

T H E L A W R E F O R M C O M M I S S I O N

A N C O I M I S I Ú N U M A T H C H Ó I R I Ú A N D L Í

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REPORT ON ILLEGITIMACY

IRELAND

The Law Reform Commission,
River House, Chancery Street, Dublin 7

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LAW REFORM COMMISSION

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CHAPTER 1 THE PRESENT LAW

1. In recent years the law relating to illegitimacy of children has come under increasing criticism in public discussion. In this Report we analyse the existing law and the law in other jurisdictions and we make proposals for reform. Our proposals are of a radical nature. However, we think that a law that denies substantial rights to innocent children needs radical reform. Reform of the law on this subject is clearly an issue on which there is likely to be debate and disagreement in public discussion. Although we make many radical proposals, we think it preferable that we should present them in a Report rather than in a Working Paper; there would be little to be gained by the delay involved in consulting with the public between the times of publication of the Working Paper and the Report, especially when the bases of many of the submissions would be related to social and moral issues rather than strictly legal questions. There is, of course, a very important place for this type of consultation, but on the present subject we feel that it should be between the Government (rather than the Commission) and the general public.

Who is Illegitimate?¹

2. Illegitimacy is a negative concept, denoting those persons who are not "legitimate". Who, therefore, is legitimate? First,

¹ See A. Shatter, Family Law in the Republic of Ireland, ch. 11 (2nd ed., 1981).

and most obviously, are children conceived and born within marriage. Next are children born within marriage but conceived before marriage. Thus, for example, a child conceived four months before his parents marry one another will be legitimate. The third category of legitimate children consists of those conceived within the marriage but born after it has ended. Thus, for example, a posthumous child is legitimate.

3. The fourth category of legitimate children is one on which no judicial authority has pronounced but which on principle should be recognised. This arises where a child is conceived as the result of pre-marital intercourse and his parents then marry but his father dies before his birth. Had the father *lived*, the child would without question have been legitimate, and the fact that the child is born posthumously does not in itself appear to be a reason to deny him legitimate status².

4. The final category of legitimate children is that arising from legitimation by the subsequent marriage of the parents. This category was introduced into our law by the Legitimacy Act 1931³ and is discussed in detail later in this chapter⁴.

5. A child who does not come within any of these categories is illegitimate. Thus, for example, a child born of a void marriage is illegitimate regardless of whether any decree of nullity is obtained. A child who is born of a voidable marriage will also be illegitimate but will be so only if a decree of annulment is obtained by one of the parties to the marriage. If no decree is obtained the child's legitimate status will be secure, but once a decree is obtained it is retrospective in its effect and the child will be treated as having at all times been illegitimate.

² Cf. P. Bromley, Family Law, 256 (6th ed., 1981).

³ No. 13 of 1931.

⁴ Infra, pp. 12-15.

Presumption of Legitimacy

6. The courts have consistently held that a strong presumption of legitimacy arises where a child is born during marriage⁵. In Yool v Ewing⁶ Sir Andrew Porter M.R. stated:

"Now, the presumption of legitimacy in the case of a child born during wedlock is not one juris et de jure⁷ The question is one of fact. But the presumption is of enormous strength, and will not be rebutted in an ordinary case, where husband and wife live together, by mere evidence, or even proof, that a person or persons other than the husband had improper relations with the wife. In such a case the law, on the clearest grounds of public policy and decency, will not allow any enquiry as to who is the father. But it might be otherwise where the husband and wife were not living under the same roof, though there was clearly possibility of access."

7. The presumption of legitimacy may be rebutted by showing that the spouses did not have sexual intercourse at the relevant time⁸. This may be established by proof that either of the spouses was incapable of sexual intercourse as a result of an impotent or sterile condition⁹, or that the spouses were absent from each other at the relevant time¹⁰.

⁵ See A. Shatter, Family Law in the Republic of Ireland, 170-172 (2nd ed., 1981), W. Hooper, The Law of Illegitimacy, 9-19, chs. 2 - 3 (1911).

⁶ [1904] 1 I.R. 434, at 440-441.

⁷ Citing The Aylesford Peerage Case 11 A.C. 1 (1885) and The Poulett Peerage Case [1903] A.C. 395.

⁸ Cf. Morris v Davies 5 Cl. & Fin. 163, 7 E.R. 365 (1837), Hargrave v Hargrave 9 Beav. 552, at 555, 50 E.R. 457, at 458, per Lord Langdale M.R. (1846).

⁹ Cf. W. Hooper, supra, fn.5, 167-168.

¹⁰ Cf. R. v Luffe, 8 East 193, 103 E.R. 316 (1807), R. v Inhabitants of Maidstone, 12 East 550, 104 E.R. 215 (1810).

8. The presumption of legitimacy may also be rebutted by "e/vidence from the whole of the circumstances of the case, including in particular the conduct of the husband and the wife and the wife's paramour both before and after the birth of the child, which satisfies a Court that sexual intercourse did not take place between the spouses at the period of conception"¹¹.

9. Where the spouses have been separated by a decree for divorce a mensa et thoro, sexual intercourse between them is not presumed. In order to establish the legitimacy of a child born during this time, it is necessary to prove that the husband had access, or means of access¹². As the Court stated in The Parishes of St George and St Margaret Westminster¹³:

"When a woman is separated from her husband by such a divorce, the children she has during the separation are bastards; for we will intend in due obedience to the sentence, unless the contrary is shewed".

10. Where, however, one spouse deserts the other or the spouses separate without obtaining a decree for divorce a mensa et thoro¹⁴, even where they have entered into a deed of separation containing a clause that they will not molest one another¹⁵, the presumption of legitimacy is not displaced, although it may be greatly weakened¹⁶.

11. Two factors make the ascertainment of true paternity difficult, if not impossible, in certain cases. The first concerns evidence by the spouses; the second concerns blood tests. Each will be considered in turn.

¹¹ W. Hooper, supra, fn.5, 163.

¹² Cf. W. Hooper, supra, fn.5, 154.

¹³ 91 Salk. 123, at 123, 91 E.R. 115, at 116 (1706).

¹⁴ Cf. id.

¹⁵ Cf. The Aylesford Peerage Case, supra, fn.7, Morris v Davies, supra, fn.8.

¹⁶ Cf. W. Hooper, supra, fn.5, 155.

(a) The Rule in Russell v Russell

12. Under what is generally known as the rule in Russell v Russell¹⁷, neither spouse may give testimony to the effect that he or she did not have sexual intercourse with the other, if this would tend towards rendering a child born to the mother illegitimate.¹⁸ In Russell v Russell¹⁹, the Earl of Birkenhead L.C. stated:

"The rule is not limited to any special class of case. It is absolutely general in the comprehensiveness of its expression. It does not, for instance, lay down that where husband and wife are present in the same bed; the same bedroom; the same house; the same town, the evidence must be repelled; but that it may on the other hand be received if the husband has (for instance) been absent from the country for twelve months before the birth of the child. It says, upon the contrary, that such evidence shall not be given at all."

13. But this statement may mislead: there are some circumstances where the rule does not apply. Where the child was clearly conceived before marriage is one such exception²⁰. The position where the spouses have separated is as follows. The rule in Russell v Russell applies even where the parties are separated by court order or by consent²¹. But where the parties are

¹⁷ [1924] A.C. 687 (H.L.). See also Goodright v Moss, 2 Cowp. 591, 98 E.R. 1257 (1777).

¹⁸ Of course, whilst the spouses may not give evidence to this effect, "there is no room for doubt, that in every case non-access can be proved by evidence aliunde": Smyth v Smyth, [1948] N.I. 181, at 184 (K.B.D. (Mat.)), Andrews L.C.J.).

¹⁹ [1924] A.C., at 698.

²⁰ Poulett Peerage Case, [1903] A.C. 395 (H.L.).

²¹ Park v Park, [1946] N.I. 151 (K.B.D. (Mat.)), Andrews L.C.J.).

separated by court order, and a child is born at a time which is consistent only with its having been conceived after the order was made, there is, as we have seen²², a presumption that the child is not the husband's. In such a case, "the wife may rebut this presumption if she can, but she must do it by evidence other than her own"²³.

14. Where the spouses have separated by consent, whether by deed or otherwise:

"the husband cannot give evidence of non-access, but he can prove that fact by any means open to him other than his own evidence. The presumption is that the child is legitimate. If the husband leads evidence to rebut that presumption, the wife can call, but cannot herself give, evidence in support of the child's legitimacy"²⁴.

15. It should be noted finally that the rule in Russell v Russell will not and does not purport to exclude a statement by an alleged spouse where the status of the marriage is an issue: until the marriage has been proved, "any statement by either spouse as to its existence or as to the legitimacy of the children is admissible"²⁵.

²² Supra, p.4.

²³ Ettenfield v Ettenfield, [1940] 1 All E.R. 293, at 301 (C.A., per Goddard L.J.). See also Park v Park, supra, fn. 21.

²⁴ Ettenfield v Ettenfield, supra, fn. 23, at 301 (per Goddard L.J.).

²⁵ Mulhern v Cleary, [1930] I.R. 649, at 679 (Sup. Ct., per FitzGibbon J.).

(b) Blood Tests

16. Blood tests may afford very useful evidence as to paternity²⁶. Whilst "scientists have not to date found the ultimate paternity test"²⁷, important conclusions of an evidential nature may be drawn from blood tests. Since certain properties of the blood components are inheritable, detectable and varied²⁸, they act as genetic masters and thus comprise "the most useful tool in solving parentage problems"²⁹. Blood tests can therefore exclude³⁰ with certainty a particular man from being the father of a particular child in cases where his blood lacks a matter which the child's has, and must have received from, his natural father's; or when the man's blood contains a matter that would have appeared in the child's blood if the man had been the father, given the mother's genetic make-up. In some cases it may be that a blood test may indirectly establish paternity: this may arise where, for example, it is known that at the

²⁶ See generally H. Krause, Illegitimacy: Law and Social Policy, 123-139 (1971), Polešky & Krause, Blood Typing in Disputed Paternity Cases - Capabilities of American Laboratories, 10 Family L. Q. 287 (1976), Joint AMA-ABA Guidelines: Present Status of Serologic Testing in Problems of Disputed Parentage, 10 Family L. Q. 247 (1976), Lee, Current Status of Paternity Testing, 9 Family L. Q. 615 (1975), Forrest, The Legal Implications of HLA Testing for Paternity, 15 J. Family L. 537 (1978), Terasak, Resolution by HLA Testing of 1000 Paternity Cases Not Excluded by ABO Testing, 16 J. Family L. 543 (1978), Larson, Blood Test Exclusion Procedures in Paternity Litigation: The Uniform Acts and Beyond, 13 J. Family L. 713 (1974), Bartholemew, The Nature and Use of Blood-Group Evidence, 24 M.L.R. 313 (1961), the English Law Commission's Report, Blood Tests and the Proof of Paternity in Civil Proceedings, Appendix B (Law Com. No.16, 1968).

²⁷ Forrest, supra, fn. 26, at 537.

²⁸ Cf. id., at 537-538.

²⁹ See Lee supra, fn. 26, at 616.

³⁰ "The point which requires emphasis is that blood-grouping evidence can only normally be used to exclude, not to prove, paternity": Bartholemew, supra, fn. 26, at 315.

material time the mother had intercourse with only her husband and one other person, and the blood test excludes the husband but not the other person as a possible parent³¹.

17. It is clear that evidence derived from blood tests is admissible (subject to the general rules of evidence) in proceedings where paternity is in issue³². No difficulty arises where a person is willing to be tested, but where he or she refuses to be tested, or refuses to permit a child in his or her care to be tested, the position is somewhat confused.

18. The matter does not appear to have been resolved yet by an Irish court. In England, in W. v W.³³, it was held that a blood test may not be ordered against an unwilling adult. Danckwerts L.J. stated:

"To compel persons to submit to a blood test without their consent seems to me a very serious interference with personal liberty and rights"³⁴.

19. The Court of Appeal in that decision considered that no power to order the making of blood tests could be derived from the previous practice of the Ecclesiastical Courts in ordering medical inspections in nullity proceedings where a party was alleged to be impotent³⁵. Since there was neither direct statutory authority for such an order nor power contained in any

³¹ S. Cretney, Principles of Family Law, 272 (3rd ed., 1980).

³² This was established at a relatively early stage in the Irish courts (cf. Anon., Bernstein Blood Tests as Evidence, 66 I.L.T. & Sol. J. 64, 111 (1932)).

³³ [1964] P. 67 (C.A.).

³⁴ Id., at 78.

³⁵ Cf. A. Shatter, Family Law In The Republic of Ireland, 72-73 (2nd ed., 1981).

rules of court, the court had no right to order what "would prima facie be an unlawful act"³⁶.

20. The Scottish decision of Whitehall v Whitehall³⁷ reached the same conclusion. Lord Wheatley's objection was based primarily on the view that it would be contrary to justice to order a party in effect to tender evidence from which that party would have "nothing to gain and a great deal to lose"³⁸, at the demand of a party who had "nothing to lose and a great deal to gain"³⁹ by the production of such evidence. In the Inner House, Lord Justice Clerk Thomson endorsed this approach⁴⁰, but added another objection:

"Enforcement would mean the compulsory infliction of a surgical operation, a minor one no doubt, but none the less an invasion of the person of the wife; or, if the Court were not prepared to go that length, it would have to regard her refusal as a contempt of Court which would mean, if the Court were really in earnest, keeping the wife in gaol till she thought better of her refusal"⁴¹.

Whereas the position regarding blood tests of adults is reasonably clear, that relating to blood tests of minors is far less certain.

³⁶ [1964] P., at 74 (per Willmer L.J.).

³⁷ 1958 S.C. 252, criticised by Bartholemew, supra, fn. 26, at 324-330.

³⁸ 1958 S.C., at 253.

³⁹ Id. This approach did not find favour with Lord Reid in S. v Mc.; W. v W., [1972] A.C. 24, at 43 (H.L. (Eng.), 1970).

⁴⁰ 1958 S.C., at 257-8.

⁴¹ Id., at 258. Bartholemew, supra, fn. 26, at 327-328, has made trenchant criticism of this statement. He stigmatises the argument that a compulsory blood test is "an invasion of the person of the wife" as circular: if the Court has power to make the order, then what would have been a battery must be regarded as a lawful interference with the person. He argues also that

21. The whole area of consent to medical intervention in respect of minors is one that raises many unresolved problems in our law⁴². Briefly, it appears that a minor is not automatically deprived of capacity to consent on his or her own behalf to such treatment: rather, it depends on whether the particular minor can understand what is involved in the procedure in question⁴³. The law does not specify a minimum age in this regard. It is widely accepted⁴⁴ that a minor in his late teens has the capacity to consent to medical treatment in general and it has even been suggested⁴⁵ that a child as young as nine years may consent to simple medical procedures.

22. Where a minor is not capable of providing the necessary consent and, indeed, even in cases where he is, the practice in this country and indeed abroad is for medical practitioners to obtain the consent of his parents or guardian for the proposed treatment. It is somewhat difficult to understand⁴⁶ how such consent, given by a third party, can logically provide a defence, but the approach clearly has the support of decisions in this jurisdiction⁴⁷ and elsewhere⁴⁸. It may perhaps be justified on the ground of necessity, implied consent or agency.

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contempt of court is not the only response open to the court in the event of refusal: it would be entitled to treat the refusal as sufficient evidence of the fact in issue.

⁴² Cf. B. McMahon & W. Binchy, Irish Law of Torts, 143 (1981) Skegg, Consent to Medical Procedures on Minors, 36 M.L.R. 370 (1973), Institute of Law Research & Reform, Alberta, Background Paper No.9, Consent of Minors to Medical Treatment (1975).

⁴³ Skegg, supra, fn. 42, at 373.

⁴⁴ Cf. id.

⁴⁵ Id.

⁴⁶ Glanville Williams, Joint Torts and Contributory Negligence, 315 (1951).

⁴⁷ Holmes v Heatley, [1937] Ir. Jur. Rep. 74 (High Ct., Maguire J., with jury, 1936) (semble).

⁴⁸ Cf. In re L. (An Infant), [1968] P.119 (C.A., 1967), B. (B.R.) v B. (J), [1968] P.466 (C.A.). See further Skegg, supra, fn. 42, at 375.

23. It seems, on principle, that it is lawful for a parent to consent to the taking of a blood test of a minor where the minor does not object to this or where on account of his lack of age he is unable to consent. Where the minor does object, it is not certain (in the absence of judicial authority in this country on the point) whether the consent of a parent would be sufficient to override the minor's objection.⁴⁹ In a case where it would be in the minor's best interests to be tested, it seems reasonable to assume that a Court could order the test to be carried out.

24. Where a parent or child consents to the test but the other parent or any other interested person objects, the position is not clear; the better view appears to be that the Court is not obliged to order a test, but that the Court should "override any objection on the part of the guardian *ad litem*, the other spouse or any other interested person, unless it can be shown that the test would be against the child's interest"⁵⁰.

⁴⁹ In *S. v McC.; W. v W.*, *supra*, fn.39, Lord Reid considered that:

"it is not and could not be a legal wrong for a parent or person authorised by him to use constraint to his young child provided it is not cruel or excessive. There are differences of opinion as to the age beyond which it is unwise to use constraint, but that cannot apply to infants or young children. So it seems to me to be impossible to deny that a parent can lawfully require that his young child should submit to a blood test".

⁵⁰ P. Bromley, *Family Law*, 235 (4th ed., 1971), referring to the position in England. See further Hayes, *The Use of Blood Tests in the Pursuit of Truth*, 87 L. Q. R. 86 (1971), *S. v McC.; W. v W.*, *supra*, fn. 39. The English approach, which is governed by statute (*Family Law Reform Act 1969*, Part III), seeks to adopt a sensible compromise between the respective interests of the parties, and it is submitted that it would be likely to find general favour in our courts, which would be entitled to invoke section 3 of the *Guardianship of Infants Act 1964*, which makes the welfare of the child the paramount consideration in proceedings relating to the child. Cf. A. Shatter, *Family Law in the Republic of Ireland*, 172, fn. 24 (2nd ed., 1981).

Legitimation⁵¹

25. Both Roman Law and Canon Law contain rules conferring legitimate status on an illegitimate child whose parents married subsequently, provided they were free to marry each other at the time of the child's birth. This principle was not accepted into our law until 1931. Section 1(1) of the Legitimacy Act 1931 provides that in such a case the child will be legitimate from the date of the marriage⁵² if the father is, at the date of the marriage, domiciled in the State⁵³. But section 1(2) provides that such legitimation will occur only if "the father and mother of such person could have been lawfully married to one another at the time of birth of such person or at some time during the period of ten months preceding such birth". The effect of this provision is that, where the child is conceived and born at a time when either parent is married to a person other than the other parent, the child may not be legitimated by the subsequent marriage of the parents. But where, for example, a child is conceived in adultery but the marriage between its parent and the other spouse is terminated (by death or dissolution) before its birth, then it may be legitimated by subsequent marriage. Similarly, where between the conception and birth of a child one of its parents marries a person other than the other parent, the fact that, at the date of its birth that parent is married to another will not prevent the child from being legitimated subsequently after the termination of the marriage to that other person.

⁵¹ See generally, A. Shatter, Family Law in the Republic of Ireland, ch.11 (2nd ed., 1981).

⁵² Or, where the parents had married before the commencement of the Act, the date of its commencement.

⁵³ The private international law aspects of the subject have been discussed by the Commission in Working Paper No.10 - 1981, Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws, pp. 52-54.

26. It should be noted that it is necessary that the child be living at the date of the subsequent marriage⁵⁴: post mortem legitimation is not permissible.

27. Section 6 of the Legitimacy Act 1931 expressly provides that a legitimated person has the same rights and is under the same obligations in respect of maintenance and support of himself or of any other person as if he had been born legitimate; moreover, he is entitled to claim for damages, compensation, allowances, benefits and otherwise to the same extent as legitimate children. For the purposes of entitlement to property and succession, the legitimated child is treated somewhat differently from a legitimate person. Section 3(1) provides that a legitimated person and his spouse, children or more remote issue are entitled to take any interest -

- (a) in the estate of an intestate dying after the date of legitimation;
- (b) under any disposition coming into operation after the date of legitimation;
- (c) by descent under an estate in tail created after the date of legitimation;

in like manner as if the legitimated person had been born legitimate⁵⁵. The effect of this provision (in conjunction with the other provisions of the Act) is that the legitimated child may share in the estate of an intestate dying after (but not before) the date of his legitimation, but that, in the case of testate succession, the legitimated child may acquire an interest under a will, even where it was made before he was

⁵⁴ Section 1(1).

⁵⁵ See also section 3(3), which provides that a legitimated person is not entitled to succeed to any dignity or title of honour by virtue of having been legitimated.

legitimated, provided the testator died after he was legitimated⁵⁶. Moreover, while the legitimated child may benefit from the exercise of a general power of appointment, whenever that power was created, where the power is exercised after his legitimation, a special power of appointment may not be exercised in his favour after legitimation unless the instrument granting this special power also came into operation after the legitimation⁵⁷.

28. Section 3(2) of the Legitimacy Act 1931 provides that, where the right to property depends on the relative seniority of the children of any person, and those children include one or more legitimated persons, the legitimated person or persons rank as if he or they had been born on the day when he or they became legitimated and, if more than one of them became legitimated at the same time, they rank as between themselves in order of seniority.

29. Whilst, as has been mentioned, a person may be legitimated only where he is alive, the marriage of his parents after his death may have important effects on those related or connected to him. Section 5 of the Act provides that, where a person is not legitimated because he has died before his parents' marriage, the rights of his spouse, children and remoter issue (as well as those claiming in succession to them) are preserved, so that they may take the interest that they could have taken had he been legitimated at the date of the marriage. An example will indicate how this section operates. "F and M have an illegitimate child, C, born in 1940. C dies in 1970, leaving a legitimate child, G. F and M intermarry in 1972. A testator dying in

⁵⁶ This is because a will is a "disposition" (section 11) which "come/s/ into operation" on the death of the testator: A. Shatter, Family Law in the Republic of Ireland, 169 (2nd ed., 1981).

⁵⁷ Cf. Re Wicks' Marriage Settlement, [1940] Ch.475, Re Hoff, [1942] Ch.298.

1981 bequeaths a sum of money on trust for F's legitimate grandchildren. G can claim, for he is entitled to take such interest as he could have taken if C had been legitimated on his parent's marriage in 1972"⁵⁸.

Constitutional Aspects⁵⁹

30. The Constitutional position of children born outside marriage is in a number of respects uncertain. The Courts have analysed a number of issues: whether the child born outside marriage has Constitutional rights and, if so, the Constitutional basis of those rights; whether the parents and the child (or the woman and the child) constitute a "family" for the purposes of Article 41 of the Constitution; and the Constitutional position of the mother and the father respectively. Each of these issues will be examined in turn.

The Constitutional Position of the Child

31. The position of the child was analysed by Gavan Duffy P., in In re M., an Infant⁶⁰. He stated of a young girl born out of wedlock:

".... I regard the innocent little girl as having the same 'natural and imprescriptible rights' (under Art. 42) as a child born in wedlock to religious

⁵⁸ P. Bromley, Family Law, 579 (6th ed., 1981).

⁵⁹ See generally, J.M. Kelly, The Irish Constitution, 483-484, 493-498 (1980), A. Shatter, Family Law in the Republic of Ireland, ch.1 (2nd ed., 1981), Staines, The Concept of "The Family" Under the Irish Constitution, 11 Ir. Jur. (n.s.) 223 (1976).

⁶⁰ [1946] I.R. 334.

and moral, intellectual, physical and social education"⁶¹

32. This approach was confirmed by the Supreme Court in The State (Nicolaou) v An Bord Uchtála⁶², where Walsh J. stated:

"Article 42, section 5, of the Constitution, while dealing with the case of failure in duty on the part of parents towards the children, speaks of 'the natural and imprescriptible rights of the child' Those 'natural and imprescriptible rights' cannot be said to be acknowledged by the Constitution as residing only in legitimate children any more than it can be said that the guarantee in section 4 of the Article as to the provision of free primary education excludes illegitimate children. While it is not necessary to explore the full extent of the 'natural and imprescriptible rights of the child' they include the right to 'religious and moral, intellectual, physical and social education.' An illegitimate child has the same natural rights as a legitimate child though not necessarily the same legal rights. Legal rights as distinct from natural rights are determined by the law for the time being in force in the State. While the law cannot under the Constitution seek to deprive the illegitimate child of those natural rights guaranteed by the Constitution it can, as in the Adoption Act 1952, secure for the illegitimate child legal rights similar to those possessed by legitimate children".⁶³

33. This passage was quoted by Walsh J. in G. v An Bord Uchtála⁶⁴, in 1978. He added that the legitimate child has the fundamental rights of every human being and the fundamental

⁶¹ Id., at 344. See also id., at 349 (per Haugh, J.).

⁶² /1966/ I.R. 567.

⁶³ Id., at 642.

⁶⁴ /1980/ I.R. 32, at 67.

rights which spring from its relationship to its mother. Such a child, he stated:

"is just as entitled to be supported and reared by its parent or parents who are the ones responsible for its birth, as a child born in lawful wedlock. One of the duties of a parent or parents, be they married or not, is to provide as best the parent or parents can the welfare of the child and to ward off dangers to the health of the child"⁶⁵.

34. Developing his analysis of the position of the child born outside marriage, Walsh J. stated:

"Not only has the child born out of lawful wedlock the natural right to have its welfare and health guarded no less well than that of a child born in lawful wedlock, but a fortiori it has the right to life itself and the right to be guarded against all threats directed to its existence whether before or after birth. The child's natural rights spring primarily from the natural right of every individual to life, to be reared and educated, to liberty, to work, to rest and recreation, to the practice of religion and to follow his or her conscience. The right to life necessarily implies the right to be born, the right to preserve and defend (and to have preserved and defended) that life, and the right to maintain that life at a proper human standard in matters of food, clothing and habitation. It lies not in the power of the parent who has the primary natural rights and duties in respect of the child to exercise them in such a way as intentionally or by neglect to endanger the health or life of the child or to terminate its existence. The child's natural right to life and all that flows from that right are independent of any right of the parent as such. I wish here to repeat what I said in McGee's Case⁶⁶ at p. 312 of the report:- '.... any action on the part of either the husband and wife or of the State to limit family sizes by endangering or destroying human life must necessarily not only be an offence against the common

⁶⁵ Id., at 67-68.

⁶⁶ [1974] I.R. 284.

good but also against the guaranteed personal rights of the human life in question.' In these respects the child born out of lawful wedlock is in precisely the same position as the child born in lawful wedlock.

The Constitution rejected the English common law view of the position of the illegitimate child in so far as its fundamental rights are concerned. It guarantees to protect the child's natural rights in the same way as it guarantees to protect the natural rights of the mother of the child".⁶⁷

35. The other judges in G. v An Bord Uchtála took somewhat different positions. O'Higgins C.J. stated that a child born out of wedlock:

"... has natural rights. Normally these will be safe under the care and protection of its mother. Having been born the child has the right to be fed and to live, to be reared and educated, to have the opportunity of working and of realising his or her full personality and dignity as a human being. These right of the child (and others which I have not enumerated) must equally be protected and vindicated by the State. In exceptional cases the State, under the provisions of Article 42, s.5, of the Constitution, is given the duty as guardian of the common good to provide for a child born into a family where the parents fail in their duty towards that child for physical or moral reasons. In the same way, in special circumstances, the State may have an equal obligation, in relation to a child born outside the family, to protect that child even against its mother, if her natural rights are used in such a way as to endanger the health or life of the child or to deprive him of his rights. In my view, this obligation stems from the provisions of Article 40, s.3, of the Constitution".⁶⁸

36. Henchy J., like O'Higgins C.J., attributed the Constitutional basis of the rights of a child born out of wedlock to Article

⁶⁷ [1980] I.R. 32, at 69.

⁶⁸ Id., at 55.

40.3 , rather than Article 42.5. He interpreted the passage from In Re M., an Infant⁶⁹ (quoted at p.15 supra) as showing that Gavan Duffy P. had reached the same conclusion although that judge had expressly referred only to Article 42.

37. Parke J. stated

"The child has personal rights to life, to be fed, to be protected, reared and educated in a proper way; these rights are recognised by Article 40 of the Constitution. In my view, a child has no constitutional right to have these obligations discharged by his or her natural parent, and, if there are other persons able and willing to satisfy such requirements, then a child's constitutional rights are sufficiently defended and vindicated"⁷⁰

The remaining judge in G. v An Bord Uchtála, Kenny J., did not express any view on the matter.

The Legitimated Child

38. As regards the constitutional position of a legitimated child Henchy J., in In re J., an Infant⁷¹, stated:

"I find it impossible to distinguish between the constitutional position of a child whose legitimacy stems from the fact that he was born the day after his parents were married, and that of a child whose legitimacy stems from the fact that his parents were married the day after he was born. In the former case the child is legitimate and a member of the family from birth by operation of the common law; in the latter case, by operation of the statute, from the date of his parent's marriage. The Constitution gives no definition of the family, but it does recognise,

⁶⁹ Supra, fn. 61.

⁷⁰ [1980] I.R. 32, at 100.

⁷¹ [1966] I.R. 295, at 306-307.

in Article 41, section 3, sub.s. 1^o, that it is founded on the institution of marriage. I am satisfied that s.1 of the Legitimacy Act, 1931, operated to endow the child in this case with membership of a family founded on the institution of marriage. It is an example of the way in which certain constitutional rights - for example, citizenship and rights founded on citizenship - may be conferred by the operation of an Act of Parliament. It is, of course, essential that such a statutory provision should not offend against the Constitution; but there is no suggestion in the present case that s.1 of the Legitimacy Act, 1931, is unconstitutional".

Do the Parents (or either of them) and the Child Born Outside Marriage Constitute a "Family" for the Purposes of Article 41?

39. Under Article 41.1.1^o of the Constitution the State "recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law". Under Article 41.1.2^o, the State guarantees "to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State". Under Article 41.3.1^o, the State pledges itself "to guard with special care the institution of Marriage, on which the Family is founded and to protect it against attack."

40. The Courts have consistently⁷² held that the Family that is afforded protection by the Constitution is the family based on marriage.

⁷² Cf. In re M., an Infant /1946/ I.R. 334, at 344 (High Ct., per Gavan Duffy, P.), In re Cullinane, an Infant /1954/ I.R. 270 (point not argued), The State (Nicolaou) v An Bord Uchtála /1966/ I.R. 567 (Sup. Ct.), In re J., an Infant /1966/ I.R. 295 at 306-307 (High Ct., per Henchy J.), McN. v L., unreported, High Ct., Kenny J., 12 January 1970 (at p. 4 of judgment), G. v An Bord Uchtála /1980/ I.R. 32.

41. In the Supreme Court decision of The State (Nicolaou) v An Bord Uchtála⁷³, Walsh J. (speaking for the Court) stated:

"It is quite clear from the provisions of Article 41, and in particular section 3 thereof, that the family referred to in this Article is the family which is founded on the institution of marriage and, in the context of the Article, marriage means valid marriage under the law for the time being in force in the State. While it is quite true that unmarried persons cohabiting together and the children of their union may often be referred to as a family and have many, if not all, of the outward appearances of a family, and may indeed for the purposes of a particular law be regarded as such, nevertheless as far as Article 41 is concerned the guarantees therein contained are confined to families based upon marriage".

Constitutional Position of the Mother of a Child Born Outside Marriage

42. Although the mother of a child born outside marriage derives no Constitutional rights or protection from Article 41 or 42, the Courts have recognised that she is not deprived of all Constitutional rights. In The State (Nicolaou) v An Bord Uchtála⁷⁴, Mr Justice Walsh (speaking for the Court) stated that:

"Her natural right to the custody and care of her child, and such other natural personal rights as she may have (and this Court does not in this case find it necessary to pronounce upon the extent of such rights), fall to be protected under Article 40, section 3, and are not affected by Article 41 or Article 42 of the Constitution."

⁷³ [1966] I.R. 567, at 643-644.

⁷⁴ [1966] I.R. 567, at 644. For criticism of this approach, see J.M. Kelly, Fundamental Rights in the Irish Law and Constitution, 245 (2nd ed., 1967).

43. In the Supreme Court in G. v An Bord Uchtála⁷⁵, this statement in Nicolaou's case was analysed by three judges. O'Higgins C.J. said:

"But the plaintiff is a mother and, as such, she has rights which derive from the fact of motherhood and from nature itself. These rights are among her personal rights as a human being and they are rights which under Article 40, s.3, sub-s.1, the State is bound to respect, to defend and vindicate. As a mother she has the right to protect and care for, and to have custody of, her infant child. The existence of this right was recognised in the judgment of this Court in The State (Nicolaou) v An Bord Uchtála.⁷⁶ This right is clearly based on the natural relationship which exists between a mother and child. In my view it arises from the infant's total dependency and helplessness and from the mother's natural determination to protect and sustain her child. How far and to what extent it survives as the child grows up is not a matter of concern in the present case. Suffice to say that this plaintiff, as a mother, had a natural right to the custody of her child who was an infant, and that this natural right of hers is recognised and protected by Article 40, s.3, sub-s.1, of the Constitution. Section 6, sub-s.(4) and Section 10, sub-s.(2) (a) of the Guardianship of Infants Act 1964 constitute a compliance by the State with its obligation, in relation to the mother of an illegitimate child, to defend and vindicate in its laws this right to custody. These statutory provisions make the mother guardian of her illegitimate child and give the mother statutory rights to sue for custody. However, these rights of the mother in relation to her child are neither inalienable nor imprescriptible, as are the rights of the family under Article 41. They can be alienated or transferred in whole or in part and either subject to conditions or absolutely, or they can be lost by the mother if her conduct towards the child amounts to an abandonment or an abdication of her rights and duties."⁷⁷

44. Walsh J. adopted a similar approach. He stated:
 "During the hearing of this appeal counsel for the notice parties advanced a bold but, in my opinion,

⁷⁵ [1982] I.R. 32.

⁷⁶ [1966] I.R. 567.

⁷⁷ [1980] I.R. 32, at 55.

totally untenable view that the mother of an illegitimate child has no natural rights in regard to that child. This Court, in its decision in The State (Nicolaou) v An Bord Uchtála⁷⁸, clearly recognised the natural right of the mother of an illegitimate child to the custody and care of her child and held that this, and other natural personal rights which she has, fall to be protected under Article 40, section 3, of the Constitution. The fact that such rights are not specifically enumerated in the Constitution does not support in any way the submission made in this Court on behalf of the notice parties The mother and her illegitimate child are human beings and each has the fundamental rights of every human being and the fundamental rights which spring from their relationship to each other. These are natural rights"⁷⁹.

Parke J. also favoured the view that the mother of an illegitimate child had constitutional rights in relation to the child based on Article 40.3.1^o.

45. Henchy J. took a different view of the Constitutional position of the mother. He stated:

"I share the view that, while the relevant constitutional rights of children are available equally to legitimate and illegitimate children, the constitutional guarantee for the family does not avail the mother (still less the father) of an illegitimate child. There is no parity of moral capacity or of social function which would justify reading s.3 of Article 40 as importing for such a mother natural and imprescriptible rights and duties of parents within a family. In the normal state of things, the effectuation of the constitutional rights of an illegitimate child will require that the mother be given custody, particularly in the case of a very young child. In such a case the custody has a constitutional footing in so far as it satisfies a constitutional right of the child; while the mother's own right to custody has a legal, as distinct from a constitutional foundation. In such circumstances the mother's legal right to custody must always yield to the constitutional rights of the child, so that the mother's claim to custody will not be given

⁷⁸ [1966] I.R. 567, at 644.

⁷⁹ [1980] I.R. 32, at 66, 67.

recognition if, because of factors such as physical incapacity, mental illness, personality defect, chronic alcoholism, drug addiction, moral depravity, or dereliction of parental duty, the mother's custody would be incompatible with the child's constitutional rights. It is true that the mother's right to the custody and care of her child was said in The State (Nicolaou) v An Bord Uchtala⁸⁰ to be given constitutional protection by s.3 of Article 40, but that observation was not part of the ratio decidendi of that case. The only matter in issue in that case was the nature and extent of the rights of a father of an illegitimate child. If the mother of an illegitimate child had a constitutionally-protected personal right to its custody, it is difficult to see how in a case such as the present one she could be held to have lost that right when there is no evidence that she was ever made aware of the existence of the right. In my opinion, however, the mother's rights in regard to the child, although deriving from the ties of nature, are given a constitutional footing only to the extent that they are founded on the constitutionally-guaranteed rights of the child."⁸¹

46. Kenny J. also described the passage in Nicolaou's Case as having been obiter. He stated that he did not agree with it. He noted that in some decisions in the nineteenth and early part of the present century, the judges had spoken of the 'natural' right of the mother of a illegitimate child but he stated that in these cases:

"'natural' referred to the tie by blood which exists between mother and child; they were not thinking in terms of the philosophical doctrine of natural law and natural rights which the Victorian and Edwardian judges and lawyers regarded with contempt"⁸².

47. Kenny J. quoted the passage from Nicolaou's Case and commented that it seemed to him that there was an equation in this passage of "natural rights" and "constitutional rights". He did not accept that there was such a connection, "particularly as

⁸⁰ /1966/ I.R. 567, at 644.

⁸¹ /1980/ I.R. 32, at 87,88.

⁸² Id., at 96.

the word 'natural' is so ambiguous"⁸³. It might mean, he stated, when used in connection with the relationship of mother and child, the link between them formed by the facts that she had conceived the child, that it issued from her body and was fostered and nurtured by her, or it might mean that the theory of natural law, "on which so much of that part of the Constitution dealing with Fundamental Rights is based"⁸⁴, recognised such a right. Kenny J. concluded his analysis of the issue as follows:

"In my opinion the mother of an illegitimate child has a statutory right under the Guardianship of Infants Act 1964 to the custody of her child but has not a constitutional one. She has a natural right to it in the first sense which I have outlined above: I reserve the question whether she has such a right under the second sense of that word"⁸⁵.

The Constitutional Position of the Father

48. The father of a child born outside marriage has no Constitutional rights in respect of his child based on Article 40.3., 41 or 42 of the Constitution. The decision in which the issue was analysed in detail is The State (Nicolaou) v An Bord Uchtála⁸⁶. In this case, the applicant, a Greek Cypriot, was the natural father of a child born in London to a woman of Irish parents who was a citizen of Ireland. The applicant wished to marry the mother of the child but she was unwilling to do so. The mother, with the applicant's consent, took the child to her parents' home in Ireland and then started making arrangements to have the child adopted. When the applicant discovered this, he registered a formal protest with the Adoption Board, indicating very strongly that he was not

⁸³ Id., at 97.

⁸⁴ Id.

⁸⁵ Id.

⁸⁶ /1966/ I.R. 567.

agreeable to having the child adopted. He told the mother that he wished to have the child with him and that he was ready and willing to give the mother a home with himself or else to marry her, whichever she wished. Notwithstanding this, the mother went ahead with the adoption, and an adoption order was made in due course. The applicant found out about the adoption order after some considerable difficulty. He applied to the High Court for a conditional order of certiorari to have the order brought up and quashed.

49. Murnaghan J., in the High Court, declined to do so. The Supreme Court granted a conditional order of certiorari. The High Court discharged the order and the applicant's appeal to the Supreme Court was unsuccessful.

50. Two provisions of the Adoption Act 1952 may be noted. Section 14(1) provides that:

"An adoption order shall not be made without the consent of every person being the child's mother or guardian or having charge of or control over the child, unless the Board dispenses with any such consent in accordance with this section".

Section 16(1) provides that:

"The following persons and no other persons shall be entitled to be heard on an application for an adoption order -

- (a) the applicants,
- (b) the mother of the child,
- (c) the guardian of the child,
- (d) a person having charge of or control over the child,
- (e) a relative of the child,
- (f) a representative of a registered adoption society which is or has been at any time concerned with the child,
- (g) a priest or minister of a religion recognised by the Constitution (or, in the case of any such religion

which has no ministry, an authorised representative of the religion) where the child or a parent (whether alive or dead) is claimed to be or to have been of that religion,

- (h) an officer of the Board,
- (i) any other person whom the Board, in its discretion, decides to hear."

51. "Parent" is defined, for the purposes of the Act as not including "the natural father of an illegitimate child"⁸⁷. "Relative" similarly is defined as including relationship to an illegitimate child traced through the mother only⁸⁸.

52. Mr Nicolaou made a number of arguments as to why these statutory provisions were contrary to the Constitution. He referred firstly to Article 40.1 of the Constitution which provides as follows:

"All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function."

53. In essence, the applicant argued that, at the time the Constitution came into force and thereafter, Irish law recognised as a personal legal right the right of the father of an illegitimate child to its custody, inferior only to that of the mother, while alive, and after her death superior to that of all other persons; that this legal right was founded on pre-existing natural right, and that the Adoption Act 1952, in giving the natural father no right to be heard before an adoption order was made, had no regard to this legal right. This failure, contended the applicant, amounted to unfair discrimination and was therefore repugnant to Article 40.1 of the Constitution.

⁸⁷ Section 3.

⁸⁸ Id.

54. Walsh J., for the Court, noted that:

"Legal rights, unless guaranteed by the Constitution, may be adversely affected or completely taken away by legislation"⁸⁹.

He stated that the Court was not satisfied that the cases⁹⁰ relied on by the applicant established that the natural father did have the natural right to custody of the child, as alleged.

55. Mr Nicolaou had further argued that sections 14(1) and 16(1) of the Adoption Act 1952 discriminated against the natural father

"on the ground of sex because rights are given to the mother which are denied to the father and on the ground of paternity because rights are given to persons, who may be more distant relations of the child or even strangers in blood, which are denied to natural fathers"⁹¹.

56. This argument was rejected by Mr Justice Walsh in a passage which has been much discussed subsequently:

"Under the provisions of these sections of the Act certain persons are given rights and all other persons are excluded. Whether or not the natural father is excluded depends upon the circumstance whether or not he comes within the description of a person who is given a right, and he may or may not come within some such description. If he is in fact excluded it is because in common with other blood relations and strangers he happens not to come within any such description. There is no discrimination against the natural father as such. The question remains whether there is any unfair discrimination in giving the rights in question to the persons described and

⁸⁹ /1966/ I.R. 567, at 640.

⁹⁰ Reg v Nash 10 Q.B.D. 454 (C.A., 1883), In re Crowe, 17 I.L.T.R. 72 (1883); In re Kerr 22 L. R. Ir. 642 (1888), 24 L. R. Ir. 59 (1889), In re Hyndman 39 I.L.T.R. 191 (1905), In re Connor /1919/ I.R. 361.

⁹¹ /1966/ I.R. 567, at 640-641.

denying them to others. In the opinion of the Court, each of the persons described as having rights under s.14, sub-s.1 and s.16, sub-s.1, can be regarded as having, or capable of having, in relation to the adoption of a child a moral capacity or social function which differentiates him from persons who are not given such rights. When it is considered that an illegitimate child may be begotten by an act of rape, by a callous seduction or by an act of casual commerce by a man with a woman, as well as by the association of a man with a woman in making a common home without marriage in circumstances approximating to those of married life, and that, except in the latter instance, it is rare for a natural father to take any interest in his offspring, it is not difficult to appreciate the difference in moral capacity and social function between the natural father and the several persons described in the sub-sections in question. In presenting their argument under this head counsel for the appellant have undertaken the onus of showing that in denying to the natural father certain rights conferred upon others s.14, sub-s.1, and s.16, sub-s.1, of the Act are invalid having regard to Article 40 of the Constitution. In the opinion of the Court they have failed to discharge that onus."⁹²

57. Mr Justice Walsh went on to consider the argument by the applicant that the provisions of the Adoption Act violated the guarantees contained in Article 40.3.1^o of the Constitution, relating to the personal rights of the citizen. He stated:

"The Constitution does not set out in whole what are the rights of the citizen which are encompassed in this guarantee and, while some of them are indicated in sub-section 2 of section 3, it was pointed out in the judgment of this Court in Ryan v A.G.⁹³ that the personal rights guaranteed are not exhausted by those enumerated in sub-section 2. It is, however, abundantly clear that the rights referred to in section 3 of Article 40 are those which may be called the natural personal rights and the very words of sub-section 1, by the reference therein to "laws", exclude such rights as are dependent only upon law. Sub-section 3 cannot therefore in any

⁹² [1966] I.R. at 641. For critical analysis of this statement, see J.M. Kelly, Fundamental Rights in the Irish Law and Constitution, 242-243 (2nd ed., 1967), A. Shatter, Family Law in the Republic of Ireland, 360-361.

⁹³ [1965] I.R. 294.

sense be read as a constitutional guarantee of personal rights which were simply the creation of the law and in existence on the date of coming into operation of the Constitution. For the reasons already indicated earlier in this judgment in so far as a father has rights in respect of his natural child which were the creation of law, judge-made or legislative, they were of their nature susceptible to legislative change and if the Adoption Act, 1952, has effected such change it does not infringe the guarantee contained in section 3 of Article 40. It has not been shown to the satisfaction of this Court that the father of an illegitimate child has any natural right, as distinct from legal rights to either the custody or society of that child and the Court has not been satisfied that any such right has ever been recognised as part of the natural law. If an illegitimate child has a natural right to look to his father for support that would impose a duty on the father but it would not of itself confer any right upon the father. The appellant has, therefore, failed to establish that any personal right he may have guaranteed to him by Article 40, section 3, of the Constitution has been in any way violated by the Adoption Act of 1952."⁹⁴

Nationality and Citizenship

58. Irish citizenship may be obtained by either birth or descent. Every person born in Ireland is an Irish citizen from birth⁹⁵. A person may also base his or her Irish citizenship on the nationality of his father or mother⁹⁶. Finally citizenship may be obtained by marriage⁹⁷ or by naturalization⁹⁸.

⁹⁴ [1966] I.R., at 642-643.

⁹⁵ Irish Nationality and Citizenship Act 1956, section 6(1). See generally C. Parry, Nationality and Citizenship Laws of the Commonwealth and the Republic of Ireland, vol. 1, ch. 17 (1957).

⁹⁶ Id., section 6(2)-(5).

⁹⁷ Id., section 8.

⁹⁸ Id., Part III.

59. The relevant legislation does not define "father" or "mother". Accordingly our nationality laws seem to operate without any distinction based on the marital status of parents. The point has not yet been decided in our courts, however, and it should be noted that there is English authority⁹⁹ supporting a different interpretation of these plain words when used in similar British legislation.

60. Three provisions may be noted briefly. Posthumous children may acquire Irish citizenship through their late father¹⁰⁰. Foundlings first found in the State are, unless the contrary is proved, deemed to have been born in Ireland¹⁰¹. Finally, where an adoption order is made, and either of the adoptive parents (or, where there is only one adoptive parent, that parent) is an Irish citizen, the adopted child, if not already an Irish citizen, becomes an Irish citizen¹⁰².

Maintenance of Children Born Outside Marriage¹⁰³

61. The statutory provisions relating to maintenance of children born outside marriage are complex. The former law on the subject was contained in the Illegitimate Children (Affiliation Orders) Act 1930, amended (as regards jurisdiction and maximum amounts of payments) by the Courts Act 1971. In 1976, reform of family

⁹⁹ Abraham v A.G. /1934/ P. 17. Cf. O'Brien v Stoutt, High Ct., D'Arcy J., unreported, 5 May 1982 (1977 No. 3264P).

¹⁰⁰ 1956 Act, section 9.

¹⁰¹ Id., section 10.

¹⁰² Id., section 11.

¹⁰³ See generally, A. Shatter, Family Law in the Republic of Ireland, 363-376 (2nd ed., 1981), Horgan, The Financial Support of Illegitimate Children, 11 Ir. Jur. (n.s.) 59, at 60-81 (1976).

maintenance obligations was effected by the Family Law (Maintenance of Spouses and Children) Act 1976. This Act conferred on all children, without discrimination as regards the marital status of their parents, new and extensive rights to maintenance. Ideally, it would have been desirable for the legislation to repeal the 1930 Act and fundamentally reform all aspects of the law relating to children born outside marriage. To have taken this course would, however, have delayed the enactment of the family maintenance legislation for a considerable period; so an interim solution was adopted whereby the 1930 Act was substantially amended but not replaced. At the time it was hoped that later on the old enactment would be repealed and new and comprehensive legislation enacted in its stead.

62. In order to best understand the existing law, therefore, it is necessary first to examine the structure of the 1930 Act and then to consider the changes brought about by the 1976 legislation.

The Illegitimate Children (Affiliation Orders) Act 1930

63. The structure of the 1930 legislation was that the primary maintenance obligation - so far as legal enforceability was concerned¹⁰⁴ - rested on the father against whom an affiliation order was made, but this liability was of a short-term nature (normally not beyond the time the child reached the age of sixteen), and was capable of being commuted to a lump sum payment sanctioned by formal commutation order of the Court or of being replaced by a voluntary agreement to maintain the child

¹⁰⁴ It is true that section 14 of the Act provided that none of its provisions were to operate to "remove or disturb" the liability of the mother to maintain her child, but this liability was only one at public law under sections 53 to 55 of the Poor Relief (Ireland) Act 1838 and was not capable of being enforced by or on behalf of the child under civil law.

(again sanctioned by Court approval). Moreover, stringent limitation periods and a requirement that the mother's evidence as to paternity be corroborated inhibited the mother in obtaining maintenance for her child.

64. Under the provisions of the Act, an award of up to £1 per week could be made by a District Justice against the putative father in respect of the maintenance and education of the child.¹⁰⁵ The maintenance ceased to be payable when the child attained sixteen years¹⁰⁶, save in cases where, immediately before the attainment of that age, it appeared to a District Justice that the child was "mentally or bodily deficient in such manner and to such degree as to render such child totally and permanently unfit for employment of any kind"¹⁰⁷; in such cases, the Justice might order payments to continue under the affiliation order for the life of the child¹⁰⁸.

65. The 1930 Act also contained a provision¹⁰⁹ whereby, if the putative father consented, a lump sum might be fixed by the District Justice in commutation of weekly payments that might otherwise have been due. Moreover, even where an affiliation order for periodical payments had been made, it was possible for an order for commutation of periodical payments to be made subsequently on application to the Court by the person liable to make such payments - that is, the father or his personal

¹⁰⁵ Section 3(1). The Courts Act 1971, section 19(1)(a), raised this amount to £5 per week in District Court proceedings and gave jurisdiction to the High Court with no maximum limit to the amount that might be ordered there.

¹⁰⁶ Section 4(2).

¹⁰⁷ Section 4(3).

¹⁰⁸ *Id.*

¹⁰⁹ Section 3(1)(c).

representative¹¹⁰. Where the putative father who was liable to make periodical payments died during the currency of an order to make such payments, the Court, on application to it by the mother,¹¹¹ could make a commutation order.¹¹² In fixing a lump sum payable under a commutation order, the Justice was required to act with a view to securing for the child benefits at least equal to those which he would derive from a continuation of periodical payments¹¹³; moreover, in fixing the lump sum, the District Justice was required to have regard to all the circumstances of the case and in particular, where the circumstances so required, to the probability of the payment of a weekly sum being ordered to be continued after the child had attained the age of sixteen years¹¹⁴. Thus, in the case of a mentally or physically disabled child, in respect of whom an order for periodical payment might be ordered for the duration of his life, the Court was required to take particular account of this possibility when fixing a lump sum, since obviously this would greatly increase the amount that might be considered appropriate¹¹⁵.

Voluntary Agreements for Maintenance

66. The 1930 Act also contained provisions relating to voluntary agreements for the maintenance of children born outside marriage. Where a person (referred to as "the admitted father") who admitted

¹¹⁰ Section 8(1).

¹¹¹ Or other person to whom the periodical payment was payable: a discretion was conferred by section 9(1) on the District Justice in this regard.

¹¹² Section 8(2).

¹¹³ Section 8(3).

¹¹⁴ Section 8(3).

¹¹⁵ The Courts Act 1971, section 19(2), conferred on the High Court comparable powers relating to commutation payments.

himself to be the father of a child born outside marriage entered into an agreement with the mother before an affiliation order was made against him, and by the agreement bound himself to make provision for the child, the admitted father or mother might apply to the District Justice of the district where the mother resided for approval of the agreement, and the Justice, if he approved of it, might by order record such approval¹¹⁶. A similar procedure was established in respect of voluntary agreements for maintenance made after the making of an affiliation order¹¹⁷.

67. The Act provided that the Justice might approve of an agreement even though the provision made by it differed "wholly or partially"¹¹⁸ from the benefits which could be obtained for the child under the Act; the District Justice was, moreover, permitted to approve of the agreement only where he was of the opinion that the provision made by it was:

"substantially as beneficial to such child and its mother as the benefits which could be obtained for and in respect of such child under this Act"¹¹⁹.

68. An important feature of voluntary agreements for maintenance, as provided by the 1930 Act, was that an order recording the approval by the District justice of such agreements constituted a complete bar to proceedings (or, as the case might be, to further proceedings) under the Act against the putative father¹²⁰.

¹¹⁶ Section 10(1).

¹¹⁷ Section 10(2).

¹¹⁸ Section 10(3).

¹¹⁹ Id. The reference to the child's mother is interesting. It confirms the impression that, in cases where an award of maintenance is made to a mother for the support of her child, some of the award is regarded as being for the direct benefit of the mother, albeit being intended by the Court to benefit the child indirectly.

¹²⁰ Section 10(4).

A prospective defendant anxious to avoid the notoriety attaching to affiliation proceedings might therefore contemplate making a voluntary agreement for maintenance under the Act. It is true that a Court order recording the approval by the Justice was required; and this might possibly occasion some publicity¹²¹. The alternative was to attempt to foreclose proceedings by a private agreement to maintain the child which included a condition that no proceedings would be initiated under the Act¹²².

Variation Orders and Termination Orders

69. Power to vary the amount of periodical payments made under an affiliation order was conferred by the 1930 Act on the District Justice, who was given an untrammelled discretion in the matter¹²³. Moreover, where the Justice was satisfied that liability for payment had ceased under the provisions of the Act or where he was satisfied that justice required that such liability should cease, he was empowered to terminate the obligation to make periodical payments from such date as he considered proper¹²⁴.

Other Payments Which Might Be Ordered

70. Various other payments might be ordered against a putative father. Under the Act payment of a sum not exceeding £50 might

¹²¹ The provisions concerning publicity in newspapers and other publications, contained in sections 3(5) and 3(8) of the Act, do not appear to have excluded the right to publish a statement that an order recording such approval was made by the District Justice.

¹²² Whether such a condition would be binding is not clear. Cf. A. Shatter, Family Law in the Republic of Ireland, 374 (2nd ed., 1981).

¹²³ Section 5(1).

¹²⁴ Section 5(2).

be ordered for the purpose of apprenticing a child of between fourteen and sixteen-and-a-half years of age.¹²⁵ The court could also order the payment of funeral expenses, whether the child died before¹²⁶ or after¹²⁷ the making of an affiliation order, to a maximum amount of £5.00.

Enforcement Provisions

71. The 1930 Act provided that payments due under any of its provisions were recoverable as a civil debt.¹²⁸ Where, however, there was a default in payment, the District Justice was empowered, on application to him by the mother (or other person to whom the payment was to be made), to make an attachment order directing payment to be made out of any pension or income received by the person in default¹²⁹.

The Family Law (Maintenance of Spouses and Children) Act 1976

72. As has been mentioned¹³⁰, the Family Law (Maintenance of Spouses and Children) Act 1976 introduced some radical reforms

¹²⁵ Section 6(1). (This amount was not raised by the Courts Act 1971.)

¹²⁶ Section 3(1)(a).

¹²⁷ Section 7. This amount was raised to £50 by section 19(a) and (c) of the Courts Act 1971.

¹²⁸ Section 11(1).

¹²⁹ Section 13.

¹³⁰ Supra, p. 32.

into the law of maintenance of children born out of wedlock. Since the philosophy which inspired these changes applied to all children, whether born within or outside marriage, it is necessary to examine the general approach adopted by the Act.

73. It seems fair to observe that the central idea behind the 1976 Act related primarily to the family based on marriage, although the Act, so far as possible, was designed to cover children born outside marriage as well as legitimate children.

74. The Act favours, as a basic policy, imposing on both spouses an obligation to maintain each other and their children. This obligation is expressed in statutory language which does not purport to distinguish between the spouses, as such, in the nature and degree of the obligation which is imposed on either; it seems clear, however, having regard to the matters to which the court is required to have regard¹³¹ and from the attitude normally adopted in cases before the courts,¹³² that a more extensive financial obligation will in most cases be imposed on the husband.

¹³¹ Section 5(4) of the Act provides that:

"The Court, in deciding whether to make a maintenance order and, if it decides to do so, in determining the amount of any payment, shall have regard to all the circumstances of the case, and in particular to the following matters -

- (a) the income, earning capacity, (if any) and other financial resources of the spouses and of any dependent children of the family, including income or benefits to which either spouse or any such children are entitled by or under statute, and
- (b) the financial and other responsibilities of the spouses towards each other and towards any dependent children of the family, and the needs of any such dependent children, including the need for care and attention". (Emphasis added).

¹³² Cf. the statement of the Minister for Justice, Patrick Cooney, T.D., Second Reading Debate on 22 July 1975: 284 Dail Debates, cols. 68-69.

75. The second basic policy favoured by the 1976 Act is that the right to apply to the Court for maintenance should generally be available only to a parent and not a child. In the case of a family where the parents are married to each other and living together, the right to apply to the Court alleging that a spouse is failing to provide proper maintenance for the spouse or any of the children of the family is available only to the other spouse. During the passage of the legislation, the then Minister for Justice, Mr Patrick Cooney T.D., explained that this gave effect to the policy that the law should not intrude unduly into the privacy and autonomy of family life. Whilst parents are under an obligation under public law to provide a minimum level of maintenance for their children the approach favoured by the Act is that it would not be proper for the civil law maintenance obligation of parents with regard to their children to be enforceable either by the children themselves or by some outside "busybody". On this view, if the spouses wish to lavish a high degree of economic benefits on their children this should be regarded as their own prerogative; conversely, if they choose to adopt a more spartan regime, this again should be a matter for them to decide. Only where the spouses living together are not in agreement as to whether the level of maintenance being provided for their children is sufficient is access to the Court permitted under civil law.

76. On this analysis, a child's right to be supported by his father is adequately protected by his mother¹³³. But if the legislation had gone no further, then, in cases where the mother was not present, the child would have no one to "champion" his interests. To provide for such a case, section 5(1)(b) of the 1976 Act enables third-party intervention by "any person" alleging that a spouse has not provided adequate maintenance in

¹³³ Or, more rarely, father, where a maintenance order is being sought against the mother.

cases where one spouse:

- (i) is dead,
- (ii) has deserted, or has been deserted by, the other spouse,
or
- (iii) is living separately and apart from the spouse who is
alleged not to be providing proper maintenance¹³⁴.

77. Since the policies just described relate primarily to families based on marriage, very great conceptual and practical difficulties arise in attempting to apply these policies to children born outside marriage. The structure of the 1930 Act did not presuppose that the parents of children born outside marriage would normally be cohabiting in a union similar to marriage: indeed, its provisions¹³⁵ appear to have been largely designed to operate in situations where this was not the case. Moreover, the policy of legislative deference to the privacy and autonomy of married persons is not paralleled in the case of unmarried persons.

78. It was not considered advisable therefore to include provisions in the 1976 Act limiting the right of an "outsider" to apply to the Court for a maintenance order against either parent of a child born outside marriage to cases where the parents were not cohabiting.¹³⁶

¹³⁴ An order may be made in such a case only where "there are dependent children of the family (not being children who are being fully maintained by either spouse)" (section 5(1)(b)).

¹³⁵ Those relating to commutation orders, for example.

¹³⁶ Further technical problems would arise if an attempt were to be made to include a provision akin to section 5(1)(b)(ii) quoted above. There is no notion of "desertion" where one cohabiting party ceases to cohabit with another. This problem could be surmounted but it confirms the difficulties that would arise in treating legal relationships that differ in important respects as though they were the same as each other.

79. Accordingly, the 1976 Act adopted a compromise policy with respect to parents of a child born outside marriage. It sought to impose an equal obligation on each of the parents of such children, just as it did on parents of children born within marriage. But as a general rule, this obligation is enforceable at the suit of "any person"¹³⁷. It may not be enforced against the father until an affiliation order has been made against him¹³⁸; nor may a third party intervene where the father is complying with an order. Even where he is not so complying an order will not be made at the suit of a third party unless the Court, having regard to all the circumstances, thinks it proper to do so. So far as the mother is concerned, a third party application may be taken at any time against her, whether or not she has sought an affiliation order against the father. It should be noted in this context that (although the general limitation period within which affiliation proceedings must be taken is three years from the birth of the child¹³⁹) an affiliation order may be obtained against the father at any time after he has contributed to the maintenance of the child, provided that such a contribution took place within three years of the date of the birth of the child¹⁴⁰. Thus, where the parents of the child cohabit within this three-year period, the right of the mother to take affiliation proceedings against the father is not subject to any time limitation period thereafter. This goes some of (but obviously not the whole) way towards reducing the potential

¹³⁷ Section 4A(1) of the 1930 Act (inserted by section 28(1)(b) of the 1976 Act).

¹³⁸ Section 4A(1) only operates with respect to a "parent". Section 4A(4) (so far as is of present relevance) defines "parent" as meaning either the mother or "the putative father" of the child. Section 1 of the 1930 Act provides that "... the expression 'putative father' means a person adjudged by an affiliation order made under this Act to be the putative father of an illegitimate child".

¹³⁹ Section 2(2) of the 1930 Act, inserted by section 28(1)(b) of the 1976 Act.

¹⁴⁰ Id. The other exceptions involve cases where the defendant was outside the jurisdiction at the date of the birth or subsequently.

impact of the distinction in the 1976 Act regarding third party intervention in the cases of married and unmarried parents, respectively.

Proof of Paternity

80. Section 3(2) of the 1930 Act provides:

"No Justice of the District Court shall be satisfied that a person is the putative father of an illegitimate child without hearing the evidence of the mother of such child and also evidence corroborative in some material particular or particulars of the evidence of the mother".

Thus, if, for example, the mother dies, no affiliation order may be made.

81. It has constantly been laid down that corroborative evidence:

"must be evidence which tends to prove that the man is the father of the complainant's child; in other words, it must be evidence implicating the man; evidence which makes it more probable than not that he is the father of the child"¹⁴¹.

82. Other attempts at providing a definition of corroboration have been made. In Morrissey v Boyle¹⁴², Murnaghan J. stated:

¹⁴¹ Thomas v Jones [1921] 1 K.B. 22, at 44 (per Atkin L.J.), cited with approval by Sullivan, P. (as he then was) in The State (Reilly) v District Justice for Clones [1935] I.R. 908, at 925 (High Ct.), and again by Sullivan C.J. (as he had become) in Morrissey v Boyle [1942] I.R. 514, at 521-522, Murnaghan J. referring to it with approval at 523; in Kiely v Mulvihill 82 I.L.T.R. 1, at 1 (Circuit Ct., 1947), this passage was again cited with approval by Judge O'Briain.

¹⁴² [1942] I.R. 514, at 523 (Supreme Ct.). Murnaghan J., was dissenting but the dissent did not affect his statement of the law. As to corroboration, generally, see Commission's Working Paper No.6 - 1979 (The Law relating to Seduction etc.) pp. 11-13.

"the corroborative evidence required by the statute may be of two kinds :

1. Evidence of facts tending to corroborate the story of the mother as to what happened.
2. Evidence of the conduct of the defendant."

And in the same case O'Byrne J. stated:

"It is not sufficient that the evidence of the complainant should be merely consistent with a charge having been made. There must be such a balance of probability that it would be reasonable and proper for the trial Judge to hold that a charge was in fact made".¹⁴³

83. The Courts have on occasion expressed support for the policy basis of the requirement of corroboration imposed by the statute. In Guardians of Sligo Union v Curran¹⁴⁴, Gibson J. stated:

"If such corroboration was not necessary, no man would be safe."

What Evidence Amounts to Corroboration?

84. The evidence that may amount to corroboration naturally varies widely according to the particular case. Direct evidence is, of course, most effective, but, of the nature of things, rarely available. Accordingly, the evidence that generally is adduced tends to be of an indirect and circumstantial nature.

85. The cases have held that mere evidence of opportunity for sexual intercourse is not, of itself, sufficient¹⁴⁵, but that

¹⁴³ Id., at 527.

¹⁴⁴ 33 I.L.T.R. 181, at 182 (Circuit Case, 1899).

¹⁴⁵ Cf. The State (Smyth) v Fawsitt /1950/ Ir. Jur. Rep. 25,

such evidence when combined with other evidence may amount to sufficient corroboration for the purpose of the statute¹⁴⁶.

86. In several cases the response of the defendant to an accusation of paternity has been relied upon by the applicant as constituting sufficient corroboration for the purposes of the statute. Sometimes, of course, the evidence is unambiguous¹⁴⁷, but frequently the courts have had a difficult task in attempting to distinguish between conduct tending to confirm the truth of the accusation (or, at least, belief on the part of the defendant in its truth) on the one hand and conduct consistent with no more than embarrassment and distress at being so accused, on the other¹⁴⁸.

87. An analogous question is whether the defendant's failure to give evidence may be treated as corroborating the applicant's case¹⁴⁹. Some commentators have argued that it should but the point does not yet appear to have been decided in our courts.

¹⁴⁶ Cf. O'Neill v Kelly /1957/ Ir. Jur. Rep. 81 (Circuit Ct., Judge Deale), Cahill v Reilly /1957/ Ir. Jur. Rep. 77 (Circuit Ct., Judge Deale), Keily v Mulvihill 82 I.L.T.R. 1 (Circuit Ct., Judge O'Briain, 1947). See also Egan v Wallace /1957/ N.I. 64 (C.A., 1956), Norwood v Scott 73 I.L.T.R. 200 (Recorder's Court, Belfast, 1939).

¹⁴⁷ See, e.g. Reg. v Piercy, 18 L.T. 238, 16 Jur. 193 (Q.B. 1852).

¹⁴⁸ Cf. McCarthy v Hourihane /1935/ Ir. Jur. Rep. 37 (High Ct.), Morrissey v Boyle /1942/ I.R. 514 (Sup. Ct.), Cahill v Reilly, *supra*, Oliver v Jeffrey 89 J. P. Jo. 355 (High Ct., 1925).

¹⁴⁹ Cf. G. Wilkinson, Affiliation Law and Practice, 32 (1958) (raising, but not attempting to resolve, the question).

Succession

88. The child born outside marriage has restricted succession rights in respect of the estate of its deceased parents. Conversely, the parents have restricted succession rights in the child's estate.

Succession Rights of Child in Mother's Estate

89. Where the mother of a child born outside marriage (who has not been legitimated) dies intestate leaving no legitimate issue, then the child born outside marriage (or, if he is dead, his issue) is entitled to take any interest in his mother's estate to which he (or, if he is dead, his issue) would have been entitled if he had been born legitimate¹⁵⁰. Where the child has been legitimated he is entitled to take any interest in the estate of his mother if the mother dies intestate after the date of the legitimation, in like manner as if the child had been born legitimate.¹⁵¹

90. Where the mother has died testate, the position appears to be that a child born outside marriage has a right to apply to the court under section 117(1) of the Succession Act 1965 for an order that proper provision be made for him out of his mother's estate on the basis that the mother failed in her moral duty to make proper provision for him. Section 110 of the Act provides:

¹⁵⁰ Legitimacy Act 1931, section 9(1). Section 9(3) provides that the section "does not apply to or affect the right of any person to take by purchase or descent an estate in tail in real property". Nor does the section affect the succession "to any dignity or title of honour": section 10(1).

¹⁵¹ Legitimacy Act 1931, section 3(1).

"In deducing any relationship for the purposes of this Part¹⁵² the provisions of the Legitimacy Act, 1931, and of section 26 of the Adoption Act, 1952, shall apply as they apply in relation to succession in intestacy".

91. It appears that, since "the provisions of the Legitimacy Act 1931" are invoked in their entirety to aid in the task of deducing any relationship for the purposes of Part IX of the 1965 Act, it follows, first, that, aided by section 3(1) of the 1931 Act, a legitimated child has a claim under section 117 of the 1965 Act "in like manner as if the legitimated person had been born legitimate"¹⁵³, and, secondly, that the right of a child born outside marriage to claim against its mother's estate under section 117 must be limited to a case where the mother leaves no legitimate issue, since section 9(1) of the 1931 Act conditions a claim based on the intestacy of the mother to such a case. Finally in this context, by virtue of the application of section 26 of the Adoption Act 1952, it seems clear that an adopted child has a right to claim under section 117 of the 1965 Act in respect of the estate of an adoptive parent, and not in respect of the estate of a natural parent.

Rights of Succession of Mother in Child's Estate

92. The rights of succession of a mother in respect of the estate of her child born outside marriage are clear. Where the child (not having been legitimated) dies intestate, the mother is entitled to take any interest in the child's estate to which she would have been entitled if the child had been born legitimate and she had been the only surviving parent¹⁵⁴.

¹⁵² That is, Part IX, which includes the right of a child to apply to the Court under section 117.

¹⁵³ Section 3(1) of the Legitimacy Act 1931.

¹⁵⁴ Legitimacy Act 1931, section 9(2).

Where the child has been adopted, the adoptive mother has the same rights of succession as if the child had been her child "born in lawful wedlock"¹⁵⁵, the natural mother losing all rights of succession in her child's estate.¹⁵⁶

93. Where the child has been legitimated and dies intestate, the same persons are entitled to take the same interests in the child's estate as they would have been entitled to take if the legitimated person had been born legitimate¹⁵⁷.

Succession Rights of Child in Father's Estate

94. Where the father of a child born outside marriage (who has not been legitimated) dies intestate, the child has no rights in his estate¹⁵⁸. Mr Justice D'Arcy so held in the recent case of O'Brien v Stoutt¹⁵⁹, where the expression "issue" in sections 67 and 69 of the Succession Act 1965 was interpreted as referring to legitimate children only. The Court rejected a constitutional challenge to these provisions on the basis that Article 40 of the Constitution conferred neither an express nor an implied right of inheritance on illegitimate children and that Article 43 did not give an individual right to inherit property.

95. Where the child has been legitimated the child has the same rights against his father as against his mother, that is he may take any interest in like manner as if he had been born legitimate¹⁶⁰.

¹⁵⁵ Adoption Act 1952, section 26(1).

¹⁵⁶ Id.

¹⁵⁷ Legitimacy Act 1931, section 4.

¹⁵⁸ Cf. A. Shatter, Family Law in the Republic of Ireland, 378 (2nd ed., 1981).

¹⁵⁹ High Ct., unreported, 5 March 1982 (1977 No. 3264P).

¹⁶⁰ Legitimacy Act 1931, section 3(1).

96. It seems that a child born outside marriage has no claim against his father's estate under section 117 of the Succession Act 1965, where the father dies testate. Section 110 appears to afford no justification for holding that such a claim exists. The only entitlements under section 110 are limited to analogies with the Legitimacy Act 1931 and section 26 of the Adoption Act 1952, neither of which gives the child born outside marriage a claim against the father's estate save in cases of legitimation or adoption.

Guardianship of Children

97. The mother of a child born outside marriage is the guardian of that child¹⁶¹. The "natural father"¹⁶² of the child may, however, apply to the court under section 11 of the Guardianship of Infants Act 1964 regarding the custody of his child and the right of access to the child by either parent¹⁶³.

98. However, no order for maintenance against either the mother or the father under subsection (2), para. (b), is permissible where such father makes a section 11 application - section 11(4).

Artificial Insemination

99. Artificial insemination involves some particular issues in relation to the subject of illegitimacy. There are two types of artificial insemination: artificial insemination where the

¹⁶¹ Guardianship of Infants Act 1964, section 6(4).

¹⁶² The term is not defined further: presumably it will suffice to establish on the balance of probabilities that the applicant is the father.

¹⁶³ Guardianship of Infants Act 1964, section 11(4).

husband's semen is used, generally referred to as A.I.H.¹⁶⁴, and artificial insemination by a third party donor, generally referred to as A.I.D.¹⁶⁵. Since A.I.H. and A.I.D. raise somewhat different issues in respect of illegitimacy, they will be considered separately.

A.I.H.

100. The status of a child conceived by A.I.H. is the same as that of a child conceived by ordinary means. Thus, if the marriage is a valid one the child will be legitimate. If, however, the marriage is void the child will be illegitimate, and if it is voidable, the child will become retrospectively illegitimate if the marriage is annulled.

101. This latter possibility is a real one in cases where A.I.H. is practised on account of the impotence of either party to a marriage. Impotence is a ground rendering a marriage voidable. A.I.H. does not constitute consummation of a marriage. Thus a child conceived by A.I.H., like any other child who is conceived

¹⁶⁴ For discussion of the indications that have been put forward for A.I.H., see Evans, Artificial Insemination (A.I.H.) for Sperm Antibodies and Oligozoospermia, 48 Br. J. Urology 499, at 500 (1976), Harrison & Wynn-Williams, Human Artificial Insemination, Br. J. Hosp. Med., June 1973, p. 760, at p. 760, Sheilds, Artificial Insemination as Related to the Female, 1 Fertility & Sterility 271, at 271-272 (1950), Meaker, Indications and Arrangements for Artificial Insemination, 54 Urol. & Cutaneous Rev. 404, at 405 (1950).

¹⁶⁵ For discussion of the indications that have been put forward by A.I.D. see A. Emery, Elements of Modern Genetics, 213 (5th ed., 1979), Pennington & Naik, Donor Insemination: Report of a Two-Year Study, /1977/ Br. Med. J., vol. 1, p. 1327, at p. 1329, Dixon & Buthram, Artificial Insemination Using Donor Semen: A Review of 171 Cases, 27 Fertility and Sterility 130, at 130 (1976), Kleegman, Therapeutic Donor Insemination, 5 Fertility and Sterility 7, at 14 (1954), Guttmacher, Haman & MacLeod, The Use of Donors for Artificial Insemination: A Survey of Current Practices, 1 Fertility & Sterility 264, at 266 (1950), Meaker, supra, fn.1, at 405.

in spite of a condition of impotence¹⁶⁶, will become illegitimate if the marriage is annulled on this ground.

102. It is possible in some cases that the fact that the petitioning party resorted to A.I.H. would be held in the circumstances to amount to approbation¹⁶⁷ of the marriage, which would preclude that party from obtaining an annulment¹⁶⁸. Another limitation is the rule that an impotent spouse generally may not petition for a decree of annulment on account of his or her own impotence. This rule does not, however, apply where the other spouse has repudiated the marriage¹⁶⁹ and it is possible that our courts may prefer¹⁷⁰ to follow the approach favoured in England¹⁷¹, adopting a broader discretion on the

¹⁶⁶ As, for example, where a child is conceived by *fecundatio ab extra* (cf. Clarke (orse. Talbott) v Clarke /1943/ 2 All E.R. 540) or was conceived before the marriage at a time when the impotent condition did not exist (cf. Dredge v Dredge (orse. Harrison) /1947/ 1 All E.R. 29). It should be noted that *fecundatio ab extra* does not constitute consummation of a marriage: cf. Snowman (orse. Besinger) v Snowman /1943/ P. 186, and see Russell v Russell /1924/ A.C. 687, at 722, (per Lord Dunedin).

¹⁶⁷ See generally A. Shatter, Family Law in the Republic of Ireland, 76-77 (2nd ed., 1981), Lasok, Approbation of Marriage in English Law and the Doctrine of Validation, Modern L. Rev. 249 (1963), Moore, Defences Available in Annulment Actions, 7 J. Family L. 239, at 249 ff. (1967).

¹⁶⁸ Cf. R.E.L. (orse. R.) v E.L., /1949/ P. 211 (defence of approbation rejected on the facts), Q. v Q., The Times, 12 May 1960.

¹⁶⁹ Cf. McM. v McM. & McK. v McK. /1936/ I.R. 177 (High Ct., Hanna, J., 1935), A. v A. sued as B., 19 L. R. Ir. 403 (Mat., Warren, J.; on appeal C.A., 1887).

¹⁷⁰ Cf. R. (orse. W.) v W., unreported, High Ct., 1 February 1980, where Finlay P. considered that it was "not necessary" to decide whether the broader discretionary approach should be favoured since the respondent had "unequivocally" repudiated the marriage.

¹⁷¹ Harthan v Harthan, /1949/ p. 115 (C.A., 1948), analysed by Bevan, Limitations on the Right of an Impotent Spouse to Petition for Nullity, 76 L.Q.R. 267 (1960).

question¹⁷².

103. A particular problem arises in relation to the use of "sperm banks". The possibility that frozen semen might regain its vitality when subsequently re-warmed was recognised over two centuries ago.¹⁷³ The technique was improved this century and "sperm banks" now are in operation in several countries, including Britain,¹⁷⁴ but not so far in this jurisdiction.

104. One of the consequences of the establishment of "sperm banks" is that by storing man can induce conception in old age and long after death.¹⁷⁵ This has important implications in respect of legitimacy. While clearly a posthumous child conceived by ordinary means is the legitimate child of his deceased father, even where the mother has married again between the conception and the birth, the same rule may not apply where the mother, after the death of her first husband and after her marriage to her second husband, conceives and gives birth by means of her deceased husband's semen. So far no court in any country seems to have pronounced on the matter.

105. Since this is an area where scientific advances have outstripped the law, the courts, if cases arise, will be called on to make creative judgments, doing their best to apply settled

¹⁷² Cf. A. Shatter, Family Law in the Republic of Ireland, 74-75 (2nd ed., 1981).

¹⁷³ Cf. Sherman, Research on Frozen Human Semen: Past, Present and Future, 15 Fertility & Sterility 485, at 485 (1964).

¹⁷⁴ Cf. Ledward, Crich, Sharp, Colton & Symonds, The Establishment of a Programme of Artificial Insemination by Donor Semen within the National Health Service, 83 J. Obs. & Gynaec. 917 (1978), Pennington & Naik, supra, fn. 165, at p. 1329, Report of Panel on Human Artificial Insemination, [1973] Br. Med. J. Supplement, vol. 2, p.3, at p.t.

¹⁷⁵ Sherman, supra, fn. 173, at 491.

legal principles by analogy to the new facts. It would seem on principle that in the case of post mortem conception, the child should not be regarded as legitimate, any more than a child conceived by the first husband after divorce and remarriage is regarded as the legitimate child of that husband.

A.I.D.

106. In our law it seems that a child conceived by A.I.D. is illegitimate¹⁷⁶. Quite simply, he is not the child of the husband and wife, and only a child who is the child of a husband and wife, even where he is conceived or born before the marriage, will be legitimate.

107. Decisions in the United States of America have adopted conflicting approaches to the question of the legitimacy of a child conceived by A.I.D. Some have held that he is legitimate¹⁷⁷. Others¹⁷⁸, using such concepts as "semi-adoption", have favoured the view that the child should be treated as though he were the legitimate child of the husband. It seems most unlikely that this second line of decisions would meet with the approval of an Irish court.

¹⁷⁶ Cf. Bartholemew, Legal Implications of Artificial Insemination, 21 Modern L. Rev. 236, at 236 (1958); Mayo, Legitimacy for the A.I.D. Child, 6 Family L. 19 (1976).

¹⁷⁷ E.G. Doornbus v Doornbus, Super. Ct., Cook Cty., Ill. 13 December 1954, discussed by Biskind, Legitimacy of Children Born of Artificial Insemination 5 J. Family L. 39, at 40 (1965), Ledebur, Note, 43 Geo. L. J. (1955), Gursky v Gursky, 242 N.Y.S. 2d 406, 39 Misc. 2d 1083 (Sup. Ct., 1963), noted by Lacy, 16 Ala. C. Rev. 178 (1963), Anon., 64 Colum. L. Rev. 376 (1964), Twerski, 47 Marquette L. Rev. 585 (1964), Anon. v Anon. 246 N.Y.S. 2s 835, 41 Misc. 2d 886 (Sup. Ct., 1964).

¹⁷⁸ E.g. Strnad v Strnad, 78 N.Y.S. 2d 390 (Sup. Ct., 1948), analysed by Hoyt, /1950/ Wisc. L. Rev. 136, Ohlson v Ohlson, No.54 S.13875 (Super. Ct., Cook Cty., Ill, Spet., 1954), discussed by Guttmacher, Artificial Insemination, 18 De Paul L. Rev. 566, at 581 (1969), California v Sorensen, 63 Cal. 2d 280, 473 P. 2d 495, 65 Cal. Rptr. 7 (1968), In re Adoption of

The Position of the A.I.D. Child in relation to Maintenance,
Succession, Guardianship and Custody Rights

108. Whilst it is clear that the A.I.D. child is illegitimate, a number of related questions arise, to which the answer is somewhat less certain. The position of the mother, the donor and the husband will be considered below in respect of these issues.

Maintenance

(a) The Husband of the Mother

109. Clearly there is no question of the husband of the mother automatically owing maintenance obligations towards the child as though he were his legitimate child. Nevertheless, in practice it may be that the husband will in fact owe important maintenance obligations towards the child.

(i) Position under the Family Law (Maintenance of Spouses and Children) Act 1976¹⁷⁹

Section 3(1) of the Act defines "dependent child of the family" (to which both parents will owe an obligation of maintenance) as follows:

"dependent child of the family, in relation to a spouse or spouses, means any child -

(a) of both spouses, or adopted by both spouses under

fn. 178 cont'd
Anonymous, 74 Misc. 2d 99, 345 N.Y.S. 3d 430 (Sur. Ct., 1973), C.M. v C.C., 152 N.J. Super. 160, 377 A. 2d 821 (1977), analysed by Smith, A Close Encounter of the First Kind: Artificial Insemination and an Enlightened Jury, 16 J. Family L. 41 (1978).

179 No.11. See generally, A. Shatter, Family Law in the Republic of Ireland, 283-284 (2nd ed., 1981).

the Adoption Acts, 1952 to 1974, or in relation to whom both spouses are in loco parentis, or

- (b) of either spouse, or adopted by either spouse under the Adoption Acts, 1952 to 1974, or in relation to whom either spouse is in loco parentis, where the other spouse, being aware that he is not the parent of the child, has treated the child as a member of the family¹⁸⁰.

It would appear that the husband who has consented to A.I.D. may be regarded as being in loco parentis to the child. Alternatively, where he has at any time "treated the child as a member of the family" the child may be regarded as being entitled to maintenance under the provisions of the Act. It would appear reasonable to assume that where the husband at any time - before or after the birth of the child - held the child out as his own, this would be likely to be regarded as "treat~~/ing~~ the child as a member of the family".

Where the husband consented to his wife's undergoing A.I.D. but immediately after she had done so changed his mind, it seems that he should owe a maintenance obligation to the child, although this would perhaps involve a rather broad interpretation of the requirement that he must have "treated the child as a member of the family".

- (ii) Position under the Guardianship of Infants Act 1964¹⁸¹ and under the Illegitimate Children (Affiliation Orders) Act 1930¹⁸²

It is clear that a husband - whether he has consented to the conception of the child or not - owes no maintenance obligations to a child of his wife conceived by A.I.D.

¹⁸⁰ The definition proceeds to prescribe certain age limits, which are not of present relevance.

¹⁸¹ No.7 of 1964.

¹⁸² No.17 of 1930.

(b) The Donor

110. The position of the donor would appear to be that, being the father of the child in question, he would be obliged to maintain the child where paternity is established in affiliation proceedings, in the same way as if the child were conceived in the normal way.

111. The main problem is, of course, one of proving the identity of the donor, so the duty of maintenance set out above would be merely theoretical in almost all cases¹⁸³.

112. Where the donor's identity is discovered the possibility of his seeking to recoup his expenses in the discharge of his maintenance obligations by suing the doctor who did not make his legal position clear to him or who reveals his identity should be noted¹⁸⁴.

113. A final point worth noting is that, since 1976¹⁸⁵ (as has been mentioned) an enforceable maintenance obligation is imposed on the mother of an illegitimate child under the affiliation machinery of the 1930 Act. The effect of this change in the context of the donor-father of the A.I.D. child is that he might be able to "counterclaim" against the mother if called on to maintain the child.

(c) The Mother

114. As is noted in the previous paragraph, the mother of an

¹⁸³ See, however, C.M. v C.C., 152 N.J. Super. 160, 377 A. 2d 821 (1977).

¹⁸⁴ Cf. A. Holder, Medical Malpractice Law, 250 (2nd ed., 1978).

¹⁸⁵ Cf. the Family Law (Spouses and Children) Act 1976, section 28(1) (No.11 of 1976), inserting section 4A into the Illegitimate Children (Affiliation Orders) Act 1930 (no.7 of 1930).

A.I.D. child is under an obligation to maintain the child¹⁸⁶. No enforceable obligation arises, however, under the Guardianship of Infants Act 1964¹⁸⁷.

Succession

(a) The Husband

115. A child conceived by A.I.D. has no succession rights in the husband's estate since the child is neither the husband's own nor adopted by the husband.¹⁸⁸ Conversely, of course, he has no entitlement in the child's estate.

116. Two aspects of the subject may be noted. First, whilst the presumption of legitimacy and the rule in Russell v Russell may no doubt come to the assistance of an A.I.D. child in a succession claim¹⁸⁹, one commentator has observed that

"i/t is entirely possible that the family of the husband may know of his inability to have children, and relatives might contest the A.I.D. child's right of inheritance"¹⁹⁰.

117. Secondly, such an expression as "my son" in a will or other testamentary document will be presumed to refer, of course, to

¹⁸⁶ Id.

¹⁸⁷ Cf. section 11(4) of that Act.

¹⁸⁸ Cf. the Succession Act 1965, section 110 (No.27 of 1965). See generally Demars, Note: Artificial Insemination: Problem Child of the Law, 40 N.D. L. Rev. 89, at 96-97 (1964).

¹⁸⁹ Cf. supra, pp. 5-6.

¹⁹⁰ Verkauf, Artificial Insemination: Progress, Polemics, and Confusion - An Appraisal of Current Medico-Legal Status, Houston L. Rev. 3 227, at 304-305 (1966). See, also, to similar effect, Carr, Comment: Artificial Insemination: Problems, Policies and Proposals, 26 Ala. L. Rev. 120, at 142 (1973); and cf. Bullock v Knox, 96 Ala. 195, 11 So.339 (Sup. Ct.,1892).

the testator's legitimate child only¹⁹¹, which the A.I.D. child is not.

(b) The Donor

118. The donor-father is in the same position regarding succession entitlement and obligations as any other father of a child born out of wedlock. It is worth noting that, if all out-of-wedlock children are to be made legitimate children of their parents by legislation that does not also address the subject of artificial insemination, a donor¹⁹² will have substantial rights in the estate of the child.

(c) The Mother

119. The mother of an A.I.D. child is in the same position regarding succession as if the child were conceived in the ordinary way.

Adoption

120. Some important distinctions are drawn in adoption law between legitimate and illegitimate children. Illegitimate children and orphans are eligible for adoption, as well as legitimated children whose birth has not been re-registered under the Legitimacy Act 1931. Other legitimate children may not be

¹⁹¹ Cf. A. Shatter, Family Law in the Republic of Ireland, 378 (2nd ed., 1981); see also Verkauf, supra, fn. 190, at 305, Jacobs & Leudtke, Note: Social and Legal Aspects of Artificial Insemination, [1965] Wisc. L. Rev. 859, at 877-878.

¹⁹² Assuming, of course, that he could surmount the very difficult problem of proof of paternity.

adopted. Those eligible to adopt include the mother, natural father or relative of the child, traced through the mother.

121. The only case in which the consent of the father is necessary for an adoption is where the child has been legitimated by subsequent marriage. Otherwise his consent is not required. This has been mentioned already in the discussion of the Nicolaou case in relation to the Constitutional position of fathers of illegitimate children¹⁹³.

¹⁹³ Cf. supra, pp. 25-38

CHAPTER 2 THE LAW IN CERTAIN OTHER JURISDICTIONS

Northern Ireland

122. The law on the subject of illegitimacy was substantially amended by the Family Law Reform (Northern Ireland) Order 1977¹. A child born outside marriage (or his issue if he is dead) is entitled to participate in the intestacy of either parent to the same extent as if he had been born within marriage². But he has no right of intestate succession to other persons, such as his grandparents, brothers or sisters. The parents of a child born outside marriage have the same succession rights on his death intestate as they would have had if he had been born within marriage³ but others, such as grandparents, brothers and sisters, have no similar rights.

123. Any reference to "children" or "issue" in wills or other dispositions made after 1 January 1978, so far as they relate directly or indirectly to persons who are to benefit or to be capable of benefitting under the disposition, are to be construed as including children born outside marriage, unless the contrary intention appears⁴. The common law rule that prohibits gifts to unborn illegitimate children has been abolished⁵.

¹ S.I. 1977 No. 1250 (N.I. 17). The Order is analysed by Eve & Kerr in 28 N.I.L.Q. 488 (1977). The Order brings the law in Northern Ireland into line with the law in England and Wales: cf. the Family Law Reform Act 1969, (c. 46), sections 14-27.

² Article 3(1).

³ Article 3(2).

⁴ Article 4.

⁵ Article 4(8).

124. Under the 1977 Order⁶, children born outside marriage may apply for reasonable provision for their maintenance to be made out of a deceased parent's estate under the Inheritance (Family Provision) Act (Northern Ireland) 1960.

125. The Court may direct that a blood test be taken⁷ but it will be taken only with the consent of the person to be tested⁸. Where a person refuses or otherwise fails to take the steps necessary to be tested, the Court may draw such inferences, if any, from that fact as appear proper in the circumstances⁹.

126. The presumption of legitimacy may be rebutted by evidence that it is more probable than not that the person was illegitimate¹⁰.

127. The natural father of an illegitimate child may apply to the Court for an order for custody of the child. When such an order has been made, he is treated as if he were the lawful father of the child, and is entitled to appoint a guardian by deed or will¹¹.

128. The provisions relating to legitimation in Northern Ireland law are similar to those in this jurisdiction, save that (unlike in this jurisdiction) an illegitimate person may be legitimated

⁶ Article 7.

⁷ Article 8(1).

⁸ Article 9(1). A minor of sixteen years or over may provide an effective consent: Article 9(2); where the minor is under this age, the consent of the person who has care and control of him is necessary: Article 9(3).

⁹ Article 11(1).

¹⁰ Article 15.

¹¹ Article 15.

by the subsequent marriage of his parents even though either parent was married to another at the time of his birth¹².

129. Children are legitimate (1) if born of a void marriage where one or both of the spouses reasonably believed that the marriage was valid or (2) if born of a voidable marriage.

England

130. The law in England¹³ is substantially the same as in Northern Ireland. The law was partially reformed in 1969¹⁴ following the Report of the Russell Committee in 1966¹⁵. Tentative proposals for radical change were made by the English Law Commission in 1979, in its Working Paper No. 74, Family Law : Illegitimacy¹⁶. The Committee provisionally concluded that the status of illegitimacy should be abolished and that the law hitherto applicable to legitimate children should apply to all children without distinction. They recommended that no attempt should be made by statute to exclude any claim of a father from automatic entitlement to parental rights. Thus the father of a child born outside marriage would be its joint guardian unless and until he was removed by the court. Time limits for bringing proceedings for the maintenance of children would be removed. Succession rights would be equalised. Unless the court dispensed with his agreement, the father of a child

¹² Cf. the Legitimacy Act (Northern Ireland) 1928, as amended by the Legitimacy Act (Northern Ireland) 1961, section 1.

¹³ See generally P. Bromley, Family Law, 255-282, 575-580, 595-603, 621-626 (6th ed., 1981).

¹⁴ Family Law Reform Act 1969, (c. 46), sections 14-27.

¹⁵ Report of the Committee on the Law of Succession in Relation to Illegitimate Persons, 1966 (Cmd. 3051)

¹⁶ For analysis of the Working Paper, see Hayes, 43 M.L.R. (1980).

born out of wedlock would have to agree to the child's adoption, although the Commission stated that they would welcome comments on the proposal that the mother might be permitted to apply ex parte in special circumstances for an order dispensing with the father's agreement.

131. The Commission proposed that a presumption of paternity arising from the fact of marriage should replace the present presumption of legitimacy. Voluntary acknowledgement of paternity would be permissible by means of entry of a father's name on the birth register, but not otherwise.

132. The Commission also proposed that there should be a procedure for obtaining a declaration of parentage without seeking any other order. Only the child would have an unqualified right to apply for a declaration of parentage; any other person would be entitled to apply only if the court was satisfied that it was appropriate having regard to the welfare of the child that the issue be tried. The Commission recommended that there should be no requirement of corroboration in these proceedings or in any other proceedings in which paternity was in issue.

133. Finally the Commission invited views on whether there should be a rule of law whereby a child conceived by artificial insemination by third-party donor (A.I.D.) with the consent of the mother's husband should for all purposes be deemed to be the child of his mother's husband and not that of the donor.

Scotland

134. The law in Scotland¹⁷ is broadly similar to that in England and Northern Ireland but differs in certain notable

¹⁷ See D. Walker, Principles of Scottish Private Law, ch.17 (2nd ed., 1975).

respects. The concept of the putative marriage, where at least one party honestly but erroneously believes that a null marriage is valid, has been part of the law in Scotland for centuries¹⁸. Children born of such a marriage are legitimate¹⁹. Similarly legitimation by subsequent marriage was part of the common law of Scotland, although it is now regulated by statute²⁰.

135. The mother is the "natural custodian" (but is neither tutor nor curator) of an illegitimate child. The father has similar rights as in this country to apply to the court on matters of custody and access. The child's rights of succession prior to 1968 were also similar to those in Ireland, but, since the enactment of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968, the child has rights in its parents' estates equal to those of children born within marriage, though it continues not to have rights of succession through its parents - for example, from grandparents, uncles or siblings²¹.

136. The Scottish Law Commission published a Consultative Memorandum²² on Illegitimacy in 1982. The Commission tentatively proposed that the status of illegitimate be retained, on the basis that its abolition would lead to certain results which would be hard to justify. The Commission also proposed that the mother of a child born outside marriage should, by operation of law, be its tutor and curator. It invited views on whether

¹⁸ Cf. Walker, supra, fn.1, 302-303.

¹⁹ As are children born of a voidable marriage, since the enactment of the Law Reform (Miscellaneous Provisions) Act 1949, section 4.

²⁰ Cf. the Legitimation (Scotland) Act 1968.

²¹ Cf. E. & J. Wilson, The Law of Husband and Wife in Scotland, 182-183 (1974).

²² Scottish Law Commission, Consultative Memorandum No.53, Family Law: Illegitimacy (February 1982).

the father should be entitled to apply to the Court to be appointed tutor or curator, and on whether it might be desirable to enable joint tutory and curatory to be conferred on him otherwise than by application to the Court, whether by virtue of joint registration of the child's birth or by agreement with the mother or otherwise. On succession, the Commission proposed the equalisation of rights between legitimate and illegitimate children.

Continental Europe

137. In most countries in continental Europe the law relating to children born outside marriage has been substantially reformed over the past thirteen years. Legislative changes were enacted in Sweden in 1969²³, in the Federal Republic of Germany in 1970²⁴, in France in 1972²⁵ and in Italy in 1975²⁶. Other countries, notably Norway²⁷, introduced radical reforms far earlier.

²³ Cf. Lodgberg, The Reform of Family Law in Scandanavian Countries, Ch.9 of A. Chloros ed., The Reform of Family Law in Europe, at 212-214 (1978), Agell, The Swedish Legislation on Marriage and Cohabitation: A Journey Without a Destination, 29 Am. J. Comp. L. 285, at 300-301 (1981).

²⁴ Cf. Bohndorf, The New Illegitimacy Law in Germany, 19 I.C.L.Q. 299 (1970), Frame, The Legal Status of Children of Illegitimate Parents: A Comparative Survey, 2 Comp. L. Yearbk. 47, at 51-54 (1978), J. Neville Turner, Improving the Lot of Children Born Outside Marriage - A Comparison of Three Recent Reforms: England, New Zealand and West Germany (1973).

²⁵ Cf. Engelhard-Grosjean, The French Law of Filiation, 37 La. L. Rev. 701 (1977), Frame, supra, fn.24, at 54-56, Foyer, The Reform of Family Law in France, Ch.4 of A. Chloros ed., The Reform of Family Law in Europe, at 93-101 (1978).

²⁶ Cf. Librando, The Reform of Family Law in Italy, Ch.7 of A. Chloros ed., The Reform of Family Law in Europe, at 161-166 (1978).

²⁷ Cf. H. Krause, Illegitimacy: Law and Social Policy, 179-193 (1971), Frame, supra, fn.24, at 48-51, Lodgberg, supra, fn.23, at 219-220.

138. One of the most striking features of the law in continental European countries is the concept of voluntary acknowledgement of paternity, whereby the father of a child born outside marriage may, by authorised means (of varying degrees of formality), acknowledge that the child is his²⁸.

139. Maintenance obligations owed by parents to their children born outside marriage are generally the same as those owed by them to their children born within marriage. Succession rights of children have also tended to be equalised, but in some countries full equality has not yet been achieved.

140. In the Federal Republic of Germany, for example, where the deceased father leaves a surviving wife, a child or children born within marriage, any child of his directly born outside marriage does not participate in the estate itself but instead is entitled to make a substitutional succession claim (Erbersatzanspruch); the claim is of a monetary nature against the fathers' heirs, the amount of which is equal to what the child would have inherited if he had been legitimate. The claim is subject to a limitation period²⁹. It is generally limited to cases where the child has been recognised or where the deceased person has been declared its father before his death³⁰. Otherwise no inheritance right will arise, even if the parents were living together and the child had been reared as theirs³¹. One aspect

²⁸ See, e.g. Articles 334, 335 of the French Civil Code, article 260 of the Swiss Civil Code.

²⁹ Three years from when the claimant learned of the death of his or her father, subject to an absolute maximum of thirty years from the death: cf. Neville Turner, supra, fn.24, at 43.

³⁰ Cf. Neville Turner, supra, fn.24, at 43, citing two limited exceptions: (1) if the death occurred when a paternity action was pending; (2) if the child was unborn or less than six months old at the date of the death, provided the paternity proceedings are instituted within six months.

³¹ Cf. Meulders-Klein, Cohabitation and Children in Europe, 29 Am. J. Comp. 359, at 374 (1981).

of the child's succession rights is worthy of particular note from a comparative law standpoint. A child born outside marriage, when aged between 21 and 27 years, may demand an advance settlement of his substitutional succession claim to be paid to him directly during the lifetime of his father³². The legislation includes provisions for calculating the appropriate amount: three times the average year's maintenance paid by the father in the last five years during which the child was fully dependent on him. If this is impossible a lower amount may be agreed. In certain other cases a higher amount may be claimed. (The absolute maximum and minimum respectively are amounts twelve times and once the average year's maintenance during the specified period.) Postponement of payment of the capitalised sum is possible in cases of hardship.

141. Payment of the capitalised sum does not absolve the father from discharging his continuing maintenance obligations (if such exist in the specific case), but it acts as a bar to a claim by the child on the death of the father. The rights of the father and his descendants in the child's estate will also be extinguished on payment of the capitalised sum.

142. Commenting on these provisions, one observer has stated:

"It may be that the 'final break' in the relationship which can thus be secured will be welcomed in some circumstances by both sides. On the other hand, it seems a classic encouragement to the sowing of wild oats. And there is a risk that the father may become unexpectedly prosperous, when the child will not be able to share in that prosperity"³³.

³² BGB, s. 1934d, cf. Neville Turner, *supra*, fn.24, at 43.

³³ Neville Turner, *supra*, fn.24, at 44.

143. Similarly, in France, although as a general rule children born outside marriage have equal rights of succession as those born within marriage³⁴, nevertheless, in the case of an adulterine child, the principle of equality does not prevail. The adulterine child is entitled to half of what he would have inherited from his father, had he been legitimate, the other half being added to the share of the legitimate children, but only to those legitimate children of the marriage already born when the adultery took place³⁵. Moreover, the adulterine child's share of the estate at the expense of the spouse of the adulterous spouse is only half that of the legitimate child³⁶. These limitations on the adulterine child's rights to succession are designed to protect the deceived spouse and abandoned legitimate children: as against other persons (including grandparents, uncles and aunts and children of previous marriage), the adulterine child has full rights of succession³⁷.

144. Commenting on these limitations Professor Engelhard-Grosjean states that they are:

"designed to soothe the strong feelings still commonly prevailing in France (as revealed by poll estimates), concerning the suffering adultery causes to the family"³⁸.

Significant distinctions between parental rights still exist in relation to guardianship of children born outside marriage.

³⁴ C.C., article 757. See Foyer, supra, fn. 25, at 100-101, Engelhard-Grosjean, supra, fn. 25, at 713.

³⁵ Cf. Engelhard-Grosjean, supra, fn. 25, at 713, Foyer, supra, fn. 25, at 101, Frame, supra, fn. 24, at 56.

³⁶ Cf. Engelhard-Grosjean, supra, fn. 25, at 713.

³⁷ Cf. Foyer, supra, fn. 25, at 101.

³⁸ Supra, fn. 25, at 713.

145. In the Federal Republic of Germany, parental authority is exercised by the mother even where the father has recognised the child³⁹. In such a case the father has no right of supervision or even visitation without the mother's consent or a court order⁴⁰. The only way the father may obtain parental authority is to adopt or to have the child legitimated by the Guardianship Court.⁴¹ But in either of these cases, only he may exercise custody: the mother will be deprived of it. Joint custody is never available for unmarried parents.⁴²

146. This position has been criticised by one commentator as being:

"unjustified when the father has met his responsibilities by recognizing and caring for the child and its full detrimental significance appears in case of disruption of the de facto union".⁴³

147. French law provides that the exercise of parental rights is contingent on voluntary acknowledgement of the child. If both parents acknowledge the child, generally only the mother has authority over the child⁴⁴ but this position may be modified by court order (which may confer such authority on the father alone or on both parents jointly), having regard to the best interests of the child.⁴⁵

³⁹ Section 1705, BGB.

⁴⁰ Section 1711, *id.*

⁴¹ Sections 1723-1739, *id.*

⁴² Cf. Meulders-Klein, *supra*, fn.31, at 382 and the authorities cited by him.

⁴³ *Id.*, at 383.

⁴⁴ Cf. Engelhard-Grosjean, *supra*, fn. 35, at 712-713.

⁴⁵ Cf. *id.* See also Frame, *supra*, fn. 24, at 100.

148. In Sweden, the mother of the child born outside marriage is normally its custodian. Where she and the father agree, the father may be permitted to be the custodian, if this is not considered detrimental to the welfare of the child. The welfare of the child may also require that the father be appointed custodian, even against the mother's wishes.⁴⁶

149. Finally, reference should be made to the European Convention on the Legal Status of Children Born Out of Wedlock (opened for signature on 15 October 1975). The Convention sets out general principles of equality between children, irrespective of the marital status of their parents, although it does provide for distinctions in respect of guardianship and access. The Convention is of importance in so far as it indicates the direction which reform of the law in European countries may take in the future. In this connection, it should be noted that the European Court of Human Rights in Marckx v The Belgian Government (13 June 1979) condemned Belgian legislation on illegitimacy as violating Articles 8 and 14 of the European Convention on Human Rights.

United States of America

150. The Constitutional jurisprudence of the United States in relation to children born outside marriage has been complex and confusing. Several decisions on the subject have been handed down by the United States Supreme Court in recent years, but, despite this, uncertainty still prevails on some of the most basic of Constitutional questions. It is proposed, first, to discuss the degree of scrutiny to which the Court will subject State legislation in determining whether it is in conformity with the Constitution, and then to go on to consider the degree of protection that has been afforded in relation to specific aspects of the law affecting children born outside marriage.

⁴⁶ Cf. Lodgberg, supra, fn. 23, at 212-213.

Degree of Constitutional Scrutiny to which Legislation Affecting Children born outside Marriage has been subjected⁴⁷

151. The equal protection clause of the Constitution has been involved most frequently on behalf of those seeking to have legislation discriminating against children born outside marriage struck down on constitutional grounds.

152. Traditionally, the Court would not hold legislation unconstitutional unless there was no "rational basis for it"⁴⁸.

153. The Court subsequently developed a second standard of review in those cases where the discriminatory classification either threatens a fundamental constitutional right - such as the right to procreate⁴⁹, vote⁵⁰ or travel⁵¹ among the States - or involves a suspect classification - such as race⁵², ancestry⁵³

⁴⁷ See generally, G. Douthwaite, Unmarried Couples and the Law, 117-129 (1979), Clark, Constitutional Protection of the Illegitimate Child? 12 U. Calif. Davis L. Ref. 383 (1979), Kellett, The Burger Decade: More Than Toothless Scrutiny for Laws Affecting Illegitimates, 57 J. Urban L. 791 (1980), Weber, Comment: Illegitimacy and Equal Protection: Two Tiers or an Analytical Grab-bag? 7 Loyola U.L.J. 754 (1976), Malz, Illegitimacy and Equal Protection, /1980/ Arizona State L. J. 831, Hallissey, Illegitimates and Equal Protection, 10 J. L. Reform 543 (1977), Vincent, Comment: Equal Protection and the "Middle-Tier": The Impact on Women and Illegitimates, 54 Notre Dame L. 303 (1978), Ford, Casenote: Constitutional Law - A Less Than Most Exacting Scrutiny for Illegitimacy, 42 Missouri L. Rev. 444 (1977), Isaacson, Comment, Equal Protection for Illegitimate Children: A Consistent Rule Emerges, /1980/ Brigham Young U. L. Rev. 142, Note, Illegitimacy and Equal Protection, 49 N.Y.U.L. Rev. 479 (1974), Thompson, Comment: Constitutional Law: Equal Protection for Illegitimates, 17 Washburn L. J. 392 (1978).

⁴⁸ Cf. McGowan v Maryland, 366 U.S. 420, at 425-426 (1961).

⁴⁹ Skinner v Oklahoma ex rel. Williamson, 316 U.S. 535 (1942).

⁵⁰ Harper v Virginia Bd. of Elections, 383 U.S. 663 (1966).

⁵¹ Shapiro v Thompson, 394 U.S. 618, at 629-631 (1969).

⁵² Loving v Virginia, 388 U.S. 1 (1967), McLaughlin v Florida, 379 U.S. 184 (1964); Bolling v Sharpe, 347 U.S. 497 (1954).

⁵³ Oyama v California, 332 U.S. 633 (1948), Korematsu v United States, 323 U.S. 214 (1944).

or alienage⁵⁴. In such cases the Court will subject the legislation in question, not to the rational relationship test, but to that of strict scrutiny, which requires the Court to analyse rigorously the necessity of the classification as a means of accomplishing a compelling State interest⁵⁵. In practice, the result of applying these differing tests is that the rational relationship test will rarely overturn legislation whilst the strict scrutiny test will almost invariably do so.

154. In recent years the two-tiered analysis has been qualified somewhat and commentators have perceived an intermediate level of scrutiny defined in various ways in different cases⁵⁶.

155. The Supreme Court has not adopted a consistent approach towards setting a standard of scrutiny by which legislation affecting children born outside marriage should be judged. But the Court has consistently⁵⁷ declined to hold that the strict scrutiny test should be applied. In Mathews v Lucas⁵⁸, the Court noted that illegitimacy, unlike race and sex, does not carry "an obvious badge". Therefore, never having faced discrimination as severe or pervasive as that experienced by women and blacks, illegitimate children were considered by the Court not to require the higher degree of judicial protection afforded to these groups⁵⁹. This decision has been criticised

⁵⁴ In re Griffin, 413 U.S. 717 (1973), Sugarman v Dougall, 413 U.S. 634 (1973), Graham v Richardson, 403 U.S. 365 (1971).

⁵⁵ Cf. Weber, *supra*, fn. 47, at 756-757.

⁵⁶ See Gunther, The Supreme Court, 1971 Term - Foreword, In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1 (1972), Note, Illegitimacy and Equal Protection, 49 N.Y. L. Rev. 479 (1974).

⁵⁷ Cf. Trimble v Gordon, 430 U.S. 762 (1977), Jiminez v Weinberger, 417 U.S. 628 (1974), Mathews v Lucas, 427 U.S. 495 (1976).

⁵⁸ 427 U.S. 495 (1976).

⁵⁹ Id., at 506.

by some commentators on the basis that national origin and alienage, to which the strict scrutiny test is applied, like illegitimacy, do not carry "an obvious badge" - in at least some cases⁶⁰.

156. In some earlier cases⁶¹ the Court applied what was (at most) the rational relationship test. But in Weber v Aetna Casualty & Surety Co.⁶², the Court appeared to favour a somewhat less lenient standard. Rather than require merely that the rational relationship with State interests be established, it stated:

"The essential inquiry is inevitably [a duel] on what legitimate interest does the classification promote? What fundamental personal rights might the classification endanger?"⁶³.

This general approach has also been favoured in most subsequent decisions⁶⁴.

157. In Mathews v Lucas⁶⁵ the majority stressed that the standard by which the statute was to be judged was "not a toothless one". This striking expression was repeated in Trimble v Gordon⁶⁶. In the light of the Court's apparent volte face,

⁶⁰ Cf. Hallissey, supra, fn.47, at 555-556.

⁶¹ Levy v Louisiana, 391 U.S. 68 (1968), Glova v American Guarantee & Liability Ins. Co., 391 U.S. 73 (1968), Labine v Vincent, 401 U.S. 532 (1971).

⁶² 406 U.S. 164 (1972).

⁶³ Id., at 173.

⁶⁴ Cf., Gomez v Perez, 409 U.S. 535 (1973) (per curiam); New Jersey Welfare Rights Ord. v Cahill, 411 U.S. 619 (1973) (per curiam); Jiminez v Weinberger, 417 U.S. 628 (1974), Mathews v Lucas, 427 U.S. 495 (1976), Trimble v Gordon, 430 U.S. 762 (1977). But see Lalli v Lalli, 439 U.S. 259 (1978).

⁶⁵ 427 U.S., at 510.

⁶⁶ 430 U.S., at 767.

however, in Lalli v Lalli⁶⁷ it would be rash to assume that the Court continues to adhere to this somewhat more stringent standard than the "rational relationship" test.

158. As will be seen, the adoption by the Court of a particular level of scrutiny has not led to predictability in its findings regarding specific legislative provisions. The same standard has been applied in different cases with analyses and results that commentators⁶⁸ have found impossible to reconcile.

Constitutional Intervention in relation to Specific Aspects of the Law affecting Children Born Outside Marriage

159. The United States Supreme Court and lower Courts have analysed from a Constitutional standpoint a wide range of statutory provisions relating to children born outside marriage. In some areas judicial policy has been unequivocal: in others, no clear policy has yet emerged.

160. The areas where the United States Supreme Court has adopted a clear policy may first be mentioned. In respect of wrongful death statutes, it is now clearly established that the legislature may not discriminate against children born outside marriage in respect of claims based on the death of their parents⁶⁹; nor may the legislature discriminate against mothers of children born outside marriage in respect of claims based on

⁶⁷ 439 U.S. 259 (1978). Cf. Anon., Note, 13 Ga. L. Rev. 620, at 633-634 (1979), Guerin, Note, 59 Denver L. J. 435, at 464 (1980).

⁶⁸ Cf., e.g., Clark, supra, fn. 47, at 397-398.

⁶⁹ Levy v Louisiana, 391 U.S. 68 (1968) (mother); In re Estate of Ortiz, 60 Misc. 2d 756, 303 N.Y.S. 2d 806 (1969), Schmoll v Creedy, 54 N.J. 194, 254 A. 2d 525, 38 A.L.R. 3d 605 (1969) (father). See Annot., 78 A.L.R. 3d 1230 (1977). Cf. Weber v Aetna Casualty and Surety Co., 406 U.S. 164 (1972) (workers' compensation).

the death of these children⁷⁰. But the Court has upheld legislation denying rights of action to fathers arising from the deaths of their unlegitimated children.⁷¹

161. In one area of the law (i.e. in the statutes concerning immigration) the United States Supreme Court has shown marked reluctance to strike down distinctions based on marital status of parents. In Fiallo v Bell⁷², this legislation was upheld, the United States Supreme Court holding that the power of Congress over aliens was "of a political character and therefore subject only to narrow judicial review".

162. Discriminations in social security legislation have led to conflicting responses from the United States Supreme Court. The Court has struck down provisions that give a priority in social security benefits to the spouse, legitimate children and certain categories of illegitimate children over other categories of illegitimate children⁷³; it has also struck down provisions excluding from disability benefits illegitimate children born after the occurrence of the disability⁷⁴. But it has upheld provisions denying the payment of insurance benefits to children of a deceased wage-earner where the wage-earner had never acknowledged his paternity in writing nor contributed to the support of the children.⁷⁵

⁷⁰ Glonn v American Guarantee & Liability Ins. Co., 391 U.S. 73 (1968).

⁷¹ Parham v Hughes, 441 U.S. 347 (1979).

⁷² 430 U.S. 787, at 792 (1977).

⁷³ Jimenez v Weinberger, 417 U.S. 638 (1974).

⁷⁴ Davis v Richardson, 342 F. Supp. 588 (D. Conn. 1972), aff'd., 409 U.S. 1069 (1972) (per curiam); Griffin v Richardson, 346 F. Supp. 1226 (D. Md., 1972), aff'd., 409 U.S. 1069 (1972) (per curiam). See also Weber v Aetna Casualty & Surety Co., supra, fn. 69, New Jersey Welfare Rights Organisation v Cahill, 411 U.S. 619 (1973).

⁷⁵ Mathews v Lucas, 427 U.S. 495 (1976). For analysis of this decision, see Clark, supra, fn. 47, at 395-398, Ford, supra, fn. 47.

163. Statutory provisions denying a child born outside marriage the right to recover support from his father have been struck down by the Court⁷⁶ with little hesitation. But legislation relating to succession rights has given rise to much more confusion.

164. In 1971, in Labine v Vincent⁷⁷, the Court by a five-to-four margin⁷⁸ upheld legislation in Louisiana which provided that an acknowledged illegitimate child would inherit from its father only where he left no legitimate descendants, no parents or grandparents, and no collateral relatives.

165. The Court considered that the legislation:

"clearly has a rational basis in view of Louisiana's interest in promoting family life and of directing the disposition of property left within the State"⁷⁹.

It considered, moreover, that the interests of the illegitimate child were not unduly interfered with since the deceased father could always have provided for the child by will.

166. The Court's deference to State policies of promotion and protection of family life and of establishing an orderly method of property distribution was replaced by a far more testing

⁷⁶ Gomez v Perez, 409 U.S. 535 (1973). Cf., Mills v Habluetzel, 8 Family L. Repr. 3037 (U.S. Sup. Ct., 1982) (striking down Texas statute requiring paternity suit to be taken within one year of birth of child; although procedures for illegitimate children need not be "coterminous with those accorded legitimate children", the one-year limitation period did not provide an "adequate opportunity to obtain support").

⁷⁷ 401 U.S. 532 (1979).

⁷⁸ The Court's three decisions on the issue of illegitimacy and intestate succession - Labine v Vincent, Trimble v Gordon and Lalli v Lalli - have all been characterised by a five-to-four split.

⁷⁹ 401 U.S., at 536, n.6.

scrutiny in Trimble v Gordon⁸⁰, in 1977. The United States Supreme Court struck down Illinois legislation which limited rights of intestate succession of children born outside marriage to their mother's estate whilst permitting legitimate children to inherit from the estates of both their parents.

167. Justice Powell, in his majority opinion, conceded that "no one disputes the appropriateness of Illinois' concern with the family unit, perhaps the most fundamental social institution of our society"⁸¹, but he considered that the Court below (which had upheld the legislation) had not addressed the relation between the legislation and the promotion of legitimate family relationships. Quoting from Weber v Aetna Casualty & Surety Co.⁸², he stated:

"The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual - as well as an unjust - way of deterring the parent"⁸³.

168. In a passage which assumed great importance subsequently, Powell J. evinced some sympathy for the argument that the threat of spurious claims and the uncertainty of paternity (in contrast to maternity) were factors to which legislation on inheritance

⁸⁰ 430 U.S. 762 (1977), analysed by Daigle, 38 La. L. Rev. 189 (1977), Schwab, 43 Missouri L. Rev. 116 (1978), Zarski, 27 De Paul L. Rev. 175 (1977), Hunter, [27?] Villanove L. Rev. 405 (1978), O'Connor, 11 Creighton L. Rev. 609 (1977), Thompson, 17 Washburn L. J. 392 (1978), Chaffee, 13 Tulsa L. J. 178 (1977), Harrison, 9 Texas Tech L. Rev. 113 (1977), Overcash, 52 Tulane L. Rev. 406 (1978), Fertelmes, 16 Duquesne L. Rev. 468 (1978), Cohen, 23 N.Y. L. School L. Rev. 329 (1977).

⁸¹ Id.

⁸² 406 U.S. 164, at 175 (1971).

⁸³ 430 U.S., at 772.

could have regard. But he was of the view that the lower Court⁸⁴ had failed to consider the possibility of a "middle ground" between the extremes of complete exclusion and case by case determination, as a result of which "significant categories" of children born outside marriage were unjustly discriminated against.

169. Justice Powell added (in a footnote):

"Evidence of paternity may take a variety of forms, some creating more significant problems of inaccuracy and inefficiency than others. The States, of course, are free to recognise these differences in fashioning their requirements of proof. Our holding today goes only to those forms of proof which do not compromise the State's interests. This clearly would be the case, for example, where there is a prior adjudication or formal acknowledgement of paternity. Thus, we would have a different case if the state statute were carefully tailored to eliminate imprecise and unduly burdensome methods of establishing paternity"⁸⁵.

170. This passage was ambiguous as to whether a State statute must make both methods of proof available to the child born outside marriage or whether it would be constitutional for a State to require proof of paternity by only one of these methods to the exclusion of any other⁸⁶. As will be seen, that distinction is a most important one.

171. Trimble v Gordon⁸⁷ left the law on this question in a state of considerable uncertainty. It was difficult to see how

⁸⁴ In In re Estate of Karas, 61 Ill. 2d 40, 329 N.E. 2d 234 (1975), in respect of the same statutory provisions as were struck down by the United States Supreme Court in Trimble v Gordon. Because there had been no written opinion arising out of the Illinois Supreme Court's determination of Trimble v Gordon, the United States Supreme Court's analysis focussed on the Karas decision.

⁸⁵ 430 U.S., at 772, n.14 (emphasis added).

⁸⁶ Cf. Wilson, 28 Emory L. J., at 1167 (1979).

⁸⁷ 430 U.S. 762 (1977).

it could be reconciled with Labine v Vincent⁸⁸ although the Court in Trimble v Gordon was careful not to overrule the earlier decision in so many words.

172. The uncertainty was to some extent reduced by the Court's decision, in 1978, in Lalli v Lalli⁸⁹. Here the Court upheld New York's intestacy law which precluded illegitimate children, save those legitimated by a court order "of filiation declaring paternity in a proceeding instituted during (sic) the pregnancy of the mother or within two years from the birth of the child"⁹⁰, from claiming inheritance rights in their natural father's estate.

173. Justice Powell, writing for a plurality of the Court⁹¹, recognised the substantial interest of the State in the orderly disposition of property at death, noting that inheritance by children born outside marriage from their father's estate might disrupt the disposition of property because of difficult problems of proof. The New York statute, requiring a judicial determination of paternity during the lifetime of the father, increased accuracy, facilitated the administration of estates and minimised delay, uncertainty and fraud.

⁸⁸ 401 U.S. 532 (1971).

⁸⁹ 439 U.S. 259 (1978). For analysis see Clark, supra, fn. 47, at 389-390, Kellett, supra, fn. 47, at 804-806, Isaacson, supra, fn. 47, at 142-143, 154-164, Anon., 13 Ga. L. Rev. 620 (1979), Guerin, 59 Denver L. J. 452 (1980), Metz, 48 U. Cincinnati L. Rev. 578 (1979), Wilson, 28 Emory L. J. 1151 (1979).

⁹⁰ N.Y. Est., Powers & Trusts Law, section 4-1.2 (McKinny 1967).

⁹¹ Chief Justice Burger, Justices Stewart and Powell. Justices Blackmun and Rehnquist joined the affirmance. Justice Brennan, joined by Justices White, Marshall and Stevens, dissented.

174. In language difficult to reconcile with the spirit and tone of such decisions as Levy, Glon, Weber and Trimble, the Court stated:

"An illegitimate, if made an unconditional distributee in intestacy, must be served with process in the estate of his parent How does one cite and serve an illegitimate of whose existence neither family nor personal representative may be aware? And of greatest concern, how does one believe the finality of decree in any estate where there always exists the possibility however remote of a secret illegitimate lurking in the buried past?"⁹²

175. The appellant argued that New York's legislation excluded from rights of inheritance significant categories of children born outside marriage, particularly "known" children who would be quite able to supply proof of paternity without seriously disrupting estate administration. To this argument the Court responded that a liberal judicial interpretation by the New York Courts of the affiliation law would mitigate some of the harshness. Reverting to the position espoused in Labine and subsequently rejected by Trimble, the Court in Lalli v Lalli⁹³ noted that there was no insurmountable barrier to succession since a father was always free to provide for his illegitimate child by will.

176. In his concurring opinion, Justice Blackmun went so far as to describe the decision in Trimble v Gordon⁹⁴ as "a derelict, explainable only because of the overtones of its appealing facts"⁹⁵ and offering little precedent for constitutional analysis of State intestate succession laws.

⁹² 439 U.S., at 270 (quoting a statement made by Surrogate Sobel, in In re Flemm, 85 Misc. 2d 855, at 859, 381 N.Y. 2d 573, at 575-576 (Sur. Ct. 1975)).

⁹³ 429 U.S., at 273, n.10.

⁹⁴ 430 U.S. 762 (1977).

⁹⁵ 439 U.S., at 277.

177. In his dissenting opinion, Justice Brennan stressed that there was "no possible difficulty of proof, and no opportunity for fraud or error"⁹⁶ where the father had formally acknowledged his child; New York had "less drastic means"⁹⁷ available than those it had adopted to prevent fraudulent claims.

178. A leading authority on family law in the United States has summarised the present position as follows:

"On the current state of the cases it seems that legislatures must fashion any statute distinguishing between inheritance by legitimates and illegitimates to cover only those cases in which inheritance would create doubt, uncertainty or lack of finality in the title to property. If this can be done, then perhaps the Supreme Court will find the statute constitutional. Any predictions, however, based on opinions as ambiguous as those in Labine, Trimble and Lalli are necessarily unreliable. It seems probable that the validity of particular state inheritance laws can never be certain until the Supreme Court has given or withheld its approval of them"⁹⁸

New Zealand

179. The legal position of children was radically transformed some years ago by the enactment of the Status of Children Act 1969⁹⁹.

⁹⁶ Id., at 278 (quoting his dissent in Labine v Vincent, 401 U.S., at 552).

⁹⁷ Id.

⁹⁸ Clark, Constitutional Protection of the Illegitimate Child? 12 U. Calif. Davis L. Rev. 383, at 390 (1979).

⁹⁹ No.18. For commentary on the legislation, see J. Neville Turner, Improving the Lot of Children Born Outside Marriage - A Comparison of Three Recent Reforms: England, New Zealand and West Germany (National Council of One Parent Families, 1973), Angelo, Who's Legitimate Now? 6 Victoria U. of Wellington L. Rev. 365 (1970), Cameron, The Twilight of Illegitimacy, [1969] N.Z.L.J. 621, Cameron, Family Law Reform in New Zealand, 4 Family L.Q. 167, at 177-183 (1970), Hinde, Sutton, Webb, Vennell, Mummery, Brooks & Palmer, Status of Children Act 1969 - A Conspectus, 4 Recent L. 38 (1970), Ullrick, Parents at Law, 11 V.U.W.L.R. 95 (1981).

180. Section 3(1) of the Act provides as follows:

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

181. Section 3(2) provides that:

"The rule of construction whereby in any instrument words of relationship signify only legitimate relationship in the absence of a contrary expression of intention is abolished"¹⁰⁰.

182. And section 3(3) provides that:

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

183. The effect of these provisions is that, if, for example, a testator leaves property to "my children in equal shares", all his children, whether born within or outside marriage will benefit

184. Section 3 applies only to instruments executed on or after 1 January 1970, the date the legislation came into effect. Instruments executed and intestacies taking place before that date are governed by section 4. The effect of this section, briefly, is to apply the former law to such instruments and intestacies, including cases which involve the creation of a special power of appointment.

¹⁰⁰ This provision does not abolish the judicial rule of policy against benefitting future illegitimate children, but it has been argued that the general policy of the Act is sufficiently strong to have abolished it implicitly: Cameron, [1969] N.Z.L.J. 621, at 623.

185. Section 5 of the Act is concerned with presumptions as to parenthood. It provides that:

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

186. Some aspects of the drafting of the section have given rise to comment. The reference to a child "born to a woman during her marriage" could suggest that the presumption arises that her husband is the father even in a case where the spouses were not living together by reason of a separation order made by the Court. Such was not the former law and it would be curious if the legislation were to have this effect. The second point worthy of note is that section 5 does not in express terms weaken the strength of the presumption of paternity (formerly legitimacy) where, as the case law showed¹⁰¹, the onus of proof required to rebut the presumption was heavy. In the light of the policy to which the legislation gives effect, the former standard of proof, which was based in large part on the policy of preserving the legitimate status of children born to married women, may not now be appropriate as there is no longer a status of illegitimate. Since there is nothing in the express terms of section 5 which would require the courts to insist on the former degree of proof the better view appears to be that the presumption may be rebutted on the balance of probabilities.¹⁰²

187. The Act also provides for voluntary acknowledgement of paternity and enables the court to make a declaration of paternity

¹⁰¹ Cf. Ah Chuck v Needham, [1931] N.Z.L.R. 559.

¹⁰² Cf. Cameron, [1969] N.Z.L.J. 621, at 624.

on application to it by the alleged mother or father or any person "having a proper interest in the result".

188. The Act amends the law so as to ensure that children have equal rights of intestate succession which do not depend on the marital status of their parents.

189. Another significant Act, enacted a year before the Status of Children Act 1969, should also be noted. The Guardianship Act 1968 by section 6 makes the following distinction between children born outside marriage: (a) those whose parents were "not living together as husband and wife at the time the child was born", and (b) those whose parents were so living together. In respect of children falling within the first category, the mother is the sole guardian; in respect of the second, the mother and the father are joint guardians. The father of a child falling within the first category may, however, apply to the Court for sole or joint guardianship, either during the mother's lifetime or after her death. The Court has a general discretion in the matter. But the father and the mother of a child born outside marriage may apply to the Court, under section 11 of the Act, for custody.

190. The Status of Children Act 1969 amended the Adoption Act 1955 so as to require the consent of the father to the adoption of his child in any case where he is the child's guardian by virtue of the Guardianship Act. Thus, where the father and mother of a child born outside marriage are living together as husband and wife at the time the child is born or where the father has been made guardian by the Court, his consent for the child's adoption will be required.

Australia

191. The law in Australia¹⁰³ relating to children born outside marriage was until recently similar to English law. Over recent years, however, legislation has been enacted in Victoria¹⁰⁴, Tasmania¹⁰⁵, South Australia¹⁰⁶, New South Wales¹⁰⁷ and Queensland¹⁰⁸, on general lines similar to that of New Zealand's Status of Children Act 1969, which has been described in detail above¹⁰⁹. Western Australia has achieved substantially the same effect by amendment of previous laws¹¹⁰.

192. The law relating to affiliation proceedings is substantially similar to our law. In certain States, however, the requirement of corroboration of the mother's evidence is dispensed with where the defendant fails to appear in court¹¹¹ or, being present in court, fails to give evidence on oath denying paternity¹¹².

¹⁰³ See H. Finlay, Family Law in Australia, ch. 9 (2nd ed., 1979).

¹⁰⁴ Status of Children Act 1974.

¹⁰⁵ Status of Children Act 1974.

¹⁰⁶ Family Relationships Act 1975. See also the Guardianship of Infants Amendment Act 1975, section 4.

¹⁰⁷ Children (Equality of Status) Act 1976.

¹⁰⁸ Status of Children Act 1978.

¹⁰⁹ Cf. supra, pp. 80-83.

¹¹⁰ Cf. H. Finlay, Family Law in Australia, para. 961 (2nd ed., 1979).

¹¹¹ Cf. Victoria's Status of Children Act 1974, section 27(1)(b); South Australia's Family Relationships Act 1975, section 140 (a)(b); and Tasmania's Status of Children Act 1974, section 35(1)(b).

¹¹² Cf. Victoria's Status of Children Act 1974, section 27(1)(a); South Australia's Family Relationships Act 1975, section 140; and Tasmania's Status of Children Act 1974, section 36(1)(a).

CHAPTER 3 PROPOSALS FOR REFORM

Our Basic Proposal

193. The Commission have examined in detail the various ways in which the present law on the subject of illegitimacy might be reformed. Our basic premise during our deliberations was that, so far as the rights of children are concerned, it is unjust for the law to distinguish between children on the basis of the marital status of their parents. Giving effect to this premise does not in general cause difficulties, although certain specific aspects of the law do raise important and somewhat difficult problems. Separate questions arise as to whether all children should have the same rights irrespective of the marital status of their parents and as to whether other persons should have rights in relation to children whether or not the parents of the children are married. We consider that these difficult questions are best treated when they arise in the specific contexts discussed below.

194. On the basis that the rights of children should not be restricted on the ground of the marital status of their parents, we consider that the status of illegitimacy should be removed from our law. It seems to us impossible to have true equality of rights as long as this status exists.

195. We appreciate, of course, that social attitudes towards children outside marriage are not exclusively (and perhaps not in large part) dependent on the continued existence of the status of illegitimacy. Its abolition will not, at a

stroke, transform these social attitudes, but we consider that it may have some effect in changing public opinion and private attitudes on this question.

196. We considered, but rejected, a possible model of reform in which the substantive legal rights of children born outside marriage would be equalised with those of children born within marriage, while at the same time retaining the concept of illegitimacy. This solution appears to us to have little to recommend it, preserving as it would the notion that children born in certain circumstances are in some way inferior to others. It would not seem correct to argue that, if the children's rights had been equalised, illegitimacy would become no more than a neutral descriptive category: the notion of illegitimacy has such strong traditional emotive associations that these would surely, to some extent at least, continue to apply to it even after the legal disabilities of illegitimate persons had been removed.

197. We also rejected a possible model of reform which would be of a still more limited nature. This would involve improving some of the legal rights of children relative to their parents (but not other relations), while retaining the concept of illegitimacy. This idea was favoured in England in 1969¹ and in Northern Ireland in 1977². It does not appeal to us because it falls far short of giving effect to the general principle of equal rights which we have set out as our basic concept.

198. A threshold question that must be considered is whether the abolition of the status of illegitimacy and the equalisation of legal rights of children would be constitutional. It could

¹ Family Law Reform Act 1969.

² Family Law Reform (Northern Ireland) Order 1977

be argued that since, under Article 41.3.1 of the Constitution, the State pledges "to guard with special care the institution of Marriage on which the Family is founded, and to protect it against attack", that pledge would be broken by a statute which gave rights to persons who are not members of the Family (as that term is understood in the Constitution)³ at the expense of members of the Family. Moreover, it might be considered that the removal of the status of illegitimacy would weaken the respect in society for the institution of marriage⁴ and in that way offend against the Constitutional pledge.

199. As against this, it can be argued that so far as these arguments have any force, they seek to justify the existing law on the basis that the goal of protection of the institution of marriage should be achieved by denial of the legal rights of innocent persons, namely children born outside marriage. The Commission do not consider that our Constitution would require such a conclusion.

200. Accordingly, we recommend that the legislation should remove the concept of illegitimacy from the law and equalise the rights of children born outside marriage with those of children born within marriage.

201. If the concept of illegitimacy is to be removed this will have important and wide-ranging implications for our law that require detailed examination. We will consider each of these areas of the law in turn.

³ Cf. supra, pp. 20-21.

⁴ This possible effect has been perceived by a number of commentators, not all of whom are of socially conservative leanings. Cf. e.g., Meteyard, Parenthood v Marriage, 10 Family L. 206, at 206 (1980), Justice, Illegitimacy: Comments submitted by Justice on the [English] Law Commission Working Paper No. 74, p. 1 (May 1980). But cf. the Report of the Law Reform Committee of Tasmania, The Law of Succession in Relation to Illegitimate Persons, para. 15 (1977).

Ascertainment of Parental Relationship

202. The effect of removing the notion of illegitimacy from our law is that the legal relationship between parent and child will arise without discrimination between children on account of the marital status of their parents. The Commission consider that there should be no condition precedent in our law which must be fulfilled before this legal relationship arises between parent and child. Such an approach would offend against the principle of equality on which our proposals are based. If there is to be no such limiting condition in our law the result will be that a legal relationship will arise between parent and child in cases which the law in many countries has been reluctant to recognise: namely, where children are born as a result of adulterous or incestuous unions. In our view, the law should face the reality of the child's origins in such cases: the proper solution does not appear to be for the law to deny the reality of the relationship. Accordingly, we propose that the legal relationship of parent and child should not be subject to any exceptions or prior conditions.

203. An important question, as we see it, is that of proof. It should be open to anyone with a proper interest to seek to establish the parenthood of a person. But our law could greatly assist the determination of the question if it set out realistic evidential rules, including legal presumptions, designed to ensure that commonsense prevail and that the delay and trouble associated with largely unnecessary applications for judicial declarations be, as far as possible, avoided.

Presumption as to Paternity

204. We now consider how the present law relating to the presumption of legitimacy should be changed.

205. As has been seen⁵, the presumption of legitimacy is difficult to displace in two respects. The onus of proof required to displace it is that of establishing beyond reasonable doubt that the child is not the child of the husband of its mother. Also, a spouse may not be permitted to give evidence to the effect that he or she had not sexual intercourse with the other spouse at the relevant time.

206. Once the concepts of legitimacy and illegitimacy are abandoned, the presumption of legitimacy becomes merely a presumption of parenthood. Indeed, since maternity in our law is not regarded as raising a question of fact, the presumption becomes in practice one of paternity.

207. If no specific provisions on this matter were included in the legislation, the courts would be placed in a position of some uncertainty as to whether the presumption of paternity would operate as the presumption of legitimacy used to operate. For this reason alone it is necessary to deal with the subject in the legislation.

208. The first question that must be considered is whether there should be a presumption of paternity at all. In the Commission's view such a presumption, subject to the conditions proposed below, is both necessary and desirable. As the Ontario Law Reform Commission observed:

⁵ Cf. supra, pp. 3-11.

"It would be intolerable if the child born within marriage were required to prove his paternity affirmatively"⁶

209. When should this presumption arise? Various solutions have been adopted or proposed in other countries. Section 5 of New Zealand's Status of Children Act 1969, for example, provides that the presumption arises where the child is born

"to a woman during her marriage, or within ten months after the marriage has been dissolved by death or otherwise"

210. The Ontario Law Reform Commission made a proposal⁷ on very similar lines, preferring the period of eleven months to that of ten months specified in the New Zealand provision. Both approaches⁸ apply the presumption to marriages that are void or voidable.

211. In our view the presumption should be limited somewhat more strictly. We consider that a presumption of the paternity of the mother's husband should arise where a child is born to a woman during her marriage, or within ten months after the marriage has been declared to be void, or has been terminated by death or otherwise, except where the mother, at the relevant time, was living separate and apart from her husband, whether by court order, desertion on the part of either spouse, agreement or otherwise.

212. Beyond this we do not consider it desirable to specify. Moreover, we consider that the legislation should be so drafted

⁶ Report on Family Law, Part III, Children, p.18 (1973).

⁷ Id.

⁸ See also the English Law Commission's proposal to similar effect in respect of void marriages (the presumption already applying in respect of voidable marriages in England): Working Paper No.74, Family Law: Illegitimacy, para. 9.11 (1979).

as to make it clear that, in cases where the presumption does not arise, this does not necessarily mean that the Court is obliged to proceed on the basis that there is a presumption against paternity. How the Court should approach the determination of paternity in such cases must depend on the circumstances of each case.

213. A particular issue arises in relation to separation pursuant to court order. Clearly, a decree for divorce a mensa et thoro would be such an order, but other orders, such as "barring orders" under statute⁹ or under common law¹⁰ give rise to more doubt, since these orders may be of limited duration and, in the case of common law injunctions at least, may be made subject to limitations and conditions, the effect of which, from a commonsense viewpoint, may be that the presumption that the husband is father should not be so easily displaced as in the case of an order for divorce a mensa et thoro.

214. We have come to the view that the better approach would be for the legislation to include such barring orders within the scope of the expression "court order". It seems to us that where these orders are in effect (provided, of course, that they are of a duration to cover the relevant time at which the child must have been conceived) commonsense suggests that a presumption that the husband is the father should not arise.

⁹ Cf. Family Law (Maintenance of Spouses and Children) Act 1976, section 22, and Family Law (Protection of Spouses and Children) Act 1981.

¹⁰ Cf. A. Shatter, Family Law in the Republic of Ireland, 337-340 (2nd ed. 1981).

Onus of Disproving Paternity

215. We must now consider the question whether the onus of disproving paternity should be that of proof beyond reasonable doubt (as is the case with regard to the presumption of legitimacy) or merely proof on the balance of probabilities.

216. It can be argued that the existing standard of proof should be set aside on the basis that it is designed to protect a child from a legal finding that he is illegitimate, and that, since in future this will not be possible (because the concept of illegitimacy will no longer exist), the need for protection will not arise. It can also be argued that it is in the child's interests that his true paternity be established: where his mother's husband is prevented by the existing high standard of proof from establishing in law what he knows to be the true facts, this is scarcely conducive to harmonious family relationships. As the English Law Commission has observed:

"the emotional and financial effect on the child is not likely to be beneficial if the husband is firmly convinced that he is not its father"¹¹.

217. Finally, it can be said that justice to the husband requires that the test of balance of probabilities be adopted.

218. It may, however, be argued that the strength of the existing presumption is designed not merely to protect the child against being found to be illegitimate but also to protect him against being untruthfully disowned by either or both of his parents. A father might, for example, seek to relieve himself of maintenance obligations to his child by denying paternity.

¹¹ Law Com. No. 16, Blood Tests and the Proof of Paternity in Civil Proceedings, para. 14 (1968).

In other cases, the antipathy might be directed towards his wife rather than his child: in seeking to brand her as guilty of adultery, the husband might be willing to let the child suffer the consequences of being held by the court to be the product of an adulterous union. Reducing the present force of the presumption will therefore unquestionably increase the possibility of a child wrongfully being held not to be the child of the husband.

219. Overall, the Commission consider that the balance of the argument favours the view that the strength of the presumption should be reduced to one that may be rebutted on the balance of probabilities rather than on proof beyond reasonable doubt.

220. The Commission also consider that the legislation should set aside the present rule that spouses may not give evidence of non-access to rebut the presumption that the child is theirs. This step was taken in several jurisdictions many years ago¹². It seems to us the rule is far too crude a way of affording protection to a child against being wrongfully disowned. The balance of the argument appears to be clearly in favour of abolishing the rule.

Presumption of Paternity Arising Other Than by Marriage

221. It is necessary at this point to consider other types of factual circumstances where it may be proper for the law to presume (in the absence of evidence to the contrary) that a

¹² Cf. the Law Reform Division, New Brunswick Department of Justice, Working Report, Status of Children Born Outside Marriage; Their Rights and Obligations and the Rights and Obligations of Their Parents, p. 10 (1974).

particular man is the father of a child. The advantage of such a rebuttable presumption is that in its operation it resolves the issue of paternity for practical purposes in many cases, thus removing the need for the delay which resort to judicial proceedings would involve for the parties. Moreover, we consider that children should, as far as possible, be able to live their lives without having to obtain a court decision on such a matter as their paternity where commonsense indicates that a particular person is their father.

(a) Unmarried Cohabitation

222. A possible basis for a presumption of paternity is that of unmarried cohabitation. Where, for example, a couple live together for many years, holding themselves out as married, and rearing a family of several children, it would seem to be somewhat unrealistic for the law not to presume that the man is the father of the children. The fact that the couple were not (or could not be) formally married should not affect the practical aspects of the case.

223. In some jurisdictions, including Tasmania, New South Wales and Ontario, unmarried cohabitation gives rise to a presumption of paternity but it is significant¹³ that there is a wide divergence in the statutory provisions in these jurisdictions as to what constitutes cohabitation for this purpose. Cohabitation for a period of twelve months is required in Tasmania whereas "relationship of some

¹³ Cf. the English Law Commission's Working Paper No. 74, Family Law: Illegitimacy, para. 9.12 (1979).

permanence" is required in Ontario.¹⁴

224. In the view of the Commission it is not possible to define cohabitation in such a way as to provide a useful and accurate criterion for the circumstances in which the presumption of paternity should arise. We note that the English Law Commission have taken the same view. They state:

"The value of a 'prima facie evidence rule' lies in its general applicability without further evidence. This condition is satisfied by the marriage presumption, because one starts with a fact about which there is no dispute (that a marriage ceremony has taken place) and then draws the natural inference from that fact. But cohabitation (or, rather, cohabitation 'as husband and wife', for only such cohabitation can be relevant) is by no means self-proving¹⁵, especially if there are further statutory definitions going to the durability of the relationship."¹⁶

225. It should be noted that, even where no statutory presumption arises, this does not mean that a man who is cohabiting with the mother will be unable to establish that he is the father where this is the case. He merely will be unable to rely on a presumption to assist him in this regard.

¹⁴ The Civil Code Draft of Quebec has made a similar proposal. See also Levin, Abolishing Illegitimacy, p. 4 (National Council for One Parent Families, 1977).

¹⁵ The English Law Commission referred in this context to the controversy in England over the application of the "cohabitation rule" by the Supplementary Benefits Commission, which afforded evidence in support of its view that the notion of cohabitation was "by no means self-proving". See generally on this question Pearl, Cohabitation in English Social Security and Supplementary Benefits Legislation, 9 Family L. 232 (1979).

¹⁶ Working Paper No. 74, Family Law, Illegitimacy, para. 9.12 (1979). It is interesting to note that in French law, no presumption of paternity arises from unmarried cohabitation. "The reason is that there is no duty of fidelity between cohabitantes as between husband and wife": Meulders-Klein, Cohabitation and Children in Europe, 2 Am. J. Comp. L. 359, at 365 (1981).

(b) Payment of Support

226. We also consider that the payment of money by a man to the mother of a child for the support of the child should give rise to no presumption that he is the father. The payment of money in such circumstances is far too equivocal in its implications for such an inference to be drawn. It is true that, under existing affiliation law, the time limit of three years for taking proceedings is removed where the man has contributed to the support of the child at any time within three years of the birth of the child. This rule can, however, be explained, not on the basis that it proves that the man is the father - plainly it does not have this effect in affiliation proceedings - but rather because, in the absence of such a rule, the mother might be lulled into a false sense of security by the receipt of some maintenance and might thus let the limitation period slip by. This fear was a very real one before 1976, since until then the limitation period was only six months¹⁷ from the time of the child's birth.

(c) Maintenance Orders

227. Under proposals that we shall make below¹⁸ the present procedure for affiliation proceedings will be replaced by a simple system of orders for maintenance of children, irrespective of the marital status of their parents. We will

¹⁷ Cf. the Illegitimate Children (Affiliation Orders) Act 1930, section 2(2). It is worth noting in this context that none of the other grounds for extension of the time limit under the 1930 or the 1976 Act could in any way support the view that they are based on the presumption that the defendant is the father. Rather is it clear that they are designed to prevent evasion of service of proceedings by leaving the jurisdiction of the State.

¹⁸ Infra, pp. 116 ff.

be proposing¹⁹ that an uncontested order for maintenance will give rise to a rebuttable presumption of paternity.

(d) Birth Certificates

228. A birth certificate is frequently used as evidence of parentage, and has been held to constitute rebuttable evidence of paternity. We now must consider how the law in relation to birth certificates should be framed to take account of the abolition of the legal concept of illegitimacy.

229. We believe that it is proper that birth certificates should constitute rebuttable evidence of paternity. The convenience that this would involve for all parties need not be stressed. The position of spouses and unmarried parents respectively will be considered in turn.

(i) Spouses

230. We consider that where the birth of a child is registered on the application of a married woman in the name of her husband and herself, or on the application of a married man in the name of his wife and himself, this should constitute rebuttable evidence of paternity. In the large majority of cases, of course, this will cause no difficulty; indeed, a different rule would probably cause far more difficulty. But this general rule, if it were not qualified in a number of respects, could lead to unsatisfactory results. We must therefore consider the position that may arise in various different circumstances. Let us first consider the position where the spouses have been living apart since before the time the

¹⁹ Infra, p. 116.

child was conceived. In such a case the wife or husband might seek to register a child born of the wife as the child of the husband's, making no reference to the fact that the spouses are separated.

231. The other spouse may either (a) acquiesce in the proposed registration; (b) object to the Registrar about the intended registration; or (c) do nothing because he or she is unaware of the attempt to register the birth (possibly, in the case of a husband, not even being aware of the child's existence).

232. The Commission consider that the legal position should be governed by the practical realities of the case. The Registrar is not a Court; he has no capacity to order investigations or to superintend judicial disputes. He can, in the main, merely act on information supplied to him, although in cases of suspected fraud or misrepresentation he can, of course, instigate an inquiry by the Gardai.

233. On this basis, we recommend that where the spouses are at the relevant time living apart and the husband acquiesces in the proposed registration of the birth by his wife, with his name as father, the registration should proceed. The same should apply in cases where the wife acquiesces in the proposed registration by her husband of the birth of her child with his name as father. Furthermore, where one spouse is unaware of the registration until after it has been completed, the Registrar should have no obligation to make any change in the register merely on the demand of that spouse.

234. The intended effect of these recommendations in practice is as follows. Where a spouse - whether through acquiescence or ignorance of the true position - fails to object to the registration of the birth in the names of both spouses, a

presumption should arise that the husband is the father of the child. But this presumption should be secondary to, and dependent on, the specific rule that no presumption that the husband is father should arise where the spouses have been living separate and apart. This will mean that in such a case the birth certificate will not be permitted to distort the realities of the position.

235. We must now consider the case which arises where a spouse hears of the proposed registration before it has taken place, and objects that it incorrectly names the husband as father. In such circumstances we recommend that the Registrar decline to register the birth for a period of three months. After that period, unless the Registrar has received notice from the objecting spouse that proceedings have been initiated seeking a declaration as to the child's paternity²¹, he should register the birth of the child, naming the husband as father.

236. The basis of our recommendation is that it is the function of the Court rather than the Registrar to make determinations as to paternity. If the Registrar is apprised of a disagreement between the spouses on this question before he has registered the birth, he should give the spouse who seeks to displace the presumption of paternity based on marriage the opportunity to take proceedings for a declaration as to paternity. If that spouse does not go ahead with these proceedings within a reasonable period, the Registrar should register the birth in accordance with the presumption based on marriage.

237. We now must consider the converse case, where an attempt is made to register a man other than the husband as the father

²¹ These proceedings are described in detail infra, pp. 104 ff.

of the child. In our view, registration should be permitted (with the consent of the mother and the man) if either a court order involving the separation of the spouses at the relevant time is furnished to the Registrar or if the consent of the husband to the registration is obtained. The effect of registration of the name of the other man as father of the child would be to displace the presumption that the husband is father and to establish a rebuttable presumption that the other man is the father of the child.

238. We are somewhat concerned that it might be unwise to permit the registration of the name of another man where the husband consents. This might make it too easy for fraudulent rejection of paternity to take place. We accept that this risk exists but we note that the risk will exist even without this provision, which can be justified on the basis that it would introduce a practically convenient way of recognising paternity of a child of a man other than the mother's husband.

(ii) Unmarried Parents

239. Birth certificates in relation to children born to unmarried persons raise somewhat different issues so far as presumptions as to paternity are concerned. Our general approach to this question is that the birth certificate may be a useful indicator of paternity, sufficient to support a rebuttable inference of paternity, where the birth is registered in the name of a man with the consent of both the mother and the man; where, however, either of them does not agree to this course, we consider that the matter becomes one for the Court to determine in proceedings for a declaration of paternity. Accordingly, we recommend that, where the mother of a child is unmarried and a man is registered as father of the child, with the consent of both the mother and the man, a rebuttable

presumption will arise that that man is the father. Otherwise, his name should not be registered (and only the mother's should be registered) unless the Court, in the proceedings for a declaration as to paternity which we shall be proposing below²², orders that such entry be made or permitted to be made on application to it by any person.

(e) Recognition by Father

240. As has been mentioned, in several European jurisdictions and elsewhere, the law permits the father of a child born outside marriage to recognise the child either by formal acknowledgment or by conduct. A criticism that has frequently been voiced of our law is that it contains nothing like this.²³

241. Under the Commission's proposals, of course, the legal relationship between father and child will not depend on recognition by the father. Recognition will only be necessary or relevant to the extent that it assists in establishing proof of that relationship.

242. The Commission consider that the legislation should provide that recognition of the child by a man raises a rebuttable presumption that he is the father of the child.

243. The question then arises as to what the legal provisions for recognition should be. The legislation could adopt a very

²² Infra, pp. 104 ff.

²³ But cf. the fear expressed by the Church Assembly Board for Social Responsibility, in Fatherless by Law?, p. 31 (1966).

broad and general approach²⁴ which would extend to any acts by a man that indicate that he is the father of a child. There is something to be said for this solution since it could cover such cases as where a man lives in a stable union outside marriage and rears a family, treating the children throughout his life as his own. Indeed there might be some criticism of a law which did not provide that a rebuttable presumption of paternity arises in such circumstances.

244. Nevertheless, the Commission consider that it would not be desirable for a law to adopt this approach. This is because a rebuttable presumption should arise only in well-defined circumstances: if the requirements for its creation are vague and uncertain, its general utility may be greatly weakened. If imprecise and broad criteria are adopted, a legal adviser advising on the question whether recognition had been established based on such a broad criterion, would in some cases only be able to say: "The facts I have been given make it reasonably likely that a Court would hold that a rebuttable presumption of paternity arises". This is less than helpful. Moreover, in clear cases where the conduct of the man is consistent only with his being father of the child, there is no need for a rebuttable presumption which, if it existed, would add nothing to the position.

245. There would, however, be practical difficulties if the law required that recognition should be effective in raising a rebuttable presumption of paternity only if it were formally evidenced by, for example, a statutory declaration or registration in a register. In many cases people simply will not make the effort to do this, since, as they perceive it, they will not derive sufficient benefit for themselves or their

²⁴ As in New Zealand where section 7 of the Status of Children Act 1969 refers to cases where paternity "has been admitted (expressly or by implication) by the father".

children from the effort involved.

246. The Commission appreciate that this may be the position in some cases but, nevertheless, we consider that the best approach would be for the law to prescribe certain formal methods whereby recognition may be effected so as to give rise to a rebuttable presumption of paternity. The methods we envisage would be the statutory declaration and re-registration of the birth. In either case action by the mother would be required. The statutory declaration would not be effective unless supported by another statutory declaration made by the mother agreeing that the man is the father. Re-registration of the birth would not be permitted unless the prior consent of the mother were furnished to the Registrar.

247. An important aspect of recognition concerns children born of married women who were living with their husbands at the relevant time. We do not consider that recognition of another man as father, effected without the consent of the husband, should operate so as to defeat the presumption of paternity based on marriage. In such a case it seems to us imperative that the rebuttable presumption that the husband is the father should not be displaced so easily but rather should be a matter for the Court to determine in the proceedings for a declaration of paternity that we will be proposing below.

248. But where a husband who is living with his wife²⁵ consents either to the registration of the birth in the name of another man (as we have already proposed) or, as the case may be, to the re-registration of the birth, then we consider that recognition

²⁵ Where the woman has been living apart from her husband, the consent of the husband would not be required; in such a case no presumption of paternity would arise.

should be effective. The consent should in either case be given in written form.

249. A specific problem, which affects not just recognition but also registration of births, should be considered briefly at this point. A married woman and a man who is not her husband may seek the consent of her husband to the registration or re-registration of the birth in the man's name or to the making of statutory declarations to the effect that the man is the father. That consent may not be forthcoming because the husband is unable to give it on account of mental disability. Should there be some procedure enabling a Court to give consent in such a case? In our view, it would be better not to introduce such a procedure. We are reluctant to propose a cumbersome and confusing network of procedures in the area of presumptions as to paternity. The primary purpose of presumptions is to clarify the position. We are reluctant to make the statutory provisions too cumbersome, and we consider that in the case which we have described the parties would not be prejudiced since they could always avail themselves of the proceedings (which we shall propose) for a declaration as to paternity. There seems little point in supplementing these proceedings with another category of judicial proceedings.

Declarations as to Parenthood

250. A central question under the proposed new law concerns the establishment of a binding legal relationship between parent and child. So far we have been considering only the question of rebuttable presumptions, and it is, of course, the nature of such presumptions that they may be displaced by evidence to the contrary. We now proceed to make proposals for the procedure

that we consider would best assist the establishment of a binding legal relationship between parent and child.

251. It seems to us that the best approach would be for the legislation to establish a procedure whereby the Court could make a declaration of parenthood that would bind all persons unless subsequently overruled on appeal or on the ground that it was obtained by fraud or on the basis of new evidence not available to the Court at the time of the declaration.

252. A number of aspects of the proposed procedure for paternity declarations are now examined.

(a) Who Should be Entitled to Take Proceedings Seeking a Declaration of Parenthood?

253. One of the acknowledged weaknesses of the present law is that, in almost every case, only a mother may take proceedings to establish a legal relationship between the father and the child²⁶. It has frequently been urged that the father, the child, and indeed any person with a proper interest, should also have this right. Under our proposals to get rid of the concept of illegitimacy, it would be much too restrictive for the legislation to provide that the legal relationship between father and child could be established only through proceedings taken by the mother.

254. In our view it should be open to the mother, a man alleging that he is the father, the child and any person with a proper interest to take proceedings seeking a declaration as to

²⁶ Of course, in other proceedings, not involving legal rights and obligations between parent and child, the issue of paternity or maternity may arise and be resolved by the Court under existing procedure.

parenthood. We appreciate that this might involve an entirely false allegation of paternity (or, more rarely, of maternity) by a third person, but consider that this is not a factor that should prevail against the introduction of these proceedings. Under present law men may be subjected to false allegations but it has not been argued that on this account affiliation proceedings should be abolished.

255. The criterion of persons "with a proper interest" is necessarily vague but we consider that it is sufficient to sound a note of warning that officious or prurient proceedings are not to be tolerated. The formula has been part of New Zealand law in this context for over a decade.²⁷

256. The necessity for an application by a person with "a proper interest" would arise where an executor or administrator had received information that a certain person was the parent of a child and would, as such, be concerned in the administration of an estate.

²⁷ Cf. the Status of Children Act 1969, section 10. The English Law Commission, in Working Paper No. 74, Family Law: Illegitimacy, para. 9.40 (1979) proposed that any person (in addition to the child) might apply for a declaration as to paternity "but only if he can satisfy the the court that it is appropriate, having regard to the welfare of the child, that the issue be tried". We do not consider that such a reference to the welfare of the child is either necessary or desirable in the context. The concept of "a proper interest" seems to us preferable since it would clearly enable the Court to exclude intrusive proceedings whilst at the same time ensuring that proceedings will not be prevented from being heard merely because the welfare of the child would be served by a refusal to hold the proceedings. We do not believe that it would be proper or just to suppress the possibility of the truth emerging thereby by reference to the welfare of the child.

(b) Should the Mother be Compelled to Identify the Father of
of her Child, and should the Father be Compelled to
Identify the Mother of his Child?

257. An important question of policy that must now be considered is whether a mother should be compelled to identify the father of her child.²⁸ In favour of compulsion it may be argued that justice to the child requires that he be informed of the identity of his father since refusal to supply this information will deprive him of important legal and financial rights, including the right to be maintained by his father, as well as the right to succeed to his father's estate. Moreover, the possibility of establishing a continuing personal relationship with his father should not be discounted in some cases.

258. There are, however, significant arguments against compelling a mother to identify the father. It may be that such an approach would intrude improperly into her privacy. She may have what she considers to be good reason for not wishing to identify the father. He may, for example, be a married man or a close relation, and she may not wish to cause pain and hardship to herself or to others. If the law compelled her to identify the father there would be a temptation in some cases for her to make a false identification.

259. In our view the balance of the argument weighs in favour of compelling the mother to identify the father. Accordingly, we recommend that in proceedings for a declaration as to paternity the mother should be a compellable witness.

²⁸ Cf. Bowen Poulin, Illegitimacy and Family Privacy: A Note on Maternal Cooperation in Paternity Suits, 70 Northwestern U.L. Rev. 910 (1976).

260. We cannot see any significant reason why a father should not be a compellable witness in proceedings for a declaration as to maternity, in such rare occasions as they might arise. Accordingly, we recommend that in proceedings for a declaration of maternity the father should be a compellable witness.

(c) Should there be a Time Limit for Taking Proceedings?

261. We must now consider whether the proposed proceedings for a declaration as to parenthood should be subject to any time limit within which they would have to be initiated. The present law of affiliation²⁹ requires that proceedings be brought within three years of the birth of the child save in cases where the alleged father has contributed to the child's maintenance within three years of its birth or has been residing outside the jurisdiction.

262. In favour of retaining the existing limitation in relation to proceedings for a declaration as to paternity³⁰ it can be argued that it has three advantages. First, it means that fresh rather than stale evidence is brought before the Court: this improves the likelihood of the truth emerging and of justice being done. Second, the present limitation period protects men against being exposed to the risk of false accusations of a blackmailing nature which, with the passage of time, would become difficult to refute. Third, the existence of the time limitation may be regarded as being in the interests of the child in that it encourages the mother to take proceedings

²⁹ Illegitimate Children (Affiliation Orders) Act 1930, section 2 (as amended by s.28(1) of the Family Law (Maintenance etc.) Act 1976).

³⁰ Somewhat different considerations would appear to apply to proceedings for a declaration as to maternity; the possibility of false accusations of a blackmailing nature seems less likely, for example.

at a time when they are most likely to be successful on account of the fact that the evidence is still fresh and more easily corroborated.

263. We do not consider that these arguments are strong ones. It is undoubtedly true that fresh evidence is the better evidence, but it is also true that stale evidence is better than none. The establishment of a legal relationship between parent and child is not similar to an award of damages. It is but the first step in the creation of a continuing relationship between the parent and the child. Under our proposal a declaration as to parenthood will establish rights and obligations between parent and child which will last for the duration of their respective lives, and indeed, have implications even after their deaths. The fact that the declaration is sought several years after the birth of the child seems to us no reason for refusing to hold the proceedings. If the evidence is sufficient a declaration will be made; if it is not, the Court will refuse to make a declaration.

264. As to the fear of false charges, it should be noted that this risk is present whether or not there is a time limit: a false charge can be made at any time, including a time within the present three-year limit.

265. The third argument in favour of a limitation period, namely that it is in the interest of the child that the establishment of a parental relationship be made sooner rather than later, can be disposed of briefly. As a general principle this is undoubtedly correct. But it is an inflexible principle that takes no account of cases where there may be good reasons for delay. In such cases, it may be argued that it might be in the interests of the child that the relationship be established belatedly rather than not be established at all. A limitation period would effectively deny the right of the

child itself to seek a declaration as to parenthood once it had reached an age sufficiently mature to make a decision on the question.

266. We consider, however, that in cases where either the child or the alleged parent has died before proceedings for a declaration of parenthood have been initiated, somewhat different considerations apply. The purpose of proceedings in such circumstances cannot be to initiate a personal relationship between the parent and the child: a financial motivation will be likely in many cases to predominate. The risk of fraudulent claims should not be discounted in such cases, and we consider that the legislation should take steps to mitigate the likelihood of such claims being made. We recommend that proceedings for a declaration as to parenthood should be capable of being brought at any time during the joint lives of the parent and child, and, where either dies, within six years of the death where a share in the estate of the deceased is being claimed, (See s. 126 of the Succession Act 1965.)

(d) Proof

267. We must now consider the question of proof in proceedings for a declaration as to parenthood. Specifically, we must consider whether it should be necessary for the evidence as to parenthood to be corroborated. As has been mentioned⁵, the present law of affiliation requires that the evidence of the mother be corroborated in some material particular or particulars. The purpose of this requirement is to protect men against false charges of paternity. Under the proposed action for a declaration as to parenthood, however, it would

³¹ Supra, pp. 42 ff.

not always be a parent who might be in need of protection. Since the legislation would confer substantial rights of succession, for example, on parents of children born outside marriage, it is possible that a false admission of parenthood could be made by a parent seeking to assert a right of inheritance in the estate of the deceased person whom he or she alleges to be his or her child. It might therefore be thought desirable to include a corroboration requirement in all proceedings for a declaration as to parenthood or, more restrictively, in any proceedings where either the alleged parent or the child had died before the proceedings were commenced.

268. We see the force of this argument but on balance we consider that it would not be desirable to include a corroboration requirement either generally or in specific cases. The difficulty with such a requirement is that it could work injustice and hardship in certain instances since the Court might be perfectly satisfied on the evidence that a person is the parent of a child but it would be obliged nonetheless on account of the absence of corroboration not to make a declaration as to parenthood. We consider that proof on the balance of probabilities unencumbered by a corroboration requirement would be the better approach.

(g) Proceedings for Declaration as to Non-Parenthood

269. We consider that it should also be possible for a person to obtain a decree that the relationship between father (or mother) and child does not exist. This would be desirable in a case where, for example, a false allegation of paternity has been made or a rebuttable presumption of paternity has arisen but is contested. It does not appear to us sufficient merely for the Court to be entitled to refuse to make a positive decree

of parenthood. Such a refusal could in some instances fall far short of a definite finding that the person is not the parent: the Court might merely consider that the case for a declaration of parenthood had not been made out.

270. We consider therefore, that the Court should have the specific power to make a declaration that a person is not the parent of a particular child but that it should exercise this power only on special application to it by the mother, the child, the alleged father or any person with a proper interest. In other cases (where a positive declaration of parenthood has been sought unsuccessfully) the Court should content itself with declining to make the declaration sought.

(f) Which Court should have Jurisdiction?

271. In the view of the Commission the Circuit Court is the proper Court to exercise jurisdiction over proceedings for a declaration as to parenthood. An appeal should be capable of being taken to the High Court only on the basis that the Circuit Court acted on a mistaken view of the law. A rehearing on the merits should not be permissible.

(g) Effect of a Decree making a Declaration as to Parenthood

272. In our view a decree making a declaration as to parenthood should bind all persons unless it is subsequently overruled on appeal or set aside on the ground that it was obtained by fraud or on the basis of new evidence not available to the Court at the time it made the declaration.

Maintenance of Children

273. Of all aspects of the law relating to children born outside marriage maintenance is perhaps the least controversial. Whereas formerly enforceable parental maintenance obligations towards children generally were regarded with some suspicion by the law, today it is generally accepted that parents should owe fully enforceable maintenance obligations to their children, whether or not they are born within marriage. Accordingly, there scarcely seems need to debate seriously the proposition that children born outside marriage should have effective and enforceable rights to maintenance by their parents.

274. The Commission consider that the principle of equality of treatment between children irrespective of the marital status of their parents requires that rights of maintenance of all children should be identical. It may seem an easy task for the legislation to incorporate such a principle. But, as has been seen³², some difficulties arise on account of the structure of the Family Law (Maintenance of Spouses and Children) Act 1976³³. That Act does not give the child the right to apply to the Court for a maintenance order against its parents; instead, in the case of a child born within marriage³⁴, it permits the parent to apply on the child's behalf; where, however, the parents are not living together, "any person" may apply to the Court for a maintenance order for that child. As has been mentioned³⁵, it was not possible to reflect those

³² Supra, pp. 33 ff.

³³ Amending (in section 28) the law as to affiliation orders.

³⁴ And also those children who, although not born within marriage, fall within the definition of "dependent child of the family": section 3(1) of the 1976 Act.

³⁵ Supra, pp. 37-42.

policies exactly in the case of children born outside marriage since unmarried cohabitation has never been regarded by the law as creating the same relationship as marriage. An application may be brought by "any person" against the mother of a child born outside marriage at any time (whether or not she is cohabiting with the child's father and whether or not she has obtained an affiliation order against him). However, an application by such a person may not be brought against the father, unless (a) an affiliation order has been made against him, (b) he has failed to comply with its terms, and (c) the Court, "having regard to all the circumstances thinks it proper to do so"³⁶.

275. We find this distinction between the mother and the father of a child born outside marriage difficult to justify. It results from what was really an interim solution that was designed to bring the provisions of the 1930 Act into line with the provisions of the 1976 Act as to spouses and "dependent children of the family".

276. A radical solution commends itself to the Commission. This is to orientate all child maintenance proceedings towards the children and to confer on the child the right to apply to the Court for an order for maintenance against either (or both) of its parents irrespective of their marital status. Such a right would be capable of being exercised by persons (with a proper interest) acting on behalf of the child or specifically authorised by the child so to act.

277. Would such a policy be desirable? Would it involve the danger of children taking, or threatening to take, vindictive proceedings against their parents? Would it put in immature hands a weapon capable of bringing embarrassment and financial costs upon parents in relation to an aspect of parental

³⁶ Section 4A(3)(b) of the 1930 Act, inserted by section 28(i)(b) of the 1976 Act.

functions where they ought to be afforded a broad discretion? In other words, would it more often bring about greater family divisions and bitterness than in the few cases where under the present law a child might with justification consider that its interests were not being adequately championed by its mother?

278. In our view these are exaggerated fears. It seems to us that the introduction of a provision in the legislation giving children a right to sue their parents for maintenance³⁷ will scarcely be a factor, in itself, in encouraging disharmony in families, or, more generally, in bringing about hostile attitudes towards parental status and functions.

279. Accordingly, we recommend that all children, irrespective of the marital status of their parents, should be entitled to apply to the Court for an order for maintenance against either or both of their parents.

280. Although we do not intend to make general proposals in this Report regarding family maintenance obligations, we think that it is an appropriate place to recommend that the legislation include a provision that, in making an order for maintenance for or on behalf of a child, the Court should be empowered to give a direction for a capital payment or payments to be made by either parent to or on behalf of the child. Having given such a direction, the Court would be permitted, subsequently, in cases where it considered it proper, to make (or vary) an order for maintenance for or on behalf of the child. We consider that the present law would benefit from this expansion of the Court's powers, which already exist, to a limited extent, in respect of children born outside marriage.

³⁷ Cf. The Church Assembly Board for Social Responsibility, Fatherless by Law?, 24-25 (1966).

Legislative Replacement for Affiliation Proceedings

281. Once the concept of illegitimacy has been removed the notion of special affiliation proceedings becomes redundant. Paternity, where it is in issue, would be determined by proceedings for a declaration of paternity, at the suit of any of the parties in the proceedings for maintenance. Where an alleged father against whom a maintenance order is sought does not contest the allegation that he is the father, and a maintenance order is made against him, we consider that this should give rise to a rebuttable presumption that he is the father. We also consider that maintenance proceedings should not be subject to any limitation of time. This issue has already been discussed in relation to declarations as to paternity. We consider that the same arguments apply in the present context. Similarly, we do not favour the retention of corroboration of the mother's evidence, for the reasons we have already given in relation to proceedings for a declaration of paternity. We would not wish to continue the existing rule that only "a single woman" should be entitled to take proceedings for maintenance against the father of her child. (See definition of "mother" in section 1 of 1930 Act.)

282. We also propose that a provision be included in the legislation rendering ineffective any provision in any agreement that would have the effect of denying a person -whether parent, child or any other person with a proper interest - the right to apply to the Court for a maintenance order in respect of a child born outside marriage. This approach reflects the same policy as that favoured in respect of children born within marriage by section 27 of the Family Law (Maintenance of Spouses and Children) Act 1976.

Blood Tests

283. It has been clearly established that blood tests can afford very useful evidence as to paternity in some cases³⁸. It is therefore desirable that they should be capable of being availed of whenever they are likely to throw light on the question.

284. Where a person is willing to undergo a blood test no legal difficulties arise. The problem arises in cases where a person is unwilling or, by reason of lack of age or mental capacity, is unable to provide the appropriate consent to be tested. Each of these cases will be considered in turn.

(a) Refusal to Consent to a Blood Test

285. In proceedings in which the question of paternity is in issue it is possible that any of a number of persons may refuse to undergo a blood test: not only may the alleged father refuse; the mother may refuse to be tested or to allow a test to be carried out on the child whose paternity is in issue. Other persons (such as near relations) the testing of whom would be relevant may also refuse to be tested. In the present section only cases of refusal by a person to undergo a test himself or herself will be considered: cases of refusal by proxy will be considered later.

286. In the Commission's view it would not be proper for the law to require a person to undergo a blood test against his or her will. Apart altogether from any doubt as to the constitutionality of such a provision, we do not consider that it would be a just or sound policy to introduce compulsion in

³⁸ See supra, pp. 7 ff.

this area. We are reinforced in this view by the fact that we are in harmony with many other law reform agencies and committees that have also considered this question³⁹.

287. If compulsion is not to be used, two other possible approaches may be considered. One, favoured by the New Zealand legislation⁴⁰ and by legislation in South Australia, is to lay down clear consequences of refusal to undergo a test: where the mother refuses, her application for maintenance must be dismissed, and, where the alleged father refuses, the Court may dispense with the necessity of corroboration. The other approach which is broadly favoured by the law in Northern Ireland⁴¹ and England⁴², for example, permits the Court to draw such inferences as it considers proper as a result of the refusal of a particular person to undergo a test.

288. In the view of the Commission the second approach is preferable. The first approach has the advantage of making the implications of refusal to be tested abundantly plain to the person in question; but in some cases it might not prove the ideal solution. In our opinion, the discretionary approach is more useful. Whilst the implications of refusal are more discreetly indicated, a person contemplating refusal (especially after he or she has been legally advised) would have no real doubt as to what those implications would be.

³⁹ E.g. the English Law Commission in its Report, Blood Tests and the Proof of Paternity in Civil Proceedings (Law Com. No. 16).

⁴⁰ Domestic Procedure Act 1968.

⁴¹ Family Law Reform (Northern Ireland) Order 1977.

⁴² Family Law Reform Act 1969.

(b) Consent by Proxy

289. In some cases, as has been mentioned, a person may be unable to provide the necessary consent to be tested on account of his or her youth or because of mental illness or disability. Yet it may be that his evidence would greatly assist the determination of the question of paternity.

290. The policy issues raised by minors differ in some respects from those of a mentally ill or disabled adult, so consideration will be given first to the question of consent in the case of minors.

(1) Minors

291. In the Commission's view, no minor should be required to submit to a blood test against his will. Where the Court considers that a minor is in the circumstances fit to provide (or refuse) the necessary consent, that minor should be ordered to submit to a blood test: the consent of his parents or guardians should not be required. Refusal by such a minor to be tested would enable the Court to draw such inferences as it considers proper.

292. Only where the Court considers that the minor is not in the circumstances capable of providing the necessary consent would the question of consent by proxy arise. In such a case the Court would have power to order a blood test to be carried out if the person having care and control of the child consents. Where this person refuses to consent the Court should again be permitted to draw such inferences as it considers proper. Where more than one person has care and control of the child and they disagree as to whether he should be tested, then the

Court should be free to draw such inferences as it considers proper, but, of course, the child would not have to be tested in the event of such a disagreement. We prefer this approach to that of prescribing a certain minimum age (16, for example⁴³) at which a minor may attain the right to provide consent. On this sensitive matter we feel that our law should as far as possible defer to the autonomy of the child, rather than lay down specific age limits.

(2) Adults who are Unable on Account of Mental Disability to Consent to be Tested

293. Where an adult is unable to consent to undergo a blood test on account of mental disability, it appears to the Commission that the Court should be empowered to order a blood test to be taken, provided that the person in whose care the adult is does not withhold consent. If such a person withholds consent, the Court should be permitted to draw such inferences as it considers proper. (Similar provisions as those which we have proposed in respect of minors should apply in cases where more than one person has care and control and they disagree as to whether the mentally disabled person should undergo a test.)

Blood Testing Procedures

294. As to the procedure to be followed by those carrying out blood tests under Court order, we consider that this is a matter best determined by regulations drawn up by the Minister for Health.

⁴³ As in Northern Ireland and England.

The Law of Succession

295. If the concept of illegitimacy is to be removed, several questions arise in relation to the law of succession. Should children born outside marriage have the same succession rights in their parents' estates as children born within marriage? Should these rights extend to the estates of their grandparents and all other relatives? Conversely, what succession rights should their parents, grandparents and other relatives have in their estate? These questions will be considered in turn. Our analysis throughout is based on the general premise that children should have equal rights irrespective of the marital status of their parents.

Rights of Child Against Mother's Estate

296. Under the present law where the mother of a child born outside marriage dies intestate leaving no legitimate children, the child is entitled to take any interest to which he would have been entitled if he had been born legitimate. The child has no intestate succession rights in his mother's estate when any legitimate child survives the mother. The position of the child under section 117 of the Succession Act 1965 has already been examined⁴⁴. The present policy regarding intestate succession from the mother would be likely to commend itself to few people today. But what should replace it? The Commission consider that on the principle of equality, the child born outside marriage should have the same rights against its mother's estate as the child born within marriage.

⁴⁴ Supra, pp. 45-46.

297. It is difficult to see what problems this would cause. Normally, where the child has not been adopted, the mother rears it herself and thus in many cases the child will be as much a part of the social unit as will any child born within marriage. In those cases where the mother has abandoned the child or has given the child into the care of another person, then, although the child will not be in a social unit with the mother, this does not in itself appear to us to be a proper reason for refusing the child succession rights to the mother's estate. It would be difficult to make a distinction on principle between a married woman who abandons her child born within marriage (where the child would have succession rights) and an unmarried woman who abandons her child (where the child would, on this account, not have succession rights). Moreover, such a law would in some cases make the position of the child born outside marriage worse than it is at present⁴⁵, that is, in cases where a mother who has no legitimate children abandons a child born outside marriage.

298. Accordingly, the Commission recommend that children born outside marriage should have the same succession rights in respect of their mother's estate as children born in marriage.

Rights Against Father's Estate

299. The question of succession rights of children born outside marriage in respect of their father's estate is one that has given rise to some discussion in a number of

⁴⁵ Cf. the Law Reform Division of the New Brunswick Department of Justice's Working Paper, Status of Children Born Outside Marriage; Their Rights and Obligations and the Rights and Obligations of their Parents, p. 68.

countries⁴⁶. On the principle of equality, such children should have the same rights as children born within marriage. But it has been argued that other considerations come into play. It is said that many men take little or no interest in children born outside marriage that they know are theirs. In a number of cases the father may not even be aware of the existence of the child. The family that is a reality in his life is the family that he forms based on marriage. It is said that to give children born outside marriage succession rights against his estate would do damage to the family based on marriage by reducing the amount of the estate to which its members would be entitled. The point is made that in practical terms the out-of-wedlock child, in asserting rights of succession against his father's estate, is not obtaining rights against his father - who is now dead - but rather against other living persons, namely the man's wife and the children of his marriage. The point has also been made that the man's estate will in many cases to some extent represent the fruits of the labour of his marital family⁴⁷; and it is said that it would be unfair for these persons to have to share the estate with a child who has not contributed to the acquisition of the property. It is, moreover, sometimes argued that to allow succession rights to children in their father's estate would cause distress and

⁴⁶ In England the subject was analysed by the Report of the Committee on the Law of Succession in Relation to Illegitimate Persons (the Russell Committee) (Cmd. 3051, 1966), and by the English Law Commission in Working Paper No. 74, Family Law: Illegitimacy Part V, (1979). Many other common law jurisdictions have also considered the question: see, e.g. Western Australia Law Reform Committee's Report, Project No. 3 on Illegitimate Succession, Law Reform Committee of Tasmania's Report, The Law of Succession in Relation to Illegitimate Persons (1977), Ontario Law Reform Commission's Report on Family Law, Part III, Children (1973), Law Reform Division of New Brunswick Department of Justice, Working Paper, Status of Children Born Outside Marriage; Their Rights and Obligations and the Rights and Obligations of their Parents (1974).

⁴⁷ Farmers form an obvious and significantly large group where such contributions are constantly made.

humiliation to many wives who would discover that their husbands had been unfaithful⁴⁸.

It has also been pointed out that:

"an intestacy is a voluntary act by which parents consciously decide to benefit children born to them in marriage and to exclude their other children. It is said therefore that any proposal to bring a child born outside marriage into the list of persons entitled to benefit on an intestacy is to impinge on the principle of freedom of testation."⁴⁹

300. Finally, it could be argued⁵⁰ that the present law's approach to children born outside marriage is correct in distinguishing between succession rights to their mother's and their father's estate, respectively. There is generally more likely to be a familial relationship between the mother and child than between the father and the child.

301. These arguments are rarely articulated fully in public discussion of the subject today. On this account it is perhaps worth quoting at some length from the Working Paper⁵¹ on the status of children born outside marriage published by the Law Reform Division of the New Brunswick Department of Justice in 1974, since it expresses the fundamentals of the argument in

⁴⁸ Another argument, concerning the danger of fraudulent claims by persons appearing for the first time after the death of their alleged fathers, will be discussed below.

⁴⁹ Ontario Law Reform Commission, Report on Family Law, Part III, Children p. 11 (1973), referring to Note of Dissent by Sir Hugh Munro-Lucas-Tooth in the Russell Committee Report.

⁵⁰ Cf. the Russell Committee Report, para. 23.

⁵¹ Law Reform Division of the New Brunswick Department of Justice, Working Paper, Status of Children Born Outside Marriage: Their Rights and Obligations and the Rights and Obligations of their Parents (September 1974).

favour of the status quo in terms that would be difficult to improve upon:

"In framing recommendations in this area there is a natural tendency to look at the problem primarily from the standpoint of the child. It is very easy to say that a father owes certain obligations to his children and that his children have a right to inherit from him, and then to jump to the conclusion that the law is arbitrary and discriminatory by excluding his children born outside marriage from the enjoyment of rights equal to those enjoyed by his children born within marriage. One can overstress blood relationships as a criterion for the enjoyment of rights and benefits and totally ignore other relevant factors. One should perhaps pose this question: What is the basic principle behind our law of inheritance? Does our law authorise children to inherit because we recognise a special magic in a blood relationship or is it because blood relationship is a dominant factor in a social unit that the law recognises as a stabilizing factor in society, the family? Does our law not recognise a certain justice in having the members of a family unit share the proceeds of the estate of one of its members? Clearly we recognise that blood relationship is not an essential factor in so far as we recognise the equal rights of adopted children. If the policy behind our law is to strengthen and encourage family relationships, or at least to induce some notion of responsibility among members of a social unit, then perhaps the law should not be extended to benefit children outside marriage unless these are somehow brought within the social unit. Looking at it from this standpoint, the child born outside marriage who is raised by his unwed mother and father should probably be placed in the same position as a child born within marriage for purposes of inheritance. So that where a father acknowledges a child as his child, or initiates action in the courts by which a declaration of paternity is issued, the child should be entitled to inherit on the same basis as children born within wedlock. Where, however, the father is declared to be a father pursuant to legal action taken by the mother or child, and does nothing to bring the child within a social unit of which he is a part, or bears no responsibility with respect to the child other than to support him in conformity with a court order, perhaps the child should not be entitled to inherit from the father except where

expressly named as a beneficiary.

It is arguable that to recommend otherwise would involve a significant interference, in many cases, with the legal rights and expectations flowing out of the contract of marriage. While, from the standpoint of the child it may seem inequitable to treat a child from outside marriage differently from one born within marriage, yet, from the standpoint of the mother and the children born within marriage, to treat equally the child born outside marriage detracts from the benefits accruing to the members of the family. Take, for example, the case of a father dying intestate leaving a wife and two children. The family may know nothing of the existence of a child born of the father outside this marriage who, nonetheless, appears on the scene and establishes that it is the 'child' of the intestate and thus is entitled to share in the portion of the estate going to 'children' Surely one must question carefully the social benefit of a law to this effect. Perhaps more extensive rights may be accorded a child born outside of marriage where his father does not have a wife and child and has no social unit to protect. Perhaps the law should simply be expressed to allow the natural child of a father to inherit except where specific provisions are made to protect the expectations of the basic social unit of which the father was a part."⁵²

302. We quote this argument in detail because it is better that its full force and content be appreciated rather than that the case be understated. Nevertheless, the Commission, for the reasons given below, do not accept the validity of the arguments in favour of the status quo.

303. It is reasonable to believe that some of these arguments would be supported, to some extent at least, in certain sections of Irish society. But, in the Commission's view, none of them is sufficiently strong to disturb application of the principle that requires that the rights of all children to succeed to

⁵² Id., pp. 65-67.

their father's estate be the same.

304. On the general question whether it is justifiable to deny a child born outside marriage the right to succeed to his father's estate on the basis that to allow him to do so would diminish the material value of the rights conferred by marriage, the Commission consider that, even though diminution would result in at least some cases, it nevertheless does not seem right that in our society the protection of the institution of marriage should require that innocent children be deprived of rights to inherit from their father.⁵³

305. The argument regarding the distress of the widow does not commend itself to the Commission. It seems contrary to principle that saving one person from distress should be at the price of another person's rights - especially when that other is totally without responsibility for the distress.

306. The argument about the "fruits of family labour" might at least justify giving 'the wife and family' the right to be compensated for their contribution to the size of the estate of the deceased man; but it would not justify the denial of the right of the child born outside marriage to inherit from his father.

307. A point worth noting in this regard is that, in many cases, the reason the child born outside marriage does not contribute to the acquisition of the assets is because he is not allowed to do so. It would be somewhat heartless to proceed from the fact that the child does not participate in the life of the family to conclude that this justifies denying him any right to succeed

⁵³ Cf. the Law Reform Commission of Tasmania's Report, The Law of Succession in Relation to Illegitimate Persons, para. 15.

to his father's estate.

308. Another point should be noted. In some cases the father of a child born outside marriage will be an unmarried man living with the child and the child's mother. In such cases, the argument based on the protection of the family does not carry any weight, since the argument relates only to cases where the man leaves a wife or a wife and family.⁵⁴

309. As to the argument that intestacy should be regarded as a voluntary act, the Commission can do no better than adopt the statement of the Ontario Law Reform Commission, who replied to this argument as follows:

"We think it more likely that an intestacy is evidence either of a deceased's failure to come to grips with the matter of disposing of his property after death, or of his failure to take sufficient interest in the matter. In these circumstances we see the law of intestacy as setting out a value judgment on the part of the Legislature as to those persons the intestate deceased ought to have benefitted. This being so, we consider that children born outside marriage have as much moral entitlement to share in an intestate's estate as other children."⁵⁵

310. As to the argument that it is proper for distinction in succession rights to be made between the estates of mothers and fathers, respectively, on the basis that children born outside

⁵⁴ It could perhaps be contended that the arguments continue to have some force (albeit to a reduced degree) even where there is no marital family. It could be said that giving children born outside marriage in such cases full succession rights would discourage a potential wife from marrying the father, as she would know that his children would inherit on his death, to the diminution of her children's succession rights. This does not seem to the Commission to be a very real argument.

⁵⁵ Ontario Law Reform Commission, Report on Family Law, Part III, Children, pp. 11-12 (1973).

marriage more frequently have a continuing filial relationship with their mother than with their father, we consider that this view is not sustainable for three reasons. First, it does not seem proper to deny a child who is living with his father the right to succeed to his father's estate on the basis that generally a familial relationship between mother and child is more common⁵⁶. Second, it offends against justice that a child who has been excluded by his father from a familial relationship on the basis of circumstances of his birth for which the father, and not the child, was responsible, should, on the basis of that exclusion, be denied the right to succeed to his father's estate. Third, children born within marriage may be abandoned by their parents, yet this has not been considered a reason for denying them succession rights against their estates⁵⁷. Accordingly, the Commission recommend that children born outside marriage should have the same rights of succession in respect of their father's estate as children born within marriage.

Section 117 Applications

311. One question which should be considered is whether section 117 of the Succession Act 1965 should be redrafted to give the Court more guidance as to what is the "moral duty" of a parent in relation to a child born outside marriage. Not to do so would mean that the legislature was leaving it to the courts to decide on what this duty should be. It might be

⁵⁶ It might be considered desirable for the legislation to attempt to distinguish between cases where there is a "familial relationship" between father and child and cases where there is not but there would be formidable difficulties in formulating any satisfactory test of such a relationship. Cf. the Russell Committee Report, and the Western Australia Law Reform Committee Report, para. 28.

⁵⁷ Cf. the Western Australia Law Reform Committee Report, Project No. 3 on Illegitimate Succession, para. 28.

argued that the legislature should have a view on what the moral duty - or at least the outer limits or general aspects of that duty - should be in respect of a child born outside marriage. It might be considered wrong for the legislature not to include at least some guidelines rather than leave it to the Court to make its own value judgment, with possibly wide variation between judges on this point, perhaps affected by their moral attitudes towards sexual relationships outside marriage and towards children born outside marriage.

312. As against this view, a few points can be made in reply. First, it can be argued that the existing provisions of section 117 have worked well in relation to the children to whom the section extends and that the possibility of differing value-judgments among different judges does not appear to have given rise to difficulties in practice. (It is, however, true that children born outside marriage raise particular, distinct and important possibilities for differences in values between judges.)

313. Secondly, it can be argued that section 117 as now drafted acknowledges the fact that each case is unique, containing many factors that distinguish it from others. The fact that a child is born outside marriage is one factor, but only one, in determining the issue of moral duty. It may be a factor of considerable importance in others. Since this is so, any general provision about birth out of wedlock would have to be drafted in very general terms, to which greater or less weight would be attached in specific cases. Finally, it can be said that to include specific provisions regarding children born outside marriage would be precisely the type of development which the abolition of illegitimacy is designed to avoid, namely, treating children born outside marriage differently from children born within marriage.

314. On balance, therefore, the Commission recommend that no specific reference to birth outside marriage be included as a guide to the Courts in the exercise of their discretion under section 117 of the Succession Act 1965.

Child's Rights in Estates of Other Relations

315. The next question that must be considered is whether a child born outside marriage should have the same rights to a share in the estate of a relative other than his parents (e.g. his grandparents, aunts and uncles, brothers and sisters, etc.) as a child born within marriage.

316. This issue was considered by the Russell Committee in Britain in 1967. The Committee came to the view that such a change should not be made:

"We appreciate that there may well be cases in which it would be reasonable to suppose that a bastard would be intended by the deceased to share in the intestate estate of a grandparent, or of a brother or sister But on the whole it seems to us that it would not be right to impose a system of intestate succession which could, for example, lead to participation of a daughter's bastard in the intestacy of that daughter's parent when such participation might be directly opposed to the wishes of the latter, who indeed, might know nothing of the bastard."⁵⁸

317. This approach seems based on the notion that generally those who die intestate are likely to have some degree of antipathy towards their kindred on the basis of the marital status of their parents; and, moreover, that this antipathy is such that it would embrace both children of whose existence the

⁵⁸ Para. 32.

intestate was actually aware and children of whom he or she had never heard.

318. In the Commission's view, such an approach should not be favoured for the following reasons: First, it offends against the principle of equality, which is fundamental to our recommendations. Second, it would seem wrong to regard intestacy as invariably an indication of the intention of the intestate as to how his or her estate should be distributed: as has been mentioned⁵⁹, other factors may frequently come into play. Third, the assumption that persons have a real antipathy to kindred based on the marital status of their parents must surely be unfounded in many cases, as for example, where grandparents have lovingly reared their daughter's child. In the absence of a great deal of empirical evidence on the question the Commission can only speculate on general attitudes, but we consider that legislative rules for distribution should not automatically exclude persons from benefit on vague assumptions as to the attitude of a deceased.⁶⁰

319. Finally, it should be noted that equalising succession rights of children in the estates of grandparents etc. does not inhibit the freedom of testation already existing under the Succession Act 1965.

320. Accordingly, the Commission recommend that all children should have equal rights of succession in the estates of their relations.

⁵⁹ Supra, p. 128.

⁶⁰ Cf. the Western Australia Law Reform Committee's Working Paper, Illegitimate Succession, para. 35 (1968), and its Report, Illegitimate Succession, para. 30 (1970).

Rights of Succession by Parents in the Child's Estate

321. We now turn to the converse question of the succession rights of parents and other relations in the estates of children born outside marriage. Under present law, as has been seen⁶¹, the mother of a child born outside marriage has a limited right to succeed to his or her estate: the father has no such right.

322. Some important questions of policy are raised by the change in the law on the subject of birth outside marriage.

323. On one view, the principle of equality between children irrespective of the marital status of their parents requires that the succession rights of parents in the estates of their children should be equal. But it can be argued that the principle of equality should extend only to the rights of children and not to rights of parents. More specifically, it can be argued that a child born outside marriage, who has no responsibility for the circumstances of his or her birth, should lose no rights on that account, but that the parents of the child are in an entirely different position since they brought the child into the world⁶².

324. There is, moreover, considerable doubt as to the propriety of a law which would, for example, give substantial succession rights to the father of a child born outside marriage, where the child was the product of a fleeting relationship between its parents, the father during the child's life having

⁶¹ Supra, pp. 46-47.

⁶² There are, of course, rare cases where the parents may not have been aware of the fact that the child would be born outside marriage: they may, for example, have married in unconscious breach of prohibited degrees of relationship. There are other cases (such as rape, for example) where a parent may have no responsibility for the conception of the child.

perhaps clearly refused to have anything to do with the child. A still more extreme case is that of the rapist-father. Nor is it impossible to conceive of cases where it would not necessarily be proper for the mother to inherit: she might, for example, have abandoned the child completely and have never bothered about it afterwards.

325. We consider that the question may be resolved into a choice between three approaches: the law could provide no succession rights for parents of children born outside marriage; it could provide that both parents would generally have the same succession rights as parents of children born within marriage, subject to an exception in "undeserving" cases; or it could provide equal succession rights without any such exception.

326. The first option does not commend itself to us. It would actually make the existing position of the mother worse, and could be quite inappropriate policy in many cases.

327. The second option appears to the Commission to have more to recommend it. The principle of unworthiness to succeed is already part of our law. Section 120 of the Succession Act 1965 excludes a number of persons from succession to a deceased person's estate. A sane person guilty of murder, attempted murder or manslaughter of the deceased may not take a share in his or her estate unless it is bequeathed by the deceased after the offence has been committed⁶³. Nor may the guilty person make an application under section 117⁶⁴. Moreover, a person who has been convicted of an offence against the deceased or against his or her spouse

⁶³ Section 120(1).

⁶⁴ Id. Section 117 provides for applications by disinherited children.

or child⁶⁵, punishable by imprisonment for a maximum period of at least two years or by a more severe penalty, may not take any share as a legal right or make an application under section 117⁶⁶. Desertion and failure to comply with a decree of restitution of conjugal rights are also grounds precluding a spouse from taking any share in the estate of the deceased as a legal right or on intestacy⁶⁷. A spouse against whom a decree of divorce a mensa et thoro has been obtained by the deceased spouse is also precluded from taking any such share⁶⁸.

328. It may be argued that the conception of a child outside marriage is in many cases an irresponsible act which, by imposing social difficulties on the child, is not dissimilar to committing an offence against the child⁶⁹. On one view, the Court could be given power, exercisable either automatically or on a discretionary basis, to disentitle a parent to rights of succession in the child's estate where, in the circumstances, the Court considered that the conception of the child was an irresponsible act. Some specific guidance could be given to

⁶⁵ Including an adopted child and a person to whom the deceased was in loco parentis at the time of the offence - section 120(4).

⁶⁶ Id.

⁶⁷ Section 120(2).

⁶⁸ Id.

⁶⁹ In this context it is worth noting that in the United States some children born outside marriage have attempted to sue their parents (or, where their mother was mentally disabled, those having charge of her) in tort based on the circumstances of their conception. Cf. Zepeda v Zepeda, 41 Ill. App. 2d 240, 190 N.E. 2d 849 (1963), Williams v State of New York, 18 N.Y. 2d 481, 276 N.Y.S. 2d 885, 223 N.E. 2d 343 (1966), Pinkney v Pinkney, 198 50 2d 52 (Fla. Dist. App. 1967), Slawet v Strob, 62 Wis. 2d 295, 215 N.W. 2d 9 (1974), Becker v Schwartz, 46 N.Y. 2d 401, 386 N.E. 2d 807 (1978). The courts have generally been unreceptive to the notion of a tort based on "wrongful life" in this context but some legal commentators have taken a different view: cf. Wolff & Cirillo, The Bastard's Cause of Action: A Statutory Cause of Action for Illegitimate Children, 19 J. Family L. 463 (1981).

the Court in determining the question. Such factors as the age of the parent, the relationship between the parents, and the degree of pressure that may have been exerted on one party by the other could, for example, be set out in the legislation. Most obviously, the question whether the child had been conceived by rape would be one to which the Court's attention would be directed specifically. There is something quite offensive to many people's sense of justice in permitting a man to benefit materially as a result of such a crime.⁷⁰

329. In spite of the pressing case that can be made in favour of the second option of denying rights of succession to "unmeritorious" claimants such as a rapist, the Commission are of the view that, on balance, it should be rejected in favour of the third option which would give parents of children born outside marriage the same rights of succession in their children's estates as parents of children born within marriage.

330. We take this view for the following reasons. First, if parental "unmeritoriousness" is to become part of our law, there seems no justification for limiting it to cases where the child was born outside marriage. It is relatively easy to conceive of cases of gross parental neglect with respect to children born within marriage; but (unless the existing laws are changed) parents guilty of this type of behaviour will continue to have succession rights in their children's estates. Second, in so far as rape is concerned, a child may be conceived as a result of violence within marriage as well as a result of violence outside; and it would be difficult to justify the denial of

⁷⁰ Another point should be noted. If the rapist father has succession rights in the child's estate, he will do so to the detriment of the mother - the rape victim.

succession rights to one violent father on the basis of his act and not to the other. If, however, violence within marriage were to constitute a bar to succession (in order to remove distinctions based on marital status), there would seldom if ever be evidence that the child was conceived as a result of the violent act of the father.⁷¹ Third, and more generally, the Commission consider that the law of succession operates more satisfactorily where the law provides few bars to inheritance. The law of intestate succession necessarily involves somewhat general rules as to entitlement to succeed to property. If these general rules do not commend themselves to any person who is concerned with what is to happen to his property after his death, he may dispose of his property before he dies or make a will.⁷² Were the law to introduce bars to entitlement to succeed based on general grounds of "unmeritoriousness" there is no guarantee that the estates of deceased persons would be better administered and more equitably distributed.

331. On balance, therefore, the Commission are of the view that it would be better for the legislation not to include any bar to entitlement by parents - married or unmarried - to succeed to the estates of their children. The Commission have reached this view in full appreciation of the various arguments that may be made against it. As so often with reform in the field of succession law, whatever approach is ultimately favoured by the legislation involves some drawbacks and limitations.

⁷¹ A man who is guilty of serious violence against his wife is, if convicted, precluded from taking a share as a legal right in her estate - s.120(4) of the Succession Act 1965.

⁷² It should be noted in this context that where a child dies testate, its parents have no rights in its estate (other than what the child may choose to give them in its will) - Part IX of the 1965 Act.

Succession Rights of Other Relations in Child's Estate

332. The question whether other relations should have succession rights in the child's estate does not appear to the Commission to raise great difficulty, once it has been accepted that the parents should have such succession rights. To deny those relations entitlement in the child's estate would preserve a distinction between children based on the marital status of their parents, where no social argument of any force would appear to justify the distinction.

333. There is one case where it might appear inappropriate for relations to have succession rights in the child's estate - where the relations derive their claim from an "unmeritorious" parent. An example will make this clear. A man rapes a woman and is killed by a car when seeking to avoid arrest. Is it proper that his parents should in some cases have the right to succeed to the property of the child? The answer appears to the Commission to be that, if the man would have been entitled to succeed had he lived, his parents should not lose their rights to succession on account of his "unmeritoriousness".

334. The Commission therefore recommend that other relations should be entitled to succeed to the estate of a child born outside marriage in like manner as they would to the estate of a child born within marriage.

Construction of "children", "issue" and similar words in wills and other instruments

335. Under present law⁷³ words such as "children" and "issue", when used in wills and other instruments are interpreted as

⁷³ Cf. A. Shatter, Family Law in the Republic of Ireland, 378 (2nd ed., 1981).

prima facie meaning legitimate children. The question now arises as to whether this rule of construction should continue to be part of the law after the enactment of the legislation.

336. In England the issue was considered by the Russell Committee in 1967. The Committee recommended in favour of retaining the rule of construction. They said as follows:

"Any change in the present prima facie rule of construction would in our view lead to more problems than it would solve. A father would be faced with the alternative of either benefiting against his wishes bastards who might be born to his daughter, or of extending to her by the terms of his will the gratuitous insult of expressly excluding the possible outcome of her possible immorality. We feel considerable sympathy for the suggestion that in the case of at least a mother's will a reference to her children should include her bastard as well as her legitimate children, as being more likely than otherwise to accord with her intention. But it would be unacceptable to impose on a mother who did not want to include the former the need to reveal in her will that which might not be generally known, either by express exclusion of individuals, or of bastards as such, or by some device which might well reveal the position of those with knowledge of the family. Further it would, we feel, lead to confusion to have different principles of construction of such phrases applied to different documents. Accordingly, we do not recommend any change under this head."⁷⁴

337. We quote the Russell Committee argument in full because it articulates in starkly clear terms the argument against changing the rule of construction. It stresses a point that might otherwise be missed, namely, that the rule of construction

⁷⁴ Russell Committee Report, para. 57. The Committee drew attention to the fact that the existing rule was prima facie only and "by no means absolute": id., para. 58. The Committee's recommendation was not adopted in the subsequent legislation. (Section 15 of the Family Law Reform Act 1969 abolished the rule.)

should not be regarded as being concerned primarily with the interests of children, but rather that it is designed to give effect to the probable intentions of the person who draws up the instrument.⁷⁵ We feel, however, the Committee's view should not be adopted. It is far from clear that the present rule of construction accurately represents the intentions of those drawing up instruments; and the notion that a father generally would view with distaste the prospect of benefiting "bastards who might be born to his daughter" is by no means widespread. It is possible that some parents would so view matters but, even if the rule of construction were abandoned, they would still be able to exclude "the possible outcome of [their daughter's] immorality", should they so desire. And even if it is necessary to reveal the existence, or concern about the possible future existence, of a child born outside marriage, the law should not cater for excessive sensitivity in regard to the matter.

338. On balance, therefore, the Commission are of the view that the present rule of construction should be set aside and that no prima facie inference should be drawn that words such as "children" and "issue" when appearing in written instruments refer to children born within marriage only.

339. The Commission consider, however, that it would not be advisable for the legislation to provide that the abolition of this rule of construction should be retrospective in its effect

⁷⁵ Another line of argument could be pursued. It could be said that the rule, in reflecting probable intentions of those who draw up instruments, thus protects the interests of the intended beneficiaries - the children born within marriage. It may be argued that it would be wrong to reduce the share of these children, where by law they are otherwise fully entitled to receive it, by frustrating the presumed intention of the person seeking to confer that share upon them. But see the following sentences of the text, supra.

so as to apply to instruments made before the enactment of the legislation. Such a policy would greatly unsettle the law and would cause immense confusion, practical difficulties and uncertainty. Accordingly, we recommend that this change in the law should apply only to instruments made after the enactment of the legislation.

340. A problem of detail arises as a result of this recommendation. It concerns special powers of appointment. An example will make the difficulty clear. A testator died in 1970 having made a will which provided that after X's life, the property was to go "to such of X's children as X shall by deed or will appoint". X has two children born outside marriage: the first in 1975, the second in 1983, after the legislation has come into effect. X dies in 1984. If the present rule of construction is to apply, neither of X's two children would benefit from the power of appointment conferred on X (unless the prima facie inference was for some reason displaced). The question thus is: should either or both of these children be entitled to benefit once the rule of construction is abandoned, as proposed?

341. In favour of permitting them to benefit, it can be argued that, if X chooses to exercise the power of appointment in 1984, for example, he should not be prevented from including his sons, born outside marriage, who on that date will suffer no general legal discrimination and who will come within the definition of "children" in any instruments executed after the enactment of the legislation.

342. As against this it can be argued that X, in exercising the special power of appointment, is merely giving effect to the intentions of the maker of an instrument executed before the enactment of the legislation and that, in harmony with the general principle of non-retrospection already proposed, the

the intentions of the maker of the instrument should not be frustrated by extending the class of appointees.

343. A compromise might be considered. This would permit extension of the class to children born after the enactment of the legislation but not to children born before its enactment. In the example given, this would mean that X would be permitted to appoint to his second son but not his first. As against this, it may be argued that such a compromise might be considered arbitrary and in some cases (including the example given above) might lead to increased feelings of injustice between members of families.

344. On balance, therefore, and with some hesitation, the Commission recommend that, where an instrument made before the enactment of the legislation creates a special power of appointment, nothing in the legislation is to extend the class of persons in whose favour the appointment may be made so as to include any person who is not a member of that class.

Protection of Trustees, Administrators and Executors

345. If children born outside marriage are to have equal succession rights with those born within marriage, and if the present rule of construction of such words as "children" and "issue" in instruments is to be set aside, then it follows that, unless special protection is given to them by the legislation, trustees, administrators and executors will be under new and substantial obligations of enquiry and conduct the precise scope of which would be difficult to determine in advance of precedents being gradually built up in case-law.

346. Legislation in several other jurisdictions⁷⁶ has included provisions exempting trustees, administrators and executors from an obligation to enquire into whether there are claimants born outside marriage, and relieving them from liability for distributing the property in disregard of the claims of such persons. In the Commission's view, there is much to recommend a provision on these lines, especially from the practical standpoint.

347. It may, however, be said that such a provision goes too far in that it sacrifices the rights of children born outside (but not inside) marriage in the interest of practical administrative convenience. If the legislation were to impose on trustees, administrators and executors only an obligation to act reasonably in inquiring as to the existence of claimants born outside marriage and in distributing the estate, this could scarcely be described as too onerous a burden.

348. The Commission accept the logic of this criticism but consider that it does not give adequate weight to the practical difficulties of proof which arise in respect of children born outside marriage. We, therefore, recommend that the legislation should include provisions exempting trustees, administrators and executors from the obligation to enquire as to whether there are claimants born outside marriage, and relieving them from liability where they administer estates in ignorance of the claims of such persons.

349. But we also consider it desirable that the legislation should include a provision to the effect that these exemption

⁷⁶ E.g. New Zealand (Status of Children Act 1969, section 6), England (Family Law Reform Act 1969, section 17).

provisions should not prejudice the right of any such claimants to follow the property, or any property representing it, into the hands of any person, other than a purchaser for value, who may have received it. This is already the law in England⁷⁷ and there seems much to recommend it.

Agreements etc. for Benefit of Children not yet Conceived

350. Under present law, a provision in a deed or other instrument inter vivos for the benefit of a future illegitimate child is void. Clearly this rule would not easily harmonise with our general proposals. Accordingly, we recommend that it be abolished.

Guardianship and Custody

351. Under present law, as has been seen⁷⁸, the mother of a child born outside marriage is its guardian. The father has only limited rights to apply to the Court on matters affecting the custody and welfare of the child.

352. We must now consider whether, if the status of illegitimacy is to be removed, as proposed, the fathers of all children born outside marriage should become joint guardians with their mothers.

353. In favour of this change it can be argued that, if the abolition of the concept of illegitimacy is to be meaningful

⁷⁷ Cf. the Family Law Reform Act 1967, **sect.** 17. The term "purchaser" is used in the section, but this "presumably means purchaser for value": P. Bromley, Family Law, 577, fn. 2 (6th ed., 1981).

⁷⁸ Supra, p. 48.

rather than cosmetic such a consequence must follow. To preserve a distinction as to guardianship based on the marital status of parents discriminates against the child as well as the parent since guardianship may be regarded as being in the child's interest as well as a right of the parent.⁷⁹ A change in the law making fathers of children born outside marriage their guardians might have some effect, in certain cases at least, in encouraging them to play an active and caring role in the upbringing of their children. Moreover, it can be argued that, in some instances, the existing law does not accord with reality. Where a couple are cohabiting as man and wife with children born of the union, denying the father guardianship rights could be regarded as indirectly penalising the children because their father has failed to marry their mother. This offends against the principle on which our proposals are based in so far as it requires that penalties on children should be abolished even where they are indirectly caused. It may be argued that for these various reasons the father should be made joint guardian of his children, whether they have been born within or outside marriage.

354. But some formidable arguments may be made against the law's providing that all fathers of children born outside marriage should become their joint guardians.

355. First, it can be said that such a change in the law would be inappropriate and would fail to accord with the practical realities in many cases. Why should the connection of blood require that a father who conceived a child in a brief relationship or transient meeting with the mother be given full parental

⁷⁹ Cf. G. v An Bord Uchtala, 113 I.L.T.R. 25 (Sup. Ct., 1978 per Walsh J.):

"Among the mother's natural rights is the right to the custody and care of her child. Rights also have their corresponding obligations or duties These obligations of the parent or parents amount to natural rights of the child and they exist for the benefit of the child."

rights as joint guardian, where he has no continuing association with the mother or child? This argument has been forcibly expressed by one commentator as follows:

"It is unnecessary to give natural fathers additional legal rights if the mother voluntarily allows him to exercise them. If she does not, the father's influence is forced on her and the child, to dubious advantage, when she chose not to marry him or the relationship was brief. The natural father who wants rights over his children should marry their mother; and if she refuses to marry him, she should not be forced to accept a quasi-marital relationship"⁸⁰

356. In similar terms, another English commentator argues:

"~~T~~he rights of the mother should not be placed under the umbrella of the child's welfare, they merit independent examination. This is because giving rights to fathers automatically encroaches upon and diminishes the existing rights of mothers and this is a political issue. At present a distinction is drawn between married and unmarried parents. Married couples implicitly agree to share parental rights and duties and this is recognised by law However, is a single mother in an analogous position to a married mother with regard to her child? Does a woman who has sexual intercourse with a man implicitly agree to share parental rights over any child who is the product of such intercourse? If not, should she be forced to do so by law? Has Parliament the right to legislate that the unmarried mother and father should be treated by law as if they had been living in a nuclear family which has broken down, when the reality may be quite different, as when the child is the product of a casual affair or a broken love affair, or where the mother is a married woman or the father a married man?

One cannot generalise about the reactions of single mothers to these questions, but they are bound to generate strong emotions. How too will the parents of

⁸⁰ Ruth Deech, The Reform of Illegitimacy Law, 10 Fam. L. 101, 104 (1980).

a young pregnant daughter respond to the knowledge that the father has rights? In an extreme case is it too far-fetched to suggest that a pregnant woman will choose, or be persuaded, to have an abortion rather than risk the natural father asserting his rights of custody and access? One cannot know the answer to this question, but it is real and disturbing and it ought to be asked."⁸¹

357. Perhaps this argument does not pay sufficient attention to the wide range of circumstances in which children may be conceived and born outside marriage.⁸² There may be some mothers who choose to have children outside marriage with the intention that the father is not to have joint guardianship rights, but their number must surely be small.

358. In our view, the principle of equality requires that no distinction should be made in the legal rights of guardianship on the basis of marital status, and accordingly we recommend that both parents of children should be joint guardians of the children, whether they are born within or outside marriage. We do not perceive that this will cause difficulties in many cases. Where the father is involved in the upbringing of the child it will bring about a significant improvement in the law; where he has no interest in the child, the change will have little practical effect on the position. The only case involving possible difficulties is where the father has an interest in the child but the mother does not wish him to participate in the child's upbringing.

⁸¹ Hayes, Law Commission Working Paper No. 74: Illegitimacy, 43 M.L.R. 299, at 301 (1980).

⁸² Hayes, supra, at 301, concedes that "it is arguable that cohabiting unmarried couples ... agree to share parental rights and duties and that this too ought to be recognised by law." Yet some of these couples will have chosen to cohabit precisely because they seek to avoid the legal rights and obligations that marriage involves. Cf. Deech, The Case Against Legal Recognition of Cohabitation, Ch. 30 of J. Eekelaar & S. Katz ed., Marriage and Cohabitation in Contemporary Societies, at p.302 (1980).

359. Under present law it would appear that the father may apply to the Court for custody or access but his position would surely be a stronger one, even where the welfare of the child continued to be the criterion, once he becomes joint guardian of the child. An English commentator has noted of a similar proposal made by the English Law Commission:

"reference here to the welfare principle conceals the reality that courts draw a distinction in practice between giving rights and taking rights away. Courts almost always grant access to the non-custodial parent where the child is legitimate.⁸³ Furthermore it is fashionable at present to link the right of access to the welfare of the child.⁸⁴ If no discrimination is permissible against natural fathers it seems that an increasing number of access orders are likely to be made where there is nothing in the father's behaviour which debars him, although access is strongly resisted by the mother."⁸⁵

360. Whether this would be a desirable development so far as children are concerned is a matter on which psychologists may debate. In recent years increasing criticism has been voiced in some quarters as to the desirability of orders for access⁸⁶ but the question is still far from resolved.⁸⁷

⁸³ The practice is the same in the Irish courts: cf. A. Shatter, Family Law in the Republic of Ireland, 222-223 (2nd ed., 1981), O'Reilly, Custody Disputes in the Irish Republic: The Uncertain Search for the Child's Welfare, 12 *Ir. Jur. (n.s.)* 37, at 64 (1977).

⁸⁴ Cf. A. Shatter, *id.*, 223.

⁸⁵ Hayes, Law Commission Working Paper No. 74: Illegitimacy 43 *M.L.R.* 299, at 300 (1980).

⁸⁶ Cf. Goldstein, Freud & Solnit, Beyond the Best Interests of the Child (1973) (analysed by O'Reilly, *supra*, fn. 83), Maidment, Access Conditions in Custody Orders, in F. Bates ed., The Child and the Law, 124 (1976), Henszey, Visitation by a Non-Custodial Parent: What is the "Best interest" Doctrine?, 15 *J. Family L.* 213 (1976)

⁸⁷ Cf. Wallerstein & Kelly, Surviving the Breakup (1980), Freeman, How Children Cope with Divorce - New Evidence on an Old Problem, 11 *Family L.* 105 (1981).

361. We recognise that this is a matter of considerable importance in its legal implications but we consider that it would be better to examine it in the context of general reform of the law relating to the custody and guardianship of all children, irrespective of the marital status of their parents, rather than in the present Report, which is concerned with reform of the law of illegitimacy. We do not believe that the proper approach is to deny a father access to a child born outside marriage merely because the mother objects: such a rule would perpetuate the very discrimination we are seeking to remove. We are confident that the Court is no less competent to decide whether access is desirable in respect of such a child than in respect of a child born within marriage.

362. We accept, however, that it would not be appropriate for the legislation to provide merely that fathers of children born outside marriage should be joint guardians, and that cases of disputes as to custody, access or other matters affecting the child should be resolved by section 11 of the Guardianship of Infants Act 1964. We consider that a provision on the following lines should be introduced into that Act.

- "(1) On application to it by a parent, infant or any other person with a proper interest, the Court may order -
- (a) that the other parent, or parent, as the case may be, shall not have the custody of his child or children or of any child or children adopted under the Adoption Acts 1952 to 1976, without the prior approval of the Court on application to it by him under section 11 of this Act, and
 - (b) that he shall not be entitled to exercise any other rights in relation to such child or children that would be exercisable by him by virtue of the fact that he is the guardian of such child or children.
- (2) No order shall be made unless the Court is satisfied that the best interests of the child so require and that, having regard to the rights and interests of all other persons concerned, it would be proper to make the order."

363. The purpose of this provision would primarily be to enable the mother of a child born outside marriage to obtain an order depriving the father of the right to custody and to the exercise of other guardianship rights, where this would be in the best interests of the child. Thus, for example, in the case of a man who had shown no interest in the child, and who, on being informed of the proceedings, indicated that he had no wish to exercise any parental function with respect to the child in the future, the Court could decide that the best interests of the child required that the father be deprived of the right to custody and of the exercise of other guardianship rights. But where the father sought to exercise these rights, even in a case where the mother objected, the outcome of the Court's investigation of the best interests of the child, which would of course depend greatly on the evidence adduced by the parties, would be less easy to predict. In some cases, doubtless, the father would be deprived of the exercise of his rights as guardian, but in others, equally certainly, he would not. This, we believe, is as the law should be. It seems to us that he should not be denied the right to exercise these rights merely because the mother objects.

364. Our proposal would extend to all parents, irrespective of their marital status. In the case of parents of children born within marriage, their rights under the Constitution and otherwise should be taken into consideration. So also the Court should have regard to the Constitutional and other rights of parents of children born outside marriage. Moreover, the Constitutional and other rights of all children irrespective of the marital status of their parents should also be taken into account. Accordingly, our draft legislative provision requires the Court to have regard to the rights of all persons concerned.

365. There are some aspects of our proposal that should be

noted because they show that, in some cases at least, it may not provide an ideal solution.⁸⁸ First, a mother may not relish the prospect of taking legal proceedings against the father in order to divest him of the entitlement to custody or to exercise other guardianship rights. She may, for example, be afraid of being assaulted by him or she may simply wish to exclude him entirely from her life. Second, unless and until an order was obtained against the father divesting him of these rights, the father would be free to act as any guardian would in relation to the child.⁸⁹

366. The first possibility - that a mother might be afraid to take proceedings against the father - is one that is no doubt a serious one, but, in our view, the proper way for the law to deal with it is not to set aside a general principle that fathers, irrespective of marital status, should be guardians of their children. The risk of intimidation is present in many human relationships and activities. We consider that the solution to our problem lies in the area of law enforcement and criminal law policy rather than in setting aside a principle that is concerned with ensuring justice and equality as respects children born outside marriage.

367. The case of the mother who wishes to exclude the father completely from her life does not appear to us to constitute a sufficiently strong reason for setting aside the principle. If the mother can establish that the welfare of the child requires that the father be excluded from the exercise of guardianship rights, then our proposal will come to her aid;

⁸⁸ Cf. the English Law Commission's Working Paper No. 74, Family Law: Illegitimacy, para. 3.11 (1979).

⁸⁹ Cf. id.

if she cannot, it would be unfair that, on the basis only of her attitude to the father, the father should be deprived of these rights. As we have indicated already, we perceive guardianship as being the concern not only of the parents but also of the child.

368. We are of the view that provision should be made in the legislation so as to enable a mother to apply to the Court even before the birth of the child, seeking an order depriving the father of the exercise of rights of guardianship. In extreme cases, such as those involving conception following rape, the Court might be disposed to make such an order.

369. We considered, but rejected, an alternative approach⁹⁰ whereby the father of a child born outside marriage would be entitled to exercise guardianship rights only where he cohabits (or has at some time cohabited) with the mother or where he has been registered on the child's birth certificate as its father, or where, on application to it, the Court makes an order conferring these rights on him. The advantage of this approach is that it would help the mother in difficult situations. It would also make the legal position coincide more realistically with the factual position in many cases. But the approach suffers from the disadvantage that it perpetuates the idea of differentiation between different kinds of parents. There is also a practical objection to adopting such an approach. If the exercise of guardianship rights is to depend on cohabitation, difficult problems of interpretation will arise in practice. Since it is not very easy to say what exactly constitutes

⁹⁰ This approach is favoured (with some differences in detail) in several European jurisdictions, in New Zealand and in some Australian states.

cohabitation there would be an undesirable lack of certainty in a number of instances.

370. We are also of the view that subsection (3) of section 11 of the Guardianship of Infants Act 1964 should be repealed.

This subsection makes orders in respect of custody and maintenance of children under the age of twenty one years unenforceable where the parents reside together, the orders completely ceasing to have effect after the parents have resided together for three months. We have already recommended that this policy be changed so far as orders for maintenance of children are concerned. We consider that it should also be changed so far as custody orders are concerned. Under our general proposals, the father of a child born outside marriage will have a far more extensive right to custody than at present and the potential for legal conflict with the mother on this question is likely to be increased. It seems to us safer that an order for custody should not thus terminate automatically after three months' cohabitation but rather should be subject to variation or discharge by the Court under section 12. We consider that this change should apply to all parents without distinction as to marital status: it is, perhaps, possible to justify a distinction on this matter on the basis of marital status, but we consider that the position should be the same for all parents in so far as custody and guardianship of their children is concerned.

371. We further consider that subsection (1) of section 18 of the Guardianship of Infants Act 1964 should be repealed.

That subsection enables the Court, in granting a decree for divorce a mensa et thoro, to declare that the respondent spouse is a person unfit to have custody of the children of the marriage or of adopted children. A parent who has thus been declared unfit is not, on the death of the other parent,

entitled as of right to the custody of the children.

372. The advantage of this provision is that it streamlines procedural matters, since, in a case where it applies, an application under section 11 of the Guardianship of Infants Act 1964 would not be required. But the provision does this by concentrating attention on the wrong-doing of one spouse as spouse rather than on the best interests of the child.⁹¹ Moreover, the provision has no application in respect of children born outside marriage (other than adopted children). The new provision, which we have proposed above, seems to us adequately and suitably to deal with the situation now dealt with in section 18(1) of the 1964 Act.

373. Next, we recommend that the scope of subsection (2) of section 18 of the Guardianship of Infants Act 1964 should be extended. The subsection enacts that a provision contained in any separation agreement made between the father and mother of an infant is not to be invalid by reason only that it provides that one of them is to give up the custody or control of the infant to the other. We consider that the subsection should extend to all categories of agreement that contain such a provision, rather than merely separation agreements, and that it should extend to all parents, irrespective of whether their children are born within or outside marriage.

374. Finally, we recommend that a provision be inserted into section 11 of the Guardianship of Infants Act 1964 to the effect that (subject to the provisions as to registration of births and rights and liabilities arising under criminal law, contract or tort) the surname of a child should be a matter for the child himself (when mature enough) or the person or

⁹¹ Cf. A. Shatter, Family Law in the Republic of Ireland, 226 (2nd ed., 1981).

persons having care and control of the child to determine, provided that, on application to the Court under subsection (1) of section 11, by the child, a guardian or any other person with a proper interest, the Court may, having regard to the best interests of the child and to all the other circumstances of the case, make such order as to the surname of the child as it considers proper. The subject of surnames should not, in our view, be a matter for undue legal technicalities and refinements. The approach that we favour seems to us to combine simplicity and flexibility with adequate protection for the interests of the parties concerned.

Domicile and Habitual Residence of Minors

375. A minor's domicile follows that of its mother where it is born outside marriage.⁹² It seems that the mother may elect not to change the minor's domicile when she is changing her own, but that she may not change the minor's domicile without changing her own.

376. The Commission propose to submit a Report on Domicile and Habitual Residence⁹³ to the Taoiseach in the near future. The Commission will recommend that "habitual residence" and not "domicile" will in future be the connecting factor in the conflicts of laws. As regards children, the Report will propose that a child under the age of sixteen who has not been

⁹² Cf. Law Reform Commission Working Paper No. 10-1981, Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws, paras. 87-92.

⁹³ Working Paper No. 10 contains (Ch. 13) the 'General Scheme of a Bill to Reform the Law by substituting "Habitual Residence" for "Domicile" as a Connecting Factor for the Purpose of the Conflict of Laws.'

married shall be presumed to have the habitual residence of his parents (including adoptive parents) or of that parent with whom he has his home unless the contrary is shown or unless the circumstances indicate otherwise. In the Commission's view, this should apply to all children, irrespective of the marital status of their parents.

Nationality and Citizenship

377. The abolition of the concept of illegitimacy will probably not affect the law of nationality and citizenship since it would appear that under present law the child may derive Irish citizenship from its father, irrespective of whether the child is born within marriage.⁹⁴ However, we consider that the legislation should clarify this point. The proposals we have made concerning the presumption as to paternity and judicial proceedings for a declaration of paternity will, of course, have some practical effect in increasing the number of cases where a legal relationship between father and child may easily be established.

Parental Consent to Marriage

378. We must now consider the effects of the abolition of the status of illegitimacy on the law relating to parental consent to marriage.

⁹⁴ Cf. supra, p. 31.

379. Under present law, where a minor between the ages of sixteen and twenty-one years wishes to marry he or she must obtain the consent of his or her guardians. Where there is no guardian, or where the guardian cannot be found or refuses consent to the proposed marriage, the consent of the President of the High Court (or of a High Court Judge nominated by the President) must be obtained. Since, in the case of a child born outside marriage, the mother is the sole guardian, only her consent is required. The father, even where he is living with the mother and the child, has no function in the matter.

380. If the law were to be changed so as to confer the status of guardian on the father of a child born outside marriage, then, unless the legislature provided otherwise, the consent of such father would be required for the marriage of his child, in the same way as the mother's consent is now required.

381. The subject of consent to marriage has been dealt with by the Commission in Working Paper No. 2-1977, The Law Relating to the Age of Majority, the Age for Marriage and Some Connected Subjects. We proposed that marriage where one of the parties is a minor should be null and void unless the consent of the guardians had first been obtained; if they disagreed or refused or withheld consent or if there was no guardian or the minor was a ward of court, the consent of the President of the High Court (or of a Judge of that Court nominated by the President) should be required.⁹⁵ Where a guardian whose consent was required was incapable of consenting by reason of mental disability or where he or she had not, after reasonable enquiries, been found, the President (or other Judge) might give the necessary consent to the marriage.⁹⁶

⁹⁵ Cf. section 8(1) of the General Scheme of a Bill, at p.87 of the Working Paper. See also paras. 4.55-4.57 of the Working Paper.

⁹⁶ Cf. section 8(2) of the General Scheme of a Bill, at p. 87 of the Working Paper.

382. Since, under the proposed legislation, the father of a child born outside marriage will be a guardian of the child, his consent will, by virtue of our proposals in Working Paper No.2, be required for the marriage of his minor child. We consider that the provision enabling the President to dispense with consent where the guardian cannot be found will ensure that the change in the law will not result in hardship.

Artificial Insemination

383. If the legal concept of illegitimacy is to be abolished, this will have important implications in respect of artificial insemination. The position regarding A.I.H. and A.I.D. will be considered in turn.

A.I.H.⁹⁷

384. No particular difficulty will arise in respect of A.I.H. The child will in all cases have a full legal relationship with his father, whether or not the marriage is annulled. The A.I.H. child will thus be in exactly the same position as a child conceived in the ordinary way.

A.I.D.⁹⁸

385. A child conceived by A.I.D. is in a different position. After the legislation a legal relationship of father and child will be established between the donor and the child: and there will be no relationship between the husband and the child.

386. Obviously, it would be inappropriate that a donor should

⁹⁷ For an account of the existing law, see pp. 49-52 supra.

⁹⁸ For an account of the existing law, see pp. 52-57 supra.

be given rights of guardianship and succession in the child's estate. Conversely, it would also be inappropriate that the child should supplement its existing rights of maintenance against the donor by rights of succession to his estate. The fact that normally the donor and the child would be unknown to each other, of course, reduces the significance of these legal considerations to theoretical rather than practical significance.

387. The question therefore arises as to whether the legislation should attempt to deal specifically with the subject of A.I.D. as a result of the implications for A.I.D. which would follow from a general abolition of the legal concept of illegitimacy. In the Commission's view, this is not a matter on which we should make proposals in the present context. The subject of artificial insemination by a donor raises important moral⁹⁹ and social¹⁰⁰ issues that are more properly matters for determination by the legislature. We have referred in

⁹⁹ Cf. Kelly, Artificial Insemination: I. Theological and Natural Law Aspects, 33 U. Detroit L. J. 135 (1955), Finegold, Artificial Insemination, Ch.3 of E. Torrey ed., Ethical Issues in Medicine (1968), Lo Gatto, Artificial Insemination: II. Ethical and Sociological Aspects, 1 Catholic L. 267 (1955), Symposium on Artificial Insemination: The Religious Viewpoints, 7 Syracuse L. Rev. 96, P. Ramsey, Ethics at the Edges of Life: Medical and Legal Intersections, 81ff. (1978), J. Fletcher, Morals and Medicine, (1954), N. Anderson, Issues of Life and Death, ch. 2 (1976), I. Jakovits, Jewish Medical Ethics, 248-250 (1959).

¹⁰⁰ Cf. Levison, Dilemma in Parenthood: Socio-Legal Aspects of Human Artificial Insemination, 36 Chicago-Kent L. Rev. 1 (1959), Mangin, Artificial Insemination: The Social and Anthropological Viewpoint, 7 Syracuse L. Rev. 106 (1955), Verkanf, Artificial Insemination: Progress, Polemics and Confusion - An Appraisal of Current Medico-Legal Status, 3 Houston L. Rev. 277 (1966), Taviss, Problems in the Social Control of Biomedical Science and Technology, in E. Medelson, J. Swazey & I. Taviss ed., Human Aspects of Biomedical Innovation 3, at 30-31 (1971), Wadlington, Artificial Insemination: The Dangers of a Poorly Kept Secret, 64 N.W.U.L. Rev. 777 (1970), Dienes, Artificial Donor Insemination: Perspectives on Legal and Social Change, 54 Iowa L. Rev. 253 (1968), Smith, Through a Test Tube Darkly: Artificial Insemination and the Law, 67 Mich. L. Rev. 127.

previous Working Papers¹⁰¹ to the limits within which it is proper for our recommendations to be made. The question of general social policy towards A.I.D. appears to us to be outside our remit.

389. The Commission does not consider that that part of the subject of A.I.D. that is directly affected by the proposals concerning illegitimacy should be dealt with. The Commission could, for example, recommend that, where a husband consented to A.I.D., he should be regarded as the father of the child.¹⁰² But any such recommendation requires that all aspects of A.I.D. be examined, including such fundamental questions as the following: Should falsification of the register of births by persons resorting to A.I.D. cease to be criminal?¹⁰³ Should A.I.D. when practised by a woman without her husband's consent be a ground for legal separation (divorce a mensa et thoro)? If so, does such conduct fall within the existing ground of

¹⁰¹ Working Paper No. 5 - 1979, The Law Relating to Criminal Conversation and the Enticement and Harboursing of a Spouse, p. 56; Working Paper No. 6 - 1979, The Law Relating to Seduction and the Enticement and Harboursing of a Child, p. 62.

¹⁰² This is already the law in some jurisdictions (including New York and California) and the English Law Commission has tentatively proposed that it should become the law in England: Working Paper No. 74, Family Law: Illegitimacy, para. 10.11 (1979).

¹⁰³ Cf. Vital Statistics and Births, Deaths and Marriages Registration Act 1952. Other offences that may in certain cases be associated with A.I.D. are perjury and conspiracy.

adultery¹⁰⁴ or cruelty,¹⁰⁵ or should a new ground be created? If A.I.D. is performed on an unmarried woman, who should be regarded as having legal parental rights in respect of the child?

390. Some of the problems concerning A.I.D., especially where the woman is not married, raise questions concerning paternal relationship that are clearly related to those that arise where the mother is married. It can be argued that a man with whom the mother is cohabiting should not be denied the legal status of "father" merely because he is not married to the mother. To answer one or two questions without formulating a general policy on the subject of A.I.D. would, in the Commission's view, be likely in the long run to create further difficulties.

¹⁰⁴ There is no decision on this question in this jurisdiction and the decisions in other jurisdictions are divided. In the Canadian decision of Orford v Orford, 49 O.L.R. 15, 58 D.L.R. 251 (Sup. Ct. 1929), analysed by Tallin, 34 Van. Bar Rev. 1, 166 (1956), Hubbard, 34 Can. Bar Rev. 425 (1956), Long, 2 Manitoba L. J. 87 (1967), A.I.D. without the husband's consent was held to constitute adultery. The same approach was favoured in Doornbus v Doornbus, No. 54 S. 14981, Super. Ct., Cook Cty., Ill., 13 Dec. 1954, 23 U.S.L. Week 2308 (1954), app. dismissed, 12 Ill. App. 2d 473 (1955). In the Scottish decision of MacLennan v MacLennan, 1958 S.C. 105 (Outer House, Lord Wheatley), analysed by E. Clive & J. Wilson, The Law of Husband and Wife in Scotland, 447-449 (1974) Payne, 40 N.C.L. Rev. 111 (1961), a different view was taken. In accord with MacLennan are Hoch v Hoch, Cr. Ct., Cook Cty., Ill., 1948 and Strnad v Strnad, 190 Misc. M86, 78 N.Y.S. 2d 390 (1948). The commentators generally favour the MacLennan approach, but cf. D. Walker, The Law of Delict in Scotland, vol. 2, 717 fn. 22 (1966).

¹⁰⁵ Cf. Dienes, Artificial Donor Insemination: Perspectives on Legal and Social Changes, 54 Iowa L. Rev. 253, at 265 (1968).

Barring Orders

391. Under section 22 of the Family Law (Maintenance of Spouses and Children) Act 1976,¹⁰⁶ the Court may order a spouse to leave the family home if it is of opinion that there are reasonable grounds for believing that the safety of the other spouse or of any dependent child of the family requires it. This statutory remedy supplements the common law injunction (as well, of course, as remedies for assault and battery in tort and criminal law).

392. Application for a barring order under section 22 may be made only by a spouse: the child has no right of application. Nor is the section applicable to unmarried persons living together.¹⁰⁷

393. On the basis that the concept of illegitimacy is to be abolished the question arises as to whether section 22 should be amended. In our view the proper approach would be for the legislation to enable, not only a spouse but also a child of any person, whether that person is or is not married, to apply to the Court under the section for a barring order. This approach is consistent with the philosophy we have adopted elsewhere in this paper that legal rights for the benefit of children should be capable of being enforced by the children themselves.

¹⁰⁶ See A. Shatter, Family Law in the Republic of Ireland, 335-337 (2nd ed., 1981),

¹⁰⁷ This contrasts with the position in several other jurisdictions.

Adoption

394. If, as we propose, the concept of illegitimacy is removed from our law, there will arise a formidable issue of legal policy in respect of adoption. At present,¹ three categories of children may be adopted: illegitimate children, legitimated children whose birth has not been re-registered and orphans. After the concept of illegitimacy has been abolished our law of adoption could take one of a number of approaches or options including the following:

- (a) it could remain unchanged, the legislation merely replacing the words "illegitimate child" by a neutral description, such as "child born outside marriage";
- (b) it could limit the entitlement to be adopted to orphan children;
- (c) it could extend the entitlement to be adopted to all children, irrespective of the marital status of their parents, whether (i) with the consent of both parents (or, possibly, one of them); or (ii) without the consent of either parent;
- (d) it could retain the present entitlement of children to be adopted, supplementing it by a limited entitlement of children born within marriage to be adopted, based perhaps on parental abandonment, neglect or ill-treatment or, more broadly, on a criterion of the child's best interests.

395. As may be seen from this list of possible approaches to reform, the abolition of the status of illegitimacy does not in itself provide the answer to what is a much broader question of social policy in respect of adoption.

¹⁰⁸ Cf. supra, pp. 57-58.

396. The questions raised involve fundamental issues of social policy that, in our view, call for determination by the Oireachtas rather than for consideration by a law reform agency on the basis that there is only one proper "legal" solution. We confine ourselves to setting out some of these issues as we perceive them in the hope that this may clarify the position in some respects. We do not see it as our function to go further than this. Though in some cases it may be difficult to determine with precision where the line should be drawn, it is clear that there is and must be a distinction between matters susceptible of recommendations based on purely legal criteria and matters that go beyond such criteria and that are essentially the concern of social policy, the determination of which must lie with the legislature. Whilst abolition of the status of illegitimacy thus raises a question as to what principle should govern the law of adoption, abolition does not by itself provide the answer.

397. We propose to conclude this Report by reviewing the various issues raised by the approaches or options set in para. 394 supra.

Option (a) No Change in the Substance of Present Adoption Law

398. Option (a), as we have stated, would leave the present law of adoption unchanged, the legislation merely replacing the words "illegitimate child" by a neutral description such as "child born outside marriage". In favour of this approach it may be argued that it enables those children who are most likely, as a group, to benefit from adoption to be adopted, whilst protecting the privacy of families based on marriage from unwarranted and undue intrusion by the State. It has also

sometimes been argued that the Constitutional rights of the family under Article 41 and 42 would be breached by legislation permitting the adoption of children born within marriage. Whether this would be so is a matter on which we would not wish to express an opinion but we note that the opposite view was taken by Walsh J. in the Supreme Court decision G. v An Bord Uchtála.¹⁰⁹

399. Against option (a), however, it can be argued that it preserves a distinction between children based on the marital status of their parents. This may be regarded as being inconsistent with the policy of equalising rights of children, which this Report advocates.

Option (b) Limiting Adoption to Orphaned Children

400. Option (b) would limit entitlement to be adopted to orphaned children. In favour of this approach it can be argued that it removes the present distinction between children based on the marital status of their parents. But, against this, it should be noted that it does so at a price. It would mean that children born outside marriage would no longer be eligible for adoption. The present law, which enables such children to be adopted, is based on the view that adoption of a child into a two-parent family is likely to confer a benefit on the child. To deny the child this benefit merely to comply with a principle of equality may seem to many to be an improper approach.

Option (c) Adoption of All Children, Irrespective of the Marital Status of their Parents

401. Option (c) would extend the entitlement to be adopted to

¹⁰⁹ [1980] I.R. 32, 79.

all children, irrespective of the marital status of their parents either (i) with the consent of both parents (or, possibly, one of them) or (ii) without the consent of either parent. This option is a radical one. It would remove the present distinction between children based on the marital status of their parents and would preserve the entitlement of children born outside marriage to be adopted, extending this entitlement to children born within marriage. This option raises a number of important questions as to the circumstances in which children may be adopted: whether, for example, the consent of one or both parents would be required; whether notice of a proposed adoption should be given to an absent father; whether adoption should be permitted against the wishes of both parents. These questions will be discussed below, but first a general objection to the option may be stated. It can be argued that it would be socially undesirable for the law to permit parents of children born within marriage to give up their children for adoption. Since adoption entails the termination of all parental obligations in respect of the adopted child, the consciousness of parental responsibilities among families might, over a period of time, be weakened. Moreover, it may be said that, if adoption were to be permitted against the wishes of the parents, there would be a real risk that the State would be improperly interfering in family life. A few stark examples will, perhaps, bring out the force of this objection. Should compulsory adoption be permitted of children born to a single mother, or to an itinerant family or to a mildly mentally or physically handicapped couple or to a very poor couple, where their prospects in life are bleak? If the welfare of the child is to be the only criterion, and the rights of the other members of the family are to be ignored or given little attention, a case could be made that the child would be better off, certainly economically and in terms of educational and career prospects, and in some cases psychologically as

well¹¹⁰, if adopted into a loving and prosperous family, rather than remain with its natural parent or parents. But are there not very serious risks in a law that would permit such intrusion by the State into family autonomy? The problem is clearly a social and political one and its solution depends on the values that are basic to our society.

402. If we accept that all children may be adopted with the consent of their parents, we must now consider whether the consent of both parents should be required. In our analysis we proceed on the assumption that there should be no distinction between the rights of parents based on their marital status.

403. In favour of requiring the consent of both parents, it may be argued that, since both parents will (under our proposals) be joint guardians of the child, it would not be proper for the child to be adopted without the consent of both guardians. To permit an adoption where one of the parents objects would interfere intolerably with his or her natural and Constitutional rights.

404. As against this it may be argued that such a requirement would ignore the practical realities of life. Parents may, and do, abandon their children, whether born within or outside marriage. A husband or wife may desert the family, or become a long-term patient in a mental hospital. In the case of children born outside marriage fathers frequently exhibit little or no interest in their offspring. It would seem therefore

¹¹⁰ Especially where the child is very young and has not yet formed a strong and lasting bond with its parents. It is possible, therefore, that if adoption against the wishes of parents were to be permitted, the law, in the psychological interests of the child, would require that it be surrendered by the parents at birth or fairly soon afterwards.

that a blanket requirement that the consent of both parents would always be required could lead to harsh and inappropriate results in practice.

405. One approach that the legislation might favour would be to establish a general principle that the consent of both parents would be required before an adoption order could be made, but that this general principle would not apply in exceptional specified cases. Some of these exceptional cases would arise in practice as respects all parents, irrespective of their marital status, but others would in practice arise only as respects fathers of children born outside marriage since such fathers are most likely to be "absent parents" frequently.

406. It would, of course, be wrong for legislation to proceed on the assumption that all "absent fathers" of children born outside marriage require the same treatment. In practice they may differ greatly one from another. The following are somewhat generalised categories into which such fathers may fall:

- (a) those fathers who have played an active role in the rearing of their children before the question of adoption arises;
- (b) those fathers who wish to play such a role but who are unable to do so because either they are prevented by the mother from doing so or they are unaware of the whereabouts (or the existence) of the child;
- (c) those fathers who do not wish to participate actively in the upbringing of their children.

407. Most people would probably consider that the legislation

should seek to protect the interests of fathers falling under the first two categories, but, as experience in the United States has shown, it is not an easy task for the legislation to protect those interests while at the same time not imposing great hardship and difficulty on the mother in terms of publicity and delay. We do not think that it would be useful to go into more detail on this question¹¹¹, other than to record the fact that these difficulties exist.

Option (d) Supplementing the Existing Law of Adoption by a Limited Entitlement to Adoption of Legitimate Children

408. Option (d) would retain the present entitlement of orphans and children born out of wedlock to be adopted but would supplement it by an entitlement of legitimate children to be adopted in specified cases of abandonment or neglect by their parents. Of course, this option preserves a distinction between the legal position of legitimate and illegitimate children. Moreover, it raises the difficulties we have already mentioned concerning the limits of the right of the State to interfere in family relationships.

409. Finally, we record again that, in our view, these options relate to problems that call for resolution by the Oireachtas on the basis of values that are regarded as fundamental in our society.

¹¹¹ Another question that requires consideration is whether adopted children should be informed of the identity of their parents. This issue has provoked much discussion internationally in recent years and has led to statutory changes in several countries.

CHAPTER 4 SUMMARY OF RECOMMENDATIONS

1. Legislation should remove the concept of illegitimacy from the law and equalise the rights of children born outside marriage with those of children born within marriage: p. 87.
2. The legal relationship of parent and child should not be subject to any exceptions or prior conditions: p. 88.
3. A presumption of the paternity of the mother's husband should arise where a child is born to a woman during her marriage, or within ten months after the marriage has been declared to be void, or has been terminated by death or otherwise, except where the mother, at the relevant time, was living separate and apart from her husband, whether by court order, desertion on the part of either spouse, agreement or otherwise: p. 90.
4. The legislation should be so drafted as to make it clear that, in cases where the presumption does not arise, this does not necessarily mean that the Court is obliged to proceed on the basis that there is a presumption against paternity: pp. 90-91.
5. For the purposes of recommendation No.3, "court order" should include a barring order: p. 91.
6. The presumption of paternity should be capable of being rebutted on the balance of probabilities: p. 93.
7. Spouses ought to be permitted to give evidence of non-access to rebut the presumption that a child is theirs: p. 93.

8. Birth certificates should constitute rebuttable evidence of paternity: p. 97.

9. Where the birth of a child is registered on the application of a married woman in the name of her husband and herself, or on the application of a married man in the name of his wife and himself, this should constitute rebuttable evidence of paternity: p. 97.

10. Where the spouses are at the relevant time living apart and the husband acquiesces in the proposed registration of the birth by his wife, with his name as father, the registration should proceed. The same should apply in cases where the wife acquiesces in the proposed registration by her husband of the birth of her child with his name as father. Furthermore, where one spouse is unaware of the registration until after it has been completed, the Registrar should have no obligation to make any change in the register merely on the demand of that spouse: p. 98.

11. The presumption set out in recommendation No. 9 should be secondary to, and dependent on, the specific rule that no presumption that the husband is father should arise where the spouses have been living separate and apart: p. 99.

12. Where a spouse hears of a proposed registration of a child's birth and objects that it incorrectly names the husband as father, the Registrar should decline to register the birth for a period of three months. After that period, unless the Registrar has received notice from the objecting spouse that proceedings have been initiated seeking a declaration as to the child's paternity, he should register the birth of the child, naming the husband as father: p. 99.

13. Where an attempt is made to register a man other than the

husband as the father of the child, registration should be permitted (with the consent of the mother and the man) if either a court order involving the separation of the spouses at the relevant time is furnished to the Registrar or if the consent of the husband to the registration is obtained. The effect of registration of the name of the other man as father of the child would be to displace the presumption that the husband is father and to establish a rebuttable presumption that the other man is the father of the child: p. 100.

14. Where the mother of a child is unmarried and a man is registered as father of the child, with the consent of both the mother and the man, a rebuttable presumption should arise that that man is the father. Otherwise, his name should not be registered (and only the mother's should be registered) unless the Court, in proceedings for a declaration as to paternity, orders that such entry be made or permitted to be made, on application to it by any person: pp. 100-101.

15. Recognition of the child by a man should raise a rebuttable presumption that he is the father of the child: p. 101.

16. Recognition should be effected by statutory declaration or re-registration of birth. In either case action by the mother would be required. The statutory declaration would not be effective unless supported by another statutory declaration sworn by the mother agreeing that the man is the father. Re-registration of the birth would not be permitted unless the prior consent of the mother were furnished to the Registrar: p. 103.

17. Recognition of another man as father, effected without the consent of the husband, should not operate so as to defeat the presumption of paternity based on marriage. In such a case the rebuttable presumption that the husband is the father should

not be displaced so easily but rather should be a matter for the Court to determine in proceedings for a declaration of paternity: p. 103.

18. Where, however, a husband who is living with his wife consents in writing to the registration of the birth in the name of another man or (as the case may be) to the re-registration of the birth, that recognition should be effective: pp. 103-104.

19. The legislation should establish a procedure whereby the Court may make a declaration of parenthood (i.e. of paternity or maternity, as the case may be) which would bind all persons: p. 105.

20. It should be open to the mother, a man alleging that he is the father, the child and any person with a proper interest to take proceedings seeking a declaration as to parenthood: pp. 105-106.

21. In proceedings for a declaration as to paternity, the mother should be a compellable witness: p. 107.

22. In proceedings for a declaration as to maternity, the father should be a compellable witness: p. 108.

23. Proceedings for a declaration as to parenthood should be capable of being brought at any time during the joint lives of the alleged parent and child, and, where either dies, within six years of the death where a share in the estate of the deceased is being claimed: p. 110.

24. In proceedings as to parenthood proof on the balance of

probabilities should be required: there should be no requirement of corroboration: p. 111.

25. The Court should have the specific power to make a declaration that a person is not the parent of a particular child, but it should exercise this power only on special application to it by the mother, the child, the alleged father or any person with a proper interest; in other cases (where a positive declaration has been sought unsuccessfully) the Court should content itself with declining to make the declaration sought: p. 112.

26. The Circuit Court should exercise jurisdiction over proceedings for a declaration as to parenthood. An appeal should be capable of being taken to the High Court only on the basis that the Circuit Court acted on a mistaken view of the law. A rehearing on the merits should not be permissible: p.112.

27. A decree making a declaration as to parenthood should bind all persons unless it is subsequently overruled on appeal or set aside on the ground that it was obtained by fraud or on the basis of new evidence not available to the Court at the time it made the declaration: p. 112.

28. The principle of equality of treatment between children irrespective of the marital status of their parents requires that rights of maintenance of all children should be identical: p. 113.

29. All children, irrespective of the marital status of their parents, should be entitled to apply to the Court for an order for maintenance against either or both of their parents: p. 115.

30. In making an order for maintenance for or on behalf of a child, the Court should be empowered to give a direction for a capital payment or payments to be made by either parent to or

on behalf of the child. Having given such a direction, the Court would be permitted, subsequently, in cases where it considered it proper, to make (or vary) an order for maintenance for or on behalf of the child: p. 115.

31. Where an alleged father against whom a maintenance order is sought does not contest the allegation that he is the father, and a maintenance order is made against him, a rebuttable presumption should arise that he is the father: p. 116.

32. Maintenance proceedings in respect of children born outside marriage should not be subject to any limitation of time: p. 116.

33. In such maintenance proceedings corroboration of the mother's evidence should not be required: p. 116.

34. The present rule in respect of affiliation proceedings that only a "single woman" should be entitled to take proceedings should not be retained in the new law of maintenance of children born outside marriage: p. 116.

35. Any provision in an agreement that would have the effect of denying a person - whether parent, child or other person with a proper interest - the right to apply to the Court for a maintenance order in respect of a child born outside marriage should be ineffective: p. 116.

36. The law should not compel an adult to undergo a blood test against his or her will: p. 117.

37. Where a person who has been ordered to undergo a blood test refuses to do so, the Court should be entitled to draw such inferences as it considers proper as a result of this refusal: p. 118.

38. No minor should be required to submit to a blood test against his or her will: p. 119.

39. Where the Court considers that a minor is in the circumstances capable of providing (or refusing) the necessary consent, that minor should be ordered to submit to the blood test: the consent of his parents or guardians should not be required: p. 119.

40. Refusal by such a minor to be tested should enable the Court to draw such inferences as it considers proper: p. 119.

41. Where the Court considers that a minor is not in the circumstances capable of providing the necessary consent to be tested, the Court should be empowered to order a blood test to be carried out on the minor if the person having care and control of the minor consents: p. 119.

42. Where this person refuses to consent, the Court should be permitted to draw such inferences as it considers proper. Where more than one person has care and control of the minor, and they disagree as to whether the minor should be tested, the minor should not be tested. But the Court should be permitted to draw such inferences as it considers proper: pp. 119-120.

43. Where an adult is unable to consent to undergo a blood test on account of mental disability, the Court should be empowered to order that a blood test be taken, provided that the person in whose care the adult is does not withhold consent: p. 120.

44. If such a person withholds consent, the Court should be permitted to draw such inferences as it considers proper: p. 120.

45. Similar provisions to those proposed in respect of minors should apply in respect of persons under a mental disability in cases where more than one person has care and control of the disabled person and they disagree as to whether he or she should undergo a blood test: p. 120.
46. The procedure to be followed by those carrying out blood tests should be determined by regulations drawn up by the Minister for Health: p. 120.
47. Children born outside marriage should have the same succession rights in respect of their mother's estate as children born within marriage: p. 122.
48. Children born outside marriage should have the same succession rights in respect of their father's estate as children born within marriage: p. 129.
49. No specific reference to birth outside marriage should be included as a guide to the courts in the exercise of their discretion under section 117 of the Succession Act 1965: p. 131.
50. All children should have equal rights of succession in the estates of their relations: p. 132.
51. The legislation should not include any bar to entitlement by parents - married or unmarried - to succeed to the estates of their children: p. 137.
52. Other relations should be entitled to succeed to the estate of a child born outside marriage in like manner as they would to the estate of a child born within marriage: p. 138.
53. The present rule of construction of wills, deeds and other instruments should be set aside and no prima facie inference

should be drawn that words such as "children" and "issue", when appearing in such instrument, refer to children born within marriage only: p. 140.

54. The change proposed in recommendation No.53 should apply only to instruments made after the enactment of the legislation: p. 141.

55. Where an instrument made before the enactment of the legislation creates a special power of appointment, nothing in the legislation should extend the class of persons in whose favour the appointment may be made so as to include any person who is not a member of that class: p. 142.

56. The legislation should include provisions exempting trustees, administrators and executors from the obligation to enquire as to whether there are claimants born outside marriage, and relieving them from liability where they administer estates in ignorance of the claims of such persons: p. 143.

57. The legislation should also include a provision to the effect that these exemption provisions should not prejudice the right of any such claimants to follow the property, or any property representing it, into the hands of any person, other than a purchaser for value, who may have received it: pp. 143-144.

58. The legislation should abolish the present rule that a provision in a deed or other instrument inter vivos for the benefit of an illegitimate child who has not yet been conceived is void: p. 144.

59. Both parents of a child should be the joint guardians, whether the child is born within or outside marriage: p. 147.

60. The Court should be empowered to make an order depriving a parent of custody and the power to exercise other guardianship rights where it is satisfied that the best interests of a minor require this and that it would be proper to make such an order having regard to those interests and to the rights and interests of all other persons concerned: p. 149-150.

61. Provision should be made in the legislation so as to enable a mother to apply to the Court even before the birth of the child seeking an order depriving the father of the exercise of the rights of guardianship: p. 152.

62. Section 11(3) of the Guardianship of Infants Act 1964 should be repealed: p. 153.

63. Section 18(1) of the Guardianship of Infants Act 1964 should be repealed: p. 153.

64. Section 18(2) of the Guardianship of Infants Act 1964 which enacts that "a provision contained in any separation agreement made between the father and mother of an infant shall not be invalid by reason only of its providing that one of them shall give up custody or control of the infant to the other" should be extended to cover agreements other than separation agreements, and children, whether born within or outside marriage: p. 154.

65. A provision should be inserted into section 11 of the Guardianship of Infants Act 1964 to the effect that (subject to the provisions as to registration of births and rights and liabilities arising under criminal law, contract or tort) the surname of a child should be a matter to be determined by the child himself (when mature enough) or by the person or persons having care and control of the child, provided that, on application to the Court under section 11(1) of the Guardianship

of Infants Act 1964, by the child, a guardian or any other person with a proper interest, the Court may, having regard to the best interests of the child and to all the other circumstances of the case, make such order as to the surname of the child as it considers proper: pp. 154-155.

66. The recommendation to be made in the Commission's Report on Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws that a child under sixteen who has not been married shall be presumed to have the habitual residence of his or her parents (including adoptive parents) or of that parent with whom he has his or her home should apply to all children irrespective of the marital status of their parents: pp. 155-156.

67. The legislation should state that a child is capable of deriving Irish citizenship from its father, irrespective of whether the child is born within marriage: p. 156.

68. Section 22 of the Family Law (Maintenance of Spouses and Children) Act 1976 should be amended so as to permit not only a spouse but also a child of any person, whether that person is or is not married, to apply to the Court for a barring order: p. 162.

The Commission make no recommendations relating to

- (1) A.I.D., or
- (2) the amendment of the law of adoption,

consequent on the abolition of the status of illegitimacy. These are, in the Commission's view, essentially matters of social policy and, as such, more properly matters for determination by the Oireachtas. (See pp. **158** -161 and 163-169 supra.)
