EQUAL STATUS OF CHILDREN

> 'There has been a marked increase in the proportion of illegitimate births during recent years. These years too have seen a change in social attitudes towards extra-marital sexual relations. Whether as a cause or as a consequence of these changing attitudes out-of-wedlock pregnancies occur now with similar frequency across all social class.'[1]

This matter-of-fact statement of births outside marriage is typical of the growing acceptance of children born outside marriage, particularly in Western countries. This article does not propose to deal with social aspects of illegitimacy;[2] instead, it will focus on the legal implications of illegitimacy and the legal disabilities of illegitimate children. Discussion of the law in Malaysia will exclude the position of Muslim illegitimate children.

Legitimacy has been defined as a legal concept whereby a couple's child is entitled to full recognition as a member of their family group, enjoying the rights which that status involves.[3] The law determines who shall enjoy this status; it also defines the legal consequences of legitimacy or illegitimacy. At common law, an illegitimate child[4] was regarded as *filius nullius*,[5] the son of nobody, and it was from this concept that the disabilities of illegitimate children were derived. Originally, this legally defined status served to protect marriage and all that follows from it by leaving those born outside wedlock devoid of

[1] E. Crellin, M.L. Kellmer Pringle & P. West, *Born Illegitimate: Social and Educational Implications*, Report by National Children's Bureau, London (1971), 12.

[2] See Hinshawati Shariff, *The Protection of Illegitimate Children*, A Project Paper submitted to the Faculty of Law in the 1978/79 session; H.A. Finlay & A. Bissett-Johnson, *Family Law in Australia*, Melbourne: Butterworths (1972), 241–47.

[3] S.M. Cretney, *Principles of Family Law*, London: Sweet & Maxwell (1971), 309.

[4] In this article, the term 'illegitimate child' will be used synonymously with the terms 'child born outside marriage' and 'ex-nuptial child'.

[5] D. Hambly and J.N. Turner, *Cases and Materials on Australian Family Law*, Sydney: The Law Book Co. (1971), 478.

legal rights in relation to property and inheritance. Some of these legal disabilities have since been removed, but others still remain and function as social sanctions against minority behaviour. Over the years, the legislature in Malaysia has sometimes intervened to alleviate the hardships of illegitimate children. For example, provision is made in the *Legitimacy Act, 1961* for legitimation of children by subsequent marriage of their parents.[6] Since 1952, there has been acceptance in the *Adoption Ordinance* of the rule that an adopted child becomes the legitimate child of his adopters.[7] Power is also conferred on the Magistrate's Courts to order maintenance of illegitimate children.[8] Nevertheless, an illegitimate child and his mother have succession rights only on the intestacy of the other.[9] Therefore, there still remain in statutes some areas where an illegitimate child is discriminated against.

In the United States the legal sensitivity in the rights of an illegitimate child moves towards the direction of the Bill of Rights. Krause was quoted as saying:

> 'Beginning in 1968, the U.S. Supreme Court decided a series of cases on the basis of the Equal Protection Clause of the Federal Constitution which established the principle that the illegitimate child is entitled to legal equality with the legitimate child in most substantive areas of the law. Numerous state statutes discriminating against illegitimate children have been declared unconstitutional, and the bulk of the remaining legislation on the subject is under severe constitutional doubt.'[10]

Unlike in the United States, a Bill of Rights is absent in British Commonwealth countries so that no claim may be made that children born outside marriage are constitutionally entitled to 'Equal Protection'.[11] Nevertheless, the equalisation policy

[6] S.4. This Act does not apply to Muslims since subsequent marriages must be monogamous in nature: s. 3.

[7] S. 9.

[8] *Married Women and Children (Maintenance) Ordinance, 1950*, s. 3(2)

[9] *Legitimacy Act, 1961*, s. 11(1) and (2).

[10] R.E. Lee, 'The Changing American Law Relating to Illegitimate Children' [1975] *Wake Forest Law Review*, 415.

[11] J.N. Turner, 'Children Born Outside Marriage – Slow Progress in Common Law Countries' in F. Bate (ed.), *The Child and The Law*, New York (1976), 449–50.

has taken other forms, such as the New Zealand approach in the form of the *Status of Children Act 1969* or the constitutional safeguard approach taken in Malaysia. The New Zealand model has been very closely adopted in various states in Australia. The relevant statutes are the *Status of Children Act 1974* (Tasmania), *Status of Children Act 1974* (Victoria), *Family Relationships Act 1975* (South Australia), and *Children (Equality of Status) Act 1976* (New South Wales). All these statutes seek to remove legal disabilities of illegitimate children and, although it was recognised that direct practical effects of the measure are unlikely to be dramatic, its significance as a statement of social and legal policy is 'of the first magnitude'. The statutes have thus made provisions for all children to be equal and that '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.'[12]

In Malaysia article 8 of the Federal Constitution guarantees that 'all persons are equal before the law and entitled to the equal protection of the law'; yet, there are statutes which still stipulate the circumstances in which a child may be deemed illegitimate and others which demarcate the different rights of legitimate children from illegitimate children.

The marriage institution appears to be the focal point in ascertaining the status of children both under the common law and Malaysian statutes. The common law deems a child illegitimate if he is the child of a woman who is not lawfully married at all, or because he is the child of a woman who is lawfully married, but upon whom he is conceived by another than her lawful husband.[13] This common law rule was first introduced into the Straits Settlements by the *Second Charter of Justice* in 1826.[14] Statutes enacted thereafter clearly stipulate the position of children born of a marriage subsequently avoided and children whose parents subsequently

[12] Vic.: *Status of Children Act 1974*, s. 3(1); Tas.: *Status of Children Act 1974*, s. 3(1); S.A.: *Family Relationships Act 1975*, s.6(1); N.S.W.: *Children (Equality of Status) Act 1976*, s. 6.

[13] *Halsbury's Laws of England*, Vol. 3 (3rd. ed.), 86.

[14] *In the goods of Abdullah* (1835) 2 Ky. Ecc. 8.

married. The position of children born during a marriage subsequently annulled or avoided is provided in the *Divorce Ordinance, 1952.* Section 15 states that any child born of a marriage avoided because either party to the marriage was at the time of the marriage of unsound mind or subject to recurrent fits of insanity or epilepsy, or because the respondent was at the time of the marriage suffering from veneral disease in a communicable form, shall be a legitimate child of the parties thereto notwithstanding that the marriage is so avoided. In cases where a marriage is annulled on the ground that a former husband or wife was living, and it was adjudged to be in good faith and with the full belief of the parties that the former spouse was dead, children conceived before the decree *nisi* is made are entitled to succeed to the estate of the parent who at the time of the marriage was competent to contract.[15]

The *Law Reform (Marriage and Divorce) Act, 1976*[16] has improved the position of illegitimate children as it increases the number of such children of voidable marriages deemed to be legitimate children of the parties to the marriage while section 75(2) provides that children of void marriages, both or either of the parties reasonably believed that the marriage was valid and the fathers of the children were domiciled in Malaysia, are to be treated as legitimate children of their parents. There is however an exception where children of void marriages will be deemed illegitimate and that is if the marriages are void because they were contracted contrary to section 5 of the Act. Section 5 disallows a lawfully married person from marrying a second time during the continuance of that marriage. This exception is obviously more stringent than its corresponding provision in the *Divorce Ordinance.*[17]

[15] S. 17. *The Divorce Ordinance, 1952* does not, by implication, apply to Muslims: s. 4.

[16] This statute has yet to be enforced as law. It does not govern Muslims: s.3(3).

[17] S. 17. See the Singapore case of *Re Estate of Liu Sinn Minn, Decd.* [1976] 1 M.L.J. 145, where the Court of Appeal held that marriage in the expression 'void marriage' in s. 93(2) of the Women's Charter does not include a Chinese secondary marriage. The problem posed in that case will not arise in Malaysia because the *Law Reform (Marriage and Divorce) Act* expressly excludes void marriages of such nature: ss. 75(2) and 5. See also K.S. Wee, 'The Law of Legitimacy in Singapore' (1976) 18 *Malaya Law Review* 1, 9–16.

Marriage determines yet another status of children, namely, legitimation. The *Legitimacy Act, 1961* provides for the legitimation of children by subsequent marriage of their parents. The marriage has to be valid and monogamous and the father has to be at the date of the marriage domiciled in Malaysia.[18] The Act also recognises legitimation by extraneous laws.[19] Objections have been raised against the second condition of legitimation, that is that the father of the child has to be domiciled in Malaysia at the date of the marriage. Even legitimation by extraneous laws will not be recognised in Malaysia if legitimation in those jurisdictions do not require domicile of the father to be in those jurisdictions.[20] It is agreed that the domicile requirement is, in effect, limiting the number of persons eligible for legitimation and the noble purpose of the Act may ultimately be a mere 'eye-wash'.

The areas of law where illegitimate children in Malaysia and Australia are still discriminated against are many. This article will examine the extent to which statutes have perpetrated this unsatisfactory situation and the extent to which they have improved the legal status of illegitimate children and that of their putative fathers. Specific areas of examination are proof of paternity, succession, maintenance, adoption, guardianship, custody and access.[21]

A. PROOF OF PATERNITY

The rights conferred upon an ex-nuptial child by the recent Australian legislations in respect of his father's estate and others are only of theoretical value if paternity cannot be proved. It is proposed to deal with a number of aspects attached to this problem and they are presumption of paternity, evidence of paternity, acknowledgement of paternity, blood tests, and limitations on right of succession.

[18] S. 4.

[19] S. 10.

[20] The Federation of Women Lawyers, Malaysia, 'Current Legislation in Peninsular Malaysia: Some Thoughts for International Women's Year, 1975' [1975] 2 *Malayan Law Journal* lxxv, lxxviii.

[21] *Supra*, P. 1.

(a) Presumption of Paternity

At common law, it was presumed that a child born or conceived during a marriage was legitimate.[22] This presumption of legitimacy assumes that the wife's husband was the father of the child. Originally, this presumption could not be rebutted but it could subsequently by evidence of non-access by husband to his wife, or blood tests.

Section 5 of the Victorian *Status of Children Act,* on the presumption of parenthood, is quite akin to the presumption of legitimacy under the common law. It reads:

> '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.'

This section has been criticised because it omits the case of void marriages and unions where the parties know that they are void unions. Where a marriage is later held to be void, this section becomes inapplicable because then the marriage has not been 'dissolved' as such. If a couple goes through a ceremony of marriage and cohabit, and a child is born during the period of cohabitation or within ten months of cohabitation ceasing, it is reasonable to presume the child is a child of the mother and 'her husband'. This should be extended to a case where although the couple knew that their marriage is void, they have lived together and the relationship has continued for a reasonable time. The Act ought then to contain a provision that where a man and a woman have cohabited for a period of at least twelve months, a child born or conceived during the period of cohabitation or within ten months of the cessation of cohabitation is a child of those parents.[23]

In South Australia[24] a person is held to be the putative spouse of another if he is cohabiting with that person as the husband or wife *de facto* of that other person and he has either so cohabited with that other person continuously for the period

[22] *Banbury Peerage Case* (1811) 1 Sim. and St. 153.

[23] M. Neave, 'The Position of Ex-Nuptial Children in Victoria' [1976] *Melbourne University Law Review* 330, 338.

[24] *Family Relationships Act 1975*, s. 11.

of five years immediately preceding that date or during the period of six years immediately preceding that date so cohabited with that other person for periods aggregating not less than five years, or he has had sexual relations with that other person resulting in the birth of a child. However, its provision for presumption of parenthood is similar to the one in Victoria. It is suggested that the above conditions ought to be sufficient evidence in establishing paternity as well.

In New South Wales provision is made for voidable marriages and unions normally unrecognised by law.[25] Thus, where a woman gives birth to a child during her marriage or within ten months after the termination of her marriage, whether by death of her husband or by a decree of dissolution of the marriage or otherwise, and the woman has not remarried since the termination of that marriage and before the birth of the child, the child is presumed to be a child of the marriage. Marriages which may be deemed to be dissolved on the making of the decree *nisi* includes a marriage dissolved by a decree of dissolution or a voidable marriage dissolved by a decree of nullity. In cases where there was no ceremony of marriage at all, the child shall be presumed to be the child of that woman and that man if she gives birth to the child and, at any time during the period of twenty-four weeks commencing with the beginning of the forty-fourth week before the birth of the child, she has cohabited with a man to whom she was not married.

The New South Wales statute is apparently the most advanced in its provisions for presumption of parenthood. While it may be thought that the legal disabilities of ex-nuptial children stem from the factual difficulty of proving paternity and cannot therefore be eliminated by law, this can be quite misleading.[26] The difficulties in proving paternity may undoubtedly be admitted but if an effective presumption of paternity is available as is presumption of legitimacy, these difficulties might be removed. Chisholm suggested that if a man and a woman have a child as a result of their cohabitation for one year or at the time of its conception, recognition should be

[25] *Children (Equality of Status) Act 1976*, s. 10.

[26] R. Chisholm, 'Justice for Ex-Nuptial Children: Another Step Forward' [1977] *Australian Current Law Digest* 40, 44.

given to the child's origins. Some inroads towards this direction can be seen in South Australia and New South Wales.

In Malaysia, a presumption of paternity is explicitly provided in the *Evidence Act, 1950.*[26a] Section 112 of the Act reads:

> 'The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.'

This presumption of paternity is indeed a very strong one because so long as it could be proved that the parties to the marriage had access to each other at any time when the child could have been conceived, the child is the child of the man. This presumption has excluded any scientific evidence which may be adduced to rebut the presumption. The result of such a strong presumption is illustrated in the New Zealand case of *Ah Chuck* v. *Needham.*[27] There, a child was born to European parents but exhibited strong signs of being racially a half-caste. There was evidence that the wife had been on intimate terms with a Chinese market gardener but, at the same time, there was no evidence that the husband and wife had not had intercourse at or about the time of conception. Herdman, J. held:

> '. . . no matter how suspicious one may be about Chuck's intimacy with Mrs. Hedges, it is indisputable that at or about the time the child was conceived Hedges and his wife had opportunities of access. They were living together as man and wife in the years 1928 and 1929. It therefore follows that the child having been born during the subsistence of the marriage it (*sic*) is *prima facie* legitimate.'[28]

Unfortunately, this appears to be the position even in Malaysia. If blood tests were allowed to rebut the presumption such a decision would not have existed. The presumption has ignored

[26a] This presumption applies to Muslims because the *Evidence Act, 1950* is a law of general application. See Ahmad Ibrahim, *Family Law in Malaysia and Singapore*, Malayan Law Journal (Pte) Ltd., Singapore (1978), 256.

[27] [1931] N.Z.L.R. 559.

[28] At p. 563.

instances of void or voidable marriages and the status of children born thereof; however, as shown earlier, various other statutes have provided for presumption of legitimacy of children born of void or voidable marriages.[29]

(b) Evidence of Paternity

In Victoria prima facie evidence of paternity takes a number of forms stipulated in section 8 of the *Status of Children* Act, They are:

(i) a certified copy of the entry of the name of the father of the child upon the Register of Births;
(ii) an instrument signed by the mother of the child, and the person acknowledging paternity, if the instrument is executed as a deed, or in the presence of a solicitor;
(iii) an order made for maintenance or confinement expenses under section 10 or 12 of the *Maintenance Act 1965*;
(iv) an order made outside Victoria in another state, or Territory of the Commonwealth or in New Zealand, that the person is the father of the child; or
(v) a similar order made by the Court or public authority of a country specified by the Governor-in-Council.

Although not expressly stipulated, this section applies to facts and events occurring before the commencement of the Act, that is a maintenance order made before the 1st. of March 1975 is applicable to prove that the man is the putative father of the child.

Section 15 of the *Maintenance Act* makes a putative father responsible for payment of funeral expenses for the mother if the mother dies during or in consequence of her pregnancy or in consequence of the birth of the child but this order has been excluded as evidence of paternity. To obtain an order under this section it is necessary to establish three things, namely, that the mother of the child died during or in consequence of the pregnancy or in consequence of the birth of the child; that the defendant is the father of the child or has been so adjudged in other legal proceedings; and, that the defendant has not made

[29] *Divorce Ordinance, 1952*, ss. 15 and 17; *Law Reform (Marriage and Divorce) Act, 1976*, s. 75.

adequate provision in respect of such funeral expenses.[30] Section 14(3) of the same Act provides for funeral expenses of the illegitimate child to be paid by the father. Such orders certianly cannot be made unless the court is satisfied that the defendant is the father of the child. It would only be fair and right that paternity be established this way or, at least, allow it to be presumed or evidence prima facie or otherwise of paternity.

In South Australia a different approach is adopted. Court orders and acknowledgement of paternity do not constitute mere prima facie evidence but conclusive evidence of paternity.[31] This is important especially when adoption is concerned.[32] Thus, when a man is conclusively held to be the father of a child, his relatives cannot produce further evidence to disturb the court's finding. In New South Wales where an order has been made under the *Maintenance Act* requiring a man named in the order to pay an amount for or towards the funeral expenses of an ex-nuptial child that man is presumed to be the father of the child.[33] He is further presumed to be the father of the child if a custody order had been made in respect of an ex-nuptial child and he is the man named in the order as being the father.[34]

In Malaysia evidence of paternity is not explicitly provided in any legislation. Whatever may be adduced as evidence is implicit, for instance, in the *Married Women and Children (Maintenance) Ordinance, 1950* and the *Law Reform (Marriage and Divorce) Act, 1976.* Section 3(2) of the 1950 Ordinance requires proof of paternity before a court can make a maintenance order for an illegitimate child. The 1976 Act provides maintenance for illegitimate children by their mother and father. It necessarily follows that evidence of paternity must be adduced prior to the court making a maintenance order.

[30] J.P. Bourke and J.F. Fogarty, *Maintenance, Custody and Adoption – Victoria*, Melbourne: Butterworths (3rd. ed.) (1972), 99.

[31] *Family Relationships Act*, s. 7.

[32] *Infra.*

[33] *Children (Equality of Status) Act*, s. 12(1)(a).

[34] *Id.* subsection (1)(b).

(c) Acknowledgement of Paternity

Acknowledgement of paternity is often undertaken at the time an illegitimate child's birth is being registered. In Victoria a man can enter into the Register of Births in relation to the child a certified copy of the entry purporting to be made or given under section 47 of the *Registration of Births Deaths and Marriages Act 1959*, or he may sign an instrument acknowledging that he is the father of the child, although it has to be executed as a deed. The consent of the child's mother is required in both cases unless the mother is dead, cannot be found, physically or mentally ill or by virtue of other reasons where consent could be dispensed with.[35] Clearly, there is no way where a father is able to have his name registered if the mother of the child withholds consent. It is questionable, therefore, whether the spirit of section 3 of the *Status of Children Act* is reflected here.

In Malaysia a somewhat similar situation prevails. Section 13 of the *Births and Deaths Registration Ordinance, 1957* provides that a Registrar shall not enter in the register the name of any person as father of the child except at the joint request of the mother and the person acknowledging himself to be the father of the child. In other words, if the mother refuses to request the child's father's name to be entered in the register, there is nothing the father can do. If the mother consents, both parties sign the register and the surname to be entered in respect of the illegitimate child will be the surname of the putative father. Otherwise, the surname of the child will be the surname of the mother.[36]

(d) Blood Tests

In the present state of medical knowledge, blood tests prove that a man could not, according to the biological laws of heredity, be the father of a particular child. It is unfortunate that tests can only provide conclusive evidence of paternity in a negative sense; they can prove that a man cannot be the father

[35] *Registration of Births Deaths and Marriages Act 1959*, s. 25(1) and (2), and s. 25A, as introduced by Act No. 8302 of 1972.

[36] Ss. 13 and 13A (2).

of a particular child.[37] Normally, there would be a seventy percent average chance of obtaining an exclusion result where a man is wrongly accused of paternity.[38] No positive evidence of paternity can be established by such a test and once doubt has been cast, particularly where a man denies fathering a child, it may be hoping too much that he will accept a non-exclusion result and treat the child as his own.[39]

Nevertheless, because of the cumbersome procedure of proving paternity otherwise, it has been suggested that blood tests be used instead. Proof of paternity is crucial in many instances involving an ex-nuptial child. If there is a fear that false accusations of paternity will be made in the absence of a corroboration requirement, provision for blood tests is the best way to allay it.[40] Even if blood tests are provided for in the statutes, they have to be conducted when either the father or the child is alive. This poses a problem especially in cases involving matters of succession because the nature of blood tests allow them to be conducted when the parties to disputes are alive.

The present law in Victoria does not encourage the use of blood tests in paternity proceedings. There is no power for courts of summary jurisdiction that hear affiliation cases to order the parties to submit to blood tests. The taking of blood from a person without his consent is an assault unless it is authorised by a court order. This causes difficulties both in cases of adults who refuse and the children who lack capacity to consent.[41]

The failure to provide for blood tests in Victoria explains the existence of section 27(2) in the *Maintenance Act 1965*, which provides that no order for maintenance may be made when the

[37] *S. v. McC.; W. v. W.* [1970] 3 W.L.R. 366, 372.

[38] *Ibid.*

[39] See M. Hayes, 'The Use of Blood Tests in the Pursuit of Truth' [1971] *Law Quarterly Review* 86; Neave, 354–58; R. Sackville and A. Lanteri, 'The Disabilities of Illegitimate Children in Australia: A Preliminary Analysis' (1970) 44 *Australian Law Journal* 51, 60.

[40] In New Zealand the *Domestic Proceedings Act 1968* provides for compulsory 'genetic tests'. This appears to extend to tests other than blood tests: s. 50.

[41] Sackville and Lanteri, 54; Hambly and Turner, 494–97.

court is satisfied that, at about the time when conception occurred, the mother had intercourse with men other than the defendant. While the section is designed to take into account the difficulty of establishing paternity in these circumstances, it ignores the role which blood tests might play. The section applies a complete prohibition against an order even if it seems entirely obvious that other men could not have fathered the child. Where illegitimate children legislation is concerned, the paramount consideration ought to be the child's needs. By depriving him maintenance, the legislation is actually punishing him for his mother's immorality. The introduction of blood tests is hence strongly advocated and section 27(2) should be repealed.[42]

In South Australia the *Community Welfare Act 1972–75* provides for blood tests but only for affiliation proceedings.[43] The evidence provided in blood tests would evidently be helpful in actions for declarations of paternity and the provision should be extended to cover this situation. While the defendant is allowed to request for blood tests in the Act, it is preferred if the court on its own motion directs the child, the defendant, or the mother, to be tested. Failure of each party to comply with the order should be accorded adverse inferences instead of dismissal of the complaint. When the child's right of support always depends on the mother's willingness, it might not always work in the best interests of the child when the mother withholds consent.

In New South Wales the *Children (Equality of Status) Act* does provide for blood tests in determining paternity and maternity[44] and it incorporates all the above-mentioned preferences in a blood test legislation.[45] The tests may be applied for in any civil proceedings in which paternity or maternity of a

[42] Neave, 355–56.

[43] S. 112.

[44] Maternity of a child usually present no problem and evidence of a doctor or nurse present at the time of delivery is available. Problems however arise when mothers deny their children if they are involved in a mix-up at a hospital in the period shortly after birth, or when the children are taken into the family and passed off as legitimate children when they are actually not. See Finlay and Bissett-Johnson, 247.

[45] *Children (Equality of Status) Act*, Pt. IV.

child falls to be determined.[46] The court before which the proceedings are taken may, on its own motion or on the application of a party to the proceedings, give directions for the use of blood tests. The taking of blood samples is given a specified duration of time but where the court has given a direction and a party to the proceedings has 'failed without reasonable cause' to take the steps required of him for the purpose of giving effect to the direction (including any step required of him with respect to a child under his care and control), the court may draw such inferences from that as appears to be warranted in the circumstances. In particular, the court may in the appropriate case, treat the failure as evidence corroborating the evidence of another party to the proceedings and, where the party is relying on the presumption of parenthood, as evidence rebutting that presumption.[47]

As earlier mentioned, in Malaysia results of blood tests are not recognised as evidence rebutting the presumption of legitimacy. Blood tests may not be able to prove a certain man as father of a child but the tests could nevertheless assist the courts in some cases where strict adherence to the presumption may engender ludicrous results.[47a]

(e) Limitations on Right of Succession

Although the Victorian *Status of Children Act 1974* seeks to do away with any sort of discrimination against ex-nuptial children, section 7 places some obstacles to their right of succession. If the ex-nuptial wants to share in the estate of his father he must show that paternity has been admitted expressly or by implication or established against the father in the father's lifetime. This disadvantages a child who discovers his paternity only after his father's death.

Section 10 provides that an application may be made to the Supreme Court for a declaration of paternity, whether or not the father, or child, or both of them, are living, but such a declaration obtained after the death of the father will be of no

[46] S. 19.

[47] S. 21(1).

[47a] See 'Children born out of wedlock — Legal status' [1976] 1 Malayan *Journal* xxii.

use generally for any purposes enumerated in section 7. This obstacle is further emphasised because not only is the child prejudiced in succeeding to his father's estate, he is also prejudiced where a claim is being made upon any other estate and the success of the claim depends upon the establishment of a relationship of father and child.

Another complication is the provision that admission may be express or implied. There is little doubt that recognition for the purpose of section 7 can take place by conduct. If the courts place a liberal interpretation on the requirement and are ready to give almost anything the potentiality of an admission in proper cases, the objectionable features of the provisions may be largely overcome. Cameron had forwarded an example where X, a bachelor, has intercourse with an unmarried girl, who becomes pregnant.[48] There is no doubt in anyone's mind that the child is his, both families accept the situation and are prepared to welcome a marriage. A wedding is arranged but before the ceremony, X is killed. In such cases, would such admissions be valid when the child is not yet born? Morally, this is the type of cases where the Act should apply.[49]

The probable rationale for this section is fear that claim might be made after the death of an alleged father when the father was no longer in a position to refute the claim. The other justification is that if the father has not admitted paternity or had it established against him, he is unlikely to turn his mind to the existence of the child when making a testamentary disposition or executing a trust deed. In such a document he may exclude the child because he is unaware of its existence, or has no connection with it at all. But this argument carries little weight in cases of intestacy. Generally, a person who can show a sufficiently close relationship to the intestate is entitled to a share of his estate, regardless of whether or not he was aware of the existence of the child during his lifetime. On the other hand, there may be more justification in requiring a father to establish his claim during the child's lifetime because it is in-

[48] B.J. Cameron, 'The Twilight of Illegitimacy' [1969] *New Zealand Law Journal* 621, 624.

[49] In West Germany it is possible for the father to acknowledge the child before birth. See J.N. Turner, *Improving the Lot of Children Born Outside Marriage*, National Council for One-Parent Families (1973), 17.

conceivable if he had had no real paternal relationship with the child during its lifetime to simply base his claim on biological relationship. He had not fulfilled any of his duties as a father when the child was alive and is claiming benefits when it dies.[50]

When an ex-nuptial child wishes to claim on the intestacy of his father he must necessarily prove two things, namely, he must prove paternity and he must show that paternity was admitted by, or established against, the putative father during his lifetime. The prima facie evidence of paternity in section 8 is inadequate as relatives of the alleged father could introduce evidence to show that despite the maintenance order against him, he was not in fact the father. Only a declaration from the Supreme Court would conclusively establish paternity. Still, the second requirement needs to be proved.

B. SUCCESSION

(a) Construction of Wills and Deeds

Under the common law, the fate of illegitimate children in matters of succession was fixed by the court in the case of *Hill* v. *Crook*,[51] where it was held that a gift to children as a class is prima facie to be construed as a gift to legitimate children only. This presumption could however be rebutted if it is shown that the testator had intended to benefit the illegitimate children as well. Hence, although the general policy says that no illegitimate child is precluded from taking under a will of deed, there is still a presumption against this right.

This effect of the judgement in *Hill* v. *Crook* is abolished by section 3(2) of the Victorian *Status of Children Act*.[52] It says:

> 'The rule of construction whereby in any instrument, in the absence of expression of any intention to the contrary, words of relationship signify only legitimate relationship, is abolished.'

Henceforth, in deeds or wills executed after the commencement of the Act, the settlor or testator must clearly evidence an intention to exclude an ex-nuptial child because the mere use of

[50] Neave, 341–42.

[51] (1873) L.R. 6 H.L. 625.

[52] Tas.: s. 3(2); S.A.: s.6(2); N.S.W.: s. 7(2).

the words 'legitimate' or 'lawful' children will be inadequate to express such intention.[53] Names of the children could be used instead, but this would exclude children to be born after the will has been executed. These unborn legitimate children could still be provided for if the phrase 'to the children of A by his wife B born after their lawful marriage' or 'children born after their lawful marriage' is used.[54]

Hill v. *Crook* is also authority for the rule that a gift to illegitimate children to be born in the future is void as contrary to public policy, since such a gift is said to promote immorality. This can scarcely amount to an inducement to immorality since a will is a secret document and can always be revoked by the testator during his lifetime.[55]

The object of the rule may be the discouragement of immorality, but some of its results might be 'ludicrous if they had not been so unjust'.[56] An example is where a testator makes a will in favour of 'my children by B (his mistress) now living or hereafter to be born'. He has two children then living by B; another is born subsequent to the date of the will. The first two can take while the third cannot no matter how careful the instrument is designed. It was suggested that since the decisions governing this rule are all eighteenth and nineteenth century decisions, 'a rule that disinherits a child because he happens to be born after the date of his father's will must long have ceased to have any moral or social credibility'.[57]

While the other Australian statutes do not mention this second rule in *Hill* v. *Crook*. the New South Wales legislation purports to abolish it but only insofar as dispositions affected by the Act are concerned. Section 7 of the *Children (Equality of Status) Act 1976* provides in subsection (4) that –

> '. . . any rule of law that a disposition in favour of an ex-nuptial child not conceived or born when the disposition

[53] Vic.: s. 3(3); N.S.W. s. 7(3).

[54] G.W. Hinde, R.J. Sutton, P.R.H. Webb, M.A. Vennell, D.R. Mummery, B.T. Brooks, and K.A. Palmer, 'Status of Children Act 1969 – A Conspectus' [1970] *Recent Law* 38.

[55] Finlay and Bissett-Johnson, 268.

[56] Cameron, 623.

[57] *Ibid.*

takes effect is void as being contrary to public policy is, with respect to a disposition to which this section applies, abolished.'[58]

The new rule regarding the construction of wills and deeds applies only to instruments that are executed after the commencement of the legislation.[59] Therefore, irrespective of the date of the testator's death, his testamentary dispositions will be governed by the law applicable, if they were made before the 1st. of March, 1975 in Victoria. If a testator executes a will containing a gift to his children in 1973 and does not die until 1990, the gift will at that time be construed as a gift to legitimate children only. Although the provision is designed to effectuate the testator's intention which was expressed before the legislation came into force, in the present circumstances the results could be harsh. The ex-nuptial child of the testator is not advantaged by the new law which would have been enforced for fifteen years. The eventual result will be to thwart attempts by the Act to equalise children and the status of illegitimacy will have a lingering effect or a 'long twilight'.[60]

As the position stands, no existing testamentary disposition needs to be revised because of the passing of the Act, although the drafting of any subsequent codicil has to be watched with care. To alleviate the plight of the disadvantaged children, it is suggested that on a fixed future date the provision of the Act ought to be made applicable to all wills irrespective of dates of execution. This means that a testator who wishes to benefit only his legitimate children needs to meet the requirements of the Act by altering his will. In this way, the testator's intention will not be defeated and the ex-nuptial children will not be deprived of rights to property. Even when the *Status of Children Bill* was read in the Victorian Parliament, the opposition had expressed the view that the Act ought to apply prospectively to all persons who die after the passage of the Bill,

[58]Section 7 relates to dispositions made inter vivos after the commencement of the Act and dispositions made by will or codicil executed before or after the commencement of the Act by a person who dies after that commencement.

[59]Neave, 335. See Victoria, *Parliamentary Debates*, Legislative Assembly, 16 October, 1974, 1210–1211, per Mr. B. Jones.

[60]Cameron, 622.

irrespective of the date of execution of their wills. The idea is that the people who do not wish illegitimate children to be included ought to change their wills.[61]

New South Wales has accommodated this difficulty by making the statute applicable to dispositions made inter vivos after the commencement of the Act and dispositions made by will or codicil executed before or after the commencement of the Act by a person who dies after that commencement. It implicitly means that if the will is executed before the Act commences and the testator dies before that commencement, the Act becomes inapplicable. If he dies subsequent to the commencement, there is a presumption that he has taken note of the statute and amends his will or codicil accordingly. A certain reasonable period of time is however required to give the public notice of the provisions contained in the new Act or wide publicity of their implications be undertaken prior enforcement. The Act is further much wider in application since it also includes dispositions made inter vivos.

In dispositions mentioned above, any special power of appointment will include illegitimate children.[62] In other states too where an instrument is excluded under the recent legislations, any special power of appointment does not extend the class of persons in whose favour the appointment may be made or cause the exercise of the power to be construed so as to include any person who is not a member of that class.[63] An example provided[64] is, suppose that A, by his last will validly executed in 1970, gave all his estate to B for life and then to such of B's children as B should by deed or will appoint. A dies in 1972 and in 1976, B, by deed, appointed the remainder to his 'children' in equal shares. Suppose that B had a child born out of wedlock in 1972 and two children born in lawful wedlock in 1973 and 1974 respectively. The fact that the deed of appointment was executed after the commencement of the Act is irrelevant. A's will, which created the special power of

[61] Victoria, *Parliamentary Debates*, Legislative Assembly, 12 November, 1974, 1948, per Mr. B. Jones.

[62] *Children (Equality of Status) Act*, s. 8(2).

[63] Vic.: s. 4(2); Tas.: s. 4(2).

[64] Hinde, *et al.*, 40.

appointment, having been executed in 1972, is an instrument to which section 4(1) of the Act applies, so that, by section 4(2), nothing in the Act can 'extend the class of persons in whose favour the appointment may be made, or cause the exercise of the power to be construed so as to include any person who is not a member of that class'. Therefore, the reference to 'B's children' in A's will must be construed as a reference to B's legitimate children, so that only B's two legitimate children could take under the deed of appointment.

In Malaysia the relevant statute governing wills is the *Wills Ordinance, 1959*.[64a] Nowhere in the Ordinance has 'child' or 'children' been defined. Accordingly, the common law of England on the 7th. of April, 1956 will apply[65] and the presumption that illegitimate relations do not take is the law relating to wills in Malaysia.[66]

(b) Distribution on Intestacy

The Victorian law of intestacy discriminates against the ex-nuptial child because such a child could succeed to his mother's estate only if she has no other legitimate issue of her own.[67] Again, if she has a husband but no legitimate children, the share of the ex-nuptial child is not two-thirds of the intestacy but half with the other half passing to the husband.[68] The mother of an ex-nuptial child who dies intestate has similar rights in the child's estate as she would have if the child had been born legitimate.[69] On the other hand, an ex-nuptial child has no right to share in the distribution of his intestate father's estate, nor has a putative father the right to share in the distribution of his ex-nuptial child's intestate estate.

[64a] This Ordinance does not apply to Muslims: s. 2(2).

[65] By virtue of the *Civil Law Act, 1956*, s. 3(1)(a).

[66] It would appear that, generally, adopted children do not take under a will unless expressly mentioned in it: see *Re Tan Hong Decd.* [1962] M.L.J. 355. In England the *Family Law Reform Act 1969* has completely reversed the position with regard to illegitimate relations. Thus, in respect of post-1969 wills, there is a presumption that they do take. See A.R. Mellows, *The Law of Succession*, London: Butterworths (3rd. ed.) (1977), 178.

[67] *Administration and Probate Act 1958*, Pt. I, Div. 6.

[68] S. 52(2)(a)

[69] *Id.* subsection (2) (b).

Section 4(3) of the Victorian *Status of Children Act* provides in effect that the estates of all persons who have died either partially or wholly intestate before the commencement of the Act are to be distributed in accordance with the enactments and rules of law which would have applied to them if the Act had not been passed. Hence, unlike in the case of a will where the testator's date of death is irrelevant, it is the date of the intestator's death which determines application of the Act in the case of an intestacy.

Where a person dies after the commencement of the Act, section 7 declares the position of an ex-nuptial child to be similar to that of a legitimate child for the purposes of intestacy. However, as shown earlier, there is still the need to prove admission of paternity (expressly or impliedly) by the father or establishment of peternity against the father in his lifetime and, if the father is the beneficiary of the child, paternity has to be so admitted or established while the child was living. This requirement indeed obstructs the right of the ex-nuptial child to his father's intestacy.

The relevant statutes in Malaysia are the *Distribution Ordinance, 1958*[69a] and the *Legitimacy Act, 1961.* Section 3 of the *Distribution Ordinance* clearly specifies what sort of children the Ordinance is referring to when it defines 'child' to mean 'a legitimate child and where the deceased is permitted by his personal law a plurality of wives includes a child by any of such wives . . .' Thus, an illegitimate child is not considered when distributing an intestate's estate.[69b] The *Legitimacy Act* has improved the position of an illegitimate child as regards his rights to his mother's intestacy, albeit in a very limited way. If his mother dies without leaving any legitimate issue, the Act vests in him an interest in her property. It follows that if she has other legitimate children, he does not have any right in her intestacy at all. But, when he dies intestate, his mother, if alive, will take any interest therein to which she would have been

[69a] This Ordinance does not apply to Muslims: s. 2.

[69b] Although an adopted child has been excluded in the definition of 'child', he would be able to claim a share in his adopting parents' intestate estate because, on adoption, he is deemed to stand in relation to his adopters just like their real child: see sections 9 and 29 of the *Adoption Ordinance, 1952.*

entitled if the child had been born legitimate and she had been the only surviving parent.[70] As in Victoria, the *Legitimacy Act* has excluded the right of an illegitimate child to his father's intestacy and vice versa.[71]

(c) Testator's Family Maintenance

The Victorian *Administration and Probate Act 1958* provides for rights of certain relatives of a deceased person to claim a share in the estate if the will of that person fails to make adequate provision for their proper maintenance and support. Since 1962,[72] an illegitimate child has been able to apply to the Supreme Court for further provision from the estate of a deceased father or mother where the distribution of the estate, either by will, or by operation of the intestacy provisions adequate provision is not made for the child's 'proper maintenance or support'. Thus, although an illegitimate child could not claim a share in the intestate estate of his father as of right, he could make a claim under this statutory provision.

The definition of children entitled to make a claim against the estate of the deceased includes 'illegitimate children of the deceased totally or partially dependent on or supported by the deceased immediately before his death or in respect of whom there was then in force against the deceased an order for the payment of maintenance or confinement expenses.'[73] The illegitimate child is still disadvantaged because he has to show his dependency upon the deceased immediately before death. In the case of the legitimate child he could apply to the court by virtue of the existing relationship between himself and the deceased, although the claim might be unsuccessful for reasons such as the child's maturity and independent means. The purpose for this limitation on the illegitimate child is to limit applicants to those who had been recognised by the deceased father before his death. The setbacks of this limitation have

[70] S. 11(1) and (2).

[71] In England the *Family Law Reform Act 1969* treats an illegitimate child in the same way as a legitimate child. Thus, illegitimate children can benefit even on their fathers' intestacies: s. 14.

[72] *Administration and Probate (Family Provision) Act, 1962,* s. 5.

[73] S. 91.

been discussed in relation to section 7 of the *Status of Children Act.*[74]

An anomaly created by this provision in the *Administration and Probate (Family Provision) Act 1962* is while an illegitimate child does not have any rights of succession upon the death intestate of his father, he is still permitted to bring court proceedings to secure adequate provision from the estate, provided he can meet the various requirements imposed. Once it is established that the illegitimate child, at least if he has been maintained by his father, is entitled to a moral claim on his father's estate, it seems to follow that he should have automatic rights of succession under the legislation governing the distribution of an intestate's property.[75]

Even when an illegitimate child has rights of application it does not follow that a court will equate an application by an illegitimate child with that of a legitimate child. In *Re Wren,*[76] Smith, J. held that there is no prima facie rule of equality or inequality to be applied in determining competing claims of legitimate or illegitimate children. The court's duty is to consider the case of each applicant individually in the light of all relevant circumstances, and to assess, in accordance with the general principles applicable to such applications, what provision it is necessary to make in order to adequately provide for the applicant's proper maintenance. The relevant circumstances, in a case such as the present, would include the legitimacy or illegitimacy of the children with competing claims, the present state of the law, and prevailing social attitudes relating to illegitimacy insofar as each of those has a bearing upon the extent of the deceased's moral duties or upon the future of the claimants.

In Malaysia the statute which provides for the rights of certain relatives of a deceased person to claim a share in the estate if the will of that person fails to make adequate provision for their proper maintenance and support is the *Inheritance (Family Provision) Act, 1971.* Section 3 lists four types of possible claimants:

[74] *Supra.*

[75] Sackville and Lanteri, 60.

[76] [1970] V.R. 449.

(a) a wife or husband;
(b) a daughter who has not been married, or who is, by reason of some mental or physical disability, incapable of maintaining herself;
(c) an infant son; or
(d) a son who is, by reason of some mental or physical disability, incapable of maintaining himself.[77]

'Son' and 'daughter' have been defined to include 'a male or female child adopted by the deceased under the provisions of any written law relating to the adoption of children for the time being in force and also the son or daughter of the deceased *en ventre sa mere* at the date of the decease'.[78] It would appear that illegitimate children are excluded from the provisions of this Act as, if they were intended to benefit from the Act, the definition would have mentioned them. The position of illegitimate children in this respect differs from that in Victoria.

(d) Protection of Executors, Administrators and Trustees

Testators may have ex-nuptial children the existence of whom may be concealed by the testators or the children's mothers. The purpose of section 6 of the Victorian *Status of Children Act*[79] is to protect executors, administrators or trustees who distribute property in ignorance of the existence of an ex-nuptial child. Thus an executor, administrator or trustee is under no obligation to inquire as to the existence of any person who could claim an interest in the estate or property by reason only of the Act. These categories of persons are further protected against any action by any ex-nuptial children where a distribution of property has been made and at the time of such distribution these persons had no notice of the relationship upon which the claim is based.

Although it is, to a certain extent, reasonable to protect the personal representatives or trustees, the protection given here is probably too wide. There is, for instance, no requirement where they have to advertise for ex-nuptial children to come forward

[77] See Federation of Women Lawyers, *Some Thoughts*, lxxxvii. This Act does not apply to Muslims: s. 1(2).

[78] S. 2.

[79] S.A.: s. 12; Tas.: s. 6.

with their claims or to 'follow up any suspicion or rumour of which they have notice'. In other words, they are under no duty to seek out possible beneficiaries. This position can be compared to that of legitimate beneficiaries where the trustees would be personally liable if they had not included any legitimate beneficiaries in the distribution of the property.[80]

The problem of protecting personal representatives or trustee do not arise in Malaysia because illegitimate children do not have the right to claim against their parents' testacy.

C. MAINTENANCE

Maintenance for ex-nuptial children in Victoria is possible only through affiliation proceedings. The *Maintenance Act 1965* makes provision for a claim to be brought on behalf of the mother during her pregnancy or, within twelve months of the child's birth, for 'preliminary' or 'confinement' expenses.[81] These expenses are defined to include the woman's maintenance expenses for two months preceding the confinement, reasonable medical, surgical, hospital and nursing expenses and the maintenance of the mother and child for three months after the birth.[82] An order for future maintenance of the child may be made on the hearing of the complaint for preliminary expenses.[83] The father may be made to pay for funeral expenses upon the death of the child or of the mother in consequence of her pregnancy. Further orders for the payment of special medical and like expenses of the child in respect of whom an order is in force may be made too.[84]

The *Status of Children Act* in its schedule amends the *Maintenance Act* but the amendments are only minor ones relating to terminology used. Thus while the legitimate child may apply for maintenance from his father by virtue of their relationship, an illegitimate child has to depend on his mother's application through affiliation proceedings. Further, while

[80] Neave, 346; Turner, *Improving the Lot of Children*, 42; Turner, 'Children Born Outside Marriage', 458.

[81] S.12.

[82] S.3.

[83] S. 13.

[84] S. 16.

several orders may be made for the benefit of the nuptial child under the *Family Law Act 1975*,[85] those that are available to the ex-nuptial child are very limited.[86] It was earlier shown how corroboration of the mother's evidence of paternity of an ex-nuptial child is required and if the mother refuses to undergo blood tests, there is no way the court can order them. The ex-nuptial child is further disadvantaged here because the relationship of the child to the usual breadwinner and his source of support is often uncertain and difficult to prove. Indeed, his rights to maintenance are meaningless if his father cannot be traced.

There may be instances where even the mother of an ex-nuptial child deserts him and he is left to fend for himself. For such situations the *Marriage Act 1958* provides for maintenance by the mother. Section 17 of the Act reads:

> 'The mother of an infant to whose father she was not married at the time of its conception shall with or without assistance from the putative father maintain such infant. . . until such child attains the age of sixteen years.'

Whereas a nuptial child is entitled to maintenance until the age of eighteen years[87] the ex-nuptial child is discriminated against and can be maintained only up to sixteen years of age. The mother of an ex-nuptial child further has to support her child under section 11 of the *Maintenance Act*.

The *Married Women and Children (Maintenance) Ordinance, 1950* provides for the maintenance of an illegitimate child in Malaysia by his mother or father if the child can prove that he is unable to maintain himself and that his mother or father has neglected or refused to maintain him. Upon due proof thereof, the court orders such monthly allowance not exceeding fifty dollars, as to the court seems reasonable.[88]

[85] No. 53 of 1975, Pt. VIII.

[86] The *Family Law Act 1975* is inapplicable to ex-nuptial children because it is a Commonwealth legislation and the Commonwealth Parliament has no jurisdiction over matters governing ex-nuptial children: s. 51, Placitum (xxi) (xxxix).

[87] *Family Law Act 1975*, s. 73.

[88] S. 3(2). This Ordinance does apply to Muslims if adopted by the respective State legislature: s. 13. See Ahmad Ibrahim, 262.

The *Law Reform (Marriage and Divorce) Act, 1976* has alleviated the plight of illegitimate children in the area of maintenance because sections 2 and 87 provide for the meaning of 'child' to include an illegitimate child of either of the parties to the marriage who is under the age of eighteen years. Hence, it is the duty of a parent to maintain or contribute to the maintenance of his or her children, including illegitimate children, either by providing them with such accommodation, clothing, food and education as may be reasonable having regard to his or her means and station of life or by paying the cost thereof.[89] The court may at any time order a man to pay maintenance for the benefit of his child if he has refused or neglected to provide for the child.[90] The court has the corresponding power to order a woman to pay or contribute towards the maintenance of her child where it is satisfied that having regard to her means it is reasonable so to order.[91] The *Law Reform Act* therefore does not only entitle an illegitimate child to be maintained by his father but also by his mother. The amount of maintenance is no longer restricted to fifty dollars but left open and dependent on circumstances of the case.[92]

D. GUARDIANSHIP, CUSTODY AND ACCESS

Related to an ex-nuptial child's rights are the rights of his putative father, especially when the latter has recognised and acknowledged him as his son or daughter. Besides adoption, which will be discussed under the next heading, guardianship, custody and access are areas where rights of the putative father are most affected.

(a) Guardianship

A guardian is a person with the responsibility to look after a child's moral and physical welfare, to protect and control its property and to ensure that it is properly educated. It is possible to have the guardianship of a child vested jointly in the

[89] S. 92.

[90] S. 93.

[91] *Id.* subsection (2).

[92] S. 109 and Schedule.

parents but its custody separately.[93] In that case the parent who is only a joint guardian must be consulted in all major decisions affecting the child's well-being and his property, while the sole custodian actually cares for the child.[94]

One of the areas in which a guardian has a right over his child is its surname. In the case of legitimate children, the authorities have established that the court has jurisdiction to interfere where a mother, as a sole custodial parent, has changed the surname of the child without the consent of the father.[95] In the case of illegitimate children, it would appear that the court has jurisdiction to interfere as well. A case in point is *G* v. *P*,[96] where the applicant was the putative father and the respondent was the mother of an ex-nuptial child, who on birth was registered under the name of her putative father. The respondent had subsequently married another man and adopted his surname in relation to the child. The applicant applied for an order directing the respondent to use in relation to the child her putative father's surname. It was held that both at common law and pursuant to section 147 of the *Marriage Act 1958*,[97] the court has jurisdiction to direct that the mother of an illegitimate child cause her infant to be known by his putative father's surname. After referring to section 3(1) of the *Status of Children Act*, Kaye, J. said that the putative father occupies the same position in law in relation to his natural child as he does to his child in wedlock. He went on to say that by parental right, the father of a legitimate child is the guardian of that child, even when the mother had been awarded custody. The ultimate effect of section 3(1) would be that the father of the illegitimate child is his guardian[98] and the mother's action in seeking to change the child's surname without his consent had infringed his right as such a guardian.

[93] See *Neale* v. *Colquhoun* [1944] S.A.S.R. 119.

[94] *Seabrook* v. *Seabrook* [1971] N.Z.L.R. 997. See P.E. Nygh, *Guide to The Family Law Act 1975*, Sydney: Butterworths (1975), 78.

[95] *In re T (an Infant)* [1963] Ch. 238; *Y* v. *Y* [1973] Fam. 147.

[96] [1977] V.R. 44.

[97] As amended by section 12 of the *Status of Children Act 1974*.

[98] In the case of a legitimate child, his parents have joint guardianship over him; *Family Law Act 1975*, s. 61. See Chisholm, 42.

While the putative father is considered a guardian of his ex-nuptial child in *G* v *P*, the Supreme Court in an unreported case[99] held that he is not such guardian meant in the *Adoption of Children Act 1964* because the term 'guardian' does not carry its ordinary meaning, that is, solely from parentage and immature age of the child. Instead, it means a person to whom the law of the state gives certain powers as regards a child. This case will be dealt with again when custody and adoption are discussed.

The relevant statute governing guardianship in Malaysia is the *Guardianship of Infants Act, 1961*.[99a] Section 3 provides that the guardian of the person of an infant also has the custody of the infant and he is responsible for the infant's support, health and education. The father of an infant is ordinarily the guardian of the infant's person and property[1] but the court may make such order as it thinks fit regarding the custody of the infant and the right of access thereto of either parent.[2] Thus, even in Malaysia, guardianship and custody can be awarded to different parents.

The *Guardianship of Infants Act*, however, does not provide for the guardianship of illegitimate children. This was confirmed in the case of *Re Balasingam and Parvathy, Infants.*[3] There, the applicant had applied under the Act for custody of her two infant children who were born illegitimate. The question before the court was whether the High Court has jurisdiction to entertain an application by the *de facto* mother for a custody order under the Act. It was held that 'infant' means legitimate infant unless there is some violation of a moral obligation or of a probable intention resulting from so interpreting the word. Since none of the words 'father', 'mother', or 'infant' appearing

[99] Judgement delivered on the 23rd April 1976.

[99a] With the exception of Kelantan, this Act has been adopted, with necessary modifications, to extend to Muslims, by all the states in Peninsular Malaysia: Ahmad Ibrahim, 250.

[1] See Federation of Women Lawyers, *Some Thoughts*, lxxvi–lxxvii; Tan Sri Datuk Haji Abdul Kadir bin Yusof, 'Women and The Law' [1975] 2 *Malayan Law Journal* xxi, xxiii–xxiv.

[2] S. 5.

[3] [1970] 2 M.L.J. 74.

in sections 5 and 6 of the Act can be construed to mean the *de facto* parents of illegitimate children or illegitimate infants, the court concluded that the Act does not apply to illegitimate children and therefore the court has no jurisdiction to make the order sought.

(b) Custody

Under the common law, nobody has a right to the custody of the ex-nuptial child by virtue of his *filius nullius* status. Subsequently, the mother is given the right. In the case of a legitimate child, both parents have a right to the child's custody unless deprived by a court order. The father of an ex-nuptial child may apply for the custody of the child but his claim is normally inferior to that of the mother and will be upheld if the child will benefit by the father having custody.[4] In *Edwards* v. *Hamment*,[5] Barry, J. said:

> 'So far as the position of the putative father is concerned the authorities establish that while he can assert no legal rights with respect of the child, in an appropriate case, if the Court considers that it will be for the benefit of the child that he should be associated with it, rights will be given to him by curial order'.[6]

Since the mother generally has custody it is for her to determine the manner of the child's upbringing, and the religion it will adopt. It is also for her to decide whether to consent to the child's marriage if the child is a minor. It is only when the father does acquire custody of the child that he acquires the legal rights of a guardian that he did not previously possess.[7] Without a custody order the father of an illegitimate child has duties but no rights to control the child's upbringing. *G* v. *P.*[8] seems to have slightly altered the position. Although the mother may have custody of the child, the father as a parent is, nevertheless, the guardian by

[4] See *Marriages Act 1958*, s. 147.

[5] [1948] *V.L.R. 110.*

[6] *Id.* 113.

[7] Finlay and Bissett-Johnson, 265.

[8] [1977] V.R. 44.

virtue of section 3(1) of the *Status of Children Act.* Clothed with legal rights of a guardian, it is apparent that his consent is required for adoption and for marriage if the child is a minor. This argument was not accepted in an earlier mentioned unreported case[9] where Jenkinson, J. held that the *Status of Children Act* does not necessarily entitle the putative father to legal rights of a guardian. The learned judge probably meant this to be applicable only in adoption cases.[10]

In *Nobels* v. *Anderson*[11] and *Westwood* v. *Palise*[12] the Supreme Court of Victoria considered references by which the claim to custody of an infant by a father who has not married to the mother is to be determined. In *Nobels* v. *Anderson,* the applicant had separated from his wife and shortly thereafter set up home with another woman. They lived together as man and wife until she was killed in a motor car accident. During their period together two children were born to them and although it was the applicant's intention to marry her when he was free to do so, they were unmarried at the date of her death and the children remained illegitimate. After her death, the applicant placed the children in the care of the respondents as a temporary measure. When he had arranged his affairs he requested that the respondents surrender the children to him. Respondents refused and he sought an order that the children be made wards of the court and that their custody be committed to him. Crockett, J. decided that the lack of status of the children required that in all the circumstances they be made wards of the court. He further decided that the principle upon which the question of custody should be decided is that the welfare of the children should be regarded as the first and paramount consideration. A parent has a preferred role in questions of custody when in competition with the claim of blood relations or strangers but the weight to be given to the fatherhood in determining what is best for

[9] *Infra.*

[10] *Supra.* n. 99.

[11] [1972] V.R. 821.

[12] [1973] V.R. 311.

the welfare of the illegitimate children will depend on the circumstances that attend the illegitimate paternity and which are ordinarily peculiar to such paternity. Since the applicant's relationship with his mistress was in all respects comparable, during its currency, with that of a normal family, and it was merely the unfortunate death of the mother which prevented the regularisation of the union and the legitimation of the children, the care and control of the children were given to the applicant.

In *Westwood* v. *Palise*, an illegitimate child was born to the mother from her association with the applicant. The relationship between the mother and the applicant was more than casual and after the birth of the child they cohabited and affirmed their plans to marry but were unable to do so because of the refusal of the mother's parents to consent. The mother subsequently died in a motor car accident. Thereafter the applicant had the de facto custody of the child. The mother's parents commenced proceedings for orders that the child be made a ward of the court and that custody be given to them. Applicant then began cross-proceedings for his child's custody. Adam, J. held that in the circumstances, including the factors attendant upon the parenthood of the applicant, the strength of the bond between the child and himself, and events occurring after the accident, custody should be awarded to the applicant father with liberal access granted to the parents of the mother.

In the unreported Victorian case earlier mentioned, a son and a daughter were born to the mother and applicant father and these two children were the subjects of two applications before the court; the one pertinent here is regarding custody. The father had applied for their custody and when considering this application, Jenkinson, J. referred to the two cases described above. He was of the view that the *Status of Children Act 1974* does not require any of the principles stated in those cases to be substantially modified. In fact the Act makes it very clear that

> '. . . fatherhood, within or without the marriage bond, is to be taken into consideration in the determination of disputed custody and is to be given such weight as the particular circumstances which have attended the bio-

> logical relationship requires. The Act may also be said to reinforce the human tendency to invest the biological relationship of parent and child with powerful emotional bonds among those whose relationship has not been reinforced by the marriage of the parents. Since it is that tendency upon which judicial preference for blood relationship in custody proceedings is based, the Act may perhaps be regarded as an encouragement to the courts to look with favour upon the claim to custody of a putative father. . .'

But this is, of course, still subjected to section 147 of the *Marriage Act 1958* in a case to which that section applies.

This case differs in one aspect from the two previous ones because here the court had to decide between the putative father and the prospective adoptive parents of the two children. At the time of the hearing, the children were under the care and control of an adoptive agency and the mother and the principal officer of the adoption agency had proposed to commit them to the care of the proposed adopters as a step towards adoption. Expert evidence showed that any disturbance of the children's custody after they have been removed from the care of their present foster parents and placed with a couple who are at that time virtual strangers to them would involve a great risk of serious psychological harm. Nevertheless, the court was satisfied that if the father was granted custody of his children, he was very likely 'to misjudge and disregard their needs under the pressure which that responsibility would impose on him'. In this event, the best interests of the children were considered and the father's application was dismissed.

Under the Malaysian *Guardianship of Infants Act*, guardianship and custody are separate concepts and may be awarded to separate parents. Besides mentioning custody in sections 3, 5 and 13, the Act does not make further reference to the duties of a parent granted custody or to the considerations a court must take before awarding custody to any parent. The *Civil Law Act* however does provide that in all cases relating to the custody and control of infants the law to be administered is the same as would have been administered in like cases in England at the date of the coming into force

of the Act, regard being had to the religion and customs of the parties concerned, unless other provision is or shall be made by any written law.[13] The law in England in 1956 clearly disentitles the putative father or the *de facto* mother of an illegitimate child from applying to the court for a custody order and the case of *Re Balasingam and Parvathy, Infants*[14] merely affirms that law.

The *Law Reform (Marriage and Divorce) Act, 1976* has improved the existing law related to custody as it governs both legitimate and illegitimate children.[15] Thus, the court can by order place a child in the custody of his father or mother, or where there are exceptional circumstances making it undesirable that the child be entrusted to either parent, of any relative of the child or of any association the objects of which include child welfare or to any other suitable person.[16] Before making the custody order, the court is to have regard to the wishes of the parents of the child and to the wishes of the child, where he is of an age to express an independent opinion.[17] There is a rebuttable presumption that it is for the good of a child below the age of seven years to be with his mother but in deciding whether that presumption applies to the facts of any particular case, the court is to have regard to the undesirability of disturbing the life of a child by changes in custody.[18] Section 89 lists the conditions which may be included in a custody order.

(c) Access

Common law jurisdictions normally take the view that fathers of children born within marriage virtually have an automatic right to access on separation. It would be anomalous presently to deny access to an acknowledging father of a child born out-

[13] S. 27. See Ahmad Ibrahim, 142–44, and, inter alia, *Chuah Thye Peng* v. *Kuan Huah Oong* [1978] 2 M.L.J. 217; *Tan Eng Kim* v. *Yew Peng Song* [1977] 1 M.L.J. 234; *Loh Kon Fah* v. *Lee Moy Lan* [1976] 2 M.L.J. 199; *J.* v. *C.* [1969] 1 All E.R. 788.

[14] *Supra.*

[15] Part VIII, read with s. 2.

[16] S. 88(1).

[17] *Id.* subsection (2) (a) and (b).

[18] *Id.* subsection (3).

side marriage. In the case of *Edwards* v. *Hamment*,[19] a married woman had resumed cohabitation with her husband but prior to that she had had two illegitimate children with another man. Application was filed by the father of the two children for access but this was refused on the ground that it was not for the benefit of the children that the father should have access. The Supreme Court however held that it has jurisdiction to order that the father of an illegitimate child have custody of or access to such a child. The *Status of Children Act* should further enhance the rights of a putative father of access to his illegitimate child.

E. ADOPTION

In Victoria although the rights of custody and access of a putative father is inferior to that of the mother, the father do have a say in the matter. However, in the case of adoption, the mother has the sole voice as to consent. The *Status of Children Act 1974* merely amends the *Adoption of Children Act 1964* by substituting the words of section 23(3) from 'an illegitimate child' to 'a child whose parents were not so married to each other'. If the relationship between an ex-nuptial child and his father is established irrespective of whether the father or mother are married to one another, one questions the rationale of this discrimination in the rights of a putative father.

The effect of the new amendment is illustrated in the already mentioned unreported case where counsel for the principal officer of the adoption agency submitted that the father was not a person whose consent to the adoption of his children was required by section 23 of the *Adoption of Children Act 1964*. Counsel for the father denied this submission because although before the 1st of March 1975 his client was not a person whose consent to the adoption of the two children was required by section 23, on that date the *Status of Children Act 1974* commenced and, therefore, the father became a 'guardian' of each of the children within the meaning of that word in section 23(3). Jenkinson, J. however was of the opinion that what was intended by the adoption legislation when they used the word 'guardian' in collocation with the word 'parent' was not those

[19] [1948] V.L.R. 110.

rights in relation to the custody, care and control of the legitimate children derived solely from parentage and the immaturity of the children and characterised by the word 'guardianship' in legal language. He referred to the definition of 'guardian' in section 4(1) of the *Adoption of Children Act 1964* which says:

'a person who is or is deemed to be the guardian of the child . . . under a law of . . . a State'.

This limits the term to a person whose claim to the name of 'guardian' derives from statute law and not by mere biological relationship. Indeed, had the draftsman intended that the consent of the putative father should be required, that could be achieved by repealing subsection (3) and deleting from subsection (2) the word 'legitimate'.

It is interesting to note that although the putative father's consent is not required, the court may prevent adoption by considering the best interests of the child. This is an indirect way in which a father may achieve his objectives. In the case of *C.N. and M.G. (Infants)*,[20] the putative father of two children opposed an application for their adoption made by their mother and her husband. The children were born outside marriage while their parents were living together for some years, and close ties had grown up between the children and their father. The father argued that the severance of those ties would not be in the best interests of the children. The applicants contended that it was very much in the interests of the children not only that they be legitimatised but that they be given the advantages of a stable home environment. The Supreme Court of the Northern Territory took judicial notice of contemporary Australian society and held that it is unlikely that the fact of illegitimacy will disadvantage children who would have the undoubted security of being much loved by their natural parents and who will receive the support of the spouses of those parents. In the circumstances, the court was not satisfied that it would be in the interests of the children to make the order sought.

A possible rationale for excluding the putative father's consent to adoption is to avoid delay in obtaining the consent and holding up legal proceedings. A putative father often withholds

[20] [1976] A.C.L.D. 357.

consent to spite the mother, and experience indicates that he is either indifferent to the adoption or is very ready to give his consent because the adoption will terminate all his responsibilities.[21] Nonetheless, if the putative father had acknowledged his illegitimate child he ought to be given the right to withhold consent to his adoption. After all, under the new legislations the child benefits on proof of paternity. It would be unjust if duties are imposed on the acknowledging father when he does not possess any rights as regards the child. As the law now stands, the father's objections may be heard indirectly when the court considers 'the best interests of the child'.

South Australia has adopted a different approach because evidence of paternity under the *Family Relationships Act* is not prima facie evidence but conclusive evidence. As a result, the *Adoption of Children Act 1966–1971* has been amended in 1975 to provide for a requirement of the father's consent to his illegitimate child's adoption. He can only avail himself of this right if he is recognised as the father[22] and this recognition has to take place either before the expiry of thirty days after the day on which an instrument of consent to the adoption was signed by the mother or before the day on which an order for the adoption of the child is made, whichever is earlier. However, if the court is satisfied on the application of a person claiming to be the father of the child that he has commenced proceedings under the *Family Relationships Act 1975* for a declaration that he is the father of the child, it shall stay the proceedings for adoption of the child, to enable the proceedings establishing paternity to be determined. If he is adjudged to be the father of the child, his consent is required for the adoption of the child.[23]

This is a more favourable approach as where a person is recognised as the father of a child, he ought to be given some rights to it. There were objections to these provisions but there are safeguards available to prevent abuse.[24] The period during

[21] Western Australia, *Parliamentary Debates*, Legislative Council (1969), 169, per the Hon L.A. Logan, Minister for Child Welfare.

[22] S. 21.

[23] *Id.* subsection (3).

[24] South Australia, *Parliamentary Debates*, 5 November 1975, 1702, per Mr. Allison.

which a father can establish his parenthood of the child is limited because five days following birth of the child, the mother can legally put him out for adoption and then, within thirty days, that adoption can be revoked. The father must, therefore, act very fast, that is, within thirty-five days of birth if the mother has put her child for adoption from birth. The father would have to act quickly to exercise his rights and it is unlikely in most cases that he would act within that time. Even if he did, the court can still do without his consent.

In Malaysia the *Adoption Ordinance, 1952*[24a] enables the mother or father of the illegitimate child to adopt him.[25] 'Child' has been defined as 'an unmarried person under the age of 21 and includes a female under that age who has been divorced' and, since illegitimate children have not been excluded, the mother or father of an illegitimate child can adopt him. In cases where a mother wishes to put out her illegitimate child for adoption, the child's father has to give his consent. Section 5(1) states that the consent of every person or body of persons who is a parent or guardian of the child (including an illegitimate child) in respect of whom the application is made or who is liable to contribute to the support of the child is required before an adoption order is made. 'Father', in relation to an illegitimate child, has been defined as the natural father.[26] It follows that the putative father's consent is necessary. In instances where the putative father cannot be traced, his consent may be dispensed with. Likewise, his consent can be dispensed with if he has abandoned, neglected or persistently ill-treated the child, or persistently neglected or refused to contribute to the support of the child if so liable.[27]

CONCLUSION

Whilst it is agreed that no child is born of its own volition and therefore to punish the illegitimate child for the sin of its parents is to punish a child for a sin of which it is not guilty,

[24a] This Ordinance does not apply to any person professing the Muslim religion: s. 31. See Ahmad Ibrahim, 264.

[25] S. 4(1)(c).

[26] S.2.

[27] S.5(1)(a) to (d).

there still exist in the legislations of Australia and Malaysia discriminatory provisions which perpetrate the notion that an illegitimate child is a child of nobody and should be deprived of rights normally accorded to his legitimate counterpart. Malaysian statutes have greatly improved the common law position of illegitimate children, however there are areas where discrimination continues. The *Wills Ordinance, 1959, Distribution Ordinance, 1958, Inheritance (Family Provision) Act, 1971* and *Guardianship of Infants Act, 1961* have all expressly or impliedly excluded illegitimate children, thus depriving them equal rights to property and their parents equal rights to guardianship, custody and access. The situation is almost inadvertant as the *Divorce Ordinance, 1952,* and the *Legitimacy Act, 1961* insist on differentiating children into legitimate and illegitimate groups. The *Law Reform (Marriage and Divorce) Act, 1976* may have improved certain existing provisions found in the *Married Women and Children (Maintenance) Ordinance, 1950,* the *Legitimacy Act,* the *Divorce Ordinance* and the *Guardianship of Infants Act,* but it nevertheless maintains a minority group of illegitimates.[28] Perhaps, the constitutional guarantee entrenched in article 8 of the Federal Constitution ought to be strictly adhered to when dealing with children. But, will the embodiment of the statement 'all children are equal' in a statute seeking to equate the status of all children suffice?

The Australian experience has proved that mere statements of equality are inadequate and, ultimately, a farce. The disabilities of illegitimate children may be alleviated but the recent statutes still leave the problem of enabling a child to establish paternity against his father. Illegitimacy may be formally abolished but children are left without a recognising or recognised father. In many cases, therefore, the reform, if any, is more apparent than real. Until the efficiency of blood tests and legal proceedings are improved, requirements for proof of paternity will continue to engender problems. The statutes declare that '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' for all purposes of the law. If this means that a putative father is

[28] S. 75.

entitled to the same rights and subjected to the same duties as a father of a child born within marriage, the putative father ought to be able to give consent to the child's marriage below the age of free marriage, to have a say in his upbringing, and to consent to his adoption. Because his rights to custody, access and the above rights have been deprived, it is clear that there is discrimination between the two groups of children and their relationships with their fathers.

The policy to equalise the legal status of children is, therefore, very difficult to achieve. A legislature needs to examine and articulate all aspects of the illegitimacy problem and problems facing the illegitimate child.[29] It is not good enough simply to make consequential amendments via schedule deleting the word 'illegitimate' where appropriate.

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[29] See 'Children born out of wedlock – Legal status' [1976] 1 *Malayan Law Journal* xxii.

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SRI LANKA'S NEW CONSTITUTION

On July 21, 1977, the people of Sri Lanka entrusted to their elected representatives the task of drafting and adopting a new republican constitution in order to achieve the goal of a democratic socialist republic. The proposed constitution was also to ensure to all people freedom, equality, justice, fundamental human rights and independence of the judiciary and ratify the immutable republican principles of representative democracy. In pursuance of this mandate, the representatives adopted and enacted the new Constitution for Sri Lanka in 1978. The purpose of this brief article is to take note of the salient characteristics of the new Constitution.

The Constitution has been declared to be the supreme law of the Democratic Socialist Republic of Sri Lanka. Sri Lanka has been declared to be a free, sovereign, independent and democratic socialist republic, and is to be known as the Democratic Socialist Republic of Sri Lanka.[1] Sri Lanka is to be a unitary state.[2] In Sri Lanka, the sovereignty is vested in the people.[3] Sri Lanka gives the 'foremost' place to Buddhism and, accordingly, it is the duty of the State to protect and foster the 'Buddha Sasana'.[4] But, religious freedom is guaranteed to all persons by Article 10 which declares that every person is entitled to freedom of thought, conscience and religion and freedom to adopt a religion or belief of his choice. This freedom is further strengthened by Article 14(1)(e) according to which every citizen is entitled to the freedom, either in public or in private, to manifest his religion or belief in worship, observance, practice and teaching.

[1] Article 1.

[2] Article 2.

[3] Article 3.

[4] Article 9.