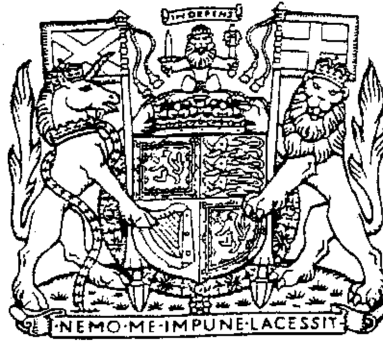

SCOTTISH LAW COMMISSION

CONSULTATIVE MEMORANDUM NO : 53

FAMILY LAW : ILLEGITIMACY

February 1982

THIS CONSULTATIVE MEMORANDUM IS PUBLISHED FOR COMMENT AND CRITICISM AND DOES NOT REPRESENT THE FINAL VIEWS OF THE SCOTTISH LAW COMMISSION.

The Commission would be grateful if comments on this Consultative Memorandum were submitted by 30 September 1982. All correspondence should be addressed to:-

Dr D.I.Nichols
Scottish Law Commission
140 Causewayside
EDINBURGH EH9 1PR

(Telephone: 031-668-2131)

MEMORANDUM NO. 53 ILLEGITIMACY

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SCOTTISH LAW COMMISSION
MEMORANDUM NO. 53

FAMILY LAW: ILLEGITIMACY

PART I

INTRODUCTION

Purpose and plan of Memorandum

1.1. In this consultative Memorandum we invite comments on proposals for reform of the law of Scotland relating to illegitimacy. These proposals are designed to improve the legal position of illegitimate children and to remove anomalies in the law. They are, however, of a provisional and tentative nature and are all open to reconsideration in the light of comments received. The purpose of this Memorandum is consultation. We intend to follow it, in accordance with our usual practice, with a Report which will take the results of our consultation into account and which will contain firm recommendations for legislation if any is thought necessary.

1.2. The plan of the Memorandum is as follows. Part I deals briefly with historical, statistical and comparative material, and outlines the present law and possible approaches to reform. Parts II to X deal with various areas of the law where reform might be required. In these Parts we assume that the present definition of legitimacy remains more or less unchanged. Finally in Part XI we consider possible changes in the legal definition of legitimacy. Some of the possible changes on which we invite views in Part XI are of a fairly radical nature. We ask, for example, whether it might be possible to provide for legitimation by court decree or by registration of the parents, at their joint request, in the Register of Births. We considered whether we ought to deal with these possibilities first but concluded that their substantive legal effect, or lack of substantive legal effect, could be properly assessed only in the light of the material in Parts II to X. We have therefore dealt with them at the end of the Memorandum.

Historical development

1.3. At common law a child was illegitimate from birth if his parents were not validly married to each other at the time of his conception, or at the time of his birth, or at any time in between. However, the child of a void marriage was legitimate provided at least one of the parents believed in good faith that the marriage was valid, and the mistaken belief arose through an error of fact.[1] An illegitimate child was legitimated by the subsequent marriage of his parents provided they had been free to marry at the time of his conception.[2] An illegitimate person was subject to many civil disabilities. He could not hold office in the pre-Reformation church[3] and he could not be appointed to any public or judicial office at least until the early 17th century.[4] He could not dispose of his moveable property by will, so that if he was not survived by a wife or lawful issue the Crown succeeded to the whole of his moveable estate.[5] Where heritage was concerned, in default of lawful issue, the Crown succeeded. Both these last mentioned consequences could be avoided by the purchase of royal letters of legitimation which permitted testamentary disposition of moveables and allowed a person who would have been heir at law had the illegitimate person been legitimate to succeed to his heritage. Although these letters were termed letters of legitimation they did not legitimate the recipient for all purposes; they merely waived the Crown's rights of succession.[6]

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[1] Purves' Trs. v. Purves (1895) 22R.513.

[2] Fraser, Parent and Child (3rd ed.) pp. 37 to 51.

[3] Fraser, Parent and Child (3rd ed.) p. 51. Dispensation from the Pope, or for minor orders from a bishop, could be obtained.

[4] Hope's Major Practicks Vol. I p. 320 (Stair Society Vol. 3). This disability could be removed by letters of legitimation; it seems to have disappeared by the time of Baron Hume's lectures 1786-1822.

[5] Fraser, Parent and Child (3rd ed.) p. 52.

[6] Stair, III.3.45.

1.4. Illegitimacy placed the child outside the families of both of his parents. He was regarded as filius nullius - in the eyes of the law he was nobody's child. With a few limited exceptions, noted in the next paragraph, an illegitimate child had no legal relationship with either of his parents. As Erskine[1] put it:-

> "All children born of a woman who was not married at the time of her conception are unlawful, otherwise called natural children or bastards, and consequently are entitled to none of the civil rights conferred by law on those who are procreated in marriage."

An equally robust statement of the very limited legal relationship between an illegitimate child and his father is that of Lord Justice-Clerk Inglis[2]:-

> "The bastard having no father, what is the relation of the man by whom paternity has been admitted or against whom it has been proved? It is not a relation which creates reciprocal duties and obligations. The father has no right of custody of the bastard's person, or of administration of his estate; he has none of the characteristics of the patria potestas."

1.5. The law did however recognise that an illegitimate child was entitled to aliment from his parents.[3] After initial doubts it was finally settled that an illegitimate child was not obliged to aliment his mother.[4] The mother was normally entitled to the custody of her illegitimate child,[5] but after

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[1] I.6.51.

[2] Corrie v. Adair (1860) 22D.897 at p. 900.

[3] Erskine, I.6.56. This right transmitted as a debt against the estate of the deceased parent. Oncken's Judicial Factor v. Reimers (1892) 19R.519. In this respect the illegitimate person was in a better position than a legitimate person who had, at best, an equitable claim to aliment out of his deceased parent's estate. See Beaton v. Beaton's Trs., 1935 S.C. 187.

[4] Clarke v. Carfin Coal Co. (1891) 18R. (H.L.) 63 overruling Samson v. Davie (1886) 14R.113.

[5] Sutherland v. Taylor (1887) 15R.224. The father could, however, meet a claim for aliment by offering to take over the care of the child once it had reached a certain age (generally 7 for a boy and 10 for a girl).

her death her relatives had no better claim than that of the child's father.[1] The relationship between an illegitimate child and his parents was also recognised for the purposes of marriage and incest, although there was considerable doubt as to how far recognition extended beyond the child and his parents.[2] The inability of an illegitimate child to succeed to his mother's moveable estate on her intestacy did not become a widely established proposition until the time of Erskine,[3] both Stair[4] and Bankton[5] expressing the contrary view.

1.6. The consequences of the principle that an illegitimate child had no legal relationship with either parent (apart from the exceptions noted in the preceding paragraph) have been profoundly altered by statute. The main statutory modifications, in chronological order, have been as follows.

Bastards (Scotland) Act 1836

This Act allowed an illegitimate person to dispose of his moveable property by will in the same way as a legitimate person.

Legitimacy Act 1926

Section 9 entitled an illegitimate child and his mother to succeed to each other on intestacy in limited circumstances. The child succeeded to his mother only if she was not survived by lawful issue; while the mother succeeded to her child if she would have done had he been legitimate and had she been the only surviving parent.[6]

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[1] Wilson v. Taylor (1865) 3M.1060.

[2] See paras. 10.9 to 10.12 below.

[3] III.10.8.

[4] IV.12.1.

[5] I.2.4.

[6] These limited provisions have been replaced by the more general provisions contained in the Law Reform (Miscellaneous Provisions)(Scotland) Act 1968.

Illegitimate Children (Scotland) Act 1930

Section 2(1) gave the father of an illegitimate child the right to apply to the court for custody of, and access to, his child, and empowered the court, on such application, to make such order as it thought fit "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." Section 2(2) abolished the father's right to meet a claim for aliment by offering to take over the care of the child.

Law Reform (Miscellaneous Provisions)(Scotland) Act 1940

Section 2 gave an illegitimate person the like right to recover damages and solatium in respect of the death of either of his parents as if he were legitimate.[1]

Law Reform (Miscellaneous Provisions) Act 1949

Section 4 provided that the children of a voidable marriage are legitimate if they would have been legitimate had the marriage been dissolved rather than annulled.

Law Reform (Damages and Solatium) Act 1962

Section 2 gave either parent of an illegitimate child the like right to recover damages or solatium in respect of the child's death as if he were legitimate.[1]

Law Reform (Miscellaneous Provisions)(Scotland) Act 1968

Part I of this Act, which followed on the report of the Committee on the Law of Succession in Relation to Illegitimate Persons (the Russell Committee),[2] gave an illegitimate person the same right as a legitimate person to inherit on intestacy from his father and mother, whether or not the parent was also

[1] This provision has been replaced by the more general provisions of the Damages (Scotland) Act 1976.

[2] (1966) Cmnd. 3051.

survived by legitimate children.[1] It also gave the parents of an illegitimate person the right to succeed to him on intestacy if he was not survived by issue.[2] An illegitimate child was also given the same right to legitim out of his parents' estates as a legitimate child,[3] but as a _quid pro quo_ his preferential claim to aliment out of their estates was abolished.[4] In relation to the construction of wills and other deeds executed after 25 November 1968, section 5 provided that references to a child or other relation were to be taken to include an illegitimate child or relation, unless the contrary intention appeared.[5] Section 6 placed an illegitimate child in the same position as a legitimate child for the purposes of certain technical rules of testate succession.[6]

Legitimation (Scotland) Act 1968

Section 1 provided that a child was legitimated by the subsequent marriage of his parents even though they were not free to marry at the date of his conception. The child became legitimate from the date of marriage.

Damages (Scotland) Act 1976

This Act extended the categories of relatives entitled to damages in respect of the death of a person, and provided that in deducing a relationship for such purpose, an illegitimate person was to be treated as the legitimate child of his mother and reputed father.[7]

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[1] S.1, substituting a new section for s.4 of the Succession (Scotland) Act 1964.

[2] S.1, substituting a new section for s.4 of the Succession (Scotland) Act 1964.

[3] S.2 adding s.10A to the Succession (Scotland) Act 1964.

[4] S.4. See page 3 footnote 3.

[5] This section did not apply to the devolution of any title, coat of arms, honour or dignity. S.5(5).

[6] I.e. the _conditio si testator sine liberis decesserit_, the _conditio si institutus sine liberis decesserit_, and the principle of accretion.

[7] S.1 and Sch. 1.

Marriage (Scotland) Act 1977

Section 2 provided that a marriage was void if the couple were related in a specified degree, even where the relationship was traced through or to any person of illegitimate birth.

Many other statutes place the mother of an illegitimate child in the same position as the mother of a legitimate child (e.g. Mental Health (Scotland) Act 1960, Social Work (Scotland) Act 1968, Adoption (Scotland) Act 1978, British Nationality Act 1981).

Summary of present law

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

(a) Guardianship

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. The parents of a legitimate child are his joint 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 the parents are joint custodiers in the absence of any court order to the contrary.

(c) Adoption

The agreement of the father of an illegitimate child is not required to the making of an adoption order unless he has been awarded custody, but the father's relationship to the child is recognised to a limited extent. The father of a legitimate child must agree to the making of an adoption order or his agreement must be dispensed with.

(d) Taking into care and assumption of parental rights

The father of an illegitimate child is involved only if he 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 do not descend to illegitimate relations; nor can an illegitimate person 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.

(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 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.

(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.

Statistics on illegitimacy

1.8. The proportion of children born in Scotland who are illegitimate at birth has almost 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 1977, 1978 and 1979 were 9.57, 9.80 and 10.2 respectively.[1] These national percentages hide wide local variations; in 1979 over a fifth (21.1%) of all

[1] Annual Report of the Registrar General for Scotland 1979, Table A1.1.

children born in the Greater Glasgow Eastern Health District were illegitimate, compared with 1.7% in Eastwood.[1] Until 1977 the rise in the proportion of illegitimate births was largely due to the drop in total births[2] since the number of illegitimate births remained roughly constant. Since then, however, the number of illegitimate births has risen substantially, both absolutely and as a proportion of total live births.[3]

1.9. 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 1979 the number had fallen to 683.[4] 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.[5] Over the last decade the number of re-registrations has varied between six to eight hundred a year[6] suggesting that about four hundred illegitimate

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[1] Ibid, p. L.

[2] 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.

[3] Illegitimate live births were 5,968 in 1977, 6,304 in 1978 and 6,960 in 1979. Total live births in these years were 62,342, 64,295 and 68,366 respectively. Annual Report 1979, Table A1.1.

[4] Annual Report 1969, Part 1 Table T2.1; Annual Report 1979, Table T2.1.

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

[6] Annual Report 1979, Table T1.2.

children per year are legitmated by subsequent marriage of their parents. A substantial majority of those born illegitimate in recent years remain so.

1.10. 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 probably greater than a quarter of a million - about five per cent of the population of Scotland.

1.11. 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 1% of <u>all</u> children aged 0-15 of women in Great Britain aged 18-49 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. As between 5-10% of all children are illegitimate this suggests that about 1 in 7 of all illegitimate children are living in family with their parents. 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]

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[1]Table 8.23.

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

[3]See also Cheetham, <u>Unwanted Pregnancy and Counselling</u> (1977) p.72.

Comparative survey

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,[1] in the Scandinavian countries,[2] and in Switzerland,[3] New Zealand[4] and almost all of the Australian States.[5] The law of West Germany was reformed in 1969[6] and that of France in 1972.[7] It would add excessively to the bulk of this Memorandum to attempt to consider all these laws in detail. We have therefore selected three sets of laws - those of England, West Germany and New Zealand - for the purposes of comparison and refer to them, and occasionally to other legal systems, at appropriate points throughout this Memorandum. In relation to English law it should be borne in mind that the Law Commission has reform under active consideration.[8]

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[1] See Krause, Child Support in America (1981) pp. 119, 161 to 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.

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

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

[4] Status of Children Act 1969.

[5] Finlay, Family Law in Australia (2nd. ed. 1979) pp. 962 to 967.

[6] 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).

[7] Law of 3 Jan., 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.

[8] Their Working Paper No. 74 on Family Law: Illegitimacy was published in 1979 and a Report is expected shortly.

Need for reform and possible approaches

1.13. There seems to us to be a need for some reform of the law relating to illegitimacy. Many of the legal differences between legitimate and illegitimate children seem indefensible and the existing law can lead to anomalous and inconvenient results. In particular we can see no justification for an illegitimate child not having his mother at least as his tutor or curator, for not treating sexual intercourse between a man and his illegitimate sister as incest, and for not allowing brothers and sisters born of cohabiting parents to inherit each other's estates on intestacy.

1.14. There would appear to be public support for at least some reform in this area of the law. Many of the changes proposed by the Law Commission for England and Wales in their Working Paper[1] were widely supported on consultation, the support coming in some cases from organisations represented throughout the United Kingdom. Further evidence of support for reform can be derived from the speeches made in Parliament in connection with the Children Bill 1979, which sought to assimilate the legal position of legitimate and illegitimate children.[2]

1.15. Reform 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.[3] The preamble to this Convention notes that in a

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[1]Working Paper No. 74, Family Law: Illegitimacy (1979).

[2]This was a Private Members Bill introduced by Mr James White M.P. It was denied a Second Reading mainly because it was considered that, in view of the complexity of the subject, legislation should be initiated by the Government after the Law Commissions had reported.

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

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.[1] 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.[2] The policy of the Convention is to allow "progressive stages for those States which consider themselves unable to adopt immediately" all of its rules[3] and reservations are valid for only five years at a time.[4] It is clear that the general policy of the Convention is the reduction of legal discrimination against illegitimate children and that the United Kingdom's position would be more in accord with that policy if the reservations were unnecessary.

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[1]Art. 1.

[2]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.".

[3]Preamble.

[4]Art. 14(2).

1.16. The United Kingdom is also a party to the European Convention on Human Rights. This Convention, by Article 8, provides that "everyone has the right to respect for his private and family life, his home and his correspondence" subject to interference only on grounds of public interest. It has been 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 Article 8 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 changes are necessary to prevent the continuing breach of Article 8 by the United Kingdom.

1.17. The most radical approach to reform would be to abolish all legal differences between legitimate and illegitimate children. So far as the law was concerned all children would be treated alike whatever their parents' marital status. There would still, of course, be children born in wedlock and children born out of wedlock, but there would be no legal difference between them and it would no longer be meaningful to refer to the legal status of legitimacy or the legal status of illegitimacy. This has many attractions, for there would cease to exist a legal status which might be seen as discriminating against certain people by reason only of their parents' behaviour or decisions. The present law, by assigning a different legal status to legitimate and illegitimate children, may to some extent prevent their social assimilation and provide a life-long source of embarrassment and humiliation to many. The absence of any legal distinctions might, in the course of time, help to lessen social prejudice against children born out of wedlock.

[1] [1979-80] 2 E.H.R.R. 330.

1.18. We would be glad to receive comments on the merits or demerits of this "abolitionist" approach, but our tentative conclusion is that a better approach to effective reform in this area is to concentrate on specific issues. The elimination of <u>all</u> legal differences between children born in wedlock and children born out of wedlock would lead to certain results which would be hard to justify. If the rules presently applying to legitimate children were to be applied to all children, the father of an illegitimate child would, however fleeting his relationship with the mother, acquire full parental rights. He would, for example, be the child's tutor or curator along with the mother and would have equal custody rights. His agreement would have to be obtained or dispensed with before the child could be adopted. On the other hand, if the rules presently applying to illegitimate children were applied to all children, the fathers of millions of children would be needlessly deprived of legal rights. It might be possible, of course, to devise new rules which would apply equally to children born within and out of wedlock. For example, a father could have parental rights if, and only if, he was registered as the father. We have not, however, found any range of solutions which would completely eliminate all legal differences between children born in wedlock and children born out of wedlock without giving rise to results which we would regard as unjustifiable. The fact of the matter is that, at least for certain purposes, such as registration of birth and presumptions of paternity, marriage is a convenient criterion. Our tentative view, which remains open for reconsideration in the light of the response received on consultation, is that it would be wrong to disregard this fact.

1.19. We are fortified in this conclusion by two considerations. First, although New Zealand is often held up as an example of a jurisdiction that has abolished illegitimacy, an examination of the law of New Zealand shows rather that the lot of "illegitimate" children has been considerably improved, and that the term "illegitimate child" has been replaced by "a child whose parents are not or were not married to each other." Secondly, the Law Commission for England and Wales, who provisionally proposed removal of the concepts of legitimacy and illegitimacy from the law of family relations,[1] received many strongly argued objections to this approach, largely on the ground that it would confer parental rights on irresponsible fathers who had taken no interest in their child.

1.20. The approach which we favour, and which we adopt in this Memorandum, is to examine each area of law where differences between legitimacy and illegitimacy exist, and to put forward appropriate proposals for reform. Some of our proposals seek to eliminate distinctions in particular areas; others recognise that some distinction is objectively justifiable; yet others seek to increase the opportunities for responsible parents to have their position in relation to the child recognised by the law.

Matters not covered in Memorandum

1.21. Our review of the law relating to illegitimate children will reveal possible defects in the law relating to the tutory and curatory of legitimate children. It would, however, be beyond the scope of this Memorandum to discuss the possibilities for reform of that area of the law and we have not attempted to do so. Nor have we attempted to deal with children procreated by proxy

[1]Working Paper No. 74, Family Law: Illegitimacy (1979).

(whether by artificial insemination or "womb leasing" or otherwise). Developments in this area raise very different questions from those with which we are concerned in this Memorandum and require very different treatment.

General effect of proposals and form of legislation

1.22. On many of the issues discussed in the Memorandum we have formed no provisional view and merely invite comments. It is not possible, therefore, to say what the general effect of our proposals would be. One possible outcome of consultation, however, might be general approval for a package of reforms which significantly improved the legal position of the mother of an illegitimate child and the legal position of the child in relation to the mother while adopting a somewhat more pragmatic, issue by issue, approach to the legal relationship between the illegitimate child and his father. The form of legislation adopted to implement any package of reforms of this nature might be of a much simpler nature than the discussion in the following pages might suggest. It might be possible, for example, to have a general provision treating all children as legitimate children in relation to their mothers with, perhaps, certain limited exceptions. The form of legislation would, however, depend on, among other things, the results of consultation and we have preferred not to tie ourselves down to any particular formula at this stage.

PART II

ESTABLISHMENT OF PATERNITY

2.1. There are differences in relation to the establishment of paternity between children born in wedlock and children born out of wedlock. Broadly speaking, the former have a father designated for them by the law whereas the latter have not, and may have to prove paternity without the aid of any legal presumptions. In this part of the Memorandum, we look at various topics in connection with establishing the paternity of children. We concentrate on paternity because with rare exceptions ascertaining the maternity of a child presents no difficulties. We discuss the various presumptions which assist in deciding paternity and the extent to which local or central government agencies are involved in establishing paternity.

Presumptions of paternity

2.2. Present law. A child conceived by a married woman during the subsistence of the marriage is presumed to be the child of her husband. This presumption is expressed by the maxim "pater est quem nuptiae demonstrant". It is not entirely clear whether the presumption applies in the case of a void marriage[1] or an irregular marriage.[2]

[1] 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.

[2] 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 (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 establish an exception to that rule.

2.3. 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.[1] 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. It has been said that the standard of proof required is proof beyond reasonable doubt.[2] The Divorce (Scotland) Act 1976 now provides[3] 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.

2.4. 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,[4] even where she has intercourse with men other than her future husband.[5] This presumption may be rebutted in the same way as the presumption mentioned in paragraph 2.2 above.[6]

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

[2] Imre v. Mitchell, 1958 S.C. 439; Brown v. Brown, 1972 S.L.T. 143. S. v. S., 1977 S.L.T. (Notes) 65.

[3] S.1(6).

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

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

[6] Hastings v. Hastings, 1941 S.L.T. 323.

2.5. There is no presumption in Scots law that a man who marries the mother of an illegitimate child is the father of that child.[1] 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.[2]

2.6. There is no legal presumption that a man who is named in the Register of Births as the father of an illegitimate child is the child's father.[3] 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.

2.7. Comparative Law

England and Wales

A child born to a married woman, or within an acceptable period after the termination of the marriage, is taken to be the child of her husband, ex-husband or late husband as the case may be.[4] This presumption can be rebutted by evidence which shows that it is more probable than not that the child is illegitimate.[5] The presumption does not apply where the marriage is void, but the Law Commission has suggested that it should.[6]

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

[2] James v. McLennan supra.

[3] 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.

[4] Halsbury's Laws of England (4th ed.) Vol. 1, para. 691.

[5] Family Law Reform Act 1969, s.26.

[6] Working Paper No. 74, Family Law: Illegitimacy (1979) para. 9.11.

New Zealand

A child born to a woman during her marriage, or within 10 months after the marriage has been dissolved by death or otherwise is, in the absence of evidence to the contrary, presumed to be the child of her husband or former husband.[1] The presumption applies in the case of a void marriage.[2] It can be rebutted by proof on a balance of probabilities.[3]

West Germany

A child born to a married woman after the date of her marriage is legitimate if he was conceived before or during the marriage and the husband cohabited with her during the period of conception, unless it is manifestly impossible that the husband was the father. A husband is presumed to have cohabited with his wife, but where the period of conception precedes the marriage this presumption is only valid if the husband died without having contested the child's legitimacy. The presumption applies where the marriage is void.[4]

2.8. Assessment of present law. 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 tentative 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 for 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.

[1] Status of Children Act 1969, s.5.

[2] Status of Children Act 1969, s.2.

[3] Sample v. Sample [1973] 1 N.Z.L.R. 584.

[4] BGB Art. 1591.

2.9. It would be theoretically possible, in order to have one rule applying equally to legitimate and illegitimate children, to replace the presumptions based on marriage by a rule that a man would be presumed to be a child's father only if he had acknowledged paternity (e.g. by agreeing to have his name entered in the Register of Births) or had been found to be the father in court proceedings.[1] A solution along these lines was proposed by a Norwegian committee appointed in 1975 for the purpose of revising the legislation on children, but met with a storm of protest.[2] Our view is that such a scheme would be wholly unacceptable because most husbands would resent the idea that they were not presumed to be the fathers of their wives' children and that they had to take some positive step to establish this fact. Practical considerations also militate against the adoption of such a scheme. An admission of paternity would have to be obtained in connection with the birth of nearly every child, even if legitimate. These admissions would have to be recorded and made available so that the man could demonstrate to third parties that he was the child's father. Provision would also have to be made for dead, incapacitated, or absent fathers.

2.10. Another way of removing the differences between children born within and outside wedlock in relation to the establishment of paternity would be the replacement of the marriage based presumptions (set out in paragraphs 2.2 and 2.4 above) by a presumption based on cohabitation.[3] Under such a scheme a man would be presumed to be the father of a child born to a woman with whom he had cohabited around the

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[1] J. Levin "Abolishing Illegitimacy" (1977, National Council for One Parent Families).

[2] Lødrup in Marriage and Cohabitation in Contemporary Societies (1980) pp. 413 to 419.

[3] A conflict of presumptions would arise in many cases were the marriage based presumptions to be retained, unless the presumption relating to cohabitation was restricted to unmarried women.

likely date of conception. We do not favour the adoption of such a scheme because of the difficulty of deciding whether a man and a woman are cohabiting. For a presumption to be useful it should start from an easily established fact; cohabitation is not self-evident or easily provable whereas marriage is.

2.11. We think that it should be made clear that the presumptions of paternity based on marriage apply in cases where the marriage is void or irregular. The underlying assumption behind the 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. The theoretical objection that a woman might have more than one "husband" if void marriages are taken into account is, we think, unlikely to be of importance in practice. If there were a conflict of presumptions, paternity would have to be established by reference to the facts of the case.

2.12. While we do not favour the replacement of the present presumptions based on marriage we invite views on the question whether they could usefully be supplemented by a presumption based on registration. 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 an illegitimate child was the father until the contrary was proved. The presumption would be based on an easily ascertainable fact and would correspond to reality. It should, we think, apply to registration in any United Kingdom Register of Births[1] but should apply only where neither of the presumptions based on marriage applies.

2.13. So far as the standard of proof required for rebuttal of the presumption pater est is concerned, we think that if the effect of section 1(6) of the Divorce (Scotland) Act 1976 is that one standard applies for the purposes of proof of adultery in divorce actions and another for all other purposes, then the present law is unsatisfactory. It could lead to the absurd result that a man was held not to be the father of his wife's child for the purposes of a divorce but was still presumed to be the father for all other purposes. Even if that is not the effect of the 1976 Act, it may be thought that proof beyond reasonable doubt is too high a standard for the rebuttal of the presumption that the husband is the father of his wife's child. We note that in England and Wales the presumption has, since 1970, been rebuttable by proof on a balance of probabilities.[2] In our Memorandum on the Law of Evidence[3] we proposed that the standard of proof should be changed to proof on a balance of probability.

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[1]Including the Air Register Books of Births and Deaths, the Marine Registers, and the Service Departments Registers kept under the Civil Aviation Act 1949, s.55; the Merchant Shipping Act 1970, s.72; and the Registration of Births, Deaths and Marriages (Special Provisions) Act 1957 respectively.

[2]Family Law Reform Act 1969, s.26.

[3]Memorandum No. 46 (Sept. 1980, para. V.17).

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 the husband to be the father of his wife's child when it is probable on the available evidence that he is not, is likely to benefit neither the child nor the mother nor the husband. On the other hand there may be merit in retaining a high standard of proof in this area in order to discourage challenges to the legitimacy of children and the stability of families. There are also difficulties in the concept of proof on a balance of probability, at least if it is pushed to its logical conclusion. Suppose, for example, that 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? This type of difficulty is not confined to proof of paternity and could be resolved, if at all, only by a re-phrasing of the rule on the standard of proof required in civil cases. So long as the choice is between proof beyond reasonable doubt and proof on the normal civil standard[1] it may be that the latter should apply. We think it right, however, to draw attention to the implications.

2.14. Provisional proposals. Our preliminary conclusions on presumptions of paternity can be summed up as follows. It should be made clear that the presumptions (a) that the husband is the father of a child conceived by his wife during their marriage and (b) that the husband is in certain circumstances the father of a child born to his wife during their marriage but conceived before the marriage, apply in the case of an irregular or void marriage.
(Proposition 1).

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[1] Cf. Brown v. Brown, 1972 S.C. 123; Lamb v. Lord Advocate, 1976 S.C. 110.

Where a man has been registered in any United Kingdom register of births as the father of a child and neither of the presumptions mentioned in Proposition 1 apply, that man should be presumed to be the child's father. (Proposition 2).

Views are invited as to whether the standard of proof required to rebut the presumptions mentioned in Propositions 1 and 2 above should be proof on a balance of probabilities. (Proposition 3).

Judicial proceedings

2.15. Presumptions of paternity help to resolve some questions in relation to the establishment of paternity. They do not always apply, however, and even where they do apply they may be rebutted. It is important that those with a legitimate interest in establishing a child's paternity should have adequate judicial remedies to enable them to do so. Such remedies exist in Scots law, but the law relating to them is in need of clarification and improvement. We deal with this question in Part IX of the Memorandum.

Public intervention

2.16. Various statutes entitle central and local government agencies[1] to bring an action of affiliation and aliment against the alleged father of a child for the purpose of establishing his liability to aliment the child where this is denied, and where public money has been disbursed on behalf of the child. This apart, there is no involvement by public agencies in order to ascertain the paternity of an illegitimate child.

[1]The Department of Health and Social Security under s.19 of the Supplementary Benefits Act 1976; Regional Councils under s.81 of the Social Work (Scotland) Act 1968 and s.44 of the National Assistance Act 1948.

2.17. Comparative law

New Zealand

A Child Welfare Officer may apply to the court for a paternity order under section 47 of the Domestic Proceedings Act 1968 where the mother is dead, has abandoned the child or is unable to apply, but otherwise may only apply with the written consent of the mother.

Norway

The mother, as well as the doctor and midwife attending, are required to notify the welfare authorities of the birth of an illegitimate child and to give information regarding the probable time of conception and the possible identity of the father. Where the mother names a possible father, the District Governor issues a writ against him, but where there are several possible fathers a writ need not be issued. On receipt of the writ the alleged father may admit paternity or apply to the court for a determination of this issue. Failure to respond to the writ within a short specified time will result in the man being held to be the father. The judge hearing a paternity case takes an active role as he is under a duty to establish the child's paternity if possible. Thus all persons who may have relevant information may be summoned to give evidence; refusal to testify is a punishable offence. Parties must in general submit to blood testing and other medical examinations. The courts will not declare a man to be the father unless this is highly probable.[1]

2.18. One of the disadvantages suffered by an illegitimate child, compared with a child born in wedlock, is that steps have to be taken to identify his father. State intervention along the lines of that in Norway can be justified on the grounds that it does an illegitimate child little or no good for the law to confer substantial legal rights[2] on him *vis-a-vis* his father if no efforts are made to find the father while the evidence is fresh and available. Apart from financial interests and legal rights, the child also has an

[1] International Encyclopaedia of Comparative Law Vol. IV ch. 6 para. 80.

[2] E.g. a right to aliment and inheritance rights in his father's estate.

emotional interest in knowing who his father is. Finally public authorities have a financial interest in establishing the paternity of illegitimate children in order to recover money they provide for the support of such children.

2.19. In about half of the cases of illegitimate births the father is registered as such in the Register of Births. Where paternity is not voluntarily admitted, the present system of establishing paternity depends very much on the mother bringing legal proceedings. Even though legal aid is available for the purpose of bringing actions of affiliation and aliment, these proceedings make only a small contribution to the discovery of the paternity of illegitimate children where this is not admitted.[1] While we have no firm figures we understand that very few actions of affiliation and aliment are brought by public authorities.

2.20. The Russell Committee[2] rejected the idea that it might be made the responsibility of some public authority to investigate every illegitimate birth in order to seek to establish the child's paternity. They did so partly on the ground of administrative expense and partly on the ground that it would not prove acceptable to permit official questioning of a mother in order to reveal matters which she might wish to keep private. We agree with the conclusions of the Russell Committee and are not inclined to support public intervention in this area.

Evidence of paternity

2.21. We have in our consultative Memorandum on the Law of Evidence[3] made tentative proposals for, or invited views on,

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[1] 248 actions of affiliation and aliment were brought in the sheriff courts as ordinary actions in 1979 and 145 decrees in favour of the pursuer were granted. Civil Judicial Statistics Scotland 1979, Cmnd. 8111, Table 9.

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

[3] Memorandum No. 46 (1980).

reform of the law on (a) proof of paternity by blood test evidence and other genetic evidence,[1] (b) the privilege of spouses to refuse to give evidence as to whether or not sexual intercourse took place between them,[2] and (c) corroboration by false denial.[3] We do not therefore deal with these questions in this Memorandum.

Recognition of paternity

2.22. The question for consideration under this heading is whether there should be some special provision to enable a man to make a formal recognition of paternity which would be binding on himself and other people. The present law of Scotland makes no provision for such recognition. The effect of a voluntary admission of paternity depends on the ordinary law of evidence. Thus a man's extrajudicial admission of paternity would be admissible against him as a statement against interest but its weight would depend on all the circumstances of the case.[4] It would not establish paternity conclusively for all legal purposes.

2.23. Comparative law

France

Acknowledgement of paternity may be done when the child's birth is registered or subsequently by a document of declaration in the proper form (an "acte authentique").[5] An acknowledgement by the father without naming the mother and without her consent is effective as regards the father only.[6] An acknowledgement by a man other than the mother's husband is null

[1] Ibid. paras. M.02 to M.08.

[2] Ibid. para. S.16.

[3] Ibid. paras. X.07 to X.09.

[4] Walker and Walker, Evidence pp. 27 to 29.

[5] Code Civil, Art. 335.

[6] Code Civil, Art. 336.

if the child possesses legitimate status.[1] The child, the mother, the father and any other person with an interest (including the state) may challenge an acknowledgement.[2]

The effect of an unchallenged acknowledgement by the father is to declare paternity and to establish the father-child relationship for all legal purposes.[3]

New Zealand

Section 8(2) of the Status of Children Act 1969 provides that an instrument signed by the mother of a child and by any person acknowledging that he is the father of the child is, if executed as a deed, or by each of those persons in the presence of a solicitor, prima facie evidence that the person named is the father of the child. Section 9 permits such instruments to be filed with the Registrar General of Births, Deaths and Marriages who indexes them. A search of the index and inspection of any instrument is permitted only if the searcher has, in the opinion of the Registrar General, a proper interest in the matter.

West Germany

An admission of paternity may be made by the father even before the child is born.[4] The child or his legal representative (usually the Youth Welfare Office) must consent to the admission but the mother's consent is not required although she may furnish the Youth Welfare Office with reasons why they should not consent on behalf of the child. The admission must be officially authenticated and must be made formally before a notary, the court, the Youth Welfare Office or a civil officer and the admission must be sent to the Registrar of Births, Deaths and Marriages.[5] There are complex provisions relating to the persons entitled to challenge an admission and the periods within which a challenge is competent.[6]

The effect of an unchallenged admission is to determine the paternity of an illegitimate child with effect for and against all persons. The legal effects of paternity can, in so far as not otherwise provided for by the law, be asserted only from the time of an admission or a judicial determination of paternity.[7]

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[1]Code Civil, Arts. 334 to 339.

[2]Code Civil, Art. 339.

[3]Code Civil, Arts. 334 to 338.

[4]BGB Arts. 1600a and b(2).

[5]BGB Art. 1600e.

[6]BGB Arts. 1600g to m.

[7]BGB Art. 1600a.

2.24. The French and West German provisions outlined above make it possible for the father of an illegitimate child to establish his paternity by an administrative process. There would seem at first sight to be much to be said for such a system. On further examination, however, it seems doubtful if there would be sufficient advantages over the present law to justify the introduction of a new set of rules which would inevitably be fairly complicated. For a recognition to have any wider effect than under the present law it would have to be either made with the consent of the mother or made in such circumstances that those whose interests might be affected had a right of challenge. In the first situation, where the mother consents, it is already possible for the father to be registered as such in the Register of Births.[1] In the second situation, there would have to be rules on such matters as intimation to third parties, the time and manner of any challenge by a third party, and the procedure for resolving any dispute. If the procedures were sufficiently satisfactory to justify wide effect being given to a voluntary recognition they would hardly differ from those in an action for declarator of paternity.[2] In short, while it is undoubtedly desirable that means should be available whereby the father of an illegitimate child can establish his paternity either with or without the consent of the mother, the present law on the registration of births and on declarators of paternity provides such means. In our view it is likely to be more satisfactory to examine our existing

[1] We have suggested at para. 2.12 above that registration should give rise to a presumption of paternity. We discuss the registration procedures in Part III. From a small scale survey conducted by the department of the Registrar General for Scotland it appeared that a man was registered as father in the case of nearly half of all illegitimate births in Scotland in 1978.

[2] See Part IX below.

procedures with a view to improvement[1] than to introduce a special set of rules on formal recognitions. We therefore make no proposals for the introduction of such rules.

[1]See Parts III and IX below.

PART III

REGISTRATION OF BIRTH

3.1. In this part we look at the registration of the birth of illegitimate children, and the provisions for re-registering such births.

Particulars to be registered

3.2. Section 13 of the Registration of Births, Deaths and Marriages (Scotland) Act 1965 provides that there shall be kept for every registration district a register of births containing such particulars as may be prescribed. The prescribed particulars[1] are:-

- (a) Surname and names of the child, its sex and place and date and time of birth;
- (b) the mother's names, surname and maiden surname and her usual residence;
- (c) the father's names, surname and occupation;
- (d) the place and date of the parents' marriage; and
- (e) the informant's signature and qualification to act as informant.

An extract (i.e. a copy) of any entry in the Register of Births may be issued on payment of the appropriate fee.[2] Sections 19 and 40 of the 1965 Act provide for the issue of an abbreviated certificate of birth which contains only the child's names and surname, sex, and place and date of birth. Details of the child's parentage and his parents' marital status are omitted.

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[1] The Registration of Births, Still-births, Deaths and Marriages (Prescription of Forms)(Scotland) Regulations 1965 (S.I. 1965 No. 1839) reg. 3 and Sch. 1, as amended by the Registration of Births, Still-births, Deaths and Marriages (Prescription of Forms)(Scotland) Amendment Regulations 1971 (S.I. 1971 No. 1158), reg. 3 and Sch. 1.

[2] Registration of Births, Deaths and Marriages (Scotland) Act 1965, s.38(2).

3.3. 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 life-long source of embarrassment to the child himself. It would be possible to meet this problem if the Register of Births were to omit details of the child's paternity and his parents' marriage. We do not favour such a proposal. Fathers of legitimate children and many fathers of illegitimate children wish to have the fact of their paternity recorded. Children also have an interest in having their paternity recorded. Apart from these considerations, an extract birth certificate in its present form serves as evidence of a father-child relationship where this requires to be demonstrated.

3.4. Another way of avoiding embarrassment would be to provide that the Register of Births should omit details of the parents' marriage and the married surname of the mother. In registrations where the father's particulars were entered an illegitimate child's birth entry might be indistinguishable[1] from that of a legitimate child. However, lack of information as to the parents' marriage would seriously detract from the usefulness of the Register of Births for the purposes of medical, legal, historical and genealogical research, while omitting the married surname of the mother would oblige a married woman who wished to demonstrate that she was the mother of the child or that the child was legitimate to produce her marriage certificate as well as the child's birth certificate. In our view, shielding a small minority from

[1] Where the mother of a legitimate child was the informant she would usually sign the register using her married surname.

possible embarrassment is not a sufficient reason for the majority to be inconvenienced as described above.

3.5. We think that a better approach to this problem is for greater use to be made of the abbreviated birth certificates which are issued free at the time of registration of the birth and which do not disclose the fact of illegitimacy. This, however, is a matter of practice and not a matter on which we can make any proposals for law reform.

Registration of father at time of birth

3.6. In the case of a legitimate child either the mother or the father may attend the district registrar's office for the purpose of registering the birth. Where the mother is the informant and is married, her husband will be registered as the child's father, unless she states that he is not, when either the particulars of the father will be omitted or she will be invited to return along with the father (or with a statutory declaration by him acknowledging paternity) if she wishes his particulars to be included. Where the father is the informant he will be asked if he is married to the mother. If he states that he is, he is permitted to register the child's birth with himself as the father. If he states that he is not, registration will not proceed, and he will be informed that the mother or some other qualified informant[1] must attend to register the birth.

3.7. In the case of an illegitimate child section 18(1) of the Registration of Births, Deaths and Marriages (Scotland) Act 1965 provides that:-

> "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 the father of the child except on the joint request of the mother and the person acknowledging himself to be the father of the child".

[1] Registration of Births, Deaths and Marriages (Scotland) Act 1965, s.14.

An acknowledgement may take the form of the father attending the district registrar's office personally with the mother and signing the register with her in the presence of the registrar. Alternatively the mother may sign in the district registrar's office a declaration in prescribed form[1] stating that a particular man is the father and submit a statutory declaration by that man acknowledging his paternity.

3.8. Comparative law

England and Wales

Section 2 of the Births and Deaths Registration Act 1953 lays on either the mother or the father of a legitimate child the duty of giving information of the particulars required to be registered concerning the birth.

Section 10 of the 1953 Act, as amended by section 27(1) of the Family Law Reform Act 1969 and section 93(1) of the Children Act 1975, provides that the registrar shall not enter the name of any person as father of an illegitimate child except:-

(a) at the joint request of the mother and father; or

(b) at the request of the mother on production of a declaration by her that the person is the father and a declaration by that person acknowledging his paternity;

(c) at the written request of the mother (and where the child is 16 or over the written consent of the child) on production of a court order naming that person as the putative father.[2]

New Zealand

Section 18 of the Births and Deaths Registration Act 1951, as amended by the Schedule to the Status of Children Act 1969, provides that the registrar shall not enter the name of, or any particulars relating to, any person as the father of a child whose parents are not (or were not as the case may be) married to each other except where:-

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[1] The Registration of Births, Still-births, Deaths and Marriages (Prescription of Forms)(Scotland) Regulations 1965, Sch. 26.

[2] We deal with the Scottish position in relation to registration after a decree of paternity at paras. 3.12 to 3.19 below.

(a) the mother and father jointly request such an entry or, if the mother is dead or cannot be found, the father requests the entry;

(b) the mother produces a written consent by the father and the registrar is satisfied that the mother and father were living together at the time of the birth of the child.

3.9. At present a father can register the birth of his child and have himself registered as father where the child is legitimate. However, if the child is illegitimate the particulars of the father can only be registered at the joint request of the father and mother.[1] There are two questions here. First, should the mother be able to register a man as the father without his consent? Secondly, should a man be able to register himself as father without the mother's consent? So far as the first question is concerned there would be manifest dangers of abuse if any man could be registered as the father of an illegitimate child without his consent and we would not propose such a system. The position is different, however, where the man has signed a statutory acknowledgement of paternity or has been found to be the father by a competent court. We understand that a statutory declaration by a man acknowledging his paternity is treated as a consent to registration as father. Where a court has found a man to be the father we can see no reason why the mother should not be able to register him as father even if he does not consent.[2] We

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[1] S.18(2) of the Registration of Births, Deaths and Marriages (Scotland) Act 1965 provides that in certain circumstances the particulars of the father may be entered in the Register of Corrections Etc. (where the original entry did not contain these particulars) other than at the joint request of the presents.

[2] She can do so in England and Wales. See the Births and Deaths Registration Act 1953, s.10(c), added by the Children Act 1975, s.93(1). It would be unusual for a finding of paternity to be obtained before the birth was registered, given that the normal period allowed for registration in Scotland is 21 days, Registration of Births, Deaths and Marriages (Scotland Act 1965, s.14.

therefore propose that <u>the mother of an illegitimate child should be entitled to register a man as the father on production of a court decree finding him to be the father</u>. (Proposition 4).

3.10. The second question - whether the father should be able to register himself as father without the consent of the mother - is more difficult. It could be argued that a father should be entitled to have the fact of his paternity registered without the mother's consent, since her veto may be for purely personal reasons, and that the child also has an interest in having his paternity recorded. On the other hand many women do not wish particulars of their child's father to be registered. In particular, to entitle unmeritorious fathers (e.g. rapists) to register themselves as fathers, would cause considerable embarrassment to the mothers and might not be in the best interests of the child even if it were made clear in the legislation that the right to be registered as father did not carry with it the right to choose the child's name. Allowing fathers to register themselves as fathers, without the mother's consent, might also create difficulties for district registrars, in that they would be deprived of the corroborative evidence of the mother. They would either have to make further enquiries in order to verify the man's paternity or accept that false information might be provided in a greater number of cases than at present. Where a legitimate child's birth is being registered, once it is established that the child's parents are married to each other, the presumption <u>pater est</u> entitles the district registrar to enter the mother's husband as father without further enquiry. Our tentative conclusion is that the father of an illegitimate child should not be entitled to register himself as father without the mother's consent.

3.11. There is one other matter connected with the initial registration of the birth on which we would welcome views. The present law provides for registration of the father if both parents attend the district registrar's office personally, or if the mother attends, declares the man to be the father, and submits a statutory declaration by him acknowledging his paternity. It seems to us that this is unduly restrictive. Providing the necessary declarations are made by both parents, we see no reason why the father should not be entitled to register the child's birth as well as the mother.[1] We propose for consideration that either parent of an illegitimate child should be entitled to register the child's birth, and have the father registered, 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.
(Proposition 5).

Subsequent recording of the name and surname of the father

3.12. Section 18(2) of the Registration of Births, Deaths and Marriages (Scotland) Act 1965 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"[2] record those particulars in the Register of Corrections Etc.:-

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[1] Consequential amendments may be required to the provisions making it an offence to fail to register the birth. Registration of Births, Deaths and Marriages (Scotland) Act 1965, s.53(3). We do not envisage that every father of an illegitimate child would be liable to prosecution for failing to register the birth.

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

"(a) if a decree of paternity has been granted by a competent court;[1] 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."

3.12. The regulations made under the 1965 Act seem to assume that an application under section 18(2)(b) to record the name and surname of a man as father of an illegitimate child in the Register of Corrections Etc. will only be made by the mother, for her declaration of the man's paternity requires to be made personally before the district registrar.[2] We see no reason why the father of an illegitimate child should not be entitled to apply to the Registrar General to have his name and surname recorded in the Register of Corrections Etc. provided he signs before the district registrar a declaration acknowledging his paternity and produces a statutory declaration by the mother stating that he is the father. We

[1] 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.

[2] The Registration of Births, Still-births, Deaths and Marriages (Prescription of Forms)(Scotland) Regulations 1965, Sch. 26.

therefore propose that where the birth has been registered without the father's particulars either parent of an illegitimate child should be entitled to apply to the Registrar General for the father's name and surname to be recorded in the Register of Corrections Etc. on production of the declarations referred to in Proposition 5. (Proposition 6).

3.14. A statutory declaration by the father acknowledging his paternity or an application to the sheriff for the purpose of recording his particulars in the Register of Corrections Etc. can be made only within 12 months of the birth of the child. While this period may give a reasonable time for most fathers to come to a decision, there is a risk that any time limit might operate so as to prevent the names of fathers from being recorded in the Register of Corrections Etc. This would not seem to be desirable. It may be that a distinction could be drawn between a statutory declaration and an application to the sheriff. In the case of the former a time limit might help to prevent a false declaration by a man who is not the father but who has taken up cohabitation with the mother some years after the child's birth. In the case of an application to the sheriff the risk of a false acknowledgement of paternity might be less. We invite views on the question whether there should continue to be a time limit of 12 months from the date of birth for the purposes of section 18(2)(b) and (c) of the Registration of Births, Deaths and Marriages (Scotland) Act 1965 (statutory declaration of paternity by father of illegitimate child or application to sheriff for recording father's name in the Register of Corrections Etc.). (Proposition 7).

3.15. It seems unduly restrictive to permit the father to apply to the sheriff under section 18(2)(c) only where the child's mother is dead. In our view this procedure should also be available where the mother has abandoned the child and cannot be found, or where she is incapable of making any declaration. We propose, therefore, that an application to the sheriff under section 18(2)(c) of the Registration of Births, Deaths and Marriages (Scotland) Act 1965 (for recording the name of 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. (Proposition 8).

Re-registration

3.16. The preceding paragraphs have described how the particulars of the father of an illegitimate child can be recorded in the Register of Corrections Etc. However, before those particulars can be shown in the body of the entry in the Register of Births and consequently in any extract birth certificate, the birth must first be re-registered. Re-registration serves a useful purpose in that a copy of the re-registered entry can be obtained in order to demonstrate the father's paternity to persons outwith the family. Otherwise the original entry would have to be supplemented by a copy of the court decree or copies of the declarations of the mother and father.

3.17. Section 20(1) of the Registration of Births, Deaths and Marriages (Scotland) Act 1965 provides that 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 ...

> 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:"[1]

Neither the Act, nor the Regulations made under it, contain any restriction on the persons who may apply for authority to re-register a birth under section 20(1)(a) of the 1965 Act and it would seem therefore that anyone could apply. If authority is given, the Regulations require "the informant" to attend personally at the district registrar's office for the purpose of signing the register in his presence.[2] However, if the informant lives outside the registration district he may be authorised by the Registrar General to make a declaration in writing of the particulars to be entered in the register.[3] The "informant" has a wide meaning.[4] It includes the father or mother of the child; any relative of either parent of the child, being a relative who has knowledge of the birth; the occupier of the premises in which the child was, to the knowledge of that occupier, born; any person present at the birth; and any person having charge of the child.[5] It is possible that, in the context of the 1965 Act,[6] the father of an illegitimate child would not be regarded as the "father" or as a "parent" for

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[1] Re-registration may also be authorised if an illegitimate person has been legitimated by subsequent marriage. The procedure in this type of case is laid down in the Act. S.20(1)(c).

[2] Registration of Births, Deaths and Marriages (Miscellaneous Provisions)(Scotland) Regulations 1965 (S.I. 1965 No. 1838), reg. 4.

[3] Ibid. reg. 5.

[4] Ibid. reg. 2 - "informant" means a person who is by the [1965] Act required or stated to be qualified to give information concerning a birth or a death.

[5] 1965 Act, s.14.

[6] In particular, s.18 (which makes special provision for registering the births of illegitimate children) and s.53(3) (which makes it an offence for the parent of a child to fail to give information concerning the birth of his child as required by the Act).

this purpose. It seems, however, that he could qualify as an informant if, for example, he had been present at the birth, or had been the occupier of the house in which the child was born or had charge of the child. That is not, however, the end of the matter. Section 18(1) of the 1965 Act provides that the registrar shall not register the birth of an illegitimate child 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 ..."[1]

The father will not be treated as acknowledging paternity unless he attends personally at the registration office together with the mother and signs the register, or unless there is produced to the registrar declarations by both the father and the mother.[2] It is not clear whether this provision applies only to the initial registration of the birth or whether it would also apply to a re-registration. The words quoted above seem to apply to <u>any</u> entry in the register whether at the time of the initial registration or later. If this interpretation is correct the mother could not re-register the birth, without a statutory declaration from the father, even if she had a decree establishing his paternity.[3]

3.18. The present law seems unclear. We are informed, however, that the practice is to regard the mother, but not the father, as being entitled to apply to have the birth of an illegitimate child re-registered under section 20(1)(a) of the 1965 Act. If the child is over 18 years of age he is,

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[1] S.18(1).

[2] S.18(1). See para. 3.7 above.

[3] This, however, would be cured by our suggestion in para. 3.9 above that the mother should be entitled to register the father on production of a decree of paternity.

in practice, regarded as being entitled to apply for re-registration of his own birth entry. Even if the father had obtained a declarator of paternity he would not be regarded as qualified to apply for re-registration of the child's birth.

3.19. In the present state of the law on this question it seems to be necessary to ask what the underlying policy should be. It would be going 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 it 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 have the birth re-registered. The most obvious might be where the mother consents. Other cases might be where he has sole custody of the child or other parental rights,[1] especially if the mother is dead, or has abandoned the child and cannot be found. As it would be difficult to identify in advance the exceptional cases where it would be reasonable to allow the father to re-register the birth without the mother's consent the most appropriate technique might be to require the father to apply to the sheriff for authority to re-register.[2] The sheriff could take into account the child's interests in deciding whether or not to allow re-registration to take place. We envisage

[1] See Parts IV to VI below.

[2] Cf. the procedure, for certain cases of re-registration following legitimation by subsequent marriage, laid down in s.20 of the 1965 Act.

that these rules would apply only to a child below the age of 16[1] and that above that age the "child" should be entitled to apply for re-registration of his own birth. We therefore invite views on the following propositions. (a) The law on the re-registration of the birth of an illegitimate child under section 20(1)(a) of the Registration of Births, Deaths and Marriages (Scotland) Act 1965 should be clarified.
(b) Where the child is under the age of 16 re-registration should be possible on the application of (1) the mother or (2) the father with the consent of the mother or the sanction of the sheriff.
(Proposition 9).

[1] Cf. s.43(5) of the 1965 Act. This provision, as amended, allows a person over the age of 16 but under the age of 18 to apply, with the consent of his parent or guardian, to have a change of name or surname recorded. "Parent" and "guardian" are not defined.

PART IV

GUARDIANSHIP

Present law

4.1. "Guardianship" is not a term of art of Scots law, but it is used, in different senses, in various statutes. We discuss some of these statutes in Part VI when we deal with miscellaneous parental rights. In this Part we are concerned with guardianship in the sense of tutory or curatory.[1] 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.[2] In the case of an illegitimate child neither parent is tutor or curator.[3] 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.[4] Another difference is that the present law makes no provision for the appointment of testamentary tutors or curators to an illegitimate child.

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[1]The "tutor" is the guardian of a pupil child (i.e. a boy under 14 or a girl under 12). The "curator" is the guardian of a minor child (i.e. a child above these ages but under 18). In general, the tutor acts _for_ the child in litigation and legal transactions, whereas the curator acts _along with_ the child.

[2]Guardianship Act 1973, s.10.

[3]_Corrie_ v. _Adair_ (1860) 22D.897; _Jones_ v. _Somervell's Tr._, 1907 S.C. 545.

[4]_Young_ (1828) 7S.220; _Ogilvy_ (1849) 11D.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) 9D.988; _Davison_ (1855) 17D.629.

Neither the mother[1] nor the father[2] 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.[3]

4.2. Comparative law

England and Wales

Section 85(7) of the Children Act 1975 provides that while the mother of an illegitimate child is alive she has the parental rights and duties exclusively except as otherwise provided by or under any enactment. She can appoint a testamentary guardian.[4] The father becomes a guardian on the death of the mother if he had custody then.[5] The father can appoint a testamentary guardian only if he was entitled to custody immediately before his death.[6]

New Zealand

A child born outwith marriage is under the sole guardianship of his mother, unless the mother and the father were at the date of the birth living together as husband and wife. In this latter situation the mother and father are joint guardians. A father who is not a joint guardian by virtue of this provision may apply to the court to be appointed either joint or sole guardian of the child.[7] Either parent is entitle to appoint by deed or will any person to act as the child's guardian after his or her death. However, where the appointing parent was not a guardian at the date of death (e.g. the father of an illegitimate child who was not living with the mother at the date of the child's birth and who had not been subsequently appointed guardian) the person appointed has to apply to the court and the court may, if it thinks fit, appoint him as guardian.[8]

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

[2] Fraser, Parent and Child (3rd. ed.) p. 161.

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

[4] Guardianship of Minors Act 1971, s.4(2).

[5] Ibid. s.3(2) read with s.14(3).

[6] Ibid. s.4(1) read with s.14(3).

[7] Guardianship Act 1968, s.6.

[8] Ibid. s.7.

West Germany

The mother of an illegitimate child has full parental powers in respect of that child.[1] The child, however, has a curator whose duty is to represent his interests in the determination of paternity, the enforcement of maintenance claims and succession and inheritance cases.[2] Upon the birth of the child the Youth Welfare Office becomes the child's curator.[3] The power to otherwise appoint or cancel the appointment of a curator is exercised by the Guardianship Court on petition by the mother.[4] The father of an illegitimate child has none of the rights flowing from the patria potestas and is not entitled to apply to the court to have parental powers conferred upon him. A person who has been nominated by a parent of the child is qualified to be a guardian, but such a nomination is only valid if at the time of his death the parent was entitled to the care of the person and property of the child.[5] The guardian is appointed by the Guardianship Court who issue him with a certificate of appointment.[6]

Legal position of mother

4.3. 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 filius nullius, having no legal relationship with either of his parents. Although for most 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.[7] Where necessary, a tutor or curator can be appointed to the child but we do not view this as a satisfactory solution since it entails the trouble and expense of an application to the court.

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[1] BGB Art. 1705.

[2] BGB Art. 1706.

[3] BGB Art. 1709.

[4] BGB Art. 1707.

[5] BGB Arts. 1776(1) and 1777(1).

[6] BGB Arts. 1789 and 1791(1).

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

4.4. We suggest that the mother should become the child's tutor or curator by operation of law, without prejudice to the possibility of the father acquiring similar rights by means of an application to the court or, possibly, some other means.[1] An illegitimate child is usually brought up by his mother, unless adopted, and making her the tutor or curator would seem to provide a realistic and satisfactory solution. We therefore propose that the mother of an illegitimate child should, by operation of law, be the tutor and curator of the child.
(Proposition 10).

4.5. We also think 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. Where the mother exercises her power to appoint testamentary tutors and curators the child will not on her death be left, as he is at present, without any tutors or curators.[2] An application to the court for appointment of tutors and curators would therefore be necessary only where the mother had failed to exercise her power of appointment or where the appointed person was unable or unwilling to act. We therefore suggest that the mother of an illegitimate child should be entitled to appoint testamentary tutors and curators to the child.
(Proposition 11).

Legal position of father

4.6. We would not favour any solution which made the father of an illegitimate child the tutor and curator of the child in every case. This would give rights to fathers where the child had resulted from a casual liaison or even from rape;

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[1] See paras. 4.6 to 4.14 below.

[2] 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.

it would fail to recognise that many men do not have any continuing relationship with their illegitimate children. It would, we think, be inappropriate to confer parental rights on such "unmeritorious" fathers. It might be argued that such fathers would not in practice seek to exercise their rights. Fathers of legitimate children remain joint 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 mothers and provoke unnecessary litigation. If every father was to be a joint tutor or curator he would become more involved in care or adoption proceedings than he is at present. Steps would have to be taken to ascertain the whereabouts of every father and to allow him an opportunity to make representations to the court even in cases where it would clearly be wrong 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.

4.7. If it is accepted that some but not all fathers should have rights of tutory and curatory in respect of their illegitimate children, the issues are the identification of meritorious fathers and the methods by which rights might be conferred upon such fathers. We discuss various possibilities in the following paragraphs but would welcome further suggestions.

4.8. <u>Guardianship on application to court</u>. One way of conferring parental rights upon fathers of illegitimate children would be to provide that a father should be entitled to apply to the court[1] for an order making him the child's tutor and curator either solely[2] or jointly with the mother. The main advantage of such a scheme is that the court would be able to consider the circumstances of each case. It would need to be satisfied, particularly if the mother was married, that the applicant really was the father and would make an order only where it was in the best interests of the child to do so. Thus there would be little likelihood of "unmeritorious" fathers becoming tutors or curators. On the other hand an application to the court involves considerable trouble and expense. Few parents would avail themselves of the procedure, thus frustrating the objective of conferring tutory or curatory upon meritorious fathers. While some provision for court applications would seem to be necessary, it would be desirable if some other way could be found of conferring tutory and curatory upon certain fathers, particularly those who live with the mothers in stable extra-marital unions.

4.9. It is for consideration whether a father's application to the court for tutory or curatory should require the consent of the mother. This might be regarded as unjustified in cases where the father had been playing an active role in the child's upbringing or where the mother had neglected or abandoned the child. It could give rise to difficulty

[1] We suggest at para. 4.32 below that this should be the Court of Session or the sheriff court.

[2] If the mother is dead he might already have this right under s.4(2A) of the Guardianship of Infants Act 1925. See para. 4.22 below.

if the mother were dead or could not be found. But some fathers might abuse a right to apply for tutory or curatory in order to embarrass or cause trouble for the mother without any intention of taking part in the child's life.[1] A related question is what weight the court should give to the welfare of the child in deciding a father's application. In dealing with an application by either parent for the custody of, or access to, an illegitimate child, the court is directed to have 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.[2]" The actual words of this Act differ 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". The courts have, however, interpreted the 1930 Act as making the welfare of the child the paramount consideration.[3] It is possible, too, that section 1 of the 1925 Act might now be held to apply to illegitimate children.[4] In this state of the law it might be thought that the best solution would be to apply the well-tried formula of section 1 of the 1925 Act.[5] We have, however, formed no concluded view on this question.

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[1]A similar danger exists in theory in relation to custody applications by fathers under the Illegitimate Children (Scotland) Act 1930, s.2. So far as we are aware, it has not materialised in practice.

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

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

[4]In Brand v. Shaws (1888) 16R.315 it was held that the Guardianship of Infants Act 1886 did not apply to illegitimate children, but the House of Lords in the English case of J. v. C. [1970] A.C. 668 held that section 1 of the 1925 Act was quite general in scope.

[5]We discuss this formula further at para. 5.4 in relation to custody and access.

4.10. Views are invited on the following questions.
(a) Whether the father of an illegitimate child should be entitled to apply to the court to be appointed tutor or curator to his child; (b) whether the father's application should be competent only if the mother consents; and (c) whether in deciding such applications the court should be directed by statute to regard the welfare of the child as the first and paramount consideration.
(Proposition 12).

4.11. Guardianship by virtue of cohabitation. The arguments in favour of conferring tutory and curatory upon fathers of illegitimate children are at their strongest in cases where the father and mother are cohabiting in a stable extra-marital union. This suggests that such fathers should be the joint tutors and curators of their children by statute, provided a suitable formula can be found for identifying them. New Zealand adopts this approach; section 6 of the Guardianship Act 1968 provides that the parents of an illegitimate child shall be his joint guardians if at the time of his birth they were living together as if they were husband and wife. Conferment of rights by statute avoids the trouble and expense of applications to the court. Also, as soon as the legislation comes into force parental rights are conferred upon a large number of fathers. On the other hand there are difficulties in conferring rights upon couples whose status as cohabiting couples may be a matter of doubt and uncertainty:[1] no certificate can be made available to prove that a couple were living together as if they were man and wife. Thus a father may have difficult in demonstrating to third parties that he is the tutor or curator of his illegitimate child. In those cases where tutory or curatory

[1] Cohabitation as husband and wife is a notoriously difficult test for third parties to apply. See the Supplementary Benefit Commission's papers on Cohabitation (H.M.SO. 1971) and Living Together as Husband and Wife (H.M.S.O. 1976).

is important in everyday life there is usually money or property involved. It may be necessary to obtain a receipt for a legacy paid to a child. It may be necessary for the child's property to be sold. It may be necessary to bring or defend a court action for the child. In such cases we doubt whether third parties could reasonably be expected to accept a man's assurance that he was the child's tutor or curator by virtue of cohabitation with the child's mother.[1] In short, this type of tutory or curatory might be useless in the only situations where it mattered. We would welcome views on this question but our tentative conclusion is that <u>the father of an illegitimate child should not be the child's tutor or curator merely by virtue of cohabitation with the mother</u>.
(Proposition 13).

4.12. <u>Guardianship by registration or agreement</u>. Another approach, based on conferring statutory rights of joint tutory or curatory upon a limited class of fathers, might be to provide by legislation that where the father's particulars were recorded, at the joint request of the parents, in the entry in the Register of Births[2] relating to the child, the mother and father should become the child's joint tutors and curators, either being able to act without the other, as in the case of a legitimate child. In nearly half the registrations of births of illegitimate children the particulars of the father are entered, so that legislation along the above lines would have an immediate and an extensive effect. It would also appear at first sight to avoid the difficulties

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[1] In New Zealand where a man's statutory guardianship is disputed a declarator can be obtained from the court. Guardianship Act 1968, s.6(A), added by Guardianship Amendment Act 1969, s.2.

[2] Including the Scottish Air Register Book of Births and Deaths, Marine Register and Service Departments Register kept under the Civil Aviation Act 1949, s.55; the Merchant Shipping Act 1970, s.72; and the Registration of Births, Deaths and Marriages (Special Provisions) Act 1957 respectively.

arising from basing statutory rights on cohabitation: the father's joint tutory and curatory would flow from the fact of registration and could be readily demonstrated to third parties by production of an extract birth certificate of the child. Against these undoubted advantages, however, must be set the possibility that conferring tutory or curatory on the father by virtue of joint registration might deter some mothers from agreeing that the father's particulars should be entered in the Register of Births. We are by no means convinced that this would follow and would particularly welcome views on whether there would be a real danger of this happening.[1] It may be that most parents would continue to register their child's birth jointly without thinking about the long-term legal relationship thus created. The above scheme could only apply if the mother were unmarried, for otherwise her husband would be presumed to be the father of any child conceived during the marriage and would therefore be, until the presumption of his paternity was rebutted, the child's tutor or curator. While it would not always be clear from the register that the mother was unmarried, her status could be demonstrated to those who doubted the father's tutory or curatory; and if either her status or the man's paternity was challenged[2] application could be made to the court for a declarator.

4.13. Another scheme would be to entitle the mother of an illegitimate child to enter into an enforceable agreement with the father, in terms of which she shared tutory and curatory of the child with him. Such a scheme would have to be

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[1]We return to this important question, in another context, at para. 11.12 below.

[2]In terms of Proposition 2 above a man registered as father would be presumed to be the father where the mother is unmarried.

confined to unmarried mothers for the husband of a married woman is presumed to be her child's father and hence tutor and curator until the presumption is rebutted. A mother who had been removed from the tutory or curatory or her child would not be entitled to enter into an agreement. There are attractions in this approach. Only fathers showing an interest in and a degree of commitment to the child would enter into agreements. There would be no need for court proceedings and no interference with the registration of births. It would be possible for the agreement to be terminated, suspended or varied by a further agreement or on the occurrence of events specified in the original agreement. There are also, however, objections to this approach. First, the procedure might be open to abuse: there would be no safeguards for the child's welfare or the management of his estate. Secondly, it would be impossible to ensure that only unmarried mothers entered into such agreements, and that the man asserting joint tutory and curatory was the child's father. In consequence third parties would never be certain that the man named in the agreement was tutory or curator. Third, it can be argued that parental rights should not be alterable by private deed.[1]

4.14. In the preceding paragraphs we have put forward two schemes which would make the father of an illegitimate child his tutor and curator jointly with the mother by virtue of registration or agreement. We would welcome views on these, or suggestions for achieving the same result in other ways. <u>Views are invited on the desirability of enabling joint tutory and curatory to be conferred upon the father of an illegitimate child otherwise than by application to the court,</u>

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[1] See Clive "The Guardianship Act 1973" 1973 S.L.T. (News) 225 criticising s.10(2) of the Act which permits separated parents of a legitimate child to enter into enforceable agreements regarding parental rights.

whether by virtue of joint registration of the child's birth or by agreement between the parents or otherwise.
(Proposition 14).

Appointment of testamentary guardians

4.15. We turn to the question whether the father of an illegitimate child should have a right of appointing testamentary tutors and curators to his child. The present law, which precludes the father of an illegitimate child from making such an appointment, seems unjustifiable, particularly where the mother and father have lived and brought up the child together, or where the father has brought up the child himself after the mother's death. We would not, however, favour empowering every father, by virtue of his fatherhood of the child, to appoint testamentary tutors and curators. Such a power might be confined to those fathers who enjoyed a substantial relationship with their children during their lifetimes. A suitable test would seem to be whether the father, at the date of his death, was a tutor or curator of the child or was, by virtue of a court decree, entitled to the custody of the child.[1] Tutory, curatory or custody by virtue of a court decree are easily verifiable facts, thus minimising the likelihood of litigation to establish the validity of a deceased father's appointment. We propose, therefore, that an appointment of testamentary tutors or curators to an illegitimate child by the father of the child should be valid if the father, at the date of his death, had custody of the child by virtue of a court decree or was the child's tutor or curator.
(Proposition 15).

Consequential matters

4.16. If the parents of an illegitimate child can become, at least in certain circumstances, his tutors and curators a

[1]We deal with custody in Part V below.

number of consequential matters need to be resolved. These are:-

(a) the nature of the tutory and curatory

(b) the legal position of the surviving parent

(c) resolution of disputes

(d) removal of either parent as tutor or curator, and

(e) which courts should have jurisdiction.

We consider these questions below. Our general view is that the rules applying to legitimate children whose parents are joint tutors and curators should also apply to illegitimate children in the same position

4.17. Nature of guardianship over illegitimate children. We take it as axiomatic that the tutory or curatory of the parents of an illegitimate child would, if it existed, be the same as in the case of a legitimate child. This would mean, among other things, that where both were tutors and curators their rights and authority would be equal and would be exercisable by either without the other.[1] We mention this point for the sake of clarification but do not consider it necessary to embody it in a formal proposition.

4.18. Position of surviving parent. The father of an illegitimate child will, under our proposals, become a joint tutor or curator of the child only where he has shown at least some interest in the child. This being so, we think it appropriate that on the death of the mother he should become the child's sole tutor or curator subject to any appointment of testamentary tutors or curators by the mother[2] or of tutors or curators by the court to act along with him. On the death of the father, the mother would continue to be

[1] Guardianship Act 1973, s.10(1).

[2] See para. 4.5 above and para. 4.20 below.

the child's tutor or curator but would act alone unless the father had appointed testamentary tutors or curators[1] or the court appointed tutors or curators to act with her. The position of parents who are joint tutors and curators of an illegitimate child in relation to tutory or curatory by the surviving parent would therefore be the same as the position of parents of a legitimate child.[2]

4.19. Where the father of an illegitimate child is not a tutor or curator during the mother's lifetime, the child will be without a tutor or curator after her death unless she appointed testamentary tutors or curators. An application to the court would be necessary if a tutor or curator was desir d or became necessary. In order to reduce the need for su h applications we suggest that a father who has custody of the child by virtue of a court decree should become tutor or curator even where he was not a tutor or curator whilst the mother was alive.[3]

4.20. We therefore propose:-

Where the parents of an illegitimate child were his joint tutors or curators immediately before the death of one of them, the surviving parent should become the child's tutor or curator solely or jointly with any tutors or curators appointed by the deceased parent.
(Proposition 16).

The father of an illegitimate child should on the mother's death become the child's tutor or curator, either solely or jointly with any testamentary tutors or curators appointed by the mother, if he was immediately before her death

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[1]See para. 4.15 above.

[2]Guardianship Act 1973, s.10; Guardianship of Infants Act 1925, s.4.

[3]We suggest a similar test in relation to a father's power of appointing a testamentary tutor or curator in para. 4.15 above. Factual custody (i.e. custody without a court decree) and any tutory or curatory resulting from this would be difficult to demonstrate to third parties.

entitled to the custody of the child (either solely or jointly with any other person) by virtue of a court decree. (Proposition 17).

The court should have power to appoint a tutor or curator to act jointly with a surviving parent who becomes sole tutor or curator in the circumstances described in Proposition 16 or 17.
(Proposition 18).

4.21. Where either parent has appointed testamentary tutors or curators the question arises whether the surviving parent (if a tutor or curator)[1] should have the right to object to acting jointly with such tutors or curators. In the case of legitimate children, section 5 of the Guardianship of Infants Act 1925 provides that a testamentary tutor acts jointly with the surviving parent unless the surviving parent objects. The court has power on application by the testamentary tutor to allow the surviving parent to be the sole tutor, to order the testamentary tutor and the surviving parent to be joint tutors or to order that the testamentary tutor shall be the sole tutor. The Tutors and Curators Act 1696 empowers the Court of Session to remove a testamentary curator and the Court also has power at common law to remove a parent as curator.[2] In our opinion, provisions along these lines would provide a satisfactory solution in the case of illegitimate children. We therefore propose that where the surviving parent of an illegitimate child is a tutor or curator, he or she should have the same right to

[1] If the surviving father is not tutor or curator his remedy is to apply for appointment as such. If he objects to acting with the testamentary tutor or curator he could, in addition, apply for the removal of the latter. See paras. 4.24 to 4.27 below.

[2] Harvey v. Harvey (1860) 22D.1198; Robertson (1865) 3M.1077 per Lord Justice-Clerk Inglis at p.1079; Fraser, Parent and Child, (3rd ed.) p.90.

object to acting jointly with a testamentary tutor or curator appointed by the other parent as has the surviving parent of a legitimate child.
(Proposition 19).

4.22. There is one other consequential matter which we would mention in relation to the position of the surviving parent. Section 4(2A) of the Guardianship of Infants Act 1925,[1] as it applies to Scotland, provides that

> "Where [a pupil] has no parent, no [tutor] and no other person having parental rights with respect to him, the Court, on the application of any person, may if it thinks fit appoint the applicant to be the [tutor] of the [pupil]".

It is not entirely clear whether this provision would apply to an illegitimate child. Its terms are applicable to any pupil child but there is authority to the effect that the Guardianship of Infants Acts do not apply to illegitimate children.[2] While the terms of section 4(2A) are open to criticism, on the ground *inter alia* that the reference to "parental rights" is possibly unsuitable in this context, it is a useful provision and does not seem to have given rise to practical difficulties. This is not the place to reform the law on the guardianship of legitimate children. We suggest therefore that it should be made clear that section 4(2A) of the Guardianship of Infants Act 1925 (which enables the court to appoint a tutor to any child having no parent, tutor or other person having parental rights) applies to illegitimate children. The mother of an illegitimate child should, but the father should not, be regarded as a "parent" for this purpose. (Proposition 20). The effect of this proposition would be that on the death of the mother

[1] Added by the Children Act 1948, s.50. The section has to be read, in its application to Scotland, along with s.11 of the 1925 Act and s.8 of the Guardianship of Infants Act 1886.

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

of an illegitimate child a third party could apply for appointment as a tutor if, but only if, neither the father nor anyone else was already tutor or already had parental rights. This, of course, would be without prejudice to the father's right to apply for appointment as tutor.

4.23. Resolution of disputes. Disputes relating to the upbringing of the child or the management of his property may arise between the mother and the father as joint tutors or curators of an illegitimate child or between one of them, as surviving tutor or curator, and a testamentary tutor or curator. We think that there should be no rule that the views of one party will automatically prevail; rather the dispute should be referred to the courts for resolution. Provisions to this effect apply to the parents of legitimate children.[1] We therefore propose that where a dispute relating to the welfare of the child arises between joint tutors and curators of an illegitimate child the court should have power, on application by either party, to make such order regarding the matters in dispute as it thinks proper.
(Proposition 21).

4.24. Removal of guardians. We have proposed earlier that the mother of an illegitimate child should, by operation of law, be the child's tutor and curator, and that in certain circumstances the father may act jointly with her. Provision must therefore be made to deal with the exceptional cases where the welfare of the child demands the removal of either parent as tutor or curator.

[1] Guardianship of Infants Act 1925, s.6 (tutors only); Guardianship Act 1973, s.10(3) (parents only).

4.25. The courts' powers to remove tutors or curators of legitimate children are based partly on common law and partly on statute. The Court of Session may remove tutors-dative or curators-dative,[1] or a testamentary tutor or curator appointed by a deceased parent,[2] and may remove the mother as tutor of her child.[3] Both the Court of Session and the sheriff courts have power to remove a surviving parent as tutor where a testamentary tutor has also been appointed and either the parent or the testamentary tutor objects to the joint office.[4] Resort to the common law powers of the Court of Session is necessary where the father[5] or the tutor-in-law[6] is to be removed as tutor or curator or where the mother is to be removed as curator. Illegitimate children can have tutors or curators only by an order of the Court of Session and these may be removed on application to the court. In addition to these powers of the civil courts, a criminal court finding a parent guilty of certain sexual offences in relation to a girl under 16 can divest the

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[1]Tutors and Curators Act 1672, which applies where the tutor or curator fails to make up eiks to the inventory of the estate under his charge.

[2]Tutors and Curators Act 1696; <u>Malcolm</u> v. <u>Webster</u> 1840 16 F.C. 65; Guardianship of Infants Act 1886, s.6 (tutors only).

[3]Guardianship of Infants Act 1886, s.6 as read with s.8.

[4]Guardianship of Infants Act 1925, s.5 as read with the Guardianship of Infants Act 1886, s.9.

[5]<u>Baillie</u> v. <u>Agnew</u> (1775) 5 Brown's Supplement 526; <u>Harvey</u> v. <u>Harvey</u> (1860) 22D.1198; Robertson (1865) 3M.1077 per Lord Justice-Clerk Inglis at p.1079 "Cases may occur and, such have occured, in which we have found it necessary to sever all connections between the parent and child"; removal of father as administrator of the child's property only <u>Johnstone</u> v. <u>Wilson</u> (1822) 1S.558; <u>Glassford Petitioner</u> (1849) 11D.1030; Robertson (1865) 3M.1077; <u>McNab</u> v. <u>McNab</u> (1871) 10M.248; Allan (1895) 3 S.L.T. 87.

[6]<u>Munnock Petitioner</u> (1837) 15S.1267.

parent of all authority over the girl,[1] and local authorities have powers to assume parental rights, on specified grounds, in relation to children in their care.[2]

4.26. Comparative law

England and Wales

Section 6 of the Guardianship of Minors Act 1971 empowers the High Court to remove a testamentary guardian or a guardian appointed or acting under the Act, while section 4 empowers any court to remove a surviving parent from guardianship where the surviving parent is a guardian jointly with a testamentary guardian, and the parent objects to acting jointly or the testamentary guardian considers that the surviving parent is unfit to have custody of the child. There is no statutory power to deprive one parent of guardianship while both are alive, but such an order may be made at common law.[3]

New Zealand

Section 10 of the Guardianship Act 1968 provides that the court may, on application, deprive a parent of the guardianship of his child or remove from his office any testamentary guardian or any guardian appointed by the court. However, a parent is only to be deprived of guardianship where the court is satisfied that the parent is for some grave reason unfit to be guardian or is unwilling to exercise his responsibilities as guardian.

West Germany

The parents of a legitimate child have joint parental rights, while the mother alone has such rights over her illegitimate child. The Guardianship Court may take appropriate steps to deal with parents who jeopardize the welfare of the child, abuse their rights to care for the child or jeopardize his property.[4] The Guardianship Court is empowered to discharge a parent from the administration of the child's property if he becomes bankrupt or fails to comply with any order of the court designed to end the jeopardy of the child's property.[5]

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[1] Sexual Offences (Scotland) Act 1976, s.11(4).

[2] Social Work (Scotland) Act 1968, s.16 as re-enacted with amendments by Children Act 1975 s.74.

[3] Wellesley v. Wellesley (1828) 2 Bligh N.S. 124, H.L.

[4] BGB Arts. 1666 and 1667.

[5] BGB Arts. 1669 and 1670.

A parent who is convicted of a serious crime against his child forfeits parental authority.[1] Where the Guardianship Court terminates a parent's authority it may order the other parent to have sole authority (not where illegitimate children are concerned) or it may appoint a guardian or curator to the child.[2]

4.27. In our view there should be a single statutory provision empowering the court to remove any tutor or curator of an illegitimate child whether such tutor or curator is a parent, a testamentary tutor or curator, or a tutor or curator appointed by a previous court order.[3] The court would no doubt be slow to exercise such a power especially where a parent was being deprived of the tutory or curatory of his child. We do not consider that such orders should be final. Where there is a change of circumstances which justifies reinstating any parent or testamentary tutor or curator the court should have power on application to recall the order removing them. We propose that <u>the court should, on application, have power to make an order removing a person as tutor or curator to an illegitimate child and to recall such an order</u>. (Proposition 22).

4.28. <u>Which court should have jurisdiction</u>? The sheriff court has no common law powers to deal with the tutory or curatory of children. However, it has statutory powers to appoint a tutor to act with the surviving parent of a legitimate child,[4] to appoint a tutor to an orphan pupil

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[1] BGB Art. 1676.

[2] BGB Art. 1678.

[3] There is a need for a similar rationalisation in the case of legitimate children but that is beyond the scope of this Memorandum. We intend to examine the law of guardianship generally in the context of our work on the law of minors and pupils.

[4] Guardianship of Infants Act 1925, s.4(1) and (2).

or a pupil who is without tutors,[1] and to remove the testamentary tutor or surviving parent as tutor to a legitimate child where either the testamentary tutor or the surviving parent objects to the other acting jointly.[2] The sheriff court also has power to appoint and recall the appointment of a factor <u>loco tutoris</u> or a <u>curator bonis</u> to a child.[3] All other powers in connection with the tutory or curatory of children are exercised by the Court of Session exclusively.

4.29. We think it desirable that any power of appointment of tutors and curators to illegitimate children[4] should be capable of being exercised by the sheriff courts as well as by the Court of Session. The sheriff courts, being spread throughout Scotland, are more accessible to, and less expensive for, litigants than the Court of Session. Fathers who seek tutory or curatory of their illegitimate children should have no unnecessary obstacles placed in their way. The sheriff courts, at present, have jurisdiction to deal with the custody of, and access to, illegitimate children,[5] so that it would be appropriate for the sheriff courts to be able to deal with the question of the child's tutory or curatory at the same time.

4.30. The resolution of disputes between joint tutors and curators and the removal of a person as tutor or curator to

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[1]Guardianship of Infants Act 1925, s.4(2A), added by Children Act 1948, s.50.

[2]Guardianship of Infants Act 1925, s.5, as read with Guardianship of Infants Act 1886, s.9. Dobie, <u>Sheriff Court Practice</u>, p. 583 expresses the view that the sheriff has no power to remove tutors.

[3]Judicial Factors (Scotland) Act 1880, as amended by Law Reform (Miscellaneous Provisions)(Scotland) Act 1980, s.14.

[4]See para. 4.10 and Proposition 12 above.

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

an illegitimate child should also, we think, be competent in either the Court of Session or the sheriff courts. In the case of legitimate children, disputes between the parents as tutors or curators can already be dealt with in the sheriff courts[1] and, as we have seen, the sheriff courts already have certain powers to remove a surviving parent as tutor.[2]

4.31. In order that a particular application can be directed to a suitable sheriff court, appropriate jurisdictional tests, such as, perhaps, the habitual residence of the child, will have to be adopted.

4.32. We therefore propose that <u>the powers referred to in Propositions 12, 18, 20, 21 and 22 above (appointment and removal of tutors and curators to illegitimate children and resolution of disputes between joint tutors or curators) should be exercisable by the Court of Session or by the sheriff courts</u>.
(Proposition 23).

[1]Guardianship Act 1973, s.10(3).
[2]See para. 4.28 above.

PART V

CUSTODY AND ACCESS

Introduction

5.1. At common law the father had no right to the custody of his illegitimate child.[1] The mother had a near absolute right,[2] subject only to control by the Court of Session.[3] Only a very strong case could overcome the rights of the mother.[4] The father had no title to bring an action for custody of the child, although in exceptional cases he could apply to the court for the protection of the child.[5] The father might when the child reached a certain age, usually 7, offer to bring the child up himself. This did not give the father an enforceable right to the custody of the child; the result of a refusal by the mother to hand over the child was that she forfeited any future right to aliment in money from the father.[6] On the death of the mother, her relatives had no better claim to the custody of the child than that of the father.[7]

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[1] Corrie v. Adair (1860) 22D.897 at p. 900.

[2] Where a father left a substantial inheritance to his illegitimate child, the father's trustees sometimes obtained custody of the child in order to educate him in accordance with his future station in life. Fraser, Parent and Child (3rd. ed.) p. 162. Fairweather v. Lyall (1826) 4S.614 (where the father was allowed to take his child away from the mother because she had married another man and had a family by him) is an isolated case against the general rule.

[3] Acting under common law or the Custody of Children Act 1891.

[4] Macpherson v. Leishman (1887) 14R.780 (delivery to mother ordered); Sutherland v. Taylor (1887) 15R.224 (delivery to mother refused); Campbell v. Croall (1895) 22R.869 (delivery to mother refused); Kerrigan v. Hall (1901) 4F.10 (delivery to mother ordered): Mitchell v. Wright (1905) 7F.568 (delivery to mother refused); Walter v. Culbertson, 1921 S.C. 490 (delivery to mother ordered).

[5] Fraser, Parent and Child, (3rd. ed.) p. 161.

[6] Moncrieff v. Langlands (1900) 2F.1111. S.2(2) of the Illegitimate Children (Scotland) Act 1930 provides that refusal of an offer by the father shall not terminate the father's liability.

[7] Wilson v. Taylor (1865) 3M.1060.

5.2. The common law outlined above has been extensively altered by legislation passed in the course of this century. A major change in the mother's right of custody was made by the Illegitimate Children (Scotland) Act 1930. Section 2(1) provides:-

> "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.[1]

5.3. The effect of section 2(1) of the 1930 Act is that the mother retains a prima facie right to the custody of the child,[2] but in the event of any dispute the court will decide the question of custody by reference primarily to the welfare of the child. Only if this consideration and the conduct and the wishes of both parents fail to decide the issue of the custody of the child will the mother be preferred.[3] The father does not have a right to the custody of the child; he is merely entitled to apply to the court for an order awarding custody to him.[4] It will be noted that section 2(1) enables either parent to apply for access to the child.

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

[2] A. v. B., 1955 S.C. 379, per Lord Sorn at p. 390; McCormack v. McCormack, 1963 S.L.T. (Notes) 3.

[3] Duguid v. McBrinn, 1954 S.C. 105.

[4] A. v. B., 1955 S.C. 379; see AB v. CD, 1962 S.L.T. (Sh.Ct.) 16 for a case where the father was awarded custody and the mother interdicted from interfering with the child.

Criterion to be applied

5.4. 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 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] At first it was generally thought that the 1925 Act applied only to disputes between the parents of legitimate children but in J. v. C.[4] the House of Lords held that it was quite general in scope. We are not concerned in this Memorandum with the criterion applying to custody disputes affecting legitimate children. If we were, we might wish to consider whether the "first and paramount" formula is really the best formula which could be devised. Given, however, that that formula exists for legitimate children and that it is well-established and familiar to courts and practitioners, 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 will make any difference in the substance of the law, we therefore propose that:- in any proceedings

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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.

[3]Duguid v. McBrinn, 1954 S.C. 105; A. v. B. 1955 S.C. 379 per Lord President Clyde at p. 384.

[4][1970] A.C. 668. This case was concerned with a dispute between the English foster parents and the Spanish parents of a legitimate child.

before any court in which the custody or upbringing of, or access to, an illegitimate child is in question the court should be required to regard the welfare of the child as the first and paramount consideration.
(Proposition 24).

Right to apply to court.

5.5. The right of either parent 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 the right should be available and our provisional conclusion is therefore that it should continue. If the parents were cohabiting they would probably wish, at least in the usual case, to have joint custody; so that their position would be the same as that of the parents of a legitimate child.[1]

Custody by operation of law?

5.6. 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 any 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. It may be, therefore, that there is no need to confer custody rights on the father by operation of law. We would however welcome views on this question. The possibilities would include those discussed above in relation to guardianship - custody rights by virtue of cohabitation,[2] or by virtue of the entry of the father's

[1]Guardianship Act 1973, s.10(1).
[2]Para. 4.11.

name in the Register of Births,[1] or by virtue of an agreement between the parents.[2] Views are invited on the question whether there are any circumstances in which custody rights should be conferred on the fathers of illegitimate children by operation of law without the need for any application to a court.
(Proposition 25).

[1]Para. 4.12.
[2]Para. 4.13.

PART VI

OTHER PARENTAL RIGHTS

Introduction

6.1. The concept of parental rights is not an easy one.[1] There is doubt about what exactly is covered and there is room for debate about whether many of the so-called "rights" are really rights in the strict sense of the word.[2] Many of them are closely linked with, or qualified by, related duties. Matters which are commonly discussed under this heading include (in addition to guardianship, custody and access):- education and religious upbringing; reasonable chastisement; 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. Parts IV and V of this Memorandum deal with tutory, curatory, custody and access. In this Part the term parental rights is used to mean the parental rights possessed by the parents of a legitimate child other than tutory, curatory, custody and access. Although agreement to adoption may be regarded as a parental right we deal with this separately (in Part VII) in view of the importance of adoption proceedings in terminating the relationship between the child and his natural parents. Before we can discuss proposals for reform in relation to parental rights it is necessary to state briefly the existing law.

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[1]There has been a good deal of discussion of this question in English books and periodicals. See e.g. Bromley, Family Law (6th ed. 1981) pp. 276 to 319; Hall, "The Waning of Parental Rights" 1972 B.J.C.L. 248; Eekelaar, "What are Parental Rights" 89 L.Q.R. (1973) 210; Freeman, "What rights and duties do parents have?" 144 J.P. (1980) 380; Maidment, "The Fragmentation of Parental Rights" 40 C.L.J. (1981) 135; Dickens, "The Modern Function and Limits of Parental Rights" 97 L.Q.R. (1981) 462.

[2]See Eekelaar, loc. cit.

Present law

6.2. Education and religious upbringing. At common law the father of a legitimate child has a recognised right to direct his education and religious upbringing.[1] On the father's death the tutors of a legitimate pupil child had this right.[2] By virtue of the Guardianship Act 1973[3] the mother's rights are now equal to the father's, either being able to act without the other. The position in relation to an illegitimate child is not clear at common law but in practice the mother, who has a right to custody[4] (but not tutory or curatory),[5] is recognised as having the right to control the child's education and religious upbringing. The Education (Scotland) Act 1980 (which consolidates earlier legislation) imposes a statutory duty on parents to provide an education for their children of school age[6] and recognises for its purposes a "general principle" that, so far as is compatible with the provision of suitable instruction and training and the avoidance of unreasonable public expenditure, children are to be educated in accordance with the wishes of their parents.[7] It also recognises that parents may elect that their children should not take part in religious observances or receive religious instruction in schools governed by the Act.[8] The Act defines "parent" for its purposes as including "guardian and any person who is liable to maintain or has the actual custody of

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[1]Fraser, Parent and Child, (3rd. ed.) p. 74.

[2]Borthwick v. Dundas (1845) 8D.318.

[3]S.10(1).

[4]See paras. 5.1 to 5.3 above.

[5]See para. 4.1 above.

[6]S.30.

[7]S.28. See also s.28A (duty of education authority to comply with parents' requests as to schools), inserted by Education (Scotland) Act 1981

[8]S.8. See also ss.9 and 10.

a child or young person".[1] As both parents of an illegitimate child are liable to maintain the child it follows that the Act in effect draws no distinction between legitimate and illegitimate children for its purposes.

6.3. Reasonable chastisement. A parent will not be guilty of assault merely because he administers reasonable chastisement to his child.[2] It seems, however, that this is not strictly a parental right so much as a right of anyone having lawful charge or control of the child.[3] This appears to be recognised by section 12(7) of the Children and Young Persons (Scotland) Act 1937 which deals with cruelty to children under sixteen and which provides that:-

> "Nothing in this section shall be construed as affecting the right of any parent, teacher, or other person having the lawful control or charge of a child or young person to administer punishment to him."

6.4. Consent to medical or surgical treatment. In the case of a legitimate pupil child the parents as tutors have a right to consent to, or withhold consent to, medical or surgical treatment of the child. The position with regard to children above the age of pupillarity is not clear. There is no statute on the matter and, on one view, the curator of the child (even if a parent) would have no control over the child's person. The legal position with regard to illegitimate children of any age is also unclear. We are informed that in practice the mother's consent would be accepted, as would the father's consent if he stated that he was the child's "parent or guardian".

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[1]S.135(1).

[2]Fraser, Parent and Child (3rd. ed.) p. 83.

[3]Gordon, Criminal Law (2nd. ed.) p. 827.

6.5. <u>Child care and assumption of parental rights by local authorities</u>. The Social Work (Scotland) Act 1968 confers certain rights and 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.[1] They are also entitled at any future date to apply to the sheriff for it to be set aside.[2] 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.[3]

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[1]Social Work (Scotland) Act 1968, ss.16(5) and 16(7).

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

[3]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".

6.6. 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.[1] A parent or guardian of the child is entitled to dispute the grounds of referral,[2] to appeal against the decision of the hearing,[3] and to require a review of the hearing's decision periodically.[4] "Parent" and "guardian" for these purposes have the meanings set out in the preceding paragraph.[5] 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.[6] 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.[7]

Assessment of present law

6.7. It will be seen from the above account (which does not purport to deal with every statutory provision in which the

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[1]S.41.

[2]S.42.

[3]S.49.

[4]S.48.

[5]See note 3, page 78 above.

[6]S.88(1).

[7]S.88(3).

word "parent" is used) that for the purposes of certain so-called parental rights a factual test, such as having charge or control of the child, is used. Other statutory provisions use the term "parent" or "guardian" and may or may not define "guardian" so as to include the father of an illegitimate child who has been awarded custody. Some statutes assume that the mother of an illegitimate child is covered by the term "parent". It is not clear, however, to what extent the mother of an illegitimate child would be regarded as the child's legal parent in a case not covered by a statutory provision. The effect of our proposals on guardianship and custody would be to extend the range of cases in which the parents of an illegitimate child would be recognised as such for legal purposes. Where a statute referred to a child's guardian the mother of a pupil child would always be included unless she had been removed by a court decree[1] and the father would be if he had been appointed as tutor by a court or if he had become tutor in any other recognised way.[2] The position, however, would not be entirely satisfactory even if our earlier proposals were implemented. There would continue to be doubt about the legal position of the parent of an illegitimate child in various areas governed by the common law. There would be no provisions enabling the father of an illegitimate child to apply to a court for parental rights in general or for certain specific parental rights. There would be no provisions for resolving disputes relating to the exercise of parental rights where both parents had such rights. The court would have no power to divest the mother of some or all

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[1]Para. 4.27.

[2]Whether the curator of a minor child was included in the term "guardian" would depend on the statute in question. This is not always made clear, but this difficulty is not confined to illegitimate children and is beyond the scope of this Memorandum.

of her parental rights in cases where such action was necessary. And certain statutory provisions would continue to give inadequate recognition to the father of an illegitimate child.

Proposals for reform[1]

6.8. We suggest that it should be made clear by statute that, except as otherwise provided, the mother of an illegitimate child has to the exclusion of the father all the parental rights possessed by the mother of a legitimate child. (Proposition 26). This would put beyond doubt the mother's legal position in relation to such matters as education and consent to medical treatment. A provision to this effect has already been enacted for England and Wales.[2]

6.9. We also suggest for consideration that the father of an illegitimate child should be entitled to apply to the court for any of the parental rights possessed by the father of a legitimate child. (Proposition 27). In deciding whether to confer parental rights on the father the court would have regard to the welfare of the child[3] and any parental rights conferred would, unless the court ordered otherwise, be equal to, and without prejudice to, those of the mother. The main utility of this provision is that it would enable a father who did not wish to claim custody of his illegitimate child and who did not wish to be tutor or curator of the child but who did wish some limited right, such as the right to have a say in the child's education, to seek a decree

[1] In the Propositions in this Part "parental rights" means parental rights other than tutory, curatory, custody and access.

[2] The Children Act 1975 s.85(7) provides that:- "Except as otherwise provided by or under any enactment, while the mother of an illegitimate child is living she has the parental rights and duties exclusively". S.85(1) defines the parental rights and duties as "all the rights and duties which by law the mother and father have in relation to a legitimate child and his property".

[3] See para. 5.4 and Proposition 24 above.

limited to what he wished to obtain. The law would, we think, be open to criticism if it compelled a father to seek more than he wished. The provision would, however, also enable the father of an illegitimate child, who was playing a full paternal role in fact, to ensure that his rights were no less than those of the father of a legitimate child.[1]

6.10. The considerations applying to the automatic conferring of parental rights on certain fathers (e.g. those cohabiting with the mother, or those registered as father in the Register of Births at the joint request of both parents, or those who have entered into an agreement with the mother) are the same as in relation to tutory and curatory. We refer to our earlier discussion of this question[2] and we invite views on the question whether there are any circumstances in which, without the need to apply to a court, the father of an illegitimate child should have all the parental rights possessed by the father of a legitimate child. (Proposition 28)

6.11. In Part IV of this Memorandum we proposed[3] that the court should have power on application to make orders resolving disputes between the tutors or curators of an illegitimate child relating to the child's welfare, and that in extreme cases the court should have power to divest a parent of the tutory or curatory of the child. Similar powers would seem to be necessary in relation to parental rights other than those flowing from tutory, curatory or custody. We therefore propose:-

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[1] In relation to a minor child the rights of a parent are in some respects more extensive than those of a third party who is a curator. Compare Graham v. Graham (1780) Mor. 8934 with Harvey v. Harvey (1860) 22 D.1198.

[2] See paras. 4.11 to 4.14 above.

[3] Paras. 4.23 to 4.27 and Propositions 21 and 22.

Where the parents of an illegitimate child have parental rights jointly and a dispute arises between them relating to the exercise of those rights, the Court of Session or the sheriff courts should have power, on application by either parent, to make such order regarding the matter in dispute as it thinks proper.
(Proposition 29).

The Court of Session or the sheriff courts should, on application, have power to make an order divesting the mother or the father of an illegitimate child of any parental rights and to recall such an order.
(Proposition 30).

6.12. The definition of "guardian" in the Social Work (Scotland) Act 1968 includes not only the father of an illegitimate child who has been appointed "guardian" but also a father (or other person) who has for the time being the charge of or control over the child. A father who had been awarded custody would come within this definition if he had charge of the child. However, the father might have custody (whether or not jointly with the mother) while the mother might have the actual charge of the child. In this situation it could be argued that the father, having neither charge of nor control over the child, could not be regarded as a "guardian" for the purposes of the Act. We express no views on the merits of this argument but suggest that for the removal of doubt 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 jointly with any other person. (Proposition 31). If the father were, in certain circumstances, to be the tutor or curator of the child by operation of the law the reference to "a person appointed... to be the guardian" would have to be changed.

PART VII

ADOPTION

Introduction

7.1. In this part of the Memorandum we examine the legal position of the father of an illegitimate child in relation to adoption proceedings involving his child. We discuss two issues: first, in what circumstances the father's agreement to the making of an adoption order should be necessary, and secondly, whether the father should in general be notified of adoption proceedings and have the right to make representations to the court hearing the adoption petition.

Agreement of the father

7.2. Present law. Section 12(1)(b) of the Children Act 1975 provides that an adoption order shall not be made unless each parent or guardian of the child agrees to the making of the order or such agreement is dispensed with by the court making the order. "Parent" is not defined, but it is universally assumed that it includes the mother of an illegitimate child. It has been held that the father of an illegitimate child is not a parent for this purpose.[1] However, if he has been awarded custody of the child he falls within the definition of guardian[2] so that his agreement is required unless dispensed with. A father who has not been awarded custody at

[1] A. v. B., 1955 S.C. 378. In some sheriff courts, however, the agreement of the father is required if he is named as father in the Register of Births or if his paternity is admitted or established.

[2] Adoption Act 1958, s.57(1) as amended by Children Act 1975, Sch. 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.

the date of commencement of the adoption proceedings can apply for custody subsequently. The adoption proceedings are sisted until the custody application is decided.[1]

7.3. Where either the mother or the father of a child applies to adopt the child, section 11(3) of the Children Act 1975 provides that the court shall not make an adoption order unless it is satisfied that the other natural parent is dead, cannot be found or there is some other reason justifying the exclusion of the other natural parent. It is thought that "natural parent" includes the father of an illegitimate child.[2]

7.4. Section 14 of the Children Act 1975 will, when brought into force, empower the court to declare a child free for adoption. Such an order can be made only if each parent or guardian of the child agrees or his agreement is dispensed with. In the case of an illegitimate child, the father is only a guardian if he has been awarded custody.[3] In order to protect a father who has not obtained an award of custody at the date when the freeing proceedings commence, the court must before making the freeing order be satisfied that he has no intention of applying for custody, or that if he did apply his application would be likely to be refused.[4]

7.5. Comparative law

England and Wales

The law in this area is the same as that of Scotland.

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[1] A. v. B. 1955 S.C. 378; A. v. N. 1973 S.L.T. (Sh.Ct.) 34.
[2] Cretney, Principles of Family Law, (3rd. ed.) p. 541.
[3] See p. 84 footnote 2.
[4] Children Act 1975, s.14(8).

New Zealand

Where an application for adoption of an illegitimate child is being considered the mother's consent to the making of the adoption order is necessary unless dispensed with. The consent of the child's father is necessary if he is a guardian (whether by virtue of cohabitation with the mother at the child's birth[1] or otherwise), and in any other case if in the opinion of the court it is expedient to require his consent.[2]

West Germany

The adoption of an illegitimate child requires the consent of his mother unless her whereabouts are unknown or she is permanently incapable of consenting.[3] Where the mother's conduct is such that she forfeits her right to consent the Guardianship Court can consent instead.[4] The Guardianship Court should hear the father of the child, preferably before the child is placed for adoption. This hearing may be dispensed with if it proves impossible to arrange or it would seriously delay the adoption or the Youth Welfare Office has heard the father and reported to the Court.[5]

7.6. Proposals for reform. We think it is at least arguable that the present law regarding agreement to adoption gives inadequate recognition to the father of an illegitimate child who has shown an interest in his child and has continuing contacts with him. Thus a father who looked after his child without having legal custody would find that his agreement to the adoption of his child was not required. Adoption cuts off any rights he has as father and it would seem wrong that this could be done without his agreement - unless, of course, there were grounds for dispensing with his agreement.

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[1] Guardianship Act 1968, s.6.

[2] Adoption Act 1955, s.7(3)(a) and (b) as substituted by Status of Children Act 1969, s.12(2).

[3] BGB Art. 1747(1).

[4] BGB Art. 1747(a).

[5] BGB Art. 1747(b).

7.7. In considering whether to free a child for adoption the court will, when this procedure comes into force, have to be satisfied that the father of an illegitimate child will not apply for custody or that if he did he would be likely to be refused. This appears to give greater recognition to the father than do the requirements for his agreement to an adoption order. It is, however, open to the objection that the court is required in freeing proceedings to speculate as to the likely result of a hypothetical application for custody. It might therefore be preferable to retain the existing rules for agreements to adoption and to continue to allow a father to apply for custody notwithstanding pending adoption proceedings; such applications may be seen as a means of safeguarding a non-custodier father's position.

7.8. We have previously considered whether the father of an illegitimate child should become the child's tutor, curator or custodier jointly with the mother where both parents jointly register the child's birth or where they sign a written agreement to this effect.[1] Were these schemes to be implemented the problem of the concerned and interested father might largely disappear for he would usually be a joint tutor, curator or custodier and his agreement to his child'd adoption would therefore be required unless dispensed with. Whether or not these schemes are implemented it is arguable that the agreement of the father should be required if he has parental rights[2] (excluding tutory, curatory or custody) at least in cases where these involve more than a very limited right of access. To elicit views on this difficult topic we invite views on the question:- <u>should the agreement of the father of an illegitimate child to the</u>

[1]Proposition 14 (paras. 4.12 to 4.14).

[2]See Proposition 27(para. 6.9).

adoption of his child be required (subject to the normal rules for dispensing with parental agreement) not only if he is the child's tutor or curator or has a legal right to the custody of the child(whether solely or jointly with any other person), but also if he has any other parental rights in relation to the child? (Proposition 32).

Notification to the father

7.9. Whether the father of an illegitimate child is notified of an adoption petition relating to his child depends upon the discretion of the court hearing the petition. The Act of Sederunt (Adoption of Children) 1959[1] obliges the curator ad litem to investigate whether there is any person other than those specified in paragraph 8 who in his opinion ought to be notified and to report accordingly. 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. In many courts the father is notified if his whereabouts are known and he is named as father in the Register of Births,

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[1]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).

[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 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 (Sch. 2, para. 10).

or his paternity is admitted or established; in others fathers are never notified; and in yet others the father is notified if the *curator ad litem's* report reveals that the father has links with the child. A person who is notified is entitled to be heard by the court.[1]

7.10. The Houghton Committee in recommending the introduction of freeing for adoption procedures[2] observed that the attitude of fathers of illegitimate children varies widely from those who have no interest in the child to those who have been living with the mother in a stable union and regard the child as just as much their responsibility as if he had been born in lawful wedlock. They thought that in view of the need to ensure that the freeing order would be an unchallengeable transfer of parental rights it was important that the father should be notified of the proceedings where he is known and can be found. They recommended that such fathers should be made respondents in applications for freeing orders and should have the right to make representations to the court, but that their agreement should not be required before an order could be made. There is, however, a difference between the freeing procedures under section 14 of the Children Act 1975 and normal adoption petitions. An application for an order declaring a child free for adoption is made by an adoption agency before the child is placed for adoption. An ordinary adoption petition is presented by the prospective adopters when they already have the child in their care. It may be thought that it would be less acceptable to expose adopters to the risk of a troublesome father than to expose an adoption agency to the same risk. The difficulty, as always, is to find a way of

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[1] Act of Sederunt (Adoption of Children)1959 as amended, Form C.

[2] Report of the Departmental Committee on the *Adoption of Children* (1972) Cmnd. 5107, paras. 192 to 197.

recognising the rights of the father who takes an interest in the child without causing unnecessary trouble and distress by extending too much recognition to other fathers. The present practice should, we think, be clarified and standardised, but we have come to no conclusion as to what the rules and practice on notification should be. Views are invited on the extent to which fathers of illegitimate children should be notified of adoption proceedings. (Proposition 33). We would particularly welcome the views on this question of those who are professionally involved in adoption proceedings.

PART VIII

SUCCESSION

Introduction

8.1. In this part of the Memorandum 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 suggest possible reforms.

Intestate succession

8.2. 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 *filius nullius* and thus had neither parents nor collaterals from whom he could inherit on intestacy.

8.3. 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

[1] IV.12.1.
[2] I.2.4.
[3] III.10.8.

had to succeed to her parents or other relatives had she survived.[1] The Succession (Scotland) Act 1964 merely re-enacted this provision.[2]

8.4. 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.[3] These recommendations were accepted and implemented for Scotland by the Law Reform (Miscellaneous Provisions)(Scotland) Act 1968.[4]

8.5. Many differences, however, remain between illegitimate and legitimate persons in the field of succession. While an illegitimate child[5] 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.[6] A person has no rights in the intestate estate of his brothers or sisters, uncles or aunts, grandparents or remoter relatives where he is illegitimate or where there is any illegitimacy involved in the

[1] Tait and Others Petitioners, 1946 S.L.T. (Sh.Ct.)2.

[2] S.4.

[3] Report of the Committee on The Law of Succession in Relation to Illegitimate Persons (1966) Cmnd. 3051, paras. 29 to 55.

[4] Ss. 1 and 2.

[5] 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, Sch. 1.

[6] Succession (Scotland) Act 1964, ss.10A and 11(1) respectively inserted and amended by Law Reform (Miscellaneous Provisions) (Scotland) Act 1968, s.2 and Sch. 1.

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.

8.6. 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, 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.

8.7. <u>Comparative law</u>

<u>England and Wales</u>

The position of an illegitimate child is virtually identical to that in Scotland. Section 14(1) of the Family Law Reform Act 1969 provides that where either parent of an illegitimate child dies leaving intestate estate, the child or his issue will be entitled to take the same interest as if the child had been born legitimate. Issue does not include illegitimate descendants. Conversely section 14(2) provides that where an illegitimate child dies leaving intestate estate each of his parents is entitled to take the same interest as if the child had been born legitimate. An illegitimate child is presumed by section 14(4) not to be survived by his father unless the contrary is shown. Apart from these provisions the common law rule, that an illegitimate relationship is no relationship at all, applies.

An illegitimate child may apply, under the Inheritance (Provision for Family and Dependants) Act 1975 for provision out of the estate of either of his deceased parents if the deceased's will or the law relating to intestacy does not make such financial provision as is reasonable in all the circumstances of the case for the child to receive for his maintenance.[3]

<u>New Zealand</u>

Section 3(1) of the Status of Children Act 1969 appears to place illegitimate children on the same footing as legitimate

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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] Ss. 1 and 25(1).

children for the purposes of succession. It provides that the relationship between every person and his father and mother shall be determined irrespective of whether the father and mother are or have been married to each other, and all other relationships are to be determined accordingly. However the relationship of father and child is recognised for the purposes of succession or any claim under the Family Protection Act 1955[1] only if (a) paternity has been admitted (expressly or by implication) by, or established against, the father in his lifetime and, if the father seeks to benefit, before the death of the child, or (b) paternity has been established by a declaration of paternity made after the death of the father or, as the case may be, the child.[2]

West Germany

As regards the mother and her relatives an illegitimate child is treated as if he were legitimate for the purposes of intestate succession or claiming the compulsory portion (Pflichtteil). Where the father and his relatives are concerned, if the father leaves legitimate issue, the illegitimate child's claim is for a substitute inheritance portion (Erbersatzanspruch) either on intestacy or if a will is left that gives less than this portion.[3] The substitute inheritance portion amounts to half what the child would have been entitled to on intestacy were he legitimate. If the father leaves neither legitimate issue nor a spouse his illegitimate child inherits his whole estate. The father (and his descendants) and the mother (and her legitimate descendants) have similar claims for a substitute inheritance portion from the estate of their illegitimate child.[4]

An illegitimate child's claim for a substitute inheritance portion is only competent if the child had been recognised or his paternity legally declared before his father's death. There are two exceptions to this rule; (1) if the death occurred while a paternity action was pending; and (2) if the child was less than 6 months old at the date of death and an application for determination of paternity is made within 6 months.[5]

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[1] Re N deceased, [1976]2 N.Z.L.R. 404.

[2] Status of Children Act 1969, s.7(1), as amended by Status of Children Amendment Act 1978 s.3.

[3] BGB Art. 1934a(1).

[4] BGB Art. 1934a(2).

[5] BGB Art. 1934c(1).

Any claim for a substitute inheritance portion prescribes after 3 years from the date when the claimant gets to know of the death or 30 years after the date of death whichever is the earlier.[1]

An illegitimate child between 21 and 27 years old is entitled to demand an advance settlement of his substitute inheritance portion from his father. The amount is generally three times the annual maintenance payable by the father.[2]

8.8. Defects of the present law. The present law is open to many 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.[3] 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.

8.9. It is true that these effects can sometimes be avoided if the child is adopted, but that is not always possible or desirable[4] and, in any event, is not something over which the child has any control. It is also true that the child's

[1]BGB Art. 1934b(2).

[2]BGB Art. 1934d(1) and (2).

[3]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.

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

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.

8.10. *Proposals for reform*. The consequences of the present law could be mitigated if the courts were empowered, on application, to make awards out of intestate estates to persons not entitled to participate by reason only of their illegitimate relationship with the deceased. However, such a proposal involves a radical change in the nature of succession rights from entitlement based on statutory rules to awards based on the discretionary powers of courts. The present Memorandum is an inappropriate place to examine such a far-reaching proposal. The role, if any, of a discretionary element in the law of succession is a question best left until the law of succession as a whole is reviewed.

8.11. Another solution would be to treat a mother-illegitimate child relationship for the purposes of succession as if it were a legitimate relationship.[1] Such a change would entitle an illegitimate child in appropriate circumstances to inherit from his mother's other children and her relatives,

[1] In putting forward this scheme we do not envisage that the rights of an illegitimate child to his father's estate and *vice versa* should cease to be recognised. This would reverse the changes introduced comparatively recently by the Law Reform (Miscellaneous Provisions)(Scotland) Act 1968.

particularly her parents. It would recognise the close links that often exist between an illegitimate child and his maternal relatives, and it would result in the elimination of most of the harsh cases arising under the present law. Because there is usually no difficulty in establishing claims based on maternity, the scheme would not result in increased litigation or delay in winding up estates. On the other hand, it would be anomalous to treat the relationship between a mother and her illegitimate child as if it were legitimate, and yet deny a similar effect to a father-child relationship where paternity had been admitted or legally established and the father or his relatives had maintained close personal links with the child.

8.12. A third solution would be to extend the proposal in the preceding paragraph to fathers, so treating any relationship, for succession purposes, as if it were legitimate. This was considered and rejected by the Russell Committee. In paragraph 32 of their report they state:-

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

We do not find these arguments particularly convincing. Legitimate persons are also liable to succeed on intestacy to their grandparents' or brothers' estates against the deceased's wishes. A man may be unaware of the existence of a legitimate or adopted child of his daughter. While we would not quarrel with the proposition that the rules of intestate succession should correspond with the probable

testamentary intentions of most people, insofar as they are compatible with public policy and justice, the current intentions of people in Scotland must remain a matter for conjecture in the absence of any survey, and there does seem to be a question of public policy and justice involved here.

8.13. If the law on succession were to afford recognition to relationships, whether legitimate or illegitimate, many harsh cases would be avoided. The law would also be simplified. It is difficult to defend the current position on logical grounds. If it is accepted, as it is by the present law, that an illegitimate child is related in blood to his parents and is therefore entitled to succeed on their intestacy, then he ought to be allowed to succeed to remoter relatives for he is also related in blood to them. A change along the lines proposed would also eliminate the inconsistency of approach between intestate and testate succession. A grandfather who makes testamentary provisions in favour of his grandchildren will, in the absence of any express indication to the contrary, benefit legitimate and illegitimate grandchildren alike. However, should he die intestate, the present law excludes the claims of any illegitimate children of his children. Moreover the problems of succession rights of illegitimate persons cannot be considered solely in a Scottish context. Article 9 of the European Convention on the Legal Status of Children born out of Wedlock provides that:-

> "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."

In ratifying the Convention, the United Kingdom reserved the right to apply Article 9 only in relation to the estates of the father and mother of a child born out of wedlock. This reservation is valid for five years, the intention of the Convention being to allow "progressive stages" for States

unable to adopt immediately all its rules.[1] Our third solution, if implemented, would enable the United Kingdom to withdraw this reservation, or to allow it to expire without renewal, so far as Scots law is concerned.

8.14. In order to elicit comments we propose that <u>a relationship traced to, from, or through a person of illegitimate birth should, for the purposes of intestate succession and legitim, be treated as a legitimate relationship</u>. (Proposition 34).

8.15. We turn now to discuss whether there should be any restrictions imposed on the establishment of paternity in connection with claims to estates. Spurious posthumous claims can delay administration or lead to costly litigation at the expense of the estate. These claims may be very difficult for the executors or beneficiaries to refute, although if the relationship had been claimed in the deceased's lifetime, they might have been easily disposed of. Both New Zealand and West Germany[2] do not in general recognise any claim arising out of a father-illegitimate child relationship unless such relationship has been admitted or established in the lifetime of the father or the child. We do not favour the introduction of similar provisions in Scotland, as they could well result in the exclusion of otherwise well-founded claims. It should be left to the courts, who are accustomed to dealing with claims against estates of dead people, to decide whether a claimant has established the relationship on which his claim is founded.

8.16. A difficulty about proposals which extend the range of beneficiaries in intestacy or claimants for legitim

[1] Art. 14(2) and Preamble.

[2] For details see para. 8.7 above.

beyond the immediate family circle is that these will be much harder to trace, particularly where the relationship is illegitimate. The present law seeks to overcome this problem by protecting executors who distribute the estate in ignorance of any claims arising out of illegitimate relationships,[1] and by presuming that the father of an illegitimate child whose estate is being distributed has predeceased the child unless the contrary is shown.[2] The New Zealand legislation contains elaborate provisions relating to the enquiries an executor or trustee must make in order to escape personal liability from claims by illegitimate relatives emerging after distribution. Before letters of administration can be granted he must have made reasonable enquiries as to the existence of any illegitimate children of the deceased, and where the deceased was illegitimate also about the existence of his parents.[3] These enquiries must include looking through the deceased's papers and searching the register of declarations, orders and instruments of acknowledgement of paternity.[4] Reasonable enquiries as to the existence of illegitimate relatives must also be made before any distribution of the estate; in addition to those mentioned above, enquiry must also be made of the deceased's solicitor and at least one other person who the executor believes may have knowledge of the family.[5] Provided the executor has no notice of claims and makes reasonable enquiries he is not personally liable for wrongful distribution.[6] Where

[1] Law Reform (Miscellaneous Provisions)(Scotland) Act 1968, s.7.

[2] Succession (Scotland) Act 1964 s.4(3) as substituted by Law Reform (Miscellaneous Provisions)(Scotland) Act 1968, s.1.

[3] Status of Children Act 1969, s.5A as inserted by Status of Children Amendment Act 1978, s.2.

[4] Status of Children Act 1969, s.6 as amended by Status of Children Amendment Act 1978, s.2.

[5] Status of Children Act 1969, ss.6 and 6A as inserted by Status of Children Amendment Act 1978, s.2.

[6] Status of Children Act 1969, s.6B as inserted by Status of Children Amendment Act 1978, s.2.

the executor is aware of a claimant, he can serve a notice warning such a claimant that unless an application is made within 3 months to the Supreme Court for a declarator of the claimant's relationship to the deceased, the estate will be distributed without regard to his claim.[1]

8.17. We tend to think that such elaborate provisions are unnecessary. Executors as a matter of prudent administration make enquiries if the existence of illegitimate relatives is suspected, because beneficiaries who have to give up all or part of their share of the estate to successful claimants will be aggrieved if the executors had made no enquiries prior to distribution. We think, however, that if the law is changed as suggested in Proposition 34 the rules for the protection of executors and trustees would have to be extended.

8.18. The present law makes use of two techniques in this area - (a) an express protection of trustees and executors and (b) a presumption of non-survivorship. Section 7 of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1968 provides express protection for trustees and executors. 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

[1] Status of Children Act 1969, s.6C added by Status of Children Amendment Act 1978, s.2.

> 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."

It will be noted that section 7 does not provide protection to trustees or executors who have failed to ascertain that the father of a deceased illegitimate child exists. That situation is dealt with by means of a presumption of non-survivorship. Section 4(3) of the Succession (Scotland) Act 1964[2] 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."

8.19. The simplest way of adapting the existing law to the situation which would be created if Proposition 34 were accepted 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

[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.

(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. Our tentative preference is for an extension of section 7 of the 1968 Act. To use presumptions of non-survivorship in this context seems 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 South America and disappears and the case where the judicially declared father of an illegitimate child goes off to South America and disappears. The problem, as we see it, is not one of presumed death but one of protecting executors and trustees. We therefore propose 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. (Proposition 35).

Testate succession

8.20. 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 deciding 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."

[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) 16S.1.

[6] Burns' Trs. v. Burns, 1917 S.C. 117.

[7] Paras. 57 and 58.

[8] S.5.

[9] S.6; see para. 8.22 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]

8.21. 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

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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 Sept., 1964.

[5]Gloag and Henderson, Introduction to the Law of Scotland (8th. ed.), p.668.

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

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. We therefore suggest for consideration that 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).
(Proposition 36).

Miscellaneous matters

8.22. 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 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

[1]Farquharson v. Kelly (1900) 2F.863.
[2]Torrie v. Munsie (1832) 10S.597.

child could benefit from the *conditio si testator sine liberis decesserit*. 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, but invite comments from those who have experienced problems.

Entails

8.23. 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[1] 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.

8.24. 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.[2] 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."[3] Unless there is a

[1] Entail (Scotland) Act 1914.

[2] Legitimation (Scotland) Act 1968, ss.7 and 8; Law Reform (Miscellaneous Provisions)(Scotland) Act 1968, s.5(5)(b).

[3] S.37(1). See also the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968, s.5(5)(b).

strong demand for change we would tentatively favour continuing this policy. We therefore make no proposals for reform in this area.

PART IX

JUDICIAL PROCEEDINGS

Preliminary matters

9.1. In this part of the Memorandum we deal with judicial proceedings for the establishment of parentage, legitimacy or illegitimacy. One of the remedies available for this purpose is the so-called action of "declarator of bastardy". This term, although logically no more objectionable than the term "declarator of illegitimacy", nevertheless seems needlessly offensive given that "bastard" has become a term of abuse in ordinary language. Our first proposition in this part of the Memorandum is therefore that declarators of bastardy should be renamed declarators of illegitimacy. (Proposition 37). We envisage that, if found acceptable, this proposition would be implemented by amendment of section 33 of the Court of Session Act 1830 (which gave the Court of Session jurisdiction in actions of declarator of bastardy) and any other statutory references to such actions and by corresponding amendments to the Rules of Court. We shall use the term "declarator of illegitimacy" henceforth in this Memorandum.

9.2. Judicial decisions on questions of parentage or legitimacy may take various forms and may be made in various contexts. A decision may take the form of a declarator, made either in an action concluding for a declarator alone or in an action concluding for a declarator along with some other remedy. At a less formal level a decision may take the form of an express finding of fact in a Court of Session interlocutor or in findings annexed to a sheriff's final judgment. At a less formal level still, a decision on parentage or legitimacy may be merely part of the grounds for the court's decision on some other matter, without being stated as an express finding in fact.[1] In

[1] In the sheriff courts, but not in the Court of Session, the court's findings in fact must be set forth in the final judgment. Sheriff Courts (Scotland) Act 1907, Sch. 1, rule 82.

this part of the Memorandum our main concern is with declarators of legitimacy,[1] illegitimacy and parentage, whether made in an action for such a declarator alone or in an action concluding for such a declarator along with some other remedy. We shall consider whether such declarators should have a wider effect than an ordinary decree _in personam_ and whether the procedure for obtaining them should be governed by any special rules. We shall also consider the rather special position of a finding of paternity in an action of affiliation and aliment. Before we discuss these main issues, however, it is necessary to deal with some procedural doubts.

9.3. The first doubt is whether an action of declarator of legitimacy, illegitimacy or parentage is competent alone, without any conclusion for another remedy.[2] It seems, in fact, to be accepted that an action of declarator of legitimacy or illegitimacy alone is competent.[3] There appears to be no authority on the question in relation to declarator of parentage. We think that it is important that the law should provide a means of deciding questions of legitimacy or parentage, even if no other remedy is sought at the time. We suggest therefore that _for the removal of doubt it should be made clear that an action of declarator of legitimacy, illegitimacy or parentage alone is competent_. (Proposition 38).

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[1] We assume, for the purposes of this Memorandum, that a declarator of legitimation is merely a type of declarator of legitimacy.

[2] On the competency of a bare declarator generally, see Walker, _Civil Remedies_ pp.116 and 117.

[3] On declarators of legitimacy, see Maclaren, _Court of Session Practice_, p.751; Maxwell, _The Practice of the Court of Session_, p.426. Actions of declarator of legitimacy or bastardy are recognised types of consistorial action, originally competent in the Commissary Court (see e.g. _Blair of Kinfawns_ 1760, Hermand p.60) and transferred to the Court of Session by the Court of Session Act 1830, s.33.

9.4. The second doubt relates to the competency of raising an action, the outcome of which turns on a decision as to legitimacy or parentage, without including a conclusion for the appropriate declarator. This is a matter of importance in the present context because, if there are to be special rules on jurisdiction and procedure in relation to declarators of legitimacy or parentage, there will often be cases where the pursuer will wish, or require, to raise an issue of legitimacy or paternity as a prerequisite of some other right or remedy which he seeks without including a conclusion for declarator of legitimacy or parentage. The present law is uncertain on this point. The leading books on Court of Session practice state the rule as being 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".[1]

This rule is vague and has not been universally observed.[2] It has been regarded as competent to decide questions of legitimacy incidentally in proceedings for service of heirs,[3] and to decide questions of paternity incidentally in actions for aliment, without any declaratory conclusion.[4] It has also been regarded as competent to determine the existence or validity of a marriage incidentally without a declaratory conclusion. In Turnbull v. Wilsons and Clyde Coal Co.[5]

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[1]Maclaren, Court of Session Practice, p.648. See also, in almost identical terms, Maxwell, The Practice of the Court of Session, p.360.

[2]See e.g. Argyll v. Campbeltown Coal Co., 1924 S.C. 844.

[3]Norris v. Gilchrist (1847) 9 D.466; Fenton v. Livingstone (1856) 18 D.865 at p.867.

[4]See Silver v. Walker, 1938 S.C. 595.

[5]1935 S.C. 580 at p.583. This case arose out of a claim by a woman for workmen's compensation. The defenders denied that she had been married to the deceased workman. The case was decided on the terms of s.21(2) of the Workmen's Compensation Act 1925. See also Johnstone v. Spencer, 1908 S.C. 1015 (finding of paternity for purposes of workmen's compensation); McDonald v. Mackenzie (1891) 18 R.502 (finding of marriage for purposes of poor law).

Lord President Clyde explained the position as follows.

> "It is inevitable that in litigations between strangers, and even in litigations between a *soi-disant* spouse and a stranger, the question should sometimes occur whether the *soi-disant* spouse is really such. Other questions of the same kind may arise - as to legitimacy for example. It has never before been suggested that, because those questions involve status, therefore they cannot be determined incidentally to the litigation; although no doubt the effect of a decision between strangers, or between a stranger and the *soi-disant* spouse, obtained in such circumstances, goes no further than is necessary for the determination of the dispute with which the litigation is concerned, and (unlike the judgment pronounced in a declarator of status where the proper parties are called) has no effect whatever *contra mundum*."

It is important that any doubt on this question should be removed before consideration is given to any special rules which should apply to declarators of legitimacy, illegitimacy or parentage. We therefore suggest that *for the removal of doubt it should be made clear that a question of legitimacy or parentage may be determined incidentally for the purposes of any litigation without any necessity for a declarator*. (Proposition 39). Subject to what we say about findings of paternity in actions of affiliation and aliment,[1] we suggest no change in the law on the effect of incidental findings of legitimacy, illegitimacy or parentage. Any such finding would have no effect against persons not parties to the action and would go "no further than is necessary for the determination of the dispute with which the litigation is concerned."[2]

9.5. The third doubt relates to the true nature of an action which includes both conclusions for declarator of legitimacy,

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[1] See paras. 9.29 and 9.30 below.

[2] *Turnbull* v. *Wilsons and Clyde Coal Co*. *supra*.

illegitimacy or parentage and other conclusions of, say, a petitory nature. In one case it was held that an action which concluded (a) for payment of legitim, which failing, aliment and (b) for declarator of legitimacy was in substance an action for declarator of legitimacy, so that jurisdiction could not be founded on arrestment and the whole action had to be dismissed.[1] This is an inflexible approach, the effect of which may be to penalise a pursuer for including a declaratory conclusion. A more flexible approach is to regard such an action as a combined action[2] so that failure to establish jurisdiction in relation to the declaratory conclusion would not necessarily prevent jurisdiction from being established in relation to the petitory conclusion. Conversely, the establishment of jurisdiction in relation to the declaratory conclusion (for example, on the basis of domicile) would not give the court jurisdiction to entertain a petitory conclusion against a defender who was not otherwise subject to the court's jurisdiction.[3] Any special procedural rules applying to proceedings for declarator of legitimacy, illegitimacy or parentage would, on this view, apply only to the declaratory conclusion in such an action and not to any petitory or other conclusion. We suggest that _for the removal of doubt it should be made clear (a) that it is competent to combine a conclusion for a declarator of legitimacy, illegitimacy or parentage with a conclusion for any other competent remedy and (b) that, in such a combined action, the separate conclusions are to_

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[1] _Morley_ v. _Jackson_ (1888) 16 R.78.

[2] Cf. _Curran_ v. _Curran_, 1957 S.L.T. (Notes) 47 (Action for declarator of legitimacy, and for custody. Conclusion for custody held incompetent, under the law as it then was, in the Outer House. Declarator of legitimacy granted.)

[3] Cf. _Fraser_ v. _Fraser and Hibbert_ (1870) 8 M.400 (Jurisdiction in divorce did not give jurisdiction to award damages against co-defender.).

be regarded, for jurisdictional and procedural purposes, as separate actions (so that, for example, failure to establish jurisdiction in relation to the declaratory conclusion would not necessarily result in failure to establish jurisdiction in relation to the other conclusion). (Proposition 40). In making this proposal we leave over the question of who should have title and interest to pursue a declaratory conclusion with or without some other conclusion.

Declarators of legitimacy, illegitimacy or parentage

9.6. When we refer to an action of declarator of legitimacy, illegitimacy or parentage in this Memorandum we include any conclusion for such a declarator, even if the action contains other conclusions in addition. The law on all three types of action is unclear in certain respects but the law on actions of declarator of parentage is particularly undeveloped. This is not surprising. Such actions, although undoubtedly competent in Scots law,[1] have not been frequent. So long as little turned on the establishment of illegitimate parentage there was little cause to bring such an action. If a person wished to establish his or her rights to succeed to a deceased person on intestacy, for example, he had until fairly recently to establish a legitimate relationship. We think that it is desirable that the law on declarators of parentage should be placed on a firm footing and that the opportunity should be taken to clarify the rules relating to actions for declarator of legitimacy or illegitimacy.

Effect of decree

9.7. Present law. We begin with the question of the effect of a decree of declarator of legitimacy, illegitimacy or parentage

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

because the answer to this question determines the approach which may have to be taken to such questions as intimations to third parties and the need for proof. The present law 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 judments *in rem* and universally binding. This too was

[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.

obiter in relation to legitimacy. Although Lord Sands' view does seem to be more consistent with the way in which the law has developed in relation to actions of declarator of status generally,[1] the effect of a declarator of legitimacy or illegitimacy must be regarded as a matter of doubt in Scots law.

9.8. The position in relation to a declarator of paternity or maternity is also unclear. On one view such a declarator is not a judgment as to the status of a person.[2] If the mother is unmarried a decision that A rather than B is the father of the child does not, on this view, affect the child's status at all. He or she is illegitimate whatever the outcome. The decision is therefore subject to the ordinary rules on res judicata.[3] Although this view arguably involves a rather narrow view of "status",[4] and seems particularly

[1]There is now no doubt, for example, 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."

[2]See Silver v. Walker, 1938 S.C. 595.

[3]A.B. or C. v. D. (1949) 65 Sh.Ct.Rep. 181.

[4]See e.g. Hepburn v. Tait (1874) 1 R. 875 per Lord Neaves at p. 878 ("To a certain extent it [paternity] involves the element of status.") and McDonald v. Ross, 1929 S.C. 240 per Lord Sands at p. 248 ("Status in the law of marriage and of parent and child is a relative term. It fixes a relationship between the party concerned and another party ... From this relationship certain rights flow. In the case of an illegitimate child, a determination of paternity fixes a relationship between the child and the father which endures throughout life ..."). It may be doubted, however, whether membership of the class of people whose fathers have been identified by court decree is yet regarded as conferring a status in the same way as, say, membership of the class of people who are legitimate or illegitimate.

unrealistic where the mother is married,[1] there appears to be no authority for the view that a declarator of paternity is anything other than a judgment in personam governed by the ordinary rules on res judicata.

9.9. Assessment of present law. That the present law is unclear has, we hope, been demonstrated above. It could also, if Lord Sands' view is correct, be said to be inconsistent in apparently treating declarators of legitimacy or illegitimacy in one way and declarators of parentage in another. The issue in these proceedings may be exactly the same - whether X is the child's parent - and the consequences may be equally important for those concerned.[2] There would seem to be much to be said for treating them all in essentially the same way.

9.10. Options for reform. Decrees of declarator of legitimacy,[3] illegitimacy or parentage could be regarded (a) as judgments in rem, binding on all the world (b) as judgments binding on the parties and on those who had been given notice of the proceedings in a manner to be prescribed[4] (c) as judgments which would be regarded as sufficient evidence of legitimacy, illegitimacy or parentage in

[1] In this case a declarator of paternity in effect determines whether the child will be regarded as legitimate or illegitimate.

[2] See e.g. Grant v. Countess of Seafield, 1926 S.C. 274 (which, although nominally an action for declarator of marriage and legitimacy, turned entirely on the establishment of parentage.).

[3] For the purposes of this discussion we are assuming that an action for declarator of legitimation will be governed by the same rules as an action for declarator of legitimacy.

[4] Cf. Matrimonial Causes Act 1973, s.45(5) - declaration of legitimacy to be "binding on Her Majesty and all other persons whatsoever, so however that the decree shall not prejudice any person - (a) if it is subsequently proved to have been obtained by fraud or collusion: or (b) unless that person has been given notice of the application in the manner prescribed by rules of court or made a party to the proceedings or claims through a person so given notice or made a party.".

subsequent proceedings unless the contrary was proved[1] (d) as ordinary judgments in personam governed by the normal rules on res judicata or (e) as judgments never giving rise to res judicata.[2]

9.11. Our tentative view is that the last two of these options would be unacceptable. There is an obvious interest in finality in relation to decisions on family relationship.[3] If a matter of legitimacy or parentage has been litigated, perhaps at great expense, in proceedings governed by special rules and intimated to those with an interest to oppose them,[4] both the public and the individuals concerned are entitled to expect that the matter will not be reopened in further proceedings. It is desirable, in our view, that the law should provide a means whereby legitimacy or parentage may be firmly established.[5]

9.12. Our provisional view is that the first option - that a declarator of legitimacy, illegitimacy or parentage should be a judgment in rem, binding on the whole world - is too extreme. It is true that a judgment in rem could be reduced on certain grounds, such as fraud on the court.[6] Even so, a third party could be seriously prejudiced by such a decree. The undoubted interest in finality has to be balanced against the potential injustice of holding someone bound by a decision which is to his prejudice, which he can easily prove to be wrong, and which he had no opportunity to challenge at the time. It is no

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[1] Cf. Law Reform (Miscellaneous Provisions)(Scotland) Act 1968, s.11.

[2] Cf. Norris v. Gilchrist (1847) 9 D.466 at p. 474.

[3] This was recognised in the clearest terms in the Ampthill Peerage [1977] A.C. 547.

[4] We deal with these points in paras. 9.16 to 9.21 below.

[5] See the Ampthill Peerage [1977] A.C. 547 per Lord Simon of Glaisdale at pp. 575 to 578.

[6] See Walker v. Walker, 1911 S.C. 163; Acutt v. Acutt,1936 S.C. 386.

doubt for this reason that Parliament, when it introduced declarations of legitimacy into English law, provided that they would have effect against the Crown and all other persons but should not prejudice any person "unless such person has been cited or made a party to the proceedings or is the heir-at-law or next of kin or other real or personal representative of or derived title under or through a person so cited or made a party.".[1] These provisions have been repeated in subsequent enactments, with only minor alterations.[2] The Law Commission for England and Wales have suggested that they should be extended to cover declarations of parentage.[3]

9.13. The third option - that a declarator of legitimacy, illegitimacy or parentage would give rise to a rebuttable presumption of legitimacy, illegitimacy or parentage - might be thought to confer insufficient finality. It would always be open to a third party, even if he has received notice of the action but has not become a party to it, to rebut the presumption at a later date.

9.14. The second option - that a declarator of legitimacy, illegitimacy or parentage would be binding on all those who had been given notice of the action - would seem to strike the right balance between finality and fairness to third parties. It is the solution which we provisionally favour. It is open to the criticism that it introduces a new type of decree, half way between a decree _in rem_ and a decree _in personam_, and thereby complicates the law. On the other hand it has apparently operated without undue difficulty in England and Wales since 1858 and has been repeated by Parliament in successive consolidations.

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[1] Legitimacy Declaration Act 1858, s.8.

[2] See now the Matrimonial Causes Act 1973, s.45. The provisions were considered and applied in the _Ampthill Peerage_ [1977] A.C. 547.

[3] Working Paper No. 74, _Family Law: Illegitimacy_ (1979) para. 9.38.

9.15. We express no concluded opinion on this matter but invite views on the question: should a decree in an action of declarator of legitimacy, illegitimacy or parentage

(a) have effect against all persons, without exception, or

(b) have effect against all those who had been given notice of the action and those deriving title from it?; or

(c) give rise to a rebuttable presumption of legitimacy, illegitimacy or parentage, as the case may be, or

(d) have some other effect and, if so, what?

(Proposition 41). Although we have referred above to a decree having effect "against all persons" or "against all the world" there is no way of ensuring that a decree will be recognised as a judgment in rem in foreign countries. That is a matter for their law.

Title and interest to sue

9.16. The question of title and interest to sue for a declarator is one which can arise in relation to any type of declarator and which may merge into the question whether the declarator sought is academic or premature. Declarators may be sought in such a wide range of situations, in both private and public law,[1] that it is difficult to lay down any general rule. It has been said that if a party

> "has an interest to obtain the decision of the court on a question 'which is neither academic nor premature but is both practical and of immediate urgency', the court will answer the question."[2]

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[1]See Scottish Law Commission, Remedies in Administrative Law (Scot. Law Com. No. 14, 1971). The question of title and interest to sue is discussed at pp. 44 to 47.

[2]Macnaughton v. Macnaughton's Trs. 1953 S.C. 387 per Lord Guthrie at p. 389.

This may, however, be too broad a statement: interest, without some recognised title to sue, may not always be sufficient.[1] Unfortunately, title to sue is itself notoriously difficult to define.[2]

9.17. It is reasonably clear that at present where a pursuer seeks a petitory remedy and has a title and interest under the general law relative to the petitory remedy, he also has a title and interest to sue for a declarator of paternity, legitimacy or illegitimacy where these issues are prerequisites of the petitory remedy.[3] Beyond this the question of title and interest is less clear. There are cases where declarators in this field have been treated as competent when combined with further declarators of patrimonial rights of greater or lesser particularly flowing from the relationship sought to be declared.[4] A declarator of bastardy and putting to silence at the instance of a mother without further interest being disclosed appears to be competent.[5] A declarator of bastardy at the instance of a husband also appears to be competent by itself or in combination with a conclusion for divorce.[6] It may be, although the authorities are not absolutely conclusive on the point, that a person would be regarded as having a sufficient title and interest to seek a declarator of the legitimacy of a direct ancestor, even although he averred no interest other than the establishment of the blood link.[7]

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[1] See e.g. Nicol v. Dundee Harbour Trs. 1915 S.C. (H.L.) 7 (in relation to the pursuers' interest as rival traders).

[2] In Nicol, supra, at p. 12 Lord Dunedin said "I am not aware that anyone of authority has risked a defintiion of what constituted title to sue. I am not disposed to do so ...".

[3] Cf. Macaulay v. Hussain, 1966 S.C. 204.

[4] See e.g. Grant v. Countess of Seafield, 1926 S.C. 274; Cumming v. Brewster's Trs., 1972 S.L.T. (Notes) 76; Smith v. Dick (1869) 8 M.31.

[5] Imre v. Mitchell, 1958 S.C. 440.

[6] S. v. S. 1977 S.L.T. (Notes) 65; Brown v. Brown, 1972 S.L.T. 143.

[7] Moncrieff v. Moncrieff (1904) 6 F.1021, approved in Bosville v. Lord MacDonald, 1910 S.C. 597.

9.18. There are two questions on which we think that the law should be clarified, especially if a declarator in this field is to have more than a mere in personam effect and is to be subject to special rules. The first is whether there should be a clearly established category of persons who are deemed to have a sufficient title and interest to sue for a declarator by virtue of relationship alone. It might be argued that the establishment of a blood link should be regarded as sufficient interest by itself.[1] On the other hand, it could be said that this proposition is far from obvious in the case of remoter relatives and that only a party to the tripartite relationship, or to an alleged tripartite relationship, of father, mother and child should be regarded as having sufficient title and interest by virtue of relationship alone.[2]

We invite views on whether

(a) a person should be regarded as having a title and interest to sue for a declarator of legitimacy, illegitimacy or parentage, without having to show any further interest, if (i) he is the child whose legitimacy or parentage is in question or (ii) he is, or claims to be, or not to be, a parent of that child, or

(b) the category of persons entitled to sue without showing any interest other than relationship should be enlarged to include remoter relatives, and if so, which?

(Proposition 42).

9.19. The second question is whether a person should be entitled to sue for a declarator of legitimacy, illegitimacy or parentage on the basis of a mere patrimonial interest, on

[1] Cf. Moncrieff v. Moncrieff supra; Bosville v. Lord MacDonald, supra.

[2] Cf. the observations of the Lord Ordinary in Imre v. Mitchell, 1958 S.C. 440 at p. 445.

the assumption that a decree of declarator will have wider effect than a decree _in personam_. It is arguable that it would be wrong to allow persons whose interests are merely patrimonial and who are not related to the person whose legitimacy or parentage is in issue, to raise proceedings which may result in a decree akin to a decree of status. Such persons must, of course, be able to raise appropriate proceedings - which might include a declarator as to patrimonial right - to enable the patrimonial issue in which they are interested to be determined: the question for consideration is simply whether they should be entitled to obtain a declarator of someone's legitimacy, illegitimacy or parentage if they have no family connection with that person and if their only interest is patrimonial. Should, for example, a corporate body which has an interest in an estate by virtue of an assignation in security be able, in the course of realising that security, to raise proceedings to have a person declared legitimate or illegitimate or to have a person's parentage determined by a declarator which would have a wider effect than a mere decree _in personam_? Should a charity which is the residuary legatee of X be able to raise an action for declarator that X was the illegitimate son of Y, a millionaire who died intestate shortly before X's own death? Or should it be the case that a person or body with only patrimonial interests should be confined to patrimonial remedies? Should declarators of legitimacy, illegitimacy and parentage be available only to those with an interest by virtue of relationship? We have already raised the question whether certain interests based on relationship should be sufficient to confer title to sue for a declarator of legitimacy, illegitimacy or parentage. We now raise the question whether an interest based on relationship, as opposed to a mere patrimonial interest, should be necessary before a person has title to sue for one of these declarators. Accordingly _we invite views on the question whether, without prejudice to the right of any person to_

raise any other appropriate proceedings, a person should be entitled to sue for a declarator of legitimacy, illegitimacy or parentage ONLY if he comes within the category of persons mentioned in Proposition 42(a) or (b)?
(Proposition 43)

Defenders and third parties

9.20. The defender or defenders in an action for declarator of legitimacy, illegitimacy or parentage will be the person or persons whose interest it is to deny the claim being made.[1] This might be the alleged father;[2] or the man who is presumed to be the father;[3] or the alleged father's trustees;[4] or the heirs and successors of an alleged ancestor;[5] or, if there is a matter such as nationality or social security at stake, the Lord Advocate.[6] In an action for declarator of illegitimacy the child should be called as a defender[7] but it is not clear that this would be regarded as necessary in an action for declarator of parentage.[8] It is for consideration whether the law should be clarified on this point. Accordingly, we invite views on the question whether it should be provided that the child, if alive and not the pursuer, should be called as a defender in any action for declarator of his legitimacy, illegitimacy or parentage. (Proposition 44). If the response

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[1]MacLaren, Court of Session Practice, p. 751; Maxwell, The Practice of the Court of Session, p. 153.

[2]Macaulay v. Hussain, 1966 S.C. 204.

[3]Imre v. Mitchell, 1958 S.C. 440.

[4]Cumming v. Brewster's Trs., 1972 S.L.T. (Notes) 76.

[5]Grant v. Countess of Seafield, 1926 S.C. 274.

[6]It is a common practice to call the Lord Advocate as a defender in actions for declarator of marriage.

[7]Jamieson v. Jamieson 1969 S.L.T. (Notes) 11; Brown v. Brown 1972 S.L.T. 143.

[8]Cf. Macaulay v. Hussain, 1966 S.C. 204 (an action for declarator of paternity, and for aliment).

is affirmitive it would be for consideration whether the requisite provision should be made by statute or by Rules of Court. The latter would seem, at first sight, to be more appropriate.

9.21. Section 8 of the Conjugal Rights (Scotland) Amendment Act 1861 gives the Lord Advocate the right to intervene in an action of divorce or declarator of nullity of marriage. The public interest in an action for declarator of legitimacy, illegitimacy or parentage may be just as important. There may, for example, be a suspicion of a collusive action for nationality or immigration purposes. We note that in England the Attorney-General must be made a party to a petition for a declaration of legitimacy or illegitimacy in every case.[1] The options here would appear to be (a) to leave it to the pursuer to decide whether to call the Lord Advocate as a defender in the public interest (b) to entitle the Lord Advocate to intervene even if not called as a defender (as in actions of divorce or nullity of marriage) or (c) to provide for the Lord Advocate to be called as a defender in every case. As the first option represents the existing law we merely invite views on the other two. We have formed no concluded view but would be grateful for views on the question:- <u>should any provision be made (a) to require the Lord Advocate to be called as a defender in any action for declarator of legitimacy, illegitimacy or parentage or (b) to entitle the Lord Advocate to intervene in such actions</u>?
(Proposition 45).

9.22. An action of declarator of legitimacy or illegitimacy is a consistorial action[2] and, as such, is governed by

[1]Matrimonial Causes Act 1973, s.45(6); Matrimonial Causes Rules 1977, r. 110.

[2]Court of Session Act 1830, s.33.

special rules.[1] These rules give the court a general power to order intimation of the action to such person as it thinks fit[2] and also provide for compulsory intimation to certain persons in certain circumstances - for example, if the defender is mentally ill or if his address is unknown or if he is alleged to have committed adultery with another person.[3] These rules appear to have been framed primarily with actions of divorce in mind and would not always apply very appropriately to an action for declarator of legitimacy or illegitimacy. If a decree in such an action is to have extended effect (whether as a judgment _in rem_ or to a slightly lesser extent) it would seem to be reasonable to provide for intimation of the action to be made to those with an interest in it. This would be a matter for Rules of Court but a possible solution would be that adopted in England whereby the applicant for a declaration of legitimacy must apply to the court for directions as to what persons must be given notice of the application.[4] We have recommended, after consultation, a similar solution for actions of damages for death.[5] Under the present law an action for declarator of paternity or maternity is not a consistorial action and is subject to no special rules on intimation. If a decree in such an action is to have an extended effect this would seem to be wrong. _We invite views on the question whether Rules of Court should provide for intimation of an action of declarator of legitimacy, illegitimacy or parentage to be made to such persons with an interest as the court may require_. (Proposition 46).

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[1]Rules of Court, Section 3.

[2]Rule 164. "The Court may in any [consistorial] action order intimation to be made to such person as it thinks fit."

[3]Rule 155.

[4]Matrimonial Causes Act 1973, s.45(7); Matrimonial Causes Rules 1977, r. 110.

[5]Scottish Law Commission, _Report on section 5 of the Damages (Scotland) Act 1976_ (Scot. Law Com. No. 64, 1981).

Need for proof

9.23. An action for declarator of legitimacy or illegitimacy is, as we have seen, a consistorial action. No decree of declarator can, therefore, be granted "until the grounds of action shall be substantiated by sufficient evidence".[1] An action for declarator of paternity or maternity is, on the other hand, not a consistorial action so that in an undefended case decree can be granted without proof.[2] If the effect of the decree is to be the same in both cases it would seem to be reasonable that the requirement for proof should be the same. Further, if the effect of the decree is to be enlarged beyond that of a simple decree *in personam* it would seem to be reasonable that there should be a requirement of proof. *We invite views on the question whether actions for declarator of parentage should be brought within the category of actions in which no decree in favour of the pursuer will be granted without proof.* (Proposition 47). We are not here concerned with incidental findings of paternity or maternity for the purposes of other proceedings. The answer to the above question would not therefore affect the procedure in actions of affiliation and aliment.

Restrictions on declarators affecting those not of full age and capacity

9.24. If, as we suggest, a decree of declarator in this area should have some wider effect than a mere decree *in personam*, the problem arises whether and in what circumstances it would be right to permit such a declarator when the question at issue is the legitimacy or parentage of a minor or pupil or incapax. It is certainly arguable that it would be wrong to permit decrees relating to the status of a young

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[1] Court of Session (Scotland) Act 1830, s.36.

[2] See e.g. *Livingstone* v. *Gillies*, 1930 S.L.T. (Sh.Ct.) 25; *A.B. or C.* v. *D.* (1949) 65 Sh.Ct.Rep. 181.

child to be binding on that child or to raise a presumption against him. There are, we think, a number of options:-

(First) that it should never be competent to sue for declarator of the legitimacy, illegitimacy or parentage of a person under the age of majority or some lesser age or, perhaps, suffering from mental incapacity;

(Second) that if the *curator ad litem* appointed to such a child or incapax declines to participate in the action, the action so far as concluding for declarator should be incompetent;

(Third) that the court should have a discretion to refuse to entertain the conclusion for declarator unless satisfied that the proceedings were in the child's or incapax's best interests; or

(Fourth) that the conclusion for declarator should be competent irrespective of the age or capacity of the child.

The first option might be thought to be too extreme. It would prevent a husband from seeking a declarator that a child born to his wife was not his child and a mother from seeking a declarator that a particular man was the father of her child. It would mean that, in many cases, a child's parentage could not be conclusively determined until a date when the evidence was very stale. The second option might be thought to give excessive power or place an excessive burden on whoever happened to be appointed *curator ad litem* to the child. He alone would be able to decide whether an issue of parentage or legitimacy, in which various parties might have an interest, could be determined in the form of a declarator of legitimacy, illegitimacy or parentage. His decision would not be subject to control or scrutiny. The third option would have the apparent advantage of flexibility.[1]

[1] A solution along these lines was proposed by the English Law Commission in Working Paper No. 74, *Family Law: Illegitimacy* (1979) paras. 9.40 to 9.41.

There may be cases where it would seem to be undesirable to allow an action for declarator of legitimacy or illegitimacy or parentage to proceed. The action might be brought maliciously in order to embarrass the mother. Even if brought in good faith the action might not be in the best interests of the child. The child, for example, might be happily established in a family with his mother and a man whose fatherhood may be in doubt but who is nevertheless willing to accept the child as his. It could be argued that in such circumstances there would be little point in allowing an action for declarator of another man's paternity to proceed. On the other hand, the long-term interests of the child may be a matter of pure speculation. The family in which the child appears to be settled may turn out to be unstable. The apparently irresponsible putative father may become a man whom the child would be proud to have as a father. Moreover to stress the child's interests exclusively may be to ignore the legitimate interests of the mother or father or other person in having the relationship declared. It could also be argued that this matter is an unsuitable one to be left to judicial discretion as it might involve a question of principle on which there might be strong and perfectly legitimate differences of view. We do not, of course, suggest that there should be any restriction because of age or incapacity in actions which do not seek a declaratory solution but raise a question of legitimacy or parentage only incidentally to a petitory conclusion. In such cases, we think that the court would in any event appoint a curator to the child whose legitimacy or parentage is in question, but the curator could prevent the action having any binding effect on the child simply by declining to enter appearance. We invite views on the question whether there should be any restrictions on the right to seek or obtain a declarator of the legitimacy, illegitimacy or parentage of a person not of full age and capacity and, if so what?
(Proposition 48)

Court of Session or sheriff court?

9.25. Actions of declarator of legitimacy or illegitimacy are competent only in the Court of Session.[1] Actions of declarator of paternity are certainly competent in the Court of Session, but there are dicta[2] and sheriff court decisions[3] to the effect that they are also competent in the sheriff court. Those dicta and decisions proceed on the assumption that a declarator of paternity does not determine status and would have no effect beyond the parties to the action in question. If, as we suggest, a declarator of parentage is to have the same wide effect as a declarator of legitimacy or illegitimacy we think it should be subject to the same rules as to the jurisdiction of the sheriff court. We have formed no concluded view on the question whether all these actions should, or should not, be competent in the sheriff court. The question of divorce in the sheriff courts is under consideration in other quarters and it may be that the decision on other consistorial actions should await the determination of that question. In the meantime we merely invite views on the question:- should actions for declarator of legitimacy, illegitimacy or parentage be competent only in the Court of Session? (Proposition 49). An affirmative answer would not prevent incidental findings of paternity or maternity being made in the sheriff courts for the purposes of actions such as affiliation and aliment

[1] The Sheriff Courts (Scotland) Act 1907, s.5(1) excepts from the sheriff's jurisdiction "actions of declarator ... the direct or main object of which is to determine the status of individuals.".

[2] McDonald v. Ross, 1929 S.C. 240, per Lord Morison at p. 252 ("she could have raised the question [of paternity] in an initial writ of declarator which was made competent in Sheriff Court procedure by the Act of 1907"); Silver v. Walker, 1938 S.C. 595, per Lord Wark at p. 600 (declarator of paternity not necessary in action for aliment of illegitimate child - "if such a declarator had been inserted ... it would have raised, and could have raised, no question of status".).

[3] Livingstone v. Gillies, 1930 S.L.T. (Sh.Ct.) 25 ("It cannot be disputed that the paternity of an illegitimate child may competently be determined by decree in the Sheriff Court."); A.B. or C. v. D. (1949) 65 Sh.Ct.Rep. 181 (action for declarator of paternity - "no effect on child's status in law.")

or custody and aliment, although it would mean that the crave in such actions in the sheriff court should not include a crave for a declarator.[1]

Jurisdiction of Scottish courts

9.26. There is no clear authority on the question of the jurisdiction (in the international sense) of the Court of Session in actions of declarator of legitimacy, illegitimacy or parentage.[2] It will probably be generally agreed that these actions, at least if they are to have wider effect than actions *in personam*, are more akin to actions of declarator of marriage, or nullity of marriage, or death, than to ordinary actions for the payment of money and that the grounds of jurisdiction should reflect their personal nature.[3] We suggest for consideration that the rules should be similar to those applying to other consistorial actions[4] and accordingly invite views on the proposition that *the Court of Session should have jurisdiction to entertain an*

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[1] A declaratory crave in the sheriff court is not necessary under the present law and was unknown in the sheriff courts before 1907. See *Silver* v. *Walker*, 1938 S.C. 595.

[2] See Anton, *Private International Law*, pp. 342-344. The cases of *Morley* v. *Jackson* (1888) 16 R.78 and *Smijth* v. *Smijth* 1918, 1 S.L.T. 156 are not particularly helpful, largely because they do not take sufficiently into account that an action for declarator of legitimacy is an action affecting status.

[3] 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" (Art. 1). This term is given a wide meaning. It would certainly cover an action of declarator of legitimacy or illegitimacy 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. Proceedings concerning the status of natural persons are excluded from Sch. 7 of the Civil Jurisdiction and Judgments Bill, presently before Parliament. See cl. 20.

[4] See the Domicile and Matrimonial Proceedings Act 1973, s.7; Presumption of Death(Scotland) Act 1977, s.1.

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

(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.

(Proposition 50).

9.27. If it were to be decided that actions for declarator of legitimacy, illegitimacy or parentage were to be competent in the sheriff courts, the question of which sheriff court should have jurisdiction would have to be resolved. The existing rules, which are designed for actions of a patrimonial nature, seem quite inappropriate.[1] A sheriff court might, for example, have jurisdiction if (a) the Court of Session would have had jurisdiction under the rules proposed above[2] and (b) the alleged mother, the alleged father, or the child is domiciled[3] or habitually resident in the sheriff court district at the date when the action is begun or was

[1] The Sheriff Courts (Scotland) Act 1907, s.6 provides for jurisdiction on the basis of (a) the defender's residence, (b) the defender's place of business (c) arrestment to found jurisdiction (d) the place of the alleged wrong (e) the place of performance of the contract (f) the situation of the funds in dispute (g) reconvention and (h) prorogation. These rules will, in any event, be changed if the Civil Jurisdiction and Judgments Bill, at present before Parliament, is enacted.

[2] Proposition 50. The purpose of this requirement is to ensure that the jurisdiction of the sheriff courts in the international sense would not be wider than that of the Court of Session.

[3] In the special sense given to the word by cl. 38 of the Civil Jurisdiction and Judgments Bill.

domiciled or habitually resident there at the time of his or her death. We prefer, however, to make no specific proposal on this point for the time being. If divorce actions become competent in the sheriff court, rules of jurisdiction would have to be worked out for this purpose and it would seem to be desirable that the rules on jurisdiction in other consistorial actions should follow suit so far as possible. In any event, we think that a decision on this matter should await the enactment of the Civil Jurisdiction and Judgments Bill.

Actions of affiliation and aliment

9.28. We have dealt with actions for aliment (defined so as to include any claim for aliment whether or not combined with a claim for some other remedy such as separation, adherence or affiliation) in our Report on Aliment and Financial Provision.[1] We have there recommended a uniform set of rules for all obligations of aliment and actions for aliment, without any distinction between those relating to aliment for illegitimate children and those relating to aliment for legitimate children. It is therefore unnecessary to consider further here the alimentary aspects of actions for affiliation and aliment. It is also unnecessary to consider here the rules on jurisdiction in actions of affiliation and aliment because these rules are being changed and placed on a more rational footing by the Civil Jurisdiction and Judgments Bill, which is currently before Parliament.[2] We therefore confine our discussion to the effect of a finding of paternity in an action of affiliation and aliment.

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

[2] See cl. 20 and Sch. 7 rule 2(5) of the Bill. For the background, see the Report of the Scottish Committee on Jurisdiction and Enforcement (H.M.S.O. 1980) paras. 5.43 to 5.58 and 13.28 to 13.49.

9.29. At common law a finding of paternity in an action of affiliation and aliment, even if it "declares" the defender to be the father,[1] is not regarded as a declarator of status.[2] It has no effect on anyone other than the parties to the action. Section 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.[3] 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 that it 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.

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

[2] Silver v. Walker, 1938 S.C. 595.

[3] 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.

It is arguable that a decree in such an action is an unsafe basis for a presumption which may, with the passage of time, become more and more difficult to rebut. It is also arguable that there is a risk of collusion between the mother (who may, of course, be a married woman) and a man prepared to admit falsely that he is the father. This line of criticism would lead to the conclusion that, in relation to findings of paternity, section 11 should be repealed or, perhaps, restricted to defended cases where paternity has been established after proof. Against this, however, it could be argued that the section gives rise to nothing more than a presumption, which can always be rebutted, and that in the vast majority of actions of affiliation and aliment the risk of collusion is minimal. Presumptions are based not on certainty but on likelihood and if a man has been found to be the father in an action of affiliation and aliment it is more likely than not that he is the father. The benefits of the section in hundreds of ordinary cases should not, it might be said, be thrown away because of the risk that in a few cases the presumption will be unfounded. We have formed no concluded view on this question. If, however, it were to be decided that the paternity provisions in section 11 were, on balance, worth preserving, it would have to be asked whether they were not too narrow. There would seem to be no reason to give an extended effect to findings of paternity in actions of affiliation and aliment but to deny such effect to findings of paternity or maternity in other proceedings, such as actions for custody or access, or actions concerning property disputes.

9.30. Our tentative conclusion is that the paternity provisions in section 11 are not satisfactory as they stand. We prefer, however, to leave this question completely open and, accordingly, invite views as follows. <u>Section 11 of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1968 provides that a finding of paternity in an action of affili-</u>

ation and aliment or in affiliation proceedings elsewhere in the United Kingdom is sufficient evidence of paternity in subsequent civil proceedings unless the contrary is proved. Should this provision (a) be left as it is (b) be repealed or restricted or (c) be extended to other incidental findings of paternity or maternity? (Proposition 51).

PART X

MISCELLANEOUS MATTERS

10.1. In this part of the Memorandum we look at the position of an illegitimate child in relation to aliment, nationality, domicile, marriage, incest, name, ante-natal injuries, damages for death and proceedings under the Mental Health (Scotland) Act 1960.

Aliment

10.2. Under the present law the parents of an illegitimate child are both bound to contribute towards his maintenance. Grandparents and remoter ascendants are not. 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 child 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. In these circumstances we think it is unnecessary to deal further with aliment in this Memorandum.

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

British citizenship

10.3. British citizenship, a concept introduced by Part I of the British Nationality Act 1981[1] may be acquired by a legitimate child through either 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,[2] 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."[3]

10.4. 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.[4] A child born in the United Kingdom acquires British citizenship if his mother was settled here at the date of birth;[5] he is also entitled to be registered as a British citizen if his mother becomes settled in the

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[1]Parts II and III deal with citizenship of British Dependent Territories and British overseas citizenship respectively. The Act is, it is reported, unlikely to come into force before 1983 (The Times, 31 Oct., 1981).

[2]Dealing with legitimated children.

[3]See also s.3(b)(c).

[4]S.1(4).

[5]S.1(1)(b)

United Kingdom thereafter, provided the application for registration is made before the child attains 18 years of age.[1] Finally, the Secretary of State has a discretionary power to register any minor as a British citizen.[2] Failing these provisions, the person must have resort to naturalisation.[3]

10.5. During the passage of the British Nationality Act 1981, the Government, as a result of considerable concern voiced at the situation of illegitimate children, expressed willingness to reconsider the matter on receipt of reports from the Law Commissions.[4] Citizenship is pre-eminently a United Kingdom matter. We are in close communication with the Law Commission for England and Wales on this issue but, while we would welcome any views which consultees may care to express, we do not wish to make any specific proposals for reform at this stage.

Domicile

10.6. 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.[5] A posthumous legitimate child's domicile of origin is thought to be that of his mother.[6] Doubts exist as to a legitimate child's domicile of origin where his parents' marriage is putative[7] or where

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[1]S.1(3).

[2]S.3(1).

[3]S.6 and Sch. 1.

[4]Official Report, Standing Committee F, Col. 102 (17 Feb., 1981).

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

[6]Anton, Private International Law p. 167.

[7]Ibid., p. 168.

his parents live apart and have separate domiciles at the date of birth.[1] A child's domicile of origin can be of significance even when the child is grown up: it revives whenever a domicile of choice is relinquished and lasts until another domicile of choice is acquired;[2] and it is retained if the person, through leading an unsettled life, never acquires a domicile of choice.[3]

10.7. 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 during pupillarity follows that of his father.[4] Only if his father is dead[5] or his parents are separated and he has his home with his mother[6] will the child's domicile follow that of his mother.

10.8. Although we think that there is a need for reform in this area, we are of the opinion that the present Memorandum is an inappropriate place for proposals to be put forward. It is highly desirable that the rules on domicile should apply uniformly throughout the United Kingdom. We therefore suggest that this topic might be the subject of a joint study by both Law Commissions or an inter-departmental committee with both Scottish and English representation.

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[1] Cheshire and North, Private International Law (10th. ed.) p. 180; Bromley, Family Law (6th. ed.) p. 2.

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

[3] McLelland v. McLelland, 1942 S.C. 502.

[4] Shanks v. Shanks, 1965 S.L.T. 330.

[5] Crumpton's J.F. v. Finch-Noyes, 1918 S.C. 378.

[6] Domicile and Matrimonial Proceedings Act 1973, s.4(2).

Marriage

10.9. Before 1977 it was not clear what marriages were prohibited by reason of the propinquity of the parties when their relationship was illegitimate. Bankton[1] and Erskine[2] made no distinction between legitimate and illegitimate relationships while Fraser[3] 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[4] a marriage between a man and his deceased wife's illegitimate niece was held invalid and in Philp's Trs. v. Beaton[5] a marriage between a man and his brother's daughter's illegitimate daughter was held valid.

10.10. 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 solemnized in 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

10.11. The crime of incest is not committed by sexual intercourse between an illegitimate person and any of the

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[1] I.5.42.

[2] IV.4.56.

[3] Husband and Wife (2nd. ed.) Vol. I, pp. 131 and 132.

[4] 1928 S.L.T. 376.

[5] 1938 S.C. 733.

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 the above case. Alison[2] states that incest cannot be committed by any people related illegitimately; Erskine,[3] Macdonald[4] and Hume[5] are of the opinion that an illegitimate son can commit incest with his mother. However, Lord Walker in H.M. Advocate v. R.M.[6] 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.

10.12. In our recent Report on Incest we have recommended[7] 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 Memorandum.

Name

10.13. In Scotland names (apart from titles and other dignities, and business and trade names) are a matter of usage.[8] A legitimate child is almost invariably given the

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[1] H.M. Advocate v. R.M., 1969 J.C. 52.

[2] i, 565.

[3] IV.4.56.

[4] (5th. ed.), p. 148.

[5] i, 452.

[6] 1969 J.C. 52 at p. 62.

[7] Scot. Law Com. No. 69 (1981), para. 4.11.

[8] Encyclopaedia of the Laws of Scotland "Name and Change of Name" Vol. 10 p. 138.

surname of his father. The former Scottish practice was for an illegitimate child to take his father's surname,[1] 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 tend to think that the present absence of legal rules in Scotland regarding the name of an illegitimate child is satisfactory. However, we invite comments.

Damages for injuries causing death

10.14. At common law neither the father[2] nor the mother[3] 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.[4] 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[5] and either of the parents to sue in respect of the death of their illegitimate child.[6] These two Acts have been repealed and new provision made by the Damages (Scotland) Act 1976.

[1] Ibid., p. 151.

[2] McNeill v. McGregor (1901) 4F. 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.

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

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

[5] S.2(2).

[6] S.2.

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.[1] The parents of an illegitimate child can also claim for "loss of society" in respect of the death of their illegitimate child, and an illegitimate child has a similar claim in respect of the death of either of his parents.[2] We think that the present law is satisfactory and make no proposals for change.

Proceedings under the Mental Health (Scotland) Act 1960

10.15. The nearest relative and other relatives of a person suffering from mental disorder have various rights and obligations under the Mental Health (Scotland) Act 1960. For example, an application for admission of a mentally disordered person to hospital may be made by his or her nearest relative,[3] and a relative can give an effective consent to an emergency recommendation for admission.[4] The nearest relative can also, in certain circumstances, order the discharge of a patient.[5] Section 45 defines "relative" and "nearest relative". "Relative" means any of the following:-

(a) spouse
(b) child
(c) father
(d) mother
(e) brother or sister

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[1] Sch. 1, para. 2(b).
[2] S.1(4) as read with s.10(2) and Sch. 1.
[3] S.26.
[4] S.31(2).
[5] S.43(4).

(f) grandparent

(g) grandchild

(h) uncle or aunt

(i) nephew or niece.

"Nearest relative" means, subject to the other provisions of the Act, the person first listed above who is caring for the patient or who was so caring immediately before the admission of the patient to a hospital or his reception into guardianship, failing whom the person first so listed.[1] Section 45(2) provides that in deducing relationships an illegitimate person shall be treated as the legitimate child of his mother. Section 47(1) of the 1960 Act deals with patients under 18 years of age. The nearest relative is deemed to be the guardian or guardians appointed by court order or by a deed or will of a parent[2] or a person having custody under a court order or separation agreement.[3] The sheriff has power, on application by a relative, or any other person with whom the patient is residing (or was last residing before admission to hospital) or a mental health officer, to appoint someone else to act as the nearest relative of a patient if there is no nearest relative or if there are certain other grounds for making such an appointment.[4] The effect of these provisions is, first, that the father of an illegitimate child is not a relative or nearest relative of the child for the purposes of the Act unless he has been awarded custody and, secondly, that an illegitimate child is excluded from being a relative of his father and of relatives traced through his father.

10.16. If the father of an illegitimate child were to become his guardian by virtue of cohabitation, joint

[1] S.45(3).

[2] S.47(1)(a).

[3] S.47(1)(b).

[4] S.48.

registration of birth or a deed signed by both parents,[1] section 47(1)(a) would have to be amended to ensure that the father qualified as a nearest relative even though not appointed by court decree. We draw attention to this point but, as it depends on the reaction to proposals which have been put forward very tentatively, do not embody it in a proposition. It should be noted that our proposals entitling a parent of an illegitimate child to nominate testamentary guardians and empowering the court to appoint the father of an illegitimate child as guardian would not require any amendment to be made since such nominations or appointments are already recognised.

10.17. Under section 45 of the 1960 Act an adult illegitimate person and his father are not relatives. In circumstances where there is a close family relationship between the two, this rule would seem to be unduly narrow. A justification for the present rule might be the practical difficulty of ascertaining the father of an illegitimate person or of establishing that a man has no illegitimate children. This, however, would not arise if one of the parties had the factual care of the other. Similar considerations apply with regard to relatives traced through an illegitimate person or his father. If, for example, an orphaned illegitimate child were being brought up by his paternal grandmother, she might well be the person best qualified to act as his nearest relative. We think that the Mental Health (Scotland) Act 1960 should give more recognition to illegitimate relationships in cases where they have involved close family ties, provided that this could be done without causing undue difficulty in the administration of the Act. We have formed no concluded view on how this could best be done and would welcome suggestions. One possibility would be to use the "caring for" test already used in the Act in its definition of nearest relative. To elicit comment we tentatively suggest that

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[1] See paras. 4.11 to 4.14 above.

for the purposes of the Mental Health (Scotland) Act 1960 a person should be treated as a relative of another person if (a) he would be a relative if he were related legitimately to that other person and (b) he is caring for that other person or was so caring immediately before that other person was admitted to hospital or was received into guardianship under the Act. (Proposition 52). This would not give full recognition to illegitimate relationships. It would, however, recognise them in those cases where recognition seems most clearly justified and least likely to cause practical difficulty.

PART XI

POSSIBLE CHANGES IN DEFINITION OF LEGITIMACY

Introduction

11.1. The proposals on which we have invited views in the earlier parts of this Memorandum would improve the legal position of the illegitimate child and remove various anomalies in the law. They would not, however, abolish illegitimacy as a legal status or remove all legal distinctions between legitimate and illegitimate children. The question therefore arises whether the category of legitimate children could or should be extended.

Present law

11.2. Under the present law a child is legitimate at birth if his father and mother were validly married to each other at the date of his birth, or at the time of his conception, or at any time in between. For this purpose marriage includes a voidable marriage.[1] Children of a void marriage are legitimate only if at least one of the parents believed the marriage to be valid and the mistaken belief arose out of an error of fact,[2] not an error of law.[3] This is termed a putative marriage. It is thought that any child conceived after both his parents have become aware that their marriage is void is illegitimate.[4] A child illegitimate at birth is legitimated by the subsequent marriage (including a voidable or putative marriage) of his parents if his father is domiciled in Scotland at the date of the marriage.[5] An illegitimate child who is adopted is treated as the legitimate child of the adopter or adopters for almost all purposes.[6]

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[1]Law Reform (Miscellaneous Provisions) Act 1949, s.4.

[2]Petrie v. Ross (1896) 4 S.L.T. 63.

[3]Purves' Trs. v. Purves (1895) 22 R. 513; Philp's Trs. v. Beaton, 1938 S.C. 733.

[4]Fraser, Parent and Child (3rd. ed.) p. 34.

[5]Legitimation (Scotland) Act 1968, s.1.

[6]Children Act 1975, Sch. 2, para. 1.

Children of void marriages

11.3. The present law, that children of a void marriage are legitimate if the marriage is putative, has a long history[1] but may be thought to be unduly restrictive. It penalises children for their parents' lack of good faith, although the children who are thus bastardised could not have influenced their parents' conduct. While it is no doubt right and proper that marriages should be held to be void on various grounds (such as a prior subsisting marriage) it by no means follows that the children of such marriages should be regarded as illegitimate. In many continental countries[2] and in many States in the United States of America[3] children of a void marriage are legitimate, notwithstanding the absence of good faith on the part of parents. It might be argued that to remove the requirement of good faith would encourage parties to contract a void marriage for the sole purpose of legitimating a child. We doubt, however, whether this would be a serious problem in practice. There are provisions designed to prevent void marriages from being contracted[4] and the parties would lay themselves open to prosecution for giving false information to the registrar[5] or (in some cases) for bigamy. Void marriages are liable to give rise to other legal difficulties (for example, if one party wishes to marry someone else) and are unlikely to appeal to people acting in a deliberate and calculating way. We invite views on the question whether the child of a void marriage should be legitimate.

(Proposition 53).

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[1] It derives from the canon law, where it was introduced by a rescript of Pope Innocent III. See Fraser, Parent and Child (3rd. ed. 1922) pp. 27 to 36.

[2] E.g. France, The Netherlands, Spain, Switzerland, West Germany. International Encyclopaedia of Comparative Law Vol. IV, Ch. 6, p. 22.

[3] See Krause, Child Support in America (1981) p. 111.

[4] Marriage (Scotland) Act 1977, ss.3 to 5.

[5] Ibid., s.24(1)(b).

Legitimation otherwise than by subsequent marriage

11.4. Under the present law the only way[1] of legitimating a child born illegitimate is by the subsequent marriage of his parents. There is, however, no logical reason why legitimation should not be possible by other means - such as a court decree or some form of joint recognition by the parents. We consider these possibilities below. For the reasons given above[2] in relation to the conferring of guardianship rights on fathers, we would tentatively reject the possibility of legitimation by mere cohabitation.

11.5. Three objections might be made to the idea of legitimation by some means other than marriage - (1) that it is a radical departure from accepted legal ideas (2) that it would be unnecessary if the reforms canvassed in this Memorandum were adopted and (3) that it is potentially dangerous to third parties. We consider these in turn.

11.6. That a suggestion is radical is not a good reason for refusing to consider it. In any event the traditional connection between marriage and legitimacy is not as close as might be thought at first sight. Because of the doctrine of the putative marriage, Scots law always recognised that a child may be legitimate even although his parents have never been married to each other in the eyes of the law. The law of adoption too has weakened the traditional link. An unmarried person can adopt a child and that child will be treated as his or her legitimate child for almost all legal purposes.[3]

11.7. Although there would be few legal differences between legitimate and illegitimate children if all the propositions

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[1]Apart from an Act of Parliament.

[2]Para. 4.11.

[3]Children Act 1975, ss.8, 11 and Sch. 2. Only a married couple can adopt jointly. See para. 11.7.

in this Memorandum were accepted and implemented, there would still be some difference and the legal status of legitimacy would not disappear. There is, moreover, no way of knowing how many of our proposals will prove acceptable. It may very well be the case that there would be little legal benefit to the child in being legitimated and that the father could secure some recognition of his position by applying for custody, tutory or curatory and other parental rights, to be exercised jointly with the mother. It does not, however, follow that people would regard the status of legitimacy as of no value. There might well be couples who were unable or unwilling to marry each other but who were both determined to do everything possible for their child. For such couples a simple way of conferring full legitimacy might well be preferable to any other legal remedies available to them. It should be noted that adoption would not be an available remedy: only a married couple can adopt jointly.[1]

11.8. In relation to the rights of third parties, legitimation by some means other than marriage would present no more danger than legitimation by subsequent marriage. The dangers would be insubstantial, in any event, even under the present law, and would become even less substantial if the proposals in this Memorandum were accepted. An illegitimate child can already inherit from his parents in exactly the same way as a legitimate child so that there could be no question of prejudicing the other children of the father or the mother by allowing legitimation. The same goes for aliment from the parents. There is under the present law a slight danger that legitimation might confer rights against grandparents in relation

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[1] Children Act 1975, s.10. One of the parents might apply for adoption, but adoption by one parent alone will now be allowed only in exceptional circumstances (*ibid* s.11(3)) and, in any event, the effect would be to exclude the other parent.

to aliment and succession, which would not otherwise exist. This would disappear if the proposals in this Memorandum and the recommendations in our Report on Aliment and Financial Provision were accepted.[1] Any objection based on the interests of third parties is not, in any event, a very strong one. Neither a grandparent nor any other relative (apart from a parent) has any control over the number of children who may be added to the family by legitimate procreation or adoption.

11.9. Legitimation by court decree. It would be possible to empower the court, on a joint application by the child's parents, to grant a decree conferring on the child the status of their legitimate child. We have referred to a joint application because we would not be in favour of one of the parents being able by unilateral application to legitimate the child as regards both parents; unilateral applications which resulted in the child being legitimated as regards only the applicant parent could result in the child having a dual status which might not be readily understood by the general public and which we would not favour. It might be argued that if the parents of an illegitimate child wish to legitimate the child they should do so by marrying each other. They might not wish to marry, however, even if they were both free to do so, and it would seem to be pointless to require parties to go through the charade of a marriage followed by a divorce in order to achieve a result which could be achieved more simply and more directly. A decree of legitimation would alter status, as does a decree of divorce. It would be self-executing and binding on everyone. It would in some respects be analogous to an adoption order as it would place the child in the legal

[1] We have recommended in our Report on Aliment and Financial Provision (Scot. Law Com. No. 67, 1981) para. 2.38 that there should no longer be an alimentary obligation between grandparents and grandchildren.

position of a legitimate child of the applicants. We would envisage that the procedure would involve proof that the applicants were the child's parents and the appointment of a curator ad litem to represent the child's interests if he or she were under age. If the mother were married, intimation of the application to her husband might be required so that he could, if so advised, contest the other man's claim to paternity. Decree would be granted on proof of paternity and maternity. It would not be discretionary. The rules of jurisdiction might be similar to those proposed above in relation to declarator of parentage.[1] There might be reporting restrictions. We do not, however, wish to elaborate on possible rules of procedure and jurisdiction at this stage. Our concern is to seek views on the question of principle.

11.10. One objection to making provision for legitimation by court decree might be that it would simply draw attention to the fact that the child's parents were not married to each other and would do nothing to remove the social stigma, if any, attaching to a child born out of wedlock. Although the fact of legitimation would be noted in the Register of Corrections Etc. the entry in the Register of Births would still show that the parents were not married. This objection is valid to this extent - that legitimation by court decree would not be as satisfactory from the child's point of view as legitimation by subsequent marriage. It might still, however, be better than no legitimation at all in those cases where marriage was out of the question. Any embarrassment to the child at the time of the legitimation would probably be no greater than in the case of legitimation by subsequent marriage and would be minimal or non-existent if the child were very young. Although there is no way of knowing how people would react in later life to the knowledge that they

[1] See paras. 9.26 and 9.27.

has been legitimated by court decree it seems not unreasonable to suppose that they might prefer to have been legitimated in that way than not to have been legitimated at all. We invite views on the question - should the law make provision for legitimation by court decree on the application of both parents?
(Proposition 54).

11.11. Legitimation by registration. It would be possible to provide that the child of an unmarried woman would be legitimated automatically by the registration of the particulars of the mother and father, at their joint request, in the Register of Births,[1] There would be many advantages in such a solution. It would entail no additional expense on the part of the parents. Since about half of all illegitimate births are jointly registered it would result in a substantial reduction in the number of illegitimate children in the future. The child would be legitimated in most cases very soon after birth. The scheme would require no additional action on the part of the parents, and no additional public expenditure, since the child's birth has to be registered anyway. The fact of legitimation would be a matter of public record: the child would be the legitimate child of the two people who appeared on the Register of Births as his parents. If children could be legitimated in this way there might be less temptation for people to enter into "shotgun marriages" solely to legitimate a child. This solution would apply only to children whose births were registered in the Scottish Register of Births;[1] it

[1]Including the Scottish Air Register Book of Births and Deaths, Marine Register and Service Departments Register Dept under the Civil Aviation Act 1949, s.55; the Merchant Shipping Act 1970, s.72; and the Registration of Births, Deaths and Marriages (Special Provisions) Act 1957 respectively.

would apply only to the children of unmarried mothers; and it would apply only where the birth was registered at the joint request of the parents. It would not therefore be a complete substitute for decrees of legitimation or for applications to the court for parental rights. It would, however, substantially reduce the need for such court proceedings.

11.12. The main objection to legitimation by joint registration might be that unmarried mothers, who would at present agree to joint registration of the father, would be deterred from doing so by the thought that the child would become fully legitimate. We are not convinced that many would be. After all, registration of the father under the present law strengthens his position, factually if not legally. He is in a better position to claim custody of the child and to succeed to the child's property on the child's death. If these considerations are not a deterrent it may be that the conferment of full legitimacy would not be.

11.13. It may be, indeed, that more parents would choose to register the child's birth jointly if the child thereby became legitimate. This might be done without thought for the long term consequences: legitimation would be irrevocable and would mean, among other things, that both parents would have full parental rights. Pressure might be put on mothers to agree to joint registration in order to legitimate the child. Fathers might be registered even if they were unlikely to play any part in the child's life. It could, of course, be said that from the child's point of view it is better that the father should be registered wherever possible. Research has suggested that many people have a need to know their origins[1] and this is reflected in the law on adoption.[2] The child

[1] Triseliotis, In Search of Origins (The experiences of adopted people).

[2] Adoption Act 1958, s.22, as amended by Children Act 1975, s.27.

may also have a patrimonial, as well as a psychological, interest in having paternity established. It is impossible to predict at the time of the child's birth how valuable the child's alimentary and succession rights in relation to the father might be. There could also, in cases involving potential genetic disorders, be medical reasons for having paternity established. The fact that the father may be unlikely to play an active role in the child's life is not necessarily a good reason for not identifying him. The father of a legitimate child may abandon the mother before the child's birth or shortly afterwards and play no further role in the child's life. Yet that would not usually be regarded as a good reason for not registering him.

11.14. Another objection to legitimation by joint registration might be that it would increase the stigma attaching to those who were illegitimate. They would be recognised as those whose parents had not only not married but had also not been willing to register the birth jointly. It may be, however, that such people would be in no worse position than they are now. Indeed if the proposals in this Memorandum were accepted and implemented they would be in a better legal position. It could also be argued that it is better to improve the position of some people even if the improvement cannot apply to everyone than to do nothing for those who can be helped.

11.15. We would be particularly grateful for comments on the above points and therefore invite views on the question:- <u>should it be provided by statute that the child of an unmarried woman is deemed to be the legitimate child of both parents where they both appear on a Scottish Register of Births at their joint request</u>?
(Proposition 55).

11.16. Supplementary rules. In relation to any method of legitimation after the birth of a child questions arise as to the date of the legitimation and its effect on third parties. We think that these questions should be resolved by applying the principles laid down in the Legitimation (Scotland) Act 1968. This would mean that the child would be legitimate only from the date of the decree or other legitimating act. Legitimation would not affect any rights vested in third parties prior to the date of the legitimation.

PART XII

SUMMARY OF PROVISIONAL PROPOSALS AND QUESTIONS FOR CONSIDERATION

Para.

II. ESTABLISHMENT OF PATERNITY

		Para.
1.	It should be made clear that the presumptions (a) that the husband is the father of a child conceived by his wife during their marriage and (b) that the husband is in certain circumstances the father of a child born to his wife during their marriage but conceived before the marriage, apply in the case of an irregular or void marriage.	2.14
2.	Where a man has been registered in any United Kingdom register of births as the father of a child and neither of the presumptions mentioned in Proposition 1 apply, that man should be presumed to be the child's father.	2.14
3.	Views are invited as to whether the standard of proof required to rebut the presumptions mentioned in Propositions 1 and 2 above should be proof on a balance of probabilities.	2.14

III. REGISTRATION OF BIRTH

		Para.
4.	The mother of an illegitimate child should be entitled to register a man as the father on production of a court decree finding him to be the father.	3.9

		Para.
5.	Either parent of an illegitimate child should be entitled to register the child's birth and have the father registered 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.	3.11
6.	Where the birth has been registered without the father's particulars, either parent of an illegitimate child should be entitled to apply to the Registrar General for the father's name and surname to be recorded in the Register of Corrections Etc. on production of the declarations referred to in Proposition 5.	3.13
7.	We invite views on the question whether there should continue to be a time limit of 12 months from the date of birth for the purposes of section 18(2)(b) and (c) of the Registration of Births, Deaths and Marriages (Scotland) Act 1965 (statutory declaration of paternity by father of illegitimate child or application to sheriff for recording father's name in the Register of Corrections Etc.).	3.14
8.	An application to the sheriff under section 18(2)(c) of the Registration of Births, Deaths and Marriages (Scotland) Act 1965 (for recording the name of the father of an illegitimate child in the Register of	3.15

Para.

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.

9. (a) The law on the re-registration of the birth of an illegitimate child under section 20(1)(a) of the Registration of Births, Deaths and Marriages (Scotland) Act 1965 should be clarified. (b) Where the child is under the age of 16 re-registration should be possible on the application of (1) the mother or (2) the father with the consent of the mother or the sanction of the sheriff. — 3.19

IV. GUARDIANSHIP

10. The mother of an illegitimate child should, by operation of law, be the tutor and curator of the child. — 4.4

11. The mother of an illegitimate child should be entitled to appoint testamentary tutors and curators to the child. — 4.5

12. Views are invited on the following questions:- (a) whether the father of an illegitimate child should be entitled to apply to the court to be appointed tutor or curator to his child; (b) whether the father's application should be competent only if the mother consents; and (c) whether in deciding such applications the court should be directed by statute to regard the welfare of the child as the first and paramount consideration. — 4.10

		Para.
13.	The father of an illegitimate child should not be the child's tutor or curator merely by virtue of cohabitation with the mother.	4.11
14.	Views are invited on the desirability of enabling joint tutory and curatory to be conferred upon the father of an illegitimate child otherwise than by application to the court, whether by virtue of joint registration of the child's birth or by agreement between the parents or otherwise.	4.14
15.	An appointment of testamentary tutors or curators to an illegitimate child by the father of the child should be valid if the father, at the date of his death, had custody of the child by virtue of a court decree or was the child's tutor or curator.	4.15
16.	Where the parents of an illegitimate child were his joint tutors or curators immediately before the death of one of them, the surviving parent should become the child's tutor or curator solely or jointly with any tutors or curators appointed by the deceased parent.	4.20
17.	The father of an illegitimate child should on the mother's death become the child's tutor or curator, either solely or jointly with any testamentary tutors or curators appointed by the mother, if he was immediately before her death entitled to the custody of the child (either solely or jointly with any other person) by virtue of a court decree.	4.20

		Para.
18.	The court should have power to appoint a tutor or curator to act jointly with a surviving parent who becomes sole tutor or curator in the circumstances described in Proposition 16 or 17.	4.20
19.	Where the surviving parent of an illegitimate child is a tutor or curator, he or she should have the same right to object to acting jointly with a testamentary tutor or curator appointed by the other parent as has the surviving parent of a legitimate child.	4.21
20.	It should be made clear that section 4(2A) of the Guardianship of Infants Act 1925 (which enables the court to appoint a tutor to any child having no parent, tutor or other person having parental rights) applies to illegitimate children. The mother of an illegitimate child should, but the father should not, be regarded as a "parent" for this purpose.	4.22
21.	Where a dispute relating to the welfare of the child arises between joint tutors or curators of an illegitimate child the court should have power, on application by either party, to make such order regarding the matters in dispute as it thinks proper.	4.23
22.	The court should, on application, have power to make an order removing a person as tutor or curator to an illegitimate child and to recall such an order.	4.27

		Para.
23.	The powers referred to in Propositions 12, 18, 20, 21 and 22 above (appointment and removal of tutors and curators to illegitimate children and resolution of disputes between joint tutors or curators) should be exercisable by the Court of Session or by the sheriff courts.	4.32
V.	CUSTODY AND ACCESS	
24.	In any proceedings before any court in which the custody or upbringing of, or access to, an illegitimate child is in question the court should be required to regard the welfare of the child as the first and paramount consideration.	5.4
25.	Views are invited on the question whether there are any circumstances in which custody rights should be conferred on the fathers of illegitimate children by operation of law without the need for any application to a court.	5.6
VI.	OTHER PARENTAL RIGHTS	
26.	It should be made clear by statute that, except as otherwise provided, the mother of an illegitimate child has to the exclusion of the father all the parental rights possessed by the mother of a legitimate child.	6.8
27.	The father of an illegitimate child should be entitled to apply to the court for any of the parental rights possessed by the father of a legitimate child.	6.9

		Para.
28.	We invite views on the question whether there are any circumstances in which, without the need to apply to a court, the father of an illegitimate child should have all the parental rights possessed by the father of a legitimate child.	6.10
29.	Where the parents of an illegitimate child have parental rights jointly and a dispute arises between them relating to the exercise of those rights, the Court of Session or the sheriff courts should have power, on application by either parent, to make such order regarding the matter in dispute as it thinks proper.	6.11
30.	The Court of Session or the sheriff courts should, on application, have power to make an order divesting the mother or the father of an illegitimate child of any parental rights and to recall such an order.	6.11
31.	For the removal of doubt 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 jointly with any other person.	6.12

VII. ADOPTION

32.	Should the agreement of the father of an illegitimate child to the adoption of his child be required (subject to the normal rules for dispensing with parental agreement) not only if he is the child's tutor	7.8

Para.

or curator or has a legal right to the **custody** of the child (whether solely or jointly with any other person), but also if he has any other parental rights in relation to the child?

33.	Views are invited on the extent to which fathers of illegitimate children should be notified of adoption proceedings.	7.10

VIII. SUCCESSION

34.	A relationship traced to, from, or through a person of illegitimate birth should, for the purposes of intestate succession and legitim, be treated as a legitimate relationship.	8.14
35.	(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.	8.19
36.	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	8.21

other purposes (such as the appointment of an executor or the fulfilment of a condition).

IX. JUDICIAL PROCEEDINGS

37. Declarators of bastardy should be renamed declarators of illegitimacy. — 9.1

38. For the removal of doubt it should be made clear that an action of declarator of legitimacy, illegitimacy or parentage alone is competent. — 9.3

39. For the removal of doubt it should be made clear that a question of legitimacy or parentage may be determined incidentally for the purposes of any litigation without any necessity for a declarator. — 9.4

40. For the removal of doubt it should be made clear (a) that it is competent to combine a conclusion for a declarator of legitimacy, illegitimacy or parentage with a conclusion for any other competent remedy and (b) that, in such a combined action, the separate conclusions are to be regarded, for jurisdictional and procedural purposes, as separate actions (so that, for example, failure to establish jurisdiction in relation to the declaratory conclusion would not necessarily result in failure to establish jurisdiction in relation to the other conclusion). — 9.5

		Para.
41.	Should a decree in an action of declarator of legitimacy, illegitimacy or parentage (a) have effect against all persons, without exception, or (b) have effect against all those who had been given notice of the action and those deriving title from them; or (c) give rise to a rebuttable presumption of legitimacy, illegitimacy or parentage, as the case may be, or (d) have some other effect and, if so, what?	9.15
42.	We invite views on whether (a) a person should be regarded as having a title and interest to sue for a declarator of legitimacy, illegitimacy or parentage, without having to show any further interest, if (i) he is the child whose legitimacy or parentage is in question or (ii) he is, or claims to be, or not to be, a parent of that child, or (b) the category of persons entitled to sue without showing any interest other than relationship should be enlarged to include remoter relatives, and if so, which?	9.18
43.	We invite views on the question whether, without prejudice to the right of any person to raise any other appropriate proceedings, a person should be entitled to sue for a declarator of legitimacy, illegitimacy or parentage ONLY if he comes within the category of persons mentioned in Proposition 42(a) or (b)?	9.19

		Para.
44.	We invite views on the question whether it should be provided that the child, if alive and not the pursuer, should be called as a defender in any action for declarator of his legitimacy, illegitimacy or parentage.	9.20
45.	Should any provision be made (a) to require the Lord Advocate to be called as a defender in any action for declarator of legitimacy, illegitimacy or parentage or (b) to entitle the Lord Advocate to intervene in such actions?	9.21
46.	We invite views on the question whether Rules of Court should provide for intimation of an action of declarator of legitimacy, illegitimacy or parentage to be made to such persons with an interest as the court may require.	9.22
47.	We invite views on the question whether actions for declarator of parentage should be brought within the category of actions in which no decree in favour of the pursuer will be granted without proof.	9.23
48.	We invite views on the question whether there should be any restrictions on the right to seek or obtain a declarator of legitimacy, illegitimacy or parentage of a person not of full age and capacity and, if so what?	9.24

		Para.
49.	Should actions for declarator of legitimacy, illegitimacy or parentage be competent only in the Court of Session?	9.25
50.	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 (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.	9.26
51.	Section 11 of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1968 provides that a finding of paternity in an action of affiliation and aliment or in affiliation proceedings elsewhere in the United Kingdom is sufficient evidence of paternity in subsequent civil proceedings unless the contrary is proved. Should this provision (a) be left as it is (b) be repealed or restricted or (c) be extended to other incidental findings of paternity or maternity?	9.30

Para.

X. MISCELLANEOUS MATTERS

52. For the purposes of the Mental Health (Scotland) Act 1960 a person should be treated as a relative of another person if (a) he would be a relative if he were related legitimately to that other person and (b) he is caring for that other person or was so caring immediately before that other person was admitted to hospital or was received into guardianship under the Act. — 10.17

XI. POSSIBLE CHANGES IN DEFINITION OF LEGITIMACY

53. We invite views on the question whether the child of a void marriage should be legitimate. — 11.3

54. Should the law make provision for legitimation by court decree on the application of both parents? — 11.10

55. Should it be provided by statute that the child of an unmarried woman is deemed to be the legitimate child of both parents where they both appear on a Scottish Register of Births at their joint request? — 11.15