual custody (by virtue of an order made under section 8(1)(*b*)) are to be exercised *jointly*. This is designed to achieve consistency so far as possible with section 8(4) of the Domestic Proceedings and Magistrates' Courts Act 1978, and section 11A of the Guardianship of Minors Act 1971 (section 37 of the 1978 Act), under which legal custody cannot be shared; and the right to actual custody under a court order is also not shared because legal custody includes actual custody. (As to the definition of those terms see note 2 to clause 3 above). It will, however, be possible under this subsection to order that actual custody be shared, in a case, for example, where unmarried parents are cohabiting: see paragraph 7.32 of the Report.

Clause 4 (continued)

New section 8(4)

6. This subsection provides for the variation and discharge of orders dealing with parental rights and duties.

New section 8(5)

7. This subsection prevents an order for financial relief from being made on an application for parental rights and duties under this section. As is explained in paragraphs 7.27 and 7.31 of the Report, section 8 is primarily intended to allow those fathers of non-marital children who are likely to play a significant role in the upbringing of such children to have their position equated with that of a married father. The section is accordingly not intended for cases where financial relief is required: if financial relief is required in the same proceedings, application can be made under section 9 (or section 10 or 11, as the case may be) of the Act.

New section 8(6)

8. This subsection provides for orders for parental rights and duties to cease when the child reaches 18, thus bringing such orders into line with orders for legal custody relating to a "child" (as defined in section 20(2) of the Guardianship of Minors Act 1971 as amended by Schedule 3 to the Bill).

Orders for custody and financial relief on application of either parent.

5. For section 9 of the Guardianship of Minors Act 1971 and for the heading preceding that section there shall be substituted the following heading and section—

"Orders for custody and financial relief

Orders for custody and financial relief on application of either parent.

9.—(1) The court may, on the application of either parent of a child, make such order regarding—

(*a*) the legal custody of the child; and

(*b*) access to the child by either parent,

as the court thinks fit.

(2) The court may, on the application of either parent of a child, make—

(*a*) in the case of proceedings in the High Court or a county court, one or more of the orders mentioned in subsection (3) of this section;

(*b*) in the case of proceedings in a magistrates' court, one or both of the orders mentioned in paragraphs (*a*) and (*c*) of that subsection.

(3) The orders referred to in subsection (2) of this section are—

(*a*) an order requiring one parent to make to the other parent for the benefit of the child, or to the child, such periodical payments, and for such term, as may be specified in the order;

(*b*) an order requiring one parent to secure to the other parent for the benefit of the child, or to secure to the child, such periodical payments, and for such term, as may be so specified;

(*c*) an order requiring one parent to pay to the other parent for the benefit of the child, or to the child, such lump sum as may be so specified;

(*d*) an order requiring either parent to transfer to the other parent for the benefit of the child, or to the child, such property as may be so specified, being property to which the first-mentioned parent is entitled, either in possession or reversion;

(*e*) an order requiring that a settlement of such property as may be so specified, being property to which either parent is so entitled, be made to the satisfaction of the court for the benefit of the child.

(4) An order under this section, other than an order mentioned in paragraph (*c*), (*d*) or (*e*) of subsection (3), may be varied or discharged by a subsequent order made on the application of either parent or after the death of either parent on the application of any guardian under this Act.

(5) An order shall not be made under subsection (1) of this section giving legal custody to a person other than the mother or father."

EXPLANATORY NOTES

Clause 5

1. This clause re-enacts with amendments section 9 of the Guardianship of Minors Act 1971 to deal with orders for legal custody and maintenance of children on the application of a parent.

New section 9(1)

2. This subsection re-enacts the substance of section 9(1) of the Act with two changes. First, the subsection applies both to marital and to non-marital children (see section 20(2A) of that Act). Secondly, the reference to the "conduct and wishes of the mother and father" as a specific criterion for deciding on the child's legal custody or access is removed and with it any gloss on the principle of the paramountcy of the child's welfare stated in section 1 of the Guardianship of Minors Act 1971. The subsection implements the recommendations made in paragraph 14.28 of the Report.

New section 9(2) and (3)

3. These two subsections deal with the making of financial orders for children and re-enact and extend the provisions of section 9(2) in accordance with the recommendations made in paragraph 14.5 of the Report.

New section 9(2)

4. This subsection effects two changes of substance to the existing subsection. First, it extends to non-marital children the financial relief powers of section 9 of the 1971 Act, thus in particular giving the High Court and county court jurisdiction to make orders in relation to such children. Secondly, it allows an order for financial provision under section 9 to be made whether or not an order for legal custody is made, thus implementing the recommendation made in paragraph 14.14 of the Report.

5. Under paragraph (*a*) the High Court and county court have power to make any financial order mentioned in new section 9(3) below; under paragraph (*b*) the magistrates' court retains the same power as under the present law to make a periodical payments order or a lump sum order (not exceeding £500: section 12B(2) of the Guardianship of Minors Act 1971); see paragraph 6.6 of the Report.

New section 9(3)

6. This subsection sets out the financial orders which may be made under section 9(2). The orders correspond substantially with those which may be made for children by the divorce court under section 23(1) and 24(1) of the Matrimonial Causes Act 1973 and thus include the power to order secured periodical payments and to the transfer or settlement of property (although it is not expected, for reasons given in paragraphs 6.6 to 6.8 of the Report, that such orders will be frequently made). The power under section 24(1) of the Matrimonial Causes Act 1973 to vary "marriage" settlements is excluded for the reason given in paragraph 6.9 of the Report.

New section 9(4)

7. This subsection deals with variation and discharge of periodical payments and secured periodical payments orders.

EXPLANATORY NOTES

Clause 5 (continued)

New section 9(5)

*8. This subsection is intended to come into force at the same time as Part II of the Children Act 1975, under which non-parents may apply for legal custody in the form of a "custodianship" order. Until then non-parents can continue to be granted legal custody under the Guardianship of Minors Act 1971: transitional provisions are dealt with in clause 38(2) and Schedule 3 to the Bill.

Orders for custody and financial relief where persons is guardian to exclusion of surviving parent.

6. For section 10 of the Guardianship of Minors Act 1971 there shall be substituted the following section—

"Orders for custody and financial relief where person is guardian to exclusion of surviving parent.

10.—(1) Where the court makes an order under section 4(4) of this Act (including an order made under that section by virtue of section 5A of this Act) that a person shall be the sole guardian of a child to the exclusion of his mother or father, the court—

(*a*) may make such order regarding—

(i) the legal custody of the child; and

(ii) access to the child by the surviving parent,

as the court thinks fit;

(*b*) whether or not it makes an order under paragraph (*a*) of this subsection, may make—

(i) in the case of proceedings in the High Court or a county court, one or more of the orders mentioned in subsection (2) of this section;

(ii) in the case of proceedings in a magistrates' court, one or both of the orders mentioned in paragraphs (*a*) and (*c*) of that subsection.

(2) The orders referred to in subsection (1)(*b*) of this section are—

(*a*) an order requiring the surviving parent to make to the guardian for the benefit of the child, or to the child, such periodical payments, and for such term, as may be specified in the order;

(*b*) an order requiring that parent to secure to the guardian for the benefit of the child, or to secure to the child, such periodical payments, and for such term, as may be so specified;

(*c*) an order requiring that parent to pay to the guardian for the benefit of the child, or to the child, such lump sum as may be so specified;

(*d*) an order requiring that parent to transfer to the guardian for the benefit of the child, or to the child, such property as may be so specified, being property to which the surviving parent is entitled, either in possession or reversion;

(*e*) an order requiring that a settlement of such property as may be so specified, being property to which that parent is so entitled, be made to the satisfaction of the court for the benefit of the child.

(3) The powers conferred by subsection (1) of this section may be exercised at any time and include power to vary or discharge any order previously made under those powers other than an order mentioned in paragraph (*c*), (*d*) or (*e*) of subsection (2) of this section."

EXPLANATORY NOTES

Clause 6

This clause substitutes a new section for section 10 of the Guardianship of Minors Act 1971 which provides for a child's legal custody, access and financial provision where the court makes an order that a testamentary guardian be a guardian to the exclusion of the surviving parent. The clause implements the recommendation made in paragraphs 14.7 to 14.8 and 14.14 of the Report and brings section 10 of the Guardianship of Minors Act 1971 into line with section 9.

Orders for custody and financial relief where joint guardians disagree.

7. For section 11 of the Guardianship of Minors Act 1971 there shall be substituted the following section—

"Orders for custody and financial relief where joint guardians disagree.

11.—(1) The powers of the court under section 7 of this Act to make orders regarding matters in difference between joint guardians shall, where one of the joint guardians is a parent of the child, include power—

(*a*) to make such order regarding—

(i) the legal custody of the child; and

(ii) access to the child by that parent,

as the court thinks fit;

(*b*) to make—

(i) in the case of proceedings in the High Court or a county court, one or more of the orders mentioned in subsection (2) of this section;

(ii) in the case of proceedings in a magistrates' court, one or both of the orders mentioned in paragraphs (*a*) and (*c*) of that subsection;

(*c*) to vary or discharge any order previously made under that section other than an order mentioned in paragraph (*c*), (*d*) or (*e*) of subsection (2) of this section.

(2) The orders referred to in subsection (1)(*b*) of this section are—

(*a*) an order requiring the parent to make to the other guardian for the benefit of the child, or to the child, such periodical payments, and for such term, as may be specified in the order;

(*b*) an order requiring the parent to secure to the other guardian for the benefit of the child, or to secure to the child, such periodical payments, and for such term, as may be so specified;

(*c*) an order requiring the parent to pay to the other guardian for the benefit of the child, or to the child, such lump sum as may be so specified;

(*d*) an order requiring the parent to transfer to the other guardian for the benefit of the child, or the child, such property as may be so specified, being property to which the parent is entitled, either in possession or reversion;

(*e*) an order requiring that a settlement of such property as may be so specified, being property to which the parent is so entitled, be made to the satisfaction of the court for the benefit of the child."

EXPLANATORY NOTES

Clause 7

This clause substitutes a new section for section 11 of the Guardianship of Minors Act 1971 which provides for a child's legal custody, access and financial provision where there is a disagreement between joint guardians one of whom is a parent. The clause implements the recommendation made in paragraphs 14.7 to 14.8 and 14.14 of the Report and brings section 11 of the Guardianship of Minors Act 1971 into line with sections 9 and 10.

Orders for financial relief for persons over eighteen.

8. After section 11A of the Guardianship of Minors Act 1971 there shall be inserted the following section—

Orders for financial relief for persons over eighteen.

11B.—(1) Any person who has attained the age of eighteen (whether or not his parents have at any time been married to each other) may apply to the High Court or a county court for an order under this section if at the time of the application his parents are not living with each other.

(2) If on an application under subsection (1) of this section it appears to the court that—

(*a*) the applicant is, or will be, or if an order were made under this section would be, receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not he is also, or will also be, in gainful employment; or

(*b*) there are special circumstances which justify the making of an order under this section,

the court may make one or more of the following orders, that is to say—

(i) an order requiring his mother or father (or both) to pay to the applicant such periodical payments, and for such term, as may be specified in the order;

(ii) an order requiring his mother or father (or both) to pay to the applicant such lump sum as may be so specified.

(3) An application may not be made under subsection (1) of this section by any person if, immediately before he attained the age of sixteen, a periodical payments order was in force with respect to him.

EXPLANATORY NOTES

Clause 8

1. This clause, which inserts a new section 11B into the Guardianship of Minors Act 1971, implements the recommendation made in paragraph 14.15 of the Report that children over 18 should, in certain circumstances, have the right to apply for financial relief from their parents under the 1971 Act.

New section 11B(1)

2. This subsection provides that a child over 18 may apply to the High Court or county court only (for reasons given in paragraph 6.32 of the Report) for financial relief if his parents are not living together. As is explained in paragaph 6.31 of the Report, no such right is provided where the child's parents are living with each other at the time of the application.

New section 11B(2)

3. This subsection sets out, in paragraphs (*a*) and (*b*), the educational or other circumstances in which a financial order may be made in favour of an adult child on his own application and, in paragraphs (i) and (ii), the types of order (unsecured periodical payments or lump sum from either or both of his parents) which may be made. The circumstances in which orders may be made and the type of orders correspond with those available (on the application of a parent) for the benefit of a child under the Domestic Proceedings and Magistrates' Courts Act 1978 ss. 2(1) and 5(2): see also Matrimonial Causes Act 1973 s. 29(2) and Guardianship of Minors Act 1971 s. 12(2).

New section 11B(3)

4. This subsection prevents an adult child from applying under this section if, immediately before he attained the age of 16 (the age to which periodical payments orders run in the first instance), there was an order in force with respect to him. In such a situation the child should apply to vary or revive (as the case may be) the earlier order: see section 12C(4) and (5) of the Guardianship of Minors Act 1971 as amended by Schedule 4 to the Bill. The child over 18 is not prevented from applying for a periodical payments order under this section by reason of a lump sum or property adjustment order having been previously made with respect to him.

(4) No order shall be made under this section at a time when the parents of the applicant are living with each other.

(5) Any order made under this section requiring the making of periodical payments shall, notwithstanding anything in the order, cease to have effect on the death of the person liable to make payments under the order.

(6) An order under this section requiring the making of periodical payments may be varied or discharged by a subsequent order made on the application of any person by or to whom payments were required to be made under the previous order.

(7) In subsection (3) of this section "periodical payments order" means an order made under—

(*a*) this Act

1969 c. 46. (*b*) section 6(3) of the Family Law Reform Act 1969,

1973 c. 18. (*c*) section 23 or 27 of the Matrimonial Causes Act 1973,

1975 c. 72. (*d*) section 34 of the Children Act 1975, or

1978 c. 22. (*e*) Part I of the Domestic Proceedings and Magistrates' Courts Act 1978,

for the making of periodical payments."

Clause 8 (continued)

New section 11B(4)

5. New section 11B(1) above provides that an *application* cannot be made by a person over 18 if his parents are living together; this subsection provides that an *order* cannot be made at a time when the parents are living together, so that it covers the case where cohabitation is resumed between the application and order. However, if the parents cohabit after making of the order, this will not affect the order: see Schedule 2, para. 46 below.

New section 11B(5)

6. This subsection provides that any order made under this section is a personal one which expires on the payer's death, thus making for consistency with existing legislation: Guardianship of Minors Act 1971 s. 12(3), as substituted by Domestic Proceedings and Magistrates' Courts Act 1978 s. 42.

New section 11B(6)

7. This subsection provides for the variation and discharge of orders on the application of the payer or payee.

New section 11B(7)

8. This subsection is supplemental to section 11B(3) which prevents a child over 18 from applying for financial provision under this section if a periodical payments order was in force when he attained 16; subsection (7) defines "periodical payments order" for this purpose by reference to the proceedings in which a particular payments order may have been made.

Variation of orders for secured periodical payments after death of parent.

9. After section 12C of the Guardianship of Minors Act 1971 there shall be inserted the following section—

Variation of orders for secured periodical payments after death of parent.

12D.—(1) Where the parent liable to make payments under a secured periodical payments order has died, the persons who may apply for the variation or discharge of the order shall include the personal representatives of the deceased parent, and no application for the variation of the order shall, except with the permission of the court, be made after the end of the period of six months from the date on which representation in regard to the estate of that parent is first taken out.

(2) The personal representatives of a deceased person against whom a secured periodical payments order was made shall not be liable for having distributed any part of the estate of the deceased after the expiration of the period of six months referred to in subsection (1) of this section on the ground that they ought to have taken into account the possibility that the court might permit an application for variation to be made after that period by the person entitled to payments under the order; but this subsection shall not prejudice any power to recover any part of the estate so distributed arising by virtue of the variation of an order in accordance with this section.

(3) Where an application to vary a secured periodical payments order is made after the death of the parent liable to make payments under the order, the circumstances to which the court is required to have regard under section 12C(1) of this Act shall include the changed circumstances resulting from the death of that parent.

(4) In considering for the purposes of subsection (1) of this section the question when representation was first taken out, a grant limited to settled land or to trust property shall be left out of account and a grant limited to real estate or to personal estate shall be left out of account unless a grant limited to the remainder of the estate has previously been made or is made at the same time.

(5) In this section "secured periodical payments order" means an order for secured periodical payments made by virtue of section 9(3)*b*), 10(2)(*b*) or 11(2)(*b*) of this Act."

EXPLANATORY NOTES

Clause 9

1. This clause inserts a new section 12D into the Guardianship of Minors Act 1971 to deal with variation or discharge of secured periodical payments orders where the payer has died; it brings the guardianship provisions into line with provisions dealing with secured periodical payments orders in divorce proceedings (Matrimonial Causes Act 1973 s. 31), thus implementing the recommendation made in paragraph 14.16 of the Report.

New section 12D(1)

2. This subsection corresponds with section 31(6) of the Matrimonial Causes Act 1973. It permits the personal representatives of the deceased payer under a secured periodical payments order to apply for its variation or discharge, and it imposes a six month time limit from the date of obtaining a grant of representation to the estate (subject to extension by the court) for applications for variation or discharge of orders.

New section 12D(2)

3. This subsection corresponds with section 31(8) of the Matrimonial Causes Act 1973; it protects personal representatives who distribute property after the six month period, and preserves the right of a claimant to recover money paid to a beneficiary. This immunity exists in order to ensure that speedy administration of the estate is facilitated.

New section 12D(3)

4. This subsection corresponds with section 31(7) of the Matrimonial Causes Act 1973 and provides that the court is to have regard to the changed circumstances resulting from the death of the parent liable to pay under the order.

New section 12D(4)

5. This subsection is consequential on subsection (1) and corresponds with section 31(9) of the Matrimonial Causes Act 1973.

New section 12D(5)

6. This subsection is self-explanatory.

Supplementary provisions relating to orders under Guardianship of Minors Act 1971.

10. After section 13A of the Guardianship of Minors Act 1971 there shall be inserted the following sections—

"Certain orders to cease to have effect on marriage of parents.

13B. Where—

(*a*) the right to the actual custody of a child is given to a parent of the child by an order under section 8 or 9(1) of this Act, or

(*b*) periodical payments are required to be made or secured to a parent of a child by an order under section 9(2) of this Act,

then, if the parents of that child subsequently marry, or re-marry, each other, that order shall cease to have effect on the date of the marriage.

Direction for settlement of instrument by conveyancing counsel.

13C. Where the High Court or a county court decides to make an order under this Act for the securing of periodical payments or for the transfer or settlement of property, it may direct that the matter be referred to one of the conveyancing counsel of the court for him to settle a proper instrument to be executed by all necessary parties."

EXPLANATORY NOTES

Clause 10

1. This clause inserts new sections 13B and 13C into the Guardianship of Minors Act 1971. The new section 13B provides for the lapse of orders conferring actual custody or periodical payments orders (made payable to a parent) upon the subsequent marriage of the parents to each other, thus implementing the recommendation made in paragraph 14.17 of the Report.

2. The new section 13C empowers the court to direct the settlement of a proper instrument by conveyancing counsel where a secured periodical payments order or a property transfer or settlement order is made. The provision corresponds with section 30 of the Matrimonial Causes Act 1973.

Proof of paternity of non-marital child.

11. For section 14 of the Guardianship of Minors Act 1971 and for the heading preceding that section there shall be substituted the following heading and section—

"Proof of paternity of non-marital child

Proof of paternity of non-marital child.

14. Where, in any proceedings on an application for an order under this Act in respect of a non-marital child, a party to the proceedings is alleged to be, or alleges that he is, the father of the child but that allegation is not admitted in those proceedings by the other party to the proceedings, the court shall not on that application make any order under this Act or under the Guardianship Act 1973 which imposes any obligation or confers any right on the person who is alleged to be, or alleges that he is, the father of the child unless it is proved to the satisfaction of the court that that person is the father of that child."

EXPLANATORY NOTES

Clause 11

1. This clause substitutes for the existing section 14 of the Guardianship of Minors Act 1971 a new section dealing with proof of paternity. The existing section 14 which deals with the application of the Act to illegitimate children is no longer appropriate.

2. The object of the clause is to ensure that no order is made in guardianship proceedings which imposes duties or confers rights on the person alleged to be the father of a non-marital child, unless paternity is proved or admitted. The principal cases will be where the mother alleges that a man is the father of her child in maintenance proceedings in respect of that child: and where a man alleges that he is the father of a child in custody or access proceedings. The reference to proceedings under the Guardianship Act 1973 is to interim orders: see section 2(4) and (4A) of that Act as substituted by paragraph 42(*c*) of Schedule 2 to the Bill. Analogous provisions relating to proof of paternity in other proceedings are to be found in clauses 14(4), 21(*b*), 22(2) and 23(2) of the Bill.

Amendment of s. 1 of Guardianship Act 1973.

1973 c. 29.

1975 c. 72.

12.—(1) For subsection (2) of section 1 of the Guardianship Act 1973 (agreements between parents to give up parental rights) there shall be substituted the following subsection—

"(2) Notwithstanding anything in section 85(2) of the Children Act 1975, an agreement may be made between the parents of a child, whether or not the parents have at any time been married to each other, as to the exercise by either of them, during any period when they are not living with each other in the same household, of any of the parental rights and duties as respects that child; but no such agreement shall be enforced by any court if the court is of opinion that it will not be for the benefit of the child to give effect to it."

(2) After subsection (3) of that section (which enables application to be made for the direction of the court where the parents of a marital child disagree on a question affecting the child's welfare) there shall be inserted the following subsection—

"(3A) Subsection (3) above shall not apply in relation to a non-marital child unless the father has parental rights or duties (other than the right of access only) as respects the child by virtue of an order in force under section 8(1) or 9(1) of the Guardianship of Minors Act 1971."

EXPLANATORY NOTES

Clause 12

1. This clause effects changes in section 1 of the Guardianship Act 1973 in relation to out-of-court agreements about parental rights and to disagreements on questions concerning the welfare of a child.

Subsection (1)

2. This subsection substitutes a new section 1(2) of the Guardianship Act 1973 and implements the recommendation made in paragraph 14.34 of the Report relating to out-of-court agreements. The existing statutory provision only validates agreements made by married parents and then only if the agreement is in contemplation of separation: this subsection extends to all parents whether married or not, and whether divorced or not, the right to make agreements about the exercise of parental rights while the parents are separated. Such agreements remain subject to the power of the court in the interest of the child to refuse to enforce them. The general prohibition on transferring or surrendering the parental rights under section 85 of the Children Act 1975 remains; this subsection deals only with the *exercise* of parental rights.

Subsection (2)

3. Under section 1(3) of the Guardianship Act 1973 an application can be made for the court's direction where parents disagree on a question affecting a legitimate child's welfare. This subsection adds a new subsection (3A)—allowing such applications to be made in relation to non-marital children if the father has an order for legal custody or for parental rights and duties (other than the right only of access), thus implementing the recommendation made in paragraph 14.27 of the Report.

Provisions relating to wards of court

Provisions relating to wards of court.

1969 c. 46.

13. In section 6 of the Family Law Reform Act 1969 (which relates to maintenance for wards of court)—

(*a*) for subsection (3) there shall be substituted the following subsection—

"(3) Section 12 of the Guardianship of Minors Act 1971 (duration of orders for maintenance) and subsections (4), (5) and (6) of section 12C of that Act (variation and revival of orders for periodical payments) shall apply in relation to an order made under subsection (2) of this section as they apply in relation to an order made by the High Court under section 9 of that Act." ;

(*b*) in subsection (5) (which provides that an order under that section shall cease to have effect if the parents of the ward reside together for a period of three months after the making of the order) for the words "three months" there shall be substituted the words "six months";

(*c*) subsection (6) (which provides that no order shall be made under that section requiring any person to make any payment towards the maintenance or education of a non-marital child) shall cease to have effect.

EXPLANATORY NOTES

Clause 13

1. This clause makes three amendments to section 6 of the Family Law Reform Act 1969 in relation to maintenance for wards of court.

2. Paragraph (*a*) brings the provisions for the duration of maintenance orders for wards and the variation and revival of such orders into line with the corresponding provisions of the Guardianship of Minors Act 1971.

3. Paragraph (*b*) amends section 6(5) of the Family Law Reform Act 1969 so that the provision in wardship cases relating to the cessation of a maintenance order by reason of the parents' subsequent cohabitation is brought into line with that in guardianship cases (section 5A of the Guardianship Act 1973), thus implementing the recommendation made in paragraph 14.22 of the Report.

4. Paragraph (*c*) repeals section 6(6) of the Family Law Reform Act 1969 so that the court will have power to make a periodical payments order for a non-marital ward, thus implementing the recommendation made in paragraph 14.21 of the Report.

5. A provision allowing for a maintenance order for a ward of court made under section 6(2) of the Family Law Reform Act 1969 to provide for payment of maintenance directly to the ward (as opposed to payment to the other parent or other person having care and control of the ward) has been inserted in section 50 of the Administration of Justice Act 1982.

Provisions relating to custodianship orders

Maintenance of non-marital child who is subject to custodianship order.

14.—(1)Part II of the Children Act 1975 (which relates to custodianship) shall have effect subject to the following provisions of this section.

1975 c. 72.

(2) In section 34, subsection (3) (which provides that no order shall be made under that section requiring the father of a non-marital child to make payments in respect of the child) shall cease to have effect.

(3) In section 36, subsection (5A) (which provides that an order under that section committing a non-marital child to the care of a local authority shall not require the father to make payments in respect of the child) shall cease to have effect.

(4) After section 36 there shall be inserted the following section—

"Proof of paternity of non-marital child.

36A. "Where—

(*a*) in any proceedings on an application for an order under section 34(1)(*b*) or (*c*), or

(*b*) in any proceedings on an application under section 35 for the revocation of a custodianship order,

the person alleged to be the father of a non-marital child who is the subject of the custodianship order does not admit that he is the father of that child, the court shall not make an order under section 34(1)(*b*) or (*c*) or, as the case may be, under section 36(5) unless it is proved to the satisfaction of the court that that person is the father of that child."

(5) In section 43, for subsection (3) there shall be substituted the following subsection—

"(3) Any order for the payment of money made by a magistrates' court under this Part of this Act shall be enforceable as a magistrates' court maintenance order within the meaning of section 150 of the Magistrates' Courts Act 1980."

1980 c. 43.

(6) Section 45 (application by the custodian of a non-marital child for an affiliation order) shall cease to have effect.

EXPLANATORY NOTES

**Clause 14*

1. This clause makes amendments to Part II of the Children Act 1975 in consequence of the abolition of affiliation proceedings by custodians and brings the law relating to custodianship into line with the changed law relating to guardianship, as recommended in paragraph 14.13 of the Report.

2. *Subsection (1)* is self-explanatory.

3. *Subsection (2)* which repeals section 34(3) of the Children Act 1975 is a corollary of the repeal of section 45 of that Act which provides for affiliation proceedings on the application of a custodian (*subsection (5)* below). As a result of these repeals, financial orders against a father in respect of his non-marital child who is subject to a custodianship order will be available under section 34 of the Children Act 1975 in the same way as if the child had been of marital birth.

4. *Subsection (3)* is consequential upon abolishing affiliation proceedings by a local authority in respect of a child in care (as to which see n. 137 to paragraph 6.50 of the Report; and clause 21 of the Bill). The effect of this subsection is that the local authority will, under section 36(5) of the Children Act 1975 (as substituted by section 68 of the Domestic Proceedings and Magistrates' Courts Act 1978), be able to apply for a periodical payments order from a parent in respect of a child who has been taken into care upon the revocation of a custodianship order (section 36 of the Children Act 1975) whether the child is marital or non-marital.

5. *Subsection (4)* inserts a new section 36A into the Children Act 1975 which provides that the court may only make a financial order against the father of a non-marital child on the application of a custodian in the course of custodianship proceedings, or on the application of a local authority where the child has been received into care on the revocation of a custodianship order, if paternity is proved or admitted. This provision is similar to clause 11 (guardianship proceedings).

6. *Subsection (5)* substitutes a new section 43(3) of the Children Act 1975 for the existing subsection; it provides that orders are to be enforceable as magistrates' court maintenance orders instead of as affiliation orders: see note 3 to clause 1 above.

7. *Subsection (6)* abolishes affiliation orders in custodianship proceedings and corresponds with the abolition of affiliation proceedings generally (clause 1 above).

Alteration of maintenance agreements made in respect of non-marital children

Alteration during lives of parties of maintenance agreement made in respect of non-marital child.

15.—(1) In this section and in section 16 of this Act "maintenance agreement" means any agreement in writing made, whether before or after the commencement of this Act, in respect of a non-marital child between the mother of the child and a person who acknowledges in the agreement that he is the father of the child, being an agreement which contains provisions in respect of the making or securing of payments, or the disposition or use of any property, for the maintenance or education of the child; and any such provisions are in this section and in section 16 referred to as "financial arrangements".

(2) Where a maintenance agreement is for the time being subsisting and each of the parties to the agreement is for the time being either domiciled or resident in England and Wales, then, subject to subsection (4) below, either party may apply to the High Court, a county court or a magistrates' court for an order under this section.

(3) If the court to which the application is made is satisfied either—

(*a*) that, by reason of a change in the circumstances in the light of which any financial arrangements contained in the agreement were made (including a change foreseen by the parties when making the agreement), the agreement should be altered so as to make different financial arrangements, or

(*b*) that the agreement does not contain proper financial arrangements with respect to the child.

then, subject to subsections (4) and (5) below, that court may by order make such alterations in the agreement by varying or revoking any financial arrangements contained in it as may appear to that court to be just having regard to all the circumstances; and the agreement shall have effect thereafter as if any alteration made by the order had been made by agreement between the parties and for valuable consideration.

EXPLANATORY NOTES

Clause 15

1. Clauses 15 and 16 implement the recommendations made in paragraph 14.18 of the Report. They reproduce for non-marital children the substance of the law relating to the alteration of written maintenance agreements which is contained in sections 35 to 36 of the Matrimonial Causes Act 1973 and which at present applies only to parties to a marriage.

2. Clause 15 deals with the alteration of written maintenance agreements during the lifetime of either party. It corresponds generally with sections 34 and 35 of the Matrimonial Causes Act 1973 and implements the recommendations made in paragraph 14.18 of the Report.

Subsection (1)

3. This subsection defines "maintenance agreement" and "financial arrangements" for the purposes of the two clauses. It corresponds with section 34(2) of the Matrimonial Causes Act 1973, but it applies only to non-marital children for whom separate provision has to be made because the corresponding provision in the Matrimonial Causes Act 1973 deals with maintenance agreements for children which are made between spouses. The subsection provides that only the mother and the person acknowledging himself in the agreement to be the father of the non-marital child come within its terms.

Subsection (2)

4. This subsection, which provides for application to the High Court, a county court or a magistrates' court to vary a maintenance agreement, corresponds to section 35(1) of the Matrimonial Causes Act 1973.

Subsection (3)

5. This subsection reproduces the effect of section 35(2) of the Matrimonial Causes Act 1973 with necessary modifications which are due to the powers being exercisable only in relation to children; for the purposes of the subsection it is assumed (unlike the corresponding provision of the Matrimonial Causes Act 1973) that some financial arrangements were originally made in the agreement whose terms it is desired to alter.

(4) A magistrates' court shall not entertain an application under subsection (2) above unless both the parties to the agreement are resident in England and Wales and at least one of the parties is resident in the commission area for which the court is appointed, and shall not have power to make any order on such an application except—

(*a*) in a case where the agreement contains no provision for periodical payments by either of the parties, an order inserting provision for the making by one of the parties of periodical payments for the maintenance of the child;

(*b*) in a case where the agreement includes provision for the making by one of the parties of periodical payments, an order increasing or reducing the rate of, or terminating, any of those payments.

(5) Where a court decides to alter, by order under this section, an agreement by inserting provision for the making or securing by one of the parties to the agreement of periodical payments for the maintenance of the child or by increasing the rate of the periodical payments required to be made or secured by one of the parties for the maintenance of the child, then, in deciding the term for which under the agreement as altered by the order the payments or, as the case may be, the additional payments attributable to the increase are to be made or secured for the benefit of the child, the court shall apply the provisions of
1971 c. 3. subsections (1) and (2) of section 12 of the Guardianship of Minors Act 1971 as if the order in question were an order under section 9(3)(*a*) or (*b*) of that Act.

(6) For the avoidance of doubt it is hereby declared that nothing in this section affects any power of a court before which any proceedings between the parties to a maintenance agreement are brought under any other enactment to make an order containing financial arrangements or any right of either party to apply for such an order in such proceedings.

Clause 15 (continued)

Subsection (4)

6. This subsection corresponds to section 35(3) of the Matrimonial Causes Act 1973. It provides that magistrates' courts may only exercise jurisdiction under the clause to deal with unsecured periodical payments and where parties are resident in England and Wales (and one is resident in the relevant commission area). The subsection implements the recommendation made in paragraph 14.18 of the Report.

Subsection (5)

7. This subsection reproduces with necessary modifications the effect of section 35(5) of the Matrimonial Causes Act 1973. Its purpose is to ensure that the same rules apply to the duration of maintenance agreements for non-marital children which are altered by an order under this clause as apply to orders for financial relief under section 9 of the Guardianship of Minors Act 1971.

Subsection (6)

8. This subsection, which ensures that any other financial proceedings between parties to a maintenance agreement should not be prejudiced by the powers conferred in this clause, reproduces with necessary modifications the effect of section 35(6) of the Matrimonial Causes Act 1973.

Alteration after death of one party of maintenance agreement made in respect of non-marital child.

16.—(1) Where a maintenance agreement within the meaning of section 15 of this Act provides for the continuation, after the death of one of the parties, of payments for the maintenance of a non-marital child and that party dies domiciled in England and Wales, the surviving party or the personal representatives of the deceased party may, subject to subsections (2) and (3) below, apply to the High Court or a county court for an order under that section.

(2) An application under this section shall not, except with the permission of the High Court or a county court, be made after the end of a period of six months from the date on which representation in regard to the estate of the deceased is first taken out.

(3) A county court shall not entertain an application under this section, or an application for permission to make an application under this section, unless it would have jurisdiction to hear and determine proceedings for an order under section 2 of the Inheritance (Provision for Family and Dependants) Act 1975 in relation to the deceased's estate by virtue of subsection (1) of section 22 of that Act (which confers jurisdiction on county courts in proceedings under that Act, if the value of the property mentioned in that subsection does not exceed such sum as may be fixed by order of the Lord Chancellor, at the passing of this Act £30,000).

1975 c. 63.

(4) If a maintenance agreement is altered by a court on an application made in pursuance of subsection (1) above, the like consequences shall ensue as if the alteration had been made, immediately before the death, by agreement between the parties and for valuable consideration.

(5) The provisions of this section shall not render the personal representatives of the deceased liable for having distributed any part of the estate of the deceased after the expiration of the period of six months referred to in subsection (2) above on the ground that they ought to have taken into account the possibility that a court might permit an application by virtue of this section to be made by the surviving party after that period; but this subsection shall not prejudice any power to recover any part of the estate so distributed arising by virtue of the making of an order in pursuance of this section.

EXPLANATORY NOTES

Clause 16

1. This clause, which deals with the matter discussed in paragraphs 6.45 to 6.46 of the Report, is supplementary to clause 15 and covers the case where it is desired to alter a maintenance agreement after one of the parties to the agreement has died. It corresponds to section 36 of the Matrimonial Causes Act 1973 and extends to non-marital children the powers available under that Act in respect of marital children.

Subsection (1)

2. This subsection, which allows the surviving party or a personal representative of the deceased party to apply to the court for an order varying a maintenance agreement, reproduces with necessary modifications the effect of section 36(1) of the Matrimonial Causes Act 1973.

Subsection (2)

3. This subsection, which is self-explanatory, is identical in its terms to section 36(2) of the Matrimonial Causes Act 1973.

Subsection (3)

4. This subsection limits the jurisdiction of the county court in line with that court's powers to deal with applications for reasonable financial provision out of the deceased's estate under the Inheritance (Provision for Family and Dependants) Act 1975. It corresponds to the substituted section 36(3) of the Matrimonial Causes Act 1973.

Subsection (4)

5. This subsection is identical in its terms to section 36(4) of the Matrimonial Causes Act 1973.

Subsection (5)

6. This subsection is identical in its terms to section 36(5) of the Matrimonial Causes Act 1973. It gives the personal representatives the same immunity from liability, and the applicants a similar right to recover property, as in relation to variation of secured periodical payments orders: see the new section 12D(2) of the Guardianship of Minors Act 1971 (clause 9 above).

(6) In considering for the purposes of subsection (2) above the question when representation was first taken out, a grant limited to settled land or to trust property shall be left out of account and a grant limited to real estate or to personal estate shall be left out of account unless a grant limited to the remainder of the estate has previously been made or is made at the same time.

1975 c. 63.

(7) Subsection (3) of section 22 of the Inheritance (Provision for Family and Dependants) Act 1975 (which enables rules of court to provide for the transfer from a county court to the High Court or from the High Court to a county court of proceedings for an order under section 2 of that Act) and paragraphs (*a*) and (*b*) of subsection (4) of that section (provisions relating to proceedings commenced in the county court before the coming into force of an order of the Lord Chancellor under that section) shall apply in relation to proceedings consisting of any such application as is referred to in subsection (3) above as they apply in relation to proceedings for an order under section 2 of that Act.

Clause 16 (continued)

Subsection (6)

7. This subsection reproduces with necessary modifications the effect of section 36(6) of the Matrimonial Causes Act 1973 and also corresponds to the new section 12D(4) of the Guardianship of Minors Act 1971 (see clause 9 above).

Subsection (7)

8. This subsection, which deals with transfer of proceedings between the High Court and the county court, is identical in its terms to the substituted section 36(7) of the Matrimonial Causes Act 1973.

Adoption of non-marital children

Amendment of provisions of Adoption Act 1976 relating to adoption of non-marital children.

17.—(1) In section 72(1) of the Adoption Act 1976 (which contains a definition of "guardian" for the purposes of the provisions of that Act relating to agreement to adoption) in the definition of "guardian" for paragraph (*b*) there shall be substituted the following paragraph—

1976 c. 36.

"(*b*) in the case of an illegitimate child, includes the father where—

(i) he has a right of access or any other parental right in relation to the child by virtue of an order under section 8 or 9(1) of the Guardianship of Minors Act 1971, or

1971 c. 3.

(ii) he has custody of the child by virtue of an order under section 2 of the Illegimitate Children (Scotland) Act 1930."

1930 c. 33.

(2) In section 18 of that Act (which relates to orders declaring a child free for adoption) for subsection (7) there shall be substituted the following subsection—

"(7) Before making an order under this section in the case of illegitimate child whose father is not his guardian, the court shall satisfy itself in relation to any person claiming to be the father that either—

(*a*) he has no intention of applying under the Guardianship of Minors Act 1971 for an order giving him a right of access or any other parental right in relation to the child, or

(*b*)if he did apply under that Act for a right of access or any other parental right the application would be likely to be refused."

EXPLANATORY NOTES

Clause 17

1. This clause makes changes in the legal position of the father of a non-marital child as regards the making of an adoption order in respect of that child; and as regards the making of an order freeing the child for adoption. These matter are discussed in paragraphs 9.2 to 9.14 of the Report. References are to section 72(1) of the consolidating Adoption Act 1976 which is not yet in force. Section 107(1) of the Children Act 1975 remains the relevant provision in force for the moment: see paragraph 5 of Schedule 3 to the Bill.

2. This clause uses the word "illegitimate" because under the present law (Adoption Act 1976, s. 39(4)) an adopted child is, by his adoption, prevented from being "illegitimate". Moreover, a custody order may have been made under the law of Scotland which uses the expressions "legitimate" and "illegitimate" (see paragraph 1(*b*)(ii) of section 72(1) of the 1976 Act as substituted by this clause).

Subsection (1)

3. This subsection re-enacts section 72(1)(*b*)(i) of the Adoption Act 1976 so as to implement the recommendation made in paragraph 14.46 of the Report that the father of a non-marital child should be a "guardian" of the child, and hence be a person whose agreement to the child's adoption is required under section 16 of the Adoption Act 1976, if he has any parental rights by court order. An order conferring a right of access is sufficient for this purpose. Under the existing law only a father with a custody order is a "guardian" for this purpose.

4. This subsection also re-enacts, without change, paragraph (*b*)(ii) of section 72(1) of the Adoption Act 1976 which deals with custody orders made in Scotland.

Subsection (2)

5. This subsection deals with the case where it is sought to make an order freeing for adoption a child whose father is not a "guardian". (If a father is a "guardian" his agreement to the adoption is required in the same way as any other parent or guardian: Adoption Act 1976 s. 18(1); Children Act 1975 s. 14(1)). This subsection re-enacts section 18(7) of the Adoption Act 1976 (section 14(8) of the Children Act 1975) with one change, corresponding to the change effected by subsection (1): the court will require to be satisfied that the father of a non-marital child has no intention of applying, or no prospect of success on such an application, for an access order or an order giving him any parental rights. Under the existing provision the court has only to be satisfied in relation to the likelihood of the father obtaining a custody order.

Consents to marriages of children under 18

Consents to marriages of children under 18.

1949 c. 76.

18. In Schedule 2 to the Marriage Act 1949 (consents required to marriages of children under 18) for Part II there shall be substituted the provisions of Schedule 1 to this Act.

EXPLANATORY NOTES

Clause 18

This clause is self-explanatory. It implements the recommendations made in paragraph 14.48 of the Report; see the notes to Schedule 1 to the Bill.

Amendment of other enactments

Meaning of "parent" in Children and Young Persons Act 1969.

1969 c. 54.

19. In section 70 of the Children and Young Persons Act 1969 (Interpretation) after subsection (1) there shall be inserted the following subsection—

"(1A) Where an order of any court is in force giving the right to the actual custody of a non-marital child to the father of the child, any reference in this Act to the parent of that child includes a reference to the father.

In this subsection 'actual custody', in relation to a child, means the actual possession of his person and 'non-marital child' has the same meaning as in the Family Law Reform Act 1982".

EXPLANATORY NOTES

Clauses 19–23

These clauses amend enactments relating to children who are in care or are in receipt of benefits under the National Assistance Act 1948 or the Supplementary Benefits Act 1976.

Clause 19

This clause implements the recommendation made in paragraph 14.36 of the Report that the father of a non-marital child should be treated as a "parent" for the purposes of the Children and Young Persons Act 1969 if he has an order giving him the right to the actual custody of the child. The relevance of being a "parent" under the Children and Young Persons Act 1969 is chiefly in relation to receiving notices of proceedings, to making applications on the child's behalf and to the payment of compensation where the child has committed an offence: see paragraph 7.52 of the Report. The definition of "actual custody" is in accordance with section 87(1) of the Children Act 1975; as to the definition of "non-marital child", see clause 37 of the Bill.

Meaning of "parent" in Child Care Act 1980.

1980 c. 5.

20.—(1) For subsection (2) of section 8 of the Child Care Act 1980 (application of foregoing provisions of that Act in relation to a child who is the subject of a custody order) there shall be substituted the following subsection—

"(2) Where an order of any court is in force giving the right to the actual custody of a child to any person, the provisions of this Part of this Act shall have effect in relation to the child as if for references to the parents or guardian of the child or to a parent or guardian of his there were substituted references to that person, except that where, in the case of an order in force under section 8(1)(*a*) of the Guardianship of Minors Act 1971, the court directs that the actual custody of a non-marital child shall be shared between the mother and father of the child, both the mother and father of that child shall be treated as parents for the purposes of those provisions.

In this subsection 'actual custody', in relation to a child, means the actual possession of his person."

(2) In section 13 of that Act (penalty for assisting children in care to run away etc.) for subsection (4) there shall be substituted the following subsection—

"(4) Section 8(2) of this Act shall apply for the purposes of this section as it applies for the purposes of provisions of Part I of this Act."

(3) In section 24(4) of that Act (emigration of children) there shall be inserted at the end the words "and section 8(2) of this Act shall apply for the purposes of subsection (2) above as it applies for the purposes of the provisions of Part I of this Act."

(4) In section 64 of that Act (transfer of parental rights and duties to voluntary organisations) there shall be added at the end the following subsection—

"(8) Section 8(2) of this Act shall apply for the purposes of this and the next following section as it applies for the purposes of the provisions of Part I of this Act".

(5) In section 87(1) of that Act (Interpretation) for the definition of "parent" there shall be substituted the following definitions—

" 'marital child' and 'non-marital child' have the same meanings as in the Family Law Reform Act 1982;

'parent' in relation to a non-marital child, includes (except in Part I and sections 13(2), 24, 64 and 65) the father of the child;".

EXPLANATORY NOTES

Clause 20

1. This clause defines the word "parent" for the purposes of the Child Care Act 1980 so as to include the father of a non-marital child in appropriate circumstances, thus implementing the recommendations made in paragraph 14.35 of the Report. Under the Child Care Act 1980 such a father is treated as a parent for certain purposes of the Act if he has "custody" of the child by court order (sections 8(2), 13(4) and 66(2)); this clause redefines "parent" in terms consistent with the conceptual framework of the Children Act 1975: see note 2 to clause 3 above.

2. This clause provides that for certain purposes the father of a non-marital child is only treated as a parent if he has an order giving him the right to actual custody. These purposes are—

(*a*) rights to demand the return of a child from "voluntary" care and to resist an assumption by the local authority of parental rights and duties (Part I of the Act);

(*b*) the right to remove a child from "voluntary" care on giving 28 days' notice (s. 13);

(*c*) the right to be consulted on the question of the child's emigration (s. 24);

(*d*) rights in connection with children in the care of voluntary organisations (ss. 64 and 65);

For other purposes of the Act *all* fathers of non-marital children are treated as "parents". These purposes are—

(*a*) recovery of funeral expenses from parent and payment to parent of certain expenses of visiting child or attending funeral (ss. 25 and 26);

(*b*) parental contributions towards the maintenance of children in care (ss. 45–48 as re-enacted).

Subsection (1)

3. This subsection re-enacts section 8(2) of the Child Care Act 1980 with two changes. Under the existing subsection where there is an order for custody the person given custody is treated as a "parent" for the purposes of Part I of the Act. In this way the father of an illegitimate child may become a "parent"; and, in the case of a legitimate child, a sole custody order (in divorce proceedings, for example) will make the custodial parent the only "parent" for these purposes.

4. The first change effected by this subsection is the replacement of the concept of "custody" by the concept of the "right to actual custody", thus bringing the provision into line with other legislation (compare section 11A of the Guardianship of Minors Act 1971 as amended by section 37 of the Domestic Proceedings and Magistrates' Courts Act 1978). It will cover "custody" orders made by divorce courts which deal with the right to actual custody by orders either for "custody" or for "care and control".

5. The second change relates to orders giving shared actual custody under a "parental rights" order (Guardianship of Minors Act 1971, s. 8(1)(*a*) and (3) as substituted in this Bill: see clause 4 above and Schedule 4 below). Under such an order both the mother and father will be treated as "parents".

Clause 20 (continued)

Subsection (2)

6. This subsection applies section 8(2) of the Child Care Act 1980 as substituted: see *subsection (1)* above. Under section 13 of the Act, it is a criminal offence to assist a child in care to run away, to remove him without lawful authority, or to harbour him; and, under section 13(2), the ambit of the offence is extended to children in "voluntary" care in respect of whom no parental rights resolution by the local authority is in force. For these purposes a parent does not have "lawful authority" to remove a child who has been in care throughout the preceding six months but such a parent may give 28 days' notice of his intention to remove the child. The new section 13(4) (which is substituted by this subsection) provides that any person, including the father of a non-marital child, who has an order giving him the right to the actual custody of the child qualifies as a "parent" for this purpose, as under section 8(2). The changes effected by this subsection correspond to those in subsection (1), i.e. substituting a right of actual custody for custody and dealing with orders for shared actual custody.

Subsection (3)

7. This subsection applies section 8(2) of the Act (see *subsection (1)* above) in relation to the power of the local authority to arrange for the emigration of children in care. The subsection provides that anyone who is a parent within the meaning of section 8(2), i.e. any person who has the right to actual custody, has a right to be consulted on the question of the child's emigration.

Subsection (4)

8. This subsection applies section 8(2) of the Act (see *subsection (1)* above) in cases of transfer of parental rights and duties to voluntary organisations (section 64) and from voluntary organisations to the local authority (section 65). The subsection provides that anyone who is a parent within the meaning of section 8(2), i.e. any person who has the right to actual custody, is a parent for the purposes of these two sections.

Subsection (5)

9. This subsection extends the definition of "parent" to include any father of a non-marital child (whether or not the father has actual custody) for the purposes of the Child Care Act 1980 except for those provisions dealing with parental rights which have been specifically dealt with: see note 1 above.

Contributions in respect of children in care of local authorities.

1980 c. 5.

21. In Part V of the Child Care Act 1980 (which relates to contributions towards the maintenance of children in the care of local authorities)—

(*a*) in section 45, for subsection (1) there shall be substituted the following subsection—

"(1) Where—

(*a*) a child is in the care of a local authority under section 2 of this Act, or

(*b*) a child is in the care of a local authority by virtue of a care order (other than an interim order),

then, whether the child is a marital or non-marital child, the following persons (and no others) shall be liable to make contributions in respect of the child, that is to say—

(i) if the child has not attained the age of 16, the father and the mother of that child, and

(ii) if the child has attained the age of 16 and is engaged in remunerative full-time work, the child himself."

(*b*) in section 47 (which relates to contribution orders) after subsection (2) there shall be inserted the following subsection—

"(2A) Where, on an application under subsection (1) above in respect of a non-marital child, the person alleged by a local authority to be the father of the child does not in the proceedings on that application admit that he is the father, the court shall not make a contribution order requiring him to make any contribution in respect of the child unless it is proved to the satisfaction of the court that he is the father of that child.";

(*c*) in section 47, for subsection (4) there shall be substituted the following subsection—

"(4) A contribution order shall be enforceable as a magistrates' courts maintenance order within the meaning of section 150(1) of the Magistrates' Courts Act 1980, except that any powers conferred on a magistrates' court by that Act shall as respects a contribution order be exercisable, and exercisable only, by a magistrates' court appointed for the commission area where the contributor is for the time being residing.";

1980 c. 43.

(*d*) at the end of section 47 there shall be added the following subsection—

"(5) Where a contribution order is made requiring the father of a non-marital child to make contributions in respect of the child, the father shall keep the local authority to whom the contributions are required to be made informed of his address; and if he fails to do so, he shall be guilty of an offence and liable on summary conviction to a fine not exceeding £25.";

(*e*) sections 49 and 50 (which relate to affiliation orders) shall cease to have effect.

EXPLANATORY NOTES

Clause 21

1. This clause implements the recommendation made in paragraph 14.20 of the Report and amends sections 45 and 47 of the Child Care Act 1980 in consequence of the abolition of affiliation proceedings.

2. Paragraph (*a*) amends section 45(1) of the Child Care Act 1980 (which sets out the liability to make contributions in respect of children in care) so as to include in its scope both the father and the mother of the non-marital child.

3. Paragraph (*b*) inserts a new subsection (2A) into section 47 of the Child Care Act 1980 which deals with contribution orders made by a magistrates' court on application by the local authority which has the child in its care. The new subsection deals with proof of paternity on the same lines as clause 11 (Guardianship of Minors Act proceedings) and clause 14(4) (custodianship proceedings).

4. Paragraph (*c*) is consequential on the abolition of affiliation proceedings. It provides that contribution orders are to be expressed to be enforceable as magistrates' courts' orders under the Magistrates' Courts Act 1980 instead of (as under the existing law) as affiliation orders: see note 3 to clause 1 above.

5. Paragraph (*d*) provides that a father who is ordered to make contributions in respect of his non-marital child is required to keep the local authority informed of his address. Such an obligation will be imposed by section 9 of the Act (as amended) on any parent who is entitled, by operation of law or court order, to the actual custody of the child; and it is clearly appropriate that a father who has been ordered to contribute should be obliged to keep the authority informed of his whereabouts. However, it is considered oppressive to impose such an obligation on other fathers.

6. Paragraph (*e*) repeals the provisions which relate to affiliation orders.

Recovery of cost of assistance provided under National Assistance Act 1948 for non-marital children.
1948 c. 29.

22.—(1) In section 42 of the National Assistance Act 1948 (which relates to the liability to maintain a spouse and children) for subsection (2) there shall be substituted the following subsection—

"(2) In subsection (1) of this section the reference to a man's children includes a reference to his non-marital children and the reference to a woman's children includes a reference to her non-marital children.

In this subsection and in subsection (7) of section 43 of this Act 'non-marital child' has the same meaning as in the Family Law Reform Act 1982."

(2) In section 43 of that Act (which provides for the recovery of the cost of the provision of accommodation from persons liable for maintenance) for subsection (6) there shall be substituted the following subsections—

"(6) An order under this section shall be enforceable as a magistrates' court maintenance order within the meaning of section 150(1) of the Magistrates' Courts Act 1980.
1980 c. 43.

(7) Where a complaint is made under this section against a man as the father of a non-marital child, then, if the respondent does not in the proceedings on the complaint admit that he is the father of the child, the court shall not make an order under this section unless it is proved to the satisfaction of the court that the respondent is the father of that child."

(3) Section 44 of that Act (which relates to affiliation orders) shall cease to have effect.

EXPLANATORY NOTES

Clause 22

1. This clause, which implements the recommendation made in paragraph 14.20 of the Report, makes amendments to the provisions of the National Assistance Act 1948 which relate to maintenance for children for whom a local authority arranges accommodation under that Act. The amendments are consequential upon the abolition of affiliation proceedings and the bringing of non-marital children within the same provisions as marital children.

Subsection (1)

2. This subsection substitutes a new subsection for section 42(2) of the National Assistance Act 1948 and thereby brings non-marital children into section 42 of the Act which imposes a liability on both parents to maintain their child.

Subsection (2)

3. This subsection makes two changes regarding the procedure for recovering the cost of assistance from persons liable for maintenance. First, section 43(6) of the 1948 Act provides that orders under section 43 will henceforth be expressed to be enforceable as magistrates' court maintenance orders instead of affiliation orders: see generally note 3 to clause 1 of the Bill. Secondly, a new section 43(7) provides for paternity to be proved on the same lines as clause 11 (Guardianship of Minors Act proceedings), clause 14(4) (custodianship proceedings) and clause 21 (contribution proceedings).

Subsection (3)

3. This subsection repeals the provision which relates to affiliation orders.

Recovery of expenditure on supplmentary benefits in respect of non-marital children.

23.—(1) In section 17 of the Supplementary Benefits Act 1976 (liability to maintain a spouse and children) after subsection (1) there shall be inserted the following subsection—

"(1A) In subsection (1) above the reference to a man's children includes a reference to his non-marital children and the reference to a woman's children includes a reference to her non-marital children.

1976 c. 71.

In this subsection and in section 18(2) of this Act 'non-marital child' has the same meaning as in the Family Law Reform Act 1982."

(2) In section 18 of that Act (which provides for the recovery of expenditure on supplementary benefits from persons liable for maintenance)—

(*a*) for subsection (2) there shall be substituted the following subsection—

"(2) Except in a case falling within section 17(1)(*c*) of this Act, where a complaint is made under this section against a man as the father of a non-marital child, then, if the respondent does not in the proceedings on the complaint admit that he is the father of the child, the court shall not make an order under this section unless it is proved to the satisfaction of the court that the respondent is the father of the child";

(*b*) for subsection (7) there shall be substituted the following subsection—

"(7) An order under this section shall be enforceable as a magistrates' court maintenance order within the meaning of section 150(1) of the Magistrates' Courts Act 1980.".

1980 c. 43.

(3) Section 19 of that Act (which relates to affiliation orders) shall cease to have effect.

EXPLANATORY NOTES

Clause 23

1. This clause makes amendments to the Supplementary Benefits Act 1976 which are consequential upon abolishing affiliation proceedings, thus implementing the recommendation made in paragraph 14.20 of the Report.

Subsection (1)

2. This subsection inserts a new section 17(1A) into the Supplementary Benefits Act 1976 and thereby brings non-marital children within section 17 (which imposes a liability on all parents to maintain their children).

Subsection (2)

3. This subsection corresponds to section 43 of the National Assistance Act 1948 as amended in clause 22(2) above. Paragraph (*a*) replaces section 18(2) of the Supplementary Benefits Act 1976 (which prevents the father of an illegitimate child from being proceeded against as a "liable relative"), with a new subsection which deals with the proof of paternity on the same lines as in clauses 11, 14(4), 21 and 22(2) above.

4. This subsection refers to the exception under section 17(1)(*c*) of the Supplementary Benefits Act 1976, which applies where a man has given an undertaking under the immigration rules to be responsible for the maintenance of a dependant: he will remain liable to do so even though the dependant was of non-marital birth and the man's paternity has not been proved.

5. For paragraph (b) of the subsection, see note 3 on clause 1 of the Bill.

Subsection (3)

6. This subsection abolishes affiliation orders in relation to supplementary benefits.

PART II

PROPERTY RIGHTS

Succession on intestacy.
1969 c. 46.

24.—(1) In section 14 of the Family Law Reform Act 1969 (which enables an illegitimate child to succeed on the intestacy of parents and parents to succeed on the intestacy of an illegitimate child) for subsections (1) to (5) there shall be substituted the following subsections—

"(1) Where any person dies intestate in respect of all or any of his real or personal property, an illegitimate person, and any person related to an illegitimate person, shall be entitled to take any interest therein as if the illegitimate person had been born legitimate.

(2) For the purposes of subsection (1) of this section, an illegitimate person shall be presumed not to have been survived by his father or by any person related to him through his father, unless the contrary is shown."

(2) The amendment by this section of section 14 of the Family Law Reform Act 1969 does not affect any rights under the intestacy of a person dying before the coming into force of this section; and section 14 of that Act, as it has effect immediately before the coming into force of this section, shall continue to have effect in relation to a person dying, or in relation to an instrument inter vivos made, after the coming into force of that section and before the coming into force of this section.

(3) In section 17 of the Family Law Reform Act 1969 (which provides protection for trustees and personal representatives) in paragraph (*a*) after the words "the father of" there shall be inserted the words "or on any person related through the father to".

EXPLANATORY NOTES

Clauses 24 to 26

1. These clauses implement the recommendations made in Part VIII of the Report (see paragraphs 14.37 to 14.45) in relation to rights of succession to property so as to equate the legal entitlement of those of non-marital birth and those of marital birth.

2. In these clauses, the word "illegitimate" has been retained because it has been necessary to differentiate between non-marital children who have been legitimated by the subsequent marriage of their parents and those who have not. It is not possible to treat legitimated children as "marital children" for the purposes of succession because some of the provisions of Part II of the Family Law Reform Act 1969 (which this Part of the Bill amends) apply not only to illegitimate children but to children who are born illegitimate and subsequently legitimated. It is, on the other hand, not possible to treat legitimated children as "non-marital children" because that would conflict with the provisions of the Legitimacy Act 1976 (see in particular section 3). Accordingly, in view of the difficulties of adapting the phrase "marital children" for the purposes of Part II of this Bill, the word "illegitimate" (which does not include the legitimated) is used.

Clause 24

1. This clause makes amendments to Part II of the Family Law Reform Act 1969 so as to implement the recommendations made in paragraphs 14.37 and 14.42–14.43 of the Report concerning rights of intestate succession.

Subsection (1)

2. This subsection substitutes two new subsections for section 14(1) to (5) of the Family Law Reform Act 1969.

(*a*) The new section 14(1) of the Act extends intestate succession rights so that illegitimacy becomes irrelevant for the purpose of entitlement on intestacy, whether by an illegitimate person or to his estate. The rights extend to cases where both the intestate and the claimant are illegitimate; and where the claimant traces his relationship through someone who is illegitimate.

(*b*) The new section 14(2) of the Act extends the presumption of non-survivorship (which is at present contained in section 14(4) of the Family Law Reform Act 1969 and applies to the father of an illegitimate intestate) to all the relatives of an illegitimate deceased on the paternal side. This is a rule of convenience which has been enlarged in consequence of the extension of rights of intestate succession to such relatives: see paragraphs 8.30–8.33 of the Report.

Subsection (2)

3. This subsection provides that the clause does not operate retrospectively: it does not affect rights in relation to deaths occurring before the clause is brought into force, and it preserves the existing section 14 in relation to deaths occurring (or deeds made) between the commencement of section 14 of the Family Law Reform Act 1969 and the commencement of this clause.

Subsection (3)

4. This subsection implements the recommendation made in paragraph 14.42 of the Report by extending the protection conferred on trustees and personal representatives by section 17 of the Family Law Reform Act 1969 so as to cover claims by persons who become entitled as a result of the extension of intestate succession effected by subsection (1) above. Under the existing law personal representatives may distribute property without having ascertained that there are persons who claim to be entitled as illegitimate children or issue or fathers of illegitimate intestates (there is no similar protection in respect of claims by mothers: see paragraph 8.29 of the Report). This clause extends such protection to cover claims by remoter relations on the paternal side.

Construction of dispositions. 1969 c. 46.

25.—(1) In relation to any disposition made after the coming into force of this section, the application of section 15(1) of the Family Law Reform Act 1969 (which provides that, unless any contrary intention appears, references to children and other relatives include references to, and to persons related through, illegitimate children) shall not be restricted to cases where the reference in question is to a person who is to benefit or to be capable of benefiting under the disposition or, for the purpose of designating such a person, to someone else to or through whom that person is related, and accordingly in section 15(2) of that Act for the words from the beginning to "but that subsection" there shall be substituted the words "Subsection (1) of this section".

(2) In section 15 of the Family Law Reform Act 1969 after subsection (3) there shall be inserted the following subsections—

"(3A) Where, in any disposition made after the coming into force of section 25 of the Family Law Reform Act 1982, the word "heir" or "heirs" is used otherwise than for the creation of an entailed interest, then, notwithstanding anything in section 132 of the Law of Property Act 1925, a person shall not be excluded from taking an interest under that disposition by reason only that he or any person related to him was born illegitimate. 1925 c. 20.

(3B) Where a disposition which creates an entailed interest in any real or personal property is made after the date on which section 25 of the Family Law Reform Act 1982 come into force, a person born illegitimate, and any person descended from or through a person born illegitimate, shall be entitled to take an interest by descent under that disposition as if the person born illegitimate had been born legitimate, unless the contrary intention appears."

(3) Nothing in this section shall affect the operation or construction of any disposition made before the coming into force of this section; and section 15 of the Family Law Reform Act 1969, as it has effect immediately before the coming into force of this section, shall continue to have effect in relation to a disposition made after the coming into force of that section and before the coming into force of this section.

(4) Notwithstanding any rule of law, a disposition made by will or codicil executed before the date on which this section comes into force shall not be treated for the purposes of this section as made on or after that date by reason only that the will or codicil is confirmed by a codicil executed on or after that date.

EXPLANATORY NOTES

Clause 25

1. This clause effects reforms benefiting illegitimate persons in relation to succession under dispositions (including entailed interests). These matters are discussed in paragraphs 8.15 to 8.25 of the Report.

Subsection (1)

2. This subsection removes the restriction (contained in section 15(2) of the Family Law Reform Act 1969) whereby the operation of the presumption under section 15(1) is confined to cases where a potential beneficiary is being identified. The subsection implements the recommendation made in paragraph 14.38 of the Report.

Subsection (2)

3. This subsection inserts two new subsections after section 15(3) of the Family Law Reform Act 1969. First (see new section 15(3A)) the subsection implements the recommendation made in paragraph 14.39 of the Report to the effect that, other than where entailed interests are being created (as to which see below), the word "heir" is to be construed in relation to any future disposition without necessarily excluding a person from consideration because that person is illegitimate. Section 132 of the Law of Property Act 1925 preserves the pre-1925 rules as to the identification of an "heir"; this subsection allows a person who is illegitimate (or who traces his claim through someone who is illegitimate) to qualify as "heir" if that was the intention. Secondly (see new section 15(3B)) the subsection implements the recommendation made in paragraph 14.40 of the Report so as to enable an illegitimate person, or a person descended from or through someone who is illegitimate, to take under an entailed interest unless there is a contrary intention expressed in the disposition.

Subsection (3)

4. This subsection makes it clear that the above amendments of section 15 do not operate retrospectively and that rights under dispositions made before the implementation of this clause are not affected. The subsection is on similar lines to clause 24(2) above.

Subsection (4)

5. This subsection makes it clear that where a will is made before the implementation of this clause the fact that a codicil confirming the will may be made *after* the clause is implemented will not prevent the will from being treated as having been made *before* implementation of the clause. This provision follows the pattern of section 15(8) of the Family Law Reform Act 1969 and is made necessary because otherwise the dispositions in the will might be governed by the law in force at the date of the later codicil: cf. *Re Rayner* [1903] 1 Ch. 685.

Entitlement to grant of probate or administration

26. After section 16 of the Family Law Reform Act 1969 there shall be inserted the following section—

1969 c. 46.

" **16A.**—(1) For the purpose of determining the person or persons who would in accordance with probate rules be entitled to a grant of probate or administration in respect of the estate of a deceased person, the deceased shall be presumed, unless the contrary is shown, not to have been survived by any person related to him who is illegitimate or by any person whose relationship with the deceased is deduced through a person who is illegitimate.

1981 c. 54.

(2) In this section 'probate rules' means rules of court made under section 127 of the Supreme Court Act 1981.

(3) This section does not apply in relation to a person dying before the coming into force of this section."

EXPLANATORY NOTES

Clause 26

This clause adds a new section 16A to the Family Law Reform Act 1969. *Subsection (1)* implements the recommendation made in paragraph 14.45 of the Report that, for the purposes of obtaining a grant of probate or administration, there should be a rebuttable presumption that the deceased left no surviving relatives who are illegitimate or whose relationship is traced through illegitimacy. *Subsection (2)* is self-explanatory. *Subsection (3)* makes it clear that the clause does not operate retrospectively.

PART III

DECLARATIONS OF PARENTAGE

27.—(1) Any person born in England or Wales may apply—

(*a*) to the High Court, by petition or in such other manner as may be prescribed; or

(*b*) to a divorce county court in the prescribed manner, for a declaration under this section that a person named in the application is his father, that a person so named is his mother or that persons so named are his parents.

(2) Where any person applies by his next friend for a declaration under this section, then, if at any stage of the proceedings on the application the court considers that it would be against the interests of the applicant to determine the application, the court shall refuse to hear or, as the case may be, continue to hear it.

(3) On an application under this section the court may at any stage of the proceedings, of its own motion or on the application of any party to the proceedings, direct that all necessary papers in the matter be sent to the Attorney-General.

(4) Where on an application under this section the Attorney-General requests to be made a party to the proceedings, the court shall order that he shall be added as a party accordingly, and, whether or not he so requests, the Attorney-General may argue before the court any question in relation to the application which the court considers it necessary to have fully argued and take such other steps in relation thereto as he thinks necessary or expedient.

EXPLANATORY NOTES

Clauses 27 to 30

These clauses provide for the making of declarations of parentage and implement the recommendations made in paragraphs 14.52 to 14.61 of the Report.

Clause 27

1. This clause implements the recommendation made in paragraph 14.52 of the Report that there should be power to make a declaration of parentage, there being no such power under the existing law: *Re J. S. (A Minor)* [1981] Fam. 22.

Subsection (1)

2. This subsection provides for the mode of application for declarations of parentage; and the declarations which may be made, i.e. as to the applicant's paternity or maternity (or both). The subsection provides for the High Court and the divorce county court (as to which see clause 30 below) to hear these applications, thus implementing the recommendation made in paragraph 14.59 of the Report. The rules to be prescribed will be Matrimonial Causes Rules: see the note on paragraph 39 of Schedule 2 to the Bill. For reasons given in paragraph 10.21 of the Report, jurisdiction is limited to cases where the applicant was born in England or Wales.

Subsection (2)

3. This subsection, which implements the recommendation made in paragraph 14.53 of the Report, deals with applications for declarations of parentage made by a next friend on behalf of a minor whose parentage is in issue. In order to protect the interests of the minor the court will not hear the application if it would be against the minor's interests to do so; and the court may consider this issue at any stage of the proceedings.

Subsection (3)

4. This subsection, which implements the recommendations in paragraph 14.56 of the Report, provides that the court may direct all necessary papers to be sent to the Attorney-General; it may act of its own motion or on the application of any party to the proceedings including the applicant.

Subsection (4)

5. This subsection provides for the Attorney-General's role in declaration proceedings. Whether or not the court directs that papers be sent to him, the Attorney-General may become a party to proceedings, may argue any question which the court wishes to have argued or may take any other appropriate steps: see generally paragraphs 10.23 to 10.25 of the Report.

(5) The court may direct that notice of any application under this section shall be given in the prescribed manner to such other persons as the court thinks fit, and where notice is so given to any person the court may, either of its own motion or on the application of that person or any party to the proceedings, order that that person shall be added as a party to those proceedings.

(6) Where on an application under this section it is proved to the satisfaction of the court—

(*a*) that a person named in the application is the father, or

(*b*) that a person so named is the mother, or

(*c*) that persons so named are the parents,

of the applicant, the court shall make a declaration accordingly.

(7) Any declaration made under this section shall be in the prescribed form and shall be binding on the parties to the proceedings and any person claiming through a party to the proceedings, and where the Attorney-General is made a party to the proceedings the declaration shall also be binding on Her Majesty.

EXPLANATORY NOTES

Clause 27 (continued)

Subsection (5)

6. This subsection deals with notice of, and parties to, proceedings; notice is given to any person whom the court specifies. The court may direct that that person is to be made a party to the proceedings; and any party to the proceedings or person given notice may apply for that person to be added as a party. Rules will be required as to the manner of giving notice: cf. Matrimonial Causes Rules 1977 (S.I. 1977 No. 344), r. 110(4).

Subsection (6)

7. This subsection, which implements the recommendations made in paragraphs 14.54 and 14.60 of the Report, provides that where the court is satisfied as to the fact of parentage then it must grant the declaration sought.

Subsection (7)

8. This subsection, which implements the recommendation made in paragraph 14.61 of the Report, provides that declarations bind parties to the proceedings and those who claim through them. Where the Attorney-General has been made a party to the proceedings the declaration is binding on the Crown.

Supplementary provisions as to declarations of parentage.

28.—(1) Rules of court may provide that any application for a declaration under section 27 of this Act shall contain such information as may be prescribed and may in particular, but without prejudice to the generality of the foregoing provision, provide that any such application shall contain such information as may be prescribed as to—

(*a*) the nationality or citizenship at the time of the application of the applicant and of any person who is named in the application as a parent of the applicant, and

(*b*) the effect which the establishment of the parentage of the applicant may have on his nationality or citizenship.

(2) Where any costs are incurred by the Attorney-General in connection with any application for a declaration under section 27 of this Act, the court may make such order as it considers just as to the payment by other parties to the proceedings of those costs.

(3) No proceedings under section 27 of this Act shall affect any final judgment or decree already pronounced or made by any court of competent jurisdiction.

(4) The court hearing an application under section 27 of this Act may direct that the whole or any part of the proceedings shall be heard in camera, and an application for a direction under this subsection shall be heard in camera unless the court otherwise directs.

1968 c. 63.

(5) In section 2 of the Domestic and Appellate Proceedings (Restriction or Publicity) Act 1968 (restriction of publicity for certain proceedings)—

(*a*) in subsection (1) there shall be inserted at the end the following paragraph—

"(d) proceedings under section 27 of the Family Law Reform Act 1982 (declarations of parentage);"

(*b*) in subsection (3) after the words "subsection (1)(*a*)" there shall be inserted the words "or (*d*)".

(6) Where a declaration is made under section 27 of this Act, the prescribed officer of the court which made the declaration shall notify the Registrar General in such a manner, and within such period, as may be prescribed of the making of that declaration.

EXPLANATORY NOTES

Clause 28

1. This clause makes provisions as to declaration of parentage consequential upon those in clause 27 above.

Subsection (1)

2. This subsection implements the recommendation made in paragraph 14.57 of the Report that applications for a declaration of parentage should contain information as to the nationality or citizenship of the applicant and his parents and the possible effect which a declaration of parentage might have thereon. It will be for the Matrimonial Causes Rule Committee to decide what if any other information should be required of the applicant.

Subsection (2)

3. This subsection provides for the reimbursement of the Attorney-General's costs by other parties to the proceedings in any case where the Attorney-General has played a part in the proceedings. There is a similar provision in divorce proceedings: see Matrimonial Causes Act 1973, s. 8(1).

Subsection (3)

4. This subsection corresponds to section 45(8) of the Matrimonial Causes Act 1973.

Subsection (4)

5. This subsection corresponds to section 45(9) of the Matrimonial Causes Act 1973 and makes provision for hearing *in camera.*

Subsection (5)

6. Paragraph (*a*) of this subsection applies section 2 of the Domestic and Appellate Proceedings (Restriction of Publicity) Act 1968, which restricts publicity in relation to proceedings for declarations of legitimacy, etc. Paragraph (*b*) applies the provisions of section 1(1)(*b*) of the Judicial Proceedings (Regulation of Reports) Act 1926 to the effect that publicity is limited to giving particulars of the declaration sought.

Subsection (6)

7. This subsection provides for the effect of a declaration of parentage to be reflected on the births register so that the birth may be re-registered in appropriate circumstances: see clause 33 below. This subsection implements the recommendation made in paragraph 14.71 of the Report to the effect that (for example) a person whose birth certificate contains no details of his paternity may apply for a declaration of parentage and, upon obtaining a declaration that a named man is his father, may have his birth re-registered to show his paternity.

Provision as to blood tests.

29.—(1) In any proceedings on an application under section 27 of this Act the court hearing the proceedings may, either of its own motion or on an application by any party to the proceedings, give a direction for the use of blood tests for the purpose of determining whether a person named in the application under that section is or is not a parent of the applicant and for the taking, within a period to be specified in the direction, of blood samples from the applicant, from any person named in the application as a parent of the applicant and from any other person who is party to the proceedings, or from any of those persons.

(2) The person responsible for carrying out blood tests taken for the purpose of giving effect to a direction under subsection (1) above shall make to the court by which the direction was given a report in which he shall state—

(*a*) the results of the tests;

(*b*) whether any person named in an application under section 27 of this Act is or is not excluded by the results from being a parent of the applicant; and

(*c*) if that person is not so excluded, the value, if any, of the results in determining whether that person is a parent of the applicant;

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

1969 c. 46.

(3) Subsections (3) to (5) of section 20 and sections 21 to 25 of the Family Law Reform Act 1969 shall apply in relation to a direction given under subsection (1) above and a report made under subsection (2) above as they apply in relation to a direction given under subsection (1) and a report made under subsection (2) of section 20 of that Act.

(4) Without prejudice to section 23 of the Family Law Reform Act 1969, where in proceedings on an application under section 27 of this Act a court gives a direction under subsection (1) above or under section 20 of that Act for the taking of blood samples, then, if any person named in the direction fails, within such period as may be specified by the court to take any step required of him for the purpose of giving effect to the direction, the court may dismiss the application; and a person shall be deemed for the purposes of this subsection to have failed to take a step so required of him if he fails to consent to the taking of a blood sample from himself or from any person named in the direction of whom he has care and control.

(5) The court may at any time revoke or vary a direction previously given by it under subsection (1) above.

(6) Where a direction is given under subsection (1) above on the application of a party to the proceedings, that party shall pay the cost of taking and testing blood samples for the purpose of giving effect to the direction (including any expenses reasonably incurred by any person in taking any steps required of him for the purpose), and of making a report to the court under this section, but the amount paid shall be treated as costs incurred by him in the proceedings.

EXPLANATORY NOTES

Clause 29

1. This clause makes additional provision as to blood tests in proceedings for a declaration of parentage and implements the recommendations made in paragraph 14.58 of the Report. The chief provisions which are additional to those in the Family Law Reform Act 1969 are—

(*a*) the court may give a direction for the use of blood tests of its own motion: clause 29(1);

(*b*) the court may direct that a blood sample be taken from any party to the proceedings: clause 29(1);

(*c*) the court may dismiss an application if any person named in a blood test direction fails to take a step required for the purpose: clause 29(4).

Additionally this clause provides that blood tests may be used to determine parentage (including maternity) and are not limited to paternity; and for the reason given in paragraph 10.28 of the Report, the purpose of a blood test direction is expressed to be to determine whether or not a person is a parent and not merely whether a person is excluded from being a parent.

Subsection (1)

2. This provision corresponds in part to section 20(1) of the Family Law Reform Act 1969 and provides for the court hearing proceedings for a declaration of parentage to be empowered to direct the use of blood tests. Under section 20(1) of the 1969 Act samples may be taken only from the person whose paternity is at issue, the mother of that person and any party alleged to be the father; under this subsection a sample may be taken from any person who has been made party to the proceedings including, for example, the mother's husband.

Subsection (2)

3. This subsection, which corresponds substantially to section 20(2) of the Family Law Reform Act 1969, is consequential on subsection (1) and provides for the person responsible for carrying out the blood test to report to the court.

Subsection (3)

4. This subsection applies, for the purpose of blood tests made under this clause, the provisions of the Family Law Reform Act 1969 which deal with the form of the tester's report (s. 20(3)); additional explanatory statements by the tester (s. 20(4)); notice to other parties of an intention to call the tester as a witness (s. 20(5)); required consents (s. 21); power to make regulations (s. 22); failure to comply with direction (s. 23); personation (s. 24); and definitions (s. 25).

Subsection (4)

5. This subsection empowers the court to dismiss an application if any person named in the blood test direction fails to take a step required for the purpose, thus implementing the recommendation made in paragraph 14.58(c) of the Report. This is in addition to the court's powers under section 23 of the Family Law Reform Act 1969, in particular that of drawing inferences from the failure to comply with a direction. The subsection includes among those who are to be regarded as having failed to take a required step anyone who has care and control of a person under disability and fails, on that person's behalf, to take a required step.

EXPLANATORY NOTES

Clause 29 (continued)

Subsection (5)

6. This subsection corresponds to the provision in section 20(1) of the Family Law Reform Act 1969 and allows the court to vary or revoke a blood test direction.

Subsection (6)

7. This subsection corresponds to section 20(6) of the Family Law Reform Act 1969 and deals with costs incurred under a blood test direction where a party to the proceedings has applied for such a direction.

Interpretation of Part III.

30. In this Part of this Act—

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

"blood tests" includes any test made with the object of ascertaining the inheritable characteristics of blood;

"divorce county court" means a county court designated under section 1 of the Matrimonial Causes Act 1967;

1967 c. 56.

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

"prescribed" means prescribed by rules of court.

EXPLANATORY NOTES

Clause 30

This clause defines certain words for the purposes of Part III of the Bill. The definitions correspond to those in section 25 of the Family Law Reform Act 1969 except for "divorce county court" and "prescribed", which are self-explanatory.

PART IV

REGISTRATION OF BIRTHS

Registration of father of non-marital child.

31. For section 10 of the Births and Deaths Registration Act 1953 there shall be substituted the following section—

1953 c. 20.

"Registration of father of non-marital child.

10.—(1) Notwithstanding anything in the foregoing provisions of this Act, in the case of a non-marital child, no person shall as father of the child be required to give information concerning the birth of the child, and the registrar shall not enter in the register the name of any person as father of the child except—

(*a*) at the joint request of the mother and the person acknowledging himself to be the father of the child (in which case that person shall sign the register together with the mother); or

(*b*) at the request of the mother on production of—

(i) a declaration in the prescribed form made by the mother stating that that person is the father of the child; and

(ii) a statutory declaration made by that person acknowledging himself to be the father of the child; or

(*c*) at the request of that person on production of—

(i) a declaration in the prescribed form by that person acknowledging himself to be the father of the child; and

(ii) a statutory declaration made by the mother stating that that person is the father of the child; or

(*d*) at the request of the mother or that person (which shall in either case be made in writing) on production of—

1971 c. 3.

(i) a certified copy of an order made under section 8 or 9(1) of the Guardianship of Minors Act 1971 which gives that person any parental rights or duties in relation to the child or an order under section 9(2) of that Act which requires that person to make any financial provision for the child; and

(ii) if the child has attained the age of 16 years, the written consent of the child to the registration of that person as his father.

(2) Where a person acknowledging himself to be the father of a non-marital child makes a request to the registrar in accordance with paragraph (*c*) or (*d*) of subsection (1) of this section, he shall be treated as a qualified informant concerning the birth of the child for the purposes of this Act; and the giving of information concerning the birth of the child by that person and the signing of the register by him in the presence of the registrar shall act as a discharge of any duty of any other qualified informant under section 2 of this Act."

EXPLANATORY NOTES

Clauses 31 to 33

These clauses are designed to facilitate the recording of paternity on the birth certificate of a non-marital child, thus implementing the recommendations made in paragraphs 14.69, 14.71 and 14.74 of the Report. Clause 31 deals with the first registration of the birth of a non-marital child; clause 32 deals with the re-registration of the birth of such a child; and clause 33 deals with re-registration of birth after a declaration of parentage.

Clause 31

1. This clause substitutes a new section 10 for the Births and Deaths Registration Act 1953 which deals with the circumstances in which paternity may be recorded on first registration in the case of a non-marital child. The main changes of substance effected by this clause are that a person acknowledging himself to be the father of a non-marital child may be registered as the child's father in two additional cases: first, if he has a court order under which he has parental rights and duties and, secondly, if he has a statutory declaration as to his paternity made by the mother. These changes are discussed in paragraphs 10.60 to 10.63 and 10.73 to 10.75 of the Report.

Subsection (1) of new section 10

2. This subsection re-states the principle that the father of a non-marital child is not to be required to give information concerning the birth of the child. Other parents are so required: Births and Deaths Registration Act 1953, ss. 2 and 36. This subsection thus reproduces the effect of the existing provision and ensures that only in the circumstances set out in clause 31 will the person claiming to be the father be entitled to register the child's birth: there will be no general right or duty to register.

3. The subsection sets out, in paragraphs (*a*) to (*d*), the circumstances in which the name of the father of a non-marital child may be registered on first registration.

4. Paragraphs (*a*) and (*b*) re-enact without change the existing paragraphs (*a*) and (*b*) of section 10(1) of the Births and Deaths Registration Act 1953, as substituted by section 27(1) of the Family Law Reform Act 1969.

5. Paragraph (*c*) gives effect to the recommendation made in paragraph 14.74 of the Report that, just as the mother of a non-marital child can register the child's birth on the strength of declarations made by herself and by the man acknowledging himself to be the father (paragraph (*b*) above), so the acknowledging father should be able to register the birth with such declarations.

6. Paragraph (*d*) replaces the existing paragraph (*c*) of section 10 of the Births and Deaths Registration Act 1953 as substituted by section 93(1) of the Children Act 1975, which provides for registration of a child's birth upon production of an affiliation order. This paragraph provides that either the mother or the person acknowledging himself to be the father may on written request have the child's birth registered, so as to show that person's name as father, on production of an order giving him legal custody or any parental rights, or an order that he make financial provision for the child. This implements the recommendation made in paragraph 14.69 of the Report. Subparagraph (ii) requires the written consent of the child if over 16 to the registration; this is a requirement under section 93(1) of the Children Act 1975 and, for the reason

Clause 31 (continued)

given in paragraph 10.66 of the Report, is extended to cases where there has been an order for custody or parental rights, as well as where there has been a financial provision order.

Subsection (2) of new section 10

7. This subsection is necessary because the father of a non-marital child is not, as such, a qualified informant concerning the birth of the child: see note 2 above. Since only a qualified informant can give information so as to register the child's birth, this subsection makes such a father a qualified informant where he makes a request under paragraph (*c*) or (*d*) of subsection (1). Registration at the instance of the father of a non-marital child in this way discharges the duty of any other qualified informant (such as a person present at the birth: section 1(2) of the Act); this provision corresponds with proviso (i) to section 2 of the Act (which discharges the duty of any other qualified informant if any one informant has given the relevant information).

Re-registration of birth of non-marital child.

1953 c. 20.

32. For section 10A of the Births and Deaths Registration Act 1953 there shall be substituted the following section—

"Re-registration of birth of non-marital child.

10A.—(1) Where the birth of a non-marital child has been registered under this Act, but no person has been registered as the child's father, the registrar shall re-register the birth so as to show a person as the father—

(*a*) at the joint request of the mother and that person; or

(*b*) at the request of the mother on production of—

(i) a declaration in the prescribed form made by the mother stating that that person is the father of the child; and

(ii) a statutory declaration made by that person acknowledging himself to be the father of the child; or

(*c*) at the request of that person on production of—

(i) a declaration in the prescribed form by that person acknowledging himself to be the father of the child; and

(ii) a statutory declaration made by the mother stating that that person is the father of the child; or

(*d*) at the request of the mother or that person (which shall in either case be made in writing) on production of—

1971 c. 3.

(i) a certified copy of an order made under section 8 or 9(1) of the Guardianship of Minors Act 1971 which gives that person any parental rights or duties in relation to the child or an order under section 9(2) of that Act which requires that person to make any financial provision for the child; and

(ii) if the child has attained the age of 16 years, the written consent of the child to the registration of that person as his father;

but no birth shall be re-registered under this section except in the prescribed manner and with the authority of the Registrar General.

(2) On the re-registration of a birth under this section—

(*a*) the registrar shall sign the register;

(*b*) in the case of a request under paragraph (*a*) or (*b*) of subsection (1) of this section, or a request under paragraph (*d*) of that subsection made by the mother of the child, the mother shall also sign the register;

(*c*) in the case of a request under paragraph (*a*) or (*c*) of that subsection, or a request made under paragraph (*d*) of that subsection by the person requesting to be registered as the father of the child, that person shall also sign the register; and

(*d*) if the re-registration takes place more than three months after the birth, the superintendent registrar shall also sign the register."

EXPLANATORY NOTES

Clause 32

1. This clause substitutes a new section for section 10A of the Births and Deaths Registration Act 1953 which provides for the re-registration of the birth of a non-marital child where no person has previously been registered as the child's father.

Subsection (1) of new section 10A

2. This subsection sets out the cases where the father's name may be shown in the births register on re-registration. Paragraphs (*a*) to (*d*) correspond to paragraphs (*a*) to (*d*) of section 10(1) of the Act as re-enacted in clause 31 above (which deals with first registration), with modifications which are necessary because for re-registration there is no requirement that there be a "qualified informant". Instead re-registration requires the authority of the Registrar General.

3. Paragraphs (*a*) and (*b*) re-enact paragraphs (*a*) and (*b*) of section 10A(1) of the Births and Deaths Registration Act 1953 (as substituted by the Children Act 1975 s. 93(2)) without change.

4. Paragraphs (*c*) and (*d*) correspond to paragraphs (*c*) and (*d*) of section 10(1) of the Act: see notes 5 and 6 to clause 31 above.

Subsection (2) of new section 10A

5. This subsection re-enacts with modifications the existing subsection which deals with the signing of the births register on re-registration. Under the re-enacted subsection, the signing of the register (whether by the mother, the person acknowledging himself as the father, or both) takes place where there has been a request, under paragraphs (*a*), (*b*), (*c*) or (*d*) of subsection (1), that the birth be re-registered. Paragraph (*d*) of the subsection is identical in its terms to the existing paragraph (*c*) of section 10A(2).

Re-registration of birth after declaration of parentage.

1953 c. 20.

33. After section 14 of the Births and Deaths Registration Act 1953 there shall be inserted the following section—

"Re-registration of birth after declaration of parentage.

14A. Where the Registrar General receives, by virtue of section 28(6) of the Family Law Reform Act 1982, a notification of the making of a declaration of parentage in respect of any person, then, if it appears to him that the birth of that person should be re-registered, he shall authorise the re-registration of that person's birth, and the re-registration shall be effected in such manner and at such place as may be prescribed."

EXPLANATORY NOTES

Clause 33

This clause provides for the re-registration of a person's birth following a declaration of parentage, thus implementing the recommendation made in paragraph 14.71 of the Report. Re-registration of the birth under the new section 14A of the Births and Deaths Registration Act 1953 will be effected by the authority of the Registrar General and will follow the receipt by him of a notification from the court of a declaration of parentage. It is intended that the manner and place of such re-registration should be prescribed by rules.

PART V

MISCELLANEOUS AND SUPPLEMENTARY

Artificial insemination.

34.—(1) Where after the coming into force of this section a child is born in England or Wales as the result of the artificial insemination of a woman who—

(*a*) was at the time of the insemination a party to a marriage (being a marriage which had not at that time been dissolved or annulled), and

(*b*) was artificially inseminated with the semen of some person other than the other party to that marriage,

then, unless it is proved to the satisfaction of any court by which the matter has to be determined that the other party to that marriage did not consent to the insemination, the child shall be treated in law as the legitimate child of the parties to that marriage and shall not be treated as the child of any person other than the parties of that marriage.

(2) Any reference in this section to a marriage includes a reference to a void marriage if at the time of the insemination resulting in the birth of the child both or either of the parties reasonably believed that the marriage was valid; and for the purposes of this section it shall be presumed, unless the contrary is shown, that one of the parties so believed at that time that the marriage was valid.

(3) Nothing in this section shall affect the succession to any dignity or title of honour or render any person capable of succeeding to or transmitting a right to succeed to any such dignity or title.

EXPLANATORY NOTES

Clause 34

1. This clause implements the recommendations made in paragraphs 14.78 to 14.82 of the Report and deals with the status and paternity of a child conceived by A.I.D. with the consent of his mother's husband.

Subsection (1)

2. This subsection provides that after the clause comes into force a child born to a married woman after artificial insemination from a donor is to be treated in law as the legitimate child of his mother and her husband and as a child of their marriage. An A.I.D. child in such circumstances will no longer be in law a non-marital child or the child of the donor.

3. The subsection makes it clear that the child's mother's marriage must be subsisting at the time of the insemination; but it is immaterial that the marriage is terminated between the insemination and the birth.

4. The subsection provides for the consent of the mother's husband to the insemination as a condition for the A.I.D. child to be treated as a child of the marriage; but such consent is to be presumed, subject to proof to the contrary, thus implementing recommendations made in paragraphs 14.78 and 14.79 of the Report.

5. The subsection limits the operation of the provision to a child born in England or Wales.

Subsection (2)

6. This subsection applies this clause to A.I.D. children of a void marriage in terms which correspond to those in the Legitimacy Act 1976 s. 1(1) (and s. 1(3), as to which see clause 35 below), thus implementing the recommendation made in paragraph 14.82 of the Report.

Subsection (3)

7. This subsection preserves the existing law in relation to dignities and titles of honour as it affects A.I.D. children; see paragraph 12.21 (and also paragraph 8.26) of the Report.

Children of void marriages.

1976 c. 31.

35. In section 1 of the Legitimacy Act 1976 (legitimacy of children of certain void marriages) there shall be added at the end the following subsections—

(3) It is hereby declared for the avoidance of doubt that subsection (1) above applies notwithstanding that the belief that the marriage was valid was due to a mistake as to law.

(4) In relation to a child born after the coming into force of section 35 of the Family Law Reform Act 1982, it shall be presumed for the purposes of subsection (1) above that one of the parties to the void marriage reasonably believed at the time of the act of intercourse resulting in the birth of the child (or at the time of the celebration of the marriage if later) that the marriage was valid, unless the contrary is shown.".

EXPLANATORY NOTES

Clause 35

1. This clause implements the recommendations made in paragraph 14.67 of the Report. Under section 1(1) of the Legitimacy Act 1976 the child of a void marriage is treated as the legitimate child of his parents if at least one of the parents reasonably believed (at the time of the act of intercourse resulting in the birth of the child or at the time of the celebration of the marriage if later) that the marriage was valid. Section 1(2) limits the operation of section 1(1) to cases where the father of the child is domiciled in England and Wales.

2. The clause adds two further subsections to section 1 of the 1976 Act. New subsection (3) makes it clear that a mistake of law (for example as to the validity of a foreign divorce decree) does not prevent the belief from being regarded as reasonably held; some doubt has been expressed as to this (see Bromley, *Family Law* 6th ed., (1981), p. 267). New subsection (4) facilitates proof of legitimacy by creating a presumption that at the material time one of the parties did reasonably believe in the validity of the marriage.

Amendment of s. 12 of Civil Evidence Act 1968.

1968 c. 64.

36. In section 12 of the Civil Evidence Act 1968 (which relates to the admissibility in evidence in civil proceedings of the fact that a person has been adjudged to be the father of a child in affiliation proceedings)—

(*a*) in subsection (1) for paragraph (*b*) there shall be substituted the following paragraph—

"(*b*) the fact that a person has been found to be the father of a child in proceedings before any court in England and Wales under the Guardianship of Minors Act 1971, section 43 of the National Assistance Act 1948, section 36A of the Children Act 1975, section 18 of the Supplementary Benefits Act 1976 or Part V of the Child Care Act 1980 or has been adjudged to be the father of a child in affiliation proceedings before any court in the United Kingdom";

1971 c. 3.
1948 c. 29.
1975 c. 72.
1976 c. 71.
1980 c. 5.

(*b*) in subsection (2) for the words "to have been adjudged" there shall be substituted the words "to have been found or adjudged" and in paragraph (*b*) for the words "matrimonial or affiliation proceedings" there shall be substituted the words "other proceedings".

EXPLANATORY NOTES

Clause 36

1. This clause amends section 12 of the Civil Evidence Act 1968 in consequence of the abolition of affiliation proceedings, thus implementing the recommendation made in paragraph 14.62 of the Report.

2. Paragraph (*a*) of the clause extends the rule contained in section 12(1)(*b*) of the Civil Evidence Act 1968 so that a finding of paternity made in any proceedings under the Guardianship of Minors Act 1971—not only maintenance proceedings—is to be admissible in any civil proceedings; and provides that such a finding will constitute proof of paternity in the subsequent proceedings, subject to proof to the contrary. The paragraph extends the rule to proceedings under the National Assistance Act 1948, the Children Act 1975, the Supplementary Benefits Act 1976 and the Child Care Act 1980 in consequence of the abolition of affiliation proceedings under those Acts (as to which see paragraph 6.50 of the Report.) It preserves the existing rule as regards adjudications of paternity in existing affiliation orders and orders made elsewhere in the United Kingdom.

3. Paragraph (*b*) is consequential and reflects the fact that a finding of paternity may be made in an extended range of proceedings as set out above.

Interpretation

37. In this Act—

"commission area" has the same meaning as in the Justices of the Peace Act 1979;

1979 c. 55.

"marital child" means—

(*a*) a child whose parents were married to each other at the time of his birth or (if the marriage has been terminated before his birth) at the time of the act of intercourse resulting in his birth,

1976 c. 31.

(*b*) a child who is treated as legitimate by virtue of section 1 of the Legitimacy Act 1976,

(*c*) a child who is a legitimated person within the meaning of section 10 of that Act,

(*d*) a child who is treated as legitimate by virtue of section 34 of this Act.

1976 c. 36.

(*e*) a child who is an adopted child within the meaning of Part IV of the Adoption Act 1976, and

(*f*) any other child who is treated in law as legitimate;

"non-marital child" means a child who is not a marital child."

EXPLANATORY NOTES

Clause 37

This clause defines certain terms for the purposes of the Bill. Under the clause, a "marital child" means any of the following—

(*a*) a child whose parents were married to each other at the time of his birth or conception (where the marriage ended by divorce or death before the birth of the child);

(*b*) the child of a void marriage one of whose parents reasonably believed in the validity of the marriage;

(*c*) a child legitimated by the subsequent marriage of his parents or recognised as legitimate by foreign law;

(*d*) a child conceived by A.I.D. who is treated as legitimate under clause 34 above;

(*e*) an adopted child;

(*f*) any other child who is treated as legitimate under the present law, such as a child who is legitimate under English private international law.

A "non-marital child" is any other child. The terms "marital child" and "non-marital child" are intended to replace the words "legitimate" and "illegitimate", for the reasons given in paragraph 4.51 of the Report.

Amendments and transitional provisions.

38.—(1) The enactments specified in Schedule 2 to this Act shall have effect subject to the amendments specified in that Schedule, being minor amendments and amendments consequential on the preceding provisions of this Act.

(2) The transitional provisions and savings in Schedule 3 to this Act shall have effect.

1978 c. 30.

(3) The inclusion in this Act of any express saving or amendment shall not be taken as prejudicing the operation of section 16 or 17 of the Interpretation Act 1978 (which relate to the effect of repeals).

EXPLANATORY NOTES

Clause 38

This clause gives effect to the amendments and transitional provisions made by the Bill.

Subsection (1) gives effect to the amendments of existing legislation specified in Schedule 2.

Subsection (2) gives effect to the transitional provisions and savings specified in Schedule 3.

Subsection (3) is a saving provision to preserve the general operation of sections 16 and 17 of the Interpretation Act 1978 relating to the effect of repeals.

Text of Guardianship of Minors Act 1971 as amended.

1971 c. 3.

39. The Guardianship of Minors Act 1971 (excluding consequential amendments of other enactments and savings) is set out in Schedule 4 to this Act as it will have effect, subject to section 38(2) and 41(2) of this Act, when all repeals and amendments made in it by this Act and by the Children Act 1975 operate.

EXPLANATORY NOTES

Clause 39

This clause introduces the Guardianship of Minors Act 1971 as set out in a "Keeling" Schedule in Schedule 4. (See the introductory note on clauses 2 to 11 of the Bill.) The Act is set out as it will have effect (subject to transitional provisions) when the repeals and amendments operate. The reference to repeals and amendments made by the Children Act 1975 is to the so far unimplemented provisions of Part II of that Act (custodianship).

Repeals.

40. The enactments specified in Schedule 5 to this Act are hereby repealed to the extent specified in the third column of that Schedule.

EXPLANATORY NOTES

Clause 40

This clause makes provision for the repeal of the existing legislation specified in Schedule 5.

Commencement.

41.—(1) This Act shall come into force on such day as the Secretary of State may by order made by statutory instrument appoint and different days may be appointed for different provisions.

(2) Without prejudice to the transitional provisions contained in Schedule 3 to this Act, an order under subsection (1) above may make such further transitional provisions as appear to the Secretary of State to be necessary or expedient in connection with the provisions thereby brought into force, including such adaptations of the provisions thereby brought into force or any provision of this Act then in force as appear to him to be necessary or expedient in consequence of the partial operation of this Act or the Children Act 1975.

1975 c. 72.

EXPLANATORY NOTES

Clause 41

1. This clause deals with the commencement of the Bill.

Subsection (1)

2. This subsection provides for the coming into force of the Act by order. Different days are provided for because of rules and other arrangements which will be required before certain provisions can be implemented.

Subsection (2)

3. This subsection enables further transitional provisions (ie other than those set out in Schedule 4) to be made by order, including, in particular, transitional provisions called for by unimplemented parts of the Bill or the Children Act 1975.

Short title and extent.

42.—(1) This Act may be cited as the Family Law Reform Act 1982.

(2) The following provisions of this Act extend to Scotland—

(*a*) section 38(1) and paragraphs 2, 7, 8, 53 and 59 of Schedule 2,

(*b*) section 40 and Schedule 5 so far as it relates to the Maintenance Orders Act 1950, and

1950 c. 37.

(*c*) this section.

(3) The following provisions of this Act extend to Northern Ireland—

(*a*) section 38(1) and paragraphs 7 and 8 of Schedule 2.

(*b*) section 40 and Schedule 5 so far as it relates to the Maintenance Orders Act 1950, and

(*c*) this section.

(4) Except as stated in subsections (2) and (3) above, this Act extends to England and Wales only.

EXPLANATORY NOTES

Clause 42

1. This clause deals with the short title and the extent of the Bill.

Subsection (2)

2. This subsection provides that, with certain exceptions, the Act does not extend to Scotland. The exceptions relate to minor amendments of the National Assistance Act 1948, the Maintenance Orders Act 1950, the Supplementary Benefits Act 1976 and the Adoption (Scotland) Act 1978: see notes to Schedule 2, paras. 7, 8, 53 and 59.

Subsection (3)

3. This subsection provides that with certain exceptions the Act does not extend to Northern Ireland. The exceptions relate to minor amendments of the Maintenance Orders Act 1950: see notes to Schedule 2, paras. 7 and 8.

SCHEDULES

SCHEDULE 1

CONSENTS TO MARRIAGES OF CHILDREN UNDER 18

Provisions to be substituted for Part II of Schedule 2 to the Marriage Act 1949

"H. Where the child is a non-marital child

Circumstances	*Person or persons whose consent is required*
1. Where both parents are alive:	
(*a*) if the father has been given by an order of any court the right to the actual custody of the child or the right to consent to the marriage of the child, or both those rights;	The mother and the father.
(*b*) if the father has not been given either of those rights.	The mother.
2. Where the mother is dead:	
(*a*) if the father is a guardian under the Guardianship of Minors Act 1971 and there is no other guardian;	The father.
(*b*) if the father is a guardian as mentioned in paragraph (*a*) above and another guardian has been appointed by the mother or by the court under the Guardianship of Minors Act 1971;	The father and the guardian if acting jointly, or the father or the guardian if the father or guardian is the sole guardian of the child.
(*c*) if the father is not a guardian and a guardian has been appointed by the mother or by the court under the Guardianship of Minors Act 1971.	The guardian.

1971 c. 3.

EXPLANATORY NOTES

Schedule 1: Consents to marriages of persons under 18

1. This Schedule implements the recommendations made in paragraph 14.48 of the Report by substituting a new Part II of Schedule 2 to the Marriage Act 1949 to deal with parental consent to the marriage of a non-marital child. As to certain minor or consequential amendments to the Marriages Act 1949, see Schedule 2, paras. 4 to 6 and the notes to those paragraphs.

2. The Schedule deals with four cases, *viz.*

(1) where both parents are alive;

(2) where the mother is dead;

(3) where the father is dead;

(4) where both parents are dead.

3. Under paragraph 1, where both parents are alive, the consent of the mother, and the mother alone, is required unless the father has been given by court order the right to actual custody or the right to consent to the marriage; if he has, the consent function is vested in both the parents.

4. Under paragraph 2, where the mother is dead, the consent to marry function is vested in the guardian or guardians of the child whether the surviving father (if a guardian) or a non-parent guardian. (It should be noted that if the father had parental rights under a court order before the mother's death, he will normally become a guardian: see paragraph 7.39 of the Report and clause 3 of the Bill.)

Circumstances	*Person or persons whose consent is required*
3. Where the father is dead:	
(*a*) if there is no other guardian:	The mother.
(*b*) if a guardian has been appointed by the father or by the court under the Guardianship of Minors Act 1971.	The mother and the guardian if acting jointly, or the mother or the guardian if the mother or guardian is the sole guardian of the child.
4. Where both parents are dead:	The guardian or guardians appointed by the mother or father or by the court under the Guardianship of Minors Act 1971.

In this Schedule—

'actual custody', in relation to a child, means the actual possession of his person;

'marital child' and 'non-marital child' have the same meanings as in the Family Law Reform Act 1982."

EXPLANATORY NOTES

5. Under paragraph 3, where the father is dead, the consent to marry function is vested in the surviving mother and in a non-parent guardian, if any.

6. Under paragraph 4, where both parents are dead, the consent to marry function is vested in the child's guardian or guardians.

7. The rationalisation of the law relating to the consent to marry function where one or both of the parents of the non-marital child are dead is discussed in paragraphs 9.15 to 9.20 of the Report.

8. The definition of "actual custody" corresponds with that in section 87(1) of the Children Act 1975. The definitions of "marital child" and "non-marital child" are contained in clause 37 above.

SCHEDULE 2

MINOR AND CONSEQUENTIAL AMENDMENTS

The Maintenance Orders (Facilities for Enforcement) Act 1920 (c. 33)

1. In section 6(2) of the Maintenance Orders (Facilities for Enforcement) Act 1920—

(*a*) for the words "in like manner as an order of affiliation" there shall be substituted the words "as a magistrates' court maintenance order";

(*b*) at the end of that subsection there shall be inserted the words—

"In this subsection 'magistrates' court maintenance order' has the same meaning as in section 150(1) of the Magistrates' Court Act 1980."

1980 c. 43.

The National Assistance Act 1948 (c. 29)

2. In section 42 of the National Assistance Act 1948 for subsection (3) there shall be substituted the following subsection—

"(3) In the application of subsection (1) of this section to Scotland the reference to a man's children includes a reference to children his paternity of whom has been admitted or otherwise established and the reference to a woman's children includes a reference to her illegitimate children.".

3. In section 56(1) of that Act after the words "local authority" there shall be inserted the words "other than any sum due under an order made under section 43 of this Act".

The Marriage Act 1949 (c. 76)

4. In the Marriage Act 1949 for the words "an infant", wherever they occur in sections 3, 16 or 28 or in Schedule 2, there shall be substituted the words "a child" and for the words "the infant", wherever they occur in section 3 or in Schedule 2, there shall be substituted the words "the child".

5. In section 78(1) of that Act for the definition of "infant" there shall be substituted—

" 'child' means a person under the age of 18."

6. In Schedule 2 to that Act for the heading to Part I there shall be substituted the following heading—

"1. *Where the child is a marital child"*

The Maintenance Orders Act 1950 (c. 37)

7. In section 16(2) of the Maintenance Orders Act 1950—

(*a*) in paragraph (iii) for "12(2)" there shall be substituted "11B" and for "2(4)(*a*)" there shall be substituted "2(4A)";

(*b*) paragraph (iv) shall be omitted;

(*c*) the paragraph (vi) inserted by the Children Act 1975 shall be omitted;

(*d*) in the paragraph (vi) inserted by the Supplementary Benefits Act 1976 the words "or section 4 of the Affiliation Proceedings Act 1957 on an application made under section 19(2) of the Act of 1976" shall be omitted.

EXPLANATORY NOTES

Schedule 2: Minor and consequential amendments

1. In a number of provisions in this Schedule maintenance orders are expressed as being enforceable as if they were magistrates' court maintenance orders under section 105(1) of the Magistrates' Courts Act 1980 instead of as affiliation orders. This is a consequence of abolishing affiliation proceedings and affiliation orders: see note 3 on clause 1 of the Bill.

Maintenance Orders (Facilities for Enforcement) Act 1920

2. As to paragraph 1, see note 1 on this Schedule.

National Assistance Act 1948

3. Paragraph 2 re-arranges the form of the Scottish provision in consequence of the amendment to the English provision in clause 22 of the Bill.

4. Paragraph 3, dealing with recovery of sums due under the Act, is consequential on making orders enforceable as magistrates' court maintenance orders: see note 1 on this Schedule and clause 22(2) of the Bill.

Marriage Act 1949

5. Paragraph 4 replaces the word "infant" in various provisions of the Marriage Act 1949 by the more modern and widely used word "child".

6. Paragraph 5 is consequential upon paragraph 4.

7. Paragraph 6 amends the heading to Part I of Schedule 2 to the Act consequentially upon using "marital" in place of "legitimate" and "child" in place of "infant".

Maintenance Orders Act 1950

8. Paragraph 7 is consequential upon the abolition of affiliation proceedings and deals with maintenance orders enforceable in different parts of the United Kingdom. Paragraph 7(*a*) adds orders under the new section 11B of the Guardianship of Minors Act 1971 (financial provision on the application of those over 18) to those orders which are enforceable throughout the United Kingdom: and it amends the reference to the Guardianship Act 1973 in line with the substituted section 2(4), (4A) and (5) (interim custody and maintenance orders): see note 52 on paragraph 42 of this Schedule. Paragraph 7(*b*), (*c*) and (*d*) remove the separate provisions relating to affiliation orders.

8. In section 18 of that Act for subsection (2) there shall be substituted the following subsection—

"(2) Every maintenance order registered under this Part of this Act in a magistrates court in England and Wales shall be enforceable as a magistrates' court maintenance order within the meaning of section 150 of the Magistrates' Courts Act 1980.". 1980 c. 43.

The Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951

9. In section 2(1)(*d*) of the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951—

(*a*) the words "an order in a matter of bastardy, an order enforceable as an affiliation order or" shall be omitted;

(*b*) for "12(2)" there shall be substituted "11B";

(*c*) for "2(4)(*a*) there shall be substituted "2(4A)".

The Births and Deaths Registration Act 1953 (c. 20)

10. In section 9(4) of the Births and Deaths Registration Act 1953 for "(*b*) or (*c*)" there shall be substituted "(*b*), (*c*) or (*d*)".

11. In section 34(2) of that Act for the words "required by law" there shall be substituted the words "required or permitted by law".

12. In section 41 of that Act after the definition of "mother" there shall be inserted the following definition—

" 'non-marital child' has the same meaning as in the Family Law Reform Act 1982".

9. As to paragraph 8, see note 1 on this Schedule.

Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951

10. Paragraph 9(*a*) is consequential on the abolition of affiliation proceedings: see note 1 on this Schedule. Paragraph 9(*b*) is consequential on the introduction of financial provision orders on the application of those over 18. Paragraph 9(*c*) is consequential on the re-arrangement of the provisions of section 2 of the Guardianship Act 1973 (interim orders): see notes 52–54 on paragraph 42 of this Schedule.

Births and Deaths Registration Act 1953

11. Paragraph 10 is consequential on the introduction of the provision (new section 10(1)(*d*) of the Act: clause 31 of the Bill) enabling the father of a non-marital child to register the child's birth. Section 9 of the 1953 Act deals with information required to be given to the registrar to be given to other persons; a declaration which has to be provided under section 9 may include a request for registration under section 10 of the Act (by the father of a non-marital child).

12. Paragraph 11 is consequential upon making the father of a non-marital child an informant in certain circumstances as to the child's birth. As explained in the note on clause 31(2) of the Bill, such a father is not, under the present law, a qualified informant concerning the child's birth but, in the circumstances provided in that clause, is to be permitted to give such information. Section 34(2) of the Births and Deaths Registration Act 1953 provides that a births register entry is only evidence thereof if it is signed by a person required to give information; this paragraph provides that such an entry will be evidence if it is signed by a person permitted to give information, namely the father of the non-marital child in the circumstances set out.

13. Paragraph 12 applies the definition of "non-marital child" to that Act: see clause 37 of the Bill.

The Maintenance Orders Act 1958 (c. 39)

13. In section 3 of the Maintenance Orders Act 1958 for subsection (2) there shall be substituted the following subsection—

"(2) Subject to the provisions of the next following subsection, an order registered in a magistrates' court shall be enforceable as a magistrates' court maintenance order within the meaning of section 150 of the Magistrates' Courts Act 1980".

The Administration of Justice Act 1970 (c. 31)

14. In Schedule 8 to the Administration of Justice Act 1970—

(*a*) in paragraph 4 for "12(2)" there shall be substituted "11B" and for "2(4)(*a*)" there shall be substituted "2(4A)";

(*b*) paragraph 5 shall be omitted.

The Guardianship of Minors Act 1971 (c. 3)

15. Without prejudice to any other amendment of the Guardianship of Minors Act 1971 made by this Act, for the word "minor" and the word "minors", in each place in which either of those words occurs in that Act, there shall be substituted respectively the word "child" or the word "children".

16. In section 3 of the Guardianship of Minors Act 1971 in subsections (1) and (2) for the word "minor", in the first place where it occurs in each subsection, there shall be substituted the words "marital child".

17. In section 4 of that Act—

(*a*) in subsection (1) for the word "minor" there shall be substituted the words "marital child";

(*b*) in subsection (2) for the word "minor" there shall be substituted the words "child" (whether marital or non-marital)";

(*c*) in subsection (3) after the word "appointed" there shall be inserted the words "(other than a guardian appointed in respect of a non-marital child by the mother of the child)".

Maintenance Orders Act 1958

14. As to paragraph 13, see note 1 on this Schedule.

Administration of Justice Act 1970

15. Paragraph 14 amends Schedule 8 to the Act which defines a "maintenance order" for the purposes of enforcement under the Maintenance Orders Act 1958 and section 92 of the Magistrates' Courts Act 1980. Sub-paragraph (*a*) is consequential upon the introduction of the new section 11B of the Guardianship of Minors Act 1971 (financial provision for those over 18); and upon the new section 2(4A) of the Guardianship Act 1973 (see paragraph 42(*c*) of this Schedule). Sub-paragraph (*b*) removes the separate provisions relating to affiliation orders.

Guardianship of Minors Act 1971

16. Paragraph 15 substitutes the words "child" and "children" in the Act for "minor" and "minors": see note 2 on clause 1 of the Bill.

17. Paragraph 16 is consequential upon making the Guardianship of Minors Act 1971 apply, prima facie, to all children whether marital or non-marital. Accordingly in areas of guardianship law (such as the guardianship rights of a surviving parent) where distinctions continue to be made between marital and non-marital fathers it is necessary to add the words "marital" and "non-marital" where appropriate. As to "child" instead of "minor", see note 16 above.

18. Paragraph 17(*a*) which deals with appointment of testamentary guardians by a father makes a consequential change similar to that discussed in the previous note. Paragraph 17(*b*), dealing with the appointment of guardians by the mother, extends section 4(2) to all cases whether the child is marital or non-marital. Paragraph 17(*c*) is consequential upon the fact that the father of a non-marital child will have no automatic guardianship rights and accordingly will not be in a position to act jointly with the guardian appointed by the mother.

18. In section 5 of that Act—

(*a*) in subsection (1) for the words "Where a minor has no parent" there shall be substituted the words—

"Where—

(a) both parents of a marital child are dead, or

(b) the mother of a non-marital child is dead,

and, in either case, the child has";

(*b*) in subsection (2) for the words from "notwithstanding" to end of the subsection there shall be substituted the words "notwithstanding that parental rights and duties with respect to the child are vested in a local authority or a voluntary organisation by virtue of a resolution under section 3 or 64 of the Child Care Act 1980".

1980 c. 5.

19. In section 11A of that Act—

(*a*) in subsections (1), (2) and (3) for "11(*a*)" there shall be substituted "11(1)(*a*)";

(*b*) at the end there shall be added the following subsection—

"(4) An order shall not be made under section 9(1), 10(1)(*a*) or 11(1)(*a*) of this Act at any time when the child is free for adoption by virtue of an order made under section 18 of the Adoption Act 1976 or section 18 of the Adoption (Scotland) Act 1978.".

1976 c. 36.
1978 c. 28.

20. In section 12 of that Act—

(*a*) in subsection (1) for the words "an order made under section 9, 10 or 11 of this Act for the making of periodical payments" there shall be substituted the words "a periodical payments or secured periodical payments order";

(*b*) in subsection (3) for the words "Any order made under section 9, 10 or 11 of this Act requiring the making of periodical payments" there shall be substituted the words "A periodical payments order";

(*c*) at the end there shall be added the following subsection—

"(4) In this section—

'periodical payments order' means an order for periodical payments made by virtue of section 9(3)(*a*), 10(2)(*a*) or 11(2)(*a*) of this Act; and

'secured periodical payments order' means an order for secured payments made by virtue of section 9(3)(*b*), 10(2)(*b*) or 11(2)(*b*) of this Act."

EXPLANATORY NOTES

19. Paragraph 18 amends section 5 of the Act in consequence of the policy of referring to "non-marital" children where it is necessary to differentiate between the fathers of such children and other parents; see note 17 above. This paragraph also extends the power to appoint a guardian to cases not only, as under the existing section 5(2), where the local authority have parental rights (section 3 of the Child Care Act 1980) but also where a voluntary organisation has parental rights (section 64 of that Act).

20. Paragraph 19 makes consequential changes in section 11 (orders for custody and financial relief where joint guardians disagree) to bring the provisions of sections 9, 10 and 11 of the Act into line. This paragraph also inserts a new section 11(4) into this Act so as to prevent the court from making a legal custody or access order once an order freeing a child for adoption has been made. This is because upon a "freeing for adoption" order the parental rights and duties vest in the adoption agency and before such an order has been made the position of the parent will have been considered (Adoption Act 1976, s. 18; Adoption (Scotland) Act 1978, s. 18). (Reference is made to the Adoption Act 1976; until that consolidation measure is brought into force section 14 of the Children Act 1975 and the Adoption Act 1958 will continue to apply: see paragraph 8 of Schedule 3 to the Bill.)

21. Paragraph 20(*a*) is consequential on the new power to make secured periodical payments orders under the Act: see the note on clause 5 (new section 9(3)). Paragraph 20(*b*) and (*c*) are consequential on the re-arrangement of the provisions under which periodical payments orders are made under the Act as re-enacted and on the bringing of secured periodical payments orders into the ambit of the Act.

21. In section 12A of that Act for the words "or 11(*b*)" there shall be substituted the words "11(1)(*b*) or 11B".

22. In section 12B of that Act—

(*a*) in subsection (1) for "11(*b*)" there shall be substituted "11(1)(*b*)", the words "in maintaining the minor" shall be omitted and there shall be inserted at the end the words "being liabilities or expenses incurred in connection with the birth of the child or in maintaining the child";

(*b*) in subsection (2) for "11(*b*)" there shall be substituted "11(1)(*b*)";

(*c*) in subsections (3) and (5) for the words "or 11", in each place where they occur, there shall be substituted the words "11 or 11B".

(*d*) in subsection (3) after the words "for the making" there shall be inserted the words "or securing".

23. In section 12C of that Act—

(*a*) in subsections (1), (2) and (3) for the words "or 11" there shall be substituted the words "11 or 11B";

(*b*) in subsections (1), (2), (3) and (4) for the words "for the making of periodical payments" there shall be substituted the words "for the making or securing of periodical payments.".

(*c*) for subsection (5) there shall be substituted the following subsections—

"(5) Where an order for the making of periodical payments made under section 9, 10 or 11 of this Act ceases to have effect on the date on which the child attains the age of 16 or at any time after that date but before or on the date on which he attains the age of 18 the child may apply—

(*a*) in the case of an order made by the High Court or a county court, to the court which made the order, or

(*b*) in the case of an order made by a magistrates' court, to the High Court or a county court,

for an order for the revival of the first mentioned order, and if on such an application it appears to the High Court or county court that—

(i) the child is, or will be, or if an order were made under this subsection would be, receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not he is also, or will also be, in gainful employment; or

(ii) there are special circumstances which justify the making of an order under this subsection,

the court shall have power by order to revive the first mentioned order from such date as the court may specify, not being earlier than the date of the making of the application.

(6) Any order made under section 9, 10 or 11 of this Act by the High Court or a county court which is revived by an order under subsection (5) above may be varied or discharged under section 9, 10, or 11 of this Act, as the case may be, on the application of any person by whom or to whom payments are required to be made under the order.

EXPLANATORY NOTES

22. Paragraph 21 is consequential on the introduction of financial provision orders on the application of children over 18 (the new section 11B of the Act).

23. Paragraph 22(*a*) and (*b*) provide that, where the court makes a lump sum order which enables liabilities or expenses incurred before the date of the order to be met, the expenses and liabilities may include those relating to the birth of the child. This is consequential on the abolition of section 4(4) of the Affiliation Proceedings Act 1957 which provides for such expenses to be recovered: see paragraph 6.11 of the Report.

24. Paragraph 22(*c*) is consequential on the new power to make financial provision orders on the application of children over 18.

25. Paragraph 22(*d*) is consequential on the new power to make secured periodical payments orders under the Act.

26. Paragraph 23(*a*) and (*b*) are consequential on the new powers, respectively, to make financial provision orders for children over 18 and to make secured periodical payments orders.

27. Paragraph 23(*c*) implements the recommendation made in paragraph 14.15 of the Report. It substitutes new subsections (5), (6) and (7) for subsection (5) of section 12C to deal with the right of a child aged over 18 to apply for the revival of an order for periodical payments which ceased to have effect at the date when he reached 16 or between the ages of 16 and 18; the age limit of 21 is removed (see paragraph 6.33 of the Report). This right is additional to the right to obtain a new order, as to which see section 11B of the Act (clause 8 of the Bill) and the notes thereon. The new subsection (5) allows the child over 18 to apply to the High Court or a county court for the revival of an earlier order (even if the earlier order was made in the magistrates' court) if he can show educational or other special circumstances; these matters are discussed in paragraphs 6.30 to 6.33 of the Report. Subsection (6) provides for variation or discharge of orders.

(7) Any order made under section 9, 10 or 11 of this Act by a magistrates' court which is revived by an order of the High Court or a county court under subsection (5) above—

(*a*) for the purposes of the variation and discharge of the order, shall be treated as an order of the court by which it was revived and may be varied or discharged by that court on the application of any person by whom or to whom payments are required to be made under the order, and

(*b*) for the purposes of the enforcement of the order, shall be treated as an order of the magistrates' court by which the order was originally made."

24. In section 13 of that Act for subsection (3) there shall be substituted the following subsection—

"(3) Any order for the payment of money made by a magistrates' court under this Act shall be enforceable as a magistrates' court maintenance order within the meaning of section 150 of the Magistrates' Courts Act 1980 c. 43. 1980".

25. In section 13A(1) of that Act for "11(*a*)" there shall be substituted "11(1)(*a*)".

26. In section 14A of that Act—

(*a*) in subsection (1) for the words "The court, on making an order under section 9(1) of this Act" there shall be substituted the words "Subject to subsection (9) of this section, the court, on making an order under section 8 or under section 9(1) of this Act in respect of a child";

(*b*) in subsection (3) for "11(*a*)" there shall be substituted "11(1)(*a*)";

(*c*) in subsection (5) paragraph (*c*) and the word "or" at the end of paragraph (*b*) shall be omitted;

(*d*) in subsection (8) for the words "section 9" there shall be substituted the words "section 8 or 9";

(*e*) for subsection (9) there shall be substituted the following subsection—

"(9) Where an order under section 8 of this Act is made or is in force with respect to a non-marital child, no order shall be made under subsection (1) of this section with respect to that child at a time when the parents of the child are living with each other".

27. In section 15 of that Act—

(*a*) in subsection (1) for the words "Subject to the provisions of this section" there shall be substituted the words "Except where the contrary intention is indicated";

(*b*) in subsection (4) for the words "whether with or without an order" there shall be substituted the word "or";

(*c*) in subsection (5) for the word "including" there shall be substituted the word "or".

28. In section 16(8) of that Act for "11(*c*)" there shall be substituted "11(1)(*c*), 11B(6)", for "12C(5)" there shall be substituted "12C(2)" and the words "or (3D)" shall be omitted.

Subsection (7) deals with magistrates' court orders which are revived by an order of the High Court or county court. It is provided (for reasons given in paragraph 6.32 of the Report) that the High Court or county court should have exclusive jurisdiction to vary or discharge such revived orders but that magistrates' courts should enforce orders originally made by them.

28. As to paragraph 24, see note 1 on this Schedule.

29. Paragraph 25 is consequential on the re-arrangement of the provisions of section 11 of the Act (see Schedule 4 below) which deals with orders for custody and financial relief where joint guardians disagree.

30. Paragraph 26(*a*) provides that section 14A of the Act (access by grandparents) applies in cases of a parental rights order under section 8 of the Act (subject to the condition in section 14A(9): see note 34 on this Schedule) or a custody or financial order under section 9.

31. Paragraph 26(*b*) is consequential upon the re-arrangement of the provisions of section 11: see note 29 on this Schedule.

32. Paragraph 26(*c*) is consequential on the possibility that section 33 of the Children Act 1975 (custodianship orders) will not be in force when the provisions of this Bill are in force: see generally the notes on paragraph 4 of Schedule 3 to the Bill.

33. Paragraph 26(*d*) is consequential on the new section 8: see note 30 on this Schedule.

34. Paragraph 26(*e*) implements the recommendation made in paragraph 14.29 of the Report that access applications by grandparents should not be entertained where the parents are living with each other.

35. Paragraph 27(*a*) which relates to the definition of "the court" reflects the fact that those words do not under the Act always include the High Court, county court and magistrates' court: see e.g. section 11B.

36. Paragraph 27(*b*) and (*c*) are consequential upon the new power under section 9 of the Act to make financial provision orders irrespective of whether orders for legal custody are made: see note 6 on clause 5 of the Bill (new section 9(2)).

37. Paragraph 28 deals with orders made by the High Court on appeal from magistrates' courts. It is consequential on the re-arrangement of the provisions of section 11 and on the introduction of the new section 11B of the Act (financial provision for adult children) with consequences relating to section 12C of the Act (variation and revival of orders). The omission of section 4(3D) of the Guardianship Act 1973 is consequential on the repeal of that provision: see note 54 on paragraph 42(*f*) of this Schedule.

29. In section 20 of that Act for subsection (2) there shall be substituted the following subsections—

"(2) In this Act, unless the context otherwise requires—

"actual custody", as respects a child, means the actual possession of the person of the child;

"child", except where used to express a relationship, means a person who has not attained the age of eighteen;

1975 c. 72. "legal custody" shall be construed in accordance with Part IV of the Children Act 1975;

"maintenance" includes education;

"marital child" means—

(*a*) a child whose parents were married to each at the time of his birth or (if the marriage has been terminated before his birth) at the time of the act of intercourse resulting in his birth,

1976 c. 31. (*b*) a child who is treated as legitimate by virtue of section 1 of the Legitimacy Act 1976,

(*c*) a child who is a legitimated person within the meaning of section 10 of that Act,

(*d*) a child who is treated as legitimate by virtue section 34 of the Family Reform Act 1982,

(*e*) a child who is an adopted child within the meaning of Part IV of the Adoption Act 1976, and

(*f*) any other child who is treated in law as legitimate;

"non-marital child" means a child who is not a marital child.

(2A) Except where otherwise indicated and except in the definitions of "marital child" and "non-marital child" in subsection (1) of this section, any reference in this Act to a child shall be construed as including a reference to both a marital child and a non-marital child.

(2B) Any reference in this Act to the parents of a child living with each other shall be construed as a reference to their living with each other in the same household."

The Attachment of Earnings Act 1971 (c. 32)

30. In Schedule 1 to the Attachment of Earnings Act 1971—

(*a*) in paragraph 5 for "12(2)" there shall be substituted "11B" and for "2(4)(*a*)" there shall be substituted "2(4A)";

(*b*) paragraph 6 shall be omitted.

38. Paragraph 29 substitutes a new section 20(2)(2A) and (2B) of the Act. Section 20(2) provides definitions of terms in the Guardianship of Minors Act 1971 as amended in the Bill. The definition of "actual custody" corresponds to that in section 87(1) of the Children Act 1975; the definition of "child" is designed to make that word an effective substitute for the word "minor" (see note 2 on clause 1 of the Bill). As to the definition of "legal custody", see note 2 on clause 3. The definition of "maintenance" is self-explanatory. The definitions of "marital child" and "non-marital child" are in accordance with those in clause 37 of the Bill: see the notes on that clause.

39. The new section 20(2A) reflects the policy of not discriminating in language between marital and non-marital children except where this is necessary.

40. The new section 20(2B) corresponds with the definition of "living with each other" which applies in other statutes: see Matrimonial Causes Act 1973, s. 2(6); Domestic Proceedings and Magistrates' Courts Act 1978, s. 88(2).

Attachment of Earnings Act 1971

41. Paragraph 30 amends Schedule 1 to this Act which defines a maintenance order for enforcement purposes. Sub-paragraph (*a*) makes changes consequential on the introduction of the new section 11B of the Guardianship of Minors Act 1971 and on the re-arrangement of provisions in section 2 of the Guardianship Act 1973 (as to which see notes on paragraph 42 of this Schedule). Sub-paragraph (*b*) is consequential on the abolition of affiliation proceedings and repeals the separate provision relating to affiliation orders.

The Maintenance Orders (Reciprocal Enforcement) Act 1972 (c. 18)

31. In section 8 of the Maintenance Orders (Reciprocal Enforcement) Act 1972 for subsection (4) there shall be substituted the following subsection—

"(4) An order which by virtue of this section is enforceable by a magistrates' court shall be enforceable as if it were a magistrates' court maintenance order made by that court.

In this subsection "magistrates' court maintenance order" has the same meaning as in section 150(1) of the Magistrates' Courts Act 1980.". 1980 c. 43.

32. In section 27 of that Act—

(*a*) in subsection (2) for the words from "appointed for the commission area" to the words "as the case may be" there shall be substituted the words "acting for the petty session district";

(*b*) in subsection (9) the words "section 5(5) of the Affiliation Proceedings Act 1957" shall be omitted.

33. In section 28 of that Act after "19(1)(ii)" there shall be inserted "20A".

34. In section 28A(3) of that Act in paragraph (*e*) after "19(1)(ii)" there shall be inserted "20A".

35. In section 30 of that Act—

(*a*) for subsection (1) there shall be substituted the following subsection—

"(1) Section 12C(5) of the Guardianship of Minors Act 1971 (revival by the High Court or county court of orders for periodical payments) shall not apply where the complaint is for an order under section 9(2) of that Act."

(*b*) in subsection (2) for the words "to which subsection (1) above applies" there shall be substituted the words "for an order under section 9(2) of that Act";

(*c*) in subsection (3) the words "the Affiliation Proceedings Act 1957 or", the words "paragraph (*b*) of section 2(1) of the said Act of 1957 (time for making complaint) or", the words "(provision to the like effect) as the case may be", the words "three years or" and the words "in the case of a complaint under the said Act of 1924" shall be omitted;

(*d*) in subsection (5) the words "the said Act of 1957 or" and the words "as the case may be" shall be omitted;

(*e*) in subsection (6) the words "or an affiliation order under the said Act of 1957" shall be omitted.

36. In section 33 of that Act for subsection (3) above shall be substituted the following subsection—

"(3) An order which by virtue of subsection (1) above is enforceable by a magistrates' court shall be enforceable as if it were a magistrates' court maintenance order made by that court.

In this subsection "magistrates' court maintenance order" has the same meaning as in section 150(1) of the Magistrates Courts Act 1980.". 1980 c. 43.

EXPLANATORY NOTES

Maintenance Orders (Reciprocal Enforcement) Act 1972

42. As to paragraph 31, see note 1 on this Schedule.

43. Paragraph 32(*a*) and (*b*) are consequential on the abolition of affiliation proceedings. Paragraph 32(*a*) deletes the reference to "commission area" because those words apply only to the law of England and Wales where affiliation proceedings are being abolished. The rest of subsection (2) is preserved because it applies to Northern Ireland where affiliation proceedings remain, and where the "petty session district" is the relevant place.

44. Paragraphs 33 and 34 are consequential on the introduction of the new section 20A of the Domestic Proceedings and Magistrates' Courts Act 1978 (revival of orders for periodical payments on application by child aged between 16 and 18): see note 67 on paragraph 55 of this Schedule.

45. Paragraph 35(*a*) repeals the existing section 30(1) of the Act as a consequence of the new power to make financial orders independently of orders for legal custody provided for under clause 5 (new section 9(2) of the Guardianship of Minors Act 1971); and excludes the operation of section 12C(5) (revival of orders on application by a child over 16) in relation to complaints under the 1972 Act. Paragraph 35(*b*) is a drafting amendment consequential on the repeal of section 30(1) of the Maintenance Orders (Reciprocal Enforcement) Act 1972 provided in paragraph 35(*a*). Paragraph 35(*c*), (*d*) and (*e*) remove the separate provisions relating to affiliation proceedings. The reference to the "said Act of 1924" is to the Illegitimate Children (Affiliation Orders) Act (Northern Ireland) 1924 which is not affected by this Bill.

46. As to paragraph 36, see note 1 on this Schedule.

37. In section 41 of that Act—

(*a*) subsection (1) shall be omitted;

(*b*) in subsection (2A) paragraph (*a*) shall be omitted and in paragraph (*b*) for the words "10, 11 or 12C(5)" there shall be substituted the words "10 or 11" and the word "revival" shall be omitted;

(*c*) in subsection (2B) paragraph (*a*) shall be omitted.

The Matrimonial Causes Act 1973 (c. 18)

38. In section 27 of the Matrimonial Causes Act 1973 for subsection (6B) there shall be substituted the following subsection—

"(6B) Where a periodical payments order made in favour of a child under this section ceases to have effect on the date on which the child attains the age of sixteen or at any time after that date but before or on the date on which he attains the age of eighteen, then if, on an application made to the court for an order under this subsection, it appears to the court that—

(*a*) the child is, or will be, or if an order were made under this subsection would be, receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not he is also, or will also be, in gainful employment; or

(*b*) there are special circumstances which justify the making of an order under this subsection.

the court shall have power by order to revive the first mentioned order for such date as the court may specify, not being earlier than the date of the making of the application, and to exercise its powers under section 31 of this Act in relation to any order so revived."

39. In section 50(1) of that Act at the end of paragraph (*a*) there shall be inserted the words "and section 27 of the Family Law Reform Act 1982 (declarations of parentage)".

The Guardianship Act 1973 (c. 29)

40. Without prejudice to any other amendment of the Guardianship Act 1973 made by this Act, for the word "minor" and the word "minors", in each place in which either of those words occurs in Part I of that Act, there shall be substituted respectively the word "child" or the word "children".

41. In section 1 of the Guardianship Act 1973—

(*a*) in subsection (1) for the words "a minor", in both places where they occur, there shall be substituted the words "a marital child";

(*b*) in subsection (7) the words "or be taken as applying in relation to a minor who is illegitimate" shall be omitted.

47. Paragraph 37(*a*) is consequential on the abolition of affiliation proceedings. Paragraph 37(*b*) is consequential on the introduction of the new section 11B of the Guardianship of Minors Act 1971 and on the non-application of the new section 12C(5) of that Act (see note 45 on paragraph 35 of this Schedule). Paragraph 37(*b*) and (*c*) also repeal separate provisions relating to affiliation orders (section 41(2A)(*a*) and (2B)(*a*) of the Maintenance Orders (Reciprocal Enforcement) Act 1972).

Matrimonial Causes Act 1973

48. Paragraph 38 corresponds to paragraph 23(*c*) above and provides for the revival of a periodical payments order made under section 27 of the Matrimonial Causes Act 1973 (failure to maintain) on the application of a child over the age of 18. The age limit of 21 is removed: see paragraph 6.33 of the Report.

49. Paragraph 39 provides that rules made in relation to declarations of parentage should be made by the Matrimonial Causes Rule Committee.

Guardianship Act 1973

50. Paragraph 40 replaces "minor" by "child" in this Act for the same reason as in the Guardianship of Minors Act 1971: see note 2 on clause 1 of the Bill.

51. Paragraph 41(*a*) and (*b*) are consequential upon making the Guardianship of Minors Act apply prima facie to all children whether marital or non-marital; accordingly under section 1(1) of the Guardianship Act 1973 (which deals with equality of parental rights) it is necessary to draw an express distinction between parental rights in relation to marital and in relation to non-marital children.

42. In section 2 of that Act—

(*a*) for subsection (2) there shall be substituted the following subsection—

"(2) Where—

1971 c. 3.

(*a*) an application is made under section 8 of the Guardianship of Minors Act 1971 by the father of a non-marital child for the parental rights and duties in relation to the child, or

(*b*) an application is made under section 9(1) of that Act by the mother or father of any child for the legal custody of the child,

then, subject to sections 3 and 4 below—

(i) if by virtue of the making of, or refusal to make, an order on that application the actual custody of the child is given to, or retained by, a parent of the child, but it appears to the court that there are exceptional circumstances making it desirable that the child should be under the supervision of an independent person, the court may make an order that the child shall be under the supervision of a specified local authority or under the supervision of a probation officer;

(ii) if it appears to the court that there are exceptional circumstances making it impracticable or undesirable for the child to be entrusted to either of the parents, the court may commit the care of the child to a specified local authority."

(*b*) in subsection (3) for the words "subsection (2)(*b*)" there shall be substituted the words "subsection (2)(ii)";

(*c*) for subsections (4) and (5) there shall be substituted the following subsections—

"(4) Subject to the provisions of this section, where an application is made under section 8 or 9(1) of the Guardianship of Minors Act 1971, the court, at any time before it makes a final order or dismisses the application, may, if by reason of special circumstances the court thinks it proper, make an interim order containing any such provision regarding the legal custody of and right of access to the child as the court has power to make under section 9(1).

(4A) Subject to the provisions of this section, where an application is made under section 9(2) of the Guardianship of Minors Act 1971, the court, at any time before it makes a final order or dismisses the application, may make an interim order requiring either parent to make to the other or to the child such periodical payments towards the maintenance of the child as the court thinks fit.

(5) Where under section 16(4) of the Guardianship of Minors Act 1971 the court refuses to make an order on an application under section 8 or 9 of that Act on the ground that the matter is one that would more conveniently be dealt with by the High Court, the court shall have power—

EXPLANATORY NOTES

52. Paragraph 42(*a*) substitutes a new section 2(2) so as to provide, in exceptional circumstances, for a supervision or care order in respect of a child who has been the subject of proceedings for legal custody under section 9 of the Guardianship of Minors Act 1971 or for parental rights under section 8; the paragraph is consequential upon the introduction of parental rights applications under section 8 (as to which see clause 4 of the Bill and the notes on that clause, and paragraphs 7.26 to 7.33 of the Report). Paragraph 42(*b*) is consequential on the re-arrangement of the provisions of section 2(2) as a result of the substitution above.

53. Paragraph 42(*c*), which deals with interim custody and financial orders, is consequential upon giving the court power to make financial orders under section 9 of the Guardianship of Minors Act 1971 whether or not an order for legal custody is made (see note 6 on clause 5) and upon giving the court power to make parental rights orders under section 8 of the 1971 Act. The new section 2(4) of the 1973 Act deals with interim custody and access orders; the new section 2(4A) deals with interim orders for financial provision; and the new section 2(5) deals with interim orders where the court refuses to make a final order under section 8 or 9 of the 1971 Act on the ground that the matter would more conveniently be dealt with by the High Court.

(*a*) in the case of an application under section 8 or 9(1) of that Act, to make an order under subsection (4) above,

(*b*) in the case of an application under section 9(2) of that Act, to make an order under subsection (4A) above.";

(*d*) in subsection (5B) for the words "section 9" there shall be substituted the words "section 9(2)";

(*e*) for subsection (5E) there shall be substituted the following subsection—

"(5E) On an application under section 8, 9(1) or 9(2) of the Guardianship of Minors Act 1971 the court shall not have power to make more than one interim order under this section with respect to that application, but without prejudice to the powers of the court under this section on any further such application.";

(*f*) subsection (6) shall be omitted.

43. In section 3(1) of that Act for "2(2)(*a*)" there shall be substituted "2(2)(i)".

44. In section 4 of that Act—

(*a*) for "2(2)(*b*)" wherever it occurs, there shall be substituted "2(2)(ii)";

(*b*) subsection (3D) shall be omitted.

45. In section 5 of that Act—

(*a*) for subsections (1) and (2) there shall be substituted the following subsections—

"(1) There shall be no appeal under section 16 of the Guardianship of Minors Act 1971 from an interim order under subsection (4A) of section 2 above.

(2) Section 8(4) of the Guardianship of Minors Act 1971 shall apply in relation to an interim order made under this Act on an application under that section as if the interim order had been made under that section, and section 9(4) of that Act shall apply in relation to an interim order made under this Act on an application under the said section 9 as if the interim order had been made under the said section 9.

(2A) Section 13 of the Guardianship of Minors Act 1971 shall apply in relation to an interim order made under this Act as if the interim order had been made under that Act.";

(*b*) in subsection (3)(*a*) after the words "under section 9 of that Act" there shall be inserted the words "requiring periodical payments to be made towards the child's maintenance or".

EXPLANATORY NOTES

54. Paragraph 42(*d*) is consequential on the re-arrangement of the provisions of section 9 of the Guardianship of Minors Act which results from the separation of legal custody and maintenance orders: see note 53 above. Paragraph 42(*e*) which deals with the successive interim orders is consequential on the powers introduced in sub-paragraph (*c*): see note 53 above. Paragraph 42(*f*) is consequential upon bringing non-marital children within the financial provisions of the Guardianship of Minors Acts.

55. Paragraphs 43 and 44(*a*) are consequential upon the re-arrangement of the provisions of section 2(2) of the Guardianship Act 1973: see note 52 to paragraph 42 above. Paragraph 44(*b*) excludes the operation of the new section 12C(5) of the Guardianship of Minors Act 1971 (revival of orders) from orders made under section 2(3) of the 1973 Act (maintenance for children who have been made the subject of a care order in guardianship proceedings).

56. Paragraph 45 makes further consequential amendments relating to interim orders. Paragraph 45(*a*) which deals with appeals, variation and discharge, and enforcement of orders is consequential on the amendments in paragraph 42 above. Paragraph 45(*b*), which deals with the case where one of the parties resides in Scotland or Northern Ireland, is consequential on the power to make financial orders whether or not an order for legal custody is made.

46. In section 5A of that Act for subsections (1) and (2) there shall be substituted the following subsections—

"(1) Where any of the following orders is made, that is to say—

(*a*) an order under section 9(1) of the Guardianship of Minors Act 1971 which gives the right to the actual custody of a child to one of the parents of the child,

(*b*) an order under section 9(2) of that Act which requires periodical payments to be made or secured to a parent of the child,

(*c*) an interim order under section 2(4) above which gives the right to the actual custody of a child to a parent of the child,

(*d*) an interim order under section 2(4A) above which requires periodical payments to be made to a parent of the child,

that order shall be enforceable notwithstanding that the parents of the child are living with each other at the date of the making of the order or that, although they are not living with each other at that date, they subsequently live with each other; but that order shall cease to have effect if after that date the parents of the child live with each other for a period exceeding six months.

(2) Where any of the following orders is made, that is to say—

(*a*) an order under section 9(2) of the Guardianship of Minors Act 1971 which requires periodical payments to be made or secured to a child,

(*b*) an order under section 2(2)(i), 2(2)(ii) or 2(3) above,

(*c*) an interim order under section 2(4A) requiring periodical payments to be made to a child,

then, unless the court otherwise directs, that order shall be enforceable notwithstanding that the parents of the child are living with each other at the date of the making of the order or that, although they are not living with each other at that date, they subsequently live with each other.

(2A) Where an order is made under section 11B of the Guardianship of Minors Act 1971 requiring periodical payments to be made to a person who has attained the age of eighteen, then unless the court otherwise directs, that order shall be enforceable notwithstanding that the parents of that person, although they are not living with each other at the date of the order, subsequently live with each other.".

47. In section 6(1) of that Act for the words "section 5 or 9" there shall be substituted the words "section 5, 8 or 9(1)".

48. After section 7 of that Act there shall be inserted the following section—

"Interpretation of Part I.

8. In this Part of this Act—

"child", except where used to express a relationship, means a person who has not attained the age of eighteen;

"marital child" and "non-marital child" have the same meansings as in the Guardianship of Minors Act 1971.".

EXPLANATORY NOTES

57. Paragraph 46 substitutes a new section 5A(1), (2) and (2A) for the existing section 5A(1) and (2) of the Guardianship Act 1973. Section 5A(1) and (2) deal with the effect on certain orders of the child's parents living together, and take account of the power to order secured periodical payments under the Guardianship of Minors Acts and the re-arranged provisions of section 2 of the Guardianship Act 1973 (interim orders) (see paragraphs 42–45 of this Schedule).

58. The new section 5A(2A) provides that periodical payments orders in favour of children over 18 do not lapse if their parents resume living together. For such orders to be obtained however the parents must be living apart at the date of the order: see new section 11B(1) and (4) of the Guardianship of Minors Act 1971 (clause 8 of the Bill) and paragraphs 6.30 to 6.32 of the Report.

59. Paragraph 47, which deals with welfare reports, is consequential on the introduction of the new section 8 of the Guardianship of Minors Act 1971 (parental rights orders).

60. Paragraph 48 applies the definitions of "child", "marital child" and "non-marital child" contained in section 20(2) of the Guardianship of Minors Act 1971 (see Schedule 4 below) to the Guardianship Act 1973.

The Social Security Act 1975 (c. 14)

49. In section 25(1) of the Social Security Act 1975 there shall be added at the end of paragraph (*b*) the words "or

(*c*) if the woman and her late husband were residing together immediately before his death, the woman is pregnant as the result of being artificially inseminated with the semen of some person other than her husband."

The Children Act 1975 (c. 72)

50. In section 34 of the Children Act 1975—

(*a*) in subsection (4) for the word "illegitimate" there shall be substituted the words "a non-marital child";

(*b*) in subsection (5)—

(i) after the words "(3B), (4)" there shall be inserted the words "(4A)";

(ii) for the words "(5E) and (6)" there shall be substituted the words "and (5E)"; and

(iii) in paragraph (*a*) for the words "2(2)(*b*) and (4)(*a*)" there shall be substituted the words "2(2)(ii) and (4A)";

(*c*) at the end there shall be added the following subsection—

"(7) In this section and in section 36A "non-marital child" has the same meaning as in the Family Law Reform Act 1982".

51. In section 35 of that Act for subsection (10) there shall be substituted the following subsections—

"(10) Where an order under section 34(1)(*b*) ceases to have effect on the date on which the child attains the age of 16 or at any time after that date but before or on the date on which he attains the age of 18, the child may apply to an authorised court, other than a magistrates' court, for an order for the revival of that order, and if, on such an application, it appears to the court that—

(*a*) the child is, or will be, or if an order were made under this subsection would be, receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not he is also, or will also be, in gainful employment; or

(*b*) there are special circumstances which justify the making of an order under this subsection,

the court shall have power by order to revive the order made under section 34(1)(*b*) from such date as the court may specify, not being earlier than the date of the making of the application and to vary or revoke under this section any order so revived.

(10A) Any order made by a magistrates' court under section 34(1)(*b*) which is revived by an order under subsection (10) shall for the purposes of the enforcement of the order be treated as an order made by the magistrates' court by which the order was originally made."

52. In section 37(3) of that Act the words "section 9 (orders for custody and maintenance" there shall be substituted the words "section 9(1) (orders for custody)".

Social Security Act 1975

61. Paragraph 49 provides for a widowed mother's allowance (based on her late husband's contributions) where a woman is pregnant as a result of A.I.D. and was residing with her late husband immediately before his death. Under section 25(1) of the Act she would have been entitled to the allowance if she had been pregnant by her late husband; this paragraph is consistent with treating an A.I.D. child as the child of its mother's husband in the circumstances provided for in clause 34 of the Bill.

Children Act 1975

62. Paragraph 50(*a*) and (*c*) are consequential on the introduction of the word "non-marital" as defined in clause 39 of the Bill. Paragraph 50(*b*) is consequential on the re-enactment and repeal of provisions relating to interim orders under the Guardianship Act 1973: see notes to paragraphs 42 to 45 of this Schedule.

*63. Paragraph 51 is consequential on paragraph 23(*c*) of this Schedule and provides for the revival of a periodical payments order made under the custodianship provisions on the application of a child over the age of 18. The age limit of 21 is removed: cf. paragraphs 23(*c*) and 38 of this Schedule and the notes on those paragraphs. In line with those paragraphs, paragraph 51 provides for application to an "authorised court" other than the magistrates' court, i.e. the High Court or county court (see section 100(1) of the Children Act 1975) but, under the new section 35(10A), the magistrates' court remains the court for enforcement purposes.

*64. Paragraph 52 is consequential on the powers to make financial orders whether or not an order for legal custody is made: see note 6 on clause 5 (new section 9(2) of the Guardianship of Minors Act 1971).

The Supplementary Benefits Act 1976 (c. 71)

53. In section 17 of the Supplementary Benefits Act 1976 for subsection (2) there shall be substituted the following subsection—

"(2) In the application of subsection (1) above to Scotland—

(*a*) the reference to a man's children includes a reference to children his paternity of whom has been admitted or otherwise established; and

(*b*) the reference to a woman's children includes a reference to her illegitimate children".

54. In section 26(2) of that Act for the words "an order enforceable as an affiliation order" there shall be substituted the words "an order made under section 18 of this Act".

The Domestic Proceedings and Magistrates' Courts Act 1978 (c. 22)

55. After section 20 of the Domestic Proceedings and Magistrates' Courts Act 1978 there shall be inserted the following section—

"Revival of orders for periodical payments.

20A.—(1) Where an order made by a magistrates' court under this Part of this Act for the making of periodical payments to or in respect of a child (other than an interim maintenance order) ceases to have effect on the date on which the child attains the age of sixteen or at any time after that date but before or on the date on which he attains the age of eighteen, the child may apply to the High Court or a county court for an order for the revival of the order of the magistrates' court, and if, on such an application, it appears to the High Court or county court that—

(*a*) the child is, or will be, or if an order were made under this subsection would be, receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not he is also, or will also be, in gainful employment; or

(*b*) there are special circumstances which justify the making of an order under this subsection,

the court shall have power by order to revive the first mentioned order from such date as the court may specify, not being earlier than the date of the making of the application.

(2) Where an order made by a magistrates' court is revived by an order of the High Court or a county court under subsection (1) above, then—

(*a*) for the purposes of the variation and discharge of the revived order, that order shall be treated as an order of the court by which it was revived and may be varied or discharged by that court on the application of any person by whom or to whom payments are required to be made under the order, and

(*b*) for the purposes of the enforcement of the revived order, that order shall be treated as an order of the magistrates' court by which the order was originally made."

Supplementary Benefits Act 1976

65. Paragraph 53 re-enacts section 17(2) of the Supplementary Benefits Act 1976 so that it applies only to Scotland; the part of the subsection relating to England and Wales is repealed. See the note on clause 23 of the Bill.

66. As to paragraph 54, see clause 23(2)(*b*) of the Bill; and note 1 on this Schedule.

Domestic Proceedings and Magistrates' Courts Act 1978

67. Paragraph 55 corresponds to paragraph 23(*c*) of this Schedule and provides for the revival of a periodical payments order made under section 2 of the Domestic Proceedings and Magistrates' Courts Act 1978 on the application of a child over the age of 18. The age limit of 21 is removed: cf. paragraphs 23(*c*), 38 and 51 of this Schedule.

56. In section 32 of that Act for subsection (1) there shall be substituted the following subsection—

"(1) An order for the payment of money made by a magistrates' court under this Part of this Act shall be enforceable as a magistrates' court maintenance order."

57. In section 88(1) of that Act after the definition of "local authority" there shall be inserted the following definition— 1980 c. 43.

" 'magistrates' court maintenance order' has the same meaning as in section 150(1) of the Magistrates' Courts Act 1980".

58. In Schedule 1 to that Act—

(*a*) after paragraph 3 there shall be inserted the following paragraph—

"3A. Any order for the payment of money in force under the Matrimonial Proceedings (Magistrates' Courts) Act 1960 (including any such order made under that Act by virtue of paragraph 1 above) shall be enforceable as a magistrates' court maintenance order.

(*b*) in paragraph 4 for the words "paragraph 2 or 3" there shall be substituted the words "paragraph 2, 3 or 3A".

The Adoption (Scotland) Act 1978 (c. 28)

59. In section 65(1) of the Adoption (Scotland) Act 1978 in the definition of "guardian" for the words "where he has custody of the child by virtue of an order under section 9 of the Guardianship of Minors Act 1971 or" there shall be substituted the words "where he has a right of access or any other parental right in relation to the child by virtue of an order under section 8 or 9(1) of the Guardianship of Minors Act 1971 or has custody of the child".

The Child Care Act 1980 (c. 5)

60. In section 51(3) of the Child Care Act 1980 for "47(4)" there shall be substituted "47(2A) and (4)".

61. In section 55 of that Act—

(*a*) subsection (3) shall be omitted;

(*b*) in subsection (5) the words from "and any jurisdiction conferred by this section in affiliation proceedings" to the end of the subsection shall be omitted.

62. In section 86 of that Act for paragraphs (*a*) and (*b*) there shall be substituted the words "of an order made by a court under section 47 or 48 of this Act".

63. In section 87(1) of that Act, in the definition of "relative" after the words "a child" there shall be inserted the words "(whether marital or non-marital)" and for the words from "and includes" to the end of the definition there shall be substituted the words "and includes, in the case of a non-marital child, the father of the child".

68. As to paragraphs 56 and 57 see note 1 on this Schedule.

69. As to paragraph 58(*a*) see note 1 on this Schedule; sub-paragraph (*b*) is consequential on sub-paragraph (*a*).

Adoption (Scotland) Act 1978

70. Paragraph 59 is a provision in Scottish legislation consequential on the change in the legal position under English law of the father of the non-marital child regarding the child's adoption which is effected by clause 17 of the Bill.

Child Care Act 1980

71. Paragraph 60 is consequential on the new section 47(2A) of the Child Care Act 1980 dealing with proof of paternity in contribution cases: see clause 21(*b*) of the Bill.

72. Paragraph 61, which deals with proceedings by or against a person residing in Scotland or Northern Ireland, is consequential on the abolition of affiliation proceedings.

73. Paragraph 62, which deals with the use of court orders in evidence, is consequential on the abolition of affiliation proceedings and the amendments to section 47 of the Act effected in clause 21 of the Bill.

74. Paragraph 63 is consequential on the use of "marital" and "non-marital": see note 2 on clause 1 of the Bill. It also provides that the father of a non-marital child qualifies as a "relative" in cases where he does not qualify as a "parent" under the Act; and it preserves the substance of the existing law: see paragraphs 7.49 to 7.51 of the Report.

The Magistrates' Courts Act 1980 (c. 43)

64. In section 58(2)(*a*) of the Magistrates' Courts Act 1980 for the words "an affiliation order or order enforceable as an affiliation order" there shall be substituted the words "a magistrates' court maintenance order".

65. In section 64 of that Act for subsection (4) there shall be substituted the following subsection—

"(4) Any costs awarded on a complaint for a maintenance order, or for the enforcement, variation, revocation, discharge or revival of such an order, against the person liable to make payments under the order shall be enforceable as a sum ordered to be paid by a magistrates' court maintenance order."

66. In section 80(1) of that Act for the words "an affiliation order or an order enforceable as an affiliation order" there shall be substituted the words "a magistrates' court maintenance order".

67. In section 93(1) of that Act for the words "an affiliation order or order enforceable as an affiliation order" there shall be substituted the words "a magistrates' court maintenance order".

68. In section 94 of that Act for the words "an affiliation order or order enforceable as an affiliation order" there shall be substituted the words "a magistrates' court maintenance order".

69. In section 95 of that Act for the words "affiliation order or an order enforceable as an affiliation order" there shall be substituted the words "a magistrates' court maintenance order".

70. In section 100 of that Act for paragraph (*b*) there shall be substituted the following paragraph—

"(*b*) on any application made by or against that person for the making of a magistrates' courts maintenance order, or for the variation, revocation, discharge or revival of such an order".

71. In section 150(1) of that Act—

(*a*) the definition of "affiliation order" shall be omitted;

(*b*) after the definition of "London Commission area" there shall be inserted—

"magistrates' court maintenance order" means a maintenance order enforceable by a magistrates' court;

1970 c. 31.

"maintenance order" means any order specified in Schedule 8 to the Administration of Justice Act 1970 and includes such an order which has been discharged, if any arrears are recoverable thereunder;".

The Civil Jurisdiction and Judgments Act 1982 (c. 27)

72. In section 5 of the Civil Jurisdiction and Judgments Act 1982—

(*a*) after subsection (5) there shall be inserted the following subsection—

"(5A) A maintenance order which by virtue of this section is enforceable by a magistrates' court in England and Wales shall be enforceable in the same manner as a magistrates' court maintenance order made by that court.

In this subsection 'magistrates' court maintenance order has the same meaning as in section 150(1) of the Magistrates' Courts Act 1980.";

1980 c. 43.

(*b*) in subsection (6) the words "in England and Wales or" shall be omitted.

EXPLANATORY NOTES

Magistrates' Courts Act 1980

75. As to paragraphs 64 to 71 see note 1 on this Schedule.

Civil Jurisdiction and Judgments Act 1982

76. Paragraph 72(*a*) inserts a new section 5(5A) into the Act: see note 1 on this Schedule. Paragraph 72(*b*) removes so far as the law of England and Wales is concerned the provision relating to affiliation orders; the provision remains in force in Northern Ireland.

SCHEDULE 3

TRANSITIONAL PROVISIONS

Applications pending under amended or repealed enactments

1. This Act (including the repeals and amendments made by it) shall not have effect in relation to any application made under any enactment repealed or amended by this Act if that application is pending at the time when the provision of this Act which repeals or amends that enactment comes into force.

Affiliation orders

1957 c. 55.

2.—(1) Any affiliation order made under the Affiliation Proceedings Act 1957 which is in force immediately before the coming into force of section 1 of this Act shall not be affected by the repeal by this Act of that Act, and the provisions of that Act of 1957 (and the provisions of the Magistrates' Courts Act 1980 as they have effect immediately before the coming into force of any of the amendments made to that Act of 1980 by Schedule 2 to this Act) shall, after the coming into force of section 1 of this Act, continue to apply in relation to such an order and to an affiliation order made by virtue of paragraph 1 above.

1948 c. 29.
1976 c. 71.
1980 c. 5.

(2) Any reference in this paragraph to an affiliation order made under the Affiliation Proceedings Act 1957 includes a reference to an affiliation order made, and to any order made in relation thereto, by virtue of section 44 of the National Assistance Act 1948, section 19 of the Supplementary Benefits Act 1976 or section 49 or 50 of the Child Care Act 1980 and the reference to the provisions of that Act of 1957 shall be construed accordingly.

1971 c. 3.

3. Where an application is made to the High Court or a county court for an order under section 9(2) of the Guardianship of Minors Act 1971 in respect of a non-marital child, then, if an affiliation order providing for periodical payments is in force in respect of that child by virtue of this Schedule, the court by which that application is heard may, if it thinks fit, direct that the affiliation order shall cease to have effect on such date as may be specified in the direction.

Orders giving custody of child to person other than parent

1975 c. 72.

4.—(1) If on the date on which section 5 of this Act comes into force section 33 of the Children Act 1975 is not in force, the provisions of this paragraph shall have effect.

(2) In this paragraph "the relevant period" means the period beginning on the date on which section 5 of this Act comes into force and ending on the date on which section 33 of the Children Act 1975 comes into force.

(3) In relation to an application made during the relevant period for an order under section 9 of the Guardianship of Minors Act 1971, that section shall have effect as if—

(*a*) in subsection (2) after the words "parent of a child" there were inserted the words "or of any other person who has the right to the actual custody of the child";

(*b*) in subsection (3) after the words "other parent", in each place where they occur, there were inserted the words "or to the person who has the right to the actual custody of the child";

(*c*) in subsection (4) there were added at the end the words "or (before or after the death of either parent) on the application of any other person who has the right to the actual custody of the child"; and

(*d*) subsection (5) were omitted.

EXPLANATORY NOTES

Schedule 3: Transitional Provisions

1. Paragraph 1 makes the usual provision that the coming into force of this Act or any part of it does not affect applications pending under any repealed or amended enactment.

2. Paragraph 2(1) provides that existing affiliation orders and affiliation orders made on applications pending when this Act comes into force are not affected by the repeal of the Affiliation Proceedings Act 1957. Paragraph 2(2) defines affiliation orders for this purpose so as to include affiliation orders made under the other Acts referred to.

3. Paragraph 3, which implements the recommendation made in paragraph 14.4(*b*) of the Report, provides that financial orders under section 9(2) of the Guardianship of Minors Act 1971 as amended may be made notwithstanding an existing affiliation order and provides that an existing order can be terminated by court order; for a discussion of this see paragraphs 6.53 to 6.55 of the Report.

4. Paragraph 4 deals with the possibility that section 33 of the Children Act 1975 (custodianship orders) will not be in force when clause 5 of this Bill (orders for custody and financial relief) is implemented. Until section 33 of the 1975 Act comes into force it will still be possible for non-parents to be granted legal custody under the Guardianship of Minors Act 1971. (When that section comes into force non-parents will have to apply for custodianship orders). Accordingly this paragraph preserves for the transitional period the substance of the existing law so far as non-parents are concerned.

5. Paragraph 4(1) is an enabling provision.

6. Paragraph 4(2) defines the transitional period when this provision applies.

7. Paragraph 4(3) deals with three situations under section 9 of the Guardianship of Minors Act 1971 (see Schedule 4 to this Bill) where the position of the non-parent who has the right to actual custody (as to which see note 2 on clause 3 of the Bill) is relevant:

(*a*) under section 9(2) of that Act, as a person entitled to apply for an order for financial relief;

(*b*) under section 9(3) of that Act, as a person to whom payments in respect of the child may be ordered to be made;

(*c*) under section 9(4) of that Act, as a person entitled to apply for the variation or discharge of orders. The omission of section 9(5) is consequential on preserving the substance of the present law during the transitional period.

1973 c. 29.

(4) In relation to an application made during the relevant period for an order under section 9(1) of the Guardianship of Minors Act 1971, section 2(2) of the Guardianship Act 1973 shall have effect as if in paragraph (ii) after the word "parents" there were inserted the words "or to any other individual".

(5) In relation to an application made during the relevant period for an order under section 9(2) of the Guardianship of Minors Act 1971, subsection (4A) of section 2 of the Guardianship Act 1973 shall have effect as if after the word "other" there were inserted the words "or to any person who has the right to the actual custody of the child".

(6) In relation to an application made during the relevant period for an order under section 9 of the Guardianship of Minors Act 1971, section 5A(2) of the Guardianship Act 1973 shall have effect as if for paragraphs (*a*) to (*c*) there were substituted the following paragraphs—

"(*a*) an order under section 9(1) of the Guardianship of Minors Act 1971 which gives the right to the actual custody of a child to a person who is not a parent of the child,

(*b*) an order under section 9(2) of that Act which requires periodical payments to be made or secured to a child or to a person who has the right to the actual custody of a child but who is not a parent of the child,

(*c*) an order under section 2(2)(i), 2(2)(ii) or 2(3) above,

(*d*) an interim order under section 2(4) above which gives the right to the actual custody of a child to a person who is not a parent of the child,

(*e*) an interim order under section 2(4A) above which requires periodical payments to be made to a child or to a person who has the right to the actual custody of a child but who is not a parent of the child".

(7) In relation to an order made under section 9(1), 10(1)(*a*) or 11(1)(*a*) of the Guardianship of Minors Act 1971 or section 2(4) of the Guardianship Act 1973, on an application made during the relevant period, section 13A of the said Act of 1971 shall have effect as if at the end of subsection (3) there were inserted the words "or by any other person who has the legal custody of the child concerned by virtue of the order so mentioned".

(8) In relation to an application made during the relevant period for an order under section 14A of the Guardianship of Minors Act 1971, that section shall have effect as if at the end of subsection (5) there were added the words "or

(*c*) if the court has made an order under section 9(1)(*a*) of this Act giving the legal custody of the child to a person other than one of the parents, by that person".

EXPLANATORY NOTES

8. Paragraph 4(4) is a consequential provision which refers to section 2(2) of the Guardianship Act 1973 (care or supervision order in exceptional circumstances).

9. Paragraph 4(5) is a consequential provision which refers to section 2(4A) of the Guardianship Act 1973 (interim orders) as substituted by this Bill: see Schedule 2, para. 42(*c*) above.

10. Paragraph 4(6) refers to section 5A of the Guardianship Act 1973 (enforceability of orders during subsequent cohabitation by parents) as substituted by this Bill: see Schedule 2, para. 46 above. This paragraph provides for the position where an order has been made under section 9 of the Guardianship of Minors Act 1971 in favour of a non-parent. The reference in sub-paragraph (*c*) to sections 2(2)(i), (2)(ii) and (3) of the Guardianship Act 1973 (as amended or substituted in paragraph 42 of Schedule 2 to the Bill) is to care and supervision orders.

11. Paragraph 4(7) refers to section 13A of the Guardianship of Minors Act 1971 (restriction on removal of child from England and Wales: see Schedule 4 to the Bill) and provides for the case where a non-parent may have been granted legal custody and wishes to apply for a direction against the removal out of the jurisdiction (or for the variation or discharge of such direction).

12. Paragraph 4(8) refers to section 14A of the Guardianship of Minors Act 1971 (access applications by grandparents: see Schedule 4 to the Bill) and preserves for the transitional period the provision which applies where a non-parent has been granted legal custody and wishes to apply for variation or discharge of the access order. See note 4 above.

S.I. 1980 No. 1478.

(9) Paragraphs 10 to 13 of Schedule 2 to the Domestic Proceedings and Magistrates' Courts Act 1978 (Commencement No. 4) Order 1980 shall not apply in relation to an application made after the coming into force of section 5 of this Act for an order under the Guardianship of Minors Act 1971 or the Guardianship Act 1973.

References to provisions of Adoption Act 1976 and Adoption (Scotland) Act 1978

1976 c. 36.

5. If on the date on which section 17(1) of this Act comes into force, the definition of "guardian" in section 72(1) of the Adoption Act 1976 is not in force, the reference in the said section 17(1) to that definition shall be construed as a reference to the definition of "guardian" in section 107(1) of the Children Act 1975.

6. If, on the date on which section 17(2) of this Act comes into force, section 18 of the Adoption Act 1976 is not in force, the reference in the said section 17(2) to subsection (7) of the said section 18 shall be construed as a reference to subsection (8) of section 14 of the Children Act 1975.

7. If, on the date on which section 37 of this Act comes into force, or on the date on which paragraph 29 of Schedule 2 to this Act comes into force, Part IV of the Adoption Act 1976 is not in force, the reference in the said section 37 or in section 20(2) of the Guardianship of Minors Act 1971 to the said Part IV shall be construed as a reference to Part I of Schedule 1 to the Children Act 1975.

8. If, on the date on which paragraph 19(*b*) of Schedule 2 to this Act comes into force, section 18 of the Adoption Act 1976 is not in force, the reference in section 11A(4) of the Guardianship of Minors Act 1971 to the said section 18 shall be construed as a reference to section 14 of the Children Act 1975.

9. If, on the date on which paragraph 19(*b*) of Schedule 2 to this Act comes into force, section 18 of the Adoption (Scotland) Act 1978 is not in force, the reference in section 11A(4) of the Guardianship of Minors Act 1971 to the said section 18 shall be construed as a reference to section 14 of the Children Act 1975.

1978 c. 28.

10. If on the date on which paragraph 59 of Schedule 2 to this Act comes into force, the definition of "guardian" in section 65(1) of the Adoption (Scotland) Act 1978 is not in force, the reference in that paragraph to that section shall be construed as a reference to section 107(1) of the Children Act 1975.

EXPLANATORY NOTES

13. Paragraph 4(9) repeals certain transitional provisions contained in the Domestic Proceedings and Magistrates' Courts Act 1978 (Commencement No. 4) Order 1980. Those transitional provisions have been replaced by those in paragraph 4 of this Schedule.

14. Paragraphs 5 to 10 make it clear that provisions under the Children Act 1975 which are re-enacted in the (consolidating) Adoption Act 1976 apply until the latter Act comes into force.

15. Paragraph 5 refers to the definition of "guardian" in the Children Act 1975 and the Adoption Act 1976. See clause 17 of the Bill.

16. Paragraph 6 deals with the reference in clause 17(2) of the Bill to the "freeing for adoption" provision in the Children Act 1975 and the Adoption Act 1976.

17. Paragraph 7 refers to the interpretation clause of the Bill (definition of adopted child).

18. Paragraph 8 deals with the reference to the "freeing for adoption" provision in section 11A(4) of the Guardianship of Minors Act 1971 (inserted by Schedule 2, para. 19(*b*) above).

19. Paragraph 9 deals with a similar reference to the Scottish "freeing for adoption" provision.

20. Paragraph 10 deals with the reference, in paragraph 59 of Schedule 2 to the Bill, to the definition of "guardian" in section 107(1) of the Children Act 1975 and section 65(1) of the Adoption (Scotland) Act 1978.

Registration of Births

11. Where the birth of a non-marital child born in England or Wales before the date appointed for the coming into force of section 31 of this Act has not
1953 c. 20. been registered under the Births and Deaths Registration Act 1953 before that date, then, if an order has been made under section 4 of the Affiliation Proceedings Act 1957 (including an order made under that section by virtue of paragraph 1 above) naming any person as the putative father of that child, the mother of the child, on production of a certified copy of the order, may request the registrar to enter the name of that person as the father of the child under section 10 of that Act of 1953 as if the order made under section 4 of that Act of 1957 were an order under section 9(2) of the Guardianship of Minors Act 1971.

12. Where the birth of a non-marital child has been registered under the Births and Deaths Registration Act 1953 before the date appointed for the coming into force of section 32 of this Act but no person has been registered as the father of the child, then, if an order has been made in respect of the child under section 4 of the Affiliation Proceedings Act 1957 (including an order made under that section by virtue of paragraph 1 above) naming any person as the putative father of the child, the mother of the child may, on production of a certified copy of that order, request the registrar to re-register the birth under section 10A of that Act of 1953 so as to show as the father of the child the person named in the order.

EXPLANATORY NOTES

21. Paragraphs 11 and 12 deal with the registration (paragraph 11) or re-registration (paragraph 12) of the birth of a non-marital child, after the implementation of this Bill, pursuant to an affiliation order made before the implementation of the Bill. (The reference to paragraph 1 of this Schedule is to affiliation orders made after the implementation of the Bill in proceedings pending at the time of implementation.) In either case—first registration or re-registration—the mother may, as under the present law, have the birth registered or re-registered on the strength of the affiliation order.

SCHEDULE 4

THE GUARDIANSHIP OF MINORS ACT 1971 (*c.* 3) AS AMENDED BY THIS ACT

[*In the provisions set out in this Schedule the words inserted by the Bill are set out in* **heavy type**]

ARRANGEMENT OF SECTIONS

EXPLANATORY NOTES

Schedule 4: Guardianship of Minors Act 1971 as amended

This Schedule, which sets out the Guardianship of Minors Act 1971 as amended by other Acts and by the Bill, is of the kind known as a "Keeling Schedule" (see the introduction to the notes on clauses 2 to 11 of the Bill). The heavy type indicates the amendments made by the Bill.

Jurisdiction and procedure

Supplementary

An Act to consolidate certain enactments relating to the guardianship and custody of minors.

(Formal enacting words)

General principles

Principle on which questions relating to custody, upbringing etc. of children are to be decided.

1. Where in any proceedings before any court (whether or not a court as defined in section 15 of this Act)—

(*a*) the legal custody or upbringing of a **child**; or

(*b*) the administration of any property belonging to or held on trust for a **child**, or the application of the income thereof,

is in question, the court in deciding that question, shall regard the welfare of the **child** as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father in respect of such legal custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father.

For the avoidance of doubt it is hereby declared that the provisions of this section apply to all children whether or not the mother and father of the child have at any time been married to each other.

. . . . . .

Appointment, removal and powers of guardians

Rights of surviving parent as to guardianship.

3.—(1) On the death of the father of a **marital child**, the mother, if surviving, shall, subject to the provisions of this Act, be guardian of the **child** either alone or jointly with any guardian appointed by the father; and—

(*a*) where no guardian has been appointed by the father; or

(*b*) in the event of the death or refusal to act of the guardian or guardians appointed by the father,

the court may, if it thinks fit, appoint a guardian to act jointly with the mother.

(2) On the death of the mother of a **marital child**, the father, if surviving, shall, subject to the provisions of this Act, be guardian of the **child** either alone or jointly with any guardian appointed by the mother; and—

(*a*) where no guardian has been appointed by the mother; or

(*b*) in the event of the death or refusal to act of the guardian or guardians appointed by the mother,

the court may, if it thinks fit, appoint a guardian to act jointly with the father.

4.—(1) The father of a **marital child** may by deed or will appoint any person to be guardian of the **child** after his death.

Power of father and mother to appoint testamentary guardians.

(2) The mother of **a child (whether marital or non-marital)** may by deed or will appoint any person to be guardian of the **child** after her death.

(3) Any guardian so appointed **(other than a guardian appointed in respect of a non-marital child by the mother of the child)** shall act jointly with the mother or father, as the case may be, of the **child** so long as the mother or father remains alive unless the mother or father objects to his so acting.

(4) If the mother or father so objects, or if the guardian so appointed considers that the mother or father is unfit to have the custody of the **child,** the guardian may apply to the court, and the court may either—

(*a*) refuse to make any order (in which case the mother or father shall remain sole guardian); or

(*b*) make an order that the guardian so appointed—

(i) shall act jointly with the mother or father; or

(ii) shall be the sole guardian of the **child.**

(5) Where guardians are appointed by both parents, the guardians so appointed shall, after the death of the surviving parent, act jointly.

(6) If under section 3 of this Act a guardian has been appointed by the court to act jointly with a surviving parent, he shall continue to act as guardian after the death of the surviving parent; but, if the surviving parent has appointed a guardian, the guardian appointed by the court shall act jointly with the guardian appointed by the surviving parent.

Power of court to appoint guardian for child having no parent etc.

5.—(1) **Where**—

(*a*) both parents of a marital child are dead, or

(*b*) the mother of a non-marital child is dead,

and, in either case, the child has no guardian of the person, and no other person having parental rights with respect to him, the court, on the application of any person, may, if it thinks fit, appoint the applicant to be the guardian of the **child.**

(2) A court may entertain an application under this section to appoint a guardian of a **child** notwithstanding that parental rights and duties with respect to the child are vested in a local authority or a voluntary organisation by virtue of a resolution under section 3 or 64 of the Child Care Act 1980.

1980 c. 5.

Guardians of non-marital children.

5A.—(1) **Where the father of a non-marital child has any parental rights and duties in relation to the child by virtue of an order in force under section 8 or 9(1) of this Act, sections 3, 4 and 5 of this Act shall apply in relation to the child as if he were a marital child; but any appointment of a guardian made under section 4(1) of this Act by virtue of this section shall be of no effect unless the appointor has those parental rights and duties immediately before his death.**

(2) **Where on an application under section 8 or 9(1) of this Act in respect of a non-marital child the only right given to the father is a right of access, the father of the child shall not be regarded for the purposes of this section as having any parental rights and duties in relation to the child.**

Power of High Court to remove or replace guardian.

6. The High Court may, in its discretion, on being satisfied that it is for the welfare of the **child,** remove from his office any testamentary guardian or any guardian appointed or acting by virtue of this Act, and may also, if it deems it to be for the welfare of the **child,** appoint another guardian in place of the guardian so removed.

Disputes between joint guardians.

7. Where two or more persons act as joint guardians of a **child** and they are unable to agree on any question affecting the welfare of the **child,** any of them may apply to the court for its direction and the court may make such order regarding the matters in difference as it may think proper.

Parental rights and duties in relation to non-marital children

Orders for parental rights and duties for father of non-marital child.

8.—(1) **The father of a non-marital child may apply to the court for the parental rights and duties in relation to the child and, on such an application, the court may—**

(*a*) **order that the father shall have all the parental rights and duties, or**

(*b*) **order that the father shall have all or such as the court may specify of the parental rights and duties other than the right to the actual custody of the child.**

(2) **Where, on an application under subsection (1) of this section, the court makes an order under paragraph (*b*) or makes no order under that subsection, the court may make such order regarding access to the child by the father as the court thinks fit.**

(3) **Where the father of a child is given parental rights and duties by virtue of an order under subsection (1) of this section, the father shall, unless the court otherwise directs, have those rights and duties jointly with the mother of the child or, if the mother is dead, jointly with any guardian appointed by the mother or the court under this Act, except that where by virtue of an order under paragraph (*a*) of that subsection the father is given the actual custody of the child, he shall, unless the court otherwise directs, have that right exclusively.**

(4) **An order under subsection (1) of this section may be varied or discharged by a subsequent order made on the application of either parent of the child or, if the mother is dead, on the application of any guardian under this Act.**

(5) **No such order as is mentioned in section 9(3) 10(2) or 11(2) of this Act shall be made on an application under this section.**

(6) **Any order made under this section shall cease to have effect when the child attains the age of eighteen.**

Orders for custody and financial relief

Orders for custody and financial relief on application of either parent.

9.—(1) **The court may, on the application of either parent of a child, make such order regarding—**

(*a*) **the legal custody of the child; and**

(*b*) **access to the child by either parent,**

as the court thinks fit.

(2) **The court may, on the application of either parent of a child make—**

(*a*) **in the case of proceedings in the High Court or a county court, one or more of the orders mentioned in subsection (3) of this section;**

(*b*) **in the case of proceedings in a magistrates' court, one or both of the orders mentioned in paragraphs (*a*) and (*c*) of that subsection.**

(3) **The orders referred to in subsection (2) of this section are—**

(*a*) **an order requiring one parent to make to the other parent for the benefit of the child, or to the child, such periodical payments, and for such term, as may be specified in the order;**

(*b*) **an order requiring one parent to secure to the other parent for the benefit of the child, or to secure to the child, such periodical payments, and for such term, as may be so specified;**

(*c*) **an order requiring one parent to pay to the other parent for the benefit of the child, or to the child, such lump sum as may be so specified;**

(*d*) **an order requiring either parent to transfer to the other parent for the benefit of the child, or to the child, such property as may be so specified, being property to which the first-mentioned parent is entitled, either in possession or reversion;**

(*e*) **an order requiring that a settlement of such property as may be so specified, being property to which either parent is so entitled, be made to the satisfaction of the court for the benefit of the child.**

(4) **An order under this section, other than an order mentioned in paragraph (*c*), (*d*) or (*e*) of subsection (3), may be varied or discharged by a subsequent order made on the application of either parent or after the death of either parent on the application of any guardian under this Act.**

(5) **An order shall not be made under subsection (1) of this section giving legal custody to a person other than the mother or father.**

Orders for custody and financial relief where person is guardian to exclusion of surviving parent.

10.—(1) **Where the court makes an order under section 4(4) of this Act (including an order made under that section by virtue of section 5A of this Act) that a person shall be the sole guardian of a child to the exclusion of his mother or father, the court—**

(*a*) may make such order regarding—

(i) the legal custody of the child; and

(ii) access to the child by the surviving parent,

as the court thinks fit;

(*b*) whether or not it makes an order under paragraph (*a*) of this subsection, may make—

(i) in the case of proceedings in the High Court or a county court, one or more of the orders mentioned in subsection (2) of this section;

(ii) in the case of proceedings in a magistrates' court, one or both of the orders mentioned in paragraphs (*a*) and (*c*) of that subsection.

(2) The orders referred to in subsection (1)(*b*) of this section are—

(*a*) an order requiring the surviving parent to make to the guardian for the benefit of the child, or to the child, such periodical payments, and for such term, as may be specified in the order;

(*b*) an order requiring that parent to secure to the guardian for the benefit of the child, or to secure to the child, such periodical payments, and for such term, as may be so specified;

(*c*) an order requiring that parent to pay to the guardian for the benefit of the child, or to the child, such lump sum as may be so specified;

(*d*) an order requiring that parent to transfer to the guardian for the benefit of the child, or to the child, such property as may be so specified, being property to which the surviving parent is entitled, either in possession or reversion;

(*e*) an order requiring that a settlement of such property as may be so specified, being property to which that parent is so entitled, be made to the satisfaction of the court for the benefit of the child.

(3) The powers conferred by subsection (1) of this section may be exercised at any time and include power to vary or discharge any order previously made under those powers other than an order mentioned in paragraph (*c*), (*d*) or (*e*) of subsection (2) of this section.

Orders for custody and financial relief where joint guardians disagree.

11.—(1) **The powers of the court under section 7 of this Act to make orders regarding matters in difference between joint guardians shall, where one of the joint guardians is a parent of the child, include power—**

(*a*) to make such order regarding—

(i) the legal custody of the child; and

(ii) access to the child by that parent,

as the court thinks fit;

(*b*) **to make—**

(i) **in the case of proceedings in the High Court or a county court, one or more of the orders mentioned in subsection (2) of this section;**

(ii) **in the case of proceedings in a magistrates' court one or both of the orders mentioned in paragraphs (*a*) and (*c*) of that subsection;**

(*c*) **to vary or discharge any order previously made under that section other than an order mentioned in paragraph (*c*), (*d*) or (*e*) of subsection (2) of this section.**

(2) **The orders referred to in subsection (1)(*b*) of this section are—**

(*a*) **an order requiring the parent to make to the other guardian for the benefit of the child, or to the child, such periodical payments, and for such term, as may be specified in the order;**

(*b*) **an order requiring the parent to secure to the other guardian for the benefit of the child, or to secure to the child, such periodical payments, and for such term, as may be so specified;**

(*c*) **an order requiring the parent to pay to the other guardian for the benefit of the child, or to the child, such lump sum as may be so specified;**

(*d*) **an order requiring the parent to transfer to the other guardian for the benefit of the child, or to the child, such property as may be so specified, being property to which the parent is entitled, either in possession or reversion;**

(*e*) **an order requiring that a settlement of such property as may be so specified, being property to which the parent is so entitled, be made to the satisfaction of the court for the benefit of the child.**

Further provisions relating to orders for custody.

11A.—(1) An order shall not be made under section 9(1), 10(1)(*a*) or **11(1)(a)** of this Act giving the legal custody of a child to more than one person; but where the court makes an order under one of those sections giving the legal custody of a **child** to any person it may order that a parent of the **child** who is not given the legal custody of the **child** shall retain all or such as the court may specify of the parental rights and duties comprised in legal custody (other than the right to the actual custody of the **child**) and shall have those rights and duties jointly with the person who is given the legal custody of the **child**.

(2) Where the court makes an order under section 9(1), 10(1)(*a*) or **11(1)(a)** of this Act the court may direct that the order, or such provision thereof as the court may specify, shall not have effect until the occurrence of an event specified by the court or the expiration of a period so specified; and where the court has directed that the order or any provision thereof shall not have effect until the expiration of a specified period, the court may, at any time before the expiration of that period, direct that the order, or that provision thereof, shall not have effect until the expiration of such further period as the court may specify.

(3) Any order made in respect of a **child** under section 9(1), 10(1)(*a*) or **11(1)(a)** of this Act shall cease to have effect when the **child** attains the age of eighteen.

(4) **An order shall not be made under section 9(1), 10(1)(a) or 11(1)(a) of this Act at any time when the child is free for adoption by virtue of an order made under section 18 of the Adoption Act 1976 or section 18 of the Adoption (Scotland) Act 1978.**

1976 c. 36.
1978 c. 28.

Orders for financial relief for persons over eighteen.

11B.—(1) Any person who has attained the age of eighteen may apply to the High Court or a county court for an order under this section if at the time of the application his parents are not living with each other.

(2) If on an application under subsection (1) of this section it appears to the court that—

(*a*) the applicant is, or will be, or if an order were made under this section would be, receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not he is also, or will also be, in gainful employment; or

(*b*) there are special circumstances which justify the making of an order under this section,

the court may make one or more of the following orders, that is to say—

(i) an order requiring his mother or father (or both) to pay to the applicant such periodical payments, and for such term, as may be specified in the order;

(ii) an order requiring his mother or father (or both) to pay to the applicant such lump sum as may be so specified.

(3) An application may not be made under subsection (1) of this section by any person if, immediately before he attained the age of sixteen, a periodical payments order was in force with respect to him.

(4) No order shall be made under this section at a time when the parents of the applicant are living with each other.

(5) Any order made under this section requiring the making of periodical payments shall, notwithstanding anything in the order, cease to have effect on the death of the person liable to make payments under the order.

(6) An order under this section requiring the making of periodical payments may be varied or discharged by a subsequent order made on the application of any person by or to whom payments were required to be made under the previous order.

(7) In subsection (3) of this section "periodical payments order" means an order made under—

(*a*) this Act,

1969 c. 46. **(*b*) section 6(2) of the Family Law Reform Act 1969,**

1973 c. 18. **(*c*) section 23 or 27 of the Matrimonial Causes Act 1973,**

1975 c. 72. **(*d*) section 34 of the Children Act 1975, or**

1978 c. 22. **(*e*) Part I of the Domestic Proceedings and Magistrates' Courts Act 1978,**

for the making of periodical payments.

Duration of orders for periodical payments.

12.—(1) The term to be specified in a **periodical payments or secured periodical payments order** in favour of a **child** may begin with the date of the making of an application for the order in question or any later date but—

(*a*) shall not in the first instance extend beyond the date of the birthday of the **child** next following his attaining the upper limit of the compulsory school age (that is to say, the age that is for the time being that limit by virtue of section 35 of the Education Act 1944 together with any Order in Council made under that section) unless the court thinks it right in the circumstances of the case to specify a later date; and

1944 c. 31.

(*b*) shall not in any event, subject to subsection (2) below, extend beyond the date of the **child's** eighteenth birthday.

(2) Paragraph (*b*) of subsection (1) above shall not apply in the case of a **child** if it appears to the court that—

(*a*) the **child** is, or will be, or if an order were made without complying with that paragraph would be, receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not he is also, or will also be, in gainful employment; or

(*b*) there are special circumstances which justify the making of an order without complying with that paragraph.

(3) A **periodical payments order** shall, notwithstanding anything in the order, cease to have effect on the death of the person liable to make payments under the order.

(4) **In this section—**

"periodical payments order" means an order for periodical payments made by virtue of section 9(3)(a), 10(2)(a) or 11(2)(a) of this Act; and

"secured periodical payments order" means an order for secured periodical payments made by virtue of section 9(3)(b), 10(2)(b) or 11(2)(b) of this Act.

Matters to which court is to have regard in making orders for financial relief.

12A. In deciding whether to exercise its powers under section 9(2), 10(1)(*b*), **11(1)(b) or 11B** of this Act and, if so, in what manner, the court shall have regard to all the circumstances of the case including the following matters, that is to say—

(*a*) the income, earning capacity, property and other financial resources which the mother or father of the **child** has or is likely to have in the foreseeable future;

(*b*) the financial needs, obligations and responsibilities which the mother or father of the **child** has or is likely to have in the foreseeable future;

(*c*) the financial needs of the **child**;

(*d*) the income, earning capacity (if any), property and other financial resources of the **child**;

(*e*) any physical or mental disability of the **child**.

Provisions relating to lump sums.

12B.—(1) Without prejudice to the generality of sections 9(2), 10(1)(*b*) and **11(1)(b)** of this Act, an order under any of those provisions for the payment of a lump sum may be made for the purpose of enabling any liabilities or expenses reasonably incurred before the making of the order to be met, **being liabilities or expenses incurred in connection with the birth of the child or in maintaining the child.**

(2) The amount of any lump sum required to be paid by an order made by the magistrates' court under section 9(2), 10(1)(b) or **11(1)(b)** of this Act shall not exceed £500 or such larger amount as the Secretary of State may from time to time by order fix for the purposes of this subsection.

Any order made by the Secretary of State under this subsection shall be made by statutory instrument and shall be subject to annulment in pursuance of a resolution of either house of Parliament.

(3) The power of the court under section 9, 10, 11 **or 11B** of this Act to vary or discharge an order for the making **or securing** of periodical payments by a parent of a **child** shall include power to make an order under the said section 9, 10, 11 **or 11B**, as the case may be, for the payment of a lump sum by that parent.

(4) The amount of any lump sum which a parent may be required to pay by virtue of subsection (3) above shall not, in the case of an order made by a magistrates' court, exceed the maximum amount that may at the time of the making of the order be required to be paid under subsection (2) above, but a magistrates' court may make an order for the payment of a lump sum not exceeding that amount notwithstanding that the parent was required to pay a lump sum by a previous order under this Act.

(5) An order made under section 9, 10, 11 **or 11B** of this Act for the payment of a lump sum may provide for the payment of that sum by instalments and where the court provides for the payment of a lump sum by instalments the court, on an application made either by the person liable to pay or the person entitled to receive that sum, shall have power to vary that order by varying the number of instalments payable, the amount of any instalment payable and the date on which any instalment becomes payable.

Variation etc. of orders for periodical payments.

12C.—(1) In exercising its powers under section 9, 10, 11 **or 11B** of this Act to vary or discharge an order for the making **or securing** of periodical payments the court shall have regard to all the circumstances of the case, including any change in any of the matters to which the court was required to have regard when making the order.

(2) The power of the court under section 9, 10, 11 **or 11B** of this Act to vary an order for the making **or securing** of periodical payments shall include power to suspend any provision thereof temporarily and to revive any provision so suspended.

(3) Where on an application under section 9, 10, 11 **or 11B** of this Act for the variation or discharge of an order for the making **or securing** of periodical payments the court varies the payment required to be made under that order, the court may provide that the payments as so varied shall be made from such date as the court may specify, not being earlier than the date of the making of the application.

(4) An application for the variation of an order made under section 9, 10 or 11 of this Act for the making **or securing** of periodical payments to or for the benefit of a **child** may, if the **child** has attained the age of sixteen, be made by the **child** himself.

(5) Where an order for the making of periodical payments made under section 9, 10 or 11 of this Act ceases to have effect on the date on which the child attains the age of sixteen or at any time after that date but before or on the date on which he attains the age of eighteen, the child may apply—

(*a*) in the case of an order made by the High Court or a county court, to the court which made the order, or

(*b*) in the case of an order made by a magistrates' court, to the High Court or a county court,

for an order for the revival of the first mentioned order, and if on such application it appears to the High Court or county court that—

(i) the child is, or will be, or if an order were made under this subsection would be, receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not he is also, or will also be, in gainful employment; or

(ii) there are special circumstances which justify the making of an order under this subsection,

the court shall have power by order to revive the first mentioned order from such date as the court may specify, not being earlier than the date of the making of the application.

(6) Any order made under section 9, 10 or 11 of this Act by the High Court or a county court which is revived by an order under subsection (5) above may be varied or discharged under section 9, 10 or 11 of this Act, as the case may be, on the application of any person by whom or to whom payments are required to be made under the order.

(7) Any order made under section 9, 10 or 11 of this Act by a magistrates' court which is revived by an order of the High Court or a county court under subsection (5) above—

(*a*) for the purposes of the variation and discharge of the order, shall be treated as an order of the court by which it was revived and may be varied or discharged by that court on the application of any person by whom or to whom payments are required to be made under the order, and

(*b*) for the purposes of the enforcement of the order, shall be treated as an order of the magistrates' court by which the order was originally made.

Variation of orders for secured periodical payments after death of parent.

12D.—(1) Where the parent liable to make payments under a secured periodical payments order has died, the persons who may apply for the variation or discharge of the order shall include the personal representatives of the deceased parent, and no application for the variation of the order shall, except with the permission of the court, be made after the end of the period of six months from the date on which representation in regard to the estate of that parent is first taken out.

(2) The personal representatives of a deceased person against whom a secured periodical payments order was made shall not be liable for having distributed any part of the estate of the deceased after the expiration of the period of six months referred to in subsection (1) of this section on the ground that they ought to have taken into account the possibility that the court might permit an application for variation to be made after that period by the person entitled to payments under the order; but this subsection shall not prejudice any power to recover any part of the estate so distributed arising by virtue of the variation of an order in accordance with this section.

(3) Where an application to vary a secured periodical payments order is made after the death of the parent liable to make payments under the order, the circumstances to which the court is required to have regard under section 12C(1) of this Act shall include the changed circumstances resulting from the death of that parent.

(4) In considering for the purposes of subsection (1) of this section the question when representation was first taken out, a grant limited to settled land or to trust property shall be left out of account and a grant limited to real estate or to personal estate shall be left out of account unless a grant limited to the remainder of the estate has previously been made or is made at the same time.

(5) In this section "secured periodical payments order" means an order for secured periodical payments made by virtue of section 9(3)(*b*), 10(2)(*b*) or 11(2)(*b*) of this Act.

Enforcement of orders for custody and maintenance.

13.—(1) Where an order made by a magistrates' court under this Act contains a provision committing to any person the actual custody of any **child**, a copy of the order may be served on any person in whose actual custody the **child** may for the time being be, and thereupon the provision may, without prejudice to any other remedy open to the person given the custody, be enforced under section 63(3) of the Magistrates' Courts Act 1980 as if it were an order of the court requiring the person so served to give up the **child** to the person given the custody.

1980 c. 43.

(2) Any person for the time being under an obligation to make payments in pursuance of any order for the payment of money made by a magistrates' court under this Act shall give notice of any change of address to such person (if any) as may be specified in the order, and any person failing without reasonable excuse to give such a notice shall be liable on summary conviction to a fine not exceeding £50.

(3) **Any order for the payment of money made by a magistrates' court under this Act shall be enforceable as a magistrates' court maintenance order within the meaning of section 150 of the Magistrates' Courts Act 1980.** **1980 c. 43.**

Restriction on removal of child from England and Wales.

13A.—(1) Where the court makes—

(*a*) an order under section 9(1), 10(1)(*a*) or **11(1)(a)** of this Act regarding the legal custody of a **child,** or

(*b*) an interim order under section 2(4) of the Guardianship Act 1973 containing provision regarding the legal custody of a **child,**

the court, on making the order or at any time while the order is in force, may, if an application is made under this section, by order direct that no person shall take the **child** out of England and Wales while the order under this section is in force, except with the leave of the court.

(2) An order made under subsection (1) above may be varied or discharged by a subsequent order.

(3) An application for an order under subsection (1) above, or for the variation or discharge of such an order, may be made by any party to the proceedings in which the order mentioned in paragraph (*a*) or (*b*) of that subsection was made.

Certain orders to cease to have effect on marriage of parents.

13B. Where—

(*a*) **the right to actual custody of a child is given to a parent of the child by an order under section 8 or 9(1) of this Act, or**

(*b*) **periodical payments are required to be made or secured to a parent of a child by an order under section 9(2) of this Act,**

then, if the parents of that child subsequently marry, or re-marry, each other, that order shall cease to have effect on the date of the marriage.

Direction for settlement of instrument by conveyancing counsel.

13C. Where the High Court or a county court decides to make an order under this Act for the securing of periodical payments or for the transfer or settlement of property, it may direct that the matter be referred to one of the conveyancing counsel of the court for him to settle a proper instrument to be executed by all necessary parties.

Proof of paternity of non-marital child

Proof of paternity of non-marital child.

14. **Where, in any proceedings on an application for an order under this Act in respect of a non-marital child, a party to the proceedings is alleged to be, or alleges that he is, the father of the child but that allegation is not admitted in those proceedings by the other party to the proceedings, the court shall not on that application make any order under this Act or under the Guardianship Act 1973 which imposes any obligation or confers any right on the person who is alleged to be, or alleges that he is, the father of the child unless it is proved to the satisfaction of the court that that person is the father of that child.** **1973 c. 29.**

Access to children by grandparents

Access to children by grandparents.

14A.—(1) **Subject to subsection (9) of this section, the court, on making an order under section 8 or under section 9(1) or (2) of this Act in respect of a child,** or at any time while such an order is in force, may on the application of a grandparent of the **child** make such order requiring access to the **child** to be given to the grandparent as the court thinks fit.

(2) Where one parent of a **child** is dead, or both parents are dead, the court may, on an application made by a parent of a deceased parent of the **child,** make such order requiring access to the **child** to be given to the applicant as the court thinks fit.

(3) Section 11A(2) of this Act shall apply in relation to an order made under this section as it applies in relation to an order under section 9(1), 10(1)(*a*) or **11(1)(a)** of this Act.

(4) The court shall not make an order under this section with respect to a **child** who is for the purposes of Part III of the Child Care Act 1980 in the care of a local authority.

1980 c. 5.

(5) Where the court has made an order under subsection (1) above requiring access to a **child** to be given to a grandparent, the court may vary or discharge that order on an application made—

(*a*) by that grandparent, or

(*b*) by either parent of the **child** . . .

. . . . . .

(6) Where the court has made an order under subsection (2) above requiring access to a **child** to be given to a grandparent, the court may vary or discharge that order on an application made—

(*a*) by that grandparent, or

(*b*) by any surviving parent of the **child,** or

(*c*) by any guardian of the **child.**

1973 c. 29.

(7) Section 6 of the Guardianship Act 1973 shall apply in relation to an application under this section as it applies in relation to an application under section 5 or 9 of this Act, and any reference to a party to the proceedings in subsection (2) or (3) of the said section 6 shall include—

(*a*) in the case of an application under subsection (1) or (2) above, a reference to the grandparent who has made an application under either of those subsections;

(*b*) in the case of an application under subsection (5) or (6) above, a reference to the grandparent who has access to the **child** under the order for the variation or discharge of which the application is made.

(8) Where, at any time after an order with respect to a **child** has been made under subsection (1) above, no order is in force under **section 8 or 9** of this Act with respect to that **child,** the order made under subsection (1) above shall cease to have effect.

(9) **Where an order under section 8 of this Act is made or is in force with respect to a non-marital child, no order shall be made under subsection (1) of this section with respect to that child at a time when the parents of the child are living with each other.**

Jurisdiction and procedure

Courts having jurisdiction under this Act.

15.—(1) **Except where the contrary intention is indicated,** "the court" for the purposes of this Act means—

(*a*) the High Court;

(*b*) the county court of the district in which the respondent (or any of the respondents) or the applicant or the **child** to whom the application relates resides; or

(*c*) a magistrates' court appointed for the commission area (within the meaning of the Justices of the Peace Act 1979) in which any of the said persons resides. 1979 c. 55.

(2) A magistrates' court shall not be competent to entertain—

. . . . . .

(*b*) any application involving the administration or application of any property belonging to or held in trust for a **child** or the income thereof.

(3) A county court or magistrates' court shall not have jurisdiction under this Act in any case where the respondent or any of the respondents resides in Scotland or Northern Ireland—

(*a*) except in so far as such jurisdiction may be exercisable by virtue of the following provisions of this section; or

(*b*) unless a summons or other originating process can be served on the respondent or, as the case may be, on the respondents in England or Wales.

(4) An order under this Act giving the legal custody of a **child** to a person resident in England or Wales **or** requiring payments to be made towards the **child's** maintenance may be made, if one parent resides in Scotland or Northern Ireland and the other parent and the **child** in England or Wales, by a magistrates' court appointed for the commission area (within the meaning of the Justices of the Peace Act 1979) in which the other parent resides.

(5) It is hereby declared that a magistrates' court has jurisdiction—

(*a*) in proceedings under this Act by a person residing in Scotland or Northern Ireland against a person residing in England or Wales for an order relating to the legal custody of a **child or** an order requiring payments to be made towards the **child's** maintenance;

(*b*) in proceedings by or against a person residing in Scotland or Northern Ireland for the revocation, revival or variation of any such order.

(6) Where proceedings for an order under subsection (1) of section 9 of this Act relating to the custody of a child are brought in a magistrates' court by a person residing in Scotland or Northern Ireland, the court shall have jurisdiction to make any order in respect of the **child** under that section on the application of the respondent in the proceedings.

Appeals and procedure.

16.—(1) Where any application has been made under this Act to a county court, the High Court may, at the instance of any party to the application, order the application to be removed to the High Court and there proceeded with on such terms as to costs as it thinks proper.

. . . . . .

(3) Subject to subsection (4) of this section, where on an application to a magistrates' court under this Act the court makes or refuses to make an order, an appeal shall lie to the High Court.

(4) Where an application is made to a magistrates' court under this Act, and the court considers that the matter is one which would more conveniently be dealt with by the High Court, the magistrates' court shall refuse to make an order, and in that case no appeal shall lie to the High Court.

(5) In relation to applications made to a magistrates' court under section 14A of this Act regarding access to a **child** by a grandparent or under section 3(3) or 1973 c. 29. 4(3A) of the Guardianship Act 1973 for the discharge or variation of a supervision order or, as the case may be, an order giving the care of a child to a local authority or an order requiring payments to be made to an authority to 1980 c. 43. whom care of a child is so given, rules made under section 144 of the Magistrates' Courts Act 1980 may make provision as to the persons who are to be made defendants on the application; and if on any such application there are two or more defendants, the power of the court under section 64(1) of the Magistrates' Courts Act 1980 shall be deemed to include power, whatever adjudication the court makes on the complaint, to order any of the parties to pay the whole or part of the costs of all or any of the other parties.

(6) On an appeal under subsection (3) of this section the High Court shall have power to make such orders as may be necessary to give effect to its determination of the appeal including such incidental or consequential orders as appear to the court to be just, and, in the case of an appeal from a decision of a magistrates' court on an application for or in respect of an order for the making of periodical payments, the High Court shall have power to order that its determination of the appeal shall have effect from such a date as the court thinks fit, not being earlier than the date of the making of the application to the magistrates' court.

(7) Without prejudice to the generality of subsection (6) above, where, on an appeal under subsection (3) of this section in respect of an order of a magistrates' court requiring a parent of a **child** to make periodical payments, the High Court reduces the amount of those payments or discharges the order, the High Court shall have power to order the person entitled to payments under the order of the magistrates' court to pay to that parent such sum in respect of payments already made by the parent in compliance with the order as the High Court thinks fit and, if any arrears are due under the order of the magistrates' court, the High Court shall have power to remit the payment of those arrears or any part thereof.

(8) Any order of the High Court made on an appeal under subsection (3) of this section (other than an order directing that an application shall be re-heard by a magistrates' court) shall for the purposes of the enforcement of the order and for the purposes of any power to vary, revive or discharge orders conferred by section 9(4), 10(2), **11(1)(c)**, **11B**(6) 12B(5) or **12C(2)** of this Act or section 3(3) or 4(3A) of the Guardianship Act 1973 be treated as if it were an order of the magistrates' court from which the appeal was brought and not of the High Court.

17.—(1) Nothing in this Act shall restrict or affect the jurisdiction of the High Court to appoint or remove guardians or otherwise in respect of **children.**

Saving for powers of High Court and other courts.

(2) Nothing in section 15(4), (5) or (6) of this Act shall be construed as derogating from any jurisdiction exercisable, apart from those provisions, by any court in England or Wales; and it is hereby declared that any jurisdiction conferred by those provisions is exercisable notwithstanding that any party to the proceedings is not domiciled in England and Wales.

Supplementary

. . . . . .

20.—(1) This Act may be cited as the Guardianship of Minors Act 1971.

Short title, interpretation and extent.

(2) **In this Act, unless the context otherwise requires—**

"actual custody", as respects a child, means the actual possession of the child;

"child", except where used to express a relationship, means a person who has not attained the age of eighteen;

"legal custody" shall be construed in accordance with Part IV of the Children Act 1975; 1975 c. 72.

"maintenance" includes education;

"marital child" means—

(*a*) **a child whose parents were married to each other at the time of his birth, or (if the marriage has been terminated before his birth) at the time of the act of intercourse resulting in his birth,**

(*b*) **a child who is treated as legitimate by virtue of section 1 of the Legitimacy Act 1976,** 1976 c. 31.

(*c*) **a child who is a legitimated person within the meaning of section 10 of that Act,**

(*d*) **a child who is treated as legitimate by virtue of section 34 of the Family Law Reform Act 1982, and**

(*e*) **a child who is an adopted child within the meaning of Part IV of the Adoption Act 1976; and** 1976 c. 36.

(*f*) **any other child who is treated in law as legitimate;**

"non-marital child" means a child who is not a marital child.

(2A) **Except where otherwise indicated and except in the definitions of "marital child" and "non-marital child" in subsection (1) of this section, any reference in this Act to a child shall be construed as including a reference to both a marital child and a non-marital child.**

(2B) **Any reference in this Act to the parents of a child living with each other shall be construed as a reference to their living with each other in the same household.**

(3) References in this Act to any enactment are references thereto as amended, and include references thereto, as applied, by any other enactment.

(4) This Act—

(*a*) so far as it amends the Maintenance Orders Act 1950 extends to Scotland and Northern Ireland,

. . . . . .

but, save as aforesaid, extends to England and Wales only.

SCHEDULE 5

REPEALS

Chapter	Short title	Extent of repeal
1948 c. 29.	National Assistance Act 1948.	Section 44.
1950 c. 37.	Maintenance Orders Act 1950.	Section 3. In section 16(2)— (*a*) paragraph 16(iv); (*b*) the paragraph (vi) inserted by the Children Act 1975; (*c*) in the paragraph (vi) inserted by the Supplementary Benefits Act 1976 the words "or section 4 of the Affiliation Proceedings Act 1957 on an application made under section 19(2) of the Act of 1976".
1951 c. 65.	Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951.	In section 2(1)(*d*) the words "an order in a matter of bastardy, an order enforceable as an affiliation order or."
1955 c. 10.	Army Act 1955.	In section 150(5) the words from "references to a sum ordered to be paid" to the end of the subsection.
1955 c. 19.	Air Force Act 1955.	In section 150(5) the words from "references to a sum ordered to be paid" to the end of the subsection.
1957 c. 53.	Naval Discipline Act 1957.	In section 101(5) the words "and includes an affiliation order within the meaning of the Affiliation Orders Act 1914".
1957 c. 55.	Affiliation Proceedings Act 1957.	The whole Act.
1958 c. 39.	Maintenance Orders Act 1958.	In section 22(1) the words "affiliation order".
1959 c. 73.	Legitimacy Act 1959.	The whole Act.
1969 c. 46.	Family Law Reform Act 1969.	Section 6(6) Section 27.
1970 c. 31.	Administration of Justice Act 1970.	In Schedule 8, paragraph 5.
1971 c. 32.	Attachment of Earnings Act 1971.	In Schedule 1, paragraph 6.
1972 c. 18.	Maintenance orders (Reciprocal Enforcement) Act 1972.	In section 30— (*a*) subsection (1); (*b*) in subsection (3) the words "the Affiliation Proceedings Act 1957 or", the words "paragraph (*b*) of section 2(1) of the said Act of 1957 (time for making complaint) or" the words "(provision to the like effect) as the case

EXPLANATORY NOTES

Schedule 5 : Repeals

1. Where there are no specific notes the repeals set out in this Schedule are consequential on the abolition of affiliation proceedings, as to which see note on paragraph 1 of Schedule 2 to the Bill.

Family Law Reform Act 1969

2. As to the repeal of section 6(6) see notes on clause 13 of the Bill.

3. The repeal of section 27 is consequential on the introduction of the extended powers to enter the name of the father on registration of the birth of a non-marital child: see paragraphs 14.69 and 14.74 of the Report and clause 31 of the Bill.

Maintenance Orders (Reciprocal Enforcement) Act 1972

4. The repeals of sections 3(3) and 30(1) are consequential on the recommendation (paragraph 14.14 of the Report) that it should be possible to make a financial relief order under the Guardianship of Minors Act 1971 without making an order for legal custody at the same time (see clauses 5, 6 and 7 of the Bill).

Chapter	Short title	Extent of repeal
1972 c. 18 —*cont.*	Maintenance Orders (Reciprocal Enforcement) Act 1972—*cont.*	may be", the words "three years or" and the words "in the case of a complaint under the said Act of 1924"; (*c*) in subsection (5) the words "the said Act of 1957" and the words "as the case may be"; (*d*) in subsection (6) the words "or an affiliation order under the said Act of 1957". In section 41— (*a*) subsection (1); (*b*) in subsection (2A), paragraph (*a*); (*c*) in subsection (2B), paragraph (*a*).
1972 c. 49.	Affiliation Proceedings (Amendment) Act 1972.	The whole Act.
1973 c. 29.	Guardianship Act 1973.	In section 1(7) the words "or be taken as applying in relation to a minor who is illegitimate". Section 2(6). Section 4(3D).
1974 c. 4.	Legal Aid Act 1974.	In Schedule 1, paragraph 2 of Part I.
1975 c. 72.	Children Act 1975.	Section 34(3). Section 36(5A). Section 45. In section 85(2) the words "(which relate to separation agreements between husband and wife). Section 93(1) and (2). In Schedule 3, paragraphs 14 and 75(1).
1976 c. 36.	Adoption Act 1976.	In Schedule 3, paragraph 16.
1976 c. 71.	Supplementary Benefits Act 1976.	Section 19.

EXPLANATORY NOTES

Guardianship Act 1973

5. The repeal of the words in section 1(7) is consequential on the recommendation in paragraph 14.34 of the Report that out-of-court agreements between parents of non-marital children should be valid subject to the power of the court to intervene (see also clause 12(1) of the Bill).

6. As to the repeal of section 4(3D) see note on paragraph 44(*b*) of Schedule 2 to the Bill.

Children Act 1975

7. The repeal of the words in section 85(2) is consequential on the recommendation relating to out-of-court agreements: see note 5 above.

8. The repeal of section 93(1) and (2) is consequential on the re-enactment with amendments of the provisions relating to birth registration of non-marital children: see clauses 31 and 32 of the Bill.

9. The repeal of paragraph 75(1) of Schedule 3 is consequential on the re-enactment of the Guardianship of Minors Act 1971 s. 9(1) whereby non-parents will be able to apply only for custodianship orders (when Part II of the Children Act 1975 comes into force) and not for legal custody under the 1971 Act.

Adoption Act 1976

10. The repeal of paragraph 16 of Schedule 3 is consequential on the re-enactment of section 9(6) of the Guardianship of Minors Act 1971 (no legal custody order where child free for adoption) under this Bill in the same terms.

Chapter	Short title	Extent of repeal
1978 c. 22.	Domestic Proceedings and Magistrates' Courts Act 1978.	In section 20, subsections (10) and (13). In section 36(1), paragraph (c). Section 38(2). Section 41. In section 45, subsections (2) and (3). In Schedule 2, paragraphs 30 and 44.
1980 c. 5.	Child Care Act 1980.	Sections 49 and 50. In section 52(1), paragraph (*b*). In section 54(1) and (2) the words "49, 50". Section 55(3). In Schedule 2, paragraphs 4 and 5 and in paragraph 7 the words "49, 50".
1980 c. 43.	Magistrates' Courts Act 1980.	In section 55(8) the words "or in proceedings in any matter of bastardy". In section 59(2) the words "an affiliation order". In section 65(1)— (*a*) in paragraph (*b*) the words "or section 44"; (*b*) paragraph (*d*); (*c*) in paragraph (*i*) the words "or section 19"; (*d*) in paragraph (*k*) the words "49 or 50". Section 92(3) In section 150(1), the definition of "affiliation order".
1981 c. 54.	Supreme Court Act 1981.	In Schedule 1, in paragraph 3(b)(iii) the words "affiliation or".
1982 c. 24.	Social Security and Housing Benefits Act 1982.	In Schedule 4, paragraphs 1 and 25.

EXPLANATORY NOTES

Domestic Proceedings and Magistrates' Courts Act 1978

11. The repeal of section 20(10) and (13) is consequential on the recommendations in paragraph 14.15 of the Report in relation to financial provision for adult children: see clause 8 (section 11B of the Guardianship of Minors Act 1971 as amended); Schedule 2, para. 23(*c*) (section 12C(5) to (7) of that Act as amended); and Schedule 2, para. 55 (new section 20A of the Domestic Proceedings and Magistrates' Courts Act 1978).

12. The repeal of section 36(1)(*c*) (definition of "actual custody" in section 20(2) of the Guardianship of Minors Act 1971) is consequential on the substitution, by Schedule 2, para. 29 above, of a new section 20(2) into the 1971 Act.

13. The repeal of section 38(2) is consequential on the re-enactment of section 2(2) of the Guardianship Act 1973 (care and supervision orders for minors under 16) under this Bill: see Schedule 2, para. 42 above.

14. The repeal of section 41 is consequential on the re-enactment of sections 9, 10 and 11 of the Guardianship of Minors Act 1971 under this Bill.

15. The repeal of section 45(2) and (3) is consequential on the re-enactment of section 2(4) and (5) of the Guardianship Act 1973 (interim maintenance orders) under this Bill: see Schedule 2, para. 42 above.

16. The repeal of Schedule 2, para. 30 is consequential on the repeal of the existing section 14 of the Guardianship of Minors Act 1971 (application of Act to illegitimate children).

17. The repeal of Schedule 2, para. 44 is consequential on the re-enactment under this Bill of section 5(2) of the Guardianship Act 1973 (variation and discharge of interim orders): see Schedule 2, para. 45 above.

APPENDIX B

List of persons and organisations who sent comments on Working Paper No. 74

The Rt. Hon. Sir John Arnold
Association of British Adoption and Fostering Agencies
Association of County Councils
Association of Directors of Social Services
Ms. S. Atkins
Australian National Council for the Single Mother and her Child
Mr. C. R. Ayling
Board of Deputies of British Jews
Bolton Women's Liberation Group
British Association of Social Workers
British Institute of Human Rights
British Juvenile and Family Courts Society
British Medical Association
Ms. J. Burgoyne
Mr. C. H. H. Butcher
The Hon. Mrs. Justice Butler-Sloss
Caistor Womens Group
Cambridge Women's Liberation
Miss C. A. O. Catlin
Chancery Bar Association
Mrs. C. Childs
Church of England Board for Social Responsibility
Church of England Children's Society
Mr. C. M. V. Clarkson
College of Law Women's Group
Council of H.M. Circuit Judges
Mr. D. J. Cusine
Mrs. R. Deech
Department of Health and Social Security (Children's Division)
Mr. S. B. Dickson
Viscount Dilhorne
Diocese of Chelmsford: Department of Mission
Ms. F. Duffy
Ms. Duncan
Mr. J. M. Eekelaar
Families Need Fathers
Family Bar Association
Family Division (Divisional Law Reform Committee)
Family Planning Association
Family Welfare Association
Farrer and Co.
Ms. Diana Forrest
Mr. D. Fruin
Lord Gardiner, C.H.
General Register Office

H. H. Judge Jean Graham Hall
H. H. Judge Brian Grant
General Assembly of Unitarian and Free Christian Churches
Gingerbread
Professor R. H. Graveson, C.B.E., Q.C.
Professor J-M. Grossen
Professor H. R. Hahlo
Mr. D. Hamilton
H. N. Hampson
Mr. J. C. Hall
Mr. T. Harper
Mr. N. Harrison
Mrs. M. Hayes, J.P.
Health Visitors' Association
Mrs. Brenda Hoggett
Holborn Law Society
The Hon. Mr. Justice Hollings, M.C.
Home Office
Institute of Legal Executives
Justice
Justices' Clerks' Society
Lord Kilbrandon
Ms. L. Lambert
The Hon. Mr. Justice Latey, M.B.E.
Mr. C. T. Latham, O.B.E.
The Law Society (Family Law Sub-Committee)
Ms. H. Lawson
Mr. D. P. Lessels
Lord Chancellor's Department
Mr. J. R. Lucas
Magistrates' Association
Mrs. S. Maidment
Manchester Action against Rape Group
Ms. C. Matheson
Ms. M. W. McCraw
Medical Research Council
Methodist Church: Division of Social Responsibility
Mothers' Union
National Association for Maternal and Child Welfare
National Association of Social Workers in Education
National Association of Widows
National Council for One Parent Families
National Council of Social Services
National Council of Women
National Labour Women's Advisory Committee
National Organisation of Labour Students Women's Committee
National Society for the Prevention of Cruelty to Children
Nottingham Rape Crisis Centre
Nottingham Women's Centre

Mrs. D. Oliver
The Rt. Hon. Lord Justice Ormrod
Mr. M. Parry
A. W. Patton
Payday
Mr. P. Penketh
H. H. Judge Pennant
Dr. S. Poulter
Mr. R. H. Pykett
Rights of Women
Ms. L. Rovnik
Royal College of Midwives
Royal College of Nursing (Northern Ireland)
Royal College of Obstetricians' and Gynaecologists' Subcommittee on Artificial Insemination
Salvation Army
Mr. A. Samuels, J.P.
Lord Scarman, O.B.E.
Mr. P. J. Schofield
Scottish Council for Single Parents
Senate of the Inns of Court and the Bar
The Hon. Mr. Justice Sheldon
Ms. M. Sims
Society of Conservative Lawyers
Lord Templeman, M.B.E.
Mr. D. Tolstoy, Q.C.
Treasury Solicitor's Department
University of Bristol Teachers of Family Law
University of Southampton: Department of Adult Education
Wages for Housework
Professor P. R. H. Webb
Ms. R. Webber
Welsh Women's Aid
Ms. C. Wilts
Women's National Commission
The Hon. Mr. Justice Wood, M.C.
York University

APPENDIX C

List of those who attended a seminar on Illegitimacy, held at All Souls College, Oxford in March 1979. (This list refers to those positions that they held at the date of the seminar.)

Mr. L. Abse, M.P.
Mr. P. Bottomley, M.P.
Mrs. M. Bramall
Mrs. J. Cheetham
Dr. E. M. Clive
Mgr. M. J. Connelly
Mr. D. J. Cusine
Mr. J. M. Eekelaar
Mr. A. B. Ewbank, Q.C.
Baroness Faithfull, O.B.E.
H. H. Judge Jean Graham Hall
Mrs. B. M. Hoggett
The Hon. Mr. Justice Hollings, M.C.
Mrs. A. S. Hopkinson, J.P.
The Rt. Rev. Graham Leonard, Bishop of Truro
Mr. P. Lewis
Mr. M. Maclagan
Mr. F. P. Neill, Q.C.
Mr. J. D. Waite, Q.C.

Law Commission

The Hon. Mr. Justice Kerr, Chairman
Mr. S. M. Cretney, Commissioner
Mr. S. B. Edell, Commissioner
Mr. W. A. B. Forbes, Q.C., Commissioner
Dr. P. M. North, Commissioner
Mr. J. C. R. Fieldsend, Secretary
Mr. B. M. F. O'Brien
Lady Johnston
Mr. T. L. Rees

Scottish Law Commission

The Hon. Lord Hunter, V.R.D., Chairman
Mr. A. E. Anton, C.B.E.
Mr. R. D. D. Bertram, W.S.
Mr. J. P. H. MacKay, Q.C.
Professor T. B. Smith, Q.C.
Mr. J. B. Allan, Secretary
Mr. A. J. Sim, Assistant Secretary

APPENDIX D

EUROPEAN CONVENTION ON THE LEGAL STATUS OF CHILDREN BORN OUT OF WEDLOCK

The member states of the Council of Europe, signatory hereto.

Considering that the aim of the Council of Europe is to achieve a greater unity between its Members, in particular by the adoption of common rules in the field of law:

Noting that in a great number of member states efforts have been, or are being, made to improve the legal status of children born out of wedlock by reducing the differences between their legal status and that of children born in wedlock which are to the legal or social disadvantage of the former;

Recognising that wide disparities in the laws of member states in this field still exist;

Believing that the situation of children born out of wedlock should be improved and that the formulation of certain common rules concerning their legal status would assist this objective and at the same time would contribute to a harmonisation of the laws of the member states in this field;

Considering however that it is necessary to allow progressive stages for those states which consider themselves unable to adopt immediately certain rules of this Convention.

Have agreed as follows:

Article 1

Each Contracting Party undertakes to ensure the conformity of its law with the provisions of this Convention and to notify the Secretary General of the Council of Europe of the measures taken for that purpose.

Article 2

Maternal affiliation of every child born out of wedlock shall be based solely on the fact of the birth of the child.

Article 3

Paternal affiliation of every child born out of wedlock may be evidenced or established by voluntary recognition or by judicial decision.

Article 4

The voluntary recognition of paternity may not be opposed or contested in so far as the internal law provides for these procedures unless the person seeking to recognise or having recognised the child is not the biological father.

Article 5

In actions relating to paternal affiliation scientific evidence which may help to establish or disprove paternity shall be admissible.

Article 6

1. The father and mother of a child born out of wedlock; shall have the same obligation to maintain the child as if it were born in wedlock.

2. Where a legal obligation to maintain a child born in wedlock falls on certain members of the family of the father or mother, this obligation shall also apply for the benefit of a child born out of wedlock.

Article 7

1. Where the affiliation of a child born out of wedlock has been established as regards both parents, parental authority may not be attributed automatically to the father alone.

2. There shall be power to transfer parental authority; cases of transfer shall be governed by the internal law.

Article 8

Where the father or mother of a child born out of wedlock does not have parental authority over or the custody of the child, that parent may obtain a right of access to the child in appropriate cases.

Article 9

A child born out of wedlock shall have the same right of succession in the estate of its father and its mother and of a member of its father's or mother's family, as if it had been born in wedlock.

Article 10

The marriage between the father and mother of a child born out of wedlock shall confer on the child the legal status of a child born in wedlock.

Article 11

1. This Convention shall be open to signature by the member states of the Council of Europe. It shall be subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

2. This Convention shall enter into force three months after the date of the deposit of the third instrument of ratification, acceptance or approval.

3. In respect of a signatory state ratifying, accepting or approving subsequently, the Convention shall come into force three months after the date of the deposit of its instrument of ratification, acceptance or approval.

Article 12

1. After the entry into force of this Convention, the Committee of Ministers of the Council of Europe may invite any non-member state to accede to this Convention.

2. Such accession shall be effected by depositing with the Secretary General of the Council of Europe an instrument of accession which shall take effect three months after the date of its deposit.

Article 13

1. Any state may, at the time of signature, or when depositing its instrument of ratification, acceptance, approval or accession, specify the territory or territories to which this Convention shall apply.

2. Any state may, when depositing its instrument of ratification, acceptance, approval or accession or at any later date, by declaration addressed to the Secretary General of the Council of Europe, extend this Convention to any other territory or territories specified in the declaration and for whose

international relations it is responsible or on whose behalf it is authorised to give undertakings.

3. Any declaration made in pursuance of the preceding paragraph may, in respect of any territory mentioned in such declaration, be withdrawn according to the procedure laid down in Article 15 of this Convention.

Article 14

1. Any state may, at the time of signature, or when depositing its instrument of ratification, acceptance, approval or accession or when making a declaration in accordance with paragraph 2 of Article 13 of this Convention, make not more than three reservations in respect of the provisions of Articles 2 to 10 of the Convention.

Reservations of a general nature shall not be permitted; each reservation may not affect more than one provision.

2. A reservation shall be valid for five years from the entry into force of this Convention for the Contracting Party concerned. It may be renewed for successive periods of five years by means of a declaration addressed to the Secretary General of the Council of Europe before the expiration of each period.

3. Any Contracting Party may wholly or partly withdraw a reservation it has made in accordance with the foregoing paragraphs by means of a declaration addressed to the Secretary General of the Council of Europe, which shall become effective as from the date of its receipt.

Article 15

1. Any Contracting Party may, in so far as it is concerned, denounce this Convention by means of a notification addressed to the Secretary General of the Council of Europe.

2. Such denunciation shall take effect six months after the date of receipt by the Secretary General of such notification.

Article 16

The Secretary General of the Council of Europe shall notify the member states of the Council and any state which has acceded to this Convention of:

a. any signature;

b. any deposit of an instrument of ratification, acceptance, approval or accession;

c. any date of entry into force of this Convention in accordance with Article 11 thereof;

d. any notification received in pursuance of the provisions of Article 1;

e. any declaration received in pursuance of the provisions of paragraphs 2 and 3 of Article 13;

f. any reservation made in pursuance of the provisions of paragraph 1 of Article 14;

g. the renewal of any reservation carried out in pursuance of the provisions of paragraph 2 of Article 14;

h. the withdrawal of any reservation carried out in pursuance of the provisions of paragraph 3 of Article 14;

i. any notification received in pursuance of the provisions of Article 15 and the date on which denunciation takes effect.

In witness whereof, the undersigned, being duly authorised thereto, have signed this Convention.

Done at Strasbourg, this 15th day of October 1975, in English and in French, both texts being equally authoritative, in a single copy, which shall remain deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each of the signatory and acceding states.

EUROPEAN CONVENTION ON THE LEGAL STATUS OF CHILDREN BORN OUT OF WEDLOCK

signed at Strasbourg, on 15 October 1975

Declarations and Reservations

UNITED KINGDOM

(Letter from the Permanent Representative of the United Kingdom deposited with the instrument of ratification on 20 February 1981)

1. In accordance with Article 14, paragraph 1 of the Convention, the Government of the United Kingdom reserve the right:

(a) not to apply Article 6, paragraph 1 of the Convention in relation to England and Wales and Northern Ireland;

(b) not to apply Article 6, paragraph 2 in relation to Scotland, and

(c) to apply Article 9 only in relation to the estates of the father and mother of a child born out of wedlock.

2. In accordance with Article 13, paragraph 2 of the Convention, it is hereby declared that the Convention shall extend to the Bailiwick of Guernsey, Herm and Jethou, with the reservation, made in accordance with Article 14, paragraph 1 of the Convention, that Article 9 shall apply in Guernsey, Herm and Jethou only in relation to the testate succession in the estate of a father or mother of a child born out of wedlock.

3. The Government of the United Kingdom also wish to declare their understanding that neither Article 9 nor Article 10 or the Convention is to be interpreted as conferring upon a child born out of wedlock any right of succession to the Crown or a title of honour or any right of inheritance to an entailed interest.

Printed in England for Her Majesty's Stationery Office by
Brown Knight & Truscott Ltd, London and Tonbridge
Dd 0302098 C20 12/82

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