

**THE LAW REFORM COMMISSION OF HONG KONG**

**REPORT ON**

**ILLEGITIMACY**

**[TOPIC 28]**

We, the following members of the Law Reform Commission of Hong Kong, present our report on Illegitimacy.

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October 1991

# THE LAW REFORM COMMISSION OF HONG KONG

## REPORT ON

## ILLEGITIMACY

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# Introduction

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## Terms of Reference

1. On 18 December 1989, under powers granted by the Governor-in-Council on 15 January 1980, the Attorney General and the Chief Justice referred to the Law Reform Commission for consideration the following:

*“To consider the law relating to legitimation and illegitimate persons, having particular regard to the provisions of the International Covenant on Civil and Political Rights, and to recommend such changes in the law as may be thought necessary.”*

## The Commission’s method of work

2. The first stage of our examination of this subject was the preparation of a detailed background paper by the Secretariat, setting out the issues to be considered and the options for reform. This paper was tabled for our consideration in July 1990. At that stage, we decided to seek the views of a number of interested bodies and individuals.

3. Our consultation took two forms. Those organisations and individuals who might be expected to have an understanding of the legal issues involved were sent the background paper as it stood while those likely to have an interest without any particular legal expertise were sent a questionnaire which contained specific questions on the most important areas of illegitimacy.

4. The public consultation exercise was conducted between August and October 1990. The paper on the subject, together with a questionnaire, was sent to over sixty bodies and organisations. Some forty-two responses were received. The views submitted were carefully studied and we express our appreciation of all those who took the trouble to respond.

5. The survey revealed that there was overwhelming support for the removal of legal discriminations against illegitimate children. There was also general support for the abolition of the concept of illegitimacy. As a result of the consultation and of our further detailed discussion of illegitimacy, we were able to finalise our conclusions in this report.

## **Terminology**

6. Throughout this report we have used the word “illegitimate” to describe children born out of wedlock. We are conscious of the pejorative connotations of that word but we have thought it preferable to use one well-understood word rather than to risk confusion by adopting terms such as “non-marital” which do not feature in earlier legislation or case law. We have also consistently referred to a child as “he”. We intend that this should be understood to mean “he or she” without the necessity of spelling the matter out on each occasion.



# Chapter 1

## Illegitimacy in Hong Kong

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### What is illegitimacy?

1.1 Strictly speaking, illegitimacy is not a status at all: illegitimate children are merely those to whom the law does not grant the status of legitimacy. In broad terms, a child is legitimate if his parents were validly married to one another either when he was born or when he was conceived (see Knowles v Knowles [1962] P 161). This common law statement has been modified by statutory provisions over the years but, in general, a child will be illegitimate unless he falls within the scope of this broad definition.

1.2 The importance of the concept of legitimacy in the law, and the legal disadvantages which flow from not being accorded that status, probably stem historically from a concern to protect the family as the unit of society. Brenda Hoggett ("Parents and Children," 2<sup>nd</sup> Ed., at page 119) expressed the following view:

*"The institution of marriage may well have been devised in early societies in order to establish a relationship between father and child .... A man may derive spiritual, emotional and material advantages from having children, but whereas motherhood may easily be proved, fatherhood may not. A formal ceremony between man and woman, after which it is assumed that any children she may have are his, is the simplest method of establishing a link. It also enables him to limit his relationships to the offspring of a suitable selected mate. A legal system which wishes to facilitate the orderly devolution of property and status within patrilineal families will therefore place great emphasis on the concept of legitimacy. But a legal system which is no longer so concerned about material provision for future generations of the few, and is far more concerned about the welfare of all young children, is likely to find the concept more and more distasteful."*

1.3 Certain legal disabilities flow from a child's illegitimacy. We shall examine these in detail later. Suffice it to say at this stage that the law treats the illegitimate child with disfavour in fields as diverse as succession, maintenance and citizenship. The legal discrimination against illegitimacy extends beyond the child and restricts the father's rights as a parent: the father of an illegitimate child has, for instance, no automatic rights of access or custody.

## The extent of illegitimacy in Hong Kong

1.4 Such figures as are available to us indicate that the number of illegitimate births in Hong Kong is relatively small, and significantly lower than in the United Kingdom. The comparative figures for the last six years are as follows:

	<u>No. of illegit. births</u>	<u>Percentage of illegit. births to all live births</u>
<u>1985</u>		
UK	124,000	17.0%
HK	3,323	4.3%
<u>1986</u>		
UK	158,000	21.0%
HK	2,682	3.7%
<u>1987</u>		
UK	178,000	22.9%
HK	2,367	3.3%
<u>1988</u>		
UK	198,000	25.0%
HK	2,379	3.2%
<u>1989</u>		
UK	206,692	26.6%
HK	2,534	3.5%
<u>1990</u>		
UK	222,829	27.9%
HK	3,013	4.3%

1.5 While the number of children in Hong Kong disadvantaged by the present law on illegitimacy may be small, we nevertheless believe that the law in this area merits our attention.

## Illegitimacy at common law

1.6 We have seen earlier that a child is illegitimate if his parents were not validly married to one another either when he was born or when he was conceived. Thus, if a married woman gives birth to a child fathered by someone other than her husband, the child will be illegitimate. This has a particular current significance since the effect would be that at common law a child born as a result of artificial insemination by a donor other than the mother's husband would be illegitimate. A child is not illegitimate where he is conceived in marriage but the father dies before the child's birth (Blackstone, "Commentaries on the Laws of England" [1825] I at pp 454, 456 and 459). Similarly, a child conceived in marriage but born after the parents have

divorced is legitimate at common law. Conversely, a child will be legitimate if he is conceived out of wedlock but the parents marry before he is born.

1.7 A presumption operates at common law that a child born to a married woman is the child of her husband and therefore legitimate. This presumption is rebuttable by proof to the contrary and was explained as follows in Knowles v Knowles ([1962] P 161, at page 166):

*“There is undoubtedly a presumption (strong, but capable of being rebutted by satisfactory evidence) that a child born in wedlock to a married woman is the child of her husband. That presumption applies not only to a child born during wedlock but also to a child clearly conceived during wedlock. That appears from ... cases ..... where what was being considered was the paternity of a child which must, according to the laws of nature, have been conceived during wedlock but which had been born after the death of the husband. The presumption that a child conceived during wedlock is a legitimate child of the husband applies just as much whether the husband and wife are living together in the ordinary way or whether they are separated by agreement, or by a deed, or simply separated, even if the wife has obtained from the magistrates an order for maintenance, unless that order contains a non-cohabitation clause .... The presumption ceases to operate if the parties are separated under an order of the court such as, for example, a decree of judicial separation, which does away with the duty of the spouses to live together. It seems to me that the basis of the presumption is that the law contemplates spouses as fulfilling their marital duties to each other unless there has been an actual order of the court dispensing with the performance of their duties. So long as the law contemplates the spouses as performing their marital duties to each other, so long will it contemplate that a married woman, if she bears a child, will be bearing it as a result of intercourse with her husband only.”*

1.8 The common law position in relation to void and voidable marriages has been modified by statute as we shall see later but it was that the child of a void marriage was considered illegitimate while the child of a voidable marriage was legitimate until the marriage was invalidated by law. Once a voidable marriage was annulled, any child of the marriage was rendered illegitimate retrospectively.

## **Statutory modification of the common law**

1.9 The common law rules on illegitimacy are modified in Hong Kong by a number of statutory provisions, principally those in the Legitimacy Ordinance (Cap 184). Section 3 of that Ordinance renders an illegitimate child legitimate where his parents subsequently marry. This is provided the child's father is domiciled in, or has a substantial connection with, Hong Kong

at the time of the marriage. Section 8 also legitimates an illegitimate child in Hong Kong if the child has been legitimated by marriage under the laws of another country, provided the father was domiciled in, or had a substantial connection with, that other country at the time of the marriage. To all intents and purposes, the legitimated child is treated by the law in the same way as a legitimate child.

1.10 An important aspect of the law which affects illegitimacy is the determination of what constitutes a valid marriage. In Hong Kong, this issue is complicated by the fact that marriage could formerly be constituted in a number of traditional (and frequently imprecise) ways. Concubinage was permitted and a man might have children from more than one wife. The Marriage Reform Ordinance (Cap 178) changed all this and provided that from 7 October 1971 Hong Kong marriages were to be monogamous and could only be contracted in accordance with the Marriage Ordinance (Cap 181). Thereafter, a concubinage was no longer a status recognised by law and customary marriages would no longer be recognised as a valid means of contracting a marriage. Section 14(1) of the Legitimacy Ordinance (Cap 184) clarified the position of children of such marriages by providing that a child would be legitimate (and deemed always to have been so) if he was a child of:

- (a) a modern marriage validated by the Marriage Reform Ordinance;
- (b) a customary marriage declared to be valid by the Marriage Reform Ordinance;
- (c) a union of concubinage; or
- (d) a kim tiu marriage entered in accordance with the Chinese law and custom applicable in Hong Kong before 7 October 1971.

1.11 As we saw earlier, the child of a void marriage is illegitimate at common law. Section 20 of the Matrimonial Causes Ordinance (Cap 179) characterises void marriages as those where:

- (a) the marriage is incestuous;
- (b) either party is under 16;
- (c) either party is married to someone else at the time of the marriage;
- (d) the parties are not male and female; or
- (e) the marriage is invalid by the law of Hong Kong. This last category would cover cases where, for instance, the marriage was not conducted by a competent minister or the Registrar of Marriages.

Clearly, the common law rule could cause hardship where the parents had made an honest mistake as to the status of their marriage. To mitigate the effects of the common law rule, section 11 of Cap 184 renders the child of a void marriage legitimate if at the time of intercourse (or at the later celebration of marriage) either of the parents reasonably believed that the marriage was valid.

1.12 At common law the child of a voidable marriage was legitimate until the marriage was invalidated by law. As with void marriages, the Matrimonial Causes Ordinance sets out the categories of voidable marriage. Section 20(2) provides that the following grounds render a marriage voidable:

- (a) non-consummation of the marriage because of incapacity or willful refusal;
- (b) lack of valid consent;
- (c) either party was unfit to marry because of mental disorder at the time of marriage; or
- (d) at the time of the marriage the respondent was pregnant by someone other than the petitioner or was suffering from venereal disease in a communicable form, provided the petitioner was not aware of this at the time of the marriage.

1.13 Where any of these grounds exist, the husband or wife can petition the court to declare that the marriage is null and void. In the absence of any other legal provision, the effect of such a declaration of nullity would be that the marriage would be invalid from the outset and any child of the marriage would thus become illegitimate. To relieve the effects of this on the issue of such a marriage, section 12 of the Legitimacy Ordinance provides that where a decree of nullity is granted in respect of a voidable marriage any child who would have been legitimate if the marriage had been dissolved rather than annulled is deemed to be a legitimate child despite the annulment. (The retroactive effect of a decree of nullity has been further modified in respect of decrees granted after 30 June 1972. Section 20B of the Matrimonial Causes Ordinance provides that a decree operates only from the time the decree has been made absolute and the marriage is treated as if it existed up to this time.)

1.14 The legal disabilities associated with illegitimacy are largely removed by adoption. Section 13(1) of the Adoption Ordinance (Cap 290) passes all the parental rights and duties in relation to custody, maintenance and education to the adopter "as if the infant were a child born to the adopter in lawful wedlock". In respect of custody, maintenance and education "the infant shall stand to the adopter exclusively in the position of a child born to the adopter in lawful wedlock." In addition, section 15(1) of Cap 290 ensures that an adopted child is treated as if he were legitimate in relation to intestate succession, while subsection (2) of that section provides that any will is to be

interpreted as if the adopted child was the legitimate child of his adoptive parents.

## **Proof of paternity**

1.15 Before moving on in the next chapter to discuss the legal effects of illegitimacy, we should say something of the ways in which the law in Hong Kong currently allows paternity to be established. It should be made clear at the outset that there is a difference between establishing who is the father of a child and rendering that child legitimate. A finding by the court that the unmarried X is the father of the illegitimate Y may have established paternity but it does not in any way change the nature of Y's illegitimacy. With that initial proviso, we shall examine various aspects of paternity one by one.

### **(i) Marriage**

1.16 We pointed out at paragraph 1.7 that a presumption operates at common law that a child born to a married woman is the child of her husband. It follows from that, of course, that the child is considered legitimate, though the presumption can be rebutted by proof to the contrary beyond reasonable doubt. Section 12 of the Legitimacy Ordinance (Cap 184) provides that where a voidable marriage is dissolved, any children of the marriage will nevertheless continue to be treated as legitimate. Section 11 makes similar provision in respect of void marriages provided at least one of the parents thought the marriage was valid.

### **(ii) Cohabitation**

1.17 In some Commonwealth jurisdictions cohabitation is treated in the same way as marriage and constitutes prima facie evidence of paternity. Different definitions of cohabitation are used in different jurisdictions. Cohabitation for a period of twelve months is required in Tasmania whereas "a relationship of some permanence" is required in Ontario. No such rule applies in Hong Kong and cohabitation raises no presumption of paternity.

### **(iii) Registration of birth**

1.18 Section 24(2) of the Births and Deaths Registration Ordinance (Cap 174) provides that:

*"Every entry and every certified copy of an entry in a register book for the registration of births or of deaths shall be received as evidence of the birth or death to which the same relates without other or further proof of such entry."*

Since section 24(2) only relates to evidence of the birth and not of paternity, this would not necessarily imply that the fact that an individual's name is entered on the register as the father of the child is prima facie evidence of paternity, a presumption which arises in some other jurisdictions as we shall see later.

1.19 Prior to 1971, by virtue of section 12 of Cap 174, if a Chinese father acknowledged himself to be the father of a child and registered the child's birth together with the mother, the person registering as the father was deemed to be the father of the child and the child was deemed to be legitimate. However, this deeming provision reflected the legal and social realities of the situation before concubinage was brought to an end and the provision was deleted from section 12 in 1971. The legal position is now that acknowledgement by the father together with registration by both parents does not legitimate the child.

***(iv) Finding by the Court***

1.20 In Hong Kong there is no jurisdiction given to the court to make declarations of paternity where no other relief is sought. A legitimate child has the right to apply for a declaration of **legitimacy** or a declaration of **legitimation** under section 49 of the Matrimonial Causes Ordinance (Cap 179) but that, as we have seen, is not the same as paternity. An illegitimate child has no such right.

1.21 Findings of paternity may be made in conjunction with other proceedings, however. The Affiliation Proceedings Ordinance (Cap 183) allows an unmarried mother or her child to apply for maintenance from the father. Section 5 of Cap 183 states that the court "may adjudge the defendant to be the putative father of the child" and the court may then make a variety of awards for the maintenance of the child.

## Chapter 2

### The legal effects of illegitimacy

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2.1 We have described in the previous chapter the concept of illegitimacy and how, and on whom, the law confers that "status". In this chapter we will examine the legal disadvantages which flow from illegitimacy, both for the child himself and for his parents. These may be divided into a number of categories and we will look at each of these in turn.

#### (a) Succession

2.2 Unlike legitimate children, illegitimate children have no right to succeed to their father's estate on the father's intestacy. The definition of "child or issue" in section 2(2) of the Intestates' Estates Ordinance (Cap 73) does not include children born out of wedlock.

2.3 Illegitimate children can succeed to their mother's estate on her intestacy but only when there are no surviving legitimate children (section 10 of the Legitimacy Ordinance (Cap 184)). Unlike legitimate children, they cannot inherit on the intestacy of their father or their brothers or sisters as section 2(4) of the Intestates' Estates Ordinance limits the meaning of "brother or sister" to a "child" of the same father and section 2(2) defines "child" as a "child of a valid marriage". There appears to be some inconsistency in the law, however, as the legitimate brother or sister of an illegitimate intestate can succeed to the deceased's estate, as can his father (see sections 4(6) to (8) of the Intestates' Estates Ordinance).

2.4 The Deceased's Family Maintenance Ordinance (Cap 129) is intended to provide a means for dependants of the deceased to obtain maintenance out of the estate where the will (or the intestacy rules) do not make reasonable provision for the dependant. Unfortunately for the illegitimate child, however, the "dependants" described in section 2 of the Ordinance who may benefit do not include children not born of a valid marriage.

2.5 It is relevant to point out under this heading that the rule of construction at common law in relation to testate succession is that words denoting a family relationship are presumed to refer only to legitimate relations.

2.6 One further aspect of succession in Hong Kong is of interest and that is the distinctive provisions which apply in the New Territories by virtue of the New Territories Ordinance (Cap 97). We have already had occasion to



examine these in relation to our report on wills and concluded that they had no place in a modern society (“Report on Law of Wills, Intestate Succession and Provision for Deceased Persons’ families and Dependants”, Topic 15, at page 56). The relevance to our present study is that Chinese customary law (which applies to succession to land in the New Territories which has not been exempted from Part II of the New Territories Ordinance) recognised a relationship between a man and his secondary wives, or “tsips”. Children of a “tsip” were regarded as being as legitimate as those of the first wife.

## **(b) Adoption**

2.7 The concept of adoption is not one known to the common law. Parental Rights, duties and liabilities were inalienable at common law and could not be transferred to another person. The procedure for such a transfer was introduced by statute and in Hong Kong is governed by the Adoption Ordinance (Cap 290). An adoption order may be made in favour of the mother or father, or a “relative” of the child who is 21 or over, or a person who is 25 or over (section 5 of Cap 290). “Relative” is defined in section 2 of Cap 290 to mean where the child is illegitimate:

*“.... the father of the infant and any person who would be a relative of the infant within the meaning of this definition if the infant were the legitimate child of his mother and father.”*

Section 2 further defines “father” to mean the natural father when dealing with an illegitimate child, while “parent” in relation to such a child “means his mother, to the exclusion of his father”.

2.8 Under the present law of adoption, an adoption order will not made” .... except with the consent of every person who is a parent or guardian of the infant or who is liable by virtue of any order or agreement to contribute to the maintenance of the infant; or .... on the application of one of two spouses, except with the consent of the other spouse” (section 5(5) of Cap 290). Since “parent” in relation to an illegitimate child means the mother and not the father, the consent of the father of an illegitimate child is not required for adoption unless the father is liable to maintain the child under a court order (e.g. an affiliation order) or he has been made a guardian of the child. He could, however, attempt to “block” adoption proceedings by applying to the court for custody of his child under sections 10(1) and 21(1) of the Guardianship of Minors Ordinance (Cap13). By the same token, the father may still apply for custody of his illegitimate child after the mother has given a general consent to the child’s adoption (see “Family Law in Hong Kong”, Pegg, 2nd Ed, pp 236 ad 237).

2.9 In Hong Kong, section 5A of the Adoption Ordinance (Cap 290) gives the court power to dispense with any consent required by section 5(5)(a) and to make an order declaring a child free for adoption where the court is satisfied that consent should be dispensed with. Section 5A only applies to cases where the Director of Social Welfare is the legal guardian of the child

and the application is made by the Director. In other cases, section 6 gives the court power to dispense with consent if it is satisfied that the child has been neglected or persistently ill-treated by his parent or guardian; that the person liable to contribute to the maintenance of the infant has persistently neglected or refused so to contribute; that the person whose consent is required cannot be found or is incapable of giving his consent or that his consent is unreasonably withheld; or that the consent ought, in all the circumstances of the case, to be dispensed with (section 6 of Cap 290).

### **(c) Maintenance**

2.10 “At common law there is no legal obligation on a father or mother to maintain a child, unless the neglect to do so would bring the case within the criminal law” (Halsbury’s Laws of England, Fourth Edition, Vol 24, para. 505). That position has been modified by statute, however, and in Hong Kong both the Separation and Maintenance Orders Ordinance (Cap 16) and the Matrimonial Proceedings and Property Ordinance (Cap 192) make provision for the maintenance of children of a marriage. A wife may apply to the court under section 3 of Cap 16 for a lump sum or periodical payments to be made by her husband under section 5 “for the maintenance and education of each child of the marriage committed to her custody”. This option will only be available to the wife where she can show that the husband has been guilty of one of what may be termed the “matrimonial offences” described in section 3. These include the husband’s “willful neglect to provide .... reasonable maintenance and education for her infant children whom he is legally liable to maintain.” “Child of the marriage” in section 3 is not defined but would clearly not include an illegitimate child. Any maintenance order made under section 5 will normally expire when the child reaches 16 but section 12 allows an exception when the child is undergoing full-time education or training beyond the age of 16. In that case, the wife can apply for an extension of the maintenance order until the child is 21.

2.11 An alternative means of obtaining maintenance is provided in the Matrimonial Proceedings and Property Ordinance (Cap 192). Section 8(1) allows either the husband or the wife to apply for an order where the other party has “willfully neglected” to provide, or to make a proper contribution towards, reasonable maintenance for any “child of the family”. “Child of the family” is defined as a child of both the parties to the marriage and “any other child who has been treated by both those parties as a child of their family” (section 2). “Child” includes an illegitimate child. Section 8(5) of Cap 192 gives the court power to make orders “as it thinks just” for periodical payments or a lump sum for the benefit of the child. Normally, orders under section 8(5) cannot extend beyond the time when the child reaches 21 but section 10(3) provides an exception where there are “special circumstances” or where the child is undergoing training or receiving instruction at an educational establishment.

2.12 The provisions of both the Matrimonial Proceedings and Property Ordinance and the Separation and Maintenance Orders Ordinance

which we have looked at so far deal with maintenance where a marriage is involved and continues to subsist. The Matrimonial Proceedings and Property Ordinance also deals, however, with maintenance for “children of the family” where there are proceedings for divorce, judicial separation or nullity of marriage. Sections 5 and 6 in broad terms give the court power to make similar orders for maintenance of the child as those we have described under section 8, with the addition of a power under section 6 to order the transfer of property for the child’s benefit once a decree of divorce, nullity or separation has been granted. The same provisions under section 10 which we have outlined in paragraph 2.11 regarding the duration of any order for maintenance apply equally here.

2.13 None of the provisions we have referred to are of any assistance to an unmarried mother, however. Instead, she will have to look to the Affiliation Proceedings Ordinance (Cap 183) and apply for an affiliation order under section 3. An “affiliation order” is an order that the man judged to be the putative father of an illegitimate child shall make payment to the child’s mother (or some other person named in the order).

2.14 An affiliation application is subject to restrictive rules under Cap 183. It can only be made by the child or the child’s mother and an order will only be made if certain special requirements are satisfied. Firstly, the child’s mother must be a “single woman” at the date of the application for maintenance or have been so at the date of the child’s birth. Secondly, proceedings must be brought within 12 months of the child’s birth; or at any subsequent time upon proof that the man alleged to be the father of the child has paid money for the child’s maintenance within the 12 months after the birth; or at any time after the father’s return to Hong Kong upon proof that he ceased to reside in Hong Kong within the 12 months after the birth of the child (section 4(1)). Thirdly, the mother’s evidence must also be corroborated “in some material particular” (section 5).

2.15 If the court is satisfied with the evidence, it may adjudge the defendant to be the putative father of the child and may also, “if it thinks fit in all the circumstances of the case,” make an order for a lump sum or periodical payments for the maintenance and education of the child (section 5(2)). Unlike the maintenance provisions in the Matrimonial Proceedings and Property Ordinance (Cap 192), there is no power in Cap 183 to make an order for the transfer of property of the child’s benefit. An affiliation order does not normally extend beyond the child’s sixteenth birthday but the mother can apply to the court for the order to be continued until the child is 21 where the child is undergoing a course of education or training or is suffering from a mental or physical disability (section 9).

2.16 From this outline of Hong Kong’s statutory provisions relating to the maintenance of children, we can see that the illegitimate child is significantly disadvantaged by the law. Generally, the illegitimate child must look to the Affiliation Proceedings Ordinance for assistance. That Ordinance sets out distinctive procedures relating to the custody and maintenance of illegitimate children. It does not apply to legitimate children. The powers of

the court as to the range of orders that can be made in affiliation proceedings are limited in that a child born outside marriage, unlike a child born within marriage, can never benefit from any of the orders for secured provision or property adjustment. In Hong Kong, a child born within marriage can benefit from such an order under sections 5, 6 and 8 of the Matrimonial Proceedings and Property Ordinance (Cap 192). Furthermore, an affiliation order is only available in the restricted circumstances described in paragraph 2.13: an order would not be available, for instance, where the mother did not make application within 12 months of the birth. No such restrictions apply to maintenance orders under the Matrimonial Proceedings and Property Ordinance or the Separation and Maintenance Orders Ordinance.

#### **(d) Pensions**

2.17 In Hong Kong, civil service and judicial pensions are not payable to illegitimate children. The definitions of “child” in the Widows’ and Children’s Pensions Ordinance (Cap 79), the Pension Benefits Ordinance (Cap 99) and the Pension Benefits (Judicial Officers) Ordinance (Cap 401) all state that child in relation to an officer “does not include an illegitimate child.” (It is worth noting that the Pensions Ordinance (Cap 89), which applies to civil servants appointed before 1 July 1987, in some ways adopted a more liberal approach than the Pension Benefits Ordinance which replaced it. Section 18(3)(e) of the earlier Ordinance included in the definition of “child” “any child of a female officer” and so covered illegitimate offspring of a female civil servant.) In the Pensions Regulations made under the Royal Hong Kong Auxiliary Police Force Ordinance (Cap 233) and in the Widows and Orphans Pension Ordinance (Cap 94) an illegitimate child is not included in the definition of “child”. The definition in the latter Ordinance refers to “a child of an officer by his wife, born after marriage.” Some relief is given by section 12 of the Affiliation Proceedings Ordinance (Cap 183). That section gives the court power to attach a defendant’s pension where an affiliation order has been made against him, “notwithstanding the provisions of the Pensions Ordinance, the Pension Benefits Ordinance ..., the Pension Benefits (Judicial Officers ) Ordinance .... and of any other Ordinance.” This provision does not, however, enable the illegitimate child to obtain a pension as a dependant of the pensioner in the way that a legitimate child could.

#### **(e) Guardianship**

2.18 A guardian is a person who is legally entitled to parental rights and duties in relation to a child. It is by no means clear what those rights are. Ormrod J in Re N (minors) [1974] 1 All ER 126 remarked (at page 130):

*“if one were asked to define what are the rights of a parent apropos his child or her child I for one would find it very difficult. Most of them are rights to apply for orders, or rights to apply for consent or to withhold consent to marriage, and limited things of*

*that kind. There are plenty of obligations, but when it comes to rights it is by no means easy ....”*

Pegg (“Family Law in Hong Kong”, second ed., at page 193) suggest that:

*“The rights and powers exercisable over a child included [at common law] the right to physical care and control, the rights to the services of the child, the right of chastisement, the right to determine the form of religious and secular education, the right to control the child’s property, and the right to appoint a testamentary guardian, although the list is far from being exhaustive.”*

2.19 Guardianship can arise naturally (as in the automatic guardianship of the father of a legitimate child) or by appointment, whether by court order or testamentary provision. Under the present law in Hong Kong, the father of an illegitimate child, unlike the father of a legitimate child, is not entitled automatically to become the child’s guardian on the mother’s death. If the unmarried father is awarded custody by the court, he will have the right to appoint a testamentary guardian (sections 6(1) and 21(3) of the Guardianship of Minors Ordinance (Cap 13)). In such circumstances he will also have a right to become the child’s guardian on the death of the mother (section 5 and 21(3) of Cap 13). This restriction on the rights of guardianship of fathers of illegitimate children unless they have been awarded custody by the court operates unfairly against an unmarried father living in a stable relationship with the mother. In such circumstances, the father is unlikely to see any need to apply for a custody order. “However close the father’s link with the child he has no right to appoint a guardian, and thus do something to secure the child’s upbringing after his death, unless he has a custody order” (para 7.6, Law Com No. 118, commenting on a similar provision in England).

## **(f) Custody**

2.20 We have seen that it is difficult to identify with any degree of precision what is encompassed by the term “parental rights”. A similar lack of clarity occurs with “custody”. While a parent or guardian has full parental rights over the child, custody amounts to something less and is exercisable over the child while he is a minor. Lord Denning said in Hewer v Bryant [1970] 1 QB 357 that:

*“The legal right of a parent to the custody of his child .... is a dwindling right which the courts will hesitate to enforce against the wishes of the child, the older he is. It starts with a right of control and ends with little more than advice.”*

In general terms, custody may be said to be the right to actual physical care and control of the child. Mayo J put it thus in the South Australian case of Wedd v Wedd ([1948] SASR 104, at 106):

*“It may be ‘guardianship’ and custody’, when used in contrast, are several aspects of the same relationship. The former can very well be employed in a special context to denote duties concerning the child ab extra; that is a warding off; the defence, protection and guarding of the child, or his property, from danger, harm or loss that may ensue from without. .... Custody essentially concerns control, and the preservation of the child’s person, physically, mentally and morally; responsibility for a child in regard of his needs, food, clothing, instruction, and the like.”*

2.21 At common law, parental and custodial rights over a legitimate child resided in the father to the exclusion of the mother. No one possessed parental or custodial rights in respect of an illegitimate child. The case of Barnardo v Mchugh [1891] AC 388, however, held that at equity the wishes of the mother were a primary consideration for the court when exercising its equitable powers in respect of the custody of an illegitimate child. It was also established in Barnardo’s case that the mother of an illegitimate child has the legal right to its custody unless and until those rights are displaced by court order or other competent act. There is some doubt as to the application of Barnardo in Hong Kong. In Re M.L., an infant 1969 HKLR 427, Briggs J pointed out that the basis of the decision in Barnardo had been the obligation placed on the mother by the Poor Law Acts in England to maintain her child. No equivalent legislation applied in Hong Kong. The point is largely academic, however, as the question of custody is now largely governed by statute.

2.22 According to section 3(1) of the Guardianship of Minors Ordinance (Cap 13), in custody disputes the welfare of the child is the first and paramount consideration. The court must not take into consideration the superiority of one parent’s claim over that of the other (section 3(1)(a)(ii)) and a mother has the same rights and authority as the father (section 3(1)(b)). Section 3(2), however, states that these principles are not applicable in relation to illegitimate children. The explanatory memorandum to the Bill indicates that the intention was to retain the application of the equitable principle which gives the mother of an illegitimate child a greater claim than the father (see the Explanatory Note to the Guardianship of Minors (amendment) Bill 1982). It may be inferred from this that although the welfare of the child is the paramount consideration in all custody disputes (see section 3(1)(a)(i) which applies to all proceedings involving children, whether legitimate or illegitimate), in proceedings involving an illegitimate child the court must also consider the superiority of the claim of one parent over that of the other. In the case of an illegitimate child this would mean that the mother’s claim would be superior to that of the father.

2.23 If that is the effect of section 3(2), one commentator has suggested that “the law has been drastically changed” and that, if the welfare of the child is paramount, the inherent superiority of one parent’s claim over the other should be no more relevant in relation to an illegitimate than to a legitimate child. (see “Custody and the putative father”, Pegg, (1983) HKLJ 358). In recent years the child’s interest has invariably been considered as

paramount and less weight has been attached to parental rights in disputes over custody before the court, whether the child be legitimate or illegitimate. "The decline of parental rights as opposed to the paramountcy of the child's welfare is also evident in the court's power to award custody or access to third parties where it is in the child's best interest to do so" (Pegg, (1983) HKLJ at p. 363).

2.24 Although the common law gives the mother of an illegitimate child a greater claim to custody than the father, in recent years the position of the putative father has been considerably improved by statute. Sections 10 and 21 of the Guardianship of Minors Ordinance (Cap 13) give the putative father the right to apply for the custody of the child.

2.25 Section 4(1) of Cap 13 makes unenforceable an agreement for a parent to give up his or her parental rights, except where the agreement is between husband and wife and is to operate during separation while married. Section 4(5), however, specifically provides that this does not apply in relation to an illegitimate child. It would seem, therefore, that there would be no legal impediment to the father of an illegitimate child entering into an enforceable agreement with the mother to give up any parental rights in the child.

## **(g) Nationality**

2.26 Part II of the British Nationality Act 1981 set out the circumstances in which a person may acquire citizenship as a British Dependent Territories Citizen (BDTC). Under section 15, a person born in a dependent territory after the commencement of the Act is a BDTC if at the time of his birth his father or mother is a BDTC or his father or mother is settled in a dependent territory. Section 16 provides that a person born outside a dependent territory is a BDTC if at the time of his birth his father or mother is a BDTC otherwise than by descent; or his father or mother is a BDTC and is serving outside the dependent territories in service designated by the Secretary of State. Section 17 allows a person to apply for registration as a BDTC on certain conditions. Hong Kong is one of the dependent territories (Schedule 6 of the 1981 Act).

2.27 Section 50(9) states that "the relationship of mother and child shall be taken to exist between a woman and any child (legitimate or illegitimate) born to her" but "the relationship of father and child shall be taken to exist only between a man and any legitimate child born to him." An illegitimate child not born in Hong Kong will therefore not be entitled to BDTC status if his mother is not a BDTC, or is a BDTC by descent only, even if his natural father is. Even where the illegitimate child is born in Hong Kong, unlike a legitimate child, he will not be entitled to BDTC status if his mother is neither a BDTC nor settled in Hong Kong, even though his natural father is a BDTC.

## **(h) Domicile**

2.28 Hong Kong's law of domicile follows that of England. The concept of domicile is a complicated one but in broad terms domicile is a means by which the law ensures that every individual is connected to a particular legal system. A person's domicile is the country (or jurisdiction) in which he intends to reside permanently or indefinitely. It does not necessarily coincide with the individual's nationality, nor even with the country in which he has his home. Because of the fact that domicile is concerned with establishing a connection with a legal system rather than a state, a person would, for instance, be domiciled in England or Scotland rather than the United Kingdom. In some cases a person may have different domiciles for different legal purposes: in Australia, for instance, while domicile in a particular state is relevant for most purposes, federal domicile applies to matrimonial matters. Every person is accorded by the law a domicile of origin at birth which coincides with the domicile of one or other of his parents. A legitimate child born during his father's lifetime has his domicile of origin in the country of his father's domicile at the time of the child's birth. If the child is born after his father's death, or is illegitimate, his domicile of origin follows that of his mother. Thereafter, the child's domicile changes with the father's in the case of a legitimate child and with the mother in the case of an illegitimate child, until the child is old enough to have the legal capacity to acquire his own domicile of choice. In later life, whenever a person's domicile of choice lapses without his acquiring a new domicile of choice, his domicile of origin will revive (see generally Dicey and Morris, "The Conflict of Laws", Tenth Edition, chapter 7)

## **Registration of births**

2.29 In Hong Kong, the requirements for registration of a birth differ according to whether the child is born in or out of wedlock. Section 7 of the Births and Deaths Registration Ordinance (Cap 174) imposes on the father (or the mother in the case of the father's death, illness, absence or inability) of every child born alive in Hong Kong the duty to give the Registrar of Births and Deaths particulars of the child's birth within 42 days. Section 12 of Cap 174, however, expressly exempts the father of an illegitimate child from this duty. The father's name is not to be entered in the register as the father except by a joint request with the mother, and both parents must sign the register together.



## Chapter 3

### The case for reform

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3.1 It is clear from our outline of the current law in chapter 2 that an illegitimate child and his parents are treated differently from legitimate offspring in a number of respects. The law places the illegitimate child (and sometimes one or other of his parents) in a disadvantaged position. Should the present discrimination be retained?

#### Arguments for retaining discrimination

3.2 There are a number of arguments in favour of retaining discrimination. First, it can be said that the legal distinction between legitimacy and illegitimacy reflects social realities. Historically, the birth of an illegitimate child was regarded as bringing disgrace on the mother and her immediate family. An illegitimate child could not expect to be recognised as a member of the family, nor inherit property.

3.3 Such evidence as is available to us, however, suggests that the public perception of illegitimacy no longer accords with this view. In 1985, in response to a survey conducted by this Commission in relation to our study on wills, intestate succession and provision for deceased persons' families and dependants, an overwhelming majority of respondents favoured the removal of the existing discrimination against illegitimate children. 86% felt that an illegitimate child should be able to claim maintenance from his father's estate while 68% thought that the child's mother should have a similar right (see appendix 1 to our report on "Law of Wills, Intestate Succession and Provision for Deceased Person's Families and Dependants", Topic 15). Those views were further supported by the responses to a questionnaire we issued in relation to this present study of illegitimacy. It is also relevant that a significant proportion of illegitimate children born in Hong Kong are acknowledged by their fathers. Over the last six years, the details of registration of illegitimate births in Hong Kong are as follows:

<u>Year</u>	<u>Acknowledged by both parents</u>	<u>Registered without father's name</u>
1985	3039	284
1986	2392	290
1987	2080	287
1988	2045	334
1989	2194	349
1990	2690	315

3.4 While the fact that the father has chosen to have his name registered with the birth does not necessarily justify any inference as to the stability or otherwise of the parents' relationship, we nevertheless think it reasonable to suggest that it indicates a willingness to regard the child in a less censorious way. We are unconvinced by the argument that the present law reflects society's attitude to illegitimacy.

3.5 A second argument advanced in favour of retaining the present law is that it serves to uphold moral standards and supports the institution of marriage. We affirm our view that the law should protect the institution of marriage and that the family is the fundamental unit of our society but we do not believe that the present discrimination achieves very much in that regard. We are persuaded in this by the reasoning of the Law Commission in England who observed that while a married relationship should in principle be more stable than an unmarried one and so create a better environment for the child,

*"... many marriages were not stable, and ... statistically it seemed that marriages entered into primarily for the purpose of ensuring that an expected child would not be born illegitimate were especially at risk. We therefore concluded that it was difficult to accept that the institution of marriage was truly supported by a state of the law in which the conception of a child might encourage young couples to enter precipitately into marriages which perhaps had little chance of success" (Law Commission Report No. 118, at paragraph 4.6).*

## **Arguments against discrimination**

3.6 The fundamental argument against retaining the present law is that it is discriminatory and unfair because the target of the discrimination is not himself responsible for any misconduct. In recent years the trend in many Commonwealth jurisdictions has been to remove legal discrimination against persons born outside marriage. In 1987 the Commonwealth of Australia passed the Family Law Amendment Act which expands the operation of the Family Law Act over custody, guardianship, access and child maintenance so that it applies to all children, not merely to children of a marriage. In the same year, the Family Law Reform Act was enacted in England and Wales, the Family Law (Parent and Child) Act was enacted in Scotland and in Ireland the Status of Children Act was passed to abolish the legal discrimination against children born outside marriage.

3.7 Even if we were convinced by the arguments in favour of discrimination outlined at paragraphs 3.2 to 3.5 above, we would find it impossible to accept the anomalies that exist in the present law. For instance, the law allows the father of an illegitimate child to succeed on the child's intestacy, even though he may have had no contact with him, but the child has no corresponding right. Similarly, while there is a general obligation in custody matters to regard the welfare of the child as of

paramount importance, that principle is subject in the case of an illegitimate child to the superiority of the mother's claim.

3.8 We further believe that support for the removal of the present legal discrimination can be found in Article 24(1) of the International Covenant on Civil and Political Rights which protects a child from discrimination on the ground of his birth. Article 26 of the same Covenant states that all persons are equal before the law. It prohibits any discrimination and guarantees to all persons equal and effective protection against discrimination on any ground, including birth. The Covenant applies to Hong Kong. The particular relevance of Article 24 to the question of illegitimacy is emphasised in a general comment by the Human Rights Committee dealing with that Article in which they enjoined States parties reporting to the Committee to "indicate how legislation and practice ensure that measures of protection are aimed at removing all discrimination in every field, including inheritance, particularly as between children who are nationals and children who are aliens or as between [legitimate children] and children born out of wedlock."

3.9 The Hong Kong Bills of Rights Ordinance 1991 includes in Articles 20 and 22 of the Bill of Rights provisions in identical terms to Articles 24(1) and 26 of the International Covenant. It may be worth noting in this regard that the European Convention on Human Rights (which does not apply to Hong Kong) also contains provisions prohibiting discrimination on the grounds of a person's birth. In 1980, the European Court of Human Rights held in the case of Marckx v Kingdom of Belgium [1979-1980] 2 EHRR 330 that the provisions of Belgian law prohibiting an illegitimate child from inheriting from his close maternal relatives on their intestacy contravened the non-discrimination provisions in the European Convention. That decision has been referred to with approval in a number of subsequent cases, including Inze v Republic of Austria [1987], Series A, 10 EHRR 394 where the court observed that a difference of treatment was discriminatory if it had no objective and reasonable justification. Contracting States were allowed a certain "margin of appreciation" in assessing whether a difference of treatment was justified but what was permissible would vary according to the circumstances, the subject matter and its background. The court concluded that very weighty reasons would have to be advanced before a difference of treatment on the basis of birth out of wedlock could be regarded as compatible with the Convention. It is too early to know what weight may be given by the courts in Hong Kong to decisions based on the European Convention but it seems reasonable to suppose that they will form a part of the courts' deliberations.

## **The options for reform**

3.10 **It will be apparent from the proceeding discussion that we are satisfied that reform of the law in relation to illegitimacy is necessary.** Having reached that conclusion, it seems to us that there are two alternative approaches which may be adopted:

- (a) the legal disadvantages which flow from illegitimacy should be removed as far as is practicable; or
- (b) The legal concept of illegitimacy should itself be removed, with the result that there should no longer be any legal distinction between people on the basis of the marital status of their parents.

Before reaching a conclusion as to which of these two courses is to be preferred, we think it would be helpful to examine the approach followed in other jurisdictions.

## Chapter 4

### The law in other jurisdictions

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#### China

##### (i) *Traditional Chinese law*

4.1 In Qing law, sons of “tsips” (qie: concubines, or “secondary wives”) were legitimate and competed with the sons of the “tsai” (qi: principal wife) in the distribution of the family property. Children born of illicit intercourse (i.e. children born as a result of intercourse with a woman not forming part of the father’s household and living outside) were entitled to a half-share, or to an equal share in the event of a successor having been adopted through default of other children (section 88 of the Da Qing Lu Li or Qing Penal Code).

4.2 No rights were given to illegitimate children unless paternity was recognised by the father and he had made himself responsible for their upbringing (Jamieson, “Chinese Family and Commercial Law”, at page 16). This view is confirmed by rulings of the Supreme Court contained in the “Translation of Extracts from ‘A complete book of Rules decided by the Supreme Court’” which is annexed to the Strickland Committee Report on Chinese Law and Custom in Hong Kong. (The Strickland Committee was appointed by the Governor in 1948 under the chairmanship of the then Solicitor General, George Strickland, to consider, inter alia, to what extent Chinese law and custom as existing in 1843 when Hong Kong came under British rule still applied to Chinese in Hong Kong.)

4.3 The Strickland Committee considered that the English rule that a person cannot be legitimate unless his parents are married would probably apply in Hong Kong so that the legitimation of a son born out of wedlock by mere recognition on the part of the putative father was not allowed. The Committee referred to the finding of the Privy Council in the case of Khoo Hooi Leong v Khoo Chong Yeok [1930] AC 346 that the Chinese custom of legitimation of a natural son by subsequent recognition was not part of the law of the Straits Settlements in relation to Chinese people domiciled there and took the view that the Chinese custom of legitimation by subsequent recognition would not apply in Hong Kong either. In the Straits Settlements case Lord Russell of Killowen, delivering the Privy Council’s advice, said (at page 355):

*“The modifications of the law of England which obtain in the Colony ... arise from the necessity of preventing the injustice or oppression which would ensure if that law were applied to alien*

*racas unmodified. ... From [that] necessity arise the recognition by the Courts of the Colony of polygamous marriages among the Chinese, and, as a logical consequence, the recognition of the legitimacy of the offspring (whether male or female) of such marriages. Their Lordships, however, are unable to find any grounds which would justify such a modification of English law as to treat an illegitimate natural son as legitimated by the mere fact of subsequent recognition. Legitimation of a child, whose parents are not husband and wife, is unknown and repugnant to the common law of England, and no hardship (much less injustice or oppression) need result from a refusal to admit a modification in this respect of the English law in its application to Chinese.”*

4.4 It has been suggested, however, that notwithstanding this view there have been indications that children of an illicit union may be considered to be legitimate as a result of recognition by the putative father (Pegg, “Family Law in Hong Kong”, 2nd edition, at page 185). The case of Wong Kam Ying and Another v Man Chi Tai [1967] HKLR 201 was referred to in support of this proposition. In that case, Huggins J held that the children born to a concubine was legitimate under Chinese customary law, even though the union with the concubine was held to be bigamous and void as having been entered into after a monogamous marriage under the Marriage Ordinance. With respect to Pegg, there is nothing in Huggins J’s judgement which can realistically be prayed in aid of the proposition that the child of an illicit union may be legitimated by the father’s recognition. The case proceeded instead on the reasoning that the intercourse between the father and the concubine was not an offence under Chinese customary law and that the children were therefore legitimate since “under the old Chinese customary law legitimacy as we understand it ... was an unknown concept and the only material question was whether the issue was born of such intercourse as was considered an offence” (at page 218). The question whether under Hong Kong Law a child could be legitimated by recognition by his father would appear to remain undecided.

**(ii) PRC Law**

4.5 The common law concept of “illegitimate children” is referred to as “children born out of wedlock” (feihunsheng zinu) in the Marriage Law of the People’s Republic of China. It is judicially defined to mean children born to an unmarried man and woman, or of an act of adultery.

4.6 Article 19 of the Marriage Law states that “children born out of wedlock shall enjoy the same rights as children born in wedlock. No one may harm or discriminate against them.” The effect of this article, according to an expert on Chinese law, is that the child born out of wedlock should be treated as if there was a valid marriage between his parents (In the matter of Sit Yuk Cheung and in the matter of an application for Judicial Review, Sit Woo Tung, Applicant MP No. 40 of 1990). On the basis of the expert’s

evidence, Mr Justice Kaplan concluded that Chinese law does not in fact recognise any distinction between legitimacy and illegitimacy.

(a) *Succession*

4.7 Article 10 of the PRC Law of Succession states that a child is entitled to inherit the estate of his deceased parent. Article 10 defines “child” to include an illegitimate child. It is clear that an illegitimate child therefore has rights to inherit the estate of his parents. Article 18 of the Marriage Law provides that “parents and children shall have the right to inherit each other’s property”.

(b) *Adoption*

4.8 At the time of writing, there is no express statutory provision in PRC law relating to the adoption of illegitimate children, although adoption itself is provided for in Article 20 of the 1980 Marriage Law and a code of adoption is currently being drafted. However, in practice, the father could adopt an illegitimate child. In addition, as a general rule the father’s consent would be required before a man who subsequently married the natural mother could adopt the illegitimate child.

(c) *Maintenance*

4.9 Article 19 of the Marriage Law states that “the father of a child born out of wedlock shall bear part or the whole of the child’s living and educational expenses until the child can support himself.” In practice, if the natural mother is subsequently married to another man who is willing to bear part or the whole of the child’s living and educational expense, the natural father’s obligations to maintain may be abated proportionally or exempted totally.

(d) *Guardianship and custody*

4.10 There is no express statutory provision in relation to the guardianship and custody of illegitimate children. Since under the Marriage Law the parents have a duty to bring up and educate their children (including by virtue of Article 19 any illegitimate children) the parents should jointly have rights of guardianship and custody of their children, including illegitimate children. Article 16 of the 1986 General Principles of the Civil Law (in force, 1 January 1987) provides that “parents of a minor [weichengnian ren de fumu] are the guardians of that minor”. Where there is a dispute over the guardianship and custody of an illegitimate child, the court will make a judgment in accordance with the rights and interests of the child and the actual conditions of both parents.

## England and Wales

4.11 The law relating to illegitimacy in England and Wales is mainly governed by the Family Law Reform Act 1987 (“the 1987 Act”) and to a lesser extent the Children Act 1989 (“the 1989 Act”). Concern at the plight of illegitimate children was first highlighted by an attempt to introduce a private member’s bill by Mr James White on 23 February 1979. It was intended to challenge “the affirmation that the sin of the parents must be visited upon the children, that the preservation of property rights is more important than the welfare of the child, and that the institution of marriage must be buttressed by outlawing children born out of wedlock” (Hansard, House of Commons, Vol. 963 col. 813). It was said that “the heartache, the embarrassment and even the fear caused by this vile discrimination [against illegitimate children] over the years is outmoded, repulsive and an affront to every decent citizen of Britain” (Hansard, HC, Vol. 963, Col. 820). Mr Arthur Davidson, representing the Government, also aired his concern saying the “there is in this country a growing distaste for all forms of arbitrary discrimination. Discrimination against an individual based on the circumstances of his birth is ... not only outmoded but abhorrent, unjustified and totally unfair” (Hansard, HC, Vol. 963, Col. 833). The bill was not read for the second time, however, because it was thought inappropriate that such a complex subject should be dealt with by a loosely drafted private member’s bill.

4.12 Subsequently, two reports on Illegitimacy were published by the Law Commission (Nos. 118 and 157) in 1982 and 1986 which formed the basis of the 1987 Act. The 1987 Act did not abolish the status of illegitimacy but was intended to remove “so far as possible .... any avoidable discrimination against, or stigma attaching to, children born outside wedlock” (Hansard, HL, Vol. 482, Col. 647). Section 1 of the 1987 Act sets out the legislation’s basic premise that in future “reference .... to any relationship between two persons shall, unless the contrary intention appears, be construed without regard to whether or not the father or mother of either of them .... have or had been married to each other at any time.” The Law Commission considered that “this approach enables the [Act] to achieve the legislative changes needed to implement the basic policy without using adjectives which describe the child” (Law Commission Report No. 157, at paragraph 2.4).

4.13 While the 1987 Act’s principal purpose was to reform the law in relation to the consequences of illegitimacy, the Children Act 1989 is a more comprehensive statute, seeking “to reform the law relating to children; to provide for local authority services for children in need and others; to amend the law with respect to children’s homes community homes, voluntary homes and voluntary organisations; to make provision with respect to fostering, child minding and adoption and for connected purposes”. The 1989 Act’s main effect on illegitimate children is in the introduction of the concept of “parental responsibilities” in place of the earlier emphasis on “parental rights and duties.”



**(a) Succession**

4.14 The rule of construction at common law relating to testate succession under which words denoting a family relationship were presumed to refer only to legitimate relations was reversed in England and Wales by section 15 of the Family Law Reform Act 1969. Unless there was a contrary intention, a reference in a will to, for instance, the testator's sons would include an illegitimate son. The effect of the section was limited, however, to circumstances where the individual was to benefit from the will. Furthermore, the old restricted meaning of "heir" was preserved and section 15 did not affect entailed property. Reform benefiting illegitimate children was taken further by sections 1 and 19 of the 1987 Act. As we have seen, section 1 of the 1987 Act provides that a relationship between two persons should be constructed without regard to the concept of illegitimacy. Section 19 specifically states that section 1 is to apply in construing wills and codicils and dispositions *inter vivos* and no account is to be taken of whether the relationship between two persons is established through or outside marriage. Section 19 (2) makes it clear that the reforms effected by this section extend to entailed interests. The changes brought about by the 1987 Act are not contingent on the individual benefiting from the will.

4.15 Section 18 of the 1987 Act deals with the rights of succession to property on intestacy. Illegitimacy is not to be taken into consideration in determining rights of succession, either **of** an illegitimate person or **to** an illegitimate person's estate. This means that where an illegitimate child dies intestate, his natural father will be entitled to share his estate along with other beneficiaries.

4.16 Section 14 of the Family Law Reform Act 1969 created a presumption that the father of an illegitimate intestate had not survived his child. This was intended to overcome the difficulty of tracing the natural father where an illegitimate child died intestate and to place the burden of proof firmly on the individual seeking to benefit from the deceased's estate. The Law Commission recommended in its first Report on Illegitimacy that this presumption should be preserved and extended to persons related to the illegitimate intestate through the natural father (para. 8.33 Law Com No. 118). This recommendation was adopted in section 18(2) of the 1987 Act.

**(b) Adoption**

4.17 The change in emphasis in the law from parental rights to parental responsibilities brought about by the 1989 Act has had its affect on the law of adoption. Under Section 18(1) of the Adoption Act 1976, the court is empowered to free a child for adoption if it is satisfied that each parent or guardian of the child has freely, and with full understanding of what is involved, agreed generally and unconditionally to the making of the order, or that his agreement to the making of an adoption order should be dispensed with on a ground specified in section 16(2). Section 88 and Schedule 10 of the 1989 Act amended the adoption Act 1976 so that before making such an order "in

the case of a child whose father does not have parental responsibility for him” the court must be satisfied that the father has no intention of applying for “parental responsibility” or a residence order under sections 4(1) and 10 of the 1989 Act respectively, or, if he did apply, his application would be likely to be refused.

4.18 “Parent” is defined in the Adoption Act 1976 as “any parent who has parental responsibility for the child” under the 1989 Act, while “parental responsibility” means “all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to a child and his property” (see section 3 of the 1989 Act, which applies equally to the Adoption Act 1976). The definition of “parental responsibility” cannot be said to be particularly helpful and has been the subject of much criticism Lord Meston referred to it as a “non-definition”, a view with which it is difficult to argue (Hansard, Vol. 502, HL, Col 1172). If a child’s parents were married at the time of his birth, both have parental responsibility. If the child’s parents were not married, only the mother has parental responsibility automatically (section 2(1) of the 1989 Act). The father can only acquire it by application to the court or by an agreement with the mother in the prescribed form (section 4 of the 1989 Act).

### **(c) Maintenance**

4.19 Prior to the reforms introduced by the 1987 and 1989 Acts, the right to maintenance (and the ways in which it could be obtained) differed according to whether the child was legitimate or illegitimate. For example, an illegitimate child, unlike his legitimate counterpart in matrimonial proceedings, could not benefit from any of the orders for secured provision or property adjustment. The Law Commission considered this inequality of treatment to be wrong. They pointed out that the relationship between the unmarried parents of a child may have lasted as long as many marriages which end in divorce, and the child’s financial position may equally need to be secured. The Commission did not think it was a valid objection to argue that the mother might benefit as the property which would be the subject of the order would often be the common home. As pointed out by the court in Northrop v Northrop [1968] P 74, it was difficult to draw a rigid line between providing for the mother and providing for the child since the needs of the two are inter-related. Accordingly, the Commission took the view that the range of financial orders that the court could make in respect of illegitimate children should be expanded to include secured periodical payment and property adjustment orders. They considered that the principle that all children should have an equal right to financial provision from their parents required that the wholly distinctive procedure relating to illegitimate children under the Affiliation Proceedings Act 1971 should be removed.

4.20 The 1989 Act makes comprehensive provision for children’s maintenance in Schedule 1. The schedule’s provisions apply to legitimate and illegitimate children (and their parents) alike. Either parent (or a guardian or a person who has a residence order in respect of the child) can

apply to the court for an order for financial provision for the child. The High Court or county court has power to order either or both parents to make or secure periodical payment; to pay a lump sum; or to settle or transfer property to which either parent is entitled. The court can order these payments to be made to the child himself or to the applicant for the child's benefit. The magistrate's court is empowered to make orders for periodical or lump sum payment. The situation under the 1989 Act is therefore that unmarried parents have the same rights and obligations in respect of maintenance as their married counterparts.

**(d) Pensions**

4.21 In the United Kingdom, an "eligible" child under the UK Principal Civil Service Pension Scheme includes an illegitimate child. Both the Pension (Increase) Act 1971 and the Parliamentary Pensions Act 1972 state that a child includes an illegitimate child.

**(e) Guardianship**

4.22 The basis policy of the Law Commission in their two reports on illegitimacy was that parental rights should not automatically vest in an unmarried father but that he should be able to obtain parental rights and be made subject to parental duties if a court considered recognition of the father's position to be in the child's interest. Accordingly, the Commission recommended that if the father had obtained an order giving him any parental rights he should automatically become the child's guardian on the mother's death (see paragraph 7.39 of the Law Commission's Report No. 118). Section 6(1) of the 1987 Act gave effect to this.

4.23 The 1989 Act, however, brought significant further changes. Section 2(4) expressly abolishes the rule of law that the father is the natural guardian of his legitimate child. As a consequence, section 3 of the Guardianship of Minors Act 1971 which provided (in the case of a legitimate child) that upon the death of one parent, the other became the guardian has been repealed (Schedule 15, 1989 Act). Section 6(1) of the 1987 Act which extended section 3 to illegitimate children where the father has a parental rights or custody order has also been repealed.

4.24 With the 1989 Act's emphasis on parental responsibility, section 5 of that Act provides that a guardian of a child may only be appointed by a court in family proceedings, by a parent with parental responsibility or by an existing guardian. An unmarried father will therefore be able to appoint a guardian if he has parental responsibility or has himself been appointed a guardian. Appointments by a parent or guardian can only take effect on the appointer's death. They must be in writing and will not be effective unless there is no surviving parent with parental responsibility or the child was living with the appointer under a residence order at the time of his death.

**(f) Custody**

4.25 As we have seen, the 1989 Act has moved away from the established concepts of family law by tying the child's welfare to the idea of parental responsibility. The "definition" of "parental responsibility" in section 3 of the 1989 Act would seem to embrace the old notions of custody and access, so that a person with parental responsibility would have rights of custody. We have already described how married parents and unmarried mothers automatically have parental responsibility under section 2 of the 1989 Act but that the unmarried father has no such automatic rights, though he may apply to the court for an appropriate order under section 4. Section 8 of the 1989 Act has introduced a new range of orders which the court can make in relation to what would hitherto have been described as custody and access. These "section 8 orders" are as follows:

- (i) a "contact order", which makes provision for what contact the child is to have with other persons named in the order (essentially a replacement for the access order);
- (ii) a "prohibited steps order", which prohibits certain steps being taken in respect of a child without the consent of the court;
- (iii) a "residence order", which settles the arrangements to be made as to the person with whom the child is to live; and
- (v) a "specific issue order", which gives directions to determine a specific issue which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child

The granting of a residence of order automatically confers parental responsibility on the individual concerned (see section 12(2) of the 1989 Act). Under section 10(4) of the 1989 Act, the father of an illegitimate child can apply to the court for any of the section 8 orders in just the same way as the parent of a legitimate child.

**(g) Nationality**

4.26 Nationality is principally governed (as in Hong Kong) by the British Nationality Act 1981. Section 1(1) provides that a person born in the United Kingdom on or after 1 January 1983 is a British citizen if at the time of his birth his father or mother is a British citizen or is settled in the United Kingdom. Section 50(9), as we have seen (see paragraph 2.27 above), restricts the relationship of father and child to that "between a man and any illegitimate child born to him." The effect is that an illegitimate child takes his nationality only from his mother, unlike his legitimate counterpart.

4.27 The Law Commission felt that the continuance of such discrimination against the illegitimate child could not be justified and suggested that, subject to proof of parentage, an illegitimate child should be

entitled to acquire British citizenship from his father in the same way that a legitimate child could under the existing law (see paragraph 11.9, Law Commission Report No. 118). The Law Commission suggested that one method of determining entitlement to British citizenship, would be to rely on a declaration of parentage by the court, made in accordance with appropriate rules. Where the claimant was born outside England and Wales and the declaration procedure was not available to him, the claim might be dealt with through administrative procedures. The Commission concluded, however, that:

*“because the question of British citizenship is a United Kingdom matter we are not including clauses in the draft Bill annexed to this Report to amend the British Nationality Act 1981. Any such amendment would have to await the outcome of consultation with those responsible for reform of the law in other parts of the “United Kingdom” (paragraph 11.20, Law Com. Rep. No. 118).*

The 1987 Act followed the Commission’s draft and made no changes in respect of nationality.

#### **(h) Domicile**

4.28 A legitimate child takes his father’s domicile as his domicile of origin at birth. An illegitimate child, on the other hand, takes his mother’s domicile as his domicile of origin. This domicile revives in later life whenever a domicile of choice is lost without a new one being acquired.

4.29 During his minority, a legitimate child’s domicile changes with that of his father (the “domicile of dependence”) while an illegitimate child’s domicile changes according to his mother’s.

4.30 The present law has been criticised, not least in a joint report by the English and Scottish Commissions (“Private International Law – The Law of Domicile”, Law Commission Report No. 168, Scottish Law Commission Report No. 107) which proposed that a child should be domiciled in the country with which he was most closely connected. The Law Commissions proposed two rebuttable presumptions (at paragraphs 4.12 and 4.13 of their report):

- (a) where the parents had the same domicile and the child had his home with one or both of them, the child’s domicile should be presumed to be most closely connected with the parents’ domicile; and
- (b) where the parents had different domiciles and the child has his home with only one of them, the child should be presumed to be most closely connected with the parent.

The effect of these proposals would be that whether or not a child was illegitimate would no longer be of significance in determining domicile.

### **Registration of births**

4.31 The legal provisions of the Births and Deaths Registration Act 1953 relating to the registration of births were broadly similar to the present Hong Kong position we outlined at paragraph 2.29. Effectively, the father of an illegitimate child was under no obligation to register the birth of his child and could not have his name registered as the father without the consent of the mother. Since, then, changes have been made to allow more room for the name of the putative father to be recorded on the register. Section 27 of the Family Law Reform Act 1969, for instance, relaxed the rule that where a person was to be entered on the register as the father of an illegitimate child, both mother and father had to attend personally before the registrar. Similarly, section 93 of the Children Act 1975 allowed the registration of the father of an illegitimate child by the mother on production of an affiliation order naming the father. That Act also provided for the re-registration of an illegitimate child's birth where no name of the father had been entered originally.

4.32 These changes, however, suffered from the restriction that the father of an illegitimate child could not have his name entered in the birth register without the mother's consent, even where he had been adjudged to be the father in affiliation proceedings. The Law Commission considered this to be "discrimination against the father and it may operate against the child's interests because his paternity has not been recorded and may subsequently be difficult to prove" (Law Commission Report No. 118, at paragraph 10.60). The Commission considered that the father should have the right unilaterally to have his name entered in the register. The Commission concluded (at paragraph 10.61 of their report) that a person adjudged to be the father should be able to have his name entered on the register because:

*"First, if a man is obliged to accept the financial obligations of paternity it is, we feel, reasonable that he should be entitled if he wishes to have the fact of his fatherhood recorded. Secondly, registration of paternity could well benefit the child, not only, for example, in a possible future inheritance claim, but more generally to satisfy the desire to discover his biological parentage. .... Thirdly, there is some advantage in having court orders and birth register entries so far as possible consistent with one another rather than, as now, allowing one parent but not allowing the other to have the findings on a public document such as a court order reflected on another public document such as the births register."*

4.33 Sections 24 and 25 of the Family Law Reform Act 1987 were enacted to answer the deficiencies identified by the Law Commission. While continuing the principle that the father of an illegitimate child was under no

obligation to register the birth, the law now provided for the unmarried father to have the right to register as such without the mother's consent where he had parental rights and duties by virtue of a court order. The Children Act 1989 now enables an unmarried father to acquire parental responsibility by court order or by formal agreement with the mother. Further minor changes were made to the Births and Deaths Registration Act 1953 to accommodate this change of emphasis. Henceforth, an unmarried father who has acquired parental responsibility by a court order or by a parental responsibility agreement with the mother is also allowed to have his name entered in the register.

### ***Proof of Paternity***

#### *(i) Marriage*

4.34 The common law presumption to which we referred at paragraphs 1.7 and 1.16 that a child born to a married woman is presumed to be the child of her and her husband is the same in England as in Hong Kong, with the important distinction that in England the presumption may now be rebutted on a balance of probabilities, rather than on proof beyond reasonable doubt as is the case in Hong Kong (see section 26 of the Family Law Reform Act 1969).

4.35 Section 28 of the Family Law Reform Act 1987 amended the Legitimacy Act 1976 to take account of concerns voiced by the Law Commission in their report on Illegitimacy. Under the Legitimacy Act, children of a void marriage were considered legitimate provided one of the parents reasonably believed in the validity of the marriage. The Law Commission recommended that there should be a presumption that at least one of the parties to the marriage reasonably believed in its validity. Their reason was that it would be difficult to prove reasonable belief if the issue of the child's paternity arose many years after the marriage. The Commission also argued that it should be made clear that a mistake of law (such as a belief that a defective divorce decree was valid) was capable of amounting to a "reasonable belief". These proposals were incorporated in the 1987 Act.

#### *(ii) Cohabitation*

4.36 Cohabitation does not form the basis for a presumption of a paternity. Reform along those lines was specifically rejected by the Law Commission (see paragraph 10.54 of Law Commission Report No. 118).

#### *(iii) Registration of birth*

4.37 In England, "any entry in a register of birth is prima facie evidence of the truth of the entry in so far as the entry is one to be made by statute" (Jackson v. Jackson and Pavan [1964] P 25, per Phillimore J. at page 30). In that case, Phillimore J. found that the person (the adulterer) whose name appeared in the birth certificate of the child was the father of the

illegitimate child. He made this finding based on his interpretation of sections 10 and 34 of the Births and Deaths Registration Act 1953. Section 10 exempts the father of an illegitimate child from giving information concerning the birth of the child. The Registrar will not enter in the register the name of any person as father of the child unless both the mother and the person acknowledging himself to be the father request it and both of them sign the register together. Section 34 of the same Act states that an entry of a birth or death in a register shall not be evidence of the birth or death unless the entry purports to be signed by some person professing to be the informant and to be such a person as might be required by law at the date of the entry to give to the registrar information concerning that birth or death. The Law Commission took this decision as authority to say that the entry of a man's name as father in the register of births is prima facie evidence of paternity (see paragraph 10.59, Law Commission Report No. 118).

*(iv) Finding by the court*

4.38 In England, as in Hong Kong, the court formerly had no jurisdiction to entertain applications for declarations of paternity where that was the only relief sought, nor could an illegitimate child apply for a declaration of legitimacy. The English Law Commission argued for the introduction of such a procedure, however, and their recommendation was adopted in section 22 of the Family Law Reform Act 1987 which introduced a new section 56 to the Family Law Act 1986, allowing applications to be made by anyone for a declaration of paternity, legitimacy or legitimation, regardless of whether they were legitimate or illegitimate.

## **Scotland**

4.39 The common law position in Scotland is essentially the same as that in Hong Kong: a child is legitimate if his parents were married to each other either when he was born or when he was conceived. An illegitimate child can be legitimated by adoption or the subsequent marriage of his parents. Historically, an additional means of legitimation was the issue of "letters of legitimation" by the Crown.

4.40 To place the Scottish law in context, it is worthwhile including at this point statistics referred to by the Scottish Law Commission in their report on Illegitimacy ("Family Law: Report on Illegitimacy", Scottish Law Commission Report No. 82) published in 1984. At paragraph 1.6 of that report the Commission pointed out that the proportion of children born in Scotland who were illegitimate had doubled over the previous two decades. From 1961 – 1965 the average percentage of live births which were illegitimate was 5.17%. The corresponding figures for the years 1979 to 1982 were 10.1%, 11.1%, 12.2% and 14.2% respectively. On the basis of these and other figures the Commission concluded (at paragraph 1.8) that, while precise calculations were impossible,



*“on the basis of the illegitimate birth rates, adoption rates and legitimation rates over the last few decades, it can be asserted with some confidence that the number of illegitimate people is greater than a quarter of a million – about five per cent of the population of Scotland.”*

4.41 The Scottish Law Commission considered that the main objective of reform of the law on illegitimacy “should be the removal of legal differences between legitimate and illegitimate children without, however, conferring parental rights automatically on the fathers of all illegitimate children” (at paragraph 1.15). Statutory changes to the common law position followed the Commission’s report with the enactment of the Law Reform (Parent and Child) (Scotland) Act 1986 (“the 1986 Act”). Section 1(1) of that Act sets out a basic principle of equality between children in establishing the child’s relationship to any other person. It provides that:

*“The fact that a person’s parents are not or have not been married to one another shall be left out of account in establishing the legal relationship between the person and any other person; and accordingly any such relationship shall have effect as if the parents were or had been married to one another.”*

4.42 The common law concept of legitimation by subsequent marriage is now governed by the Legitimation (Scotland) Act 1968. The parents’ marriage legitimates any child from the date of the marriage, regardless of whether or not the parents were free to marry at the time of conception. Section 3 provides that where the child has died before the parents’ marriage, the legitimation is nevertheless effective “for .... determining the rights and obligations of any person living at or after” the date of the marriage.

#### **(a) Succession**

4.43 Before the enactment of the 1986 Act, an illegitimate child had no rights of succession on intestacy from relatives other than his descendants, spouse or parents, and only those relatives had had rights on his intestacy. The 1986 Act, however, removed these distinctions and legitimate and illegitimate children are now treated in the same way for the purposes of intestate succession. Section 36(5) of the Succession (Scotland) Act 1964 (as amended) provides that the concept of legal equality of children under section 1(1) of the Law Reform (Parent and Child) (Scotland) Act 1986 shall apply to the Succession (Scotland) Act 1964; and any reference (however expressed) in that Act to a relative shall be construed accordingly.

4.44 One significant distinction remains, however, between legitimate and illegitimate children in succession matters. Section 9(1)(c) of the 1986 Act specifically excludes the Act from applying “to any title, coat of arms,

honour or dignity transmissible on the death of the holder.” An illegitimate child therefore cannot normally succeed to such titles or honours.

### **(b) Adoption**

4.45 Adoption in Scotland is governed by the Adoption (Scotland) Act 1978. An adoption order vests all parental rights and duties relating to the child in the adopters and extinguishes any pre-existing rights and duties (see sections 12(1) and (3)). From the date of adoption, the adopted child is treated as the legitimate child of the adopters, subject to certain limited exceptions. Adoption does not, for instance, affect the child’s relationship with his natural parents for the purposes of the law of incest or the prohibited degrees of marriage.

4.46 Section 16(1) of the Adoption (Scotland) Act requires the consent of the child’s parent or guardian to adoption. In the case of the father of an illegitimate child, however, his consent is not required unless he has “parental rights” under the 1986 Act. The father will only have those rights if “he is married to the child’s mother or was married to her at the time of the child’s conception or subsequently” (section 2(1)) or he has been granted parental rights by a court order under section 3(1) of the 1986 Act. “Any person claiming interest” can apply for an order under section 3 but in making an order the court must regard the welfare of the child as paramount.

### **(c) Maintenance**

4.47 “Maintenance” is not a term of art in Scots law. Instead, the term used is “aliment”. The Family Law (Scotland) Act 1985 recognises the child’s right to aliment from both parents. Section 1 of the Act imposes on a father or mother the obligation of payment of aliment to his or her child. An obligation of aliment is “an obligation to provide such support as is reasonable in the circumstances, having regard to the matters to which a court is required or entitled to have regard under .... [the] Act” in determining the amount to award. “Child” as defined in section 27 of the 1985 Act includes a child “whether or not his parents have ever been married to one another” and the obligation to aliment therefore applies to the parents of legitimate and illegitimate children alike.

4.48 The court has the power to order the making of periodical payments, the making of alimentary payments of an occasional or special nature (including payments in respect of inlying, funeral or educational expenses) and to backdate the award of aliment (section 3, Family Law (Scotland) Act 1985). “Child” for the purposes of the obligation to aliment in section 1(1) of the 1985 Act means “a person under the age of 18 years; or over that age and under the age of 25 years who is reasonably and appropriately undergoing instruction at an educational establishment, or training for employment or for a trade, profession or vocation” (section 1(2) of the Family Law (Scotland) Act 1985).

**(d) Guardianship**

4.49 As with “maintenance”, “guardianship” is not a term of art in Scots law, though it has been used in a number of statutory provisions. Instead, Scots law refers to “tutors” and “curators”. A tutor acts **on behalf of** a pupil child (i.e. a boy under 14 or a girl under 12) in litigation and legal transactions, administers the child’s property and has certain other powers in relation to the child’s person and upbringing. A curator, on the other hand, acts **along with** a minor child (i.e. a child who is not a pupil and is under 18) and adds his consent, if he thinks fit, to litigation or legal transactions entered into by the child. The curator has no direct control over the child’s property or person, however.

4.50 Prior to the reforms of 1986, both parents had equal status as tutors or curators of their legitimate children. Neither parent, however, had any automatic right to be appointed as tutor or curator of an illegitimate child. The 1986 Act now provides that a child’s mother has automatic tutory and curatory rights and that the father has those rights if married to the mother at the time of the child’s conception or at any time subsequently (see section 2(1)). If the father does not qualify for these rights, he may apply to the court for an order under section 3(1) of the 1986 Act in the same way as that described in relation to adoption. Either parent may appoint a testamentary tutor or curator, provided the parent in question at the time of his or her death was a tutor or curator of the child (see section 4). This changes the previous position which had been that in the case of an illegitimate child only the mother could appoint.

**(e) Custody**

4.51 At common law, only the mother of an illegitimate child had a right to his custody but, since 1930 and the introduction of the Illegitimate Children (Scotland) Act, the father could apply to court for custody. The 1986 Act further modified the position. Since custody is a “parental right” within the meaning of section 8 of the 1986 Act, the father of an illegitimate child is now in the same position in respect of custody as he is in relation to the other parental rights. In other words, he will only have a right to custody if he is married to the child’s mother at the time of the child’s conception or subsequently or he obtains a court order (sections 2 and 3 of the 1986 Act).

**(f) Access**

4.52 Broadly speaking, access is the right to see a child and to spend time with him or her. Access can be distinguished from custody as being a much more limited right. The courts frequently award custody to one parent while granting access to the other. In Robertson v Robertson (1981 SLT (Notes) 7), for instance, the court awarded custody of his 8 year old daughter to the father while granting extensive access to the mother.

4.53 At common law, the mother of an illegitimate child had, as we have seen, the right to custody. The father had no right to access but the Custody of Children Act 1891 gave him the right to apply. Access is, like custody, a “parental right” under the 1986 Act and the position of the father of an illegitimate child in respect of access is now the same as that already described in relation to custody.

**(g) Nationality**

4.54 For all practical purposes, the law relating to nationality is the same in Scotland as it is in England. (There is a curious footnote to this in that while the House of Lords held in Macao v Officers of State (1822) 1 Sh App 138 that British nationality could not be conferred by a pre-Union Scottish Act, they held in AG v Prinse Ernest Augustus of Hanover [1957] 1 All ER 49 that the reverse was true of a pre-Union Act of the English Parliament.) Nationality is governed by the British Nationality Act 1981, with the consequences for illegitimate children which have already been described (see paragraphs 4.26 and 4.27 above).

**(h) Domicile**

4.55 The law on domicile in Scotland as it affects illegitimate children is essentially the same as that in England and Wales which we outlined at paragraphs 4.28 to 4.30 above. The criticisms apply with equal force.

**Parental Rights**

4.56 Hong Kong is not alone in finding it difficult to define precisely what parental rights encompass. In Scotland, the Scottish Law Commission remarked that “the concept of parental rights is an elusive one” (“Family Law – Report on Illegitimacy,” Scot Law Com Rep 82, at paragraph 4.1), while the authors of the Stair Memorial Encyclopaedia of the Laws of Scotland suggested that whether “parental rights are rights at all has been the subject of debate” (Volume 10, at paragraph 1259). What is clear is that the position has changed with the enactment of the 1986 Act.

4.57 Section 8 of the 1986 Act defines parental rights as :

*“tutory , curatory, custody or access, as the case may require, and any right or authority relating to the welfare or upbringing of a child conferred on a parent by any rule of law.*

Parental rights are held automatically by the mother of a child but a father only has those rights automatically if he is married to the child’s mother, or was married to her at the time of the child’s conception or subsequently (section 2(1) of the 1986 Act). The approach of the 1986 Act follows the reasoning of the Scottish Law Commission in its report on “Illegitimacy” which did not

favour giving automatic parental rights to fathers of illegitimate children. To do so “would give rights to fathers where the child had resulted from a casual liaison or even from rape; it would fail to recognise that many men do not have any continuing relationship with their illegitimate children [and] it would cause offence to mothers who had struggled alone to bring up their children with no support from the fathers” (Scot Law Com Rep 82, at paragraph 2.5).

4.58 This approach has been the subject of considerable criticism. The Encyclopaedia of the Laws of Scotland points out that:

*“many ‘unmarried fathers’ play a full parental role and, indeed, that many married fathers do not. .... A compromise position might have been to grant automatic parental rights to the father based on cohabitation with the mother for a minimum period of time. The rejection of this solution reflects a reluctance on the part of private law, unlike public law, to attach much significance to cohabitation” (Volume 10, at paragraph 1187).*

4.59 The Commission itself now believes that a re-examination of the issue is called for. In their discussion paper on “Parental Responsibilities and Rights, Guardianship and the Administration of Children’s Property” (Scottish Law Commission Discussion Paper No. 88) the Commission point out (at paragraph 2.21) that the present law means that:

*“a man who abandoned his wife when she was pregnant, and never saw his child, would have full parental responsibilities and rights, whereas a man who was cohabiting with the mother of his child and playing a full paternal role would have none. We would question whether this is in line with current social thinking”.*

Referring to the argument in favour of the present law that it prevents interference in the child’s upbringing by an “undesirable” father, the Commission suggest that:

*“the answer to parental involvement which is against the child’s welfare is for a court to remove or regulate parental rights. It seems unjustifiable, however, to have what is in effect a presumption that any involvement by an unmarried father is going to be contrary to the child’s best interests. Moreover it is by no means clear that there is a real risk of harassment by unmeritorious fathers. A father who has never taken any interest in his child is unlikely to assert parental rights. The less meritorious the father, the less likely is he to trouble himself about his child” (at paragraph 2.25 of Discussion Paper 88).*

## **Registration of births**

4.60 The father of an illegitimate child cannot register the birth of his child alone (see section 18(1) of the Registration of Births, Deaths and Marriages (Scotland) Act 1965, as amended by the 1986 Act). He cannot have his name entered in the register of births as father of the child except on a joint request with the mother. That can be accomplished by the production of declarations by each parent acknowledging that he is the father. The production of a court order finding or declaring that the person is the father of the child is equally effective.

## **Proof of Paternity**

### *(i) Marriage*

4.61 In Scotland, the common law presumption pater est quem nuptiae demonstrant (literally, “the father is to whom the marriage points”) has now been incorporated in statute. Section 5(1) of the Law Reform (Parent and Child) (Scotland) Act 1986 provides that a man is presumed to be the father of a child if he was married to the mother at any time in the period beginning with the conception and ending with the birth of the child. This applies to void, voidable and irregular marriages alike. The Scottish Law Commission justified the inclusion of void or irregular marriages in the presumption as follows:

*“The underlying assumption behind these legal presumptions is that a woman who is married to a man is likely to have intercourse with him and is unlikely to have intercourse with other men. This assumption, founded on normal standards of human behaviour, is as true when the couple’s marriage is void or irregularly entered into, as it is when the couple are regularly married.” (Scottish Law Commission Report No. 82, at paragraph 6.7).*

The presumption can be rebutted on a balance of probabilities (section 5(4) of the 1986 Act), a change from the previous common law position where rebuttal required proof beyond reasonable doubt (Brown v Brown 1972 SC 123).

### *(ii) Cohabitation*

4.62 Scots law differs from that in England and Hong Kong in that it recognises the concept of marriage by “cohabitation with habit and repute”. The basis of this doctrine is that the parties’ tacit consent to marry, inferred from and combined with their cohabitation with habit and repute, constitutes what is termed an irregular marriage. A number of criteria must be satisfied before the doctrine applies:

- (a) The cohabitation must have been as man and wife.

- (b) It must be for a sufficient length of time for the court to infer that there was a tacit agreement to marry.
- (c) It must take place in Scotland.
- (d) The parties must be widely accepted as man and wife.
- (e) The parties must have cohabited “at bed and board”. Sexual intercourse per se is not enough.
- (f) The parties must have legal capacity to marry.

The significance of this to our present study is that section 5(2) of the 1986 Act specifically includes irregular marriages within the scope of section 5(1)'s presumption of paternity flowing from marriage.

*(iii) Registration of birth*

4.63 At common law, the entry of a person's name on the register of births as father of the child did not lead to any presumption of paternity. Section 5(1)(b) of the 1986 Act now provides, however, that there is a rebuttable presumption of paternity where a man and the child's mother acknowledge that he is the father and he is registered as such. By virtue of section 5(4), the presumption can be rebutted on a balance of probabilities.

*(iv) Finding by the Court*

4.64 A declarator of parentage that a person is, or is not, the parent of a child has always been available in Scots law. There is now statutory provision, however, in section 7 of the 1986 Act. An action “for declarator of parentage, non-parentage, legitimacy, legitimation or illegitimacy” can be raised in the sheriff court or the Court of Session. If granted such a declarator has universal application (i.e. its effect is not limited to the parties to the proceedings themselves). It is also possible, however, that a finding of parentage may be made as an incidental finding in other proceedings. These incidental findings apply only in the particular proceedings and raise no general rule of paternity, legitimacy, etc (sections 5(3) and 10 of the 1986 Act).

## **New Zealand**

4.65 In New Zealand, the Status of Children Act 1969 removed the legal disabilities of children born out of wedlock. Section 3 provides that the relationship between every person and his father and mother is to 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. The section applies to every person, regardless of when or where they were born (see section 3(4)).

**(a) Succession**

4.66 Illegitimate children have the same rights of succession as legitimate children (section 3(1) of the Status of Children Act 1969). Section 3(2) of the same Act abolishes the rule of construction at common law that in any instrument, in the absence of a contrary expression of intention, words of relationship signify only legitimate relationship. Wills executed before the commencement of the Act are unaffected by the Act, as are intestacies arising from deaths before the Act's commencement (see section 4).

**(b) Adoption**

4.67 Where the parents are married or where the father as well as the mother is the guardian of the child, the consent of both parents is required before the child can be adopted. In any other case, only the consent of the mother is required "provided that the court may in any such case require the consent of the father if in the opinion of the court it is expedient to do so" (section 7 of the Adoption Act 1955, as amended by section 12 of the Status of Children Act 1969).

**(c) Guardianship**

4.68 Guardianship in New Zealand is governed by the Guardianship Act 1968 and is defined as "the custody of a child .... and the right of control over the upbringing of a child" (section 3 of the Act). An illegitimate child is placed in a somewhat different position to a legitimate child. Section 6 deals with natural guardianship and provides that the father and mother of a child are each a guardian of the child. However, the mother is the sole guardian if:

- "(a) she is not married to the father of the child, and either:*
  - (i) has never been married to the father; or*
  - (ii) her marriage to the father of the child was dissolved before the child was conceived; and*
- (b) she and the father of the child were not living together as husband and wife and at the time the child was born."*

The father of the child may in such circumstances apply to the court to be appointed a guardian, either jointly with the mother or in her stead (section 6(3) of the 1968 Act).

4.69 Somewhat strangely, section 7(1) of the 1968 Act allows the father or the mother of a child to appoint a testamentary guardian without distinction between legitimate and illegitimate children. However, sub-section 3 indicates that if the testator is not himself a guardian at his death, the testamentary guardian must apply to the court for appointment in that capacity. The effect of this is that while the father of an illegitimate child may appoint a guardian in his will, that appointment will not be effective without the court's subsequent sanction.



**(d) Custody**

4.70 “Custody” is defined in the Guardianship Act 1968 as “the right to possession and care of a child” (see section 3). As we have already seen, the father and mother of a child are each the natural guardians, subject to some qualification where the child is illegitimate (see paragraph 4.68 above), and as such have custody of the child. The 1968 Act gives the court a range of powers to decide custody issues. Section 11 empowers the court to make such orders as it thinks fit in relation to a child’s custody on an application by either parent or guardian, while section 12 allows a similar order to be made in relation to divorce or other matrimonial proceedings.

**(e) Nationality**

4.71 Under the Citizenship Act 1977, every person born in New Zealand on or after 1 January 1949 is deemed to be a New Zealand citizen by birth (section 6 of the 1977 Act). Persons born outside New Zealand on or after 1 January 1978 are New Zealand citizens by descent if at the time of their birth their father or mother was a New Zealand citizen otherwise than by descent (section 7 of the 1977 Act). The section draws no distinction between legitimate and illegitimate children and the latter can therefore acquire citizenship through either parent, just as a legitimate child can. Section 3 of the Act provides that a person, in the absence of evidence to the contrary, is presumed to be the father of another person if “he was married to that other person’s mother at the time of that other person’s conception or birth”; or where his paternity has been established in terms of section 8 of the Status of Children Act 1969. Section 8 of that Act lists a variety of ways in which prima facie evidence of paternity can be established, including any instrument signed by the mother in which an individual acknowledges his paternity and a certified copy of the register of births which contains the father’s name. The effect is that a child can acquire citizenship through his father if paternity is established, regardless of whether or not the child’s parents are, or have been, married.

**(f) Domicile**

4.72 Domicile is unaffected by the Status of Children Act 1968. Section 12(3) specifically states that nothing in the Act shall “limit or affect any enactment or rule of law relating to the domicile of any person”.

**Australia**

4.73 In the 1979s, all the Australian States and Territories except the Australian Capital Territory began to enact legislation with the purpose of assimilating the legal position of children born out of wedlock to that of children born to married parents (“Family Law in Australia”, 4th Ed. 1989 by H.A. Finlay and R.J. Bailey-Harris, at page 397). Some Australian states

enacted legislation modelled on New Zealand's Status of Children Act 1969 which sought to remove the legal disabilities of children born out of wedlock. Other states achieved substantially the same effect by amending the relevant legislation piecemeal.

4.74 One example of the approach adopted in Australia is to be seen in the Victorian States of Children Act 1974. Section 3(1) states that "for all purposes to the law of Victoria the relationship between every person and his father and mother shall be determined irrespective of whether the father and mother are or have been married to each other, and all other relationships, shall be determined accordingly." In G v P [1977] VR 44 Kaye J said (at page 47):

*"In my view the effect of this section is to declare that, as between him and his father and mother, a child's rights and duties are the same irrespective of whether he was born in wedlock or out of it. As a consequence, the putative father occupies the same position in law in relation to his natural child as he does to his child born in wedlock."*

**(a) Succession**

4.75 The changes in status introduced by the various pieces of legislation in different states and territories apply equally to succession. Where intestacy arises, the illegitimate child is placed on the same footing as a legitimate child, both in respect of his own intestacy and that of a relative.

**(b) Adoption**

4.76 There is no uniformity in the law of the various States in relation to adoption. This is because the states have differed in their definition as to which parent's consent is required. It is pointed out in "Family Law in Australia" (4th Ed., page 400) that some states require the consent of both parents only when they were married to each other at the time of the child's birth or at or after conception. This includes Queensland, Western Australia, Tasmania and the Australian Capital Territory. In those jurisdictions, where the child is illegitimate the father's consent is not a prerequisite to the making of an adoption order. However, South Australia, Victoria and the Northern Territories made the consent of the father of an illegitimate child a specific prerequisite to adoption, provided that his paternity is recognised under State or Territory laws. For example, in the Adoption Act 1984 in Victoria, section 33 provides for the natural father of an illegitimate child to give his consent if his name appears in the entry relating to the child in the birth register, if his paternity has been declared or acknowledged under the Status of Children Act or he has been adjudged to be the father under the status of children, maintenance or family law legislation. In New South Wales, an unmarried father's consent is not required unless he is the legal guardian or the

custodian by court order or unless he lived with the mother in a de facto relationship after the child's birth.

**(c) Maintenance**

4.77 Section 66A(1) of the federal Family Law Act 1975 (as inserted by the Family Law Amendment Act 1987), which applies to most parts of Australia, sets out the basic principle of child maintenance which is to ensure "that children receive a proper level of financial support from their parents". Parents have the primary duty to maintain the child. The Act applies to all children irrespective of the marital status of their parents.

**(d) Guardianship**

4.78 Section 63F of the federal Family Law Act 1975 (as inserted by the 1987 Act) provides that, subject to any court order, the parents of a child are jointly entitled to custody of the child and each is a guardian of the child. The Act applies regardless of whether the parents are married or not.

**(e) Custody**

4.79 We have seen in the foregoing paragraph that under the federal Family Law Act 1975 the parents of a child are jointly entitled to custody, regardless of their marital status.

**(f) Nationality**

4.80 A child born in Australia will acquire citizenship by birth if a parent is an Australian citizen or permanent resident, or if the child has been ordinarily resident in Australia for a period of 10 years following the birth (section 10(2) of the Australian Citizenship Act 1948-73, as amended by section 4 of the Australian Citizenship Amendment Act 1986). A person born outside Australia will acquire Australian citizenship by descent if a parent was an Australian citizen and the birth is duly registered at an Australian Consulate (section 10B). However, it is not clear if this would apply to the putative father as "parent" is not defined in the Australian Citizenship Act 1948. Section 34 (repealed by section 24 of the Australian Citizenship Act 1984) referred to legitimated children but there is no separate reference to illegitimate children. It is unclear whether an illegitimate child would be able to acquire citizenship through his putative father in terms of section 10, section 10A and section 10B of the Australian Citizenship Act.

## **Ireland**

4.81 In 1987 the Irish legislature (the Oireachtas) enacted the Status of Children Act “to equalise the rights under the law of all children, whether born within or outside marriage” (see the explanatory memorandum to the Bill). Section 3 provides that the relationship between any person and his father and mother “shall, unless the contrary intention appears, be determined irrespective of whether his father and mother are or have been married to each other, and all relationships shall be determined accordingly”.

### **(a) Succession**

4.82 Section 29 of the Status of Children Act 1987 introduced a new section 4A in the Succession Act 1965 to provide that for the purposes of the 1965 Act relationship shall be deduced irrespective of the marital status of a person’s parents.

### **(b) Adoption**

4.83 In Ireland, only illegitimate children, orphans and legitimated children whose births have not been re-registered are eligible for adoption. The Status of Children Act did not change this position. The consent of the father is not required for an adoption except where the child has been legitimated by subsequent marriage (section 10 Adoption Act 1952, section 2 Adoption Act 1964 and schedule to Legitimacy Act 1931).

### **(c) Maintenance**

4.84 Illegitimate children have the same right of maintenance as legitimate children. A parent or third party may apply to the court for a periodical payment order for the support of dependent children against the parent who has failed to provide such maintenance as is proper in the circumstances (section 5 and 5A, Family Law Maintenance of Spouses and Children Act 1976 as amended by the Status of Children Act 1987). “Dependent children” is defined in section 3 of the Family Law (Maintenance of Spouses and Children) Act 1976 (as amended by the 1987 Acts) as any child under 16, including children whose parents are not married to each other. A child over that age may still be a dependent child if he is in full-time education or is mentally or physically handicapped.

### **(d) Guardianship**

4.85 The father and mother of a legitimate child each have guardianship rights in respect of the child (section 6 of the Guardianship of Infants Act 1964). Where the mother of a child has not married the child’s father, she alone is the guardian of the child unless the father is appointed a

guardian by the court (section 6(4) of the Guardianship of Infants Act 1964). A special informal procedure can be used where the mother consents to the appointment and the father is already registered on the birth register (section 6 Guardianship of Infants Act 1964, as amended by section 12 of the Status of Children Act 1987).

**(e) Nationality**

4.86 Irish citizenship may be obtained by birth or descent. Section 5 of the Status of Children Act 1987 declares that any reference to father, mother or parent in the Irish Nationality Acts 1956 and 1986 includes a father, mother or parent who was not married to the child's other parent at the time of the child's birth. An illegitimate child is therefore able to acquire citizenship from his father, just as a legitimate child can.

**(f) Domicile**

4.87 The law regarding domicile is effectively the same as that in England. An illegitimate child takes his domicile from his mother. The Status of Children Act 1987 did not affect this position.

**Registration of births**

4.88 As far as a legitimate child is concerned, full details of birth and parentage appear on the register at the request of either parent. In the case of an illegitimate child, the father's name can be entered on the register:

- (a) at the joint request of both the father and the mother. Both parents must sign the register;
- (b) at the request of either parent supported by a declaration from that parent and a statutory declaration from the other parent as to the paternity of the child; or
- (c) at the written request of either parent supported by an appropriate court order naming the father as the father of the child (section 7 of the Births and Deaths Registration Act (Ireland) 1880, as amended by section 49 of the Status of Children Act 1987).

## Chapter 5

### The options for reform and our conclusions

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#### Recommendation for general reform

5.1 We have already discussed in chapter 3 the case for reform of the present law relating to illegitimacy and concluded that change was necessary. In reaching that view we had in mind particularly the unfairness of laws which place an individual at a legal disadvantage because of the circumstances of his birth, factors for which the individual himself can clearly have no responsibility. We were conscious, too, of the requirements imposed by the international Covenants and the Hong Kong Bill of Rights Ordinance (59 of 1991). The relevance of these considerations was given even greater weight by the Hong Kong Government's recent report to the United Nation's Human Rights Committee ("Third Periodic Report by Hong Kong under Article 40 of the International Covenant on Civil and Political Rights: An Update", Hong Kong Government, March 1991). Paragraph 78 of that report specifically refers to our present study and says that "the Law Reform Commission is currently examining questions of illegitimacy with a view to improving the situation of illegitimate children, particularly related to the right of succession". We are fortified in our view that reform is necessary by this indication that the Government itself expects changes to be made.

5.2 At paragraph 3.10, we concluded our discussion of the case for reform by saying that there were two alternative approaches to reform: one would be the removal of discrimination against the illegitimate child while retaining the concept of illegitimacy, and the other would be the removal of the concept of illegitimacy itself. In practice, there may be little difference between these two approaches. As long as the legal concept of marriage continues, so will there be children who are born out of wedlock. The introduction of a statutory provision that the law will no longer recognise any legal distinction between married and unmarried children will not remove the **factual** differences of the circumstances of their birth. What the law can do is to ensure that labels such as "legitimate" and "illegitimate", which suggest notions of superiority and inferiority, are not unnecessarily perpetuated and that the illegitimate child is not legally disadvantaged.

5.3 In their First Report on Illegitimacy, the English Law Commission suggested the adoption of the terms "marital" and non-marital" child, an approach with which the Scottish Commission strongly disagreed. The Scottish Commission remarked (at paragraph 9.2 of Scottish Law Commission Report No. 82).

*“This is just another way of labelling children, and experience in other areas, such as mental illness, suggests that new labels can rapidly take on an old connotations. In our view it should be so rarely be necessary to discriminate between children on the basis of whether their father was married to their mother that no special legal label is required for this purpose. .... In short, we would not wish to see a discriminatory concept of ‘non-maritality’ gradually replace a discriminatory concept of ‘illegitimacy’. We would rather see future legislation distinguish, where distinctions based on marriage are necessary, between father rather than between children.”*

The English Commission subsequently re-considered the issue and concluded in their Second Report on Illegitimacy that they were “convinced that the Scottish approach is the better means of carrying the policy of non-discrimination into legislative form” (see paragraph 2.3 of English Law Commission Report No. 157).

5.4 Both the English and Scottish Commissions concluded that the best approach was to provide that there would be legal equality between children, subject to specified exceptions, regardless of whether or not their parents had been married to each other. Such an approach avoided the necessity to consider fundamental changes to the definition of illegitimacy while allowing particular areas to be addressed where there were good grounds for distinguishing between married and unmarried parents.

5.5 In considering any possible changes to the law relating to illegitimacy, it is important to bear Hong Kong’s special circumstance in mind. We referred at paragraph 1.4 to the number of illegitimate births in Hong Kong and saw that these represented a far lower percentage of total live births than in the United Kingdom. We also saw at paragraph 3.3 that a high proportion of illegitimate births in Hong Kong were registered with the father’s name, indicating the father’s willingness to acknowledge his paternity. There is some evidence that in Hong Kong the majority of parents of children born outside marriage are cohabiting couples. In 1988, out of 2,849 illegitimate births, the parents’ relationship was described as cohabitation in 2,681 cases, representing some 91% of couples. One author suggests that about 90% of illegitimate children in Hong Kong are born of “stable, illicit unions” (“Custody and the Putative Father”, Pegg, (1983) 13 HKLJ 358, at page 365).

5.6 While the number of people affected by the law on illegitimacy may be significantly lower than in the United Kingdom, the indications are that most illegitimate children are acknowledged by their fathers and that there is strong public support for the removal of any legal discrimination against them. We referred at paragraph 3.3 to the public response to our 1985 survey in relation to our work on succession. A large majority of respondents favoured the removal of discrimination. That view was supported by those responding to the questionnaire we circulated in relation to the present review of illegitimacy. All but one of those responding to that questionnaire favoured

an end to discrimination and a majority supported removing the concept of illegitimacy altogether.

5.7 Having examined the ways in which reform of the law has been approached in a number of other jurisdictions in chapter 4, and having considered the particular circumstances of Hong Kong, **we are persuaded that the law should be changed to provide a general rule that there be legal equality for all children, regardless of the marital status of their parents. This general rule should be subject only to specific limited exceptions.** In reaching this conclusion, we have taken particular note of the reasoning and approach of the English and Scottish Commissions.

## Parental rights

5.8 The adoption of a rule of equality for all children does not necessarily mean that all parents should be treated alike and, in particular, it does not inevitably necessitate the granting of full parental rights to the father of an illegitimate child. In both England and Scotland, as we have seen, parental rights and responsibilities only devolve on an unmarried father where there is a court order to that effect (see sections 2 and 4 of the Children Act 1989 and sections 2 and 3 of the Law Reform (Parent and Child) (Scotland) Act 1986). In deciding not to grant automatic parental rights to unmarried fathers, but to allow the court power to grant those rights on application by the father, the English Commission said:

*“We recognise that, owing to the widely varying extent to which unmarried fathers in fact assume responsibility towards their children (and indeed towards the mothers who bring those children up), it would not be in the best interests of the children if fathers were automatically to enjoy full parental status. Where the parents are in fact living together and co-operating in bringing up their children, we hope that such [parental rights] orders will frequently be applied for and granted” (Law Commission Rep. No. 157, at paragraph 3.3).*

In reaching their conclusion, the English Commission placed considerable weight on the submission of the National Council for One Parent Families. There appeared little other evidence upon which the Commission made its recommendation to reject the automatic conferment of parental rights on unmarried fathers.

5.9 A similar view was taken by the Scottish Commission who found there was general agreement on consultation that:

*“... it would not be desirable to give the father of an illegitimate child parental rights automatically. This would give rights to fathers where the child had resulted from a casual liaison or even from rape; it would fail to recognise that many men do not have any continuing relationship with their illegitimate children.*



*It would cause offence to mothers who had struggled alone to bring up their children with no support from the fathers” (Scottish Law Commission Rep. No. 82, at paragraph 2.5).*

5.10 In Hong Kong, the opposite view was presented to us by the Hong Kong Association of Business and Professional Women. They emphasised the difference between the social circumstance prevailing in England and Hong Kong. They indicated that in Hong Kong the majority of parents of illegitimate children are cohabiting. They argued that there was no evidence in Hong Kong to suggest that the father of an illegitimate child was more likely to abuse his parental rights than his married counterpart, nor was there any evidence to suggest that an unmarried father was any less fit to bring up his child. The Association therefore suggested that the concept of illegitimacy should be abolished and automatic parental rights should be conferred on unmarried fathers.

5.11 A substantial majority of those who responded to our questionnaire on illegitimacy favoured the granting of parental rights to unmarried fathers, though the majority of those wished to impose conditions of one sort or another. These included a requirement that the father has already assumed parental rights or responsibilities, or that he has an agreement with the mother to exercise such rights and duties, or that he could apply to court for an order granting him such parental rights duties or responsibilities.

5.12 It is worth recalling at this point the criticisms which have been levelled at the United Kingdom’s failure to grant automatic parental rights to unmarried father (see paragraphs 4.58 and 4.59 above). In particular, it has been said that a child any suffer as much neglect or disinterest from a married father as from an unmarried one. If the cause for concern is that there is a possibility of parental involvement which would be to the child’s detriment, then the answer is not to deprive an entire class of fathers of parental rights because of an errant few, but rather to give the court power to regulate or remove parental rights in appropriate individual cases on cause being shown. If all children are to be treated alike by the law, logic would dictate that similar treatment should be accorded to their parents.

5.13 We are impressed by the force of this argument but we believe that the paramount concern in allocating parental rights (as in so many other areas of family law) should be the welfare of the child. In achieving that welfare, we have concluded that there is a substantial benefit in ensuring that the law on this issue is clear and unambiguous. That end would be met by providing that parental rights would be automatically granted to all parents, married or unmarried, but it would have the undesirable effect of, for instance, granting rights to a father who had had no contact with the mother since the act of intercourse resulting in the child’s birth. Such a situation would be a source of constant uncertainty for both mother and child, with the possibility that the absent father might at any stage assert his parental rights when it suited him. Providing the mother with the legal means to seek a court order removing the father’s parental rights in such circumstances would resolve the

situation but we do not think it reasonable that the law should place that burden on the mother in order to protect the child's welfare.

5.14 One alternative would be to grant parental rights automatically to unmarried fathers who were cohabiting with the mother for a special period, an approach adopted by the Law Reform Institute of Alberta in its recent report on "Status of Children" (Report No. 60, March 1991). This would satisfy the requirements of Article 19 of the Hong Kong Bill of Rights, which provides that "the family .... is entitled to protection by society and State", by ensuring that where there was a genuine family unit involving father and child, the law would provide proper protection for that family. The disadvantage is that the concept of cohabitation is imprecise. We fear that a set of legal provisions founded on cohabitation would lack that certainty which we believe is vital to the child's best interests in providing a stable home environment. For that reason we reject this alternative also.

5.15 **In our view, the solution which best ensures the child's welfare while keeping to a minimum any differential treatment between married and unmarried fathers is to grant parental rights automatically to the mother of a child, whether or not she is or has been married to the father, but to grant the father those rights and responsibilities only by virtue of marriage to the child's mother or by a court order. "Marriage" should include for this purpose a voidable marriage and a void marriage which the father believed in good faith was valid.** It should be stressed that this approach does not in any way prevent a cohabiting unmarried father from obtaining parental rights by way of an application to court. Indeed, the law should place no obstacles in the way of such applications. Our approach, however, ensures that, in the child's interests, an unmarried father is not automatically granted parental rights. The onus here rests with the unmarried father to obtain parental rights, rather than with the mother to exclude that father's rights under the option in the preceding paragraph. We believe that the approach we have chosen is likely to be less disruptive to the child's upbringing.

5.16 We discussed earlier (see paragraph 2.18) the difficulty of defining what was meant by "parental rights" in Hong Kong. We saw in chapter 4 that that difficulty was not confined to our own jurisdiction. Effectively, what we mean when we refer to parental rights in our recommendation in the preceding paragraph is those rights or authorities conferred on a parent by law which relate to the upbringing or welfare of the child. Our general recommendation is subject to specific proposals on particular aspects of the law relating to illegitimacy and we shall examine these in turn.

#### **(a) Succession**

5.17 As we pointed out in our discussion of the law of succession in chapter 2, the present law in Hong Kong appears unfair to illegitimate children in certain situations. It seems unreasonable, for instance, that the father of

an illegitimate child can succeed to his child's estate on intestacy, but the child has no similar right to succeed to the father's estate. The measure of the present law's effects can be illustrated by example. Suppose a man enters into a valid marriage in China. There are children born of the marriage. The husband subsequently leaves his wife and children in China and moves to Hong Kong where he cohabits with another woman. There are children born from that union. Once in Hong Kong, the husband has no further contact with his wife and family in China. With the help of his cohabitee and their children in Hong Kong, he starts a business and eventually makes his fortune here. He subsequently dies intestate many years later. Under the present law, the wife and the children of the marriage are entitled to the estate, despite the fact that they have had no contact with the deceased for years. On the other hand, the cohabitee and the children of the union in Hong Kong, who helped the deceased husband make his fortune here, are not entitled to any part of the estate.

5.18 We have already considered questions of succession in one of our earlier references (see our report on "The Law of Wills, Intestate Succession and Provision for Deceased Persons' Families and Dependents", Topic 15). In that report, we accepted that all children should have equal succession rights, irrespective of whether or not they are born within marriage (see paragraphs 9.10 and 9.11 of Topic 15). The present position was criticised as being unfair. We recommended that the Intestates' Estates Ordinance (Cap 73) should be amended to provide that references (however expressed) to any relationship between two persons should be construed without regard to whether or not the father and mother of either of them, or the father and mother of any person through whom the relationship is deduced, have or had been married to each other at any time. The effect of such a change would be that an illegitimate child would become automatically entitled to succeed on his father's death intestate.

5.19 In England, as we have seen, (see paragraph 4.16 above) section 14 of the Family Law Reform Act 1969 created a presumption that the father of an illegitimate child did to survive his child. In our report on "Wills", we adopted a similar recommendation to overcome the difficulties in those cases where it might not be possible to trace the father. We recommended that there should be a presumption that an illegitimate child was not survived by his father and we proposed to insert a new section 3A in the Intestates' Estates Ordinance (Cap 73) to this effect (see paragraph 9.18, Topic 15).

5.20 A particular distinction is drawn by the law in relation to certain land in the New Territories. Section 11 of the Intestates' Estate Ordinance (Cap 73) explicitly states that the mode of succession on intestacy set out in that Ordinance does not apply to certain land in the new Territories. In addition, section 13 of the New Territories Ordinance (Cap 97) gives the court the power, in relation to specified land in the New Territories, to recognise and enforce any Chinese custom or customary right affecting such land. That custom might well be at odds with the principle we favour of giving equal rights of succession to illegitimate children. We concluded in our report on "Wills" that the legal exceptions which applied to succession to certain New

Territories land should be repealed (see paragraph 12.6, Topic 15). We see no reason now to resile from that recommendation.

5.21 We considered the rule of construction at common law under which words denoting a family relationship are presumed to refer only to legitimate relations. We concluded that this strict rule of construction should be changed “in view of the more enlightened community attitudes revealed by the 1985 local public opinion survey” so that words denoting a family relationship are presumed to include illegitimate relations (paragraph 3.27, Topic 15).

5.22 Our report on “Wills” recommended amendment to the Deceased’s Family Maintenance Ordinance (Cap. 129) (“DFMO”) to enable an illegitimate child to claim under the Ordinance (see paragraph 14.4 of Topic 15). The Ordinance gives the court a discretion to make reasonable provision for the maintenance of a deceased’s dependants out of the net estate in certain situations. Illegitimate children do not fall within the definition of “dependant” or “son “ or “daughter”, even though they may have cared for the deceased in his or her later years and may have been actually dependant on the deceased. We considered this to be unfair and recommended dispensing with the use of the term “dependant” to describe those who may apply under the DFMO. In its place, the particular classes of persons who may apply for family provision should be set out. We proposed the repeal of the existing provisions in the DFMO which set out the rights to apply of the deceased’s children. These should be replaced by less restrictive provisions, similar to the English Inheritance (Provision for Family and Dependents) Act 1975, which do not preclude applications by illegitimate children.

5.23 **We continue to subscribe to the views expressed in our earlier report on “Wills” and see no reason to change our recommendations. We accordingly reaffirm the recommendations on succession of our “Wills” report which we have outlined in the foregoing paragraphs as they affect illegitimate children.**

**(b) Adoption**

5.24 We saw at paragraph 2.8 above how section 5(5) of the Adoption Ordinance (Cap 290) requires the consent of “every person who is a parent or guardian of the infant” before an adoption order can be made. The definition of “parent” in section 2 of Cap 290 states that “in relation to a child who is illegitimate, means his mother, to the exclusion of his father”. This means the putative father has no right to refuse to accede to his child’s adoption. In contrast, the father of a child born within marriage can prevent the making of an adoption order unless his refusal to agree can be held to be “unreasonable”, in which case the court can order his agreement be dispensed with.

5.25 The most recent development in England, under the Children Act 1989, is to require the court to satisfy itself, before making an order freeing the child for adoption, that the father does not have parental responsibility for the child, has no intention of acquiring parental responsibility or a residence order under the 1989 Act and if he did make such an application, it would be likely to be refused. This change recognises the right of a putative father to have a say where the question of adoption of his child is concerned, provided he can satisfy the court that certain conditions are met. This is in line with the principle of removing legal discrimination affecting an illegitimate child so far as is possible.

5.26 The vast majority of those who responded to our questionnaire on illegitimacy favoured giving the father of an illegitimate child the right to object to the child's adoption, with more than half of those suggesting that that right should not be subject to any condition. In our principal recommendation, however, we have argued for giving unmarried fathers parental rights only as a result of a court order (see paragraph 5.15) and we think that this should apply in relation to adoption. As was pointed out by the Scottish Law Commission, "we can see no reason why a father who has shown no interest in the child and who indeed may have been unaware of the child's existence should have a right to refuse to allow an adoption to take place unless a court dispenses with his agreement" (Scottish Law Commission Report No. 82, paragraph 4.6). Equally, where the court has felt it right to grant any parental right to an unmarried father, whether it be custody, guardianship or merely access (bearing in mind that the court must have had the child's welfare in mind as the paramount consideration when deciding whether or not to make the order), we do not think that the father's consent to adoption in these circumstances should be dispensed with. We therefore favour an approach similar to that followed in England. **We recommend that the agreement of the father to the adoption of his illegitimate child should be required where he has been awarded any parental right and the award is still operative.**

**(c) Maintenance**

5.27 We examined in chapter 2 the ways in which maintenance could be claimed and pointed out that the procedure available in respect of an illegitimate child was governed by the Affiliation Proceedings Ordinance (Cap 183). That Ordinance is restrictive in its operation and is inconsistent with our basic premise that children should be treated alike, regardless of the marital status of their parents. The financial provision available for legitimate children under the Guardianship of Minors Ordinance (Cap 13), the Separation and Maintenance Orders Ordinance (Cap 16) and the Matrimonial Proceedings and Property Ordinance (Cap 192) differs in certain respects from that available to the illegitimate child under Cap 183. In particular, under the Matrimonial Proceedings and Property Ordinance the court can make orders for transfer of property, settlement of property or secured periodical payments which are not available under Cap 183.

5.28 In England, the Children Act 1989 provides for the same range of alternatives for financial provision for all children, legitimate or illegitimate. We favour a similar approach for Hong Kong. The 1989 Act in England, however, was the result of a wide-spread review of all aspects of the law relating to children. It is not within the scope of our current reference to attempt such a task and we therefore propose the more modest course of amending our existing statutory provisions, rather than repeal and the introduction of an entirely new Ordinance. **We accordingly recommend that the Guardianship of Minors Ordinance (Cap 13), the Separation and Maintenance Orders Ordinance (Cap 16), the Affiliation Proceedings Ordinance (Cap 183) and the Matrimonial Proceedings and Property Ordinance (Cap 192) should be amended to ensure that illegitimate children enjoy the same rights to financial provision as legitimate children.** The particular circumstances of the child and his family will mean that the court will make different orders in different cases. What our recommendation should achieve is that the full range of options is available to the court, regardless of the child's status.

5.29 The requirements of the Affiliation Proceedings Ordinance to which we referred at paragraph 2.14 that the applicant be a single woman, that there be corroborative evidence, and that the statutory time limits be complied with, are all peculiar to that Ordinance and do not apply where a legitimate child is involved. **Consistent with our view that the differences between legitimate and illegitimate children should be removed as far as possible from the law, we recommend that these restrictive requirements of Cap 183 be repealed.** In making this recommendation, we are fully aware that in practice claims for maintenance for an illegitimate child will often differ from those for a legitimate child simply because paternity will frequently be a contested issue. To adopt the English Law Commission's view, however, "what the law can and, in our view, should do is to remove the wholly distinct procedure relating to illegitimate children, tainted as it is by its historical association with the Poor Law and its overtones of criminality" (Law Commission Report No 118, paragraph 6.2).

**(d) Pensions**

5.30 Our survey shows that the majority of respondents consider that children should be treated equally, irrespective of the marital status of their parents. Our principal recommendation is in line with that public view. **It follows that we believe that Civil Service and judicial pensions should therefore be payable in respect of children born outside marriage. That being the case, we recommend that the pensions legislation to which we referred at paragraph 2.17 should be amended to make it clear that a reference to "child" includes any child born of the officer.**

**(e) Guardianship**

5.31 In Hong Kong, the father of an illegitimate child is not entitled automatically to become the child's guardian on the mother's death. He has the right, however, to appoint a testamentary guardian if he is awarded custody by the court (sections 6(1) and 21(3) of the Guardianship of Minors Ordinance (Cap 13)). We observed at paragraph 2.19 that if the unmarried father is living in a stable relationship with the mother, he is unlikely to see any need to apply for a custody order. In such circumstances, the unmarried father would then have no right to appoint a guardian.

5.32 The parent situation on guardianship in England is governed by section 5 of the Children Act 1989. This section is intended to simplify and clarify the law of guardianship. Unmarried fathers will now be able to appoint a guardian if they have obtained parental responsibility or themselves been appointed as guardian (sections 5(3) and 5(4)). A person appointed as a child's guardian has parental responsibility for the child concerned (section 5(6)). Testamentary appointments will only be effective if the child has no surviving parent with parental responsibility for him, or the deceased person and no other parent had a residence order immediately before death (sections 5(7), 5(8) & 5(9)). The situation will no longer arise where a surviving parent caring for a child has to co-operate with a guardian appointed by the deceased parent.

5.33 We recommended at paragraph 5.15 that parental rights and responsibilities should be enjoyed automatically by the mother of a child, whether or not she is or has been married to the father, but that the father should only have those rights and responsibilities by virtue of marriage to the mother or by a court order. We believe that consistency with that recommendation favours an approach similar to that followed in, for example, England or New Zealand (see paragraphs 4.24 and 4.68). **We therefore recommend that the father and mother should each be guardians of a child but only the mother should be a guardian if she is not (and has never been) married to the father of the child, or her marriage to the father of the child was dissolved before the child was conceived and both were not living together as husband and wife at the time the child was born. However, the father should be able to apply to the court to be appointed as a guardian of the child either in addition to, or instead of, the mother or any guardian appointed by her.** We have recently had the question of custody and guardianship referred to us for consideration ("Guardianship and Custody", Topic 32). That study will clearly impinge on aspects of the present reference but we do not think we should hold back at this stage from recommending changes in the law on guardianship and custody as they affect illegitimacy.

**(f) Custody**

5.34 We observed in chapter 2 that the concept of custody was an imprecise one but that it could broadly be said to be the right to the actual

physical care and control of the child. Hong Kong's present law gives, it would seem, the mother of an illegitimate child a greater claim to custody than the father. The general requirement in section 3(1) of the Guardianship of Minors Ordinance (Cap 13) that in custody disputes the welfare of the child is the first and paramount consideration is waived in proceedings involving an illegitimate child by virtue of section 3(2). The effect is that the mother's claim is superior to that of the father where an illegitimate child is concerned. **We see no reason why this distinction should be drawn between legitimate and illegitimate children. We recommend that section 3 of the Guardianship of Minors Ordinance (Cap 13) should be amended by repealing subsection 3(2) to make it clear that in all cases the welfare of the child should be the first and paramount consideration.** That requirement is in our view sufficient without the intrusion of the existing section 3(2) to ensure that, for instance, an unmarried mother is given custody where the court is satisfied that the father's exercise of custodial rights over the child would not be in the child's best interests.

5.35 Section 4(2) of the Guardianship of Minors Ordinance provides that where there is disagreement on any question affecting the welfare of a minor, either parent may apply to the court for direction and the court may make such order as it thinks proper. However, section 4(5) makes it clear that this does not apply to illegitimate children. **We see no good reason why parents of an illegitimate child should be treated differently in this regard and we recommend that section 4 of the Guardianship of Minors Ordinance should be amended to give the same right to apply to the court for direction to married and unmarried parents alike.**

**(g) Nationality**

5.36 We have seen that the British Nationality Act 1981 does not allow an illegitimate child to obtain British Dependent Territory citizenship through his putative father who is himself a British citizen (see paragraph 2.27). The English Law Commission thought this was not justified and suggested that an illegitimate child should be entitled to British citizenship on the basis of a declaration of parentage by the court. The Commission recognised, however, that British citizenship was a matter for the United Kingdom Government on which it would be inappropriate for the Commission to offer definitive proposals (Law Commission Report No 118, at paragraph 11.1). The same can be said here. **We realise that the solution lies in the hands of Her Majesty's Government. It would not be constructive for us to make recommendations to the Hong Kong Government which the latter has no power to implement. We therefore content ourselves with raising the issue of citizenship for consideration by the Hong Kong Government and, ultimately, by the Government of the United Kingdom while expressing our support for the view of the English Law Commission that the existing discrimination against the illegitimate child is unjustified.**



**(h) Domicile**

5.37 In paragraph 2.28 we indicated that Hong Kong's law on domicile follows that of England, with the resultant differences between legitimate and illegitimate children. We referred to the recommendations of a joint report on Domicile by the English and Scottish Commissions at paragraph 4.30. **We entirely agree that changes along the lines suggested by the British Commissions would appear sensible but we do not think that it can properly be said to be within the scope of our present reference to make recommendations for reform which would affect not only illegitimate children but also legitimate children. We believe that this issue should be considered as part of a more general study of the law of domicile and content ourselves with remarking at this juncture that we believe that any reform should remove the current distinctions based on the marital status of a child's parents.**

## **Registration of births**

5.38 We described in some detail at paragraphs 4.31 to 4.33 the criticisms which were levelled over the years at the law in England as it affected unmarried fathers. Those criticisms apply with equal force to the current law in Hong Kong. Section 7 of the Births and Deaths Registration Ordinance (Cap 174) imposes an obligation on married parents to register the birth of a child within 42 days. No such obligation is imposed on the father of an illegitimate child, however, because of an express exception under section 12. The unmarried father cannot have his name entered on the register except by way of a joint request with the mother, and both parents must sign the register together (section 12 of Cap 174).

5.39 In line with our principal recommendation that there should be legal equality for all children, regardless of the marital status of their parents, we think it right that every effort should be made to remove the stigma which may attach to a child who cannot produce a birth certificate which identifies his father. Clearly, there will be cases where the father cannot be identified but we see no justification for the law to place artificial impediments in the way of an unmarried father who is willing to be publicly registered as the child's father. In particular, we think it unreasonable that, for instance, an unmarried father should pay maintenance for his child but have no right to be registered as the child's father without the mother's consent. Even in those unlikely cases where the father, while showing no other interest in his child, nevertheless wished to be registered as the father, we can see no convincing reason why the law should seek to conceal the biological fact of his fatherhood by hedging round that registration with restrictions. There may be justification for denying automatic parental rights to unmarried fathers, as we have argued earlier, but we do not think that those arguments apply to the right to enter a person's name on the register as father. **We accordingly recommend that the father of a child should have the automatic right to have his name entered on the register of births, regardless of his marital status, but that in the case of an unmarried person registration will only**

follow the production of satisfactory evidence of parenthood. That evidence may take the form of a declaration by the mother acknowledging that person as father; a court order as to paternity; or such other matter as satisfies the Registrar of Births that the applicant is the child's father. We do not think that it should be permissible to register a person's name as father without his consent, unless there is a court order as to paternity. It would, we suggest, be unsafe to allow a mother to register an individual as the father merely on her own assertion.

## **Proof of Paternity**

5.40 We described at paragraphs 1.15 to 1.21 the Hong Kong law on proof of paternity and in chapter 4 we outlined the law in some other jurisdictions. We now consider how, if at all, our present law should be changed.

### **(i) Marriage**

5.41 We saw at paragraph 1.16 that in Hong Kong there is a presumption that a child born to a married woman is the child of her and her husband. A similar presumption applies in both England and Scotland. In England and Scotland this presumption is rebuttable on a balance of probability but in Hong Kong proof in rebuttal must be beyond a reasonable doubt. The Law Commissions in both England and Scotland thought that the standard of proof to rebut the presumption of marriage should be on a balance of probability. They argued that if the standard were proof beyond reasonable doubt, then a child would still be presumed to be the child of his mother's husband even though it was probable on the available evidence that he was not the father. On the other hand, a higher standard of proof might serve to discourage challenges to the stability of families. As the Scottish Law Commission pointed out, however, the reduction over the years of the legal disabilities suffered by illegitimate children may justify the view that there is no longer a need for a requirement of proof beyond reasonable doubt. **We are persuaded by the thinking in the United Kingdom on this matter. We do not think it necessary or desirable in the light of our other recommendations that the standard required to rebut the presumption of paternity (and hence legitimacy) by marriage should be proof beyond a reasonable doubt. We recommend that the presumption itself should be clearly stated in statutory form and that it should be rebuttable on a balance of probabilities.**

5.42 In relation to void marriages, a child will be treated as legitimate in Hong Kong if either of the parties to the marriage reasonably believes in its validity (section 11 of the Legitimacy Ordinance (Cap 184)). A similar provision existed in England in the Legitimacy Act 1976. The English Law Commission recommended in their report on Illegitimacy that there should be a presumption that at least one of the parties to the marriage reasonably

believes in its validity. They argued that it would be difficult to prove reasonable belief if the issue of the child's paternity was only raised many years after the marriage. The Commission also wished it made clear that a mistake of law (e.g. a belief that a divorce decree is valid) is capable of being a "reasonable belief". These concerns are reflected in section 1 of the Legitimacy Act 1976 and section 28 of the Family Law Reform Act 1987. **We see no reason to disagree with the Law Commission in this respect. The adoption of a presumption that at least one of the parties to the marriage reasonably believed in its validity at the time of the act of intercourse resulting in the birth (or of the marriage, if later) would ensure the application of section 11 of the Legitimacy Ordinance (Cap 184) to protect the legitimacy of a child of a void marriage. We believe that such a presumption is desirable in the best interests of the children of any such union.**

**(ii) Cohabitation**

5.43 No presumption of paternity (or legitimacy) arises from cohabitation under the law in Hong Kong or England. Scotland, on the other hand, has retained the concept of marriage by cohabitation by habit and repute. The effect of section 5 of the Law Reform (Parent and Child) (Scotland) Act 1986 is that a child born of such a union is presumed to be the "husband's" and hence legitimate. We do not feel that Hong Kong would accept a radical reform along the lines of Scots law. The concept of marriage by cohabitation by habit and repute is one of long standing in Scotland but it would be an entirely new departure for Hong Kong.

5.44 A number of other jurisdictions accept cohabitation as the basis for a presumption of paternity. We are persuaded by the reasoning of the English Law Commission on this, however. **The Law Commission in England found it impossible to define cohabitation with any useful and accurate criterion upon which a presumption of paternity could arise. The scope for dispute and disagreement in deciding whether or not a particular relationship satisfies the requirements of "cohabitation" seem to us, too, to be considerable. We therefore reject cohabitation as a basis for a presumption of paternity.**

**(iii) Registration of birth**

5.45 In Scotland (as we saw at paragraph 4.63), there is a statutory presumption of paternity where a man and the child's mother acknowledge that he is the father and he is registered as such. In England, the entry of a man's name in the register as father is prima facie evidence that he is the father. The situation in Hong Kong is probably the same as in England though it is by no means clear. Whether or not registration of a man's name as father of a child should lead to a presumption of paternity is, we believe, linked to the question of what right a father has to have himself so registered. If, for instance, the act of registration is permitted without the necessity of

producing any evidence of paternity then we should be less willing to allow an inference of paternity to be drawn from that registration than where some proof of paternity was required as a condition of registration.

5.46 At paragraph 5.39 we recommended that an unmarried father should have an automatic right to have himself entered on the register as the child's father with the mother's consent, or on production of a finding of paternity by a court, or on production of such other matter as would satisfy the Registrar of Births that the applicant is the child's father. **We believe that the requirements imposed on an unmarried father under our earlier recommendation before his name may be entered in the register ensure that there is little likelihood that the system will be abused by spurious claims of fatherhood. In the circumstances, we recommend that there should be a statutory provision that the entry of a man's name in the Register of Births as the father of a child raises a presumption of paternity. In line with our recommendation at paragraph 5.41 in relation to rebuttal of the presumption of paternity through marriage, we recommend that the presumption of paternity arising from entry of an individual's name on the register as father should be rebuttable on a balance of probabilities.**

*(iv) Finding by the court*

5.47 As we saw at paragraph 1.20, there is no jurisdiction in Hong Kong for the court to make a declaration of paternity where no other relief is sought. Findings of paternity can, however, be made in conjunction with other proceedings, such as custody or maintenance. This contrasts with the position in Scotland, for instance, where a declarator of parentage that a person is, or is not, the parent of a child has always been available and is now incorporated in status (see paragraph 4.64). In England, section 56 of the Family Law Act 1986 (as amended by the Family Law Reform Act 1987) now allows application for declarations of paternity, legitimacy and legitimation, regardless of whether the applicant is legitimate or not.

5.48 **We think it desirable that a person should be able to seek a declaration of paternity from the court without limiting this right to situations where the finding of paternity is incidental to custody or other proceedings and we recommend that the law should be amended to provide this right. We further recommend that any such finding of paternity should not only bind the parties to the proceedings but should have general effect.**

5.49 The Law Commission in England considered that the Attorney General should be given the right to intervene in declaration proceedings. This would enable the Attorney General to assist the court by addressing argument to it on the law or the facts. This would provide innocent parties with some protection in a false claim of parentage. **We agree that the Attorney General should play such a role and we therefore propose the enactment of a provision similar to section 59 of the Family Law Act**

**1986 which sets out the powers of the court to refer papers to the Attorney General and the powers of the Attorney General to intervene.** Section 59 empowers the court on its own motion, or on the application of any party to declaration proceedings, to direct that all necessary papers be sent to the Attorney General. The Attorney General, whether or not he is sent the papers, may intervene in declaration proceedings “in such manner as he thinks necessary or expedient” and “argue before the court any question in relation to the application which the court considers it necessary to have fully argued.”

5.50 In considering whether a finding of paternity by a court should be reflected on the register, the English Law Commission proposed a distinction between cases where a finding of paternity is the only relief sought and cases in which paternity is an incidental finding. They reasoned that in the former case, the issue of paternity would have been specifically and fully addressed, with the interests of the child in relation to paternity taken into the reckoning. Where, however, paternity was only an incidental issue the Commission felt that the interests of the child in respect of paternity would not necessarily have been adequately addressed. They therefore proposed that incidental findings of paternity should not automatically be entered on the register. The Commission took the view that (Law Commission Report No. 118, at para. 10.65):

*“In relation to the former [that is, declarations of parentage] we think that the court should .... notify the Registrar-General following a declaration of parentage, so that re-registration can be automatically effected. The declaration procedure is intended to provide a means whereby parentage claims can be authoritatively examined; and it seems right that the result of such an examination should be recorded in the register. .... In relation to incidental findings of paternity where there has been an order for financial relief, custody or the like we think that either parent should have the right, as the mother has now, to re-register the birth.”*

5.51 The Commission drew a further distinction between incidental findings in cases where the child was under 16 and those where he was older. In the latter cases, the consent of the child to re-registration should be required. These proposals were adopted in the Family Law Reform Act 1987. Section 25 of that Act amended the Births and Deaths Registration Act 1953 to provide that either parent could apply to have the father’s name entered on the Register of Births on production of a declaration by the applicant parent identifying the father and a statutory declaration by the other parent to the same effect. Either parent can also apply on production of “a certified copy of a relevant order” (section 10A(1)(d) of the 1953 Act, as substituted by section 25 of the 1987 Act). A “relevant order” is:

- (a) an order giving the father any parental rights under the 1987 Act;

- (b) an order giving the father any parental rights under the Guardianship of Minors Act 1971;
- (c) an order under the Guardianship of Minors Act 1971 requiring the father to make any financial provision for the child (see section 10(3) of the 1953 Act as substituted by section 24 of the 1987 Act.)

If the child is 16 or over, his written consent is required to the registration of the person's name as the child's father.

5.52 Where a declaration of parentage is made (as opposed to an incidental finding) the court will automatically notify the Registrar General and the birth will be re-registered if "it appears to [the Registrar General] that the birth of that person should be re-registered" (section 14A of the 1953 Act, as substituted by section 26 of the 1987 Act). The consent of the child is not a condition to re-registration.

5.53 There seem some grounds for questioning the English approach in relation to findings of paternity by the court and the circumstances in which they will be reflected on the Register of Births. In particular, it is difficult to understand why a finding by the court as to paternity, whether it be incidental or not, should not be capable of being automatically reflected on the register. The effect of such an entry on the register will be to raise a rebuttable presumption that the person named as father is indeed the father. It would be open to a person who felt that the issue of paternity had not been adequately canvassed before making a finding of paternity incidental to, for instance, maintenance proceedings to produce evidence later to rebut the presumption in separate proceedings for a declaration of paternity. On the face of it, there would not seem to be any particular difficulty with this. It would, in any case, be difficult to envisage a situation where, for instance, the biological fact of fatherhood is adjudged one way in custody proceedings and another way in maintenance proceedings. If a court is satisfied for the purposes of maintenance proceedings that X is the father, there is an argument for saying that that ruling should be valid for general application until evidence is produced to gainsay it.

5.54 Three other aspects of the English approach seem open to criticism. Firstly, if the English Law Commission's argument is valid that in affiliation proceedings "the child's interests are not considered in the context of the finding of paternity and subsequent birth re-registration" (para. 10.66 of their Report No. 118) and there should not therefore be automatic registration of incidental findings, then it is difficult to see how the child's interests are any better served by allowing either parents to have the birth automatically re-registered on production of a "relevant order", as is the case under section 10A(1)(d) of the Births and Deaths Registration Act 1953 (see paragraph 5.51 above).

5.55 Secondly, while consideration of "the child's interests" is clearly relevant when matters bearing directly on his welfare, such as custody or

guardianship, are in issue, it is arguable whether those interests are relevant when what is at issue is the accuracy of a register of public record. There is an argument that the integrity of the record should override other interests. Thirdly, and following from the last concern, there is a strong argument for saying that the Register of Births, like other public records, should be a full and accurate reflection of the facts as they are known. If evidence of paternity has been adduced in court sufficient to justify a finding of paternity, albeit incidental, then that fact should be reflected on the Register. There is some relevance here in Lord Denning's comment in the course of the debate on the 1987 Act (referring to the rather different fact that the husband of a woman who gives birth following "artificial insemination by donor" ("AID") is treated under the 1987 Act as the child's father) when he asked, "Is it right to tell a lie on the birth certificate? Is it fair for the child itself to be told and to be led to believe that the husband is the father when in truth some other man is the father?" (Hansard, HL Vol. 482, Col. 1282).

5.56 We have given careful consideration to these criticisms of the English approach but we think on balance that we should follow that model. There is much to be said, it seems to us, in adopting legislative provisions which have proved satisfactory elsewhere, particularly when those provisions are from the English system on which Hong Kong's own legal system is broadly based. The other recommendations in our report in general adopt the line followed in England and we think it sensible to be consistent in our approach so far as is reasonable. Much of this present study is devoted to ensuring that the interests of the child (and in particular the illegitimate child) are protected. It is consistent with that aim that the child's interests should be taken into account when considering whether a finding of paternity by the court should be reflected on the register. We take the view that the English legislation achieves a sensible balance between the interests of the child and the desirability of maintaining the integrity of the register. **We therefore recommend that provisions similar to those in sections 10, 10A and 14A of the Births and Deaths Registration Act 1953 in England (as substituted by sections 24, 25 and 26 of the Family Law Reform Act 1987) should be adopted in Hong Kong.** Sections 10, 10A and 14A are annexed to this report.

## **Artificial Insemination by Donor**

5.57 We referred briefly at paragraph 1.6 to the fact that a child born as a result of artificial insemination by a donor (or "AID") other than the mother's husband would be illegitimate at common law. This and other issues were addressed in Hong Kong in an interim report on "Surrogacy and Artificial Insemination by Donor" published in July 1989 by the Committee on Scientifically Assisted Human Reproduction (SAHR). The Committee looked at the practice and guidelines of a number of overseas institutions and health ministries such as those in Singapore, the United Kingdom, the United States and Canada. These countries all make consent one of the conditions for the couple receiving AID treatment.

5.58 The Committee made a number of recommendations on AID. As far as the legitimacy of children born by AID was concerned, the Committee recommended that this should be protected by legislation. They favoured legislative measures along the lines of the Family Law Reform Act 1987 in England. Section 27 of that Act provides that a child born as the result of the artificial insemination of a married woman by the semen of a donor is treated in law as the child of the married woman and her husband, unless it is proved that the husband did not consent to the artificial insemination. Since the Committee reported, the Human Fertilisation and Embryology Act 1990 has been enacted in England which effectively repeats the provisions of section 27 of the Family Law Reform Act 1987 (which is now repealed) but extends their operation to take account of medical and scientific developments in embryology. This does not affect the overall validity of the Committee's recommendations and we agree with their conclusion.

5.59 We are conscious in reaching that conclusion that section 27 of the Family Law Reform Act 1987 was the subject of considerable debate in Parliament. We referred at paragraph 5.55 to the views expressed in that debate by Lord Denning that it was undesirable to introduce a provision to the effect that a child born of AID to married parents would be treated as the child of those parents and that the register of births would record that fact. The justification for section 27 was argued forcefully by, inter alia, the Lord Chancellor, Lord Hailsham, who pointed out that the alternative would be to enter on the register that the child had been fathered by a person unknown. To do that would be to place the child born by AID in a disadvantaged position not shared by any other children. We are persuaded by that reasoning. **We accordingly recommend that adoption of a provision similar to section 28 of the Human Fertilization and Embryology Act 1990 which provides that a child born to a married woman as a result of one of the techniques authorised in the Act is to be treated as the child of the woman and her husband, unless it is shown that the husband did not consent. If the woman is unmarried but is treated together with a man then, by virtue of section 28(3), that man is to be treated as the father of the child.**

## **Blood test evidence**

5.60 There is one further aspect of the law relating to illegitimacy to which we should make brief reference. We have spoken of actions to establish paternity. An important consideration in such actions is of course the nature of the evidence which is used as a basis for the court's finding. In Hong Kong, we know that blood test evidence is often used in proceedings involving disputes as to paternity. Although there are no statutory provisions on the effect of a refusal to undergo blood tests, we understand that Family Court Judges always make it clear to any party refusing such a test that adverse inferences may well be drawn unless cogent reasons are given to persuade the court otherwise. We understand that the latest scientific techniques are available and used in Hong Kong and the matter of parentage can now usually be determined beyond doubt. In England, provision for the use of blood tests in determining paternity is made in Part III of the Family



Law Reform Act 1969 (sections 20 to 25). Under section 20 of that Act, the court has power to direct that blood tests be taken from the child, the mother and the alleged father. The Law Commission suggested that this should be extended to cover any other person who is a party to the proceedings (eg. the mother's husband). Section 23 of the Family Law Reform Act 1987 gives effect to this proposal by amending section 20 of the 1969 Act. The 1969 Act was also amended to enable the court to give a direction for the use of scientific tests and the use of bodily samples such as bodily fluids or bodily tissue in addition to blood tests. These changes reflect developments in scientific techniques, such as the DNA testing procedure, which is now readily available.

5.61 Where a person fails to comply with a direction of the court under section 20, section 23 allows the court to "draw such inferences, if any, from that fact as appear proper in the circumstances".

5.62 In Scotland, the position is now broadly the same as that in England, following the enactment of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990. Prior to that, an adult could not be compelled by the court to take a blood test and no contrary inference could be drawn from a refusal to do so. As in England, the Scottish courts may now direct that a party provide a sample of blood or other bodily fluid or tissue and may draw an inference from a failure to comply.

5.63 The question has been brought to our attention as to whether or not a requirement to submit to a blood test, with the consequence of an adverse inference being drawn if the test is not taken, could constitute an infringement of human rights. In X v Austria (Application No. 8278/78, 18 Decisions and Reports 154 (1979)), the European Commission of Human Rights considered the case of an individual who had been compelled by force to submit to a blood test following a court order. Clearly, the legal provision at issue was a more draconian measure than those in the United Kingdom and had been promulgated in 1943 under Nazis. Nevertheless, the Commission held that there had been no breach of the European Convention and, in particular, that the right to respect for private life under Article 8.1 had not been breached. The Commission considered that:

*"the public has an interest in that the courts have the power to make use of harmless scientifically proved methods of obtaining evidence for the purpose of determining paternity relationships and thereby determining paternity rights."*

The Commission concluded that the interference with private life complained of by the applicant was proportionate to the purpose sought and was "necessary in a democratic society for the protection of the rights of others."

5.64 The European Convention for the Protection of Human Rights and Fundamental Freedoms does not apply to Hong Kong but a right to the protection of privacy from arbitrary or unlawful interference is contained in Article 17 of the International Covenant on Civil and Political Rights and

embodied in Article 14 of the Hong Kong Bill of Rights Ordinance 1991 (59 of 1991). In the light of the decision in X v Austria we think it unlikely that provisions along the lines of those in the United Kingdom to which we have referred at paragraphs 5.60 and 5.62 would offend against the Bill of Rights. **We see considerable practical advantage in clarifying the powers of the court in its use of blood and other tests in paternity cases. We therefore recommend that provisions similar to those in sections 20 to 25 of the Family Law Reform Act 1969 (as amended) be adopted in Hong Kong to make it clear that a court may order the taking of samples from the child, any parent (or alleged parent) and any party to the proceedings. It should be open to the court to draw such inference as is reasonable in the circumstances from a refusal to comply with such an order.**

## Chapter 6

### Summary of recommendations

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#### General reform

6.1 We believe that reform of the law in relation to illegitimacy is necessary (para. 3.10). We are persuaded that the law should be changed to provide a general rule that there be legal equality for all children, regardless of the marital status of their parents. This general rule should be subject only to specific limited exceptions (para 5.7).

#### Parental rights

6.2 We have concluded that parental rights and responsibilities should be enjoyed automatically by the mother of a child, whether or not she is or has been married to the father, but that the father should only have those rights and responsibilities by virtue of marriage to the child's mother or by a court order. "Marriage" should include for this purpose a voidable marriage and a void marriage which the father believed in good faith was valid (para 5.15).

#### (a) *Succession*

6.3 We continue to subscribe to the views expressed in our earlier report on "Wills" and see no reason to change our recommendations. We accordingly reaffirm the recommendations on succession of our "Wills" report as they affect illegitimate children (para 5.23). Those recommendations were that the Intestates' Estates Ordinance (Cap 73) should be amended to provide that references (however expressed) to any relationship between two persons should be construed without regard to whether or not the father and mother of either of them, or the father and mother of any person through whom the relationship is deduced, have or had been married to each other at any time (para 5.18); that there should be a presumption that an illegitimate child was not survived by his father (para 5.19); that the legal exceptions which apply to certain New Territories land should be repealed (para 5.20); that the common law rule of construction that words denoting a family relationship are presumed to refer only to legitimate relations should be changed so that words denoting a family relationship are presumed to include illegitimate relations (para 5.21); and that the Deceased's Family Maintenance Ordinance (Cap 129) should be amended to enable illegitimate children to benefit from the estate (para 5.22).

**(b) Adoption**

6.4 We recommend that the agreement of the father to the adoption of his illegitimate child should be required where he has been awarded any parental right and the award is still operative (para 5.26).

**(c) Maintenance**

6.5 We recommend that the Guardianship of Minors Ordinance (Cap 13), the Separation and Maintenance Orders Ordinance (Cap 16), the Affiliation Proceedings Ordinance (Cap 183) and the Matrimonial Proceedings and Property Ordinance (Cap 192) should be amended to ensure that illegitimate children enjoy the same rights to financial provision as legitimate children (para 5.28).

6.6 We recommend that the restrictive requirements of the Affiliation Proceedings Ordinance (Cap 183) which require that the applicant be a single woman, that there be corroborative evidence, and that the statutory time limits be complied with, should be repealed (para 5.29).

**(d) Pension**

6.7 We believe that Civil Service and judicial pensions should be payable in respect of children born outside marriage. That being the case, we recommended that the legislation to which we referred at paragraph 2.17 should be amended to make it clear that a reference to “child” includes any child born of the officer (para 5.30).

**(e) Guardianship**

6.8 We recommend that the father and mother should each be guardians of a child but only the mother should be a guardian if she is not (and has never been) married to the father of the child, or her marriage to the father of the child was dissolved before the child was conceived and both were not living together as husband and wife at the time the child was born. However, the father should be able to apply to the court to be appointed as a guardian of the child either in addition to, or instead of, the mother or any guardian appointed by her (para 5.33).

**(f) Custody**

6.9 The general requirement in section 3(1) of the Guardianship of Minors Ordinance (Cap 13) that in custody disputes the welfare of the child is the first and paramount consideration is waived in proceedings involving an illegitimate child by virtue of section 3(2). The effect is that the mother’s claim is superior to that of the father where an illegitimate child is concerned.

We recommend that section 3 of the Guardianship of Minors Ordinance (Cap 13) should be amended by repealing subsection 3(2) to make it clear that in all cases the welfare of the child should be the first and paramount consideration (para 5.34).

6.10 Section 4(2) of the Guardianship of Minors Ordinance provides that where there is disagreement on any question affecting the welfare of a minor, either parent may apply to the court for direction and the court may make such order as it thinks proper. However, section 4(5) makes it clear that this does not apply to illegitimate children. We see no good reason why parents of an illegitimate child should be treated differently and we recommend that section 4 of the Guardianship of Minors Ordinance should be amended to give the same right to apply to the court for direction to married and unmarried parents alike (para 5.35).

### **(g) Nationality**

6.11 We have highlighted the disadvantaged position in which the law places an illegitimate child in relation to nationality. We realise that the solution lies in the hands of Her Majesty's Government. It would not be constructive for us to make recommendations to the Hong Kong Government which the latter has no power to implement. We therefore content ourselves with raising the issue of citizenship for consideration by the Hong Kong Government and, ultimately, by the Government of the United Kingdom while expressing our support for the view of the English Law Commission that the existing discrimination against the illegitimate child is unjustified. (para 5.36).

### **(h) Domicile**

6.12 We consider that changes to the law of domicile along the lines suggested by the English and Scottish Law Commissions would appear sensible but we do not think that it can properly be said to be within the scope of our present reference to make recommendations for reform which would affect not only illegitimate children but also legitimate children. We believe that this issue should be considered as part of a more general study of the law of domicile and content ourselves with remarking at this juncture that we believe that any reform should remove the current distinctions based on the marital status of a child's parents (para 5.37).

## **Registration of births**

6.13 We recommend that the father of a child should have the automatic right to have his name entered on the register of births, regardless of his marital status, but that in the case of an unmarried person registration will only follow the production of satisfactory evidence of parenthood. That evidence may take the form of a declaration by the mother acknowledging that person as father; a court order as to paternity; or such other matter as

satisfies the Registrar of Births that the applicant is the child's father. We do not think that it should be permissible to register a person's name as father without his consent, unless there is a court order as to paternity. It would, we suggest, be unsafe to allow a mother to register an individual as the father merely on her own assertion (para 5.39).

## **Proof of paternity**

### ***(i) Marriage***

6.14 We recommend that the presumption of paternity (and hence legitimacy) by marriage should be clearly stated in statutory form and that it should be rebuttable on a balance of probabilities (para 5.41).

6.15 We recommend the adoption of a presumption that at least one of the parties to the marriage reasonably believed in its validity at the time of the act of intercourse resulting in the birth (or of the marriage, if later). This will ensure the application of section 11 of the Legitimacy Ordinance (Cap 184) to protect the legitimacy of a child of a voidable marriage (para 5.42).

### ***(ii) Cohabitation***

6.16 We reject cohabitation as a basis for a presumption of paternity because of the inherent difficulties and uncertainties with such an approach (para 5.44).

### ***(iii) Registration of birth***

6.17 We recommend that there should be a statutory provision that the entry of a man's name in the Register of Births as the father of a child raises a presumption of paternity. In line with our recommendation at paragraph 5.41 in relation to rebuttal of the presumption of paternity through marriage, we recommend that the presumption of paternity arising from entry of an individual's name on the register as father should be rebuttable on a balance of probabilities (para 5.46).

### ***(iv) Finding by the court***

6.18 We think it desirable that a person should be able to seek a declaration of paternity from the court without limiting this right to situations where the finding of paternity is incidental to custody or other proceedings and we recommend that the law should be amended to provide this right. We further recommend that any such finding of paternity should not only bind the parties to the proceedings but should have general effect (para 5.48).

6.19 We believe that the Attorney General should be given the right to intervene in declaration proceedings. This would enable the Attorney General to assist the court and to provide innocent parties with some protection in a false claim of parentage. We therefore propose the enactment of a provision similar to section 59 of the Family Law Act 1986 which sets out the powers of the court to refer papers to the Attorney General and the powers of the Attorney General to intervene (para 5.49).

6.20 We recommend that provisions similar to those in sections 10, 10A and 14A of the Births and Deaths Registration Act 1953 in England (as substituted by sections 24, 25 and 26 of the Family Law Reform Act 1987) should be adopted in Hong Kong. This would have the effect that, while declarations of paternity would automatically be reflected on the register, incidental findings would only be entered on the register when certain conditions were satisfied (para 5.56).

### **Artificial insemination by donor**

6.21 We recommend the adoption of a provision similar to section 28 of the Human Fertilisation and Embryology Act 1990 in the United Kingdom which provides that a child born to a married woman as a result of one of the techniques authorised in the Act is to be treated as the child of the woman and her husband, unless it is shown that the husband did not consent. If the woman is unmarried but is treated together with a man then, by virtue of section 28(3), that man is to be treated as the father of the child (para 5.59).

### **Blood test evidence**

6.22 We recommend that provisions similar to those in sections 20 to 25 of the Family Law Reform Act 1969 (as amended) be adopted in Hong Kong to make it clear that a court may order the taking of samples from the child, any parent (or alleged parent) and any party to the proceedings. It should be open to the court to draw such inference as is reasonable in the circumstances from a refusal to comply with such an order (para 5.64).

**Sections 10, 10A and 14A of the  
Births and Deaths Registration Act 1953**

**Registration of father where parents not married**

10 (1) Notwithstanding anything in the foregoing provisions of this Act, in the case of a child whose father and mother were not married to each other at the time of his birth, no person shall as father of the child be required to give information concerning the birth of the child, and the registrar shall not enter in the register the name of any person as father of the child except -

- (a) at the joint request of the mother and the person stating himself to be the father of the child (in which case that person shall sign the register together with the mother); or
- (b) at the request of the mother on production of -
  - (i) a declaration in the prescribed form made by the mother stating that that person is the father of the child; and
  - (ii) a statutory declaration made by that person stating himself to be the father of the child; or
- (c) at the request of that person on production of -
  - (i) a declaration in the prescribed form by that person stating himself to be the father of the child; and
  - (ii) a statutory declaration made by the mother stating that that person is the father of the child; or
- (d) at the request of the mother or that person (which shall in either case be made in writing) on production of -
  - (i) a certified copy of a relevant order; and
  - (ii) if the child has attained the age of sixteen, the written consent of the child to the registration of that person as his father.

(2) Where, in the case of a child whose father and mother were not married to each other at the time of his birth, a person stating himself to be the father of the child makes a request to the registrar in accordance with paragraph (c) or (d) of subsection (1) of this section -

- (a) he shall be treated as a qualified informant concerning the birth of the child for the purposes of this Act; and



- (b) the giving of information concerning the birth of the child by that person and the signing of the register by him in the presence of the registrar shall act as a discharge of any duty of any other qualified informant under section 2 of this Act.

(3) In this section and section 10A of this Act references to a child whose father and mother were not married to each other at the time of his birth shall be construed in accordance with section 1 of the Family Law Reform Act 1987 and 'relevant order', in relation to a request under subsection (1)(d) that the name of any person be entered in the register as father of a child, means any of the following orders, namely -

- (a) an order under section 4 of the said Act of 1987 which gives that person all the parental rights and duties with respect to the child;
- (b) an order under section 9 of the Guardianship of Minors Act 1971 which gives that person any parental right with respect to the child; and
- (c) an order under section 11B of that Act which requires that person to make any financial provision for the child.

### **Re-registration where parents not married**

10A (1) Where there has been registered under this Act the birth of a child whose father and mother were not married to each other at the time of the birth, but no person has been registered as the father of the child, the registrar shall re-register the birth so as to show a person as the father -

- (a) at the joint request of the mother and that person; or
- (b) at the request of the mother on production of -
  - (i) a declaration in the prescribed form made by the mother stating that that person is the father of the child; and
  - (ii) a statutory declaration made by that person stating himself to be the father of the child; or
- (c) at the request of that person on production of -
  - (i) a declaration in the prescribed form by that person stating himself to be the father of the child; and
  - (ii) a statutory declaration made by the mother stating that that person is the father of the child; or

- (d) at the request of the mother or that person (which shall in either case be made in writing) on production of -
  - (i) a certified copy of a relevant order; and
  - (ii) if the child has attained the age of sixteen, the written consent of the child to the registration of that person as his father;

but no birth shall be re-registered under this section except in the prescribed manner and with the authority of the Registrar General.

- (2) On the re-registration of a birth under this section -
  - (a) the registrar shall sign the register;
  - (b) in the case of a request under paragraph (a) or (b) of subsection (1) of this section, or a request under paragraph (d) of that subsection made by the mother of the child, the mother shall also sign the register;
  - (c) in the case of a request under paragraph (a) or (c) of that subsection, or a request made under paragraph (d) of that subsection by the person requesting to be registered as the father of the child, that person shall also sign the register; and
  - (d) if the re-registration takes place more than three months after the birth, the superintendent registrar shall sign the register.

### **Re-registration after declaration of parentage**

14A (1) Where, in the case of a person whose birth has been registered in England and Wales -

- (a) the Registrar General receives, by virtue of section 56(4) of the Family Law Act 1986, a notification of the making of a declaration of parentage in respect of that person; and
- (b) it appears to him that the birth of that person should be re-registered,

he shall authorise the re-registration of that person's birth, and the re-registration shall be effected in such manner and at such place as may be prescribed.

(2) This section shall apply with the prescribed modifications in relation to births at sea of which a return is sent to the Registrar General.