

## REPORTS OF COMMITTEES

### LAW COMMISSION WORKING PAPER NO. 74: ILLEGITIMACY

It is morally wrong for the law to discriminate against a child because of the nature of his parentage. Furthermore the label "illegitimate child" is offensive and unkind so that, *prima facie*, it appears desirable to abolish that status altogether. The Law Commission presents two models for reform: the first is to abolish the adverse legal consequences of illegitimacy, the second is to abolish the status of illegitimacy entirely. In accordance with their usual practice the Law Commission invite comment and criticism on the questions raised and the provisional conclusions drawn in their working paper. However, to limit comment and criticism to those questions summarised at the end of the paper would be to accept that the correct questions have been asked, and to accept that to work out the consequences of the abolition of illegitimacy in an impeccable legal way is what abolition of the status is all about.

The greater part of the paper deals in detail with the legal consequences flowing from the abolition of illegitimacy at a high level of abstraction, paying particular attention to the elimination of anomalies and the amendment of legislation. The scheme of the paper may be described as a linear progression: first, by outlining the present law, to demonstrate the legal discrimination which is still extant against illegitimate children; secondly, by reliance *inter alia* on the welfare principle, to argue against retention of the present law where it discriminates against illegitimate children; thirdly, to present two models for reform and provisionally to favour the second model, abolition of the status of illegitimacy; fourthly, to examine in various contexts the legal consequences which would flow from abolition of the status; fifthly, to examine issues of evidence and procedure relating to establishment of paternity; and finally, to examine the legal difficulties relating to the status of the child where a child is born as a result of artificial insemination of the mother with sperm provided by a third party donor (A.I.D.).

Abolition of illegitimacy means that all fathers will enjoy full parental rights equally with the mother. The Law Commission analyse the new duties the law will impose on the father of an illegitimate child, and to a lesser extent they analyse his new rights. One weakness of their paper is that only superficial attention is given to the practical implications of giving rights to fathers, while the emotional dimensions of implementing such a change are virtually ignored. Furthermore the effect of giving rights to fathers is not tested against the welfare principle; this means that the Law Commission fail to ask themselves some fundamental questions before they conclude, at an early stage, that abolishing illegitimacy promotes the welfare of the child. It is suggested that the views of

the public should be sought on the following questions, as well as those asked in the working paper.

### *Custody*

Will giving all fathers parental rights increase the number of conflicts over custody and access? Where the father has a right rather than only a claim to be recognised, is he likely to be more assertive? The welfare of the child is the motivating factor behind this area of law reform, but if the answer to the above questions appears to be yes then the effect on the child of increasing the number of custody disputes requires careful study and consideration. It could be argued that to give fathers rights makes little difference because, under the present law, a father can apply for custody or access under the Guardianship of Minors Act 1971, so that whether or not he has rights the issue will be decided, as now, on the basis of the welfare principle.<sup>1</sup> But reference here to the welfare principle conceals the reality that courts draw a distinction in practice between giving rights and taking rights away. Courts almost always grant access to the non-custodial parent where the child is legitimate. Furthermore it is fashionable at present to link the right of access to the welfare of the child.<sup>2</sup> If no discrimination is permissible against natural fathers it seems that an increasing number of access orders are likely to be made where there is nothing in the father's behaviour which debars him, although access is strongly resisted by the mother. Indeed the Law Commission acknowledges this may be the case in paragraph 3.16.

But will this be beneficial or harmful to most children? Goldstein, Freud and Solnit<sup>3</sup> advance the view that the parent with custody, and not the court, should have the right to decide whether it is desirable for the other parent to have access, not as a matter of parental rights but because such an approach best serves the welfare of the child. The view of the Law Commission "that the decision to exclude a father from all parental rights and duties is so important that it should not be the mother's alone; the final decision should lie with the courts"<sup>4</sup> may be entirely misconceived. Do we know enough about the impact of access orders on children to risk a further proliferation of such orders?<sup>5</sup> The response of the working paper is, if there is a dispute over custody and access, the courts will decide and they "are bound to regard the welfare of the child as paramount."<sup>6</sup> But this approach is too simplistic and places far too heavy a burden on the welfare principle which is not large enough to embrace all the issues involved. First of all the matter

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<sup>1</sup> *S. v. O.* (1978) 8 Fam. Law 11; *M. v. J.* (1978) 8 Fam. Law 12.

<sup>2</sup> *M. v. M.* [1973] 2 All E.R. 81.

<sup>3</sup> *Beyond the Best Interests of the Child* (1973).

<sup>4</sup> Para. 3.16.

<sup>5</sup> For a general review of research material see S. Maidment, "Access Conditions in Custody Orders," in *The Child and the Law* (1976), p. 124, edited by Frank Bates.

<sup>6</sup> Para. 3.16.

may never come before a court. Where a mother objects to the child's father exercising parental rights she may not litigate the issue because she is frightened of courts as a forum. Secondly all family lawyers are familiar with the myths and "folk lore" which the layman believes to apply to domestic relationships, and it is quite likely that a woman will take the view that it is no good applying to the court because the father now has rights. In such a case the welfare principle will have nothing to do with the assertion of parental rights by the father.

Furthermore the rights of the mother should not be placed under the umbrella of the child's welfare, they merit independent examination. This is because giving rights to fathers automatically encroaches upon and diminishes the existing rights of mothers and this is a political issue. At present a distinction is drawn between married and unmarried parents. Married couples implicitly agree to share parental rights and duties and this is recognised by law.<sup>7</sup> It is arguable that cohabiting unmarried couples also agree to share parental rights and duties and that this too ought to be recognised by law. Indeed to some extent it is, under the Guardianship of Minors Act 1971, but the father does not have rights and perhaps he should. However, is a single mother in an analogous position to a married mother with regard to her child? Does a woman who has sexual intercourse with a man implicitly agree to share parental rights over any child who is the product of such intercourse? If not, should she be forced to do so by law? Has Parliament the right to legislate that the unmarried mother and father should be treated by law as if they had been living in a nuclear family which has broken down, when the reality may be quite different, as when the child is the product of a casual affair or a broken love affair, or where the mother is a married woman or the father a married man?

One cannot generalise about the reactions of single mothers to these questions, but they are bound to generate strong emotions. How too will the parents of a young pregnant daughter respond to the knowledge that the father has rights? In an extreme case is it too far-fetched to suggest that a pregnant woman will choose, or be persuaded, to have an abortion rather than risk the natural father asserting his rights of custody and access? One cannot know the answer to this question, but it is real and disturbing and it ought to be asked.

### *Adoption*

When a baby is placed for adoption his mother is nearly always unmarried, so abolition of illegitimacy has particular significance for the mother, the father and the baby. The Law Commission devote only three pages of their paper to adoption, but it is here that giving rights to the natural father may prove directly pre-

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<sup>7</sup> Guardianship Act 1973.

judicial to the welfare of the child. Adoption is about the relinquishment of parental rights. At present, where the child is illegitimate, only the mother has these rights, and she must agree to her child's adoption, or her agreement must be dispensed with by a court. The father of an illegitimate child enjoys no such right of veto unless he is the child's legal guardian. Arguably this is unjust to the father where he has been living with the mother in what has been a stable union. The Law Commission describe the natural father's position before the court as usually a weak one "primarily because in the past it has been felt that the advantage to an illegitimate child of losing the status and stigma of bastardy outweighs any disadvantage of losing all legal links with his natural father."<sup>8</sup> But is his position so weak, and will the child benefit if his position is strengthened?

At present the father's interests are to some extent safeguarded by rules of court. Where he is liable to maintain the child he must be made a respondent to the application and receive notice of the hearing. In other cases the *guardian ad litem* has a duty to inform the court if he learns of any person claiming to be the father who wishes to be heard by the court on the question whether an adoption order should be made. It is true that in the past a natural father has stood little chance of preventing an adoption order being made, though there have been exceptions,<sup>9</sup> and at least two persistent fathers have had rights of access grafted onto adoption orders.<sup>10</sup> However these cases occurred before the concept of custodianship was introduced by the Children Act 1975 as an alternative to adoption. It is submitted that where the parents have been living in a stable union this new concept will give adequate protection to the natural father's interests, but at the same time, and this to my mind is crucial, the welfare of the child will be decisive.

In practice the interest of the natural father requires legal recognition in two situations. The first is where the mother has married and she and her husband apply to adopt her child. Here the court can only make an adoption order where it is satisfied that adoption would better promote and safeguard the welfare of the child than would an order making the child's stepfather his custodian.<sup>11</sup> A custodianship order means that a child retains his links with his natural father, and where appropriate the father's interest in the future of his child can be recognised in the form of an access order. The custodianship provisions of the 1975 Act have not yet been implemented, but when they are it seems more than likely that courts will prefer custodianship to adoption in these circumstances, because they are analogous to the situation where the parents have been divorced and the mother and her new husband apply to adopt. Here courts have almost always refused

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<sup>8</sup> Para. 6.4.

<sup>9</sup> *Re C. (M.A.)* [1966] 1 All E.R. 838.

<sup>10</sup> *Re J.* [1973] Fam. 106; *Re S.* [1976] Fam. 1.

<sup>11</sup> Children Act 1975, s. 37.

to make an adoption order, because the issue is better dealt with as a matter of custody and access under the divorce court's matrimonial jurisdiction.<sup>12</sup>

The second situation is where the child has been placed for adoption with third parties. At present the natural father can protect his interest in the child in two ways: he can apply for legal custody under the Guardianship of Minors Act 1971, and he can ask to be heard in the adoption application. (He may have the right to be made a respondent under the rules, *supra*.) The two applications should be brought together and no decision made until both have been heard. If, in the light of the father's evidence, the court decides that it is for the welfare of the child to maintain the link with his father, it can give legal custody to the father or it can make a custodianship order in favour of the applicants to adopt rather than an adoption order. Many would agree that the present law thereby gives adequate recognition to the natural father without prejudicing the welfare of his child.

If the natural father is given full parental rights then, before his child can be adopted, he must either yield these rights voluntarily or his agreement must be dispensed with. But this can cause delay and delay is a crucial factor which has direct bearing on the welfare of the child. A baby should be placed with his adoptive parents as soon as possible so that the process of bonding, which is vital to the baby's physical, mental and emotional development, can start to take place. Delaying the process of bonding between baby and adoptive parents can never be beneficial to the child and it may damage his development and his capacity to form loving relationships.

Why should giving parental rights to fathers give rise to delay? There could be many reasons. The Law Commission hint at them in paragraph 6.6, but they need to be spelt out and their implications for the child, the mother and the potential adopters (who also have an interest which merits attention) need to be explored. For example an adoption agency may decide that a child ought not to be placed with adopters until the father's agreement has been obtained. He may prove obdurate, or it may not be possible to trace him, meanwhile his child will linger in an institution or with foster parents. The working paper implies that the new freeing procedure will resolve this type of problem, but it will not resolve the problem of delay. The father's agreement must still be obtained or be dispensed with and this takes time, meanwhile all planning for the child's future may be brought to a standstill and sometimes this will happen before the child has been placed in the adopters' home.

Furthermore the father has rights, and legal procedures are designed to safeguard legal rights. Courts will feel bound to adjourn

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<sup>12</sup> *Ibid.* s. 10 (3); *Re S.* [1977] 3 All E.R. 671.

the application while attempts are made to trace and serve the father. A suggested solution is that an application to dispense with the father's agreement could be made *ex parte* without any attempt to serve him. The Law Commission make this proposal, but then state

“ This procedure would only be appropriate in extreme cases where the natural father has clearly no claim to be considered (for example where he has been convicted of raping the mother). Such a procedure would obviously be a considerable departure from the principle that a man should not be deprived of his rights without being given the chance to be heard. We do not therefore at present favour such a proposal.”<sup>13</sup>

One has some sympathy with that approach to *ex parte* applications, but it illustrates precisely how the welfare of the child is prejudiced by increasing the rights of the natural father. Indeed the Law Commission state that “ it is sometimes suggested . . . that the necessity to involve the child's father in the proceedings may deter some mothers from ever placing a child for adoption,”<sup>14</sup> and that is a sentence which gives pause for thought. How does that promote the welfare of the child?

The Law Commission might be well advised to consider the following questions before it prepares its final report. Illegitimate children who are placed for adoption are born as a result of promiscuous and adulterous sexual intercourse as well as broken love affairs or stable cohabiting unions. If an unmarried mother cannot or will not identify the father can her child be freed for adoption? In the former case the father's agreement could probably be dispensed with on the ground that he cannot be found,<sup>15</sup> but this is an uneasy solution because the court must rely on the mother's word in order to extinguish the father's rights, and she may not be telling the truth. If the mother refuses to identify the father, should or can she be compelled to do so? The answer to this question can only be no, but will this mean that her child cannot be adopted because his father has rights which are protected by law? Furthermore the mother's motives may be entirely honourable, for example the father of her child could be a married man and if the fact that he had fathered an illegitimate child became known to his wife it could lead to the breakdown of that marriage. Perhaps the Law Commission should consider what social policy is served by requiring the agreement of a married man to his illegitimate child's adoption.

### *Children in care*

Rather surprisingly the effect of abolishing the status of illegitimacy on children in local authority care is not explored in the working paper. If the father becomes a “ parent ” for the purposes of the Children Act 1948 then, if the child is in care under section

<sup>13</sup> Para. 6.6.

<sup>14</sup> *Ibid.*

<sup>15</sup> Children Act 1975, ss. 12 (2) (a) and 14 (1) (b).

1 of that Act, the local authority will not be authorised to keep the child in care if the father expresses the desire to take over the care of the child.<sup>16</sup> This creates various practical difficulties and it has a potential for harming the child. Children are received into care under the Children Act 1948 because their parents are dead, or they have been abandoned, or, and this is more commonplace, because their parents are prevented by circumstances from being able to care for them.<sup>17</sup> There is a very wide range of possible relationships between the father, the mother and the child, but if the child has been received into care it is reasonable to make two assumptions: first that the mother is, by definition, prevented for the time being from caring for her child and secondly that, again by definition, local authority intervention is necessary in the interests of the child. If the mother had wanted the father to care for the child she could have made the appropriate arrangements.

Unless the mother has a court order giving her legal custody of the child, when she then has exclusive parental rights for the purposes of the 1948 Act,<sup>18</sup> the father has the right to take the child out of care. The local authority has no right to keep the child unless there are grounds for assuming the father's parental rights under section 2, grounds which generally depend on his inability or unfitness to care; or unless it makes the child a ward of court. One can anticipate numerous circumstances in which this right vested in the father will clash with the best interests of the child. It will also be gravely prejudicial to the mother in a case where she does not want the father to be involved with their child. It raises practical difficulties too. What will social workers do when faced with a request from the father to take over the care of the child, when they know the mother strongly opposes him doing so? The long-term answer, that a court can resolve the issue between the parents, does not answer their immediate problem.

Many children languish in long-term care because their parents will not relinquish their parental rights.<sup>19</sup> The Children Act 1975 partially mitigates some of the worst effects for the child by enabling applications to be made to remove those rights after the lapse of time. But time limits are of necessity crude and may bear no relationship to the welfare of an individual child. The Law Commission should consider whether giving natural fathers rights will increase the number of children who live in this twilight existence.

### *Policy*

Paragraph 3.1 poses three reactions to illegitimacy:

- (a) that continued discrimination against the illegitimate child is justified and should be preserved;

<sup>16</sup> Children Act 1948, s. 1 (3), subject to s. 1 (3A) (parent must give 28 days notice when child has been in care for six months). *London Borough of Lewisham v. Lewisham JJ.* [1979] 2 All E.R. 297.

<sup>17</sup> Children Act 1948, s. 1.

<sup>18</sup> *Ibid.* s. 6 (2). <sup>19</sup> Jane Rowe and Lydia Lambert *Children who Wait*, (1973).

- (b) that such discrimination is not justified and that the existing legal disadvantages so far as the child is concerned should be removed;
- (c) that reform should not merely remove the legal disadvantages attaching to illegitimacy, but should abolish that status altogether.

Any reasonable and moral person will answer "no" to (a) and "yes" to (b). However if reactions (a) and (b) are applied to the child's father, that is

- (a) that continued discrimination against the father of an illegitimate child is justified and should be preserved;
- (b) that such discrimination is not justified and that the existing legal disadvantages so far as the father is concerned should be removed,

it is not at all clear how a reasonable and moral person would or should respond. The question whether a class of fathers should automatically be debarred from the exercise of parental rights is tentatively discussed and tentatively rejected in paragraph 3.12 because "whatever the definition of the class of excluded fathers, the rule would be arbitrary and likely to produce unsatisfactory results in particular cases."

The Law Commission focuses attention on the rights and the status of children and suggests that all children should enjoy the same rights and the same status. It appears to accept as inevitable that all fathers must consequently enjoy the same rights. But why should justice to children confer rights on adults? The Law Commission suggests that the welfare of the child requires a "yes" response to reaction (c), but if this leads to the second model of reform as outlined in the working paper, such a model does nothing to convince this reader that the child will gain more than he will lose.

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## REPORTS OF THE COMMITTEE ON OBSCENITY AND FILM CENSORSHIP <sup>1</sup>

### *Introduction*

OBSCENITY and Film Censorship are controversial subjects on which most people have views and many people strong feelings. Obviously, the effective operation of the law in this field is severely constrained by the marked absence of consensus as to what role it ought to perform.<sup>2</sup> However, while opinion is sharply divided on

<sup>1</sup> Cmnd. 7772.

<sup>2</sup> Cf. *Pornography, the Longford Report* (1972) and National Council for Civil Liberties, *Against Censorship* (1972).