Scottish Law Commission

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FAMILY LAW

REPORT ON ILLEGITIMACY

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The Honourable Lord Maxwell, *Chairman,*
Mr. R. D. D. Bertram, W.S.,
Dr. E. M. Clive,
Mr. J. Murray, Q.C.,
Sheriff C. G. B. Nicholson, Q.C.

The Secretary of the Commission is Mr. R. Eadie. Its offices are at 140 Causewayside, Edinburgh EH9 1PR.

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SCOTTISH LAW COMMISSION

Item 14 of the Second Programme

FAMILY LAW

ILLEGITIMACY

To: The Right Honourable the Lord Mackay of Clashfern, Q.C.,
Her Majesty's Advocate

We have the honour to submit our Report on Illegitimacy

(*Signed*) PETER MAXWELL, *Chairman*
R. D. D. BERTRAM
E. M. CLIVE
JOHN MURRAY
GORDON NICHOLSON

R. EADIE, *Secretary*
7th November 1983

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PART I INTRODUCTION

1.1 In this Report we make recommendations for the reform of the law of Scotland relating to illegitimacy and related matters. The Report, which is published as part of our family law programme,[1] follows on the consultative memorandum on Illegitimacy which we published in 1982.[2] We have been greatly assisted by the comments on this memorandum which we have received not only from organisations and groups and members of the legal profession, but also from private individuals directly affected by the present law.[3] We were also assisted by a seminar on illegitimacy held in Edinburgh on 25 June 1982 under the auspices of the Scottish Council for Single Parents.

Scope of Report

1.2 The main subject of this Report is the law on illegitimacy. It became clear to us, however, as our work progressed that the implementation of our recommendations on this subject would require fairly extensive amendments to the legislation on the guardianship of children. This legislation is itself in an unsatisfactory state and we concluded that the opportunity should be taken to rationalise it, simplify it and modernise it. As this involved going slightly beyond our consultative memorandum, we issued a further consultation paper on "Illegitimacy and the Guardianship Acts" in April 1983.[4] The result was strong support for our further proposals. This Report therefore recommends the repeal and replacement, with amendments, of the Guardianship of Infants Acts 1886 and 1925 and certain related statutory provisions. We do not, however, deal in this Report with major policy issues in the law on the guardianship of children, such as whether there should continue to be two categories of guardian (tutors and curators) depending on the age of the child. We intend to prepare a consultative memorandum on this and other aspects of the law relating to children when resources permit.

1.3 We took the view in our memorandum[5] that developments relating to children procreated by artificial insemination and similar techniques raised different questions from those relating to illegitimacy and required different treatment. We did not therefore consult on these issues and do not deal with them in this Report. We are pleased to note that a Departmental Committee chaired by Mrs. Mary Warnock has been set up to consider these and related matters.[6]

1.4 In the memorandum we referred frequently to the laws of other countries, particularly England, New Zealand and West Germany. For reasons of space we do not include detailed accounts of other countries' laws

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[1] See our Second Programme of Law Reform (Scot. Law Com. No. 8, 1968), Item 14.

[2] Consultative Memorandum No. 53.

[3] A list of those organisations, etc., who submitted written comments is contained in Appendix B. We have not listed the private individuals who commented because some of them certainly, and others possibly, wished their communications to be treated as confidential.

[4] This paper was not published but was sent to certain regular commentators on our consultative memoranda. We are grateful to those who commented on it. A list of those who did so appears in Appendix C.

[5] Para. 1.21.

[6] Hansard (H.C.) 23 July 1982 vol. 28, Written Answers, col. 329.

in this Report. We do refer later in this introduction to certain developments in other countries but only in a brief and general way.

Arrangement of Report

1.5 The remainder of this introduction contains brief accounts of the factual background to the law, of the differences between illegitimate and legitimate children in the present law, of developments in England and Wales and abroad, and of our general approach to reform. We discuss, in Parts II to VIII of the Report, specific reforms relating to illegitimacy. Most of our provisional proposals on these matters were generally supported on consultation. Then in Part IX we discuss how our policy can best be translated into legislation. Part X is a summary of our recommendations and Appendix A contains a draft Bill with explanatory notes.

Statistics on illegitimacy

1.6 The proportion of children born in Scotland who are illegitimate at birth has doubled over the last two decades. In the period 1961–65 the average percentage of live births which were illegitimate was 5.17, whereas the corresponding figures for 1979, 1980, 1981 and 1982 were 10.1, 11.1, 12.2 and 14.2 respectively.[1] These national percentages hide wide local variations; within one city in 1981 the percentage varied from 2.8 in one district to 25.9 in another.[2] Until 1977 the number of illegitimate births remained roughly constant, but the proportion continued to rise, largely due to the drop in total births.[3] Since then, however, the number of illegitimate births has risen substantially, both absolutely and as a proportion of total live births.[4]

1.7 Children who are born illegitimate may lose that status through adoption, or legitimation by subsequent marriage of their parents. The number of illegitimate children adopted has dropped markedly in recent years. In 1969 1,952 illegitimate children were adopted while in 1981 the number had fallen to 653.[5] No direct figures are available for those children who are legitimated by the subsequent marriage of their parents. But some estimate can be obtained from the number of re-registrations of birth, because subsequent legitimation is the main reason for re-registration.[6] Over the last decade the number of re-registrations has varied between 600 and 800 a year,[7] which suggests that about 400 illegitimate children per year are legitimated by subsequent marriage of their parents. A substantial majority of those born illegitimate in recent years remains so.

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[1] *Annual Report of the Registrar General for Scotland* 1981, Table A1.2 and Preliminary Return for 1982.

[2] *Ibid.*, s.2.1.

[3] Annual average total live births in 1961-65, 102,642; total live births in 1977, 62,342. *Annual Report* 1977, Part 2, Table P1.1.

[4] Illegitimate live births were 5,968 in 1977, 6,960 in 1979, 7,678 in 1980 and 8,447 in 1981. Total live births in these years were 62,342, 68,366, 68,892 and 69,054. *Annual Report* 1981, Table A1.1.

[5] *Annual Report* 1969, Part 1, Table T2.1; *Annual Report* 1981, Table T1.2.

[6] *Annual Report* 1979, p.LV. The Registrar General for Scotland's Department has estimated that out of the 700 or so annual re-registrations in 1976-80, 400 were as a result of legitimation.

[7] *Annual Report* 1981, Table T1.2.

1.8 It is impossible to calculate precisely the number of illegitimate people in Scotland at the present time. On the basis of the illegitimate birth rates, adoption rates and legitimation rates over the last few decades, it can be asserted with some confidence that the number of illegitimate people is greater than a quarter of a million—about five per cent of the population of Scotland.

1.9 The available information shows that the traditional image of the illegitimate child as a child being brought up by a lone mother and having no contact with his father does not always correspond to reality. The General Household Survey for 1979 found that about one per cent of *all* children under sixteen born of women in Great Britain aged 18 to 49 were living with both their natural parents in a household based on cohabitation rather than legal marriage.[1] This is a significant number of children. Also about half of all illegitimate births are registered jointly by both parents[2] and, although no safe conclusion as to the family situation of these illegitimate children can be drawn from this figure, it seems reasonable to assume that, in some of these cases at least, the father will play some role in the child's life even if he is not cohabiting with the mother.[3]

Summary of present law

1.10 The differences between legitimate and illegitimate persons in various fields of the law are set out later in this Report with the necessary references to authority. For convenience we summarise here the main differences.

(*a*) *Guardianship*[4]

Neither the mother nor the father of an illegitimate child is the child's tutor or curator, and neither parent has power to appoint testamentary tutors or curators to the child. Both parents of a legitimate child are his tutors and curators, either being able to act without the other; both can appoint testamentary tutors and curators.

(*b*) *Custody*

The mother has a *prima facie* right to the custody of her illegitimate child; the father may, however, apply to the court for custody. In the case of a legitimate child both parents have custody (either being able to act without the other) in the absence of any court order to the contrary.

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[1] Table 8.23.

[2] Estimate for 1978 from the General Register Office (Scotland).

[3] See also Cheetham, *Unwanted Pregnancy and Counselling* (1977) p. 72.

[4] "Guardianship" is not a term of art in Scots law. Sometimes it is used in a particular way for the purposes of a particular statute. Unless the context otherwise requires we use it in this Report to cover both tutory of a pupil child (i.e. a boy under 14 or a girl under 12) and curatory of a minor child (i.e. a child above those ages but under 18). The tutor's role is a more extensive one than the curator's. The tutor acts *on behalf of* the child in litigation and legal transactions, administers the child's property and has certain ill-defined powers in relation to the child's person and upbringing. The curator acts *along with* the child and adds his consent, if he thinks fit, to litigation or legal transactions entered into by the child. He has no direct control over the child's property or person.

(*c*) *Adoption*

The agreement of the father of an illegitimate child is not required to the making of an adoption order unless he happens also to be the child's "guardian".[1] The father of a legitimate child must agree to the making of an adoption order or his agreement must be dispensed with by order of the court.

(*d*) *Taking into care and assumption of parental rights by local authorities*

The father of an illegitimate child is involved only if he has been appointed the child's guardian or has "charge of or control over" the child: no such limitation exists where the child is legitimate.

(*e*) *Succession*

An illegitimate person is not entitled to legitim from the estates of his grandparents or remoter ascendants. He has no rights of inheritance on intestacy from relatives other than his descendants, spouse or parents, and only these relatives have rights on his intestacy. In wills and other deeds references to a child or a relation are (unless the contrary intention appears) taken to include an illegitimate child or relation as long as the will or deed was executed after 25 November 1968. In prior deeds references to a child or other relation are presumed to mean legitimate children and relations only. Titles, coats of arms, honours and dignities very seldom descend to illegitimate relations; and an illegitimate person cannot succeed to an entailed estate.

(*f*) *Aliment*

Both parents of an illegitimate child are jointly liable to aliment him, but apart from the child's own legitimate descendants no other relatives are obliged to aliment him. The child is not obliged to aliment his parents or grandparents. If an illegitimate child once becomes self-supporting it is thought that his entitlement to aliment does not revive if he thereafter becomes indigent. The father is primarily liable for the aliment of his legitimate children. On his failure the obligation then rests on the mother and then on the grandparents. A legitimate person may be obliged to aliment both his parents and his grandparents. A legitimate person's entitlement to aliment revives if he becomes indigent after having been self-supporting.[2]

(*g*) *Nationality*

For the purposes of the British Nationality Act 1981 the father is not treated as a parent of his illegitimate child.

(*h*) *Incest*

Incest is not committed by sexual intercourse between an illegitimate person and any relations of his or her parents. Intercourse between an illegitimate child and his or her parent is thought to be either

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[1] See para. 4.5 below. He is regarded as "guardian" for this purpose if he has been awarded custody by a court.

[2] In our recent Report on *Aliment and Financial Provision* (Scot. Law Com. No. 67, 1981) we have recommended rules which would apply equally to legitimate and illegitimate relationships.

incest or a common law crime liable to similar penalties. A legitimate person commits incest if he or she has intercourse with his or her parents or certain close relatives e.g. brother, sister, uncle, aunt, nephew, niece, daughter-in-law, mother-in-law.[1]

(*i*) *Domicile*

An illegitimate child's domicile of origin is the domicile of his mother; that of a legitimate child is that of his father. An illegitimate child's domicile continues to be derived from that of his mother so long as he remains a pupil (i.e. a child under the age of 12 in the case of a girl; 14 in the case of a boy). A legitimate child's domicile is normally derived from that of his father so long as he remains a pupil, although there is now an exception to this rule in cases where the parents are living apart and the child has his home with the mother.

The United Kingdom context

1.11 The Law Commission have recently recommended that the law of England and Wales should be reformed so as to remove all the legal disadvantages of illegitimacy so far as they affect the illegitimate child.[2] Fathers of children born out of wedlock would not automatically acquire rights to custody and guardianship but would be able to apply for such rights to a court which would be directed to regard the welfare of the child as the first and paramount consideration in disposing of the application. Concern has, from time to time, been expressed in Parliament about the existing law on illegitimacy[3] and, in 1979, a private member's Bill to assimilate the legal position of legitimate and illegitimate children attracted considerable support.[4]

The international context

1.12 Many countries have in recent years taken steps to change the law relating to children born out of wedlock. In some cases laws have purported to place the illegitimate child in the same legal position as the legitimate child. This has been done in several States of the United States of America,[5] the Scandinavian countries,[6] Switzerland,[7] New Zealand[8] and almost all of the

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[1] In our recent Report on *Incest* (Scot. Law Com. No. 69, 1981) para. 4.11 we have recommended rules which would apply equally to legitimate and illegitimate relationships.

[2] Report on *Illegitimacy* (Law Com. No. 118, 1982).

[3] See e.g. Hansard (H.L.) 22 Feb. 1967, vol. 280, cols. 707-721, 725-775; 20 Feb. 1973, vol. 339, cols. 36–38; Hansard (H.C.) 17 Feb. 1969, vol. 778, cols. 46, 58–62, 70, 74, 97 and 99.

[4] The Bill was introduced by Mr. James White MP. So far as the Parliamentary debates reveal, the main reason stated for not proceeding with the Bill was that the matter was more complex than it seemed at first sight and should await the reports of the Law Commissions. See Hansard (H.C.) 23 Feb. 1979, vol. 963, cols. 807-845.

[5] See Krause, *Child Support in America* (1981) pp. 119, 161 and 162, 206 to 212. The Uniform Parentage Act has been enacted in nine States. The Act abandons the concept of illegitimacy and provides that "The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents." Quite apart from this legislative development, the U.S. Supreme Court, in a series of cases, has held that the Equal Protection Clause of the U.S. Constitution entitles the child of unmarried parents to legal equality with the child of married parents.

[6] See Krause, *International Encyclopedia of Comparative Law* (1976) Vol. IV, Ch. 6 pp. 10 and 11. Norway granted substantial legal equality to the illegitimate child as early as 1915.

[7] Law of 25 June 1976, modifying Arts. 252 to 263 and 270 to 327 of the Swiss Civil Code.

[8] Status of Children Act 1969.

Australian States.[1] The law of West Germany was reformed in 1969[2] and that of France in 1972.[3] In these two countries, however, complete equality has not been achieved and there are still some differences, for example in relation to succession law.[4] The Irish Law Reform Commission have recently recommended that 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".[5] The Uniform Law Conference of Canada has recently promulgated a Model Uniform Status of Children Act, recommended for adoption by the Provinces, which would likewise abolish any distinction between the status of children born inside and outside marriage.[6]

1.13 Removal of the remaining legal disadvantages of illegitimacy would be in line with this country's treaty obligations. The United Kingdom has ratified the European Convention on the Legal Status of Children born out of Wedlock.[7] The preamble to this Convention notes that in a great number of member States of the Council of Europe efforts have been, or are being, made to improve the legal status of children born out of wedlock by reducing the differences between their legal status and that of children born in wedlock which are to their legal or social disadvantage. It records that the signatory States believe that the situation of children born out of wedlock should be improved and that the formulation of certain common rules concerning their legal status would assist this objective. The Convention then binds each Contracting Party to ensure the conformity of its law with the provisions of the Convention.[8] A State is, however, allowed to make not more than three reservations. The present law of Scotland does not conform to two provisions of the Convention and the United Kingdom accordingly reserved the right not to apply, or not to apply fully, those provisions in relation to Scotland.[9] The policy of the Convention is to allow "progressive stages for those States which consider themselves unable to adopt immediately" all of its rules[10] and reservations are valid for only five years at a time.[11] It is clear that the general policy of the Convention is the reduction of legal discrimination against

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[1] Finlay, *Family Law in Australia* (2nd. edn. 1979) pp. 962 to 967.

[2] There is a useful account of the reforms in West Germany and New Zealand in Turner, *Improving the Lot of Children Born outside Marriage* (National Council for One-Parent Families, 1973).

[3] Law of 3 January 1972. The new Art. 334 of the Code Civil provides that the illegitimate child has in general the same rights and duties as the legitimate child in his relations with his father.

[4] See Turner, *op. cit.*, pp. 43 and 44; Engelhard-Grosjean, *The French Law of Filiation* 37 La. L. Rev. 701 (1977).

[5] Report on Illegitimacy (L.R.C. 4—1982) para. 200.

[6] Proceedings of the 62nd annual meeting of the Conference (1980).

[7] The United Kingdom instrument of ratification was deposited on 24 February 1981 and the Convention entered into force for the United Kingdom on 25 May 1981.

[8] Art. 1.

[9] The provisions in question are: Art. 6(2): "Where a legal obligation to maintain a child born in wedlock falls on certain members of the family of the father or mother, this obligation shall also apply for the benefit of a child born out of wedlock." Art. 9: "A child born out of wedlock shall have the same right of succession in the estate of its father and its mother and of a member of its father's or mother's family, as if it had been born in wedlock."

[10] Preamble.

[11] Art. 14(2).

illegitimate children and that the United Kingdom's position would be more in accord with that policy if the reservations were unnecessary.

1.14 The United Kingdom is also a party to the European Convention on Human Rights. The European Court of Human Rights has held in the case of *Marckx* v. *Kingdom of Belgium*[1] that the provisions of Belgian law prohibiting an illegitimate child from inheriting from his close maternal relatives on their intestacy contravened Articles 8 and 14 of the Convention (read together) and that these different inheritance rights of legitimate and illegitimate children lacked objective and reasonable justification. In Scots law, as in Belgian law, an illegitimate child has no such inheritance rights, so that arguably changes are necessary to prevent the continuing breach of the Convention by the United Kingdom.

The general approach to reform

1.15 It may be helpful if we set out briefly our general approach to reform of the law on illegitimacy. This is that the main objective should be the removal of legal differences between legitimate and illegitimate children without, however, conferring parental rights automatically on the fathers of all illegitimate children. It seems to us, and this view is supported by the results of our consultation, that it is fundamentally unjust for the law to discriminate against people on the basis of the marital status of their parents. One or two commentators expressed anxiety about the possible effects on the institution of marriage of removing all differences between legitimate and illegitimate children. It is impossible to say whether there would, or would not, be any such effects or what such effects might be. There are, at most, possibilities and, as the Law Commission put it, these possibilities

> "must be balanced against the certainty that if the law is not changed those who have the misfortune to be born illegitimate will continue to suffer from legal handicaps which are now widely regarded as anomalous and unjustified."[2]

In our view, as in the view of the Law Commission, "the scales tip decisively in favour of remedying the injustice of the present law".[3] This does not require, however, that all fathers including, for example, those who have shown absolutely no interest in their child, should have full parental rights. This was the view of practically all those who commented on our memorandum. To pave the way for the specific recommendations to follow, we therefore **recommend** that:

1. The general objective of reform of the law on illegitimacy should be to remove legal differences between people which depend on whether their parents are or have been married to each other, without, however, conferring parental rights automatically on all fathers.

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[1] [1979-80] 2 E.H.R.R. 330.
[2] Law Com. No. 118 (1982) para. 4.8.
[3] *Ibid.*

PART II GUARDIANSHIP

2.1 "Guardianship" is not a term of art of Scots law, but it is used, in different senses, in various statutes.[1] In this Part we are concerned with guardianship in the sense of tutory or curatory.[2] The present law on this subject is open to the serious criticism that it makes no provision whatsoever for the guardianship of illegitimate children in the absence of a court order. In this respect it discriminates against the illegitimate child. In the case of a legitimate child both parents are, by operation of law, his tutors or curators, either being able to act without the other.[3] In the case of an illegitimate child neither parent is tutor or curator.[4] If a tutor or curator is needed (for example, for litigation or the granting of a receipt or the administration of property) one has to be appointed by the court.[5] Another difference is that the present law makes no provision for the appointment of testamentary tutors or curators to an illegitimate child. Neither the mother[6] nor the father[7] of an illegitimate child is entitled to appoint, by will or other deed, a person to act as the child's tutor or curator after the parent's death. In the case of a legitimate child either parent can make such an appointment.[8]

Legal position of mother

2.2 The present law which denies to the mother the tutory or curatory of her illegitimate child is, in our view, unrealistic. It is a relic from the days when an illegitimate child was regarded as nobody's child (*filius nullius*), having no legal relationship with either of his parents. Although for many everyday purposes a mother who has custody of her child is treated as if she were the tutor or curator, her lack of any legal standing poses problems where the child has substantial property or becomes involved in legal proceedings.[9]

2.3 In our consultative memorandum we suggested that the mother of an illegitimate child should be the child's tutor and curator.[10] This proposition was very strongly supported on consultation. We therefore **recommend**:

2. The mother of an illegitimate child should be the child's tutor and curator.
(Clause 2(1)(*a*).)[11]

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[1] See e.g. Adoption Act 1958, s.57; Social Work (Scotland) Act 1968, s.94(1).

[2] See footnote to para. 1.10(*a*) above.

[3] Guardianship Act 1973, s.10.

[4] *Corrie* v. *Adair* (1860) 22 D. 897; *Jones* v. *Somervell's Tr.*, 1907 S.C. 545.

[5] *Young* (1828) 7 S. 220; *Ogilvy* (1849) 11 D. 1029; *Ward* v. *Walker* 1920 S.C. 80. The Administration of Justice (Scotland) Act 1933, s.12 enables a minor child to apply to the Court of Session for the appointment of a curator. Where the need is for someone to administer a pupil child's property a factor *loco tutoris* may be appointed. Such a factor acts subject to the supervision of the court and becomes *curator bonis* to the child when the latter attains minority at the age of 12 or 14. See Judicial Factors Act 1849; Judicial Factors (Scotland) Act 1889, s.11; *Buckie* (1847) 9 D. 988; *Davison* (1855) 17 D. 629.

[6] *Brand* v. *Shaws* (1888) 16 R. 315.

[7] Fraser, *Parent and Child* (3rd edn.,) p. 161.

[8] Tutors and Curators Act 1696; Guardianship of Infants Act 1925, s.5; Guardianship Act 1973, s.10.

[9] Except actions of affiliation and aliment, where, by longstanding custom, the mother can bring an action on behalf of the child.

[10] Para. 4.4 and Proposition 10.

[11] The references to clauses in this and subsequent recommendations are references to the clauses contained in the draft Law Reform (Parent and Child) (Scotland) Bill: see Appendix A.

2.4 We also proposed in our memorandum that the mother of an illegitimate child should be entitled to appoint a person to be the child's tutor and curator after her death.[1] This was unanimously supported on consultation. Further consideration has, however, suggested one refinement. A mother who has lost her parental rights or who has been deprived of tutory or curatory by a court should not be able to appoint a tutor or curator to act after her death. We therefore **recommend**:

3. The mother of an illegitimate child should be entitled to appoint testamentary tutors and curators to her child, but any such appointment should be of no effect unless, immediately before her death, the mother was tutor or curator of the child.
(Clause 4(1).)

Legal position of father

2.5 *No automatic parental rights in all cases.* There was general agreement on consultation with our provisional view that it would not be desirable to give the father of an illegitimate child parental rights automatically. This would give rights to fathers where the child had resulted from a casual liaison or even from rape; it would fail to recognise that many men do not have any continuing relationship with their illegitimate children. It would cause offence to mothers who had struggled alone to bring up their children with no support from the fathers. It might be argued, of course, that such fathers would not in practice seek to exercise their rights. Fathers of legitimate children remain tutors and curators after divorce and this poses few problems in practice even where the father loses all contact with his children. However, we do not find this argument compelling. Mothers of illegitimate children might feel, rightly or wrongly, that they were at risk from interference and harassment by unmeritorious fathers in matters connected with the upbringing of the children. To obtain a feeling of security a mother might have to apply to the court for the father's rights of tutory or curatory to be terminated. This would cause much worry and expense for the mother and provoke unnecessary litigation. If the father was automatically to be a tutor or curator in all cases he would become more involved in care or adoption proceedings than he is at present. Steps would have to be taken to ascertain his whereabouts and to allow him an opportunity to make representations to the court even in cases where it would clearly be inappropriate for his views to be given any weight at all. The end result might well be the unnecessary protraction of such proceedings to the disadvantage of the child, the mother. the prospective adopters, the foster parents or the local authority. We concluded in the memorandum that what was required was some way of identifying "meritorious" fathers who might be given parental rights, including tutory and curatory, and we discussed ways in which this might be done.

2.6 *Guardianship on application to court.* The first possibility was that the father of an illegitimate child might be allowed to apply to a court to be appointed tutor or curator to his child, either solely or along with the mother.[2] The main advantage of this solution would be that, while a method

[1] Para. 4.5 and Proposition 11. For the difficulties which the present law can cause in practice, see Lamotte, *The Home that Jill Built* (Scottish Council for Single Parents, 1981) p.7.

[2] Consultative memorandum, paras. 4.8 to 4.10.

would be provided for a concerned and interested father (for example, one who had been in fact looking after the child) to apply for tutory or curatory, the court would be able to consider the circumstances of each case. It would need to be satisfied that the appointment was in the interests of the child. There would be little likelihood of "unmeritorious" fathers becoming tutors or curators. We considered whether the father's application for tutory or curatory should require the consent of the mother, pointing out that, while in some cases this might seem a reasonable requirement, in others (for example, where the mother had abandoned the child and the father had been looking after the child) it would seem to be unjustified. Although we did not reach any provisional conclusion on these questions there was, in the event, a remarkable consensus on consultation. Most of those who commented thought that the father should be able to apply to the court for tutory or curatory. He should not need the mother's consent to do so although she would, of course, have the right to oppose the application if she so wished. We think that a provision on these lines could be useful in at least three situations. First, where a couple are living together but are not married, and wish to share parental rights and responsibilities, the provision would enable the father to apply for appointment as tutor and curator along with the mother.[1] Secondly, if the mother has died or abandoned the child it could be useful to have a mechanism whereby the father could apply to be appointed tutor or curator. Thirdly, if custody of the child were awarded to the father (for example, on the breakdown of a relationship or cohabitation) it could be useful for him to be appointed tutor or curator. In all these situations it could well be in the child's interests to have the father appointed as his legal guardian.

2.7 A number of commentators made the point that if the mother and the father both agree that the father should be tutor and curator along with the mother there should be some simple way of achieving this result. To meet this point we suggest that rules of court should provide for a simple procedure in those cases where the father applies with the consent of the mother.[2]

2.8 It should not be necessary for a father who is appointed tutor to his child when, say, the child is two years old to re-apply for appointment as curator when the child attains the age of minority at the age of 12 or 14. Accordingly we suggest that a father appointed tutor to his child should, unless the court directs otherwise, automatically become the child's curator on the child's attaining the age of minority.

2.9 Our **recommendations** on this point are therefore as follows:

4. (*a*) The father of an illegitimate child should be entitled to apply to the court to be appointed tutor or curator to his child, either alone or along with the mother.
(Paragraph 2.6; Clause 3(1).)

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[1] He could apply for custody in the same proceedings. See para. 3.5 below.

[2] Where the father applies for tutory or curatory without the mother's consent we envisage that, as in an application for custody under the present law, the mother would be the defender or respondent.

(*b*) Rules of court should provide for a simple form of procedure for those cases where the father applies with the consent of the mother.
(Paragraph 2.7)

(*c*) A father appointed tutor to his child should, unless the court directs otherwise, automatically become the child's curator on the child's attaining the age of minority.
(Paragraph 2.8; Clause 3(3).)

2.10 *Guardianship by virtue of cohabitation.* We considered, in the memorandum, whether it might be possible to provide that the the father would be tutor and curator, along with the mother, if at the time of the child's birth he was cohabiting with the mother.[1] We pointed out, however, that it might be unreasonable to expect third parties to accept a man's assurance that he was the child's tutor or curator by virtue of cohabitation, perhaps years previously, with the child's mother. Most commentators agreed with our provisional view that the father should not become the child's tutor or curator merely by virtue of cohabitation with the mother—some because they considered cohabitation to be too uncertain a test, some because they thought that to give rights to men by virtue of mere cohabitation would weaken respect for marriage, and some because they thought that to give parental rights to the father on the basis of cohabitation, possibly of a temporary nature, with the mother would not necessarily be in the child's long-term interests. The comments received confirm us in our provisional view and we make no recommendation for the conferment of parental rights on the basis of cohabitation.

2.11 *Guardianship by agreement and registration.* There was rather more support for another approach canvassed in the memorandum[2] —namely, that the father might be given parental rights, including tutory and curatory, if *both* parents signed an appropriate agreement to this effect which might be noted in the register of births (or possibly some other register). A variant suggested by one body was that there might be a two-part birth certificate. The first part would record details of parentage and the time and place of birth. The second part would record who was entitled to exercise parental rights. We gave very serious consideration to these possibilities because they do seem to offer the considerable advantages of convenience, cheapness and informality. In the end, however, we decided not to recommend any procedure of this nature at this stage. The first priority is to give legal equality to illegitimate people themselves and we feared that to recommend that parental rights might be acquired by simple agreement and registration might be seen as going too far and might jeopardise the main reform. We had in mind the views of those commentators who were concerned about possible weakening of the institution of marriage. There are also practical considera-

[1] Para. 4.11.

[2] Para. 4.12. There was strong opposition to the idea, also floated in the memorandum, that the mere registration of the father in the register of births at the joint request of the mother and the father should by itself give him parental rights. Consultees feared that this would discourage mothers from agreeing to the registration of the father's name. Some expressed the view that registration should have the function of recording parentage only. We do not pursue this idea further.

tions. It would, we think, be undesirable that parents should simply sign a form as a matter of course without considering the implications both for the child and for themselves. There would, therefore, be a need for careful counselling, particularly if the issue arose shortly after the birth of the child when decisions might be made on an emotional basis without careful assessment of long-term considerations. Yet a scheme depending on new registration procedures, involving a need for careful counselling at the time of registration, would throw an extra burden on the registrars at a time of reduced public expenditure. We concluded that, for the time being, it would be more prudent to confine ourselves to a recommendation that fathers could acquire tutory or curatory by an application to the court. In practice, problems requiring the intervention of a tutor or curator do not arise very often and a right to apply at the time should be sufficient to prevent difficulties. If experience with this reform suggests that there is a real need for, and a strong demand for, a simpler procedure based on joint agreement and registration then the matter could be considered again.

2.12 *Appointment of testamentary guardians by father.* Under the present law the father of an illegitimate child has no right to appoint a tutor or curator to the child to act after his death. In the memorandum we suggested that the father might be given the right to appoint testamentary guardians if, at the date of his death, he was entitled to custody of the child or was the child's tutor or curator.[1] Our proposal was generally supported on consultation. On reflection, however, we consider that it should be limited to cases where the father was tutor or curator at the date of death, and should not extend to cases where he had only a right to custody. There is no reason, in our view, why a father who was not himself tutor or curator at the time of his death (and who may even have been unsuccessful in an application to be appointed tutor or curator) should be able to appoint someone to act as tutor or curator after his death. We therefore **recommend**:

5. The father of an illegitimate child should be entitled to appoint testamentary tutors or curators to his child, but any such appointment should be of no effect unless the father, immediately before his death, was tutor or curator of the child.
(Clause 4(1).)

Right of surviving parent to continue as tutor or curator

2.13 In the memorandum we suggested that, where both parents of an illegitimate child were his tutors or curators immediately before the death of one of them, the surviving parent should become the child's tutor or curator solely or along with any tutors or curators appointed by the deceased parent.[2] This was generally supported on consultation. We remain of this view but we do not think that any express legislative provision is necessary to bring about this result. If both parents were tutors or curators immediately before the death of one of them the survivor will automatically continue to be tutor or curator. If another tutor or curator has been validly appointed then the survivor will automatically have to act along with that tutor or curator so long

[1] Para. 4.15 and Proposition 15.
[2] Para. 4.20 and Proposition 16.

as they are both in office. No statutory provision is necessary. We therefore make no recommendation for legislation on this point.[1]

2.14 In the memorandum we also suggested[2] that if the father was entitled to *custody* of his illegitimate child immediately before the mother's death he should, on her death, become the child's tutor or curator. The Faculty of Advocates disagreed with this proposition. They thought that there was no demand for it and that the fact of legal custody might not denote any present and continuing connection between the father and the child. We have reconsidered this matter and have decided to make no recommendation on the lines provisionally proposed in the memorandum. Quite apart from the practical points made by the Faculty of Advocates we think there is no good reason why the death of the mother should cause the father's right to custody to be expanded to include tutory or curatory. A father could apply for tutory or curatory as well as custody, if he wished to ensure that he would be tutor or curator on the mother's death.

2.15 In the case of a legitimate child section 5(3) of the Guardianship of Infants Act 1925 provides that a surviving parent can object to a testamentary tutor appointed by the other parent. If such an objection is made the effect of the Act appears to be that the testamentary tutor ceases to be entitled to act as tutor unless he successfully applies to the court under section 5(4) for an order that he should act jointly with the surviving parent or that he should be sole tutor.[3] In the memorandum we suggested that these rules should apply also to illegitimate children. On reconsidering this matter, however, we have come to the conclusion that the rules are open to serious criticism. Third parties have an interest in knowing whether someone is entitled to act as tutor to a child. They would often have no reliable way of knowing whether the surviving parent had or had not objected to another tutor's acting. An objection may be quite informal and no time limits are laid down. It appears to us that a tutor or curator validly appointed should be entitled to continue to act until removed by a court. We therefore do not recommend the extension of the rules in section 5(3) and (4) of the Guardianship of Infants Act 1925 to illegitimate children. We suggest later that they should be repealed in relation to legitimate children.[4] We also suggest later that there should be a general rule that where two people are tutors or curators to a child either should be able to act without the other.[5] The effect of this would be that in many cases the surviving parent and the testamentary tutor or curator could simply agree that the latter should play no active role in relation to the child.

Powers of court

2.16 We suggested in the memorandum that the court should have the same statutory powers as it has in relation to a legitimate child to appoint a tutor or

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[1] We suggest later a simplification of the relevant legislation relating to legitimate children. See para. 9.16 below.

[2] Para. 4.20 and Proposition 17.

[3] S.5(4).

[4] Para. 9.20.

[5] Para. 9.21. This would be subject to any provision to the contrary in a deed or court decree appointing the tutor or curator.

curator to an illegitimate child, to resolve disputes between two or more tutors or curators and to remove a person as tutor or curator to a child.[1] These propositions were generally approved on consultation. We discuss later how these powers should be expressed in relation to both legitimate and illegitimate children.[2] In the meantime we **recommend**:

6. The court should have the same powers in relation to an illegitimate child as it has in relation to a legitimate child to appoint a tutor or curator to the child, to resolve disputes between two or more tutors or curators and to remove a person as tutor or curator. (Clause 3.)

Which court?

2.17 Under the present law the sheriff has certain statutory powers to appoint and remove tutors to legitimate children.[3] Other such powers are reserved for the Court of Session.[4] In the consultative memorandum we suggested that in relation to illegitimate children the court's powers to appoint and remove tutors and curators and to resolve disputes between joint tutors or curators should be exercisable by the Court of Session or by the sheriff courts. In our consultation paper of April 1983 we suggested that the same should apply in relation to the tutory or curatory of legitimate children. Both suggestions were strongly supported. We therefore **recommend**:

7. The powers referred to in Recommendations 4 and 6 above should be exercisable by the Court of Session or the sheriff courts. (Clauses 3 and 8.)

Criterion to be applied

2.18 In the memorandum we asked whether, in deciding on any application by the father for tutory or curatory, the court should be directed to regard the welfare of the child as the first and paramount consideration.[5] This is the formula used in section 1 of the Guardianship of Infants Act 1925 in regard to any court proceedings relating to the custody or upbringing of a child. All those who commented agreed that the court should be so directed. On considering this matter further in the light of comments received on our consultation paper of April 1983 we have concluded that the words "first and" in the statutory formula are unnecessary. If the child's welfare is the paramount consideration then it is paramount whether the court comes to it first, second or last. We have also concluded that the principle of the paramountcy of the child's welfare should apply, not only to applications by a father for tutory or curatory, but to any exercise of the court's powers in relation to tutory or curatory. We also think that it should be made clear that the court should not make any order relating to the tutory or curatory of a child unless satisfied that the order is consistent with the principle that the child's welfare is the paramount consideration.[6] We therefore **recommend**:

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[1] Paras. 4.20 and 4.22 to 4.27 and Propositions 18 and 20 to 22.
[2] Paras. 9.12 and 9.13.
[3] See Guardianship of Infants Act 1925, ss.4(1), (2) and (2A), 5(4).
[4] See Guardianship of Infants Act 1886, s.6.
[5] Para. 4.9 and Proposition 12(*c*).
[6] We discuss this question further, in relation to legitimate children, in paras. 9.17 and 9.18.

8. It should be provided by statute that in exercising any powers relating to the tutory or curatory of an illegitimate child the court should regard the welfare of the child as the paramount consideration and should not make any order unless satisfied that it is in the child's interests.
(Clause 3(2).)

PART III CUSTODY AND ACCESS

Present law

3.1 The mother of an illegitimate child is recognised as having a right to custody, although this may be set aside if that is required by the child's welfare.[1] Since 1930 the father of an illegitimate child has had the right to apply to the court for custody or access. The relevant statutory provision is section 2(1) of the Illegitimate Children (Scotland) Act 1930 which provides as follows:

> "the court may, upon application by the mother or the father of any illegitimate child, or in any action for aliment for any illegitimate child, make such order as it may think fit regarding the custody of such child and the right of access thereto of either parent, having regard to the welfare of the child and to the conduct of the parents and to the wishes as well of the mother as of the father . . .".

The court in determining an application for custody under section 2(1) may commit the care of the child to a local authority or order that the child shall be under the supervision of a local authority.[2]

Right to apply to court

3.2 The right of the father to apply to the court for custody of, or access to, an illegitimate child seems to have given rise to no difficulty, so far as we are aware, in practice. It seems to be desirable in principle that this right should be available, and there was no suggestion on consultation that it should not continue.[3] Accordingly we suggest no change in the substance of the law on this point.[4] The father should, if he so wishes, be able to apply for custody to be exercised along with the mother.[5] This would often be what the parents would wish if they were in fact living together. As a father in such circumstances would often wish to be appointed tutor and curator (as well as custodier) along with the mother, we think it would be desirable to enable him to apply for these rights in the one application and to do so, where the mother consents, by the simple form of procedure which we have suggested should be introduced by rules of court.[6]

Criterion to be applied

3.3 As we have seen, the court in dealing with an application by either parent for the custody of, or access to, an illegitimate child is directed to have regard "to the welfare of the child and to the conduct of the parents and to the

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[1] *Duguid* v. *McBrinn,* 1954 S.C. 105; *A.* v. *B.,* 1955 S.C. 378, per Lord Sorn at p. 390; *McCormick* v. *McCormick,* 1963 S.L.T. (Notes) 3.

[2] Guardianship Act 1973, ss.11(1) and 12(2)(*a*).

[3] See the discussion in the consultative memorandum, paras. 5.3 and 5.4.

[4] We recommend later (para. 9.13) that instead of depending on a special provision in the Illegitimate Children (Scotland) Act 1930 (a statute which we recommend should be repealed) this right should depend on provisions in the guardianship legislation which would be applicable to all children, whether or not their parents had married. This, however, would be a change of form, not substance.

[5] The present wording of s.2(1) of the 1930 Act is sufficiently flexible to permit the court to make an order for joint custody.

[6] Para. 2.9 above.

wishes as well of the mother as of the father".[1] This wording differs slightly from section 1 of the Guardianship of Infants Act 1925, which provides that any court dealing with the custody or upbringing of a child under 16 shall regard the welfare of the child as "the first and paramount consideration",[2] but the effect appears to be much the same.[3] We can see no advantage in having a slightly different formula, which probably achieves the same results in practice, for illegitimate children. In the interests of legislative consistency, but without suggesting that it would make any difference in the substance of the law, we therefore proposed in our memorandum that the 1925 Act formula should apply in relation to the custody and upbringing of illegitimate, as well as legitimate, children.[4] This was generally agreed. We now consider, however, for the reasons given above in relation to tutory and curatory,[5] that the words "first and" in the statutory formula are otiose. We also consider it should be made clear that the court should not make any order relating to the custody of, or access to, an illegitimate child unless satisfied that the order is in the child's interests.[6]

Custody by operation of law?

3.4 Where the father and mother of an illegitimate child are living together in a stable relationship the present law is that the mother, but not the father, will be regarded as having the right to custody. So long as their relationship continues this is unlikely to give rise to difficulty. Both will enjoy factual custody, whatever the legal position. If they separate and custody is disputed the matter would have to be resolved by the court in any event. There is, therefore, no pressing need to confer custody rights on the father by operation of law. We did, however, seek views on this question in our memorandum, referring to such possibilities as custody rights by virtue of cohabitation,[7] or by virtue of a registered agreement between the parents.[8] Although views differed on this point on consultation, some commentators favouring the idea of custody rights by virtue of a registered agreement, there was a weighty body of opinion in favour of the view that an application to the court should always be required. For this reason, for the reasons given earlier in this paragraph, and for the reasons given in paragraphs 2.10 and 2.11 in relation to tutory and curatory, we make no recommendation on the conferring of custody rights on the fathers of illegitimate children otherwise than on application to the court.

3.5 Our **recommendations** on custody and access are therefore as follows:

9. (*a*) The father of an illegitimate child should continue to have the right to apply to the court for an order for the custody of, or

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[1] Illegitimate Children (Scotland) Act 1930, s.2(1).

[2] The section applied originally only to pupil children, but was extended to children under the age of 16 by the Custody of Children (Scotland) Act 1939, s.1. It has been held to be quite general in scope and to apply, for example, to a dispute between parents and foster parents. See *J.* v. *C.* [1970] A.C. 668.

[3] *Duguid* v. *McBrinn,* 1954 S.C. 105; *A.* v. *B.* 1955 S.C. 378 per Lord President Clyde at p. 384.

[4] Para. 5.4 and Proposition 24.

[5] Para. 2.18 above.

[6] This question is discussed further at para. 9.18 below.

[7] See para. 2.10 above, where this question is discussed in relation to guardianship.

[8] See para. 2.11 above, where this question is discussed in relation to guardianship.

access to, the child (including an order for joint custody to be exercised along with the mother.)
(Paragraph 3.2; Clause 3(1).)

(*b*) Rules of court should provide for a simple form of procedure for those cases where the father applies for custody with the consent of the mother.
(paragraph 3.2.)

(*c*) It should be provided by statute that in exercising any powers relating to the custody or upbringing of, or access to, an illegitimate child, the court should regard the welfare of the child as the paramount consideration and should not make any order unless satisfied that it is in the interests of the child.
(Paragraph 3.3; Clause 3(2).)

PART IV OTHER PARENTAL RIGHTS

4.1 The concept of parental rights is an elusive one but matters commonly discussed under this heading include (in addition to tutory, curatory, custody and access): control of education and religious upbringing; consent to medical or surgical treatment; agreement to adoption; registration of change of name; and the right to be heard in relation to measures of child care or assumption of parental rights by a local authority. We proposed in the memorandum that the mother of an illegitimate child should have full parental rights,[1] that the father should be able to apply to the court for any of the parental rights possessed by the father of a legitimate child,[2] and that the courts should have power to resolve disputes between the parents of an illegitimate child as to the exercise of parental rights and to divest the mother or father of an illegitimate child of any parental rights.[3] There was substantial agreement with these propositions on consultation, but also some concern at the vagueness of the term "parental rights", and a suggestion that there was no need to provide for applications by fathers to the court for any such rights other than tutory, curatory, custody or access. In the light of these comments we have re-examined our provisional proposals.

Common law and statutory parental rights

4.2 It is convenient to draw a distinction between parental rights derived from the common law and parental rights derived from statutory provisions. In the case of the latter what has to be considered in each case is whether the statutory definition of "parent" or "guardian" needs to be amended. In fact such statutory definitions seem invariably to include the mother of an illegitimate child within the definition of "parent" so that the question is reduced to whether the father should be included within the definition and, if so, in what circumstances. We consider this question later in relation to the adoption legislation, the Social Work (Scotland) Act 1968 and the legislation on registration of change of name.[4] In the meantime we confine the discussion to those parental rights (other than tutory, curatory, custody or access) derived from the common law of Scotland—that is, any rather ill-defined rights in relation to education, religious upbringing and consent to medical or surgical treatment. This Report is not the place to analyse these so-called rights in depth or to ask to what extent they actually exist as separate rights independent of, say, tutory or custody. Our concern here is with the question whether any such rights which do exist should be recognised in relation to illegitimate as well as legitimate children and, if so, when.

Mother's common law parental rights

4.3 Our provisional proposal[5] that the mother of an illegitimate child should have full parental rights was strongly supported on consultation. We think that this is right and that the mother of an illegitimate child should have the

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[1] Consultative memorandum, para. 6.8 and Proposition 26.
[2] *Ibid.*, para. 6.9 and Proposition 27.
[3] *Ibid.*, para. 6.11 and Propositions 29 and 30.
[4] Paras. 4.5 to 4.12 and para. 7.9 below.
[5] Consultative memorandum, para. 6.8 and Proposition 26.

same parental rights as the mother of a legitimate child. We therefore **recommend**:

10. The mother of an illegitimate child should have in relation to the child any parental rights (in addition to tutory, curatory, custody or access) recognised by the common law of Scotland.
(Clause 2(1)(*a*).)

Father's common law parental rights

4.4 It follows from the conclusions which we have reached in relation to the father's rights to tutory, curatory, custody and access[1] that we would not recommend that the father of an illegitimate child should have any other parental rights automatically, or by virtue of cohabitation, registration or agreement.[2] The question for consideration therefore is whether there should be provision for enabling him to apply to a court for any parental rights (other than tutory, curatory, custody or access) recognised by the common law. It seems to us, as it seemed to almost all of those commenting on this issue,[3] that such provision would be desirable. A father might wish to apply, for example, for specific rights in relation to the direction of the child's education or religious upbringing, but not for custody or for appointment as the child's tutor or curator. There would seem to be no reason to compel him to apply for more than he wished. Moreover, it would seem to be desirable to enable the father of an illegitimate child who is playing a full paternal role to apply for court orders which, taken together, would place him in the same legal position as the father of a legitimate child. The considerations relating to procedure, to the criterion to be applied and to other consequential matters are the same as in relation to tutory and curatory.[4] We therefore **recommend**:

11. (*a*) The father of an illegitimate child should be entitled to apply to the court for any parental rights (in addition to or instead of tutory, curatory, custody or access) recognised by the common law of Scotland.
(Clause 3(1).)

(*b*) Rules of court should provide for a simple form of procedure for those cases where the father applies with the consent of the mother.

(*c*) The court should have power in relation to an illegitimate child to resolve disputes between two or more persons having parental rights and to remove a person's parental rights.
(Clause 3(1).)

(*d*) It should be provided by statute that in exercising any powers relating to the award, exercise or removal of parental rights in relation to an illegitimate child the court should regard the welfare of the child as the paramount consideration and should not make any order unless satisfied that it is in the interests of the child.
(Clause 3(2).)

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[1] See paras. 2.5, 2.10, 2.11, 3.4 and 3.5 above.

[2] This question was raised in para. 6.10 and Proposition 28 of the consultative memorandum.

[3] It was raised in para. 6.9 and Proposition 27 of the consultative memorandum.

[4] See para. 6.11 and Propositions 29 and 30 of the consultative memorandum and paras. 2.6 to 2.9 and 2.16 to 2.18 above.

Father's rights in relation to adoption

4.5 Under the present law the agreement of the father of an illegitimate child to the adoption of the child is not generally required. He is not regarded as a "parent" for the purposes of the adoption legislation.[1] He may, however, come within the definition of a "guardian" in that legislation.[2] If he is a guardian of the child his agreement to the adoption is required in that capacity,[3] unless it is dispensed with by the court on certain statutory grounds.[4] Once the new rules enabling children to be freed for adoption[5] before being placed with prospective adopters are brought into force the position of the natural father will be strengthened. First, he will be able to have his views considered at an early stage before the child has begun to be settled in a new home. Secondly, under the new rules the court will have to be satisfied, before freeing an illegitimate child for adoption in a case where the father is not already a "guardian" (as that term is defined), that the father has no intention of applying for custody or that if he did he would be likely to be refused.[6] It will still be the case, however, that the agreement of the father will not be required unless he qualifies as a "guardian" and, of course, only some cases will be dealt with under the freeing procedure.

4.6 The effect of our recommendations on tutory and curatory will be to make it easier for an interested and concerned father to have himself appointed tutor or curator either alone or along with the mother. That will often protect his position in relation to adoption.[7] If he is awarded custody, his position is also protected. His agreement to the adoption is required, unless dispensed with. We would not favour any rule whereby the agreement of the father of an illegitimate child was *always* required for the adoption of a child. We can see no reason why a father who has shown no interest in the child and who indeed may have been unaware of the child's existence should have a right to refuse to allow an adoption to take place unless a court dispenses with his agreement. There would clearly be grave practical

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[1] *A.* v. *B.* 1955 S.C. 378.

[2] The Adoption Act 1958, s.57(1) as amended by the Children Act 1975, Sched. 3 para. 39(*d*) defines "guardian" as—

(*a*) a person appointed by deed or will in accordance with the provisions of the Guardianship of Infants Acts 1886 and 1925 or the Guardianship of Minors Act 1971 or by a court of competent jurisdiction to be the guardian of the child, and

(*b*) in the case of an illegitimate child, includes the father where he has custody of the child by virtue of an order under section 9 of the Guardianship of Minors Act 1971, or under section 2 of the Illegitimate Children (Scotland) Act 1930.

One difficulty with (*a*) is that Scottish courts do not appoint "guardians" as such, although they do appoint tutors or curators. There is no doubt that a person appointed tutor is a guardian for the purposes of the adoption legislation, but there is more doubt if he is appointed curator. The draft Bill appended to this Report contains a minor consequential amendment to remove this difficulty. (See Sched. 1, amendment to the definition of "guardian" contained in the Adoption (Scotland) Act 1978, s.65(1).)

[3] Children Act 1975, s.12(1)(*b*).

[4] Children Act 1975, s.12(2). The grounds include the following: that he cannot be found or is incapable of giving agreement; that he is withholding agreement unreasonably; that he has persistently failed without reasonable cause to discharge the parental duties in relation to the child; that he has abandoned or neglected the child.

[5] Children Act 1975, s.14.

[6] Children Act 1975, s.14(8).

[7] See footnote 2 above.

disadvantages in any such rule. There would be a danger of serious difficulties and delays in a matter which should, in the interests of the child and others, be as straightforward as possible. The question which remains is whether, in adoption proceedings, the agreement of the father of an illegitimate child should be required if he has a court order in his favour awarding him access or any other parental right short of custody, tutory or curatory. Adoption would normally cut off the father's parental rights and it would seem right that this should not be done without his agreement—unless, of course, there were grounds for dispensing with that agreement.[1]

4.7 There was a mixed response to this question on consultation.[2] Some commentators considered that the present law provided adequate protection. Others thought there was a case for giving more recognition to certain fathers, particularly those who were or had been cohabiting as husband and wife with the mother of the child.

4.8 After carefully weighing the comments received we have concluded that, on balance, the arguments for improving the position in relation to adoption of a father who has been awarded any parental rights by a court outweigh the arguments against. There will not be many fathers in this category. A father will only be awarded a parental right if this is in the child's interests: the welfare of the child will be the court's paramount consideration in dealing with any such application. Where the father of an illegitimate child has an award of, say, access he would seem to be entitled to no less consideration than a divorced father with an award of access. Nor is this simply a question of the father's interests. The child's interests too may suggest that a link with the natural father should not be broken. If the father has not maintained a link with the child, notwithstanding his award of parental rights, there are adequate grounds under the existing law on which his agreement could be dispensed with. We therefore **recommend**:[3]

12. The agreement of a father to the adoption of his illegitimate child should be required (unless dispensed with on one of the statutory grounds) not only where he is the child's tutor or curator or is entitled to custody of the child, but also where he has been awarded access to the child or any other parental right and the award is still operative.
(Paragraphs 4.6 to 4.8; Schedule 1, amendment to the Adoption (Scotland) Act 1978, section 18(7).)

4.9 Another issue on which we sought views was the extent to which the fathers of illegitimate children should be notified of adoption proceedings.[4] This question arises only where the father is not regarded as "guardian".

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[1] As there would be if, for example, he had abandoned or neglected the child or withheld his agreement unreasonably. See Children Act 1975, s.12(2).

[2] The question was discussed in para. 7.8 and Proposition 32 of the consultative memorandum.

[3] The Law Commission have already recommended, for England and Wales, that the definition of "guardians" in the adoption legislation should include the father of an illegitimate child who has a right of access or any other parental right by virtue of an order under specified provisions of the Guardianship of Minors Act 1971. See (1982) Law Com. No. 118, paras. 9.2 to 9.12 and clause 17(1) of the draft Bill annexed to it.

[4] Consultative memorandum, para. 7.10 and Proposition 33.

Under the present law notification to the father in such circumstances is a matter for the discretion of the court hearing the adoption petition.[1] The curator *ad litem* will report to the court on whether there is any person who in his opinion ought to be notified.[2] The court *may* order service of a notice of the proceedings on any person or body having the rights and powers of a parent of the child, or having custody or care of the child;[3] on any person liable by virtue of any order or agreement to contribute to the child's maintenance;[4] and on any other person who in the opinion of the court ought to be notified.[5] We understand that practice varies between sheriffdoms as to whether fathers of illegitimate children are notified. Although some commentators suggested that the rules should be changed to require notification of the father of an illegitimate child if his whereabouts were known, others with extensive practical experience in this area considered that the present rules worked satisfactorily and were opposed to any attempt to impose a standardised solution on a situation which varied enormously from case to case. Given that there was a serious division of opinion on this point, that the matter turns on rules rather than primary legislation, and that it is peripheral to our main concern in this Report, we have decided to make no recommendations for any change in the rules on the notification of adoption proceedings to the fathers of illegitimate children.

Father's statutory rights and duties in relation to child care and assumption of parental rights by local authorities

4.10 The Social Work (Scotland) Act 1968 confers certain rights and imposes certain duties upon the parents of illegitimate children. Section 15, as re-enacted with amendments by section 73 of the Children Act 1975, deals with children in the care of local authorities. A local authority is not authorised to keep a child in care by virtue of this section (although it may retain the child in care on other grounds) if a parent or guardian of the child wishes to take over the care of the child. To this end the local authority must take steps to discover the whereabouts of the child's parents or guardians. Section 16 of the 1968 Act, as re-enacted with amendments by section 74 of the Children Act 1975, empowers a local authority in certain circumstances to pass a resolution assuming parental rights in respect of a child. The parents or guardians of the child must, unless the resolution is made with their consent, be notified of such a resolution and are entitled to object to it.[6] They are also

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[1] Act of Sederunt (Adoption of Children) 1959 (S.I. 1959 No. 763) as amended by Act of Sederunt (Adoption of Children Amendment) 1966 (S.I. 1966 No. 1621) and Act of Sederunt (Sheriff Court, Adoption of Children Amendment) 1977 (S.I. 1977 No. 977). The paragraph numbers in the next four footnotes refer to the 1959 Act of Sederunt as amended.

[2] Para. 6(*k*).

[3] Para. 8(*b*). If the father has been awarded custody by a court then, as noted above, his agreement to the adoption is required.

[4] Para. 8(*c*).

[5] Para. 8(*f*). The corresponding rules in England and Wales (The Adoption (County Court) Rules 1976, S.I. 1976 No. 1644) require a person liable by virtue of any order or agreement to contribute to the maintenance of the child to be made a respondent to the adoption application (rule 4(2)(*e*)), and the guardian *ad litem* must forthwith inform the court if he hears of any person claiming to be the father who wishes to be heard (Sched. 2, para. 10).

[6] Social Work (Scotland) Act 1968, ss.16(5) and 16(7). If there is an objection the resolution lapses unless the local authority applies to the sheriff for an order that it should not do so.

entitled at any future date to apply to the sheriff for it to be set aside.[1] The mother of an illegitimate child is a parent for these purposes: the father is not, but he is a guardian if he has been appointed as such by deed or will or by the order of a court or if he has for the time being the charge of or control over the child.[2]

4.11 Part III of the Social Work (Scotland) Act 1968 established children's hearings to deal with children who, for a variety of reasons, may be held to be in need of compulsory measures of care. A children's hearing may, if certain facts relating to the child or his family (the grounds of referral) are accepted or established, require a child to be subject to a supervision requirement. A supervision requirement may take the form of the child living at home but supervised by the local authority Social Work Department, or residing at a List D school, a children's home, with foster parents or a relative. Every parent or guardian of the child is entitled to be present at the hearing and has a duty to attend unless the hearing considers attendance unnecessary.[3] A parent or guardian of the child is entitled to dispute the grounds of referral,[4] to appeal against the decision of the hearing,[5] and to require a review of the hearing's decision periodically.[6] "Parent" and "guardian" for these purposes have the meanings set out in the preceding paragraph. Finally, where the child is in the care of a local authority or subject to a supervision requirement, his parents are obliged to notify the local authority of any change of their address.[7] For this purpose "parent" includes a father who is making any payment to a local authority for the child's maintenance by virtue of any order or decree made under the provisions of Part VI of the 1968 Act.[8]

4.12 In the consultative memorandum we pointed out that the definition of "guardian" in the Social Work (Scotland) Act 1968 might exclude a father of an illegitimate child who had been awarded custody of the child but who did not actually have charge of the child for the time being.[9] We suggested that any doubt on this point should be removed and that a father entitled to custody should qualify as a "guardian" for the purposes of the Act. This was generally supported on consultation. We therefore **recommend**:

13. The definition of "guardian" in section 94(1) of the Social Work (Scotland) Act 1968 should include the father of an illegitimate child if he is entitled to custody of the child, either solely or along with any other person.
(Schedule 1.)

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[1] Social Work (Scotland) Act 1968, s.18.

[2] Social Work (Scotland) Act 1968, s.94(1): "'parent' means either or both parents and . . . in relation to a child who is illegitimate, means his mother to the exclusion of his father"; "'guardian' means a person appointed by deed or will or by order of a court of competent jurisdiction to be the guardian of a child, or in relation to a child includes any person who, in the opinion of the court or children's hearing having cognizance of any case in relation to the child or in which the child is concerned, has for the time being the charge of or control over the child".

[3] S.41.

[4] S.42.

[5] S.49.

[6] S.48.

[7] S.88(1).

[8] S,88(3).

[9] Para. 6.12 and Proposition 31.

Father's position under other statutory provisions

4.13 We deal later with the father's position in relation to registration and re-registration of his child's birth and registration of any change in his child's name.[1] In the memorandum we discussed the position of the father (and other relatives) of an illegitimate person under the Mental Health (Scotland) Act 1960 and suggested that the Act should give more recognition to illegitimate relationships in cases where they had involved close family ties.[2] Since then the Mental Health (Amendment) (Scotland) Act 1983 has been passed. It gives considerable recognition to factual family ties[3] and goes a long way to meet the points made in the memorandum. In these circumstances we make no recommendation on this point.

[1] Paras. 7.5 to 7.9.
[2] Para. 10.17 and Proposition 52.
[3] See s.19 (which inserts a new ss.(7) in s.45 of the 1960 Act).

PART V SUCCESSION

5.1 In this part of the Report we examine the differences which exist in the law of succession between the rights of an illegitimate person and those of a legitimate person, and recommend reforms.

Intestate succession

5.2 At common law an illegitimate child had no rights of succession in relation to his father's estate, whether heritable or moveable, or to his mother's heritable estate. There was diversity of opinion amongst the institutional writers regarding his rights in relation to his mother's moveable estate. Both Stair[1] and Bankton[2] were in favour of allowing such claims but Erskine,[3] whose opinion eventually prevailed, took the contrary view. Before any statutory changes were made, an illegitimate child was for the purposes of succession regarded as "nobody's child" and thus had neither parents nor collaterals from whom he could inherit on intestacy.

5.3 The first change to the common law was made by the Legitimacy Act 1926. Section 9 conferred upon the mother and her illegitimate child limited reciprocal rights in the event of either of them dying intestate without legitimate issue. An illegitimate child did not have the right to represent his deceased mother in any claim she might have had to succeed to her parents or other relatives had she survived.[4] The Succession (Scotland) Act 1964 merely re-enacted this provision.[5]

5.4 As a result of representations made in Parliament during the passage of the 1964 Act the Russell Committee was set up to examine the position of illegitimate persons in relation to succession. The Committee recommended legislation to give an illegitimate child and his parents reciprocal rights of succession and to give the child a right to legitim from his parents' estates.[6] These recommendations were accepted and implemented for Scotland by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968.[7]

5.5 Many differences, however, remain between illegitimate and legitimate persons in the field of succession. While an illegitimate child[8] is entitled to legitim out of the moveable estate of his parents on a basis of equality with any legitimate children, he has no right to legitim by representation from the estates of his grandparents or remoter ancestors.[9] A person has no rights in the intestate estate of his brothers or sisters, uncles or aunts, grandparents or

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[1] IV.12.1.
[2] 1.2.4.
[3] III.10.8.
[4] *Tait and Others Petitioners,* 1946 S.L.T. (Sh.Ct.) 2.
[5] S.4.
[6] Report of the Committee on *The Law of Succession in Relation to Illegitimate Persons* (1966) Cmnd. 3051, paras. 29 to 55.
[7] Ss.1 and 2.
[8] Or his issue should the child predecease his parents. Succession (Scotland) Act 1964, s.11 as amended by Law Reform (Miscellaneous Provisions) (Scotland) Act 1968, Sched. 1.
[9] Succession (Scotland) Act 1964, ss.10A and 11(1) respectively inserted and amended by Law Reform (Miscellaneous Provisions) (Scotland) Act 1968, s.2 and Sched. 1.

remoter relatives where he is illegitimate or where there is any illegitimacy involved in the relationship.[1] Conversely where an illegitimate person dies intestate the only persons who have rights in his estate are his spouse, his children and their issue, and his parents.

5.6 An intestate estate to which there are no other claimants falls to the Crown.[2] The Crown, through the Queen's and Lord Treasurer's Remembrancer,[3] may on application make gifts from such estates to those who have moral but no legal claims. This practice may enable an illegitimate child to receive all or part of the estate of a relative such as a brother or grandfather.

5.7 *Defects of the present law.* The present law is open to several objections. First, by restricting the succession rights of an illegitimate child it penalises him for his illegitimacy: a status for which he cannot be held responsible.[4] Secondly, it differentiates between a family sanctioned by marriage and a family resulting from a stable union to the detriment of the children of the latter. Thirdly, it can lead in practice to harsh cases, as illustrated by the following examples. An illegitimate child brought up as a member of the family with his legitimate half-brothers or half-sisters cannot inherit on intestacy from them, nor they from him, even if there are no other surviving relatives. An illegitimate child brought up by, or enjoying close connections with, his maternal grandparents or other relatives has no claims either for legitim or on intestacy from their estates.

5.8 It is true that these effects can sometimes be avoided if the child is adopted, but that is not always possible or desirable[5] and, in any event, is not something over which the child has any control. It is also true that the child's relatives may make wills benefiting him. However, this cannot be seen as a satisfactory answer given that the majority of people in Scotland die intestate. Another way in which an illegitimate person can benefit from the estates of his intestate relatives is by application to the Queen's and Lord Treasurer's Remembrancer for an *ex gratia* award. This, of course, is feasible only where the estate has fallen to the Crown, not where some distant but legitimate relative takes in preference to the illegitimate brother or grandchild, and any benefit is entirely discretionary. None of these considerations persuades us that the *status quo* ought to be maintained.

5.9 *The proposal in the consultative memorandum.* In the consultative memorandum we suggested that a relationship traced to, from, or through a person of illegitimate birth should for the purposes of intestate succession be

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[1] Succession (Scotland) Act 1964, s.4(4) substituted by Law Reform (Miscellaneous Provisions) (Scotland) Act 1968, s.1.

[2] Succession (Scotland) Act 1964, s.7.

[3] An office now held by the Crown Agent.

[4] The European Court of Human Rights has held that provisions of Belgian law prohibiting an illegitimate child from having any rights in the intestate estates of his maternal relatives violated Arts. 8 and 14 of the European Convention on Human Rights: *Marckx* v. *Kingdom of Belgium* [1979–80] 2 E.H.R.R. 330.

[5] The policy of the adoption law is now against adoption by single parents, relatives and step-parents. Children Act 1975, ss.11 and 53.

treated as a legitimate relationship.[1] We were not persuaded by arguments formerly advanced against this solution to the effect that it might sometimes result in an illegitimate grandchild succeeding to a grandparent against the latter's wishes and indeed in cases where the grandchild's existence was unknown to the grandparent.[2] We pointed out that legitimate persons were also liable to succeed on intestacy to a grandparent against the latter's wishes, and that a man may well be unaware at the time of his death of the existence of a legitimate or adopted grandchild. We considered that it was unsafe to assume, in the absence of survey evidence, that most people in Scotland would be opposed to succession by illegitimate grandchildren, brothers or sisters. We also noted that it was difficult to defend the current position on logical grounds. If rights of succession between an illegitimate child and his parents are recognised on the sole basis of the blood relationship between them, it is difficult to see why this principle should not extend to remoter blood relatives. It is also anomalous that if a grandfather leaves his property by will to his grandchildren the bequest benefits illegitimate as well as legitimate grandchildren,[3] whereas if he dies intestate only legitimate grandchildren succeed to him. Finally we noted that the solution we suggested would bring Scots law into line with Article 9 of the European Convention on the Legal Status of Children born out of Wedlock[4] and with the European Convention on Human Rights as it has been interpreted.[5]

5.10 The fact of the matter is that the important decision of principle was taken in 1968 when reciprocal rights of succession were introduced between illegitimate children and their parents. We are aware that it may seem strange that a father who has never taken any interest in his illegitimate child can, under the present law, succeed to the child on intestacy. It is equally strange, however, that the father of a legitimate child who deserts his wife while she is pregnant and who never sees his child can inherit from the child on intestacy. The cause of these results is simply that the law of intestate succession ignores conduct and merit.[6] The problem of the unmeritorious successor is not confined to cases where a relationship is illegitimate. Extending rights of intestate succession to illegitimate relationships more remote than parent and child would merely generalise an existing rule and remove anomalies.

5.11 *The results of consultation.* There was almost unanimous support on consultation for our proposal that legitimate and illegitimate relationships should be treated alike in the law of intestate succession.[7] One working party on the memorandum, in strongly supporting the proposal, said:

> "It has been particularly obvious that many people are startled by the proposition that an illegitimate child has no brothers or sisters for

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[1] Para. 8.14 and Proposition 34.

[2] See the Report of the Committee on *The Law of Succession in Relation to Illegitimate Persons* (1966) Cmnd. 3051, para. 32.

[3] Because of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968, s.5.

[4] See para. 1.13 above.

[5] See footnote 4 to para. 5.7 above.

[6] There is a very limited exception for cases where the heir has killed the deceased. Even this is qualified. See the Forfeiture Act 1982.

[7] The only dissent was from one legal body whose Committee on the consultative memorandum were divided on this issue, a majority being against the proposal.

succession purposes. We know of cases which suggest that the 1968 changes have been so generally accepted in popular belief that there is disbelief about any remaining restrictions such as the bar between brothers and sisters where the relationship is illegitimate."

We ourselves were informed directly of a case in which a person died intestate leaving two cousins as nearest relatives. The deceased person had inherited much of the family property by will, but because he was illegitimate his estate passed to the Crown rather than to the surviving cousins, to their understandable resentment. The results of consultation have confirmed our provisional view and we accordingly **recommend**:

14. Legitimate and illegitimate relationships should be treated alike for purposes of intestate succession and legitim.
(Paragraphs 5.2 to 5.11; Schedule 1, amendments to the Succession (Scotland) Act 1964; and Schedule 2, repeals of certain provisions in the 1964 Act and in the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968.)

5.12 *Protection of trustees and executors.* The present law contains two provisions for the protection of trustees and executors against the emergence of late claims by unsuspected illegitimate relatives of a deceased person. The first provision is section 7 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968. It provides as follows:

"Notwithstanding anything in the foregoing provisions of this Act, a trustee or an executor may distribute any property vested in him as such trustee or executor, or may make any payment out of any such property, without having ascertained—

(a) that no illegitimate person exists who is or may be entitled to an interest in that property or payment in consequence of any of the said provisions, and

(b) that no illegitimate person exists or has existed, the fact of whose existence is, in consequence of any of the said provisions, relevant to the ascertainment of the persons entitled to an interest in that property or payment,

and such trustee or executor shall not be personally liable to any person so entitled of whose claim he has not had notice at the time of the distribution or payment; but (without prejudice to section 17 of the Act of 1964)[1] nothing in this section shall affect any right of any person so entitled to recover the property, or any property representing it, or the payment, from any person who may have received that property or payment."

The second provision is section 4(3) of the Succession (Scotland) Act 1964[2] which provides that, for the purposes of the rule that the parents of an illegitimate child succeed to him on intestacy in the same way as if he were legitimate,

"an illegitimate person shall be presumed not to be survived by his father unless the contrary is shown."

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[1] The Succession (Scotland) Act 1964, s.17 protects persons who have acquired title to heritable property in good faith and for value.

[2] Substituted by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968, s.1.

5.13 The simplest way of adapting the existing law to the situation which would be created if Recommendation 14 were implemented would be to extend the above presumption to relatives traced through the father: an illegitimate child would be presumed not to be survived by any paternal relative. This would preserve both techniques of the existing law and merely extend the one which needed to be extended. It must, however, be asked whether it is necessary and desirable to preserve two techniques when one would do. It would be possible, for example, to repeal section 4(3) of the 1964 Act and extend section 7 of the 1968 Act so as to protect executors or trustees who distributed property without ascertaining (*a*) whether an illegitimate relative of a deceased person existed or (*b*) whether a paternal relative of a deceased illegitimate person existed. It would also be possible to repeal section 7 of the 1968 Act and extend section 4(3) of the 1964 Act to provide two presumptions—(*a*) that a person is not survived by any illegitimate relative and (*b*) that an illegitimate person is not survived by any paternal relative. Presumptions of this nature could, of course, produce very artificial results. A person might be held to have survived members of a much younger generation. In the consultative memorandum we expressed a tentative preference for an extension of section 7 of the 1968 Act. To use presumptions of non-survivorship in this context seemed to us to confuse two questions—namely, the establishment of paternity and the presumption of life. A man would not be able to exercise rights of succession as the father of an illegitimate child unless he established his paternity to the satisfaction of the executors or trustees. There is no need for any presumption of non-paternity in this respect. The onus is already on him. If, however, paternity has been established—by, for example, a declarator of paternity—a special presumption of non-survivorship limited to cases of illegitimacy seems unnecessary and undesirable. There would seem to be no reason for not applying the general law on the presumption of life to this situation. There is no significant difference between the case where the divorced father of a legitimate child goes off to a distant country and disappears and the case where the judicially declared father of an illegitimate child goes off to a distant country and disappears. The problem is not one of presumed death but one of protecting executors and trustees. We therefore proposed in our consultative memorandum that (*a*) the protection afforded by the present law to trustees and executors who distribute property without having ascertained the existence of an illegitimate relative should be extended to trustees and executors who distribute property without having ascertained the existence of a paternal relative of a deceased illegitimate person and (*b*) there should be no special presumptions of non-survivorship in the case of illegitimate relationships.[1]

5.14 These proposals were generally agreed by those who offered comments, although one body suggested that the rule protecting trustees and executors should be framed in such a way as not to distinguish between legitimate and illegitimate people. There is much force in this suggestion. It is arguable that the illegitimacy of any relationship is not the real point in framing a rule for the protection of trustees and executors who distribute property in good faith in ignorance of the existence of a relative with a claim on the estate. There are cases where even in the case of legitimate

[1] Para. 8.19 and Proposition 35.

relationships an executor or trustee cannot be sure that a hitherto unknown relative will not come forward and claim a share. We were therefore tempted to recommend that section 7 of the 1968 Act should be reframed so as to make the protection depend on criteria such as the executor's good faith rather than the illegitimacy of any relationship. We have concluded, however, that a change of this nature, which would be of wide application, should not be recommended without full consultation. This is a matter to which we shall have the opportunity to return in our projected work on succession law. In the meantime, as a holding measure, we **recommend**:

15. (*a*) The protection afforded by the present law to trustees and executors who distribute property without having ascertained the existence of an illegitimate relative should be extended to trustees and executors who distribute property without having ascertained the existence of a paternal relative of a deceased illegitimate person.

(*b*) There should be no special presumptions of non-survivorship in the case of illegitimate relationships.

(Paragraphs 5.12 to 5.14; Schedule 1, amendment to the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968, section 7.)

Testate succession

5.15 Prior to 1968 it was a settled rule of construction that where a testator referred to children he was held to mean legitimate children[1] unless there was something in the will[2] or surrounding circumstances[3] pointing strongly to a different intention. Illegitimate children might be included if their exclusion would result in intestacy.[4] The same rule applied where the words "descendants" or "issue" were used.[5] An illegitimate child legitimated by the subsequent marriage of his parents would not benefit if he was legitimated after the date of vesting.[6] The Russell Committee in 1966 recommended no change in these rules.[7] However, this was not accepted and the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 altered the common law presumption against the inclusion of illegitimate children[8] and also dealt with other rules which disadvantaged illegitimate persons.[9] Section 5(1) of the 1968 Act provides:

> "In deducing any relationship for the purpose of ascertaining the person or persons entitled to benefit under a provision contained in any deed, persons shall, unless the contrary intention appears, be taken to be or, as the case may be, to have been, related to each other notwithstanding that the relationship existing between them is or was an illegitimate one only; and any rule of law to the contrary shall cease to have effect."

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[1] *Mitchell's Trs.* v. *Cables* (1893) 1 S.L.T. 156; *Govenlock's Trs.* v. *Govenlock* (1895) 3 S.L.T. 163; *McDonald's Trs.* v. *Gordon*, 1909 2 S.L.T. 321; *Scott's Trs.* v. *Smart* 1954 S.C. 12.
[2] *Allan* v. *Adamson* (1902) 9 S.L.T. 404.
[3] *Purdie's Trs.* v. *Doolan* 1929 S.L.T. 273.
[4] *Scott's Trs.* v. *Smart* 1954 S.C. 12.
[5] *Cairnie* v. *Cairnie's Trs.* (1837) 16 S. 1.
[6] *Burns' Trs.* v. *Burns* 1917 S.C. 117.
[7] Paras. 57 and 58.
[8] S.5.
[9] S.6; see para. 5.17 below.

The new rule applies only in relation to deeds executed after 25 November 1968,[1] and does not affect the construction of any enactment.[2]

5.16 Reference by a testator to his children in a will executed after 1968 includes his illegitimate children in the absence of express provision to the contrary; similarly a reference to his daughter's issue will include a reference to all her descendants whether legitimate or illegitimate. "Nephew" means in addition to legitimate nephews, an illegitimate son of the testator's legitimate sister as well as an illegitimate son of his illegitimate brother.[3] A reference in a will to the "heir" or "heirs" of a person dying after the commencement of the Succession (Scotland) Act 1964[4] is thought to be a reference to those entitled to succeed on intestacy under that Act,[5] and for the purpose of ascertaining the person or persons entitled to benefit as heirs in a will or other deed executed after 25 November 1968 an illegitimate relationship is deemed to be a legitimate relationship.[6] Thus an illegitimate son of a predeceasing son would be entitled to a bequest by the son's father to his heirs. Two minor criticisms can be made of section 5(1), both arising from its application only to ascertaining beneficiaries. First, an illegitimate son of the testator could not be confirmed as executor if the will appointed "my son" instead of mentioning him by name. The question at issue here would not be one of "ascertaining the person or persons *entitled to benefit under a provision*". Secondly, it might be argued that a bequest to A provided he had children at the date of the testator's death would fail if A had only illegitimate children. The argument might be that the question in such a case was not one of ascertaining the beneficiary but rather of deciding whether an ascertained beneficiary had fulfilled a condition. It could, on the other hand, be argued that the question is simply whether a person A is entitled to benefit and that this situation is covered by section 5(1). We express no view on this question but consider that it would be desirable to extend the statutory provision slightly in order to avoid the risk of anomalies.[7] We therefore **recommend**:

16. The principle of section 5(1) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 should apply not only for the purpose of ascertaining the person or persons entitled to benefit under a deed but also for the purpose of ascertaining the person or persons designated by a deed for other purposes (such as the appointment of an executor or the fulfilment of a condition). (Paragraphs 5.15 and 5.16; Clause 1; Schedule 1, addition of section 36(5) to the Succession (Scotland) Act 1964.)[8]

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[1] Ss.5(3) and 22(5).

[2] S.5(5).

[3] This has been doubted in England and Wales. See Ryder, (1971) 24 *Current Legal Problems* pp. 163 and 164, commenting on the Family Law Reform Act 1969, s.15(1)(*b*). This doubt does not seem to arise on the differently drafted Scottish section.

[4] 10 September 1964.

[5] Gloag and Henderson, *Introduction to the Law of Scotland* (8th edn.), p. 668; Meston, "Bequests to Heirs" 1974 S.L.T. (News) 109.

[6] Law Reform (Miscellaneous Provisions) (Scotland) Act 1968, s.5(1).

[7] Our provisional proposal on this point (consultative memorandum, para. 8.21 and Proposition 36) was agreed to by all those who offered comments on it.

[8] The addition of s.36(5) enables s.5(1) of the 1968 Act to be repealed (see Sched. 2).

Miscellaneous matters

5.17 The Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 also made changes in various rules that applied to illegitimate persons. Previously only the issue of a *legitimate* child who predeceased the testator were entitled to the share of the estate their deceased parent would have taken by survivance;[1] accretion did not operate in class gifts to illegitimate children;[2] and only an after-born *legitimate* child could benefit from the rule that a will may be revoked by the birth of a posthumous child.[3] Section 6 of the 1968 Act extends these rules to illegitimate children in the case of wills executed after 25 November 1968. We are not aware of any difficulties in these areas, and none was brought to our attention on consultation.

Entails

5.18 The terms "child", "issue" or "heirs of the body" in a deed of entail refer only to legitimate persons, because the pre-1968 Act rules of construction continue to apply to such entails. A deed of entail in order to be valid must have been executed before 1914[4] and so cannot be affected by section 5 of the 1968 Act, which applies only to deeds executed after the commencement of the Act. We do not think that existing deeds of entail should be altered so as to benefit illegitimate children.

Titles etc.

5.19 Hereditary titles, coats of arms and other honours and dignities do not descend to illegitimate persons because the terms of the grant (to a person and his heirs or descendants) impliedly exclude such persons. "Heirs" and "descendants" are deemed to include legitimate or legitimated issue only. The policy of recent statutes on the law of succession has been to exclude titles from their scope. Thus the Succession (Scotland) Act 1964 provides that nothing in it is to "apply to any title, coat of arms, honour or dignity transmissible on the death of the holder thereof or affect the succession thereto or the devolution thereof".[5] In the consultative memorandum we said that unless there was a strong demand for change we would tentatively favour continuing this policy.[6] There was, on consultation, no demand for change, although one or two commentators would have accepted an application of the general law to titles of honour. We therefore recommend no change in the law relating to titles of honour.

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[1] *Farquharson* v. *Kelly* (1900) 2 F. 863.
[2] *Torrie* v. *Munsie* (1832) 10 S. 597.
[3] Entail (Scotland) Act 1914.
[4] Legitimation (Scotland) Act 1968, ss.7 and 8; Law Reform (Miscellaneous Provisions) (Scotland) Act 1968, s.5(5)(*b*).
[5] S.37(1). See also the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968, s.5(5)(*b*).
[6] Para. 8.24.

PART VI ESTABLISHMENT OF PARENTAGE

6.1 If illegitimate children are to have the same rights as legitimate children it is important that the law should make satisfactory provision for the establishment and proof of parentage. In this part of the Report we therefore consider the law on presumptions of paternity, blood tests in proof of parentage and judicial proceedings for the establishment of parentage.

Public intervention

6.2 We do not recommend the introduction of a system whereby it would be the responsibility of some public authority to investigate every illegitimate birth in order to establish the child's paternity and, if necessary, to take compulsory paternity proceedings. A system of this kind was considered by the Russell Committee but rejected, partly on the ground of administrative expense and partly on the ground that it would not prove acceptable to require official questioning of a mother in order to reveal matters which she might wish to keep private.[1] In our consultative memorandum[2] we expressed agreement with this approach. Those who commented on this point on consultation were of the same view. We have been interested to note that the Law Commission have recently come to the same conclusion in relation to compulsory paternity proceedings. After pointing to the historical parallel with the Elizabethan Poor Law, which aimed to find the father of an illegitimate child to relieve the parish from having to provide support for the child, they continue:

> "However, we think that a compulsory system would in some cases be harmful to the child and we doubt whether it would be of much benefit in most cases: fathers revealed in this way would be likely to be those most reluctant to contribute financially or in any other way to the child's welfare. Moreover, to propose that a system of this kind be established, with the cost and administrative problems which would arise, seems to us unrealistic in present circumstances. Finally such a system would inevitably sometimes put pressure on the single mother. In some circumstances she might give unreliable information about the child's paternity, especially if she wished to avoid contact with the father; in others she might claim not to know the father's identity. On balance therefore we think that the disadvantages of introducing a compulsory paternity action outweigh its possible advantages."[3]

We have also been interested to note that the Norwegian law on this point, which until recently imposed an obligation on the mother to give information regarding the father, has now been amended to remove this obligation.[4]

Presumptions of paternity

6.3 *Present law.* A child conceived by a married woman during the

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[1] Report of the Committee on *The Law of Succession in Relation to Illegitimate Persons* (1966) Cmnd. 3051, para. 41.

[2] Para. 2.20.

[3] Law Com. No. 118, para. 10.45 (footnote omitted).

[4] Act on Children and Parents of 8 April 1981. We are indebted to Mr. O. B. Støle for providing us with a translation of this Act.

subsistence of the marriage is presumed to be the child of her husband.[1] It is not entirely clear whether the presumption applies in the case of a void marriage[2] or an irregular marriage.[3]

6.4 The above presumption in favour of the husband's paternity is very strong, but it may be rebutted by proof of his sterility or by proof that sexual intercourse did not take place between him and his wife during the period within which conception must have occurred.[4] It is not sufficient to establish that other men as well as the husband had intercourse with the wife within that period. Where it is averred that the husband is not the father of a child born to his wife, the onus of proving this averment rests on the person making it. The presumption of the husband's paternity is a difficult presumption to rebut. The standard of proof required to rebut it has been expressed in different ways by different judges at different times, but in recent cases it has been accepted that the standard of proof required is proof beyond reasonable doubt.[5] The Divorce (Scotland) Act 1976 now provides[6] that the standard of proof required to establish the ground of an action of divorce is proof "on balance of probability" so that the question arises whether, for the limited purpose of proving adultery in a divorce action, the presumption of the husband's paternity can be rebutted by proof on balance of probability.

6.5 Where a man has been familiar with a woman before marriage and she is pregnant at the date of her marriage to him, these facts raise a strong presumption that he is the father of her child,[7] even where she has intercourse with men other than her future husband.[8] This presumption may be rebutted in the same way as the presumption mentioned in the previous paragraph.[9] There is no presumption in Scots law that a man who marries the mother of an illegitimate child is the father of that child.[10] However, where such a child has been reputed to be legitimate for a long period, there is a presumption that he had in fact been legitimated by the subsequent marriage of his parents.[11] There is no legal presumption that a man who is named in the Register of

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[1] This presumption is expressed by the maxim *pater est quem nuptiae demonstrant* (literally "the father is he to whom the marriage points".)

[2] Stair (III, 3.42) thought it did, but it could be argued on principle that as the marriage does not exist in the eyes of the law no legal presumption can, in the absence of legislation, flow from it.

[3] Stair (III, 3.42) and (IV, 45.20) thought the presumption applied in such a case. In *Baptie* v. *Barclay* (1665) Mor. 8413 it was said that there was no presumption of legitimacy "unless it had been a formal marriage" but the marriage was disputed in this case. In *Swinton* v. *Swinton* (1862) 24 D. 833 it was said by Lord Deas (at p. 838) that there was not "the same presumption in favour of legitimacy in a case of marriage alleged to have been constituted by habit and repute, as in cases of regular marriage". Again, however, the marriage was in dispute. The modern view is that an irregular marriage, once entered into, has all the effects of a regular marriage and it is by no means clear that the dicta in the above cases established an exception to that rule.

[4] *Montgomery* v. *Montgomery* (1881) 8 R.403; *Steedman* v. *Steedman* (1887) 14 R.1066.

[5] *Brown* v. *Brown* 1972 S.C. 123; *S.* v. *S.* 1977 S.L.T. (Notes) 65; *Docherty* v. *McGlynn* 1983 S.L.T. 645.

[6] S.1(6).

[7] *Gardner* v. *Gardner* (1877) 4 R. (H.L.) 56; *Imre* v. *Mitchell* 1958 S.C. 439.

[8] *Reid* v. *Mill* (1879) 6 R.659; *Kerr* v. *Lindsay* (1890) 18 R.365.

[9] *Hastings* v. *Hastings* 1941 S.L.T. 323.

[10] *Smith* v. *Dick* (1869) 8 M.31; *James* v. *McLennan* 1971 S.L.T. 162 (H.L.).

[11] *James* v. *McLennan supra.*

Births as the father of an illegitimate child is the child's father.[1] If anyone sought to prove that the man was the father, his admission of paternity at the time of registration could be an important item of evidence, but the burden of proof would still be on the person seeking to establish paternity.

6.6 *Presumptions based on marriage.* It is highly desirable that there should be some legal presumption relating to the paternity of a child since paternity, unlike maternity, is not a self-evident fact. Our view is that the present presumptions based on marriage accord with normal human behaviour, are highly desirable in the interests of the stability of family life, and should be retained. It would be wrong to abandon these presumptions because in a few cases they lead to results which do not correspond with the true situation. Presumptions based on the mother's marriage are easy to apply because the fact of marriage is readily proved. From the point of view of an outsider who needs to know who the father is, a presumption based on marriage is particularly helpful since the husband can be easily identified and can be treated as the father until the contrary is established. It is important to note that marriage-based presumptions of paternity are not in any way discriminatory in relation to the child. It would be perfectly possible to abolish illegitimacy altogether as a legal concept and yet to retain a presumption that a husband is the father of his wife's child. We think therefore that the presumptions of paternity based on marriage should remain. Indeed we think that it would be advantageous to set out clearly in a statute that a man should be presumed to be the father of a child if he was married to the mother of the child at the date of the child's conception or birth or at any time between those dates.

6.7 In our consultative memorandum we suggested that, for the avoidance of doubt, it should be made clear that the presumptions of paternity based on marriage apply in cases where the marriage is void or irregular.[2] The underlying assumption behind these legal presumptions is that a woman who is married to a man is likely to have intercourse with him and is unlikely to have intercourse with other men. This assumption, founded on normal standards of human behaviour, is as true when the couple's marriage is void or irregularly entered into, as it is when the couple are regularly married. Our proposal on this point was agreed by all those who commented on it. We therefore **recommend**:

17. It should be made clear by statute that a man is presumed to be the father of a child if he was married to the mother of the child at the date of the child's conception or birth or at any time between those dates and that, for this purpose, marriage includes an irregular or void marriage.
(Paragraphs 6.6 and 6.7; Clause 5(1)(*a*) and (2).)

In theory there is a danger of conflicting presumptions because a woman might be married to one man at the date of her child's conception and to another at the date of the child's birth, or might be a party to a valid marriage

[1] The Registration of Births, Deaths and Marriages (Scotland) Act 1965, s.41(3), provides that an extract from the register "shall be sufficient evidence of the birth . . .". This does not mean that it is evidence of paternity or maternity. See *MacKay* v. *MacKay* 1946 S.C. 78.

[2] Paras. 2.11 and 2.14 and Proposition 1.

with one and a void marriage with another. This is not likely to be a frequent source of difficulty. If a question did arise as to which husband was the father, the presumptions would cancel each other out and the question would have to be decided on the evidence. We do not think it necessary to provide specifically for this situation by legislation.

6.8 *Standard of proof required to rebut presumptions of paternity based on marriage.* In the consultative memorandum we set out arguments for and against a change in the present law that the presumptions of paternity based on marriage can be rebutted only by proof beyond reasonable doubt. We pointed out that in favour of a change in the standard of proof it could be said that the legal and social consequences of illegitimacy are not now sufficient to justify a requirement of proof beyond reasonable doubt, and that to hold a husband to be the father of his wife's child when it was probable on the available evidence that he was not might benefit neither the child nor the mother nor the husband.[1] We also pointed out that in England and Wales, since 1970, the proof required to rebut the presumption of the husband's paternity has been proof on a balance of probabilities.[2] We noted that where a husband claims, for the purposes of divorce, that his wife must have committed adultery because she had given birth to a child by another man, it is arguable that the standard of proof required for this purpose is the balance of probabilities.[3] On the other hand we pointed out that there might be merit in retaining a high standard of proof in this area to discourage challenges to the stability of families. We noted too that there are difficulties in the concept of proof on a balance of probabilities, at least if it is pushed to its logical conclusion. We gave the example of a case where it is proved that over the period when conception could have occurred the mother had sexual intercourse with her husband once and with another man three times. If there is no other evidence to suggest that one man rather than the other is the father, is it more probable than not that the husband is not the father? Balancing the arguments for and against a change in the standard of proof, we ventured the very tentative view that, so long as the choice is between proof beyond reasonable doubt and proof on a balance of probabilities, it might be that the latter should apply. We did not, however, make any provisional proposal to this effect but merely invited views as to whether the presumptions of the husband's paternity should be rebuttable by proof on a balance of probabilities.[4]

6.9 Almost all of those who commented on this question supported a change to proof on a balance of probabilities. We have not, however, found this an easy question to resolve. It is a question on which two views are possible, depending to some extent on whether the focus of attention is a case where a marriage has broken down and doubts have already been raised as to the paternity of a child, or a case where there is a challenge to the stability of a settled family relationship. In the first type of case, where the question may simple be whether a woman's first husband or proposed second husband is the father of her child, it is easier to advocate a change to proof on a balance of

[1] Para. 2.13. See the observations in *S.* v. *S., W.* v. *Official Solicitor* [1972] A.C. 24.
[2] Family Law Reform Act 1969, s.26.
[3] Divorce (Scotland) Act 1976, s.1(6).
[4] Para. 2.14 and Proposition 3.

probabilities. Indeed it is not difficult to imagine cases of this nature where it might be regarded as unjust to hold the first husband to be the father solely on the basis of a technical rule of evidence.[1] In the second type of case it is easier to advocate the retention of proof beyond reasonable doubt. As a way out of this difficulty we considered whether an intermediate standard of proof—such as proof "by clear and convincing evidence"—might be applied. We feared, however, that such a standard would be liable to lead to confusion and difficulty and might not differ significantly from proof beyond reasonable doubt. In the end, after making enquiries as to the effects of the change in the standard of proof in England and Wales,[2] we reached the conclusion, with some hesitation and not without difficulty, that the standard should be proof on a balance of probabilities. We therefore **recommend**:

18. The standard of proof required to rebut any presumption of paternity based on marriage should be proof on a balance of probabilities.
(Paragraphs 6.8 and 6.9; Clause 5(4).)

6.10 *Presumption based on registration of birth.* In the consultative memorandum we invited views on the question whether the presumptions based on marriage could usefully be supplemented by a presumption based on registration which would come into operation only in cases where the presumptions based on marriage did not apply.[3] As a matter of practice the man who has admitted paternity and allowed himself to be registered as the father of an illegitimate child will be treated as the father. There is, however, no legal presumption that he is the father. Such a presumption would be to the benefit of the child. If, for example, the child wished to claim legitim or rights under the law of intestate succession on the man's death he could rely on this presumption of paternity. The burden of proof would be on anyone seeking to deny that the man was the child's father. The presumption would also be to the benefit of third parties, such as local authorities, who might be concerned with the child. They would be entitled to assume that the man registered as the father of a child was the father until the contrary was proved. The presumption would be based on an easily ascertainable fact and would, in most cases, correspond to reality. It would, however, be rebuttable by proof on a balance of probabilities.

6.11 The almost unanimous view on consultation was in favour of a presumption based on registration. One commentator did, however, suggest a refinement of it—namely that the presumption should not apply in a question with another man claiming, within a reasonable period after the registration, to be the father of the child. If it did apply in such cases the man who happened to be favoured by the mother, and who was accordingly registered as the father, might enjoy an unwarranted advantage in the paternity dispute. We have given careful consideration to this suggestion but have decided not to recommend its adoption. It would have to be decided

[1] Cf. *Watson* v. *Watson* [1954] P.48 where Barnard J. felt constrained to hold the husband liable for the maintenance of the wife's child although, on a balance of probabilities, the child would not have been held to be the husband's.

[2] We were informed that, partly because of the widespread use and increasing reliability of blood test evidence, the change has had little practical effect.

[3] Para. 2.12 and Proposition 2.

whether the reasonable period should run from the birth or from the registration of the birth or from the registration of a man as the father (perhaps years later) in the Register of Corrections Etc. On any view it could not safely be assumed that the real father would know that time was running against him. It would also have to be decided what time should be regarded as reasonable. Any fixed period—such as a year—would be arbitrary, but to leave a "reasonable time" undefined would be to frustrate the main purpose of the presumption which would be to introduce an element of certainty. Given that the presumption could be rebutted by proof on a balance of probabilities we are not satisfied that the proposed refinement is necessary. It would complicate the law without, in our view, being likely to make very much difference in practice.

6.12 For reasons which we explain later, we do not think that a finding of paternity in an undefended action for affiliation and aliment is a secure basis for a presumption.[1] Similarly the mere registration of a man as father on the basis of such a decree is insufficient: we consider that the proposed presumption based on registration should be confined to cases where the man and the mother have both acknowledged his paternity. We also think it should be limited at least in the first instance to United Kingdom registers, where there are stringent restrictions on the circumstances in which a man can be registered as the father of a child. We therefore **recommend**:

19. Where a man and the mother of a child have both acknowledged that he is the father and he has been registered as such in any register kept under section 13 or section 44 of the Registration of Births, Deaths and Marriages (Scotland) Act 1965 or in any corresponding register kept under statutory authority in any other part of the United Kingdom and where no presumption of paternity based on marriage applies, the man registered as the father should be presumed to be the father.
(Paragraphs 6.10 to 6.12; Clause 5(1)(*b*).)

Blood tests in proof of parentage in civil proceedings

6.13 The usefulness of blood test evidence in paternity disputes is now generally recognised.[2] For more than ten years the use of such evidence in determining paternity in civil proceedings in England and Wales has been regulated by statute.[3] The five essential features of the English statutory provisions are as follows:

(1) They give the court power to give a direction for the use of blood tests and for the taking of blood samples from the child, the mother and any person alleged to be the father.

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[1] See paras. 6.29 and 6.30 below.

[2] See *Docherty* v. *McGlynn* 1983 S.L.T. 645; *Allardyce* v. *Johnston* 1979 S.L.T. (Sh. Ct.) 54; *Holmes* v. *Holmes* [1966] 1 W.L.R. 187; *S.* v. *S.* [1972] A.C. 24; Law Commission, Report on *Blood Tests and the Proof of Paternity in Civil Proceedings* (Law Com. No. 16, 1968); *Law of Evidence* (Research Paper for Scottish Law Commission) paras. 13.02 to 13.06; Mason, *Forensic Medicine for Lawyers* (2nd. edn., 1983) pp. 183 to 188. We are informed that in England and Wales evidence based on the analysis of blood samples is now extremely common in paternity disputes.

[3] Family Law Reform Act 1969, Part III, brought into force on 1 March 1972 by S.I. 1971/1857. These provisions implemented the recommendations of the Law Commission in Law Com. No. 16.

(2) They provide that a blood sample required under a direction cannot be taken from a mentally sound person above the age of 16 without his consent.

(3) They regulate the taking of samples from children under the age of 16 and from mentally disordered persons.

(4) They provide for regulations to be made on the persons entitled to take blood samples required under a direction; on the persons entitled to test those samples; on the identification of the samples; on the charges that may be made; on the form of reports to the court; and so on.

(5) They provide for the effects of a failure by a person to consent to the taking of blood samples from himself or a child named in the direction over whom he has care and control. The general rules are that the court may draw such inferences from the failure as may appear proper in the circumstances and may, in an appropriate case, deny the person the benefit of a presumption. The court may also dismiss a person's claim for any relief.

There is no statutory regulation of the use of blood test evidence in Scotland. This has the effect that blood test evidence is less frequently used in paternity disputes in Scotland than it might be and it gives rise to problems in relation to the giving of consent to the taking of blood samples from pupil children.[1]

6.14 In our consultative memorandum on the law of evidence we suggested that provisions for Scotland on the lines of the English legislation on this topic were overdue and should be introduced.[2] This suggestion was approved by most of those who submitted comments on it. On reconsidering the question, however, we have come to the conclusion that legislation on the English lines would not necessarily be the best that could be devised for Scotland. We therefore intend to issue a further consultation paper, in the course of our work on the law of evidence, seeking views on various options for reform. It may be that the essential questions in this area are not confined to blood tests in relation to proof of parentage in civil cases but relate generally to the powers of the courts to order the production of evidence which can be obtained only by some invasion of the bodily integrity of an individual, and to the sanctions available to secure compliance with any such order. There is, however, one aspect of the problem which has given rise to particular difficulty in paternity disputes in Scotland and which can be appropriately dealt with in this Report. That is the giving of consent to the taking of blood samples from pupil children and those above the age of pupillarity who are incapable of giving consent.[3] If the law on this question were clarified, one obstacle to the use of blood test evidence in paternity disputes would be removed. At one time the courts in Scotland appeared to be reluctant to attach much weight to blood test evidence[4] but that attitude has now changed.[5]

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[1] See *Imre* v. *Mitchell* 1958 S.C. 439; *Allardyce* v. *Johnston* 1979 S.L.T. (Sh. Ct.) 54; *Docherty* v. *McGlynn, supra.*

[2] Consultative Memorandum No. 46 (1980), paras. M.06 and M.07 and Proposition 160.

[3] *Docherty* v. *McGlynn, supra.* The problem in this case related to consent on behalf of a pupil child. In the circumstances of the case the court was able to resolve the problem by relying on the presumption that a husband is the father of his wife's child. Other cases might not lend themselves to the same solution.

[4] See *Imre* v. *Mitchell* 1958 S.C. 439; *Sproat* v. *McGibney* 1968 S.L.T. 33.

[5] See *Docherty* v. *McGlynn, supra; Allardyce* v. *Johnston, supra.*

6.15 So far as the question of consent on behalf of a pupil child[1] is concerned, the person most clearly qualified to give consent is the child's tutor who would normally, of course, be a parent. We suggest no alteration in the rule that a man presumed to be the parent should be entitled to rely on this presumption, for the purpose of consenting to blood samples, until the presumption is rebutted.[2] We think it would be useful also to permit consent to be given by any person having custody, or care and control, of the child.[3] On the other hand there would seem to be no need to permit consent to be given by a parent who was neither the child's tutor nor a person having custody, or care and control, of the child. As a longstop, we think that the court should be given an express statutory power to consent to a blood sample being taken from a pupil child if there is no tutor or other person entitled to give such consent,[4] or if it is not reasonably practicable to obtain the consent of the tutor or other such person or if the tutor or other person entitled to consent is unwilling to assume the responsibility of giving or withholding consent. It should be provided that the court's consent will be given only if it is satisfied that the taking of the sample would not be detrimental to the child's health. The purpose of such an intervention by the court would simply be to supply a missing consent. The court would not be ordering or authorising the use of force to take a blood sample against the will of the person having the care and control of the child. The court's power to supply the necessary consent might be useful if, for example, the child was in the care of someone other than his parent and that person, although willing to allow access to the child for the taking of blood samples, was unwilling to assume the parental responsibility of giving or refusing consent. We envisage that in practice the court would give consent only if satisfied that the person with care of the child would not place obstacles in the way of the sample being taken.

6.16 In the case of those above the age of pupillarity who are incapable of giving consent there will very often be no person legally entitled to consent to the taking of a blood sample for the purpose of resolving a dispute about parentage. A curator *bonis* has no control over the person of his ward and cases where a mentally ill person has a tutor dative[5] or a guardian under the mental health legislation[6] are comparatively rare. This is one difference between the situation of the pupil and that of an *incapax* above the age of pupillarity—a pupil normally has a tutor, an adult *incapax* does not. Another is that the concept of a person having custody, or care and control, of an adult *incapax* is not one with any precise legal meaning. For these reasons, the practical question in relation to an *incapax* above the age of pupillarity will usually be whether the court can supply the necessary consent for a blood

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[1] A minor child could probably, under the present law, give consent on his own behalf. We intend to examine the whole question of consent to medical treatment etc. by, and on behalf of, pupils and minors in a consultative memorandum on the law of children.

[2] *Docherty* v. *McGlynn, supra.*

[3] Cf. the Family Law Reform Act 1969, s.21(3), which provides for consent to be given by the person who has care and control of the child.

[4] This would be a rare situation because there would almost always be someone who could be said to have the care or control of a pupil child.

[5] See *Dick* v. *Douglas* 1924 S.C. 787.

[6] See Mental Health (Scotland) Act 1960, s.29, as amended by Mental Health (Amendment) (Scotland) Act 1983, s.11.

sample to be taken. We think that it should be able to do so on the same conditions as in the case of a pupil child.

6.17 Our **recommendations** on consent to blood tests are, therefore, as follows:

20. (*a*) It should be provided that consent to the taking of a blood sample from a pupil child for the purposes of proof of parentage in civil proceedings may be given by any person who is his tutor or who has custody, or care and control, of him.

(*b*) It should be provided that consent to the taking of a blood sample from any person who is incapable (whether or not by reason of pupillarity) of giving consent may be given by the court where

(i) there is no person who is entitled to give such consent, or

(ii) there is such a person but it is not reasonably practicable to obtain his consent, or he is unwilling to accept the responsibility of giving or withholding consent

provided that the court is satisfied that the taking of the sample would not be detrimental to the person's health.
(Paragraphs 6.13 to 6.17; Clause 6.)

Judicial proceedings

6.18 *Declarators of legitimacy or bastardy.* Even if the recommendations in this Report on the removal of legal differences between legitimate and illegitimate people were implemented in full, there would still be cases where legitimacy would be important.[1] Most significantly, it would be important in relation to deeds executed, and enactments passed, before the implementing legislation came into force.[2] It would also be important in relation to titles of honour[3] and could be important in relation to future deeds which use terms such as "legitimate" or "illegitimate".[4] In these circumstances, we do not think it would be right to recommend that it should no longer be possible to apply for a declarator of legitimacy[5] or bastardy, although we hope, and expect, that both will become extremely uncommon as the legal consequences of legitimacy or illegitimacy dwindle away.[6] We suggested in our consultative memorandum that the term "declarator of bastardy" was needlessly offensive

[1] Of course, the father's position would be affected significantly by whether or not he was married to the mother at or after the child's conception. See clause 2(1)(*b*) of the draft Bill, Appendix A.

[2] See clause 1(2) and (3) of the draft Bill, Appendix A.

[3] *Ib.*, clause 9(1)(*c*).

[4] *Ib.*, clause 1(2) and (3).

[5] We use the term "declarator of legitimacy" to include a declarator that someone has been legitimated.

[6] It may be important in certain cases (e.g. for purposes of parental rights) to know whether an admitted parent of a child was married to the other parent at a certain time. The question here is the existence of a valid marriage and the appropriate remedy would normally be a declarator of marriage, or a declarator of nullity of marriage or a declarator of freedom and putting to silence.

and should be changed.[1] This was supported by almost all those who commented.[2] We therefore **recommend**:

21. As there may continue to be a residual need for actions for declarator of legitimacy or bastardy (in relation, for example, to titles of honour or deeds executed, or enactments passed, before reforming legislation comes into force) these actions should not be made incompetent. Declarators of bastardy should, however, in future be referred to in legislation and in rules of court as declarators of illegitimacy.
(Clause 7.)

6.19 *Declarators of parentage or non-parentage.*[3] As a declarator is a generally available remedy in Scots law it is already possible to obtain a declarator that someone is, or is not, the parent of a particular child.[4] Such declarators, if the recommendations in this Report are implemented, may become a more acceptable alternative to declarators of legitimacy or illegitimacy, and it would, we think, be helpful if appropriate forms of conclusion were included in rules of court. If this is not done there is a danger that practitioners may use actions for declarator of legitimacy or illegitimacy (for which forms of conclusion are provided) in cases where a declarator of parentage or non-parentage would be quite sufficient. We therefore **recommend**:

22. Rules of court should provide forms of conclusion for actions for declarator of parentage or non-parentage.

6.20 *Incidental findings as to legitimacy or parentage.* There may be cases where a pursuer needs a finding as to legitimacy or parentage as a prerequisite to the obtaining of some other remedy but does not need, or wish, a declarator of legitimacy, illegitimacy, parentage or non-parentage. The law should, in our view, make it clear that it is possible to obtain such incidental findings without the need for a declarator (which would have a more extensive effect than a mere incidental finding).[5] Unfortunately the present law is not entirely clear. There are statements in leading books on Court of Session practice to the effect that:

> "Whenever the right upon which the pursuer desires to found an action is not quite clear, it is necessary to preface his petitory, reductive, prohibitive, or possessory conclusions with a declaratory conclusion."[6]

On the other hand there are *dicta* to the effect that questions as to marriage or legitimacy can competently be determined incidentally for the purposes of

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[1] Para. 9.1 and Proposition 37.

[2] One commentator thought, however, that legislation to effect a mere change in name was not worthwhile. Another thought that declarators of legitimacy or bastardy should be replaced entirely be declarators relating to parentage.

[3] By a declarator of parentage we mean a declarator that a named person is or was the parent or child of another named person; by a declarator of non-parentage we mean a declarator that a named person is not or was not the parent or child of another named person. See draft Bill, clause 8.

[4] See e.g. *Cumming* v. *Brewster's Trs.* 1972 S.L.T. (Notes) 76.

[5] See para. 6.28.

[6] Maclaren, *Court of Session Practice* p. 648; Maxwell, *The Practice of the Court of Session,* p. 360.

litigation on other matters without the need for any declarator.[1] In the consultative memorandum we suggested that any doubt on this point should be resolved.[2] This was generally supported on consultation. We therefore **recommend:**

23. It should be made clear, for the removal of doubt, that a question of legitimacy or parentage may be determined incidentally for the purposes of any litigation without any necessity for a declarator. (Clause 7(5).)

6.21 *Declarators of legitimacy, illegitimacy, parentage or non-parentage in the sheriff courts.* The Sheriff Courts (Scotland) Act 1907 excludes from the sheriff's jurisdiction "actions of declarator . . . the direct or main object of which is to determine the personal status of individuals."[3] This seems to cover actions for declarator of legitimacy or illegitimacy.[4] It is not clear whether it covers all actions for declarator of parentage under the present law,[5] although it may cover some—for example, those where the mother is a married woman and where the question is whether her husband or some other man is the father. In our view, and this was generally supported on consultation,[6] declarators of legitimacy, illegitimacy, parentage or non-parentage should be competent in the sheriff court. We therefore **recommend:**

24. It should be made clear that declarators of legitimacy, illegitimacy, parentage or non-parentage can be granted either by the Court of Session or by a sheriff court. (Clause 7(2) and (3).)

6.22 *Rules of jurisdiction.* It is unclear under the existing law when the Scottish courts will have jurisdiction to deal with an application for a declarator of legitimacy, illegitimacy, parentage or non-parentage whether or not combined with an application for some other remedy. We made proposals in the consultative memorandum to the effect that the rules on the jurisdiction of the Court of Session should be similar to those applying to other consistorial actions.[7] We suggested that the Court of Session should have jurisdiction to entertain an action for declarator of legitimacy, illegitimacy or parentage if (and only if) either the alleged mother, the alleged or presumed father, or the child:

(*a*) is domiciled in Scotland on the date when the action is begun; or

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[1] See *Turnbull* v. *Wilsons and Clyde Coal Co.* 1935 S.C. 580 at p. 583; *Johnstone* v. *Spencer* 1908 S.C. 1015; *McDonald* v. *Mackenzie* (1891) 18 R. 502.

[2] Para. 9.4 and Proposition 39.

[3] S.5(1).

[4] But not, of course, incidental findings for the purposes of some other action.

[5] *McDonald* v. *Ross* 1929 S.C. 240, per Lord Morison at p. 252; *Livingstone* v. *Gillies* 1930 S.L.T. (Sh. Ct.) 25; *Silver* v. *Walker* 1938 S.C. 595, per Lord Wark at p. 600; *Mrs. A., B. or C.* v. *D.* (1949) 65 Sh. Ct. Rep. 181.

[6] On Proposition 49 in para. 9.25 of the consultative memorandum. Some consultees thought the rules should follow the rules for divorce actions. The Divorce Jurisdiction, Court Fees and Legal Aid (Scotland) Act 1983, s.1, gives the sheriff courts concurrent jurisdiction in divorce.

[7] Para. 9.26 and Proposition 50. The European Convention of 27 Sept., 1968 on jurisdiction and the enforcement of judgments does not apply to proceedings concerning "the status or capacity of natural persons". This term is given a wide meaning and would almost certainly cover an action for declarator of parentage. See the *Report of the Scottish Committee on Jurisdiction and Enforcement* (H.M.S.O. 1980) para. 5.45.

(*b*) was habitually resident in Scotland throughout the period of one year ending with that date; or

(*c*) died before that date and either

(i) was at death domiciled in Scotland, or

(ii) had been habitually resident in Scotland throughout the period of one year ending with the date of death.

Although all of those who commented agreed with this proposition it has subsequently been brought to our attention that there may be cases where, even if none of the above criteria is satisfied, it is still desirable to allow an action for declarator of paternity to be raised in Scotland in order that the father of a child born in Scotland may be entered in the register of births. It would therefore be useful to add birth in Scotland to the above grounds. It would also be useful to make it clear that the domicile or habitual residence in Scotland of a person alleged *not* to be a parent would found jurisdiction (e.g. in a declarator of non-parentage). And it should be made clear that the rules apply to an "application" for a declarator as well as an "action", because an action may contain applications for more than one remedy and it is our intention that in any such combined action the rules of jurisdiction here recommended should apply to, and only to, the application for a declarator of parentage. Any other application in the action (e.g. a conclusion for legitim) should be governed by the jurisdictional rules appropriate to it. Failure to establish jurisdiction in relation to one application would not, therefore, necessarily result in failure to establish jurisdiction in the other. It is by no means clear that this is the present law,[1] so that legislative clarification seems desirable. We accordingly **recommend**:

25. The Court of Session should have jurisdiction to entertain an action or application for declarator of legitimacy, illegitimacy, parentage or non-parentage if (and only if) the child was born in Scotland or the alleged or presumed parent or the child:

(*a*) is domiciled in Scotland on the date when the application is made; or

(*b*) was habitually resident in Scotland throughout the period of one year ending with that date; or

(*c*) died before that date and either

(i) was at the date of death domiciled in Scotland; or

(ii) had been habitually resident in Scotland throughout the period of one year ending with the date of death.

(Clause 7(2).)

6.23 So far as the sheriff courts are concerned we **recommend**:[2]

26. A sheriff court should have jurisdiction to entertain an action or application for declarator of legitimacy, illegitimacy, parentage or non-parentage if (and only if)

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[1] See *Morley* v. *Jackson* (1888) 16 R. 78 and the consultative memorandum, para. 9.5 and Proposition 40(*b*).

[2] This recommendation is based on the suggested rules in para. 9.27 of the consultative memorandum. We have, however, added a reference to birth of the child in the sheriffdom for the reason explained above and deleted, for the sake of simplicity, a reference to "domicile" (in the special sense of the Civil Jurisdiction and Judgments Act 1982) in the sheriffdom.

(*a*) the child was born in the sheriffdom; or

(*b*) the Court of Session would have had jurisdiction under the above rules and the alleged or presumed parent or the child was habitually resident in the sheriffdom on the date when the application is made or was habitually resident there at the time of his or her death.

Clause 7(3).)

In this and the previous recommendation "the alleged or presumed parent" includes a person who claims or is alleged to be or not to be the parent.

(Clause 7(6).)

6.24 *Right of intervention by Lord Advocate.* Section 8 of the Conjugal Rights (Scotland) Amendment Act 1861 gives the Lord Advocate the right to intervene in an action for declarator of nullity of marriage or divorce and provides for the court to direct the action to be laid before the Lord Advocate whenever the court considers this to be necessary for the proper disposal of the action. The purpose is to enable the public interest to be represented. In the consultative memorandum we suggested that the public interest in an action for declarator of legitimacy, illegitimacy or parentage might be just as important as in an action for divorce. There might, for example, be a suspicion of a collusive action for nationality or immigration purposes. We invited views on whether provision should be made (*a*) to require the Lord Advocate to be called as a defender in every case or (*b*) to entitle the Lord Advocate to intervene (as in actions for declarator of nullity of marriage).[1] As a result of consultation we do not now think it would be appropriate to recommend the extension of the principle of section 8. There was no enthusiasm on consultation for the first alternative, to require the Lord Advocate to be called as a defender in every case. As to the second alternative, we think it unlikely that the Lord Advocate would nowadays seek to intervene in a divorce or nullity action and that an extension of this power to other classes of action would be unnecessary and inappropriate. Where evidence is presented in civil proceedings suggesting that a criminal offence has been committed, it is always open to the court, acting under its general powers, to instruct that the matter be brought to the attention of the Crown Office. Accordingly we have concluded that there would be no practical advantages in extending the principle of section 8.

6.25 *Need for proof before decree.* Section 6 of the Court of Session Act 1830 provides that no decree or judgment in favour of the pursuer shall be given in certain consistorial actions (including actions for declarator of legitimacy or illegitimacy) until the grounds of action have been substantiated by sufficient evidence. We suggested in the consultative memorandum that this rule should be applied also to declarators of parentage.[2] This was agreed by all those who commented on it. We therefore **recommend**:

27. It should be provided that a decree of declarator of parentage or non-parentage cannot be granted until the grounds of action have been substantiated by sufficient evidence.
(Clause 7(4).)

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[1] Para. 9.21 and Proposition 45.

[2] Para. 9.23 and Proposition 47.

6.26 *Effect of declarators of legitimacy, illegitimacy, parentage or non-parentage.* The present law on the effect of these declarators is far from clear. In *Norris* v. *Gilchrist*[1] the view was expressed, on the basis of canon law authorities, that a decision on a question of legitimacy could never give rise to a plea of *res judicata* and that accordingly a child who had been declared illegitimate could later try again and, if he produced better evidence, obtain a declarator of legitimacy.[2] This view was *obiter*: the actual decision in the case was only that an incidental finding of illegitimacy in proceedings for service as heir did not bar a subsequent action for declarator of legitimacy. The *dictum* has been founded on in at least one reported case[3] this century but would seem to have been superseded by the decision in *Lockyer* v. *Ferryman*[4] to the effect that the canon law rule in question was not part of the law of Scotland. At the opposite extreme is the view of Lord Sands in *Administrator of Austrian Property* v. *Von Lorang*[5] when he said that judgments determining marital status and legitimacy were judgments *in rem* and universally binding. This too was *obiter* in relation to legitimacy.[6] The position in relation to a declarator of parentage or non-parentage is also unclear. On one view such a declarator is not a judgment as to the status of a person.[7] The decision is therefore subject to the ordinary rules on *res judicata*.[8] It would seem to be desirable for the law on the effect of these various declarators as to legitimacy or parentage to be clear and consistent. An essential issue in all of them may be whether X is or is not the child of Y—and the consequences may be equally important for those concerned.

6.27 In our consultative memorandum we put forward various options for consideration.[9] We pointed out that one extreme solution would be to make a declarator of legitimacy, illegitimacy or parentage binding on everybody (like a decree *in rem*). We did not favour this solution (because it could involve serious prejudice to third parties who had had no opportunity to challenge the decree at the time) and neither did most of our consultees. At the other extreme, it could be provided that a declarator of legitimacy, illegitimacy or parentage has no more effect than an ordinary decree *in personam* (i.e. it would not be binding on anyone other than the parties and would not even give rise to any presumption). Our provisional view, with which all those who commented agreed, was that this would be unacceptable. There is an obvious interest in finality in such matters. If a matter of legitimacy or parentage has been judicially determined, after proof, it would seem to be desirable that the

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[1] (1847) 9 D. 466.

[2] Per Lord Justice-Clerk Hope at p. 474.

[3] *Coutts* v. *Wear* 1914 2 S.L.T. 86. In this case it was held that a finding, in an earlier action for declarator, count, reckoning and payment, that the pursuer was not legitimated did not give rise to *res judicata* in a later multiple-poinding. See also *Imre* v. *Mitchell* 1958 S.C. 439 at p. 443.

[4] (1876) 3 R. 882; (1877) 4 R. (H.L.) 32.

[5] 1926 S.C. 598 at pp. 622 and 623. Lord Sands was dissenting but his view on the merits was upheld by the House of Lords. See 1927 S.C. (H.L.) 80.

[6] There is no doubt, however, that a declarator of nullity of marriage is regarded as a judgment *in rem (Administrator of Austrian Property* v. *Von Lorang* 1927 S.C. (H.L.) 80.) See also the *Ampthill Peerage* [1977] A.C. 547 per Lord Simon of Glaisdale at p. 576—"if the judgment is as to the status of a person, it is called a judgment *in rem* and everyone must accept it."

[7] See *Silver* v. *Walker* 1938 S.C. 595.

[8] *Mrs. A., B. or C.* v. *D.* (1949) 65 Sh. Ct. Rep. 181.

[9] Paras. 9.10 to 9.15 and Proposition 41.

decree should have some effect other than that of merely settling that particular question between those particular parties. In between these two extremes there are at least two options which appear to strike a reasonable balance between finality and fairness to third parties. One is to provide that the decree is binding on the parties to the action and on all those given notice of the action, whether or not they actually chose to make themselves parties to it. The other is to provide that the decree is binding on the parties and, in relation to others, gives rise to a rebuttable presumption that the person declared to be a parent is a parent. Opinion was divided on this issue on consultation. Some consultees pointed out that the two options are not mutually exclusive. There is no reason why a decree should not be binding on certain people while raising a presumption in relation to others.

6.28 We have found this a difficult issue. We have concluded, however, that while there should be no change in the ordinary rule that a decree of declarator as to legitimacy or parentage is *res judicata* in relation to the parties to the proceedings,[1] it would not be safe to make it binding on those given notice of the action. It could be difficult to establish later who had actually received notice of the action and unsafe to assume that all those to whom notice had been sent had actually received it. It would also, we think, be unreasonable to place third parties with a remote contingent interest in the outcome of the proceedings in the position of having to decide whether to intervene in potentially expensive litigation or take the risk that it would affect them adversely in certain eventualities at a later date. On the other hand it would seem to be reasonable to provide that a declarator as to legitimacy or parentage, granted only on sufficient evidence, should in relation to third parties raise a presumption of legitimacy, illegitimacy, parentage or non-parentage. This presumption would be rebuttable by proof on a balance of probabilities so that, while it would promote some measure of stability, it would not preclude a successful challenge by a third party[2] able to produce new or better evidence. We therefore **recommend**:

28. A decree of declarator of legitimacy, illegitimacy, parentage or non-parentage should, without prejudice to any effect it may have on the parties to the proceedings at common law, give rise to a presumption (rebuttable on a balance of probabilities) of legitimacy, illegitimacy, parentage or non-parentage which should displace any contrary presumption arising out of marriage, registration or any prior court decree.
(Paragraphs 6.26 to 6.28; Clause 5(3).)

6.29 *Findings of paternity in actions of affiliation and aliment.* At common law a finding of paternity in an action of affiliation and aliment, even if it "declares" the defender to be the father,[3] is not regarded as a declarator of status.[4] It has no effect on anyone other than the parties to the action. Section

[1] To legislate for this would be to state the obvious. Clause 5(3) of our draft Bill therefore merely states that the new rules suggested will be without prejudice to any effect the decree may have in relation to the parties at common law.

[2] Including the child if he or she were not a party to the original proceedings.

[3] Since 1907 it has been possible in an action of affiliation and aliment in the sheriff court to ask the court to find and declare that the defender is the father. See Dobie, *Sheriff Court Styles* pp. 18 and 19.

[4] *Silver* v. *Walker* 1938 S.C. 595.

11 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 provides, however, that a finding of paternity in an action of affiliation and aliment or in affiliation proceedings elsewhere in the United Kingdom is to be admissible in evidence in any subsequent civil proceedings and is to be taken as proof of paternity unless the contrary is proved.[1] We appreciate that this provision may make it easier to prove adultery in a divorce action, although that in itself may give rise to anomalies: if a divorce decree cannot be granted without sufficient proof why should it be granted on the basis of a decree in an undefended action of affiliation and aliment? We also appreciate that section 11 may make it easier for the child to establish paternity for the purposes of succession on the father's death. Nevertheless we think the section is open to criticism on several grounds. An action of affiliation and aliment may be of a very summary nature. There is no provision for the child's interests to be represented. Although the alleged father will be called as defender, there is no provision for intimation to any other parties. If the action is undefended, decree may be granted without proof. In the consultative memorandum we suggested that a decree in such an action might be a very unsafe basis for a presumption. We reached no provisional conclusion, however, but merely invited comments on various options—such as repealing or restricting the special rule in section 11, extending it to other incidental findings of parentage, or leaving it as it is.[2] Consultation on this point produced no clear guidance. Some commentators were strongly of the view that a finding of paternity in an undefended action for affiliation and aliment is not a sufficient basis for a presumption. Others favoured leaving the rule as it is or confining it to cases where paternity has been established after proof.

6.30 In considering the proper approach to take to section 11 of the 1968 Act we have taken into account the recommendations which we have already made in relation to declarators of parentage. If these are implemented such declarators will become readily available, in the sheriff courts as well as the Court of Session. They will be granted only after proof and will raise a presumption of parentage which would apply in any subsequent proceedings unless rebutted. All of this means that a special rule on incidental findings of paternity in actions for affiliation and aliment (or other proceedings) is less necessary. If a pursuer wishes a decree which will have a wider effect than an ordinary decree *in personam* he should conclude for a declarator, accepting that this will necessitate a proof even in undefended proceedings. If he does not, or cannot,[3] and seeks only an incidental finding, we think that this should have effect only for the purposes of that particular action. We therefore **recommend**:[4]

29. The references to findings of paternity in section 11 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 should be deleted.
(Paragraphs 6.29 and 6.30; Schedule 2.)

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[1] The section also deals with findings of adultery but we are here concerned only with its paternity provisions. For the background to the adultery provisions see the Report of the Royal Commission on Marriage and Divorce (Cmd. 9678, 1956) paras. 929 to 932, 989.

[2] Paras. 9.29 to 9.30 and Proposition 51.

[3] E.g. because the court lacks jurisdiction.

[4] The recommendation mentions "references to findings of paternity", because section 11 deals also with findings of adultery.

6.31 *Other matters relating to judicial proceedings.* In the consultative memorandum we proposed a fairly extensive set of rules on such matters as the competency of a declarator of legitimacy, illegitimacy or parentage on its own;[1] the competency of combining a conclusion for such a declarator with other conclusions;[2] title and interest to sue;[3] citation of defenders;[4] intimations to third parties;[5] and restrictions on the right to raise such actions in relation to a person not of full age and capacity.[6] Many lay commentators did not offer comments on these matters, no doubt regarding them as being of a rather technical legal nature. The lawyers and legal bodies who commented were generally in favour of our provisional proposals. The Faculty of Advocates, however, whose views in relation to judicial proceedings are entitled to particular respect, were strongly opposed to legislative interference in these matters. They considered that some of the questions to which we drew attention could be regulated, if regulation is needed, by rules of court, and that on other points there is insufficient doubt to justify legislation. They expressed the view that the courts, in applying the present common law, are perfectly well able to clarify any minor points requiring clarification. We think, on reconsideration, that there is considerable force in these views. In England and Wales, where there is no common law on declarators to fall back on, it may be necessary to legislate on declarations of parentage in some detail in order to provide a remedy where none exists.[7] The position is different in Scotland where the remedy already exists[8] and where it could simply lead to confusion to attempt to regulate, in relation to particular types of declarator, questions which are equally liable to arise in relation to other types of declarator. We therefore make no recommendations on these matters.

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[1] Para. 9.3 and Proposition 38.
[2] Para. 9.5 and Proposition 40.
[3] Paras. 9.16 to 9.19 and Propositions 42 and 43.
[4] Paras. 9.20 to 9.21 and Propositions 44 and 45(*a*).
[5] Para. 9.22 and Proposition 46.
[6] Para. 9.24 and Proposition 48.
[7] Cf. Law Com. No. 118, paras. 10.2 to 10.39 and clauses 27 to 30 of the draft Bill appended thereto.
[8] See e.g. *Cumming* v. *Brewster's Trs.* 1972 S.L.T. (Notes) 76.

PART VII REGISTRATION OF BIRTHS

7.1 There is no doubt that the law on registration of births is a matter of great concern to the parents of illegitimate children and, later in life, to the children themselves. Whereas some of the areas of law which we examine in this Report impinge but rarely on the lives of individual citizens the law on registration of births affects most. Under the present law an illegitimate child's extract birth certificate discloses his illegitimacy since, even if his father's name and particulars are entered, information regarding the date and place of his parents' marriage is absent. This may cause embarrassment to the parents when they exhibit the certificate for official purposes. It may also be a lifelong source of embarrassment to the child himself. It should be noted, however, that the Registration of Births, Deaths and Marriages (Scotland) Act 1965 provides for the issue, free of charge, at the time of registration, of an abbreviated certificate of birth which contains only the child's name and surname, sex and place and date of birth.[1] Details of the child's parentage and his parents' marital status are omitted. We regard the introduction of the issue of free abbreviated certificates of birth by the 1965 Act as a most important reform and repeat the hope expressed in our consultative memorandum that use will be made of them, rather than full extract certificates, whenever possible.

Some suggestions made on consultation

7.2 Some commentators made suggestions for very extensive changes in the system for registering births. These were sometimes linked to suggestions for conferring parental rights by virtue of registration in a special register (a solution which we have rejected)[2] but sometimes put forward on their own merits. One body, for example, suggested that all births should be recorded in a confidential register which would be accessible only to the child and his guardian and which would contain details of parentage and possibly the contents of any agreement between the parents on parental rights. The public register of births and the actual birth certificate would contain only the names of the child, the sex, the date of birth and the place of birth. One difficulty with a system of this type is that it would not provide a ready method of proving parentage, which is necessary for various purposes. Another is that it would reduce the value of the registers for the purposes of research. We do not feel able to recommend the introduction of any such system.

7.3 One commentator made a strong plea for allowing a mother to register the name of the father without the latter's consent or the need for a court decree. She explained that in her own case her father had refused to accompany her mother to the registrar's office although there was no doubt about paternity. He had wished to "keep his reputation unblemished". As the mother had not wished to raise a court action the result was that the birth certificate never disclosed the father's name. We have a great deal of sympathy with this plea. It would, however, be unsafe to allow a mother to register any man as the father of her child merely on her own assertion. Unpleasant though it may be, we think that the only solution in this type of

[1] Ss.19 and 40.
[2] See para. 2.11 above.

case is an application to the court for a declarator of paternity. We have made recommendations to clarify certain aspects of the law on such declarators and to ensure that they are competent in the sheriff courts.[1] We proceed to consider whether there are any ways in which the registration of the births of illegitimate children and, where possible the entry of the father on the register can be made easier.

Facilitating registration of births of illegitimate children

7.4 In the consultative memorandum we made proposals for certain minor amendments to the legislation on registration of births designed (*a*) to enable the mother to have a man entered in the Register of Births as father of her illegitimate child on production of a court decree finding him to be the father,[2] and (*b*) to enable *either* parent to register an illegitimate child's birth, and have the father entered in the register, on production of the appropriate documents signed by both.[3] The advantage of this is that, where both parents wished to have the child registered as theirs, the father could attend to the registration. There would be no need for the mother to assume this burden as is the case under the present law. These proposals were generally agreed on consultation. We therefore **recommend**:

30. The mother of an illegitimate child should be entitled to have a man entered in the Register of Births as the father on production of a court decree finding him to be the father.
(Schedule 1, amendments to Registration of Births, Deaths and Marriages (Scotland) Act 1965, section 18(1).)

31. Either parent of an illegitimate child should be entitled to register the child's birth, and have the father entered, in the Register of Births on production to the registrar of (*a*) a declaration made by the mother naming the man as father and (*b*) a declaration made by the man acknowledging that he is the father. The registering

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[1] Paras. 6.23 to 6.30 above.

[2] Para. 3.9 and Proposition 4. S. 18(1) of the Registration of Births, Deaths and Marriages (Scotland) Act 1965 already enables the father's name and surname to be entered in the Register of Births on the joint request of the mother and the person acknowledging himself to be the father. The subsection is in the following terms:

"In the case of an illegitimate child the registrar shall not register the birth upon information supplied by the father alone, and shall not enter in the register the name and surname of any person as father of the child except on the joint request of the mother and the person acknowledging himself to be the father of the child; and no person shall be treated for the purposes of this subsection as having acknowledged himself as aforesaid unless either—

(*a*) he attends personally at the registration office together with the mother and signs the register, in the presence of the registrar, together with her; or

(*b*) there is produced to the registrar—

(i) a declaration in the prescribed form made by the mother stating that the said person is the father of the child, and

(ii) a statutory declaration made by the said person acknowledging himself to be the father of the child."

S. 18(2) enables the father's name and surname to be entered in the Register of Corrections Etc. (if not already entered in the Register of Births) if a decree of paternity has been granted by a competent court or in certain other circumstances. See para. 7.5 below.

[3] Paras. 3.10 and 3.13 and Propositions 5 and 6.

parent's declaration would be in prescribed form[1] while the absent parent's declaration would be a statutory declaration.[2] (Schedule 1, amendments to 1965 Act, section 18(1).)

Recording name of father in Register of Corrections Etc.

7.5 We invited views in the consultative memorandum on the question of the time limits which apply when it is sought to record the name and surname of the father of an illegitimate child in the Register of Corrections Etc.[3] The present law on this is contained in section 18(2) of the Registration of Births, Deaths and Marriages (Scotland) Act 1965, which provides that where the name and surname of the father of an illegitimate child have not been entered in the Register of Births, the Registrar General "may"[4] record those particulars in the Register of Corrections Etc.:

> "(*a*) if a decree of paternity has been granted by a competent court;[5] or
>
> (*b*) if there is produced to him—
>
> (i) a declaration in the prescribed form made by the mother of the child stating that the person mentioned in the following sub-paragraph is the father of the child, and
>
> (ii) a statutory declaration *made within twelve months of the birth of the child* to the effect that the person making that declaration acknowledges himself to be the father of the child; or
>
> (*c*) if, where the mother is dead, he is ordered so to do by the sheriff upon application made to the sheriff *within the like period* by the person acknowledging himself to be the father of the child."[6]

In the memorandum we pointed out that while the twelve months limits in section 18(2) might give a reasonable time for most fathers to come to a decision, there was a risk that any time limit might operate so as to prevent the names of fathers from being recorded.[7] The views expressed on consultation were varied. There was no absolute majority for any one solution. Some commentators favoured abolishing the twelve months time limit altogether. A smaller number favoured retaining the existing time limits. A still smaller number favoured retaining the existing twelve months limit for declarations by fathers under section 18(2)(*b*) but removing it for applications to the sheriff under section 18(2)(*c*). One commentator favoured a five year

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[1] S.54 authorises the Registrar General, with the approval of the Secretary of State, to make appropriate regulations by statutory instrument.

[2] i.e. a declaration before a notary public, justice of the peace or other person authorised by law to administer oaths, in the form prescribed by the Schedule to the Statutory Declarations Act 1835.

[3] Para. 3.14 and Proposition 7.

[4] We are informed that in practice particulars are always recorded if the statutory conditions for registration are met.

[5] The Registrar General's department interpret "decree of paternity" widely. They record not only decrees of affiliation and aliment and declarators of paternity granted by Scottish courts, but also decrees naming the father of a child which are granted by courts in other parts of the United Kingdom or foreign countries. Incidental findings of paternity by courts may also induce entries in the Register of Corrections Etc. Where a Scottish court grants a decree of affiliation and aliment or a declarator of paternity the clerk of court notifies the Registrar General of the import of the order.

[6] Emphasis added.

[7] Para. 3.14.

time limit. Those who favoured abolishing the time limits included the Scottish Council for Single Parents and several mothers of illegitimate children. One of these mothers told us that she had not been informed on registering her child's birth that there were time limits affecting the entering of the father's name on the birth certificate. The father was abroad at the time of the birth. When he returned the parents both went to have him entered in the register only to be told that they were too late and that a paternity action would be required. As they did not wish the publicity of a court action the father was never registered and the child's birth certificate remained incomplete. Another mother told us that she wished the father's name to be entered on the register as she objected strongly to her child's birth certificate conveying the impression that the father was unknown. The father was willing to acknowledge paternity but had changed his address frequently and was difficult to contact. When she got in touch with us she had been advised that, because more than a year had elapsed since the birth, the father's name could be recorded only on production of a decree of paternity.

7.6 The main reason for the time limit is that the further one is removed from the date of birth the greater likelihood there is of the mother and a man who is not the father being tempted to register that man as father, in spite of the fact that by knowingly and falsely declaring himself to be the father he would be guilty of a criminal offence.[1] This risk is present, however, even within the twelve months period and the imposition of a time limit seems a crude way of guarding against it. We note that there is no time limit in England and Wales, either under the present law or under the new rules recommended by the Law Commission.[2] It seems to us to be undesirable, on balance, to have time limits which do not have clearly demonstrable benefits but which clearly can have the effect of preventing the names of fathers from being registered. In the light of the comments received on this point we have concluded that the disadvantages of the twelve months limit outweigh any advantages it may have. We therefore **recommend**:

32. There should no longer be any time limits in section 18(2) of the Registration of Births, Deaths and Marriages (Scotland) Act 1965 (recording of father's name in the Register of Corrections Etc.). (Paragraphs 7.5 and 7.6; Schedule 1.)

7.7 We drew attention in the consultative memorandum to another way in which section 18(2) of the 1965 Act could be modified so as to make it easier for the father of an illegitimate child, who acknowledges paternity, to be entered in the Register of Corrections Etc. At present section 18(2)(*c*) (which allows the father to apply to the sheriff for an order that his name be recorded in the Register) applies only where the mother is dead. We suggested that it might be extended to cover cases where the mother could not be found or was incapable of making a declaration under section 18(2)(*b*) of the Act.[3] This was generally agreed to on consultation.[4] One commentator suggested,

[1] Registration of Births, Deaths and Marriages (Scotland) Act 1965, s.53; False Oaths (Scotland) Act 1933, s.2.

[2] Law Com. No. 118, draft Bill, clause 32.

[3] Para. 3.15 and Proposition 8.

[4] Where the father is dead, our recommendations on declarators of parentage (and, in particular, on their availability in the sheriff court) will make it easier for mothers to apply for the father's name to be entered in the Register of Corrections Etc.

however, that the provision might be further extended to cover cases where the mother was refusing unreasonably to consent to the father's name being recorded. This, however, would be to apply a remedy designed for non-contentious cases to a situation of dispute between the parents and we think that in such a situation the father's remedy should be to raise an action for declarator of paternity and, if so advised, to seek re-registration of the birth.[1] We therefore **recommend**:

33. An application by a man to the sheriff under section 18(2)(*c*) of the Registration of Births, Deaths and Marriages (Scotland) Act 1965 (for recording his name as the father of an illegitimate child in the Register of Corrections Etc.) should be competent not only where the mother is dead (as under the present law) but also where the mother cannot be found or is incapable of making a declaration under section 18(2)(*b*) of the Act.
(Schedule 1.)

Re-registration of birth

7.8 In the consultative memorandum we invited views on whether there was a need for clarification of the provisions in the 1965 Act on the re-registration of births.[2] These provisions, among other matters, enable the Registrar General for Scotland to authorise the re-registration of the birth of an illegitimate child if the name and surname of the father have, after the original registration of the birth, been recorded in the Register of Corrections Etc.[3] This is useful because it enables the father's name and surname to be shown in the body of the re-registered entry in the Register of Births and hence in any extract birth certificate. We were informed that the law gave rise to no problems in practice and we therefore make no recommendation on this point. We also pointed out in the memorandum that in practice the mother but not the father was regarded as being entitled to apply to have the birth

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[1] See para. 7.8 below.

[2] Para. 3.19 and Proposition 9(*a*).

[3] "20.—(1) In the case of any person, if—

(*a*) the entry relating to him in the register of births is affected by any matter contained in the Register of Corrections Etc. respecting his status or paternity, or

(*b*) the entry relating to him in the register of births has been so made as to imply that he was found exposed, or

(*c*) the entry relating to him in the register of births having been so made as to imply that he was illegitimate, he has subsequently (whether before or after the commencement of this Act) been legitimated by subsequent marriage of the parents,

the Registrar General may at any time authorise the re-registration of the birth, and any such re-registration shall be effected in such manner as may be prescribed:

Provided that the Registrar General shall not authorise the re-registration of a birth in pursuance of paragraph (*c*) of this subsection, in a case where the paternity of the person has not been entered in the register of births or in the Register of Corrections Etc. in accordance with section 18 of this Act, or any corresponding enactment in force before the commencement of this Act, save with the sanction of the sheriff granted upon the application—

(i) of both parents of the person jointly, or

(ii) where one of the parents is dead, of the surviving parent, or

(iii) where both parents are dead, of or on behalf of the person,

after such intimation as the sheriff may direct, and after due inquiry, and a hearing of any party having interest who may appear to oppose such application.

(2) In this section any reference to the register of births includes a reference to any register of births kept under any enactment in force at any time before the commencement of this Act."

re-registered following on the entry of the father's name in the Register of Corrections Etc.[1] The effect of re-registration is, as we have seen, that the father's name will appear in any extract birth certificate. If the father is, for example, a rapist this result may not be desired by the mother or the child. It would, therefore, go too far to give every father whose name appeared in the Register of Corrections Etc. a right to require the child's birth to be re-registered. That would not be necessary to preserve evidence of paternity (given that the relevant information is in the Register of Corrections Etc. in any event) and could cause suffering or embarrassment to the mother and the child. On the other hand, there would seem to be cases where the father should be entitled to apply to have the birth re-registered. The most obvious might be where the mother consents. Other cases might be where he has custody of the child or tutory or curatory over the child. We suggested in the memorandum that in the case of a child under the age of 16 re-registration should be possible on the application of the mother, or on the application of the father with the consent of the mother, or the sanction of the sheriff.[2] This was generally supported on consultation. On reconsidering this matter, however, in the light of our recommendations on guardianship and custody, we think that where the father is tutor or curator to the child or is entitled to custody of the child he should be able to apply for re-registration without the need for any application to the sheriff, and that if this were provided for there would be no need to provide for applications to the sheriff. This should not give rise to any problems of proof for the Registrar General because, under our recommendations, the father of a child would be tutor or curator or would be entitled to custody only by virtue of marriage to the mother or a court decree. Tutory, curatory or custody would be established by production of a marriage certificate or a court decree. In the memorandum we envisaged that these rules would apply only to a child below the age of 16 and that above that age a person should be entitled to apply for re-registration of his own birth. It was suggested to us, however, that a person between the ages of 16 and 18 should be able to apply for re-registration only with the consent of a parent or guardian, on the analogy of the provisions on recording a change of name or surname.[3] It is desirable to preserve a coherent approach to applications by young people under the 1965 Act and this seems to us a reasonable suggestion, provided that "guardian" is defined.[4] We also think that it would be desirable to preserve the existing flexibility of the law by enabling other categories of permitted applicants to be prescribed by regulations made under the 1965 Act. We therefore **recommend**:

34. Re-registration of the birth of a person under section 20 of the Registration of Births, Deaths and Marriages (Scotland) Act 1965 should be possible (subject to the proviso in subsection (1) of that section)
    (*a*) if the person is under the age of 16, on the application of (i) his mother or (ii) his father if he is the tutor or curator of, or entitled to custody of, the person or if he applies with the consent of the mother;

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[1] Paras. 3.16 to 3.18.
[2] Para. 3.19 and Proposition 9(*b*).
[3] See s.43(5) of the 1965 Act.
[4] It is not defined at present in the 1965 Act.

(*b*) if the person is 16 or over but under the age of 18, on the application of that person with the consent of a parent or curator (if he has any);
(*c*) if the person is 18 or over, on the application of that person;
(*d*) in any case, on the application of such other person as may be prescribed by regulations made under the Act.
(Schedule 1, new section 20(3) of the 1965 Act.)

Recording of change of name

7.9 Section 43 of the Registration of Births, Deaths and Marriages (Scotland) Act 1965 provides for recording of a change of name or surname where a birth has been registered in Scotland. In relation to children under 16 application can be made only by a "qualified applicant", a term which is defined as

> "the father and mother of the child or, if either of the parents is deceased, the surviving parent, or, in the case of an illegitimate child, the mother of the child or, if both parents are deceased or, in the case of an illegitimate child, the mother is deceased, the guardian of the child or other person who has determined that the name, or, as the case may be, surname, of the child should be changed or given; . . ."[1]

Under our recommendations (as indeed to some extent under the existing law) the father of an illegitimate child might be appointed tutor or curator to the child, or might be awarded custody of the child, either alone or along with the mother. In these cases we think he should be recognised as a qualified applicant even if the mother is still alive. The opportunity could be taken to reframe section 43 in a way which did not refer to illegitimate children but which distinguished, where necessary, between fathers. We therefore **recommend**:

35. Section 43 of the Registration of Births, Deaths and Marriages (Scotland) Act 1965 should be reframed so as to distinguish between those fathers who are, and those fathers who are not, qualified to apply for recording of their child's change of name rather than between legitimate and illegitimate children. A father should be regarded as a qualified applicant not only by virtue of marriage to the mother but also if he is the child's tutor or curator or is entitled to custody of the child.
(Schedule 1, new section 43(10) of the 1965 Act.)

[1] S.43(3).

PART VIII MISCELLANEOUS

8.1 In this part of the Report we look at the position of an illegitimate person in relation to aliment, nationality, domicile, marriage, incest, name, antenatal injuries, damages for death, and the recovery of supplementary benefits and contributions for children in care.

Aliment

8.2 Under the present law the parents of an illegitimate child are both bound to contribute towards his maintenance. They are liable on an equal footing, although the actual liability of each will depend on his or her means. Grandparents and remoter ascendants are not liable to aliment an illegitimate child and the child is not bound to aliment his parents or remoter ascendants. In the case of a legitimate child the primary obligation of aliment is on the father. Only if he cannot pay is the mother liable. Grandparents and other ascendants may become liable if a nearer relative cannot pay. The obligations of support are reciprocal and accordingly, if he has sufficient means and his parents are in need, a legitimate child may be bound to aliment his parents. These are the main differences between legitimate and illegitimate children in relation to aliment. We have examined them and other minor differences in our recent Report on *Aliment and Financial Provision*[1] and have made recommendations which would eliminate all differences between legitimate and illegitimate children in this area. In broad terms, what we have suggested is that both parents should be liable to aliment their children[2] but that the child should not be liable to aliment his parents. Obligations of aliment by and towards grandparents and remoter relatives would be abolished. If our recommendations on these matters in our Report on *Aliment and Financial Provision* are implemented before our recommendations in this Report no provisions on aliment will be needed in any Act giving effect to the latter. If, however, this Report is implemented before our Report on *Aliment and Financial Provision* we would recommend the inclusion in the implementing legislation of a provision designed to ensure, at least, that both parents (whether or not they are or have been married to each other) are liable to aliment their child according to their means; that a child is not bound to aliment his parents (whether or not they are, or have been, married to each other); and that there are no obligations of aliment between grandparents and grandchildren or between remoter ascendants and descendants. If this is not done the effect of the general rule of equality in Clause 1 of the Bill appended hereto would be to apply the rules presently applying to legitimate children to all children.[3] This we would regard as an undesirable result.

British citizenship

8.3 British citizenship, a concept introduced by Part I of the British Nationality Act 1981[4] may be acquired by a legitimate child through either

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[1] Scot. Law Com. No. 67 (1981).

[2] But only until the child attains the age of 18 (or 25 if he is receiving further education)—Recommendation 4 of the Report.

[3] See paras. 9.25 to 9.27 for a discussion of the "maintenance" provisions in the guardianship legislation.

[4] Parts II and III deal with citizenship of British Dependent Territories and British overseas citizenship respectively.

parent; the Act, however, continues the policy of the British Nationality Act 1948 by providing that an illegitimate child may not acquire citizenship through his father. Section 50(9) provides that for the purposes of the Act:

> "(*a*) the relationship of mother and child shall be taken to exist between a woman and any child (legitimate or illegitimate) born to her; but
>
> (*b*) subject to section 47,[1] the relationship of father and child shall be taken to exist only between a man and any legitimate child born to him;
>
> and the expressions 'mother', 'father', 'parent', 'child' and 'descended' shall be construed accordingly."[2]

8.4 The result of the above provisions is that an illegitimate child can acquire British citizenship through his mother but cannot acquire citizenship through his father. Where an illegitimate child is born to a foreign mother he may, however, acquire citizenship in other ways. A person born in the United Kingdom is entitled to be registered as a British citizen if he has spent most of the first 10 years of his life here.[3] A child born in the United Kingdom acquires British citizenship if his mother was settled here at the date of birth;[4] he is also entitled to be registered as a British citizen if his mother becomes settled in the United Kingdom thereafter, provided the application for registration is made before the child attains 18 years of age.[5] Finally, the Secretary of State has a discretionary power to register any minor as a British citizen.[6] Failing these provisions, the person must have resort to naturalisation.[7]

8.5 That these provisions discriminate against people on the basis of their parents' marital status cannot be denied. Whether they should continue to do so is a question of United Kingdom policy on which we have not consulted and on which we do not think it would be appropriate to express a view. We would, however, make the technical point that the abolition of the status of illegitimacy in various countries makes it dangerous to rely on words like "legitimate" and "illegitimate" in nationality legislation designed to discriminate against children born out of wedlock. The desired object might not be achieved in relation to people whose personal law no longer recognises the concepts of legitimacy and illegitimacy, or gives "legitimacy" an unusually extended meaning.

Domicile

8.6 Domicile is important for many purposes, such as succession to moveables, capacity to marry and capacity to make a will. An illegitimate child's domicile of origin is that of his mother at the date of birth; a legitimate child's is that of his father.[8] A posthumous legitimate child's domicile of origin

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[1] Dealing with legitimated children.

[2] See also s.3(3)(*b*) and (*c*).

[3] S.1(4). Under the British Nationality Act 1948 a person born in the United Kingdom was a British citizen automatically. This is no longer the case under the British Nationality Act 1981.

[4] S.1(1)(*b*).

[5] S.1(3).

[6] S.3(1).

[7] S.6 and Sched. 1.

[8] *Udny* v. *Udny* (1869) 7 M. (H.L.) 89.

is thought to be that of his mother.[1] Doubts exist as to a legitimate child's domicile of origin where his parents' marriage is putative[2] or where his parents live apart and have separate domiciles at the date of birth.[3] A person's domicile of origin remains significant throughout his life. It revives whenever a domicile of choice is lost without a new one being acquired;[4] and it is retained if the person, through leading an unsettled life, never acquires a domicile of choice.[5]

8.7 An illegitimate child's domicile changes with the domicile of his mother until he attains the age of minority, after which he can acquire an independent domicile of his own. In contrast, a legitimate child's domicile changes with the domicile of his father until the child attains the age of minority.[6] Only if his father is dead[7] or his parents are separated and he had his home with his mother[8] will the child's domicile follow that of his mother.

8.8 Although we think that there is a need for reform in this area, we are of the opinion that this Report is an inappropriate place for discussion of options for reform. Such options would be better discussed in a review of the whole law of domicile conducted on a United Kingdom basis. The Law Commission have reached a similar conclusion.[9]

Marriage

8.9 Before 1977 it was not clear what marriages were prohibited by reason of the propinquity of the parties when their relationship was illegitimate. Bankton[10] and Erskine[11] made no distinction between legitimate and illegitimate relationships while Fraser[12] was of the opinion that only mother–illegitimate son and father–illegitimate daughter marriages were within the forbidden degrees. There were only two reported cases. In *Robertson* v. *Channing*[13] a marriage between a man and his deceased wife's illegitimate niece was held invalid and in *Philp's Trs.* v. *Beaton*[14] a marriage between a man and his brother's daughter's illegitimate daughter was held valid.

8.10 Section 2(1) of the Marriage (Scotland) Act 1977 provides that a marriage between a man and any woman related to him in a degree specified in Column 1 of Schedule 1 or between a woman and any man related to her in a degree specified in Column 2 of that Schedule is void if solemnised in

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[1] Anton, *Private International Law* p. 167.
[2] *Ibid.*, p. 168.
[3] Cheshire and North, *Private International Law* (10th edn.) p. 180; Bromley, *Family Law* (6th edn.) p. 11.
[4] *Udny* v. *Udny* (1869) 7 M. (H.L.) 89.
[5] *McLelland* v. *McLelland* 1942 S.C. 502.
[6] *Shanks* v. *Shanks* 1965 S.L.T. 330.
[7] *Crumpton's J.F.* v. *Finch-Noyes* 1918 S.C. 378.
[8] Domicile and Matrimonial Proceedings Act 1973, s.4(2).
[9] See Law Com. No. 118, paras. 13.3 and 14.83.
[10] I.5.42.
[11] IV.4.56.
[12] *Husband and Wife* (2nd edn.) Vol. I, pp. 131 and 132.
[13] 1928 S.L.T. 376.
[14] 1938 S.C. 733.

Scotland or at a time when either party to the purported marriage was domiciled in Scotland. For the purposes of section 2(1) a degree of relationship exists even when traced through or to any person of illegitimate birth. Thus a marriage is void if it is within the forbidden degrees whether the relationship is legitimate or illegitimate. We think that the present law is satisfactory and make no proposals for change.

Incest

8.11 The crime of incest is not committed by sexual intercourse between an illegitimate person and any of the relatives by blood or affinity of his or her parents.[1] The position regarding intercourse between a mother and her illegitimate son or a father and his illegitimate daughter is not free from doubt, and was left undecided in *H.M. Advocate* v. *R.M.*[2] Alison[3] states that incest cannot be committed by any people related illegitimately; Erskine,[4] Macdonald[5] and Hume[6] are of the opinion that an illegitimate son can commit incest with his mother. However, Lord Walker in *H.M. Advocate* v. *R.M.*[7] was of the opinion that intercourse between a person and any of his or her direct ascendants or descendants is a common law crime. The Marriage (Scotland) Act 1977 assimilated illegitimate and legitimate relationships for the purposes of marriage only.

8.12 In our recent Report on *Incest* we have recommended[8] that sexual intercourse between two people who are related to each other through an illegitimate relationship should be incest where such intercourse would be incest were the parties legitimately related. Accordingly, we make no proposals for reform in this Report.

Name

8.13 In Scotland names (apart from titles and other dignities, and business and trade names) are a matter of usage.[9] A legitimate child is almost invariably given the surname of his father. The former Scottish practice was for an illegitimate child to take his father's surname;[10] but it is nowadays more usual for the child to take the mother's surname. The mother, of course, may well have assumed the name of the child's father if she is cohabiting with him. We think that the present absence of legal rules in Scotland regarding the name of an illegitimate child is satisfactory[11] and this view was supported by those who offered comments on this point.

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[1] *H.M. Advocate* v. *R.M.* 1969 J.C. 52.
[2] 1969 J.C. 52.
[3] i, 565.
[4] IV.4.56.
[5] (5th edn.), p. 148.
[6] i, 452.
[7] 1969 J.C. 52 at p. 62.
[8] Scot. Law Com. No. 69 (1981), para. 4.11.
[9] Encyclopedia of the Laws of Scotland, "Name and Change of Name" Vol. 10 p. 138.
[10] *Ibid.*, p. 151.
[11] We recommend, however, certain consequential changes in the statutory provisions on *registration* of a change of name or surname. See para. 7.9.

Damages for injuries causing death

8.14 At common law neither the father[1] nor the mother[2] of an illegitimate child had a title to sue for damages in respect of injuries resulting in the death of the child; nor had the child a title to sue in respect of his mother's death.[3] The Workmen's Compensation Act 1906 allowed an award to be made to an illegitimate child of the deceased workman if the child was dependent upon the deceased's earnings. Further statutory changes were made by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 and the Law Reform (Damages and Solatium) (Scotland) Act 1962 which respectively entitled an illegitimate child to sue in respect of the death of either of his parents[4] and either of the parents to sue in respect of the death of their illegitimate child.[5] We examined these and other questions in our Report on *Damages for Injuries Causing Death,*[6] and our recommendations were implemented by the Damages (Scotland) Act 1976. Section 1(1) of the 1976 Act as read with Schedule 1 enlarges the circle of relatives who are entitled to claim damages in respect of a person's death to ascendants and descendants however remote, and brothers, sisters, uncles, aunts and their issue. In deducing any relationship an illegitimate person is treated as the legitimate child of his mother and reputed father.[7] The parents of an illegitimate child can also claim for loss of society in respect of the death of the child, and an illegitimate child has a similar claim in respect of the death of either of his parents.[8] We think that the present law is satisfactory and make no proposals for change, apart from a minor consequential amendment.[9]

Recovery of supplementary benefit and contributions for children in care

8.15 In their Report on *Illegitimacy* the Law Commission for England and Wales have recommended certain changes to the rules of English law on the recovery of supplementary benefit from the father of an illegitimate child.[10] These changes are partly changes of form, rather than of substance, and partly changes consequential on the proposed abolition in England and Wales of the separate and distinct procedure relating to affiliation proceedings. It would be undesirable if the English provisions did not refer to illegitimate children whereas the Scottish provisions did, and we have therefore included in our draft Bill a provision designed to express the Scottish rules on recovery

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[1] *McNeill* v. *McGregor* (1901) 4 F. 123. Where the child was legitimated by subsequent marriage after the fatal injury occurred but before his death his father acquired a title to sue. *McLean* v. *Glasgow Corporation* 1933 S.L.T. 396.

[2] *Weir* v. *Coltness Iron Co. Ltd.* (1889) 16 R. 614: *Clarke* v. *Carfin Coal Co.* (1891) 18 R. (H.L.) 63.

[3] *Clement* v. *Bell & Sons Ltd.* (1899) 1 F. 924.

[4] S.2(2).

[5] S.2.

[6] (1973) Scot. Law Com. No. 31.

[7] Sched. 1, para. 2(*b*).

[8] S.1(4) as read with s.10(2) and Sched. 1.

[9] See draft Bill, Appendix A, Sched. 1. One effect of this amendment would be to remove any possible doubt there may be as to whether Sched. 1 of the 1976 Act means that in deducing a relationship for the purposes of the Act a parent or ascendant of an illegitimate person is to be treated as a legitimate parent or ascendant.

[10] Law Com. No. 118 (1982) para. 6.50. Similar changes were recommended in relation to the National Assistance Act 1948, s.42 which still applies to the recovery of certain expenditure by local authorities.

of supplementary benefit from liable relatives in a way which does not use the term "illegitimate children".[1] This is a change in terminology only and not a change in substance. We also include a provision repealing the Scottish equivalents of the special affiliation proceedings for the recovery of supplementary benefit paid for illegitimate children.[2] The reasons are, first, the desirability of having similar rules on these matters in both England and Scotland and, secondly, the fact that the provisions on the recovery of benefit paid for children generally provide an adequate remedy.[3] These changes would keep the law on the recovery of supplementary benefit in England and Scotland essentially the same. For the same reasons we provide in our draft Bill[4] for an amendment to section 42 and the repeal of section 44 of the National Assistance Act 1948, which are similar to the above provisions of the Supplementary Benefits Act and which still have a residual application to certain types of expenditure. Again the changes correspond to changes recommended by the Law Commission for England and Wales.

8.16 Section 81 of the Social Work (Scotland) Act 1968 contains special provisions for the recovery, by a local authority, of aliment for an illegitimate child in its care (a "maintainable" illegitimate child). The provisions fall into two parts. First, there is a provision giving a local authority, where no decree for aliment has been granted in respect of the child, the same right as the mother to raise an action for affiliation and aliment "concluding for payment for aliment in respect of the child."[5] This seems to be unnecessary because the local authority has, in any event, a right to apply for a contribution order in relation to any maintainable child against his father or mother. There seems to be no need for a special extra provision in relation to, and only in relation to, illegitimate children. We therefore recommend the repeal of this provision. The second part of section 81 provides that where a decree for aliment for a maintainable illegitimate child is in force the local authority can apply for an order that payments under the decree be made to it.[6] There would seem to be no reason why this procedure, enabling payments under an existing decree to be diverted to a local authority, should not be available in relation to a decree for aliment for any child, legitimate or illegitimate. This result could be achieved by simple textual amendments.

8.17 Our **recommendations** on the above matters are therefore as follows:

36. (*a*) The Scottish rules in section 17 of the Supplementary Benefits Act 1976 on recovery of supplementary benefit from liable relatives should be expressed in a way which does not use the term "illegitimate children". A similar change should be made in section 42 of the National Assistance Act 1948. These changes should not affect the substance of the existing law.

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[1] See draft Bill, Appendix A, Sched. 1 (amending s.17 of the Supplementary Benefits Act 1976).
[2] *Ib.*, Sched. 2 (repealing Supplementary Benefits Act 1976, s.19).
[3] See Supplementary Benefits Act 1976, s.18.
[4] See Appendix A, Scheds. 1 and 2.
[5] S.81(1).
[6] S.81(2).

(*b*) Section 19 of the Supplementary Benefits Act 1976 and section 44 of the National Assistance Act 1948 (which contain special rules for illegitimate children and which will be repealed for England and Wales if the Law Commission's recommendations on illegitimacy are implemented) should be repealed for Scotland.

(*c*) Section 81(1) of the Social Work (Scotland) Act 1968 should be repealed as unnecessary. The remainder of section 81 should be amended so as to apply to legitimate as well as illegitimate children.

(Paragraphs 8.15 and 8.16; Schedules 1 and 2.)

PART IX THE LEGISLATION REQUIRED

General considerations

9.1 *The words "legitimate" and "illegitimate".* So long as marriage exists and children are born there will be children born in marriage and children born out of marriage. In some cases of children born out of marriage the parents will marry each other after the birth: in others they will not. These are facts and, short of abolishing marriage, there is nothing the law can do about them. Even today there may be a certain social stigma attaching to birth out of marriage. There is not much that law reform can do about this directly, although it can help indirectly by ensuring that there is the minimum *legal* justification for drawing distinctions between people on the basis of their parents' marital choices, and by ensuring that statute law does not attach offensive legal labels to people whose parents have not married each other. We have no doubt, from comments received on our consultative memorandum, that the word "illegitimate" is found offensive by many of those to whom, or to whose children, it is applied. It suggests that a person is "unlawful" and inferior.

9.2 We have borne these considerations in mind in deciding on the form of legislation to implement our recommendations. We have not, however, found it possible to eliminate the words "legitimate" and "illegitimate" entirely from Scots law. They are used in certain existing United Kingdom statutes (such as the British Nationality Act 1981) which our recommendations do not affect. They, or similar words such as "lawful children", are used in private deeds and will probably continue to be so used. It would be unwise to assume that private citizens writing their own wills, for example, would necessarily be aware of any legislative policy proscribing the use of certain ordinary English words. If particular words are used already in areas of the law which will not be affected by our recommendations, and if they are used and are likely to continue to be used in private deeds, it seems only realistic to allow them to have their intended meaning. We think, however, that nothing should be done to encourage the labelling of children in this way in the future and we would endorse the view of the Law Commission for England and Wales that the terms "legitimate" and "illegitimate" should, wherever possible, cease to be used as legal terms of art.[1] We do not agree with the Law Commission, however, that it would be desirable to replace these terms with "marital" and "non-marital". This is just another way of labelling children, and experience in other areas, such as mental illness, suggests that new labels can rapidly take on old connotations. In our view it should so rarely be necessary to discriminate between children on the basis of whether their father was married to their mother that no special legal label is required for this purpose. There are already children, for example, whose fathers, although married or formerly married to the mother, have been deprived of custody and other parental rights. It has not been found necessary to invent a special legal label for them. In short, we would not wish to see a discriminatory concept of "non-maritality" gradually replace a discriminatory concept of "illegitimacy". We would rather see future legislation distinguish, where distinctions based on marriage are necessary, between fathers rather than between children.

[1] Law Com. No. 118 (1982), para. 4.51.

Where it is thought necessary to distinguish between people on the basis of whether or not their parents were married to each other at any relevant time—and we hope this will be a very rare exception—we would suggest that this should be done expressly in those terms. We have included, in the Schedule to the draft Bill appended to this Report, provisions which would remove terms such as "legitimate children", "illegitimate children" and "lawful issue" from a number of Scottish statutory provisions. We have, we hope, paved the way for the gradual disappearance from the statute book, as statutes are repealed and replaced, of such adjectives as "legitimate" and "illegitimate" in relation to people. We cannot, and would not wish to, tie the hands of future legislators. We do, however, like the Law Commission for England and Wales, **recommend**:

37. The terms "legitimate" and "illegitimate", as applied to people, should wherever possible cease to be used in legislation. (Paragraphs 9.1 and 9.2.)

9.3 *The legal status of illegitimacy.* Implementation of our recommendations would remove most remaining legal differences between children which depend on whether or not their parents are, or have been, married to each other. It would not, however, remove all and, as we have seen, the words "legitimate" and "illegitimate" would not be entirely removed from the statute law. In these circumstances, it would be a matter for argument whether it was any longer justifiable to refer to a legal status of illegitimacy in Scots law. This, in our view, is not a matter on which it would be appropriate to legislate. Legislation is concerned with rules. Whether minor differences in the rules applying to different classes of persons justify the ascription of a distinct status is a matter for commentators rather than legislators.

9.4 *Simplifying the statute law.* In this Report we have gone as far as is, in our view, feasible at present in the direction of legal equality for all children, without this implying legal equality for all fathers. This means the elimination of a number of unnecessary distinctions between children born in and out of marriage. This in turn presents an opportunity for simplifying the statute law in this area which we think should be grasped.

A rule of equality subject to exceptions

9.5 *The general rule of equality.* The law has come a long way since the general rule in relation to a child born out of wedlock could be expressed by saying that he was nobody's child—*filius nullius*. Even under the present law there are so many exceptions to that rule that it has become misleading even as a starting point. The recommendations in this Report will carry the process still further, to the point where it makes sense to switch round the rule and the exceptions and to say that, subject to certain limited exceptions, a child born out of wedlock is in the same legal position as any other child. In our consultative memorandum, as in this Report, we have dealt one by one with those areas of the law where there are significant differences between legitimate and illegitimate children. We pointed out in the memorandum, however, that depending on the results of consultation the outcome of this process might well be legislation of a much simpler nature than this issue by issue approach might suggest.[1] The results of our consultation leave us in no

[1] Para. 1.22.

doubt that there is strong support for an approach which does not discriminate between children on the basis of conduct or decisions by their parents over which the children have no control, but which is prepared where necessary to discriminate between parents. The best and simplest way of giving effect to this approach and of giving effect to our detailed recommendations on the legal consequences of birth out of wedlock is, we think, the enactment of a general rule of equality subject to exceptions. We therefore **recommend**:

38. Legislation to implement our recommendations on the legal consequences of birth out of wedlock should take the form of a general rule of legal equality for all children, regardless of whether their parents are or have been married to each other, subject to specified exceptions.
(Clause 1(1).)

This approach makes it unnecessary to consider certain radical alterations to the definition of legitimacy and to the law on legitimation on which we invited views in the consultative memorandum.[1]

9.6 *Construction of future deeds and enactments.* Under the present law there is a rule of construction whereby references in enactments to children, fathers, mothers or other relatives are, unless the contrary intention appears, taken as references to legitimate relatives only. We think that this rule should be reversed in relation to future enactments. The same rule used to apply in the construction of deeds but, as we have seen, the rule has been reversed by section 5 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 for the purposes of ascertaining the person or persons entitled to benefit under a provision contained in a deed executed after 25 November 1968. We have already recommended that the principle of section 5 should be generalised.[2] We therefore **recommend**:

39. (*a*) References in enactments passed, or deeds executed, after the date of commencement of any legislation implementing these recommendations, to any relative or class of relative should, unless the contrary intention appears, be construed without regard to whether a person's parents are or were married to each other.
(Clause 1(2).)

9.7 The above recommendation applies to future deeds and enactments. We think, however, that it should be accompanied by a special subsidiary rule for future deeds. The reason for distinguishing between future deeds and enactments is, simply, that the latter are always drafted by skilled professionals. We have already recommended[3] that the terms "legitimate" and "illegitimate" should, wherever possible, cease to be used as legal terms of art. The Law Commission for England and Wales have made a similar recommendation.[4] If the policy behind these recommendations is found acceptable and if the draft Bills appended to the Law Commission's Report

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[1] Paras. 11.3 to 11.15.
[2] Para. 5.16 above.
[3] Para. 9.2.
[4] Law Com. No. 118 (1982), para. 4.51.

and to this Report are enacted it can reasonably be assumed that Parliamentary draftsmen will be aware of the new policy. The same cannot be said of private citizens who may well, without the benefit of legal advice, write wills, and other deeds, using phrases like "legitimate children" or "lawful issue". How should these words be construed? We considered recommending that such terms, which might be inserted unthinkingly, should not elide the general rule of equality.[1] On this view a bequest to "my daughter's lawful children" would benefit all her children, whether or not she was ever married to the father. We have decided, however, not to recommend a special rule of this nature. First, it would be likely to frustrate, rather than give effect to, the intentions of testators. And second, it could produce anomalous results where words like "illegitimate" or "unlawful" were used. It would not seem reasonable to assume that these words would be inserted as mere words of style. They would normally be used with a clear purpose. To have one rule for the word "legitimate" and another for the word "illegitimate" could, however, produce strange and unintended results in a case where a testator used both. A bequest of "£1,000 to each of my daughter's legitimate children and £500 to each of her illegitimate children" might, for example, result in the latter receiving £1,500 each. A court could always avoid this result by saying that the context required a different interpretation, but the statutory rule would merely make a sensible result more difficult, rather than easier, to achieve. It seems to us that it would be desirable for the legislation to lay down some rule for the use of words like "legitimate" or "lawful" in future deeds. Otherwise there might be doubt as to how far these words could be held to indicate an intention to exclude the new general rule of equality. We think, however, that the appropriate solution and the one most likely to give effect to the intentions of testators and others is to provide that these words will carry their accustomed meaning unless the context otherwise requires. We therefore **recommend**:

39. (*b*) A reference in a deed executed after the date of commencement of any legislation implementing these recommendations to a legitimate or illegitimate or lawful or unlawful person should, unless the context otherwise requires, be construed in the same way as it would have been if the legislation had not been passed. (Clause 1(3).)

9.8 *Exception for prior deeds and enactments.* The general rule of equality would have to be subject to an exception for prior deeds. Any other rule would amount to retrospective alteration of private arrangements. So far as prior enactments are concerned the matter is not quite so clear cut. There are two possible strategies. One is to apply the rule of equality with exceptions for particular statutes. The other is to leave existing statutes unaffected unless specifically amended. The first course would require an exhaustive examination of all existing enactments including United Kingdom statutes and subordinate legislation applying to Scotland, to ensure that nothing was being changed inadvertently. This would be a daunting task, in the absence of any computerised data base comprising all Scottish legislation, and it would be difficult to be absolutely sure that nothing had been overlooked. The second

[1] Cf. the New Zealand Status of Children Act 1969, s.3(3).

course is the safer as it means that existing provisions remain unchanged unless specifically amended. We therefore **recommend:**

39. (*c*) The general rule of equality should be subject to an exception for deeds executed before the date of commencement of any legislation implementing these recommendations and for any enactment passed before that date and not specifically amended by the implementing legislation.
(Clause 1(3).)

9.9. *Exception for parental rights of father.* The general rule of equality will have to be qualified by provisions on parental rights designed to ensure that the mother of a child will have full parental rights whether or not she is or has been married to the child's father, but that the father will have parental rights only by virtue of marriage to the mother, or court decree.[1] Although we have, because of the existing law, had to deal separately in this Report with tutory and curatory, custody and access, and other common law parental rights, the result of our recommendations is that the same rules will apply to them all. There is, therefore, no reason why the legislation should not deal with them all in one provision. This would apply to all children and would, when read with other provisions in the proposed Bill, replace section 10 of the Guardianship Act 1973 which applies to legitimate children only. For the purposes of this provision we think that a father should be regarded as married to the mother at any time when he is a party to a purported marriage to her which is voidable, or void but believed by him in good faith to be valid. It should not matter whether his error is one of fact or law. Such a father would have parental rights under the existing law, at least if his error were one of fact,[2] and it is not our intention to cut down the circumstances in which fathers have parental rights. We therefore **recommend**:

40. The general rule of equality referred to in Recommendation 38 should be subject to a provision on parental rights designed to ensure (*a*) that the mother of a child will have full parental rights whether or not she is or has been married to the father, but (*b*) that the father will have parental rights only by virtue of marriage to the mother or court decree. For this purpose "marriage" should include a voidable marriage and a void marriage which the father believed in good faith was valid (whether his error is one of fact or law).
(Clause 2(1), (2) and (3).)

9.10 *Other exceptions to general rule of equality.* Summing up what is implicit in conclusions reached earlier in this Report, and incorporating transitional provisions for the protection of existing rights, we **recommend**:

41. The general rule of equality referred to in Recommendation 38 should not affect:
    (*a*) any rule of law whereby a child born out of wedlock takes the domicile of his mother as a domicile of origin or dependence;[3]

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[1] This is not intended to preclude the mother from appointing the father to act as tutor or curator to her child after her death. See draft Bill, Appendix A, clauses 2(4) and 4.

[2] Because of the doctrine of putative marriage. See *Purves's Trs.* v. *Purves* (1895) 22 R. 513.

[3] See paras. 8.6 to 8.8 above.

(*b*) the succession to titles of honour;[1]
(*c*) the right to legitim out of, or the rights of succession to, the estate of any person dying before implementing legislation comes into force.[2]
(Clause 9(1)(*a*), (*c*) and (*d*).)

Replacement of Guardianship of Infants Acts

9.11 *The case for reform.* The implementation of our recommendations on the legal consequences of illegitimacy would, in any event, require certain amendments to the Guardianship of Infants Acts 1886 and 1925. These Acts, although they effected significant improvements in the law when they were passed, are now ripe for review. They are examples of legislation passed for England and applied to Scotland in a crude way. They generally apply only to legitimate children. They contain terminology which is manifestly inappropriate for Scots law[3] and some of their provisions are incoherent,[4] unnecessary[5] or out of touch with current principles and practice.[6] These Acts no longer apply in England and Wales, having been consolidated by the Guardianship of Minors Act 1971. It seemed to us, as our recommendations on illegitimacy took shape, that the opportunity should be taken to repeal the Acts of 1886 and 1925 and to replace them by provisions applying to all children, whether born in or out of wedlock, and expressed in a concise modern form. As this involved going beyond our consultative memorandum and recommending certain changes in the law relating to legitimate children, we though it right to issue a supplementary consultation paper. We did this in April 1983. The paper was sent to a number of bodies and individuals who comment regularly on our consultative memoranda. We are grateful to those who commented on it, particularly as they did so within a very short deadline.[7] The results were most encouraging. There was strong support for our general proposal to replace the Acts of 1886 and 1925 and for the general lines on which we proposed to do so.[8] We proceed to explain how we think the Acts of 1886 and 1925 should be recast. The Acts serve four essential functions in relation to parental rights.[9] First, they confer powers on the courts to make certain orders. Second, they specify how those powers should be exercised (the welfare of the child being the paramount consideration). Third, they regulate guardianship after the death of a parent. And fourth, they provide for the

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[1] See para. 5.19 above.

[2] Cf. Succession (Scotland) Act 1964, s.37(1)(*d*).

[3] E.g. "guardian", "infant", "next friend", "decree nisi or absolute".

[4] E.g. some rules confine jurisdiction to appoint or remove a tutor to the Court of Session and others give jurisdiction also to the sheriff courts. See 1886 Act, s.6; 1925 Act, ss.4(1), (2) and (2A), 5(4).

[5] E.g. 1886 Act, ss.10, 11 and 13.

[6] E.g. 1886 Act, s.7 (express power to declare guilty party in divorce to be a person unfit to have custody).

[7] A list of those who submitted written comments is in Appendix C.

[8] We set out draft clauses in the consultation paper to indicate the type of reform we had in mind. We explained, however, that these were liable to be changed and refined in the light of the consultation. In the event, we have been able to effect further significant simplifications.

[9] The Acts also contain at present some scattered provisions on aliment. We have recommended the repeal of these in our Report on *Aliment and Financial Provision* (Scot. Law Com. No. 67, 1981). They could, in our view, be safely repealed even if that Report is not implemented.

situation where there are two or more guardians. We consider each of these functions in turn.

9.12 *Powers of courts to make orders.* The 1886 and 1925 Acts give the courts certain powers—

(*a*) to make orders as to custody and access;[1]

(*b*) to remove and appoint tutors in certain circumstances;[2]

(*c*) to resolve disputes between "joint guardians".[3]

These powers are not, however, general. The power to make orders as to custody and access can be exercised only on the application of the mother[4] or father[5] or, in certain specified circumstances, on the application of a tutor.[6] The power to remove tutors under the 1886 Act and appoint new tutors in their place can be exercised only by "either division of the Court of Session".[7] The power to remove and appoint tutors under the 1925 Act can be exercised by the Court of Session or the sheriff court but is limited to cases where at least one parent is dead.[8] As already noted, the powers under the 1886 and 1925 Acts are limited to legitimate children. The Court of Session and sheriff court have powers under section 2 of the Illegitimate Children (Scotland) Act 1930 to make orders, on the application of the mother or father, relating to the custody of, and access to, an illegitimate child.

9.13 The restricted powers under the 1886 and 1925 Acts co-exist with the very general powers of the Court of Session, in the exercise of its *nobile officium*, to make orders relating to the guardianship, custody and upbringing of children, and with the general power of the sheriff courts under section 5 of the Sheriff Courts (Scotland) Act 1907 to deal with "actions for regulating the custody of children". The question of title to sue for custody at common law has never been conclusively determined but the courts have certainly not shown themselves restrictive. Professor Wilkinson has summed up the position as follows:[9]

> "The classes of persons other than parents or guardians entitled to pursue custody applications at common law in Scotland have never been exhaustively defined but it is clear that they are wide-ranging. Cases of application by grandparents are numerous (e.g. *Cochrane* v. *Keys*, 1968 S.L.T. (Notes) 64—a grandparent pursuing in a question with a parent). In *Morrison* v. *Quarrier* (1894) 21 R. 889 and 1071, a brother, and in *Walker* v. *Walker* (1824) 2 S. 788, a tutor-at-law, respectively were petitioners. Trustees of a parent who were also testamentary tutors (*Whitson* v. *Speid* (1825) 4 S. 42) and in a number of cases, e.g. *Gulland* v. *Henderson* (1878) 5 R. 768, factors loco tutoris have sued. In *Cheetham* v. *Glasgow Corporation* [1972 S.L.T. (Notes) 50] Lord Dunpark had

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[1] 1886 Act, s.5.

[2] 1886 Act, s.6; 1925 Act, s.4(1), (2) and (2A), s.5(4).

[3] 1925 Act s.6. See also Children and Young Persons (Scotland) Act 1932, s.73; Guardianship Act 1973, s.10(3).

[4] 1886 Act, s.5.

[5] Administration of Justice Act 1928, s.16.

[6] 1925 Act, s.5(4), s.6 as expanded by Children and Young Persons (Scotland) Act 1932, s.73.

[7] 1886 Act, s.6.

[8] 1925 Act, ss.4 and 5, read with 1886 Act, s.9.

[9] "The Children Act 1975" 1976 S.L.T. (News) 221 and 237 at p. 239. See also Clive, "Getting Children Out of Dangerous Homes" 1976 S.L.T. (News) 201 at pp. 205 to 208.

suggested obiter that foster-parents had a title to apply for custody, although in reaching the conclusion he relied on s.1 of the Guardianship of Infants Act 1925 rather than on a common law rule, and in *Syme* v. *Cunningham*, 1973 S.L.T. (Notes) 40 (a case actually concerned with a grandmother's application) Lord Keith had said 'in my opinion the court has power under the nobile officium to entertain and deal with an application for custody of an illegitimate child at the instance of any person who can qualify a proper interest'. In *Syme* Lord Keith was concerned with the custody of an illegitimate child but it is submitted that the same principle applies where the custody of a legitimate child is at stake. Certain doubts may remain as to what constitutes 'a proper interest' but neither principle nor authority requires that it be any more than such connection with the child as is necessarily possessed by anyone who has lawfully had the child in his or her care for any material length of time. Indeed the law probably goes further and allows a title to sue to anyone who can show that the granting of a custody application in his favour would be for the welfare of the child—thus effectively merging questions of title to sue and of the merits of the application—although it would be only in highly exceptional circumstances that such a title could be shown by someone who did not have a prior connection with the child."

The provisions in the Acts of 1886 and 1925, with their various restrictions and piecemeal solutions, do not square with the generalised approach of the Scottish common law and appear to reflect the traditionally more restrictive approach of English law.[1] In our view a new statutory provision to replace the various provisions in the Acts of 1886 and 1925 on the powers of the courts to make orders relating to parental rights should not restrict title to sue,[2] should be quite general in scope and should apply to all children whether or not their parents have been married to each other. It should also apply to both the Court of Session and the sheriff courts. We therefore **recommend**:

42. (*a*) The various provisions in the Guardianship of Infants Acts 1886 and 1925 and the Illegitimate Children (Scotland) Act 1930 on the powers of the courts to make orders relating to tutory, custody and access should be replaced by a general provision giving the court power, on the application of any person claiming an interest, to make orders relating to parental rights. "Parental rights" for this purpose should mean tutory, curatory, custody, access and any right or authority relating to the welfare or upbringing of a child conferred on a parent by the common law. "The court" should mean the Court of Session or the sheriff court.
(Paragraphs 9.11 to 9.13; Clauses 3 and 8; Schedule 2.)

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[1] See Wilkinson, *op. cit.*, at p. 239.

[2] In our consultation paper of April 1983 we put forward two possible solutions to the problem of title to sue. One was to prepare the new provision on the powers of the courts to make custody or access orders using a formula such as "without prejudice to any power of the court to entertain an application by any other person . . .". The other was to confer title to sue on *inter alios* "any person having an interest to apply". We received several strongly argued comments favouring a generalised rule on title to sue on the lines of the second solution, although some doubts were expressed about the precise formula we suggested. We have found these comments particularly helpful and have taken them carefully into account in formulating our revised proposal.

This provision would also replace section 10(3) of the Guardianship Act 1973 which gives the court power to deal with disputes between a father and a mother on questions affecting their child's welfare. It would enable parts (not yet in force) of section 47 of the Children Act 1975 which confer title to sue for custody on relatives and foster parents to be repealed. It would, of course, enable the father of a child born out of wedlock to apply for tutory, curatory, custody or other parental rights, and would enable the court to award such rights either to him alone or to him along with the mother. It would thus give effect to our earlier recommendations on these points. The definition of "parental rights" is so framed as to exclude patrimonial rights such as succession rights.

9.14 A court dealing with an action for divorce, judicial separation or nullity of marriage has power to make orders relating to the custody, maintenance and education of children under the age of 16.[1] We think that it would be desirable to apply the principle of the preceding recommendation to this power also and to extend it to cover any order relating to parental rights. There may be cases, for example, where a divorce court should be able, on application, to deprive a parent of tutory and curatory over his children or to award such tutory and curatory to a step-parent who is being given exclusive custody of a child in the divorce action. We also think that the opportunity should be taken to confer a power to vary or recall an order made under these provisions. The absence of such a statutory power has required the courts to take care to reserve leave to apply for a variation every time it makes an order relating to custody in an action for divorce, nullity of marriage or separation.[2] We therefore **recommend**:

42. (*b*) Section 9 of the Conjugal Rights (Scotland) Amendment Act 1861 should be amended so as to give the court power to make orders relating not only to custody and education but also to other parental rights, as defined in Recommendation 42(*a*) above, and to vary or recall any such order. (Schedule 1.)[3]

9.15 The recommendation in the preceding paragraphs is not intended to affect the powers and duties of local authorities or children's hearings in relation to children in need of care under the Social Work (Scotland) Act 1968, as amended.[4] In particular, the provisions of the 1968 Act, as amended,

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[1] Conjugal Rights (Scotland) Amendment Act 1861, s.9 (read with the Custody of Children (Scotland) Act 1939, s.1 and the Matrimonial Proceedings (Children) Act 1958, s.14(1)); Divorce Jurisdiction, Court Fees and Legal Aid (Scotland) Act 1983, Sched. 1, para. 4. In our Report on *Aliment and Financial Provision* (Scot. Law Com. No. 67, 1981) we have recommended the repeal of the reference to "maintenance" in this provision. There is no reason why, under the general law, a conclusion or crave for aliment, or interim aliment, for a child should not be made in an action for divorce, nullity or separation. The reference to "maintenance" in the section is therefore unnecessary. The reference to custody is on the other hand necessary because custody applications under the general law are made, in the Court of Session, by petition.

[2] *Sanderson* v. *Sanderson* 1921 S.C. 686; *Bain* v. *Douglas* 1936 S.L.T. 418. Rule of Court 170B(2), (8) and (9).

[3] This amendment will enable ss.7 and 14 of the Matrimonial Proceedings (Children) Act 1958 to be repealed.

[4] See Parts II and III of the Social Work (Scotland) Act 1968 as amended by the Children Act 1975. See also the Health and Social Services and Social Security Adjudications Act 1983, s.7 (which deals with parental access to a child subject to a parental rights resolution).

on the assumption of parental rights would remain in force as a separate body of law.[1]

9.16 We have not included in the draft Bill appended to this Report any clauses on the grounds of jurisdiction to make orders relating to parental rights. The reason for this is that we are dealing with this question in a report to be published jointly with the Law Commission for England and Wales. In the meantime, we have confined ourselves to minor amendments designed to ensure that a court will have jurisdiction to make orders relating to parental rights in a divorce action if it has jurisdiction in the divorce action,[2] and that the existing jurisdiction of the sheriff courts to deal with actions for regulating the custody of children under the Sheriff Courts (Scotland) Act 1907, as amended, extends also to other actions relating to parental rights as defined in our Bill.[3]

9.17 *How the courts' powers should be exercised.* Section 1 of the Guardianship of Infants Act 1925 provides as follows:

> "Where in any proceeding before any court (whether or not a court within the meaning of the Guardianship of Infants Act 1886) the custody or upbringing of an infant, or the administration of any property belonging to or held on trust for an infant, or the application of the income thereof, is in question, the court in deciding that question, shall regard the welfare of the infant as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father, in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father."

There are similar references to the criterion of the child's welfare in section 5 of the Guardianship of Infants Act 1886 and section 2 of the Illegitimate Children (Scotland) Act 1930. We have already recommended[4] that the child's welfare should be the paramount consideration in the exercise of the court's powers in relation to tutory, curatory, custody, access and other parental rights over an illegitimate child. We think, however, that a statutory replacement for section 1 of the 1925 Act and the corresponding references in the 1886 and 1930 Acts could, with advantage, be in simpler and more comprehensive terms. It should apply to tutory, curatory, custody, access and other common law parental rights. It should *not* apply to the administration of trust property—which will be, and should be, governed by the terms of the trust. It should simply make the child's welfare the "paramount" consideration, the words "first and" adding nothing.[5] And it need not contain the

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[1] A question might arise whether any legislation implementing our recommendation should be interpreted in the light of the decision in *Beagley* v. *Beagley* 1983 S.L.T. 424 (Inner House); The Times, 20 December 1983 (House of Lords).

[2] This requires a slight amendment to the Domicile and Matrimonial Proceedings Act 1973, Sched. 2, para. 3.

[3] This requires, for the avoidance of doubt, a slight amendment to s.5 of the Sheriff Courts (Scotland) Act 1907. See draft Bill, Appendix A, Sched. 1, new para. (2C).

[4] Paras. 2.18, 3.3 and 4.4 above.

[5] This was a point to which we referred in our consultation paper of April 1983. The view of those who commented on this point was that the words "first and" were indeed unnecessary, obscure and question-begging.

concluding words about the claim of one parent being superior to that of the other. These are all minor drafting points which would hardly alter the substance of the provision.

9.18 There is a more serious point on section 1 of the 1925 Act. It does not make it clear that before making any order relating to tutory, curatory, custody or other parental rights a court should be satisfied that the order is in the interests of the child. This omission is important because it has left room for the view that in an undefended application for custody (other than an application in proceedings for divorce, separation or nullity of marriage)[1] a court can grant decree without any proof or inquiry.[2] This situation has been remedied to a considerable extent by a new procedural rule for sheriff court proceedings. The new rule provides that the normal procedure for granting decree in an undefended action does not apply to actions for the custody of children. Such actions will be called in court, if the pursuer takes the appropriate steps, and "decree may be granted after such inquiry as the sheriff thinks necessary".[3] The new rule, however, does not apply to applications relating to tutory, curatory or parental rights other than custody and it applies only to sheriff court proceedings. Moreover it does not expressly require the court to be satisfied before granting decree, though this is probably implied. Notwithstanding the new rule, which is in our view an extremely useful rule so far as it goes, we consider that it would be desirable to provide expressly by statute that a court should not make any order relating to parental rights, including the upbringing of a child, unless satisfied that this would be in the child's interests. This would not mean that there would have to be a proof in every case. The court might be satisfied by statements made by or on behalf of the parties, or by a report, or by a proof. We consulted on this proposal in our consultation paper of April 1983 and received strong support for it. We therefore **recommend**:

43. Section 1 of the Guardianship of Infants Act 1925 (and the corresponding provisions in section 5 of the Guardianship of Infants Act 1886 and section 2 of the Illegitimate Children (Scotland) Act 1930) should be replaced by a provision to the effect that in any proceedings concerning parental rights (as defined in the preceding recommendation) a court should regard the welfare of the child as the paramount consideration and should not make any order affecting such rights unless satisfied that it is in the child's interests. (Paragraphs 9.17 and 9.18; Clause 3(2); Schedule 2.)

9.19 *Tutory and curatory after death of a parent.* Section 4 of the Guardianship of Infants Act 1925 provides that on the death of one parent of a legitimate child the other becomes tutor, either alone or "jointly" with any tutor appointed by the other. If no tutor has been appointed by the deceased parent the court may if it thinks fit appoint a guardian to act "jointly" with the mother. These provisions will be unnecessary in the scheme we are

[1] In such proceedings the court has a statutory duty to be satisfied regarding the arrangements for the care and upbringing of children before granting decree of divorce, separation or nullity. Matrimonial Proceedings (Children) Act 1958, s.8.

[2] See *Beverley* v. *Beverley* 1977 S.L.T. (Sh.Ct.) 3.

[3] Act of Sederunt (Ordinary Cause Rules, Sheriff Court) 1983, Rule 22(3).

recommending. If both parents of a child are tutors or curators before the death of one of them (whether they are married to each other or not) then the other will automatically continue as tutor or curator either alone or along with any tutor or curator appointed by the other. No special legislative provision is necessary to bring this about. Nor is any special provision necessary for the appointment by a court of a tutor or curator to act along with the surviving parent. The courts' general power to make orders as to tutory, curatory or other parental rights will be sufficient for any exceptional cases.

9.20 Section 5 of the 1925 Act enables a parent of a legitimate child to appoint a tutor to act after his death. We think that this power should apply also to the appointment of curators (presently governed by the common law) and that any appointment of a tutor or curator should be valid, as we have already recommended for illegitimate children,[1] only if the parent was tutor or curator at the date of his or her death (or would have been if he or she had survived the birth of the child.) There is no reason why a parent who has been deprived of parental rights in general, or of tutory or curatory in particular, should have this right. If the power is so limited it can be expressed in exactly the same way for all parents whether or not they are or have been married to each other. Section 5(3) of the Act provides that any tutor appointed by a deceased parent shall act "jointly" with the surviving parent, unless the latter "objects to his so acting". Again there is no provision for curators. Similar problems could arise in both cases and we think the same rules should apply. In relation to both tutors and curators, a requirement of "joint" acting seems to us to be likely to cause inconvenience and difficulty. It will often be convenient for a tutor or curator to act alone. Where both parents are alive and where both are tutors or curators to the child either can act without the other.[2] This seems to us to be a more flexible arrangement. There may be cases, for example, where a father has appointed his brother to act as tutor or curator to his child after his death, having in mind the eventuality of the child's being left an orphan. On the father's death, the mother and the brother may both be quite content that the mother should continue to act as tutor and curator, with the brother playing a merely passive role and being held in reserve, as it were, in case the mother should die before the child attained majority. The provisions on the effect of an objection by the surviving parent also seem open to criticism. It appears that on such an objection, which may be quite informal, the testamentary tutor ceases to be entitled to act. He may, however, apply to the court under section 5(4) for an order that he shall act either jointly with the surviving parent or as sole tutor. Third parties may have an interest in knowing whether someone is entitled to act as tutor to a child and it seems to us to be wrong that a tutor, validly appointed by a deceased parent, should in effect be liable to be deprived of office by a mere objection by the surviving parent. Nor is this procedure necessary within the scheme we are now recommending. If the surviving parent and the appointed tutor or curator are not in disagreement no application to the court is necessary. They can arrange things amicably between themselves, just as separated or divorced parents can. If they are in disagreement to such an extent that the intervention of a court is

[1] Paras. 2.4 and 2.12 above.
[2] Guardianship Act 1973, s.10(1).

necessary—and in practice this will probably be the case only where property or litigation is involved—either can apply to the court under the general provision enabling the court to make orders relating to tutory, curatory and other parental rights. We therefore **recommend**:

44. The provisions in sections 4 and 5 of the Guardianship of Infants Act 1925 on tutory after the death of the parent of a legitimate child should be replaced by a simple provision, applying to all children, enabling a parent to appoint any person to be tutor or curator of the child after his or her death. Any such appointment should be of no effect unless the parent was tutor or curator of the child at the time of his or her death or would have been if he had survived the birth of the child.
(Paragraphs 9.19 and 9.20; Clause 4(1); Schedule 2.)

9.21 *Two or more persons with parental rights.* It will very often, indeed usually, be the case both under the present law and under the rules we are here recommending that two or more persons will be entitled to parental rights, or certain parental rights, in relation to a child. The present statute law does not regulate this situation in a consistent way. If the two persons with parental rights are the parents of a legitimate child then either can act without the other.[1] If a surviving parent is acting as tutor along with a tutor appointed by a deceased parent or appointed by a court under the 1925 Act, then both act "jointly".[2] If both parents have appointed tutors, then on the death of the surviving parent both appointed tutors act jointly.[3] Similarly, if a tutor has been appointed by the court on the death of one parent and another tutor has been appointed by the surviving parent, then on the death of the surviving parent both tutors act "jointly".[4] There is no statutory regulation of the situation where two or more persons are curators. We can see no reason for these different solutions to what is essentially the same problem. For the reasons given above we prefer the solution of the Guardianship Act 1973 to that of the 1925 Act, although this should be subject to any express provision to the contrary in a decree or deed conferring the right in question.[5] We therefore **recommend**:

45. The rules on joint tutors in the Guardianship of Infants Act 1925 and on the situation where both parents have parental rights under the Guardianship Act 1973 should be replaced by a general provision to the effect that where two or more persons have any parental right (as defined in Recommendation 42(*a*) above[6]) in relation to a child, any one of them shall be able to exercise that right without the consent of any other unless any decree or deed conferring the right otherwise provides.
(Clause 2(5); Schedule 2.)

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[1] Guardianship Act 1973, s.10(1).
[2] Guardianship of Infants Act 1925, ss.4 and 5.
[3] 1925 Act, s.5(5).
[4] *Ib.*, s.5(6).
[5] In deeds appointing tutors and curators there may be express provisions as to a quorum and sometimes provisions to the effect that a particular person is a *sine qua non* with, in effect, a veto on the actings of any others.
[6] See para. 9.13.

9.22 *Tutors to become curators in certain cases.* A parent who is tutor to his or her child automatically becomes curator when the child attains the age of minority. Similarly, a person appointed to be a factor *loco tutoris* to a pupil child becomes automatically *curator bonis* to the child on the latter's attainment of minority.[1] This rule is, we understand, found to be extremely convenient in practice. We think that a similar rule should apply where a person has been appointed by a court or by a deceased parent to be a tutor to a child. We therefore **recommend**:

46. A person appointed by a court, or by a deed, to be tutor to a child should, unless the court otherwise orders or the deed otherwise specifically provides, become curator to the child when the child attains the age of minority.
(Clauses 3(3) and 4(2).)

9.23 *Fiduciary position of tutors.* The 1886 and 1925 Acts contain provisions on the fiduciary position of certain tutors. The technique used is to bring the specified categories of tutors within the scope of the Judicial Factors Act 1849 and the Trusts (Scotland) Act 1921.[2] We would wish the 1886 and 1925 Acts to be repealed entirely. There can be little point in keeping these Acts on the statute book merely because they make non-textual amendments to previous Acts. On the other hand the provisions in question would be out of place in the body of the draft Bill appended hereto. The solution to this difficulty is to put the provisions in question where they belong, which is in the Acts of 1849 and 1921 respectively. The schedule of amendments to the draft Bill appended hereto contains a provision for this purpose.

9.24 *Provisions not re-enacted.* Section 7 of the 1886 Act gives the court power on granting a decree of separation or "a decree either nisi or absolute for divorce" to declare "the parent by reason of whose misconduct such decree is made to be a person unfit to have the custody of the children (if any) of the marriage" with the stated effect that "the parent so declared to be unfit shall not, upon the death of the other parent, be entitled as of right to the custody or guardianship of such children". This provision, so far as we are aware, is rarely if ever used. It was enacted long before the introduction of the statutory principle that in any question relating to the custody or upbringing of a child the welfare of the child is the paramount consideration, and long before the introduction of the irretrievable breakdown of the marriage as (in principle) the sole ground of divorce.[3] In our consultation paper of April 1983 we expressed the view that section 7 was now unnecessary and out of touch with current principles and practice. No-one disagreed with this assessment and we therefore do not recommend the re-enactment of this provision. If a parent wishes the other parent to be deprived of custody, or of tutory or curatory, and if this is in the interests of the child, the court could under our recommendations make an appropriate order, with immediate effect, in the divorce proceedings. This would be a more effective protection

[1] Judicial Factors Act 1889, s.11.

[2] See 1886, Act, s.12; 1925 Act, s.10. The latter provision was rendered necessary by the decision in *Shearer's Tutor* 1924 S.C. 445.

[3] See Divorce (Scotland) Act 1976, s.1(1). The words "in principle" are inserted because under s.1(2) irretrievable breakdown can be established by, among other things, proof of adultery, intolerable behaviour or desertion.

for the child than a declarator of unfitness under section 7. The 1886 Act also contains various procedural and ancillary rules which need not be replaced.[1]

9.25 Section 3(1) of the 1925 Act enables a court to make orders relating to the custody of, and access to, a child notwithstanding that the parents are living together. This would be superseded by the more general power which we have recommended.[2] Section 3(2) enables the court, when it has made an order for custody under the 1886 or 1925 Acts, to make an order as to the "maintenance" of the child against the parent excluded from having custody.[3] This would seem to be unnecessary as the parent is, in any event, liable to aliment the child. Section 3(3) provides that no order for custody or maintenance made under the section shall be enforceable or shall give rise to any liability while the parents live together and that any such order shall cease to have effect if the parties continue to reside together for three months after it is made. This seems misconceived and unnecessary in relation to a custody order, which cannot be "enforced" without a further application to the court for a delivery order and does not give rise to any "liability". It seems unnecessary and undesirable in relation to a "maintenance" order. In our consultation paper we suggested that section 3 was unnecessary and made no proposals to replace it. There was no dissent from those who commented.

9.26 Section 5 of the 1925 Act (power to appoint testamentary guardians) will be superseded by the more general provision we have discussed above.[4] Section 5(4) contains a provision enabling the court to order a surviving parent to pay sums to a tutor towards the maintenance of a pupil child. This seems to be unnecessary. In Scotland, unlike England and Wales, the parent has a general liability to aliment the child, so that specific statutory provisions of this kind add nothing.[5]

9.27 Section 8 of the 1925 Act introduces an anomalous set of rules for the enforcement of certain orders for the payment of money under the guardianship legislation, but not all such orders. These rules include an isolated provision, for this extremely limited purpose, for the attachment of an income or pension. As the rules to which this section relates will themselves disappear as a result of our recommendations, the section will be left with nothing to which it can apply and should not therefore be re-enacted.[6]

Implementation of other recommendations

9.28 The implementation of our recommendations on presumptions of paternity, on blood tests in civil proceedings relating to proof of parentage,

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[1] I.e. s.8 (application of Act to Scotland); s.9 (interpretation of terms); s.10 (as to removing proceedings and appeals); s.11 (power to make rules as to procedure); s.13 (saving clauses).

[2] See Recommendation 42(*a*) at para. 9.13.

[3] We have recommended the repeal of this subsection in our Report on *Aliment and Financial Provision* (Scot. Law Com. No. 67, 1981).

[4] See Recommendation 44 at para. 9.20.

[5] We have already recommended the repeal of these "maintenance" provisions of s.5(4) in our Report on *Aliment and Financial Provision* (Scot. Law Com. No. 67, 1981).

[6] We have, for this reason, already recommended the repeal of s.8 in our Report on *Aliment and Financial Provision* (Scot. Law Com. No. 67, 1981).

and on judicial proceedings for the establishment of parentage presents no special difficulty and is dealt with by clauses 5, 6 and 7 of the draft Bill appended to this Report. Our other recommendations, including those on adoption, on the position of the father under the Social Work (Scotland) Act 1968, on succession law, and on the registration of births are dealt with by amendments to existing statutes.[1]

Consequential amendments and repeals

9.29 Our recommendations will pave the way for the repeal of the Illegitimate Children (Scotland) Act 1930 and the Affiliation Orders Act 1952 as well as the Guardianship of Infants Acts 1886 and 1925 and various supplementary enactments. The result will be a considerable simplification of the law. A number of consequential amendments to other provisions will also be necessary. These are set out in Schedule 1 to the draft Bill appended to this Report. The reasons for them, and effects of them, are where necessary explained in the notes accompanying that Schedule. The Legitimation (Scotland) Act 1968 will not be repealed, because there will still be some purposes for which legitimacy is relevant, and we think it would be unjustifiable to remove the potential benefits of legitimation in these areas.

[1] See draft Bill, Appendix A, Sched. 1.

PART X SUMMARY OF RECOMMENDATIONS

1. The general objective of reform of the law on illegitimacy should be to remove legal differences between people which depend on whether their parents are or have been married to each other, without, however, conferring parental rights automatically on all fathers.
(Paragraph 1.15.)

Guardianship

2. The mother of an illegitimate child should be the child's tutor and curator.
(Paragraph 2.3; Clause 2(1)(*a*).)

3. The mother of an illegitimate child should be entitled to appoint testamentary tutors and curators to her child, but any such appointment should be of no effect unless, immediately before her death, the mother was tutor or curator of the child.
(Paragraph 2.4; Clause 4(1).)

4. (*a*) The father of an illegitimate child should be entitled to apply to the court to be appointed tutor or curator to his child, either alone or along with the mother.
(Paragraphs 2.6 and 2.9; Clause 3(1).)

   (*b*) Rules of court should provide for a simple form of procedure for those cases where the father applies with the consent of the mother.
(Paragraphs 2.7 and 2.9.)

   (*c*) A father appointed tutor to his child should, unless the court directs otherwise, automatically become the child's curator on the child's attaining the age of minority.
(Paragraphs 2.8 and 2.9; Clause 3(3).)

5. The father of an illegitimate child should be entitled to appoint testamentary tutors or curators to his child, but any such appointment should be of no effect unless the father, immediately before his death, was tutor or curator of the child.
(Paragraph 2.12; Clause 4(1).)

6. The court should have the same powers in relation to an illegitimate child as it has in relation to a legitimate child to appoint a tutor or curator to the child, to resolve disputes between two or more tutors or curators and to remove a person as tutor or curator.
(Paragraph 2.16; Clause 3.)

7. The powers referred to in Recommendations 4 and 6 above should be exercisable by the Court of Session or the sheriff courts.
(Paragraph 2.17; Clauses 3 and 8.)

8. It should be provided by statute that in exercising any powers relating to the tutory or curatory of an illegitimate child the court should regard the

welfare of the child as the paramount consideration and should not make any order unless satisfied that it is in the child's interests.
(Paragraph 2.18; Clause 3(2).)

Custody and access

9. (*a*) The father of an illegitimate child should continue to have the right to apply to the court for an order for the custody of, or access to, the child (including an order for joint custody to be exercised along with the mother.)
(Paragraphs 3.2 and 3.5; Clause 3(1).)

(*b*) Rules of court should provide for a simple form of procedure for those cases where the father applies for custody with the consent of the mother.
(Paragraphs 3.2 and 3.5.)

(*c*) It should be provided by statute that in exercising any powers relating to the custody or upbringing of, or access to, an illegitimate child, the court should regard the welfare of the child as the paramount consideration and should not make any order unless satisfied that it is in the interests of the child.
(Paragraphs 3.3 and 3.5; Clause 3(2).)

Other parental rights

10. The mother of an illegitimate child should have in relation to the child any parental rights (in addition to tutory, curatory, custody or access) recognised by the common law of Scotland.
(Paragraph 4.3; Clause 2(1)(*a*).)

11. (*a*) The father of an illegitimate child should be entitled to apply to the court for any parental rights (in addition to or instead of tutory, curatory, custody or access) recognised by the common law of Scotland.
(Clause 3(1).)

(*b*) Rules of court should provide for a simple form of procedure for those cases where the father applies with the consent of the mother.

(*c*) The court should have power in relation to an illegitimate child to resolve disputes between two or more persons having parental rights and to remove a person's parental rights.
(Clause 3(1).)

(*d*) It should be provided by statute that in exercising any powers relating to the award, exercise or removal of parental rights in relation to an illegitimate child the court should regard the welfare of the child as the paramount consideration and should not make any order unless satisfied that it is in the interests of the child.
Clause 3(2).)

(Paragraph 4.4.)

12. The agreement of a father to the adoption of his illegitimate child should be required (unless dispensed with on one of the statutory grounds) not only where he is the child's tutor or curator or is entitled to custody of the child,

but also where he has been awarded access to the child or any other parental right and the award is still operative.
(Paragraphs 4.6 to 4.8; Schedule 1, amendment to the Adoption (Scotland) Act 1978, section 18(7).)

13. The definition of "guardian" in section 94(1) of the Social Work (Scotland) Act 1968 should include the father of an illegitimate child if he is entitled to custody of the child, either solely or along with any other person.
(Paragraph 4.12; Schedule 1.)

Succession

14. Legitimate and illegitimate relationships should be treated alike for purposes of intestate succession and legitim.
(Paragraphs 5.2. to 5.11; Schedule 1, amendments to the Succession (Scotland) Act 1964; and Schedule 2, repeals of certain provisions in the 1964 Act and in the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968.)

15. (*a*) The protection afforded by the present law to trustees and executors who distribute property without having ascertained the existence of an illegitimate relative should be extended to trustees and executors who distribute property without having ascertained the existence of a paternal relative of a deceased illegitimate person.
(*b*) There should be no special presumptions of non-survivorship in the case of illegitimate relationships.
(Paragraphs 5.12 to 5.14; Schedule 1, amendment to the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968, section 7.)

16. The principle of section 5(1) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 should apply not only for the purpose of ascertaining the person or persons entitled to benefit under a deed but also for the purpose of ascertaining the person or persons designated by a deed for other purposes (such as the appointment of an executor or the fulfilment of a condition).
(Paragraphs 5.15 and 5.16; Clause 1; Schedule 1, addition of section 36(5) to the Succession (Scotland) Act 1964.)

Establishment of parentage

17. It should be made clear by statute that a man is presumed to be the father of a child if he was married to the mother of the child at the date of the child's conception or birth or at any time between those dates and that, for this purpose, marriage includes an irregular or void marriage.
(Paragraphs 6.6 and 6.7; Clause 5(1)(*a*) and (2).)

18. The standard of proof required to rebut any presumption of paternity based on marriage should be proof on a balance of probabilities.
(Paragraphs 6.8 and 6.9; Clause 5(4).)

19. Where a man and the mother of a child have both acknowledged that he is the father and he has been registered as such in any register kept under section 13 or section 44 of the Registration of Births, Deaths and Marriages

(Scotland) Act 1965 or in any corresponding register kept under statutory authority in any other part of the United Kingdom and where no presumption of paternity based on marriage applies, the man registered as the father should be presumed to be the father.
(Paragraphs 6.10 to 6.12; Clause 5(1)(*b*).)

20. (*a*) It should be provided that consent to the taking of a blood sample from a pupil child for the purposes of proof of parentage in civil proceedings may be given by any person who is his tutor or who has custody, or care and control, of him.

(*b*) It should be provided that consent to the taking of a blood sample from any person who is incapable (whether or not by reason of pupillarity) of giving consent may be given by the court where

(i) there is no person who is entitled to give such consent, or

(ii) there is such a person but it is not reasonably practicable to obtain his consent, or he is unwilling to accept the responsibility of giving or withholding consent,

provided that the court is satisfied that the taking of the sample would not be detrimental to the person's health.
(Paragraphs 6.13 to 6.17; Clause 6.)

21. As there may continue to be a residual need for actions for declarator of legitimacy or bastardy (in relation, for example, to titles of honour or deeds executed, or enactments passed, before reforming legislation comes into force) these actions should not be made incompetent. Declarators of bastardy should, however, in future be referred to in legislation and in rules of court as declarators of illegitimacy.
(Paragraph 6.18; Clause 7.)

22. Rules of court should provide forms of conclusion for actions for declarator of parentage or non-parentage.
(Paragraph 6.19.)

23. It should be made clear, for the removal of doubt, that a question of legitimacy or parentage may be determined incidentally for the purposes of any litigation without any necessity for a declarator.
(Paragraph 6.20; Clause 7(5).)

24. It should be made clear that declarators of legitimacy, illegitimacy, parentage or non-parentage can be granted either by the Court of Session or by a sheriff court.
(Paragraph 6.21; Clause 7(2) and (3).)

25. The Court of Session should have jurisdiction to entertain an action or application for declarator of legitimacy, illegitimacy, parentage or non-parentage if (and only if) the child was born in Scotland or the alleged or presumed parent or the child—

(*a*) is domiciled in Scotland on the date when the application is made; or

(*b*) was habitually resident in Scotland throughout the period of one year ending with that date; or

(*c*) died before that date and either

(i) was at the date of death domiciled in Scotland; or

(ii) had been habitually resident in Scotland throughout the period of one year ending with the date of death.

(Paragraph 6.22; Clause 7(2).)

26. A sheriff court should have jurisdiction to entertain an action or application for declarator of legitimacy, illegitimacy, parentage or non-parentage if (and only if)

(*a*) the child was born in the sheriffdom; or

(*b*) the Court of Session would have had jurisdiction under the above rules and the alleged or presumed parent or the child was habitually resident in the sheriffdom on the date when the application is made or was habitually resident there at the time of his or her death.

(Paragraph 6.23; Clause 7(3).)

In this and the previous recommendation "the alleged or presumed parent" includes a person who claims or is alleged to be or not to be the parent.
(Paragraph 6.23; Clause 7(6).)

27. It should be provided that a decree of declarator of parentage or non-parentage cannot be granted until the grounds of action have been substantiated by sufficient evidence.
(Paragraph 6.25; Clause 7(4).)

28. A decree of declarator of legitimacy, illegitimacy, parentage or non-parentage should, without prejudice to any effect it may have on the parties to the proceedings at common law, give rise to a presumption (rebuttable on a balance of probabilities) of legitimacy, illegitimacy, parentage or non-parentage which should displace any contrary presumption arising out of marriage, registration or any prior court decree.
(Paragraphs 6.26 to 6.28; Clause 5(3).)

29. The references to findings of paternity in section 11 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 should be deleted.
(Paragraphs 6.29 and 6.30; Schedule 2.)

Registration of births

30. The mother of an illegitimate child should be entitled to have a man entered in the Register of Births as the father on production of a court decree finding him to be the father.
(Paragraph 7.4; Schedule 1, amendments to Registration of Births, Deaths and Marriages (Scotland) Act 1965, section 18(1).)

31. Either parent of an illegitimate child should be entitled to register the child's birth, and have the father entered, in the Register of Births on production to the registrar of (*a*) a declaration made by the mother naming the man as father and (*b*) a declaration made by the man acknowledging that he is the father. The registering parent's declaration would be in prescribed form while the absent parent's declaration would be a statutory declaration.
(Paragraph 7.4; Schedule 1, amendments to 1965 Act, section 18(1).)

32. There should no longer be any time limits in section 18(2) of the Registration of Births, Deaths and Marriages (Scotland) Act 1965 (recording of father's name in the Register of Corrections Etc.).
(Paragraphs 7.5 and 7.6; Schedule 1.)

33. An application by a man to the sheriff under section 18(2)(*c*) of the Registration of Births, Deaths and Marriages (Scotland) Act 1965 (for recording his name as the father of an illegitimate child in the Register of Corrections Etc.) should be competent not only where the mother is dead (as under the present law) but also where the mother cannot be found or is incapable of making a declaration under section 18(2)(*b*) of the Act.
(Paragraph 7.7; Schedule 1.)

34. Re-registration of the birth of a person under section 20 of the Registration of Births, Deaths and Marriages (Scotland) Act 1965 should be possible (subject to the proviso in subsection (1) of that section)

(*a*) if the person is under the age of 16, on the application of (i) his mother or (ii) his father if he is the tutor or curator of, or entitled to custody of, the person or if he applies with the consent of the mother;

(*b*) if the person is 16 or over but under the age of 18, on the application of that person with the consent of a parent or curator (if he has any);

(*c*) if the person is 18 or over, on the application of that person;

(*d*) in any case, on the application of such other person as may be prescribed by regulations made under the Act.

(Paragraph 7.8; Schedule 1, new section 20(3) of the 1965 Act.)

35. Section 43 of the Registration of Births, Deaths and Marriages (Scotland) Act 1965 should be reframed so as to distinguish between those fathers who are, and those fathers who are not, qualified to apply for recording of their child's change of name rather than between legitimate and illegitimate children. A father should be regarded as a qualified applicant not only by virtue of marriage to the mother but also if he is the child's tutor or curator or is entitled to custody of the child.
(Paragraph 7.9; Schedule 1, new section 43(10) of the 1965 Act.)

Miscellaneous

36. (*a*) The Scottish rules in section 17 of the Supplementary Benefits Act 1976 on recovery of supplementary benefit from liable relatives should be expressed in a way which does not use the term "illegitimate children". A similar change should be made in section 42 of the National Assistance Act 1948. These changes should not affect the substance of the existing law.

(*b*) Section 19 of the Supplementary Benefits Act 1976 and section 44 of the National Assistance Act 1948 (which contain special rules for illegitimate children and which will be repealed for England and Wales if the Law Commission's recommendations on illegitimacy are implemented) should be repealed for Scotland.

(*c*) Section 81(1) of the Social Work (Scotland) Act 1968 should be repealed as unnecessary. The remainder of section 81 should be amended so as to apply to legitimate as well as illegitimate children.

(Paragraphs 8.15 to 8.17; Schedules 1 and 2.)

The legislation required

37. The terms "legitimate" and "illegitimate", as applied to people, should wherever possible cease to be used in legislation.
(Paragraphs 9.1 and 9.2.)

38. Legislation to implement our recommendations on the legal consequences of birth out of wedlock should take the form of a general rule of legal equality for all children, regardless of whether their parents are or have been married to each other, subject to specified exceptions.
(Paragraph 9.5; Clause 1(1).)

39. (*a*) References in enactments passed, or deeds executed, after the date of commencement of any legislation implementing these recommendations, to any relative or class of relative should, unless the contrary intention appears, be construed without regard to whether a person's parents are or were married to each other.
(Paragraph 9.6; Clause 1(2).)

(*b*) A reference in a deed executed after the date of commencement of any legislation implementing these recommendations to a legitimate or illegitimate or lawful or unlawful person should, unless the context otherwise requires, be construed in the same way as it would have been if the legislation had not been passed.
(Paragraph 9.7; Clause 1(3).)

(*c*) The general rule of equality should be subject to an exception for deeds executed before the date of commencement of any legislation implementing these recommendations and for any enactment passed before that date and not specifically amended by the implementing legislation.
(Paragraph 9.8; Clause 1(3).)

40. The general rule of equality referred to in Recommendation 38 should be subject to a provision on parental rights designed to ensure (*a*) that the mother of a child will have full parental rights whether or not she is or has been married to the father, but (*b*) that the father will have parental rights only by virtue of marriage to the mother or court decree. For this purpose "marriage" should include a voidable marriage and a void marriage which the father believed in good faith was valid (whether his error is one of fact or law.)
(Paragraph 9.9; Clause 2(1), (2) and (3).)

41. The general rule of equality referred to in Recommendation 38 should not affect:

(*a*) any rule of law whereby a child born out of wedlock takes the domicile of his mother as a domicile of origin or dependence;

(*b*) the succession to titles of honour;

(*c*) the right to legitim out of, or the rights of succession to, the estate of any person dying before implementing legislation comes into force.

(Paragraph 9.10; Clause 9(1)(*a*), (*c*) and (*d*).)

42. (*a*) The various provisions in the Guardianship of Infants Acts 1886 and 1925 and the Illegitimate Children (Scotland) Act 1930 on the powers of the courts to make orders relating to tutory, custody and access should be replaced by a general provision giving the court power, on the application of any person claiming an interest, to make orders relating to parental rights. "Parental rights" for this purpose should mean tutory, curatory, custody, access and any right or authority relating to the welfare or upbringing of a child conferred on a parent by the common law. "The court" should mean the Court of Session or the sheriff court.
(Paragraphs 9.11 to 9.13; Clauses 3 and 8; Schedule 2.)

(*b*) Section 9 of the Conjugal Rights (Scotland) Amendment Act 1861 should be amended so as to give the court power to make orders relating not only to custody and education but also to other parental rights, as defined in paragraph (*a*) above, and to vary or recall any such order.
(Paragraph 9.14; Schedule 1.)

43. Section 1 of the Guardianship of Infants Act 1925 (and the corresponding provisions in section 5 of the Guardianship of Infants Act 1886 and section 2 of the Illegitimate Children (Scotland) Act 1930) should be replaced by a provision to the effect that in any proceedings concerning parental rights (as defined in the preceding recommendation) a court should regard the welfare of the child as the paramount consideration and should not make any order affecting such rights unless satisfied that it is in the child's interests.
(Paragraphs 9.17 and 9.18; Clause 3(2); Schedule 2.)

44. The provisions in sections 4 and 5 of the Guardianship of Infants Act 1925 on tutory after the death of the parent of a legitimate child should be replaced by a simple provision, applying to all children, enabling a parent to appoint any person to be tutor or curator of the child after his or her death. Any such appointment should be of no effect unless the parent was tutor or curator of the child at the time of his or her death or would have been if he had survived the birth of the child.
(Paragraphs 9.19 and 9.20; Clause 4(1); Schedule 2.)

45. The rules on joint tutors in the Guardianship of Infants Act 1925 and on the situation where both parents have parental rights under the Guardianship Act 1973 should be replaced by a general provision to the effect that where two or more persons have any parental right (as defined in Recommendation 42(*a*) above) in relation to a child, any one of them shall be able to exercise that right without the consent of any other unless any decree or deed conferring the right otherwise provides.
(Paragraph 9.21; Clause 2(5); Schedule 2.)

46. A person appointed by a court, or by a deed, to be tutor to a child should, unless the court otherwise orders or the deed otherwise specifically provides, become curator to the child when the child attains the age of minority.
(Paragraph 9.22; Clauses 3(3) and 4(2).)

APPENDIX A

Law Reform (Parent and Child) (Scotland) Bill

ARRANGEMENT OF CLAUSES

SCHEDULES

DRAFT

OF A

BILL

TO

Make fresh provision in the law of Scotland with respect to the consequences of birth out of wedlock, the rights and duties of parents, the determination of parentage and the taking of blood samples in relation to the determination of parentage; to amend the law as to guardianship; and for connected purposes.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Legal equality of children.

1.—(1) Subject to the provisions of this Act, the legal relationship between a person and his relatives shall not be affected by the fact that his parents are not or have not been married to one another; and accordingly any such relationship shall have effect as if the parents were or had been married to one another.

(2) Any reference (however expressed)—

(*a*) in any enactment passed after the commencement of this Act,

(*b*) subject to subsection (3) below, in any deed,

to any relative shall, unless the contrary intention appears in the enactment or deed, be construed in accordance with subsection (1) above.

(3) Nothing in this section shall apply to the construction or effect of—

(*a*) any enactment passed before the commencement of this Act unless the enactment as amended by Schedule 2 to this Act otherwise provides;

(*b*) any deed executed before such commencement;

(*c*) any reference (however expressed) in any deed executed after such commencement to a legitimate or illegitimate person or relationship.

Clause 1

This clause, when read with the consequential amendments and repeals in the Schedules to the Bill, implements the general policy of the Report that there should be a general rule of legal equality for all children, whether or not their parents have ever been married to each other. See, in particular, Recommendations 1, 14, 16, 37, 38 and 39.

Subsection (1)

This subsection implements Recommendation 38. It has the general effect of extending to illegitimate children the legal principles which at present apply to legitimate children, subject to certain exceptions. It seeks to achieve this without using words such as "legitimate" or "illegitimate", "lawful" or "unlawful". The reference to relatives, in this and the following subsections, extends to all relatives including, of course, parents. The Bill, however, contains special rules on the legal position of the father who is not, and has not been, married to the child's mother (see clause 2).

Subsection (2)

This subsection implements Recommendation 39(*a*). It preserves, for example, the effect of the references to illegitimate children in the British Nationality Act 1981 and other United Kingdom statutes, such as the tax legislation.

Subsection (3)

This subsection implements Recommendation 39(*b*) and (*c*).

Parental rights and their exercise.

2.—(1) In relation to a child—

(*a*) his mother shall have parental rights whether or not she is or has been married to the child's father;

(*b*) his father shall have parental rights only if he is married to the child's mother or was married to her at the time of the child's conception or subsequently;

but this subsection shall be subject to the operation of sections 3 and 4 below.

(2) For the purposes of subsection (1)(*b*) above, the father shall be regarded as having been married to the mother at any time when he was a party to a purported marriage with her which was—

(*a*) voidable, or

(*b*) void, but believed by him in good faith at that time to be valid.

(3) Subsection (2)(*b*) above shall apply whether the belief that the marriage was valid was due to an error of fact or an error of law.

(4) Nothing in this section shall affect the operation of any enactment or rule of law by virtue of which a parent may be granted or deprived of parental rights.

(5) Where two or more persons have any parental right, each of them may exercise that right without the consent of any of the other persons unless any decree or deed conferring the right otherwise provides.

Clause 2

This clause implements Recommendations 2, 10, 40 and 45. The expression "parental rights" includes all parental rights, including tutory, curatory, custody and access (see definition in clause 8).

Subsection (1)

This subsection gives effect (when read with subsections (2) to (4)) to the policy of Recommendation 40—i.e. that the mother of a child should have full parental rights but that the father should have parental rights only by virtue of marriage to the mother or court decree. The change in the law effected by subsection (1) is to give the mother of an illegitimate child full parental rights. Paragraph (*a*) implements Recommendations 2 (mother of illegitimate child to be his tutor and curator) and 10 (mother to have other parental rights). Paragraph (*b*) by itself preserves the present law. It must, however, be read with subsection (4) and clause 3, which make it clear that the father can obtain parental rights by court decree.

Subsection (2)

This subsection reflects the existing law on putative marriages. It is necessary because of the word "only" in subsection (1)(*b*). A father who discovers, after some years of family life, that his marriage is void (because e.g. his wife's divorce from a former husband is not recognised) has his parental rights safeguarded by this provision.

Subsection (3)

This subsection goes beyond the present law on putative marriages by making it clear that it does not matter whether the father's error was of fact or law (see paragraph 9.9.)

Subsection (4)

This subsection not only preserves the right of a father who does not have parental rights through marriage to apply to the court to be granted parental rights (see clause 3(1)), but also preserves the father's rights under a recognised foreign court order or under a valid appointment as the child's tutor, curator or guardian. The subsection also preserves all existing powers to deprive parents of parental rights, including those under section 16 of the Social Work (Scotland) Act 1968. The law on the effect of an adoption order is not affected by the Bill (see clause 9(1)(*b*)).

Subsection (5)

This subsection implements Recommendation 45. So far as parents are concerned, it preserves the rule of the present law contained in the Guardianship Act 1973, section 10(1).

Orders as to parental rights.

3.—(1) Any person claiming interest may make an application to the court for an order relating to parental rights and the court may make such order relating to parental rights as it thinks fit.

(2) In any proceedings relating to parental rights the court shall regard the welfare of the child involved as the paramount consideration and shall not make any order relating to parental rights unless it is satisfied that to do so will be in the interests of the child.

(3) Any person appointed by a court to be tutor to a child shall, unless the court otherwise orders, become curator to the child when the child attains the age of minority.

Clause 3

This clause implements Recommendations 4(*a*) and (*c*), 6, 7, 8, 9(*a*) and (*c*), 11(*a*), (*c*) and (*d*), 42(*a*) and 43, and partly implements Recommendation 46. It therefore covers applications by either parent, irrespective of whether they are married to one another, and by any other person (such as a grandparent) who claims an interest. As in clause 2, the expression "parental rights" includes all parental rights, including tutory, curatory, custody and access (see definition in clause 8). The court's powers include: conferring any parental right; depriving a person of any parental right; and resolving disputes between parents. An application may be made either to the Court of Session or to the sheriff court (see definition of "the court" in clause 8). The subsection enables several overlapping provisions in the Guardianship of Infants Acts 1886 and 1925 to be repealed (see paragraphs 9.11 to 9.13).

Subsection (1)

This subsection implements Recommendations 4(*a*), 6, 7, 9(*a*), 11(*a*) and (*c*) and 42(*a*). The wording of the subsection ensures that the court's powers may be exercised in any proceedings, whether or not they principally concern the granting or depriving of parental rights. For the avoidance of any doubt, Schedule 1 contains an amendment to the Conjugal Rights (Scotland) Amendment Act 1861, section 9, which ensures that an order relating to parental rights may be made in an action for divorce, judicial separation or declarator of nullity of marriage. Clause 9(2) confers on the court a general power to vary or recall an order made under the Bill, including this subsection. The generality of title to sue in this subsection (which reflects the position at common law in Scotland) enables section 47 of the Children Act 1975 to be superseded and repealed (see Schedule 2).

Subsection (2)

This subsection implements Recommendations 8, 9(*c*) and 11(*d*) and 43. The test under the present legislation—"first and paramount consideration"—is simplified (see paragraph 2.18) but this is a mere verbal change. Of more importance is the provision that the court should not make any order relating to parental rights unless satisfied that this will be in the best interests of the child.

Subsection (3)

This subsection implements Recommendation 4(*c*) (which refers specifically to a father) and extends the principle to all tutors. It also partly implements Recommendation 46.

Power of parent to appoint tutor or curator.

4.—(1) The parent of a child may by deed appoint any person to be tutor or curator of the child after his death, but any such appointment shall be of no effect unless the parent at the time of his death was tutor or curator of the child or would have been such tutor if he had survived until after the birth of the child.

(2) Any person validly appointed by a deed under subsection (1) above to be tutor to a child shall, unless the deed otherwise specifically provides, become curator to the child when the child attains the age of minority.

(3) Nothing in this section shall affect any power to appoint, or any appointment of, a tutor for the purposes of the administration of any property given or bequeathed to a child.

Clause 4

Subsection (1)

This subsection implements Recommendations 3, 5 and 44, and partly implements Recommendation 46. It does not distinguish between legitimate and illegitimate children, and as regards parents who are or have been married to one another largely confirms the present law. There is, however, one minor change to the present law: a parent who is no longer tutor or curator is not allowed to appoint a tutor or curator to act after his death.

Subsection (2)

This subsection partly implements Recommendation 46 and is the counterpart of clause 3(3) (which deals with an appointment of a tutor by the court).

Presumptions.

5.—(1) A man shall be presumed to be the father of a child—

(*a*) if he was married to the mother of the child at any time in a period beginning with the conception and ending with the birth of the child; or

(*b*) where paragraph (*a*) above does not apply, if both he and the mother of the child have acknowledged that he is the father and he has been registered as such in any register kept under section 13 (register of births and still-births) or section 44 (register of corrections, etc.) of the Registration of Births, Deaths and Marriages (Scotland) Act 1965 or in any corresponding register kept under statutory authority in any other part of the United Kingdom.

(2) Subsection (1)(*a*) above shall apply in the case of a void, voidable or irregular marriage as it applies in the case of a valid and regular marriage.

(3) Without prejudice to any effect at common law which a decree of declarator in an action to which section 7 below applies may have in relation to the parties, a decree of declarator in such an action shall give rise to a presumption to the same effect as the decree; and any such presumption shall displace any contrary presumption howsoever arising.

(4) Any presumption under this section may be rebutted by proof on a balance of probabilities.

Clause 5

This clause implements Recommendations 17, 18, 19 and 28.

Subsection (1)

This subsection implements Recommendations 17 and 19. Paragraph (*a*) prevails over paragraph (*b*): in other words, where a mother is a married woman, and a man other than her husband is registered as the father, no presumption arises under paragraph (*b*) (see paragraph 6.10). The clause does not seek to deal, for example, with the rare case where a woman might be married to one man at the date of conception and to another man at the date of birth (see paragraph 6.7). The Report recommends (at paragraph 6.12) that at least in the first instance the presumption contained in paragraph (*b*) should be limited to United Kingdom registers.

Subsection (3)

This subsection implements Recommendation 28. In relation to a declarator of parentage its effect is that the declarator will be binding on the parties (if not reduced) at common law and will give rise to a rebuttable presumption in relation to others.

Subsection (4)

This subsection implements Recommendation 18. This is already the rule in English law (Family Law Reform Act 1969, section 26).

Determination of parentage by blood sample.

6.—(1) This section applies where, for the purposes of obtaining evidence relating to the determination of parentage in civil proceedings, a blood sample is sought by a party to the proceedings or by a curator *ad litem*.

(2) Where a blood sample is sought from a pupil child, consent to the taking of the sample may be given by his tutor or any person having custody or care and control of him.

(3) Where a blood sample is sought from any person who is incapable of giving consent, the court may consent to the taking of the sample where—

(*a*) there is no person who is entitled to give such consent, or

(*b*) there is such a person, but it is not reasonably practicable to obtain his consent in the circumstances, or he is unwilling to accept the responsibility of giving or withholding consent.

(4) The court shall not consent under subsection (3) above to the taking of a blood sample from any person unless the court is satisfied that the taking of the sample would not be detrimental to the person's health.

Clause 6

This clause implements Recommendation 20. It fills a gap in the existing law relating to the giving of consent for the taking of a blood sample from a pupil child or *incapax*. *Subsection* (2) applies to pupil children. *Subsection* (3) applies to any person, whether or not a pupil child, who is incapable of giving consent.

Actions for declarator.

7.—(1) This section applies to an action for declarator of parentage, non-parentage, legitimacy, legitimation or illegitimacy.

(2) An action to which this section applies may be brought in the Court of Session only where the child was born in Scotland or the alleged or presumed parent or the child—

(*a*) is domiciled in Scotland on the date when the action is brought;

(*b*) was habitually resident in Scotland for not less than one year immediately preceding the said date; or

(*c*) died before that date and either—

(i) was at the date of death domiciled in Scotland; or

(ii) had been habitually resident in Scotland for not less than one year immediately preceding the said date.

(3) An action to which this section applies may be brought in the sheriff court only where—

(*a*) the child was born in the sheriffdom, or

(*b*) an action could have been brought in the Court of Session under subsection (2) above and the alleged or presumed parent or the child was habitually resident in the sheriffdom on the date when the action is brought or on the date of his death.

(4) In an action to which this section applies, the court may grant decree of declarator only if it is satisfied that the grounds of action have been established by sufficient evidence.

(5) Nothing in any rule of law or enactment shall prevent the court making in any proceedings an incidental finding as to parentage, non-parentage, legitimacy, legitimation or illegitimacy for the purposes of those proceedings.

(6) In this section, "the alleged or presumed parent" includes a person who claims or is alleged to be or not to be the parent.

Clause 7

This clause implements Recommendations 21, 23, 24, 25, 26 and 27.

Subsection (1)

For the definitions of parentage and non-parentage, see clause 8.

Interpretation.

8. In this Act, unless the context otherwise requires, the following expressions shall have the following meanings respectively assigned to them—

"action for declarator" includes an application for declarator contained in other proceedings;

"child", except where used to express a relationship,

(*a*) in relation to custody or access, means a child under the age of 16 years;

(*b*) in relation to tutory, means a pupil;

(*c*) in relation to curatory, means a minor;

(*d*) in relation to parental rights other than custody, access, tutory or curatory means a child under the age of 18 years;

"the court" means the Court of Session or the sheriff;

"curator" does not include curator *ad litem*;

"deed" means any disposition, contract, instrument or writing whether *inter vivos* or *mortis causa*;

"non-parentage" means that a person is not or was not the parent, or is not or was not the child, of another person;

"parent" includes natural parent;

"parentage" means that a person is or was the parent, or is or was the child, of another person;

"parental rights" means tutory, curatory, custody or access, as the case may require, and any right or authority relating to the welfare or upbringing of a child conferred on a parent by the common law;

"tutor" does not include tutor *ad litem*.

Clause 8

"*Parent*". The definition precludes any argument that "parent", as used in this Bill, excludes a parent who is not or has not been married to the other parent.

"*Parental rights*". The definition is limited to common law rights. The legal position of a parent under any particular statute depends on the definition of parent in that statute.

Savings and supplementary provisions.

9.—(1) Nothing in this Act shall—

(*a*) affect any rule of law whereby a child born out of wedlock takes the domicile of his mother as a domicile of origin or dependence;

(*b*) except in Schedules 1 and 2 to this Act, affect the law relating to adoption of children;

(*c*) apply to any title, coat of arms, honour or dignity transmissible on the death of the holder thereof or affect the succession thereto or the devolution thereof;

(*d*) affect the right of legitim out of, or the right of succession to, the estate of any person who died before the commencement of this Act.

(2) The court may at any time vary or recall any order made or consent given by it under this Act.

Transitional provisions, amendments and repeals.

10.—(1) The enactments specified in Schedule 1 to this Act shall have effect subject to the amendments set out in that Schedule.

(2) The enactments specified in Schedule 2 to this Act are hereby repealed to the extent set out in the third column of that Schedule.

Citation, commencement and extent.

11.—(1) This Act may be cited as the Law Reform (Parent and Child) (Scotland) Act 1983.

(2) This Act shall come into force at the end of the period of three months beginning with the day on which it is passed.

(3) This Act shall extend to Scotland only.

Clause 9

Subsection (1)

Paragraph (*a*) implements Recommendation 41(*a*). Paragraph (*b*) ensures, for example, that nothing in the Bill affects the law whereby an adopted child is treated as the legitimate child of the adopters. See Children Act 1975, Schedule 2 and (prosp.) Adoption (Scotland) Act 1978, s.39. Paragraph (*c*) implements Recommendation 41(*b*). Paragraph (*d*) implements Recommendation 41(*c*).

Subsection (2)

This supplements clauses 3(1) and 6(3).

SCHEDULES

Schedule 1 — Section 10

Enactments Amended

The Judicial Factors Act 1849 (c.51)

In section 25 at the end there shall be inserted the following new subsection—

"(2) Any person being an administrator-in-law, tutor-nominate, guardian appointed or acting under the Guardianship of Infants Acts 1886 and 1925 or tutor appointed under the Law Reform (Parent and Child) (Scotland) Act 1983 who shall, by virtue of his office, administer the estate of any pupil, shall be deemed to be a tutor within the meaning of this Act and shall be subject to the provisions thereof, but any such person shall not be bound to find caution in terms of sections 26 and 27 of this Act unless the court, on the application of any party having an interest, shall so direct."

The Conjugal Rights (Scotland) Amendment Act 1861 (c.86)

For section 9 there shall be substituted the following section—

"Orders with respect to children.

(1) In any action for divorce, judicial separation or declarator of nullity of marriage the court may make, with respect to any child of the marriage to which the action relates, such order (including an interim order) as it thinks fit relating to parental rights, and may vary or recall such order.

(2) In this section

(*a*) "child" and "parental rights" have the same meaning as in section 8 of the Law Reform (Parent and Child) (Scotland) Act 1983,

(*b*) "child of the marriage" includes any child who

(i) is the child of both parties to the marriage, or

(ii) is the child of one party to the marriage and has been accepted as one of the family by the other party

(*c*) "court" in relation to divorce and separation includes the sheriff court."

Schedule 1

The Judicial Factors Act 1849

This amendment is consequent upon the repeal of the Guardianship of Infants Acts 1886 and 1925 (see paragraph 9.11). It preserves the substance of the 1886 Act, section 12 (see paragraph 9.23).

The Conjugal Rights (Scotland) Amendment Act 1861

The amendment to section 9 implements Recommendation 42(*b*) (see paragraph 9.14). It enables sections 7 and 14 of the Matrimonial Proceedings (Children) Act 1958 to be repealed (see Schedule 2). The revised section 9 is confined to orders relating to parental rights and omits any reference to maintenance or aliment: the Commission have already recommended a partial repeal to this effect in an earlier Report (see draft Family Law (Financial Provision) (Scotland) Bill, Schedule 2, appended to Scot. Law Com. No. 67).

The Sheriff Courts (Scotland) Act 1907 (c.51)

In section 5, after paragraph (2B) there shall be inserted—

"(2C) Applications for orders relating to parental rights under section 3 of the Law Reform (Parent and Child) (Scotland) Act 1983".

The Trusts (Scotland) Act 1921 (c.58)

In section 2, in the definition of "trustee", after the word "tutor" there shall be inserted the words "(including a father or mother acting as tutor of a pupil)".

The National Assistance Act 1948 (c.29)

In section 42, for subsection (3) there shall be substituted the following subsection—

"(3) Subsection (2) of this section shall not apply to Scotland and, in the application thereto of subsection (1) of this section, any reference to 'children' includes a reference to children whether or not their parents have ever been married to one another".

The Matrimonial Proceedings (Children) Act 1958 (c.40)

In section 9(1), for the words from "with respect" to "that child" there shall be substituted the words "relating to parental rights as could be made".

The Succession (Scotland) Act 1964 (c.41)

In section 33(1), for the words "deed taking effect after the commencement of this Act", where those words second occur, there shall be substituted the words "such deed".

In section 36, there shall be added the following subsection—

"(5) Section 1(1) (legal equality of children) of the Law Reform (Parent and Child) (Scotland) Act 1983 shall apply to this Act; and any reference (however expressed) in this Act to a relative shall be construed accordingly".

The Sheriff Courts (Scotland) Act 1907

This amendment partly implements Recommendation 42(*a*). The reference in section 5(2) to actions for regulating the custody of children is repealed by Schedule 2.

If the Commission's recommendations on aliment (see draft Family Law (Financial Provision) (Scotland) Bill, Schedule 1, appended to Scot. Law Com. No. 67) and on the abolition of actions of adherence (see draft Law Reform (Husband and Wife) (Scotland) Bill, Schedule 1, appended to Scot. Law Com. No. 76) are also implemented, four consecutive paragraphs of section 5 of the 1907 Act will be in the following terms:

"(2) Actions for aliment or separation (other than any action mentioned in subsection (2A) below):

(2A) Actions arising out of an application under section 3(1) of the Maintenance Orders (Reciprocal Enforcement) Act 1972 for the recovery of maintenance:

(2B) Actions for divorce:

(2C) Applications for orders relating to parental rights under section 3 of the Law Reform (Parent and Child) (Scotland) Act 1983."

The Trusts (Scotland) Act 1921

This amendment is consequent upon the repeal of the Guardianship of Infants Acts 1886 and 1925 (see paragraph 9.11). It preserves the substance of the 1925 Act, section 10 (see paragraph 9.23).

The National Assistance Act 1948

This amendment partly implements Recommendation 36(*a*) (see paragraph 8.15). It makes no change to the substance of section 42, which imposes an obligation on both parents to maintain their children, whether or not they are married to one another.

The Matrimonial Proceedings (Children) Act 1958

The amendment to section 9(1) substitutes a reference to parental rights for the present wording ("custody, maintenance and education"). Similar words at present appear in section 9(2) dealing with actions of adherence: no corresponding amendment is proposed, because of the Commission's recommendation to abolish actions of adherence (see draft Law Reform (Husband and Wife) (Scotland) Bill, Schedule 2, appended to Scot. Law Com. No. 76).

The Succession (Scotland) Act 1964

These two amendments (along with the repeals to the 1964 Act and to the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 specified in Schedule 2) implement Recommendations 14 and 16.

The Registration of Births, Deaths and Marriages (Scotland) Act 1965 (c.49)

In section 14, at the end, there shall be added the following subsection—

"(5) In this section, any reference to the father or parent of the child shall not include a reference to a father who is not married to the mother and has not been married to her since the child's conception."

In section 18, for subsection (1), there shall be substituted the following subsections—

"Births of children born out of wedlock.

18.—(1) No person who is not married to the mother of a child and has not been married to her since the child's conception shall be required, as father of the child, to give information concerning the birth of the child and, save as provided in section 20 of this Act, the registrar shall not enter in the register the name and surname of any such person as father of the child except

(*a*) at the joint request of the mother and the person acknowledging himself to be the father of the child (in which case that person shall sign the register together with the mother); or

(*b*) at the request of the mother—

(i) on production of—

(*aa*) a declaration in the prescribed form made by the mother stating that that person is the father of the child; and

(*bb*) a statutory declaration made by that person acknowledging himself to be the father of the child; or

(ii) on production of a decree by a competent court finding or declaring that person to be the father of the child; or

(*c*) at the request of that person on production of—

(i) a declaration in the prescribed form by that person acknowledging himself to be the father of the child; and

(ii) a statutory declaration made by the mother stating that that person is the father of the child.

The Registration of Births, Deaths and Marriages (Scotland) Act 1965

For the amendment to section 14(5), see note to section 18 below.

The revised section 18(1) implements Recommendations 30 and 31 (see paragraph 7.4).

(1A) Where a person acknowledging himself to be the father of a child makes a request to the registrar in accordance with paragraph (*c*) of subsection (1) of this section, he shall be treated as a qualified informant concerning the birth of the child for the purposes of this Act; and the giving of information concerning the birth of the child by that person and the signing of the register by him in the presence of the registrar shall act as a discharge of any duty of any other qualified informant under section 14 of this Act."

In section 18, in subsection (2), for the words "an illegitimate" there shall be substituted the word "a", in paragraph (*b*) for heads (i) and (ii) there shall be substituted the words "a declaration and a statutory declaration such as are mentioned in paragraph (*b*) or (*c*) of subsection (1) of this section", and in paragraph (*c*) for the word "dead" there shall be substituted the words "dead or cannot be found or is incapable of making a request under subsection (1)(*b*) of this section, or a declaration under subsection (1)(*b*)(i)(*aa*) of this section, or a statutory declaration under subsection (1)(*c*)(ii) of this section, and the words "within the like period" shall be omitted.

In section 20, in subsection (1)(*c*), for the words from "having been" to the end of paragraph (*c*) there shall be substituted the words "has been so made as to imply that his parents were not then married to one another and his parents have subsequently married one another".

In section 20, at the end, there shall be added the following subsection—

"(3) Subject to the proviso in subsection (1) of this section, an application for re-registration of a person's birth under this section may be made—

(*a*) if the person is under the age of 16 years,—

(i) by the person's mother, or

(ii) by the person's father if he is the person's guardian or is entitled to custody of the person or applies for such re-registration with the mother's consent; or

(*b*) if the person is of or over the age of 16 years but under the age of 18 years, by the person himself with the consent of a parent or guardian; or

(*c*) if the person is of or over the age of 18 years, by the person himself; or

(*d*) in any case, by any person who may be prescribed by regulations made under this Act."

In section 43(3), for the words from "in the case" to "the mother is" there shall be substituted the words "if both parents are".

In section 43, at the end there shall be added the following subsection—

The new section 18(1A) ensures that where a father registers the birth of a child under section 18(1)(*c*) other qualified informants (see section 14 of the 1965 Act) are relieved of their duty to do so.

In section 18(2) the omission of the reference to a period of twelve months in paragraphs (*b*)(ii) and (*c*) implements Recommendation 32 (see paragraphs 7.5 and 7.6). The addition in paragraph (*c*) implements Recommendation 33 (see paragraph 7.7).

The new section 20(3) implements Recommendation 34 (see paragraph 7.8).

The new section 43(10) implements Recommendation 35 (see paragraph 7.9).

"(10) In this section, "father" and "parent", in relation to a child, do not include the father who is not married to the mother and has not been married to her since the child's conception and who is not the child's tutor or curator and is not entitled to custody of the child."

In section 56, in subsection (1), there shall be inserted (in their appropriate alphabetical place) the following definitions—

'"guardian includes tutor or curator;

"tutor or curator" does not include tutor *ad litem,* curator *ad litem* or curator *bonis.'*

In section 56, at the end, there shall be added the following subsection—

"(3) Section 1(1) (legal equality of children) of the Law Reform (Parent and Child) (Scotland) Act 1983 shall apply to this Act; and any reference (however expressed) in this Act to a relative shall, unless the contrary intention appears, be construed accordingly."

The Social Work (Scotland) Act 1968 (c.49)

In section 16(11), for paragraph (*c*) there shall be substituted—

(*c*) a tutor or curator to the child is appointed under the Law Reform (Parent and Child) (Scotland) Act 1983; or".

In section 18(4), for the words from "section" to "1925" there shall be substituted the words "the Law Reform (Parent and Child) (Scotland) Act 1983", and for the word "guardian" in both places where it occurs there shall be substituted the words "tutor or curator".

In section 81(2), for the words from the beginning to "in force" there shall be substituted the words "where a decree for aliment of a maintainable child is in force", for the word "father" there shall be substituted the words "person liable under the decree", and the words "for aliment" where those words second occur shall be omitted.

In section 81(4)(*b*), for the words "father of a child" there shall be substituted the words "person liable to pay aliment for a child under a decree", and for the words "the father" where those words second occur there shall be substituted the words "that person".

In section 88(3), for the word "father" there shall be substituted the word "person".

In section 94(1), in the definition of "guardian", for the words "the guardian" there shall be substituted the words "the tutor, curator or guardian", and for the word "charge" there shall be substituted the words "custody or charge".

The Social Work (Scotland) Act 1968

The amendments to sections 16(11) and 18(4) are consequent upon the repeal of the Guardianship Acts 1886 and 1925.

The amendments to section 81 partly implement Recommendation 36(*c*) (see paragraph 8.16).

The amendment to section 94(1) implements Recommendation 13 (see paragraph 4.12).

The Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 (c.70)

In section 7, at the end of paragraph (*b*) there shall be inserted the following paragraph—

"and (*c*) that no paternal relative of an illegitimate person exists who is or may be entitled to an interest in that property or payment,".

The Sheriff Courts (Scotland) Act 1971 (c.58)

In section 37(2A), after the word "custody" there shall be inserted the words "tutory, curatory".

The Guardianship Act 1973 (c.29)

In section 13(1), after the definition of "child" there shall be inserted the following definition—

" 'guardian' means a tutor or curator or other guardian, but does not include a tutor or curator *ad litem* or a curator *bonis*;".

In section 7, paragraphs (*a*) and (*b*), for the words "of the said provisions" there shall be substituted the word "enactment".

The Domicile and Matrimonial Proceedings Act 1973 (c.45)

In Schedule 2, in paragraph 3 for the words from "or for" to the end there shall be substituted the words "and paragraph (2C) of the said section 5."

The Children Act 1975 (c.72)

In section 49(1), for the words "a relative, step-parent or foster parent" there shall be substituted the words "not a parent".

In section 55(1), at the end there shall be added the words "and 'relative' means a grand-parent, brother, sister, uncle or aunt, whether of the full blood or half blood or by affinity".

In section 55(2), at the end there shall be added the words "and shall be construed in accordance with section 1(1) of the Law Reform (Parent and Child) (Scotland) Act 1983".

The Law Reform (Miscellaneous Provisions) (Scotland) Act 1968

The new paragraph (*c*) in section 7 implements Recommendation 15(*a*) (see paragraphs 5.12 to 5.14).

The Guardianship Act 1973

No amendments are proposed to sections 11(1) and 12(2)(*a*): these subsections will be amended when section 48(3) and (4) of the Children Act 1975 comes into force.

The Domicile and Matrimonial Proceedings Act 1973

See paragraph 9.16.

The Children Act 1975

Section 49 requires applicants for custody, other than a parent, to give notice of the application to the appropriate local authority. At present the section applies to a limited category of applicant—a relative, step-parent or foster parent—and the effect of the amendment is to apply the section to all applicants other than a parent.

The amendment to section 55(1) introduces a definition of relative for the purposes of Part II of the Act, which relates to custody. (There is a definition of relative in section 107, but it incorporates the definition contained in the Adoption Act 1958, section 57, which contains a reference to illegitimate children.)

The Damages (Scotland) Act 1976 (c.13)

In Schedule 1, in paragraph 2, for sub-paragraph (*b*) there shall be substituted—

"(*b*) section 1(1) of the Law Reform (Parent and Child) (Scotland) Act 1983 shall apply; and any reference (however expressed) in this Act to a relative shall be construed accordingly."

The Supplementary Benefits Act 1976 (c.71)

In section 17, after subsection (2) there shall be inserted the following subsection—

"(2A) Subsection (2) above shall not apply to Scotland, and in the application of subsection (1) to Scotland any reference to children shall be construed as a reference to children whether or not their parents have ever been married to one another."

The Adoption (Scotland) Act 1978 (c.28)

In section 18(7), for the words "an illegitimate child whose father is not its guardian" there shall be substituted "a child whose father is not married to the mother and who does not have any parental right in relation to the child" and for paragraphs (*a*) and (*b*) there shall be substituted the following paragraphs—

"(*a*) he has no intention of applying for any parental right under section 3 of the Law Reform (Parent and Child) (Scotland) Act 1983, or

(*b*) if he did apply for any parental right under that section the application would be likely to be refused."

In section 39(2), for the words "an illegitimate" there shall be substituted "a".

In section 46(1), for the words "an illegitimate" there shall be substituted "a".

In section 65(1), in the definition of "guardian", in paragraph (*b*), for the words from "an illegitimate" to the end there shall be substituted the words "a child whose father is not married to the mother, includes the father where he has, in relation to the child, tutory, curatory, custody, access or any other parental right by virtue of an order by a court of competent jurisdiction."

The Administration of Justice Act 1982 (c.53)

In section 13(1), for the words from "an illegitimate" to the end there shall be substituted the words "section 1(1) of the Law Reform (Parent and Child) (Scotland) Act 1983 shall apply; and any reference (however expressed) in this Part of this Act to a relative shall be construed accordingly".

The Supplementary Benefits Act 1976

The amendment to section 17 implements Recommendation 36(*a*) (see paragraph 8.15). It makes no change to the substance of section 17, which for supplementary benefit purposes imposes an obligation on both parents to maintain their children, whether or not they are married to one another.

The Adoption (Scotland) Act 1978

The new paragraphs (*a*) and (*b*) of section 18(7) implement Recommendation 12 (see paragraphs 4.6 to 4.8).

Schedule 2 Section 10

Enactments Repealed

Chapter	*Short Title*	*Extent of Repeal*
1886 c.27.	The Guardianship of Infants Act 1886.	The whole Act.
1907 c.51.	The Sheriff Courts (Scotland) Act 1907.	In section 5, in paragraph (1), the words from "and" to "individuals", paragraph (1A) and, in paragraph (2), the words from "and actions" to the end.
1925 c.45.	The Guardianship of Infants Act 1925.	The whole Act.
1928 c.26.	The Administration of Justice Act 1928.	Section 16.
1930 c.33.	The Illegitimate Children (Scotland) Act 1930.	The whole Act.
1932 c.47.	The Children and Young Persons (Scotland) Act 1932.	The whole Act.
1939 c.4.	The Custody of Children (Scotland) Act 1939.	The whole Act.
1948 c.29.	The National Assistance Act 1948.	Section 44.
1952 c.41.	The Affiliation Orders Act 1952.	The whole Act.

Schedule 2

The National Assistance Act 1948

The repeal of section 44 partly implements Recommendation 36(*b*) (see paragraph 8.15).

Chapter	*Short Title*	*Extent of Repeal*
1958 c.40.	The Matrimonial Proceedings (Children) Act 1958.	Section 7. In section 8(1), the words "maintenance and education". In section 10(1), the words "maintenance and education". In section 11(1), the words "maintenance and education". In section 13(1), the words "maintenance and education". Section 14.
1964 c.41.	The Succession (Scotland) Act 1964.	Section 4. In section 6, the words from "For the purposes" to the end. In section 9(1)(*a*) and (*b*), the words from "or by any" to "intestate". Section 10A. In section 11, in subsection (1), the words from "by virtue" to "rule of law" and the words from "In this" to the end, in subsection (2), the words from "For the purposes" to the end and, in subsection (4), the words "section 10A of this Act or of". In section 13, the words from "In this section" to the end. In section 33(1), the

The Matrimonial Proceedings (Children) Act 1958

For the repeals of sections 7 and 14, see the note to Schedule 1 on the Conjugal Rights (Scotland) Amendment Act 1861, section 9.

The Succession (Scotland) Act 1964

See the note to Schedule 1 on the 1964 Act.

Chapter	*Short Title*	*Extent of Repeal*
		words from "(other than" to "said section 10A". In section 36(1), in the definition of "issue", the word "lawful".
1965 c.49.	The Registration of Births, Deaths and Marriages (Scotland) Act 1965.	In section 43(3), the words from "in this definition" to the end.
1968 c.49.	The Social Work (Scotland) Act 1968.	In section 81, subsection (1) and, in subsection (3), the words from the beginning to "section or".
1968 c.70.	The Law Reform (Miscellaneous Provisions) (Scotland) Act 1968.	Sections 1 to 6. In section 7, the words from the beginning to "this Act". In section 11, in subsection (1), paragraph (*b*), the words "or, as the case may be, is (or was) the father of that child" and the words "or paternity"; in subsection (2), the words from "or to" to "section", the words from "or, as" to "child" and the words "or affiliation"; in subsection (3) the words "or affiliation"; and in subsection (6) paragraph (*b*). Schedule 1.

The Registration of Births, Deaths and Marriages (Scotland) Act 1965

The words deleted from section 43(3) are unnecessary in view of the general terms of the adoption legislation (see Children Act 1975, Schedule 2 and (prosp.) Adoption (Scotland) Act 1978, s.39).

The Social Work (Scotland) Act 1968

This repeal partly implements Recommendation 36(*c*) (see paragraph 8.16).

The Law Reform (Miscellaneous Provisions) (Scotland) Act 1968

See the note to Schedule 1 on the Succession (Scotland) Act 1964.

Chapter	*Short Title*	*Extent of Repeal*
1973 c.29.	The Guardianship Act 1973.	Section 10. Section 11(6). In section 12(1)(*b*), the words "under the Guardianship of Infants Act 1886". Section 15(1)(*b*). Schedule 4. In Schedule 5, paragraphs 1 to 3.
1973 c.45.	The Domicile and Matrimonial Proceedings Act 1973.	In Schedule 2, in paragraph 4, the words from "as extended" to the end, and paragraph 8.
1975 c.72.	The Children Act 1975.	Section 47. In section 48(1), the words from "and for this" to the end. In section 53, in subsection (1), the words from "the applicant" to "child and", and subsection (2)(*a*).

The Guardianship Act 1973

For the repeal of section 10, see Recommendation 45 (and paragraph 9.18). See also clause 2(5). Section 10(2) is not reproduced. The first part of this subsection provides that an agreement to give up parental rights is unenforceable. As we pointed out in our Consultation Paper of April 1983, the same result would be reached by the common law—parental rights are *extra commercium* and cannot be validly renounced or transferred by mere private agreement. The second part of the subsection permits amicable arrangements between separated parents over the exercise of parental rights (for example that one is to have care and the other access). This too is unnecessary, as such arrangements are not restricted by the general law.

The Children Act 1975

The repeal of section 47 is consequential on the main provisions in the Bill. Section 47(1) gives a title to sue for custody to any relative, step-parent or foster parent of a child. This is rendered unnecessary by the more general provision in clause 3(1) of the Bill which gives title to sue to any person claiming interest.

Section 47(2) provides that custody of a child shall not (except under section 2 of the Illegitimate Children (Scotland) Act 1930) be granted in any proceedings to a person other than a parent or guardian of the child unless that person satisfies one or more of four conditions. These are:

(*a*) if he is a relative or step-parent of the child, has the consent of the parent or guardian and has had care of the child for three months; or

(*b*) if he has the consent of the parent or guardian and has had care of the child for at least a year; or

(*c*) if he has had care of the child for at least three years; or

(*d*) if he cannot satisfy conditions (*a*), (*b*) or (*c*), but he can "show cause, having regard to section 1 of the Guardianship of Infants Act 1925 . . . why an order should be made awarding him custody".

The time-limits contained in conditions (*a*), (*b*) and (*c*) can therefore be circumvented. The effect of the subsection, when read with section 1 of the 1925 Act (welfare of child first and paramount consideration), is that a person other than a parent or guardian may be awarded custody if, but only if, this is justified by the criterion of the child's welfare. This, however, is exactly the result achieved by clause 3 of the Bill. Section 47(2) is therefore unnecessary.

The remaining provisions of section 47 are ancillary to the first two subsections and fall to be repealed along with them.

Chapter	*Short Title*	*Extent of Repeal*
1976 c.71.	The Supplementary Benefits Act 1976.	Section 19.
1977 c.15.	The Marriage (Scotland) Act 1977.	Section 2(2)(*b*).
1978 c.28.	The Adoption (Scotland) Act 1978.	In section 65(1), in paragraph (*a*) of the definition of "guardian", the words from "in accordance" to "1971".
1983 c.12.	The Divorce Jurisdiction, Court Fees and Legal Aid (Scotland) Act 1983.	In Schedule 1, paragraphs 3 and 4.

The Supplementary Benefits Act 1976

The repeal of section 19 partly implements Recommendation 36(*b*) (see paragraph 8.15).

APPENDIX B

List of those who submitted written comments on Consultative Memorandum No. 53

Convention of Scottish Local Authorities
Mr. John Dewar and Ms. Caroline Forder, University of Lancaster
Faculty of Advocates
Faculty of Law, University of Aberdeen
Ms. Rachel Filinson, Medical Research Council
General Register Office for Scotland
Professor W.M. Gordon
Law Society of Scotland
Dr. R. D. Leslie
Mr. E. C. Melville, W.S.
Mother's Union, Edinburgh Diocese
National Children's Bureau, Scottish Group
Scottish Convention of Women
Scottish Council for Single Parents
Scottish Education Department
Scottish Federation of Independent Advice Centres
Scottish Law Agents Society
Scottish Legal Action Group
Scottish Women's Aid
Sheriffs' Association
Society of Writers to H.M. Signet
Dr. P. K. Virdi
Mrs. L. C. Wallis
Mr. George Watt

APPENDIX C

List of those who submitted written comments on consultation paper of April 1983 on "Illegitimacy and the Guardianship Acts"

The Rt. Hon. the Lord Emslie
Professor W. M. Gordon
Miss Anne Griffiths
The Law Society of Scotland
Dr. W. W. McBryde
Scottish Courts Administration
Scottish Education Department
Scottish Home and Health Department
Scottish Legal Action Group
Sheriffs' Association
Society of Writers to H.M. Signet
Professor A. B. Wilkinson

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